# 律師法學期刊

## THE LAWYERS

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E-mail：law@sharing.com.tw

# 主 編 序

## 律師法學雜誌創刊一周年

本期為律師法學雜誌創刊一周年，感謝各界的提攜與灌溉，讓本刊得以繼續成長茁壯。而最近投稿者也從律師擴大至大專院校任職的學者，豐富了本刊的內容與法學議題論述的深度，對此深表感謝。也希望未來能有更多的法律工作者在本刊聚集，一同努力讓我國的律師制度、法制建設與司法實踐能持續進步。

本期內容與先前有顯著不同，在收錄的四篇文章中，兩篇以英文撰寫的文章主要介紹泰國的法學教育與其律師制度，在我國可謂相當新鮮。在我國，比較法或是相關法律制度的探究，往往侷限在美國、德國或是日本，東南亞國家受限於許多因素，幾乎無法在相關議題中佔有空間。希望本期的嘗試能夠被讀者接受，進而繼續支持本刊往後在律師制度等議題方面，以其他國家做為介紹的對象。

另外兩篇由我國律師撰寫，探討「有限公司監察權行使之權利義務主體」與「刑事補償後國家之賠償責任」，也具相當價值。雖然近期時節越趨燥熱，國際情勢亦有中美貿易戰的紛擾，但還是衷心期盼，閱讀本刊的讀者是處於較本刊出版時更重視法治與人權的時空中。

**陳宗奇**

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# An Overview of the Legal Profession in Thailand

*Nandana Indananda & Manaswee Wongsuryrat*[*]

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* Nandana Indananda is a partner of Tilleke & Gibbins and Manaswee Wongsuryrat is an Associate of Tilleke & Gibbins. Tilleke & Gibbins is a leading Southeast Asian regional law firm, which has offices in six Southeast Asian countries, including Thailand (Bangkok), Vietnam (Hanoi and Ho Chi Minh City), Jakarta (Indonesia), Cambodia (Phnom Penh), Laos (Vientiane), and Myanmar (Yangon).

# Abstract

This paper aims to provide general information regarding the legal profession in Thailand, particularly with regard to the profession of a “Lawyer”, as well as offer a brief overview of how the organization of lawyers is organized in Thailand. Although many articles and public information about the procedural steps to practice as a Thai Lawyer can be easily found in Thai-language materials, English-language materials are quite lacking. Therefore, when looking through the lens of a non-Thai speaking person, it is actually quite difficult to obtain the necessary information to understand a Lawyer’s role within the Thai legal system.

In order to provide general information regarding the systems and procedures in place for Thai Lawyers, this paper will cover all the relevant information — from definitions and types of Lawyers in Thailand to the established route to become a practicing Lawyer. We will also discuss the regulatory organization and controls governing admitted Lawyers. This paper will also explore the different levels of Lawyers, areas of practice, Notarial Services Attorneys, foreign Lawyers practicing in Thailand, and implications of legal malpractice and its accompanying regulations.

The main research resources used for writing this article are related to domestic laws and regulations, combined with statistical data received from the Lawyers Council of Thailand under Royal Patronage, and includes other Thai legal journals and articles.

The authors hope that this paper will help readers have a better understanding of the Legal Profession in Thailand, and in addition, will be helpful in setting out solid guidelines for any future research relating to this matter.

**Keywords:** lawyer, Thailand, Thai, lawyer license, bar examination, the Lawyer Council of Thailand, notarial service attorney

The role of lawyers in Thai society has been long recognized as an integral part of the judicial system in Thailand. However, the earliest extant written evidence can be traced to the era of King Rama I of Siam (Siam being the former name of Thailand). Specifically, the term "lawyer" was mentioned in the Law on Acceptance of Cases B.E. 1899[1] (A.D. 1356), which was later included as part of the Three Seals Law, as the first codified law in Thailand enacted in 1805. Since then, the role of the lawyer as a professional advocate has developed over time, first being systematized by the rules and requirements set out in the first Lawyers Act B.E. 2457 (A.D. 1914) and supported by subsequent laws and regulations.

Lawyers in Thailand had been supervised and controlled by the Thai Bar Association with the promulgation of the Lawyers Act B.E. 2508 (1965), which conferred sole authority to the Thai Bar Association to issue lawyers' licenses, register lawyers in the official list, and control the legal etiquette of lawyers. However, there were several disagreements and conflicts between practicing lawyers and the Thai Bar Association, including how to separate the seniority levels of lawyers and disputes involving the supervisory power and control exerted by the Committee of Legal Etiquette of Lawyers of the Thai Bar Association. Therefore, there were frank discussions regarding whether the power centralized within the Committee of the Thai Bar Association, comprised of judges, public prosecutors, lawyers, and others, should be transferred to a newly established organization administered by lawyers. It was emphasized that lawyers should be governed by lawyers, just as the medical profession in Thailand is governed by the Medical Council of Thailand. For this reason and after many discussions with respected lawyers, the House of Representatives and the Senate promulgated the Lawyers Act B.E. 2528 (A.D. 1985) ("Lawyers Act"), which is the first Act to endorse the establishment of the Lawyers Council of Thailand as the country's professional regulatory body of the legal profession.[2] Since then, the Thai Bar Association has lost its supervisory and governing power over the lawyers in Thailand. The only historic evidence that shows the relationship between the Thai Bar Association and legal practitioners in Thailand is that lawyers still need be members of the Thai Bar Association in order to be allowed to wear the Advocate's gown in Court.

At the present time, lawyers in Thailand are regulated by the current Lawyers Act and are regulated by the official lawyers' organization, which is the Lawyers Council of Thailand under Royal Patronage ("Lawyers Council of Thailand"), which was established the same year as the Act's promulgation.

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1 The name of this law in the Thai language is "*Phra aiyakan laksana rap fong por.sor. 1899"*. B.E. are the initials representing "Buddhist Era", which is the official calendar in Thailand.

2 Surachai Suwanpreecha, *The Lawyers Act and the Rules Related to Lawyers*, *in* LAWYER PRACTICE FOR LA313, at 13, 22-34 (Surachai Suwanpreecha ed., 1990).

# I Definition of Lawyer and Types of Lawyers in Thailand

In Thailand, the term "lawyer" is defined by Section 4 of the Lawyers Act as a person who has registered with the Lawyers Council of Thailand, who has received a legal practitioner's license. Therefore, the term "lawyer" signifies that the license holder is a licensed and registered lawyer. Unlike common law jurisdictions and some civil law countries, Thailand does not divide legal practitioners into barristers or solicitors. Therefore, lawyers in Thailand practice law as a fused profession, which means that any lawyer who acquires a license to practice law in Thailand can act as both a legal advisor or as an advocate without any legal restrictions. It is interesting to note that while an advocate's tasks (such as acting as a trial litigator in Court, preparing Complaints, Answers, Appeals, Answers to Appeals, Appeals to the Supreme Court, Answers to Appeals to the Supreme Court, and preparing any Court Motions or Statements relating to a Court case for others) are entirely restricted to a licensed and registered lawyer only, there are no legal restrictions for any lay person to give legal advice or represent a client outside of the court system in Thailand.[3] Thus, while a license to practice law might not be a necessary requirement for a position as legal consultant or in-house counsel, it is a mandatory requirement for trial litigators in Thailand. In this article, the term "lawyer" means a person who has officially registered and received a license to practice law from the Lawyers Council of Thailand.

# II Level System and Range of Practice for Lawyers in Thailand

When the system for admitting lawyers was initiated in 1914, practicing lawyers in Thailand were divided into two levels — first-class lawyers and second-class lawyers.[4] The differences between the two classes were the qualification requirements and the range of practice. Particularly, the first-class lawyers could practice law in every province of Thailand, but the second-class lawyers could only practice in the provinces specified in their lawyer's license. However, this two-tier system was abolished with the promulgation of the currently enforced Lawyers Act and the establishment of the Lawyers Council of Thailand the same year.[5] Since then, there has been only one class/level of lawyer in Thailand. The qualification requirements for a lawyer's license and the range of practice

3 Lawyers Act B.E. 2528 (1985), s.33.

4 Lawyers Act B.E. 2457 (1914).

5 Viraphong Boonyobhas, *Private Lawyers in Contemporary Society: Thailand*, 25(2) CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 169, 172-73 (1993), *available at* https://scholarlycommons.law.case.edu/jil/vol25/iss2/7 (last visited May 15, 2019).

have been consolidated into one unified standard under the Lawyers Act and related organizations.

In light of the above, there is now only one range of practice for lawyers in Thailand, which covers all provinces in Thailand. In other words, every lawyer, who is registered and has received a license to practice law from the Lawyers Council of Thailand, is able to practice law and represent clients in every judicial Court in Thailand without any regional restrictions. Depending on personal choice, lawyers can freely choose the region or province where they would like to practice or set up their offices. Despite that flexibility, in practice, the numbers of lawyers in each province are vastly different.[6] From the statistics collated by the Lawyers Council of Thailand, as of today, the three provinces that have the highest number of Lawyers are Bangkok (Capital), Nonthaburi Province and Pathum Thani Province. All of these three provinces are located within the Bangkok Metropolitan Region (Bangkok and surrounding provinces). On the other hand, the three provinces that have the lowest number of lawyers are Bueng Kan Province, Mae Hong Son Province and Amnat Charoen Province, which are all border provinces of Thailand. This information shows that the desired practice locations for lawyers in Thailand are actually clustered around Bangkok, the capital of the country.

## III Areas of Practice

There is no limitation over the type of legal practice open to lawyers, in general, which means that the licensed lawyers can practice law in almost any area of their choice in Thailand. The only restricted area is Juvenile and Family law. To practice in the Juvenile and Family Court, lawyers are required to attend a mandatory legal consultant training course and to pass the related examinations as a compulsory condition of practicing Juvenile and Family law. The aforesaid courses and examinations are organized by the Central Juvenile and Family Court, and the subjects for the exam are including Juvenile rights, Court procedure for Juvenile and Family cases, psychology, social work and other related matters. Once a lawyer has passed the exams, the Central Juvenile and Family Court will register that lawyer's name in the list of legal consultants approved for Juvenile and Family cases. After that, the list will be disseminated to the Juvenile and Family Courts around the country.[7]

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6 The capital city, Bangkok, always has a large numbers of lawyers compare to other provinces in Thailand. *See* Ngamnet Triamanuruck, Sansanee Phongpala & Sirikanang Chaiyasuta, *Overview of Legal Systems in Asia-Pacific Region: Thailand, in* OVERVIEW OF LEGAL SYSTEMS IN ASIA-PACIFIC REGION 1, 6 (the Conferences, Lecturers, and Workshops at Scholarship@Cornell Law: Digital Reciprository ed. 2004).

7 The Rules of the Supreme Court President regarding Training and Practice Regulations of Legal Consultants, Registration and Deletion of Name to/from the List B.E. 2556 (2013), ss.15, 17.

For other areas, such as administrative law, company law, labor law, real estate law, intellectual property laws, tax law or energy law, lawyers are able to proceed with contentious matters without any limitations. However, there are some limitations for non-contentious matters, which are similar to restraints imposed by other countries, regarding patent agents or tax agents. If a lawyer would like to represent a client in filing an application, opposition, counterstatement, or appealing for or against a patent registration with the Department of Intellectual Property (DIP), they have to pass certain requirements set out by the DIP and must obtain a Patent Agent License before being able to represent their client in those actions.[8] Similarly, to be permitted to handle online tax payments for taxpayers, a person or an accounting office has to qualify for and attain a Tax Agent Certificate from the Revenue Department (RD).[9] However, the status of Patent Agent or Tax Agent is not exclusive to lawyers, and a person without a legal background can also apply to be registered as either. The relationships among lawyers, accountants and patent attorneys are not considered as overly competitive, as there are practice areas are quite distinct. While there are firms that offer both legal services and accounting, there are very few large ones. Regarding patent attorneys/agents, their practices are generally focused on patent drafting and patent registration. Therefore, in a patent litigation case or when giving legal advice regarding patent issues, any lawyer can provide such services without possessing a Patent Agent License.

## IV Mandatory Representation by a Lawyer

The current law requires mandatory representation by a lawyer only in those criminal cases where the sentencing penalty involves the possibility of capital punishment or in criminal cases where the accused is under the age of 18.[10] For other cases, if a plaintiff or defendant is not represented by a lawyer, then the unrepresented party will have to attend and comply with all the Court proceedings by themselves. No other person except the plaintiff or defendant, or their lawyer, can represent a party in a lawsuit.[11] Generally, it is quite rare that a party will choose to represent themselves in Court. The Court can assist an unrepresented party by assigning a public defender for them upon their request. Similarly, although there is no requirement for mandatory representation by a lawyer in the second instance (in the Appellate Court) or the third instance (in the Supreme Court), it is highly

8 Notification of the DIP regarding Registration for Patent Agent B.E. 2552 (2009).

9 Notification of RD regarding Qualification, Application, Issuance, Renewal and Apply for Replacement of the Tax Agent Certificate for Filing a Tax Form and Handling Tax Payments or Other Regulated Actions for Taxpayers through RD's website B.E. 2547 (2004) and the updated Notification B.E. 2552 (2009).

10 Civil Procedure Code, s. 60; Criminal Procedure Code, ss. 134/1, 171, 173.

11 Lawyers Act B.E. 2528 (1985), s. 33.

recommended that a party be represented by a lawyer in these circumstances, as it requires a good grasp of legal knowledge to prepare a proper appeal petition. There are no qualification restrictions for attorneys in the second instance (Appellate Court) or the third instance (Supreme Court). Therefore, if a lawyer is qualified to practice law in Thailand, the lawyer is able to practice and represent their client at any level of Court proceedings.

## V Statistical Information for Lawyers in Thailand

According to the statistical information compiled by the Lawyers Council of Thailand (as of December 7, 2018), the number of lawyers in Thailand countrywide, from January 1, 1986 through December 20, 2018, was 89,503. From that total number, the gender breakdown consists of 60,837 male lawyers and 28,666 female lawyers. The number of lawyers registered with the Lawyers Council of Thailand for each of the past 10 years are listed in the table below.

| Year | Number of Lawyers Registered |
|---|---|
| 2009 | 2,748 |
| 2010 | 3,763 |
| 2011 | 2,048 |
| 2012 | 3,087 |
| 2013 | 3,200 |
| 2014 | 2,614 |
| 2015 | 2,420 |
| 2016 | 1,625 |
| 2017 | 3,314 |
| 2018 | 5,589 |

As can be seen from the above table, there were 15,562 lawyers registered within the past five years, and there were 30,408 lawyers registered with the Lawyers Council of Thailand within the past 10 years.[12]

## VI License and Registration Systems for Lawyers

To qualify as a lawyer in Thailand, a person is required to attain a lawyer's license and to register their name with the Lawyers Council of Thailand. The lawyer's license can be obtained via two different routes — the Lawyer Training Route and the Lawyer Internship Route. After the applicant has completed one of these routes, the applicant still has to attend two further compulsory sessions, which are an oral examination and a Professional

12 These statistics are based on unofficial statistics received from the Lawyers Council of Thailand.

Ethics and Legal Etiquette training session. After completion of all these requirements, he or she can obtain a lawyer's license from the Lawyers Council of Thailand, thus completing the formalities for registration as a lawyer.[13] An internship is required no matter which route the applicant has chosen, but there is no internship requirement after the applicant has already obtained the lawyer's license.

## A. Lawyer Training Route

The Lawyer Training Route is a training course offered by the Law Practice Training Center, a subsidiary organization of the Lawyers Council of Thailand.[14] This course opens for applications at least once every year, but it may allow applications to be submitted more than once annually, depending on the current policy of the Law Practice Training Center. The course consists of two main parts — an academic section and a practical section. Prior to submitting an application for this course, each applicant has to pass several qualification requirements. First, only a person who is of Thai nationality is able to apply for this training course. Second, the applicant must have a Bachelor of Laws degree or diploma or equivalent qualification recognized by the Lawyers Council. Third, an applicant must not ever have committed an infamous, dishonorable, immoral, or dishonest act. Fourth, an applicant cannot be currently serving a prison term, as sentenced by a final judgment of the Court. Fifth, an applicant cannot be infected by a contagious disease that is repugnant to Thai society.[15] If all five criteria are met, an application for the Lawyer Training Route will be accepted. However, if the applicant fails to satisfy any of the five criteria, their application for the course will be rejected by the Law Practice Training Center.

The academic section of the Lawyer Training Route determines the theoretical knowledge of the applicants. This part of the course includes more than 90 hours of lectures/seminars. Although attendance is not mandatory, knowledge of the course materials will be assessed by a final written examination. The subjects taught in the lectures/seminars are the same subjects that will be included in the Academic Examination, i.e. (1) Professional Ethics and Legal Etiquette; (2) Methods of Court Procedure for Civil Cases; (3) Methods of Court Procedure for Criminal Cases; (4) Methods of Court Procedure for Other Types of Cases; and (5) Principles of Legal Consultancy.[16] All

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13 Charunun Sathitsuksomboon, *Thailand's Legal System: Requirements, Practice, and Ethical Conduct, available at* http://thailawforum.com/articles/charununlegal.html (last visited May 15, 2019).

14 The Law Practice Training Center was established by the Lawyers Council of Thailand under Section 4 of the Rules of the Lawyers Council of Thailand regarding the Law Practice Training Center B.E. 2529 (A.D. 1986).

15 The Rules of the Lawyers Council of Thailand regarding the Law Practice Training Center B.E. 2529 (A.D. 1986), s. 5.

16 The Rules of the Lawyers Council of Thailand regarding the Law Practice Training Center B.E. 2529

subjects are mandatory, and there are no elective subjects available. The Academic Examination consists of a multiple-choice exam and a written essay exam, and attendees have to be awarded at least half of the total points available to pass the academic test. Kindly note that while attendance during the lectures/seminars is voluntary, every applicant still has to attend and pass the examination before they can proceed to the next stage of the course. If the applicant is absent from the exam or fails the exam, they will have to reapply for the Lawyer Training Route during the next available round.

Once an applicant has passed the academic part of the course, he or she will be able to proceed to the Practical part of the course. The Practical part of the course aims to determine the skill and ability of the applicants in practical legal situations. Thus, this part of the course includes a six-month mandatory internship, which will be assessed by the supervising attorney, followed by a series of lectures/seminars, which the applicant may choose to attend or not, and a Practical Examination. The start and finish dates of the internship semester will be set up and announced by the Law Practice Training Center. Within such period, the applicant may choose to intern with any law firm or legal department of a private company under the condition that the supervising attorney in such organization has held a Lawyer's License for more than seven years. In addition, an internship at the Law Practice Training Center is equal to an internship in the aforesaid organizations. The applicant can independently approach the place where they would like to intern and inform the Law Practice Training Center, once they have been accepted by the place. Additionally, an applicant can ask the Law Practice Training Center to find an internship place for him or her. During the internship period, the Law Practice Training Center will organize a series of lectures/seminars regarding the subjects of trial and document preparation and Court proceedings, which are directly related to the subjects of the Practical Examination. After six months of internship, the applicant will be graded by his/her supervising attorney. The applicant will pass the internship stage if the applicant's score is at least half of the total points to be awarded. Once the applicant has passed the internship, he or she can attend the following examination. However, if the applicant does not pass the internship, the applicant will have to be placed in another six-month internship and be assessed by the supervising attorney.

The Practical Examination also consists of a multiple-choice exam and a written exam. One significant difference that distinguishes the Practical Examination from the Academic Examination is that, in the written portion of the Practical Examination, not only does the applicant have to write the answer correctly, but the applicant also has to use the correct Court form and prepare the correct set of documents in order to get be awarded any marks. With regard to this Practical Examination, if the applicant is absent or fails the

(A.D. 1986), s. 13.

exam, they will have to file a request with the Law Practice Training Center to maintain their provisional status. Then, once the next round of Practical Examinations opens, an applicant who has maintained their provisional status can take the Practical Examination. If the applicant does not successfully maintain their provisional status, they will have to reapply to undergo the Lawyer Training Route again. However, the Director of the Law Practice Training Center may allow an applicant, who has failed to maintain their provisional status, to reinstate their status under selected special circumstances. This special exception will be provided on a case-by-case basis only.

Similar to the Academic Examination, an applicant has to get at least half of the available points to pass the Practical test. Once the applicant has passed the Practical test, the applicant can proceed to the next step, which is the oral examination. Statistically, there were 7,687 people registered for the Academic Exam in Batch 50 (taken on June 24, 2018), and only 848 of them passed the exam. Additionally, there were 6,501 people registered for the Academic Exam in Batch 49 (taken on December 16, 2017), and only 1,115 people passed the exam. For the Practical Exam, there were 3,523 people registered for the latest exam in Batch 49 (taken on September 9, 2018), and only 788 of them passed the exam. In addition, there were 6,154 people registered for the Practical Exam in Batch 48 (taken on March 17, 2018), and surprisingly, 3,496 people passed the exam.[17]

## B. Lawyer Internship Route

This route is an alternative route to the Lawyer Training Route. By choosing this route, a person does not need to apply for any courses with the Law Practice Training Center. A person can proceed to do an internship first, and then attend the examination at the end of the internship period. First, before a person can apply for an internship following this route, they have to pass one qualification requirement. The requirement stipulates that an internship applicant must have a Bachelor of Laws degree or diploma or equivalent qualification recognized by the Lawyer Council.[18] Similar to The Lawyer Training Route, a law firm or legal department of a private company, to which an applicant decides to apply for an internship, has to have an attorney with a valid Lawyer's License obtained more than seven years previously.[19]

The required period of internship for this route is a minimum of one year, which is

[17] These numbers are based on several announcements of the Lawyers Council of Thailand regarding examination results, which are publicly available on the official website of the Lawyers Council of Thailand.

[18] The Rules of the Lawyers Council of Thailand regarding Internship in Law firms B.E. 2535 (A.D. 1992), s. 5(1).

[19] The Rules of the Lawyers Council of Thailand regarding Internship in Law firms B.E. 2535 (A.D. 1992), s. 5(2).

longer than the internship period of the Lawyer Training Route. Moreover, a person will have to find and apply for their internship on their own without assistance. Once a person has been accepted for their internship, they will have to notify the Lawyers Council of their name, address, qualifications (with certified copies as evidence) and the name and address of the law firm, and information regarding Lawyer's License of the supervising attorney. All of the information above has to be notified within 15 days of the date the internship period commences, using the document forms provided by the Lawyers Council.[20] The one-year internship period will be calculated as from the notification of the internship submitted to the Lawyers Council. After the internship period has ended, a person has to attend and pass the final written examination, before they will be allowed to take the Oral Examination. The examination process of this route is different from the examination process of the Lawyer Training Route, as it has combines the Academic and Practical Examinations as one written exam. The test taker has to answer correctly and use the correct Court form in order to achieve a passing score. A passing score is being awarded at least half of the points available. The examination itself consists of multiple-choice questions and a written essay exam, and it is generally more difficult than the examinations taken during the Lawyer Training Route. Generally, the final examination for this route will be open for applications only once a year, but there might be more than one intake for applications, depending on the examination policy of the Law Practice Training Center each year.

In the case where the test taker fails the final examination, they will have to wait another year to retake the examination. The "maintain the provisional status" process is not required for to register to retake the examination in the Lawyer Internship Route. If the test taker passes the final examination, they can proceed to the Oral Examination. There were three final examination rounds organized in 2018 for those taking the Lawyer Internship Route. For the first examination, there were 2,337 people registered, and 362 of them passed the exam. There were 1,591 people registered for the second examination, but only 25 of them passed the exam. In the third examination, there were 1,238 people registered for the examination, while only 201 of them passed the exam.[21]

## C. Oral Examination

After passing the final exam (in the case of the Lawyer Internship Route) or the Academic and Practical Exams (in the case of the Lawyer Training Route), all prospective

[20] The Rules of the Lawyers Council of Thailand regarding Internship in Law firms B.E. 2535 (A.D. 1992), s. 5(3)(ก) and s. 5(3)(ค).

[21] These numbers are based on announcements made by the Lawyers Council of Thailand regarding the related examination results, which are publicly available on the official website of the Lawyers Council of Thailand.

applicants have to attend and pass the same Oral Examination, no matter which route they have chosen. The Law Practice Training Center will arrange the dates for the Oral Examination once to twice a year, and the applicants from both routes will all be tested at the same time taking the same exam. In the Oral examination, each applicant will be tested and assessed by one to three examiners. The examiners are usually senior or experienced lawyers from various law firms or law offices. The questions used in the Oral Examination are normally related to Civil or Criminal Court procedures or to any legal practice of the Court. The questions are different each year. The assessment of the answers to the questions depends on the examiners' discretion as to whether the applicant's answers are acceptable or corrected. If the applicant's answers do not satisfy the standards of the judging examiners, the applicant will be sent to a special room, colloquially known as the "cold room", to be tested again by a special examination committee. If the applicant still fails the questions of the committee, the applicant will need to take the Oral Examination again in the next round. All applicants know whether they have passed or failed the Oral Examination on the examination date. If the applicant passes the Oral Examination, he or she will have to attend the Professional Ethics and Legal Etiquette training session, which will normally be held around one to two weeks after the Oral Examination date.

## D. Professional Ethics and Legal Etiquette Training

Once an applicant has passed all the required courses, internship, and examinations, they will have to attend a mandatory Professional Ethics and Legal Etiquette training session. Normally, this training takes place over a morning (half-day). The morning training will be divided into two sessions, i.e. Professional Ethics and Legal Etiquette. Each session will be presented by a guest speaker, who is usually an experienced attorney, and sometimes even by the President of the Lawyers Council of Thailand. After all the training is finished, there will be a Graduation ceremony whereby all the successful candidates will receive their certificate, whether by the Lawyer Training Route or by the Lawyer Internship Route. At the end of the ceremony, all applicants will have to swear the Oath required of all attorneys. At this stage, all the required training will be deemed finished. However, the certificate received during the ceremony is not equal to the Lawyer's License. The candidate will still have to proceed to the next step in order to obtain the Lawyer's License and to register their license with the Lawyers Council.

