

Reply to QUESTIONNAIRE
on the 4th Congress of the World Conference on Constitutional
Justice

“THE RULE OF LAW AND CONSTITUTIONAL JUSTICE
IN THE MODERN WORLD”

11 – 14 September 2017, Vilnius, Lithuania

QUESTIONNAIRE

A. The rule of law and constitutional justice in the modern world

I. The different concepts of the rule of law

1. What are the relevant sources of law (e.g. the Constitution, case-law, etc.) which establish the principle of the rule of law in the legal system of your country?

#Answer

The sources of Thai law are the constitution and law, including all subordinate laws. Additionally, according to the Constitution, the Constitutional Court’s ruling is deemed to make a law unenforceable; also, it is binding on other State organs and other Courts.

Other Courts’ rulings do not have an effect in law but they are deemed to be a guideline for legal interpretations which could bind on the Courts in the following cases. However, it can be seen that in many cases the principle of the rule of law has

been found and inserted in decisions and rulings of the Courts' adjudication.

2. How is the principle of the rule of law interpreted in your country? Are there different concepts of the rule of law: formal, substantive or other?

#Answer

The principle of the rule of law in Thailand is consistent with the principle of the rule of law in the universal meaning. The examples are as the followings: the principle of *Nullum crimen sine lege*, or, a person shall not be subject to criminal punishment, if there is no law in force at the time of commission provided to be an offence, is prescribed in section 2 and 3 of the Penal Code; and, the principle indicating that every person must act in good faith is prescribed in section 5 of the Civil and Commercial Code. The rule of law concerning criminal procedure exists in many sections of Criminal Procedure Code, for instance, the principle indicating that no person shall be compelled to Self-Incrimination in section 232, it provides that the accused person may not be cited as a witness by the prosecutor; or, the principle indicating that witness would not answer any questions which would subject to the risk of being prosecuted for a criminal offence appears in section 324. Also, the Constitutional Court directed that the rule of law embraces the natural justification.

3. Are there specific fields of law in which your Court ensures respect for the rule of law (e.g. criminal law, electoral law, etc.)?

#Answer

The current Constitution of the Kingdom of Thailand¹ provides in section 3 paragraph 2 in order to guarantee an effect to the rule of law, that the National Assembly, the Council of Ministers, the Courts, the Constitutional Organs, and the State organs shall perform their duties according to the Constitution, law, and the rule of law for the common interests of the country and the well-being of the people as a whole. Therefore, the rule of law is the principle complied by the Constitutional Court along with the Constitution and law in its adjudication.

¹ The term “the current Constitution of the Kingdom of Thailand” in this paper means the Draft Constitution B.E. Referendum on 7th August 2016 (B.E.2559) Edition.

4. Is there case-law on the content of the principle of the rule of law? What are the core elements of this principle according to the case-law? Please provide relevant examples from case-law.

#Answer

The Constitutional Court has cited the rule of law in many rulings. The outstanding cases are exemplified by the followings: there are many Acts provided that a person shall be responsible for criminal offence without proof of committing an offence; also, a person who acts as an agent of juristic person shall be responsible for criminal offence committed by juristic person. These provisions of such Acts are contrary to or inconsistent with the Constitution and the rule of law relating to the principle of Presumption of Innocence (the Constitutional Court Ruling No. 12/2012, No. 5/2013, No. 10/2013 and other relevant rulings).

Furthermore, there was a section in Mutual Assistance in Criminal Matters Act, B.E. 2535 (1992) providing that all evidences and documents obtained under this Act are deemed to be admissible according to the laws, this section was not in conformity with the rule of law, therefore, it was contrary to or inconsistent with the Constitution. This is because that section limited the right of the defendant in the criminal case through compelling him to be bound by evidence obtained from the plaintiff's examination in a foreign court and the defendant did not have the opportunity to inspect or acknowledge, or

sufficiently prepare a defense against such evidence (the Constitutional Court Ruling No. 4/2013).

