

Constitutional afterlife: The continuing impact of Thailand's postpolitical constitution

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Thailand's constitution of 1997 introduced profound changes into the country's governance, creating a "postpolitical" democratic structure in which an intricate array of guardian institutions served to limit the role of elected politicians. Ultimately, the constitutional structure was undermined in a military coup against populist billionaire Thaksin Shinawatra, who had taken over many of the institutions designed to constrain political power. Nonetheless, the 1997 constitution appears to be having a significant afterlife, in that its institutional innovations have survived the enactment of a new Constitution and continue to constrain the political process. This article describes the Thai situation and speculates on the conditions for constitutional afterlife.

On September 19, 2006, General Sondhi Boonyaratkalin of the Thai military led a bloodless coup while the country's controversial prime minister, Thaksin Shinawatra, was in New York, participating in the annual opening debate of the United Nations General Assembly. The next day, the self-proclaimed National Administrative Reform Council abolished the 1997 constitution. Thus ended an experiment in constitutional design that had been devised to overcome Thailand's chronic problems of political corruption and instability, and had been heralded as an innovation in Asian constitutionalism more generally. As Thailand's political crisis continues under its new 2007 Constitution, this article considers the impact of the 1997 document and argues that, notwithstanding its premature death, the document is likely to continue to exert significant influence in Thai politics.

The Thai constitution of 1997 (B.E. 2540) exemplified a recent trend in constitutional drafting that is best characterized as postpolitical. The postpolitical constitution involves enhanced efforts to structure and channel democratic power and to limit the role of partisanship, encompassing not only constitutional courts but myriad other institutions that effect a highly refined

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separation of powers.¹ Thailand's 1997 document featured a complex set of "guardian" institutional safeguards against legislative overreaching, constructed in nested institutions of mutual checks and balances. Not only did the constitution establish an array of independent oversight institutions, each with an intricate appointment mechanism, but it also included a nonpartisan elected body, the Senate, which played a central role in appointing the oversight institutions and was thought to guarantee insulation from the allegedly corrupting influence of political parties.

This elaborately structured edifice of constraints on politics was, in the end, unable to withstand the political influences of Thaksin's billionaire populism. Postpolitical constitutions, the Thai example suggests, are hardly capable of restraining politics but, nonetheless, may transform it in novel ways. Indeed, one might speculate that postpolitical constitutions risk politicizing institutions with technocratic bases of legitimacy, overloading them with tasks they are not designed or prepared to handle. In the case of Thailand, the guardian institutions became vulnerable to hidden influence from the prime minister, who was willing to use an array of tools to perpetuate his power. This triggered forces that killed the 1997 constitution at the age of nine.

But the formal death of the constitution did not terminate the various independent guardian agencies that it established. Most of these remained functional during the entire period of the coup and interim constitution, notwithstanding the lack of a formal legal basis for their authority, and were thus well-positioned to help usher in the current Constitution, with its slightly restructured but still heavily technocratic arrangements, which was adopted by referendum in August 2007. This suggests the notion of the *constitutional afterlife*, the impact of a text beyond the formal survival of a constitution as a legally binding document.

Constitutional afterlife provides a novel way of thinking about constitutional impact. Traditionally, we think about the impact of constitutions in terms of the efficacy of their formal provisions. We imagine that constitutions matter when there is congruence between text and practice, and do not matter when such congruence is lacking. We might ask, for example, whether rights promised in the text are actually observed in fact, or whether institutions set up by a constitution operate within its constraints.² Another criterion for success or failure might be endurance of the formal text, or the ability of a constitutional regime to deliver political goods such as economic growth and democratic stability.³ The Thai example suggests that constitutions might also

¹ See FRANK VIBERT, *THE RISE OF THE UNELECTED: DEMOCRACY AND THE NEW SEPARATION OF POWERS* (Cambridge Univ. Press 2007); Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000).

² Linda Camp Keith, *Constitutional Provisions for Individual Human Rights (1976-1996): Are They More than Mere 'Window Dressing?'* 55 POL. RES. Q. 111 (2002).

³ Zachary Elkins, Tom Ginsburg & James Melton, *The Lifespan of Written Constitutions* (unpublished manuscript, on file with authors).

matter for their enduring institutional innovations. Constitutional afterlife may be particularly important for the study of constitutionalism in unstable political environments.⁴ While modern Thai history does not bode well for the long-term survival of the current constitutional document, institutional endurance alone marks a significant step toward stability, and the legacy of 1997 may continue to make a difference for Thai governance.

1. Thailand's constitutional graveyard

1.1. History

The Kingdom of Siam was an absolute monarchy until 1932, when a group of young army officers led a bloodless coup d'état and established a constitutional monarchy. Those behind the new system were not republicans: they undertook their revolution while addressing the king as subjects and insisting that he had the final decision on whether to allow the establishment of constitutional government.⁵ The political forces behind the coup included both right-wing elements in the military and bureaucracy, and left-wing nationalists clustered around the intellectual Pridi Banomyong. The tension between the two (and with a third group, royalists who eventually aligned with the military in 1957) has arguably dominated Thai politics, in one form or another, for seven decades.

Pridi was an anticolonial nationalist, of the same generation and orientation as Aung San, Nehru, and Ho Chi Minh. Unlike those figures, however, he faced not a departing colonial power but a more complex domestic environment in which the very nature of the state was highly contested.⁶ Pridi was one of the major drafters of the 1932 constitution, which promised direct elections once half the citizens had completed primary education.⁷ But when his economic plan included elements of nationalization, he was labeled a communist, and successive coups by the military and royalists followed, until politics stabilized under antiroyalist General Plaek (Phibun) Phibunsongkhram. Phibun aligned with Japan during World War II, and changed the name of the country from Siam to Thailand.⁸ After the war, Pridi became the country's first elected prime minister, but Phibun soon managed to regain power, exiling Pridi. Phibun was deposed in turn by another coup in 1957, in which royalist elements allied with the army under Field Marshal Sarit Thanarat. The following

⁴ See also GRETCHEN HELMKE, *COURTS UNDER CONSTRAINTS* (Cambridge Univ. Press 2005).

⁵ PAUL HANDLEY, *THE KING NEVER SMILES: A BIOGRAPHY OF THAILAND'S BHUMBOL ADULYAJEJ*, 45 (Yale Univ. Press 2006).

⁶ PRIDI BANOMYONG, *PRIDI BY PRIDI* (Chris Baker & Pasuk Phongpaichit trans., Silkworm 2000).

⁷ CONST. SIAM (1932) art. 10.

⁸ SULAK SIVARAKSA, *SEEDS OF PEACE* (Parallax 1992).

five decades witnessed an oscillation between military rule and civilian government, accompanied by frequent constitutional change.

