

The Implementation of the Emergency Decree in Response to the COVID-19 Pandemic in Thailand

A Brief Paper
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ICJ LEGAL BRIEFING

THE IMPLEMENTATION OF THE EMERGENCY DECREE IN RESPONSE TO THE COVID-19 PANDEMIC IN THAILAND

1 July 2021¹

1. Background

On 25 March 2020, the Thai government declared an “emergency situation” in all areas of Thailand, purportedly to combat the COVID-19 outbreak, in the exercise of its power under the Emergency Decree on Public Administration in Emergency Situation B.E. 2548 (‘Emergency Decree’).² The Emergency Declaration has been extended 12 times, most recently on 25 May 2021 for a period between 1 June and 31 July 2021.³ A series of regulations containing several Emergency Decree measures have been periodically announced pursuant to Emergency Decree powers.⁴

The ICJ has previously reviewed, assessed and made recommendations in relation to the implementation of Thailand’s Emergency Decree in three reports and briefings: (i) *More Power, Less Accountability: Thailand’s New Emergency Decree*, released in August 2005;⁵ (ii) *Implementation of Thailand’s Emergency Decree*, released in July 2007;⁶ and (iii) *Legal Briefing: The Implementation of Thailand’s Emergency Decree in Response to Protests in 2020*, released in October 2020.⁷ These revealed that a number of the legal and practical responses undertaken by the Thai authorities to address purported public emergencies in the past decades have not complied with rule of law principles and international legal obligations.

This legal briefing focuses on four further areas of concern on the implementation of the Emergency Decree in response to the COVID-19 outbreak, namely: (i) the basis for and scope of the declaration of the emergency situation; (ii) the emergency decree measures; (iii) the limited judicial scrutiny provided by the court in respect of such measures; and (iv) the problematic provision of legal immunity from prosecution of authorities exercising emergency powers.

¹ The information in this report is accurate as of 1 July 2021.

² Available at: https://interaffairs.psu.ac.th/images/download/covid/Declaration_of_Emergency_in_Thailand.pdf

³ See the Notification Re: Extension of Duration of the Declaration of an Emergency Situation in all areas of the Kingdom of Thailand (12th Extension), 25 May 2021, available at: http://www.ratchakitcha.soc.go.th/DATA/PDF/2564/E/114/T_0072.PDF (in Thai).

⁴ Available at: <https://www.mfa.go.th/en/content-category/press-release-and-information-2>.

⁵ ICJ, ‘More Power, Less Accountability: Thailand’s New Emergency Decree’, August 2005, available at: <https://www.icj.org/wp-content/uploads/2005/08/Thailand-accountability-advocacy-2005.pdf>.

⁶ ICJ, ‘Thailand: implementation of Thailand’s emergency decree’, July 2007, available at: <https://www.icj.org/thailand-implementation-of-thailand%C2%B4s-emergency-decree/>.

⁷ On 15 October 2020, the Thai government declared a “serious emergency situation” in all areas of Bangkok, it was nevertheless lifted a week later. See: ICJ, ‘Thailand: lifting of serious emergency situation in Bangkok is welcome, but emergency laws remain deeply problematic – ICJ Briefing Paper’, October 2020, available at: <https://www.icj.org/thailand-lifting-of-serious-emergency-situation-in-bangkok-is-welcome-but-emergency-laws-remain-deeply-problematic-icj-briefing-paper/>. (ICJ 2020 Emergency Decree Briefing)

2. Declaration of the emergency situation

The 25 March Emergency Declaration must, both on its face and as implemented, comply not only with Thai law, but with Thailand's international legal obligations.

Under international human rights law and particularly the International Covenant on Civil and Political Rights (ICCPR), to which Thailand is a party, certain rights must always be protected in their full scope, while others may be subject to some form of limitation or restriction in exceptional circumstances. The possibility for such limitation is provided in two possible ways. First, pursuant to article 4 of the ICCPR,⁸ where there is a public emergency so severe that it threatens the life of the nation, certain ICCPR rights may be derogated from, but derogating measures must be non-discriminatory and may be taken only to the extent that they are strictly necessary to meet a specific threat to the life of the nation. Certain rights, including, among others, freedom from torture and ill-treatment, the right to life, aspects of fair trials, are never subject to such derogation. Second, some human rights and fundamental freedoms protected under the ICCPR, expressly provide limitations and the circumstances under which they may be limited.⁹ However, these limitations must be strictly necessary and proportionate to their purpose and be non-discriminatory in purpose and effect.¹⁰

Unlike the ICCPR, the International Covenant on Economic Social and Cultural Rights (ICESCR) does not expressly provide for derogations pursuant to states of emergencies, nor do any of its provisions contain limitation clauses of the kind found in the ICCPR. However, article 4 of ICESCR provides that: "in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society."

Nonetheless, in the narrow circumstances in which some human rights may be limited or derogated from to address a public health emergency, such as COVID-19 pandemic, the minimum core obligations of each of the rights enunciated under the ICESCR are generally not subject to such limitations or restrictions.¹¹

Significantly in the context of the COVID-19 pandemic, States must "take measures to protect the rights to life and health of all individuals within their territory and all those subject to their jurisdiction".¹² Emergency and other measures purporting to be COVID-19 response measures

⁸ Article 4(1) of the ICCPR provides that: "in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."

⁹ For instance, under article 12(3), 14(1), 18(3) 19(3), 21, and 22(2) of the ICCPR, the rights and fundamental freedoms of movement, public trial, manifestation of religion or belief, expression, assembly and association allow for restriction only where provided by law and for a limited range of purposes such as national security or public safety, public order, public health or morals, or to protect the rights of others.

