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Commentary

Open to Interpretation? Allowing the Prime Minister to Serve for More Than Eight Years

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The decision of the Constitutional Court on the issue of whether General Prayut Chan-o-cha has occupied the position of Prime Minister for eight years, which would result in his dismissal under Section 170 and Section 158 paragraph four of the Constitution of the Kingdom of Thailand B.E. 2560 (the "2017 Constitution"), might not change the Thai political scene very much. But in the field of jurisprudence, the Constitutional Court's ruling may be seen as a microcosm of the Thai legal and judicial system, which has been abused time and time again, making it hard to believe that Thailand has had a Western-style legal system for over a hundred years and transformed its governmental system into a democracy 90 years ago.

The issue of the calculation of General Prayuth's tenure as prime minister has sparked widespread debate among the general public and lawyers alike. We have seen the phenomenon of constitutional draftsmen expressing their thoughts and suggesting guidelines for interpreting the calculation of the eight-year period under Section 158, despite not giving their opinions at the time when opinions should have been given—i.e., during the meeting of the Constitution Drafting Committee ("CDC") at which the chairman raised this very issue for discussion. We have seen the members of the CDC, who had expressed one opinion at the meeting, later change their minds and give a different opinion. And we have heard rumours that the Chairman of the CDC gave an opinion to the Constitutional Court that his opinion recorded in the minutes of the

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CDC meeting was incorrectly recorded by the official who took the minutes of the meeting, which in turn had somehow not been endorsed by the Committee.

There is no clear basis in legal theory to use as a guideline for interpreting the law and disputing these bizarre facts, and any legal interpretation would rest on facts that may be incomplete or distorted to give weight and credibility to their explanations. An unnamed former judge of the Constitutional Court even commented that:

> to decide anything, you should not go and ask the people who drafted the law. Otherwise, you would need to ask every person who was involved in its drafting. Thus, if a law has been written clearly, it should be interpreted directly. Why do you need to have a debate about it? Why do you need to invite experts to give opinions when people's views can change, one minute saying this, the next minute saying that? Therefore, this is not a matter on which you really have to go and seek the opinions of those who drafted the law. Because the Constitutional Court is the one who applies the law; the draftsmen do not apply it. Since the Constitutional Court is the one who applies the law, it must be the one to make the interpretation of what is written and what that means, which is not a particularly difficult thing. (*Matichon*, 11 September 2022)

The way in which laws are interpreted can vary depending on the inclination of the interpreter, i.e., it is based on their personal discretion. This subjectivity is one of the main reasons why jurisprudence in the Western world has become increasingly complex and nuanced in terms of systematic and reasoned decisions. Theories and legal mechanisms have been created to regulate and prevent the application and interpretation of the law from being based solely on personal discretion.

Certainty in legal matters is the guarantee of rights and freedoms and the foundation of the legal system. Human society has long learned that rights and freedoms will not be protected if the legal system is unable to create clarity and certainty in legal matters ("legal certainty"). This is the reason why Roman citizens called for the laws to be made in writing for the first time (the Twelve Tables) over 2000 years ago.

The creation of the Twelve Tables marked the beginning of Roman law, which forms the foundation of the civil law system. Roman law had great faith in written law because written law creates clarity and certainty in legal matters for the public. This allows citizens to understand their legal rights and responsibilities in advance, without having to wait for a decision or interpretation of customary law based on the discretion of the person with authority. Legal certainty also allows citizens to check whether the state applies the law equally to everyone.

Although the common law system has developed a large number of legal principles through the use of judges' discretion in deciding cases, it also has the principle of *stare decisis*, which guides judges not to decide cases based on personal preferences. This helps create legal certainty for the public. Even though common law has created many legal principles over the course of hundreds of years, the majority of the law in countries that use the common law system is written law, enacted by the

legislature, which has received power and legitimacy from the people for enacting laws.