In seventy-six years since the establishment of the constitutional monarchy, Thailand has had eighteen constitutions, somewhere between seventeen and twenty-three coups and coup attempts, and fifty-six governments.⁹ The pattern of constitution-making seems to have involved cycling among a relatively small number of institutional variants. The 1932 constitution, for example, was the basis for the 1952 document, just as the 1997 constitution was the basis for the 2007 document. One of the chief axes of constitutional change has been whether the National Assembly, particularly the upper house or Senate, is to be elected or appointed by the government, military, or king. Because of their ephemeral quality, Thai constitutions do little to constrain those in power in accordance with the constitutionalist ideal. Still, the very fact that constitutions are repeatedly promulgated suggests that they are playing some role in legitimating power-holders, and may reflect what one scholar describes as an “almost mystical faith that the promulgation of modern codes, statutes and constitutions would somehow produce a modern Thailand.”¹⁰

1.2. The unwritten constitution

As in every country, underlying the formal constitutional text of the day in Thailand is a set of informal norms and rules that constrains the exercise of political power.¹¹ The unwritten constitution forms a daunting challenge for comparative research, as it lacks the clarity and definitiveness that we associate with legal rules, but is particularly helpful for understanding Thailand, where formal rules are unstable. Real constitutional constraint comes from unwritten constitutional norms, particularly those concerning the role of the country’s long-ruling and widely respected monarch, King Bhumibol Adulyadej, who took the throne after the still-unsolved murder of his brother in 1946.¹²

⁹ The dates of the country’s constitutions include 1932 (two documents were promulgated that year), 1946, 1947 (interim), 1949, 1952 (revisions of the 1932 constitution), 1957, 1968, 1972 (temporary), 1974, 1976, 1977, 1978, 1991 (two documents), 1997, 2006 (interim), and 2007. See http://en.wikipedia.org/wiki/Constitution_of_Thailand. On coups, see <http://www.harvardir.org/articles/1587>; <http://australianetwork.com/news/infocus/s1745603.htm>; and <http://www.abc.net.au/7.30/content/2006/s1745732.htm>.

¹⁰ DAVID M. ENGEL, *LAW AND KINGSHIP IN THAILAND DURING THE REIGN OF KING CHULALONGKORN* (Univ. Michigan Press 1975).

¹¹ For treatments of the unwritten U.S. Constitution, see HERBERT W. HORWILL, *THE USAGES OF THE AMERICAN CONSTITUTION* (Kennikat 1925); CHRISTOPHER G. TIEDEMAN, *THE UNWRITTEN CONSTITUTION OF THE UNITED STATES* (G.P. Putnam 1890); and Ernest A. Young, *The Constitution Outside the Constitution*, 117 *YALE L. J.* 100 (2008). See also Bruce Ackerman, *The Living Constitution*, 120 *HARV. L. REV.* 1737 (2007).

¹² See generally, HANDLEY *supra* note 5; Chai-Anan Samudavanija, *Thailand: A Stable Semi-Democracy*, in 3 *DEMOCRACY IN DEVELOPING COUNTRIES: ASIA* 305 (Larry Diamond et al. eds., Lynne Rienner 1989).

The unwritten constitutional status of the king did not emerge automatically in 1932, but was the result of decades of political battles between the monarchy, elected politicians, and the military. In 1956, for example, the king made a veiled criticism of the military junta, provoking a strong reaction from Phibun that threatened royal autonomy.¹³ Since Sarit's coup in 1957, however, the palace has gradually expanded its authority, and the royally endorsed coup has become a standard feature of Thai politics. It was most apparent in 1981, when coup leaders moved against Prime Minister Prem Tinsulanond (a former general) and took over much of Bangkok. The king's refusal to grant the leaders an audience was crucial in undermining the coup, which collapsed after three days.¹⁴

The king has developed ties with all the powerful groups in society, and the monarchy has established itself as the ultimate arbiter of political conflicts, sharing power with the politicians, bureaucrats, and generals who run the country on a day-to-day basis. The monarchy has remained a stabilizing factor, aloof from politics and yet intervening at crucial times to keep the system in some semblance of balance. This role has been played as a matter of informal politics rather than formal institutional authority. For example, the formal powers given to the king in the 1997 text were perhaps greater than what is accorded in comparable European constitutional monarchies, but not formidable.¹⁵ In reality, the king's frequent though elliptical interventions in politics have meant that governance was bound by informal as well as formal constraints.¹⁶ At times, however, the monarch's interventions have gone well beyond his limited formal role. For example, in 1992, King Bhumibol appointed technocrat Anand Panyarachun as prime minister over elected MP Somboon Rahong, who had been nominated by the Parliament. The choice was widely accepted, despite its utter lack of constitutional basis.¹⁷

An incomplete listing of the unwritten constitutional rules is as follows: the monarch, head of state, is highly respected and will limit his interventions in the political sphere.¹⁸ However, on the occasions when he exercises

¹³ HANDLEY, *supra* note 5, at 134.

¹⁴ Kobkua Suwannathat, *The Monarchy and Constitutional Change Since 1972*, in REFORMING THAI POLITICS 57 (Duncan McCargo ed., Nordic Institute of Asian Studies 2002).

¹⁵ These include refusing to assent to bills and calling for further deliberation (§ 94); dissolving the House of Representatives (§ 116); and convoking extraordinary sessions of the National Assembly.

¹⁶ KOBKUA SUWANNATHAT-PIAN, *KINGS, COUNTRY AND CONSTITUTIONS: THAILAND'S POLITICAL DEVELOPMENT 1932-2000* (Routledge Curzon 2003).

¹⁷ Suwannathat, *supra* note 14, at 57, 61, 65.

¹⁸ James Ockey, *Monarch, Monarchy, Succession, and Stability in Thailand*, 46 ASIA PAC. VIEWPOINT 115 (2005) (monarch has institutionalized his influence to a great degree).

his power, he will be respected. The military can step in to resolve perceived crises, and coups are a perfectly acceptable method of leadership change. However, coup-makers should always seek a private blessing from the throne before, and a public one immediately after, any coup.¹⁹ Meanwhile, violence against the people is rarely, if ever, legitimate,²⁰ and no political force is entitled to excessively restrict the freedoms of the people. Furthermore, there seems to be a constitutional understanding now that coup leaders should restore democracy by promising new elections and a new constitution. The coup leaders invariably promulgate a new interim text—the fact that Thailand has had so many constitutions attests to the tradition of blessing coups in this fashion. As one commentator has observed, Thailand has accepted constitutional processes without accepting constitutional ideals and practices, repeatedly adopting new texts that fail to endure or constrain.²¹

The unwritten constraints, however, ensure that Thai authoritarianism is, in relative terms, not very authoritarian.²² Compared with neighboring Myanmar or Indonesia, repression by the Thai military has been relatively mild, even in its darkest hours. One can conclude that, though proceeding from a different historical tradition from Western liberal constitutionalism, Thai society operates on the basis of quasiconstitutional understandings of limitation on government that do not proceed from a written text.

The monarch does not view constitutions as enduring or permanent institutions that constrain and channel power; in fact, he has spoken of constitutions as foreign imports, based on textbook notions of democracy that are not appropriate for Thailand's unique political culture.²³ Drawing on the Buddhist idea of impermanence, the king has emphasized that

¹⁹ Even the antiroyalist Phibun Phibunsongkram sought the king's formal approval. HANDLEY, *supra* note 5, at 91. In 1977, the Kriengsak coup did not seek go-ahead approval in advance, and was not received warmly by the king. *Id.* at 267–268.

²⁰ HANDLEY, *supra* note 5, at 267 (“Coups by this time were accepted among large parts of the Thai elite as a natural political change, especially if they were not violent.”). Bhumibol criticized the coup-makers and the protesters in 1973, 1976, and 1992.

