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Pornsakol Panikabutara Coorey

Abstract

After the absolute monarchy was replaced by the first constitution in 1932, the military and technocrats had made up Thai bureaucracy leaving little room for discussing stability of law and civil liberties. To date, there have been a number of military interventions as well as 18 constitutions (including the latest version in August 2007) as the ingredient of democratic regime for Thailand over the past 75 years. It is not surprising why it is commonly albeit wrongly perceived that the rule of law does not exist in the kingdom of Thailand.

The fact that Thailand's constitutional government developed along in a different path from that of the Western world should not be solely used to sum up the absence of the rule of law. Instead, such fact should be drawn on as the starting point to illustrate how far the Thai Constitutions have learnt to embrace the rule of law for the country. Accordingly, the following study is set to prove whether Thailand does admire and advocate the constitutional governance where the laws and administrative procedures are designed to protect individual liberties, restrict the power of the state to infringe on individual rights, and hold leadership accountable to the public.

THE EVOLUTION OF THE RULE OF LAW IN THAILAND: THE THAI CONSTITUTIONS

1. Overview of the Thai constitutions

After the absolute monarchy was replaced by the first constitution in 1932, the military and technocrats had made up Thai bureaucracy. To date, there have been 57 governments, 18 constitutions (including the latest version in August 2007) and a number of military interventions forming the democratic regime for Thailand over the past 75 years. This leaves little room for discussing stability of law and civil liberties. Undeniably, the military force has become habitual where the new power would exploit it to overthrow an existing constitution, which is replaced by a new constitution. It is not surprising why it is commonly perceived that the rule of law does not exist in the kingdom of Thailand.

From 1947 onwards, there has been a vicious cycle of military coups which unavoidably contribute to the fact that the significance of the constitution in Thai political history and government lies in its function to serve the interests of stability of a given regime.² In this sense, Thai constitutions have been seen as nominal rather than normative and represented realities of power relations more than being the source of political legitimacy.³ The failure of the constitutional development pushed for the movement for political reform demanding a reasonably acceptable level of protection of fundamental rights in 1992.⁴ The outcome of the reform is the 16th constitution in 1997 which is believed to be the best constitution that Thailand ever has.⁵ One of the main reasons which contributes to such belief is the fact that the 16th constitution introduced certain measures to make the government accountable and protect civil liberties.⁶

However, the fact that Thailand's constitutional government developed along in a different path from that of the Western world should not be solely used to sum up the absence of the rule of law. Instead, such fact should be drawn on as the starting point to illustrate how far the Thai constitutions have learnt to embrace the rule of law for the country. The arguable progression of the constitution could be employed as an indicator of what needs to be incorporated in improving the condition of the rule of law. Accordingly, the following study is set to prove whether Thailand does admire and advocate the constitutional governance where the laws and administrative

¹ Pinai Nanakorn, "Comparative Constitutionalisms: The Remaking of Constitutional Orders in South-East Asia" (2002) 6 *Singapore Journal of International and Comparative Law* 90, at 93.

² Thanet Aphornsuvan, *The Search for Order: Constitutions and Human rights in Thai Political History*, a paper published in the proceedings of the symposium on "Constitutions and Human Rights in A Global Age: An Asia-Pacific Perspective", held at the Research School of Pacific and Asian Studies, Australian National University, Canberra, 1-3 December 2001.

³ Professor Ted McDorman of the University of Victoria stated "[m]ost political commentators have accepted that the role of a constitution in Thailand has been to legitimate the authority exercised by the then-dominant political forces." This is cited in Asian Human Rights Commission, *Discussion of Constitutionalism and Its Relationship to Human Rights* (Lesson 49)

http://www.hrschool.org/doc/mainfile.php/lesson49/187/ (19 September 2007).

⁴ Borwornsak Uwanno & Wayne D. Burns, "The Thai Constitution of 1997: Sources and Process" (1998) 32 *University of British Columbia Law Review* 227, at 233.

⁵ "Constitution is not the law for the political party" (in Thai), *Matichon Daily*, 27 March 2008, at 2. ⁶ Thawilwadee Bureekul & Stithorn Thananithichot, *The Thai Constitution of 1997: Evidence of Democratisation*, a paper presented at an International Conference on "Governance in Asia: Culture, Ethics, Institutional Reform and Policy Change", held at City University of Hong Kong, Hong Kong, 5-7 December 2002.

procedures are designed to protect individual liberties, restrict the power of the state to infringe on individual rights, and hold leadership accountable to the public.⁷

2. The relationship between the rule of law and the constitution

Historically, the effort of nobles to use law to restrain kings became successful when the Magna Carta was signed by King John in 1215 which is arguably regarded as the first constitution in the world. This legal document required the King to renounce certain rights as well as to protect his subjects from unlawful imprisonment. This debate of how the rule of law and the constitution become involved is continuously expanded. More intensively, such involvement is articulated in Dicey's *Introduction to the Study of the Law of the Constitution* where he has described the rule of law in the following terms:

That "rule of law", then, which forms a fundamental principle of the "constitution", has three meanings... 10

