



Review Article

Suggestion to empower the Supreme Court to constitutional review in Thailand

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Abstract

The establishment of the Constitutional Court as an organization for reviewing constitutionality in Thailand began in 1997 and is still ongoing. However, the current role of the Constitutional Court has been heavily criticized as a result of rulings of political intervention and anti-democracy due to impartiality, and issuing a judgment that establishes itself above all other constitutional organizations, violating the separation of powers principle. Furthermore, many cases contradict the intent of the Constitution and its provisions. Therefore, the objective of this article is to propose a new approach to establishing court bodies to review the constitutionality of the law through documentary-based research. This study suggested guidelines for “a semi-centralized system” that would establish divisions in the Supreme Court of Justice and the Supreme Administrative Court to review the law’s constitutionality. There is also another form that is still a centralized system of constitutional review. Another centralized system of constitutional review would create a division in the Supreme Court of Justice, reducing some roles and responsibilities and increasing mechanisms for selecting judges who are more closely linked to the people and have more democratic accountability.

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Introduction

In a state with a liberal democratic form of government, these constitutions uphold the rule of law and democracy as fundamental values. Democracy is a principle that is bound to the people who own power. Therefore, the

democratic Constitution requires that the formation of political institutions, such as executive and legislative bodies, be derived from the people or elected. Protecting people’s fundamental rights, the rule of law, and the legal state (Rechtsstaat) are complementary to democratic ideals. Therefore, it is important to avoid political parties claiming majorities and exploiting their power to restrict people’s fundamental freedoms and rights by allowing the judiciary to use its legal authority to limit the use of state power. In other words, there are provisions in the Constitution and the legislation that mandate the judicial body to use its authority to examine the legality of a law

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passed by a legislative body or that provide the judicial body the authority to review the constitutionality of the use of a legislative and executive power (Ferejohn & Pasquino, 2003).

Thailand is a democratic state. Accordingly, the Thai Constitution accepts such principles. That is, the 2017 Constitution of the Kingdom of Thailand specifies principles supporting the principles of democracy in several sections, such as Section 2, Section 3, the first paragraph, and Section 114.

To achieve the rule of law under the Constitution, the 2017 Constitution certifies this principle in several sections, among other provisions, including Section 3 Paragraph 2, Section 26 Paragraph 1, Section 197 Paragraph 1, and Section 210 Paragraph 1 (1) in conjunction with Section 148 and Article 256, and so on. Therefore, the Constitution established the Constitutional Court to carry out its primary duty: defending the Constitution as the supreme law. Consequently, the constitutional provisions give the Constitutional Court a crucial responsibility to protect constitutionality from using legislative enactment powers, preventing the legislative and political body from using its authority to enact unconstitutional laws that restrict people's rights and freedoms. The preservation of fundamental freedoms and rights has increased significantly since the establishment of the Constitutional Court under the 1997 constitution. The Constitutional Court investigates whether the use of state power may violate citizen's fundamental rights. The Constitutional Court strongly supports these rights and freedoms.

The Thai Constitution does not provide only the Constitutional Court to supervise the validity of laws passed by legislators. It also defines other powers and duties of a political nature. As a result, the Constitutional Court has often used its authority in ways that are against the Constitution's and the law's letter and spirit. In particular, the Constitutional Court has developed its jurisdiction above and beyond that allowed by the Constitutional provision, potentially elevating it to the position of highest rank among constitutional bodies (Constitution Ruling. No. 6-7/2551, 18-22/2555, 15-18/2556, 5/2564). However, the Constitution did not design the Constitutional Court to have such a status. Therefore, this article presents an alternative form of judicial constitutional review in Thailand.

Literature Review

The idea that the Constitution is the supreme law of the legal system is known as Constitutional supremacy. In other words, as the Supreme Law of State principle, the Constitution makes all other laws within the state subordinate to the Constitution itself. Consequently, it empowers the judiciary to control the legislature to prevent it from enacting laws contrary to or inconsistent with the Constitution (Limbach, 2001). The court's ability to annul the decisions made by the elected Parliament is still up for debate. The issue of the courts who use these powers lacks democratic legitimacy.

