

William J. Jones & Douglas Rhein

## HEGEMONIC PRESERVATION AND THAILAND'S CONSTITUTIONAL CRISIS

*William J. Jones*  
Mahidol University  
International College, Thailand  
[william.jon@mahidol.ac.th](mailto:william.jon@mahidol.ac.th)  
*Douglas Rhein*  
Mahidol University  
International College, Thailand  
[douglas.rhe@mahidol.ac.th](mailto:douglas.rhe@mahidol.ac.th)

### ABSTRACT

*Thailand has been engulfed in a prolonged political crisis since the ouster of former Prime Minister Thaksin Shinawatra in 2006. At the center of this political crisis is a conflict between the country's elites which, according to popular discourse, involves the core of Thailand's major political, cultural and social institutions. The rise of former Prime Minister Thaksin Shinawatra can be traced back to the 1997 liberal 'peoples' constitution which was the culmination of reform stemming from the bloodletting of the 1992 'Bloody May' military crackdown, itself a correlate of the 1991 military coup. After Thaksin's ouster the military junta and its installed government promulgated a new constitution in 2007 by means of a highly controversial referendum. The 2007 constitution created and strengthened a constellation of independent institutions, a semi-appointed Senate and has since seen the rise of activism and politicization of the aforementioned. This paper argues that Hirschl's hegemonic preservation thesis offers a powerful tool for understanding and analyzing the current political crisis and gridlock whilst providing insight into the 'failure' of the 2007 Constitution as well as method for understanding the future of Thai politics and Thai Constitutionalism writ large.*

### KEYWORDS

- *Thailand politics*
- *Thai politics*
- *Constitutionalism*
- *Constitutionalization*
- *Political conflict*

### 1. Introduction

Thailand's ongoing political deadlock began after the ousting of populist former Prime Minister Thaksin Shinawatra in a military coup on September 19<sup>th</sup>, 2006. Over the subsequent 10 years since the 2006 coup, Thailand has had six Prime Ministers and five changes of government without elections. Since the 2006 coup, the cyclical nature of street protests, political movements and countermovements, undemocratic reform proposals and return to power by popular democratic mandate of Thaksin led political parties demonstrates that Thailand's body politic is in the midst of fast moving change. This has led to an unprecedented social division between 'traditional' democratic guidance and the newfound democratic voice of a historically marginalized majority. At the center of the current political crisis is the specter of the 1997 'People's Constitution' which was a tool that allowed Thaksin Shinawatra's hegemony and was the principal basis for the 2007 Constitution. This paper argues

that a constellation of independent institutions operating under the legal provision of the 2007 Constitution, with the Senate as a lynchpin, constitute a closed loop system of institutional power which acts as a mechanism for traditional conservative elites to counter democratically elected governments. To defend this assertion, the authors will use Hirschl's 'hegemonic preservation' model and focus primarily on the institutional setup and interplay of independent institutions created by the 2007 Thai Constitution.

## 2. Hegemonic Preservation and Thailand

Constitutionalization pertains to the normative and institutional aspects of embedding legal functions and actions of subjects, (bound to) to a nation's constitution. This inherently presupposes that constitutional law (the highest in the hierarchy of laws) be concerned with "legal and theoretical foundations of a particular kind of political order" (Whittington al: 2008, p.8). Important to this conceptualization is that political and social institutions, courts and their decisions are part and parcel derived from a legitimate basis of legal text, namely a constitution and its attendant framework that seeks to objectify and organize a nation's legal rules with its subjects. As such, constitutionalization is subject to a nation's politics and political order.

Hegemonic preservation diverges from constitutional scholarship by engaging constitutionalization and legal frameworks from a perspective of political input rather than legal output of case decisions. Hirschl argues that constitutions emanate from political choices of elite actors which helps to explain the political origins of institutional constellations and judicial empowerment via constitutionalization of rights (Hirschl: 2000, 2001, 2004a, 2004b, 2004c, 2006, 2008a, 2008b). The trigger point for recourse to "constitutional fortification of rights may provide an efficient institutional path for hegemonic socio-political forces to preserve their hegemony and to secure their policy preferences even when majoritarian decision-making processes are not operating to their advantage" (Hirschl: 2000, p. 95). He terms this a 'thick' interpretation of law as it incorporates the strategic interplay among socio-political actors within the larger socio-cultural context which gives rise to specific constellations of constitutionalism and their outgrowth of institutions. Implicit in Hirschl's understanding is that the 'thin' version of constitutionalism is based on a legal text and the end product of enforcement or institutional setting is not enough to explain the increasing reversion to judicial mechanisms for the imposition of order and/or law. The focal point of hegemonic preservation is the use of constitutionalism and the judiciary to eliminate and/or obviate threats to specific groups of elites who perceive threats to their power and/or their power waning within a historical predisposed context (Shambayati, Kirdiş: 2009). Put simply, elites losing power or perceiving a threat to their traditional power, be it social, political, economic, cultural or a combination therein, trigger constitutionalization and a reversion to 'rule of law' and the use of legal institutions in order to stem the threat. This is based on constitutions and the strategic use of the judiciary for power maintenance. The use of rule of law in this context does not denote a firm adherence to law but, at least in superficial form, the socio-political usage of the neutral phraseology for legitimacy purposes. The principled understanding is that the use of law will allow for power maintenance inside controllable institutions

rather than a reversion to extralegal actions outside the remit of official controls. However, abusive use of the law undermines the perceived neutrality and legitimacy of constitutional institutions. An interesting caveat of Hirschl's examination is the usage of a separation of powers via constitutional independence to provide legitimacy for institutions which act as a checks and balances system in order to insulate threatened elites from majoritarian decision-making and policy authority derived (primarily) through democratic mandates (Báli: 2013), (El-Ghobashy: 2008), (Isiksel: 2013), (Kahler: 2000), (Moustafa: 2003), (Shambayati: 2008), (Shambayati, Kirdiş: 2009). Hirschl argues that judicial empowerment through constitutionalization can be seen as a form of 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 and constitutional entrenchment of rights and judicial review in order to transfer power to supreme courts" (Hirschl 2004a: p.12).*

Hirschl considers three main groups which engage in constitutionalization via strategic interplay and/or vested interests of particular actors: "threatened political elites, economic elites and judicial elites seeking to enhance their political influence" (Hirschl 2004b: p. 90). The purposes of constitutionalization are to shield and support policy preferences of threatened elites against emerging 'peripheral' power players and underrepresented actors. Of critical importance is the normative content and purpose of constitutionalization under hegemonic preservation which Hirschl sees as being led by:

*"elites, urban intelligentsia, the legal profession, and the managerial class [which] represent historically hegemonic enclaves of political and economic power holders. Interest-based empowerment is likely to occur when the judiciary's public reputation for professionalism, political impartiality, and rectitude is relatively high; when judicial appointments are controlled to a large extent by hegemonic political elites; and when the courts' constitutional jurisprudence predictably mirrors the cultural propensities and policy preferences of these hegemonic elites" (Hirschl 2004b: p.91).*

Firstly, hegemonic preservation within the context of Thailand's political conflict will assume a few nuances. A high degree of political contestation is present. As such, it is not assumed that a hegemonic group is guarding its power. Rather, this group is using constitutionalization as a defensive mechanism to regain or retain its power which has continuously eroded since the election of Thaksin Shinawatra in 2001. Hegemonic preservation is not so much about retaining power against threatening groups as it is about increasing and reinstating traditional power that has eroded. Secondly, Thailand's political economy is not so clearly delineated as to consider economic, political and social elites as distinct groups separate from one another. In particular, when one considers the 'network monarchy' (see Handley: 2006 and McCargo: 2005) these distinctions are not only blurred but can be collapsed into one another. Conversely, when one

considers the opposing power center of Thaksin Shinawatra, a clear distinction cannot be made as economic power is fused with political and social realms of power. To be more precise, the authors consider “threatened elites” within the context of McCargo’s (2005) context of ‘network monarchy’ which includes but is not solely limited to the royal institution, military, Bangkok business elites, the Democrat party and upper class conservatives.

Hirschl (2004a) identifies four necessary conditions for the reversion to judicial empowerment: 1. Election outcomes do not represent the elite’s interests; 2. Election outcomes bring about possibilities of regime change/challenges to the state ideology; 3. Some sort of political deadlock allows the courts to step in; and 4. Powerful political actors empower the courts. Mérieau (2016) has correctly identified that these conditions were met in the following: 1. Thaksin and proxy parties have won every election since 2001 with every reasonable prediction that they would continue to win; 2. Election outcomes threatened to undermine traditional elites control of the bureaucracy and dominant state ideology; 3. Politically generated deadlocks allowed the courts to assert themselves in 2006, 2008, 2014, 2015 and lastly 2017; 4. Powerful political actors have continually empowered the courts. With this in mind, the authors take the position that institutional contestation for appointment of persons to independent constitutional bodies and control of constitutional interpretation and crafting is of paramount consideration for the preservation of power. As such, the legal realm of constitutionalism comes to the fore as a mechanism for control and a center for political conflict.

Given the enhanced and strikingly pro-active stances that Thailand’s constitutional independent organizations have taken since 2006, with the dismissal and jailing of the Electoral Commission of Thailand, to the disbanding of consecutive pro-Thaksin political parties and disenfranchisement of multiple pro-Thaksin Prime Ministers, to the judicial rulings on government policy, legislation and decrees, it goes without question that these organizations are both challenging electoral politics and the executive and legislative branches of government. The authors argue in the following sections that the primary reason for these challenges lays (or can be found) in Thailand’s conservative establishment which seeks to undermine the threatening power of Thaksin Shinawatra and his family. This influence is derived from unprecedented electoral success and seeks to protect the ‘network monarchy’ from majoritarian politics which can no longer be controlled via traditional methods thus the reversion to undemocratic politics of institutional subversion by the use of law. This network monarchy serves to denote elements of the military, namely the hegemonic ‘Eastern Tigers’ of the Queens Guard, the traditional social elites, the economic elites centered in the capital of Bangkok and the Privy Council.

Current scholarship on Thailand’s constitutionalism centers on politicization of the judiciary with a focus on court cases and the historical process of politicizing legal institutions (Dressel: 2009, 2010a, 2010b), (Dressel, Mietzner: 2012), (Ginsburg: 2009), military influence and political figures (Chambers: 2010, 2013), (Phongpaichit, Baker: 2009). Dressel (2012) argues that hegemonic preservation offers promise in explaining the larger context of Thailand’s judicial problems, yet there is a lack of inquiry using this tool which seeks to inclusively incorporate institutionalization

and context of elite preservation through politics and law. Judicial politicization is a powerful analytical tool to peer into court decisions and the underlying logic of judicial decisions. However, this tool does not allow for a broader analysis which is political in origin, but is restrictive in the end product of court decisions. Current scholarship on Thailand's political conflict uses different units of analytic frameworks that help to answer some important piecemeal questions, but fall short of providing a compelling larger picture. Walker (2012) considers Thaksin's policies to have empowered and made Thailand's rural peasant population self-aware, which has put Bangkok elites on the defensive. Ünalı (2014) considers the 2010 red shirt protests and anti-monarchy graffiti as powerful symbols of a spontaneous outburst of a politicized underclass that has increasingly gained insight into the powers that are obstructing their political voices. The political conflict strain of inquiry assumes, perhaps unintentionally, a grass roots political awakening that is taking on spontaneity and a life of its own which embodies, to the authors' point of view, far too much agency on the part of individuals. This is borne out by the lack of resistance after the 2014 coup when Thaksin and his allies effectively demobilized the red shirt movement due their own concerns of political retribution. If the political conflict strain was correct, logic would dictate a continued localized grass roots resistance regardless of top down funding and organizing. This is simply not the case in Thailand's body politic and the claim of extreme agency flies in the face of the political sociology of Thailand. Marshall (2014) considers the primary source of Thailand's instability to be centered solely on contestation over royal succession. Marshall's claim carries weight in the context of succession being an issue due to the centrality of the royal institution within the network monarchy. However, the claim that all political conflict boils down to elite fears of royal succession is reductive in that it does not allow for an analytical framework outside of contestation for the role of the King while generalizing the "elites" influence to nameless persons and vague institutions. Furthermore, it assumes that the King is all powerful in managing this network monarchy without giving proper regard to institutions and powerful actors within a constellation of institutions to engender challenges to traditional power centers. While these authors provide valuable insights into Thailand's conflict emergence, generators and expressions, they fail to answer two primary questions: 1. how the supposed great divide of Thailand's body politic is being managed institutionally in a continuous and oblique manner; and 2. who is involved in this continuing process and how do they relate within a larger ecosphere of different power centers and actors.

