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# Readings on Thai Justice: A Review Essay

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**Abstract:** *How far can judges hope to address Thailand's political problems? This article reviews six Thai-language books dealing with various aspects of the judiciary, exploring the historical and intellectual origins of the institution. Thirayudh Boonmee's 2006 call for a judicialisation of politics – his own elaboration of two important royal speeches – builds on judges' longstanding belief that they are acting "in the name of the King". But their narrow, formalistic training ill-equips them to exercise broad powers. The article contrasts judges' idealised self-understandings (as seen in a popular book on how to become a judge by Natthapakon Phitchayapanyatham, and in the 2010 Judicial Code of Ethics) with revisionist perspectives on the judiciary developed by critical scholars Nidhi Eoseewong, Piyabutr Saengkanokkul, and Somchai Preechasilapakul. Whereas judges may imagine themselves to be acting directly on behalf of the monarchy, revisionist scholars insist that since 1932 judges have formed part of a modern democratic order, in which they need to be more transparent and accountable. A close reading of these books reveals that there is no shared agreement in Thai society about the nature or basis of judicial authority.*

**Keywords:** *Thailand, judicialisation, judges, politics*

Courts of Justice (2010) *Pramuanjirayatham kharatchakantulakan* [Judicial Code of Ethics] (Bangkok: Office of Courts of Justice).

Natthapakon Phitchayapanyatham (2011) *Banthuek lap: Chabap khon yak nang banlang san* [Secret report: For those who want to sit on the court bench] (Athaya Millennium).

Nidhi Eoseewong (2012) *Phiphaksan* [Judging the judges] (Bangkok: Matichon).

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Piyabutr Saengkanokkul (2009) *Nai phraporamaphithai prachathippatai lae tulakan* [In the name of the King, democracy and the judiciary] (Bangkok: Openbooks).

Somchai Preechasilapakul (2003) *Khwamyokyon nai prawatisat khong bidahaeng kotmaithai* [Complications in the history of the father of Thai law] (Bangkok: Winyuchon).

Thirayudh Boonmi (2006b) *Thulakanpiwat* [Judicial review] (Bangkok: Winyuchon).

On 7 May 2014, Thai Prime Minister Yingluck Shinawatra was removed from office – along with nine members of her Cabinet – by a unanimous decision of the Constitutional Court (Fuller, 2014). She had allegedly abused her power by improperly transferring a senior bureaucrat. The court's decision followed months of street protests against Yingluck's government (Montesano, 2014). It was the third time a prime minister from a pro-Thaksin party had been judicially ousted, yet the move failed to prevent a military *coup d'état* two weeks later. Not for the first time, action by Thailand's top judges did not stop the country's top generals from calling an abrupt halt to representative politics. What lay behind this trend for judges to make incompletely successful interventions in politics?

Conservative analysts have argued that the judicialisation of Thai politics is a development to be welcomed. For more critical commentators, asking Thai judges to perform a progressive social and political role appears unrealistic, given the conservative history of the judicial institution, its proximity to royal power, its consistent accommodations with the military, and above all the narrow and uncritical legal training of most judges. The Administrative and Constitutional Courts, founded after 1997, are less clearly bounded by these conservative histories and traditions, but a series of judicial decisions hostile to pro-Thaksin forces post-2006 has raised significant questions about the image and standing of all three courts. This article reviews some relevant Thai-language writings by a conservative sociologist, two critical legal scholars, a leading historian and a serving judge – and also peruses the judiciary's own published Code of Conduct. These sources have been selected because they offer important insights largely inaccessible to a non-Thai readership; they are by no means exhaustive.

### Conservative Views

One of the most influential texts on the Thai judiciary to appear in recent years is by prominent public intellectual Thirayudh Boonmee, who earned his spurs as a firebrand radical student leader in the 1970s, then became a Thammasat University sociology professor and grew markedly more conservative over time. In mid-2006 he published first an article and then a slim book on the subject of judicialisation (Thirayudh, 2006a; 2006b, pp. 16–19; see also Kanokrat, 2012, p. 238), offering his own gloss on two important royal speeches of 25 April 2006. In the better known of the two speeches, the King had called upon Supreme Court judges to help solve Thailand's acute political crisis, following the rise of street protests against then prime minister Thaksin Shinawatra (Yingluck's older brother), and the problematic election earlier that month, which had been boycotted by the Democrat Party. Thaksin was a deeply polarising figure, a police officer turned telecommunications magnate who had bought his way into politics and then captured the hearts of many Thai voters (McCargo and Ukrist, 2005). A snap

election called by Thaksin in early 2006 was boycotted by the opposition, which successfully turned it into a farce. The King declared:

Therefore, the Supreme Court must act by thinking it over together with other courts on how to resolve the crisis, and must do so very quickly otherwise the nation will collapse and cannot be salvaged... Now, the people are looking up to the courts, particularly the Supreme Court... The people across the country and the people all over the world will praise that the Thai Supreme Court is still competent, knowledgeable, and is determined to rescue the nation when the time comes.<sup>1</sup>

