Democratic Breakdown through Lawfare by Constitutional Courts:

The Case of Post-"Democratic Transition" Thailand

Eugénie Mérieau

Abstract

Third-wave democracies have massively adopted mechanisms of judicial review, notably constitutional courts, considered key institutions of successful democratic transitions. By preventing abuses of the constitution and safeguarding people's rights, they act as a bulwark against the claims of potential autocrats. In Thailand, the 1997 democratic transition led to the adoption of a powerful constitutional court tasked with safeguarding democracy from the threats of populism, corruption, and authoritarianism. Yet since its inception, the court's record has been puzzling. It has dissolved most, if not all, of the pro-democracy, anti-military political parties, dismissed all elected prime ministers, and paved the way for two military coups. In short, against established theories linking constitutional courts to democratization, the introduction of constitutional review in Thailand has led to democratic breakdown. To make sense of this puzzle, this article will investigate three variables of the court—strategic interests, ideologies, and institutional design—within the larger bureaucratic structure of the Thai state, to account for the anti-democratic behaviour of Thailand's Constitutional Court. This piece considers materials in Thai and English.

Keywords: lawfare, judicialization, constitutional courts, democratic breakdown, democratization, autocratization, Thailand

DOI: 10.5509/2022953475

I. Constitutional Courts, Democratization, and Lawfare

The establishment of a constitutional court as part of a process towards democratic transition has long been considered a key process of the rule of law, deemed conducive to democracy, with South Africa being the poster child for such a transition. As stated by Hirschl:

Eugénie Mérieau is associate professor of public law at the University of Paris 1 Panthéon-Sorbonne, France. She is the author of *Constitutional Bricolage: Thailand's Sacred Monarchy vs. the Rule of Law* (Oxford: Hart, 2021). Email: eugenie.merieau@sciencespo.fr

> The crowning proof of democracy in our times is the growing acceptance and enforcement of the idea that democracy is not the same thing as majority rule … that democracy must protect itself against the tyranny of majority rule through constitutionalization and judicial review … . Judicial empowerment through the constitutionalization of rights now appear to be widely accepted conventional wisdom of contemporary constitutional thought.[1]

Inversely, cracking down on courts has often been seen as a sign of "democratic backsliding"—Hungary and Poland being symbols of such reverse transition.[2] Would-be autocrats target constitutional courts as they seek to preempt the courts' opposition to their planned "abuse of constitutional amendment" to consolidate power in their hands (often, this entails increasing their term limits).[3] Recently, new literature challenging this causal relationship has emerged, bringing a more nuanced account of the relationship between constitutional courts and democratization and cautioning against adopting constitutional courts in young democracies.[4] Hirschl, Ginsburg, and others further argued that authoritarian leaders could choose to adopt constitutional review in the context of democratization for the purpose of safeguarding their interests after the transition, a process known as self-interested hegemonic preservation strategy,[5] or the insurance method.[6] Creating a specialized constitutional court could also play into the hands of would-be autocrats as a means to defeat or circumvent the judicial independence of the ordinary courts.[7]

Judicial independence is traditionally understood as a major component of the rule of law and democracy. However, here as well, more nuanced accounts have emerged recently, challenging the relationship between judicial independence, the rule of law, and democracy: judicial independence does not guarantee "pro-democracy" rulings and can even be a key legitimacy attribute for courts upholding an autocratic status quo.[8] However, the

---

[1] Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, 2004), 1–2.

[2] Kriszta Kovács and Kim Scheppele, "The Fragility of an Independent Judiciary: Lessons from Hungary and Poland—and the European Union," in *Legal Change in Post-Communist States: Progress, Reversions, Explanations*, eds. Kaja Gadowska and Peter H. Solomo Jr. (Hannover: Ibidem Verlag, 2019).

[3] David Landau, "Abusive Constitutionalism," *University of California Davis Law Review* 47 (2013): 189–260; Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford: Oxford University Press, 2019).

[4] Tom Daly, *The Alchemists, Questioning Our Faith in Courts as Democracy-Builders* (Cambridge: Cambridge University Press, 2017).

[5] Hirschl, *Towards Juristocracy*, 11.

[6] Mark Ramseyer, "The Puzzling (In)Dependence of Courts: A Comparative Approach," *Journal of Legal Studies* 23, no. 2 (1994): 721; Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge: Cambridge University Press, 2003).

[7] Nick Cheesman, "How an Authoritarian Regime in Burma Used Special Courts to Defeat Judicial Independence," *Law and Society Review* (2011): 801–830.

[8] Anil Kalhan, "'Gray Zone' Constitutionalism and the Dilemma of Judicial Independence in Pakistan," *Vanderbilt Journal of Transnational Law* 46 (2013): 1–96.

literature has seldom explored the role of constitutional courts in bringing down democracy (nor advocated against judicial independence or for the abolition of existing constitutional courts). Likewise, the link between "judicialization of politics" and "lawfare" has received insufficient attention in the literature; the judicialization of politics is associated with the rise of constitutional courts while lawfare seems to be attributed mostly to supreme courts. However, as constitutional courts increasingly acquire quasi-criminal jurisdiction, and as supreme courts increasingly acquire jurisdiction in political cases, this trend can no longer be ignored.

Judicialization of politics is a phenomenon theorized as follows: "the ever-accelerating reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies."[9] Hirschl identifies the following fields of judicial empowerment: "judicial scrutiny of executive-branch prerogatives in the realms of macroeconomic planning or national security (i.e., the demise of what constitutional theorists call the "political question" doctrine); judicialization of electoral processes; judicial corroboration of regime transformation; fundamental restorative-justice dilemmas; and above all, the judicialization of formative collective identity, nation-building processes, and struggles over the very definition or raison d'être of the polity as such."[10] Judicialization of politics has long been analyzed as a purely US pathology, unlikely to reach Asia and in particular Southeast Asia,[11] before more recently being recognized as a truly global phenomenon—inclusive of Asia and Southeast Asia.[12]

Albeit closely related to judicialization of politics, lawfare is a distinct concept, the genesis of which happened in a very different context. Lawfare is an "essentially contested concept"[13]: in international relations and international law, it is used positively by the military establishment as a new cost effective warfare tool or negatively by human rights lawyers to challenge the military establishment, especially with regards to human rights protection.[14] In domestic politics, it refers mostly to the use of tribunals to neutralize political opponents by preventing them from running for office, using mostly criminal sanctions. Lawfare manifests itself in situations of judicialization of politics, namely when political decision making is transferred from Parliament to courts,[15] within a general context marked by

---

[9] Ran Hirschl, "The Judicialization of Mega-Politics and the Rise of Political Courts," *Annual Review of Political Science* 11 (2008): 93–118.

[10] Hirschl, "The Judicialization of Mega-Politics and the Rise of Political Courts," 98.

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

[12] Björn Dressel, *The Judicialization of Politics in Asia* (London: Routledge, 2012).

[13] W. B. Gallie, "IX.—Essentially Contested Concepts," *Proceedings of the Aristotelian Society* 56 (1956): 167–198.