We believe that hegemonic preservation allows for analyzing Thai politics from a perspective that bridges units of analysis of the individual, group and institutional levels. This provides a richer descriptive frame for understanding the larger mechanisms of power and conflicts in Thailand's body politic. By considering the macro framework of legal constitutionalism within the context of multi-branch institutional networks, this paper seeks to offer a pathway that 'connects the dots' for a greater understanding of the inner workings and personalities at work that have successfully undermined civilian elected governments sympathetic to Thaksin Shinawatra. This article also seeks to address this gap in scholarship and modestly provide an extrapolation for future research. Given the context of post-coup constitutional drafting and the outcome

of which is now known, hegemonic preservation is an ideal method to demonstrate how traditional elites are using constitutionalization to fundamentally roll back civilian politics of the previous two decades. The most glaring example of this is the interim charter's insistence that independent bodies can challenge government policies based on financial criteria that 'endanger' the financial stability of the country. The methodology of hegemonic preservation provides for a rich explanation of the political origins of the 2007 constitution as well as a deeper understanding of how constitutional organs are shaping the political landscape against majoritarian democracy. It does so by exploring the origins of constitutions as well as the people and groups inside constitutional institutions and their decisions to provide a descriptive reading of why and how Thailand has reached this point while also providing a glimpse into what will transpire with the coming 'permanent' constitution.

### 3. Background to Thailand's Political Crisis

Thaksin's removal via a military coup was the crescendo of an intense political standoff that found its roots in ex-Thaksin supporter Sondhi Limthongkul personally leading protests and taking his Channel 9 television show mobile after it was cancelled due to personal conflicts between Thaksin Shinawatra, Sondhi Limthongkul, and Paiboon Damrongchaitham in September, 2005 (Nelson: 2005). These mobile, single man protests continued building and finding wider bases of support until eventually attracting thousands of viewers. This can be perceived rightly as the incubator that would later turn into the full blown political force that removed Thailand's most successful Prime Minister. However, these protests, while attracting thousands, did not achieve critical mass until the sale of Shinawatra's Shin Corporation to Temasek Holdings of Singapore. The sale of Shin Corporation was the trigger that enflamed and galvanized many sectors of Thai society and truly gave Sondhi's movement wider appeal (Sajid et al.: 2009), (Nelson: 2007a). The Shin Corp sale was the critical juncture that united personal crusade with wider social outrage due to the \$1.8 billion tax free business transaction, leading to the creation of the People's Alliance for Democracy as it came to be known in February, 2006 (Nelson: 2007a), (Nelson: 2007b).

With increasing street protests and allegations of disloyalty to the monarchy, Thaksin called for a snap election in April 2006 just one year after having won a landslide parliamentary victory [19 million Thai Rak Thai votes opposed to second place Democrat 9 million] (ANFREL: 2005), (Croissant, Pojar: 2005), (Nelson: 2006), (Nogsuan: 2005), (Ueranantasun: 2012). With pressure to hold off this election until political reform could take place, Thaksin instead went ahead with elections to solidify a majoritarian mandate by popular referendum which precipitated a boycott of the elections by Thailand's main opposition parties; namely the Democrats and Chart Thai. This created a constitutional crisis as the necessary 20% vote threshold could not be met in order to seat a quorum in parliament (Nelson: 2006). Adding to the crisis was the Electoral Commission of Thailand's investigations into alleged irregularities of Thaksin's Thai Rak Thai 'hiring' small parties to run in uncontested constituencies as well as ECT officials being accused of electoral fraud in accepting 30,000 Baht [approximately \$1,000] by altering 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).

With a political stalemate ensuing and no end in sight to political conflicts, Thailand's King Bhumibol came out publically in what was considered an unofficial political intervention by Thailand's revered monarch exercising moral and extra-constitutional authority. 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 contravention to Thailand's notoriously slow bureaucratic methods, quickly, decisively and in alarming coordination. In late April, the Administrative Court cancelled rerun elections to fill constituency seats. On May 8<sup>th</sup>, the Constitutional Court declared in an 8-6 ruling that the April election was 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 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 the Criminal Court and ushered off to a 4-year jail sentence (Dressel: 2012). Perhaps to head off perceived conflict, but most likely because it was the ripe moment for intervention that had been planned since February, the military led by the Army enacted a coup d'état in the evening of September 19<sup>th</sup> ahead of the rescheduled elections (Chambers: 2013), (Montesano: 2009).

#### **4. The 1997 People's Constitution: Too Successful but an Inspiration to Extraconstitutionalism**

Thaksin Shinawatra's rise, success and eventual downfall was part and parcel

apart of the democratic reform period of the late 1990's which culminated in what Connors terms a 'liberal-conservative' effort to find common ground between social conservative and radical reform groups in the aftermath of the 1991 coup and the bloodletting of 1992 (Connors: 2008), (Hewison: 2010), (Phongpaichit, Baker: 2009). The 1997 Constitution attempted to rectify a number of apparently chronic problems in the Thai political system, namely corruption, corrupt government/officials and politicians, punishment of corrupt officials, an unproductive legislative process and unstable coalition governments (Borwornsak, Burns: 1998), (Connors: 1999), (McCargo, 2002), (Ockey, 1997). In attempting to counter these problems, the 1997 Constitution strengthened the executive branch of government, stabilized political parties by instituting a 90 day rule and crafted a delicate balance of power by allowing for the creation of independent watchdog agencies of the Ombudsman, National Counter Corruption Commission, Human Rights Commission, Election Commission, State Audit Commission, Administrative Court, Constitutional Court and a fully elected Senate with oversight and participatory powers in selecting members of independent agencies (Borwornsak, Burns: 1998), (Constitution of the Kingdom of Thailand 1997: sections 75, 121, 126.1) (Klein: 1998), (Klein: 2003) (Nanakorn: 2002), (Pongsudhirak: 2009). Bowornwathana (2000) alluded to the fragility and possible 'success' of the 1997 Constitution leading to its eventual downfall. The claim that its subversion is derived from the success of Thailand's first PM elected under the constitution, PM Shinawatra, and the manner in which he came to dominate Thai politics via populism and allegedly undermined constitutional checks and balances, thereby threatening a systemic risk factor to the entire democratic system with the King as head of state (Albritton, Bureekul: 2008), (Hewison: 2004), (Kuhonta: 2008), (Phongpaichit, Baker: 2009), (Pongsudhirak: 2009), (Tejapira: 2006). In essence it can be stated that the 1997 Constitution's death was due to its success and the inability of Thailand's conservative elite to adapt to challenges to their power via legal pathways as the Constitution's structure had been nearly hegemonized by PM Shinawatra. The reason for the 1997 Constitution's success is that it attempted to stabilize Thai politics by empowering the executive branch of government while empowering independent agencies. After nearly all of these were captured by Thaksin in 2005, it had led to what the People's Alliance for Democracy (yellow shirts) labeled a "parliamentary dictatorship". This was strong enough so that "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" (Mérieau: 2016, pp. 9).

