

〈특집: 아시아 민주주의 발전에서 헌법재판의 역할〉

## Thai Constitutional Courts and the Political Order\*

Glaser, Henning\*\*

### Abstract

The article deals with the constitutional courts (CCs) of the Kingdom of Thailand and the impact they have and had on the political order and vice versa. Especially the present CC, introduced by the 2007 Const. after a military coup d' état in 2006 against then Prime Minister (PM) Thaksin, attracted attention when it terminated in 2009 two subsequent governments of his political camp which came to power again after the first post-coup elections. It is the ongoing conflict between these two camps, the "red" camp of ousted PM Thaksin, perceived to be a threat for the established role of the monarchy and those who defend this role, the "yellow" camp, which forms the background against which the CC's performance often was explained. In fact, the conflict is not only about a disputed political leader and the preparations of his coming back, but about the basic conflict how the country shall be governed. Latest since demonstrations of the "red" camp have been cracked down violently by the then "yellow" government in 2010 the opposition against the established constitutional system became a fundamental one. The "yellow" government came to power following the above mentioned CC's impeachment of a "red" PM and the dissolution of his political party. After the "red" camp gained an overwhelming majority in parliament with the second post-coup elections again, the new government introduced the plan for a major constitutional reform. The reform threatened to redefine the role of the CC and was provisionally stopped recently by an injunction order of the CC. Main reason was that it could not be excluded that the reform would not change the basic structure of the constitution which is formed by

\* The author expresses his sincere gratitude to Prof. Seog-Yun Song and Prof. Woo-Young Rhee, both from Seoul National University, School of Law, for their support and the Law Research Institute, Seoul National University, for the opportunity to participate in the conference "The Role of Constitutional Adjudication for the Development of Asian Democracy" in December 2011.

\*\* Henning Glaser teaches German and comparative public law at the Faculty of Law, Thammasat University; he is head of the German-Southeast Asian Center of Excellence for Public Policy and Good Governance (CPG), [www.cpg-online.de](http://www.cpg-online.de).

the sublime and differentiated role the monarchy plays in it. Interesting is, how important not only the overall performance of the *present* CC seems to be defined by its function to protect this basic structure but the whole idea of constitutional review in Thailand including the previous CC under the const. of 1997 which has been abolished by the coup of 2006. The very concept of constitutionalism in Thailand and its challenge by a particular leader on the one hand and a competing concept of constitutionalism on the other seems to be a key to a substantial understanding of constitutionalism and the function and performance of constitutional review in Thailand at heart. The first one of these competing concepts of constitutionalism is the very Thai concept which integrates elective mechanisms in a system which is very much defined by the role of the monarchy. It is facing an emancipating concept of elective democracy which firstly gave the populism of then PM Thaksin ground while it received a more universalistic stance in the interpretation of parts of the “red-shirts”, a street based protest movement, allied with Thaksin but not identical with his political party. Elective democracy, according to all Thai constitutions, has to be framed by the autochthon Thai concept to which it is subordinated. The thesis for this study is that it was one of the key functions of both CCs to discipline this concept. Insofar mission and design of constitutional review in Thailand responded to widespread misuses, namely in form of vote buying, as well as a political narrative reinforcing its destructive potential in contrast to the essence of the positive counter – narrative of Thai-style democracy. The latter is forming not only forming the basic structure all Thai constitutions in recent decades and in the same time also a political narrative with historical, cultural, religious and class – orientated implications which could be described as the – historically contingent and conceptually fluid – very Thai version of the so called ‘Asian values’. While the first CC functioned very well in disciplining elective democracy by using its far reaching powers to dissolve political parties and disqualify politicians, it failed to do so, when mega politics have been affected in person of then PM Thaksin. After his populist based regime was aborted by the coup, the present CC became the decisive force to fulfill the same mandate proactively especially in cases pertaining to mega-politics.

## A. Introduction

The present study deals with the impact Constitutional Courts (CCs)<sup>1)</sup> had on Thailand’s political order and vice versa. Even if this is a wide topic, a lot of

what may be said about it can be understood along some few conceptual lines marking the underlying constitutional discourse.

To trace them, it is necessary to widen the perspective from a mere textual description of the institution and some landmark decisions to the *context* of Thai constitutionalism, conceptual discursive and political.<sup>2)</sup> Is the contextual argument generally useful for the constitutional analysis as observing the intersection of law and politics, it is in particular for an understanding of the Thai realities. *Legal* governance in Thailand is here much less a distinct and dominating feature in the ordering of the political and commanding a much lower reach and density than it may claim it in classical countries like the US or Germany. Other, non-legal systems of order, one may think of all facets of familism, be it a “moral” or “immoral” one<sup>3)</sup>, have more relative weight and are informing the concept and application of (constitutional) law in a distinct and different way. The fact that legal commands of the constitution regulate the political order with a comparatively limited impact only corresponds at least with two interrelated phenomena which contribute to the relative difference between a political system like the Thai and a stronger law-dominated one. Firstly the scholarly doctrine of constitutional law is less geared with the practice of constitutional review and thus not helping to improve and stabilize, criticize and legitimize the court’s performance as could be expected from the fact that it is representing a generally impressively differentiated legal science. On the other hand the performance of the CC is not so much

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<sup>1)</sup> There have been two in the last fourteen years which both will be regarded in this article.

<sup>2)</sup> See Andrew Harding, Peter Leyland, *The Constitutional System of Thailand. A Contextual Analysis*, Oxford and Portland 2011, p.177; from a German point of view Christoph Möllers, “Legalität und Legitimation des Bundesverfassungsgerichts”, in: Matthias Jestaedt, Oliver Lepsius, Christoph Möllers, Christoph Schönberger (eds.), *Das entgrenzte Gericht. Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht*, Berlin 2011, p.283.

<sup>3)</sup> See Edward C. Banfield, *The Moral Basis of a Backward Society*, Chicago 1958. The term is meant widely to describe norms emerging from social structures related to or formed according the model of the family. It is including highly legitimized forms of paternalism as well as wide spread and diverse forms of patron-client relationships, brotherhoods and networks of alliances etc.

providing a steady impetus for the continuous development of political and constitutional life in terms of an ongoing process of constitutionalization. Not so much the continuous adjustments and concretizations of constitutional law are the sign of the CC's performance but the exercise of a corrective mandate which is enforced in single cases which are less connected by doctrine or a sense for precedents than in western systems. This is furthermore due to the different function of CCs within their constitutional system and to the fact that Thai CCs are in general representing an ensemble of quite fragmented constitutional powers within a system of multiple normative orders. Thai constitutional law and decisions of Thai CCs are nevertheless not only potentially powerful symbols but also sharp swords as the case arises, especially in certain significant fields of governance. Performing constitutional law Thai CCs are following the same behavioral and institutional patterns like other CCs while their function is defined by a very specific concept of good governance being essential for the understanding of the contemporary and future performance of the CC of Thailand.

The first chapter shall introduce in the development and structure of the two CCs in the context of this concept of good governance. Following, the court's performance will be analyzed in some selected aspects which may reveal some patterns of continuity and change in Thai constitutionalism against the background of the basic understanding of good governance provided dominantly by the subsequent constitutions. Finally, actual challenges and problems of The Thai CCs as resulting from their performance will be reflected with special respect of the ongoing constitutional crisis triggered by a very recent order of the CC to the parliament to halt an initiated process of amending the constitution.

## B. Institutional Development, Concepts and Organizational Structure

To understand the impact of constitutional review on the political order and vice versa it is useful to reflect structure and performance of the two Thai CCs on the historical development of constitutional review and the basic concepts of

constitutionalism informing its function. Historical development, concepts of constitutionalism and positioning of the CCs are subject of the first part of this chapter (A. I.), the organizational structure of the second part (A. II.) before the performance of the CCs will analyzed in the following chapter (B.).

### I. Development: Historical Aspects, Functional Background, Positioning

The historical development of constitutional review in Thailand offers an interesting and wide field, which will be reflected here very selectively with respect of the CCs performance and as being related to the underlying concepts of constitutionalism in Thailand. Meanwhile, there are in fact two partly competing concepts of constitutionalism which are informing the course and functional background of constitutional review for the role of constitutional review in Thailand is also the fact that CCs never really gained a comparable authority as the Supreme Court.

#### 1. Historical development and relation to other constitutional players

In historical perspective neither the idea of constitutional review nor that of a specialized institution concerned with some constitutional control powers is new for Thailand.<sup>4)</sup> Nevertheless, legal review has never become a mechanism exercised on a regular basis by the ordinary courts nor have the specialized Constitutional Tribunals prior to the 1997 Const.<sup>5)</sup> achieved any constitutional relevance. Thus,

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<sup>4)</sup> After World War II in which Thailand has been allied to Japan the post - war government enacted a War Crime Act B.E. 2488 which regulated punishable war crimes for the past. Within the context of shifting political circumstances the Supreme Court in decision 1/2489 held that the War Crime Act B.E. 2488, in particular related to a punishment of crimes defined retroactively was unconstitutional and therefore null and void. Even before, with the second Thai constitution B.E. 2489 a Constitutional Tribunal had been introduced an institution which came again with subsequent constitutions, but never became practically relevant. See for Indonesia Daniel S. Lev, "Between State and Society: Professional Lawyers and Reform in Indonesia", in Timothy Lindsey (ed.), *Indonesia: Law and Society*, Sydney 1999, pp.48, 53. This is different for example from Indonesia, where legal/constitutional review has been introduced not before 2003.

<sup>5)</sup> The 1997 Const. was the 16<sup>th</sup> constitution after the revolution in 1932.

even if the idea was not new, the regular practice of constitutional review and its organization by a specialized CC with strong review powers has been introduced with the Const. of 1997. This quality of being a newly designed institution with a wide range of competences and the context of the 1997 Const. which was widely perceived as a watershed in the political development of the country caused the general impression of a promising beginning for the court. However, the introduction of a specialized CC was the result of heavy discussions in the Constitution Drafting Assembly (CDA). Formation, design, and composition of the new institution were subject of fierce debate and some changes.<sup>6)</sup> This kind of attention was not given to the composition of the second CC, which was established after the coup

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<sup>6)</sup> Against the fact that the Thai public law is strongly influenced by French and German law - while the general practice of legal application is also influenced by common law trained judges - the new constitution and the institution of the new CC presented a combination of different models and some own accents, the latter in particular concerning the dealing with elective democracy. Generally the CC represented a combination of French (a-priori review of draft legislation) and German models (organ dispute, concentrated review with a right of ordinary courts to require review etc.). See for the comparatively strong appeal of the German model Akaratorn Chularat, "The Legal State. Enforcing Good Governance", in: *Law, Constitution Issue 1*, Jun. Sept. 2007, p.34, 36ff. Chaowanna Traimas and Jochen Hoerth, "Thailand. Another New Constitution as a Way out of the Vicious Cycle?", in: Clauspeter Hill, Jörg Menzel (eds.), *Constitutionalism in Southeast Asia*, Vol. 2, Singapore 2008, pp.287, 308. For the strong influence of the German model of constitutional review in general see Donald P. Kommers, "Can German Constitutionalism Serve as a Model for the United States?" in: *Der Staat*, Vol. 37 (1998), pp.335, 336; William Rehnquist, "Verfassungsgerichte-Vergleichende Bemerkungen", in: Paul Kirchhof, Donald P. Kommers (eds.), *Deutschland und sein Grundgesetz*, Baden-Baden 1993, pp.453, 454; Andreas Zimmermann, "Bürgerliche und politische Rechte in der Verfassungsrechtssprechung mittel- und osteuropäischer Staaten unter besonderer Berücksichtigung der Einflüsse der deutschen Verfassungsgerichtsbarkeit", in: Jochen A. Frowein, Thilo Marauhn (eds.), *Grundfragen der Verfassungsgerichtsbarkeit in Mittelund Osteuropa*, Berlin et al. 1998, pp.89 ff.; Kim Hyo-Jeon, Hundert Jahre Verfassungsrecht in Korea und Deutschland. Ein Beitrag zur Rezeptionsgeschichte deutschen Rechts in Korea, in: *Jahrbuch des öffentlichen Rechts 35* (1985), pp.585-618, Seok Jong-Hyun, *Die Rezeption des deutschen Verwaltungsrechts in Korea*, Berlin 1991; Huh Young, Die Grundzüge der neuen koreanischen Verfassung von 1987, in *Jahrbuch des öffentlichen Rechts 38* (1989), p.565 ff.; Manfred Rehbinder, Sonn Ju-Chan, (eds.), *Zur Rezeption des deutschen Rechts in Korea*, Baden-Baden 1990; Heinrich Scholler, *Die Entwicklung der Rezeption westlichen Rechts auf die sozialen Verhältnisse in der fernöstlichen Rechtskultur*, Baden-Baden 1993.

d'état of 2006 under the Const. 2007. Contrary to the first CC this court was staffed quietly and routinely this time and entered the scene with significant different expectations than the first one. To understand continuity and the change in the development of constitutional review it is helpful to have a look on both, the constitution which set up Thailand's first CC and the turning point, its abolishment by a military coup which was welcome by a majority of Thailand's elite and triggering in the same time a protest movement which should challenge the fundamentals of power in an unprecedented way.

The 1997 Const. emerged from political struggles in the beginning 1990s after Thailand's military based rule had faced a severe legitimacy crisis weakening the military and significantly contributing to those of the monarchy. This process empowered the middle class and strengthened the civilian elite. In a first move resulting in the 1997 Const. conservative forces freeze the equilibrium without too much conceptual change in terms of modern constitutionalism preferred to prevent any unpredictable dynamics. However, the movement towards a new level of Thai constitutionalism had gained already enough impact to enforce a more substantial solution. This led to the preparation of the 1997 Const. since 1994. Despite the fact that the constitutional project turned out to be the first one of its kind in Thai political history which received nationwide attention, the 1997 Const. was far away from being a unilateral expression of a homogenous concept of constitutionalism. A great deal of misunderstandings about the function and role of the CC is attributed to the misleading perception of this fact. What has been described as a western-like liberal constitution later on, was in fact a combination of autochthon Thai and western elements of constitutionalism and the result of a compromise of conservative and reform orientated royalists, established politicians and progressive reformers.

One of the unusual alliances in this process linked some royalist and the progressive forces in their attempt to control the established caste of politicians to contribute generally to a higher level of governance. This old civilian power elite, political parties and state bureaucracy, had become subject of the legitimacy crisis lingering on after the military has stepped aside. They were challenged as being

unaccountable and ineffective while defending their interests in preserving power heavily.<sup>7)</sup> Most of the parliamentarians and those royalists who represented a more deliberate stance in preserving the particular Thai understanding of constitutionalism opposed the progressive reformers.

But a simple juxtaposition of progressive and conservative forces would be misleading as the biggest part of the ‘progressive’ forces had not at all any change of the fundamental frame of the royalist concept of “Thai-style democracy” in mind, but did believe that both concepts, in particular the central role of the monarchy and western-like democracy, could be merged harmoniously. These hopes were soon disappointed and finally destroyed when the constitution was set up and its new institutions lacked the people to use it in the way that had been outlined by the drafters. Today many of the formerly progressive liberal activists of the 1990s are staunch supporters of a Thai-style democracy and regarding core elements of western-style democracy much more critical towards the applicability for their country than before. They advocate today that these liberal western elements have to be clearly subordinated to the overarching frame of Thai-style democracy and constitutionally they are indeed. Others took side of western-style democracy, even if it is still hardly possible to suggest a western-style constitutional monarchy in public discourse. Their main issue is the harsh use of the *lèse majesté* law. Generally the conceptual front-lines of 1997 were less complicated than today when one part of the drafters tried to prevent too much change while the other tried to integrate western ideas of good governance with different grades of consideration of the given Thai-style framework. At heart the conflict which was finally settled by the compromise of 1997 was more about the influence of different civilian elites, often using the discussion how far western style elements of governance should be integrated in the Thai-style concept as a battle field of their power interests. Nevertheless the opposition against western constitutionalism was strong. In 1996 for instance, the Interior Ministry representing the bureaucratic elite declared the discussions to be a threat to national security since ‘political

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<sup>7)</sup> See Michael Kelly Connors, “Framing the People’s Constitution”, in: Duncan McCargo (ed.), *Reforming Thai Politics*, Copenhagen 2002, pp.37, 52.

reform has a tendency to support political participation of the people'.<sup>8)</sup> In 1997 short before the economic crisis would eventually change the whole setting the discussion heated up to a critical point, triggered by manifest resistance against too progressive ideas, such as the reformulation of the section concerning people's sovereignty from "derives from" to "belongs to the people" in Sect. 3 and the introduction of a fully elected second chamber in parliament.<sup>9)</sup> Some conservative threatened the scene with the possibility of a para-military intervention which reminded of the year 1976 when a student movement had been cracked down in a massacre at Thammasat University.<sup>10)</sup> Interestingly, some media and scholars suggested that the critical ideas had been promoted by *agents provocateurs* to heat up the discussion to the point of an abortion of the constitution making process.<sup>11)</sup> Anyway, the Asian economic crisis of 1997 changed the whole frame of the process heavily increasing the public pressure to finally enact the constitution which was publicly perceived as the only saving mean in shaky times. This, finally propelled also the more progressive forces, which enjoyed an emerging influence, into a position, which was strong enough not only to be heard but also to be involved. Indeed, very quickly now and without too much contestation the draft – including the disputed elements – was eventually enacted, probably substantially because of the economic crisis had unpredictably speeded up the events.<sup>12)</sup> Even conservative forces saw the constitution now as a chance to prevent greater harm and to defend their interests against more fundamental change.

The following course of constitutional development from 1997 until present is then marked by five general elections, not less than three constitutions, one coup

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<sup>8)</sup> See Sathaban Damrongrathanuphab krasuang mahathai (Damrongrathanuphab Institute, Ministry of Interior) Yuthasat krasuang mahathai 2540-2549 (Strategy of the Ministry of Interior 1997-2006), 1996, p.40, quoted according to Michael Kelly Connors, *Democracy and National Identity in Thailand*, New York, London 2003, p.169.

<sup>9)</sup> See *ibid.*, p.168.

<sup>10)</sup> See Prawase Wasi, "An Overview of Political Reform", in Duncan McCargo (ed.), *Reforming Thai Politics*, p.25.

<sup>11)</sup> See Connors, in *Reforming Thai Politics*, pp.37, 54.

<sup>12)</sup> See Connors, in *Reforming Thai Politics*, pp.37, 53.

d'état and two governments terminated by rulings of the CC. What was the driving force in these dynamics? From 2001 to 2006 the history of traditionally instable civilian governments experienced its first exception since 1932 with the rule of Thaksin Shinawatra who was eventually ousted by the military putsch of 2006 and is haunting the establishment behind the putsch since then, with his sister as incumbent prime minister of Thailand. While Thaksin managed from 2001 to 2006 to gain increasingly strong influence as Prime Minister including control over some of the constitutional watchdog bodies and attempted partial control respectively over the military, he faced a growing opposition led by royalist critics within the established elite and middle class, lead by former political and business allies who turned to become his sworn enemies. This anti – Thaksin movement came up in 2005. It was led by the particularly royalist Democrat Party (DP) in parliament and the extra – parliamentary People's Alliance for Democracy (PAD), a street based protest movement associated with the DP. Among the allegations against Thaksin including an authoritarian leadership style, the undermining of the constitution's spirit and corruption, the one which was the most sustainable for the following events, was the alleged threat to the monarchy.<sup>13)</sup> In 2006, DP and PAD by boycotting national elections and organizing mass demonstrations, both calling for royal intervention, prepared the stage for the military coup of 2006. After being endorsed by the King, the junta formed an Interim government and enacted the Interim Constitution of 2006 which established a Constitutional Tribunal. Its main objective was to dissolve the former governing party, Thaksin's TRT, and its coalition parties and to ban the members of their executive boards for five years from politics, while whitewashing the DP.<sup>14)</sup>

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<sup>13)</sup> See Marc Askew, "Introduction: Contested Legitimacy in Thailand", in Marc Askew (ed.), *Legitimacy Crisis in Thailand*, Chiang Mai 2010, pp.1, 2.

<sup>14)</sup> The Constitutional Tribunal established according to Sect. 35 of the Interim Constitution of 2006 was clearly the weakest of the three institutions vested with constitutional review powers. While the Supreme Court and the Supreme Administrative Court have not been touched by the coup maker the CC was abolished, partly to punish an institution which had disappointed and partly in order to prevent even the possibility of a review of the events and responsibilities leading to the coup. See also Sect. 37 Interim Constitution of 2006 which specifies the extent of the immunity for the coup.

In 2007 the Interim government set up a new constitution which was adopted by referendum (albeit with a marginal majority in favor). The new constitution, which is the present one, re-introduced the institution of a CC with slightly modified competences and a different design and composition. Elections in the end of the year, in Dec. 2007, brought then a surprising victory of Thaksin's PPP, founded to replace the dissolved TRT. After having been sentenced to jail in absentia before because of a conflict of interest involving his wife in a land deal with the state, he was represented during the election by Samak Sundaravej, who soon was impeached by the CC in 2008 followed by the dissolution of the PPP later in the same year. This resulted in the end of the second PPP government under Somchai Wongsawat, Thaksin's brother in law, a mild mannered career judge who had served as secretary of state for justice and minister of education before, and a military encouraged defection of a splinter-group of the PPP joining the opposition now. Together with the DP they formed a new government while the PPP as opposition remained the strongest party in parliament. Bloody protest against the DP-led "yellow" government resulted in mass protests organized by another street based protest movement, the red-shirts, an alliance of Thaksin supporters, adversaries of the military coup and the present political system. These protests culminated in a government crackdown using massive state force in 2009 and 2010 and were accompanied by unprecedented open calls for a revolutionary change of the system in the face of bloodshed, which were later so not repeated. The following national elections in 2011 brought a landslide victory of the second party follow – up of the Thaksin – camp, the PTP, which started in 2012 to prepare the coming back of Thaksin from exile and a major constitutional reform, both recently stopped by a temporarily injunction of the CC.

To sum up the front-lines of the divide in between the CC had to perform, there are on the one hand the DP and PAD claiming to protect the monarchy, a duty they share with the military, and on the other the three parties subsequently set up by Thaksin (TRT, PPP and PTP) and the extra-parliamentary protest movement, "democratic front against dictatorship" (UDD), here referred to as 'redshirts'<sup>15</sup>). Their objectives are less clear as Thaksin and his senior allies

among the career politicians are seeking for reconciliation while parts of the UDD seem to favor a regime change whereas the definite agenda is difficult to access as every opposition to the governing basic concept of constitutionalism and governance would violate the law. While parts of the UDD developed a sense for western-style constitutionalism, Thaksin showed a stronger sense for authoritarian-style populism legitimizing political power by public support alone.

Against this background, the different perception of both' CCs role becomes explainable. From the perspective of those who framed the 2007 Const. and designed the present CC, the court under the 1997 Const. had developed disappointingly. Initially regarded as an impressively vested institution facing an open horizon to claim institutional influence and authority, most observers soon saw the court as a second league player. Even if the CC still provided some important contributions to political power play, it never overcame its submission under Thaksin in 2001 (see below B. II). In the end, the performance was widely seen as having paved way for the degeneration of the 1997 Const. Thus, the new CC started on a much lower level of premature praise but with much more determination as an agent of the dominating state ideology perceived to be challenged by Thaksin even more after the coup. Nevertheless, the second CC immediately was associated with the "yellow" anti-Thaksin camp and accused to apply a double standard in favor of the DP. The complicating moment in the present situation is the fact that until now the Thaksin-camp did not formulate any agenda without the specific adherence to the monarchy which characterizes Thai-style democracy and is precondition to operate in the constitutional system. But it is exactly this fear, the fear that elective democracy could be unleashed from this specific governance concept, if Thaksin returns home which drives the dynamics underlying the present CC in its public perception. This is leading to a brief consideration of the mentioned competing concepts of constitutionalism forming the matrix for a key part of the CC's performance.

