ABSTRACT

THE JUDICIALIZATION OF POLITICS: AN EXAMINATION
OF THE ADMINISTRATIVE COURT OF THAILAND

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Since 2000, Thailand's judiciaries have decided the fate of polls, politicians, political parties and policies. Such frequent incursions into uncharted political waters signals a tide of new and largely opaque activities that scholars refer to as "the judicialization of politics." This dissertation provides an account of the judicialization of Thai politics through an examination of the Administrative Court of Thailand. It focuses on the particular actions of both judges and plaintiffs as necessary to explain the phenomenon. In addition, this study attempts to examine the effects of the judicialization of Thai politics upon not only the immediate parties involved in disputes but also expands beyond to cover larger political, social and economic questions.

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THE JUDICIALIZATION OF POLITICS: AN EXAMINATION OF THE ADMINISTRATIVE COURT OF THAILAND

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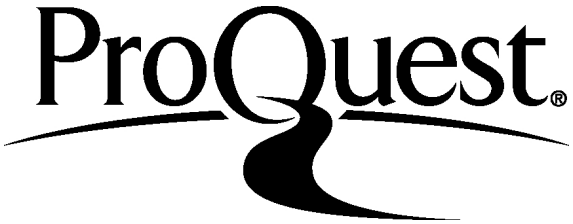

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CHAPTER 1

ENTER THE COURTS

"Could there be the judicialization of politics in the Administrative Court? Yes, it is very likely. But I don't see this as necessarily a 'bad' thing."

-Former President of the Supreme Administrative Court of Thailand[1]

Since 2000, Thailand's judiciary has decided the fate of polls, politicians, political parties and policies.[2] Such frequent incursions into uncharted political waters has signaled a tide of new and largely opaque activities that scholars refer to as "the judicialization of politics" or "the reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies."[3] The judiciary is a new actor that has entered into the already messy fray called Thai politics. This dissertation provides an account of the judicialization of Thai political activities by focusing on judges and plaintiffs. In addition, this study attempts to examine the effects of the judicialization of Thai politics on not only to the immediate parties involved in disputes but also expands beyond to cover larger political, social and economic questions. This study focuses exclusively on the Administrative Court of Thailand, which is a cover term for both the nine regional Courts of First Instance and the Supreme

[1] Interview on July 3, 2012.

[2] This dissertation choses as its point of departure the 2000 Constitutional Court decision that found former Democratic Party Executive, Deputy Prime Minister and Minister of Interior, Sanan Kachornprasart guilty and banned for five year for failing to declare his assets. While Thailand has many courts, this dissertation specifically refers to the Court of Justice, Constitutional Court and the Administrative Court. Nonetheless, the study is fully cognizant of the literature on lèse-majesté, a phenomenon, which, also is increasing in frequency and involves the judiciary, namely the Supreme Court of Justice. Much like the Constitutional Court annulled the results from the 2006 election, the Supreme Administrative Court of Thailand ruled an injunction against a re-run in districts that had failed to achieve the 2007 Constitutionally-required 20 percent voter turnout.

[3] Ran Hischl. The Judicialization of Politics in, Caldiera, Gregory A., Kelemen, R. Daniel. and Whittington, Keith E. (2008; 723) The Oxford Handbook on Law and Politics. Oxford: Oxford University Press. Hirschl's definition refers to three processes: "(1) the spread of legal discourse, jargon, rules, and procedures into the political sphere and policy making forums and processes; (2) judicialization of public policy-making through "ordinary" administrative and judicial review; and (3) the judicialization of "pure politics"—the transfer to the courts of mater of an outright political nature and significance including core regime legitimacy and collective identity questions that define (and often divide) whole polities."

Administrative Court centered in Bangkok. While existing studies on the Thai judiciary's activities overlook this particular court system and choose instead to regard the more visible Constitutional Court of Thailand, a more nuanced examination reveals the Administrative Court of Thailand's merits. Ginsburg (2009, 94-95) underscores this fact when he remarks, "Although given less attention worldwide, the availability of judicial review of administrative action is in some sense more important than constitutional review, in that most citizens encounter the state in simple interactions that do not raise constitutional issues. [E]ven more than the Constitutional Court, the Administrative Court has played a major role in structuring citizen-state relations since 1997 and is becoming an important arena."

Indeed, Ginsburg's assertion proves prophetic when witnessing recent developments in Thai politics and justifies the call that serious attention be given to the Administrative Courts and, by understanding its activities, a deeper understanding of judicialization can also be achieved. Due to its emphasis on official administrative acts, the Administrative Courts' jurisdiction includes important political, economic, and social questions. Moreover the calendar of the Administrative Court's activity is impressive and at the very least alone warrants further inquiry. Since its establishment as stipulated in the 1997 Constitution and its official opening in 2001, up until 2013, the Courts of First Instance and the Supreme Court have accepted nearly 100,000 cases. Table 1 illustrates the steady rise of cases each year for both the Bangkok-centered Supreme Administrative Court and the regional Courts of First Instance between 2001-

2013.[1] Finally, since 2005 Thai politics has been characterized by frequent cycles of violence, breakdowns of democratic rule, and disappointing authoritarian responses.

Table 1

Overall Number of Administrative Court Cases Accepted from 2001-2013

Year	**Supreme Administrative Court**	**Administrative Courts of First Instance**	**Total**
2001	384	5311	5695
2002	963	4256	5219
2003	1262	4249	5511
2004	1434	3620	5054
2005	1809	4349	6158
2006	1994	5075	7069
2007	1929	4958	6887
2008	1998	4254	6252
2009	2027	5250	7277
2010	2273	4607	6880
2011	2352	5915	8267
2012	3150	8482	11632
2013	3345	9675	13020
Total	**24920**	**70001**	**94921**

Source: 2013 Annual Statistics for Administrative Court Cases. Office of the Administrative Court of Thailand.

After the September 19, 2006 military coup d'etat removed popular but mercurial Prime Minister Thaksin Shinawatra, the interim military-appointed government then orchestrated the drafting of a new 2007 Constitution that was approved in a controversial public referendum. One striking consequence of the 2007 constitution was the strengthening of the judiciary and granting

[1] To be clear, there is one Supreme Administrative Court but multiple Administrative Courts of First Instance. The Supreme Administrative Court is essentially a court of appeals. This should not be confused with Thailand's Supreme Court of Justice which primarily adjudicates criminal cases. Cases involving official administrative acts are under the purview of the Administrative Courts. Chapter 4 will elaborate on questions of jurisdiction.

it a position of greater political prominence. As Harding and Leyland (2011, 166) observe, "The enormous faith placed in the Thai judiciary to decide crucial issues was identified by some critics as *the* 'dominant theme' of the 2007 Constitution."[2] A key reason for this newfound faith in the judiciary was the performances of the Supreme Administrative Court, as well as, the Supreme Court of Justice and the Constitutional Court of Thailand immediately prior to and after the coup. In fact, the expanded role of the judiciary represents a trend in Thailand whereby other non-elected institutions possess considerable prerogatives compared to their elected counterparts.

The Administrative Court has been one of the few institutions to be given greater political responsibilities. The 2007 Constitution established a seven-member Senate Selection Committee responsible for appointing members of a dual appointed Senate[3]—one of the members is a Supreme Administrative Court judge (s 112).[4] The President of the Supreme Administrative Court is now a member of the Constitutional Court Selection Committee responsible for appointing judges. Although the most recent coup occurred in May 2014, it is likely that the trend of according greater significance and responsibility to non-elected institutions will likely continue for the foreseeable future. The divisions within Thai politics and society that were crystallized during the height of the Thaksin government remain unchanged—making attempts to re-run democratic elections too costly for his opponents, thus setting the stage for a coup. The Administrative Courts were once again instrumental in providing the necessary pretexts for the most recent military coup in May 2014 by ruling that Prime Minister Yingluck Shinawatra's

[2] See: 'Judicial Role in the Constitution: From People's Charter to Judges Charter,' *The Nation*, April 30, 2007.
[3] Half parliament-appointed and half elected by the populace.
[4] The previous 1997 Constitution established a fully elected Senate.

cabinet decisions to transfer a career civil servant was procedurally-illegal. The Constitutional Court then used the former court's ruling to claim that the transfer was based on corruption.

Until recently, most discussions on Thai politics paid little attention to including the judiciary as a relevant actor responsible for effecting political outcomes. Pasuk and Baker (2009, 275) aptly capture this by writing, "In the past the judiciary had played a minimal role in Thai politics. In the great passion for constitutional reform during the 1990s, the judiciary scarcely figured. Politicians rarely seemed worried by the prospect of judicial reckoning. No prime minister has ever been found guilty of malpractice while in office, and only one minister had been jailed for corruption in recent years." Indeed the judiciary's inertia was the consequence of a constellation of factors.

First, as part of King Chulalongkorn's (Rama V) Chakkri Reformation that included widespread reforms to modernize the country and keep it free from colonial rule, the creation of the Ministry of Justice in 1892 began to introduce justice reforms.[5] Prior to that, there was no position of judge, as the administration of justice was an ancillary function of Department Heads in Bangkok and Provincial governors. Neither positions were independent of the crown.[6] This changed with the passage of the 1908 Law on the Organization of the Courts, which removed justice administration from the departments to six courts, five of which were now placed in the Ministry of Justice. The sixth, the Supreme Court, was directly under the authority of the King. Because of the latter, judges' privileged status elevated them from criticism and, ultimately,

[5] For an excellent review of the development of the modern justice system see Vella (1955), Thai Bar Association, (1967) and Darling (1970).
[6] Neither department heads or governors were particularly interested in entertaining autonomy given the prestige that proximity to the throne offered.

accountability. The overthrow of the absolute monarchy in 1932 by a group of civilian and military officers ushered in experimentations with parliamentary democracy. However, after a series of coups and countercoups, the military established its political supremacy after 1946. Despite episodic flirtations with parliamentary rule along the way, the judiciary remained uninvolved with the larger politics of the day until the promulgation of the 1997 Constitution.

Second, the courts previously lacked institutional powers necessary for judicialization. For instance, neither its jurisdiction nor the safeguards in appointment and removal afforded the independence necessary to incentivize the entertainment of political questions. Judicial review did not exist and, given the long succession of military dictatorships, any attempt thereof would invite further weakening. With particular respect to the Administrative Court, despite nearly a century of disappointments in efforts to create it, the institution did not exist until 2001. Only shortly after the 1997 Constitution's creation of the Constitutional Court did it and the Administrative Court (both intended to be independent of political influence) enjoy real space to contribute to the judicial life of the nation in a meaningful way.

However, the mere establishment of the new institutions, while important, is a necessary but insufficient explanation for their subsequent performance. What explains the judiciary's ascendency towards the political? Specifically, what factors explain the Administrative Court's activity? Activity entails the decisions that the court has made in cases brought before it. How do judges make decisions? In recognition of the old adage—"without plaintiffs, judges have no cases to decide"—what factors explain individuals' decision to use the court? Finally, to what extent does the Administrative Court's decisions affect politics, economics and society? This

dissertation attempts to answer these enjoined questions by uncovering legal and political complexities of historical importance, as well as to explain associated implications.

In order to answer such pressing questions, this study investigates the context within which Administrative Court judges and former plaintiffs maneuver. In order to assess the court's larger political impact, this study also includes the perspectives of politicians and high-ranking bureaucrats. It assesses the extent to which the court impacts how bureaucrats perform their duties (in implementing policy) and likewise how politicians create policies. Seeking to ensure a geographically-comprehensive perspective of the court's impact between 2011-2014, this study interviewed judges from the Courts of First Instance throughout the country's four main regions: Central, North, Northeast, and South. The study also includes interviews with Supreme Administrative Court judges.

The Judicialization of Politics: Approaches and Aversions

Earlier literature examining the judicialization of politics focused almost everywhere in the world but Asia—save a selected few. This neglect was intentional (albeit confusing) as the late C. Neal Tate (1994, 464), reflecting on the phenomenon's potential occurrence in the non-democratic countries of Burma, Cambodia, Vietnam, Indonesia and Brunei, concluded, "It appears that the judicialization of politics is likely to occur mostly, if not only, in regimes that have adopted the institutions and norms of liberal democracy and that have accepted the principle of judicial independence."[7] As a result, until recently, nearly all of the cases and the analytical perspectives were derived from liberal democracies, a bias which resulted in the

[7] Interestingly Ginsburg and Moustafa (2005) note an important but (conveniently) overlooked irony that much like authoritarian leaders even in democracies, the judicialization of politics can be caused by elites overriding elected institutions. As a result they find that the previous neglect of authoritarian regimes from such analyses is unnecessary.

exclusion of most countries that failed to achieve membership in such an exclusive group. A consequence of such a limited scope of countries led to Dressel's (2012,12) sober analysis that "current theoretical models of judicialization are transferred only with difficulty to the Asian context." This dissertation addresses the lack of a full understanding of the Thai context when it comes to judicialization of politics.

The majority of pre-existing approaches explaining judicialization focuses primarily on sources that *empower* the courts. To simplify, these accounts posit the following factors: individuals, institutions, ideas and macro-structure. Individual approaches present judicialization as the result of agency. Such action(s) are largely based on strategic calculus. Both Ginsburg (2003) and Ramseyer (1994) present political elites' motivation for empowering courts based on their anticipation of greater electoral competition advantage. Cognizant of the potential loss of power motivates threatened leaders to empower the judiciary in order to "lock-in" policy prerogatives or prevent unfair retaliation by winners. Relatedly, another strategic model that Hirschl (2006; 2008b) coins "hegemonic preservation" refers to elites, who as they become exposed to competition, decide to "lock-in" their prerogatives by appointing a loyal judiciary able to negate any potential threats from an electorate.

Included in individual-based approaches, is the presentation of judges as political actors. From these accounts, judges too maneuver to increase the court's power relative to other actors and institutions. Their decisions, based on various motivations, are strategically-derived. For example, Ferejohn's (2002) "separation of powers" model presents judges' strategic behavior stimulated from several exogenous factors beginning with a gridlocked executive and legislature unable to resist and or punish them.

Approaches explaining judicialization through a strict emphasis upon institutions locate such empowerment at either the domestic and/or supranational level. For example, domestic courts are active in political arenas directly or indirectly through membership in supranational bodies like the United Nations and World Trade Organization and the European Union. A precondition of membership usually requires that domestic governments adopt laws and principles that empower the judiciary to serve as a key guarantor of fundamental rights. In some countries, this may not have occurred save such requirements. Institutionalist approaches, that are domestic in origin, present judicialization as a consequence of existing political and legal structures that provide the necessary institutional "infrastructure." These are usually constitutionally enshrined and involve the separation of powers or some form of checks and balances, in addition to, a legal document clearly articulating the judiciary's functions. In this sense, courts engage in the political arena because they possess and utilize the institutional powers conferred upon them to do so.

Proponents of ideational factors present judicialization as a wave of a larger global rule of law movement that includes the establishment and appropriateness of the judiciary as arbiter of political questions. The provision of judicial review and court's de facto and de jure independence has remained an indicator of respectability. In fact, some analyses like Woods and Hilbink (2009) go further by arguing that irrespective of regime type or the degree to which they possess institutional independence, whether judges actually intervene is rooted in their *willingness* to do so—itself a consequence of larger historical and cultural contexts which affect their identity and, thus, likeliness of action. The rise in judicialization is influenced by norms, practices the origins of which are located in domestic or international norms. For instance,

Cappelletti (1989) notes that the rise in constitutionalism in the post-World War II era was a result of the failures of elected institutions in pre-war Germany, Italy and Japan to stop the election of fascist dictators who violated with impunity the rights of their opponents. Preventing the "tyranny of the majority" from reoccurring was one of the central motivations for proponents of an enhanced role for ensuring the judiciary's independence and powers.

Finally, macro-structuralist accounts of judicialization are diverse and located at the domestic and supranational level. For example, neofunctionalist-based analyses depict the judiciary's expansionary role(s) as predicated on particular demands from a state expanding in responsibilities and responses to pressures from within and without. Modernization-inspired theories posit that as societies become more complex, so do public policy challenges that the state is asked to solve. As a consequence, in some cases, the latter requires the creation and/or empowerment of legal institutions to efficiently regulate and control such effects. Scholars have also portrayed judicialization as a response to the global diffusion of democratic values and the rise of constitutionalism in particular since the conclusion of World War II (Tate and Vallinder 1995; Epp 1998; Cappelletti 1989). The global expansion of liberal democracy and constitutionalism have in many respects translated into the near universal acceptance of norms and standards which confer greater legitimacy on the judiciary as an appropriate arbiter of disputes. For instance, it is not uncommon for the judiciary to possess the final voice in questions of fundamental human, economic and social rights.

While in offering accounts of judicialization, scholars usually utilize the aforementioned approaches when addressing what Hirschl defines as "mega-politics." His second category denotes judicialization of public policy-making through "ordinary" administrative and judicial

review. Hirschl's distinctions between the second and third "type" is that the former is intended to include cases that are more "narrow" in terms of the overall impact of the parties affected by the decision, although he admits that such differences are more a matter of choice than degree. In their analysis of the judicialization of politics or what they define as the judicialization of administrative governance, Ginsburg and Chen (2009) posit three factors that explain the emergence of the judiciary: economic, political and international.[8] Economic factors refer to the need for an expanded judiciary in the regulation of economic activity caused by globalization. An increasingly globalized economy has led to enormous increases in trade and inflows of capital which then necessitates that domestic governments, previously accustomed to informal institutional arrangements with state and non-state domestic firms, adopt new (formal) measures to successfully accommodate new firms. Thus judicialization serves to define or clarify existing laws and regulations. Also, economic activity, in particular the increasing privatization of public services, requires the courts to monitor and regulate these new arrangements, hence the expansion of their powers.

While economic incentives speak to structural obstacles that governments face, political factors include actors' decision-making (agency). Given the diversity of regimes in Asia, Ginsburg (2009) claims that both democratic and authoritarian regimes have proven willing to empower their respective judiciaries to assist in governance. In democracies the expansion of the judiciary in the areas of administration reflect a need to monitor bureaucracies' behavior given challenges such as the limited period of government's elected terms. Even for authoritarian

[8] Chen and Ginsburg (2009) consider "international" to be synonymous with what Hirschl and I define as macro-structural.

regimes, judicialization has addressed the need for governments to provide credible commitments to economic investors, both foreign and domestic.

In addition, the judiciary serves as an oversight mechanism for large bureaucracies and helps address principal-agent challenges, as well as improves domestic and foreign investor confidence. Ginsburg and Chen (2009, 8) summarizes this with the following, "Whereas in democracies, courts are needed because of extensive principal-agent problems associated with the competition for political power, in dictatorships they are needed precisely because political power is so concentrated." Nevertheless, the motivation for control suggests that judicialization can occur in authoritarian regimes, although it may be so on a more limited scale and limited to particular areas. Finally, international factors are twofold: institutional and ideational. Institutional factors refer to supranational regulatory regimes, which dictate domestic regimes' policies and behavior. Ginsburg and Chen (ibid, 9) note that, "trade and investment regimes typically involve supranational adjudication and review of local government practices." Ideational factors attend to the prevalence of global legal norms that present the increase of judicial activities in the areas of administrative governance as not only appropriate but increasingly necessary.

In sum, despite distinctions between the approaches with respect to whether the question is one of governance or "mega-politics", as the previous section has illustrated, the sources of empowerment are located in agency, macro-structure, ideas or institutions. Further, the locus of the sources of empowerment may also vary depending on the particular context. With respect to the judicialization of politics in Thailand, the distinction that Hirschl makes between governance and mega-politics is spurious because the Administrative Court's jurisdiction affords the

inclusion of both questions. For example, the court has made decisions which have cancelled the re-running of national elections, ruled elected mayors ineligible, prevented major industries from operating due to policy slights, reappointed senior bureaucrats to the chagrin of the Prime Minister, as well as reversed major policy decisions to privatize state industries.

More Politicalization than the Judicialization of Politics: Current Approaches, Narrow Questions and Predictable Explanations

As previously discussed, prior to the 1997 Constitution's establishment of the Constitutional and Administrative Court, the judiciary lacked agency and the institutional and larger structural conditions that were conducive to judicialization. These conditions began to change beginning with the 1997 Constitution's establishment of two independent courts: Constitutional and Administrative. Since the creation of these courts, their subsequent activity has affected both politics and government administration. Most of the arguments previously offered conclude that the judicialization of Thai politics is an elite-driven phenomena—most notably that of the monarchy. In particular, several authors, (Dressel 2010a, 2010b, 2012; McCargo 2014, 2015; and Hewison (2010) have written that the key factors explaining judicializaiton are elites' infighting—and the particular role of the monarchy. Most argue that the King's addresses to the courts clearly signaled the monarchy's opposition to Thaksin and his supporters and thus compromised judges' ability to be independent. This, however is not judicialization of politics but, instead, politicalization of the judiciary.[9] For these authors, the judiciary is beholden to the King's interest. While many of the cases offered are accurate in this

[9] There is a thin line here. As will be shown, sometimes the court can make decisions based on what they believe the King wants though he may have not actually told them to do so. Arguments were also made about the Constitutional Court's ruling to suspend 111 party executives from Phua Thai party, even upsetting the top brass over such a draconian judgment.

conclusion, this fails to account for the diversity of cases that exists in which the monarchy is not involved and, hence, judicialization occurs. By offering cases that clearly demonstrate judicialization, this study contributes to the Thai literature on judicial politics and addresses an important lacuna.

In one of the earliest attempts to explain the judiciary's role in Thai politics, Dressel (2010) arrives at the conclusion that intra-elite conflict resulted in conservative royalist groups using the judiciary to achieve their (political) bidding. This is an instance of politicalization. Dressel and many authors claim that King Bhumipol Abdulyadej has directly intervened on multiple occasions to ultimately politicize the judiciary and ensure that it rule against former Prime Minister Thaksin Shinawatra and, subsequently, affiliated politicians, political parties and individuals. Examining the Thai judiciary's decisions between 2006-2008, Dressel notes that the Constitutional Court of Thailand, Supreme Administrative Court and the Supreme Court of Justice have handed down rulings that are clear indications of "double-standards" and a politically compromised institution.

For example, he notes how in concerted fashion the Administrative and Supreme Court ruled to annul the 2006 national election results that would have likely reaffirmed Thaksin and his Thai Rak Thai (TRT) party's political dominance. While Thaksin and the TRT had won re-election in early 2005, due to his increasingly authoritarian governing style, as evidenced by the removal of checks and balances and eventually culminating into a tax-free sale of his telecommunications company to a Singapore firm, opposition from various segments of Thai society arose. None of his detractors was more crucial than that of the royal family. Calls for his resignation began to grow louder and as large protests gained further momentum, the embattled

but still popular prime minister decided to conduct a snap election in February 2006, believing that another electoral victory would both re-confirm his popularity, bolster his legitimacy and most importantly, silence his critics.

Aware of the likelihood of a repeat of the previous 2005 election victory that saw TRT win an outright majority and in doing so become the first re-elected political party in the country's history, opposition parties, including the chief rival, the Democrat Party, decided to boycott the election, expecting that in many of their districts, the constitutionally required 20 percent voter turnout would not occur and thus the government would be unable to form until a re-run was conducted with the desired turnout.

During this time, charges were filed with the Constitutional Court, accusing the TRT of fraud and even paying for political parties to run as opposition in boycotted districts in an attempt to reach the required 20 percent minimum turnout. In addition, the Supreme Administrative Court accepted cases related to several procedural errors that occurred during the election. During this controversy, many authors claim that King Bhumipol Adulyadej's April 2006 royal address calling for the three main courts (Constitutional, Supreme and Administrative) to "resolve" the impasse was crucial. According to Dressel (2010), King Bhumipol's comments that an impending one-party TRT government was "undemocratic" was a death knell to Thaksin. He (2010, 680) states, "that the royal message got through was shown just days later when the Chief Justice of the Supreme Court called a meeting of the heads of the Administrative, Supreme, and Constitutional Courts. The meeting was not only followed by the Constitutional Court's decision to annul the April 2 elections but also by the heads of the three courts calling for the Election Commissioners to resign." The result of the courts' decision led to

the continuation of protests that paralyzed the country up until September 2006 when the Thai military came into power while Thaksin was in New York.

With Thaksin removed, Dressel (2010) and others credit King Bhumipol's address to the Administrative Court on the eve of the Constitutional Tribunal's 2007 decision on the fate of Thai Rak Thai party as *the* factor that led to its eventual decision to dissolve the Thai Rak Thai party and impose a five-year ban on 111 party executives. At the same time it acquitted its more conservative and royalist-aligned Democrat Party despite overwhelming evidence that its members committed many of the same offences as the TRT. Ultimately, Dressel claims that Thailand has experienced *politicalization* of the judiciary and not *judicialization*.

McCargo (2014) attempts to provide a framework for what he understands to be the judicialization of Thai politics. Acknowledging that the diversity of courts, cases, and outcomes preclude any likelihood of arriving at generalizable conclusions as they pertain to what judicialization is, as well as its effects, he suggests using a micro-level (case by case) approach that is highly contextualized. McCargo acknowledges that even the Thai word for judicialization, *'tulakanpiwat'* remains contested and usually connotes two contrasting interpretations related to the court's functions: progressive and conservative. Progressive judicializations serves to advance the agendas of society's most marginalized and has the potential to translate into the creation, expansion and protection of rights. Judicialization that is conservative in orientation seek to "clean up electoral politics" and prevent the tyranny of the majority.

Ultimately, the two perspectives that McCargo presents are not necessarily mutually exclusive. However, based on the court cases that he refers to— the annulment of the 2006 election, the dissolution of TRT and subsequent acquittal of the Democrat Party, the removal of

Prime Minister Samak Sundaravej from office, the Supreme Court's two-year jail sentence for Thaksin for helping his wife secure a lucrative land deal, the seizure of $1.32 billion of his assets from and the removal of his younger sister, Prime Minister Yingluck Shinawatra— the direction is one-sided.[10] No wonder he (ibid, 437) concludes, "For many in Thailand, the new institutions first created under the 1997 Constitution—notably the Constitutional Court—had become part of the problem, rather than part of the solution. Institutions that were supposed to ensure stronger checks and balances have become elements of a troubling "juristocracy": highly politicized and serving primarily to reign in supposedly untrustworthy politicians on behalf of bureaucrats and royalists."[11]

There is an element of truth in McCargo's conclusion. His specific examples do exhibit the judiciary's activity as well as the rather predictable nature of decisions. However, despite his earlier caution that one could not draw overall conclusions with respect to judicialization, McCargo fails to adhere to his own forewarning. Further, he does not offer a particularly balanced account illustrating the progressive outcomes. Ultimately, by stating that the court is politicized, what he is alluding to is the politicialization of the judiciary and not judicialization per se.

As this dissertation will demonstrate, politicalization of the judiciary by elites has occurred and some of the outcomes have served to enhance conservative elites' position. However, as this study will also illustrate, judicialization has also occurred and, the judiciary, in particular the Administrative Court of Thailand has made decisions that led to the realization of

[10] McCargo does not suggest that the two perspectives are exclusive.
[11] Hirschl's (2004, 1) "juristocracy" refers to the phenomena of, "constitutional reform has transferred an unprecedented amount of power from representative institutions to judiciaries."

progressive outcomes. In particular, the Supreme Administrative Court's rulings both against and for the bureaucracy, has included the cessation of activities by powerful industries that caused environmental degradation including awarding of large financial compensation. In fact, in efforts to adjudicate cases related to environmental and health challenges with speed and efficiency, the court even created a special, "Green Courts" which is strictly dedicated to adjudication such cases. Likewise, the court has created a special division to adjudicate personnel cases within the bureaucracy. These outcomes have protected and expanded the individuals' rights against abuse.

Significance of the Study

This study is significant because, for the past decade and a half, Thailand's judiciary has increasingly become an important actor affecting the country's political, economic and social affairs. Whether acting to annul elections, ban politicians and parties, as well as affirm/reject important government policies, the Supreme Courts of Justice, Constitutional Court, and Administrative Courts have been active, whether within their own respective jurisdictions or, on occasion, in concert. To date, while several students of Thai politics have acknowledged the judiciary's increasing prominence , none have managed to approach the phenomenon from the perspective of both mega-politics and governance in an in-depth and systematic fashion. Apart from examining a few select cases, there have been no serious attempts to place the phenomenon within the larger context of published findings. Many explain away the court's activity as a result of elite machinations without backing up their claims or counter-claims by referring to the scholarship of serious researchers.

Regrettably, the existing literature on the Administrative Court of Thailand is largely confined to public law scholars like Leyland (2006; 2009 and 2010) who, while actually

demonstrating judicialization, fails to take seriously the institution as a political actor.[12] This dissertation expands the scope of the judicialization of Thai politics literature by including the Administrative Court—a court that has produced both, to use McCargo's useful distinction, progressive *and* conservative outcomes. Given the nearly fifteen years of political turbulence in Thailand, the court is still an institution that exists within a highly politicized environment. As subsequent chapters will further elaborate, internal divisions within the court began to reflect the larger societal divisions, aligning the country between pro- and anti- Thaksin supporters.

The focus on the Administrative Court promises several contributions. First, the military overthrow of the caretaker government on May 22, 2014 was yet another indication of the fragility of Thai democracy. To date, the current military dictatorship's disingenuous attempts to defuse an environment engulfed by tensions by crafting a bargain between political elites whose interests are threatened by democratic politics and those who are empowered by it. However, it is likely that the new constitution will further weaken elected institutions in favor of the unelected. This will translate into a more prominent role for "independent" bodies like the Supreme Court of Justice, Constitutional Court and Administrative courts, as well as the civilian and military bureaucracy. Even during the current military rule, judicialization continues. The Administrative Court remains active in striking down the present military government's policies, although the types of cases are more narrow given the restricted policy space. My interviews with a few

[12] On reason the public law field has maintained a monopoly on the Administrative Court and perhaps the political scientist's aversion to study the court is the former's assertion that the court possess institutional safeguards that prevent it from political use. As the chapter on judges will demonstrate, Administrative court judges at both the Supreme and First Instance levels confirm that while *de jure* independence exists (defined as the formal institutional provision that provide judges the necessary autonomy and resources to make decisions free of external and internal interference), politics so as well. I suspect an additional reason for the neglect is the divide between political science and public administration. The latter is, wrongly perceived as devoid of politics and sadly reduced to a mere technical questions. Given the importance of the historical importance of the bureaucracy in Thailand as well as growing importance of policies in electoral politics, ignoring an institution tasked with monitoring the bureaucracy as well as determining political outcomes is surprising.

Administrative Court judges at both the Courts of First Instance and the Supreme Administrative Court reveal that judges have not directly faced any interference from the military government but did express a continued awareness of the political context and the associated sensitivities therein when making decisions.

Second, the turn towards non-elected institutions at the expense of elected ones shines a spotlight on the more significant power of the (non-elected) bureaucracy which effects the lives of ordinary citizens. As a consequence, one of the key institutions responsible for ensuring government accountability, transparency and efficiency is precisely the Administrative Court. Finally, research on the judicialization of Thai politics answers larger questions about the status of democratization. Understanding why the Administrative Court's role is more prominent, indeed more important, and who is using the court and why, can offer insights as to the condition of Thailand's politics. In particular, in cases where the Administrative Court decides against the government, does this mean that the relatively new but largely untested court serves as an instrument of accountability, or is it yet another blip in a long historical line of ineffectual institutions? This study offers insight into these larger questions. Today, any analysis of politics and governance in Thailand that fails to provide an account of the judiciary is incomplete.

This study contributes to the judicialization of politics literature in a number of ways. First, by testing theories related to courts and judges as well as former plaintiffs, this study seeks to determine whether the aforementioned theories are applicable to Thailand. In cases where they fail to elucidate beyond the obvious, it then seeks to provide alternative explanations and thus further advance the literature on judicialization and the courts. Second, this study aims to be one of the few to incorporate the perspectives of judges, both acting and retired. This is a rarity given

the challenge of access to people in power, time and the needed sensitivity associated with the topic. Third, this will be the first extensive, in-depth study of the judicialization of politics in Thailand. While some scholars have examined a few controversial decisions and have, as a result, arrived at rather one-sided conclusions about the role of judiciary in Thai politics and society, this study invests a considerable amount of resources in pursuit of a more comprehensive account. Finally, by focusing on two categories that Hirschl distinguishes under the umbrella of judicialization—mega-politics and policy/governance—this present study enlarges our understanding of the phenomenon because it demonstrates how one court can examine both dimensions. It is hoped that the results from this dissertation can advance the literature as a whole, as well as make scholars of Thailand more cognizant of the impact of the judiciary on politics at both the national and the more personal, intimate level. In short, courts increasingly matter in Thailand. The degree to which they do and do not and why is what this study aims to demonstrate.

Key Research Questions

This study's key research questions are:

1. What key factors account for the judicialization of politics in Thailand? In particular:
2. What key factor(s) account for former plaintiff's decision to use the court?
3. What factors account for the Administrative Court's activity?
4. What key factors do judges take into account when making a decision?
5. What are the major implications stemming from the establishment of the Administrative Court from the perspectives of both judges and plaintiffs? To what extent has the Administrative Court affected the relationship between Thai citizens and the bureaucracy? To what extent has the Administrative Court affected the bureaucracy?

Dissertation Outline

Chapter 2 proffers an overview of the judicialization of politics literature while paying particular attention to key approaches that explain the phenomenon's occurrence and absence. By exploring the necessary conditions needed for judicalization, most notably: formal institutional protections that afford judges independence in decisionmaking and judges willing to make such decisions and individuals willing to submit plaints, this chapter establishes a framework for the study. Further, the chapter explores key debates within the literature while also addressing where the Thai case fits.

Chapter 3 outlines the dissertation's methodology. This dissertation used a within-country comparative approach and utilized both quantitative and qualitative methodologies. In particular, the study includes several public opinion surveys and official case statistics from the Office of the Administrative Court. The study used in-depth interviews in order to determine the key factors that judges take into account when making a decision. In addition to the quantitative analyses and interviews, this study also uses previous court cases as case studies.

Chapter 4 provides an in-depth analysis of the Administrative Court. Understanding the Court's history, mission, jurisdiction and formal enforcement powers, are key to appreciating its role as well as uncovering the power of judges and the position of plaintiffs. The chapter also provides statistics that illustrate the activity of the Administrative Courts in terms of its caseload, as well as other functions that the institution performs. The chapter concludes by demonstrating that the institutional dynamics of the court offer a necessary but alone insufficient explanation for both judges and plaintiffs' actions.

Chapter 5 explores the perspective of former Administrative court plaintiffs through interviews. The chapter also tests arguments related to judicialization through an exploration of Thais' perceptions towards the courts and other institutions. Ultimately, the chapter finds that public opinion surveys suggest that Thais are more likely to adjudicate their grievances involving the bureaucracy through the judiciary. This affirms one of Tate's pre-conditions for judicialization. In addition, based on interviews with former plaintiffs, most plaintiffs perceive the court as one of "last resort" meaning that it is used after all other means of conflict resolution are exhausted. The origins of this is institutional however, many plaintiffs are motivated to receive justice. This chapter concludes that judicialization within the perspective of the Administrative Court is likely to continue.

Chapter 6 examines the perspectives of Administrative Court judges both current and former, at the Court of First Instance and Supreme Administrative Court. This chapter also explores the key factors judges take into account when making decisions. It also provides judges' perspective on Thai politics, government, political institutions, plaintiffs and how judge themselves perceive the role of the court. It argues that Administrative Court judges are strategic actors who are primarily concerned with the public's perception of the court's reputation and will seek to appease whenever possible. Supreme Administrative Court judges reflected a greater awareness of the public perception and were sensitive to their reactions.

Chapter 7 includes former court cases as case studies. The cases illustrate not only the court's ability to affect important government policies including foreign policy, national elections, and powerful economic actors. The cases also illustrate an instance where the interests of King Bhumipol Adulyadej are directly-vested. This case illustrates that the court can function

as it went from an independent institution (judicialization) to being under the direct control of another actor (politicalization). Thus while previous accounts of the judiciary's role in Thai politics present judicialization and politicalization as mutually-exclusive, this chapter demonstrates more nuanced is demanded on a case-by-case basis.

Finally, Chapter 8 concludes with a summary of the study's key findings, contributions as well as limitations. One notable shortcoming has been that the study does not incorporate the perspective of the bureaucracy. Future research is necessary in order to better determine how bureaucrats perceive the Administrative Court. This will help better inform questions regarding the court's impact.

CHAPTER 2

JUDICIALIZATION OF POLITICS LITERATURE REVIEW

Nowadays I have to "lawyer up." I've been subject to several lawsuits in the Administrative Court and had to increase my legal staff. It affects my ability to govern."

--Current governor of a large metropolitan city[1]

Over the last decade and a half, the Thai judiciary's role in determining political, economic and social outcomes has been unprecedented in history. However when situated in the larger global context, the judicialization of Thai politics is in fact part of a more established and ongoing "movement." This chapter takes stock of the judicialization of politics literature with a particular emphasis upon the key approaches that account for its occurrence. It presents a framework to explain the phenomenon's inter-related nature and accounts for the diversity of actors involved. In addition, the framework also explains one concept's fluidity.

Surveying the different terms that judicialization of politics scholars offer, section one establishes a definition with clear conceptual guidelines for this study. In doing so, the important distinctions are teased out for analytical clarity. Section two explores the plethora of approaches that explain judicialization's occurrence—an explanation ultimately located in *sources that empower the judiciary*. Arguing that none of the approaches are adequate in their explanation of judicialization alone, section three presents a framework for this study that affords better

[1] Interview on August 6, 2012.

analytical clarity. Finally, section four focuses on the relevant scholarship on the judicialization of Thai politics to the Administrative Court and how the framework addresses shortcomings.

Defining the Judicialization of Politics

Throughout its relatively short history in political science, scholars have offered numerous definitions of the judicialization of politics. In one of the earliest multi-country studies on judicialization, C. Neal Tate in Tate and Vallinder (1995, 28) conceptualizes the phenomenon as a "dual process":

1) "A process by which courts and judges come to make or increasingly to dominate the making of public policies that had previously been made (or, it is widely believed, ought to be made) by other government agencies, especially legislatures and executives"; and, 2) "A process by which nonjudicial negotiating and decision-making forums come to be dominated by quasi-judicial (legalistic) rules and procedures."

Several assumptions that pertain to key actors, processes, outcomes in this definition require further explication. First, the establishment of courts and judges as *the* key actors presumes that they have the independence from external actors to make decisions. This is important because in the absence of independence, there is no judicialization but, instead, politicalization of the judiciary.[1] While this dissertation finds courts and judges are key actors necessary for explaining judicialization, it is not the only one. Second, this definition subscribes to a specific *process and direction*: the shift in responsibilities *from* other actors, notably elected institutions and individuals, *to* the judiciary. Judicialization means that the courts and judges are more prominent in determining political outcomes relative to other actors. Finally, the definition assumes that judicialization leads to a specific *outcome*—the creation of public policies. Indeed, more notable

[1] Politicalization does not mean that the judiciary was previously an apolitical institution, to the contrary it refers to the lack of independence from external actors to make "their own" decisions.

decisions from judiciaries like the U.S. Supreme Court and others have led to the creation of new public policies, most notably in the form of laws addressing a variety of issue areas ranging from abortion, slavery, hate speech and even to the seemingly miniscule regulation of weekly work hours.

However, the judiciary's ability to effect political outcomes can occur in much more complex and less obvious ways. For example, U.S. Supreme Court scholar, Michael McCann (1994, 72) demonstrates such impact on political actors' behavior that is not directly observable. The actions of both legislators and executives may reflect strategic considerations of the court's anticipated reactions to impending legislation or behavior. In this sense, when Congress and the president negotiate legislation, whether or not one side believes the court is in their "corner" or not, can determine the strength of one's bargaining power and thus dictate subsequent negotiations. McCann (ibid) also finds that "legislators both anticipate judicial statutory interpretation when writing new laws and "rewrite" laws in response to judicial rulings "inviting" clarification of previous policy action." If other political actors take into account the anticipated reactions of the judiciary when performing their respective duties, then perhaps judicialization may have always been an understudied reality. Ultimately, this perspective reminds scholars to exercise greater awareness in their conceptualization of the judiciary's role and how it alters the behavior of other actors beyond the formalities of judicial review.[2]

[2] Landfried's (1994) neo-institiutionalist examination of the German Federal Constitutional Court's decisions over a 40-year period, found that its impact on the *Bundesstaat* through the more obvious judicial review represents but one aspect. Indeed, the court was able to influence the policymaking process by signaling to lawmakers what content should (and should not) be included within proposed legislation. Because the court is the authority with respect to the interpretation of the constitution, this dictates that lawmakers consider the anticipated reactions when crafting legislation. In addition to a sensitive parliament, Landfried finds that the parliament acquiesces to the judiciary by not seeking to challenge its authority. Hence, Landfried asserts that judicialization occurs before the court formally acts and a more comprehensive understanding of how the judiciary functions is necessary.

The second part of the Tate's definition refers to the increase of legal norms, formal rules and procedures over previously non-legalistic ones. Both Habermas (1988) and Teubner (1987, 359) refer to this as "juridification" or "the tendency toward an increase in formal (or positive, written) law that can be observed in modern society." In their essay on juridification, Blichner and Molander (2008, 38-39) provide a five-concept typology: constitutive, law expansion and differentiation, conflict-solving by reference to law, increased judicial power, and legal-framing. Each concept reflects a specific process and outcome.

"First, constitutive juridification is a process where norms constitutive for a political order are established or changed to the effect of adding to the competencies of the legal system. Second, juridification is a process through which law comes to regulate an increasing number of different activities. Third, juridification is a process whereby conflicts increasingly are being solved by or with reference to law. Fourth, juridification is a process by which the legal system and the legal profession get more power as contrasted with formal authority. Finally, juridification as legal framing is the process by which people increasingly tend to think of themselves and others as legal subjects."

Like all constitutive approaches there are difficulties determining the specific timing when these rules gain widespread acceptance and adherence as well as the extent of its impact. For example, establishing formal laws may not necessarily lead to its application and impact on society or politics if, as is common in many countries, especially, Third Wave democracies, formal legal institutions and corresponding laws are, for many reasons, cosmetic.[3]

As Tate and Vallinder (1995) concede, it is possible that these two processes can occur independent of each other. For example, the expansion of formal rules, norms and legal

[3] Discussing the judicialization of Latin American politics, Sieder et. al., (2005) argue that in some newly democratizing countries where judiciaries were instruments of repression in authoritarian regimes such legacies of abuse have meant that the creation of formal laws empowering the "new" courts have proven ineffectual.

discourse (de jure independence) may not result in an increase in the judiciary's direct policy-making activity but may, in fact, prove merely cosmetic. Furthermore, as this chapter will illustrate, the judiciary's "domination" of the policy-making process can even either undermine support of existing laws or supersede laws, rules and procedures.[4]

In her examination of the Mexican judiciary, Pilar Domingo (2004, 110) defines the judicialization of politics based on four key processes:

"First it is a process by which there is an increase in the impact of judicial decisions upon political and social processes. Second it refers to the process by which political conflict is increasingly resolved at the level of the court. Third, at a discursive level, judicialization of politics reflects the degree to which regime legitimacy is increasingly constructed upon public perception of the state's capacity and credibility in terms of delivering on the rule of law, rights protection. Finally, it refers also to the growing trend by different political actors and groups within society to use law and legal mechanisms to mobilize around specific policies, social and economic interests and demands."

Domingo's judicialization is more expansive with respect to the actors, processes, and outcomes than Tate and Vallinder suggest. She draws attention to the significance of courts and judges and their various functions—all of which may either be a *driver* (direct*)* or *driven* (indirect) in the process of judicialization. Whether impacting political and social questions, the scope and effect of judicialization can be contingent on context. As this chapter will expound further, the judicialization of politics can occur irrespective of whether judges alone are the key source of empowerment or not.

[4] Moreover, the establishment of formal independence (de jure) may not translate into judges' ability to make decisions without external influence (de facto).

The four processes also illustrate the diversity of activism and degree of independence that the judiciary may have. In the first component of the definition, Domingo positions judges' decision-making and its associated impact as the main driver of judicialization. The second definition positions individual(s) who use courts and judges to achieve their respective interest(s) as the key drivers. In the latter case, judicialization originates with the actors who use the court to achieve an objective(s) through legal channels. The third definition depicts judicialization as a process that enhances and/or maintains regime leadership legitimacy.[5] Finally, the fourth definition describes judicialization that originates from non-state actors who mobilize the courts to achieve their respective goals. In sum, although the judiciary ultimately determines outcomes, the emphasis on other actors as necessary to explaining the process by which this occurs provides a more comprehensive account of the phenomenon.

Domingo's definitions while comprehensive, fail to offer meaningful distinctions between process and outcomes. For instance, the judiciary's increasing involvement in determining politics is an outcome but offers no explanation with respect to motives. This is a challenge that persists within the literature, as scholars have the tendency to presume that judicialization makes "positive" contributions for the state and society, whereas "bad" decisions represent a more biased court and thus is indicative of "politicalization" of the judiciary. Several challenges arise from such assumption. First, political science and judicialization literature in particular, depicts judges as political actors who make (biased) decisions strategically. The

[5] As this chapter will later discuss, this reflects the increasingly global acceptance of the rule of law irrespective of regime type although such universalism democratizes its meanings.

biased nature of their decision-making does not mean that they are not independent.[6] To the contrary, judges' strategic nature in fact reflects an autonomy that is afforded to them. That judges are strategic also can complicate assumptions that particular decisions are indicative of the court's independence. Greater context understanding is needed. Further, understanding that judges are political actors affords scholars of judicialization to better account for the court's behavior and hence the degree to which the phenomenon can strengthen or undermine regimes.

Comparative law scholar Ran Hirschl (2006, 723; 2008, 121-124) defines the judicialization of politics as a "tripartite" process that is usually interrelated with other aspects, though need not necessarily be limited to just one of the following: "(1) the spread of legal discourse, jargon, rules, and procedures into the political sphere and policy making forums and processes; (2) judicialization of public policy-making through "ordinary" administrative and judicial review; and (3) the judicialization of "pure politics"—the transfer to the courts of matter of an outright political nature and significance including core regime legitimacy and collective identity questions that define (and often divide) whole polities."[7]

Like the previous two authors, the first part of Hirschl's definition refers to what is called "juridification." Hirschl's latter two definitions delineate what he refers to as "normal" and "mega-politics." "Normal" politics are instances where the court creates administrative policies and exercises judicial review. "Mega politics" raises political questions of greater significance in scope. For example, in some countries policy issues such as abortion, affirmative action, capital

[6] Independence does not mean that judges are not influenced by several factors, it simply means that they are not *directly* influenced from an external (outside of the court) actor(s) who is able to directly eliminate their ability to make a decision. Whether making decisions based on personal ideology or more the anticipated reactions of others, judges are presumed biased.
[7] Hirschl uses "pure" and "mega" interchangeably.

punishment, state-run healthcare or same-sex marriage are important policy questions that can have enormous political implications. Both a politician's and a political party's position on issues can impact their political future and their relevance to stakeholders, most notably voters. Further, as Ginsburg (2009, 1) reminds us, the overemphasis of constitutional questions within judicialization studies neglects the reality that "most citizens are far more likely to encounter the state in the routine matters that are the stuff of administrative law rather than in the rarified sphere of constitutional law." This underscores the importance of possessing a broader conceptualization of the judiciary and its involvement in governance and administration.[8] Ultimately, determining whether judicialization has or has not occurred, regardless of origin, is what is important.[9]

Alec Stone-Sweet's (2000; 2002, 71) conceptualization of judicialization offers a historical-institutionalist account of the process in which the judiciary is legitimated as the arbiter of conflict between two parties.[10] He defines judicialization as, "the process by which triadic law-making progressively shapes the strategic behavior of political actors engaged in interactions with one another."[11] This "triad" refers an interactive relationship involving three actors—two disputant parties ("dyad") and a third party (usually the judiciary) which he then calls, "triad"). Judicialization officially commences when conflicts that two disputants were

[8] In fact, Hirschl himself acknowledges that his category of policy and public administration questions as "narrower" in scope and impact and somehow less "pure" may simply be an exercise in semantics.
[9] Essentially, what constitutes "political" is contextual. Hirschl (2006,728) even concedes that the distinction between the second and third categories lies, "between mainly procedural justice issues on the one hand, and substantive moral dilemmas or watershed political quandaries that the entire nation faces on the other." Even this distinction is contingent on other factors. For example, the significance of national elections depends upon other corresponding factors, *most importantly the quality of the state administration in terms its ability to translate voters' policy preferences into tangible results.*
[10] This also includes the two disputant parties accepting the decision as final.
[11] In an earlier work explaining the French Constitutional Council's evolution from an apolitical outside to an active lawmaker, Stone-Sweet (1992, 7) defines this as "juridicization of policymaking" or "how the increasingly intense interaction between a constitutional court and governments and parliamentarians has structured political choices and shaped policy outcomes."

previously able to mediate outside of formal/legal intervention become intractable, thus requiring both to entrust the matter to a third party and adhere to the latter's decision.

