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# Constitutional Court Decision No. 19/2564: A Threat to Democracy? Forfeiture of Fundamental Rights and the Judicialization of Politics by the Thai Constitutional Court in 2021

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## Abstract

*This article aims to closely examine how the Thai Constitutional Court in Decision No. 19/2564 interpreted Section 49 of the 2017 Constitution as "Thai-style militant democracy," suppressing the fundamental rights of the citizen, which reflects the characteristics "judicialization of politics" and "politicization of the judiciary" applied by the Court. This article explores the factors behind this interpretation and evaluates the impact of the decision. In Decision No. 19/2564, the Court ruled to suppress the activists' freedom of expression on the ground that they exercised their rights with the intention to "overthrow" the rule by democracy with the King as the head of state. This ruling not only brings controversies, but also demonstrates the way the Court interpreted the concept of a "democratic regime of government with the King as head of state," which is a core concept of Thai-style democracy and Thai constitutionalism, and how the Court applied its reasoning to the mechanism of "militant democracy" to defend the regime's structure. These controversies can be*

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*understood by examining the relationship between the political players within Thailand; the workings of informal power; the hidden political structure within the constitution; and Thai judicial culture and identity.*

Keywords: Militant democracy — Judicialization of politics — Politicization of the judiciary — Thai constitutional court — Freedom of expression

# I. INTRODUCTION

Thailand's politics have become judicialized and are increasingly the subject of contention. The Constitutional Court recently made another important decision that places it on one side of a polarized society: Constitutional Court Decision No. 19/2564 has been criticized for the ambiguity of the Court's order, and it brings controversies in both procedural and substantive aspects of the judicial reasoning of the decision. This article will focus on how the Thai Constitutional Court interpreted Section 49 of the 2017 Constitution, the "Thai-style militant democracy" clause, to suppress the right to assemble peacefully and unarmed and to suppress the freedom of expression of the respondents and activists so as to preserve "the democratic regime of government with the King as head of state" (DRKH).

The Free Youth Movement (FYM) is a decentralized youth-led democracy movement begun by the #FreeYouth (#เยาวชนปลดแอก) campaign launched on social media platforms in November 2019.[1] FYM, alongside its allies, promoted many anti-government protests between July and December 2020.[2] Initially, the protests presented three demands: the resignation of Prayuth Chan-Ocha, a new constitution, and an end to state threats against dissidents. The demands increased to ten, including a proposal to reform the monarchy[3] by the United Front of Thammasat and Demonstration (UFTD) at a peaceful demonstration[4] in August 2020. In September 2020, Natapon Toprayoon[5] submitted a petition to the Constitutional Court claiming that Arnon Nampa and 10 other protestors had on various occasions organized demonstrations that violated the institution of the monarchy, considering their

[1] Aim Sinpeng, "Hashtag Activism: Social Media and the #FreeYouth Protests in Thailand" (2021) 53(2) Critical Asian Studies 192–205 <https://doi.org/10.1080/14672715.2021.1882866>.

[2] ibid 3.

[3] Anusorn Unno, "'Reform, Not Abolition': The 'Thai Youth Movement' and Its Demands for Reform of the Monarchy" (2022) 3 ISEAS Yusof Ishak Institute Perspective 1, 5–6 <https://www.iseas.edu.sg/wp-content/uploads/2021/12/ISEAS_Perspective_2022_3.pdf>.

[4] Tyrell Haberkorn, "Reform is Not Revolt: Preliminary Observations on Constitutional Court Ruling No. 19/2564" in Tyrell Haberkorn, *Constitutional Court Ruling: A Selection of Documents in Justice in Translation 7/2021* (SEALab Center for Southeast Asian Studies, University of Wisconsin-Madison 2021) 2–4 <https://seasia.wisc.edu/sjsea-project/jsealab/justice-in-translation/>.

[5] Natapon Toprayoon was a former adviser to the President of the Ombudsman who once filed a petition to the Constitutional Court to dissolve the Future Forward Party, but the Court dismissed the case in Constitutional Court Decision 1/2563 (known as the "illuminati case").

speeches about the monarchy to be an act with the intention of overthrowing the DRKH, according to Section 49 of the Constitution. Natapon demanded of the court to cease the activities of all respondents mentioned in his petition.

Of the respondents identified in the petition, the Court only accepted the actions and speeches of respondents Nos. 1, 2 and 3 (Arnon Nampa, Panupong Jadnok and Panausaya Sithijirawat) during the demonstration of 10th August 2020 as the object of the case. It took a full year to consider the petition.[6] Meanwhile, all the respondents had already been charged with the violation of Section 112, the crime of *lèse majesté*. Without the need for witnesses to provide testimony, the Court ruled that respondents Nos. 1, 2 and 3 had exercised rights and freedoms with the intention of overthrowing the rule by DRKH according to Section 49 of the Constitution, with the ruling ordering respondents, *including related organizations and networks*, to cease these actions in the future as well.[7]

My argument is that Decision No. 19/2564 shows the latest trend of the Courts in applying "Thai-style militant democracy" (TSMD), which has mutated far beyond its origin. The Court interpreted Section 49 without separating the element of a "democratic regime" from the element of a "government with the King as head of state" under the ideology of Thai-ness, Thai-style democracy, and Thai constitutionalism, which reflects the fluid concept of an "unwritten" or "invisible" constitution.[8] The Court even tried to establish a "Thai constitutional identity" by giving a definition of the concepts "nation" and "king," specifying in the decision the duties of Thai citizens to protect these values. Without hesitation, the Court not temporarily forfeited, but permanently suppressed the fundamental political rights of the citizens guaranteed by the constitution, which are the foundation of liberal democracy and vital for a pluralistic society.[9] The Court also prioritized the preservation of DRKH.

This kind of interpretation of TSMD in the light of DRKH, and the willingness of the Court to act in a highly political area by trying to form a collective identity, reflects the phenomena of "judicialization of politics" and "politicization of the judiciary" in Thailand, which can be understood by examining the past sequence of events and the relationship between the Courts and the other institutions; power, both formal and informal; and the judicial culture and ideologies.

I aim to examine closely how the Thai Constitutional Court interpreted TSMD in Decision No. 19/2564. Section I of this article will start with the examination of the original idea of militant democracy and how it mutated into Thai-style militant democracy. In Section II, I will provide an analysis of TSMD and DRKH in Decision

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[6] ibid 4.

[7] Constitutional Court Decision 19/2564, 10 November 2021, Royal Gazette 49.

[8] Part of the unwritten Thai Constitution in Thai Constitutionalism is the vague and fluid concept of customary law and royal prerogative powers according to constitutional convention and ideological and symbolic narratives with normative authority. As Henning Glaser argued, DRKH is *both* the basic structure of the constitution and the vague and fluent but "omnipresent and omnipotent" meta-order. See Henning Glaser, "Thai Constitutional Court and the Political Order" (2012) 53(2) Seoul Law Journal 65, 78–80.

[9] Louis Favoreu et al, *Droit des libertés fondamentales* (8th edn, Dalloz 2021) 371 and 396.

No. 19/2564, exploring the logic behind the decision, and how it fits in with the phenomenon of judicialization of politics in Thailand. Finally, I will evaluate the impact of Decision No. 19/2564 in Section III, followed by a conclusion.

# II. THE MUTATION OF MILITANT DEMOCRACY

## A. Militant Democracy and its Controversies

There is no agreed-upon definition of "militant democracy." However, there are commonalities in all attempts to define this concept.[10] Militant democracy can refer to a democratic regime that is willing to use pre-emptive measures, which would mainly be preventive legal measures which restrict rights and freedoms, to prevent anti-democratic "enemies"—those who aim to ruin a democratic structure by abusing democratic rights and freedoms given by a democratic regime—from destroying said regime.[11]

This term was first used by Karl Loewenstein in his pair of articles in 1937[12] on how democratic governments could resist fascist overthrow. Loewenstein developed the concept of militant democracy under a specific context: to fight back against fascism's methods of radical emotionalism, and to strike at the roots of fascism's political technique[13] which paralyzed the democratic order into chaos, finally establishing an autocratic regime. Loewenstein's argument is based on the idea that democracy must actively defend itself against its enemies,[14] and that the law must fortify vulnerable spots in the democratic structure, as democracy offers freedoms even to its most hostile enemies.[15] In his works, he repeatedly employs martial language and metaphors[16] to illustrate his idea that democracy is "at war" with autocracy.[17] Loewenstein even justifies militant democracy measures using an analogy

[10] Svetlana Tyulkina, *Militant Democracy: Undemocratic Political Party and Beyond* (Routledge 2015) 14 <https://doi.org/10.4324/9781315767819>.

[11] Jan-Werner Müller, "Militant Democracy" in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional law* (Oxford University Press 2012) 1253.

[12] Karl Loewenstein, "Militant Democracy and Fundamental Rights I" (1937) 31(3) The American Political Science Review 417–32 <https://doi.org/10.2307/1948164>; Karl Loewenstein, "Militant Democracy and Fundamental Rights II" (1937) 31(4) The American Political Science Review 638–58 <https://doi.org/10.2307/1948103>.

[13] Paul Cliteur and Bastiann Rijpkema, "The Foundation of Militant Democracy" in Afshin Ellian and Gelijn Molier (eds), *The State of Exception and Militant Democracy in a Time of Terror* (Republic of Letters Publishing 2012) 232.

[14] Loewenstein, "Militant Democracy I" (n 12) 430.

[15] Cliteur and Rijpkema, "The Foundation of Militant Democracy" (n 13) 235. There is a possibility that a democratic regime can overthrow itself. See also the "paradox of democracy" in Carlo Invernizzi Accetti and Ian Zuckerman, "What's Wrong with Militant Democracy?" (2017) 65(1) Political Studies 182, 183 <https://doi.org/10.1177/0032321715614849>.

[16] Ben Plache, "Soldiers for Democracy: Karl Loewenstein, John H. Herz, Militant Democracy and the Defence of the Democratic State" (MA thesis, Virginia Commonwealth University, 2013) 37.

