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A Peek Inside the Thai Judiciary: My Two-Year Experience as a Judicial Commissioner of Thailand

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1. Introduction: A rocky beginning.

Why would anyone be interested in knowing the life of a typical judge, and the judicial system in which he or she has worked, in any country? For one thing, the judiciary is regarded as one of the three branches of government in a democracy where the principles of checks and balances are important for anyone to understand the full working mechanisms of this judicial branch. This alone would be sufficient for us to be interested in knowing more about the people who form a part of this power. But, as these people are different from one country to another, we need to be careful not to generalise on the life of a judge or any judicial system. Thailand is no exception where its judges and its judicial system have special characteristics that defy simple generalisation. Therefore, to really understand the Thai judiciary, we must go inside the mere organisational structure of the courts of justice and how judges work, into how they are trained, start their careers, are promoted or demoted, and interact with other sectors of the Thai society.

As a typical Thai economist, I previously had had very little knowledge about Thai judges and the Thai judiciary. The legal part of our economic knowledge is simply that it is taken for granted, that the legal system does not have any effects on the economic decisions of consumers or producers, of the government and its people. Indeed, in a perfectly competitive world, a law is not required as all the people in it will adjust according to the forces of supply and demand, or the benefits and costs of their interactions. But this world exists only in theory where the "real" world will see a lot of social and political conflict where the judges and judicial system will play its critical role.

I have changed my perception of the Thai judiciary after having a chance to work as a commissioner in the National Anti-Corruption Commission of Thailand. I was thrust into a position where I had to use various laws to indict public officials for their various wrongdoings. I am not a judge, of course, but, whether you like it or not, what I did was a part of judicial adjudication that makes you feel that you should have a greater knowledge of Thai judges and the Thai judiciary. Hence my attempt to get involved in this sacred institution in a quick way. I became one of the two "external" commissioners in the Judicial Commission of Thailand on October 7, 2014. There are a lot of stories that went behind the above simple fact that I will try to elucidate in this paper so that interested readers could understand the complex interplays and checks and balances of the three sources of power in the Thai society. At this point, I will simply say that the Judicial Commission of Thailand, or JC from now on, is the highest authority that governs the policy and administration of the Thai justice system, just like the Thai Parliament is the highest organisation of the Thai legislature, and the Government Cabinet is the highest body of the executive branch of government. The term for my office was two years, which I served without any problems until October 6, 2016. But how I got to be in this position in the first place was full of drama and suspense that I will use as my starting point.

The rules and regulations governing how one can become a judicial commissioner has changed today from the time I got my position in 2014, but the composition of JC has remained unchanged since its latest reorganisation in 2000. There are 15 members in the JC, with the President of the Supreme Court as its ex officio chairperson, 6 members elected from judges in the Supreme Court, 4 from the Court of Appeal, 2 from the Court of the First Instance, and 2 from candidates outside the Thai court systems. It is the last two members from outside the Thai court systems that I call “external” judicial commissioners.

How are these two external commissioners selected? Today, according to the new regulations announced in 2018, these two commissioners will be selected by all judges in the country via voting ballots sent to the Office of the JC in Bangkok. To be on the list of qualified candidates, one has to submit his or her own application in person at the said office within a specified time period. The qualification of the external candidates is specified in Section 39 of the Act on Judicial Service of the Courts of Justice, B.E. 2543 (A.D. 2000). Reading this Section can make a potential candidate dizzy with the stringent conditions, 16 in all to be exact, imposed on him or her. For example, the qualified candidate must be a Thai by birth, aged at least 40, having at least a bachelor degree, with good character, not being a member of any political party, having no serious criminal record, not working in any government agencies, and even not having any independent occupation or career.

In 2014 the rules and regulations were different and even more complex. At that time, the selection of successful candidates would be made by the Thai Senate, not the judges in the Thai judiciary. The main argument then was that the legislative body, in this case the Thai Senate, should have a role in countering the power of the judiciary body by selecting the candidates of their choices. In May 2014, however, there was a coup in Thailand by the Thai military, where the old constitution was abolished and a group of 500 people were handpicked by the military junta to act as members of the National Legislative Assembly (NLA) and also as Senate at the same time. The external judicial commissioner candidates would have to go through the screening process organised by a special subcommittee set up by this interim legislative assembly acting as Senate where four would be shortlisted and submitted to the whole Senate to select the two of their choices by secret ballots.

I passed through the gruelling vetting processes by the Senate Subcommittee where I had to prepare my vision statement and answer various questions by members of this Subcommittee and was among the four shortlisted candidates being submitted to the full Senate for voting. Fortunately, I came first among the four candidates in the ballots, and my name was sent to the President of the JC to be announced in the Royal Gazette as a new external judicial commissioner.

It was here that all my troubles began. During the screening process of the Senate Subcommittee, all the names of candidates were announced to the public by the Subcommittee,

and request was made to the general public to submit any petitions or any evidence of wrongdoings or improprieties of these candidates that would help towards their names not being properly selected. This stage must have gone through the Subcommittee without any question, but after the announcement by the President of the JC, a group of people submitted a letter to the President of the JC to review the validity and qualification of my case on the accusation that I was defendant in many court cases pending final adjudications. Not checking the validity of such accusation, the President of the JC simply sent a formal letter to the President of the Thai Senate, asking for a review of my qualifications.

