

Prime Ministerial Term Limit: Adopted, Abused, and Abandoned

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Abstract

Since 2007, Thailand has introduced a prime ministerial term limit into its constitutional system. However, the purpose of this term limit appears not to prevent an elected tyranny but rather to obstruct enemies of the conservative establishment who have been entrenching their presence in Thailand's volatile politics. The measure was put to the test when Prayuth Chan-ocha, the junta leader and one of Thailand's longest serving prime ministers, hit the eight-years term limit. The Constitutional Court was willing to ignore the law and save him. This article traces the adoption of the prime ministerial term limit and highlights the constitutional court decision as a case study of an abusive constitutional borrowing.

Keywords: Term limit — Abusive constitutional borrowing — Prayut Chan-ocha — Constitutional court

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I. A POTPOURRI CONSTITUTION

The Thai constitutional system is a potpourri of transplanted designs. Legal transplant is a common technique for a lawyer searching for a legal solution to any problem, from a new constitutional drafting procedure to anti-corruption measures, from a new electoral system to judicial review. A drafter, or a judge, would identify another jurisdiction facing a similar challenge and study how that jurisdiction deals with it. Then, the drafter or the judge would consider how best to modify their legal solution to suit Thailand's context. This adopt-and-adapt approach is how one of Thailand's best constitutions, the 1997 Constitution, was designed. Prior to the actual drafting in 1996, a group of legal scholars had carried out an extensive study of a new political arrangement that would solve the chronic problem of democratic failure. A series of studies, which later became a blueprint for the 1997 Constitution, extensively drew many lessons from various jurisdictions. The Constitutional and Administrative Courts are drawn from France, Germany, Italy, and Austria.¹ The idea of an organic law is taken after France's.² The Supreme Court Criminal Division for Political Office Holders is also an adaptation from French's Haute Cour de Justice.³ Independent constitutional bodies originated from independent regulatory agencies of the USA, UK, and France.⁴ The outcome is Thailand's impressive 'People's Constitution of 1997.'

While adopt-and-adapt is a standard practice in the globalized world, lately, legal borrowing has become increasingly problematic. No legal design can be introduced in its original form as it has to be adapted to fit the local context. But adaptation and abuse can be difficult to differentiate. Thai constitutional lawyers seemingly abuse the technique to borrow certain terminologies and concepts but modify them to serve a very different end, usually a less liberal one. This is sometimes described as 'anti-purposive legal borrowing' where the adopted measure of a norm is for the purpose opposite to that underpinning such norm.⁵ The Constitutional Court of Thailand is a case in point, where judges regularly cite theories such as the constituent power theory, the basic structure doctrine, or militant democracy to

¹ กมลชัย รัตนสกาวงศ์, "ศาลรัฐธรรมนูญและวิธีพิจารณา" in ธนาพล อิวสกุล (ed), การปฏิรูปการเมืองไทย: ฐานคิดและข้อเสนอว่าด้วยการออกแบบรัฐธรรมนูญฉบับประชาชน ปี 2540 [Kamonchai Rattanasakawong, Constitutional Court and Its Procedures in Thanapol Ewsakul (ed), *Thailand's Political Reform: Basis and Proposal for Designing the People's Constitution in 1997*] (Thailand Research Fund 2017) 508–53.

² สมคิด เลิศไพฑูรย์, "พระราชบัญญัติประกอบรัฐธรรมนูญ" [Somkid Lertpaitoon, "Organic Act"] in Thanapol, *Thailand's Political Reform* (n 1) 53–80.

³ บวรศักดิ์ อุวรรณโณ, "ระบบการตรวจสอบทุจริตของผู้ดำรงตำแหน่งระดับสูง" [Borwornsak Uwanno, "Corruption Scrutiny for High-Level Office Holders"] in Thanapol, *Thailand's Political Reform* (n 1) 554–627.

⁴ วิษณุ วรรณุญ, "องค์กรของรัฐที่เป็นอิสระ" [Vishnu Varunyoo, "Independent Public Agency"] in Thanapol, *Thailand's Political Reform* (n 1) 467–507.

⁵ Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford University Press 2021) 44 <<https://doi.org/10.1093/oso/9780192893765.001.0001>>.

dissolve democratic political parties, undermine an anti-government movement, block an attempt to reform a constitution, or limit rights and liberties.⁶

During the drafting of the 2017 Constitution, the junta, the National Council of Peace and Order (NCPO), ordered that the drafting committee had to prepare a draft that created a democratic regime with the king as head of state suitable to Thailand's social context.⁷ The term resembles Thai-style democracy, which is actually a euphemism for a fragile or even illiberal democratic regime.⁸ That mandate effectively allowed constitution drafters to experiment with novel legal solutions, allegedly not to promote democracy, but to weaponize the law to prevent the opposition from winning office while further entrenching the authoritarian structure into the system. It created a hybrid regime where dictatorship could be disguised as a legitimate elected government.⁹ For example, under the pretext of more accurate representation of demography, the 2017 Constitution adopted a modified mixed-member apportionment system that resulted in a highly fractious House of Representatives which aided the NCPO leader to win office.¹⁰ Similarly, the 2017 Constitution expanded the roles of the court and watchdog agencies to fight against corruption. Under such pretext, eventually these bodies became supra-constitutional bodies that domineered electoral politics.¹¹ The constitution and the judiciary were, therefore, the junta's potent weapons to maintain its power. The interesting question is what if the two collide.

