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# ENTRENCHING THE MINORITY: THE CONSTITUTIONAL COURT IN THAILAND'S POLITICAL CONFLICT

Khemthong Tonsakulrungruang\*

*Abstract:* Since 2006, Thailand has witnessed an unprecedented surge of judicial activism from the Constitutional Court to scrutinize elected politicians in the name of the rule of law. Democracy, argued Constitutional Court judges, could only be consolidated if the rule of law was maintained. But examination of several high-profile constitutional cases suggested that the Constitutional Court was actually working on behalf of the powerful elite minority to obstruct the democratic process under the pretext of protecting the rule of law. This antagonistic position brewed resentment and violence which jeopardized the Constitutional Court's legitimacy as a neutral political arbiter. The 2014 coup d'état showed that once again the country has failed to consolidate its democratization. This failure suggests that the Constitutional Court's notion of the rule of law might not be compatible with the notion of electoral democracy.

## INTRODUCTION

The 1997 political reform in Thailand resulted in the establishment of the Constitutional Court as the guardian of democracy. Its mission was to bring Thailand peace and stability but the decade-long political conflict from 2006 up to the present indicated otherwise. Since 2006, Thailand witnessed several violent demonstrations as well as two *coup d'états*. Much of the conflict surrounded controversial former Prime Minister Thaksin Shinawatra, who held office from 2001-2006, and can be explained as a struggle between his supporters who elected and reelected him into power, and his opponents who repeatedly filed lawsuits as a means to remove him from power. In many cases, the actions of the Constitutional Court are believed by many to have helped escalate tensions to their breaking point. For example, it endorsed an armed occupation of Bangkok,<sup>1</sup> dissolved major political parties,<sup>2</sup> and embraced the military regime's impunity.<sup>3</sup> The Constitutional Court was accused of downplaying the importance of a general election while emphasizing the rule of law which favored the powerful anti-democratic minority. As a result, the decisions of the Constitutional Court led to a

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<sup>1</sup> Constitutional Court [hereinafter Const. Ct.] No. 45/2557, 2014; Const. Ct. No. 50/2557, 2014.

<sup>2</sup> Const. Ct. No. 1-2/2550, 2007; Const. Ct. No. 3-5/2550, 2007; Const. Ct. No. 18-19-20/2551, 2008.

<sup>3</sup> Const. Ct. No. 5/2551, 2008.

crisis, not a solution. After beginning as a neutral arbiter of constitutional disputes, the Constitutional Court became an active player whose role was a decisive factor in winning the political struggle.

This paper aims to study the Constitutional Court's role in the majority-minority struggle in the post-2006 coup Thailand. Part I provides an overview of Thailand's attempt to judicialize politics with the hope that it would restore public trust and promote clean democracy. It follows the rise and fall of the Constitutional Court between 1997 and 2016. Part II then closely examines a selection of Constitutional Court cases decided during this time period. These cases represent the elected government's fight to regain its authority to deliberate public policies. Also, these cases reveal how the Constitutional Court understands its role in the democratic regime. Finally, Part III concludes this paper by looking at all the factors that led the Constitutional Court to become the opponent of the majority.

## I. JUDICIALIZATION OF THAI POLITICS

The Constitutional Court of Thailand was a product of the 1997 political reform, which produced the 1997 People's Constitution. This political reform was preceded by the 1991 military takeover of the civilian government, and the subsequent May 1992 uprising by Thai citizens against the military-controlled government. The violent clash forced the military to end its intervention in politics and triggered a reform to permanently consolidate democracy.<sup>4</sup>

The 1997 Constitution was created with the goals of empowering the people and eradicating corruption.<sup>5</sup> In addition to having periodic free and fair elections, the Constitution Drafting Assembly (CDA) created several agencies that would perform a check-and-balance function. The CDA pursued large-scale judiciary reform, and established the independent Constitutional Court,<sup>6</sup> Administrative Court,<sup>7</sup> and the Criminal Division for the Political Office Holders within the Supreme Court of Justice.<sup>8</sup> Reflecting the CDA's distrust in civilian politicians, the CDA assigned the judiciary the duty to guard fundamental democratic principles, such as the rule of law and civil liberties, leading to the

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<sup>4</sup> CHRIS BAKER & PASUK PHONGPAICHIT, A HISTORY OF THAILAND 250–62 (2d ed. 2014); Tom Ginsburg, *Constitutional Afterlife: The Continuing Impact of Thailand's Postpolitical Constitution*, 7 INT'L J. CONST. L. 83, 89–91 (2008).

<sup>5</sup> Ginsburg, *supra* note 4, at 94.

<sup>6</sup> Radthathamnoon [THAI CONSTITUTION] (B.E. 2540) — 1997 (ch. 8 § 255).

<sup>7</sup> *See id.* § 272.

<sup>8</sup> *See id.* § 276.

judicialization of Thai politics.<sup>9</sup> In addition to the new courts, the CDA created independent watchdog agencies such as the National Counter-Corruption Commission (NCCC) and the Election Commission (EC), which were under neither the Legislative nor Executive branches.<sup>10</sup> Together, the three newly established courts and these independent watchdog agencies, would punish arbitrary officials and uphold the rule of law.

The Constitutional Court was comprised of career judges, legal experts, and political scientists who were recruited through a complicated nomination process with as little political oversight as possible.<sup>11</sup> The Constitutional Court had jurisdiction to: (1) review a provision of law and the law-making process; (2) settle a jurisdictional dispute among the legislature, the executive, and independent watchdog agencies; (3) disqualify a corrupt public office holder; and (4) protect the Constitution and democratic values.<sup>12</sup> Through judicial review, the Constitutional Court could restore trust in the government, which was necessary to strengthen Thailand's weak democracy.

The conception of the Constitutional Court was not without resistance. Prior to the Constitutional Court, the Thai legal system only had been used to having only the Court of Justice which had a universal jurisdiction. The idea of having specialized courts for public law disputes was a novel one. The Court of Justice opposed the idea of having professional and non-lawyer judges, as well as the idea of adjudicating political disputes.<sup>13</sup> It feared that the Constitutional Court would invite political influence into the judiciary.<sup>14</sup> However, the CDA managed to

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<sup>9</sup> Bjoern Dressel, *Court and Judicialization in Southeast Asia*, in *ROUTLEDGE HANDBOOK OF SOUTHEAST ASIAN DEMOCRATIZATION* 268, 272–77 (William Case ed., 2009); See Thirayuth Boonmee, *Too-la-karn-pi-vat*, [Judicial Activism] (2006) (The strongest advocate for judicialization of politics was perhaps Thirayuth Boonmee, a then lecturer in sociology at Thammasart University, who first coined the term judicial activism.).

<sup>10</sup> Duncan McCargo, *Introduction: Understanding Political Reform in Thailand*, in 'REFORMING THAI POLITICS' 1, 10–11 (Duncan McCargo ed. 2001).

<sup>11</sup> Radthathamnoon (B.E. 2540) — 1997 (ch. 8 § 255–56); Andrew Harding & Peter Leyland, *The Constitutional System of Thailand: A Contextual Analysis; Historical Analysis and Contemporary Issues in Thai Constitutionalism*, SOAS L. 166–69 (2011).