His action made first page news in many Thai daily newspapers. I unwillingly became the centre of the institutional feud between the legislative and judiciary branches of government. It was true that I had many cases pending in various courts of justice, criminal as well as civil, but as I had explained to various journalists who interviewed me, all of my court cases were the litigation works of those alleged culprits that I myself and my colleagues in the National Anti-Corruption Commission had indicted. As a result, the NACC commissioners were sued for misconduct in office by these people. In Thai law, indicted individuals could litigate against us in the Thai courts. Obviously, this was not a personal wrongdoing on my part but a part of the execution of my duty, and should not be used against me in my application of JC commissioner.

The Thai Senate, after reviewing my case, was firm on its earlier decision and action, but the President of the JC still would like me to consider vacating my position despite my written explanation to him and all other members of the JC during my first attendance of the JC meeting in late October 2014. An informal meeting was convened between me and several other officials of the Office of JC, including the Secretary General of the Office of the Judiciary in a tacit pressure to force me to resign on my own volition. But I stood my ground, citing the proper execution of my duty as a NACC Commissioner, not a personal offence. This seemed to work, as the meeting resulted in the complete acceptance of the JC later, and I had never encountered any doubt on my qualification, or my integrity, again throughout my tenure.

2. A day in the life of a Judicial Commissioner.

For “internal” or “in-house” or “judicial” commissioners, that is, those commissioners who are elected from judges of the three courts, the duty at the JC is a part of their daily work in addition to their normal judging cases, but for the two “external” commissioners, the job is also full time as we could not engage in any outside activities like being an advisor to any public or private organisations, or being a self-employed person. The JC usually meets twice a month, normally on the first and third Monday of the month. This meeting normally starts at 9 am and finishes around 12 at midday when lunch will be served to all members in the dining room of the JC Office before everyone goes out on his or her own business. There is no salary for all JC commissioners, but each will be paid a meeting fee of 20,000 baht (the rate in 2014 to 2016) for the two meetings in each month.

As for the two non-judge commissioners, there are no other requirements other than these two meetings in a month. On special occasions such as the opening of a new court, they would be invited to attend the opening ceremony as well. Or, when the JC commissioners would go on a study tour abroad, the two external commissioners will also be invited to join. There are no other facilities or amenities for their positions: no offices, no official cars, no assistants, no health insurance, and so on. In short, the main duty for external commissioners is just to participate in two monthly meetings where they have equal rights to vote on any issue brought to the attention of the Commission.

But what actually are the main functions of the JC? In this case, we need to refer to the law that provides the power to the JC which is the Act on Judicial Service of the Courts of Justice, B.E. 2543. However, unlike most other pieces of legislation, this Act does not provide a specific section that indicates the role or duty of the JC. Instead, the power of the JC is revealed in various parts of the Act. There could be a reason for this, that is, this law highly emphasises the importance of the integrity and independence of judges at all levels, and seems to hesitate to specify a body that exerts its controlling power over these judges.

I should mention at this juncture that the JC is not the same as the JAC or Judicial Administration Commission, its “sister” organisation that deals specifically with the physical and personnel administration and management of all courts in Thailand. The JAC is also headed by the President of the Supreme Court, but its members consist of an equal number of representatives (four) from each of the three courts, plus up to four outside administration, management, or budgetary experts appointed by the President. However, with the exception of the Chair of the JAC who is also President of the Supreme Court, all members of the JAC cannot be the same as the JC.

In general, it could be surmised that the overall functions of the JC can be classified into three categories: (1) the appointment (or instatement), transfer, and promotion of all judges: (2) the remuneration of all positions of judges: and (3) the punishment of judges who violate the established Code of Judicial Conduct. On the first group of functions, this is what the JC would do routinely during an annual cycle of changes in judges’ positions. The Office of the Judiciary would carry out its constant and continuous checking of movements of judges in all three courts and plan ahead what would be taking place in the upcoming year. The long list of appointments, transfers, and promotions would be presented to the JC at appropriate time, and the main duty of the JC was simply to approve such list. There was no point that any JC member would or should scrutinise all the names in the list to see if such appointments, transfers, or promotions were valid or would create any problems. The responsible officials at the Office of the Judiciary would have all the necessary information and facts to do all these. If there were any mistakes or irregularities, the affected judges would raise an issue, and the matter would come to the attention of the JC in due course. In my opinion, this part of the work

by the Office of the Judiciary runs smoothly and with clockwork precision, despite hundreds or even thousands positions to be considered yearly. This practice was made possible partly because there are strict seniority criteria governing the position of each judge. In a long queue of judges ranked by seniority where jumping of the queue is not allowed, each judge would know his or her own position, and would complain if his or her place against others in front or behind is unfairly treated. I will elaborate on this point again later.

The first function was made easier by the second function, which is that of the power to set remuneration levels of all judges. Except for the President of the Supreme Court who has the highest remuneration level class 5, all other judges would be classified under level 4 to 1. The judges in each court would have the same remuneration level. For example, Supreme Court judges would have remuneration level 4, Appeal Court level 3, and the Court of the First Instance level 2 and 1. This system makes it easy to move judges of the same court around as they are all in the same remuneration level. And once the higher level of status is attained, it will never go backward, unless there is a disciplinary punishment on that judge.

