

The Judicialization of Politics: The Role of Constitutional Court in Thailand and Korea

Napisa Waitoolkiat, South East Asian Institute of
Global Studies, Payap University

Nithi Nuangjamnong, Department of Political
Science, Naresuan University

Note: This PowerPoint is part of authors' presentation at
the International Conference on Thai Studies,
Bangkok, Thailand, July 26-28, 2011. Please do not cite
without authors' permission

Man is by Nature a Political Animal

- Judicial activism/ Judicialization of Politics (JP)?
- Ran Hirschl defined JP as “the ever-accelerating reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies”

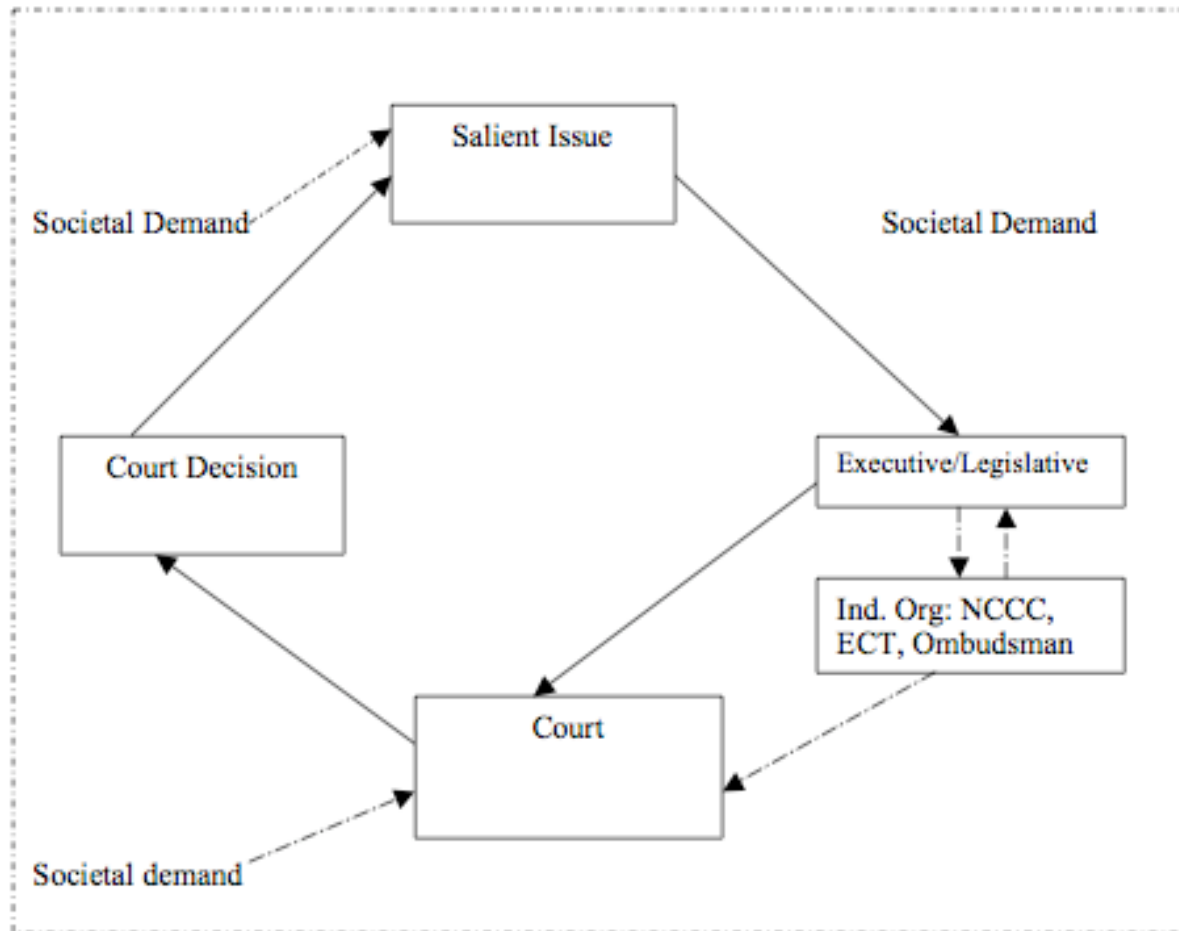
Judicial Activism: Mega-politics

- The growing involvement of courts in “matters of outright and utmost political significance that often define and divide whole politics”
- Example: Disqualification of Political Parties and Candidates, Decision Makers in disputes over National Electoral Outcomes, Impeachment, Corruption Indictments against Heads of the State.

