

# Analyze the Role of the Thai Constitutional Court in Thailand's Constitutionalism from Examples of the Judicial Review of the Constitutionality of Election

Ke Li

University of Melbourne, Parkville VIC 3010, Australia

**Abstract:** Thailand's Constitutional Court used its power of judicial review to invalidate two cases of electoral disputes, creating political vacuums in the military coup. In the process, the definition of "abuse" reveals that the Constitutional Court has been interfered with or "packaged" by political forces, abusing judicial review to maintain the legitimacy and sacrifice its own neutrality. It becomes the spokesperson of the political forces led by the opposition to Thaksin. Through horizontal and vertical analysis, the power of the Constitutional Court has been continuously expanded, and the judges have intervened and adjudicated political disputes with political positions, constantly denying the measures of the representative government and the results of democratic elections. It has led to the contradiction between the rule of law and the development of democratic politics and undermines the core values of constitutionalism, exacerbating Thailand's already fragile constitutionalism crisis

**Keywords:** Thailand's Constitutional Court; Constitutionalism; Judicial Review; Elections; Democracy

## 1. Constitutionalism

Constitutionalism is composed of a series of principles and rules, such as the principles of popular sovereignty and the rule of law.[1] It is used as a tool to limit the power of the government and to guarantee the rights of citizens through the constitution.[2] According to The Federalist Papers, constitutionalism is based on two foundations, representative government and separation of powers, and behind the distribution of power. It requires that the exercise of political power should be subject to the restrictions of the constitution which are drafted in the name of people.[3] The constitution institutionally assigns different powers to how to exercise them to meet the requirements of the rule of law, and as the highest-ranking law, it gives the judiciary the power to uphold the constitution and the obligation to interpret the constitution. Thus, in the process of upholding constitutional jurisdiction, the judiciary has generated constitutional legitimacy.

After the end of World War II, more and more emerging nation-states joined the ranks of constitutionalism. At present, the Constitutional Court has become a vital institution in these states to limit the power of the government, and the last line of defense of constitutionalism. In this context, Thailand, as a member of Southeast Asia, is the second largest economy economically, but its politics are relatively marginalized in the global order. From a comparative constitutional point of view, Thailand is a rare country that has not been colonized in Southeast Asian. Although it has no colonial history, it has maintained a long period of feudal monarchy.[4] And then it experienced a bloodless

coup like Britain, established a constitutional monarchy, and formulated a constitution.[5] However, Thailand presents a constitutionalism development and characteristics that are completely different from those of the north and even other countries in the global south. Never before has the constitutionalism of a country been affected by so many factors. The king, religion, political party's military, and the Constitutional Court which should be the defender of the Constitution, has also contributed to the process of Thailand's constitutionalism instability.[6]

## **2. The Constitutional History of Thailand**

### ***2.1 The history of the development of constitutionalism in Thailand***

Thailand's constitutional history can be traced back to Siamese revolution of 1932, when bourgeois reformers formulated the first constitution and established the constitutional monarchy, ending the absolute monarchy under the Kings of Siam.[7] However, the government was under the rule of the military, the people did not participate in it. A military coup in 1947 overthrew the civilian government, and Thailand's political order entered a vicious circle.[8] Under such circumstances, until the constitution was enacted in 1997, which it was regarded as the watershed of Thai constitutionalism. It is considered to be the "people's constitution", and even seen as the development of a new constitutionalism in Asia in the early stage.[9]

### ***2.2 Constitutional Court of Thailand: 1997-2016***

#### ***2.2.1 The 1997 Constitution***

Thailand's Constitutional Court is a product of the 1997 Constitution. The purpose of the 1997 Constitution is to limit the power of the government by improving the democratic mechanism in order to guarantee the rights and freedoms of the people, and establishes the supreme legal status of the Constitution.[10] In order to preserve the authority and status of the Constitution, the Constitutional Court has been established, which has the ultimate and supreme jurisdiction over the constitutionality of any legal provision.[11] The Constitutional Court, in addition to having the constitutional review of the constitutionality of the review of laws. It has jurisdiction over the settlement of jurisdictional disputes between authorities, the impeachment of officials, the evaluation of appointments, and the disbandment of political parties, and has the mission of upholding the Constitution and democratic values. The Ombudsman, as an independent body, has the power to filed the lawsuits to the Constitutional Court or the Administrative Court in relation to the unconstitutionality of laws and regulations

The 1997 Constitution provides that the Constitutional Court consists of five judges of the Supreme Court, two judges of the Supreme Administrative Court, five legally qualified persons and three scholars related to political science. They are produced through a mixed process of appointments and nominations, from which the Senate can pick candidates from the shortlist. The judges are formed by a nominating committee made up of representatives of political parties, and if the Senate approves the nomination, the nomination is successful.