Therefore, the organization that exercises power to control the constitutionality of the law (Constitutional Review) is an organization that destroys the foundation of democracy itself. Most public legal scholars, however, support the idea that judicial bodies should exercise control over them even though there is no democratic connection with the people. They argue that the establishment of a system of constitutional review is an essential guarantee in a democratic regime that prevents most parties from acting arbitrarily (Ginsburg, 2003).

Protecting the Constitution is the supreme law in practice. Therefore, all democratic constitutions either create institutions that exercise the legal authority granted by the Constitution or mandate that the traditional courts already in place do so. For example, in Japan, the Constitution entrusts the constitutional control of the law to the ordinary courts (Court of Justice). Each country has designed organizations that exercise such powers differently, depending on their social context. We can group such as follows:

The Constitution requires the Court of Justice to control the Constitutionality of the Law or the American Model

The American model is also known as the system that gives courts of justice (the ordinary courts) the power to regulate the law's constitutionality. It allows courts of justice at all levels to determine whether to apply the law included in the cited legislation. The Court can decide the case without it being forwarded to another body. The Constitution was not the source of the judiciary's self-imposed authority to review the law's constitutionality. However, in *Marbury v. Madison* (1803), the United States Supreme Court confirmed that the Court is an institution that can apply the law. The Constitution is a written document of law that the Court can interpret in a case (Sinha, 2016).

Japan is another state where the Constitution grants the Court the power to review if laws passed legislatively are constitutional. Japan adopted the American Model after World War II. As a result, the current Japanese Constitution was written with significant influence from the United States. Based on the American legal system, Japan abolished the Administrative Court, which existed during the Meiji Constitution, and turned to a single court system. Under provisions set in the Constitution, Section 81 gives the power to check constitutionality to the Court of Justice. However, the Court of Justice does not frequently exercise its authority to determine whether a law's provisions conflict with the Constitution for political reasons (Liang & Wada, 2017). As evidence, it is commonly stated that the Supreme Court has ruled statutes unconstitutional, in whole or part, only nine times in its history (Gardbaum, 2018, Hasebe, 2007). It also appears that Malaysia, Singapore, and the Philippines have courts of justice to govern their preferences with the constitutionality of the law (Dressel, 2018).

A Constitution requires a Particular Body to control the Constitutionality of a Law or the European Model

In the *Marbury v. Madison* case (1803), the U.S. Supreme Court used its judicial authority to control the law's constitutionality. In response, Europe has made efforts to create a body to review the law's constitutionality independently from the ordinary courts. Depending on the circumstances in each country, the Constitutional Court or the Constitutional Tribunal difference was established.

France's Constitutional Council (Conseil Constitutionnel), instituted by the Constitution, has review authority over the Parliament's legislative powers and the Rules of Procedure of the Houses of Parliament. Since the Constitution specifies the scope of Parliament's ability to exercise its legislative powers only as stipulated in Article 34, if the Parliament considers a bill with content not prescribed by the Constitution in Article 34, then enacting such a law would be unconstitutional. In Article 37, the power to enact the law beyond the Parliament's powers is under executive regulation-making power. The Constitutional Council generally exercises powers to control the constitutionality of organic law, statute law, and bylaws of Parliament. It will also review the bill before the president signs it.

However, after the 2008 constitutional amendment, Article 61–1 provides that the Constitutional Council has

the power to decide the Parliament's promulgated statutory provisions that may violate Constitutional rights and liberties, but only when the case is considered in court. In the case of Turkey, the Constitution stipulates that the Constitutional Court plays a significant role in protecting the Constitution's supremacy and defending the people's fundamental freedoms, including overruling constitutional amendments, and exercising other powers that impact political parties, such as dissolving them (Köker, 2010).

From the above experiences, the system of judicial constitutional review is diverse. However, to establish a system of judicial constitutional review in each country, there is no need to use a system from a particular country without adjustments. Thailand's constitution has used many forms of judicial constitutional review throughout its history (Tonsakulrungruang, 2018). Nevertheless, the system of judicial constitutional review in Thailand still has problems. This article proposes a form of judicial constitutional review that may be appropriate for Thailand.