The more modern explanation of the association between the rule of law and the constitution lies in the discussion of constitutionalism by the Asian Human Rights Commission where it says:

There are two aspects to the relationship between constitutionalism and the rule of law: not only is constitutionalism the institutional basis for rule of law in any society, it is also safeguarded by the rule of law.¹¹

And perhaps the easiest way to sum up the bond between the rule of law and constitutionalism is spelled out by Stefan Voigt in the context of a theory of the necessary conditions for implementing effective constitutions:

It will further be argued that the concepts of the rule of law and constitutionalism are so closely related to each other that they can almost be used interchangeably. 12

Whether or not the summary is completely resourceful, it cannot be denied that the deficiency of constitution can be a gauge for the absence of the rule of law as a constitution is generally used as a tool to convey the concept of the rule of law. Nevertheless, the presence of the constitution is not a guarantee of the advocacy of the rule of law. This is especially true where the constitution is drafted on the military domination with the mere objective to tick off the requirement of being a democratic country. In fact, it is the content of the constitution which does matter to prove the well-being of the rule of law.

The existence of the rule of law can be proved through the existence of a number of institutional provisions such as the constitutional supremacy, the separation

http://www.yale.edu/lawweb/avalon/medieval/magframe.htm (22 October 2007).

http://law.bepress.com/unswwps-flrps08/art45

⁷ James Klein, *The Constitution of the Kingdom of Thailand, 1997: A Blueprint for Participatory Democracy*, Working Paper Number 8, The Asia Foundation Working Paper Series, 1998, at 15.

⁸ Brian Tamanaha, *On the Rule of Law*, Cambridge University Press, UK, 2004, at 25.

⁹ Nancy Troutman, The Avalon Project at Yale Law School

¹⁰ A V Dicey, *Introduction to the Study of the Law of the Constitution* (first published 1885, 10th ed), Macmillan, London, 1960.

¹¹ Asian Human Rights Commission, *Discussion of Constitutionalism and Its Relationship to Human Rights* (Lesson 49) http://www.hrschool.org/doc/mainfile.php/lesson49/187/> (19 September 2007).
¹² Stefan Voigt, "Making Constitutions Work: Conditions for Maintaining the Rule of Law" (1998)
18(2) *Cato Journal* 191, at 196.

of powers, judicial review and the prohibition of retroactive legislation.¹³ The maintenance of the rule of law also requires the independence of the judiciary in articulating and interpreting laws. 14 Logically, if these key components are integrated into the constitution, it is likely that the rule of law as opposed to the rule of men is secured due to the procedure of minimising unconstrained discretion.¹⁵ It is very interesting indeed to explore whether any of the 18 versions of the Thai constitutions consists of those features which could contribute to the stability of the rule of law.

3. **Constitutional supremacy**

The notion of a super statute - a fundamental law superior to ordinary law - is central to the rule of law doctrine since the discretion attached to lower- ranked laws is curbed by declaring those laws unenforceable if they are contrary to the constitution. 16 In other words, the constitution as fundamental law is higher than all other laws, decrees and administrative rules and regulations. 17 Based on the theory of the social contract which formed the United States Declaration of Independence and the French Declaration of the Rights of Man and of the Citizen, a constitution holds the supreme hierarchy of laws because it is a piece of law in which every member of society agrees to respect.¹⁸

Surprisingly, the supremacy of the constitution was not explicitly promulgated either in the first constitution of the United States or the first constitution of Thailand. 19 In the United States, the provision on the constitutional superiority was introduced by the Federal Constitution in 1787 and it takes almost 160 years for Thailand to recognise the principle through the 1946 constitution. ²⁰ But the impact of the principle which contributes to the rule of law in Thailand becomes visible after the enforcement of the 1997 constitution.

Since the 1946 constitution expressly adopted the principle, the Council of State was the main authority to apply the principle.²¹ Originally, the Council of State in the form of a 'committee' attached to the Council of Ministers was responsible for examining the legality of laws as well as adjudicating administrative cases.²² But being only a committee which was connected to the executive arm of the government would extremely be difficult for the Council of State to oppose any legislation the

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 $^{^{13}}$ Asian Human Rights Commission, Discussion of Constitutionalism and Its Relationship to Human Rights (Lesson 49) < http://www.hrschool.org/doc/mainfile.php/lesson49/187/> (19 September 2007).

Denise Meyerson, "The Rule of Law and the Separation of Powers" (2004) 4 Macquarie Law Journal 1, at 6.

¹⁵ Frederick Schauer, "Rules, the Rule of Law, and the Constitution" (1989) 6 Constitution Comment

¹⁶ A E Howard, "Reflection on the Rule of Law America's 400th Anniversary at Jamestown" (2007) 42 University of Richmond Law Review 9, at 29.

¹⁷ Jacob Hornberger, The Constitution and the Rule of Law < http://www.fff.org/freedom/0892a.asp>

⁽⁴ October 2007).