In another speech on the same day to judges of the Administrative Court, the King called upon them to look into the election issue. Before long, the courts responded by nullifying the 2006 general election. Writing soon afterwards in the context of the 2006 anti-Thaksin movement, Thirayudh argued that the judiciary now had an important responsibility to resolve problems that had arisen from the flawed political reform process leading to the promulgation of the 1997 Constitution (see McCargo, 2002). Thirayudh coined the term *tulakanpiwat*, which has been variously translated as judicial review, judicialisation, judicial activism and judiocracy.<sup>2</sup>

In his pamphlet, Thirayudh argued that Thailand faced a choice between two different directions: majoritarianism and constitutional democracy. The principle that electoral majority was the primary basis of government legitimacy was a recurrent theme of Thaksin supporters. Majoritarianism, however, had produced politicians whose governments were not focused on passing legislation, but on promoting their own party's successes, in order to secure re-election. Thirayudh suggested that such a system could eventually lead to authoritarian rule, as in Nazi Germany (Thirayudh, 2006b, pp. 13–14). The only alternative was to support the development of a constitutional democracy in which checks and balances could operate: the “Thaksin system” [*rabop Thaksin*] had prevented such mechanisms from working effectively.

According to Thirayudh, the 1997 Constitution had already led Thailand down the path of constitutional democracy, as seen in the establishment of a constitutional court. But what were people to make of the recent royal speeches, in which the King asked the Supreme Court, Constitutional Court and Administrative Court to work together? He argues that in times of national crisis, this suggestion that they take collective action was legitimate; moreover, increased judicial involvement in politics was not simply a short-term fix, but something that would be broadly welcomed by the population, giving them the feeling that proper monitoring mechanisms were in place (Thirayudh, 2006b, pp. 18–19). Indeed, giving a greater political role to the judiciary was actually part of a global trend (2006b, p. 28).

According to his analysis, capitalism and corruption had entered all of the country's higher institutions – Parliament, the Senate, and the various independent agencies. Apart from a brief period after World War II, the Thai judiciary had enjoyed little independent authority to check the power of the executive or Parliament until the 1997 Constitution. That Constitution empowered the judiciary and created the possibility of an alliance between the three main courts to check and balance the executive and legislative branches (Thirayudh, 2006b, pp. 29–32). There were two main ways the courts might do this. The first was by making decisions on particular cases – such as

annulling a problematic election – as short-term solutions. The trouble with such actions was that they could not prevent the recurrence of similar crises in the future. The second way was by building up a robust set of institutional mechanisms that would allow the courts to perform a continuing set of functions (Thirayudh, 2006b, pp. 31–32). Thirayudh (2006b, p. 32) went on to evoke an apocalyptic vision of Thailand descending into terrible rounds of further conflict if the judiciary was not willing to take such action. He called upon the courts to open more space for people and the society to bring court cases challenging political power (Thirayudh, 2006b, p. 37); this he argued would allow for greater justice and the avoidance of future crises.

Thirayudh was certainly right to warn that Thailand could face more serious political crises in the future. The month after his pamphlet was published, the military lost patience with judicial interventions, and staged a military coup to oust Thaksin Shinawatra from the premiership. In the years that followed, the courts dissolved Thai Rak Thai and its successor party Phalang Prachachon, banned Thaksin and 148 others from electoral office for five years, removed three pro-Thaksin prime ministers from office, confirmed the seizure of most of Thaksin's assets, and sentenced Thaksin himself to a 2-year jail sentence. Mass anti-Thaksin street protests were held in 2008 and then again in 2013–14, while large-scale pro-Thaksin redshirt demonstrations were held in 2009 and 2010. The 22 May 2014 *coup d'état* once again illustrated that judicial activism was not sufficient either to effect or to prevent regime change; indeed, as in 2006, it is arguable that court rulings helped to facilitate rather than avert military rule. While judges were inordinately proud of their proximity to the monarchy, their role as enablers of the military often loomed larger.

Thirayudh's arguments offered little analysis about the nature or the origins of the Thai judiciary. Despite coining an important new term, his 2006 pamphlet is scrappy and repetitive. Insights into the world of Thai judges are very hard to find, since judges rarely discuss their views with outsiders, and do not generally write memoirs; Thailand has little tradition of critical biography or reflexive autobiography. A partial exception is a 2011 pocket book by serving judge Natthapakon Phitchayapanyatham, who offers some insights into what it is like to be a judge, and how to become one. The book is written in a down-to-earth style, with an obvious eye to prospective readers from the tens of thousands of young hopefuls who take the annual examinations to enter the judiciary, of whom fewer than a hundred may be selected. Nevertheless, the book offers some naively revealing glimpses into the self-understandings of a Thai judge.

Natthapakon uses his own life story as a moral tale to illustrate how he was able to become a judge, despite the fact he had neither an outstanding academic record, nor any inside connections.<sup>3</sup> He instead attributes his success to ambition, determination, perseverance, passion and good planning. He quotes a senior judge, Wichit Leethamchayao, as saying: "Studying law is very easy: there is no need to calculate until you go crazy like other subjects" (Natthapakon, 2011, p. 15). Natthapakon (2011, pp. 41–42) claims that he was never very good at either maths or English, but he is adamant that the judges' examination is based purely on the ability of those who enter, and not on their inside connections (Natthapakon, 2011, p. 17).

