

## **Governance and administration in a 'new' democracy: The case of formal control of the free-to-air television in Thailand (1997-2006)**

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### **Abstract**

While Thailand has nominally been a constitutional democracy since 1932, the role of military, bureaucratic elites has influenced development and implementation of public policy. In this paper we argue that reforms to media regulations promised in the 1997 Constitution have been largely ineffective. Specifically the independent media regulator has not been established, laws related to broadcast media continue to be inconsistent with constitutional requirements and regulations are either not consistently enforced, or are enforced in a manner inconsistent with the Constitution. We attribute this to the continued diminished role of the constitution as 'supreme law' and the ongoing, albeit changing, influence of the military, bureaucratic and business elites on Thai democracy.

**Key words:** constitutional democracy, Thailand, free-to-air television

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## Introduction

Studying the governance and administration of electronic media in Thailand poses several challenges. The political and social climate that limits freedom of communication in Thailand also has discouraged academic research. It is not in the interests of the Thai elite groups that benefit from media control to encourage academic research that may be critical of their role. As such, much of the research in this area has relied on secondary sources or, during periods of greater democracy, the contemporary reports of 'public academics', journalists and broadcasters. As such, research has either been historical in nature, or at risk of the being coloured by the biases of those who rely on access to the media for at least part of their livelihood.

The research presented in this article is part of a broader research program that also addresses the influence of Thai cultural characteristics including patron client relationships, elite groups, ownership and informal control on the governance and administration of broadcast and print media in Thailand. In this article we focus only on the formal control of free- to-air television media in Thailand, which we define as control through the application of the constitution, proclamation of laws and regulations, and the enforcement of such laws and regulations. For reasons purely related to publication length, we have excluded discussion of ownership control and allocative control in Thai free-to-air television. For similar reasons we have confined our analysis of to free-to-air television.

The information and analysis in this article is based on both historical and contemporary documents and interviews with media owners, managers of television and radio stations, broadcasters and journalists, Thai media, political science and public policy academics, politicians and senior public servants involved in the formal regulation of the Thai media. In all cases, the interviewees were given the opportunity for their responses to be de-identified, and in all but one case the interviewees took up this opportunity. In total there were 38 interviewees, with the majority interviewed more than once in the period 1998 –

2006. With the exception of three interviews conducted after the military coup in 2006, all interviews were conducted face-to-face.

The declared bias of both authors is that we support freedom of communication within a structured regulatory environment where regulations are consistently and fairly enforced. Our access to the interviewees was based on the network of relationships developed by one of the two authors. As such respondents were broadly or specifically aware of this bias. However, neither author has a current or intended future reliance on employment within the Thai media sector, or the Thai bureaucracy. Thai language was used in the interviews, and we have used a 'close-to-direct translation' method for the quotations used in this article. The advantage of this is that the quotations are 'in the voice' of the interviewees. The disadvantage is that in some cases the English grammar is clumsier than if we had used translation methods that involved more extensive editing of the respondents statements.

The 1997 Constitution, known colloquially as the 'people's constitution', includes provisions for the establishment of an independent broadcast media regulator, and a range of guarantees of freedom of expression in broadcast media. In this article we argue that throughout the recent period of democratic rule in Thailand (1997-2006) the reform of formal governance and administration of free-to-air television in Thailand has been largely ineffective because of two important characteristics of governance in Thailand: the continuation of a diminished role of the constitution as 'supreme law' and the ongoing, albeit changing, influence of the military, bureaucratic and business elites on Thai democracy.

In the following sections we initially provide a brief overview of the history of constitutional democracy in Thailand and the relationships between Constitutions and the media. We discuss the impact of the 1997 Constitution on formal control of Media. Three questions are addressed:

1. Has legislation and regulation been aligned with the provisions of the Constitution?
2. Has legislation and regulation been enforced in line with the Constitution?
3. Has an independent media regulation body been established in line with constitutional requirements?

