

## **Democracy and Rule of Law in Thailand: Judicialization of Politics or Politicization of the Judiciary**

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### **1. Introduction**

The rule of law is an essential element of democracy and one of the institutions which has the responsibility to uphold the rule of law is the judiciary.

In the case of Thailand, since the introduction of the governmental system of constitutional monarchy in 1932, the judiciary has enjoyed independence in both appointment of judges and making decisions. But as our democracy develops, corruption, abuse of power and electoral frauds are widespread. The judiciary is now encouraged to be more assertive in handling all malpractices in elections and politics. The present constitution allows the judiciary to play a more assertive role in ensuring clean politics. The assertiveness known is known as 'judicialization of politics'. But whether this judicialization of politics will turn out to be politicization of the judiciary remains to be seen. Let us look at this assertive role of the judiciary in upholding the rule of law and democracy.

### **2. The court System in Thailand**

The previous constitution promulgated in October 1997 introduced a reform of the judicial system resulting in the establishment of a Constitutional Court and an Administrative Court, which continue to the present day. The Courts of Justice and the Military Court which were established when the country's judicial system was modernized at the turn of the twentieth century are still recognized. The Courts of Justice have three tiers. At the bottom are the Courts of First Instance where litigation begins. At the middle is the Court of appeals and at the top is the '*Dika*' or Supreme Court.

The Constitutional Court has power to determine the constitutionality of the provision of laws and bills under deliberation of and passed by the legislature and dispute over authority of constitutional organs. It is also authorized to determine the

constitutionality of the issuance by the cabinet of an emergency decree upon the request of parliamentarians. The Constitutional Court shall decide whether the issuance is necessary to maintain national or public safety, national economic security or to avert public calamity. If the Constitutional Court decides that the issuance is not consistent with the Constitution, the decree will be ineffective retrospectively since the enactment.

Another jurisdiction of the Constitutional Court which has political implication is related to the decision on the qualification of members of the House of Representatives, senators, cabinet ministers, the election commissioners or any political appointees. The Constitutional Court has the authority to decide whether those politicians are constitutionally qualified. But the Constitutional Court cannot take initiatives, it can consider such cases when it receives a complaint from the members of the House of Representatives or senators.

It is also interesting to note that the Criminal Case Division for Persons Holding Political Positions is set up within the Supreme Court to deliberate cases of politicians who have been accused of committing crime, corruption or abuse of power.

Under the present Constitution, the Criminal Case Division has additional authority to unseat MPs or Cabinet members who have committed electoral frauds.

In addition, it has the authority to dismiss a public official from his or her political position and forbid him or her to hold any political position for five years if he or she fails to submit a declaration of his or her assets and liabilities or intends to submit them without accuracy upon the request by the National Counter Corruption Commission.

Now let us look at the impact of the role of the Constitutional Court as a part of the judiciary in upholding the rule of law and democracy. To what extent it can help consolidate our democracy? In addition to the problems of corruption and abuse of power of politicians, one of the serious problems of democratic consolidation at the moment is the conflict between the pro-Thaksin and anti-Thaksin movements and this conflict is related to the problem of corruption and abuse of power. How has the Court tackled these problems?

### **3. Political Problems and the Reform of the Court System.**

After the 1992 uprising, there were demands for political reform. Why did we need it? One of the reasons was to ensure political stability and thus consolidate our democracy. During the preceding fifty years, we had witnessed political and government instability. Coups and counter coups were common. Civilian governments were short lived in the 1990s when democracy was reestablished. Another reason was to eradicate corruption in the political arena and in government agencies. During the preceding two decades, we had witnessed a rapid increase of vote buying, especially in rural areas, and political corruption and lack of political ethics among politicians. The third reason was to ensure civil and political rights and liberties of the people. In fact, certain rights and liberties have been guaranteed since 1932 when the first constitution was promulgated. However, there have been a number of constraints. Thus, if we want to have a functioning liberal democracy those constraints should be lifted and new rights and liberties should be introduced.

As a part of political reform, a new constitution was drafted and put into effect in October 1997. The reform of the judicial system was introduced with the establishments of the Constitutional Court and Administrative Courts as mentioned earlier.

Despite the 1997 constitution, money politics continued. Vote buying and electoral frauds were common and widespread. When Thaksin came to power in 2001, he launched policies to help the poor through 'populist' policies. But this did not mean that he would not use his position to enrich himself and his political allies. Several of his government initiatives were considered as a form of policy corruption because they were intended to enrich the government leaders and their families. The coup in September 2006 to oust Thaksin was unable to eradicate his influence. The new Constitution which came into effect in August 2007 was designed to give more authority to the judiciary in tackling corruption and lack of political ethics among politicians. His supporters won the general election in December 2007 and were able to form a pro-Thaksin government with his ally, Samak Sundaravej as prime minister.

