

Book Review

Duncan McCargo *Fighting for Virtue: Justice and Politics in Thailand.*

Ithaca and London: Cornell University Press, 2019. 282.¹

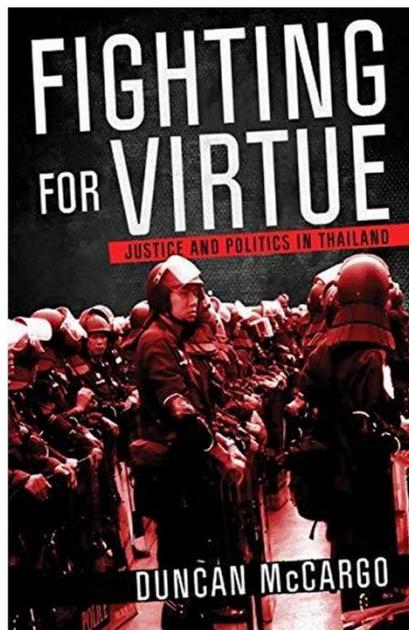
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In this exceptionally challenging book, Duncan McCargo provides a richly researched treatment of the dramatic engagement of the judicial system and politics in Thailand in the decade between 2006 and 2016. *The Fighting for Virtue* aims to convince reader of the overall failure of Thai judicial system to promote rights – based justice and the rule of law.

McCargo's starting point is the claim that “the Thai legal system is primarily dedicated to the preservation of peace and order, rather than to more liberal goals such as promoting rights – based justice, or even to the conservative, technocratic objectives of promoting the rule of law” (2). The rest of the book attempts to show that the judicial policies of Thai courts have had an opposite impact ending in increased discontent and conflict. A short review cannot do justice to the academic complexity of McCargo’s eight chapters. The book's first chapter examines the meaning of being a Thai judge as a profession. Thai judges are described as a self – conscious prideful elite. The second chapter aims at uncovering traditional and moral attachments of Thai judiciary to the King. Chapter 3 looks at the way how Thai courts responded to the political challenges of the rise of a populist party. The following three chapters critically examine many high – profiled political cases. They are of a great value and are recommended for all students of Thai law in order to become aware of the flaws of judicial process in Thailand. McCargo observed personally the trials described in the chapters and he interviewed their participants. His sympathetic attitude to the defendants and a critical examination of all players in these cases makes his description of a Thai trial illuminating. In the first case of Somyot Prueksakasemsuk (Chapter 4), the editor of a magazine was jailed for 7 years for an ambiguous text, deemed to defame the king, without writing it. In the second case of Katha Pajariyapong (Chapter 5), the defendant was convicted in posting messages online that allegedly caused panic among the public and compromised national security. In the second case, the prosecution invoked 2007 Computer Crime Act arguing that spreading rumors about the king’s health is endangering public

security. An interesting part of the analysis of these cases is the description of a detrimental role of the defense lawyer for the interests of the accused.

Chapter 6 deals with the case of Jon Ungpakorn, an NGO activist who was accused together with other 9 persons for disrupting in 2007 parliamentary proceedings of the National Assembly appointed by the military government. He and others were charged with assembling to breach the peace, trespass and sedition. The court rejected sedition (Section 116 of the Penal Code), but the defendants were convicted on other less severe charges. The punishment was, however, mild as all defendants received suspended sentences. Similarly to previous chapters, the description of the case is revealing. Being an observer of the court's proceedings, the author argues that this case was unique as the defendant and his lawyers tried their best to lose the case rather than to win in order to draw public attention.

In contrast to the previous chapters, Chapter 7, titled as "Crimes of Thaksin," may be misleading. The criminal case against Thaksin in 2008, involving the conflict of interest in helping his wife to buy land from a state agency at a reduced price, is only briefly mentioned (179). The chapter largely covers the role of the Constitutional Court in the period 2001 – 2013 in attempts to remove Thaksin and various persons standing close to the populist leader from their political offices. The chapter lacks the academic force characteristic for the previous chapters. It mentions many cases without giving them a clear explanation and analysis. The final chapter of the book also does not fit well with the previous chapters and, indeed, with the claim that Thai judicial activism is motivated by the desire of the political elites to keep their power. In this chapter, the Constitutional Court emerged as unwilling to give judgements on troublesome political cases in 2012 – 2014. The central case of the chapter was the decision on the constitutionality of the Yingluck Shinawatra government's attempt to amend constitution in 2012. The author offers an overall deep analysis of the case explaining the reasons for the constitutional court's reluctance to take a pro – active position in political cases.

From the informative point of view, *Fighting for Virtue: Justice and Politics in Thailand* is a very good book, but its rich detail and analysis is based on the mixture of correct evaluations, imprecise concepts, and a Western liberal bias. For example, McCargo’s assessment of Thai political and legal history since the 1997 Constitution is overall accurate. He perceives the 1997 Constitution as a failed experiment of faith in institutional innovations that will bring stability and justice (6). The reason for the failure is rightly seen in the growth of the populist party headed by Thaksin Shinawatra that threatened the ‘network monarchy’. Nevertheless, there is some imprecision in describing the “network monarchy” itself that is central in his analysis of the process of “judicialization” or an active participation of Thai judiciary in dealing with political questions. McCargo writes: “The network monarchy is an aggregation of elite royalist players, including the Privy Council, the military, the upper echelon of the civil service, prominent academics and members of civil society – and the judiciary” (3). The examination and the assessment of this network and its role in judicial policies, however, lacks comprehensiveness. Instead of a complete analysis of all its constituent parts, he unjustifiably reduces the network monarchy to the undemocratic elite which desires to preserve its power and status quo (218) leaving outside much more diverse parts of Thai monarchism. In one sense, McCargo is right in presenting it as a political force that opposes various populist political movements. But he fails to understand that the “network monarchy” is *not* limited only to some civil and military elites. It also finds a broad support across all levels of Thai society, particularly among the middle class. This failure to understand “network monarchy” as a mass based political force, and not only as a cadre party,² weakens the analysis of Thai judiciary in this book.

