

Challenging the constitutionality of laws in the absence of a constitution

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Since 1932, Thailand has had 17 constitutions. During periods of non-elected regime change, usually following military coups, constitutions have been abrogated with interim charters put in place pending the approval of "permanent" constitutions.

Most recently, the 2007 charter was abolished by the National Council for Peace and Order in May 2014 and an interim document enacted shortly afterwards.

A new draft constitution was rejected recently by the National Reform Council. A second attempt to draft a charter is now under way but it is not clear if and when it will pass. While the Constitutional Court remains in existence, its ability to effectively decide issues of constitutional merit remains uncertain.

An internal letter issued by the Office of the Judiciary to the courts shortly after the abrogation of the 2007 constitution further complicates the matter. It recommended that claims challenging the constitutionality of Thai laws in the absence of a permanent constitution should be considered for dismissal.

This poses difficulties for those seeking to challenge Thai laws imposing indirect presumptions of liability on directors and officers.

Section 115 quarter of the Thai Customs Act is one such law. It imposes a presumption of criminal liability on a company director or officer for criminal customs violations. For example, a director or officer can be presumed to have intentionally under-declared customs duties even if he or she had no involvement in customs clearance or product valuations.

Essentially, Section 115 quarter presumes strict liability, shifting the burden of proof to the director or officer to prove his or her innocence when faced with a charge.

This conflicts with Section 39 of the 2007 constitution, which guarantees a presumption of innocence to the accused in line with previous Thai constitutions and universally recognised human rights principles.

On a number of occasions, Thailand's strict liability provisions under the criminal law have been successfully challenged as contrary to the rights guaranteed by Section 39 of the 2007 constitution.

One such case involved a challenge to Section 54 of the Direct Sales and Direct Marketing Act BE 2545 (2002), in which the claimants argued that the language of the strict liability provision fundamentally ignored the right to the presumption of innocence for those criminally accused.

Ultimately, the Constitutional Court agreed with the claimants and ruled that the provision was unconstitutional and therefore unenforceable. Similar challenges have been made with respect to Section 78 of the Telecommunications Business Operation Act BE 2544 (2001) and Section 74 of the Copyright Act BE 2542 (1999).

As with many other Thai laws, Section 115 quarter of the Thai Customs Act contains language that is identical to the language ruled unconstitutional in the case involving the challenge to Section 54 of the Direct Sales and Direct Marketing Act. Unfortunately, since many customs cases are settled or resolved before a full criminal trial is reached, Section 115 quarter has not yet been constitutionally challenged before the court. Therefore, directors and officers continue to be charged or subjected to criminal investigations based on presumed liability.

If the standards used by the Constitutional Court in its review of Section 54 of the Direct Sales and Direct Marketing Act were applied to a review of Section 115 quarter of the Customs Act, it is likely that Section 115 quarter would also be ruled unconstitutional and unenforceable.

Such a ruling under the 2007 constitution would apply to all cases not already determined as final judgements by the courts of Thailand, including all pending customs claims from pre-charge investigations, through trial and appeal, presuming judgement is not yet final.

In the absence of a permanent constitution, does a viable avenue exist for a charged party to challenge Section 115 quarter of the Customs Act or similar strict liability provisions? In theory, the Constitutional Court, following the recommendation of the Office of the Judiciary, would dismiss such a petition.

The recommendation, however, does not absolutely require the court to take such action, meaning that a challenge may be possible.

In addition, a challenge would likely incorporate arguments not limited to Section 37 of the 2007 constitution, including arguments based on universally recognised human rights such as the presumption of innocence and non-retroactivity in criminal claims, which are both accepted in the Rule of Law enacted in the interim constitution.

There is no doubt that the uncertainty caused by the absence of a permanent constitution makes constitutional challenges more difficult. However, the rights guaranteed by the 2007 constitution also confirm rights that are recognised under the Rule of Law and the interim constitution, which provides an avenue for interim challenges.