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Competing Notions of Judicialization in Thailand[1]

DUNCAN McCARGO

This article examines the politics of judicialization in Thailand between 2006 and 2014, looking at the ways in which the judiciary became regularly embroiled in politics during this extremely contentious period. It takes as its starting point important royal speeches of 2006, and the interpretation of those speeches offered by the prominent academic and social critic Thirayudh Boonmee. Several key judicial decisions which had lasting political consequences are closely examined, including the 2006 election annulment, the 2007 banning of Thai Rak Thai, the removal of pro-Thaksin Shinawatra prime ministers Samak Sundaravej and Yingluck Shinawatra in 2008 and 2014, Thaksin's conviction on corruption-related charges in 2008 and the judicial seizure of his assets in 2010. Some of the questions posed in this paper are as follows: Does judicialization inevitably mean conservative attempts to curtail the power of politicians and undermine electoral politics? Are judges working on behalf of Thai society, or in alignment with certain vested interests? Could greater judicial activism serve progressive social and political causes in the Thai context? The paper argues that Thailand's "judicialization" is a complex phenomenon: judgements made by different courts, in different cases and at different times need to be scrutinized on their individual merits.

Keywords: Thailand, Thaksin, justice, judicialization, monarchy.

DUNCAN MCCARGO is Professor of Political Science at the University of Leeds, and currently holds a shared appointment at Columbia University, New York. Address: School of Politics and International Studies, University of Leeds, LS2 9JT, UK; email: d.j.mccargo@leeds.ac.uk.

Ensuring justice is a central element in the creation of any democracy. But what happens when notions of law and justice are deeply contested, rather than robustly grounded? In the Thai context, the legal system has often operated as an instrument of power exercised on behalf of the monarchy and other traditional institutions, rather than as a source of rights and redress for citizens. A series of short-lived constitutions since 1932 have illustrated the instability and malleability of legal "rules of the game" in the Thai context. Drawing on fieldwork-based research, this article explores competing understandings of rule, law and justice in Thailand, in order to examine how far the current legal system supports processes of democratic change, and how far it offers visible or concealed obstacles to progressive political reforms. At the heart of the issue lies the contested meaning of "judicialization" (*tulakanpiwat*) a term popularized in the wake of two major royal speeches in 2006.[2] For some, judicialization means rousing the slumbering Thai judiciary into progressive activism and constructive engagement with pressing social and political issues. For others, judicialization means using the judiciary to curtail the power and influence of elected politicians, turning judges into an instrument of the traditional elite.

The growing involvement of the judiciary in politics, broadly defined, has been a global trend in recent decades. Nevertheless, as recently as 1995, Neal Tate and Torbjorn Vallinder wrote that: "A majority of the Southeast Asian countries are unlikely candidates for the judicialization of politics because they are ruled by regimes that, by any standard of judgment, are distinctively, if not ruthlessly, undemocratic and non-constitutional."[3] For these authors, "judicialization" is seen in largely positive terms: the growing willingness of the courts to act in the public interest, challenging power-holders, remedying abuses and supporting citizens. Subsequent developments, including regime change in Indonesia after 1998, mean that such modes of judicialization have been gaining ground in the region. Yet the trend in Thailand has been more ambiguous; despite some progressive rulings at certain junctures, many of these have been readily overturned. Despite the constitutional reforms of 1997, Thailand has not yet seen many positive results from the entrenchment of what Ran Hirschl critically terms "juristocracy".[4] Indeed, in many respects Thailand's judicial empowerment has resembled just the sort of "self-interested hegemonic preservation" described by Hirschl.[5]

The Thai judiciary has long enjoyed close links with the ruling elite, and especially with the monarchy.[6] Judges did not defend any of Thailand's constitutions on the numerous occasions when the army had seized power, always legitimating military coups and failing to insist upon the rule of law. Leading historian Nidhi Eoseewong has argued that despite the 1932 "revolution" which ended the absolute monarchy, judges have never really changed their thinking:

> Judges are still allowed to think that they are part of the monarchy in providing service. They don't think they are part of the people's sovereignty, with a duty to protect rights and freedom as enshrined by the constitution.[7]

Prior to 1932, judges had simply been administrative officials acting on behalf of the state, with no notion of separation of powers; although in theory this had changed since 1932, in practice their mentality had never changed.[8]

In 1997, Thailand's new Constitution was widely hailed as a breakthrough in the country's democratic development.[9] Most previous constitutions had resulted from military-initiated moves and lacked popular legitimacy. The 1997 Constitution was unusual in that it received backing from a wide range of sources and was hailed the "people's constitution", as a result of the extensive process of public consultation which preceded its promulgation.[10] For all its flaws, the 1997 Constitution was an attempt to establish a new basis of legitimacy for electoral politics in Thailand, incorporating a range of independent agencies designed to create checks and balances, and so prevent the abuse of power. In the eyes of key figures behind the drafting process, the 1997 Constitution represented a systematic attempt to develop an alternative and more workable mode of political legitimacy for a nation that was over-reliant on extra-constitutional power and influence exerted by the monarchy and range of actors that have been termed "network monarchy",[11] notably the judiciary, the bureaucracy and the military. In other words, the authors of the 1997 process were seeking to find pre-emptive ways of firming up Thailand's political order in anticipation of the impending royal succession, which would likely see a highly revered King replaced by one who commanded far less respect and very little affection.[12] The post-1997 order was intended to be one in which constitutionalism was robustly embedded, and which was no longer reliant upon the personal *barami* (charisma) of the current monarch.

Some scholars argued that the 1997 Constitution formed part of a worldwide movement known as the "new constitutionalism", reflecting wider trends in global legalism.[13] While there is no denying the adeptness with which Thailand readily imports both technologies and other forms of innovation, new Thai constitutions are an old story, with no prompting really needed from Europe or Latin America. The 1997 Constitution was the latest iteration of a long-standing Thai practice with a twist: this time those whom Michael Connors calls the "liberal royalists" were given centre-stage to devise a constitution to their liking,[14] one which would both protect the monarchy and also insulate it from the likely political upheavals that would precede and follow the contentious period of the royal succession. Because they lacked legal experience, the prime movers of this process — former Prime Minister Anand Panyarachun and physician-activist Prawase Wasi — were reliant upon a number of prominent public law experts to help generate technical solutions to the country's complex social and political problems.