## E. Obtaining a Lawyer's License and License Registration

Before a successful candidate, who has passed all the above requirements, can obtain a Lawyer's License and then register their license with the Lawyers Council, the Lawyers Council Committee will have to examine the qualifications of the candidate. However, this

time the Committee will use stricter standards when examining each candidate's qualifications. To that end, a person who requests that the Lawyers Council grant them a Lawyer's License, and then that their name be registered with the Lawyers Council, has to have their qualifications approved by the Committee as follows:

1. A person of Thai nationality.
2. Age at least 20 years old at the time of submitting a request.
3. Must have a Bachelor of Laws degree or diploma or equivalent qualification, any of which are recognized by the Lawyers Council. Additionally, a person has to be a member of the Thai Bar Association.
4. Must not ever have committed an infamous or dishonorable or immoral or dishonest act.
5. Is not currently serving a prison term where sentencing was carried out by a final judgment of the Court.
6. Must not ever have served a prison term where sentencing was carried out by a final judgment of the Court, particularly in the case where the Lawyers Council Committee deems the conviction as dishonorable for legal professionals.
7. Must not ever have been sentenced as a bankrupt person.
8. Is not infected by contagious diseases that are repugnant to Thai society.
9. Does not have a physical or mental disability that affects competency when practicing as a lawyer.
10. Is not a full-time government official or local government official, with the exception of a political official.
11. Is not a person who has been deleted from the list of registered lawyers for less than five years from the date of deletion.[22]

As may see from the above list of qualifications, this list includes some additional items that are not included in the qualification requirements for those taking the Lawyer Training Route. One particular qualification in the above list that is worth mentioning is that a candidate for a Lawyer's License must also be a member of the Thai Bar Association. This is because only members of the Thai Bar Association are allowed to wear Advocate's gowns in Thai Courts of law. This qualification highlights the relationship between the Thai Bar Association and the Lawyers Council of Thailand, which will be explained more fully in the next chapter. If an applicant for a Lawyer's License has received the required certificate and passed all the qualification stated above, the Lawyers Council of Thailand will consider whether to grant the Lawyer's License or to allow the

[22] Lawyers Act B.E. 2528 (A.D. 1985), ss.35, 71.

applicant to register their name in the list of registered lawyers.[23] The decision whether or not to grant the Lawyer's License to an applicant is under the sole discretion of the Lawyers Council Committee. If the Committee decides not to grant a particular applicant a Lawyer's License, the reasoning for such decision must be clearly stated so that the applicant is able to appeal such decision to the Special President's Committee of the Lawyers Council of Thailand for its final decision.

## VII Thai Bar Association and the Lawyers Council of Thailand

Unlike many other countries, the organization that has the power to control and supervise lawyers in Thailand is the Lawyers Council, not the Thai Bar Association. This has caused wide confusion among the public, especially from a foreigner's point-of-view, since every Thai lawyer still has to be a member of the Thai Bar Association in order to be allowed to wear the Advocate's gown or so-called "Barrister's robes", if appearing before the Court. Some may be confused as to whether passing the Bar Examination, which is different from the Lawyer's License Examinations, is required in order to practice law in Thailand. All this confusion is due to the complicated legal history of Thailand. In brief, the lawful right to wear an Advocate's gown was first legislated by the Barrister's Robes Act B.E. 2479 (A.D. 1936) when the Thai Bar Association[24] was the supervisory organization for lawyers. However, the power and authority regarding the supervision of lawyers was later transferred from the Thai Bar Association to the Lawyers Council of Thailand with the promulgation of the Lawyers Act in 1985. Thus, at present, it is not required for lawyers to pass the Bar examination, but it is mandatory for lawyers to be members of the Thai Bar Association in order to be allowed to wear the Advocate's gown in Court.

The Thai Bar Association today still provides legal education courses and administers the Bar Examination to interested applicants.[25] Passing the Bar Examination of the Thai Bar Association is not a necessary requirement for practicing lawyers. However, those lawyers seeking barrister-at-law status, must still pass the Bar Examination, which is a mandatory qualification requirement for those pursing a judicial appointment or for those hoping to practice law as a public prosecutor or judge. Furthermore, the barrister-at-law status is recognized generally by government organizations as a higher level of education,

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23 Ministerial Regulation No. 2 promulgated under the Lawyers Act B.E. 2528 (A.D. 1985), s.3, s.4.

24 Based on the Barrister's Robes Act B.E. 2479 (A.D. 1936), s.5.

25 Please see information of legal education courses provided by the Thai Bar Association in Vichai Ariyanuntaka, *Legal Research and Legal Education in Thailand*, *in* DOING LEGAL RESEARCH IN ASIAN COUNTRIES CHINA, INDIA, MALAYSIA, PHILIPPINES, THAILAND, VIETNAM 145, 169-72 (Institute of Developing Economies ed. 2003).

similar to a professional certificate in the legal field. Nevertheless, the only important status that lawyers require from the Thai Bar Association is membership status, which could be either ordinary membership or extraordinary membership. Ordinary membership is available for a student who has passed the Bar Examination of the Thai Bar Association. The extraordinary membership is available to either (1) a person who graduated from one of the specifically listed universities, or (2) a person who passed the lawyer examination process administered by the Lawyers Council of Thailand.[26] Therefore, an applicant for a Lawyer's License, who has passed the lawyer examination process, can apply to be an extraordinary member of the Thai Bar Association without having to take the Bar Examination. However, applicants vying for the Lawyer License might as well participate in both the lawyer examination process and the Bar Examination, and then register their membership as ordinary member. There is virtually no distinction between lawyers who are an ordinary members and lawyers who are extraordinary members of the Thai Bar Association.

## VIII Types of Licenses and Time Limitations of Licenses

When a Lawyer License is granted to an applicant, the applicant is free to choose the type of Lawyer License that best suits their needs. There are two types of Lawyer License — a two-year license and a lifetime license.[27] The main difference between the two types is the fee for license registration, which is higher in the case of the lifetime license. Apart from the license, the Lawyers Council also issues the Lawyer Council Member Card and the License Book, according to the type of license the applicant has selected. The two-year license must be renewed within 90 days before the date of expiry, or within 60 days after the expiry date with a surcharge added to the renewal fee.[28] The Lawyers Council Member Card and the License Book will also change at the same time as the license renewal. In the case of a lifetime license, although there is no time limitation on the license itself, the Lawyer Council Member Card for this type of license has an expiry date and has to be changed every six years.[29] In other words, the lifetime license does not actually last forever without an update or renewal, as the lawyer still has to apply for a change of their lifetime license card once every six years. To renew the Lawyer's License or to change the license card, there are no special requirements, such as seminars, courses, or practice results. Only an application form and application fee are required. If the lawyer

26 The Rules of the Thai Bar Association B.E. 2507 (A.D. 1964), s.4, s.5.
27 Lawyers Act B.E. 2528 (1985), s.39.
28 Lawyers Act B.E. 2528 (1985), s.39, 40.
29 The Rules of the Lawyers Council of Thailand regarding the Lawyer Council Member Card B.E. 2535 (A.D. 1992), s.4.

chooses to register first for a-two year license, they still can apply to the Lawyers Council to switch to a lifetime license at a later date.[30]

## IX Lawyer Organizations

The national lawyer organization of Thailand is the Lawyers Council of Thailand under the Royal Patronage, which was established in 1985 following the implementation of the Lawyers Act. The legal entity of the Lawyers Council is a juristic person, which has rights and duties, according to the scope and objectives described under the Lawyers Act.[31] The objectives of the Lawyers Council of Thailand is prescribed in Section 7, as follows:

1. To promote the education and practice of lawyers.
2. To supervise legal etiquette of lawyers.
3. To promote the harmony and honor of the members.
4. To promote and provide welfare for members of the Lawyers Council.
5. To promote, assist, recommend, publicize and educate the general public regarding any legal matters.

In addition to the objectives above, the Lawyers Council is also responsible for the issuance of Lawyer's Licenses and administering Lawyer's License registration, according to the conditions prescribed under the Lawyers Act.[32] The Lawyers Council of Thailand consists of the Lawyers Council Committee and Lawyers Council members. The Lawyers Council Committee is comprised of one representative from the Ministry of Justice, one representative from the Thai Bar Association, the President of the Lawyers Council and other Lawyers Council members totaling not more than 23 people. At least nine of the Lawyers Council Committee must have registered offices in each of the nine provincial regions, i.e. one office in each region. The President of the Lawyers Council and the Lawyers Council Committee are elected by members of the Lawyers Council countrywide.[33] The Lawyers Council members are licensed lawyers. Once a lawyer has registered their name with the Lawyers Council of Thailand and obtained the Lawyer's License, a lawyer will automatically become a member of the Lawyers Council.[34] A lawyer's membership status will be renewed at the same time that a lawyer successfully renews their Lawyer's License. Similarly, if a lawyer loses their Lawyer's License, no matter what the reason, their membership status as a member of the Lawyers Council will

30 Ministerial Regulation No. 2 promulgated under the Lawyers Act B.E. 2528 (A.D. 1985), s.6.
31 Lawyers Act B.E. 2528 (A.D. 1985), s.6.
32 Lawyers Act B.E. 2528 (A.D. 1985), s. 8.
33 Lawyers Act B.E. 2528 (A.D. 1985), s. 14.
34 Lawyers Act B.E. 2528 (A.D. 1985), ss. 11, 37.

be terminated.[35] There are no other types of memberships granted by the Lawyers Council. Membership of the Lawyers Council is available only to individual members, and no groups or organizations are able to be Lawyers Council members.

The organizational structure of the Lawyers Council of Thailand is divided into two main levels — the Central level and the Regional level. The Central level of the Lawyers Council consists of several offices, as follows:[36]

1. Office of Legal Aid Committee
2. Office of Environment Committee
3. Office of Human Rights Committee
4. Office of Administrative Litigation
5. Office of Consumer Protection
6. Office of Alternative Dispute Resolution
7. Institute of Advanced Legal and Professional Studies
8. Law Practice Training Center
9. Institute of Legal Professionals Development
10. Institute of Research and Development of Law
11. President's Office and the Lawyers Council Committee Office
12. Office of Inspection and Report
13. Office of Budget Process
14. Office of Technology and Information Technology
15. Office of the Secretary
16. Office of Accounting and Finance
17. Office of Administration and Human Resources
18. Office of Lawyer Registration
19. Office of the Spokesperson and Public Relations
20. Office of Notarial Services Attorney Registration
21. Office of Legal Etiquette Committee
22. Office of International Affairs
23. Office of Privileges and Welfare
24. Office of Sport Clubs

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35 Lawyers Act B.E. 2528 (A.D. 1985), s. 13, 44.

36 The Rules of the Lawyers Council of Thailand regarding the Division of the Lawyers Council's Offices and Rights and Duties of the Lawyers Council Committee B.E. 2556 (A.D. 2013), s. 4(4.1).

25. Office of Credit Union and Cremation Matters
26. Office of Cremation Welfare of the Lawyers Council
27. Office of Supplies
28. Office of Public Interest Protection and Corruption Litigation
29. Office of Journals and Publications
30. Office of Volunteer Counsel
31. Office of Conferences

Regarding the Regional level, there are two main offices — the Regional Office of the Lawyers Council of Thailand and the Provincial Office of the Lawyers Council of Thailand.[37] The Regional Office of the Lawyers Council of Thailand is divided into nine separate Regional Offices, based on the jurisdictions of the chief judges in each region; details of the jurisdiction covered by each Regional Office can be seen below.

1. Regional Office No. 1 is responsible for the Lawyers Council's assigned duties within the provinces of Phra Nakhon Si Ayutthaya, Lop Buri, Chai Nat, Sing Buri, Ang Thong, Saraburi, Pathum Thani, Nonthaburi, and Samut Prakan.
2. Regional Office No. 2 is responsible for the Lawyers Council's assigned duties within the provinces of Chon Buri, Pattaya, Chachoengsao, Nakhon Nayok, Prachin Buri, Sa Kaeo, Rayong, Trat, and Chanthaburi.
3. Regional Office No. 3 is responsible for the Lawyers Council's assigned duties within the provinces of Nakhon Ratchasima, Chaiyaphum, Buri Ram, Surin, Si Sa Ket, Ubon Ratchathani, Amnat Charoen, and Yasothon.
4. Regional Office No. 4 is responsible for the Lawyers Council's assigned duties within the provinces of Khon Kaen, Udon Thani, Nong Bua Lam Phu, Nong Khai, Bueng Kan, Sakon Nakhon, Nakhon Phanom, Mukdahan, Maha Sarakham, Roi Et, Loei and Kalasin.
5. Regional Office No. 5 is responsible for the Lawyers Council's assigned duties within the provinces of Chiang Mai, Lampang, Mae Hong Son, Chiang Rai, Payao, Nan, Lamphun, and Phrae.
6. Regional Office No. 6 is responsible for the Lawyers Council's assigned duties within the provinces of Phitsanulok, Sukhothai, Uttaradit, Tak, Kamphaeng Phet, Phichit, Phetchabun, Nakhon Sawan, and Uthai Thani.
7. Regional Office No. 7 is responsible for the Lawyers Council's assigned duties within the provinces of Nakhon Pathom, Ratchaburi, Suphan Buri, Kanchanaburi,

[37] The Rules of the Lawyers Council of Thailand regarding the Division of the Lawyers Council's Offices and Rights and Duties of the Lawyers Council Committee B.E. 2556 (A.D. 2013), s. 4(4.2).

Phet Buri, Prachuap Khiri Khan, Samut Sakhon, and Samut Songkhram.

8. Regional Office No. 8 is responsible for the Lawyers Council's assigned duties within the provinces of Suratthani, Nakhon Si Thammarat, Chumphon, Ranong, Krabi, Phangnga, and Phuket.
9. Regional Office No. 9 is responsible for the Lawyers Council's assigned duties within the provinces of Songkhla, Trang, Phatthalung, Satun, Pattani, Yala, and Narathiwat.

The jurisdiction of each Regional Office actually covers all the judicial provinces in the above-listed provinces within Thailand. The judicial provinces include provinces or districts that have either Provincial level courts or Municipal level courts or both. The Provincial Office of the Lawyers Council of Thailand also operates in every judicial province of Thailand. There are no other official organizations apart from the Regional Offices and the Provincial Offices of the Lawyers Council. It is not mandatory for a lawyer to become a member of a local lawyer organization in order to represent a client in such local regions or provinces.

## X Notarial Services Attorney

Lawyers in Thailand have always provided Notary Public Services for clients from the time that these types of services became available in Thailand, even though originally there were no specific provisions governing Notary Public Services.[38] However, in May 23, 2003, the Lawyers Council decided to issue Regulations regarding the Registration of Notarial Services B.E. 2546 (A.D. 2003), which is the first regulation regarding notary public services in Thailand. Together with the promulgation of such rules, the Lawyers Council started to offer standard training sessions for lawyers interested in becoming Notarial Services Attorneys.

In 2008, as the Special President's Council of the Lawyers Council of Thailand, Justice Minister agreed to issue The Rules of the Lawyers Council of Thailand regarding the Registration of Notarial Services Attorneys B.E. 2551 (A.D. 2008), which was published in the Royal Gazette on January 8, 2009. A Notarial Services Attorney must be a licensed lawyer who has passed all the training and qualifications required by the Lawyers Council. To that end, the Lawyers Council of Thailand standardized their training course and began offering such course to any interested lawyers. Passing this course is a mandatory requirement before a lawyer can apply to the Lawyer Council for registration as

[38] Frank Munger, *Thailand: The Evolution of Law, the Legal Profession and Political Authority*, NYLS Legal Studies Research Paper No. 3347143, 16 (2019), *available at* https://ssrn.com/abstract=3347143 (last visited May 15, 2019).

a Notarial Services Attorney.

The Notarial Services Attorney Training Course is a two-day course, which includes several lectures and examinations on several subjects, including the principles governing and the registration procedure of a Notarial Services Attorney; a comparison between Notaries Public in Thailand and other countries; categories of signatures and document certifications; the certification procedure and Notary stamp; case studies; and the legal etiquette and legal liability involved in offering Notary Public Services. Once a lawyer has attended and passed the requirements of the training course, he or she can apply for registration as a Notarial Services Attorney with the Lawyers Council of Thailand.

The qualification requirements for a person seeking registration as a Notarial Services Attorney are as follows:

1. A person who is a licensed lawyer.
2. A person who has passed the Notarial Services Attorney Training Course, according to the requirements of the Lawyers Council of Thailand.
3. A person is not currently serving a punishment or under sanctions for violation of legal etiquette.
4. A person who must not ever have committed an infamous or dishonorable or immoral or dishonest act.

If the applicant passes all of the above requirements, the Lawyers Council will register the applicant's name and issue the Notarial Services Attorney Certificate, with its unique registration number, and the Notary Public stamp to the applicant without delay.[39] The Certificate is valid for two years from the date of issuance. A Notarial Services Attorney must then apply for renewal within 90 days before the date of the Certificate's expiration.[40]

## XI Foreign Lawyers

In the past, Thailand allowed foreigners to practice as lawyers of the Court around the time of the Lawyers Act B.E. 2477 (A.D. 1934), with the requirement that all hearings be conducted in the Thai language.[41] However, since the enactment of the Lawyers Act B.E. 2508 (A.D. 1965), local legal practice is now strictly reserved for Thai nationals only. As may be noted from the qualification requirements to attend the Lawyer Training Route and

[39] The Rules of the Lawyers Council of Thailand regarding the Registration of Notarial Services Attorneys B.E. 2551 (A.D. 2008), s. 4.

[40] The Rules of the Lawyers Council of Thailand regarding the Registration of Notarial Services Attorneys B.E. 2551 (A.D. 2008), s. 6.

[41] Ruchira Bunnag, *Thai Lawyers and Foreign Lawyers*, *in* Daily News (Daily News ed. 16 March 2014).

the qualifications to obtain and register for a Lawyer's License, the first condition of both qualifications is that the applicant must be of Thai nationality. More specifically, legal practice is considered a prohibited profession that is closed to foreigners in Thailand, according to Clause 39 of the Royal Decree Naming Occupations and Professions Prohibited to Aliens (Foreigners), as issued under the Alien Employment Act B.E. 2521 (A.D. 1978). Therefore, currently, it is not possible for a foreigner, who is not a Thai citizen, to apply or obtain a Lawyer's License or to practice law in Thailand. There was an attempt in 2015–2016 to update the Lawyers Act to allow foreigners to practice law and to be regulated under an amendment to the Lawyers Act. However, such proposal faced furious objections from numerous local lawyers, and the change did not actually materialize.[42]

Foreigners who work in the legal business in Thailand are actually non-licensed workers, who are able to work under the scope of "Business Consultants" or "Investment Advisors" only. Additionally, foreigners are allowed to act as arbitrators, if the applicable law of the case is not Thai law or if the enforcement and the award of a decision will not occur within Thailand.[43]

## XII Professional Responsibility and Legal Malpractice

Lawyers can be held legally liable for legal malpractice in Thailand. The major laws and regulations covering these areas are (1) The Rules of the Lawyers Council of Thailand regarding Legal Etiquette B.E. 2529 (A.D. 1986), and (2) the Thailand Penal Code, specifically the sections regarding confidentiality and the duties of professionals.

The Rules of the Lawyers Council regarding Legal Etiquette sets out self-regulation measures and the supervisory authority that the Lawyers Council can enforce against any professional misconduct perpetrated by a registered lawyer. From time to time, the Lawyers Council appoints several lawyers to serve as "The Legal Etiquette Committee", which performs these supervision duties and delivers proper punishment against other accused lawyers. The Legal Etiquette Committee has the legal status of a government official, according to the Thailand Penal Code. The composition of the Committee includes the appointment of a President and a Vice-President, and other Committee members, who shall be not less than seven people. All of the Committee members must have worked as

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42 Workpoint News, *Lawyers Gathered to Oppose the Lawyers' Bill that Allows Foreigners to Practice Law*, *in* Workpoint News (Workpoint News ed. 1 Feb 2016), *available at* http://www.workpointtv.com/news/1297 (last visited Jan. 27, 2019).

43 David Lyman and Alongkorn Tongmee, *Lawyer's Obligations: Confidentiality of Client Information in Thailand*, New York State Bar Association International Section Seasonal Meeting in Singapore Plenary Panel D: Ethics Panel 1, 3-4, 6 (Tilleke & Gibbins ed. 2009).

lawyers for ten years or more and must never have been punished for any legal etiquette breach. In addition, the Committee members' names must never been removed from the lawyer registration list.[44]

There are three types of punishment for any violation of The Rules regarding Legal Etiquette, i.e. (1) probation; (2) temporarily suspended from working as a lawyer (not more than 3 years); and (3) removal of the accused's name from the lawyer registration list.[45] In the case where the violation is a petty offense, and it is the first time that the violator has committed such violation against The Rules regarding Legal Etiquette, the Legal Etiquette Committee may reject punishment and choose to warn the offender about their misconduct or may order that a written probation notice be issued instead.[46] There are several requirements for lawyers to adhere to with regard to The Rules regarding Legal Etiquette, such as:

1. Breach of legal etiquette within the courtroom, such as contempt of Court or judges, presenting false witnesses or evidence to the Court, bribery, etc.
2. Breach of legal etiquette with the client, such as instigating the client to file a lawsuit in a groundless or unfounded case, intentionally non-appearance in Court, disclosing to the client confidential information, representing a party that conflicts with a former client, etc.
3. Breach of legal etiquette with fellow lawyers, such as unreasonably acquiring a case that another lawyer is currently representing.
4. Breach of legal etiquette with general persons, such as advertising a legal services fee or other persuasive content regarding the promotion of legal services.
5. Breach of legal etiquette involving a lawyer's behavior, such as running a legal practice targeting immoral or dishonorable matters or cases.
6. Breach of wearing proper lawyer's attire, such as dressing improperly, or did not wearing the Advocate's gown at a Court hearing.[47]

Any person or any lawyer may file an accusation against a lawyer claiming that he or she has violated the legal etiquette expected of a lawyer.[48] Such accusation has to be filed

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44 Lawyers Act B.E. 2528 (A.D. 1985), ss. 54, 61.

45 The Rules of the Lawyers Council of Thailand regarding Legal Etiquette B.E. 2529 (A.D. 1986), s. 52.

46 The Rules of the Lawyers Council of Thailand regarding Legal Etiquette B.E. 2529 (A.D. 1986), s. 52.

47 Lawyers Act B.E. 2528 (A.D. 1985), s. 53. There are many legal allegations that an interested party might raise to the Legal Etiquette Committee. Please see more details in the Rules of the Lawyers Council of Thailand regarding Legal Etiquette B.E. 2529 (A.D. 1986), ss. 5-20.

48 For detail regarding legal procedure for the case regarding the violation of legal etiquette of lawyers, *see* Panida Pongsuwan, *The Control of Power in Legal Professional organizations: A Case Study of Lawyers Council of Thailand*, Master of Laws Program Thesis of Chulalongkorn University, 1, 122-32 (Chulalongkorn University ed. 2008), *available at* https://cuir.car.chula.ac.th/xmlui/bitstream/handle/123456789/58788/Panida%20Pongsuwan.pdf?sequence=1&isAllowed=y (last visited May 15, 2019).

with the President of the Legal Etiquette Committee in writing within one year after the accuser has acknowledged the act of violation and has learned the identity of the violator, but such formal complaint must not be more than three years since the date of the violation.

Apart from The Rules regarding Legal Etiquette stated above, the Thailand Penal Code also has a specific provision regarding legal malpractice. This is specified in Section 323, which is the section covering the parameters and penalties for disclosures of Private Secrets by professionals.

**Thailand Penal Code**

**Section 323**

> Whoever knows or acquires a private secret of another person by reason of his functions as a competent official or his profession as a medical practitioner, pharmacist, druggist, midwife, nursing attendant, priest, advocate, lawyer or auditor, or by reason of being an assistant in such profession, and then discloses such private secret in a manner likely to cause injury to any person, shall be punished with imprisonment not exceeding six months or a fine not exceeding 10,000 baht, or both.
>
> A person undergoing training and instruction in the profession mentioned in the first paragraph who has known or acquired the private secret of another person in the training and instruction in such profession, and discloses such private secret in a manner likely to cause injury to any person shall be liable to the same punishment.

The above provision from the Thailand Penal Code is a section that specifically prescribes the breach of confidentiality duty of certain professionals, including advocates and lawyers, as well as persons who are undergoing training to become a lawyer or persons under the instructions of a lawyer. Thus, not only the lawyer himself or herself is liable, but also the legal intern or proxy of the lawyer could be liable to criminal charges under this section, if confidentiality is breached. Thus, a lawyer must be careful and must always preserve the confidentiality of the client to the highest degree as possible, because they could not only lose their license, but they could also be punished by the relevant law for their legal malpractice.

It should be emphasized that there is no limited liability available for lawyers in Thailand, and a lawyer could be held fully liable as a result of their improper conduct. However, it is not mandatory or usual for lawyers to apply for lawyer's liability insurance in Thailand.

## Summary

The legal system in Thailand has undergone a long history of development, which makes it rather unique and distinctive from other jurisdictions. Over time, the supervision of lawyers has changed from being under the authority of the Thai Bar Association to now being regulated by the Lawyers Council of Thailand under Royal Patronage. The Lawyers Council itself, as the main national lawyers' organization, has gone through many changes. More and more rules and regulations of the Lawyers Council are being updated and issued, which has led to an improvement of the standardized legal practice guidelines for legal practitioners. The Lawyers Council of Thailand and Thai lawyers will continue to work together to develop and augment the legal system governing lawyers in Thailand, all the while maintaining good legal practice standards for the benefit of the people of Thailand and for the benefit of our legal society as a whole.

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# The Development of Thai Laws and Legal Education:

## Political and Social Forces to Modernity

*Nattapong Suwan-in*（**陳光合**）*

Contents



* Assistant to the Dean for Academic Affairs; Lecturer in Law, School of Law, Assumption University of Thailand; Registered Lawyer; Notarial Services Attorney; Ph.D. in Law, College of Law, National Taiwan University; MBA, School of Business, National Taiwan University of Science and Technology. The author can be reached at law.ghchen@gmail.com, nattapong.suwan-in@au.edu. Disclaimer: The views and opinions expressed in this article are those of the author and do not necessarily represent the views and/or opinions of the institution.

# Abstract

Again and again, Thailand has gone through stages of dilemmas. Its milestones have told us unpleasant historical stories of national conflicts that are influenced by political and social forces. Having Thailand as the case study to analyze influences of external and internal changes in politics and social force, Thailand has to be flexible in adjusting its national policies and laws to serve circumstances at a time. Its laws have been developed in accordance with its administration, political system, and revolution in economy, so as its legal education that has been upgraded in correspondence with changes of global dynamics.

From the monarchy to the similar style of Western democracy, Thai laws nowadays share the same or at least similar structure of legal system. The continental style of codification has shaped Thai laws to live up to international standard in written codes with the supreme court decisions as a secondary authority that lower courts and lawyers somehow pay respect. To be legal practitioners, Thai students have to pass through stages of jurisprudential study and professional training of which attorneys and barristers are of different directions unlike the system in the US or in the UK.

