

# **Constitutional Review through the Rule of Law**

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## Constitution Review through the Rule of Law

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The Kingdom of Thailand has continuously existed as one and indivisible Kingdom with the King as Head of State for more than 700 years ago. The country had been under governmental regime of absolute monarchy until 1932 when the regime has changed to constitutional monarchy. According to the current constitution<sup>1</sup>, Thailand adopts and maintains the principle of Separation of Sovereign Power for a check and balance among the Cabinet, the Parliament and the Judiciary.

The Judiciary consists of four separate and independent Court Systems, namely the Constitutional Court, the Court of Justice, the Administrative Court and the Military Court.

### 1. The Constitutional Court of the Kingdom of Thailand

**1.1** The Constitutional Court has been established by the 1997 Constitution and operating up until now. It is one-tier court with only 9 justices. Three justices come from the Supreme Court of Justice; two from the Supreme Administrative Court; and the rest from the selection of a constitutional committee and approved by the Senate<sup>2</sup>. According to the 2017 Constitution, all nine justices of the court must be approved by the Senate. They shall be in office only seven years and not exceeding the age of seventy five.

**1.2** The Constitutional Court is not the supreme court of the land. It ranks *pari passu* with the other courts. It has no jurisdiction to review any judgment or order of another court. No appeal can be made to the Constitutional Court against any judgement or order of another court. Its jurisdiction has been limited only to disputes or issues stipulated by written provisions of the Constitution or the Act of Parliament.

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\* Justice of the Constitutional Court, the Constitutional Court of the Kingdom of Thailand, 15th May 2018, Saint Petersburg, Russia.

<sup>1</sup> The Constitution of the Kingdom of Thailand 2017 Article 3 paragraph one

<sup>2</sup> The Parliament consists of two Houses; The House of Representative and the Senate.

The Constitutional Court is the organisation which exercises judicial power in protecting the principle of the constitutional supremacy. In addition, the Court also supports and defends the basic rights and liberty of the people. Thus, ensuring that the constitutionality of the law is the main responsibility of the Constitutional Court. Duties of the Court include giving a ruling whether any provision of law to be enforced by other courts is contrary to or inconsistent with the constitution. It is also the responsibility of the Constitutional Court to consider whether a provision of law is constitutional as proposed by the Ombudsmen or the National Human Rights Committee.

During the period between the implementation of the Constitutions, B.E. 2540-2550 (A.D. 1997-2007), the Constitutional Court had ruled that 14 provisions of law contravened the Constitution. The Constitutional Court is still responsible for and has the principal authority in reviewing the legitimacy and the Constitutionality of law under the current constitution of 2017.

The above mentioned rulings by the Constitutional Court have provided a significant legal standard, pertaining to the Principle of the Supreme Law of the Constitution, as indicated by improved precedents in ruling in accordance with the Rule of Law.

**1.3** Article 211 paragraph four of the 2017 Constitution confirms the absolute binding force of the ruling and decision of the Constitutional Court as having been provided in the 1997 and 2007 constitutions. This is a unique effect of the Constitutional Court's ruling, not existing in other courts in Thailand. The Article clearly provides that the ruling of the Constitutional Court shall be absolute and binding the Parliament, the Cabinet, other Courts, independent constitutional organizations and every form of state entity. Ironically, the Constitutional Court itself is not bound by its own previous rulings or precedents. There have been, however, only few cases in which the Constitutional Court does revoke its previous ruling.

## **2. The Rule of Law in Thailand**

**2.1** Before 2007, the rule of law was regarded as one aspect of legal philosophy and had little impact in the Thai legal system.

The rule of law has been regarded as a main and fundamental principle in the Thai constitution since 2007. It applies to the exercise of power and performance of duty of all state agencies. It has legal status as one of major

provisions of constitution which cannot be abolished or amended by the Parliament alone. There must be approval by the people in the referendum.<sup>3</sup> In addition, after the draft amendment to the constitution has been approved by the Parliament, on the request of members of Parliament not less than one out of ten of all current members, it may have to be sent to the Constitutional Court for a constitutional review<sup>4</sup>.

