

# Introducing the Constitutional Court of Thailand from the Viewpoint of “Good Governance”

Yoshiaki Shimojo

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## Introduction

It has been almost 30 years since the end of the Cold War between the East and West. Since then, many Asian countries have got rid of conventional authoritarian systems, and have moved toward constitutionalism as a means to accomplish change. In this paper, based on aspects introduced into the Constitutions of the Kingdom of Thailand of 1997 and 2007, I intend to investigate the current characteristics of Asian constitutionalism from the viewpoint of the concept of “good governance.” This paper is based on my

report, “The development of theories of Justice in Japan and Thailand,” delivered at a symposium held at the Thammasat University Law Faculty on September 03, 2018.

## I. The New Tide of Asian Constitutionalism

From the late 1980s through the 1990s, many East and Southeast Asian countries brought an end to authoritarianism, and embraced constitutional reform based on the concepts of “good governance” and “rule of law,” along with “democratization.” Examples include Indonesia, where democratization reform took place after the downfall of President Suharto in 1998; the Philippines, where a democratic constitution was established in 1987 after the Marcos system collapsed; and the Kingdom of Thailand, which established a Constitution in 1997 as part of their political reform, which took place in the 1990s. Describing this trend, Prof. Andrew Harding dubbed it, “New Asian Constitutionalism.”<sup>1)</sup>

It is important to begin by defining what “good governance,” the leading idea of “New Asian Constitutionalism,” actually means. It is a foundational guideline of legal system reform in developing countries, replacing the concept of “good government,” which was based on the election democracy theory in the field of development law.

According to a World Bank report of 2002, “good governance” means “all acts based on predictable policy formation that is open and is transparent, fully-specialized bureaucrats, government acting with accountability for their actions, strong civil society participating in government affairs, and the rule of law.” This extends to many aspects, from the market economy to the prevention of political corruption, reduction of poverty, local autonomy, and decentralization<sup>2)</sup>.

Alternatively, according to a study done by the international political scientist, Prof. Hirotsune Kimura, “good governance” means the rule of law, anti-

corruption, leadership, expansion of the political participation of the citizenry, reinforcement of civil society and social capital, fair elections, civil liberty and human rights security, freedom of media, stability and certainty in drafting and execution of public policy, improvement of transparency and accountability, sustained organizational reform, trust to the government<sup>3</sup>).

Thus, the meaning of good governance is not necessarily settled. However, the concept of good governance usually includes the rule of law and the extermination of political corruption, which connect to the theme of this paper.

## II. The International Spread of Constitutional Courts and “Judicialization of Politics”

As is generally known, the first Constitutional Court was developed in Austria in the 1920 Constitution of Austria. In the century since, the system has been adopted in about 60 countries around the world.

After World War II, Constitutional Courts began to be established across the world. They were adopted in some Western countries after the collapse of fascism (Italy (1948) and Germany (1949)); in Southern Europe and South American countries after the collapse of military regimes (Greece (1975), Portugal (1976), Spain (1978), and Brazil (1988)); in Eastern and Central European countries after the fall of socialist governments (Poland (1985), Hungary (1989), Bulgaria (1991), and Russia (1995)); in South Africa (1993) after the end of apartheid; and in a number of Asian countries after the Cold War period (South Korea (1987), Taiwan (1995), Thailand (1997), and Indonesia (2001))<sup>4</sup>. Thus, it may be said that Constitutional Courts have played important roles in the formation of constitutional order during periods of dramatic change, such as the shift from authoritarianism to democracy, independence struggles, or the revival of the state in the crises of the 20th century<sup>5</sup>).

As pointed out in recent literature, it is evident from the global spread of

judicial review systems after the 1970s that the “judicialization of politics” is one of the main characteristics of modern constitutionalism. Judicialization of politics can be defined as, “the reliance on courts and judicial means for addressing core moral predicaments, public policy questions and political controversies”<sup>6)</sup>, or “the phenomenon that judicial decisions affect the political process and the policy formation process in a big way.”<sup>7)</sup> It should be noted that in recent years, Thailand is the country which has progressed most rapidly in the judicialization of politics, through the foundation of its Constitutional Court after the enactment of the 1997 Constitution.