He stresses that his readers – would-be judges – should be at pains to maintain a good moral record. Natthapakon (2011, p. 23) describes how he once had to remain very calm when a friend was in trouble with the police, since doing otherwise "might

discredit and influence his judicial examination in the future”, and also how he refused to try drugs in his youth for the same reason. He offers three reasons why judges need to be pure and clean:

- They exercise authority on behalf of the King to maintain justice for the society
- They are the last group of people whom people can turn to in a conflict situation
- Judges who lack virtue may abuse their position and so harm others, rather than create justice.

The first two reasons are extremely telling. First, Thai judges exercise authority on behalf of the King, not on behalf of the Constitution or the state. This sense of a royally-endorsed role for the judiciary is at the core of judges’ self-understanding; it helps account for judges’ willingness to convict even in apparently tendentious *lèse majesté* cases, and their reluctance to take into account questions of constitutional and human rights, where these are invoked by defence counsel. Thai judges see themselves as morally virtuous, partly by dint of their association with the crown. Natthapakon’s second point, the role of the judiciary as a last resort in the event of conflict, strongly reflects the royalist discourse of *tulakanpiwat*, as laid out by Thirayudh.

Natthapakon writes proudly of the high prestige of judges, who must always be referred to as “*than*” (roughly equivalent to “your honour”) – a status justified because judges perform their duties in the name of the King. He quotes in full the oath they give before a statue of the King:

I offer my oath that I shall be loyal to the King and shall perform my duty in the name of the King with honesty, removed from all biases, in order to create justice for the people and peace for the kingdom. I shall preserve and adhere to the democratic regime with the King as the head, the Constitution of the Thai Kingdom, and the law (Natthapakon, 2011, p. 31).

The oath has several different elements, and the people, the law and the Constitution are invoked – but only once each, whereas the King is mentioned three times and the kingdom twice. Loyalty to the King takes verbal precedence over all other considerations, and this element of the oath is clearly seen by Natthapakon – reflecting the understanding of most judges – as forming the basis for the high prestige of the judiciary.<sup>4</sup> But while Natthapakon is keen to insist that judges should refrain from dabbling in anything that could undermine public trust – including selling Amway and the like – he cites no less a figure than Prince Raphi to assert that judges are allowed to socialise and even to drink “where appropriate”, as long as such behaviour does not compromise their integrity.

Later in the book, Natthapakon (2011, pp. 51–58, p. 74) describes the ordeal of preparing for the judges’ examination, including the anxiety and emotional ordeals he experienced. He stresses the need to read at least 100 pages daily, and to concentrate on closely studying previous rulings of the Supreme Court. The emphasis on rote learning of these old rulings has been the focus of much criticism for encouraging a narrow approach to knowledge.

He goes on to discuss the training given to judges’ assistants, as those who have passed the entrance examination are known, before they become qualified to act as judges themselves. The training begins with a week-long Buddhist retreat, where the



judges-to-be wear white, wake up early, join morning prayers and then practise meditation. They then begin an intensive 4-month residential training course, during which they study legal issues, teamwork, proper behaviour and etiquette when in public, how to talk to others, how to dress, how to eat, meditation and – oddly enough – dancing. After the residential training they are assigned to various courts where they learn about the practicalities of conducting trials, under the tutelage of actual serving judges. They are then assessed by a committee to see whether they meet the required standard: “The standard consists of being a virtuous, ethical, honest, capable, responsible and appropriately behaved person” (Natthapakon, 2011, p. 105).

Natthapakon (2011, pp. 206–08) then discusses key points from the Judicial Code of Conduct, before concluding with a discussion of a case in which he was able to persuade an aunt and her niece to settle a bitter property dispute amicably – which he referred to as his “doing good for the King” case (Natthapakon, 2011, pp. 120–27). By ending with yet another reference to the monarchy, he underlines his desire to assert the connection between the judiciary and the King. In a final afterword, he declares (switching into English) that readers will now understand that their author was really “born to be judge” [sic] (Natthapakon, 2011, p. 133).

The Judicial Code of Conduct, cited and discussed by Natthapakon, is an important text for understanding the ethics, socialisation and outlook of Thai judges (Courts of Justice, 2010).<sup>5</sup> The latest and third edition of the Code was published in 2010 (the first edition appeared in 1986); the full text runs to 122 pages, but most key points are summarised in a 9-page version. Former president of the Supreme Court, prime minister and later privy councillor Thanin Kraivichien, a noted royal favourite, played a leading role in crafting the original Code. A short opening chapter on the ideology of judges contains standard English quotations from Lord Denning (“justice is what the right-minded members of the community believe to be fair”), John Rawls and Lord Campbell (Courts of Justice, 2010, pp. 2–4), reflecting Thanin’s legal training at LSE and his status as an English barrister. But these quotes sit alongside references to the writings of King Chulalongkorn and to the oath sworn by all Thai judges referred to by Natthapakon (as specified in Article 201 of the 2007 Constitution).

