

Nationalistic History in Thai Constitutional Court Rulings: Article 112 of the Thai Criminal Code as an (Un)Popular Law

*Angelo Sathayu Sathorn**

Abstract

Ever since youth-led protests erupted in 2020, Thailand has seen an unprecedented rise in the number of political prisoners. Many individuals who exercised their right to freedom of expression to openly criticize the Thai monarchy have found themselves indicted and detained under Article 112 of the Thai Criminal Code. This paper aims to challenge the nationalistic historical approach evident in Thai Constitutional Court rulings related to Article 112 by applying non-traditional narratives of Thai history. The argument is that the Court cannot claim that limitations on criticism of the monarchy and Article 112 are part of the “Spirit of the Thai National Community” because the Court failed to consider alternative viewpoints on Thai history besides “Royal Nationalism.” Additionally, the Court neglected the legal history of the lèse-majesté offense and how it demonstrates that the offense was a creation induced by the Thai ruling class without any popular consensus.

Keywords: Nationalism — Thai Constitutional Court — Article 112 — Lèse-majesté — Thai history — Rule of law

* LLB (Thammasat University); angelo.sathayu@gmail.com.

I. INTRODUCTION

A. Article 112 and the “Spirit of the Thai National Community”

In this article, the author will explore the question of whether it is valid for the Thai Constitutional Court to claim that Article 112 of the Thai Criminal Code is part of the “Rule of Law” and the “Spirit of the Thai National Community” (*jit winyan prachachat thai*), as argued by the Court in various rulings related to the lèse-majesté offense. This article is divided into 4 parts: (1) introduction, (2) the Court’s failure to consider anything apart from “Royal Nationalism,” (3) the Court’s failure to consider the legal history of the lèse-majesté offense and exclusion of the people, (4) conclusion.

Article 112 of the Thai Criminal Code criminalizes “defaming, insulting, or threatening” the Thai king, queen, heir-apparent, or regent with punishment ranging from three years’ imprisonment up to a maximum of 15 years’ imprisonment. The application of the law in conjunction with other laws, such as the Computer Crimes Act B.E. 2550 (2007), has resulted in disproportionately severe sentences of up to 25 or 50 years’ imprisonment.¹

To understand the relation between Article 112, “Rule of Law,” and the “Spirit of the Thai National Community,” we must first understand how the Thai Constitutional Court’s view of “Rule of Law” is mostly in line with universal standards, except for issues regarding the Thai monarchy. This is most evident in Constitutional Court Ruling No. 28–29/2555 (2012).² The ruling is a prime example of how the Court has been keen to insert “Thai-style” values into its interpretation of the Rule of Law, particularly concerning how Article 112 of the Thai Criminal Code is both constitutional and compatible with the Rule of Law in Thailand. This is supported by Kla Samutwanit’s analysis of various Constitutional Court verdicts, in which he highlights how the Court has referred to “Rule of Law” as a “principle of naturally-appearing justice that contains universal values.”³ Kla argues that the “universal values” referred to by the Court are evidence of a “universal” aspect of the Court’s interpretation of Rule of Law, as the Court often refers to international treaties or conventions in conjunction with the Rule of Law.⁴ Nonetheless, in Constitutional

¹ “26-Year-Old Sentenced to 25 Years in Prison for Royal Defamation” *Prachatai English* (15 March 2024) <[URL](#)>; Jonathan Head, “Thailand: Man Jailed for 50 Years for Defaming Monarchy” *BBC News* (19 January 2024) <[URL](#)>.

² This 2012 case concerned the lèse-majesté charges levied on Somyot Pruksakasemsuk and Ekachai Hongkangwan, which both challenged the constitutionality of the law. Somyot and his legal team argued that the provision was inconsistent with the rule of law under section 3 paragraph 2 of the 2007 Thai Constitution.

³ กล้า สมุทรวานิช, “ศาลรัฐธรรมนูญกับการแปลความหมายสร้าง และบังคับใช้ ‘หลักนิติธรรมไทย’” ใน เข้มทอง ต้นสกุลรุ่งเรือง (บรรณาธิการ) นิติรัฐ นิติธรรม ประวัติศาสตร์ภูมิปัญญาเปรียบเทียบ [Kla Samutwanit, “The Constitutional Court and Interpreting the Meaning of Creating and Enforcing ‘Thai Rule of Law’” in Khemthong Tonsakulrungruang (ed), *Rule of Law, Legal History: A Comparative History of Intellectual Property* (Illuminations Editions 2024)] (Thai) 236–37.

⁴ Kla also highlighted that the Court views the concept of “Rule of Law” primarily through the lens of “naturally appearing” justice or “natural law” that “altogether see its importance as a principle that

Court Ruling No. 28–29/2555 (2012), the Court ruled that Article 112 of the Thai Criminal Code was constitutional, reasoning that the severe penalties were compatible with Rule of Law as they were intended to “preserve public order and good morals.”⁵ What is highly interesting is how the Court explained the legitimacy of the law, which is done by referring to Thai history. Particularly it invoked “the honor exhibited by the Royal Institution (which) sustained the nation’s honor and preserved the essential elements of the democratic form of government with the King as head of state.”⁶ Kla argues that, through such ruling, we can infer that there has only been one distinct “Thai-style” aspect that has been inserted into “Rule of Law” in Thailand, which is the Thai State’s duty to protect the Monarchy’s status as the nation’s “highest institution.” Such purpose and duty imposed on the Thai State, therefore, justifies the criminalization of speech and heavy penalties imposed and allows Article 112 to fit nicely in the Thai Rule of Law paradigm, in the mind of the Constitutional Court.⁷

Yet, we are still left with many questions. How does the protection of an institution, supposedly limited by a constitution, trump the fundamental rights of the people, in the mind of the Constitutional Court? What facilitates this “royalist” interpretation of the “Rule of Law”? The author believes that such questions can be answered by understanding that the key factor facilitating a “royalist” interpretation of “Rule of Law” in Thailand is what the Thai Courts have referred to as the “Spirit of the Thai National Community.” It is critical to note that, ever since the concept was established in the aforementioned Constitutional Court ruling of 2012, Thai courts have continued to utilize and expand such a concept. This is supported by the findings of Thai legal scholar Worachet Pakeerut. Worachet has explained how the Thai Constitutional Court has never defined what the “Spirit of the Thai National Community” is, and its definition must be inferred from a judgement of the Central Labor Court concerning a case where an employer requested the Court to fire his employee who was the head of a labor union.⁸ The employer wished to fire his employee, as the employee had appeared on a television program wearing a shirt that had a statement which the employer deemed critical of the monarchy. In giving its answer on the issue of whether the employer’s reasons for firing his employee were just, the Court ruled in favor of the employer. Reasoning that “upon considering the Spirit of the Thai National Community it can be seen that, the Spirit of the Thai National Community is distinct from other nations, of which it is widely accepted or known that the Thai people have respect and venerate their king, nobody may defame or insult him, therefore the employer’s firing of his employee due to the

States have to protect and adhere to, irrespective of domestic law, or legal history or culture.” For more details, see Kla, “Thai Rule of Law” (n 3) 237.

⁵ *ibid* 237–38.

⁶ The Constitutional Court of the Kingdom of Thailand, “Summary of Constitutional Court Ruling No. 28–29/2555 (2012)” dated 10th October B.E. 2555 (2012) 64–67.

⁷ Kla, “Thai Rule of Law” (n 3) 238–39.