It will be very interesting to see and learn the unique style of the civil law system in Thailand and the recent development in Thai legal education and proliferation of business-law-style courses in its domestic law programs.

**Keywords:** legal education, legal system, law program, development of law, development of legal education, Thailand

# I Introduction to Thai Legal System and Its Legal Education

*"Law is an experience developed by reason and reason tested by experience; it is experience organized and developed by reason, authoritative promulgated by the law making organs of society and backed by the fore of that society… it is a task of social engineering designed to eliminate friction and waste in the satisfaction of unlimited human interests and demands out of a limited store of goofs in existence… it is a process of social adjusting; a system of practical compromises of conflicting and overlapping interests"*

The brilliant doctrine of an American philosopher, Roscoe Pound, on the contemporary jurisprudence though was long ago stated in more than a century, it yet well describes the development and functions of laws in Thailand today. To Pound, science of law is the association of social sciences and law, and social control and civilization. Law is a tool of social engineering in balancing interests and resolving individual and social problems[1].

Thai laws, as it has experienced external and internal influences and gone through stages of reform and change caused by politic and social forces, the development of laws according to the Thai history is the intelligent effort in improving laws in response to forces at a time and to eliminate friction and waste in the satisfaction of human demands and interests as stated by Pound.

In 1238 during the period of Sukhothai, the first period of Thai history, law was seen as an order of the king who exercised supreme power under the monarchy. There, when society was simple and static and way of life was plain, law was not connected to people, out of reach, and merely was a rule of the king whom people pay respect being influenced by the Hindu jurisprudence or the Code of Manu[2].

To the Ayudhaya period when Krung Sri Ayudhaya was addressed as the Thai second capital city (1350 to 1767), once society became subtler and complex with improvement of people's way of life, people's demand for satisfaction of interests, law, and judiciary system was advanced that then required the law making organ dealing with such complexity. Judicial power in this period became in hands of the "Purohita" and the king.

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1 Linus McManaman, *Social Engineering: The Legal Philosophy of Roscoe Pound*, 33(1) ST. JOHN'S L. REV. 1, 16-17 (1958).

2 Vichai Ariyanuntaka, *Legal Research and Legal Education in Thailand, in* DOING LEGAL RESEARCH IN ASIAN COUNTRIES CHINA, INDIA, MALAYSIA, PHILIPPINES, THAILAND, VIETNAM 145, 147-48 (Institute of Developing Economies ed., 2003).

Purohita was a Chief Chaplain and a helper to the king in trial and ruling. Law was the development of judgements that later became a model and royal precedent to follow comparing to the "judge-make-law" principle in Britain. Also, it was a legislation of the king and his royal officials that was timely evidenced and stated in historical documents[3].

As the matter of fact that the law making group was customarily the king and his surrounded people, to gain legal knowledge, it is not a choice you make but rather a bet of luck that if you were born in royal families or as royal officials, you would likely have chance to study and learn how to legislate law that was back then confined in royal palace. "*The method of dissemination of legal knowledge was done by narrations and indirect teaching between relatives and friends who needed to exercise their legal rights*", said Honorable Judge Vichai Ariyanuntaka in his writing[4]. Thus, the study of law was very limited in the group of involving persons[5], while general education was conducted in temples.

In the beginning of Rattanakosin period, after the end of Krung Sri Ayudhaya, because of political factor, that was the war with Myanmar (Burma), the continuation of nationhood demanded Thailand to have all existed laws assembled and revised after the loss of law collections in the invasion. Together with the establishment of new rules of law, after almost a year, Thailand in the reign of King Rama I had then finished its so called "the Three Emblems of State Law" or "the Code of the Three Seals" that was influenced by the Indian Law. It was considered as the original formality of the law of the land and had been used as basis of Siam judiciary[6].

Once laws were advanced and the community developed, to no surprise, legal education was then disseminated more among the group of people involving in the judiciary; the judge, jury, and executing officer of criminal fines. But as law was yet perceived and treated confidential that dissemination of its contexts was strictly prohibited and without printing technology, it was not widely known to public[7].

In 1855, grounded on claims that Thai laws and its judiciary system were cruel, way out of date, unsystematic, and uncivilized by foreigners, along the revolution in Thai politics influenced by external force of colonization from England and France under the

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3 *Id.* at 148.

4 *Id.*

5 *Id.* at 149.

6 *Id.* Siam was the former name of Thailand. *See also* Noppramart Prasitmonthon, *A Comparative Legal Study between the Common Law and the Civil Legal Tradition of Thailand*, at 1, *available at* https://pdfs.semanticscholar.org/fb0f/615c673d84defe3617761ae104e8053fe1f1.pdf (last visited Feb. 20, 2019).

7 NIPA SUEBKINNEON, LEGAL EDUCATION SYSTEM IN THAILAND: PAST, PRESENT & FUTURE NEEDS 13 (2004).

Bowring and similar treaties during the second half of the nineteenth century[8], Thailand under the reign of King Rama IV decided to reform its legal system in 1891 to discharge itself from the "extra-territorial jurisdiction" turmoil which caused foreign citizens to subject to trial in special Counselors under their own laws[9].

The friction basing on "internal" and "external" interests of different nations demanded Thailand to start opening up for harmonization in laws. Following the reform in 1891, the country then moved toward continental style of codification known as the Civil Law system that occupies most of the countries in Europe[10]. To achieve that goal and by taking nature of the country into account[11], Thailand, for the purpose of balancing power of colonizing countries, had then decided to elevate and embrace foreign codes into Thai local codes. More or less, it is a transplantation of foreign justice to Siam[12] that today evidences in many provisions in the Thai civil and commercial law or the "Thai CCC" (Thai Civil and Commercial Code). While Law of Contract and Law of Delict (Tort) in the Thai CCC appear to be very similar to the civil codes of Japan and Germany[13], some provisions, such as Law of Family and Law of Succession, were still very much relied on local culture and national custom. It is also observed that British law under the Common Law system has also influenced Thai laws in many areas such as the Civil and Criminal Procedural Codes[14].

During 1800s, by orders of the crown, the study shows that Thailand had greatly reformed almost all of its laws to meet international standard. It includes Civil Procedural Code and Constitution of the Court of Justice in 1895, the Criminal Code in 1908, The Criminal Procedural Code in 1935 and also its amendments in later years[15].

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8 Ariyanuntaka, *supra* note 2, at 149. *See also* Munin Pongsapan, *Remedies for Breach of Contract in Thai Law*, *in* STUDIES IN THE CONTRACT LAWS OF ASIA I: REMEDIES FOR BREACH OF CONTRACT (Oxford Express ed., 2016).

9 Ariyanuntaka, *supra* note 2, at 149-50. "The exception of judicial power above foreigners living in Siam (Thailand). English subjects were not under Thai law and judiciary. Other western countries followed suit, claiming that their people should not be put under Thai law and judiciary as well because of the insufficiencies and unsystematic of Thai Law and Courts. They preferred to have their peoples subjected only to their laws and special tribunal of judiciary established by them, including citizens of their colonies in Asia". *See also* Prasitmonthon, *supra* note 6, at 1-2.

10 Ariyanuntaka, *supra* note 2, at 151.

11 *Id.*

12 Pongsapan, *supra* note 8. "The code system of Thailand was established mainly through legal borrowing. Most of the borrowed rules have survived and seem to have taken root in the new environment".

13 *Id*. *See also* Sandra Blechschmidt, *Interview with Mr. Shiori Tamura*, *in* CPG ONLINE MAGAZINE (German-Southeast Asian Center of Excellence for Public Policy and Good Governance ed., 2016).

14 Prasitmonthon, *supra* note 6, at 1-2.

15 Ariyanuntaka, *supra* note 2, at 151-52.

Along with the change of laws in Thailand that was structured and designed to align with continental style of civil law, the country, in the reign of King Rama V, had also directed outstanding officials and royal families to study laws in Europe; mostly to England and France of their great colonial power. Once returned, they paid great contribution to the land to handle judicial tasks and to enhance Thai laws against the claim of foreigner on uncivilization of Siamese laws to discharge himself from local jurisdiction. Legal system was then no longer limited to the group of people surrounded the king and be restricted in royal house or royal premises[16]. The study was tremendously influenced by foreign legal rules of the common law during the beginning but was later influenced by the civil law in the end[17].

When the first law school was established in late 1800s, the Thai Bar Association was commissioned to operate as an academic institution to provide jurisprudential study and found people legal basis to produce new generation of officials that was once inadequate to handle judicial tasks under the change. Rather than an organization for professional training, the Bar association first structured its curriculum to focus on domestic and international laws with several numbers of language courses. The Barrister-at-Law degree would be granted to graduates who pass all requirements and that include the one-year term learning and one final exam[18]. In 1911, the school was transferred to be under the Ministry of Justice and had its main duty to both teach law and provide professional training before it was constituted as college[19]. From time to time, the Bar association had been adjusted and reorganized its structure to serve different purposes in different situations and been subjected to different supervising organizations with political and social influences[20].

Nowadays, the study of Thai laws is permitted to conduct in various institutions to serve different markets that makes the Thai legal study comprehensive. Starting from university level, which carries out its jurisprudential study to found legal basis, to professional training in the Thai Lawyers Council and the Bar that were put in task to enhance intensity of legal study and train university graduates to become a lawyer, public prosecutor, or a judge, they all work in hand to make Thailand's legal education living up to international level.

In analysis of the Thai legal education, this paper has summarized important details of the current system to demonstrate steps to become a lawyer and/or barrister in Thailand. While Part I already laid some background on the development of Thai laws and legal

16 *Id*. at 152.
17 Pongsapan, *supra* note 8.
18 Ariyanuntaka, *supra* note 2, at 153-54.
19 *Id*.
20 *Id.* at 155.

education in the past, Parts II and III will turn readers to the current legal system after reform[21] that found basis to the Thai legal study under control of the quality assurance committee[22]. Part IV will then move to discuss on the functions of the Thai Lawyers' Council and Thai Bar Association on training perspective with short conclusion in Part V in the end.

## II Thailand Legal System: The Continental Style of Codification with Supreme Court Decision as a Secondary Authority

As the result of Thailand's great law reform, Thailand today uses the continental style of codification with supreme court decision as a secondary authority. It is a successful legal transplantation, on point of view of the author, that guarantees certain standard in law.

When it is said that Thailand uses the continental style of codification, there are four important laws to note and they are Civil and Commercial Code (as amended 1992), Criminal Code (1934), Civil Procedural Code (1934), and Criminal Procedural Code (1934), being known in the name of the four-column law[23]. The four-column law is Thailand's fundamental law and it is commonly understood as the primary source of law in the country. The law contains general principles and they are comprehensively relevant in content especially in the Thai CCC. The Thai CCC contains six chapters of its main provisions and comprising of 1,755 provisions. It starts from Law of Person in Chapter 1, Law of Obligation in Chapter 2, Law of Specific Contracts (i.e. sale, exchange, hires, agency, carriage, suretyship, partnership and company and etc.) in Chapter 3, Law of Property in Chapter 4, Law of Family in Chapter 5, and Law of Succession in Chapter 6. From birth to death, all provisions in the law are logically and systematically connected and layout almost all singular activities of humanity we regularly see in life.

Also, it is worth to mention that though Thailand is a civil law country, norm and custom somehow play role in Thai law. The system recognizes custom as a source of written law that influences behaviors of people especially in commerce and trade that one may conclude its supplementary function similar to the French[24]. According to Article 4 in the General Provision section of the Thai CCC, "the law must be applied in all cases which *comes within the letter and spirit of any of its provision* (par.1). Where no provision is applicable, the case shall be decided according to *local custom* (par. 2). If there is no such

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21 *See* Part II: THAILAND LEGAL SYSTEM: THE CONTINENTAL STYLE OF CODIFICATION WITH SUPREME COURT DECISION AS A SECONDARY AUTHORITY.

22 *See* Part III: THAILAND LEGAL EDUCATION.

23 Sometimes called the "four-pillar law".

24 Prasitmonthon, *supra* note 6, at 3.

local custom, the case shall be decided by *analogy to the provision most nearly applicable*, and, in default of such provision, by the *general principles of law* (par. 3)" (emphasis added), the provision shows its order and choices of law to be applied to a case. While one may view this customary law as a shadow of written law in the Thai code[25], the author sees this as one of uniqueness in the Thai system to fix loophole in law in addition to the supreme court decision that is respected as a secondary authority.

Though Thailand upholds its civil law style of codification that sources of law are from acts, statutes, and regulations, the country also gives importance to the published supreme court decisions that frequently used as a guide to how court interprets written law. It reveals likelihood of success in a litigation that Thai lawyers, by analogy, can explore possibility and potentiality in reasoning to oppose or argue disputes. Unlike the common law system, the supreme court decision in the Thai case is by no mean treated as a precedent and it is not uncommon to observe that courts in Thailand are not bound by the formers in making their decisions.

Thus, to study law, students in law school in Thailand will generally be required to primarily emphasize on written law to fully understand its meaning, its gist and its objectives and to further be required to review the supreme court decisions to apprehend her interpretation to properly apply law with the case, together with customary law and general principles that all law students should be familiar.

Therefore, sources of law in Thailand, if to be ranked according to its hierarchy, will start from the Constitution which holds its superlative authority to the codified law (including the four-column law), Acts, Royal Ordinance (Emergency Decree), Decree, and Ministerial Regulations and announces. As global community is getting lack of boundary driven by trade (both goods and services) and investment, with proliferation of bilateral, regional and multilateral trade agreements (i.e. free trade agreement—FTA), Thailand is more in touch with international laws and its international obligations which require domestic implementation and legislation. Some aspects of law, specially commercial law, then became even more internationalized and standardized that the same regulations can probably be found in both Thailand and Europe (i.e. intellectual property law). Usually, this sort of law will be promulgated in a form of an act or a decree which requires less time consumption in its implementation. Once the law is getting more harmonized, Thai laws will then be more universal.

[25] *Id.*

# III Thailand Legal Education

## A. Legal Study in Thailand

To conform with international standard of legal education, Thai legal study is currently under control of the Office of Higher Education Commission or OHEC under the Ministry of Higher Education, Science, Research and Innovation[26]. By law, the Commission is responsible in managing higher education provision and promoting higher education development on the basis of academic freedom and excellence that may occasionally formulate policy, develop and set higher education standards and/or recommendations to universities in Thailand. Each year, school of law, as an operating and working unit in a university, will be periodically evaluated its performance outcome on the quality in providing educational service that its management will be closely monitored and inspected. Their mandates are said to be for conveying higher education development policies and plans that correspond to the National Economic and Social Development Plan and National Education Plan that wholly require proper management[27].

However, back in the past, after the reform in 1891, law school in Thailand was under management of the Ministry of Justice. As a college, in 1933, King Rama VII decided to declare a royal decree to established law school as a faculty in university. First, it was announced as the Faculty of Law and Political Science in Chulalongkorn University which was originally instituted in 1933. Later in 1934, the school was transferred to be a part of Thammasat and Political Science University. For about 14 years during 1934 to 1948, there was only one legal study institution in land before the second law school was established in Chulalongkorn University in 1951[28].

Today (2019), there are about 101 law schools in Thailand that are ratified by the Thai Bar Association that provide legal education service for undergraduates[29]. Among these, there are 18 public universities, 33 private universities, and 38 rajaphat universities that all

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[26] The Office of Higher Education Commission was previously under control of the Ministry of Education but latterly reorganized, by virtue of the Reorganization of Ministry, Sub-Ministry, and Development Act (No. 19) B.E. 2562 (2019) and the Ministry of Higher Education Commission, Science, Research and Innovation Administration Act B.E. 2562 (2019), to be under control of the Ministry of Higher Education, Science and Technology.

[27] The Office of the Higher Education Commission, *About Us*, *available at* http://inter.mua.go.th/about-us-ohec/ (last visited Feb. 20, 2019).

[28] Ariyanuntaka, *supra* note 2, at 156-157.

[29] The Institute of Legal Education of Thai Bar Association, *List of Law Schools to be Qualified for Admission to the Institute of Legal Education of Thai Bar Association* (2018), *available at* http://www.thethaibar.or.th/thaibarweb/files/Data_web/3_%20Kong_Borikan/thabian_naksueksa/un_thethabar122018.pdf (last visited Feb. 20, 2019).

share the number[30]. Of the 18 public universities, there are two open-state universities, Ramkhamhaeng and Sukhothai Universities, which provide remote learning to students who are interested in their courses but have no opportunity to enroll as a full time[31].

At present, legal study in Thailand under the undergraduate level is comprised of 4-year standard study that is divided into eight terms. In these eight terms, with summer term as an option, students will generally be required to learn basic laws to found basis that later be used in their career. The curriculum will normally focus on the preparation of law students for legal practice[32], so the teaching and learning in Thailand will mostly emphasize on the lecture given before a massive number of students[33]. However, the author now more observes a modern style of education in teaching and learning that in-class discussion and workshop are also available in law schools.

Recently, as global and career markets have changed, needs of consumers are no longer limited to work in supply only the Thai judiciary but also to supply business. Curriculums designed by each school have been moving from traditional or conservative module to modern state of student center where needs of stakeholders are more paid respect. It observed that apart from the basic laws that students need to learn, including the four-column law that dominates most of the courses in law program, there are more courses on business now available to muster up students to several areas of expertise. Most of these courses are a free elective course that usually provide in the third or fourth academic year to follow global trends. Generally, students will be free to choose any courses to enroll in the third or fourth year subject to their interests.

Seemingly that after the One-Belt One Road policy were initiated by China and ASEAN's (or even Asian) trade and investment became liberalized, pragmatism again starts booming among educators in Thailand that the curriculum in recent years has moved toward practices. As Thailand lives in a splendid geography, courses like logistics, ASEAN law, intellectual property, media and telecommunication and more are observed to have been included in many institutions' syllabus to add values. However, none can likely, in return repay hands-on experiences to students as the matter of fact that institutions lack of expertise and practical lecturers. Sad but true, by being restricted according to the OHEC regulations on the qualification of part-time lecturers[34] and the attitude of Thais towards teachers[35], will there be any legal practitioners swopping their seats from law firms to law

30 They were formerly a teacher college.
31 Ariyanuntaka, *supra* note 2, at 157.
32 *Id*. at 186.
33 *Id.*
34 *See* Part III. B. QUALITY ASSURANCE IN LEGAL EDUCATION.
35 Thai people tend to view that teaching career is somehow way behind doctors, engineers, technicians, and lawyers, which are well credited and more in favor in the country. As the consequence, teachers are

schools in universities if their salaries can possibly be cut for two-third? If yes, there will be very few in number. Though the author is one of them, comparing to those who swop from academia to a firm, the number of these niche lecturers are now in need to put Thailand's legal education competitive in the world of free market.

According to the regulation of OHEC which requires more "qualified" career-professors or a full-time lecturer to be responsible in law programs[36], by applying Western style of education, universities in Thailand are living in a difficult situation to employ these people who are perfectly equipped with perfect qualifications on research, academic work, and practical skills, against the low payment given in return. Opportunity to employ judges and public prosecutors as a part-time lecturer that used to be available is more or less desperately shut out because of their failure to meet this academic requirement.

On top of that, along with the less-born-child phenomenon in Asia, Thai universities moreover have to fight and struggle with the decreasing number of new-born child. Various courses in the law programs now attempt to attract high school students to be in their campuses. There are several numbers of law course that now offer legal study in English[37], in bilingual (Thai-English)[38], and major number in Thai[39]. Many of them now partner their courses with oversea universities[40]. The total number of credits required for graduation is generally between 135 to 145 credits. In general, to be a candidate for admission to law school in a university, student is required to complete his/her high school or M.6[41] (Senior High School) degree or any equivalents. Students will also be required to take the National Assessment and Educational Test on graduating from high school (Central Admission System)[42] and/or direct entrance examination (Direct Admission System)[43], which is now available a number of times a year (together called the "Admission Test"), to gain certain scores to be admitted. Sometime students are also required to pass an interview and/or

paid much more lower in return though their jobs are actually about nurturing and founding children to be a quality citizen.

36 *See* Part III. B. QUALITY ASSURANCE IN LEGAL EDUCATION.

37 The entire LL.B. program is wholly conducted in English.

38 The main courses offered in the LL.B. program are conducted in Thai with some business law courses (or specialist courses) conducted in English.

39 The entire LL.B. program is wholly conducted in Thai.

40 Sakda Thanitcul, *ASEAN Charter and Legal education in Thailand* (2009), at 7, *available at* http://www.aseanlawassociation.org/10GAdocs/Thailand1.pdf (last visited Feb. 20, 2019).

41 M.6 is a senior high school degree in Thailand which is equivalent to the high school diploma (Grade 12) in the US.

42 National Assessment and Educational Test is administered, monitored, and conducted by the National Institute of Educational Testing Service (Public Organization)—NIETS. The test includes O-Net, GAT, and PAT. For more info., please see http://www.niets.or.th/en/.

43 The current admission system in Thailand now work in parallel between i) the National Assessment and Educational Test which accounts students a certain proportion of admission score and ii) the Direct Entrance Examination to be organized by each individual university, together with an interview or attitude test (if any).

attitude test (if any) subjected to regulation of each university[44].

In order to exhibit the curriculums presently used in universities as a prerequisite to pursue law careers in Thailand, the author deems appropriate to pick up curriculums of these three notable universities to discuss and to merely focus on the undergraduate program of law study (LL.B.) as long discussion of all the programs in a publication may sound impossible and inappropriate.

## 1. Bachelor of Laws Program in Thai

### Chulalongkorn University ("CU Law")

In the light of the CU Law's mission to produce quality graduates who both own legal knowledge and morality that will generate academic works and researches for national development and to become one of the leading universities in Asia[45], the LL.B program currently available in the undergraduate level of law study in Chulalongkorn is designed to target on two groups of students[46]; i) a new fresh high school graduate (high school diploma or M.6) and ii) graduate with bachelor's degree from other fields. Whilst the first is aimed to produce new lawyers, judges, and public prosecutors to supply to law market and required to pass the Admission Test[47], the latter is aimed to produce a multi-skill lawyers who can comprehensively apply law in their fields of knowledge and view law as a practical tool to serve their careers[48]. Similar to the American system, law in this case is seen as a professional subject. Students are required to take only the Direct Entrance Examination to be admitted to the school.

The general LL.B. program of the CU Law requires a period of four year study or eight studying semesters for full-time students whereas the minimal period shall not be less than seven semesters and the maximum period not more than 16 semesters[49]. One academic year is consisted of two semesters; first (from January to May) and second (from August to December) semesters, and a summer semester as an interval term (from June to July). According to the system, each semester has 15 weeks of study but the summer term

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44 Ariyanuntaka, *supra* note 2, at 157-158. *See also* Triamanuruck, Phongpala, and Chaiyasuta, *Overview of Legal Systems in Asia-Pacific Region: Thailand*, *in* OVERVIEW OF LEGAL SYSTEMS IN ASIA-PACIFIC REGION 5 (the Conferences, Lecturers, and Workshops at Scholarship@Cornell Law: Digital Repository ed., 2004).

45 Faculty of Law Chulalongkorn University, *Bachelor of Laws Program-Structure* (2015), *available at* http://www.law.chula.ac.th/home/page.aspx?id=57 (last visited Feb. 20, 2019).

46 Information as of January 29, 2019.

47 *See supra* note 45.

48 Faculty of Law Chulalongkorn University, *Bachelor of Laws Program (Special Program for Graduates from Other Fields)-Structure* (2015), *available at* http://www.law.chula.ac.th/home/page.aspx?id=71 (last visited Feb. 20, 2019).

49 *See supra* note 45.

is very much shorter to only six studying weeks.

To be qualified for graduation, students are required to enroll not more than 22 credits or not less than nine credits per one semester and required to gain the total accumulated credits of 138 credits. In order to acquire 138 credits[50], students need to complete i) general subjects of 35 credits, ii) specific subjects of 93 credits which include a) compulsory basic legal subjects (77 credits), b) compulsory area subject (2 credits), and c) compulsory-to-choose area subjects (14 credits), and iii) noncompulsory subjects or free-elective courses of 10 credits[51].

On review of their curriculum, it is observed that most of the courses in the program are related to the four-column law and common law subjects (i.e. Tax Law, Labor Law, Administrative Law, Public and Private International Law) that Thai students are normally required to complete to later be qualified to admit to professional associations and pursue their law career. However, what may be interest to employers is likely the courses related to business law such as Law and Accounting (3404201), Economic Analysis of Laws and Implication for Business (3404202), ASEAN Law (3405201), Business Crime (3402431), Seminar on Business Law and Investment in the ASEAN Countries (3401411), Business Law in English (3401433), Contract Negotiation and Drafting (3401438), Marketing Law (3404407), International Trade Law (3405432), International Contract Law (3405433), International Business Transaction Law (3405434), International Environmental Law (3405436), International Economic Law (3405443-3405444), Introduction to Chinese Law (3404119), Law on Broadcasting and Telecommunications Business (3404406), Entertainment Law (3404413), Law on Medicine and Public Health (3404414), Mineral Resource and Petroleum Law (3404474), and Law of Technology (3404499). In parallel with language courses in French, Chinese, Japanese, English, and German that can be seen as their strengths, CU Law is, to the point of view of the author, more into private law (business law), as versus public law, as their expertise.

### Thammasat University ("TU Law")

Basing on unique history of the TU Law that has gone through a stage of political dilemma[52], that was once called "Thammasat and Political Science University", TU Law tends to focus their program more on public law if we compare with the CU Law's program. In consideration of their curriculum being now offered to law students, students are required to complete 141 credits to earn a bachelor of laws degree, and that takes

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50 *Id*.

51 *Id*. *See also* Faculty of Law Chulalongkorn University, *Bachelor of Laws Program-Course Description* (2015), *available at* http://www.law.chula.ac.th/home/page.aspx?id=59 (last visited Feb. 20, 2019).

52 Faculty of Law Thammasat University, *About Us* (2013), *available at* http://interllb.law.tu.ac.th/about-us/faculty-of-law-and-thai-society (last visited Feb. 21, 2019).

approximately four years or eight semesters to study[53]. The term starts and ends almost the same time as other law schools in Thailand, with summer term as an option for students to enroll. The maximum period for their learning is up to 14 semesters but in no case shall not less than seven[54].

Similar to the program offered in CU Law, TU Law at present also offers LL.B. program to high school graduates and graduates with bachelor's degree from any field to pursue the law degree. TU Law's LL.B has two plans as students' option. To go with Plan A, students will be able to graduate with certificate of specialization in any of the four specific fields in law (Civil Law, Commercial and Business Law, Public Law, and Legal Profession in Administration of Justice). To get the certificate, students are required to complete i) general subjects of 30 credits, ii) specific subjects of 105 credits which include a) compulsory subjects (87 credits) and b) compulsory-to-choose area subjects (18 credits), and iii) noncompulsory or free elective subjects of six credits[55]. If the certificate is not their need, students will then be free to take more free elective courses up to 24 credits, whereas the specific subjects of 105 credits will then be reduced to 87[56].

