

Commentary

Thai Ethical Standards: A New Constitutional Mechanism for Checks and Balances?

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The Constitutional Court of Thailand removed Prime Minister Srettha Thavisin from office in August 2024 over a gross ethical violation by appointing a minister who was once in jail over contempt of court,¹ effectively dismissing the whole cabinet as a result.² Though impressive in its disrupting effects that brought about changes in several key political positions, the case against the Prime Minister is not the first ethical standards case decided against politicians. In a series of cases against less prominent political figures from 2021 to 2023, the Supreme Court also punished politicians accused of moral wrongdoings with harsh lifetime political bans. Of these four cases from the Supreme Court, two concern illegal encroachment of public lands; one is a case of unlawful proxy voting in the House of Representatives; and the last one involves online criticism of the monarch.³ As the initial jurisprudence of both courts has shown, the diverse grounds for ethical violations are open for interpretation and, thus, ideal for abuse. The threat of these new ethical standards was fully understood only once the Prime Minister was surprisingly dismissed in a 5–4 decision. However, ethical standards can also constrain power not just only of the politicians but also of all constitutional organs, complementing the existing system of checks and balances.

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¹ Constitutional Court Decision 21/2567, 14 August 2024.

² By virtue of section 167 of the Constitution which states that ministers vacate office *en masse* upon “. . . (4) being disqualified or being under any of the prohibitions under section 160 . . .” Thai Constitution (TC) 2017, s 167.

³ “‘ผิดมาตรฐานจริยธรรมร้ายแรง’ เครื่องมือสอยนักการเมืองจากรัฐธรรมนูญ’60” [“Violation of Ethical Standards”: A Removal Tool for Politicians from the 2017 Constitution] (iLaw, 21 September 2023) <<https://www.ilaw.or.th/articles/6217>> (Thai).

Notwithstanding the charges of arbitrariness and abuse, the Constitutional Court has effectively shifted the vetting standard for ministerial candidates. Thus, the new system of ethical standards does not fall easily into a normative category.

This Commentary introduces and analyzes the core elements of Thai ethical standards to situate this new feature in recent comparative constitutional law literature. Part I traces the origin and intent of ethical standards, and Part II summarizes key features of the code of ethics created by the Constitutional Court and other independent organs.

I. HISTORY AND DESIGN OF ETHICAL STANDARDS

While enforcing a lifetime political ban for a serious violation of ethical standards is rightfully a new addition to Thai constitutional law, constitutionalizing the code of ethical standards had already begun since the 1997 Constitution and then developed further in the 2007 Constitution. The 1997 Constitution first established ethical standards for holders of political positions and all state officials and employees in one of the sections under the unenforceable Directive Principles.⁴ Evidently, ethical standards were meant to prevent corruption and create efficiency in the performance of duties,⁵ but the unenforceable nature of this new tool made it ineffective in practice. Each public institution made its own code of ethics available without sanction for violating ethical standards.⁶

After the coup in 2006, which abrogated the Constitution, the drafters of the new 2007 Constitution saw the unscrupulous behavior of politicians during the time of the previous Constitution as a fatal defect.⁷ Thus, they doubled down on ethical standards, dedicating a new chapter on “Ethics of Holders of Political Positions and State Officials” to the new Constitution. All state officials and political officeholders were still required to have a code of ethics.⁸ But this time, violation or non-compliance with ethical standards was considered a disciplinary breach committed by such state officials.⁹ Moreover, the Ombudsmen and the National Anti-Corruption Commission had designated roles in considering cases of violation and reporting any serious violation to the Senate, which could then vote to remove politicians from their

⁴ TC 1997, s 77.

⁵ *ibid.*

⁶ The secretary of the Constitutional Drafting Committee of the 2007 Constitution noted that ethical standards were ineffective and violations of ethics such as impunctuality and conflict of interests among politicians had no repercussions. สมคิด เลิศไพฑูรย์, “ความเป็นมาและเจตนารมณ์ของรัฐธรรมนูญแห่งราชอาณาจักรไทย พุทธศักราช 2550” (2550) 5(3) วารสารสถาบันพระปกเกล้า 1 [Somkit Lertpaithoon, “The Origin and Intent of the Constitution of Thailand B.E. 2550” (2007) 5(3) King Prajadhipok’s Institute Journal 1] (Thai) 13.

⁷ *ibid* at 20.

⁸ TC 2007, s 279.