Written law in various legal systems sometimes comes in the form of laws that are written to be easily understood by the general public and laws that are abstract or filled with legal jargon and can only be applied correctly by lawyers. No matter what form the law appears in, written law still always has problems of unclear language or wording that leads to debate and different interpretations among both the community of legal scholars and the general public. This is the reason why legal scholars need to develop principles and theories about the application and interpretation of the law, to prevent the law's application and interpretation from becoming subjective, based on the personal preferences of the person deciding the case. Without these principles and theories, the application of the law will not be certain, and those with the power to apply or interpret the law will use this uncertainty as a tool to restrict the rights and freedoms of the people, according to their personal preferences.

I. THE LITERAL INTERPRETATION AND THE PURPOSIVE INTERPRETATION OF THE LAW

The principles of drafting and enacting laws in modern states tend to produce written laws that are easy for the general public to read and understand by using everyday language and reducing the complexity of technical legal terminology. For this reason, most of the language and content of the law has a meaning that is clear on its face. When there is a problem that requires interpretation, it is necessary to interpret the law in accordance with the meaning that is clearly expressed by the text.

No matter how clear provisions of law may be, they may still require legal knowledge garnered from systematic study to understand them. Take, for example, the word "marriage" in the Civil and Commercial Code: the general public may not know that this refers only to a marriage registered in the form required by the law. Furthermore, even though words may have a simple, ordinary meaning, lawyers can still always create problems in interpreting them. This is the reason why using the literal method cannot solve disputes in interpretation, and lawyers must rely on other theories of interpretation that are more trustworthy and create legal certainty.

Even though lawyers have developed a large number of theories of interpretation, and there are principles that differ in each field of law, whether it be civil, public, criminal, or international law, the general principle of interpretation that lawyers in all fields agree upon is to interpret the law in accordance with its purpose.

The purposive interpretation of the law means to interpret the law in order to achieve the objectives of that law.

Identifying the purpose of the law must be done through a consistent and reliable process. One method of identifying the purpose of the law, widely accepted by the legal community, is through examining documents related to the drafting of the law. This is because these documents provide an accurate and reliable record of the

events that took place during the drafting process. Even though the thoughts and opinions of the draftsmen may not be the same as the purpose of the law, they are the most important 'clues' to finding its purpose. Identifying the purpose of the draftsmen, by interviewing or finding out the truth from draftsmen who are still alive, is merely an exceptional or supplementary method, to be used only when it is not possible to find the purpose of the law or in a situation where the information in the documents is incorrect. This is because the opinions of the living tend to change over time and as a result of the environment at the time when the question is asked, but information recorded in documents does not shift with time or a changing environment.

Before the change in our system of government, documents relating to the drafting of Thai laws consisted only of the minutes of meetings and correspondence of the law drafting committee or the law review committee. But after the change in the system of government, the House of Representatives was established, which adopted a complex legislative process in the style of Western democracies, and the Office of the Council of State was created to perform the duty of assisting the government in drafting laws, which developed a more complex system of drafting and reviewing draft laws. The documents relating to the drafting of any law increased in volume, and there began to be a format for recording the principles and rationale associated with the draft, for the general public to be aware of the purpose of drafting that law.

Some laws, for example the 2017 Constitution, have a document recording the purpose of each provision, under the name "The Objectives and Accompanying Explanations of the Sections of the Constitution of the Kingdom of Thailand 2017." This document is particularly important for identifying the purpose of the law, since it sets out the purpose of the law clearly for the use of those applying the law, and for the general public to be able to know and understand the law, enforce the law, and act in accordance with the law with convenience and certainty.