**2.2** The difficulty is that the constitution does not give definition of the term. There has never been any guidance given by any authoritative entity. It becomes, as a result, hard issues every time when we have to use the rule of law in practice; such as what is the meaning of the rule of law, whether it is similar to or different from the universal rule of law or that of other countries and how the Constitutional Court plays its role in applying the rule of law for the protection of people right and liberty as well as in reviewing abuse of power in politics and government.

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<sup>3</sup> Article 256 (8) in the case where the draft Constitution Amendment is an amendment to Chapter I General Provisions, Chapter II The King or Chapter XV Amendment to the Constitution, or a matter relating to qualifications and prohibitions of persons holding the positions under the Constitution, or a matter relating to duties or powers of the Court or an Independent Organ, or a matter which renders the Court or an Independent Organ unable to act in accordance with its duties or powers, before proceeding in accordance with (7), a referendum shall be held in accordance with the law on referendum, and if the referendum result is to approve the draft Constitution Amendment, further proceedings shall then be taken in accordance with (7);

<sup>4</sup> Article 256 (9) before the Prime Minister reports to the King for signature pursuant to (7), Members of the House of Representatives, Senators or members of both Houses comprising not less than one-tenth of the total number of existing members of each House or of both Houses, as the case may be, have the right to sign a joint petition submitting their opinions to the President of the House in which they are members or the President of the National Assembly, as the case may be, that the draft Constitution Amendment under (7) is contrary to section 255 or is of the characteristic under (8). The President of the House who receives such petition shall submit the opinions to the Constitutional Court. The Constitutional Court shall render a decision within thirty days from the date the petition is received. While the petition is under consideration for decision by the Constitutional Court, the Prime Minister may not present such a draft Constitution Amendment to the King for signature.

*“...rule of law is not an all-or-nothing affair ; so that nations that fail to obey its mandates in one respect are to be treated as tyrannies. The Rule of Law is aspirational and is therefore a matter of degree....” (Prof.Ronald Dworkin, New York University, 2012)*

Lord Bingham sharply stated : “A State which savagely represses or persecutes sections of its people cannot in my view be regarded as observing the rule of law, even if...(it has done according to) detailed laws duly enacted and scrupulously observed.”

**2.3** Does the rule of law require the judiciary to have the power to declare parliamentary enactments unconstitutional and therefore unenforceable?

I think it does, provided that the review is authorized by the constitution and it has been done in accordance with the ambit of due process and rule of law for the national interest and peace and happiness of the people. The rule of law requires that no one be above the law. But many other legal theorists think to the contrary. They think, giving final authority to the courts over the validity of enactments is a direct violation of the rule of law because it places unelected judges above the law. This issue has been one of controversy. Some people think that the rule of law requires supremacy of a political majority, while many others think that the rule of law forbids unlimited power of any institution or person.

As threats to National Security may sometimes require certain restrictions of civil and political rights, the law shall have to give some power or discretion to the Authority. In their difficult situation, the rule of law may need to be balanced properly.

A good system is one of checks and balances rather than a strict separation of powers. The exercise of power must therefore be checked and balanced by the exercise of other independent and impartial powers.

Sovereign power should be distributed among various institutions and individuals in such a manner that no institution or person can assume absolute power because power tends to corrupt and absolute power corrupts absolutely.

One indispensable requirement of the rule of law is the presence of the Judiciary, with proper Independence, Impartiality and Integrity, which is able to resolve disputes and assure respect for the law.

(1) If judges are appointed by the executive with no safeguards and if the executive can have judges fired at will, the rule of law is not respected.

(2) If acts of government involving the exercise of public power vis-à-vis citizens are excluded from judicial review the rule of law is also violated.

If the law allows for so much power or discretion that no one could prevent or deter its arbitrary exercise to the detriment to the country or the people, then we should feel obliged to have it repealed or at least become unenforceable.