Stone-Sweet's definition possesses the fluidity to capture the process(es) and timing of the dyad's establishment, breakdown and evolution into a triad. This conceptualization of judicialization is less fixated upon the establishment of a formal (state) institution and is applicable in contexts outside of state-centric accounts. Stone-Sweet's judicialization focuses more on the process by which the two disputant parties adhere to the third party's decision and how this relationship develops formally—less than the particular issue area that is judicialized. This expands our understanding of what can be judicialized. Critics of his definition argue that it is uni-directional. For example, Ferejohn (2002) argues that Stone-Sweet fails to offer an account of "de-judicialization" which implies a breakdown of the triad and re-establishment of the dyad. Further, the extent to which Stone-Sweet's judicialization can accurately determine the timing when the dyad becomes a triad (judicialization) in cases involving great complexity is questionable. Judicialization is a concept that is more fluid because it is dependent on the breakdown of mediation between specific parties. This perspective may give too much emphasis to individual actors because it does not account for the effect of the state. For instance, the establishment of new laws and courts may affect the speed by which the dyad breakdowns or even how it is maintained.

Other definitions of judicialization are narrower in scope, as they emphasize a particular process or outcome. For example, examining the judiciary's role in the expansion of rights in the U.S., India and Britain, Charles Epp's (1998) advances the term "rights-enhancing judicialization." This is what Siederet al. (2005, 5) define as "judicialization from below" or

"when certain sectors of society gain greater consciousness of their legal rights and entitlements, and when citizens adopt strategies of legal mobilization to press claims through the courts for their existing rights to be upheld, or use legal discourses to create rights not yet protected or codified in law." From this perspective, society uses courts to either fully establish new rights or affirm and enhance existing ones.

Literature on the judicialization of rights made an important contribution to the field because it demonstrated that the process could originate from the below thus giving a new voice to studies that had until then overemphasized the role of courts and elites. This is precisely Epp's reason for his study notes explanations that overemphasize the role of the high courts in rights revolutions in the U.S., Britain and India are important, this does not diminish the importance of the court entirely nor that of the state. In fact, Epp's (1998) admiration of the legal structures rivals that of the role of "the masses."[12]

In its simplest form judicialization is, the process(es) by which courts and/or judges determine political outcomes. This dissertation uses Hirschl's definitions of the judicialization of politics because it captures the various processes involved.[13] However, it intentionally avoids equating the phenomenon with a particular outcome(s). As was mentioned previously, the assumption that judicialization serves only a positive purpose for state and society fails to appreciate the phenomenon's many permutations. For example, judicialization may or may not

[12] Central to Epp's (198, 2-3) thesis is that actors utilize what he defines as "institutional support structures" such legal advocacy organization and legal networks to provide the needed legal pressures to obtain legal victories.
[13] Judicialization contrasts from politicalization in that the latter refers to judicial activity that lacks autonomy and is directed from without. Thus courts and judges make decisions at the behest of another actor(s). Patapan (2012, 219) describes politicalization as "political usurpation of the legal authority of the court in ways that undermine its expertise, independence, and judgment."

lead to the "desirables" of improved governance, accountability or transparency—it may in fact undermine regimes—democratic or authoritarian by empowering elites who, no longer being able to influence political power through the ballot box, to have a "voice." Victories obtained through the judiciary may further exacerbate social, economic and political inequalities as much as it may reduce them.

Further, Hirschl's definition is better positioned to accommodate the Administrative Court of Thailand's institutional peculiarities. First it privileges Administrative Court judges as responsible for not only providing rulings, but also its jurisdiction which includes "normal" and "mega-politics." The court's institutional rules empower judges to investigate and ultimately enforce its rulings. While Hirchl's definition provides the most accurate account of the court's activity, its description is partial as it fails to reflect the inter-related nature of judicialization. Any attempt to understand judicialization through the perspective of the Administrative Court of Thailand must take into account plaintiffs because, in their absence, judges have no cases to rule on. Thus, the framework below addresses this important gap.

The Judicialization of Politics: Key Explanations of Empowerment

Judicialization of politics occurs when the court and judges determine or affect political outcomes. This definition assumes that judges make decisions independent from direct external influence. This section provides key factors that explain the phenomenon's occurrence. Despite burgeoning research, the judicialization literature still lacks comprehensiveness, as scholars in the subfields of international relations, comparative politics (including comparative judicial politics), public administration, and public law have unfortunately worked in isolation. This led

to Stone-Sweet's (2002, 2) sober conclusion that "no coherent body of theorizing on judicial institutions exist[s]."

A key reason for the many "islands of findings" is that most studies originate from different sub-fields that in turn adopt different points of departure with respect to fundamental questions such as the role and behavior of courts and judges. For example, the public law field largely present courts and judges, barring a few "deviants", as an apolitical actor(s) genuine in their commitment to upholding the principles of jurisprudence. As previously discussed, political scientists by contrast presume that courts and judges are yet another political actor albeit in a more interesting garb. With respect to these fundamental points of departure, this section discusses the major approaches that explain judicialization and demonstrates that both the public law and political science make important contributions to the overall understanding of the phenomenon.

This section surveys some of the major approaches that explain the key factors why the judicialization of politics occurs. Hirschl (2008) presents five approaches: functionalist, rights-centric, institutionalist, court-centric and realist. Other scholars like Dressel (2012) offers three: institutionalist, ideational and structural approaches to explain the judicialization. Finally, Ginsburg and Chen (2009) also submits three: economic, political and institutional. Despite the differing terminologies, all three authors' approaches converge. For the purpose of simplification, this study categorizes them under the following umbrella-terms: individual, institutional, ideational, and macro-structuralist. While all the approaches possess their own individual merit, none alone sufficiently explain the phenomenon examined within this study.

Thus, the section includes a framework that addresses this shortcoming and better captures judicialization.

Individual-Based Approaches

Approaches that emphasize individuals as central to the analysis of why judicialization occurs, focus on the importance of choice(s). Led by various motives, elites, ranging from powerful politicians to judges, empower the judiciary to have a greater ability to determine political outcomes. Discussing the importance of judges, Tate (1995, 33) asserts that "judicialization develops only because judges decide that they should (1) participate in policy-making that could be left to the wise or foolish discretion of other institutions, and at least on occasion, (2) substitute policy solutions they derive for those derived by other institutions." While this presents a more "noble" justification of judges' motives, it underscores the importance of understanding judges' ontology.

The absence of judicialization studies was largely attributed to political science's reluctance to come to terms with its conception of courts and judges that was outdated, normative and, ultimately, inaccurate. Specifically, because most of the research in the discipline's early years focused on formal institutional rules and procedures, both court and judges were reduced as apolitical and thus deemed a subject unworthy of inquiry during the turn to more behavioral-oriented research.[14] The focus on judges' values and conservative or liberal leaning were usually deduced from their decisions. One glaring omission from such analysis was

[14] For an excellent review of the development of the judicial politics literature, see Nancy Maveety, 'The Pioneers of Judicial Behavior 'The University of Michigan Press, Ann Arbor 2003, especially chapter 1: The Study of Judicial Behavior and the Discipline of Political Science. Interestingly, Dwodle's (2009) questions why most political scientists have previously neglected the courts. This may be because institutions were abandoned during the disciplines behavioral revolution, although the study of judges' decision-making remained a subject of study.

the omission of the institutional rules from which judges operated. The emergence of "new institutionalist" analyses began to focus on how institutional rules affect judges behavior and how the latter may not be indicative of actors' true desires. This points to the strategic nature of decision-making that eventually became a dominant school within the discipline called "rational choice."

Derived from neoclassical economics' rational choice theory that portrays human behavior to be the result of strategic calculus, judges and, by extension, the courts, in turn, possess exogenously-derived preferences that they order and choose based on the anticipated actions of other actors. These actors vary from the dispute parties, elected and non-elected institutions, the media, etc. Most of this strategic interaction transpires within the institutional context of the court's formal rules. Given such constraints, individual(s) make the most optimal decision possible (Lichbach 2003). The judicialization of politics literature in particular assumes that judges use the powers and privileges bestowed to them in order to strategically intervene in politics. This approach borrows from the judicial politics literature that is commonly referred to as the "strategic model."[15]

Ample literature exists explaining motives for judicialization. For example, judges make decisions in response to the anticipated reaction of other actors, such as elected institutions and individuals, other judges on the same bench, the media, the reputation of the court, and their careers. Knowledge of judges' preferences is important because it can allow observers to better predict their decisions. Ultimately, the strategic-based approach states that judges' decisions do

[15] For more on the strategic model, see Elster 1986, Spiller & Gely 1992, Boucher & Segal 1995, Epstein & Knight 1998; 2000, Maltzman et al. 2000, Lax & Cameron 2007, and Staton & Vanberg 2008.

not reflect their sincere (true) preferences. While judicialization solely focuses on the strategic approach of judicial decision-making, it is important to note the other two key perspectives explain how judges make decisions: attitudinal and historical-institutional.[16]

Individual-based analyses that explain judicialization are not limited to judges. Political elites, rather individually or as a collective, strategically empower the court for several reasons. First, long-standing elites may empower the judiciary to determine political questions for the purposes of accessing in the court in future. Such access would allow elites political influence especially when others sources of power no longer exist. Referred to as the "separation-of-powers" literature judicial empowerment is attributed to the strategic calculations of other actors, most notably legislators.

Ginsburg (2003, 97) states, empowerment is the result of "concrete political power struggles, the interests of elites and other influential stakeholders, and clashes of fundamental ideals" that are irreconcilable. The courts thus serve as a check on elected institutions at the behest of elites who face uncertain futures and henceforth are crafted to serve as a method to

[16]According to the attitudinal model, judges make decisions based upon their ideological positions and/or personal values. For example, 'Judge Aaron votes conservative because ideologically he is a "conservative." Ultimately, this approach argues that each decision is a revelation of judges' true preferences and that they are self-interested political actors. As Segal and Spaeth (2002, 111) state that, "Attitudinalists argue that because legal rules governing decision-making in the cases that come to the Court do not limit discretion; because justices need not respond to public opinion, Congress, or the President; and because the Supreme Court is the court of last resort, the justices, unlike their lower court colleagues, may freely implement personal policy preferences." Finally, the traditional legal model reduces judicial decision-making as a question of the extent to which decisions reflected a commitment to upholding the principal of legal jurisprudence. Judges only take into consideration their interpretation of the law in spite of other potential factors such as pressure from the media, politicians, other branches of government and civil society, etc. (Engel and Engel 2010). While the general lack of precision of most laws usually necessitate judicial rulings which lack consensus, this does not necessarily mean that the law is the most important factor under judges' consideration when making a decision. This is referred to as "mechanical jurisprudence" which assumes that there is only one correct response to legal question that all judges must adhere to (for more see, Segal and Spaeth 2002, p. 48). Finally, historical institutionalist perspectives of decision-making argues that judges preferences constitute and are constituted by the rules inherent in the courts. The judiciary's institutional rules construct how judges make decisions and provide judges with their identity.

"lock in" unpopular interests. It is important to understand that while elites can empower the judiciary this does not mean that judges' decisions are not their own; in fact, it may even mean greater independence than before.[17] Hirschl (2008) finds the expansion of judicial power to be the result of the traditional elite's careful machinations. Empowering the judiciary through the devices employed by the longstanding elites, is intentioned to protect and maintain their interests in the face of threats from rival parties (Ramseyer 1994) or even allow politicians to evade blame for unpopular policy positions which are projected to result in defeat (Sunkin 1995; Voigt and Salzberger 2002).

Likewise, explaining why national courts have become so powerful evidenced by increased activity in determining political questions that beforehand were within the strict domain of elected institutions, Hirschl (2004) too concludes that political and economic elites under threat of political power strategically empower the courts. The increase in constitutionalism and judicial activity in Israel, Canada, New Zealand and South Africa which he labels "juristocracy" and such instances to be a direct consequence of elites and interest groups machinations desiring to ensure that their position is not threatened in the likelihood that they would lose political power.[18] Coining this term as the "hegemonic preservation thesis" Hirschl (ibid, 11-12) argues that elites decide to transfer power away from the legislature to the courts, which, through continued access, is able to ensure the continued protection of their interests. Hirschl (ibid, 12) focuses on three elite groups that empower the courts: 1) political elites who seek to maintain or further enhance their dominance, 2) economic elites that perceive the courts

[17] When judges lack autonomy, the result is politicalization.
[18] Hirschl's (2004, 1) "juristocracy" refers to the phenomena of, "constitutional reform has transferred an unprecedented amount of power from representative institutions to judiciaries."

as being a strong advocate of neo-liberal economic policies and 3) judicial elites (judges) who are inclined to desire the enhancement of their status and powers.

In addition to the focus on threats towards of electoral prospects, political elites can also empower the judiciary as a response to pressures stemming from government's poor performance and economic crises. Ginsburg (2009) credits the 1997/98 East Asian Financial Crisis for spurring decisions for political reforms, in particular the establishment of judicial review in new areas related to macro-economic policy and administrative governance reforms. For Thailand, the crisis spurred politicians and other elites' decision(s) to approve the most liberal constitution in the country's turbulent political history—a decision that provided an expanded role of the judiciary and hence the opportunity for judicialization.

Early judicialization of politics literature focused solely on democratic regimes, both established and newly-transitioned. Such exclusivity was the consequence of several assumptions, many of which are interrelated. First, scholars expected that only within liberal democracies could there exist an environment of genuine political, social and institutional support hospitable for judicialization. Second, scholars assumed that only democrats would be serious in affording the judiciary with such powers necessary for judicialization—most notably, independence from outside interference. Finally, scholars assumed that only within democratic government could one find a serious commitment to the principles of the rule of law and, in particular, equality before the law. As a result, all of the earlier case studies were representative of Western democracies, as well as newly democratizing regions in post-Soviet Eastern Europe, Latin America, and Africa. As a result there was a failure to consider authoritarian regimes as potential site for judicialization.

However, the inability to consider the possibility of judicialization within authoritarian regimes reflects several misconceptions. First, a lack of understanding about the judiciary's role and function within authoritarian regimes needs better appreciation. Further, scholars had a poor understanding of the concept of judicial independence and its relation with regime type. As a result, most of the assumptions made explaining why judicialization does or does not occur were narrow and even contradictory. Several unanswered questions resulted in confusion and contradictions. One of the key reasons that prevented earlier scholars from considering authoritarian regimes was not only a lack of understanding of the regimes but also a normative bias attached to the phenomenon. Many considered judicialization to produce a "good" for democracy, even though democracy theorists have long debated the role and appropriateness of the judiciary and in particular its ability to affect the elected institutions' public mandate.

Labeling instances where the U.S. Supreme has through judicial review inhibited elected institutions as the "counter-majoritarian difficulty", Alexander Bickel (1962, 33) concludes such behavior to be "a deviant institution in a democratic society."[19] Indeed, in discussing the rise of powerful judges, famed judge Robert Bork (2002, 2-22) is more colorful in his assessment of the counter-majoritarian difficulty which he defines as the "American disease" that would eventually lead to, he warns, "the rule of law to the rule of judges." Bork argues that contemporary judges use their position to advance their own agendas (usually leftist) in a larger culture war between conservative and liberal values, while frustrating majoritarian institutions and the popular will.[20]

[19] The "counter-majoritarian difficulty" refers non-elected institutions' ability to override elected institutions.
[20] Not everyone is convinced that the "counter-majoritarian difficulty" is really that difficult at all. Dahl (1975, 291) attempts to downplay concerns by arguing that with particular respect to the Supreme Court, such fears are exaggerated because elected officials are responsible for the appointment of justices. As a result, he concludes "it would appear, on political grounds, somewhat unrealistic to suppose that a Court whose members are recruited in the fashion of the Supreme Court justices would long hold to norms of rights or justice substantially at odds with the rest of the political elite." If this statement is true, then the

The underlying point is that even in democracies, the judiciary's position is not without criticism. Decisions can exacerbate inequalities or protect the rights of minorities.

Several authors are dismissive of any prospect that judicial review could exist within authoritarian regimes, let alone judicialization. Cappelletti (1989,188-189) declared, "Indeed, if one wisdom clearly emerges from comparative analysis...it is that no effective system of judicial control is compatible with, and tolerated by, anti-libertarian, autocratic regimes, whether they place themselves at the left or the right of the political spectrum. This fact, that judicial review is anathema to the tyrant, is confirmed by developments in many countries in several continents, and most frequently in Latin America and Africa." Further addressing the judicialization of politics specifically, Tate (1995, 464) famously proclaimed, it "is likely to occur mostly, if not only, in regimes that have adopted the institutions and norms of liberal democracy and accepted the principle of judicial independence." Others like Schedler (2009, 10-11) dismiss the notion that the judiciary is anything other than a "course" from leadership's "menu of manipulation." Such cynicism assumes that courts were ultimately created to work at the strict behest of regime leadership and that this precluded any pretense of anything "positive." While these assumptions offer some validity—they fail to reflect a more comprehensive account of the role of the judiciary even within authoritarian regimes. In the discussion of the published literature on

emotional arguments about Supreme Court judges not being directly elected are overstated. For instance, through the process whereby an elected President nominates individuals that the elected members of Senate confirm, the final appointments to the bench will reflect political aspirations of the voting public to a reasonable degree. At most, any deviation will not be as extreme as Bickel and Bork suggest. Holding elections for appointments to the Supreme Court would add new and possibly dangerous complications, especially with the increasing role of money in elections. Finally, after examining the number of instances in which the Supreme Court has ruled on congressional legislation related to freedom of speech, religion, press and assembly unconstitutional, Dahl (1975, 292) concludes that with such decisions, "the lawmakers and the Court were not very far apart; moreover, it is doubtful that the fundamental conditions of liberty in this country have been altered by more than a hair's breadth as a result of these decisions."

judicialization that continues below, judicialization in the abstract will be shown to be independent of regime type.

The important question with respect to authoritarian regimes is to determine whether there would be any incentive by which leadership would afford their courts with independence or autonomy in making decisions. Discussing the prospects of judicial independence in other regimes, Becker (1970, 121) is optimistic in his assessment that, "it would seem that a politically independent judiciary can exist in a political system not usually labeled "democracy" by Americans." Unfortunately, scholars have not taken this statement seriously until most recently. The remaining section affirms Becker's observation and illustrates that the judicialization of politics can and does occur within authoritarian regimes.

Asking why regime leaders would empower the judiciary with independence to make decisions, Moustafa (2007) and Moustafa and Ginsburg (2008, 4) advance five goals:

1. Establish social control and sideline political opponents;
2. Bolster a regime's claim to "legal" legitimacy;
3. Strengthen administrative compliance within the state's own bureaucratic machinery and solve coordination problems among competing factions within the regime;
4. Facilitate trade and investment; and,
5. Implement controversial policies so as to allow political distance from core elements of the regime.

Authoritarian regimes also seek to use of the judiciary under the greater umbrella of "rule of law" to assuage foreign investors and legitimate their rule. For example, in his study on the Egypt's Supreme Constitutional Court (SCC), Moustafa (2007) finds that both former strongmen Anwar Sadat and Hosni Mubarak needed to convince potential foreign investors who were wary of the nationalizing policies of the former Nasser government's serious commitment to upholding the rule of law in terms of guaranteeing property rights for businesses that were

concerned about arbitrary seizures. In addition to the SCC, Egypt's Administrative Court was empowered to exert control over the bureaucracy given that the military dictatorship lacked the capacity to monitor the bureaucracy. Finally, the empowerment of courts assisted the regime in using the rule of law as a tool of legitimacy for critics. The irony, as Moustafa brings to light, is the fact that the court provided an opening for meaningful contestation—which was not the original intentions of the Mubarak regime. Through the SCC, government opponents were able to challenge and win in areas, such as reversing legislation that had barred political opposition and outlawed opposition parties. In 1987 and 1990, the SCC ruled that the national election laws were unconstitutional, then leading to the dissolution of the People's Assembly.

Scholars have attempted to combine judges and political elites to explain judicialization. Discussing the phenomenon in the United Kingdom, Sunkin (1994, 126) concludes that two sources are responsible: ambitious judges and strategic politicians. In the first instance, motivated to expand their powers and circumvent parliament, judges have successfully challenged central and local government policies in various areas such as "education, television licensing, airline regulation, local government finance and social welfare." The court is strategic in the sense that they understand that may face retaliation if other actors, most notably parliament perceive them as too evasive.

Discussing politicians, Sunkin argues that they are responsible for judicialization because they purposely delegate contentious policy questions to the judiciary. Several reasons are responsible for such strategic delegation.[21] First, by allowing the judiciary to determine the outcomes of political questions, it also removes politicians' direct responsibility and

[21] For more on politicians' strategic delegation, see Voigt and Salzberger (2002).

accountability to the electorates for potentially unpopular policy positions. Second, delegation can also negate prospective victories from political rivals who adopt a more popularly favorable position towards an issue. In sum, individuals make judicialization possible either directly or indirectly through strategically empowering the court's institutional powers and, from the perspective of judges, strategic decisions that advance the court's position relative to other institutions.

Institutionalist Approaches

Institutionalist perspectives explain judicialization to be the results of pre-existing rules and powers that empower the court to make decisions independent of interference and provide the jurisdiction related to political questions. For example Hirschl (2008), Tate and Vallinder (1994; 1995) argue that institutions designed to maintain the rule of law, most notably an independent judiciary with review power is a necessary pre-condition for judicialization. Also included within the institutionalist approach is pre-existing institutions that are closely characterized with democratic government. In particular, enshrined principles such as the separation of powers, a judiciary that is adequately staffed with judges, an adequate budget and measures to prevent external interference. In addition, there should usually be the establishment of human and legal rights.

As mentioned, in institutionalist approaches, the global expansion of democracy is seen as responsible for being a key driver of the judicialization of politics. Tate (1994, 188) suggest that with the exception of the Philippines and Papua New Guinea, "it appears that the judicialization of politics is likely to occur mostly, if not only, in regimes that have adopted the institutions and accepted norms associated of liberal democracy and that have accepted the

principle of judicial independence, there is little likelihood for the judicialization of politics in these countries." After noting the "not free" rating that Freedom House assigned to Cambodia, Vietnam, Indonesia, Burma and Brunei, democracy usually entails a separation of powers among major branches of government, as well as some form of decentralization. For most liberal democracies, the rule of law is well-institutionalized evinced by political elites' and citizens' general adherence.[22] Harding and Nicholson (2009, 2) examine the prevalence of what they define as "new courts" in Asia or "the introduction of a court not previously in existence (or a new chamber within the existing court structure) having a specially defined jurisdiction or to a judicial innovation which does not relate to jurisdiction as such." New courts facilitate judicialization given the introduction of new rules and jurisdiction for managing conflict between opposing parties.

Finally, discussing the expansion of judicial review and the rise of constitutionalism in the immediate aftermath of World War II, Mauro Cappelletti (1989) argues that the failures of elected institutions to stop the rise of fascist dictators in Italy and Germany led to an enhanced role for the judiciary as new institutional powers included an ability to determine political questions—in particular protecting the rights of minorities. Institutionalist approaches argue that judicialization is the result of established rules and provisions, most critically, independnce that empower to court and judges to make decisions that determine political outcomes.

Ideational-based Approaches

[22] The emphasis on liberal is intentional because, as Zakaria (1997) makes clear, a majority of today's democracies are far from liberal.

Ideational-based approaches argue that the expansion or creation of norms and values which are favorable to judicialization include the participation of the courts in political questions. For example, rights-centered approaches portray the judicialization of politics as a consequence of a more politically conscious public who perceive as appropriate, the judiciary engaging in political questions on their behalf. Further, this approach finds that non-state actors, ranging from non-government organizations, interest groups, and political activists, accord greater trust and confidence in the judiciary as opposed to elected institutions. This approach maintains further that legal mobilization structures assists the process of allowing the under-represented and disenfranchised to achieve and protect their rights.[23]

Explaining the judicialization of rights in Canada, Britain, the United States and India, Epp (1998) credits the phenomenon in the U.S. and to a limited extent Britain (but not India) to not only to individuals' ability to access the courts, but also the presence of "institutional support structures" related to government-sponsored finance as well as rights advocacy groups and lawyers willing to engage in litigation. This sustained pressure led to what Epp (ibid, 7) labels a "rights revolution" which was composed of judicial attention to and support for new rights as well as implementation of those rights. In the absence of plaintiffs and lawyers, courts are inactive, as judges have no cases to rule on and rights cannot be established and/or expanded on in a vacuum.

Scholars also credit values and norms attributed to liberal democracy and in particular constitutionalism, the protection of human rights, as well as equality before the law that can lead

[23] Labeling this approach, the "rights hypothesis", Ferejohn (2002, 56) argues that people use courts to both create and protect a nursery of rights against political abuse.

to judicialization.[24] For example, in her study examining the increase in judicial activity in post-authoritarian Mexico, Domingo (2005) finds that rights discourse has facilitated greater public involvement in the rule of law and checks against the arbitrary use of state power against society. Smulovitz (2005) argues that rights discourse was also a significant factor of judicialization of several issues areas not previously covered in Argentina. Areas such as family violence and workplace sexual harassment are no longer ignored or limited to non-state forms of justice, but victims are increasingly using the judiciary as a method to punish offenders. Judicialization in these areas became possible once society accepted the court as a legitimate arbiter.

Macro-Structuralist Approaches

Macro-structuralist approaches present political phenomena to be a consequence of large structural-historical forces, in this case judicialization (Lichbach and Zuckerman 1997;Lichbach 2003). Several perspectives explaining judicialization exist. Hirschl (2008) writes of functionalist-oriented approaches that explain judicialization is a response to specific needs. This is usually in the form of the government's attempt to address complex challenges. For example, modernization theories depict the judiciary's empowerment to be the result of socio-economic development. Evinced by indices of high levels of urbanization, literacy and technological sophistication, such growth also invites complex challenges, such as environmental pollution (created in part by advanced industrialization), international terrorism and transnational

[24] The importance of norms and values are also important in explanations of the lack of judicialization despite institutional powers that better position judges to determine political questions. Hilbink (2007), incorporates a historical-institutionalist perspective to analyze of the Chilean judiciary's behavior during and after the Pinochet dictatorship. Explaining the judiciary's averseness towards addressing larger political questions despite its institutional prowess, she finds that the court itself in terms of both the institutional rules and senior judges, shaped how lower ranking judges perceived themselves and their role. This identity is what Hilbink labels "apolitical" and ultimately explains the court's muteness.

organized crime (made possible due to technological advancements), and governments thus respond with essentially more government, and hence the creation of legal institutions or the expansion of existing ones.

Writing about the judicialization in Asia, Ginsburg (2009, 5) credits economic globalization which has, "rapidly intensified scope and scale of global transactions and the liberalization of trade and capital flows" has translated to the introduction of new (international) entrants into domestic markets. He further explains that in order to provide incentives for these new actors to invest, domestic governments create several policies to advance the interests of investors. For example, policymakers craft regulatory standards and institutions to replace those that were previously informal or non-existent. These efforts are aimed at creating a more transparent and accountable environment. In some instances, efforts to attract investment has lead to an increase in the privatization of public sector services, which commands the establishment of legal institutions needed to adjudicate disputes. In this sense, the role of state has transformed itself from public good provider to conflict-mediator through new judicial activity.

Kim and Park's study posits "macro-structural" and "micro" variables to explain judicialization in South Korea. The Constitutional Court of Korea (KCC) is the primary institution that has led judicialization. First, South Korea's democratic transition in the late 1980s resulted in a constitutional government which has allowed political competition to become institutionalized. This is important because both the political elite and society became increasingly pluralistic thus commanding that competition for political power become more

formal. The expansion of judicial rules to establish or clarify new rights helped better facilitate judicialization.

Kim and Park refer to "micro" factors as the court's institutional and ideational composition. Institutionally the Constitutional Court has the provisions necessary for independent decision-making. Korean society, has demonstrated trust in the judiciary and is overly supportive of judicialization. Finally, KCC justices practice strategic "temperance" decision-making which includes their ability to consider the anticipated implication of their decisions. This has allowed for judicialization to continue.

Understanding the Judicialization of Politics through the Administrative Court of Thailand: Towards a Framework

Current explanations of judicialization are unable to explain the Thai Administrative Court's activity. Despite each of the approaches different points of departure and their respective contributions to explaining judicialization therein, none alone are capable of providing a comprehensive account of the phenomenon in Thailand. Judicialization involves several interrelated processes. Accounting for this dynamic, this section proposes a framework that combines aspects from several approaches. The framework is contextual in that it is tailored to the specific institutional design of the Administrative Court. This framework combines the rights-based and court-centric approaches with modifications. Judicialization begins once individuals' submit plaint(s) to the court because without cases, judges have nothing to decide. Following this, judges are then responsible for making decisions. Ultimately, it points to the importance of ensuring that frameworks are appropriate to the institution in question which can subsequently determine which individuals(s) are relevant for explanation. In the case of

judicialization for this dissertation, both plaintiffs and judges are relevant for explanation. Therefore the framework includes the following:

1. First, individuals' decision to use the court begins judicialization. This reflects a willingness or desire to use the court. While rights-based approaches to judicialization present the phenomenon as largely dependent on an increasing rights-consciousness of society, this dissertation operationalizes willingness based on public perceptions toward elected institutions and non-elected institutions. Discussing individuals' motivations to use the court, Cortner (1968) argues that there is an inverse relationship between individuals' perceptions of alienation towards elected institutions and the judiciary is indicative of their willingness to pursue litigation against government. In particular, high perceptions of alienation towards elected institutions and low perceptions of alienation towards the judiciary are likely to lead individuals to pursue ligation. Likewise, Tate and Vallinder (1994; 1995) argue that judicialization correlates with an inverse relationship between (public) perceptions towards the judiciary versus elected institutions. In particular, perceptions that are favorable towards the judiciary and less favorable towards elected institutions are likely to lead to judicialization. The opposite would indicate the absence of judicialization.

This dissertation's framework includes public perception of the civilian bureaucracy within its analysis of public opinion surveys data of non-elected institutions given that the Administrative Court is primarily responsible for adjudicating cases between individual(s) and the bureaucracy. The inclusion of the civilian bureaucracy affords greater conclusiveness with respect to understanding future trends in judicialization. This contributes to the judicialization of politics literature because it underscores the importance of public perceptions because they are

able to indicate willingness to sue. Finally, understanding public perceptions of institutions/individuals that are jurisdiction-specific can provide an indication of the phenomenon's future.

2. Understanding the judiciary's formal institutional rules and in particular the measures to establish independence (de jure) as well as judge's *actual ability* to make decisions independently (de facto) is vital. First, judicialization necessitates independence for judges to make decisions without interference from outside (f)actors. As chapter four will elaborate, the Administrative Court's formal institutional composition affords judges protection from direct interference in the appointment, removal, disciplinary, and budget process. Rios-Figueroa (2011) uses five indices to determine the extent of independence: (1) judges' selection and appointment process, (2) tenure length of judges versus appointer, (3) the appointment procedure's relationship with tenure length, (4) whether judges' removal process requires 2/3 of legislature tenure, (5) whether there is a particular quota of judges and the budget process.[25]

As Peerenboom (2004) notes, nearly every regime, democratic, authoritarian or otherwise, has a "thin" version of the rule of law. Actual independence, (de facto) depends on the actors involved (structure). Agreeing with Leyland (2006) and Mutebi (2006), this dissertation finds the Administrative Court of Thailand's de facto independence has been impressively resilient across several governments and regimes. Judicialization has occurred in democratic and authoritarian regimes albeit at a more limited scale in the latter. The study finds that the only actor who is capable of eliminating the court's independence is King Bhumipol Abdulyadej.

[25] Although Rios-Figueroa (2011) is particularly referring to constitutional courts, there is no indication that this should not apply to other courts irrespective of a particular type.

When King Bhumipol Adulyadej is involved, the politicalization of the Administrative Court results.

3. De facto independence is conceptualized as the court's willingness to adjudicate cases.[26] This study uses three indicators from statistics that reflect the Administrative Court's activity. First, the number of cases that the court accepts compared to those that they reject. Second, the number of cases that the court has fully adjudicated in comparison with those that it has not. Without an actual decision, judicialization remains incomplete. Third, the amount of cases filed within the Office of Case Enforcement that are adjudicated compared to cases that are remain ongoing indicates the extent to which the court is going to ensure implementation of cases under dispute. Fortunately, the Office of the Administrative Court of Thailand collects all of this information.

Understanding the specific context is important because it helps identify any (f)actors which would eliminate the judiciary's independence. This study submits that Thailand's revered King Bhumipol Abdulyadej is capable of affecting the court's independence thus leading to politicalization of the judiciary. McCargo's (2005) "network monarchy" conceptualizes the fluidity of the King's influence and means by which he is able to exert it to and through others. For example, the King usually employs Privy Council President Prem Tinsulonand as a messenger *de force* to "communicate" his interests. As this dissertation will later show, on occasion, the King will exert his influence. When this occurs, the judiciary, like all Thai

[26] That the judicialization of politics literature conceptualizes judges to be strategic actors complicate the notion of assuming independence is captured based on a particular decision. Judges may avoid cases or delay ruling both of which are part and parcel of pure stratagem that is attributed to their independence.

institutions, lack independence. This affirms McCargo (2014) timely reminder that questions of judicialization should be based on a case/issue basis and is much more fluid than earlier scholars have previously conceptualized.

In an attempt to develop a framework to explain judicialization of courts in Asia, Dressel (2012) used de facto independence and the degree of judicial activity. While informative, the relationship misses one from the important question of instances of politicalization and judicialization. For instance, the degree of a politicized court's involvement in mega-politics questions does not say anything about de facto independence. Ultimately, both Cambodia and the Thai Constitutional Court from 2006-2010 are, in essence politicized by an external actor. The question of both Cambodia's muteness and Thailand's activity may have more to do with the regime type, in particular the amount of space given to make decisions than institutional variables. For instance, the court's activity should not be based on its degree but *type*. This means that judges' ability to make decisions on its own versus areas/instances where it is unable. In this sense, de facto independence itself may be predicated on the identification of specific factors.

Although McCargo (2014) and writers on Thai politics (Dressel, ibid) are accurate in their observation that politicalization of the Thai judiciary has produced (conservative) outcomes that have limited elected governments, this is incomplete. This study argues that in addition to politicalization of the judiciary, genuine judicialization of Thai politics has occurred. Furthermore, over the years the Administrative Court has made notable progressive decisions in favor of individuals and local communities and, in turn, against government. The Administrative Court in particular offers an interesting case of both judicialization and politicalization but this

depends on the actors involved. Judicialization and politicalization are fluid concepts and thus the proposed framework is able to capture.

The Judicialization of Thai Politics: Calls for the Administrative Court

Most of the literature on the judiciary's increasingly political relevance in Thailand centers more on politicalization than judicialization. Many studies claim, or at least allude to, courts making decisions under the direction of King Bhumipol Adulyadej. Such an account paints the judiciary as the lackey of the King who seeks to use the institution to limit the powers of popular politicians they do not favor. To various degrees, McCargo (2014), Hewison (2010), Dressel (2008, 2012) and others argue that the judiciary has not enjoyed the necessary autonomy needed to make independent decisions. Because of the ability of the so-called "elites"—the "network monarchy"— to influence the court, the result has been, in their eyes, politicalization of the courts.

But this approach assumes that the monarchy's interests are always invested. This is simply not true and, while it is important to note instances to the contrary, they remain a rarity. On the contrary, scholarship on the Administrative Court's activity has largely presumed the institution to be more independent and professional than both the Constitutional Court and Supreme Court of Justice. In fact, Mutebi (2006, 316) writes, "In contrast to other watchdog bodies, the Administrative Court's Justices have been lauded for their probity, their rigour, constitutional values, and flexibility in implementing secondary laws that might infringe on public liberty or well-being. These principles have all too often been overlooked, or virtually derided in some instances, by other constitutionally mandated watchdog agencies including the

Constitutional Court, the NCCC, and the EC. From the moment the Administrative Court handed down the historic ruling in June 2002 on a scandal involving the Prime Minister's use of the Anti-Money Laundering Office (AMLO) for an illegal investigation into the banking transactions of journalists critical of his government, the Court has proven to be a key arena for questioning the abuse of state power."

Further, public law professor Peter Leyland (2006; 2011) has researched and written extensively on the Administrative Court and suggests that the court is one of the most professional and independent in the country. If indeed true, it would make the prospects for judicialization greater than politicalization. As the chapter on the Administrative Court's history and institutional design will convey, the court is afforded independence, a luxury that institutions like Constitutional Court of Thailand did not have. This dissertation argues that, depending on the interests involved, both have in fact occurred. Both politicalization and judicialization are fluid and can occur within the same court irrespective of regime type.

Conclusion

As this chapter has made clear, judicialization involves several interrelated actors on multiple levels. This is an important reminder because, like all phenomena, there are several factors that explain its occurrence. With respect to the Administrative Court of Thailand, approaches that can combine the institutional, court-centered and rights-centered perspectives are able to offer a more comprehensive account. One of the key contributions of this research is that it demonstrates judicialization is fluid and can occur irrespective of the regime. It also demonstrates that understanding public perceptions can help identify current reasons why the court is active and the phenomenon's future.

CHAPTER 3

RESEARCH METHODOLOGY

This study utilized two data collection methods: approximately 40 in-depth semi-structured interviews and five case studies. In addition, this study incorporated several secondary sources: official case statistics, public opinion surveys and official case summaries—all of which are publicly available. Such methods and data sources correspond with those that previous judicialization of politics scholarship has employed.[1] This study uses what is referred to as "triangulation" of different methods—quantitative and qualitative. Both compliment each other's inherent strengths and weaknesses. As King, Keohane and Verba (1994, 5-6) submit, "Neither quantitative nor qualitative research is superior to the other, regardless of the research problem being addressed." In fact, the majority of judicialization scholarship uses qualitative methods, and in particular, the crucial case study method.[2] Of such studies, it is rare to gain access to judges—a privilege that this dissertation includes.

This chapter will proceed as follows. The first section explains the design that this study used to answer the research questions. This includes the introduction of several concepts, their operationalization and associated indicators. Following a brief summary of the judicialization of

[1] Most studies have examined crucial case(s) that demonstrate judicialization. For more see: McCargo (2014) Dressel (2012) edited work on Asia, in Sieder et al (2005) some of the chapters by both Espinosa and Smulovitz includes court case statistics to demonstrate the area of judicialization and the impact in terms of citizens higher propensity to use the court. Tate and Vallinder (1994) early work.

[2] Eckstein (1975, 118) defines the crucial case study methods as, "one that most closely fit a theory if one is to have confidence in the theory's validity, or conversely, must not fit well with any rule contrary to that proposed."

politics approaches that this study utilizes, the second section presents this dissertation's key hypotheses. In addition, the section explains the selection criterion used for field sites visits as well as case studies. The third section discusses the instruments that the study utilized to collect data. Finally, the chapter concludes with a discussion of the sources of data, duration of research and limitations.

Conceptual Overview

Judicialization is the *process* by which the courts and judges become more active in determining political questions. Specifically, this study uses Hirschl's (2008) definition, which better conceptualizes these processes as: "(1) the spread of legal discourse, jargon, rules, and procedures into the political sphere and policy making forums and processes; (2) judicialization of public policy-making through "ordinary" administrative and judicial review; and (3) the judicialization of "pure politics"—the transfer to the courts of matters of an outright political nature and significance, including core regime legitimacy and collective identity questions that define (and often divide) whole polities."

By focusing on the court's activity in administrative cases and "purer" politics, this study focuses on the second and third aspects. For example, a discussion of cases involving administrative decisions related to the transfer of high-ranking bureaucrats as well as the decisions to annul the re-run of districts in a national election and the annulment of a foreign policy that prolonged border skirmishes and led to the loss of lives and damage to the local economy.

Finally, this dissertation examines the impact of judicialization on Thai politics and government. Whether or not judicialization leads to the improvement of the quality of democracy

and efficiency of administration is also contingent on how judges make decisions. As the literature review elaborated, judicialization has strengthened both democratic and authoritarian regimes in areas such as economic management and administrative oversight. In other examples, judicialization has yielded results that have, to the chagrin of leadership, created avenues for opponents to successfully challenge and undermine incumbents. In Egypt, for example, limited political space for the judiciary led to judicialization that had spillover effects. This was a consequence that regime leadership had not intended to have happen. Likewise, in democracies, judicialization can allow groups that lack support from the majority to stifle popular will.

But the court's activity is not just explained by the court and judges alone. Indeed as Holland (1991, 9) reminds us, "rarely are courts permitted to be self-starters, searching on their own initiative for social injustices in need of remedy. They rely upon private litigants or political institutions to place policy questions on their docket. Where there is relatively easy and cheap access to the courts, the potential for activism is greater." Plaintiffs are a necessary component in explaining judicialization in Thailand. As a result, this study focuses on the activity of plaintiffs, as well as courts and judges to explain judicialization. In this endeavor, the two approaches found in the literature that are most relevant are the court-centric and bottom-up types. One vantage point of analyzing two actors is that it follows Geddes's (2003, 23) advice " to divide the big question into the multiple processes that contribute to it and propose explanations for the separate processes rather than the compound outcome as a whole." This is important when attempting to research complex phenomenon like judicialization. Given the numerous factors involved in judicialization, this will allow the study to avoid oversimplification at the expense of accuracy.

In order to capture the actors and the dynamic in which they operate, the study utilizes different variables, indicators and methods of collection. As discussed in the literature review chapter, the court-centric approach positions both courts and judges as the key actors driving the process. By focusing on the court's activity *and* the behavior of judges, and in particular how they make decisions, this approach demonstrates that judicialization does not occur by happenstance but, to the contrary, through the purposeful actions of both the courts and the judges.

Based on the classic study by Epstein and Knight (1998, 10-11), what is popularly referred to as the "strategic model" of judicial decision-making employs assumptions from neoclassical economics' rational choice theory. As such, their argument depict judges as calculated decision-makers aspiring to achieve their most desired preferences within the context of institutional constraints and the anticipated reactions of other actors. This borrows from this judicial politics literature and presents judges as political actors who conceal their preferences under the guise of jurisprudence and the particular facts of the case. But who exactly are these judges and what are their preferences? Indeed as the literature review suggested, scholars characterize Thai judges as conservative in orientation. In both of their respective studies, Sulak (1971) and McCargo (2015) find Thai judges to have a conservative understanding of their and the judiciary's role in society. Judges' envision their responsibilities as sanctioning elected institutions and individuals.

One reason for this conservatism lies in judges' widespread belief that they are representatives of the monarchy—particularly that of King Adulyadej Bhumipol. As a result,

judges' behavior mirrors King Bhumipol's historically-questionable commitment to liberal democracy and progressive values and are thus more concerned with the stability and the maintenance of the status quo.[1] This contrasts with more progressive ideals of the judiciary's role that seek to advance social rights and ameliorate injustices. According to McCargo (2014), most judges perceive themselves as extensions of the monarchy and, thus protectors of the nation who exist to punish politicians as well as sanction governance misperformance(s), including populist policies. Thus he concludes that, despite the more liberal aspirations that judicialization could advance more progressive outcomes, such as the protection and advancement of citizens' rights against more powerful interests, outcomes have been of a more demos-limiting spirit. The judicialization of Thai politics will continue to lead to the weakening of elected institutions.

Although McCargo (2014) concedes that his assessment of a more conservative judiciary may not be applicable to the courts that originated in the 1997 Constitution; however, his conclusion may nevertheless be salient because, like the Supreme Court of Justice, the majority of judges who date back to the 1997 Constitution are former bureaucrats and, many, are judges from pre-existing courts. With respect to the Administrative Court of Thailand, some of the judges from the Supreme Administrative Court were from the Council of State as well as other courts.[2] McCargo aptly notes the multiple outcomes that judicialization can produce. Earlier scholarship had failed to distinguish among the outcomes that judicialization produces.[3]

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[1] Several authors (Connors, 1999), Hewison (1997) McCargo (2002), and Handley (2008) have illustrated that King Bhumipol is no democrat and has even, in fact, either directly or indirectly, undermined individuals, institutions and norms necessary for a truly liberal democratic government (see in particular McCargo 2005).

[2] Prior to the creation of the Administrative Court, the Council of State was the institution formally responsible for adjudicating grievances between bureaucracy and citizen.

[3] For instance, just because economic inequality may be higher in some liberal democracies than others it does not mean that they are not democratic.

The published literature that explains judicialization from the perspective of plaintiffs attempts to understand the key factors that explain their decision to pursue litigation. Two key perspectives are found in the bottom-up literature. The first perspective correlates attitudes toward elected institutions *and* the judiciary, with the decision to pursue litigation. For example, Tate and Vallinder (1994) state that judicialization is likely when the public's perceptions are negative towards elected institutions and more positive towards the judiciary. The two authors follow Cortner's (1968) argument that perceptions of alienation/marginalization led to either a greater willingness or averseness to pursing litigation. This study used public opinion surveys to measure Thais' perceptions towards not only political institutions but also the bureaucracy and the judiciary. Further, because the Administrative Court is primarily responsible for adjudicating cases involving the bureaucracy, this dissertation also includes public opinion survey results concerning the bureaucracy/bureaucrats.[4]

Another perspective that explains judicialization from plaintiffs' point of view essentially argues that it is seen as a convenience in the sense that it reduces the costs of litigation and affords continued access. Epp's (1998, 3) "rights-enhancing judicialization" thesis which argues that the "masses", in particular litigants, drive the process through the use of "institutional support structures." However, given the context, this argument must be modified because of Thai civil society's longstanding weakness—especially in the areas of advancing rights. For example, Epp's demonstrates how litigants relied on institutionalized-support that afforded sustained

[4] In case of the Administrative court, usually the defendant party is the bureaucracy thus the inclusion of individuals' perceptions.

access to the court necessary for judicialization. Although for Epp, this institutional support originated from non-state sources, one can argue that the Administrative Court itself provides the necessary resources needed for continued access. Such resources include provision of free legal consultations, non-required legal representation, the elimination of court fees for litigants, many of whom are poor, provision for cases that do not involve administrative contracts and a generous time period for filing grievances—90-day and 1 year for administrative contracts. The study assumes that the Administrative Court of Thailand's support structure may provide plaintiffs with the motive necessary to pursue litigation.