Section 2 of the Code contains detailed guidelines for the performance of judicial duties. The Code is replete with Buddhist language and references: judicial virtue is equated with following the dharma by avoiding bias (3.2), for example, and the Supreme Patriarch’s definition of “composure” is cited approvingly (3.3), while section 35.3 contains an extended elaboration of his concept of solitude, or *sandot*, which might be best translated as “being consistently self-content”. The Code also elaborates on Buddhadasa’s explanation of the law of karma (Courts of Justice, 2010, p. 33).<sup>6</sup> At various points the Code refers to a classic article by Phraya Chinda Phirom, ‘Words of Warning to Judges’, which particularly stresses the importance of using polite language to everyone (Phraya Chinda Phirom, 1929). One key passage cited concerns how a junior judge should handle discussions with the other two judges assigned to the case:

If they do not listen, you should not get angry and must keep in mind that as a new judge, you do still lack experience. Even if you counter argue, you must do it gently rather than harshly. In arguing you should not only consider your opinion but take their opinion into consideration. If theirs is reasonable and you are wrong, then you must admit your fault. If you are right, only then should you



hold fast to argue politely. After the argument is over, you may still be emotional but you should not let it turn into anger or hatred toward one another. It is part of a job that normally requires you to consult and argue (Courts of Justice, 2010, pp. 28–29).

Deference to the authority of seniors is deeply inculcated into Thai judicial mores. Another passage cited from the same article concerns official unity:

...beyond unity among judges as mentioned, there should also be unity between different governmental branches. Importantly, governing branch officials such as intendants, provincial governors, and district officers, are officials (*kharatchakan*) of the King, just like the judges, whose duty is to ameliorate the pains and nurture the happiness of citizens (Courts of Justice, 2010, p. 55).

The Code's liberal citing of Phraya Chinda Phirom is especially interesting given the article's 1929 date, which immediately precedes the end of the absolute monarchy. Although judges are no longer royal officials in the pre-1932 sense, their 2010 Code of Conduct does not acknowledge any change in their status since 1932. Furthermore, Phraya Chinda Phirom clearly places judges in the same category as other officials such as district officers, and not in a specially reified category of their own.

The final section of the Code discusses questions of ethics, family and lifestyle, including the importance of respecting seniority, dress codes when meeting superiors, and even seating arrangements; wives of judges are supposed to arrange themselves according to the seniority of their husbands (35.6). The handbook codifies not simply the ethics of judges, but their world view and especially their strong sense of identity as a moral elite.

### Revisionist Histories

Understanding how this came about involves reading more widely about the origins of the Thai judiciary. Every year on 7 August, courts across Thailand hold events to commemorate Wan Raphi – Prince Raphi Pattanasak Day, in honour of the “founding father” of Thai law.<sup>7</sup> Elaborate funeral-like ceremonies with huge wreaths are staged in front of court buildings, which are thrown open to the public for a variety of educational events, including mock trials in which law students perform roles alongside real judges and prosecutors.

But who was Prince Raphi, and how pivotal was his role in the creation of the Thai legal system (for a related discussion see Loos, 2006, pp. 47–63)? In a revisionist analysis, Chiang Mai University law academic Somchai Preechasilapakul set out to ask these questions, investigating when the cult of Prince Raphi began, who started it, and for what purposes (Somchai, 2003). He also seeks to explain the relative neglect of other key narratives in Thai legal history, notably the central role of the Belgian legal advisor Gustave Rolin-Jacquemyns (see Tips, 1992; 1996), who held office from 1892 to 1901. His core argument is that the legacy of Prince Raphi was rediscovered and reconstructed after the late 1940s, as part of a nationalist and later royalist turn. Prince Raphi was a very useful symbol for those eager to demonstrate that Thai law was

grounded in Thai history, and had been shaped by Thais. The reality, Somchai argues, was rather different.

The Raphi myth is set out in its standard form in a hagiographic article that has been extensively cited and recycled in all subsequent discussions (Phattansak, 1968). Prince Raphi (1874–1920) was a son of King Chulalongkorn (Rama V) who studied at Christchurch, Oxford before returning to Siam, where he spent the rest of his life working in the legal field. The book catalogues 14 major offices and achievements of the prince, including serving as minister of justice for 14 years (1896 to 1910), founding Siam's first law school in 1897, and reforming various important laws (Somchai, 2003, pp. 12–14). Most subsequent academic studies and theses discussing Prince Raphi simply recite the points listed in this article without any serious attempt to verify or critique them (Somchai, 2003, p. 7). Facetiously dubbing the article a “masterpiece”, Somchai (2003, p. 15) declares that its author is “unreasonable and intentionally negligent of contradictions without any explanation”. He questions why Rolin-Jacquemyns receives only two brief mentions, despite the fact that the Belgian was given Siam's highest non-royal rank, Chao Phaya Abhai Raja, and clearly played a very major role in establishing Siam's modern legal system. He co-edited the legal code in 1897, recommended the creation of a law school to King Chulalongkorn, and co-examined the bar exams for the law school. Another question for Somchai is why busts of both men were originally commissioned, although later only Prince Raphi merited a full-sized statue. And why was the first public statue of Prince Raphi not erected until 44 years after his death (Somchai, 2003, pp. 17–20)?