[17] Tyulkina, *Militant Democracy* (n 10) 27.

with the concept of the state of emergency. In wartime and a state of siege, it is necessary to temporarily suspend some fundamental rights for the sake of national self-defense. Loewenstein stated that "every possible effort must be made to rescue democracy, even at the risk and cost of violating fundamental principles."[18] In the second article,[19] Loewenstein surveys the anti-fascist legislation of the European nations that had remained democratic at the time, and categorizes them into fourteen types to support his argument as to what democracies must do to defend themselves, including curbing the right to assembly of "organized hooliganism" and "extremist parties;"[20] limiting the freedom of public opinion, speech, and press to ban fascist propaganda;[21] and the use of trained political police for the discovery, repression, supervision, and control of anti-democratic movements.[22] Loewenstein concluded that democracy should no longer remain inactive in self-defense against extremism. The maximum defense measure is equal to the minimum of self-protection. A "successful" defense also depends on many factors,[23] including the specific juridical technique of each country.

Lowenstein's idea of militant democracy became highly influential, and was the starting point of the idea of self-defending democracy, which was integrated into the constitutional systems of several modern states,[24] and into treaties.[25] It has been implemented by national constitutional courts,[26] which apply measures such as the forfeiture of rights and the dissolution of political parties. Each legal system adopts the idea of self-defendant democracy in ways that go beyond Lowenstein's idea, as nowadays the "enemies" of democracy come in various and complex forms. Democracy has been challenged by religious fundamentalism, global terrorism, authoritarian and illiberal or populist strategies,[27] and other extremist ideas. Thus, the contemporary militant democracy issue is deeply connected with the history of each particular country.[28] As Svetlana Tyulkina pointed out, Loewenstein's version of militant democracy is only a "set of guidelines on how to resist a particular political movement (fascism) in a particular constitutional context (the Weimar Republic)."[29] The

[18] Loewenstein, "Militant Democracy I" (n 12) 432.

[19] Loewenstein, "Militant Democracy II" (n 12) 644.

[20] ibid 651–52.

[21] ibid 652.

[22] ibid 655.

[23] ibid.

[24] Cliteur and Rijpkema, "The Foundation of Militant Democracy" (n 13) 245.

[25] Anna Asbury, *Militant Democracy: The Limits of Democratic Tolerance* (Bastiann Rijpkema 2018) 4.

[26] See the case of the German Federal Constitutional Court on banning the quasi-Nazi Socialist Reich Party (SRP) in 1952 and the German Communist Party (KPD) in 1956, Jan-Werner Müller, "Militant Democracy" (n 11) 1257.

[27] Antoula Malkopoulou, "Introduction. Militant Democracy and Its Critics" in Anthoula Malkopoulou and Alexander S. Kirshner (eds), *Militant Democracy and Its Critics: Populism, Parties, Extremism* (Edinburgh University Press 2019) 1 <https://doi.org/10.1515/9781474445627-003>.

[28] Markus Thiel, "Introduction" in Markus Thiel (ed), *The 'Militant Democracy' Principle in Modern Democracies* (Ashgate 2009) 5.

[29] Tyulkina, *Militant Democracy* (n 10) 34.

complexity of contemporary militant democracy issues is due to deep differences in the historical, social, cultural, and legal circumstances and *particular* contexts of the various democracies. Therefore, Tyulkina concluded that "militant democracy is not a universal stencil that can be promptly applied to any democratic state."[30] In each democratic state, militant democracy has a specific purpose as its reason for being; the range of targets, the conditions of the legitimacy of its measures and its features depend on the characteristics of each democracy.[31] The transplantation of militant democracy and its regulations across legal systems faces these challenges.

The idea of "fighting fire with fire" in Loewenstein's original concept of militant democracy still brings up controversies and debates in theoretical issues. If democracy is by definition a concept that guarantees rights and freedoms, then how is it to restrict these rights in the name of preservation of democracy when challenged existentially by enemies? Loewenstein's concept has been criticized for using dictatorship as a means to defend democracy—the so-called *democratic dilemma*.[32] Moreover, a clear definition of militant democracy and its general legal theory are still absent. Thus, militant democracy has a potentially expansive scope, beyond that which it needs to sustain democracy; which may result in misinterpretation and abuse, especially by political elites.[33] It can easily turn into illiberal democracy, which is more concerned with its own stability than with political developments.[34] It can be manipulated for political purposes and misused to contest liberal democracy itself, because defending democracy involves the element of politics.[35] Answers to the questions "Who is an enemy of democracy?" and "What kind of action cannot be tolerated?" in a democratic framework mostly rely on interpretation by the authorities—the so-called *arbitrariness of militant democracy*.[36] Recognizing legitimate targets for militant democracy measures, and distinguishing them from cases where the measures are used for suppressing political competition and silencing opposition, is quite challenging.

To find an answer to the problems of justification and effectiveness of militant democracy, some scholars try to propose a softer version of militant democracy, known as *neo-militant democracy*.[37] They suggest that militant measures should primarily regulate only certain areas, such as the electoral arena or special

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[30] ibid 35.

[31] ibid 36.

[32] Martin Klamt, "Militant Democracy and the Democratic Dilemma: Different Ways of Protecting Democratic Constitution" in Fred Bruinsma and David Nelken (eds), *Explorations in Legal Culture* (Reed Business BV 2007) 134.

[33] Udi Greenberg, *The Weimar Century. German Émigrés and the Ideological Foundations of the Cold War* (Princeton University Press 2014) 184 <https://doi.org/10.1515/9781400852390>.

[34] András Sajó, "Militant Democracy and Emotional Politics" (2012) 19(4) Constellation 562, 565 <https://doi.org/10.1111/cons.12011>.

[35] Tyulkina, *Militant Democracy* (n 10) 29.

[36] Accetti and Zuckerman, "What's Wrong with Militant Democracy?" (n 15) 184–85.

[37] Antoula Malkopoulou and Ludvig Norman, "Three Models of Democratic Self-Defense: Militant Democracy and its Alternatives" (2018) 66(2) Political Studies 442, 445–46 <https://doi.org/10.1177/0032321717723504>.

circumstances, and should be neutral in order to prevent abusive militant democracy practices, as they should focus on *actions,* not *ideas*.[38] Some scholars try to define a "good" militant policy by delimiting the scope of militant measures or the effects of these measures by suggesting that the ban should be temporary.[39] Some have suggested that militant democracy must not be interpreted as discouraging democracies. Its measures are legitimate only where there are strong procedural and institutional guarantees to ensure that limitations on individual rights are not misused in the name of protecting the democratic structure.[40] Some even argue that it should be used only in a transitional constitutionalism context and may not be appropriate for mature liberal democracies.[41]

## B. From *wehrhafte Demokratie* to a Thai-style Militant Democracy

There is evidence to indicate that Thai constitutions since the 1997 Constitution have received constitutional ideas from Germany on *wehrhafte Demokratie* (German militant democracy). Poonthep Sirinupong argues that the transplantation of German militant democracy in Thailand led to a "mutation effect,"[42] creating Thai-style militant democracy under the concept of "rights to protect the constitution." The genealogy of the rights to protect the Constitution can be traced back by a comparative analysis of Section 63 of the 1997 Constitution, Section 68 of the 2007 Constitution, and Section 49 of the 2017 Constitution.

Section 63 of the 1997 Constitution states:

> No person shall exercise the rights and liberties prescribed in the Constitution to overthrow the democratic regime of government with the King as Head of the State under this Constitution or to acquire the power to rule the country by any means which is not in accordance with the modes provided in this Constitution.

Even though there are no official citations of the German Basic Law (Grundgesetz, GG) in the drafting process, the strong influence of German militant democracy can be traced back to the work of Kamolchai Rattanasakaowong,[43] one of the researchers in

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[38] ibid 445.

[39] ibid 446. See also Alexander S. Kirshner, *A Theory of Militant Democracy: The Ethics of Combating Extremism* (Yale University Press 2014).

[40] Tyulkina, *Militant Democracy* (n 10) 31.

[41] Ruti Teitel, "Militating Democracy: Comparative Constitutional Perspective" (2007) 29(1) Michigan Journal of International Law 29, 49.

[42] ปูนเทพ ศิรินุพงศ์, " 'สิทธิพิทักษ์รัฐธรรมนูญ' ในกฎหมายรัฐธรรมนูญไทย: การกลายพันธุ์ของความคิดทางรัฐธรรมนูญที่รับเข้าจากต่างประเทศ?" (2561) 47(1) วารสารนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 81 [Poonthep Sirinupong, "'Rights to Protect the Constitution' in the Thai Constitutional System: The Mutation of the Migration of Constitutional Ideas" (2018) 47(1) Thammasat Law Journal 81] (Thai) 85.

[43] ibid 103–4. See also กมลชัย รัตนสกาววงศ์, "ศาลรัฐธรรมนูญและวิธีพิจารณาคดีรัฐธรรมนูญ" ใน การปฏิรูปการเมืองไทย ฐานคิดและข้อเสนอว่าด้วยการออกแบบรัฐธรรมนูญฉบับประชาชนปี 2540 (สำนักงานกองทุนสนับสนุนการวิจัย, 2560) [Kamolchai Rattanasakaowong, "The Constitutional Court and the Constitutional Case

the "Political Reform" project which had a huge influence on the Constitution Drafting Committee (CDC) of the 1997 Constitution. Kamolchai suggested that the newfound Constitutional Court should have the jurisdiction and power to examine the facts and forfeit the rights of a person or a group of persons who act against the regime,[44] which is similar to Article 18 of the GG. However, Kamolchai suggested that it should be the House of Representatives, the Senate or the Cabinet that has the ability to submit the petition. He further suggested that in the same article of the Constitution, the Court should also have the power to dissolve political parties on the ground that they are acting against the regime,[45] and that the petition for the dissolution of parties should be submitted only by the Attorney-General—which is completely different from Article 21 (2) of the GG.