So, the punishment of a judge is a key function that makes the JC the most powerful organisation of the Thai judiciary. This is not difficult to see: judges impart sentences on guilty defendants; JC imparts sentences on guilty judges. But it should be noted that, within the Thai judiciary, the sentences will only be confined to disciplinary actions which, according to Section 76 of the JC Act, consist of five modes of disciplinary punishment: (1) expulsion; (2) dismissal; (3) discharge; (4) suspension from promotion or salary increase; (5) reprimand. If a judge commits a criminal offence, his or her case will be submitted to the National Anti-Corruption Commission (NACC) to investigate and prosecute (in conjunction with the Office of the Attorney General) before it is submitted to the relevant court of justice for its legal consideration and sentencing. The Thai judiciary cannot and will not initiate criminal investigation against its own judges.

Being the highest body of the Thai justice system, the JC has very elaborate steps in dealing with disciplinary punishments of judges. When a disciplinary complaint is properly presented to the JC, a group of 3 judges will be assigned to look into the matter and report to the JC. If there is evidence of a disciplinary infraction, the case will be submitted to the Judicial Subcommittee consisting of 21 members, 7 of which are appointed from each of the three courts. If there is still prima facie evidence against a judge in question by a majority vote, the result of the investigation will be submitted to the JC for final decision. The decision of the JC is final and there is no higher authority to which an appeal can be made, except in case of expulsion, dismissal, or discharge, a grievance can be made to the JC to reconsider. But the outcome is usually unchanged because it has gone through very elaborate steps already before the final verdict is reached.

There are two other regular or routine activities that the JC is involved in its normal undertaking. One is the administration of the annual intake or recruitment of new judges and the appointment of associate, non-tenured, judges from applicants outside the court systems. On the first activity, there are three ways in which a new judge could be recruited into the Thai judiciary. The first is the "Large Field" general examination of candidates with a bachelor's degree in law from local universities; the second "Small Field" examination of candidates with graduate law degrees from local universities, and the third "Mini Field" examination of candidates with graduate law degrees from accredited foreign universities. All of these candidates must also pass the bar examinations of the Bar Association of Thailand before being eligible to apply for the three fields of new judge exams. The first field is probably the most difficult of all three exams, as thousands of candidates vie for limited intake of new judges each year. But once these successful candidates pass their exams and become new judges (or assistant judges or judge-trainees as they are usually called at the start before being appointed full-fledged judges after a year of extra training), their most secured lives would begin, with continuous recognition, support, and promotions from 25 until their retirement at 70, that is if they conduct themselves well under the strict Code of Judicial Conduct.

As for the consideration and appointment of associate judges, the JC will make final decisions on the list of candidates selected by the Office of the Judiciary from applicants outside the court system to officially sit with professional judges on specialised cases that their expertise may be helpful such as on cases on juvenile and family matters, on international trade or international property rights, and so on. These non-remunerated, volunteer positions are widely sought after by a large group of the Thai public for their recognition and prestige in the Thai society,

3. The strengths and weaknesses of Thai judges

In the two years that I was working with JC under three different presidents, I was very surprised that there were so few disciplinary cases against judges of all levels. If I am not mistaken, there were less than ten cases in the two years that I worked there. This fact attests to the first important strength of Thai judges that make them one of the most trusted and respected public officials in the country, their personal integrity. As mentioned earlier, they must observe, as closely as possible, the Code of Judicial Conduct which has been enforced since 1986. This does not mean that Thai judges lacked integrity before 1986, but the application of this Code makes it easy for all judges to follow explicit guidelines.

There are many factors that help the Thai judges to be honest and proper in their jobs and their lives. Their salaries and other official assistance and facilities may not be as large as those in the private sector, but they can provide comfortable lifestyles in the Thai setting. Indeed, salary levels of judges in Thailand are highest among all other public officials, except those in state enterprises and special public organisations under specific public organisation laws. Job security for a judge is akin to life-time employment in exchange for quiet and secluded lives that

most judges will observe. But those who want to be judges know this from the beginning when they apply to sit for the judge exam, and once they pass it and want to become a judge, they are willing to sacrifice normal lives for this special kind of life. The prestige and public image of Thai judges also contributes to their willingness to stay in their jobs in this way.

Occasionally, some judges are willing to have a chance to be associated with others in Thai society outside the justice system. They could do this by asking for the permission of the JC to enrol or take part in special short courses on various public issues organised by various public organisations such as the National Defence College, the Capital Market Academy, the Constitutional Court, the Election Commission, or the King Pokklao Institute. The Office of the Thai Judiciary itself, through the organisation and management of the JAC does have its own special course for their own judges and invites outside participants from the public agencies and the private sector to join in. This course by the JAC called Senior Administrator Course on the Management of the Justice System (**ผู้บริหารกระบวนการยุติธรรมระดับสูง หรือ บ.ย.ส.)** has become one of the four most sought after opportunities for some participants in the private as well public sector to come to know important judges in person while in the course together. In good light, this also gives an opportunity for the judges to know more people outside their circle, but in bad light, it also provides an unwarranted opportunity for these people outside the judicial circles to influence the judgement of these judges in their work. Of course, a good judge could distinguish between what is proper or not and would be careful not to allow conflicts of interest to trample with their work. [2] Not all judges agree with the operation of this special course, but as long as it is proven that there is no harm done in the ordinary functioning of the judges, it could continue. As a matter of course, the JC would allow requests by judges to enrol in these courses if it is not too excessive. Integrity of these judges is readily accepted at face value.

