

The Constitutional Drafting Assembly is sealed off by a barbed wire; citizens are left to shout from outside



Lesson Series 49

Constitutionalism and human rights

Summary

This lesson series introduces the concept of constitutionalism and discusses its relationship to human rights, democracy and the rule of law.

The lesson also looks at the current situation in Thailand, where the interim government is in the process of drafting a new constitution after the military coup of September 2006.



THEME: Constitutionalism and human rights

The Issue

A country's constitution is its cornerstone in protecting the rights and liberties of its citizens, as well as setting out a framework for political, economic and social governance. Without an adequate framework, society cannot be effectively governed by the rule of law.

This framework of governance must represent the will of the people, and its rules and regulations must be those consented to by citizens. Without this consent, no constitution can be truly democratic or legitimate. It is unfortunate that while many Asian countries have so called constitutions, these do not in fact represent the will of the people. Furthermore, these constitutions are not always used as a framework for governance. For this reason, there is little effective rule of law in the region; instead, violence, corruption and human rights abuse prevail.

The Lessons

Lesson 1 provides an introduction to the concept of constitutionalism and discusses its relationship to human rights and the rule of law in society.

Lesson 2 is a case study of the 1997 Constitution of Thailand.

Cover cartoon from Prachatai news website, 2006

Lesson 1

This lesson introduces the concept of constitutionalism, while making a distinction between adopting a constitution and genuine constitutionalism. The relationship between constitutionalism, human rights and the rule of law is also discussed.

What is constitutionalism?

For genuine democracies, constitutions consist of overarching arrangements that determine the political, legal and social structures by which society is to be governed. Constitutional provisions are therefore considered to be paramount or fundamental law. All other laws within a country must abide by and follow the principles of the constitution. Under these circumstances, if constitutional law itself is inadequate, the nature of democracy and rule of law within a country is affected. This will affect citizens' human rights, which can only be realized and protected under a rule of law framework.

The structure of modern nations has been shaped with government being divided into executive, legislative and judicial bodies, with the commonly accepted notion that these bodies and their powers must be separated. This is one of the most fundamental tenets of modern governance, and as such is a key characteristic of any constitution. Of course, the separation of powers does not mean these bodies function alone, rather they work interdependently, but maintain their autonomy. Other tenets include the idea of limited government and the supremacy of law. Together, these can be termed the concept of constitutionalism.

In other words, constitutionalism is the idea that government should be limited in its powers and that its authority depends on its observation of these limitations. In particular, these limitations relate to legislative, executive and judicial powers. A constitution is the legal and moral framework setting out these powers and their limitations. This framework must represent the will of the people, and should therefore have been arrived at through consensus.

If these are taken to be the basic tenets of constitutionalism, then not all states with constitutions will have embraced constitutionalism; authoritarian governments or military dictatorships do not fulfil the tenets of the supremacy of law or the separation of powers. The judiciary in Cambodia for instance, is highly subordinate to the executive, blurring boundaries between the two arms of government. The huge number of disappearances of alleged political activists in Pakistan is a clear violation of the rule of law. The message sent to society in these cases is clear: it is not the constitution that reigns supreme, but those in power. It is therefore important to distinguish between adopting a constitution and genuine constitutionalism. This distinction becomes particularly important when constitutions are adopted to protect the interests of the ruling regime. A constitution is not merely a document introduced by the state with the title of 'constitution'. Many authoritarian regimes introduce

such documents to justify arbitrary rule. Thailand for instance, has had a new constitution virtually every time there is a change of power. A genuine constitution however, is an attempt to limit and reverse all forms of arbitrariness.

Democracy and constitutionalism

Authoritarian governments are by their very nature unconstitutional. Such governments think of themselves as above the law, and therefore see no necessity for the separation of powers or representative governance. Constitutionalism however, is primarily based on the notion of people's sovereignty, which is to be exercised—in a limited manner—by a representative government. The only consensual and representative form of governance in existence today, is democratic government consisting of multiple political parties, fair elections, freedom of opinion and expression, and the rule of law. In this way, there is a very important and basic link between democracy and constitutionalism.