The result of the constitutional drafting is quite close to Kamolchai's suggestion, except that it does not separate the entity who has the power to submit a petition to the court between cases involving private persons, and those involving and the dissolution of parties; as Paragraph 2 of Section 63 of the 1997 Constitution states,

> In the case where a person or a political party has committed the act under paragraph one, the person knowing of such act shall have the right to request the Attorney-General to investigate its facts and submit a motion to the Constitutional Court for ordering the cessation of such activities without, however, prejudice to the institution of a criminal action against such person.

Paragraph 3 of the same section affirms the idea of the dissolution of political parties: "In the case where the Constitutional Court makes a decision compelling the political party to cease to commit the act under paragraph two, the Constitutional Court may order the dissolution of a such political party."

The idea of TSMD was based on the DRKH from the very beginning. It should be noted that Kamolchai's proposal of militant democracy was based on his suggestion that the formation of the bench of the Constitutional Court has a direct link to the consent of the House of Representatives,[46] which is hugely different to the formation of the Court by Section 255 of 1997 Constitution. Kamolchai's suggestion was also based on the model of temporary forfeiture of the right,[47] not a complete suppression of the right. These differences affect the legitimacy of the court to act as the guardian of the Constitution when using militant democracy measures.

Besides the adoption of Kamolchai's ideas by the CDC in the first draft of the 1997 Constitution,[48] evidence of the idea of militant democracy can also be found in

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Procedure" in *Thai Political Reform: Foundation Ideas and Suggestion for Constitutional Design of 1997 Constitution* (Thai Research Fund 2017)] (Thai).

[44] Poonthep (n 42) 103.

[45] ibid 104.

[46] Kamolchai, "The Constitutional Court" (n 43) 26–27.

[47] ibid 41.

[48] See the CDC's draft version on Section 3/3/30 in มนตรี รูปสุวรรณ และคณะ, เจตนารมณ์ของรัฐธรรมนูญ (วิญญูชน 2542) [Montri Roobsuwan and others, The Spirit of the Constitution (Winyuchon 1999)] (Thai) 145–46.

the discussion held during the CDC meeting in 1997.[49] When Bawornsak Uwanno, as the secretary of the CDC, answered the question of the distinction between Section 48 Chor[50] of the 1991 Constitution and the newly drafted Section 63 of the 1997 Constitution, he stated that the intention of Section 63 is to prevent the overthrow of the regime or the acquisition of the power to rule by any means outside the constitution.[51] He also stated that Section 63 is a concrete action for a serious threat and must be interpreted together with Section 65,[52] the right to resistance.[53]

Thai-style military democracy has been officially transformed into the "right to protect the constitution" in the 2007 Constitution; this term was mentioned in Section 13 of Chapter 3 of the Constitution. Section 68 of the 2007 Constitution has almost the same content as Section 63 of the 1997 Constitution, with the addition of the prohibition of the right of election in the fourth paragraph. The idea of the "right to protect the constitution" is affirmed by Section 49 of the 2017 Constitution as part of Chapter 3: the Rights and Liberties of the Thai people. There are significant changes in some wordings, cutting out the phrase concerning an act to acquire the power to rule the country by unconstitutional means, and adding the right of individuals to submit the petition directly to the courts in a case where the Attorney-General refuses to submit the petition or fails to proceed within 15 days from the receiving of the case. The provision on political parties has been removed, as it has been moved to the provision in Section 92 of the Organic Act on Political Parties 2018, which expands the scope of TSMD. The Constitutional Court can now dissolve parties which commit an act that overthrows or "may be against" the DRKH.

Three characteristics of the complete mutation of militant democracy in Thailand and its effects have been pointed out by Poonthep.[54] First, he argued that the measures of the courts, "the order to cease such act" and its ambiguous effects, are completely different from the forfeiture of rights in Article 8 of the GG. Second, he pointed out that the Thai Constitution does not separate the case of a private person from the case of a political party, which can create odd effects as the types of cases in question are substantially different, both in procedural aspects and sanctions. Third, he criticized the fact that the notion of "rights to protect the constitution" changes the paradigm of the *restriction* or *forfeit of rights* for the sake of democracy to the paradigm of *rights*; in this context, the "right to request the Attorney-General" by the

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[49] รายงานการประชุมคณะกรรมาธิการร่างรัฐธรรมนูญแห่งราชอาณาจักรไทย (ครั้งที่ 13) วันพุธที่ 11 มิถุนายน 2540 [Minutes of the 13th Meeting of the Constitutional Drafting Committee on Wednesday, 11 June 1997)] (Thai) 5–18.

[50] Section 48 Chor (มาตรา 48 ฉ) stated that "No person shall exercise the rights and liberties according to the Constitution against the nation, the religion, the King, and the Constitution."

[51] Statement in Thai: "ในมาตรา ๖๓ นี้เข้าใจว่าคงต้องการเพื่อป้องกันการล้มล้างการปกครอง หรือเพื่อให้ได้มาซึ่งอำนาจโดยวิถีทางที่ไม่ได้เป็นรัฐธรรมนูญเท่านั้นเอง" in Minutes of the 13th Meeting (n 49) 8.

[52] Statement in Thai: "ในมาตรา ๖๓ นี้ต้องการให้ใช้กระบวนการที่ว่านี้ เฉพาะเรื่องที่เป็นเรื่องคอขาดบาดตายจริงๆ . . . จะใช้เฉพาะเรื่องร้ายแรง เพราะมาตรา ๖๓ ต้องอ่านโยงกับมาตรา ๖๕ ด้วย . . ." in ibid.

[53] Section 65 of the 1997 Constitution states that "A person shall have the right to resist peacefully any act committed for the acquisition of the power to rule the country by a means which is not in accordance with the modes provided in this Constitution."

[54] Poonthep, "Rights to Protect the Constitution" (n 42) 104–6.

person knowing of an act becomes the "right to defend the constitution." This paradigm shift creates a scenario where militant democracy can be a dispute between individuals, leading to the use of TSMD for political purposes.

The Constitutional Court of Thailand also plays a crucial role in the mutation of militant democracy through its constitutional interpretation in Decision No. 18-22/2555 and Decision No. 3/2562, which demonstrated the features of abusive constitutional borrowing.[55]

Decision No. 18–22/2555 (2012) was a reaction to the attempt by Prime Minister Yingluck's cabinet to undo the 2007 Constitution.[56] The government demanded to amend the "rule of amendments to the constitution." The Court attempted to intervene, even though there was no clear written rule that would permit judicial review of a constitutional amendment. After it accepted a claim from the Senators, the Court gave the injunction to parliament to stop amending the constitution. Even though it finally dismissed the case because there was "*not a consistent fact proving that the amendment of the constitution is the overthrow of the democratic regime*,"[57] the Court significantly took TSMD to another level, both in the aspects of the right to petition and in the object of the case.

In the first aspect, the right to petition, the Court expanded its jurisdiction by interpreting Section 68 of the 2007 Constitution by linking it with the right to resistance guaranteed by Section 69 of the 2007 Constitution; the Court stated that the Attorney-General just has a duty to examine the initial facts. Whether the Attorney-General decides to submit the petition to the court or not, it does not remove the right of the citizen to submit the petition because the constitution should be interpreted to encourage the "rights to protect the constitution" and the right to resistance.[58] By argument of the right to resistance, the Court can achieve two purposes simultaneously. On one side, the Court can directly accept the petition submitted by the Senators without passing through the Attorney-General, to cease the actions of its preferred target. On the other side, it can simply dismiss the case against certain demonstration groups as it prefers, on the claim that they normally exercise the right to resistance and freedom of assembly recognized by the Constitution.[59]

Regarding the second aspect, the object of the case concerns the scope of the term "to exercise rights and liberties to overthrow the regime." Decision No. 18–22/2555 showed that the using of the state's organ power provided by the constitution and laws (in this case, the amendment of the constitution) can be considered as a kind of the "exercise the rights and liberties to overthrow the regime." This interpretation paved the way for the Court to examine almost every action. It resulted in the use of

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[55] See Rosaland Dixon and David Landau, *Abusive Constitutional Borrowing* (Oxford University Press 2021) 36 and 106–12 <https://doi.org/10.1093/oso/9780192893765.003.0003>.

[56] See Khemthong Tonsakulrungruang, "Constitutional Amendment in Thailand: Amending in the Spectre of Parliamentary Dictatorship" (2019) 14(1) Journal of Comparative Law 173, 181.

[57] Constitutional Court Decision 18–22/2555, 28 November 2012, 26.

[58] ibid 7–8 and 21–23.

[59] Poonthep mentioned Constitutional Court Orders 67–69/2555, 23/2556, 54/2556, 59/2556, 61/2556, 63/2556, and 16/2557 in "Rights to Protect the Constitution" (n 42) 100.

TSMD against the state's organs including Parliament, the Cabinet, and even the Court itself.[60]

Another huge step in the mutation of militant democracy directly concerning DRKH is Decision No. 3/2562 (2019). It was caused by the announcement of the nomination of ex-Princess Ubolratana as a candidate for Prime Minister by the Thai Raksa Chart Party (TSN). Within a few hours, King Vajiralongkorn immediately took action by issuing a Royal Decree,[61] which led to the disqualification of ex-Princess Ubolratana. Finally, the Election Commission (EC) brought the case to the Constitutional Court, claiming that the TSN violated the law on political parties. The Court went on to dissolve the Party, banning all its executive members from the right to be elected, and prohibiting the executive members from forming new parties or being executive members of a party for 10 years.[62]

This decision is grounded on the idea that the monarchy is above all politics. The Court affirmed that not only the King himself, but *all* members of the royal family are above politics. The Court also cited its decision of 2000 to support the idea.[63] Therefore, the nomination of ex-Princess Ubolratana is an action that would foreseeably lead to a "ruling monarchy," which means the DRKH and the "reigns but does not rule" principle would be implicitly ruined. The Court went further, affirming that exercising the rights prescribed in the Constitution must not devastate the fundamental principle of the Constitution and DRKH, therefore the Constitution has a mechanism of "self-defending democracy" to defend an "excessive" exercise of rights by political parties. The Constitutional Court cited Section 92(2) of the Organic Act on Political Parties, which states that there is sufficient ground to sanction political parties if their action "*may* be against" the DRKH. Even though the constitution did not define the terms "overthrow" or "against" the regime, the Court firmly interpreted these words in the broad sense: "overthrow" denotes an action that has the intention to destroy or ruin the regime until it is completely dissolved and no longer exists. According to the Court, an action "against" the regime is an action that can cease the regime's progress or weaken it, resulting in the deterioration of the regime. The Court interpreted this term by using an analogy with the offence of defamation in the criminal code, and cited some of the Supreme Court's decisions.[64] It finally concluded that

> The action of the TSN party brings a royal family member to politics, an action which reasonable Thai citizens feel could bring down the Monarchy, the soul of the nation,

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[60] ibid 99.

