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## Thailand's Deep State, Royal Power and the Constitutional Court (1997–2015)

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### ABSTRACT

This article challenges the network monarchy approach and advocates for the use of the concept of Deep State. The Deep State also has the monarchy as its keystone, but is far more institutionalised than the network monarchy accounts for. The institutionalised character of the anti-democratic alliance is best demonstrated by the recent use of courts to hamper the rise of electoral politics in a process called judicialisation of politics. This article uses exclusive material from the minutes of the 1997 and 2007 constitution-drafting assemblies to substantiate the claim that the Deep State used royalists' attempts to make the Constitutional Court a surrogate king for purposes of its own self-interested hegemonic preservation.

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Prominent scholars have argued that to understand Thailand's contemporary politics, an examination of formal political institutions is insufficient (Harris 2015; McCargo 2005). In an important article, McCargo (2005, 500) has argued that "Thailand's political order is characterised by network-based politics. From 1973 to 2001, Thailand's leading political network was that of the reigning monarch, King Bhumibol [Adulyadej]." For McCargo, the "network monarchy" is an informal network of elites composed of the top leaders of the military, members of the bureaucracy and the palace, centred on the President of the Privy Council, General Prem Tinsulanonda, who has increasingly acted as proxy for the king. McCargo (2005, 516) argues that "royal power" was a "form of network governance." This network is said to have reinvented itself to cope with Thailand's last democratisation exercise, launched in 1992:

After May 1992, a new system of monarchical governance was refined, one much less reliant on direct action. Royalists ... worked hard to reinvent network monarchy as a more liberal construct, not paralysed by anachronistic military and bureaucratic preferences for stability and order. (McCargo 2005, 508)

The return to the politics of *coup*-making, in 2006 and 2014, however, suggests that this "new system" and reinvention as a "liberal construct" has failed. In this article, it is suggested that this failure is reflective of the inability of the network monarchy

approach to adequately conceptualise the institutionalised basis of Thailand's elite networks (see Veerayooth and Hewison 2016). In contrast, this article will seek to explain the resilience of the military-bureaucratic elements of the regime using the concept of the "Deep State," which accounts not only for networks, but also for the institutions in which they operate.

In examining the power of elites and institutions in various contexts, several authors have drawn attention to the existence of what they have variously identified as the "dual state" (Fraenkel 1941), the "parallel state" (Paxton 2004), or as this article will explain it, the "Deep State" (Dale Scott 2008).<sup>1</sup> The Deep State can be considered as a state within the state, composed of state agents over which civilian governments have limited or no control. The Deep State is organised, autonomous and possesses its own hierarchy and rules. Parallel to the regular state, the Deep State possesses its own ideological state apparatus that is used to fine-tune the democratic discourse to suit its needs (see Althusser 1970). It does so through manipulation of public opinion, using various means including the engineering of crisis and national security emergencies (Tunander 2009, 66). Like the regular state, the Deep State is not monolithic; various actors and networks engage in power struggles within its framework. However, the fundamental difference between the regular state and the Deep State is that the former is visible to the people it claims to serve, whereas the latter is hidden and unaccountable. The Deep State is the invisible framework under which institutional interests of unaccountable bodies and co-opted non-state networks are aggregated (Ahmed 2012, 79).

Although there is still limited literature on the concept of the Deep State, it has most often been described as a powerful and essentially anti-democratic alliance composed of the broader security forces, including the military, police and the judiciary, who are involved in regular aspects of administration in the visible state, but which also maintain a shadow set of activities that has considerable veto power over the regular state (Tunander 2012). With many of its actions being behind the scenes or secret, the Deep State is able to create "situations" that destabilise or overturn legal governments or stage *coups* against the regular state. The idea of a Deep State has been applied to the US CIA-led "military-industrial complex" (Morgenthau 1955) and to the Turkish case, where the Deep State is defined as "networks which operate under official cover, without any accountability and mobilized by top military commanders in order to organize rebellion and public mobilization against particular goals" (Unver 2009, 3). In Turkey, the command structures of the military have long been the main operational unit of the Deep State. This Deep State has also relied on the judiciary and legal elites to deliver actions and decisions that maintain its control over the regular state (Soyler 2014). At times of crisis, the Deep State's agents will take over the state in order to re-establish its favoured regime.

In the case of Thailand, the Deep State may be considered as composed of state agents who oppose the rise of electoral politics, from low-ranking civil servants to the highest-ranking officials. They will often refuse to take their orders from elected governments as they see them unfit for administering the country. They seek to maintain and strengthen a particular and preferred social, political and economic order with the monarchy as its symbolic keystone. The Deep State and its agents use royal legitimacy, which they consider derive from the king's practice of the 10 Buddhist

virtues, to enhance their power and bypass regular state processes through a process called *ang barami* (to claim royal legitimacy) or *peung barami* (to depend on royal legitimacy) (see Gray 1986; Unaldi 2013). The more representative of the king they appear to be, the more *barami* they can claim. However, their ability to enhance their power based on the process of borrowing *barami* highly depends on the actual *barami* of the present king, who was 88 and infirm in December 2015. Unaldi (2014) explains:

As King Bhumibol's health fades, his charismatic leadership will soon no longer be a source of legitimacy for those who have prospered under his reign. The fear of losing hard-won privileges to the rural masses [through processes of electoral politics] is a very real one for the royalist elites....

Anticipating an unfavourable royal succession, which promises to bring the feared and disliked Crown Prince Vajiralongkorn to the throne, Deep State agents have attempted to create new sources of legitimacy, less reliant on the personal *barami* of the ill and aging king, but still insulated from electoral politics, as a way of enhancing and securing their power in a post-Bhumipol era.

This article will argue that it is the judiciary that has been chosen to become one of the Deep State's main pro-active agents. Several factors guided this movement to the judiciary. First of all, as McCargo noted, there was a need to "reinvent network monarchy as a more liberal construct." This derived from the political weakness of the military following its brutal response to the May 1992 civilian uprising. Shamed by this, for several years its capacity for political intervention was limited. In addition, the civilian backlash against the military's brutality in 1992 saw a movement of the political discourse to embrace a contested notion of democratisation. Meanwhile, the emergence of an international discourse on "judicial activism" provided a useful legitimising discourse for allowing the judiciary to engage the political arena (Tate and Vallinder 2005). These pressures and trends resulted in the development of an institutional framework established in the 1997 Constitution that provided for the expansion of judicial power, most notably through the creation of a Constitutional Court.