⁹ *ibid.*

positions with an additional 5-year ban from holding any political position.¹⁰ Despite all these improvements, the heightened ethical standards still failed to achieve any high-profile removal, as the Senate did not remove a single person throughout the lifetime of the 2007 Constitution.¹¹

With the same resolve, the drafters of the 2017 Constitution assessed their mistakes and devised a new plan. The Constitutional Court would replace the Senate as the final arbiter of all ethical violations. There would also be an additional power to revoke the right to stand for election of the violator of ethical standards for life and to revoke their right to vote for not more than ten years.¹² Strikingly, even before the Constitution was in force, the new vision for ethical standards was heavily criticized, especially on how the Constitutional Court would take part in drafting the code of ethics for all and then adjudicate cases of ethical standard violations itself.¹³ Thus, in the final version of the Constitution, the drafters were pressured to rely on the more respectable Supreme Court to handle the cases.¹⁴ If the Senate and other independent organs were not reliably independent or strict enough with ethical charges, the Supreme Court, as the most trusted institution in Thailand,¹⁵ should be the only certain choice for this herculean task. Now, the Supreme Court has overall jurisdiction in cases of serious violation of ethical standards.¹⁶ At the same time, the Constitutional Court still holds limited jurisdiction for cases against members of the House of Representatives, Senators, or Ministers brought through the vote of either house.¹⁷ Despite the attempt to put the Supreme Court at the front of ethical standards cases, it was the Constitutional Court, through this limited channel, that ended Srettha's ministership and ultimately brought attention to the new system.

¹⁰ TC 2007, s 270–74, 279–80.

¹¹ Only six cases reached the final stage of voting for a removal. “ปิดฉากยกมือ ‘ถอดถอน’ ในสภาสูง ‘สุรพงษ์’ เคสสุดท้ายถึงทวน ก่อนโอนอำนาจให้ ‘ศาล’ ตาม รธน. ใหม่” (ไทยพับลิก้า, 5 พฤศจิกายน 2559) [“The End of ‘Removal’ in Senate, ‘Surapong’: The Final Case Before Handling Over to the ‘Court’ under the New Constitution” *Thai Publica* (5 November 2016)] <<https://thaipublica.org/2016/11/dismissal-of-political-appointees/>> (Thai).

¹² TC 2017, s 235 paras 3 and 4.

¹³ วรเจตน์ ภาคีรัตน์, “ไม่มีศาลรัฐธรรมนูญเสียดีกว่า” (ประชาไท, 23 พฤศจิกายน 2567) [“Vorajet Pakeerat, ‘We Better Have No Constitutional Court At All’” *Prachatai* (23 November 2024)] <<http://prachatai.com/journal/2016/02/63944>> (Thai).

¹⁴ นาทะ ดวงวิชัย, เทียบรัฐธรรมนูญ ปี 2540–2550 ร่างรัฐธรรมนูญฉบับเสนอสภาปฏิรูปแห่งชาติลงมติ และร่างรัฐธรรมนูญเบื้องต้น (ปี59) [Natha Duangwichai, *Comparison of the Constitutions of 1997, 2007, and the Draft Constitution Proposed to the National Reform Council and the Preliminary Draft of the Constitution* (2016)] (Thai) 303–11 <<https://dl.parliament.go.th/handle/20.500.13072/469851>>.

¹⁵ According to a poll conducted in 2022 by King Prajadhipok's Institute, the top three institutions among all independent institutions under the Constitution are the Courts of Justice, the Constitutional Court, and the Administrative Courts, respectively. รัชชาติ แสงมะหะหมัด และวิศิษฎ์ ชัชวาลทิพากร, ความเชื่อมั่นต่อสถาบันต่างๆ และความพึงพอใจต่อการบริการสาธารณะ พ.ศ. 2565 และสรุปผลการสำรวจ พ.ศ. 2545–2565 (สำนักวิจัยและพัฒนา สถาบันพระปกเกล้า 2566) [Ratchawadee Sangmahammad and Wisit Chatchawantipakorn, *Confidence in Institutions and Satisfaction with Public Services B.E. 2565 and Summary of Survey Results from 2002 to 2022* (King Prajadhipok's Institute 2023) (Thai) 8 <<https://www.kpi.ac.th/uploads/pdf/fIV49y41DwAodIFVzZPtefgsRJ9cYzkMqZbhFUzk.pdf>>.

