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Pornsakol Panikabutara Coorey

Abstract

The role of the King has been evolved throughout the history of Thailand. At the beginning of the nation, the King was perceived as a "father" of the Thai people. The paternal relationship had later been replaced with the demigod image. It was a result of the mixing cultures between Indian Hindu and Khmer Buddhism. So many decades, it was believed that the King enjoyed this demigod status under the absolute monarchy. With reference to a number of revolutions occurred to the European monarchs, it was suggested that Thailand turned to constitutional monarchy. The new regime would offer a better chance for the rule of law in Thailand. It was predicted that the King's power could no longer be unlimited. It was therefore not surprising that the absolute monarchy was replaced by constitutional monarchy. The replacement officially marked Thailand as a country with democracy and modern constitution in 1932.

What is more surprising is that the new democratic regime has not seemed to deliver much chance for the rule of law. With so many military and civil interruptions, the King was repeatedly asked to take action or to deal with the problem. The question then arises as to how the King can be involved in the process. This is particularly so where his role is limited by the regime of constitutional monarchy. Whatever his action or inaction is, it would definitely have impacted the rule of law in Thailand. The study illustrates how fascinating the rule of law has been conceived with the application from the "palace". The emphasis is placed on King Bhumibol Adulyadej the Great or King Rama IX who is the world's longest - serving current head of state and the longest-serving monarch in Thai history.

KING'S INFLUENCE ON THE RULE OF LAW IN THAILAND

1.Background of the King

The role of the King of Thailand has evolved considerably over the last eight hundred years of reign. At the birth of the nation, the King was regarded as a "father" of the "children". The paternal relationship conveniently allowed the Thai people in the Sukhothai period (the first era of Thai history) the "right to access" to the King. The application of this relationship is still evident in modern time where the Thai people petition to the present King Rama IX, whom is seen as a last resort when their grievance is ignored by the authority.

During the Ayutthaya period (the second era of Thai history), the perception towards the King had changed due to the influence of Khmer Buddhism as well as Indian Hinduism.⁴ The King was perceived by the general populous as a "demigod", where all justice was sprung from.⁵ One example of his elevated status is seen where the King preserves the power to reconsider the judgment made by the judiciary and then exercises his power to pardon the convicted.⁶

In the present period of Rattanakosin, Western influence, especially its legal and political ideologies, often confronted the long line of Kings. This was particularly true for the concepts of liberal democracy and separation of powers. In 1932, absolute monarchy was rescinded and liberal democracy and other western ideas paved their way to officially become a political form of the Thai government. Other Western influences also plunged into Thailand through the legal and economic channels. Reforms and restructurings were inevitably taken place. These "radical changes" to some of Thailand's key institutions were considered necessary for the nation not to be colonised. Despite these abrupt changes, the monarch institute has survived and evolved into what is now considered as a constitutional monarchy.

The survival of the Thai monarchy over the last eight hundred years unquestionably affirms that the royal institute is a fundamental and powerful institution of Thailand. The question remains as to what influence, if any, the King have on the rule of law in Thailand under its new democratic regime. This is a topic that has not been properly

¹ Sawaeng Bonchalermwipas, *The Thai Legal History* (in Thai), Winyuchon Publication, Thailand, 2000, at 78; Preedee Kasemsup, *Legal Philosophy* (in Thai), Thammasat University Press, Thailand, 1996, at 69.

² Damrongrachanuparb, *The Legend of Buddhist Pagoda* (in Thai), Praepittaya, Bangkok, 1971, at 35.

³ Pramol Rootjanaseri, *King's Power* (in Thai), Bangkok, 2005, at 108-113; Chaw Chang Hua Nah, "Under the King's Power" (in Thai) (2006) 6(4) *Journal of Court of Justice* 15, at 17-18.

⁴ Kittisak Prokati and Saweang Boonchalermwipas, "Role of the King as Ruler and Source of Law" (in Thai), a paper discussed in an academic seminar hosted by Thammasat University for *the 60th Anniversary Celebrations of His Majesty the King's Accession to the Throne*, Bangkok, 30 November 2006, at 13; Preedee Kasemsup, op. cit., at 49.

⁵ Jesada Bhornchaiya, *Power of the King: the Comparison between Thailand & England* (in Thai), Chulalongkorn University Press, Bangkok, 2003, at 42-50.

⁶ Section 191 of the 2007 Constitution; Tanin Kraivixien, the King on His Majesty the King & His Genius on Law (in Thai), a lecture given at the Faculty of Law, Thammasat University, Bangkok, 5 January 2000.

⁷ Ukrit Mongkolnawin, *The History of International Law* (in Thai), Bopit, Bangkok, 1970, at 122-129.

⁸ Boonsri Meewong-u-kote, "The King Institute according to the Thai Constitution" (in Thai), a paper discussed in an academic seminar hosted by Thammasat University for *the* 60th Anniversary Celebrations of His Majesty the King's Accession to the Throne, Bangkok, 30 November 2006.

explored before. What follows is a detailed analysis of how and to what extent the King of Thailand does influence the rule of law. The emphasis is placed on the King during the present Rattanokosin period, especially King Bhumibol Adulyadej the Great or more commonly known as King Rama IX, who is the world's longest-serving current head of state and the longest-serving monarch in Thai history.

