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Book Review

Dictatorship on Trial: Coups and the Future of Justice in Thailand

Tyrell Haberkorn
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*Phattharaphong Saengkrai**

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What would the judgments of Thai courts have read if they had taken seriously democratic values and human rights principles? This simple question—occasionally discussed in a classroom—receives a thoughtful answer in an elegant, pellucid book, provocatively titled *Dictatorship on Trial*, by the historian Tyrell Haberkorn. Haberkorn has chosen five cases during the recent coup regime in Thailand, the National Council for Peace and Order (NCPO, 2014–19), where the courts decided in favour of the junta or upheld the repressive regime in one way or another. She has painstakingly rewritten the decisions in these cases from a people-centric perspective, relying on the same evidence in the cases, and the legal materials available to Thai courts: Thai criminal, civil, administrative, and constitutional law, as well as human rights treaties to which Thailand is a party, especially the International Covenant on Civil and Political Rights (ICCPR). The narrative form in her decisions takes the same form as that of Thai courts' decisions. But her decisions are rendered by the "Court for the People."[1] They contribute to the construction of "a jurisprudence of accountability"—"one that values and centres, rather than erases, the participation of the people in the polity; holds state officials and institutions to account; and treats justice itself as an ideal to strive toward."[2]

* Lecturer, Faculty of Law, Thammasat University; saengkrai@tu.ac.th.

[1] Tyrell Haberkorn, *Dictatorship on Trial: Coups and the Future of Justice in Thailand* (Stanford University Press 2024) xxiii <https://doi.org/10.1515/9781503639416>.

[2] ibid 17.

Dictatorship on Trial comprises five chapters devoted respectively to each of the five cases, with a substantial introduction brilliantly discussing the historical relationship between Thai courts and the dictatorial regime. Each chapter begins with a succinct account of the background and broader context of the case, the discussion on how the court decided the case, and some critical reflection based on a close reading of the decision. These are then succeeded by the decision of the Court for the People. Chapter One discusses and rewrites the judgment in *Pansak Srithep v. General Prayuth Chan-Ocha* where the plaintiff brought a criminal case against the coup leaders of the NCPO for the crime of rebellion and treason. While the Supreme Court rejected the claim, the Court for the People opines that "[a] coup is the forcible toppling of the existing government and the seizure of governing power by a junta. A coup, therefore, is within the scope of the actions defined as a crime in Article 113 of the Criminal Code."[3] Chapter Two turns to *Office of the Attorney General v. Apichat Pongsawat* where the defendant was found guilty by the Supreme Court in 2019 for having participated in a peaceful protest in violation of the NCPO Order No. 3/2558 prohibiting an authorised assembly of five or more persons. The Court for the People reverses that judgment, reasoning that "[a]t worst, the defendant was arrested, accused, and prosecuted under an order that was illegally issued and not law."[4] It additionally references successive constitutions of Thailand which enshrine human dignity, rights and freedoms of people, and the ICCPR which recognises the right to peaceful assembly.

The other three cases follow a similar thread. Chapter Three concerns the famous constitutional case where the renowned professor of public law at Thammasat University, Worachet Pakeerut, succeeded in challenging the constitutionality of the NCPO Order criminalising those who refuse to comply with the NCPO's summons to report in the wake of the coup. Haberkorn rightly argues that while the outcome of the Thai Constitutional Court's decision rendered Worachet not guilty, its reasoning still defended the necessity of restrictions of rights and freedoms during and after the coup, thereby naturalising the overthrow of democratically elected governments in Thailand. The Constitutional Court for the People squarely addresses this point, bringing the Constitutional Court's decision to its full democratic potential. It references the dissenting opinion of Judge Kirati Kanchanarin in the 2009 case before the Political Officeholder Division, of the Supreme Court, which deserves to be quoted *in extenso*:

> The sovereignty belongs to the people. The court is one of the sovereign power, which is of the people. . . . The exercise of power in governing the country by undemocratic means, or in other words, securing power without the consent of the majority of the people, is equivalent to the overthrow of democracy. A revolution or a coup is the overthrow of the constitution and is a crime according to Article 113 [of the Criminal Code]. It is a way of obtaining power to govern the country by undemocratic means. If the court affirms the power of individuals or a group of individuals who carry out a revolution or a coup to be the sovereign state, it is equal to the court not serving and

[3] ibid 51.
[4] ibid 75.

> protecting the people from the exercise of illegitimate authority, and being indifferent to the protection of democracy.[5]

Chapter Four rewrites the *Office of the Attorney General v. Piyarat Chongthep and others* judgment in 2020, which held the defendants criminally liable for campaigning against the adoption of the draft constitution prepared under the NCPO regime. The Court for the People decides in favour of the defendants. Finally, in Chapter Five, Haberkorn has chosen a case before the Administrative Court, in which Pansak Srithep challenged the legality of the Ministry of Justice Order No. 314/2558 establishing a prison for civilian defendants in national-security-related cases. In 2019, the Administrative Court rejected Pansak's petition. The Administrative Court for the People, by contrast, orders the revocation of the order in question and the immediate closure of the prison.

Haberkorn's book is thoroughly researched, drawing extensively upon primary materials in Thai. It is noteworthy that the judgment of the Administrative Court in Chapter Five is not publicly available online, which requires one to visit the court library outside of Bangkok just for reading. The five cases have also been carefully selected and effectively presented. They have been taken from different courts, subtly suggesting that the repressive decisions unduly restricting the rights and freedoms are not the monopoly of one category of judicial organs in the Thai dual-court system. Even the Constitutional Court, which is expected to serve as the Guardian of the Constitution, has contributed to naturalising the coup in its seemingly progressive decision. More importantly, the five cases all vividly illustrate how the military had weaponised laws for suppression, and how dissenters had attempted to resort to legal processes to counter such suppression. Law, in this book, emerges as a site for continuous contestation. This image of law—long presented by critical legal scholarship in various strands—serves as the backdrop against which judgments can be productively rewritten. It prises open the mental space for rethinking the potential use of law in the struggle against an oppressive regime.