## **A brief history of constitutional democracy in Thailand**

Thailand has remained a nominally a constitutional democracy since 1932. However its progress towards 'true' democracy has not been smooth. Over this period of 74 years, Thailand has had 58 governments. There were ten successful coup d'etat (from 17 attempts), which resulted in 23 military junta-led governments. The most recent coup d'etat occurred in September, 2006.

Of the 16 constitutions since 1932, only four constitutions can be classified as 'democratic', developed by representative parliamentary governments. Eight have been 'semi-democratic', developed by parliamentary governments having leaders that were not elected. Four constitutions have been 'non-democratic', developed by governments that came into power without an election. In addition, there have been periods where a democratic constitution was nominally in place, but ignored by semi-democratic or non-democratic governments that ruled by 'decree' or 'notification'. In the 74 years since 1932 there were only 19 years when political institutions operated within a democratic framework (Bangkok Post, 12 February 2003; Dheravakin, 1997; Samudavanija, 1995; Wantana, 1992). Having had a long experience in authoritarianism, Thai society faces the failure of democratic institutionalisation and an absence of political development (Dheravegin, 1975). In fact, the discontinuity of democratic rule is one of the key weaknesses of the democratic pattern in Thailand.

In Thailand a constitution does not normally provide 'the general and neutral rules of the game' (Wantana, 1997), which regulate participation and competition between political groups. On the contrary, constitutions have been used as a major tool in maintaining the power of groups creating them (Yimprasert, 1992). While "constitutions always state that the rights and freedoms provided by the constitution must be reflected in the laws...all have gaps for the government and the parliament to exploit. (Asian Foundation and Faculty of Communication of Thammasat University 1992, p. 6, translated by the authors). This is coupled with a low level of political institutionalisation in Thailand that is the consequence of three important factors: the frequency of coups de tat by military, the discontinuity of elected parliaments, and the weaknesses of political parties (Samudavanija, 1995).

## Thai Constitutions and the Media

It can be argued that one of the key governance roles related to regulation of the media in a modern democracy is to ensure freedom of the expression. While earlier constitutions (1932 temporary; 1932 full, 1946, 1947) defined Thailand as a 'democracy' and conferred freedom of personal communication, it was not until 1949 that freedom of the press was included in the constitution:

People have freedom of speaking, writing, and publishing. The government officers cannot censor information in the newspaper before printing except during war or crisis situation in the country. In addition, the state cannot close down the newspaper. (The Constitution 1949, Section 35)

Senguthai (1958) comments that main reason for the inclusion of this provision was to enable Thailand to enter the United Nations as a signatory of the Declaration of the Human Rights, rather than because of a real commitment to the those rights. The Parliament had to be seen to strongly support these rights by endorsing a constitution that gave 'far greater rights than had existed under prior constitutions' (Senguthai 1958, p. 884, translated by the authors).

Not all of the constitutions that followed provided the same level of support for the right to free communication, and the right to a free media. Indeed, the constitutions introduced by coup-led governments in 1955, 1976 and 1977 did not include any reference to communication rights. The 1972 constitution included only basic communication rights, and specifically excluded political communication rights. Further, there were periods where the constitution was 'suspended' by the military governments, as it is October 2006. Only three Constitutions (1949, 1974 and 1991) extended communication rights beyond the individual, and these extensions only applied to the print media. Until 1997 there was no constitutionally guaranteed freedom to communicate in radio and television broadcasting mentioned in any constitutions (Siriyuvasak, 1997). This means that for the majority of the period since 1932, Thais either had either no constitutionally supported rights of freedom of expression, or, only limited constitutionally supported rights to freedom of expression.

Section 39 of the 1997 Constitution deals with media and includes a number of specific clauses that relate to freedom of communication and reforming broadcast media ownership.