This article focuses on such collision between the constitution and the judiciary. The constitution drafters adopted an executive term limit in the 2017 Constitution, the goal of which was said to be to prevent parliamentary dictatorship. This article would

⁶ See Khemthong Tonsakulrungruang, "Thailand's Unamendability: Politics of Two Democracies" in Rehan Abeyratne and Ngoc Son Bui (eds), *The Law and Politics of Unconstitutional Constitutional Amendments in Asia* (Routledge 2021) <<https://doi.org/10.4324/9781003097099>>; Khemthong Tonsakulrungruang, "Entrenching the Minority: The Constitutional Court in Thailand's Political Conflict" (2017) 26(2) *Washington International Law Journal* 247; "Thailand: An Abuse of Judicial Review" in Yap Po Jen (ed), *The Judicial Review of Elections in Asia* (Routledge 2016) <<https://doi.org/10.4324/9781315668567>>.

⁷ Interim Charter B.E. 2557 (2014), s 35 (2).

⁸ Kevin Hewison and Kengkij Kitirianglarp, "'Thai-Style Democracy': The Royalist Struggle for Thailand's Politics" in Søren Ivarsson and Lotte Isager (eds), *Saying the Unsayable. Monarchy and Democracy in Thailand* (Nordic Institute of Asian Studies Press 2010) 186–92 <<https://doi.org/10.1355/cs33-1f>>.

⁹ Eugénie Mériau, "Thailand in 2018: Military Dictatorship under Royal Command" in Daljit Singh and Malcolm Cook (eds), *Southeast Asian Affairs 2019* (Institute of Southeast Asian Studies 2019) 329–31 <<https://doi.org/10.1355/aa19-1t>>.

¹⁰ See Jacob I. Ricks, "Thailand's 2019 Vote: The General's Election" (2019) 92(3) *Pacific Affairs* 443 <<https://doi.org/10.5509/2019923443>>; Siripan Nogsuan Swasdee, "Electoral Integrity and the Repercussions of Institutional Manipulations: The 2019 General Election in Thailand" (2019) 5(1) *Asian Journal of Comparative Politics* 52 <<https://doi.org/10.1177/2057891119892321>>.

¹¹ See Khemthong, "Entrenching the Minority" (n 6); Eugénie Mériau, "Thailand's Deep State, Royal Power and the Constitutional Court (1997–2016)" (2016) 46 *Journal of Contemporary Asia* 445; Duncan McCargo, Saowanee T. Alexander, and Petra Desatova "Ordering Peace: Thailand's 2016 Constitutional Referendum" (2017) 39 *Contemporary Southeast Asia* 65, 69 <<https://doi.org/10.1355/cs39-1b>>.

like to propose that such adoption is actually an abusive borrowing of a concept. The highlight of this article is the constitutional court case when the term of Prayuth Chan-ocha, the former junta leader and the prime minister, was challenged. Prayuth tried to evade it and, ultimately, the Constitutional Court came to his aide through a questionable constitutional interpretation. The case, resulting in the failure to disqualify Prayuth, proves that the term limit was introduced not to safeguard liberal democracy but to obstruct an enemy of the establishment. Thus, state mechanisms are willing to abandon the law in order to exempt their peers from such limit.

This article also sheds light on the relationship between the junta and the constitutional court. Conventional wisdom would assume that the constitution and the judiciary must be under Prayuth's control as he claimed the status of the sovereign. However, a closer look into the term limit case shows that Prayuth could not control the Constitutional Court, which resisted accepting Prayuth's interpretation of the term-limit clause. The Constitutional Court offered its own 'middle-way' interpretation. Such approach fits the Constitutional Court's reputation as independent, arbitrary, and still anti-majoritarian.

The article traces the origin of the law and the global pattern before discussing its introduction into Thailand's constitutional system. Finally, it looks into the constitutional court case. The case highlights abusive constitutional borrowing with a twist when that constitutional mechanism is enforced upon the authoritarian leader himself, compelling the Constitutional Court to render the measure less effective in order to save Prayuth Chan-ocha. It ends with a discussion of the consequence of the case on Thailand's democratization.

II. TERM LIMIT AND EVASION

Around the world, democracy is receding. But democracy is no longer threatened by men in uniform and tanks. In most cases, democracy is not killed by a traditional coup d'état but a new breed of men aspiring to game the system and rule as a sham but seemingly legitimate government. A constitution becomes a key, not an obstruction, to power.¹² This new threat is harder to detect. People may not be aware until it is too late—that democracy has been hollowed out. One of the best red flags for such democratic backsliding is the evasion of an executive term limit.

Conventional wisdom dictates that a person in power shall not be allowed to stay indefinitely.¹³ A politician may need time to gain experience on how to run the government successfully, but too much time does not translate into more expertise. On the contrary, an overstayer will eventually build his network that dominates the

¹² See David Landau, "Abusive Constitutionalism" (2013) 47 UC Davis Law Review 189; Kim Lane Scheppele, "Autocratic Legalism" (2018) 85(2) The University of Chicago Law Review 545.

¹³ Tom Ginsburg, Zachary Elkins, and James Melton, "Do Executive Term Limits Cause Constitutional Crises?" in Tom Ginsburg (ed) *Comparative Constitutional Design* (Cambridge University Press 2012) 351 <<https://doi.org/10.1017/CBO9781139105712.016>>.

political landscape and cripple check-and-balance mechanisms. Ultimately, that person will rid the opposition and turn the country into an authoritarian regime.

A term limit is a standard mechanism to prevent such a problem. Usually it is straightforward and easy to understand.¹⁴ Unlike other clauses which may be written in ambiguous legalese, anyone who can count can figure out if that president's time is up.