In its first years of existence, Thailand's Constitutional Court was full of hope and prestige. Its decisions are skillfully maintaining the separation of powers and the rights of citizens and maintain a certain degree of respect in matters falling within the competence of other organs. Until the Constitutional Court ruled in favor of Thaksin Shinawatra, who was charged with by the National Counter Corruption Commission of hiding assets when he was deputy prime minister. The neutrality of the Constitutional Court was questioned. Especially after the military seized power, in order to

prevent Thaksin political forces from seizing control of the judiciary again, a series of reforms were introduced to the constitutional court.

### ***2.2.2 Invalidation of the 2006 Election***

Thaksin won the election in 2005, gaining an overwhelming majority. To quell public anger and opposition protests, Thaksin dissolved the House of Representatives on February 24 and called the general election early on April 2, 2006. But it has been resisted by opposition parties who argued the election is too short for them. Despite strong opposition from both the public and the opposition, Thaksin's TRT Party won in a landslide victory, winning more than an absolute majority of seats. However, there are still some problems in the middle.[12] For example, some candidates of the TRT Party did not obtain 20% of the vote and in order to circumvent the 20% requirement of the law, the party pretended to hire some small parties to compete with it.[13] With the population and opposition parties dissatisfaction with the election results and the results in controversy, King Bhumibol Adulyadej, in a speech on April 25, 2006, urged the judiciary to "perform its duties".[14]

The Constitutional Court soon accepted an electoral case brought by the Ombudsman. And it later ruled that the Royal Decree arranging the election was unconstitutional, and operation of the Election Commission the voting booths violated the principle of electoral secrecy stipulated in the Constitution, and that the results did not produce a balanced parliament, and therefore the 2006 election was invalid. This was followed by the military coup, in which the National Security Council replaced the Constitutional Court with the Constitutional Council.[15]

### ***2.2.3 The 2007 Constitution***

When the 2007 Constitution went into effect, the Constitutional Court was reactivated. [16] Some shortcomings of the 1997 constitution were remedied, such as allowing individual citizens to file constitutional petition.[17] However, compared with the 1997 Constitution, it expanded the scope of the function of dealing with political disputes, and it also changed the amount of Constitutional Court judges and the way in which they were nominated. In addition, the composition of the Selective Committee for Judges has been changed to include only the President of the Supreme Court of Justice, the President of the Supreme Administrative Court, the President of the House of Representatives, the Leader of the Opposition in the House of Representatives, the President of the Constitutional independent organizations. The Senate can only reject or accept the nomination.

### ***2.2.4 Invalidation of the 2014 Election***

In 2013, Thai Prime Minister Yingluck Shinawatra proposed an amnesty bill, which the public opposed. The amnesty bill might allow the military to avoid prosecution and Thaksin to return home. People's Democratic Reform Committee (PDRC) demonstrated to demand the prime minister's resignation. Yingluck, made a decision of dissolution of House of Representatives and started a new election. Yingluck learned from her brother's mistake that she set the election time within the 60 days allowed, but the Thailand's Democrat Party were still not satisfied. In opposition to this election, PDRC blocked registration sites, resulting in the inability of candidates to register in time and multiple constituencies not being able to vote. As a result, elections were held only in parts of Thailand. Therefore, the Ombudsman demanded that the Constitutional Court to review the results of the election. The Constitutional Court rejected the government's defense, arguing that it had not taken into account the objections and concerns of all parties regarding the election. It also pointed out

that the election should be held on the same day, otherwise it would violate the constitutional mandate, so the election was void. Subsequently, the Royal Thai Army seized power and once again drafted a new constitution, Thailand's 2017 Constitution, which was more political in character, continuing to restructure the Constitutional Court and providing for vacancies to be filled by former senior state bureaucrats.