More importantly, Deep State agents as an opportunity to transform the "traditional" and "charismatic" legitimacy of the king into a legal-rational legitimacy through the judiciary. Judges already had an informal function as the representative of the king, mandated to exert extraordinary powers in times of crisis, and the 1997 Constitution provided the opportunity to convert this into formal and legitimate power. The result was that the Deep State organised for the Constitutional Court to take on the "king's role" as defined by McCargo (2005, 501):

The main features of Thailand's network monarchy from 1980 to 2001 were as follows: the monarch was the ultimate arbiter of political decisions in times of crisis; the monarchy was the primary source of national legitimacy; the King acted as a didactic commentator on national issues, helping to set the national agenda, especially through his annual birthday speeches; the monarch intervened actively in political developments.... At heart, network governance of this kind relied on placing the right people (mainly, the right men) in the right jobs.

Consequently, a process of judicialisation of politics unfolded. This process has seen the judiciary not simply offering *a posteriori* validity for military putsches in 2006 and 2014 as the monarchy had done in the past, but being instrumental in shaping

situations of institutional crisis that permitted successful military *coups*.<sup>2</sup> In 2006 and 2014, constitutional rulings cancelling general elections left the country in situations of political vacuum favourable to military takeovers. In addition, in 2008, the judiciary itself managed the ouster of a democratic government. In 2013, the judiciary vetoed the parliament's attempt at constitutional revision, unveiling the sovereign character of the Deep State.

This article will show that the introduction of constitutional review and other judicial mechanisms of check and balance in the 1997 Constitution represented a genuine attempt to launch a conservative democratisation process; it was envisioned that elected politicians would be sufficiently deferential to the network monarchy to abstain from challenging the structure of the Deep State. However, the Deep State was challenged by the rise of Thaksin Shinawatra. Elected in 2001 and re-elected in 2005, the telecommunications billionaire became prime minister and gained unprecedented popularity, especially in the countryside. In the eyes of some in the Deep State, he was becoming a rival to the king, gaining considerable *barami* through the implementation of generous and successful pro-poor policies. In response, in 2005, the Deep State provoked and declared an “emergency situation” that allowed it to stage a *coup* in 2006 and take control of the political order by establishing the 2007 Constitution. This constitution represented a failed attempt to institutionalise, in the “democratic order,” the king's power to veto political decisions and nominations in a Constitutional Court with expansive powers. That the 2007 constitution failed to adequately institutionalise these veto powers in the Constitutional Court is illustrated in the 2014 military *coup* where judicial interventionism created instability but was unable to complete the jettisoning of the elected government without the military delivering the “death blow.” Thus, the attempted institutionalisation of the Deep State's role through the use of the Constitutional Court as a “surrogate king” was unsuccessful in seeing off the challenges posed by contested democratisation, political empowerment and the rise of electoral representation.

The article now turns to an analysis of the Deep State's attempted transfer of traditional royal powers onto the Constitutional Court. Responding directly to McCargo's (2005, 511) remark about the need of “institutionalising Thailand's political order” as something “essential, if the country was to avoid a violent crisis at the time of the royal succession,” it is argued that such attempt was dedicated to ensuring the Deep State's resilience in the event of an unfavourable royal succession.

## Judicialisation and the Deep State

The role of the judiciary in Thailand's recent period of political crisis has received extensive commentary in recent years (Connors 2008; Dowdle 2009; Dressel 2010; Ginsburg 2009; Hewison 2010; McCargo 2005). These accounts have mostly relied on the concept of the “judicialisation of politics” as defined by Hirschl (2004, 2) as an expansion of judicial power beyond its initial scope into the political arena. Although a useful beginning, these studies have not sought to embed judicialisation into an analysis of broader institutional context of the state. Nor have they examined the intentions of Constitution-drafters in any detail to test Hirschl's “self-interested hegemonic

preservation theory” according to which “judicial empowerment through constitutionalisation as a form of self-interested hegemonic preservation”:

is best understood as a product of a strategic interplay between threatened political elites, who seek to preserve or enhance their political hegemony by insulating policy making in general and their policy preferences in particular from the vicissitudes of democratic politics while they profess support for democracy... When their policy preferences have been, or are likely to be, increasingly challenged in majoritarian decision-making arenas, elites that possess disproportionate access to, and influence over, the legal arena may initiate a constitutional entrenchment of rights and judicial review in order to transfer power to supreme courts.” (Hirschl 2004, 12)

In what follows, it will be demonstrated that judicial empowerment created by the 1997 Constitution was part of a Deep State’s self-interested hegemonic preservation strategy. The objective was to enable the Deep State to face two sets of challenges: democratisation and the rise of majoritarian politics on the one hand and the aging of the king on the other. The practice of the judicialisation of politics that unfolded from 2006 onwards is part of such self-interested hegemonic preservation strategy.

The judicialisation of politics requires a constitution that provides for judicial empowerment through the existence of a Constitutional Court and other judicial bodies with wide authority. The existence of these institutions provides the legal and institutional framework for the process of judicialisation.

In Thailand, judicialisation developed in three phases. The first phase of judicial empowerment was the drafting of the 1997 constitution. Although studies have pointed to the role of “liberal royalists” such as Anand Punyarachun and Prawase Wasi (Connors 2002), it was legal scholars Bowornsak Uwanno and Komet Khwanmuang who advocated for the introduction of a Constitutional Court modelled after continental European courts.<sup>3</sup> They envisioned a Constitutional Court that was a kind of “insurance” against the political uncertainty of democratisation (see Ginsburg 2003).

The second phase is identified as beginning with King Bhumibol’s speech to judges on April 25, 2006, where he urged their intervention to resolve a political impasse associated with the April 2, 2006 elections which had been boycotted by opposition political parties. The judiciary responded with considerable enthusiasm. Subsequent decisions resulted in the annulment of the elections, the sacking and jailing of election commissioners and, in 2007, the dissolution of Thaksin’s Thai Rak Thai Party (TRT) which had won elections in 2001, 2005, and claimed a disputed victory in 2006. The outcome of this contestation and royally inspired judicial interventionism was the September 2006 military *coup* to oust Thaksin’s government. The judicial empowerment that paved the way for the *coup* was then “constitutionalised” in the 2007 Constitution developed under military and military-backed regimes. This charter, and the enhanced role of the judiciary, was shaped by so-called liberal royalist constitution drafters to limit the power of elected politicians and to provide institutionalised veto powers for the Deep State.