Somchai (2003, pp. 27–35) argues that despite popular notions that Thai law is based on the ancient Three Seals Code, in practice virtually the whole legal system now used in Thailand was imported in the nineteenth century: there are no real “Thai roots” to speak of in modern law. Raphi is primarily remembered for three achievements: creating Siam's first law school offering Western legal education; reforming and amending laws to make them better suited for Siam's changing social context; and centralising the judicial system, which was previously scattered across different administrative departments, under the Ministry of Justice. But while Prince Raphi's speech on the need to establish a modern law school is often cited, Rolin-Jacquemyns had already made the very same proposals to King Chulalongkorn. While the school was only established once Prince Raphi returned to Siam from his studies, this was because they needed sufficient personnel to run it. Both Rolin-Jacquemyns and Prince Raphi played leading parts in designing the curriculum and conducting examinations for the school, and in 1927 busts of both men were erected there – reflecting their shared roles in the creation of modern legal education.

Prince Raphi's role in drafting the Criminal Code was also more complicated than is typically understood. While he was appointed as president of the original commission to draft the new Code in 1897, the commission's draft was later scrapped and a new process was begun, initiated by George Padoux, another foreign advisor. Prince Raphi turned down the opportunity to head the new commission and did not play any direct role in drafting the Criminal Code that took effect in 1908 and remained in force until 1956 – which was also largely edited by two foreign advisors. Somchai (2003, pp. 45–50) argues that Prince Damrong Rachanuparb should be given more credit for having pushed through this new legal code, rather than Prince Raphi.<sup>8</sup>

Somchai (2003, pp. 62–65) argues that for many years Prince Raphi’s reputation was admired primarily by a limited group of legal practitioners, mainly his former students. At one point, 25 judges quit their posts to express solidarity when Prince Raphi felt he had failed to win justice from King Chulalongkorn over the way he was portrayed in a play. Prince Raphi was credited by judges with boosting their status, not to mention their pay – which helps explain his lasting appeal.

A celebration was held in his memory in 1954, but Prince Raphi Day only began to be recognised in its present form at Thammasat University in 1962, reflecting the more conservative re-orientation of the university away from the legacy of its founder, Pridi Banomyong (see Pridi, 2000),<sup>9</sup> and towards the revived royalism of the Sarit Thanarat era (Somchai, 2003, pp. 71–75; on Sarit, see Thak, 2007; on revived royalism, see Ferrara, 2014, pp. 26–37). Thammasat thus laid claim to a royalist legacy: the first heads of Thammasat’s law department were all former students of Prince Raphi, and the original law school merged with a new faculty at Chulalongkorn University, which was then transferred to Thammasat in 1934. Ironically, law students from Thammasat later insisted that their faculty had its origins in the old law school, a claim that Somchai (2003, p. 84) views with some scepticism.

Two years later, in 1964, a full-sized statue of Prince Raphi was completed outside the Ministry of Justice, and the annual ceremony shifted to this location, symbolising its full incorporation into the judicial bureaucracy. A wide range of legal professionals and court officials began to join the ceremonies at this open, public venue, along with law students from Thammasat and Chulalongkorn Universities (Somchai, 2003, pp. 77–80). The new statue symbolised the growing significance of Prince Raphi Day, which now took on a whole new set of sacred meanings that were reaffirmed annually.

Meanwhile, the original pair of busts depicting Rolin-Jacquemyns and Prince Raphi had been completely neglected since the merger of the original law school with Chulalongkorn University’s Faculty of Law and Political Science in 1933 – until they were “rediscovered” as recently as 1984. The image of Rolin-Jacquemyns was an uncomfortable reminder of the role foreigners had played in the creation of a modern legal system. The elevation of Prince Raphi as the sole “father of Thai law” was part of a selective historical narrative that glossed over the inadequacies of the indigenous legal system, and played down the importance of both foreign practitioners and foreign legal principles in reforming and modernising that system (Somchai, 2003, p. 91).

Overall, Somchai argues that reverence for Prince Raphi as the “father of Thai law” was a socially constructed discourse in a context in which the monarchy was gaining prominence, and Pridi was being airbrushed out of the historical narrative. This discourse formed part of a wider project to create a sense of “Thai law” and affirm Thai national identity. What is especially interesting is the way in which the law faculties at both Chulalongkorn and Thammasat Universities have sought to lay claim to Raphi’s legacy; both assert on their websites that they can trace their lineage back to his school of law,<sup>10</sup> with its focus on training future judges and prosecutors. Both of Thailand’s leading law faculties thus vie with one another to bolster their royalist credentials, and to maximise the numbers of their students who successfully enter the ranks of the judiciary. The political reconstruction of Prince Raphi from the late 1940s onwards underpins both of these longstanding trends, which play down the more critical legal tradition associated with the end of the absolute monarchy.<sup>11</sup> Somchai’s book helps to explain why expecting Thailand’s judges to help solve the country’s political problems

is likely to be a stretch; they have never been properly trained for such a challenging task.