Just as mere constitutions do not make countries constitutional, political parties and elections do not make governments democratic. Several Asian countries have been termed 'illiberal democracies', for while they have periodic elections, they are not governed by the rule of law and do not protect the rights and liberties of their citizens. India and Sri Lanka are both examples of such countries, where the politicization of public institutions is common, where politicians and government officials are deemed above the law and where there is significant violence against minorities and marginalized groups. Genuine democracies rest on the sovereignty of the people, not the rulers. Elected representatives are to exercise authority on behalf of the people, based on the will of the people. Without genuine democracy, there can be no constitutionalism.

Rule of law

Rule of law refers to the supremacy of law: that society is governed by law and this law applies equally to all persons, including government and state officials [See Lesson Series 40 for a detailed study of the rule of law and human rights in Asia]. There are two aspects to the relationship between constitutionalism and rule of law: not only is constitutionalism the institutional basis for rule of law in any society, it is also safeguarded by the rule of law.

Following basic principles of constitutionalism, common institutional provisions used to maintain the rule of law include the separation of powers, judicial review, the prohibition of retroactive legislation and habeas corpus. The independence of law making bodies is established, as is independence for judges in articulating and interpreting laws. Genuine constitutionalism therefore provides a minimal guarantee of the justice of both the content and the form of law. On the other hand, constitutionalism is safeguarded by the rule of law. Only when the supremacy of the rule of law is established, can supremacy of the constitution exist. Constitutionalism additionally requires effective laws and their enforcement to provide structure to its framework.

Process of constitution making

It is now clear that the constitution is an essential document, laying out the framework of a nation's political, economic and social structure. How should such an important document come into being? First, it is necessary to note that not all constitutions are written documents. The greatest example of a constitution that cannot be found in a written format is the British constitution, which has however, existed for many centuries. Modern constitutions though, tend to be found in written documents.

A framework for a country's governance and structure cannot be laid out without deep intellectual and societal agreements on political, legal and moral issues. In order to arrive at such agreements, there must be considerable public debate and discussion prior to the adoption of any constitution. Such discussion must take into account that all societies will have conflicting interests. While certain interests will inevitably predominate, the impartial protection of rights and liberties should ensure that such dominant interests do not harm others. Drafting a constitution is therefore very much related to democracy and the rule of law.

Modern constitutions have tended to be written in the aftermath of colonial or military repression. They therefore learn from the mistakes of history, and write into new constitutions numerous limits and obligations of government. The 1947 Constitution of India for instance, paid much attention to the rights of individuals to participate in political affairs, as well as the duties of the government in protecting these rights, in particular by limiting the powers of arrest and detention. This was a direct consequence of colonial history, which saw hundreds of political activists taken away and tortured.

Questions For Discussion

1. In your opinion, what are the most important aspects of constitutionalism? Discuss these in relation to the constitution of your country.
2. Discuss the relationship between democracy and constitutionalism. Are non-democratic governments constitutional?
3. How would you explain to a human rights activist or a law student the relationship between human rights and constitutionalism?

Lesson 2

This lesson studies the Thai Constitution of 1997. It is not an exhaustive study of the constitution's strengths and weaknesses; the lesson spotlights unique aspects of the constitution in relation to the rule of law and human rights (as compared to the country's previous constitutions).

More importantly, such a study is timely, given that the country's interim government is in the process of writing a new constitution. The 1997 constitution derived its legitimacy from being created and enforced by the people; hence it is considered the first 'people's constitution'. What is the legitimacy of a constitution written by a government in power through a military coup?