Despite the best efforts of the 1997 reformers, in less than a decade King Bhumibol publicly declared that the new old constitutionalism had failed:

> Now, Thailand is encountering the worst crisis in the world. Therefore, judges have duties to perform. … Today, it has to be up to the Supreme Court judges. Other courts, whether they are the Administrative Court or Constitutional Court, or whatever courts, are not as entitled to decide as the Supreme Court. Therefore, the Supreme Court must act by thinking it over together with other courts on how to resolve the crisis, and must do so very quickly otherwise the nation will collapse and cannot be salvaged. … Now, the people are looking up to the courts, particularly the Supreme Court. … The people across the country and the people all over the world will praise that the Thai Supreme Court is still competent, knowledgeable, and is determined to rescue the nation when the time comes. … Thank you on behalf of all the people that our Supreme Court judges are still strong.[15]

Two royal speeches of 26 April 2006 were widely hailed as a turning point for Thailand, the first explicit emergence of "judicialization" as an alternative way of managing politics. Such ideas were popularized in a May 2006 paper by Thammasat University academic and polemicist Thirayudh Boonmi, who suggested that the judiciary could resolve problems relating to political reform.[16] Most Thais arguably understand *tulakanpiwat* to signify actions taken by the judiciary to help avert political crisis, or actively to curtail the

power of politicians. But in reality the meanings of judicialization are both multiple and contested.[17]

In the remainder of this article, the political context of the rise of judicialization will first be examined: how are Thai courts assuming new roles? After this, some recent court cases with important political dimensions will be briefly reviewed: the annulment of the April 2006 general election; the dissolution of the Thai Rak Thai Party (TRT) in 2007; the removal of Prime Minister Samak Sundaravej from office in 2008; former Prime Minister Thaksin Shinawatra's conviction for abuse of power in 2008; the confiscation of more than 60 per cent of Thaksin's assets in 2010; and the judicial ouster of Prime Minister Yingluck Shinawatra in May 2014.[18] Various alternative meanings of "judicialization" will be then discussed, including: the courts as crisis managers; the courts as a "checking and balancing" power; the conservative political alliance between the judiciary and the establishment; judicial activism; and judicial engagement with society.

The Changing Nature of the Courts

In his April 2006 speeches, the King explicitly disavowed the idea that the monarchy should be called upon to resolve deep-rooted social and political conflicts. The belated royal intervention of May 1992, when the King effectively demanded the resignation of Prime Minister Suchinda Kraprayoon, had set a troubling precedent: an expectation that the palace would rescue Thailand from itself.[19] The political reform movement underpinning the 1997 Constitution formed an attempt to institutionalize checks and balances that would prevent such a crisis from recurring. The 1997 Constitution introduced a number of independent agencies, including a Constitutional Court and a Supreme Administrative Court. These new courts, staffed by a mixture of former career judges (from the Courts of Justice and Administrative Court) and newly-selected judges drawn from academia and public service, were given important roles in curtailing abuses of bureaucratic and political power — in effect, an explicitly political mission.[20] The performance of these new courts was controversial and intensely debated.

The King's April 2006 speeches reflected the view that the Constitutional Court had been captured by pro-Thaksin interests, and was now unable or unwilling to decide on matters of profound national importance.[21] But people were wrong to turn to the monarchy: instead, they should turn to the judiciary. It is important here to

understand the difference between the Courts of Justice and the new courts created under the 1997 Constitution. The King specified that the other courts "were not as entitled to decide" as the Supreme Court, which was composed entirely of professional career judges. In other words, the King was asserting the supremacy of the older Courts of Justice over the more politicized post-1997 Constitutional Court.

While originally conceived primarily as a body that would review new and existing legislation to ensure that it was compatible with the Constitution, in practice the post-1997 Constitutional Court came to serve as a court of last resort to address sensitive political issues, and to validate the decisions of other agencies such as the National Counter-Corruption Commission and the Election Commission. James Klein has shown that in the first four years of the Constitutional Court's existence, judges ruled on 237 motions which could be grouped into five categories.[22] Only 7.6 per cent of these motions addressed the constitutionality of parliamentary acts, and only 9.7 per cent concerned the governance of constitutional mechanisms. However, 55.7 per cent involved passing judgement on the constitutionality of existing laws — mainly attempts by a range of social actors retrospectively to annul legislation passed before 1997. About 16.5 per cent of cases concerned the dissolution of political parties, while 10.5 per cent involved petitions for the removal of officials from public office. In terms of public and media interest, it was these last two categories of judgement for which the Constitutional Court was best known, and where it was most active: for many people, the *de facto* role of the Court was to dissolve political parties and oust problematic officials — powers that could easily be exploited by conservative forces in Thai society to curtail electoral democracy. As Klein puts it, the Court "has demonstrated that it will serve as neither a force for social reform or legal change when it comes to protecting the rights of citizens".[23]

In the Thai case, since 1997 certain courts have served as an important check and balance on executive power and authority. In the eyes of the Thai public, such refereeing has been the primary function of the post-1997 "independent" institutions. From 1997 to 2006, this refereeing typically involved the Constitutional Court acting in concert with other agencies — notably the Election Commission of Thailand (ECT) and the Counter-Corruption Commission — to dissolve political parties or bar officials from office. The 1997 Constitution also established a Criminal Division

for Persons Holding Political Positions under the auspices of the Supreme Court. After 2006, this "politicians' court" assumed greater prominence: most notably, former Prime Minister Thaksin Shinawatra received a two-year jail sentence in 2008.

Three serving prime ministers were removed from office by the Constitutional Court in the years that followed (Samak Sundaravej and Somchai Wongsawat in 2008, and Yingluck Shinawatra in 2014), and several political parties were banned, including the former ruling TRT party in 2007, and the ruling People Power Party in 2008. Nevertheless, the impartiality of the Constitutional Court and other bodies had been called into question. Critics claimed that these organs sometimes functioned as "partial referees", adjudicating the Thai political game on behalf of conservative interests closely associated with the palace. Judges constituted a key element of the monarchical network, an informal alliance of conservative forces who exert power and influence in Thailand in the name of, on behalf of, or simply because of, sympathy with and loyalty to the monarchy. At times, the self-identification of judges as royal servants was at loggerheads with their function as neutral referees.