[61] The Decree stated that it is inappropriate and unconstitutional for the members of the royal family to be involved in politics, and that doing so is contradictory to the Thai constitutional customs, constitutional conventions, and the intention of the constitution.

[62] Constitutional Court Decision 3/2562, 9 March 2019.

[63] Constitutional Court Decision 6/2543 stated that if the EC passes the regulation that forces members of the royal family to exercise the right to vote in a general election, it will contradict the principle that the monarchy is above all politics and the "political neutrality" of the King.

[64] Supreme Court Decisions 3167/2545, 256/2509, and 2371/2522.

> and which is used as a tool to achieve political advantages without concern for the fundamental principles of the DRKH. . . . Therefore the party has clearly committed an act that may be against DRKH.[65]

Decision No. 3/2562 affirms that "democracy" in Thai-style militant democracy corresponds exactly to DRKH. Another aspect of this decision that should be noted is that the Court showed clear signs of constructing a "Thai constitutional identity" by linking this identity to DRKH.

It can be concluded that TSMD is now different from *wehrhafte Demokratie* in aspects of both substance and procedure: from the condition to submit the petition to the court, to the range of targets of the measures, to the reason behind the use of militant democracy measures given by the Constitutional Court.

# II. TSMD, DRKH, AND THE PHENOMENON OF JUDICIALIZATION OF POLITICS IN DECISION NO. 19/2564

## A. TSMD and DRKH in Constitutional Court Decision No. 19/2564

In Decision No. 19/2564, the matter of the case which must be examined and ruled upon by the Court was whether the actions of respondents Nos. 1, 2 and 3 were the exercise of rights or freedoms in order to overthrow DRKH or not. The Court used the admissible facts of the case by focusing on speeches made by the respondents at the demonstrations and the call for the "transformation" of the monarchy in 10 demands. The Court summed up the 10 demands[66] and started by ruling that the protection of the rights and freedoms of the Thai people is part of the constitutional values that are the core of DRKH,[67] but that this protection exists with the condition that the exercise of rights and freedoms must not endanger or contravene state security, peace, public morals and public order, or violate the rights and freedoms of others, according to Section 25 of the Constitution. The Court stated that "when an individual has rights and freedoms, they also have accompanying duties and responsibilities," namely the duty to protect and preserve the nation, religion, the King, and DRKH; the duty to strictly follow the law and to not violate the rights and freedoms of others; and not to do anything that might create division or hatred in society, according to Section 50 (1)(3) and (6) of the Constitution.

This part of the decision reflects the idea that the Court cited the duties of citizens, based on national ideologies, as the conditions that limit the exercise of rights to support the idea of DRKH. This decision confirms Poonthep's argument regarding

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[65] Constitutional Court Decision 3/2562.

[66] See the translation of 10 demands of the activists in Haberkorn, *Justice in Translation 7/2021* (n 4) 102–3.

[67] Constitutional Court Decision 19/2564, 10 November 2021, Royal Gazette 40–41.

the mutation of militant democracy which goes far beyond its origin. Even though the origin of TSMD, Section 63 of the 1997 Constitution, was intended to be used against coups d'état, the "anti-acquisition of power clause"[68] was removed during the drafting of the 2017 Constitution, resulting in the interpretation of TSMD by the court that linked it back to the prohibition of the exercise of rights against the nation, religion, the King, and the Constitution. The Court even firmly confirms that Section 49 of the 2017 Constitution "stems from the Section 35 of the 1932 Constitution (Revision in 1952)[69] and is stipulated in the same manner in every subsequent constitution."[70] This can be questioned, as Bawornsak once pointed to the difference between "overthrowing" the regime and acts "against" the regime and distinguished the concept of militant democracy from the exercise of rights and liberties according to the Constitution against the Nation, Religion, the King, and the Constitution (Section 48 Chor of the 1991 Constitution) in a CDC meeting.[71] TSMD was *first* introduced in the 1997 Constitution, not the 1932 Constitution (revision in 1952).

The Court further stated that Section 49 of the Constitution confirmed the right of individuals to submit a petition directly to the court. The Court affirmed that, for clarity, the 2017 Constitution confirms the idea of guaranteeing the rights of the citizen to protect the Constitution from acts to overthrow DRKH by adding the phrase "if the Attorney-General has ordered to not proceed as petitioned or does not proceed within 15 days from the receipt of the petition, the petitioner can submit the petition directly to the Constitutional Court." The Court states that "the guarantee of the right of the petitioner to submit the petition guarantees the preservation of the essence of DRHK."[72] This part of the decision reflects the idea of "rights to protect the constitution" as a "right to petition," leading to a situation where individuals use the Court as the battleground of different political ideologies to silence another political opponent. This is an example of the misuse of militant democracy and demonstrates the *arbitrariness of militant democracy*. Decision No. 19/2564 shows the inconsistency of the court in the interpretation of the right to petition. In Decision No. 18–22/2555, the Court directly received the petition of the Senators without going through the Attorney-General, but in Decision No. 19/2564, even though the Court confirms the right of the citizens to directly submit the petition, it must still be first submitted to the Attorney-General; the Court rejected the petition concerning respondents Nos. 4 to 10, on the ground that the petitioner did not submit that part of the petition before the Attorney-General.[73]

To define the term "to overthrow," the Court cited its own decisions, Decisions No. 18–22/2555 (the constitutional amendment case) and No. 3/2562 (TSN case). It

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[68] Section 65 of the 1997 Constitution (n 53) and Section 69 of the 2007 Constitution.

[69] Section 35 of the 1932 Constitution (Revision in 1952) stated that "No person shall exercise the rights and liberties according to the Constitution against the nation, religion, the King, and the Constitution." It has the same text as Section 48 Chor (มาตรา 48 ฉ) of the 1991 Constitution.

[70] Constitutional Court Decision 19/2564, 10 November 2021, Royal Gazette 42.

[71] See Minutes of the 13th Meeting (n 49) 8.

[72] Constitutional Court Decision 19/2564, 10 November 2021, Royal Gazette 43.

[73] ibid 29.

is now consistently claimed that "to overthrow" denotes an action that has the intention to destroy or ruin something until it has been completely dissolved and no longer exists.[74]

The Court ruled that the call for the amendment of the constitution concerned the "above-politics" status of the King under the doctrine "the King can do no wrong," and that the call for a revocation of the *lèse-majesté* law would affect the worshipped status of the King and result in turbulence and insubordination among the citizens. Therefore, these actions are an excessive and inappropriate exercise of rights, resulting in the endangerment of the security of the state, peace, public morals and public order which will finally demolish the DKRH, as "the King and the Nation have been indivisible up until now and will still exist together henceforward."[75] The Court affirmed that "[e]ven though Thailand has democracy, the Thai citizen agrees to invite the King to be the head of state, to be the primary institution alongside with the nation, in a position of revered worship and this shall not be violated, to preserve the Thai-ness of the nation."[76] To support its arguments, the court cited two former constitutions: the Interim Charter on the administration of Siam, 1932, and the Constitution of 10th October 1932. The Court stated that "[i]t can be seen that from the Sukhothai, Ayutthaya and up through the Ratthanakhosin period, the governing power belongs to the King, as he has the great mission to preserve the survival of the country and citizens." The Court cited the *Dasavidha-rājadhamma*, the 10 Buddhist virtues of the Kings, the revered position of the King and his role as the spiritual center of the citizens. The Court affirmed the continuity of the monarchy even though there was a revolution to change the regime in 1932, by explaining that "the People's Party and the citizens agreed to invite the King to be the key institution and still co-exist with democratic rule," and stated that "the King exercises sovereign power according to the constitution; this form of rule is called DRKH" and "the monarchy is the indispensable pillar of DRKH."[77]

This part of the decision is the most controversial. Significantly, it shows that the Court tries to construct a "Thai constitutional identity" with the DRKH, by combining it with Thai-ness, Buddhist kingship, Thai-style democracy and Thai constitutionalism by using the TSDM as a tool.

"Thai-ness" is a concept developed by King Vajiravudh as a new national identity during his reign from 1910 to 1925,[78] but later crafted by Kukrit Pramot during the 1950s. It is based on 3 pillars: Nation, Religion, and Monarchy, in which the "Buddhist" king is the embodiment of the nation and of political unity.[79] Ironically,

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[74] ibid 45.

[75] ibid.

[76] ibid.

[77] ibid 47.

[78] Federico Ferrara, *The Political Development of Modern Thailand* (Cambridge University Press 2015) 68 <https://doi.org/10.1017/CBO9781107449367>.

[79] Andrew Harding and Rawin Leelapatana, "Constitution-Making in 21st-Century Thailand: The Continuing Search for a Perfect Constitutional Fit" (2019) 7(2) The Chinese Journal of Comparative Law 266, 269 <https://doi.org/10.1093/cjcl/cxz009>.

Thai-ness as the ideological weapon of the conservatives that generates "political romanticism,"[80] which is the natural enemy of militant democracy, is described in this decision to support TSMD. The values of Buddhist kingship cited in this decision can be traced back to the time of absolute monarchy—the Thai Monarchy based on the concepts of *Devaraj* and *Dharma raja*.[81] *Devaraj* is the cult that believes that the King is a demi-god, a divine king, or the avatar of gods. It explains the position of revered worship of the king in the old tradition. *Dharma raja* is the concept that the King rules by the law of *Dharma*[82]: that of Buddhist virtue. By *Dharma raja,* the King holds the position of great ruler by following the 10 virtues of the King to maintain righteousness. These concepts are still highly influential nowadays, as the Court cites them to justify the revered worship position of the King as the center of the nation. These ideas of Thai-ness and Buddhist kingship were taken into account in the creation of "Thai-Style Democracy."