¹⁰ UN Human Rights Committee, 'General Comment No. 34', CCPR/C/GC/34, para 21-36; UN Human Rights Committee, 'General Comment No. 37', CCPR/C/GC/37, para 40-79.

¹¹ UN Committee on the Economic Social and Cultural Rights, 'CESCR General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)', 14 December 1990, E/1991/23, available at: <https://www.refworld.org/docid/4538838e10.html>.

¹² UN Human Rights Committee, 'Statement on derogations from the Covenant in connection with the COVID-19 pandemic', CCPR/C/128/2, 30 April 2020, available at: <https://www.ohchr.org/Documents/HRBodies/CCPR/COVIDstatementEN.pdf>.

must therefore, in the first place, be compliant with Thailand's human rights obligations, including in terms of the rights to health and life.¹³

Public emergency

Article 4(3) of the ICCPR requires Thailand to immediately inform the other States Parties to the ICCPR, through the intermediary of the Secretary-General of the United Nations, of any provisions from which it has derogated, the reasons for the derogating measures, and, if applicable, any extension of the state of emergency.¹⁴

On 4 June 2020, the Thai government informed the UN Secretary General that "the Kingdom of Thailand considered it necessary to adopt temporary urgent measures in order to protect the public health, safety and peaceful living of the people, as well as suppress the spread of COVID-19....[and] that some of these temporary urgent measures may involve a derogation from some of its obligations under the ICCPR, particularly Article 12 (freedom of movement). The emergency situation was notified as effective from 26 March to 30 June 2020.¹⁵ However, at the time of writing, in the absence of any subsequent notification to the UN Secretary General concerning the extensions of the state of emergency, it had generally been presumed that Thailand was not purporting to derogate from any ICCPR rights beyond 30 June 2020. Its derogation from some of its obligations under the ICCPR ceased from 1 July 2020 onward though the measures put in place restricting rights have continued.

Surprisingly, however, on 21 May 2021 the Director-General of the Department of International Organizations, Ministry of Foreign Affairs of Thailand, announced at a meeting with Thai CSOs that it was their opinion that article 4(3) of the ICCPR only required Thailand to inform other States Parties to the ICCPR of the commencement and the termination of derogation. Therefore, Thailand considered that other States Parties remain duly informed of its on-going emergency situation, until it notifies otherwise.

This understanding by the Director General notwithstanding the intent of Thailand to continue to derogate from human rights obligations, Thailand is required to submit additional notifications of derogating measure and its extension of the duration of a state of emergency beyond 30 June. Otherwise, any continuing derogation is in breach of Thailand's international legal obligations. Any restrictions to rights must comply with the law involving ordinary restrictions and not to those justified under ICCPR article 4 as a derogation under a proclaimed state of emergency.

¹³ Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 'COVID-19 measures must be grounded first and foremost on the right to health', 10 June 2020, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25945&LangID=E>; UN Economic and Social Council, 'Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights', U.N. Doc. E/C.12/2020/1, 7 April 2020, available at: <https://undocs.org/E/C.12/2020/1>. See generally, ICJ, 'Living Like People Who Die Slowly: The Need for Right to Health Compliant COVID-19 Responses', 1 September 2020, available at: <http://www.icj.org/wp-content/uploads/2020/09/Universal-Global-Health-COVID-19-Publications-Reports-Thematic-Reports-2020-ENG.pdf>

¹⁴ UN Human Rights Committee, 'General Comment No. 29: Article 4: Derogations during a State of Emergency', 31 August 2001, CCPR/C/21/Rev.1/Add.11, para 17, available at: <https://www.refworld.org/docid/453883fd1f.html>. ('General Comment No. 29'). The UN Human Rights Committee also stated that additional notifications are required "if the State party subsequently takes further measures under article 4, for instance by extending the duration of a state of emergency...[and]... in relation to the termination of derogation".

¹⁵ Thailand's Notification under Article 4(3), C.N.194.2020. TREATIES-IV.4 (Depositary Notification), available at: <https://treaties.un.org/doc/Publication/CN/2020/CN.194.2020-Eng.pdf>.

Would the situation meet ICCPR emergency criteria?

It is worth assessing Thailand's emergency response in terms of derogations, in the event that Thailand continues to justify its emergency measures in terms of derogations under ICCPR, without additional notification.

It is far from clear that the "emergency situation" as defined in section 4 of the Emergency Decree¹⁶ would reach the level of seriousness so as to impose a "threat to the life of the nation"¹⁷ as required under article 4 of the ICCPR as a condition for derogation.

The Declaration of the Emergency Situation by the Prime Minister on 25 March 2020 referred to the fact that the COVID-19 outbreak is a highly contagious disease with no vaccine nor medicine available for effective treatment and the fact that the number of infected persons and deaths globally was increasing. It also pointed to the recognition of the situation as a pandemic by the World Health Organization. Consequently, it was a situation that "threatens public order and the safety of the people which necessitates stringent and urgent measures to prevent the widespread transmission of the disease", and "therefore necessary to adopt urgent measures to protect the people's safety and peaceful living of the people." "Public order" and "public safety" were cited as justifications to impose measures limiting rights.¹⁸

Of course, a severe pandemic can undoubtedly threaten the integrity, health and life of a population. However, according to the Ministry of Public Health, as of the date the Emergency Decree was declared, the COVID-19 virus had infected a confirmed total of 934 people and contributed to four deaths in Thailand.¹⁹ Approximately a month after the Emergency Decree was enforced, the COVID-19 infection rate was dramatically reduced.²⁰ For many months thereafter there was no record of new local transmissions. All recorded infections were returnees who were found positive in state quarantines. The second wave of the COVID-19 outbreak started in December 2020 in certain provinces in Thailand and slowed down by the end of January 2021.²¹ Thailand's COVID-19 third wave began around 1 April 2021, after infections were traced to nightlife venues in the capital Bangkok. In just two months, the country's total cases have spiked more than nine-fold, from about 28,900 to over 264,000 confirmed cases and COVID-19 had contributed to 2,080 deaths as of 1 July 2021.²²

¹⁶ Section 4 "emergency situation" was defined as: "a situation, which (...) may affect the public order of the people or endangers the security of the State or may cause the country or any part of the country to fall into a state of difficulty (...) pursuant to which it is necessary to enact emergency measures to preserve the democratic regime of government with the King as Head of State of the Kingdom of Thailand under the Constitution of the Kingdom of Thailand, independence and territorial integrity, the interests of the nation, compliance with the law, the safety of the people, the normal living of the people, the protection of rights, liberties and public order or public interest, or the aversion or remedy of damages arising from urgent and serious public calamity."