A. The 'People's Charter' of 1997

Since the establishment of constitutionalism in Thailand in 1932 there have been at least 15 constitutions, six of which were adopted between 1968 and 1978. Writing in 1993, Professor Ted McDorman of the University of Victoria in Canada observed that constitutions in Thailand have been seen as nominal rather than normative. That is, they have served to validate the power of the ruling group, rather than lay down ground rules that everyone must obey. "Most political commentators have accepted that the role of a constitution in Thailand has been to legitimate the authority exercised by the then-dominant political forces," McDorman said. For this reason, the country has had a new constitution virtually every time that power has changed hands.

In 1992 however, the people of Thailand broke from this history when popular resistance to the dictator-turned-prime minister General Suchinda Kraprayoon caused the government's downfall and the beginning of some years of reforms, culminating with the 1997 Constitution of Thailand, widely called the 'People's Charter'.

On 11 October 1997 the people of Thailand realised a popular aspiration towards government based upon a rational set of standards applied to all persons, rather than one set of standards for rulers and another for everyone else.

The 1997 Constitution was unprecedented. It was the first to be written by the people of Thailand for the people of Thailand. The assembly that wrote the draft was itself elected by popular vote, not handpicked by some general. The drafters met and discussed the shape and contents of the constitution with people all over the country. Hundreds of interest groups were established to raise and carry forward discussion on and around the drafting. Social debate and exchange flourished. In 2001 Dr Thanet Aphornsuvan of Thammasat University wrote that

"The new Constitution reflected the crystallization of 67 years of Thai democracy. In this sense, the promulgation of the latest constitution was not simply another amendment to the previous constitutions, but it was a political reform that

involved the majority of the people from the very beginning of its drafting. The whole process of constitution writing was also unprecedented in the history of modern Thai politics. Unlike most of the previous constitutions that came into being because those in power needed legitimacy, the Constitution of 1997 was initiated and called for by the citizens who wanted a true and democratic regime transplanted on to Thai soil.”

...For the first time, the rule of law truly became a part of the supreme law. Dr James Klein of the Asia Foundation in 2003 described how,

“Thailand’s fifteen previous constitutions had been subservient to code and administrative law designed by the bureaucracy to regulate individuals in society by restricting their fundamental rights and liberties... Thai politicians, the military and senior civilian bureaucrats had always reserved for themselves the power to interpret the meaning of law and the intent of the constitution.”

As a result of public dissatisfaction at this state of affairs, Dr Kittipong Kittayarak, a former director general of the Department of Probation has written how the 1997 Constitution

“Put great emphasis on overhauling the criminal justice system. The timing of the drafting of the Constitution also coincided with public sentiments for reform, triggered by public dissatisfaction of criminal justice as a result of the wide media coverage on the abuse of powers by criminal justice officials, the infringement of human rights, the long and cumbersome criminal process without adequate check[s] and balance[s], etc. The public also learned of conflicts in the judiciary and other judicial organs which at times were spread out and, thereby, deteriorated public faith in the justice system. With such [a] background, the members of the Constitutional Drafting Assembly used the occasion to introduce a major overhaul of Thai criminal justice” [AHRC, ‘Thailand: The return of the military & the defiance of common sense’, *article 2*, vol. 5, no. 5, October 2006, p.4].

Participatory democracy

The 1997 constitution represented a change from representative to participatory democracy in Thailand. Since 1932, the military and technocrats had made up Thai bureaucracy, with little room for citizens to participate. Furthermore, from 1947 onwards, there has been a vicious cycle of military coups. From the writing of a new constitution to the enacting of laws and mechanisms, the 1997 Constitution provided a means for achieving the reforms desired by the people.