2. Why is the King of Thailand so influential?

The rule of law in Thailand would not have developed to where it is today without the influence of the line of Kings that reign in the Rattanokosin period. In particular, King Rama V (1868-1910) was clear in his intention to implement liberal democracy and the rule of law in Thailand. In pursuing his intention, many law reforms took place. Law was employed as a basis for government legitimacy. Among these law reforms was an increase in rules and regulations to restrict the government officials' power. Specific crimes and instances of official corruption were listed in the Criminal Code of 1908. 10 To a lesser extent, human rights, such as freedom of speech and equality before law, were touched upon, which were of great significance for future development.¹¹

Royal advocacy for a democratic regime was continued by King Rama V's successors. In 1932, King Rama VII played a pivotal role in the development of democracy and the rule of law in Thailand. Perhaps the most important change that King Rama VII made was to relinquish his sovereign powers to the people. By doing this, King Rama VII reduced his role, although not necessarily his influence, over the Thai judicial and political institutions considerably. What followed was the development of an independent, democratic Thai government, which not only enacted a Western style constitution, but also adopted a separation of powers model. As a result of these radical changes, Thailand officially declared itself a democratic state and was arguably recognised as one by the rest of the world. 12

The change from absolute monarchy to constitutional monarchy seemed to mark the beginning of a separation between two concepts: law and kingship.¹³ However, this was not the case for Thailand. Although the role of the King changed on paper, his influence on the people and key institutions did not deplete. On the one hand, certain roles of the King are now legislated in the Thai Constitution. On the other hand, the inseparable connection between the King and his people can be seen as frequent as many trips as the King took to listen to his people in both legal and non legal matters around the country. In this regard, the decision of King Rama VII to relinquish his power did not change the way the Thai people pay respect to the royal institute.

Moreover, the royal institute has been revered for their reason to alter the Thai regime. The royal institute genuinely believed that democracy and the rule of law would advance the status and welfare of the Thai nation.¹⁴ Indeed, the King's determination rapidly developed into the close bond between the royal institute and the Thai people. Because of the King's aspiration, the Thai people have vested their trust in the King more

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⁹ King Rama V's speech explaining the governmental reforms, Bangkok, 1927.

¹⁰ David Engel, Law and Kingship in Thailand During the Reign of King Chulalongkorn, Centre for Southeast Asian Studies, Michigan, 1975, at 101. ¹¹ David Engel, op. cit., at 95.

¹² Wisnu Krau-Ngam, Constitutional Law (in Thai), 3rd ed, Saweangsuthi Karnpim, Bangkok, 1987, at 336.

¹³ David Engel, op. cit., at 1.

¹⁴ David Engel, op. cit., at 17-18.

than their Members of Parliament.¹⁵ The people pay the highest respect to the King since for all they know "the King will do no wrong to his people". When King Bhumibol was crowned in 1950, he pledged that he would "reign with righteousness for the benefit and happiness of the Thai People". It is a promise of the King that has strengthened his influence on the nation.

For the Thai people, it does not matter whether their King is an absolute monarch or subject to the constitution. They always see the King as a hard working "father" who supports, advises, or even prevents any misfortune. The perception is confirmed when King Bhumibol travels around the country to listen to his people's problems and offers solutions on a face to face basis. This makes the monarchy strong in the eyes of the Thai people, especially those in rural areas of Thailand. According to a recent survey, the appointment of the new Prime Minister Abhisit Vejjajiva and his government (which is against the ex-Prime Minister Thaksin Shinawatra) did not make the Thai people as happy as the King's recovery from his sickness. When asked about the link between the King and the prime minister, the poll answered that the new prime minister must be truly loyal to the King in order to prolong the life of the new government.

The extraordinary bond between the King and the Thai people always puzzles foreign scholars. Andrew Harding, an English professor of law, viewed that the Thai King's popularity allows for the exercise of discretion to a somewhat greater extent than in European constitutional monarchies.¹⁸ It is evidenced where the King was able to intervene in a number of political crises. In fact, it almost becomes a norm. When the country is in political crisis, the King is expected to be an intermediary. In a fascinating way, his action has somehow altered the course of each incident considerably.¹⁹ Undoubtedly, and in a similar fashion, the King's ability to be politically involved has also impacted on the operation of rule of law in Thailand. This is shown in more detail from his influence and key role in the constitutional monarchy.

3. King and his role in constitutional monarchy

The name "constitutional monarchy" already suggests that the power of the King is limited by the constitution. Under the regime, the King is portrayed as a symbolic head of the state. Indeed, since Thailand became constitutional monarchy, the constitution always affirms that sovereign power belongs to the Thai people with the King as head of the state.²⁰ The King shall exercise such power through the National Assembly (the Parliament), the Council of Ministers, and the Courts.²¹ The King's role in the Thai Constitution is not much different from that of the European counterparts. To emphasise

¹⁵ "Two Leaders Three Prime Ministers" (in Thai), Matichon Daily, 26 May 2007.

¹⁶ The poll was published on 29 December 2008 by the Academic Network for Community Happiness Observation and Research.

¹⁷ The poll was published on 5 December 2008 by the Assumption University (ABAC Poll).