In recent years, Thailand has seen several major "judicial" interventions in the political process. The judicial "actors" involved varied from case to case, yet the cases aroused intense public interest and had the effect of radically altering the direction of Thailand's politics. Some of the judgements seemed directly related to royal speeches or to actions supported by members of the monarchical network. Part of the problem here involves defining the "judiciary". The major cases discussed here differ significantly. The Thaksin acquittal case of 2001 centred on the Constitutional Court. The election annulment case of 2006 involved cooperation between the Constitutional Court, the Administrative Court and the Supreme Court. By contrast, the TRT dissolution case was implemented by a military-appointed Constitutional Tribunal. Judges of the Administrative Court could themselves come from a variety of backgrounds, including those with qualifications in the field of law or the administration of state affairs, and were not limited to people who had made their careers as professional judges. The creation of the Constitutional Court served partly to undermine the monopoly of Supreme Court judges over major legal decisions, a de-professionalization of judicial power, and was met with some resistance from the career judiciary. Indeed, the kind of power

exercised by the Constitutional Court might best be termed "quasi-judicial", since members operated within a judicial framework, but did not necessarily have judicial backgrounds or perspectives.

The 2007 Constitution enacted under the auspices of the Council for National Security's (CNS) military regime — but validated by an unprecedented if controversial national referendum — amended the provisions for members of the Constitutional Court, reducing membership from 15 to just 9 (the same number as the United States Supreme Court).[24] The new membership comprised 3 Supreme Court justices, 2 Supreme Administrative Court justices, 2 persons with legal qualifications, and 2 individuals qualified in political science, public administration or other social sciences, and experienced in state affairs. Those qualified for Constitutional Court positions now included practising lawyers with at least thirty years' continuous experience. The overall effect was likely to be an increase in professionalization, since former career judges could now occupy the majority of the seats (five out of nine), and two others were likely be held by very experienced members of the legal profession. The aim of the drafters — themselves including many conservative bureaucrats and lawyers — was apparently to tighten the membership of the Constitutional Court, in the hope of making it less politicized and less amenable to interference.[25]

Judicialization in Action

For most observers, the process of judicialization refers to a number of controversial court cases since April 2006, some of which will be briefly reviewed here. Nevertheless, there were some interesting precedents. The Constitutional Court had issued three important and rather surprising judgements between 1999 and 2001. The first of these involved Newin Chidchob, at the time an influential TRT faction leader and deputy agriculture minister from Buriram province. In 1999, the Court ruled by one vote that although Newin had been convicted on defamation charges, he could continue to serve in his ministerial post. By contrast, Sanan Kachornprasart, the secretary-general of the Democrat Party, a former minister of agriculture, industry and interior, and one of the leading political figures of the 1990s, was convicted of irregularities in his assets declarations by the Constitutional Court in 2000, and banned from political office for five years.[26] Yet the following year, the Court narrowly acquitted then Prime Minister Thaksin Shinawatra on very similar charges

to those faced by Sanan, after a popular campaign on Thaksin's behalf led by a number of prominent royalists. Whereas after 2006 the courts were accused of bias against Thaksin and favouritism towards the Democrats, precisely the opposite appeared to be true at the turn of the millennium.

What all three of these early cases illustrated was the Constitutional Court's tendency to "back winners" and punish those on the losing side. Newin was a rising star in the 1990s, and the support of his faction was crucial for the survival of Prime Minister Chuan Leekpai's government's coalition. By contrast, in the wake of the 1997 Constitution, Sanan was seen as a political "dinosaur" wedded to obsolete modes of money politics and influence-peddling. The banning, from which he never recovered, allowed the Democrat Party to bring in new blood, and was privately welcomed by many from the Party's southern faction, who had never trusted Sanan to begin with. By 2001, Thaksin was a popularly-elected prime minister endorsed by many royalists who believed he was a man they could work with. Removing him from office would have caused a national political crisis. Nevertheless, in the years that followed, critics of Thaksin would repeatedly point to the Court's 2001 decision as a missed opportunity to halt Thaksin's inexorable political ascent. That ascent was only finally checked by the 2006 military coup, and a set of key legal decisions associated with it.

Case 1: The Annulment of the April 2006 General Election

In early 2006, Thaksin called for a snap election. The police officer-turned-telecoms-billionaire-turned-politician had been facing growing political pressures and protests over allegations of disloyalty to the monarchy, corruption and conflict of interest, especially following the sale of his family's Shin Corp to Singapore's Temasek Holdings in January.[27] Nevertheless, dissolving the House was an extraordinary political move, since TRT had won an overwhelming election victory just a year earlier, and Thaksin had three more years of his term remaining. Well aware that they had no chance of winning the election, the opposition parties decided to boycott it. Across the country, TRT candidates engaged in troubling shenanigans, either running against themselves, or against candidates from fake minor parties no one had ever heard of.[28] Millions of voters cast anti-TRT "no" votes. Nevertheless, even if all the no votes, invalid votes and votes for minor parties are counted as

votes against TRT, the majority of voters in 2006 cast their votes in favour of Thaksin's party.

Following the two April royal speeches, in May 2006, the Constitutional Court annulled the election. A striking feature of the 2006 election annulment was the unusual degree of coordination involved between the Supreme Court, the Supreme Administrative Court and the Constitutional Court. The King made two speeches addressed to members of the Administrative Court and the Supreme Court, in which he was extremely critical of the election; the Chief Justice of the Supreme Court called unprecedented meetings with the other two Courts, which are supposed to work independently; and shortly afterwards, the Administrative Court decided to cancel some re-run elections in expectation that the whole election might be nullified. The Constitutional Court subsequently invalidated the entire election. The speech to the Administrative Court suggested the King's impatience with legal niceties that allowed the different courts to pass the buck on difficult decisions:

> Now, I will talk about the election. The court itself has the right to discuss the election, especially the candidates who received less than 20 per cent of the vote.
>
> Is this issue relevant to you? In fact, it should be. The issue of the sole candidacy elections is important because they will never fulfil the quorum. If the House is not filled by elected candidates, the [sic] democracy cannot function. If this is the case, the oaths you have just sworn in would be invalid. You have sworn to work for democracy. If you cannot do it, then you may have to resign. You must find ways to solve the problem.
>
> When referring the case to the Constitution[al] Court, the court said it was not their jurisdiction. The Constitution Court[al] said they're in charge of drafting the Constitution and their job was finished after completing the draft.
>
> I ask you not to neglect democracy, because it's a system that enables the country to function.
>
> Another point is whether it was right to dissolve the House and call for snap polls within 30 days. There was no debate about this. If it's not right, it must be corrected.
>
> Should the election be nullified? You have the right to say what's appropriate or not. If it's not appropriate, it is not to say the government is not good. But as far as I'm concerned, a one party election is not normal. The one candidate situation is undemocratic.[29]

The King's speech made clear that he was expecting the different courts to work together to address a serious political crisis, rather than retreat behind legalistic arguments about questions of jurisdiction. One theme of his speech was that calls for a royally-appointed prime minister under Article 7 of the Constitution were inappropriate:

> Please help the court to think. Now the public pins their hope on the courts, especially the Supreme Court, but other courts as well. The people say that the court is still honest and knowledgeable because the judges have learned about the law and scrutinize them carefully so the country survives. If you do not follow legal principles, correct administration principles, the country will not survive as it is today, because there are not enough MPs to fill the quorum of 500. It cannot function. You have to consider how to work this out. You cannot ask the King to make a decision saying that the King has signed his signature. Article 7 does not say that the King has that authority. It does not.[30]

The King did not propose to provide the solution to Thailand's political "mess": this was a job for the courts. His words implied a preference for the career judges of the Supreme Court over the "independent" but potentially politicized quasi-judicial bodies established under the 1997 Constitution. As Michael Montesano put it, "In short order, the Constitutional Court found pretexts to annul the 2 April election."[31] In addition, a spokesman for the three courts called upon all five Election Commissioners to resign.[32] When only one did, the remainder found themselves briefly arrested and thrown into jail.[33] There was little doubt in the minds of most observers of a direct causal link between the royal speeches, and the election annulment and associated actions. The role of the courts in this remarkable episode was certainly that of a referee, but a referee acting on whose behalf? The courts had clearly been extremely reluctant to act without prompting.

Case 2: Banning Thai Rak Thai, Not the Democrats, May 2007

On 19 September 2006, the military staged a *coup d'état* against Prime Minister Thaksin Shinawatra, who went into voluntary exile abroad. The military junta — known as the Council for National Security (CNS) — proceeded to abrogate the 1997 Constitution and announced that a successor would be drawn up. Elections were eventually scheduled for 23 December 2007. At this point, Thaksin's

TRT party — which had won strong victories in 2001 and 2005 — looked well placed to win the forthcoming election as well. But the ECT had charged both TRT and the Democrats with committing irregularities during the annulled April 2006 general election. A Constitutional Tribunal was specially appointed (at this point the old Constitutional Court had been abolished and not yet restored) to consider the case.[34]

A few days before the Tribunal's decision was announced, the King made another speech to Administrative Court judges; referring to the case, he declared "I have the answer in my heart, but I have no right to say it." Alluding to his April 2006 intervention, he went on:

> You took responsibility following what I said in Hua Hin over a year ago and consequently many things happened. And those things have their causes. But the things got entangled. And soon they may be more so. You must be well prepared to dispense some criticism — not as judges, but as individuals or specialists — to prevent our country from sinking and people saying we have done nothing or trying to solve the problem … Please keep on trying to improve our country's situation, which is not good at all this year.[35]

This time the message from above was far less direct than in the case of election annulment, and many commentators saw it as reflecting a royal desire for compromise, rather than for harsh treatment of TRT. But the Constitutional Tribunal proceeded both to dissolve TRT, and to ban 111 executive members of the Party from office for five years.[36] Thaksin was now ineligible to run for election, along with virtually everyone who had served as a minister in his cabinets. TRT had been essentially decapitated.

On the same day as TRT and three other small parties were banned, the Democrat Party was acquitted in a parallel case, in a decision which some commentators claimed reflected judicial bias against pro-Thaksin forces. Nevertheless, the evidence against the Democrats was notably thinner, and it was possible to see the ECT's charges against the Party simply as a ploy to create "cover" for the real target: TRT. As with the TRT verdict, the judges were divided 6–3, evidence of a strong divergence of views even among this carefully selected group.

Perhaps surprisingly, the ruling junta was not happy with the judgement. CNS Chief General Sonthi Boonyaratkalin immediately proposed an amnesty for banned TRT executives, a controversial

suggestion from which he quickly distanced himself.[37] Some speculated that CNS would have preferred both TRT and the Democrats to be dissolved, in the interests of "fairness", and to permit a complete reshaping of the political landscape. Others believed that CNS had wanted only a small number of key TRT executives banned, and not all 111 of them; the mass bannings foiled schemes to create a reconfigured post-TRT "Matchima Party" led by close Sonthi associate Somsak Thepsuthin.[38] Sonthi admitted having met the vice-president of the Tribunal the day before the verdict was announced, though he denied having lobbied for a particular outcome.

Ultimately, the Constitutional Tribunal punished the TRT in an extremely draconian fashion, arguably going beyond the royal advice, and beyond the expectations of the CNS. If the military coup was the blunt instrument used to oust Thaksin from office, judicial interventions were now one of the most important mechanisms by which the monarchical network sought to manage and reorganize political power in the post-coup period. But the 2007 party dissolution cases illustrated that the monarchy, the military junta and the judiciary had somewhat different agendas; the Tribunal judges adopted a harder line with pro-Thaksin forces than other elements of the network. By May 2007, General Sonthi and CNS were looking ahead, anticipating the need to work with pro-Thaksin elements in the wake of the election. The Constitution Tribunal, by contrast, was still thinking in punitive terms about the need to extirpate Thaksin's allegedly malign political influence.