Drafting of constitution

It is important to note that even the process of drafting the new constitution was a democratic, bottom-up process. After years of paternalistic rule and instability, as well as numerous constitutions, all of which did little to promote genuine democracy, the Thai people were ready for change. After a new parliament was in place

following the Black May incident of 1992, the House of Representatives nominated an ad hoc committee, the Constitutional Reform Committee, to analyze the necessary steps for fundamental reform in 1993. This committee presented its report in 1995. The Committee for Developing Democracy then staged a nation wide series of public hearings regarding constitutional reform to ensure that the debate was not limited to Bangkok alone. In May 1996 parliament passed a Constitutional Amendment Bill that provided for a Constitutional Drafting Assembly (CDA) made up of 99 members. There was one member from each of the country's 76 provinces. The rest of the members were experts in public law, political science and public administration short-listed by universities, to be chosen by the parliament. The CDA was to conduct a survey of public opinion through hearings and finalize a draft for presentation to the parliament in 240 days. If parliament voted short of a majority, a public referendum would be held.

With immense public participation, the 1997 constitution was a product of people's aspirations for future democracy and governance. Various pressure groups and NGOs submitted documents to the CDA regarding what they wanted a future constitution to look like. Their past history of unaccountable government, electoral fraud, inefficient justice system and lack of protection for individual liberties led them to seek greater transparency in governance, public participation in the political process and affirmation of the state's obligations towards human rights.

After taking all this into consideration, the Constitution Drafting Committee (CDC) finished a first draft in May 1997. Committee members then travelled throughout the country to listen to opinions on the draft. This provided an unprecedented exposure of constitutional issues to the public and assisted enormously in bringing the process to the attention of a wide spectrum of the population. The CDA members then submitted their own recommendations for amending the draft constitution, and a final draft was approved on 15 August 1997.

Institutional and legislative reform

As part of the fundamental reform of the political system sought by Thai citizens, the new constitution enforced a greater separation of the executive, legislative and judicial branches of government. All three branches were also strengthened, in particular the legislative and judicial.

The executive branch of government comprises the prime minister and his cabinet—the council of ministers—who are individually and collectively responsible to the National Assembly, the legislative branch of government. The prime minister must be appointed from amongst members of parliament, and after his appointment, as well as the appointment of cabinet ministers, these persons cease to be members of parliament.

The constitution separates the National Assembly into the House of Representatives and the Senate, the latter of which, for the first time in Thai history, is directly elected by the people. The 200 Senators cannot be affiliated with any political parties or campaign for election. The Senate cannot be dissolved by the prime

minister. Members of parliament (i.e. of the House of Representatives) are both popularly elected (100 members) as well as selected from a party list (400 members). The party list system aims to allocate seats more fairly and gives parties the opportunity to choose candidates for their knowledge rather than their electability. The National Assembly is thus composed of members of civil society through the Senate, as well as political party members through the House of Representatives.

By preventing members of parliament from holding ministerial posts or government offices at the same time, the 1997 constitution institutes a greater separation between the executive and legislative branches of government. Furthermore, the constitution provides a mechanism by which citizens can monitor and recall certain members of the House and the cabinet.

In order to increase checks and balances within the government, the constitution paid great attention to institutional reform. Old institutions were amended to be more effective—the National Counter Corruption Commission replaced the previous Counter Corruption Commission—and many new ones were introduced to act as watchdogs. Among them were the Constitutional Court, the Administrative Court, the Office of the Auditor-General, the National Human Rights Commission and the Ombudsman.

The Elections Commission was also established, to oversee elections. The 1997 constitution requires everyone to vote in general elections; failure to do so is punishable by law. This stemmed from the desire to overcome vote buying and electoral politics that have dominated past elections. The Commission controls the conduct of all state elections in the country, for the House of Representatives, the Senate, for local assemblies and administrators, and referenda, as well as controlling and being the registrar of political parties and acting as court of first instance for election petitions and similar disputes. Furthermore, votes are to be counted centrally under the Commission's supervision, rather than in polling stations as was the custom previously. The Commission's Chairman has control over the execution of the organic laws on elections and on political parties.

Human rights

Human rights were explicitly recognized in the country's constitution for the first time; the 1997 constitution stipulates that human dignity, not only the rights and liberties of an individual, must be protected. Chief among these rights are individual rights, community rights, rights of children, the elderly, the disabled, and equality of the sexes. Freedom of information, the right to public health and education and consumer rights are also recognized. In all, there are 40 rights mentioned, compared to only nine rights in the Constitution of 1932.

