



8 November 2022

Re: Thai officials must drop all the ongoing prosecutions under the Emergency Decree

Dear Honorable Ambassador,

We, the undersigned non-governmental organizations, are writing to express our serious concern regarding the ongoing impact of the implementation of the Emergency Decree on Public Administration in Emergency Situation B.E. 2548 (“Emergency Decree”) in response to the Covid-19 pandemic in Thailand. We are troubled by reports of the continuing prosecution of individuals charged under the Emergency Decree, despite the end of the declaration of the “emergency situation” in all areas of Thailand as well as the effect of regulations, announcements, and orders issued thereunder.

We urge you to call on Thailand to cease all intimidation, harassment and prosecution of all individuals solely for peacefully exercising their rights to freedom of expression, information, peaceful assembly, movement, and public participation through the abuse of laws and administrative regulations, and to immediately drop all charges, issue non-prosecution orders, and refrain from further charges, against any individual, including those facing prosecution solely for peacefully exercising their human rights for alleged violation of the Emergency Decree.

Purportedly to combat the Covid-19 outbreak, Thailand had been operating under a state of emergency since 26 March 2020,¹ with the executive government having extended the declaration of an emergency situation 19 times since then. During this period, a series of regulations containing several Emergency Decree measures have been periodically announced pursuant to Emergency Decree powers. These include several vague and overbroad restrictions on the rights to freedom of movement, expression, peaceful assembly and public participation.

On 29 September 2022, Prime Minister Gen. Prayuth Chan-o-cha issued an announcement titled “Repeal of the Declaration of Emergency Situations in the Kingdom and other Relevant Announcements, Regulations, and Orders” (hereinafter “Announcement”). This Announcement—which came into force on 1 October 2022—effectively repealed the declaration of an emergency situation prompted by the spread of Covid-19 around the country, and at least 47 regulations, announcements and/or orders issued under the Emergency Decree, as well as announcements and orders made under other specific laws with the stated intent of combatting the outbreak. In total, the Emergency Decree was in force for more than two-and-a-half years.

Over the past two years, there has been numerous political and other protests. Among the demands typically made by political protesters are: (1) the resignation of the prime minister and a new election; (2) amendments to the 2017 Constitution; (3) no retaliation against or prosecution of activists peacefully exercising their human rights; and (4) reforms to the institution of the monarchy. The rise of multiple political groups created challenges in balancing competing objectives, between controlling the spread of Covid-19 and respecting and protecting the human rights of everyone, including to freedom of peaceful assembly.

We have reviewed, assessed and made recommendations in relation to the implementation of Thailand’s Emergency Decree in response to the Covid-19 outbreak. Our analysis has revealed that a number of the legal and practical responses undertaken by the Thai authorities purportedly to address public emergencies in the past two years have not complied with rule of law principles and international legal obligations.² In particular, bringing criminal charges against and prosecuting persons under the Emergency Decree for simply exercising their rights to expression and peaceful assembly could not be considered necessary and proportionate even during the pandemic; moreover, it did not adhere to the principle of legality as required by international human rights law, and was inconsistent with the legitimate purpose of ensuring the protection of public health.

¹ Declaration of an Emergency Situation in all areas of the Kingdom of Thailand, available at: https://interaffairs.psu.ac.th/images/download/covid/Declaration_of_Emergency_in_Thailand.pdf

² ‘*The Implementation of the Emergency Decree in Response to the COVID-19 Pandemic in Thailand - A Brief Paper*’, International Commission of Jurists (July 2021), https://www.icj.org/wp-content/uploads/2021/07/FINAL_APP270601_TFH_Draft_COVID_19_ED_LEGAL_BRIEFING_proofread.pdf (“ICJ Briefing on the Emergency Decree in Response to the COVID-19”)

Emergency Decree Cases

High number of cases corresponds with periods of political movements

Based on information from Thai Lawyers for Human Rights (TLHR),³ from May 2020⁴ to September 2022, at least 1,468 individuals in 661 cases have been charged with and/or prosecuted under the Emergency Decree in incidents arising out of public protests ("Emergency Decree cases").⁵ Out of them, at least 241 individuals in 157 cases are children (i.e., under the age of 18).

Criminal proceedings under the Emergency Decree make up the highest number of individuals and cases with respect to political trials in the past two years, followed by lèse-majesté cases under Section 112 of the Criminal Code.