[14] David Hughes, "What Does Lawfare Mean?" *Fordham International Law Journal* 40 (2016): 1–40; David Kennedy, *Of Law and War* (Princeton: Princeton University Press, 2006).

[15] Hirschl, *Towards Juristocracy.*

the "fetishization" of law[16] and the hegemony of the rule-of-law ideal.[17] As the rule of law is considered to have democratic virtues, democracy becomes understood as a by-product of the rule of law—hence, it is widely accepted that the rule of law can and even must at times temporarily trump democracy in order to better consolidate democracy in the long run (see infra).

In this paper, I will explore how the Thai Constitutional Court, at times helped by the Supreme Court, has played and is still playing an instrumental role in the process of democratic breakdown and autocratization by aggressively engaging in both the judicialization of electoral politics and lawfare against elected politicians. In the next section, I will give a brief overview of the role of courts in both democratization and autocratization, giving accounts of judicialization of politics and lawfare in Thailand, from 1997 until today. In the third, fourth, and fifth sections, I will examine three interrelated variables: the strategic interests of constitution drafters, the institutional design of the court, and the ideologies of the judges, respectively, to account for the anti-democratic judicialization of politics and lawfare in the country. Finally, I will offer a few theoretical reflections on the sequential relationship between democratization, judicialization, lawfare, and autocratization.

II. Democratization, Judicialization, Lawfare, and Autocratization in Thailand

Since Thailand embarked on a path toward democratization in 1997, all elected governments have been overthrown by the military or the courts or an alliance of the two, although the 1997 Constitution was hailed as one of the most democratic, liberal, and progressive constitutions of the Global South at the time.[18] It was one of the third wave model constitutions, comparable to the South African Constitution for its participatory and transformative character.[19] Yet since its enactment, all elected prime ministers, without exception, have been dismissed by the courts or overthrown by the military. In the case of military coups, the Thai Constitutional Court always played an instrumental, preparatory role: its decisions precipitated the two military coups of 2006 and 2014 that brought the military back into government after 15 years of civilian rule.

The 1997 Constitution was the outcome of the overthrow of military rule in 1992. Described as "postpolitical,"[20] it introduced a constitutional court

[16] John L. Comaroff, "Reflections on the Rise of Legal Theology: Law and Religion in the Twenty-First Century," *Social Analysis: The International Journal of Social and Cultural Practice* 53, no. 1 (2009): 193–216.

[17] Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004), 4.

[18] See James Klein, *The Constitution of the Kingdom of Thailand, 1997: A Blueprint for Participatory Democracy* (Bangkok: Asia Foundation, 1998).

[19] Frank Munger, "Constitutional Reform, Legal Consciousness, and Citizen Participation in Thailand," *Cornell International Law Journal* 40 (2007): 455–475; Abrak Saat, *The Participation Myth: Outcomes of Participatory Constitution-Processes on Democracy*, PhD dissertation, Umea University (2013).

as well as numerous other independent constitutional organs, such as a National Anti-Corruption Commission and an Election Commission, anticipating the demands of the World Bank and the International Monetary Fund (IMF), which gained a prominent role within the circle of Thai economic policy makers in the aftermath of the 1997 Asian financial crisis.[21] The first elections under this Constitution were held in 2001. Billionaire and former policeman Thaksin Shinawatra was elected and re-elected in 2005 in the biggest landslide in Thai electoral history. Labelled a "populist," he threatened the old establishment by trying to control independent constitutional organs and the military. Meanwhile, his populist style alienated him from the establishment, and his human rights violations from part of the educated middle class. A tax evasion scandal prompted massive protests calling for his resignation in 2005. Thaksin called snap elections on April 2, 2006—and won again.

Yet the result of the 2006 election was annulled by the Constitutional Court in May for tenuous reasons (the placement of the voting booths in some constituencies), and election commissioners were sent to jail.[22] New elections were scheduled for October of the same year, which would have undoubtedly returned Thaksin to power, but the military declared martial law and staged a coup on September 19, 2006, while Thaksin was in New York attending the UN General Assembly meeting. In May 2007, a constitutional tribunal appointed following the coup dissolved Thaksin's party, and banned him and other executive members from politics for five years, thanks to a military order giving such powers to the tribunal.[23] A new Constitution, whose drafting had been supervised by the military, was approved by a slim margin in a referendum held in August 2007, while the kingdom was still under martial law. It increased the powers of the Constitutional Court based on the afore-mentioned military order, allowing the court to ban elected politicians from politics for five years—effectively granting it wide powers of political sanction.[24]

Under the new 2007 Constitution, elections returned Thaksin's party—which had been reformed under a new name—to power. It soon faced dissolution by the Constitutional Court again, and was dissolved in December 2008, with members of the executive committee all banned from politics for five years.[25] Fresh elections were held in 2011, and Yingluck Shinawatra,

---

[20] Tom Ginsburg, "Constitutional Afterlife: The Continuing Impact of Thailand's Post-Political Constitution," *International Journal of Constitutional Law* 7 (2009): 83–105.

[21] Michael K. Connors, "Framing the 'People's Constitution'," in *Reforming Thai Politics*, ed. Duncan McCargo (NIAS Press, 2002), 37–55.

[22] See Bjoern Dressel, "Judicialization of Politics or Politicization of the Judiciary?" *Pacific Review* 23 (2010): 671–691.

[23] Announcement no. 27 of the Committee for the Democracy with the King as Head of State, 3 October 2006.

[24] Article 237, 2007 Constitution.

[25] Constitutional Tribunal Decision 3–5/2550, 30 May 2007.

Thaksin's younger sister, was triumphantly elected as prime minister. Facing protests prompted by her attempt to pass an amnesty bill that would have benefitted her brother, she called snap elections for February 2, 2014, and won. However, following the same scenario as in 2006, the Constitutional Court annulled the election results, and new elections were tentatively scheduled for July 20, 2014. However, Yingluck was found guilty of abuse of power by the Supreme Administrative Court and dismissed by the Constitutional Court in early May.[26] On May 20, the military declared martial law and on May 22 staged a military coup. Against all expectations, Yingluck's party was not dissolved in the aftermath of the coup. A new Constitution, adopted by referendum in 2016, was promulgated in 2017. It once again increased the powers of the Constitutional Court, allowing the Court to act *quasi-suo moto* (on its own motion) to dissolve political parties and ban their members from politics for up to a life ban.[27]

Thus, in 2006, as in 2014, the military coup took place after elections won by pro-Thaksin forces were cancelled by the Constitutional Court. In both cases, the courts created a political vacuum by weakening or dismissing the legislature and the government, facilitating the army's power seizure. The sequence of events reveals the workings of a judicial-military "deep state" with veto power over elected governments,[28] using techniques of "illiberal constitutionalism,"[29] in what fits the definition of a "tutelary democracy," namely a democracy in which elections are relatively free and fair, but where non-elected elites maintain a veto power over key government policies and appointments.[30] The succession of election results annulment and political party dissolution reflects a full-blown judicialization of politics. It is within this context of judicialization of politics that lawfare against popular political leaders unfolded.