⁸ “40 ปีนิติปรัชญา (3) วรเจตน์ ภาคีรัตน์: อุดมการณ์เบื้องหลังกฎหมายและการศึกษาพระราชโองการ 8 กุมภาพันธ์” [“40 years of Legal Philosophy (3) Worachet Pakeerut: Ideology Behind the Law and the Study of the Royal Decree dated 8 February” *Prachathai* (1 March 2019)] (Thai) <[URL](#)>.

aforementioned incident is not an unjust firing of an employee.”⁹ The link between “Spirit of the Thai National Community” and “Thai-style” Rule of Law is, as explained by both Kla and Worachet, how they both rest on the same set of values. The “good morals” of the Thai people as demonstrated by their respect and veneration of the monarchy, and the particularity of such “Thai-style” morals, which makes them worth adhering, protecting and applicable to even Thai political society and legal society. Kla thus argues that “Spirit of the Thai National Community” and “Thai Rule of Law” can be used interchangeably as they mean almost the same thing as both are sets of the same values which serve as a “distinct” part of Thai society and work as “additions” that can expand the scope of interpreting written law.¹⁰ In this paper, the author will refer to such a set of values as the “Spirit of the Thai National Community.”

From the aforementioned analyses, it is clear that the “Spirit of the Thai National Community” is the crucial connector between Article 112 and “Thai-style Rule of Law,” in the eyes of the Thai Constitutional Court. If one were to challenge this view, one must question whether it is truly valid to claim that Article 112 is part of the “Rule of Law.” This makes the research question of this article highly relevant in a time like now. More and more, people are realizing the socio-legal implications of the Constitutional Court’s rulings, particularly Constitutional Court Ruling No. 28–29/2555 (2012), which will be explained in the following sub-section.

B. Socio-Legal Implications of Constitutional Court Ruling No. 28–29/2555 (2012)

Ever since the Constitutional Court first invoked the idea of a “Spirit of the Thai National Community” in 2012, arguments along spiritual lines have continued to be invoked by the Court, particularly in cases concerning the Thai monarchy. This has led to significant socio-legal implications and worrying consequences for the development of Thai democracy. In terms of the legal consequences, a number of worrying legal precedents have been set regarding the employment of spiritual arguments, restrictions on possible amendments to Article 112, and the determination of the intention of individuals or political parties that propose changes to Thailand’s “lèse-majesté” law. These legal consequences have also rippled into socio-political effects, particularly the reinforcement of the “fear factor” of Article 112 and the dimming possibility of any future change in Thai laws regarding the monarchy, whether driven by parliament or the people.

With regards to the continued employment of spiritual arguments by the Thai constitutional court, this can be seen in Constitutional Court Ruling No. 19/2564 B.E. 2564 (2021). This ruling concerned the actions of protest leaders, particularly their speeches regarding the monarchy at a demonstration at Thammasat University’s Rangsit Campus on 10 August 2020. The Court ruled that those actions constituted

⁹ Kla, “Thai Rule of Law” (n 3) 243–45.

¹⁰ *ibid* 244–45.

the “exercise of rights and freedoms to overthrow rule by democracy with the king as head of state, according to Article 49 Paragraph 1 of the Thai Constitution (B.E. 2560).”¹¹ What is most interesting is how the Constitutional Court’s explanation before arriving at such a conclusion is rooted in an interpretation of Thai history and its supposed spiritual implications. This can be seen by how the Court invokes the history of Thai kings “leading the military to fight to always protect and expand the kingdom in previous eras” and their supposed adherence to Buddhist principles of governance to explain that “[t]he king therefore has been respected and the spiritual center inseparable from all Thai people for many hundreds of years.”¹²

Spiritual arguments were also raised by the Court in Constitutional Court Ruling No. 3/2567 B.E. 2567 (2024). This case concerned the Move Forward Party’s (MFP) proposal to amend Article 112. The Court ruled that such a proposal, similarly to the previous ruling discussed, constituted “the exercise of rights and freedoms to overthrow rule by democracy with the king as head of state according to Article 49, paragraph one, of the Constitution.”¹³ Spiritual arguments were employed to explain how offenses against the monarchy are inextricably linked to offenses against national security, which is supposedly justified by how “he (the king) is the heart of the people in the nation and preserves the strength and unity of the people in the nation.”¹⁴ MFP’s proposal to make the Royal Household Bureau the only possible complainant in an Article 112 case, was also deemed to be making “commission of offenses of violation of Article 112 into actions that do not impact the nation or people, even though the commission of such offenses are an attack on the hearts of the Thai people who respect and venerate the institution of the monarchy.”¹⁵

Concerning precedents relating to possible amendments to Article 112, the Court has concretized the standard set by Constitutional Court Ruling No. 28–29/2555 B.E. 2555 (2012), which prohibits any amendment that would, in effect, make the standard of proof in an Article 112 case the same as defamation of an ordinary citizen. This can be seen in Constitutional Court Ruling No. 3/2567 B.E. 2567 (2024). In this decision, the Court explicitly refers to Constitutional Court Ruling No. 28–29/2555 (2012) as a precedent about how violations of Article 112 are more serious offenses than defaming or insulting ordinary citizens under Article 326 of the Thai Criminal Code. This was done in the context of justifying the Court’s argument that MFP’s proposal to amend the law, so that the standard for burden of proof in an Article 112 case would be the same as defamation for an ordinary person, would violate the Thai monarch’s inviolability and “position of revered worship.”¹⁶

¹¹ “Thai Court Rules Students’ Royal Reform Call Sought to Overthrow Monarchy” *Reuters* (10 November 2021) <[URL](#)>.

¹² Tyrell Haberkorn, “On Reform and Revolt: Constitutional Court Ruling No. 19/2564” (2023) 2(2) *Thai Legal Studies* 282, 305–6 <[URL](#)>.

¹³ Tyrell Haberkorn, “Translated Judgment: Drafting a Law Is Not Overthrow: Constitutional Court Ruling No. 3/2567” (2024) 4(1) *Thai Legal Studies* 72, 100 <[URL](#)>.

¹⁴ *ibid* 95.

¹⁵ *ibid* 96.

¹⁶ *ibid* 95.

With regard to the intention of individuals or political parties who propose amendments to Article 112, a similar trend can be observed in both aforementioned rulings. In both rulings, the Thai Constitutional Court did not consider subjectively the intention of parties who propose amendments or abolishment of either Article 6 of the Thai Constitution¹⁷ and Article 112 of the Thai Criminal Code. This can be seen by how the Court refused to consider the motives provided by the defendants in both rulings. Instead of analyzing each defendant's intention subjectively, the Court viewed that the intention of the defendants as a whole could be objectively inferred by the mere nature of both Article 6 of the Thai Constitution and Article 112 of the Thai Criminal Code, respectively. Particularly, its nature as providing protection to the monarchy. In Constitutional Court Ruling No. 19/2564 (2021), the activists were deemed to have intent to “destroy the monarchy” for daring to propose the abolishment of Article 6 of the Thai Constitution, whilst in Constitutional Court Ruling No. 3/2567 (2024) the 44 MPs from MFP were also deemed to have intent to “destroy the monarchy” for a proposal to amend Article 112 through legislative means.¹⁸