¹⁶ TC 2017, s 235(1).

¹⁷ TC 2017, ss 82, 170 para 3.

Moreover, the latest iteration of ethical standards is unique in its emphasis on creating a single set of universal ethical standards applicable to all parties involved.¹⁸ Evidently, the drafters of the 2017 Constitution envisioned a code of judicial conduct that expands its reach to all other constitutional offices, from independent organs to ministers and legislators. As the Constitution was nicknamed “the cheat-buster Constitution” during the process leading to its promulgation,¹⁹ holding politicians to a heightened standard usually reserved for independent institutions is a move worthy of this nickname. Tellingly, the name of the finished Code of Ethics only emphasizes that it is meant for the Constitutional Court and independent organs, even though the Constitution clearly requires that these ethical rules apply equally to legislators and ministers.²⁰

As a result, the Constitutional Court and independent organs are required to “jointly prescribe ethical standards applicable to the judges of the Constitutional Court and persons holding positions in the independent organs.”²¹ The oversight institutions and politicians do not start on a level playing field. While the members of the House of Representatives, Senators, and the Council of Ministers can voice their opinions about the ethical standards, only the Constitutional Court and all other independent organs have the final say on what shall be included in the resultant Code of Ethics.²² Untrustworthy politicians need to abide by whatever set of ethics are imposed upon them. Strikingly, the Constitution stresses the severity of this duty to establish ethical standards by dictating that the Code of Ethics is created within a year after the promulgation of the Constitution; failure to do so would automatically vacate all judges of the Constitutional Court and persons holding positions in independent organs from their office.²³

Overall, the 2017 Constitution continues to pursue ethical standards that could be traced back to the 1997 Constitution. It still furthers the quest to constrain the role of partisanship in Thai politics through various oversight mechanisms and independent institutions.²⁴ Despite subsequent failures of the overarching design since 1997, constitutional drafters never gave up on the idea that moral degradation among political figures is the main defect that has plagued Thailand since the 1932 democratic revolution. Consequently, fixing the problem of morality is inevitably the task of a constitution made for Thailand.

¹⁸ TC 2017, s 219.

¹⁹ “Welcome Ethics Move” *Bangkok Post* (26 September 2024) <<https://www.bangkokpost.com/opinion/opinion/2872372/welcome-ethics-move>>.

²⁰ TC 2017, s 219 para 2.

²¹ The ethical standards are also applicable to the Auditor-General and heads of the secretariat of the Constitutional Court and the Independent Organs Constitution. *ibid.*

²² *ibid* para 2.

²³ TC 2017, s 276 para 1.

²⁴ Tom Ginsburg, “Constitutional Afterlife: The Continuing Impact of Thailand’s Postpolitical Constitution” (2009) 7 *International Journal of Constitutional Law* 83, 83–84 <<https://doi.org/10.1093/icon/mon031>>.

II. THE CONTENT AND PROCEDURE OF ETHICAL STANDARDS

Due to time constraints and forced collaboration between different institutions responsible for creating the Code of Ethics, the completed ethical standards are eclectic and unsystematic. Many provisions in the current Code of Ethics (formally known as “Ethical standards for judges of the Constitutional Court, persons holding a position in an independent agency, including Auditor General and chief administrators of the Constitutional Court and Independent Organs B.E. 2561,” hereinafter “the Code”) derive verbatim from various codes of ethics implemented by each individual institution from past Constitutions since 1997. For instance, the second Chapter of the Code shares the same name and some of the provisions with a subsection of the Constitutional Court’s Code of Ethics promulgated in 2011.²⁵ Moreover, the Code of Judicial Conduct for all judges was also a source of inspiration for various provisions in the Code.²⁶

Among these rules, the range of content is virtually limitless and therefore unpredictable. For instance, there are rules on upholding the rule of law, on saving government resources from wasteful spending, and even one on sexual harassment.²⁷ But the most relevant and coherent rules are the ones on political views and virtues. These rules impose sanctions on undesirable behaviors outside the ambit of criminal law, enforcing disciplinary punishment and political bans without strict procedural requirements.²⁸ Moreover, in most parts of the Code, whether a violation is serious or not depends on the nature of such violation, intent, and the degree of damage caused.²⁹

There is, however, one further sophistication over the previous sets of ethics. Now, the Code must explicitly specify the type of violation or non-compliance with ethical standards of a serious nature.³⁰ Accordingly, the following six rules are under the title of “Ideological Ethical Standards,” and any violation of them shall automatically be of a serious nature.³¹ Serious violators are thus those who do not:

No. 5 believe and uphold the democratic system with the King as Head of State according to the Constitution of Thailand.