Results and Discussion

Historically, the Thai Constitution has used methods to control the constitutionality of the law to protect the supremacy of the Constitution. There are four types: First, the House of Representatives has the highest power to interpret the Constitution. Second, by the Court of Justice. The third type, the Constitutional Tribunal, exercises powers to control the law's constitutionality. The last one is giving the Constitutional Court the right to decide on constitutional issues in its current form (Tonsakulrungruang, 2018).

The main reason for establishing the Constitutional Court was to solve problems of independence with neutrality and lack of continuity of the former Constitutional tribunal.

The 1997 Constitution, which replaced the Constitutional Tribunal, established the Constitutional Court as the body that oversees the law's constitutionality in Thailand. However, there are problems arising from the exercise of the Constitutional Court's powers through continual rulings, which can extract the essence of the problem from the existence of the Constitutional Court as follows.

The judges of the Constitutional Court have no Democratic Relationship with the People

Kelsen (1928) has said that reviewing the constitutionality of legislative acts is negative lawmaking. Therefore, a judicial body that exercises constitutional review

over legislative law must also have a democratic connection with the people. However, consider the 2017 Constitution of Thailand in the section that determines the Constitutional Court judges. The Constitution defines the selection of the Constitutional Court judges in three ways: The first is selection in the Supreme Court of Justice's general meeting (Section 200 paragraph 1 (1)), second is in the Supreme Administrative Court's general meeting (Section 200 paragraph 1 (2)), and the third is in the Nomination Committee's selection (Section 200 paragraph 1 (3) (4) (5)).

The Constitutional Court's judges are appointed through the first two methods or a meeting of the Supreme Court of Justice and the Supreme Administrative Court. It is distinguished by the selection of individuals within its court organization, through rules and procedures established by the Supreme Court of the Court of Justice and the Administrative Court. Therefore, the source of Constitutional Court judges from the Supreme Court of Justice and the Supreme Administrative Court general meetings lacks democratic legitimacy.

The Constitutional Court judges from the first two paths are entirely disconnected from the people. In addition, there is a lack of scrutiny from other organizations to balance the power of such selections. Regarding the final source of Constitutional Court judges from the Nomination Committee's appointment, there is little to no democratic connection to the people. When a person is chosen or nominated to be appointed a judge of the Constitutional Court, the Senate must approve it by a vote of no less than one-half of the total number of Senate members. It is well-known that the current Senators are based on the transitional provisions of the 2017 Thailand Constitution, with no democratic connection to the people.

As a result, when the Constitutional Court decides on politically related cases or the use of political institutions' power, it is frequently heavily criticized. The Constitutional Court is considered as a political organization rather than one that is independent or neutral. It is not acting as neutrally as it should. The Constitutional Court's decision was perceived as government intervention. According to the principle of separation of powers, the Constitutional Court cannot balance powers.

The Thai Constitutional Court establishes itself above all other constitutional organizations

Under public law theory, the organization established by the Constitution exercises only the powers granted by

the Constitution (*pouvoir constitué*). The democratic Constitution is designed to balance and counterbalance sovereign power. It is not intended for any organization to become a superpower.

The current Constitution differs from the 1997 and 2007 Constitutions in its design for the Constitutional Court. As a result, the Court was removed from the court chapter and given its own chapter by the drafters of the Constitution (Chapter 11: the Constitutional Court). These changes may encourage Constitutional Court judges to perceive themselves as presiding over political organizations and other courts. The Constitutional Court's ruling No. 5/2564 raises the question of whether the Constitutional Court established its power over other courts and monopolized or centralized constitutional interpretation while expanding its powers to review constitutionality (Constitutional Court rulings Nos. 18-22/2555, 15-18/2556, and 5/2564). Indeed, the Constitutional Court amends the Constitution itself in some cases (the Constitutional Court No. 6-7/2551). The outcomes of these Constitutional Court rulings impact public trust in the use of the Constitution and the law. They are unsure when the Constitutional Court will extend its power to decide on political matters that appear not to be empowered by the Constitution. They believe the Constitutional Court is gaining authority over the Constitution and other state bodies.