If we attempt to identify the purpose of Section 158 paragraph four of the Constitution from the *Objectives and Accompanying Explanations of the Sections of the Constitution of the Kingdom of Thailand 2017* document, we can find the reason for the limitation on the term of office of the Prime Minister, set out clearly as follows: "The period of eight years is set in order not to create an overly long monopoly on political power that could cause a political crisis" (p. 275). In other words, this Constitution intends not to allow any person to occupy the position of Prime Minister for more than eight years, which the Constitution views as a sufficiently long time for one person to wield the highest governmental power in the state as head of the executive branch, and long enough to manage affairs in accordance with his or her policy to achieve success. The adoption of the principle of a limitation on the term of office, which is normally used in presidential systems, for the Thai parliamentary system, demonstrates that the Constitution has a special purpose in creating this bizarre system. Therefore, it must be interpreted in accordance to achieve this special purpose.

II. IS THE PURPOSE OF MEECHAI RUCHUPHAN THE PURPOSE OF THE CONSTITUTION?

Although the purpose of Article 158 paragraph four of the Constitution is clearly expressed in the *Objectives and Accompanying Explanations of the Sections of the Constitution of the Kingdom of Thailand 2017* document, there are some who attempt to undermine this purpose with the interpretation that the Constitution is only in effect prospectively (i.e., starting on its effective date of 6 April 2017). Therefore, the calculation of the term of office of the Prime Minister must begin from that date.

It is true, and no one denies, that the Constitution came into force on 6 April 2017. However, the fact that this is the date that the Constitution came into force does not mean that legal acts that took place before the 2017 Constitution are not recognised or have no legal effect under the 2017 Constitution. If this eccentric interpretation were correct, provisions that set out the qualifications for membership of the House of Representatives or Ministers, such as not having been sentenced to a term of imprisonment, would only apply to judgments imposing prison sentences handed down after the Constitution came into force. If so, would this mean that someone convicted before the coming into force of the 2017 Constitution fails to meet the qualifications or not?

Adopting such a bizarre interpretation, in an attempt to extend the term of office of the Prime Minister to more than eight years, would result in many provisions of the Constitution being unable to be enforced in accordance with their purpose. It would also conflict with judgments of the Constitutional Court in many previous cases, which have deprived people of their rights and dissolved political parties for acts which took place before the 2017 Constitution came into force.

If the view is that the purpose of Section 158 paragraph four, as recorded by the draftsmen of the 2017 Constitution in the *Objectives and Accompanying Explanations of the Sections of the Constitution of the Kingdom of Thailand 2017* document, is not sufficient to resolve conflicts in its interpretation, another piece of legal drafting documentation that may be able to point to the purpose of the Constitution is the report of the meeting of the CDC.

It is not often that a problem of interpretation that arises after a law comes into force has been brought up in discussion at the drafting stage. However, the issue of the calculation of the eight-year term of office of the Prime Minister was raised for debate by Mr. Meechai Ruchuphan, the Chairman of the CDC, at the 500th meeting. Mr. Meechai expressed clearly the view that the eight-year prime ministerial term of office of General Prayut Chan-o-cha is to be counted starting from when he assumed the position of Prime Minister in 2014 after the National Council for Peace and Order ("NCPO") seized power. The role of Mr. Meechai, in the position of the only civilian member of the NCPO, is crucial if, as many Thai people believe, the purpose of the 2017 Constitution is the purpose of Mr. Meechai—which is not unreasonable—or if they take the view that the purpose of the 2017 Constitution is the intention of the NCPO; Mr. Meechai, in the position of a member of the NCPO, is a co-creator of that

intention. For this reason, the view of Mr. Meechai in the 500th meeting is not merely the view of the Chairman, or of one member, of the CDC, but a powerful opinion of someone in the position of a co-creator of the intention of the Constitution, who knows the purpose of the 2017 Constitution better than anyone in the world.