¹⁷ According to Principle 39 of the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, not every disturbance or violent act reaches the level of seriousness of "threatens the life of the nation". The situation must be of such imminent and actual threat and magnitude that it: (i) affects the whole of the population and either the whole or part of the territory of the state; and (ii) threatens the physical integrity of the population, the political independence or the territorial integrity of the state or the existence or basic functioning of institutions indispensable to protect and ensure rights recognized in the ICCPR.

¹⁸ The Declaration of an Emergency Situation in all areas of the Kingdom of Thailand, 25 March 2020, available at: https://image.mfa.go.th/mfa/0/mkKfL2iULZ/migrate_directory/news3-20200326-161207-994002.pdf.

¹⁹ Department of Disease Control, 'Corona Virus Disease (COVID-19)', available at: <https://ddc.moph.go.th/viralpneumonia/eng/index.php>.

²⁰ Department of Disease Control, 'Statistics', available at: <https://covid19.ddc.moph.go.th/> (in Thai)

²¹ Bangkok Post, 'Ministry confident second wave will end this month', available at: <https://www.bangkokpost.com/thailand/general/2047919/ministry-confident-second-wave-will-end-this-month>.

²² Please see up to date information at: <https://ddc.moph.go.th/viralpneumonia/eng/index.php>.

While this is a serious public health crisis, that requires exceptional measures, the authorities have failed to demonstrate that this rises to the level of a threat to the life of the nation requiring a derogation from guarantees of freedom of movement beyond those already allowed for under article 12(3) of the ICCPR (see below).

In addition, Thailand was successful in eliminating domestic COVID-19 cases during the third and fourth quarters of 2020, although the present challenges remain significant with the third wave. The Government has failed to explain the reason why such relatively low infection rates in early 2020 necessitated resort to initial powers under the Emergency Decree, including the formal measures it took to derogate from freedom of movement. It has been alleged that the emergency measures were adopted in their broad terms at least in part not to address a real public health emergency, but rather for ulterior purposes, such as to target political activists who were exercising their right to peaceful assembly (which will be further described below in Part 3).²³

Non-derogating human rights restrictions

The COVID-19 is a serious global pandemic affecting Thailand and, in fact, most of the rest of the world. While the pandemic likely does not meet the standard of a “threat to the life of the nation” such as to justify derogating measures under ICCPR article 4, it certainly does constitute at least one basis for a degree of limitation on certain rights, particularly, “the protection of public health”.

To the extent strictly required by the grounds of public health or morals, national security or public order, or for the respect of the rights and freedoms of others, measures limiting the scope of some human rights protections under the following articles of the ICCPR may be adopted: 12(3) (freedom of movement); 14(1) (public trial); 18(3) (freedom to manifest one’s religion or beliefs); 19(2 and 3) (freedom of expression and information); 21 (freedom of peaceful assembly); and 22(2) (freedom of association). Notably, the language of the 25 March Declaration does invoke the terms “public order” and “public safety” as grounds for the potentially exceptional measures that could serve to limit the exercise of human rights.

Any limitation must be necessary and proportionate to these purposes and they adhere to the principles of legality and be non-discriminatory. However, as will be described below in Part 3, it is doubtful that the restrictive measures adopted have been strictly necessary and proportionate, and adhered to the principle of legality, as require by international law. Indeed, it is also questionable whether, during certain periods, some of the measures have been used in a manner inconsistent with the legitimate purpose of ensuring the protection of public health or public order or protecting other rights.

Communicable Disease Act

Other domestic laws, such as the Communicable Disease Act B.E. 2558 (2015) (‘CDA’),²⁴ may have been sufficient to address the pandemic in Thailand without the need to invoke the Emergency Decree.²⁵ The Emergency Decree contains several provisions that are excessively vague and overbroad, as it grants seemingly unrestricted powers in certain areas to the Prime

²³ For example, Marwaan Macan-Markar, ‘Thailand seeks to extend COVID emergency despite no new cases’, Nikkei Asia, 29 June 2020, available at: <https://asia.nikkei.com/Politics/Turbulent-Thailand/Thailand-seeks-to-extend-COVID-emergency-despite-no-new-cases>; Article 19, ‘Thailand: Stop using emergency powers to restrict the rights of protesters’, 29 June 2020, available at: <https://www.article19.org/resources/thailand-stop-using-emergency-powers-to-restrict-the-rights-of-protesters/>; and Thaiger, ‘Activists slam “politically motivated” decree extension’, 1 July 2020, available at: <https://thethaiger.com/coronavirus/activists-slam-politically-motivated-decree-extension>.