Another quality that can be construed and accepted as a strength of Thai judges is the independence in their adjudication. This kind of independence must be perceived or interpreted at two levels, on the demand side, that is independence inherent in the performance of the judges themselves, and on the supply side, that is independence that exists or is provided by the Thai judiciary system. On the supply side first, the independence of judges is sanctified and enshrined both in the country's Constitution as well as the specific law governing their services, the Act on Judicial Service of the Courts of Justice, B.E. 2543. The second paragraph of Section 188 of the 2017 Constitution simply stipulates that "Judges and justices are independent in trial and adjudication of cases, in accordance with the Constitution and laws in the swift and fair manner, and without any partiality". And in Section 66 of the Act on Judicial Service, it is stated that "a judge shall not interfere in a trial and adjudication of other judges or commit any action which will deprive such trial and adjudication of independence or fairness".

[2] In 2015, a Supreme Court judge who was also a member of the JC was selected to be one of 9 judges in the Criminal Division of the Supreme Court to consider a case against the Prime Minister of Thailand at that time on the rice policy issue. She successfully declined this obligatory selection arguing that she used to enroll in the same class as this PM in the course organised by the Capital Market Academy.

On the demand side, most judges who take their independence in their adjudication very seriously would know that if they perform their duties correctly and honestly no one can find fault or interfere with them. This does not include the practice that the judgement or verdict of a particular judge may be scrutinised or reviewed by another responsible judge in the line of duties such as the Director General of a particular court. But this scrutiny is for the purpose of improving the judgement or verdict, not the replacement or change of judgement or verdict of the original judge. This is an indication of difference of opinion, not interference of adjudication power and independence of the original judge. If a judge whose verdict is scrutinised this way feels that his or her independence is being compromised or interfered with, he or she can report to the JC. There were a few cases where more senior judges were reprimanded or punished by the JC for overstepping their roles in dealing with the independence of other judges. [3]

As a matter of record, I would like to cite the viewpoint of a Thai senior judge who later became the President of the Supreme Court and Chairman of the JC. In 2013, Mr. Cheep Julamon (2013) in his individual course report submitted to the Rule of Law and Democracy Class 1 organised by the Constitutional Court of Thailand, believed in exactly the two most important requirements for the a proper adjudication of a Thai judge under the proper rule of law: the integrity of the judge which gives rise to neutrality or impartiality in his judgement and the independence which he has in his power. This is what he said in the summary of his report:

"There are two important principles of performing a duty as a judge in the court of justice: maintaining the neutrality and being independent in adjudication. Such principles must be upheld to make the court procedure fair to everyone that is involved. They are measures to protect the rights and liberty of the citizen under section 197 of the Thai Constitution B.E. 2550. The performance of the judge must be legal and in good faith under the law and legal tradition. As long as the judge acts within the judicial power in good faith and exercises discretion legally both in the issue of fact and the issue of law, the judge will be protected. On the contrary, if the judge exercises discretion in bad faith or illegally, the judge will be examined like other state officials. Nevertheless, in general, the scrutiny within the judicial power is different than that of the executive or the legislative. The examination of the judge performance includes the internal investigation through the Judicial Commission and by external investigation by the Senate or the National Anti-Corruption Commission."

[3] In 2020, a Thai judge committed suicide by shooting himself in protest against this practice of verdict scrutiny by a superior judge. He should have accepted this practice which is common everywhere. He could have stood his ground as no one can force him to do otherwise if he acts in good faith and with due considerations. If his verdict was incorrect, it may be corrected by appeal procedures, or reviewed by the JC later. If he still thinks that the superior judge interferes with his judgement, violating the independence principle of a judge, he should report this case to the attention and investigation of the JC which has the final authority to decide on his complaint.

However, while the independence of judges can be looked upon as a strength or strong point of the Thai justice system, it can also be a source of weakness. Imagine a judge who is incompetent in his or her background knowledge, or not careful enough in his or her conduct of the trial, really makes errors in judgement, the independence factor will actually create injustice rather than justice. Independence in judgement, therefore, must be supported by, or subsumed under, the best possible legal background of the judge. [4]

It is often argued by many legal experts, even some of the judges themselves, that the basic training of those who would become judges in Thailand is inadequate. This is not the fault of those judges who passed the difficult judge-trainees exam to become the judges, but the educational system concerning the granting of the first law degree in Thailand. Unlike the situation in some countries such as the US where to get a law degree, a student must first get a degree in some other disciplines whether in natural sciences, applied sciences, social sciences, or humanities before embarking upon law study, in Thailand students can go straight into the study of law without much background knowledge in other subjects or disciplines. In some universities, high school students are allowed to take courses in law while in high school. Therefore, graduates in law often lack a wider knowledge in other areas that may help them to become better or more all-round lawyers. In Thailand, however, law studies in public or private universities are relatively easier than in other subjects or disciplines. For example, bachelor courses of law in many universities do not include strong requirements in English or other modern languages, quantitative subjects like mathematics and statistics, or other strong social science subjects such as economics which can provide a strong foundation for most careers including modern judges. Law studies in Thailand stress familiarity in the four books of law: the Penal Code, the Civil and Commercial Code, the Criminal Procedures Code, and the Civil and Commercial Code. And in the judge-trainees exam, emphasis is placed on these four areas of legal understanding, at the expense of all other knowledge. True, there is a test of English in the annual judge-trainees exam, but the score given to this test is so small that some applicants did not sit for this test at all and were still successful in the overall passing grade.

