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Taking Rights Seriously? Recent Shifts in Procedural and Substantive Matters of the Thai Constitutional Court

Apinop Atipiboonsin[*]

Abstract

The Thai Constitutional Court has recently dealt with an increased number of cases concerning constitutional rights such as abortion and same-sex marriage, which have gained public attention in a similar way to the Court's many cases on political issues. This new development may show that the Court is now performing its role as a constitutional guardian and bulwark of rights. However, the expansion of the caseload on rights may promote judicial activism, and thus indicates a new strategy for the Court to become more powerful. This article looks both at the substantive changes in the jurisprudence of the Court as well as the procedural adjustments in recent court cases, in order to determine the extent to which the Court has transformed itself to fit the ideal image of a great constitutional court in a comparative context. The article analyzes all the constitutional rights cases decided since 2019, in order to gauge the overall performance of the Court. Furthermore, the article provides some examples of cases that seemingly protect constitutional rights, but in fact simultaneously serve to expand the future powers of the Court. The analysis then suggests that while the Court might appear to have improved its protection of rights, this comes at a cost – namely, that of a court which is potentially all the more active and politically involved.

Keywords: Constitutional court — Thai constitutional law — Constitutional rights — Judicial review — Judicial behavior

* Lecturer, Faculty of Law, Thammasat University; LLB (Thammasat University), LLM (Columbia University); SJD Candidate (University of Virginia); apinop@staff.tu.ac.th.

I. INTRODUCTION

The Thai Constitutional Court[1] has never been renowned for its role as a bulwark of liberty. The Court has instead been described as "a major threat to Thai democracy"[2] or even "the fourth branch of sovereignty."[3] Academic interests as well as international news headlines largely revolve around the Court's many controversial cases involving the dissolution of political parties or the invalidation of constitutional amendment proposals.[4] While famous constitutional courts of international stature such as those of South Africa and Colombia make their names through pioneering new rights, the Thai Court—after more than 20 years of existence—has yet to usher in a watershed moment for the rights and liberties of the Thai people.

Understandably, much has been written about the Court's political intervention, while cases on rights protection are rarely highlighted or discussed beyond a few prominent cases. Indeed, given the impact of past politically controversial cases, this focus is warranted. However, rights jurisprudence is still an essential part of the Court's work. After all, one of the primary roles of modern constitutional courts is the protection of constitutional rights embedded in the constitution.[5] Without constitutional rights cases, more than half of the Court's decisions would be excluded from analysis.[6] Particularly considering the recent appearance of cases dealing with abortion rights and same-sex marriage, which in many jurisdictions would be groundbreaking, the Court might already have started to push in a new direction.[7]

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[1] Hereinafter any reference to the Constitutional Court of Thailand will be shortened to "the Court" with a capital C for brevity.

[2] Eugénie Mérieau, "The Thai Constitutional Court, a Major Threat to Thai Democracy" *IACL-IADC Blog* (3 May 2019) <https://blog-iacl-aidc.org/2019-posts/2019/5/3/the-thai-constitutional-court-a-major-threat-to-thai-democracynbsp>.

[3] Pandit Chanrochanakit, "Deformed Constitutionalism: Thai-Style Judicialization and the Problem of Parliamentary Supremacy" (2021) 12 Political Science & Public Administration Chiang Mai University Journal Suppl. 2, 1, 17.

[4] For example, Björn Dressel and Khemthong Tonsakulrungruang, "Coloured Judgements? The Work of the Thai Constitutional Court, 1998–2016" (2019) 49 Journal of Contemporary Asia 1 <https://doi.org/10.1080/00472336.2018.1479879>; Panthip Pruksacholavit and Nuno Garoupa, "Patterns of Judicial Behaviour in the Thai Constitutional Court, 2008–2014: An Empirical Approach" (2016) 24 Asia Pacific Law Review 16 <https://doi.org/10.1080/10192577.2016.1200310>.

[5] Alec Stone Sweet, "Constitutional Courts" in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 818–19 <https://doi.org/10.1093/oxfordhb/9780199578610.013.0040>.

[6] For instance, 10 out of 20 cases decided in 2020 came from constitutional complaints (section 213) and constitutional questions referred from ordinary courts (section 212) that are cases affecting individuals directly. รายงานประจำปี 2563 (สำนักงานศาลรัฐธรรมนูญ, 2564) [Annual Report of the Constitutional Court, 2020 (The Office of the Constitutional Court 2021)] (Thai) 81–87.

[7] For example, *Roe v Wade*, 410 U.S. 113 (1973) (United States); Corte Constitucional de Colombia, Sentencia C-355/06 (Colombia); *Obergefell v Hodges*, 576 U.S. 644, (2015) (United States); Judicial Yuan Interpretation No. 748 (Taiwan); *Fourie and Another v Minister of Home Affairs and Another* [2004] ZASCA 132, 2005 (3) BCLR 241 (SCA), 2005 (3) SA 429 (SCA) (30 November 2004), Supreme Court of Appeal (South Africa).

Simultaneously, on the procedural side, as many as four cases of constitutional complaints successfully reached the Court in a span of just two years, from 2020 to 2021.[8] In light of the fact that the Court had throughout its history accepted only a single case to consider through this channel (back in 2011),[9] this sudden surge of cases needs an explanation. Has the Court's rights jurisprudence now become significant to all, not just to lawyers who focus on obscure doctrinal points in preparation for the bar examination?[10]As both the Court's procedural and substantive directions have changed profoundly in such a short period of time, has the Court started to become the guardian of both the constitution and of rights? The article thus investigates this reimagination of the Thai Court, as well as the possible causes of such rapid changes.

The article focuses primarily on constitutional rights cases over the past five years since the 2017 Constitution became effective, in order to capture the new developments and assess the effects they have had on Thai constitutional law. The article consists of three parts. The first part summarizes the history of constitutional rights jurisprudence by the Court, discussing both the doctrinal, factual, and ideological points that dictate its direction. The second part shows the Court's potentially progressive development since 2017, by looking at both the procedural and substantive changes. The last part proceeds to analyze the effects of the increasing number of constitutional rights cases, and determines whether the Court is now truly functioning better as a protector of the rights and liberty of the people.

II. THE BASELINE SINCE THE FORMATION OF THE COURT

The Court was designed to protect the expanded set of rights as well as the overarching principle of human dignity created under the 1997 Constitution, through various means.[11] Since 1997, the Court has held a strong-form constitutional review that is abstract and centralized with both *ex ante* and *ex post* jurisdictions. All subsequent constitutions have consistently affirmed the primacy of the Court on constitutional

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[8] Constitutional Court Decisions 4/2020, 19 February 2020; 7/2020, 27 May 2020; 5/2021, 17 March 2021; and 7/2021, 12 May 2021.

[9] Constitutional Court Decision 47/2011, 21 December 2011.

[10] Constitutional rights jurisprudence is the main subject matter of the constitutional law part in the Thai Bar examination. ธนรัตน์ ทั่งทอง, "วิชากฎหมายรัฐธรรมนูญ" เนติบัณฑิตยสภา (2562) [Thanarat Thangthong, "Constitutional Law Lecture" Thai Bar Association (2019)] (Thai) <https://www.thethaibar.or.th/thaibarweb/files/Data_web/dowloads_doc/term1/thanarat/con_thanarat.pdf> (exam questions focus on Section 212 and 213, right after the effective date of the 2017 Constitution).

[11] อุดม รัฐอมฤต และคณะ, การอ้างศักดิ์ศรีความเป็นมนุษย์หรือใช้สิทธิเสรีภาพของบุคคลตามมาตรา 28, (สำนักงานศาลรัฐธรรมนูญ, 2544) [Udom Rathamarit et al., "The Use of Human Dignity, Rights and Liberties of the People Pursuant to Section 28" (Office of the Constitutional Court 2001)] (Thai) 91–92 (noting that the Court can serve to protect constitutional rights and human dignity through various indirect channels even without a system of constitutional complaint according to the 1997 Constitution).

interpretation.[12] By design, the Court was poised to become one of the most powerful courts in the world.