If there is one category of cases that should have been added to the five chapters, it is a case related to Section 112 of the Criminal Code. Scholars have shown how the lèse-majesté law has been misused and abused to silence political oppositions and dissenting voices, especially in recent years.[6] Haberkorn is keenly aware of this, but she has decided against rewriting the judgments in these cases. The epilogue of the book, titled "Judgments that Cannot Be Rewritten," briefly discusses the Section 112 cases and argues that the provision should be repealed instead. I still regard that judgment-rewriting in this field, within the available legal materials, could be instructive. Judges in the Court for the People could refer, for example, to the General Comment of the Human Rights Committee under the ICCPR which notes that:

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[5] ibid 111.

[6] See, e.g., Eugénie Mérieau, "A History of the Thai Lèse-Majesté Law," in Andrew Harding and Munin Pongsapan (eds) *Thai Legal History: From Traditional to Modern Law* (Cambridge University Press 2021) 77 <https://doi.org/10.1017/9781108914369.007>.

> all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition. Accordingly, the Committee expresses concern regarding laws on such matters as, lèse majesté, *desacato*, disrespect for authority, disrespect for flags and symbols, defamation of the head of state, and the protection of the honour of public officials, and laws should not provide for more severe penalties solely on the basis of the identity of the person that may have been impugned. States parties should not prohibit criticism of institutions, such as the army or the administration.[7]

The need to rewrite, and rethink, the relevant judgments has become even more acute after *Dictatorship on Trial* was published. In 2024, the Constitutional Court dissolved the Move Forward Party, holding that its campaign to amend Section 112 amounted to an attempt to overthrow the democratic regime with the King as Head of State.[8] If campaigning for amendment is, in effect, prohibited, one wonders what remains legally available for those seeking to improve the law. As scholars and politicians continue to decipher this Constitutional Court's decision to find some room for future action, a rewriting of this decision—or the judgments of the Court of Justice in cases related to speech crimes more broadly—promises to bring new, practical insights for necessary legal arguments. It can, additionally, contribute to a rethinking of what Thongchai Winichakul calls the "Royalist Rule of Law."[9]

Methodologically, *Dictatorship on Trial* makes a significant contribution to the literature on lawfare, judicial activities, and contemporary politics in Thailand. In rewriting the decisions, Haberkorn has drawn inspiration from the prefigurative movement, especially the feminist judgments project. The gist of this scholarly/political approach is eloquently explained in the last sentence of the book: "Scholars, too, must write as if another history, and the justice imagined and forged within it, is possible."[10] The point is to write judicial decisions as if the culture of liberal democracy had already consolidated in the Thai society. The Prologue further explains this methodological point, but only briefly. This innovative methodology deserves further reflection, not least because of the burgeoning literature on both domestic and

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[7] Human Rights Committee, "General Comment No. 34. Article 19: Freedoms of Opinion and Expression," UN Doc CCPR/C/GC/34 (12 September 2011) para 38.

[8] See, further, Khemthong Tonsakulrungruang, "A Standoff Between the Monarchy and the People: On the Ban of Thailand's Move Forward Party" *Verfassungsblog* (6 September 2024) <https://verfassungsblog.de/move-forward-party-ban-thailand/>; Rawin Leelapatana, "From State of Exception to Hyper-Legalism: The Thai Constitutional Court and the Dissolution of the Move Forward Party" *Australian Institute of International Affairs* (29 August 2024) <https://www.internationalaffairs.org.au/australianoutlook/from-state-of-exception-to-hyper-legalism-the-thai-constitutional-court-and-the-dissolution-of-the-move-forward-party/>.

[9] Thongchai Winichakul, "We Live Under 'Royalist Rule of Law'" *Prachatai English* (7 June 2024) <https://prachataienglish.com/node/10970>. See, further, Thongchai Winichakul, "Confession to Lèse Majesté: A Lens into the Rule of Law in Thailand" (2019), paper submitted as part of the "Legacies of the Past in the Modern Rule of Law in Thailand" project <https://www.ide.go.jp/library/Japanese/Publish/Reports/InterimReport/2018/pdf/2018_2_40_026_ch01.pdf>.

[10] Haberkorn, *Dictatorship on Trial* (n 1) 175.

international law.[11] Its roots lie in anarchist thought and some strands of Marxist and Black feminist thought, so there is a promising, intimate relationship with prefiguration and emancipatory justice.[12] In this sense, *Dictatorship on Trial* serves as an inspiring invitation for scholars working on lawfare, judicial politics in Thailand, and possibly Thai private law, to reflect on what legal prefiguration means in the long-standing strive for freedom in the Thai society.

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[11] See, in particular, the "Feminist Judgment Series: Rewritten Judicial Opinions," published by Cambridge University Press. See also Loveday Hodson and Troy Lavers (eds), *Feminist Judgments in International Law* (Bloomsbury 2019) <https://doi.org/10.5040/9781509914449>.

[12] For a useful example of the ongoing research programme, see the project led by Martijn Hesselink at the European University Institute <https://www.eui.eu/research-hub?id=prefigurative-law-1>.

[*] **Indexing Thai names.** "Although family names are used in Thailand, Thai people are normally known by their given names, which come first, as in English names. The name is often alphabetized under the first name, but practice varies." The Chicago Manuel of Style (18th edn, University of Chicago Press 2024) §15.93.