

ARTICLE 19's Submission to the UN Universal Periodic Review of the Kingdom of Thailand

Twelfth Session of the Working Group of the Human Rights Council, October 2011

Executive summary

1. ARTICLE 19: Global Campaign for Free Expression is a non-governmental human rights organisation that works globally to promote and protect freedom of expression and information. ARTICLE 19 was founded in 1987 and has observer status with ECOSOC. ARTICLE 19 first worked on Thailand in 2004 and has since supported a media reform advocate prosecuted for defamation, published a baseline study on *Freedom of Expression and the Media: Thailand*, and produced a report on the impacts of defamation on freedom of expression in Thailand, among others.
2. Given the expertise and scope of activities of ARTICLE 19, this submission focuses on Thailand's compliance with its international human rights obligations in protecting the right to freedom of expression and right to freedom of information. Thailand is a party to the ICCPR. The new 2007 Thai Constitution provides a series of protections for freedom of expression and information, including a whistleblower protection (Article 62), which makes Thailand one of the small handful of countries that protects those who provide information in suspicion of the conduct of government in their constitutions. In practice however, the Thai government falls short of meeting its obligations. In particular, since 2006 following the political unrest, the government has tightened its grip on freedom of expression in broadcast, internet and other mediums, and has used a regime of legislations to stifle political debates. The major issues of ARTICLE 19's concern are:
 - Government **use of emergency powers** to suppress freedom of expression;
 - Restrictions on **the right to freedom of expression on the internet**;
 - Use of **defamation and lèse-majesté laws** to silence critics;
 - Failure of the government to effectively implement the **Official Information Act**;
 - **Control of media** by the military and government.

Use of emergency powers to suppress freedom of expression

3. On 7 April 2010, the government declared a state of emergency, under the Emergency Decree on Public Administration in Emergency Situation 2005 ("Emergency Decree"), in 24 provinces including Bangkok, following violent clashes between anti-government groups and state security forces. The state of emergency was gradually lifted in most locations except Bangkok and three surrounding provinces, which finally had their emergency status lifted on 22 December after eight months. Nevertheless the Emergency Decree has been replaced by the Internal Security Act (ISA), which allows the government to hold suspects without charge for up to seven days, ban gatherings, and impose censorship without having to resort to judicial procedures.
4. ARTICLE 19 has since criticized this action for the following reasons:
 - The **Emergency Decree** (art. 9 and 11) allows for very broad and discretionary powers of the government in violation of international legal standards: such as to detain suspects without charge, prohibit public gatherings or any act which may cause unrest, and impose censorship on any means of communication that has the potential to incite fear, affect state security, public order and good moral. Although the Emergency Decree limits the emergency situation to three months, it permits extensions by the Prime Minister, with the approval of the Council of Ministers, provided that each extension does not exceed three months. The lack of a clear

requirement for justification of an emergency, gives the government's unchecked power to declare an emergency and restrict free expression at any time and over extended periods of time.

- The emergency powers have been abused in the respective period to target journalists and shut down media channels such as websites, community radios, satellite and online television stations, newspapers and magazines. For example:
 - Two foreign journalists (Hiro Muramoto and Fabio Polenghi) were killed and at least two Thai and three foreign journalists injured during the violent crackdown on protests in April and May 2010. No perpetrators have been brought to justice for the killings so far.
 - On 3 October 2010, Amornwan Charoenkij was arrested for selling slippers printed with the message "People died at Ratchaprasong," referring to the site of the crackdown on anti-government protests, with photos of Prime Minister Abhisit and Deputy Prime Minister Suthep Thaugsuban.
 - On 19 November 2010, ahead of the UDD commemoration of the Ratchaprasong crackdown, a ban was imposed on the sale, distribution, possession and display of rally materials such as shirts, photographs, illustrations, and printed texts, with punishments of two years in prison and a maximum fine of 40,000 baht (US\$1,335).
 - The government has detained without charge UDD members and their supporters, in unofficial detention sites including military camps, which are more prone to abuse.