The most basic idea is to put a fixed number of terms, usually two, for the head of state or government. Sometimes a multiple term is allowed, but not in succession.¹⁵ That leader can return to office only after a gap period. Other variations allow successive terms but only for one or two terms total.¹⁶ Many countries in Latin America, Asia, and Africa adopt a version of the presidential term limit.¹⁷ Even the USA, which had had no official term limit prior to Franklin Roosevelt's third term in 1941, introduced the 22nd Amendment that turned the time-honoured tradition into law.¹⁸

Studies show that, despite the prevalence of a term limit, surprising numbers of leaders are inclined to evade the term limit restriction. According to one study, at least one-third of leaders tried to overstay.¹⁹ The majority go as far as amending, or replacing, a constitution. Xi Jin Ping of China, after ten years and two terms in office, amended the PCR Constitution so he could stay for life.²⁰ Paul Kagame of Rwanda and Abdelaziz Bouteflika of Algeria employed the same tactic.²¹ Faustin-Archange Touadéra of the Central African Republic rewrote the constitution to reset the term limit.²² A similar tactic was carried out by Alpha Conde of Guinea.²³ Some ask the court to interpret the term in their favour e.g., when Evo Morales overhauled the high court of Bolivia and appointed friendly judges.²⁴ Others seek help from a trusted accomplice. Russia's Vladimir Putin let Dmitry Medvedev to run as an interim president for a term while Putin ruled as a prime minister before returning.²⁵ The rest simply ignore the mandate.

¹⁴ Mila Versteeg, Timothy Horley, Anne Meng, Mauricio Guim, and Marilyn Guirguis, "The Law and Politics of Presidential Term Limit Evasion" (2020) 120 Columbia Law Review 173, 186–87.

¹⁵ Ginsburg et al, "Executive Term Limits" (n 13) 355–56.

¹⁶ *ibid* 356.

¹⁷ *ibid* 355.

¹⁸ *ibid* 352–53.

¹⁹ Versteeg et al., "Law and Politics" (n 14) 176.

²⁰ "China's Leader Xi Jinping Secures Third Term and Stacks Inner Circle with Loyalists" *The Guardian* (23 October 2022) <<https://www.theguardian.com/world/2022/oct/23/xi-jinping-to-rule-china-for-precedent-breaking-third-term>>.

²¹ Versteeg et al., "Law and Politics" (n 14) 175.

²² "Constitutional Referendum to Remove Presidential Term Limits Divides Central African Republic" *AP News* (7 July 2023) <<https://apnews.com/article/central-african-republic-referendum-vote-constitution-democracy-e1ce818f27fcfc7452003a9fa7ef02>>.

²³ Adem K. Abebe, "It's Time for the African Union to Put a Stop to 'Third-termism'" *Al Jazeera* (8 July 2019) <<https://www.aljazeera.com/opinions/2019/7/8/its-time-for-the-african-union-to-put-a-stop-to-third-termism>>.

²⁴ Versteeg et al., "Law and Politics" (n 14) 225–26.

²⁵ *ibid* 241–42.

Not all attempts are successful. About two-third succeed.²⁶ But how could we best stop an evasion attempt? Can a constitution count on the judiciary to stop the rogue leader? Surprisingly, a study suggests that a judicial body is ineffective in preventing an evasion.²⁷ It appears that, by the time a leader announces his wish to stay beyond the limit, he has already co-opted the court. The people may offer a better alternative. Senegal's Macky Sal only ruled out the third-term possibility after a deadly protest.²⁸ So did Morales, who went into exile temporarily after his attempt was foiled by protest.²⁹

A final note is that while there is no hard-and-fast rule, a term limit seems to be applicable mainly to the presidential system. Normally, in a parliamentary system, a government serves as long as it enjoys confidence of the parliament. Germany's chancellor Angela Merkel stayed in her office for 16 years. Margaret Thatcher served as the UK prime minister from 1979–90.

III. THAILAND'S ADOPTION OF A TERM LIMIT

Thailand's experiment with an introduction of a term limit into its parliamentary system seems puzzling at first. Among its Southeast Asian neighbours, Thailand stands out for its unstable politics. Generally, Southeast Asian politics are defined by strongmen and clan politics. Cambodia's Hun Sen has recently appointed his son, Hun Manet, the new prime minister after four decades in power.³⁰ Hun Sen is now his son's advisor. Ferdinand Marcos of the Philippines first attempted a constitutional convention to rewrite the 1935 Constitution. When the convention failed, he declared martial law in 1972, which would extend his presidency indefinitely.³¹ However, his regime succumbed soon after the declaration of martial law. Interestingly, his son, Ferdinand Marcos Jr., has returned to politics. On the contrary, Thailand's volatile politics meant that, with one exception, the country never had a democratically elected prime minister finish their first full term, let alone overstay.³² A prime minister almost always ends their term prematurely by (1) being ousted by a coup d'état, (2) being

²⁶ *ibid* 176.

²⁷ *ibid* 175–76.

²⁸ "Senegal's Macky Sall Rules Out Third Term after Deadly Protests" *Al Jazeera* (4 July 2023) <<https://www.aljazeera.com/news/2023/7/4/senegals-macky-sall-rules-out-third-term-after-violent-unrest>>.

²⁹ "Evo Morales Returns to Bolivia, Ending Year in Exile" *AP News* (10 November 2020) <<https://apnews.com/article/argentina-bolivia-latin-america-evo-morales-4f5ff3b663086bacd71c7f3672c3d014>>.

³⁰ "Cambodia: Son of Long Time Ruler Hun Sen Becomes PM in Historic Transfer of Power" *The Guardian* (22 August 2023) <<https://www.theguardian.com/world/2023/aug/22/who-is-cambodia-pm-hun-manet-hun-sen-son-transfer-of-power>>.

³¹ William H. Overholt, "The Rise and Fall of Ferdinand Marcos" (1986) 26 *Asian Survey* 1137, 1139–40 <<https://doi.org/10.2307/2644313>>.

³² See chapter 8 and 9 of Chris Baker and Pasuk Phongpaichit, *A History of Thailand* (2nd edn, Cambridge University Press 2013) <<https://doi.org/10.1017/CBO9781139656993>>.

forced to dissolve the House due to scandals, or (3), the latest development, being removed by the judiciary. Prior to 2007, there was no term limit on the prime minister.

