

38th Session of the Human Rights Council

Joint Side Event: Freedoms of Expression, Assembly, and Association in Elections in Asia

Re Thailand and Cambodia

20 June 2018

Kingsley Abbott, Senior Legal Adviser, ICJ

Introduction

During the course of the last four years, there has been a significant regression with respect to human rights and the rule of law in the ASEAN region.

It has not been immune from the global trends of xenophobia, nationalism, racism, populism and the strongman leader.

We are also hearing:

- the suggestion, again, that human rights are an imposition, and should be subordinated to so-called "Asian Values"
- the position taken by various apologists that human rights – particularly fundamental freedoms – are too high of an expectation; "give these countries time and let's work on economic development first," they say
- the idea that civil society is a threatening, destabilizing force that needs to be monitored, regulated and suppressed

But one of the most concerning developments playing out before those of us living in the region is the misuse of the law.

A trend that underpins so much of what we are seeing.

Rather than simply violating the human rights of people and seeking to hide or deny the fact, ASEAN states are increasingly legislating to allow for violations – seeking to make them 'lawful'.

Let's look at Thailand and Cambodia - two countries where key elections are on the horizon.

Thailand

On 22 May 2014, the democratically elected government was overthrown by the military.

Since then, the military – using the name the National Council for Peace and Order – has progressively replaced civilian power with military rule by:

- implementing Martial Law throughout the country - replacing it, after a year, with Head of the NCPO Order 3 (Martial Law by another name) which bans the gathering of five or more people for political purposes and gives the military

power to detain people for up to seven days without trial at unofficial places of detention;

- giving the Head of the NCPO near unlimited power to issue any order, with the power of law, without the possibility of review or accountability;
- appointing a Cabinet which includes members of the military;
- ordering the prosecution of civilians in military courts for certain crimes - which ended in September 2016 for new cases, but old cases are ongoing;
- overseeing a National Strategy Act which will pave the way for the military to 'legally' oversee Thailand for the next 20 years

Some statistics obtained from several sources including the excellent Thai NGO Thai Lawyers for Human Rights:

Since the coup:

- the NCPO and Head of NCPO have issued more than 520 Orders & Announcements
- over 800 people have been summoned for attitude adjustment
- at least 260 public events have been barred, impeded or interfered with
- at least 90 people have been charged with sedition
- more than 400 people have been charged with violating the ban on political gathering (including 132 this year)

At the time of the coup, there was a loud outcry from the international community.

Today, despite the fact that nearly all these restrictions on human rights and the rule of law remain, the international community rarely speaks out publicly anymore.

Rather, over four years later, longer than the normal political cycle, the EU, the US and others have all long since normalized their relationships with Thailand.

Sometimes premising this normalization as being part of an effort to encourage Thailand to hold elections.

But these elusive elections have been slated for 2015, 2017, 2018, and 2019 (and as of this week, after some unspecified date of the coronation).

There has been a staring competition between Thailand and the international community, which the international community lost.

The situation we warned, back in 2014, must not be allowed to normalize has normalized.

There is a now a new, more authoritarian, Thailand.

On Monday, Thailand even executed its first prisoner in nine years, undoing years of work and commitments towards abolition.

In its press statement the Department of Corrections even talked about how, like China and the US, Thailand focuses more on protecting the public from crimes than the rights and freedoms of wrongdoers – as if these two ideas are in tension with each other!

The legal and constitutional framework of Thailand has been fundamentally altered, moving away from the rule of law and protection of human rights.

And with international pressure greatly diminished – and in some cases disappeared (or replaced with what is called “quiet diplomacy”) for a variety of reasons – it is set to remain that way for the foreseeable future, even beyond elections.

And let’s be clear, this is not just bad for Thailand, but also for the whole region.

Not long ago, Thailand was the high bar in the region and its fall has brought the whole region down.

We have watched up close as ASEAN countries have learned from each other, testing the waters to see what violations they can get away with and, sadly, at the moment that’s quite a lot.

