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## The Criminalization of Dissent

### Challenges to the Rule of Law in Thailand

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In June 2020, people took to the streets calling for democratic and legal reform in Thailand. The National Council for Peace and Order (NCPO) had installed a military government on May 22, 2014, the thirteenth coup since the transition from absolute to constitutional monarchy in 1932. Though the junta had officially exited from power following a general election in March 2019, its leader, General Prayuth Chan-ocha, remained prime minister and many laws and policies put in place by the military regime remained in place. The protests coalesced around three initial demands: the prime minister must resign, a new constitution must be drafted, and the state must stop threatening dissidents. In August 2020, the fourth demand was added: the monarchy must be reformed. Despite the nominal status of Thailand as a constitutional monarchy for over ninety years, the position of the monarchy in the polity, which formally is to be a democracy with the king as head of state, remains unclear.<sup>1</sup> Increasingly large protests in September, October, and November 2020 supported the demand for reform of the monarchy. The government responded with police violence and prosecutions, particularly under Article 112 of the Criminal Code. Article 112, often referred to simply as Thailand's lèse majesté provision, stipulates an outsize punishment of three to fifteen years' imprisonment per count of defamation, insult, or threat to the king, queen, heir apparent, or regent. The second postcoup general election, held in May 2023, resulted in an overwhelming victory for opposition parties and a strong mandate for both the military to exit from power and the constitution to be revised. But the Move Forward Party, which secured the most votes and included reform of Article 112 as one of its key policy provisions, faced social and legal accusations of disloyalty to the monarchy for daring to do so.

<sup>1</sup> The very meaning of "rule by democracy with the king as head of state" also remains unclear.

On the surface, Thailand may appear to be a particularly egregious illustration of the rule by law, of the thin rule of law, or of law-and-order regimes favored by autocrats.<sup>2</sup> But examination of the criminalization of calls for reform around the monarchy indicates that a deeper, and more concerning, development may be underway. The law is being used to criminalize peaceful dissent over, or even mere questioning of, how power is apportioned and exercised in the polity, so as to preserve the monarchy. Procedure is being interpreted to restrict and twist fundamental concepts, including innocence and guilt. The interpretation and implementation of the law are being deployed in an attempt to transform the political and legal system.

The recent movement for reform of the monarchy can be understood as being in the service of what Gregory Shaffer and Wayne Sandholtz define as “the rule of law as an ideal – or meta-principle – under which individuals are not to be subject to the arbitrary exercise of power.”<sup>3</sup> The movement aims to clarify and limit the ambiguous institutions behind the arbitrary exercise of power (i.e., the monarchy and its allies – namely, the military and the judiciary) and create space for the voices and desires of the people to be meaningful in governing the polity.<sup>4</sup> The backlash should be understood as an attack on the rule of law that aims to expand and entrench the arbitrary exercise of power within and in relation to the law and judicial process. The primary tool of repression is the law itself (i.e., the use of Article 112 and related constitutional provisions), which obscures the violence contained within it. After all, those who hold power are only enforcing the law against those who violate it.

Motivated by concern with both the immediate effects on the lives of those who dare to dissent and the long-term changes in law and politics, I examine the movement for democracy and reform of the monarchy and the backlash in 2020–23 through Shaffer and Sandholtz’s framework. I focus on the five sources of arbitrariness within regimes that present themselves as pro-rule of law but act to weaken or destroy it. The specificity of the framework makes it possible to apprehend the

<sup>2</sup> TOM GINSBURG & TAMIR MOUSTAFA, *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* (2008); JOTHIE RAJAH, *AUTHORITARIAN RULE OF LAW LEGISLATION, DISCOURSE AND LEGITIMACY IN SINGAPORE* (2012); NICK CHEESMAN, *OPPOSING THE RULE OF LAW: HOW MYANMAR’S COURTS MAKE LAW AND ORDER* (2015).

<sup>3</sup> See Chapter 1.

<sup>4</sup> EUGENIE MERIEAU, *CONSTITUTIONAL BRICOLAGE: THAILAND’S SACRED MONARCHY VS. THE RULE OF LAW* (2021).

operations and entrenchment of the arbitrary in the law, the significance of challenging it, and the tremendous courage of those who risk doing so. I proceed by first offering a brief recent history of the rule of law and Article 112, highlighting the entry of the five sources of arbitrariness into the judicial process. Second, I analyze the movement in 2020–23 as a response and challenge to this history and the obstacles to the rule of law it entrenched. Third, I examine the backlash as both an attempt to halt transformation and evidence of how far the monarchy and their allies are willing to go to preserve their power. Finally, I conclude with preliminary reflections on ongoing developments at the time of this chapter's completion. Ten years and two elections after the May 2014 coup, it is time for a transition to democracy in Thailand, but dangers to the rule of law remain strong. This demands scholarship capable of both comprehending those dangers and identifying strategies to challenge them.

## I A Recent History of the Rule of Law and Article 112

On June 24, 1932, when the People's Party, a civilian–military coalition, fomented the transformation from absolute monarchy to a constitutional regime, their goal was to “change from the system of government in which the king is above the law to the system of government in which the king is under the law.”<sup>5</sup> Making everyone in the polity subject to the same law should have been a foundational step to establish the rule of law and stem the arbitrary exercise of power. Yet the political and legal history of the last ninety years in Thailand demonstrates the challenges in doing so. The challenges are most evident in the series of periodic coups and the difficulty of bringing the king – and his close allies in the military – under the law. Prior to 1932, the military was the army of the king and this has changed little, and even intensified during the Cold War, with their interests and resources linked.