### **3. The Role of the Constitutional Court of Thailand in Constitutionalism**

#### ***3.1 Abuse of Judicial Review***

The abuse of judicial review may occur when the judiciary is used to uphold political purposes or to legitimize authoritarian measures or regimes rather than to safeguard the rule of law and individual rights.[18] And over time, it reflects the intentions or motivations to favor a certain party, which reduces the legitimacy of the judiciary, and constitute the abuse of judicial review. [19] Of course, the serious consequences may often be difficult to measure or to distinguish from other constitutionalism changes, so it is necessary to combine the intention of the court and the final actual effect to infer whether it constitutes an abuse of judicial review in a particular context.

Although the intention is a very subjective thing, it can be used to speculate on the intention of the Constitutional Court at that time through the legal reasoning of the court, which can help infer. For example, whether courts deviate from orthodox precedent and legal reasoning, or selectively use doctrine to protect allies against political opponents.[20]

During the 2006 election dispute, the Constitutional Court insisted that the Royal Decree setting the time of the election and election regulations of the Election Commission were within its jurisdiction. The reason was from the 1997 Constitution's provision, "allows the Ombudsman to submit laws or regulations to the Constitutional Court or Administrative Court". The Constitutional Court relied on this ambiguous provision of 1997 Constitution to provide itself with "legitimate" reasons. The problem, however, was that the Ombudsman's request for review by the Constitutional Court did not mean that the content of the request fall within the jurisdiction of the Constitutional Court. It is interesting that the Supreme Administrative Court rejected the request by Thaksin opponents to review the royal decree arranging the election date, considering that it was a political issue. But the Constitutional Court held that it was not a political issue and was therefore subject to judicial review. The attitude and statement of the Constitutional Court were not consistent with that of the Supreme Administrative Court. It can clearly respect the jurisdiction of the Supreme Administrative Court. As a result, the Royal Decree was declared unconstitutional.

Furthermore, the Constitutional Court considered that it has competent to review the Electoral Commission's decision to relocate polling stations. However, the Electoral Commission is an independent body established under the constitution and is not subject to cabinet supervision. Its resolution fell under administrative rules, which fell within the jurisdiction of the Administrative Court. However, the Constitutional Court insisted to believe that it could review the decision of the Election Commission and also declared the election commission's decision unconstitutional. In response to vague provisions, the court did not choose to adopt logical and rigorous legal reasoning but went beyond the initiative of legal provisions and directly incorporated the vague scope into its own jurisdiction. [21]

After that, in 2014, the Constitutional Court, according to ambiguous provisions, still considered that it had the power to review the royal decree arranging the general election. The 2007 Constitution tried to clarify this ambiguity by making it clear that disputes over the constitutionality of laws fall

within the jurisdiction of the Constitutional Court. The disputes over the constitutionality of rules, orders, or other acts of administrative organs fall within the jurisdiction of the Administrative Court. Royal decrees generally fall within the Cabinet and are administrative rules that can only be reviewed by administrative court. The court always insisted that it had jurisdiction over this matter. It held that the royal decree arranging the general election was not belong to an administrative rule and that its power derives from the constitution, not the statute. The Constitutional Court expanded the scope of its authority on its own initiative to a certain extent instead of following orthodox legal reasoning, carefully analyzing the provisions of the Constitution and respecting the responsibilities of other institutions. It exercised its power of judicial review wherever possible to bring the case within its own ambit. It tends to defend the anti-Thaksin party rather than the constitutionalism values and constitution in these cases, which can be regarded as having the political intention of abusing judicial review.

In terms of the finally actual consequences, Thailand's Constitutional Court invalidated elections in 2006 and 2014, which were soon followed by military coups.[22] It objectively created a power vacuum, allowing all sectors of the already conflicted Thai society to join the struggle for power in order to protect their own interests, thus creating conditions for the military to intervene. Objectively, it showed that the court had a strong political purpose—to oppose Thaksin's forces, reducing its own legitimacy. It appears to use judicial review to remove the influence of Thaksin's forces, tilting the political balance in Thailand's elite minority.