¹⁸ Andrew Harding, "May there be Virtue: New Asian Constitutionalism in Thailand" (2001) 3 *Asian Law* 236, at 240-241.

¹⁹ Kevin Hewison, "The Monarchy and Democratisation" in Kevin Hewison (ed), *Political Change in Thailand*, Routledge, USA, 1997, at 58.

²⁰ Section 2 of the 2007 Constitution.

²¹ Section 3 of the 2007 Constitution.

that Thailand does have the rule of law, the current 2007 Constitution also inserts that "all state organs shall perform duties of office by the rule of law". ²²

Where the administration is not democratically carried out and the rule of law is not maintained, would it be logical for the King as head of the state to intervene? Generally, the intervention is not something that can be expected in a Western-style constitutional monarchy. However, the opposite is true in the context of Thailand. The Thai people are more than willing to consult or rely upon the King's decision when crisis occur. In terms of political conflicts, it is always the case where the Thai people petition for the King's advice. It is not surprising to conclude that the King is indispensable to Thai constitutional jurisprudence.²³ It seems clear that the Thai King is more than a symbolic monarchy.

3.1. King's influence on the legislative power

Constitutional monarchy does not forbid the King to be involved with the legislative power. However, his role is passive and only attached to the symbolic function. The boundary is clear that the King would engage only in the appointment of key figures in the National Assembly or the royal signing of legislation. Nothing is expected more than the role of the English counterpart where the Queen convokes the parliament, opens, and prorogues its session. However, the Thai King has prerogatives which place the monarchy slightly beyond the European model of constitutional monarchy. One example can be established - the prerogative to veto.

After a bill is approved by the National Assembly, the prime minister must submit it to the King for his signature.²⁶ If the King does not agree with the bill, he can refuse to give his assent to the bill.²⁷ However, his rejection is not absolute. The King could object to the bill, but it entirely depends upon the decision of the parliament whether to take the royal advice. If the parliament reaffirms the bill with the required votes, the bill can be enforced as law as if the King had signed it. This is in line with the rule of law theory and international practice. The Thai Constitution assures that the power to veto confines to the symbolic status. Nevertheless, the King's influence is beyond the boundary of being a symbol.

In 1992, King Bhumibol did not sign his signature on the *Amendment of the Civil Code Bill*. ²⁸ The *Bill* would allow the much higher damages for defamation committed by the press and publishers. The King was concerned that the *Bill* would be the obstruction of the freedom of speech and the right to information. ²⁹ According to the constitutional

²² Section 3 paragraph 2 of the 2007 Constitution.

Andrew Harding, op. cit., at 240.

²⁴ Sections 124 and 151 of the 2007 Constitution.

²⁵ Andrew Harding, op. cit., at 240.

²⁶ Section 150 of the 2007 Constitution.

²⁷ Section 151 of the 2007 Constitution states "If the King refuses his assent to a bill and either returns it to the National Assembly or does not return it within ninety days, the National Assembly must re-deliberate such bill. If the National Assembly resolves to reaffirm the bill with the votes of not less than two-thirds of the total number of the existing members of both Houses, the prime minister shall present such bill to the King for signature once again. If the King does not sign and return the bill within thirty days, the prime minister shall cause the bill to be promulgated ad an Act in the Government Gazette as if the King had signed it".

signed it".

28 The Bill was passed by the National Assembly on 24 January 1992.

²⁹ Matichon Daily, 27 January 1992.

process,³⁰ it is the duty of the parliament to review whether there should be any amendment to the *Bill* and re-submit it to the King. However, the parliament agreed not to proceed with the *Bill*. It was internally agreed that the King's opposition should be respected.³¹ This is the only example of where the King has vetoed a Bill in parliament and it would be a surprise if he would veto any future Bill with parliament opposing his decision.³²

It could be argued that the prerogative to veto is one way to uphold the rule of law in Thailand.³³ For the Thai people, the King is the most trusted institute in Thailand. From the socio-legal approach, the King should be empowered to obstruct any illegitimate or unsound law. Indeed, it is a problem of tradition, belief, and culture when they interrelate with law. In this case, the idea of rule of law is questioned when interacting with a long serving monarch. There is no clear answer as to who the best controller of the rule of law is. By not signing the *Amendment of the Civil Code Bill*, it is believed by the Thai people that King Bhumibol truly prevented the corrosion of the rule of law.

If the *Bill* were to be implemented, it would have been easy for authority to control and influence the press. The media would not have been active to report the news or to investigate any corruption allegation. Hence, the King's prerogative appeared not only to impede arbitrary law. In the context of rights, the King's position also strengthened right to information and right to free speech.³⁴ In this particular instance, the King's influence on the legislative power is believed to offer the better platform for the rule of law in Thailand.

3.2. King's influence on the executive power

When King Rama VII relinquished his absolute power, he specifically expressed that "sovereign power was now transferred to the Thai people not to the group of elites". The question again arises if the government becomes tyranny, would the King as head of the state exercise his power to re-establish the rule of law? It becomes an even more controversial issue when other factors are linked. A coup, for example, is a popular alternative for Thailand. When the government entertained arbitrary power, automatically there appears news about soldiers and military coups. Then, would it be justifiable for the King to intervene before a coup occurs? According to the rule of law, it should not be either the King or the coup, but the law itself to restore the functional and legitimate government. Indeed, it is the question of how the rule of law is translated into a distinctive society.