PM Shinawatra's success and discourse of disloyalty to the monarchy [veiled as a threat to the larger network surrounding the monarchy] led the Thai military led by army chief Sonthi Boonyaratkarin to seize power in a bloodless royalist coup on September 19, 2006 (Connors, Hewison: 2008), (Ungpakorn: 2007) and proceed immediately to declare martial law, repeal the 1997 Constitution hence disbanding the Constitutional Court and take full control of both Houses of Parliament (Council for Democratic Reform 2006, 1, 3, 4, 16). Interestingly, following the coup, the CDR junta announced that it would be keeping relics of the 1997 Charter via organic legislation such as the NCCC, Criminal Procedure for a Person Holding Political Position (Council for Democratic Reform: 2006, pp. 19) while also adding an Assets Inspection [Scrutiny]

Committee to undertake investigation where there are “grounds to suspect that the Administration of the State affairs under the Council of Ministers vacating office by the result of the Democratic Reform under Constitutional Monarchy was carried out dishonestly for personal benefit or benefit of others” (Council for Democratic Reform: 2006, pp. 23). The AIC found its legal grounding in organic legislation derived under the legitimacy of the 1997 charter with the Anti-Money Laundering Act, B.E. 2542 (1999)<sup>1</sup> and the Organic Law on National Counter Corruption, B.E. 2542 (1999). The AIC was provided with legal authority equivalent to the Anti-Money Laundering Commission, Transaction Commission, National Counter Corruption Commission and the Director of the Revenue Department. This created a closed loop system for hounding PM Shinawatra personally as well as “seizure, attachment and auction of [his] assets” as the CDR chose the AIC members, empowered it via organic legislation from an abrogated constitution and utilized those organic institutions legal basis for insulating the AIC with powers equal to them then reselecting the State Auditor-General (Council for Democratic Reform 2006, 23 supra 1, 2 and 6, 29). The inherent biases of the CDR’s actions can be seen in its views towards cherry-picking the 1997 Constitution as it wished, exemplified by its acts towards the now defunct charter:

*The provisions of Clause 1 of the Announcement of the Council for Democratic Reform No. 12 dated 20<sup>th</sup> September B.E. 2549 (2006) shall be repealed and replaced by the following: Clause 1. The repeal of the Constitution of the Kingdom of Thailand does not affect the enforcement of the Organic Act on State Audit, B.E. 2542 (1999). The Organic Law on State Audit, B.E. 2542 (1999) shall remain in force, provided that the provisions of Part 1, Chapter 1, shall be suspended until the enactment of a law amending or repealing thereof. The State Audit Commission holding office on 18<sup>th</sup> September B.E. 2549 (2006) shall vacate from office. Council for Democratic Reform Order #29*

In closing, it should be noted that the Assets Scrutiny Committee did its job, according to its’ political mandate and alongside its’ sister organization the NCCC which was comprised of many known anti-Thaksin persons. It filed multiple criminal charges against PM Shinawatra affiliates in connection with the CTX bomb scanner scandal and proceeded with the grand prize of indicting and freezing assets of PM Shinawatra and his family in connection with the later adjudicated Ratchadapisek land deal, satellite communications deals and EXIM bank loans (Charoensin-o-larn: 2007, 2009).

This backlash against the 1997 Charter is interesting in that particular portions of it were used as the prototype of the 2007 Constitution which was drafted by the Council of National Security (CNS) [successor to the CDR junta] and approved by the Constitutional Drafting Assembly (composed of military and bureaucrat personnel) with a mandate of 6 months to draw up a charter for referendum prior to fresh elections (Dressel: 2009, pp. 297). The CNS essentially threatened the general public with the constitutional referendum by stating, as a hedge, that if the draft constitution was rejected it would choose among the previous 17 Constitutions (Nelson: 2011). As such, even with the full weight of government, military, royalist, royalist bureaucracy,

1 It should be noted that the usage of B.E. refers to the Buddhist calendar year which then corresponds to the later Christian calendar year of A.D.

media and government budget, the referendum only provided a turnout of 57.61% and approval of 57.81%. Nonetheless, with the passage and promulgation of the 2007 Constitution, Thai politics changed both structurally and ideologically, the first of which is the focus of the subsequent section. It will be shown that the 1997 Constitution served as a basis for the 2007 Constitution, and in particular for its independent organs. However, the 2007 Charter used the organs and insulated them from change via a closed loop system. It accomplished this by way of the Senate and selective appointments so as to take the reformist liberal ideals of the 1997 Charter and use them as tools to counter electoral democracy.

## 5. The 2007 Constitution: Senate and Independent Triumvirate of Constitutional Organs

This section will focus on the 2007 Constitution and its institutional setup with specific focus on the Senate and the three independent constitutional organs: the Election Commission of Thailand, the National Counter Corruption Commission and the Courts [Constitutional, Administrative]. It is argued that the 2007 Constitution laid the legal basis for these institutions to contain democracy and majoritarian politics by institutionalizing a closed loop system of appointments and selections that act as guardians for traditional elite interests in the face of threats by PM Shinawatra and his new populist based electoral network. Prior to engaging in the analytical discussion it is important to provide a frame of reference for the original intent of the drafters of the 2007 Constitution. Judge and constitutional drafter Vicha Mahakun lucidly stated that:

*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 naïve...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 no 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 in Bangkok Pundit 2007)*

This is crucially important in that it provides clear insight into the role the judiciary finds for itself within greater Thai society and the political system. This brash statement is not indicative of a self-anointed position but stems from King Rama IX's words and the self-interpretation which was seized upon by members of the judiciary. Within the context of a King legally, socially and culturally beyond reproach, the judiciary is simply acting out the 'good' will and intentions of the King and not being an enemy of democracy and the Thai people.

### 5.1. The Senate of the Kingdom of Thailand

The 2007 Constitution dictated that the Senate be a 150 member chamber with 76 members directly elected in single member provincial districts while the remaining 74 to be appointed based on selection (Constitution 2007: section 111).