To successfully pass the judge-trainees exam, applicants often rely on the memories and citations of correct sections in the four books of law, together with the guessing of likely exam questions from the past exams in previous years. Without a doubt, the successful candidates, especially in the “Large Field” exam, must be extremely capable ones, but the element of luck cannot be ruled out entirely. These successful judge-trainees will be required to spend a year of study given by the Office of the Judiciary to prepare them to be junior judges, but the rigour of

[4] On May 14, 2024, a woman activist, aged 28, who was charged with a series of “thought crimes” including lèse-majesté, died from hunger strike while being held in prison for more than three months pending trial. Her pre-trial bail was repeatedly refused by a judge even though she had her constitutional right for bail, and her hunger strike was her protest against this judicial injustice. The judge of course would argue that he has full judicial independence to refuse bail, and no one can stop him, not even the JC. No one has died from hunger strike like this before. Therefore, her death could be a meaningful catalyst to challenge unchecked judicial independence such as this one.

this training is never a subject of real professional review or evaluation (at least during the time I was working there). Obviously, there are those who pass the exam with high marks and those with low passing marks, but almost all of these judge-trainees finish this one-year course with flying colours, mostly with an A. It seems that the lives of these judges-to-be start with a well-protected atmosphere.

The observation and practice of the seniority principle in the Thai judiciary is often regarded as the source of strength and weakness of the Thai judiciary. I have eluded earlier that this system has provided job security for most of the Thai judges which, in turn, encourages integrity and honesty in their duties. But, to a certain extent, it could be argued that this seniority system stifles the efficiency and excellence in the judgments of these judges. This seniority system does not allow for the insertion or infusion of new judges who do not start their careers at the passing of the judge-trainees exams. There are many able law professors in Thailand, but these people never have an opportunity to enter the judicial service even temporarily. The two worlds of justice administration in Thailand have become mutually exclusive between the actual execution of legal cases in the courts of law and the teaching of law in universities. Unlike many developed countries where getting in and out of judgeship happens normally and regularly as the situations required for the efficiency, excellence, and innovation of judicial services, the judiciary in Thailand remains a stalwart of conservatism where traditional procedures reigns supreme in the adjudication practices, the precedence of previous judgements of cases dominates or significantly influences judgement of new cases, and strict adherence to the letter of the law becomes a usual norm of most judges.

In my two-year experience with the JC, I had many opportunities to address this issue of the pros and cons of the existing seniority system in the Thai judiciary with many members of the JC. While some were sympathetic with my argument about the insertion or infusion of outside legal experts as new judges, none showed any genuine desire to change the existing system. I tried to devise a procedure that the JC has the power to give explicit weights to the criteria of judicial appointment and promotion, say, 90 per cent weight to seniority and 10 per cent to merits of individual judges, but this was also unsuccessful. However, there was one incident that the JC exerted its appointment power that took a break from the usual customs of seniority-based appointment. This happened in 2017 when the judge with the third rank in seniority was selected by the JC as the new President of the Supreme Court, bypassing the judge with the second rank in the rostrum of the Thai judiciary. This decision was greeted with wide-spread approval not only within the judicial circles, but from the outside public as well for the strong character and merits of the chosen candidate. Personally, I take this as a movement in the right direction.

The independence of Thai judges may also be extended over the transfers against their will. Section 18 of the Act on Judicial Service states that “The transfer and appointment of a judge under Section 17 is permissible only with his or her consent unless it is an annual transfer,

appointment, promotion to a higher position or he or she is subject to a disciplinary action or becomes a defendant in a criminal case, according to the regulations of the JC as published in the Royal Gazette". I should add, however, that, if necessary, the JC can invoke Regulation on Regulation of the Judicial Commission on the Determination of Necessary Conditions that cannot be Avoided to Assign/Second Judicial Officials for Other Temporary Positions. I have seen the use of this Regulation a number of times over the objections or protests of few judges.

4. Thai judiciary in wider perspective.

What I have discussed so far is the pertinent story behind my two-year experience as a judicial commissioner of the JC of Thailand from 2014 to 2016. I have tried to explain what I saw from my twice monthly meetings of the JC from the point of view of an economist who has some hands-on experience in a quasi-judicial position as a commissioner in the National Anti-Corruption Commission of Thailand (NACC) and initiator of movements to espouse law with economics at that organisation and other academic institutions, especially at the National Institute of Development Administration (NIDA). My perception and appreciation of the Thai judiciary has been good, and I am confident that the Thai judiciary can continue to serve the Thai people well into the foreseeable future. However, one cannot deny that in the last two decades or so, the Thai judiciary has been subject to a series of criticisms as to its proper role in the Thai society, especially in the Thai politics. The main question being raised against the Thai judiciary is that it has overstepped its proper role as the efficient, effective, and impartial arbiter of individual and societal conflicts. Many people have called this phenomenon 'judicialisation of Thailand', or in a more specific, more contentious accusation, 'judicialisation of Thai politics'. How true is this accusation or allegation against Thai judiciary? Should we be concerned with this alleged phenomenon that casts negative lights on the Thai judiciary? If true, what is a correct way or ways under which the Thai judiciary should undertake? This is the discussion of the Thai judiciary in wider perspectives beyond my personal experience mentioned above.