Independent Variable(s) (X):

Within the judicialization of politics literature there is a lack of consensus with respect to understanding plaintiffs' motives for pursuing legal action. The larger literature on plaintiffs' motives is voluminous.[5] For example, explaining the expansion of rights as a result of activity from the masses, Epp's (1998) "rights-enhancing judicialization" thesis presents this as the result of plaintiffs' activity and in particular the use of support mechanisms needed to sustain activity.

Tate's initial chapter in Tate and Vallinder (1995) argues that the inverse relationship between perceptions towards elected institutions and the judiciary will determine the extent to which individuals pursue legal mediation. In particular, when individuals have unfavorable perceptions towards elected institutions *and* more favorable ones towards the judiciary, they are more likely to use the courts; hence judicialization is the result. This argument follows Richard Cortner's (1968) in explaining that people's perceptions of marginalization and disadvantage

[5] For an overview of the litigation literature, see the chapter by McCann in Whittington, Kelemen and Caldeira (2008).

from elected institutions determine the extent to which they are likely to pursue litigation. Instances where there are unfavorable perceptions towards (1) elected institutions and (2) elected officials and (3) the bureaucracy and civil servants, and; (4) more favorable perceptions towards the judiciary translate into individuals who are more likely to use the judiciary to mediate their dispute.

I operationalized those four variables by using the results from existing public opinion surveys that assess citizens' perceptions of government and public officials. Although the survey sample size did not specifically target former Administrative plaintiffs, it serves as a more reliable proxy. The surveys ask questions related to trust, corruption and, first and foremost, they are more representative of public opinion than surveys that would just draw from former plaintiffs input. This more representative sample will provide a better account of the general population opinions and as a result offer conclusions that produce a more accurate snapshot of the current and future direction of judicialization.

The public opinion surveys are from the following sources: the Asia Foundation, Transparency International's Corruptions Perception Index and Global Corruption Barometer, The World Values Survey, King Prajadhipok's Institute and the Asia Barometer Study.[6] Results from numerous public opinion surveys in order to assess Thai citizens' sentiments about numerous institutions both elected and non-elected. I sought to determine whether results are consistent across the surveys, given that the questions address a similar theme: citizens' perception of key institutions and actors in their country, both elected and non-elected. All of the

[6] The Asia Foundation: http://asiafoundation.org/, Transparency International's Corruptions Perception Index and Global Corruption Barometer: https://www.transparency.org/, The World Values Survey: http://www.worldvaluessurvey.org/wvs.jsp, King Prajadhipok's Institute: http://kpi.ac.th/ and the Asia Barometer: http://www.asianbarometer.org/.

surveys included a relatively large number of respondents, which helped control for random measurement error. In addition, in order to address concerns about the validity of citizen perceptions, some surveys asked different questions related to citizen perceptions of elected institutions and individuals. For example, in 2009 and 2010, the Asia Foundation conducted surveys that examined Thai opinion about the "institutional integrity" and "institutional neutrality" of several institutions, including the judiciary. In 2007, 2008 and 2010 Transparency International's Corruption Perception's Index survey asked 500 respondents' about their perception of the then current government's effort in the fight against corruption, as well as whether they perceived government corruption as becoming better, worse or remaining constant.

In addition, I used the King Prajadhipok Institute (KPI) series of surveys of Thais from 2002-2010 that asked respondents about the extent of their trust in various committees, institutions, "independent" bodies and agencies. Results from a series of KPI surveys are particularly valuable because they allow the study to compare not only the judiciary with other elected institutions but also because it separated the judiciary into three major courts: the Supreme Court of Justice, the Constitutional Court, and the Administrative Court. As a result, this survey differentiates the courts. This allows this study to be more precise than those that employ the generic term 'judiciary', which can be misleading. For example, if citizens consider the term 'judiciary' in answering a question about the 'judiciary' to mean either the Constitutional Court or Supreme Court as opposed to the Administrative Court, then results recoding their perceptions can be misleading.

In order to assess respondents' perceptions of institutions, this study uses survey results from Transparency International in order to assess perceptions of corruption, the extent to which

citizens believe their government is addressing corruption, and which institutions are perceived the most corrupt. Finally, the study used results from a 2007 Asia Barometer survey to assess the extent to which respondents are confident in the elected and non-elected institutions such as parliament, elected officials, and the judiciary.

Tate in Tate and Vallinder (1994; 1995, 28-33) suggests the instruments that comprise judicialization—separation of powers, democratic governments, a legal document such as a constitution and/or bill of rights that guarantee liberties for all individuals as well as legal institutions (courts) are called on to adjudicate disputes. In addition, Tate believes that negative perceptions towards elected institutions and positive perceptions of the judiciary are important. Nonetheless, he (ibid. 1995, 33) ultimately concludes that even when these conditions are present, judicialization is not a foregone conclusion. Recognizing this reality, in addition to the aforementioned surveys, during in-depth semi-structured interviews with former plaintiffs, I also asked about the key factors that led them to decide to sue.[7]

This dissertation adopts the court-centric approach, which ultimately presents both courts and judges as the key drivers in the expansion of judicialization. This perspective includes two indicators at two different levels: at the macro-level (institution's activity) and at the micro-level (individual judges' activity). From the macro-perspective, the independent variable that captures its activity is the number of cases that the court accepts for adjudication. This number distinguishes cases between the Courts of First Instance and the Supreme Administrative Court.

[7] Finally, to assess judicialization's impact on former plaintiffs, in particular their relationship with the bureaucrats/bureaucracy, this study asked during interviews.

At the micro-level, judges' activities are captured by their decision-making. The court-centered approach assumes that judges are strategic actors who make decisions based on their goals/preferences, the anticipated reactions of other actors, and the institutional context. As mentioned in the previous chapter, the judicial decision-making literature also provides multiple perspectives about the key factors that judges consider. Individual judges' preferences as well as their understanding of the anticipated reactions of other actors, mainly the two parties and the Thai media, are captured through interviews. The institutional context refers to the Administrative Court's procedures for decision-making and its effect was also asked during interviews.

Dependent Variable(s) (Y):

The dependent variables that this study uses to capture the judicialization of politics from the perspectives of former plaintiffs is found within the court's case statistics. First, the annual number of consultations that the court provides is able to more accurately capture judicialization than the number of cases finally submitted and accepted by the court. The number illustrates that individuals are at the very least (re)defining their relationship between themselves and the state in the language of the law. This too demonstrates the presence of judicialization and provides a more accurate number with respect to actual cases that enter the judiciary. However, in recognition of the importance of individual(s) decision to use the courts, this study includes the total number of plaints submitted to both the Courts of First Instance and Supreme Administrative Court.

The dependent variables that captures judicialization from the court-centric perspective of courts and judges is also captured within the court's official statistics. First is the annual number

of cases that the court completes. While in the act of accepting cases, the court legitimates plaints within its jurisdiction, the actual adjudication of cases is used as an indicator. Second, another indicator is the number of cases that the Office of Case Enforcement accepts and resolves. A division within the Office of the Administrative Court, the Office of Case Enforcement is largely responsible for ensuring the timely adherence to the court's ruling.

This dissertation also provides insight into the question of decision-making. Although court statistics and records of cases summaries provide valuable insight into the court's activity, including the actual decision, it fails to provide any indication about judges' individual decision or anything about the judges themselves. Further, because the court uses the collegial model, judges' individual votes are not included. To compensate for this omission, this researcher interviewed judges. During these interviews, judges at both the Supreme Administrative Court and Courts of First Instance throughout the country were asked how they make decisions. Understanding the process that judges use when making decisions permits this study to provide a more in-depth account of the judicialization process. Ultimately, for judges, their collective decision alone is the outcome variable.

Hypotheses

This study submits the following hypotheses that will be explored in this dissertation. The focus on several relationships that this study will uncover will lead to a better understanding of judicialization in the Administrative Courts of Thailand.

Rights-Centric (Mass-based) Approach

Proposition 1: *Former plaintiffs' perception of representative political institutions (e.g. the Parliament) impacts whether or not they will address their grievances through litigation.*

Specifically, those who use the courts perceive that they are most alienated from elected institutions and individuals.[8]

Hypothesis 1a: Thais have a less favorable perception of elected institutions relative to the judiciary.

Null Hypothesis H01: Thais have a more favorable perception of elected institutions relative to the judiciary.

Hypothesis 1a (H1a): Thais have a less favorable perception of the Prime Minister relative to the judiciary.

Null Hypothesis H01a: Thais have a more favorable perception of the Prime Minister relative to the judiciary.

Hypothesis 1b (H1b): Thais have a less favorable perception of Parliament relative to the judiciary.

Null Hypothesis H01b: Thais have a more favorable perception of Parliament relative to the judiciary.

Hypothesis 1c (H1c): Thais have a less favorable perception of political parties relative to the judiciary.

Null Hypothesis H01c: Thais have a more favorable perception of political parties relative to the judiciary.

Hypothesis 1d (H1d): Thais have more negative perceptions of politicians relative to the judiciary.

[8] In addition to Cortner, both Schepple and Walker, (1991) and Vose (1959) find that the politically disadvantaged see the court as their last resort in addressing grievances.

Null Hypothesis 1d (H01d): Thais have a more favorable perception of politicians relative to the judiciary.

Hypothesis 1e (H1e): Thais have a less favorable perception of the civilian bureaucracy/bureaucrats relative to the judiciary.

Null Hypothesis H01e: Thais have a more favorable perception of bureaucrats relative to the judiciary.

Proposition 2: *Former plaintiffs' decide to use the Administrative Court because of their desire to oppose rights violations from defendant(s) in question as well as because the Administrative Court makes litigation easy.*

Hypothesis 2 (H2): Plaintiffs use the Administrative Court to defend rights' violation(s).

Null Hypothesis 2(H02): Plaintiffs will declare that they used the Administrative Court for reasons unrelated to defending themselves against rights violations. Plaintiffs will also respond that rights violations were not a factor in their decision to submit their plaint.

Proposition 3: *The Administrative Court of Thailand accepts more cases than it rejects.*

Hypothesis (H3a): The total number of plaints that the Administrative Court accepts increases.

Null Hypothesis (H03a): The total number of plaints that the Administrative Court accepts decreases.

Hypothesis (H3b): There is a steady increase in the number of cases that the Supreme Administrative Court accepts as appeals from the Administrative Courts of First Instance.

Null Hypothesis (H03b): There is a steady or dramatic decline in number of cases that the Supreme Administrative Court accepts as appeals from the Administrative Courts of First Instance.

Hypothesis 3c (H3c): There is a steady increase in number of cases that the Supreme Administrative Court accepts directly.

Null Hypothesis (H03c): There is a steady or dramatic decline in number of cases that the Supreme Administrative Court accepts directly.

Hypothesis 3e (H3e): There is a steady increase in the number of cases that are filed with the Administrative Courts of Thailand.

Null Hypothesis (H03e): There is a steady or dramatic decline in number of cases that individual(s) filed with the Administrative Courts of Thailand.

Proposition 4: *Administrative Court judges, both of the First Instance and the Supreme Administrative Court, make decisions based on a strategic calculus.*

Hypothesis (H4a): Administrative Court judges, both of the First Instance and Supreme Administrative Court consider their goals/preferences when making decisions.

Null Hypothesis (H04a): Administrative Court judges, both of the First Instance and Supreme Administrative Court do not consider their goals/preferences when making decisions.

Hypothesis (H4b): Administrative Court judges, both of the First Instance and Supreme Administrative Court, consider the anticipated actions of other plaintiffs and defendants when making decisions.

Null Hypothesis (H04b) Administrative Court judges, both of the First Instance and Supreme Administrative Court, do not consider the anticipated actions of other plaintiffs and defendants when making decisions.

Hypothesis (H4c): Administrative Court judges, both of the First Instance and Supreme Administrative Court, consider institutional constraints when making decisions.

Null Hypothesis (H04b): Administrative Court judges, both of the First Instance and Supreme Administrative Court, do not consider institutional constraints when making decisions.

Methodology and Data

In order to be as methodologically comprehensive as possible, this dissertation incorporates triangulation: case study, qualitative, and quantitative approaches. For example, obtaining the perspectives of judges in terms of how they make decisions, I conducted semi-structured interviews with current and former administrative court judges serving in five courts. The Office of the Administrative Court did not respond to my initial formal interview request letter for judges and staff. Given the sensitive title of my dissertation, the sensitive nature of the topic, and my status as a political science student, I completely understood.

However, I was fortunate to gain initial access to an Administrative Court judge through a personal contact who is a senior-ranking politician within the Democrat Party who offered to contact a senior Administrative Court of First Instance judge who was serving in a regional court.[9] After interviewing this judge, they then agreed to help facilitate other interviews with other judges within the court. In addition to this contact, a personal friend of mine who was a former journalist had many contacts with many former pro-Thai Rak Thai/People's Power Party/Phua Thai politicians, as well as judges in the Administrative Courts, both First Instance Courts and the Supreme Administrative Court. After these interviews, I then used those judges that I interviewed to gain access to other judges in a snowballing sampling manner.[10]

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[9] At the time, I was unaware of the irony of the situation. The fact that a well-known politician helped a doctoral student conducting research on judicialization contact a judge who was a close friend should have reassured me that the topic and court in question was relevant.

[10] While not able use a sampling method that was random, given the sensitivity of the topic and my identity, the snowballing sampling method was appropriate.

In order to maintain integrity, before and after each interview I assured interviewees that their identities would be held in strict confidence; all interview notes would be stored in a safe and reliable location; and they would not have to sign anything[11]. Each interview with judges lasted approximately two hours, as well as for those who granted me the opportunity for additional follow-up. Prior to each interview, each judge was provided with a copy of the Institutional Review Board (IRB) form, in Thai, which informed them of the study's purpose, their rights and privileges. Each judge was then verbally informed that they do not have to answer any question they were not comfortable with; their identity would not be disclosed at any time; and due to their voluntary participation, they could terminate the interview at any time.

The judicialization of politics within the context of the Administrative Court is about (re)defining the relationship between citizen and state with respect to particular state agencies and officials, this should be captured by in-depth interviews and, the statistical data that the Office of the Administrative Court gathered. For example, the Administrative Court's Justice Development Institute is a division under the Office of the Administrative Court that is responsible for training both provincial and central Thai bureaucrats about the court, administrative law and their rights and privileges relative to the court and citizens. While they conducted surveys assessing the effectiveness of the courts' influence on the bureaucracy in terms of improving service delivery and transparency, the professionalism and reliability of these studies are questionable.

[11] The court was hesitant primarily because of the word, "politics" in the phrase judicialization of politics." Most judges expressed discomfort with this term as they thought my project was about exposing corrupt judges.

First Instance

This study incorporated a within-country comparison method. Within-country comparisons allow for control of extraneous variables. For instance, focusing on a single institution like the Administrative Court assists in controlling for variables such as culture, time, and institutional rules. There are nine regional Administrative Courts distributed throughout Thailand, called the Administrative Courts of First Instance, four of which I examined were in regions in the North, Northeast, Central and South. In addition, to visiting a Court of First Instance located in central Thailand, this study also includes interviews with judges from the Supreme Administrative Courts. I selected a court in each of these regions because they represent each of the regions in the country. While every court has institutional rules, I did not assume that all judges make decisions according to the same motivations; nor do I assume that plaintiffs' motivations for using the court are uniform.

Because this dissertation examines 4 of the 9 lower level (First Instance) courts that have the largest number of cases, there may be accusations of selection bias. One reason why this study did not include some courts was because they had yet to be opened. Because all of the courts have the same procedures in terms of standards for accepting, rejecting or transferring cases, I argue that the decision to choose these particular courts was not detrimental to the reliability of the findings. One reason why I chose the most active courts (those with the most cases accepted) was to ensure that judges had a sufficient amount of experience to provide answers that were productive. The study avoids accusations of regional bias and ensures that much of the country was sufficiently represented geographically.

Case Study Selection Criterion

In addition to the analysis of public opinion survey data and in-depth interviews, this dissertation incorporates the case study method to assist in the explanation of the impact of judicialization in politics.[12] As George and Bennett (2005) state, the benefits of case studies are manifold. They provide a richer context of the phenomena than is offered from studies relying solely on quantitative data. While the approach can be criticized as "suffering" from "thick description", many argue that they can be parsimonious and focused on key variables and events that help to clearly explain the phenomenon in question.

Shortcomings

Like all studies there are methodological shortcomings. First, the study was limited to plaintiffs' perspective(s) with respect to their relationships with the (bureaucracy) defendants. This study could have focused more comprehensively on the Administrative Court's impact in the areas of policy development and implementation. Future studies could be well-positioned to contribute to this knowledge. Further, the definition and concepts that this study uses are the result of the author's choice. While conventional definitions are geared towards judicialization from the strict (limited) perspective of democratic governance, this dissertation challenges readers to think beyond such a normative bias and acknowledge the manner in which the process transcends regime type. Third, this dissertation did not survey plaintiffs and judges. The main reason for this was the limitation in resources and the specific context within which the study

[12] George and Bennett (2005, 5) defines this as, "the detailed examination of an aspect of a historical episode to develop or test historical explanations that may be generalizable to other events."

was conducted. For example, the research topic was so sensitive that, when judges were informed that the topic was judicialization, their reaction was not welcoming. They were more cautious when discussing their decision-making and did not want to fill out a survey that I had administered. Nonetheless, a larger, more representative sample from pre-existing surveys more than compensate for this shortcoming. Fieldwork in Thailand began in August 2011 and concluded in October 2014.

CHAPTER 4

THE ADMINISTRATIVE COURT OF THAILAND: ORIGIN, PROCESS AND SIGNIFICANCE

This dissertation underscores the importance of two approaches, court-centric and rights-centric as integral to the explanation of the judicialization of Thai politics. While the former emphasizes the court's activity and judges' decisions, the latter focuses on plaintiffs' activity. Neither judges nor plaintiffs operate in a vacuum. Both maneuver within the larger institutional context of the Administrative Court of Thailand—in particular its formal rules and procedures. It is important to understand these rules and procedures because they affect actors' behavior. Both judges' strategic calculus and individuals' decision to use the court includes consideration of the institutional rules and procedures.

This chapter introduces the Administrative Court from a consideration of its historical and institutional positions. The first section offers a brief overview of the Thai judiciary and highlights the journey that lead to the 1997 Constitution's establishment of the Administrative Court of Thailand. Second, this chapter transitions to an examination of the court's institutional composition, including the structure, jurisdiction and the case-adjudication process. Third, and closely related, this chapter turns to explaining the various ways in which the court's rules empowers both judges and plaintiffs. Finally, this chapter concludes with a discussion of independence from the perspective of the judiciary's formal institutional design by using Rios-Figeroa's (2011) indices for assessing the extent to which the courts have established

mechanisms to serve as safeguards from outside interference. While the court's formal powers are important, the chapter also makes clear that those powers alone are a necessary but insufficient explanation for the judicialization of Thai politics through the Administrative Court. The importance of agency, in particular, individuals' decisions to use the court and judges' decisionmaking are two necessary factors that are responsible for the phenomenon's emergence. Isolated cases are important to the extent that the result of judges lead to the creation and/or elimination of important policies.

Prelude to the Court: Justice and the Struggle to Establish the Administrative Court

Within the larger modernizing reforms during the Chakkri Reformation, in 1874 King Chulalongkorn created an advisory body called the Council of State. Chulalongkorn was inspired by the French *Conseil d'Etat* and created the new body to be comprised of legal and administrative advisors to assist him in the management of the bureaucracy. Summarizing the role of the new body, Bhalakula (2002, 5) notes, "The Council of State served, on the one hand, as an organ providing advice to the King on issues related to the management of state affairs as well as law-drafting on the one hand. On the other hand, it functioned as an organ to consider petitions presented by the King's subjects who were aggrieved or injured as a consequence of an act by a State agency or State official or the adjudication of administrative disputes."

With Chulalongkorn serving as president, the council's approximately twenty individuals, ranged from members of the royal family, noblemen and experts in administrative affairs. Bhalakula further observes that despite the institution's aspirations, due to several redundancies in functions and the inability of the advisors to properly understand the function of

the council, King Rama V dissolved the council twenty years later—reverting back to the previous system of individuals petitioning the courts, the bureaucracy and/or the King directly. In actuality however, the Council possessed no real autonomy, as the final decision always lay at the king's discretion.

Facing pressure to maintain independence and escape the colonialist ambitions of Britain and France, Siam, under King Mongkut (Rama IV 1851-68) began to create a modern state.[1] Pressured by British ambassador John Bowring to sign an agreement that would require Siam to make embarrassingly generous economic and legal concessions, King Mongkut signed the 1855 Bowring Treaty that would essentially force Siam to open its protected markets to trade. In addition, this treaty stipulated legal extra-territoriality for British citizens and those under its protectorates. Understanding that other countries would want similar concessions, Mongkut encouraged the participation of other Western powers to maintain its independence by avoiding domination by any one power. King Mongkut realized that in order to maintain independence, as serious transformation of his rudimentary government into a modern bureaucracy would be needed.

Although Mongkut proceeded with these reforms cautiously, it was his successor son, King Chulalongkorn (Rama V, 1868-1910), who carried out reforms in earnest. Admiring European culture, history and development, King Chulalongkorn traveled extensively throughout Europe in order to learn more about the modern advances in government and technology. He even sent his children to Europe for education and a means of equipping to help lead Siam's development. Frustrated with underperforming fellow royals and other elites who were in

[1] In 1939, the name 'Kingdom of Siam' was changed to the 'Kingdom of Thailand'.

command of departments, and desiring to accelerate reforms, Chulalongkorn used the strategy of employing Western advisers. Writing about their importance, Vella (1955, 342) says, "It is almost inconceivable that the modernization, centralization, and the increase in the efficiency of the government begun in the 1890's could have been achieved to any extent without the efforts and instruction of the foreign advisers." One notable adviser was a former lawyer, politician and diplomat from Belgium named Dr. Gustave Rolin-Jacquemyns, who not only advised King Chulalongkorn and was largely responsible for drafting all of the laws for the latter's final approval, but also advised Prince Ratburi or popularly referred to as Rabi who, would later serve as the Minister of Justice. Of Dr. Rolin-Jacquemyns, Vella (ibid, 342) writes, "During his seven years of service to the Thai government, he laid the foundation for reliance on legal arguments in Thai foreign policy."[2]

In 1932 a group of civilian and military officers overthrew the absolute monarchy and promulgated a constitution in 1933 that included the establishment of an independent judiciary. However, several events would prevent such provisions from coming to fruition. First, larger political realities undermined the likelihood that the judiciary would possess any meaningful independence and decision-making autonomy. Shortly after the establishment of the constitutional monarchy, factionalism between civilian and military coalition parties in the government emerged. The military's decision to exile one of the principal architects of the 1932

[2] Discussing the extent of Dr. Rolin-Jaequemyns' influence, Tips (1992) concludes that he was largely responsible for drafting most of the legal and administrative reforms for the modern criminal code. Quoting another foreign adviser, Tips (1992, 207) notes, Rolin-Jaequemyns, "drafted or prepared all the laws and regulations, the diplomatic and administrative correspondence, and was consulted on everything." This points to the importance of foreign advisers' important role in crafting the modern Thai legal code as well as other areas of reform.[2].As McCargo (2014b) notes, this illustrates the important but underappreciated position that foreign advisors had in the early development the modern Thai state. For the origin and role of foreign advisers during the Chakkri Reformation, see Vella (1955, 342-343).

revolution, intellectual Pridi Phanomyong, from Thailand due to accusations that he was a communist, signaled that the military would be the dominant faction. From that moment, the Thai experiments with constitutional democracy would prove an exception to longstanding periods of military rule. A series of coups and counter coups followed, although during that time the military's position was never seriously threatened by external forces.

Given that the Thai judicial system was a part of the civilian bureaucracy, the new government absolved them from political influence. Not only was the military in control, they, of course, used their own courts. Girling (1981,168) notes that under military rule, the country was subject to martial law and as a consequence, "various cases may be subject to trial by military courts without right to appeal." Successive military-dominated governments circumscribed politics and essentially circumvented opportunities for the judiciary to posses any political relevance nor perform as an institution to administer justice.

While military rule obviated the judiciary's relevance, evidence suggests that the courts would not have been more assertive in politics even under a constitutional monarchy still in its infancy. For one, the judiciary lacked the institutional powers necessary to make any significant political gains. For example, Riggs (1966, 156) notes that the court lacked judicial review powers with respect to the constitutionality of laws. This prerogative would not appear for another six decades. Further, even before the creation of the Administrative Court of Thailand, there still existed no independent institution to adjudicate grievances between citizens and the bureaucracy. Finally, Thai legal historians assert that judges have continued to perceive themselves as working primarily on behalf of the monarchy.

Beginning in 1958, General Sarit Thanarat came to power and began to use the monarchy to legitimate his dictatorship amongst Thais. The judiciary, like other bureaucratic entities, were more interested in maintaining than challenging the status quo. Girling (1981, 167-168) acknowledges that although "the judiciary prides itself on its integrity and maintenance of the rule of law" he nonetheless concludes that it is "the product of Thai society, like the bureaucracy itself" and thus would have been unlikely to challenge the larger politics of the day. Considering the prospects of the judiciary initiating political change during longstanding cycles of military rule, Thai intellectual Sulak Sivarak (1973, 50-51) is more blunt in saying, "Although Thai courts are free and worthy of respect, Thai judges, in general, have antiquated ideas and have not been creative enough to bring about the reformation of Thai judicial procedures and to make them more relevant to the present needs of the society."

Administrative law in Thailand is a relatively recent development. In fact, the establishment of the Administrative Court was the culmination of a decades-long process that was not without opposition. Administrative Court historian and former Supreme Administrative Court Vice-President, Dr. Bhokin Bhalakula (2001), writes that prior to the institution's establishment, four avenues for adjudicating grievances existed. First, people could use criminal courts to mediate disputes between themselves and the particular bureaucrat(s) involved. This more direct method targeted individual officials for their behavior, although, legally, the consequences were never as serious as the court suggests. Administrative cases were not criminal offences and absent a criminal act that could occur in certain circumstance, the administrative cases were technically outside the jurisdiction of a criminal court. Second, individuals could also appeal to criminal courts to appeal official administrative acts and orders. Administrative actions

as such were less about an individual's case per se but broader, as they dealt with larger questions of policy. Much like the former individual cases, the Thai criminal code was not appropriate for adjudicating administrative cases.

There were also informal mechanisms to adjudicate grievances. Third, individuals had the ability to directly petition the administrative officials' immediate supervisors with hopes that the latter would rule in their interests and take remedial action. This, of course, depended entirely on the discretion of the official(s) in question and thus on a more informal relationship between actors. Finally, Thais had the opportunity to directly submit their grievance(s) to His Majesty the King for personal mediation.[3] However, it was extremely unlikely that a personal relationship existed between king and subject. The latter two measures were considered outside of the formal legal process. While in principle all of the aforementioned measures were available for the aggrieved, in practice they all shared the distinction of lacking application. Citizens challenging the bureaucracy's authority were a rarity. Such lack of activity was a partial consequence of the latter's dominance over the citizenry.

These four means of adjudicating cases between private citizens and the bureaucracy lasted until the overthrow of the absolute monarchy in 1932. In 1933 Prime Minister Pridi Phanomyong resurrected the Council of State and placed it within the Office of the Prime Minister. Similar in terms of hierarchy to its predecessor under the monarchy, this Council of State comprised the Prime Minister as Chairman, a Secretary-General as head of administration, and Councilors of State who served as advisors on administrative and legal issues. The Councilors of State were further divided into two categories: law and petition councilors.

[3] Bhalakula (2001,9)

Appointed by the King to four-year terms, the former were mainly responsible for drafting laws addressed to the House of Representatives and the Council of Ministers, while also providing legal counsel and opinions to state agencies, including those involving administrative orders. Interestingly, despite a controversial place in Thai history, the Administrative Court attributes the creation of modern administrative law and the origins of the court to the intellectual writings of Pridi. In one of his lectures in 1932, he writes:

The special principles of government, such as the administrative rules concerning the relations between government power and private individuals, exist in all countries, even in Siam in the same way as other countries. We shall see in future study that there are many enactments which lay down the rules of government power, for example, with respect to the power to establish various ministries and offices. Also there are laws which regulate the practices of the administration with respect to policing for maintaining peace and order, with respect to activities for the welfare of the people, or with respect to strengthening the economy. In addition, there are also enactments about administrative cases, for instance about appeals against various orders by officials of the legal administrative department. All these matter are not civil, commercial, or other private law. So they must be organized as another branch of law.[4]

Further partitioned into two categories, *ordinary* and *special* petition councilors were entrusted with adjudicating administrative disputes. Despite these reforms, the Council of State was largely ineffective because decisions were not legally binding, thus depriving the body of meaningful authority to adjudicate cases. In fact, because there were no formal procedures for adjudicating administrative cases, both in terms of petitioning the court as well as the legal proceedings dispute parties, the Council as a whole was inoperative.

According to Bhalakula, one recurring challenge was that if a plaintiff were to submit their grievance(s) about a particular action or act or decree, the Prime Minister, who concurrently was responsible for the final ruling, could reject petitions out of hand or provide another excuse

[4] Translated in Pasuk and Baker (2000).

absolving the bureaucracy of any responsibility. Numerous efforts were made to address these gaps. For example, in 1935 the government presented bills called, *"The Powers and Duties of the Council of State concerning Administrative Cases B.E. 2478"* and the *"Bill of Administrative Proceedings"* to the General Assembly, though both eventually died in the House of Representatives.

In 1946 legislators attempted to pass the, *"Bill on Administrative Cases Trial Partners."* According to Bhalakula most of the opposition against these efforts came from institutions like the Courts of Justice, which saw neither a need to create alternative procedures or another (rival) court. The Courts of Justice viewed the Administrative Court as redundant and thus unnecessary "idea" that would serve to usurp their powers. Although throughout the years from 1949-1973 legislators made numerous efforts to transform the Council of State into a *de facto* administrative court, there was no attempt to create a formal court to adjudicate cases involving official administrative acts and orders.

For example, in 1949 parliament passed the *Petition Act*, which mandated the establishment of a Petition Commission purposed to adjudicate citizens' petitions against bureaucrats and/or their respective agencies. The commission performed important duties such as considering petitions and making judgments that it would then submit to the Prime Minister for consideration. As the final authority, the prime minister had complete discretion to approve, reject or, in fact, provide his own judgment. While this system served as a de facto court, like the second Council of State, the Commission was not a legal body, neither, as Bhalakula (2002,6) notes, was the body "accomplished" because it was powerless. The Prime Minister had ultimate

control. While technically, the Petition Commission co-existed and was independent from the Council of State several overlapping jurisdictions created confusion.

Furthermore, for several reasons the commission was ineffective. First, the commission's adoption of civil court procedures produced numerous challenges, such as delays given that cases were about administrative acts. Civil court procedures incorporated the adversarial approach, which places the burden of proof on the two parties in dispute—in this case a private individual versus a state agency or official. An obvious disadvantage was that the bureaucracy had resources to defend itself and, given that, requests for evidence would require the cooperation of the defendant. This was an obvious conflict of interest. Bhalakula (2007,46) aptly captures this in writing, "The State agency, undeniably the more conversant of the two sides in the relevant laws and facts, was left at large to dictate the direction of proceedings at the expense of injustices suffered by the people."

In addition to the adversarial approach of proceeding, the court lacked an impartial arbiter. As was mentioned, this was absent given that, as final arbiter, the Prime Minister could either agree with plaintiffs or reject the Petition Commission's recommendations. This represented a clear conflict of interest, because agreeing with private individuals ultimately undermined the premier's own power and policies. Discussing the politics inherent in the commission's role, Bhalakula (2007, 46) again notes, "If a case was not high on the Prime Minister's agenda, it may be delayed or wholly ignored." In an interview, Dr. Bhalakula discussed the prime minister's actions in avoiding accountability. He stated, "that prime minister would either purposely delay the proceedings, or the decision, and or ultimately disagree with the

commission's recommendation so as to ensure that the government always won the important cases."[5]

After widespread student-led protests resulted in the military dictatorship stepping down and the ushering in of the first experiences of parliamentary democracy by civilian rule, on October 6, 1974, Thailand's first democratic constitution was promulgated and included language in Section 212 creating an Administrative Court that was to be completely distinct from the Court of Justice in terms of its jurisdiction. However, the constitution was vague because it did not specify whether the court would be placed within the Court of Justice or exist entirely divorced as a stand-alone court.

Ideas of resurrecting the Administrative Court were found in several pieces of legislation. Section 70 of *the Town Planning Act*. (2518/ 1975). The *Act on Land Reform for Agriculture* (2518/ 1975) also included language for using the court, provided that it was in existence. Despite these promising developments, Thailand's brief flirtation with parliamentary democracy would prove to be short-lived, as the military overthrew the government in October 1976, only to then overthrow the succeeding government the following year in October 1977. Preparing for a general election, the military dictatorship passed the Constitution of the Kingdom of Thailand B.E. 2521 (1978). However, this constitution did not include language calling for the establishment of an administrative court.

In 1979, the Thai parliament once again approved the establishment of a Council of State Act, which reformed the previous Petition Council by repealing and combing the functions from the previous petition commission of *The Act of on the Council of State, B.E. 2476 (1933)* and the

[5] Interview with Dr. Bhalakula on September 18, 2014.

Petition Council Act, B.E. 2492 (1949) and unified the Law Drafting and Petition *Councils*, respectively. Nevertheless, despite the attempt to resurrect the Council of State, it suffered from the same deficiencies as its predecessor: lack of final decision-making authority for the council as well as appropriate procedures for administrative cases. Following the government of the unelected Prime Minister General Prem Tinsulanonda (1980-1988), there was no progress towards the court's development largely because of a dispute over whether the court should have been under the purview of the Court of Justice or be an independent body with its own appellate court—or under the purview of the Supreme Court.

According to Bhalakula, in terms of the eventual establishment of the Administrative Court, the period between 1989-1996 proved to be the most critical. Following the Prem government, the election of a completely civilian-led government was led by Prime Minister (and former general) Chatichai Choonhavan (1988-1991). Parliament decided that upon its establishment, an Administrative Court of Thailand would be independent and distinguished from the Court of Justice. After the military removed the Choonhavan government in 1991, Anand Panyarachun was appointed as interim prime minister until the 1992 elections. However once the 1992 elections failed to produce an elected prime minister, the military, led by General Suchinda Kraprayoon agreed to step in. Previously, General Suchinda had vowed to not to run. Despite attempting to create the illusion that he was running as a civilian, mass protests erupted only to have the military respond with a bloody crackdown in May 1992. With King Bhumipol's decision to intervene between protestors and military, Suchinda decided to step down. After this, Anand was reappointed until elections.

In September1992, the Democrat Party's Chuan Leekpai was elected and formed a government. Under the Leekpai government, heated discussions about establishing the court were re-ignited. Prime Minister Chuan Leekpai stated on October 21, 1992 that the government wanted to formally establish the court by 1996. Despite the momentum that had been building, a 1995 land development project scandal involving several cabinet ministers resulted in their subsequent resignation, effectively halting progress towards the establishment of an administrative court because the Leekpai government collapsed.

Following a 1995 amendment to the then 1991 Constitution was language specifying that the Administrative Court would be separate from the Courts of Justice. A new government under Prime Minister Barnhan Silpa-archa would fail to advance the court. Due to the extent of widespread corruption which would earn his government the nickname "Buffet Cabinet," given that cabinet members enriched themselves, the government was short-lived. The Administrative Court's slow development was partially a consequence of larger political crises; and it would again take a back seat.

Following the Silpa-archa government's dissolution, retired General Chavalit Yongchaiyudh and his New Aspiration Party coalition formed the next government. The tenure of this government too would prove brief, as its inability to effectively manage and maneuver the country's faltering economy through the1997/8 East Asian financial crisis spelled its doom. Assigning blame for the stunning collapse of the Thai economy to fiscal mismanagement stemming from incompetent and corrupt politicians, an overwhelming majority of Thais became weary of their control of government and lack of accountability in general. To some, the

weaknesses in the political system could be located in the institutional design, amendable only through constitutional reform.

The previous constitution (1991) encouraged parliament to be comprised of large coalition of political parties. This situation proved unstable and susceptible to corruption. Governments were formed based on bargaining amongst parties for cabinet positions that were then brought in to plunder the state. As a result, citizens viewed politicians and political parties, which were deemed to be no more than a personal vehicle for corruption, as a cancer on democracy and a well-functioning economy.

While the Banharn government created the constitutional drafting commission it was under the succeeding the Choonhavan government that the body oversaw the establishment of the 1997 Constitution. Popularly referred to as the "People's Constitution" due to the unprecedented amount of participation from civil society groups as well as intellectuals during the drafting stage facilitated by the Constitution Drafting Assembly (CDA). Under the theme of "accountability" and "democratic deepening," the 1997 Constitution established several independent courts, including the Administrative Court. The court was tasked to adjudicate disputes between aggrieved parties and the bureaucracy. The court was one of a nursery of independent bodies that framers designed to provide citizens with enhanced powers to hold public officials and bureaucrats accountable for their actions.[6] Advocates of political reform were strengthened by the 1997 Asian Financial Crisis that saw the baht collapse and Thailand

[6] The other independent bodies were: National Anti-Corruption Commission, National Anti-Money Laundering Commission, and the Constitutional Court.

accept economic reform packages from the International Monetary Fund (IMF) that called for greater liberalization.

The Chuan government approved the *Act on the Establishment of the Administrative Court and Administrative Court Procedures, B.E. 2542 (1999)*, which established the court's overall composition, its jurisdiction, the powers and duties of plaintiffs, defendants and judges, respectively. There are currently eight regional Courts of First Instance and the Supreme Administrative Court. The Supreme and Central (Bangkok) court officially opened in March 2001, with Chiang Mai in July 2001 and Songkhla in August 2001. Nakhon Ratchasima opened in October 2001, Khon Kaen 2002, Pitsanoluk October 2002, Rayong 2003, Nakhon Sri Thammarat August 2003, Udon Thani September 2010 and Ubon Ratchathani April, respectively.

In sum, the Administrative Court's development was a long process that encompassed several periods of successes and setbacks. While the court's development spanned multiple regimes and constitutions, the 1997 Asian financial crisis had deleterious affects on the Thai economy and politics. However, as Connor (2002) notes, the crisis provided the necessary momentum for the passage of the most liberal constitution in Thai history. Absent the urgency that lawmakers felt to "do something", it is highly unlikely that it would have otherwise passed.[7]

[7] Connors mentions that the Ministry of Interior was actively campaigning against the 1997 Constitution. In an interview about the opposition during the Constitutional Drafting Assembly, Bhalakula made clear that the Court of Justice tried to prevent the establishment of the Administrative Court. "The Courts of Justice did not believe that there needed to be an Administrative Court. The thought that the court was unnecessary and that if there were to be a court, they should be under the Court of Justice a nd not a completely separate court." Interview on September 18, 2014.

The Administrative Court: Key Actors, Jurisdiction and Powers

Discussing the Administrative Court's fundamental powers, jurisdiction and procedures, this section provides an overview of how the court operates, as well as an enumeration of the key actors in the court. In order to understand how the court functions, it is necessary to explore its inner workings, all of which are found in its foundational documents: *Act on the Establishment of the Administrative Court and Administrative Court Procedure, B.E. 2542 (1999).*[8] Article 3 classifies the key actors involved in the court's procedures. For example, parties to disputes are defined as, "a plaintiffs and a defendant, and includes a person, administrative agency or State official becoming a party to the case by way of interpleading, whether voluntarily or being summoned by an Administrative Court to appear in the case by reason of being an interested person or a person likely to be affected by the outcome of the case, and, for the purpose of the proceedings, shall also include the person authorized to represent the aforesaid person."[9]

An "administrative agency" refers to a Ministry, Sub-Ministry, Department, Government agency called by other name and ascribed the status as a Department, provincial administration, local administration, State enterprise established by an Act or Royal Degree or other State agency and shall include an agency entrusted to exercise the administrative power or carry out administrative acts. For example, administrative agencies *can* include the Ministry of Foreign Affairs, Department of Corrections, Department of Land, local government organizations such as the Provincial Administrative Organizations (PAO) or Tambon Administrative Organizations (TAO), etc.

[8] *Act on the Establishment of the Administrative Court and Administrative Court Procedure, B.E. 2542 (1999)*, hereafter referred to as, "1999 Administrative Court Act."
[9] ibid,3-4.

State officials refer to *(1) Government official, official, employee, group of persons or person performing duties in an administrative agency; (2) quasi-judicial council or committee or person empowered by law to issue any by-law, order or resolution affecting persons; and (3) person who is under the supervision or superintendence of administrative agencies or State officials under (1) or (2)*[10]. This primarily refers to individual bureaucrats of any rank, but also includes quasi-judicial bodies, such as the Civil Service Commission (CSC). Ultimately, anyone empowered by Royal Decree with administrative authority is potentially subject to legal action. For example, individuals' positions can be named, such as the Prime Minister or *nayok* or head of a local government entity.

An "administrative contract" refers to a contract in which at least "one of the parties is an administrative agency or a person on behalf of the State and which exhibits the characteristic of a concession contract, contract providing public service or contract for the construction of public works or for the exploitation of natural resources."[11] Examples of an administrative contract is one that exhibits the characteristics of (a) a concession contract, (b) a public concession contract or (c) a contract for the provision of public utilities or (d) a contract for the exploitation of natural resources. This means that the Administrative Court considers private companies under an administrative contract with a government entity to be, by extension, a government entity liable as well. Article 3 of the 1999 Administrative Court Act stated that upon winning a concession from the State, private company "A" in having an administrative contract with the particular state agency, are themselves by extension now legally a state agency and thus subject

[10] ibid,*2-3.*
[11] ibid, 4.

to legal action as they are under the supervision of a State agency or official. Public-private companies however are not under the jurisdiction of the Administrative Court, but under the supervision of the civil court.

Types of Administrative Court Cases

Like all courts, the Administrative Court has a specific jurisdiction which defines the type of cases that it is qualified to adjudicate. This section illustrates those cases and discusses them at length in order to clarify their place. Article 9 of the 1999 Administrative Court Act, specifies six types for the court's consideration proper:

(1) case(s) involving unlawful act(s) by an administrative agency or State official, whether in connection with the issuance of a rule or order or in connection with other acts, by reason of acting without or beyond the scope of powers and duties or in a manner inconsistent with the law or the form, process or procedure which is the material requirement for such act or in bad faith or in a manner indicating unfair discrimination or causing unnecessary process or excessive burden to the public or amounting to undue exercise of discretion;
(2) disputes pertaining to an administrative agency or state official neglecting his or her official duties which are required by law or performing such duties with unreasonable delay;
(3) disputes related to a wrongful act or other liabilities of an administrative agency or State official arising from the exercise of power under the law or from a law, administrative order or other orders, or from the neglect of official duties required by the law to be performed or the performance of such duties with unreasonable delay;
(4) disputes related to an administrative contract;
(5) cases legally-prescribed to the Court by an administrative agency or State official for mandating a person to do or refrain from committing a particular act;
(6) cases legally-prescribed be under the jurisdiction of the Administrative Court.[12]

These six categories command a number of important observations. First, the court only adjudicates cases involving violations during official administrative acts. For example, when an individual acting within their official capacity is either (under)performing in a way that is not consistent with a specific order or decree, legal action is permissible. This is distinguished from

[12] The Act on the Establishment of Administrative Courts and Administrative Courts Procedure BE 2542 (1999).

criminal acts, which would be under the Court of Justice's jurisdiction. For example, a state official embezzling funds for their own benefit is considered a criminal offence and hence adjudicated in criminal court. However, in some instances, violations of administrative acts also involve criminal activity. Evidence from an Administrative Court hearing is admissible in other courts.

Administrative Court rulings, if in favor of the plaintiff, generally command remedial action on the part of the state (e.g., issuing a driver's license or striking down an order removing a civil servant from their position and restoring their previous salary). In cases involving the destruction of property or interest occurred from administrative contracts require the agency in question to provide financial compensation with, if necessary, interest. Most cases do not require financial compensation. As this chapter will later show, the majority of cases that the Administrative Court adjudicates pertain to unreasonable delay of action. When the court rules in favor of a party, within the ruling are guidelines that they direct them to adhere to the order within a specified period of time.

Second, that the court adjudicates grievances that involve individual bureaucrats challenging orders and actions from their superiors demonstrates that the bureaucracy can be either the aggrieved or *provocateurs*. In most cases, bureaucrats challenge what they deem to be unfair human resource decisions that affect their careers. For example, orders related to promotion, demotion or transfer that bureaucrats' deem without merit are now subject to legal action through the Administrative Court. Title II of the 2008 Civil Service Act requires that in order to use the Administrative Court for arbitration, bureaucrats have to first submit their human resource-related grievances to the Merit System Protection Commission (MSPC) for

adjudication.[13] Section 116 of the Act states that if there is a disagreement with the MSPC's final ruling, the plaint has 90 days to appeal to the Supreme Administrative Court. Section 71 stipulates that the CSC must accept the Administrative Court's ruling as final.

Procedurally, bureaucrats can only elevate the Administrative Court *after* they have undergone the MSPC arbitration. This is not exclusive to the former but to all interested parties. Chapter four of the 1999 Administrative Court Act, article 42 states, "In the case where the law provides for the process or procedure for the redress of the grievance or injury in any particular matter, the filing of an administrative case with respect to such matter may be made *only after* action has been taken in accordance with such process and procedure has also been given thereunder or no order has been given within a reasonable period of time or within such time as prescribed by law."[14] Thus the Administrative Court is one of last resort. The fact that the court can only be accessed after such efforts have been made speaks to the extent to which plaintiffs are willing to resolve their grievances.

Third, determining what exactly constitutes "unreasonable delay" lends itself to debate because, ultimately, it is a matter of discretion. Waiting six to nine months to obtain a land deed or driver's license when the process is expected to take one week or less is an obvious case in which the court would take into consideration. What is less clear, however, are instances in which administrative acts are undefined in terms of time. For example, instances in which the

[13] Sivaraks (2011) writes, "The MSPC is composed of seven commissioners selected by the Selection Committee comprising the president of the Supreme Administrative Court as chairman, a vice-president of the Supreme Court designated by the president of the Supreme Court, a qualified CSC commissioner elected by the CSC, and the secretary-general of the CSC shall be a member and secretary. The MSPC has its main responsibility in (1) protecting the merit system by advising and preventing government agencies from issuing or regulating unmerited rules and regulations, (2) considering appeals, and (3) considering complaints."
[14] Italics emphasized. Act on Establishment of Administrative Court and Administrative Court Procedure, B.E. 2542 (1999), p. 41.

government allows industries to extract natural resources, the former is required to conduct a prior Environmental Impact Assessments (EIA) or a Health Impact Assessment (HIA). Failure to do so can take months to correct. Further, the court is required to assess the assessment, a task that requires technical capacity that is beyond judges' expertise. Ironically, even the court itself has been subjected to administrative lawsuits for unreasonable delay in ruling.

Within the Administrative Court is the Office of the Case Enforcement, which is responsible for ensuring that losing parties comply with rulings. This applies to specific acts but also policies: orders and decrees. Whether poor performance or policy, the Administrative Court has the authority to address both questions when petitioned. In recognition of this crucial jurisdiction, the court does have its boundaries. The 1999 Administrative Court Act states that there are three main categories of cases that are outside the courts' jurisdiction:

(1) actions concerning military disciplines;
(2) actions of the Judicial Commission under the law on judicial service;
(3) cases within the jurisdiction of the Juvenile and Family Court, Labor Court, Tax Court, Intellectual Property and International Trade Court, Bankruptcy Court or other specialized courts.