The appointment of senators was left to a Senate Selection Committee comprised of seven members which included the President of the Constitution Court, Chairperson of the Election Commission, Chief Ombudsman, Chairperson of the National Anti-Corruption Commission, Chairperson of the Audit Commission [the auditor-general], a Supreme Court judge, and a Supreme Administrative Court judge (Constitution 2007: section 113). The Selection Committee can choose equal representatives from the academic, public, private, professional and other sectors according to a minimum majority process (Constitution 2007: section 114, Organic Act on the Election of Members of the House of Representatives and the Acquisition of Senators 2007). Senators must hold a Bachelor's degree and are prohibited from being "an ascendant, a spouse or a son or daughter of a member of the House of Representatives or a person holding a political position" and cannot be a political party member 5 years previous to their candidacy (Constitution 2007: section [3], [5], [6]). This clearly indicates an urban middle class bias as well as fear of the Thai familial network dynamic of politics where relatives and associates often hold office with or for another politician.

Chambers and Muntarbhorn have argued that this opaque mechanism is highly elitist with a strong bias towards urban areas and now "lends itself to a greater degree of instrumentalization by the powers-that-be" but verges on authoritarianism as the military dominated the process of drafting with the network monarchy in the background, especially as the Palace has the final say regarding signature endorsements to independent institutions and legislation (Chambers: 2009, 2010), (Muntarbhorn: 2009, pp. 86). Eoseewong (2003) argues that the final point is critical to understanding the deeper structure of Thai political culture as constitutions can be torn up or abrogated, but underlying and constant is the cultural constitution with the monarchy at its apex and held to be sacred [*sak.sit*]. This point is highly instructive as the Puea Thai led government of Yingluck Shinawatra attempted to pass an amnesty bill in September 2013 encountering fierce resistance from the general Bangkok public which led to a fresh round of protests and conflict. She promptly withdrew the amnesty bill stating "I have sought royal permission from His Majesty the King for the return of the controversial charter amendment bill on the make-up of the Senate as well as a royal pardon for any act that may have offended the King" (Bangkok Post, 2013).

The lynchpin of the Senate is key to understanding independent institutions and hegemonic preservation which is why appointed Senators were so outraged at Puea Thai's attempts to change the Senate make up by going so far as to petition the Constitutional Court to rule on the constitutional legality of the amendment. The Court itself ruled in a series of decisions on November 20 that amendments to the constitution seeking to alter the Senate to a fully elected body "[would] overthrow the democratic regime of government with the King as Head of State" and allowing for spouses for candidacy "would allow for a domination of power" (Constitutional Court of Thailand 2013).<sup>[2]</sup> The Court's reasoning was that Thailand's majoritarian system allows for 'oppression' and trampling of rights of the minority and to allow for a fully elected Senate would further aggravate democratic imbalance. This cuts to

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2 See Saksith Saiyasombut's blog for excellent commentary on the Courts ruling and general politics. See Thitinan Pongsudhirak commentary on East Asia Forum for up to date commentary on Thai politics and insight into contemporary machinations of courts, protests and political players.

the heart of the argument for hegemonic preservation as Parliament should have the constitutional prerogative to amend portions of the constitution. In attempts to change the democratic composition of the Senate to make it fully elected, legal elites stepped in to rebuff challenges to their original constitutional power of appointment. It should be noted that three judges of the Court were members of the military appointed constitutional drafting committee for the 2007 Constitution.

The senate is a crucial body as independent constitutional organizations and judges are appointed by this legislative organ. The Constitutional Court comprises of nine judges appointed by the King from the Senate (Constitution 2007: section 204), the composition being: three Supreme Court judges, two Supreme Administrative Court judges, two from law and political science fields respectively (Constitution 2007: section 204). Furthermore, in the case of law and political science judges, there exists a selection process conducted by a Selection Committee comprised of the President of the Supreme Court, the President of the Supreme Administrative Court, the President of the House of Representatives, the Leader of the Opposition in the House of Representatives and the President of a constitutional independent organ elected amongst Presidents of such independent organs (Constitution 2007: section 206). It is instructive that courts are selecting courts and the leader of the opposition (Democrat Party has been in opposition for the better part of 15 years notwithstanding its elite engineered rise to power in 2008) has a say in such a vital organ. Lastly, independent organizations are instrumental in having a key say in who gets selected to sit on such vital organs which will be explored in subsequent analysis.

The importance of the Senate in holding the system of independent organs, and hence hegemonic preservation of ‘network monarchy’, is central and demonstrated by the fierce defense of its Constitutional status with Constitutional Court rulings in 2013, which argued that changing the Senate composition to be fully elected would be tantamount to subverting the monarchy and democracy. The legal logic behind this decision essentially states that having full democratic expression via majoritarian electoral democracy of the Senate would be to destroy democracy. This logic rests on the assumption that if Senate reform were to take place, former PM Shinawatra and his Puea Thai party would be able to change the composition of all independent organs to their advantage as they would come to dominate the Senate as they do the House in a repeat of the 2001-2005 years. In a readily reducible form, this logic reads as fear that if the closed loop system is broken and electoral democracy supplants the closed system, the old network which established the system would stand to lose heavily and hence the system must be protected at all costs. The same can be said for Yingluck and Thaksin as can be seen in their attempts to change the composition of the Senate. The politicization of appointed Senators can be assumed but this has been confirmed by appointed Senator Somchai Sawaengkarn who stated that voting patterns of appointed senators show that 60 of the 73 appointed senators are in the anti-government camp (Bangkok Post 2014a). The Senate is central to hegemonic preservation in that it provides the locus point for conflict against the House of Representatives. Furthermore, the Senate provides oversight and selects the composition of independent agencies which are secondary focal points for institutional resistance to former PM Shinawatra proxy governments and their ability to operate. This is further substantiated with the

latest Constitution which, due to a lengthy and oddly formulated question in the 2016 Constitutional referendum, will see a fully appointed Senate for a period of five years after the next elections. It can be presumed that any attempt to alter the Constitution by a former PM Shinawatra friendly government will most certainly be rendered void by the Constitutional Court.

### *5.2. Constitutional, Civil and Administrative Courts*

The Constitutional Court has four judges from both law and political science professions (Constitution 2007: section 204). The selection of the latter four non judicial members is done by a selection committee comprising presidents of the Supreme Court, Supreme Administrative Court, House of Representatives, a president of a constitutional independent organ elected amongst presidents of independent organs and the House of Representatives opposition leader with a final submission to the Senate President (Constitution 2007: section 206). Perhaps the strongest power aside from judicial review is the fact that the Constitutional Court can now introduce and enact legislation, a power equal to the legislative and executive branch of government (Constitution 2007: section 139).