Beginning with a military coup in 1933, only a year after the end of absolute monarchy, there began a cycle consisting of a coup and the abrogation of the constitution, drafting of a new constitution and elections, and then another coup once democracy becomes too unruly. Since 1932, there have been twelve coups, twenty constitutions, and thirty

<sup>5</sup> PRIDI BANOMYONG, *PRIDI BY PRIDI: SELECTED WRITINGS ON LIFE, POLITICS, AND ECONOMY* 124–25 (Chris Baker & Pasuk Phongpaichit trans., 2000).

prime ministers.<sup>6</sup> Part of this cycle is impunity for those who launch coups, with each coup followed by an amnesty law. Legal scholar Somchai Preechasinlapakun argues that this provides an incentive for would-be coup-makers to overturn the system. Rather than the rule of law, he explains that a “rule of coups” is present.<sup>7</sup> Accompanying the rule of coups, Thongchai Winichakul argues that the rule of law is royalist, meaning that “the king is above law and justice (not the constitution or parliament that are held to be universal norms).”<sup>8</sup> From the very beginning, citizens have pushed back against both the rule of coups and the royalist rule of law, but it has been difficult for them to gain traction against both ingrained practices.

Yet, as the Cold War wound down by the early 1990s, democracy seemed possible and coups seemed to perhaps be a phenomenon of the past in Thailand. In 1997, the seventeenth constitution, dubbed the “People’s Constitution” due to the participatory process through which it was drafted, seemed like it might be permanent.<sup>9</sup> But as parliamentary politics and political parties without strong allegiance to either the monarchy or the military grew too strong and unruly, the rule of coups returned. On September 19, 2006, the twelfth coup ousted the elected prime minister, Thaksin Shinawatra, and set in motion a sustained attack on democracy and the rule of law, which continues today. This included both a brutal state crackdown on protestors calling for the return of elections in April–May 2010 and then the May 22, 2014, coup, which is the primary subject of this chapter.

The May 22, 2014, coup by the NCPO ushered in the most repressive regime in Thailand since the counterinsurgency regimes of the Cold War. The regime promised to “return happiness to the people” after nearly ten years of polarized political contention beginning in the period prior to the previous coup, which took place on September 19, 2006. The 2006 coup was instigated by those who perceived that the government of democratically elected prime minister Thaksin Shinawatra – and, in

<sup>6</sup> The total number of coups in Thailand is thirteen, with the transformation from absolute to constitutional monarchy on June 24, 1932, being the first.

<sup>7</sup> Somchai Preechasinlapakun, *The Coup Rule of Law*, in *THE 19 SEPTEMBER COUP: COUP FOR DEMOCRACY WITH THE KING AS HEAD OF STATE 192* (Thanapol Eawsakul ed., 2007).

<sup>8</sup> Thongchai Winichakul, *The Legal Privileged State and Royalist Rule of Law: History of the Genealogy of Thai-style Rule by Law*, 17th Puey Ungpakorn Special Lecture (Mar. 9, 2020), in *WAY MAG.* 79 (2020).

<sup>9</sup> Erik Martinez Kuhonta, *The Paradox of Thailand’s 1997 “People’s Constitution”: Be Careful What You Wish For*, 48 *ASIAN SURV.* 373 (2008).

particular, its widespread popular support – was a threat to the monarchy.<sup>10</sup> Rather than resolving it, the coup only deepened the conflict between the royalist–nationalists who called for it and the democratic–populists who opposed it. While review of the contention between 2006 and 2014 is beyond my analysis here, the choice of a coup to attempt to resolve it set the stage for the entrenchment of the violation of the rule of law.

Article 112 has been part of the Criminal Code since its last revision in 1957, but it was rarely used until after the September 19, 2006, coup.<sup>11</sup> Anyone can walk into a police station to make an accusation of lese majesty against another, and the police are then obliged to investigate it. Cases began emerging following the 2006 coup, with dissident activists, writers, and netizens being prosecuted. Then, following the 2014 coup, Article 112 became one of the NCPO's key tools to remake society, and cases quickly spiked and far exceeded previous records. The increase in cases paralleled the advancing age of King Bhumipol, who was the longest-reigning monarch in the world at the time of his death on October 13, 2016, and concern over the transition to his son, Vajiralongkorn, who was surrounded by unsavory rumors about his personal life and his fitness for kingship.<sup>12</sup> The NCPO most frequently opted to use the law and prosecution, rather than extrajudicial violence, as its tool to suppress and silence its critics. The NCPO also sought to stifle dissent by revoking the passports of Thai citizens who resided abroad and declined to return.<sup>13</sup>

<sup>10</sup> GOOD COUP GONE BAD: THAILAND'S POLITICAL DEVELOPMENTS SINCE THAKSIN'S DOWNFALL (Pavin Chachavalongpun ed., 2014).

<sup>11</sup> On the history of Article 112 and related defamation laws, see DAVID STRECKFUSS, TRUTH ON TRIAL IN THAILAND (2010).

<sup>12</sup> Although extensive discussion of the monarchy is beyond the scope of this chapter, it is worth noting that Bhumipol became an outsize, god-like figure over the course of his lifetime. After falling into irrelevance following the end of absolute monarchy through World War II and the unexpected death of King Ananda, Bhumibol's older brother, in 1946, the combined efforts of the institution of the monarchy, the military, and the US government created new social, cultural, and political significance for Bhumipol and the monarchy during the Cold War. See PAUL HANDLEY, THE KING NEVER SMILES: A BIOGRAPHY OF THAILAND'S BHUMIPOL ADULYADEJ (2006); THONGCHAI WINICHAKUL, THAILAND'S HYPER-ROYALISM: ITS PAST SUCCESS AND PRESENT PREDICAMENT (ISEAS Trends in Southeast Asia No. 7, 2016).

<sup>13</sup> Dissidents summoned for "attitude adjustment" shortly after the coup who were out of the country and did not return, such as Pavin Chachavalongpun, had their passports revoked. See Pavin Chachavalongpun, *The Case of Thailand's Disappearing Dissidents*, N.Y. TIMES (Oct. 14, 2019), [www.nytimes.com/2019/10/14/opinion/thailand-dissidents-disappearance-murder.html](https://www.nytimes.com/2019/10/14/opinion/thailand-dissidents-disappearance-murder.html).