Despite the grand design, the 1997 Court still failed to achieve its main objective, that of constitutional compliance of all political players, which resulted in the 2006 coup d'état.[13] The 1997 Court did not fare any better on the protection of individual rights.[14] Cases that involved constitutional rights were often dismissed outright, decided against or, even when the ruling was favorable, received without much interest from the public.[15] While the 1997 Constitution granted many rights and introduced the concept of human dignity for the first time, the enforcement of rights was not effective and consistent. Moreover, the first decade of the Court coincided with events in which human rights were blatantly ignored, such as the 'war on drugs' in 2003, and abuses against the Muslim population in the south in the Tak Bai incident in 2004.[16] Keeping in mind the long history of impunity for human rights violators,[17] the inception of the Court did not inspire any groundbreaking improvements in the rights and liberty of the people.

One reason for the unenthusiastic approach towards rights points to the design of the Constitutional Court docket.[18] While the Court was bestowed with newly created powers and jurisdictions (e.g. striking down legislation and dissolving political parties), the Court did not have free rein to choose any case to adjudicate. Unlike the American Supreme Court that has total docket control through the grant of certiorari,[19] the Thai Court is a centralized constitutional court with several formalistic requirements that restrict its discretion to a minimum with regard to the number of cases available to the Court. It is understandable that the Court should not be flooded with frivolous claims from all directions. However, even the German Federal

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[12] For example, Section 268 of the 1997 Constitution states that "The decision of the Constitutional Court shall be deemed final and binding on the National Assembly, Council of Ministers, Courts and other State organs."

[13] See a detailed account in Khemthong Tonsakulrungruang, "Entrenching the Minority: The Constitutional Court in Thailand's Political Conflict" (2017) 26 Washington International Law Journal 247.

[14] For an in-depth account of the performance of the Court in human rights cases under the 1997 Constitution, see Andrew Harding and Peter Leyland, *The Constitutional System of Thailand: A Contextual Analysis* (Hart Publishing 2011) 176–80.

[15] For example, the Court handed out 400 decisions during the seven years of the Court to 2004; but the Court only invalidated provisions of laws in six cases. เฉลิมพงศ์ เอกเผ่าพันธุ์, "การคุ้มครองสิทธิเสรีภาพของประชาชนตามรัฐธรรมนูญโดยศาลรัฐธรรมนูญ" (วิทยานิพนธ์, มหาวิทยาลัยธรรมศาสตร์ 2548) [Chalermpong Ekpaopun, "The Protection of Constitutional Rights and Liberty by the Constitutional Court" (LLM dissertation, Thammasat University 2005)] (Thai) 150.

[16] Michael K. Connors, "Ambivalent About Human Rights: Thai Democracy" in Thomas W. D. Davis and Brian Galligan (eds), *Human Rights in Asia* (Elgar 2011) 105, 108–14.

[17] See generally, Tyrell Haberkorn, *In Plain Sight: Impunity and Human Rights in Thailand* (University of Wisconsin Press 2018).

[18] Chalermpong, "The Protection of Constitutional Rights" (n 15) 155–56, 166–69.

[19] The Supreme Court has complete discretion over the granting of certiorari with at least 4 justices agreeing to review the case. Scott H. Bice, "The Limited Grant of Certiorari and the Justification of Judicial Review" (1975) 1975(2) Wisconsin Law Review 343.

Constitutional Court, which is supposed to be the model for the Thai Court,[20] has the discretion to choose from hundreds of petitions by individuals claiming violation of constitutional rights.[21] Since human rights advocacy through litigation has never been truly active in Thailand,[22] the Court can only get a limited range of constitutional rights cases from the available gateways. There is only so much the Court can do while waiting for potential groundbreaking rights cases to go through all sorts of procedural hoops and become available to the Court.

The gateways to the Court for rights protection were indeed minimal, especially in the beginning. According to the 1997 Constitution, there were three main gateways for rights cases to get to the Court, excluding all other channels that deal with conflicts between constitutional institutions, corruption charges, or cases involving political parties:

1) Legislation can be challenged before its promulgation through petitions from members of the National Assembly or the Prime Minister.[23] This is an ex ante review which could catch unconstitutional provisions before they cause a real violation of rights to any individual. However, the Court can only act here as a negative legislator, being part of the legislative process by negating a part of a piece of legislation.[24] The process is abstract; and it is next to impossible to anticipate all possible abuse of rights at this point. Thus, it is understandable that most legislation pass muster without much trouble throughout the history of the Court. From 1997 to 2013, there were only six pieces of legislation that were completely struck down through this channel;[25] most of them were invalidated on procedural grounds such as the failure to comply with legislative processes, or to reach a required quorum in legislative sessions.[26]

2) An ordinary court, a criminal court, or an administrative court may refer to the Court a constitutional question arising in the course of court proceedings. A party to the case can raise an objection that provisions in a law are in conflict

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[20] Harding and Leyland, *Constitutional System of Thailand* (n 14) 161.

[21] David Fontana, "Docket Control and the Success of Constitutional Courts," in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar 2011) 624, 627 <https://doi.org/10.4337/9780857931214.00043>.

[22] Buddhist tradition that focuses on duties and social order rather than individual rights could be one explanation for the lack of enthusiasm for rights protection. See Vitit Muntarbhorn, "Rule of Law and Aspects of Human Rights in Thailand: From Conceptualization to Implementation?" in Randall Peerenboom (ed), *Asian Discourses of Rule of Law* (Routledge 2004) 348.

[23] TC 1997, s 262; TC 2007, s 185.

[24] Hans Kelsen, "*La Garantie Juridictionnelle de la Constitution*" (1928) 45 Revue de Droit Public 197.

[25] ภาสพงษ์ เรณุมาศ, "สถิติคำวินิจฉัยของคณะตุลาการรัฐธรรมนูญและศาลรัฐธรรมนูญ (ตั้งแต่อดีต ถึงพ.ศ. 2556)" (2556) 43 วารสารศาลรัฐธรรมนูญ [Passapong Renumas, "Statistics of the Constitutional Tribunal and the Constitutional Court (From the Past to 2013)" (2013) 43 Constitutional Court Journal] (Thai) 43, 84–85.

[26] For example, Constitutional Court Decision 13–14/1998, 12 November 1998 and 16/2008, 6 November 2008.

with the Constitution if there has not yet been a decision of the Court on such provisions.[27] Through this channel, the Court serves its function as the final arbiter on constitutional questions, preventing the Constitution from being interpreted differently in every court of law.[28] However, reference to the Constitutional Court was heavily abused throughout the life of the 1997 Constitution, as lawyers often filed a constitutional challenge in courts as a strategy to delay their trials, taking advantage of the Constitution that states that the case at issue shall be on hold awaiting the answer to the constitutional question.[29] These cases burdened the Court greatly and seldom provided any meaningful constitutional challenges, as had been the intention.[30]

3) The Ombudsman can also submit cases to the Court whenever a provision of law or any act of any State official raises the question of constitutionality.[31] This third gateway was meant to serve as a flexible route, covering all the cases and controversies about constitutional violations that might not be applicable through other channels. For individual citizens, the Ombudsman provides the most accessible path in putting their grievances to the Court. Indeed, some early rights cases were brought to the Court by the Ombudsman.[32] That said, the Thai Ombudsman struggles with relatively low activity[33] and a redundant role compared to other independent and supervisory organs.[34] So far, filing complaints to the Court has not been a priority.

As seen from the limited number of gateways to the Court, the fear of overwhelming the Court with frivolous claims drove the drafters of the 1997 Constitution to be conservative in opening venues for constitutional rights cases. Not until 2007 did the Constitution add another gateway to the Court.[35] Fixing the defect

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[27] TC 1997, s 264; TC 2007, s 211.