<sup>12</sup> Harding & Leyland, *supra* note 11, at 165; For more details, see also Khemthong Tonsakulrungruang, *The Anti-Majoritarian Constitutional Court of Thailand*, presented at *the 6th Asian Constitutional Forum*, Singapore, Dec. 11, 2015, 7–10.

<sup>13</sup> Harding & Leyland, *supra* note 11, at 159–61, 191–95 (prior to 1997, the Court of Justice was the only judicial institution. Judges were professional lawyers recruited through a state entrance examination. Its jurisdiction covered all private disputes, criminal or civil. Constitutional and administrative disputes were subject to the Constitutional Council and the Council of State respectively. Both the Constitutional Council and the Council of State belonged to the executive branch).

<sup>14</sup> James Klein, *The Battle for Rule of Law in Thailand: the Constitutional Court of Thailand*, in *THE CONSTITUTIONAL COURT OF THAILAND: THE PROVISIONS AND THE WORKING OF THE COURT* 35,

convince the opposition otherwise and the Constitutional Court began operating in 1998.

The early years of the Constitutional Court produced mixed results for those hoping for independent judicial review and the protection of strong democratic institutions. In many early cases, the Constitutional Court often deferred to the government's position.<sup>15</sup> However, it delivered a few important decisions in favor of gender equality, rights of occupation, and rights in criminal justice processes.<sup>16</sup> Also, it disqualified and banned several high-profile politicians who were found guilty of filing false asset statements by the National Counter-Corruption Commission.<sup>17</sup>

Unfortunately, the Constitutional Court made a few mistakes too. Accused politicians were sometimes spared despite their obvious misconduct.<sup>18</sup> For example, in 2003, the Constitutional Court acquitted Thaksin Shinwatra, then a popular businessman-turned-politician and potential Prime Minister candidate even though four judges had voted not guilty against seven who had voted guilty.<sup>19</sup> The four abstaining votes were then counted as not guilty resulting in an 8/7 decision.<sup>20</sup> Normally, the abstaining votes should not have been counted as not guilty. Moreover, the Constitutional Court raised the standard of proof from finding a normal intention that Thaksin was aware of his undisclosed properties to a special intention that Thaksin deliberately lied about his assets.<sup>21</sup>

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36–37 (Amara Raksasataya & James R. Klein eds., 2003); Harding & Leyland, *supra* note 11, at 161–62.

<sup>15</sup> Borwornsak Uwanno, *Economic Crisis and Political Crisis in Thailand: Past and Present*, 4:3 NAT'L TAIWAN UNI. L. REV. 141, 147–50 (2009).

<sup>16</sup> Kla Samudavanija, *Khob-Ked-Am-Nat-Nha-Tii-Sarn-Ratthathammanoon-pheu-song-serm-karn-pok-krong-nai-ra-bob-prachathippatai-lae-kum-krong-sitthi-seri-paph-khong-pra-cha-chon* [Scope of Power and Duty of the Constitutional Court for Promotion of Democratic Rule and Protection of Civil Rights and Liberties] King Prajadhipok's Institute Research Paper 14-15 (2014) [Thai.] [KPI Research]; see Const. Ct. No. 21/2546, 2003; Const. Ct. No. 25/2547, 2004; Const. Ct. No. 30/2548, 2005. For judicial deferral, see Klein, *supra* note 14, at 43–45; Const. Ct. No. 5/2541, 1998; Const. Ct. No. 4/2542, 1999.

<sup>17</sup> Klein, *supra* note 14, at 60, 70.

<sup>18</sup> Const. Ct. No. 36/2542, 1999 (a minister received a pending imprisonment sentence which should disqualify him from the office. However, the Constitutional Court interpreted a disqualification clause as an actual imprisonment so the accused minister could still retain his seat in the cabinet); See Const. Ct. No. 4/2544, 2001 (the Constitutional Court acquitted ten members of the cabinet who still held shares in business entities, citing the lack of evidence for conflict of interest).

<sup>19</sup> Const. Ct. No. 20/2544, 2001.

<sup>20</sup> *Id.*

<sup>21</sup> Const. Ct. No. 20/2544, 2001; See Klein, *supra* note 14, at 74–76; Samudavanija, *supra* note 16, at 169–70 (criticisms of the decision in Const. Ct. No. 20/2544, 2001).

The mistake was costly. Subsequently, Thaksin rose to prime-ministership in 2001 and dominated almost all branches of government. His popularity left the House of Representatives with an opposition too small to stop him.<sup>22</sup> His wealth and deal-making ability secretly controlled the Senate and other watchdog agencies, rendering the system of checks-and-balances ineffective.<sup>23</sup> With diminishing oversight, many of Thaksin's policies infringed upon rights and liberties of Thais while enriching himself and his supporters.<sup>24</sup> The concerned public asked the Constitutional Court to scrutinize Thaksin's actions but the Court always deferred to the government.<sup>25</sup> The Constitutional Court's deferrals to the government started to upset the public so there were calls for the judiciary, as the only remaining institution resistant to Thaksin's grip, to be more aggressive in keeping the Prime Minister in check.<sup>26</sup> The call for judicial activism resonated even in the Royal speech to judges during their swear-in ceremony.<sup>27</sup>

Although the Constitutional Court finally responded to the call for activism by invalidating the 2006 general election,<sup>28</sup> it was too late to rescue its credibility. A military coup followed month-long demonstrations in September 2006. The Council for National Security (CNS) abolished the 1997 Constitution and temporarily suspended the Constitutional Court.<sup>29</sup> The CNS replaced the Constitutional Court with

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<sup>22</sup> BAKER & PONGPAICHIT, *supra* note 4, at 267; Ginsburg, *supra* note 4, at 97.

<sup>23</sup> Kevin Hewison, *Constitutions, Regimes and Power in Thailand*, 14:5 CONTEMPORARY POLITICS 928, 935–36 (2007).

<sup>24</sup> PASUK PHONGPAICHIT & CHRIS BAKER, THAKSIN: THE BUSINESS OF POLITICS IN THAILAND 197–224 (1st ed. 2004); Kevin Hewison, *Thaksin Shinwatra and the Reshaping of Thai Politics* 16:2 CONTEMPORARY POLITICS 119–33 (2010); Vivit Muntarbhorn, *Human Rights in the Era of "Thailand Inc."*, in HUMAN RIGHTS IN ASIA 320–45 (Randall Peerenboom et al. eds., 2006).

<sup>25</sup> See Thitinan Pongsudhirak, *The Tragedy of the 1997 Constitution*, in DIVIDED OVER THAKSIN: THAILAND'S COUP AND PROBLEMATIC TRANSITION 34 (N. John Funston ed., 2009).

<sup>26</sup> See Bjoern Dressel, *Judicialization of Politics or Politicization of the Judiciary? Considerations from Recent Events in Thailand*, 23:5 THE PACIFIC REVIEW 671, 673 (2010).