18 Borwornsak Uwanno, *Public Law Volume III* (in Thai), Nititham, Bangkok, 1995, at 18. See generally, Jean Jacques Rousseau, *The Social Contract*, The Penguin Classics, Harmondsworth, 1968. James McClellan, Liberty, Order, and Justice: An Introduction to the Constitutional Principles of American Government (3rd ed), Liberty Fund, USA, 2000, at 347-354.

²⁰ Section 87 of the 1946 constitution stated that "[t]he provisions of any laws which are contrary to or in conflict with this constitution are unenforceable."

²¹ Somkid Lertpaitoon & Bunjerd Singkaneti, The Jurisdiction of the Constitutional Court According to Sections 264 and 266 (in Thai), a research of the Office of the Constitutional Court http://www.concourt.or.th/download/infordocument/abstract_1.pdf (4 October 2007), at 2. Office of the Council of State

http://www.krisdika.go.th/about 01.jsp?head=1&item=1> (4 October 2007).

government itself proposed. Inevitably, the Council was criticised for not being able to fulfil the task of assessing the legality of law.

In an attempt to rectify the unfulfilled system, the 1997 constitution overhauled the procedure of appraising the constitutional legality of law by establishing the Constitutional Court and equipped it with the power to review how constitutionally lawful the provision of any law is.²³ This is believed to strengthen the rule of law by getting rid of the higher authority of code and administrative law constructed by the bureaucracy with the high level of discretion.²⁴ This is something that the Council of State had not achieved. In *Marbury v Madison*, the supremacy of constitution was successfully spelled out by Chief Justice John Marshall where it was held that an Act of Congress contrary to the constitution was not law.²⁵ With the founding of the Constitutional Court taking over the Council of State, Thailand would expect nothing less than the success the United State has made through its judicial review.

4. Constitutional supremacy through the rulings of the Constitutional Court

More than half of the rulings of the Constitutional Court during its first 10 years of its operation have dealt with the constitutionality of law. ²⁶ This confirms the fact that the supremacy of constitution has been in the spotlight since the enactment of the 1997 constitution. The solidity of the rule of law is therefore highly expected through the eagerness of the Constitutional Court when they perform their judicial review on the executive's decision.

The very first executive laws which were tried for their unconstitutionality are emergency executive decrees issued by Prime Minister Chuan Leekpai during the Asian financial crisis in 1998. The decrees were to expand the role of the Financial Restructuring Authority to settle the debts by the issue of 500 billion Thai Baht in bonds. The decrees also empowered the Ministry of Finance to seek 200 billion Thai Baht in overseas loans.²⁷ The opposition filed the application to the Constitutional Court alleging that the decrees were unconstitutional since there was no emergency as required by the Constitution in expanding the power of the Minister of Finance.²⁸ In upholding the constitutionality of the decrees, the Court viewed that the decrees were essential for the financial security of the country since the general public agreed that the nation was in an economic crisis.²⁹

The Royal Decree is not the only kind of law which is tested on the basis of the constitutional supremacy. The higher status of law like an act of legislation is also put on trial. Under the hierarchy of Thai laws, an Act of Parliament is superior to the executive law like a Royal Decree. This means that the Constitutional Court has

²⁴ James Klein, *The Constitution of the Kingdom of Thailand, 1997: A Blueprint for Participatory Democracy*, Working Paper Number 8, The Asia Foundation Working Paper Series, 1998, at 16. ²⁵ 5 U.S. 137 (1803).

²³ Section 264 of the 1997 constitution.

²⁶ The rulings were published via the website of the Constitutional Court http://www.concourt.or.th/decis.html (5 October 2007).

²⁷ See generally, James Klien, *The Battle for the Rule of Law in Thailand: The Constitutional Court of Thailand* ConCourt%20Apr03.pdf (5 October 2007), at 10.

²⁸ Section 219 of the 1997 constitution is designed to cover the constitutionality of an emergency decree which only concerns the maintenance of national or public safety, national economic security, or to avert public calamity according to section 218.

²⁹ Section 218 of the 1997 constitution. See also, Sombat Chantornvong, *The 1997 Constitution and the Future of Thai Politics*, a paper presented at the 7th International Conference on "Thai Studies", held at the University of Amsterdam, The Netherlands, 4-8 July 2002.

become more familiar with the question of the constitutional legality of an Act of Parliament. One of the interesting rulings includes the *Names of Person Act* (1962) which was alleged of containing the discriminatory clause against a person on the ground of the difference in sex and personal status thus it was in breach of section 30 of the 1997 Constitution.³⁰

Section 12 of the *Names of Person Act* (1962) stated that all married women shall use their husbands' surnames. It was argued that the section was intended to abrogate married women's right to use their maiden names.³¹ In supporting the provision of the Act, the Minister of Interior, being in charge of the Act, asserted that it was a legal measure which enhanced the strength of the family unit.³² Contrary to the view of the Minister, the Court nullified a provision on the ground of the violation of gender balance.³³ The provision therefore was announced as a violation of the constitution and later was amended by the *Names of Person Act (No. 3)* (2005) allowing married women to use either their maiden names or their husbands' surnames.³⁴