### *3.2 Politicization of the Judiciary*

At present, there is no consensus on the concept of politicization of the judiciary. Pilar Domingo believes that he politicization of the judiciary refers that because the political forces intervene and impact on the judiciary and the legal process leading to the loss of independence and impartiality of the judiciary, so that the judicial process becomes a tool of political struggle, with the result that political forces and political interests stand in the dominant position of the judicial process.[23] According to Björn Dressel, the politicization of the judiciary means that there may be serious damage and distortion of the rule of law behind the trend of judicialization, that is, the judiciary will undermine the rule of law and in fact replace it with the rule of judges. Therefore, it can be understood that judicial review institution participates in political disputes at the cost of judicial neutrality, and thus causes negative phenomena and trends. It emphasizes the undermining of the rule of law by the active behavior of the judiciary, which is heavily influenced by political forces, leading to the loss of independence and public support of the judiciary and the constitution court becomes an instrument of political struggle.

This article analyzes the trend of the politization of the judiciary in the Thai Constitutional Court from both horizontal and vertical perspectives. From a horizontal perspective, the new Constitution in 2007 expanded the competence of the Constitutional Court. After the Constitutional Court declared that the election was annulled, the military coup happened in 2006. The military government promulgated a transitional constitution by royal decree to legitimize the regime, and a new constitution was drafted in 2007.[24] The Constitutional Court goes further in its function of dealing with political disputes. For example, the President of the Constitutional Court is a member of the Senators Selective Committee of the Senate, the selection and election of Ombudsman, the National Counter Corruption Commission, the State Audit Commission, and the National Human Rights Commission and has the right to participate in the composition of these bodies. It also has the

authority to propose legislative acts to the House of Representatives. These powers are essentially related to the competence to determine specific matters and belong to political powers, which are not straightforwardly connected to the core task of the constitutional court itself, which is to resolve constitutional disputes. The constitutional court performs these powers, making it more political.

Furthermore, the 2007 Constitution also stipulates that the Constitutional Court can directly ban a party for electoral fraud, attempts to overthrow the democratic regime or violating the law, and its leaders will not be able to exercise the right to vote in the next five years. There is no clear definition of what constitutes “attempts to overthrow democratic power” and “inconsistency with the Constitution”, and it depends on the judicial discretion of the Constitutional Court, which clearly gives the Constitutional Court too broad and unclear powers. When and how to use this power is up to the Constitutional Court itself, so it is even more necessary for the court to handle political disputes from a neutral and impartial standpoint. However, the nomination and composition of judges further aggravate the bias of the court.

The 2007 Constitution also amended the amount and nomination of Constitutional Court judges.[25] Since the scope of the Court's review is given so broad, the nomination of judges partly determines the Court's style and attitude. It reduced the number of judges to nine, expanded the proportion of professional judges from the Supreme Court of Justice and the Supreme Administrative Court, and reduced the amount of people who have legal and political science experiences. The judges' voting results in political cases also showed their political attitudes and deeply doubted the fairness of their verdict and whether their rulings were merely aimed to resist Thaksin's power. For example, Judge Jaran Pakdeethanakul has publicly criticized Thaksin's government's corruption and populist policies. Nakarin Mektrairat and Taweekiat Meenakanit had also publicly expressed their anti-Thaksin stance before their nominations, raising suspicions that the Constitutional Court's decisions in high-profile political cases were based on ideology rather than law.

Changes in the composition and appointment of the courts are seen as a key driver of the politicization of the judiciary, with the military not only “wrapping” the Constitutional Court through “constitutional reform”, appointing a group of anti-Thaksin ideological judges and expecting to legitimize its own regime.

From a vertical perspective, the Constitutional Court's judgements on the two election cases clearly reflect its radical judicial attitude and biased neutral position. In 2006, the reasoning of the Constitutional Court was very far-fetched. The fundamental reason for the Constitutional Court's attitude and behavior is the order of the king of Thailand. On April 25, 2006, King Bhumibol of Thailand delivered a speech urging the judiciary to fulfil its responsibilities and conveying the will that the judicial system should solve the political crisis, which brought unbearable burdens to the Constitutional Court and triggered the tendency of “judicial politicization” that continues to this day.