²¹ Kanok Wongtrangan, *Executive Power and Constitutionalism in Thailand*, in CONSTITUTIONAL AND LEGAL SYSTEMS OF ASEAN COUNTRIES 287, 289 (Carmelo V. Sison ed., Academy of ASEAN Law and Jurisprudence, Univ. Phillipines 1990), discussed in Ted L. McDorman, *The 1991 Constitution of Thailand*, 3 PAC. RIM L. & POL. J., 257, 263 (1995).

²² See McDorman, *supra* note 21, at 218; Samudavanija, *supra* note 12; see also Ted L. McDorman & Margot Young, *Constitutional Structures and Human Rights in Southeast Asia: Cambodia, Indonesia, Thailand and Vietnam*, 47 U. NEW BRUNSWICK L. J. 85 (1998).

²³ In a 1992 speech, he mischaracterized the United States as providing a constitutional right to welfare, which he argued would not be fiscally sound if imported to Thailand. HANDLEY, *supra* note 5, at 344.

unworkable institutions can easily be changed and that constitutions are impermanent human creations.²⁴ Thailand's constitutional monarchy thus differs significantly from that of the United Kingdom or the Netherlands. There, *constitutional* monarchy suggests that both constitution and monarch are enduring, and that the former constrains the latter. The monarch is the embodiment of the nation, but not a force in politics. In Thailand, the monarchy is permanent, while constitutions are ephemeral. Constitutions may not regulate the monarchy; nonetheless, they *are* used to legitimate temporal power-holders.²⁵

This constitutional scheme is workable in large part because the state is autonomous and continues to function without much interference from the political classes. Thailand has been influentially, if elliptically, described as a “bureaucratic polity,” to emphasize the relative autonomy of the state and the idea that political organization tends to occur in pervasive patron-client relations with state elites.²⁶ The political parties are viewed as almost parasitic on the society, using money to organize their constituents rather than representing organic interests from the bottom up. There has been limited local involvement in decision-making, as governors are appointed Ministry of Interior bureaucrats. In short, Thailand's stabilizing institutions—monarchy, bureaucracy, and Buddhism—all derive their power from extraconstitutional sources and are constrained by a set of informal norms rather than by formal rules.

One increasingly salient question is whether the unwritten constitutional rules with the traditional monarch at the center are institutional in character or uniquely tied up with the charismatic authority of Bhumibol Adulyadej.²⁷ This issue is crucial, particularly as a monarchical succession looms. The crown prince is widely believed to lack the gravitas of his father, and so it is unclear whether he can use his power with sufficient prudence so as to preserve it. While the issue is beyond the scope of this paper, succession will provide a crucial test for the unwritten constitution.²⁸

2. The 1997 constitution

The Thai constitution of 1997 was a watershed in Thai politics, marking the first time that a constitution was adopted with widespread public

²⁴ HANDLEY, *supra* note 5, at 434; *see also* Andrew Harding, *Buddhism, Human Rights and Constitutional Reform in Thailand* 1 *ASIAN J. COMP. L.* (2007), available at http://works.bepress.com/andrew_harding/1.

²⁵ Samudavanija, *supra* note 12.

²⁶ FRED RIGGS, *THAILAND: MODERNIZATION OF A BUREAUCRATIC POLITY* (1966).

²⁷ SUWANNATHAT-PIAN, *supra* note 16, at 2, 20, 76.

²⁸ HANDLEY, *supra* note 5 at 363; *but see* Ockey, *supra* note 18 (greater institutionalization).

involvement.²⁹ In 1991, one of the country's many coups had been triggered by intramilitary factional politics.³⁰ Once in power, the new leaders began to engineer constitutional reform to maintain power, and a military man, General Suchinda, was elected as premier. Political parties protested, and large demonstrations developed on the streets of Bangkok in May of 1992, demanding broader constitutional reform and a return to democracy. These protests were met with violence by the military. The crisis was averted only when the king remonstrated with the military prime minister and the leader of civilian protests on television.

There followed an interim government of technocrats with some military representation, charged with overseeing the eventual return to democracy. Initially, the government sought to effectuate the transition through a constitutional amendment process, but ultimately it was decided that an entirely new draft was needed.³¹ A drafting commission, which included some elected members as well as appointed members, produced proposals in 1995, but these were resisted by entrenched elements of the Thai scene.³² The drafting commission consisted of widely respected academics, as well as lawyers and other technocrats, but it had the support of the military.³³

Despite the king's call for a short, simple constitution,³⁴ the final draft was formidable: 336 articles and 142 pages in English translation.³⁵ The process

²⁹ For general accounts, see Peter Leyland, *The 2007 Constitution and the Continuing Quest For Good Governance In Thailand* (2001) (draft on file with author); Andrew Harding, *May There Be Virtue: 'New Asian Constitutionalism' in Thailand*, 3 *ASIAN L.* 236, 241 (2001); Michael Connors, *Framing the 'People's Constitution'*, in *REFORMING THAI POLITICS*, *supra* note 14, at 37 (critiquing NGOs but essentially optimistic analysis); Duncan McCargo, *Introduction*, in *REFORMING THAI POLITICS*, *supra* note 14; see also Sombat Chantornvong, *The 1997 Constitution and the Politics of Electoral Reform*, in *REFORMING THAI POLITICS*, *supra* note 14, at 203.

³⁰ The coup followed rare public criticism of Western-style institutions by the king. HANDLEY, *supra* note 5, at 337–339; see generally Ted L. McDorman, *Constitutional Change and Continuity in Thailand in the Aftermath of the 1991 Coup*, in *ASIA-PACIFIC LEGAL DEVELOPMENT* 218 (Douglas A. Johnson & Gerry Ferguson eds., Univ. British Columbia Press 1998).

³¹ Duncan McCargo, *A Hollow Crown*, 43 *NEW LEFT REV.* 135 (2007) (tying the need for a new draft to the desire to avoid political violence after the death of the current monarch, a sensitive assertion that was not reported in the local media).

³² Peter Leyland, *Thailand's Constitutional Watchdogs: Dobermans, Bloodhounds or Lapdogs?*, 2 *J. COMP. L.* 151 (2008).

³³ Harding, *supra* note 24, at 239; see also Andrew Harding, *Southeast Asia, 1997–2003: Two Case Studies on the Politics of Law and Development*, in *GLOBALISATION AND RESISTANCE: LAW REFORM IN ASIA SINCE THE CRISIS* (Christoph Antons & Volkmer Gessner eds., Hart 2007).

³⁴ HANDLEY, *supra* note 5, at 434.

³⁵ After the constitution's demise, former coup leader Suchinda Krapayoon argued that the constitution was too detailed. *Thailand's Struggle for Constitutional Survival*, Matichon, Mar. 12, 2007, quoted in 6 *ARTICLE 2*, at 2 (2007), at <http://www.article2.org/mainfile.php/0603/279>.

was designed as a model of public involvement and deliberation, with extensive consultations and education sessions. The adoption process, too, included the public as a backup option: the constitution was to be adopted by the National Assembly, but if the assembly rejected the draft, it would be put to public referendum, for the first time in Thai history. Huge public discussions with t-shirts (green for supporting the constitution, yellow for opposition) engendered public debate and discussion. In the end, the referendum was unnecessary, as the National Assembly adopted the text amid great public support.