To distinguish between judicialization and lawfare, let us examine in detail the fate of disposed prime ministers Thaksin and Yingluck Shinawatra. Not only were their respective positions as prime ministers weakened by the courts before a military overthrow, but both were also convicted to jail terms and had their assets seized by the courts after the coup.

---

[26] Constitutional Court Decision 9/2557, 7 May 2014.

[27] In the 1997 and 2007 Constitutions, a request for party dissolution could only be filed by the ombudsman, but with the 2017 Constitution, any individual can directly petition the attorney-general to submit a case to the Constitutional Court. The 2017 organic law on political parties, which complements the 2017 Constitution, empowers the Constitutional Court to dissolve any political party and as a result of this, to ban its executive board members from politics for an indefinite period of time. Article 49 of the 2017 Constitution. Article 92 of the 2017 Political Party Act.

[28] Eugénie Mérieau, "Thailand's Deep State: Royal Power and the Constitutional Court," *Journal of Contemporary Asia* 46 (2016): 445–466.

[29] Eugénie Mérieau, "The Legal–Military Alliance for Illiberal Constitutionalism in Thailand," *Politics and Constitutions in Southeast Asia*, eds. Bjoern Dressel and Marco Buente (London: Routledge, 2016).

[30] Adam Przeworski, "Democracy as a Contingent Outcome of Conflicts," in *Constitutionalism and Democracy,* eds. Jon Elster and Rune Slagstad (Cambridge: Cambridge University Press, 1988).

Following the 2006 coup, the military junta created a special commission to investigate Thaksin's actions and send cases of alleged corruption and mismanagement of public funds directly to the Supreme Court's special division for political office holders. As there was no appeal possible, the entire judicial process was both speedy and conclusive. The afore-mentioned commission, set up "to investigate actions that have caused damages to the State," launched more than 30 investigations against Thaksin,[31] resulting in the conviction of Thaksin in 2008 to a two-year jail term for the sale of a plot of public land to his wife at a discounted price.[32] In the case of Yingluck, the public prosecutor alleged hundreds of billions of baht (dozens of billions of US dollars) in losses incurred to the state for her rice subvention scheme implemented during her term, from 2011 to 2014, [33] resulting in a five-year jail term sentence handed down in 2017.[34] Additionally, their respective assets were seized. Both rulings were read *in absentia*, with Yingluck and Thaksin having fled abroad instead of appearing before the court.

Indeed, both Thaksin and Yingluck rejected their trials as unconstitutional. Thaksin considered that the commission especially set up by decree by the coup leaders to prosecute him following the coup was unconstitutional, while Yingluck argued that the implementation of her rice subsidy scheme, as a government policy, should have been scrutinized by the Parliament, not the courts—questioning both the legitimacy and the constitutionality of the Supreme Court's own investigation. While Thaksin's plea of unconstitutionality was forwarded to the Constitutional Court,[35] Yingluck's was simply dismissed by the Supreme Court. What this demonstrates is the court's increased confidence in the exercise of discretionary powers. Most of Thaksin's government members had managed to escape prison terms, yet Yingluck's entire governmental team in charge of the rice policy was heavily jailed: Yingluck's former minister of Commerce, Boonsong Teriyapirom, was sentenced to 48 years,[36] while four of his colleagues were sentenced to jail terms ranging from 24 to 40 years.

To summarize, despite their tenures being ten years apart, both ex-prime ministers, the two most popular Thailand had ever had, shared the same fate: they were elected with a large majority of votes then removed by a military coup following a Constitutional Court's ruling invalidating their re-election. Once removed from power, they were both banned from politics for five years, prosecuted, then charged and sentenced to non-suspended jail terms by the

---

[31] Its English name was euphemized as "Assets Examination Committee."

[32] Supreme Court Special Division for Holders of Political Positions, Red case 1/2550, 11 August 2008.

[33] Press release of the Supreme Court, 27 August 2017.

[34] Supreme Court' Special Division for Holders of Political Positions, Black case 22/2558, Red case 211/2560, 27 September 2017.

[35] Constitutional Court Decision 11/2551, 5 August 2008.

[36] "Supreme Court Adds 6 years to Boonsong Jail Term," *Bangkok Post*, 6 September 2019, https://www.bangkokpost.com/thailand/politics/1744494/supreme-court-adds-6-years-to-boonsong-jail-term.

Supreme Court, and their assets were seized. In both highly politicized cases, public prosecutors relied on the idea of "damages" they had caused to the state—a ground associated with legitimacy rather than legality.[37]

Against this background, a first glance at Thai judicial politics seems to depict an all-too-familiar account of a politicized judiciary lacking independence and accountability, acting as the mouthpiece of a military government whose aim is to silence political rivals.[38] However, like in other authoritarian or semi-authoritarian regimes,[39] the picture is far more complex than it seems. First, Thailand's judiciary is, institutionally at least, independent from both the military and the government. The government, either civilian or military, does not appoint Supreme Court or Constitutional Court judges: the former, recruited on merit through competitive examinations, enjoy life tenure; the latter are appointed in an elaborate process dominated by the judiciary. Within the judiciary itself, a judicial committee, composed of career judges elected among themselves, guides internal promotions.[40] The Constitutional Court is also mostly composed of career judges elected among themselves without institutionalized political interference (three from the Supreme Court, and two from the Supreme Administrative Court, out of nine members, cf infra). In fact, Thai courts including the Constitutional Court are arguably not only institutionally independent from the military and government, but even autonomous.[41]

Second, in spite of undisputable evidence that the voting patterns of the Constitutional Court from its creation to the present display some political bias against the Shinawatras and their political allies,[42] this constancy in judicial decision making has remained the same, regardless of the colour of the government of the day, or even regardless of whether the government was civilian or military. Indeed, the judiciary has worked similarly against the Shinawatras under civilian or military governments: Thaksin's conviction happened under civilian rule—the prime minister at the time was actually of the same political party as Thaksin—while Yingluck's took place under a military government. Both of their re-elections were invalidated precisely

---

[37] Eugénie Mérieau, "I·CONnect – Thailand's Supreme Court and the Prosecution of Thailand's Successive Prime Ministers," *Blog of the International Journal of Constitutional Law*, 11 October 2017.

[38] In his account of the constitutional courts of Asia, Bjorn Dressel lists the Thai Constitutional Court in the category of "highly dependent" courts ("De Facto Judicial Independence"); with "highly involved in politics" ("Judicial Involvement in Mega-Politics") as resulting in "politicization of the judiciary." Björn Dressel, *The Judicialization of Politics in Asia* (London: Routledge, 2012), 6.

[39] Tom Ginsburg and Tamir Moustafa, *Rule By Law: The Politics of Courts in Authoritarian Regimes* (Cambridge: Cambridge University Press, 2008); Lisa Hilbink, *Judges beyond Politics in Democracy and Dictatorship: Lessons from Chile* (Cambridge: Cambridge University Press, 2007).