The Supreme Administrative Court adjudicates cases between the state and private persons. As such Administrative Courts hold significant power in their ability to hear and decide on cases of state administration, including emergency decrees, state policies essential to machinations of state power and its ability to govern. This court is chosen by the judicial commission which is comprised of the “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), (Dressel, Mietzner: 2012), (Pariyawong: 2010).

It is clearly seen that these powerful courts are essentially closed loop systems of nomination and selection but the lynchpin of confirmation is once again the Senate. To demonstrate a clear bias in these court’s rulings we can draw on a selection of cases occurring over the previous years. The most publicized cases are from 2008 when the Constitutional Court in a 9-0 verdict disqualified pro former PM Shinawatra People’s Power Party PM Samak Sundaravej for hosting a cooking program on television and receiving petty remuneration in what has been called ‘judicial creativity’ (Constitutional Court Decision 2008a). The Court based its ruling on Section 267 of the Constitution which deals with conflict of interests and forbids the PM and Ministers from being a private employee which would compromise their ethics. The Court reasoned that the PM was an employee due to receiving remuneration and as such a contract was entered into with the production firm. It based this on a rather ‘general’ definition of employee in the Thai language and further reasoned that ‘constitutional intent’ of Section 267 was to bar state officials from all contractually self-benefiting interactions with the private sector. (Constitutional Court Decision 2008a, *supra* 13-14). Later, with the People’s Power Party<sup>3</sup> government and under extreme pressure, the Constitutional

3 Thaksin’s political parties have undergone changes in name. The original was the Thai Rak Thai Party dissolved after the 2006 coup. Its reincarnation was the People’s Power Party which was dissolved in 2008 by the Constitutional

Court in conjunction with the Supreme Court on advice from the NCCC ruled to dissolve the PPP 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). The Court reasoned that party executive Yongyuth had met with 10 district and village level chiefs of Chiang Rai province. Furthermore, 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 (Constitutional Court Decision 2008b, *supra* 20).

A comparative glance at constitutional rulings across governments of the political divide provide a glance into the biased discretionary power exercised by the Courts. In comparison to the latest political crisis when ‘red shirt’ supporters of former PM Shinawatra descended on Bangkok in April of 2010, then Democrat Party PM Abhisit enacted an emergency decree, whereby the government asked the Civil Court to rule on an injunction to force protesters from Ratchaprasong intersection. The Civil Court passed the case on to the Constitutional Court for a decision on the constitutional legality and usage of the emergency decree, stating that it did not have the competence to rule in such a case. 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). Furthermore, the Court reasoned that an injunction was not necessary as the PM, *qua* director of the Internal Security Operations Command was empowered by Articles 16 and 18 of the Internal Security Act to enforce the emergency decree (Civil Court Decision 2010a). 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* 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 of violence. It is well documented that later in May the government ordered the military to retake protest sites which led to the death of over 90 protesters, civilians and security personnel (mostly protesters).

In order to gain clarity, it is important to juxtapose the prior decision with the political crisis between a Puea Thai led government and the People’s Democratic Reform Committee led by former deputy PM Suthep Thaugsuban of the Democrat led Abhisit government. In 2014, the Yingluck government 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 an Emergency Decree invocation would not automatically lead to a seizure of administrative power and upheld the legality of the governments invocation (Constitutional Court Decision 2014a, *supra* 73-78). The Civil Court was petitioned by PDRC member Thavorn Seniam asking for a ruling on the legality of the emergency

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Court in the Yongyuth Case. Its current incarnation is the Puea Thai Party.

decree on the grounds that it was not yet necessary and to revoke and prohibit the government's use of force with protest dispersion. The Civil Court ruled that the decree was legal according to the previous Constitutional Court ruling and that the caretaker government had executive legal power to issue the decree. However, the Court noted that the execution of the decree must take into consideration the rights, freedom and liberty of citizens in accordance with Section 4 of the Constitution. That said, the Court called three witnesses, former PM and Democrat party leader Abhisit 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 protests were non-violent and protesters unarmed. The Court chose to give much weight to the witness statements and chose to rule that while the emergency decree was legal its enforcement must not: 1. Use 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. Order 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 essentially defenestrated the government, emboldened protesters and was based on the legal test of whether or not protesters were violent. As such, the government was duty bound to uphold the legal rights of freedom of movement, assembly etc. without regard for the disruptions that it was causing. This was in direct contradiction to the Civil Court regarding Democrat PM Abhisit'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 the PDRC protests had seen numerous acts of violence including but not limited to the forceful blocking of election polling stations on February 2<sup>nd</sup>, 2014, thus negating citizens 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 show 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. Witness testimony to which the Court gave weight can be seen as tainted in that all three persons were known anti-Thaksin opposition and/or had an axe to grind with the administration of the time. Given that the Court chose to listen to partisan testimony and base its decision partially on that testimony is in itself a demonstration of politicized bias.

The last case we will examine is the Constitutional Court decision to nullify the February 2<sup>nd</sup>, 2014 general election. On December 9<sup>th</sup>, 2013 in the face of mass protests over the botched Amnesty bill, Yingluck dissolved parliament and called for fresh elections. With the EC indeterminate and not wanting to hold elections according to the caretaker government's date of February 2<sup>nd</sup> and the Democrat party boycott, the stage was set for a confrontation. When the polls were held on February 2<sup>nd</sup> 2014, the PDRC forcefully disrupted polling stations in over 30 constituencies [and disrupted voter registration in the run-up] (The Nation, December 30<sup>th</sup> 2013). The botched election led to legal questions regarding the validity of the election results and when to hold elections in the 28 constituencies where voting was not completed. Thammasat University professor Kittipong Kamonthamwong asked the Constitutional Court to rule on whether the February 2<sup>nd</sup> polls were legal and where legal authority to set a new date lay. The Court ruled that the polls were incomplete in 28 constituencies and thus invalidated the election results. This was based on Article 108(2) which states that "The dissolution of the House of Representatives shall be made in the form of a Royal Decree in which the day for a new general election must be fixed for not less than forty-five days but not more than sixty days as from the day the House of Representatives has been dissolved and such election day must be the same throughout the Kingdom. The dissolution of the House of Representatives may be made only once under the same circumstance" (Constitution 2007). The Court decided that elections had to be held and completed within 1 day even though this is not explicitly stated in the Constitution (Constitutional Court Decision 2014b). Rather than hold replacement elections in the districts where voting did not take place, the Court invalidated the entire election thus derivatively providing support to the EC which had been against holding the polls in the first place. Secondly, by not allowing replacement polls the Court essentially blocked the democratic process by not allowing people to exercise the constitutional right to vote. Perhaps most importantly the Court did not allow for the democratic system to play out, but rather insulated the democratic process within the EC which was staunchly anti-government.