First, it is often argued that the advent of Thai judicialisation began after the address of King Rama 9 to a group of Supreme Court judges in April 2006. [5] Thailand at that time was in turmoil, with the government under Dr. Thaksin Shinawatra who controlled the largest number of seats in the Parliament with his single party, yet he was facing ungovernable situations from widespread protests against his improper role as the country's prime minister. His dissolution of the parliament and the conduct of a new election had resulted in an unsuccessful outcome and a stalemate in the political situations. Not only that Dr. Thaksin's power and influence was so strong as to dominate practically all executive agencies in his government, it had also dominated the country's legislature and rendered it ineffective in challenging his authority. There was a widespread call for the King to intervene, to solve this political impasse, but the

[5] For a succinct yet comprehensive account on judicialisation in Thailand, see Dressel and Khemthong (2020). The paper by Duncan McCargo on "Competing Notions of Judicialisation in Thailand" (McCargo 2014) gives a finer detail on the nature and characteristics of judicialisation in Thailand.

King refused to play this role, suggesting that the judiciary which is the other source of power in the democratic system of checks and balances, not him, should undertake to play this role.

Those of us who remember the political situations in Thailand in the beginning of 2006 could sympathise with this turn of events. Until then, the Thai judiciary would prefer to wait until the conflict occurs before taking any actions rather than engaging in any preventive or pre-emptive stance. These judges would consider themselves solvers of conflicts, not the preventers of conflicts. Left to themselves, they would do nothing while the country got bogged down in political quagmire. The advice by the King was not only timely and necessary, it also brought about an opportunity for the judiciary, for good or ill, to reinvent itself.

We need to distinguish between the judicialisation of Thailand defined as a conscious increase in judicial activities on strictly political and administrative matters and on matters related to ordinary criminal and civil offences. On political and administrative matters, the judicialisation is meant to include the active role of the Constitutional Court and the Administrative Court, both of which have their origins in the 1997 Constitution. The Constitutional Court, in particular, has been subject to widespread criticisms for many of its questionable decisions on various political cases. For example, Pandit Chanrochanakit (2021), a lecturer of political science at Chulalongkorn University, has gone so far as to call performance records of the Thai Constitutional Court as a "deformed" constitutionalism. Another scathing criticism of the Thai Constitutional Court came from Khemthong Tonsakulrungruang (2017), currently a law professor at Chulalongkorn University. In his earlier analysis of the role of this court in the Thai society, he concluded that,

"By 2016, the Constitutional Court had lost its reputation as a neutral arbiter. Fighting corruption and restoring the rule of law became hollow mantras to justify its hostility toward a democratic government as the Court actively cooperated with the corrupt and opaque regime of NCPO [National Council for Peace and Order – M.C.]. The Court has proved to the public that it was one of the most powerful and decisive players in Thai politics. Unfortunately, the Court did not wish to guard the Constitution or protect the already fragile democracy."

In my opinion, I think the above criticisms are too severe. It seems that these critics had little qualm about the excessive and abusive power of the government under the so-called Thaksin System. Once the abuse of power of the government is evident, with no one being able to stop that, the Constitutional Court is cast in a difficult role to provide the needed checks and balances. It is true that the Court used feeble reasons to justify its decisions in several constitutional cases, such as the removal of a prime minister for his cooking TV show, or a dissolution of a political party for its perceived adversary to democracy. But there were cases where the Constitutional Court could rightfully act but did not do so. For example, it did not stop the government in 2011 to carry out its rice policy programme which, at the end, caused the largest public loss in Thai history. It might fail to do likewise again in 2024 when the government

in power decides to create another massive populist policy by handing out large amounts of spending money (10,000 baht each) to 50 million Thai citizens.

One problem with the current Thai Constitutional Court is that the members of the Court do not come from candidates with known expertise in constitutional law or practical experience in analysing and solving constitutional issues. More than half of the current membership of the Court comes from regular judges from the Courts of Justice with long years in normal judicial services but no formal training or experience in constitutional law. The members from the academic sector and former government bureaucrats suffer from the same shortcomings of not being well versed in constitutional matters. True, expertise in constitutional matters can grow with years in service, but if one can help it, this should not a learning-by-doing experiment for new constitutional judges. If the Constitutional Court would continue as a supra-national organisation whose decisions bind all other political and administrative organisations in the future, it is hoped that the qualifications of its members could change.