Emergency Decree cases can be categorized as follows:

- From 26 March 2020 to 18 July 2020, which is the period before the Free Youth protest,⁶ there were seven cases;
- From 15 to 22 October 2020 during which time the government declared a state of "severe emergency" in response to political demonstrations in 2020, there were 35 cases;⁷
- There are 88 cases resulting from violations of the curfew, which was imposed in accordance with the Emergency Decree. Most of these cases took place during the period of the Din Daeng protest from August to October 2021 and are accompanied by charges under the Communicable Disease Act B.E. 2558 (2015);
- There are 109 "car mob" cases —most of which occurred between July and October 2021— where individuals allegedly drove their vehicles to participate in protests at different locations in the country;⁸ and

³ 'กันยายน 65: จำนวนผู้ถูกดำเนินคดีทางการเมืองยอดรวมอย่างน้อย 1,860 คน ใน 1,139 คดี', Thai Lawyers for Human Rights (4 October 2022), <https://tlhr2014.com/archives/49210>

⁴ This date marks the period when protesters started to conduct political activities again after a state of emergency was declared in March 2020.

⁵ Many individuals are prosecuted in multiple cases.

⁶ Pro-democracy protests, led by students from the Free Youth group and the Student Union of Thailand.

⁷ For the legal briefing analyzing the implementation of Thailand's Emergency Decree on Public Administration in Emergency Situation B.E. 2548 (2005) in response to protests in 2020, see: 'Thailand: lifting of serious emergency situation in Bangkok is welcome, but emergency laws remain deeply problematic – ICJ Briefing Paper', International Commission of Jurists (27 October 2020), <https://www.icj.org/thailand-lifting-of-serious-emergency-situation-in-bangkok-is-welcome-but-emergency-laws-remain-deeply-problematic-icj-briefing-paper/>.

⁸ '1 ปี ความมืดมน ไร้ประยุทธ์ สรุปคดีทั่วไทย ไม่น้อยกว่า 109 คดี ศาลยกฟ้องไป 5 คดี อัยการสั่งไม่ฟ้อง 4 คดี', Thai Lawyers for Human Rights (July 3, 2022), <https://tlhr2014.com/archives/45616>.

- There are 41 Emergency Decree cases where individuals were also charged under the Public Assembly Act B.E. 2558 (2015). The police brought two charges—violations of Emergency Decree and Public Assembly Act—against individuals simultaneously despite the fact that the Public Assembly Act is expressly not applicable in times of state of emergency. Prosecutors should immediately drop the Public Assembly Act charges in these 41 cases for that reason.

In at least 41 of the 661 Emergency Decree cases, the defendants “confessed” their guilt at the trial stage. In most of these cases, the court sentenced the defendants to a fine or suspended their sentences. Public prosecutors issued non-prosecution orders in at least 23 cases. Thai courts acquitted the defendants in 28 cases. Thai courts convicted the defendants under the Emergency Decree in eight cases. Thus far, only 87 cases have been concluded while more than 574 cases are still at the investigation, trial or appeal stages.⁹

During the above-noted periods, laws were enforced in an incoherent manner, as exemplified by the numerous regulations issued under the Decree at different times. Such confusion demonstrate the impropriety of reliance on the Emergency Decree to deal with a public health emergency. For instance, a severe state of emergency was declared in response to political demonstrations and implemented alongside with the existing state of emergency declared with the stated view of controlling Covid-19. At times, regulations issued under the Emergency Decree, which are secondary legislation that rank hierarchically lower than primary legislation, appeared aimed at overriding primary laws. The regulations provided that the Public Assembly Act B.E. 2558 (2015) was to be applied despite the Public Assembly Act clearly stating that it is not to be used during a state of emergency.¹⁰ In April 2022, the Lopburi District Court decided that the government issued an unlawful Emergency Decree measure—i.e. Announcement of the Chief Official Responsible for Remedy the Emergency Situation in Relation to the Security Matters (No. 9), dated 3 August 2021, Regarding the Prohibition of Assembly, Carrying out of Activities, or Gathering that Risk Spreading Covid-19—because it was endorsed by the authority without the power to do so.¹¹

574 cases are still ongoing despite the end of the Emergency Decree

The repeal of the Emergency Decree, as well as the regulations, announcements, and orders issued thereunder, have not automatically resulted in the dismissal of cases where individuals faced criminal prosecution in relation to the violations of Emergency Decree measures enacted with the stated view of stopping the spread of Covid-19.