Two incidents are addressed as to how the rule of law can be translated into a Thai society where the King is seen as the most powerful source of power. Both incidents reiterate the King's influence in terms of executive power. They involved the role of the

³⁰ Section 94 of the 1991 Constitution; Section 94 of the 1997 Constitution; Section 151 of the 2007 Constitution.

³¹ Bowornsak Uwanno, *Public Law Volume III* (in Thai), Nititham, Bangkok, 1995, at 228-229.

³² Pramol Rootjanaseri, *King's Power* (in Thai), Bangkok, 2005, at 79.

³³ Pramol Rootjanaseri, op. cit., at 80.

³⁴ Jesada Bhornchaiya, op. cit., at 258.

³⁵ King Rama VII stated in his abdication letter on 2 March 1934 that "I am fully willing to relinquish the powers which previously belonged to me, to the people in general, but I refuse to hand these powers to any specific person or group to exercise them in an absolute way and without listening to the real voice of the people".

King in performing the royal appointment of the prime minister and other ministers.³⁶ Interestingly, both incidents raise the question whether the royal appointment of the prime minister can only be perceived as symbolic. The former occurred in 1973 which was normally referred to as the "14 Tu La Uprising" (the 14 October Uprising). It started with massive student demonstrations which protested against the then prime minister and his military-dominated government.³⁷ The latter was the King's speech before the latest coup in September 2006. It answered to the rally to obtain a royally-appointed prime minister. The rally was to replace the elected Prime Minister Thaksin Shinawatra who was accused of conflict of interest³⁸ and fraud of election.³⁹ Each of these incidents will be discussed individually in detail below.

3.2.1. Prerogative to appoint the prime minister: the 14 October Uprising

In 1973, after extensive protests against Prime Minister Field Marshal Thanom Kittikachorn and the deaths of pro-democracy demonstrators, King Bhumibol appointed Sanya Dharmasakti as the new prime minister. The appointment was argued as the King's interference with political matters. The opposition to the King also argued that Sanya was not an appropriate person as a prime minister. He was not a Member of Parliament. Instead, he was the King's counsel and a member of the Privy Council at that time. The decision of the King in this matter is historically living and contestable. It clearly sparked the discussion of the King's political role under constitutional monarchy.

The defence of the royal act can be formulated on a number of grounds. Firstly, there was no proper prime minister in office because Thanom lost his control of his government. He then resigned and fled the country. Secondly, there was no requirement that the prime minister must be a Member of Parliament. Thirdly and most importantly, Thailand was on the verge of commencing a civil war. Prior to the King's intervention, the administration under Prime Minister Thanom was extremely confused and in disrepute. Thanom commanded that anyone disagreeing with his military-dominated government would be jailed. While Thanom ordered the military to suppress the

³⁶ Section 171 of the 2007 Constitution.

³⁷ Elinor Bartak, *The Student Movement in Thailand: 1970-1976*, Centre of Southeast Asian Studies, Monash University, Australia, 1993, at 8-20.

³⁸ Pasuk Phongpaichit, *Thaksin: The Business of Politics in Thailand*, Silkworm Books, Thailand, 2004, at 197.

The Constitutional Court handed down the decision on 8 May 2006 ruled 8-6 to invalidate the election in April 2006.
 Sanya Dharmasakti was also the Rector of Thammasat University at that time. He was highly regarded as

⁴⁰ Sanya Dharmasakti was also the Rector of Thammasat University at that time. He was highly regarded as the legal expert of the country.

⁴¹ Nakarin Mektrirat, *The King Who Supports Democracy* (in Thai), Thammasat University Press, Bangkok, 2006, at 121.

⁴² "The Historic Record – King Advises on the Political Crisis of the Nation" (in Thai), *Matichon Weekly*, 28 April 2006, at 26.

⁴³ Thongtong Chantarangsu, *The King's Power in the Constitutional Law* (in Thai), Chulalongkorn University Press, Bangkok, 2005, at 95-96.

⁴⁴ It was a period of social and political conflicts since Thanom declared martial law and abrogated the constitution.

⁴⁵ Prajak Kongkeerati, *Finally the Movement Can Be Seen* (in Thai), Thammasat University, Bangkok, 2005, at 513-518.

demonstrators,⁴⁶ the rule of law in theory did not take place in practice under these circumstances. As a head of the state, the King's action should not be seen as a step backwards to the time of absolute monarchy.

More theoretical defence could also be devised to further justify the King's intervention. According to the Thai Constitution, wherever no provision under the constitution is applicable to any case, it shall be decided in accordance with "the constitutional practice in the democratic regime of government with the King as head of the state". A Prior to Thanom's administration, there had not been any case where the prime minister fled the country and left the cabinet unattended. Resorting to constitutional practice as a guideline seemed to be an attractive and viable option. When "constitutional practice" was applied to find the solution for the country, it was interpreted as a warrant for King Bhumibol to appoint the new prime minister.

