

When Queer Emotions Meet the Constitutional Promise: Dystopian Constitutionalism in Thai Popular Culture

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Abstract

In classical constitutionalism, constitutional courts are dedicated guardians of the law, acting to promote fundamental rights. However, during an anticipated transition to democracy after the 2019 general election, substantial changes occurred in the pattern of judgments by the Constitutional Court of the Kingdom of Thailand (CC). These happened amidst popular demand for a democratic regime based on the rule of law. By squeezing heteronormative and royalist-nationalist ideologies into its legal reasoning, the CC has violated the constitutional rights of Thai citizenry and created a normative cosmos in which all forms of otherness are disregarded.

This article reads a utopian fantasy of Thainess in the Constitutional Court Decisions Nos. 19/2564 and 20/2564 in tandem with selected popular cultural texts on concepts of dystopian constitutionalism and queer jurisprudence. The goal is to analyze how disenfranchised voices neglected by the Court's metanarrative may

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express queer negative emotions such as anger and fear, disclose the downside of constitutional promise, and offer playful readings of constitutional ideas and practices as Thailand struggles to attain the popular definition of constitutionalism.

Keywords: Constitutional law — Thai constitutionalism — Dystopia — Queer legal theory — Law and emotion — Law and literature

I. DYSTOPIAN CONSTITUTIONALISM

A. Recent Developments in Thai Constitutionalism

In classical constitutional law and political science, constitutionalism is a term referring to the ideal state of democracy in which the power of government bodies is limited by the rule of law. Nicholas W. Barber proposes the concept of “negative constitutionalism,” noting that although the concept of constitutionalism has been used widely in constitutional studies, its definition remains unclear. However, he points out that constitutionalism has a positive role in enhancing the well-being of the people.¹ This perspective underscores the importance of government bodies in safeguarding the constitutional rights of the people. In the same vein, Carl Schmitt points out that a constitution is a conscious decision, which the political unit attains for itself and provides itself through the envoy of constituent power. In this sense, the constitution is valid by virtue of the political will existing in the power that institutes it.² In other words, the Thai Constitutional Court (CC) is believed to be guardians of the constitution and the will of the people.

On the contrary, recent CC judgments have cast doubt on which side it supports. Essentializing constitutional ideas is proven inefficient for delivering justice in light of the recent shift in CC behaviour, in which the court has acted blatantly as an organ of the Thai constitutional order suprastructure. Michel Rosenfeld captures this contradiction of constitutionalising constitutional values by saying that the conventional concept of constitutional identity is being challenged by the rise of populism under the Trump administration in the United States, which purports to establish an imagined community by bringing together people of various identities.³

In the Thai cultural context, the monarchy has been an integral part of the basic structure of constitutionalism. “Permutations of the Basic Structure: Thai Constitutionalism and the Democratic Regime with the King as Head” by Henning Glaser examines the evolution of Thai constitutional thinking as a “democratic regime

¹ Nicholas W. Barber, “Introduction: Constitutionalism” (2015) 7 Oxford Legal Studies Research Paper 2, 1–22 <<http://dx.doi.org/10.2139/ssrn.2565721>>.

² Julia Scholz-Karl, “Behind the Theoretical Debate between Hans Kelsen and Carl Schmitt: The Nineteenth Century Constitutionalism and German Public Law” (2021) 7 UNIO – EU Law Journal 11, 4–17 <<https://doi.org/10.21814/unio.7.2.3101>>.

³ Michel Rosenfeld, “Deconstructing Constitutional Identity in Light of the Turn to Populism” (2022) 659 Forthcoming Cardozo Legal Studies Research Paper 10, 1–10.

of government with the king as head” since the Siamese revolution of 1932. Glaser finds that the King is seen by anti-democratic forces as a savior to displace an unwanted prime minister at times of national crisis, as evidenced by constant references to Section 7 of the Constitution of the Kingdom of Thailand (Interim), B.E. 2557 (2014) in which the monarch’s functions are so described.⁴

However, a literature survey on the role of the monarchy in Thai constitutionalism may be insufficient for understanding the changing behavior pattern of the CC in the post-2016 era. The court has participated in interfering with fundamental rights in a manner exceeding merely supporting the constitutional norm with the King as head of state. Therefore, it is important to examine the CC’s role in shaping constitutional identity after the transition of 2016. It is noteworthy that the CC’s sociocultural context between 2019 and 2021, when protestors demanded true democracy, has shifted its behavior in impeding constitutionally guaranteed rights. In this way, the CC has gradually trespassed on constitutional rights.

The concept of constitutionalism is a modern invention. The CC’s actions in recent years are an example of how the Thai elite have used a seemingly modernised instrument to create the promise of inclusion. In this constructed vision, Thai citizens will attain state-constructed happiness if they fulfil conditions of citizenship based on heteronormative royalist-nationalist ideology. Reading dystopian elements in selected rulings and popular cultural texts is one way to expose epistemic violence that systematically and perpetually oppresses queer people under the guise of modern constitutionalism.

B. Queering Law, Emotion, and Popular Culture

In recent decades, constitutional law scholars have examined the roles of the constitution and the CC in Thai politics, but queer and affective politics in Thai constitutionalism remain understudied. In terms of the role of emotions in Thai constitutionalism after the 2014 Thai coup d’état by General Prayut Chan-o-cha, the junta government used draconian martial law and Article 112 of the Thailand Criminal Code (TCC) to create an oppressive atmosphere. This atmosphere discourages individuals from expressing political opinions and participating in political activities. In addition, cultural instruments such as songs, music videos, and nationalistic fairs were used to create an imagined community where traditional Thai values associated with the monarchy and the military are upheld. The rhetoric of happiness under military rule has been introduced in Thailand since the 2014 coup d’état. In this sense, the Thai state and its subsidiaries performed the role of happiness creators, especially during times of national crises.

The role of the Thai state and its agencies as saviors with the goal of national modernization is described in Thongchai Winichakul’s (2000) “Quest for ‘Siwilai’: A

⁴ Henning Glaser, “Permutations of the Basic Structure: Thai Constitutionalism and the Democratic Regime with the King as Head” in Andrew Harding and Munin Pongsapan (eds), *Thai Legal History* (Cambridge University Press 2021) 233–51 <<https://doi.org/10.1017/9781108914369.017>>.