Apart from the four-column law and common law subjects available in the program, strengths of the curriculum of the TU Law, according to the author, is likely a variety of public law courses. This includes Introduction to German Legal System (LA273), Seminar on Law and State Policy on the Disable (LA279), Criminal Law Seminar (LA316), Comparative Criminal Law (LA318), Seminar: Problems in Criminal Justice (LA384), Criminal Justice (LA313), Extradition Law and Mutual Assistance in Criminal Matters (LA393), Criminal Investigation (LA485), Law of Local Administration (LA357), Law Relating to Control of the Exercise of State Power (LA254), Law Relating to Public Agents (LA255), Comparative Constitutional Law (LA258), Political Party and Electoral Law (LA354), and Law of Parliaments (LA356), just to name a few. The author yet observes that there are also several business law courses available such as Laws on Information Technology (LA363), Laws on Mass Communication and Telecommunication Business (LA433), Laws on Food and Drug (LA435), but there are very few in number. Likely, TU Law tends to be more conservative in their curriculum comparing to the curriculum of Chulalongkorn University.

To be admitted to TU Law, candidates must obtain a high school degree or a bachelor degree in any field from any recognized universities and to pass a certain score of the Admission Test[57].

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53 Faculty of Law Thammasat University, *Program Description*, at 8, *available at* https://reg.tu.ac.th/th/Picture/AttFile/c9b0a12f-81e0-4d47-92ba-079e30983576 (last visited Feb. 21, 2019).

54 *Id.*

55 *Id.*

56 *Id.* at 9.

57 *Id.* at 7-8.

## 2. Bachelor of Laws Program in Bilingual

### Assumption University of Thailand ("AU Law")

Standing as one and only private university in our three examples, Assumption University has its long history in business. Started in 1969 when the school was first established as "Assumption Commercial College" by St. Gabriel foundation, and later be upgraded to "Assumption Business Administration College or ABAC" in 1972 and to "Assumption University (AU) in 1975[58], AU has been living under shadow and fame of its business school even till the AU Law was established in 1992. Ambition of the school, as stated in its first statement, is to "produce graduates in legal profession specializing in business law"[59], that will conform to the university's long known identity and unique characteristic. AU Law's curriculum was therefore strategized to target on producing young business lawyers for local and international firms. As the law degree of AU is equally recognized by authorities, it is also optional for their graduates whether to choose and apply to take judicial exams to be public prosecutors or judges after their bar graduation.

Though, by law, the program offered by AU Law is considered as a Thai program as the Ministry of Education positioned law schools to serve local consumption on legal services and because law is deeply connected to local culture and tradition that all the programs are required to be in Thai, AU Law program is in practice bilingual and differentiated from other law courses. It on one hand contains minimum requirements of law courses in Thai language to be qualified by related Thai authorities, and on the other hand provides specialized and free elective courses, as well as general education courses, in English.

Speaking particularly on its LL.B. program, the current Program Modification B.E. 2560 (2017) at present provides i) general education courses of 30 credits, ii) specialized courses of 108 credits, and iii) free elective courses of six credits, in total 144 credits, to students[60]. Of the general education courses of 30 credits, students will have to complete English and Thai language courses of 15 credits (Thai accounts for only three credits), social science courses of nine credits and humanities courses of three credits. This includes courses such as Introduction to Economics (ECO2202), Arts of Reasoning (GE2103),

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[58] Assumption University, *History and Background* (2016), *available at* http://www.au.edu/index.php/about-au/history/1578-history-and-background-1.html (last visited Feb. 20, 2019). The University is a non-profit institution administered by the Brothers of St. Gabriel, a worldwide Catholic religious order, founded in France in 1705 by St. Louis Marie De Montfort, devoted to education and philanthropic activities. The congregation has been operating many educational institutions in Thailand since 1901.

[59] School of Law Assumption University, *History* (2015), *available at* http://www.law.au.edu/history.html (last visited Feb. 20, 2019).

[60] Assumption University, *Bulletin 2018-2019* (2019), at 244, *available at* http://www.au.edu/images/pdf/Bulletin2018-2019_001.pdf (last visited Feb. 20, 2019).

Logical Thinking and Application (GE2106), Statistics (SA1201) and so on[61]. While of the specialized courses of 108 credits, students will need to complete core law courses in Thai of 89 credits as required by professional associations, and major required courses of 13 credits, including Law on Taxation in International Trade and Investment (LL4504), Intellectual Property Law (LL4505), International Business Transaction Law (LL4506), Principles of Contract Drafting (LL4606) in English[62]. On top of that, students will be free to choose any of the free elective courses of six credits subject to their interests such as Natural Resources Law (LL4407), Broadcasting and Telecommunication Laws (LL4409), Energy and Petroleum Law (LL4410), Securities and Securities Exchange Law (LL4509), Investment Law (LL4511), International Economic Law (LL4512), Carriage of Goods by Sea Law (LL4514), Industrial Law (LL4516), Law on Real Estate Business (LL4517), Law on Fashion Business (LL4525), International Financial Law (LL4526), International Organization Law (LL4704), Introduction to Digital Technology Laws (LL4802), Business Law and ASEAN (LL4804), Law on Digital Economy and Startup Business (LL4805), Law on Agriculture (LL4806), Introduction for Logistic and Supply Chain (LL4807), Legal Aspects of Transportation and Logistics (LL4808), Business, Corporate Governance and Corporate Social Responsibility (LL4809), and so on[63]. Thus, AU Law's strength is likely on the application and practical skills of law in business in due course to the development of global and regional economy and in accordance with the university's ambition to provide scientific and humanistic knowledge in business education and management science to public[64].

To be admitted to AU Law, similar to the formers, students must have completed their high school study and pass certain score of the Admission Test as well as an interview conducted separately by the school. The entire course runs for four years which is divided into eight semesters with summer terms. The first semester starts in January and ends in May, and the second semester starts in August and ends in December. Each semester has 15 studying weeks and students are required to attend classes not less than 80 percent.

### 3. Bachelor of Laws Program in English

#### Thammasat University

International LL.B. Program in Business Law, was initially introduced by Thammasat University in 2013 and to date remains the one and only English program available in the

61 *Id*. at 244-245.
62 *Id*. at 245.
63 *Id*. at 246.
64 Assumption University, *Objectives and Policies* (2016), *available at* http://www.au.edu/index.php/about-au/history/1638-objectives-and-policies-1.html (last visited Feb. 20, 2019).

country. In order to provide domestic society an option to learn Thai law in English and supply graduates who are capable of English language to market, in the midst of global economic interdependence propelled by international trade and investment and the rise of ASEAN[65], TU Law took their initial step in exploring this niche by providing a LL.B. program entirely in English.

According to their course, students will learn laws for four years or eight semesters, plus four summer terms, that includes the basic laws, the four-column law and the common law subjects. Students are required to complete a minimum of 125 credits within seven academic years but not less than seven semesters or three years and a half to graduate. Each semester contains 15 weeks of full-time study and a summer term runs for at least six weeks[66]. To be awarded an International LL.B degree in Business Law, of the 125 credits, students are required to complete i) general education courses of 30 credits, specialized courses of 89 credits, and iii) optional or free elective courses of six credits[67]. Because the number of courses are slightly lower comparing to other law programs in other universities, there are always question and doubt on their quality posed by markets[68].

Of the general education courses of 30 credits, students will learn i) 21 credits of compulsory general education courses such as Critical Thinking, Reading and Writing (TU104), Thailand, ASEAN, and the World (TU101), and Life and Sustainability (TU103), and ii) nine credits of compulsory-to-choose general educational courses such as introduction to economics (EE210), Business Basic for Law Students (LB133), and Legal Communication Skill (LB163)[69]. And of the 89 credits of specialized courses, students will take 41 credits of the law course of which include law of the four-column and 48 credits of designated optional course. In consideration of the optional course, it is interesting to see that students are now allowed to choose 36 credits of business law course and 12 credits of non-business law course of which account a total of 48 credits freely[70]. It is also found that there are about seven courses, i.e. Family Law (LB303), Law of Succession (LB304), Law on Negotiable Instruments (LB335), Law of Evidence (LB384), Insolvency Law (LB383), Income Tax Law (LB343), Private International Law (LB393), Labor Law (LB353), and Banking and Finance Law (LB349), that students can possibly opt-out not to learn though they are normally required by institutions as they contain three main chapters of the Thai

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65 Faculty of Law Thammasat University, *Why an international LL.B.* (2013), *available at* http://interllb.law.tu.ac.th/program-overview/why-an-international-llb (last visited Feb. 20, 2019).

66 Faculty of Law Thammasat University, *Curriculum (Academic Year 2018-2022)* (2013), *available at* http://interllb.law.tu.ac.th/program-overview/curriculum-2018-2022 (last visited Feb. 20, 2019).

67 *Id*.

68 Faculty of Law Thammasat University, *Frequently Asked Questions* (2013), *available at* http://interllb.law.tu.ac.th/program-overview/frequently-asked-questions (last visited Feb. 20, 2019).

69 *See supra* note 66.

70 *Id*.

CCC that are considered as a fundamental.

Also, it is very interesting to see new courses such as Law on Information Technology (LB363), Law on Mass Communication and Telecommunication Business (LB366), Law on Real Estate Development (LB403), Principles of Tax Accounting (LB447), Tax Administration and Tax Planning (LB449), Business Negotiation (LB465), Introduction to Chinese Law (LB264), Introduction to Japanese Law (LB268), Introduction to German Law (LB267), Introduction to French Law (LB266), and Economic Analysis of Law (LB364), are now included in the law program of TU. Students are free to choose courses which are taught in English and offered by any faculty in Thammasat University to complete the rest of six credits of optional courses[71].

To be admitted to the International LL.B. Program in TU Law, it is all about the application process that is now available in three tracks. In whatever track, candidates are required to have high school certificate, pass the Admission Examinations and Selection Process which includes one written exam and an interview. They are also expected to gain a certain score of TOEFL, IELTS, or TU-GET set by the school to prove their proficiency in English language. The score lasts for two years before the application date[72].

## B. Quality Assurance in Legal Education

For the purpose of enhancing Thailand's education to live up to international standard and be universally acceptable, the National Education Act B.E. 2542 (as amended in B.E. 2445) started in 2002 introduced its quality assurance system for higher education institutions in Thailand. The scope covers law schools which provide educational services in the undergraduate level, schools of law are now therefore being bound by the standard subjected to the Ministry of Education Notification on the Undergraduate Program Standard Criteria B.E. 2558 (2015) ("2015 Notification"). To make sure that the law programs being offered by universities in Thailand will meet certain requirements on i) Regulatory Standards (curricular management in accordance with the standard criteria stipulated by OHEC), ii) Graduates (including graduate quality in accordance with the Thai qualifications framework for higher education, and graduates' employment or research output), iii) Students (student admission, student support and development, and results experienced by students), iv) Instructors (including management and development of instructors, instructor quality, and results experienced by instructors), v) Curriculum, Learning and Teaching, and Learner Assessment (including content of courses in the curriculum, establishment of an instructional system for instructors and a process for

71 *Id.*

72 Faculty of Law Thammasat University, *Admission* (2018), *available at* http://interllb.law.tu.ac.th/admissions (last visited Feb. 20, 2019).

learning and teaching, learner assessment, and curriculum operational results according to the Thai qualifications framework for higher education), and vi) Learning Resources, the six indicators are in place to be used for checking and monitoring universities' performance each year as a repeated step of PDCA system (Plan, Do, Check, Act) that will be evaluated by OHEC. The score will then be published following the evaluation. Among various rules, what are viewed important and a stumbling block for universities in running law programs is likely the Indicator No. 3.2 on Student Support and Development and No. 4.2 on Instructor Quality.

According to Article 10 of the 2015 Notification, the academic program operated by the higher education institutions must have adequate *qualified instructors* (emphasis added), given that i) "10.1.1 the program faculty member[73] must hold a master's degree or an assistant professor title and have produced, in the past five years, at least one academic work which is not a part of graduation requirements and published in accordance with the publication criteria specified for academic title appointment", and ii) "10.1.2 qualified faculty members responsible for the program[74], of at least five in number, must hold the same qualifications and academic works as specified in 10.1.1, and in case the program has more than one study track, each track must be have at least three faculty members, who hold direct or related specialization to the track, responsible for the program".

Moreover, in Article 10.1.3 (Quality of the Lecturer), the provision says "the lecturer can be either a full-time or part-time lecturer who holds at least a master's degree or an assistant professor title in the field of study or related field. Where the full-time holds merely a bachelor's degree, they can continue teaching in the program only if they have been teaching in such program before the Undergraduate Program Standard Criteria B.E. 2558 takes effect".

In the case of the part-time lecturer, they are required to have the same qualifications but if "(they) have no master's degree, they are required to have at least a bachelor's degree and have at least six years of working experience related to the course. Whatsoever the case will be, the part-time lecturer must not teach more than 50 percent of the total number of hours of a course in which a full-time lecturer is responsible for the management of the course"

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73 According to Article 4 of the 2015 Notification, the Program Faculty Member shall mean a full-time faculty member who holds a degree in the field of study or related field of study and teaches and conducts research in the field of study.

74 According to Article 4 of the 2015 Notification, the Faculty Member Responsible for the Program shall mean a program faculty member who is i) responsible for developing and managing curriculum and instruction which include planning, controlling quality, following-up, evaluating and developing, and ii) is involved throughout the implementation of the program.

As the result, law schools are now living in difficulty in managing their programs to meet the requirements, especially to recruit an adequate number of qualified members who have practical skills to work. Despite the unlikelihood of possibility that practical lawyers will switch to work in academics, many of them obtain only a bachelor degree though they have great numbers of years of practical experience. They are hence unqualified to teach and pass on their knowledge even as a part-time. In some courses that are very practical such as Contract Drafting or Counselling and Advocacy that probably require no theory but a workshop, part-time lecturers are not allowed to conduct more than half of the course.

Also, though there is an exception clause to Article 10.1.2, provided in its last par. that "in case the program is unable to complete the number of faculty members responsible for the program, the University may propose the appropriate number and qualifications of faculty members responsible for the program to OHEC for approval", this is yet not easy and subjected to consideration and discretion of OHEC on case by case basis. Not to mention that there are likely only three international journals in law that are qualified and recognized by OHEC according to the publication criteria stated in OHEC's Regulations on Academic Title Appointment B.E. 2556[75], nuisance in their program management is even more severe in the master of laws program where its requirements on qualified instructors are much stricter; and they are the requirements on the number of academic work to be published per year and the level of academic title of thesis/independent study advisors and program faculty members according to Article 10.3 of the Ministry of Education Notification on the Graduate Program Standard Criteria B.E. 2558. Nevertheless, it is out of scope of this paper to further discuss.

By taking Thai history in the introduction part into consideration, likely, law schools in Thailand are more into teaching rather than producing research.

# IV Professional Associations

## A. Thailand Lawyers' Council under the Royal Patronage

In speaking of Thai legal education, it will be incomplete if this paper ignores mentioning the function of the two Thai professional associations, the Thai Lawyers' Council and the Thai Bar, in legal training.

Following jurisprudential study in law school, Thailand Lawyers' Council will provide professional training to transform law school graduates to be a lawyer. According to Article 4 of the Lawyers Act B.E. 2528 (1985), lawyer is defined as "a person who *has*

[75] This is to note that among the 19 international journals listed in the exhibit to OHEC's Regulations on Academic Title Appointment B.E. 2556, there are likely only three journals in law, including Scopus and Social Science Research Network, being qualified and recognized by the commission.

*been registered as a lawyer*, and *a license has been issued* to him or her by the Lawyers Council (emphasis added). Therefore, by law, there can be no one being a lawyer or practicing law in Thailand without i) a law degree, ii) having registered with the Lawyers' Council, and iii) obtaining a license to practice. Unlike the United Kingdom, lawyers in Thailand are not divided into barristers and solicitors, nor are required to pass a bar exam as they would be required in the United States[76].

In order to be registered and obtain a lawyer's license, an individual must meet certain educational requirements and that requires i) an LL.B or an associate degree or a certificate in law equivalent to an LL.B. or an associate degree from an educational institution accredited by the Thai Lawyers' Council, and ii) completion of training in professional ethics and basic principles of advocacy and legal profession[77]. The training, which is run by the Institute of Law Practice Training of the Lawyer's Council, is divided into two stages. In the first stage, the candidate will be required to learn the theory of case conduct and professional ethics for not less than 90 hours and will subsequently be required to pass the test at the end of the term. Then in the second stage, the candidate will be required to have an internship in a qualified law firm. After six months (at least) of actual training, the candidate will need to apply their knowledge in the second test before he or she is qualified to a lawyer's license[78].

It is also important to note that to be a lawyer, the profession is by law restricted and reserved to only Thais[79]. According to Thailand's Foreign Business Act B.E. 2542 (1999), legal service business is the business which Thai national is not ready to compete with foreigners subject to the List No. 3[80]. Foreign citizens are therefore being prohibited to operate legal service unless permission is granted by the Director-General[81].

By law, the lawyer's license is valid for two years from the date of issuance and it subjects to renewal 90 days prior to its expiration. To avoid any interruption[82], it is optional for Thai lawyers to apply for a lifetime membership[83].

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76 Charunun Sathitsuksomboon, *Thailand's Legal System: Requirements, Practice, and Ethical Conduct*, *available at* http://thailawforum.com/articles/charununlegal.html (last visited Feb. 20, 2019).

77 *Id. See also* Section 35 of the Lawyers Act B.E. 2528.

78 Sathitsuksomboon, *supra* note 76.

79 Section 35 of the Lawyers Act B.E. 2528.

80 Thailand Foreign Business Act art. 4 provides: "Foreigner means (1) natural person not of Thai nationality; (2) juristic person not registered in Thailand…".

81 Article 8 of the Foreign Business Act B.E. 2542.

82 The Lawyers Act B.E. 2528 art. 44 provides: "The lawyer title can be ceased upon terminated by (1) death; (2) notification of his termination of practice; (3) failure to renew his license…".

83 Section 39 of the Lawyers Act B.E. 2528.

## B. Thai Bar Association

While in Thailand, lawyer's license is an essential requirement to practice law and be a lawyer, the Thai Bar is on the other hand a prerequisite to become public prosecutor or a judge. As such, the lectures in Thai Bar more focus on decisions of the supreme court and analysis on the analogy and the court's arguments. This attracts many legal practitioners to enroll for the course to gain more knowledge in law though they may not run for judicial exams in the end.

Rather than producing personals to serve judiciary in the Ministry of Justice in the old day[84], the operation of the Thai Bar Association nowadays focuses more on promotion of education and knowledge of legal practice for law practitioners[85]. This aim was stated in the objective of establishment of the Legal Education Institute of the Thai Bar Association that was accorded to the Agreement of the International Bar Association in which Thailand is a member. It was the consensus of the International Bar Association which was held in Hague, Netherlands, in 1948[86].

At present, to be qualified as a candidate to apply to study in Thai Bar, the applicant must be a person who graduates with Bachelor of Laws degree from universities in Thailand or overseas and passes an examination to the standard stipulated by the Legal Study Committee of the Bar according to Article 56 of the Thai Bar Association Regulation B.E. 2507 (1964) ("1964 Regulation").

Subject to the Rule of the Thai Bar Association on Student Registration, Teaching and Learning, Examinations, and Disciplines and Ethics B.E. 2507 (1964), Article 5 states that the curriculum of study is comprised of two semesters and two written exams. In Article 5 par. 2, it states that the first semester begins in June and ends in September and the second semester begins in December and ends in March. The written exam is held at the time in between.

Time of teaching in the Thai Bar is between 8.00 to 16.30 of the normal class and from 17.00 to 20.00 of the evening class but class attendance is not a requirement. Students are permitted to study at home[87].

According to Article 8 of the Rule, in the first semester, students will study criminal and civil and commercial law course. It includes labor law, criminal law, administrative law, civil law on property, juristic act, obligation, torts, sales, exchange, gift, hire of property, hire-purchase, hire of labor, hire of service, loan, deposit, suretyship, mortgage,

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84 *See* Part I: INTRODUCTION TO THAI LEGAL SYSTEM AND ITS LEGAL EDUCATION.

85 Ariyanuntaka, *supra* note 2, at 149. *See also* Sathitsuksomboon, *supra* note 76.

86 Ariyanuntaka, *supra* note 2, at 149.

87 *Id*. at 170.

pledge, agency, broker, bill, partnership and company, family, succession, tax law, land law, intellectual property law and international law, of which account 20 questions in the final test. And in the second semester, students will study on criminal and civil procedural law, which includes bankruptcy law, civil procedural law, criminal procedural law, constitution of the court of justice, trial procedure in juvenile and family court, evidence law and litigation and witness examining practices, of which account another 20 questions in the second test[88]. If students can pass all the tests, they will then be qualified to take an oral test before being entitled to Barrister-at-Law degree[89]. Later, they will then be qualified to apply for a judicial recruitment, either to be a judge or public prosecutor, of course if they are willing to be.

Apparently, the way of learning and testing law students in legal education of Thai Bar can be differentiated from those in universities as its curriculum focuses more on professional training and the supreme court decisions as a secondary authority that are commonly *respected* by judges in lower courts (emphasis added).

According to Article 3 of the 1964 Regulation, membership of the Thai Bar Association are of five different classes; they are ordinary membership, extraordinary membership, associate membership [90], auxiliary membership [91], and honorary membership[92]. Whilst all registered lawyers in Thailand, by virtue of the Lawyers Act B.E. 2528, are admitted to extraordinary membership, only students who pass all the requirements that earlier stated will then possibly be admitted to the ordinary member of the Bar.

# V Conclusion

Said Honorable Judge Vichai, “the appropriate lawyer is compared with social architect or engineer. He or she should have very keen legal knowledge in particular area. Economic, social, and politic matters will be important for all lawyers to understand the situations and its implications. Lawyers, therefore, will be able to manage to establish justice in the society, which is the step toward elevating quality and integrity of Thai community. Lawyers should be able to protect state interest and sovereignty”[93]. To be a

88 *Id*.

89 Sathitsuksomboon, *supra* note 76.

90 Associate membership is for a second-class lawyer that was first originated by virtue of the Lawyers Act B.E. 2508. After the enforcement of the Lawyers Act B.E. 2528, the second-class lawyer was then abolished.

91 Auxiliary membership is for students of the Institute of Legal Education of the Thai Bar Association.

92 Honorary membership is given to any distinguished person with extensive knowledge of legal or political science.

93 Ariyanuntaka, *supra* note 2, at 175.

great lawyer, as a social engineer who shapes and keeps proper structure of local society stated by Pound, it is the matter of nonstop learning and well-rounded knowledge that legal education is a big and significant part of entire effort and contribution of institutions and professional associations in the country. To certain point, the current education system in Thailand is, by point of view of the author, already well designed to prepare law students to the path though it had sometime struggled with political and social changes. The country yet needs great lawyers to sustain its “modernity”. The choice is nonetheless in hands of all legal practitioners, including educators, in land.