²⁵ The subsection is titled “Ethical Standards Which Are Core Values” Constitutional Court’s Announcement: Code of Ethics for Constitutional Judges 14 November 2011.

²⁶ For instance, both Rule No. 16 of the Code and Section 28 of the Judicial Code of Conduct are against expressing an opinion to the public in any way that may affect the person’s performance of duty or integrity.

²⁷ The Code of Ethics, Rules nos. 12, 24 and 20.

²⁸ The Regulation of the President of the Supreme Court on procedures for cases regarding the serious violation or non-compliance of ethical standards, as announced by the Supreme Court, adopted the inquisitorial mode of proceeding and applied civil procedures in all ethical standards cases.

²⁹ The Code of Ethics, Rule no. 27 para 2.

³⁰ TC 2017, s 219 para 2.

³¹ The Code of Ethics, Rule no. 27.

No. 6 uphold the monarchy, independence, sovereignty, territorial integrity and areas where Thailand has sovereign rights, honor and interests of the Nation, national security and public order.

No. 7 prioritize national interests over personal interests.

No. 8 perform duties with honesty and refrain from seeking wrongful gains for themselves or others or willingly or indirectly allow others to abuse their official position to seek unlawful benefits.

No. 9 refrain from asking, calling, accepting or agreeing to accept properties or any interest in a way that might affect the performance of their duties.

No. 10 refrain from receiving gifts, properties, or any interest, except for cases where gifts are made under moral duty or as permitted in accordance with laws, regulations, and rules.

Consequently, when the Constitutional Court removed Prime Minister Srettha from office, the complaint filed by the Senate listed rules Nos. 7, 8, 11, 17, and 19 of the Code as ethical standards allegedly violated when the Prime Minister had appointed an immoral minister to the post.³² He was ruled unfit to lead the Cabinet because he was immoral by association and, therefore, lacked the honesty and integrity required by Rule No. 8, which is automatically a serious violation without having to consider all other violations.³³ In stark contrast, three years earlier the same Court swiftly dismissed an ethical standards complaint against then Prime Minister General Prayuth Chan-o-cha for occupying, even after his retirement from the forces, the Army guest residence.³⁴ Evidently, critics have correctly observed that the rules found in the Code of Ethics are too ambiguous to follow.³⁵ Most of the ethical rules in the Code are too indeterminate as legal rules. Imaginative legal minds could bundle many violations together out of any scenario. After all, one gross violation is sufficient for such a harsh punishment. In this respect, the ethical standards could be another rendition of “abusive judicial review” where such a universally accepted constitutional idea is appropriated to further undemocratic goals by banning political parties and politicians from the opposition.³⁶

However, a less cynical view of the issue would point to another global phenomenon that is more tolerable in comparison: self-regulation of professional institutions. A code of ethics by and for an organization is most prevalent in professional settings where complete regulation by the government is undesirable.³⁷ Lawyers and physicians, in particular, are known for their rigorous system of

³² Constitutional Court Decision 21/2567, 14 August 2024.

³³ *ibid.*

³⁴ Constitutional Court Decision 29/2563, 2 December 2020.

³⁵ Chairith Yonpiam, “Ethics Changes Face Backlash” *Bangkok Post* (24 September 2024) <<https://www.bangkokpost.com/thailand/politics/2870767/ethics-changes-face-backlash>>.

³⁶ Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford University Press 2021) 103–15 <<https://doi.org/10.1093/oso/9780192893765.001.0001>>.

³⁷ Nuno Garoupa, “Regulation of Professions in the US and Europe: A Comparative Analysis” *SSRN Scholarly Paper* (1 August 2004) 9–10, 20–22 <<http://dx.doi.org/10.2139/ssrn.640502>>.

professional ethics based on self-regulation. Thus, ethical standards did not come originally from the illustrious constitutional drafters. Indeed, establishing a code of ethics has been an established practice for the judiciary since the Thai Courts of Justice introduced their own judicial code of conduct from sources such as the U.S. and ancient Thai laws in 1986.³⁸ In principle, an independent group of professionals, the judiciary, should subject themselves to greater scrutiny to justify their extraordinary power through a more robust code of conduct.