Trust has been built on the operation of the Constitutional Court considering that a number of applications relating to the constitutionality of law have been increased over the short period of time. At the same time, the Court has encountered more complicated issues including the interpretation of the type of law which can be subject to the test of constitutional supremacy.³⁵ In the Ruling No. 16/2002 (B.E. 2545), the question on the jurisdiction of the Court was raised as to whether the *Rule for Judicial Officers in the Court of Justice Act* (2000) could be challenged on the unconstitutional supremacy under the jurisdiction of the Constitutional Court.³⁶

Indeed, there was no further explanation in section 264 of the 1997 constitution as to which type of law could be tested on the basis of constitutional supremacy. Accordingly, the Constitutional Court interpreted that only Acts of Parliament and emergency decrees are included in the definition of "law" in section 264.³⁷ Even though there is some disagreement to such narrow interpretation to exclude rules, regulations, and orders of the executive branch, it is hoped that the operation of the Constitutional Court would bring the rule of law to life and lead Thailand toward the new era of the citizen's perception about the rule of law.³⁸ By

<www.cdi.anu.edu.au/CDIwebsite_1998-</p>

³⁰ Section 30 stated "[a]ll persons are equal before the law and shall enjoy equal protection under the law. Men and women shall enjoy equal rights..."

³¹ The Court held that the word 'shall use' in section 12 of the *Names of Person Act* (1962) bore the characteristics of a mandatory provision.

³² Constitutional Court Ruling No. 21/2003 (B.E.2546).

³³ The Office of Women's Affairs and Family Development, Questionnaire to Governments on Implementation of the Beijing Platform for Action (1995) and the Outcome of the Twenty-Third Special Session of the General assembly (2000)

http://www.un.org/womenwatch/daw/Review/responses/THAILAND-English.pdf (4 October 2007). ³⁴ Section 6 of the *Names of Person Act (No.3)* (2005).

³⁵Supalak Pinijpuwadol, "Interpretation of 'According to law' in 1997 Constitution" (in Thai) (2004) 23(2) *Chulalongkorn Law Journal* 61, at 98-100.

³⁶ It was raised that the *Rule of Judicial Officers in the Court of Justice Act* (2000) contravened section 30 of the 1997 constitution since section 26 of the *Rule of Judicial Officers in the Court of Justice Act* (2000) requires any judge candidate to be physically and mentally able to perform the duty as a judge. The Act was contested on the ground of discrimination against persons with disabilities.

³⁷Somkid Lertpaitoon and Bunjerd Singkaneti, *The Jurisdiction of the Constitutional Court According to Sections 264 and 266* (in Thai)

http://www.concourt.or.th/download/infordocument/abstract_1.pdf (21 October 2007), at 8.

38 James Klein, *The Battle for the Rule of Law in Thailand: The Constitutional Court of Thailand*

declaring laws unconstitutional, not only law must be consistent with the constitution, civil liberties and rights written in the constitution are practically recognised and articulated.

The expectation that the Thai Constitutional Court would enlighten the people about the rule of law can be supported by a comparative study of the Korean Constitutional Court. Previously, the power of constitutional adjudication in Korea had been vested in the Constitutional Committee. After the Revolution in 1960 and the introduction of the current 1987 constitution, the Constitutional "Court" was established to overcome the deficiency of the "Committee" in handling constitutional cases. It is the Korean Constitutional Court which makes the theory on the rule of law accessible and conveys it through its decisions. With some similarity on the establishment and the development of the two Constitutional Courts between Thailand and Korea, the success in implementing the rule of law particularly on the supremacy of constitution should not be just a dream for Thailand.

5. Separation of powers

If the concept of separation of powers is a model for the governance of democratic states, Thailand would be a real advocate of democracy – a regime where the system of checks and balances is indispensable, the evidence of which could be seen in various versions of the Thai constitutions including the first constitution where it claimed that 'the King who is the head of the nation, exercises the sovereign power in conformity with the provisions of the Constitution which means through the Assembly of the People Representatives; the State Council; and the Courts.' ⁴⁰ Similar wordings can also be found in the later versions of the Thai constitutions.

However, the flaw of the separation of powers could be seen when putting the first constitution into action in 1932. Despite of the clear statement in the constitution, most members of the House of Representatives were appointed by the members of the coup which seized sovereign power from King Rama VII and later found the first political party – the People's Party. The question then is raised as to how the separation of powers could properly function when the executive power mingled with the legislative power.

Fortunately, that was not the permanent flaw. Due to the low level of education among Thai people, the choice of appointing the members of the Parliament was preferred to a general election. At that time, more than half of eligible voters had not completed primary education. ⁴³ By the time the third constitution was introduced in 1946, the Parliament was composed of the House of Representatives and the

^{2004/}thailand/thailand_downloads/ThaiUpdate_Klien_ConCourt%20Apr03.pdf> (21 October 2007), at 13.

Jong-Sup Chong, *New Democracy and the Constitutional Court in Korea*, a paper presented at the 2nd ASLI Conference: "The Challenge of Law in Asia: from Globalization to Regionalization?", held at the Faculty of Law, Chulalongkorn University, Bangkok, 26-27 May 2005.