Geographical Discourse of Civilizational Thinking in the Late Nineteenth and Early Twentieth-Century Siam.” Thongchai argues that the savior plot is a component of official Thai historiography within the context of hyper-royalist nationalism and European colonialism. According to this metanarrative, when Thais face a national crisis, an anticolonial hero will rescue them from calamity.⁵ Positioning themselves as saviors who have promised to bring peace and happiness, the Siamese elite used a heroic plot to confront colonialism while modernizing the nation. Constructing a nationalist discourse of happiness as a means of “civilizing” the nation is also discussed in Phattharanit Kiatthanawit’s “Siamese State and Society and the Management of Emotion: Regime of Horror, 1851-1910.” Phattharanit argues that the Siamese elite achieved modernization by creating a “regime of horror” in which negative emotions such as fear and horror were managed to psychologically control Siamese citizens.⁶ In this context, the legal system is not emotionless; it becomes a component of an emotional regime intimately governing daily life in Thailand. Kitpatchara Somanawat pertinently evaluated the legal regime of annoyance among the middle classes in Thailand by examining civil, criminal, and administrative case law through emotional history.⁷

In terms of contemporary Thai politics, Chutima Pragatwutisarn’s “Promise of Happiness: Political Imagination in Contemporary Thai Society,” used Sara Ahmed’s concept of the promise of happiness to study the role of emotions, especially happiness, in Thai politics between 2014 and 2018. The results were that “Love and Warmth at Winter’s End,” a propaganda song about happiness promoted by the junta government and at nationalistic fairs, diagnosed happiness and nostalgia as a phantasmagoria or nostalgic fantasy of bygone Siam to bask in the decline of Thai royalist nationalism.⁸

In the context of Thai constitutionalism, the CC as an instrument of the Thai state also created what Sara Ahmed termed a “promise of happiness,” in which ruling forces assign positive feelings to things that cause pleasure or delight, called “happy objects.” This way, forms of state violence are hidden under the guise of apparent happiness.⁹

To this end, the CC as a bestower of legal promise used existing jurisprudence as a political instrument for creating a conservative illusion concealing epistemic violence, including human rights violations and legal abuses committed in the name

⁵ Thongchai Winichakul, “The Quest for ‘Siwilai’: A Geographical Discourse of Civilizational Thinking in the Late Nineteenth and Early Twentieth-Century Siam” (2000) 59 *The Journal of Asian Studies* 528–49 <<https://doi.org/10.1017/S0021911800014327>>.

⁶ Phattharanit Kiatthanawit, “Siamese State and Society and the Management of Emotion: Regime of Horror, 1851–1910” (Master Diss., Chiang Mai University 2019).

⁷ Kitpatchara Somanawat, “Judicialization of Emotion: The Legal Regime of Annoyance among Thai Middle Class” (2021) 22 *Journal of Human Science* 87.

⁸ Chutima Pragatwutisarn, “The Promise of Happiness: Political Imagination in Contemporary Thai Society” (2021) 16 *Philosophia OSAKA* 10, 1–19 <<https://doi.org/10.18910/78340>>.

⁹ Sara Ahmed, *The Promise of Happiness* (Duke University Press 2010) 21–49 <<https://doi.org/10.1515/9780822392781>>.

of the law. In contrast to happiness, negative feelings such as anger, frustration, and sadness have been used widely by individuals to criticise the extant legal system.

However, mainstream jurisprudence based on the positivist paradigm assumes that law should be objective and rational. Mostly, the law does not function in expected ways, especially under exceptional conditions such as disaster or *coup d'état*. Therefore, legal rationality inhibits people from expressing their feelings. Obviously, emotions have no evident place in a regime of reason.¹⁰

This paper examines emotions in constitutional law and cultural texts, adopting queer legal theory by embracing the emotions of individuals from all walks of life. Queering constitutionalism focuses on a range of narratives dealing with current constitutional problems as well as the metaphysical question of law and human rights discourse. Storytelling is defined as an instrument for narrating individual embodied experiences by victims of the justice system. Another concern is that narratives cannot be separated from emotions. Still, there is no attempt here to restrict the notion of constitutionalism essentialistically to limit legal imaginations.

Somchai Prichasilapakun identified civil and criminal judgments related to sexual crimes affirming that patriarchy is pervasive in Thai legal practices.¹¹ However, scant literature on Thai constitutional and public law has touched on topics of gender or sexuality. Methodological constraints in current studies on Thai constitutional law highlight the significance of applying feminist queer legal theories grounded in the humanities and narrative science to current studies of the CC, which view its ontology as a political actor motivated solely by political and economic interests. Considering recent court decisions from 2020 to 2021, the CC has alluded to civil and commercial law principles, thereby interfering with the private law domain, including commercial law, in political party dissolution and civil law in the context of same-sex marriage.¹² Consequently, queer and feminist legal theories focusing on intimate and subjective legal matters might be used as supplementary means of constitutional interpretation.

In queering selected constitutional and cultural texts, it is critical to delineate strands of feminist and queer legal theory based on deconstructive and postmodern approaches. In this way, ideological, epistemological, and ontological problems with existing jurisprudence that shaped CC judges are deconstructed. Despite variations in perspective, feminist and queer legal theory shares similar orientations as equality projects in critical legal studies to dismantle systems within law.¹³ Most critical legal theories address sexual and gender issues as well as demonstrate how legal ideals based on liberal humanism exclude those who refuse to be defined by confining

¹⁰ Julia J. A. Shaw, *Law and the Passions: Why Emotion Matters for Justice* (Routledge 2021) 1–3.

¹¹ สมชาย ปรัชชาติกุล, เพศวิถีในคำพิพากษา (เกวลีพรินต์ 2558) [Somchai Prichasilapakun, *Sexuality in Judgment* (Kaewalee Printing 2015)] (Thai).

¹² Thai Constitutional Court Decision 5/2564, 21 February 2020; Thai Constitutional Court Decision 20/2564, 17 May 2021.

¹³ Martha A. Fineman, “Introduction: Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations” (2009) Emory Public Law Research Paper No. 09-75, 1–8 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1516647#>.

binaries (for example, reason/emotion, culture/nature, male/female, or upper class/working class) in legal discourse.