The third phase is marked by the Constitutional Court’s effective usurpation of sovereign power under the 2007 Constitution. Starting with the 2008 dissolution of the ruling party and subsequent change of government, which some have referred to as a “judicial *coup*,” its landmark decision was the July 2012 Constitutional Court decision (Order 29/2555, July 4, 2012) to forbid constitutional revision. This ruling

acknowledged that sovereign power did not reside in the people nor in their representatives in parliament but resided in the Deep State and the parallel powers it exerted through the judiciary to assert political control whenever it deemed necessary.

This article now turns to a closer analysis of these phases of the constitutionalisation and institutionalisation of judicial political intervention. It argues that these processes have been a result of contested and, ultimately, failed efforts by the Deep State to “manage” a transition to a stable post-Bhumipol electoral regime that embeds the Deep State’s preferred political norms. The resort to military power in 2006 and 2014 is evidence of this failure, leading to a military dictatorship from May 2014 that is engaging in yet further efforts to establish a constitutional and electoral regime that will effectively maintain the existing order of social, political and economic power with the monarchy as its symbolic keystone.

### Phase 1: The 1997 Constitution

The 1997 Constitution drafting process was the outcome of a popular movement to reform politics that started in the early 1990s. It led to the creation of a council of academics, the Democracy Development Committee (DDC), chaired by Prawase Wasi, to study constitutions abroad and make proposals for Thailand. The DDC published 15 booklets about issues deemed important in drafting the new Constitution. Scrutiny of these issues reveals that the main concern of the constitution drafters in their search for “better democracy” was to create checks and balances in order eliminate “money politics.” While one of the booklets dealt with rights and liberties the others focused on issues such as anti-corruption, vote buying, fair elections and checks and balances. This focus stems from the fact that the underlying narrative of the early 1990s among elite commentators, academics and in the media was that money politics was the evil of the political system and a major obstacle to democratisation (see Anek 1996).

This discourse on money politics and vote buying cast doubt on the legitimacy of elections, and consequently, the entire democratic process. Even though the 1997 Constitution was the outcome of popular protest, the resulting institutional architecture was a response to elite discourses on corruption that cast *elected politicians* as undermining democratisation (see Thongchai 2008). This elite discourse found considerable support in an international concern for “good governance,” which gained momentum in the 1990s, and was a mirror for Thai elite concerns (see, for example UNDP 1997; World Bank 1994). This discourse was appropriated by Thailand’s elite and hailed as the solution to the vote-buying and corruption problem. The term “good governance” was imported, translated in Thai as *thammaphiban* and redefined with a focus on fight against corruption (see Bidhya 2007; Bowornsak 2006). As Connors (2008, 147) puts it, “The 1997 settlement twinned enhanced executive power with institutions that were to scrutinise the exercise of that power, something that was consonant with various international organisations then pushing ‘good governance’.”

The 1997 Constitution adopted many of the features promoted by international agencies and international constitutional doctrine, such as the constitutionalisation of rights and liberties and the creation of a Constitutional Court. The constitution drafters were also particularly zealous in establishing an anti-corruption framework comprising several independent agencies, the most important ones being the Election Commission



(EC) and the National Counter-Corruption Commission (NCCC), as well as a Supreme Court's Special Division for Holders of Public Offices. In structuring and ordering these agencies, the Constitutional Court was dominant, with, for example, the findings of certain watchdog bodies requiring confirmation by the Constitutional Court before a decision had binding effect (see Harding and Leyland 2011, 162–163).

The 1997 CDC had divided its work into three parts: first, rights and liberties; second, checks and balances; and third, political institutions. The Constitutional Court was discussed in the second category. When the term “Constitutional Tribunal” was proposed, it was rejected as the idea was to have a court with wide powers of sanction.<sup>4</sup> The Constitutional Court was modelled after the German Constitutional Court.<sup>5</sup> In its final form, the Constitutional Court comprised 15 justices, with seven judges selected by the judiciary, and eight qualified people, from law and political science backgrounds, selected by a committee of political party representatives, judges and university deans. The Senate, fully elected but supposedly apolitical, had to choose the eight qualified people from a list of 16 names (Section 255 and 257, 1997 Constitution). It had wide-ranging powers of constitutional review. It could: (i) strike down legislation (both *ex ante* and *ex post*) and emergency decrees, rule on references from the courts as to constitutionality; (ii) impeach public office holders, consider qualifications to hold public office; (iii) rule on legality of elections and elections results, and control constitutionality of political party actions with possibility to order their dissolution; and (iv) hear disputes as to the competence of State organs (Harding and Leyland 2011, 165).

From inception, the Constitutional Court's actions were counter-majoritarian. Most of its rulings sanctioned political parties and politicians. Only a few human rights cases were handled by the Court in its first years of existence, and the rulings often failed to advance human rights.<sup>6</sup> The Court's main mandate was, in conjunction with the Senate, to act as a veto power on majoritarian politics whose outcomes were uncertain. Several factors point to the fact that it was envisioned as a regulatory body that would take over as “moral authority” from the aging king.

First of all, the relationship between the king and the judiciary was strengthened and constitutionalised. The 1997 Constitution-drafters enshrined the oath of allegiance of judges before the king in the Constitution. Article 252 states:

Before taking office, a judge shall make a solemn declaration before the King in the following words: I, do solemnly declare that I will be loyal to His Majesty the King and will faithfully perform my duties in the name of the King without any partiality in the interest of justice, of the people and of the public order of the Kingdom. I will also uphold and observe the democratic regime of government with the King as Head of the State, the Constitution of the Kingdom of Thailand and the law in every respect.

While oath-taking wasn't new, it was for the first time written in the 1997 Constitution. Whereas privy councillors and the cabinet also swear an oath of allegiance to the king, members of parliament swear an oath of allegiance to the Constitution. In fact, the wording of Article 252 reveals the 1997 constitution drafters' view of a hierarchy of norms: upholding the Constitution comes second to upholding the royalist customary practice (“the democratic regime of government with the King as Head of State”), while upholding the law ranks last. Fragile, chaotic and “evil” parliamentarians responsible for law-making were opposed to strong, stable and “good” king's judges



mandated to uphold the continuity of the Thai state embodied in royal customary practice. This view of a special link between the king and the judiciary is reinforced by the official practice of judges issuing their rulings “in the name of the King.”