The socio-political effects of such rulings become apparent once we consider the “fear factor” surrounding Article 112 in Thai society. The “fear factor” refers to the stigmatization of any form of criticism of the Thai monarchy. By employing spiritual arguments to render the aforementioned rulings, the Thai Constitutional Court has set a dangerously low bar for an act to constitute “destroying the monarchy.” Even minute criticism of the monarchy can be equated as acts that damage the Thai nation as a whole. This stigmatizes any speech that may be deemed critical of the monarchy, creating fear for those who want to express their views on the institution but do not want to be branded as enemies of the state, whilst also creating a sense of alienation for those who have already had their speeches branded as critical of the Thai monarchy.¹⁹ The lower the bar, the higher the possibility of acts to constitute the serious accusation of “destroying the monarchy,” and thus the risk and fear for society increases. Thus, Article 112's “fear factor” is further compounded by how the Constitutional Court inferred the intentions of the defendants in both rulings. The enthusiasm of Thai Courts to not consider subjectively the intention of parties who propose amendments or abolishment of either Article 6 of the Thai Constitution and Article 112 of the Thai Criminal Code, and the fear created by such precedent, further dims the possibility of any future change in Thai laws regarding the monarchy, whether driven by parliament or the people. Ever since the MFP was dissolved by the

¹⁷ Article 6 of the Thai Constitution B.E. 2560 (2017) concerns the inviolability of the monarch. It stipulates that “The King shall be enthroned in a position of revered worship and shall not be violated. No person shall expose the King to any sort of accusation or action.” As seen in “Translation of the Constitution of the Kingdom of Thailand B.E. 2560 (2017)” (Published in the Government Gazette, Vol. 134, Part 40a, Page 1, dated 6 April B.E. 2560, 2017, Office of the Council of State) 4.

¹⁸ Haberkorn, “Reform” (n 12) 307; Haberkorn, “Drafting a Law” (n 13) 97–100.

¹⁹ “ทิวากร : นักกิจกรรมเรียกร้องให้ปล่อยตัวชายที่สวมเสื้อมีข้อความเกี่ยวกับสถาบันกษัตริย์จาก รพ. จิตเวช” [“Tiwakorn: Activists Call for the Release of a Man Who Wore a Shirt With a Statement Related to the Monarchy From Psychiatric Hospital” *BBC News Thailand* (17 July 2020)] (Thai) <[URL](#)>.

Constitutional Court in August 2024²⁰ no political party in Thailand has yet to propose a similar policy. Furthermore, despite issues in criminal procedure being prominent in litigation involving Article 112, the continued invocation of the Constitutional Court's ruling in 2012 is becoming an omnipresent barrier deterring any future amendments by the Thai people and their elected representatives. Remedying the issues of Article 112 seems almost inconceivable within the Constitutional Court's conception of "Thai-Style Rule of Law."

II. FAILURE TO CONSIDER ANYTHING APART FROM "ROYAL NATIONALISM"

A. Section Introduction

We have established that the Court views the "Spirit of the Thai National Community" as the justification for linking the existence of Article 112 to "Thai-Style Rule of Law." In this section, the author will demonstrate that this argument rests on an interpretation of Thai history that is rooted in "Royal Nationalism" (*rachachatniyom*). Furthermore, the author will argue that the Court's interpretation of Thai history overlooks contemporary debates and developments surrounding the formation of a Thai nation-state.

B. Viewing History Through A Yellow Tinted Lens: "Royal Nationalism" in the Thai Constitutional Court's Interpretation of Thai History

1. "Royal Nationalism" in Constitutional Court Rulings.

Through the rulings discussed, we can see that in the Court's eyes, both concepts, whether the idea of a "Thai National Community" or its "spirit," are formulated based on historical grounds. As any student or expert in history would be aware, there is rarely any one certain definite narrative of history. History may be made up of supposed facts, but some "historical facts" continue to be debated to the present day, especially when new evidence is introduced. Furthermore, the body of historical academia is not limited to facts alone; its epistemological nature must also be considered. Facts are rarely considered as standalone objects of historical observation but are often also tied to varying interpretations of such a set of facts derived from a diverse range of primary and secondary sources, and by a multitude of people. Put simply, whilst it is undeniable that there is some form of "truth" in the study of history,

²⁰ Jonathan Head, "Move Forward: Thai Court Dissolves Reformist Party That Won Election" *BBC News* (7 August 2024) <[URL](#)>.

historical academia is made up of various interpretations of history, meaning even the Thai Constitutional Court's invocation of Thai history is, at the end of the day, merely its own interpretation of Thai history. This, therefore, begs the question of what the characteristics of the historical narrative invoked by the Thai Constitutional Court are, and what they tell us about the type of history being invoked by the Court.

As already touched upon, the author aims to argue that the Thai Constitutional Court has employed an interpretation of Thai history that is rooted in "Royal Nationalism." This requires an understanding of what the concept of "Royal Nationalism" actually is.

The term "Royal Nationalism" was first coined by prominent Thai historian Thongchai Winichakul. In his highly influential work titled *Royal Nationalism (rachachartniyom)*, Thongchai highlights how, ever since the reign of King Chulalongkorn (1868–1910), Thailand has been ideologically gripped by a form of nationalism that he calls "Royal Nationalism." Under this conception of nationalism, being "Thai" or not was defined by whether or not such a person was within the influence or *baramee* of the Thai monarchy.²¹

This is supported by the views of another Thai historian, Tanapong Luekajornchai. Tanapong summarizes the concept of "Royal Nationalism" as coined by Thongchai in the following terms: an imagined community whereby "subjects" from diverse cultural and social backgrounds are all united beneath the influence or *baramee* of the Siamese king.²² *Royal Nationalism* is complemented by another critically acclaimed work by Thongchai, an earlier release titled *Siam Mapped: History of the Geo Body of a Nation*.²³

However, to understand "Royal Nationalism" apart from looking at Thongchai's work, we must also look at the work of David Streckfuss. Streckfuss has argued that efforts to integrate other ethnic and cultural groups into a homogenous "Thai" identity through a "National Integration" program did not occur until the early years of Thai democracy underneath the "People's Party" (*khana ratsadon*) (1932–1947) and particularly during Field Marshal Plaek Pibulsongkram's first tenure as Prime Minister (1938–1944).²⁴ Nonetheless, Streckfuss still agrees with Thongchai that the

²¹ Thongchai Winichakul, *The Royal Nation-State* (Same Sky Books 2016).

²² "เมื่อใดจึงเป็น(รัฐ)ชาติไทย?: เมื่อตาบอดวิ่งหารัฐชาติไทย" ใน ฐนพงศ์ ลือขจรชัย, "เมื่อใดจึงเป็นชาติไทย" ["When Did the Thai Nation (State) Become?: When the Blind Seek a Thai Nation State" in Tanapong Luekajornchai, *When Did the Thai Nation (State) Become* (Illuminations Editions 2021)] (Thai) 26–27.

²³ In *Siam Mapped*, Thongchai highlights how the creation of a map of the Thai-nation state created a framework whereby the Siamese ruling class could physicalize Thailand into a visible entity that was capable of being related back to its populace. Essentially, *Royal Nationalism* highlighted the absolutist state-mandated view of Thai history that persists until the present day, whilst *Siam Mapped* demonstrated how modern maps were one of the many mechanisms used by the Siamese ruling class to transfuse their interpretation of history into the minds of the general public. For a more detailed enquiry, see Thongchai Winichakul, *Siam Mapped: A History of the Geo-Body of a Nation* (University of Hawaii Press 1997) <[URL](#)>.