Somchai's book on Prince Rapi should ideally be read alongside his articles on the "three strands" of Thai legal education. In this set of articles (Somchai, 2010a; 2010b; 2010c) he defines these as the legal positivism of Prince Rapi's era, in which the aim was to produce competent state legal officials; the Pridi Banomyong period which emphasised producing well-rounded students who understood the relationships between law, politics and society; and the written law studies strand that has dominated Thai legal training since the late 1940s, emphasising rote learning and technical expertise, almost entirely devoid of broader context.

In a 2012 book of collected articles entitled *Phiphaksan*, Nidhi Eosewong, Thailand's most distinguished historian and public intellectual, suggests that prior to 1932, judges were administrative officials acting on behalf of the state with no notion of separation of powers; and despite the apparently dramatic change in the political system, in practice judicial attitudes and self-understandings had never changed (Nidhi, 2012, pp. 15–21).<sup>12</sup> Nidhi set out some of the main ideas found in the book in a lecture he gave at Thammasat University on 17 March 2013, when he lamented that the 1932 demise of the absolute monarchy had had no real impact on the mentality of the Thai judiciary.<sup>13</sup> Nidhi bemoaned the fact that Thais generally believed "justice floats down from the sky... The judge is the one who studies justice and uses it to judge people". This he termed "a complete lie". He suggested that during the absolute monarchy era, judges always sided with the state and were expected to treat everyone harshly. The idea of a benevolent and sacred judiciary actually only came later on (Nidhi, 2012, p. 19). The kinds of verdicts that people in today's Thailand find troubling were perfectly reasonable during the period of the absolute monarchy, but are no longer appropriate.

Paradoxically, the sacredness of the judiciary that has grown up during the era of democracy thrives precisely because of judges' close links with the monarchy, and yet the sacredness of the monarchy itself exists entirely outside the democratic system (Nidhi, 2012, p. 20). The presence of the King's picture in every courtroom, coupled with rules forcing everyone in court to behave in an orderly fashion and dress properly, underlines this ambiguous sacredness. The purpose of canonising judges is not to serve justice and democracy, but to keep judges free from critical scrutiny, and from all checks and balances. This judges achieved by attaching themselves to the monarchy, which is beyond accountability.

When they founded Thammasat University, Pridi and the People's Party wanted to produce well-rounded lawyers, not simply "barbers".<sup>14</sup> The new regime required the production of lawyers who understood democratic principles, not simply those who had been trained as barbers, giving everyone absolute monarchy haircuts. But while this was a very important idea, the People's Party did not really manage to execute it in practice. Carrying out such a project involves giving lawyers broad intellectual training, not simply studying old Supreme Court decisions. They need to understand why laws cannot be applied retrospectively, for example. As the mechanism of a democratic regime, courts must derive their sovereignty from the people.

However, in Thailand, we like to think of the judiciary as the best barbers. Just as there are the best typists, and the best computer technicians, judges are the

best barbers for legal matters. Put simply, [the court] is a meeting room for experts, who descended from God knows where, using their expertise to determine the lives of people. This idea about judges as the top experts, external experts, is a very appealing idea in Thailand. We are taught to hate and look down on politicians, and we like to create “experts”, such as a benevolent person with “*khunatham*” [virtue] or a skilled person, who floats down from God knows where to control the people we chose.<sup>15</sup>

Nidhi argues that judges themselves misunderstand the nature of the oath they swear – they are not literally swearing allegiance to the King, but to the people’s sovereignty as represented by the King:

When you have a ruler, the ruler protects the people and provides a service of justice to others. 1932 only succeeded in establishing Thammasat but couldn’t change the old mentality. Judges are still allowed to think that they are part of the monarchy in providing a service. They don’t think they are part of the people’s sovereignty, with a duty to protect rights and freedoms as enshrined by the Constitution.<sup>16</sup>

The same problem may be clearly seen in Thailand’s lack of a jury system: “This is because by culture, we believe in experts but not in human beings like ourselves. This is the heart of democracy”.<sup>17</sup>

In his book, Nidhi went on to praise the Nitirat group of legal academics for their proposals to reform the *lèse majesté* law, arguing that those who criticised the detail of their proposals were missing the point. This 7-member group of revisionist legal academics based at Thammasat University law faculty, informally led by Worajet Pakeerat, has been very active in raising critical perspectives on the relationship between the judiciary and the monarchy, including critiquing the role of the legal establishment in supporting the 2006 military coup, and proposing revisions to the *lèse majesté* law (see McCargo and Tanruangporn, forthcoming). Nidhi (2012, pp. 131–33) observed that Nitirat was insisting upon the right of Parliament to amend laws relating to the monarchy, something that royalists could misconstrue as treason and might therefore resist through the use of violence. When judges acted in the name of the King, those who interpreted the law were inherently superior to those who merely legislated.

