



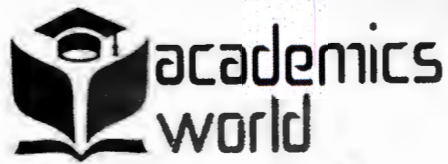
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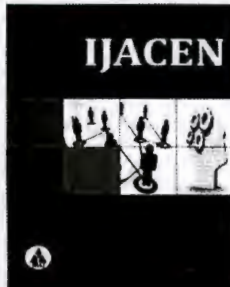
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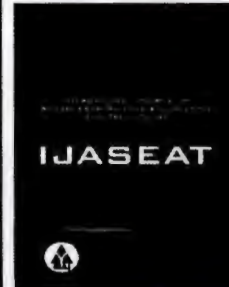


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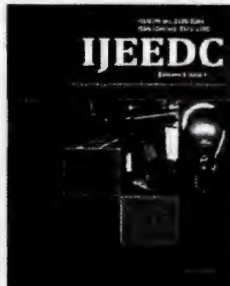


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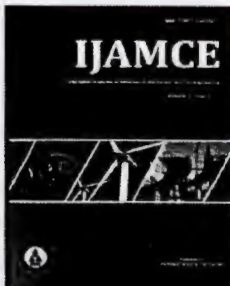


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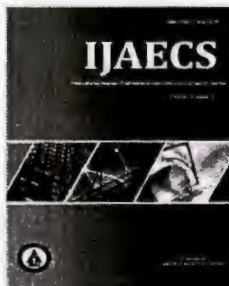


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# THE EXERCISE OF THE ABSOLUTE POWER OF THE HEAD OF THE NCPO UNDER THE CONSTITUTION OF THE KINGDOM OF THAILAND (INTERIM), 2014

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**Abstract**— This research focused on the legal status of the power of the Head of the National Council for Peace and Order according to Section 44 of Constitution of the Kingdom of Thailand (Interim), 2014. From the study, it was found that Thailand accepted the coup d'état on 22<sup>nd</sup> May 2014. This coup d'état council under the name of "The National Council for Peace and Order" (the NCPO) is a sovereignty that has the absolute power to perform any act to bring the Nation back to normality. After bringing back peace to the Nation, the NCPO has provided Constitution of the Kingdom of Thailand (Interim), 2014 as a temporary conditional covenant to manage the country, and the determination on the preparation of permanent constitution shall be done on the next stage. However, Section 44 of the Constitution has provided the absolute power to the Head of the NCPO with the approval of the NCPO, and such exercised power shall be deemed lawful and constitutional under this Constitution. In this case, such power exercise is exempted from monitoring, and it is counted as a contrary to the Rule of Law Principle. Therefore, the judiciary as the main organization according to the separation of powers shall be confident to refuse the exercise of power under Section 44 of the Head of the NCPO in the case where there is no state of emergency by taking the Rule of Law Principle which mainly focuses on the protection of freedoms of people into account.

**Keywords**— Democracy, Legal State, Coup

## I. INTRODUCTION

Although Thailand has changed its administrative system to democracy and has constitution since 1932, most of Thai people still have not understood the administration under the democracy and they have gotten used to be under the administration. The politics and administration are the affairs of the politicians and government officers. There were announcement of the constitution. Until 1997, Thailand has big political reform, by which there are announcement of the constitution having provisions to promote people to participate in politic in various means and certify the right of freedom which have never been before, and to proceed with the populism policy of government of Mr. Taksin Shinawatt, causing a lot of people politically awakened. This is for the reason that they are aware of their own rights and privileges allocated from their representatives if being part of the government. Picture of democracy which was vague, appears to be obvious.

However, since Mr. Taksin Shinawatt was the Prime Minister for the 2<sup>nd</sup> time, the Thai Rak Thai Party had 376 representatives in the House of Representatives among 500 representatives, which Mr. Taksin Shinawatt ignored to listen to the minority, causing academic groups and middle-class people angry. Meanwhile, Mr. Taksin's popularity in country side had increased because he was viewed that he was the person who really granted power to people. Thailand went to the conflicts of the democratic ideas, which there were 2 groups of important ideas. The first group was United Front of Democracy Against Dictatorship (UDD) (Red shirt), which

supported the government of Mr. Taksin Shinawatt, and the second group was People's Alliance for Democracy (PAD) (Yellow Shirts), which opposed Mr. Taksin Shinawatt. Before both groups would encounter each other by force on 19<sup>nd</sup> September 2006, the Military Coup seized state power and use military force to protect the chaos which would happen, which there was the decision of the Constitutional Tribunal to dissolve the Thai Rak Thai Party.