According to Thai Lawyers for Human Rights (TLHR), formed in the first days after the coup to document rights violations and defend those targeted, at least 162 were prosecuted for violation of Article 112 during the NCPO's five-year regime.<sup>14</sup> People were prosecuted under Article 112 for performing plays, writing graffiti in bathrooms, having conversations in taxis, and – representing the largest number of cases – making social media posts. The longest known punishment was handed down to Wichai (family name withheld), who was sentenced to thirty-five years' imprisonment for ten Facebook posts deemed to violate the law in June 2017; Wichai's sentence was reduced from seventy years as he confessed.<sup>15</sup> After King Bhumibol's death in October 2016, there was initially a rapid decline in new Article 112 cases. After a decade of increasing accusations and prosecutions, this seemed like a hopeful sign of decriminalization of speech critical of the monarchy. Upon closer examination, however, it soon became clear that the lack of prosecution did not mean that critics of the monarchy were now free to criticize the king, but rather signaled a new kind of danger for dissidents and the Thai polity.<sup>16</sup> The murder or disappearance of at least nine republican critics in exile illustrated the gravity of this danger.

Unjust prosecutions of dissidents and extrajudicial killing of them is part of a continuum of violence. These actions, as well as the difficulty of halting the prosecutions or holding the assassins to account, exemplify the crisis of the rule of law in Thailand. Shaffer and Sandholtz's five sources of arbitrariness highlight the dangers to both individuals and the polity.

The five sources of arbitrariness point to a range of moments, sites, and actors involved in the unjust exercise of power detrimental to the rule of law. The first source of arbitrariness is based on the radical inequality of those within the polity, in which “the wielder of power is not subject, in practice, to the law, its controls and limits.”<sup>17</sup> Accompanying Article 112, which provides special protection for the king, queen, heir apparent, or

<sup>14</sup> THAI LAWYERS FOR HUM. RTS., *COLLAPSED RULE OF LAW: THE CONSEQUENCES OF FOUR YEARS UNDER THE NATIONAL COUNCIL FOR PEACE AND ORDER FOR HUMAN RIGHTS AND THAI SOCIETY* 26–32 (2018).

<sup>15</sup> *Man Jailed for 35 Years in Thailand for Insulting Monarchy on Facebook*, GUARDIAN (June 9, 2017), <https://tinyurl.com/hs2uweps>.

<sup>16</sup> I have written elsewhere about two Article 112 cases involving alleged defamation of King Vajiralongkorn that made it to court and their irregularities. Tyrell Haberkorn, *Dictatorship, Monarchy and Freedom of Expression in Thailand*, 77 J. ASIAN STUD. 935 (2018). Both punishment and leniency were arbitrary and without legal basis.

<sup>17</sup> See Chapter 1.

regent, Article 6 of the 2017 Constitution further stipulates that: “The king shall be enthroned in a position of revered worship and shall not be violated. No person shall expose the king to any sort of accusation or action.” This means that the king cannot himself face prosecution and exists above the law.

Compounding the inequality between the rulers and the ruled in the polity, it is impossible for citizens to guess when they will or will not be charged under Article 112. Once the surge in prosecutions began after the 2014 coup, many people were concerned that they would be arrested for articles they had written, social media comments they had posted, and other actions. Some were, but many were not. Many were also concerned that they might be killed, and, again, some were. This reflects the second source of arbitrariness, in which “individuals are unable to know and predict how power will be wielded over them.”<sup>18</sup> The condition of not knowing what violence one will experience for expressing one’s view generates fear that limits public discussion about the monarchy and power generally in Thailand.

The third and fourth sources of arbitrariness further structure the relationships between those who hold power and those subject to its operations by distinguishing between those who are not permitted to explain their actions and, conversely, those who can act without having to offer any explanation. Shaffer and Sandholtz explain that the third source of arbitrariness “is where individuals have no place to be heard, inform, question, or respond to how power is exercised over them.”<sup>19</sup> Many Article 112 cases arise precisely from questioning or responding to the exercise of power by the monarchy, not from anything clearly recognizable as defamation, insult, or threat. Yet judges interpret the very questioning of the king’s power as all three. Defendants in Article 112 cases who choose to plead innocent and fight their cases are further punished with a nearly certain guilty verdict, while those who confess are rewarded with a halving of their sentence. The fourth source of arbitrariness intersects closely with the third and is “where authorities do not engage in public reason-giving in issuing their decisions, which reasons then can be contested, including before judicial, political, and administrative processes.”<sup>20</sup> The courts frequently cite the long-standing presence of the monarchy and a presumed universal love for the king as the reasons

<sup>18</sup> See Chapter 1.

<sup>19</sup> See Chapter 1.

<sup>20</sup> See Chapter 1.

for their harsh punishment of those who dissent. No arrests have been made in the cases of the nine disappeared or extrajudicially killed republican exiles; the ability to kill one's critics with impunity further reflects and consolidates the power of the monarchy and its allies.

The fifth source of arbitrariness is "the proportionality of any measure in terms of the reasonable relationship of means and ends."<sup>21</sup> The minimum punishment per violation of Article 112 is three years and the maximum is fifteen years. There are no standard sentencing guidelines, but several examples illustrate the outsized punishments meted out to those who dissent. Daranee Charnchoengsilpakul, prosecuted in the first wave following the September 19, 2006, coup, was initially sentenced to eighteen years' imprisonment for three counts of violation of the law in relation to roughly fifty-five minutes of speech. Her sentence was reduced on appeal to fifteen years' imprisonment or roughly one year for each four minutes of speech.<sup>22</sup> Wichai, mentioned above as receiving the longest sentence during the NCPO regime, was initially sentenced to seventy years' imprisonment for ten Facebook posts, or seven years per post; his sentence was reduced to thirty-years once he confessed. These sentences cannot be understood as anything other than disproportionate.