The Administrative Court: Hierarchy

Hierarchically, the Administrative Court of Thailand is composed of a Supreme Administrative Court located in Bangkok and the Administrative Courts of First Instance, the latter of which the 1999 Administrative Court Act requires that they are dispersed regionally throughout the country.

According to 1999 Administrative Court Act, the Supreme Administrative Court is the final arbiter in four types of cases:

1. *those involving dispute(s) pertaining to a decision of a quasi-judicial commission as prescribed by the General Assembly of the Judges of the Supreme Administrative Court;*
2. *those involving dispute(s) pertaining to the legality of a Royal Decree or by-law that the Council of Ministers issued or approved;*
3. *cases which the law specifies as being within the jurisdiction of the Supreme Administrative Court; and*
4. *appeals made against a judgment or order of an Administrative Court of First Instance.*

As Tables 2 and 3 demonstrate, nearly 97 percent of the cases that the Supreme Administrative Court accepted are appeals from the Court of First Instance. Likewise, approximately 96 percent of the cases that the Supreme Administrative Court has adjudicated were appeals.

The Administrative Court of First Instance is further divided into a Central Administrative Court and Regional Administrative Courts. Provinces within the jurisdiction of the Central Administrative Court are Bangkok and surrounding provinces. There are seven Regional Administrative Courts: Chiang Mai, Songhkla, Nakhon Ratchasima, Khon Kaen, Phitsanulok, Rayong, Nakhon Si Thammarat, all of which have several corresponding provinces that are within their jurisdiction respectively.[15] See Tables 3, 4, 5, and 6.

The Administrative Court consists of two levels (see Figure 1). The highest level, the Supreme Administrative Court, predominantly performs as an appellate body, while the Courts of First Instance function as the initial court that adjudicates grievances. Within both the Supreme Administrative Court and the Administrative Courts of First Instance a hierarchy of positions exists. For the former, there is a President of the Supreme Administrative Court, Vice

[15] While as of this writing there are seven Regional Administrative Courts of First Instance, in Chapter V, Article 94 of the Act on Establishment of Administrative Court and Administrative Court Procedure, B.E. 2542 (1999) mandates that there be the a total of 16. The other 9 Regional Administrative Courts to be established are: Chumphon, Buri Ram, Phrae, Yala, Lop Buri, Sakon Nakhon, Suphan Buri, Udon Thani, and Ubon Ratchathani, respectively.

Table 2

2013 Cases Accepted by the Supreme Administrative Court: 2001-2013 by Category and Year

Year	**Direct Plaints**	**Court of First Instance Appeals under consideration**	**Court of First Instance Appeal Requests**	**Total**	**Total % of Appeals**
2001	25	17	342	384	93.48
2002	29	107	827	963	96.98
2003	17	291	954	1282	97.11
2004	32	609	793	1434	97.76
2005	19	906	884	1809	98.94
2006	63	924	1007	1994	96.84
2007	41	994	894	1929	97.87
2008	61	1067	870	1998	96.94
2009	94	1157	776	2027	95.36
2010	93	1156	1024	2273	95.90
2011	186	1351	815	2352	92.09
2012	97	1909	1144	3150	96.92
2013	105	2180	1060	3345	96.86
Total	**862**	**12668**	**11390**	**24920**	**96.54**

Source: Administrative Case Statistics 2013. Office of Administrative Court.

Table 3

2013 Cases Adjudicated by the Supreme Administrative Court: 2001-2013 by Category and Year

Year	**Direct Plaints**	**Court of First Instance Appeals under consideration**	**Court of First Instance Appeal Requests**	**Total**	**Total % of Appeals**
2001	6	-	134	140	95.71
2002	19	14	656	689	97.24
2003	26[16]	64	713	803	96.76
2004	21	178	964	1163	98.19
2005	21	234	979	1234	98.29
2006	53	387	920	1360	96.10
2007	41	460	919	1420	97.11
2008	52	559	927	1538	96.61
2009	62	428	740	1230	94.95
2010	67	491	763	1321	94.92
2011	47	733	775	1555	96.97
2012	108	967	875	1950	94.46
2013	128	989	1051	2168	94.09
Total	**651**	**5504**	**10416**	**16571**	**96.07**

Source: Administrative Case Statistics 2013. Office of Administrative Court.

[16] The number reflects the cases adjudicated in the same category but not necessarily from that year. So even though the 2003 number is higher than the total accepted in the same from the previous table, it reflects residual from previous years' cases.

Table 4

Current Regional Administrative Courts of First Instance and Corresponding Jurisdictions Structure[17]

	Court of First Instance	Provinces in Jurisdiction
1	Chiang Mai	Chiang Mai, Chiang Rai, Mae Hong Son, Lampang, Lamphun, Nan, Phayao, Phrae and Uttaradit.
2	Khon Kaen	Kalasin, Khon Kaen and Maha Sarakham, Nakhon Phanom, Mukdahan, Loei, Sakon Nakhon, Nong Khai, Nong Bua Lam Phu and Udon Thani.
3	Nakhon Ratchasima	Chaiyaphum, Nakhon Ratchasima, Buri Ram, Yasothon, Roi Et, Si Sa Ket, Surin, Ubon Ratchathani and Amnat Charoen.
4	Nakhon Si Thammarat	Krabi, Nakhon Si Thammarat, Phang-Nga, Phuket, Surat Thani,Chumphon and Ranong.
5	Phitsanulok	Kamphaeng Phet, Tak, Nakhon Sawan, Phichit, Phitsanulok, Phetchabun and Sukhothai
6	Rayong	Chanthaburi, Chachoengsao, Chon Buri, Trat, Prachin Buri, Rayong and Sa Kaeo
7	Songhkla	Trang, Patthalung, Songkhla, Satun, Narathiwat, Pattani and Yala.
8	Ubon Ratchathani	Yasothon, Roi Et, Si Sa Ket, Ubon Ratchathani and Amnat Charoen.
9	Udon Thani	Loei, Nong Khai, Nong Bua Lam Phu and Udon Thani

Source: The Act on the Establishment of Administrative Courts and Administrative Courts Procedure BE 2542 (1999

[17] As of September 27, 2011.

Table 5

Central (Bangkok) Administrative Courts of First Instance and Corresponding Provinces within its Jurisdictions

1	Regional Court	Provinces in Jurisdiction
	Central Administrative Court	Bangkok Metropolitan, Nakhon Pathom, Nonthaburi, Pathum Thani, Ratchaburi, Samut Prakan, Samut Sakhon, and Samut Songkhram

Source: The Act on the Establishment of Administrative Courts and Administrative Courts Procedure BE 2542 (1999)

Table 6

Futuristic Composition of Regional Administrative Courts of First Instance and Corresponding Provinces within its Jurisdictions

	Court of First Instance	Jurisdiction
1	Buri Ram	Buri Ram and Surin
2	Chiang Mai	Chiang Mai, Chiang Rai, Mae Hong Son, Lampang, Lamphun, Nan, Phayao, Phrae and Uttaradit.
3	Chumphon	Chumphon, Prachuap Khiri khan, Phetchaburi and Ranong
4	Khon Kaen	Kalasin, Khon Kaen and Maha Sarakham
5	Lop Buri	Nakhon Nayok, Phra Nakhon Si Ayutthaya, Lop Buri, Saraburi, Sing Buri, and Ang Thong
6	Nakhon Ratchasima	Chaiyaphum and Nakhon Ratchasima;
7	Nakhon Si Thammarat	Krabi, Nakhon Si Thammarat, Phangnga, Phuket and Surat Thani
8	Phitsanulok	Kamphaeng Phet, Tak, Nakhon Sawan, Phichit, Phitsanulok, Phetchabun and Sukhothai

9	Phrae	Nan, Phayao, Phrae and Uttaradit;
10	Rayong	Chanthaburi, Chachoengsao, Chon Buri, Trat, Prachin Buri, Rayong and Sa kaeo;
11	Sakon Nakhon	Nakhon Phanom, Mukdahan and Sakon Nakhon
12	Songhkla	Trang, Phatthalung, Songkhla and Satun
13	Suphan Buri	Kanchanaburi, Chai Nat, Suphan Buri and Uthai Thani
14	Ubon Ratchathani	Yasothon, Roi Et, Si Sa Ket, Ubon Ratchathani and Amnat Charoen.
15	Udon Thani	Loei, Nong Khai, Nong Bua Lam Phu and Udon Thani
16	Yala	Narathiwat, Pattani and Yala

Source: The Act on the Establishment of Administrative Courts and Administrative Courts Procedure BE 2542 (1999)

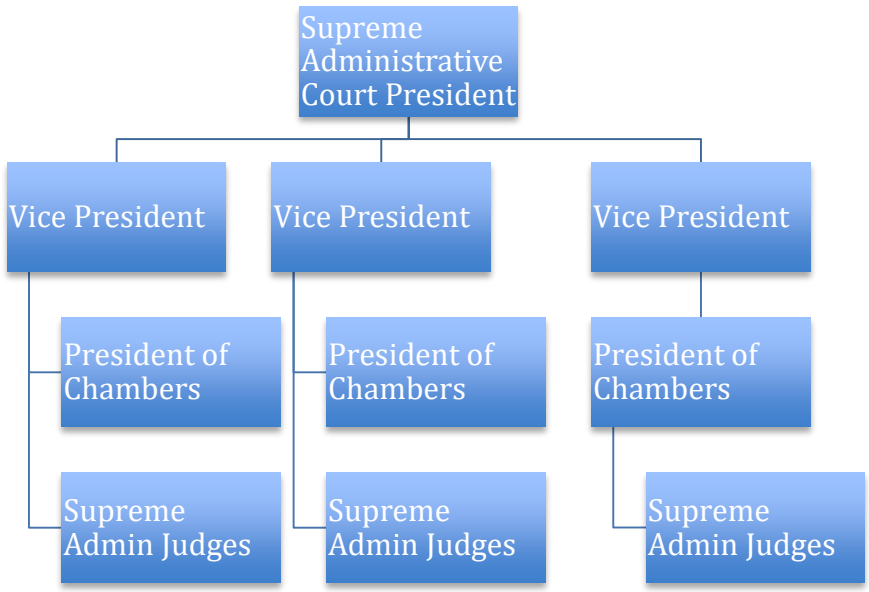

Figure 1. Hierarchical structure of the Administrative Court.

President and numerous Presidents of chambers. Within each chamber are other Supreme Administrative Court judges.

Functionally, each position is slightly different. The President of the Supreme Administrative Court of First Instance is responsible for the overall management and administration of the court. In addition to this more managerial function that includes conducting annual inspections to each regional court of first instance, s/he also serves as a judge on cases. The President is responsible for assigning judges to chambers. Likewise, the President of the Supreme Administrative Court also serves as the public face of the entire court. The President also conducts inspections of the court and assigns Supreme Administrative Court judges to each chamber. The Vice-Presidents of the Administrative Court, both Supreme and First Instance, support the President's official duties in addition to perform their duties as judges.

Chambers are the group of judges that the presidents designate to adjudicate a particular case. Many chambers are specialized based on the specific type of case. For example, cases involving environment or the Ministry of Justice would be assigned to a chamber where judges specialize in those corresponding issue areas. Presidents of Chamber are responsible for the oversight and timely adjudication. The judge-commissioner of justice is an administrative judge whom the President of the Supreme Administrative Court appoints to prepare the facts, laws, and a preliminary opinion that is separate and non-binding on the rest of the judges in the chamber.[18] The judge-rapporteur is an Administrative Court judge who the president designates to collect evidence and facts pertaining to all parties. This information is then given to the

[18] This judge-commissioner of justice provides their opinion before the chamber's official judgment. According to Article 58 of the 1999 Administrative Court Act, the President of the Supreme Administrative can appoint a judge commissioner of justice from either the Supreme Administrative Court or the Court of First Instance.

chamber in advance so that the rest of the judges can determine the ruling. The judge-rapporteur is coincidentally an administrative judge from that same chamber.

Each trial requires a minimum quorum of judges who must be present. The Supreme Administrative Court needs a minimum of five judges assigned to each case, while the Court of First Instance requires at least three judges. The number of judges must always be an odd number in order to reach a majority. The final ruling does not provide the specific vote of each judge, only the written decision. Sometimes included in the official decision are judges' reasoning whether they were in favor of the plaintiffs or defendants.

Adopting the same structure of the Supreme Administrative Court, the Administrative Court of First Instance also consists of a President, Vice-Presidents, Presidents of Chambers, Judge-Commissioners of Justice, Judge Rapporteurs and Court of First Instance Judges. Likewise, all of these individuals operate in a similar capacity as the Supreme Administrative Court (see Figure 2).

Plaintiffs and Judges: Powers and Privileges

This section demonstrates that the Administrative Court's formal institutional structure provides a partial justification for the dissertation's emphasis on both judges and plaintiffs. Epp (1998) argues that the institutional support structures allow individuals' to pursue litigation. While the institutional support structure refers to lawyers and legal advocacy groups to assist individuals, this is relevant to the Administrative Court because the court also provides the necessary provisions to consistently pursue litigation. This section discusses this structure. The first part examines the institutional powers that the court affords to plaintiffs—specifically those related to access. The second section elaborates judges' powers that the 1999 Administrative

Court Act provides. Beyond the more obvious responsibility of decision-making, I explore their more ancillary functions that afford their position with significant import. The third part discusses how both actors interact—specifically through their interdependent relationship that better illustrates this dynamic. Finally, this section concludes by arguing the while the institutional configuration is important, it does not provide a complete explanation that illuminates each actor's behavior and hence the judicialization of politics.

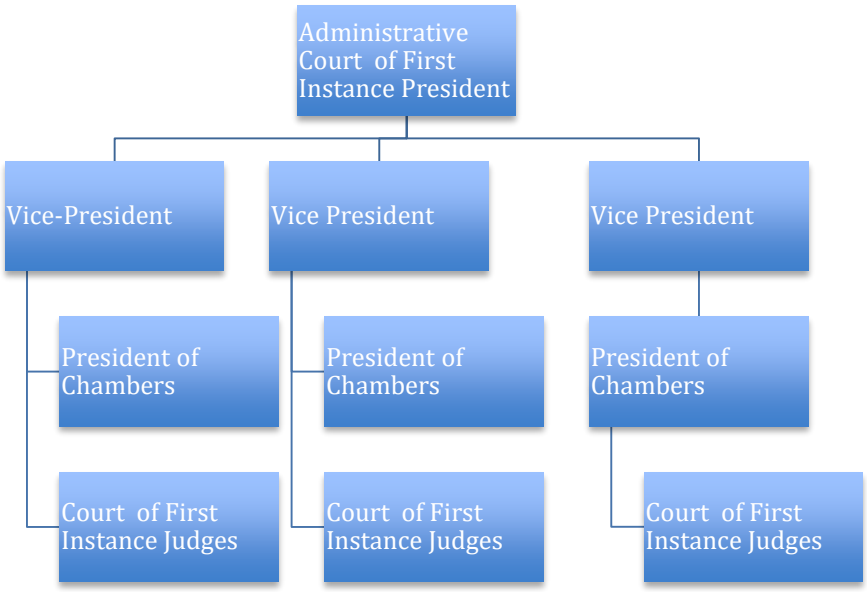

Figure 2. Hierarchical structure of the Administrative Court of First Instance.

Who Uses the Administrative Court? Prospects, Privileges and Powers

The Administrative Court offers several incentives for prospective plaintiffs. First and foremost, the qualifications for filing a grievance are generous. Article 42 of the 1999 Administrative Court Act defines a plaintiff as, "any person who is aggrieved, or injured or who

may inevitably be aggrieved or injured in consequence of an act or omission by an administrative agency or State official or who has a dispute in connection with an administrative contract or other cases falling within the jurisdiction of the Administrative Court." This is definition provides tremendous leverage. In addition, there are no hindrances placed on being a plaintiff with respect to nationality, age, as even those under the age of 18 must obtain their parents' or guardians' permission.

The Administrative Court also provides prospective plaintiffs with several incentives to resolve their grievances. Most pertain to generous access standards. In particular, the amount of time given to submit cases, the provision of free consultations and absence of legal fees in all cases with the exception of administrative contracts. With respect to time, to be eligible to access the administrative courts, one must file their respective grievance(s) within 90 days upon knowledge of an alleged offence. For grievances involving administrative contracts, individual(s) have one year to file.

The court also provides free legal counseling to prospective plaintiffs. Given that the Administrative Court is less than 20 years old, it is not relatively known compared to other more longstanding institutions. In fact, in interviews with Administrative Court judges and lawyers, all believed that the majority of Thais remain unfamiliar with the court. This results in the lack of basic knowledge about the court as well as related procedures and jurisdiction. A noted environmental rights lawyer stated that once the people are more aware of the court and their rights, the cases are likely to increase.[19] In interviews with officials from the Office of the

[19] One should not fail to appreciate the impact that the lack of knowledge of the court can have for the average citizen. Even the Administrative court does acknowledges this reality, and the court has various legal educational programs throughout the country to explain the court's function and purpose as well as citizens' rights as they pertain to the state.

Administrative Court, they stated that during consultations with individuals who have a grievance, the court tries to encourage all parties to resolve the conflict before it is formally submitted to the court. As a neutral arbiter attempting this alternative dispute mediation, officials stated that this allows for a dispute to avoid a more formal court process that can be lengthy and unnecessary. However, they note, when mediation is not possible, the court offers parties with consultants who help navigate the adjudication process.

In interviews with Administrative court officials, judges and plaintiffs, all agreed that the court's consultation service help eliminate areas of lack of knowledge or misconceptions that plaintiffs regularly have. Consultations provide prospective plaintiffs with comfort, trust and a reassurance of the institutions ability to provide justice. In addition to assisting plaintiffs, Administrative Court officials stated that their consultation assists helps individuals determine whether their grievance merits further legal action. Discussions with former plaintiffs stated that this allowed them to better assess whether they had a legitimate chance of winning. Finally, some judges stated that the consultation service helps eliminates cases that are potentially frivolous and would hinder their ability to dedicate full attention to other cases.

Likewise, interviews with senior officials from the Office of the Administrative Court stated that the court's consultants educate prospective plaintiffs on the rewards that the court can provide. For example, with respect to the type of judgments the court provides, consultants educate individuals about the prospective award as well as what the court cannot award. In addition, the court provides consultation on the more administrative minutia related to the adjudication process, such as how to properly submit a plaint whether in person or via postage, as well as explain the court's entire adjudication process. Interviews with judges and plaintiffs

revealed that access to the court is an important determinant as to whether or not the latter would submit a plaint. One should not overlook the frequency by which the court consults individuals. According to the annual statistics that the Office of the Administrative Court publishes, the court has consulted over 100,000 instances since its inception. Table 7 demonstrates the types of consultations that the court provides individuals.

Table 7

Total Number of Consultations by Year and Type

Type / Year	Filing a plaint form, submitting a plaint, appealing, or related information	Whether cases are in the jurisdiction or not	Miscellaneous knowledge about the Administrative Court	Steps before submitting a plaint to the Administrative Court	Other	Total
2001	189	108	34	74	213	618
2002	2516	2153	1611	1684	1047	9011
2003	3636	2361	1530	1940	2096	11563
2004	2351	1662	1086	1497	1374	7970
2005	1719	1393	868	951	1023	5954
2006	1840	1821	1077	1085	892	6715
2007	1527	1488	1447	1078	1064	6604
2008	2064	1742	1523	1697	1174	8200
2009	2369	2119	2188	1978	1773	10427
2010	4128	2650	2848	2200	1824	13650
2011	3381	2294	2390	1769	1651	11485
2012	3387	1922	1801	1654	1179	9943
2013	3676	2134	1902	1827	1915	11454
Total	**32783**	**23847**	**20305**	**19434**	**17225**	**113594**

Source: Administrative Case Statistics 2013. Office of Administrative Court.

Based on this information, one can observe that most consultations pertain to properly filing a plaint. The second most requested consultation is related to questions about the court's

jurisdiction. Both categories in many respects are attributed to the public's lack of knowledge. When interviewed, judges and plaintiffs expressed their belief that most Thais are unfamiliar with the court.[20] Miscellaneous knowledge about the Administrative Court is the third category that ranges from questions about the number of Courts of First Instance to the total number of Supreme Administrative Court judges.

One benefit that both judges and an environmental rights lawyer acknowledged is that free legal counsel throughout the trial process allows those that are economically disadvantaged to be more willing to use the court given the absence of legal fees. Both acknowledged that usually the judicial process has the tendency to be taxing both financially and temporally, as cases are not decided quickly, however the Administrative Court is different. Plaintiffs interviewed in this study stated that because the court did not obligate them to hire a lawyer it made it helped in their decision to sue.

Finally, the court has security measures in place designed to protect plaintiffs in the event that a case may invite controversy or instances where there can be intimidation, retaliation or another concern where there is a legitimate fear for safety and well-being. Article 60 of the 1999 Administrative Court Act states that while all hearings are open to the public, the court is obligated to place in higher priority of the public welfare. The court can issue two orders:

(1) prohibiting the public from attending the whole or part of the hearing and proceeding with such hearing in camera; or
(2) prohibiting the publication of such facts or circumstances.

[20] Filing a form properly may not necessarily be an indication of a lack of knowledge of the court per se but reflect a lack of more technical challenge.

One should not overlook the importance of this. Cases involving the revocation of administrative contracts worth millions of dollars or environmental cases which can cause damage to large economic interests can easily raise the stakes and with it the raise the probability of violence. Reflecting on the danger of cases, the president of an environmental NGO who has represented plaintiffs in hundreds of cases in the Administrative Court the NGO stated, "I get death threats all the time. I'm not worried about it—everyone knows where I live. Whatever happens, the work will continue. There are other lawyer like me who will continue to fight."[21]

Discussing methods used to reduce fear, the NGO President stated, "Most plaintiffs are intimidated by the government and may be initially hesitant to submit cases in hopes that both sides can resolve the conflict outside of the court. However, once I explain that if there is physical danger, the court will protect their identities, most people are more comfortable with proceeding with the case."[22] Closely related, another provision that serves as an incentive to encourage legal action is that the court allows for group lawsuits. According to article 45 of the 1999 Administrative Court Act, "In the case where several persons wish to file an administrative case for the same cause of action, such persons may jointly submit a single plaint and appoint one among themselves to represent every plaintiff in the proceedings. In such instances, an act of the person representing the plaintiffs in the proceedings shall be deemed to bind every plaintiff." The president also indicated that the ability to file jointly with others helps individuals who are intimidated and therefore more likely to not pursue legal action.

[21] ibid
[22] Interview on April 19. 2012.

Finally, the court encourages prospective plaintiffs, especially those who are economically-marginalized, to sue. It does not require plaintiffs to pay fees in order to proceed with adjudication. Even in the event that the court awards plaintiffs financial compensation, one is only required to pay a percentage *after* the decision.[23] The court is sensitive towards plaintiffs' economic status, in particular those who may not be able to afford the court fees and thus be discouraged from legal action. The court will even grant payment exemptions depending on the circumstance.

In sum, as reflected in the court's institutional procedures and confirmed in interviews with judges and advocacy lawyers, the Administrative Court strives to ensure that barriers to access are largely limited to questions of jurisdiction. Even with respect to addressing current challenges related to access, such as public knowledge, the court engages in public education outreach programs to inform citizens of their rights versus the State and the role of the court in ensuring it maintenance. One Supreme Administrative Court judge stated that the court believes in defending the people from abuses from the government and wants the public to trust them.[24] Officials from the Office the Administrative Court stated that they try to create a welcoming environment by showing respect for individuals and their plaint(s) no matter how frivolous because they want to encourage people to use the court.

[23] According the the 1999 Administrative Court Act, court fees are collected from cases which render financial compensation for liable acts as well as cases involving fees collected from administrative contracts.
[24] Interview on June 14, 2012

Judges: Powers and Privileges

The judicialization literature presumes that courts and, by extension, judges possess the independence from external actors to make decisions. Instances where judges lack independence to make decisions translates into its politicalization. Ultimately, judicialization should demonstrate the court's ability to affect politics. The latter question can be determined by the court's jurisdiction and the particular powers that judges posses. For judges, the Administrative Court is unique in that it empowers them beyond the more obvious responsibility of decision-making. This section discusses the former in addition to explaining how the court's institutional powers position judges to be significant to the overall question of judicialization. The first part discusses the types of rulings that Administrative Court judges can make. The next looks at judges' ability to investigate evidence before determining whether cases can proceed. When enforcing decisions, the more ancillary function that judges can perform are no less important.

Decision-making: Types

First, the court empowers judges with several different *types* of decisions that they can make. Article 72 of the 1999 Administrative Act provides judges with a list of five types of decisions that they can make. First, they can revoke a by-law or order or restrain an act either partially or in total. Second, judges can order the head of an administrative agency or official to perform their duty within a specified timeframe in cases involving neglect or unreasonable delay. Third, judges can rule compensation in terms of money or property for liabilities or wrongful acts related to administrative contracts. Fourth, judges are able to order into the existence a right

or duty upon party's request for clarification. Finally, judges can issue a judgment requiring individual(s) to either take an action or refrain from doing so.

Judges as investigators

In contrast to the adversarial system, which is commonplace in courts from Western governments, that requires an impartial judge to mediate disputes between two parties, The Administrative Court uses the inquisitorial system of adjudication in which are not impartial and are, in fact responsible for determining the burden of proof by conducting investigations. These investigations are to ensure that all relevant evidence is collected so that judges are able to make the best decision possible. Article 61 of the 1999 Administrative Act states that judges have five powers during the investigation phase. First, they can issue an order for an administrative agency or official to provide a written statement related to their performance as it relates to the plaint in question. Second, judges can require an agency or official to provide material evidence related to a plaint. Third, they can require parties in a dispute to submit evidence and/or a statement(s) related to the case. Fourth, judges can issue orders to summon concerned persons to a case to give a statement or evidence for the court's consideration. Finally, judges can assess supplementary evidence for consideration of its use.

Judges' ability to investigate is important in several respects. First, the evidence presented can determine which party will win. Second, the result of judges' investigation can determine the probability of appeal. As the legal representative the State, the Office of the Attorney General, the evidence that the court provides lawyers assists in their legal strategies as well as affects the length of their own investigation. An interview with legal counsel from the

Office of the Attorney General (OAG), who represents government agencies, revealed that there were instances where the Administrative court judges have overlooked relevant evidence that state representative believe could have led to a favorable ruling. When this happens, it increases the likelihood that OAG will recommend to appeal.[25]

In addition to their investigation duties, Administrative Court judges are also responsibility for with enforcing their decisions. Through the Office of Case Enforcement, which is a division within the court that is responsible for ensuring full compliance with decisions, judges are notified when a party does not adhere to the judgment.[26] One important aspect of accountability pertains to the ability to enforce decisions. This is dependent on two actors: judges and to whomever the court has awarded. When a losing party fails to comply with a judgment order, the winning party is then able to notify the Office of Case Enforcement. The court begins to take action immediately by sending its officers to inquire about compliance by summoning the party for justification and to execute the order. As of December 2013, according to the Administrative Court's Office of Case Enforcement, 5,222 cases exist. Over 80 percent of all cases pertain to State agencies or bureaucrats who have still failed to comply with the court's order.

Table 8 demonstrates that nearly 85 percent of the office's activity involves the enforcement of offenses against a state official or agency. Given the overall number of cases, this demonstrates that compliance is usually not a serious challenge for the court. This section has demonstrated that the Administrative Court judges are vital actors who are institutionally

[25] Interview conducted on April 2, 2014.
[26] It is important to understand that the Office of Enforcement only accepts cases in which a party has failed to adhere in full to the decision. This office's activity is only a fraction of the cases the court has adjudicated and parties have complied.

empowered to impact the adjudication process at every phase—even before the court accepts cases. As an institution, in addition to its jurisdiction, through several measures the Administrative Court attempts to eliminate any potential access barriers. For example, it does not require legal representation, provides free legal consultations, and allots a generous timeframe for the aggrieved to submit their plaint(s). All of the aforementioned measures are intended to encourage individuals to submit their grievances. Finally, Administrative Court is responsible for ensuring its enforcement through its Office of Case Enforcement. This allows both winning parties and, more importantly, judges to be important to ensure that their decisions are obeyed.

Table 8

Office of Case Enforcement Statistics Based on the Accused Parties 2001-2013

Year	**Cases Received**	**Non-compliance from State/state officials**	**Total Percentage of overall cases**	**Non-compliance from Private individuals**	**Total Percentage of overall cases**
2001	6	6	100	0	0
2002	55	55	100	0	0
2003	208	199	95.67	9	4.33
2004	302	249	82.45	53	17.55
2005	362	300	82.87	62	17.13
2006	508	419	82.48	89	17.52
2007	592	486	82.09	106	17.91
2008	655	533	81.37	122	18.63
2009	620	539	86.94	81	13.06
2010	676	555	82.10	121	17.90
2011	883	695	78.71	188	21.29
2012	1152	996	86.46	156	13.54
2013	1125	971	86.31	154	13.69
Total	**7144**	**6003**	**84.03**	**1141**	**15.97**

Source: Administrative Court Case Statistics, 2013. The Office of the Administrative Court.

Activating the Administrative Court: Process

This section provides an overview of the protocols and regulations that are necessary to activate the court. For several reasons the procedures are important to the question of judicialization. First, it offers a partial explanation for the why plaintiffs use the court—thus justifying the rights-centric approach to explaining judicialization. Second, the process explains that the important role judges play is not strictly limited to decision-making but, also, throughout the adjudication process, including monitoring the implementation of decisions. After a brief overview of the court's various processes, this section brings greater attention to the importance of plaintiffs to explaining the judicialization of politics.

The Administrative Court process formally commences once individual(s) realizes they may be aggrieved due to a violation involving an administrative act. For such acts, individual(s) have 90 days to submit a plaint to the court either through post or in-person to either their regional Court of First Instance or Supreme Administrative Court, respectively. In the event that the violation involves an administrative contract, the aggrieved has one year to file. What is important to understand is that like most judiciaries, the court is not empowered to initiate cases but must receive complaints. In this respect, it is easy to understand that both plaintiffs and judge have an interdependent relationship. But while this relationship describes what occurs, it doesn't explain why. Therefore examining motivations behind both actors' behavior commands the rights-centric and court-centric approaches and their associated theoretical assumptions.

After a party submits a plaint(s), officials from the Office of the Administrative Court determines its merit for acceptance. For example, in some instances, the form may be filed incorrectly and thus requires the court to offer assistance to individuals in order to remedy it. In

other cases, the plaint may not be within the court's jurisdiction, in which case court officials would then notify the individual(s) and recommend the proper court to file their plaint. In the event that the court accepts the plaint, a court official sends the plaint to the President of the Supreme Administrative Court or Court of First Instance who then assigns the particular case to a chamber for adjudication as well as appoints a judge-commissioner of justice.

After the Chamber receives the case, there is a process called "inquiry into the facts." The President of the Chamber then appoints a judge-rapporteur.[27] Next, the judge-rapporteur examines the plaint to re-ensure that it adheres to the court's jurisdiction and regulations and if not, what recommendations are needed for adherence. If the latter cannot occur, the judge-rapporteur recommends to the chamber the plaint's full or partial dismissal. After the judge-rapporteur deems the plaint acceptable, the defendant is given a copy of the plaint as well as the associated evidence from the plaintiff. The judge then determines the necessary documentation that the defendant should submit in order to assist in the adjudication process. The defendant then has 30 days from the time that the court serves the plaint to respond. If the defendant does not reply, the court will assume that they have considered the plaint as valid. If the defendant desires to contest the plaint, they can deny or seek its dismissal and therefore submit corresponding evidence to justify their position.

Upon receiving the defendant's response, the plaintiff then has 30 days to respond in order to submit a rebuttal or accept. Failure to respond leads to dismissal of the case. If the plaintiff then responds to the defendant's evidence, the defendant is allotted 15 days to respond in kind. The process continues until the judge-rapporteur determines that the evidence is

[27] The court also assigns an administrative case official to assists in the judge-rapporteur duties.

sufficient to commence the proceedings. Once the evidence is satisfactory, the judge-rapporteur then prepares a memorandum that includes the case facts, the decisions under consideration, and their opinion. After the memo's submission and the chamber determines that no other evidence is needed, the President of the chamber will then declare that an inquiry into the facts is closed and submits the file to the President of the Court of First Instance.[28] The Judge-commissioner of Justice will then prepare the Statement of Facts and, with consultation from the President of either the Court of First Instance or Supreme Administrative Court (depending on the court), establishes a hearing date. During the hearing, parties are required to submit evidence from the proceedings in original form unless noted otherwise. After the hearing the Judge-Commissioner of Justice presents their opinion orally to all parties.

Upon receiving the Judge-Commissioner of Justice's oral statement, the court then delivers its judgment. If any parties are not satisfied with the decision, they are able to appeal to the Supreme Administrative Court within 30 days. What the Administrative Court proceedings demonstrate is that both plaintiffs and judges are vital to understanding the judicialization of politics. Indeed the process does not start without individuals' decision to submit their grievance. From that, the court's institutional rules afford judges considerable powers to determine the outcome of cases.

This section has demonstrated the Administrative Court's adjudication process. While the process is largely one involving the submission of written documentation, there are opportunities for an oral hearing. Further, the section demonstrates judges' and the court's administrative

[28] Clause 62 in the *'Rule of the General Assembly of Judges of the Supreme Administrative Court on Administrative Court Procedure'* states that the court is required to give the parties at least 10 days advance notice that the facts inquiry will terminate.

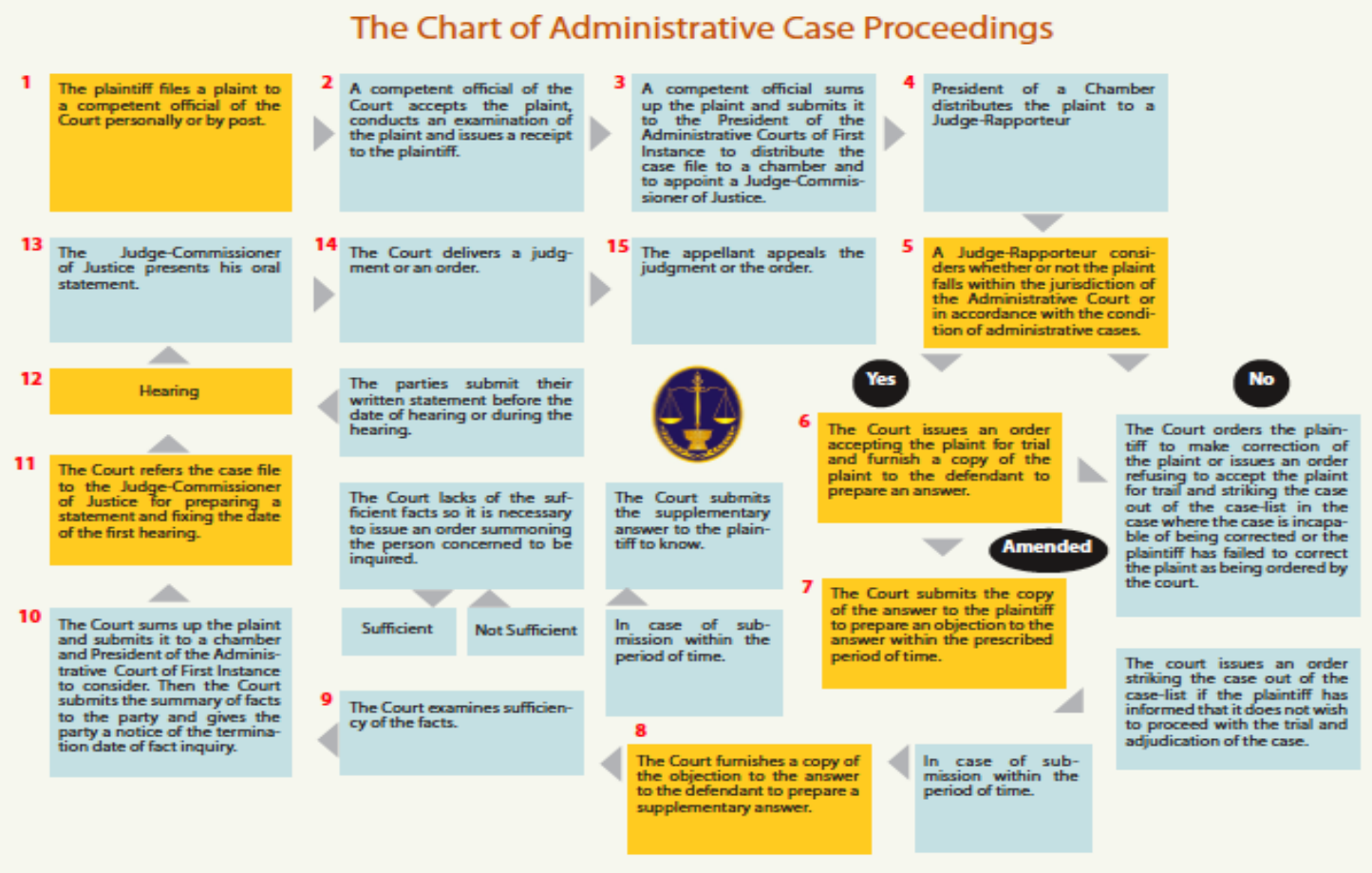

Figure 3. Chart.

officials' salience. In terms of the court's ability to be adjudicate cases, both judge and administrative court officials are vital.

Judicial Independence: Institutional Arrangements

While the literature review chapter demonstrated that arguments attempting to position judicial independence as a necessary prerequisite for judicialization, this section discusses the extent to which the Administrative Court's formal institutional arrangements elevate judges to a position in which they are able to produce decisions free from external influence. Utilizing indicators suggested by Rios-Figueroa (2011) to measure independence, the section finds that the Administrative Court provides judges with the independence to make decisions thereby making judicialization possible. Institutional considerations, although important, alone do not determine how judges make decisions. Nonetheless they are important, and, as reflected in interviews with judges, are significant to explaining both judges' and plaintiffs' behavior.

Judicial independence as a concept is surrounded by considerable debate and lack of consensus. This study uses Feld and Voigt's (2003) distinction between *de jure* and *de facto* independence. This chapter focuses on the former given that it focuses on formal institutional rules. *De jure* independence refers to the formal institutional protections that the court affords judges while *de facto* independence is the court's actual behavior. Examining the role of constitutional courts in Latin America, Rios-Figueroa (2011) proposes five indices to demonstrate the extent to which the court is free from extra-judicial influence: (1) judges' selection and appointment process, (2) tenure length of judges versus appointer, (3) the appointment procedure's relationship with tenure length, (4) whether judges' removal process

requires 2/3 of legislature tenure, (5) whether there is a particular quota of judges and the budget process.

According to Rios-Figueroa (ibid) and Rios-Figueroa and Staton (2009) the selection and appointment process of judges can determine not only the extent to which judges are accountable but more importantly the degree to which they are independent.[1] With respect to the appointment process, whatever body is responsible for appointing judges is important to determining the extent to which judges are independent. Rios-Figueroa (ibid, 29) states that "a simple distinction between procedures in which the appointment is done by judges themselves or by at least two different state or non-state organs and procedures in which appointment is done by a single organ or organization that does not belong to the judiciary. The former appointment method would guarantee a minimum of independence of judges from the appointers, whereas the latter would not meet this requirement." Rios-Figueroa and Staton (2009) argue that it is preferable that the judiciary itself dictate the process in order to preclude undue interference, although this is not necessarily a hard and fast rule.

Both Thailand's 1997 Constitution and the subsequent 1999 Administrative Court Act established the protocol for the appointment of judges for both the Courts of First Instance and the Supreme Administrative Court, respectively. The nomination process for judges is strictly an internal one where a body entitled the Judicial Commission of the Administrative Court (JCAC) selects judges. The JCAC is comprised of nine members from both the Court of First Instance and Supreme Administrative Court. JCAC members serve for two years and are eligible for re-

[1] Rios-Figueroa, Julio and Jeffrey K. Staton. 2009 "An Evaluation or Cross-National Measure of Judicial Independence." Paper presented at the fourth annual Conference on Empirical Legal Studies, November 19-21, University of Southern California, Los Angeles, CA.

election but cannot serve more than two consecutive terms. The JCAC elects the Court of First Instance judges and them submits the list to the Prime Minister who then forwards the selections to the King for royal appointment.[2]

Similar to the process for appointing judges of the Court of First Instance, for the Supreme Administrative Court, the JCAC submits the nomination list to the Prime Minister who then forwards it to the Senate for approval. Upon approval, the Senate submits to the names to the King for royal appointment. The Thai Senate is both elected and appointed. While it is important to appreciate the role of the JCAC, there is slightly more of an opportunity for interference in the nomination of Supreme Administrative Court judges given that they must be Senate-approved before they are royally-appointed. Discussion with the Office of the Administrative Court and Supreme Administrative Court judges revealed that there have never been a judicial appointee that either the Senate or King rejected. According to judges, this internal process allows the court to escape interference from third parties and limits the politics involved in the appointment process to within the court itself.

The second indicator that Rios-Figueroa utilizes is whether the length of judges' tenure is longer than that of their appointers. His argument is that if the tenure of both parties is the same, the possibility exists where the potential for pressure from the former into making favorable decisions. The former is dependent upon another important element: whether there are multiple organs participating in the appointment process. Multiple players involved in the appointment process could equally make the length of tenure obsolete given that they would influence which judges are selected.

[2] See Article 19 of the 1999 Administrative Court Act.

Thailand's Administrative Court qualifies in both categories of tenure process and appointment process. As mentioned, only the JCAC creates the list of judges for consideration. According to the 1999 Administrative Court Act, members on the JCAC serve for a term of two years with the possibility of an additional consecutive term. Administrative court judges do not have term-limits and are able to continue to serve provided that there are no violations of ethics. In order to apply to be a judge, individuals have to be at a minimum age of 35 and can serve until the retirement of age of 65. At 65 years of age, if a judge desires to continue to serve, they are subject to a physical and, upon successful completion, given a five-year term extension. As demonstrated, the JCAC selects judges for appointment, with the only distinction between Court of First Instance and Supreme Court being that the former are directly approved by the Prime Minister whereas the latter must be Senate-approved and then submitted to the Prime Minister who subsequently submits the list to the King for royal approval.

According to Rios-Figueroa (ibid, 30), the relationship between appointment procedure and tenure length of judges is critical to the question of independence because "as the length of tenure increases, the appointment method would tend to become irrelevant for influencing judges' independence from their appointers." If appointers' tenure is longer than those of judges' the latter may be pressured to make decisions to appease those responsible for their appointment. There is also the assumption that in the event that they deviate from appointers' preferences, the latter would retaliate by packing the court. The Administrative Court's appointment process is conducted through an internal committee, the JCAC. The tenure for JCAC members is only for two years, with the potential of serving for a consecutive 2-year term. This pales in comparison to judges' tenure.

Removal proceedings are important for judicial independence for a variety of reasons. For example, if the proceedings are easy to commence, judges are likely to be careful to ensure that their decisions do not invite controversy. Rios-Figueroa (ibid, 31) states that, "Particularly important is the accusation part of the process because a simple accusation may tarnish a judge's reputation; the easier it is to accuse, the more likely it is that the judge will be unduly pressured." He also distinguishes between who is able to commence the removal process in particular whether it is a single individual like the prime minister or a simple majority from either the court or another organ. Whether the proceedings can only commence upon a supermajority assigned from another organ is also important in additional to the protocol for submission and the speed by which the merits of such accusations are addressed.

According to the 1999 Administrative Court Act the removal process of administrative court judges is strictly under purview of the JCAC. There are particular reasons why this may be appropriate. Articles 22 and 23 specify the grounds by which the JCAC can initiate the removal process of judges. Most of the grounds for dismissal are related to conduct violations. For example, Article 22 states that the JCAC can pass a resolution removing a judge because of misconduct or neglect of duty, the inability to perform a duty or an inability based on an illness, being imprisoned or being bankrupt, incompetent or a mental health or physical disorder that prevents one from performing their tasks.[3] In addition, the JCAC can remove judges due to financial bankruptcy, a mental disorder and/or a physical or mental ailment that would make

[3] Judges that are financially bankrupt are more susceptible to bribes, which interviews with judges revealed, are offered.

them unsuitable for their position.[4] Regardless of the aforementioned offenses, judges are still eligible to receive their pension.

Article 23 of 1999 Administrative Court Act gives the JCAC the power to expel judges in the following circumstances:

(1) malfeasance within their official capacities;
(2) code of conduct violations; and,
(3) being imprisoned on an offence other than negligence or a pretty crime.

In the event that the JCAC expels judges, they are not obligated to receive a pension. Both the JCAC's powers to remove and expel judges illustrate the institutional protections that aim to provide the court with the ability to be independent of external interference.

Finally, Rios-Figueroa (2011) state that a constitutionalized quota of judges or a comparative document will complicate any party's efforts to pack or unpack a court in order to influence decisions. Again, the Administrative Court is exempt from quotas on judges. For the budget process, the Secretary-General of the Administrative Court submits a request to the Council of State for approval.

Conclusion

As this chapter has shown, the Administrative Court's institutional procedures and powers offer a partial explanation of both judges' and plaintiffs' behavior and, in essence, judicialization, judges, while the more obvious role of decision-making is well known, the court empowers judges in much more significant respects. Empowered by the 1999 Administrative Court Act, judges are important actors throughout the entire adjudication process. As an institution, the court's rules provide several incentives for the aggrieved. With respect to the

[4] In addition, the JCAC can remove judges related to violations of Articles 13, 14 and 18.

court as an institution reduces access barriers that help encourage individuals to sue. Finally, this chapter has demonstrated that court has important institutional measures that protect judges from external interference in turn making judicialization a real possibility.

CHAPTER 5

FROM INDIVIDUALS TO PLAINTIFFS

I get death threats all the time. I'm not worried about it—everyone knows where I live. Whatever happens, the work will continue. Even if I'm killed, there are others who will continue the work.
—Environmental-rights NGO President[1]

At its most rudimentary level, judicialization is about courts impacting politics. However, without the submission of plaints, the courts are immobile. This simple though important truth underscores the need to understand the factor(s) that motivate individuals to use the court—the subject of this chapter. Plaintiffs' perspectives offer a partial explanation of the phenomenon and in doing so provide indications of both current and future trajectories. While the legal mobilization literature is voluminous, this chapter focuses solely on those within the judicialization of politics literature.[2] This chapter's purpose/thesis is threefold: First, it argues that based on responses from several public opinion surveys, Thailand is most hospitable to judicialization. Second, prospective plaintiffs are motivated by several factors when determining whether or not to use the Administrative Court, namely: perceiving themselves as without any other recourse, the desire to receive justice and the use of strategy to calculate the anticipated risks and benefits with legal recourse.

[1] Interview on April 19, 2012
[2] See McCann in Whittington, Kelemen and Caldieira (2008) for an excellent overview of the literature. Specifically, the literature presents plaintiffs as motivated by perceptions of alienation from elected institutions and individuals *and* positive perceptions towards the judiciary.

The first section of this chapter reviews theoretical approaches within judicialization of politics scholarship as it pertains to the plaintiff activity. The second section explores the argument from both Cortner (1968) and Tate and Vallinder (1995) that correlates public perceptions of elected and unelected institutions with individuals' decision to submit plaints—turning to the court to resolve disputes normally reserved for the former and latter, thus initiating judicialization. Acknowledging that correlation does not equate causation, the third section summarizes key themes based on interview responses with former plaintiffs. In particular, the section elaborates motive(s) for using the court and the court's perceived impact on their relationship with the bureaucracy and the latter's behavior. The chapter then concludes by summarizing key implication from the interviews and survey results.