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# 論有限公司監察權行使之權利義務主體*

曾允君** 撰

## 目 次



* 投稿日期：2019 年 1 月 21 日；接受刊登日期：2019 年 2 月 18 日。
** 執業律師；國立臺北大學法律學系財經法組碩士。

# 摘　要

有限公司係兼具資合性、閉鎖性及經營與所有合一等特性之公司型態。於兼顧此等特性下，應將公司監督機制之核心即監察權賦予非董事之股東，使其成為監察權之權利主體，不因其是否兼任經理人或實際執行公司業務而異；並應區分查核權與質詢權等不同監察權內涵，分別向公司及特定董事等義務主體行使，以符合法體系之一貫。

**關鍵詞：**有限公司、監察權、不執行業務股東、經營與所有合一、資合公司

# 壹、前言

有限公司為眾多投資人或創業者所選擇採用之組織態樣，為建立對業務經營者之良好制衡及投資人保護，公司法（下未指明者同）第 109 條設有監察權之規範，使不執行業務股東得行使而監督董事業務之執行。惟因第 109 條規範文義易生解釋上疑義，致實務操作上迭生得行使監察權之主體是否包括兼任經理人或實際執行董事職務之股東，抑或監察權行使之對象是否應為公司而非董事等不同面向之爭議，後者則每經被告以當事人不適格為抗辯；又此等爭議甚常見上下級審法院持不同見解之狀況，前者得以最高法院 107 年度台上字第 1608 號民事判決、後者得以最高法院 105 年度台上字第 241 號民事判決為適例，實具有相當實務重要性，然學說討論相對較少。是以，擬試以有限公司本質出發，就監察權行使之權利及義務主體等二面向爭議為探討分析，以為拋磚。

# 貳、有限公司組織性質及監察權規範流變

於就核心議題為分析前，擬先建立分析基礎，即先探討有限公司之組織性質及監察權規範之流變，以利後續解釋適用。

## 一、有限公司之組織性質

學理上就公司之分類有採取以公司之信用作為標準，區分為人合公司（著重股東個人條件）、資合公司（著重公司財產數額）及中間公司等[1]。就有限公司而言，公司法現行所設規範架構下，並無法使之當然如股份有限公司般歸於資合公司，亦無法如無限公司般歸於人合公司，應屬於中間公司類型。惟就制度設計或規範適用上，究應將有限公司朝資合公司或人合公司性質認定，或有不同見解。

對此，有學說認為因有限公司之股東責任係採間接有限責任，致其經濟活動著重於公司財產多寡，且公司會計等制度多準用股份有限公司（第 110 條），是應屬偏資合之中間公司[2]。又，有學者認為有限公司之立法目的係為創造由少數有限責任股東組成之閉鎖性公司，據此宜認為我國公司法制規範設計上，除維持閉鎖性而具必要性者外，其餘應以資合公司本質為主[3]。相同的，有學者更具體指出，所謂資合與人合區分之基礎，應在於股東是否對公司債務負直接無限清償責任，而有限公司股東僅負間接有限責任，本質上應屬資合公司；至因公司法所設出資轉讓限制等規範而生人合性特質，僅係為便利共同經營事業而具信賴關係之少數人間和諧之閉鎖性需求所致，可謂有限公司性質上仍屬「閉鎖性資合公司」而非「股東負有限責任之人合公司」，是除維持閉鎖性有必要外，公司法上具人合公司色彩之條文，均應

1 柯芳枝（2015），《公司法論（上）》，修訂 9 版，頁 9。
2 柯芳枝，前揭註 1，頁 11。
3 劉連煜（2010），〈有限公司之資合與人合性質及相關立法之趨勢〉，《月旦法學教室》，89 期，頁 28。

予以檢討修正，以回歸資合公司本質[4]。此外，實務見解亦有表示：「在學理上依公司經濟活動之信用基礎所在為何，可區分為人合公司及資合公司，而資合公司者，其公司之經濟活動著重於公司財產數額，並不注重股東個人條件，公司債權人所恃以安心與之交易者，唯在於公司本身所擁有之財產，公司股東對公司債務概不負擔任何責任。……有限公司經濟活動之信用基礎，仍在於公司本身之財產，是以此類公司在屬性上應屬資合公司」者（臺灣高等法院暨所屬法院 97 年法律座談會民事類提案第 19 號參照）[5]。據上，可謂此等說法係認定有限公司係偏人合性質之中間公司，或應屬資合公司。

相反的，有見解逕認為有限公司與無限公司同為人合公司（臺灣高等法院高雄分院 104 年度上字第 66 號民事判決參照）[6]，或認為有限公司屬偏人合性之中間公司者[7]。有認為雖有限公司基礎為資本結合之有限責任而具資合性，惟因其閉鎖性組織構造形成著重股東個人特質及相互信任，本質上仍係採取企業所有與經營合一，是於組織型態上應認屬人合性組織[8]。亦有學者從德國法上考究有限公司之性質，並指出有限公司之產生係純目的性之立法產物，意在創設比股份有限公司組成員少、資本結構小，惟具有獨立法人格且屬有限責任之公司形態，是有限公司雖以資合公司為本，惟卻深具人合公司特質，股東間具緊密之信賴關係，而屬人合的資合公司（die personalistische Kapitalgesellschaft）[9]。據上，可謂此等說法係認定有限公司係偏人合性質之中間公司，或應屬人合公司。

除上述見解外，實務見解似多採取區分資本與組織等不同面向，認為有限公司兼具資合及人合性質而非偏重何方之見解，即認為：「有限公司具有人合公司與資合公司雙重性格；在股東彼此間之關係，偏重於人合公司之色彩，在公司資本方面，偏重於資合公司之色彩，因而股份有限公司之資本三原則（即資本確定、維持、不變原則），在有限公司亦有其適用。」（77 年 7 月 29 日法務部（77）法律字第 12471 號函參照）[10]，晚近最高法院亦有明確表示：「按有限公司係由一人以上

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4 林國全（2002），〈有限公司法制應修正方向之探討〉，《月旦法學雜誌》，90 期，頁 201-202。

5 相同見解，參臺灣高等法院 97 年度上字第 413 號民事判決、臺灣桃園地方法院 97 年度訴字第 195 號民事判決、臺灣臺北地方法院 97 年度審訴字第 302 號民事判決等。

6 王仁宏（1992），〈有限公司債權人與少數股東之保護的現行法檢討及修正建議〉，《國立臺灣大學法學論叢》，21 卷 2 期，頁 254。

7 林咏榮（1993），〈兩岸有限公司法的比較與檢討〉，《法令月刊》，44 卷 6 期，頁 229。似採相類見解者，如最高法院 80 年度台上字第 161 號民事判決即謂：「有限公司並非如股份有限公司純為資合公司之性質，而兼有人合公司之色彩；且有限公司亦非如股份有限公司為大眾化之公司，通常係由少數親朋好友醵資所設立經營之小規模企業」。

8 廖大穎（2016），《公司法原論》，增訂 7 版，頁 19-20。

9 楊君仁（2015），〈不執行業務股東兼任經理人者之監察權行使——以請求權基礎之方法探討〉，《世新法學》，8 卷 2 期，頁 220。

10 其餘採相同見解者，參臺灣高等法院臺南分院 104 年度上字第 49 號、92 年度上字第 240 號民事判決、臺灣臺北地方法院 99 年度訴字第 1831 號民事判決、臺灣彰化地方法院北斗簡易庭 105 年度斗簡字第 206 號民事判決、臺灣高雄地方法院 101 年度司字第 25 號、101 年度抗字第 224 號民事裁定、臺灣花蓮地方法院 89 年度訴字第 283 號民事判決等等。

之股東組成，就其出資額為限，對公司之債務負有限責任之營利社團法人（公司法第 1 條、第 2 條第 1 項第 2 款、第 98 條第 1 項參照）。乃冶人合與資合兩種公司之特徵於一爐，以利中小企業或家族性公司之經營。股東間關係存在彼此信賴因素，具有閉鎖性、非公開性及設立程序簡易性之特性。」（最高法院 107 年度台上字第 1800 民事判決參照），併此列明。

據上，有限公司組織型態應屬人合抑或資合性質，因涉及解釋目的，應有釐清必要。對此，鑑於學理上區別資合或人合之標準，係以公司經濟活動之信用基礎為本，而有限公司係以各股東之出資額為信用基礎，各股東並不負直接無限責任（第 99 條參照），自係以資合公司為其本質，此由有限公司不得變更為典型人合公司即無限公司[11]，即可見一斑。惟有限公司因其閉鎖及經營與所有合一[12]之特性（第 108 條第 1 項、第 111 條參照），係多數資本結構單純且成員少數之事業慣於利用之公司型態，屬其獨特於典型資合公司即股份有限公司（包括閉鎖性股份有限公司）之重要特質，是就上開學說中有謂有限公司性質上應屬「閉鎖性資合公司」之見解，敬表同意，即於公司大眾化[13]需求產生前，介於閉鎖性股份有限公司（閉鎖性資合公司、經營與所有分離）及無限公司（人合公司、經營與所有合一）間，兼具資合性、閉鎖性及經營與所有合一等特性之有限公司，或不失為小規模事業體發展事業之選擇[14]，亦因此於現行規範有適用疑義時，仍應以此等特性為解釋依歸並為修法方向，始切其本質。

## 二、有限公司業務經營與監察制度之沿革

有限公司之業務經營與監察主要係藉第 108 條及第 109 條等二條文為規範，而此二規範於民國（下同）69 年 5 月 9 日公司法修正時有較大幅度之調整，即將原先採取之「執行業務股東」及「董監事」雙軌制變更為單獨採行「董監事」之單軌制。

申言之，69 年修正前之第 108 條係採取「執行業務股東」及「董監事」雙軌制，容許股東得以章程特定股東一人或數人作為「執行業務股東」執行業務，執行業務之權限及方式則準用無限公司章相關規定；或得選任「董事」執行業務，執行

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11 經濟部（72）商字第 27847 號函、（90）商字第 09000089480 號函；廖大穎，前揭註 8，頁 101。

12 就公司經營與所有分合之討論，可參賴英照（1983），〈企業所有與企業經營之分合〉，《法學叢刊》，28 卷 4 期，頁 26-36；邵慶平（2008），〈論股份有限公司（法制）中所有與經營的合一與分離〉，《公司法——組織與契約之間》，頁 68-82。美國學者對此議題早期所做的實證研究，各得出不同之結論，詳細可參EDWARD S. HERMAN, CORPORATE CONTROL, CORPORATE POWER: A TWENTIETH CENTURY FUND STUDY 86-87 (1981); Joseph Monsen, John S. Chin & David E. Coaley, *The Effects of Separation of Ownership and Control on the Performance of the Large Firm*, 82 Q. J. ECON. 435 (1968)。

13 劉連煜（2016），《現代公司法》，增訂 12 版，頁 208。

14 就經營與所有採取合一或分離何者為佳，或有異見，有學者認為應由公司自行選擇者，參劉連煜，前揭註 13，頁 240；劉連煜（1995），〈超越企業所有與企業經營分離原則——強制機構投資人分散持股規定的檢討〉，《公司法理論與判決研究（一）》，頁 22。

業務之權限及方式則準用股份有限公司董事之規定[15]。相同的，公司業務之監察，亦區分為「不執行業務股東」或經選任之「監察人」雙軌，前者準用無限公司章之第48 條，後者準用股份有限公司監察人之規定[16]。於 69 年修正時，立法者慮及雙軌制下分別準用不同規定之結果，將「使兩者在法律上之地位不同，造成有限公司組織形態之紛歧，為簡化有限公司之組織，並強化其執行機關之功能，爰將『執行業務股東』及『董監事』雙軌制予以廢除，改採『董事』單軌制，以『董事』取代『執行業務股東』之地位，至少設董事一人，最多設三人，並準用無限公司之有關規定，而不再準用股份有限公司之有關規定」，並表明「非董事之股東，均得行使監察權，故無監察人之設置。」[17]，復將第 109 條「配合第一百零八條有限公司採董事單軌制之修正，準用無限公司之有關規定，不再準用股份有限公司之有關規定，有限公司監察人制度宜予廢除」，而刪除監察人選任及準用股份有限公司等規範內容（69 年公司法修正理由參照）。

是以，參諸上開立法沿革，可謂立法者將公司法就有限公司之原有組織設計，即「董事搭配監察人」準用股份有限公司章規範、「執行業務股東搭配不執行業務股東」準用無限公司章規範之雙軌選擇制，變更為「董事搭配不執行業務股東」準用無限公司章規範之單軌制。據立法理由，現行有限公司組織架構下，係由股東選任董事負責經營端之業務執行權，而非董事之股東則得取得監察端之監察權，並一律準用無限公司章之規定形成各該權利之內容，故有學者謂現行有限公司經營機關係「形式董事執行業務股東單軌制」[18]。

## 參、監察權行使之權利義務主體

建立分析基礎後，即可各別針對監察權行使之權利及義務主體為分析。

### 一、監察權行使之權利主體

就監察權行使主體，主要涉及之議題為執行部分業務之股東，是否仍屬第 109 條所稱「不執行業務之股東」而得行使監察權之問題，紛陳說法得大致歸納為形式認定說及實質認定說等，說明如下，並就之為分析。

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15 69 年修正前第 108 條：「公司章程訂明專由股東中之一人或數人執行業務時，準用第四十五條、第四十六條、第四十九條至第五十三條、第五十六條至第五十九條及第二百十一條之規定。公司股東選任董事執行業務者，準用股份有限公司董事之規定。第五十四條第二項、第三項之規定，於董事或執行業務之股東準用之。」

16 69 年修正前第 109 條：「公司不執行業務之股東，均得行使監察權，其監察權之行使準用第四十八條之規定。公司股東選有監察人者，準用股份有限公司監察人之規定。」

17 立法院公報，68 卷 87 期（院會紀錄），頁 25。

18 林國全，前揭註 4，頁 202。

## （一）形式認定說

### 1. 實務見解

除少數實務見解未附理由逕表示「公司法所謂不執行業務之股東，係指非董事之股東」者（最高法院 97 年度台上字第 467 號民事裁定參照）外，多數採此說之見解，係以公司法第 108 條及第 109 條於 69 年 5 月 9 日修正之理由及文義，將有限公司之成員大別為董事及非董事二類，認定前者為執行業務股東，後者均屬不執行業務股東而得行使監察權。此得以最高法院 107 年度台上字第 1608 號民事判決為例，即其認為：「按有限公司應至少置董事 1 人執行業務並代表公司，最多置董事 3 人，應經股東表決權 3 分之 2 以上之同意，就有行為能力之股東中選任之。不執行業務之股東，均得行使監察權；其監察權之行使，準用公司法第 48 條之規定。同法第 108 條第 1 項前段、第 109 條分別定有明文。又 69 年 5 月 9 日修正上開條文時，其立法理由為：『……』，是所謂有限公司之不執行業務股東，係指非董事之股東而言。」[19]，亦有更明確據此指出：「現行公司法就有限公司之組織言，係由『董事』執行公司業務，並對外代表公司，已無『執行業務股東』機關之設置，至於未任『董事』之公司股東，均屬『不執行業務之股東』者至明。」者（臺灣高等法院臺南分院 90 年度上字第 9 號民事判決參照）[20]。

此外，有實務見解就「何以非董事者均為不執行業務股東」為更深入之理由說明：「有限公司於 69 年修正時，廢除雙軌制，改採董事單軌制，並將原公司法第 109 條第 2 項『公司股東選有監察人者，準用股份有限公司監察人之規定。』刪除，顯見立法者無意禁止不執行業務股東兼任有限公司經理人或職員之情。而有限公司因有人合之特性，股東彼此有相對信賴關係，公司所有與經營並未分離。且在董事最多不超過 3 人之情形下，若不允許不執行業務股東兼任經理人或其他職員，將造成中、小企業人力調配與支援上困難，不利於公司之運作，此實存有現實上困難。更以，不執行業務股東兼任經理人或職員，參與公司經營，反更瞭解公司內部情形，有助其監察權行使。況『不執行業務之股東，得隨時向執行業務之股東質詢公司營業情形，查閱財產文件、帳簿、表冊。』乃股東個別權，係本於股東身分所產生，非出於其他股東或公司所委任之機關權（Organrecht）。是以，任何非董事之股東，均得行使此項監察權，不因其同時兼任公司經理人或職員有不同。」（臺灣高等法院臺南分院 106 年度上字第 268 號民事判決參照），亦即，認為非董事之股

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19 其餘如臺灣高等法院 107 年度上字第 880 號、102 年度上字第 134 號、101 年度上字第 271 號、98 年度上字第 1198 號、98 年度上字第 1239 號、96 年度上字第 543 號民事判決、臺灣臺北地方法院 106 年度訴字第 3934 號民事判決、臺灣新北地方法院 106 年度訴字第 393 號、103 年度訴字第 571 號民事判決、經濟部（88）經商字第 88222850 號函釋等。

20 另有不少見解援引最高法院 105 年度台上字第 241 號民事判決意旨，作為認定非董事者均為不執行業務股東者，如臺灣臺南地方法院 105 年度訴字第 1415 號民事判決、臺灣新北地方法院 107 年度訴字第 887 號民事判決，以及臺灣臺北地方法院 106 年度訴字第 1972 號民事判決等。惟最高法院前揭判決僅表明：「依上開條文文義及修法理由，有限公司行使監察權之『主體』為不執行業務股東」等語，未就不執行業務股東為定義，是逕援引該意旨實待商榷。

東即為不執行業務股東，所得行使之監察權「乃本於股東身分取得之固有權，自不應因其兼任經理人或其他職務而遭剝奪或限制」（臺灣臺北地方法院 105 年度訴字第 2258 號民事判決參照），併此列明。

據此項認定標準，凡非董事者均為不執行業務股東，縱其兼任公司經理人或實質經手請求閱覽之相關事務，如擔任工地負責人而負責簽署工程估驗單或各式請款事宜（臺灣基隆地方法院 102 年度訴字第 37 號民事判決參照）、擔任總經理而實際執行公司大部分之業務（臺灣高等法院臺南分院 106 年度上字第 268 號民事判決參照）、掌理公司工務部門而經手對外業務收支（臺灣高等法院 101 年度上字第 271 號民事判決參照）、負責招攬業務而有相當決策權限（臺灣高等法院 106 年度上字第 505 號民事判決參照），抑或已由其他途徑得悉公司經營狀況（臺灣臺中地方法院 103 年度訴字第 678 號民事判決參照）等，均仍得依據第 109 條行使監察權，惟若有因代理董事而執行公司業務時，該代理期間即不得復行使監察權（臺灣高等法院高雄分院 105 年度上字第 48 號民事判決參照）。

2. 學說見解

就不執行業務股東之解釋，學說均認為係指非董事之股東。就理由上，除未說明理由者外[21]，有表示之所以現行法以「不執行業務股東」為規範文義，乃係因 69 年修正前採行「執行業務股東」與「董事」雙軌制而生，於現行法架構下實應修正為「非董事之股東」者[22]。亦有認為因有限公司並未如股份有限公司般設有監察人及股東會制度，關於公司內部監督係由人數不多之股東自行擔任，是依據第 109 條之規定，其內部監察機關應為非董事之股東[23]。又，有認為自有限公司並無準用第 45 條可知，理論上應存在執行業務股東（董事）與不執行業務股東（非董事），後者依據第 109 條得行使監察權而實踐有限公司之企業監察職能，而監察權之內容則因有限公司之人合性組織性質而準用第 48 條與無限公司相當[24]。

此外，有學說更深入探討此議題者。亦即，有學者表示非董事者即屬不執行業務股東無疑，惟應探討者應係此等不執行業務股東之監察權是否因兼任公司職務而排除之問題。對此，該學說認為兼職並不影響非董事之股東得行使監察權，理由在於有限公司具有人合特性且公司經營與所有並未分離，股東彼此間具相當信賴關係而不應存有秘密，因此公司法所賦予之監察權本質上相當於股東資訊權（Informationsrecht），係源自於股東身分而非受其他股東委託而得，自不應因兼任經理人或其他職員而予以剝奪。況，現行法僅容許設置董事最多三人，倘不容許不執行業務股東兼任經理人或其他職員，對中小企業之人力調配將產生困難，且兼職更有助於其瞭解公司內部情形，利於監察權之行使及公司健全發展，並無不妥。是以，於法目的

21 柯芳枝（2014），《公司法論（下）》，修訂 9 版，頁 386。
22 林國全（2003），〈現行有限公司法制解析〉，《政大法學評論》，73 期，頁 97。
23 劉連煜，前揭註 13，頁 672。
24 廖大穎，前揭註 8，頁 631。

解釋上，非董事之股東縱有兼職狀態，仍無礙於其以不執行業務股東行使監察權[25]。亦有學者本於相同邏輯，認為非董事者即為不執行業務股東，且其監察權並不因兼任經理人而受影響，蓋此自第 109 條於 69 年之修正沿革且有限公司並無準用或類似第 222 條之規定可悉，況有限公司性質上屬人合之資合公司，無論於制度創設理念、閉鎖特性及機關配置等上均與股份有限公司有異，是自無由類推適用第 222 條或以非董事之股東兼任經理人而剝奪其股東固有權性質之監察權[26]。

### （二）實質認定說

部分實務見解於解釋不執行業務股東時，除依據形式認定說相關實務見解意旨而認定非董事者均屬之外，更另以是否「負責綜理公司一切營業、行政、財務事務，及決定公司內部業務處理」為輔助判斷標準，如智慧財產法院 107 年度民專上字第 2 號民事判決即謂：「有限公司執行業務股東，係指負責綜理公司一切營業、行政、財務事務，及決定公司內部業務處理之人，如僅係執行公司部分職務，欠缺前揭綜理事務之權限，實際上仍受執行業務股東監督，縱有執行公司職務之事實，亦不得逕認為執行業務之股東。再者，公司法所謂不執行業務之股東，係指非董事之股東，有經濟部 88 年 10 月 21 日經商字第 88222850 號函釋可參。」並均據以認定非董事者僅得處理公司部分事務而屬不執行業務股東，得依法行使監察權[27]。據此等見解，可謂除以是否登記為董事之形式認定外，另採取是否「負責綜理公司一切營業、行政、財務事務，及決定公司內部業務處理」等實質認定標準，作為審認得否行使監察權之標準[28]。

不同於上揭併採形式及實質認定標準者，有實務見解逕認兼任公司經理人之股東屬實際執行業務之人，應非不執行業務股東而不得行使監察權者，如臺灣臺南地方法院 106 年度訴字第 355 號民事判決即謂：「公司之經理人或清算人，股份有限公司之發起人、監察人、檢查人、重整人或重整監督人，在執行職務範圍內，亦為公司負責人。經理人之職權，除章程規定外，並得依契約之訂定。經理人在公司章程或契約規定授權範圍內，有為公司管理事務及簽名之權。公司法第 8 條第 1 項、

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25 陳彥良（2012），〈有限公司不執行業務股東監察權相關認定問題——評臺灣高等法院九十八年度上字第一一九八號民事判決〉，《月旦法學雜誌》，204 期，頁 211-214。

26 楊君仁，前揭註 9，頁 214-227。

27 其餘如臺灣高等法院 101 年度上字第 243 號、101 年度上字第 271 號民事判決民事判決、臺灣臺北地方法院 107 年度訴字第 82 號、101 年度訴字第 3737 號、100 年度訴字第 3976 號民事判決、智慧財產法院 105 年度民專訴字第 78 號民事判決、臺灣臺南地方法院 104 年度訴字第 1182 號民事判決等。

28 另有實務見解似兼以兼職股東是否須受執行業務股東之董事監督為判斷標準者，即臺灣高等法院 98 年度上字第 1198 號民事判決認為：「又公司法所謂不執行業務之股東，係指非董事之股東，有經濟部 88 年 10 月 21 日經商字第 88222850 號函釋可參，是以有限公司執行業務股東乃負責綜理公司一切營業、行政、財務事務，及決定公司內部業務處理者，……可見兩造雖不爭執上訴人於 98 年 1 月 1 日以前任超穩公司服務部經理之事實，然上訴人所執行之職務，仍需受執行業務股東之董事即被上訴人之監督，參諸前揭說明，仍與執行業務股東之董事有間，應認上訴人為不執行業務股東，揆諸前開規定，自得依公司法第 109 條準用第 48 條之規定行使股東監察權。」

第 2 項及第 31 條第 1 項、第 2 項分別定有明文。……原告自 103 年 1 月 1 日起至 106 年 2 月 9 日止擔任農林公司總經理，為農林公司實際執行業務之人，對於農林公司之財產文件、帳簿及表冊應皆已查閱，且對於公司之營業情形知之甚詳，而與不執行業務之股東，未綜理公司事務之情形，顯然有別，自不得僅因其任總經理期間與農林公司未訂立書面委任契約，遽認其屬不執行業務之股東，其請求查閱該期間之財產文件、帳簿、表冊，應非可取。」可謂係以是否有實際執行業務權限，判斷是否屬於不執行業務股東而得行使監察權。

此外，另有實務見解似於單純二分法外，另行對實際執行業務之非董事者之監察權限為限縮者，如採形式認定說之最高法院 107 年度台上字第 1608 號民事判決之下級審即臺灣高等法院 105 年度上字第 687 號民事判決，即透過立法及目的解釋認為：「以董事取代執行業務股東地位之立法目的，係為簡化有限公司原採『執行業務股東』及『董監事』雙軌制組織形態分歧之情形，強化其執行機關之功能；而賦予不執行業務股東查閱權，其主要目的在於增進公司治理，而能確實對公司加以監督；則若任由公司實際執行業務之人得恣意隨時請求查閱公司之財產文件、帳簿及表冊，此將造成公司之負擔，難謂對公司之經營無礙，與立法之目的顯有不合；故公司實際執行業務之人其行使股東查閱權，仍應受比例原則、權利禁止濫用及雙方忠實義務之拘束，其對於公司營業情形之質詢權及查閱公司財產文件、帳簿、表冊之監察權，自與未執行業務之股東有別。」據此，似謂登記為董事之股東（即執行業務股東）不得行使監察權、未登記為董事且未實際執行公司業務之股東（即不執行業務股東）得行使監察權，而實際執行業務惟未登記為董事之股東，則於符合比例原則、權利禁止濫用及雙方忠實義務等限制內得行使監察權，併此敘明。

### （三）分析

就有限公司監察權行使主體為何之議題，亦即是否應以形式上具備董事資格與否作為認定有無監察權判斷標準之疑義，可大別為以上二種不同見解，而解釋存在疑義之關鍵，應為第 109 條係以「不執行業務之股東」作為權利主體之規範文義，始生是否應判斷有無執行業務之疑義。

#### 1. 「不執行業務之股東」之解釋

對此，倘自文義解釋出發，既稱「不執行業務之股東」，則若有實際參與業務經營之非董事股東，難謂得完全切合該文義。

惟自體系解釋，第 108 條既規範公司應置董事執行業務，則可謂有限公司執行業務者為董事，而接續第 108 條規範之第 109 條所稱「不執行業務之股東」自應解釋為非董事之股東。又，自立法解釋而言，69 年修法將雙軌制修正為單軌制，於立法理由內亦明稱「以『董事』取代『執行業務股東』之地位」、「非董事之股東，均得行使監察權，故無監察人之設置」等，可謂立法者亦係擇採董事取得執行業務權限、非董事之股東取得監察權限之立法模式。

此外，自有限公司之資合本質，似應比附典型資合公司即股份有限公司設立監察人等專責機關行使監察權[29]，惟自有限公司另一本質即經營與所有合一觀之，股東間具有緊密之信賴及合作關係，各股東對於公司資產及業務營運狀況均有強烈之資訊需求性，以隨時監督掌握董事業務經營狀況，保障自身權益，則容許資訊掌握度最高之董事以外之全體股東皆有監察權，得隨時請求並取得必要資訊以掌握公司經營狀況，應有其本質上之需求性。是以，賦予全體股東均有取得與董事相當充足經營資訊之權利，實得建立有限公司營運之透明性，切合經營與所有合一之本質，符合全體股東選擇以有限公司作為事業經營模式之目的。據此，第 109 條所定「不執行業務之股東」自應解釋為董事以外之股東，始切合規範目的。

綜上所敘，除自文義解釋或難逕得出非董事之股東均得行使監察權外，無論自立法、體系或目的解釋，均應認第 109 條所稱「不執行業務之股東」係指非董事之股東，此不因非董事之股東是否有兼任公司經理人或其他職務而實際執行公司業務而異[30]，是多數說所採取之形式認定說應予肯定。惟鑑於現行文義上仍可能存在解釋疑義，且有限公司本質上仍屬資合公司，準用典型人合公司即無限公司之規範，實有體系上扞格。對此，立法論上或可採取上揭學說所指將「不執行業務之股東」修正為「非董事之股東」之方式；亦或逕將「不執行業務之股東」修正為「監察人」，而以非董事之股東為監察人，且容許得以章程或股東表決方式特定一人或數人任之[31]，並將監察權之行使準用第 218 條等股份有限公司監察人之規定，以將有限公司之規範向資合公司本質修正。

2. 監察權行使限制

然而，既「非董事之股東」或「監察人」係行使股東權或監察權[32]，仍應受權利濫用禁止原則及誠信原則之拘束。申言之，民法第 148 條第 1 項設有權利之行使不得以損害他人為主要目的之規範，據此規範得衍生出權利濫用禁止原則，而所稱「權利濫用」，係指行使權利逾越權利之本質及經濟目的、或逾越社會觀念所允許

29 此自 69 年修法時，曾慮及有限公司是否應予廢止，惟嗣討論意見主流以有限公司便於小規模營業者利用，且尚餘家數甚眾，驟然廢除有執行上困難，然「為增強有限公司之經營效能，擴大社會投資，逐步走向資本大眾化」等理由，仍有加以修正之必要等意旨，可知是時立法者亦係將有限公司以資合本質解釋，參立法院公報，68 卷 87 期（院會紀錄），頁 24。