After the 2006 election was invalidated, the Constitutional Court in 2007 even declared the TRT Party dissolved, even though Thaksin forces considered that this was a serious procedural problem, because the election results had been nullified and a new constitution had been enacted. And the legal basis for dissolving the party was actually to punish an act that did not constitute a crime when it was carried out. The majority considered that the non-retroactivity principle could only be applied in criminal cases, not political ones. Given that the parliamentary elections of April 2006 had already been annulled for a number of procedural reasons, how could a party be dissolved on the grounds that it had committed fraud in an election deemed invalid? However, the Constitutional Court has perverted the principle of the rule of law in pursuit of an outcome that is expected at the political



level.

After the promulgation of the Constitution in 2007, the Constitutional Court made a series of “bold” judicial interventions. In 2008, the Constitutional Court disqualified the prime minister in ruling whether Prime Minister Samak Sundaravej hosted a cookery show in violation of the Constitution's prohibition on public officials working in commercial organizations, citing an unusual source of legal authority, the Official Dictionary of Thai Words by the Royal Institute, rather than the more authoritative law, like labor protection law or civil law in order to define “employee” more broadly. Later, it ruled to dissolve the People Power Party led by Sharma because of buying votes in the 2007 parliamentary election. The controversy was that the Constitutional Court unexpectedly interrupted the testimony of the defense witness and made the judgment directly. These interventions have expanded the scope of judicial intervention and seriously verdict more political, reaching its peak in the 2014 election invalidation case.

In the 2014 election invalidation case, due to the fact that many constituencies had no or only one registered candidate and the possibility of violence, the Election Commission asked the Constitutional Court whether it could postpone the election and the Court deemed it necessary to reschedule the election, which included a situation that the country was in chaos. Although the Constitutional Court said that the election could reschedule if necessary, Yingluck insisted on the election as scheduled. In fact, many southern constituencies did not vote on the election day, and the opposition also attacked the registration places, blocked and attacked voters, resulting in many constituencies without candidates and unable to vote normally. The election commission was forced to consider rescheduling the election for the unfinished constituencies.

The Ombudsmen asked the Constitutional Court to review the 2014 election, which the court immediately intervened and declared them null and void. The court justified its ruling not to delay the date of the election, which the Constitution stipulates must be held within 60 days. If an election cannot be held on the same day throughout the country, it would be a violation of the Constitution and section 108(2) clearly states that “election dates must be the same across the country” to reduce voter interference by results from other constituencies. Furthermore, the Court considered that when there was no lack of candidates in 28 constituencies, those districts would no longer hold elections. Because the February 2 election failed to hold on the same day and accused the administration that it needs to recognize the chaotic situation of Thai politics and takes into consideration the objections and concerns of all relevant parties, which include the Constitutional Court, about postponing the election.

But the problem is that the courts have previously ruled that the election could be postponed when the country was in turmoil, at the request of the Election Commission. But when it was beneficial for Yingluck's interest to postpone the election of the constituencies, the court refused to accept any exceptions, sticking strictly to constitutional principles. The court was paradoxical.

Yingluck's government is partly responsible for this, which was too eager to ignore a potential electoral crisis. But the problem is that Yingluck has decided on the election within 60 days in order to learn the lessons of her brother Thaksin. However, if the cabinet does agree to defer the election, will it then be accused by the Constitutional Court of nullifying the election and deemed to be beyond the authority of the law? Would Yingluck have been considered to have attempted to subvert the democracy, under Section 68? The opposition parties can never be satisfied because they know they have a slim chance of winning this election and will try desperately to prevent it by rioting. Therefore, the alleged timing of the election and the procedural problems will always be a facade, and the

fundamental purpose to prevent Thaksin forces are in power. Later, after the Constitutional Court declared the election invalid, it dismissed Yingluck's position.