"Thai-Style Democracy" (TSD) is the term used for describing the regime during the years 1957 to 1973, the time of the "paternalistic"[83] ruler, to point out the distinctive qualities of Thai democracy and to reject the idea of Western democracy and constitutionalism.[84] It should be noted that at the time, the monarchy had successfully regained its hegemonic power after the 1932 revolution.[85] Rawin Leelapatana has described four features of TSD:[86] Firstly, a strong state, and secondly, the distinction between friends and enemies (Thai-ness vs non-Thai, anti-Thai and un-Thai); these two features seem to fit with the idea of TSMD, as the Court is willing to suppress the rights of citizens that contrast with the ideologies of Thai-ness. Thirdly, Royal Proclamation, as the rulers seek the royal proclamation to legitimate themselves, this feature leads to the explanation of Thai Constitutionalism with the King as the sovereign who represents the people; and fourthly, the use of constitutionality to stabilize the rule of the monarchy.

The latter features of TSD have led to the construction of "Thai Constitutionalism" based on many theories, including *Anekchonnikon Samosonsommut* or elected monarch doctrine;[87] *Rachaprachasamasai* or the joint

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[80] ibid 270.

[81] Eugénie Mérieau, *Constitutional Bricolage: Thailand's Sacred Monarchy vs. The Rule of Law* (Bloomsbury Publishing 2021) 57 <https://doi.org/10.5040/9781509927722>.

[82] See ibid 58–63.

[83] See Thak Chaloemtiarana, *Thailand: The Politics of Despotic Paternalism* (Cornell University Press 2019) 101.

[84] ibid 135.

[85] Rawin Leelapatana, "The Thai-Style Democracy in Post-1932 Thailand and Its Challenges: A Quest for Nirvana of Constitutional Samsāra in Thai Legal History before 1997" in Andrew Harding and Munin Pongsapan (eds), *Thai Legal History* (Cambridge University Press 2021) 221 <https://doi.org/10.1017/9781108914369.016>.

[86] ibid 221–24.

[87] *Anekchonnikon* is the Ayutthaya constitutional custom revised by Seni Pramoj around 1965. Seni got the inspiration for this idea from the works of Prince Dhani Nivat; see Mérieau, *Constitutional Bricolage* (n 81) 138–39.

rule doctrine;[88] and the doctrine of constitutional octroy.[89] These theories were the products of TSD which have been inherited over time, as Thailand does not want to rely on Western constitutionalism. They are still influential nowadays, as they merge with the notion of DRKH, which is the product of conservative scholars. TSD later successfully transformed itself into DRKH in Thanin Kraivichien's sense:[90] a regime where the King has extra-constitutional, unwritten-cultural, and customary crisis power.[91] Henning Glaser points out that DRKH is the organizing principle of Thai constitutionalism.[92] Both Thai constitutionalism and DRKH are still dynamic and flexible; Glaser mentioned that they have had a co-evolution since 1976 in his study on the "four-phase model of Thai constitutionalism."[93] He noted that the expansion of the influence of DRKH in the 1997 Constitution brings significant changes in the paradigm of Thai constitutionalism. First, DRKH became a basic structure of the Constitution, as it was presented in the preamble of the Constitution, and became a fundamental principle of the state, which means it became possible for it to evade amendment.[94] It became the *Eternal Clause* of the Thai Constitution that established a form of *militant constitutionalism*.[95] As demonstrated in Decision No. 19/2564 and various previous decisions, the TSMD is becoming a tool for taming political parties and limiting political rights. Second, DRKH can be found in Section 7 of the 1997 Constitution, leading to the use of royal prerogatives and the unwritten power of the Constitution to "fill the gap" in the Constitution[96] through the constitutional interpretation of the courts. As can be seen, DRKH led to the phenomenon of judicialization of politics. It is the new form of reliance on the Court to justify the legitimacy of the elites,[97] or even worse, to eliminate the opponents of the regime.

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[88] In 1971, Kukrit Pramoj defined it as a mode of governance according to which "the Monarchy and the people govern together." See ibid 141.

[89] The doctrine of constitutional octroy considered the King to be the source of the Thai constitutional order, granting the Constitution to citizens. See the preamble of the 1974 Constitution in ibid at 142.

[90] Thanin Kraivichien formulated a new theory instead of "Thai-style democracy." He renamed it to "the Democratic Regime with the King as Head of State." Thanin also confirmed that the King has special extra-constitutional powers in times of crisis and Thai democracy cannot be separated from the monarchy. See ธานินทร์ กรัยวิเชียร, พระมหากษัตริย์ไทยในระบอบประชาธิปไตย (กรมวิชาการ กระทรวงศึกษาธิการ 2519) [Thanin Kraivichien, The Thai Monarchy in the Democratic System (Ministry of Education, 1976)] (Thai) 29 and 52. See also the role of Thanin in the development of DRKH in Mérieau, *Constitutional Bricolage* (n 81) 143.

[91] Mérieau, *Constitutional Bricolage* (n 81) 145.

[92] Henning Glaser, "Permutations of the Basic Structure: Thai Constitutionalism and the Democratic Regime with the King as Head" in Andrew Harding and Munin Pongsapan, *Thai Legal History* (n 85) 233 <https://doi.org/10.1017/9781108914369.017>.

[93] ibid 233–35.

[94] ibid 246.

[95] ibid 247.

[96] ibid 248.

[97] Björn Dressel and Khemthong Tonsakulrungruang, "Coloured Judgements? The Work of the Thai Constitutional Court, 1998–2016" (2018) 49 Journal of Contemporary Asia 1, 11 <https://doi.org/10.1080/00472336.2018.1479879>.

The attempt in this decision to create a "Thai constitutional identity" can be explained by applying Gary J. Jacobsohn's idea on the essential function of constitutional identity.[98] Even though it is a controversial term as there is no agreed meaning,[99] constitutional identity can be understood as the fundamental concept to understand the constitution. Rawin Leelapatana and Suprawee Asanasak argue that in the case of Thailand, there is a constitutional struggle between two versions of constitutional identity:[100] liberal constitutionalism and Thai constitutionalism. Decision No. 19/2564 confirmed the idea of a nationalist-royalist version of constitutional identity based on DRKH, in the reasoning of the Court. Even though the Court cited liberal Western constitutional terms like the "three principles of democracy"[101]—liberty, equality, and fraternity—the Court applied them in its own terms of interpretation to prove that all the respondents had violated the equality and fraternity of the nation by using "speeches to stir up violence and create disharmony among the people in the nation"[102] and exercised their freedom of expression "without listening to the opinions of other people."[103] To justify blaming the respondents for their symbolic actions that harm the identity of Thai-ness, the Court mentioned that "the facts show that in many demonstrations there was the 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 Court referred to the idea of nationalism, nationhood and identities of Thailand as it mentioned "[Thailand is] the same as various other countries, which have different histories of nationhood and independence, but what is the same is that there are laws to prohibit the identity, symbolism, and national treasures from becoming stained or damaged."

This decision affirmed the argument of Rawin and Suprawee, as they underlined that the protection of political rights by the Court is not universal nor based on human rights or human dignity, but based on the identity of Thai-ness, as some of the groups identified as being contrary to the ideologies imposed by the Court are excluded.[104] The situation in which the Court tries to define the critical collective identity also reflects the phenomenon of the judicialization of politics—which will be closely examined in the next section.

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[98] Gary Jacobsohn, *Constitutional Identity* (Harvard University Press 2010) 4 <https://doi.org/10.4159/9780674059399>.

[99] Michel Rosenfeld, "Constitutional Identity" in Michel Rosenfeld and András Sajó, *Oxford Handbook of Comparative Constitutional law* (n 11) 756, 756.

[100] Rawin Leelapatana and Suprawee Asanasak, "Constitutional Struggle and Polarised Identities in Thailand: The Constitutional Court and the Gravitational Pull of Thai-ness upon Liberal Constitutionalism" (2022) 50(2) Federal Law Review 156, 172 <https://doi.org/10.1177/0067205X21087476>.

[101] Constitutional Court Decision 19/2564, 10 November 2021, Royal Gazette 48.

[102] ibid.

[103] ibid.

[104] Rawin and Suprawee, "Constitutional Struggle" (n 100) 172.

## B. Judicialization of Politics and Politicization of The Judiciary in Decision No. 19/2564

This interpretation of Section 49 of the Constitution, the identification of threats and the attempt by the Courts to form a collective identity, clearly involves the element of politics. Decision No. 19/2564 is additional evidence for the phenomenon of judicialization of politics[105] in Thailand. In a sequence of related events, the Constitutional Court has been transformed into a highly interventionist political actor[106] which stepped in and dealt with the core political controversy that affects the whole politics of the country, the so-called "judicialization of mega-politics."[107] The Constitutional Court of Thailand has been considered a leading example of the phenomenon of "politicization of the judiciary,"[108] as the Court was involved in the usurpation of political power, meanwhile influenced by the meta-constitutional actors, and has been criticized for lacking the legitimacy to act as a counter-majoritarian institution.

In Decision No. 19/2564, the Constitutional Court interpreted Section 49 of the Constitution as a provision which "aims for all Thai people to participate in protecting and preserving rule by democracy with the King as the head of state"[109] from "threats

[105] Judicialization of politics is the socio-legal phenomenon of the ever-accelerating reliance on courts and judicial means for addressing core moral predicaments, public policy questions and political controversies. There is no unified definition of judicialization of politics; as Ran Hirschl pointed out, it is often an umbrella-like term. See Ran Hirschl, "The New Constitutionalism and the Judicialization of Pure Politics Worldwide" (2006) 75 Fordham Law Review 721, 723; Ran Hirschl, "The Judicialization of Mega-Politics and the Rise of Political Courts" (2008) 11 Annual Review of Political Science 93, 94 <https://doi.org/10.1146/annurev.polisci.11.053006.183906>.