Case 3: Removing Samak Sundaravej From Office, September 2008

In the general election of December 2007, the People's Power Party led by Samak Sundaravej won the largest number of seats, and Samak became Prime Minister. Samak was a veteran political bruiser, a former cabinet minister, party leader and Bangkok governor who had emerged from retirement to serve as Thaksin's "nominee", at the head of a party widely recognized as the reincarnation of the now-deceased TRT.[39] At the time of the election, sources close to the Democrat Party hinted that Samak would not last long as prime minister, but would be swiftly ousted by legal action. In the event, he managed to retain the premiership for just over seven months, before being removed from office by the Constitutional Court on 9 September 2008.[40]

The Constitutional Court (restored in 2008) acted on the basis of two complaints, one brought by members of the Senate and another brought by the ECT. In essence, both complaints were the same. After becoming Prime Minister, Samak appeared on television as the presenter of two cooking shows, for which he had been hired by a company known as Face Media. By doing so, he had violated the constitutional ban on holders of political positions being employed by the private sector. Samak claimed that he had not been paid for his appearances, that he was not a shareholder or employee of the company, and that the shows in question had been recorded before he took office. However, Samak's submissions and other evidence submitted to the Constitutional Court contained some inconsistencies, and the Court found unanimously that he was in breach of the Constitution.

Samak was a deeply controversial figure, whose hardline pro-military views and troubling past role in the turbulent politics of the 1970s were among the many black marks that made him singularly ill-suited to the office of prime minister.[41] Nevertheless, few could argue with a straight face that Samak deserved to be removed from office for his role as a cooking show host. His passion for cooking was actually Samak's main redeeming feature. Hosting a cooking show was not the kind of conflict of interest that could undermine the nation's economy, security or political integrity, and Samak's removal from office for such a trivial transgression briefly made Thailand an international laughing stock.

The removal of Samak illustrated that the Constitutional Court was back in business, intervening to discipline politicians, as it had in other cases such as Sanan's, but had failed to do in the 1999 Newin case and the 2001 Thaksin case. The unanimity of the Court on this issue suggested a willingness to favour the known preferences of one group of power-holders, even when doing so seemed to fly in the face of common sense. The deeper irony of the case, however, is that Samak could have continued as premier if Parliament had simply reappointed him immediately following the Constitutional Court judgement. But by this time, the independent-minded Samak had outlived his usefulness to Thaksin, who unceremoniously dumped him in favour of Somchai Wongsawat, his own brother-in-law. Ironically, it was Thaksin, not the Constitutional Court, who really removed Samak from the premiership. But in the event Somchai's tenure in office proved to be even shorter,[42] while Samak himself died of cancer just over a year later.

Case 4: Thaksin and the Ratchadapisek Land Verdict, October 2008

Former Prime Minister Thaksin was convicted on 21 October 2008 of abusing his power in 2003, by assisting his wife Potjaman to buy land in a prime area of Bangkok from the publicly owned Financial Institutions Development Fund (FIDF) for 772 million baht (roughly US$22 million) in an auction. The Supreme Court's Criminal Division for Holders of Political Positions sentenced him to a two-year jail term. The case was a complex one, based around a set of inter-related arguments.[43] There were two particularly striking features of the case. First, the Court seemed uninterested in pursuing Potjaman or recovering the disputed land, accepting her defence that she was not a state official (despite the fact that Article 100 of the National Counter Corruption Act explicitly states that in such cases, spouses of state officials should be treated as state officials). The charges against Potjaman were deemed to have lapsed and the land was not confiscated from her. Second, the Court accepted Thaksin's defence (by a majority of 8–1) that he did not violate the criminal law. His conviction was essentially a technicality; his offense was signing off on the questionable transaction.

The land case verdict was politically extremely important; Thaksin was now facing a jail sentence and would face immediate arrest if he returned to Thailand. He had left the country in early August 2008, ostensibly to attend the opening ceremony of the Beijing Olympics, with the connivance of the Supreme Court, and had then travelled on to London rather than returning to hear the verdict. Following his conviction, the British authorities promptly cancelled Thaksin's United Kingdom visa, but he continued to live abroad, primarily in Dubai.[44] Whether or not the verdict was political in intent, the effect further galvanized the anti-Thaksin movement, the Peoples' Alliance for Democracy (PAD) — which was then in occupation of Government House, the prime minister's office.

Case 5: The Confiscation of Thaksin's Assets, February 2010

The Supreme Court issued a new set of rulings against Thaksin on 26 February 2010, concerning the status of 76 billion baht ($2.18 billion) in assets which had been frozen since the military coup of 2006. Thaksin was accused of five counts of "policy corruption" which had helped him to gain abnormal wealth.[45] He was convicted on four counts, two relating to changes his government

had made to the structure and operation of a mobile telephone concession, one involving the reduction in Thailand's communications security through Shin Corp's switch from one proposed new satellite to another, and a final count concerning preferential treatment to Thaksin's companies, linked to a Thai EXIM bank loan to Myanmar's military rulers. As result of his conviction, 46 billion baht ($1.32 billion) in assets were seized — the difference between the value of Shin Corp's shares when he became prime minister in 2001, and their value when he sold the same shares to Singapore's Temasek Holdings in 2006. The remaining 30 billion baht ($860 million) in assets remained frozen.

The assets decisions were widely condemned by Thaksin and his supporters; Thaksin himself, linking the case to the TRT dissolution case, claimed that the verdicts reflected the politicization of the courts. Earlier judicial decisions, such as the annulment of the 2006 elections, could be seen as ways of resolving crises and allowing the country to move beyond an impasse. The assets seizures, however, involved finalizing the unfinished business of the military coup, and hardly met the constitutional requirement that justice be carried out promptly and fairly. While it was difficult to feel much sympathy for Thaksin — whose wealth derived largely from government concessions secured through inside connections — the assets seizures were a retrospective action that appeared highly punitive. The value of the assets seized appeared to have been calculated very crudely, and with no particular reference to the charges of abuse of power of which he was found guilty. Far from resolving a vexing problem, judicial action served to help precipitate a further round of political crisis. Indeed, the decision effectively served as the cue for the mass pro-Thaksin "red shirt" demonstrations of March–May 2010, which resulted in the loss of more than 90 lives on the streets of Bangkok when the military clashed with protestors and repeatedly opened fire.[46]