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15) Please note that the color red has nothing to do with socialism.

<Table 1> Constitutions in Thailand since 1997

1997-2006	“People’s Constitution”
2006-2007	Interim Constitution
2007-	Present Constitution

<Table 2> National elections 2001-2011

National election	Victor
2001	Thaksin/TRT
2005	Thaksin/TRT
2006	Thaksin/TRT
2007	Thaksin <sup>16</sup> /PPP
2011	Thaksin <sup>17</sup> /PTP

<Table 3> Thai Governments 2001-2011

Period	Government
2001-2006	Thaksin/TRT <sup>18</sup> )
2006-2007	Military Junta
2008-2009	Thaksin <sup>19</sup> /PPP <sup>20</sup> )
2009-2011	Democrat Party <sup>21</sup> )
2011-Present	Thaksin <sup>22</sup> /PTP

<sup>16</sup>) As informal leader, formal victor was Prime Minister Samak Sundaravej.

<sup>17</sup>) As informal leader, formally Thaksin’s sister Yingluck Shinawatra is Prime Minister.

<sup>18</sup>) Dissolved by the Const. Tribunal.

<sup>19</sup>) As informal leader, formally two Prime Ministers, who were subsequent banned by the CC.

<sup>20</sup>) Dissolved by the CC.

<sup>21</sup>) DP led coalition government after break away of the PPP-led coalition following the ban of the party.

<sup>22</sup>) As informal leader, formal victor is Thaksin’s sister Prime Minister Yingluck.

## 2. The Constitutional Courts between Competing Concepts of Constitutionalism

The ongoing tensions in the Thai society and in Thai constitutional life are indeed reflections of tectonic movements which can essentially be perceived within a paradigm of competing concepts of constitutionalism. Both concepts are strongly intertwined, partly conflicting and fixed by the constitution in a clear hierarchical relation. Nevertheless, on a discursive level they have been set in motion now, corresponding to the shifting social ground of a politically highly divided society. One on these two concepts is informed by the model of western-style democracy, while it is not representing a “thick” version but consists mainly of the role elections play. It shall be addressed therefore as “elective democracy”. This governance concept basing the legitimacy of government partly on elections is embedded in the frame of another overarching governance concept which is partly in contradiction partly operating in a mode of cooperation with western-style democracy.

Leading principle, frame and precondition for the unfolding and exercise of any element of constitutionalism in Thailand is insofar the “democratic regime of government with the King as Head of State”. This is the technical term of the present constitution (as well the 1997 Const.) for the dominance of the so called “Thai-style democracy”. The governance concept addressed by it is part of both, the written and the so called “unwritten” Thai constitution. The latter is a vague and fluid concept containing customary law, prerogative powers according to constitutional convention as well as ideological and symbolic narratives with normative authority.<sup>23)</sup> Generally it is referred to as a key element of Thai

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<sup>23)</sup> See for the royal position according to the unwritten constitution and the corresponding legitimacy of the King Kobkua Suwannathat-Pian, “The Monarchy and Constitutional Change Since 1992”, in Duncan McCargo (ed.), *Reforming Thai Politics*, pp.57, 63: “It follows that the public powers of the King emanate not from a written constitution, but from the affection, devotion and trust that the Thai people have for him. These sentiments, as implied by the royal stand, form the very foundations of the King’s legitimate right to intervene [...] in the affairs of the nation. This right overrides all other written legal authorities, be they the constitution or other man-made laws.” And: “The King is [...] above all man-made laws in the land, but is under the law prescribed by the teachings of the Lord Buddha.” He is therefore “definitely not a constitutional monarch of an ordinary kind” but the “highest authority

constitutionalism. It is so, not in the sense of a social embeddedness of written law, but in the sense of the spirit and necessary essence of any Thai constitution. Thus the “democratic regime of government with the King as Head of State” is both, the legal basic structure of the written constitution and the vague and fluent while omnipresent and omnipotent meta-order, something like the Thai equivalent to Western natural law. All written constitutions of the recent decades, including the present one, are referring to the “democratic regime of government with the King as Head of State”, often using nearly identical norms. The quality of the “democratic regime of government with the King as Head of State” as a kind of Thai natural law beyond its ‘positivation’ in codified form becomes clear in the preamble of the most liberal, the 1997 Const.:

Phrabat Somdet Phra Paramintharamaha Bhumibol Adulyadej Mahitalathibet Ramathibodi Chakkri Narubodin Sayammintharathirat Borommanatthabophit [the King of Thailand] is graciously pleased to proclaim that whereas Constitutions have been promulgated as the principle of the democratic regime of government with the King as Head of the State in Thailand for more than sixty-five years, and there had been annulment and amendment to the Constitutions on several occasions, it is manifest that the Constitution is changeable depending upon the situation in the country.

These words, similar to the preamble of the present constitution, leave an unsuspected impression of relaxation towards the stability of the codified supreme law which is contrasted by the gravity and permanence of the “democratic regime of government with the King as Head of State”. Written constitutions appear as unsteady emanations of political struggle, they come, change and go - not does the “democratic regime of government with the King as Head of State”, which despite its independence from any codification, is according to Sect. 2 Const. 2007 expressively adopted ‘by Thailand’ (and not the people)<sup>24)</sup> and therefore is

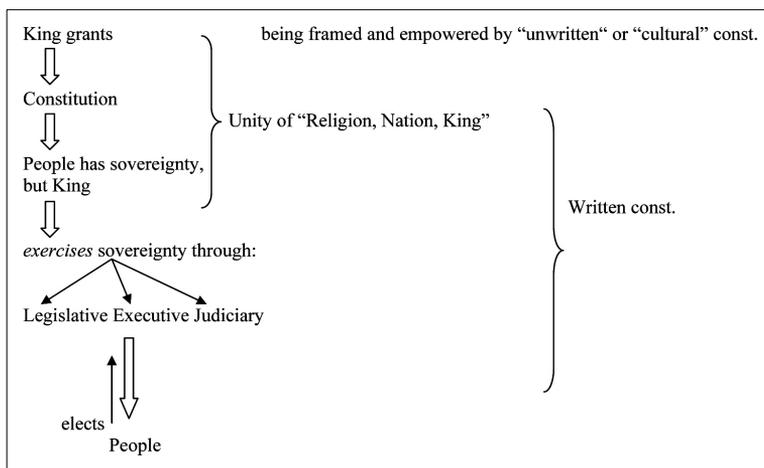
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in the land, towering over military, constitution and parliament.”

<sup>24)</sup> See Section 2 Const. 2007 (and 1997): Thailand adopts a democratic regime of government with the King as Head of the State.

also embodied in central norms of the written constitution. When Sect. 7 Const. 2007 (and 1997) states that “whenever no provision under this 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”, this was meant as a methodological gearing of the two normative spheres, the codified and the cultural.

<Diagram> Written and unwritten constitution in “Thai-style democracy”



Currently, DP and PAD call on Sect. 7 to stop the mentioned amendment of the constitution as it is intended to enable the draft of a new constitution what as such is supposed to contravene the “democratic regime of government with the King as Head of State” (see C. II). While the exemption of the latter from any substantial amendment of the present const. according to Sect. 291 demonstrates the central position which it claims at the core of the constitution, it is moreover denied to be at the disposal of the *constituent* power as well.<sup>25)</sup> The relevance for

<sup>25)</sup> See for the opinion in legal theory that the constituent power is an original, unconditioned one Ernst Bloch, *Vorlesungen zur Philosophie der Renaissance*, Frankfurt am Main 1972, p.136; Martin Heckel, “die Legitimation des Grundgesetzes durch das deutsche Volk”, in: Josef Isensee, Paul Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland (HStR)*, Volume VIII, Heidelberg 1995, § 197, marginal

the constituent power leads to the question of sovereignty. Sovereign power is, at least acc. the unwritten const. but arguably also reflected by the preamble, shared by people and the king in a special form. While the written constitution according to Sect. 3 states that it is the King who *exercises* the sovereignty which, under the constitution, belongs to the people, he is also the holder of the “ultimate sovereignty”.<sup>26)</sup> That means, that the sovereign under the constitution is the people while the constitution itself is embedded in Thai-style democracy and the “democratic regime with the King as Head of State”. The King is therefore the one who “commands” constitutions to be promulgated (see the various preambles) and moreover, according to the unwritten constitution, the one who gives the constitution to the people, while remaining to be the exerciser of<sup>27)</sup> ultimate sovereignty: A coup d’etat, according to this doctrine, if it is executed with a ‘good intention’ and endorsed by the king according to his customary powers, means returning sovereignty back in the hands of the monarch who will give it to the people again when the coup-maker proposes a new constitution which is accepted by the King.<sup>28)</sup> Furthermore, according to the royal prerogative enshrined

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note 53; Paul Kirchhof, “Der deutsche Staat im Prozess der europäischen Integration”, in: *HStR*, Volume VII, § 183, marginal note 34; Ulrich K. Preuss, “Constitutional powermaking of the new polity: Some Deliberations on the Relation Between Constituent Power and the Constitution”, in: Michael Rosenfeld (ed.), *Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspectives*, Durham 1994, pp.143-144; Michael Rosenfeld, *The Identity of the Constitutional Subject. Selfhood, Citizenship, Culture, and Community*, 2<sup>nd</sup> ed., London, New York 2010, pp. 130; Carl Schmitt, *Verfassungslehre*, 9<sup>th</sup> ed., Berlin 2010, p.91 ff; critical Herrmann Heller, “Staatslehre”, in: *Idem, Gesammelte Werke*, Volume III, 2<sup>nd</sup> ed., Tübingen 1992, pp.81, 392. On the other hand, according to an opinion in ‘doctrine, it is possible to state the revolutionary character of constitution making as matter of fact, while accepting that the present constitution may criminalize it’. See Josef Isensee, “Verfassungsrecht als politisches Recht”, in: *HStR*, Volume VII, Heidelberg 1992, § 162, marginal note 106.

<sup>26)</sup> See Michael K. Connors, “Article of Faith, The Failure of Royal Liberalism in Thailand”, in: *Journal of Contemporary Asia*, Vol. 38, No. 1 (2008), pp.143, 145.

<sup>27)</sup> See Bowornsak Uwanno, *Kotmai kap thangleuak khong sangkhom thai*, Bangkok 1994, p.29; referring to him Connors, “Article of Faith”, p.151.

<sup>28)</sup> See Uwanno, *Kotmai kap thangleuak khong sangkhom thai*, p.25; There have also been coups without royal approval but the last ones of them have been those coups which failed.

in the “democratic regime with the King as Head of State”, numerous powers are discussed to be at the royal command beyond any written competence, among them the dissolution of parliament or the replacement of the prime minister.<sup>29)</sup> Against this background there is *de lege lata* no independent concept of representative democracy to be found in the constitution.<sup>30)</sup> Thus, elective democracy is by far not the dominating principle in Thai constitutional law, and there can be virtually no consistent understanding of it as a community of equal holders of sovereign power in the form of a democratic association of the people as the basis and standard gauge for all state power. Elective democracy is rather a mechanism to allocate, organize and legitimize *parts* of public power but inevitably embedded in the “democratic regime with the King as Head of State”.<sup>31)</sup> Thus, citizens, according to Sect 65 Const. 2007 (see Sect. 47 Const. 1997) for instance, enjoy the liberty to “form a political party in order to manifest the political will of the people and to carry out political activities in fulfillment of such will through the democratic regime of government with the King as Head of the State [...]”.

The ranking between both concepts is reflected by two norms dealing with the individual who is facing threats of the constitutional order. According to Sect. 69 “a person shall have the right to peacefully resist an act committed for the acquisition of the power to rule the country by a means which is not in accordance with the modes provided in this Constitution.” Acc. to Sect. 70 “every person is under duty to uphold ‘nation, religion and King’ and the democratic regime of government with the King as Head of the State under this Constitution”. ‘Nation,

<sup>29)</sup> See *ibid.*, p.29; This was persistently demanded by the PAD against Thaksin in 2006.

<sup>30)</sup> See for example Sect. 20 (2) German Basic Law: “All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive, and judicial bodies.”

<sup>31)</sup> It should be noted that this concept which is formulating a substantially different governance concept than those which could be called western-style democracy indeed, may on the other hand be well served by certain western constitutional theories as well. See for example Leopold Stennett Amery, *Thoughts on the Constitution*, London 1956, p.20, who described a government of the people, for the people, with, but not by the people, what comes close to the position of the people in the Thai-style concept.

religion and King’, the so called “holy trinity” of Thai constitutionalism, is another key component of the unwritten Thai-style democracy including the identification of King and nation and the special relation of both to Buddhism which in Thailand is institutionally and discursively strongly interwoven with the monarchy.<sup>32)</sup>

But back to the relative weight of the two concepts: While the protected good of Sect. 70 is the “democratic regime with the King as Head of State”, Sect. 69 provides for the protection against an act committed for the acquisition of the power to rule the country by a means which is not in accordance with the modes provided in this Constitution. The latter has to be read as the protection of elective democracy against coup d’états. Does the protection of the former evolve from the respective *duty* of every citizen and is *not restricted* to any mode of action, acts of protection the latter are *optional* and *restricted* to peaceful means. Especially the restriction to peaceful means is decisive in the moment of a coup, which will appear regularly combined with the use of martial law or emergency powers restricting such peaceful means like demonstrations etc. effectively. If the ranking of both concepts is clear,<sup>33)</sup> it could be asked why there is any tension or even competition between them. There are at least two reasons. On the one hand the “democratic regime with the King as Head of State” is vague and was never explicitly differentiated due to one of its methodological meta rules, the rule not to reflect on it in detail if not necessary. On the other hand, the principle of elective democracy is similarly vague and it is exactly because of this that more far reaching notions of democracy are easily to be connected to the constitutional term. The first one who did that consequently was Thaksin calling on his popular mandate.

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<sup>32)</sup> For the implicit juxta-position of the concept of ‘nation, religion, king’ on the one and ‘constitution’ and [representative] ‘democracy’ on the other hand in the dominating mindset shaped by Thai-style democracy as a narrative see Prudhisana Jumbala, *Nation-Building and Democratization in Thailand: A Political History*, Bangkok 1992, p.23.

<sup>33)</sup> Interesting is also another ranking. So far the constitution places the duty to uphold „the democratic regime of government with the King as Head of State“ before the duties “to defend the country, to protect benefits of the nation and to obey the law” (regulated by Sect. 71).

&lt;Table 4&gt; Competing concepts of constitutionalism

	Sect. 69 Const. 2007	Sect. 70 Const. 2007
Addressee	a person	every person
Means	optional peaceful	mandatory unrestricted
Protected Good	elective democracy	“Nation, Religion, King” + democratic regime with the King as Head of State

The contrast between these two coexisting, competing and cooperating components of constitutionalism was therefore less perceived in terms of conflict in the frame of 1997 Const. than it was during the 2007 charter drafting. Nevertheless, one of the core norms of the “democratic regime with the King as Head of State”, Sect. 7, was introduced in the draft charter of the 1997 Const. in a way that is instructive because of three related aspects mentioned by Michael K. Connors. Firstly, the principle expressed by Sect. 7 was formulated and presented to the Constitution Drafting Assembly (CDA) as an amendment of Sect. 6, while being taken from previous interim constitutions issued by coup-groups. It was introduced very late as an independent Sect. 7 coincidentally with a similar lately introduced issue, the reformulation of Sect. 3 stressing now that the sovereign power belongs to the people. The formulation was opposed by the conservative members of the CDA and highly disputed (see above).<sup>34)</sup> Thus, in a significant way Sect. 7 is counter-balancing the first part of Sect. 3 allocating sovereignty to the people (who is not exercising it). In direct relation to the demanded introduction of Sect. 7, conservatives had been also concerned about the *expansive rights* of the Thai people written into the charter, being afraid that could “moving

<sup>34)</sup> See Connors, “Article of Faith”, p.150. Subject of contestation was the doctrine, that sovereignty in the last instance belongs to the monarchy, even if constitutionally allocated to the people, a contradiction which appears less sharp, if sovereignty in terms of the written constitution is understood as being framed by the unwritten one, and even the “democratic regime of government with the King as Head of state” as a partially codified principle.

away from traditional concepts of political order, in which the monarchy figured greatly.”<sup>35)</sup> Lastly, Sect. 7 was explicitly meant to guide the CC’s deliberations.<sup>36)</sup> Even if only one expression of the doctrine among many Sect. 7 and its history reveal quite clearly the lines of conflict inherent even in the discourse leading to the 1997 Const.

Complemented is the normative complex of the “democratic regime with the King as Head of State” in its codified form by its definition as a core element of *national security* due to Sect. 77.

The principle is additionally reinforced by its strict protection in criminal law making any comment or action in relation to the monarchy which may be understood as negative effectively a serious and seriously punished crime (Sect. 112 criminal code). Surrounding the whole legal complex lays furthermore a core narrative according to which the King is not only the supreme institution of the constitutional structure but the very embodiment of the nation: the “soul of the nation”. This narrative also involves cultural and religious patterns in combination with the personal charisma of a leader who rules since more than six decades. Indeed, until the unleashed dynamics after the coup, especially since 2009, the Thai monarch has been probably more than any other national leader elsewhere, with the exception of North-Korea maybe, the unchallenged and beloved center of public order and national belonging.<sup>37)</sup> This explains the sensitivity of those who are really devoted to their King and being convinced that the country owes him that it has not shared the fate of those countries which had to experience civil war or the lost of national identity.

It is this complex discursive structure, consisting of different kinds of norms, values and narratives, which contrasts and defines the perception of elective

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<sup>35)</sup> *Ibid.*

<sup>36)</sup> See *ibid.*

<sup>37)</sup> See Kobkua, “The Monarchy and Constitutional Change” in: McCargo (ed.), *Reforming Thai Politics*, p.63; Pinit Ratanakul, “Reflections on Development and Tradition in Thailand”, in: Pinit Ratanakul, U Kyaw Than (eds.), *Development, Modernization, and Tradition: Lessons From Thailand*, Bangkok 1990, p.261; Stengs, *Worshipping the Great Modernizer*, p.82; Tongyai, “The Role of the Monarchy in Modern Thailand”, in: Ratanakul, Than (eds.), *Development, Modernization, and Tradition*, p.155.

democracy. Even if clearly embedded in the structure of an overarching principle it is the emancipating potential and legitimizing appeal connected to the global trend to establish western-style democracy as a kind of universal norm, which always caused a momentum of unpredictability concerning elective democracy. Indeed, this potential manifested on the basis of a well orchestrated populism (including impressive reform achievements) when Thaksin challenged first not the King but the rule of law. He did it in principle when he questioned the power of the CC to adjudicate on a pending case dealing with the question of his impeachment: “It’s strange that a leader who was voted by 11 million people had to bow to [...] the verdict of the Constitutional Court [...].”<sup>38)</sup> For some this statement marked, from a Thai point of view in 2001, a new self-confidence of an elected prime minister, for others it was the expression of an extraordinary emanation of the “evils” associated with elective democracy

Indeed, the concept of elective democracy in Thai political thought is insofar embedded in a normatively charged narrative typically associating it with a range of weaknesses and evils that is tracing back decades.<sup>39)</sup> This narrative is reflected also by the constitution and arguably informing the role of the CC as ‘discipliner of elective democracy’ (see below A. II). The interwoven norms, narratives and institutions combining discourse, power structures and social practices constitute a kind of Foucauldian *dispositif* (dispositive).<sup>40)</sup> Against its background one of the major functions and main fields of performance of Thai CCs, the disciplination of elective democracy, makes sense. Core of the *dispositif* is the narrative of “bad” elective – and “good” Thai style democracy, while the powers being mobilized within the *dispositif* are aiming to *discipline elective democracy*. Its discursive narratives base on the undeniable practice of vote buying, inducing – according

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<sup>38)</sup> Thaksin, cited in Pasuk Phongpaichit, Chris Baker, *Thaksin*, 2<sup>nd</sup> ed., Bangkok 2009, p.2.

<sup>39)</sup> For the often negative perception of elective democracy being contrasted with Thai style democracy see Tongyai, “The Role of the Monarchy in Modern Thailand”, in Ratanakul, Than (eds.), *Development, Modernization, and Tradition*, p.155; Thongchai Winichakul, “Toppling Democracy”, in: *Journal of Contemporary Asia*, Vol. 38 No. 1, Feb. 2008, pp.11, 24.

<sup>40)</sup> See Michel Foucault, *Archäologie des Wissens*, Frankfurt am Main 1995.

to this narrative – the elected to recover their respective investments after being in office and thus causing corruption in various kinds.<sup>41)</sup> This, so the narrative, is then leading to conditions of self-serving government until the military as the guardian of public order finally deems it necessary to clean up by coup d’etat. An integral part of this narrative which became immensely important in the Anti – Thaksin coalition draws the picture of a-moral politicians who are able to buy the votes of the uneducated rural masses to rule the country against the mature political culture of the educated middle class.<sup>42)</sup> On the other side this narrative implies also a positive version of governance built on a Buddhist notion of moral rule, in easy words enabled via a higher *kharmā* which is reflected lastly also by status. This applies according to this view to the elite which is politically represented by “senior citizen” and certain “good and capable men” who are beyond the doubts raised against elected politicians and culminates in the undisputable moral authority of the monarch. His authority and legitimacy is infinitely far above from the one which may possibly be created by elections.<sup>43)</sup> Elective democracy according to this narrative therefore has to be disciplined and this has to be done strictly. Furthermore, while elected politicians from this perspective will principally meet the described doubts, there are some rare exceptions. Beside some politicians who proved to be beyond the rules of the “dirty game” there is also a relative exception among the political parties, namely the Democrat Party. The DP on the one hand is the traditional royalist party founded 1947 to safeguard the role of monarchy and therefore closer to a credible performance of the ‘good’ counter – narrative than other parties. On the other hand it is claiming to be able to count especially on the voters in Thailand’s South who, according to party’s version, are said to be ‘true’ and less influence-able by money politics.<sup>44)</sup> Decisive is that

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41) Tamada Yoshifumi, *Myths and Realities. The Democratization of Thai Politics*, Kyoto and Melbourne 2008, p.251.

42) See Yoshifumi, *Myths and Realities*, p.251.

43) See for the negative narrative of elective democracy and the elitist counter-narrative Chairat Charoensin-o-larn, “Military Coup and Democracy in Thailand”, in: John Funston (ed.), *Divided over Thaksin, Thailand’s Coup and Problematic Transition*, Singapore 2009, pp.49, 52; Thongchai Winichakul, “Toppling Democracy”, in: *Journal of Contemporary Asia*, Vol. 38, No. 1 (2008), pp.11, 27.

social support for this narrative dramatically shifted since Thaksin became the emanation of it for the one part and the victim of cynical aristocrats for the other part of the country. With the emergence of his firm rule as the first reelected prime minister of Thailand he expanded his influence on the basis of his populism over the acceptable level when he implicitly challenged one of the core assumptions of Thai-style democracy, the “mutuality of king and people” by calling normatively on his ‘social contract’ with the electorate.<sup>45)</sup> Since the formation of a powerful alliance of enemies in 2005 the old narrative tracing back decades became the heart of anti-Thaksin ideology. It was since then reproduced correspondingly divided, shared or rejected according to the front lines of the political divide with the redshirts countering it by accusing the established elites, *ammatt* (aristocratic bureaucrats), of cynically double standards and hypocrisy. The CC became the major enforcer of the mandate to discipline elective democracy along the rationale of the narrative and therefore the institution identified as main adversary by those who reject the *dispositif*.