Court as a Key Political Actor

- Its crucial role in political issues unavoidably makes the court become a major political player.
- Political Issues normally involve many actors, and some of the issues are not settled and agreed upon among actors.
- Yet, Constitutional Courts are assigned to do this job. (given that politicians might prefer to rely on Blaming Strategy; Hot Potatoes)

Model of Interaction between Court and other Political Actors



Puzzles

- Structural Explanation and its drawback:
 1. Type of governments and its structure (President/ Parliamentary); (Unitary/Federal State)
 2. Number of Parties: Multi/Two party systems
- Unable to explain the variances within the country? How would one account for the different degree of judicial activism in a given country over time?

- Given that Courts have become the key political players (the final say in national decision making) in a larger political context where different political actors can interact dynamically in attempting to promote their best interests, we argue that the higher the level of pressure by political actors, the higher the propensity of the court to adjust its behavior by compromising its decision to appease the demands of those actors.

- How do we determine whether the court's decision on a given case is indeed being politicized?
- Does the judiciary need to always compromise its decision whenever it is pressured by those actors?
- How do we separate the court's "procedural" from "political" decision?

Open the Black Box of the Court

- Explore the behavior of the judges in key political issues
- Being Political but not Being Politicized: **Politicized** defined as “**successful interference in court-decision making**” (Samak the Chef??? Is this case being politicized?)
- **Two Indicators** as determining whether a given decision of the judges is politicized: **Consistency of the ruling, Composition of the judges votes**

Types of Intervention by Political Actors

1. Direct Intervention
 - Selection Process
 - Influence in decision-making of judges in a given case
2. Indirect Intervention--the situation where political actors use the court as their political tools as to gain leverage in fighting against their political enemy.

Case of Samak the Chef

- Violation of Article 267
- Composition of Judges' Votes:
12: 0
- According to our indicators: The decision of judges is not considered being politicized.

Direct Intervention: Thailand and Korea

1. Thailand:

- Selection Process: The Senate was attempting to intervene in the nomination process at the very beginning of the creation of the CC by refusing to approve the candidate proposed by the council of the Supreme Court (Unsuccessful)
- Influence in Decision Making: The case of Thaksin (2001): Votes (8:7); Inconsistency of Ruling (Article 295)

- Direct Intervention: Thaksin Case

Accused Party	Votes of NCCC (tt. of 9)	Date of Case Acceptance	Date of CC Verdict	Violation Ground	Composition of CC. Votes	Verdict	#of CC Judges (tt.of 15)
Chatchai Sumetchotimeta	9:0	27 Dec1999	9March2000	295	NA	Guilty	13
Koson Srisang	9:0	16May2000	3July2000	295	NA	Guilty	11
Penapa Paisansupanimich	7:0	25April2001	9July2002	295	9:5	Guilty	14
Prayut Mahakijisiri	8:0	26Dec2000	3Aug 2001	295	12:0	Guilty	12
Jirayu Jarasatien	7	7March2000	30May2000	295	NA	Guilty	13
Pinit Meungkot	2/3 of existing members of NCCC	31July2002	21Nov2002	295	13:1	Guilty	14
Sanan Kajornprasart	9:0	7April 2000	10Aug2000	295	11:0	Guilty	11
Somboon Nienhom	7:0	20Feb 2001	18April 2002	295	14:1	Guilty	15
Sukum Cherdcheun	Unanimous	29Dec1999	17March2000	295	NA	Guilty	13
Witaya Siripong	8:0	20Sept2001	16May2002	295	13:0	Guilty	13

- Direct Intervention: Thaksin Case Continued

Accused Party	Votes of NCCC (tt. of 9)	Date of Case Acceptance	Date of CC Verdict	Violation Ground	Composition of CC. Votes	Verdict	#of CC Judges (tt.of 15)
Mahusen Masuyee	Unanimous	27Dec1999	6July2000	295	NA	Guilty	11
Sanich Surangsri	8:0	17May2002	6June2002	295	NA	Guilty	10
Sompong Kasetpiban	9:0	12Feb2002	18June2002	295	10:4	Guilty	14
Sumate Upalasatien	8:0	12Dec2000	13Feb2001	295	NA	Guilty	14
Anan Sawatananon	Unanimous	27Dec1999	9March2000	295	NA	Guilty	13
Saman Nguansamang	7:0	19July2001	10Oct2002	295	14:0	Guilty	14
Sawet Thongrom	7:0	9April2001	16May2002	295	13:0	Guilty	13
Subin Pipornpong	Unanimous	4April2002	16July2002	295	11:4	Guilty	15
Thaksin Shinawat	8:1	16Jan2001	3Aug2001	295	8:7	Not Guilty	15

