

## Book Review

### *Fighting for Virtue: Justice and Politics in Thailand*

Duncan McCargo  
Cornell University Press (2020)  
262 pp., ISBN 978-0-80144-999-4

Reviewed by *Andrew Harding\**

This book was published four years ago, and my excuse for such a delayed review is that *Thai Legal Studies* was only published from 2021, and review-wise the journal has had a lot of recent books on Thai law to catch up on. Nonetheless, it is worth pointing out, even after this stretch of time, that this is a book both deserving wide attention and meriting careful analysis and discussion. It raises many issues of difficulty and concern for the Thai legal complex as well as for students and scholars interested in Thai legal studies or just Thailand in general. The issues McCargo raises go to the root of politics and ideology, with the law (especially here case law) as a critical setting in which these issues are explored.

Despite its question-begging title,<sup>1</sup> the book consists mainly of an extensive and penetrating socio-legal account of the Thai judiciary in the political context of the post-1997 era, and especially the decade prior to the book's publication. It is worth noting that, whatever the reactions to which the book may give rise, it fills large gaps in our general knowledge regarding the judiciary, one of Thailand's most interesting but least studied institutions. While Frank Munger and others have done ground-breaking work on the legal profession,<sup>2</sup> we do not have anything approaching the depth and breadth

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<sup>1</sup> "Fighting for virtue" is taken from King Bhumipol's speech to the judiciary in 2006, exhorting the judiciary to "fight, fight, yes, fight for virtue, fight for justice in the country." Duncan McCargo, *Fighting for Virtue: Justice and Politics in Thailand* (Cornell University Press 2020) 84.

<sup>2</sup> See, e.g., Frank Munger and others, "Women Lawyers for Social Causes: Professional Careers and Legal Development in Thailand" (2021) 1(1) *Thai Legal Studies* 97–132 <<https://doi.org/10.54157/tls.246477>>; Frank Munger, "Thailand: The Evolution of Law, the Legal Profession and Political Authority" in Richard L. Abel, Ole Hammerslev, Hilary Sommerlad, and Ulrike Schultz (eds), *Lawyers in 21st-Century Societies, Vol. 1: National Reports* (Hart Publishing 2020); Frank Munger, "Thailand's Cause Lawyers and Twenty-First Century Military Coups: Nation, Identity, and Conflicting

of this book in terms of the judiciary.<sup>3</sup> And in this sense the book does a splendid job in examining the background, career paths, conditions, challenges, and orientation of the judiciary. McCargo's balanced, nuanced, and insightful account provides us with a picture of an institution appearing as both impressive in many respects (qualifications, expertise, devotion to public duty), and narrowly conservative in its practical application of law (caution, and adherence, far too literally, to a royalist conception of law). A couple of examples of such insights spring to mind. One is that the strict separation of the judiciary from the executive under the 1997 Constitution may not have been such a good idea in terms of judicial governance, given the resultant lack of leadership and impulse for change within the judiciary itself.<sup>4</sup> Another is that the trial process as it has developed draws on elements from both common-law and civilian heritage in terms of legal education.<sup>5</sup> These are just two of many thought-provoking insights deserving discussion.

McCargo is of course an eminent and highly experienced Thailand scholar who has written extensively on Thai politics and reform,<sup>6</sup> the media,<sup>7</sup> "network monarchy,"<sup>8</sup> and the Southern border provinces,<sup>9</sup> to name but four important areas. His work is characterised by extensive and careful fieldwork all over Thailand, and critical examination of the interaction of social and political issues. In the present book he turns his attention to the law, and his work is based on hundreds of hours spent in 2012 observing the criminal justice system in operation, and interviewing judges, legal scholars and others.<sup>10</sup> His pivot to looking at the law is highly welcome, and although this review will end by critiquing the conclusions McCargo reaches regarding the rule of law, "legalism," and law reform, there can be no doubt as to the quality of the

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Visions of the Rule of Law" (2015) (3)2 *Asian Journal of Law and Society* 301–22 <<https://doi.org/10.1017/als.2015.18>>; Frank Munger, "Constructing Law from Development: Cause Lawyers, Generational Narratives, and the Rule of Law in Thailand" in John Gillespie and Pip Nicholson (eds), *Law and Development and the Global Discourses of Legal Transfers* (Cambridge University Press 2012) <<https://doi.org/10.1017/CBO9781139093576>>.