The puzzle of why Thailand's courts seemingly side with conservatism can be answered partially by considering royal virtue and socialization. The 2006 annulment of the general election came just after the King's speech where he called for a resolution to the constitutional crisis. This can read as a call to political intervention by courts or to take a more active role in events of chaos and doubt. Second, and more profound, is the internalized perception of judges and their sense of loyalty and duty. There are only a few researchers and sources which are openly available, one is a notable short book by Judge Natthapakon Phitchayapanyatham. Phitchayapanyatham stresses a need for moral centering and to be pure and clean due to a judge's responsibility to exercise authority on behalf of the King and the last line of defense for conflictual situations

(Natthapakon: 2011). The first is most telling and reflective of the oath Thai judges take upon holding office which should be quoted at length:

*I offer my oath that I shall be loyal to the King and shall perform my duty in the name of the King with honesty, removed from all biases, in order to create justice for the people and peace for the kingdom. I shall preserve and adhere to the democratic regime with the King as the head, the Constitution of the Thai Kingdom, and the law (Natthapakon, 2011: 31).*

Kritpatchara Somanawat argues that there has been a profound historical evolution of Thailand's judiciary beginning in 1901 A.D. where the judiciary was held in very low esteem and considered to be เลว (extremely bad / contemptuous). In the interim, with the continued rise in popularity and reverence for the King under the 9<sup>th</sup> reign, and the professionalization of the judiciary in 2434 B.E. (1912 A.D.) with the setting up of the Ministry of Justice, there was eventually a fusing of ideology and a symbiotic relationship emerged which formed into an exalted status between the judiciary and royal institution/person (Somanawat: 2016).

Ultimate allegiance for judges does not lie with the constitution or the civil government but with the King. Furthermore, the socialization process and rote learning pattern of judicial qualifying continually stresses extreme conservative outlooks going so far as to dictate social and informal dress and personal consumption among many others (McCargo: 2015). Further, as Nithi Eoseewong (2012) has argued, within the Thai context, judges are viewed as ultimate arbiters of justice and law due to being socially perceived as highly virtuous persons attached to royalty by virtue, decree and deed and as such are unquestioned similarly.

### *5.3. Election Commission of Thailand*

The Electoral Commission of Thailand (henceforth ECT) has extensive powers to organize, manage and provide oversight during elections not just limited to organizing, but also to verifying results and to carrying out investigations of fraud, bribery or other criminal acts. It has extended powers of inquiry by being able to investigate party financing and enforcing the Organic Act on the Election of Members of the House of Representatives and the Acquisition of Senators, the Organic Act on Political Parties (Constitution 2007: section 235). These organic laws provide the ECT with derivative legal powers of enforcement as it is enabled to forward voter fraud cases to the Anti-Money Laundering Office for prosecution (Organic Act on the Election of Members of the House of Representatives and the Acquisition of Senators 2007: section 53 supra 2, Organic Act on the Election Commission 2007: section [11], [12], [13]) as well as forwarding cases of malfeasance of political party members whether known or not to party executives to the Constitutional Court for party dissolution and banning of party executives for five years, in essence delivering legal coup de grâce's (Constitution 2007: section 237 supra 2, OAEMHAS 2007: section 103, Organic Act on Political Parties 2007: section [18], [94]). Its constitutional powers include the exclusive right to 'red card' or disqualify a candidate for malfeasance or after an election announcement to pass the case on to the Supreme Court (Constitution 2007:

section 239 supra 1, 2). Lastly, it is instructive that there is a specific section applicable to Senate appointments and elections for the ECT to investigate and pass decisions on the Supreme Court as a final safeguard for controlling the Senate and its powers of legislation, appointment and confirmation of independent organ membership (Constitution 2007: section 240).

The current ECT is a composition of members that were appointed by the military CNS junta in 2006 (Council for Democratic Reform 2006: 13). Four members of the ECT are still active commissioners while Sumeth Upanisakorn retired in 2009 and was replaced by Wisuth Pothitaen with Senate approval. It should be noted that Commissioner Sodsri was also appointed by the military junta in 2006 to take part in drafting of the 2007 Constitution prior to her appointment as ECT Commissioner.

Parliamentary elections of 2007, which saw the restoration of electoral democracy, demonstrated the biased nature of the ECT. Plans by the military CNS to sabotage and harass the pro-Thaksin People's Power Party were uncovered. The ECT investigated the CNS and found that "the authorities had indeed acted with bias, but it dismissed the case on the grounds that CNS had done so to safeguard national security and therefore enjoyed constitutional immunity" (Freedom House: 2009). ANFREL has documented the biased nature of the ECT red and yellow election cards and investigations in 2008. ANFREL reported numerous instances of vote buying by all major political parties but witnessed investigations heavily slanted towards the PPP with lax investigations towards the Democrat and other major parties (ANFREL: 2008).

The February 2014 House elections witnessed the ECT dragging its feet and being indeterminate regarding the election organization, (Pongsudhirak: 2013) with election commissioner Somchai Srisuthiyakorn publically stating "if she [PM Yingluck] doesn't come, we'll still send out invites, keep changing hotels to meet until we finally [zeroed in on] the Four Seasons Hotel. May be then she'll come, no? (Khaosod 2014a).<sup>4</sup> Mr. Srisuthiyakorn's later commented on his Facebook page that government opposition movement red shirts of the UDD are "low class and vile" having no place in decent society (Bangkok Post: 2014d). This sort of open public bias stands in contravention to the expected neutrality becoming of a public political figure charged with organizing democracy and demonstrates the nature of the ECT's views towards former PM Shinawatra.

The Constitutional Court ruling which nullified the February 2<sup>nd</sup> election further emboldened the ECT to act as a constitutional equal with an elected government. This is best demonstrated by Commissioner Somchai's remarks concerning the resetting of general elections when he stated "the government still has a duty to propose a royal decree setting the election date. But to do so there must be a consensus between it and the EC...if no agreement is reached, a royal decree on a new election date cannot be sought" (Bangkok Post: 2014e). ECT Chairman Supachai Somcharoen upon the Constitutional Court ruling and questions regarding a new election stated that "all

4 ECT Commission Somchai's reference to the Four Season's [hotel] refers to rumors early in Yingluck's Prime Ministership of unethical meetings while parliament was in session with Srettha Thavisin a property development tycoon (ironically the PM was head of SC Asset a Shinawatra property development company prior to her rise to political prominence).

political parties should have a say in the matter...would have to take into account the political situation to ensure tax money would not be wasted” (Bangkok Post: 2014f). This is quite interesting in that Supachai suggested that a boycotting Democrat party still be engaged in election planning and that money for elections would not be provided unless the government reached a deal with the ECT.