In “Queer Phenomenology in Law: A Critical Theory of Orientation,” Nick J. Sciullo proposes the concept of queer phenomenology as an alternative to problematizing legal ontology that disregards the messiness of queer bodies. He proposes that queer messiness is a project of the following possibilities: “Messiness is a condition of possibility. Queering space means resisting the formal language of bodies. It is a ruthless reclaiming of the power of bodies to articulate identities. The way to rescue the queer body's push towards non-being, towards abjection, is to become that much more concerned with the body.”¹⁴

Our queer legal perspective is also based on the notion of “outsider queer legal theory” as proposed by Damir Banović in “Queer Legal Theory” which tracks the development of feminist and queer legal studies into three branches: conventional jurisprudence, legal realism, and outsider jurisprudence.¹⁵ While the traditional school emphasises legal textualism, Banović notes that the other two include interdisciplinary approaches to law. However, the primary distinction between these two progressive legal studies is the extent to which they permit integration of other non-legal disciplines. Nonetheless, it is essential to recall that there is no consensual definition of queer legal theory. Our project sees queer legal theory as a pluralistic, fluid method to destabilize the dominant legal discourse by embracing variant legal imaginations within and beyond the legal discipline.

Queerness is used as an umbrella term for constitutional values and practices apart from dominant constitutionalism. This study focuses on the intimate relationship between law and emotion, as well as public law and individual identities. The goal is to reveal the Orwellian vacuity of dominant jurisprudence. Two themes are explored, based on emotional practices of Thai constitutional tradition in rulings and cultural texts: utopian fantasy with happiness and negative feelings of dystopian Thailand.

Dystopia is an imagined community or society that is disappointing. Dystopian analysis of constitutionalism serves as connective tissue between constitutional law and popular cultural texts sharing dystopian elements. Thomas P. Crocker’s “Dystopian Constitutionalism” identifies dystopian constitutionalism in the American constitutional tradition. Crocker suggests that this kind of constitutional analysis

provides a method through which constitutional values and practises the American polity agrees it wishes to avoid even when there remains disagreement over those to which it might aspire. In addition, dystopian constitutionalism looks holistically at the effects of doctrinal rules, avoiding the pitfalls of doctrinal particularism that attempts to craft rules blind to the wider social and political contexts in which they apply.¹⁶

¹⁴ Nick J. Sciullo, “Queer Phenomenology in Law: A Critical Theory of Orientation” (2019) 39 *Pace Law Review* 667, 708–9 <<https://doi.org/10.2139/ssrn.3312372>>.

¹⁵ Damir Banović, “Queer Legal Theory” (2022) 1–19 <<http://dx.doi.org/10.2139/ssrn.4031017>>.

¹⁶ Thomas P. Crocker, “Dystopian Constitutionalism” (2015) 18(2) *University of Pennsylvania Journal of Constitutional Law* 593, 595 <<https://scholarship.law.upenn.edu/jcl/vol18/iss2/4/>>.

Dystopian analysis is threefold: 1) factual agreement of an actual or imagined state, where human rights are violated; 2) consequence avoidance argument in which a certain rule or practice are denied to avoid transforming into a dystopian state; and 3) examination of constitutive values in which a polity determines principles to adopt.¹⁷

Although the dystopian genre is frequently used to criticise repressive systems through dark settings and ominous atmosphere, these elements may turn negative emotions into political emotions to create an aspirational new political imagination in dark times. Tom Moylan notes:

[D]ystopia (as interpretive problematic and formal creation) can produce a sociopolitical evaluation and contestation with an enclosing and dominant system. It therefore offers an agential opportunity for a utopian process of denunciation and annunciation. However, the means by which this utopian impulse is given flesh in any dystopian narrative, even within the current ‘dystopian’ cultural milieu, is a matter for creative and interpretive intervention in each contingent case. The refunctioning of the utopian project is never a matter of absolute declaration, wishful thought, or complicit abandon.¹⁸

Creative functions of dystopian narrative featuring agents of hope will be noted as part of the framework aligning dystopian elements in Thai constitutional rulings and the cultural texts. First, the promise of inclusion in the ruling on the right to same-sex marriage will be examined, followed by discussion of how the Thai action television drama series “Not Me,” an example of *yaoi* or boys’ love (BL) thematics, portrays queer characters as agents of change who resist and disclose the hollowness of promises made by the Orwellian state. Queer elements discernible in the 2021 the CC decision that Arnon Nampa, Panupong “Mike” Jadnok and Panusaya “Rung” Sithijirawattanukul attempted to overthrow the democratic institution with the King as head of state will next be evaluated, through the court’s attempt to silence undesirable voices of Thai youth pro-democratic movements. “Catopia” and “Which My Country Has” suggest further examples of silencing agents opposing constitutional change. These popular texts may be said to reveal root causes of political instability across Thai political history, including indoctrination of hatred towards dissidents and a culture of impunity. Finally, the framework of reading queer dystopian constitutionalism in constitutional and popular texts creates a polyphonous narrative embracing constitutional values and political emotions neglected by mainstream constitutional law.

¹⁷ *ibid* 606–7.

¹⁸ Tom Moylan, “The Necessity of Hope in Dystopian Times: A Critical Reflection” (2020) 31(1) *Utopian Studies* 164, 595 <<https://doi.org/10.5325/utopianstudies.31.1.0164>>.

II. THE PROMISE OF INCLUSION IN THE SAME-SEX MARRIAGE CASE

Since the 2014 Thai coup d'état, popular culture has played an increasingly important role in pro-democracy movements. Symbolic and visual references to popular cultural texts have been employed in protests to express political agendas that could not be voiced under junta rule. In June 2014, anti-coup protesters organised a silent reading of "Nineteen Eighty-Four" by George Orwell,¹⁹ a classic dystopian novel. Use of the symbolic three-finger salute from "Hunger Games"²⁰ also exemplifies how democracy advocates have appropriated meaning from original movies, contextualizing it as resistance against the junta.