30 此可謂係具有強烈經營與所有合一色彩之有限公司獨特於強調經營與所有分離之股份有限公司之制度設計，即不要求公司監督機關本於超然獨立之立場審視業務經營，而係本於自身利益之維護而發揮監督機制。

31 此等制度設計或將涉及股份有限公司關於監察人之規範如何準用之問題，如非董事之股東得否辭任監察人？經特定一人或數人行使監察權時，其他未任監察人之股東如何請求監察人履行其職務？若監察人怠於行使職務時，未任監察人之股東如何救濟？或監察人得否請求制止董事違法行為（現行法下多數學說肯定非董事之股東得行使此項權利）？另亦涉及兼具監察人身分之股東是否因此負公司負責人之受任人義務（據現行法第 8 條似限於股份有限公司之監察人）？等諸多疑慮，惟事涉現行規範之通盤檢討且囿於篇幅，擬試為拋磚或另待撰文。

32 有學者表示德國立法者認為有限公司個別股東之資訊權，性質上兼具個別股東權及監察權之特性，參陳彥良，前揭註 25，頁 211。

之界限，徒具行使權利之外觀惟實質上違反權利之社會性而言[33]；而所稱「以損害他人為主要目的」，實務見解認為應就權利人因權利行使所能取得之利益，與他人及國家社會因其權利行使所受之損失，比較衡量以定之。倘其權利之行使，自己所得利益極少而他人及國家社會所受之損失甚大者，非不得視為以損害他人為主要目的，此乃權利社會化之基本內涵所必然之解釋（最高法院 71 年台上字第 737 號民事判例意旨參照）[34]。又，誠信原則係一般行使權利、履行債務之共通原則，並為民法第 148 條第 2 項所明定，即依據正義衡平之理念，就雙方當事人彼此之利益予以衡量，務使其於法律關係上獲得公平妥當之結果[35]。

據上，若「非董事之股東」或「監察人」之監察權行使，非為取得業務資訊以維護自身權益，而係為阻礙公司經營順暢或董事業務執行，就權利行使所欲達成之經濟目的，與公司經營受阻所生之損失間顯失比例及衡平者，如形式上係經理人、其他公司職員或單純股東，卻實質上執行董事業務或實質控制公司之人事、財務或業務經營者，事實上顯然曾掌握充足公司業務經營資訊，卻僅因經營權爭奪而刻意請求查閱帳簿表冊等資訊，造成公司過度勞力、時間或費用之成本支出，即應以其監察權之行使違反誠信原則且構成權利濫用為由，否定所為請求，實務見解即有以行使監察權之股東於擔任董事期間對於公司經營事務知之甚詳，縱經解任仍應禁止其任意就執行業務期間之公司資訊藉監察權以為探知，否則難謂與權利濫用原則無違者（臺灣臺南地方法院 105 年度訴字第 291 號民事判決參照）。惟此等解釋係權利行使之必然限制，並非就有限公司監察權為特殊限制，抑或針對兼任公司經理人或其他職務股東之監察權為例外解釋，併此敘明。

3. 原告適格之分析

於肯定形式認定說之脈絡下，有限公司非董事之股東縱兼任經理人或其他職務或實質執行董事職務，仍原則性具有監察權而得為行使，是僅需具有股東身分者提起交付表冊等訴訟，其就此等具體特定之訴訟，自具以自己名義為原告而受為訴訟標的法律關係之本案判決之資格（最高法院 93 年度台上字第 382 號民事判決），核具原告適格無疑。至於原告之監察權是否因權利濫用等理由而受限制，應屬訴訟標的法律關係是否存在或有理由之問題，與原告適格無涉。

## 二、監察權行使之義務主體

就監察權行使之義務主體，主要涉及之議題為該主體究為董事或公司，對此之紛陳說法，得大致歸納為執行業務股東說及公司說等，說明如下，並就之為分析。

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33 臺灣高等法院 103 年度上易字第 1136 號、102 年度上易字第 845 號、102 年度重上字第 830 號、102 年度重上字第 576 號民事判決等意旨參照。

34 詳請參施啟揚（2009），《民法總則》，8 版，頁 427；劉雪筠（1989），《權利濫用之研究》，國立臺灣大學法律學研究所碩士論文，頁 99-102；123-130。

35 最高法院 91 年度台上字第 754 號、臺灣高等法院 102 年度上字第 282 號、102 年度上字第 675 號、100 年度上易字第 468 號、99 年度重上字第 518 號、97 年度重上更（一）字第 28 號民事判決等意旨參照。

### （一）執行業務股東說

採此說之實務見解多以最高法院 105 年度台上字第 241 號民事判決為準據，該判決主要以文義解釋為依歸而指出：「按公司法第四十八條規定，無限公司不執行業務之股東，得隨時向執行業務之股東質詢公司營業情形，查閱財產文件、帳簿、表冊。又現行公司法第一百零九條係於六十九年五月九日修正……。其修正理由載明……依上開條文文義及修法理由，有限公司行使監察權之『主體』為不執行業務股東，行使之『對象』得為執行業務之股東，而質詢公司營業情形及查閱財產文件、帳簿、表冊則為監察權行使之『內容』。」此意旨並為多數採此說之見解所援引[36]，亦有未援引此意旨而逕依第 48 條之文義而得出應對執行業務股東請求者（臺灣高等法院 106 年度上字第 505 號民事判決、臺灣臺北地方法院 103 年度訴字第 2458 號民事判決參照），此等見解為晚近最高法院見解所持續維持（最高法院 107 年度台上字第 1800 號民事判決參照[37]）。

學說見解亦有採此項見解者，即認為依據第 109 條準用第 48 條之規定，履行之義務人應為執行業務股東（董事）個人，而非有限公司[38]。

### （二）公司說

反於上開見解，最高法院 105 年度台上字第 241 號民事判決之下級審判決即臺灣高等法院 103 年度上字第 705 號民事判決，則認為應以公司為請求對象，並附具詳盡理由。其第一項理由係認為監察權所得查閱之文件簿冊，均為公司所有，董事僅係為公司占有文件簿冊之機關，自無向其請求查閱之理，並引用最高法院 102 年度台抗字第 378 號民事裁定意旨為據；第二項理由則認為不執行業務股東之監察權屬股東權，其行使本應以公司為對象，僅行使方法始準用第 48 條。又，第三項理由以第 48 條之文句結構為解釋，認為該條係規定不執行業務股東得隨時「向執行業務之股東質詢公司營業情形」及「查閱財產文件、帳簿、表冊」，是就公司營業情形雖係向「董事」為之，惟就文件簿冊之查閱則應向占有人即公司為之，此與兩合公司之第 118 條第 1 項及股份有限公司之第 218 條規定相類，自應為相同之解釋，不應因第 48 條將二者並列即認應向相同對象行使。

學說有採取同上揭見解者，即認為若以執行業務股東為請求之相對人，難免於設有多數董事或有股東代理董事執行業務之情形，產生應以何人為相對人之疑義，

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36 臺灣高等法院 107 年度上字第 844 號民事判決、臺灣臺北地方法院 106 年度訴字第 4131 號、106 年度訴字第 1972 號、105 年度訴字第 2258 號民事判決、臺灣新北地方法院 107 年度訴字第 1633 號、107 年度訴字第 1326 號、107 年度訴字第 887 號、106 年度訴字第 1794 號民事判決、臺灣臺南地方法院 105 年度訴字第 1415 號民事判決。

37 判決意旨：「董事係有限公司之執行業務股東，不執行業務之股東為行使其監察權，依同法第 109 條準用第 48 條規定，得隨時向董事質詢公司營業情形，查閱財產文件、帳簿、表冊。同法第 110 條第 1 項並明定每屆會計年度終了，董事應依第 228 條之規定，造具各項表冊，分送各股東，請其承認。足見不執行業務股東行使質詢及查閱之監察權對象，應為董事。」

38 陳彥良，前揭註 25，頁 211；劉連煜，前揭註 13，頁 672；廖大穎，前揭註 8，頁 631；柯芳枝，前揭註 21，頁 386。

且比較與第 109 條規範文義相近之德國立法例，該國通說認為執行業務人僅係公司機關，由其為公司履行資訊義務，是自應以資訊義務主體即公司本身作為請求之相對人[39]。

此外，亦有見解認為不執行業務股東監察權之行使對象應兼及於公司者，如臺灣高等法院 105 年度上字第 427 號即表示觀諸第 109 條及第 48 條等規定，「不執行業務股東得隨時向執行業務股東行使監察權，並查閱公司財產文件、帳簿、表冊，而上開文件、帳簿、表冊均為公司所有，是不執行業務股東行使監察權之對象自兼及於公司，乃屬當然。」此等見解並為其上級審法院判決即最高法院 105 年度台上字第 1562 號民事判決所維持，可謂終審法院亦非均持相同見解。

### （三）分析

#### 1. 歧異見解之分析

採取以執行業務股東即董事為監察權行使對象之見解，符合第 109 條準用第 48 條下之文義解釋結果，且此等解釋下，將同條規定之監察權內涵即質詢權及查閱權之行使對象均指為執行業務股東，不致生規範內容割裂之情形，似屬妥適。惟於第 108 條採行董事單軌制下，董事僅係公司之執行業務機關，對於公司財產文件、表冊或帳簿等具事實上管領力者，仍係公司，董事至多僅係受公司指示而對文件等具管領力之占有輔助人（民法第 942 條參照），遑論文件等或未備置於董事管理力下之情形，則單就簿冊查核部分權能以董事為行使對象，或有理論上之缺漏。又，此說雖引據第 109 條之修正理由，惟揆諸修正理由並未具指明應以執行業務股東為行使對象之意旨，以之為據，似有不足。況，此說亦有與兩合公司及股份有公司就監察人查核權相關規範之扞格處，於體系上似未一貫，且易生董事存有多數人時，應以何者為行使對象之疑慮，執行上似亦存有窒礙。

反觀採取公司為監察權行使對象之見解，或無上開解釋上疑義，惟於第 109 條準用第 48 條之文義上，似即有無法說明處。又，採此說者雖有援引最高法院 102 年度台抗字第 378 號民事裁定為據，惟該裁定意旨主要係處理有限公司不執行業務股東是否具有代表權之疑義，監察權行使僅係附帶提及，可否謂該裁定有指出監察權行使對象之意，不無疑義。再者，此說有以不執行業務股東所行使之監察權本質上為股東權，而股東權之行使應以公司為對象為論據，惟不執行業務股東監察權是否為股東權而非如董事權般屬機關權，似尚有解釋空間。此外，立法者於 69 年修正時，將監察權行使準用第 48 條而非股份有限公司之第 218 條，或即係為將有限公司與股份有限公司監察權之行使對象為區隔。末者，此說之部分見解將查核權以公司為行使對象、將質詢權以董事會為行使對象，或有將同條規範割裂適用之狀況，是否妥適，或有疑義。

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[39] 楊君仁，前揭註 9，頁 228-230。

2. 以監察權內容區分行使對象

就上揭不同見解及質疑，本於以下理由，或區別監察權之內涵，將查核權以公司為行使對象、將質詢權以董事為行使對象，較為妥適。

首先，依據第 109 條之文義，其前段係規範「不執行業務之股東，均得行使監察權」，既未明確規範行使之對象，自留有解釋空間。雖後段準用第 48 條之結果，或生監察權之行使，係「得隨時向執行業務之股東質詢公司營業情形，查閱財產文件、帳簿、表冊」，呈現係向「執行業務之股東」行使之結果，惟第 48 條既以「，」將「向執行業務之股東質詢公司營業情形」及「查閱財產文件、帳簿、表冊」分隔，且無連結性字詞，則於文義解釋上是否無將前者所表示之質詢權與後者所表徵之查核權，分別向不同主體行使之空間，似非必然。

其次，自體系解釋觀之，第 109 條第 3 項設有「規避、妨礙或拒絕不執行業務股東行使監察權者」，對「代表公司之董事」處以罰鍰之規範，則據其文義，董事係以公司代表之形式處理不執行業務股東行使監察權所涉事務，而非以自己名義為之，則將同條第 1 項之義務主體解釋為公司，較符合該規範內在體系之一貫。次就公司法整體體系觀之，既有限公司之本質屬資合公司，於規範適用產生疑義時，自應探求屬於典型資合公司即股份有限公司之相關規範，以為解釋。觀諸股份有限公司監察人之監察權行使方式，係規範於第 218 條即「監察人應監督公司業務之執行，並得隨時調查公司業務及財務狀況，查核、抄錄或複製簿冊文件，並得請求董事會或經理人提出報告。」並設有類同於第 109 條第 2 項及第 3 項之規範，而就此規範下監察權行使之對象，除少數認為應向董事會全體[40]或董事[41]為之者外，多數見解採取查核權以公司為對象、質詢權以董事會或經理人為對象之解釋[42]，則有限公司監察權行使自宜為相同解釋，始符體系上一貫[43]。

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40 臺灣臺北地方法院 101 年度訴字第 4825 號民事判決：「公司監察人依據上揭規定行使監察權請求交付上揭表冊、資料，乃屬公司內部之權力制衡機制，性質上並非對外代表公司對董事會之制衡，是監察人若有請求交付上揭表冊、資料供其調查、查核之必要時，係以個人名義以監察人之身分向董事會全體請求交付上揭表冊、資料。」

41 臺灣高等法院 102 年度上字第 636 號民事判決：「本件被上訴人係依公司法第 218 條第 1 項前段之規定行使監察權，而非請求董事會提出報告，或行使第 228 條、第 219 條之查核表冊權，法條亦未規定須向董事會表示查核或須待董事會決議始得為之，上訴人亦自承其本人保管公司法第 218 條第 1 項前段規定之相關簿冊文件，其復為友騰公司之法定代理人，則被上訴人請求上訴人將相關簿冊文件置放於友騰公司，以供其依公司法第 218 條規定查閱，應認以上訴人為當事人為已足，上訴人抗辯須以全體董事為當事人始為適格，亦難認有理……。」（筆者按此判決為上級審即最高法院 104 年度台上字第 1116 號民事判決廢棄）。

42 此等見解得以最高法院 104 年度台上字第 1003 號民事判決意旨為代表，即：「按監察人應監督公司業務之執行，並得隨時調查公司業務及財務狀況，查核簿冊文件，並得請求董事會或經理人提出報告，公司法第二百十八條第一項定有明文。則監察人依上開規定，監督公司業務之執行，雖得請求董事會或經理人提出報告，惟為查核簿冊文件，而請求交付欲查核簿冊文件之對象，應由該簿冊之所有人即公司提出，而非經理人。」，其餘可參最高法院 104 年度台上字第 1116 號、臺灣臺中地方法院 104 年度訴字第 42 號、臺灣臺北地方法院 103 年度訴字第 4793 號、臺灣士林地方法院民事判決 101 年度訴字第 1297 號（筆者按此為最高法院 104 年度台上字第 1116 號民事判決之第一審判決）等民事判決意旨。

43 此等監察權行使對象結構，與立法院職權行使法第 16 條以下（質詢）及第 45 條以下（文件調

再者，自目的解釋觀之，第 109 條賦予不執行業務股東監察權，係為使其得隨時掌握監督董事業務經營狀況而保障自身權益，以切合經營與所有合一性質下股東間之密切信賴及合作關係，為達此目的，權利行使之便宜性自屬必要。據此，將監察權中之查核權以公司為行使對象，可切合公司始為財務業務資料所有主體之法律事實，且得避免股東於請求前須先特定應以何董事或是否應以全體董事為對象之疑義；將監察權中之質詢權以董事為行使對象[44]，得使股東針對欲提出質詢之特定董事逕行，無須迂迴對公司為之，均符合權利便宜行使之規範目的，應無不妥。

此外，立法者於 69 年修正第 109 條時雖將其準用於無限公司不執行業務股東之規範，惟並未明確說明準用之理由，亦未具體表示修正後監察權行使之對象，是單憑法文規範內容變動及修正理由，尚無法得出立法者真意。又，若立法者有意以董事會為查核權行使對象，或應與第 228 條第 3 項相當逕以明文規範「監察人得請求董事會提前交付查核」之文句，是或得謂為立法者之有意忽略，以與第 218 條規範結構相契合。據此，自立法解釋亦無法逕自排除採此說之空間。

綜上所敘，雖文義解釋上存有疑義，惟無論自體系、目的或立法解釋，均得認為不執行業務股東監察權之行使應區別內容定其對象，於查核權部分應以公司為行使對象，於質詢權部分則以董事為行使對象，與第 218 條之規範及解釋結果相同。惟現行文義之所以有解釋疑義，無非係因第 109 條未明文規範行使對象且準用第 48 條所致，為使有限公司切合其資合公司本質、避免體系上扞格，於立法論上或得將準用規範修正為第 218 條，並將第 109 條第 2 項及第 3 項等與第 218 條第 2 項以下規範相重複者為必要調整，以將有限公司之規範向資合公司本質修正。

3. 被告適格之分析

與原告適格不同，被告適格性問題於實務上較常經執為爭執，如被告爭執原告應以公司或全體董事為被告始為適格等。對此，倘依通說就給付之訴當事人適格之寬廣解釋，即原告主張其為訴訟標的法律關係之權利主體，他造為訴訟標的法律關係之義務主體，當事人適格即無欠缺之解釋（最高法院 85 年度台上字第 1054 號、93 年度台上字第 382 號民事判決參照）下，縱於採公司說下以董事為被告，或採執行業務股東說下以公司為被告，所提訴訟均不生當事人不適格之問題。惟於現行公司法規範仍存有疑義下，原告所提訴訟是否流於徒勞，仍難免受不同法院解釋見解而浮動，進而有對原告產生突襲性裁判及程序不利益之虞。是以，為利當事人得利用同一訴訟程序澈底解決紛爭，追求訴訟經濟及程序利益保護並達集中審理之目標，法院應於條件充足下，以闡明之行使而令原告有機會藉訴之變更追加方式替換或補正原列被告之不足（民事訴訟法第 199 條、第 255 條第 1 項第 2 款、第 5 款[45]及

閱）等規範模式相同。

44 學說亦有認質詢權應以執行業務股東為行使對象者，參王志誠（2013），〈有限公司不執行業務股東之監察權〉，《月旦法學教室》，132 期，頁 27-29。

45 此時得否適用此款事由為變更追加，將涉及公司及董事間併為被告時是否有合一確定必要疑義；若認有合一確定必要而構成類似必要共同訴訟，則須續為討論此款事由是否包括類似必要

第 7 款）[46]；或以具法律上利害關係為由，將未經列為被告者透過訴訟告知程序為通知，使其參加訴訟而一併受判決效力拘束（民事訴訟法第 67 條之 1）。

## 肆、結論

有限公司係兼具資合性、閉鎖性及經營與所有合一等特性之公司型態，於兼顧此等特性下，應將公司監督機制之核心即監察權賦予非董事之股東，此不因其是否兼任經理人或實際執行公司業務而異，並應區分查核權與質詢權等不同監察權內涵，分別向公司及特定董事行使，以符合法體系之一貫。惟現行法內容及準用規範易生解釋上疑義及法體系扞格，若得藉修法方式予以調和，或始為根本之道。

共同訴訟之爭議，囿於篇幅，無法深究。就此款事由是否及於類似必要共同訴訟之討論，請參沈冠伶（2005），〈當事人之追加——最高法院九十一年度台抗字第八號裁定之評釋〉，《月旦法學雜誌》，126 期，頁 197-206。

[46] 許士宦（2003），〈訴之變更、追加與闡明〉，《國立臺灣大學法學論叢》，32 卷 3 期，頁 209-210；許士宦（2010），〈法律關係之曉諭義務〉，許士宦、姜炳俊、姜世明、吳從周、沈冠伶、黃國昌著，《新民事訴訟法實務研究（一）》，頁 371。

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# A Study on the Subject of Supervisory Right in Limited Company

*Yun-chun Tseng**

## Abstract

The limited company has characteristics of capital, closed and the combination of ownership and management. Following those characteristics, the subject of supervisory right shall be a shareholder who does not be concurrently a director, no matter if the shareholder be concurrently managerial personnel or de facto conducts the business of a director or de facto controls over the management of the personnel, financial or business operation of the company and de facto instructs a director to conduct business. The supervisory right shall exercise to the company or director according to the right of inspection or question separately.

**Keywords:** limited company, supervisory right, non-executive-business shareholders, combination of ownership and management, capital company

* Attorney; LL.M., National Taipei University.

# 無罪推定與刑事補償後國家之賠償責任*

## ——簡評臺灣高等法院 106 年度國再字第 1 號民事判決

陳宗奇** 撰

目　次



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** 脩誠法律事務所合署律師；國立臺北大學法學碩士。

# 摘　要

刑事被告於終局確認無刑事責任後，一定條件下得向國家主張刑事補償，至今似已無疑義。然而，其獲刑事補償後，能否再主張國家應負賠償責任，以求填補先前因刑事程序所受之損害與不利益？在考量我國與歐洲人權法院判決後，本文認為，刑事補償後國家之賠償責任，首重有關機關對被告無罪推定原則保護之尊重，然此非豁免刑事被告於該訴訟之舉證責任；再者，賠償責任係因國家行為具不法性而生，然所謂不法並不僅於規範違反，或可參考荷蘭司法實務，而認法院此時應以事後觀點回顧檢視，本件是否存有始終不具正當性之偵查發動。文末，本文並對臺灣高等法院 106 年度國再字第 1 號民事判決為評釋。

**關鍵詞：**無罪推定、刑事補償、歐洲人權法院、偵查門檻

## 壹、前言

刑事補償作為國家責任之一環，不論其理論基礎為特別犧牲或是公法上危險責任[1]，在符合一定條件下，經確認終局無刑事責任之刑事被告，享有對國家請求刑事補償之權利，至今應已無疑義。然而，刑事補償制度是否能夠完全滿足經確認終局無刑事責任之刑事被告，在先前刑事程序所受之不利益與權利侵害，實質可疑。倘若刑事被告對所獲之刑事補償不甚滿意，或是於刑事補償階段，刑事被告主張國家具有違法或不當的情事未被充分考量；或即便補償決定機關已為考量，然卻不完全反映在補償金額上，如此情形，刑事被告於現行法下，於獲刑事補償後再提出國家應負賠償責任之訴訟，似實非不得已但卻可能之作法。而法院受理該訴訟後，如何立基於該刑事被告終局無刑事責任之基礎，去認定國家於刑事程序中是否存有不法性，隨即重要並有相當之研究價值。

我國臺灣高等法院 106 年度國再字第 1 號民事判決，剖析後其爭議大抵可謂如此，然在 2011 年，歐洲人權法院（European Court of Human Rights; der Europäische Gerichtshof für Menschenrechte）於 *Bok v. the Netherlands* 一案[2]，即已處理過類似問題。是以，本文即以概述刑事補償後國家之賠償責任為題，詳加研究與比較上開兩個案件。然需特別說明者為，刑事被告於獲刑事補償後，主張國家尚應負損害賠償之訴訟，在我國僅限國家賠償[3]，無法單以公務員或國家為被告，提起民事侵權行為損害賠償之訴，此為我國與歐洲人權法院 *Bok v. the Netherlands* 一案之最大不同。惟本文認為，即便訴訟方式有異，刑事被告所於要求者皆為賠償，而損害賠償不論是侵權行為或是國家賠償，又以具不法性為共同之要件[4]，本文認為尚有共同基礎可為

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1 此爭議請見司法院釋字第 670 號解釋文與理由書，尤其推薦閱讀許宗力大法官於該號解釋之意見書。而與該號解釋有關之國內文獻，亦可參酌如：李錫棟（2011），大法官釋字第 670 號解釋之相關問題研究，《臺北大學法學論叢》，80 期，頁 163-227；林三欽（2010），冤獄賠償、國家賠償與特別犧牲——簡評釋字第六七〇號，《月旦法學雜誌》，184 期，頁 124-140；陳運財（2010），論冤獄賠償制度之改革——兼評大法官釋字第 670 號解釋，《法令月刊》，61 卷 6 期，頁 43-63；鍾秉正（2010），國家責任的「質變」：從賠償到補償——簡評釋字第六七〇號解釋，《台灣法學雜誌》，152 期，頁 207-209。

2 ECHR, *Bok v. the Netherlands*, 2011, no. 45482/06.

3 因我國國家賠償有協議先行程序，故無法逕提起民事侵權行為損害賠償之訴，如臺灣新北地方法院 105 年度國字第 32 號民事判決：「……次按國家損害賠償，除依本法規定外，適用民法規定，國家賠償法第 5 條定有明文。是國家賠償法既已就國家侵權責任為特別規定，屬民法之特別法，自無容許人民規避國家賠償之協議先行程序，逕自依民法規定請求國家機關負賠償責任之理。依原告主張本件訴訟標的之原因事實係以任教於被告福和國中之教師即被告丙○，在學校授課過程中因故意失不法侵害原告身體權，請求被告福和國中連帶賠償損害，揆諸首開說明，自應依國家賠償法規定，向國家機關請求賠償，其逕依民法第 184 條第 1 項前段、第 188 條規定提起本件訴訟，復未依國家賠償法第 10 條規定，先行與被上訴人書面協議，自有未合。是原告逕依民法第 184 條第 1 項前段、第 188 條規定，提起本件訴訟，自非合法，應予駁回。」

4 見最高法院 90 年台上字第 371 號民事判決：「按國家賠償法第二條第二項前段所定：公務員於執行職務、行使公權力時，因故意或過失不法侵害人民自由或權利者，國家應負損害賠償責任，應具備（一）**行為人須為公務員、（二）須為執行職務行使公權力之行為、（三）須係不法之行為**、（四）須行為人有故意過失、（五）須侵害人民之自由或權利、（六）須不法行為

探究。故本文題目所謂「刑事補償後國家之賠償責任」，而非「刑事補償後之國家賠償責任」，其意即為此。

## 貳、我國與歐洲人權法院相關判決概述

以下，本文先分別概述臺灣高等法院 106 年度國再字第 1 號民事判決與歐洲人權法院 *Bok v. the Netherlands* 案之案例事實，以及各法院於判決中闡述之看法。

### 一、臺灣高等法院 106 年度國再字第 1 號民事判決

#### （一）案例事實簡述

本案為國家賠償之再審案件。再審原告張女，曾因車禍案件，經臺北地檢署檢察官以其涉犯刑法第 185 條之 4 肇事遺棄罪及第 284 條第 1 項過失傷害罪於民國 97 年提起公訴。臺灣臺北地方法院雖判決無罪，然檢察官不服提起上訴後，臺灣高等法院卻為撤銷改判。其中，過失傷害罪部分判處拘役 50 日，如易科罰金，以 1,000 元折算 1 日確定。張女就肇事遺棄罪部分提起上訴，經最高法院以 99 年度台上字第 4645 號刑事判決撤銷發回，再經臺灣高等法院判處再審原告有期徒刑 6 月，如易科罰金，以 1,000 元折算 1 日。張女雖對此再為上訴，然最高法院卻以 100 年度台上字第 4607 號刑事判決，駁回其上訴確定。