Regarding rights and liberties of the individual, a person has the liberty of dwelling, of travelling and the liberty of making a choice about his or her residence within the country. The right to practice any religion, to private property and inheritance, together with the right of expression, of association, and of information are also

recognized.

People have the right to vote, to run in an election, to form a political party, and to have access to government information. The airwaves are a common resource and cannot be monopolized by the government. People are granted rights to sue the government and public agencies, and to lodge complaints with the Human Rights Commission and the Ombudsman. Furthermore, in criminal and other cases, legal procedures must not violate the accused person's rights to a fair investigation and trial.

Finally, for the first time, the Constitution grants people 'the right to resist peacefully any act committed for the acquisition of power to rule the country by a means which is not in accordance with the modes provided in this Constitution'. This was clearly a reflection of the country's past experience of military coups.

Criminal justice reforms

As mentioned before, the 1997 Constitution was written amidst a background of inefficient and arbitrary justice, which had people calling for basic criminal justice reforms. One of the problems with the Thai legal system was its mix of civil and common law, which resulted in an unbalanced system, particularly regarding the protection of the accused. To address this, the new constitution provides more right to counsel to the accused as well as the right not to be witness against himself, aspects of the common law tradition, as well as providing for a stricter quorum of the court, reminiscent of the civil law tradition.

Other criminal justice reforms instituted by the 1997 constitution:

- **Requirement of a warrant:** Article 237 of the constitution reduces police authority to conduct searches or arrest persons without warrants, and the power to issue these warrants lies with the courts.
- **Right to prompt arraignment:** After arrest, article 237 requires the police to bring the suspect to court within 48 hours.
- **Right to bail:** Article 239 establishes a more transparent bail procedure where the arrested person is entitled to bail proportionate to the offence committed, to demand a reason for the denial of bail, and to appeal such a denial to a higher court.
- **Right to counsel:** The right to have assistance from the state for legal counsel is stipulated in article 242. The state is required to promptly find a lawyer for the suspect if he is confined or detained. Furthermore, article 241 grants the suspect the right to have a lawyer or trusted person present during police interrogation.
- **Right to speedy trial:** To avoid delays in the criminal process, article 241 states that a suspect shall rightfully receive an expeditious, continual, and fair investigation or trial. The term 'continual'—which

never appeared in previous constitutions—was added to prevent the prevalent practice of courts hearing a half-day session in trials once a month.

- **Strict quorum requirement:** Article 236 requires that judges must be present in full quorum when trying a case. It also stipulates that any judge who is not in charge of trying a certain case shall not make a judgment or ruling on that case.
- **Witness protection:** Article 244, for the first time, recognizes the rights of a witness in a criminal case to be protected and treated properly.
- **Rights of crime victims:** Article 245 requires the state to look after victims of crimes or their family members if they have suffered physical or mental assault.
- **Miscarriage of justice:** If it is proved that an individual has not committed the offense he is tried for or if his conduct does not constitute a crime, article 246 provides that he is entitled to appropriate compensation, expenses and the recovery of any rights lost during the time of his detention and trial.

Judicial activism

One very important aspect of the 1997 constitution related to its role for the judiciary, which is a key body in upholding and promoting rule of law and human rights. Together with institutional changes, the 1997 constitution brought about psychological changes as well, not just among judges, but also legal practitioners and among the ordinary people. Courts at all levels were increasingly willing to invoke constitutional rights directly, and consider arguments on human rights principles. The notion of public interest litigation was becoming known and accepted among legal practitioners. People were gaining confidence in the capacity of the courts to address the many problems facing their society. The judiciary, historically by far the weakest leg of the state in Thailand, was at last beginning to flex some muscle.