<sup>3</sup> See, however, Duncan McCargo, "Punitive Processes: Judging in Thai Lower Criminal Courts" (2021) 8(2) *Asian Journal of Law and Society* 324 <<https://doi.org/10.1017/als.2020.22>>; Duncan McCargo, "The 1991–1992 Judicial Crisis: Personalities or Principles?" in Andrew Harding and Munin Pongsapan (eds), *Thai Legal History: From Traditional to Modern Law* (Cambridge University Press 2021) <<https://doi.org/10.1017/9781108914369.018>>.

<sup>4</sup> McCargo, *Fighting for Virtue* (n 1) 104.

<sup>5</sup> *ibid* 17.

<sup>6</sup> Duncan McCargo and Anyarat Chattarakul, *Future Forward: The Rise and Fall of a Thai Political Party* (NIAS Press 2020); Duncan McCargo and Ukrist Pathmanand, *The Thaksinisation of Thailand* (NIAS Press 2005).

<sup>7</sup> Duncan McCargo, *Politics and the Press in Thailand: Media Machinations* (Routledge 2012) <<https://doi.org/10.4324/9780203995990>>.

<sup>8</sup> Duncan McCargo, "Network Monarchy and Legitimacy Crisis in Thailand" (2005) 18(4) *Pacific Review* 499 <<https://doi.org/10.5509/2021943549>>; Duncan McCargo, "Network Monarchy as Euphoric Couplet" (2021) 94(3) *Pacific Affairs* 549.

<sup>9</sup> Duncan McCargo, *Mapping National Anxieties: Thailand's Southern Conflict* (NIAS Press 2012); Duncan McCargo, *Tearing Apart the Land: Islam and Legitimacy in Southern Thailand* (Cornell University Press 2008).

<sup>10</sup> McCargo, *Fighting for Virtue* (n 1) xi.

fieldwork and the factual findings he reaches in the working chapters of the book. These findings are multi-dimensional and should be discussed critically and openly, especially but not only in the law schools. For example, the discussion of the judicial examination system<sup>11</sup> merits consideration in terms of reforms to legal education.<sup>12</sup>

Following an extensive Introduction, the first three chapters look at the judiciary in general as an institution. First in chapter 1 it is described as a “privileged caste,” as the chapter deals with the education, attitudes and career paths of judges. In chapter 2, entitled “bench and throne,” the judiciary is examined critically in terms of its complex relationship with both the monarchy, of which it regards itself in general as representative, and Buddhism. Chapter 3, entitled “challenges to the judiciary,” discusses contextual difficulties the judiciary faces, and critiques of the judiciary, especially by the *nitirat* group. The next five chapters deal with particular cases or types of case, especially ones that are legally problematical and politically controversial. Chapter 4 examines the *lèse-majesté* cases, especially that concerning Somyot Prueksakasemsuk; chapter 5 with computer crime cases, especially that of Katha Prajariyapong; chapter 6 with crimes against the state, especially the case of Jon Ungpakorn. Chapter 7 looks at the various cases involving Thaksin Shinawatra; and chapter 8 with significant cases in the Constitutional Court. These are the valuable working chapters of the book. In his Conclusion McCargo reverts to the theme of the Introduction—the relationship between politics and law.

The starting point for the inquiry into the judiciary’s role is King Bhumiphol’s speech to the judiciary in 2006, calling on them to “solve the country’s problems.” As a result of this speech, the judges commenced an incursion into the political field by invalidating a general election, commencing a process that has now become familiar, one described variously as “judicial activism,” “judicialisation of politics,” and (after Ran Hirschl) “juristocracy.”<sup>13</sup> The consequences of this expanded judicial role, rightly argued by McCargo, especially in chapters 7 and 8, to be problematical, will be familiar to most observers, but it is very helpful to have the entire story set out at such length and in such critical detail in relation to criminal cases, as well as those in the Constitutional Court.

An immediate issue that turns out to be crucial to understanding the book’s overall argument is McCargo’s frequent use of the term “legalism,” which is used on many occasions throughout the book,<sup>14</sup> and is the prime target of McCargo’s analysis. Thai society is characterised in the Introduction as “hyper-monarchised,” “hyper-militarised,” “hyper Bhuddicised,” and now also “hyper-legalised.” “Like royalism, militarism, and Buddhism, legalism serves to legitimate the Thai state and the

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<sup>11</sup> *ibid* 357.

<sup>12</sup> The critique that “critical legal studies, sociology of law, and jurisprudence are barely taught” seems, however, a little outdated: *ibid* 34. Even since 2020 there have been many useful changes.

<sup>13</sup> *ibid* 8.