[28] This function is essential for countries of the civil law tradition without the principle of stare decisis. Víctor Ferreres Comella, *Constitutional Courts and Democratic Values* (Yale University Press 2009) 20–24 <https://doi.org/10.12987/yale/9780300148671.001.0001>.

[29] TC 1997, s 264.

[30] For almost 10 years under the 1997 Constitution, only one case was successful in challenging the law through Section 264. Constitutional Court Decision 25/2547, 15 January 2004.

[31] TC 1997, s 198 and 197(1).

[32] For example, the disability case (Constitutional Court Decision 16/2002, 30 April 2002) and the gender discrimination case related to married womens' last name (Constitutional Court Decision 21/2003, 5 June 2003).

[33] Harding and Leyland, *Constitutional System of Thailand* (n 14) 214.

[34] สุรพล นิติไกรพจน์, "บทบาทและหน้าที่ของผู้ตรวจการแผ่นดินภายใต้รัฐธรรมนูญใหม่" (2560) 10(1) วารสารสำนักงานผู้ตรวจการแผ่นดิน 34 [Surapon Nitikraipot, "Roles and Functions of the Ombudsman under the New Constitution" (2017) 10(1) Office of Ombudsman Journal 34] (Thai) 37–38.

[35] The constitutional drafters did not plan to burden the Court with such an enormous task of constitutional complaints as they saw that all other gateways should be sufficient to enforce rights. See สำนักงานศาลรัฐธรรมนูญ, การให้สิทธิประชาชนฟ้องศาลรัฐธรรมนูญ: กรณีละเมิดสิทธิเสรีภาพตามรัฐธรรมนูญ (สำนักงานศาลรัฐธรรมนูญ 2548) [Office of the Constitutional Court, Granting the Right to an Individual to

in the 1997 Constitution, the constitutional complaint as inspired by the German system was added to allow any individual the right to petition the Court whenever their rights are adversely affected by the State.[36] However, since the text modified the original system by specifying that only provisions of laws (not any action by the State) could be challenged and that this channel shall be regarded as the last resort when all other viable paths to the Court had failed,[37] almost all subsequent attempts to submit a direct complaint failed. The Court accepted just one constitutional complaint, in 2011, for the first and only time during the life of the 2007 Constitution.[38]

Despite the above deficiencies concerning access to the Court, there were still rights cases where the Court ruled in favor of the mistreated individuals. Most of these cases found their way to the Court as part of the proceedings in ordinary courts or administrative courts. Since these courts do not have discretion whether to transfer constitutional questions to the Constitutional Court, they are obliged to deliver all petitions that are formulated correctly and that pertain to issues the Court has not decided on in prior cases.[39] Only through this channel can the Court have absolute control over the docket, with numerous cases to choose from in any given year.

But as discussed earlier, the channel has turned out to be a popular way for lawyers to prolong their cases, and serves as a last-ditch effort to win freedom for defendants in criminal cases.[40] Despite an improvement in the text of the 2007 Constitution that no longer halts court proceedings when the petition to the Constitutional Court is accepted,[41] the caseload of constitutional rights cases is large in quantity, but not high in quality. Social and economic rights cases that could potentially have pervasive effects on persons other than the parties to the case rarely exist. And since most cases come from criminal and civil courts, the Court has often had to deal with first-generation rights such as property rights, equality before the law, and the right to a fair trial.[42] With all these limitations in cases referred from ordinary courts, the Court has struck down a modest number of laws with limited impact on expansion and protection of constitutional rights.

File a Complaint With the Constitutional Court: In Cases of Violation of Constitutional Rights (Office of the Constitutional Court 1998)] (Thai) 245–6.

[36] จักรี นะวาระ, "การให้สิทธิบุคคลในการยื่นคำร้องต่อศาลรัฐธรรมนูญตามรัฐธรรมนูญแห่งราชอาณาจักรไทย พ.ศ. 2550 มาตรา 212" (วิทยานิพนธ์, มหาวิทยาลัยธรรมศาสตร์ 2552) [Chakree Nawara, "Granting the Right to an Individual to File a Complaint With the Constitutional Court According to Section 212 of the 2007 Constitution" (LLM dissertation, Thammasat University 2009)] (Thai) 59.

[37] TC 2007, s 212.

[38] Constitutional Court Decision No. 47/2011, 21 December 2011.

[39] TC 2007, s 211.

[40] One account of this strategy is in the case of Somyot Prueksakasemsuk, who petitioned to the Court that the lèse majesté law is unconstitutional because of its excessively harsh penalties. Duncan McCargo, *Fighting for Virtue: Justice and Politics in Thailand* (Cornell University Press 2020) 115–28 <https://doi.org/10.7591/cornell/9780801449994.001.0001>.

[41] TC 2007, s 211.

[42] First-generation rights are mostly traditional rights and liberties that protect the individual from State interference, as well as political rights. See Stephen P. Marks, "Emerging Human Rights: A New Generation for the 1980s" (1981) 33 Rutgers Law Review 435, 437–39.

To be certain, activism in accepting more cases and the zealous invalidation of laws are not clear signs of an influential and powerful constitutional court.[43] Courts can make a social and political impact beyond the bench even with a few significant cases.[44] But even when focusing on the rudimentary tasks of protecting traditional fundamental rights, in many cases the Court did not rule in favor of the petitioners.[45] The only category of cases where the Court consistently strikes down unconstitutional legislation is that of cases concerning equality before the law. Especially when dealing with gender equality, the Court has been steadfast in detecting any discrepancies in categorical equality (i.e., treat like cases alike) as shown in a case that challenged the mandatory use of the husband's last name by the wife, and in another case regarding unfair tax filing for married women.[46] When constitutional issues are legalistic and formulaic in nature, the Court is usually compelled to strike down laws accordingly.

That said, judicial deference in the interpretation of the Constitution in its formative years also prevented most cases from being successful. In one prominent rights case from the early days of the Court, the Ombudsman filed a petition representing two applicants who were disqualified from being judges due to their poliomyelitis;[47] and in another well-known case the Central Administrative Court referred to the Court a similar constitutional question challenging a law that prevents a lawyer from applying for the position of a public prosecutor.[48] Unfortunately, the Court upheld both statutes by deferring to the judicial institutions that defended these problematic rules, based on the idealistic portrayal of judges and public prosecutors.[49] The inconsistency of the Court's interpretation of equality is puzzling, but one can interpret this as a clash between a doctrinal perspective and extra-legal considerations peculiar to Thailand.[50] Equality before the law had to give way to certain traditions deemed essential to the State. Likewise, Article 112 of the Penal Code (the "lèse-majesté law") was upheld by the Court with reference to the uniqueness and continuity of the Thai royal institution since the time of Sukhothai Kingdom despite the clash between the Article and the right to freedom of expression.[51]

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[43] It is noted that many powerful courts like the US Supreme Court or the German Constitutional Court have lower invalidation rates compared to some less prominent courts. Stephen Gardbaum, "What Makes for More or Less Powerful Constitutional Courts" (2018) 29 Duke Journal of Comparative & International Law 1, 5–6 <https://doi.org/10.2139/ssrn.3050169>.

[44] ibid 6–7.

[45] For example, the Court upheld the law that presumes an intent to sell for those with more than a certain amount of narcotics (Constitutional Court Decision 3/2001, 20 March 2001), and the Court also did not take a chance to invalidate the use of leg shackles on a defendant (Constitutional Court Decision 11/2001, 18 January 2001).

[46] CC 21/2003 (n 32) and Constitutional Court Decision 17/2012, 4 July 2012.

[47] CC 16/2002 (n 32).

[48] Constitutional Court Decision 44/2002, 1 April 2002.

[49] ibid and CC 16/2002 (n 32).

[50] ธงชัย วินิจจะกูล, นิติรัฐอภิสิทธิ์และราชนิติธรรม (คณะเศรษฐศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 2563) [Thongchai Winichakul, *Rule of Law, Privilege, and Royal Rule of Law* (Faculty of Economics, Thammasat University 2020)] (Thai) 142–90.