[106] Nathan J. Brown and Julian G. Waller, "Constitutional Courts and Political Uncertainty: Constitutional Ruptures and the Rules of Judges" (2016) 14(4) International Journal of Constitutional Law 817, 817 <https://doi.org/10.1093/icon/mow060>.

[107] Ran Hirschl illustrated examples of the judicialization of mega-politics which can be grouped into five categories: (1) judicialization of electoral processes and outcome, (2) judicial scrutiny of the legislature or executive branch prerogative in economic planning or national security matters, foreign affairs or fiscal policy, (3) judicial corroboration of regime transformation by validation of regime change (4) judiciary as a key player in transitional justice, and (5) judicialization of formative collective identity, where the court gives the definition of the "critical collective identity" (the *raison d'être* of the polity such as the question like *what "*nation*" is*?). This category of judicialization of mega-politics can be described as a process of transition towards "juristocracy." See Ran Hirschl, *Toward Juristrocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004), 222–23.

[108] Björn Dessel illustrated a typology of an ideal judicial pattern in four types ranging from "Judicial Muteness," "Judicial Restraint," "Judicial Activism" to "Politicization of the Judiciary." The idea of politicization of the judiciary in his context means that the judiciary plays a crucial role and is involved in the usurpation of political power with a high degree of involvement in "mega-politics," but has a low degree of "*de facto* independence," which means the judiciary is corrupted by other players in some or all aspects of the following three factors: (1) *de jure* structure independent of the judiciary (institutional factor), (2) willingness and abilities of judges to intervene (behavioral factor) and (3) judicial support from political elites (a structural factor); see Björn Dessel, *Judicialization of Politics in Asia* (Routledge 2012) 6.

[109] Constitutional Court Decision 19/2564, 10 November 2021, Royal Gazette 42.

arising from the exercise of constitutional rights and freedoms."[110] The Court emphasized that the protection of the exercise of rights and freedoms by the Constitution can be limited on the grounds of national security, peace and order, or good morals of the people. From the point of view of the Court, constitutional rights and freedom of all Thais accompany the duty and responsibility to protect and preserve the nation, religion, the King, and DRKH.

The logic behind this interpretation can be explained by applying the notion of the "Dual Structure of the Thai Polity"[111] presented by Michael H. Nelson and "Legitimacy Conflict"[112] by Björn Dessel. In Decision No. 19/2564, the Court interfered in and decided on the conflict between two different types of political ideas: the paternalistic political establishment (the monarchy, military, bureaucracy, and technocrats) which adheres to the pillars of the traditional trinity—nation, religion, and King—as a basis for their legitimacy, being for the highest good of the nation;[113] and the modern ideology of "the people" which claims popular sovereignty, constitutionalism, and "performance" as an alternative basis for legitimacy.[114] These two legitimacies cannot be reconciled because the traditional trinity has been upraised to a state ideology, and any change proposed by the opposition is refused.

The ideology of the paternalistic political establishment requires obedient and conformist citizens; it sees these as subjects rather than political participants.[115] The Court has embraced this idea of the obedient subject; it stated that the call for amendment of the constitution on royal status would create *turbulence and insubordination among the people*.[116] Moreover, the viewpoint of the Court on the traditional trinity, especially the nation and the monarchy, is non-negotiable and outweighs the constitutional rights and freedoms of citizens; the Court concluded that the call for amendment was "the exercise of rights and freedoms in excess of what is appropriate. It has dangerous repercussions for the security of the state, peace and order, and the good morals of the people. It will undermine rule by democracy with the King as head of state."[117] As a result, an action by respondents which defies the ideology of the political establishment is considered by the Court as an "action with a clear intention to destroy the institution." It is "*incorrect*"[118] and must be eliminated

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[110] ibid.

[111] Michael H. Nelson, "Some Observations on Democracy in Thailand" (2012) SEARC Working Paper Series (No. 125) 5.

[112] Björn Dressel, "When Notions of Legitimacy Conflict: The Case of Thailand" (2010) 38(3) Politics & Policy 445 <https://doi.org/10.1111/j.1747-1346.2010.00243.x>.

[113] Michael H. Nelson, "Thailand's Legitimacy Conflict between the Red Shirt Protesters and the Abhisit Government: Aspects of a Complex Political Struggle" (2011) 29(1) Sicherheit und Frieden 14, 17 <https://doi.org/10.5771/0175-274x-2011-1-14>.

[114] Björn Dressel, "When Notions of Legitimacy Conflict" (n 112) 445.

[115] ibid 455.

[116] Constitutional Court Decision 19/2564, 10 November 2021, Royal Gazette 45.

[117] ibid.

[118] ibid 47.

because "the institution of the monarchy is an important pillar that is essential to rule by democracy with the king as head of state."[119]

The choice of ideology by the Court in Decision No. 19/2564 fits in with the phenomenon of judicialization of politics in the Thai context (*Tulagarnpiwat* ตุลาการภิวัฒน์), in many aspects. The origin of this term can be traced back to the work of Thirayuth Boonme,[120] who called for the judiciary to solve the democracy crisis as a reaction to Thaksin Shinawatra's populist policies and administration style. His work was backgrounded on the Thai political deadlock in 2006[121] and King Bhumipol's two critical royal speeches on 25 April 2006.[122] The analysis of these speeches by Duncan McCargo argued that in 2006 the King denied the idea of "direct" royal intervention in politics, and that he turned to the judiciary to resolve deep-rooted social and political conflict.[123] The interpretation of these royal speeches by Thirayuth had a huge impact on the role of the judiciary,[124] resulting in a shift since 2006 from a passive role of the courts in politics to an active one.[125] *Tulagarnpiwat* has been constructed upon Thai-style democracy[126] and is based on Thai ideological culture and royalism, relying on monarchical prestige to solve political crises and legitimize the political role of the monarch.[127] At this point, direct royal intervention has transformed itself into the

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[119] ibid 48.

[120] ธีรยุทธ บุญมี, ตุลาการภิวัฒน์ (Judicial Review) (วิญญูชน 2459) [Thirayuth Boonme, *Judicial Review* (Winyuchon 2006)] (Thai) 41.

[121] In the 2006 Election, most of Thaksin's opposition parties decided to boycott the election, leading to only one major party (TRT) running in the election. This brings a country to a political deadlock, constitutional crisis, and the question of a legitimate election, as parliamentarians failed to get 20 per cent of votes required to be seated so the Parliament could not convene. See Björn Dressel, "Judicialization of Politics or Politicization of the Judiciary? Considerations from Recent Events in Thailand" (2010) 23(5) The Pacific Review 671, 679 <https://doi.org/10.1080/09512748 .2010.521253>.

[122] See ปิยบุตร แสงกนกกุล, ศาลรัฐประหาร: ตุลาการ ระบอบเผด็จการ และนิติรัฐประหาร (ฟ้าเดียวกัน 2560) [Piyabutr Sangkanokkul, *The Court of the Coup d'état: Judiciary, Authoritarian Regime and Juridical Coup d'état* (Same Sky Books 2017)] (Thai) 9–10.

[123] Duncan McCargo, *"*Competing Notions of Judicialization in Thailand*"* (2014) 36(3) Contemporary Southeast Asia 420 <https://doi.org/10.1355/cs36-3d>.

[124] สมชาย ปรีชาศิลปะกุล และคณะ, รายงานวิจัยฉบับสมบูรณ์ โครงการการเมืองเชิงตุลาการและศาลรัฐธรรมนูญไทย, (สกว 2561) [Somchai Preechasilpakul and others, *Final Report* on *Political Judiciary and Thai Constitutional Court* (Thai Research Fund 2018)] (Thai) 258.

[125] The decisions of the Constitutional Court under the *Tulagarnpiwat* phenomenon since 2006 can be categorized into 4 groups: (1) decisions that resulted in the elimination of political rivals; (2) decisions that permitted the Court to protect its jurisdiction with political interests; (3) decisions that discredited the government and created a chain of events that defied the government; and (4) decisions that created a political vacuum. See Piyabutr, *The Court of the Coup d'état* (n 122) 49.

[126] The idea of the "graceful conferral of constitutionalism" and the dynamic of royalism are examined in Michael K. Connors, "When the Walls Come Crumbling Down: The Monarchy and Thai-style Democracy" (2011) 41(4) Journal of Contemporary Asia 657–73 <https://doi.org/10.1080/00472336.2011.610619>.

[127] Saichon Satayanurak, "Historical Legacy and the Emergence of Judicialisation in the Thai State" in Michael K. Connors and Ukrist Pathmanand (eds), *Thai Politics in Translation: Monarchy, Democracy, and the Supra-constitution* (NIAS Press 2021) 210–12.

*Tulagarnpiwat,* in which the judiciary performs the political role in place of the monarch.[128]

Many scholars[129] have criticized the fact that the expansion of the judiciary's power to fulfil the political ideology of a single group could be harmful to the constitution and to democracy. Worachet Pakeerat estimated that if *Tulagarnpiwat* only consists of the idea of using the law to eliminate political rivals, then *Tulagarnpiwat* is merely an abuse of judicial power or judicial process, which has been considered a criminal offence in some legal systems.[130] Somchai Preechasilpakul criticized Thirayuth's idea for being based only on the positive perspective of judicial activism, overpassing the negative effect of the expansion of judicial power.[131] He referred to the studies of Tom Ginsburg,[132] C. Neal Tate and Torbjorn Vallinder,[133] which have shown that the tendencies of this expansion of power can lead to the politicization of the judiciary. Somchai further pointed out that the Thai judiciary has lacked social monitoring and accountability, which are leading factors in the politicization of the judiciary. Somchai even claimed that *Tulagarnpiwat* is a powerful political propaganda tool to eliminate political players.