<sup>27</sup> *Id.*, at 680. Although the king is assumed to be "above politics", there were evidences that the Thai monarchy, from time to time, intervened in political crises. Still, making such request in public was a rare occurrence. See Thongchai Winichakul, *Monarchy and Anti-Monarchy: Two Elephants in the Room and the State of Denial in Thailand*, in GOOD COUP GONE BAD 79 (Pavin Chatchavalpongpun ed. 2014).

<sup>28</sup> Const. Ct. No. 9/2549, 2006 (Thaksin's opposition staged a month-long protest that forced Thaksin to dissolve the House and called for a snap election. However, the opposition parties all boycotted the election for Thaksin set the date too early. They also urged voters to vote no. The Constitutional Court found the 2006 election unconstitutional due to several irregularities, i.e. low voter turnout and unusually high number of ballots that casted vote to no candidate, the outcome which allowed Thaksin's party the only main party in the Parliament, and the Election Commission's unjustifiable change of electoral practice that could enable easier frauds).

<sup>29</sup> The Council of National Security Declaration No. 3 (B.E. 2549, 2006).

the Constitutional Council.<sup>30</sup> The Constitutional Council went on to find Thaksin's Thai Rak Thai (TRT) party guilty of electoral fraud, dissolved the party, and, under the CNS's direction, banned TRT executives from running for office for five years.<sup>31</sup> Undoubtedly, the election invalidation and the dissolution of TRT showed Thaksin's opponents that the judiciary could be an effective tool to counter a politician's popularity.

The Constitutional Council was automatically dissolved when the Constitutional Court resumed operating after the 2007 Constitution came into effect. The 2007 Constitution was fueled by distrust of elected politicians.<sup>32</sup> It so rigorously pursued the goal of building a transparent Thailand that it expanded the Constitutional Court's jurisdiction and increased judicial independence from political oversight.<sup>33</sup> The modified Constitutional Court was more powerful and isolated than ever. The 2007 Constitution also, for the first time, commanded that all state apparatus shall operate in accordance with the rule of law.<sup>34</sup> The rule of law clause signified the changing focus of the supreme law from building institutions responsive to the people's needs to selecting public office holders with desirable personal ethics.

The judicial activism movement has hardly died down. Since 2008, the Constitutional Court has heard a number of high-profile cases and provided more rigorous protection of the rights and liberties of Thai citizens.<sup>35</sup> Its achievements were clouded, however, by growing numbers of politically sensitive cases concerning abuse of power, conflict of interest, and the rule of law. Parties were dissolved, policies revoked, and individuals dismissed. Post-2006 Thailand was badly divided and the 2007 Constitutional Court faced a very challenging terrain. The political process was riddled with month-long demonstrations, violent crackdowns, and lawsuits.<sup>36</sup> Often, the Constitutional Court's decisions further enflamed controversies rather than ending them, which prompted

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<sup>30</sup> Thai Interim Charter (B.E. 2549, 2007) (§ 35) (The panel consisted of the President of the Supreme Court, the President of the Supreme Administrative Court, five Supreme Court judges and two Supreme Administrative Court judges).

<sup>31</sup> Const. Council. Decision No. 3-5/2550, 2007.

<sup>32</sup> Ginsburg, *supra* note 4, at 104.

<sup>33</sup> Borwornsak Uwanno, *Economic Crisis and Political Crisis in Thailand: Past and Present*, at 163–66.

<sup>34</sup> Radthathamnoon (B.E. 2550) — 2007 (ch. 1 § 3).

<sup>35</sup> Samudavanija, *supra* note 16, at 149–66.

<sup>36</sup> BAKER & PHONGPAICHIT, *supra* note 4, at 273–80.

the attempted impeachments of judges and discussions on how to reform the judiciary or nullify unjust decisions.<sup>37</sup>

In addition to controversial decisions, the Constitutional Court was embroiled in scandals involving conflicts of interest and other inappropriate behaviors. Erroneous comments and interviews were made by judges, some even on the bench.<sup>38</sup> Judges hired their children as personal aides and recruited them as staff members.<sup>39</sup> One even granted the Constitutional Court's scholarship to his son for education abroad.<sup>40</sup> Despite numerous examples of judicial misbehavior, no judge has ever been held accountable. In fact, the Constitutional Court behaved quite similarly to the politicians they condemned.

In 2014, a *coup d'état* helped end the conflict temporarily. The 2007 Constitution was abolished and replaced with the 2014 Interim Charter which gave the military junta total and absolute control over Thailand.<sup>41</sup> But, unlike in 2006, the military junta, under the auspice of the National Council of Peace and Order (NCPO), allowed the Constitutional Court to survive and continue exercising its judicial review power.<sup>42</sup> However, the Constitutional Court may not review constitutionality of orders and acts of the NCPO.<sup>43</sup> In practice, when a democratic constitution is absent and the government has absolute impunity, judicial review is no longer meaningful. The Constitutional

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<sup>37</sup> See generally Samudavanija, *supra* note 16; Duncan McCargo & Peeradej Tanruangporn, *Branding Dissent: Nitirat, Thailand's Enlightened Jurists*, J. CONTEMP. ASIA. 1, 6–7 (2015).

<sup>38</sup> "Wasan" urges a look at English draft, KHAO SOD NEWSPAPER (June 7, 2012), [http://www.khaosod.co.th/view\\_newsonline.php?newsid=TVRNek9EazVORGszTnc9PQ](http://www.khaosod.co.th/view_newsonline.php?newsid=TVRNek9EazVORGszTnc9PQ) (Thai.) (the President of the Constitutional Court defended the Court's decision by urging the public to rely on the English draft of the 2007 Constitution, an English draft of which did not exist); Bangkok Pundit, *Constitutional Court Judge: High speed rail not necessary for Thailand*, ASIAN CORRESPONDENT (Jan. 9, 2014), <https://asiancorrespondent.com/2014/01/constitution-court-judge-high-speed-rail-not-necessary-for-thailand/> (Another well-known incident when the Constitutional Court judge complained during the hearing of the government's high-speed rail project that he personally believed that the project was unnecessary because the government's priority should have been to get rid of all gravel roads).

<sup>39</sup> Saksith Saiyasombut, *New Leaked Video Dishes yet another Scandal at Thailand's Constitution Court*, ASIAN CORRESPONDENT (Nov. 10, 2010), <http://asiancorrespondent.com/2010/11/new-leaked-video-dishes-yet-another-scandal-at-thailands-constitution-court/>.

<sup>40</sup> Anuphan Chantana, *Judge upbraided for letting son go on paid study leave*, THE NATION (Aug. 27, 2013), <http://www.nationmultimedia.com/breakingnews/Judge-upbraided-for-letting-son-go-on-paid-study-1-30213603.html>.

<sup>41</sup> Khemthong Tonsakulrungruang, *Thailand's Newest Charter – A Quick First Look*, CONSTITUTIONNET (July 24, 2014) <http://www.constitutionnet.org/news/thailands-newest-charter-quick-first-look>.

<sup>42</sup> The National Council for Peace and Order Declaration No. 11/2557 (B.E. 2557, 2014).

<sup>43</sup> Thai Interim Constitution (B.E. 2557) — 2014 (§ 44,45).