### 3. Institutional Context of Constitutional Review

This is leading to a last aspect, the positioning of constitutional review within the system of constitutional institutions and the judiciary. It seems generally to be the fate of young constitutional courts to face some uncertainty about their real role, authority and influence in relation to other constitutional players on the one hand and other courts on the other. This is partly due to the fact that they are not exclusively political nor legal institutions but both. CCs *are* courts but special ones, often staffed with professionals who are not career judges and sometimes not even lawyers, which have to apply constitutional law which is essentially the “law of the political” and thus commanded by a different rationale than that enshrined in other laws. On the other hand CCs intervene in politics but not

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<sup>44)</sup> See Mark Askew, *Performing Political Identity: the Democrat Party in Southern Thailand*, Chiang Mai 2008.

<sup>45)</sup> See Kevin Hewison, “Crafting Thailand’s New Social Contract”, in: *The Pacific Review* 17 (2004), pp.503-522.

according the political rules of decision making but by claiming to enforce the supreme *law* and thus unfolding a judicial *idée directrice* and not a political one. Moreover, young CCs are not only not really belonging to one of the two sides - politics and courts - exclusively but often are also starting from “zero” concerning their institutional experiences in strategies and tactics of inter-constitutional competition when facing their counter-parts which are regularly not happy about the emergence of a new player intervening in their business. These considerations have some relevance for the two Thai CCs. In general, both CCs did not manage to emerge from the shadows of the other courts or emancipate as players following their own institutional agenda. The latter applies to the first court in relation to the overwhelming influence of the government while the second proves to function according to the role it was assigned to by the ideological and normative concept of governance dominating the constitution. Both CCs had and have to face two strong judicial rivals: the Supreme Court of Justice – rich in tradition – and the younger Supreme Administrative Court. The latter was founded a little bit later than the Constitutional Court, in 1999, and started quite successfully to profile, including some human right cases which, on side of the CC, marked only a blank space of protection. The Supreme Administrative Court, like the Constitutional Court, is modeled according to French and German influences<sup>46)</sup> but even if being the younger court is able to claim a portion of the inheritance of the former royal Council of State which was established by King *Rama V.* in 1892 (with himself as President), what invests the institution with a kind of symbolic capital ahead of the CC.<sup>47)</sup> Only some years after foundation the Supreme Administrative Court commanded a better reputation than the CC yet, which was reflected by enduring difficulties to find judges from the Supreme Administrative Court (SAC) who were willing to be sent to the Constitutional Court “on the ticket“ of the SAC.<sup>48)</sup> The existence of the SAC as a human right

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<sup>46)</sup> See *Akaratorn Chularat*, “The Legal State” in *Law, Constitution Issue 1*, Jun.-Sept. 2007, p.38. (In 2007, when the article was written, *Akaratorn Chularat* was the president of the Supreme Administrative Court.).

<sup>47)</sup> See *ibid.*, pp.35, 38.

<sup>48)</sup> According to Sect. 225 Const. 1997 two of the fourteen judges of the Constitutional

court may have supported the CCs in concentrating on their mandate to discipline elective democracy more consistently as the rationale of both paradigms, disciplining elective democracy and enabling civil rights, may contradict sometimes. Nevertheless, the most important court in Thailand is still the Supreme Court (of Justice) which traditionally enjoys the special trust and favour of his Majesty the King of Thailand and is regarded as a key pillar of good governance.<sup>49)</sup> Symbolically this is shown by the fact that it is the President of the Supreme Court of Justice who is placed nearest to his Majesty among the courts' presidents on occasion of official ceremonies and the only representative of the judiciary giving an oath of allegiance to the King at the annual birthday ceremony of the King. Therefore the newly introduced CC in 1997 was not very welcome by the Supreme Court. Strongly disputed was especially the question if the CC should receive the competence to decide on court decisions like the German Federal Constitutional Court, thus to be able to overrule the Supreme Court. Judges from the CC lobbied massively against these attempts which soon were buried. Nevertheless, the constitution maker applied the idea of concentrated review consequently in the sense that it was the sole right of the CC to interpret the constitution authoritatively. If courts below the Supreme Court decided to refer cases to CC on grounds of constitutionality of applicable law – on their own initiative or on request of a party – the court would stay its trial until the CC would issue its decision, which then was binding on the courts. This gave the CC a potential they did not use to mark their certain position vis-a-vis Supreme Court by ruling extensively in its realm. Latest since a political sensitive case in 2001 authority, dignity and informal influence between the formally equally ranked courts is quite differently allocated with the Supreme Court ranking at the top and the CC at the end.<sup>50)</sup>

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Court had to come from the Supreme Administrative Court by election at a general meeting among the judges by secret ballot.

<sup>49)</sup> See *Chanchai Likhitjitta*, "Supreme Duty", in *Law, Constitution Issue* 1, Jun.-Sept. 2007, p.58 (*Chanchai Likhitjitta* was the president of the Supreme Court). According to Sect. 218 of the present const. the ordinary Courts of Justice enjoy also the general competence having the power to try and adjudicate all cases except those specified by the Constitution or another law to be within the jurisdiction of one of the other Courts.

## II. Organization: Composition and Competences

With regard to composition and competences of the CCs the focus lies merely

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<sup>50)</sup> The extraordinary role the judiciary and especially the Supreme Court of Justice, who served after the coup also as president of the Constitutional Tribunal, is reflected in the events leading to coup of 2006. See for these events Michael J. Montesano, “Political Contests in the Advent of Bangkok’s 19 September Putsch”, in: John Funston (ed.), *Divided over Thaksin. Thailand’s Coup and Problematic Transition*, Singapore 2009, pp.1, 2-7. In 2006 a series of incidents accelerated the mobilization of mass protests against then Prime Minister Thaksin who in reaction announced the dissolution of the parliament in February 2006 and scheduled new elections for April. The opposition, in particular the Democrat Party, nearly immediately declared to boycott the election while an extra-parliamentary opposition, the PAD, supported by the Democrat Party, called in mass rallies for a royal intervention and the appointment of a new prime minister by the King due to the rules of the “democratic regime of government with the King as Head of State”. After the election, which was producing the expected victory of Thaksin’s governing party, necessary by-elections were boycotted by the opposition again, accompanied by a petition to the Central Administrative Court to cancel the by-elections. This move was intended to prevent the constitution of the house and was succeeded by another petition to suspend the results of the whole election. On 3 April 2006, then Prime Minister Thaksin declared his victory on television and reiterated a former proposal for a government of national unity supported by an independent reconciliatory commission including an offer to resign if this commission would recommend so. After the plan was rejected by the opposition immediately, the Prime Minister returned on 4<sup>th</sup> of April from an audience with the King and announced that he eventually would not accept the office of Prime Minister but would act as Caretaker Prime Minister until his successor would have been elected by the Parliament. After the opposition did not accepted the move and continued the boycott of the by-elections holding instead another mass rally on April 7, the King, in an extraordinary televised speech to senior judges requested the judiciary to take action to resolve the crisis. In this situation it was the Supreme Court of Justice which took the leading role to solve the crisis, before finally the military stepped in. The then President of the Supreme Court of Justice recalls the words of HM the King in a widely recognized speech to newly appointed judges of the court of justice on 25<sup>th</sup> of April: “So I ask you to consider – go back and consult with judges of other courts, for example the Administrative Court and Constitutional Court, as to what should be done, and then swiftly act accordingly, otherwise the country will be affected.” Words of His Majesty King Bhumipol Adulyadej cited in Likhitjitta, “Supreme Duty”, p.58. Meanwhile the Court of Justice called three members of the Election Commission to resign and, after they refused to do so, jailed the Election Commissioners because of a violation of their duties. On 8 May 2006, the Constitutional Court finally invalidated the elections and ordered a new round of elections scheduled for October, paving the way for the coup to resolve the crisis.

on the present CC while some comparisons will be drawn also to the first one, especially where this reflects aspects of continuity and change in the development of constitutional review.

### 1. Organization and Composition of the CCs

As most other countries Thailand adopts a one chamber system.<sup>51)</sup> This applies for both CCs while the number of judges changed from the first to the second CC with fifteen judges at the first to nine judges at the present court. The CC has and had one president elected from among the CC justices.<sup>52)</sup> Justices serve a non-renewable term of nine years.

Interesting are the sociological patterns reflected by the composition of the bench and especially the respective shift in the sociological structure of the bench with the creation of the second, post-coup court.<sup>53)</sup> The first CC was, according to Sect. 255, 257 Const. 1997, composed of seven career judges, five of them to be elected from among the judges of the Supreme Court, two from the Supreme Administrative Court, and eight other qualified persons, five of them qualified in the field of law, three of them qualified in the field of political science. These latter eight judges had to be selected by a committee consisting of the President of the Supreme Court, four deans of law and four deans of political science and four MPs representing parliamentary political parties, thus giving academics an overwhelming majority to select the majority of eight of the fifteen justices. Among twenty-six analyzed biographies of justices of the first CC elected and selected according to Sect. 255, 257 a wide range of different career types can be identified. Despite the fact, that most of the judges have been active in different professional fields the following schema of main career paths before their career as justice at the CC can be observed: Ten have been senior bureaucrats, nine career judges, five have been professors of law or political science, two were

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<sup>51)</sup> A CC with a two – chamber system is the German.

<sup>52)</sup> The other important Southeast-Asian CC, the Indonesian Court, is also organized as a one-chamber court with nine judges, under them one president and also one vice-president, both being elected from among the justices of the CC.

<sup>53)</sup> Numbers based on own research.

diplomats, precisely ambassadors. Among the five professors, four have been senior professors from one of Thailand's two leading faculties of law or political science respectively. This altogether is reflecting a veritable elite cross-section of pre-coup Thailand before the political divide.<sup>54)</sup> Nevertheless, many of the justices have not been representatives of the highest echelons of their career field or recruited at the peak of their career nor have they been representing a particular competence in constitutional law in their vast majority. In fact, the CC, like others of the newly introduced constitutional institutions, seem to have often served primarily as an elite reservoir for professionals of a certain status rather than it has been staffed according to its primary constitutional function. The general sociological patterns of justices are correspondingly similar, indicating a certain elite cohesion. All justices have been Buddhists, one a woman. Twenty of the justices studied at Thammasat University, two at Chulalongkorn University, two at both of these two leading universities, two completely abroad. Eleven judges had studied partly abroad, five in the USA, two in England and other two in France, one in the Netherlands and one in New Zealand.<sup>55)</sup> Remarkable is that only two among the five professors have been law professors, only one a professor from one of the leading faculties, both not experts in constitutional law. Remarkable are the ties to the executive power and the military: Four of the justices have been advisor to the prime minister, and nine, including four out of the five presidents of the court (!), have achieved a Master at the National Defense College. Different from the subsequent court under the 2007 Const., the first CC was less homogenous in the way in which the political preferences of the judges have been perceived by the general public. The CC of 1997 became a somewhat divided court especially since 2001 and 2003 respectively and until 2006. Before 2003 there have been only five from fifteen judges said to be reliably on the side of

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<sup>54)</sup> See for an understanding of elites Chris Shore, "Introduction. Towards an Anthology of Elites", in: Chris Shore and Stephen Nugent (eds.), *Elite Cultures. Anthropological Perspectives*, London and New York 2002, p.1.

<sup>55)</sup> This is also interesting as not few of the leading constitutional law professors have studied in Germany contributing to the impression of a significant distance between CC and academia.

the Thaksin government, while the other ten were not so predictable, even if not all clearly against the Prime Minister. This pattern changed in 2003, when PM Thaksin gained control not only of the National Counter Corruption Commission (NCCC) and the Election Commission (EC) but also of the CC after four judges have retired.<sup>56)</sup> Among the new justices have been three who were supposed former allies of the PM.<sup>57)</sup> With them complementing the five mentioned above, the government gained a majority of eight justices said to be reliably “friendly”.<sup>58)</sup> However it has to be noticed, that at least two of the new “Thaksin-friendly” justices commanded a comparatively remarkable educational background as lawyers, but at least one of them turned out to be very eager compared with other justices to gain further knowledge specifically as a constitutional lawyer and constitutional court judge.<sup>59)</sup>

Against this short glimpse on the sociological pattern of the first CC the

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<sup>56)</sup> See, Pasuk/Baker, *Thaksin*, p.174.

<sup>57)</sup> These persons have been the retired Director General of Customs who was said to have supported Thaksin by a positive statement during investigations against one of Thaksin’s companies facing charges of tax evasion. Secondly a Police Major-General who was prior to his nomination holding a position as an advisor in the Prime Minister’s Office and had orchestrated one of the signature campaigns in favor of Thaksin when he faced an impeachment by the CC in 2001 in an case concerning his asset declarations (see below, B. II). The third justice had been the retired deputy secretary-general of the Prime Minister himself and a former business partner.

<sup>58)</sup> See Pasuk/Baker, *Thaksin*, p.174.

<sup>59)</sup> One of these two hold not less than three bachelor grades – one from the Royal Police Cadet Academy in Public Administration, one in Economics and one in Law, both from Thammasat University – and two master: one in Public Administration and one in Political Science, from the prestigious National Institute of Development Administration (NIDA) and Chulalongkorn University respectively. He is also author of a book about “Thai Administrative Law” (in Thai). The other one, beside his LLB in law from Thammasat’s faculty of law, had an M.A. from the National Defense College and a LLM. from the University of Washington, and was later Director General of the Department of the Treasury, and Deputy Permanent Secretary in the Ministry of Finance before he became justice at the CC. The particular interest in improving skills in constitutional law of one of the justices is deduced from the continuous, active participation of the respective one in informal and semi-official meetings with foreign experts in constitutional law which have been organized by a foreign political foundation supporting the court.

composition of the second, post-coup CC (2008-present) is particularly telling. The nine Judges of the present CC, who are appointed by the King (as the judges of the first CC and the Constitutional Tribunal were), after being elected and selected respectively from the following three sources<sup>60</sup>): Three Supreme Court justices are elected from the General Assembly of the Supreme Court, two justices are elected from the General Assembly of the Supreme Administrative Court and four judges a selected by the “Selection Committee for Constitutional Court Justices”. Two of these selected judges have to be qualified in the field of law, two in the field of political science, public administration or other social sciences. The selection committee comprises five members, namely:

- 1) The President of the Supreme Court
- 2) The President of the Supreme Administrative Court
- 3) The President of the House of Representatives
- 4) The Leader of the Opposition in the House of Representatives
- 5) One person selected by and amongst the Presidents of independent constitutional organs

On the first view it becomes clear that career judges are those who have the strongest say about how the CC looks like. They are not only electing five from the nine judges and thus the majority, but have a good chance to dominate also the selection of the remaining four. Given the highly divided nature of the Thai polity it is likely that the two judges in the selection committee, namely the president of the two supreme courts, will be able to align themselves either with the President of the House of Representatives or with the opposition leader, providing them the majority to select also the rest of the bench. This counts the more as the Presidents of the independent constitutional organs are also selected under involvement of the judiciary. A look on the actual composition of the bench

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<sup>60</sup> See for this and the following the graphs Office of the Constitutional Court, A Basic Understanding of the Constitutional Court of the Kingdom of Thailand, Bangkok 2008, p.24.

confirms the impression of a strongly career-judge dominated bench. The professional background of the nine justices may be summarized as follows:

- Senior Supreme Court Judge, former Permanent Secretary, Ministry of Justice, Secretary-General of the Supreme Court
- Senior Supreme Court Judge
- Senior Supreme Court Judge
- Supreme Court Judge
- Supreme Court Judge
- Justice of the Supreme Administrative Court, Justice of the Constitutional Court (2006), Justice of the Supreme Court
- Justice of the Supreme Administrative Court, Supreme Court Justice
- Ambassador, Deputy Permanent Secretary, Ministry of Foreign Affairs
- Ambassador, Member of the Constitution Drafting Commission 2007

This composition shows not only an overwhelming influence of career judges from the highest career echelons but, all in all, more career judges and especially those from the Supreme Court than it might have been expected after a first view on the legal composition scheme of the CC's bench. Not only turns the conceptually possible relation of five judges to four other suitable professionals eventually out to be an actual 7 : 2 majority of career judges. But in fact, even the two justices who are not selected among career judges but among diplomats seem hardly able to contest their colleagues' authority in legal questions. In so far, it would be a difference if senior professors (of constitutional law or political science) would try to argue against the majority opinion of career judges who are belonging to the very top of the judicial elite than it is expectable to be the case if former ambassadors, expert for foreign relations, do. Significant is also that even the two justices coming from the Supreme Administrative Court are former Supreme Court Judges. The sociology of the court, that is very clear, changed remarkably from a more amorphous elite-crosscut to an assembly dominated by career judges from the Supreme Court. Beside this shift to a domination of the CC by a very

particular segment of the country's administrative elite, there are partly similar pattern concerning the justices of the first court: All judges are Bangkok based, male and Buddhists, seven of the nine justices studied at the faculty of law Thammasat University, two at Chulalongkorn University, among the latter one of the former ambassadors who studied international relations, what results in the fact that seven out of eight lawyers are from Thammasat's faculty of law. Only three of the judges studied abroad. All seven career judges served at the Supreme Court, even those who are elected among the Administrative Court judges. Considering these facts from an inter-temporal perspective it is the crucial question: what does the significant shift to such a domination of Supreme Court Judges imply? The thesis is firstly that the shift is not an expression of an attempted professionalization in terms of constitutional law expertise. Two facts may indicate this. On the one hand are career judges from the Supreme Court law experts but not particularly in constitutional law while on the other hand such experts are available and normally highly esteemed and practically required. Given the fact that scholarly opinions in general and in constitutional law particular are highly respected and that academics generally have a comparatively very strong impact on politics as members and regular or ad-hoc advisors respectively of nearly all important decision-making bodies and furthermore appearing as a kind of national interpreters of all possible policy questions on a daily basis in the media, their total absence at the present CC may serve as an indicator for this thesis. This raises the question why career judges have been made so dominant if not to professionalize the review capacity of the court in terms of constitutional law. A first hypothesis to explain the significant increase of the career judge – and the Supreme Court – element respectively without an observable concurrent professionalization in constitutional law, is, that this phenomenon expresses a process of intensified social closure of the governing elite. According to this approach, it would be the shift to the most reliable elite segment of the country in terms of loyalty towards the basic values of the constitution, which would explain the recruitment of the guardians of the constitution from among Supreme Court judges.

Indeed do judges receive a particular kind of trust, which makes them to represent one of the two senior squads of the official concept of Thai constitutionalism together with the military. Even if this thesis cannot be illuminated here sufficiently, it is the constitution itself which offers some meaningful indications, accentuating in the same time the difference and ranking of the two governance concepts mentioned above: As already said, it is the King of Thailand who, according to Sect. 3 Const. 2007<sup>61)</sup>, exercises the sovereign power of the Thai people through the National Assembly, the Council of Ministers and the Courts. But among the three state powers through which he does, it is evidently the judiciary which is much closer appropriated to the King than any other one. This becomes clear from the oaths the representatives of the three state powers have to give when taking office. They are significantly different.<sup>62)</sup> In a country like Thailand where communication in general and political communication in particular is very much dependent on the exact understanding of the formulations used, often indicating the relevant message only implicitly or allusively,<sup>63)</sup> such differences may tell a lot – especially if they are about the duties of state officials in relation to the King. Against this background, the different formulations of oaths present a carefully differentiated and graded awarding of trust and status, with which the awarded are put in relation to the respective normative horizon from which they receive their credentials and towards which they are supposed to serve

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<sup>61)</sup> Insofar identical with the Const. 1997.

<sup>62)</sup> See for a similar approach Kobkua, commenting on the relation of the judiciary and members of cabinet to the King as reflected by the constitution, when stating that “the practice [of the oaths] evidently implies that each minister and judiciary official is first of all a loyal subject and official of the King. They perform their duty on behalf of His Majesty. Each owes his monarch personal loyalty which implicitly overrides loyalty to others.” Kobkua, “The Monarchy and Constitutional Change Since 1992”, in: McCargo (ed.), *Reforming Thai Politics*, pp.57, 59. Kobkua stresses the priority of the loyalty towards the King before the loyalty to the constitution, while here the differences between the required grades and even forms of loyalty are discussed.

<sup>63)</sup> For the tendency to communicate by allusion as being a different mode of communication from the dominantly “Western” one with impact on constitutional core concepts see François Jullien, *Detour and Access. Strategies of Meaning in China and Greece*, New York 2000, p.373.

their duty. Top of the hierarchy are the judges. Before taking office, according to Sect. 201 Const. 2007, they make the following solemn declaration before the King:

“I, (name of the declarer) do solemnly declare that I will be loyal to His Majesty the King and will faithfully perform my duty in the name of the King without any partiality in the interest of justice, of the people and of the public order of the Kingdom. I will also uphold and observe the democratic regime of government with the King as Head of the State, the Constitution of the Kingdom of Thailand and the law in every respect.”

The other extreme point are the parliamentarians, the representatives of the only state power which is not seen as rooted in a line of tradition tracing back to the royal service from before the revolution of 1932. According to Sect. 123 Const. 2007 a member of the parliament taking office has to make the following solemn declaration at a sitting of the House — and thus, not before the King:

“I, (name of the declarer), do solemnly declare that I shall perform my duties in accordance with the honest dictates of my conscience for the common interests of the Thai people. I shall also uphold and observe the Constitution of the Kingdom of Thailand in every respect.”

In the middle between these two extreme points being closer to that one, which is marked by the judges, are the ministers. Before taking office, a minister according to Sect. 175 must make the following solemn declaration before the King:

“I, (name of the declarer), do solemnly declare that I will be loyal to the King and will faithfully perform my duty in the interests of the country and of the people. I will also uphold and observe the Constitution of the Kingdom of Thailand in every respect.”

Carefully analyzed the different oaths are offering deep insights in the

perception of the state powers as being exercised by the King leaving the impression of a highly contrasted enrolment according to which judges are closest to the King while parliamentarians are virtually dissociated from the him. Keeping in mind the thesis, that Thai CC not only served as guardians of the constitution but precisely as ‘discipliner of elective democracy’ the shift in the sociology of the present CC becomes a relevant and interesting fact.

<Table 5> Structure of oath for representatives of state power (2007 Constitution)

	Judges (Sect. 201)	Ministers (Sect. 175)	Parliamentarians (Sect. 123)
Representation of	The King	-	-
Setting of oath taking	Before the King	Before the King	Before the House
Loyal to	The King	The King	Own conscience
Mission	Justice + people + public order	Country + people	People
Normative reference to	Dem. reg. of gov. with King as Head of state + constitution + law	Constitution	Constitution
	= <i>Closest relation to King and deeply embedded in democratic regime of gov. with King as Head of State</i>	= <i>Associated to King and democratic regime of gov. with King as Head of State</i>	= <i>Dissociated from the center of the democratic regime of gov. with King as Head of State</i>

Coming back to the perception of judges, ministers and parliamentarians in the light of their oaths the following pattern are telling: Very significant is firstly that judges and ministers make their declaration before the King personally, while parliamentarians do before their own House. From a Thai point of view which is devoted to the monarchy according to the ideology of the “democratic regime of government with the King as Head of State” this may indicate that their

legitimacy has normatively no point of reference. This becomes particularly clear as only they are *not* supposed to be loyal to the King in fulfilling their duty in office – as far as it is reflected by their oath – but to their own conscience. This particularly sheds some light on the perception of parliamentarians from the perspective of official constitutionalism, which leaves them in a quite precarious position in terms of legitimacy again. To say an official could *not* be loyal to the King would normally mean to incriminate the respective one of an outrageous delinquency and an attitude of treason.<sup>64)</sup> Thus, to give an oath as a representative of a state governed by this basic concept *without* assuring loyalty to the King, an attitude which principally is demanded as the first civil duty of all Thai people (see Sect. 70 Const. 2007 and above), seems at least overly remarkable.