Many of the provisions of the 1997 document, such as the extensive list of rights, were fairly standard. The real innovations were institutional and were characterized by some as revolutionary in character.³⁶ Designed to develop good governance and to resolve Thailand's longstanding political problems, the document cabins and regulates the political process extensively.³⁷ The main democratically elected body was the House of Representatives, selected using a mixed electoral system combining proportional representation and a set of district-based constituencies using a first-past-the-post system.³⁸ House members were required to belong to political parties, and the constitution provided that expulsion from a party required giving up one's seat.³⁹ This innovation was designed to give party leaders control over their members and to encourage party discipline. It also was designed to overcome chronic problems of party-switching that had prevented the emergence of stable parties, as candidates would move around depending on which party made the best offer.⁴⁰

Besides the House, the legislature included an elected Senate, composed exclusively of nonparty actors: anyone who had been a member of a political party for the past twelve months was ineligible. Here we can see clearly the

³⁶ Paul Chambers, *Good Governance, Political Stability and Constitutionalism in Thailand 2002* 16 (Occasional Paper, King Prajadhipok's Institute, Aug. 10, 2002).

³⁷ My characterization of the motives as being good governance perhaps underemphasizes the specific political interests at stake. Michael Connors, *Political Reform and the State in Thailand*, 29 *J. CONTEMP. ASIA* 201 (1999).

³⁸ CONST. OF THE KINGDOM OF THAIL. (1997) §§ 98, 99, 102 [hereinafter 1997 CONST.].

³⁹ *Id.* at § 118. The constitution also contained some paternalistic elements. MPs were required to have a bachelor's degree, an undemocratic requirement that Harding believes was nevertheless widely supported. Andrew Harding, *May There Be Virtue: 'New Asian Constitutionalism' in Thailand*, 3 *ASIAN L.* 236, 241 (2001). One effect of this restriction was to strengthen urbanites relative to traditional bosses in the countryside.

⁴⁰ One politician I spoke with recalled being asked to give a substantial amount of money to the party for a seat on the party list. Presumably the rule preventing party-switching strengthened party bosses relative to candidates, and would increase the price paid to parties, as opposed to parties paying candidates to join them.

“postpolitical” quality of the constitution: there was an assumption that parties were corruptive and that nonparty members were somehow insulated from external pressures. Senators were elected in single-vote, multimember districts, ensuring the representation of nonmajoritarian interests. Candidates for Senate were restricted from campaigning⁴¹ and could not run for reelection. The thought was that the Senate would attract local personalities who already had grassroots support, and hence were unlikely to be corrupted by the process of formal campaigning.

As constituted, the Senate did not fully achieve the goal of a disinterested, nonpartisan check on party politics in the House. One new phenomenon was that of the “husband and wife” constituency, in which relatives of prominent politicians would run in the same geographic areas for the “nonpartisan” Senate. Although the effort to introduce technocratic and grassroots candidates to balance professional politicians was unsuccessful, it did have some resonance in the Thai context. The nonpartisan Senate is best understood as trying to steer a narrow course between the Scylla of military intervention and the Charybdis of corrupt civilian politicians. In many previous constitutions, the Senate had served as an appointed body to check an elected legislature.⁴² In 1992, the Senate was designed to remain unelected so as to ensure a military veto. The Senate can thus be seen as a guardian institution, rather than a channel of democratic representation, much as the early U.S. Senate was seen as an elitist repository of wisdom and defender of national interests against popular passions.⁴³ The 1997 document marked a break by ensuring that it was constituted by the people rather than appointed by the military, king, or government, and it did so in a way that made sense in the context of local distrust of politicians and political parties.

The 2007 Constitution combined public election with elite selection of senators.⁴⁴ As in the 1997 Constitution, senators must, again, be 40 years old and hold a bachelor’s degree.⁴⁵ In addition, the elite selection committees—consisting of the presidents of many of the guardian institutions and judges nominated by the Supreme and Administrative Courts—will take into account nominations from academia and civil society organizations.⁴⁶

⁴¹ 1997 CONST., § 129.

⁴² *E.g.*, HANDLEY, *supra* note 5, at 342; CONST. THAIL. 1978.

⁴³ JACK RAKOVE, ORIGINAL MEANINGS (Vintage 1996).

⁴⁴ CONST. THAIL. 2007, §§ 111–113 [hereinafter 2007 CONST.]

⁴⁵ *Id.* at § 115; *compare* 1997 CONST., § 125.

⁴⁶ 2007 CONST., §§ 113–114. Interestingly, the Senate itself is involved in approving members of the guardian committees. *See, e.g., id.* at §§ 206, 229, 242. Thus, there is a degree of circularity in the appointment processes.

The nominally apolitical Senate was a linchpin institution in 1997, because of its central role in appointing the various guardian institutions. The constitution included a plethora of these: the Election Commission, Audit Commission, Human Rights Commission, Ombudsman, Supreme Court (which included a special Criminal Division for Persons Holding Political Office), Supreme Administrative Court, Constitutional Court, and National Counter-Corruption Commission (NCCC).⁴⁷ These were constituted in a complex set of nested selection committees defined in the constitution itself. For example, the NCCC was nominated by a fifteen-member selection committee, including the presidents of the Supreme, Constitutional, and Supreme Administrative courts, which submitted a list of names to be selected by the Senate.⁴⁸ The Election Commission was chosen by a special ten-member selection committee that included the presidents of the Constitutional and Supreme Administrative Courts, four rectors of universities elected by their fellow rectors, and four representatives of political parties that held seats in the House.⁴⁹ The 2007 document retains all of these bodies but simplifies the selection committee structure. Instead of a specially constituted committee for each institution, nominations are now chosen by a core group consisting of the presidents of the Supreme, Supreme Administrative, and Constitutional Courts, along with the leader of the majority and the opposition leader of the House of Representatives. The courts thus become the guardians of the guardian institutions.

The Election Commission is tasked with supervising election campaigns and executing electoral law. In 1997, it was a four-member body appointed by the Senate; the 2007 version had four members plus a chairman. The Election Commission powers are extensive: it can annul election results, order new elections, and investigate fraud allegations. It used these powers extensively during Senate elections in 2000 and 2001, as well as in general elections in 2001, and, crucially, in 2005 and 2006 in the events leading up to the military coup.⁵¹

Another guardian institution constitutionalized in 1997 was the National Counter-Corruption Commission. Corruption has been endemic in Thailand, and the 1997 constitution sought to address this. The NCCC collects reports on assets from politicians and senior bureaucrats to ensure that there are no mysterious increases during the time they are in public service. Those who fail to report assets can be barred from office, subject to approval by the new Constitutional Court.

⁴⁷ In addition, the Anti-Money-Laundering Office was established by statute in 1999.

⁴⁸ 1997 CONST., § 297.

⁴⁹ *Id.* at § 138. The selections required a 3/4 majority, giving groups of politicians and academics the power to veto nominations.

⁵¹ In the 2000 Senate elections, seventy-eight candidates were disqualified.

Appointments to the NCCC in both 1997 and 2007 were similarly structured to those on the Election Commission, with senatorial voting on candidates put forward by a selection committee. In 1997, this selection committee itself included members of various institutions and civil society, while the 2007 version is composed of the heads of the three highest courts and two leaders of the House of Representatives.⁵² The NCCC members now serve for nine-year, nonrenewable terms (up from six) and may not hold other positions.