張女易科罰金執行完畢，共繳納罰金 23 萬 3,000 元（包含拘役 50 日易科罰金 5 萬元、有期徒刑 6 月易科罰金 18 萬 3,000 元）。惟張女事後聲請再審，經臺灣高等法院裁定准許開始再審程序後，臺灣高等法院以 106 年度再字第 1 號、第 2 號刑事判決其上開二罪名無罪確定[5]。

張女獲判無罪後，據以請求刑事補償，經臺北地方法院 106 年度刑補字第 13 號決定張女依再審程序裁判無罪確定前，受拘役 50 日易科罰金 5 萬元及有期徒刑 6 月易科罰金 18 萬 3,000 元之執行，准予返還 46 萬 6,000 元及自各分期繳納日起至返還

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與損害之發生有相當因果關係之要件，始足相當。」

5 本件案例事實平心而論並不複雜，甚至可謂相當單純，然不同審級間法院無罪或有罪之理由卻非內文所描述的如此雲淡風輕，惟對該案刑事判決之評釋不在本文探討之範圍內。如有興趣完整瞭解本案始末者，請閱讀：臺灣台北地方法院 97 年交訴字 45 號判決（判處張女無罪）、臺灣高等法院 97 年交上訴字 108 號判決（判處張女有罪且過失傷害有罪確定）、最高法院 99 年度台上字第 4645 號刑事判決（肇事逃逸部分撤銷發回）、臺灣高等法院 99 年交上更（一）字 8 號判決（判處張女有罪）、最高法院 100 年台上字第 4607 號判決（駁回張女上訴）。
張女在有罪確定後，積極對有罪之確定判決聲請再審與停止執行之聲請，並對否准之裁定聲請抗告，其一連串之過往可見：臺灣高等法院 100 年交聲再字 36 號刑事裁定、臺灣高等法院 100 年交聲再更（一）字 1 號刑事裁定、臺灣高等法院 101 年交聲再字 11 號刑事裁定、最高法院 101 年台抗字 751 號刑事裁定、臺灣高等法院 101 年交聲再字 35 號刑事裁定、最高法院 102 年台抗字 63 號刑事裁定、臺灣高等法院 102 年交聲再字 35 號刑事裁定、最高法院 102 年台抗字 868 號刑事裁定、臺灣高等法院 103 年交聲再字 11 號刑事裁定、最高法院 103 年台抗字 389 號刑事裁定。而後，終於在臺灣高等法院 105 年交聲再字 32 號刑事裁定與臺灣高等法院 105 年交聲再字 57 號裁定，准許開啟再審，並由臺灣高等法院 106 年再字 1 號判決與臺灣高等法院 106 年再字 2 號判決，使張女終獲無罪。

日止，按週年利率百分之 5 計算之利息確定。

然而張女認為，當初承辦車禍案件的員警具故意或過失隱匿對其有利之證據，使她被誣陷為肇事者纏訟多年並受有相當損害，遂以承辦員警所服務之機關，即臺北市政府警察局中正第二分局為被告，提起國家賠償訴訟[6]，但在未獲無罪判決前，其國賠主張皆被法院駁回[7]。而本案即是張女於刑事再審獲判無罪並獲刑事補償後，針對其先前遭駁回確定之國家賠償訴訟提起再審之案件。

### （二）臺灣高等法院見解

針對「再審原告請求刑事補償，對本件國家賠償有無影響？」此爭點，法院首先表示[8]：「……按國家損害賠償，本法及民法以外其他法律有特別規定者，適用其他法律，國家賠償法第 6 條定有明文。其立法理由載明：「本條規定國家賠償法與其他特別法之關係。關於國家之損害賠償，目前已有若干法律予以特別規定，例如……冤獄賠償法（現修正為刑事補償法）……等是。此等規定，多以公務員之特定行為侵害人民之權利或特定事故所發生損害，為應負損害賠償責任之要件，且各有其特殊之立法意旨，為貫徹各該特別法之立法意旨，自應優先於本法而適用。爰明定國家之損害賠償，本法及民法以外之其他法律有特別規定者，適用其他法律」。是主張其權利因公務員執行職務行使公權力而受不法侵害之人，倘得依刑事補償法請求補償，自應優先適用刑事補償法請求補償，不得逕依國家賠償法請求損害賠償，除非受害人有不能依刑事補償法受補償之損害者，方得依國家賠償法之規定請求賠償，此觀刑事補償法第 37 條規定即明，故刑事補償法第 37 條立法理由亦記載：「二、本法所定補償，係對於受害人財產及非財產上損失所為之補償，是修正條文第 1 條、第 2 條之情形，受害人於依本法所得之補償外，如另有未獲完足補償之損失，其符合國家賠償法規定者，本得另依該法對公務員因故意或過失不法侵害人民自由權利所生損害請求賠償，爰予明定，以維受害人權益。**惟受害人另依國家賠償法規定請求賠償時，應扣除已獲本法補償之額度，乃屬當然。**」換言之，法院並不否認獲刑事補償後，再為請求國家賠償之可能性，但是另依國家賠償法請求，且需扣除已獲刑事補償之部分。

而後，法院依張女主張之項目審視其是否有理由，但針對醫療費用與不能工作之部分，法院則是否准，並表示：「……再審原告最早係於 101 年 10 月 1 日前往精

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6 其主張為：再審被告所屬交通分隊楊姓、陳姓警員於處理民國 96 年 9 月 26 日晚間 6 時許，在臺北市中正區發生之車禍肇事逃逸案件時，有隱匿照片、光碟、通聯紀錄，怠於執行職務將監視器畫面燒錄光碟，未將照片、光碟、證人等警詢錄音帶檢送臺北地方檢察署等不法行為，**且依 110 報案紀錄單所示系爭車禍案件肇事車輛為 DMX-211 號機車，楊姓員警竟於疑似道路交通事故肇事逃逸追查表記載肇逃車輛車牌為 DNX-211 號，致伊遭誣指為系爭車禍案件之行為人，經另案刑事判決有罪確定，受有身體、健康、名譽等權利之損害。**

7 此部分可見臺灣臺北地方法院 102 年度國字第 32 號民事判決、臺灣高等法院 103 年度上國字第 21 號民事判決。

8 本文會對判決原文為字體變更，然為求閱讀方面之方便，亦為部分刪減；而本文認為重要者，亦為粗體與底線之加強，以下同，先為說明。

神科就診，距其主張再審被告所屬公務員不法執行職務或怠於執行職務之時間即自96年9月26日系爭車禍案件發生至臺北地檢署檢察官97年2月27日偵結起訴**已相隔超過4年**，……。**能否遽認係因再審被告所屬公務員不法執行職務或怠於執行職務致再審原告患有上開疾病，且勞動能力受有減損或因此不能工作，實有疑義。**是依再審原告所提證據資料既無法證明係因再審被告所屬公務員不法執行職務或怠於執行職務致其患有上開疾病，且勞動能力受有減損或因此不能工作，則再審原告請求再審被告給付醫療費用3萬1,610元、減少勞動能力即不能工作之損害150萬5,913元，尚有未合。」換言之，法院認為張女主張國家有不法之行為致其患有精神健康疾病之間隔過久，難認其主張可採。

然而，對於慰撫金之主張，法院的判決卻似乎可見同情張女之意味，而謂：「……再審原告雖主張慰撫金70萬元係針對其身體、健康、名譽受損部分為請求……，**惟其所提證據資料無法證明其身體、健康所受損害係因再審被告所屬公務員不法執行職務或怠於執行職務所致，已如上述，自無從就此部分請求慰撫金。**又刑事補償係對於受害人財產及非財產上損害所為之補償，自包括名譽權所受之損害，並應優先適用刑事補償法之特別規定請求補償。而再審原告已請求刑事補償，系爭刑事補償決定依再審原告易科罰金所繳金額23萬3,000元，加倍補償46萬6,000元及附加依法定利率計算之利息，已如上述。再審原告雖再請求因名譽受有非財產上損害之慰撫金70萬元。惟慰撫金之多寡，應斟酌雙方之身分、地位、資力與加害程度，及其他各種情形核定相當之數額，該金額是否相當，自應依實際加害情形與被害人所受之痛苦及雙方之身分、地位、經濟狀況等關係決定之……。**本院審酌上情及再審原告所受名譽侵害之程度、精神所受之痛苦等雙方身分、地位、經濟狀況等一切情狀，認本件再審原告主張再審被告應負國家賠償責任乙節縱然屬實，然再審原告請求再審被告賠償之慰撫金仍以20萬元為適當**，並未超過系爭刑事補償決定之補償金額，即難認其符合刑事補償法第37條所定另有未獲完足補償之損害，自無從就其名譽所受侵害另行請求國家賠償。是再審原告於所得之刑事補償外，另請求再審被告給付慰撫金70萬元，容有未洽。」換言之，由於張女無法證實其主張，故無法判給其慰撫金；然而，假設張女可證明其主張，法院亦認為慰撫金以20萬元為適當，而此已為張女所獲之刑事補償所涵蓋，故慰撫金之部分其主張亦無理由。

結論是，雖然張女獲無罪判決並獲刑事補償，但無法藉由國家賠償訴訟再獲得其他賠償。又張女並未針對本件再為上訴至最高法院，故本判決業已定讞。惟張女主張國家行為有不法性的部分，臺灣高等法院倒是完全沒有審酌[9]。

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9 見該判決四、（三）的部分：「……**再審原告既應優先適用刑事補償法請求補償，並已獲得刑事補償，依其所提證據資料復無法證明其尚有未獲刑事補償法完足補償之損害，與刑事補償法第37條、國家賠償法第6條規定不符，無從請求再審被告另負國家賠償責任。**則就再審原告主張：1、依110報案紀錄單所示，徐慶榮當時撥打110報案時所稱肇事車輛為DMX-211輕型機車，思源街派出所員警張慶國回報肇事車輛亦同，孫于力、曾谷百合子亦未證稱肇事車輛車號為DNX-211，再審被告所屬警員楊福財竟於肇逃追查表記載肇逃車輛車牌為DNX-211，致其權

## 二、歐洲人權法院 *BOK v. the Netherlands* 案

無獨有偶，歐洲人權法院宣判於 2011 年的 *BOK v. the Netherlands* 一案，亦為刑事被告獲判無罪並獲取刑事補償後，主張國家尚應負損害賠償之責案件。現將案例事實與歐洲人權法院見解簡述如下：

### （一）案例事實簡述

1994 年，該案之申訴人被認為有參與組織犯罪的嫌疑，於是開啟了對其的司法調查。隔年，法官授權檢察官進行相關證物之扣押，因為申訴人涉嫌的罪刑已經擴張到了毒品相關犯罪。申訴人的女兒名下在阿姆斯特丹的一間房屋於同年 3 月在法官的授權之下被搜索，搜索過程中不但造成一些物品毀損，而申訴人則因為違反鴉片法以及武器與彈藥法而被起訴[10]。

1997 年 6 月，地方法院對申訴人的各種指控做出了有罪判決，除判處其八個月的有期徒刑外，並同時命其支付 10 萬元荷蘭盾的罰金。申訴人對判決不服提出上訴[11]。隔年 2 月，上訴法院廢棄了前審判決並且無罪開釋了申訴人，理由是對申訴人的控訴無法合法且信服的被證明[12]。之後，申訴人依據荷蘭刑事訴訟法第 591A 條[13]，要求上訴法院賠償其 20 萬荷蘭盾，即因系爭程序使他支出的費用[14]。同年 6 月，該法院確認判給其 10 萬荷蘭盾的補償，但是超過的部分給予駁回。申訴人於是對此進行上訴[15]。1999 年 3 月，因拍賣賓士車所得金額加上利息亦還給申訴人[16]。

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利受有損害；2、再審被告所屬警員楊福財、陳一璋有隱匿系爭車禍案件之照片、光碟，涉嫌變造公文書、湮滅證據等行為；3、再審被告所屬警員楊福財、陳一璋怠於執行將監視錄影器拍攝影像燒錄光碟之職務，致其權利受有損害；4、再審被告所屬警員陳一璋隱匿其於案發當時之行動電話通聯紀錄，且未將本案照片光碟、孫于力、徐慶榮、曾谷百合子之偵訊錄音帶移送臺北地檢署偵辦，侵害其權利，**是否有據等爭點，既不影響本件之判斷，自無逐一審究之必要，併此敘明。**」

10 ECHR *BOK v. the Netherlands,* 2011, no. 45482/06, § 6.

11 *Id.* § 7.

12 *Id.* § 9.

13 條文節錄如下：

「"1. If the case ends without imposition of a punishment or measure ..., the former suspect or his heirs shall be granted compensation out of State funds for his travel and subsistence expenses incurred for the investigation and the examination of his case, calculated on the basis of the Act on Fees in Criminal Cases.

2. If the case ends without imposition of a punishment or measure ..., the former suspect or his heirs may be granted compensation out of State funds for the damage which he has actually suffered through loss of time as a result of the preliminary investigation and the examination of his case at the trial, as well as the costs of counsel. This will include compensation for the costs of counsel during police custody and detention on remand. Compensation for such costs may furthermore be granted when a case ends with the imposition of a punishment or measure on the basis of a fact for which detention on remand is not allowed. ...」。簡之，如果刑事案件未以刑罰或是一個措施終結，則被告或其繼承人可獲補償；此補償金除包含其所受損失外，亦可包含律師費用等。

14 ECHR *BOK v. the Netherlands,* 2011, no. 45482/06, § 10.

15 *Id.* § 11.

1999 年 7 月，考慮到刑事程序不但必須使其產生一定法律費用的支出，也導致了其與其女兒財產上與非財產上的損失，申訴人與其女兒向民事地方法院依民法提起了侵權行為之訴[17]。簡之，申訴人認為，國家機關藉由一個刑事程序來錯誤的對待他們，其利用刑事偵查的搜索和扣押是建立在一個一開始就毫無根據的懷疑基礎之上[18]。因此，申訴人主張荷蘭政府應對其兩人各為財產與非財產上之損害賠償[19]。

2001 年 7 月，地方法院對申訴人的民事案件做出駁回的判決。地方法院認為，根據申訴人主張條文的相關案例法，只有兩個情況才會認為刑事程序機構所為會被認為不法，分別是：一、程序的提起或偵查工具的使用違反了法律規定或是基本要求[20]；或是二、回顧刑事偵查機關所為，不論是最後決定出現或其他時間，其刑事程序的提起或是偵查工具的使用，是基於一個始終無法被正當化的懷疑上[21]。地方法院認為，第一個情況並未在本案當中出現，因為對於申訴人的初步司法調查有法官的合理懷疑可供支撐。此外，在上訴法院所做的判決中，也確認了在申訴人的案件當中使用該些刑事偵查並未有違法可言。至於第二點，地方法院也認為沒有出現在本案的情況當中，關於申訴人的無罪開釋以及法院所能拿到的刑事檔案都顯示了申訴人並不是莫名其妙就被懷疑。因此，申訴人唯一合法獲得補償的管道，僅有依據刑事訴訟法的相關請求補償規定，而非提起民事侵權行為之訴[22]。

至於申訴人的女兒，地方法院認為的確沒有任何嫌疑其與申訴人的刑事控訴有關，在發現其損失是肇因於對申訴人的刑事調查，法院認為不應該由其女兒承擔。地方法院於是判決荷蘭政府應該賠償其女兒，但除此之外的其他請求都屬無理由[23]。

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16 *Id.* § 12.

17 該條文相當於我國民法第 184 條侵權行為之一般規定，原文如下：
「"1. A person who commits a wrongful act (onrechtmatige daad) against another which is attributable to him, must repair the damage suffered by the other in consequence.
2. Except where there is a ground of justification, the following acts are deemed to be wrongful: the violation of a right, and an act or omission violating a duty imposed by law or a rule of unwritten law pertaining to proper social conduct.
3. A wrongdoer is responsible for the commission of a wrongful act if it is due to his fault or to a cause for which he is accountable by law or pursuant to generally accepted principles (de in het verkeer geldende opvatting)."」

18 ECHR *BOK v. the Netherlands*, 2011, no. 45482/06, §13。原文：「the applicant and his daughter claimed that a body for whose acts the State was liable had acted in a wrongful manner towards them by having brought criminal proceedings against the applicant, and by using criminal investigation tools (search and seizure) on the basis of a suspicion that had been unfounded from the outset.」

19 *Id.* § 14.

20 原文：「the institution of criminal proceedings or use of criminal investigation tools could only be regarded as wrongful when such proceedings had been brought or such tools used in breach of the law or with disregard of fundamental requirements」

21 原文：「where it appeared retrospectively from the criminal investigation – either from the final decision or otherwise – that the suspicion on the basis of which the criminal proceedings had been brought or the criminal investigation tool used had been unjustified」

22 *Id.* § 15.

23 *Id.* § 16.

對此，申訴人、其女兒以及荷蘭政府皆提出上訴[24]。

2004 年 11 月，上訴法院廢棄了地方法院所做判決，除了維持賠償申訴人女兒的這個部分，但是也將賠償金額為縮減[25]。申訴人與其女兒繼續將本案上訴至最高法院，但最高法院認為本案並非促進一個司法議題的判決，亦未具有法律統一或是法律發展的利益，因而駁回[26]。申訴人遂以荷蘭政府為被告，申訴至歐洲人權法院。

### （二）歐洲人權法院見解

歐洲人權法院認為，關於公約第 6 條第 2 項無罪推定原則的要求，歐洲人權法院已經藉由許多判例法不斷確認了其內涵，在於申訴人獲得一個無罪判決之後，其有權請求賠償其因為訴訟的支出，以及請求因合法的審前拘禁所生之補償[27]。然而，歐洲人權法院還是發現違反公約的情事，如儘管欠缺了實質的定罪，但拒絕給予被告金錢的補償反映了一種被告是有罪的看法[28]。

歐洲人權法院認為本案的情況特殊點在於，申訴人已經從國家那邊獲得了一筆錢，但因為其認為不足，因此繼續提起民事訴訟程序[29]。但民事程序的舉證責任在原告，這一點會顯示跟過往案例有別[30]。簡之，歐洲人權法院認為，申訴人的無罪是基於一個事實，即對其控訴的證據，其證據價值，並未達到超越合理懷疑的程度。但是，這並不代表其在刑事訴訟程序獲得無罪判決，即在民事訴訟程序當中得以免除其根據自己主張所應有的舉證責任[31]。一個必須被接受的結果是，內國的民事法院還是有權決定申訴人的舉證是否可證實其主張[32]。結論是，歐洲人權法院找不到民事上訴法院有違反公約第 6 條第 2 項，關於無罪推定原則對其之保障，因此本案並未有違反公約的情事存在[33]。

## 三、小結

本文認為，從以上兩個判決中，大概可以確定下列議題與刑事補償後國家之賠償責任有關，分別為：一、無罪推定原則於該賠償訴訟之意義究竟為何？刑事被告是否可因被法院終局確認無刑事責任，而將無罪推定原則作為國家應負賠償責任之主張？以及二、倘國家應負賠償責任，其歸責基礎之「不法性」又應該如何認定？以下，本文逐步釐清上開議題，從而闡述與建立本文見解，文末並對臺灣高等法院

24 *Id.* § 17.
25 *Id.* § 18.
26 *Id.* § 19.
27 *Id.* § 37.
28 *Id.* § 38.
29 *Id.* § 42.
30 *Id.* § 43.
31 *Id.* §45。原文：「His acquittal in criminal proceedings did not mean that he was dispensed from the obligation of having to prove his claim for damages brought in civil proceedings in accordance with the applicable domestic rules regarding burden of proof.」。
32 *Id.* § 46.
33 *Id.* § 48.

106 年國再字第 1 號民事判決為簡要評論。

## 參、無罪推定與刑事補償後國家之賠償責任

如前所述，探討刑事補償後國家之賠償責任，本文認為最為重要者為以下兩個議題：一、無罪推定原則於該賠償訴訟之意義究竟為何？刑事被告是否可因被法院終局確認無刑事責任，而將無罪推定原則作為國家應負賠償責任之主張？以及二、倘國家應負賠償責任，其歸責基礎之「不法性」又應該如何認定？然而，如非先為理解無罪推定原則是如何在刑事被告經終局確認無刑事責任後尚有作用空間，實無法將上開兩議題為連結與說明。故以下，本文先從無罪推定原則為概要介紹。

### 一、無刑事責任後之無罪推定原則

雖然歐洲人權法院將無罪推定原則在不同類型之案件為不同程度、不同面相之實踐已行之有年，我國對此尚非有堅實之認識[34]。不過，這也表示了無罪推定原則可以具體的作為一可供操作之標準，而非僅於刑事程序中某種證據評價規則或上位規範而已。是以，本文以下對無罪推定原則之說明，歐洲人權法院之詮釋將佔相當比重[35]。

與本文所涉議題最為有關者為：無刑事責任後之無罪推定原則，換言之，即無罪推定原則為何會在刑事被告經終局確認無刑事責任後尚有作用空間。實則，此議題我國其實亦有所討論，然僅存於刑事補償領域內，即法院在審酌終局無刑事責任之刑事被告，是否應給予補償時，其審酌之事由與帶來之法律效果是否可能與無罪推定原則有違[36]。然而，上開議題於我國或許尚屬新鮮，惟歐洲人權法院於 1993 年即已為有所表示[37]。現今歐洲人權法院對無罪推定原則之掌握與運用狀況，更是大幅

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34 國內最完整但略為早期的文獻，請見崔雲飛，無罪推定之具體實踐——以歐洲人權法院判例法為核心，國立臺灣大學法律學研究所碩士論文，2006。

35 本文認為，藉由歐洲人權法院裁判法對無罪推定原則為擴大之理解，對於我國法制建設與人權保障之提升亦有相當助益。歐洲人權法院既為我國司法院大法官在解釋憲法時常為參考之對象，於無罪推定原則經司法院釋字第 653、654 號解釋已確定有憲法位階之現況，參考歐洲人權法院就無罪推定原則之適用實務，自有其意義。

36 例如總統府司法改革國是會議第一分組於 2017 年 5 月 23 日第四次增開會議決議第一點第二項：「政府應依無罪推定原則及司法院釋字第 670 號解釋意旨及相關意見書，檢討現行刑事補（賠）償法制，不限於人身自由遭限制或拘束之情形，始能獲得刑事補（賠）償。應將財產及非財產上損害之補（賠）償，分別立法規範，其中非財產上損害賠償部分應包括適當之回復名譽措施，合於受害者文化感情之修復性和解機制、精神慰撫金等，應儘速研議檢討現行刑事補償法第 4、7、8 條有關自招嫌疑、可歸責事由、一般社會通念等之審查條件，避免無辜受害者受無罪平反後，再次由法院審查其犯罪嫌疑或有無過失等，並考量人身自由之價值無高低之別，每日補償金額應改採固定之基本數額計算（例如參考德國相關法制），但若對無辜受害者之個人及其家計影響重大，而僅給付固定基本數額不符公平者，得增加給付。」；另可見陳宗奇，論無罪推定原則為刑事補償之憲法要求——歐洲人權法院相關裁判研究，國立臺北大學法律學系碩士論文，2014。

37 ECHR, *Sekanina v. Austria*, 1993, no. 13126/87。簡之，歐洲人權法院認為，一旦被告獲得終局的無罪判決，以尚存犯罪嫌疑為由而拒絕給予其補償，即與無罪推定原則有違。
附帶說明，本案雖可言是歐洲人權法院以無罪推定原則處理刑事補償之濫觴，但 1971 年即有類

度的超越我國目前之理解範圍，但這需要一點篇幅為說明。

與我國目前傳統見解類似，早期歐洲人權法院在特定案件是否需論及無罪推定原則，端視是否有「刑事性」，換言之，僅有帶有刑事性之案件，方有討論無罪推定原則之必要。而一個案件是否帶有「刑事性」，則要考量三項要件，分別為：「內國法對該違法行為之分類（classification of the offense in the law of the respondent state）」、「違法行為之本質（the nature of the offence）」以及「被告可能受到的制裁之本質與嚴重程度（the possible punishment）」[38]。而自 1983 年起，歐洲人權法院開始將無罪推定原則用於訴訟費用議題[39]與前開所述刑事補償議題，大抵開啟了無罪推定原則於無刑事責任後之討論。而後，由於國家行為實具多樣，大多申訴人亦認與無罪推定原則有關，無罪推定原則在歐洲人權法院的運用範圍被不斷擴大。2015 年，歐洲人權法院宣判的 *Cleve v. Germany* 案[40]後，無罪推定原則於無刑事責任後可說是被運用至極致。

該案內容簡之為，申訴人被控訴，其強制性交與強制猥褻其女兒，儘管最後明斯特地方法院判其無罪，但是在無罪判決中卻表示[41]：「……結論是，由於本庭並未發現任何暗示之跡象，因此，本庭總結為，證人所描述之核心事件可作為事實基礎，即被告的確曾經在其汽車中對其女兒為性侵害。然而，被告所為之程度與時間為何，卻無法以足以確保定罪之程度為證實，因為證人於此所為之證詞之不一致實過於明確，以致於不能確定確切之事實為何。」。由於此段被申訴人認為，雖然其獲判無罪，但明斯特地方法院於判決中此段描述，將使社會上其他人依舊對他以有罪之人看待，而家事法院之後更是以此拒絕其與女兒會面交往之聲請，從而上開判決之文字，實違反歐洲人權公約第 6 條第 2 項，關於無罪推定原則對其之保障。儘

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似案件的 E.R. 案（EcomHR, *E.R. v. Austria*, Decision of 24/05/1971）。不過由於該案是申訴至歐洲人權委員會而非歐洲人權法院，且最後奧地利與申訴人達成和解，並且制定 1969 年之刑事補償法（StEG 1969 = Strafrechtliches Entschädigungsgesetz 1969）杜絕類似案件之申訴。不過，1969 年的刑事補償法並未禁止法院以犯罪嫌疑為由來拒絕補償，因此才有本案的誕生。

38 見 ECHR *Engel and Others v. the Netherlands*, 1976, no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72.