The following instances between 2003 and 2006 are indicative of the courts taking an active role in deciding issues of national importance:

When protestors against the Thai-Malaysian gas pipeline project were prosecuted, they were acquitted after asserting their rights to assemble and express their opinions freely under the constitution, as were local administrative officers sued by a company for organising meetings against a proposed phosphate mine. Officials of the Anti-Money Laundering Office were found guilty of breaching the constitutional right to privacy of five social activists whose bank accounts and other personal financial details they had illegally investigated. A lawyer sued the public prosecutor for denying him a job because of a physical disability; the court decided that he had suffered discrimination in breach of the constitution.

There were also many innovations. Radio and television broadcasting were identified as national resources to be used in the public interest (section 40); the ground upon which media rights campaigner Supinya Klangnarong successfully stood in

court against the huge resources of the former prime minister's telecommunications empire. Government departments had to inform people of any project that may affect their local environment or quality of life before giving it approval (section 59): the basis for a 2004 judgment against the industry minister and overturning of a mining concession in Khon Kaen that had not first been subject to public debate.

New innovations encouraged new thinking and behaving. Jinthana Kaewkhao, the organiser of a protest against a power plant concession in Prachuab Kiri Khan, won her case after the court defended not only her rights to free assembly and speech but also her right to participate in the management and preservation of natural resources under section 46 of the new constitution. The court went on to observe that this and other new provisions in the law were specifically intended to develop a democratic administration that obliged greater involvement by ordinary persons in public and political life than had earlier charters [AHRC, 'Thailand: The return of the military & the defiance of common sense', pp. 5-6].

Overall, the 1997 Constitution marked a great advance in the thinking of people in Thailand on constitutional issues and the management of their society. It enriched the behaviour of millions. It also constituted a great advance in the notion of consensus. Whereas 'consensus' had earlier been understood in terms of patronage—what the elite decided on behalf of everyone else—it was now understood as mature agreement among the general public. Ordinary people throughout the country soon demonstrated a better grasp of the true meaning of consensus than had the traditional authorities.

The 1997 Constitution was also of importance to many far beyond Thailand. It set an example to a region plagued by authoritarianism and the un-rule of law. As Professor Andrew Harding from the University of London has written, "Thai public law reform should be regarded as being of great significance in the context of the development of the new constitutionalism in Asia and the developing world generally."

B. Fictional constitutionalism

As opposed to the 1997 constitution, the interim constitution prepared by the military government after its coup of September 2006 was not a recognition of the aspirations of the common people. It is likely that the new constitution to be written in the near future will be in a similar vein; it will be written by the ruling regime, *for* the ruling regime.

Process

The interim constitution introduced by the regime—a characteristic of military takeovers in Thailand—is an attempt at pushing the country back towards nominal constitutionalism. It secures the power of the coup group while trying to give the opposite impression. As informed observers have already noted since it was announced on October 1, the charter gives the remodelled junta—which with it changed its name from "Council for Democratic Reform" to "Council for National

Security”—authority of appointment and decision making over the heads of any new government. Apart from appointing the prime minister, and chairperson and deputy chairperson of the temporary parliamentary assembly, under it the junta appoints a 2000-member body which will select 200 persons from among its ranks, among whom the generals again select 100, who are responsible for setting up a 35-person constitution drafting group, among whom 25 will be drawn from the 100 and ten will be handpicked by, yet again, the junta. Questions over the criteria and procedure for selection of the 2000, 200, 100, 35, 25, ten or whatever numbers of persons for whatever posts remain wholly unanswered, and largely unasked.

All this pointless whittling down of persons in order to write a new permanent constitution is apparently intended to distract attention from the fact that it is the junta deciding who does what. It is also apparent that suggestions from law experts to make changes to the document while it was still in draft, which reportedly had as its main author the same person as the 1991 interim constitution, were ignored. It is not surprising that academics and other legal professionals have expressed grave concerns. Of section 34, which allows the junta to call the council of government ministers for a meeting in which to air its views any time it pleases, former senator Thongbai Thongpao wrote in his Sunday Bangkok Post column that it “is not very clever” as it “spoils the pledge of non-interference in the civilian administration”. A cartoon on the independent news website Prachatai put the situation more simply: the constitution drafting assembly is sealed off by a barbed wire fence; two ordinary citizens are left to cling to the fence and shout from the outside.