⁴⁰ K Suwannathat-Pian, *Kings, Country and Constitutions*, RoutledgeCurzon, London, 2003, at 33. ⁴¹ Section 3 of the constitution (1991) and section 3 of the constitution (1997) stated: '[t]he sovereign power belongs to the Thai people. The King as Head of State shall exercise such power through the National Assembly, the Council of Ministers and the Courts…'

⁴² Pinai Nanakorn, "Comparative Constitutionalisms: The Remaking of Constitutional Orders in South-East Asia" (2002) 6 *Singapore Journal of International and Comparative Law* 90, at 94.

⁴³ Pinai Nanakorn, "Comparative Constitutionalisms: The Remaking of Constitutional Orders in South-East Asia" (2002) 6 *Singapore Journal of International and Comparative Law* 90, at 94.

Senate, members of which were elected.⁴⁴ In this way, even if it takes 14 years to strengthen the system of checks and balances as well as public participation in Thai democratic regime, the light of the separation of powers becomes brighter.

With the growing number of educated people, the better understanding of the interrelation between the separation of powers and the rule of law is evident. The 2007 constitution further spells out that the National Legislative Assembly, the Council of Ministers, the Courts and other state agencies must exercise the sovereign power in accordance with the rule of law. It is the first time 'the rule of law' is recognised in the written constitution. This latest version of the constitution is also well equipped with strategic methods to reduce the concentration of power thus giving hope that separation of powers will be blossomed by the well informed generation.

6. Preventing the monopoly of the executive arm

With the objective to eliminate abuse of state powers, the 2007 constitution has invented a number of measures to prevent the monopoly of the executive arm. For example, in issuing a Royal Decree, the government will be subjected to scrutiny by the Constitutional Court. Hot Something to be done at whims and fancy, the Royal Decree is reserved only for 'unavoidable emergency.' To evade the scrutiny of the National Assembly by initiating the Royal Decree is no longer a legitimate tactic of the government. This prerequisite of the Constitutional Court is deemed to prevent the disastrous Royal Decree like the *Royal Decree on Telecommunicating Excise* which was promulgated during the government of Prime Minister Thaksin.

The Royal Decree on Telecommunicating Excise was introduced while the 1997 constitution was effective. According to sections 218 and 220 of the 1997 constitution, a Royal Decree can be promulgated only when the Council of Ministers is of the opinion that it is the case of emergency and necessary urgency which is unavoidable in order to maintain national or public safety or national economic security. Considering the condition of sections 218 and 220, the Royal Decree on Telecommunicating Excise was definitely not a pressing issue for public safety or national economic security. Thus, it did not fit in the criteria provided by the constitution.

The reason why the *Royal Decree on Telecommunicating Excise* was introduced in the form of a Royal Decree instead of an Act of Parliament is arguably the idea of Prime Minister Thaksin who is the owner of the main telecommunicating companies in Thailand. To avoid the thorough investigation from the Parliament, the Royal Decree is probably the best idea in escaping the inspection of the National Assembly especially where personal interest can be easily traced by reading the proposed law. With the introduction of the 2007 Constitution, it is expected that the cabinet will have to be more careful when involving the exceptional legislative power through signing the Royal Decree.

7. Using the judicial power to investigate the acts of state officials

⁴⁴ Paul Chambers, *Good Governance, Political Stability, and Constitutionalism in Thailand 2002: The State of Democratic Consolidation Five Years after the Implementation of 1997 Constitution*, King Prajadhipok's Institute, Bangkok, 2002.

⁴⁵ Section 3 paragraph 2 of the constitution (2007). The referendum of the constitution was accepted by 57.8% of the voters on 19 August 2007.

⁴⁶ Section 181 of the 2007 constitution.

⁴⁷ Constitution Drafting Committee, *Highlights of the Draft Constitution*http://www.parliament.go.th/parcy/sapa db/committee con/index.php> (3 August 2007).

⁴⁸ Kanin Boonsuwan, 6 Years of Constitution (in Thai), Sukaparbjai, Bangkok, 2003, at 171-194.

Under the 1997 constitution, another type of court - Administrative Court has been set up. Many are still confused as to what kind of power the Administrative Court has relied on and what status it holds in the context of separation of powers. Not surprisingly, it is often mistakenly understood as an independent governmental agency.⁴⁹ In fact, the Administrative Court is an organ using judicial power which is similar to the Court of Justice but has special competence to decide disputes arising from administrative acts of state officials, whether that matter concerns a state organ and a private individual or is one between state organs themselves.⁵⁰

Prior to the establishment of the Administrative Court, Thailand had vested the power to examining the exercise of administrative agencies' power in the Council of State. The flaw of the case management soon occurred. It was seriously questioned that the Council of State which was attached to the executive power might have internal conflict and there was a high possibility that it might be influenced by the government.⁵¹ This was particularly true where certain cases involve the claim for indemnity from the government. According to the statistics of the Office of the Administrative Court, most of the disputes include the compensation for expropriation as well as the damages for unlawful acts or other liabilities committed by the state officials.⁵²

By establishing the Administrative Court, it cannot be denied that the 1997 constitution offered Thailand a great chance to incorporate a judicial review into the administrative procedure. However, the concern on this incorporation was prompted as to whether the Administrative Court is capable of challenging or questioning the administrative order on merits grounds. If the answer is "yes", the concept of separation of powers would inevitably be jeopardised. So, what would be the best solution to such concern? Even though the Administrative Court is the new organ for judicial power, its precedent on the concepts of "objective legality" and "subjective legality" was welcomed to settle its own jurisdiction where merits grounds are involved.