Court has, so far, delivered a few decisions which were criticized as helping the junta maintain its authoritarian grip over Thailand.<sup>44</sup>

From the moderately conservative beginning, the Constitutional Court had gradually gained public acceptance. However, its conservative nature upset the public and led to its own demise. The reinstated Constitutional Court was more aggressive, yet more polarized as well. While it was praised by many for providing checks-and-balances, others accused it of manipulating a government. As the following cases revealed, no longer was it a neutral arbiter of Thai politics.

## II. STRUGGLE TO RULE: CASE STUDIES

Battles between civilian politicians and the Constitutional Court were most contentious during two periods: during 2008 and from 2012 to 2014, when Thaksin-affiliated parties won general elections. In 2008, the People's Power Party (PPP), the descendant of Thaksin's Thai Rak Thai (TRT), was in power with two prime ministers: Samak Sundaravej and Somchai Wongsawat. Beginning in 2011 and continuing through 2014, Thaksin's youngest sister, Yingluck Shinawatra, led the Pheu Thai (PT) government,<sup>45</sup> where from 2012 to 2014 the Constitutional Court delivered most of its controversial decisions. These decisions had high political impact as they concerned key governmental policies and generated strong reactions from both Thaksin's supporters and opponents such as criticism, prosecution, and even armed conflicts.<sup>46</sup> Basically these cases were focused on two main issues: the executive's treaty-making power and the election of the Senate. Both were the products of the 2007 Constitution's attempts to prevent Thaksin Shinawatra's return to power.<sup>47</sup>

During his administration, Thaksin entered into many bi-lateral and multi-lateral agreements that many criticized as jeopardizing Thailand's economy and society.<sup>48</sup> Treaty-making under the 1997 Constitution was relatively easy. Unless the treaty would (1) change Thailand's territory,

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<sup>44</sup> Khemthong Tonsakulrungruang, *Thailand's Referendum Roadblock*, NEW MANDALA (Aug. 4, 2016), <http://www.newmandala.org/false-serious-business-thailands-referendum/>.

<sup>45</sup> CHRIS BAKER & PASUK PHONGPAICHIT, *supra* note 4, at 279–80.

<sup>46</sup> *Enlightened Jurists' Open Letters*, ENLIGHTENED JURISTS, <http://www.enlightened-jurists.com/blog> (Thai.) (criticism of the Constitutional Court's decisions); Pavin Chachavalpongpun, *From Market Place back to Battlefield: Thai-Cambodian Relations in the Age of a Militarized Politics*, in GOOD COUP GONE BAD 253, 259–60 (Pavin Chachavalpongpun ed. 2014) (accounts of armed conflict and legal persecution).

<sup>47</sup> Borwornsak Uwanno, *supra* note 15, at 164–65.

<sup>48</sup> See Thitinan Pongsudhirak, *The imperative of Thailand's trade policy*, BANGKOK POST (Oct. 23, 2015), <http://www.bangkokpost.com/print/740160/>.

(2) alter the jurisdiction of the State, or (3) require an act for implementation, the cabinet reserved its prerogative to proceed with the treaty without parliamentary approval.<sup>49</sup> Section 190 of the 2007 Constitution reacted by expanding the categories of treaties that required legislative approval to any treaty which: (1) provides for a change in the Thai territories; (2) provides for a change in the Thai external territories that Thailand has sovereign right or jurisdiction over such territories under any treaty or an international law; (3) requires the enactment of an Act for its implementation; (4) has a vast impact on the country's economic and social stability; or (5) has a significant binding effect upon the trade, investment, or budget of the country.<sup>50</sup> Before entering into an agreement, the cabinet was required to provide a framework of the negotiation to the Legislative Assembly and the public as well as a plan to relieve people who were likely to be affected by the treaty.<sup>51</sup> If it is unclear whether a treaty falls under one of the five categories, the Constitutional Court would rule if that treaty meets the Section 190 requirements.<sup>52</sup> The cabinet's treaty-making power was then significantly limited.

Prime Minister Thaksin was also condemned for puppeteering the Senate. The Senate was supposed to be a non-partisan body which selected candidates for watchdog agencies. But the fact that all the members of the Senate were elected by a vote of the people meant that several candidates relied on politicians' existing networks and assistance to win elections.<sup>53</sup> As a result, many senators were proxies of political parties or even relatives of politicians, rendering watchdog agencies such as the National Counter-Corruption Commission (NCCC) and the Election Commission (EC) weak and biased.<sup>54</sup> The 2007 Constitution attempted to compromise by designing a half-elected, half-nominated Senate.<sup>55</sup> Still, the model was criticized for its lack of clarity. Nominations of senators were vulnerable to secret lobbying among a few members of the Senate nomination committee.<sup>56</sup>

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<sup>49</sup> Radthathamnoon (B.E. 2540) — 1997 (ch. 7 § 224).

<sup>50</sup> Radthathamnoon (B.E. 2550) — 2007 (ch.9 §190).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Michael H. Nelson, *Delaying Constitutionalism to Protect Establishment Hegemony in Thailand*, in *POLITICS AND CONSTITUTIONS IN SOUTHEAST ASIA* 49, 59 (Marco Buente & Bjoern Dressel eds., 2017); Radthathamnoon (B.E. 2550) — 2007 (ch. 5 §114).

<sup>54</sup> PHONGPAICHIT & BAKER, *supra* note 24 at 173–76.

<sup>55</sup> Michael H. Nelson, *supra* note 53, at 59–62.

<sup>56</sup> Harding & Layland, *supra* note 11, at 45.

A. *The Thai-Cambodian Joint Communiqué Case (2008)*

In 2008, Thaksin's proxy, the People's Power Party, won the general election and Samak Sundaravej, the PPP leader, became the Prime Minister. His cabinet signed a Joint Communiqué (JC) with Cambodia, stating that Thailand would not raise an objection to Cambodia's bid to unilaterally register Preah Vihear Temple as a World Heritage site.<sup>57</sup> The ruined temple, situated along the obscure Thai-Cambodian border, was awarded to Cambodia by the International Court of Justice after years of bitter argument.<sup>58</sup> Since both parties regarded the ruined temple as the pride of their ancient glory and greatness, there was very strong emotion attached to the case.<sup>59</sup> However, the boundary dispute between the two countries remained an unresolved ticking time bomb.

From the government's perspective, the Joint Communiqué (JC) was not a treaty, as it had no legal effect.<sup>60</sup> They believed it did not encroach upon Thailand's interest over the ill-demarcated boundary, a position guaranteed by Cambodia and UNESCO.<sup>61</sup> But the People's Alliance for Democracy (PAD), which had rallied against Thaksin in 2005-2006, saw the situation differently. They believed that this JC might imply Thailand's acceptance of Cambodia's sovereignty over the disputed area adjacent to the Temple and therefore could potentially lead to territorial loss.<sup>62</sup> Deliberately employing nationalistic rhetoric, PAD was able to mobilize massive and rather violent demonstrations to serve its goal of ousting Thaksin's proxy.<sup>63</sup> The PAD accused Samak's government of not following Section 190 procedures and brought the case to the Constitutional Court.<sup>64</sup>

The Constitutional Court unanimously ruled that the JC was a treaty since it legally bound the two parties.<sup>65</sup> The Constitutional Court

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<sup>57</sup> Chachavalpongpun, *supra* note 46, at 259–60.