²⁴ Available at: https://ddc.moph.go.th/uploads/ckeditor/c74d97b01eae257e44aa9d5bade97baf/files/001_2qcd.pdf

²⁵ For example, Cross Cultural Foundation, ‘Lift the State of Emergency, enforce the 2015 Communicable Diseases Act, and increase public health funds to cope with COVID-19’, 19 April 2020, available at: <https://crcfthailand.org/2020/04/21/crcf-statement-lift-the-state-of-emergency-enforce-the-2015-communicable-diseases-act-and-increase-public-health-funds-to-cope-with-covid-19/>

Minister as set out in section 9, 11 and 12.²⁶ The CDA, on the other hand, grants the Minister of Public Health, with the advice or approval of the National Communicable Disease Committee, the power to determine measures for the purpose of prevention and control of communicable diseases, *inter alia*, by naming the communicable diseases under surveillance, demarcating the disease infected zone, designating any ports of entry in the Kingdom as international communicable disease control checkpoints, and issuing notification on the immunization.²⁷ The law also grants Provincial Governors, with the approval of the Provincial Communicable Disease Committee, the power, among others, to order the temporary closure of places, and to instruct persons infected or reasonably suspected of being infected with a dangerous communicable disease to temporarily cease performing their occupations and/or entering certain places.²⁸ It also grants the communicable disease control officers, including those stationed at international communicable disease control checkpoints, the power to perform several actions as prescribed in section 34 and 37-42 of the Act. Violators may be liable to imprisonment for a term ranging from not exceeding one month up to two years or to a fine ranging between 10,000 and 500,000 baht (USD\$ 319 - 15980) or to both.²⁹ Notably, the CDA does not provide the power to relevant authorities to impose lockdown or travel bans to the persons who are not infected or reasonably suspected of being infected with a communicable disease.

In response to the second and third wave of the pandemics, many measures that have been imposed to control the virus were in fact ordered by the Provincial Governors. For instance, the Bangkok Governor ordered the temporary closure of certain premises³⁰ and ordered residents in Bangkok to always wear face masks outside residence of accommodation,³¹ citing the power under the CDA along with the Emergency Decree. While curfew and travel bans can be imposed in accordance with the Emergency Decree as they were during the early months of the pandemic,³² several Governors only “seek cooperation” from the residents to refrain from leaving their homes at night³³ and, relying on section 34 of the CDA, instead require those seeking entry to their provinces to either monitor their health or self-quarantine for 14 days.³⁴

The Government has insisted that the CDA is not sufficient to address the pandemic as it does not give powers to issue orders to authorities such as police or immigration officers.³⁵ The report

²⁶ For a detailed analysis, see ICJ 2020 Emergency Decree Briefing, at 13-21

²⁷ Section 6, 7 and 8, Communicable Disease Act.

²⁸ Section 35, Communicable Disease Act.

²⁹ Section 49-57, Communicable Disease Act.

³⁰ See Announcement of the Bangkok Metropolitan Administration (BMA), Re: Order of Temporary Closure of Premises (No. 25), available at: <http://www.prbangkok.com/th/post/view/MDY1cDBzNnM0NHlYb3Ezc3E2NnEyNDk0cDRyOTQzcjQ0MjQzMg==>

³¹ See the Announcement of the Bangkok Metropolitan Administration (BMA), Re: Citizens in Bangkok Metropolitan Area Shall Always Wear Sanitary or Fabric Face Masks outside Residence or Accommodation, available at: <http://www.prbangkok.com/th/post/view/MDY1cDBzNnM0NHlYb3Ezc3E2NnEyNDk0cDRyOTQzcjQwMzQzMg==>

³² See Section 1 and 5, Regulation Issued under Section 9 of the Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005) (No. 5), dated 1 May 2021, available at: http://web.krisdika.go.th/data/slideshow/File/5_3-13-5-63-EN.pdf

³³ For example, Khaosod English, ‘A Curfew by any Other Name? Nonthaburi ‘Asks’ Residents to Stay Home at Night’, 24 April 2021, available at: <https://www.khaosodenglish.com/news/crimecourtscalamity/2021/04/24/a-curfew-by-any-other-name-nonthaburi-asks-residents-to-stay-home-at-night/>

³⁴ For example, Prachuap Khiri Khan Provincial Order No. 3929/ 2021 regarding Measures to prevent and control the spread of Coronavirus disease 2019 (COVID-19) and the operating of government agencies, dated 19 April 2021, available at: http://www.prachuapkhirikhan.go.th/2018/files/com_news/2021-04_35517ee4d9330ca.pdf

³⁵ Post Today, ‘Wissanu Asked for Understanding for the Extension of the Emergency Decree, Will Amend the Communicable Disease Act Within One Year’, 1 July 2020, available at: <https://www.posttoday.com/politic/news/627368> (in Thai).

of Thailand's Ministry of Public Health and WHO further stated that: "the CDA was originally designed to support responses to small, localized, outbreaks. Due to this limitation in scope, there was a reliance on the Emergency Decree mechanism for health and non-health measures. As a result, the government also needed to repeatedly extend these short-term decrees".³⁶ While it is understandable that some necessary measures may need to involve authorities outside the public health sphere, this might best be achieved by amending the CDA in order to better equip those relevant authorities with enhanced responsibilities to implement necessary and proportionate measures in coordination with the public health authorities. This is because the CDA is broadly appropriate and is already being applied in controlling a fierce third wave of infections.

