

## THAILAND'S JUDICIARY AND (UN)RULE OF LAW: A LOOK BACK AT THE UNDERMINING OF THAILAND'S JUDICIARY

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**Abstract** *The ongoing political conflict in Thailand stems from conflict among Thailand's various elite factions, nominally those aligned with Thailand's monarchy and those aligned with Thaksin Shinawatra. With political conflict spilling into the streets annually it has become apparent that Thailand's political system has failed in its functional capacity as a conflict mediation/resolution mechanism. In the face of an increasingly assertive rural population and consecutive electoral victories by pro-Thaksin political parties Thailand's conservative traditional elite have increasingly turned to the judicial branch of government in order to counter threats to their rule and overturn majoritarian electoral democracy. In this paper we argue that the politicization of Thailand's judiciary since 2006 has undermined the legitimacy of Thailand's courts as well as devolved dangerously into a system of Un-rule of law.*

**Keywords:** *Thailand; Rule of Law; Thai Politics; Thailand Courts*

### INTRODUCTION

Speaking on behalf of ASEAN and Thailand in 2012 HRH Bajrakitiyabha Mahidol stated that Thailand finds the rule of law indispensable framework for peace and prosperity and that Thailand adheres to the rule of law principally evidenced by Thailand's 2007 Constitution recognition of human rights, dignity and so forth which having a national commission for implementing and advising state organs in performance (Mahidol, 2012). Beyond diplomatic rhetoric the political situation in Thailand over the previous decade and arguably its longer range historical performance since becoming a constitutional monarchy provides a different picture, one which is not nearly so clear-cut nor picturesque. According to World Justice Project's 2012 report Thailand ranked a humble 47th in the world according to a range of indicators such as civil and criminal justice, corruption and fundamental rights. However, when considering openness of government and constraints on government powers which include impunity of action Thailand fell significantly to the low 60's (World Justice Project 2014).

It can be argued that Thailand as a body politic at least among its political classes has not inculcated the norm that amnesty for acts of violence and collective forgetfulness is not a proper method to address problems. This was best evidenced by the blanket amnesty bill put forth by the Puea Thai Party in late 2013 which led to a large outpouring of public rage against this blatant attempt by a pro-Thaksin party to forget and begin forgiving in the name of national reconciliation. Notwithstanding the Thailand's culture of impunity and the recently withdrawn amnesty legislation, Thailand's courts have become increasingly politicized since 2006 to the point where impartiality has been disregarded and legitimacy is increasingly being called into question. This paper takes up this point and argues that high courts (Constitutional and Administrative) decisions have not only been politicized and biased but display alarming characteristics verging on (Un)rule of law. We argue that the 2007 military drafted constitution provides the Constitutional Court with quasi-executive and legislative power but also due to elite political conflict surrounding the palace and pro-Thaksin supporters that politically charged court decisions have degraded Thailand's judiciary to an (Un)rule of law basis. This paper takes an historical view back to the point where Thailand's politicized courts began to lose the appearance of neutrality. The current Constitutional Court is universally understood to be a politicized body used to undermine parties and politicians that are against Thailand's power elite. By taking a view backwards we can articulate the forces and reasons for Thailand's long slide into judicial lawfare. The authors will also consider more recent Constitutional Court cases to see if there has been a change in the legal landscape in the decade plus which has transpired since the original rulings.



## METHOD AND APPROACH

This work will draw on the work of Cheesman and O'Donnell who have postulated a notion of (Un)Rule of Law. They argue that formal institutions of the state in illiberal or authoritarian countries are often taken over and used to undermine the system of law which provides a neutral venue for the arbitration and settlement of disputes. In this sense they describe areas of the world such as Latin America and Myanmar as place where formal legal systems exist and operate within the bounds of their legal authority. However, instead of being neutral arbiters of justice, courts in this spaces are tools of power elite and power centers within the society to advantage themselves whilst undermining opponents. This system of (Un)Rule creates and fosters its own system of law for the powerful that is largely devoid of any universally recognized principles. We will draw on court cases from the early period of Thailand's political conflict to try and understand what were the starting points and principles for undermining Thailand judiciary.