Interesting, even if on a mere allusive level, is also the mission the different state representatives are committed to according to their respective oaths. Noticeable so far is the fact that judges are committed to three aims, ministers to two, and parliamentarians to only one. Moreover, the different missions are also substantially interesting. All three state powers are committed to the people, which is the holder of the sovereignty which is exercised by the King (sect. 3). Parliamentarians have no other end to fulfill their duty than this minimum requirement. Comparing the oaths of judges and ministers then, it is further remarkable that the judges are additionally not only committed to “justice” like ministers are to the “country”, but also to “public order”. This indicates on behalf of the judges the existence of two functional commitments of judges which are interesting concerning the differentiation of upholding “justice” and “public order” in the frame of judicial duties. This differentiation may imply that upholding “justice” is not necessarily including “public order”, so that both concepts are not identical and that serving both ends *alternatively* may be possible for judges.

Striking are finally the differences pertaining to the normative reference to

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<sup>64)</sup> How sensitive the feelings towards the loyalty to the monarchy are is exemplified by reactions to a recent proposal of a group of academics from Thammasat University to mitigate the harsh punishments of the criminal law on *lèse majesté* which prompted warnings from different representatives of the military and even threats with a possible coup d'état if the group would continue. See Bangkok Post 27/09/2011.

which the duties of the different office holders are linked by the oaths. Especially the normative horizon of judges on the one side and ministers and parliamentarians on the other side differs significantly. While the first are normatively committed to the “democratic regime of government with the King as Head of the State”, the “constitution” and the “law” are ministers and parliamentarians committed only to the constitution. In need for explanation is the fact that the constitution does not only include the “democratic regime of government with the King as Head of the State” explicitly at a prominent place but obviously elevates it at the top of the normative hierarchy of the constitution visible for instance in Sect. 291 (1) which is limiting constitutional amendments accordingly. In other words: it is the principle, or better doctrine or ideology, of the “democratic regime of government with the King as Head of State” which forms the basic structure of the constitution itself (see above). More interesting, this constitutional duty applies especially to political parties and parliamentarians as Sect. 65 shows.<sup>65)</sup> If everybody, and political office holders in particular, is obliged to uphold and observe the “democratic regime of government with the King as Head of State” by the emphatic and supreme order of the constitution, it is in the need of explanation why only judges are ordered to refer their oath not only to the constitution but additionally also to this central part of it. From this point of view it is not only the different treatment of judges compared to ministers and parliamentarians which has to be explained but also the reason for the differentiation of the ideology of the “democratic regime of government with the King as Head of State” and the “constitution”, while both’ identity is presupposed for parliamentarians and ministers.

Two related explanations may be offered. The first is that the formulation of the oaths defines and reinforces the political concept of putting the judiciary explicitly closer to the King in the very center of the “democratic regime”.

A second, related explanation, which was mentioned above, is that the ideology of the “democratic regime of government with the King as Head of the State” appears in its nature as being part *and* not-part of the codified constitution, a

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<sup>65)</sup> See above, A I.

quality which is crucial for the understanding of Thai constitutionalism. In this sense judges are supposed to uphold both dimensions and wherever the written constitution contradicts to a normative order emanated from the “democratic regime of government with the King as Head of State” the written constitution may be adjusted accordingly. Such an operation can be expected reliably only from judges who serve their King with true devotion and the necessary normative understanding. Given the fact, that elective democracy in the version of the Thaksin-camp emancipated conceptually from its Thai-style frame and became a potential threat for the “democratic regime of government with the King as Head of State” which was not stifled but fanned by the coup of 2006, the conditions to define the guardians of the latter changed accordingly. A more reliable avant-garde was needed now, which is able to handle the constitution in the most effective way to strengthen the normative basic structure against the unleashed dynamics of elective democracy. This is the background, against which the shift in the sociological patterns makes every sense. From this perspective it seems to be an appropriate strategy against any capture of the CC by forces not being loyal to the “democratic regime of government with the King as Head of State”, given the fact that the Thai judiciary is indeed forming a highly self contained, ideologically largely homogenous elite.

The judiciary is indeed representing the one state power which has always been associated most strongly with the royal authority while, in the same time, having the greatest distance to the concept of elective democracy with all the evils typically associated with it in Thai political thought. Hence, the prominent status of judges in the predominating perception of the Thai society is based not on a rational legal status alone nor on personal power or high income, but on a certain authority, which is derived from the representation of the King as the centerpiece of the written and the unwritten Thai constitution. This special position elevates the judges in the public perception high above normal citizens to the top of a society, which is hierarchical at heart but requires a high level of loyalty on the other hand, including to those social rules which are contributing to the formation, reproduction and corporative self-control of a closed and ideologically determined

elite.<sup>66)</sup> Considering the judiciary as a particular reliable elite the constitution of 2007 expanded the CC's position in relation to government and parliament, both institutions which have been considered as less reliable on the basis of the elective democracy-element within the Thai constitution. Consequently it is now more difficult to impeach a justice under the 2007 Constitution than before, what turned out to be not only a theoretical question as will be shown below (C.II). As in the 1997 Constitution, the Senate (but notably not the House) can remove a justice for corruption and malfeasance by a 3/5 vote. However, different from the 1997 Const., the Senate under the 2007 Const. is involved in the selecting of the appointed part of the members of the Senate.

## 2. Competences

Since 1997 Thailand follows the system of specialized constitutional review, with both Thai CCs commanding similar competences, which are comparatively wide. Both combine the French style a-priori review of draft legislation with the German-style a-posteriori review. Beside review powers, which also contain emergency

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<sup>66)</sup> The loyalty to the King is binding judges in fact to a set of strict rules of purity and cohesion concerning their physical, moral and social appearance. Judges, due these partly written, partly unwritten rules are required to appear distant to the rest of society and especially devoted to HM the King. Intermarriages of judges are significantly often and at least welcome, social contacts inclined to be restricted in general to other judges, using the same sport clubs and other social platforms especially reserved for judges or having separated areas for them. Not only the family background of applicants for the judicial service but also their physical integrity and impeccable reputation may reportedly be requested as attributes of a candidate. Under these circumstances it is the judicial career which is by far the most attractive one for law students, even if some good students may back off achieving it because of the strict requirements pertaining in particular to the social life of judges. Even prior traffic violations are reported to be a possible reason for disqualification of a successful application to be admitted for the judge exam. Not a few families, pining after one of their children becoming a judge one day, do not allow their adult children to drive to the law school by themselves, to protect their record of being fouled even by minor offences against traffic law which is feared to terminate the dream to represent HM the King one day as a judge. Compare this with Indonesia, where justices of the CC are tolerated with a prior conviction which is less than five (!) years.

legislation, the two other main competences are those to decide organ disputes and – probably opening the most significant and typical field of activity of Thai CCs – those dealing with different aspects of elective democracy.

a) Review Powers

Review powers encompass the review of constitutionality of law, prior and after promulgation including emergency decrees and organic bills (Sect. 154, 155, 141, 149, 211, 245, 257, 212, 184 Const. 2007). The fact that different kinds of laws and different suitable applicants are subject of regulation throughout the constitution makes it difficult to comprehend the constitutional system on one view. Noteworthy is that affected individuals have the right to request legal review according to Sect. 212 Const. 2007 directly, what was not possible under the 1997 Const. Under the const. of 1997 individuals could seek protection only via the Ombudsman or upon request by courts, possible on initiative of the defendant or the court itself. As it turned out that many judges seemed to reject petitions of defendants according to subjective reasons, the introduction of an individual right to petition the CC promised to be a significant change.<sup>67)</sup> In fact the protection of individual rights did not change much under the Const. 2007. Moreover it might be too simplifying to interpret the extension of eligible applicants for legal review simply as an attempt to strengthen individual liberties. There is another possible rationale for the introduction of the entitlement of individuals to address the CC to be taken into consideration. When the 1997 Const. was designed it created several watchdog bodies like the CC, the Election Commission or the Counter Corruption Commission to control the destructive potential of elective democracy. As many of them have been packed since 2003 with government-loyal men, the coup-makers learned that these institutions have not been capable to prevent the perils of unleashed elective democracy on the basis of populism. On the other hand, prior to the coup of 2006, it was the PAD as a mass movement of concerned citizens

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<sup>67)</sup> See James Klein, *The Battle for Rule of Law in Thailand: The Constitutional Court of Thailand*, Paper presented at the KPI Congress IV - Five Years of Political Reform Under the New Constitution, 8-10 November 2002.

which became very important for the campaign to oust then PM Thaksin. Thus, it became one of the rationales of the new constitution to empower committed individuals to serve as control agents of the political power based on elective democracy and to protect the “democratic regime of government with the King as Head of State”. Very recently, in a landmark case which will be discussed below (under C. II), the CC extended its review powers in favor of individuals in a significant step. Until this case, the CC has been regarded to be entitled by Sect. 68 Const. 2007 to intervene in attempts to overthrow the “democratic regime of government with the King as Head of State” on request of the Attorney-General who, for his part, could act *ex officio* and on request of an individual. Now, the CC, in a case in which the Attorney-General did not act, accepted a request of an individual directly filed to the CC.

This enabled the CC to stop ongoing readings of a draft amendment bill which should have enabled the set up of a constitution drafting assembly.<sup>68)</sup> This sets another signal for the trend to enable individuals to police alternative political movements for the sake of the constitutional system. This interpretation of the trend under the 2007 Const. to widen citizens’ access to the CC is reflected by the court’s restrictive handling of human rights cases (see below under B. II).

Furthermore, review powers of the CC are generally restricted to acts of legislation. There is no review of court decisions or administrative acts by the CC<sup>69)</sup> but the latter are to be reviewed by the independent administrative courts.

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<sup>68)</sup> It was said that under both constitutions the CC had no explicit competence to review constitutional amendments, as such is not explicitly stated. See for example Harding, Leyland, *The Constitutional System of Thailand*, p.165. At least according to the CC’s practice this is not true anymore. For this and general arguments against such a limitation of review powers in both Thai constitutions see below.

<sup>69)</sup> Under the Const. 1997 it was not completely clear if the CC was entitled to rule on administrative decisions. The uncertainty is palpable in some decisions and individual rulings of the justices but mostly implicitly while the general problem is not directly addressed. The uncertainty is partly explainable as the administrative courts have been introduced in 1999 while the CC started its activity in 1998.

#### b) Competences in Organ Disputes

The second classical competence of both CCs was and is to rule on disputes pertaining to the powers and duties of two or more constitutional organs, with respect to the National Assembly, Council of Ministers or further non-judicial constitutional organs (Sect. 214 Const. 2007, Sect. 266 Const. 1997). Non-judicial organs are the so called “independent constitutional organs” like the Election Commission, Ombudsmen, National Counter Corruption Commission, State Audit Commission and the so called “other constitutional organs” namely the General Attorney, National Human Rights Commission and National Economic and Social Council. Noteworthy is that organ disputes different to the 1997 Const. are meanwhile explicitly reserved for contentious case-constellations only. Under the 1997 Const. the competence due to the vague wording of Sect. 266 was also used to define constitutional powers of eligible applicants in one-party constellations in which constitutional institutions asked the CC to clarify their status or competences (see below, B. I). A special expression of this competence is the competence to rule on the question, if international treaties have to be approved by the National Assembly (Sect. 190).

#### c) Competences as Watchdog Body of Elective Democracy

While many CCs have strong competences related to elections, elected officials and party dissolutions, these competences are significantly more extended and widely entrenched in Thai constitutional law than usual. Insofar, the present CC has the competence to rule whether members of the legislature have personal interests in the allocation of the expenditure budget of the parliament (Sect. 168), and, to rule on the personal qualification of members of the National Assembly, ministers and election commissioners to be or to stay in office (Sect. 91, 182, 233). Furthermore, on the question of a member of the House of Representatives, if a resolution of his or her party is consistent with the status or performance of his or her function or the fundamental principles of the “democratic regime with the King as the Head of State” (Sect. 65), or if party executives should cease to act contrary to party policies or if they should retire from office. Further the CC

rules on the powers and duties as stipulated by the Organic Act on Political Parties including a wide range of different kinds of competences. The CC besides deciding whether the status as a party has terminated may rule for instance on the dissolution of political parties, on the revocation of election rights of party leaders and executives. Included are furthermore rulings on the way how members of political parties exercise their political rights and liberties or rulings on the denial of the registration of parties or formal orders of the Political Party Registrar which denies the registration of changes.

Taken together the CC in cooperation with the Election Commission and the National Counter Corruption Commission appears as the nearly almighty censor of clean politics with the power to dissolve political parties and to ban all executives from politics if only one executive commits a violation of certain laws, a mechanism which will be explained below (B. II). Thus, with these powers the CC is able to end any government and eliminate any effective political mobilization if single violations of the respective laws can be proven, a task which seems not to be too difficult in a system with a long tradition in vote buying and money politics throughout the whole spectrum of political parties.

#### d) Legal Reform Recommendation

Like the Supreme Court or one of the independent constitutional organizations the CC has the right to propose bills (Sect. 139 Para 3, Sect. 142 Para 3 Const. 2007), while the first CC even had the right to recommend amendments to the constitution.

### C. Performance

Given the fact that a static snap-shot of constitutional institutions is not telling too much about the real impact they have on the political order and vice versa, it is the performance of CCs which is a promising subject of study in the given context. Performance in constitutional review is enabled and shaped by the outer

mechanisms CCs are embedded in and, interrelated to the former, by their own potential to produce decisions as well as the institutionally and individually moving forces in doing so. Thus, the performance of a CC as being reflected first of all by the case record and the substance of its decisions is also the result of cooperation with other institutions. Decisive is for instance the mode of mutual exchange with the political system and academic doctrine providing constant impulses for the adjustment of decision making. The performative potential of CCs is further influenced by the concept of law applied and the method and practice of decision making. This aspect exemplifies how outer mechanisms and inner alignment of CCs are linked as the methodological potential and approach of the respective court will be dependent on the impact of academic doctrine on its work.

This is not the place for an encompassing analysis of the Thai CCs performance but only an attempt to identify some typical pattern, after a general introduction. Focal point is the underlying function of CCs in reproducing the political order and the elements of continuity and change within the case record from 1998 to present.

### 1. Concept of Law, Method and Decision Making

Having first a look on the formalities pertaining to decision making the Const. 2007 gives already some basic information. Decisions of the present court can be rendered according to Sect. 216 by a quorum of five judges to be done by a majority vote. Sect. 216 prescribes also some central points of the procedure: Every voting judge shall give a decision on his own part and make an oral statement to the meeting before the respective resolution is passed. The decisions of the CC and those of the individual judges are to be published in the Government Gazette. Decisions must at least comprise the background of the case, a summary of facts obtained from hearings, and the reasons for the decision on questions of fact and law, as well the provisions of the constitution and other laws applied. But, how *is* the law applied, what is the concept of law and what is the legal method guiding its application? The concept of law and the methodological

approach of the CCs can best be described as formalistic with a French-style notion to spare with detailed argumentation.<sup>70)</sup> Beside a certain methodological reluctance, at least the first CC proofed to keep an eye on political consequences of its decisions even in routine cases.<sup>71)</sup> Along these dialectics, orientated at practically appropriate results, not due extended dogmatic considerations, the CCs seem to have deployed many of their decisions as being reflected by the grounds and the court's handling of similar cases. Generally, the courts merely stated rather than they argued in their presentation of decisions, hardly interpreting constitutional norms and statutes historically, systematically, or teleological. Until a very recent decision, which used the term 'rule of law' in English, even if the term was put in brackets<sup>72)</sup>, there has been also no visible sign of any consideration of general constitutional theory, comparative constitutional law or international law.<sup>73)</sup> Any recognition of domestic scholarly opinion on the interpretation of norms remains basically unapparent. This methodological reluctance in the interpretation of norms or at least its formal manifestation in the grounds of the decisions corresponds with a lack of principle-based argumentation. Contrary to the Indonesian court for instance, which frequently reflects extensively on fundamental constitutional principles, such as the rule of law, democracy, the adherence to human rights or sub-principles like legal certainty or fairness as emanations of the rule of law<sup>74)</sup>,

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<sup>70)</sup> See Andrew Harding, "The Constitutional Court of Thailand, 1998-2006", in: Andrew Harding, Penelope (Pip) Nicholson (eds.), *New Courts in Asia*, London 2010, pp.121, 129: "In the case of the Thai Court, [...], formalistic, French-style judgments were given which avoided elaboration as to the reasoning process, creating the impression that the decisions were arbitrary and unrelated to each other."

<sup>71)</sup> See as an example a case where the first CC openly obtained the opinion of experts from the Ministry of Interior, the Foreign Ministry and the National Security Council related to a question of equal treatment of Thai woman who are married with a foreign husband with Thai men who are married with a foreign wife. While foreign wives could become Thai citizen by a simplified procedure, this was denied for foreign men. See for the background *The Nation* 10/10/2003 for the decision CC No. 37/2546.

<sup>72)</sup> See CC No. 12/2555, 28<sup>th</sup> March 2012.

<sup>73)</sup> Very rarely the CC just stated that its ruling has not been in contradiction with international law when the subject matter inclined to do that.

<sup>74)</sup> See Thai Constitutional Court, Ruling No. 1/2542, with an exception as the CC -

Thai CCs did hardly deduce and apply such principles in interpreting the constitution or simple law in an elaborated way.<sup>75)</sup>

An observer who noted that the specific style of the Thai CC created the “impression that the decisions were arbitrary and unrelated to each other” mitigated this finding with reference to some countering pattern of performance, namely the fact that all judges have been (and are) obliged to render (own) judgments, that dissents became a regular feature of the court’s performance and that the Court “made some references to its own previous decisions”. While dissenting opinions often contained approaches which seemed methodologically more reflected indeed, they generally followed the mentioned pattern. Over-optimistic appears especially the evaluation that the Court “made some references to its own previous decisions in an attempt to provide a consistent and rational jurisprudence” and “also consistently consolidated the sometimes large numbers of cases raising similar issues”.<sup>76)</sup> While the CCs are often facing criticism because of an inconsistent handling of similar cases in sensitive issues, there are also examples for routine cases decided inconsistently to a significant extent as will be shown below. On the other hand, the CC judged a certain kind of similar cases indeed similar. But on a closer look it becomes clear that this does not imply the development of a specifically consistent application of law or interpretive doctrine in these cases but a mere schematic reference to decisions with nearly identical facts on a technical basis. In fact, the cases referred to is the “large number of cases involving changes in bank interest, brought in 1998-9”.<sup>77)</sup> These cases have been dealing with nearly identical facts and legal concerns, what enabled the CC for instance to bind 24 different applications for decision together on grounds of

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without further elaboration - had to decide on the question if the mandate of representatives should end with their removal from the party. In the decision which had effect on the formation on the government of Chuan Leekpai in a Democrat Party led coalition, the court argued with the principle of democracy, but, remarkably, as an element of the “democratic regime with the King as the Head of State”.

<sup>75)</sup> The mentioned recent decision represents a slight change insofar, as it is based on the presumption of innocence as an emanation of the rule of law.

<sup>76)</sup> Harding, “The Constitutional Court of Thailand”, p.129.

<sup>77)</sup> *Ibid.*, p.129, fn. 73.

identity one time. Generally, they all have been summarily dismissed because the defendants were seeking remedy against a Notification of the Bank of Thailand, which was not a proper subject matter for legal review before the CC.<sup>78)</sup> Deducing an attempt to “provide a consistent and rational jurisprudence” by references to previous decisions and the effect of an “consistently consolidated” dealing with constitutional problems related to this group of cases, seems to miss the point. Contrary, the CC especially in these decisions acted completely formally, without even any need for substantial argumentation. Aside this group of cases the CC was never accused to act consistently by reference to former decisions.

An instructive example for a significant lack of consistency in similar cases pertains to the application of one of the key competences of the CC under the 1997 constitution, the competence according to Sect. 266 Const. 1997. The norm is dealing with the “case where a problem arises as to the powers and duties of organs under the Constitution” and states that “such organs or the President of the National Assembly shall submit the matter together with an opinion to the Constitutional Court for decision.” The formulation of Sect. 266 was remarkably wide in terms of the suitable subject matter. Insofar, the constitution used in the Thai original the word *pan-ha* to describe the subject of the procedure, which may be translated with ‘problem’ as in the translation quoted above. This wording created a quite far-reaching competence of the CC to decide on any problem of constitutional bodies about their rights and duties. Thus, literally understood, Sect. 266 dealt not only with the competence to decide about so called „organ disputes“, namely contentious case constellations with at least two adversary parties involved, but established a jurisdiction to give an authoritative interpretation of rights and duties of any „organ under the constitution“. Consequently the wording of Sect. 266 created a competence to interpret laws to be applied by such an organ. This threatened to overlap with another key competence of the

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<sup>78)</sup> See for instance Constitutional Court Ruling No. 4/2542; 5/2542; 9/2542; 10/2542; 12-35/2542; 38-40/2542; 41/2542; 42/2542, all summarized in Office of the Constitutional Court, *The Constitutional Court of the Kingdom of Thailand, The Constitutional Court Rulings, 1998-2000*, Bangkok 2003.

CC, the competence to legal review regulated by Sect. 262. Such an overlap was problematic as legal review was only applicable to members of the legislative or the Prime Minister, thus a much narrower circle of eligible applicants than Sect. 266 was open to. Therefore, the procedure due to Sect. 262 as the *lex specialis* for the authoritative constitutional interpretation of laws, was at least partly in danger to be levered out by the wide wording of Sect. 266. In sum, the wording of Sect. 266 created two problems, one due to the systematic contradiction with another constitutional norm and another one due to the creation of an immense wide competence of authoritative interpretation open for an incalculable amount of cases, bringing the court as the final interpreter of the constitution in the position of a kind of super-advisory board accessible for “everybody”. This seemed critical from the point of legal policy and the functional design of the court as well. So far, the mistake had been on the side of the constitution maker. But what did the CC do, how did it handle these competencies? A way out would have been to limit the scope of application of Sect. 266 in systematical and teleological interpretation if this would not mean to assume a too creative stance in adapting the constitution. In a way this happened indeed, but without any methodological consideration. In an early decision from 2000 the court has argued that the competence according to Sect. 266 would have to be limited to *contentious* procedural constellations and thus denied its competence according to Sect. 266 in a non-contentious constellation because “the issues were *only to request* the CC *to explain the meaning of the provisions* of the constitution *without the fact that any legal dispute arose*. Therefore, it was not a case where a dispute arose as to the powers and duties of organs under the Constitution which the CC could decide under Sect. 266.”<sup>79)</sup>

As convincing the *result* of this restrictive interpretation was, as surprising is the fact that the court did not take the opposing wording of the constitution into any account but – without further explanation or comment – simply replaced the term *pan-ha*, ‘problem’, used by the constitution, with the term *kad-yaeng*, ‘dispute’. Doing so, the court produced a prudent result in a methodologically

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<sup>79)</sup> Thai Constitutional Court, Ruling No. 6/2542, pp.73, 74. (*Italics* by the author).

questionable way as it did not only introduce a new term eliminating the one used by the constitution but also introduced a fundamentally different meaning of the respective section without commenting on this procedure, its rationale and justification with any argument. More surprising, neither did the legislator protested nor did the Court keep on using its restrictive interpretation in future decisions.<sup>80)</sup> This, the subsequent handling of the interpretation of Sect. 266, is the most striking subject of study. Whenever the CC had to apply Sect. 266 in non-contentious case constellations afterwards it completely ignored it. Neither the flawed legal design of the constitutional system of the CC's competencies nor the possibility of a more restrictive interpretation of Sect. 266 or the decision doing so have been addressed by subsequent decisions. This lack of reflection in any relevant direction is accompanied by another curious characteristic. The CC did not just depart from the restrictive interpretation but used afterwards two different ways to apply Sect. 266. In *contentious* case - constellations with adversary parties the CC tended to use the definitional element 'dispute', while in *non-contradictory* constellations, cases in which only one party has been involved seeking authoritative advice about its competences, the CC basically stick to the original wording of the constitution using the term 'problem'.<sup>81)</sup> Nevertheless, the CC never gave any reason why it used two different terms referring to the same norm of which only one did correspond with the text of the constitution. This fact, the co-existence of two parallel interpretations without any visible reflection, leaves the inevitable impression of a certain lack of differentiated consideration and continuously developed and applied doctrine. This becomes almost palpable in an English publication of the Office of the Constitutional Court. Despite the fact, that there has been only one decision in which the CC applied the term 'dispute' in the context of *non-contradictory* case-constellations and arguing *contra legem* in

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<sup>80)</sup> An exception – but less expressive and again without any explanation – is maybe CC Ruling 15/2545, dated 25<sup>th</sup> April 2002.