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In addition, there are many relevant Constitutional Court's rulings in which the Constitutional Court applies the rule of law as a reason in justifying the contrariness or the inconsistency of the provisions of laws to the Constitution.

5. Has the concept of the rule of law changed over time in case - law in your country? If so, please describe these changes referring to examples.

#Answer

There was a case illustrating a change in applying the concept of the rule of law: it is related to a section in the Revenue Code which provided that the married woman's assessable income was deemed to be included in the husband's income. This Revenue Code's section attributed to the difference in paying tax between married woman and a single one. This issue was submitted to the Constitutional Court two times. The first submission was in 2002; at that time, the Court ruled that even if this provision affected the right and liberty of the taxpayer, its objective was as far as necessary for the State's interest concerning tax collection and it did not affect the essential substance of personal right or family's right and liberty (the Constitutional Court Ruling No. 48/2002).

Nonetheless, afterwards, there was new consideration on this issue in 2012, the Court ruled that the said provision of the Revenue Code did not endorse the stability of family institution and this caused men and women to dislike getting married, to undo tax planning, and to get divorced in order to avoid combining their taxable income which could make them pay a higher tax rate as a spouse. Therefore, this provision was contrary to the principle of equality (the Constitutional Court Ruling No. 17/2012). These two rulings could be concluded that, the 2002 ruling, the Court focused on State's interest rather than the right and liberty of people; while, the 2012 ruling, the Court emphasized the interest of people in family liberty rather than State's interest concerning taxation.

6. Does international law have an impact on the interpretation of the principle of the rule of law in your country?

#Answer

The Constitutional Court has applied international conventions as a reason to endorse the rule of law for two times.

The first case is concerning to the equality of persons with disabilities in working as a civil servant in certain position. Citing Convention on the Rights of Persons with Disabilities (CRPD), the Constitutional Court gave its reason to support the motion that Act on Judicial Service of the Courts of Justice, B.E.

2543 (2000), section 26 (10), in particular, the term "... having inappropriate physical or psychological conditions ..." was contrary to and inconsistent with the Constitution. This is because the term gave the Selection Committee

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a broad scope that was inappropriately applied in examining the physical or psychological conditions of a person applying for being a judge (the Constitutional Court Ruling No. 15/2012).

Another relevant case was the Constitutional Court Ruling No. 4/2013 relating to Mutual Assistance in Criminal Matters Act, B.E. 2535 (1992) which has already been mentioned in the response to the fourth question. This case, the Constitutional Court cited article 14.3 of International Covenant on Civil and Political Rights (ICCPR) concerning the right to be tried in his presence; to defend himself in person or through legal assistance of his own choosing; to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him, as a reason to endorse the contrariness or the inconsistency with the Constitution of this Act.

II. New challenges to the rule of law

7. Are there major threats to the rule of law at the national level or have there been such threats in your country (e.g. economic crises)?

#Answer

Political crisis and coup d'état are the causes attributing to the absence of the Constitution in some period of time. However, the Interim Constitution enforcing during the period of coup d'état, while recognizing the rights and liberties of the former Constitution, in order to protect public order, has limited same rights and liberties by state power (such as liberty of expression or liberty of assembly).

8. Have international events and developments had a repercussion on the interpretation of the rule of law in your country (e.g. migration, terrorism)?

#Answer

So far, there has not been any international event which has a repercussion on the interpretation of the rule of law in Thailand.

9. Has your Court dealt with the collisions between national and international legal norms? Have there been cases of different interpretation of a certain right or freedom by your Court compared to regional/international courts (e.g. the African, Inter-American or European Courts) or international bodies (notably, the UN Human Rights Committee)? Are there related in implementing decisions of such courts/bodies? What is the essence of these difficulties? Please provide examples.