Thailand's Constitutional Court intervention has profoundly changed the political landscape in Thailand. It was nominally aimed at resolving political disputes, but in fact to endorse the political will of the anti-Thaksin clique. The court even contradicted itself in its decision and attitude, sacrificing its neutrality in pursuit of an outcome it wanted to achieve – to prevent Thaksin and his political forces from returning to Thailand as much as possible.[26] Such a radical attitude of the Constitutional Court has a serious negative implication for both the democratic transition and constitutionalism development in Thailand. From an objective point of view, both Samak and his People Power Party, as well as Yingluck's Pheu Thai Party, were representatives of Thaksin's forces in Thai politics after the 2006 military coup and became the focus of the Constitutional Court after Thaksin's departure. The coups of 2006 and 2014 were undoubtedly the deadliest blows to Thailand's democratic transition. The political situation in Thailand before the two military coups was very similar: before Thaksin Shinawatra in 2006 and Yingluck in 2014 were dismissed as prime ministers, the Constitutional Court ruled to cancel the 2006 and 2014 elections, respectively. This objectively led to a power vacuum in Thai politics and created conditions for a military coup. For the Constitution Court's part, the Constitutional Court's fame among the Thai population has been declining and it has lost the credibility of the judiciary due to its numerous judgments in favor of the military blocs and royal rules, as well as cracks down pro-Thaksin parties popular among the middle and lower classes. It upsets the fragile balance of power, the judiciary succeeds in encroaching on political power, and the majority can no longer control the government because the minority learns how to overwhelm them. While acknowledging that it is the protector of constitutional principles and needs to uphold the balance of power provided for in the Constitution, the Court has extended its own powers to undermine the separation of powers, checks and balances and the rule of law required by the constitution and constitutionalism.

Meanwhile, it has led to an antithetical position both the rule of law and democracy. The constitutional court, which upheld the constitution, challenges or obstructs the elected representative democratic government headed by Thaksin. In particular, the introduction of the 2007 constitution itself lacked legitimacy.[27] And all the starting points and judicial intention of the Constitutional Court of dealing with all the relevant politically controversial cases and rulings became to protect the constitution from Thaksin, rather than to protect the constitution and its value from corruption and interference by powerful politicians and political power. It has been given enormous power to intervene in politics, lacks accountability mechanisms, making it vulnerable to its own abuse of judicial review. And judges with obvious anti-Thaksin political leanings have been recruited by the courts. The purpose of the Constitutional Court becomes to oppose Thaksin and the political forces behind him. However, Thaksin and his allies gained popularity through populism, and won elections again and again. The Constitutional Court repeatedly vetoed and blocked them, presenting a situation of confrontation between the court representing the rule of law and the government representing the public opinion, which leads to increase tensions in the relationship between constitutionalism and democracy.

An irreconcilable contradiction was formed between the Constitutional Court representing the minority elites who opposed Thaksin and the representative government representing the public opinion. Political position becomes an important yardstick for the Court to rule a case, rather than relying on legal reasoning and its neutral stance. When judges integrate their own political positions



into judicial decisions and legal reasoning, the court becomes the rule of judges, acting as the government.[28] This behavior affects the neutrality of the Constitutional Court, falls into a crisis of legitimacy, sacrifices their own credibility, and is involved in controversial party disputes, contrary to the mission of upholding constitutionalism.

The Constitutional Court became a part and even a catalyst of the Thailand's constitutionalism crisis, an elite minority that suppressed and ignored the will of the people.[29] It may also lead to a weakening of the separation of powers and a concentration of power in the judiciary. And then it would undermine the foundations of democracy and the rule of law, which these are the basic principles and pillars of constitutionalism. The Constitutional Court's approach further weakens public confidence in the law and the constitution. And coup after coup has shown that it focuses on participating in political disputes rather than on how to better safeguard individual rights and the values and spirit of the Constitution, thereby increasing the volatility of constitutional development in Thailand. The Constitutional Court is supposed to be the defender of constitutionalism, but it seems that it has abused constitutionalism and become a tool for the continuation power of authoritarian regimes, the exclusion of Thaksin political forces and the exercise of governance functions.