At the end of 2007, the Military Coup left the politic and announced the new Constitutional Law and arranged the general election again. However, the conflict between the Red shirt and Yellow Shirts did not go away together with the Military Coup. In 2011, the conflict situation seemed calmed down when the Pheu Thai Party, which the Party supported by the Red shirt group, became the government. Meanwhile, the Yellow Shirts lowered its political role. In fact, the conflict still remained by changing the opponent to the Government and the organization which inspected the using of government power, which was appointed by the Coup D'état Council and used laws to fight instead. In 2013, the Government performed its policy with various mistakes. This caused the establishment of the People's Democratic Reform Committee (PDRC) to protest against the Government and the Government was unable to use any democracy mechanism to solve these problems because there were various obstacles. The Red Shirts set up a public meeting to show their support of government. The situation seemed to be violent. On 22<sup>nd</sup> May 2014, the Coup D'état Council led by General Prayut Chan-o-cha the Commander of the Royal Thai Army seized power and set up

organization called "the National Council for Peace and Order" (the NCPO) and settled the said situation again. At this time, there were uses of absolute power more than 2006.

After the political reform in 1997, the structure of society of Thailand and the administrative changed increasingly, resulting from the development of democracy. The different views were the way of democracy. At last, by attempting to fight each other in democracy, it was an excuse of the Military Coup to seize power and supervised people to listen to the order of the leader to make the Country in order. The way of democracy dragged the feet.

In using power of dictatorship without any regulation, it would make people angry. The NCPO make legitimacy of its power by establishing the Constitution of the Kingdom of Thailand (Interim), 2014 as regulation for using state power and setting up mechanism for further arranging the permanent constitution. However, in order to remain the absolute power with the Head of the NCPO, who played the most important role in the coup d'état. In the current Constitution, it has the provision of Section 44 to provide special power to the Head of the NCPO to do any action, regardless of whether such action shall be enforceable in legislative, executive, or judicial force and it would be deemed that such order or action, together with the performance under such order are the order or action or performance that are legal according to the law and constitution which is absolutely considered as the end of democracy and the rule of law.

## II. OBJECTIVE OF THE STUDY

This research is for the purpose of studying ideas concerning the legal status of the power of the Head of the National Council for Peace and Order according to Section 44 of Constitution of the Kingdom of Thailand (Interim), 2014.

## III. RESEARCH METHODOLOGY

To study this research, a researcher collects both domestic and international paper from books, research, academic document, and laws and then conducts comparison analysis and concludes by means of depiction.

## IV. RESULT OF THE STUDY

The study found that the liberal democracy state realized in values of humanity and accepted freedom and equality of people. Such concepts would bring the establishment of constitution which contains important principle to limit state power in order to ensure fundamental rights of people. Any use of state power in legislative, executive, or judicial force will not conflict or contradict to the constitution. State

power should not be used by the leader without limitation anymore.

### 4.1 Concept on limitation of state power

In any state that holds democracy principles, the organization that uses state power will have intersection at people who are the owner of power in all dimensions and have foundation on concept of freedom and equality [1], by believing that human has freedom before having state. State was established in order to supervise public order and eliminate problems on cohabitation as society. State should not use its power from its people to destroy rights and freedom of people. Democratic states should respect rights and freedom of people and should accept a variety of opinions. [2] Any resolution in order to seek for general intention should be discussed in public so that the society would see the fact in all aspects and various dimensions which will then have the acceptable conclusion. Majority should incur from hearing many ideas. Characteristic of freedom constitution should recognize freedom in expression of opinion of person, especially freedom in proposing facts of mass communication, freedom in public meeting, freedom in concentration to be association and especially acknowledge freedom in incorporation as political party in order to present political intention of people. [3]

However, only democracy may not be sufficient to limit state power, it should adhere to the Legal State, which focuses on limitation of state power by laws in order to protect status of people. State should accept 2 rules, which are the rule that accepts rights and freedom of people and the rule that prescribes the method or measure which the state can use to achieve the said purpose, especially legality rule and rule of separation of powers.

Legal State has meaning opposite to "Police State", which is the administrative system held significantly power. The last purpose is the most importance. How to reach the purpose can use any method. [4] Therefore, people cannot receive any security on their rights and freedom. It is different from the state ruling over by the legal state that emphasizes on the constitution as the law that provides security of rights and freedom of people and has mechanism to limit state power. That means any action must depend on legal measures as essence and the use of such measures shall be in the scope of laws. If any state organization breaches any laws, the effected people have the right to file a lawsuit to the Court in order to withdraw or remedy any action which is against the laws.