²⁴ David Streckfuss, "An 'Ethnic' Reading of 'Thai' History in the Twilight of the Century-old Official 'Thai' National Model" (2012) *Southeast Asia Research* 20(3) 305–27 <[URL](#)>.

creation of “Royal Nationalism” in the late 19th century led to the infusion of Thai royalty with Thai nationhood, which has been intertwined ever since.²⁵ This is supported by Tanapong Luekajornchai’s analysis of Streckfuss’s work.²⁶

From the findings of Thongchai Winichakul and Streckfuss, we may conclude that “Royal Nationalism” has four defining features: (1) an imagined community that is spiritually linked to the Thai king, (2) “subjects” or the people which are culturally and socially diverse, (3) a spiritual link between “subjects” and the king and his influence or *baramee* as the basis of the link between the people and the nation, and (4) royalty intertwined with nationhood. These are all features which may be found in the aforementioned rulings of the Constitutional Court.²⁷

In all three decisions, the Court alludes to a longstanding and distinct “Thai people” that have always been spiritually tied to their king, or a “Thai spirit” in which the king forms the center of such spirit. This is most apparent in the Constitutional Court Ruling No. 19/2564 (2021).²⁸ Therefore, we can see that the Court views that there is a distinct “Thai” people; there is no mention of any cultural or social diversity. Furthermore, the Court deems that there has been a “Thai” community existing for a long time that could and have bound themselves to the Thai king. The spiritual arguments invoked by the Court across all three rulings, and the invocation of the achievements of “Thai” kings as seen in Constitutional Court Ruling No. 19/2564 (2021), reveal how the Court believes that the Thai monarchy and its kings, past and present, have done a lot of “good” acts which serve as a justification for the spiritual nature that the Court employs to describe the link between the Thai people, nation and monarchy. Therefore, we may determine that arguments resting upon the spiritual nature of the link between the Thai people and the monarchy and the intertwining of Thai nationhood with Thai royalty are omnipresent in all the aforementioned rulings. Additionally, although *baramee* or karma are not explicitly mentioned by the Court, we may say that the Court has alluded to such Buddhist conceptions through references to Buddhist notions of kingship.

The all-powerful kings leading the “Thai” people into successful wars of expansion allude to notions of a *devaraja* or god-king, whilst the close bond between “subject” and king alludes to notions of a “fair” and “just” king that is loved by all, which is the concept of *dhammaraja* or the just king.²⁹ These two conceptions of

²⁵ *ibid.*

²⁶ Tanapong, “Thai Nation” (n 22) 30–31.

²⁷ Constitutional Court Rulings No. 28–29/2555 (2012), No. 19/2564 (2021) and No. 3/2567 (2024).

²⁸ The influence of “Royal Nationalism” on Thai Constitutional Court jurisprudence can be seen when the Court alludes to the great historical roles monarchs have played in Thai history, particularly in preserving and expanding a national community of “Thais.” The “preserving and expanding” aspect demonstrates all the features of an interpretation of history rooted in “Royal Nationalism.” Whether it be the belief that people within the now-defined territory of Thailand have continuously and consistently attached themselves, all throughout history, to a “Thai” polity, a belief in the unbroken independence of such a polity, or the belief that all peoples within the geo-body of Thailand have consistently attached themselves to “Thai” kings and royalty.

²⁹ Timothy D. Hoare, “Spheres of Transaction in Thai Buddhism” (2011) 16(2) *Education About Asia* 1620 <[URL](#)>.

kingship mean that the king can accumulate an enormous amount of karma and thus, in a way, becomes a vessel of karma, whereby others can also receive good karma by being in the presence of the king's *baramee*. Although not explicitly mentioned, these concepts underpin the justifications that the Court uses to justify the spiritual link between the Thai nation, people, and king. Hence, we can say that elements of "Royal Nationalism" are present in the rulings of the Thai Constitutional Court, and thus the jurisprudence of the Court does not reflect a purely nationalistic interpretation of history, but more so reflects a certain type of interpretation of nationalism that was created by the Siamese ruling class in the late 19th century.

C. The Constitutional Court's Interpretation of History in a Comparative Perspective

1. Introduction.

In this final subsection, the author aims to engage in an analysis of the Constitutional Court's interpretation of history, comparatively in conjunction with an analysis of the contemporary viewpoints regarding the formation of the Thai Nation-State and national identity. The author will use this to argue that the Thai Constitutional Court has overlooked the variety of viewpoints regarding the formation of the Thai Nation-State and national identity, particularly those rooted in a more democratic approach. This primary argument will be supported by a sub-argument, which is that the Court views modern Thailand through the lens of an ancient, customary, and feudal state or *rat jareed*, along with failing to distinguish the concepts of a "state" and a "nation."

2. Viewing modern Thailand through the lens of a *Rat Jareed* & Failure to Distinguish between "Nation" and "State."

With regards to the first argument, the author would like to once again highlight Constitutional Court Rulings No. 28–29/2555 (2012), 19/2564 (2021), and 3/2567 (2024). In these rulings, the Court has completely overlooked the possibility that a "Spirit of a Thai National Community" has to be formed by a nation-building process. Instead, it is seemingly subscribing to the view that an ancient customary state existing before the 19th century was transplanted into the modern nation-state of Siam and continued on even after the nation became known as Thailand. This is perplexing, considering that contemporary research and alternative perspectives point to a transition into the modern era that was not so smooth. Hence, it would be hard to claim that modern Thailand is an ancient customary state that has persisted, unscathed and unchanged by its own interactions with colonial powers from the other side of the world.

Nowadays, it is generally accepted that "nation-states" as we understand them today did not exist for the entirety of human history. The idea of a "nation" as a defined and longstanding geopolitical entity did not exist until at least after the Enlightenment,

when “nationalism” began to arise in the West as one of the many ideologies that challenged feudalism and monarchy. In the context of Southeast Asia, such an idea never reached its shores until European colonialism facilitated the entry of “modern” concepts of nation-states with a longstanding population and defined territory. Once we understand this, it becomes clear that there can be no natural “transplant” of an ancient state into a “modern” nation-state. A nation-state, at least in our “modern” conception, can only be created by a process that binds the people, physically and mentally, to the national community and identity of that nation-state. This is what has often been referred to as a “Nation Building Process” or “National Assimilation Process.” By subscribing to the idea that a “Spirit of a Thai National Community” has always existed, the Court inevitably assumes that an ancient customary state of “Thais,” existing before the 19th century, was transplanted into the modern nation state of Siam and continues to exist into the present day. Essentially, Thailand in the modern day is no different from the feudal Ayutthaya Kingdom of the past.

The Court’s interpretation of history, which is rooted in “Royal Nationalism,” clearly overlooks the idea of a “Nation Building Process.” This view reflects the perspectives of a small minority of Thai historians, which have been convincingly challenged by works of various academics that came after. This is once again supported by Tanapong Luekajornchai’s arguments. Tanapong provides a comprehensive overview of the contemporary narratives and debates surrounding the question of when Thailand, as a national identity and polity, came into existence, in his article titled “*When did the Thai Nation (State) Become?: When the Blind seek a Thai Nation State.*”³⁰ In the article, Tanapong highlights that the contemporary narratives surrounding the formation of the Thai Nation State can be categorized into two schools of thought: those who view it as a process, and those who do not view it as a process. The latter is also further subdivided.³¹ Tanapong explains that those who advocate for the “non-process” view believe that the formation of a “State” and a “Nation” go hand in hand and occur simultaneously.³²

In the context of Thailand, supporters of the “non-process” narrative view that a “Siamese Customary State” (*ratjareed siam*) already existed for thousands of years and predated the modernization era (1885–1910) in the reign of King Chulalongkorn (Rama V), and thus argue that such customary state was merely adapted by Chulalongkorn into the “Siamese Nation State” (*ratchart siam*). Such a view excludes the necessity of any “nation-building” process, and thus the question of whether public participation is required does not arise within this school of thought. In this view, the exact year of the formation of a Thai nation state is 1892, in line with the creation of a new system of administration called “*thesapiban*,” in which lands under the control of

³⁰ Tanapong, “Thai Nation” (n 22) 7.

