

INTERNATIONAL BOOK ESSAY

Generative Constitutional Bricolage: From Thailand to Authoritarianism Elsewhere

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EUGÉNIE MÉRIEAU. *Constitutional Bricolage: Thailand's Sacred Monarchy vs. The Rule of Law*. Oxford: Hart Publishing, 2022

Introduction

On June 24, 1932, a civilian-military coalition called the People's Party fomented a transformation from absolute to constitutional monarchy in Thailand. Since the very first Charter, the Constitution has been beset by instability. Thirteen military coups, the most recent on May 22, 2014, have led to the promulgation of twenty temporary and (semi-)permanent charters, the most recent being the 2017 Constitution. What the transformation meant for the institution of the monarchy and the figure of the king has also remained both unclear and in flux. Across both dictatorship and democracy, the king has often exercised an outsized amount of power constrained neither by the Constitution nor the government.

The insecurity of the highest law in the land and the existence of an institution whose source and scope of power are unspecified and unchecked would be of political concern in any polity at any time. In present-day Thailand, this concern has become a crisis as evidenced by the prosecution of citizens for political and thought crimes for daring to peacefully question the political, legal, military, and other powers of the monarchy. This prosecution has taken place under Article 112 of the Criminal Code, which defines the crime and stipulates the punishment for *lèse majesté*: "Whoever defames, insults or threatens the king, queen, heir-apparent or regent shall be subject to imprisonment of three-to-fifteen years."¹ Part of the Criminal Code since its last major revision in 1957, the law was rarely used until 2009 (Streckfuss 2010). Since then, the number of those prosecuted under it has steadily grown and peaked in the

¹ Criminal Code of Thailand, 1957, art. 112 (amended 1976).

aftermath of the youth-led movement for democracy and reform of the monarchy in late 2020. Today, nearly three hundred people are facing prosecution and will face decades in prison if convicted (Thai Lawyers for Human Rights 2024).

Beginning in July 2020, youth activists launched a series of protests calling for democracy. They demanded that General Prayuth Chan-ocha, the 2014 junta leader who retained his position as prime minister despite the 2019 election, resign; the 2017 Constitution be revised with citizen participation; and the state stop threatening activists (McCargo 2021). On August 3, 2020, they added a fourth demand: the monarchy must be reformed. Arnon Nampa (2021), the lawyer and activist who broached this demand, acknowledged the risk in his protest speech. Speaking openly about the monarchy was not toppling the monarchy, he said, but necessary. Without addressing an unquestionable institution, all other demands for democracy would be meaningless. Protests grew throughout late 2020 and early 2021, and, for a time, change seemed both possible and likely. But then Article 112 charges began to be leveled against those who peacefully expressed dissident views about the monarchy. Reflecting the status of the monarchy and the judiciary's close link to it, innocent verdicts are rare and to be accused is to be already likely guilty. Those prosecuted face persistent challenges of access to justice, including denial of bail, lengthy pretrial detention, and disproportionate punishment, with record sentences of over eighty years for sharing a series of Facebook posts.²

This is the context in which Eugénie Mérieau's *Constitutional Bricolage: Thailand's Sacred Monarchy vs. The Rule of Law* brilliantly intervenes into a crisis that is as much analytic as it is political and legal. Against normative ideas of the rule of law that assume that constitutions and the law should and will naturally constrain royal prerogative and strengthen democracy, Mérieau argues that the ideas and practices of both in Thailand must be examined on their own terms (250). Existing explanations of the monarch's power are beset by too much emphasis on the specific personal attributes of a given king and grossly under-theorized. She instead "documents the *constitutional foundations* of the king's authority, power and legitimacy as buttressed by elaborate doctrines of the rule of law" (27; emphasis in original). This immediately brings Thailand into comparative conversations about constitutionalism, authoritarianism, and sovereignty. What if, as her work implies, dispossession of the people's rights and sovereignty to elevate the monarch is facilitated rather than constrained by the Constitution? The arc of comparison that she invites challenges readers to conceptualize how constitutions—even, or perhaps especially, those that profess a normative commitment to democracy and human rights, serve powerful institutions, such as, but not limited to, monarchies, and normalize repression. In doing so, Mérieau both makes her work of interest to a broad audience and chips away at the idea of the exceptionalism of the Thai monarchy, advanced by both those who repress dissent by citing a need to protect the monarchy and sloppier scholars than her.

Combining six years of field research with incisive analysis of an impressive range of materials including draft meeting minutes, textbooks, and court decisions, *Constitutional Bricolage* changes both what we know about law and monarchy in

² Anchan, a retired civil servant, was sentenced to eighty-seven years in 2021 for sharing posts to Facebook and YouTube. Her sentence was reduced to 43.5 years as she confessed (British Broadcasting Corporation 2021).