<sup>58</sup> See Concerning the Temple of Preah Vihear (Cambodia v. Thai.), Judgment, 1962 I.C.J. Rep. 6 (June 15).

<sup>59</sup> See Pavin Chachavalpongpun, *Temple of Doom: Hysteria about Preah Vihear Temple in the Thai Nationalistic Discourse*, in LEGITIMACY CRISIS IN THAILAND 83, 92–93, 105–09 (Marc Askew ed., 2010).

<sup>60</sup> *Id.* at 94.

<sup>61</sup> *Id.* at 87–89.

<sup>62</sup> Chachavalpongpun, *supra* note 46, at 260.

<sup>63</sup> Noppon Wong-anan, *Thai PM's foes throw nationalist temple tantrum*, THE STAR (June 25, 2008), [http://www.thestar.com.my/news/world/2008/06/25/thai-pms-foes-throw-nationalist-temple-tantrum\\_1/](http://www.thestar.com.my/news/world/2008/06/25/thai-pms-foes-throw-nationalist-temple-tantrum_1/).

<sup>64</sup> *Courts asked to nullify deal on Preah Vihear*, BANGKOK POST (June 27, 2008) <http://ki-media.blogspot.co.uk/2008/06/court-asked-to-nullify-deal-on-preah.html>.

<sup>65</sup> Const. Ct. No. 6-7/2551, 2008, at 21.

was convinced that the JC might result in a change to Thailand's territory because it accepted Cambodia's right over the disputed vicinity of the Temple.<sup>66</sup> Moreover, citing the PAD protest, the Court determined that the signing of the JC had immense effect on Thailand's and Cambodia's societies.<sup>67</sup>

The decision was a huge blow to the Samak cabinet. Although Samak cabinet had consulted with the Ministry of Foreign Affairs, the Constitutional Court disagreed with the Ministry that this JC had legal effect as a treaty.<sup>68</sup> The Constitutional Court read the law more broadly as well, determining that any treaty which "might" result in a territorial change must comply with Section 190.<sup>69</sup> Also, according to the Constitutional Court, the government failed to foresee the social impact of this treaty. The burden of determining the social and economic impact of a proposed treaty was suddenly placed upon the cabinet's shoulders.

The 2007 Constitution provided no specific remedies for a violation of Section 190. But Noppadol Pattama, the Foreign Minister, resigned.<sup>70</sup> The NCCC charged him and Samak with malfeasance, abusing their power, and deliberately causing Thailand to lose territorial interest.<sup>71</sup> These charges created momentum for the PAD to continue protesting. The protests escalated and resulted in airport closures a few months later.<sup>72</sup> The decision also strained the ties between the two nations and led to deadly skirmishes along the border.<sup>73</sup>

### B. *The Constitution Amendment Series (2012-2014)*

The PPP government ended prematurely in December 2008 when the Constitutional Court dissolved the party under an electoral fraud charge.<sup>74</sup> Abhisit Vejjajiva of the Democrat Party, Thaksin's rival, was

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<sup>66</sup> *Id.* at 23–24.

<sup>67</sup> *Id.* at 24.

<sup>68</sup> *Id.* at 18–19.

<sup>69</sup> See *Constitutional Court on Preah Vihear Communique*, ASIAN CORRESPONDENT (July 9, 2008), <https://asiancorrespondent.com/2008/07/constitution-court-on-preah-vihear-communique/> (a summary of reaction to the Constitutional Court's rationale at Bangkok Pundit).

<sup>70</sup> Chachavalpongpun, *supra* note 46, at 260.

<sup>71</sup> Samak passed away shortly after he was vacated from the office in another controversial case, the Cooking Show case, Const. Ct. No. 12-13/2551, 2008. See Dressel, *supra* note 26, at 682. Noppadon was acquitted seven years later by the Supreme Court, *Noppadon acquitted in Preah Vihear case*, BANGKOK POST (Sep. 4, 2015), <http://www.bangkokpost.com/print/681420/>.

<sup>72</sup> *Thai protesters shut down airport*, BBC (Nov. 26, 2008), <http://news.bbc.co.uk/1/hi/7749399.stm>.

<sup>73</sup> Chachavalpongpun, *supra* note 46, at 265–70.

<sup>74</sup> Const. Ct. No. 20/2551, 2008.

able to form a coalition government under the brokerage of the military.<sup>75</sup> His minority cabinet enjoyed a relatively peaceful period of 2009-2011, which benefited from no aggressive judicial review cases. Thaksin's supporters tried to organize mass demonstrations against Abhisit twice but both ended in violent military crackdowns.<sup>76</sup>

Even Abhisit realized that the 2007 Constitution severely restricted his administration's performance. In 2010-2011, he carried out a minor political reform. Two of the primary targets were the treaty-making clause and the mechanisms for Senate selection. There was no constitutional challenge to Abhisit's move but the half-hearted reform only added that there shall be laws clarifying criteria in the two cases.<sup>77</sup> These laws never came. He later lost to Thaksin's youngest sister, Yingluck, who led Pheu Thai (PT) party in the 2011 election.<sup>78</sup>

As soon as Yingluck Shinawatra assumed the office of Prime Minister, she intended to fulfill her 2011 election campaign promise of further amending the 2007 Constitution. The 2007 Constitution was unpopular not only because it deliberately crippled a popularly elected government, but also because it lacked legitimacy.<sup>79</sup> It was drafted by the junta-appointed body with little outside participation so it was seen as the legacy of the military government, not of the people. Even though the 2007 Constitution was approved by referendum, many regarded that referendum process as rigged because supporters of the 2006 coup persuaded Thaksin's followers that they had to accept the draft in order to end the military regime and they could later amend the law.<sup>80</sup>

Attempts to amend the 2007 Constitution were made twice. Initially Yingluck attempted to introduce an independent body which would study and prepare new charter provisions. After the first attempt failed, she chose a humbler path of amending only specific sections regarding the Senate and treaty-making power. The Constitutional Court struck down the second attempt in two separate lawsuits.

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<sup>75</sup> Marc Askew, *Confrontation and Crisis in Thailand*, in LEGITIMACY CRISIS IN THAILAND 31, 44 (Marc Askew ed., 2010); Pravit Rojanaphruk, *Questions Loom over New Prime Minister's Legitimacy*, THE NATION (Dec. 17, 2008), <http://www.nationmultimedia.com/homeQuestion-loom-over-new-Prime-Minister-s-legitimacy-30091207.html>.

<sup>76</sup> Marc Askew, *Confrontation and Crisis in Thailand*, in LEGITIMACY CRISIS IN THAILAND, *supra* note 59, at 45-56 & 303-17.

<sup>77</sup> See Radthathammanoon (B.E. 2554) — 2011, amend. 1, amend. 2.

<sup>78</sup> CHRIS BAKER & PASUK PHONGPAICHIT, *supra* note 4 at 279-80.