Second, an initial attempt at institutionalising this role of the Constitutional Court as the “new king” was evidenced in debate over the 1997. The constitution drafters proposed an article whereby the Constitutional Court would be the prime interpreter of “customary practice,” with the first paragraph stating:

In the case where a situation arises for which there is no mention in the Constitution that a specific organ should give an opinion thereof or decide to act according to the customary practice of the democratic regime with the King as Head of State, the Constitutional Court is the body that shall issue an opinion and decide... (1st paragraph of Article 264, CDC minutes, June 24, 1997).

This proposed paragraph meant that whenever there is a political or constitutional crisis, “customary practice with the King as Head of State” takes over “regular” constitutional provisions; and the Constitutional Court is the body in charge of interpreting such practice. This article was to form the basis for the exercise of exceptional crisis powers. However, it was considered too restrictive. Some of the fears were that giving power to solve deadlocks to the Constitutional Court alone would leave the country in a deadlock in case the Constitutional Court would not take up the case or if the case was not forwarded to the Court. This proposed paragraph was consequently moved from the title on the Constitutional Court to the General Provisions title, the reference to the Constitutional Court was dropped, and it became Article 7 in the 1997 Constitution - based on previous experience of such article in the 1959 Constitution (Wisuth Phothithen, 2nd CDC meeting, Tuesday June 24, 1997).

Beside this proposed role as a king-like supreme arbitrator in times of crisis, the Constitutional Court was also to act as a supreme counter corruption agency. Those two roles played out in 2001 when the newly elected Thaksin was investigated by the National Counter-Corruption Commission (NCCC) for concealment of assets when deputy prime minister in 1997. The NCCC had indicted Thaksin in December 2000 for failing to declare business shares owned by him and his wife. The NCCC vote was a strong 8 to 1 to indict him. Such a ruling, if confirmed, would have seen him removed as prime minister. The ruling was challenged before the Constitutional Court. In April 2001 the Constitutional Court began two months of hearings on whether to uphold the NCCC ruling. Constitutional Court justices finally acquitted Thaksin in August 2001 on the argument that he committed an “honest mistake” (BBC News, August 3, 2001). One commentator wrote: “[T]he judges were torn between two competing interests: the need to get tough on corruption – one of the key aims of the 1997 constitution – and the importance of recognising the will of the people. Yesterday, democracy won” (World Socialist Web Site, August 7, 2001). Chumpol Na Songkhla, one of the judges who cleared Thaksin of wrongdoing later told journalists:

The reason I voted this way is because I saw how Thai people united to vote for the Thai Rak Thai Party, 11 million of them, this is the supreme voice of the people, who desired to have Thaksin as prime minister. How could the Constitutional Court, a bit more than ten people, force Thaksin out of office? On that day, if the Constitutional Court had ruled that he was guilty, do you know what would have happened? Have you seen the people who

massively came to support Thaksin ? Khlanarong [Chantik] had to sneak out of the Court by a back door! If the Court had forced Thaksin out of office, it would have been burnt down instantly. (*The Manager Online*, October 14, 2004)

This case marked the first occasion that the Constitutional Court had to deal with the competing demands of majoritarianism and good governance principles. This competition was to imprint political life for the next decade. However, there were other reasons that pushed the judges to exhibit judicial restraint and refuse to dismiss Thaksin in 2001.

Firstly, in the lead-up to the 2001 Court verdict on his concealment of assets, Thaksin and his supporters engaged in a campaign of court intimidation. Thaksin mobilised his supporters at the Constitutional Court to show his contempt for unelected justices, and the superiority of his own popular mandate over the mandate given to Constitutional Court justices by the Constitution, referring to his “16 million votes.” Secondly, Thaksin at that time, had the support of the Deep State. One of its agents, Prem Tinsulanonda, allegedly requested the Constitutional Court justices not to condemn Thaksin (see McCargo 2005, 513). At that time, Thaksin’s policies were likely considered as aligned with the interests of the Deep State. However, this support was lost over the following few years.

Strengthened by this show of support and by his parliamentary dominance, Thaksin began meddling with selection of the members of the independent organisations meant to provide checks and balances. Thaksin was alleged to have appointed allies in the 2001 appointment of a new batch of election commissioners, the 2003 appointment of NCCC commissioners, and the appointment of a new Constitutional Court President. The case of the NCCC later raising their own salaries, for which they resigned and were convicted, became a symbol of the failure of anti-corruption agencies (Wikileaks 2005). Thaksin also sought to control senior appointments to the judiciary and the military (see McCargo 2005, 513). The result was that Thaksin started losing the support from the Deep State as he was seen as attempting to control it. There developed a view that the 1997 Constitution had also failed.

The constitution drafters had envisioned a strong executive, but Thaksin’s power was too strong and challenged the prerogatives of the Deep State. The phrase “parliamentary dictatorship,” already used in the 1990s, was then revamped to attack Thaksin. Constitution drafter Somkid Lertpaithoon (2008, 18) concluded: “the problem of a parliamentary dictatorship in which the governing political party held absolute control in the Parliament to result in the legislative – executive checks and balances mechanism being skewed and thrown off the balance.” Another Thaksin opponent described the operation of “parliamentary dictatorship” and personalised it:

Through Machiavellian-style tactics, he [Thaksin] later forced the merger of coalition partners, both middle-size and smaller parties, with the TRT to form a uniform, single party in power.... In the 5 years during which the TRT led the one-party government, the Opposition was not even once able to open a House debate for a vote of no confidence against the Prime Minister.

## Phase 2: The king and judicial empowerment

In early 2006, the People’s Alliance for Democracy (PAD) drew massive support to oppose Thaksin’s “parliamentary dictatorship.” Thaksin dissolved the House on

February 24 and called for new elections on April 2, 2006. The polls were boycotted by the opposition Democrat Party, which supported PAD, and by other smaller parties. According to the law, in constituencies where only one party is running, this party must obtain support of at least 20% of the constituency's eligible voters. In many constituencies, TRT candidates ran alone, and did not gain the required 20%. As a result, the House could not reconvene within the prescribed 30 days and no new prime minister could be declared.