#Answer

So far, there has not been any precise collision between legal norms in Thailand and international legal norms.²

² There was a case of the European Court of Human Rights named *Otegi Mondragon v. Spain* (no. 2034/07) on 15 March 2011 which the Court decided that Spanish law on lese majeste was contrary to Human Rights norm and liberty of expression. This decision is distinct from Thai Constitutional Court Ruling concerning Penal Code, section 112, as indicated in the Constitutional Court Ruling no. 28 – 29/2012. This is because the regime of the monarch as the head of the State has had a long history in Thailand, even though Thailand has shifted the regime to be constitutional monarchy since 1932, the recent Constitution of the Kingdom of Thailand still remains the King as the Head of the State. This

III. The law and the state

10. What is the impact of the case-law of your Court on guaranteeing that state powers act within the constitutional limits of their authority?

#Answer

The Rulings of the Constitutional Court on inspection of the membership, qualifications and prohibitions for eligibility of political position have made a guarantee measurement to inspect the political positions that must have qualifications or not be forbidden by the Constitution and not exercise their powers contrary to or inconsistent with the Constitution. If they violate the qualification and restrictive provision of Constitution, they will be terminated in position or will be deemed not to have held the political position by the ruling of the Constitutional Court.

demonstrates the reverent adoration and worship of Thai people to the King which has been enduring; also, it represents the uniqueness of Thailand that does not appear in any other country.

11. Do the decisions of your court have binding force on the other courts? Do other/ordinary courts follow/respect the case-law of your Court in all cases? Are there conflicts between your court and other (Supreme) courts?

#Answer

The previous Constitutions and the present edition of the Constitution of the Kingdom of Thailand have provided binding force between the decisions made by the Constitutional Court and the other State's organs, including the other courts, in all cases except for the case that reaches final judgement of the Supreme Court. Therefore, the binding power between the Constitutional Court and the other courts is derived from the Constitution and up to present, there is no conflict between the Constitutional Court and the other courts.

12. Has your Court developed/contributed to standards for law – making and for the application of law? (e.g. by developing concepts like to independence, impartiality, and acting in accordance with the law, *non bis in idem*, *nulla poena sine lege*, etc.).

#Answer

Under Thai laws, when a juristic person is accused of committing wrongdoings, representatives are, immediately, presumed to be criminally liable for the juristic person's offences. The Constitutional Court, however, ruled that those laws are inconsistent with or contrary to the Constitution's provision on the principle of '*presumption of innocence*', as previously mentioned in the response on the fourth question. As a result, an amendment of the provisions of such laws on a joint criminal liability of representatives for the juristic entity B.E. ... are on the way and being considered by the National Legislative Assembly.

13. Do you have case-law relating to respect for the rule of law by private actors exercising public functions?

#Answer

The Constitutional Court held that the Provincial Waterworks Authority (which is a state enterprise) had the power to lay water pipelines under, above on or across any person's land without having to pay any compensation for the use of the land. In some cases, this provision is inconsistent with the rule of law and does not appear to respect personal property rights, which is contrary to the Constitution (The Constitutional Court Ruling No. 13/2013). Moreover, another Court's ruling as to stationing the transmission line of high voltage electricity by the Electricity Generating Authority of

Thailand (EGAT) must be exercised only where necessary to minimize disruption to private properties (The Constitutional Court Ruling No. 42-43/2011).

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14. Are public officials accountable for their actions, both in law and in practice? Are there problems with the scope of immunity for some officials, e.g. by preventing an effective fight against corruption? Do you have case-law related to the accountability of public officials for their actions?

#Answer

According to Thai laws, the public officials shall be accountable for their actions and be required to comply with law. Their actions are administrative acts which shall be inspected by administrative procedure appeal and their cases must be submitted to the Administrative Court. If the public officer has a dishonest act while performing duties resulting in an injury of other persons intentionally, such act shall be subject to the criminal liability according to the Penal Code. In addition, if the public officer holds any political position, he or she may be withdrawn from the office and a complaint may be filed against the officer to the Constitutional Court for inspection on whether

his or her action is subject to disqualification or prohibition from the office or has violated the Constitution.