Why Did They Sue the State? Contending Explanations

As previously discussed in the literature review chapter, Dressel (2012) observes that existing judicialization scholarship fails to provide a convincing explanation for the phenomenon in Asia. In an attempt to offer a general account for the phenomenon, he argues that understanding the judiciary's empowerment through a model that focuses on with the "demand" and "supply" side of judicialization. Demand-based explanations present the empowerment and activity of the judiciary to be a consequence of macro-structural movements that embrace rule of law, improved quality of governance. Supply-side explanations are those that present judicial empowerment and activity as originating largely from elites who, facing political uncertainty, empower courts in order to maintain their access to power. While this dissertation differs from the actors that Dressel (ibid) proposes, it acknowledges that judicialization is a result of several interdependent relationships. Demand in this sense originates from the plaintiffs while it is

judges who "supply" decisions. As an institution, the Administrative Court was empowered by both the now former 1997 and 2007 constitutions and the 1999 Administrative Court Act. The latter in particular offers formal independence from outside influences in the nomination and appointment process of judges. Neither the Courts of First Instance nor the Supreme Administrative Court are able to initiate adjudication.

The judicialization of politics literature offers several perspectives that explain plaintiffs' motivated to pursue legal recourse. These range from the material (reward) to the non-material (rights). In their article surveying victims from the 2002 Moscow Theater Hostage crisis motives to pursue litigation against government, Javeline and Baird (2007) conclude that motivation was based on perception of trust in government. This borrows from Richard Cortner (1968) who found that plaintiffs' decision to litigate is dependent upon both their perception of alienation from elected institutions *and* the perception that the judiciary serves as the only recourse to address grievances. Cortner (1968, 287) defines the "disadvantaged" as, "highly dependent upon the judicial process as a means of pursuing their policy interests, usually because they are temporarily, or even permanently, disadvantaged in terms of their abilities to attain successfully their goals in the elected process, within the elected political institutions or in the bureaucracy."[1] Tate and Vallinder (1995) echo this argument within their presentation of factors correlated with judicialization. Specifically, they submit that individuals' perceptions towards elected institution,

[1] Interestingly, the literature explaining plaintiffs' motives argue that those who perceive themselves to be "advantaged" are just as eager to use the judiciary as well. As several authors have made clear, (Epstein 1985, Galanter 1974; Kritzer and Silbey, 2003; Olson, 1990), even those that perceive themselves as well-represented by elected institutions are also keen to pursue litigation. In particular, those who possess superior resource endowments are thus better positioned to win their case. For example, professional legal counsel can be the crucial factor that determines whether one is able to win their particular case, especially when facing a party that lacks one or is inexperienced. Galanter's (1974;1975) classic article argues that the judiciary even favors litigants that have status, power and resources ("haves") as well as engage in the legal process on multiple occasions ("repeat players") over those who lack resources ("have-nots") and only use the courts once ("one-shotters").

whether effective or ineffective, determine their willingness to sue. Through the examination of existing public opinion surveys, this study tests this argument. It anticipates that survey results will show respondents have a less favorable perception towards elected institutions but a more favorable perception of the judiciary. In addition, this study includes the addition of the civilian bureaucracy. This is because the Administrative Court's jurisdiction is one that is largely responsible for adjudicating disputes between private individuals and the bureaucracy. In addition, this inclusion of survey results of the bureaucracy are important because it, in the event that they would indicate a more positive perception towards the bureaucracy, it may be unlikely that respondents would use the Administrative Court to address their grievance—irrespective of responses towards elected institutions.

Why They Sue: Perceptions of Elected and Unelected Institutions

As previously discussed, the judicialization of politics literature provides explanations for plaintiffs' activity. Tate's chapter in Tate and Vallinder's (1995) argues that one important pre-condition correlated with the phenomenon is public perceptions towards elected institutions and the judiciary. Specifically, an inverse relationship between perceptions between the former and latter—negative perceptions towards elected institutions and politicians compared with positive perceptions towards the judiciary would make judicialization more probably. The assumption is that it is the public that is more likely to use the judiciary to address their grievances than other elected institutions and individuals who are elected. This argument can even be applicable to elected officials who are also prone to utilize the judiciary as a means to achieve partisan ends once they perceive existing mechanisms as no longer effective.

This section examines several public opinion surveys assessing Thais' perception towards elected institutions and elected officials as well as unelected institutions, including the judiciary. These surveys query respondents their perceptions although the question categories slightly vary: trust, confidence, institutional integrity, institutional politicization, and effectiveness in fighting corruption, all are proxies that capture individuals' perceptions towards elected and non-elected institutions. While these concepts connote different meanings, they all offer insight into the likelihood that the institution in question would be used. Ultimately, this section affirms Cortner (1968) and Tate and Vallinder's (1995) argument. Thais' negative perceptions towards elected institutions and individuals, in comparison to more positive ones towards the judiciary thus presenting a germane environment where the judicialization of politics is likely to occur.

In 2010, the King Prajadhipok Institute (KPI) published *Assessing Public Trust in Various Institutions and Satisfaction with Public Services*, a comprehensive report summarizing past opinion surveys measuring Thais' perceptions of trust and satisfaction towards several elected institutions and officials, as well as individuals and institutions responsible for providing public services. Table 9 provides the results from the eight surveys.

Results from the series of KPI public opinion surveys present several poignant realities. First, while the September 2006 Thai military coup may have been bloodless, one casualty was public trust in every category. These are reflected large reductions in percentage points between the 2006 coup and 2007 onwards. An average reduction of approximately thirty percentage points in respondents' trust towards the prime minister and parliament between the 2006 and 2007 years was likely a consequence of the military junta's occupation of government and were

also responsible for the drafting of the 2007 Constitution that included the weakening of several elected institutions from the 1997 Constitution.

Table 9

KPI: Public Perceptions of Trust in Public Institutions

Individual/institutions	**Year**							
Category	**2002**	**2003**	**2005**	**2006**	**2007**	**2008**	**2009**	**2010**
Prime minister	87	92.9	87.8	77.2	45.2	37.6	60.5	61.6
Government/Cabinet	82.8	74.7	83	71.5	36.5	34.4	44.7	47.4
Political parties	52.1	75.5	59.6	52.7	26.1	33.2	36.4	36.9
Members of the lower house	63.1	-	67.5	62.4	41.8	36.5	42.5	43.9
Members of the upper house	64.6	-	61.2	58.1	41.9	39.8	47.2	46.4
Provincial governors	-	-	79.5	79	66.5	55.8	64.6	64.5
Civil servants	59.8	75.1	71.1	71.3	52.1	58.9	69.9	64.9
The military	76.1	83.4	84.8	80.7	61.8	70.1	76.3	67.8
Courts of Justice	83.2	86.7	78	78.2	72.4	68.2	74.2	71.3
Constitution Court	80.7	84.9	73.5	74	64.6	60.4	68.6	65.1
Administrative Court	79.4	83.1	72.1	73.8	66.8	62.6	71.3	67.3

Source: Assessing public trust in various institutions and satisfaction with public services. 2002-2010. King Prajadhipok Institute (KPI).

Second, the 2006 military coup also negatively affected perceptions towards non-elected institutions. Usually relatively higher than other institutions, even perceptions of trust towards the military declined by nearly twenty percentage points between 2006 and 2007. Particularly noticeable was a decline in respondents' trust in the judiciary for all three courts: Courts of Justice, Constitutional Court and Administrative Court. Several prior events may help account for this reduction. For example, the Constitutional Court's decision to annul the 2006 snap national election that the incumbent government under Thaksin Shinwatra and his Thai Rak Thai

party (TRT), who had won a landslide the previous year, was again on course to win was under a cloud of controversy given that King Bhumipol had directed the judiciary to do so. In addition, in 2007, the military-appointed Constitutional Tribunal's decision to ban the Thai Rak Thai party and 111 party executives for five years appeared biased in the face of acquitting its main rival, the Democrat Party.[2] This lead to cries a judicial "double standard" by those who were aligned with Thaksin.

Although largely popular and at least considered by the media as being truly independent, the Administrative Court of Thailand did not escape criticism. As will be discussed in the later chapters, at the apex of a crisis pitting Thaksin Shinawatra against conservative-royalists in society and government as well as strong anti-Thaksin groups that were largely Bangkok-based, large protests paralyzed the capital. In an attempt to quell swelling protests, Thaksin called a snap election. The election was boycotted by the Democrat Party and other opposition parties and produced another one-sided TRT victory. However, in some districts in the Southern region, an inefficient turnout meant that a re-running of the election would be necessary. During this time, in April 2006 King Bhumipol Adbulyadej's suggested in multiple speeches before the Supreme Court, Supreme Administrative Court and the Constitutional Court to "solve the crisis." This prompted all three courts to swift and concerted action as the Supreme Administrative Court ruled to cancel the rerunning of elections in 14 districts that had failed to achieve the (2007) constitutionally-required 20 percent voter turnout. A few days later, the Constitutional Court

[2] After the coup, the military junta renamed the Constitutional Court the Constitutional Tribunal.

ruled the entire election void.[3] The court appeared to stand against Thaksin and TRT and offered no non-military solution to the impasse.

These events and others have all affected the public's perceptions towards elected and non-elected institutions. Despite the judiciary's actions, an overwhelming majority of respondents nevertheless expressed more trust in non-elected institutions, especially the judiciary than elected institutions. In addition, most of the survey results present respondents possessing negative perceptions of the bureaucracy compared with the judiciary. While at first glance this may not seem entirely relevant to the specific question of the judicialization of politics that Tate and Vallinder (1995) and Hirschl's (2008) "mega-politics" envision, however it is in fact relevant to this particular study for numerous reasons. First, the Administrative Court of Thailand's primary mandate is to adjudicate grievances between individual(s) (both private and bureaucrats) and the bureaucracy.[4] Second, while the low scores related to trust in elected institutions may indicate a greater willingness for citizens to use other institutions to mediate their grievances this may not translate in their using the Administrative Court. This would be better captured in scores related to the bureaucracy because they are the defendants. Low scores for the bureaucracy strengthen the likelihood that individuals would use the court to adjudicate grievances.[5]

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[3] The Supreme Court of Justice would too get the opportunity to engage in double standard. In 2008 judges convicted then ex-prime minister Thaksin and sentenced him, in absentia, to 2-years jail for co-signing a loan application for his then wife.

[4] The latest official Administrative Court of Thailand case statistics data illustrate that the top three categories of offences pertain to acts between private individuals and bureaucrats.

[5] While not included in this study, a survey that measures bureaucrats' perceptions towards the bureaucracy would offer insight as to whether they would be more likely adjudicate their own grievance(s) through the court instead or another institution like the Merit Service Protection Commission (MSPC). The MPSC is a division within the Office of the Civil Service Commission (OCSC) responsible for adjudicating human resource-related disputes within the bureaucracy. This office is the administrative arm of the Civil Service Commission (CSC) that is responsible for human resource management within the civil service, including the adjudication of personnel disputes. For more on the CSC and the OCSC, see, http://www.ocsc.go.th/ocsc/en/index.php?option=com_content&view=article&id=83&Itemid=246. Last accessed May 15, 2015.

In addition to the KPI report, Transparency International's "Global Corruption Barometer" (GCB) also conducted a public opinion survey in Thailand measuring perceptions towards key elected and non-elected institutions. The results demonstrate that a majority of respondents perceive their government as failing to effectively address corruption and abuse of power in government. Table 10 illustrates the results from the 2010-11 survey. Also see Figure 4.

Table 10

2010-11 Global Corruption Barometer Perceptions of Corruption in Public Institutions

Institution	**Score**
Political parties	3.6
Parliament and Legislature	3.4
Police	3.6
Business and Private Sector	3.2
Media	2.8
Public Officials and Civil Servants	3.7
Judiciary	3.0
NGOs	2.5
Religious Bodies	2.4
Military	3.5
Education	3.3

Source: Global Corruption Barometer 2010-11[6]
Scale 1-5: 1=Not at all corrupt; 5= Extremely Corrupt

[6]Question: To what extent do you perceive the following institutions in this country to be affected by corruption?

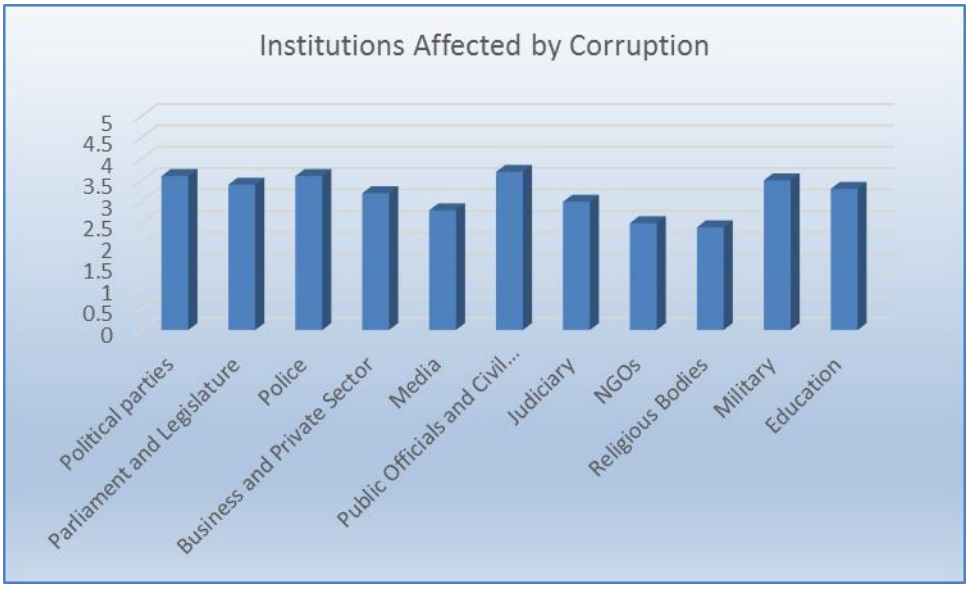

Figure 4. Thai perceptions of corruption in public institutions.

Source: Global Corruption Barometer 2010-11[7]

The results demonstrate that respondents perceived public officials and civil servants as most corrupt with a score of 3.7 on a scale of 5. Again, this is relevant to the particular type of judicialization in question and strengthens the likelihood of willingness to sue. Moreover, the judiciary had a score of 3.0 out of 5.0—the lowest score of all government institutions. This low score may partially reflect the fact that, on average, interactions between the courts and citizens are both less frequent in comparison with other institutions. But it is also probable that the judiciary's reputation is more positive when compared to elected institutions. As the literature review chapter discussed, until the 1997 Constitution created judicial review, courts were neither

[7] Question: To what extent do you perceive the following institutions in this country to be affected by corruption? (1-Not at all corrupt, 5-extremely corrupt).

politically-significant as they were lacked powers to adjudicate disputes involving administrative actions nor did they have judicial review powers.

In addition, the GCB assessed perceptions of government effectiveness in addressing corruption. This question is important because, if a majority of respondents perceive government as effective in addressing corruption then they may be more willing to resolve their grievances through non-judicial means (hence no need to use the judiciary and thus weakening prospects for judicialization). The GCB survey results in Table 11 and Figure 5 indicate that respondents perceive their government's efforts to fight corruption as largely ineffective or having no effect.

Table 11

Global Corruption Barometer: Perceptions of Government Effectiveness Addressing Corruption

Public perception of government's efforts to fight corruption	**Percent**
Ineffective	47
Neither effective nor ineffective	31
Effective	22
Total	**100**

Source: Global Corruption Barometer (GCB) 2010-11 N: 1000[8]

[8] Question: How would you assess your current government's actions in the fight against corruption?

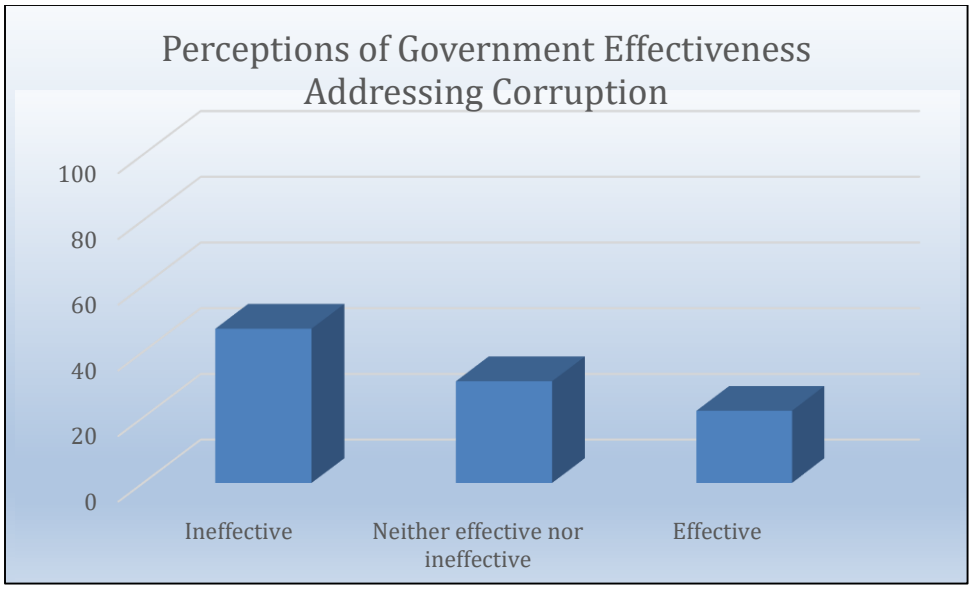

Figure 5. Perceptions of effectiveness addressing corruption.
Source: Global Corruption Barometer 2010-11

Addressing the same question, the 2013 GCB survey results prove relatively consistent with the previous 2010-11 survey. However, there are important differences in scores for some institutions. First, the judiciary's score reduced by 0.5 percentage points from 3.0 to 2.5 (out of 5.0), demonstrating that respondents viewed it as less corrupt. Respondents found political parties to be more corrupt from the previous survey by almost a half a percentage point (0.4). In addition, respondents' perception of parliament remained consistent from the 2010-11 survey with a score of 3.4 out of 5. The police along with political parties are tied as being perceived as the most corrupt among the listed public institutions. See Table 12 and Figure 6.

Table 12

Perceptions of Corruption in Public Institutions

Institution	Score
Political parties	4.0
Parliament and Legislature	3.4
Police	4.0
Business and Private Sector	3.2
Media	2.8
Public Officials and Civil Servants	3.7
Judiciary	2.5
NGOs	2.8
Religious Bodies	2.4
Military	2.6
Education	3.1
Medical and Health	2.8

Source: Global Corruption Barometer 2013
Scale 1-5: 1=Not at all corrupt; 5= Extremely Corrupt. N:1000 National[9]

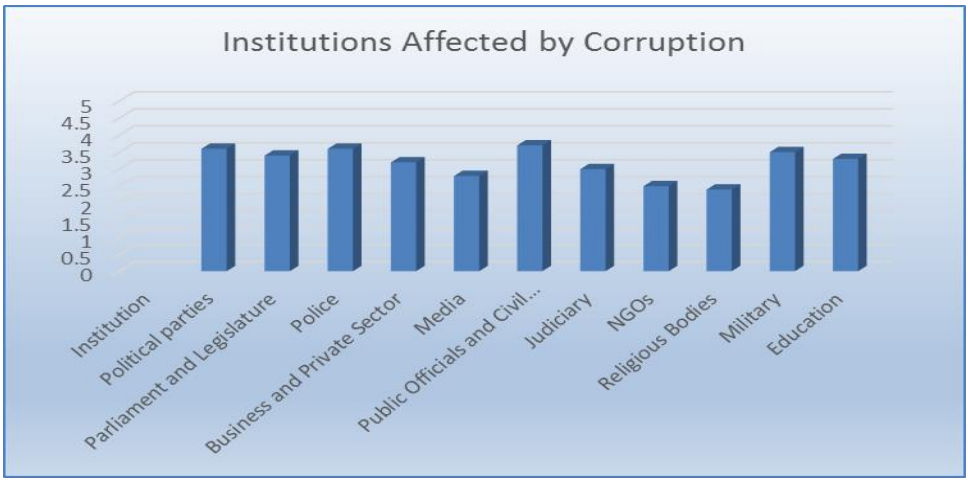

Figure 6. Perceptions of corruption in public institutions.
Source: Global Corruption Barometer 2013 N:1000

[9] Question: To what extent do you see the following categories affected by corruption in this country? Please answer on a scale from 1 to 5, where 1 means 'not at all corrupt' and 5 means 'extremely corrupt'.

Regarding respondents' perceptions of whether the government is fighting corruption, the 2013 survey results are consistent with the previous 2010-11 survey. As Table 13 illustrates, 25 percent of respondents expressed confidence that the government is either 'very effective' or 'effective', while 32 percent are 'neither effective nor ineffective' and 42 percent believe that efforts are either 'ineffective' or 'very ineffective'. This reveals that nearly half of Thais are under the impression that corruption in public institutions is not diminishing.

Table 13

Global Corruption Barometer: Public Perceptions of the Government's Efforts to Fight Corruption N: 1000[10]

Public perception of government's efforts to fight corruption	**Percent**
Very Effective	2
Effective	23
Neither effective nor ineffective	32
Ineffective	25
Very Ineffective	17
Total	**100**

Source: Global Corruption Barometer 2013 N: 1000[11]

As these results demonstrate, respondents perceive government as ineffective in fighting corruption. It would thus not be difficult to assume that this would result in individuals feeling more alienated, and thus more likely to be more receptive to using the judiciary to address their grievance(s).

[10] Question: How effective do you think your government's actions are in the fight against corruption?
[11] Question: How effective do you think your government's actions are in the fight against corruption?

Perceptions of Institutional Integrity

In 2009 and 2010 the Asia Foundation administered a series of public opinion surveys in Thailand assessing respondents' perceptions of governance across numerous questions. For example, during both years the surveys measured perceptions of the institutional integrity of elected and non-elected institutions. With respect to perceptions towards the judiciary, the 2009 survey results measuring institutional integrity revealed that 64 percent of Thais perceive the courts to have high/very high integrity. Following at a distant second is the Army with high/very high integrity score of 44 percent— 20 percentage points difference. Moreover, the courts have the lowest score for 'low/very low integrity' with 9 percent. The highest score for an elected institution in the high/very high integrity rating is 17 percent for the Senate that was, based on the 2007 Constitution, half-appointed, half-elected. See Table 14.

Table 14. Asia Foundation 2009 Perceptions of Integrity of Institutions

Institution	**High/very high integrity**	**Neither high nor low**	**Low/very low integrity**	**No response**
Courts	64	26	9	2
Army	44	41	12	4
Election Commission	36	47	15	3
Senate	17	59	21	4
Police	17	42	39	2
Parliament	10	60	29	2

Source: Asia Foundation 2009, N: 1500

Included in the survey was the question assessing the extent to which non-elected institutions were politicalized. Politicalized means the extent to which to institutions are not independent. This question provides insight related to alienation because the extent to which Thais perceive

institutions as biased serves as an indication as to whether they are trustworthy and thus more likely to be used. See Table 15.

The results from Table 15 illustrate that there is a large gap between how respondents perceive the judiciary compared with the other listed institutions. With 62 percent, the courts received almost twice as high a score in the category of "generally neutral and unbiased" than the military, which was second at 37 percent. Once again, this illustrates the judiciary's more favorable position in Thailand relative to other institutions.[12]

Table 15. Asia Foundation 2009 Perceptions of Politicization of Institutions.

Institution	**Generally Neutral and Unbiased**	**Often/Sometimes biased**	**Don't know**
Courts	62	34	3
Military	37	58	5
Election Commission	30	67	4
Police	14	84	2
Media	17	81	2

Source: Asia Foundation 2009
N: 1500

With respect to institutional integrity, according to Table 16, in 2010 the Asia Foundation repeated the 2009 survey. In the 2010 survey there was a reduction of 3 percent points (from 62 percent to 59 percent) in the most high/very high institutional integrity score. Interestingly, the

[12] While the survey questionnaire did not specifically distinguish between the different courts, there is little to suggest that doing so would have significantly alter the results. The three major courts—Constitutional, Supreme Administrative Court and Supreme Court of Justice—were active and visible immediately prior to, during, and after the 2006 coup.

reduction of the high/very high integrity score did not translate into a higher low/very low integrity score from 2010 as the court's neutral rating (neither high nor low) increased from 26 to 31 percent. Of the elected institutions, 11 percent of Thais viewed Parliament/MPs as having moderately high integrity, with 51 percent being neutral. Comparing the 2009 score with the 2010 survey, respondents' perceptions were more negative with the low/very low integrity rating decrease of 25 down to 37.[13] See Table 16.

Table 16

Asia Foundation 2010 Perceptions of Institutional Integrity

Institution	**High/very high integrity**	**Neither high nor low**	**Low/very low integrity**
Courts of Justice	59	31	9
Military	34	47	17
Election Commission	29	51	18
Police	17	46	36
Parliament/MPs	11	51	37

Source: Asia Foundation 2010
N: 1500

Likewise, the 2010 Asia Foundation survey also measured respondents' perceptions of politicization within institutions. The survey questionnaire specifically asked about the Courts of Justice and 63 percent of respondents felt that they were "generally neutral and unbiased" while 35 percent of respondents said that the court was "often/sometimes biased." The military received the second highest score for "generally neutral and unbiased" at 38 percent. This lower score could be attributed to the military coup d'état that removed an elected government and subsequently orchestrated the drafting of the 2007 constitution. See Table 17.

[13] Because the 2009 survey separated Senate and Parliament, I used the mean from the previous scores: 25.

Perceptions of Confidence in Government

In 2007 the World Values Survey conducted a public opinion survey measuring Thais' confidence in government. The results are consistent with the surveys previously discussed (see Table 18 and Figure 7). Of the eight institutions that the survey addressed, the justice system/courts received the highest score in the "great deal" category with 26.1 percent—more than double the second highest of 12.8 percent for the Armed forces. Further, the justice system/courts received the highest rating in the next category of 'quite a lot' with 45.4 percent, with the Armed forces again ranked second at a pathetic 38.5 percent.

Table 17

Asia Foundation 2010 Perceptions of Politicization of Institutions

Institution	**Generally Neutral and Unbiased**	**Often/Sometimes biased**	**Don't know**
Courts	63	35	3
Military	38	58	3
Election Commission	27	70	3
Police	15	83	2
Media	17	81	2

Source: Asia Foundation 2010
N: 1500

Nearly 72 percent of the responses for the judiciary were for those having 'a great deal' or 'quite a lot' of trust. Neither the government (38.5), parliament (32.6), political parties (23.2), civil service (43.8), police (43.3) nor television (47.4) received over 50 percent in the combined two categories. Further, almost 60 percent either had 'not very much' or 'no confidence at all' in

Table 18

2007 World Values Study: Confidence in Government[14]

Institution	A great deal	Quite a lot	Not very much	None at all	No answer
The Government	5.7	32.8	53.5	7.9	0.1
Parliament	5.0	27.6	57.2	9.8	0.3
The Political Parties	3.9	19.3	63.1	13.2	0.5
The Civil Services	6.3	37.5	48.1	7.9	0.3
The Police	8.3	35.0	43.7	12.7	0.2
Justice System/Courts	26.1	45.4	22.6	5.5	0.3
Armed Forces	12.8	38.5	41.0	7.4	0.3
Television	10.0	37.4	46.7	5.5	0.3

2007 World Values Survey
N: 1534

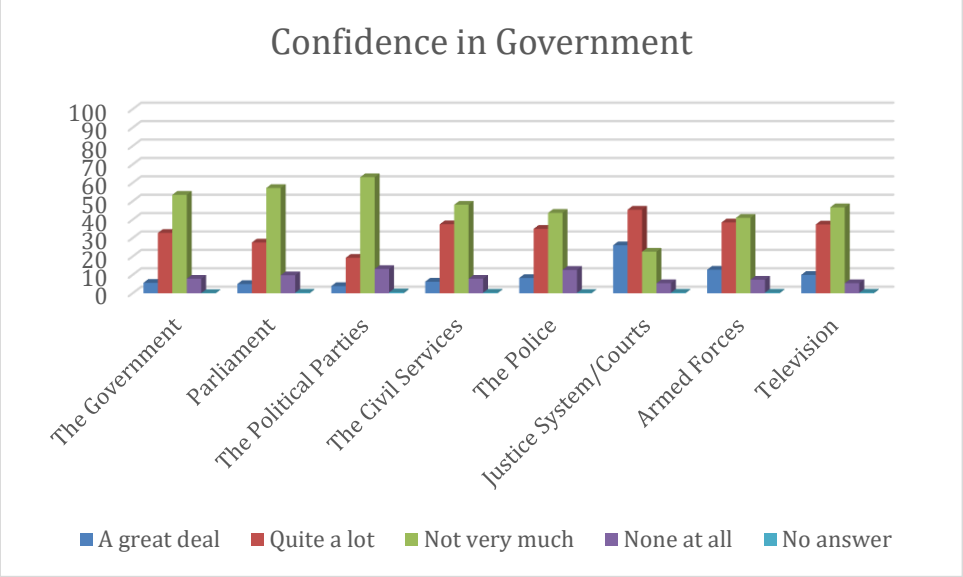

Figure 7. 2007 World Values Foundation confidence in government.

[14] Thailand Question: I am going to name a number of organizations. For each one, could you tell me how much confidence you have in them: is it a great deal of confidence, quite a lot of confidence, not very much confidence or none at all? (Read out and code one answer for each):
The government (in your nation's capital)
WV5_Results_Thailand_2007_v_2014_04_28.pdf; World Values Survey Association (www.worldvaluessurvey.org) Aggregate File Producer: ASEP/JDS, Madrid.

reaffirms the high confidence held by the judiciary in the eyes of the Thai public that the previously discussed surveys expressed.

Asia Barometer

Asia Barometer conducted two public opinion surveys in 2002 and 2006 assessing perceptions of trust in several important Thai institutions. Again, both scores are consistent with the previous surveys by showing favorable perceptions of judiciary. For the judiciary, the 2002 combined results for respondents that have a 'quite a lot' or 'a great deal' of trust in the judiciary was approximately 60 percent, while the later results from the 2006 survey asking the same question was nearly 70 percent, ten percentage points increase. The series of KPI surveys reflect attitudes before the September 2006 military coup showing that a slight majority (51 percent) of Thais perceived the Prime Minister, Parliament and other elected institutions as relatively trustworthy. This is illustrated in the electoral success of former Prime Minister Thaksin Shinawatra and his TRT majority government—the first to be re-elected in the country's tenuous history with democratic politics. Public opinion surveys conducted after the September 2006 coup all demonstrate a considerable reduction in public trust towards elected and non-elected institutions. See Tables 19 and 20.

The judicialization of politics invokes Epp's (1998) "rights-enhancing judicialization" model to explain important legal victories in Britain, the U.S. and Canada. Making the counterargument, contrary to the popular assumption that success was based on the actions of elites and judges, Epp (ibid, 2) finds, "sustained judicial attention and approval for individual rights grew primarily out of pressure from below, not leadership from above." In particular, an increasingly right-cognizant public's "strategic" utilization of existing "legal support structure"

Table 19

2002 Asian Barometer Thais Perception of Trust in Institutions

Institution	None at all	Not very much trust	Quite a lot of trust	A great deal of trust	No Answer
Courts	2.1	19	38.9	19.4	20.5
National Government	2.1	26.8	48.1	16.9	6.0
Political parties	5.8	38.7	36.9	10.5	8
Parliament	5	30.7	41.8	12.9	9.7
Civil Service	4.1	23.9	46.9	16.1	9.1
Military	2.5	16.5	47.7	28	5.4
Police	7.2	32.2	40	15.8	4.9
Local government	5.3	24.9	44.3	20.1	5.4
Newspapers	4.3	35.8	40	10.5	9.3
Television	1.4	18.2	54	21.7	4.8
Election Commission	3.5	22.7	43.5	17.7	12.7
Non-governmental Organizations	4.9	22.3	31.6	8.7	32.5

Source: 2002 Asian Barometer[15]
N 1546

[15] (http://www.jdsurvey.net/jds/jdsurveyAnalisis.jsp?ES_COL=101&Idioma=I&SeccionCol=04&ESID=447 accessed July 22, 2014) Q007.- I'm going to name a number of institutions. For each one, please tell me how much trust you have in them. Is it a great deal of trust, quite a lot of trust, not very much trust, or none at all?

Table 20

Asian Barometer 2006 Thais Perception of Trust in Institutions [16]

Institution	None at all	Not very much trust	Quite a lot of trust	A great deal of trust	Do not understand the question	Can't Choose	Decline to Answer
Prime Minister or President	5.1	22.6	45	19.4	0.8	4.4	2.5
Courts	2.1	16.8	54.4	15.3	1.8	7.1	2.4
National Government	6.3	25.5	48.6	11.1	0.7	5.1	2.8
Political parties	7.8	31.6	42.4	8.1	0.7	6.3	3
Parliament	3.3	28.6	50.4	8.7	0.9	6.1	2
Civil Service	2.8	20.4	56	12.5	0.4	5.8	2.1
Military	1.9	17.0	55.5	18.9	0.4	4.8	1.5
Police	6.4	26.0	50.1	12.6	0.2	3.3	1.4
Local government	4.2	18.5	55.5	16.3	0.3	3.0	2.2
Election Commission	7.1	25.0	46.9	9.9	1.0	7.6	2.5
Non-governmental Organizations	4.4	26.3	35.7	6.1	3.6	19.9	3.9

Source: Asian Barometer 2006
N: 1546

[16] The 2006 Asia Barometer survey was conducted from April 3, 2006, and data collection was completed on April 18, 2006. This likely explains the relatively high scores for majoritarian institutions but is consistent with the pre-2006 coup d'état scores. Source: http://www.jdsurvey.net/jds/jdsurveyAnalisis.jsp?ES_COL=101&Idioma=I&SeccionCol=08&ESID=503

helped provide consistent litigation which ultimately spurred a rights revolution in the U.S., Canada, India and Britain.[17]

If we apply this to the Thai context, one would have to explore the existing institutional support structure of the rights-advocacy organizations, rights-advocacy lawyers and financing.[18] While there are advocacy groups that exist, most of the institutional support is provided by the Administrative Court discussed in chapter four. In particular, the court makes public access relatively easy and providing the legal and technical counsel to encourage potential plaintiffs to sue. Further, finance for litigation is unnecessary given that the court provides free legal counsel.[19]

As all of these studies have indicated, Thais have a negative perception of elected institutions and non-elected governing institutions. In all of the surveys, respondents perceive the judiciary more favorably than any elected institution. This confirms the arguments both Cortner (1968) and Tate and Vallinder's (1994) that judicialization is correlated with society's negative perceptions towards elected institutions and positive perceptions of the judiciary. Results from the survey should not necessarily come as a surprise given Thailand's turbulent history with attempts to consolidate democracy. The public's positive disposition for the judiciary is notable given that the major courts either lead or were a part in the removal of popularly elected governments on multiple occasions. Another important revelation is that respondents have low perceptions towards the bureaucracy/bureaucrats. This further strengthens the argument that they would be more likely to use the Administrative Court to adjudicate their disputes.

[17] The legal infrastructure that Epps refers to are right advocacy organizations and advocacy lawyers eager to prosecute.
[18] By finance, Epp specifically refers to government financing
[19] In Chapter 4 I elaborate on the institutional provisions that the court provides.

In Their Own Words: Former Administrative Court Plaintiffs

While public opinion surveys provide insight into Thai sentiments that are correlated with judicialization, this does not equate causation. This section then provides key themes from in-depth interviews with former Administrative Court plaintiffs that help explain why they chose to use the court. In addition to the question of motives, the section also explores former plaintiffs' perspectives related to the impact of judicialization towards questions of the court's ability to affect the relationship between themselves and the bureaucracy, its effectiveness in affecting policies.

This chapter will discuss the experience of three people: "Plaintiff S,"— a prominent environmental rights advocacy lawyer who is also president of an environmental non-governmental organization (NGO). As a principal litigant in over 500 cases in the Administrative Court, Plaintiff S has served as a principal litigant in over 600 lawsuits. In addition to reflecting on their own experience as a former plaintiff, this study utilizes Plaintiff S as a proxy for those they represented. "Plaintiff J" is a former senior-level bureaucrat within the Ministry of Interior. While working as a Deputy Permanent Secretary in the Office of the Prime Minister, the Office transferred him to the Ministry of Interior's Office of the Inspector General. Finally, "Plaintiff T" is a former high-ranking bureaucrat within the National Security Council (NSC) who was transferred to the Office of the Prime Minister. All of the former plaintiffs used both the Court of First Instance and the Supreme Administrative Court and were awarded victories. Below focuses on the following themes: key factor(s) for submitting grievances to the court, perceptions of the court as a trustworthy institution, perception(s) of the court's impact upon the relationship between plaintiffs and bureaucracy, impact of the court upon politicians' behavior, in particular

their ability to perform their formal duties. Ultimately, the section will illustrate why judicialization begins and its impact upon those affected.

As claimed at the beginning of this chapter, individuals' decision to sue are a consequence of their perception of institutional alienation. The surveys indirectly capture respondents' perceptions of alienation through the various concepts that the public opinion surveys queried: trust, integrity, confidence, politicalization, efforts to address corruption, and corruption. While the responses indicate that judicialization is possible, it is important to gather the perspectives of actual former Administrative Court plaintiffs directly.

The judicialization of politics literature posits perceptions of alienation from elected institutions as one of the factors that motivates individuals to use the judiciary. In interviews, former plaintiffs' answers revealed several justifications. In addition to motives, former plaintiffs offered their opinions about the effectiveness of the Administrative Court (both Courts of First Instance and Supreme Administrative) as institutions empowered to adjudicate grievances as well as the court's impact on the relationships between individuals and the bureaucracy. Further, this chapter includes the perspective of policymakers and those entrusted with implementing those policies.

By Design and Distress: The Administrative Court as "Court of Last Resort"

Former Administrative Court plaintiffs revealed that their decision to use the court was also based on the feeling of necessity. For them the court is one of "last resort"; it represents the final opportunity through which individuals can receive redress. This speaks to the value with which individuals' accord their grievance as evidenced by the fact that individuals are willing to go to the furthest extent possible. Only fourteen years in existence, the Administrative Court is

still in its infancy relative to more longstanding institutions. Former plaintiffs readily acknowledge that many Thais remain uninformed about the court system.[20] Table 21 offers statistics from the Office of the Administrative Court showing that the majority of consultations pertain to elementary knowledge of the institution. This is perhaps expected given its relative youth and the lack of legal education in the country.

Table 21

Number of Consultations Requested Since the Court's Inception up to December 2013

Type of Cases by Year	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	Total
Filing a plaint form, submitting a plaint, appealing, or related information	189	2516	3636	2351	1719	1840	1527	2064	2369	4128	3381	3387	3676	32783
Whether cases are in the jurisdiction or not	108	2153	2361	1662	1393	1821	1488	1742	2119	2650	2294	1922	2134	23847
Miscellaneous knowledge about the Admin Court	34	1611	1530	1086	868	1077	1447	1523	2188	2848	2390	1801	1902	20305
Steps before submitting a plaint to the Admin Court	74	1684	1940	1497	951	1085	1078	1697	1978	2200	1769	1654	1827	19434
Other	213	1047	2096	1374	1023	892	1064	1174	1773	1824	1651	1179	1915	17225
Total	618	9011	11563	7970	5954	6715	6604	8200	10427	13650	11485	9943	11454	113594

Source: 2013 Administrative Court Case Statistics. Office of the Administrative Court of Thailand.

The above statistics are telling in a number of respects. First they indicate that the majority of questions that individuals have pertain to the court's more technical functions. All of

[20] Judges also recognize that most Thais still do not know about the court.

the plaintiffs that this study interviewed stated that the Thai government should more seriously invest in educating citizens about their legal rights beginning with the public education system. In the absence of a systematic commitment to education, the Administrative Court has several mechanisms to educate and inform the general public. Located within the Office of the Administrative Court, the Department of Public Relations is responsible for promoting and educating the public about the court's functions, individuals' rights and technical questions such as how to file grievances. In addition, judges travel throughout the country to participate in public awareness and educational events using these to promote the court.

One reason that the Administrative Court is one of last resort is a consequence of its institutional rules. First, the court is only accessible *after* the exhaustion of all required protocol mediation efforts. Paragraph two in Section 42 in the Act on the Establishment of Administrative Court and Administrative Procedure B.E. 2542 (1999) instructs, "in the case where the law provides for the process or procedure for the redress of the grievance or injury in any particular matter, the filing of an administrative case with respect to such matter may be made *only after action has been taken in accordance with such process and procedure and an order has also been given there under or no order has been given within a reasonable period of time or within such time as prescribed by law."*[21] This is intentional because it prevents frivolous lawsuits which is important given the relatively low number of judges (approximately 212 in a country of an estimated 66 million). For example, in discussing the decision to sue, "Plaintiffs S", replied, "The majority of the individuals that I represent submit plaints to the court because they have no

[21] Act on the Establishment of Administrative Court and Administrative Procedure B.E. 2542 (1999) Act Section 41.

other choice for receiving justice for their grievances. Initially, most people are scared to sue for a number of reasons. Most Thais are afraid to challenge the bureaucracy. They worry about retaliation. This is especially the case because they encounter the bureaucrats with whom they have a dispute everyday. Some are afraid of the consequences in suing the bureaucracy especially if they lose the case because they fear that the bureaucracy would sue them back."[22]

Likewise, "Plaintiff J" stated, "I protested my superiors' decision to transfer me because I felt that it was not based on merit but was politically-motivated. I thought my case was unjust because my superiors had not been truthful. Even before using the Administrative Court, I sent letters to my superiors asking them to explain their decision to transfer me. Even though my superiors wanted me to just accept the ruling, I decided to go to the Administrative Court because I had nothing to lose and was already planning to retire soon anyway."

Finally, "Plaintiff T" reflected, "I used the Administrative Court because I wanted them to review the MSPC's action. I had nothing to lose and I had no other option to receive justice. I was confident in the court, given its reputation from other cases and was sure that they would rule in my favor based on the merits of my case. My case received a lot of media attention because I was one of the first high-ranking bureaucrats to sue over an unlawful transfer. I did discuss my case with my family and they agreed to support me. I knew about the Administrative Court from the news and other cases like EGAT, so I thought I would get a fair ruling."

Moreover, some of the plaintiffs answered that they strategically assessed the costs and benefits of litigation. Both "Plaintiff J" and "Plaintiff T" stated that while they had the support of

[22] ibid. While the individual bureaucrat(s) is usually responsible for committing an unlawful administrative act or inaction, it is their respective agencies that provide legal representatives at court hearings. Furthermore, those legal representatives usually notify the accused of the charges and subsequent status of the case.

fellow bureaucrats, they still assessed the costs and benefits of pursing legal action. For example, both stated that they consulted with their immediate family before deciding to pursue legal action and even admitted that had they been younger in their careers or newly-hired, they would have most likely just "gone along" (accepted their transfer order) in order to not cause trouble."[23]

"Plaintiff J" stated, "I asked my wife what she thought I should do and she agreed that I should challenge the order. Once my family agreed, I knew I had nothing to lose." Likewise, "Plaintiff T" recalled, "Before I decided to challenge the decision of the MSPC, I talked with my family and discussed the implications from the case. Everyone agreed that I should do it. Even my colleagues are supporting me because they have faced the same injustice." Assessing the costs with family, illustrates the extent of deliberation that individuals exercise before deciding to sue. For both individuals, there was an understanding of the potential risks and pressures associated with challenging the bureaucracy through a medium that is official and public.

As both a president of an environmental rights advocacy NGO and a lawyer, "Plaintiff S" performs an important role that extends beyond representing the aggrieved. In many respects "Plaintiffs S" assists individuals decide whether or not to use the court. One way is encouraging communities to pursue lawsuits as part of a group. Remarking on this role, Plaintiff S stated, "I convince individuals to sue as part of a large group. For example, if there is a community affected by pollution caused by industries, getting people to sue in groups gives them the boldness and courage as opposed to a single person versus a powerful bureaucracy. This is also a strategy to pressure judges to be more sympathetic and rule in our favor."

[23] During this same interview, I asked "Plaintiff T 's" secretary who was in attendance and in his mid-twenties, whether he would use the court now in the event that a human resource decision was unmerited. He responded that he would not because it would likely damage his reputation and, ultimately career.

Another way of encouraging individuals to sue is by articulating to individuals the costs and benefits of legal recourse. Plaintiff S educates individuals about the court, its powers and jurisdiction. Discussing the strategy to encourage individuals who are initially hesitant to sue, "Plaintiff S" explained:

Usually, I have to reassure those that are hesitant to sue that there will be no retaliation towards them by bureaucrats as a result of choosing legal action. One way I keep them from being afraid and to sue is to tell them that, if the court thinks that there is a real problem with safety, judges will make the hearing private and not reveal their names. Many Thais do not sue because they don't know anything about the court. The court is new and most Thais lack basic knowledge about their rights. Thais do not understand the court so I have to teach them about the jurisdiction and rights…I tell people that there are no obstacles in using the court because it requires no legal fees and doesn't require legal representation. This differs from the Court of Justice where one must pay court fees. I also tell the people that the court is really easy and convenient to use and also provides free legal consultations that help them determine whether their cases are worth pursuing.

In addition to using the Administrative Court because they had exhausted all other means and felt that they had no choice, former plaintiffs expressed that they desired to receive justice. "Plaintiff J" pointed out, "I sued because I wanted justice. The MSPC made an unlawful decision to agree to my transfer. On the day of the vote there was supposed to be a seven-person committee voting to approve or reject my transfer order. However on that day only six members attended, and the vote ended up being a tie. In this case, the head of the committee, who had already voted in favor of my transfer, voted again as the tie-breaking seventh vote—thus rejecting my appeal. Based on the illegal nature of this process, I decided to appeal to the Administrative Court. The MSPC had not been fair or honest about the process. I found out

about what really happened from one of the members. The process was a complete joke so I appealed to the Administrative Court of First Instance in Bangkok."

In a similar fashion, "Plaintiff T" expressed, "On the day that the seven-member commission was to vote on my case only six members were in attendance, including one who was a dissenting voter from the previous subcommittee. The commission ended up voting to a tie and, the dissenting voter voted twice to break the impasse, making the total 4-3 to dismiss my case. I felt that this vote was unfair and I decided to protest the case to the Administrative Court. I wanted to receive justice because this was not fair." Justice for both plaintiffs meant redressing an injustice—in this case a decision by their respective agency responsible for adjudicating official personnel decisions. For the former plaintiffs who were high-ranking bureaucrats, this meant orders reinstating them to their previous position.

Sore Winners?: Perceptions of the Administrative Court Experience

All of the former plaintiffs offered their perspectives about their experience using the court and overall impression of the court. While all three won their cases, they also articulated similar opinions. All believed judges from the Administrative Court of First Instance were more committed to making decisions based on the principles of the facts and law, whilst the Supreme Administrative Court behaved in a more strategic manner. All former plaintiffs believe that the Supreme Administrative Court was more committed to appeasing both plaintiffs and defendants even at the expense of providing justice.

In fact, "Plaintiff S" stated, "I believe that the majority of Administrative Court judges make decisions based in accordance with the law and facts of the case, some have failed. There have been cases where the courts were influenced by the media. In fact, that's why I use this as a

strategy. I use the media as a weapon to influence and pressure them (the judges) to make decisions in favor of plaintiffs. The more media, the better [likelihood to affect outcome in favor of plaintiffs]. Sometimes the court follows the political mood of the day." Discussing the court's propensity to make decisions that are amicable to both plaintiffs and defendants, "Plaintiff S" remarked further, "I think that the court tries to make decisions that please all parties and judges are especially sensitive to ruling against a large community because the court cares about its reputation amongst the people. That is why I use the media and tell the people to show up at the court."