[40] According to the 2007 and 2017 Constitution, the Judicial Commission comprises 15 members: 13 judges elected among themselves, and two other members appointed by the Senate (Article 226 of the 2007 Constitution; Article 196 of the 2017 Constitution).

[41] Mérieau, "Thailand's Deep State.

[42] Bjorn Dressel and Khemthong Tonsakulrungruang, "Coloured Judgements? The Work of the Thai Constitutional Court, 1998–2016," *Journal of Contemporary Asia* 49 (2019): 1–23.

when they were prime ministers and controlled Parliament. So how to explain why the Supreme Court acts the way it does, engaging in extreme lawfare? And how to explain why the Constitutional Court acts the way it does, engaging in extreme judicialization of politics? Why do institutionally independent/autonomous courts in Thailand engage so aggressively in politics?

I will investigate three variables in the following sections: institutional design of the Constitutional Court and the Supreme Court's Special Division for Holders of Political Positions, which turn them into natural allies of the military against elected governments in spite of formal institutional independence; strategic interests of the constitution drafters in creating an anti-democratic Constitutional Court and the Supreme Court's Special Division for Holders of Political Positions (personal, class-based, and institutional interests); and the ideologies of the individual judges, backed by dominant anti-democratic legal doctrines, in spite of their formally merit-based recruitment process. All in all, the courts apply the orthodox playbook of judicial activism, where democracy becomes the enemy to the rule of law, and the courts, as countermajoritarian institutions, are entrusted with the mission to make the rule of law prevail over majoritarian democracy.

This orthodoxy is closely related to two principles. The first principle is that of "militant democracy," devised by Karl Loewenstein as he fled the destruction of the Weimar Republic by Nazi Germany[43]: democracy must have the means to defend itself, even through anti-democratic means, for instance by having courts dissolve political parties deemed a threat to democracy. In militant democracy's extreme forms, the Constitutional Court or Supreme Court will dissolve political parties and strike down constitutional amendments by deeming them a threat to democracy.[44] Both of these tools, enshrined in the 1949 German Fundamental Law after the war, are based on the following rationale: to protect democracy is to protect a certain constitutional order; therefore, it is up to the Constitutional Court to be its very guardian. This constitutional order builds on the unamendable parts of the German Constitution, Articles 1 to 20, also considered by the German Constitutional Court as constitutive of its "constitutional identity."[45] Attempts

---

[43] Karl Loewenstein, "Militant Democracy and Fundamental Rights," *American Political Science Review* 31 (1937): 417–432. Before Loewenstein, in the late 1920s, Carl Schmitt advocated for the dissolution of both the Communist Party and the National Socialist German Workers' Party. See Carl Schmitt, *Legality and Legitimacy* (Durham: Duke University Press, 2008 [1928]) 48–49.

[44] For a defense of militant democracy, see Alexander S. Kirshner, *A Theory of Militant Democracy: The Ethics of Combatting Political Extremism* (New Haven: Yale University Press, 2014). For a critical account, see Carlo Invernizzi Accetti and Ian Zuckerman, "What's Wrong with Militant Democracy?" *Political Studies* 65 (2017): 182–199; Patrick Macklem, "Militant Democracy, Legal Pluralism, and the Paradox of Self-Determination," *International Journal of Constitutional Law* 4 (2006): 488–516. See also Rivka Weill, "On the Nexus of Eternity Clauses, Proportional Representation, and Banned Political Parties," *Election Law Journal* 16 (2017): 237–246.

[45] Monika Polzin, "Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law," *International Journal of Constitutional Law* 14 (2016): 411–438.

to overthrow the constitutional order or identity will be neutralized by the Constitutional Court, either in their early stages through party dissolution[46] or in their ultimate stage of attempted constitutional amendment.[47]

The second principle is that of the autonomy and independence of the judiciary. The orthodoxy claims that judicial independence is paramount; indeed, the potential danger inherent in independence and autonomy of an unelected body are minimized, since the judiciary is widely acclaimed as the "least dangerous branch."[48] This principle has been the cornerstone of the discourse for the empowerment of the judiciary, against doubts raised by the "counter-majoritarian difficulty"[49] and the fear of the "government of judges."[50] As the judiciary depends on meritocratic legitimacy, it must be peopled by educated, high-ranking civil servants. They must be well paid and insulated from society and from other power centres so as to prevent potential cases of corruption and political interference. The rationale behind this is the necessary professionalization of the judiciary. As a result, individual interests and ideologies are aligned with those of the upper class (in the case of Thailand, this means Bangkok-based, royalist, and Buddhist).

The next sections will examine each variable in turn.

III. Institutional Design: King's Privy Council as a Locus of Judicial-Military Cooperation

As Ackerman has noted, both the Constitutional Court and the military can easily expand their power in times of crisis or in times of conflict between the executive and the legislature—in fact, they tend to exploit democratization for their own ends whenever possible.[51] The judiciary and the military share a common type of legitimacy, that of "professionalism"—they are both largely self-administered, based on internal procedures of recruitment and promotion—as opposed to the democratic legitimacy of political institutions based on elections.[52] A strong judiciary can function as a substitute to a strong military; and at times when the military and the judiciary are aligned, in cooperation, and concurrently in a dynamics of power grabbing, military-supported judicialization of politics can unfold. In Thailand, the empowerment of the judiciary was designed specifically to the need to tame

---

[46] Article 21(2), German Basic Law.

[47] Article 79(3), German Basic Law.

[48] Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven: Yale University Press, 1986).

[49] Bickel, *The Least Dangerous Branch.*

[50] Édouard Lambert, *Le gouvernement des juges et la lutte contre la législation sociale aux États-Unis: l'expérience américaine du contrôle judiciaire de la constitutionnalité des lois* (Paris: Marcel Giard & Cie, 1921).

[51] Bruce Ackerman, "The Rise of World Constitutionalism," *Virginia Law Review* 83 (1997): 771–797.

[52] Pierre Rosanvallon, *Democratic Legitimacy* (Princeton: Princeton University Press, 2011).

electoral politics and the dangers of "money politics" but without resorting to military coups as in the past. Instead, corrupt governments would be dismissed by court decisions.

The now-defunct 1997 Constitution created two major institutions that were meant to act as a bulwark against the corruption of elected politicians and dismiss governments while in office: first, the Supreme Court's Special Division for Holders of Political Positions, and second, the Constitutional Court. They were intended to adjudicate cases filed by independent constitutional organs such as the National Anti-Corruption Commission and the Election Commission, both staffed by career bureaucrats including members of the judiciary. The Supreme Court's Special Division for Holders of Political Positions was created to suppress corruption committed by members of the government while in office. The inspiration came from France, which has a special high court for prosecuting its ministers for actions conducted while in office. The Supreme Court's Special Division for Holders of Political Positions was initially composed of nine judges elected separately for each case during an Extraordinary General Assembly of the Supreme Court. But as candidates are not so numerous, a volunteering judge can usually get a hold of the case he or she desires to adjudicate. More importantly, the court was designed to allow trials to happen as expeditiously as possible, so that government ministers could be dismissed and convicted for corruption before the end of their term in office. Therefore, the Supreme Court handled cases filed by the National Anti-Corruption Commission directly, without initially providing for the possibility of an appeal against its decisions.