There is a case whereby the Constitutional Court ruled against the former Prime Minister (“former P.M.” hereafter) whose actions of intruding, intervening, positioning, appointing, and transferring public officers had violated the Constitution. Such actions were to advance the former P.M.’s and the relatives’ political interests. The Constitutional Court, therefore, agreed to terminate the Ministerial position of the former P.M., together with other ministers who were involved in the case above (the Constitutional Court Ruling No. 9/2014).

IV. The Law and the Individual

15. Is there individual access to your Court (direct/indirect) against general acts/individual acts? Please briefly explain the modalities/procedures.

#Answer

The current Constitution of the Kingdom of Thailand section 213 provided that a person whose rights and liberties recognized by the Constitution are violated, such person has a right to submit a motion to the Constitutional Court for its decision as to whether those acts are contrary to or inconsistent with the Constitution. However, by submitting a motion to the Constitutional Court, it shall be done in accordance with the

Organic Act on Constitutional Court Procedures that is now being considered by the National Legislative Assembly.

Alternatively, the individual can contend in Court, that the law applied to his or her case violates section 212 of the Constitution. The individual can also submit a case indirectly to the Ombudsmen for having considered under section 231 (1) of the Constitution. The Ombudsmen shall then refer a case to the Constitutional Court for its decision.

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All objections in Court, or a referral of the matter to the Constitutional Court by the Ombudsmen shall also comply with the Organic Act on Constitutional Court Procedures (as mentioned in the first paragraph).

16. Has your Court developed case-law concerning access to ordinary/lower courts (e.g. preconditions, including costs, representation by a lawyer, time limits)?

#Answer

The Constitutional Court ruled concerning the admissibility of evidence by the Court that the provision of law providing for evidence obtained from the plaintiff's examination in a foreign court that binds the defendant contradicts the rule of law and the Constitution. This is because the defendant did not have an opportunity to examine, acknowledge or sufficiently prepare a

defence against such evidence (the Constitution Ruling No. 4/2013, also mentioned in the response on the fourth question). In this regard, it confirms that the Constitutional Court recognizes and protects the rights of the defendant in the justice process. The rights include granting the opportunity for the defendant to examine evidence, be informed of and contest against such evidence.

17. Has your Court developed case-law on other individual rights related to the rule of law?

#Answer

The Constitutional Court has developed its adjudication concerning the rights of an individual in connection with the rule of law and the protection of the rights, liberties and the equality of the individual. For example, the Constitutional Court Ruling No. 21/2003 referred to the grant of a right to married women to use their maiden names. In addition, the Constitutional Court Ruling No. 12/2009 also acknowledged the rights and liberties of occupation; hence, limiting the State's unnecessary intervention in a person's occupation. Furthermore, the Constitutional Court Ruling No. 13/2013 recognized the property rights of a person. If there was a requirement to compulsory acquire a person's property, the state must provide fair compensation to the person.

18. Is the rule of law used as a general concept in the absence of specific fundamental rights or guarantees in the text of the Constitution in your country?

#Answer

The current Constitution of the Kingdom of Thailand provides on section 3 paragraph 2 that “the National Legislative Assembly, the Council of ministers, the Courts, the Constitutional Organizations, and the State organs shall perform duties in accordance with the Constitution, laws, and the rule of law for the common interests of the country and the well-being of the people at large”. Therefore, the rule of law serves as a general provision for the Constitutional Court to decide upon, where there is no provision on fundamental rights.

Moreover, the Constitution of the Kingdom of Thailand provides the essential substance on section 25 paragraph 1 that “where provisions of the Constitution are specifically

enacted to protect the rights and liberties of the Thai people and no action is prohibited or restricted by the Constitution or other laws, a person shall have a right and liberty to commit such action and is protected under the Constitution in so far as the exercise of such right or liberty does not affect or harm the security of the state.”