Notably, on 22 December 2020, the Cabinet already approved a draft amendment of the Communicable Diseases Act B.E.... ('Draft Act').³⁷ The draft was uploaded on the Ministry of Public Health's website and opened for public consultation between 10 to 28 April 2021, sometime after which it is expected to be sent to the Parliament.³⁸

The amendment provides for special measures upon the declaration of a "serious communicable disease"³⁹ and "in order to maintain public order, safety and security of the population or public interest, if it is found that there is a crisis caused by a serious communicable disease which cause or may cause serious and widespread danger to life, health or the livelihood of the people, and, if not address[ed], may cause a serious impact to the country, whether it is originated within or outside the Kingdom." Where in such cases the Prime Minister considers that special measures should "be imposed to prevent, control, stop, restore, or assist the people", the Prime Minister, with the approval of the Cabinet, may declare a "public health emergency" in Thailand or at certain areas of the Kingdom, "as necessary to address the situation". Such emergency shall be in force for the duration not exceeding three months. The Prime Minister upon the approval of the Council of Ministers will also have the power to declare the extension of duration of enforcement provided that each extension shall not exceed three months.⁴⁰

Under the Draft Act, the National Communicable Diseases Committee would have wide-ranging authority, including to propose action plans to monitor, prevent, control and treat the serious communicable disease to the Cabinet; to determine measures, procedures and conditions for travels within and into the country;⁴¹ and to assign tasks to be undertaken by provincial communicable disease committees.⁴²

The communicable disease control officer also has the authority to share certain data from the patients or suspected patients of the serious communicable disease, including persons in contact, for the purpose of treating and preventing the spread of the disease, while the National Communicable Diseases Committee may order the residents to install certain applications in their electronic devices. Such applications will warn their owners if there is any risk of contracting the disease.⁴³ Violators may be liable to a fine not exceeding 5,000

³⁶ Thailand's Ministry of Public Health and WHO, 'Joint Intra-Action Review of the Public Health Response to COVID-19 in Thailand', 20-24 July 2020, available at: <https://www.who.int/docs/default-source/searo/thailand/iar-covid19-en.pdf>

³⁷ National News Bureau of Thailand, 'Cabinet approves new Communicable Diseases Act amendment', 22 December 2020, available at: <https://thainews.prd.go.th/en/news/detail/TCATG201222203855264>.

³⁸ Department of Disease Control, 'Summary of the Outcomes of the Public Consultation on the Draft CDA which was Approved by the Council of State', 28 May 2021, available at: https://ddc.moph.go.th/uploads/ckeditor2//files/result_opinions.pdf

³⁹ The term is defined in section 44/1 of the Draft Act.

⁴⁰ Section 44/2, the Draft Act

⁴¹ The Draft Act states that the Committee cannot stop any Thai citizens from entering the Kingdom

⁴² Section 44/4, the Draft Act

⁴³ Section 44/9, the Draft Act

baht (USD\$ 160).⁴⁴ The Draft Act provides that all personal data collected cannot be used for any purpose other than monitoring, treating and preventing the spread of the disease, and for studying, researching or determining measures to prevent the future pandemic. It further provides that no personal information that may reveal the identity of its owner may be disclosed.⁴⁵ Violators may be liable to imprisonment for a term not exceeding six months or to a fine not exceeding 300,000 baht (USD\$ 9,628) or to both.⁴⁶

However, similar to the Emergency Decree, the Draft Act limits scrutiny by the courts, providing that “any regulation, notification, order, measure or an act that the National Communicable Diseases Committee determined or carried out ... [during the public health emergency] ... shall not be subject to the law on administrative procedures and the law on the establishment of Administrative Court and Administrative Court Procedure”. The Draft Act also excludes persons who are affected by the acts of communicable disease control officer in their surveillance, prevention or control of diseases from seeking compensation for the damage occurred to them. These sections risk violating the right to an effective remedy for alleged violations of human rights guaranteed under article 2 of the ICCPR, which will be described below in Part 4.

Delays to the amendment of this important legislation, which will be critical for ensuring the government’s effective response to the pandemic, are concerning. The CDA amendment should, we submit, ultimately replace the non-human rights complaint Emergency Decree. However, it will require a careful review to ensure compatibility with Thailand’s international legal obligations, including the right to privacy and the right to an effective remedy.

3. Emergency Decree Measures

Pursuant to section 9 of the Emergency Decree, the Prime Minister is given the power to issue certain regulations in the case of necessity “in order to remedy and promptly resolve an emergency situation or to prevent the worsening of [the emergency] situation”. In response to the COVID-19 pandemic, the restrictions that were issued pursuant to section 9 include:

- a) prohibition of “assembly, carrying out of activities, or gathering at any place that is crowded, or to commit any act which may cause unrest in areas determined by the Chief Officer responsible for remedying the emergency situation on matters relating to security” during certain periods between 2020 and 2021;⁴⁷
- b) prohibition of presentation or dissemination of information through any media “featuring content on the COVID-19 which is false or may instigate fear among the people, or to intentionally distort information which causes misunderstanding of the emergency situation to the extent of affecting public order or the good morals of people”;⁴⁸ and

⁴⁴ Section 51, the Draft Act

⁴⁵ Section 44/9, the Draft Act

⁴⁶ Section 62, the Draft Act

⁴⁷ The gathering prohibition was initially imposed on 25 March 2020 under Clause 5, the Regulation Issued under Section 9 of the Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005) (No. 1), available at: https://image.mfa.go.th/mfa/0/mkKfL2iULZ/migrate_directory/news3-20200329-164122-910029.pdf (“Regulation (No.1)”). It was gradually relaxed, certain types of gatherings were allowed under the Regulation Issued under Section 9 of the Emergency Decree (No. 5, 7, 9 and 10) before eventually lifted on 31 July 2020 by virtue of the Regulation Issued under Section 9 of the Emergency Decree (No.13). However, gathering prohibition was reimposed again on 25 December 2020 by Clause 3 of the Regulation Issued under Section 9 of the Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005) (No.15). Translations of the above noted Regulations are available at: <https://www.mfa.go.th/en/content-category/press-release-and-information-2?p=1>.