³¹ The view that the Thai Nation State was formed by a process is subdivided into another two strands of thought; firstly, the view that such process does not require the participation of the people, and secondly, the view that the participation of the people is required for a country to truly constitute a “Nation State.”

³² Tanapong, “Thai Nation” (n 22) 9.

the Siamese State were divided into cantons, towns, and districts, created by Prince Damrong Rajanubhab.³³ Such a system was later fully institutionalized by the promulgation of the “Executive Service Regulation of the Kingdom of Siam Act” in 1933. Although the Court makes no explicit mention of the aforementioned events, the exclusion of considering any “nation-building process” is clearly seen in the jurisprudence of the Court. In the wider sense, the Court’s jurisprudence aligns with the views of supporters of the “non-process” narrative of Thai history.

The Court’s persistence in continuing to view modern Thailand through the lens of an ancient customary and feudal state may explain why the Court failed to separate the concepts of “state” and “nation” from one another. The denial of a nation-building process means there is no “nation” or “national spirit” to be artificially created and placed within a “state.” The failure to separate the two concepts may seem minuscule at first glance, yet it has consequences for the development of Thai democracy. It is an inherently undemocratic approach, which does not factor in the role of the people, ordinary citizens, in determining what a “Thai” state and “Thai” national identity should look like.

III. THE COURT’S FAILURE TO CONSIDER THE LEGAL HISTORY OF THE LÈSE- MAJESTÉ OFFENSE AND EXCLUSION OF THE PEOPLE

As previously established, the Thai Constitutional Court has constantly reaffirmed that the “Spirit of the Thai National Community” has always existed and has always justified the existence of lèse-majesté in Thai law and society. This section aims to show that this view overlooks the developments in the recent legal history of Article 112. This will be demonstrated through the author’s two main arguments. Firstly, the Court’s belief that the lèse-majesté offense has not changed since the feudal era is in contrast to the actual history of Article 112. Secondly, the Court’s view is challenged by an observable historical relation between sovereignty and lèse-majesté; how the shift in the concept of sovereignty has influenced the use of the lèse-majesté offense throughout Thai history.

Academia on the legal history of Article 112 usually divides such history into distinct eras, starting from its pre-modern origins in the feudal era³⁴ and continuing

³³ *ibid* 10.

³⁴ Mérieau identifies the Hindu Manu Code, particularly its wording regarding kings as living embodiments of gods, which a commoner may not stare directly at or else they will be blinded, as a particularly influential aspect of Hindu and Brahmic thought on the development of lèse-majesté in Thailand. Mérieau also highlights how the punishment of statements offensive to royalty was already established by the Ayutthaya Period, particularly through what is known as the “Palace Law” (*kot montianban*) and was carried on in the early Rattanakosin period (1782–1868) through the translation of the “Palace Law” into the “Three Seals Code” (*kotmai tra samdueang*) by King Rama I. For a more detailed enquiry, see Eugénie Mérieau, “A History of the Thai Lèse-Majesté Law” in Andrew Harding

with developments during Chulalongkorn's modernization,³⁵ developments in the era of the "People's Party" (*khana ratsadon*), developments during the dictatorship of Field Marshal Sarit Thanarat and the revival of royalism,³⁶ before ending at developments in 1976 after the 6th October Massacre at Thammasat University.³⁷ The wording of the law has been untouched since then. However, the first argument will be explained through an analysis of the law's development in two periods: "Modernization" (1885–1910) and "Post-Revolution" (1932–1945). The second

and Munin Pongsapan (eds), *Thai Legal History: From Traditional to Modern Law* (Cambridge University Press 2021) 78–80 <URL>.

³⁵ A traditional narrative still held by certain academics today is that Chulalongkorn and the Siamese ruling class had already managed to "modernise" the law by removing corporal punishment. On the other hand, challengers like Mérieau counter this by explaining that such a change is more akin to a "Europeanization" of Siamese law, rather than a "modernization." Other academics have also pointed out the lingering remnants of feudal era practice in the wording and use of *lèse-majesté* in the reigns of King Rama V, Rama VI, and Rama VII. For a more detailed enquiry, see Mérieau, "Thai Lèse-Majesté Law" (n 34) 79–81, รัตนา เมฆนันท์ไพศิฐ, "การเมืองกับกฎหมายการพิมพ์ (พ.ศ.2453–2487)" (มหาวิทยาลัยธรรมศาสตร์ 2531) [Rattana Mekanthaphaisit, "Thai Politics and Law of Print Media (1910–1944)" (Thammasat University 1988)] (Thai) 58–60. For more information regarding the Peng Bunnag case, see "หอจดหมายเหตุแห่งชาติ. มร 6 บ/39. เอกสารกรมราชเลขาธิการ รัชกาลที่ 6 เบ็ดเตล็ด. เรื่องหนังสือพิมพ์ 'สามสมัย' ลงข่าวเรือพระที่นั่งเกยตลิ่งที่ช่องแสมสารใช้ถ้อยคำสำนวนหยาบช้า (2–12 พฤษภาคม พ.ศ.2454)" ["National Archive of Thailand Document No. Mor Ror 6 Bor/39. Miscellaneous Documents of the Department of Royal Secretariat of King Rama VI Regarding the 'Three Eras' Newspaper Reporting on the Royal Barge Running Aground at Samae San and Using Offensive Language (2–12 May B.E. 2454)"] (Thai), which originally appeared on "เอกสารประวัติศาสตร์: หนังสือ อพิมพ์สามสมัย หมิ่นพระบรมเดชานุภาพ รัชกาลที่ 6" ["Historical Document: 'Three Eras' Newspaper Defaming Rama VI"] (Thai) that was posted on the *Enlightened Jurists* (นิติราษฎร์) website <URL>. Pisit Petnoi, Kittipong Buayam, and Chaowalit Sompongjaroen, "The Development of the Law on the Lèse-Majesté of the King From the Phra Aiyakan Aya Luang to the Penal Code" (2020) 12 *Journal of Ayutthaya Studies* 56–64.

³⁶ Amendments to the *lèse-majesté* offense were made in 1957, the terms "insult" and "threaten" were introduced, and the offense was categorized as an offense against national security. What followed was the tenure of Field Marshal Sarit Thanarat, which is regarded as a crucial point whereby the Thai monarchy was able to regain its political and social prominence, particularly through the revival of royal rituals and proceedings which were muted in the "People Party" era, and the sponsoring of royal visits both in Thailand and outside by the Thai state. For more information, see Mérieau, "Thai Lèse-Majesté Law" (n 34) 84, and "Monarchy and Constitution in Recent Thai History" in Bruce Lockhart, Michael Montesano, and Maurizio Peleggi, *Thailand in Crisis: The Twilight of a Reign or the Birth of a New Order?* (Asia Research Institute 2009) 13.