#### **4. Assertive Role of the Supreme Court and the Constitutional Court.**

In October 2008, the Supreme Court's Criminal Case Division for Persons Holding Political Positions set up under the 1997 and 2007 Constitutions handed down a two-year jail sentence against Thaksin who lived in exile in the UK on the charge of corruption. The court ruled that Thaksin was guilty of conflict of interest by helping his wife get discounted price for her purchase of a larger area of land in one of the Bangkok business districts.

Another case was that of Yongyuth Tiypairat former House Speaker and a government party MP who was accused of committing frauds in the general election in December 2007. The Court found him guilty and ousted him from the parliament in July 2008.

As for the role of the Constitutional Court, its decision to disqualify Samak Sundaravej from premiership in August 2008 on the grounds that he had committed a conflict of interest by accepting money from a private company to appear on a TV program on cooking demonstration.

The verdict was a heavy blow to the pro-Thaksin government at that time and although the government survived with a new prime minister, its legitimacy eroded substantially since the government continued to be a nominee of Thaksin as the new premier was his brother-in-law.

Another heavy blow struck on the pro-Thaksin government was the Constitutional Court's rule on December 2, 2008 to dissolve the ruling People's Power Party (PPP) and two of its junior coalition partners on election fraud charges and as a consequence the then prime minister Somchai Wongsawat who was the PPP leader and a number of cabinet members and MPs who were the executive members of the dissolved parties were ousted from office and have been barred from politics for five years. As a consequence, a new government was set up by the opposition – the Democrat Party.

These rulings of the Constitutional Court and the Supreme Court have been criticized by the pro-Thaksin people as being in favor of the anti-Thaksin movement. But to be fair to the judiciary, these rulings were done in accordance with the Constitution although they have, as a consequence, weakened the pro-Thaksin group.

## 5. Conclusion

It is not easy to assess whether the Constitutional Court of Thailand since its establishment in 1998 has contributed to the strengthening of the people's rights and liberties, democracy and the rule of law. One of the interesting points is to what extent the Court has been able to safeguard people's rights, liberties and equality. If one looks at the cases brought to the Court, there are a number of them which have involved people's rights and freedoms, and the decision of the court on these cases has certainly contributed to the preservation of freedom and equality. For instance, in 1998 (case no. 15/2541), the court ruled that the provision in the election law which authorized the Election Commission to set up the conditions which made voters ineligible to vote was unconstitutional. In 2000 (case no. 24/2543), the court ruled that regulations issued by the Election Commission to empower it to revoke the right of a candidate to run in the next election if he/she was found in violation of the election law in the previous election was against the constitution. On issues involving equality between the sexes, there was a case submitted to the Constitutional Court by the Ombudsman to decide whether or not the provision of the family name law which required a wife to use the family name of the husband was unconstitutional. The court decided in July 2003 that the provision was not consistent with the constitution. On the other hand there have been some cases which have reflected the conservatism of the Court. For example, there is the decision of the Court in May 2002 which ruled that the Section 26 (10) of the Act on Regulations of Judicial Officials of the Courts of Justice which allowed the judiciary committee and its subcommittee to use discretion to bar a disabled lawyer from sitting for the judges' entrance examination did not constitute discrimination prohibited by Constitution.

However, when it comes to cases which have political implications, the Constitutional Court has often been criticized for not being independent. For example, in 2000, when the National Counter Corruption Commission accused former Prime Minister Thaksin of concealing some of his assets in his account of assets and liabilities statement submitted to the Commission, the Constitutional Court ruled that

he was not guilty. The Court was then criticized for being under the influence of the former Prime Minister.

Although there is no concrete evidence to prove that the Constitutional Court under the 1997 Constitution was not “independent” when it dealt with cases that had political implications, the appointment procedure of the Constitutional Court’s judges under the present Constitution has been amended to help prevent any possible political intervention as mentioned earlier. Again, the question is whether this judicialization of politics helps consolidate democracy or not. This assertive role may be effective in making politics in Thailand cleaner, but there is a concern that it might well result in politicization of the judiciary, thus making its integrity vulnerable to being questioned as politicians would try to intervene in the judiciary’s legal decision process. Moreover, its decisions did not help resolve the conflict between the pro-Thaksin and anti-Thaksin movements, and our democracy is still far from being consolidated.

The issue of the possible politicizing of the judiciary on the part of some is not limited to the Constitutional Court. The establishment of additional specialized courts within the judicial system as well as the expanded powers of the judiciary and the expanded role of judges in other areas have been questioned. There has been some concern that such judicial involvement beyond the traditional boundaries of judicial authority and powers would inevitably lead to politicizing the judiciary.

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