Given the precedents of the royal interventions in the 1973, 1976 and 1992, this crisis also resulted in calls from PAD and other royalists for the king, considered the "Supreme Arbitrator and Conciliator of the Nation," to intervene (see Bowornsak 2006). In 1973, the king had intervened to end demonstrations against a military regime and appointed a judge, Sanya Dhamasakti, as his preferred premier. In 1976, following a massacre of students at Thammasat University, the king appointed a palace favourite Tanin Kraivixien, also a judge, as prime minister. In 1992, after anti-military protests led to state repression, the king appointed another palace favourite, Anand Panyarachun, as his prime minister. In 2006, calls for a royally-appointed prime minister rose again. The PAD demanded royal intervention, invoking the Article 7 of the Constitution, which states: "Whenever no provision under this Constitution is applicable to any case, it shall be decided in accordance with the convention of the Constitution in the democratic regime of government with the King as head of State." The king refused, and replied:

I am very concerned that whenever a problem arises, people call for a royally appointed prime minister, which would not be democratic. If you cite Section 7 of the Constitution, it is an incorrect citation. Section 7 cannot be cited. Section 7 has only two lines which says that whenever no provision under this Constitution is applicable to any case, it shall be decided in accordance with the constitutional practice [in a democratic regime with the King as Head of State] But asking for a royally appointed prime minister is undemocratic. [I] affirm that Section 7 does not empower the King to do anything He wishes. (*The Nation*, April 26, 2006)

Although the king refused to intervene himself, he advised the courts to step in. This seemed to align with draft Article 264, discussed above. On April 25, 2006, the king held two separate audiences for judges of the Supreme Administrative Court and the Supreme Court. To the Administrative Court's judges he declared:

Your oath of allegiance is very important because it is broad. The duty of a judge relevant to administration is very broad. I should not talk this time, but I listened to someone talking about the election, especially the candidates who received less than 20 per cent of the votes. Besides, some of them were the sole candidates in their constituencies, which is critical. The sole candidatures cannot lead to full membership in the House, because a sole candidate must have support from at least 20 percent [of the voters]. Is this issue relevant to you? In fact, it should be. The issue of the sole candidacy elections is important because they will never fulfil the quorum. If the House is not filled by elected candidates, the democracy cannot function. If this is the case, the oaths you have just sworn in would be invalid. You have sworn to work for democracy. If you cannot do it, then you may have to resign. You must find ways to solve the problem. When referring the case to the Constitutional court, the court said it was not their jurisdiction.

The Constitutional court said they were in charge of drafting the Constitution and their job was finished after completing the draft. I ask you not to neglect democracy, because it is a system that enables the country to function.

Another point is whether it was right to dissolve the House and call for snap polls within 30 days. There was no debate about this. If it is not right, it must be corrected. Should the election be nullified? You have the right to say what is appropriate or not. (cited in Bowornsak 2006, 77)

These royal remarks were interpreted by many as a royal injunction to the courts to act quickly. A few days after this speech, the Constitutional Court ruled that:

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, i.e. from the scheduling of the elections, the application of candidates, the ballots, and the announcement of the election results. (Decision No. 9/2549 [2006] quoted by Bowornsak 2009, 32)

In overturning the power of the legislature and executive, this judicial intervention inspired by the king appears as a defining act in the judicialisation of Thailand's politics. According to Hirschl (2004), there are four conditions to judicial empowerment and judicialisation of politics: (i) election outcomes do not represent the elite's interests; (ii) election outcomes bring about possibilities of regime change/challenges the state ideology; (iii) some sort of political deadlock allows the courts to step in; and (iv) powerful political actors empower the courts.

In case of Thaksin and Thailand, it can be seen that these conditions for judicialisation were met: (i) Thaksin or his proxies have won each election since 2001, and the elite considered that this was likely to continue; (ii) these election outcomes challenged the Deep State as Thaksin attempted to bring the military and the bureaucracy under his control; he was seeking to take control of the Deep State; (iii) the 2006 deadlock allowed the courts to step in, as it did in 2014. Both deadlocks were created by the courts themselves; and (iv) the king directly empowered the justices to act as his proxies in the political crisis.

This unprecedented and extra-constitutional judicial empowerment was justified *a posteriori* by an appropriation of the notion of judicialisation. This legal discourse, counter-majoritarian in its essence yet modern and democratic in its character – as one of the latest developments of democratic constitutional thought in the West – suited the needs of the anti-Thaksin establishment. Thirayuth Boonmee, a prominent academic commentator, found the concept attractive as a Western and modern justification for anti-majoritarian views, and was the first to import it. He translated judicialisation as *tulakanphiwat* and used it to justify and explain the king's speech on April 25, 2006:

The royal speech whereby power to solve the crisis is delegated to the judges is a way of considering the courts as having a broad mission. The rationale behind what European countries call *judicialisation of politics* [in English] and what the United States of America call power of judicial review is for the judiciary to scrutinise the legislative process and the exercise of power by politicians in accordance with the 1997 Constitution. (Thirayuth 2006, 17)

Thus, Thirayuth imported judicialisation as a “progressive” concept, linked to a thick conception of democracy that advanced and consolidated democratic societies in the

West. He argued that the king's intervention marked Thailand's "... first step toward judicialisation through the Constitutional Court and the Administrative Court..." proclaiming:

According to political theory, how do we understand this royal recommendation? According to the Constitution, as a Head of State, when there is a crisis, the king has the legitimacy to make recommendations to one of the three powers to act in order to solve the crisis. As the chief of the judiciary composed of three courts, which hold meetings to issue recommendations to other agencies such as the Election Commission of Thailand ..., he has legitimacy [to do so].

Those who accepted this view considered the king as acting democratically and constitutionally. His intervention was construed as an act of "good governance," whereby "good governance" involves decisions by "good people" who are seen to be "above politics." Moral values incorporated in the "good governance" concept were found to fit moral values promoted by the king as the key figure in what Bowornsak (2006, 25) identified as the "morality of the society." He added:

When carefully analysed, the royal discourses and speeches provide guidance on what each person should do or refrain from doing, in performing his or her duties as well as on personal behavior of a good citizen. The king stresses in particular honesty, integrity, truthfulness, morality and ethics.

As already mentioned, part of the motivation behind the drafting of the 1997 Constitution was to relieve the king of some of its prerogatives by passing his *de facto* veto powers onto courts. The reputation of the judiciary as a neutral institution of "good people" encouraged the transfer of royal charisma, based on moral virtue, to the courts.

Here, the courts had destabilised Thaksin through annulment of the 2006 elections without the prospect of an upcoming election. However, after some hesitation, Thaksin, refused to resign. New elections were planned for October 2006 and it seemed to many that they would return a strong majority in favour of Thaksin. Finally, the military had to "help" and give the final death blow to the government. The military *coup* of September 19, 2006 was staged. The Constitution was repealed and a short interim Constitution invoked. All independent agencies and the Constitutional Court were dissolved. However, in the case of the Court, a new Constitutional tribunal composed of career judges was created. All this was done within one day.