Activists, lawyers, journalists, academics, and others kept up a steady challenge against the abuse of Article 112 and the accompanying forms of the arbitrary exercise of power that began with the September 2006 coup. Some defendants, like Daranee Charnchoengsilpakul, chose to fight their cases as a further form of protest even though they knew it would likely result in a harsher punishment. Lawyers provided pro bono defense for those accused and a few brave journalists reported on the cases. During the relatively open period of 2012, while Yingluck Shinawatra was prime minister, a coalition of academics, journalists, and others formed the Campaign Committee for the Amendment of Article 112 (CCAA112) to advocate for the amendment of the law so as to limit who could make accusations of violation of the law and reduce the possible punishment. CCAA112 used a constitutional provision enabling any citizen group that gathered enough signatures of support to propose the draft of a law for parliament to review, but parliament refused to even consider the draft on the basis of national security. Then, in the first few days following the May 22, 2014, coup, when the likely depth of the NCPO's repression

<sup>21</sup> See Chapter 1.

<sup>22</sup> Tyrell Haberkorn, *Engendering Sedition: Ethel Rosenberg, Daranee Charnchoengsilpakul, and the Courage of Refusal*, 24 POSITIONS: E. ASIA CULTURES CRITIQUE 621 (2016).



became clear, lawyers and activists, many active during the preceding decade, joined together to establish TLHR, which became the primary documentary and advocacy organization defending dissidents. But while those active in challenging the arbitrary exercise of power were committed, their numbers remained small until 2020, when a movement emerged to name and directly counter the forms of arbitrariness and clarify the place of the monarchy in law and politics in defense of the rule of law.

## II A Movement Emerges

The disappearance of the ninth exiled republican critic, Wanchalearm Satsaksit, in Phnom Penh on June 4, 2020, catalyzed a wave of protests.<sup>23</sup> In June 2020, there had been no domestic transmission of the coronavirus for over two months, and while the emergency law prohibiting mass gatherings was still in place, activists began to assemble, initially to call for justice for Wanchalearm and the other disappeared and murdered republican exiles, and then to make broader demands for democracy. By July, regular protests were taking place in Bangkok and provinces around the country, organized by different groups of youth activists. Initially, the protests had three main demands. First, the current prime minister, General Prayuth Chan-ocha, must resign. General Prayuth governed for five years as head of the NCPO and then retained his position following the March 2019 general election through a series of antidemocratic maneuvers. The election was meant to mark the end of military dictatorship but instead signaled a new era of authoritarian repression cloaked in the form of electoral democracy.<sup>24</sup> Second, a new constitution must be drafted. The 2017 Constitution, Thailand's twentieth, was drafted by a junta-appointed body and expanded the authority of the state and king while dispossessing the people of rights.<sup>25</sup> Third, the state must stop threatening dissidents through both excessive legal prosecution and extrajudicial intimidation and violence.

<sup>23</sup> These nine are Ittiphol Sukphaen, Wuthipong Kachathamakal, Surachai Sae Daen, Chatcharn Buppawan, Kraidej Luelert, Chuchee Chivasut, Sayam Theerawut, Krisana Thapthai, and Wanchalearm Satsaksit. To date, no arrests of possible perpetrators have been made and the investigations are stalled.

<sup>24</sup> Prajak Kongkirati, *Overview: Political Earthquakes*, 41 *CONTEMP. SE. ASIA* 163 (2019).

<sup>25</sup> Khemthong Tonsakulrungruang, *Thailand: The State of Liberal Democracy*, 16 *INT'L J. CONST. L.* 643 (2018).

In August 2020, a fourth demand was added: the institution of the monarchy must be reformed. The demand for reform of the institution of the monarchy was first publicly introduced by Arnon Nampa, a human rights lawyer at TLHR and poet, during a speech at a Hogwarts-themed protest on August 3, 2020. Dressed as Harry Potter, Arnon promised that he would speak openly about the institution of the monarchy from that day forward and called on others to do so. Arnon argued that without speaking openly about the monarchy, the other three demands of the protestors were meaningless and could not result in change. Speaking openly about the monarchy is both the first step and essential to curtailing the sources of arbitrariness in the polity. Foreseeing the impending backlash, he said that speaking about the monarchy.

Is not the toppling of the monarchy. But it is talking about it so that the monarchy will exist in Thai society in manner that is correct and legitimate for a democracy with the king as head of state. All of the students who came out to protest after the new year are aware of this . . . Do not leave it to those on the margins to have to talk about the monarchy and then face threats and harassment all alone. Do not leave it to the political exiles to talk about the monarchy and then be brutally murdered and disappeared. From now on, this is not going to happen anymore. From now on, no one who comes out to talk about the monarchy will be accused of being crazy or insane and scooped up and put in the hospital even though they spoke the truth.<sup>26</sup>

To make visible the forces behind the arbitrary exercise of power in the polity is threatening to those who benefit from such power.

A week later, on August 10, 2020, the United Front of Thammasat and Demonstration (UFTD), a new student organization based at Thammasat University, the historic center of student protest in Thailand, held a protest in which it unveiled a ten-point proposal that elaborated how to carry out the reform of the institution of the monarchy. The proposal, read by Panusaya Sitthijirawattanakul, a sociology and anthropology student at Thammasat and one of the leaders of the UFTD, included calls for restraints to be placed on the king's authority – importantly, including an end to royal endorsement of coups; for the personal, private assets of the king to be separated from the public assets of the crown financed by the people; for military units the king had placed under his own command to be transferred back to the usual chain of

<sup>26</sup> ARNON NAMPA, *THE MONARCHY AND THAI SOCIETY* 21 (2021). For the original Thai version, see อานนท์ นำภา, สถาบันพระมหากษัตริย์กับสังคมไทย (2020), <https://tinyurl.com/3vvacz8y>.

military command; for Article 112 to be abolished; and for justice to be secured in the cases of the disappeared and murdered republican exiles.<sup>27</sup> While the institution of the monarchy developed strong links to the military and the financial, landholding, industrial, and other forms of capital under Bhumipol, Maha Vajiralongkorn transferred public crown assets to his personal control and placed military units under his direct command.<sup>28</sup> The palace is not legally required to provide full financial transparency nor does it do so voluntarily. But *Al Jazeera* reported in January 2021 that King Vajiralongkorn was the world's wealthiest monarch, with a fortune of at least USD 30 billion and perhaps up to USD 70 billion.<sup>29</sup>

The UFTD's ten demands for reform became a staple of protests in the next months. They aimed to counter arbitrariness in the Thai polity by bringing the wielder of power under the law, ceasing the unpredictable exercise of power upon dissidents, and ending disproportionate punishment, or any punishment, for the peaceful expression of dissenting opinions. Most significantly, the demands and the broader movement were a direct claim to question and counter the arbitrary exercise of power.