[51] Constitutional Court Decision 28–29/2012, 10 October 2012.

III. CHANGES AFTER THE COURT'S SURVIVAL OF THE 2014 COUP

While the 2007 Constitution managed to fix some of the defects in the judicial review system, the perception remains that the Court has not done enough to enforce rights, even after the overhaul of the structure of the Court. And even when the Court did enforce rights, it was hardly credited as the guardian of constitutional rights. For instance, shortly before the coup in 2014, the Court had given several orders affirming the constitutional right to freedom of peaceful assembly of the anti-election protesters, which emboldened the movement to eventually interrupt the election.[52] Even though the judicial interpretations that produced these orders focus on constitutional rights, the Court was criticized as exploiting the meaning of constitutional rights to facilitate political goals.[53] The propriety of the Court was put even more in question after it survived the coup in 2014. While the junta abrogated the Constitution of 2007 and other democratic institutions according to past routines, the Constitutional Court that had been created under the abrogated Constitution survived the death of its constitutional foundation and served throughout the military regime.[54] Moreover, since the Court continued to operate under the temporary constitution with no meaningful cases handed out, the position of the Court with regard to the rule of law and human rights was constantly questioned during the whole period of direct military rule.[55]

Throughout the period of the 2014 Interim Constitution the Court only struck down a law once, in a case concerning the presumption of criminal liability for corporate representatives,[56] and it only did so because striking down such clauses had been an established precedent since 2012.[57] But this passivity is natural considering the limited jurisdiction the Court was granted by the Interim Constitution. Indeed, the pathways to the Court for *ex post* review of legislation were greatly limited. Section 5 of the Interim Constitution required that the request of the Supreme Court or the Supreme Administrative Court for constitutional review of legislations could only be

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[52] Rawin Leelaparana and Suprawee Asanak, "Constitutional Struggles and Polarised Identities in Thailand: The Constitutional Court and the Gravitational Pull of Thai-Ness upon Liberal Constitutionalism" (2022) 50 Federal Law Review 156, 164–66 <https://doi.org/10.1177/0067205X221087476>.

[53] ibid.

[54] ประกาศคณะรักษาความสงบแห่งชาติ ฉบับที่ 11/2557 เรื่อง การสิ้นสุดของรัฐธรรมนูญแห่งราชอาณาจักรไทย, ราชกิจจานุเบกษา เล่ม 131 หน้า 10 (26 พฤษภาคม 2557) [Announcement of the National Council for Peace and Order No. 11/2014 on the Termination of the Constitution of Thailand, Government Gazette vol 131 p 10 (26 May 2014)] (Thai).

[55] For example, Worachet Pakeerut stated how the Court is now part of a system formed by the coup. See "วรเจตน์ ภาคีรัตน์: 'ไม่มีศาลรัฐธรรมนูญเสียดีกว่า'" ประชาไท (2559) ["Interview with Worachet Pakeerut: 'It Should Be Better Without the Constitutional Court'" *Prachatai* (2016)] (Thai) <https://prachatai.com/journal/2016/02/63944>.

[56] Constitutional Court Decision 3/2016, 1 June 2016.

[57] Constitutional Court Decision 12/2012, 28 March 2012; 5/2013, 16 May 2013; 10/2013, 10 July 2013; 11/2013, 31 July 2013.

approved by the plenary session of the Supreme Court or the Supreme Administrative Court.[58]

The Court was also subject to further criticism for its role in legitimizing the junta's acts and for the varying standard used on its politically sensitive cases.[59] Soon after the promulgation of the 2017 Constitution, the Court also handed out more controversial cases, e.g. the dissolution of an emerging opposition party[60] and the declaration that calls to reform the monarchy were an attempt to overthrow the institution of the Kingdom.[61] Thus, with the Court repeating the familiar pattern of applying different standards to different political sides, it is tempting to treat all the Court's activities as falling into the same track.

But on closer inspection of all the cases since the 2017 Constitution came into effect, the Court has increasingly become far more active in the realm of rights in comparison to its track record. This change is not anecdotal or just due to a few cases like the *Abortion Case* that have grabbed the attention of the public. There are quantitative differences measurable in the number of decisions as well as changes in the law and the interpretation of laws, which substantively point towards progress in a particular direction. The next part of this article is an attempt to illustrate and analyze these developments within the context of the Court's recent history.

A. Overall Leniency in Accepting New Cases in the Procedural Stage

The most tangible change can be seen in the constitutional complaints system: the 2017 Constitution contains some modifications to the text, hinting at a less restrictive gateway for individual complainants. The expanded scope of Section 213 was one of the selling points during the campaign leading up to the constitutional referendum that ratified the Constitution. The subject of review has expanded from strictly 'provisions of the law' to 'an act,' and the stipulation that the option to petition shall only be available as a last resort was dropped from the text.[62] These changes relax the requirements for a valid constitutional complaint and thus create a possibility for the Court to be more active in accepting more Section 213 complaints.

Despite these textual developments, the Organic Act on Procedures of the Constitutional Court that was promulgated in 2018 has disappointed critics, who expected a more flexible approach to constitutional complaints. Firstly, the Organic Act stays true to the intention of the drafters who still fear an influx of petitions

[58] Interim Constitution of Thailand 2014, s 5 para 2.

[59] Dressel and Khemthong, "Coloured Judgements?" (n 4) 1.

[60] Constitutional Court Decision 5/2020, 21 February 2020.

[61] Constitutional Court Decision 19/2021, 10 November 2021.

[62] TC 2017, s 213: "A person whose rights or liberties guaranteed by the Constitution are violated has the right to submit a petition to the Constitutional Court for a decision on whether such act is contrary to or inconsistent with the Constitution."

overwhelming the Court.[63] For instance, a complaint still needs to be lodged first with the Ombudsman, and an application submitted to the Court within ninety days of the Ombudsman failing to submit the complaint to the Court.[64] Several State actions are also excluded from the jurisdiction of the Court, such as matters on which another court has already rendered a final judgment, or acts related to the personnel administration of the Judicial Commission.[65] The exclusion of all cases decided by other courts is especially limiting. Instead of following the German model of constitutional complaints, which allows petitions against the final decision of a regular court as the main source of constitutional complaints,[66] the Court was reverted to the previously held limitations by virtue of the new Organic Act.

Notwithstanding the Organic Act's narrow opening for constitutional complaints, there has nevertheless been an uptick in the number of complaints accepted by the Court. As discussed earlier, the Thai Court had only accepted a single constitutional complaint case since the inclusion of such avenue in the 2006 Constitution. However, in 2020 and 2021, the Court accepted and ruled on four cases of various kinds—a whopping rate of increase from the previous tally of just one case in a decade. But only two of these are strictly constitutional rights cases: one considers abortion rights (*Abortion Case*) and the other deals with the right of a national to enter their own country (*Exile Case*). At a glance, these cases are more salient to the realities of the people than those usually dealt with by the Court. This might be due to the encouraging signal sent by the more flexible language on the requirements for constitutional complaints in Section 213.[67] It is even possible that the recent constitutional rights cases that have reached the Court via other pathways may have inspired people to seek rights protection through the Court.

However, the other two Section 213 cases present a different picture, illustrating how constitutional complaints could provide convenient solutions to technical problems. In one case, the Court settles a constitutional interpretation regarding the qualifications of members of the Human Rights Commission (*HR Commission Case*). And in the other case, the Court reopens a case in which the Supreme Administrative Court ordered the government to pay a hefty compensation of 30 billion baht to a foreign company called Hopewell (*Hopewell Case*). In stark contrast to the previous two cases, it is quite difficult to understand, considering their central issues, how these cases are connected to the protection of constitutional rights.

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[63] ความมุ่งหมายและคำอธิบายประกอบรายมาตราของรัฐธรรมนูญแห่งราชอาณาจักรไทย 2560 (สำนักงานเลขาธิการสภาผู้แทนราษฎร 2562) [Intents and Explanations of Each Provision of the Constitution of 2017 (Office of the Secretary of the House of Representative 2019)] (Thai) 366.