⁹ ‘แม่ยكلีกสภานการณ์อุกเฉิน แต่คดี พ.ร.ก.อุกเฉินฯ จากการชุมนุม กว่า 574 คดี ยังต้องต่อสู้ต่อ’, Thai Lawyers for Human Rights (October 1, 2022), <https://tlhr2014.com/archives/49076>.

¹⁰ ‘1 ปี สภานการณ์อุกเฉินรับมือโควิด ผลกระทบต่อเสรีภาพในการชุมนุม’, Thai Lawyers for Human Rights (March 26, 2021), <https://tlhr2014.com/archives/27551>.

¹¹ ‘เบิดคำพากษายกฟ้องคดีคาร์ม่อนลพบุรี ชี้การชุมนุมยังไม่ถึงกับแอลด์เติมพันที่ ประกาศ ผบ.ทสส ไม่มีผลใช้บังคับ ออกเกินอำนาจ’, Thai Lawyers for Human Rights (May 9, 2022), <https://tlhr2014.com/archives/43412>.

Pursuant to Section 18 of the Emergency Decree, violating the Decree measures may incur imprisonment for a term not exceeding two years or a fine of up to 40,000 baht (approx. USD\$1,070), or both.

Five hundred and seventy-four cases, or 86% of all Emergency Decree cases (354 at investigation stage, 190 at trial stage, and 30 at appeal stage), are still ongoing, despite the fact that the spread of Covid-19—the purported reason for declaring a state of emergency in the first place—is now under control, and the use of the Emergency Decree has formally ended.

We consider that the Thai authorities must immediately drop all charges, issue non-prosecution orders, and refrain from further charges, against those facing prosecution for alleged violation of the repealed Emergency Decree for the following reasons:

Some measures adopted are inconsistent with Thailand's obligations under international human rights law

The restrictions that were issued pursuant to the Emergency Decree include the imposition of night-time curfew and the prohibition of “assembly, carrying out of activities, or gathering at any place that is crowded, or to commit any act which may cause unrest”.

Under international human rights law, and particularly the International Covenant on Civil and Political Rights (ICCPR), to which Thailand is a party, human rights and fundamental freedoms may be limited only under very narrow conditions and circumstances and for a restricted set of purposes, including to address a public health emergency. Any such limitations must be strictly necessary and proportionate to their purpose and be non-discriminatory in purpose and effect.

However, the above noted Emergency Decree measures and the manner they are applied do not comply with these conditions. They serve to limit freedom of peaceful assembly, protected under Article 21 of the ICCPR; freedom of expression and information, protected under Article 19 of the ICCPR; freedom of movement, protected under Article 12 of the ICCPR; and the right to take part in the conduct of public affairs, protected under Article 25 of the ICCPR. They have not been accompanied by a clear delineation of what they would entail in the specific context of the situation targeted by these measures, as required under the principles of legality in accordance with the ICCPR. In the context of Covid-19, the imposition of criminal punishment against the violators of the Decree also extends far beyond the scope of public health measures strictly necessary to protect the rights to life and health, constituting a disproportionate punishment.¹² There has been no evidence to suggest that any of the political activities targeted under the Emergency Decree contributed to an increased spread of Covid-19, nor has there appeared to be evidence publicly presented by any State authorities.

Pursuant to Article 4 of the ICCPR, where there is a public emergency so severe that it threatens the life of the nation, certain ICCPR rights may be subject to necessary and proportionate

¹² See ICJ Briefing on the Emergency Decree in Response to the COVID-19

derogations, but this may only be done to the extent strictly required by the exigencies of the situation. However, despite the relatively low infection rates during several periods, the Thai government has failed to explain the reason why it deemed necessary to resort to the Emergency Decree powers as required under Article 4 of the ICCPR as a condition for derogation.¹³ In addition, the emergency situation was notified by the Thai government to the UN Secretary-General effective from 26 March to 30 June 2020.¹⁴ 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 2020.¹⁵

Against individuals exercising their rights to freedom of expression and peaceful assembly

The rights to freedom of expression, peaceful assembly, movement and public participation are also guaranteed by the Constitution of the Kingdom of Thailand B.E. 2560 (2017). Among others, Section 34 guarantees a person's right to "enjoy the liberty to express opinions, make speeches, write, print, publicize and express by other means;" and Section 44 ensures "a person shall enjoy the liberty to assemble peacefully and without arms."