### III. Design of Thailand’s 1997 Constitution

Without going into the details of the formation progress, the 1997 Constitution of Thailand was the first constitution established through consultation with the Thai nation, without the participation of military authorities. Thus, it is called the constitution of the people (People’s Charter), which arose as a result of the democratization of Thailand in the 1990s. It was drawn up without the direct intervention of political parties, which reflects the intense distrust and fear of party politicians by well-informed Thai people, including citizens and intellectuals<sup>8)</sup>.

On the basis of these circumstances, the 1997 Constitution was intended to overcome two defects in the design of the constitution. The first defect was the inveterate political corruption that had undermined Thai parliamentary democracy, and the second defect was the instability of the government due to constant division into splinter parties.

To address the first defect, a number of independent surveillance bodies were written into the Constitution, to develop mechanisms to prevent political and bureaucratic corruption<sup>9)</sup>. These include the National Counter Corruption

Commission (NCCC), the Election Commission, the Ombudsman, the National Human Rights Commission, and a Special Division of the Supreme Court for Criminal Proceedings Against Persons Holding Political Positions and Anti-Money Laundering.

In order to address the second defect, a Westminster-type cabinet-rule system based on popular will was established, signaling a shift from a multi-member medium-size constituency system to a single-member constituency system, along with raising a no-confidence requirements for the Prime Minister and cabinet members, and prohibiting the Prime Minister and cabinet members from holding concurrent posts with a member of the National Assembly<sup>10</sup>.

#### **IV. Authority and Organization of the Constitutional Court in the 1997 Constitution**

In the 1997 Constitution, Chapter VIII, section 2, Article 268 states that “The decision of the Constitutional Court shall be deemed final and binding on the National Assembly, Council of Ministers, Courts and other State organs.”

With that in mind, a range of authority is given to the Constitutional Court. The Constitution contains not only the court’s original powers, such as the right to examine an issue referred by the Court or litigant (Article 264); the right to examine a draft of a proposed law or bill related to constitutional law (Article 262); and a mediation right in administrative issues (Article 266); but also secondary authority, such as ordering the dissolution of a political party if they perform an unconstitutional act (Article 63); the right to examine political parties’ resolutions relating to resignations from the political party (Article 118, Clause1(8)); and the right to examine disclosures of financial breach by persons in public office, such as the Prime Minister, other ministers, and members of the National Assembly (Article 295, Clause 2)<sup>11</sup>.

Along with this, a system to elect judges to the Constitutional Court was

laid out in the 1997 Constitution, in order to secure judicial independence. The Constitutional Court consists of the President and fourteen judges, appointed by the King upon the advice of the Senate. The President and judges of the Constitutional Court are picked through election by four different judicial bodies (Article 255, Clause 1(1)-(4))<sup>12)</sup>:

- (1) Five judges from the Supreme Court elected by secret ballot at a general meeting of the Supreme Court of Justice.
- (2) Two judges from the Supreme Administrative Court elected by secret ballot at a general meeting of the Supreme Administrative Court.
- (3) Five judges qualified in law selected by the Selection Committee for judges of the Constitutional Court.
- (4) Three judges qualified in political science selected by the Selection Committee for judges of the Constitutional Court.

The Selection Committee for judges of the Constitutional Court consists of 13 members elected from different governing bodies, such as Courts, learned society (jurists and political scientists), and representatives of political parties<sup>13)</sup>. Candidates to be double of the fixed number are elected by a  $\frac{3}{4}$  majority and are then recommended to the Senate, after their consent to stand for office has been obtained (Article 257).

## V. Reform of the Constitutional Court in the 2007 Constitution

The 1997 Constitution, the so-called “People’s Charter,” adopted many innovative systems. However, this Constitution had a short lifespan, due to the intense rivalry between a pro-Thaksin group and an anti-Thaksin group. In the middle of the night of September 19, 2006, a coup d’état by “the Council for Democratic Reform leaving His Majesty the King as sovereign(CDRM)” succeeded.<sup>14</sup> As a result, the Constitution of 1997 was discarded, and the

Constitutional Court was abolished, along with the Diet and the Cabinet.