[64] พระราชบัญญัติประกอบรัฐธรรมนูญ ว่าด้วยวิธีพิจารณาของศาลรัฐธรรมนูญ พ.ศ. 2561 [The Organic Act on Procedures of the Constitutional Court, B.E. 2561 (2018)] (Thai) s 46.

[65] ibid s 47.

[66] Luisa Wendel, Anna Shadrova, and Alexander Tischbirek, "From Modeled Topics to Areas of Law: A Comparative Analysis of Types of Proceedings in the German Federal Constitutional Court" (2022) 23 German Law Journal 493, 505–6 <https://doi.org/10.1017/glj.2022.39>.

[67] "เปิดสามเหตุผลศาลรัฐธรรมนูญไม่รับคำร้องประชาชน กรณีถูกละเมิดสิทธิเสรีภาพตามรัฐธรรมนูญ" *iLaw* (2561) ["Three Reasonings the Constitutional Court Used in Dismissing Cases Filed by the People Regarding the Violation of Rights" *iLaw* (2018)] (Thai) <https://ilaw.or.th/node/4743>.

In both these cases that involved the technical and doctrinal discussions of rights, the Court struggled to apply terminology of rights to comply with the requirements under Section 213. In the *HR Commission Case*, the question at hand was whether members of the National Legislative Assembly (the legislative branch formed to replace Parliament after the coup in 2014) are ineligible as candidates for official positions with independent organs.[68] While the Constitution clearly states that former members of Parliament are disqualified,[69] it is not written anywhere that members of the National Legislative Assembly are classified as members of Parliament as regards this issue. Instead of treating the case in straightforward terms (resolving conflicts between constitutional organs—a kind of case not permitted under Section 213), the Court relied on the principle of equality before the law to consider whether conflicting interpretations between independent constitutional organs result in unequal treatment of petitioners.[70] Similarly, while the central issue to the *Hopewell Case* is the source of law and the interpretation of the prescriptive period to file a case in the administrative courts, the Court framed the case under the principle of the rule of law and the general protection of rights and liberties by the judiciary.[71] The case was criticized as a desperate attempt to protect Thailand's financial interests while undermining the trustworthiness of Thai judiciary and its ability to attract foreign investment in the long run.[72]

Even more puzzling, three of these four Section 213 cases could simply have been dismissed at the procedural stage using routine technicalities consistently applied by the Court in other dismissals.[73] In the *Exile Case*, the Ministry of the Interior had already revoked the order, rendering the case moot.[74] Thus, the Court could just have dismissed the case; there was nothing for the Court to rectify, as the complainant's rights were no longer violated.[75]

In the *Abortion Case*, a doctor who was arrested and charged with providing a procurement of abortion (pursuant to Section 302 of the Penal Code) filed a constitutional complaint to the Court to consider the constitutionality of Section 301 and 305 of the Penal Code. But Section 301 only targets pregnant women, not medical

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[68] CC 7/2021 (n 8).

[69] พระราชบัญญัติประกอบรัฐธรรมนูญว่าด้วยคณะกรรมการสิทธิมนุษยชนแห่งชาติ พ.ศ. 2560, ราชกิจจานุเบกษา เล่ม 134 หน้า 1 (10 ธันวาคม พ.ศ. 2560) [Organic Act on the National Human Rights Commission 2017, Government Gazette vol 134 p 1 (10 December 2017)] (Thai) s 10(18).

[70] CC 7/2021 (n 8) 4.

[71] CC 5/2021 (n 8) 7.

[72] "เปิด 5 ปมปัญหา หลัง 'ศาลปค.' รื้อคดี 'โฮปเวลล์' ใหม่" สำนักข่าวอิศรา (2565) ["Five Problems After the Administrative Court Gave a Retrial of Hopewell"] (Thai) *Isranews* (2022) <https://www.isranews.org/article/isranews-news/110560-supreme-admincourt-hopewell-law-news.html>.

[73] iLaw lists three main reasons given by the Court in its first 55 dismissals of petitions under the new Section 213 as follows: (1) there are other pathways to reach the Court; (2) the Constitution has other prescribed procedures for the issue at hand; (3) there was no violation of rights and liberties. See "Three Reasonings" (n 67).

[74] CC 7/2020 (n 8).

[75] ibid.

practitioners.[76] While Section 305 exempts those charged under both Section 301 and Section 302 if the procedure was operated by a medical practitioner for legitimate reasons,[77] the Court ultimately struck down only Section 301, which did not apply directly to the complainant.[78] Thus, the case was only indirectly related to the charges against the doctor.[79] Moreover, the Court did not address how the complainant had already exhausted all the steps and procedures available in accordance with the requirement under Section 213 when she did not try to make a petition to the Court in the criminal court according to Section 212 first.[80]

As for the *Hopewell Case*, the Court contradicts directly its own precedent found in Case 6-7/2018, which clearly states that the Court upholds "the finality of judicial decisions" and thus shall not reconsider a case already decided by other courts.[81] Furthermore, the Court struggles to justify interpreting the State Railway of Thailand and the Transport Ministry, which are both State organs, as persons directly injured by a public act, since the resolution made by the plenary of the Supreme Administrative Court judges did not directly cause grievances to either of the complainants.[82]

In view of the above observations, the impression is that the Court is willing to bend its rules to generate more cases through Section 213 only when doing so conveniently serves a purpose, causing as little trouble as possible to the State. The acceptance of the four cases might be a phenomenon compared to the past decade, but the fact that they were picked from among 385 applications for constitutional complaints since 2017 (an 'acceptance rate' of 1.04%)[83] defeats the purpose of Section 213 being an accessible gateway for individuals with grievances. In comparison, the German Constitutional Court had ruled in favor of the complainant in 111 cases from among 5361 constitutional complaints (a 'success rate' of 2.07%) from 2011 to 2022.[84] Unlike in Thailand, the majority of cases decided by the German Court came from the channel of constitutional complaints.[85]

Section 213 was not the only venue where rights adjudication took place; there has also been a change in constitutional rights cases referred from other courts. The uptick in Section 212 cases admitted to the Court is observable—albeit not as obvious. While the requirements for cases referred through ordinary courts and administrative

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[76] ประมวลกฎหมายอาญา [Penal Code] (Thai) s 301.

[77] ibid s 305.

[78] CC 4/2020 (n 8) 6–9.

[79] CC 4/2020 (n 8).

[80] Organic Act on Procedures of the Constitutional Court (n 64) s 47(3).

[81] Constitutional Court Decision 6–7/2018, 28 November 2018, 9.

[82] "Five Problems" (n 72).

[83] "สถิติคดีของศาลรัฐธรรมนูญ" วิทยาลัยศาลรัฐธรรมนูญ ["Statistics of Constitutional Court Cases" *College of the Constitutional Court*] <https://www.constitutionalcourt.or.th/ewtadmin/ewt/occ_web/ewt_news.php?nid=773>.

[84] "Report 2020" *Federal Constitutional Court* (2021) 47 <https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Jahresbericht/jahresbericht_2020.pdf?__blob=publicationFile&v=6>.

[85] Wendel et al., "From Modeled Topics to Areas of Law" (n 66) 505.

courts under Section 212 remain unchanged from the 2007 version, the easing at the procedural stage is observable by comparing the number of cases accepted.[86] From 2009 to 2013, 44 out of 107 petitions made it to the Court (41.12%). In contrast, from 2018 to 2022 the Court accepted 33 out of a total of 44 petitions (75%) for substantive consideration. While the declining popularity of using the channel as a strategy to delay court proceedings could also be responsible for more cases being accepted in spite of the lower number of petitions, the Court's increased willingness to engage with rights cases is clear from the numbers.