⁴⁸ Clause 6, Regulation (No. 1)

- c) closure of point of entry into the Kingdom whether by air, water, or land and additional requirements imposed on Thai nationals returning to the Kingdom.⁴⁹

These restrictions serve to limit, respectively:

- freedom of movement, protected under ICCPR article 12, through the imposition of a restrictions imposed on the Thai returnees;
- freedom of assembly, protected under ICCPR article 21; and
- freedom of expression and information, protected under ICCPR article 19

The ICJ reiterates its concerns, particularly in respect to section 9, which can be used by the Prime Minister under the current "emergency situation", to allow vague and overbroad restrictions on the right to freedom of movement, expression and assembly.⁵⁰

Vaguely-defined measures

Two clearly vague and overbroad measures are the bans on dissemination of "intentionally distort[ed] information which causes misunderstanding of the emergency situation to the extent of affecting public order or the good morals of people" and the ban on "any act which may cause unrest in areas determined by the Chief Officer responsible for remedying the emergency situation on matters relating to security." The mere assertion language of "public order", "good morals", "unrest" and "security" has not been accompanied by a clear delineation of what these would entail in the specific context of the situation targeted by these measures. This is required under the principles of legality and legitimacy in accordance with articles 19(3) and 21 of the ICCPR.⁵¹

Critically, these provisions and the manner they are implemented appear to be inconsistent with the principles of proportionality and necessity in accordance with articles 12, 19 and 21 of the ICCPR, and not strictly necessary to meet a specific threat to the life of the nation in accordance with article 4 of the ICCPR.

Disproportionate punishment

Violating the Emergency Decree measures may incur imprisonment for a term not exceeding two years or a fine of up to 40,000 baht (approx. USD\$1,283), or both.⁵² In the context of COVID-19, they also extend far beyond the scope of public health measures designed to secure the rights to life and health.

According to the Court of Justice, in April 2020 alone, there were reports that at least 23,628 people faced criminal prosecution in relation to the violations of emergency decree enacted to stop the spread of COVID-19.⁵³

⁴⁹ Clause 3, Regulation (No. 1)

⁵⁰ ICJ 2020 Emergency Decree Briefing, at 16-20.

⁵¹ UN Human Rights Committee, 'General Comment No. 34', CCPR/C/GC/34, para 25; UN Human Rights Committee, 'General Comment No. 37', CCPR/C/GC/37, para 44. The UN Human Rights Committee has affirmed that laws imposing restrictions on the rights to expression, information, association and assembly must be formulated with enough precision to enable individuals to ascertain and adjust their conduct and not confer unfettered or sweeping discretion to those implementing the laws.

⁵² Section 18, Emergency Decree

⁵³ Information and Public Relations Division, Court of Justice, 'Secretary of the Court of Justice Revealed Statistic of Cases of Emergency Decree's Violator Between 1-15 May 2020', 16 May 2020, available at: <https://iprd.coj.go.th/th/content/page/index/id/193199> (in Thai)

Restrictions imposed on Thai nationals for entering into the Kingdom

In response to COVID-19, several new border rules have also been imposed, including the rule that require Thai nationals to apply for a certificate of entry into the Kingdom from the Royal Thai Embassy or the Royal Thai Consulate in their country of residence, and to have a medical certificate attesting that the traveller is fit to travel which issued no longer than 72 hours before travelling. This rule had effectively stranded many Thai citizens overseas during the early months of the pandemic and risks violating Article 12(4) of the ICCPR, that guarantees everyone's right to enter their own country. For example, in April 2020 it was reported that about 800 Thai workers are stranded in Malaysia's Kelantan state, unable to cross the border to Thailand because they have no money to pay for a fit-to-travel health certificate.⁵⁴

Assemblies

Regarding the ban on assembly which came into effect between the period of 26 March and 31 July 2020, and again on 25 December 2020 up until the time of writing, the ICJ has previously noted that in practice the provisions impose a blanket restriction on freedom of assembly by ordering a general ban on peaceful, public demonstrations, which is "presumptively disproportionate" and not "based on a differentiated or individualized assessment of the conduct of the participants and the assembly concerned".⁵⁵

The ban has been used by the Thai authorities with the inevitable and predictable effect of suppressing participation in public protest mostly aimed at the government. For example, the Emergency Decree was used against at least three anti-government protesters for organizing the demonstration at the Pathumwan Skywalk on 24 June 2020 to commemorate the 88th anniversary of the 1932 Siamese Revolution.⁵⁶ It was reported that the demonstration drew approximately 200-300 participants.⁵⁷ However, during this period, the government had already allowed several types of other large gatherings to be organized, including meetings, seminars, exhibitions, ceremonies, musical performances, concerts, as well as the organization of activities in hotels, theatres, meeting rooms, convention centres, exhibition centres, movie theatres or other places.⁵⁸

According to a leading Thai NGO, Thai Lawyers for Human Rights (TLHR), between 25 March 2020 and 29 April 2021, there have been some 145 cases in which a total of at least 492 protesters and activists were charged for violating the Emergency Decree in connection with the COVID-19 outbreak. The ICJ has seen no evidence to suggest that these political activities contributed to an increased spread of COVID-19, nor has there been any publicly presented by any State authorities.⁵⁹

⁵⁴ Bangkok Post, 'Hundreds of Thais stranded in Malaysia without health clearance', 20 April 2020, available at: <https://www.bangkokpost.com/thailand/general/1903600/hundreds-of-thais-stranded-in-malaysia-without-health-clearance>

⁵⁵ ICJ Emergency Decree Briefing, p. 18 – 19; UN Human Rights Committee, 'General Comment No. 37', CCPR/C/GC/37, paras. 36 – 38.

⁵⁶ Prachatai, 'Emergency Decree used against anti-government protesters despite authorities' claim, says TLHR', 29 August 2020, available at: <https://prachatai.com/english/node/8753>

⁵⁷ MOB Data Thailand, 'Read the Declaration of the People Party', available at: <https://www.mobdatathailand.org/case-file/1596462010698/> (in Thai).