Comparatively, some features of ethical standards are comparable also to the removal and impeachment process for presidents found in other democratic regimes. Quite in line with ethical standards, the use of impeachment is not strictly limited to politicians whose acts fall within the narrow ambit of criminal law, and courts could have some role in supporting the process.³⁹ The 2007 Constitution quite possibly saw that the Senate, as an elected institution,⁴⁰ was the only institution with legitimacy to punish elected politicians for violation of ethical standards as a kind of self-regulation. Currently, with the Supreme Court dominating all matters of ethical standards (including drafting the Code) and with the Constitutional Court in a support role, the model of professional ethics self-regulation becomes problematic as a lopsided tool of checks and balances against elected politicians. While the judiciary can play a role in the impeachment process or even have the last call as in the case of South Korea,⁴¹ combining such a broad set of ethical rules with court proceedings for removal is truly a novelty outside of a theocracy for its lack of accountability.

On the other hand, novel precedents from ethical standards could function as informal constitutional norms, whether as unwritten constitutional rules or as constitutional conventions. More constraints on political power then prevent political moves known as “constitutional hardballs” that are “within the bounds of existing constitutional doctrines but that are nonetheless in some tension with” constitutional convention or niceties expected of good governance.⁴² For instance, after the case of Prime Minister Srettha, maintaining powerful politicians with criminal ties becomes too precarious, given the risk of disqualification for the whole cabinet. Politicians with past criminal charges or dubious reputations are forced to relinquish their claims to be considered for the ministerial quota allocated to their parties.⁴³ Indeed, ethical

³⁸ อัญชริกา กิ่งมลิ, “การพ้นจากตำแหน่งของตุลาการศาลรัฐธรรมนูญก่อนครบวาระ: ศึกษากรณีการฝ่าฝืนหรือไม่ปฏิบัติตามมาตรฐานทางจริยธรรมอย่างร้ายแรง” (วิทยานิพนธ์ปริญญาโท มหาวิทยาลัยธรรมศาสตร์ 2566) [Uncharika Kingmali, “Constitutional Court Judges Vacating Office Before Term Expiration: A Case Study of Serious Contravention of, or Non-Compliance with, Ethical Standards” (Master of Laws, Thammasat University 2023)] 29–30 (Thai).

³⁹ See generally, Tom Ginsburg and others, “The Comparative Constitutional Law of Presidential Impeachment” (2021) 88(1) *University of Chicago Law Review* 81.

⁴⁰ Contrary to the Senate of the 2017 Constitution, half of the Senators from the previous Constitution must come from an election. TC 2007, s 111.

⁴¹ South Korea Constitution, art 111.

⁴² Mark Tushnet, “Constitutional Hardball” (2004) 37(2) *John Marshall Law Review* 523, 523.

⁴³ Napon Jatusripitak, “Rule by “Good People” or Rule by Political Dynasties? Ethics and Moral Politics in Thailand” *FULCRUM* (12 September 2024) <<https://fulcrum.sg/rule-by-good-people-or-rule-by-political-dynasties-ethics-and-moral-politics-in-thailand/>>.

standards become a focal point during the formation of subsequent governments, effectively raising “the ethical bar of Thai politics.”⁴⁴ Abusive or not, ethical standards can indeed constrain politicians and provide a strong dose of checks and balances.

III. CONCLUSION

In conclusion, constitutional ethical standards found in the Thai Constitution are a grand experiment in mixing ethics with constitutional democracy. Further research on the issue is warranted, especially on how to understand the design within the lens of Buddhist constitutionalism and judicialization of politics. Is governance through a code of ethics truly a unique Buddhist design or a universal idea found since the time of antiquity? Is the system of ethical standards simply an extreme version of judicialization of politics? This commentary could only give a glimpse of what ethical standards signify. Further studies shall address their academic and practical values in more detail.

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⁴⁴ Ken Mathis Lohatepanont, “Opinion—Thailand’s New Politics of ‘Morality’ Straitjackets Pheu Thai —Thai Enquirer Main” *Thai Enquirer* (22 August 2024) <<https://www.thaienquirer.com/52846/opinion-thailands-new-politics-of-morality-straitjackets-pheu-thai/>>.

* **Indexing Thai names.** “Although family names are used in Thailand, Thai persons 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* (18th edn, University of Chicago Press 2024) §15.93.