Nidhi’s work on the judiciary is not based on extensive historical research; the writings in *Phiphaksan* are rather polemical. Nevertheless, they draw upon his extremely subtle and nuanced revisionist understandings of modern Thai history. “Fortunately or unfortunately, I did not study law,” he declared at Thammasat; Nidhi is unwilling to leave discussion of legal questions to legally trained professionals. He is sceptical about judicial technicians who claim to be simply administering justice on behalf of the King. As highlighted by his March 2013 lecture delivered at Thammasat – hosted by the Nitirat group – Nidhi’s writings on the judiciary focus attention back on the question of legal education, and on the ambiguous origins of Thailand’s leading law faculty: was it created by Pridi and the People’s Party, or a continuation of Prince Rapi’s law school?

Piyabutr Saengkanokkul, one of the best known members of Nitirat, is a charismatic speaker and gifted populariser with a law doctorate from Paris. His books are collections of shorter, previously published pieces organised around shared themes, rather

than systematic arguments; they are lightly referenced, often citing more French theory than empirical evidence. In his most important book Piyabutr seeks to question claims by judges that they act on behalf of the monarchy (Piyabutr, 2009). He reviews recent developments in the judicialisation of politics, arguing that judges need to recognise the limits of their authority and their role in politics and policymaking. He is critical of judges for overstepping the mark by making political interventions (Piyabutr, 2009, pp. 84–85).

Chapter 2 – titled ‘What is Ruling in the Name of the King?’ – contains the core of Piyabutr’s arguments. By claiming that their rulings are made “in the name of the King”, as stressed by Natthapakon, judges seek to “reinforce the sacredness of the verdict, hypnotise people into obedience, and perhaps even to create protection against criticism” (Piyabutr, 2009, p. 94). The effect is to make both judges and their verdicts “untouchable”. Piyabutr (2009) argues that the real meaning of this language is that the judges are exercising power and are accountable for its use; the invocation of the King’s name reflects symbolic power, rather than literal royal authority for their decisions. Similar powers “in the name of the King” are exercised by both the legislative and executive branches – the judiciary cannot claim any greater *barami* (sacred authority) than other institutions. The phrase to be found in Article 233 of the 1997 Constitution does nothing more than describe the relationship between judicial authority, the form of the kingdom and the principles of democracy. This is a completely different situation from that under absolute monarchy, when only the King could grant justice. Where judges in other monarchies such as Japan, Spain and the United Kingdom invoke the notion of judging in the name of the monarch, there is no real difference between the name of the King and the name of the people (Piyabutr, 2009, p. 98).

In a later chapter, Piyabutr discusses the ways in which the judiciary and the courts sanctioned the inherently illegal act of seeking state power after successive coups. Nitirat has focused much of its work in recent years on scrutinising these collusive understandings between the military and the legal establishment. He argued that the use of the law by extra-constitutional powers did not create justice in the broader sense, but rather reinforced the power of lawyers, who served as an invaluable tool in the process of establishing a supposed “legal state” which is actually grounded in violation of the law (Piyabutr, 2009, pp. 156–58).<sup>18</sup> Similar themes are addressed in Piyabutr, 2007 book, where he argues, based on Supreme Court rulings and Yut Saenuthai’s work on the 1932 revolution, that the Thai legal system considers the legitimacy of coup authority as based on “real power”, rather than the rightness of the process of coming to power (Piyabutr, 2007, p. 101).<sup>19</sup> He cites a Supreme Court ruling of 1980 which stated that unless coup decrees were specifically invalidated, they remained valid. Along with various 2006 provisions to legalise that later coup, this ruling meant that trying to challenge a coup on purely legal grounds was unlikely to succeed.

In his final chapter, Piyabutr (2009, pp. 246–53) asks why Pridi Banomyong’s name hardly appears in legal texts, despite his central role in introducing a Constitution and the principle of universal suffrage. Instead, King Chulalongkorn is popularly acclaimed as the father of Thai law; all credit is given to the King and to judges, rather than to Pridi. Piyabutr’s main theme in the book is to attack the pre-modern idea that Thai law was gifted to the people by the monarchy; Pridi represented a more radical and enlightened understanding of justice, which has often been occluded.



## Concluding Remarks

The judicial ouster of Yingluck Shinawatra from Government House in May 2014 was further evidence that *tulakanpiwat* was still alive – although not perhaps entirely well. The books reviewed here have illustrated the gulf that exists between conservative and revisionist views of the Thai judiciary. For Thirayudh it is natural that Thai judges should carry out royal advice to help preserve order and avert national calamity. The language of the Judicial Code of Conduct – with its emphases on maintaining unity and loyalty to the monarchy – lends itself to such a view, which is apparently shared by serving judges such as Natthapakon. But for revisionist scholars such as Somchai, Piyabutr and Nidhi, the idea that Thai judges issue rulings literally “in the name of the King” is a wilful misunderstanding of their role in a constitutional monarchy. Such a misunderstanding glosses over the ambiguous origins of Thai law, and reflects a dangerously narrow mode of legal training.