³⁷ Amendments to the law in 1957 and by Admiral Sang-ad Chaloryu's regime in 1976 are often explained by traditionalists in a similar manner to previous developments, which occurred in the modernization era. For a more detailed enquiry, see Pisit, Kittipong, and Chaowalit, "Lèse-Majesté of the King" (n 35) 60. Furthermore, as the US came to regard Thailand and particularly its monarchy as a vital tool in combating the spread of communism in Southeast Asia, the *lèse-majesté* offense became intertwined with the concepts of national security and combating the spread of communism. For more details, see "Ideologies, 1940s to 1970s" in Chris Baker and Pasuk Phongpaichit, *A History of Thailand* (Cambridge University Press 2022) 187 <URL>. Thus, the Thai state actively pursued *lèse-majesté* charges against suspected communists whilst also labelling persons who were deemed to have insulted the monarchy as communists. This led to the infusion of *lèse-majesté* with the concept of national security and had arguably set up the perfect political and legal conditions for the 1976 amendments, whereby the military junta of Sang-ad Chaloryu increased the maximum sentence from seven years to 15 years and set a minimum sentence of three years' imprisonment.

argument will focus on the “Post Revolution” period, which the author will argue is the closest point Thailand has gotten to abolishing the law. Therefore, for this essay, only the developments in the two aforementioned periods will be explored.

With regards to the first argument, although the Court supports its justification through an interpretation of Thai history, in neither of the rulings mentioned throughout this paper did the Court explicitly mention or analyse the legal history of Article 112. The Court had essentially overlooked the history of the criminalization or punishment of speech against royalty throughout Thai history.³⁸ This fails to reflect the actual historical development of the law, because the Court is essentially overlooking the historical development of the law from the feudal “lèse-Majesté” or “*mihn prabaromadechanupab*” (หมิ่นพระบรมเดชานุภาพ) to the modern Article 112. This puts the Court in a position where it is unable to separate the two from each other. Although the two terms have been used interchangeably throughout the essay for the sake of efficiency, legally and historically speaking, they are not the same thing. This is because regardless of how we view the development of Article 112 in the age of a “modernized” legal system, it is clear that lèse-majesté in the feudal era did not operate under the same conception as under a more (but not completely) modernized legal system under Chulalongkorn and certainly not completely the same as the modern version of the lèse-majesté offense, which has gone through many developments since then.

The historical and legal distinction between lèse-majesté and Article 112 can be seen through Chulalongkorn’s modernization, the overthrow of absolute monarchy in 1932, and an alternative interpretation of the monarch’s “position of revered worship.” This is supported by the works of Eugénie Mérieau and Worachet Pakeerut. Mérieau identifies the Hindu Manu Code as a particularly influential aspect of Hindu and Brahmic thought on lèse-majesté in the feudal era.³⁹ Particularly influential was its wording, which provided for kings as living embodiments of gods, in which a commoner may not stare directly at them, or else they will be blinded.⁴⁰ Mérieau also points out how such Hindu and Brahmic concepts were replaced when the law was

³⁸ It should be noted that the body of academic work covering the legal history of “lèse-majesté” in Thailand is not as expansive as academia covering the history of Thailand. By the turn of the 21st century, only a limited number of studies or articles on Article 112 existed, whereas academia on Thai history was already well established since the 1950s, originally through the work of anthropologists and historians keen to specialize in Southeast Asia. However, as the 2006 military coup unfolded and Thailand entered a period of extreme political instability, the number of Article 112 cases began to rise, and so did societal and academic interest in the controversial law. Interest in the legal history of Article 112 also began to take shape, leading to a number of works on the topic being published, most notably by David Streckfuss, Somchai Preechasilpakul, and Eugénie Mérieau. For more details, see Duncan McCargo, *Fighting for Virtue: Justice and Politics in Thailand* (Cornell University Press 2020) 10–20 <URL>; Mérieau, “Thai Lèse-Majesté Law” (n 34) 77; David Streckfuss and Somchai Preechasilpakul, “Ramification and Re-Sacralization of the Lese Majesty Law in Thailand” [2008] 10th International Conference on Thai Studies, The Thai Khadi Research Institute, Thammasat University 2; David Streckfuss, *Truth on Trial in Thailand: Defamation, Treason, and Lèse-Majesté* (Routledge 2011) <URL>.

³⁹ Mérieau, “Thai Lèse-Majesté Law” (n 34) 78–79.

⁴⁰ *ibid.*

“Europeanized” during the reign of Chulalongkorn.⁴¹ Furthermore, Worachet points out how, paradoxically, the penalties for “lèse-Majesté” in the era of Absolute Monarchy were less severe than the contemporary Article 112.⁴²

The historical and legal basis for a distinction between the two is most clearly explained by Worachet. He has argued that Article 112 should not be interpreted in a way that is in line with pre-1932 political thought.⁴³ Essentially, Article 112 should not be conceptualized under an absolute monarchy or feudal framework. Worachet bases this argument on the belief that the modern Thai monarchy post 1932 is a “constitutional organ,” meaning an institution created by the constitution, and therefore, even the king can technically violate the constitution.⁴⁴ This belief rests upon Worachet’s interpretation of Article 8 of the Thai Constitution B.E. 2550 (2007) (now Article 6 of the 2017 Thai Constitution), particularly the king’s “position of revered worship” (*pen tee kaorop sakkara*). Worachet argues that under an absolute monarchy, punishing any criticism of the monarch or royalty is justifiable because the king is literally in a “position of revered worship.” However, since Thailand changed to a democratic constitutional monarchy in 1932, the interpretation of Article 8 must be in line with this new democratic regime, and courts can no longer interpret the monarch’s “position of revered worship” in the same manner as before 1932. Therefore, Worachet explains that the king’s “position of revered worship” and inability to be “subject to any accusation or charge” under Article 8, means that the king must not do anything which would subject himself to accusations such as expressing political opinions, and only by remaining non-political does the monarch stay in a position of “revered worship” and will not be subject to accusation or charge.⁴⁵ This interpretation of Article 8, whereby it acts more as a limitation on the monarch rather than a justification for Article 112, is most likely influenced by the work of Thai legal scholar, Yud Saeng-Uthai.⁴⁶

Concerning the second argument, the shift in the concept of sovereignty in Thai history, and its influence on the use and wording of Article 112 in Thailand, can be most seen in the period between 1932 and 1945. This is because the early years of Thai democracy, from 1932 to 1945, may be considered the closest point Thailand has gotten to abolishing its lèse-majesté law. Mérieau has highlighted how, although the revolutionaries were reluctant to change or remove the provision from the criminal code, the law was not widely used during the “People’s Party” era and was essentially

⁴¹ *ibid* 79–81.

⁴² “หลากหลายมิติกฎหมายหมิ่นพระบรมเดชานุภาพ” (มหาวิทยาลัยธรรมศาสตร์ คณะนิติศาสตร์ โครงการประกาศนียบัตรบัณฑิตทางกฎหมายมหาชน; 2553) [“The Many Perspectives of the Lèse-Majesté Law” (Thammasat University, Faculty of Law, Graduate Diploma in Public Law, 2010)] (Thai) 74–75.

⁴³ *ibid* 76–77.

⁴⁴ *ibid* 81.

⁴⁵ *ibid*.