The 1997 Constitution also provided for a constitutional court composed of 15 justices, half of them chosen by the Supreme and Supreme Administrative Court and the other half by a committee dominated by the judiciary. The 2007 and 2017 Constitutions lowered the number of justices from 15 to 9, but the composition ratio of career judges and the selection process remained virtually unchanged. Therefore, the Constitutional Court was and is still mainly composed of career judges, selected among themselves. Since its inception, the Thai Constitutional Court has had wide-ranging powers of constitutional review both *a priori* (abstract review) and *ex ante* (both abstract and concrete review). On top of this, it also has other competencies, such as dissolving political parties and reviewing (the procedure of) constitutional amendments. It can dissolve a political party if it can be established that the party's actions are aimed at "the overthrow" of "Democracy with the King as the Head of State," or are intended "to acquire power to rule the country by means other than those provided in the Constitution."[53]

[53] It can dissolve a political party based on article 68 of the Constitution: "A person is prohibited from using the rights and liberties provided in the Constitution to overthrow the democratic rule with the King as the Head of State as provided by this Constitution; or to acquire power to rule the

During its first 20 years of operation, the Constitutional Court has notably expanded its own jurisdiction, in particular in the domain of the judicial review of elections. This competence did not initially fall within the jurisdiction of the Constitutional Court (matters of electoral fraud were handled by the Election Commission and the Supreme Court). However, the Thai Constitutional Court has managed to progressively claim jurisdiction over electoral disputes pertaining to the overall process.[54] In particular, it has claimed jurisdiction over royal decrees scheduling elections, claiming such decrees are not administrative acts but are akin to statutes/legislative acts, therefore coming under the Constitutional Court's jurisdiction, not the Administrative Court's jurisdiction. It was on this basis—finding the royal decree that scheduled the election to be unconstitutional—that the Constitutional Court annulled Thai general elections both in 2006 and in 2014.

When Thaksin dissolved the House on February 2, 2006 and called for an election on April 2, 2006, the opposition, claiming that this timeframe was not sufficient to properly prepare for the campaign, announced a boycott of the election. According to the Constitution, an election should be held within 60 days after a dissolution of the Lower House. The government still decided to organize the election as planned on April 2, 2006. Virtually without competition, the government-aligned party, Thaksin's Thai Rak Thai, won almost 90 percent of the seats. The election was immediately challenged, before the Administrative Court, which found the election unlawful,[55] and before the Constitutional Court,[56] which found it unconstitutional for being held too early, compromising the democratic nature of the election, and for being held in violation of the principle of the secrecy of the vote (the voting booth was placed facing outward).

When Yingluck dissolved the House in December 2013, having learned the lesson of her brother's judicial-military overthrow, she decided to schedule the election in February 2014; this gave the opposition 57 days to prepare for the election, three days short of the maximum timeline authorized by the Constitution. The opposition still decided to boycott the poll. This time, the opposition decided to obstruct the polling and intimidate

---

country by means other than is provided in the Constitution. Where a person or political party acts under paragraph one, the witness thereof has the right to report the matter to the Prosecutor General to investigate facts and to submit a request to the Constitutional Court for decision to order cessation of such act without prejudice to criminal proceedings against the doer of the act. If the Constitutional Court decides to order cessation of the said act under paragraph two, the Constitutional Court may order dissolution of that political party. In case of order dissolution of that political party by the Constitutional Court under paragraph three, the leader of the dissolute Party and the members of the board of the executive committee under paragraph one are prohibited the right of election for five years from the date of order by the Constitutional Court."

[54] Khemthong Tonsakulrungruang, "Thailand: An Abuse of Judicial Review," in *Judicial Review of Elections in Asia*, ed. Po Yen Jap (London: Routledge, 2016).

[55] Central Administrative Court Decision, Red Cases 607–08/2549, 16 May 2006.

[56] Constitutional Court Decision 9/2549, 8 May 2006.

those willing to cast their ballots, resulting in violence at the voting booths. As a result, voting could not happen in various constituencies. The election was immediately challenged before the Constitutional Court for being undemocratic. The Constitutional Court annulled the election,[57] and then disqualified Yingluck from her prime ministership.[58] Yingluck was overthrown by a military coup a few days later. In both the 2006 and 2014 cases, the constitutional review of electoral processes, not provided for by the Constitution, paved the way for the removal of popular elected prime ministers and their ouster by military coup.

The troubling parallelism of the judicial-military sequence seems to hint at an institutionalized pattern of judicial-military cooperation. This cooperation has not only entailed the removal of elected governments, but also the *a posteriori* "validation" of military coups overthrowing them, as well as the neutralization of their attempts at constitutional amendments while in office. For instance, in 2013, the court struck down constitutional amendments[59] that aimed to remove some of the military's access to parliamentary seats: the elected government of Yingluck Shinawatra had attempted to revise the Constitution in order to make the Senate a fully elected House of Parliament (under the then 2007 Constitution drafted under the supervision of the military, half the members of the Senate were appointed by a selection committee composed of high-ranking civil servants including the president of the Constitutional Court, which resulted in the appointment of many retired military officers to the Senate). However, the Thai Constitutional Court invalidated the draft constitutional amendment for being constitutive of an attempt to "acquire power by unconstitutional means."[60] Therefore, in this case, the court interpreted the Constitution so as to prevent democratization of the legislature and to preserve military privilege.

Likewise, since the 1950s, the judiciary has protected the ability of the military to stage coups, by using the Kelsenian theory of revolutionary legality (a coup is legal whenever it is de facto effective) and strictly enforcing self-given military amnesties; since its creation, the Constitutional Court has furthered the legacy of the Supreme Court, by enforcing amnesties for the military and judicial immunity of their legislative and administrative acts.[61] After the 2014 coup, as all institutions were dissolved, the Constitutional Court was spared and continued to operate and to hand down rulings

---

[57] Constitutional Court Decision 5/2557, 21 March 2014.

[58] Constitutional Court Decision 9/2557, 7 May 2014.

[59] Constitutional Court Decisions 15–18/2556, 20 November 2013.

[60] Article 256 (6) of the 2007 Constitution. Also related to an interpretation of the meaning of "Democracy with the King as Head of State," which is protected by an eternity clause. According to Article 255, "An amendment to the Constitution which amounts to changing the democratic regime of government with the King as Head of State or changing the form of the State shall be prohibited."

[61] For more details, see Eugénie Mérieau, *Constitutional Bricolage: Thailand's Sacred Monarchy vs. the Rule of Law* (Oxford: Hart, 2021).

favouring the military.[62] This close proximity is also illustrated by the fact that proposals to have military courts participate in the appointment of the Constitutional Court, or to have military courts and the Constitutional Court jointly intervene in cases of political "crisis," trumping the government, are routinely discussed in constitution-drafting assemblies.[63] This is explained, in the Thai context, by the relationship of both institutions to Thailand's "super-ombudsman,"[64] the Monarchy.