<sup>79</sup> Andrew Harding, Rawin Leelapatana, & Khemthong Tonsakulrungruang, *Thailand Update: The Search for Perfect Paper Continues*, INT'L J. CONST. L. BLOG (Dec. 2, 2013), <http://www.icconnectblog.com/2013/12/thailand-update-the-search-for-perfect-paper-continues/>.

<sup>80</sup> See *What they say on the draft 2007 constitution*, PRACHATAI ENGLISH (Aug. 20, 2007), <http://prachatai.org/english/node/156>.

## 1. The Wholesale Amendment Attempt

Yingluck's first move was bold. She planned to amend Section 291, which prescribed the constitution amendment process. According to Section 291, both houses of Parliament shall meet in a joint session to consider the motion to amend the constitution. An approval required a supermajority.<sup>81</sup> Yingluck intended to replace Section 291 with an amended provision creating the Constitutional Drafting Assembly that allowed for broader public participation in the amendment process similar to the 1997 CDA. Her opposition certified the case to the Constitutional Court under Section 68.<sup>82</sup>

Normally, a provision of law reviewable by the Constitutional Court strictly meant an organic act or a parliamentary statute. A motion to amend the constitution, therefore, could not be filed through an ordinary judicial review channel. However, Yingluck's opponents claimed that an amendment was an act to gain power to rule the country through undemocratic means, which fell under Section 68. Section 68 provided the authority for an individual to petition to the Constitutional Court if he or she witnessed an act that jeopardized democracy or the constitution.<sup>83</sup> But the government quickly pointed out that Yingluck's opposition was not authorized to directly file a suit to the Constitutional Court. To prevent a huge flood of frivolous lawsuits, Section 68 required the Attorney-General to investigate complaints and file the case, a precedent the Constitutional Court had always adhered to.

Nonetheless, for the first time, the Constitutional Court ignored its precedent and accepted the claim without Attorney-General oversight. The Constitutional Court justified its acceptance of the case by determining that Section 68 actually provided a dual-track for judicial review.<sup>84</sup> The Court held that in urgent situations that required the immediate protection of democracy or the constitution, an individual could bypass the Attorney-General and submit a case directly to the Constitutional Court.<sup>85</sup>

Despite hearing the case, the Constitutional Court did not find the motion for amendment unconstitutional. The amendment proposal did

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<sup>81</sup> Radthathammanoon (B.E. 2550) — 2007, ch. 15 § 291.

<sup>82</sup> *Id.* ch. 3, Part 13 §68.

<sup>83</sup> *Id.*

<sup>84</sup> Const. Ct. No. 18-22/2555, 2012, at 22.

<sup>85</sup> *Id.*

not explicitly state that it purported to take down Thailand's democracy. That conclusion would be too far-fetched without observing practical effects of the new Constitution Drafting Assembly. Nonetheless, the Constitutional Court suggested that since the 2007 Constitution was voted into effect, any proposal to amend the charter should have been approved by a referendum first.<sup>86</sup>

Nowhere did Section 291 mention a referendum or other method of public participation. It simply required an absolute majority and prohibited amending certain areas of the constitution.<sup>87</sup> Given the lack of textual support, many view the Constitutional Court's decision as an attempt to invent a constitutional barrier to thwart the government's plan. Moreover, the language of the decision was ambiguous since the Constitutional Court did not explicitly demand a referendum, but merely recommended so.<sup>88</sup> At first, MPs from the PT party moved to impeach judges for acting *ultra vires*.<sup>89</sup> When anger over this attempted maneuver subsided, the government tried to compromise by postponing the amendment for more careful study.<sup>90</sup>

## 2. The By-Section Amendment Attempt

After months of dormancy, the government tried a different strategy. It would proceed according to steps prescribed by Section 291 to amend the 2007 Constitution to provide for popular election of all senators and shorten the treaty-making process. However, the anti-Thaksin faction directly filed complaints under Section 68 for the second time.

The following two decisions encapsulated and clarified the Constitutional Court's view of both proposed amendments. In the case of the Senate election, the Constitutional Court explained its understanding of democracy stating that democracy was not always about the majority's rule.<sup>91</sup> Popular mandate could easily turn into tyranny by the majority.

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<sup>86</sup> *Id.* at 23.

<sup>87</sup> Radthathammanoon (B.E. 2550) — 2007, ch. 15 § 291 (1).

<sup>88</sup> Eugénie Mériéau saw this suggestion as a non-binding *orbiter dictum*. In fact, this is the sole reason for the Constitutional Court to stop the amendment process. See Eugénie Mériéau, *Thailand's Deep State, Royal Power and the Constitutional Court (1997-2015)*, 46 J. OF CONTEMP. ASIA 445, 460 (2016).

<sup>89</sup> Saksith Saiyasombat, *Is Thai Constitutional Court's intervention unconstitutional?*, ASIAN CORRESPONDENT (June 5, 2012), <https://asiancorrespondent.com/2012/06/thailand-constitutional-court-intervention/>.

<sup>90</sup> *PM assigns Council of State to study charter court ruling for next move*, MCOT (Nov. 22, 2012), <http://www.mcot.net/site/content?id=528f2f31150ba020700002a5#.VvB8O9LJzIU>.

<sup>91</sup> Const. Ct. 15-18/2556, 2013, at 20-21.

Therefore, a democratic country needed be governed by the rule of law.<sup>92</sup> The 2007 Constitution's goal was to create an honest and transparent government that acted in the best interests of the public.<sup>93</sup> The Constitutional Court was designated by the 2007 Constitution to ensure that the government respected the rule of law through the power of checks-and-balances.<sup>94</sup>

The Constitutional Court found the government's motion to amend the 2007 Constitution unconstitutional for two reasons. On procedural grounds, the Court found that the government unduly changed the original bill and the President of the Parliament reduced the time allotted for parliamentary debate.<sup>95</sup> Moreover, several MPs were absent at the time of voting, but they asked their peers to forge their vote.<sup>96</sup> As the result, quorum was lacking and the process was undemocratic.

On substantive grounds, the Constitutional Court saw the Senate as an important checks-and-balances mechanism because it appointed watchdog agencies and heard an impeachment trial of a parliamentary member. It was, thus, important that the Senate maintained its independence from political parties. An all-elected chamber would turn the clock back to 1997 when the whole Parliament was "the family business" of spouses in both Houses.<sup>97</sup> This situation could lead to another crisis and another *coup d'état*. Because the government's proposal could impair the Senate's ability to check upon itself, the government was trying to gain the power to run the country through undemocratic means.<sup>98</sup> The Constitutional Court spared the government by not dissolving the PT party. But the NCCC prepared an impeachment of all MPs that voted in favor of the amendment proposal.<sup>99</sup>

Critics pointed out that a senatorial election is a common practice in democratic countries.<sup>100</sup> How could more popular elections be undemocratic? Further, there was no such prohibition in the 2007 Constitution, and the House of Representatives was already full of MPs,

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 19.

<sup>94</sup> *Id.* at 21–22.

<sup>95</sup> *Id.* at 22–25.

<sup>96</sup> *Id.* at 27.

<sup>97</sup> *Id.* at 29–30.

<sup>98</sup> *Id.* at 31.