Indirect Intervention: Thailand

- Dissolution of Political Parties:

1. Chart Thai Party: (Violation of Political Party Act Article 94)

Composition of Votes (8:1)

2. Machimatipathai Party: (Violation of Political Party Act Article 94)

Composition of Votes (9:0)

3. Palang Prachachon Party (Violation of Political Party Act Article 94)

Composition of Votes (8:0)

4. **Democrat Party**: (Violation of Political Party Act Article 94)

Composition of Votes (4:3)

Indirect Intervention: Thailand

- National Counter Corruption Commission (NCCC): Increase its salary
- Timing: House sent the case to Supreme Court of Justice, a criminal division for persons holding political positions
- A week later, NCCC sent the case to CC:
- CC “strategically deserted” the case

Composition of Votes: 8:7

Direction Intervention: Korea

- Selection Process: President Roh indirectly interfered in the selection process by asking Judge Jeon to resign from the regular members of CC in order to become the president of CC.

Yet, the President's political maneuvering on this case failed.

Indirect: Gwangju

- The Victims of Gwangju Incident versus the leader of Military Regime--Chun and Roh.
- Time Line:
 1. The victims asked the Prosecutor to send this case to the Criminal Court. But he declined to process the case
 2. The victims sent the case to CC, but the CC refused to respond to the public demands.
 3. The alliance of victims and other NGOs used the alternative channel by asking the House to pass the bill to penalize the military leader.
 4. The military strikes back by sending the case to the CC. (**Composition of Votes: 5:4**)

Summary of Gwangju-related cases' decision by justices

	Nominated by President			Nominated by Supreme Court			Nominated by Assembly		
	Kim Yong-joon	Chung Kyung-sik	Kim Chin-Woo	Lee Jae-hwa	Koh Joong-Suk	Hwang Do-yun	Cho Seung-Hyung	Shin Chang-on	Kim Moon-hee
Dec 12 Incident (94Hun-Ma246)	con	con	con	con	dis (un)	con	dis (un)	con	con
Special Act (96Hun-Ka2)	un	con	con	con	un	un	con	un	un

Key: "con" means "constitutional".
 "un" means "unconstitutional".
 "dis" means "dissent".

Indirect: Impeachment

- The opposition party passed the motion to impeach the President--being biased favoring his party in the House election.
- The House later sent the case to the CC.
- The president's party won in the election right before the verdict.
- The Court decided not to impeach the President though there was a clear evidence that he violated the election law.

Indirect Intervention: Relocation of the Capital

- Seoul versus rural:
- Roh's Administration passed the law to move the capital from Seoul to Kongju
- Yet, Seoul's residents sent the case to CC on the ground that such law needs to be subject to referendum.
- CC decided that such law violated the "customary constitution." (**Composition of Votes: 8:1**)
- Roh responded by removing some of the provisions (National Assembly; Presidential office; Courts) and resubmitted to CC again.
- Finally, Court decided to validate this new proposal. (**Composition of Votes: 7:2**)

Summary of relocation of capital city cases' decision by justices

Justices	Nominated by President			Nominated by Supreme Court			Nominated by Assembly		
	Yun Young-chul	Song In-Jun	Choo Sun-hoe	Kim Kyoung-il	Kim Young-il	Jeon Hyo-sook	Lee Sang-kyung	Kwon Seong	Kim Hyo-jong
(2004 <i>Hun-Ma</i> 554)	un	un	un	un	un (sep)	dis (con)	un	un	un
Justices	Yun Young-chul	Song In-Jun	Choo Sun-hoe	Kim Kyoung-il	Lee Kong-hyun	Jeon Hyo-sook	Cho Dae-hyen	Kwon Seong	Kim Hyo-jong
(2005 <i>Hun-Ma</i> 579)	con	con	con	con	con (sep)	con (sep)	con (sep)	dis (un)	dis (un)

Key: "con" means "constitutional".

"un" means "unconstitutional".

"dis" means "dissent"

"sep" means "separate concurring opinion"

So What Then?

- CC is indeed a key political actor.
- How to minimize the degree of politicization?
We propose: **2/3** of the votes requirement for the court's decisions on a given case.
- If the judiciary institution relies on the legitimacy, it needs to find a good balance as being a horizontal accountability (accountable to formal institutions) as well as vertical accountability mechanism (accountable to civil society).