Many people would consider the Constitutional Court a specialised judicial unit that specifically deals with constitutional conflicts and disputes, not to be counted as a part of judiciary *per se* which deals with the adjudication of civil and criminal cases in general. If this is so, then, the analysis of the role and performance records of the Thai Constitutional Court should be different from that of the mainstream judiciary. In some countries, the normal courts of justice take care of all other disputes including constitutional, environmental, international trade, technological, and other modern matters by allowing normal judges to acquire special training in these new areas, or allowing insertion and infusion of new judges experienced in these new areas. It may be difficult for the Thai judiciary to do this, but it is not impossible as long as there is a serious change in the overall philosophy and administrative structure of the Thai judiciary. If this can be done, it would obviate the need to have a separate specialised judicial unit like the Constitutional Court, the Administrative Court, or many constitutional independent agencies such as the National Anti-Corruption Commission for that matter. The main point is: Can the present Thai judiciary do this?

Of all scholars who have studied the role of the Thai judiciary in its handling of its overall legal affairs of the country, no one could exceed or surpass Dr. Duncan McCargo of the University of Leeds in the UK in the extent of continuous attention and the degree of seriousness of scholarship on the study of the Thai judiciary. Well known for his extensive researches and writings on Thai politics, he is also known to be the most knowledgeable about the Thai judiciary. In 2019, he published a book entitled, ***Fighting for Virtue: Justice and Politics in Thailand*** (McCargo 2019) after extensive research in Thailand, including interviews with many

people in the Thai judiciary and other related sectors in Thailand. [6] This book has become one of the most important studies on the Thai judiciary to date.

In this book, McCargo began by explaining the process by which a new judge is recruited, trained, appointed, promoted, and socialised, more or less similar to what I described in this paper. We saw the same things: extremely competitive exam, stringent code of conduct, exalted image of respected public servant, and dignified, albeit closed, personal life. On this part McCargo concluded that Thai judges were not irrational, but they were put in a difficult position to do their work in the name of the King which resulted in several cases of strict pre-trial conditions and harsh sentences if the cases involved the *lèse-majesté* or defamation of the King section of the Penal Code (Section 112). [7] The book then recounts these difficulties faced by judges in adjudicating many other cases involving politicians, especially Dr. Thaksin Shinawatra and many of his colleagues in the special division of the Supreme Court dealing with criminal wrongdoings or misconduct in office of politicians or political office holders. The book ends with a chapter on the Constitutional Court and concludes that it is not too different from what we had discussed earlier.

At the end this is what McCargo sums up about the role of the Thai judiciary (McCargo 2019, preface:

"The book argues that during the final decade of the Ninth Reign, the Thai judiciary failed on all counts: their political interventions were inept and inflammatory, while their punitive treatment of supposed dissidents was unconscionable. The main questions asked by the book are: Why did the Thai courts embark on a path of judicialization, variously defined, from 2006 onward? How did they rise to the challenge? And above all, why did they fail? My tentative answers: judges failed partly because the mission they were given by the King was an impossible one, and because the monarchical network could never decide what to do about Thaksin and his associates. Judicial crackdowns, evasions, and procrastinations reflected the inconsistent position of the palace. But judges also failed because they took their nominal role as royal servants far too literally, trying too hard to protect the fading monarchy, rather than to administer justice in the public interest."

[6] Knowing that McCargo was working on the Thai judiciary, I invited him to talk with me when I met him at the Weatherhead East Asian Institute of Columbia University in the City of New York when I was attending the 2015 Conference of the American Law and Economics Association at this university. He did come to talk with me at NIDA in Bangkok some months later while I was still a member of the JC, and I was able to tell him about my experience at the JC, part of which I write in this paper.

[7] All judges are bound by Section 191 of the 2017 Constitution which stipulates that: "Before taking office, a judge and justice shall make a solemn declaration before the King in the following words: "I, (name of the declarer) do solemnly declare that I will be loyal to His Majesty the King and will faithfully perform my duties in the name of the King without any partiality, in the interest of justice for the people and of the public order of the Kingdom. I will also uphold and observe the democratic regime of government with the King as Head of the State, the Constitution of the Kingdom of Thailand and the law in every respect."

And again, on a larger picture of Thai politics where the role of the judiciary is paramount (McCargo 2019 Conclusion):

"This book has demonstrated that Thailand is suffering from a surfeit of legalism: revolving-door constitutions, politicized independent agencies—including a problematic Constitutional Court—and a judiciary that works on behalf of an imagined monarchy, rather than in the public interest. The results are plain to see: a profound degree of political instability, high levels of social polarization, very high conviction rates, the abuse of punitive treason spectrum laws, and a prison population that is rising uncontrollably. Far from easing tensions through reflexive and moderating decisions, the courts have aggravated matters and fuelled growing levels of crisis".

Under these untenable situations, McCargo did suggest some solutions to the existing problems of "hyper-legalism". He argued that "courts should strive for what Judith Shklar terms "tribunality": the pragmatic and judicious resolution of complex political problems. If this means fudging legal niceties to achieve a workable outcome, so be it". In their reviews of McCargo's book, both Khemthong (2020) and Larsson (2020) commented on the vagueness of McCargo's view on the possible solution to the problems of Thai judiciary: his "fudging legal niceties to achieve a workable outcome". To Khemtong, this idea "would sound almost as if he (McCargo) were urging a judge to depart from the text of the law in order to obtain a desirable outcome. That leaves the serious question of what the law is if not a set of rules and precedents to replace the whims of a man. Larsson also commented that the concluding message of McCargo's book is a rather perplexing one. Despite the overall positive review of McCargo's book, he has raised a pertinent question about the suggestion to fudge legal niceties to achieve a workable outcome, and the strange conclusion that a radical anti-legalism should be advocated. [8]

5. A concluding remark

At the beginning of this paper, I mentioned a glitch in my becoming an external or non-judicial member of the JC, but I did not mention the main reason I decided to apply for this job. Now I can go more into this point.