### III A Backlash Ensues

After the August 3 and August 10, 2020, protests, many observers were concerned that speaking so frankly about the monarchy would frighten the majority of the people and end the budding democracy movement. Instead, the movement “shattered the ceiling” (“ทะลุเพดาน”) of what could be said about the monarchy in public discussions in Thailand. For a time, Thailand seemed poised on the brink of tremendous change in terms of a transition to democracy, reform of the monarchy, and strengthening of the rule of law. But then a backlash began, marked by entrenchment of existing sources of arbitrariness.

Parit Chiwarak, another Thammasat University student and member of the UFTD, concluded a speech he gave in Khon Kaen province in

<sup>27</sup> For the full statement, see *The Demonstration at Thammasat Proposes Monarchy Reform*, PRACHATAI ENG (Aug. 11, 2020), <https://prachatai.com/english/node/8709>.

<sup>28</sup> On Bhumipol's links to capital, see PUANGCHON UNCHANAM, *ROYAL CAPITALISM: WEALTH CLASS AND MONARCHY IN THAILAND* (2020).

<sup>29</sup> *Thailand Protests: How Much Is the King Worth?*, AL JAZEERA (Jan. 30, 2021), <https://tinyurl.com/2dsjxtw>.

northeastern Thailand on how the king's endorsement of coups had harmed society by noting that:

Finally, as we are well aware of how our country works, I don't know that I will have another opportunity to say the things that I have said here in Khon Kaen. I don't know what will happen to me when I come down from the stage and leave. For those who do not think well of me, who think of using methods outside the law to harm me, do whatever you are going to do. But we have unmasked our struggle. If you do anything to us, if you do anything to me, we have only one enemy. We will all know who ordered it. Let me take this opportunity, before I do not have any more opportunities, to affirm to my brothers and sisters that as long as I am still breathing, I will struggle with you for our enduring ideals. If I have blundered, been careless, erred, or ever been offensive, I ask for forgiveness here.<sup>30</sup>

Parit's comments reflected his awareness of the nine disappeared and murdered republican exiles and the risk that those who speak about the monarchy incur. His choice of words – “We all will know who ordered it” – is both a critique of the king's power and a challenge to it in the form of speaking about it openly. Parit remains alive, but has twenty-four pending Article 112 cases against him. Were he to be convicted in even only a handful of these cases, this would result in a *de facto* life sentence. Beginning in November 2020, criminal cases began to be brought against activists who participated in demonstrations, particularly those who called for the reform of the monarchy, with many cases against Parit, Arnon, Panusaya, and other leaders and activists.<sup>31</sup> According to a TLHR report, between November 24, 2020, and June 26, 2023, at least 252 individuals have been arrested and charged with violation of Article 112.<sup>32</sup> The majority of these charges stem from peaceful, unarmed expression of opinion about the monarchy and its place in the Thai polity. Periods of denial of bail prior to trial have

<sup>30</sup> My translation. Parit Chiwarak, *Down With Feudalism, Long Live the People* [In Thai: พิธีกรรม ชิววาร์กซ์, ศักดินาจพินาศ ประชาชนกว่าจะเจริญ], Demonstration organized by Khon Kaen Has Had Enough, Khon Kaen (Aug. 20, 2020).

<sup>31</sup> Parit is the activist facing the largest number of Article 112 cases. Arnon is currently facing fourteen; Panusaya is facing ten; and Panupong Jadnok, a Ramkhamhaeng University student and also UFTD activist, is currently facing nine. Although all four are currently released on bail, it could be revoked at any time. In addition, they are subject to extensive restrictions, including having to wear electronic monitoring anklets at all times.

<sup>32</sup> These numbers were last updated on June 26, 2023. For regular updates, see สถิติผู้ถูกดำเนินคดีมาตรา 112 [Statistics of those prosecuted in Article 112 cases], TLHR, <https://tlhr2014.com/archives/23983>.

become routine for those accused, and adherence to stringent bail conditions is required for those released. One of these conditions is to not participate in any further protest or do anything that might damage the monarchy, which is left unspecified in the release orders.

Alongside the criminal proceedings under Article 112, another judicial process related to the August 3 and 10, 2020, demonstrations illustrates the dwindling of the rule of law and the expansion of arbitrariness in Thailand. Article 49 of the 2017 Constitution permits anyone who believes that others are engaged in efforts to overthrow rule by democracy with the king as head of state to request that the Constitutional Court examine their actions, and for the cessation of such efforts to be ordered if found to constitute overthrow. Like the courts of justice as a whole, the Constitutional Court is closely linked to the institution of the monarchy.<sup>33</sup> First established following the promulgation of the 1997 Constitution, it comprises nine justices royally appointed following suggestion by royally connected institutions. The nine justices of the current court include three Supreme Court justices appointed by the Supreme Court, two Supreme Administrative Court justices appointed by the Supreme Administrative Court, and two legal experts and two political science experts appointed by the Senate, whose current members were appointed by the NCPO leaving office in 2019.

Article 49, which first appeared in the 1997 Constitution, was intended to protect against future coups. But in September 2020, Nattaporn Toprayoon, a royalist lawyer, submitted a petition to the Constitutional Court arguing that Arnon's speech on August 3 and the peaceful, unarmed demonstration by the UFTD at Thammasat University on August 10 and its ten-point proposal constituted an overthrow of

<sup>33</sup> Article 49 states:

No person shall exercise the rights or liberties to overthrow the democratic regime of government with the king as head of state.