<sup>14</sup> Oddly and unhappily, “legalism,” along with “rule of law,” “separation of powers,” “judicial activism” and “constitutionalism,” is not included in the rather unhelpful index, inhibiting the tracking of the use of these and no doubt other terms.

monarchical network. It privileges select groups (judges and legal specialists) and credits them with knowledge and expertise, but also with virtue.”<sup>15</sup>

It is not entirely apparent, however, what “legalism” is supposed to mean. The term seems to be used variously in ways that are not familiar to lawyers and legal scholars, to whom it would naturally be a slightly pejorative term indicating “the practice of following the law very closely, especially by paying more attention to rules and details than to the intentions behind them,” as the Cambridge Dictionary would have it. The well-known phrase coined by Stanley de Smith, “the austerity of tabulated legalism” also captures this meaning well. McCargo gives examples of this in the chapters on criminal cases, and refers to “an extremely legalistic culture, based on decades of dusty precedents.”<sup>16</sup> However, he also gives the term a much more expansive meaning. It is variously used to mean the illegitimate deployment of law against actual or perceived “rebels;”<sup>17</sup> inoculation of judges from temptations and human failings;<sup>18</sup> the rule of law in general;<sup>19</sup> subordinating judicial authority to royal prerogative;<sup>20</sup> bafflingly, proposals for legal reforms;<sup>21</sup> or even just a belief in the power or perfectibility of law itself.<sup>22</sup>

It is not clear how legalism in this highly expanded sense, which few readers will recognise, relates to the judicialisation/juristocracy that is also extensively critiqued in the Introduction and Conclusion. But presumably these terms are also included in “legalism.” Moreover, it is also unclear what the opposite of this legalism might be: what would things look like if judges did *not* adhere to legalism? What if they were to ignore their dusty precedents? The answer provided is unconvincing. If only, McCargo argues, judges would use “empathy and imagination,”<sup>23</sup> and adhere to an (unspecified) overarching concept of justice (whose idea of justice, exactly?), then all would be well. Yet this argument appears to lead right back to the problem that judges’ thinking is informed by an unduly narrow, conservative royalist ideology. If judges are to use their imaginations, and take account of the political reality that surrounds them, would this not lead to the very “juristocracy” McCargo is opposed to, and worse, perhaps even more of the kind of decision-making he criticises? Would it not distort the law in favour of supposed royal interests, validate military coups but punish vigorously minor or even imaginary breaches of law by elected politicians, and punish defendants on the basis of highly tenuous evidence? The alternative is to imagine what justice might be.

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<sup>15</sup> McCargo, *Fighting for Virtue* (n 1) 8.

<sup>16</sup> *ibid* 31. Nonetheless, judges are praised at several points for their technical knowledge.

<sup>17</sup> *ibid* xi.

<sup>18</sup> *ibid* 54.

<sup>19</sup> *ibid* 1–29.

<sup>20</sup> *ibid* 56.

<sup>21</sup> *ibid* 21.

<sup>22</sup> *ibid* 211–18.

<sup>23</sup> E.g., *ibid* 132.

Yet McCargo also, surprisingly, rejects the idea of law reform, even in forms proposed by the critical *nitirat* group.<sup>24</sup> For example, a proposal to reduce the maximum penalty for lèse-majesté from fifteen to three years is merely dismissed as “legalistic.”<sup>25</sup> In fact both the entire *nitirat* notion of law reform (which is in general supported by those who seek political change in Thailand), and current Thai legal practice, are rejected as being based on a flawed notion that law is distinct from and superior to politics. It is not clear, however, in what sense this might be true. Judges do not in general assert such superiority; rather they see the law as framing the political process, but leaving political decision-making to its proper jurisdiction, by virtue of the notion of judicial deference. Decisions may be reviewed, usually on quite narrow, mainly procedural, grounds, but not substituted. In Thailand judges have repeatedly even validated military coups that were clearly unconstitutional, taking judicial deference to the very extreme. If law and politics are not in the end in some sense separate, then what is to stop politics simply invading the legal process in ways that McCargo himself denounces?

On these issues regarding the relationship of politics to law there can of course be much discussion. But it remains a problem for this book that, if McCargo is right, it is difficult to see what should be done about the law. If we leave it as it is, we have, it seems, bad laws badly interpreted and inconsistently enforced. If we reform it, the argument goes, we are deceiving ourselves, because law reform has not been successful, being shown in recent years to be easily circumvented, undermined, or exploited for wrongful purposes. All this is plausible.<sup>26</sup> One might think, however, that the answer—and it is one very familiar to lawyers—is that only a change in legal culture, including and especially amongst lawyers themselves, is likely to bring about successful improvement in the understanding and application of law in the interests of justice. And, further, that this legal culture would have to be one that embraced the notion of rule of law. Yet this too is rejected by McCargo in the Introduction, which offers the thin gruel of a rather generalised critique of the rule of law, in line with Cheesman’s work on Myanmar, and Judith Shklar’s vague suggestion of “tribunality.”<sup>27</sup> It is not clear which concept of the rule of law is being rejected, as the tenuous argument is that rule of law is indistinguishable from rule by law. Yet the chapters on the cases provide numerous examples of cases where the rule of law might well have provided a better answer than rule by law, and better also than the empathy

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<sup>24</sup> This group is discussed at some length: e.g., at *ibid* 91–101.