⁵⁸ Clause 3, the Regulation Issued under Section 9 of the Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005) (No. 10), available at: https://image.mfa.go.th/mfa/0/mkKfL2iULZ/migrate_directory/news3-20200618-095925-060442.pdf

⁵⁹ In one case, Lampang provincial public prosecutor rendered a decision not to prosecute protesters who were charged with criminal offense for violating the emergency measures prohibiting gathering in a crowded space. The order was based on three reasons: (1) the gathering took place in an open space, protesters were wearing face masks and keeping distance from each other, the place of gathering was therefore not crowded; (2) the content of the speeches made during the gathering were critics to the government and were not seditious in character; and (3) during the time of the gathering, no local transmission of COVID-19 was found. See: TLHR, 'A look at non-prosecution order for case concerning

Dissemination of “false information”

Since the outbreak of the COVID-19 pandemic, numerous reports have emerged of individuals being arrested for allegedly sharing “false information” on social media in relation to the government’s response to the pandemic,⁶⁰ while the authorities failed to identify whether “false information” online was promulgated with ill intent or malice. Although the ICJ recognizes the necessity to combat the spread of false information online to protect public health during the time of uncertainties of a pandemic, this objective can and must be carried out using proportionate and less intrusive means than criminal sanctions and/or onerous fines. For example, timely, regular and clear rebuttals by the authorities on what they deem to be false information would have adequately advanced public health aims, while still respecting the rights to free expression and information.⁶¹

4. Limited scrutiny by the Courts

Irrespective of whether emergency measures that serve to limit or otherwise interfere with the enjoyment of human rights are undertaken pursuant to formal derogations or ordinary measure of limitation, they must necessarily be subject to judicial review.⁶² The UN Human Rights Committee has affirmed repeatedly that Courts should have the power to examine the lawfulness of the declaration of emergency and the measures taken during an emergency.⁶³ In addition, the right to an effective remedy for alleged violations of human rights under the Covenant, protected under article 2 of the ICCPR, must be available.⁶⁴ Indeed, judicial review functions take on increased importance in the context of public health emergencies such as COVID-19 where usual avenues for political engagement may be significantly curtailed by even necessary movement restrictions.

However, section 16 of the Emergency Decree explicitly excludes access to Administrative Courts. Administrative courts – having jurisdiction over any act by an official or agency who exercises administrative power – have also interpreted the Emergency Decree as preventing them from judicially reviewing measures that have been imposed pursuant to the Decree. For example, on 26 March 2020, an activist filed a petition with the Administrative Court demanding legal action against the Thai government for imposing a new border rule requiring Thai nationals to have letter issued by Thai embassies and health certificates to fly home as a measure to cope with COVID-19, which effectively stranded many Thai persons overseas.⁶⁵ On 2 April 2020,

violation of the emergency decree in Lampang province citing gathering in opened space, protesters wore facial mask and no virus infections found’, 25 April 2021, available at: <https://tlhr2014.com/archives/28755> (in Thai). <https://tlhr2014.com/archives/28755> (in Thai).

⁶⁰ For example, Bangkok Post, “Two held for sharing fake news on virus”, 30 January 2020, available at: <https://www.bangkokpost.com/thailand/general/1847099/two-held-for-sharing-fake-news-on-virus>; The Thaiger, “9 arrested for sharing “fake news” about Covid-19, government handouts”, 6 June 2020, available at: <https://thethaiger.com/hot-news/crime/9-arrested-for-sharing-fake-news-about-covid-19-government-handouts>

⁶¹ ICJ, ‘Southeast Asia: States must respect and protect rights in combating misinformation online relating to COVID-19’, 1 April 2020, available at: <https://www.icj.org/southeast-asia-states-must-respect-and-protect-rights-in-combating-misinformation-online-relating-to-covid-19/>.

⁶² ICJ, ‘Geneva Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis’, Principle 1; and ICJ, ‘Commentary to the Declaration’, 2011, at 1-15, available at: <https://www.icj.org/wp-content/uploads/2011/05/ICJ-genevadeclaration-publication-2011.pdf>

⁶³ For example, UN Human Rights Committee, ‘Concluding Observations on Colombia’, CCPR/C/79/Add. 76, para.38 and para. 23; UN Human Rights Committee, ‘Concluding Observations on Sri Lanka’, CCPR/C/79/Add.56, para. 13.

⁶⁴ General Comment No. 31, para 14 – 17.

⁶⁵ The Rule was initially imposed by the Civil Aviation Authority of Thailand in their Notification dated 19 March 2020, available at: <http://www.mfa.go.th/main/contents/files/news3-20200329-164122-910029.pdf>. On 25 March 2020, the Emergency Decree also imposed measure with the same requirements.

the Central Administrative Court refused to admit the case because, under the Emergency Decree, the imposed measures are not subject to review by the Court.⁶⁶

The activist therefore had to seek an alternate route and submitted the case to the Bangkok Civil Court. Indeed, in June 2010, when asked to adjudicate whether the regulation excluding access to the Administrative Court under Section 16 was constitutional or not, the Constitutional Court confirmed the constitutionality of such regulation and stated that “a person injured [from the exercise of the emergency power] could bring their case to the civil courts”.⁶⁷ In February 2014, the Civil Court also made a decision barring the government from enforcing some of the regulations issued under the Emergency Decree against the anti-government protesters because they were in violation of demonstrators' rights.⁶⁸ However, on 5 April 2020, Bangkok Civil Court dismissed the above case on the basis that the Order was issued by the Prime Minister with whom such power under the Emergency Decree is vested.⁶⁹ This inconsistency has brought about uncertainty in regard to the ability of the courts to scrutinize the emergency measures and the rights to access to remedies for people affected by such measures.