Any person who has knowledge of an act under paragraph one shall have the right to petition to the attorney general to submit a motion to the Constitutional Court for an order to cease such act.

In the case where the attorney general orders a refusal to proceed as petitioned or fails to proceed within fifteen days as from the date of receiving the petition, the person making the petition may submit the petition directly to the Constitutional Court.

The action under this section shall not prejudice the criminal prosecution against the person committing an act under paragraph one.

democracy with the king as head of state.<sup>34</sup> In sloppy prose and with unclear logic, Nattaporn advanced a series of arguments aiming to discredit and vilify the activists. He denied the activists' claim that they aimed to reform the institution of the monarchy and instead argued that they aimed to create disorder and division.

There were two key slippages in his argument. The first is that he did not define the meaning of a system of rule by democracy with the king as head of state and instead argued that the activists disrespected and wished to overthrow the monarchy. While Article 49 of the Constitution applies specifically to the system of rule, accusing the activists of aiming to overthrow the monarchy is a much stronger, and (for the activists) more dangerous, argument to make. Nattaporn's second slip-page is complementary. He collapsed the meaning of opposition and overthrow into one another.<sup>35</sup> This move fails to recognize the role of peaceful opposition in building and sustaining democracy. Rather than a clear argument as to how the activists' peaceful speeches constituted, or would even lead to or prompt, overthrow of rule by democracy with the

<sup>34</sup> The Constitutional Court has been involved in many highly politicized cases since September 19, 2006, coup. See Andrew Harding & Peter Leyland, *THE CONSTITUTIONAL SYSTEM OF THAILAND: A CONTEXTUAL ANALYSIS* (2011); Eugénie Mérieau, *Thailand's Deep State, Royal Power and the Constitutional Court (1997–2015)*, 46 J. CONTEMP. ASIA 445 (2016); Khemthong Tongsakulrungruang, *The Constitutional Court of Thailand: From Activism to Arbitrariness*, in *CONSTITUTIONAL COURTS IN ASIA: A COMPARATIVE ANALYSIS* 184 (Albert H.Y. Chen & Andrew Harding eds., 2018); DUNCAN McCARGO, *FIGHTING FOR VIRTUE: JUSTICE AND POLITICS IN THAILAND* (2020) (especially ch. 8, *Courting Constitutionalism*, 184–210).

<sup>35</sup> He wrote:

The words “overthrow” and “opponent” are not defined in law. But these two words are ordinary words in the Thai language that have commonly used and known meanings. Therefore, the court itself knows that overthrow refers to actions with the intention to destroy or devastate in order to cause to cease to exist, to not be preserved, or to no longer have. Regarding the word opponent, it does not have to have to be violent to the degree of having the intention to overthrow and destroy until it no longer exists. It does not have to be to the degree of positioning oneself as the enemy or the opposite side only. It is simply action characterized by the characteristic of being obstructive or blocking to keep from progressing. Or actions that cause there to be the impact of erosion, sabotage until it falls into disrepair and decay, or becomes weaker. This falls within the category of acting as an opponent already.

Petition for Constitutional Court to Rule According to Article 49, in *JUST. IN SE. ASIA LAB, UNIV. OF WIS.-MADISON CTR. FOR SE. ASIAN STUD., CONSTITUTIONAL COURT RULING NO. 19/2564: A SELECTION OF DOCUMENTS* 9, 45 (Tyrell Haberkorn trans., Dec. 2021) [hereinafter *CONSTITUTIONAL COURT RULING*].

king as head of state, Nattaporn instead repeatedly claimed that the speeches made him and others who loved the king uneasy.<sup>36</sup> Nattaporn included extensive quotes from the activists' speeches in his complaint, but the quotations called his argument into question.

The three activists named in the petition – Arnon, Panusaya, and Panupong Jadnok, a student at Ramkhamhaeng University and member of the UFTD – were limited to submitting a written response to his petition. They explained that they were calling for reform, not overthrow, of the institution of the monarchy; challenged the vagueness of his argument; and indicated their willingness to provide verbal testimony to the Constitutional Court if needed.<sup>37</sup> Despite the gravity and complexity of the case, neither the three activists nor the academics and other

<sup>36</sup> *E.g., id.* at 44, 45:

The aforementioned speeches at the times, dates, and locations contain content that gravely distorts, encroaches upon, ridicules, and defames the institution of the monarchy such as has never occurred. The actions of the aforementioned group of people have caused the Thai people who love the nation, religion, and king to be aware and see the images and actions of the overconfident daring of the protestors. They are gravely concerned and worried that this group of youth of the nation have this attitude and expression that is an overconfident ridiculing like this. It is action that has the intention to overthrow rule by democracy with the king as head of state.

The Petitioner, as a Thai person, feels very disappointed and uneasy about the aforementioned expression of this group of people, along with the students, professors, politicians, former politicians, as in Document No. 8 who claim that the aforementioned actions are the exercise of fundamental rights according to democracy and are not against the law. In addition, they claim that these demands are not a proposal to overthrow the institution of the monarchy, but are a proposal with good intentions so that the institution of the monarchy can continue to be idolized by the people under a democracy.

<sup>37</sup> Their response to the accusation of overthrow is particularly important:

The petition submitted by the Petitioner is ambiguous and unclear. That is, Article 49 of the 2017 Constitution of the Kingdom of Thailand stipulates that no person shall exercise their rights or freedoms to overthrow rule by democracy with the king as head of state. But the Petitioner's petition does not clarify how the three Respondents exercised their rights or freedoms to overthrow rule. Namely, from the content of the petition, the Petitioner does not describe the meaning, essence, and constituent elements of rule by democracy with the king as head of state. The facts and accusations that the Petitioner describes are vague and the Petitioner does not specify which rights or freedoms the three Respondents exercised, or what actions were the overthrow of rule by democracy with the king as head of state. For example, the Petitioner describes the facts about the "Thammasat Won't Stand For It"

experts they prepared as witnesses were allowed by the Constitutional Court to provide verbal testimony. When arbitrariness reigns, those who hold power are seen as beyond question and those who challenge it beyond reason.