On the contrary, the first four longest serving prime ministers were military dictators or semi-democratic leaders.³³ Field Marshall Plaek Piboonsongkram served 15 years and 25 days. Field Marshall Thanom Kittikajon stayed for 9 years and 205 days. Although Prem Tinnasulanond never carried out a coup, this staunch royalist successfully garnered support from the army and political parties to be nominated as prime minister.³⁴ He reigned for 8 years and 154 days. Prayuth Chan-ocha was the fourth longest serving prime minister. Field Marshall Sarit Thanarat passed away in the office. These junta prime ministers entered the office and were backed by authoritarian means. They enjoyed vast power and had virtually no limits.

However, the experience under the Thaksin Shinawatra administration from 2001 to 2006 somewhat justifies an adoption of a term limit vis-à-vis the possible rise of a populist authoritarian. In 2005, Thaksin Shinawatra set a record as the first democratically elected leader who completed the first full term. His success was partly due to the 1997 Constitution that favoured a stronger, more stable, government, as well as due to his innovative style of governance, making him hugely popular.³⁵ His party, Thai Rak Thai (TRT), won another term with an even larger margin, another unprecedented success. Thaksin was confident enough to announce that TRT would stay in power for at least 20 years in order to completely transform Thailand.³⁶ That ambitious announcement triggered a fear of parliamentary dictatorship among Thaksin's opponents, who began to worry about his populist authoritarian approach to governance. Although he claimed that, in his third term, he would step down and act only as an advisor, that did not allay the fear. Thaksin's second term was fraught with accusations of corruption, violation of human rights, and meddling with checks-and-balances.³⁷ Eventually, that fear led to the formation of anti-Thaksin movement which successfully expelled him in the 2006 coup. That very same fear convinced the constitution drafters to adopt a presidential term limit into the 2007 Constitution. The 2007 Constitution prohibited the PM from holding office for more than eight consecutive years.³⁸ This term limit is part of a larger design to place more restraints

³³ “อนาคตของประยุทธ์หลังคำตัดสินศาลรัฐธรรมนูญ ‘แคนดิเดตนายกฯ หรือองคมนตรี ???’ ” [“Future of Prayuth after the Constitutional Court’s Decision: ‘Prime Ministerial Candidate or Privy Councillor???’ ”] *iLaw* (4 October 2022) <<https://www.ilaw.or.th/node/6278>>.

³⁴ Baker and Pasuk, *History of Thailand* (n 32) 236–37.

³⁵ Kasian Tejapira, “Toppling Thaksin” (2006) 39 *New Left Review* 5, 28–29; Kewin Hewison, “Thaksin Shinawatra and the Reshaping of Thai Politics” (2010) 16 *Contemporary Politics* 119, 122, 126–27 <<https://doi.org/10.1080/13569771003783810>>.

³⁶ “ทักษิณ : ‘เราต้องเป็นรัฐบาลอีก 20 ปี—ทำการเมืองอย่างสร้างสรรค์’ ” [“Thaksin: ‘We Must be Government for Another 20 Years—Committed to Constructive Politics’ ”] *Voice Online* (26 July 2018) <<https://www.voicetv.co.th/read/rJTmgJw4Q>>.

³⁷ Kasian, “Toppling Thaksin” (n 35) 32–35; Hewison, “Thaksin Shinawatra” (n 35) 123–24.

³⁸ Constitution of Thailand B.E. 2550 (2007), s 171 para 4: “The Prime Minister shall not serve in office more than eight years.”

on the head of the executive, including a new electoral system, a more fractious house, and stronger watchdog agencies.³⁹ The new prohibition, however, was never used.

Post-2006-coup politics were chaotic. Thaksin's proxy, Samak Sundaravej, was elected prime minister in early 2008 but he lasted only eight months. The Constitutional Court axed him for a conflict of interest charge.⁴⁰ His successor, Somchai Wongsawat, was disqualified after less than three months in office when the Constitutional Court dissolved his party, the People's Power Party.⁴¹ Abhisit Vejjajiva presented a more peaceful and orderly case when he dissolved the House in 2011, after the constitution amendment had come into effect. Yingluck Shinawatra, Thaksin's youngest sister, was ousted by a coup in 2014 after almost three years as Thailand's first female prime minister. More precisely, she decided to dissolve the House in November 2013 when the public protested against an amnesty bill.⁴² Later, the Constitutional Court disqualified her from being a caretaker prime minister for violation of conflict of interest.⁴³ After the coup ousted the remaining cabinet, the junta-appointed National Legislative Assembly impeached her.⁴⁴ It appeared that a term limit may not be necessary. Since 2007, no prime minister has even finished their first term. Still, the constitution drafters kept the term limit. They also changed details of it.

The 2017 Constitution is the product of the May 2014 coup d'état which abolished the 2007 Constitution. General Prayuth Chan-ocha, the then Army Commander and the leader of the National Council for Peace and Order (NCPO), commissioned constitutional experts to draft a new charter under the NCPO's close supervision.⁴⁵

The NCPO's ambitious goal was two-fold. First, it aimed to totally eradicate Thaksin Shinawatra's presence in Thai politics.⁴⁶ The popular former prime minister was regarded by many conservatives as a threat to their control of politics. Second, the NCPO wanted to entrench its control over Thai politics indefinitely.⁴⁷ The majority's wisdom was not to be trusted so Thai democracy required the NCPO's guardianship. As a result, the 2017 Constitution was designed with two conflicting mandates reflecting the two goals. It introduced several mechanisms that would obstruct the

³⁹ See Tom Ginsburg, "Constitutional Afterlife: The Continuing Impact of Thailand's Postpolitical Constitution" (2009) 7 *International Journal of Constitutional Law* 83 <<https://doi.org/10.1093/icon/mon031>>.