Thailand and how we know it. Spanning the late nineteenth century to the present, the book is broken down into three thematic-temporal sections: the beginning of constitutionalism (nineteenth century to the Second World War); military dictatorship and the Cold War (Second World War to the 1990s); and juristocracy (1990s to the present). The status of the Thai monarchy as unquestionable, which is how activists such as Arnon Nampa can be sentenced to decades in prison for peaceful expression, is revealed to be the result of a series of legal and political ideas and actions over the last hundred years. To think further about how Mérieau does so and why it is analytically and politically significant, I examine her creative methodology and one of the daring new histories that she offers.

The Urgency of Constitutional Bricolage

Mérieau takes a bold approach to demystify and denaturalize the category of constitutional monarchy in Thailand. She is explicitly decolonial and calls for a method of constitutional analysis that goes beyond the orientalist and self-orientalist approaches by scholars who argue that constitutionalism has simply failed to take hold in Thailand and other authoritarian countries of the global South. To do so, she creates a new strategy to map and analyze constitutional monarchy in Thailand, which she names “constitutional bricolage.” Bricolage conjures an uneven and messy process of production, a sentiment that Mérieau here extends to constitution making. The concept “emphasizes the various contingencies at play in constitution-making and interpretation, in particular the choice of foreign and traditional influences from various traditions and time periods, and their creative misuses, whether voluntary or involuntary” (9). A range of actors—law drafters, judges, scholars, politicians, and others—are involved in the authoring, reading, implementing, and failing to implement the Constitution. Constitutional bricolage is an explicitly anti-hegemonic concept, she notes, that positions the creation of constitutions as “a symbolic, emotional and even at times aesthetic political process made up of misunderstandings, self-interested strategies, accidents/errors and much imagination” (22). *Constitutional Bricolage* “documents the never-ending process of mixing forms of meanings, manipulating symbols, signifiers and signified by focusing on the work of constitutional scholars—namely, re-assignment, playful combination and local hybridization . . . to uncover the rationalities at play in the bricoleur’s mind, in particular the work of ordering borrowed constitutional items into a coherent dogmatic construction responsive to specific political aims—here, the authority and resilience of the monarchy” (26).

What makes constitutional bricolage so generative is its capacity to open up for questioning the unexpected ways in which constitutionalism and the rule of law are put to use against their normative ideas in the service of the monarchy. Revealing how the Constitution has been used to repress in the name of the monarch is the first step to challenging it on its own terms. As Noura Erakat (2019) so persuasively argues, the law is contingent, and its meaning dependent, on the interpretation of those who use it, whether for repression, liberation, or something else altogether. Not only is the law contingent, but its history is as well.

A Daring New History of Democracy with the King as Head of State

Each of the three thematic-temporal sections of *Constitutional Bricolage* are further divided into three chapters that address legal texts, legal doctrinal thought, and constitutional practices in turn. While each piece of the historical puzzle of how the Constitution has come to be deployed against the people in the service of glorifying the monarchy is significant, Mérieau's tracing of the formation of democracy with the king as head of state (DKHS) is particularly so. The 2017 Constitution specifies DKHS as the form of rule in Thailand. While the precise meaning of DKHS is unclear, repression in its defense has become very clear in two recent Constitutional Court cases. Paired with criminal prosecution, Thailand's Constitutional Court has issued two rulings since 2021 equating peaceful questioning of the monarchy and calls to reduce Article 112's harsh punishment to overthrow of rule. These two rulings came under Article 49 of the 2017 Constitution, which allows citizens to file petitions for the Constitutional Court to examine and rule to cease actions that may be the exercise of rights and liberties to overthrow rule by democracy with the king as head of state. Similar to DKHS itself, "overthrow" is not defined in the 2017 Constitution.

In November 2021, the Constitutional Court ruled that the democracy movement's call for reform of the institution of the monarchy constituted overthrow of rule by democracy with the king as head of state. The argument they made was that, even though the activists advocated reform, and not a republic, their actions devalued the monarchy and intended to destroy it and so it was therefore overthrow.³ Then, in February 2024, the Constitutional Court ruled that the proposal by the liberal democratic Move Forward party of a law to amend Article 112 to reduce the punishment and limit those who could file a complaint under it to the Royal Household Bureau constituted overthrow of rule by democracy with the king as head of state. The court wrote that the proposal of an amendment to the law concealed a real desire to abolish the law and that if they "are left to continue the aforementioned actions, overthrow of rule by democracy with the king as head of state is not far off."⁴

The Constitutional Court's rulings do not have criminal implications, but they matter in other ways. On August 7, 2024, the Constitutional Court ruled to dissolve the Move Forward party on the basis of the party's threat to DKNS. It is tempting to dismiss the Constitutional Court as repressive ideologues and their rulings as illogical. But to do so would be a mistake. Instead, as Mérieau's book demonstrates, such actions must be taken seriously on their own terms. She makes this possible by tracing the origins of DKNS. The first traces of DKNS are in the 1949 Constitution, in which Article 2 states that "Thailand has a democratic system. It has a King as Head [of State]" (113). The 1949 Constitution legislates that the king is not able to be accused, which remains part of every subsequent charter and functions together with Article 112 to prevent the king from being questioned.