The Constitution imposes unnecessary political roles and duties on the Constitutional Court

Before the current constitution, the Constitutional Court frequently ruled on political issues. However, it only mentioned significant cases to illustrate how the Constitutional Court approached political matters and caused political crises, resulting in coups, overthrowing the government, and overthrowing the Constitution (Chen, 2018).

The powers and duties of the Constitutional Court increased in the 2017 Constitution. The Constitutional Court's powers and duties are divided into six groups:

1. Examination of the constitutional amendment process;
2. Control over the constitutionality of laws, draft legislation, and review of the process of enacting an Emergency Decree;
3. An examination of Parliament's internal operations;
4. Decisions on the membership and qualifications of members of Parliament and Cabinet;
5. Examining the issues of various organizations 'powers, duties, and powers under sections 210 (2),

6. Finally, examining and ruling on an act that violates people's rights or liberties under Section 213.

However, Section 210 (2) of the 2017 Constitution has changed the language. The phrase "...problems about the duties and powers of..." makes this case not necessarily one of conflict between one organization and another organization. Even if there is no dispute, it can be submitted to the Constitutional Court for consideration. The main effect of this provision is that the Constitutional Court functions more as a legal advisor to the constitutional organization than as a judicial body.

In the case of adjudicating an act that violates people's rights or freedom, Section 213 of the 2017 Constitution grants people the right to file a lawsuit directly with the Constitutional Court. The 2017 Constitution, Section 213, has changed the text from the 2007 Constitution, Section 212. They use the text "provisions of law" to mean "Action." Section 213, paragraph two of the 2017 Constitution stipulates the conditions for filing lawsuits against the people to the Constitutional Court, described in the Organic Act on Procedures of the Constitutional Court. Under the Organic Act on the Procedure of the Constitutional Court B.E. 2561 (2018), the conditions for filing a lawsuit directly to the Constitutional Court are very narrow.

Drawing from the preceding point, the Constitutional Court has been stringent in its interpretation of Section 213. There were 255 petitions received under Section 213 of the Constitutional Court from 2017 to 2021. The Constitutional Court accepted the petition to consider the cases filed directly under Section 213, including Constitutional Court ruling Nos. 4/2563 and 7/2563.

On the other hand, the Constitutional Court's ruling No. 5/2564 created a new phenomenon in which the Constitutional Court interprets or changes the provisions of Article 213 of the Constitution, resulting in numerous legal consequences, especially the violation of Section 213 of the Constitution by accepting the Ombudsman's request for consideration.

In only a few cases, does the Constitutional Court decide political issues by interpreting the constitution's provisions through the spirit of the constitution. In the case of the Constitutional Court's decision No. 14/2565, there is an important question: When does the term of Prime Minister Prayut Chan-ocha actually begin? Prayut Chan-ocha has been prime minister since the 2014 coup d'état; however, the court has ruled that the law should count general Prayut Chan-ocha's term of office from the date the current Constitution came into force.

Conclusion and Recommendation

The authors noted numerous types of constitutional control in use worldwide. For example, when Thailand attempted to replace the Constitutional Tribunal with the Constitutional Court to solve one problem, the Constitutional Court created another. In response, the authors propose the dissolution of the Constitutional Court, and the Supreme Court examines the constitutionality of the law instead. However, suppose we let the courts have general jurisdiction over all civil, criminal, and public law questions. In such case, any court can engage in a constitutional review in the same jurisdiction as the United States (diffuse system) and affect the unity of court judgments. Therefore, the Constitution should be amended when creating a new constitution to adjust the power to check the law's constitutionality only at the Supreme Court. An additional department, known as "the Supreme Court of Constitutional Review Division", may be set up. Such should proceed as follows.