Under the 1997 constitution, the Constitutional Court had a central role in policing the other independent bodies.⁵³ In addition to interpreting the constitution and resolving jurisdictional disputes among governmental authorities, the Constitutional Court exercised an array of ancillary powers. It could confirm findings of and evaluate disclosures submitted to the NCCC, review whether any appropriations bill would lead to involvement of an elected official in the expenditure of funds,⁵⁴ determine whether an emergency decree was warranted by a true emergency,⁵⁵ determine whether election commissioners should be disqualified,⁵⁶ and decide whether political party regulations violate the constitution or fundamental principles of Thai governance.⁵⁷ Because of the overarching concern with corruption that animated the 1997 constitution, the Court had the power to demand documents or evidence to carry out its duties. In this sense, it was a kind of inquisitorial Constitutional Court. It was the exercise of these powers that embroiled the Court in controversy during the political crisis of 2006 discussed below, and, unsurprisingly, the 2007 document scales back the Court's ancillary powers,⁵⁸ restoring it to a more conventional role.

The creation in 1997 of a system of administrative courts to allow citizens to challenge government action was an enormous innovation.⁵⁹ Although

⁵² 2007 CONST., § 246.

⁵³ The court was composed of a president and fourteen judges appointed by the king on the advice of the Senate. It included five justices of the Supreme Court, two judges of the Supreme Administrative Court, five other lawyers, and three persons with political science degrees. Nominations for the latter two categories came from the selection committee, which included four deans of law and four of political science faculties, four MPs, and the president of the Supreme Court. This committee nominated ten persons with law degrees and six with political science degrees; from this list, the Senate then elected five law degree-holders and three political science degree-holders to serve on the Court. 1997 CONST., § 255–257.

⁵⁴ 1997 CONST., § 180.

⁵⁵ *Id.* at § 219.

⁵⁶ *Id.* at § 142, referring to §§ 137 and 139.

⁵⁷ *Id.* at § 47, ¶ 3.

⁵⁸ For a prediction to this effect, see Tom Ginsburg, *Ancillary Powers of Constitutional Courts*, in INSTITUTIONS AND PUBLIC LAW: COMPARATIVE APPROACHES (Tom Ginsburg & Robert Kagan eds., Peter Lang Publishing 2004).

⁵⁹ 1997 CONST., §§ 276–279.

given less attention worldwide, the availability of judicial review of administrative action is in some sense more important than constitutional review, in that most citizens encounter the state in simple interactions that do not raise constitutional issues. This innovation was particularly important in Thailand, where the state had traditionally been insulated from public scrutiny.⁶⁰ Analysts report that, even more than the Constitutional Court, the Administrative Court has played a major role in structuring citizen-state relations since 1997 and is becoming an important arena.⁶¹ The court has issued a wide range of judgments constraining the government at many levels. For example, in a well-known case involving a government-chartered television station, ITV, Thaksin's family was a majority stakeholder and sought to renegotiate the licensing arrangement, which had been issued by the prime minister's office.⁶² Interestingly, the bureaucrats in the office resisted, and the court sided with them against a company controlled by the sitting prime minister himself. In another case in 2008, the court enjoined the foreign minister from taking action that might support Cambodia's bid for UN funding for a contested border temple.

These institutions, established in 1997, are all in some sense postpolitical. They reflect the idea that democratic politics ought to be constrained and that the political process cannot be trusted to ensure clean politics. This reflects long-standing Madisonian themes in democratic theory, as filtered through the twentieth-century shift away from parliamentary sovereignty. The Thai constitution is an extreme case, however, in its efforts to insulate appointments and management of the "guardian institutions" from any taint of political parties. In addition to having complex selection committees, the apolitical Senate was a crucial veto gate for all the institutions. This no doubt reflects not so much progressivism on the part of the drafters of the 1997 text but, rather, Thailand's long-standing ambivalence toward politics and politicians. Conservative forces have always viewed democracy with some trepidation, and Thailand's constitutional history is replete with unelected legislative institutions appointed by elite bodies. The general global trend toward guardian institutions interacts with a set of local elite and technocratic values.

3. The life and death of the 1997 constitution

After its adoption with widespread support, the 1997 constitution got off to an auspicious start, as the complex set of institutions it inaugurated began to

⁶⁰ FRED RIGGS, *THAILAND: THE MODERNIZATION OF A BUREAUCRATIC POLITY* (Univ. Hawaii Press 1966).

⁶¹ Leyland, *supra* note 32.

⁶² Peter Leyland, *The Emergence of Administrative Justice under the 1997 Thai Constitution*, in *THE JUDICIALIZATION OF ADMINISTRATIVE GOVERNANCE IN ASIA* (Tom Ginsburg & Albert Chen eds., Routledge 2009). Leyland's research provides numerous other examples of constraint by the administrative courts.

regulate politics. The Thai Constitutional Court, for example, took up high-profile cases involving scrutiny of politicians. In one such case, Sanan Kachornprasart, the minister of interior and deputy prime minister, was found to have deliberately submitted a false statement of his assets to the NCCC. In August 2000, the Constitutional Court unanimously confirmed the report of the NCCC, leading to a five-year ban from office for the prominent politician.⁶³ By the end of 2000, the Court had confirmed NCCC decisions in 17 cases.

Things began to change with the election of January 2001, which brought to power Thaksin Shinawatra, who had built a fortune in the telecommunications business, and then entered politics in 1994, becoming an MP and cabinet member in the early years of return to democracy. Described as Thailand's Silvio Berlusconi, Thaksin offered little in the way of substantive policy, but he tapped into regional resentments and built a following in the rural North and Northeast. Like his Italian counterpart, Thaksin has long been linked with corruption, and, in early 2001, when he was the leading candidate for prime minister, he was found to have registered his assets in the names of various household staff and business colleagues. When Thaksin's Thai Rak Thai party subsequently won the elections, the Constitutional Court was placed in a difficult position; it was called on to confirm the NCCC decision, which would have banned Thaksin from politics for five years. In a divided decision that has been described as confused, the Court found that the false report had not been filed deliberately, and thereby allowed Thaksin to assume the office of prime minister. This result was reached by deciding two separate issues: first, that Thaksin was not required to file an asset report and second, that his false report had been inadvertent.⁶⁴ The Court decided each issue against Thaksin but, in accordance with its odd voting rules, aggregated the pro-Thaksin votes on the two issues against the affirmative votes in the first case, allowing the clear winner of the election to take power.

Thus began a long chapter that ultimately led to the constitution's demise. Thaksin subsequently consolidated his power, acquiring political parties by merger and acquisition, and securing Thailand's first ever single-party majority government in 2001. Despite (or perhaps due to) a more active Election Commission, the price of vote-buying went up during this election. Yet the Election Commission disqualified only two candidates out of 312 against whom complaints were lodged. Gradually, Thaksin began to influence all the independent political institutions, including the Constitutional Court and those designed to prevent corruption. He did this through a combination of appointments, intimidation, and bribery, particularly focusing on the Senate, which

⁶³ Constitutional Court Decision 31/2543 (2000) (Thailand).

⁶⁴ Andrew Harding, *The Politics of Law and Development in Thailand, Seeking Rousseau, Finding Hobbes* 11–12 (presented at Conference on Law and Development at a Crossroads: Asian Alternatives to Universal Schemes, Feb. 9–10, 2008).

played the linchpin role in appointments. Eventually, all the institutions succumbed to his pressure; among the people he appointed to the Election Commission, for example, was a general who had himself been disqualified by the commission.⁶⁵ Those who were not cowed were not reappointed.