In addition, a brand new gateway (which also made its debut in the 2017 Constitution) for cases filed against a State agency demanding benefits under Chapter V of the Constitution (Duties of the State) was created, along with other improvements in existing gateways. During the drafting period, the new way of enforcing rights has been the highlight of the new updates to the Constitution, claiming an innovation unlike any other jurisdictions.[87] Through this newly added Section 51, many socio-economic rights have been reformulated as State duties and could thus be enforced when it is perceived that the State has failed to fulfil its duties. Potentially, the Court could follow the famous *Grootboom* case of the South African Constitutional Court by instructing the government to achieve the progressive realization of these rights.[88] However, not a single case under Section 51 has emerged during the first five years. It is possible that the failure of the new way of mobilizing rights may be due either to its novelty or to its obscurity.[89] In any case, the lack of enthusiasm on the part of the Court may discourage potential litigants from pursuing this pathway. Given the Court's track record, it is unlikely that the Court will be enthusiastic about forcing the government to grant rights—especially social and economic rights—to individuals.

B. Tendency to Strike Down Legislation in the Substantive Stage

From January 2018 to the end of June 2022 the Court accepted 33 petitions through Section 212 and struck down provisions of law in six cases. The success rate of 18.18%

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[86] The author read all constitutional right cases accepted into the docket by the Court from 2009 to 2013 (the five full years of operation before the coup in 2014) and from 2018 to 2022 (the first five full years since the 2017 Constitution) as publicly available via the Court's database and hand-coded the data with inputs from the Court's statistical data on overall case filings.

[87] สำนักงานศูนย์วิจัยและให้คำปรึกษาแห่งมหาวิทยาลัยธรรมศาสตร์, สิทธิของประชาชนและชุมชนในการฟ้องร้องหน่วยงานของรัฐ ให้ปฏิบัติตามรัฐธรรมนูญแห่งราชอาณาจักรไทย พุทธศักราช 2560 มาตรา 51 และพระราชบัญญัติประกอบรัฐธรรมนูญ ว่าด้วยวิธีพิจารณาของศาลรัฐธรรมนูญ พ.ศ. 2561 มาตรา 45 (สำนักงานศาลรัฐธรรมนูญ 2563) [Thammasat University Research and Consultancy Institute, *Rights of Individuals and Communities to File a Complaint to Public Organizations to Comply with Section 51 of the Constitution of 2017 and section 45 of the Organic Act on Procedures of the Constitutional Court 2018* (Office of the Constitutional Court 2020)] (Thai) 147–150.

[88] *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169.

[89] There have only been two petitions filed under this Section until 2022, namely Constitutional Court Orders 40/2021 and 59/2021.

for petitioners is not particularly significant, seen in isolation. However, the new tendency of the Court in deciding against the State is clear when compared with the Court's record in the five years before the 2014 coup, which shows a success rate of 15.9%.[90] This is especially striking when a series of three cases regarding presumption of criminal liability for corporate representatives (all of which were based on the same precedent handed down in 2012) are excluded from the data, as the success rate between 2009 and 2013 drops even lower to 9.75%.[91]

Interestingly, the six cases since 2018 that resulted in invalidation of laws are consistent with the established jurisprudence of the Court. The only outlier was one case concerning the political right of a candidate of a local office.[92] Three cases protected the rights of defendants in criminal courts; the other two cases dealt with property rights.[93] To illustrate: in 2019 the Court struck down a law that forces the accused to provide fingerprints for the police or public prosecutors with a harsh penalty of up to six months in jail.[94] Surprisingly, the invalidated law was an announcement made by the junta after the 2006 coup. It is long established in Thailand that Thai judiciary generally accept orders and rules of the junta as a legal and proper source of law, based on the principle that these rules and orders are valid whenever a coup is recognized and the new order is functioning effectively.[95] While the Court acknowledged the need for law and order that necessitated the junta's rule, the continuity of such rules into a new and proper Constitution is now not guaranteed, seeing as the Court had already invalidated another announcement in 2009.[96]

Similarly, in a more high-profile case, the Court invalidated two announcements by the junta after the 2014 coup that ordered people to report to the authorities with possible criminal penalties against those who failed to report.[97] The case is truly significant because the Court struck down these announcements even though they were constitutionalized in Section 279 of the Constitution, which states that all announcements of the National Council for Peace and Order shall be considered constitutional, lawful and effective.[98] As a result, at least 12 more people also benefited from the decision as they had been prosecuted under the same announcements.[99] Of all the rights cases under the 2017 Constitution, this case is the

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[90] The Court only struck down provisions of law in six of all cases under Section 211 of the 2007 Constitution.

[91] See n 57.

[92] Constitutional Court Decision 13/2020, 2 September 2020.

[93] Constitutional Court Decision 2/2021, 24 February 2021, and 8/2021, 2 June 2021.

[94] Announcement of the Council for Democratic Reform No. 25 Re: Proceeding relating to Criminal Justice THCDR 25 (29 September 2006).

[95] Thai Supreme Court Decisions 45/2496, 1662/2505, and 1234/2523.

[96] Constitutional Court Decision 12/2009, 19 August 2009.

[97] Constitutional Court Decision 30/2020, 2 December 2020.

[98] TC 2017, s 279.

[99] "รายงานการตั้งข้อหาทางการเมืองหลังรัฐประหาร 2557" ศูนย์ข้อมูลกฎหมายและคดีเสรีภาพ (2562) ["Report on Political Charges After the 2014 Coup" *Freedom of Expression Documentation Center* (2019)] (Thai) <https://freedom.ilaw.or.th/politically-charged?fbclid=IwAR1PcRLQXvOEjF1z_4R7hmVld7LcArClPzx_yrfeCKgiRCMr0K29LGued-M>.

most striking; it paves the way for others to contest any announcements and orders of the junta, notwithstanding the constitutionalized status of these junta-made laws. It is worth noting here that all the announcements by the junta that have been invalidated so far only pertained to due process rights protecting those prosecuted under criminal law, and did not touch upon any socio-economic rights or political rights.

As for property rights cases, the Court in one case invalidated a provision that unjustly prevented those whose properties were expropriated by the State from receiving a just compensation if they fail to claim the compensation within ten years.[100] In another case, the Court struck down a tax law that allows the State to swiftly confiscate properties under the anti-money laundering law for those with serious tax violations.[101] The Court in these two cases applied the proportionality test in a straightforward manner to strike down the laws at issue.[102] The problematic provisions were mostly caused by technical defects with no underlying malicious intent to violate rights: in the former case, the failure to take into account the possible hardship in claiming compensations when there are many parties involved with the property;[103] in the latter, the norm-breaking act of adding a new predicate offence in the Revenue Code instead of the usual Money Laundering Act.[104]

With regard to the two Section 213 cases (the *Abortion Case* and the *Exile Case*) that directly concern constitutional rights, the Court ruled in favor of the complainants. The problematic provision of the Penal Code was ordered to be amended, and it was affirmed that a Thai national shall never be exiled. But the impact of these two cases is hardly profound. As discussed earlier, the complainant in the *Exile Case* had already regained his right to enter Thailand during the proceeding. And the abortion law was long considered outdated as Thai people in general were already open to a moderate change to improve access to safe and legal abortion.[105] The case is meaningful only with the implication that the success of the case could inspire more people who may want to litigate as a strategy to advance constitutional rights.[106]

Considering all cases that had been won against the State through the use of Sections 212 and 213, the choice of cases in which the Court decided to strike down laws are somehow of low impact and mostly focused on due process rights or property rights, with the case against the junta's announcements and the *Abortion Case* being the only two with any profound effects. All other cases are trivial and legalistic in the sense that they hardly benefit the public at large. Looking solely at the number of

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[100] CC 2/2021, (n 93).

[101] CC 8/2021, (n 93).

[102] CC 2/2021, (n 93) 6–7; CC 8/2021, (n 93) 11–12.

[103] CC 2/2021, (n 93) 5–6.

[104] CC 8/2021, (n 93) 10–12.

[105] Grady Arnott et al., "Exploring Legal Restrictions, Regulatory Reform, and Geographic Disparities in Abortion Access in Thailand" (2017) 19(1) Health and Human Rights Journal 187, 189–90.