⁴⁶ Saeng-Uthai argued for an interpretation of the “position of revered worship” on similar lines as Worachet. This can be seen in หยด แสงอุทัย, คำอธิบายรัฐธรรมนูญแห่งราชอาณาจักรไทย พุทธศักราช 2511 และธรรมนูญการปกครองราชอาณาจักร พุทธศักราช 2515 ว่าด้วยพระมหากษัตริย์ (วิญญูชน 2551) [Yut Saeng-Uthai, *Explanation of the Constitution of the Kingdom of Thailand B.E. 2511 (1968) and the Constitution of the Kingdom of Thailand B.E. 2515 (1972) Regarding the King* (Winyuchon 2008)] (Thai).

suspended in purgatory.⁴⁷ Mérieau also points to how the revolutionaries tried to mitigate the uncertain nature of lèse-majesté proceedings caused by the law's broad wording, by limiting such a wide scope through the use of "good faith towards the constitution" as a justification that could excuse a person of liability.⁴⁸ Essentially, after the revolution in 1932, sovereignty had shifted from being held and exercised by the king with absolute power to being held by the people and exercised through the three branches of government under a constitution. Under such circumstances, justifying that defamation of the king constituted defamation of the nation became considerably harder, driving the People's Party's aforementioned efforts in mitigating the law's wide-reaching scope through constitutional exceptions. This is also supported by the works of David Streckfuss and Somchai Preechasilpakul.⁴⁹ Sarit Thanarat's rise to power through a military coup in 1957 is often touted as the beginning of the end for a more lenient employment of lèse-majesté offenses as seen in the "People Party" years.

In summary, this section aimed to show that the Court's historical reasoning behind its justification for Article 112 overlooks recent developments in the legal history of Article 112. This was demonstrated by showing that the Court does not believe that the modern Article 112 has changed from the feudal "lèse-Majesté," despite there being a historical and legal basis for separating the two, as seen by an analysis of the "modernization" period (1885–1910) and the "post revolution" period (1932–1945). Furthermore, it was demonstrated by showing that shifts in the concept of sovereignty have also influenced the wording and use of Article 112 throughout Thai history, and this can be most seen in the law's developments between 1932 and 1945.

IV. CONCLUSION

Throughout this essay, we have tried to find the answer to the main research question, which is whether it is valid for the Thai Constitutional Court to claim that Article 112 of the Thai Criminal Code is part of the "Rule of Law" and the "Spirit of the Thai National Community" (*jit winyan prachachat thai*).

To answer the question, a number of things were established. Firstly, we established that the "Spirit of the Thai National Community" has been used as the justification for the compatibility of Article 112 of the Thai Criminal Code with the Rule of Law in Thailand by the Thai Constitutional Court. The complete infusion of a law that criminalizes defaming, insulting, or threatening the monarch and certain members of the royal family and punishes such actions with severely disproportionate

⁴⁷ Mérieau, "Thai Lèse-Majesté Law" (n 34) 82–83.

⁴⁸ *ibid* 82.

⁴⁹ Streckfuss and Somchai, "Ramification and Re-Sacralization" (n 38) 5, and David Streckfuss, "The Intricacies of Lese-Majesty: A Comparative Study of Imperial Germany and Modern Thailand" in Søren Ivarsson and Lotte Isager (eds), *Saying the Unsayable: Monarchy and Democracy in Thailand* (NIAS Press 2010) 130 <[URL](#)>.

jail time, with “Thai-style” Rule of Law, has set a precedent for the Constitutional Court, post-2012, to employ the aforementioned justification more liberally and with more far-reaching political implications. Implications particularly on the ability of Thai society to address apparent issues in the law’s broad wording, its usage as a political weapon, and the fear caused by its existence. Secondly, we established that the Court has employed a narrow interpretation of history that is based on what Thongchai Winichakul defines as “Royal Nationalism” and how it overlooks contemporary narratives and discourses on Thai history. The Court failed to distinguish between the concepts of a “State” and a “Nation,” leading it to overlook the view that national identities are not naturally appearing and formed through a process. We also established how this view is inherently undemocratic as it overlooks the participation of the people in such a process. Essentially, the Court views modern Thailand and its citizens through the lens of an ancient, customary, and feudal state. Thirdly, we established how it overlooks the legal history of the *lèse-majesté* offense in Thailand. Particularly, we established how the Court does not believe that the offense has changed since the feudal era, and how this contrast to the real history of Article 112. This was shown through differentiating the feudal “*lèse-Majesté*” and the modern Article 112, and the historical and legal basis for such differentiation. Additionally, we also established that the Court’s view is challenged by an observable trend throughout Thai political and legal history, which indicates that shifts in the concept of sovereignty influenced the wording and use of the *lèse-majesté* offense in Thailand. This was done by highlighting the period between 1932 and 1945, which is the closest point Thailand has ever gotten to abolishing the law.

The three main points established in this paper point to a grand contradiction in the Court’s jurisprudence. Contrary to what the Court claims throughout the rulings, there is more historical evidence to suggest that the existence, maintenance, and amendment of the *lèse-majesté* offense in Thai history have not been driven by the people or any popular consensus. Efforts in maintaining or amending the *lèse-majesté* law have always been led by the ruling class, first through monarchs with absolute power, and later through democratically illegitimate military governments. Arguably, the changes in practice and wording of the law during the “People’s Party” period were also not “people-led” as the “People’s Party” consisted of civil servants and military personnel. The Thai people have never been given the chance to exercise their right to determine what the *lèse-majesté* law should look like and how it should operate, and whether it should even exist at all. Therefore, the author believes there is reasonable weight to conclude that the Thai Constitutional Court cannot claim that limitations on criticism of the monarchy and Article 112 are part of the “Spirit of the Thai National Community” because the Court failed to consider alternative viewpoints on Thai history besides “Royal Nationalism.” Additionally, the Court neglected the legal history of the *lèse-majesté* offense and how it demonstrates that the offense was a creation induced by the Thai ruling class without any popular consensus.

Now that the main research question has been answered, the question shifts to that of the future. How will the Court’s jurisprudence affect the dynamic of future

Article 112 cases? Will the “Spirit of the Thai National Community” justification and the narrow historical interpretation that comes with it be further solidified as judicial precedent? Unfortunately, the author must admit that prospects in the near future are still grim. The continued use of the “Spirit of the Thai National Community” by the Court suggests that it is not going away anytime soon. The Court continues to invoke restrictions on possible amendments to the law as set out in 2012, most recently in its decision concerning the Move Forward Party’s proposed amendments.⁵⁰ Therefore the precedent seems here to stay. This means contemporary trends observed in Article 112 cases, such as the fluctuation in the number of cases dependent on the political atmosphere of the time, are most likely to continue.

Courts may also become less receptive towards viewpoints on the monarchy which challenge the “Royal Nationalism” narrative. This is because, as Worachet Pakeerut has explained,⁵¹ the interpretation of Article 112 is ultimately tainted by ideology and cultural norms. The Court’s invoking of a historical interpretation rooted in “Royal Nationalism” could be seen as a legal recognition of “Royal Nationalism” as being the “correct” interpretation of Thai history. This can lead judges to believe that it is the “proper” narrative of history that should be reflected in their interpretation of Article 112. Dangerously, this could further blur the line between genuine criticism of the monarchy and “defaming, criticizing or insulting,” which would exponentially broaden the scope of an already overly wide-reaching law.