Commissioner Somchai most recently expressed his support for the coup and told European Union representatives that he supports the junta’s suspension of elections until ‘reforms’ are carried out so that democracy in Thailand will produce moral people capable of running the country (Khaosod: 2014b). The ECT has proven itself a useful tool in the institutional battle against former PM Shinawatra proxy governments. The case above demonstrated that once political deadlock had been triggered and fresh elections called by the legitimate government the ECT refused to carry out its legal mandate and instead assisted in plunging the situation further into chaos.

#### *5.4. National Counter Corruption Commission*

The NCCC’s composition of members is stipulated as having to have been “Ministers, Election Commissioners, Ombudsmen, members of the National Human Rights Commission or members of the State Audit Commission, or must have served the government service in the position of not lower than Director-General or Executive in a Government agency or hold a position of not lower than Professor, become representatives of NGOs” (Constitution 2007: section 246 supra 2). This is instructive as there is a closed loop of persons from other independent organs and senior bureaucrats as well as a bias for middle class professionals rather than politicians and or private sector persons.

The current commissioners are noteworthy as Klanarong Chanthick served on the junta ASC investigating and prosecuting former PM Shinawatra alongside the Constitutional Court (The Nation: 2013). Vicha Mahakun has served on numerous posts including as principle secretary to Chief justice of the Supreme Court along with many other posts in the judiciary and, interestingly enough, was an author of the 2007 Constitution and known advocate of appointed Senators. Jaied Pornchaiya’s career spans being the Attorney General as well as senior bureaucratic positions including president of the office labor law. Jaied recently reached the age of 70 and, hence mandatory retirement, has been replaced pending Senate approval by Supa Piyajitti, a former deputy permanent secretary of commerce known for her role in publically investigating and publicizing corruption in the Yingluck governments rice pledging program in her capacity of chair of the subcommittee investigating the governments rice scheme to which she was removed as chairperson. Prasart Pongsivapai has served as appointed governor of various provinces as well as deputy permanent secretary of the interior ministry. Pakdee Pothisiri is a former senior civil servant of the public health ministry whose officials publically supported the PDRC lead by Suthep Thaugsuban (Bangkok Post 2014b). Panthep Klanarongran and Preecha Lertkamolmart are longtime NCCC members dating back over 10 years. Vichai Vivitsevi a career judge in various courts (NACC Annual Report 2011). The make-up of this organ is interesting

as it comprises senior bureaucrats, prior serving NCCC members and professors with very close links to the bureaucracy which is seen as being pitted against former PM Shinawatra led governments and sided with the anti-government PDRC.

The NCCC's powers are investigatory and quasi-judicial in that members are judicial servants (Constitution 2007: section 250 supra 2). Its powers include inquiry and providing facts for the removal of government officials from office as submitted to the Senate, investigating acts of corruption of government as submitted to the Supreme Court of Justice's Criminal Division for Persons Holding Political Positions and investigating assets and liabilities of those holding public office (Constitution 2007: section 250 [1], [2], [3], [4]). The NCCC plays an investigatory role in preparation for the courts and it is instructive to consider the rice pledging scheme case. The Yingluck governments' central policy during its first term had been a rice pledging scheme to provide rice farmers with a 40% higher than market value price for their rice to be bought without quantity restriction by the government. It was alleged that there was major fraud and leakage of billions of dollars (TDRI 2014). Regardless of these accusations the NCCC pressed ahead with a criminal inquiry against PM Yingluck in a case compiled in no less than 21 days indicating extreme efficiency and unprecedented agency coordination or the NCCC had been collecting data for years and waiting for the proper time to press formal charges (Bangkok Post 2014c). This is somewhat ironic considering similar cases on rice policy under the Abhisit government are still pending after 8 years. The NCCC's mandate to eliminate corruption by state officials is laudable but is currently being used as a mechanism to render political opponents vulnerable to civil and criminal liability on a basis which appears to be biased. The NCCC has failed to make progress in a similar case against then Democrat Party Prime Minister Abhisit Vejjajiva's rice price guarantee policy which was also accused of wide spread corruption (The Nation 2017).

## 6. Conclusion

It has been argued that the current constitutionalization of Thailand has its roots firmly in the political realm. While simply studying the judicialization of politics through its outward characteristics of court decisions is instructive, it treats law as existing as a stand-alone element in a larger context of rule of law without providing the institutional and human agency bound realities. Both of these assertions can and should be challenged in the Thai context as the current constitutional conundrum is but an outgrowth and manifestation of socio-political conflict. The authors have argued that this conflict has its roots in Thailand's larger body politic expressly in the conflict between traditional networks of power labeled as 'network monarchy' against new networks of power associated with Thaksin Shinawatra. The current situation has been characterized as one of hegemonic preservation by the former in order to obviate its power loss to the latter by majoritarian democracy. 'Network monarchy' has been able, so far, to contain threats to its power by institutionalizing a constellation of independent organs legitimized with constitutional power and supported by a half-appointed Senate which stands as the lynchpin of the closed system of institutional hegemonic preservation. It is no wonder the Yingluck government wished to amend

the 2007 military junta drafted Constitution which provides the basis for support of this network, not out of altruistic liberal democratic idealism, but rather for its own survival. The viciousness and vindictiveness of ‘network monarchy’ has been shown with the confiscation of former PM Shinawatra family assets and handing down of a prison sentence based on retroactive legislation and judicial review of a politicized and biased Court.

While hegemonic preservation has been used as an analytical tool for peering into the agency bound and cross institutional setting for Thailand’s continuing conflict it is also evident that the process for entrenching traditional institutional power from majoritarian democracy is not yet complete. This is plainly evidenced by the military coup of 2014 amid the general breakdown of political order. That said, the constitutional referendum of August 7<sup>th</sup>, 2016 has ushered in a broader control of electoral politics by further entrenching and expanding institutions of an undemocratic nature. An analysis of the new ‘permanent constitution’ is beyond the scope of this article but provides further insight into the problematic nature of the traditional elites attempt to roll back Thai democratization and finally defeat former PM Shinawatra and his allies. Hopefully, this work will serve as a basis for future research, as Hirschl’s thesis makes for a hegemonic fit with the current case of Thailand.

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