⁴⁰ Constitutional Court Decision 12-13/2551 (2008).

⁴¹ Constitutional Court Decision 20/2551 (2008).

⁴² Duncan McCargo, "Thailand in 2014: The Trouble with Magic Swords" in Daljit Singh (ed) *Southeast Asian Affairs* volume 2015 (ISEAS-Yusof Ishak Institute 2015) 338 <<https://doi.org/10.1355/aa15-1s>>.

⁴³ Constitutional Court Decision 9/2557 (2014).

⁴⁴ "Thai Lawmakers Vote to Impeach Ousted Premier" *NPR* (23 January 2015) <<https://www.npr.org/sections/thetwo-way/2015/01/23/379311642/thai-lawmakers-vote-to-impeach-ousted-premier>>.

⁴⁵ Interim Charter 2014, s 34; McCargo et al, "Ordering Peace" (n 11) 68.

⁴⁶ McCargo et al., "Ordering Peace" (n 11) 68-69.

⁴⁷ Mérieau, *Thailand in 2018* (n 9) 329.

incoming government from dominating the political landscape. Claiming to prevent parliamentary dictatorship, the 2017 Constitution purported to create a weak government under supervision of unelected bodies.⁴⁸ For example, the charter granted the judiciary and watchdog agencies expansive power to scrutinize the government's morality and constitutionality,⁴⁹ imposed stringent fiscal discipline and a code of conduct,⁵⁰ and placed a more restrictive term limit for the prime minister.

The 2017 Constitution maintained the idea of a term limit but upgraded the mandate. It changed the wording so that the Prime Minister shall not hold office for more than eight years in total, whether or not holding a consecutive term.⁵¹

Generally Thai politics oscillates between coup and election. No junta was able to hold on to power after an election as no junta has survived a post-coup election. However, the NCPO made sure that the 2017 Constitution would tilt the playing field in their favour and guarantee its victory. In addition to a modified mixed-member apportionment electoral system that favoured Prayuth's newly-founded Phalang Pracha Rath Party (PPRP),⁵² Prayuth also had total control over appointments of senators and the election commission (EC).⁵³ The EC's mismanagement of the 2019 election played a crucial role in securing PPRP's extra MPs,⁵⁴ while the 250 senators were allowed to vote for PM.⁵⁵ All these unusual arrangements facilitated Prayuth's transition from a military junta to a democratically elected prime minister even though the election was allegedly rigged.⁵⁶

Ultimately, the two objectives—securing Prayuth's electoral victory and of obstructing the upcoming government—meant that the Prayuth administration would face several self-imposed hurdles, generating a number of disputes which drew the Constitutional Court into those controversies. In a series of cases, the Constitutional Court cleared the Prayuth administration from constitutional restraints. It confirmed Prayuth's eligibility for prime ministership despite him being a junta leader and

⁴⁸ McCargo et al., "Ordering Peace" (n 11), 69; Khemthong Tonsakulrungruang, "Thailand" in Richard Albert et al. (eds), *2017 Global Review of Constitutional Law* (I-CONnect, Clough Center 2018) 293–95.

⁴⁹ Constitution of Thailand B.E. 2560 (2017), ss 219 and 233.

⁵⁰ *ibid*, ss 140, 142, and 164.

⁵¹ *ibid*, s 158 para 4: "The Prime Minister shall not hold office for more than eight years in total, whether or not holding a consecutive term. However, it shall not include the period during which the Prime Minister carries out duties after vacating office."

⁵² Siripan, "Electoral Integrity" (n 10) 3–4, 7–10.

⁵³ Ricks, "Thailand's 2019 Vote" (n 10) 449; Petra Desatova and Saowanee T. Alexander, "Election Commissions and Non-Democratic Outcomes: Thailand's Contentious 2019 Election" (2021) 43(4) *Politics* 1, 7 <<https://doi.org/10.1177/02633957211000978>>.

⁵⁴ Khemthong Tonsakulrungruang, "Thailand" in Richard Albert et al. (eds), *2019 Global Review of Constitutional Law* (I-CONnect, Clough Center 2020) 345; Desatova and Alexander, "Election Commissions" (n 53) 9–10.

⁵⁵ 2017 Constitution, s 269.

⁵⁶ Ricks, "Thailand's 2019 Vote" (n 10); Siripan, "Electoral Integrity" (n 10).

exempted his cabinet members from the conflict of interest requirement.⁵⁷ The latest in the series is the Prayuth's removal case.

IV. THE CASE OF PRAYUTH CHAN-OCHA

The dispute over Prayuth's term limit was the consequence of his extraordinary rise to power. Prayuth Chan-ocha, the Army Commander, staged a coup on 22nd May 2014 after six months of anarchic protests that paralyzed the country.⁵⁸ The coup ousted Yingluck Shinawatra, Thaksin's youngest sister and Thailand's first female prime minister, but Prayuth did not immediately appoint himself her replacement. Conventionally a coup leader had a choice between appointing himself prime minister or picking a third party, such being done in 2006. Prayuth, instead, promulgated the 2014 Interim Charter which authorized himself to appoint the National Legislative Council, who, in turn, voted for Prayuth as the prime minister on 24th August 2014.⁵⁹ Under the 2017 Constitution, the general election took place in March 2019 and, after a protracted negotiation, the Senate and the House voted Prayuth to be the prime minister on 9th June 2019.

Thus, Prayuth has been a prime minister under three different circumstances. First, from August 2014 to April 2017, his office was sanctioned by the 2014 Interim Charter. Second, from April 2017 to June 2019, the transitional clause in the 2017 Constitution recognized him as a lawful prime minister despite his unconstitutional origin.⁶⁰ Last, he was duly appointed a prime minister according to procedures as decreed by the 2017 Constitution. This peculiar circumstance meant that, when being read in bad faith, the seemingly simple and straightforward term limit was subject to debate on how best to count those eight years.