Raz has argued that the principle of rule of law need not have a basis of decency, good nor bad but rather advocates for a view of law as being what it is, in other words in order to classify a system of law according to what it says and does is the correct method of evaluation (Raz 1979: 218). With this in mind a country's laws need not conform to ideals of democracy or rights but rather assessing the law according to the word of the law and if it is applied consistently, evenly and without prejudice. The according to Cheesman this view can be termed a 'thin rule of law' whereby value laden conceptualizations of legal formation, practice and application are considered as irrelevant and detracting from a proper basis for appraisal (Cheesman 2009). Its opposite by default is a value laden conception where subjective appraisals of law being good or bad is brought to the fore, this view is a 'thick rule of law'. Cheesman's study of Myanmar illustrates the 3rd dimension existing outside of these two purviews where law is outdated, arbitrarily applied and the justice system ceases to operate as a viable neutral arbiter but rather collapses into the hegemonic political system of fluctuations thus being Un-rule of law and contradicting itself (Cheesman 2009). This is basis for a brief appraisal of Thailand's Constitutional and Administrative Courts. It is my argument that Thailand's independent courts which find direct legal authority via the constitution have undermined the rule of law and are contradicting themselves thus degrading into an Un-rule of law.

### Early Case of the 1<sup>st</sup> Thai Rak Thai Government

Thailand's political crisis found its flash point in late 2005 after then Prime Minister Thaksin Shinawatra's Thai Rak Thai party won an unprecedented parliamentary majority in elections and his family's sale of Shin Corporation in a \$1.7 billion tax free transaction. Later on September 19 2006 while he was out of the country attending a UN conference in New York the Thai military ousted the populist former Prime Minister Thaksin Shinawatra in a military coup. Just one year after winning an unprecedented second election Thaksin called for a snap election in April 2006 in the face of increasing street protests and allegations of authoritarian rule (ANFREL 2005, Croissant and Pojar 2005, Nelson, 2006, Nogsuan 2005, Ueranantasun 2012). At the time there was intense pressure to put these elections on hold until political reforms could be undertaken. Rather than wait for reform measures Thaksin instead went ahead with elections to in order to justify continued rule via a majoritarian mandate in elections. During the disputed elections Thailand's opposition Democrat Party boycotted elections causing a constitutional crisis as the mandated 20% threshold of voters could not be met in many constituencies in the South. Furthermore, there were allegations to the Electoral Commission of Thailand and investigations into alleged irregularities of TRT 'hiring' small parties to run in uncontested constituencies as well as Commission officials being accused of electoral fraud in accepting bribes to alter database information allowing for candidates to switch parties in accordance with electoral laws stipulating a 90 day period of party membership prior to elections (Nelson 2006: 11).

With political stalemate ensuing and no end in sight to political conflicts Thailand's late King Bhumibol came out publicly in what was considered an unofficial political intervention by Thailand's revered monarch exercising moral and albeit extra-constitutional authority indicative of the late era reign. In late April with still no quorum for parliamentary seating the king in a straightforward and very public manner in audience with justices of the Supreme Administrative Court and Supreme Court stated

Now, I will talk about the election. The court itself has the right to discuss the election, especially the candidates who received less than 20 per cent of the vote. Should the election be nullified? You have the right to say what's appropriate or not. If it's not appropriate, it is not to say the government is not good. But as far as I'm concerned, a one party election is not normal. The one candidate situation is undemocratic. When an election is not democratic, you should look carefully into the administrative issues. I ask you to do the best you can. If you cannot do it, then it should be you who resign, not the government, for failing to do your duty. Carefully review the vows you have made. ... The nation cannot survive if the situation runs contrary to the law. Therefore, I ask you to carefully study whether you can make a point on this issue. If not, you had better resign. You have been tasked with this duty. You are knowledgeable. You must make the country function correctly.