It states that people have freedom to express an opinion in speaking, writing, publication, advertising, and communication by other means. Secondly, the state cannot limit freedom of expression except by a special Act, to support the security of the state or protect rights, freedoms, honour and privacy of individuals. The purpose is to keep morality and public order within the state. Thirdly, the state cannot close television or radio stations. In addition, the government officers cannot ask for censorship of information before broadcast by electronic media except during war. Fourthly, the state cannot subsidise the print media or private media. Finally, the electromagnetic waves are a limited public resource used by public interest. The state has to set up an independent organisation to manage radio and television airwaves for the benefit of the Thai people, to support education, Thai culture, security of the state and other public interests, given competition by an open bidding system. (The 1997 Constitution, Section 39)

However, consistent with previous constitutions the authority to control media is given to the state 'to protect freedom of other people or to keep security of the nation and public order' (The 1997 Constitution, Section 34). There is no clear agreement that describes what should be judged as harmful to freedom of other people or security of the nation and public. Giving the authority to the state to judge this means that it can be interpreted as giving the state broad authority to control the media.

Lorimer (1994) states that 'every country has a host of laws and policies that are relevant to media functions' (1994, p.41). Formal control is the way the state uses state mechanisms to implement control over media management. This includes regulation of ownership, licensing (concessions), legislative enforcement, defamation and censorship for national security or protection morality. Formal control of the media therefore involves the proclamation and implementation of a legislative and regulatory framework.

We identify three questions related to the implementation of the 1997 Constitution:

1. Has legislation and regulation been aligned with the provisions of the Constitution?
2. Has regulation been enforced in line with the Constitution?
3. Has an independent media regulation body been established in line with constitutional requirements?

### **Has regulation and legislation been aligned with the provisions of the Constitution?**

Television broadcasting is controlled by the 1955 Broadcasting Act (revised 1987, 1992 and 1994) and the 1992 Regulation on Broadcasting. These pieces of legislation reflect consistent government policy that does not give freedom of communication to broadcasting media. The level of control on broadcast media is greater than the level of control on newspapers (Bowra, 1996). As there was no mention of freedom of expression of broadcast media, or reform of media ownership, until the 1997 Constitution, it can not be argued that the act and regulation were constitutionally invalid. However, the 1997 Constitution did include express provisions for free media and open communication.

The 1955 Broadcasting Act and its associated regulations are still used to control broadcast media. These regulations, despite their vagueness, set the tone of television in Thailand (All interviewees, 1998-2006; Youngsamart & Fisher, 2003). The stations cannot deviate from the promotion of the loyalties to the nation, the religion and the monarchy. They have to serve as the medium from the government to the people and support the operation of government agencies as well (Youngsamart & Fisher, 2003).

### **Is regulation being enforced in line with the Constitution?**

The existence of constitutional provisions, laws and regulations does not necessarily mean that they will be implemented to either formally control the media, or to ensure freedoms are protected. Policy implementation is important in Thailand because the 'state and government policy do not always agree' and as such, the 'government officers have great discretion' (Asian Foundation and Faculty of Communication of Thammasat University, 1992, p. 28, translated by the author). In general 'government officers tend to implement policy in an authoritarian way', and 'follow the views of the government of the day', exploiting the loopholes of the constitution or the law to control media' (Asian Foundation and Faculty of Communication of Thammasat University, 1992, p. 29, translated by the author). Similar views to this are also expressed by Dheravegin (1975) and Methukul (1992).

The differences that exist between government policy (Acts, Notifications and Regulations) and state policy (Constitutions) make the role of government officials in policy implementation crucial to the way in which media are controlled in Thailand. In practice,

government officials are responsible for the application of formal control, and 'they always serve the government, so the policy of the government of the day is more important for them than official state policy, as expressed in the Constitution' (Academic 2 1999 also supported by Journalist 2 1999; 2003 and Television Producer 1 2001). As such, they implement the government's policies through the 'interpretation and use of the existing Act and regulations, in line with government expectations'. (Academic 4, 2001; Also supported by Politician 1, 1999; Politician 2, 2002)

Journalist 2 explained the reason for this behaviour in two separate interviews:

If the government want to interfere with the media they can do it through the civil service. Sometimes they [civil servants] these people very strongly enforce the law, and go beyond its requirements, because they want to be seen as doing what they believe the government wants. They have the expertise and know the loopholes, which the Ministers may not know. They think if the do what the government wants, they will be rewarded (Journalist 2 1999).

