



## ‘Societal Culture and Constitutions: The case of Thailand’

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In what ways is culture reflected in the substance of the Constitution, including constitutional text? What are the implications (both positive and negative) of this, for example for local ownership, national identity, constitutional interpretation?

Culture is reflected in the phrase ‘democracy with the King as Head of State’ which can be found in more than ten articles in the current Constitution, appearing in the preamble and the general provisions, in the catalogue of rights and duties, in the amendment procedure section and in the ‘National Policy’ section.

This phrase, whose interpretation depends on justices of the Constitutional Court, is influenced by Thai constitutional doctrine and political, social and cultural context, and sets heavy but fluctuating constraints on constitutional practices.

First, culture is enshrined in the preamble as follows:

*His Majesty King Maha Vajiralongkorn Bodindradebayavarangkun is graciously pleased to proclaim that the Prime Minister has respectfully informed that since Phrabat Somdet Phra Paramintharamaha Prajadh. ipok Phra Pokklao Chaoyuhua graciously granted the Constitution of the Kingdom of Siam, B.E. 2475 (1932), **Thailand has continuously and always maintained its adherence to a democratic regime of government with the King as Head of State**, even though Constitutions have been annulled, amended and promulgated on several occasions [...] This will in turn drive the country to progressively develop and become stable, prosperous and sustainable, politically, economically and socially, under the democratic regime of government with the King as Head of State.*

The preamble refers to both authoritarian and democratic constitutions, legitimizing them equally as being under the patronage of the King.

Culture is also reflected in the following provisions:

- Section 2 provides that ‘Thailand adopts **a democratic regime of government with the King as Head of State**’, while section 255 provides that ‘An amendment to the Constitution which amounts to changing the democratic regime of government with the King as Head of State or changing the form of the State shall be prohibited’. According to article 255, section 2 is therefore unamendable – it is an eternity clause. Based on former case-law, it potentially means that a constitutional amendment reforming the modes of selection of the Senate is unconstitutional (the Senate must be appointed or half-appointed). Although there is no case-law on the topic, it also probably means that the Privy Council, appointed at the discretion of the King, cannot be abolished.

➤ Section 5 states:

*The Constitution is the supreme law of the State. The provisions of any law, rule or regulation or any acts, which are contrary to or inconsistent with the Constitution, shall be unenforceable. Whenever no provision under this Constitution is applicable to any case, an act shall be performed or a decision shall be made in accordance with **the constitutional conventions of Thailand under the democratic regime of government with the King as Head of State.***

This provision can be interpreted by royalist justices as meaning that the King has discretionary powers to remove and appoint prime ministers in times of crisis or after a military coup, as set by the precedents of 1973, 1976 and 1992.

➤ Section 45 provides 'A person shall enjoy the liberty to unite and form a political party **under the democratic regime of government with the King as Head of State**, as provided by law'. In the current political context, this provision de facto prohibits political parties with republican views, or parties with too moderate loyalty for the King. For instance, parties which would propose the abolition of the *lèse-majesté* law, according to which any criticism of the King shall be punished by a jail-term of 3 to 15 years, would probably face dissolution.

➤ Section 49 provides:

*No person shall exercise the rights or liberties **to overthrow the democratic regime of government with the King as Head of State.** Any person who has knowledge of an act under paragraph one shall have the right to petition to the Attorney-General to submit a motion to the Constitutional Court for an order to cease such act. In the case where the Attorney-General orders a refusal to proceed as petitioned or fails to proceed within fifteen days as from the date of receiving the petition, the person making the petition may submit the petition directly to the Constitutional Court. The action under this section shall not prejudice the criminal prosecution against the person committing an act under paragraph one.*

This provision means, in the present context, that a party or politician cannot propose a reform of the Senate, the Privy Council or the *lèse-majesté* law, *inter alia*.

➤ Section 50 provides 'A person shall have the following duties: (1) to protect and uphold the Nation, religions, the King and the democratic regime of government with the King as Head of State'.

➤ Section 78 provides

*The State should promote the correct knowledge and understanding of the public and communities regarding **the democratic regime of government with the King as Head of State**, and their participation in various aspects of the development of the country, in the provision of public services at both national and local levels, in the scrutiny of the exercise of State power, in combating against dishonest acts and wrongful conducts, as well as in decision making in politics and in all other matters that may affect the public or communities.*

Thus, a decontextualized, 'textual' reading of the Thai Constitution, would utterly misread the Constitution.