Judges of Thailand's high courts armed with the King's words decided to intervene in politics directly and. In late April the Administrative Court cancelled rerun elections to fill constituency seats. On May 8 the Constitutional Court declared in an 8-6 that the April election null and void thus ordering new elections to be held within 60 days. The Court declared "the election yielded results which are unfair and undemocratic, and are therefore unconstitutional, being inconsistent with Articles 2, 3, 104 (3) and 114 from the beginning of the election process" (Constitutional Court of Thailand 2006) this dual decision was based on the dual reasoning that initial elections which took place within 37 days violated the democratic 'core' of Thailand's election and that the ECT had allowed voting booths to be positioned in such a way as to violate privacy and anonymity of voters which had already been warned by ANFREL earlier (Bangkok Post November 5, 2005). Mounting pressure on the ECT to resign over its performance and compromised neutrality built over the course of a month. The ECT in defiance of public and royal opinion refused to resign [except for one member] and hence were convicted in July of malfeasance over the April election by a Criminal Court and ushered off to 4 years in jail (Dressel 2012: 87). The inability of Thailand's high courts to act independently of their own volition based on legal rules, principles and honest independence is an indictment of the character of the courts and judges who seemingly could not act on their own without an external force telling them to.


In 2007 after the ousting of Thaksin with a military drafted interim constitution in place the Constitutional Tribunal ruled to dissolve Thaksin's Thai Rak Thai party and bar over a hundred executives from office for 5 years for malfeasance in the 2006 elections. This ruling is interesting in that it is retroactive application of law by a court with questionable legitimacy as well as words once again of the King who stated prior to the ruling "I have the answer in my heart but cannot say it" (The Nation 2007).

### **Constitutional and Administrative Courts**

The Constitutional Court is comprised of three Supreme Court judges, two Supreme Administrative Court judges and two each from law and political science professions (Constitution 2007: section 204 [1], [2], [3], [4]). The selection of the later four non judicial members is according to a selection committee comprising presidents of the Supreme Court, Supreme Administrative Court, House of Representatives, a president of constitutional independent organ elected amongst presidents of independent organs and, House opposition leader with submission to the Senate President (Constitution 2007: section 206 [1]). The strongest power aside from judicial review lies with the Constitutional Court ability to introduce legislation, essentially making it a coequal with the legislative and executive branch of government (Constitution 2007: section 139 [3], 142 [3]).

The Supreme Administrative Court decides cases between the state and private persons. The Administrative Courts holds significant power being able to decide cases of state administration including emergency decrees, state policies. This court is chosen by the judicial commission which is comprised of "President of the Supreme Administrative Court, nine qualified members who are administrative judges and elected by administrative judges amongst themselves, two qualified members elected by the Senate and one qualified member elected by the Council of Ministers" (Constitution 2007: section 226 [1], [2], [3], Dressel and Mietzner 2012, Pariyawong 2010).

### **Court Rulings of 2007-Present**



To demonstrate a clear bias in these court's rulings I will now draw on a selection of cases over the previous years. The most well-known cases are from 2008 when the Constitutional Court first in a 9-0 verdict disqualified PM Samak Sundaravej for hosting a cooking show. The decision was based on his receiving payment for his appearances (\$20-\$30) (Constitutional Court Decision 2008a). The Court based its ruling on Section 267 of the Constitution which deals with conflict of interests. This article forbids the PM and Ministers from being a private employees with the understanding that private enterprise may compromise their ethical compass. The Court reasoned that the PM was in fact an employee of the production firm, thus eligible to be dismissed on conflict of interest grounds. This is based a very broad interpretation of what constitutes an employee and how much influence the employer had over the employee. Furthermore, the court kept within strict bounds a understanding of 'constitutional intent' of Section 267 which was to prohibit state officials from any and all contractually self-benefiting interactions with the private sector. (Ibid, supra note 13-14). Later with the government under extreme pressure the Constitutional Court in concert with the Supreme Court, based on advice from NCCC ruled to dissolve the People's Power Party and ban Yongyuth Thirapairat for vote buying in accordance with legal provisions of Organic Act on Political Parties B.E. 2550 (2007) (Constitutional Court Decision 2008b). In this case the court reasoned that party executive Yongyuth had met with 10 district and village level chiefs of Chiang Rai province. The Court stated that the accusation of vote buying was justified as it was *plausible* that Yongyuth had planned (though had not yet done) to exchange land, money and various assets in return for their support of the PPP in elections (Ibid, supra note 20).

A quick comparative glance at Constitutional rulings across governments Thailand's political divide will help to hone the focus of the argument. When 'red shirt' supporters of Thaksin Shinawatra descended on Bangkok in April of 2010 to protest then PM Aphisit Vejjajiva. The PM enacted an emergency decree asking the Civil Court to rule on an injunction in order to legally force Red Shirt protesters from Ratchaprasong intersection.