The current Thaksin government is placing extreme pressure on the civil servants to use any means possible to prevent the media from criticising the government. The civil servants are either two scared to speak up, or are supporting the government because they think it will benefit their careers (Journalist 2, 2003).

The regulations and laws give authority to the government officers to suspend publications, close down newspapers, issue an order suspending programs, revoke a license or certification issued, and issue an order ceasing the station where it appears that the media may jeopardise law and order and threaten public morality.

This authority can be broadly interpreted. According to 'their interpretation of how to implement their legitimate power', it can be seen that 'the government officers deeply influence the implementation of media policy' (Academic 1, 2001; Also supported by Journalist 3, 2002; Journalist 4, 2002). Media policy, in practice depends 'on their sense of responsibility' (Academic 3, 2002). If bureaucrats choose, they can make media 'the political tool of the government or medium for communication rights and freedom of expression' (Journalist 1, 2001).

Throughout the period since the 1997 Constitution came into effect, the 1955 Broadcasting Act continues to be used as a formal device to restrict media freedom in Thailand. For example, The Thai Journalists Association (2002a) reports two such examples. In 2001 the 'Public Relations Department terminated two programs, Rian Song

Dan (Two Sides of a Coin) and Tarm Ha Kaen Dharma (The Core of Dharma), on the grounds the hosts, Chirmsak Pinthong, did not have an announcer's license. Given that Chirmsak has been a broadcaster for over 10 years, and (from the personal knowledge of the one of the authors) the broadcaster's license test is a short test that with reading and speaking with the correct accent, it is unlikely that Chirmsak would not have either had a license, or have met the criteria for one.

**Has an independent media regulation body been established in line with constitutional requirements?**

The 1997 Constitution set a three year deadline to establish the National Broadcasting Commission (NBC) as the independent body responsible for the allocation of broadcast licenses, and for the current owners of broadcast spectrum (the military and various state agencies) to return the spectrum to the 'independent' regulator (the NBC). In August 2006, nearly six years after the 1997 Constitution came into affect and nearly 6 years after the deadline expired, the NBC still does not exist, and no spectrum has been returned. As such, the bureaucratic and military elites still control and manage broadcast media through direct ownership of broadcast media, and through the allocation of concessions to the private sector. Further, neither the National Broadcasting Commission (or its sister organisation, the National Communication Commission) have been given legislative authority to regulate broadcasting.

The moves by former Prime Minister Thaksin Shinawatra to introduce a CEO style of government, through the appointment of private sector managers to senior positions in the civil service and increasing direct management role taken by government minister, many of whom had links to major Thai companies, arguable meant that the bureaucracy was directly captured by interests it sought to regulate (Youngsamart & Fisher, 2001) Indeed, the delay in the establishment of the NBC since 2003 has been in part as a direct result of court challenges to appointees to the commission, on the basis of their perceived lack of independence. This form of crony-capitalism has been cited as the rationale part of the catalyst for the military coup d'etat in 2006.

## Conclusion

The 1997 Constitution set in place provisions to change the formal regulation of broadcast media in Thailand. Our discussion above identifies three short-comings in the implementation of the reforms set out in the Constitution; laws and regulations inconsistent with the Constitution continued to exist, laws and regulations contrary to the Constitution continued to be enforced and the independent regulatory body was not established. We attribute the failure to meet to the continued failure by the military, bureaucratic and military elites to view the Constitution as 'supreme law'.

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