Since 2019, the CC has contributed to sustaining the status quo rather than providing justice to individuals, overriding those who seek true democracy in which individual rights are respected and constitutionally protected. By failing to safeguard people's rights and on occasion violating them, the CC has created what may be termed the "promise of inclusion" by referring to legal ideals based on heteronormative and royalist-nationalist values where patriarchy, royalist nationalism, and neoliberalism are deeply ingrained. However, the court's legal ideals were challenged on November 2021 by pro-democracy proponents, when the Rainbow Unity for Marriage Equality marched in Bangkok to protest the recent decision and demand the right to marry for the lesbian, gay, bisexual, transgender, queer or questioning, intersex, and more (LGBTQI+) community.²¹ Other ongoing civic movements have responded to the CC judgment. On May 17, 2022, the International Day Against Homophobia, Transphobia, and Biphobia (IDAHOT), LGBTQIA+ rights activists demonstrated support for marriage equality by writing their own version of the controversial CC ruling on the exclusionary marriage law.²² This people's judgement is based on a project initiated in March 2022 to rewrite the court decision. Tyrell Harberkorn, a Thai studies researcher and project participant, explained that the initiative was inspired by international activists and feminist lawyers. She observed that courts in democratic countries seek to be progressive, but in Thailand, an opposite effort strives to maintain conservative ideology.

To understand how constitutional oppression manifests itself in the form of gender exclusion, heteronormativity must be defined. In "Compulsory Heterosexuality and Lesbian Existence," Adrienne Rich, an American feminist poet, examined

¹⁹ "Protesting Thai Reader of Orwell's 1984 Dragged Off by Police in Bangkok," *South China Morning Post* (23 June 2014) <<https://www.scmp.com/news/asia/article/1538616/protesting-thai-reader-orwells-1984-dragged-police-bangkok>>.

²⁰ "'Hunger Games' Salute Used to Protest Coup D'état in Thailand" *Wikinews* (5 June 2014) <https://en.wikinews.org/wiki/%27Hunger_Games%27_salute_used_to_protest_coup_d%27%C3%A9tat_in_Thailand?dpl_id=1406837>.

²¹ "Demand for Thai Marriage Equality to Hit the Street at Sunday Protest" (*Coconuts Bangkok*, 25 November 2021) <<https://coconuts.co/bangkok/news/demand-for-thai-marriage-equality-to-hit-the-street-at-sunday-protest/>>.

²² "Activists Rally for Marriage Equality, Rewrite Court Ruling" *Prachatai* (20 May 2022) <<https://prachatai.com/english/node/9834>>.

characteristics of heterosexuality by building on Kathleen Gough's article "The Origin of the Family" to define eight characteristics of male power. These included the power to "deny women [their own] sexuality" and to "force itself [male sexuality] upon them."²³ In this sense, the CC reasoning in the same-sex marriage case expresses a homophobic outlook on the disenfranchised who do not meet the heteronormative norm. Struggling to instil elite constitutional values, the court labelled individuals striving to challenge the status quo as "others" in the system. This court's rhetoric created a utopian fantasy of Thai constitutionalism in which rights of people adhering to the CC values are safeguarded while queer people are forced to experience unnecessary pain and alienation from the promised regime of fundamental rights.

Rather than ensuring fundamental rights to queer people as guaranteed by the constitution, the court has paradoxically withdrawn them, asserting that Article 1448 of the Thai Civil and Commercial Code (TCCC) suffices to serve their fundamental needs. The theme of the CC Decision No. 20/2564 Same-Sex Marriage released in 2021 amounts to a romantic representation of Thai constitutionalism based on homophobic, royalist-nationalist perspectives limiting fluidity and plurality of queer identities.

A. The Utopian Concept of Family

A fixed idea of family emerges when the court defines it as merely a procreational instrument:

The definition of marriage is when a male and a female decide to spend their life together as husband and wife with the aim to procreate. They take care of each other under moral values, customs, traditions, religious principles and law. This marriage is the beginning of a family institution, which is the fundamental institution for creating new members of society. Therefore, legal marriage is only reserved for biological males and females.²⁴

In this dichotomous essentialist viewpoint, a fundamental right to marry is actually not just for the sake of reproduction but includes a right to create legal obligations and benefits for committed relationships that may not fall within the scope of heteronormativity. According to the theory of the positive right to marry, the U.S. Supreme Court ruled in *Obergefell* (2015) that this right is grounded in a foundational commitment to equal liberty, which is considered as a positive right. The right to personal choice regarding marriage is inherent in the concept of individual autonomy. It supports a two-person union unlike any other in its importance for committed individuals. The right to marry safeguards children and families, because marriage affords permanency and stability vital for children's best interests.²⁵ The core of the

²³ Adrienne Rich, "Compulsory Heterosexuality and Lesbian Existence" (1980) 5 Signs 631–60 <<https://doi.org/10.1086/493756>>.

²⁴ Thai Constitutional Court Decision 20/2564, 17 November 2021.

²⁵ *Obergefell v Hodges* (2015) 576 US 644.

right to marry is a “power right.” Everyone should be free to enter committed relationships, as long as doing so is consistent with equal liberty for both parties. Citizens are entitled to the power to create marriage's legal rights and duties.

In addition, the court's outdated binary worldview of gender and sexuality amounts to problematic safeguarding of civic rights of queer people. Perhaps the court concept of family as an economic unit resembles that of Gary Becker in which division of labor by gender within marriage is an efficient, essential feature of family life.²⁶ Men are responsible for market work, while women deal with household production. This theory has been much criticized. Susan Moller Okin notes that such an arrangement presume that husbands are heads of the household, to whom wives owe domestic and sexual services and obedience. In this way, the marital family contributes to the social and economic marginalization of women and perpetuates male dominance and patriarchy.²⁷ Today, as specific roles for marital partners evaporate, the need for two genders in a family is even less valid than formerly.

In the neoliberal concept of nuclear family, marriage is commonly equated with parenthood with a goal to reproduce individuals to serve the free market. According to Martha Albertson Fineman's “The Sexual Family,” legal images of the traditional nuclear family could create the legal reality for state oppression. This representation of family law breeds a legal reality that marginalizes other forms of family and sexuality outside the confining binary of man and woman.²⁸

It should be noted that bearing and raising children, as a matter of personal preference, should not be a precondition for any notion of family. When individuals concur to have a child, it is their right to do so by adoption. Queer families may view the nuclear family option as oppressive, but if they choose it, the state must provide it for them according to the theory of the positive right to marry. From a queer perspective, the definition of family institution should be valid whether or not children are present. To say that procreation is a goal of having a family is to deny non-binary couples the fundamental right to marry. This infringement of their human dignity marginalizes them.