In the first few days following the *coup*, the junta also issued two announcements that would propel judicial empowerment to a new level. In one, the junta created the Assets Examination Committee, which would take pending cases related to Thaksin and his family from the criminal courts and investigate them. Meanwhile, junta Announcement 27 increased the penalty for electoral fraud: political parties whose members were found guilty of electoral fraud would not only be dissolved as under the 1997 Constitution, but the members of the executive committee would also be banned from politics for five years. Announcement 27 later became Article 237 of the 2007 Constitution, giving the Constitutional Court power to impose a 5-year ban on all members of parties' executive committees when ordering a dissolution of a political party. This article would become one of the pillars of the practice of judicialisation under the 2007 Constitution.

The first objective of this announcement was to serve as a basis for the dissolution of the TRT. And indeed, on May 30, 2007, the renamed Constitutional Tribunal ordered the dissolution of TRT and revoked the electoral rights of its executives for a period of five years by a six to nine vote. A month before the ruling, the king, in its April 9, 2007 speech to judges, stressed the importance of cracking down on corruption and that judges were directly mandated by him to exert this prerogative: <sup>7</sup>

You have sworn an oath of allegiance, according to which you must perform your duty in my name. If you do it right, I'll get the favour of your work performed in the public interest. If you don't do it right, I'll be dishonoured.... If there is no justice, it means people can cheat and do wrong, and if the courts do not perform their duty to support good people, the country will not survive.

This proximity between the institution of the judiciary and the monarchy as established in the 1997 Constitution was further enshrined in the 2007 Constitution. The royally-sponsored "good people"/anti-election/corruption narrative became its major underpinning. Judges were to be involved in the selection and appointment of the Senate. The genesis of the 2007 Constitution is well summarised in the words of judge and one of its drafters, Vicha Mahakun:

We all know elections are evil, but [why do] many people still want to see history repeated? People, especially academics who want to see the constitution lead to genuine democracy, are naive... Electing senators is a problem, as seen in the past, so why don't people want judges to help select senators? ... I would like to recall HM the King's speech here. On April 9, His Majesty told the judges to perform their duties firmly and without caring what others might say. His Majesty said if the courts did not support good people, society could not survive. His Majesty said it was most imperative [for judges] to ensure justice.... Even HM the King places trust in the judges; would you condemn them? (cited at Bangkok Pundit 2007)

During the 2007 Constitution-drafting process, Vicha made the argument that the judicialisation of politics was an internationally-recognised response to "evil politics" and "corruption." He quoted the judicialisation of politics in France, Italy and Spain: "The word 'judicialisation' emerged in 1980 in Europe, notably in Italy, Spain, and France, when it appeared that politics was evil and created nothing but confusion for their countries." (Constitution-Drafting Assembly, 16th session (special session), Thursday April 30, 2007). The failure of the 1997 Constitution was also a failure of the Senate. Under the 1997 Constitution, the Senate was fully elected but was designed to be an apolitical or neutral "house of wise men" meant to be to counter "evil politicians." The idea of having efficient checks and balances in the work of constitutional organisations rested entirely on this vision for the Senate. It was allocated the power to nominate, select, appoint and impeach members of independent organisations. Hence, the Senate had 200 members, elected on a first-past-the-post ballot in the 76 provinces of Thailand, with members prohibited from political party membership and electoral campaigning. The result of the 2000 senatorial election and its actions under the Thaksin government, however, defeated these intentions. In the eyes of its architects, the Senate had failed.

It was for this reason that the 2007 Constitution drafters made the Senate a half-appointed, half-elected 150-member body, while retaining most of the powers granted



to it by the 1997 Constitution. Accordingly, 74 Senators were to be appointed by a seven-member Committee, and 76 elected in each province. Under Section 113 of the 2007 Constitution, the seven-member selection committee, ostensibly “non-political,” comprised the presidents of the Constitutional Court, the NCCC, the Ombudsmen, the EC, the State Audit Commission, a judge from the Supreme Court and a judge from the Supreme Administrative Court. The point of a half-appointed Senate was to ensure that the members of independent organisations and the Constitutional Court were “insulated” from political interference. As a result, it created a class of privileged members of parliament accountable only to the Deep State. It created a kind of “State nobility” that reproduced itself - and that is how the Deep State works.

### Phase 3: Rise and fall of judicialisation

The 2007 Constitution drafters, sympathetic to the idea of the “judicialisation of politics,” and following the 2006 king’s injunction and the ideas of royalist academic Thirayuth, intended to give the judiciary the means to act in ways that effectively took on the king’s role as supreme arbitrator; they intended to give judges royal powers in times of crisis. In a document outlining the objectives of the Constitution distributed by the Constitution-Drafting Committee to Constitution-Drafting Assembly members, it was stated: “Do not let a government which was dismissed act as interim government.” Instead, it was provided that “the Constitutional Court President, the President of the Supreme Court and the Supreme Administrative Court choose a special interim cabinet, which should be comprised of people with experience in administration” (Constitution Drafting Committee, Summary of CDC opinions regarding political institutions submitted to CDA, March 19, 2007, Parliament Secretariat, point 5.3: 21).

This proposal was translated into the fourth paragraph of Article 68 in the constitution, softening the draft version, from giving judges the authority to select a cabinet to giving judges the mandate to “meet” to “consider ways to solve the problem.” The final version also added representatives from the political branch. In the draft version of the 2007 Constitution, Article 68 read:

If there is a national crisis or a political situation where it is necessary, there shall be a meeting of the following: the Prime Minister, President of House of Representatives, President of the Senate, Leader of the Opposition, President of the Constitution Court, President of the Supreme Court, President of the Supreme Administrative Court, and President(s) of Independent Agencies under the Constitution, to consider ways to solve the problem. (Draft of the 2007 Constitution, public hearings version submitted for public hearings in April 2007, Article 68 para. 4)

This paragraph was later withdrawn under popular pressure (Manager online, May 9, 2007). Even so, in its actions following the implementation of the 2007 Constitution, the intent of the paragraph and even its earlier version came to be implemented from 2008 onwards.<sup>8</sup>

The most emblematic decision of this period is the 2008 dissolution of the ruling People’s Power Party (PPP) which threw out this elected government and which allowed the opposition Democrat Party to form a government. In the first half of 2008, the yellow-shirts occupied Government House for 190 days, forcing the



government to relocate. As leader of the pro-Thaksin PPP, Samak Sundaravej, was elected in December 2007, the first election that took place after the 2006 *coup*. He was later forced to resign as the Constitutional Court ruled that his activity of holding a cooking show on TV was unconstitutional (Decision DC 12-13/2551, September 9, 2008). He was replaced as prime minister by Somchai Wongsawat. By the end of 2008, the PAD moved to occupy the Bangkok's international and domestic airports, creating a major crisis. In December, the Constitutional Court dissolved the PPP (Decision DC 20/2551, December 2, 2008). MPs had to join other parties or lose their status, with 32 PPP MPs switching to the Bhumjaithai Party formed by former Thaksin ally Newin Chidchob. Newin's MPs switched sides and voted for Democrat Party leader Abhisit Vejjajiva to become prime minister through a parliamentary vote. The PPP called this event a "judicial *coup*," while the PAD and the Democrat Party declared victory.