Prayuth and the opposition disagreed on the point when Prayuth's prime ministerial term began. For the opposition, and the majority of the public, the language of section 158 was plain. A prime minister encompasses any form of prime minister, a junta or democratic one, and should all be included. They therefore insisted that Prayuth's term began in August 2014 and expired in August 2022. Prayuth disagreed. He was adamant that the 2017 Constitution did not intend to include his term as a junta prime minister. His 8-year term only began after he was properly selected by the Parliament in June 2019. According to Prayuth, he could still serve the country until 2027. When Prayuth refused to leave in August 2022, the opposition

⁵⁷ Constitutional Court Order 36/2562 (2019); Constitutional Court Decision 29/2563 (2020); Constitutional Court Decision 6/2564 (2021).

⁵⁸ See Prajak Kongkirati, "Thailand's Failed 2014 Election: The Anti-Election Movement, Violence, and Democratic Breakdown" (2016) 46(3) *Journal of Contemporary Asia* 467 <<https://doi.org/10.1080/00472336.2016.1166259>>.

⁵⁹ Khemthong Tonsakulrungruang, "Hope v Reality: Can Thailand's Military be Trusted?" *Constitutionnet* (29 August 2014) <<https://constitutionnet.org/news/hope-v-reality-can-thailands-military-be-trusted>>.

⁶⁰ 2017 Constitution, s 264 para 1.

asked the Constitutional Court to rule on Prayuth's eligibility for the office. The opposition also requested the Constitutional Court to order Prayuth to suspend his performance until the verdict was reached.

In a 5-4 decision, the Constitutional Court entertained the opposition's request to suspend Prayuth.⁶¹ No official reason was given. A temporary suspension order was an innovation of the 2017 Constitution. For the first time, if the Constitutional Court or the political crime division of the Supreme Court is convinced that a complaint is likely, it may order an accused MP to temporarily suspend their performance. This ban is applicable to a cabinet member, too.⁶² The measure is often considered a prediction of the case's outcome as previously suspended MPs were disqualified, including the infamous case of Thananthorn Jungrungruangkij, the leader of the rising opposition party Future Forward, who was declared ineligible due to a conflict of interest.⁶³

The main debate in this case was an interpretation of section 158. How should the Constitutional Court count Prayuth's prime ministerial term? There seems to be methodological difference here. The opposition cited the record from the meeting of the Constitution Drafting Committee (CDC). After the 2017 Constitution came into effect, the CDC convened to prepare a guideline accompanying the new law. In the 500th meeting, dated 7th September 2021, Meechai Ruechupan, the president of the CDC, asked if a term prior to the promulgation of the 2017 Constitution should be counted together with the term after the promulgation. Supoj Khaimuk, the first vice president of the CDC and a former Constitutional Court judge, agreed that all terms should be considered. No objection was made and the minutes to the meeting were adopted as such.⁶⁴ The guideline itself clarifies that the 8-year term does not need to be consecutive. The only exception is the term during an interim government. This new term limit is in place to prevent a person from overstaying in power, which could trigger a political crisis. This, the opposition insisted, was the purpose of the 2017 Constitution: to prevent a monopoly of political power.

There were circumstances supporting why Prayuth had been a prime minister since 2014. In 2018, the Constitutional Court applied a conflict of interest rule to several ministers who had been in office prior to 2017.⁶⁵ The National Anti-Corruption Commission exempted Prayuth from disclosing his assets when he was appointed a prime minister in 2019 because he was returning to the same post.⁶⁶ Most importantly, the transitional clause recognized Prayuth's government as a legitimate one under the 2017 Constitution, as earlier mentioned.

The last argument was a plea that the majority of the public had always understood Prayuth to be the prime minister throughout these eight years. He had

⁶¹ Office of the Constitutional Court, Press Release no. 17/2565 (24 August 2022).

⁶² 2017 Constitution, ss 82 and 170.

⁶³ Constitutional Court Decision 14/2562 (2019). See Khemthong, "2019 Global Review" (n 54) 346.

⁶⁴ Constitution Drafting Committee, Minutes of the 500th Meeting (7 September 2021) 1–6.

⁶⁵ Constitutional Court Decision 5/2561 (2018).

⁶⁶ "ป.ป.ช.ไม่ 'เปิดเผย' บัญชีทรัพย์สินประยุทธ์ที่ยื่นตอนเข้ารับตำแหน่งนายกฯ รอบสอง" ["NACC Does Not Disclose Prayuth's Assets in His Second Round of PM"] *The Matter* (6 April 2021) <<https://thematter.co/brief/139973/139973>>.

been exercising prime ministerial power just like other prime ministers, so the Constitutional Court should not confuse the public by ruling otherwise. There is no differentiating a term for a junta or civilian prime minister.

The above opinion resonated in a joint statement written by 51 legal scholars from 15 universities submitted to the Constitutional Court. The joint statement agreed that there was a single category of a prime minister under the 2017 Constitution. Without an explicit exemption, Prayuth's 8-year term began in August 2014.⁶⁷

Prayuth, on the contrary, adopted a very narrow reading of the text: there were two types of prime minister. First was a junta prime minister and another was an elected prime minister. A prime minister in the 2017 Constitution should be understood to refer only to a prime minister who is specifically selected according to the 2017 Constitution's procedure. Hence, his time as the 'prime minister' counts only from June 2019 when he was officially voted into the office. His defence was supported by the CDC president's memorandum to the Constitutional Court. Meechai opined that a rule, especially the one imposing a limit on people's rights, such as a term limit, could not be applied to an act prior to the promulgation of the 2017 Constitution.⁶⁸ Therefore, Prayuth's term began since 6th April 2017, the date of the promulgation. Meechai repudiated the validity of the minutes of the CDC meeting, saying that the minutes were misunderstood and an incomplete record that the CDC had yet to adopt because that meeting was the last and the CDC disbanded shortly afterwards.