Leading to the "14 October Uprising", Thanom ran his administration through the National Executive Council where he as a Premier, also held the position of the Army Commander. It was a clear sign of the inexistence of the rule of law where various powers were vested in one person. The National Legislative Assembly was wholly appointed. Two-third of the members was soldiers or policemen. After the appointment of Sanya, a large number of the members in the unicameral Assembly were pressurised and thus resigned from their positions. It appeared that the royal appointment of the new prime minister reinstalled the rule of law for the country.

However, the King's decision has been enormously criticised. Even though he only put the "constitutional practice" into practice, he was blame to venturing outside the constitution. Perhaps it is because the provision was so generalised, giving no further direction as to what it was meant by the term "the constitutional practice in the democratic regime of government with the King as head of the state". To clarify the term, the comparative approach is explored to illustrate whether King Bhumibol's prerogative departed from that of other constitutional monarchy.

In the United Kingdom where the constitution is complied by the Crown, the power to appoint the prime minister is also vested in the Queen as head of the state.⁵⁰ Like Thailand in the normal circumstance, the Queen must appoint the prime minister who is the leader of the party which won the election.⁵¹ However, the power to appoint the prime minister in England is not classified only as symbolic as it is generally understood. In the past, the personal prerogatives were exercised in the times of special circumstances such as wars as well as financial crisis.⁵²

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⁴⁶ James Ockey, "Thailand: The Struggle to Redefine Civil-Military Relations" in Muthiah Alagappa (ed), *Coercion and Governance: The Declining Political Role of the Military in Asia*, Stanford University Press, USA, 2001, at 194-195.

⁴⁷ Section 7 of the 1997 Constitution; section 7 of the 2007 Constitution.

⁴⁸ See also Suchit Bunbongkarn, "Thailand: Democracy under Siege" in James Morley (ed), *Driven by Growth: Political Change in the Asia-Pacific Region*, An East Gate Book, USA, 1999, at 164-165.

⁴⁹ The pressure was from the Thammasat Graduate Committee as well as the Law Society in November 1973. The fact that these groups were largely consisted of lawyers made the pressure become more intense. ⁵⁰ Vernon Bogdanor, *The Monarchy and the Constitution*, Clarendon Press, Oxford, 1995, at 84-111.

The Office of Prime Minister is governed not by codified laws, but by unwritten and, to some extent, fluid customs known as constitutional conventions, which have developed over years of British history. See also, Jesada Bhornchaiya, op. cit., at 226.

These incidents include the 1916 appointment of Prime Minister Lloyd George and the appointment of the temporary government during the monetary crisis in 1931 by King George V.

During World War I, Prime Minister Asquith, the leader of the Liberal Party had resigned because he could not gain support from the parliament. However, his competitor - Bonar Law, the leader of the Conservatives Party was not able to form the new government either. The Conservatives Party was only minority in the government. The question then arose as to how the United Kingdom would have a legitimate prime minister especially in the time of war. King George V was concerned of the stability of the country if there was no prime minister in office. He therefore initiated the meeting by calling over leaders from different parties. King George V intended to find an appropriate person who could avoid conflicts in government by coalition.⁵³ It was clear that the King's involvement in the process was substantial and was not predicted under constitutional monarchy.

At the end of World War I, the United Kingdom suffered from the Great Depression. The then Ramsay Macdonald's government was having a problem in gaining support for its financial policy. Fearing for the government's resignation during the financial crisis, King George V was prepared to engage in any necessary inventive measure. This included King George V in arranging to support the minority government. He asked the leaders of the Conservatives and Liberal Parties to form a "National Government" – a coalition which was designed to be a caretaker of the country.⁵⁴

Considering the fact that King Bhumibol appointed Sanya as the prime minister during the time of the uprising, the roles of the Thai King and the English counterpart appear to be not so different. The experience of the United Kingdom illustrates that there have been occasions when constitutional monarchy entered into politics. In fact, the number of interferences by the English monarch in appointing or dismissing ministers is greater than that of Thailand. 55 Under special circumstances, it would not be irrational for constitutional monarchy in exercising their prerogatives to foster the democratic rule of law principle. With the commencement of the civil war in Thailand, "constitutional practice" should allow the royal prerogatives in preventing any loss of the country under the constitutional law.

3.2.2. Asking for the royal government: the political deadlock during Thaksin Shinawatra's government

More recently, the King's role in politics was re-visited. It is a repetition of how the Thai people perceive the duty of their King. When referring to King Bhumibol, the Thai people generally replace the word "king" with "father". Being a "father", the King is expected to take control of any problems Thailand encounters. 56 This is especially true in terms of political turmoil which is one major setback of the country. It is noted however, that the expectation of the people could be a false impression. By this, it means that such expectation may not be found under normal circumstance in constitutional monarchy. The false impression could ask for something which the King could not deliver because of the constitutional boundary. This is a case which Thailand has experienced during the late administration of the ex-Prime Minister Thaksin Shinawatra.

⁵³ Jesada Bhornchaiya, op. cit., at 230.

⁵⁴ Jesada Bhornchaiya, op. cit., at 231.

⁵⁵ Jesada Bhornchaiya, op. cit., at 220-221.

Jesada Bhornchaiya, op. cit., at 220-221.

The speech by Crown Prince for the 60th Anniversary Celebrations of His Majesty the King's Accession to the Throne on 9 June 2006.