The logic behind the interpretation of TSMD in Decision No. 19/2564, based on the ideology of the paternalistic political establishment, fits in with the definition of *Tulagarnpiwat* given by Piyabutr Sangkanokkul, who defined it as "(a) process in which the judiciary has a political role by deciding by intention to eliminate a political group which they think can be harmful to the elite network and the regime;"[134] and by Eugénie Mérieau, who described this phenomenon in Thailand by using the expression "Juristocracy for self-interested hegemonic preservation."[135]

The reasons behind the judicialization of politics in Decision No. 19/2564 are determined by various factors. The formation of the bench of the Constitutional Court and its selection committee are under a strong influence of the Supreme Court of Justice and the Supreme Administrative Court,[136] and must be approved by the junta-appointed Senate. As a result, the Constitutional Court has deep ties with Thai judicial

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[128] Mérieau, *Constitutional Bricolage* (n 81) 188.

[129] For example, Kasian Tejapira, Pichit Likitsomboon, Worachet Pakeerat, and *Khana Nitirat* academics; see คำแถลงนิติราษฎร์ฉบับที่ 8 วรเจตน์ ภาคีรัตน์: ตุลาการภิวัฒน์กับการบิดเบือนการใช้อำนาจตุลาการ [The 8th Declaration of Nitirat Group Worachet Pakeerat: Tulagarnpiwat and the Distortion of Judicial Power] (2 December 2010) and วรเจตน์ ภาคีรัตน์, ด้วยกฎหมายและอุดมการณ์ (ไชน์พับบิชชิ่งเฮาส์, 2558) [Worachet Pakeerat, *By Law and Ideology* (Shine Publishing House 2015)] (Thai) 170.

[130] ibid 173.

[131] สมชาย ปรีชาศิลปะกุล, เมื่อตุลาการเป็นใหญ่ในแผ่นดิน: รวมบทความว่าด้วยตุลาการภิวัฒน์ ตุลาการพันลึก และตุลาการธิปไตย (บุ๊คสเคป 2562) [Somchai Preechasilpakul, *When the Judiciary Rules the Land* (Bookscape 2019)] (Thai) 35.

[132] Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press 2009), cited in Somchai, ibid.

[133] C. Neal Tate and Torbjorn Vallinder (eds) *The Global Expansion of Judicial Power* (New York University Press 1995), cited in Somchai (n 131).

[134] Piyabutr, *The Court of the Coup d'état* (n 122) 49.

[135] Mérieau, *Constitutional Bricolage* (n 81) 266.

[136] See Sections 200, 203 and 204 of the 2017 Constitution.

culture,[137] judicial royalist identity,[138] and a network of conservative-military actors[139] who engaged in the promotion of a military-dominated authoritarian constitutional order.[140] It is not a surprise that the Court raised no objection against authoritarianism, and instead willingly entrenched the illiberal regime.[141] Constitutional mechanisms have been used to block popular demands because the Court does not recognize that its legitimacy came from popular sovereignty due to its lack of connection with the citizens.[142]

The suppression of political activists by the Court in Decision No. 19/2564 corresponds to the idea of "*The Court of the Coup*" presented by Piyabutr Sangkanokkul. In a summing up of events of judicialization of politics in Thailand, he concluded that *Tulagarnpiwat* and *The Court of the Coup* are the flip sides of the same coin.[143] He pointed out that Thai courts act as the guardian of the authoritarian regime. In times of democracy, the courts play the role of "activists," aggressively intervening with the elected government by means of judicial review, a broad sense of interpretation of the law, or even by using both formal and informal institutional power. In an authoritarian regime, by contrast, the courts seem to restrain themselves or even became "mute," strictly enforcing the positivism law,[144] which leads to the

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[137] Thai judicial cultures are based on conservatism and secrecy. The Courts have a strong close-culture based on the "self-enforced" model. It is also based on the "sanctity of the monarchy" by which courts function in the name of the King, not the people, as demonstrated by the extraordinarily formal modes of procedure and ceremonies, the strictly formal trials, and the power of the Court to control the trial by using the rules on contempt of court.

[138] The identity of Thai judges is described as "Goodman," "Gentleman," "Legal Sophist," and "Royalist"; see Saichon, "Historical Legacy" (n 127) 188. See also กฤษณ์พชร โสมณวัตร, "อำนาจแห่ง 'อัตลักษณ์' ตุลาการ" (2557) 7(1) วารสารนิติสังคมศาสตร์ 76 [Kitpatchara Somanawat, "Power of 'Identity' of Judges" (2014) in 7(1) Nitisangkhomsat Journal 76] (Thai) 77–113.

[139] See the idea of the "Network Monarchy" in Duncan McCargo, "Network Monarchy and Legitimacy Crisis in Thailand" (2015) 18(4) The Pacific Review 499 <https://doi.org/10.1080/09512740500338937>; a "network for royal hegemony" in Pavin Chachavalpongpun, "Introduction" in Pavin Chachavalpongpun (ed), *Routledge Handbook of Contemporary Thailand* (Routledge 2019) 6; and a "deep state" in Eugénie Mérieau, "Thailand Deep State, Royal Power and the Constitutional Court (1997–2015)" (2016) 46(3) Journal of Contemporary Asia 445 <https://doi.org/10.1080/00472336.2016.1151917>.

[140] Khemtong Tonsakulrungruang and Björn Dressel, "The Ties that Bind: Thailand's Constitutional Court & the Military Junta" (*I-CONnect Blog*, 12 June 2019) <http://www.iconnectblog.com/2019/06/the-ties-that-bind-thailands-constitutional-court-the-military-junta/>.

[141] Khemthong Tonsakulrungruang, "Thailand's Unamendability: Politics of Two Democracies" in Rehan Abeyratne and Ngoc Son Bui (eds), *The Law and Politics of Unconstitutional Constitutional Amendments in Asia* (Routledge 2021) 182 <https://doi.org/10.4324/9781003097099-13>.

[142] วรเจตน์ ภาคีรัตน์, "บทสัมภาษณ์ความเห็นทางวิชาการ การปฏิรูปองค์กรตุลาการ : ความท้าทายในบริบทการเมืองไทย" (2556) 10(2) จุลนิติ 12 [Worachet Pakeerat, "The Interview on the Judicial Reform: Challenges in Thai Political Context" (2013) 10(2) Julaniti 12] (Thai) 15.

[143] Piyabutr, *The Court of the Coup d'état* (n 122) 49.

[144] Thongchai Winichakul pointed out that the main factor that made Thai jurisprudence different from a normative jurisprudence is the idea of the Absolute Monarchy and the semi-colonial situation of Siam. He pointed out that the modernization of the law in Siam is a reforming of governing tools from the Absolute Monarchy to the "rule by law" in the light of extremist legal positivism, where the law by text is the order of the state that the people need to follow without questioning the justice or values.

violation of human rights and the deprivation of freedom of assembly, as well as the suppression or elimination of factions that contest the regime.

Decision No. 19/2564 demonstrated the trend of "Stealth Authoritarianism," which refers to "the use of legal mechanisms which exist in a regime with favorable democratic credentials for an anti-democratic end."[145] The Court enforced legal policies based on "national security" or "peace and public order," which resulted in the infringement of fundamental rights. Many of those accused of thoughtcrimes[146] are still pleading for their cases in a long trial, with a huge amount of bail security or even without any right to bail. This situation led to the "culture of self-censorship" of Thai public figures and bureaucracy. These try to exhibit the characteristics of patriotism, royalism, and Thai-ness, instead of characteristics that might be contrary to the regime. The combination of the "culture of self-censorship" with the application of Thai-style constitutionalism and DRKH ideologies at all levels of the judiciary can without question lead to a *juristocracy* which automatically protects the authoritarian regime *without* any direct command.

## III. THE IMPACT OF THE DECISION

In Decision No. 19/2564, the Court concluded that the respondents' demand to revoke the provision that guarantees the inviolable royal status of the King is an action "with a clear intention to destroy the monarchy and DRKH."[147] The impacts created by this decision can be grouped into two categories:

### A. The Impact Both on the Parties in the Case and on Outsiders: The Ambiguity of the Order of the Court

The Constitutional Court considered the actions of the respondents to be an "attack," and claimed that they wrongfully exercised their rights through use of foul language and by violating the rights of others who may have a different point of view.[148] The Court considered these actions to be a bad model and mentioned third parties in the

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Thai jurisprudence was made up of authoritarian rules from the start. It was not based on the "rule of law" but the "rule by law." Thongchai uses the expression "rule by law of the privilege state" (นิติรัฐอภิสิทธิ์) to describe the phenomenon, as it is the legal system that gives a privilege for the state which is governed by the idea of absolute monarchy (รัฐสมบูรณาญาสิทธิราชย์) to use its power to violate fundamental rights and freedom in order to maintain public interest, see ธงชัย วินิจจะกูล, นิติรัฐอภิสิทธิ์ และราชนิติธรรม ประวัติศาสตร์ภูมิปัญญาของ Rule by Law แบบไทย (ปาฐกถาพิเศษ ป๋วยอึ๋งภากรณ์ ครั้งที่ 17, 2563) [Thongchai Winichakul, *Rule by Law of the Privilege State and Royal Rule of Law: The History of the Thai Rule by Law* (17th Special Keynote Address in Memory of Puey Ungphakorn, 2020] (Thai) 100.

[145] Ozan O. Varol, "Stealth Authoritarianism" (2015) 100 Iowa Law Review 1673, 1684.

[146] See Tyrell Haberkorn, *In Plain Sight: Impunity and Human Rights in Thailand* (The University of Wisconsin Press 2018) 15–17.

[147] Constitutional Court Decision 19/2564, 10 November 2021, Royal Gazette 47.

[148] ibid.

decision: the "movement" that uses different tactics, formats, speakers, and a new ploy that has no specific leaders but is continued by a group of people who share the same intention.[149] The Court went on to accuse the movement of the respondents "and their networks" of being a movement "that has had the same intention" from the beginning, declaring that the respondents had repeated their actions continuously, and that these actions were characterized by "agitation" and "using false information" to cause chaos and violence in society. This part of the decision explains the logic of the Court and answers the question as to why its order to cease the actions included the networks of the respondents and related organizations. This logic seems problematic, as the Court attempts to use it to expand its power to third parties outside the case. The Court's order to cease actions (the demonstration and speeches) which had already been terminated, and also to refrain from "unspecified" actions happening "in the future," referring to both the respondents and the networks, also created vagueness on the binding force of this decision and its relative effects. Even though Section 211 of the Constitution[150] affirms the final and binding *erga omnes* force of the decision of the Court to other state organs, in this case, the Court rulings must still produce *inter partes* effects only, since the TSMD case, according to Section 49, is a case between specific individual parties. The decision of the Court shall be deemed final only to persons who are party to the case, not to third parties,[151] since the latter are not involved in the lawsuit and have no chance to exercise their right of defense or to be heard in a fair trial. The decision's ruling concerning third parties seems to blur this line.