The Thai experience suggests that the Constitutional Court would be given broader powers, or use judicial review to expand its jurisdiction on its own initiative. However, this does not represent that the principle of rule of law in constitutionalism has been strengthened. On the contrary, it will weaken the image of the constitutional court as a neutral adjudicator, making judges believe that the Constitutional Court is the God and actively intervene in matters other than jurisdiction. The court uses their constitutional powers to interfere with the powers of democratically elected representative governments that the Constitution provides. These powers actually impair the doctrine of separation of powers and checks and balances in constitutionalism, making the judiciary more politically active. In addition, from the perspective of results, the Constitutional Court invalidated the election, although ostensibly restricting the power of the government, its pertinence is self-evident, and finally the judgments promoted the military coup. But a military coup does not mean that the rights of individuals in the constitution are guaranteed and upheld. The court's approach has made Thailand's already fragile constitutionalism more difficult, rather than advancing it. Therefore, no matter from the analysis of the purpose of constitutionalism, or from the analysis of its means and tools for its realization, the constitutional court has not played a positive role in constitutionalism.

#### 4. Conclusion

Overall, this article argues that in terms of constitutional judicial review of elections, the Constitutional Court did not help Thailand, which was already constitutionally-unstable, to stabilize the political situation through judicial review. Instead, it abused judicial review in the process of "maintaining" constitutionalism and gradually led the trend of politicization of the judiciary, which intensified political conflicts and made the already shaky constitutionalism of Thailand even worse.

Further, an analysis of the Thai Constitutional Court's handling of election cases shows the abuse of judicial review by the Thai Constitutional Court. The military other political forces, like King, has used their power to influence the courts to implement their true intentions — —to oppose the electoral victory of Thaksin and his party and preserve the legitimacy of the regime. Elections are considered to be an important way to achieve democracy. However, by negating the results of democratic elections, the Constitutional Court of Thailand has obvious political stance and partisan bias in the attitude and

results of dealing with judgments, which has a serious negative impact on electoral democracy and has become a tool for party struggle. At the same time, it also shows that the political rights of citizens have not been well protected and its behavior damages the enthusiasm of Thai citizens to vote, which will make citizens lose trust in the Constitutional Court.

In addition, the practices and attitudes of the Thai Constitutional Court have also contributed to the trend of the politicization of judicial in Thailand. The Constitutional Court has been involved in electoral disputes and other political forces since 2006. In the process of exercising the power of judicial review, the courts repeatedly intervened in the political and electoral disputes and declared them invalid. It has caused conflicts between the Constitutional Court, which represents the rule of law, and the representative government, which represents public opinion, and even led to the confrontation between Thailand's constitutionalism and democracy. The judges integrated their own political positions into the rulings which has become the rule of judges. And the Constitution Court loses its neutrality to safeguard the interests of the military and the elites behind them, and the trend of judicial politicization became increasingly obvious.

Therefore, the article argues that Thailand's experience shows that constitutional judiciary with too broad powers does not mean that the rule of law and constitutionalism can be strengthened, and it may undermine it. Under such circumstances, the constitutional court needs to maintain a more neutral position, and judges need to understand their own responsibilities and missions, eliminate interference as much as possible, and maintain the hard-won constitutionalism.

## References

- [1] James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, 1995) 62–79.
- [2] Milena Petters Melo and Thiago Rafael Buckhart, 'A Constitutionalism "of" the Global South? Epistemological Reflections on Emerging Constitutional Trends' (2022) 14(3) *Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito (RECHTD)* 420, 421–2.
- [3] Ran Hirschl, 'The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions' (2000) 25(1) *Law & social inquiry* 91, 91–102.
- [4] Frank W Munger, 'Thailand's Monarchy and Constitutional History-Constitutional Bricolage: Thailand's Sacred Monarchy vs. the Rule of Law. By Eugénie Mérieau. London: Hart Publishing, 2021, 328 pp. Hardcover (2022) 9(3) *Asian Journal of Law and Society* 460.
- [5] Borwornsak Uwanno and Wayne D Burns, 'The Thai Constitution of 1997: Sources and Process' (1998) 32 *University of British Columbia Law Review* 227, 228–9.
- [6] Eugénie Mérieau, 'Buddhist Constitutionalism in Thailand: When Rājadharmā Supersedes the Constitution' (2018) 13(2) *Asian Journal of Comparative Law* 283, 284–305.
- [7] B Dressel, 'When Notions of Legitimacy Conflict: The Case of Thailand: Dressel / WHEN NOTIONS OF LEGITIMACY CONFLICT' (2010) 38(3) *Politics & Policy* 445, 447–56.
- [8] Daniel Fineman, *A Special Relationship: The United States and Military Government in Thailand, 1947-1958* (University of Hawai'i Press, 1997) 15–64.
- [9] Andrew Harding, 'May There Be Virtue: "New Asian Constitutionalism" in Thailand' 3 *Australian Journal of Asian Law* Volume 3, 236, 237–8.
- [10] Thitinan Pongsudhirak, 'Thailand since the Coup' (2008) 19 *J. Democracy* 140, 141.
- [11] James R Klein, 'The Battle for Rule of Law in Thailand: The Constitutional Court of Thailand' [2003] *The Constitutional Court of Thailand. The Provisions and the Working of the Court* 34, 35.