In another problematic reasoning, the CC explained that heterosexual marriage is legal under customary law. It stated that according to Thai legal tradition, marriage can only be contracted between males and females. As a result, Article 1448 of the TCCC is in accordance with natural law and Thai customary law, and therefore the law can only be enforced when it does not oppose the will of its people.²⁹

Here, nationalism meets heterosexist attitudes. Supposedly marriage of non-binary individuals cannot occur because it does not align with the Thai constitutional order. This may be explained by the concept of homonationalism, as proposed by Jasbir Puar, in which homosexuals will be recognized as members of society only if

²⁶ Gary Becker, “A Treatise on the Family” (1981) 14–37.

²⁷ Susan Moller Okin, “Justice, Gender and the Family” (1989) 157–59.

²⁸ Martha A. Fineman, “The Sexual Family. Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations” (2009) Emory Public Law Research Paper No. 09-74.

²⁹ Thai Constitutional Court Decision 20/2564, 17 May 2021.

they adhere to ideals and narratives such as neoliberalism and nationalism upheld by the state.³⁰ But the court failed to consider that society evolves. For the law to remain effective, it must acknowledge societal development. A law may originally refer to males and females, but after a century or more, societal shifts must be considered. Traditionally in Thailand, homosexual behavior did not deny status as normative males and was not considered sexual misconduct.³¹ On the contrary, such behavior was historically ignored by Thai religious and legal authorities. There is no record in Thailand of laws against cross-dressing, cross-gender behaviour, or sexual orientation. Early Thai law tended to criminalize sexual acts rather than sexual identity. Private, non-commercial sodomy between consensual adults was decriminalized in 1953.³²

As the court claimed that non-binary couples do not pursue constitutional rights, it added that the demand for same-sex marriage from the LGBTQIA+ community only stems from emotional and sexual needs,³³ and queer individuals cannot form a deep connection. This implies that such relationships are inferior to those between a male and female, who unite as husband and wife to build a family, creating deep family connections.

The court continues its heterosexist project by affirming that this intimate relationship cannot be achieved by queer individuals.³⁴ Some may validate the court's reference to the principle of equality, but its reasoning is essentially problematic insofar as, like heterosexual couples, non-binary couples are entitled to identical legal rights and benefits from the state.

By stating that non-binary partners are driven purely by emotions and sexual needs, the court reduces multiple identities of non-binary individuals to mere biological instincts, thereby displaying a social Darwinist perspective on gender and sexuality. By reducing non-binary persons to mere emotional creatures, the court implies that people in this community lack free will and self-determination, undermining their human dignity.

In Germany, the relationship between marriage rights and human dignity is more humanely understood. As stipulated in Article 2 I of the Constitution of the Federal Republic of Germany or Basic Law (*Grundgesetz*; GG), freedom in same-sex partnership is an integral part of the right to personality development.³⁵ It is part of human dignity according to Article 1 I of the same constitution under the Theory of Effort (*Leistungstheorie*), which explains that everyone has the right to determine

³⁰ Mentioned in ชนาธิป ตติยการณวงศ์, “รักที่มีเงื่อนไข: ความสัมพันธ์อันอึดอัดกึ่งเลื้อยระหว่างรัฐไทยกับ LGBTQ” [Chanatip Tatiyakaroonwong, “Conditional Love: An Awkward Relationship between Thailand and LGBTQ” (25 August 2019)] (Thai) <<https://spectrumth.com/2019/07/25/รักที่มีเงื่อนไข-ความสั>>.

³¹ Peter A. Jackson, “Non-normative Sex/Gender Categories in the Theravada Buddhist Scriptures” (1996) <<https://openresearch-repository.anu.edu.au/bitstream/1885/41884/1/theravada.html>>.

³² Jirayudh Sinthuphan and Thanchanok Ruendhawil, “Fighting for Love: A Battle for Equal Marriage Rights in Thailand” (2022) 7 Asia Democracy Research Network, 1–6.

³³ Thai Constitutional Court Decision 20/2564, 17 May 2021.

³⁴ *ibid.*

³⁵ BVerfGE 9,20 (34f.) = NJW 1959,283; BVerfGE 82, 6 (15 u. 16) = NJW 1990, 1593; BVerfGE 84, 168 (184) = NJW 1991.

their identity and discover their personality. For an individual to achieve full human dignity, a quest to find oneself must occur, as guaranteed by the state. Similarly, in *Obergefell v. Hodges*, the U.S. Supreme Court held that same-sex marriage is a protected constitutional right, because personal choice in marriage is inherent in the concept of individual autonomy. When Article 1448 and the CC deny the right to same-sex marriage, the human dignity of the Thai queer people is clearly violated.

In doing so, the CC disregards the principle stated in Section 27 of the Thai Constitution that all persons are equal before the law and their rights and liberties shall be protected equally under the law, so unjust discrimination against a person on the basis of sex difference shall not be permitted. The proviso “The Constitution does not forbid queer individuals from spending their life together, being intimate, having a wedding ceremony, stating a partner as the beneficiary, bequeathing the will to a partner nor from establishing a co-ownership” reflects gender stereotyping that includes queer people only if they are economically independent. This is how heteronormativity combined with capitalism creates an unnecessary condition for non-binary people to exercise basic rights.

Epistemologically, the court’s reasoning illustrates how logical empiricism in modern jurisprudence seeks to dismiss emotions and queer experiences in inherently discriminatory ways. To realize the promise of inclusion in a utopian constitutionalism, state-constructed societal and economic roles must be accepted in which the government strives to erase individual gender and sexuality.

B. Queer Characters as Constitutional Agents?

The CC ruling on same-sex marriage stirred public opinion over its role in upholding marriage equality as constitutionally guaranteed. LGBTQIA+ rights supporters planned a pride march in Bangkok’s business zone a few days after the ruling to oppose the court’s decision.

“Not Me” (*Khao... Mai Chai Phom*; 2021) is a Thai action television drama series³⁶ in the *yaoi* boys’ love (BL) genre of fictional media. It was directed by Anucha Boonyawatana, a Thai independent director and trans woman whose films focus on issues of gender and sexuality in Thai society. The series tells of Thai university students who find their own ways to address current national socio-legal issues. A scene in which the protagonists discuss the concept of rule by law, a clear reference to Thongchai Winichakul’s 2019 lecture on the evolution of the concept of rule of law in the context of Thailand, sparked debate. As the main plot of rebellion unfolds, the series explores the culture of impunity, corruption in the selection process for government officers, rights of disabled persons, same-sex marriage and enforced disappearances.