Thus, the "airport crisis" – declared a national crisis – was resolved by the Constitutional Court dismissing the elected government and creating an alternative without requiring another election. Constitutional Court judge Wasan Soypisuth explained the Court's reasoning:

If the country at that time had been peaceful, the government and the opposition could have joined hands, the country could have moved forward, and I believe most of the judges would have decided not to dissolve the parties.... But the country at that time was chaotic and the Constitution Court had to use its judgement to maintain law and order. (quoted in *The Nation*, March 16, 2013)

If judicial activism against parties and politicians developed from 2006 to solve "crisis," then it was practiced as politically-biased activism. Although the TRT/PPP was dissolved twice by the Constitutional Court following EC's resolutions (in 2007 and 2008), the Democrat Party escaped this fate following an EC request in 2010 (Decision DC 16/2553). Such decisions were identified as double standards, and this view was reinforced when the Constitutional Court found the 2010 red shirt protests illegal (Decision DC 10-11/2553), while other courts found royalist protests in 2014 legal (Bangkok Civil Court, case 275/2557). Likewise, although Democrat Party revisions to the Constitution in 2009 were permitted, those proposed by pro-Thaksin parties were struck down by two Constitutional Court rulings in 2012 and 2013 (Order 29/2555; Decision 15-18/2556).

The Constitutional Court's decisions to prohibit constitutional revision are further illustrative of its politicisation. In 2012, the newly-elected government, with Yingluck Shinawatra at the head of the Pheu Thai Party, sought to amend Article 291 of the 2007 Constitution to pave the way for the election of a Constitution drafting assembly. In June 2012, the Constitutional Court directly accepted individual petitions contesting the legality of this attempt, based on Article 68 of the Constitution, whose intention was to sanction attempts to overthrow democracy. It states:

No person shall exercise the rights and liberties prescribed in the Constitution to overthrow the democratic regime of government with the King as Head of State under this Constitution or to acquire the power to rule the country by any means which is not in accordance with the modes provided in this Constitution.

In the case where a person or a political party has committed the act under paragraph one, the person knowing of such act shall have the right to request the Prosecutor-General to investigate its facts and submit a motion to the Constitutional Court for ordering cessation of such act without, however, prejudice to the institution of a criminal action against such person.

The complaints were made directly to the Court, not filtered by the Prosecutor-General as prescribed by the above paragraph.<sup>9</sup> In fact, the Prosecutor-General declared that it would not have forwarded the complaint to the Constitutional Court as the amendments were legal (*The Nation*, June 8, 2012; see also *Bangkok Pundit*, June 8, 2012). The Court accepted the case for consideration but was later dismissed on grounds of insufficient supporting evidence (Decision 17-22/2555, July 13, 2012). This dismissal did not alter the strong signal sent by the acceptance of the case. Politicians were on notice about the extent to which they could manoeuvre (or rather, not manoeuvre) when dealing with the 2007 Constitution.

In the *obiter dictum* of the judgement (being a general recommendation annexed to the judgement but not considered to be binding), the Court recommended that the parliament amend the Constitution article by article or organise a referendum. The government bowed to the Court and decided to proceed article by article, beginning with three articles: Article 190 about parliamentary approval for signature of treaties; Article 113 about the recruitment of senators; and Article 68 itself. For the latter, the constitutional revision consisted merely of a rewording so that no ambiguity could remain as to whether or not the Prosecutor-General had to screen complaints filed by individuals before submitting them to the Constitutional Court.

These three attempts were challenged before the Court on the basis of Article 68. In May 2013, the Constitutional Court decided, on a 5-4 vote, to consider petitions against the amendments based on Article 68 (Press release 33/2556, May 13, 2013). On November 20 2013, the Court ruled that amendment to Article 113, making the Senate fully-elected was an attempt to overthrow democracy (Decision 15-18/2556). Considering a constitutional revision attempt to make the Senate a fully elected body, the Constitutional Court quoted the danger of “parliamentary dictatorship.” In doing so, the Constitutional Court blocked any future attempts at revising the Constitution. The Court became the guardian of the “un-revisable” character of the 2007 Constitution and a key defendant of the anti-electoral spirit of the 2007 Constitution. Some parliamentarians who had voted in favour of the move were later charged of “abuse of power” by the National Anti-Corruption Commission (*The Nation*, January 8, 2014).

Thus, Article 68 was interpreted by judges in such a way that it gave the Constitutional Court a veto power over what constitutes the sovereign act of constitutional revision. Claiming that the “democratic regime of government with the King as Head of State” was at risk, the Constitutional Court expanded its power to veto constitutional amendments. The use of a “state of emergency” to create a parallelism while retaining apparent adherence to democratic principles is a common means of Deep State action, in democracies and authoritarian regimes alike, as explained by Tunander (2009, 56):

In fact, this parallel security structure, ... what some would call the “deep state,” is the very apparatus that defines when and whether a “state of emergency” will emerge. This aspect

of the state is what Carl Schmitt in his work *Politische Theologie* from 1922 qualifies as the “sovereign.”

The most “innovative” legal creation of the Constitutional Court is the usurpation of derived constituent power in the case of constitutional revision. According to constitutional theory, if Constitutional Court judges are the guardians of the constitutional order, they cannot interfere with constitutional revision by the constituent power except with regards to “eternity clauses” (constitutional clauses not subject to revision, such as the form of the state and the political regime).<sup>10</sup>

The 2012 move initiated with the proposed revision of Article 68 can be analysed in two ways, yet both converging to the same conclusion. Either the “democratic regime with the king as Head of State” is an eternity clause and the existence of an unelected body of experts to appoint judicial and political institutions including the Senate is a constitutive element of such regime; or, there is no eternity clause and the Constitutional Court vetoed the substance of constitutional revisions, exerting de facto sovereign power by invoking royalist customary law. Either way, the Deep State proves its sovereignty and preserves its hegemony and the political order.