[106] Srisamai Chaeuchat, the doctor in the *Abortion Case*, stated in an interview how she was inspired by successful litigation abroad. "ศาลจังหวัดหัวหิน มีคำพิพากษา 'ยกฟ้อง' พญ.ศรีสมัย ในข้อกล่าวหาทำแท้งผิดกฎหมาย" เครือข่ายอาสา *RSA*, ["Hua Hin Provincial Court 'Acquitted' Dr. Srisami for Illegally Providing an Abortion" *RSA Thai*] (Thai) (2020) <https://www.rsathai.org/contents/17496/>.

petitions admitted to the Court could give a false impression that is at odds with the actual verdicts and the extent to which these cases produce any tangible effects on rights. If one focuses instead on cases denied by the Court, challenging areas are left untouched; for instance, the lèse majesté law is still intact and same-sex marriage has not miraculously emerged from thin air. There are still no cases that could indicate a paradigm shift in the Court towards pursuing and protecting more progressive rights. The Court is therefore practically unchanged in terms of rights enforcement despite the changes in some quantitative measures.

IV. THE STRATEGIC GAME OF CONSTITUTIONAL JURISPRUDENCE

Even though judicial review has become a new standard in modern democracies, it does not necessarily exist in every democracy, and scholars still have some criticisms for the practice. The most common argument against judicial review is the counter-majoritarian difficulty. The unelected judges should not use judicial review to invalidate laws enacted by the legislature, which are supposedly the true representative of the people.[107] The argument is even stronger when modern constitutional courts not only tackle cases arising from conflicts between branches of governments or between the federal and state governments, but also consider cases concerning constitutional rights. When constitutional courts deal with rights, which are often abstract and general, they run a great risk of taking over a legislative role, thus taking away important discussions about rights from the public. There will always be disagreements about rights that are not legalistic in nature, requiring participation from the public.[108]

But the counter-majoritarian difficulty may have been exaggerated. Scholars have argued that an apex court only uses its powers in accordance with the preferences of the majority.[109] With the lack of democratic legitimacy, constitutional courts often carefully exercise the power of judicial review to reflect the general attitude of the people, functioning as another representative and thus democratic force. This is why judicial review is celebrated worldwide;[110] more often than not the people are not actively concerned enough about rights to benefit from the democratic process, and

[107] Alexander Bickel, *The Least Dangerous Branch* (2nd edn, Yale University Press 1986) 16–23.

[108] Jeremy Waldron, "Core of the Case against Judicial Review" in Jeremy Waldron, *Political Political Theory. Essays on Institutions* (Harvard University Press 2016) 209–12 <https://doi.org/10.4159/9780674970342-009>.

[109] Robert A. Dahl, "Decision-making in a Democracy: The Supreme Court as a National Policy-maker" (1957) Journal of Public Law (Fall) 279, 292.

[110] Eighty-three percent of constitutions around the world have judicial review. See Tom Ginsburg and Mila Versteeg, "Why Do Countries Adopt Constitutional Review?" (2014) 30 Journal of Law Economics & Organization 587 <https://doi.org/10.1093/jleo/ewt008>.

the judiciary can become the last bastion of liberties for the minorities.[111] In such instances, constitutional courts can rise above the counter-majoritarian difficulty and become an enlightened court, guiding the public with progressive decisions, as in *Brown v. Board of Education* where the American Supreme Court found racial segregation unconstitutional.[112]

Taking a more pessimistic stance, courts can also engage with constitutional rights cases as part of a strategy to maximize their powers and legitimacy. All the powerful constitutional courts are courts of rights; the international prestige of many apex courts in the world came from the rights jurisprudence they have consistently produced.[113] And with prestige collected through an expansion of rights jurisprudence, courts can be truly powerful to the point of leading a 'juristocracy.'[114] Courts in less democratic countries can also adopt judicial review as part of abusive constitutional borrowing, applying liberal tools for authoritarian gains.[115]

Within the above discussion, where should the Thai Constitutional Court be placed? Despite all the controversies caused by the jurisprudence of the Court and several other plans for reform, the continuation of judicial review has rarely been questioned in Thailand. The idea that the Court has expanded its capacity to enforce rights is usually received as a cause for celebration. Whatever the theoretical oppositions to judicial review, having platforms for individuals to seek compliance to constitutional norms is in the best case a guarantee of the rule of law, and at the very least a symbol of it. The idea that human rights, rule of law, and supremacy of the constitution need to be guarded by the judiciary has been deeply ingrained in the minds of lawyers in Thailand.[116] The recent developments in constitutional rights cases

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[111] A similar reasoning could be found in *United States v Carolene Products Co.*, 304 U.S. 144 (1938) that argues that the court should apply a heightened standard of judicial review where a law or statute conflicts with Bill of Rights protections, where the political process is malfunctioning, or when a law affects "discrete and insular minorities."

[112] Luis Roberto Barroso, "Countermajoritarian, Representative, and Enlightened: The Roles of Constitutional Courts in Democracies" (2019) 67 American Journal Comparative Law 109, 133–137 <https://doi.org/10.1093/ajcl/avz009>.

[113] For example, see Manuel Jose Cepeda-Espinosa, "Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court" (2004) 3 Washington University Global Studies Law Review 529, 655–658 (providing details of how the writ of protection of fundamental rights affect all areas of law in Colombia); Peter E. Quint, "The Most Extraordinarily Powerful Court of Law the World Has Ever Known—Judicial Review in the United States and Germany" (2006) 65 Maryland Law Review 152, 160–161 (providing an account of how the German Constitutional Court imposed affirmative obligations on the government).

[114] See generally Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2007).

[115] Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford 2021) 106–112 <https://doi.org/10.1093/oso/9780192893765.001.0001> (citing Thailand as a case study).

[116] It is argued that the Court that was meant to check government action happened to align with the view of local elites who need unelected guardian institutions to supervise democracy. See Tom Ginsburg, "Constitutional Afterlife: The Continuing Impact of Thailand's Postpolitical Constitution" (2009) 7 International Journal of Constitutional Law 83, 94–95 <https://doi.org/10.1093/icon/mon031>.

could suggest a genuine effort by the Court to turn towards the rule of law and human rights.

But the effectiveness of judicial review in Thailand is not guaranteed just by the existence of the system as designed. It is therefore worth asking how well the Court has in practice fulfilled its role in rights protection—a role overshadowed by its past record of many controversial cases. The findings in the second part of this article challenge the constant claim that judicial review is essential for the protection of rights in Thailand since the scope and impact of the recent constitutional rights cases are not significant enough to justify the oversized powers given to the Court. Specifically, with the new developments that provide much more discretion to the Court in both procedural and substantive matters, the Court needs to address how the results justify the powerful tools they are given.

Firstly, while the quantity of rights cases does not make a court progressive or liberal, as cases need to be meaningful to highlight the power and legitimacy of the court, a growing number of cases can indicate its increasing activism. As the Thai Court is among the most cited for its aggressive activism,[117] this development might not help the reputation of the Court. On the contrary; the growing caseload could be a cause for concern. A passive court may be useless in protecting rights; but an active court is not a guarantee for success. Active courts can potentially cause problems in the long run.

Indeed, given the thin and subjective line between the definition of a political case and that of a constitutional rights case, an influx of more cases provides opportunities for the Court to disguise politically sensitive cases as rights cases. For instance, while the pathway under Section 213 is limited by the restrictions of the Organic Act, the Court can nevertheless admit cases of its choice to the docket, as demonstrated by the flexible interpretations it has already made. The four cases discussed above have already paved the way for other cases, with almost limitless potential as long as players outside and inside the Court are willing to be creative in attaching their agendas with any rights written in the Constitution. Comparable to the strategy of indirect deferral in *Marbury v. Madison*, where the American Supreme Court planted the seed of judicial review in its verdict for future use,[118] the Thai Court could handpick a handful of petitions from among the hundreds that are going to emerge in the coming years. This is troublesome given the concerted efforts by both the complainants and the Court in prior cases, which already removed three prime

[117] See, for example, Samuel Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge University Press 2015) 264–68 <https://doi.org/10.1017/CBO9781139839334>; Albert H. Y. Chen, "Constitutional Courts in Asia: Western Origins and Asian Practice" in Albert H. Y. Chen and Andrew Harding (eds), *Constitutional Courts in Asia: A Comparative Perspective* (Cambridge University Press 2018) 25–28.