The objective legality places an emphasis on whether the decision-maker has a power to issue an administrative order while the subjective legality focuses on the right of the claimant if it is injured by the action of an official.⁵³ In applying these two concepts, the jurisdiction of the Administrative Court becomes more apparent and well established. Moreover, the principle of exhaustion of administrative remedies is affirmed to avoid the contravention of the administrative order by the Administrative Court. 54 Section 42 of the Administrative Courts Act (1999) requires the claimant to exhaust administrative remedies such as appeal against the administrative order before

⁴⁹ Ackaratorn Chularat, The View of the President of the Supreme Administrative Court on the existing important issues on the understanding of the role and mission of the Administrative Court during the past three years since the Establishment of the Administrative Court

http://www.admincourt.go.th/amc_eng/06-ARTICLE/3year_edited.pdf (31 October 2007).

The Remaking of Constitutional Orders in South-East Asia" (2002) 6 Singapore Journal of International and Comparative Law 90 at 111; Section 276 of the 1997 constitution.

⁵¹ Ackaratorn Chularat, The View of the President of the Supreme Administrative Court on the existing important issues on the understanding of the role and mission of the Administrative Court during the past three years since the Establishment of the Administrative Court

http://www.admincourt.go.th/amc eng/06-ARTICLE/3year edited.pdf> (31 October 2007), at 5.

Case statistics can be viewed at http://www.admincourt.go.th/amc_eng/02-KADEE/stat.htm.

⁵³ Peter Leylan, "Droit Adminitratif Thai Style: A Comparative Analysis of the Administrative Courts

in Thailand" (2006) 8 Australian Journal of Asian Law 121, at 135. 54 Ruthai Hongsiri, "Suing the Sovereign under Thai Law" (2003) 35 George Washington International Law Review 695, at 698.

filing an application to the Court. In this way, the administrative decision is internally reviewed before the Court can take any action.

The principle of exhaustion was tested in the Supreme Administrative Court Decision No.202/2545 (2002). It was held that the plaintiff was eligible to claim the compensation for expropriation because the plaintiff had appealed the order for the compensation to the Minister before resorting to the Court which is the procedure prescribed by law.⁵⁵ The decision firmly illustrates that even though the 1997 constitution highlighted the importance of the judicial power, the concept of separation of powers is not abused. It is another piece of evidence underlining how different facets of the rule of law are well balanced in Thailand.

8. Law must be prospective

Formal legality is one of the formal versions of the rule of law. ⁵⁶ The formal legality requires the law to be general, clear and hold the temporal dimension providing the public with the protection against the retroactive law. ⁵⁷ Putting an emphasis on the last requirement, the prospective facet helps maintain the concept of the rule of law by reducing the chance of the arbitrary government turning its back against an innocent act which is already committed. As Joseph Raz accentuated, the rule of law is well established only when the law is capable of guiding the behaviour of its subjects. ⁵⁸

The Thai constitutions have continuously and rigorously upheld the principle that law must be prospective. ⁵⁹ Not only the concept is written in the constitution, it is also affirmed in the Criminal Code that no person shall be inflicted with a criminal punishment unless he or she has committed an act which the law in force at the time of commission provides to be an offence and imposes punishment. ⁶⁰

9. Well- established on the principle of the prospective legislation

During the World War II, though technically Thailand was a supporter of Japan as Prime Minister Phibul Songkhram had declared war against the United States and Great Britain, there was an underground resistance movement against Japan called Khabuankarn Seri Thai (Free Thai Movement). It was the important source to the British and American governments for military intelligence in the region but this means that it took the opposite direction from that of the Thai government.⁶¹ When the War was over, Thailand was spared from being prosecuted by the British and

⁵⁵ The judgment can be accessed at <<u>http://www.admincourt.go.th/03-JUDGEMENT/01-JUDGMENT_INTERESTED/b01order/2022545.htm</u>> (1 November 2007).

⁵⁶ Brian Tamanaha, On the Rule of Law, Cambridge University Press, UK, 2004, at 97.

⁵⁷ Paul Craig, "Formal and Substantive Conceptions of the Rule of Law" (1997) *Public Law* 467; J M Balkin, "The Rule of Law as a Source of Constitutional Change" (1989) 6 *Constitution Comment* 21; Matthew Kramer, "On the Moral Status of the Rule of Law" (2004) 63(1) *Cambridge Law Journal* 65; Lord Bingham of Cornhill, *The Rule of Law*, the 6th Sir David Williams Lecture, Centre of Public Law, University of Cambridge,

http://cpl.law.cam.ac.uk/past activities/the rule of law text transcript.php> (10 July 2007).