Considering the number of activists charged for violating the Emergency Decree, including violations of curfew and the prohibition on public assembly, it appears that emergency measures were adopted in their broad terms at least in part not to address a real public health emergency, but rather for other purposes, such as to target political activists who were exercising their rights to freedom of expression, public participation and peaceful assembly.

Based on the TLHR's statistics on Emergency Decree cases,¹⁶ public prosecutors issued non-prosecution orders in 23 cases, and the court acquitted the defendants in 28 cases. The justifications given by the public prosecutors were varied and included: there was insufficient evidence; the protest was not congested; and/or protesters had the right to peacefully assemble. One reason the court gave for acquitting the defendants is that to assemble in public is to exercise the right protected under the Constitution. Notwithstanding these acquittals, the fact that such criminal proceedings were brought against the activists in the first place contributed to their fear or exhaustion, put an unnecessary burden and had a "chilling effect" on them, and discouraged the exercise of human rights as far as the individual activists were concerned and more broadly within the general public.

¹³ *Ibid.*

¹⁴ Thailand's Notification under Article 4(3), C.N.194.2020. TREATIES-IV.4 (Depositary Notification), 4 June 2020, <https://treaties.un.org/doc/Publication/CN/2020/CN.194.2020-Eng.pdf>.

¹⁵ See ICJ Briefing on the Emergency Decree in Response to the COVID-19

¹⁶ 'แม้ยกเลิกสถานการณ์ฉุกเฉิน แต่คดี พ.ร.ก. ฉุกเฉินฯ จากการชุมนุม กว่า 574 คดี ยังต้องต่อสู้ต่อ', Thai Lawyers for Human Rights (October 1, 2022), <https://tlhr2014.com/archives/49076>.

Impose an unnecessary burden on the justice system resources

The prosecution of the Emergency Decree cases put an undue burden on the justice system and thereby has effectively hobbled the administration of justice in the country. In the past two years and a half, only 87 out of 661 Emergency Decree cases have been concluded. More than 50% of the cases (i.e., 354 cases) are still at the investigation stage. To prosecute such cases, the Thai justice system must utilize a significant amount of its resources, including financial, human, and time resources, for conduct that is no longer illegal following the adoption of the Announcement. Doing so would divert the State's resources from prosecuting other ordinary and essential judicial matters.

Recommendations

We respectfully call on your government to urge the Thai government to immediately cease the intimidation, harassment or prosecution of all individuals solely for peacefully exercising their rights to freedom of expression, information, and peaceful assembly.

Thai authorities should immediately drop all charges, cease investigation of these cases, issue non-prosecution orders, withdraw cases or their appeals before the court, desist from appealing the acquittals, including on the basis that the underlying conduct is no longer illegal, and refrain from bringing further charges, against individuals facing prosecution for alleged violation of the Emergency Decree. Alternatively, the prosecutor should exercise their power under Section 21 of the Public Prosecutor Organization and Public Prosecutors Act B.E. 2553 (2010), where a case may be referred to the attorney general should they believe prosecution is not in the public interest or would affect the safety, security, or important interests of the nation. The attorney general, in turn, has the power not to indict or appeal, as well as to withdraw cases.

Additionally, the Thai authorities should consider quashing the convictions of individuals under the Emergency Decree. The Thai authorities should also ensure and facilitate equal access to prompt, accessible and effective remedies and reparation for all individuals who have had their rights violated as a result of intimidation, harassment or prosecution simply for the exercise of human rights.

Sincerely,

ALTSEAN-Burma

Amnesty International

ARTICLE 19

ASEAN Parliamentarians for Human Rights (APHR)

Asia Democracy Network (ADN)

Asian Cultural Forum on Development Foundation (ACFOD)

Asian Network for Free Elections (ANFREL)
CIVICUS: World Alliance for Citizen Participation
Community Resource Centre
Cross Cultural Foundation (CrCF)
ENLAWTHAI Foundation
Human Rights and Development Foundation (HRDF)
Human Rights Lawyers Association (HRLA)
Human Rights Watch
iLAW
International Commission of Jurists (ICJ)
International Federation for Human Rights (FIDH)
Lawyers' Rights Watch Canada
Manushya Foundation
People's Empowerment Foundation (PEF)
Protection International
Thai Lawyers for Human Rights (TLHR)
The Asian Forum for Human Rights and Development (FORUM-ASIA)
Union for Civil Liberty (UCL)