Case 6: The Removal of Yingluck Shinawatra from Office, May 2014

In a ruling dated 7 May 2014, the Constitutional Court unanimously removed serving Prime Minister Yingluck Shinawatra from office. Her offence was to have ordered the transfer of Thawil Pliensri from his former position as Secretary General of the National Security Council in September 2011 (as part of a wider reshuffle), in violation of Article 266 of the Constitution. The Constitutional Court's

decision followed a ruling two months earlier by the Administrative Court that Thawil's transfer had been illegal. In its judgement, the Constitutional Court stated:

> … it was not convincing that the transfer of Thawil Pliensri was for the benefit of government functions according to the cabinet policies announced to Parliament. The procedure of transfer was also done within a short period of time. It was believed that the cause of the transfer was to appoint the respondent's relative to be the police chief.[47]

On technical grounds, the Constitutional Court's reasoning was arguably correct: Thawil was probably moved from his post for political reasons not related to his qualifications or performance. At the same time, Thawil was a well-known Democrat supporter who in 2014 took a public part in the People's Democratic Reform Committee's (PDRC) protests against the Yingluck government, despite being officially an advisor to the prime minister. No Thai prime minister in recent times has allowed political opponents to occupy key bureaucratic positions that involve jurisdiction over their own security.

Quite apart from the fact that Thawil's removal had facilitated the appointment of a Thaksin relative, Priewphan Damapong, as police chief, Yingluck would have been very unwise to have left Thawil in a position where he would have sought to undermine her. Because Thawil worked within the office of the prime minister, Yingluck could not easily avoid responsibility for his transfer. But similar considerations had influenced countless appointments to posts such as ambassador and provincial governor during the Thaksin and Abhisit governments; indeed, coup leader-turned-Prime Minister General Prayudh Chan-ocha, who succeeded Yingluck in office, proceeded to appoint senior officials primarily on the basis of personal loyalty. Yingluck's judicial ouster in May 2014 also needs to be seen in its political context — the culmination of a six-month campaign to remove her, spearheaded by street protests orchestrated by her political opponents with support from key figures linked to the military.

While the judges of the Constitutional Court would argue that their decision was made on purely legal grounds, Yingluck's supporters certainly did not see it that way.[48] As was often the case, however, the judgement did include a major concession: only Yingluck and a small number of cabinet ministers were removed from office, and the remainder were permitted to continue in office until this latest

"judicial coup" was followed up by a military one a fortnight later. The Constitutional Court did not administer the coup de grace.

Competing Notions of Judicialization

The term "judicialization" in the Thai context clearly means quite different things to different people. On one level, the term refers simply to the practice of assigning greater social and political roles to judges or former judges, including roles as members of the independent agencies such as the Constitutional Court, membership of the senate or even ministerial positions. In a positive sense, this notion draws on the idea of the judiciary as a "reserve" of good and virtuous people, who may be drawn upon to help supply qualities and expertise which are deficient in other areas of society. It taps into wider social myths about the standing and goodness of judges, myths which form a major part of the way judges understand themselves.

Yet this form of judicialization is far from a progressive idea; it is an essentially conservative discourse which equates judicial power with state power, and involves the endorsement of the actions of the executive by the judiciary. This could be seen most clearly in the refusal of the courts to accept petitions challenging the legality of laws issued by post-coup military administrations in 1948 and subsequently.

The 2007 Constitution (in Section 219, a revision of Section 272 of the 1997 Constitution) again included a specific component of the Supreme Court designed to try holders of political positions for criminal cases. The renewed emphasis on this body in the years that followed appeared to reflect the stress placed by the King in his 26 April 2006 speeches on the pre-eminent role of the Supreme Court in helping to resolve the country's political problems. The implication here was that the Constitutional Court had proved insufficiently reliable, which might or might not be the same thing as insufficiently independent. While independent courts might be beyond the reach of interference by elected politicians, they could also prove unwilling to bend to the desires of the country's traditional institutions. The Thai establishment had a very specific understanding of "judicial independence" — judicialization meant the willingness of the judiciary to take action against politicians on behalf of the monarchy, the military and conservative views of the national interest.

Other views of judicialization were much more liberal, progressive or radical. Supporters of progressive versions of

judicialization hoped to see a more activist and interventionist judiciary, one which would make common cause with litigants against abuses of power by vested interests, including big business or the even the state itself. Pichet Maolanond, a Thai lawyer and legal scholar, argued for what he called "progressive judicial activism" (*tulakan thikhwam kaona*), a new mode of understanding the role of the judiciary as the agent of social change on environmental and other salient social issues.[49] Pichet drew inspiration from developments in a number of other countries, such as Japan, where environmental pressure groups had achieved some notable successes in securing landmark legal decisions, despite the essentially conservative nature of the judiciary and the legal system. Although Pichet's own ideas were much more progressive than the conservative monarchist approach adopted by Thirayuth Boonmi, he was also willing to employ the language of "judicialization" as a way of popularizing his ideas. In part, this was a practical, even a pragmatic, choice, since notions of the judiciary as a progressive force for policy change remained highly contested in Thailand, especially among the judges themselves. By adopting the term "judicialization", advocates of progressive change could cloak their arguments in the respectability of royally-sanctioned ideas which were less threatening and provocative. This was the kind of creative appropriation by which many debates are advanced in the Thai context; in much the same way, an alliance of conservatives, liberals and progressives was able to rally around the creation of the 1997 Constitution under the catch-all flag of "political reform".

Jarun Koananun, a lecturer in law at Ramkhamhaeng University, argued that from the standpoint of critical legal philosophy, he would naturally adopt a skeptical stance towards judicial activism. But his own stance was one of critical acceptance of judicial activism, so long as it was accompanied by a more liberal social order in which judges were more open to criticism; involved an element of great popular participation; and was based on principles of social justice, human rights and dignity.[50] Jarun expressed concern that Thai judges should be viewed as human beings: they had not reached some form of Buddhist enlightenment, nor were they philosopher kings. But in practice most Thai judges were quite reluctant to debate sensitive questions such as judicialization or judicial activism, even in the context of internal seminars, let alone in public settings

Other progressive ideas associated with the trend towards judicial activism included debates around issues such as restorative justice

and community dispute resolution. Some academics were working with small groups of judges to explore developments of this kind. One academic termed this "peaceful" judicialization, in contrast to what he called "violent" judicialization — actions such as dissolving political parties.[51] While an emphasis on reconciliation might seem narrow and conservative, it offered a means of establishing contact with sympathetic members of the judiciary and exposing them to a wider frame of reference. The kinds of judges interested in such issues, so-called "NGO judges", formed only a small minority of the judiciary, and clearly felt themselves to be a marginalized community within the wider institution as a whole.