Since Thailand became democratic, political stability was rare. Many scholars start to wonder whether democracy is actually the right regime for Thailand.⁵⁷ Vote buying and election fraud are common activities among Thai politicians.⁵⁸ Even if there was a belief that Thaksin Shinawatra would change the course of Thai politics, he, in the end was prosecuted for many charges relating to corruption.⁵⁹ Before Thaksin was officially ousted, allegation of corruption and conflict of interest were continually exposed. The series of protests were held by a growing number of those who were against him. Thaksin stood still as he believed that he was legitimately elected. It was unfortunate for the King as he was once again demanded to end this political deadlock.

The demand was specific for King Bhumibol to appoint a new prime minister and a new government. The King was very careful in handling such request. It would be undesirable if he was accused of stepping outside the "constitutional practice" again. In responding to the demand, his Royal Highness was prompt to tell the country's judges to sort out the "mess". Within two weeks after the royal speech, the Constitutional Court ruled that the 2 April 2006 election in which Thaksin had just won was invalidated. Thaksin was no longer able to hold his office.

King Bhumibol himself compared and contrasted both of his decisions in 1973 and 2006. There is a significant difference between the student uprising in 1973 (14 October Uprising) and the protest against Thaksin in 2006. While General Thanom resigned during the uprising, Thaksin had never given up his position since his party won the election on 2 April 2006. However, those who were against Thaksin grew so fast and became so aggressive. With these circumstances, Thaksin only promised that he would not take the official prime minister position but would continue his premier as a caretaker. Therefore, despite the massive demand asking the King to appoint a new prime minister, Thaksin was not replaced. Under constitutional monarchy, substituting an elected prime minister would undermine the principle of democratic rule of law. The two

⁵⁷ Pongsak Hoontrakul, "Legitimacy will mitigate the risk of tyranny in Thailand", *The Nation*, 23 October 2008 http://nationmultimedia.com/2008/10/23/opinion/opinion/2008656.php (14 January 2009).

⁵⁸ Pasuk Phongpaichit, "Is There Any Hope in Preventing Corruption?", a paper presented at King Prajadhipok's Institute Congress I on *Politics, Administration, and Change in Thai Society at the Outset of Next Century*, Bangkok, 10-12 December 1999.

⁵⁹ "Profile: Thaksin Shinawatra", *BBC News* < http://news.bbc.co.uk/2/hi/asia-pacific/1108114.stm (14 January 2009).

⁶⁰ Chachapon Jayaphorn, *Precautionary Issues When Asking for the Royal Government* (in Thai) http://www.law.chula.ac.th/web/popnews.php?Id=75> (25 August 2007); Susan Downing, *The Reserve Powers of the Governor-General*, Research Note 25 1997-1998

http://www.aph.gov.au/library/Pubs/rn/1997-98/98rn25.htm (28 August 2007).

⁶¹ King Bhumibol addressed the Administrative and Supreme Courts' judges during separate Royal audience at Klai Kangwol Palace in Prachuap Khiri Khan on 25 April 2006.

⁶² The decision was handed down on 8 May 2006.

 (28 August 2006).

⁶³ King Bhumibol addressed the Administrative and Supreme Courts' judges during separate Royal audience at Klai Kangwol Palace in Prachuap Khiri Khan on 25 April 2006.

⁶⁴ Frank Munger, "Culture, Power, and Law: Thinking about the Anthropology of Rights in Thailand in an Era of Globalisation" (2007) 51 *New York Law School Law Review* 817, at 821.

^{65 &}quot;Thai PM Thaksin says he'll step down", Channel NewsAsia, 4 April 2006.

incidents are examples of how the King conceives his role in accommodating the democratic rule of law. ⁶⁶

3.3. King's influence on the judicial power

The decision of the Constitutional Court in invalidating the April 2006 generated three aspects of the rule of law in Thailand. Firstly, the campaign requesting the King to appoint a new prime minister was put to an end. This avoided any criticism that the King might misrepresent the concept of constitutional monarchy or the rule of law. Secondly, it was a beginning of what so-called "judicial revolution". By directly speaking to the judges who were at his palace, it was a clear message for them to start utilising their power in building "clean" government. Finally, it is a confirmation of how the King can influence the rule of law in Thailand through the judicial power.

After the Constitutional Court nullified the 2006 election, there are several rulings handed down by other Thai courts relating to political corruption or misrepresentation. It embarked the idea of political landscape being altered by the judiciary. The idea would probably have not occurred if the King had not deliberated with the Thai judiciary. The King's approach to solve the political deadlock in April 2006 has paved the way for the Thai courts to be well equipped with the concept of the rule of law. The King has sparked the judicial battery which has been flat for a long time. His speech also raised public awareness of how necessary the impartial institute is, for the rule of law to be firmly developed. Prior to the King's speech, the Thai people seemed to forget that judicial power can provide the system of checks and balances to eliminate any arbitrary act.

3.3.1. Independence of the judiciary

Since democracy is the political philosophy Thailand has been keen to pursue, separation of powers must be incorporated. To maintain the balance among the legislative power, the executive power, and the judicial power, the latter must have the status of a co-equal branch of a government. Coinciding with the concept of the rule of law, to exclude abuse of power, the judiciary must be independent. When researching the Thai legal history, it is found that the principle of judicial independence was well established. Even though there was the long period of absolute monarchy, the independence of the judiciary was still respected. A number of incidents can be demonstrated to validate the royal respect for the doctrine of judicial independence.