"Plaintiff J" recollected:

After the Court of First Instance's decision came down, the Ministry of Interior agreed to not appeal the decision, but the Permanent Secretary in the Office of the Prime Minister decided to appeal the ruling to the Supreme Administrative Court. The Supreme Administrative Court took an additional two years to decide to affirm the Administrative Court of First Instance's original ruling. Even though I eventually won the appeal, I believe that the Supreme Administrative Court's decision was purely based on politics. First they should not have even accepted the appeal. There was no need to accept the appeal because the government did not submit any new documents to justify their claim. The court purposely delayed their decision in order to appease all parties. I believe that the court purposely decided to rule in favor just before I was going to retire. The court even purposely changed judges in the chamber midway during the hearings as a delay tactic. I am disappointed that there was no penalty for what the court has done.

Reflecting on the Supreme Administrative Court's decision to rule in their favor, "Plaintiff T" stated, "I'm very glad that my case was finally resolved but I'm disappointed that the court took a very long time to confirm the original ruling. The government's appeal did not offer any new evidence and the Supreme Administrative Court should have rejected it. I believe that the court purposely delayed their decision. They wanted to wait until I was only a few more months until my retirement. The decision should have happened much earlier."

In sum, despite winning their cases, all of the former plaintiffs believed that the Supreme Administrative Court intentionally delayed a decision that they thought was clearly in their favor. In addition, all believed that the Supreme Administrative Court purposely accepted appeals from the defendants in the absence of any additional or new evidence in order to appease the losing side (government). Former plaintiffs who were high-ranking bureaucrats also believed that judges purposely delayed the court's proceedings and waited until they were close to retirement before ruling to uphold the lower court's original decision. Both stated that they felt that the Supreme Administrative Court attempted to appease both parties. "Plaintiff J" remarked, "Saving face is important in Asian culture and the court does not want to embarrass the government in high-profile cases." Interestingly, as a lawyer who continues to use the Administrative Court, "Plaintiff S" uses the court's propensity to make popular decisions to their advantage through public pressure and the media presence."

Judicialization and the Questions of Its Effects

As the literature review illustrated, depending on context, the judicialization of politics can emit several effects. To varying degrees, all of the former plaintiffs expressed disappointment in the Administrative Court. However such disappointments does not reflect the complete experience. Former plaintiffs discussed areas where the court's decision produced more positive impact on their relationship with the bureaucracy. The court is changing traditional power relations between bureaucrat and the individual, improving accountability in terms of oversight of bureaucrats work. "Plaintiff J" stated, "I and the other plaintiffs that I represent feel empowered by the court. I think most people feel that bureaucrats are now more cautious because the court puts fear in them and they might feel threatened. The court does make

bureaucrats more accountable. Now they must respect the people. In the past they ignored the people but this is changing because of the court. Now, they have worry about the court. The gap between bureaucrats and citizens are narrower and they are more respectful of ordinary citizens. Now bureaucrats consider the rights of the people before taking action. There is more fear when they make decisions." When asked whether this applied to bureaucrats at every level, Plaintiff S responded, "bureaucrats, both lower ranking and their superiors are knowledgeable about the court, the rights of citizens and they know what they can and cannot do. Bureaucrats know the law. There is no excuse. They know about the court."

Conclusion

As this chapter demonstrated, numerous reasons are responsible for former plaintiffs' decisions to pursue litigation. First, the public opinion surveys demonstrate the environment in which Thais do not hold positive perceptions towards elected institutions, and, as is relevant to the court's jurisdiction, the bureaucracy. By contrast, most Thais hold the judiciary in a favorable esteem. This contributes to existing literature that correlates the phenomenon with public perceptions because it includes questions that are directly applicable to the court in question's jurisdiction. In addition, through a discussion from interviews with former plaintiffs, the chapter identified that several reasons were directly responsible for their decision to use the court. Perceiving themselves as not having any other option, possessing the desire to receive justice and, finally, using of strategic calculus were all mentioned as factors into their decision. The use of the Administrative Court and with it, judicialization will likely continue for the immediate future.

CHAPTER 6

STRATEGIC INTERACTIONS: JUDGES AS KINGS AND SERVANTS

In the beginning we were like brothers. Even if we disagreed with each other during a case—it didn't matter—we would still eat lunch together after. This began to change once Ackaratorn began to lead a crusade against Thaksin. Then, once he began to interfere, I knew it was time for me to leave.

-A Former Vice President of the Supreme Administrative Court of Thailand[1]

Based on data acquired through in-depth semi-structured interviews, this chapter provides the Administrative Court judges' perspectives on decision-making, politics and the court's relationships with several key political actors. Using the court-centric approach as a point of departure, this dissertation hypothesizes that judges make decisions based on calculus or what the judicial politics literature refers to as the "strategic approach." This chapter's thesis affirms that judges are strategic decisions-makers. In particular, they seek to protect the court's reputation, appease both disputant parties based on their anticipated reactions as well as those of the public. The level stratagem is more pronounced based on the court: Supreme Administrative Court judges expressed greater concern for the court's reputation and the reactions of the disputant parties and the public than Court of First Instance judges.

The first section explores the court-centric approach while also providing a brief discussion of the history of the Thai judiciary's role in politics. While acknowledging the

[1] Interview on September18, 2014.

historical position of the Thai judiciary and judges' personalities, the section argues that the Administrative Court judges depart from traditional values. The second section discusses Administrative Court judges' perceptions and then teases out the key factors that they consider when making decisions. Section three argues that based on judges' understanding of their role in relation to adjudicating disputes between Thai society and the bureaucracy, judicialization has led to the realization of more progressive ideals. Finally, section four uses the perspectives from politicians to affirm the argument that through the Administrative Court, judicialization is reality that affects the former's ability to perform their respective duties.

Calculated Decisions: The Court-centric Approach

The court-centric approach depicts judicialization as a judge-driven phenomenon. Through judges' decisions, courts ultimately determine political outcomes. Included within this approach are numerous assumptions. First, as individuals, judges are political actors who make decisions strategically to achieve their outcomes. This description is an extension of the judicial politics literature that presents decision-making as strategic. Commonly referred to as the "strategic approach", this model of decision-making postulates that decisions represent judges' most optimal choice given a concomitant of factors—existing and anticipated. The approach's origins are in neo-classical economics rational choice theory.[1] In their landmark study on the U.S. Supreme Court decision-making, Epstein and Knight (1998, 10) argue that justices are calculative and that decisions do not reflect their "true" preferences but, instead, a suboptimal compromise given the following factors:

1. other actors' preferences;

[1] For an excellent review of the strategic approach, see Spiller and Gely 2007.

2. other actors' anticipated reactions of; and,
3. institutional context.[2]

Epstein and Knight's contribution to the judicial politics literature is important because it presents judges' decision-making as strategic endeavors thus fully embracing them as political actors. In turn, the judicialization of politics literature adopts this specific approach as its point of departure. Likewise this study too adopted the court-centric approach, but was hesitant to accept Epstein and Knight's assumptions related to judges' preferences without reservation. As the literature review chapter conveyed, the public law field has historically presented judges as being primarily invested in making decisions that conform to the principles of jurisprudence while in contrast, post-behavioral revolution political science has been comfortable conceptualizing judges as but "another" political actor under a different garb.

With respect to Thailand in particular, existing literature on judges present them as conservative in their interpretation of the meaning of the rule of law and, in particular, their attitudes about the role of the judiciary in society. Specifically, in McCargo's (2015) review of a series of writings by Thai academics and judges themselves, he concludes that the majority of Thai judges have historically perceived their roles to be one that is *conservative* with respect to seeking to limit the "evils" of popular government institutions and politicians. This, according to McCargo, contrasts with more *progressive-oriented* outcomes that lead to the advancement of ideals such as social justice and expansion of rights for the marginalized.

Several authors attribute Thai judges' conservative disposition to a number factors. First, with respect to their professional qualifications, relative to the rest of the country, most judges

[2] Like the authors, I do not attempt to claim that the attitudinal and institutional approaches are irrelevant or that judges make decisions strategically at all times.

come from elite background with respect to educational level. All Administrative Court judges, both Courts of First Instance and Supreme Administrative Court, must have university degrees at the graduate level. In addition, judges must pass the Thai barrister law exam. They are also required to have previously served as a high-ranking judge in a parallel court or have been a senior level bureaucrat. Second, historically, the Thai judiciary has never been an ambitious institution let alone forward-thinking enough to entertain progressive questions. The expansion of rights, such as the elimination of slavery was royally derived. King Chulalongkorn's Chakri Reformation (1892) directed a series of state-building and modernizing initiatives.

Reflecting on justice administration prior to the creation of the Ministry of Justice, former President of the Supreme Court of Justice (who would also become Prime Minister) Tanin Kraivixien (1967, 11-12) writes that the King was *the* Supreme Judge. In fact, prior to the creation of the modern bureaucracy justice administration was not a distinct position but, instead, one of the more perfunctory administrative duties. "The Head of each department was entrusted with administrative authority as well as judicial tasks. He acted as chief judge over the courts in the capital that came under him. In the provinces, the Governor of each town was concurrently administrative head and chief judge." One of King Chulalongkorn's reforms was the establishment of the Ministry of Justice in 1892 that he entrusted to his son, Oxford-educated son, Prince Ratburi, as the first Minister of Justice. The Ministry of Justice's earliest contributions was the creation of the 1908 Law on the Organization of the Courts which abolished the 16 departmental courts and established six distinct ones, one of which was the Supreme Court of Justice. Although the Supreme Court of Justice was directly responsible to the King, the remaining five courts were placed within the Ministry of Justice. This also established

the distinct function and position of a judge. Attempts to separate judge from King Chulalongkorn was not without controversy.

Indeed, the question of separating judges from the King had created tension between the Minister of Justice and his father. Mead (2004, 112) writes, "The king, Prince Damrong and some other cabinet ministers considered the judiciary to be an arm of the absolutist state, existing in order to serve state interests." While serving as Minister of Justice, Prince Ratburi openly clashed with his father on several questions related to jurisprudence, including an episode in which a fellow royal insulted him. He used this occasion to illustrate that, due to a royal court whose allegiance was not to the law would even fail to protect him. Although Prince Ratburi cited this offense as a reason for his frustration, according to Mead (ibid, 114), "the real cause of conflict lay in the prince's attempt to establish the judiciary as an autonomous body. This caused tension between the king and Prince Ratburi to persist, and was responsible for the delay in completing the Criminal Code, which was under the supervision of Prince Ratburi." Judges wrote to the King expressing support of Prince Ratburi but the King was not impressed. He accepted his son's resignation and even a senior judge who claimed unable to perform his duties without Prince Ratburi's tutelage.

As Mead (ibid, 117) notes, "This incident showed a modern minister challenging the king's authority in the name of professionalism. It also confirmed the king's worse fears, that the practice of modern bureaucracy could be detrimental to his authority. Officials now regarded their ministers rather than the king as patron. He was seen to be removed from the bureaucratic processes of recruitment and promotion, and so his claim to be prime patron lost credibility."

This episode, which was not the first, eventually led to the severing of relations between father and son. Nevertheless, the Supreme Court justices remained under the crown's control.

In 1932 civilian and military officers overthrew the absolute monarchy then under King Prajadhipok. Attempts to create a stable constitutional democracy by intellectual and Thammasat University law professor Pridi Banomyong, proved frustrating. This was further complicated by the Japanese interregnum of Thailand during World War II had led to the rise of General Phibun Songkram (1932-1944). Following his resignation, the return to civilian rule occurred under Khuang Aphaiwong. After Aphaiwong resigned in August 1945, next was career diplomat and former ambassador to the U.S., Seni Pramoj. He then resigned in 1946 and Aphaiwong was reinstated. Another Aphaiwong resignation led to Pridi taking office (again) in March 1946. However, a series of events would limit Pridi's tenure. The publication of his formulation of a Marxist-inspired economic plan was not welcomed by the monarchy and military. After the suspicious death surrounding King Ananda on June 9, 1946, political opponents began to paint Pridi as culpable thus causing him to resign. Rear Admiral Luang Thamrong then became Prime Minister. In 1947, the army staged a coup re-installing Phibun.

Following this period of a revolving door of political leadership, General Sarit Thanat (1958-63) finally established the military's supremacy through a coup d'etat. Seeking to create mass appeal for his regime, General Sarit resurrected a then politically and financially anemic monarchy.[3] General Sarit also imposed martial law and replaced the civilian judiciary with that of the military. Under General Sarit, Thailand cultivated close relations with the West, the U.S.

[3] Prior to Sarit's decision, as an institution, the monarchy was largely circumscribed. Inspired by the Japanese nationalism, Phibun sought to legitimate his rule as an instrument of modernization through promoting Thai nationalism. The monarchy was perceived an antiquated and antithetical to development ideals.

in particular, in order to obtain economic development. Since the overthrow of the absolute monarchy, Fred Riggs (1966) and other observers of Thai politics characterize the period as a "bureaucratic polity." This meant that the politics resided within the narrow confines of the civilian and military bureaucracies, due to the absence of countervailing forces able to organize and articulate demands. Far from a state of tranquility, intra-bureaucratic competition was actually quite fierce within the bureaucratic polity. As one of the factions existing on the "outside", the judiciary had no constituency, and while initially close to an increasingly popular but still military-dependent monarchy, it lacked influence.

Throughout successive dictatorships Thailand's judiciary exercised no meaningful influence towards political outcomes other than exonerating previous dictators from potential prosecution. Opportunities for greater influence began in earnest with the promulgation of the 1997 Constitution. The constitution afforded the judiciary the institutional provisions to influence political outcomes by serving as an instrument for improving governance and administration. Discussing the increasing activity of the Thai judiciary in politics, Dressel (2006) concludes that judges are conservative royalists and, as a result, served more of an instrument of the King Bhumipol's control. This is evidenced by the king's speech to justices from the Constitutional Court, the Supreme Administrative Court, and the Supreme Court of Justice in the wake of the 2006 election impasse which led to rulings against Prime Minister Thaksin Shinawatra and his Thai Rak Thai party. Dressel further notes that it is only judges who swear an oath to uphold the law directly in the King's presence. This underscores the monarch's influence on the Courts and, as a result, his conclusion that politicalization of the Thai judiciary has transpired. The latter presumes that judges are able to make decisions independent of external

actors— the monarchy in particular. Ultimately, this dissertation finds that his conclusion is partially correct. When the monarchy's interests are involved, the court will comply and hence, politicalization will be the result. But, as chapter seven will discuss, this is not the status quo.

In addition, McCargo's (2015) review essay of writings of Thai academics' and judges' perceptions of justice and their role in governance concludes that for some, the concept of justice can connote either one of two different meanings: conservative or progressive. Liberal interpretations believe that the role of judges should reflect a type of judicialization that could translate into more progressive outcomes, such as the expansion and protection of the rights of the disenfranchised. Those subscribing to a more conservative bent understand judicialization as a mechanism to sanction popular government. The judiciary in this respect reduces democratic space. So which viewpoint is more accurate? Arguing that most Thai judges have antiquated ideas about their role and what the rule of law means, McCargo concludes that judicialization is likely to lead to more conservative outcomes.[4]

In an earlier article, McCargo (2014) surveys recent decisions by the Constitutional Court, and to a lesser extent, the Supreme Administrative Court and Supreme Court of Justice, and concludes that the ongoing wave of the judicalization of Thai politics has led to a series of demos-limiting outcomes. Such outcomes, he claims, is a reflection of established political elites' understanding of the rule of law as well as their conceptualization of populism as a threat to their ability to maintain access to power through electoral politics. However, McCargo's observations, while accurate, reflect more of a one-sided catalogue of cases than a

[4] To his credit, he does acknowledge judges' conservative orientation may not align with image of the courts that the 1997 Constitution established.

comprehensive account of the judiciary's behavior. A more balanced examination would reveal that recent instances of judicialization have in fact also led to the advancement of progressive ideals. The Administrative Court—both the Courts of First Instance and the Supreme Administrative Court—have crafted rulings that have defended the rights of communities against powerful state interests.[5] Such decisions are one of the reasons for the court's high esteem. Further, McCargo's (2014) examples reflect more of the elite's politicalization of the judiciary—not judicialization.

While this chapter concurs with McCargo's observation of judges' conservative leanings, this does not preclude them from also making progressive decisions. In fact, even a quick purview of key Administrative Court's decisions reveal how they have advanced the rights of marginalized groups, ranging from asserting the rights of the LBGT communities to protecting communities from the potential negative effects that can result from government efforts to privatize state industries.[6]

Section One: Who Are the Administrative Court Judges?

A glance at the Administrative Court judges reveals that they are well-educated. Based on the Administrative Court's statistics, nearly 76 percent have postgraduate degrees. Many have studied law internationally either in Europe or North America. (See Table 22.)

[5] As Chapter 4 indicated, this also refers to industries, which legally become state industries.

[6] In September 2011, the Central Court in Bangkok ruled that the military could not label transvestites as "mentally ill." The military subsequently agreed to accept this ruling. http://www.independent.co.uk/news/world/asia/court-to-thai-military-transsexuals-not-ill-2354067.html (Accessed August 10, 2015)

Table 22

Level of Education for All Administrative Court Judges

Less than Bachelor	Bachelor	MA	PhD	Total	Percent w/ post-graduate education
0	50	143	19	212	76

Administrative Court of Thailand 2013 Annual Report. Office of the Administrative Court of Thailand.

The level of education reflects the qualification standards that individuals must meet in order to be eligible for the position. To recall from chapter four, in order to qualify to be a Court of First Instance judge, one must be at least 35 years old, have at least a bachelors in a related field and a hold a mid-level position rank in the bureaucracy. Likewise, Supreme Administrative Court judges must meet the educational requirements of a relevant degree and ample years of professional experience at the more senior executive level. The JCAC can and usually does nominate Supreme Administrative Court judges from the Courts of First Instance. While the court is only fifteen years old, many judges are former senior bureaucrats from ministries. In an interview with an official from the Office of the Administrative Court, they remarked, "This gives judges an advantage because, as former bureaucrats, judges are able to know if a bureaucrat did not know or just refused to follow an order. It also improves the time needed to make decisions."[7] One Court of First Instance judge stated, "Prior to becoming a judge, I was a former high-ranking official in the Ministry of Education and that helps me understand policies

[7] Interview on July, 10, 2012.

and make better-informed decisions quickly."[8] This illustrates the advantages that one's knowledge about law and policies within a particular ministry or agency gives judges.

While in terms of education and age, Administrative Court judges mirror traditional judges, the court departs from the Thai judiciaries in their progressive disposition. This is evinced by both their perception of their roles as well as their attitudes towards aggrieved parties, the bureaucracy and Thai society. Hence, as far as the Administrative Court of Thailand is concerned, judicialization has led to progressive outcomes. However, important distinctions do exist between the Supreme Administrative Court and Courts of First Instance in terms of the degree to which certain factors are relevant in decision-making. This chapter argues that these differences are owed to institutional dynamics. Court of First Instance judges expressed a greater willingness to make decisions that reflect their true preferences. This contrasts with Supreme Administrative Court judges who expressed greater concern for the anticipated reactions to their decision's impact on the immediate parties involved as well as Thai society. In addition, Supreme Administrative Court judges demonstrated that their decisions are based on their anticipation of the Thai public's reaction(s) and how that particularly affects their reputation. This section proposes that this distinction is a consequence of important distinctions within each court's institutional composition. Specifically, Court of First Instance judges articulated that the probability of appeal was greater in cases involving large economic and political interests. This prospect allows judges to make decisions without concern about anticipated reactions that may be negative. By contrast, Supreme Administrative Court judges' expressed a greater awareness

[8] This same Court of First Instance judges stated that one source of friction between the courts and bureaucrats is because most Administrative Court judges were former bureaucrats and never were asked to judge. "They [bureaucrats that are defendants] sometimes are disrespectful because they don't believe we are competent." Interview on May 11, 2012.

of their decisions' impact on the larger public and greater sensitivity towards the anticipated reactions of plaintiffs and judges. As a result, they revealed a greater willingness to "craft" rulings that would appease all parties as best as possible.

Table 23 offers an illustration of the composition of the Courts of the First Instance and the percentage of judges that are represented in this study. Of the courts that this study includes, the total percentage of judges interviewed represent nearly 20 percent. This is significant given the longstanding challenges associated with access to such a group comprised of reclusive individuals and due to the sensitivity of the topic.

Table 23

Courts of First Instance Judges Interviewed Total Number and Percentage

Region of Specific Court of First Instance	Total Judges in Specific Court	Interviewed	Percentage
Central	64	10	15.6
North	12	3	25
Northeast	14	2	14.2
South	10	3	30
Total	**100**	**18**	**18**

Source: Administrative Court of Thailand 2013 Annual Report.

In addition to the percentage of judges represented from the particular Court of First Instance, the overall percentage of cases adjudicated in each court is well-represented in this study. While the distribution of cases from the Courts of First Instance are heavily skewed, as nearly half of all cases are adjudicated in the Court of First Instance located in the Central region which is located in Bangkok/Nonthaburi. Table 24 illustrates the distribution of cases based on region.

Table 24

Total Distribution of Court of First Instance Cases Based on Region and the Number of Provinces within its Jurisdiction from 2001-2013

Region						
Year	**Central (20)**	**Northeast (20)**	**South (14)**	**North (16)**	**East (7)**	**Total**
2001	2, 542	1, 072	686	748	330	5, 378
2002	2, 018	981	579	562	190	4, 330
2003	1, 848	843	755	596	224	4, 266
2004	1, 611	842	517	469	250	3, 689
2005	2, 148	840	595	588	264	4, 435
2006	2, 438	1, 050	605	919	319	5, 331
2007	2, 702	1, 129	505	726	280	5, 342
2008	2, 156	1, 057	435	654	189	4, 491
2009	2, 881	1, 126	441	502	291	5, 241
2010	2, 094	1, 199	469	574	342	4, 678
2011	2, 468	1, 549	485	585	315	5, 402
2012	4, 205	1, 015	2, 054	761	285	8, 320
2013	3, 412	3, 718	803	1, 197	614	9, 744
Total	**32, 523**	**16, 421**	**8, 929**	**8, 881**	**3, 893**	**70, 647**

Source: 2013 Annual Statistics for Administrative Court Cases. Office of the Administrative Court of Thailand.

Finally, Table 25 illustrates the total number of Supreme Administrative Court judges and those interviewed and the total percentage that they represent. Nearly a tenth of the Supreme Administrative Court judges were interviewed.

During the interviews, all of the questions centered upon the following questions: 1. key factor(s) they consider when making decisions; 2. role and impact of the court upon plaintiffs and defendants in the immediate dispute; and, 3. impact of the court's decisions upon the relationships between Thais and the bureaucracy as well as intra-bureaucratic relations.

Table 25

Percentage of Current Supreme Administrative Court of Thailand Interviewed

Court	Total Judges in Court	Interviewed	Percentage
Supreme Administrative Court of Thailand	22	2*[9]	9

Source: Administrative Court of Thailand 2013 Annual Report. Office of the Administrative Court.

Section Two: Factors Impacting Decision-making

As the last section made clear, the judicial politics literature characterize judges as rational actors who make decisions based on an underlying desire to achieve the best possible outcome(s) given external factors/constraints. These factors can vary from the anticipation of other actors' reactions that can include the immediate parties as well as those indirectly involved. In addition, another factor could be the anticipated impact of judges' decisions upon the court's reputation. More narrow factors include the anticipated impact upon judges' individual career trajectories. Although, the potential list of factors could be limitless, identification of such factors are better ascertained through having an understanding of judges' goals.

Interviews with judges throughout four Courts of First Instance as well as the Supreme Administrative Court revealed several themes related to those factors they consider during decision-making. They are the following: the need to craft decisions that offer a semblance of justice, ensuring that immediate parties were aware that decisions were based on the facts and law, and, based on the anticipation of the public's reaction towards their decision, and ensuring decisions did not negatively affect the court's reputation.

[9] In addition, I interviewed 2 retired Supreme Administrative Court. One was a former President and the other a Vice-President.

While judges from both courts expressed the same factors in decision-making, Supreme Administrative Court judges intimated a more pronounced consideration for ensuring that their decision did not adversely affect the court's reputation. This section argues that the key reason for such differences are owed to institutional factors— in particular the prospect of appeal. Losing parties' ability to appeal Court of First Instance's decisions to the Supreme Administrative Court reduces the consequences that judges from the former associate towards anticipated reactions and thus the need to be as prospective. As a result, Court of First Instance judges are less concerned about questions of the overall impact and anticipated reactions. As a court whose decisions are final, Supreme Administrative Court judges are not afforded such a luxury and therefore the consequences associated with decisions are magnified.

Justice

Although varying in degree of emphasis, every Administrative Court judge stressed that they consider providing justice during decision-making. Justice means a ruling that provides an appropriate resolution to grievance(s) in question. Judges depicted justice as more of a means than end: a resolution that parties agree to accept. Decisions have elements of justice. The extent to which judges emphasize the importance of justice in relation to other factors, varies. For example, one senior judge from a Court of First Instance located the Northeast stated, "*Our duty is to give justice to the people. I only care about the evidence and justice when I make a decision. If the people don't like my decision, I don't care, I cannot worry about that."*

This more "cavalier" perspective is rare because most judges understand decisions to be beyond the simple provision of justice. More often judges acknowledge a constellation of other factors. For example when asked about the important factors involved in decision-making,

another judge from the same court replied, "*When I make decisions, I care only about providing justice. But justice is not only one question. It involves the public interest as well. It is never simple. We have to be fair and make sure the right decision is made. Sometimes I know when cases will be appealed. All judges know this but we have to make a decision that has justice."* Another judge from a Court of First Instance located in Bangkok stated, "*The key factors for me are the law and the facts. When you have both in your decision that equals justice. Sometimes we already know when cases will be appealed, so there's no pressure. Justice is not about one question and as judges we have to take a complete perspective."* This illustrates judges' recognition of other factors but the key factor that they emphasized was whether the decision provided some form of justice.

Judges believe that their decisions should contain "justice." For judges, justice serves as a means to reach an end: a decision that both the immediate parties and the larger public deemed acceptable. Court of First Instance judges were more vocal about the importance of justice irrespective of the anticipated reactions from the immediate parties or the larger public than that of their Supreme Administrative Court counterparts. This was largely because most Court of First Instance judges anticipate when a losing party will not agree with their decisions and appeal to the Supreme Administrative Court, irrespective of judges' sincerest efforts. In this way, appeals afford Court of First Instance judges protection from facing negative backlash. This affords them the independence from actors' anticipated reactions. While this does not recuse judges from ensuring that their decisions contain "justice" it does explain why most did not express concern towards anticipating the public's reaction.

Institutional differences distinguish the perspectives of judges as the plaintiffs and defendants have the option of appealing any decision irrespective of its "quality."[10] Another judge from the same court replied, "*When I make decisions, I care only about providing justice. But justice is not only one question. It involves the public interest as well. It is never simple. We have to be fair and make sure the right decision is made. Sometimes I know when cases will be appealed. All judges know this but we have to make a decision that has justice."* A judge from a Court of First Instance in the Northeast stated, "*When I make decisions, I care only about providing justice. But justice is not only one question. It involves the public interest as well. It is never simple. We have to be fair and make sure the right decision is made. Sometimes I know when cases will be appealed. All judges know this but we have to make a decision that has justice. I don't have any pressure, I think the we have enough independence to make decisions."*

This statement captures this section's argument that losing parties' ability to appeal reduces the pressure that Court of First Instance judges face. While judges acknowledge that it does not excuse them from making decisions under certain pressures, they believe that this provides them with the independence to not consider the potential negative consequences upon them.

Even Supreme Administrative Court judges acknowledge the importance of appeals however, they understand the finality of their decisions and the anticipated impact associated with their decisions and the reactions from affected parties are still important. JudgeSAC1 replied*, "When it comes to making a decision, we know that people who lose will likely appeal to*

[10] Quality refers to the extent that decisions include the facts and correct application of the law.

us [Supreme Administrative Court]. I know that when I make decision, I have to look at the facts and the law. But I also have to look at how a decision would benefit society. This is difficult. Society needs justice. We also have to think about the future. We look at the consequences and discuss our decisions. So I make decisions based on the principle of justice but justice has to be supported by law. There needs to be a balance between public and individual interests." In stark contrast, Supreme Administrative judges readily acknowledge the importance of providing justice but are more cognizant of additional factors that they must take into account. In this respect judges conceded that their decisions are not simple questions reduced to ones of providing justice, they include larger concerns related to the anticipated impact upon the wider public and the court's overall reputation.

Facts and Law

Court of First Instance and Supreme Administrative Court judges frequently expressed the importance of both supporting their written decisions with the relevant facts as well as utilizing the appropriate application of the law. Like justice however, this is as much a means—to craft a decision that was more palatable to all parties—than necessarily a sincere commitment to legal principles. In this sense, Administrative Court judges understand beforehand that if their decisions fail to include facts and law, the anticipated reactions of the immediate parties and the larger public will be unfavorable. Judges from the Court of First Instance were more adamant about the importance of the decisions reflecting the facts and law than those from the Supreme Administrative Court.

For example, when asked about the factors that they consider when making decisions, a judge from a Court of First Instance in the South answered, *"In principal, judges should care*

only about the facts and the meaning of the law. The court cannot be seen as biased. When one writes their decision, they will clearly know if the decision is correct. You will know when you write the decision if it is right or wrong. If the decision is not right, then one must re-examine all the facts." Another judge from the same court stated, *"I think that the meaning of the law is important. The facts of the case are very important. There are always disagreements with the chambers. How one makes decisions depends on them. Sometimes there is media pressure, but we're supposed to make decisions based on the facts and law.*

Discussing the significance of facts and law in their decisions, a judge from a Court of First Instance in Bangkok replied, *"The facts in the case must be the most important. We have to get to the bottom of cases and make decisions. If there is a problem, we have to search for evidence. If we do our jobs and use the law, everything will be fine. The people will understand, even if they lose. I know that some judges in the court make decisions based on personal opinions, but this is dangerous. I've been involved in big cases, and if the verdict is logical and based on law, most people won't appeal."*

In addition, a judge from a Court of First Instance located in Northern Thailand, commented, "*My focus is on the facts in the case and the law…I have to be professional, even if the decision is not popular and goes against the people. Even if I like the plaintiffs, I still have to make the right decision based on the facts and the law."* An interview with a Supreme Administrative Court judge too emphasized the importance of decisions including a consideration of the facts in the case and the laws. One Supreme Administrative Court judge remarked, "*Things get difficult because we are the Supreme Administrative Court—questions*

about justice now are less clear. There are many factors involved. I make sure I take my time and try to make the best decision given the facts and law."

These responses capture the significance of facts and law that Administrative Court judges attribute to their decision-making. At a rudimentary level, all of the judges acknowledged that each decision should reflect a consideration of the facts and law. However, the degree to which they emphasize its importance and thus determine the decision varies. These examples reveal that Court of First Instance judges are convinced that if their decisions reflect the law, they do not anticipate negative response from the immediate parties (plaintiffs and defendants) and the public.

Nonetheless, judges understand that decisions that demonstrate an inclusion of the facts and law is crucial to gain both plaintiffs' and defendants' and the larger public's acceptance. Further, these perspectives also distinguish differences between Court of First Instance and Supreme Administrative Court judges' reliance upon the facts and law. For the former, a greater significance to ensuring the facts and law were expressed while for the latter, decisions were the results of a concomitant of factors and not easily reduced to questions of fact and law. The next section elaborates the importance that judges attribute to the court's reputation that affects their decision-making.

Reputation

To varying extents, all Administrative Court judges consider the facts, the appropriate law and justice when making decision. However, in addition to these factors all judges consider their decision's anticipated effects upon the institution's reputation. There is a variance with respect to the extent to which the court's reputation is important. In particular, the Court of First

Instance judges expressed less concern about their decision's anticipated impact on the court's reputation than that of their Supreme Administrative Court counterparts. The reason for this difference is institutional: parties' ability to appeal Court of First Instance reduces their need to be as prospective.

Judges possess a rather sober understanding about the larger political realities in which they are situated. They comprehend the potential negative effect that a poor decision would have upon their reputation. For instance, judges do not desire to be associated with more reputable institutions that are associated with injustice and corruption. Administrative Court judges state the need to avoid the controversial Constitutional Court. All of the judges stated that they did not want the public to esteem them like the former. Some believed that their decisions would allow them to distinguish themselves from other courts that were associated with injustice.

A judge from a Court of First Instance in Bangkok, stated, *"Our reputation is important. Look at the status of other courts in the country. We want to make decisions that use the law and facts. Look at the Constitutional Court. It was already political—see how the judges are appointed. The court tries to use law to solve political crises and their verdicts are not based on law and facts.* Likewise, another judge from the same court in Bangkok, replied, *"Our reputation must be protected. We cannot allow politics to enter the court anymore….You see, one bad decision can damage our reputation. If this happens, the people will not trust us anymore."*

The importance that judges attribute to their decisions on the court's reputation is more pronounced at Supreme Administrative Court level. One Supreme Administrative Court judge stated, *"We have to make decisions quickly because the people are waiting for us. We are the "Court of the People." If we make a bad decision, we will disappoint the people. We cannot be*

like the other courts. Sometimes it is difficult to balance the rights of the people and the law. If we make a bad decision, people will lose confidence in us. We have to maintain our reputation. This is important….We take our reputation as a court that helps the people very seriously. We show the people respect and we never scold them or treat them bad. We encourage the citizens to come to us when they are not satisfied with the bureaucracy." Another judge on the Supreme Administrative Court answered, "*Things get difficult because we are the Supreme Administrative Court. Questions about justice now are less clear. There are many factors involved. I make sure I take my time try to make the best decision given the facts and law. I also have to consider the public interest."* The "public interest" in this statement is less about the decision's impact upon larger Thai society than the court's reputation.

Overall, Supreme Administrative Court judges were more vocal about concerns about the anticipated reactions of their decisions on the court's reputation and how they take this into account when making decisions. In this respect, judges' consideration about the "public interest" reflects more of a desire to appease. This demonstrates their awareness of the court's position in society and their decisions' potential impact on the public esteem of the court.

Section Three: Judges' Perceptions

Understanding judicialization's impact is important and while Administrative Court judges express belief that they are gradually transforming power relations between citizens and the bureaucracy and the perspective of those who interact with court: plaintiffs and defendants. The court has proven to be more than a mediator of these two parties. In fact, it has actively sought to transform power relations between the two. Ultimately, judges perceive themselves as agents of change, thus judicialization has led to more progressive outcomes. For example, a

former President of the Supreme Administrative Court opined, *"Judicialization is not necessarily a "bad thing" in Thailand although many people think so. I read the book ' The Global Expansion of Judicial Power' and I think that the Administrative Court can adapt the principles of judicialization. Judges need to be liberal in their interpretation of the laws. The Administrative Court has both liberal and conservative judges—neither can allow the court to be used for political purposes. Judicialization can help if we use the law correctly. It can be a useful instrument."*

The former president's comments reveal the optimism towards judicialization. In addition being *the leader* of the court, the court's leadership understands the phenomenon of judicialization from a positive perspective. Further the former president does not equate judicialization with "the political" and understand judges to be liberal in their interpretation. Discussing the judicialization's impact on the bureaucracy and society, a judge currently serving at a Court of First Instance located in the South commented, *"Since the Administrative Court was established, we have improved the bureaucracy, and we have made Thais know their rights and the law and responsibilities of bureaucrats. Now the rights of the people are known. We have brought the power of rights for the people. Before, there were no neutral institutions in Thailand. Now the people know that they will receive justice at the Administrative Court."*

In addition, judges from both the Court of First Instance and Supreme Administrative Court conceptualized their roles in more progressive terms as most believe that they are responsible for reversing the bureaucracy's legacies of underperformance within which they include the mistreatment of Thai citizens. In addition, judges perceive themselves responsible for protecting citizens as well as preventing environmental degradation. For judges, the court's

ability to affect policies also affords them with power to affect politicians who create them. Finally, judges' decisions and, ultimately, judicialization is also to result in the establishment of new rights for not only Thai society but also bureaucrats.

First, judges believe that the Administrative Court is an instrument to create progressive outcomes. For instance, judges believe that the Administrative Court can sanction the bureaucracy and ensure that it is held accountable for their behavior. As one judge from the Court of First Instance located in Bangkok stated, *"Before, bureaucrats could do whatever they wanted. There was no transparency or accountability. People were scared. Most don't know anything about the law or what bureaucrats do. They just obey. Since birth, we're taught to respect and obey the bureaucracy—to trust them because they know what is best for us. But this is changing. Now people who have a problem can use the Administrative Court.*

Another senior judge serving from the Court of First Instance located in Bangkok, stated, *"Bureaucrats have to now be careful in their duties because of the Administrative Court. If they violate the law, they will face the court. There is more justice in this court than in any other courts. That is why the citizens come. We give citizens confidence that they will be protected by the law.* Likewise, a judge from a Court of First Instance in the North, remarked*, "The Court has a big role to play in providing justice. In the past, bureaucrats ignored citizens' rights, but not now. When the court rules against the bureaucracy, it forces the bureaucrats to rethink their attitudes and behavior towards the people. It makes them change their relationship with the people and respect their rights."*

A Supreme Administrative Court judge remarked, "*Bureaucrats are more careful now. If they do not provide service to citizens, there needs to be an explanation, unlike in the past.*

Before bureaucrats didn't care about the people, they could do what they wanted because there were no consequences. Now it is different. Now if they do wrong, they must be prepared to go to court." One judge from the Court of First Instance located in the North, remarked, "*Bureaucrats know that they have to be careful. They are afraid of the court, because they know that if they do not perform according to the law, they will face us. This is not like before where they could do whatever they wanted. Now they will come to the Administrative Court."*

This passage reveals that Administrative Court judges perceive themselves as defenders of the Thai public. Judges believe that since the court's creation it has been responsible for transforming traditional power dynamics between the state and citizens. Moreover, judges are convinced that their decisions have led to the advancement of citizens' rights and abilities to hold the bureaucracy accountable. The court offers the aggrieved retribution. Such a transformation has extended beyond these two actors and includes politicians whose policies the bureaucracy is responsible for implementing. Discussing the court's ability to affect politicians, a retired Vice-President of the Supreme Administrative Court recalled, "*The current President mentioned how the Administrative Court has a policy of protecting the environment. That's absolutely ridiculous. No court is supposed to have an environmental policy. It's not supposed to be a policymaker and it is supposed to not intervene in politics. Both Democrats and Phua Thai have tried to prevent the Administrative Court from making policy. Nowadays the exception has become the principle. It's sad*."

While this former judge expresses disappointment in what they believe is an overly ambitious agenda of the court, what is clear is that the decisions can impact politicians. In addition to decisions leading to challenges in traditional state-society relations, judicialization

has also advanced and protected the rights of the aggrieved. Discussing the Administrative Court's role protecting citizens as well as aggrieved bureaucrats from violations, a judge from a Court of First Instance in Bangkok observed, *"The Administrative Court is changing accountability between citizens and the bureaucracy. Now the rights of the people have to be respected by the government. People don't need a lawyer. The plaintiffs have more power…Even for bureaucrats, if their appointment or transfer decision was not clear, they can use the Administrative Courts. The Administrative Courts allows people to retaliate in order to protect their rights—and it is working."*

One Supreme Administrative Court judge stated, *"We have to make decisions quickly because the people are waiting for us. We are the "Court of the People." If we make a bad decision, we will disappoint the people….In the early years, people did not trust the administrative court and believed that the court was biased toward bureaucracy. Now citizens know more, especially the people at the grassroots; they use the court more often because they know the court is on their side."*

Revealed within the Supreme Administrative Court justice's statement is a perception of the Administrative Court as possessing a more favorable disposition towards plaintiffs. This presents the court less as a neutral arbiter of justice. In fact in an interview with another Supreme Administrative Court judge, he commented, "*When making decisions, we try to have the "mind of the people" and use justice."* Much like the former President of the Supreme Administrative Court, judges themselves have recognized this more "people-friendly" bias and have acknowledged this position can cause potential danger to the court's reputation.

For example, after admitting to using the "mind of the people" in decision-making the same Supreme Administrative Court judge then stated, "*I will admit that while we as judges always focus on the rights of the people, what about the bureaucracy's responsibilities to the people? This is a weak point for the court. The bureaucracy must take their responsibilities to the people seriously. And we as the court have to let the bureaucracy know that we are here to help them—not just rule against them. We should appear neutral to bureaucrats also."*

A judge from the Court of First Instance located in Bangkok/Nonthaburi, stated, "*We try to be neutral and make both the people and bureaucrats trust us. We want everyone to come to us to receive justice. The court is for the people and the bureaucrat. Most judges focus on the people and their rights, but we are here for bureaucrats too. We even have seminars to educate bureaucrats about the court. The seminars educate them about the court and how the court can help. They like that.*" While judges recognize the importance of *appearing* neutral is important this is more to stave off accusations of being unfair.[11] When judges make decisions they do so based on the anticipated reactions of the immediate parties involved and larger Thai society. There are other concerns than just providing justice. Judges are more concerned with ensuring that their decisions will at least appear to include principles of justice that make it more palatable for the former and latter with the intention of gaining their acceptance.

While judges perceive themselves in a positive light in terms of the impact they have made, many also acknowledge the dangers associated with their activity. One judge in a Court of First Instance in the South stated, *[A]s judges, we do have to be careful to not go beyond our*

[11] In fact, Thai politicians who have experience facing the Administrative Court have recognized the anti-government bias. This is discussed in greater lengths in section four.

jurisdiction. We cannot go beyond the scope of our duties and we cannot be too aggressive against the government. We must let ministries use the rule of law and not do their work for them." While the previous indicates that judges are conscientious of not appearing to go beyond their scope, this perspective is not uniform.

A former Vice-President of the Supreme Administrative Court believes that the court has in fact stepped out of its original jurisdiction. Commenting on this he recalled, "*When the court was first established, we were careful to keep balance between the people and bureaucrats. Our focus was on staying true to the Administrative Court Act. Gradually we went beyond our duties. We went from just looking at legal questions to not even caring about the law. Nowadays the decisions are not really detailed. This is dangerous because if we replace the law, there will be no standard. Today, the court needs to get back to staying in its jurisdiction."*

Discussing the belief that the court has transcended its original roles and functions, the judge further elaborated*:*

When I was a judge, our role was limited, and the court tried to not have influence over the bureaucracy. We were once respected by bureaucrats. Even when we ruled against the bureaucracy, we would at least address the relevant questions in each case from both plaintiffs and defendants. This has changed. Nowadays the court doesn't even consider the defendants claims. There's no real application of the law. The court needs to be careful because the public and the politician will not accept these things much longer. The court is not as balanced as it used to be. Judges used to respect the government but not any more. Their decisions are not logical, and it shows disrespect for the rule of law. Look at the court's rulings in environmental cases. The current President mentioned how the Administrative Court has a policy of protecting the environment. That's absolutely ridiculous. No court is supposed to have an environmental policy. It's not supposed to be a policymaker and it is supposed to not intervene in politics.

This is not only the opinion of a retired Supreme Court judge but also a current senior-Supreme Administrative Court judge who argues that straightforward questions for judges to

decide have been complicated. *"Some of my colleagues, I'm too ashamed to say the things that they do when they are making decisions. You can have your own opinion, but you should act like a professional judge. Simple things like, if cases are in the jurisdiction, plaintiffs have standing."* The concern about judges' ability to make decisions about questions that were previously thought to involve technicalities is no longer the case. For this judge, the Supreme Administrative Court began to accept cases that it should have not. Discussing the Supreme Administrative Court's former President Dr. Ackaratorn Chularat, the aforementioned judge further stated, "*The former President influenced certain cases. He was accepting cases that were not in the court's jurisdiction."* Most judges confided that the court began to accept case beyond its jurisdiction in late 2005.

All of the judges interviewed in this dissertation believe that through their decisions—judicialization—the court is transforming how the bureaucracy performs its duties. In addition, their decisions affect the bureaucracy's daily transactions with the general public. At the policymaking level, Administrative Court judges also believe judicialization has helped provide clear orders for the bureaucracy. For example, through their orders a judge from a Court of First Instance in the South remarked, "*We also help the bureaucracy by establishing principles for orders. This narrows cases and it also narrows avenues of potential corruption. Now if the administrative order is clear and already interpreted, all people have to respect this principle. We keep emphasizing to the bureaucrats: Follow the order over your boss. Historically bureaucrats were always powerful. They don't like that we were established. We are especially hated amongst senior bureaucrats. But I don't care, I have to do my duty."*

Elaborating upon the manner in which the Administrative Court has positively impacted the bureaucracy and Thais, a judge serving at the Court of First Instance located in the South, said, *"Since the Administrative Court was established, we have improved the bureaucracy, and we have made Thais know their rights and the law and responsibilities of bureaucrats. Now the rights of the people are known. We have brought the power of rights for the people. Before, there were no neutral institutions in Thailand. Now the people know that they will receive justice at the Administrative Court."* Indeed, all of the judges interviewed believed that through their decisions, the Administrative Court was responsible for an improvement in government performance as well as a Thai society that was not only more conscious of their rights but also better protected from official abuse.

Administrative court judges believe that they are instruments of progressive change affecting not only the bureaucracy but also as a result, politicians who craft policy. Whether responsible for decisions to protect local environments at the expense of economic growth, preventing illegal elections or the partial privatization of state enterprises, judges have expressed a bias towards plaintiffs' concerns and an eagerness to protect their associated rights. As political beings, judges' motivations may at times been less than genuine and more focused on their reputation, decisions still speak to a court that is more likely to confront the government, no matter how popular. This does not translate to cases involving the direct interests of the King Bhumipol Abdulyadej. *When* the latter is involved, politicalization results. This section has demonstrated that judicialization and politicalizaiton are dynamic and can occur within the same institution depending on the actors involved.

Section Four: Impact on Politicians

The Administrative Court's decisions and hence, judicialization's impact extends beyond the immediate parties in each dispute. Depending on the grievance in questions, decisions can affect even politicians. Based on interviews with several veteran Thai politicians, judicialization in the context of the Administrative Court has directly affected them in several areas. First, judicialization affects politicians' ability to effectively control the bureaucracy. Second, and related, judicialization can determine the longevity of policies to which politicians attribute importance. Finally, judicialization affects politicians' decision to create policies.

When asked about the impact of judicialization upon their duties within the context of the Administrative Court, a governor of a large city replied:

The judicialization of politics is certainly real and affects my job as an administrator in a number of respects. First, because bureaucrats can protest their transfer orders, sometimes the court interferes in my role as political master. While some bureaucrats also use the court, and there are cases that are genuine, others are more political and use the court to cause trouble for me and my administration. People who don't like me or my party affiliation like to sue and cause me headaches. I've been named in about 300 cases. Most plaintiffs are those with a habit of complaining. These are usually mid-level bureaucrats. Another challenge is because the Administrative Court's jurisdiction is not clear, I have to worry about whether or not I'm violating the law or not. As a result, I and other politicians now have to "lawyer-up" because people are using the courts to attack each other. My legal staff has increased since I've been in office, but I'm not too concerned. We just have to make sure every decision is explained clearly and is supported by law. I'm not afraid of lawsuits.