[8] But, somehow, as someone who had had experience working in a quasi-judicial organisation with a power to indict alleged political wrongdoers (NACC), I think I understand McCargo's point of view on this issue. A locally trained judge in Thailand would be unlikely to stray from the written text of the law, or the legal precedence from previous judgements, despite his or her own personal conviction. But for a social scientist with no formal local training in law, I would not be uncomfortable about making some decisions that may flaunt on "legal niceties" if I think the outcome is right. In other words, to use some legal jargon, I will be more inclined to rely on "*de facto*" arguments, that is, arguments based on verifiable factual events instead of "*de jure*" arguments, that is, arguments based on merely letters of the law in my deliberation, if I have a legal right to do so.

As the only academic economist in the 9-member National Anti-Corruption Commission (NACC) between October 2006 and August 2012, I enjoyed this opportunity enormously to be able to apply my economic knowledge to my new quasi-judicial job as anti-corruption commissioner. I had some basic training in jurisprudence from my one and a half years studentship at the Faculty of Political Science, Chulalongkorn University, and hands-on, real-world on-the-job training, at the NACC on criminal and anti-corruption laws. Each year we would visit the Supreme Court, to talk with its President and other senior Supreme Court judges to learn how we could work together more efficiently and effectively in our respective jobs. This also gave me a further desire to know the inside of the Thai judiciary where I had known nothing before, except the common respect that most Thais have on their judges. I wanted to know if, like what I had done at the NACC, I could use my economics to understand the Thai judiciary and use it to improve it if and when necessary. Therefore, when my tenure as an NACC Commissioner was over in 2012 I made a plan to apply for the position of external judicial commissioner according to Section 36 (3) of the Act on Judicial Service B.E. 2543, and got it in early October 2014.

I have more or less said what I like to say in this paper, after pondering about it for many years. My respect for Thai judges has not changed as a result of my being in their midst for two full years. I admire their integrity and honesty while in their jobs, and appreciate their conscious attempts to live a quiet and dignified life at all time. Of course, there are some who could not do this, and we in the JC had had a chance to mete out appropriate corrections. But the incidence of this is far smaller than the wrongdoings of other state officials that I had seen while at the NACC. I also appreciate the independence of the judges themselves and the principles of independence provided by the system. But I had some misgivings about how Thai judges have gone through their law studies in Thai universities, the brief additional training before the instatement from judge-trainees status, the other insignificant trainings that they have had during their careers, the straight line promotion system that sees no new innovative inputs into the Thai judiciary, and the difficult situations they face while doing their jobs in the name of the King, and so on.

I wish that the study for a basic law degree in Thai universities increases from four years to five years or even longer, with increased compulsory requirements on quantitative and foreign language (English in the main) skills, and the change in the structure and composition of the judge-trainees exam that reflects this greater overall knowledge. The seniority system should be amended by an increased emphasis on merits and the possibility of what I call the insertion or infusion into new judgeship from outside. Thai judges should be allowed, indeed encouraged, to engage more with the public, not so much on spoken opportunities, but opportunities to write and publicise their technical and intellectual opinions in public. As for the difficulty in carrying out their duties in the name of the King, normally this does not pose much problem unless they have to conduct a case against defamation of the King and other members of the royal family. But the Thai judges are bound by specific enforcement by the Constitution.

They cannot change their stance as long as this provision in the current constitution is still in force. It is possible that we could recuse normal career or professional judges from adjudicating these royal defamation cases on the basis of conflict of interest and temporarily assign outside judges for these cases. This could help relieve our judges from frequent criticisms that they often receive.

On the accusation that the Thai judiciary was instrumental in the unfair removal of democratically elected politicians from office, which, according to the view of McCargo, was rampant between 2006 and 2017, the current event in 2024 seems to create a new phenomenon which can be called counter-judicialisation or judicialisation in reverse. What do I mean by this? If McCargo's view is correct, that judicialisation of Thai politics ran between 2006 and 2017, and affected mostly Dr. Thaksin Shinawatra and his associates, then the situation in 2024 requires a reconsideration of the role of the Thai judiciary or the Thai justice system. After the coup in 2006, many writers complained that the actions of the Thai judiciary, especially the Constitutional Court, were unfair to Dr. Thaksin and his associates because they were popularly elected and had rightful power to do what they promised to the electorate. To the general public this seems to make sense, as they did not have all the details of what Dr. Thaksin and his associates had committed. Now, Dr. Thaksin has returned from his exile to face the penalty on the crime he had confessed of committing, but has been able to bend the rules, with the help of all his associates who are in power, to avoid being in jail even for a day, when the Thai judiciary could do nothing. This is what I call counter-judicialisation or judicialisation in reverse, and in my opinion it is not a good thing.

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