This relationship is mediated by several institutions. First, the King's Privy Council, created as part of the 1947 "royal coup," consolidated following successive military coups, but also during times of liberalization from the 1970s onwards, has been vetting military promotions and exerting significant influence over the Constitutional Court from the date of its creation. Through the King's Privy Council, the military has been able to influence policy making and use de facto veto powers over civilian rulers, notably with regards to military and judiciary promotions.[65] Second, from 1947 onwards, constitution-drafting bodies have also played and continue to play a pivotal role in aggregating preferences of both the military and the judiciary by allowing them to draft new institutions reflecting their common interests. Finally, besides the Privy Council and constitution-drafting assemblies, post-coup military-appointed legislative assemblies, also routinely composed of military officers and members of the judiciary, account for such cooperation.

These three institutions have a strong relationship to the king, who is the constitutionally mandated authority in charge of appointing members of the Privy Council, constitution-drafting assemblies, and post-coup legislative assemblies. The Privy Council is the highest and most prestigious institution in the bureaucratic structure—it is the closest to the monarch one can get. Therefore, being appointed to the King's Privy Council is the pinnacle of achievement for both military and judicial officers; their own individual interest drives them to perform their duties in alignment and to the satisfaction of the king. Meanwhile, being appointed to a constitution-drafting body—and performing duties to the satisfaction of the king's interest—is a stepping stone towards a Privy Council's appointment.

---

[62] Eugénie Mérieau, "What's the Role of a Constitutional Court in a Military Dictatorship? On the Dissolution of Thai Raksa Chart," *New Mandala*, 5 April 2019.

[63] Eugénie Mérieau, "The Constitutional Court in the 2016 Constitutional Draft: A Substitute King for Thailand in the Post-Bhumibol Era?" *Kyoto Review of Southeast Asia*, 3 February 2016, https://kyotoreview.org/yav/constitutional-court-2016-thailand-post-bhumibol/.

[64] Michael K. Connors, "Liberalism, Authoritarianism and the Politics of Decisionism in Thailand," *The Pacific Review* 22 (2009): 363.

[65] See, generally, Duncan McCargo, "Network Monarchy and Legitimacy Crises in Thailand," *The Pacific Review* 18, no. 4 (December 2005), 499–519. On judicial-military cooperation within the Privy Council, see Mérieau, "Thailand's Deep State: Royal Power and the Constitutional Court."

IV. Strategic Interests in Constitution Drafting: Personal Interests, Group Interests, Class Interests

Constitution drafters are strategic actors. Elster, in an influential paper, offers a pioneering study of the "motivations of the framers" in drafting a constitution and designing specific institutions: "roughly speaking, interest divides into personal interest, group interest, and institutional interests."[66] To Elster, institutional interests are by far the strongest drivers of constitution making, while personal interests are only marginal. Yet in Thailand, the personal interests of the members of constitution-drafting bodies are perhaps the first determinants of constitution making. It is in the personal interest of the constitution drafter to be individually appointed to the Constitutional Court, as a preliminary step before an eventual appointment to the King's Privy Council.

Let us look at the careers of two prominent drafters of the 2007 Constitution, namely Vicha Mahakun and Jaran Phakdithanakul, both career judges who presided over important subcommittees of the constitution-drafting committee, on "courts" and "political institutions," respectively. Both favoured a strong, independent, constitutional court and strong, independent constitutional organs. Both proposed involving judges even further in the control of political processes, going so far as to suggest replacing most elections with judicial appointments. Vicha famously declared: "We all know elections are evil. We should not trust politicians, but judges."[67] Jaran is well known for declaring, in various press conferences, that the king is the first judge in the kingdom and, as such, has every right to exercise his judicial sovereignty through the courts.[68] It came as no surprise that Jaran played a key role in expanding the role of the Constitutional Court—he even proposed that a crisis committee, composed of the three courts, including the Constitutional Court, should have the power to veto the government's decisions (this proposal was defeated).[69]

In any case, under the influence of Jaran and Vicha, the 2007 Constitution gave a paramount role to judges in the country's overall institutional structure: both as appointees and as appointing authorities of constitutional organs and the Senate. It was immediately dubbed the "Judges' Charter" by prominent observers of Thai politics,[70] and later described as establishing a

---

[66] Jon Elster, "Forces and Mechanisms in the Constitution-Making Process," *Duke Law Journal* 45 (1995): 364–396.

[67] *Bangkok Pundit*, "Our New Guardians: Elections are 'Evil,'" Asian Correspondent Blog, 27 April 27 2007, accessed December 31, 2015, http://asiancorrespondent.com/2007/04/our-newguardians-elections-are-evil.

[68] Eugénie Mérieau, "Thailand's Juristocracy," *New Mandala*, 17 May 2014, https://www.newmandala.org/thailands-juristocracy/, accessed 15 April 2021.

[69] Mérieau, "Thailand's Juristocracy."

[70] Chang Noi, "From the People's Constitution to the Judges' Constitution," *Nation*, 30 April 2007.

juristocracy.[71] This resonates with Elster's definition of institutional interest: "institutional interest in the constitution-making process operates when a body that participates in that process writes an important role for itself into the constitution."[72] After the 2007 Constitution was adopted, Vicha was appointed to the National Anti-Corruption Commission while Jaran became a Constitutional Court justice. As a Constitutional Court justice, the latter assumed a leading role in the interpretation of the major political cases that have reached the court since then, such as the dissolution of the People's Power Party in December 2008,[73] of the Thai Raksa Chat Party in March 2019[74] and of the Future Forward Party in February 2020.[75] Meanwhile, as an anti-corruption commissioner, Vicha played a key role in the investigation and launch of the prosecution against both Thaksin and Yingluck for corruption. Both are in all likelihood awaiting their appointment to the King's Privy Council.

The career of another constitutional justice from the career judiciary is illustrative of my point here: Nurak Mapranit. A career judge, he was appointed by the military to the 2007 Constitution-drafting body as well as to the post-2006 coup Constitutional Tribunal, where he ruled on the dissolution of the Thai Rak Thai Party in 2007. After the 2007 Constitution was adopted, he was appointed to the Constitutional Court. As a Constitutional Court justice, he ruled on the disqualification of then-Thaksin-aligned Prime Minister Samak Sundaravej from his prime ministership for having hosted a cooking show in September 2008, on the dissolution of Thaksin's People's Party in December 2008, on the unconstitutionality of revising the Constitution to have an elected Senate in 2013, on the invalidation of Yingluck's re-election in 2014, on the dissolution of the Thaksin-aligned Thai Raksa Chat Party in 2019 and of the anti-military opposition party Future Forward Party in 2020. In this latter case, he acted as the Constitutional Court's presiding judge, and took the extreme position of voting in favour of giving Future Forward Party members a lifetime ban from politics (in the end, they were banned from politics for "only" 10 years). Immediately after handing down the Future Forward Party dissolution ruling, he was appointed by the king to the Privy Council.[76] This appointment to the Privy Council signalled that the most extreme forms of judicial activism, akin to a politics of repeated judicial coups, yielded the highest possible reward of an appointment to the King's Privy Council.