Prior to the reign of King Rama V (1868-1910), courts in Thailand were scattered and unregulated. The jurisdiction among courts was not clear. In criminal cases, certain administrative offices had power to convict or punish the accused. In other words, those

⁶⁷ Marwaan Macan-Markar, "Judicial Revolution Changing Political Landscape", *Inter Press Service News Agency*, 19 August 2008.

⁶⁶ Nakarin Mektrirat, op. cit., at 218.

⁶⁸ International Commission of Jurists, "The Dynamic Aspects of the Rule of Law in the Modern Age", a report on the proceedings of the *South-East Asian and Pacific Conference of Jurists*, Thailand, 15-16 February 1965, at 42.

⁶⁹ Barry Weingast, "The Political Foundations of Democracy and the Rule of Law" (1997) 91(2) *American Political Science Review* 245, at 260-262.

⁷⁰ Lung-chu Chen, "Human Rights Protection Needs Rule of Law and Independence of Judiciary to Succeed" in Uwe Johannen & James Gomez (eds), *Democratic Transitions in Asia*, Select Publishing, Singapore, 2001, at 85.

who had power to arrest the criminals also acted as adjudicator in the case. Police were allowed to trial the case if the penalty of the charge was not more than six months of imprisonment. These rules were channels for polices to abuse their power. It was one of the main reasons why King Rama V decided to overhaul the court system in Thailand. In issuing the law retracting the adjudicating power from the police, King Rama V believed that he was successful in building the independence of the judiciary.

Now that Thailand is a constitutional monarchy, the King can no longer issue his own law to support the judiciary. Despite not having absolute power like King Rama V, King Bhumibol has continued to be a promoter of the independence of the judiciary. This may raise the question as to how judges can be independent if they are influenced by the King. To answer the question, it needs more clarification of what influence can mean. King Bhumibol does not instruct judges how to decide their assigned cases. He is influential in the sense that he continues pleading judges to be impartial. In normal circumstances, such a request might be easily ignored. However, as the sole source of unity and strength of the country, most judges would want to live up to the King's expectation and often do so.

Under constitutional monarchy, judges are selected by the process according to the judicial law and the constitution. The rules are varied depending upon the types of courts they belong to. Before taking office, judges are required to make a solemn declaration before the King. 72 It is again a symbolic role of the constitutional monarch to appoint judges. 73 However, King Bhumibol has turned this symbolic ceremony to be a real opportunity to reiterate his request. Every time, judges were at his palace for their royal appointment, King Bhumibol would always articulate the ability of an individual judge in maintaining judicial impartiality and honesty.⁷⁴ The seriousness of the King's request might be underestimated when he is seen as a constitutional monarch. However, when seen as a beloved father and role model of the country, the King's word is enthusiastically adopted without hesitation.⁷⁵

3.3.2. Prerogative to grant a pardon

The inseparable relationship between the King and the Thai people is unprecedented. It would be difficult to understand anything in Thailand if the King's influence was not included. "Father" is not the only status chartered by such relationship and influence. "Adjudicator" is also part of the role the King in Thailand has long played. Presiding over the court of law was a duty an absolute monarch was to perform. After all, the King was the fountain of justice. ⁷⁶ Under constitutional monarchy, the King can no

⁷¹ Trachuying, "Porisapa Court" (in Thai) (1997) 44 (4) *Dulapah* (Journal of the Office of Judiciary) 118, at

⁷² Section 201 of the 2007 Constitution.
⁷³ Section 200 of the 2007 Constitution.

⁷⁴ Chamrus Khaemajaru, "King Bhumibol and the Judiciary Power" (in Thai), King Bhumibol: The Carer of Legal Profession (in Thai), Bangkok, 1987, at 61-74. Kevin Hewison, op. cit., at 62.

⁷⁶ Stanley De Smith & Rodney Brazier, Constitutional and Administrative Law, Clarendon Press, London, 1999, at 382-387; Frederick Stevens, "Proper Use of the Writ of Injunction: From the Standpoint of Legal History" (1908) 8(7) Columbia Law Review 561, at 561.

longer deliver a trial. His prerogative is limited to granting a pardon.⁷⁷ However, the concept is immeasurably inherited and still very much alive in Thailand.

Indeed, the concept that "the King is the fountain of justice" is recently contested in November 2008. Those who support the ex-Prime Minister Thaksin Shinawatra attempted to link the concept with the prerogative to grant a pardon. It was a plan to rescue Thaksin after he was convicted of corruption. If pardon were granted, Thaksin would be able to return to Thailand without jail sentence. While there was an attempt to ask for a royal pardon, Thaksin continued denying the legitimacy of the judgment. This is seen as a contradictory tactic. If Thaksin believes that he has done nothing wrong, why would there be a need for a royal pardon? The plan for a royal pardon attracted widespread criticism. It was quickly and quietly subsided before the end of 2008.⁷⁸

The attempt to ask for a royal pardon is a good example how King Bhumibol is influential in the judicial affair. Even if he is the King under constitutional monarchy, the Thai people generally believe that he is still the fountain of justice. It is also an explanation as to why there are a large amount of petitions sent to the palace. Each year, there are thousand of petitions that King Bhumibol revised. Even though pardon is an international practice, the number of petitions raises the concern whether the King's prerogative would lead to the rule of law interruption.