The interim constitution, like others of its type, also gives all pronouncements by the military regime the force of law, and grants them immunity from prosecution for any coup-related actions. By mid-October there were 36 such announcements and 28 such orders listed on the website of the Council for National Security, the renamed coup group. Apart from scrapping the former government, the 1997 Constitution and Constitutional Court, they have imposed martial law, repealed earlier laws, amended the Royal Thai Police Act 2004, restricted free speech and movement, banned political gatherings, and set up new bodies [AHRC, ‘Thailand: The return of the military & the defiance of common sense’, pp. 6-7].

Judiciary

An independent judiciary is essential in upholding and promoting the rule of law in any society. A few years ago, some senior United Nations staff in Cambodia met with a government minister to discuss the state of the country’s courts. They expressed concern about their lack of independence, and asked what intentions the government had to address this problem. “Don’t worry,” the minister told them simply, “I will make them independent.”

The independence of judges however, cannot simply be declared. It is by the effective functioning of institutions and maintenance of safeguards that judges obtain true independence. Section 18 of the new Constitution of Thailand (Interim) 2006, which was signed into law by the head of the military junta, holds that: “Judges are independent in the trial and adjudication of cases in the name of the King and in the interest of justice in accordance with the law and this Constitution.” Section 35 goes on to order the appointment of a new tribunal in place of the

Constitutional Court, comprising of judges from the two remaining senior courts. Such a declaration is directly contradicted by the order to replace a superior court with a tribunal, and stipulation of its membership, on the signature of a military officer who obtained power by force. In fact, it can be said that

Its appointing of a new constitutional tribunal instead defies the very notion of judicial independence. Its orders to various government agencies to go after members of the former government reveal that its interests are limited to the exercise of “justice” as justification for its own illegal acts, rather than to uphold any notions of the rule of law [AHRC, ‘Thailand: The return of the military & the defiance of common sense’, p. 11].

Above all else, the independence of judges is ensured by security of tenure. This means that judges cannot be removed and appointed on the whims of the executive or any other part of government. It means that courts cannot be opened and closed on the prerogative of any one person or agency outside of the judiciary. It means that judges, once appointed, are not easily or quickly removed.

Innumerable commentaries and precedents established around the world recognize security of tenure as vital to the integrity of the courts and maintenance of the rule of law. In the Federalist Papers, three framers of the United States’ constitution note that “nothing will contribute so much as this to that independent spirit in the judges”. It follows that the 1985 UN Basic Principles on the Independence of the Judiciary have declared: “Judges, whether appointed or elected, shall have guaranteed tenure [AHRC, ‘Thailand: The return of the military & the defiance of common sense’, p. 10].”

The Nation newspaper of October 8 reported Professor Worachet Pakeerut of Thammasat University as saying that coups would continue in Thailand for as long as its courts recognize the amnesties that perpetrators pass for themselves. Worachet said there “was a discrepancy in the Thai judicial system that recognized law written by people in power even though the law was against morality and people’s common sense”. This discrepancy is the crux of Thailand’s problems. For as long as its higher judiciary legitimizes illegal takeovers of power, there will be illegal takeovers. For as long as the orders of generals are written into law through new constitutions, there will be fictional constitutionalism. The highest form of contempt of court is the extralegal removal of a judiciary and legislature, as happened in Thailand on September 19. Where superior courts meekly accept such acts, they lose the public confidence needed to address all issues of national concern. For this reason, it is suggested that “the most important job for the superior courts now, is not to rule on the former government, but to rule on the present one”.