Although the rule of state is the rule to secure that fundamental rights and freedom of people shall be protected by the use of state power, however, in certain circumstances, states are necessary to violate the rule of state so that any performance of state will achieve without damage or with the least damage,

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which is the exemption of the rule of state. However, the state should use its power only when it is necessary and the strictest and the state may compensate to the effecting people after using such power. Therefore, the cases that are considered as the exemption of the rule of state principally shall be 2 cases as follows:

(1) Use of state power in unusual situation is the case that the state must use its absolute power with necessity in order to bring peace to its state or maintain security of state to pass the crisis and bring peace to the state soonest. The state must ignore to respect the legality rule but it should not be to such extent that refrains from using the rule of state to enforce. It should only release more than normal situation. [5]

(2) Act of government is the concept to limit the power of judiciary in inspects the action of executive organization in relation to the legislature and the act of executive organization in international relation is considered as exemption of legal enforcement under the use of rule of state. However, although the court could not inspect the legality of government's action, the government still remains under the control and inspection of organization and political procedure, such as questioning or no-confidence debate which is the responsibility to the parliament, which may include the liability to the trust of people through the criticism of media. [6]

In order to enforce such rules mentioned above, the state should bring such rule to stipulate in the constitution. According to the Constitutionalism, which is the concept to use the written constitution as instrument to determine the model of administration and prescribe the mechanism to be infrastructure in order to establish the executive organization of the state, [7] by focusing on the 3 major goals. The first goal is that the leader, who has the highest power, must ensure and protect the rights and freedom of people under control. People should participate in the administration or in using the highest power to regulate the country. Second, it builds the system to control and inspect the use of state power. Third, it should build equality among people in the society. Then, the fourth goal is to improve political structure to be stable. Thailand uses the concept in relation to limit state power to specify in the written constitution according to the Constitutionalism in the first political reform in 1997 by assuring democracy and rule of state in the constitution.

#### **4.2 Special power of the Head of the NCPO**

The study found that Thailand has various coup d'état. Each coup d'état brought the issue in dispute about the status of coup d'état council to the consideration of the court of justice. The court of justice certified the legal status of "coup d'état council", which accomplished all the time according to the Positivism. The coup d'état council is considered as the sovereignty and has power to order which can enforce

as a law which is not different from any laws prescribed by the legislation in normal situation, including power to arrange the new constitution instead of the previous constitution which was torn by the coup d'état council. For the coup d'état on 22<sup>nd</sup> May 2014, the NCPO has absolutely taken control power from the government. It is considered that in fact the NCPO has the state power, but it is not appeared any lawsuit to the court. However, it is anticipated that the Court would consider based on the Positivism as previously done.

In this seize of power, the NCPO claimed that there was necessity to do so in order to settle the conflict and build the harmony to the society. Therefore, when the situation after seizing was calmed down, the NCPO has arranged the Constitution of the Kingdom of Thailand (Interim), 2014 as the rules to control the country and prepare the permanent constitution and also ensured its legal status and use of further power.

The study found that the Constitution of the Kingdom of Thailand (Interim), 2014 provided guarantee on the rights and freedom of people in Section 4, specifying that "Subject to the provisions of this Constitution, human dignity, rights, liberties and equality previously enjoyed by the Thai people with the protection under Thailand's administrative conventions of the democratic regime of government with the King as Head of State and Thailand's existing international obligations shall be protected under this Constitution." Although there is only Section 4 that ensures the rights and freedom of people, the meaning already covers the fundamental rights of people in all respects.

However, the Constitution of the Kingdom of Thailand (Interim), 2014 has provision of Section 44 specifying that "In the case where the Head of the National Council for Peace and Order deems necessary for the purpose of reforms in various fields, for the enhancement of unity and harmony among people in the country, or for the prevention, restraint, or suppression of any act which undermines public order or national security, the Throne, the national economy, or State affairs, irrespective of whether such act occurred inside or outside the Kingdom, the Head of the National Council for Peace and Order, with the approval of the National Council for Peace and Order, shall have power to order, restrain, or perform any act, whether such act has legislative, executive, or judicial force; the orders and the acts, including the performance in compliance with such orders, shall be deemed lawful and constitutional under this Constitution, and shall be final. When those have been carried out, a report shall be made to the President of the National Assembly and the Prime Minister for acknowledgement without delay."