To be fair, the oversight institutions were not completely pro-Thaksin. The Constitutional Court ruled that a couple of his appointments, including those of the Election Commission and the auditor general, had not followed proper procedure.⁶⁶ The NCCC was celebrated by some as being particularly effective, but came under severe attack in 2005, when it awarded itself a significant salary increase without parliamentary scrutiny.⁶⁷ The Criminal Division of the Supreme Court ruled that the nine commissioners violated the law, and removed them from office. New appointments were not forthcoming, so the commission became dormant. All in all, the general perception was that the independent agencies did not function as they should have.

Thaksin's first term was marked by the disappearance of up to 3,000 suspected drug dealers, as well as a confrontational attitude toward renewed Muslim insurrection in the South of the country. He also was accused by critics of overriding the constitution by declaring a state of emergency in the South. When the Human Rights Commission complained, the prime minister attacked it in the media, although he did modify the emergency decree.⁶⁸ In January 2005, Thaksin won reelection when his party captured an overwhelming majority of parliamentary seats, making it impossible for the opposition to mount a vote of no confidence.

Eventually, Thaksin's heavy-handed tactics prompted domestic opposition, first from fellow elites such as media tycoon Sondhi Limthongkul, who eventually made claims that Thaksin sought to overthrow the monarchy.⁶⁹ Only when Thaksin passed a series of laws that allowed him to sell his company, Shin Corporation, to a Singapore entity in early 2006 for \$1.9 billion without paying taxes, however, did the middle class of Bangkok withdraw its support. Thaksin was sued for alleged corruption and electoral violations, and was charged with spending an estimated \$260 million in bribes to voters in the campaign.⁷⁰ Because the NCCC was not in operation, the case went before the Constitutional Court, which, true to its pro-Thaksin reputation, found that there was no justiciable case.

⁶⁵ Leyland, *supra* note 32, at 158.

⁶⁶ *Id.* at 159.

⁶⁷ *Id.* at 171.

⁶⁸ *Id.* at 172.

⁶⁹ Kevin Hewison, *Constitutions, Regimes and Power in Thailand*, 14 *DEMOCRATIZATION* 928, 937 (2007).

⁷⁰ Leyland, *supra* note 32, at 168.

With no help from any political institutions, anti-Thaksin members of the public began to demonstrate in the streets, calling for his resignation or impeachment, particularly in the wake of the sale of Shin Corporation. Thaksin then dissolved Parliament and called a snap election for April 2, 2006, but the opposition chose to boycott it, saying Thaksin should step down first. The election went forward, but because of irregularities and the boycott, failed to produce a clear result.⁷¹ At this point, on April 26, 2006, the king met with the leaders of the Constitutional, Supreme, and Supreme Administrative courts and publicly called for them to resolve the constitutional crisis, suggesting they should void the April election. The Constitutional Court responded by annulling the election; three election commissioners were jailed, on the grounds that the time allowed for the campaign had been too brief and that some polling booths had been positioned to allow others to view the ballots as they were cast. Five new election commissioners, who had just been chosen after months of deadlock, would be replaced. Nevertheless, with political institutions at a standstill, the appointment process could hardly operate effectively. The Constitutional Court seemed to have failed to resolve the problem completely. This is a paradigmatic example of the politicization of the judiciary that post-political constitutions risk by placing great power in the hands of guardians.

Still, there seemed to be light at the end of the tunnel. A November election was expected to produce valid results at last.⁷² Then, however, Thaksin began to interfere with the military, promoting his own cohorts in the military hierarchy and replacing those associated with Privy Councilor Prem Tinsulanonda, a retired general and former prime minister. Public demonstrations intensified in the fall; as Thaksin prepared to hold new elections, the military stepped in.

Thus the Thai constitution of 1997 died a peaceful death at the age of nine. The sources of its failure were not congenital but, rather, reflected the difficulty of designing any institutional solution to governance problems in a country as corrupt as Thailand, particularly with a billionaire prime minister willing to bribe any and all in his pursuit of power. However, Thaksin was only the precipitating cause. Deeper problems of political institutions remain, impervious to formal solutions.

⁷¹ Thaksin's party won 80 percent of the seats, running unopposed in many districts. However, the election law required that any candidate running unopposed garner at least 20 percent of the vote in a district in order to win the seat. James Ockey, *Thailand in 2006*, 47 *ASIAN SURVEY* 133, 134 (2007). As many voters left their ballots blank in protest, Thaksin's candidates failed to capture the necessary 20 percent in thirty-eight districts (despite the TRT allegedly having provided support to small parties to ensure competition). This produced a constitutional crisis because the election had not produced a sufficient number of seats for the parliament to be seated. By-elections were required in the thirty-eight constituencies, but these, too, failed to produce a full slate of members of Parliament.

⁷² *Old Soldiers, Old Habits*, *THE ECONOMIST*, Sept. 23, 2006, at 27.

4. The interim constitution

Speculation on motives for the 2006 coup abound. Some believe that it was designed to prevent an outbreak of violence that might have emerged during demonstrations and counterdemonstrations over Thaksin's campaign the following weekend. Perhaps more plausibly, Thaksin's attempt to promote his own classmates in the military command structure triggered a counter-reaction from another class of military commanders—intermilitary factional disputes had been the basis for many a coup and failed coup previously. No doubt deeper tensions in civil-military relations, over the conflict in the South, also helped lay the groundwork for the coup.⁷³ Rumors also allege that Thaksin's wealth had found its way into the royal family itself, as he sought to corrupt certain members.

The coup leaders followed a venerable tradition of blaming civilian corruption for the need to step in. They promptly appointed a government led by former army commander Surayud Chulanond. Crucially, the coup leaders kept alive most of the independent commissions, although the interim constitution does not so stipulate.⁷⁴ The only major institutional reform is that the interim constitution takes judicial review from the Constitutional Court and sets up a Constitutional Committee, consisting of the chair of the Supreme Court and the chair of the Administrative Court, along with five justices of the Supreme Court elected by their colleagues.⁷⁵ No doubt this reflects disappointment in the Constitutional Court that had allowed Thaksin to take power in the first place and later seemed to serve his interests.

The interim constitution outlined a process for constitutional reform and promised wide public participation.⁷⁶ It set up a Constitutional Drafting Assembly and a 100-member nonpartisan Constitutional Drafting Commission to be selected by the coup leaders from a larger group.⁷⁷ Actual drafting was done by a subcommittee of thirty-five, consisting of twenty-five persons from the Drafting Commission along with ten appointed by the coup leaders, chaired by Prasong Soonsiri, a veteran ally of Prem. The 1997 constitution was to be treated as a default, with the drafters required to explain any deviations from it.⁷⁸ In this way, the coup leaders signaled their commitment to set politics aside, ensure some institutional continuity, and provide an anchor for the drafting process.

⁷³ Ockey, *supra* note 71, at 137.

⁷⁴ INTERIM CONST. THAIL. 2006 [hereinafter INTERIM CONST.]. Article 26 implies that the institutions will remain in place, since they will be consulted on the draft of the permanent constitution, but the interim constitution nowhere states that they will remain operational.

⁷⁵ INTERIM CONST. art. 35.

⁷⁶ *Id.* at pmb1.