The Civil Court shunted the case on to the Constitutional Court for a decision on the on both constitutional legality and usage of the emergency decree. The Constitutional Court decided that Courts of Justice (Civil Court) had the jurisdiction to rule on cases regarding the Decree on Public Administration in an Emergency Situation. The Civil Court thus ruled that the protest was "illegal, was an internal security risk for the country, and was an unconstitutional use of freedoms" (Civil Court Decision 2010a, supra note 14). Furthermore, the Court stated that an injunction was not necessary as the PM held the dual role as director of the Internal Security Operations Command was empowered by Articles 16 and 18 of the Internal Security Act to enforce the emergency decree (Ibid).

Later in the month the Civil Court further decided that the PM and Deputy PM "must use measures to reclaim protest sites as they presented a danger to the country (Civil Court Decision 2010b, supra note 8). These decisions upheld the constitutional legality of the emergency decree without reservation and allowed the government of the time cart blanc to enforce the emergency decree due to the presence violence. It is well documented that later in May the government ordered the military to retake the protest site which led to the death of over 90 protesters, civilians and security personnel (mostly protesters). In order to gain clarity I will now juxtapose the prior decision with the current political crisis between a Puea Thai led government and the PDRC led by former deputy PM under Aphisit.

The Yingluck government in 2014 enacted an emergency decree in response to aggressive actions by the PDRC and a petition was brought before the Constitutional Court by former Democrat MP Wirat Kalayasiri and Senator Paibul Nititawan asking for a decision on the legality of the Decree invocation. The Court ruled that Emergency Decree invocation would not automatically lead to seizer of administrative power and upheld the legality of the governments invocation (Constitutional Court Decision 2014, supra note 73-78). The Civil Court was petitioned by PDRC member Thavorn Seniam asking for a ruling on the legality of the emergency decree on the grounds that it was not yet necessary and revoke and prohibit the government to use force with protest dispersion. The Civil Court ruled that the decree was legal according to the Constitutional Court ruling previously and that the caretaker government had executive legal power to issue the said decree. However, the Court noted that the execution of the decree must be take into consideration the rights, freedom and liberty of the citizen in accordance with Section 4 of the Constitution. That said the Court called three witnesses former PM and Democrat party leader Aphisit Vejjajiva, Democrat MP Atthawit Suwanpakdee and former Secretary General of National Security Council Tawin Pleansri (whom would later be reinstated by the Administrative Court on grounds his



transfer was illegally done by Yingluck Shinawatra). All three witnesses claimed that PDRC protest were non-violent and protesters unarmed. The Court chose to give much weight to the witnesses statements and chose to rule that while the emergency decree was legal its enforcement must not:

1. Us force, or authorize the use of force and weapons to break up a peaceful protest organized by the plaintiff and other protesters, in accordance with Section 63, paragraph 1, of the Constitution of Thailand B.E. 2550
2. Ordering seizure of goods, consumer goods, chemical substances or other materials which have been used, or will be used, for any act, or to support any act, by the plaintiff and the people
3. Issue orders to search, remove or demolish buildings, structures, or barriers set up by the plaintiff and the people
4. Prohibit the sales, use, or possession of medical supplies, consumer goods, chemical substances or any other material or equipment which could be used by the plaintiff and the protesters
5. Ban any act that amounts to blocking traffic and roads, any act that causes disruption to the normal use of roads in all areas that the plaintiff and the people occupy for the purposes of the protest
6. Prohibit public gatherings of the plaintiff or of five or more people in certain areas
7. Prohibit the use of roads or vehicles, or setting restrictions on the use of roads or vehicles by the plaintiff and the people for the purposes of the protest
8. Prohibit the use of buildings, entry into or residing within any building or place; or prohibiting entry into any area by the plaintiff and the people
9. Order the evacuation of the plaintiff and the people out of the protest sites; or prohibiting the plaintiff and other protesters from entering the protest sites. (Civil Court Decision 2014, Black Case)