Before analyzing details, understanding the Thai audience’s reaction to the genre is pertinent. Often the gay romance genre is criticized for commodifying

³⁶ Anucha Boonyawatana (director), “Not Me” (2021) GMMTV.

homosexual relationships and superficially promoting LGBTQIA+ inclusion instead of aspiring to real change. Some critics see the Thai BL genre as creating a utopian fantasy about homosexual relationships while ignoring hardships such as heteronormativity that homosexual individuals confront in reality. According to some audiences, this apparent favoring of queer visibility tries to market coming-out stories by presenting gay or queer characters as rebellious forces before reintegrating them into the current system. Yet the transgressive moments depicted are essential for understanding how queer characters are portrayed as agents of constitutional change. Arguably, the representation of queer characters in “Not Me” is innovative, using a range of characters to represent diverse ideologies in popular constitutionalism, with efforts to instrumentalize this literature to reimagine the constitutional order. Despite centering on two cis-gay characters, as in other programs in this genre, “Not Me” positions its protagonists as government rebels. The show also includes an array of societal minorities. For example, the mother of the supporting character Yok is deaf.

Apart from featuring current socio-legal problems, “Not Me” featured in a video short³⁷ in which a transgender university student convinces a non-binary protagonist to sign a petition to amend Article 1448 of the TCCC, to promote a real-life petition. In literary and media studies, paratext is material that surrounds a published main text, such as covers, posters, and promotional videos, framing the main text and potentially changing the reception of a text or its interpretation by the public.³⁸ Paratextualization blurs the border between the real world and fiction, demonstrating how each influences the other, and how literary activism creates political emotions in an audience.

C. Resisting the System

As mentioned in the introduction, queer jurisprudence may be conceived as outsider legal thinking. Apart from suppressing queer emotions on the right to same-sex marriage, the CC has continually suppressed dissident voices of pro-democracy activists. Serving as a signifier of change and hope for a national transition to real democracy, these activists sparked ongoing uprisings in Thailand. From the anti-democratic standpoint, suppressing them would discourage democracy advocates from expressing themselves.

The Open Society Foundations (2021) defines a chilling effect as the negative impact of government activities on natural or legal persons that discourages them from enjoying rights due to the possibility of official or informal consequences, such as threats, attacks, or smear campaigns.³⁹ The desire of pro-democracy activists for

³⁷ GMMTV, “Not Me #สมรสเท่าเทียม” [Not Me #samesexmarriage (2022)] (Thai) [video] Facebook <https://m.facebook.com/watch/?v=1002625070349232&_rdr>.

³⁸ George Stanitzek, “Text and Paratext in Media” (2005) 32 *Critical Inquiry* 27–42 <<https://doi.org/10.1086/498002>>.

³⁹ Laurent Pech, “The Concept of Chilling Effect: Its Untapped Potential to Better Protect Democracy, Rule of Law, and Fundamental Rights in the EU” (*Open Society Foundation* 2021)

monarchy reform might be considered as one aspect of queerness in the conservative constitutional order of Thailand that the court has sought to deny.

With Decision No. 19/2564, the CC has confirmed that the demands of the United Front of Thammasat and Demonstration amount to an overt act to overthrow the monarchy. Their rationale is that to exercise rights or freedom to demand constitutional amendments about the King's status constitutionally and above politics according to Article 6 of the Thai Constitution constitutes an excessive exercise of rights or freedom and a threat to national security, public order and good morals, potentially leading to the overthrow of a democratic regime of government with the King as head of state.⁴⁰

In its decision, the court refers to Decision No. 18–22/2555 and Decisions No. 3/2562 that defined the term “overthrow” as an irreversible critical threat to the constitution and the regime, including an overt act to destroy or ravage them.⁴¹

Yet the public speeches and demands of the United Front of Thammasat and Demonstration cannot be seriously considered as advocating the overthrow of the monarchy. Worachet Pakeerut, a legal scholar, defines an act of overthrowing as containing the use of force, a tendency towards violence by an established group to destroy a regime. A simple expression of political views cannot amount to an overthrowing of the monarchy.⁴² Freedom of expression is an essential foundation for a democratic society and a basic condition for its progress and individual self-fulfilment.⁴³ It plays an essential role in any state governed by the rule of law.⁴⁴ United Front of Thammasat and Demonstration demands a society permitting more space for the expression of individual opinion and, far from attempting to overthrow the monarchy, attempts to enhance the extant democratic system.

More erroneous CC reasoning was the assertion that sovereign authority has always belonged to the King, and that the monarchy and the nation have been united as a single entity from the nation's origins and will remain so.⁴⁵

Article 3 of the Thai Constitution states that sovereign power belongs to the people. Article 2 declares that Thailand is a democratic regime. A fundamental principle of democratic states is popular sovereignty, in which the people are the ultimate source of governmental authority. This includes the notion that a democratic

<<https://www.opensocietyfoundations.org/uploads/c8c58ad3-fd6e-4b2d-99fa-d8864355b638/the-concept-of-chilling-effect-20210322.pdf>>.

⁴⁰ Thai Constitutional Court Decision 19/2564, 29 November 2021.

⁴¹ *ibid.*

⁴² มุมมอง วรเจตน์ ภาคีรัตน์ ต่อคำวินิจฉัยศาลรัฐธรรมนูญ คดีล้มล้างการปกครองของ 3 ราษฎร [Worachet Pakeerut's View on the Constitutional Court's Overthrow the Monarchy Ruling] (*Voice TV*, 3 January 2022) (Thai) <https://www.voicetv.co.th/read/xB_xqDbJ6>.

⁴³ *Lingens v Austria* (1986) 8 EHRR 407; *Sener v Turkey* App No 26680/95 (ECtHR, 18 July 2000); *Thoma v Luxembourg* App No 38432/97 (ECtHR, 29 March 2001); *Marônek v Slovakia* App No 62584/00 (ECtHR, 19 April 2001); *Dichand and Others v Austria* App No 29271/95 (ECtHR, 26 February 2002).

⁴⁴ *Castells v Spain* App No 11798/85 (ECtHR, 23 April 1992); *Prager and Oberschlick v Austria* App No 20834/92 (ECtHR, 26 April 1995).

⁴⁵ Thai Constitutional Court Decision 19/2564, 29 November 2021.

government is by the people and for the people. The people are therefore the highest political authority in a democracy, from whom political authority flows to the state. When the CC denies the people's right to express opinions, a foundation of identity and self-determination, it renders them *personae non gratae*, to borrow a phrase from public international law. In this way, the court removes their political authority instead of safeguarding their rights and freedom.