⁷⁷ *Id.* at art. 19.

⁷⁸ *Id.* at art. 26.

There does not appear to be formal precedent in Thailand for this kind of constitutional anchoring, though research on drafting processes is limited, and we do not know what happens behind the closed doors of the drafting room.

Drafting was followed by consultation with a wide range of institutions, presentation to the king, and a public referendum. Should the referendum have voted the Constitution down, the government and National Assembly were to select a previous constitution to be used as the new constitution. Either way, elections were to be held within forty-five days. In an interesting innovation, members of the Constitutional Drafting Assembly are not allowed to run for election for two years after completing their duties.⁷⁹

The coup leaders also took steps to punish Thaksin and ensure that he would not return to political life, extending the investigation that had begun under the 1997 constitution. The Constitutional Tribunal under the interim constitution heard a trial for fraud and found the Thai Rak Thai party liable on corruption charges in May 2007, forcing it to disband and banning many of its leaders from office for five years. A separate process ordered the seizure of Thaksin's assets and issued arrest warrants for him and his wife, who eventually was convicted of tax fraud and sentenced to prison. At this writing, Thaksin is a fugitive who has vowed to return to Thai politics sometime in the future.

5. Constitutional afterlife? The 2007 Constitution

In April 2007, a provisional draft of the new Constitution was released, and in keeping the coup leaders' timetable, was approved in August by a referendum, with a majority of 58 percent. This marked the first ever referendum held on a constitution in Thailand; the 1997 constitution had promoted the idea but not actually utilized it. The draft document largely followed the 1997 constitution, although it contained a number of controversial new provisions; public debate forced the drafters to scale back some of the latter.⁸⁰ Among other things, the 2007 Constitution reinstated the Constitutional Court and again gave it extensive ancillary powers, including policing political parties,⁸¹ removal from office of members of Parliament and ministers,⁸² approval of disqualification of

⁷⁹ *Id.* at art. 30. This decision was also undertaken in drafting after the French Revolution in 1789. Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 *DUKE L.J.* 364, 385 (1995).

⁸⁰ Section 68 of the draft constitution, subsequently withdrawn, extended the ancillary powers of constitutional courts quite far. While providing for a right of resistance against those who take power through unconstitutional means, the section allows for the formation of an emergency governing council of the prime minister, the chairpersons of upper and lower houses, the leader of the opposition, and the chairpersons of the Constitutional Court, Supreme Court, Supreme Administrative Court, and independent organizations.

⁸¹ 2007 *CONST.*, at § 65.

⁸² *Id.* at §§ 91, 106, 182.

election commissioners,⁸³ approval of organic laws for important institutions,⁸⁴ approval of challenges to emergency decrees,⁸⁵ and a role for its chairman in committees that select senators. The other watchdog institutions also were retained, with slightly streamlined appointment procedures.⁸⁶

One of the areas in which the 1997 text will have influence is criminal procedure. The 1997 document introduced many radical changes, including requiring judicially issued warrants for arrests;⁸⁷ demanding speedy consideration of reasonable bail;⁸⁸ proclaiming the right to a speedy, continuous, and fair trial;⁸⁹ guaranteeing the right to a lawyer during interrogation;⁹⁰ and establishing witness and victim protection.⁹¹ These provisions provoked a major revision to the country's criminal procedure code and the passage of other laws to effect these changes.⁹² The expansive list of human rights, too, is retained in the 2007 document, with only minor reorganization and reformulation.⁹³

Other innovations concern the prime minister, who must be an elected member of the House and may not serve more than two four-year terms.⁹⁴ Perhaps the major distinction between the 1997 and 2007 documents is that the latter reverts, in part, to an appointed Senate.⁹⁵ The attraction of a

⁸³ *Id.* at § 233.

⁸⁴ *Id.* at §§ 138–141.

⁸⁵ *Id.* § 185.

⁸⁶ The 2007 Constitution also introduced a code of ethics for officeholders, for which compliance is to be monitored by the ombudsman and, in serious cases, the NCCC. Violators are subject to a strict ban from political office. It retained the rule preventing candidates from switching parties ninety days before an election, designed to prevent parties from buying candidates. It involves assets declarations for political officeholders and their families. *Id.* at §§ 279, 280, 250.

⁸⁷ 1997 CONST., § 237; *see also* 2007 CONST., § 32.

⁸⁸ 1997 CONST., § 239.

⁸⁹ *Id.* at § 241; *see also* 2007 CONST., § 40.

⁹⁰ 1997 CONST., § 241.

⁹¹ *Id.* at § 244–245; *see also* 2007 CONST., § 40(5).

⁹² *See* Siriphon Kusonsinwut, *Protecting Witnesses or Perverting Justice in Thailand?* (June 2006) (unpublished JSD Thesis, University of Illinois College of Law).

⁹³ 2007 CONST., §§ 26–69.

⁹⁴ *Id.* at § 171.

⁹⁵ One senator will be selected from each *Changwat* (province). With seventy-six *Changwat* (counting Bangkok) and 150 total senators, this means that roughly half of the Senate will be appointed by a committee composed of heads of the Constitutional Court, Election Commission, Ombudsmen, National Counter Corruption Commission, State Audit Commission, and one judge from each of the Supreme Court and Supreme Administrative Court as entrusted by the general meeting of the Supreme Administrative Court. 2007 CONST., §§ 111, 113, 114. Nominations may come from “academic institutions, public sector, private sector, professional organizations and other organizations.” *Id.* at § 108.

paternalistically selected upper house as a check on “ordinary” electoral politics remains strong in Thailand, where politicians are distrusted but the military is considered unfit for long-term rule. The half-appointed current Senate will retain its status as an elite check on partisan politics; it remains to be seen whether it will perform any more admirably in this role than its elected predecessor.⁹⁶

These institutional revisions notwithstanding, the core institutional structures remain substantially the same. The 1997 constitution, though it died at the tender age of nine, will have lasting impact on Thai politics in the core area of restraints on government. In this sense, the 1997 constitution continues, in its afterlife, to constitute a critical juncture in Thailand’s long and tumultuous political history.⁹⁷ Only time will tell if these seeds of constitutionalism are in fact rendered effective.

In this regard, the choice of the coup leaders to allow some institutional continuity is a sound one. Successful written constitutions depend on an array of informal understandings, including the development of institutional reputations that can ensure effectiveness. Many of the postpolitical institutions of 1997 did contribute significantly to effective governance. The Administrative Court, for example, is a great success story, voted “independent institution of the year” in a public opinion poll.⁹⁸ The Human Rights Commission devised solutions for easing tensions in southern Thailand—including the idea of an apology and greater autonomy—that laid the groundwork for the military government’s peace-building initiatives there. Institutional continuity will allow these bodies to build on past successes, and help to develop effective power in the future. Thus, the 1997 constitution promises to have a longer afterlife than its short life might lead one to believe.

6. The institutions bite back

In December 2007, elections were held as initially promised by the coup leaders. Thaksin’s banned Thai Rak Thai party had regrouped under the banner of the People’s Power Party (PPP) and won a plurality, securing 233 of the 480 seats. Thus, the coup leaders’ worst nightmare materialized: the party associated with Thaksin had prevailed, and was able, eventually, to form a government headed by Samak Sundaravej, an old-time politician hand-picked by Thaksin.⁹⁹ Popular

⁹⁶ The 2007 Constitution retains the requirement that senators have at least a bachelor’s degree, a controversial and elitist educational requirement. *Id.* at § 115.