Subsequently, the 2006 Constitution was established, an interim constitution under the military regime. Based on this constitutional procedure, the 18th Constitution of the Kingdom of Thailand was proclaimed on August 24, 2007.

The 2007 Constitution remained faithful to the spirit of constitutional political reform drawn up in the 1997 Constitution, retaining the focus on political ethics and prevention of the abuse of power. However, the 1997 Constitution had enabled corruption by the Thaksin government because it adopted a strong cabinet-rule system<sup>15)</sup>. Because of this, the 2007 Constitution included a relaxation of the cabinet-rule system, through the revival of a multi-member medium-size constituency system, the combination of an appointment system with popular election for members in the Senate, and the reduction of no-confidence requirements for the Prime Minister and the cabinet Ministers<sup>16)</sup>.

The 2007 Constitution has been dubbed the “Judges’ Charter,” as it involved some reforms to the Constitutional Court. These include the authority to examine the request for constitution suit by citizens (Article 212, Clause 1), the right to issue orders for the dissolution of political parties and the disenfranchisement of the leaders and the officers of political parties (Article 237, Clause 2), and the right to examine treaties (Article 190, Clause 6)<sup>17)</sup>. On the organization side, the fixed number of judges qualified was reduced from eight to four (Article 204, Clause 1(3)-(4)), and the Selection Committee process for appointing judges qualified to the Constitutional Court was simplified (Article 206, Clause 1(1))<sup>18)</sup>.

## VI. Cases of the Constitutional Court under the 1997 Constitution

Here, I introduce two main precedent cases on the issue of political corruption under the 1997 Constitution.

**Secretary of State for the Home Department, Sanan, false assets report case (Constitutional Court Decision 31/2543, dated August 10, 2000)<sup>19)</sup>**

On April 07, 2000, the NCCC presented to the Constitutional Court regarding lies about debt listed in the financial disclosure report, which Sanan Kachornprasart submitted. At the time the report was submitted, Sanan had been a member of the House of Representatives in 1997, a Cabinet Minister, and the deputy prime minister in the Chuwan Cabinet. Thus, Sanan violated Article 295 of the 1997 Constitution regarding disclosure of the finances of a public office holder. Sanan was the Secretary of State for the Home Department and the deputy prime minister of the Chuwan Cabinet at the time.

Sanan resigned as Secretary of State for the Home Department without waiting for the judgment of the Constitutional Court. Subsequently, on August 10, 2000, the Constitutional Court convicted him, and Sanan was prohibited from running for public office for a period of five years.

**Prime Minister Thaksin assets concealment scandal case (Constitutional Court Decision 20/2544, dated August 03, 2001)<sup>20)</sup>**

On December 26, 2000, the NCCC brought an action against Thaksin Shinawatra, who was the leader of Thai Rak Thai Party at that time, on the grounds of a violation of Article 295 of the Constitution. The NCCC claimed that Thaksin had lied in the financial disclosure report, which he submitted at the time of his appointment and resignation as deputy prime minister of the Chawarit Cabinet, as well as one year after his resignation, and that he deliberately concealed assets. On August 03, 2001, the Constitutional Court recognized that Thaksin, who was appointed as Prime Minister on February 9 of that year, had concealed assets, but acquitted him of the charge by a vote of eight to seven, saying that the crime was not intentional.



## VII. Cases of the Constitutional Court under the 2007 Constitution

I will now introduce two representative examples of political corruption or election violations that the Constitutional Court dealt with under the 2007 Constitution.

### **Prime Minister Samak employment case (Constitutional Court Decision 20/2544, dated August 03, 2001)<sup>21)</sup>**

This case discussed whether the appearance on a TV cooking program by Prime Minister Samak Sundaravej constituted an act of public interest reciprocity. According to Article 267 of the 2007 Constitution, an act of public interest reciprocity by the Prime Minister and other Ministers is prohibited, because, “such persons shall not hold any position in a partnership, a company or organization carrying out business with a view to sharing profits or incomes or be employee of any man.”