Furthermore, the Court seems to be developing a “deterrent power” in a similar fashion as observed in France with the Constitutional Council (*Conseil Constitutionnel*). The term was coined by Alec Stone Sweet in 1992 to describe how the Constitutional Council could exert indirect influence on public policy in France whilst essentially doing nothing.⁵² Sweet argued that this could be seen by how various French governments attempted to predict the Council’s view towards certain areas of public policy and would make tweaks to its public policy dependent on such predictions. This is what Sweet defined as “deterrent power,” which he argued would ultimately lead to a “judicialized policy-making process.”⁵³ This type of indirect influence can also be observed with the Thai Constitutional Court. Many academics have already commented on the Court’s increasingly political role, with some arguing that Thailand is heading towards a “juristocracy.”⁵⁴ Furthermore, the indirect influence of the Court on policies regarding Article 112 is most visible. Ever since the Court ruled that proposals to abolish or amend Article 112 amounted to overthrowing the monarchy, no other political party or movement has come forward to take the mantle of bringing changes regarding Article 112. The idea of a political party

⁵⁰ Haberkorn, “Drafting a Law” (n 13) 95.

⁵¹ Thammasat University, “Many Perspectives” (n 42) 78.

⁵² ภูริ พวงศ์เจริญ, “ฤาหาใช่เพียงร่างทรง: แนวทางเชิงวิพากษ์ในการศึกษาสถาบันตุลาการ” (วารสารสังคมศาสตร์ปีที่ 45 ฉบับที่ 2 บทความที่ 3, 2015) [Phuri Foowongcharoen, “Not Merely Oracles, Perhaps: Critical Approaches to the Study of the Judiciary” (Journal of Social Sciences: 45(2) Article 3, 2015)] (Thai) 39.

⁵³ Alec Stone, *The Birth of Judicial Politics in France* (Oxford University Press 1992) 119 <[URL](#)>.

⁵⁴ สมชาย ปรีชาศิลปกุล, “ตุลาการธิปไตยในอุ้งมือชนชั้นนำ” [Somchai Preechasilpakul, “Juristocracy in the Hands of the Ruling Class” *101 World* (2024)] (Thai) <[URL](#)>.

proposing amendments to Article 112 as a part of its agenda for the next general election in Thailand seems increasingly unlikely.

Nonetheless, there is still light at the end of the tunnel. The author believes that, despite the grim prospects for the near future, there is still hope for change. This is because the precedent of the “Spirit of the Thai National Community” and a narrow interpretation of Thai history can still be overturned. The author is not arguing that it will happen soon. Instead, the author believes that such an endeavor will bear fruit with time. The road towards overturning such a precedent may be hard, but not impossible.

It will be hard, as there is still a high degree of receptivity for “Royal Nationalism” in judicial circles. This is because, to put it simply, Thai courts are royalist.⁵⁵ Furthermore, the author believes that it will be difficult due to the existence of the concept of a “Democratic Regime with a King as Head of State” (DRKH). This is because DRKH facilitates the aforementioned judicial receptance of royal nationalism. DRKH is essentially the belief that under the “Thai-style” democratic constitutional order, there is an extra layer of power that permeates the constitution and can be called upon to solve crises. This extra layer of power is the moral authority of the monarchy. It developed initially from King Bhumibol’s intervention in the 1973 popular uprising, and was ideologically concretized by another famous intervention in the 1992 “Black May” uprising. However, it has now also become part of Thai constitutional law. This was highlighted by Henning Glaser, who argued that “DRKH had represented the paramount principle of Thai constitutionalism since at least the 1976 Charter.”⁵⁶ Glaser also traced the concept’s ideological origins in the aforementioned royal interventions in 1973 and 1992.⁵⁷ However, Glaser brings more clarity to the infusion of DRKH into constitutional law by pointing to how the concept was first introduced into law by the 1997 Thai Constitution, as a result of efforts by certain royalist but liberal minded drafters, particularly Borwornsak Uwanno.⁵⁸ The introduction of

⁵⁵ Duncan McCargo highlights how Thai judges essentially believe that they are dispensing justice for the King in his book *Fighting for Virtue: Justice and Politics in Thailand* (Cornell University Press 2020) 66–91 <[URL](#)>. McCargo highlights how oath-swearing, the royal pardon, and judicial culture contributes to creating a royalist mindset within the judiciary. The Thai Constitutional Court has also not shied away from displays of royalism, such as when it declined to rule on the constitutionality of the cabinet delivering its oath of office before the King without the constitutionally required commitment to upholding the constitution. The Court declined the case on the basis that “declaring the oath to the King was not under its authority to review.” For more details, see Henning Glaser, “Permutations of the Basic Structure: *Thai Constitutionalism and the Democratic Regime with the King as Head*” in Harding and Munin, “Thai Legal History” (n 34) 251.

⁵⁶ Glaser, “Permutations” (n 55) 246.

⁵⁷ *ibid* 233–40.

⁵⁸ Glaser, “Permutations” (n 55) 240–49. For more information on Uwanno’s theory of “Shared Sovereignty” between the Thai people and King, see “อำนาจก่อตั้งระบอบและองค์กรทางการเมือง” ใน บรรทัด อารณโณ, คำอธิบายวิชากฎหมายรัฐธรรมนูญ พิมพ์ครั้งที่ 4 สำนักอบรมศึกษากฎหมายแห่งเนติบัณฑิตยสภา 2563) [“Constituent Power and Political Organs” in Bowornsak Uwanno, *Explanation on Constitutional Law* (2020, 4th Edition, Institute of Legal Education of the Thai Bar)] (Thai) 145–61.

Section 7⁵⁹ (now Section 5(2) of the Thai Constitution B.E. 2560 (2017)) is particularly relevant. The provision gave constitutional legitimacy to political interventions by the Thai monarch, by essentially acknowledging the monarchy as a “higher” level of power over the constitution. As Glaser puts it, “Ultimately, the formerly loose coexistence of a written constitution of limited scope and impact and Thai-style democracy as a vague governance ideology became replaced with an explicit acknowledgment of a supreme layer of the constitutional order hovering high above the written constitution, which, however, links itself by means of sect. 7 to this super-constitution.”⁶⁰

Yet, in the future, things may change. There are still interpretations of law and history that can open up a way towards a more democratic future. By viewing a process with the people as necessary in forming a “national identity” or “national spirit,” courts can go beyond the anti-democratic tendencies of the “non-process” narrative. This will allow courts to take a more open-minded approach to history. They will no longer be restricted to assessing history from the perspective of the role of royal actors. Judges will be relieved from the burden of dealing with the cognitive limitations placed by Royal Nationalism’s narrow approach to history and will be truly free to intellectually engage with alternative viewpoints on Thai history and the legal history of Article 112. Judges and lawyers will have an instrumental role to play if we want to see a future where Thai courts interpret the relation between law and history more democratically. It is up to the judges to bring such an interpretation into the decisions of the courts, and it is up to the lawyers to push for such an interpretation in their arguments. Without these efforts, a more democratic approach, as aforementioned, would never be truly established as part of the legal culture in Thailand.

Lastly, the author would like to leave the reader with a few questions to ponder. The “judicialization of politics” in Thailand, especially in the context of the DRKH, has been a much-frequently talked about topic in academic circles. However, the author believes there is still more to discover. Many questions remain unanswered, such as what is the future of DRKH? Will the DRKH have another evolution, or will it die out? What legal and political implications will occur from such changes? Thai society must confront these questions.

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⁵⁹ Article 7 of the Thai Constitution B.E. 2540 (1997) concerns the situation whereby no constitutional provision is applicable. It stipulates that “Whenever no provision under this Constitution is applicable to any case, it shall be decided in accordance with the constitutional practice in the democratic regime of government with the King as Head of the State.” As seen in “Translation of Constitution of the Kingdom of Thailand B.E. 2540 (1997)” (The Office of the Council of State 1997) 3.

⁶⁰ Glaser, “Permutations” (n 55) 249.