There are those who argue that the opinion in favour of counting the eight-year term from 2014, expressed in the 500th meeting of the CDC, is only the opinion of the Chairman and the Vice Chairman. Even if we disregard the fact that Mr. Meechai knows the purpose of the 2017 Constitution better than anyone else in the world, anyone familiar with legislative drafting meetings knows that if a member of the legislative drafting committee has an opinion on the principles or guidelines for the application or interpretation of any legal provision undergoing drafting, he or she will express that opinion and it will be recorded in the minutes of the meeting. Usually, no vote is taken on whether to adopt an opinion in any form. Therefore, if people are expressing opinions along the same lines, especially if those opinions are of the Chairman and Vice Chairman, and there are no committee members expressing any other opinions, then on this matter it can be clearly understood that the CDC collectively is of the opinion that the eight-year term of office of the Prime Minister under Section 158 paragraph four shall be counted from 2014. In his book *Thoughts of the 2017 Constitution Drafting Committee*, Mr. Meechai himself wrote that

> In the work of the CDC, from beginning to end, the method of casting votes was never used (although in truth there was a vote, once and only once: when it was necessary to move out to the countryside to increase our progress, to complete the work within the specified time, someone proposed to relocate to the seaside, someone else proposed the mountains. There was no reason to have a long debate over this, so I called for a vote by show of hands. The majority voted for the seaside, so to the seaside we went). (p. 20)

III. THE MINUTES OF THE 501ST CDC MEETING

If any member of the Constitution Drafting Committee had disagreed with Mr. Meechai's opinion that the eight-year term should be counted from 2014, they would have expressed their objection at the 500th meeting, where this issue was raised for discussion. They also had a further opportunity to object in the 501st meeting, which approved the minutes of the 500th meeting. Since no member of the Committee protested against the opinion of Mr. Meechai, it can be understood that the Committee members held the same opinion as Mr. Meechai and unanimously accepted that the eight-year calculation pursuant to Section 158 paragraph four must be made from 2014. This is the best and most conclusive evidence showing the purpose of the Constitution in calculating the eight-year term of the Prime Minister.

The more attempts by the draftsmen of the Constitution to refute their previous opinions and actions, and the more attempts to discredit the version of the facts recorded in the minutes of the 500th meeting by alleging that the minutes of the

meeting are inaccurate or were never approved, the more credible it becomes that the view of Mr. Meechai on the interpretation of Section 158 paragraph four recorded in the minutes of the 500th meeting is the true purpose of the provision.

IV. THE ARBITRARY INTERPRETATION TO ALLOW REMAINING FOR OVER EIGHT YEARS

There are some who propose using principles of political science over jurisprudence in interpreting Section 158 paragraph four, especially the opinion that a middle path should be chosen between the options of beginning the calculation in 2014, 2017 and 2019 respectively: i.e., to calculate from 2017. To interpret the law using the middle path like this has no principled or theoretical basis accepted in jurisprudence or that can be explained by morality. An interpretation along the middle path in a manner that brings principles of political science to bear on jurisprudence merely results in an arbitrary interpretation, which is an attempt to undermine the legal consequences that follow from the direct and straightforward application of legal principles. The application of Section 158 paragraph four and the identification of the purpose of this legal provision is the application and interpretation of a provision of law, not the application of principles of political science.

What damage must Thai society suffer, and what opportunities must be lost to the Thai people, from interpretations using principles of political science upon principles of law in important cases that are turning points, politically and legally, for the country?

The interpretation of the calculation of the eight-year period, according to Section 158 paragraph four in line with principles of jurisprudence, is an interpretation of the purpose of the law, which is a guideline for interpretation to produce clarity and legal certainty as a safeguard of the rights and freedoms of the people. There is only one purpose of Section 158 paragraph four in calculating the eight-year term of office of the prime minister; that is, to begin the calculation from 2014. If you wish to interpret it to allow the Prime Minister to remain for more than eight years, it is necessary to use an arbitrary interpretation, which is the Thai style of interpretation, as can be seen time and time again. If we see an arbitrary interpretation in another case, this should not be considered surprising in a Thai society in which the desecration of the legal system and judicial process has become normal.