⁵⁸ Joseph Raz, "The Rule of Law and Its Virtue" in *The Authority of Law*, Clarendon Press, UK, 1979, at 214.

⁵⁹ Section 32 of the 1997 constitution and section 39 of the 2007 constitution.

⁶⁰ Section 2 of the Criminal Code.

⁶¹ See generally, E Bruce Reynolds, *Thailand's Secret War: The Free Thai, OSS, and SOE during World War II*, Cambridge University Press, New York, 2005.

American Allies because the Free Thai Movement was credited of fighting against Japan.⁶²

However, the Free Thai Movement was subject to the prosecution by its own government since they were against the Prime Minister's decision to declare war against the Allies. Certain members of the Free Thai Movement were put on trial under the War Criminals Act (1945). In deciding that the War Criminals Act (1945) was retrospective, the Supreme Court relied on the 1932 constitution which was the first permanent and effective constitution in Thailand at that time. The Court held that a person was free to act or not to act as long as it was not prohibited by the provisions of the law. 63 It was underlined that "the law" meant the law which had been existing at the time the action was taken. In giving assistance as a spy to the Allies, the Thai Free Movement was not guilty as charged because there had not been any law prohibiting such activity. Therefore the War Criminals Act (1945) was void as it was a retroactive law with the objective to punish the past conduct.⁶⁴

There have been a large number of cases where the defendants are charged with the laws which are promulgated after the acts are committed. But this is not something that the rule of law proponents should be concerned. The principle of the prospective law has a deeper root in the Thai legal system. This is especially true when a context for considering if the law is retrospective is related to the criminal offence which is created for the administrative reason. Take the *Identification Card* Act (1983) as an example of how the government managed to control the use of identification for the reason of the national security.

The Identification Card Act (1983) was amended by the Identification Card Act (No.2) (1999). Section 14 of the *Identification Card Act* (1983) previously made it a criminal offence for "a person who has Thai nationality" if the false representation was made with the objective to be issued with the identification card. For the national security reason, the Identification Card Act (No.2) (1999) amended section 14 of the *Identification Card Act* (1983) widening the provision to capture more subjects. The amended section 14 now reads "any person" instead of "a person who has Thai nationality."65

The defendant in the Supreme Court Decision No. 9173/2544 (2001) made a false representation before the Identification Card Act (1983) was amended. The Identification Card Act (No.2) (1999) would not be operated as it would render a retroactive impact. As a result, the Identification Card Act (1983) would be an applicable law. However, the prosecutor relying on the wording in the *Identification* Card Act (No.2) (1999) wrote in the affidavit describing the defendant as "any person." By not articulating in the application that the defendant was a person who has Thai nationality as required by the *Identification Card Act* (1983), the complaint was procedurally illegal as the subject of the *Identification Card Act* (1983) was not lawfully described. In confirming that the law must be prospective and the *Identification Card Act* (No.2) (1999) was not applied, the defendant was acquitted by the Supreme Court.

⁶³ Section 14 of the 1932 constitution.
⁶⁴ The Supreme Court Decision No. 1/2489(1946). ⁶⁵ Section 8 of the *Identification Card Act* (No.2) (1999).

⁶² Central Intelligence Agency, DCI Remarks Honouring the Free Thai Movement https://www.cia.gov/news-information/speeches-testimony/2000/dci_speech_05082000.html (31) March 2008).

What is more interesting is that the Court of Justice has reinforced the principle of the prospective law by associating it with the doctrine of public interest. The doctrine empowers the Court itself to raise the issue of the retrospective law without considering whether or not any litigant in a lawsuit questions the temporal dimension of law.⁶⁶ In this way, the issue of retroactive legislation is automatically examined by the Court of Justice in every case.⁶⁷ As a result, not only is the formal legality version of the rule of law the primary subject of the constitution as it is written in the Thai constitutions, the extended impact of the provision also allows the judiciary to check whether the government and the National Assembly have complied with the principle of the rule of law.

10. Arguable interpretation of the retrospective principle in the area of electoral

When considering the doctrine in the context of criminal law, it cannot be denied that the formal legality of the rule of law which requires law to be prospective has theoretically and practically gained a strong momentum. The above examples clearly indicate that the Court is ready to strike out any unpredictable law. However, when the doctrine is applied in the context of electoral law, the interpretation of such doctrine may not render a clear result as it does in the criminal case. It is concerned that the formal legality on the prospective law may not be appropriately interpreted in the case where the Thai Rak Thai Party of Prime Minister Thaksin Shinawatra was ordered to be dissolved and the members were revoked the political rights by the Constitutional Tribunal.⁶⁸

The decision for the dissolution of the Party was relied on the Declaration of the Council for Democratic Reform (No.27) ("the Declaration") which was the applicable law before the 2006 interim constitution was promulgated. 69 Harsh criticism of the decision is inevitable since the Tribunal based its decision on the Declaration which was approved by the coup. The primary concern of such criticism is whether the Declaration could render the retrospective effect on the corrupted political activities which had been committed before the military coup has taken control of the country.