<sup>81)</sup> In fact, in the decisions dealing with Sect. 266, there are rarely also other Thai words in use which more or less seem to fit the scheme of “dispute” for contradictory and “problem” for non-contradictory constellations or composites of both Thai words.

doing so, the official publication uses not only the term ‘dispute’, but states this as the only right and possible interpretation of Sect. 266. Similar to the decisions which notoriously blended out the existence of the respective contrary interpretation in their own record, the author of the booklet neither mentions the contrary wording of the constitution nor the diverging dominating practice of the court itself. According to the booklet the constitution says: “In the case were a *dispute arises* as to the powers and duties of organs under the Constitution, [...]”<sup>82)</sup> That this is not just a translation mistake becomes clear in the following explanation which emphatically introduces this interpretation:

It is important that a dispute on the powers and duties of organizations under the Constitution shall be a ‘dispute’ in regard to a performance of such powers and duties. As a result, the Constitutional Court shall not consider a petition without a common ground of dispute. For instance, an interpretation of the powers and duties of organizations or a discussion regarding the powers and duties of organizations under the Constitution where a dispute has not occurred, shall not be taken under the Constitutional Court’s consideration and decision.<sup>83)</sup>

After the present constitution of 2007 eventually changed the text from ‘problem’ to ‘dispute’ there is no problem with the interpretation of this competence anymore. Nevertheless, as a part of the development of constitutional procedure law and the methodological capacity of the court, the interpretation of Sect. 266 remains a striking lesson.

If this example is instructive concerning the ability of the CC to formulate, develop and apply an own doctrine of interpretation throughout its cases the question arises how far constitutional review receives input from the academic doctrine in constitutional law.

Despite the principally long reaching roots of legal review in Thailand not only the practice of constitutional review by a *specialized* court has been started not

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<sup>82)</sup> Office of the Constitutional Court, *A Basic Understanding on the Constitutional Court of Thailand*, Bangkok 2002, p.41.

<sup>83)</sup> *Ibid.*

before 1997, but also the academic doctrine of constitutional law in Thailand proves to be a similar young even slightly older academic discipline, represented by only a comparatively small, although growing, number of experts until today. Moreover, quite from the beginning and relevant until present, Thai CCs never established a firm and dynamic gearing of their activity with the academic public law doctrine as it is typical for other constitutional courts. In some countries like Italy, Austria or Germany newly founded courts could base their performance on such already existing ties between judicial practice and academic doctrine in public law. Differently, Thai CC and constitutional law doctrine rather co-exist in separated spheres more than they interact. However, the impact of a cross-fertilizing relationship seems to be a crucial factor for performance and capacity of CCs in general. Thus, the present composition of the bench by career judges and diplomats corresponds with the long-term two-sided distance between the CCs and scholarly doctrine of constitutional law. It is less an active part and driving force of constitutionalization.<sup>84)</sup>

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<sup>84)</sup> On the side of the academia the relatively low discursive exchange may also be explained by the widespread feeling of inconvenience to talk about constitutional issues in depth as at least elements of the basic structure of the constitution are exempted from the discussion by formal and informal rules, in particular the monarchy. The monarchy has to be left out of any legal or political consideration due to the wide spread feeling of “revered worship” (Sect. 7 Const. 1997, 2007) and the strict law on *lèse majesté*. But reluctance is also used in relation to the performance of courts. Even if not constantly observed, the risk of committing a contempt of court however is at least a possibility if comments are too critical. After an administrative court for instance had issued an injunction suspending the operating permissions of some dozens investment projects in the Ma Ta Phut industrial zone which immediately became the most debated legal issue in the country the president of the Lawyers Council of Thailand asked “the state agencies and the private sector to refrain from talking publicly about the economic consequences of the injunction as this could be interpreted as being contempt of court”. Cited in Bangkok Pundit 14/10/2009. In the early days of the first CC, in 1999, one of the Justices even demanded a general ban of public comments of CC decisions. See Klein, *The Battle for the Rule of Law in Thailand*, p.33.

## II. Influence on Law and Politics

Maybe the most relevant piece of performance related directly to the political order, shaping it and being shaped by it over the years, are the decisions of the CCs pertaining to elective democracy and the disciplining of democratic participation. They are sharply contrasted by the nearly absence of a strong protection of human rights provided by the CCs on an ongoing basis. Before these two fields of activity are analyzed the activity of the CCs in their similarities and differences shall be regarded briefly.

### 1. Activity of the Courts in General

The performance of the Thai CCs in general is ambiguous and not easily to be described by catchy phrases like ‘activism’ or ‘passivism’. Compared for instance with the younger Indonesian CC, which nearly immediately turned out to become an influential, independent and self-confident institution after its implementation, the first Thai CC never overcame a certain reluctance in political sensitive cases.

On the other hand, if the cases have not been too sensitive, the court handled its competence normally on a merely positivist routine base in a reliable manner. Dealing with these ‘normal’ cases the CC operated along its constitutional mandate, particularly productive in producing a continuous correction of the development of elective democracy. These cases are affecting democratic participation not so much in the sense of citizen’s direct participation than that of their representatives: elected political office holders and political parties. In this type of routine decisions dealing with the removal from political offices and the dissolution of political parties, the CC functioned in cooperation with the respective constitutional agencies, the Election Commission and the Counter-Corruption Commission, rather as an judicial automate than an positive legislator or an active instance of legal interpretation. Furthermore, the first CC acted reluctantly in human rights cases in which it hardly spoke in favor of the individual.<sup>85)</sup> In very rare cases it did, the cases were not dealing with political relevant human rights like the freedom of

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<sup>85)</sup> Deciding decisively passive in human right cases, the court has been staying insofar away from the judicial dynamic the Korean or Indonesian court developed.

expression or assembly for instance. These general patterns did not change after the coup d'état with the new CC under the Const. 2007 taking over, with one important difference: The first court deviated from its constitutional mandate and the rule of law in few cases pertaining to politically sensitive constellations while the present court arguably may have deviated from the rule of law in the eyes of its critics but not from its constitutional mandate.

The first CC was accused to be too obedient towards the strong Thaksin administration and to use a double standard in impeachment cases in favor of him. The second court was criticized to do the same in favor of the royalist DP and against the Thaksin-camp, which was considerably weakened after the coup. According the critics the court proved to be an active part of the 'patriotic front' of the formal and informal forces which cooperated to save the "democratic regime with the King as the Head of the state" against a return of the ousted ex-PM and meanwhile "enemy of the system", Thaksin. As this front resembled most of the sources and representations of power including an active military as senior 'partner-guardian' of the constitutional order, which itself was designed by these forces, it could be argued, that even decisions against the politically weak governments of the Thaksin-camp appeared as affirmative to political power. To speak about a similar impact of both courts in ruling in favor of the dominating power in certain sensitive cases seems therefore considerable.

In some respect the situation in 2009 and since 2011 when the Thaksin-camp took over again after the coup reminds on the situation in Germany after WWI when the new republican government faced the opposition of the joint forces of the military, bureaucracy and judges, rejecting the new republican state and its government wholeheartedly. However, the difference between Germany in the 1920s and Thailand since 2007 is the same as between the periods of performance of the first and second CC pertaining to their adherence to political power on the one hand and the constitution on the other. While the first CC was accused to have violated its constitutional mandate by violating the rule of law, the second CC could claim to act in an area of conflict created by the constitution itself. In this respect, the CC would act in favor of one constitutional concept against the

other. Forced to decide in a case of conflict, the decision for the court could only be one in favor of the “democratic regime with the King as the Head of the State” as it was nearly uncontested before 2006.

Nevertheless, both CCs arguably violated or sacrificed respectively the rule of law. Apart from the different context in deciding political decisive cases, the second CC remained principally true to the established tradition of constitutional review with a little modification. As the CC currently rules in cases concerning mega-politics with the established system but against formal political power in government and parliament the courts horizon of expectations started to shimmer when member of the governing party threatened to abolish the court with the already induced major constitutional reform leading to the making of a new charter. The probably most promising strategy from the point of view of the CC to counter this is a double one. On the one hand, the CC attacked the government substantially by stopping the amendment process (see C. II). On the other hand, the court proved to be significantly more concerned with human right protection than before. If the thesis is true, that the CC on the scout for allies and support already started to discover an intensified interest in human right issues and the present equilibrium will linger on, this might result in a generally increased pro-human right activity of the CC in 2012.

So far, the overall activity of Thai CCs over the past nearly fifteen years can be outlined briefly as follows: Significant in terms of judicial activity have been three aspects in particular decisions pertaining to: mega-politics, secondly routine or less divisive decisions pertaining to elective democracy and, finally, human right cases. As the former two groups of cases are pertaining to elective democracy or democratic participation respectively, it is justified to distinguish only two fields of constitutional law, in which the role and impact of the CCs may be analyzed.

## 2. Selected Decisions: Human Rights and Democratic Participation

Thus, the impact of Thai CCs on the political order will be measured with respect of two different fields of influence: human rights and democratic participation.<sup>86)</sup>

a) Cases Contributing to Democratic Participation

Cases regulating the channels of democratic participation are mostly dealing with two legal consequences, the removal of elected office holders and the dissolution of political parties. The latter also entails the ban of wrongdoers as well as members of the executive boards of the respective parties from politics according to the post-coup legislation (Organic Act on Political Parties 2007). These cases are arguably contributing to a Foucauldian *dispositif* enshrined in Thai constitutionalism that is effectively demanding, justifying and contributing to numerous processes aimed to discipline elective democracy. Institutionally it is supported by the respective laws and practices, which allow the dissolution of political parties, the ban of members of their executive committees for five years from politics, or the removal of elected officials by the watchdog bodies in charge. The latter are the National Counter Corruption Commission and Election Commission, the CC and, since the coup, also the Supreme Court.<sup>87)</sup> The *dispositif* partly responds to notorious excesses of party politics marked by money politics

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<sup>86)</sup> Beside these two main types of cases, there have been a number of cases in the first years after the Asian financial crisis, 1998-2002, dealing with the constitutionality of the legal strategies of government and central bank to counter the consequences of the crisis. These cases have been often initiated as attempts of affected people and institutions to gain time against the regulations by using remedies to the CC. As stated above, they have been handled regularly by summarily rejecting their applicability. Other cases dealt with different problems, among them some important, especially pertaining to organ disputes but they did not reach the level of landmark decisions or form distinguished groups of cases. It may therefore be justified to focus on the mentioned categories of cases, cases pertaining to human rights and democratic participation.

<sup>87)</sup> After the coup of 2006 the CC lost the competence to decide in asset concealment cases which has been shifted to the Supreme Court, what, in way, was a punishment for the handling of this competence in a famous case against Thaksin in 2001. See Vitit Muntarbhorn, "Deconstructing the 2007 Constitution", in: Funston (ed.), *Divided over Thaksin*, pp.80, 83. But the ordinary justice contributes also indirectly to the project of disciplining democratic participation. For example does the practice of using defamation law hamper both the open political debate including the media's ability and willingness to comment on it as a precondition of elective democracy in general and the criticism of the judicial practice of the *dispositif* being protected by the use of contempt of court in particular.

and even gangsterism especially in local politics, partly it also reinforces a specific *political narrative* which is describing the dark side of Thai constitutionalism, nurtured especially since the 1990s in Thailand. This narrative deals with the issue of the “dirty game” of elective democracy, which is countered by the ideology of “Thai style democracy” and “democratic regime of government with the King as Head of State” and connected to the guardian role of the military.

Interestingly, most of the cases reinforcing the *dispositif* in the strongest way, namely the removal of elected office holders and the dissolution of political parties, are inclining to be routine cases due to the kind of procedure applied. Here, the routine procedure normally leads to the decision automatically on the basis of fact finding and the preparation of the Election and Counter Corruption Commission respectively. This counts for party dissolutions, especially related to reporting mistakes, and to asset declaration cases concerning elected office holders. Some other case variations concerning party dissolutions or the removal from office open space for substantial legal consideration. In other words, the same legal consequence, the removal from office, can be drawn due to a mere formal routine execution on the basis of fact finding, in particular in asset concealment cases, as well as due to legal interpretation for instance to answer the question if a member of parliament could be elected while being in custody. Across to this distinction according to the way the legal consequence is achieved, cases dealing with party dissolutions or the removal of officials can also be classified according to their *effect on politics*. While most of them remain on the level of a *certain constitutional normality*, others have been heavily divisive and affected *mega-politics*.

Finally, there are some other cases pertaining to democratic participation and the concept of democracy, which remain on the level of a certain constitutional normality and are dealing with other constellations than with party dissolutions and removals from office.

All in all, decisions directly contributing to the discourse of elective democracy are forming probably the most remarkable subject of activity in terms of coherent influences of cases types the Thai CCs dealt with.

From this point of view the *changing role* of the Thai CC since 2007, which has been described in terms of a judicialization of politics initiated by the coup makers, appears in a more differentiated light as the change seems to be more a gradual one than it reflects a substantive new concept of review powers. As far as the *functional understanding* of constitutional review is concerned, the CC post 2007 just performed more stringently along the lines of the old discourse. At heart, the fundamental change is not so much the definition of any new role of the CC but the fact, that the fears of the evils of elective democracy has become true and concrete with a mass movement which demands changes in a way which was unthinkable in 2006 yet.

Therefore it is only natural that the judiciary in general was given more formal influence by the 2007 Const. in the attempt to balance out and adjust the state powers in a way which aimed to prevent a coming back of Thaksin on the basis of populism enabled by elective democracy.<sup>88)</sup> But the very function of constitutional jurisprudence from the perspective of Thai constitutionalism has always been the same, even if the CC between 2001 and 2006 was less reliable in some cases.

#### aa) Disciplining of Elective Democracy on a Routine Basis

Numerous are the cases in which the CCs fulfilled their function in disciplining elective democracy using their competences to dissolve political parties and remove elected officials due to purely formal reasons as to failures in submitting necessary notifications and reports. These cases are considered here as routine cases as explained above. Strictly formal, thus effectively decided on the basis of fact finding, have been firstly most of the party dissolution cases. Exceptions are the dissolution of the former governing party (TRT) after the coup d'état 2006 as it was legally doubtful if retroactive law of the coup makers could be applied and the respective cases against the DP as formal obstacles appeared which had to be

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<sup>88)</sup> See Chairat Charoensin-o-larn, "Military Coup and Democracy in Thailand", in Funston (ed.), *Divided over Thaksin*, pp.49, 68. The presidents of the highest courts are now involved in the selection of the appointed (not elected) Senators (which form around one half of the upper house) and members of the independent watchdog bodies under the constitution.

considered.<sup>89)</sup> All in all, political parties have been dissolved around eighty times<sup>90)</sup>, while dissolutions recommended by the EC have been denied in only three cases, – all of them concerning the Democrat Party.<sup>91)</sup> The sharpness of the dissolution option lies in the ease to be dissolved on purely formal grounds but also to be hold responsible as a mass organization for individual wrong doings, followed by the automatic dissolution of the whole party and the disqualification of all executive board members: According to Sect. 237 Para. 2 Const. 2007, if convincing evidence appears that a member of the executive board of a political party connives or neglects for instance that a candidate of his or her party committed a violation of the party law, for example by vote buying or unfair campaigning, all executive board members shall be suspended for the period of five years from politics. Consequently a single – even if minor – infringement of one candidate combined with the negligent unawareness of one board member can eliminate hundreds of politicians from political life for five years without any proof or even allegation that they did anything wrong. The Thaksin camp experienced the devastating power of this mechanism when its parties have been dissolved two subsequent times, resulting in more than one hundred of banned

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<sup>89)</sup> Tellingly the substantial concerns due to the ban on retroactivity could be overcome with the same formalistic ease for the disadvantage of the TRT as the purely formalistic concerns in the Democrat Party dissolution case worked for the party.

<sup>90)</sup> There are three reasons for party dissolutions, firstly political inactivity, irrelevance (less than 5000 members) or non-compliance with formal requirements like annual activity reports due to the procedural requirements, secondly substantial reasons, namely concerning political parties which have carried out acts detrimental to national security or the “democratic regime of government with the King as Head of State”, allow foreigner to become their members, or receive illegal contributions like vote buying, thirdly voluntarily dissolution in particular to enable a merger with another party. See for the present legal status Sect. 68, 237 Const. 2007; Sect. 91-98 Organic Act on Political Parties. While the first case concerning the dissolution of political parties, one of the first cases of the CC under the Const. 1997 at all, was about the merger of two parties, which made the voluntary dissolution of one of them necessary (see Thai Constitutional Court Ruling No. 6/2541), almost all of the other party dissolutions belong to the first or second group.

<sup>91)</sup> See CC Ruling No.15/2553 (29<sup>th</sup> November 2010), No.16/2553 (9<sup>th</sup> December 2010), CC No.48/2554 (28<sup>th</sup> December 2011); see also Constitutional Tribunal Ruling No. 1-2/2550 (30<sup>th</sup> May, 2007).

politicians only after the first time. In other words, these routine cases can automatically affect mega-politics, especially if the governing party or the major opposition party are subject of ban and dissolution. Recently, in March 2012, the dissolution of two political parties and the subsequent ban of their executive committee members from politics for five years was induced because the parties failed to submit an activity report for the year 2009 to the political party registrar without giving any sufficient reason as required by Article 93 of the political party law.<sup>92)</sup> The harsh consequence of a rather petty omission and the routine based action of the CC are the remarkable characteristics of these cases. They are normally not affecting important political parties but sending a steady signal about the way the constitution perceives and handles political parties in general. This complements the fact that the law creates the potential of a deadly weapon against any political party due to the high probability to find a reason to dissolve it.

A contribution to the symbolic dimension of these mechanisms is also the ease with which the law is routinely used in political communication to threaten or discredit the respective opponent. Immediately after the last national election 2011 for instance a candidate from the DP who is a lawyer, requested the EC to dissolve the victorious Puea Thai Party (PTP), the third subsequent and the third subsequently victorious party set up by the Thaksin camp. The petition claimed that the PTP was run by a banned politician, as the elder brother of the present Prime Minister, Yingluck Shinawatra, and ousted premier Thaksin Shinawatra and other banned members of the dissolved TRT/PPP advised the campaign of the PTP.<sup>93)</sup> It was obvious that the allegation was founded but not less obvious that it would apply in a way to virtually all more important Thai parties which were successors of dissolved parties after the coup, two of them including the most important coalition partners of the DP while leading the government.<sup>94)</sup> Not long

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<sup>92)</sup> See Bangkok Post 28/03/2012.

<sup>93)</sup> See Nirmal Ghosh, “Legal bid to dissolve winning Puea Thai Party”, The Straits Times 09/07/2011, latest accessed at <http://www.asianewsnet.net/home/news.php?sec=1&id=19865> on 14/06/2012.

<sup>94)</sup> Most striking is the example of Newin Chidchob, who was not only banned for 5 years as TRT executive board member, but remains the only politician ever caught on

ago, conversely, it was the meanwhile governing PTP which threatened to apply for a dissolution of the DP because of unfair campaigning practices during the recent elections.<sup>95)</sup>

Routine cases have been secondly those cases concerning the removal of officials because of wrongly declared assets. Most of them did not turn out to affect mega politics even if some of them caused debate. Especially during the first years of the court under the 1997 const. also some prominent politicians have been banned. Meanwhile, after the coup of 2006, the mandate to handle these cases has been shifted from the CC to the Supreme Court, Criminal Division for Politicians. But it is still the CC which is in charge to remove officials or to rule on the membership of members of the National Assembly, Council of Minister and Election Commissioners according to Sect. 91, 182, 233 Const. 2007. The one office removal case on grounds of a wrong asset declaration which affected mega politics was a case against then Prime Minister Thaksin. The alleged failure of the CC to handle the case appropriate became the reason to shift these cases to the Supreme Court. All in all, some dozen politicians have been removed from their office and banned five years from politics because of wrong declarations of their assets.

Another category of removal from office-cases are those which are not about asset declarations but the necessary qualifications to hold public office. Two substantially similar cases may be exemplary selected.<sup>96)</sup> The first one is related

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tape engaged in illegal electoral practices and switched sides after the second party of the Thaksin camp, the PPP, was banned in 2008 to form a coalition with the Bhumjaithai Party which he controlled as de facto leader and the DP in spite of being banned from politics. Without his party the DP would not have been able to gain the majority after the CC dissolved the PPP and banned more than hundred of its politicians. His father even became chairman of the House of Representatives.

<sup>95)</sup> See *The Nation* 12/03/2012.

<sup>96)</sup> These two cases while dealing with similar problems have been decided at the very beginning of constitutional review in Thailand on the one hand and very recently on the other. In the meanwhile politicians lost their office again and again, sometimes low profile politicians, sometimes important functionaries, after the coup 2006 mainly pertaining to the Thaksin camp. Beside the example of Prime Minister Samak, as case which belongs in the category 'mega politics', especially the first elected

to a major power broker, the already mentioned Newin Chidchop, and the other one to one of the core leaders of the redshirt movement and one of the main representatives of the redshirt movement in parliament.

These two cases demanded the CCs to interpret the constitution in similar even if not identical case constellations, dealing with the qualification of parliamentarians and ministers respectively when they have been detained or sentenced to imprisonment respectively. The first case, decided very early by the first CC in 1998, dealt with a political key figure, then deputy minister Newin who joined several parties and has supported both present political basic-camps subsequently. He had been sentenced by a provincial court because of defamation of a competitor in his home province according to the very strict practice to handle the defamation law in political dispute, another mechanism disciplining elective democracy. As Newin had been convicted to a six-month jail-term, which had been suspended by the court, the President of the House of Representatives requested the CC for a ruling if Newin had lost his qualification to be member of the government. In fact, Sect. 216 Para 4 Const. 1997 stated this for the case that a cabinet member would be sentenced with imprisonment. According to the Court convictions punished only by *suspended* sentences did not fulfill the constitutional requirements for disqualification as they “should not be deemed as his or her being imprisoned”.<sup>97)</sup> This controversial decision was issued by a split seven-to-six vote which was heavily criticized. In those days, the ruling is from June 1999, Newin has been the leader of one of the smaller parties in the coalition government headed by the influential but battered Prime Minister Chuan Leekpai and his Democrat Party. Under the critics was even former Thai Prime Minister Anand Panyarachun, who headed the 44-member committee that drafted the new constitution

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government of the Thaksin camp after the coup, the said Samak administration, lost several important figurers before Samak himself was removed from premiership. While Public Health Minister and close Thaksin ally Chaiya Sasomsub has been removed because to declare his wife's 50 per cent holding in a private company, another ally, former House Speaker Yongyuth Tiyapairat was banned from politics for five years for vote buying, before finally Samak himself was removed.