Besides career judges, scholars also played a crucial role in constitution

---

[71] Mérieau, *Constitutional Bricolage*; Piyabutr Saengkanokkul, ในพระปรมาภิไธย ประชาธิปไตยและตุลาการ [In the name of the king, democracy and the judiciary] (Openbooks, 2009).

[72] Elster, "Forces and Mechanisms", 380.

[73] Constitutional Court Decision 20/2551, 2 December 2008.

[74] Constitutional Court Decision 3/2562, 9 March 2019.

[75] Constitutional Court Decision 5/2563, 21 February 2020.

[76] Announcement on the appointment of a privy councillor, 4 May 2020.

drafting. Notably, legal scholar Bowornsak Uwanno—author of many influential law handbooks and books on the monarchy, constitutionalism, and judicial activism, who taught generations of students at Chulalongkorn University about Thai law, even becoming dean of the Chulalongkorn Law Faculty—was, as the secretary-general to the 1997 Constitution-Drafting Committee, one of the main architects of the Constitutional Court. Likewise, political science scholar Nakharin Mektrairat—author of influential books on the monarchy, constitutionalism, and judicial activism, and dean at the faculty of political science who taught Thai politics and administration at Thammasat University—was, in the 2007 Constitution-Drafting Assembly, a strong advocate of expanding the powers of the Constitutional Court. Following the 2014 coup, Vicha, Jaran, Nakharin, and Bowornsak were all appointed by the military to the various post-coup constitution-drafting bodies—Nakharin was additionally appointed to the Constitutional Court, joining Nurak, in 2015.

In any case, these individual examples show how the design of a strong constitutional court is backed up by individual strategic interests of promotion. Beyond these individual strategies, empowering the court also responds to the class interests of constitution drafters, namely to maintain the dominance of the bourgeois class of Bangkok (calling themselves "good people" or *khon di*) over the lower classes of the provinces. To understand the class interests of constitution drafters such as Vicha, Jaran, Nurak, Nakharin, and Bowornsak, it is necessary to first examine how the dominant discourse on Thai democracy, analyzed by Anek Laothamatas in his 1996 article,[77] shapes educated bourgeois understanding of Thai politics, hatred for elected politicians, and ultimately support for judicial-military coups against elected governments.

According to Anek Laothamatas, Bangkok has always opposed political choices made by the rest of Thailand. Rural masses elect governments, and Bangkok overthrows those through mass protests and support for coups. This conflict on election outcomes stems from diverging interests between a poor uneducated Thailand and a rich educated Bangkok. "It is rooted in the conflicting expectations of elections, politicians, and democratic government itself of two major social forces—the urban, educated middle class and the rural farmers or peasants."[78] According to Thai dominant discourses shaped by Bangkok elites, the poor, rural, provincial, and agrarian Thai society is not educated enough to properly understand issues at stake when going to vote. This, combined with poverty, makes these citizens an easy target for ill-intentioned politicians ready to buy votes to get their seat

---

[77] Anek Laothamatas, "A Tale of Two Democracies: Conflicting Perceptions of Elections and Democracy in Thailand," in *The Politics of Elections in Southeast Asia*, ed. Robert Taylor (Washington: Woodrow Wilson Center Press, 1996), 201–223.

[78] Laothamatas, "A Tale of Two Democracies."

in Bangkok's House of Representatives. It is then a moral duty incumbent to the rich, urban, and educated Bangkok citizens to get rid of these ill-intentioned politicians by supporting coups.

The driving, paradigmatic question of the Bangkok, educated, middle class is how to ensure that the *khon di* (good people, i.e morally superior people, both devout Buddhists and true royalists) are the ones recruited to Parliament to drive the Nation forward, as opposed to uneducated, rural, local patrons. In their view, the electoral system is unable, in the particular case of Thailand, to solve the equation. Because Thai people lack sufficient education, they sell their votes to corrupted, local, mafia-style politicians who also lack sufficient education to understand the National Good, and the system fails to recruit any *khon di* at all. This discourse is pervasive in Thai legal academic circles. According to the King Prajadhipok's Institute, which is a major locus of the "scientific" *khon di* discourse (and a place to which Vicha, Jaran, Nurak, Nakharin and Bowornsak gravitate):

> At the core of the current political conflict lies the existence, in Thai society, of conflicting views on democracy. The first view places emphasis on the electoral process with the executive deriving its legitimacy from the 'majority rule'. The opposing view considers 'morality and ethical behaviour' of the executive more important than its representativeness. Both views are being held by a variety of groups for different reasons, *be it convictions or personal interests.*[79]

Finally, there is the institutional interest of lawyers and the legal profession in having a strong constitutional court and preserving it from being suppressed or tamed by electoral majorities. That is why the 2007 and 2017 Constitutions have included increased protection from constitutional amendment for the Constitutional Court. In the 2017 Constitution, the Constitutional Court cannot be suppressed by constitutional amendment unless a referendum is held.[80]

V. Ideas or Ideologies in Constitutional Interpretation: Militant Democracy, Militant Constitutional Identity

In his book *Constitutional Identity*, Jacobsohn defines what he calls "militant and acquiescent constitutionalism."[81] Militant constitutionalism occurs in the context of a "disharmonic Constitution," which he defines as when tensions arise between competing principles enshrined in the Constitution. It manifests itself as follows: "The idea of a mandate to redesign society lies at the core of the militant model of constitutionalism."[82] In Thailand, the

[79] King Prajadhipok's Institute, *Report on Reconciliation* (Nonthaburi: KPI, 2012), emphasis added.
[80] Article 256 (8) of the 2017 Constitution.
[81] Gary Jacobsohn, *Constitutional Identity* (Cambridge: Harvard University Press, 2010) 213–270.
[82] Jacobsohn, *Constitutional Identity.*

khon di discourse informs the redesign of society through a militant form of constitutionalism, namely a Buddhist-royalist understanding of the Thai Constitution. The aim is to defend Thailand's constitutional order as defined in Article 2 of the Constitution as "Democracy with the King as Head of State" (hereafter, DKHS). Judicial activism then becomes the means to police the compliance of elected governments with DKHS.