Restrictions on the right to freedom of expression on the internet

5. The censorship of the internet and other communications networks in Thailand is of major concern. In particular, the 2007 Computer Crime Act is used aggressively to limit online speech. In addition, other legislation including the Emergency Decree and Penal Code, and informal pressure is used to limit access to content on the internet without adequate legal authority. *Lèse-majesté* is often used as pretence by authorities to limit public comment. Tens of thousands of websites are being blocked, many without any judicial authority.
6. The **Computer Crime Act (CCA)**, adopted on 18 July 2007, severely undermines the right to freely provide and receive information on the internet, and contradicts with Thailand's domestic and international freedom of expression obligations:
 - *Overbroad crimes.* Articles 14-16 of the CCA criminalize publishing information on public computers. The provisions are vague and overbroad and allow for the subjective interpretation by state officials. Between July 2007 to July 2010, there were at least 185 reported cases under the CCA, of which 128 were under Articles 14-16. The offences include providing "false computer data" which would "cause damage to the 3rd party" (art. 14.1), or "damage the county's security or cause public panic" (art. 14.2), an "offense against the Kingdom's security" (14.3) or "of a pornographic nature" (14.4). None of these crimes is defined further. It is also an offense to forward information of this type if it is "already known" to be one of the above categories. (14.5)
 - *Liability of website hosts.* Article 15 of the CCA imposes liability on internet service providers (ISPs) for their users' activities. While it states that liability should only be imposed when the host is acting "affirmatively", in practice, its application has been one of strict liability in violation of international standards. In a case currently under trial, Chiranuch Premchaiporn, the editor of the news website *Prachatai*, has been charged under these provisions for anti-monarchy comments made on the site by anonymous visitors. Despite her immediate cooperation with the authorities to remove the problematic remarks, she is facing up to 50 years of imprisonment if found guilty.
 - *Edited Pictures.* Article 16 prohibits publishing modified pictures, which could "impair a 3rd party's reputation" or cause the 3rd party to be "isolated, disgusted or embarrassed". This

effectively bans the publishing online of any critical photographs as it prohibits standard photographic techniques such as cropping and enhancing.

- *Blocking of websites.* The overbroad blocking of websites in Thailand is endemic. Websites are being blocked often without any court authority, not based on harm but on subjective, unchallenging decisions by officials acting in secret. Article 20 of the CCA allows authorities to petition a court to block access to websites. There have been at least 117 court orders issued since the promulgation of the CCA. At least 74,686 sites and pages have been blocked. The Emergency Decree (art. 9.3) imposed in many provinces since April 2010 is also used to block websites. The Centre for the Resolution of the Emergency Situation (CRES) has blocked an additional tens of thousands of sites without a court order. No finding of illegality is required as is under the CCA. In addition, state officials often block websites using other methods, such as sending official letters requesting cooperation from ISPs, without any legal authority. Further provisions grant the Ministry of Information and Communication Technology (MICT) discretionary powers to block or halt the dissemination of computer data related to an offence against the royal family under Article 112 of the Penal Code.
- *Surveillance of users not suspected of a crime.* Article 16 requires ISPs, cybercafés etc. to retain information about all users for 90 days regardless of whether they have been considered to commit a crime. Regulations issued in 2008 set out powers. Article 18 of the CCA gives authorities strong powers to be able to seize computers and data. Three of the sections, including demanding traffic data from ISPs, do not require a court order. This is a violation of both the Thai Constitution and international law protecting personal life and data and has an additional chilling effect on freedom of expression.

Use of defamation and *lèse-majesté* laws to silence critics

7. Powerful elites, companies and politicians frequently use both **criminal and civil defamation** to intimidate, bankrupt and imprison their critics. Defamation is a criminal offence under the 1956 **Penal Code**, amended in 2003. Contrary to international standards, it does not prohibit public bodies from initiating defamation cases, or requires public figures to be more tolerant of criticism than ordinary citizens. ARTICLE 19 has long argued that criminal defamation constitutes a disproportionate interference to the guarantee of freedom of expression.
8. In addition under the **Civil and Commercial Code**, no limit is set on the compensation for defamation, leaving it entirely to the discretion of the court. In recent years, big corporations - including Picnic Corporation and Tesco Lotus (local branch of the U.K.-based company Tesco) - have sought exorbitant damage claims (as high as hundreds of millions of US dollars) for comments made in the media. Although the courts rarely grant awards as large as those claimed, this strategy works effectively to frighten defendants into settling the disputes through out-of-court negotiations. Major businesses have also used advertising to pressure newspapers to settling defamation cases.
9. Freedom of expression is further compromised through the ***lèse-majesté* law**, which is classified under Offences Relating to the Security of the Kingdom in the Penal Code. It carries a maximum of 15 years of imprisonment if one is found guilty “to defame, insult or threaten the King and his family” (art. 112). By providing special protection for the royalty, the *lèse-majesté* law is in breach of international guarantees of freedom of expression, which require public figures to tolerate more, rather than less, criticism.
10. Since the military coup in 2006, there has been a sharp increase in *lèse-majesté* charges, frequently used to silence oppositional voices in the name of protecting the royalty. The *lèse-*

majesté law is often used in conjunction with the 2007 Computer Crime Act to restrict expression on the internet. Examples include:

- Daranee Charnchoengsilpakul was convicted for making anti-royalty speeches at UDD rallies in 2008. She petitioned against the judge's decision to hold her case behind closed doors for national security reason, claiming it contravened the constitutional provision for an open trial. The Criminal Court declined to forward her petition to the Constitution Court and sentenced her to 18 years in prison on 28 August 2009. Daranee then took the case to the Appeals Court, which ruled in her favour and annulled the jail sentence on 9 February 2011. The case is pending the Constitution Court's ruling.
- In the *Prachatai* case mentioned in the previous section, its editor is also separately charged for violating *lèse-majesté* in addition to the CCA.
- Suwicha Thakhor, a Thai blogger, was sentenced to ten years in jail on 3 April 2009 for posting an image on the internet that was deemed to have insulted the royal family. He was found guilty of violating both the *lèse majesté* law and the CCA. He was eventually released on 28 June 2010 on royal pardon.
- A number of foreign writers have also been accused of *lèse-majesté*, including Australian writer Harry Nicolaides, Thai-British academic Giles Ji Ungpakorn, and BBC Southeast Asia correspondent Jonathan Head.

Failure of the government to effectively implement the Official Information Act

11. Thailand became the first Southeast Asian country to provide a legal guarantee to the right to information when the **Official Information Act** (OIA) was passed in 1997. But 13 years on, the legal and practical enforcement of this right remains weak.
12. The OIA falls short of meeting international standards in a number of areas:
 - Article 11 states that state agency must respond to the public's information request "within a reasonable time." The lack of a clear time limit has allowed state agencies to delay response often for months before eventually denying a request without giving any reason. It has also been used to block further information release.
 - Under Articles 14 and 15, information that "may jeopardize the Royal Institution" cannot be disclosed. Furthermore information relating to the royalty is to be kept secret for 75 years, as compared to the 20-years duration for other state secrets. This exception restricts the public's ability to access information held by the Royal Institution that can affect their lives, or to hold members of the royalty accountable for their actions.
 - The OIA prescribes much harsher punishment for officials disclosing restricted information than those found to have failed to give access to information. It therefore serves to enhance the culture of secrecy that has characterised Thai bureaucracy.
 - The Official Information Commission (OIC) is not independent as it is part of the Prime Minister's Office, which has the power to undermine information disclosure.
13. Implementation of the OIA has taken a downturn since 2000. There is no current data on the extent to which the Thai people have made use of the OIA. Media workers have surprisingly shown little interest in using the OIA to obtain information. Over 4,000 government agencies throughout the country have still not set up a right to information unit. Many agencies also fail to comply with their legal obligation to proactively disclose a number of types of information such as powers and duties of the agency, budgets, and concessions to individuals for public service provisions.
14. Nevertheless, there has been a positive development in access to environmental information. A landmark decision made by the OIC on 7 June 2010 specified that information relating to

environment and health must be made available for people to monitor, as stipulated in Article 9 (8) of OIA. It identified 16 types of environmental and health information that the state has to prepare, make public, and organise in a manner easy for search.

Control of media by the military and government

15. In response to past media practices, the revised 2007 Thai Constitution expressly prevents mergers and cross ownership, and prohibits politicians from owning or holding shares in any newspaper, radio, television or telecommunications business. It also requires a single independent regulatory agency, to distribute broadcasting frequencies and supervise the media industry. But serious problems relating to conflict of interest remain. The government and military control nearly all the national terrestrial television networks and operate many radio networks. Recent legislation has been passed to modify regulation, but the new 2008 Broadcasting Act still recognises the ownership rights of the army, the government Public Relations Department and other state agencies.
16. Although the Thai media is highly competitive and critical of the government, journalists tend to exercise self-censorship on issues regarding the military, monarchy and the judiciary. This has been widely attributed to the control of media by powerful players of the Thai political backstage.

Recommendations

17. In response to these concerns, ARTICLE 19 calls on the UN Human Rights Council to make the following recommendations to the Thai government:
 - The government should review all laws affecting freedom of expression for compliance with the 2007 Thai Constitution and international standards. Those that fail to meet the standards should be repealed or amended as necessary to remedy the problem;
 - The government should adopt emergency decrees only as absolutely necessary and in accordance with constitutional and international standards in this area. All restrictions on freedom of expression in existing emergency decrees should be repealed immediately;
 - The Computer Crime Act should be limited to crimes that affect systems or networks including illegal access to computer systems or using computer systems to create harm to the computer network such as releasing viruses or denial of service attacks, and to preventing fraud;
 - Defamation should be fully decriminalised. Limits should be imposed on the use of defamation charges by public bodies and officials, and on the amount of damage claims;
 - The *lèse-majesté* law should be repealed;
 - The government should cease all forms of censorship, especially through the use of the *lèse-majesté* law and emergency powers to restrict freedom of expression;
 - The Official Information Act should be amended to include all public bodies including the Royal Institution, set clear time lines for the disclosure of information, and narrow down the exceptions. The OIC should be made independent of the government;
 - The rights of the military and the government to own and control the media should be restricted by law.