The verdict is still out on Thailand’s judicialisation. At various junctures in the post-2006 period, the courts did not follow an anti-Thaksin script. The Constitutional Court could have removed Yingluck from office in mid-2012, for example, but rejected entreaties to do so. The relationship between the courts and other key power-holders in Thailand is complex, and subject to constant renegotiation. The books reviewed here help to map out some preliminary terrain, but much more research is needed before firm conclusions may be drawn.

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## Notes

1. See ‘HM the King’s April 26 speeches (unofficial translation)’. *The Nation*, 27 April 2006. Available at [http://nationmultimedia.com/2006/04/27/headlines/headlines\\_30002592.php](http://nationmultimedia.com/2006/04/27/headlines/headlines_30002592.php). For a full Thai transcript of the royal speech, see ‘Phraratchadamrat phrabatsomdetphrachoyuhua 26 mesayon 2549’ [The King’s royal speech on 26 April 2006]. *Phujatkan Online*, 30 April 2006. While there are differences in emphasis between the two royal speeches, Thirayudh glosses over these in his pamphlet.
2. Thirayudh himself seems unsure about how best to translate the term. He uses the English phrase “judicial review” in the title of the pamphlet, but on p. 19 he renders it as “judicialisation of



- politics”. Legal scholar and campaigner Pichet Maolanond has tried to popularise the phrase “judicial activism”; while the term “judiocracy” is favoured by the influential blogger *Bangkok Pundit*. On balance, “judicialisation” seems the best translation.
3. He provides a short CV at the end of the book (p. 135), which states he was born in the southern province of Phattalung in 1966, studied law at the open-entry Ramkhamhaeng University, and was currently a judge at the Kalasin provincial court.
  4. English judges swear a 2-part “judicial oath”, the first part of which is an oath of allegiance to the Queen. Neither part of the oath invokes notions of “the people” or the (unwritten) Constitution. Natthapakon quotes approvingly from the second part of the English oath (2011, p. 32). However, English judges do not generally see swearing this oath as the basis for special claims to prestige. “I, \_\_\_\_\_, do swear by Almighty God that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, her heirs and successors, according to law.” “I, \_\_\_\_\_, do swear by Almighty God that I will well and truly serve our Sovereign Lady Queen Elizabeth the Second in the office of \_\_\_\_\_, and I will do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will.”
  5. The Code of Conduct applies only to judges in the Courts of Justice, and not to the Administrative or Constitutional Courts.
  6. Leading scholar-monk Buddhadasa was involved for many years in training new judges. He had a close working relationship with one-time Supreme Court president Sanya Thammasak, who later became prime minister.
  7. Prince Raphi’s full royal name was Phrachaoborommawongthoe Kromluang Ratchaburidirekrit. Some sources, including Loos, refer to him as Prince Ratburi.
  8. Rungsaeng Kittayapong has also raised critical questions about the designation of Prince Raphi as the “father of Thai law”. He argues that Prince Raphi was hyper-sensitive, obstinate, and kept quitting important tasks and positions following fits of pique. Rungsaeng argues that Prince Raphi’s predecessor as minister of justice, Prince Phichit Prichakon, had an equally strong claim to be seen as the father of Thai law, but “caused himself to be written out of Thai history” because he did not hesitate to criticise the King and other ministers. Rungsaeng Kittayapong, ‘The Origins of Thailand’s Modern Ministry of Justice and its Early Development’. Unpublished PhD thesis, University of Bristol, 1990, pp. 224–34.
  9. As Baker and Pasuk note, it was not until his 1983 death after 35 years in exile that Pridi, long demonised as an anti-monarchist, was partially rehabilitated in Thailand; only in 1984 did Thammasat University finally erect a statue of its founder (Pridi, 2000, pp. xix–xx).
  10. See <http://www.law.chula.ac.th/lm/chula-and-the-faculty-of-law/faculty-of-law.html> and <http://interlib.law.tu.ac.th/about-us/faculty-of-law-and-thai-society>.
  11. Somchai has complained that the book produced little reaction from his academic colleagues; nobody else wanted to discuss Prince Raphi’s legacy critically.
  12. The way in which Phraya Chinda Phirom continues to be cited in the Judicial Code illustrates Nidhi’s point.
  13. Much of the discussion in this section is based on Nidhi’s March 2013 talk. Unfortunately a YouTube video of the talk is no longer available online. Nidhi Aeusvivongse. ‘San nai thana konkai khong rabop ...?’ [The Court as a Mechanism of a ? Regime]. Speech presented at Nitirat Seminar on The Judiciary and Justice in Thai Society, Thammasat University, 17 March 2013.
  14. Seminar, 17 March 2013. Nidhi’s “barber” analogy loses something in translation – he is playing on the word “*chang*”, a generic term for different kinds of technicians, which can be applied to a wide range of occupations, including barbers, typists and computer technicians.
  15. Seminar, 17 March 2013.
  16. Seminar, 17 March 2013.
  17. Seminar, 17 March 2013.
  18. This is one of many passages in the book where the author provides tantalisingly little elaboration.
  19. Such problems are hardly unique to Thailand, and reflect a tradition of legal positivism.

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