Moreover, it seems problematic that the Court already affirmed that the expression of opinion of the respondents is not sincere and "*is a violation of the law*."[152] It cited the terms referring to the offences in the criminal code, especially Section 116, such as "invading personal space," and "agitating and inciting the crowd using facts that distorted reality." Without hearing the testimony of the respondents, the Court seems to have lowered its protection on the respondents' right of defense in a fair trial. This can lead to the question of the preclusive effects of facts established by this decision on the other courts,[153] especially in criminal cases against activists.

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[149] ibid.

[150] "The decision of the Constitutional Court shall be final and binding on the National Assembly, the Council of Ministers, Courts, Independent Organs, and State agencies."

[151] สำนักงานศาลรัฐธรรมนูญ, รายงานการวิจัย เรื่อง สภาพบังคับของคำวินิจฉัยของศาลรัฐธรรมนูญ (สำนักงานศาลรัฐธรรมนูญ 2550) [The Office of the Constitutional Court, *The Research Report on the Binding Force of the Decision of the Constitutional Court* (Office of the Constitutional Court 2007)] (Thai) 14.

[152] Constitutional Court Decision 19/2564, 10 November 2021, Royal Gazette 48.

[153] ธีระ สุธีวรางกูร, ผลของคำวินิจฉัยของศาลรัฐธรรมนูญในคดีรัฐธรรมนูญที่เกี่ยวเนื่องกับคดีอาญา (จดหมายข่าวศาลรัฐธรรมนูญ ปีที่ 3 ฉบับที่ 2 (เล่มที่ 10) ประจำเดือน มีนาคม–เมษายน 2543) [Teera Suteevarangkul, "The Effect of the Decision of the Constitutional Court on the Constitutional Case in Connection with Criminal Offences" (The Constitutional Court's Newsletter on March–April 2000] (Thai) 9.

## B. The Impact on Thai Constitutionalism, DRKH, Thai Constitutional Identity and Thai-style Militant Democracy

As Rawin and Suprawee pointed out, Thai-style constitutionalism is shaped by the highly political decisions of the Constitutional Court.[154] Decision No. 19/2564 shows a consistent trend to expand the meaning of DRKH while shrinking the ideology of liberal democracy. The decision confirms the character of the Court as a political actor, and its role as guardian of DRKH by defining the critical collective identity of the nation, clearly illustrating the trend towards the judicialization of mega-politics. The Court did not exactly define what DRKH is. It left DRKH to continue in a vague and fluid state, though still concrete enough to be enforced. The Court stated that the call for the abolition of the activities of the royal charity fund and the royal prerogative to express political opinions in public would "cause the status of the institution of the monarchy to deviate from the customs of democratic rule to which the Thai nation has always adhered."[155] Therefore, the actions of respondents illustrate that they "had an ulterior motive in exercising their rights and freedoms, namely to overthrow DRKH, not a reform."[156] This part of the decision shows that the Court officially recognizes "the royal prerogative" of the expression of political opinions of the king as the substance of DRKH, and confirms it as the *customary rule* of the nation. Once again, the word "nation" has been used to form the constitutional identity of Thai-ness to secure the eternal status of DRKH. As the concept of identity has been subject to ambiguity and uncertainty,[157] the identity claim is common in autocratic regimes[158] and can easily be abused, resulting in the backsliding of liberal democracy.

The decision in question also impacts the status of the notion of militant democracy in Thailand as an arsenal of the DRKH. It confirmed that the mutated character of TSMD has evolved to another level. The purpose of *wehrhafte Demokratie* in defending liberal democracy has been completely distorted. The Thai Constitutional Court and this decision are examples of how the Kelsenian Constitutional Court can be turned into a means of support for the authoritarian regime. The Court picked up a dangerous tool, that of militant democracy, which innately carries the venom of malpractice in itself,[159] leading to the excessive power of the "sphere of the state" over the "sphere of freedom."[160] In the name of public security and the protection of DRKH, the Court is always willing to suppress the rights of the "enemies" of DRHK. This

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[154] Rawin Leelapatana and Suprawee Asanasak, "Constitutional Struggle" (n 100) 1.

[155] Constitutional Court Decision 19/2564, 10 November 2021, Royal Gazette 48.

[156] ibid.

[157] Pietro Faraguna, "Taking Constitutional Identities Away from the Court" 41(2) Brooklyn Journal of International Law 491, 496.

[158] R. Daniel Kelemen and Laurent Pech, "Why Autocrats Love Constitutional Identity and Constitutional Pluralism: Lessons from Hungary and Poland (2018) RECONNECT Working Paper No. 2, 10.

[159] Markus Thiel, "Germany" in Markus Thiel (ed), *The "Militant Democracy" Principle in Modern Democracies* (Ashgate 2009) 136.

[160] ibid.

practice leads to a situation that I would call an "*invisible,* but *permanent* state of exception."[161] This term implies that DRKH functions under the disguise of liberal democracy. It guarantees all political rights of citizens, except those who dare to challenge the ideologies of the regime as they are treated as a menace to national security. The measures to suspend their rights are already well arranged, and the TSMD arsenals are prepared to fire, as demonstrated by the double standard on the right to assembly of pro-liberal democracy protests and pro-DRKH protests.[162]

TSMD presented an idea that contrasts with the original. As Markus Thiel pointed out, the German Basic Law (GG) *"guarantees not only measures of protection in favor of the state, but also and primarily rights and freedoms of the citizens and all human beings*."[163] This is the reason why there are strict procedural requirements of militant measures in the GG,[164] including the proportionality test, which TSD seems to lack. The restriction of rights never equals the total undermining of rights. The transplantation of militant democracy to Thailand to protect a liberal democracy seems to be a failure, as the institutional structure did not migrate, and the effects of the transplanted rule of militant democracy in Thailand are surely different from those at the original source.[165] Or worse still: it has mutated without constraint due to the authoritarian interpretation of the authorities.

## IV. CONCLUSION

The day after the reading of the decision, the homepage of the Constitutional Court of Thailand was hacked and its name was replaced by the words "Kangaroo Court."[166] The decision sparked outrage on social media platforms, and there were several symbolic protests and statements criticizing the decision.[167] The #ปฏิรูปไม่เท่ากับล้มล้าง ("ReformIsNotOverthrow") hashtag became the No. 1 top trending topic on Twitter on

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[161] Georgio Agamben, *State of Exception* (University of Chicago Press 2005) 2 <https://doi.org/10.7208/chicago/9780226009261.001.0001>.

[162] See the cases in which the Court affirms the right to freedom of assembly of the pro-DRHK protests, especially the People's Democratic Reform Committee (PDRC-กปปส) in the Constitutional Court Orders 58/2556, 59/2556, 61/2556, 63/2556, 45/2557, and 50/2557. Rawin Leelapatana and Abdurrachman Satio Pratomo, "The Relationship Between a Kelsenian Constitutional Court and an Entrenched National Ideology: Lessons from Thailand and Indonesia" (2020) 14(4) ICL Journal 497, 510.

[163] Markus Thiel, "Germany" (n 159) 137.

[164] See the requirements of Articles 18 and 21(2) in Thiel, ibid at 117–27.

[165] Vlad Perju, "Constitutional Transplant, Borrowing, and Migrations" in Michel Rosenfeld and András Sajó, *Oxford Handbook of Comparative Constitutional Law* (n 11) 1310.

[166] "Constitutional Court Website Renamed 'Kangaroo Court'" *Prachatai* (13 November 2021) <https://prachatai.com/english/node/9552>. A kangaroo court is "any proceeding that attempts to imitate a fair trial or hearing without the usual due process safeguards"; see Shaun Ossei-Owusu, "Kangaroo Court" (2021) Harvard Law Review Forum 134, 200 and 203.

[167] Haberkorn, "Reform is Not Revolt" (n 4) 5.

10 November 2021.[168] These reactions confirm the situation described by Rawin, namely that the pro-democracy and authoritarian factions in Thailand find themselves in a "binary star" scenario where each exerts a gravitational pull on the other, while at the same time resisting this pull.[169] The tension between Thai Constitutionalism and liberal democracy still continues. The call for reform is now considered tantamount to the overthrow of the regime, leaving no room for negotiation and compromise between ideologies. The use of Thai-style militant democracy, which is completely different from Loewenstein's version, in combination with the judicialization of politics in past events has proved that TSMD has already been used as a declaration of "lawfare"[170] against liberal democracy.

To conclude, I would like to quote from the concurring opinion by Justice Louis Brandeis in *Whitney v. California*: "Order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely."[171] Those who fight fire with fire may end up getting burned.

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[168] วิศรุต สินพงพร, "อธิบายคำตัดสินศาล รธน. ปฏิรูป = ล้มล้างการปกครอง" (*Work Point Today*, 10 พฤษจิกายน 2564) [Wisarut Sinpongpon, "Explanation of the Constitutional Court Decision: Reform=Overthrow the Regime" (*Work Point Today,* 10 November 2021)] (Thai) <https://workpointtoday.com /constitutional-court-8/>.

[169] Rawin and Pratomo, "The Relationship" (n 162) 503.

[170] "Legal warfare" is the instrumentalization or politicization of the law to achieve a tactical, operational, or strategic effect. In this context it is to preserve the DRKH. See Dale Stephen, "The Age of Lawfare" (2011) 87 US Naval War College International Law Studies Series 327, 327.

[171] *Whitney v California* 274 US 357 (1927) Concurring Opinion, 375.