The dominant culture of the judiciary, with its emphasis on isolation from the rest of Thai society, made more socially-engaged models of participation very difficult to mainstream. While conservative notions of judicialization in the Thai context are all about export — applying the values and norms of the judiciary to wider Thai society — progressive understandings of judicialization and judicial activism emphasize import, exposing judges to positive trends and examples, both from Thailand and elsewhere, which can inform and support their processes of deliberation and the way they administer justice. Some progressive activists were eager to invoke the monarchy's injunction to judges to take on wider social roles as a justification for encouraging the judiciary to be more open to contact with ordinary people, and more engaged with pressing social problems and concerns.[52] They argue that limiting the judiciary to addressing immediate political crises would be much too narrow, and potentially counterproductive. For them the "Thirayudh approach" to judicialization did not address a larger set of concerns: the lack of understanding and communication between the judiciary and the wider society.

Conclusion

In 2006, the King called upon judges to help solve Thailand's political problems. His speech helped popularize ideas of judicialization, in which judges assumed a more active role in society, rather than sheltering behind a culture of legal positivism that takes all existing laws as valid, whatever their actual merits. At least two major competing notions of judicialization now co-exist side-by-side in the Thai context. On the one hand, judicialization could be progressive insofar as it places modern legal thinking at the core of

important national decisions and debates; but insofar as it implied a reversion to pre-modern understandings of justice, dividing the population into good and bad subjects of the crown, the term could be regressive and deeply problematic. A series of legal decisions from 2006 onwards gave the unfortunate impression of a judiciary that had been instrumentalized to oppose the political career of Thaksin Shinawatra, including the removal from office of three pro-Thaksin prime ministers, and the dissolution of two pro-Thaksin parties.

For many in Thailand, the new institutions first created under the 1997 Constitution — notably the Constitutional Court — had become part of the problem, rather than part of the solution. Institutions that were supposed to ensure stronger checks and balances have become elements of a troubling "juristocracy": highly politicized and serving primarily to rein in supposedly untrustworthy politicians on behalf of bureaucrats and royalists. According to critics such as Nidhi Eoseewong, judicial roles that emphasize dissolving political parties and ousting politicians are highly reminiscent of the authoritarian functions the judiciary performed during the era of the absolute monarchy. On the other hand, even the coup-era Constitutional Tribunal appears not to have done the precise bidding of its military and palace "masters"; relationships between different elements of the network monarchy are constantly being re-negotiated, and the potential exists for a more progressive mode of judicial activism gradually to emerge, along the lines envisaged by Pichet, Jarun and other critical legal academics.

NOTES

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[2] Even the correct translation of *tulakanpiwat* is troublesome; it has been variously translated into English as judicialization, judicial review, judicial activism, and judiocracy.

[3] C. Neal Tate and T. Vallinder, *The Global Expansion of Judicial Power* (New York: New York University Press, 1995), p. 464.

[4] Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge: Harvard University Press, 2004).

[5] Hirschl, *Towards Juristocracy*, op. cit., p. 11.

[6] For a critical discussion see Piyabutr Saengkanokkul, *Nai phraporamaphithai prachathippatai lae tulakan* [In the name of the King, democracy and the judiciary] (Bangkok: Openbooks, 2009).

[7] Nidhi Eoseewong, "San nai thana konkai khong rabop …?" [The Courts as a Mechanism of a Regime?], speech presented at Nitirat Seminar, "The Judiciary and Justice in Thai Society", Thammasat University, 17 March 2013.

[8] Nidhi Eoseewong, "Sanjao", in *Phiphaksan* (Bangkok: Matichon, 2013), pp. 15–21. For an extended discussion, see Duncan McCargo, "Readings on Thai Justice: A Review Essay", *Asian Studies Review*, 39, no. 1 (forthcoming 2015).

[9] See, for example, Michael K. Connors, "Framing the People's Constitution", in *Reforming Thai Politics*, edited by Duncan McCargo (Copenhagen: NIAS 2002), pp. 37–55.

[10] On the 1997 constitutional process, see ibid.

[11] Duncan McCargo, "Network Monarchy and Legitimacy Crises in Thailand", *Pacific Review* 18, no. 4 (2005): 499–519.

[12] This claim is based on my own conversations with key actors during this period, after hearing Dr Prawase Wasi refer obliquely to the succession issue in a well-attended 1995 speech that went unreported in the Thai media. See Duncan McCargo, "Alternative Meanings of Political Reform in Contemporary Thailand", *Copenhagen Journal of Asian Studies* 13 (1998): 15–17.

[13] See, for example, Andrew Harding, "May there be Virtue: 'New Asian Constitutionalism' in Thailand", *Australian Journal of Asian Law* 3, no 3 (2001): 236–60. While Thailand did indeed adopt some of the new institutions typical of "new constitutionalism" — such as a constitutional court — a legalistic focus on these technical features of the 1997 Constitution occludes the ways in which it embodied both longstanding and novel themes from the perspective of Thai politics.

[14] Michael K. Connors, "Article of Faith: The Failure of Royal Liberalism in Thailand", *Journal of Contemporary Asia* 38, no. 1 (2008): 143–65.

[15] "HM the King's April 26 speech (unofficial translation)", *The Nation*, 27 April 2006, available at <http://nationmultimedia.com/2006/04/27/headlines/headlines_30002592.php>. For a full Thai transcript of the royal speech, see "Phraratchadamrat phrabatsomdet phrachaoyuhua 26 mesayon 2549" [The King's Royal Speech on 26 April 2006], *Phujatkan Online*, 30 April 2006.

[16] For a short summary see, "Thirayudh Boonmi chu tulakanphiwat kae wikhrit-pathirup kanmuang" [Thirayudh Boonmi Pushes Judicialization to Solve Crisis and Reform Politics], *Matichon*, 1 June 2006. The argument was elaborated in Thirayudh Boonmi, *Thulakanpiwat* [Judicial review] (Bangkok: Winyachon, August 2006).