[118] See Rosalind Dixon and Samuel Issacharoff, "Living to Fight Another Day: Judicial Deferral in Defense of Democracy" (2016) Wisconsin Law Review 683, 685–87 <https://doi.org/10.2139/ssrn.2726045>.

ministers and invalidated two elections.[119] For example, the politically charged *Hopewell Case* proved the versatility of Section 213, as the Court set into motion an action that could effectively lead to the total remission of the 30 billion baht in compensation to be paid by the State, or at least the delay of payment until a change of government. Similarly, the *Human Rights Commission Case* provided an opportunity for the Court to set a precedent for all future interpretations regarding independent organs, even though the question was not relevant in solving the issue at hand.

As for the problems regarding the substantive changes in rights adjudication, the initial one is the need for equally creative discussions from all involving parties. This is the only way to make unelected judges accountable for their actions. While legal scholars have always been able to criticize the Court in an academic format, the new provision regarding contempt of the Court in the Organic Act could change that.[120] The atmosphere is not receptive to discussion, as can be seen from following statement provided by the Court at the end of each press release summarizing its decisions:

> A person has the right to express opinions according to Section 34 of the Constitution of Thailand (2017). However, in case of opinions which criticize a ruling or a decision in bad faith with words or connotations that are rude, sarcastic or malicious shall constitute an offence of contempt of the Court.[121]

Secondly, more flexibility and judicial creativity could lead to an even more unpredictable court. Once the Court is able to do anything, even with what was previously thought of as disappointingly conservative constitutional rights jurisprudence, the last shred of legal certainty might vanish. To illustrate, there is a well-known observation that the Court will enforce rights and liberties that do not directly affect the power of the State, such as gender equality, while not advancing the rights that pose a threat to the State such as those involving land and resources.[122] Recently, this has been true only in some cases. For example, the Court in the *Abortion Case* struck down the law to protect women's bodily autonomy and suggested the use of the stages of pregnancy to determine the criminality of an abortion,[123] and

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[119] See Khemthong Tonsakulrungruang, "Thailand: An Abuse of Judicial Review" in Po Jen Yap (ed), *Judicial Review of Elections in Asia* (Routledge 2016), 173–191 <https://doi.org/10.4324/9781315668567-11>.

[120] "New Law Protects Constitutional Court from Criticism" *Bangkok Post* (2018) <https://www.bangkokpost.com/thailand/politics/1424702/new-law-protects-constitutional-court-from-criticism>.

[121] For example, see "ข่าวสำนักงานศาลรัฐธรรมนูญ 9/2564" สำนักงานศาลรัฐธรรมนูญ (2564) ["Office of the Constitutional Court's Press Release 9/2021" *Office of the Constitutional Court* (2021)] (Thai) <https://www.constitutionalcourt.or.th/occ_web/download/article/article_20220518135540.pdf>.

[122] Somchai Preechasilpakul stated that the Court will defer to the State in cases that directly affect the power of the state. See วจนา วรรลยางกูร, "ศาลรัฐธรรมนูญแบบไหนที่สังคมไทยต้องการ?" [Wajana Wanlayangkoon, "What Kind of a Constitutional Court is Desired by Thai People?"] (Thai) *The 101 World* (2021) <https://www.the101.world/constitution-dialogue-constitutional-court>.

[123] CC 4/2020 (n 8) 6 ("the protection of rights of both the fetus and pregnant women have to be balanced possibly by using stages of pregnancy as standards").

Parliament accordingly amended the law to decriminalize abortion for the first trimester and the following two months (with additional requirements);[124] the power of the State was not challenged in any significant way. But there are other cases that do not strictly follow this narrative. Same-sex marriage, which is an intimate issue between couples, is not endorsed by the Court, and the constitutionality and authority of the military junta's legislative acts are heavily undermined in the *Junta Report Case*. A new model is needed to predict and understand the Court's decisions.

Of course, it is also possible to look at the recent changes through a positive lens. A constitutional court could have alternative modes of operation for certain categories of cases, e.g., applying judicial activism on questions of rights and resorting to judicial restraint on political questions.[125] Or one could also interpret that the Court is engaging in a higher strategy of passivity to build up authority for future more important cases.[126] But the only indicator for any action of the Court now seems to be whether a new case will help to build its power while causing the least inconvenience. As discussed earlier, the abortion law was outdated and the movements against abortion rights were not widespread or strong enough; striking down the law was thus popular and empowering for the Court with almost no backlash.[127] Meanwhile, Section 1448 of the Civil and Commercial Code has not been subject to the same criticism; lawyers still disagree about same-sex marriage in general (without even getting into the technical details of implementing the right). Creating a universal right to marriage is too risky for the Court, especially since there are still religious groups who are strongly opposed to the practice, even more than to the abortion law, and the government is still concerned with fiscal costs arising from same-sex couples claiming social benefits.[128] The Court ultimately tries to have it both ways: enjoying the glory of a progressive Court while at the same time gaining more authority for future politically controversial cases.

V. CONCLUSION

Since its inception in 1997, the Thai Constitutional Court has never been part of the prestigious club of apex courts worldwide revered for their rights jurisprudence; and this is likely to remain so, considering that the Court's latest series of rights cases hardly led to any international recognition. But while the increased proactivity in

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[124] พระราชบัญญัติแก้ไขเพิ่มเติมประมวลกฎหมายอาญา (ฉบับที่ 28) พ.ศ. 2564, ราชกิจจานุเบกษา เล่ม 138 หน้า 1 (6 กุมภาพันธ์ 2564) [Act Amending the Penal Code (No. 28) 2021, Government Gazette vol 138 p 1 (6 February 2021)] (Thai).

[125] Erwin Chemerinsky, *Constitutional Law* (6th edn, Wolters Kluwer 2020) 91–92.

[126] See Dixon and Issacharoff, "Judicial Deferral" (n 118) 699.

[127] For example, women's rights advocates in Thailand optimistically received the decision of the Court. See K. Chaturachinda and N. Boonthai, "A Commentary on the Recent Ruling by the Thai Constitutional Court in Relation to Abortion Law in Thailand" (2020) 28(1) Sex Reproductive Health Matters 2020 44 <https://doi.org/10.1080/26410397.2020.1776542>.

[128] Constitutional Court Decision 20/2021, 17 November 2021 9–10.

rights protection may fail to have groundbreaking effects for the people, activism in rights cases does beget further activism in other areas. By looking at all relevant rights cases in the first five years of the Court, this paper suggests that there have been changes in both procedural and substantive matters that are seemingly more progressive towards rights in an abstract manner, while not furthering constitutional rights to that degree in practice. The upshot here is that rights jurisprudence cannot only be considered based on a few well-known cases; all cases must be evaluated in the aggregate. And when the rights jurisprudence does not justify the expanding powers of the Court, future attempts at rights protection should be suspected as having ulterior motives.

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Appendix

Table 1. Section 212 cases from 2009 to 2013

Year	No. of Sec.212 cases	Struck down	Upheld	Petitions dismissed
2009	12	1	11	12
2010	4	0	4	9
2011	11	0	11	21
2012	10	1	9	16
2013	7	5	2	5

Table 2. Section 212 cases from 2018 to 2022

Year	No. of Sec.212 cases	Struck down	Upheld	Petitions dismissed
2018	2	1	1	5
2019	7	1	6	1
2020	9	2	7	3
2021	11	2	9	0
2022	4	0	4	2