In March 1993, after the 1991 coup group had already been removed from power by public protest, the Supreme Court of Thailand found that a committee set up to investigate the former government was unconstitutional, and in so doing it

overruled order 26 of the coup group as illegal. The time has come to build upon that example, and overrule some more [AHRC, 'Thailand: The return of the military & the defiance of common sense', p. 12].

Rule of law

Without genuine constitutionalism and an independent judiciary, there is little hope that Thailand will be governed by the rule of law under the current military junta. This was made clear by the interim prime minister when he said that "I am not a politician and I am not bound by special interests." He added however, that "I have the authority and the power that comes with being an appointed prime minister to act quickly and decisively." In other words, General Surayud says it is a good thing that he is unencumbered by any political parties and an elected parliament. This is contrary to the notion that only a head of government bound by the institutions of the rule of law, among them a functioning parliament and courts, can uphold the rule of law. General Surayud's very position, and his assertion of his authority to act upon it, is itself a violation of the rule of law. Inseparable from the rule of law is the notion of parliamentary sovereignty. This means that an independent parliament alone has the power to pass acts, free from interference, with effect in law. Those acts may then fall within the exclusive purview of the courts. In this way the judiciary too is strengthened, and its role reaffirmed as the arbiter of the law.

In the absence of a sovereign parliament, who is making the law in Thailand? Certainly no one answerable to its people: an unelected assembly of military and police officials, bureaucrats and academics is acting on their behalf.

A military coup necessarily displaces the foundations upon which the rule of law operates. Where an army unilaterally takes power by force and abrogates the national constitution, it is acting illegally to undermine everything upon which the courts stand. In an interview with The Times newspaper, a senior spokesman for the junta has admitted as much. "[The coup] is against the law... But sometimes, to break the deadlock, someone has to do something," Major General Thawip Netniyom is reported as having said.

While the phrase 'someone has to do something' can be used to justify anything, how can an unconstitutional act be made constitutional simply by declaring it so? How can an illegal act be made legal? To bypass the national constitution and legal framework because "sometimes someone has to do something" is not to solve any problems. It is to throw justice into the rubbish bin. And with it go the principles upon which human rights are protected, international laws written and courts established. This is not stability; it is not rule of law: it is its antithesis. It is dictatorship.

Although the 1997 constitution was innovative and much more participatory than previous constitutions, it was not 'a complete work of art but rather a work in progress'.

Recent years saw some conflict with regard to certain institutions established by the Constitution, such as the Constitutional Court and the Election Commission. However, the 1997 Constitution sought to make itself the basis of law, with government agencies subordinate to it, rather than vice versa; this was nothing short of a revolutionary change, and it was bound to bring conflict and problems. The development of new institutions, particularly where they challenge established authority, is by its very nature provocative.

Good constitutions do not die simply because bad governments abuse them. The Constitution of India was not destroyed by Indira Gandhi's dictatorial emergency rule in the mid 1970s; it was used by the people to oppose and defeat her. The Constitution of Nepal did not die despite the efforts of King Gyanendra to reimpose absolute monarchy; again people fought back and restored their democracy. Nor is the Constitution of the United States of America dead, despite the immense abuse of powers by the Bush administration.

By the same token, rewriting the constitution cannot solve the problems facing Thailand. This should be kept in mind at a time when the interim government is in the process of drafting a new constitution. In particular, the basic principles of constitutionalism upon which the 1997 constitution was based should be remembered.

The relationship between constitutionalism, human rights and the rule of law should be carefully studied. Not only in Thailand, but throughout the region, human rights activists must get involved in debating such issues in order to improve poor human rights situations.

Questions For Discussion

1. In your opinion, what is particularly valuable to learn from the Thai constitution of 1997?
2. What do you know of your national constitution? Does it follow principles of genuine constitutionalism?
3. Discuss drafting a constitution for country x. Keep the following factors in mind during your discussion:
 - a. Public consultation
 - b. Protection of rights and liberties
 - c. Framework for political, legal and moral governance