D. “Catopia”: Dissident Animals under the Junta Regime

In a parallel way to Decision No.19/2564, the short film “Catopia”⁴⁶ portrays how dissidents have become societal outcasts. “Catopia” was directed by Wisit Sasanatieng, a political activist, and included in the film compilation “Ten Years Thailand” (2018), which envisions Thailand over the next decade. Offering surrealist images of Thai politics with dark humour, “Catopia” has gained positive feedback from pro-democracy audiences as an antidote to the hopelessness felt under the junta government.

As its title suggests, “Catopia” imagines a dystopia in which anthropomorphic cats have conquered the world and mankind is believed to be extinct. The protagonist is the sole human appearing in the film, who must remain disguised as a cat person to avoid being hunted, as humans are loathed by the new world order.

In this way, humans are symbolic of the disenfranchised with different ideologies who have been purged by brainwashed cat persons to maintain the stability of law and order in Catopia. By using anthropomorphic cats, the director possibly signifies that the state's ideological apparatus can deprive humans of a sense of their own humanity, facilitating the commission of hate crimes. As part of the cinematic narrative, people with different ideologies may be detected by “human scents.” The film warns about how ideologically-based hatred may incite people to commit hate crimes, despite sharing a species. At the end of the film, a catwoman who has resisted the law ordering cat persons to kill humans is purged by the cat ruler. This dystopian film envisions a future Thailand where the rule of law is arbitrary and ultra-nationalists are encouraged to exterminate dissidents. Although the film is future-oriented, these types of hate crimes have occurred repeatedly throughout Thai history, as evidenced by the Thammasat Massacre, as depicted in the rap music video “Which My Country Has,” discussed in the next section.

E. “Which My Country Has”: Corrupted Land and Culture of Impunity

Rap music has recently been associated with cultural movements. The verb rap means “to lightly strike.”⁴⁷ Reportedly originating in the Bronx, New York City, USA in the

⁴⁶ Wisit Sasanatieng (Director), “Catopia” in *Ten Years Thailand* (2018) Ten Years Studio.

⁴⁷ Frank W. Hoffmann, “Rhythm and Blues, Rap, and Hip-hop” (Infobase Publishing 2006).

1970s, the genre's development is often used as a reflection of political discourse.⁴⁸

"Which My Country Has," a Thai rap song from 2018 by Rap Against Dictatorship imagines artists' views on the rule of law through a song about an unknown land where high morals are upheld, but the system does not function as promised. Since 2019, the song has been widely cited by the People's Party, known in Thai as Khana Ratsadon, in pro-democracy protests.⁴⁹ Rap Against Dictatorship received the Václav Havel Prize for Creative Dissent at the Oslo Freedom Forum 2019.⁵⁰

The enraged narrator begins telling the audience about contemporary events in this land, where national democracy is evidently declining. In the music video, the background depicts black-and-white images of a crowd cheering the desecration of dead bodies, in an allusion to the 1976 Thammasat Massacre. In this incident, a group of hyper-royalists brutally murdered student protesters and abused the dead bodies. Their purported crime was being communists and suspected of anti-monarchic overthrowing of the throne. This historical tragedy was never accounted for in official records of contemporary Thai political history. Its perpetrators were never convicted;⁵¹ indeed they were lauded as national saviors. In this way, Thai metanarratives of otherness make hyper-royalist citizens hate democracy supporters to the point of dehumanizing opponents and subjecting them to state-assisted massacres. The juxtaposition of Thai rap lyrics addressing contemporary constitutional issues with a music video alluding to Thailand's wounded history is noteworthy. Thai rap artists visualize constitutional imaginings in pursuit of a desired constitutional order.

The narrator of "Which My Country Has" criticizes how sovereign power never really belongs to the people as it should. The constitution, which declares people's rights, is amended frequently and such rights gradually lose urgency over time. The land is ruled by a military dictatorship which denies citizens the right to vote and freedom of expression. The people of the land are divided and live in fear. In this land, the rule of law has ceased to function. To make matters worse, the law is less powerful than plutocrats.

A culture of impunity is the central idea of the song, alluding to the Thammasat Massacre, a notoriously unresolved story. The use of this event in tandem with contemporary political events suggests how a legal culture contributes to contemporary constitutional conflicts in Thailand. As Thongchai Winichakul noted in a 2019 speech, this legal culture is part of the "Thai-style rule by law." In this privileged

⁴⁸ Rory PQ, "Hip Hop History: From the Streets to the Mainstream" *Icon Collective* (13 November 2019) <<https://iconcollective.edu/hip-hop-history/>>.

⁴⁹ "มือเป็ดเพลงประเทศภูมิ โห้ไม่พอใจ หลังแกนนำ แจ้ง รม.ประกาศสถานการณ์ฉุกเฉินใน กทม.แล้ว" ["The Demonstration Played the Song Which My Country Has after the State of Emergency Declaration in Bangkok" *Matichon* (15 October 2020)] (Thai) <https://www.matichon.co.th/politics/news_2395238>.

⁵⁰ "Iconic Thai Rappers Get Human Rights Award" (*Václav Havel Library Foundation*, 2019) <<https://www.vhlf.org/news/iconic-thai-rappers-get-human-rights-award/>>.

⁵¹ Thongchai Winichakul, "Moments of Silence: The Unforgetting of the 1976 Massacre in Bangkok" (2009) 123th Annual Meeting, American Historical Association Conference.

legal system, ruling classes are immune from illegal actions. Thongchai noted this as a root cause of Thai judicial problems.⁵² This visual reference to the unreconciled history of contemporary Thai politics is juxtaposed with present-day political references. The implicit message might be that the Thai legal system is characterised by a culture of impunity. The illegal black leopard hunt is cited, a case in which the construction millionaire Premchai Karnasuta was arrested with carcasses of the protected animal at an unauthorized campsite in the western Thungyai Naresuan Wildlife Sanctuary in Thong Pha Phum District. He was sentenced to 16 months imprisonment for unlawful possession of a dead pheasant and weapons, as well as for assisting in poaching, but was declared not guilty of any responsibility for the black leopard carcass. At a time of constitutional instability, this case cast doubt on the entire Thai legal system. It emphasized the pervasive assumption in the Thai justice system that elites can get away with wrongdoing. This message, interwoven with aggressive rap music rhythms and dystopian visual representations of Thailand, demonstrates the performer's frustration with corrupt constitutionalism. Extra emphasis on the theme of dysfunctional justice is provided by the case of official judges' houses in a national reserve park, referring to the Doi Suthep judicial housing scandal in 2018.⁵³ The narrator criticizes the judges, supposedly defenders of the people's rights, becoming those who corrupt the justice system.