<sup>97)</sup> CC Ruling 36/2542, 15<sup>th</sup> June 1999.

and who, among many other profound voices, made clear that the ruling had been against the clear and obvious intention of the drafters of the constitution.<sup>98)</sup> The fact, that one of the seven judges who voted in Newin's favour was facing criminal proceedings and therefore the risk of a suspended jail term himself contributed further to the negative effect the ruling had on the image of the court.<sup>99)</sup>

Contrary to the Newin case the second CC very recently ruled in May 2012 that Jatuporn Prompan had to be disqualified as member of parliament according to Section 106 (4), 101 (3) Const. 2007 according to which the qualification for the mandate depends on party membership.<sup>100)</sup>

According to the CC, under the Political Party Act, a party member who is lawfully detained immediately loses his or her party membership if this prevents him or her from voting in general elections. In fact, on election day Jatuporn had been detained in Bangkok Remand Prison on terrorism charges related to the 2010's red-shirt protests which have been cracked down by the government. His request for bail to leave the prison for vote was denied by the court. Neither any general principle concerning democratic participation, nor the fact, that Jatuporn who was later on been released on bail, officially requested to enable him the vote by bail, was substantially considered. Noticeable is that he was not sentenced, thus it would have been adequate to discuss if he was not protected by the presumption of innocence, a principle the CC reflected on only six weeks earlier in a politically neutral case that will be mentioned below.<sup>101)</sup>

#### bb) Divisive Decisions on Mega-politics

It's the nature of cases affecting mega politics that they are perceived with more attention than those dealing with less important issues even if they may sometimes tell the same or even more about the function of CCs. The latter could be argued for Thailand in particular, where especially the routine cases are

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<sup>98)</sup> See Klein, *The Battle for the Rule of Law in Thailand*, p.32; Boonthan Sakanond, "Rulings Pull Rug From Political Reforms", Bangkok Post 05/07/1999.

<sup>99)</sup> See *ibid.*

<sup>100)</sup> See CC Ruling No. 10/2555 (2012).

<sup>101)</sup> See CC Ruling No. 12/2555 (2012).

pointing to the outline of a central *dispositif* of the political in the country existing since long before the 2006 coup. However, as the few cases concerning mega politics have attracted most of the international attention paid to Thai CCs they may be reflected here only briefly and on selective basis.

Even if there is no final list of top cases some have been clearly affected the course and even the fate of the country's development in the way that determined the fundamentals of political power and it is telling that they did not contribute anything to any problem of dogmatic doctrine or conceptual understanding. These decisions have been highly divisive if they did not already meet an audience which was already so deeply divided that the reaction of critics was tempered by exhaustion or received with a stance of cynical expectation.

It is remarkable that all of the most divisive and important decisions of the CC pertained to mega-politics. Moreover, almost all decisions on mega politics in Thailand are explicitly decisions on democratic participation within the paradigm of disciplined elective democracy and not, for instance, on rights and duties of different state powers. This is far from being self-evident, keeping in mind that the most divisive decisions in many other countries are pertaining to value conflicts or issues like foreign policy or national security. Moreover, there are no principle-based considerations or discussions of possible interpretations and deductions from constitutional principles as the dominating concept of democracy especially, be it representative or Thai-style, in these decisions.

In substance Thai CCs made mega-politics dealing with the removal of political office holders particularly in two cases, both affecting persons who have been Prime Minister of Thailand during the trial. Other two decisions making mega-politics have been dealing with the dissolution of political parties, in both times the then governing party, namely two subsequently formed parties belonging to the Thaksin-camp, TRT and PPP. Right now, the dissolution of the third party of the Thaksin-camp, Thailand's governing PTP, appears as possible soon (see below C. II). Especially the party dissolution cases are contrasted by decisions on the required dissolutions of the DP and complemented by the annulation of an election which has been won by the TRT in 2006.

All in all, cases which may be qualified as dealing with mega politics are allocated over the whole period of constitutional review in Thailand, whereas the coup of 2006 marks a certain demarcation line with an increased number since then. During the first period under the 1997 Const., the first case clearly pertaining to mega politics occurred directly after Thaksin had been elected to become Prime Minister the first time in 2001, the second at the very end of his premiership, short before the coup, in 2006. The other four to six cases occurred after 2006, judged by the Constitutional Tribunal in 2007 and the Constitutional Court from 2008 to 2012.

The two cases dealing with the removal of Prime Ministers, the Thaksin asset-concealment case and the Samak cookery-show case, are similar according to the legal consequence under consideration but different not only according to the result. While Thaksin was discharged by the first court despite severe evidence, Samak was impeached by the present court in a questionable decision. Different have also been the respective legal procedures as the first case has been an asset declaration case decided on the basis of fact finding, while the Samak case had to be decided based on an interpretation of substantial law similar to the cases against Newin and Jatuporn.

The Thaksin concealment case first has been a routine case embedded in a very difficult political environment from the point of view of the young CC. When the result of the ruling deviated from the statistical rule that normally governed comparative routine cases in which the CC always confirmed the fact finding of the NCCC and approved the required removal, the Court in this case faced an outcry that damaged the institution's image in a way that should never be overcome. The encounter of a routine case in factual and substantial respect and an exceptional result with consequences on mega politics was the essence of the scandal that broke out and tainted the trust in the newly established CC. What was the case about? The case was stemming from the time in which Thaksin was Deputy Prime Minister in the Chavalit government in 1996 but tried after Thaksin became Prime Minister of Thailand in 2001. The political environment in 2001 was still marked by the severe social and economic consequences of the Asian

crisis of 1997.<sup>102)</sup> Thaksin had become the “white knight” in difficult times from the very beginning of his tenure. In January 2001, Thaksin’s TRT had won 248 seats out of the 500 contested, promptly absorbing some smaller parties and even a quite big one (Seritham, Chart Patthana, New Aspiration Party). This guaranteed a comfortable majority and even stable government.<sup>103)</sup> Thaksin immediately appeared as a different sort of politician, who coined his own political brand, the CEO-style, and was able to implement three innovations in Thai political life: the set up of effective reform dynamics, which have been perceived by a growing number of people as a breath of fresh air after the disappointing beginnings of the new democracy under the 1997 constitution, the consolidation of alliances of reform-orientated experts from different political origins under his firm rule and finally the building up of wide-ranging popular support from various segments of society. When the CC received the case from the NCCC which had voted 8:1 in favor of indicting Thaksin, all the hope put on him seemed to face an abrupt end. In this atmosphere heavy lobbying started conducted by highly respected “senior figures” including a former chief of the Supreme Court and senior commercial bankers, but also dynamic civil society forces, forces which later decisively mobilized against Thaksin together with other groups under the joint label PAD, known as yellow-shirt movement.<sup>104)</sup> It is noteworthy that the result of the NCCC findings was already known before the 2001 election, whereas Thaksin took the

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<sup>102)</sup> After all the economic crisis had already proven to have the power to bring a Suharto down in Indonesia and to catalyze the political divide in Malaysia starting with the rift between Prime Minister Mahathir and his Deputy Anwar, then of the governing party followed by the whole society and which is still lingering on.

<sup>103)</sup> Especially compared with the previous Chuan government of a Democrat Party-lead shaky six-party coalition. The latter had been supported by 12 independent defectors from a seventh party, Prachakorn Thai party. This party had officially decided not to cooperate with the Chuan government and tried to punish the defectors which was leading to an interesting case of the CC. See the CC ruling 20/2544, dated 3. August 2001. In the previous general elections of 1996 the victorious New Aspiration Party had won only 125 and the second strongest Democrat Party 123 seats, what later on enabled the Chuan government.

<sup>104)</sup> See Thitinan Pongsudhirak, “The Tragedy of the 1997 Constitution”, in: Funston (ed.), *Divided over Thaksin*, pp.27, 32.

opportunity to manufacture a public image as national savior with all available means immediately after his election: TV, radio, chat, visits of the countryside and a completely new social approach to the local people, all part of giant campaign he launched with all energy after assuming power.<sup>105)</sup> The justices received a lot of pressure of different kind in this context sailing between Scylla and Charybdis. Finally, the court came out with a decision which reflected its difficulties to handle the case as an entire body especially in the complicated way to count the votes of justices throughout the different stages of rule making process together.<sup>106)</sup> Consequently Thaksin was acquitted, not on grounds of merits but of facts: According to the assets in dispute, shares which have been allocated to “maids, servants, drivers, drivers, and other close persons over a period of time”, the CC stated that they have been managed by Thaksin’s wife “in the name of others” who “did not wish for others to know that they were being assisted by [Thaksin’s] spouse.” Thus, the CC came to the conclusion that all assets were those of Thaksin’s spouse only. And, this is the core argument of the decision, she “herself testified to the subcommittee for investigation [!] that she was not aware that her personal assistant had not disclosed such shares in the accounts. If she had examined, she should have known and made the disclosure. Therefore, it could be seen that even the respondent’s spouse, who was the owner of such shares, did not now. Therefore, how could it be concluded that the respondent [Thaksin] knew of the non-disclosure of such shares in the accounts?”. — This way of fact finding have been so different from all similar cases before and after the ruling that this alone would have been enough to cause the scandal, which was accompanied by some more circumstances discussed below (C. II). Many observers found this decision to be the original sin of Thai constitutionalism under the 1997 Const. committed by the institution which once was supposed to be the guardian of the constitution. It is maybe the irony of the following course of the

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<sup>105)</sup> Pasuk Phongpaichit and Chris Baker, “Thaksin’s Populism”, in: *Journal of Contemporary Asia*, Vol. 38, No. 1, Feb. 2008, pp.62, 65.

<sup>106)</sup> Seven judges found Thaksin being guilty, the other eight who ruled in favor of him included four who denied the CC’s jurisdiction on the matter and another four who acquitted him from knowing about the asset concealment.

thus tainted Thai constitutionalism that all other CC cases pertaining mega politics later on turned *against* Thaksin who had been favored by the first, and like the others fatal, decision on mega politics. So it came that Prime Minister Samak was removed from office by the subsequent CC under the 2007 const. in 2008. After the first general elections following the coup d'etat in the end of 2007 the second party of the Thaksin camp, the PPP, even heavily disadvantaged during the election campaign, gained surprising 233 from 480 seats. While the DP remained as opposition party with 165 seats, the PPP formed again a strong coalition government backed by 315 seats. The new government was headed by Samak Sundaravej, a former right-wing nationalist, who openly acted as Thaksin's proxy as the ousted Prime Minister had been banned from politics and was outside the country facing criminal charges because of alleged misuse of his power as PM.<sup>107)</sup> After Samak took over, several charges were prepared against him when the first strike, a request to remove him from office because of the allowance he received for a weekly cookery show on TV, was already successful. Substantially the case was about the question if the Prime Minister violated Sect. 267 of the Const. 2007 forbidding members of the cabinet to be "employees of any person" in order to enable the proper exercise of his functions by avoiding conflicts of interest.<sup>108)</sup>

The CC argued not very extensively, being focused on the question, if the Prime Minister had become an employee. As the legal definition according to the Civil and Commercial Code, labor law — or tax law code seemed to give a too narrow interpretation of the term to include the cooking PM, the CC declared

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<sup>107)</sup> In some respects there a parallel between the political role and fate of Thaksin in Thailand and Chen Shui-bian in Taiwan who also challenged the established system on a populist platform and ended up in jail, with the difference that the change in power in Taiwan was enabled via elections.

<sup>108)</sup> See the CC Ruling 12-13/2551, 9<sup>th</sup> Sept. 2008, fully translated in *European-Asian Journal of Law and Governance (EAJLG)*, Vol. 1, No. 1 (2011), pp.110ff. Sect. 267 constitution 2007 states: "The provisions of section 265 shall apply to the Prime Minister and Ministers, except for the holding of position or an act to be done under the provisions of law. The Prime Minister and Ministers shall neither hold any position in a partnership, a company or an organisation carrying out business with a view to sharing profits or incomes nor being an employee of any person."

these laws, as ranking lower in status than the constitution, to be inapplicable on the case which required a definition matching the rationale of the constitution — and instead was found to be served well by the definition of a general dictionary. This was enough to become the lever to remove the Prime Minister of Thailand from office.<sup>109)</sup>

Interesting cases pertaining mega-politics have been also the party dissolution cases in which the governing parties of the Thaksin camp have been dissolved, the TRT after the coup d'état in 2007 and the PPP after the first election after the enforcement of the new constitution of 2007 in 2008. The dissolution of the PPP in 2008 followed the removal of Prime Minister Samak and ended the premiership of his successor Prime Minister Somchai, when a splinter group of his party under Newin changed sides forming a coalition government with the Democrat Party.<sup>110)</sup> With the subsequent ban of both parties set up by the Thaksin camp, the complete senior level politicians of the Thaksin camp have been banned from politics for five years without any necessary proof of a personal wrongdoing. More interesting in several respects had been the case of the first party of the Thaksin camp, the TRT dissolution in the aftermath of the coup. A week before the scheduled verdict, the King gave a speech to the Supreme Administrative Court Judges, led by the then president of the Supreme Administrative Court, who concurrently served as vice-president of the Constitutional Tribunal (while the president of the Supreme Court acted as the Tribunal's president).<sup>111)</sup> In this speech, which was televised on all national TV channels simultaneously on the evening of the 24 May 2007 the King asked the country's supreme judges "to do

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<sup>109)</sup> Interesting is a comparison of this decision with a decision of the first CC from 2001 dealing with the respective Sect. 216 of the Const. 1997. In this case ten ministers of the last Chuan government had been indicted because they have been accused to "hold any position in a partnership, a company or an organization carrying out business with a view to sharing profits or incomes". In this decision all ten ministers of the Democrat Party government have been acquitted from all accusations by the CC. See CC Ruling 4/2544, 6<sup>th</sup> Feb. 2001.

<sup>110)</sup> See CC Ruling 20/2551, 2<sup>nd</sup> Dec. 2008.

<sup>111)</sup> Charoensin-o-larn, "Military Coup and Democracy in Thailand", in Funston (ed.), *Divided over Thaksin*, pp.49, 58.

their best for the country yet brace themselves for heavy criticism”<sup>112)</sup>: “Whatever court you belong to, judges need to make the right interpretation, otherwise the country will be doomed. [...] You can only decide within your heart whether the Constitutional Tribunal makes the right ruling. [...] If they are wrong, there will be trouble whether or not political parties remain. I have the answer in my heart but I have no right to say it. [...]”<sup>113)</sup> - In fact, there has been an attempt to illegally lobby certain members of the Tribunal which was discovered in August 2007.<sup>114)</sup> Nevertheless the Constitutional Tribunal, which replaced the CC under the 2006 Interim Constitution, dissolved the TRT and some smaller coalition parties and, much more controversial, banned all executive members of the parties, all in all 133 (including 111 from TRT), for five years from politics.<sup>115)</sup> Under the Const. 1997 both legal instruments, the ban of wrongdoers and the dissolution of political have been known. Now, both instruments were combined in the way described above: violations of party law by single candidates could easily imputed to members of the executive committee leading to dissolution of the whole party and the ban of all executive board members. The legal basis for this modification of the old party law, the Organic Act on Political Parties (1998) was Announcement No. 27 of the junta, the Council for Democratic Reform (CDR), which therefore constituted retroactive law. The Tribunal had no problem with the principle of the ban on retroactivity as the respective norms of the political party law did not belong to criminal law.

Another interesting aspect of the dissolution of the TRT and PPP emerged in connection with the rejection of the unanimous requested dissolution of the main political adversary of the Thaksin camp, the Democrat Party. This single political party which survived the recommendation of the EC to be dissolved made it three times, either due to the fact finding or to procedural mistakes of the EC in clear cases which normally left no way out from executing the strict letter of the law.

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112) *Ibid.*

113) Cited “King Warns of Trouble”, *The Nation* 25/05/2007.

114) See Charoensin-o-larn, “Military Coup and Democracy in Thailand”, in: Funston (ed.), *Divided over Thaksin*, pp.49, 59.

115) See CC Ruling 3-5/2550, 30<sup>th</sup> May 2007.

Insofar the Constitutional Tribunal in 2007 admittedly found that there have been “actual obstructions” of party law, but believed that “the executives and members of the House of Representatives of the DP did not participate in such obstructions.”<sup>116)</sup> Later the CC saw no other way to end two requests to dissolve the DP than to reject them because the EC had delayed the proceedings marginally and even because a wrong understanding of the formalities on the side of the EC and its chairman how to deliver the request correctly to the CC.<sup>117)</sup> The contrast could not have been stronger as one of the rejections of the dissolution of the DP due to the latter reason was announced at the same day when Prime Minister Samak was removed from his office because of his paid participation in the cookery show.

cc) Other Cases Pertaining to Democratic Participation and the Concept of Democracy

Besides the cases concerning party dissolutions and removals from office there are some other, atypical decisions dealing with elective democracy. They can be classified in two groups, cases pertaining to constitutional bodies and cases pertaining to the citizen’s role in elective democracy. A case of the first group dealt with the question if defectors of a political party supporting a coalition government against the formal decision of their party remain qualified as parliamentarians after being expelled from their party on grounds of their disobedience. In November 1997 under the circumstances of the Asian financial

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<sup>116)</sup> See CC Ruling 1-2/2550, 30<sup>th</sup> May 2007.

<sup>117)</sup> See CC Ruling 15/2551, 9<sup>th</sup> Sept. 2008, fully translated in *EALJG* Vol. 1, No. 1 (2011), pp.133ff. According to the wrong procedure the CC found that the election commissioners had no authority to ask the Attorney-General to forward the case to the CC as this authority rested only with the political party registrar who is ex officio identical with the chairman of the EC but did not act himself. Thus the court decided that only the EC but not its chairman as Party Registrar recommended that the dissolution case should be forwarded to the Office of Attorney-General.

Very actual a new petition to dissolve the DP is pending before the CC now, this time based on Sect. 68 and on grounds that the DP acquired power over the country’s administration by unconstitutional methods in 2009. See Bangkok Post 13/06/2012.

crisis, the DP under their leader Chuan Leekpai formed a new government which became just strong enough with the support of a defector faction of the Prachakorn Thai Party, the so called Cobra faction. Their Party had been part of the previous government under Chavalit's New Aspiration Party and formally decided to stay with their old partner and to refuse a cooperation with Chuan. Consequently the party under Samak Sundaravej, who later became Prime Minister for some short month in 2008, expelled the rebellious defectors after a fierce battle before the civil courts and a failed non-confidence vote against Chuan. The last chapter of the party infight was the removal of the defectors from the membership register of the Prachakorn Thai Party against which they were seeking support from the CC. The CC ruled indeed that the respective resolutions of the Prachakorn Thai Party, the resolution determining how the party members should rule in the non-confidence vote and the resolution to remove the defectors from the party list, had been unlawful.<sup>118)</sup> According to Sect. 47 Const. 1997 the CC had the competence to rule on the question if a regulation or resolution of a political party was contrary or inconsistent with the fundamental principles of the “democratic regime of government with the King as Head of State”. Based on this competence the CC states that the termination of the membership in the House would be equivalent to the determination of the Thai people's representation by the respective members of parliament and therefore a hindrance to the performance of duties for the common interest of the Thai people as ordered by Sect. 149 Const. 1997.<sup>119)</sup> Therefore, the CC states that the party resolution was contrary and inconsistent with the “democratic regime with the King as Head of State”, unfortunately without any further assessment in which way Sect. 149 or the concept of elective democracy is embedded in this central governance concept. Beside this and the fact that many critics saw the decision as being politically motivated since the support of the 12 MPs was crucial for the survival of the Chuan government<sup>120)</sup>, the decision convinces in its result.

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<sup>118)</sup> See CC Ruling 1/2442, 11<sup>th</sup> Feb. 1999.

<sup>119)</sup> See *ibid.*

<sup>120)</sup> See Sakanond, Bangkok Post 05/07/1999.

Two other cases in this group pertain to the duty to vote and the right to vote respectively.

The first case, dealing with the *duty* to vote in a very special case, was referred to the CC by the EC to clarify the scope of the newly introduced duty to vote (Sect. 68 Const. 97)<sup>121)</sup> concerning the King and certain members of the Royal Family.<sup>122)</sup> Due to the constitutional position of revered worship of the King as stated in Sect. 8 Const. 97, the EC was uncertain how to handle the legal situation on the ground of the organic law on elections of the nation's representative bodies, which stated that the respective members of the Royal Family were eligible voters (Art. 102, 118 Act on Elections) and also stated certain sanctions in the case of unexcused non exercise of the civic duty to vote. Central question was if the EC was entitled to apply the general constitutional and legal rules concerning the duty vote to the person of the King and certain members of the Royal Family as it has been legally stated or not. This and any legal duty imposed on the King by law and sanctioned by the state was and is incompatible with the constitutional function and status of the King of Thailand. So far, it would have been probably convincing enough to base the decision alone on Sect. 8 of the Const. 97, quoted also by the CC among other norms and stating that, "the King is above politics and is enthroned in a position of revered worship and shall not be violated or exposed to any sort of accusation or action." Concerning the King himself, the CC refers nevertheless to two further normative complexes of the constitution. The first is a more special one, concerning the question of the Royal succession, the other concerns the fundamental position of the Royal institution as being the centerpiece of Thai constitutionalism in general. This second complex consists of several key norms which are used by the court,

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<sup>121)</sup> Section 68 Const. 97 (Sect. 72 Const. 2007) states: "Every person shall have a duty to exercise his or her right to vote at an election."

<sup>122)</sup> See CC No. 6/2543, 29<sup>th</sup> Feb. 2000. See for a general criticism on the imposition of a duty to vote for already established democracies Jürgen Habermas, "Vorpolitische Grundlagen des modernen Rechtsstaats", in: idem, *Zwischen Naturalismus und Religion, Philosophische Aufsätze*, Frankfurt am Main 2005, pp.106, 109. In Thailand the duty to vote can be read with Habermas as an indicator for certain doubts, if elective democracy could be regarded as a well-performing constitutional concept.

under them the one regulating the sovereign power in the state.

According to the first complex, the court refers to the “Palace Law on Succession” (1924) and those sections of the constitution pertaining to it, namely Sect. 22 and 23 Const. 97. Doing so, the court stresses the power of the King to amend the succession law on his own discretion according Sect. 22 Const. 97 and therefore to determine the conditions for the succession of the Head of State in his sole prerogative. According to Sect. 22 any amendments of the Palace Law on Succession take place on initiative of the King, are drafted by his Privy Council and, after being presented to His Majesty’s consideration again, are finally delivered to the President of the National Assembly who has to countersign them on the Royal Command. The subsequent Sect. 23 which is fully quoted in the decision as Sect. 22 before, deals with different constellations of the succession under which those are most interesting regulating the situation that the “Throne becomes vacant and the King has not appointed His Heir”. In this situation it is the King’s Privy Council which submits the name of the Successor to the Throne to Council of Ministers for further submission to the National Assembly for approval. The reference to these rules of royal succession is made without any further introduction or conclusion by the CC but nevertheless implying the final conclusion of the decision that there can be no duty to vote for the King. How the succession to Throne, the constitutional position of the King and the duty to vote are related to each other is not explained but expected to be understood self-explanatorily by the Thai audience. It is the King who has the right to decide about who will be the coming Head of State alone, without any substantial contribution of elected representatives indicating the independence of his person from those parts of the constitution pertaining to the concept of elective democracy.