⁹⁷ This notion of constitutional afterlife has some precedent in Thai history. The 1991 constitution, for example, was modeled on its 1978 predecessor, and 1932 has been a touchstone as well. See McDorman, *supra* note 30, at 224.

⁹⁸ Leyland, *supra* note 32.

⁹⁹ He subsequently showed some independence from Thaksin. See Pasuk Phongpaichit & Chris Baker, *Samak: The Fly in Thaksin’s Ointment*, 171 *FAR E. ECON. REV.* 25 (2008).

protests, supported by the disaffected middle class, ensued, along with counter-demonstrations in support of the government. These have continued throughout the summer of 2008, erupting in violence in September and October.

While much of the conflict has played out in the streets, the balance of power between the pro- and anti-Thaksin forces is also being determined by the increasingly assertive independent agencies held over from the 1997 constitution. In particular, the Election Commission and the courts played a crucial role in policing the election, finding substantial irregularities in its conduct after receiving more than 940 complaints.¹⁰⁰

The Election Commission banned the designated speaker of the new Parliament from politics for campaign irregularities. This raised the specter of the disbanding of the entire PPP, since Thai law allows parties to be disbanded by the Constitutional Court on recommendation of the Election Commission if a party officer is convicted (by the Supreme Court) of electoral wrongdoing that benefited the party.¹⁰¹ At this writing, the Constitutional Court is hearing the case.¹⁰²

The courts were also the site of battles over Prime Minister Samak. Responding to a complaint submitted by the unelected Senate, the Constitutional Court ruled in September 2008 that Samak had violated Thai law by serving as the host of a television cooking program and had to resign the premiership. The PPP threatened to renominate him, but ultimately he was replaced by Somchai Wongsawat, Thaksin's brother-in-law. Protests, however, continued, and Somchai was himself accused of constitutional violations that would disqualify him from office. As protests grew more violent, a state of emergency was called. The situation remains volatile as of this writing, with another coup not out of the question.

Conclusion

The relatively short-lived 1997 constitution has wrought profound changes in the structure of Thai politics. Increasingly, the key players in Thailand are a handful of technocratic institutions whose role is to guard against the alleged excesses of partisan politics. It is well understood that the shift in constitutional

¹⁰⁰ The Election Commission rules on complaints, either by certifying the election or handing out a "yellow card" or "red card" to the winner, disqualifying the candidate and leading to a by-election. A red card bans the candidate from office for a year, while a yellow card simply calls for a new election, in which the candidate in question can still compete. In the first few weeks after the election, the commission issued a number of yellow and red cards, mainly, though not exclusively, to PPP candidates.

¹⁰¹ 2007 CONST., § 237

¹⁰² The Constitutional Court had already banned two other parties in the governing coalition—the Chart Thai and Matchimathipataya parties—for campaign violations.

power to unelected bodies poses challenges to conventional democratic theory.¹⁰³ Unelected technocratic guardians are deciding who governs and how they can do so, and it is only a slight exaggeration to say that Thailand has been living with a continuous case of *Bush v. Gore*¹⁰⁴ since 2001. The Thai case illustrates another consequence of the shift, namely that the technocratic institutions are themselves transformed by their new, high-profile mandates. The apparently postpolitical structure masks judicialized politics, and the guardians have inevitably been politicized as they are called on to determine who will govern. Many of the controversies will wind up in the courts, which will be called on to sort out the intricate institutional boundaries of the post-political Constitution. But the courts and guardian institutions alone seem unable to ultimately resolve the ongoing political conflict in what has become a divided society.

One reason that the constitutional institutions have emerged in center stage is similar to that found in other accounts of judicialization.¹⁰⁵ In a society divided among political forces of roughly equal weight, there is a functional demand for dispute resolution, particularly involving fiercely contested electoral politics. Thailand's crisis pits a traditional elite and urban middle class against a populist, billionaire-led movement representing the country's rural poor. Because the political conflict has endured over multiple constitutions, institutional continuity of the dispute resolution machinery has served the interests of all sides.

In the context of Thailand, there is another element at play, which is the relationship between the new guardian institutions and the unwritten constitution. Thailand's unwritten constitutional norms focus on the role of the monarch, whose effectiveness as mediator depends in large part on his reluctance to utilize his power. Few believe the monarchy is truly neutral in the present political conflict: indeed, the queen herself took the highly unusual step of presiding over the funeral of an antigovernment protester in October 2008, a move seen by some as sanctioning the demonstrations. But the monarchy as an institution depends for its legitimacy on its reluctance to descend to the political sphere too frequently. The monarch must remain the transcendent symbol of all Thais. The guardian institutions can reinforce this role by serving as the primary arenas of political conflict, performing a front-line role in resolving crises. It would not be accurate to say that the guardian institutions are serving as the proxy of the throne—they generally seem to decide the

¹⁰³ VIBERT, *supra* note 1 .

¹⁰⁴ 531 U.S. 98 (2000).

¹⁰⁵ MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* (Univ. Chicago Press 1981); MARTIN SHAPIRO & ALEC STONE SWEET, *ON LAW POLITICS AND JUDICIALIZATION* (Oxford Univ. Press 2002); Ran Hirschl, *The Judicialization of Politics*, in *THE OXFORD HANDBOOK OF LAW AND POLITICS* (Keith Whittington, R. Daniel Keleman & Gregory A. Caldeira eds., Oxford Univ. Press 2008).

cases before them in a more or less neutral manner. But the impact of these guardian institutions is to check and limit electoral politics, and this is consistent with the traditional royalist view of politicians as self-interested. The guardians thus reinforce the unwritten constitutional norms surrounding the monarchy, preserving it as the ultimate guardian and relieving pressures that might otherwise threaten its position.

The foregoing analysis suggests a generalizable hypothesis for the existence of constitutional afterlife. In environments of frequent constitutional turnover, unwritten rules may play an especially important role in stabilizing politics and providing order. But the innovations of written constitutions may also, sometimes, endure across iterations of formal enactment. The hypothesis is that such innovations will be effective and endure so long as they are consistent with and reinforce the unwritten constitution. Where innovations clash with the norms of the unwritten constitution, they will not find sufficient support to be retained across multiple written constitutions. This suggests that constitutions that initially appear ineffective and ephemeral can in fact have an impact beyond their own lifespan. They can create enduring institutions, but also reinforce unwritten norms that provide stability.

Even after its demise in 2006, the structure wrought in 1997 has remained in place, enjoying a constitutional afterlife. The Thai example forces us to think about constitutional change as an iterative process. For most countries, constitutional reform occurs periodically: the average person outside of the Organisation for Economic Co-operation and Development countries will live under several constitutions in the course of a lifetime.¹⁰⁶ Understanding the effect of a particular set of constitutional provisions requires looking not only at their immediate implementation and efficacy, but also at institutional changes that they bring about, which may persist well into the future, and at their impact on unwritten constitutional norms. The true significance of a constitution may not be a matter of whom it empowers, or what formal restraints it provides, or even whether its provisions are implemented. Constitutions are moments of institutional innovation and recalibration, and set in motion processes that can endure beyond the formal texts, which are all too ephemeral.

¹⁰⁶ Elkins, Ginsburg & Melton, *supra* note 3.