Of course, that is the duty and authority of the legislature, not of the court. However, the legislative process of the country may be so delayed or impossible that the nation and the people have to severely suffer from wording of the written law. In this situation, the judicial interpretation and review are justified and required by the rule of law.

### **3. Constitutional Review through the Rule of Law**

#### **3.1 Judicial Review in Thailand**

Before 1946, there was very little review by the court of justice over illegal administrative act by officials; and no review at all with respect to the Act of Parliament and Government. In 1946, surprisingly and unprecedentedly, the Supreme Court of Justice made a self – assumed authority as its duty to interpret the constitution on the ground that constitution is also the law of the land. And by that argument and principle of the constitutional law, the court declared Act of Parliament unconstitutional and therefore unenforceable. The court decided, in the Judgment of the Supreme Court of Justice in a war crime case NO. 1/1946, that it was a fundamental principle of the Constitution that the state shall not issue a law with retroactive effect to criminalize people. The War Crime Act 1946 violated that constitutional principle, thus became unenforceable.

The impacts of Judgment NO.1/1946 were so disturbing and frightening to politicians that they managed to have the new constitution explicitly prohibiting the court from exercising judicial review over the Act of Parliament. They established a constitutional tribunal to perform a reviewing function over the Act of Parliament in place of the independent and impartial court of justice.

Consequently, for 50 years since 1947, there was no judicial review over the Act of Parliament and Act of Government in Thailand. During that period, the court of justice had only reviewed unlawful administrative acts.

### **3.2 Constitutional Review by the Constitutional Court**

The 1997 Constitution made a drastic reform by establishing two independent court systems, namely the Administrative Court and the Constitutional Court.

The Administrative Court has had its main jurisdiction to review unlawful and unjustifiable administrative act or omissions. The Constitutional Court, on the other hand, was assigned to do, among other things, a constitutional review over the Acts and Draft Bills of Parliament as well as some Acts of Government.

Although the Constitutional Court was dissolved by the 2006 coup d'état, it has been re-established by the 2007 Constitution with even wider authority. And the 2014 Coup did not dissolve it but allowing it to continue carrying on its functions. However, its jurisdiction was rather limited under the then Provisional Constitution.

The current constitution was promulgated in 2017 restoring its previous jurisdiction and even widening it.

### **3.3 Justification of the Constitutional Review**

In democratic countries, the judiciary must have authority to interpret law, even in a code system, because codes or written law cannot anticipate everything. Even they do anticipate and rightly regulate, but everything is changing so also are the world, the people and their way of life. The law must then be interpreted or distinguished accordingly.

Of course, that is the duty and authority of the legislature, not of the court. However, the legislative process of the country may be so delayed or in some situation even impossible that the nation and the people have to severely suffer from wording of the written law. In this situation, the judicial interpretation and review are justified and required by the rule of law.

Some interesting examples are the Thai Constitutional Court's decisions for non-discrimination and better standard in criminal justice. However, the courts, when obliged to perform that function, must realize that they virtually make law, and in that way they must be extremely cautious and not to go too far beyond legitimacy and boundary of the rule of law.

Access to Justice especially to the independent and impartial court is another important element in a society under the rule of law.

The Judicial Review, the Rule of Law and Access to Justice are, inter alia, important elements in a society under Democratic Governance. The topics of Judicial Review, the Rule of Law and access to justice are inter-dependent, ideal and a matter of degree.

All Democratic countries seem to have agreed to have judicial review and the rule of law included in their governance. However, they split and strongly disagree on the meaning and scope of the doctrines.

The real causes and conditions of this bipolar situation are by no means the judicial review or the rule of law, but indeed the differences in ideology, background and conceptual framework of the people concerned.

We therefore come to the conclusion that this question is in reality not one of law but a question of political value to be resolved and settled by each country. We cannot transplant the meaning, the scope and methodology of these doctrines adopted well in one country to another.

----- *Thank you.* -----