³ Constitutional Court, *Constitutional Court Ruling no. 19/2564*, December 2021 (translated by Tyrell Haberkorn, *Justice in Translation no. 7/2021*, Justice in Southeast Asia Lab, University of Wisconsin-Madison).

⁴ Constitutional Court, *Constitutional Court Ruling no. 3/2567*, May 2024, 44 (translated by Tyrell Haberkorn, *Justice in Translation no. 2/2024*, May 2024, Justice in Southeast Asia Lab, University of Wisconsin-Madison).

DKNS is then solidified in a short book, *The Thai Monarchy*, written by Thanin Kraivichien (1976), who was appointed as prime minister following the October 6, 1976, massacre and coup. First, Thanin ordered the relationship of the monarchy as one in which the monarchy was primary and the military was its secondary protector. Second, he wrote a new history in which “Thailand had always been ruled by some form of democratic monarchy (or a monarchic democracy): democracy and monarchy were synonymous and essential qualities of Thailand’s indigenous form of rule” (145). Thanin’s conception of democracy was little more than the procedural presence of elections; participation, equality, and other normative qualities did not factor into his definition. Then, through a range of texts and practices over time, the fiction that Thailand has been a DKHS since 1932 was created and is now in the preamble to the 2017 Constitution.

DKNS is mentioned fourteen times in the 2017 Constitution. Defending DKNS is the duty of the people and the state and the aim of political reform. The exercise of constitutional rights and liberties must take place within it (199). Most pernicious, and reflective of the absence of democracy from DKNS, while allegedly acting under the 2017 Constitution, the king departed from it and had the new Cabinet swear loyalty to him rather than to him and the Constitution, following the 2019 election. Mériéau concludes that “the King being above politics meant, literally, the King being above the Constitution” (245). Naming this reality as such is precisely what democracy activists are being prosecuted for and what the Constitutional Court has ruled to be overthrow. What Mériéau leaves unsaid, partially because it continues to unfold and will have to wait for scholars to write in the future when the present moment of repression is safely in the past, is what violence is wrought in the name of DKHS and who is responsible. Tracing this violence, and the bricolage of actors and ideologies that made it possible, will be essential to both redress it and bring the king under the Constitution.

Conclusion

Against the ahistorical idea of DKHS, Eugénie Mériéau traces its genesis through a complicated bricolage of texts and actions, some intentional and some powerful in excess of their intentions. She is clear that she is engaged not in political recommendations but “an analysis of Thailand’s bricolaged constitutional identity over time, belonging to the realm of interpretive inquiry” (26). Yet, in a time of crisis, scholarship cannot help but be political. As lawyer Arnon Nampa and others are facing decades in prison for querying the place of the monarchy in the polity and calling for it to be reformed in line with democracy, Mériéau’s careful deconstruction of the intertwining of monarchy and law is an urgent contribution to the defense of rights and sovereignty. May more scholars lend their time and rigor to doing so.

References

- British Broadcasting Corporation. 2021. “Thai Woman Jailed for Record 43 Years for Criticising Monarchy.” April 19. <https://www.bbc.com/news/world-asia-55723470>.
- Erakat, Noura. 2019. *Justice for Some: Law and the Question of Palestine*. Palo Alto, CA: Stanford University Press.

- Kraivichien, Thanin. 1976 *The Thai Monarchy*. Bangkok: Ministry of Education [ธานินทร์ กรีย์วิเชียร. 2519. พระมหากษัตริย์ไทย. กรุงเทพฯ: กระทรวงศึกษาธิการ].
- McCargo, Duncan. 2021. "Disruptors' Dilemma? Thailand's 2020 Gen Z Protests." *Critical Asian Studies* 53, no. 2: 175–91.
- Nampha, Arnon. 2021. *The Monarchy and Thai Society*. London: PEN International.
- Streckfuss, David. 2010. *Truth on Trial in Thailand*. London: Routledge.
- Thai Lawyers for Human Rights. 2024. "April 2024: 1,295 Cases Have Been Filed against 1,954 People." 20 May. <https://tlhr2014.com/en/archives/67085>.

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