From early on, judicial activism very much structured the *khon di* discourse. For instance, Bowornsak's influential scholarship suggested that engaging in judicial activism was an act of loyalty to the king and an imperative to defend DKHS from the existential threat posed by elected governments. In a 2009 book, he identified the "Royal remarks of 25 April 2006," in which King Bhumibol had urged high court judges to become activists and cancel the re-election of Thaksin, as one key example of the king offering his royal guidance; therefore, loyalty to the king entailed engaging in or at least supporting judicial activism against elected governments.[83] The book was well received in academic circles and the press, as public intellectuals were already partaking in the advocacy of judicial activism in the name of constitutionalism, the rule of law, and the king. Among them, public intellectual Thirayuth Boonmee had imported the concept of judicialization from Europe and the US, which he later translated as *tulakanphiwat* and defined as follows:

> [Judicialization] is a way to understand judicial power as having an expanded role. [This] is what European countries, referring to the process of [judicial] control of administration call judicialization of politics [in English] and what the United States of America, referring to the [judicial] power of control of the executive, legislative and judicial power, call the power of judicial review [in English]: the judicial power truly and zealously comes in to control the legislative process and the exercise of power by politicians.[84]

According to Thirayuth, judicialization was a progressive concept adopted by Western democracies in line with thick interpretations of democracy and the rule of law. To him, judicialization, a natural consequence of the introduction of a constitutional court, constituted the best answer to the "dictatorship of Parliament."[85] Thirayuth associated the *tulakanphiwat* phenomenon with modernization and democratization, good governance, and the rule of law. As such, it was a highly desirable development in the present state of Thai politics. It resonated well with the concerns of legal scholars, for whom the attempts to neutralize the so-called dictatorship of

---

[83] Bowornsak Uwanno, *Economic Crisis and Political Crisis in Thailand : Past and Present* (Nonthaburi: King Prajadhipok's Institute, 2009).

[84] Thirayuth Boonmee, ตุลาการภิวัตน์ [Judicialization] (Bangkok: Winyuchon, 2006).

[85] Thirayuth Boonmee, Tulakanphiwat [Judicial review] (Bangkok: Winyuchon, 2006).

Parliament through the 1997 Constitution had gone wrong as Thaksin's Thai Rak Thai Party had managed to secure an absolute majority in Parliament, an unprecedented event in Thai political history. This constituted a return to a parliamentary dictatorship and an unacceptable abuse of the Constitution; as such, it justified judicial activism.

To fit the times, Thirayuth and others updated the old-fashioned concept of the dictatorship of Parliament to the more global term of "electoral" or "democratic" authoritarianism, with the underlying narrative that the rule of law should trump democratic majoritarianism. Opponents of Thaksin saw an opportunity to tie their anti-majoritarian, anti-election discourse to the concept of the rule of law. Members of the military and judiciary, as well as legal academics holding political positions, espoused this rhetoric as a means to move away from or to turn directly against Thaksin and politics at large. This was the rationale adopted by the Court in its various rulings on party dissolution from 2008 to 2020.

This narrative of judicialization as a means to preserve Democracy with the King as Head of State, also structured the judges' reasoning when it came to cases such as lèse-majesté. In its 2012 ruling on the constitutionality of lèse-majesté, the Constitutional Court ruled that lèse-majesté was in fact needed to preserve DKHS, reiterating some earlier arguments made by influential scholars of judicial activism. The court argued that lèse-majesté was a means to "give effectivity" to Article 8 of the Constitution, according to which "the King is sacred (*sakara*) and inviolable (*lameut mi day*). Nobody can expose the King to any accusation or action of any sort."[86]

By voting unanimously for the constitutionality of Article 112, the judges conformed to the doctrinal interpretation of lèse-majesté as blasphemy, part of a wider trend of royalist-Buddhist readings of Thai constitutionalism associating DKHS to Buddhist kingship and making it into Thailand's constitutional identity.[87] All in all, the belief that politics is a threat to the king or more widely to the overall DKHS system is shared by scholars and judges alike, and tilts constitutional interpretation towards anti-democratic decisions. In the name of the king and morality, the court becomes engaged in a crusade against "evil politicians," and turns into a "coup court."[88]

VI. Conclusion

Is lawfare the end logic of judicialization? Is judicialization of politics the end logic of having a constitutional court? Lawfare surely manifests itself in

[86] Constitutional Court Decision 28–29/2555, 10 October 2012.

[87] Eugénie Mérieau, "Thailand's Lèse-Majesté Law: On Blasphemy in a Buddhist Kingdom," *Buddhism, Law and Society* 4 (2019): 54–92.

[88] Piyabutr Saengkanokkul, ศาลรัฐประหาร: ตุลาการ ระบอบเผด็จการ และนิติรัฐประหาร [The coup court: the judiciary, dictatorship and judicial coups] (Same Sky Books, 2017).

a general context characterized by the fetishization of law,[89] and notably of the rule of law ideal, considered as having every virtue, including democratic virtues. The democratic process becomes a by-product of the implementation of the rule of law. Then, the Constitutional Court becomes the emblem of democracy, and any democratic transition must entail the drafting of a constitution, the creation of constitutional courts, and the expansion of their modes of petitioning, of their competence and jurisdiction, the creation of independent administrative organs with quasi-judicial powers, the generalization of the anti-corruption mandate of the judge, together with expanded powers of sanctioning elected politicians. The Thai case illustrates how this reliance on judges to guarantee or enforce democracy, in application of the orthodox principles of democracy through law, is not only problematic for its short-sighted failures, but also for its long-term effects on democracy, namely judicialization, lawfare, and authoritarian reaction.

From Charles de Montesquieu in the eighteenth century to Samuel Huntington in the twenty-first century, judicial independence has been recognized as the cornerstone of the rule of law, while the lack of civilian control of the military was identified as one, if not the main, obstacle(s) to democratization. Yet both institutions, whose legitimacy is derived from their perceived professionalism, as opposed to legitimacy derived from elections, may act in a similar fashion, refusing to take their orders from the civilian government, in order to preserve a specific anti-democratic constitutional and social order. As the Thai case exemplifies, whenever the regime is a tutelary regime, the court will mechanically become an institutional ally of the military. The Thai Constitutional Court acts as a functional substitute to the military; but by embracing a rhetoric of the rule of law, by disqualifying governments in the name of anti-corruption, and by dissolving political parties in the name of democracy, its coups are marked by the seal of legitimacy.

Thailand in fact is at the vanguard of a new trend in constitutional design: that of increasingly granting powers of quasi-criminal, quasi-administrative sanction to constitutional courts, empowering them to ban elected politicians from politics, dissolve their political parties, and even to some extent to mount criminal cases against entire governments for the policies they have implemented while in office. The Thai case is a cautionary tale against giving too much independence to constitutional courts. In particular, judicialization results in lawfare when a constitutional court gains powers to issue long-term bans on politicians and dissolve political parties by declaring them guilty of corruption, as it did in Thailand in 2008, 2011, 2019, and 2020. All in all, the very determinants of democracy through constitutional courts, namely the independence and professional autonomy of activist courts with wide-

[89] John Comaroff, "Reflections on the Rise of Legal Theology: Law and Religion in the Twenty-First Century," *Social Analysis: The International Journal of Social and Cultural Practice* 53 (2009): 193–216.

ranging veto powers over elected governments, are those very principles that can turn constitutional courts into anti-democratic devices, in a manner not dissimilar to professional armies.

University of Paris 1 Panthéon-Sorbonne, Paris, June 2022