In Thailand, there are various types of pardon that can be asked for the King's mercy. The most recent one would be the case of Harry Nicolaides, an Australian writer who was sentenced after his writing was found to slandering the royal family. He was later granted royal pardon and returned to Australia in February 2009. The more serious type involves the case where execution is the penalty. Execution is a legal punishment for criminal cases such as murder or dealing with a large amount of drugs. The concern seems to grow deeper where pardon involves these serious criminal charges. Indeed, prerogative to grant a pardon is quite broad. The constitutional provision does not provide any further direction as to when or how the King can grant his pardon. With this constitutional gap, it is not surprising as to why concern for the rule of law is growing.

King Bhumibol is very careful when asked to give his pardon by those who convict of these charges. In exercising his prerogative, King Bhumibol has never granted his pardon before the judgment is final. 85 This means that the question of facts as well as the

⁷⁷ Section 191 of the 2007 Constitution.

⁷⁸ "Opposing the Idea to Pardon Thaksin" (in Thai), *Matichon Daily*, 4 November 2008.

⁷⁹ Borwornsak Uwanno, *Law and the Alternative of Thai Society* (in Thai), Nititham, Bangkok,1994, at 6-7. ⁸⁰ The Committee Organising the Celebration of 5 December 1987, *King Bhumibol Adulyadej, the Great* (in Thai), Medical Media, Bangkok, 1987, at 144.

⁸¹ P S Ruckman, "Executive Clemency in the United States: Origins, Development, and Analysis (1900 – 1993)" (1997) 27 *Presidential Studies Quarterly* 251; Carolyn Edie, "Revolution and the Rule of Law: The End of Dispensing Power" (1977) 10(4) *Eighteenth – Century Studies* 433.

⁸² Weena Eiamprapai, "King Bhumibol Adulyadej and the Justice Procedure" (in Thai), a paper published by the Supreme Court to celebrate *the 50th Anniversary Celebrations of His Majesty the King's Accession to the Throne*, Bangkok, 1996, at 57-67.

^{83 &}quot;Thailand Frees Australian Writer", BBC News, 21 February 2009

http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/1/hi/world/asia-pacific/7903019.stm?ad=1 (18 March 2009).

⁸⁴ Section 18 of the Criminal Code.

⁸⁵ Inchan Burapan, *The Power of the King of Thailand* (in Thai), Office of Judiciary, Bangkok, 2005, at 18; Statistic on the pardon granted by the King was referred in Surasak Likasitwatanakul, "The King's

question of law is concluded by the court.⁸⁶ It is a royal guarantee that his prerogative will never impede or obstruct the trial by the judiciary. In this way, the King's prerogative to grant a pardon will not venture inside the judicial power. It is seen as a successful role of constitutional monarch in conducting his pardon without much guide from the constitution. The King as a sovereign power can lessen the penalty of the crime without forgiving the crime itself.⁸⁷

4.Unprecedented royal institute: the case of Thailand

The King in Thailand is revered above all other authorities though he has little formal power. This may not happen in other countries which constitutional monarchy operates. How the King becomes so powerful in the rule of law context is indeed the matter of the socio-legal learning. In the legal theory, the rule of law might not be contaminated with any social circumstance. In practice, the rule of law is interacted with every institute of the state. The concern is left as to how well the rule of law can perform when each institute becomes involved. More specifically, it is the concern of how rule of law can be applied in the country where the constitutional monarch is more than a symbolic power.

Walter Bagchot once summarised three rights that a constitutional monarch should possess: the right to be consulted; the right to encourage; and the right to warn. ⁸⁹ Clearly, King Bhumibol's influence went beyond what these rights can offer. As the King is the fundamental institute of Thailand, it will be difficult to separate his role from the rule of law application. It will be even more difficult to see the current King allows any instance of abuse of power to happen. In spite of everything, he is seen as a protector of the legal system or even the whole country. ⁹⁰ To conclude with the socio-legal approach, the rule of law would not be able to flourish in Thailand if it is not well supported by the King. ⁹¹

Prerogative Power to Pardon' (in Thai), a paper discussed in an academic seminar hosted by Thammasat University for *the 60th Anniversary Celebrations of His Majesty the King's Accession to the Throne*, Bangkok, 30 November 2006, at 26-27.

⁸⁶ Weena Eiamprapai, op. cit., at 63; Thongtong Chantarangsu, *Writing to the Prime Minister* (in Thai), Krungsiam Printing, Bangkok, 1993.

⁸⁷ Oxford Dictionary of Law, *Pardon*, Oxford University Press, UK, 2002.

⁸⁸ Frank Munger, op. cit., 820.

⁸⁹ Miles Taylor, Watter Bagehot: The English Constitution, Oxford University Press, UK, 2001, at 64.

⁹⁰ David Engel, op. cit., at 1.

⁹¹ Thongtong Chantarangsu, op. cit., at 95-96.