The opposition, however, refuted Meechai's explanation by producing evidence showing that the CDC had held at least one more meeting after the said one, to which Meechai did not respond.⁶⁹

A month later, the Constitutional Court released a 6-3 decision finding that Prayuth had not exceeded the 8-year term limit. First, the majority dismissed the CDC's minutes as valid authority because they were prepared almost a year after the promulgation of the 2017 charter.⁷⁰ More specifically, the minutes were not the voice of the CDC but of an individual, Meechai. One person's quote did not constitute a reliable source of constitutional interpretation. The Constitutional Court insisted on focusing on the text.

According to the Constitutional Court, a prime minister in the 2017 Constitution refers specifically to an office, the selection of which must be in accordance with the 2017 rules. However, during the transitional period, the 2017 Constitution had to recognize the Prayuth government as a legitimate governing body. Such recognition was partly about continuity, but it also meant that all rules and

⁶⁷ "Law Lecturers Advise Constitutional Court Judges PM's Term Expires by Aug 24" *Thai PBS* (16 August 2022) <<https://www.thaipbsworld.com/law-lecturers-advise-constitutional-court-judges-pms-term-expires-by-aug-24/>>.

⁶⁸ "เปิดคำชี้แจง 'มีชัย' ชี้วาระนายกฯ 8 ปี 'ประยุทธ์' เริ่มนับวันประกาศใช้ รธน.ปี 60" [Meechai's Memo Suggests Prayuth's Term Begun in 2017] *Prachatai* (6 September 2022) <<https://prachatai.com/journal/2022/09/100392>>.

⁶⁹ "ฝ่ายค้านส่งความเห็นค้าน 'มีชัย' ยัน 'ประยุทธ์' เป็นนายกฯ นับปี 60 อัดลิ้มบันทึกลับประชุม กรธ." [Opposition Opposes Meechai's Memo] *Voice TV* (7 September 2022) <<https://voicetv.co.th/read/W4yAnnHBy>>.

⁷⁰ Constitutional Court Decision 14/2565 (2022).

restrictions under the 2017 Constitution were applicable to the incumbent government as well. The Constitutional Court agreed, nonetheless, that the term limit could not be apply before the promulgation. For the Constitutional Court, the term prime minister is very specific. This is not a generic prime minister but a specific office under the 2017 Constitution, under a specific circumstance and selection procedure. Therefore, Prayuth's time as a junta prime minister does not count as a prime minister under this situation. Ultimately, the Constitutional Court rejected the dates claimed by both parties. Prayuth Chan-ocha was a prime minister, according to section 158, only since the promulgation of the law in April 2017. The prime minister had yet to reach the term limit. He had three more years to go, until April 2025.

While the majority focused on the text, the minority three, out of the original five who had earlier suspended Prayuth, emphasized the purpose of section 158. They asked why the limit was introduced in the first place. The minority recognized the danger of a prime minister who stays in office for too long, providing an opportunity for the prime minister to forge a network of cronies, eliminate existing scrutinizing mechanisms, and seek unjustified wealth.⁷¹ Such danger would create a dictator and jeopardize democracy. Section 158 was written in a clear manner and approved in the 2016 referendum to mitigate the danger of political monopoly from a prime minister both from an election and a coup. Unless the 2017 Constitution explicitly prohibited an application of term limit to an incumbent prime minister, Prayuth was still subject to the same restriction.

One notable aspect of the case is the Constitutional Court's dismissal of the CDC's explanation in interpreting the Constitution. Although the Constitutional Court did not consider the CDC to be an exclusive authority, normally the Constitutional Court always summons the drafting minutes to help with understanding the purpose of the law. For example, the Constitutional Court summoned the CDC minutes, explanatory notes, as well as Meechai's written testimony when the Constitutional Court deliberated the case of a summoning order of the House of Representatives Committee.⁷² The Constitutional Court considered both the minutes and Meechai's opinion as important sources of authority. In this case, nevertheless, the Constitutional Court publicly argued that the minutes do not represent the true voice of the CDC. By bypassing the CDC's authority, the Constitutional Court avoided ruling on the issue of Meechai's conflicting accounts and his alleged lie about the CDC's last meeting.

But the Constitutional Court also disagreed with Prayuth's interpretation. The temporary suspension and the rejection of his proposed date show that, although the court and the prime minister belong to the same political faction, the Constitutional

⁷¹ “สรุปความเห็น 3 ตุลาการเสียงข้างน้อย ผู้ชี้ว่า พล.อ. ประยุทธ์เป็น ‘นายกฯ 8 ปี’ แล้ว” [“Summary of 3 Minority Judges on Prayuth's Case”] *BBC Thai* (7 October 2022) <<https://www.bbc.com/thai/articles/cv2nd39jvndo>>.

⁷² Constitutional Court Decision 17/2563 (2020). See Khemthong Tonsakulrungruang, “Thailand” in Richard Albert et al. (eds), *The I-CONnect-Clough Center 2020 Global Review of Constitutional Law* (Clough Center for the Study of Constitutional Democracy 2021) 308.

Court was not simply Prayuth's agent who would obediently follow the junta's order. More likely the Constitutional Court and Prayuth are colleagues, working together toward the same goal of subjugating the electoral political process. But the Constitutional Court has its own interest in showing to the public its independence. The original date of August 2014 would prove to be too much a disaster to the Constitutional Court's own credibility. It was clearly against the purpose of the term limit. Yet, the polarized Constitutional Court could not agree with the opposition so it reached a compromise half-way, saving Prayuth's face without allowing the opposition to win any case against the junta.