<sup>25</sup> On the Move Forward party’s recent proposal to change Section 112 of the Criminal Code, see also Constitutional Court decision No. 3/2567, introduced and translated by Tyrell Haberkorn (in this issue), and the expert witness statement by Ronnakorn Bunmee (also in this issue).

<sup>26</sup> Nonetheless, it might be wrong to discount the post-1997 experience. The reforms introduced then have proved to enjoy an “afterlife,” as Ginsburg calls it, and many, such as the administrative courts, have proved beneficial: Tom Ginsburg, “Constitutional Afterlife: The Continuing Impact of Thailand’s Post-political Constitution” (2009) 7(1) *International Journal of Constitutional Law* 83 <<https://doi.org/10.1093/icon/mono31>>. It is usual to blame constitutional apparatus for failure in circumstances where perhaps it was the deliberate actions of individuals that should bear the blame.

<sup>27</sup> McCargo, *Fighting for Virtue* (n 1) 18–22.

and imagination that McCargo finds judicially lacking except in certain moments of clarity.

McCargo believes in the positive benefits of a successful trial. But what would a successful trial look like? For most people, one assumes, it would be a trial that is conducted fairly within the letter and the spirit of the rules. In this sense the legalism McCargo dislikes (in the narrow sense of rigid adherence to process) might fairly be insisted on by those unfortunate enough to be on the sharp end of a dubious prosecution, such as the very defendants whose cases are critiqued in chapters 4–6. The rule of law is not of course merely the mechanical application of rules (whatever that might look like—rules always need interpreting), but involves, amongst many other things, the careful and logical assessment of evidence and adherence to a process that is intended to and does facilitate such assessment. In this sense McCargo’s own critiques, which are both fair and perceptive, are in fact rule-of-law-based critiques.

To be clear, judicialisation, or “juristocracy” (that is, the overreach of judicial power in relation to political decision-making) is not to be confused with the due exercise of judicial power. It is always possible of course to construe the word “political” widely enough to encompass everything that happens in society, but that is simply one way (perhaps a tautologous one) of looking at society, and tends to deprive the word “political” of any coherent meaning. With a sophisticated and balanced approach to judicial review judges can avoid both the mindless application of literal interpretations and the substitution of judicial for political decision-making. A starting point, I suggest, might be for the courts to reject McCargo’s injunction to pay regard to political reality and hold military coups to be unconstitutional, as they clearly are.<sup>28</sup> In case this is thought to be impossible, there are in fact many instances elsewhere in which a military coup has been invalidated, or validated only subject to conditions, such as real popular assent, or a promise to return swiftly to constitutional rule.<sup>29</sup> It may well be futile to expect judges to solve underlying political problems. But they can make a contribution where it is within their remit to do so. The overarching question remains, what do we expect from judges? Confining them to mere literal application of rules is precisely what McCargo criticises them for doing. The alternative is that we could expect judicious enforcement of law, adopting an intelligent approach that considers the true meaning of law in terms of its internal morality.<sup>30</sup> Ultimately progress can only be made if the legal system becomes dedicated to “rights-based justice” as opposed to “peace and order,” to use McCargo’s own distinction. This is a long and difficult path, involving deep changes in the conception of legal order, legal practice and legal education.

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<sup>28</sup> *ibid* 8.

<sup>29</sup> Kriangsak Kittichaisaree, *Judicial Responsibility and Coups D’Etat: Judging Against Unconstitutional Usurpation of Power* (Routledge 2023) <<https://doi.org/10.4324/9781003358428>>. Even in Thailand, in Worajet’s case in 2023 the court recognised limits to military power in terms of post-coup regulations.

<sup>30</sup> Lon Fuller, *The Morality of Law* (Yale University Press 1964). Taiwan and South Korea afford examples of such an approach being adopted and seen as politically acceptable.

*Fighting for Virtue* assists us in understanding profoundly the nature of the problems that need to be dealt with, but is far from providing us with helpful solutions.

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