

THAI FOLK WISDOM AS A CHALLENGE TO THAI LAW

By Alexander Shytov

INTRODUCTION

A number of folktales (which contain folk moral principles that have direct application to law) have been presented in three other articles. Indeed, this is only a tiny part of the folk heritage which deserves to be studied by lawyers and by everyone who is interested in law and politics. There are several reasons for the need to study folktales and apply them to law. In this chapter we will look at the present political and legal state of Thailand in order to see that there is much need for Thai folk wisdom. The latter will be examined in its relation to democracy and formal Thai law.

DEMOCRACY, LAW AND FOLK WISDOM

According to the Thai Constitution, Thailand has a democratic system of government with the king as the head of state.(1) The Constitution clarifies this basic provision in the terms that sovereign power belongs to Thai people,(2) but the special honour is given to the king: "The king exercises this [sovereign] power through the parliament, the Council of Ministers and court according to the provisions of the Constitution.(3) The king undoubtedly enjoys great moral authority and respect of the Thai people. In the normal course of formation and functioning of the legislative, administrative and judicial powers in Thailand, the role of the king is, however, reduced mainly to appointments and promulgations. Both Houses of the parliament are elected by people. The winning party forms the Council of Ministers which is the highest executive body. The judges are appointed by the king. The Constitutional Court judges are nominated by the Senate, the upper chamber of the parliament.(4) The judges in the ordinary courts are approved by the Judicial Commission which consists mainly of civil servants.(5) There can be a referendum initiated by the government, but it does not have any binding force on the government.(6)

Constitutional law provides a normative framework for the exercise of political power, whether in democratic or authoritarian political regimes. The existence of parliamentary elections and written constitution are not necessarily true indicators of the existence of democracy. In the Soviet Union there were parliaments, elections, and constitutions. It is clear, however, even for the Russian Communists now, that there was a lack of democracy in the USSR. What makes democracy real is the actual participation of people in making ordinary political decisions. This participation takes direct and indirect forms. The modern states, unlike the famous democracies of the past, use mainly representative forms of democracy, which is understandable considering the size of the modern states and the complexity of the issues which the state power must address. In the representative forms of democracy there must still be substantial freedom for people to raise their voice and actually participate in making political decisions. What is the most important, however, is the nature of the relationship between the people who elect, and the officials who are elected.

One of the most important implications of Thai folk wisdom for constitutional law is that there is no essential difference in duties between private and public servants. In the democratic regimes, elected officials have the status of the servants of people. Even though law may distinguish between political offices and the offices of civil or military service, every politician is a servant of the people since the sovereign power resides in the people and not in politicians. The word 'minister' has the original meaning of a servant, and Prime Minister means nothing but the first servant. In this respect Thai political vocabulary does not display the same deep meaning of being a politician under the democratic rule. The word rattomontri is more associated with the concept of a state adviser rather than a servant. Thai folktales do not deal with political democracy, but they do deal with law. For Thai folk consciousness, any public law relationship has the feature of private law relationship, and the idea of the servant of the people must inevitably borrow normative materials known to Thai folk in their ordinary life.

The second section of the Thai Constitution says that the people of Thailand have sovereign power. If this is true, then the public officers must become genuine servants of Thai people. The relationship between the electing and the elected in true democracy has the nature of the principal-agent relationship, which is well understood for any student of private law, and which is very well understood by Thai folk in its substance. The major task is to transfer the principal-agent relationship from private relationships to the public ones. Thus far, it has not been done in Thailand and, with rare exceptions, it has been done in the rest of the world. The picture would be as follows: the people are the principal, and the MPs in democratic states are the agents which have a duty to act strictly within the authority given by the principal and in accordance with the will of the principal. Every principal-agent relationship is based on agreement. The agent - the elected officials express their agreement through their nomination as the candidates to act on behalf of the people and to follow certain policies which the people want. The people express their agreement through election. The latter is more than the process of voting for the candidates. It is also the time for political discussion and policy formulation, which the elected officials must strictly comply with. In democratic states, the power of the elected officials is based on the mandate of the people, and the elected official must act within that mandate.

One of the weak points of modern democracies, and not only in Thailand, is that they lack the mechanism of termination of agency relationship if the elected official does not comply with the promises he made when being elected, or he does not act in good faith toward the people who elected him. In other words, there is a lack of control over the officials from the time they are elected until the time of new elections. Unless there is criminal misconduct, an elected official would enjoy political power until the next elections regardless of the fact whether he acted according to the promises he made to the people or not. The agency of the elected official in democratic states is based upon a contract to employ the agent for a specific period of time, and therefore, the principal - the people cannot wrongfully discharge the agent, neither can the agent wrongfully renounce the agency. The duties of the elected official in democratic states are the same as for the agent in private law transactions. The elected official has the duty of loyalty towards people. He or she must not obtain any secret profit or benefit from his or her official position. The elected official must not accept secret gifts or commissions from third persons in connection with his official duties. Any deceitful act against the people is prohibited. The elected official has the duty to obey all lawful instructions of the people who elected him. Normally, those instructions are formed during the election campaign, but they can be given even after the election has taken place.

At this point one can again see the weakness of modern democracies who do not provide sufficient channels for people to give their instructions to their deputies. If an agent does not comply with the instructions, he is liable to the principle for any harm which may result. Another weak point is that modern democracies do not normally make politicians liable when they do not act according to the mandate they received from the people, which in turn cause political harm to the society. These weaknesses in democratic regimes can lead to the problem of politicians who are greedy for power to make all sorts of promises without any intent of acting in accordance with those promises. There is also a duty of reasonable care and a duty of accounting for all property or money belonging to the principal, or people, collected mainly in the form of taxes. Further, there is a duty to provide the principal with all information which concerns the principal.

In authoritarian states the relationship between people and the officials is very different from democratic rule. The authoritarian rule nowadays also has elections and constitutions, but the relationship between the elected and the electing does not possess the nature of the agent-principal relationship. It still has the relationship of a patron (the elected) and client (the electing) or worse than that, the relationship of the master (the elected) and slaves (the electing). Under authoritarian rule the people do not elect, but give their consent or sanction to the rule of the powerful. Election is an expression of obedience to those who rule. It is a noteworthy fact that in authoritarian regimes there would rarely be more than one real candidate for the elected post. Elections under those regimes can hardly be a process when people formulate the mandate which binds the elected officials. The elected would already have their program which is given to the people to accept with thanks, without raising any criticism of that program. In the authoritative states the people can still ask politicians to do something, for example, to build new roads, or provide more funds for education and health. Such asking has the nature of begging, rather than the nature of the sovereign who gives directions to its servants. The authoritarian states may have constitutions, and its officials can claim that the state is the most democratic, but the nature of power the officials have remains the same. The people must obey their rulers. If they do not, then violent force can be used.

In authoritarian states the military commanders are very important. Stalin called himself generalissimus, which can be translated as the general of all generals, and he liked the people to call him "the father of the nation". Authoritarian rule can take different forms. It can be the rule of one person who is either a king or a dictator. It can also be the rule of a highly organized class such as military or civil bureaucracy, or a mixture of all those types. For example, in medieval Europe, there would be a king and there would be a military class, which at the same time possessed land and was quite independent of royal authority, since the main income was generated from the land rather than from the royal treasury. The Soviet regime had the power of a dictator such as Lenin or Stalin, and at the same time it had the highly organized class called the Communist party. Even though the membership was open for everyone who shared the faith in Marxist-Leninist prophesy, the rule of the party was based on civil, military and secret police bureaucracy.