In a larger picture, the case also poses a question about how to best use the 2017 Constitution. The law is drafted with distrust of politicians, so it introduced several measures that restricted politicians' power. The 8-year term limit is unreasonably restrictive. The success of Thaksin is now almost impossible to replicate. A prime minister should be allowed to remain in office for as long as the Parliament maintains trust. But the law leaves no ambiguity about its mission to prevent parliamentary dictatorship. Should the Constitutional Court respect and follow the original purpose of the law, in effect punishing the Prayuth administration and legitimizing this illiberal constitution? Or should it depart from the law's command and let Prayuth remain in power, hence creating a greater risk of parliamentary dictatorship? That latter choice seems like the right decision, but with detrimental effect to Thai democracy.

V. UNDERSTANDING THAILAND'S PRIME MINISTERIAL TERM LIMIT

Prayuth's attempt to evade his term limit presents a very interesting case. It fits a global pattern of a strongman leader wishing to exceed his constitutional limit. It also confirms that the judiciary is not the best defence against an overstaying leader. Moreover, the case is complicated by the fact that Prayuth's ascension was undemocratic. This complication helps make a seemingly simple clause ambiguous. This ambiguity allowed the Constitutional Court to find leeway in Prayuth's favour.

The case fits the description of an abusive borrowing, too. A presidential term limit was introduced into the 2017 Constitution in order to obstruct a popular democratic leader from overstaying, not because he could become a tyrant but because he may pose a threat to the establishment. During his reign, Prayuth expanded his control over many state mechanisms, including the Senate, the National Anti-Corruption Commission, the National Human Rights Commission, the Election Commission, and the Constitutional Court, to which he appointed his cronies. The Constitutional Court did not take this context into consideration and focused narrowly on the text. The decision confirms the assumption that the term limit is not applicable to a candidate from the establishment. Hence, an anti-purposive legal transplant.

When the Constitutional Court offers an alternative reading of law in contrast with the public's understanding, it undermines the legitimacy of the Constitution. A

term limit is one of the most effective checks upon political power because of its simplicity and straightforwardness. Anyone who can count should be able to figure out if the prime minister's time is up. That was not true here. Even the simplest clause is beyond the common literary knowledge of the people.

The last twist in this case is the political implication to the involved parties: Prayuth and the Constitutional Court. At first glance, the decision was another victory for Prayuth. Throughout his eight years in power he was challenged numerous times, but the Constitutional Court faithfully sided with him in a series of decisions that cleared his administration of any constitutional obstacles. Although he was suspended for a month, the Constitutional Court finally reinstated him with three more years to go. He could then contest in the next election in mid-2023. This could be another case where the short-sighted Constitutional Court sacrificed legal certainty to save an individual.

However, a deeper probe reveals a different story. The Constitutional Court may have saved Prayuth's face by not ousting him immediately. But even if Prayuth were to win another election, he could only stay for half a term. A half-term prime minister means instability, as everyone knew that Prayuth could not complete a full term. Therefore, another candidate had to be identified in advance. The Phalang Pracha Rath Party showed no support for Prayuth's candidacy in the next election. He was pressured to leave PPRP and join a newly-founded United Thai Nation Party (UTN).⁷³ Prayuth signalled senators to propose an amendment to an executive term limit, but the idea met with criticism. His political career was basically over. It is actually the Constitutional Court that came out victorious. By suspending and reinstating Prayuth, the Constitutional Court proved that, though being part of a royalist-conservative network, the Constitutional Court is by no means under Prayuth's control. It may share some goals with Prayuth, but it is capable of making its own policy decisions. Prayuth may have had control over how the constitution was drafted, but not how it is interpreted. The case actually confirms the importance of the Constitutional Court in upholding or sinking a government.

The decision could only buy Prayuth some time. It actually made him all the more unpopular to the public. Under his administration, Thailand's economy crumbled and corruption was rampant. There were growing calls for Prayuth to be replaced by a more capable leader. The sense of injustice fuelled that dislike of the prime minister. Their chance came in the general election on 14 May 2023. The majority of Thais voted for Prayuth's two arch-rivals: the Move Forward and Pheu Thai parties, which got 151 and 141 seats, respectively. UTN performed dismally, with only 36 seats.⁷⁴

Prayuth's disastrous election outcome meant that the royalist-conservative network could no longer rely on him to lead the government. Eventually, Pheu Thai

⁷³ "Prayut Signs Up with United Thai Nation Party" *Bangkok Post* (9 Jan 2023) <<https://www.bangkokpost.com/thailand/politics/2478609>>.

⁷⁴ "Thailand Election Results: Opposition Trounces Military Parties" *Al Jazeera* (14 May 2023) <<https://www.aljazeera.com/news/2023/5/14/thailand-election-results-what-we-know-so-far>>.

made a pact with the elite network and took the leading role in forming the next government. UTN was able to join the cabinet, but Prayuth had to resign. Prime Minister Srettha Thavisin of Pheu Thai headed the 11-party coalition.⁷⁵ Legally Prayuth may, per the Constitutional Court's confirmation, be eligible for another two years in office, but, as a practical matter, that decision ended his political career.⁷⁶

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⁷⁵ Michael Montesano, "Pheu Thai's New Coalition Betrays the Faith of Voters" (*Fulcrum*, 29 August 2023) <<https://fulcrum.sg/pheu-thais-new-coalition-betrays-the-faith-of-voters/>>.

⁷⁶ On 2nd December 2023, King Vajiralongkorn appointed Prayuth to the Privy Council, ending his political career. Yet, his appointment suggests that the royalist network has never really abandoned him.

* **Indexing Thai names.** "Although family names are used in Thailand, Thais are normally known by their given names, which come first, as in English names. The name is often alphabetized under the first name, but practice varies." The Chicago Manual of Style (17th edn, University of Chicago Press 2017) §16.85.