First, the Constitutional Court must be dissolved and replaced with a specific department in the Supreme Court to check the law's constitutionality. There are two ways to establish the Supreme Court of Constitutional Review Division." First, according to the two parallels of the Supreme Court of Thailand, we can design the form of constitutional review with two organizations: a "Constitutional Review Division in Supreme Court of Justice" and a "Constitutional Review Division in Supreme Administrative Court." This design, which can be called "semi-centralized system" of constitutional review, helps prevent the issue of a court establishing itself above all other constitutional organizations. Furthermore, these courts carry the constitutional question of general jurisdiction over all questions of civil and criminal (for the Supreme Court of Justice) and public law (for the Supreme Administrative Court).

In response to the claim that the constitutional review organization must have knowledge of the law in public law or political science specializing in public law, the judgment that the law is contrary to or inconsistent with the Constitution will have that quality. The authors noted that the Court of Justice judges had studied public law. Moreover, some of them have previously worked in government agencies, and political science experts can already be called. Nevertheless, those judges (whether in the Supreme Court of the Court of Justice or the Administrative Court) must connect with the people for democratic accountability by having been endorsed by the elected members of Parliament.

An alternative approach to “the Supreme Court of Constitutional Review Division” is one bound by the people and which has been approved by the elected members of Parliament through nomination by the Court of Justice, the Administrative Court, and a special commission, according to the quota prescribed by law. However, it is a division in the Supreme Court of Justice. This form of system is still a centralized form of constitutional review.

Second, “the Supreme Court of Constitutional Review Division” should only consider the constitutionality of laws currently in effect—checking whether the bill passed by the Parliament (Article 148 of the Constitution) is a political problem that requires political parties to check their constitutionality. It is no longer necessary to submit the case to a judicial body for review.

Third, abolish powers that have the nature of trespassing into political boundaries, such as Article 139 paragraph two, Article 144 paragraph three, or Article 173, or the power under Section 210 (2), because the nature of the Court as the judicial power, an advisory body, is not the nature of the Court. Moreover, repeal Section 213 because other channels already exist.

Conflict of Interest

The authors declare that there is no conflict of interest.

References

- Ferejohn, J., & Pasquino, P. (2003). Rule of democracy and rule of law. In J. Maravall, & A. Przeworski (Eds.), *Democracy and the Rule of Law* (pp. 242–260). Cambridge University Press. <http://ndl.ethernet.edu.et/bitstream/123456789/15902/1/201.pdf#page=256>
- Ginsburg, T. (2003). *Judicial review in new democracies: Constitutional courts in Asian cases*. Cambridge University Press. <https://shorturl.at/AHZ17>
- Kelsen, H. (1928). La garantie juridictionnelle de la constitution [La justice constitutionnelle]. *Revue du droit public et de la science politique en France et à l'étranger*, *Librairie Général de Droit et de Jurisprudence*, 197–257.
- Köker, L. (2010). Turkey's political constitutional crisis: An assessment of the role of the Constitutional Court. *Constellations*, *17*(2), 328–344. <https://shorturl.at/grwMP>
- Liang Chen, P., & Wada, T.J. (2017). Can the Japanese court overcome the political question hurdle. *Washington International Law Journal*, *26*(2), 349–388. <https://heinonline.org/HOL/LandingPage?handle=hein.journals/pacrimlp26&div=21&id=&page=>
- Limbach, J. (2001). The concept of the supremacy of the constitution. *The Modern Law Review*, *64* (1), 1–10. <https://onlinelibrary.wiley.com/doi/abs/10.1111/1468-2230.00306>
- Sinha, D. (2016). Constitutional review: Study of American model and European model. *ILI Law Review*, (Summer Issue), 159–160. <https://ili.ac.in/pdf/paper9.pdf>
- Tonsakulrungruang, K. (2018). The Constitutional Court of Thailand: From activism to arbitrariness. Comparative constitutional law and policy. In H. Y. Chen, & A. Harding (Eds.), *Constitutional Courts in Asia: A comparative perspective* (pp. 185–213). Cambridge University Press. <https://shorturl.at/qyCI3>