One can agree with the author that Thai judiciary plays an important role to restrain populist movements. However, it is not as homogenous as McCargo claims

² See for the difference: Duverger, Maurice. *Les partis politiques*. FeniXX, 1981.

(Chapter 2). The judiciary includes different political adherents. It is definitely a mistake to represent Thai judiciary as exclusively conservative and anti – populist. In fact, Thai courts did take sometimes a pro-populist party stance.³ There are cases when Thai courts took an impartial position. The author himself refers to the case of Surapak Puchaisaeng (152) who was acquitted on appeal in a lese-majeste case. In the case of Jon Ungpakorn, McCargo contradicts to his previous generalizations about the Thai judiciary by saying that “the case demonstrated that by no means all judges were biased against all protestors” (168).

In McCargo's view, “the special link between the monarchy and the judiciary, the blurring of legal and Buddhist doctrines, a hierarchy of punishment based on social standing, anxiety about plots against the throne, the monarch as a legal authority, and the use of banishment as a punishment, all that characterized ancient Thai law, “continue to resonate even in the twenty-first century” (12 – 13). This claim should have been supported by historical facts. Other claims remain controversial. According to McCargo, the King of the ancient times was “uniquely able to lay down laws for his subjects and in this sense was personally above the law” (12). This view, although being shared by many Thai academics,⁴ is not universally accepted. There are reasons to hold an opposite view. In the past as well as in the present, Thai King did no legislate in the modern meaning of this word.⁵ The Thai King of the past played the role of enforcing rights and duties according to religion and custom rather than

³ BBC. ‘Thai PM escapes business inquiry’ 16 February 2006, <http://news.bbc.co.uk/2/hi/asia-pacific/4718700.stm> Thitinan Pongsudhirak ‘The Tragedy of the 1997 Constitution.’ In: N. John Funston (ed) *Divided Over Thaksin: Thailand's Coup and Problematic Transition* (Silkworm Books, 2009) 27-37, at 33. See also the discussion of the 2001 Thaksin trial on failing to declare assets. 171f.

⁴ ธงชัย วินิจจะกุล, *นิติรัฐอภิสิทธิ์และราชานิติธรรม: ประวัติศาสตร์ภูมิปัญญาของ Rule by Law แบบไทย*, ปาฐกถาพิเศษ ปวย อึ้งภากรณ์ ครั้งที่ 17, 9 มี.ค. 2563 นิตยสาร Way, 2020. 121f.; หยุด แสงอุทัย, *ความรู้เบื้องต้นเกี่ยวกับกฎหมายทั่วไป*, (กรุงเทพฯ: สำนักพิมพ์มหาวิทยาลัยธรรมศาสตร์, 2016), 77.

⁵ Kasemsup, Preedee. "Reception of Law in Thailand - A Buddhist Society." In : Masaji Chiba (ed), *Asian Indigenous Law* (Routledge, 2013) 267-300.

creating them.⁶ At present, the facts presented by McCargo can be interpreted differently in the meaning that the King maintains fundamental traditional duties and rights against the abuses of a populist government.

Regrettably, the book is not academically impartial. It reflects to some extent the view of a Western liberal or some Thai academics and human rights activists educated within a liberal tradition. Some statements in the book look like political slogans rather than careful academic conclusions. A rather typical statement of McCargo is: “the courts enthusiastically enforce new ‘laws’ that simply reflect the wishes of authoritarian rulers, and support the use of existing laws to curtails people’s rights and support dictatorship” (8). This statement is certainly an oversimplification if not an error of judgement. The reality of Thai politics and law is more complex than a caricature of an elite who employ the ideas of hyper – royalism to oppress the mass of people, although one must also avoid the opposite painting of the populist movement as a demonic force that threatens the sacred foundations of Thai society.

The author approaches Thai legal and political system from a Western republican bias which cannot digest the existence of a strong monarchy co-existing with a democratic form of government. This bias prevents him from perceiving that not every coup d’etat can be illegal (20). Moreover, a military largely bloodless intervention in some extreme cases, as it happened in Thailand, can be seen as a manifestation of the uniquely Thai unwritten constitutional system of checks and balances on abuses of a populist government. This serves as a better explanation of acceptance of military laws by Thai courts rather than unjustifiably claiming that Thai courts follow an outdated “model of justice [that] predates modern notions of rights and citizenship” (23). It is certainly a mistake to perceive monarchy in Thailand as a

⁶ Lingat, Robert. *Les sources du droit dans le système traditionnel de l'Inde*. (Paris: Mouton, 1967). 9.

reactionary force *per se*. The institution of monarchy in a modern democracy can also potentially be a safeguard of liberalism and human rights against a mob rule. This liberalism, however, takes on the Eastern robe of benevolence. This link between liberalism and benevolence is acknowledged by McCargo himself (2). But, he does not accept it as a legitimate alternative to a Western ideal of royal liberalism with its connivance to public and private sin. Certainly, McCargo is right in emphasizing the link between the Thai monarchy and the rule by virtue. This, however, is not something to frown at, but to welcome.