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

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Man is by Nature a Political Animal

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

• The growing involvement of courts in “matters of outright and utmost political significance that often define and divide whole politics”

• Example: Disqualification of Political Parties and Candidates, Decision Makers in disputes over National Electoral Outcomes, Impeachment, Corruption Indictments against Heads of the State.
Court as a Key Political Actor

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

Societal Demand

Salient Issue

Court Decision

Executive/Legislative

Ind. Org: NCCC, ECT, Ombudsman

Societal Demand

Court

Societal Demand
Puzzles

• Structural Explanation and its drawback:
  1. Type of governments and its structure (President/Parliamentary); (Unitary/Federal State)
  2. Number of Parties: Multi/Two party systems
• Unable to explain the variances within the country? How would one account for the different degree of judicial activism in a given country over time?
• Given that Courts have become the key political players (the final say in national decision making) in a larger political context where different political actors can interact dynamically in attempting to promote their best interests, we argue that the higher the level of pressure by political actors, the higher the propensity of the court to adjust its behavior by compromising its decision to appease the demands of those actors.
• How do we determine whether the court’s decision on a given case is indeed being politicized?
• Does the judiciary need to always compromise its decision whenever it is pressured by those actors?
• How do we separate the court’s “procedural” from “political” decision?
Open the Black Box of the Court

• Explore the behavior of the judges in key political issues

• Being Political but not Being Politicized: Politicized defined as “successful interference in court-decision making” (Samak the Chef??? Is this case being politicized?)

• Two Indicators as determining whether a given decision of the judges is politicized: Consistency of the ruling, Composition of the judges votes
Types of Intervention by Political Actors

1. Direct Intervention
   • Selection Process
   • Influence in decision-making of judges in a given case

2. Indirect Intervention--the situation where political actors use the court as their political tools as to gain leverage in fighting against their political enemy.
Case of Samak the Chef

• Violation of Article 267
• Composition of Judges’ Votes: 12: 0
• According to our indicators: The decision of judges is not considered being politicized.
Direct Intervention: Thailand and Korea

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

<table>
<thead>
<tr>
<th>Accused Party</th>
<th>Votes of NCCC (tt. of 9)</th>
<th>Date of Case Acceptance</th>
<th>Date of CC Verdict</th>
<th>Violation Ground</th>
<th>Composition of CC Votes</th>
<th>Verdict</th>
<th># of CC Judges (tt. of 15)</th>
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<td>Koson Srisang</td>
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<td>16 May 2002</td>
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- Direct Intervention: Thaksin Case Continued

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<td>Thaksin Shinawat</td>
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<td>16Jan2001</td>
<td>3Aug2001</td>
<td>295</td>
<td>8:7</td>
<td>Not Guilty</td>
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</table>
Indirect Intervention: Thailand

- Dissolution of Political Parties:
  1. Chart Thai Party: (Violation of Political Party Act Article 94)
     Composition of Votes (8:1)
  2. Machimatipathai Party: (Violation of Political Party Act Article 94)
     Composition of Votes (9:0)
  3. Palang Prachachon Party (Violation of Political Party Act Article 94)
     Composition of Votes (8:0)
  4. Democrat Party: (Violation of Political Party Act Article 94)
     Composition of Votes (4:3)
Indirect Intervention: Thailand

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

Composition of Votes: 8:7
Direction Intervention: Korea

• Selection Process: President Roh indirectly interfered in the selection process by asking Judge Jeon to resign from the regular members of CC in order to become the president of CC. Yet, the President’s political maneuvering on this case failed.
Indirect: Gwangju

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

<table>
<thead>
<tr>
<th>Case Description</th>
<th>Nominated by President</th>
<th>Nominated by Supreme Court</th>
<th>Nominated by Assembly</th>
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<td>Dec 12 Incident (94Hun-Ma246)</td>
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<td>Special Act (96Hun-Ka2)</td>
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<td>con</td>
<td>con</td>
</tr>
</tbody>
</table>

Key: “con” means “constitutional”. “un” means “unconstitutional”. “dis” means “dissent”.
Indirect: Impeachment

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

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

<table>
<thead>
<tr>
<th>Justices</th>
<th>Nominated by President</th>
<th>Nominated by Supreme Court</th>
<th>Nominated by Assembly</th>
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<tbody>
<tr>
<td></td>
<td>Yun Young-chul</td>
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<td>Choo Sun-hoe</td>
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<td>(2004Hun-Ma554)</td>
<td>un</td>
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</tr>
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Key: “con” means “constitutional”.
“un” means “unconstitutional”.
“dis” means “dissent”
“sep” means “separate concurring opinion”
So What Then?

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