In the first verse of the song, to underscore the problem of judicial impunity, the narrator cites an urban shooting incident. This is an obvious reference to the Thai military crackdown on the Red Shirts protest in 2010. The song also illuminates another notorious real-life case of Deputy Prime Minister Prawit Wongsuwan, unsanctioned for non-reported property, because he claimed that expensive watches in his possession were borrowed from a deceased friend.⁵⁴

"Which My Country Has" portrays an imaginary land where dwellers judge each other by moral standards, idolize those who conform to these standards, and socially sanction anyone who does not:

The country that murder is easy with money
The law can stretch more than arms of Luffy
Keep saying doing good, doing good
Which my country has. Which my country has.

In Thailand, it is commonly believed that when one worships the right person, it automatically makes a person decent. Yet crime rates are soaring. The narrator

⁵² ธงชัย วินิจจะกุล "นิติรัฐอภิสิทธิ์และราชนิติธรรม: ประวัติศาสตร์ภูมิปัญญาของ Rule by Law แบบไทย" (นิตยสาร Way 2563) [Thongchai Winichakul, "Legal Privileged State and Royalist Rule of Law: Genealogy of Thai-Style Rule by Law" (Way Magazine 2020)] (Thai).

⁵³ "Doi Suthep Judicial Housing Construction Halted" (5 April 2018) <<https://www.bangkokpost.com/thailand/general/1441210/doi-suthep-judicial-housing-onstruction-halted>>.

⁵⁴ "Watchdog Clears Thai Junta Deputy Over Luxury Watches" *Reuters* (28 December 2018) <<https://www.reuters.com/article/us-thailand-politics-idUSKCN1OR0PC>>.

criticizes the law itself for lacking the enforcement of religious preaching. People preach “be good” but commit transgressions. This shows the paradox of the “Politics of the Good Guy” discourse, according to which those who subscribe to this moral code are immune from the legal process.

All allusions to a culture of impunity in Thailand’s current political context indicate how an artist sees the existing rule of law as a system permitting holders of power and money to commit crimes freely. This message is underlined against the backdrop of the Thammasat Massacre, a defining incident of Thailand’s culture of impunity. With rap music and images of a dystopia associated with real historical events, “Which My Country Has” poignantly exposes the hollowness of the promise of happiness in the name of the law.

The CC appropriated legal reasoning considered modern to maintain constitutional thoughts and practice under the guise of a promise of inclusion. The promise of happiness for Thais can only be fulfilled when the monarchy is worshipped. More protection is insufficient. Any transgression to constitutional happiness related to the nationalist concept of neoliberalism, heterosexuality, or the monarchy must be excluded from the basic structure of Thai constitutionalism. As we have seen, the CC performed as a guarantor of happiness, using legal reasoning to create a utopian fantasy of justice that never existed. Simultaneously, the CC excluded ideologies and constitutional values debunking the utopian narrative of justice that it sought to incorporate into the grand narrative of Thainess.

III. TOWARDS QUEER CONSTITUTIONALISM

The essence of polyphony lies precisely in the fact that the voices remain independent and, as such, are combined in a unity of a higher order than in homophony. If one is to talk about individual will, then it is precisely in polyphony that a combination of several individual wills takes place, that the boundaries of the individual will can be in principle exceeded. One could put it this way: the artistic will of polyphony is a will to combine many wills, a will to the event.⁵⁵

In “Problems of Dostoevsky’s Poetics,” the Russian literary theorist Mikhail Bakhtin uses the musical term “polyphony” to portray how Dostoevsky’s novels potentially represent the voices of people from different walks of life. If we think of constitutionalism in a literary sense as a narrative about how power in a given polity should be limited and how government bodies should actively protect people’s rights, then queer constitutionalism may be considered as a polyphonic constitutional narrative with multiple voices of queer identities ignored in legal discourse. The popular cultural texts analyzed here offer glimpses into constitutional imaginations based on multiple identities.

⁵⁵ Mikhail Bakhtin, *Problems of Dostoevsky’s Poetics*, edited and translated by Caryl Emerson, University of Minnesota Press (1984) 21 <<https://doi.org/10.5749/j.ctt22727z1>>.

As Thailand struggles to find transitional justice after decades of coups d'état, this project of queering Thai constitutionalism and dominant jurisprudence underpinning it is not intended to define “queerness.” Instead, this outsider jurisprudence is proposed as a starting point for problematizing the current legal discourse and creating opportunities for meaningful reconciliation. This article is not meant to be conclusive, but to highlight the outsider paradigm that sees constitutional law as an assemblage of social, economic, cultural, and psychological forces. Instead of precisely defining Thai constitutionalism, a wide range of narratives of constitutionalism pushed out of existence by legal normalcy are readmitted to common discourse. Queering constitutional rights alongside LGBTQIA+ rights underscores how deeply queerness and emotions are embedded in diverse aspects of social, economic, political, and legal life. If everything is queer and emotional by nature, the elite’s constitutional promises supporting ideologies of neoliberalism, royalist nationalism, and heterosexism become exposed as empty, prompting a need for reimagining the current legal epistemology.

The ultimate goal of this article is to problematize dichotomous CC thinking that has shaped existing Thai constitutionalism. Popular media, including music, film, and television series, has the potential to deliver poetic justice. To attain this goal, Nussbaum cites Walt Whitman’s claim that a worthy judge must fantasize and sympathize with the poetic imagination. This notion is a crucial agent of democratic equality for the disenfranchised.⁵⁶ Cultural expression with queer characters and emotions could play a vital role as an instrument of supplementary interpretation of Thai popular constitutionalism, creating a constructive constitutional dialogue that is more nuanced, inclusive, and flexible than traditional constitutionalism which the Thai state struggles to preserve.

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⁵⁶ Martha C. Nussbaum, “Poetic Justice: The Literary Imagination and Public Life” (1995) 119–21.