Interesting among the following arguments is the statement that since the revolution of 1932 “all Constitutions of Thailand, including the current Constitution, contained a specific chapter on the King, which recognized the exceptional status of the Royal Establishment pursuant to the ideologies of the democratic form of government with the King as Head of State. The King is above politics and is enthroned in a position of revered worship and shall not be violated or exposed to

any sort of accusation or action.” The Court furthermore states that according to Sect. 3 Const. 1997<sup>123</sup>), stating that the sovereign powers belong to the Thai people and are exercised by the King as Head of state through the legislative, executive and judiciary according to the provisions of the constitution and that due to the position of the *king as being “already the exerciser of sovereign powers there was no reason to subject him to a further duty to elect a representative to exercise such power.”* On the basis of considerations of the constitutional concept of the “democratic form of government with the King as the Head of the State” and its expression in Sect. 3 and 8, and the law on succession, the CC sums up including the respective members of the Royal family:

Since the King is the exerciser of sovereign powers, maintains a standing above politics and political impartiality, together with the fact that in the past the King, Queen, and Sons and Daughters thereof never exercised any voting rights, thus if the King, Queen, Royal Heir and members of the Royal Family who are Royal Descendants of the King under the Palace Law on Succession B.E. 2467 (1924) having a close relationship with the King and frequently entrusted by Royal Command to perform functions on behalf of the King, were required to exercise voting rights, such a requirement would give rise to a conflict or inconsistency with the principles relating to upholding a standing above politics and the political impartiality of the King.

Both, the arguments pertaining to the King and those pertaining to the defined members of the Royal family, are linked together in the final conclusion referring to Sect. 71 Const. 97. This norm is the first norm in Chapter V of the constitution, titled “Directive Principles of Fundamental State Policies” and orders that “the State shall protect and uphold the institution of kingship and the independence and integrity of its territories.” Referring to the aforementioned reasons and norms and “in order to uphold the Royal Establishment as per Section 71 of the Constitution”, the CC finally concludes that the King and the

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<sup>123</sup>) The section is identical with the respective section in the present constitution.

defined members of the Royal family cannot have a duty to vote, so that the respective regulations of the election law are inapplicable to them.

The second case of this group pertains to the *right* to vote and to be elected. According to the Const. 1997 (the same applies for the Const. 2007) Buddhist monks were on the one hand prohibited from voting as well as from being member of a political party or to be elected (see Sect. 106 Para 2, Sect. 118 Para 5, Sect. 109 Para 3, Sect. 126 Para 4 and Sect. 133 Para 5) while on the one hand the freedom of religion was protected constitutionally as well as the right of equal treatment — without any such restrictions for the member of other religions who were assuming a comparable status like a monk. When a district court expelled an elected member of the local administration from office after his ordination as monk due to the provisions of the old local administration Act from 1952, the man refused to comply. After a district court requested a review of the respective act according to Sect. 264 Const. 1997 the CC stated without any substantial argument that the respective act did not violate the freedom of religion nor the right of equal treatment.<sup>124)</sup>

Another group of cases indirectly dealing with elective democracy are those concerning the right and duties of the government to cooperate with the legislative in certain fields of foreign policy, starting with the very first cases of the CC dealing with the signing of an letter of intent with the IMF by the then government to the second CC and its ruling on the Joint Communiqué between Thailand and Cambodia regulating the cooperation on a disputed border area.<sup>125)</sup> These cases are about the participatory rights of the legislative and therefore pertaining to the concept of elective democracy and democratic participation but are less significant as a case type like other mentioned.

#### b) Human Rights Cases

As much as the CCs have been induced to contribute continuously to the outline of elective democracy as low was the input the CCs gave to the system of

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<sup>124)</sup> See CC No. 44/2542, 3<sup>rd</sup> August 1999.

<sup>125)</sup> See CC No. 1/2541, 23<sup>rd</sup> May 1998; CC No. 6-7/2551, 8<sup>th</sup> July 2008.

human rights protection in Thailand.<sup>126)</sup> The sheer absence of any considerable quantity of cases in which CCs granted freedom or equality provided, it is also the quality of the very few exceptions to this rule which is striking: politically relevant rights have never been supported in favor of concrete individuals.

One of the very rare cases in which protection has been granted is the family name case, in which the CC struck down a law that required spouses to assume their husbands name on grounds of gender discrimination.<sup>127)</sup> This case is the one exception in years of review. Among all the dismissed applications one case is interesting because of its similarity to the family name case, both cases dealing with gender equality in relation to personal status. In this case Thai wives have been frustrated by the CC with their interest to enable their foreign husbands to become Thai nationals according to the same privileged rules which enabled that for foreign wives of Thai men. The newly introduced right of foreign women married to Thai men to seek Thai nationality without having to go through regular channels has to be seen against the background of the very narrow and complicated nature of these general channels. Nevertheless, the CC, after discussing the matter with experts from the Interior Ministry, the National Security Council, Foreign Ministry and academics (as mentioned above, B. I) concluded that there would be no discrimination if the same right given to foreign female spouses of Thai would be denied to foreign male spouses.<sup>128)</sup> The case is a good example for the politicized consideration behind the formalistic statements in the ruling.

Only recently, after the court was faced with the threat of becoming dissolved in the wake of the coming constitutional reform under the new regime, the CC, after a long pause, issued a protective human right decision again. As in the other case, the family name case, the case was politically neutral, dealing with Article 54 of the Direct Sale and Direct Marketing Act B.E.2545, which provided for offenses of companies covered by the law that “in the case the offender under

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<sup>126)</sup> The general status of human rights protection in Thailand is far better than the relative inactivity of the CCs may provoke to assume.

<sup>127)</sup> See CC 21/2526, 5<sup>th</sup> June 2003.

<sup>128)</sup> See CC No. 37/2546, 9<sup>th</sup> October 2003.

this Act is a juristic entity, the managing director, the manager, or any person responsible for the undertaking of the business of such entity shall be charged for such offense unless it is not proved that he or she is not involved in the said entity's offense". This provision, a bad indicator for foreign investors regularly screening the compliance conditions of countries being interesting for investment, was rendered as being unconstitutional by the CC because it contradicted Article 39 Paragraph 2 of the Constitution, stating that: "The suspect or the accused in a criminal case shall be presumed innocent".<sup>129)</sup> The decision is interesting because it used the English term 'rule of law, even if in brackets, what was a *novum*, criticized by not a few lawyers and is indicating a new, while probably limited openness for human rights and an international dimension of their understanding. This new stance may be explainable due to unclear future of the court. If this thesis is right it is maybe expectable that the CC will extend the scope of its human rights protection in the coming months while facing the reactions of the very recent interference in the ongoing amendment process which will be discussed below (C. II).

Anyway, until now, Thai CCs did not assume an active role in human right protection cases. Among the reasons may be the fact that human right protection has simply been not so much the rationale of constitutional review. Important seems also the fact that the prevailing normative concept of human rights seems also not to support a strong protective stance. Insofar the CCs seem to share the dominant understanding that civic rights are not human rights in an universalistic sense, even if this understanding of the concept was occasionally discussed. During the drafting process of the 1997 constitution the question came up for instance if human rights should be acknowledged only for Thai or (at least partially) for everybody. While many NGO's involved have supported an universalistic notion of human rights and proposed to name chapter III as "Rights and Liberties of the Person", most of the parliamentarians who generally adopted an attitude to slow down the reformist stance of the NGO - supported progressive constitutionalism, favored a more nationalist notion of human rights, aiming to provide the respective

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<sup>129)</sup> See CC 12/2555, 28<sup>th</sup> March 2012.

“Rights and Liberties” only for the Thai people.<sup>130)</sup> This latter understanding has prevailed in the legal and public discourse until today and has rarely been challenged, leaving aside the mentioned claims of universality by academics and demonstrators alienated to red-shirt movement in the context of the smouldering political divide. So far, there has been only one case before the first CC in which the restrictive interpretation of human rights has been challenged in a case which was referred to the CC by the Chon Buri Provincial Court dealing with the complaint of an imprisoned Japanese citizen against the permanent use of shackles as a violation of his human rights. However, the case eventually has not been decided because the defendant had been extradited before to Japan.<sup>131)</sup>

#### D. The Constitutional Court in Dispute and Perception

Finally the positioning of CCs for the political order may be reflected in terms of their public perception in particular according to the disputed role they assumed in ordering the political and the challenges and problems resulting from it.

##### I. Between Self-restraint and Induced Activism

While especially the first CC performed quite reliable on the routine level, it disappointed in cases pertaining to mega politics. The perception of its performance

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<sup>130)</sup> See Vitit Muntarborn, “Human Rights in the era of ‘Thailand Incorporated (Inc.)”, in: Randall Peerenboom, Carol J. Petersen, Albert H. Y. Chen (eds.), *Human Rights in Asia, A Comparative Legal Study of Twelve Asian Jurisdictions, France and USA*, New York and London 2006, p.324; The more ‘nationalist’ notion of human rights was supported by one of the most influential members of the Constitution Drafting Assembly (CDA), Professor Bowornsak Uwanno, but can be traced back to a traditional opinion in Thai constitutional law, represented for example by Prof. Yud Sanguthai. See the Summarized Report of the Constitution Drafting Commission at Imperial Queenspark Hotel on 17th-20th May 1997, Professor Bowornsak Uwanno, p.25 (In Thai); Yud Sanguthai, Explanation of Constitution (B.E. 2511). *Articles and explanations of constitutional law in general*, p.103 (in Thai).

<sup>131)</sup> See CC Ruling No. 3/2544, in *The Constitutional Court Rulings, 2001-2002*, p.7.

was marked by the latter. The second CC was perceived less ambiguous but in much more divided manner. Despite the split between those who accepted the rulings and those who fundamentally disagreed both, supporters and critics, mainly agreed that the CC functioned reliably especially in cases concerning mega politics according to its mission. Both CC have never been accused to capitalize their duty to make a name for their institution. Both did not look for the battles they had to fight. Nevertheless, both courts were involved in such heavy battles, the first one in the “battle for the rule of law” (James Klein), the present one in the battle for the “democratic regime of government with the King as Head of State”. While the first CC failed because its restraint to make mega-politics in a dramatic moment even if the constitution required this, it is the characteristic for the present CC that it operated reliably in way which could be perceived as induced activism.

## II. Challenges and Problems

Finally, it is interesting to ask for challenges and problems of the CCs as resulting from their performance. Significant is first of all, what has *not* been raised at first top when it came to discussions about challenges and problems of Thai constitutional review. Insofar, different for example from the German Federal CC in its infancy, the relation of workload and a deficient institutional outfit has not been discussed as an existential problem for both institutions. Nor did the court face one of the problems many young CCs in evolving democracies did: an insufficient base of suitable educated lawyers, a problem what the Cambodian Constitutional Council for instance faces, or any accusation of persisting individual corruption of Justices based on personal greed. Given that the CC commands the necessary material resources, is able to draw on a comparatively wide and professional pool of potential justices whose authority is not shaken by the perception of wide spread corruption, and is additionally vested with a wide range of competences, the main field of contestation has been and is the very performance of the court as such. For the present court it is problematic and challenging according to two interrelated aspects, the lack of a convincing methodological approach reflected by

a consistent case record and the fact, that the handling of politically sensitive cases has hardly any chance to meet acceptance across the political divide. Especially the latter aspect is essential for the general assessment of the CC which has to rely on a certain social trust and public authority maybe even more than other constitutional institutions to be able to function as a court is *per definitionem* expected to be impartial. An indicator for any practice to handle politically sensitive cases in an overall convincing manner is the absence of scandal or deep and fundamental rejection of the court's performance by wide parts of the population. However, here exactly lies the problem of both of the Thai courts, while the conditions changed from the first to the second court. While the first CC turned out to be too weak to function according to its institutional logic, the second court got into troubled water because of exercising this institutional logic without the necessary methodological sophistication. The failure of the first CC is symbolically reflected by the most controversial case, which turned out to become a veritable scandal, the Thaksin asset declaration case. Given the fact, that no CC receives its authority automatically but has to emancipate from the usual restraints of competing constitutional players as well as other supreme courts, the failure is understandable for a young CC operating in the framework of a similar young democracy and against the background of an increasingly strong government based on populist rule. The second court had not so much to prove its institutional independence against an overwhelming successful adversary but to continue the defeat of the unleashed forces of popular backed elective governance, which was organized by the regrouping conservative forces after the coup of 2006. Meanwhile the distrust had got a face and the perceived threat for the autochthon Thai concept of good governance evolved in reality, when more and more parts of the population refused to chose in favor of it after the coup. In this context and from this perspective decisions which seem to be strange from a foreign perspective have been predictable and expected within the constitutional system which produced them. Not scandal but fundamental rejection by a significant part of the population and a merely political instead of legal affirmation by those who supported the results was the mere consequence,

amounting not to an institutional but to a constitutional crisis, which is going on.

From this perspective the Thaksin case as a veritable institutional scandal of the first CC and the highly disputed performance of the second CC in cases concerning mega politics which were leading not so much to scandals but an actual constitutional crisis shall be briefly reflected. Beside their impact on the perception of the respective Court's performance the events discussed here in relation to the two courts have something more in common: both have been leading to attempts to impeach CC justices in charge, one time unsuccessful while the other time, pertaining to the ongoing constitutional crisis in Thailand, is now, the problem still open.

#### 1. The Thaksin Asset Declaration Case 2001

Pertaining to the Thaksin case it is only one facet which shall briefly be regarded, that is the scandal it caused, some of its expressions and concomitants. The veritable scandal which accompanied the CC's decision is shaped by the fact that the controversial decision came up in an environment in which the fundamental divide between the two political camps did not emerge yet. All in all the favorable judgment for Thaksin appeared as a scandal of institutional failure which was accepted also by those who had been not Thaksin's allies but people who put their hope for national recovery after the economic crisis on him, while conservative as well as progressive adversaries saw the Const. 1997 in the moment failing the court announced its decision. This original sin of the 1997 constitutional system was not disputed between two ideological camps in terms of competing constitutionalism but by allies and pragmatics on the one hand and critics of a single scandalous decision on the other. The scandal was possible because the CC was not ready to face the challenge to decide about the country's fate by sacking a popular leader with a promising agenda to solve the nation's problems. The failure of the legal procedures on the constitutional level prompted legal reaction. The NCCC, which unsuccessfully had asked the CC to impeach Thaksin, launched an inquiry on a motion of former Democrat Party secretary-general Maj.-Gen. Sanan Kachornprasart whether there have been grounds to impeach four

of the Constitutional Court judges who ruled in favor of Thaksin.<sup>132)</sup> When three of them petitioned in reaction to the favorable ruling an Administrative Court order to stop the proceedings the Administrative Court dismissed the case stating that it had no jurisdiction to intervene in the impeachment proceedings as prescribed in the constitution.<sup>133)</sup> On the other hand, eight “majority judges” of the Constitutional Court, who had acquitted Thaksin of the assets- concealment charges, filed a libel suit against “senior citizen” Prasong Soonsiri in 2002 for his criticism of the verdict. The case against Prasong is interesting in particular retrospectively from a postcoup perspective. In 2006 Prasong, a former head of the National Security Council, military intelligence officer, and trustee of circles close to the palace, became one of the key figures of the coup d’etat.<sup>134)</sup> As a leading member of the new military appointed National Legislative Assembly (NLA) he was influential in the making of the new constitution. Not too long ago, in September 2011, he was among those, who warned a group of academics of Thammasat University who argued for a mitigating amendment of the *lèse majesté* section 112 of the Criminal Code that their campaign could lead to another military coup.<sup>135)</sup> Interestingly, it has been the libel suit against Prasong

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<sup>132)</sup> According to ruling 31/2543, dated from 10<sup>th</sup> August 2000, the CC found that Maj-Gen. Sanan had also concealed assets, which have been linked to alleged corruption. After losing his office Sanan resigned also from the Democrat Party.

<sup>133)</sup> See *The Nation* 10/10/2003.

<sup>134)</sup> See Rodney Tasker, “Grumbles, revelations of a Thai coup maker”, Asia Times online at [http://www.atimes.com/atimes/Southeast\\_Asia/HL22Ae02.html](http://www.atimes.com/atimes/Southeast_Asia/HL22Ae02.html), latest accessed 14/06/2012.

<sup>135)</sup> See Bangkok Post 27/09/2011. Prasong is interesting also as an early and somehow representative adversary of Thaksin even if in an ambiguous way. On the one hand he is considered as one of the “good and capable men”, a convinced royalist and staunch supporter of the anti-western narrative of the two kinds of democracy as being reflected by the constitution of 2007. As a supporter of the PAD, the so called yellow shirts, which are combining their mission to protect the royal institution with a much more distinct criticism of elective democracy than the DP and which boycotted the last national elections, he is reported to regard Thaksin as the most dangerous manifestation of a corrupt leader in the wake of elective democracy who disrespects the monarchy. On the other hand it is significant for Thai politics in general but also the shift within it, that Thaksin started his career not only at the side of two of his later main adversaries from the PAD but also in the same political party, the Buddhist Palang Dharma, power of dharma-party, in which

in 2002 during which some circumstances of the CC decision have been revealed before the criminal court, which were heating up the scandal, leading not only to the mentioned calls for impeachment including the attempt to impeach the judges by the CC itself<sup>136)</sup> but also criminal persecutions after some witnesses, including a chief judge from an appeal court, testified under oath heavy lobbying efforts by the Thaksin camp.<sup>137)</sup> Significant for the environment of the scandal is the fact that Thaksin was not yet identified as the very enemy of the Thai concept of constitutionalism like he was since 2005. In 2001 most of the people supported him as the white knight who appeared to save the nation, while others saw just a politician who seemed to be more talented in using the mechanisms of elective democracy in his self-serving interest than others. Nevertheless, he was not regarded as being disrespectful to the royal institution by the wide public and, moreover, still aligned with two of his later arch enemies, Maj.-Gen. Chamlong Srimuang and media mogul Sondhi Limthongkhul, who both strongly and demonstratively supported Thaksin at this day, one in and the other before the courtroom, both mobilizing their political supporters to pressure the court.<sup>138)</sup>

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Prasong was an important member. Nevertheless the party nominated Thaksin as a newcomer in 1994 to take over Prasong's position as foreign minister. Noteworthy, Palang Dharma before Thaksin came on board, was the junior partner of the DP led Chuan-government until Palang Dharma left the coalition voting for non-confidence against the DP Prime Minister Chuan, to form a coalition with the opposition, the government in which Thaksin served as foreign minister.

<sup>136)</sup> There has even been a request of the President of the National Assembly to the CC according to Sect. 266 Const. 1997 if the Senate could ask the NCCC to launch an impeachment procedure against the four judges of CC who voted in favor of Thaksin to be handled then by the CC itself after a petition of more than fifty thousands eligible voters to remove the judges from office was made. The CC ruled that the procedure according to Sect. 266 was not admissible as there has been no dispute between the state agencies. See CC Ruling 15/2545, dated 25<sup>th</sup> April 2002. The alternative move before the Administrative Court failed also as mentioned above.

<sup>137)</sup> See The Nation at <http://www.nationmultimedia.com/home/PRASONG-LIBEL-CASE-Ura-decides-not-to-aid-defence--107613.html>, latest accessed 14/06/2012.

<sup>138)</sup> See Pongsudhirak, "The Tragedy of the 1997 Constitution", in: Funston (ed.), *Divided over Thaksin*, pp.27, 32. The same two leaders later on formed the PAD against Thaksin, Sondhi after business disputes came up, and mobilized the yellow masses against him, calling for a royal intervention dismissing the prime minister and, after

Therefore, the scandal in this time has not yet been an expression of the severe divide which the Thai society is facing today but focused on the subject matter, a decision which deviated from the rule of law in the face of political power. The only ideological impact was this violation of the rule of law.

## 2. From Scandal to Constitutional Crisis: the CC 2007-2012

It is on the other hand significant, that there had been no comparable public outcry, at least not as a scandal transported and reproduced by the conventional media and across politically different forums of debate, when the second CC issued its decision in the DP dissolution case in favor of the DP. This is astonishing as not only the diverse party dissolution cases against the DP have been questionable as such but also due to two events which had all ingredients to emerge into a veritable scandal too. Both, the court decision as well as the two events have to be seen in the context of the dissolution of the second party of the Thaksin camp in late 2008, the PPP, which won the 2007 elections. Against the DP it took until 2010 for the EC to refer the case to the CC with the recommendation to dissolve the DP. Before the CC eventually avoided a decision on the merits due to the procedural failures of the EC/Party registrar mentioned above, the two subsequent events came up which were suitable to severely shake the credibility of the court. Both were caused by leaked videos indicating in one case a meeting of the secretary of the CC's president with representatives of the DP discussing the pending case, while the second indicated that judges helped some relatives to get advance knowledge of questions on an examination for positions at the CC.<sup>139)</sup> When the information came up, there was no discursive reaction on the national media stage which could be considered as dealing with a scandal. But the perceptible horizon of the nation was also a quite different one, from that of 2001. The country looked back to the violent crackdown of redshirt protests that caused around ninety deaths and two thousands injuries. While the conservative side in the divided country claimed that the videos have been

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the Thaksin camp came back in 2008 for another coup d'état.

<sup>139)</sup> See Bangkok Pundit 24/08/2011.

doctored to discredit the CC or avoided to raise the issue agreeing with the result, the other side felt just reconfirmed and saw no reason to raise it as an outstanding development.

Particular interesting is the fact that the two incidents accompanying the decision have not been discussed and clarified by any pluralistic public discourse despite the fact that they had the potential to undermine the court's credibility just in the moment in which all eyes were directed at it, many of them with the expectation of an applied double standard.