The Constitutional Court spent over a full year considering the petition. In November 2021, the Constitutional Court ruled that the activists' actions constituted overthrow of rule by democracy with the king as head of state and ordered them to cease their activities immediately. An abbreviated version was read on November 10, 2021, and the full ruling was released on November 29, 2021. The Constitutional Court framed its ruling by recounting the facts and describing the context of the case in a way that favored Nattaporn. The Constitutional Court discounted any need to protect human rights by emphasizing the performance of duty and maintenance of good morals rather than freedom of expression. The Court placed duty in relation to a narrative of Thai history that centered the king as an unchanging, central figure in the polity, whose role was unaffected by the events of June 24, 1932. Like Nattaporn, the Constitutional Court opted not to believe the activists when they said that their intention was to reform the institution of the monarchy in order to preserve it. Relying on an unusual definition of overthrow, the Constitutional Court therefore concluded that the activists were engaged in overthrow of rule by democracy with the king as head of state and ordered them to immediately cease their activities.<sup>38</sup> The ruling rendered by the Constitutional Court was one in which the Constitution was

demonstration on August 10, 2020, by recounting the event, but does not specify which actions or words of the three Respondents are overthrow of democracy with the king as head of state. In addition, on page 22 of the petition, the Petitioner describes Constitutional Court Ruling No. 3/2562 that provides the meanings of the words "overthrow" and "opponent," which have different meanings. Then the Petitioner discusses the expression of opinions by Mr. Piyabutr Saengkanokkul, Mr. Parit Chiwarak, and Mr. Jatuporn Prompan in which they mentioned the institution of the monarchy. This is neither an action by the three Respondents nor related to the actions of the three Respondents in any way. In addition, the petition does not describe how the ten proposed demands to address the problems about the institution of the monarchy are overthrow of rule by democracy with the king as head of state. The Petitioner merely describes his own feelings and opinions.

Counter Statement by Respondents, *in* CONSTITUTIONAL COURT RULING, *supra* note 35, at 59, 59–60.

<sup>38</sup> Constitutional Court Ruling No. 19/2564, *in* CONSTITUTIONAL COURT RULING., *supra* note 35, at 80, 113–14:



interpreted in such a way as to further unquestioning valorization of the monarchy as the only perspective possible, at the expense of the protection of rights and freedom of expression.

One of the initial concerns when the Constitutional Court's ruling was announced was whether Arnon, Panusaya, Panupong, and other activists already facing numerous Article 112 cases would also be charged with violation of Article 113, or treason, which carries a maximum penalty of life imprisonment or death. This has not happened. But the potential impacts, both short-term and long-term, of the Constitutional Court ruling on the provision of justice, the rule of law, and the visions of a democratic future that dissidents imagine remain unclear.

The exercise of rights and freedoms of Respondents No. 1, No. 2, and No. 3 is not in line with the principles of democracy. The actions of Respondents No. 1, No. 2, and No. 3 are the claiming of rights and freedoms without taking equality and fraternity into consideration. Respondents No. 1, No. 2, and No. 3 exercised their freedom of expression and did not listen to the opinions of other people. They did not accept views that were different and violated the rights of other people by reviling them, invading their personal space, and agitating and inciting using facts that distorted reality. Facts and eyewitness evidence show that Respondents No. 1, No. 2, and No. 3 have organized groups in the form of a network to use violence continuously. In some instances, Respondents No. 1, No. 2, and No. 3 have used provocative parts of their speeches to stir up violence and create disharmony among the people in the nation. This has created division among the people in the nation and is the destruction of the principles of equality and fraternity. The effect of the actions of Respondents No. 1, No. 2, and No. 3 will be to ultimately overthrow democracy. In addition, the facts show that in many demonstrations there was destruction of portraits of the king. There was the removal of the blue sections from the national flag, which means the removal of the institution of the monarchy from the national flag. The ten demands of Respondents No. 1, No. 2, and No. 3, such as the revoking of Article 6 of the Constitution, the abolishing of the giving and receiving of donations by royal charity funds, the abolishing of the royal prerogative to express political opinions in public, are demands to cause the status of the institution of the monarchy to not be as it is in the tradition of democratic rule to which the Thai nation has always adhered. The continuous conduct and actions of Respondents No. 1, No. 2, and No. 3 illustrate that Respondents No. 1, No. 2, and No. 3 had the ulterior motive to exercise their rights and freedoms to overthrow rule by democracy with the king as head of state. It is not reform.

#### IV Working against Arbitrariness and toward the Rule of Law

The ongoing arrests and prosecutions under Article 112 have heightened the risks of questioning power and its unjust exercise in Thailand. While the majority of those accused have ultimately been granted bail, including the leaders discussed earlier – Arnon, Panusaya, Panupong, and Parit – their release has carried the condition of nonparticipation in political protest or other activities that might damage the monarchy. The frequency of protests declined as arrests took place throughout 2021 and 2022, but did not stop completely.

One of the most compelling new groups to emerge is Shattering the Palace (ทะลุวัง), whose primary protest action is to carry out public polls. Activists go to shopping malls, train stations, and selected public events armed with posterboards and small stickers for respondents to indicate their views on various topics about the monarchy. For daring to ask these questions, members of the group have been arrested, charged with violation of Article 112, and subjected to long periods of pretrial detention. One stark example is the case of Tantawan Tuatulanon, released on May 26, 2022, after thirty-seven days of pretrial detention following accusation of violation of Article 112 for live broadcasting and peacefully asking the police questions about the monarchy prior to a royal motorcade. She was on hunger strike for the entire period of her detention in protest at the denial of bail. Her lawyers made four applications for bail for her before the Criminal Court finally assented. She is confined to her home for twenty-four hours per day, must wear an electronic monitoring anklet, and is forbidden from participating in protests or damaging the monarchy.

