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.
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)\(^1\) had on Thailand’s political order and vice versa. Even if this is a wide topic, a lot of