### Where culture is not reflected in the substance of the Constitution, how do the two co-exist?

Thailand's strong Buddhist culture is not reflected in the Constitution, which makes it appear rather secular, when in reality, the Thai State is very religious. Buddhist doctrines govern how power is exercised by the King in the polity, sometimes bypassing the (elected or not) Parliament. The Buddhist

notion of dharma, to be enforced by the King, is deemed superior to secular law. Secular law, therefore, either in the form of a constitutional disposition, an organic or a legislative act, can be superseded by dharma as upheld by the King.

### Do aspects of culture provide points of continuity, even as the written constitution changes? If so, how?

Thailand has had 20 constitutions since 1932, when the People's Committee overthrew the absolute monarchy. There is an average of a Constitution every 4.5 years, with a coup every 6.5 years. This practice has developed into a regular pattern, called 'the vicious cycle of Thai politics' (*wongchon oubat kanmuang thai*). An interim constitution, short and fully authoritarian, is followed by a permanent constitution, which is more democratic, providing for elections. Once elections are held, a new military coup comes to abolish the constitution and the junta engages in the drafting of a new authoritarian, interim Constitution. In this process, the King personifies continuity in the Thai State. He also signs both the appointment of the head of the junta, usually following a royal audience, and the new constitution. Therefore, the Monarchy provides the point of continuity between constitutions.

Against this background, it has become common in Thailand to talk about the 'cultural constitution'. In the 1980s, prominent historian Nithi Eawsawong published a seminal work in this regard. It can be useful to quote Nithi Eawseewong at length here:

*The constitution is said to be the supreme law, but only because foreigners said this already. We copied their textbook and memorized it like a parrot. It has no real meaning in Thai culture. If it had real meaning, the constitution could not be torn up often, and laws, ministerial orders, regulations, and so on could not contravene the constitution. But in Thailand the constitution is torn up often, and more easily than the various rules and regulations of ministries and departments. Besides, there are many laws, ministerial orders, regulations, and so on, which contravene the constitution. Yet neither those enforcing these rules, nor those subject to them, feel any embarrassment at all.<sup>1</sup>*

Nithi then identifies several cultural elements forming the core of what he calls the 'cultural constitution' (*ratthathammanun chabap wattanatham*): the Monarchy, Buddhism, the Military, the 'indivisibility of spiritual and temporal power', and the notion of '*barami*' or influence, which does not derive from secular law but from the law of karma. One could argue that the cultural constitution is also supra-constitutional in that it governs the relationship between constitutions and is applied in times when there is no constitution.

### Who makes claims to societal culture? How is culture used to further a constitution building project? Can the concept of culture be misused or abused in this context?

Royalists use culture, especially the Buddhist notion of *Rajadharma*, to impose their own reading of the constitution, according to which the King has special powers on top of customary powers rooted in ancient traditions. The bureaucracy, in particular the military and the judiciary, see their role as being to uphold the 'democracy with the King as Head of State', therefore partaking in military/judicial coups on a regular basis. Both institutions cooperate on that matter. In a series of cases, courts have

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<sup>1</sup> Nithi Eawseewong, 'The Thai Cultural Constitution', English translation available in the *Kyoto Review of South East Asia*, 2003 issue 3 <https://kyotoreview.org/issue-3-nations-and-stories/the-thai-cultural-constitution/>

established that military coups are legal and constitutional once effective. Meanwhile, military coups have never interfered with or challenged the autonomy of the judiciary.

### What are the implications of culture for inclusive constitution building processes?

For foreigners, the most difficult yet necessary task is to understand the deep meanings attached to the phrase 'Thailand is a democratic regime of government with the King as Head of State', instead of reading the Thai institutional design as a 'standard' constitutional monarchy based on the Westminster model. This understanding will shed light on the relationship between the military, the Monarchy and the parliament, the role of the Senate and the Privy Council as pillars of the regime, broadly defined as 'democracy with the King as Head of State'.

Another interesting point about Thailand's constitution-drafting processes is that they have been extremely rich and diverse. Thai constitution-drafters have much more experience and knowledge than what foreign advisers usually think they do. There is an entire constitution-drafting industry in Thailand, which operates in a very efficient and sophisticated manner.

As early as 1974, Thailand has experienced participatory constitution drafting on a massive scale. In 1997, the process was also innovative and participatory. Many constitutional innovations were included in the 1997 text, especially with regards to 'independent constitutional organs' such as the National Counter-Corruption Commission. The Thai Constitutional Court is also one of the most powerful Constitutional Courts in the world, endowed with wide-ranging powers of dissolution of political parties.

The simplistic (and orientalist) views often held by foreign advisers that non-democratic regimes are constitutionally unsophisticated does not hold for Thailand.

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