<sup>99</sup> Tan Hui Yee, *Thai ex-PMs spared impeachment*, THE STRAITS TIMES (Aug. 15, 2015), <http://www.straitstimes.com/asia/se-asia/thai-ex-mps-spared-impeachment>.

<sup>100</sup> See opinion by Jantajira Aim-mayura in *Ni-Ti-Rat-Ta-Leang-Ko-Ra-Nee-Sarn-Rattathammanoon-Wi-Ni-Chai-Kae-Kai-Tii-Ma-Sor-Wor* [Declaration of Nitirat Concerning the Constitutional Court's Case on the Selection of the Senate] Prachatai (Nov. 24, 2013), <http://prachatai.com/journal/2013/11/49942>.



regardless of parties, with familial ties with one another.<sup>101</sup> Thus, similar to the referendum requirement the Court divined within Section 291, it again imposed more restrictions than the Constitution provided.

A few months later, the Constitutional Court delivered its third decision in the constitution amendment series. The case concerned the amendment of Section 190 in order to simplify and eliminate ambiguity in the treaty-making process.<sup>102</sup> The government planned to exempt from the constitutional requirements under Section 190 a treaty which (1) has a vast impact on the country's economic and social stability, or (2) has a significant binding effect upon the trade, investment, or budget of the country.<sup>103</sup> Similar to the procedural posture of the case examined above, the same party again filed a complaint under Section 68.

The Constitutional Court's decision was consistent with its prior ruling, reminding the government that Thai constitutional democracy does not require all matters to be decided by majority rule. Further, democracy can become tyrannical if the majority ignores the rule of law or harasses the minority.<sup>104</sup> The Constitutional Court had the duty to guard Thailand's democracy by reviewing the government's exercise of power.<sup>105</sup>

The Constitutional Court found that the President of the Parliament closed debate on the amendment prematurely. Although the government accused the opposition of using a foot-dragging technique to delay the consideration of the proposal, the Constitutional Court believed that it was important to give all stakeholders, especially the minority, a fair chance to express their views.<sup>106</sup> According to the Constitutional Court, amending the constitution is a serious issue and the government could only move forward after careful and thorough consultation.<sup>107</sup>

Also, the Court found that the substantive changes to the treaty-making process violated the Constitution. Citing the Joint Communique case, the Constitutional Court pointed out that entering into an international agreement could cause catastrophic damage to the country. Removal of a treaty from the procedural safeguards would deprive the

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<sup>101</sup> Satithorn Thananithichote, *Political Family in MP Election 2011*, THAILAND POLITICAL DATABASE, [http://www.tpd.in.th/content/details\\_1.php?ID=000197&type=000004#\\_ednref16](http://www.tpd.in.th/content/details_1.php?ID=000197&type=000004#_ednref16).

<sup>102</sup> Const. Ct. No. 1/2557, 2014.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 16–17.

<sup>107</sup> *Id.* at 17.

Legislative Assembly of the chance to scrutinize the Executive's exercise of power. The Constitutional Court compared the administrative burden with the benefit to the public and determined that the latter outweighed the former. This amendment was intended by the majority party to evade the Thai system of checks-and-balances, so the Court viewed it as another attempt to gain the power to rule the country through undemocratic means.<sup>108</sup>

The third decision ended the government's dream of regaining its treaty-making authority. The Constitutional Court's reasoning signaled the Judiciary's dwindling patience with the government's action. By the time of the third decision, Yingluck had made a grave mistake by forcing a universal amnesty bill through the Lower House.<sup>109</sup> The move infuriated the public because the breadth of its scope would immunize Thaksin from corruption charges as well as the army which was under investigation for manslaughter during political protests.<sup>110</sup> After another troubled election which the opposition boycotted, the Constitutional Court invalidated the election, leaving the country in a political vacuum.<sup>111</sup> Further street demonstrations crippled the interim government well into May 2014, when the Constitutional Court vacated Yingluck from premiership for promoting her brother-in-law as the new National Police Chief.<sup>112</sup> The Constitutional Court found that the Prime Minister had violated the rule of law because the transfer was for her family's personal benefit.<sup>113</sup> The month-long political crisis reached a deadlock and General Prayuth Chan-Ocha, the Army Commander, carried out the *coup d'état* in May 2014.<sup>114</sup>

### III. POLITICIZATION OF THE CONSTITUTIONAL COURT

The governing parties and the Constitutional Court focused on different notions of democracy. Samak and Yingluck relied on popular mandate to formulate their key policies while the Constitutional Court stressed the need to respect the rule of law. Both are correct and can

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<sup>108</sup> *Id.* at 21–25.

<sup>109</sup> Jeffrey Hays, *2013 Political Crisis after Yingluck Government Tries to Pass Amnesty Bill That Would Allow Thaksin to Return to Thailand*, FACTS AND DETAILS, [http://factsanddetails.com/southeast-asia/Thailand/sub5\\_8a/entry-3201.html](http://factsanddetails.com/southeast-asia/Thailand/sub5_8a/entry-3201.html) (last updated May 2014).

<sup>110</sup> Harding et al., *supra* note 79.

<sup>111</sup> James Hookway & Wilawan Watcharasakwet, *Thailand Opposition Democrat Party to Boycott Election*, WALL STREET J. (Dec. 21, 2013), <http://www.wsj.com/articles/SB10001424052702304866904579271862159417896>.

<sup>112</sup> See Const. Ct. No. 9/2557, 2014.

<sup>113</sup> See *id.* at 32. See Radthathammanoon (B.E. 2550) — 2007, § 266.

<sup>114</sup> Duncan McCargo, *Peopling Thailand's 2015 Draft Constitution*, 37 CONTEMP. SOUTHEAST ASIA 329, 333 (2015).

potentially co-exist. But one shall supplement the other. While the Constitutional Court had to protect fundamental principles from the majority's unwise decision, it was improper to dismiss the voice of the people completely.

During 2008 and 2011-2014, the Constitutional Court played a major role in effectively obstructing the democratically elected governments from implementing key policies.<sup>115</sup> The Constitutional Court's hostility to the wisdom of the majority was rooted in the rapidly changing political phenomenon, the ill-designed constitution, as well as the majority's ignorance.

Thaksin's ultra-popularity relied heavily on support from the so-called grassroots majority. They had long been neglected by his predecessors. His populist policies provided them a chance to gain political control, but this ascension alarmed the established elite who long dominated Thailand's political resources.<sup>116</sup> This phenomenon was unprecedented. The threat to their *status quo* urged them to remove Thaksin from power. Unfortunately, Thaksin managed to monopolize the legislature so they had to resort to the judiciary. The invalidation of the general election and the dissolution of TRT showed them how powerful the Constitutional Court could be, demonstrating that the 2007 Constitution was designed to utilize judicial power to its fullest.