Two additional members of Thaluwang, Bung and Bai Por, were held for ninety-one days of pretrial detention, including sixty-four days on hunger strike, after carrying out a poll at a shopping mall on whether or not royal motorcades caused inconvenience. They made seven bail requests before it was finally granted; each denial order noted that their lives were not yet in danger from their hunger strike and they were flight risks and would likely continue to engage in similar actions were bail to be granted. During one bail hearing, after being on hunger strike for fifty-four days, the two young women were so weakened by the trip from the Central Women's Prison where they are being detained that they collapsed and were rushed to the nearest hospital for treatment; the physician on duty reported to the court that they were in "normal" condition. Pretrial bail has long been denied in a majority of Article 112 cases, but

the Thaluwang cases are different, both due to the nature of the action deemed to potentially constitute lese majesty and the court's lack of concern about the health of the detainees. To be clear, while individuals accused of violent crime are routinely granted bail in Thailand, all three Thaluwang activists were subject to denial of bail and arbitrary detention for asking questions and carrying out a poll about royal motorcades.

In the May 2023 general election, the second since the May 2014 coup, the liberal democratic Move Forward Party secured the largest number of votes and a clear popular mandate to form a government. They ran on a platform of policies that included legalization of same-sex marriage, the end of compulsory military conscription, and amendment of Article 112 to reduce the punishment. But very soon after the election it became clear that the monarchy and military-aligned forces would not allow Move Forward Party to form a government. One of the legacies of the NCPO period is that the parliament is composed of 500 elected members and 250 senators who were appointed by the junta. A petition was submitted to the Constitutional Court in late June 2023, alleging that Move Forward Party's proposal to amend Article 112 constituted overthrow of the government. Like the Constitutional Court petition brought against Arnon, Panusaya, and Panupong, this one verges on the absurd: How could a policy proposal conceivably constitute overthrow? Yet the possible effects of the petition are potentially profound. The petition was brought a week before the planned election of the prime minister in the parliament, and many neutral members of parliament and even some senators who had previously indicated they would vote for Pita Limjaroenrat, the Move Forward Party candidate, opted to abstain, likely out of concern of being perceived to support an anti-monarchy party. Instead, in August 2023, a coalition made up of parties loyal to the military and monarchy, which secured few votes, formed a government and selected a prime minister whose party did not win the popular vote. A year later, in August 2024, the Constitutional Court ruled that the Move Forward Party's proposal of an amendment to Article 112 constituted overthrow. The party was dissolved and its executive banned from holding political office for ten years.

## V Conclusion: Toward a Future Rule of Law

The rise in arbitrariness and attacks on the rule of law in Thailand come at a time when authoritarianism is on the rise across Asia. A military court in Myanmar on February 1, 2021, ended the cautious transition to

democracy and brought a sharp crackdown. Dissidents are subject to arbitrary arrest and summary sentencing in secret trials.<sup>39</sup> Since the presidential election of Rodrigo Duterte in 2016 and with little change following the election of Bongbong Marcos, Ferdinand Marcos's son, in 2022, extrajudicial killings, attacks on press and academic freedom, and a general climate deleterious to the rule of law have become entrenched in the Philippines.<sup>40</sup> The rule of law in Hong Kong has declined precipitously as China has claimed legal and political control far in advance of 2047, the previously agreed-upon date of incorporation into China. Activists, journalists, and academics are facing increasing prosecutions under the draconian National Security Law for engaging in basic expression of opinion and political rights.<sup>41</sup> Compounding the difficulty in stopping the rise of arbitrariness and the violation of human rights is that, unlike the Americas, Europe, or Africa, there are no regional or subregional human rights mechanisms. The governments in the region make it a practice to cite the inviolability of sovereignty whenever they are called upon to criticize their neighbors. While the region remains safe for capital, as Ji Li notes regarding China in this volume (in Chapter 13), it is increasingly unsafe for dissidents.

Writing in the context of Putin's Russia, Masha Gessen argues that: "In functioning democracies the contradictions between avowed ideals and reality can be and often are called out, causing social and political change. That does not eliminate the built-in gap, but it has a way of making societies a little more democratic and a little less unequal, in spurts. Totalitarian ideology allows no such correction."<sup>42</sup> The fine-grained framework to examine the rule of law developed in this book by Shaffer and Sandholtz is a key tool to discover and call out gaps between ideals and reality in disparate contexts. Rather than seeing a possible trajectory in which challenges to the rule of law in Thailand, which have been particularly grave since the May 22, 2014, coup, are reversed, the situation remains challenging despite some elements that seem to signal

<sup>39</sup> ASSISTANCE ASS'N FOR POL. PRISONERS (BURMA), *THE FLOW OF INJUSTICE* (July 2023), <https://tinyurl.com/47hxs2m9>.

<sup>40</sup> For an account of the human rights situation from the perspective of a journalist who has documented and fought against it, see MARIA RESSA, *HOW TO STAND UP TO A DICTATOR: FIGHTING FOR OUR FUTURE* (2022).

<sup>41</sup> Thomas E. Kellogg & Eric Yan-Ho Lai, *The Tong Ying-Kit NSL Verdict: An International and Comparative Law Analysis* (GCAL Briefing Paper, Oct. 20, 2021), <https://tinyurl.com/mrxmn3mn>.

<sup>42</sup> MASHA GESSEN, *THE FUTURE IS HISTORY: HOW TOTALITARIANISM RECLAIMED RUSSIA* 97–98 (2017).

positive developments, such as elections. The Constitutional Court of Thailand's characterization of peaceful dissent and policy proposals as overthrow, with correspondingly harsh consequences, is an expression of the arbitrary exercise of power par excellence. Our job as scholars is to track, analyze, and criticize the means and methods by which such undermining of the rule of law takes place, as part of our contribution to strengthening it.