## Conclusion

The 2007 Constitution, with the king’s support, attempted to institutionalise the Deep State in the democratic order by means of the process of judicialisation which was to rest in the hands of a restricted circle of actors whose interests are to work toward “elite hegemonic preservation” (Hirschl 2004). It attempted to constitutionalise a Deep State relying mainly on judges in the independent organisations and the Constitutional Court, institutions seen as more democratic than the military whose publicly known relationship to the monarchy was found to have tarnished the latter.

Like “democratic” military *coups d’etat*, Constitutional Court political rulings have been made in the name of the Rule of Law in the midst of crisis. Most Constitutional Court political decisions have been made on the basis of political opportunity rather than legality. They have always been issued against the government in the context of heavy anti-government protests to which they have brought at best a “victory,” at least a “solution.”

The Deep State tried to constitutionalise the king’s role through the Constitutional Court to give it a more liberal, more sustainable and less Bhumipol-dependent aspect. In the past, the Deep State had two ways of exerting sovereign power: through direct intervention of the king (as in 1973, 1976 and 1992) and through the military. The process of democratisation launched at the end of 1992 discredited both. Acknowledging this and preparing for the end of the reign, the Deep State tried to institutionalise itself by resorting to the judges, as a surrogate king’s power. It seemed that constitution drafters in both 1997 and 2007 were actually seeking ways to make judges “above” politics and install them in a situation of “revered worship” close to that of the king by emphasising the relationship between the king and the judges and giving judges “special powers to solve crisis” such as the power to appoint a prime minister in case of crisis and the power to devise solutions for the country in case of crisis. Both have previously been considered royal prerogatives according with constitutional

practice under King Bhumibol. Thus, in both constitution drafting processes, there were attempts to transfer those powers to the Constitutional Court and its judges. The first draft of Article 68 did not make it into the 2007 Constitution nor did the first draft of Article 264 in the 1997 Constitution. However, following the king's April 2006 speech, for all practical and political purposes, this transfer happened.

In the end, in the post-1992 environment, if the Deep State could exert its sovereign power through the Constitutional Court as seen in the overthrow of an elected government in 2008 and in preventing constitutional revision in 2012, it still needed military intervention to fully see off challenges to the political order, with *coups* in 2006 and 2014. The sole reliance on the Constitutional Court (and the half-appointed Senate), as envisioned by the 2007 constitution drafters, proved insufficient to maintain the Deep State hegemony. This endeavour shows that succession continues to haunt the Deep State. It continues to feel threatened that relying on the charisma of the next king alone will not be sufficient to ensure the survival of the political order. The hegemony of the Deep State is still insufficiently institutionalised.

The analysis of judicialisation provided in this article fits the framework provided by Hirschl's theory of judicial empowerment as "self-interested hegemonic preservation strategy." In the Thai case, the phenomenon of judicialisation must be understood as a desperate attempt to institutionalise the Deep State to protect it from the challenges of both democratisation and royal succession. The 2014 military *coup* proved that this attempt is still a work in process.

## Notes

1. For a linked discussion, see Chambers and Napisa Waitoolkiat (2016).
2. In this reign, a *coup* is seen as completed when *coup*-makers are granted an audience with the king, and/or when the king has signed the Constitution, and/or when he has endorsed the new government. Likewise, the judiciary has notoriously created a jurisprudence whereby *coups d'état* were always legally valid once successful (see Somchai 2013).
3. Bowornsak Uwanno was Constitution Drafting Committee (CDC) Secretary-General and Komet Khwanmuang was CDC rapporteur on the Constitutional Court. See Minutes of the 1997 CDC, KPI database, especially CDC meeting on February 11, 1997 (Proposition of a Constitutional Court design for Thailand by Komet Khwanmuang, followed by a discussion on the Constitutional Court featuring numerous interventions by CDC Secretary-General Bowornsak).
4. Bowornsak Uwanno and Phongthep Thepkanchana strongly rejected the idea of a "Constitutional Tribunal" in the 11 February 1997 CDC meeting on the Constitutional Court. See *Raingan kan prachum kana khammatikan yok rang rattathamanoon wan angkhan thi 11 kumphaphan 2540* [Report on the CDC meeting on Tuesday February 11, 1997].
5. Kamonchai Rattanasakawong, mandated by the DDC to propose a model of Constitutional Court for Thailand, studied four foreign Constitutional Courts: Italy, Germany, Austria and France. At the end of his study, he proposed a model of Constitutional Court modeled after the German Constitutional Court (see Kamonchai 1995).
6. In a famous case, the Constitutional Court ruled that a section of the law on Judicial Officials prohibiting people with physical disabilities from taking the examination to become a judge was not in breach of the Article 30 of the Constitution, which prohibits

discrimination on the basis of physical or health conditions. The ruling was overturned by the 2012 decision of the Constitutional Court 15/2555.

7. The speech is available at: <http://www.oknation.net/blog/print.php?id=20345> (accessed December 31, 2015).
8. The 2007 Constitutional Court was not fundamentally more powerful than its 1997 predecessor; it had the same prerogatives but with a reduced number of justices. The only differences were that the 2007 Court could no longer propose constitutional amendments, but it could now hear individual petitions from individuals alleging a violation of their rights (Article 212). Also, it had wide-ranging powers of appointment.
9. Both article 63 of the 1997 Constitution and article 68 of the 2007 Constitution did not allow complaints to be filed directly with the Court. The Constitutional Court had rejected direct complaints in its first years of existence. In 2006, Surapong Tovichakchaikul had filed a petition asking the Constitution Court to order the Democrat Party dissolution under Article 63 that became article 68 of the 2007 Constitution. The Constitutional letter replied in a formal letter that the complaint had to pass the Prosecutor-General first. For more details see Bangkok Pundit, "Why has the Thai Constitution Court changed its interpretation of the law?" June 13, 2012, <http://asiancorrespondent.com/84027/why-has-the-thai-constitution-court-changed-its-interpretation-of-the-law/> (accessed December 12, 2013).
10. The literature on this topic is well-established (see Klein and Sajo 2012).

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