According to section 3 of the *Declaration*, the executive member of the disbanded political party is prohibited from engaging in any electoral activity for 5 years. 70 By dissolving the Thai Rak Thai Party, the Tribunal therefore revoked the electoral rights of the Party's executive members. The Party was banned on the ground that two senior members had hired small political parties to artificially run in the general election on 2 April 2006 in order for Thai Rak Thai Party to win the election.⁷¹ However, the hiring was committed before the *Declaration* became effective and if the *Declaration* was applicable to the case, is this the example of the violation of the rule of law?

71 See the decision of the Constitutional Tribunal http://www.concourt.or.th/download/news/Party1.pdf (30 October 2007).

⁶⁶ Section 195 of the Criminal Procedural Code.

⁶⁷ See generally, James Huffman, "Retroactivity, the Rule of Law, and the Constitution" (1999) 51 Alabama Law Review 1095.

⁶⁸ The Constitutional Court handed down the decision on 30 May 2007.

⁶⁹ The 2006 interim constitution was promulgated on 1 October 2007 by the Council for Democratic Reform. Basically, the Council consists of the coup members but it has been translated into different names. Section 34 of the 2006 interim constitution replaced the Council for Democratic Reform with the Council of National Security.

⁷⁰ Such electoral activity includes voting, being voted, and being appointed minister.

In answering "no" to the question, six out of nine judges of the Constitutional Tribunal agree that the revocation of the electoral rights is not a criminal penalty. It was only a legal measure derived from the effect of law which entitles the dissolution of a political party engaging in prohibited acts under the Organic Act on Political Parties (1998).⁷² By deeming that such revocation is not a penalty, the retroactive effect can take place without interfering the rule of law. It is further affirmed by the majority of the judges that the rule of law as against the retroactive legislation could be tainted only when the retroactive legislation renders the criminal punishment to the respondent.

The opponent of the decision argue that even though the revocation of the electoral rights is a criminal penalty, the fact that such revocation renders a retroactive effect has proved that the law is not prospective. 73 Whether the decision is sensible in the eye of the rule of law scholars depends on how the principle of retroactive law can be interpreted. Even though the decision leaves some room for controversy especially for those who lost their political rights, it is admitted that the existence of the retrospective law principle in the Thai constitutions is secured at a satisfactory level. This is particularly true for those laws which contain the criminal penalty because the Court of Justice has never failed to overthrow such retroactive legislations.⁷⁴

11. The direction of the Thai constitution: the rule of law at last?

The history of the Thai constitution is checkered. If one was to average the number of constitutions by the number of years, it would equal a new constitution just over every 4 years for the last 75 years. To add further damage to the reputation of Thailand, it is well known by the international community that most of these constitutional changes were triggered by an undemocratic military coup or a violent protest against political corruption.

It is to no surprise that critics are often eager to dismiss any progress that is made by the introduction of a new constitution in Thailand. How can there possibly be a rule of law in Thailand when the supremacy of the constitution is watered down by a constant threat of undemocratic violent protests and military coups? More importantly, why have a constitution if the military or the Thai people are continuing to not respecting it?

The simple answer to both of these two questions is that Thailand is not a liberal democratic nation that has a history of a stable constitution. Thailand is however, a nation that is in a state of "transitional democracy." It is transitional in the sense that when the constitution is in force, the majority of the nation abides by it and respects its provisions, which assist in defining the requisite characteristics of a democracy in Thailand.

http://law.bepress.com/unswwps-flrps08/art45

⁷² It was further held "[i]t is meant to prevent the political party's executive members, who caused harm to the society and the democratic form of government to repeat their wrongdoings in a certain period of time. Although the electoral rights are fundamental rights ensured for people in the democratic society, the law which sets criteria for persons who should be entitled for the electoral rights so as to suit the social conditions or to sustain the democratic form of that society, could still be valid."

⁷³ Was Tingsamitra, "Can the Law Retrospectively Revoke the Electoral Rights?" (in Thai) (2007) 1(3) The Judiciary Vision 25.

⁷⁴ Somlak Jadkranuanpol, Can the Retrospective Law Be Enforced? (in Thai) (7 January 2008).

75 Randall Peerenboom, "Varieties of Rule of Law" in Randall Peerenboom (ed), Randall Peerenboom

Asian Discourses of the Rule of Law, RoutledgeCurzon, , 2004, at 21.

While it is believed that democracy implies the rule of law, a transitional democratic state would guarantee that the basis of the rule of law can be evident or at the very least become evident. From the first constitution in 1932 to the eighteenth constitution in 2007, it is clear that more applications which derived from the notion of the rule of law have been embedded in the Thai constitution and often refined in later versions.

There is little doubt that the single most fundamental doctrine of constitutional law in a democratic society is that people can agree to set the terms and conditions of their own government through the mechanism of law. The constitution confirms that supremacy of the Thai people through their system of government. While the history of the Thai constitutions is checkered, it is nonetheless moving forward in the right direction — a direction which will someday ensure the right result for people of Thailand.