The grant of power to the Head of the NCPO is the absolute power that the Head of the NCPO can act in any way which shall be considered that it is legal and valid according to the constitution. Presently, the Head of the NCPO uses his power under Section 44 to

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issue the orders of the Head of the NCPO in the total amount of 51 orders, which many of them are affected to the rights and freedom that is assured by Section 4 of this Constitution. It could say that the orders of the Head of the NCPO are still in doubt in relation to the inspection of the special power of the Head of the NCPO which will be further discussed.

## V. DISCUSSION

As the military which is the main institution to fight with the communist during the Cold War, this made the military to claim to enter into the politics. However, after the end of the Cold War, the military still played the role in the politics by changing their ideology from fighting for communist to fight with the politicians whom the military found that they had corruption and become enemy of the nation. The advantage of the military that was the discipline, command system, confidentiality, speed of communication within the military and the permission to possess weapons helps them to seize the power of the government that they found the corruption easily.

For this coup d'état, the NCPO referred to the social conflict which took long time and proposed themselves to reform the country in order to pass such situation and built the constitution that will be perfect for the further by appointing themselves to be the political organization in the Constitution of the Kingdom of Thailand (Interim), 2014 in order to control the public order and grant special power under Section 44 to the Head of the NCPO as mentioned above.

From the study of the status and the use of state power of the Head of the NCPO during this interim constitution, it is the use of power to aim to maintain its stability. Any mechanism which are the use of special power under the constitution, use of power as the political organization or even assuring its power to be legal and further enhance it to be legal according to the constitution are conflict with the principles, which will be further discussed as follows:

The use of power of the Head of the NCPO is conflict with the democracy. That is the Head of the NCPO issued many orders subject to Section 44, affecting to the status and rights of people, especially the order No. 3/2558 which is not allowed to assemble for illegal purpose or political meeting, which is the limitation of the freedom to express opinion of people that is the basic rule of the democracy. During the past, a group of academic professors of university was charged in the offence of assembling for illegal purpose or political meeting from the announcement that "university is not military camp" in order to respond the NCPO which said that the professors like to teach in the way against the government although the opinion of this group of professors was the expression of opinion in the problems on arrangement

of education which was the direct obligation of personal of the university.

Furthermore, use of power under Section 44 is considered as final and legal according to the laws and constitution, notwithstanding the contents of the use of power. This cause the Head of the NCPO to have the power to do any action without inspection by the judicial organization according to the rule of state. And, when there is no organization according to the rule of separation other than the judicial organization during the enforcement of this interim constitution, this causes the power of the Head of the NCPO will not be inspected in all channels and it is also found that it could not inspect the military as well. For the consideration of the exemption of the rule of state in case of using state power in the unusual situation, it can see that the chaos was settled, which there is no necessity as claimed by the Head of the NCPO to act without any inspection. Therefore, if the Head of the NCPO wants to have any law, he should use the normal procedure to issue law.

For the constitutionalism that wants to use the written constitution to ensure the right and freedom of people, however, the NCPO instead arranges this interim constitution in order to claim the legitimacy in using power. Although there is Section 4 to ensure rights and freedom of people, Section 44 of the same constitution grants the power to the Head of the NCPO to do any action and it is deemed legal according to the constitution. The use of power by the Head of the NCPO is characterized as Police State to be in compliance with the goal of the Head of the NCPO, regardless of any means, such as using military power to seize persons which was accused for the charge of assembling for illegal purpose or political meeting which was against the order No. 3/2558, by way that it was not prescribed in the criminal procedural act. However, the Head of the NCPO announced that the arrest of the offender can be done by any means. This interim constitution was not written according to the constitutionalism.

Based on the abovementioned, it reflects that the use of state power by the coup d'état council is beyond the inspection procedure according to the administration model under the rule of state at all, which is far beyond the democracy. The researcher proposes that although Thai society still adheres to concept of "reluctance" to accept the coup d'état which is the phenomenon of society already happened, after Thailand announced to use the interim constitution in order to bring the country to the normal situation, it is not necessary to use absolute power anymore. And if it is allowed to assure the use of power by the coup d'état to violate the rights and freedom of people even if the situation is already calmed down, it may persuade the military to use force for coup d'état again if they have a chance. Then, Thailand would not further develop democracy. Therefore, the judicial organization as the main supporter in the inspection procedure of the use of state power should

refuse the sovereignty status of the coup d'état. However, if it would accept, the force of order of the Head of the NCPO should be enforced as the temporary law only. And it should apply the rule of state as a set of rules to limit the use of state power of the coup d'état council in each period so that it would not affect to the rights and freedom of people more than it is necessary.

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