The statements above reveal several realities. First, the governor concedes that the Administrative Court's decisions forced them to become more cognizant of the potential legal ramifications of future actions.[12] In addition, several Thai politicians believe that the

[12] A former judge stated that judicialization led to the creation of one of the very outcomes that the Administrative Court was supposed to remedy: it has actually caused the bureaucrats to performs their tasks with greater caution thus creating the very delays that the court is supposed to eliminate.

Administrative Court has failed to properly distinguish between an unpopular though procedurally-legal policies versus those that have not conformed to legal standards. Discussing judicialization, a former minister of Foreign Affairs who is a senior member of the Democrat Party remarked, *"I think the Administrative Court can be a good thing for Thai society, if it stays in its jurisdiction. It should not be telling the Ministry of Foreign Affairs what policies should or should not be made. A bad policy may not mean that it is illegal. The court must be careful."*

Another politician interviewed was a senior Phua Thai Party politician who formerly served as a minister of Foreign Affairs. According to him, the Administrative Court has illegally determined foreign policies. Discussing a particular instance where the Supreme Administrative Court was involved in the annulment of the Ministry of Foreign Affair's joint communiqué to support the Cambodian government's application for World Heritage Status consideration for the Preah Vihear temple, this former minister recalled:

The Preah Vihear case was a cabinet decision which was clearly out of the Administrative Court's jurisdiction. The Court must do their business in accordance to the rule of law. The Court of First Instance rejected the case and the plaintiffs appealed. The concern about the overlapping land issue was negotiated through the Joint-Boundary Commission (JBC). The issue was taken care of through diplomatic means. The Ministry was protecting Thai land. Based on legal principles, the case should have not even happened. The NCCC was involved because the former President of the Supreme Administrative Court illegally changed the Supreme Administrative Court's original decision.

While the previous former foreign minister expresses a negative view of judicalization, by contrast, a former Minister of Foreign Affairs from the Democrat Party had a more positive perception of judicialization but still acknowledge its dangers:

The Administrative Court is a positive development for Thai democracy. It can do good things and can be more positive for Thai democracy. I think that Thais do not know their rights, and

this needs to change. When Thais begin to know their rights, this will make government have to answer more to the people. When I was Foreign Minister, the Court did not necessarily stay within its jurisdiction. This needs to be clarified so that there is no more confusion. Judges think that they are politicians but they should stay out of politics…Nowadays in Thailand, the Courts are involved in politics. It's dangerous and unfortunate. That is not their role, I mean it has a duty to uphold the law but not get involved in politics. You have to understand, everything is political now. I think the Administrative Court judges want to be politicians and the bureaucrats. This hurts checks and balances. I've had so many cases against me—cases since I was Minister of Foreign Affairs. You cannot have the Administrative Court determining foreign policies, that is MFA's role.[13]

Finally, discussing the role of the Administrative Court and its impact, a senior executive of the Phua Thai Party who has served as a Deputy Prime Minister, the Minister of Energy, Justice and Education stated:

I and my party have been victims of the judicialization of politics and all of the courts have purposely targeted me and my party. The Administrative Court needs competent judges. They don't know administrative law and there are not enough qualified judges. Some of the judges are former bureaucrats and they don't even know administrative law. Judges must be independent, most are used to being old bureaucrats and are, by nature, not independent and slow. Judges have to change their attitudes. Even several academics have criticized the Supreme Administrative Court's rulings. Most of the judges lack a substantive understanding of administrative law. It's proven difficult for Thai judges and lawyers to understand law and the fundamental concepts. They lack knowledge of fundamental principals of law and aren't well-qualified. Political cases arise when the court gets involved in the political process. Sometimes the court intentionally does this, almost like a conspiracy.[14]

For this former minister and others from the Phua Thai Party, judicialization has largely translated into anti-Thaksin decisions through the courts. Even judges within the Administrative Court acknowledge politicians' sentiment about the court's anti-Thaksin bias. One former Vice President of the Supreme Administrative Court stated,

[13] "MFA" is an acronym for Ministry of Foreign Affairs.

[14] Interview on June 5, 2012

Akaratorn wanted judges to follow him and fight Thaksin. After the Yellow Shirts protests, Akaratorn wanted to control the whole court and make us follow him. The solution to Thaksin was going to be through the military coup and siding with the Yellow Shirts. When you look at how the court rules between Red Shirts and Yellow Shirts you can clearly see a double standard. The court is still in favor of the Yellow Shirts.

Not only did the former Minister express that the court's behavior was inappropriate, but moreover it was politically-motivated to undermine the ruling government. This sentiment affirms previous Administrative Court judges' fears that the court's reputation could suffer if the court is not viewed as neutral. True to the judicialization of politics literature, even outcomes that are progressive in intent can produce both positives and negative affects on governance. While it can lead to greater improvements in the areas of accountability and transparency, it can also yield the usurpation of elected officials' powers. While some politicians acknowledge the court's contributions to governance, elected officials believe that the Administrative Court has, on occasion, purposely went beyond upon their jurisdiction by encroaching in areas of foreign and domestic economic policymaking. While encompassed within their decision are references to the facts and laws according to some judges the underlying motives were to frustrate governments, in particular, those affiliated with former Prime Minister Thaksin Shinawatra.

Conclusion

From the in-depth interviews with judges, this chapter has demonstrated how the court-centric approach captures Administrative Court judges' decisionmaking and, ultimately, judicialization. Administrative Court judges, many of who possess progressive leanings, make decisions strategically by ensuring their decisions appear to include a sincere consideration of the facts, law, and justice. Judges also consider the anticipated reactions of the immediate parties as well as the larger public which impacts their reputation. This chapter has also demonstrated that

judges from the Court of First Instance and Supreme Administrative Court differ in the degree to which they emphasize the importance of anticipated reactions. The prospect of appeal makes judges from the Courts of First Instance less prospective while Supreme Administrative Court judges were predominantly concerned with the anticipated impact of their decisions upon the institution's reputation. This chapter argued that the prospect of appeal was a key factor in Court of First Instance judges' decisions since they did not have to consider the long-term implication of their decisions because of the belief that cases of significance were almost always appealed regardless of the quality.

Finally, in examining the impact of judicalization upon politicians, the chapter demonstrated that judicialization is a reality that affects the former's ability to govern. Perhaps not surprisingly, politicians from the previous two civilian governments are skeptical of judicialization. While they acknowledge that the court's has provided opportunities for greater accountability and the advancement of progressive rights, they also believe that the court has exceeded its jurisdiction. Moreover, judicialization has affected their ability as politicians to both make and ensure the successful implementation of policies.

CHAPTER 7

CURIOUS COURT CASES AND POLITICAL PERMEATIONS

The 1997 Constitution established the Administrative Court of Thailand as *the* primary institution to adjudicate disputes between individuals and the bureaucracy as well as within and among bureaucracies. The effects of many of the court's decisions have transcended the immediate parties through which the cases originate. In order to comprehend the context in which these decisions were made, this chapter examines five Administrative Court cases. These cases afford the opportunity to go beyond official court statistics and case summaries. While the latter two are important, they neither offer a complete nor particularly neutral perspective given the source.[1]

The chapter's argument is that in November 2005, the Administrative Court's leadership began to make decisions believed to protect the institutions' independence and, as a result, reputation against what they believed to be a Prime Minister aggressively seeking to control the court. Under the direction of the President of the Supreme Administrative Court, the court's decision began to be anti-Thaksin and created divisions within the court mirrored by larger

[1] First, while statistics offer insight towards the type(s) of grievance(s), specific services that were requested, etc., they do not provide an indication as to why individuals (both private citizens and bureaucrats) ultimately chose to use the court. This question is important because it not only informs theory, in particular those adopted in this dissertation, but also allows us to better understand the future behavior of the court. Second, these cases allows one to capture the full contextual factors within which judges adjudicate and thus may have had on judges' decisions. Third, the cases allow one to understand plaintiffs' perception of the court both pre- and post-adjudication. So in a sense, the case studies offer the opportunity go beyond what the available quantitative data reveals.

society: pro-Thaksin, anti-Thaksin and a more neutral minority. Ironically, such internal divisions caused an increase in judicialization that continued to produce progressive outcomes. It also paved the way for the court's first experience with politicalization that was directly caused by the monarchy.

The first section previews the overall structure of the case study approach and its key contributions. Emphasized in this study are the actions of former plaintiffs and judges. Beginning with the second section, the case involving the former Prime Minister Thaksin Shinawatra government's attempts at privatize the Electricity Generating Authority of Thailand (EGAT) will be examined. Such decision were less about a concern for the facts and law as they were about the court's survival as an independent institution and hence their reputation. Section three demonstrates a case of politicalization of the Supreme Administrative Court and, ultimately the fluidity with which the court's position can shift depending on the external actors involved. Finally, the chapter concludes by discussing the chapter's key implications and how they contribute to the overall judicialization of politics literature and Thai politics.

Case Studies: Insight and Importance

George and Bennett (2005, 5) define case studies as a "detailed examination of an aspect of a historical episode to develop or test historical explanations that may be generalizable to other events."[1] As a methodological approach, case studies are a tool that yields several advantages. First, by providing contextual richness, case studies can provide a more complete and accurate account of the phenomena in question. This degree of comprehensiveness does not

[1] Gerring (2008, 645) presents nine typologies: typical, diverse, extreme, deviant, influential, crucial, pathway, most similar and most different. Different authors offer alternative typologies. For example, Lijphart (1971) and Eckstein (1975) offer five, while George and Bennett (2005, 74-76) offer six: Atheoretical/configurative, disciplined configurative, heuristic, theory testing, plausibility probes, and "building blocks" studies.

have to sacrifice parsimony. Indeed one key criticism is the level of detail or, more properly, the extent to which it is necessary for explanation. Both George and Bennett (2005) and Bates (1998) demonstrate that case studies can be presented in a "structured-focused" manner that is both economical in narrative yet precise in explanation. In addition, George and Bennett (ibid) point out that the various case study methods yield better measurements of concepts and are able to generate new hypotheses and variables that rival that of quantitative methods. Finally, case study methods improve our ability to explain causation, which usually entails many variables. Based on the judicialization literature, this chapter expects that judges and plaintiffs are the key actors to understanding the phenomenon.

In two further case studies, the Thai Supreme Administrative Court's senior leadership directly manufactured outcomes that still illustrate judicialization. Hilbink's (2007) analysis of the Chilean Constitutional Court's activity is also relevant. However, whereas in Hilbink's case, Chilean justices were instrumental in creating a professional culture of "averseness" towards judicial activity, in the case of the Thai Supreme Administrative Court, the reverse was true as the president of the Supreme Administrative Court became overtly anti-Thaksin. When King Bhumipol directed the court to "resolve" the 2006 election crisis, many judges interpreted it as a decision against the incumbent Thaksin and the TRT government. The episode of the court's politicalization underscores both the phenomenon's fluidity and the need to understand contextual factors that make both a possibility.[2]

[2] Tsebelis (2002,19) defines veto players as, "individual or collective actors whose agreement is necessary for a change of the status quo." In this context, King Bhumipol would be considered an "institutional veto player" given that both the 1997 and 2007 Constitutions position him to be revered (both sec 8) and absolved from any accusation as the Head of the Armed Forces (sec 10) and whose approval is necessary for government to function. Highly revered, King Bhumipol is above any authority and is considered to be the "father of the nation."

The Beginning of the End: The Electricity-Generating Authority of Thailand (Case Number 5/2549, 2006)

Established by Thai parliament after the passage of the Electricity Generating Authority of Thailand Act B.E. (1968), the Electricity Generating Authority of Thailand (EGAT) is a state-owned enterprise (SOE) responsible for generating, procuring, transmitting or distributing electricity to consumers.[3] On September 1, 1998, the Council of Ministers approved a plan to eventually privatize EGAT. That plan was supposed to be in effect following the passing of two Royal Decrees within the State Enterprise Corporatization Act (hereafter referred to as State Enterprise Corporatization Act): article 26 and 28, respectively. Article 26 of the State Enterprise Corporatization Act established a privatized entity's special exemptions and privileges. Article 28 changed the original Act's repeal date that turned it into law. However, due to several events, most notably the 1997 Asian Financial Crisis, both the Chavalit and successive Democrat-led Chuan Leekpai governments were too beleaguered to move forward with privatization.

Moreover, perhaps commonsensically given that the crisis had led to the collapse of the Thai baht and a devastating contraction of the economy, any attempt to move forward with privatization would have largely been perceived as insensitive. In addition, since the 1992 coup, a Constitutional Drafting Assembly (CDA) had been meeting with minimal progress made. Public blame for the economic crisis was almost solely placed on the shoulders of Thai politicians and the bureaucracy. Within the more liberal factions of the CDA, accusations of corruption and fiscal mismanagement helped gather support for provisions allowing greater public participation in governance and administration in the final draft. Liberals hoped that

[3] For more on EGAT, see: http://www.egat.co.th/en/ Accessed on August 30, 2015.

participatory governance would provide the antidote to the country's historical ills. Despite the strong resistance from conservative faction consisting of politicians and bureaucrats, parliament finally approved the 1997 Constitution and submitted it to the King for royal endorsement.[4] Referred to "People's" Constitution, given the considerable number of public participation forums during the drafting process, the inclusion of a fully-elected parliament (House of Representatives and Senate) and mandatory citizen participation in policy decisions, it was, and remains, the country's most participatory. Democracy enthusiasts welcomed the 1997 Constitution with excitement and unrealistic expectations as it offered the principles of public participation, accountability and transparency.

The January 2001 national elections would provide recovering Thailand fresh start under new leadership. After narrowly escaping disqualification stemming from an asset concealment case, a new government under business tycoon turned politician, the nation chose Lt. Col. Thaksin Shinawatra, as prime minister. Having formed the Thai Rak Thai party in 1998, Thaksin seemed to have all the answers for the country in desperate need of hope. Likening his governance style to more of a CEO than politician, Thaksin endorsed privatization of the country's SOEs.[5] Selectively promoting the partial privatization of public services within these SOEs, the Thaksin government attempted to proceed with EGAT's privatization.[6] While experiencing early success with the privatization of the Petroleum Authority of Thailand (PTT)

[4] Klein and McCargo provide accounts of how conservative politicians and the bureaucracy like the Ministry of the Interior and Court of Justice blocked the reform process and even tried to sabotage the entire effort.
[5] Comparing governing to running a business, Thaksin's words proved prophetic, as he governed with little regard of democratic values and principles. This was evidenced by his suppression of the media. The Senate was key to maintaining the checks and balances envisioned in the 1997 Constitution, most notably the Constitutional Court of Thailand, the National Counter Corruption Commission (NCCC) and the Electoral Commission of Thailand because they were responsible for appointing members. It is also important to note that the terms of Thailand's bailout package included the International Monetary Fund's structural adjustment program that included the recommendation to privatize public sector industries.
[6] An immediate victory for Thaksin government was the privatization of the Petroleum Authority of Thailand.

in November 2002, by this time, however, labor unions and civil society organizations met the government's proposals with stiff resistance. One reason was that by, 2005 Thaksin became increasingly controversial. In part this stemmed from his increasingly authoritarian style of governance. Discontent began to grow from nearly every segment of society, none more crucially than that of King Bhumipol.[7] Disastrous policy initiatives like the "War on Drugs" had led to thousands of extrajudicial killings of drug dealers, the majority of which were low level, suppression of the media and inept management of the conflict in the South that then led to an exacerbation of violence. All of these events began to affect Thaksin's popularity. Enemies formed, and voices of discontent began to grow louder.

Despite the growing opposition towards the government, in early February 2005, Thaksin and the TRT became the first political party to be re-elected with an impressive absolute majority (see Table 26 for election results). With this new mandate, he sought to proceed with the privatization of EGAT. Under the State Enterprise Corporatization Act plans for privatization did not require the prime minister to obtain parliamentary approval.[8] On June 24, 2005 Prime Minister Thaksin issued two royal decrees—one repealing the EGAT Act and the other establishing EGAT as a public company. Now called the EGAT Public Limited Company (PLC), in addition to providing electricity, would be authorized to provide telecommunications services. In addition, the government approved a privatization committee responsible for oversight of the process. According to the State Enterprise Corporatization Act, members of the privatization

[7] On several occasions, the head of the Privy Council, and former Prime Minister, General Prem Tinsulanonda intimated his displeasure with Thaksin. Prem's statements are significant because they are usually believed to be expressing the sentiments of King Bhumipol.

[8] Under the government's proposal, the Ministry of Finance would still maintain majority ownership of EGAT with about 30% open to private investors.

committee were not to have any conflict(s) of interest. With privatization closer to realization, preparations began to enter EGAT PLC on the Thai Stock Exchange. The committee announced that an initial public offering (IPO) to investors would occur.

Table 26

The Thailand 2005 National Election Result

	Bangkok	**Center**	**North**	**South**	**NE**	**Subtotal**	**Party List**	**Total**
Total	37	97	76	54	136	400	100	500
TRT	32	80	71	1	126	310	67	377
Democrat	4	7	5	52	2	70	26	96
Chat Thai	1	10		1	6	18	7	25
Mahachon					2	2		2

Source: Election Commission of Thailand, 2005 National Election Final Results

In late 2005, the Supreme Administrative Court accepted a plaint from a group consisting of EGAT union representatives and non-governmental organization like the Campaign for Popular Democracy, the Consumer Protection Foundation, and the Federation of Consumer Organizations. The plaint requested an immediate injunction of the scheduled IPO, revocation of the entire process, including a return to its original state-owned enterprise status. In addition, the plaint also claimed that public should have been involved in the process, and that privatization would hurt consumers by no longer allowing the government to control costs. In November 2005, the court found merit in plaintiffs' argument and blocked the IPO.

Discussing the significance of the ruling, Leyland (2006, 142) notes, "The decision had far-reaching ramifications. In economic terms, the interruption of the schedule for flotation in a market-sensitive area dependent on investor confidence called into question the financial

viability of the entire scheme. At a political level, the anti-privatization campaign had co-functioned as a personal campaign against the Prime Minister. Indeed, the court's decision was a serious blow to a central plank of government policy." In addition, according to Leyland the decision brought into greater focus the Supreme Administrative Court's jurisdiction and its ability to balance and protect public interests.

The Thai media lauded the court's decision as a rare sign of courage in the midst of other government institutions that were by then presumed compromised. A December 2005 article in the english language daily, *The Nation*, entitled, 'Beyond Govt Control' commented, "Regarded as one of the few agencies in the three branches of government to survive political interference, the Administrative Court deserves to be honoured."[9] Discussing the court's decision in another article entitled, 'People's Court', appearing in the other main English daily, *The Bangkok Post*, the author proclaimed, "The Administrative Court is now widely seen as the most reliable institution in addressing the plight of people affected by government decisions and policies."[10] The Administrative Court was popular and considered as *the* remaining institution to have true independence.[11]

During this time the press was angered by Thaksin's use of government institutions to retaliate against journalists who were critical of his policies although the Administrative Court's decision afforded them a rare victory.[12] Although Leyland correctly observed that plaintiffs were

[9] Beyond Govt Control, The *Nation*, December 30, 2005
[10] People's Court, *Bangkok Post* January 15, 2006 Sunday.
[11] Opas Boolom, "The Country's Last Truly Independent Organization?" *Nation*, 6 November 2005.
[12] In 2002 the Supreme Administrative Court ruled unlawful Anti Money Laundering Prevention and Suppression Office (AMLO) investigation of journalists from the *Nation* who were critical of Prime Minister Thaksin and his government. See also, Kesinee Taengkiew, "'Nation' Wins Key Battle over AMLO", *Nation*, 21 June 2002; and "The 'Thaksingate' Verdict Is a Victory", *Nation*, 26 June 2002.

motivated by a larger political campaign against Thaksin, he does not consider the motives of Administrative Court judges. Through interviews with Administrative Court judges with direct knowledge of the inner workings of the chamber, comes the revelation that the court's decision against Thaksin was motivated less by a concern for the facts, law and justice and more about the survival of the court. Specifically, the court's leadership President of the Supreme Administrative Court, Dr. Ackaratorn Chularat, was personally invested in preventing Thaksin from achieving political success that he believed was a threat to the Administrative Court's ability to remain independent and thus maintain its reputation.

Discussing the former Supreme Administrative Court President's actions, one former Supreme Administrative Court judge stated, "The EGAT case was the beginning of his [Ackaratorn] personal crusade against Thaksin. He believed would save the nation. I think he believed he was acting on behalf of the King as well. After the EGAT decision, we began to have divisions between pro- and anti-Thaksin camps. Ackaratorn made it clear he was anti-Thaksin."[13] It is important to understand that the former Supreme Administrative Court judge stated that Dr. Ackaratorn acted independent of external influence. Many of the judges believe that the EGAT case was the court's formal entrance into politics. A sitting Supreme Administrative Court judge stated, "The EGAT decision was embarrassing. It should have not even been accepted but Ackaratorn wanted it. The court was clearly beyond the scope of its power."[14] This former Supreme Administrative Court judges and other judges believe that Dr. Ackaratorn personally orchestrated the EGAT defeat as well as other key Thaksin policies.

[13] Interview on June 26, 2013
[14] Interview on October 29. 2014.

Elaborating more bluntly, "Ackaratorn [former President of the Supreme Administrative Court, Dr. Ackaratorn Chularat] began to "go out of his way" to ensure that the court stopped him [Thaksin]. For instance, the court should not even have accepted the plaint given that plaintiffs did not file within the allotted time. The decision to accept the Consumer Protection Foundation as one of the plaintiffs was not right because they did not have legal standing. Organizations are supposed to have their purpose and mission statement clearly written and they [the Foundation] did not have these things. They were just created to challenge Thaksin. It was clear that Ackaratorn wanted to "get" Thaksin. Once this began to happen, I knew it was time for me to leave."[15]

While not commenting on the EGAT specifically, several judges serving in both the Court of First Instance and the Supreme Administrative Court acknowledged that during Dr. Ackaratorn's tenure the court was more "political" and too visible in the media[16]. Ultimately, the Supreme Administrative Court's injunction of the IPO served as the court's "baptism" into Thai politics. Interestingly, none of the judges mentioned the Supreme Administrative Court's 2002 decision that ruled Thaksin's use of the AMLO to investigate critical journalists as unlawful as being a "political" judgment. Their consideration of "political" translates into the manner in which judges adjudicate cases and not politicalization as understood by external actors' influence determining outcomes. One is perceived by judges as "political" to the extent that they go beyond their scope for reasons other than providing "justice" or applying the facts and law.

[15] Interview on September 18, 2014.
[16] Interview with judges on November 11, 2011.

Adding More Fuel to the Flame

On January 23, 2006 Thaksin's family sold their Shin Corporation holdings (49.61 percent) to a Singaporean-based firm Temasek Corporation for $1.7 billion dollars. This sale was tax-free, given Temasek's status as a foreign firm. Last ditch legal maneuverings by the government made this possible as Pasuk and Baker (2009, 262) write, "Only days before the transaction, the Telecommunications Law was modified to extend foreign ownership from 25 to 49 percent. The Revenue Department reversed an old tax ruling, and reimbursed a tax-payer, to remove a precedent which would have made some of the capital gains tax-liable." Public outrage was unprecedented. In early 2006, this sparked renewed protests led by former business associate-spurned-rival Mr. Sondhi Limtonkul—then owner of the (rival) Matichon Group Media Company. While Sondhi had managed to serve as Thaksin's main irritant months prior, the latest act of chicanery provided a then fledgling movement with a much-needed injection of overwhelming support from various sectors of society.

On February 9, 2006, Sondhi and others created the People's Alliance for Democracy (PAD). An umbrella organization committed to the removal of Thaksin and his government, this group was comprised of several NGO leaders and social activists, like veteran political agitator Maj. General Chamlong Srimuang, as well as opponents of privatization, Mr. Somsak Kosaisuk and Mrs. Rosana Thongchai.[17] Ironically, when he was a candidate for prime minister, many of the NGOs and individuals pledged their support for Thaksin because of his campaign declaration to collaborate with them. Once in office, however, many of these promises were broken, as

[17] Chamlong was one of the leading opposition figures to General Suchinda's attempt to remain in power in 1992. For a great book on the man and his life, see McCargo 1997.

Prime Minsiter Thaksin began to deem civil society as more of an obstacle. Tensions between the PAD and Thaksin and his supporters continued to escalate. Beginning in February, large rallies, particularly in Bangkok ensued with some reaching over 100,000 in attendance. Already paralyzing downtown Bangkok, protesters began to actively call for King Bhumipol to intervene and remove Thaksin. The king relented and suggested that it was inappropriate to call for such an arrangement. Despite calls from key military leaders and even members of the king's own Privy Council suggesting he step down, Thaksin was defiant and even attempted to undermine the growing momentum by holding a snap election in April 2006.

The Context and the Court

In the context of an increasingly unpopular prime minister, it was the Shinawatra's family's sale of their Shin Corporation shares tax-free that further emboldened Supreme Administrative Court President Dr. Ackaratorn to take action against the Thaksin government. After the February sale of his shares tax-free, other senior judges on the Court also began to follow Ackaratorn's firm anti-Thaksin lead. There was little likelihood of the Taksin government winning its appeal of the EGAT injunction. Further, given the deleterious effects that the November ruling had on investor confidence, even had the court reversed its decision and thus permitted the IPO to proceed, the market would not have been as forgiving. In March 2006, the Supreme Administrative Court ruled in plaintiffs' favor to void the entire process with retroactive application. This meant that EGAT would continue to function within its original capacity. Officially, the Supreme Administrative Court offered the following reasons as the basis for its decision:

First, with respect to the question of jurisdiction, because determining the legality of Royal Decrees is a specific responsibility of the Supreme Administrative Court, the court ruled that the case was within its jurisdiction.[18] Further, there was a question of whether all of the eleven plaintiffs had legal-standing—in particular the Consumer Protection Foundation. According to the decision, all plaintiffs were EGAT consumers and thus were or could be aggrieved by potential negative outcomes of impending privatization efforts.[19] For example, there were concerns that the impending privatization may have caused prices to rise, and that this would have been unfair to existing consumers who could not afford to pay.

Second, reviewing the credentials of the privatization committee members, the court found that one of the members had concurrently held the position of senior executive in the Shin Corporation. At that time, Prime Minister Thaksin Shinawatra, through his family, still owned a nearly fifty percent stake. Further, the inclusion of this committee member constituted a clear conflict of interest. According to the court, the committee's entire proceedings were compromised and thus void. In fact, the court stated that the ruling would apply retroactively and reestablish EGAT as a state-owned enterprise.

Finally, the chairman of the public hearing committee was an assistant to the Minister of Natural Resources and Environment. The court found that, based on Article 5(3) of the Rules of the State Enterprise Corporatization Policy Committee on Public Hearing, B.E. 2543 (2000), privatization committee members are prohibited from holding political office. Finally, the court

[18] Article 11 Number 2 of the Administrative Court Act states that the Supreme Administrative Court is responsible for adjudicating, "the case involving a dispute in relation to the legality of a Royal Decree..."
[19] One former Supreme Administrative Court judge interviewed indicated that another concern that the defendant raised was that the timeframe for submitting a plaint had expired and should have factored in the court's decision to reject the case outright. Interview on October 29, 2014.

found that the committee failed to publicize the hearing in at least one (1) newspaper for three (3) days. Instead, the committee publicized the hearing in three (3) newspapers for only one (1) day. Finally, that court ruled further that both Royal Decrees were illegal because the government was legally-required to conduct public hearings before its passage.

Although Leyland (2006, 2012) is convinced that the decision was indicative of the court's greater commitment to upholding the principles of jurisprudence, Administrative Court judges with direct knowledge reveal that while popular, it was a continuation of the politics behind the injunction months earlier for the public. The case was a litmus test for the court of not whether it would provide the "right" decision but, instead, whether its position would be solidly against Thaksin. Reflecting on the victory, Rosana Tositrakul, a board member of the Consumers Confederation of Thailand proclaimed, "Our victory with EGAT today should tell the government that people are not as stupid as Thaksin might have thought. We know what he and his cronies are up to. They want government power to sell off national assets to fatten their pockets. We will not allow that to happen. Today proves to us that justice and the people's interest will prevail."[20] Although the Supreme Administrative Court's March ruling provided (another) ruling that appeared as predicated on legal grounds, the court's senior leadership influenced the decision. Interviews with two Supreme Administrative Court judges, one a former senior judge and another currently serving, revealed that larger, more political factors affected the chamber's decision. Discussing further, the former senior judge stated:

Ackaratorn made this [case] about him [Thaksin]. He thought it was his duty to save the country from Thaksin, and other judges [within the court] started to follow. You have to understand that leadership is very important within the Thai bureaucracy and especially the [Administrative] court. Most of them [judges] will follow the president—no matter what he does. He [Ackaratorn]

[20] Quoted in Royal Decrees Revoked, March 29, 2006. *The Nation*.

even had dinner with anti-Thaksin groups. This became public and was an embarrassment to the court.[21]

The dinner refers to a March 28, 2006 meeting hosted by palace insider Piya Malakul Na Ayutthaya. Other attendees included the following: Army General Surayud Chulanont, former deputy director of the Internal Security Operations Command (ISOC), Mr. Panlop Pinmanee, President of the Supreme Court of Justice Mr. Chanchai Likhitchitta, Mr Charan Pakdithanakul, Secretary-General of the Supreme Court, and Mr Pramote Nakhonthap, an academic with pro-PAD leanings.[22] After his removal from office later that year, the scorned Thaksin would float the conspiracy argument that the objective of the dinner was to plot a coup against his government. In the article, when asked about the merits of Thaksin's accusation, Malakul replied, "I only wanted to hear what the country's top judges who happened to be my friends had to say about the situation."[23] Even if one were generous in their conclusion that there was no discussion of a coup, it is highly unlikely that neither politics were discussed nor each official's and their respective institution's actions against Thaksin.

When discussing the decision-making behind the EGAT ruling, in separate interviews with a former senior Administrative Court judge and a current Supreme Administrative Court judge reveal that they believed that two key motivations lay behind the President's actions.[24] One was the tense political climate, especially the growing protests of the PAD, but also, according to

[21] Interview on September 18, 2014.
[22] For more on this meeting, see: http://www.matichon.co.th/news_detail.php?newsid=1238263549&grpid=00&catid=01(Title in Thai: "Piya Malakul insists to ward off the claim that the meeting with Surayud and 3 Big Judges Plan a Coup was only Dinner (Author's Translation)) Surayud Chulanont would eventually be chosen by the Council for National Security as prime minister in October that same year.
[23] As quoted in *The Nation*, March 29, 2009: Piya Malakul, the dinner host,responded that there was no talk of coup.
[24] Interview with senior Courts of First Instance judge on September 18, 2014. Interview with senior Supreme Administrative Court judge on October 29, 2014.

one judge, "the president's obsession that he was acting on behalf of the nation in order to "save it" from destruction by Thaksin."[25] A retired Supreme Administrative Court judge stated that former President Ackaratorn Chularat believed that he was acting on behalf of what *he perceived* the King wanted him to do (italics for emphasis).

Determining whether or not President Ackaratorn's motivations derived organically or were the result of "higher-up" influences can lead to endless speculations. However, it is quite likely that the increasing polarization of society and the manner in which Thaksin was able to compromise the independence of the new institutions that 1997 Constitution created which motivated him to act aggressively against the prime minister and his government. And he, like all of the judges interviewed, expressed the fear of the court being associated with the Constitutional Court—an institution that most judges presumed to be under the premier's control. While for the Administrative Court, Thaksin was not able to control the appointment of Administrative Court through the formal process as the Thai Rak Thai dominated Senate could neither directly appoint or remove judges nor could it affect its budget. Nevertheless, Ackaratorn perceived Thaksin as a threat to the court's independence and ultimately reputation. In fact, EGAT was the first key case in which the Administrative Court ruled against the Thaksin government. In addition to the 2002 AMLO decision, the Supreme Administrative Court had also ruled that nominees to the National Broadcasting Commission (NBC) as well as the nominee list for the National Telecommunications Commission (NTC) were illegal based on several procedural violations.[26]

[25] Interview on September 18, 2014

[26] In 2003 and 2005, the court ruled against the new round of the NTC and NBC selection process. For more, see 'Thai Court Orders a New Candidate Selection Process for NTC', World Dialogue for Regulation for Network Economics, January 10, 2003;

Discussing further, he recalled, "Once the King got involved, most [judges] thought that he was sanctioning Ackaratorn and the rest fell apart."[27] For this judge, royal involvement referred to King Bhumipol's April 26, 2006 address to newly appointed Administrative Court judges at Klai Kangwol Palace in Prachuap Khiri Khan. This occurred during the immediate aftermath of the 2006 snap election and served as an obvious rebuke of Thaksin, Thai Rak Thai and the election result that would have continue their rule.[28]

The two active Supreme Administrative Court judges who were interviewed acknowledged that immediately following the court's injunction, divisions within the court began to arise. One judge stated, "After the EGAT case, three main groups emerged: those that were anti-Thaksin, pro-Thaksin, and those that were neutral. Even in the cafeteria, judges began to mingle only with Court members who agreed with their position. Overall, I think the court became "yellow." Judges who were deemed as "red" were kept from some of the more obviously political cases."[29]

A retired Supreme Administrative Court judge reflected, "In the beginning we were like brothers and stood together. Even when we disagreed with each other in a chamber arriving at a decision, we would still eat lunch together. No problems. We thought that we were doing something great for the nation. This began to change with the EGAT decision, when he [Ackaratorn] began to go out of his way to get Thaksin."[30] Both judges stated that politics from

'NBC Candidate Choice Nullified', *The Nation*, March 5, 2003.'Broadcasting Panel: Additional Doubt Over NBC Future' *The Nation*, September 29, 2005; 'Rejection of NBC Appeal Upheld', *The Nation*, June 7, 2006.

[27] Ibid

[28] In another speech before an audience of Supreme Court of Justice members, the King assigned the responsibility "solving the political impasse" to the judiciary, even urging the head of three courts to join together and craft a solution.

[29] Interview on September 18, 2014. The UDD was a group of pro-Thaksin group who wore red shirts to demonstrate their solidarity.

[30] Interview with a retired Supreme Administrative Court judge September 18, 2014. Interview with a judge from the .Court of First Instance on August 21, 2014..

without began to affect the court internally and that divisions within persist today even though there is new leadership, specifically a new President of the Supreme Administrative Court.[31] According to a senior Courts of First Instance judge, the Court began to have internal dysfunctions with many judges wanting to follow the Court President's position.

To recap, although it was popular and provided labor unions and consumers with a major victory, the Supreme Administrative Court's EGAT decision was neither a result of concern for the law, facts and justice nor their commitment to more progressive ideals. The EGAT injunction was politically-inspired by then President of the Supreme Administrative Court who was concerned about Prime Minister Thaksin's potential actions upon them. While it is difficult to determine whether the Administrative Court should have accepted the plaint given the lapse in time the case was controversial enough to create divisions that still persist. The EGAT case also brings into focus the importance of the larger political environment as President Ackaratorn was affected by his belief that the Administrative Court would come under the control of Thaksin. The heightened political situation further motivated the former president to steer the Supreme Administrative Court towards an anti-Thaksin bent. The price for Dr. Ackaratorn's actions was an eruption of internal divisions.[32]

In order to understand the consecutive elections of 2005 and 2006, some background information is needed. The 1997 Constitution stipulates that in each of the country's 400 districts, a minimum 20 percent turnout of the registered voters is necessary to be considered

[31] Although President of the Supreme Administrative Court, Dr. Ackaratorn Chularat retired and was replaced by Mr. Hassavut Vititviriyakul in September, 2010, he maintains an office as an "unofficial consultant." Following controversy involving the abuse of power, the JCAC suspended President Hassavut Vititviriyakul. After an attempt to appeal the suspension, he accepted the ruling.

[32] Hilbink (2007) demonstrates how senior Chilean Constitutional Court judges influence the court's activity. This certainly resonates in the Supreme Administrative Court's maneuverings in this case.

valid.[33] When districts fail to achieve this threshold, the Electoral Commission of Thailand, the entity responsible for the oversight of all elections, would be responsible for conducting a re-run. In the immediate aftermath of the Shinawatra family's tax-free sale of their Shin Corp shares to Temasak for almost 1.2 billion dollars in profit, a revived PAD called for renewed protests demanding Thaksin's resignation. In an attempt to quell the rising dissent, embattled Prime Minister Thaksin, despite his resounding victory in February 2005, called for a snap election that would serve as a referendum on his power and the legality of the sale. However, fully cognizant that this would likely lead to the same outcome as the prior year, many opposition parties chose to boycott the election, most notably the TRT's chief rival, the Democrat Party.[34] Despite accusations of paying money for opposition parties to run, in 14 districts, mainly in the South where the Democrat Party has historically maintained a stronghold, voter turnout failed to reach the constitutionally-required 20 percent threshold.

In lieu of the incomplete election, individuals submitted several plaints to the Constitutional Court, Supreme Administrative Court and Supreme Court of Justice seeking to nullify the election based on various claims ranging from voter fraud to several technicalities. The plaint submitted to the Supreme Administrative Court requested an injunction on the potential re-run in those respective districts that failed to meet the 20 percent. If the Supreme Administrative Court sided with the plaintiffs, it would ultimately prevent a projected TRT government from forming and prolong the impasse likely leading to an "extra-constitutional"

[33] 1997 Constitution of Thailand
[34] I use the term "rival" loosely, as, at least with respect to the ability to win democratic elections, the Democrat Party never posed a serious challenge to TRT.

response. On April 26, 2006, King Bhumipol addressed the Supreme Administrative Court judges about the election:

> 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. Besides, some of them were the sole candidates in their constituencies, which is critical. The sole candidatures cannot lead to full membership in the House, because a sole candidate must have support from at least 20 per cent. Is this issue relevant to you? In fact, it should be. The issue of the sole candidacy elections is important because they will never fulfill the quorum. If the House is not filled by elected candidates, democracy cannot function. If this is the case, the oaths you have just sworn would be invalid. You have sworn to work for democracy. If you cannot do it, then you may have to resign. You must find ways to solve the problem.…….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. ……You must make the country function correctly. Otherwise, you must have a discussion with the Supreme Court judges who will come in later. Conduct your discussions with people based on knowledge, honesty and faith in your duty to resolve this situation. The country should function according to the law……I will be grateful if you look into the issue.[35]

The King's address was a clear death knell for Thaksin and the TRT. Remarking that an election dominated by one party was undemocratic signaled that King Bhumipol did not accord legitimacy to the impending 2006 election and, possibly, the year prior. A few days after the speech, the Supreme Administrative Court ruled to suspend the re-run of the elections in 14 districts. The implications of this decision were important. First, this would mean that Thaksin and Thai Rak Thai would not be able to claim (another) election victory thus officially

[35] 'HM the King's speech to the Administrative Court's judges', quoted from The Nation, April 27, 2007.

legitimizing their rule. Second and perhaps more immediate for Thaksin, it would have brought a conclusion to this controversial sale.

Third, the injunction would guarantee that the impasse would continue and that a non-democratic solution would by now be necessary. Fourth, the decision allowed the Court to affirm its loyalty to the King while simultaneously producing another popular anti-Thaksin decision. One should not underestimate the importance of the Court remaining aligned with the crown. For most Administrative Court judges that I interviewed, in the 2005 EGAT case, there were questions within the court about the whether judges should follow an overly zealous Supreme Administrative Court President Dr. Ackaratorn Chularat. It was not clear whether his behavior was on his own volition, however, after the King's speech, there was little room for confusion as to the decision the court was to render.

With respect to the whether Dr. Ackaratorn was under the influence of another actor prior to the King's address, this study argues that it is doubtful that the monarchy directly influenced Ackaratorn in the EGAT decision thus making it one of judicialization. If the King was able to influence Ackaratorn through his "network monarchy", it would appear that the April 26 address or, at the very least, its directness would have not been necessary.[36] King Bhumipol's message was uncommonly direct and left little to be interpreted with respect to his sentiment towards Thaksin and the TRT. This is not a staple of the network monarchy where under the cover of other parties King Bhumipol's is able to articulate his demands and use his power.

[36] McCargo (2005) conceptualizes the "network monarchy" as fluid a system that centers on and is driven by King's Bhumipol's use of secondary parties to exert his influence. For more on the network monarchy, see McCargo (2005).

Following the Supreme Administrative Court's injunction on the re-run of the 14 contested districts, on May 8th the Constitutional Court voted 8-6 to nullify the election, citing several irregularities. The Constitutional Court claimed that the ECT failed to provide an appropriate number of days for parties to organize, and that new standards had compromised voters' ability to cast their ballot secretly. Later the Presidents of the Supreme Court of Justice, Constitutional Court and Supreme Administrative Court implored the ECT commissioners to resign, due to their decision to proceed with the election in the face of the boycotts from the main opposition parties. After the commissioners refused to resign, on July 25, the Supreme Court of Justice found them guilty of malpractice and sentenced them to four years in prison without bail. On September 16, another two years were added. Pasuk and Baker (2009, 273) offer the unofficial results from the incomplete 2006 elections based on 397 of the 400 total constituencies: 5. See Table 27.

Table 27

The 2006 National Election

	TRT	Other	Abstain	Damaged
Constituency	52	2	33	13
Party List	56	8	29	6

Source: Cited in Pasuk and Baker (2009, 273)

The results from the 2006 election demonstrated a slightly less popular TRT perhaps expected given the controversy behind the sale of the Thaksin's family Shin Corp shares. Nevertheless, results clearly indicate that the TRT would have won.

As expected, the Supreme Administrative Court decision was influenced by the King's speech. Right before an unprecedented meeting with the President of the Constitutional and Supreme Court of Justice, President Dr. Ackaratorn, commenting on the King's address to the Supreme Court of Justice and Supreme Administrative Court was quoted in the English daily, *The Nation*, "Everyone has clearly heard the royal statement and should have understood it."[37]A few days following the meeting, the courts would make decisions in coordinated fashion. One reason for this level of coordination was that the King instructed the Presidents of the three main courts to "resolve" the crisis in concert. When asking a senior Supreme Administrative Court to provide their account of the former President's actions in the EGAT case, the 2006 election, and Preah Vihear, they replied that Ackaratorn believed his actions were justified because for him it was an issue of national security. His answer meant that the facts and laws were not important in the court's decision-making; on this occasion, judges obeyed the King.

As this case has demonstrated, politicalization depends on the actors involved. Although the Administrative Courts possess formal institutional safeguards to guarantee independence from outside influence, King Bhumipol is not like any other actor. Revered by nearly all, the king's ability to influence decisions is unique though appropriate given his status in Thailand as the "Father of the Nation,"— a belief that finds its origins in the Sukhothai dynasty under the reign of Ramkhamhaeng. The Supreme Administrative Court's decision to rule an injunction is a case of politicalization. King Bhumipol's ability to influence any institution demonstrates how

[37] The Nation, 'Crucial summit by court chiefs', April 27, 2006. In the same article, Chularat stated, "Please do not try to interpret the royal statement and jump to an early conclusion about the election cancellation because every dispute would have to be resolved in accordance with the law," It is unlikely that he was sincere in this statement because not cancelling an election that the King considered undemocratic and given his previous actions during the EGAT case.

judicialization can turn into to politicalization. The king's power is unique as no other external factor had been able to determine the court's decisionmaking.

Going Green: The People v. The Map Ta Phut Industrial Estate
(Court order 592/2009)

On June 9, 2009, Mr. Srisuwan Janya, President of the Stop Global Warming Association, represented 36 individuals in a lawsuit against the National Environment Board and eight persons. The plaint claimed an area referred to as "Map Ta Phut Industrial Estate" was causing environmental harm which also endangered the health of the local public. The plaint requested an injunction of 76 industrial projects until the industries complied with the 2007 Constitution by following environmental and health regulations.[38] Residents believed that many of the industries had in fact been the source environmental pollution that had caused several health problems for local communities. Further, plaintiffs were convinced that many industries were illegally operating due to the failure of having had conducted a mandatory environmental impact assessment (EIA) and a health impact assessment (HIA) study required by that the National Environmental Act and the State Enterprise Act (1999).[39] On September 29, 2009 the Central Administrative Court of First Instance handed down an injunction on the illegal operations, which included both domestic and foreign firms who were involved in petro-chemicals manufacture and distribution.

[38] A district in Rayong province, the eastern seaboard project consists of several adjacent provinces is located on the eastern side of the Gulf of Thailand. It is part of the Thailand's Eastern Seaboard industrial zone, which consists of several additional provinces and plants. For more on the case, see In Industrial Thailand, Health and Business Concerns Collide by Thomas Fuller. *NY Times*. December 18, 2009.

[39] Article 67 of the 1997 Constitution also declares that such studies be performed and that local communities participate in any such decisions. The issue was the previous NEA was not updated to the 2007 Constitution. Section 59 of the Enhancement and Conservation of National Environmental Quality Act, B.E. 2535 (1992) states: "In case it appears that any locality is affected by pollution problems and there is a tendency that such problems may be aggravated to cause health hazards to the public or adverse impact on the environmental quality, the National Environment Board shall have power to publish notification in the Government Gazette designating such locality as a pollution control area in order to control, reduce and eliminate pollution."

This case was significant because it symbolized local communities asserting their rights through legal means against powerful economic interests. In addition, the coalition government, at the time led Prime Minister Abhisit Vejjajiwa and the Democrat Party, was pro-business and attempting to maintain positive economic growth given the political instability in a context of an ongoing global financial crisis. The case also attracted considerable media coverage both domestic and international. The media depicted the case as one of powerful businesses exploiting local communities. The Administrative Court of First Instance in Bangkok agreed with the plaintiffs and ruled that in the absence of an EAI and HAI, operations were illegal and ruled for an injunction of activities until ones were completed.

Immediately following the decision, the Abhisit government appealed to the Supreme Administrative Court seeking to revoke the injunction based on the grounds that it prevented the government's ability to effectively and efficiently administrate as well as damage the country's economic recovery efforts which were, at the time, particularly important given the Global Economic Crisis caused by the U.S. subprime loans market collapse.[40] However on December 2, 2009, the Supreme Administrative Court upheld the prior ruling. As chapter six illustrated, judges from both the Court of First Instance and Supreme Administrative Court admitted because they themselves lacked the technical expertise, they had to contract third parties to understand the impact assessments.[41]

[40] There are various estimates of the economic losses incurred by the initial injunction. Based on one estimate, the losses included billions of dollars.
[41] When asked whether there could have been a conflict of interest from those third parties, they acknowledged that it was possible, and that the court indeed needs to develop its own experts going forward.

In an interview with lead plaintiff Mr. Srisuwan Janya, he claimed that the decision to sue was one of necessity. "We realized that no one in government or any party cared. I had to convince the people that this had to be resolved through the courts. Most of the local people are not happy to use the courts. Some are scared because the cases are public, but I had to assure them that there would be no retaliation. Although the people know more about the Administrative Court today, I still have to educate them about what it does and their rights."[42]

Interviews with judges revealed that the decision was easy to derive because it was premised on Article 67 paragraph 2 of the 2007 Constitution, which states, "Any project or activity which may seriously affect the community with respect to the quality of the environment, natural resources and health shall not be permitted, unless, prior to the operation thereof, its impacts on the quality of the environment and on public health have been studied and assessed and a public hearing process has been conducted for consulting the public as well as interested persons and there have been obtained opinions of an independent organization, consisting of representatives from private organizations in the field of the environment and health and from higher education institutions providing studies in the field of the environment, natural resources or health."