- [12] James Ockey, 'Thailand in 2006: Retreat to Military Rule' (2007) 47(1) Asian Survey 133, 134–135.
- [13] Michael J Montesano, 'Thailand: A Reckoning with History Begins' (2007) 2007(1) Southeast Asian Affairs 309, 314–5.
- [14] Björn Dressel, 'Judicialization of Politics or Politicization of the Judiciary? Considerations from Recent Events in Thailand' (2010) 23(5) The Pacific Review 671, 679–80.
- [15] Beatriz Larriba Hinojar, 'The Modern Thai Conflict: National Security Issues and Perspectives' [2012] Journal of the Higher School of National Defense Studies 213, 218.
- [16] James Ockey, 'Thailand in 2007: The Struggle to Control Democracy' (2008) 48(1) Asian Survey 20, 22–3.
- [17] Andrew Harding and Peter Leyland, 'The Constitutional Courts of Thailand and Indonesia: Two Case Studies from South East Asia' (2008) 3 J. Comp. L. 118, 122.
- [18] Lech Garlicki and Marta Derlatka, 'Constitutional Review in the Abusive Constitutionalism (Continuation, Corruption or Disappearance?)' in *Constitutionality of Law without a Constitutional Court* (Routledge, 2024) 178, 180–1.
- [19] David Landau and Rosalind Dixon, 'Abusive Judicial Review: Courts against Democracy' (2019) 53 UC Davis Law Review 1313, 1325.
- [20] David E Pozen, 'Constitutional Bad Faith' (2015) 129 Harvard Law Review 885, 925–33.
- [21] Khemthong Tonsakulrungruang, 'The Constitutional Court of Thailand: From Activism to Arbitrariness' [2018] *Constitutional courts in Asia: A comparative perspective* 184, 13.
- [22] Claudio Sopranzetti, 'Thailand's Relapse: The Implications of the May 2014 Coup' (2016) 75(2) the Journal of Asian Studies 299, 299.
- [23] Pilar Domingo, 'Judicialization of Politics or Politicization of the Judiciary? Recent Trends in Latin America' (2004) 11(1) Democratization 104, 104–10.
- [24] Allen Hicken, 'The 2007 Thai Constitution: A Return to Politics Past' [2007] *Crossroads: An Interdisciplinary Journal of Southeast Asian Studies* 128, 129–56.
- [25] [25] Duncan McCargo, 'Competing Notions of Judicialization in Thailand' (2014) 36(3) *Contemporary Southeast Asia: A Journal of International and Strategic Affairs* 417, 424.
- [26] Björn Dressel, 'Courts and Constitutional Politics in Southeast Asia' in *Politics and Constitutions in Southeast Asia* (Routledge, 2016) 265, 261–2.
- [27] Andrew J Harding, Rawin Leelapattana and Khemthong Tonsakulrungruang, 'Thailand Update: The Search for Perfect Paper Continues' ('Thailand Update').
- [28] Khemthong Tonsakulrungruang, 'Entrenching the Minority: The Constitutional Court in Thailand's Political Conflict' (2017) 26 Wash. Int'l LJ 247, 267.
- [29] Khemthong Tonsakulrungruang, 'Entrenching the Minority: The Constitutional Court in Thailand's Political Conflict' 26(2) 250–1.