The Courts ruling was based on the legal test of whether or not protesters were violent basing their judgment on the said witnesses as well as the previous Constitutional Court ruling on the legality of the Decree which conceded that the protest were non-violent. As such the government was duty bound to uphold the legal rights of freedom of movement, assembly etc. without regard for the disruption that it was causing. This was in direct contradiction of the Civil Court regarding Democrat PM Aphisit's government in 2010 where the protesters were considered violent and a menace to non-protesters freedom and liberties. This ruling can be seen as partisan in that PDRC protests had seen numerous acts of violence including but not limited to the forceful blocking of election polling stations on February 2 thus negating citizen's constitutional rights of voting. But the Court also ruled that the different protest sites some of which were permanent, the same as UDD protests of 2010 but that the inconvenience they caused was not equal to the freedoms which permanent and roaming protesters were constitutionally protected. The Courts legal reasoning is strange in that a cursory glance at the daily situation would demonstrate that violence was taking place behind PDRC lines against government security forces and causing major disruptions to far more people than the two site 2010 protests.

The current Constitutional Court has kept with preceding paradigm of banning opponents of the government. After the 2019 general elections the political establishment of the military government was taken aback by the electoral success of the upstart Future Forward Party led by auto parts billionaire Thanathorn Juangroongruangkit. The FFP won 80 seats in the 500 seat parliament taking the military and conservative establishment by surprise (Wikipedia, 2019). The party had a strong reformist agenda of reforming the military and economic monopolies. This challenged Thailand's power centers strongly and they quickly moved to have the party banned. Cases against the party leadership over loans from Thanathorn to the party and his owning of shares in a bankrupt media company soon saw the party dissolved and leaders banned for 10 years (Bangkok Post, 2020; Constitutional Court, 2019). In this case the court based its decision on two loans which were provided by Thanathorn to the party with the sum of 191,200,000 Baht. The court reasoned that the loans were provided by him at an interest rate which was far below normal market rates and as such in accordance with the Organic Act on Political Parties B.E. 2560 (2017) which prohibits donations exceeding 10 million Baht/year (Constitutional Court, 2020).



## DISCUSSION

This paper has drawn on court cases of the Administrative Court and Constitutional Court to argue that politically motivated court decisions against Thaksin Shinawatra and his backers have led Thailand's judiciary into a system of (Un)Rule of Law. By continuously resorting to lawfare and the same courts to achieve political aims, Thailand's elite have undermined the rule of law in Thailand, at least within these two courts. The (Un)Rule of Law has been successful in forestalling Thaksin's power base during the coup years from 2014-2023 but in the process the legitimacy of the Thailand's two premier courts has been seriously undermined. Given Constitutional Court cases against Thailand's elites new enemy the Future Forward and no Move Forward parties the future does not look any better than the recent past for Thailand's courts. It remains to be seen if and how without constitutional reform the politicized courts can be brought back into a framework of rule of law. Given that any constitutional amendments must get approval of the Constitutional Court itself if does not appear that there are avenues for political reform with the machinery of government and law so fully under control of the conservative elite establishment. Future Forward was reestablished as the Move Forward Party and did even better in the elections of 2023 winning 151 seats, making the party the number 1 voter getter in the election (Thai PBS, 2023). This has once again produced court cases against the party leader Pita Limjaroenrat and other party members. A case was filed with Constitutional Court alleging that the party's platform reforming Article 112, the lese majeste law was unconstitutional and threatened 'the democratic system of government with King as Head of State'. This has now put in jeopardy 44 MFP MPs who signed a petition on reforming Article 112 (Jones, 2024). The continued politicization of the court and recurring use of the court has undermined its credibility and the legal system of constitutionalism writ large. It would appear that political elites are not cognizant or worried about the state of (Un)Rule of Law in the Kingdom and the knock on effects that this has with the wider system of political stability.

## CONCLUSION


Since 2006 the Constitutional Court has not only been politicized but has intruded into and is eroding the system of checks and balances within the political system with its rulings. These rulings when put into a larger frame of understanding are not simply judicial decisions but rather incremental steps in degrading, delegitimizing and destroying any semblance of rule of law or for that matter respect for law as a system of regulation. In effect high court rulings are creating a system of Un-rule of law which is undermining what was an embryotic idea to begin with. The effects of which are not overtly hostile and brazen as a military coup but steadily undermine not only law but also democracy and respect for institutions which further push the boundaries of acceptable behavior in a climate rife with turmoil.

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