5. Legal Impunity from Prosecution

In respect of human rights violations amounting to gross human rights violations or crimes under international law, States have an obligation to conduct prompt, effective and thorough, independent, and impartial, and transparent investigations and bring those responsible to justice in fair trials. This obligation is provided for in the ICCPR,⁷⁰ the Convention against Torture (article 7), the Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)⁷¹ and is detailed in the UN Updated Set of Principles for the protection and promotion of human rights through action to combat impunity. It applies particularly to torture and other ill-treatment, enforced disappearance, extrajudicial killings, among other serious crimes.⁷² For a detailed exposition of this right see ICJ's Guide on the right to remedy and reparation.⁷³

Thailand's Emergency Decree purports to severely limit the accountability of any civilian or military official exercising powers during an emergency. Section 17 provides specific immunity

⁶⁶ BangkokbizNews, 'Central Administrative Court Rejected the Petition about Fit to Fly Announcement to Combat COVID-19' (in Thai), 21 April 2020, available at: <https://www.bangkokbiznews.com/news/detail/874190> (in Thai). Notably, on 12 December 2020, the Supreme Administrative Court overturned the decision of its lower court and admitted the case. The Supreme Administrative Court pointed out that the plaintiff challenged the Rule of the Civil Aviation Authority of Thailand ('CAT'), while the Emergency Decree later imposed the same measure, but the disputed regulation is the CAT rule, therefore, the case is not subject to section 16 of the Emergency Decree.

⁶⁷ Constitutional Court, 'Summary of the Decision No. 9/2553', 9 June 2010, available at: https://english.constitutionalcourt.or.th/occ_web/download/article/file_import/center-law9_53.pdf (in Thai).

⁶⁸ Bangkok Post, 'Court rules to protect protesters', 20 February 2014, available at: <https://www.bangkokpost.com/thailand/politics/395975/court-rules-to-protect-protesters>

⁶⁹ Thai Post, 'Civil Court Dismissed Case, State can Asked for Fit to Fly', 5 April 2020, available at: <https://www.thaipost.net/main/detail/62089>. (in Thai)

⁷⁰ ICCPR's Article 2(3), as clarified by UN Human Rights Committee, 'General Comment No. 31: The Nature of the General Obligations Imposed on State Parties to the Covenant', CCPR/C/21/Rev.1/Add.13, May 2004, para. 18, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.13&Lang=en ('General Comment No. 31')

⁷¹ Available at: <https://www.ohchr.org/Documents/Publications/MinnesotaProtocol.pdf>

⁷² General Comment No. 31, para. 18. With respect to extrajudicial killings, see also Principle 8, United Nations Basic Principles on the Use of Force and Firearms: "Exceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles.", available at: <https://www.un.org/ruleoflaw/files/BASICP~3.PDF>.

⁷³ ICJ, 'The Right to a Remedy and Reparation for Gross Human Rights Violations', 2018, available at: <https://www.icj.org/wp-content/uploads/2018/11/Universal-Right-to-a-Remedy-Publications-Reports-Practitioners-Guides-2018-ENG.pdf>.

from civil, criminal or disciplinary liability for certain officials implementing powers and duties under the Emergency Decree, where those acts are performed in good faith, are non-discriminatory and not unreasonable or exceeding the necessity of circumstances. It, however, allows the possibility that victims of wrongful acts under the Decree may petition the authorities for compensation.

While the right to compensation for wrongful acts by governmental agencies reaffirms, in part, the right to an effective remedy and reparation, section 17 clearly seeks to limit the accountability of those carrying out responsibilities under emergency laws and regulations by providing a form of legal immunity.⁷⁴

6. Recommendations

To ensure that all measures adopted by Thailand in response to COVID-19 are clearly aimed to respect, protect and fulfil its obligations in relation to the rights to life and the right to health and its obligations under international human rights law, the ICJ therefore recommends the following:

1. End the use of Emergency Decree as a basis to bring criminal proceedings against persons for simply exercising their rights to freedom of movement, expression and assembly as guaranteed under international and Thai law;
2. Make clear that Thailand is not derogating from any of its obligations in accordance with the derogation provisions under Article 4 of the ICCPR without informing other States Parties to the ICCPR;
3. Should measures of derogations pursuant to article 4 be sought in the future, ensure that derogating measures may only limit the scope of other rights to the extent strictly necessary, limited in duration, and proportionate to the existing specific threats, but they may not suspend the applicability of any right in its entirety;
4. Repeal or amend provisions of the Emergency Decree so as to ensure its compliance with Thailand's international legal obligations, including:
 - to ensure that any limitations or restrictions on the exercise of internationally guaranteed rights are non-discriminatory, limited in duration, strictly necessary, and proportionate to the existing specific threats;
 - to avoid exercising the power under the provisions allowing vague and broad restrictions on the right to freedom of movement, expression and assembly;
 - to ensure that the regulations, notifications and actions of officials exercising emergency powers can be reviewed by the courts, including administrative courts, and ensure the affected persons' right to access to an effective remedy;
 - to ensure that all officials responsible for implementing the law should not enjoy unqualified legal immunity for any criminal acts carried out in the exercise of their responsibilities; and
5. Amend the CDA without delay, and use it as the main legal framework to address the COVID-19 pandemic, in a manner consistent with Thailand's international human rights obligations.

⁷⁴ In 2005, the UN Human Rights Committee, during the examination of Thailand's first periodic report under Article 40 of the ICCPR, indicated that it was "especially concerned that the Decree provides for officials enforcing the state of emergency to be exempt from legal and disciplinary actions, thus exacerbating the problem of impunity." See: UN Human Rights Committee, 'Concluding observations of the Human Rights Committee: Thailand', CCPR/CO/84/THA, 8 July 2005, para 13.

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