17 For a related discussion, see McCargo, "Readings on Thai Justice", op. cit.

18 This is far from an exhaustive list of "political" court cases: others include the banning of the Phalang Prachachon Party in 2008, and the Constitutional Court's decision on amending the Constitution in 2012.

19 This complex, controversial episode is described in detail in Paul Handley, *The King Never Smiles: A Biography of Thailand's Bhumibol Adulyadej* (New Haven: Yale University Press, 2006), pp. 346–62.

20 Under the 1997 Constitution, the Constitution Court had 15 members: 5 from the Courts of Justice (former professional judges), 2 from the Supreme Administrative Court and 8 from academic specialists in law and political science.

21 Ironically, the main evidence for this "capture" seems to have been Thaksin's 2001 acquittal by the Constitutional Court on assets concealment charges, a move that had been strongly urged by leading royalists.

22 James R. Klein, "The Battle for Rule of Law in Thailand: The Constitutional Court of Thailand", Thailand Update Paper 2003, p. 7, available at <http://www.cdi.anu.edu.au/CDIwebsite_1998-2004/thailand/thailand_downloads/ThaiUpdate_Klien_ConCourt%20Apr03.pdf>.

23 Klein, "The Battle", op. cit., p. 13.

24 For details, see Article 204 of the 2007 Constitution.

25 For a relevant discussion, see Amara Raksasataya and James Klein, *The Constitutional Court of Thailand: The Provisions and the Working of the Court* (Bangkok: Constitution of the People Society, 2003).

26 See Seth Mydans, "Key Thai Minister Resigns in Corruption Case", *New York Times*, 30 March 2000.

27 On Thaksin's controversial career, see Duncan McCargo and Ukrist Pathmanand, *The Thaksinization of Thailand* (Copenhagen: NIAS, 2005), and Pasuk Phongpaichit and Chris Baker, *Thaksin* (Chiang Mai: Silkworm, 2009).

28 Michael J. Montesano, "Thailand: A Reckoning with History Begins", *Southeast Asian Affairs 2007*, edited by Daljit Singh and Lorraine C. Salazar (Singapore: Institute of Southeast Asian Studies, 2007), pp. 314–15.

29 King's speech to Administrative Court judges (unofficial translation), *The Nation*, 27 April 2007.

30 King's speech to Supreme Court judges (unofficial translation), *The Nation*, 27 April 2007.

31 Montesano, "Thailand: A Reckoning", op. cit., p. 315.

32 See "3 san mai chuay luektang tha ko ko to chut deum yang tham nathi" [3 courts will not support elections if the old election commissioners remain in post], *Prachatai*, 16 May 2006, available at <http://www.prachatai.com/journal/2006/05/8392>.

33 In 2013, the Supreme Court finally quashed criminal convictions against the three commissioners, which had previously been upheld by the Court of Appeal. See *Khom Chat Luk*, 14 June 2013, available at <http://www.komchadluek.net/mobile/detail/20130614/160958/ศาลฎีกาพลิกยกฟ้องวาสนากกต..html>.

[34] The military-appointed Constitutional Tribunal comprised six Supreme Court justices and three Supreme Administrative Court judges, including the presidents of both courts. CNS could claim that all the members of the Tribunal were "judges" in their own right, but the composition of the Tribunal itself was essentially arbitrary. See "Thailand: The Judiciary is The Real Loser", statement by Asian Human Rights Commission, 31 May 2007, available at <http://www.ahrck.net>.

[35] "King Warns of Trouble", *The Nation*, 25 May 2007.

[36] For the full text of the judgement in Thai, see <http://files.thaiday.com/download/trt_party.pdf>.

[37] "In the wake of the verdict: Sonthi said to be unhappy with ruling", *Bangkok Post*, 1 June 2007.

[38] See "Pardon Us?", *Bangkok Post*, 3 June 2007; Thepchai Yong, "Amnesty Remarks Could Haunt Sonthi For Some Time", *The Nation,* 4 June 2007.

[39] For a discussion of Samak's removal and other developments during this period, see Tom Ginsburg, "Thailand's Constitutional Afterlife: The Continuing Impact of Thailand's Postpolitical Constitution", *International Journal of Constitutional Law* 7, no. 1 (2009): 83–105.

[40] Samak did not officially become Prime Minister until 29 January 2008.

[41] Samak was widely criticized for his roles in the October 1976 and May 1992 violent crackdowns on protest movements, and for his appalling public statements about these events. See this notorious 19 February 2008 CNN interview with Dan Rivers, available at <http://edition.cnn.com/2008/WORLD/asiapcf/02/18/talkasia.samak/>.

[42] Somchai was in office for just two-and-a-half months.

[43] Summarized in Pichet Maolanond et al., *Tulakanpiwat: chapab tulakan thikhwam kham tua bot & tulakanwang nayobai satharana* [Judicialization: judges offering non-standard decisions and judges setting public policy] (Bangkok: National Public Health Foundation, 2007).

[44] I had the opportunity to question then Foreign Secretary David Miliband on the issue when he spoke at a public forum at the University of Leeds on 21 November 2008. I asked him whether the decision to revoke Thaksin's visa was based only on the legal cases brought against him, or reflected the ongoing PAD protests or other political pressures. He replied that it was "purely a Home Office decision" and had "absolutely nothing to do with the demonstrations or anything else".

[45] "Minefield of Criminal Cases Awaits Thaksin", *The Nation*, 28 February 2010.

[46] On the 2010 protests and crackdown, see Michael J. Montesano, Pavin Chachavalpongpun and Aekapol Chongvilaivan, eds., *Bangkok May 2010: Perspectives on a Divided Thailand* (Singapore: Institute of Southeast Asian Studies, 2012).

[47] Constitutional Court Ruling No. 34/2557, 7 May B.E. 2557 (2014), p. 37.

[48] Banyan, "Thailand's Politics: Out of Luck", *The Economist*, 7 May 2014.

[49] See Pichet, *Tulakanpiwat*, op. cit.

[50] Author interview with Jarun Koananun, Bangkok, 19 March 2008.

[51] Author interview with anonymous source, Bangkok, 19 March 2008.

[52] Ibid.