Years prior when the National Environment Board (NEB) approved the projects at Map Ta Phut Industrial estate and surrounding areas, regulations for a HIA and public hearing did not exist. However while the 1997 Constitution required an EIA and an effort to include the public participation, the 2007 Constitution also required an additional HIA, the NEB regulations remained unchanged to reflect to additional standard. The 1997 and 2007 Thai constitutions

[42] Interview on April 19, 2012.

respectively granted new powers to citizens already able to petition the Administrative Court. An earlier ruling by a Court of First Instance in Rayong acknowledged that environmental and associated health defects experienced by locals was caused by pollution at Map Ta Phut. This made the Central Administrative Court in Bangkok's ruling easy to make.

The Supreme Administrative Court rejected the government's argument that the injunction was responsible for directly causing the economic losses by writing, "Good practices in continuous environmental management to enhance the quality of life for all citizens is regarded as an equitable right to be applied not only to the citizens who are presently living in this area but also to citizens who are going to settle down in this area in the future."

Immediately following the decision, the Ministry of Natural Resources and Environment drafted new regulations after consultation with a government-appointed "independent" four-party panel that former caretaker Prime Minister Anand Panyarachun chaired. Although the panel had approved a list of 18 criteria of industrial projects that would need to comply with section 67 of the 2007 Constitution and then submitted the list to the NEB, it only endorsed 11, causing public outrage.[43] Based on these new standards, only 2 out of the original 76 projects would be deemed environmentally harmful thus requiring compliance with section 67 in the 2007 Constitution. This regulation went into effect on September 1, 2010. On September 2, the Central Court in Bangkok overturned the injunction. The Central Court's decision caused outrage with plaintiffs. Plaintiffs re-submitted an appeal to the Supreme Administrative Court to (again) require the original 76 projects to comply with the original 2009 ruling, based on the previous NEB standards. The case remains active.

[43] 'Rayong Folk Want Hazards List Scrapped', Bangkok Post, August 30, 2010

This case demonstrates that the Administrative Court has the ability to impact important government policies. While plaintiffs were motivated to receive justice, judges question themselves about their ability to understand the technical complexity of environmental and health impact assessments. This brings into focus the court's ability to make informed decisions within their own capacity. The injunction lasted nearly a year. The economic losses from this decision reached billions of dollars as well as an increase in investor confidence concerns. The Abhisit government's response to the court's ruling illustrates how the government seeks to evade accountability. After the retroactive change of regulatory standards, the court agreed to re-open the plant. Still, this ex post-facto manoeuver has not prevented plaintiffs from continuing their legal fight.

More than just a Temple: Prasat Preah Vihear and Internal Politicialization

On June 18, 2008 Thailand Minister of Foreign Affairs, Mr. Noppadon Pattama, signed a joint-communiqué with the Cambodian Ministry of Foreign Affairs agreeing to support the Cambodian government's application to UNESCO for consideration of Prasat Preah Vihear temple for World Heritage status.[44] Prior to this decision, controversy about the temple and the surrounding land area had remained standing and, as a result, a potential source of friction between the two countries. In the early 20th century the French, under control of Cambodia, redrew maps to include the temple and surrounding area under their control. For the Thai side little protest was made until 1959 when both countries went to the International Court of Justice (ICJ) to mediate the dispute. In 1962, the court ruled that the temple was Cambodia's, although it

[44] Prasat Prear Vihear is the English transliteration of the Khmer word for the temple; Kao Pra Viharn is the Thai equivalent.

failed to produce clear ownership of the surrounding area in question.[45] The court's decision was a bitter defeat for Thai nationalists. Pawakapan (2013, 40) notes that, in the aftermath of the decision, "Demonstrations against the ICJ verdict were held throughout the country. Students from five leading state universities led protests in Bangkok. Even though public demonstration was illegal in Thailand at the time, the government openly approved of these instances." The ICJ decision proved unable to clarify the question of who controlled the surrounding area of the temple would be important because it would be revisited nearly forty years later.

For several reasons, the question concerning ownership of the temple's surrounding area was important. First, with respect to geography, anyone wanting access to the temple would enter through the more easily accessible Thai border. Second, this case would prove an enduring point of contention in Cambodian-Thai relations despite the efforts of the two governments to resolve the matter amicably. The Thai government under Chatchai Choonavan (1988-1991) used economic cooperation to resolve the border conflict. Third, the joint-sponsorship for World Heritage status would have been the first ASEAN security dispute to be resolved through mutual cooperation. However, this dream died. After the September 2006 coup to remove Thaksin Shinawatra, the Thai military crafted a new constitution and held national elections in which new party, People's Power Party (PPP) won. The new party was essentially pro-Thaksin and could be expected to act on his behalf. See Table 28

[45] For ICJ's decision, see: "Case concerning the Temple of Preah Vihear (Cambodia v. Thailand, Merits, Judgment of 15 June 1962: I.C.J. Reports 1962, p.6. See, http://www.icj-cij.org/docket/files/45/4871.pdf

Table 28

The 2007 National Election Result

Party	**Seats**
PPP	233
Democrat	164
Chat Thai	34
Phua Phaendin	24
Matchima	11
Ruam Jai	9
Pracharaj	5
Total	**480**

Source: Matichon, December 29, 2007.

During the PPP government, PAD protests continued. The election had essentially been a referendum on Thaksin and the military government. After winning the new election, the PPP quickly moved to reverse the actions and policies of the previous (military) government. First as Minster of Foreign Affairs, Thaksin's lawyer, Noppodon Pattama reinstituted Thaksin's passport that the previous Abhisit government had revoked. Relations prior to and after his removal, Thaksin and longtime Cambodian Prime Minister, Hun Sen, had developed a positive rapport. Hun Sen angered many Thais, including the Abhisit government by befriending and even

employing fugitive Thaksin as an economic advisor.[46] The PAD, fuelled by anti-Hun Sen and racist rhetoric against Cambodia, continued to insult and even claim that the joint application to UNESCO was motivated less by diplomacy than a projected land development deal to build casinos.[47]

During Thaksin's tenure as prime minister, Thai and Cambodian ties had moved closer. This was the result of both he and Prime Minister Hun Sen close friendship that reflected mutual economic interests as the former invested in casinos in Cambodia. After the 2006 coup d'etat, the military oversaw the development of the 2007 Constitution, The regime also ensured the TRT's dissolution and suspension of 111 of its senior executive members. The election results placed long-time political veteran and Thaksin ally, Samak Sundarej in power as premier. Previously out of the country, on February 28, 2008, Thaksin returned to face corruption charges. The PPP held talks to reform the 2007 constitution, which they believed was particularly hostile to them. This caused the PAD to reignite its protests against the government.

On June 24, 2008, the PAD submitted a plaint to the Court of First Instance in Bangkok asking the court to rule an injunction on the joint-communiqué. Four days later the court ruled in favor of the plaintiffs. The Samak government responded by questioning aloud whether the court had gone beyond its jurisdiction.[48] Discussing related critiques by academics, Pawakapan (2013, 68) quotes Thammasat University law professor Worajet Pakeerat's assessment of the decision,

[46] On October 21, 2008, the Supreme Court Supreme Court's Criminal Division for Holders of Political Positions convicted Thaksin of corruption of using his position to help his wife buy land and sentenced him to 2 years in absentia.
[47] The PAD and the Democrat Party who used each other to protest Thaksin would later pay for this. During the 2009 ASEAN summit in Cha-am, Hun Sen stated that Cambodia would not extradite Thaksin if he remained there. As expected, this angered the Thai hosts.
[48] Commenting on the role of the court, President Ackaratorn stated, "It's like we're making plenty of merit for people every day," Quoted in, 'The court with legal teeth' July 14, 2008. Bangkok Post.

"The Administrative Court had no jurisdiction over the case because the joint-communiqué was the work of the government and not an administrative order."[49]

In response to a petition by the opposition Democrat Party, on July 8th the Constitutional Court ruled that the joint communiqué was unconstitutional because it was in fact an international treaty, and according to Article 190 of the 2007 Constitution, needed to be submitted to parliament for approval. Criticizing this decision, Professor Worajet commented that the court's ruling that the joint-communiqué might have resulted in loss of Thai sovereignty was speculative and did not reflect article 190 of the constitution which requires parliamentary approval when a treaty results in loss of territory.[50] In the aftermath of the Constitutional Court's ruling, Minister of Foreign Affairs Noppadon Pattama resigned to accept full responsibility.

On September 9, 2008 the Constitutional Court ruled to remove Samak from office for corruption due to a conflict of interest from his hosting of a weekly cooking show. The PPP was on notice. Pasuk and Baker (2009, 327) wrote, "In the nine months following the installation of the Samak government, court judgments played a role in politics in a way never before witnessed in Thailand." After Samak was removed for violating the constitution, next in line was interim prime minister Mr. Somchai Wongsawat—Thaksin's brother-in-law. On December 1, 2008 the Constitutional Court ruled that the PPP, Chart Thai and Matchima were all guilty of election violations. In addition to banning the parties, the Constitutional Court also suspended 111 of the PPP's senior executives from political activity for five years. With the PPP removed, on December 17, 2008, the Democrats then formed a new government. Led by Prime Minister

[49] Woraject ultimately argued that the Constitutional Court should be responsible.
[50] Interestingly, the joint-communiqué only addressed the temple and not the disputed surrounding area. Thus, it was not in the jurisdiction of either court.

Abhisit Vejajiwa, the Democrat-coalition gained support from those scorned by Thaksin; most notably Buriram province veteran Newin Chidchob and his Bhumjaithai Party faction.

On December 29, 2008 the Supreme Administrative Court ruled to permanently revoke the joint-communiqué based on the grounds that it failed to receive parliamentary approval. In interviews with officials directly involved in the case, they offer a different perspective on the factors that went into the decision. Both current and former judges are adamant that the Supreme Administrative Court's ruling to overturn the joint-communiqué was influenced by its senior leadership whose actions were politically-motivated. According to a current Supreme Administrative Court judge with direct knowledge of the chamber's proceedings, the Supreme Administrative Court's original decision was going to be in favor of the now-deposed Samak government. However, once President Dr. Ackaratorn Chularat became aware of the impending decision, he forced the chamber to resign and established a new one comprised of judges that were anti-Thaksin. As a result, the new chamber upheld the original injunction.[51] In an interview discussing the case, a former Supreme Administrative Court judge remarked, "Look at the Kao Pra Viharn case. As soon as Ackaratorn learned that the original court had ruled 3-2 in favor of the MFA, he made the chamber resign before announcing the decision. He established a new chamber, and they ruled in favor of the plaintiffs. Although this was widely known and even reported in the media, nothing ever happened. When people brought the case to the (National) Counter Corruption Commission nothing was done."[52] President Ackaratorn's actions were reported to the then Counter Corruption Commission (then renamed from the original National

[51] Interview on October 29, 2014
[52] Interview on September 18, 2014."Khao Pra Viharn is the English transliteration of the Thai word of the Khmer word, Prasat Preah Vihear.

Anti-Corruption Commission). The media reported the change of chambers and the commission's investigation.[53] Under the Abhisit government however, the NCCC's investigation of Ackaratorn's actions was never concluded.

Consequences from the Supreme Administrative Court's revocation of the joint-communiqué resonated beyond the immediate parties. When the PPP held power, the PAD had made the temple dispute one of their strongest criticisms of Thaksin and the subsequent Samak government whom they accused of being a proxy. Seeking to align themselves with the popular anti-Thaksin movement, several members in the Democrat Party began to align with the PAD. In addition, now in power, senior executives in the Democrat Party made several vitriolic comments about Thaksin and his relationship with Prime Minister Hun Sen. As a result, relations between Cambodia and Thailand rapidly deteriorated. As a fugitive living in exile, Thaksin still met with party members in Cambodia much to the irritation of the Abhisit government. Frequent requests by the Abhisit government for Thaksin's extradition were soundly rejected by Cambodian officials. Insults and vitriolic rhetoric between cabinet officials in both countries ensued and culminated when, in October 2008, Kasit Piromya who would be the Minister of Foreign Affairs two months later, called Hun Sen a "gangster."[54] In addition, the areas surrounding the temple became militarized with frequent attacks on local residents followed by deadly border exchanges between militaries ensued this included several losses of life and economic losses.

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[53] Chamnan Chanrueng, "Kanchai amnattulakan an pen issara kap kankrathamphit to tamnaengnathi nai kanyutthitham" [The exercise of independent judicial power and the abuse of judicial power], 9 March 2011 http://prachatai.com/journal/2011/03/33456 (accessed 23 June 2015).

[54] Nation Channel Station, Khom Chat Luek, October 14, 2008. .

Ultimately, this dispute would spill over into the international arena, as Cambodia submitted the dispute to the ICJ seeking clarification of their original 1962 ruling. The Court would later rule that the temple and the surrounding land belonged to Cambodia.[55] What began as a dispute between two opposing parties in Thailand ended up leading to a foreign policy disaster between two neighboring countries. Indeed, the Supreme Administrative Court's decisions exacerbated tensions between two countries which eventually ended up being resolved by the ICJ. This demonstrates that while judicialization can originated domestically it can elevate to the international level.

Bad Bosses and Significant Losses: Thawil Bpleensri vs.
Yingluck Shinawatra (Court of First Instance decision: 847/2556)
(Supreme Administrative Court decision: 33/2557)

In June 2011, the Prime Minister Yingluck Shinawatra's cabinet transferred then National Security Council Secretary Mr. Thawil Bpleensri to the Office of the Prime Minister as Deputy Assistant Prime Minister. A career bureaucrat and appointee from the previous Abhisit government, Mr. Bpleensri was a career bureaucrat who expected to remain in his position despite the change in government. However, the new government under Thaksin's younger sister, Prime Minister Yingluck Shinawatra, decided to appoint former National Police Chief Wichean Potephosree to replace Mr. Bpleensri. This decision allowed for Mr. Priewphan Damapong, a Shinawatra family member, to replace Wichean as National Security Council Secretary.

[55] Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v Thailand) (Cambodia v Thailand), Judgment, I.C.J. Reports 2013, p.281.See: http://www.icj-cij.org/docket/files/151/17704.pdf accessed on September 4, 2015.

The cabinet approved the order to transfer Mr. Bpleensri's to the Office of the Prime Minister. While technically not a demotion with respect to rank, Thawil's new position would not have the same responsibilities as he had in his previous position. Given that Mr. Bpleensri was an appointee from the previous Democrat government, his new role as Deputy Prime Minister in the Office of Prime Minister would depend on the Prime Minister's delegation of tasks. In an interview with Mr. Bpleensri, he stated, "I considered the transfer to be a demotion. It was not fair, and it was not based on sufficient justification."[56] Mr. Bpleensri stated that he believed that the cabinet's decision was not based on merit and that he initially appealed the decision to the Merit Service Protection Board. However, according to Mr. Bpleensri, the Board's decision was a further source of injustice.

Based on a controversial (and illegal) "double vote" by the President of the Merit Service Protection Board committee that Mr. Bpleensri stated that he was more determined to appeal cases to the Administrative Court of First Instance. Mr. Bpleensri stated that he ultimately chose to use the Administrative Court because he had no other option, and that he believed that they would agree with his reasoning. "Prior to using the Court, I talked with my family and they gave me their support. I also had the support of my colleagues who too had faced similar injustices during their career."[57] Discussing his earlier experience with the Merit Service Protection Board, he confided, "I was really disappointed with them. They purposely tried to get me to accept the cabinet decision and just go away. I knew my cause was just, so I didn't."

[56] Interview w/ Thawil on May 21, 2012 As stated earlier, the Civil Service Act, stipulates that reasonable justification be given for a transfer.
[57] ibid, date.

In April 2012, Mr. Bpleensri's submitted his plaint to the Court of First Instance in Bangkok and attracted significant media coverage that was overly sympathetic.[58] Projected as a victim of injustice and corruption, Mr. Bpleensri's case was known throughout the bureaucracy. On May 31, 2012, the court ruled in his favor and ordered his reinstatement as Secretary to the National Security Council. In an interview in the aftermath of his initial victory, Mr. Bpleensri stated, " If Yingluck does not appeal to the Supreme Administrative Court and allows the Court of First Instance ruling to stand, I would move on and drop everything." When asked what would happen if the government appeals, he, answered, "I will be forced to go to the NACC. It is clear that my transfer was based on corruption."

The Yingluck government appealed the Court of First Instance's ruling. On March 7, 2014, the Supreme Administrative Court upheld the original ruling and ordered that Mr. Bpleensri be reinstated to his original position in 45 days. During that time however, questions about the motives behind the transfer had been raised as had strategies about legal action. Opponents of Yingluck believed that corruption motivated the transfer. The National Counter Corruption Commission agreed and submitted the case to the Constitutional Court. A few days following the Supreme Administrative Court's ruling, 27 senators submitted the case to the Constitutional Court requesting that Prime Minister be removed from office for the unlawful

[58] For more on Thawil's case, see: 'NSC ex-chief wins case'The Bangkok Post. June 1, 2013. http://www.nationmultimedia.com/politics/NSC-ex-chief-wins-case-30207367.html. 'Thawil wins fight against NSC tranfer' Bangkok Post, March 8, 2014. http://www.bangkokpost.com/news/politics/398798/thawil-wins-fight-against-nsc-transfer. All accessed September 7, 2015.

transfer order.[59] On May 7th, 2014, the Constitutional Court removed her and several cabinet ministers who signed the order.[60]

In another interview after the decision, Mr. Bpleensri stated that while he was relieved that the Supreme Administrative Court ruled in his favor, he was disappointed that the length of time it took for the decision to be made. According to him, " I believe that the Supreme Administrative Court was political because it took so long to make an obvious decision. The government's appeal did not even offer any new evidence to show that an appeal was warranted. The court purposely waited until it was near time for me to retire to rule in my favor. I am retiring in a few months."[61]

According to a senior Administrative Court of First Instance judge, before the Supreme Administrative Court announced its decision, all of the senior judges from the Court of First Instance and the Supreme Administrative Court met to discuss its potential implications. All of the judges agreed that the ruling had to be careful to avoid perceptions of any bias given the political environment.[62] This particular judge expressed disappointment that the court failed, "The senators used our decision to go to the Constitutional Court. The media wrongly viewed our decision as demonstrating that the Yingluck was corrupt. The senators then went to the Constitutional Court seeking her to be guilty. We [the Supreme Administrative Court] avoided the question of whether his [Thawil's] transfer was politically-motivated. It [the Supreme

[59] 'Senators seek court ruling on Yingluck' *Bangkok Post.* March 10, 2014. http://www.bangkokpost.com/news/local/399163/court-ruling-on-thawil-pliensri-invalidates-pm-hold-on-office-says-petition Accessed on September 7, 2015.
[60] 'Out of luck' May 7, 2014. *The Economist*. http://www.economist.com/blogs/banyan/2014/05/thailand-s-politics Accessed on September 7, 2015.
[61] At that time, Mr. Thawil was to retire in six months.
[62] Interview on August 21, 2014.

Administrative Court's ruling] simply stated that the government didn't provide a convincing justification for his transfer based on the Civil Service Commission Act. We were upset with the Constitutional Court because they made it seem like our decisions were related. The Administrative Court never said that Yingluck was corrupt."[63]

In sum, what seemed to be a routine transfer evolved into another judicial-led removal of a Thai prime minister without the Supreme Administrative Court's decision the Constitutional Court 's eventual decision to remove her from office. To think that another government was removed based on *an administrative order* points to the court's relevance to questions of politics and the endurance of judicialization. The Thawil Bpleensri case illustrates that in Thailand even a simple unlawful transfer order can evolve into something much more. It also shows that the Administrative Court is certainly aware of the politically-charged context in which it operates. Judges from the Supreme Administrative and Courts of First Instance met to ensure that the former's decision would not incur negative reactions from the public and, their overall reputation. For Mr. Bpleensri, the desire to challenge an injustice led to much more than even he could have originally fathomed. This episode also demonstrates that bureaucrats are now more aware of their rights than they were in the past and may be more willing to use court if necessary. Based on most recent statistics available, the Administrative Court is becoming a court where personnel disputes in the bureaucracy are resolved. The court has even created a specialized division that is specifically responsible for adjudicating personnel disputes within the bureaucracy.

[63] ibid.

Conclusion

The cases in this chapter illustrate that the judicialization of Thai politics has effects that permeate society, politics, and economics. Decisions by both judges and individuals were motivated by a host of factors. First the failure of checks and balances, especially within the Senate-appointed institutions, made the Administrative Court attractive as an "instrument of resistance" for government opponents. In the case involving Thawil Pliensri, because an existing institution like the MPSC had failed to produce what he believed to be a fair decision, in his opinion, this made the decision to elevate their grievance to the level of the Administrative Court a necessity. Thawil Pleeinsri made it clear that had the MPSC provided a fair ruling, he likely would have not have continued to fight.[64]

The larger political environment began to affect the court's leadership, who then started to influence other members of the Court. According to some judges, Supreme Administrative Court, President Dr. Ackaratorn Chularat's decisionmaking was anti-Thaksin crusade. Prior to the EGAT decision, the court managed to avoid the being politicized that the Constitutional Court and other independent institutions created by 1997 Constitution failed to. Until then, the Administrative Court was relatively little known and deemed irrelevant to political questions. Even after the EGAT decision, the Thai media (which was largely critical of Thaksin and his government, due to his repression of journalists) went so far as to characterize the Administrative

[64] Interview on May 21, 2012. Interestingly, in an interview with another senior bureaucrat who also won their case faced the same circumstance as the MPSC subcommittee's double-voting to defeat. This bureaucrat too stated that this injustice was motivation to elevate the case to the level of the Administrative Court. Interview on May 22, 2012.

Court as one of the last beacons of integrity that the 1997 Constitution had intended to be truly independent.

The Thaksin government's defeat in the EGAT case illustrates the Administrative Court's involvement in judicialization. Despite what the mainstream print media would characterize as courage in the face of an increasingly authoritarian prime minister, the court was motivated by a concern for maintaining its independence and weakening a government that its leadership felt hostile to it. While the decision was celebrated by onlookers and opponents of Thaksin, this represented a turning point in the court's short history.

Third, the Supreme Administrative Court's decision nullifying the rerun of elections in the 2006 national election illustrated a transition from judicialization to politicalization. While judicalization had until then occurred, politicalization of the court came with the involvement of King Bhumpiol. When the monarch's interests are directly or indirectly vested, the court, *like all Thai institutions*, will acquiesce.[65]

The behavior of former President of the Supreme Administrative Court Dr. Ackaratorn Chularat was critical and brings into greater focus the need to consider the importance of internal politicalization in discussions about judicialization. The question of independence is paramount. In closely critiquing the literature on judicialization one is compelled to conclude that prior studies had largely limited themselves to raising questions involving factors external to the workings of the court when it was in session. The cases in this chapter demonstrate that the judicialization of politics literature should take into greater account the importance of internal

[65] While it is fair to assume that, even if the King had not spoken directly to the Court, they may still have ruled in favor of the plaintiffs because of Ackaratorn's antics the latter would have been judicialization although under questionable motives,

politics at work within the Court's chambers, and, in particular, how its complex chemistry of interactions affects the direction the Court took in decision-making during recent turbulent times.

For example, all judges interviewed acknowledged that leadership is important. As the most visible and outspoken representative of the court, the President of the Supreme Administrative Court is important. In addition to administrative/technical responsibilities, he ensures that the Supreme Administrative Court and all of the Courts of First Instance perform their duties with probity and efficiency.[66] One of the key responsibilities of the President is to serve almost as a public spokesman. In many ways the Court's reputation is dependent on the stance taken by the President's behavior. One judge from the Court of Instance stated, "Court leadership is important. If the President is seen as political, then the court will also be viewed as political."[67] Discussing the significance of the President of the Supreme Administrative Court, a former senior Supreme Administrative Court judge stated, "If lower level judges want to get promoted, they feel compelled to show loyalty to him [the President], even if he is wrong. The President sets the entire direction of the court. If he is always in the media for bad things, then the people will see the court as bad."[68]

This affirms what previous judges expressed about the importance of the President's vision for the court. For example, one judge at the Court of First Instance stated, "While the first President [Dr. Ackaratorn] focused more on promoting the court in the public eye and was more "political", I think the current President (Hassavut) was less active in the media. He [Hassavut] has focused on the court's ability to adjudicate cases more quickly. Now judges want to complete

[66] This entails frequent inspection visits to regional courts.
[67] Interview on November 11, 2011.
[68] Interview on September 18, 2014.

cases as quickly as possible. He wants us to be quick but accurate."[69] When asked whether he and other judges are concerned that an emphasis on speed may reduce the quality of decisions, given the lack of judges, a senior Court of First Instance judge acknowledged, "This could occur, but this was the new focus of the Court due to some criticism that cases took too long. One area that would be affected is the amount of time judges spend investigating cases."[70] A judge from a Court of First Instance judge located in the South stated, "The new President wants us to make decisions quicker, but unless there is an increase in the number of judges, there is no way to prevent the quality of decisions from being negatively affected." Understanding the court's reputation for making slow decisions, a current Supreme Administrative Court judge said, "The people are waiting for our decisions. We have to do so quickly. The people are waiting and counting on us."[71] Most of the judges who commented on the leadership, acknowledged differences between the first and second Supreme Administrative Court Presidents, all expressed relief that the court was not as active in the media as before.

Former Supreme Administrative Court President, Dr. Ackaratorn Chularat's tenure was one filled with controversy. To expect otherwise would have perhaps been unrealistic given the larger political environment at that time. In a country where mass protests against an unpopular and increasingly authoritarian yet democratically-elected prime minister became increasingly common, to expect the Administrative Court to have remained on the "sidelines" when none of the other of the 1997 Constitution's independent institutions were afforded that luxury would have made Dr. Ackaratorn a legend. Perhaps it would be unfair to place complete blame on him

[69] Interview on November 11, 2011.
[70] Interview on May 27, 2012.
[71] ibid.

for the Court's fate, especially since Thaksin had managed to control the Constitutional Court composition even after a favorable ruling in 2001. Even if Ackaratorn would not have been personally invested in challenging Thaksin, it is hard to believe that he would have managed to "steer the court clear" of politics after King Bhumipol's address.

Likewise, while many Thai politics scholars believe that the King politicized the court to do his bidding, Administrative Court judges confirmed that internally, it was already pro- and anti- Thaksin. The King's remarks solidified the direction that the court would take in future decisions related to Thaksin and those who were perceived affiliated. The series of cases discussed in the preceding pages demonstrated that, internally, more conservative motivations can be the underlying motive for making ultimately progressive decisions.

This chapter has also demonstrated the evolution of the court. Previously more united, tensions between opponents of Dr. Ackaratorn and Hassavut have now started to manifest divisions inside the Court openly. Shortly after the May 2014 coup d'etat, then President Hassavut Vititviriyakul attempted to submit a draft to the military-appointed parliament that would have removed power from the JCAC to administer disciplinarian acts against internal ethics violations.[72] However, once judges became aware of the proposed legislation, they were incensed. On September 17, 2014, more than one hundred judges and administrative staff walked out of the court as a sign of protest against President Hassavut in protesting his attempt to submit

[72] For more on this, see: 'Court president faces revolt over law amendment move' The Nation. September 13, 2014. Kesinee Taengkhlao. < http://www.nationmultimedia.com/politics/Court-president-faces-revolt-over-law-amendment-mo-30243205.html>, < http://www.komchadluek.net/detail/20140917/192273.html> and '□□□□□□□□'□□□□□□□□ง พ.ร .บ.□□□□□□□□□□□□□□□□□□ [Judges oppose draft to Administrative Court Act] 'Administrative Court judges up in arms over draft bill' The Nation.,September 18, 2014. <http://www.nationmultimedia.com/politics/Administrative-Court-judges-up-in-arms-over-draft--30243531.html> All accessed September 7, 2015.

to the National Legislative Assembly an amendment modifying the JCAC's prerogative in managing human resources including the appraisal and discipline of judges without consulting and gaining approval from the General Assembly of Judges of the Supreme Administrative Court.[73]

Discussing the event, a senior Court of First Instance judge stated that the majority of judges were against Hassavut and wanted him to resign and to take full responsibility, or to at least force the Director-General of the Office of the Administrative Court, Mr. Direkrit Jenkrongtham, to resign.[74] He also stated that Hassavut was close to Ackaratorn, whom many blame for damaging the court's reputation. When this did not happen, the Court eventually created an ad-hoc disciplinary committee and suspended Hassavut. Much like the rest of the country, the Administrative Court's internal political divisions continue to persist. This indicates that judicialization will remain for the foreseeable future.

[73] This is in accordance to article 25 of the Administrative Court Act of 1999.
[74] Interview on August 21, 2014.

CHAPTER 8

CONCLUSION

Although writing about a United States of America that was still in its infancy, De Tocqueville (1835) noticed that rarely were there any political questions that did not eventually become judicial ones. As this dissertation has demonstrated, De Tocqueville's observation resonates with what has been occurring over the last fifteen years in Thailand. Since the 1997 Constitution of Thailand assigned judiciaries with the responsibility to oversee elected and non-elected institutions, courts have in turn determined important political, social and economic questions. In some cases, the judiciary has made decisions independent of external influence while in other instances, the court has been under the sway of the monarchy albeit this is rare.

This study of judicialization of politics in the Administrative Court has demonstrated that both plaintiffs and judges are paramount, given that the phenomenon is dependent on both. As the results from several public opinion surveys make clear, Thais are likely to be more open to using the Administrative Court when they have disputes with bureaucrats and/or government policies. First, Thais still hold the judiciary in much higher esteem than elected institutions, political representatives, and appointed officials acting in one official capacity or another in governing the nation. This is noteworthy given the instability that has characterized the country's politics over the last decade, in which the judiciary has become an active player. Second, that the judiciary remains more positively perceived than elected institutions may speak to

judicialization's endurance. Despite instances of the monarchy's politicalization of the Administrative Court, the court remains active—an indication of citizens' trust.Third, the Administrative Court has proven that judicialization can occur even during military dictatorships. The current injunction of a television station, Peace TV, from an opponent of the Chan-ochoa military junta television program is a bold act in a period where basic human rights remain under assault. This reflects the reality that judicialization is fluid and that, despite other cases in which the court rejected attempts to challenge the regime, judges rule strategically in the cases they agree to accept or reject. The activities and decisions of the courts are responsible for adjudicating grievances within and against the bureaucracy. The courts encapsulate the ideals of the rule of law and individual human rights. That regime opponents are willing to use the Administrative Court to challenge the regime speaks to the validity of judicialization as an important research topic.

Interviews with former plaintiffs reveal that they are willing to sue out of the desire to receive justice and that the benefits of using the court outweigh the costs. The explanation for the latter primarily resides within the court's institutional provisions. First, the court does not require individuals to hire a lawyer and provides free legal counsel. Second, the court offers a generous timeframe for the aggrieved to sue. Finally, all of the plaintiffs interviewed stated that the court was one of "last resort", as it was used after exhaustion of other measures to adjudicate grievances. The court's formal rules offer the best explanation because the court is only accessible after all other means have been employed.

Moreover, for an environmental rights advocacy lawyer who has represented hundreds of individuals in as many cases, the court presents an opportunity to hold the government

accountable. Through plaintiff victories, which were unimaginable in years prior to its establishment, the bureaucracy has to be more conscious of citizens needs. This also applies to politicians whose policies have become important benchmarks of their success. While in the lawyer's opinion, most Thais are still relatively uninformed about the court, their knowledge is increasing. For opponents of ruling governments, whether at the national or subnational level, the Administrative Courts offers opportunities for those who lose an election still to win victories. A Court of First Instance judge located in the northern region, stated, "Nowadays, in local government cases, even presidents of PAO will encourage local people to sue. This is a strategy used to place blame on the ministries in Bangkok and to protest their control over policy. Local governments pass the blame onto the ministries in Bangkok."[1]

For the senior bureaucrats interviewed in this study, their decision to use the Administrative Court represented the final opportunity to receive justice. Ironically, despite senior bureaucrats' victories, all believe that the court intentionally crafted their victories into pyrrhic ones. Specifically, the court's decisions were strategically submitted close to the date of their retirement in order to satisfy both parties. Giving plaintiffs a victory in the form of re-instatement would demonstrate that the court was able to provide justice and, providing their decision was close to their retirement, reduced the costs associated with the loss. Likewise, the environmental rights lawyer is also convinced that decisions reflect popular sentiment although on more rarified occasions. Further, recognizing that the courts are susceptible to outside influence, the lawyer admitted to employing several strategies to pressure judges, such as using

[1] Interview on November 2, 2011. Future studies should examine the use of the court by local politicians, especially with respect to protesting decentralization reforms that have been unfolding in incremental fashion. It may be possible to demonstrate a new strategy that local politicians use to deflect blame.

the media to attract widespread sympathy for the particular cause and mobilizing local communities to protest at the court.

This study has also demonstrated that gaining access to judges themselves can help better understand the court's behavior. Interviews with judges reveal several truths. First, despite initially professing an absolute commitment to providing justice only, most would later make apparent that they consider paramount the court's overall reputation, the anticipated reactions of the disputant parties, and the institutional context in which they operate when making decisions. However, there have been serious departures from the ideal when the courts cave in to outside political forces. It is in such instances when judicialization accedes to the forces of politicalization. This points to the need to understand how judges reveal their biases and the factors that could compromise their independence. In the case of the Administrative Court, the monarchy has proven to be the only factor able to directly dictate judges' decision-making.

Chapter 7 demonstrated that while judicialization requires judges to be able to make decisions independent of external influence, this does not mean that they are not political actors. Interviews with Administrative Court judges prove that they are all too cognizant of the political climate and the need to navigate deftly. While all of the judges that I interviewed did not admit to any direct wrongdoing, they did not believe that all of their colleagues maintained the same level of professional integrity. Interviews with judges have raised several questions about their decision-making. Their concern about the court's reputation is a concern for survival in autocratic times. This study has also shown the court's evolution. From a relatively quiet beginning, the court became more politically relevant. This was no doubt a consequence of the larger political environment, but also senior leadership's behavior. Interviews with several

Administrative Court judges revealed that prior to King Bhumipol's April 2006 speech to the court, the Supreme Administrative Court's leadership had already begun an anti-Thaksin campaign months earlier. It was former Supreme Administrative Court President, Dr. Ackaraton Chularat, who spearheaded efforts not only to accept the EGAT case but also to ensure that the court delivered an injunction in favor of the plaintiffs.

According to several Supreme Administrative Court judges, both active and retired, it was Dr. Ackaraton's conviction that he was protecting the nation from Thaksin that led him to go to great lengths to ensure that an important policy decision would be a defeat for the Prime Minister and his TRT government. Perceived by Courts of First Instance and Supreme Administrative Courts judges as being "overzealous" in his decision to accept the case given it was already beyond the 90 day limit, the legal-standing of some plaintiffs were questionable. Most stated that this was the first case where they believed the court became "political." This is an important reality. First, although it was not the first time the court was involved in a decision that directly challenged the popular but increasingly divisive prime minister's interests, it was the first time that judges stated that the court became "political." According to several judges, this case began to create tensions within a court that was until then relatively united. Judges expressed the opinion that the Administrative Court has not recovered from that position, as divisions among pro-Thaksin, anti-Thaksin and neutral groups still persist.

After Dr. Ackaratorn stepped down as president of the Supreme Administrative Court in October 2010, several administrative court judges that I interviewed stated that many judges viewed his successor, then president Hassavut Vititviriyakul, to be an acolyte, even though the

latter had a different personality and judicial emphasis.[2] Hassavut's unpopularity came to a head when the media reported that he had written two recommendation letters to the Royal Thai Police in hopes of influencing the promotion of an officer who was the friend of a family member. When asked in interviews, judges stated the entire court was embarrassed and became angry once they discovered that President Hassavut had attempted to usurp the JCAC's General Assembly disciplinary powers to decide whether he and the Secretary-General of the Office of the Administrative Court Direkrit Jenkrongtham should be suspended and/or expelled. This attempt made his suspension and eventual expulsion all the more likely. Eventually, the JCAC voted 8:3 to suspend Hassavut indefinitely in March 2015; in late September 2015 he was formally expelled.[3]

Second, the 2005 EGAT case provides new insight into the various charges filed because observers like Leyland (2011, 2009, 2006) and Mutebi (2006) believe that the court's November 2005 injunction was motivated by a commitment to professionalism. In addition, the decision was popular and signaled an important victory for unions and consumers. The court's motives were inspired by extra-legal motives to limit the activities of the prime minister and political parties. This demonstrated less of the judges' commitment to upholding the principles of jurisprudence than an instance of strategic political motives on their part. But this does not mean

[2] Although Dr. Ackaratorn had officially retired, he still works at the court as a paid "consultant." For his part, even Dr. Ackaratorn has acknowledged that he is outspoken. "Supreme Court chief Ackaratorn has recipe ready for post-retirement life." – Kittipong Thavevong. *The Nation*. September 26, 2010. http://www.nationmultimedia.com/home/2010/09/26/politics/Supreme-Court-chief-Ackaratorn-has-recipe-ready-fo-30138750.html Accessed on September 7, 2015.

[3] "Tribunal votes to suspend court president in promotion scandal" The Bangkok Post. March 31, 2015. < http://bangkokpost.com/news/general/513619/tribunal-votes-to-suspend-court-president-in-promotion-scandal > Accessed on September 7, 2015. Ironically, former President Hassvut would claim that he no longer had faith in receiving justice from his former colleagues. "Teary Hassavut rebuffs his dismissal but won't appeal" –*The Nation*, September 26, 2015. http://www.nationmultimedia.com/politics/Teary-Hassavut-rebuffs-his-dismissal-but-wont-appe-30269587.html Accessed on October 28, 2015.

that the court is not independent. At a time when other independent institutions, like the Electoral Commission of Thailand, the Constitutional Court and the National Anti-Corruption Commission were compromised by the Senate's ability to appoint pro-Thaksin members, the Administrative Court demonstrated its independence as evidenced by its ability to challenge Thaksin that led to his government policy defeats.

This dissertation has also shown that the separation of politics from governmental administration is no longer easy. Much like the contrasting color of opposing members' shirts, in Thailand, legal challenges ranging from transfer orders, the privatization of state-owned enterprises, or mandatory health and environmental regulations for major industrial projects are perfunctorily reduced to technical questions. As their responses have made clear, for many plaintiffs, their cases represent opportunities to resolve grievances and to challenge superiors in charge of protecting the public and the government itself. Indeed, the Administrative Court represents an opportunity for individuals to challenge those parties once deemed free from accountability: policymakers and bureaucrats.

This dissertation has demonstrated that judicialization and politicalization of the judiciary are not mutually exclusive. The former demands autonomy, as evinced by institutional safeguards for judges in reaching decisions without fear of retaliation. As the chapter on case studies has demonstrated, judges have the necessary safeguards to make decisions and have ruled against ruling governments both democratic and authoritarian. With respect to the current regime, on July 17, 2015 the Central Administrative Court ruled against the National Broadcasting and Telecommunications Commission's (NBTC) decision to revoke the license of Peace TV. The Administrative Court issued an injunction against NBTC (the junta) and in favor

of Peace TV, a popular Red-Shirt television station that the UDD leadership controlled. The NBTC claimed that Peace TV had breached the terms of its licensing contract as well as the current junta's broadcasting rules.[4] The importance of this decision is that not only clearly went against the military's wishes, but the court stated that it would also rule on the NBTC's authority to censor programs.

This Peace TV episode is not an isolated incident. On October 31, 2014, the Supreme Administrative Court dismissed a lawsuit against former Prime Minister Yingluck Shinawatra concerning a water management project that her administration approved in 2012.[5] Representing 45 villagers, the Stop Global Warming Association specifically named the former prime minister as well as the Strategic Committee for Water Resources Management, the National Water and Flood Management Policy Committee and the Water and Flood Committee as defendants guilty of malfeasance because of the lack of public hearings. In June 2013 the Central Administrative Court had previously ruled in plaintiffs' favor by requiring the then Shinawatra government to conduct additional public hearings. Since the Constitutional Court voted her out of office, the former prime minister is still facing several lawsuits for financial losses attributed to several policies under her administration. The Supreme Administrative Court dismissed the case by arguing that the plan had never been implemented and therefore there could not be any claim of compensation. Given that the current military government has successful facilitated lawsuits against the former prime minister, that the Supreme Administrative Court has made a decision for an opponent of the Chan-Ocha government speaks to the court's independence.

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[4] Red Shirt TV Allowed to Broadcast Again, Bangkok Post. July 17, 2015.

[5] 'Court dismiss water case against Yingluck', The Bangkok Post, October 31, 2014 and 'Court throws out Yingluck water case', The Bangkok Post, November, 1, 2014.

Finally, the Court of First Instance in Songkhla ruled in November 2011 that the Royal Thai Army and the Ministry of Defense compensate Two Yala Rajabhat University students, Mr. Amizi Manak and Mr. Isamaae Tae 250, 000 baht and 255, 000 baht for torture suffered at hands of the Yala 11th Task Force. In 2008 officers arrested and tortured both men for nine days. Arguing that the amount that the court awarded was insufficient, both appealed to the Supreme Administrative Court. The court began to hear the appeal on January 13, 2015.[6] Given the context in which the court faces, accepting an appeal in which the victims are requesting more compensation from the military for a case of torture is truly novel.[7] These examples are important as given the context of a military dictatorship that has curtailed basic human rights, such as freedom of speech, expression and assembly that the court made, the court's actions demonstrates judicialization's fluidity.

This dissertation has made several contributions to the existing judicialization of politics literature. First, it has demonstrated that judicialization and politicalization are not mutually exclusive. Rather the two competing forces are dependent on context; and thus, this study highlights the fluid character of both. This mirrors Moustafa's (2007; 2008) characterization of Egypt, where judicial independence was afforded exclusively in cases involving property rights for the expressed purpose of creating market confidence for investors. While there was issue spillover in Egypt that led to the authoritarian regime being challenged by the very courts it had established, it does demonstrate that judicialization and politicalization are issue-specific and can

[6] 'Torture case reaches Supreme Administrative Court' The Bangkok Post, January 13, 2015.

[7] In addition, on August 23, 2015 the Supreme Administrative Court ruled that the Prime Minister Office compensate the family of Mr. Ashari Sam-ae 534,301 baht including 7.5 percent interest within 60 days. Mr. Sam-ae died while in custody of the Internal Security Operations Command in Yala. For more, see, 'PMO dealt landmark compensation defeat', The Bangkok Post, August 23, 2015.

take place within the same court. Likewise, at different points, the Administrative Court of Thailand has been more aggressive in making decisions that affect important policy and political questions, either on its own volition (judicialization) or at the behest of other actors (politicalization).

With respect to the politicalization of the Administrative Court, the underlying factor was the proclamation of the His Majesty King Bhumipol who intended to move the nation beyond the political impasse. No individual or institution in Thailand has ever been free from the influence and desires of the monarchy when its interests are peaked on a certain issue. Even judges acknowledge that cases involving the Crown Property Bureau are usually avoided by the court.[8] When the monarchy's interests are not involved, judicialization is the norm. Despite instances of internal politicalization, as evidenced by Dr. Ackaratorn's decision to influence the court's decision in the EGAT and Prasat Khao Pra Viharn decisions, the Court remained independent of external influence.[9] Their desire to be respected and trusted by all motivated the court to seek a compromise and to engage in tactics, such as delaying decisions and changing chambers. Cultural values of compromising, avoidance and waiting for time to resolve issues are embodied in Thai social behavior and bear on judicial matters.

Second, and related, this study has better distinguished the difference between courts that are biased versus those that lack independence. While the judicial politics literature has convincingly proven that, like every political institution, judges have their particular biases, this

[8] When I asked a lawyer about cases that the court avoids, he mentioned this. A judge from the Court of First Instance, also confirmed this.
[9] This dissertation also contributes to the judicialization literature by highlighting the importance of internal politicalization. By illustrating the politics involved in decisionmaking and within the court, it also contributes to the understanding that the judiciary is far from a unitary actor.

does not mean their decisions are not "theirs." Determining judges' values can better allow scholars to analyze and predict the court's behavior depending on a particular context. Not all Administrative Court judges are conservative. In fact, most express a responsibility to protect citizens' rights in the face of an abusive bureaucracy.

Third, this dissertation has demonstrated that judicalization can produce progressive outcomes. McCargo's (2015) call to observers of Thai politics is timely in understanding the role of the judiciary and, in particular, the extent to which they produce progressive or conservative outcomes. While he demonstrated that the several courts have, when under the influence of the monarchy, made decisions that have supported demos-limiting and frankly anti-Thaksin rulings, he does acknowledge that conclusions have to be contingent on a the particular case in question. The example from this study, affirms the importance of his advice. But as the EGAT case demonstrated, it is crucial to know what transpired during decision-making. Another contribution to the judicialization literature that this study makes is that it demonstrates that progressive decisions can result from conservative motives. As the cases discussed made clear, because judges are strategic actors, that opaque operational dimension complicates one's ability to deduce their values from their final case decisions.

While all of the Administrative Court judges believe that the court assists citizens in holding the bureaucracy accountable, this does not preclude them from making decisions that appease opposing parties whenever possible. Many stated that ever since the court's inception, Thais are no longer intimidated by the bureaucracy/bureaucrats and that the court serves as a source of justice for the public. One judge stated that the court tries to be a "court of the people" where people can trust the court and feel welcome.

It is likely that judicialization will persist despite recent democratic and authoritarian reversals. While the current military dictatorship takeover has resulted in another setback to Thai democracy, eventually the soldiers will return to the barracks. The eventual re-introduction of democratic governance will likely produce an even more restrictive role for elected institutions. This is the result of a future constitution that will further weaken the aforementioned institutions—similar to what transpired with the 2007 military government and subsequent constitution. Still, it is unlikely that the next constitution will weaken the Administrative Court. After all, it was the Supreme Administrative Court's decision that ruled that the Yingluck Shinawatra cabinet had illegally transferred former National Security Council Secretary-General Tawin Bpleeinsri to a position of her choice. The Constitutional Court then used that decision as the pretext to dismiss her and the cabinet members from office. Again, the Administrative Court has proven to be an institution that allows for regime opponents to achieve victories.

The Judicialization of Thai Politics: Future Research and Recommendations

Future research on the judicialization of Thai politics from the perspective of the Administrative Court should focus on the impact of the court upon intra-bureaucratic relationships, especially with respect to grievances related to human resources and controversial administrative orders. Interviews with officers from the Administrative Court responsible for offering several training modules to bureaucrats about the court's operations and limitations indicate that the majority interests are aimed at challenging superiors in the bureaucracy. Finally, as one of the first studies that focused on the Administrative Court as a political institution, this dissertation has pioneered an attempt to raise as many additional research questions as it has

answered.[10] This is to be expected. This study has sought to highlight ways in which the courts, especially the Administrative Courts, matter in Thailand.

The Administrative Court is still relatively young. Future research could direct its attention on the extent to which the court strengthens or undermines whatever regime is in power. Furthermore, the extent to which the counter-majoritarian difficulty can provide a solution to a political impasse that has prevented Thai democracy and authoritarian regimes from being consolidated may determine the extent of continued judicialization. The court's ability to provide access and victories to losers of electoral politics may reduce the implications of defeat that may be cause for it to remain and potentially stabilize the current tension. As we have seen from Thailand and much of Southeast Asia, elections alone are neither guarantor of quality democracy nor regime legitimacy. Future studies should research the extent to which judicialization can improve the quality of governance of administration as well as the transparency and accountability of government. Furthermore, depending on the decision, studies would do well to examine the extent to which judicialization undermine those respective regimes. It is hoped that this study has set the stage for expanded research on the Thai judiciary and its relationship with and impact on the state and society.

[10] For example, the judicialization of politics literature presumes that independence from external actors is necessary but it does not address the question of internal independence that proved important in the Administrative Court's decisions. Future studies on judicialization and, especially those that adopt the court-centric approach, should consider the degree to which judges can be subject to internal interference or internal politicalization.

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