But even if the scandal did not evolve the message of the decision spread, less spectacular in form and with less ease, but it reached the public and left its marks. Interestingly, a survey of Suan Dusit poll institute in 2011 showed a problem with public trust in the CC which was even more alarming as the survey had been conducted in Bangkok and its neighboring provinces, thus not in those provinces which are known to be especially critical towards the DP. While only 17.54% of the interviewed had a lot of confidence and around 24% some, 57% did have little or no confidence in the court. Reasons mentioned by this critical majority have been alleged double standards and political interferences.<sup>140)</sup>

The setting changed again when the Thaksin camp which had been banned by the CC into the opposition won the national election of 2011 in a landslide victory. Within this changed setting an ongoing constitutional crisis has been triggered off by the CC which came at least closer to evolve into a scandal: The CC had issued an order to the parliament at June 1, 2012, to halt the readings for a constitutional amendment between the second and the third reading of the amendment bill. This partly expressed, partly heated up the political conflict which amounted to a currently ongoing constitutional crisis between CC and government/parliament. This latest case is not only a still actual one but represents also a new stage in the relationship between CC and government/parliament and a climax in the development of distrust and rejection of the institution by a big part of the population. A brief analysis of the case may serve a concluding model narrative for the topic of this article. The crisis started when the new government/parliament

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<sup>140)</sup> See *ibid.*

decided to replace the so called coup-constitution of 2007. As the present constitution – as most others of the world too – does not foresee its own replacement the procedure chosen was a two-tiered one. In a first step a constitutional amendment was planned to assign a drafting committee which in the second step should work out a new constitution, which was then to pass a referendum. The amendment to set up a drafting committee was to be introduced with three other laws including a reconciliation bill. The bill shall enable national reconciliation after the crackdown of redshirt protests in 2010 but is feared by DP and PAD also to bring Thaksin back. Remarkably is that the bill was introduced by the coup leader of 2006 General Sonthi, who is leader of one of the smaller opposition parties. Nevertheless, the bill is regarded by the DP and PAD on the one hand and some redshirt-groups on the other as a door-opener for an elite bargain between Thaksin, who is sentenced with a two year jail term because the mentioned land sale, and some of his adversaries. DP and PAD claim that the real objective of the bill is to allow him to return home as a free man and possibly getting his frozen assets back, while also many redshirts and some PTR MPs close to them see the move as a betrayal of justice.<sup>141)</sup> Beside this main battlefield there had also been tensions between government and CC when some redshirts and government MP's proposed for the discussion of a new constitution to abolish the Constitutional- and the Administrative Court and to reduce the number of the independent constitutional organisations to the minimum necessary.<sup>142)</sup> Meanwhile the PAD started a protest campaign in the end of April 2012 claiming that the amendment was to topple the “democratic regime of government with the King as Head of state” and demanding the Constitutional Court through the Office of the Attorney-General (OAG) to stop the amendment effort according to Sect. 68 of the Constitution, to dissolve the political parties supporting it, to disqualify party leaders and executives from politics for five years and to disqualify all their MPs.<sup>143)</sup> The EC and NCCC received similar requests. The public attention was

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<sup>141)</sup> See Nick Nostitz, “Reconciliation games”, *New Mandala*, June 5<sup>th</sup>, 2012, latest accessed at <http://asiapacific.anu.edu.au/newmandala/2012/06/05/reconciliation-games/> on 14/06/2012.

<sup>142)</sup> See Bangkok Post 29/02/2012.

very limited and even the PAD which is in favor of dramatic acts mobilized not more than a few hundred people to attend the public gathering lead by Maj. - Gen Chamlong Srimuang before the government complex where the complaints were handled in.<sup>144)</sup> After a month of tense debate the amendment bill had passed the second reading in parliament with 340 votes of support against 101 refusing it, when the DP declared to be determined to block at all costs and opted for an obstruction policy leading to some “disruptive” actions on 30 May in parliament. Outside the PAD gathered around 5000 protesters including PAD leader Sondhi Limthongkul, who had announced the showdown to be “the last war”. While the police were given strict orders to use only shields and avoid any violence the DP declared their support for the PAD and some DP MPs came out of parliament to visit the protesters. The next day, on 31 May, the PAD surrounded and blocked the parliament preventing MPs from entering and finally forced a closing down of the session. At the legal front some people, including one Senator and three MPs of the DP, filed a complaint against the bill based on Sect. 68, but this time directly to the CC. On the same 1 June the CC ordered a temporarily injunction ordering the parliament to suspend the third and last reading of the charter

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<sup>143)</sup> Section 68 Const. 2007 stipulates:

No person shall exercise the rights and liberties prescribed in the Constitution to overthrow the democratic regime of government with the King as Head of State under this Constitution or to acquire the power to rule the country by any means which is not in accordance with the modes provided in this Constitution.

In the case where a person or a political party has committed the act under paragraph one, the person knowing of such act shall have the right to request the Prosecutor General to investigate its facts and submit a motion to the Constitutional Court for ordering cessation of such act without, however, prejudice to the institution of a criminal action against such person.

In the case where the Constitutional Court makes a decision compelling the political party to cease to commit the act under paragraph two, the Constitutional Court may order the dissolution of such political party.

In the case where the Constitutional Court makes the dissolution order under paragraph three, the right to vote of the President and the executive board of directors of the dissolved political party at the time the act under paragraph one has been committed shall be suspended for the period of five years as from the date the Constitutional Court makes such order.

<sup>144)</sup> See Bangkok Post 27/04/2012.

amendment bill which was scheduled for June 5 until a review of its constitutionality. The order was given without any substantial reasons and caused an unfolding constitutional crisis. On Saturday June 2, the DP held a rally to support the court order<sup>145)</sup>, while the red-shirts organized mass protests with some thousands supporters who received a phone call from Thaksin who apologized for his attempts to bargain with the opposite elite. While the rallies were going on all 12 military, civilian and police intelligence agencies have been ordered to monitor the events on an order from the government, a move said to silence rumors of a possible military coup, which had been circulated among redshirt supporters and media.<sup>146)</sup> Indeed such rumors of a new military coup came up since the PAD managed it to close down parliament and the DP obstructed the session from inside.<sup>147)</sup> Prior the 2006 coup the pattern have been similar, with the DP refusing to join the parliamentary game, while mass protests of the PAD were used to urge the armed forces to “putsch” or the King to intervene by appointing an interim government based on the mentioned Sect. 7 Const. 1997 and 2007. Against this background, the order of the CC to halt the third reading was considered by government MPs and redshirts as “another coup”, a “silent-” or “judicial coup d’etat”,<sup>148)</sup> attempting to topple a popularly elected government in the same way the court did with the governments of Samak Sundaravej and Somchai Wongsawat in 2008. In the background influential persons were supposed to lobby parties in the coalition government to support a new government after the dissolution of the governing party for the case the parliament would continue the third reading ignoring the court order, promising them “grade A” ministries in a new cabinet. Additionally they claimed that DP and PAD had been in contact with senior military officers to carry out the plot to topple the government. These rumors were fueled by a meeting of the army commander with the heads of the army units on the morning of June 1, who then chaired another meeting with

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<sup>145)</sup> See *The Nation* 03/06/2012.

<sup>146)</sup> See *The Nation* 02/06/2012.

<sup>147)</sup> See *Bangkok Post* 06/06/2012.

<sup>148)</sup> See *Bangkok Post* 04/06/2012 and 03/06/2012, also for the following.

colonels in the afternoon of the same day, accompanied by an order to transfer 67 colonels, reminding some observers of the transfer of 179 colonels prior to the 2006 coup.<sup>149)</sup> The rumors prompted the Defence Minister to cut short his attention at the Shangri La Dialogue, an annual international security forum in Singapore to return to Thailand on June 1, two days ahead of schedule.<sup>150)</sup>

It was this background against which parliament and CC tried to mark or respectively find their positions. At Tuesday, June 5, the president of the House announced that he had decided to put off the debate, as the court had ordered. He explained that this was not an easy decision for him to make as on the one hand he was aware that the decisions of the CC according sect. 216 of the 2007 const. are final and binding on all state organizations, while on the other hand obeying the court's order to delay deliberations caused the risk to delay the final reading beyond the stipulated 15-day period specified in section 291 of the constitution dealing with amendments.<sup>151)</sup> Nevertheless against fierce protests from members of his own party and most of the redshirts he decided to comply, stating "in fact I disagree with the court order but for the sake of reconciliation, I will step back. I also do not want this matter to be used in seeking Pheu Thai's dissolution."<sup>152)</sup> On the other side the court's president spoke up, defending the order, being assisted by the DP which declared that, if the government continued trying to push through the amendment bill, the DP would file another complaint to the Constitution Court under articles 154 and 7 Const. The latter has been introduced already; the other stipulates that, if no less than a tenth of the total members of both Houses file a petition with the Constitution Court, the prime minister has no option but to delay the process of seeking Royal endorsement for the respective bill. The leader of the DP's legal team also concretized which issues the party would raise before the CC in the case the government would continue with its plan. According to this statement the present constitution would only allow

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<sup>149)</sup> See Bangkok Post 06/06/2012.

<sup>150)</sup> See *ibid.*

<sup>151)</sup> See Bangkok Post 07/06/2012.

<sup>152)</sup> Cited in *The Nation* 06/06/2012.

amendments but not to rewrite an entire new constitution. This is leading to the conclusion that the making of a new constitution is implicitly a violation of the constitutional basic structure. This understanding is supported by the party's statement that the House would not have the authority to assign a Constitution Drafting Assembly. A last argument pertained to a lack of public hearings on the issue.<sup>153)</sup>

A backlash for the point of view of DP and CC was the decision of the Attorney General's Office on Thursday, June 7, that the changes achieved by the amendment bills would not aim at overthrowing the "democratic regime of government with the King as Head of State." Therefore, the Attorney-General decided not to forward the petitions to the Constitutional Court.<sup>154)</sup> One day later the CC called on Parliament to promise that they would add another clause to ensure that the writing of a new constitution would not result in *reduced power for the Constitutional Court* or changes in the country's political system or form of government, as had been feared by opponents of the charter-change bill.<sup>155)</sup> In the meanwhile red-shirt group filed a petition to the Senate after gathering 20.000 signatures to support an impeachment (according to Section 270) of the seven Constitution Court judges who had voted to issue the order against the parliament<sup>156)</sup>. Moreover, a government MP who had also declared that the 2013 Budget Bill might cut the high court's non-essential expenditures such as those on security services.<sup>157)</sup> About 800 supporters of the CC meanwhile gathered to show their support for the CC judges.<sup>158)</sup>

According to the legal assessment of the court's order it is noteworthy first, that it seems that the order itself did not contain any reason neither for the urgency of the court's action nor according to the claimed violations of the "democratic regime of government with the King as Head of state". Arguments

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<sup>153)</sup> See *The Nation* 06/06/2012.

<sup>154)</sup> See *The Nation* 08/06/2012.

<sup>155)</sup> See *The Nation* 09/06/2012.

<sup>156)</sup> See *Bangkok Post* 07/06/2012.

<sup>157)</sup> See *The Nation* 08/06/2012.

<sup>158)</sup> See *Bangkok Post* 09/06/2012.

have been issued later in press conferences by the court's speaker and later also by the president of the CC while criticism was issued via newspapers, seminars and at the stage of red-shirt protests. Before the reasons given by and in support of the court shall be analyzed it is useful to have a look on the criticism of the order first.

One of the arguments often heard by political adversaries of the CC is that the order is an unconstitutional violation of the principle of separation of powers, an unconstitutional interference in the parliament's competences. This argument is ventilated in different variations from calling on parliamentary supremacy to an exemption of amendments from review.<sup>159)</sup> While the first variation is informed by British constitutional thinking and effectively baseless for the Thai constitution, the second argument is informed by French legal thinking<sup>160)</sup> but also not supported by the Thai constitutionalism: if there is a restriction of amendments in a constitutional system which provide for a strong guardian with wide review powers exactly for the purpose to preserve and protect that part of the constitution which is exempted from amendments, the review of amendments is arguably covered by the review power of the CC in teleological and systematical interpretation. A violation of the separation of powers concerning the review of amendments therefore is not convincing. However, the concrete application of Sect. 68 on the present case seems to be more problematic. A weak argument insofar is the statement that the court does not have any authority to issue the injunction because this procedural competence is not provided by the constitution and constitutional procedure law.<sup>161)</sup> The fact that the CC had to apply the respective provisions of the Civil Procedural Code to issue the injunction seems not problematic. If a CC is supposed to be a strong guardian of the constitution and questions pertaining to the basic structure of the constitution are at stake the

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<sup>159)</sup> See Bangkok Post 07/06/2012.

<sup>160)</sup> The French Constitutional Council decided to have no review powers on laws approved by referendum expressing the democratic aspect of the sovereign power. See CC Nr. 62-20 DC, November 1962, Rec. p.15, consideration No. 2; CC Nr. 92-313 DC, September 23 1992, Rec. p.94, consideration No. 2.

<sup>161)</sup> See Bangkok Post 07/06/2012.

court must have means for immediate response. If they are not provided for by the relevant law, a legal gap has to be assumed. The gap was unintentional as the enactment of a suitable procedural law was delayed. The Civil Procedural Code delivers insofar a suitable reference for analogy according to general principles as laid down in the Civil and Commercial Code, Sect. 4.

More convincing are four other arguments, two pertaining to the concrete application of the instrument of temporarily injunction, two pertaining to the interpretation of Sect. 68.

Concerning the latter, the question is firstly who is an eligible applicant to demand redress from the CC as the suit was launched directly by private individuals without mediation of the Office of the Attorney General (OAG). Secondly it is questionable who is a suitable addressee of protective measures by the CC as Sect. 68 regulates measures against the misuse of civil rights of the Thai people and not the exercise of state power. The wording of Sect. 68 the wording seems to state clearly that persons knowing about acts to overthrow the “democratic regime of government with the King as Head of State” have the right to request the Attorney General to investigate facts and submit a motion to the CC. This indicates a two-tier procedure. Since the applicants in the present case were going straight to the court instead there seems indeed a violation of the proper procedure which counts the more as the OAG meanwhile announced not to have any objections against the amendment.

The second question if the president of the House is a suitable addressee of measures according Sect. 68 seems also to be founded as the constitution refers to cases where a person or a political party exercises the rights and liberties abusively. The norm closes the catalogue of individual liberties and rights in chapter III (Sections 26-69) of the constitution, whereas lawmaking is the official duty of the parliament as an emanation of state power.<sup>162)</sup>

Beside this argument against the application of Sect. 68 also the general rules to issue an injunction seem to be critical. The CC refers to Sect. 264 Civil

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<sup>162)</sup> This is the point of view for instance of Worachet Pakeerut; see Bangkok Pundit 06/06/2012.

Procedural Code which is a kind of catchall-element for injunctions demanding according to Sect. 255 that the court shall grant “any application [...] when it is satisfied that the plaint has a good cause and has sufficient ground for applying the protective measures.” As there are legal remedies against the injunction order according to Sect. 261 it is evident that the presence of the conditions required has to be comprehensible on a prima-facie basis. Moreover, as the injunction intervenes in a core competence of the parliament and contains severe charges the requirements are inclined to be strict from a general point of legal and constitutional consideration. According to this background the opinion that the case did not require any urgent attention of the CC weighs heavy<sup>163)</sup> and it is convincing as the CC by interfering in the reading procedure of a bill is deviating from the normal procedure of a- priori review which according to Sect. 154 starts after any bill has been approved or reaffirmed by the National Assembly before the Prime Minister presents it to the King for signature. Dubious is what “sufficient ground [...] protective measures” existed as “the charge that moves are under way to overthrow the constitutional monarchy must be backed up with credible evidence and not just pure suspicion, speculation or perception, to lend any credence to the court’s decision to accept the petitions for consideration.”<sup>164)</sup>

Even constitutional law professors not known to be close to the government expressed their opinion that the amendment was in line with constitutional requirements and that even if it leads to a whole new charter this would not be possible to be considered as an attempt to overthrow the “democratic regime of government with the King as Head of State”.<sup>165)</sup>

What are now the arguments of the CC and its supporters? According to the application of Sect. 68 the CC expressed the opinion that the norm does not demand that a petition has to be filed necessarily to the Attorney General who then decides to request action from the CC but that both can directly address the

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<sup>163)</sup> See *The Nation* 08/06/2012.

<sup>164)</sup> Bangkok 07/06/2012.

<sup>165)</sup> See Prinya Thewanarumitkul, vice rector of Thammasat University, cited in Bangkok Post 07/06/2012.

CC. Being confronted with the wording of the constitution the CC explained that the English translation of the constitution would make the court's interpretation more understandable.<sup>166)</sup> This argument was hardly convincing. It was not methodologically and as the Report on the Meeting of the Assembly for the Drafting of the Constitution and the CC's own webpage and information booklet mentioned for procedures according to Sect. 68 only the Attorney General as eligible applicant.<sup>167)</sup>

Substantially the court's president clarified the rationale of the order due to the possibility of a future attempt to overthrow the "democratic regime of governance with the King as Head of State" with the new constitution to be made according to the amendment bill. Thus, so did the president argue, even if the advocates of an amendment insisted that the sections of the present constitution on the monarchy would not be touched by the new constitution, the amendment bill did not explicitly stipulate that the relevant provisions in the present Const. would be spared out.<sup>168)</sup> This argument seems to be not unproblematic concerning the question of the binding of a future constitution-maker who is not constituted yet and for which the present parliament seems to be the wrong addressee. In fact, the president of the CC formulates the mandate of the CC not as one to review the present amendment according to its legal content and quality but to control the intention of the law maker. According to him the objective of the inquiry initiated with the temporarily injunction was indeed "to find out from the bill framers whether they have ill intentions." The mere accusation of an attempted overthrow

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<sup>166)</sup> See [http://www.matichon.co.th/news\\_detail.php?newsid=1338950650&grpId=&catid=03&subcatid=0305](http://www.matichon.co.th/news_detail.php?newsid=1338950650&grpId=&catid=03&subcatid=0305), latest accessed 14/06/2012.

<sup>167)</sup> See *Report on the Meeting of the Assembly for the Drafting of the Constitution*, No. 27/2550. Several justices seem to have attended the respective meeting of the drafting assembly, see Bangkok Post 11/06/2012. See also Office of the Constitutional Court, *A Basic Understanding of the Constitutional Court of the Kingdom of Thailand*, p.41. Meanwhile the CC accepted for consideration a petition filed by a former senator also directly to the CC to rule whether the Democrat Party-led coalition government under Abhisit Vejjajiva had assumed power over the country's administration by unconstitutional methods referring to the legally other protected good under Sect. 68 beside the "democratic regime". See Bangkok Post 13/06/2012.

<sup>168)</sup> See Bangkok Post 03/06/2012.

of the “democratic regime of government with the King as Head of state” and the - not very much substantiated - possibility of such an attempt is enough to launch an inquiry of the CC, to take preventive measures against the lawmaker and to put the burden of proof on him: “As charged, the court deems it may be possible that there is a bid to overthrow the administration for another form of administration. Hence, we have to listen to the accused” who, once under suspicion, has to be treated with all necessary distrust: “Do the media believe that the accused will make a confession that they intend to change the administrative system?” Non-compliance with the investigative measures of the court comes close to a plea of guilty: “[...] if the accused refuse to defend themselves, how can the court think otherwise?”<sup>169)</sup>

Concerning the urgency of the issue the court spokesman declared that the escalating political tension had forced the Constitution Court to take swift action<sup>170)</sup>, what prompts the general question for which purpose the CC raised Sect. 68, to calm down political tensions to prevent an immediate threat to the present constitutional concept of governance. Among the few constitutional law professors speaking up in favor of the decision the statements of a former rector of Thammasat University are significant. According to the urgency which normally should be required for a temporarily injunction he declared:

The verdict has not been made and so the binding effect is very limited. The parliament can act against the injunction but it must face up to the responsibility. If parliament votes to pass the bill in its third reading, it will be proposed to His Majesty the King for endorsement. The parliament should avoid subjecting the head of state to a situation where he will be burdened with considering an issue which could invite extreme social and political conflicts.<sup>171)</sup>

This assessment reflects the required respect of the King but also reveals the problem of an injunction on grounds of urgency in the given situation. This

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<sup>169)</sup> Cited in Bangkok Post 11/06/2012.

<sup>170)</sup> See Bangkok Post 02/06/2012.

<sup>171)</sup> Surapol Nitikraipot, cited in Bangkok Post 09/06/2012.

counts the more as the former rector also made clear that the court's injunction "had a tremendous impact, as it lays down standard practice for safeguarding the constitution and precedents regarding decisions made under Section 68."<sup>172)</sup>

A certain tendency to generalize the vague wording of Sect. 68 becomes striking in his overall interpretation of Sect. 68, stating that "it entrusts the Constitution Court with the duty to protect the supreme law of the country. The court has the legal authority to stop the actions of anyone who exercises his or her rights and freedoms in a way that adversely affects the charter. [...] If the legislature drafts a law which contravenes the constitution, the Constitution Court reserves the power to declare such a law a violation of the charter." The equation of "overthrowing the democratic regime of government with the King as head of state" as stated in Sect. 68 (1) with "actions of anyone who exercises his or her rights and freedoms in a way that adversely affects the charter" seems not unproblematic, widening the scope of application of Sect. 68 significantly.

Interesting is also the statement on the procedural problems for an injunction filed directly with the CC. The former rector obviously disagrees with the interpretation of the CC's president clarifying that "the section requires petitions [...] to be submitted to the attorney-general, who investigates the action. Drafters of the constitution did not wish for the Constitution Court to initiate the investigation process itself." But:

The point to ponder is how one can interpret the letters and the spirit of the constitution. What had the constitution drafters intended when they wrote the charter? Or do we need to stick to the charter writers' intentions in interpreting laws despite the changing circumstances? [...] In this case, the Constitution Court interpreted [the constitution] differently from the way the charter writers had intended, which was for the petitions to be filed with the attorney-general. But the words of the constitution state that the court safeguards the charter. This is a big deal involving a redraft of the entire constitution. The court determines that if parliament had gone ahead with passing the amendment bill in its third reading, it could have created problems.<sup>173)</sup>

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<sup>172)</sup> *Ibid.*

This means that neither the intention of the writers nor the wording of Sect. 68 is decisive for its application but the purpose to entrust the CC with a powerful weapon against anyone who wishes to cause problems for the constitutional system. This interpretation is so vague and determined at the same time that it creates the universal constitutional weapon.

All in all, these arguments and counter-arguments are not only revealing a fundamental constitutional crisis (even if there will be probably no immediate coup d'état) but also a clear understanding of function and role of the CC by those who are acting affirmatively according to the present constitution and the CC's order supposed to preserve it.

Expression of the constitutional crisis, which is already an institutional crisis of constitutional review in Thailand, is the difficult question for those who are considering the CC's order as an evident miscarriage of justice, how to deal with the order in the light of Sect. 216 which deems decisions of the CC as final and binding to all state organs. While some scholars seem to have suggested that Sect. 216 refers only to decisions and not to orders of the court,<sup>174)</sup> what seems less convincing, the president of the parliament enforced his decision to halt the amendment according to the court's order against strong pressure from his own party.<sup>175)</sup> On the other hand, the threat to the institution of the CC represented by the drafting of a new constitution remains even more realistic if it eventually comes to the making of a new charter.

The role the CC assumes seems to be meanwhile that of an institution vested with far reaching constitutional police rights commanding an investigative mandate on demand of any concerned citizen responding also to 'bad intentions' and being equipped with an impressive arsenal. Additional to the power to eliminate every political force, be it a political party or an individual politician, on formal grounds the CC meanwhile commands far reaching powers to eliminate any legislation on suspicion if it could be directed against the governing concept of governance. The

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<sup>173)</sup> *Ibid.*

<sup>174)</sup> See Bangkok Pundit 06/06/2012.

<sup>175)</sup> See Bangkok Post 12/06/2012.

specific use of temporarily injunctions as it became standard now completes this combined police and censor power amounting to an influence on the political order which seems unique for CCs. In the same time the Thai CC is still very much dependent on the backing of those who support the governance concept the court is duly enforcing.

### E. Conclusion

Generally it may be said, that the influence of constitutional jurisprudence on law and politics provided by the CCs and the Tribunal, can hardly be described as a steady stimulus for the development of Thai constitutionalism. The latter hardly received any impact in favor of a dynamic process of differentiation and elaboration of a consistent legal system, the dogmatic doctrine on constitutional law or the people's trust in the constitution. However, Thai CCs always functioned as an important corrective mechanism, rarely surprising the observers with their decisions in an environment which was marked in the first period by a strong populist rule and then by heavily competing concepts of constitutionalism and a deeply divided society. In both periods there was not too much space left for a CC acting as a self-empowering key player in constitutional life but at best for the performance of duties of a strenuous contributor to variations of Thai-style democracy.