At a constitutional level, the 2007 Constitution was drafted upon a faulty premise. The judiciary was not guarding the constitution from a corrupt or arbitrary politician, but from Thaksin. The Constitutional Court was equipped with the ultimate power to intervene in politics. Without a mechanism to ensure its accountability, the Constitutional Court's almost absolute power was prone to be abused. Moreover, at a personal level, anti-Thaksin figures were recruited onto the bench.<sup>117</sup> As a result, the Constitutional Court represented the interests of the minority

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<sup>115</sup> See Eugénie Mérieau, *supra* note 88; Khemthong Tonsakulrungruang, *Thailand: An Abuse of Judicial Review*, in JUDICIAL REVIEW OF ELECTIONS IN ASIA 173 (Po Jen Yap ed., 2016); Pongkwan Sawatdipak, *Constitutional Court: Credibility in Democratic System*, in TRANSFORM THAILAND (Jan. 2011), <http://transform.in.th/2011/01/constitutional-court/>; Wiboon Chamchuen, *Constitutional Court and Due Process of Law*, PRACHATAI (Dec. 12, 2013), <http://www.prachatai.com/journal/2013/12/50179>.

<sup>116</sup> BAKER & PHONGPAICHIT, *supra* note 4, at 269–70, 281; Hewison, *supra* note 25. This conflict also goes deeper into ideological division. See Marc Saxer, IN THE VERTIGO OF CHANGE: HOW TO RESOLVE THAILAND'S TRANSFORMATION CRISIS 7–13 (2011).

<sup>117</sup> Jaran Pakdeethanakul was the outstanding example. He had been critical, publicly, of Thaksin's regime before the 2006 coup. He was appointed in the Constitution Drafting Council where he was actively supporting and defending the draft. He was then nominated into the Constitutional Court panel. He is still delivering several speeches that call for clean ethical politics. See Dressel, *supra* note 26, at 685.

to suppress Thaksin and his political allies. But because Thaksin was the personification of electoral politics supported by popular elections, an anti-Thaksin Constitutional Court quickly became an anti-majoritarian one. The politicized Constitutional Court was then dragged into contentious partisan political disputes.<sup>118</sup>

In the 2008 case concerning the Thai-Cambodian JC, it was beyond doubt that the case fell within the jurisdiction of the Constitutional Court. But the two parties, the cabinet and judges, read the JC differently and the Constitutional Court did not defer to the Thai and Cambodian governments' understanding. The Constitutional Court speculated possible territorial loss that the government did not foresee. Also, the government did not have the benefit of hindsight concerning the societal disunity that the Constitutional Court enjoyed. The Court's disagreement was a departure from its usually deferential stance, which created a sense of uncertainty and paranoia in the executive branch.

The series of cases between 2012-2014 were more interesting. Perhaps at this point, Thailand was more polarized politically. By citing the rule of law, the Constitutional Court made a daring move to depart from its precedential decisions concerning Section 68. Allowing direct petitions under Section 68 contradicted the text of law, the original intention, as well as common sense. The first in the series was a mere suggestion, made out of the Constitutional Court's creativity. The PT government was willing to please the judiciary by delaying the move and switching to amending individual sections. But still, the Constitutional Court was not pleased with that.

Prime Minister Yingluck was also partially to blame. Her government copied Thaksin's modus operandi by silencing the opposition with its overwhelming popularity.<sup>119</sup> It learned nothing from its past mistakes and arbitrarily rushed the consideration of the proposals. The blatant ignorance of procedural safeguards led to its unsuccessful attempts to amend the constitution.<sup>120</sup> The Constitutional Court was right that democracy, without the rule of law, could slide into popular

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<sup>118</sup> Dressel, *supra* note 26, at 684.

<sup>119</sup> The Democrat MPs boycotted the reading of the Amnesty Bill. The 310 out of 314 remaining MPs from PT voted in favor of it in one night. For criticism and comparison of Yingluck's and Thaksin's modus operandi, see Thorn Pitidol, *The End of the Red Shirts?*, NEW MANDALA (Nov. 6, 2013), <http://www.newmandala.org/the-end-of-the-red-shirts/>; Pavin Chachavalponpun, *Thai Amnesty Bill Stirs a New Round of Unrest*, THE JAPAN TIMES (Nov. 18, 2013), <http://www.japantimes.co.jp/opinion/2013/11/18/commentary/world-commentary/thai-amnesty-bill-stirs-a-new-round-of-unrest/#.WJmWdrZ969Y>.

<sup>120</sup> See Duncan McCargo, *Thailand in 2014: The Trouble with Magic Wand*, in SOUTHEAST ASIAN AFFAIRS 2015, 335, 338 (Daljit Singh & Veena Nair eds., 2015).

authoritarianism. But the Constitutional Court did not stop there. As it went on to review the substance of the amendments, it drew criticism of imposing its political preference while disregarding the wishes of the majority. Its reasoning was questionable and also out of touch with the political reality.

Accusing the government of gaining its power through undemocratic means was a punishment disproportionate to the government's actions. Such punishment signaled the National Counter-Corruption Commission to prepare an impeachment of more than 300 MPs who approved the amendment proposal. An *en masse* impeachment could be seen as the punishment for siding with Thaksin. These decisions confirmed the public's suspicion of the Constitutional Court's lack of neutrality. Together with other controversial decisions and personal scandals, its credibility eroded fast.

The rule of law was an ambiguous term. Ambiguity could be useful and hazardous at the same time. The Constitutional Court of Thailand was designed to be immune from almost all external interventions, so when it took full liberty in interpreting the term, the rule of law was used as a catch-all phrase to suppress the majority. It enabled the Constitutional Court to cross the fine line and govern the country. In order to prevent the tyranny of the majority, the Constitutional Court entrenched the oligarch's presence in Thailand's politics. The minority might not be able to actively introduce its policies, but it could block ones from the majority and steer Thailand to its liking. The Constitutional Court emphasized checks without balances.

The *coup d'état* is an epitome of the minority-majority struggle to rule. Although the NCPO claimed that it came to end the conflict, it was obvious that the NCPO was acting on behalf of the anti-Thaksin faction. Thus, it showed no interest in addressing the problem of the Constitutional Court's dwindling legitimacy. Instead, it planned to transform the Constitutional Court to an even more powerful proxy of the minority establishment.<sup>121</sup> Such a move was dangerous, for the damage to Thailand's judiciary would be severe and long-lasting.

Despite the current calmness on the surface, the Constitutional Court is still a source of tension and distrust within Thai society. The Constitutional Court was seen as helping the minority side of the conflict to entrench their interests and presence while suppressing and ignoring

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<sup>121</sup> See Mérieau, *supra* note 88.

the majority. Judges were allegedly asserting their personal opinion into reasoning and, as the result, acting as the government themselves. The Constitutional Court is being accused of obstructing democratizing process rather than promoting it. There is little wonder that, as soon as democracy resumes, the Constitutional Court will again be part of the political conflict.

#### IV. CONCLUSION

High-profile cases from 2008 to 2014 indicate that the Constitutional Court had transformed from the guardian of the constitution to a powerful ally of the anti-democratic establishment. While the democratically elected government tried to regain the control over its exercise of power, the Constitutional Court struck these attempts down, claiming that they violated the rule of law. This series of decisions against the governments drew heavy criticism that the Court was entrenching the minority's control of Thai politics. Although the Constitutional Court was designed to be immune from external oversight, it was trading its credibility over the expansion of the judicial power, the price so costly and damage irreparable.