Cambodia

Take Cambodia for example.

The ruling Party, the CPP, narrowly won the elections in 2013.

Since then it has implemented a multi-pronged plan to ensure it won’t lose the next election, scheduled for 29 July 2018 (next month).

We have witnessed the deliberate and systematic:

- closure of civil society space (no longer just “shrinking”)
- increased harassment and intimidation of civil society members and organisations, some of whom have been forced out the country
- the creation of a grand “color revolution” theory in which the main opposition party allegedly conspired with the USA and some members of civil society to topple the government, undermining the important role civil society plays in the sustainable development of Cambodia
- greater surveillance of the online sphere, with an inter-ministerial order signed last month to monitor and control online news content and other information on the internet, specifically social media
- increased assault on fundamental freedoms
- dissolution of the main political opposition and the jailing of its leader, Kem Sokha, on charges that have all the hallmarks of being politicized - resulting in the purging of CNRP representatives from the Senate (resulting in a one party senate) right down to the commune level, having a dramatic impact on the human rights and normal lives of people all over the country
- assaults on the free press
- ongoing legal harassment of human rights defenders, such as Tep Vanny
- intensifying pressure placed on ordinary people to vote in the elections after the opposition called for the elections to be boycotted
- and ongoing interference into the work of the judiciary

In other words, we are seeing the systematic dismantling of the key pillars of a free, democratic, liberal and pluralistic society.

And how has this been achieved?

It has been achieved by the misuse of the law including the passage of new laws and the amendment of old laws.

For example, the law on political parties was amended to give the Supreme Court power to dissolve a political party just weeks before the Supreme Court dissolved the CNRP.

In February, a lèse majesté provision was added to the Criminal Code.

At the same time, the Constitution was amended to impose a duty on all Cambodian citizens to:

Primarily uphold the national interest and not conduct any activities which either directly or indirectly affect the interests of the Kingdom of Cambodia

Without defining what "upholding the national interest" means - which is one of the reasons why there are no Cambodians on this panel... in case speaking here at the Human Rights Council may be considered a violation.

And how has this been justified?

On the basis of the "Rule of Law" – explicitly.

Cambodia actually says it, including here at the Human Rights Council.

This year, Cambodia even put out, brazenly you might think, a White Paper entitled "Strengthening the Rule of Law and Liberal Democratic Process".

And when diplomats approach Cambodia to enquire why laws inconsistent with human rights are being passed and used to violate human rights, the government claims that no one is above the law – and that the Government is merely implementing the "Rule of Law".

Of course, this is not what the Rule of Law means.

The Rule of Law, which the ICJ has been working on defining since the 1950s, means the passage of laws consistent with a country's international human rights obligations, and implementing laws in a way that does not violate human rights.

Lastly, on Cambodia, there is one important point I wish to make.

The prevailing wisdom of Cambodia has, for a long time, been that the ruling party always tightens its grip in advance of elections and then loosens it when they have passed.

In 2018, in my view, that old analysis can be discarded – we are not in that old cycle anymore - we are in a new, more authoritarian, paradigm now.

Why do I say that?

Because, like Thailand, the legal and constitutional framework of Cambodia has been fundamentally altered, moving away from the rule of law and protection of human rights – and this new framework will stay in place long past elections.

I want to finish with some final thoughts of my own.

As governments become more sophisticated in misusing the law and defending their actions based on the "Rule of Law" – we too have to become more sophisticated, as difficult as that is in these fast paced times of change.

We have to avoid being seduced by arguments from a position of relativity - how as long as domestic laws are being passed and implemented, no one has the right to criticize.

Rather, we have to recognize the way these legal landscapes are changing and what it means for the long term.

And while it's not easy and requires application and time, we have to analyze these new and amended domestic laws and their implementation against some objective yardstick, which thankfully we have: the international human rights legal framework - and the international legal obligations these states have voluntarily taken on.

And then we have to push back against the weaponization of the law and misuse of the rule of law.

Thank you.