The Constitutional Court interpreted the meaning of “employment” widely for the purposes of the prevention of political corruption, and while the appearance on a TV program by Prime Minister Samak was not an employment contract in civil law and labor law, the court ordered that he step down as Prime Minister, saying that it was equivalent to “employment” as an act of public interest reciprocity under constitutional law.

### **People Power Party (PPP) dissolution order case (Constitutional Court Decision 18-20/2551, dated December 02, 2008)<sup>22)</sup>**

Once Samak was ordered to step down, Somchai Wansawat, Thaksin’s brother-in-law, was in charge of the government. However, a protest movement by anti-Thaksin groups, including the People’s Alliance for Democracy(PAD), added to the turmoil.

In the middle of this disturbance, on December 02, 2008, the Constitutional Court ruled as follows: Based on recognition of the fact that in the election of the House of Representatives on December 23, 2007, although the candidates of three ruling parties, including the PPP, disturbed the process of a fair election, the party leaders and officers of the political parties concerned did not address or remedy the situation, the Constitutional Court indicated that Article 68, Clause 1 of the 2007 Constitution is applicable. This states that “No person shall exercise the rights and liberties prescribed in the Constitution...to acquire the power to rule the country by any means which is not in accordance with the modes provided in this Constitution.” Therefore, the Constitutional Court issued a dissolution order against the three ruling parties and revoked the right to vote of the leaders and the officers of such political parties for a period of five years, based on Article 237, Clause 2 in the Constitution.

## VIII. Potential Future Problems and Prospects

As mentioned earlier, the 2007 Constitution was dubbed the “Judge’s Charter,” in contrast to the 1997 Constitution, the so-called “People’s Charter.” The latest Constitution, proclaimed on April 06, 2017, can be considered the “Anti-Corruption Charter” or “Reform Constitution,” according to the Chairman of the drafting committee of the new constitution, Michai Luchupan<sup>23</sup>).

In the preamble of the 2017 Constitution, the notion of “good governance” is mentioned in two places. It provides for “establishing strict and absolute mechanisms to prevent, examine and eliminate dishonest acts and wrongful conduct to prevent executives who lack moral virtue, ethics and *good governance* from ruling the country or using power arbitrarily ...in accordance with the direction of the Civil State, pursuant to the rules under the principles of a democratic regime of government and constitutional conventions that are

suitable to the situation and the nature of Thai society, the principles of good faith, human rights and *good governance*.” In addition, Article 65, Clause 1 provides that “The state should set out a national strategy as a goal for sustainable development of the country under the principle of *Good Governance*.”

The concept of “good governance” is translated into the concept of “Thammarat” in Thailand. In Sanskrit, “Thamma (Dharm)” means morals or justice in Buddhism and “the rat” means a nation. Therefore, “Thammarat” means “the national administration that adapts to the morals or justice.”<sup>24)</sup>

In this paper, I have outlined the structure and the associated precedents of the Constitutional Court under the Thailand Constitutions of 1997 and 2007, from the viewpoint of “the theory of justice,” which was the theme of the symposium at Thammasat University on September 03, 2018. As can be seen, the Constitutional Court’s role under the Thai Constitution is not only to be the “Constitutional Guard,” but also the capstone to realize the idea of good governance<sup>25)</sup>. Further studies of the Constitutional Court in the Thai Constitutions would be of value to understand the future of Asian constitutionalism.

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  - 10) *Ibid.*, pp.247-248.
  - 11) Andrew Harding (2010), “The Constitutional Court of Thailand, 1998-2006: A turbulent innovation”, in Andrew Harding and Penelope (Pip) Nicolson (ed.), *New Courts in Asia*, Routledge, pp.124-125, pp.128-129.
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  - 13) *Ibid.*, p.254, notes 28.
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  - 15) Masaki Ina & Nobuo Kochū & Noriko Kokubun (ed.) (2010), “Ajia no kenpō nyumon (An Introduction to Asian Constitutional Law)”, Chapter 4 (writing by Masaki Ina), *Nihon Hyōronsha*, p.86.
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- 25) Andrew Harding, *supra* note 11, p.126.