39 此即 ECHR *Minelli v. Switzerland*, 1983, no. 8660/79。該案內容大致為：Vass 是某公司的董事（director），這間公司被 Fust 以及本案的申訴人 Minelli，這兩位新聞記者分別報導可能的詐欺情事，Vass 於是對這兩人提告。Fust 的案件最後被判有罪，但是 Minelli 的部分卻因為罹逾時效而未有判決。不過由於 Vass 控告 Minelli 是以自訴的方式，而瑞士法律規定自訴敗訴的當事人應負擔裁判費以及對造的訴訟費用；雖然 Minelli 並未獲得一個有罪判決，但是考量 Fust 的情況，瑞士政府即要求 Minelli 負擔三分之二的裁判費以及 Vass 的訴訟費用。Minelli 不服將本案申訴至歐洲人權法院，歐洲人權法院最後認為，瑞士這樣的做法違反公約第 6 條第 2 項的無罪推定原則。

40 ECHR *Cleve v. Germany*, 2015, no. 48144/09.

41 該段判決原文為：「... Zusammengefasst sind Anhaltspunkte einer Suggestion für die Kammer nicht ersichtlich. So geht die Kammer im Ergebnis davon aus, dass das von der Zeugin geschilderte Kerngeschehen einen realen Hintergrund hat, nämlich dass es tatsächlich zu sexuellen Übergriffen des Angeklagten zu Lasten seiner Tochter in seinem Auto gekommen ist. Die Taten ließen sich aber dennoch weder ihrer Intensität noch ihrer zeitlichen Einordnung nach in einer für eine Verurteilung hinreichenden Art und Weise konkretisieren. Die Inkonstanzen in den Aussagen der Zeugin waren so gravierend, dass konkrete Feststellungen nicht getroffen werden konnten.」。

管其在德國一路敗訴至聯邦憲法法院，但這項主張卻被歐洲人權法院接受，歐洲人權法院進而表示，被告獲得的無罪判決，必須被每個不論是直接或是間接與該無罪判決有關機構尊重[42]。

雖然該判決在德國不乏批評之聲[43]，不過歐洲人權法院以刑事被告經終局確認無刑事責任之結果，究竟有無被國家其他直接或間接有關機構尊重，作為是否有違無罪推定原則之判斷標準，本文認為，這就開啟了刑事補償後之國家責任與其不法性應該如何認定之討論可能。

## 二、無罪推定與刑事補償後國家之賠償責任

刑事被告在被法院終局性的確認其無刑事責任後，這項結果必須獲得確保，且被其他國家有關機關尊重，否則即與無罪推定原則有違，已如上所述。然而，無刑事責任之原因眾多，並非所有國家刑罰權之錯誤實現，皆可由此推論必有國家責任之不法性存在。因此，接下來的問題即為：一、國家對無罪推定原則需尊重到如何程度？以及二：刑事補償後，國家如尚須負賠償責任，究竟「不法性」應該如何認定？

### （一）無罪推定原則作為舉證責任豁免？

本文贊同歐洲人權法院於 *BOK v. the Netherlands* 一案所闡述之見解，即無罪推定原則無法在刑事被告獲得刑事補償後，主張國家尚有賠償責任之後續訴訟中，以此脫免於舉證責任。但這需要從一些對無罪推定原則在憲法上之定位說明起。且由於此部分我國文獻或釋憲實務尚非清楚，故以德國文獻所述者為主。

德國學者 Walter Sax，認為無罪推定原則的憲法依據，在於德國基本法第 1 條第 1 項的人性尊嚴[44]。其理由為，罪責原則（Schuldprinzip）作為尊重人性尊嚴的實質性規定，說明了唯有在一個人受懲罰時，國家才不需要積極的對該人有著尊重[45]。另外，Rolf Jürgen Köster，於其關於無罪推定的博士論文（Rechtsvermutung der Unschuld：historische und dogmatische Grundlagen）中，也藉由遵循著來自哲學上的理解，而認為無罪推定是來自一個人性尊嚴的擔保，一個被堅持運用的自我負責圖像。不過，德國聯邦憲法法院的固定見解，卻是從德國基本法第 20 條第 3 項[46]的法

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42 ECHR *Cleve v. Germany*, 2015, no. 48144/09, §36.

43 *Stuckenberg*, EGMR, Urt. v. 15.1.2015, Nr. 48144 /09, Cleve v. Germany (Verstoß gegen die Unschuldsvermutung durch Freispruchsbegründung), in: StV 2016, S. 5-8。簡之，波昂大學的 Carl-Friedrich Stuckenberg 教授認為，歐洲人權法院在本案不但錯誤理解事實上有罪與法律上有罪，並且將「無罪（Unschuld）」的意義直接等同現實上未實現刑事犯罪，而非是否出於任何理由欠缺刑罰上之責任。

44 GG § 1: (1) Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt.（人性尊嚴不可侵犯，尊重及保護此項尊嚴為所有國家權力之義務。）

45 Sax, *Grundsätze der Strafrechtspflege*, in: Bettermann/Nipperdey/Scheuner, Die Grundrechte, Band III/2, S. 987, 990，轉引自 *Stuckenberg*, Untersuchungen zur Unschuldsvermutung, S. 48 Fn. 11 (1997).

46 GG § 20: (3) Die Gesetzgebung ist an die verfassungsmäßige Ordnung, die vollziehende Gewalt und

治國原則（Rechtsstaatsprinzip）中導出[47]。德國聯邦憲法法院認為，無罪推定原則，應該被認為是與被告有關的諸如正當程序以及辯護權的最高原則[48]。

然而，本文認為無罪推定原則之憲法上依據，是法治國原則或是人性尊嚴，其實並未有如此大之差異存在。因為，人性尊嚴既然作為國家優先保護的義務，且對人性尊嚴的探求有助於更完善法律制度的建立，自然無法忽視來自人性尊嚴對無罪推定原則的可能影響。此外，從人類圖像（Menschenbild）作為論述依據，德國學者 Hans-Ullrich Paeffgen，於其大作 Vorüberlegungen zu einer Dogmatik des Untersuchungshaftrechts 中也明白表示，來自中世紀基督教關於自然法學派的教義，以及啟蒙運動以降的社會契約論，對「人類基本上是好（gut）的」這個看法，是維持著開放的空間[49]。Paeffgen 進而認為，從這個理想化的基本人類學假設所發展出來一個在法律上面推定的「正面要求」，是肇因於國家發展的經驗顯示，要「馴服利維坦」（Bändigung des Leviathan），是有賴一個「有效、能夠一開始並且持續」的屏障，方有可能抵禦來自國家的侵害，而無罪推定原則於此遂成為了一個可取的法律規則。因此，Paeffgen 認為，**「法治國原則是強化了對人性尊嚴保障的合理主張[50]」**（Somit verstärke das Rechtsstaatsprinzip den in der Menschenwürdegarantie begründeten Achtungsanspruch.）。

雖然「馴服利維坦」（Bändigung des Leviathan）才是現今無罪推定原則應該著重之處，似乎法治國原則更為貼切。不過，吾人真正應該要體認的是，利維坦、即國家，對於人民的侵害可能並非僅有來自審判層面，而隨著時間的發展、國家任務的變化以及權力的擴張，而有著不同面向的侵害可能。**而如果只把無罪推定原則，作為刑事程序中一個程序內的最高指導原則，恐怕就窄化了其作為限制國家權力而發展的近代意義。如何隨著國家權力的不同侵害態樣，去適時的以人性尊嚴導入無罪推定原則可能適用上的不足，並深入探究各時代對此議題彰顯的「時代精神」為何，方為研究無罪推定原則之正途。**

以此回頭檢視 *BOK v. the Netherlands* 案。本文認為，適用民事法理的民事侵權行為訴訟或是國家賠償訴訟，其舉證責任之分配標準並非國家權力作為限制人民基本權利之作用而存在，是以，誠如歐洲人權法院所述，無罪推定原則實無可能作用，並且此去干擾民事法院認定事實、確認私權的法律發現[51]。因此，刑事被告即便

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die Rechtsprechung sind an Gesetz und Recht gebunden.（立法權應受憲法之限制，行政權與司法權應受立法權與法律之限制。）

47 BVerfGE 19, 342, 349；節錄：「Diese Unschuldsvermutung ist zwar im Grundgesetz nicht ausdrücklich statuiert, entspricht aber allgemeiner rechtsstaatlicher Überzeugung und ist durch Art. 6 Abs. 2 der Europäischen Menschenrechtskonvention auch in das positive Recht der Bundesrepublik eingeführt worden.」；另參 *Stuckenberg* (Fn. 45), S. 50 ff.

48 *Stuckenberg* (Fn. 45), S. 50 f.

Paeffgen, *Vorüberlegungen*, S. 46, 52, 66. 轉引自 *Stuckenberg* (Fn. 45), S. 51 Fn. 24.

50 Paeffgen, *Vorüberlegungen*, S. 52 f., 48, 66. 轉引自 *Stuckenberg* (Fn. 45), S. 51 Fn. 25.

51 然而，假設國家所存有之刑事補償制度總是補償過少，使刑事被告必須再提起主張國家應負賠償責任之訴，亦即，假設國家藉由訴訟制度之不同而可能巧妙迴避自身應有的刑事補償責任，此時無罪推定原則是否尚無作用空間，也許就有思考的必要。

經法院確認終局無刑事責任存在，尚須針對國家行為有如何違法或不當情事盡其具體化陳述義務，說明其主張與依據為何。因此，下一個問題即為，此時應該以如何標準，判斷國家行為之不法性存在？

### （二）偵查門檻的雙重規範性違反即屬不法

儘管刑事補償在學理上尚有「公法上危險責任」或是「特別犧牲理論」之爭，惟不論採取何理論，刑事補償作為國家責任之一環，且為結果責任。換言之，一旦國家之刑罰權曾為錯誤實現，國家即應對此補償。然而，由於我國現行刑事補償法第 8 條之規定，雖於刑事補償程序時，對國家於刑事程序中是否存有不法性為考量，但這僅在定額補償之一定範圍中發揮其作用，無法突破定額補償之限制，使刑事被告獲更多之填補[52]。換言之，由於刑事補償法第 6 條第 2 項為罰金或易科罰金的補償，此類補償即便考量刑事程序中公務員有違法或不當之情節，也完全不會對補償金額有所影響。是以，倘終局確認無刑事責任之被告認為，其所獲刑事補償過少，或是國家責任之不法性在決定補償金額時未被充分評價時，其必須繼續起訴追究國家責任，方能完整填補其所受損害，此時國家責任之不法性應該如何確認，即為重要之課題。

從不法性之本質即違反規範而言，倘刑事程序中，公務員執行法定職務時有違反法律規範，致國家刑罰權錯誤實現，此情況國家需負國賠責任，或無疑問。前述 *BOK v. the Netherlands* 案，荷蘭法院對於申訴人主張是否有理由，其中一項認定標準也是如此[53]。不過，違反規範之嚴重程度既然有所不同，則是否所有規範違反之情事，即必然導向國家刑罰權之錯誤實現？此亦有因果關係論述之障礙與困難[54]。此

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52 見刑事補償法第 8 條：「受理補償事件之機關決定第六條第一項、第三項、第四項、第六項或前條第一款、第三款之補償金額時，應審酌一切情狀，尤應注意下列事項：一、公務員行為違法或不當之情節。……。」。

53 見註 20。

54 最主要的問題在於證據。亦即，刑事被告是否有罪，端視法官就現有證據與其自由心證與經驗法則之運用結果，是否使其心證已達超越合理懷疑之程度。然而，取證違法或執行程序違法並不必然產生證據排除之結果，從而即便存有違法情事，也難認被告此時之有罪確定結果屬國家刑罰權之錯誤實現。換言之，我國目前所探究者主要尚停留於「國家違法→證據排除」之連結，而尚未發展至「國家違法→證據排除→補償考量」之連結。

不過近期實務已經開始有所轉換，雖然尚不明白是否有成為一固定法則之可能，然尚可參酌：見最高法院 106 年度台上字第 2853 號判決新聞稿：「……參、本件符合刑事補償法第 34 條第 2 項所定對公務員求償之理由：一、陳肇敏、曹嘉生均屬修正前軍事審判法執行職務之公務員；柯仲慶、何祖耀係軍隊保防官，其權限僅限防諜情報案件之調查，對江國慶執行訊問之職務，雖已逾越法定權限，然所執行訊問之職務外觀，核屬修正前軍事審判法第 64 條規定軍法警察執行偵查犯罪之範疇，其二人應認屬依刑事補償法所定執行職務之公務員。**而陳肇敏明知反情報隊人員不能偵查犯罪，所擬之訪談計畫已涉及不正取供，竟予以核准；曹嘉生除違法指示黃瑞鵬簽辦江國慶施以禁閉處分，並未曾於陳肇敏上開行為時，表示反對意見，屬有重大過失之違法行為。**柯仲慶、何祖耀直接為不正方式之訊問，而取得江國慶非任意性之自白，其二人執行該職務，自屬故意且不法。」

附帶說明，陳肇敏在未被確認有任何刑事責任存在（見臺灣臺北地方法院 105 年度聲判字第 16 號刑事裁定，駁回交付審判聲請），卻有民事損害賠償責任，此是否與無罪推定原則有違，歐洲人權法院也有案件與此有關，見 ECHR, Orr v. Norway, 2008, no. 31283/04。換言之，無罪推定

外，即便法院確認無刑事責任之基礎已經肯認國家存有規範違反情事，刑事被告於補償程序時亦對此加以主張，補償決定機關依舊有相當大的程度可以不為考量[55]。就此以觀，以國家於刑事程序有明確違反法規範情事來主張國家應負賠償責任，實非容易之事[56]。然國家如果存有不當或違法情事，的確需要被充分評價。是以，本文認為，前揭 *BOK v. the Netherlands* 一案，由荷蘭法院所提出之第二項標準，即「**回顧刑事偵查機關所為，刑事程序的提起或是偵查工具的使用，是基於一個始終無法被正當化的懷疑上**」，或許可為此議題相當有價值之參考標準[57]。

刑事訴訟本質上論，即屬一由許多門檻疊砌之程序。發動偵查要求嫌疑門檻、搜索要求必要性門檻、起訴要求起訴門檻等。然而，這些門檻當中，對國家而言，最簡單跨越者即屬偵查門檻，因其僅要求犯罪嫌疑存在，國家對此即有偵查之法定義務；但相對地，偵查門檻亦作為偵查機關之誡命規範，倘人民無犯罪嫌疑，即不可對其為相關基本權干預[58]。因此，在刑事被告被法院確認其終局無刑事責任後，自

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原則在民事程序中，不管是原告（如本文所探討之情形）或是被告（如上述陳肇敏等）皆有討論甚至有其適用之空間，惟此議題牽扯因素甚多，國內尚未有相關文獻可為探究，即便作者已累積相當想法與相關資料，亦無意於此探討。

55 例如曾喧嘩一時的姊妹花強盜案，見臺灣高等法院 99 年度上訴字第 126 號刑事判決：「……由以上被告丙○○接受詢問過程，初次即表示拒絕夜間詢問，及比對另被告乙○○於警詢始終否認犯強盜罪之供詞，再參以被告丙○○於遭逮捕後為警採尿送驗之結果，安非他命及甲基安非他命濃度分別高達 2560ng/ml、20140ng/ml，有臺灣尖端先進生技醫藥股份有限公司（下稱尖端公司）濫用藥物檢驗報告、臺北市政府警察局偵辦毒品案件尿液檢體委驗單可證明（見偵卷第 136 頁至第 137 頁）。**足認被告丙○○係在施用大量安非他命後，精神狀況極度不佳，意識不清之狀態下，警方違反其拒絕夜間詢問下，接受長達 2 個多小時之詢問，且期間僅休息約 15 分鐘，足認該第二次夜間詢問顯屬刑事訴訟法第 98 條所列『疲勞詢問』，因此取得被告丙○○之自白非出於任意性，依同法第 156 條第 1 項規定，無證據能力。**」；惟即便刑事被告獲判無罪後，於請求補償時加以主張，刑事補償決定機關卻毫不考量，並以違反無罪推定原則對其是否有可歸責性加以論述，而否准其補償，見司法院冤獄賠償法庭 99 年度台覆字第 244 號覆審決定書。

56 近期最高法院實務見解，也說明了此部分的困難，見最高法院 106 年度台上字第 173 號民事判決：「……按國家機關依國家賠償法負賠償責任，係以其所屬公務員行使公權力之行為，具違法性為前提要件，此觀國家賠償法第二條規定自明。而偵查中之犯罪，尤以社會暴力犯罪影響社會治安及大眾生活安全至鉅，與公共利益有關，社會大眾自有知的權利。為期偵查刑事案件慎重處理新聞，以符合刑事訴訟法偵查不公開原則，避免發言不當，並兼顧被告或犯罪嫌疑人及相關人士之隱私與名譽，以便媒體之採訪，由法務部訂定系爭要點，此觀該要點第一點揭櫫之意旨即明。……。系爭刑案似已影響社會治安及大眾生活安全，而與公共利益有關。又系爭新聞資料已遮隱被上訴人部分姓名，且無證據證明上訴人所屬員警故意洩漏被上訴人全名之情事，為原審確定之事實。**則上訴人所屬公務員於查獲上開攸關社會治安、大眾生活安全等公共利益之系爭刑案，依系爭要點第二、三點規定發布系爭新聞資料，並兼顧被上訴人之隱私及名譽，遮隱其真實姓名，似此情形，能否仍謂其所為違反偵查不公開原則或系爭要點之規定，而具有違法性？已非無疑。**」，最高法院從而廢棄原二審命新北市政府警察局應賠償與登報道歉之判決。而更審後，新北市政府警察局已確定無國家賠償責任定讞，見臺灣高等法院 106 年度重上國更（一）字第 1 號民事判決。

57 即註 21。

58 最高法院近期已明確掌握偵查門檻具有雙重規範性之見解，見最高法院 105 年度台上字第 1615 號刑事判決：「……次按警察、憲兵及依法令關於特定事項，得行司法警察之職權者為司法警察，應受檢察官及司法警察官之命令，偵查犯罪；司法警察知有犯罪嫌疑者，應即開始調查，並將調查之情形報告該管檢察官及司法警察官，為刑事訴訟法第二百三十一條第一項、第二項所明定。該條第二項所謂『應即開始調查』之調查行為，乃為完成偵查犯罪法定任務之執行職

然應該賦予其機會，挑戰國家先前所為之偵查行為，是否基於可正當化的嫌疑或懷疑上。換言之，以「刑事程序或偵查工具使用是否基於始終無法正當化之嫌疑」作為不法性之判斷標準，所要求者並非結果責任（因為被告無罪，所以國家一定要負責），而是能夠藉由被告之主張，回顧國家所為是否能跨越最初步、最基礎與最容易證立之正當性上[59]。倘國家連最初步之正當性皆無法自圓其說，要求其負責實非過於嚴苛，況且，以此標準對國家為檢視，基本上並未對國家給予過於沉重之負擔[60]。

最後，由於國家賠償具有違法抑制機能，以上開標準為檢驗時，更可藉由相關資料於訴訟時提出並且接受被告與法官之檢驗而獲得實踐。而在確認不法性並非僅有「規範違反」，尚應包含「偵查門檻的違反」後，本文即對臺灣高等法院 106 年國再字第 1 號民事判決為評釋。

## 三、簡評臺灣高等法院 106 年國再字第 1 號民事判決

首先，該判決並未有違無罪推定原則之措舉，諸如再去爭執張女是否存有殘存之犯罪嫌疑，而是完全肯認張女為無刑事責任之人，本文對此表達肯定。又判決認為，獲刑事補償後並不妨礙張女為國家賠償之主張，此點本文也完全贊同。然而，即便張女已盡具體化陳述義務，詳加敘明其認為公務員與其行為之不法性為何，判決卻以刑事補償與國家賠償之範圍為由，對此點加以迴避、未有交代，實質可惜。

依本文之見解，對張女所為之刑事程序開啟，係因其配偶名下，車牌號碼為 DNX-211 之機車向來為其使用。而楊姓員警在已有記載肇事車輛為 DMX-211 之 110 報案紀錄單情況下，卻在肇事逃逸追查表記載肇事車輛之車牌號碼為 DNX-211，使張女受刑事程序之開啟與對之為相關偵查手段。又張女自始至終否認犯罪，並以友性證人證述其案發時位於新北市永和區之黃昏市場，故回顧刑事程序中對張女犯罪嫌疑之認定，本文認為，實建立在一始終無法正當化的嫌疑之上，國家責任之不法性應該已經具備，且楊姓員警至少具有過失。是以，張女所提之本案國賠訴訟，其主張應為有理由。

至於賠償範圍方面，判決以被告行為於民國 96 年，然張女提出之相關醫療單據卻始於民國 101 年 10 月，因相差過遠而未採信張女之主張。不過本文倒是認為，倘以最高法院於民國 100 年 8 月 18 日，以最高法院 100 年度台上字第 4607 號駁回張

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務行為。**此項規定，具有雙重之規範性，一方面規範在有犯罪嫌疑之情況下，司法警察即負有調查之法定義務；另方面規範以「犯罪嫌疑存在」為前提，限制司法警察發動刑事調查之門檻，亦即除特定之調查作為，因基本權干預之考量，依法另設有相關發動要件之外，司法警察之調查行為均應以『犯罪嫌疑存在』始得為之，核屬司法警察執行職務應遵守之誡命規範。**」

59 惟如貫徹荷蘭的實務標準，檢察官之起訴門檻與法官之有罪判決門檻也是可以挑戰之對象。惟我國國家賠償法第 13 條以及釋字第 228 號解釋之存在，以檢察官未達起訴門檻卻起訴，或是法官未達有罪判決門檻卻為有罪判決，作為國家賠償之依據，似無可能。此議題所牽涉者甚多，本文無意於此探討，而僅針對偵查門檻論述，還請讀者見諒。

60 例如由同案其他被告供述而開啟偵查者，即便事後獲判無罪，基本上皆不會被認為與此標準有違，而認有不法性可言，如蘇建和案、徐自強案等。惟上開案件國家是否有刑求等其他違法事實，不在本文所探討之範圍內。另外，由被害人指稱，而開啟對被告之偵查程序，基本上亦可通過由事後觀點的初步正當性檢驗，如註 55 之姐妹花強盜案。

女上訴致其有罪確定之點觀之，一個可能的理解是，楊姓員警之不法行為真正造成張女權利侵害及產生相關醫學上症狀與健康之減損，係到有罪確定後才開始發生。在有罪判決確定之前，也許張女即便認為無辜，但也深信司法能還其清白，所進行之程序或許僅為人民之司法協助義務所必要。然最高法院駁回其上訴致張女有罪判決確定，使張女之後要面對者，為成功率未達 1%之刑事再審[61]，如此絕望之現實終使其產生相關病症與勞動力減損之結果。是以，本文亦不贊同判決此部分之論述[62]。

## 肆、結論

本文以臺灣高等法院 106 年度國再字第 1 號民事判決，以及歐洲人權法院 *Bok v. the Netherlands* 一案，試圖概述無罪推定原則與刑事補償後國家之賠償責任。本文認為，歐洲人權法院就無罪推定原則之嶄新見解，即經確認終局無刑事責任之被告，在無罪推定原則對其保護之影響下，其他直接或間接有關機關應該對此尊重而受到拘束。而在刑事程序中，倘國家行為之不法性無法於刑事補償程序中被充分考量或是評價，則後續刑事被告以國家賠償或是民法侵權行為損害賠償之訴為主張時，國家責任之不法性就非單純審酌公務員是否有規範違反情事，而應回顧對被告發動刑事程序之偵查行為，是否建立在一始終無法正當化的嫌疑之上，即是否與偵查門檻有違。這樣之處理不但未對國家過苛，反而為無罪推定原則與國家賠償制度違法機能抑制之具體實踐。

將上開做為評釋臺灣高等法院 106 年度國再字第 1 號民事判決之基礎，本文肯認該判決遵守無罪推定原則，並未再爭執張女是否留有殘存的犯罪嫌疑。不過由於張女於刑事補償階段所請求者為罰金或易科罰金之補償，公務員即便有不法或不當之情節卻對補償金額無影響，且張女既已具體敘明國家違法情事，法院即不該對此迴避，而應肯定本件國家責任之不法性實為存在。再者，由於國家不法行為造成張女的健康損害可能遲至有罪判決確定後方發生，故判決以就診時間與其主張不法行為時間過遠而未採信張女之主張，本文亦不贊同。

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61 根據高等法院及分院刑事聲請再審案件收結情形，民國 100 年再審案件共 1370 件，僅 5 件准許開啟再審，成功率 0.36%；而民國 101 年再審案件共 1379 件，共僅有 4 件准許開啟再審，成功率 0.29%。是以，有罪確定後試圖以再審翻盤，實屬相當困難之事。相關資料統計，見：https://www.judicial.gov.tw/juds/year106/06/24-25.pdf。

62 至於律師費用之部分，判決內文雖言：「……再審原告主張受有律師費用損害 3 萬 8,000 元部分，姑不論其就律師費用之支出，並未提出任何證據資料證明，且其縱於刑案肇事遺棄罪部分提起第三審上訴時曾委任律師為辯護人，並支付律師費用，**惟肇事遺棄罪非屬強制辯護案件，難認所支出之律師費用係因再審被告所屬公務員不法執行職務或怠於執行職務所受損害**，則再審原告請求再審被告給付律師費用損害 3 萬 8,000 元，亦有未合。」就此，本文也持不同意見。本文可以接受因為未有單據，舉證不足而無法對其為有利認定之看法，但是上開判決粗體與底線之說法，似乎認為張女如果不希望有這項支出，其所為應放棄上訴，或自為上訴而無庸尋找律師，此種論述無視張女為了追求清白而對此付出如何之努力，略感遺憾。

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# The Presumption of Innocence, the Liability of the State after the Criminal Compensation:

## Comment on the Taiwan High Court 106 Kuo-Zhai-Zi No. 1 Civil Judgment

*Tsung-chi Chen**


## Abstract

When the criminal liability of the defendant was denied by the highest appellate court, the defendant is eligible to seek the criminal compensation from the State under certain conditions. However, after receiving this compensation, can the defendant still claim for compensatory damages against the State in connection with the wrongful criminal proceedings? After reviewing the judgements from Taiwan High Court and the European Court of Human Rights, this article argues that the court should weigh heavily with the application of the principle of presumption of innocence when making decision of such cases, but the defendant should not be exempted from the burden of proof which he asserted; and the wrongfulness here, is not only a normative violation. Based on the Dutch judicial practice, the court must review retrospectively whether the investigation was initiated by unjustified reasons at the early stage of the criminal procedure. The courts in Taiwan may take valuable advice from here.


**Keywords:** the principle of presumption of innocence, criminal compensation, European Court of Human Rights, doorsill theory

* Attorney; LL.M., National Taipei University.