

COVID-19

and restrictions on freedom of expression
under the Emergency Decree



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Preface

The COVID-19 outbreak is a deadly global pandemic that originated from large-scale infections in December 2019. The first patient who contracted the virus was found in Wuhan, China. Meanwhile, Thailand reported the first case of COVID-19 infection in January 2020.

Nonetheless, in the beginning, Thailand's infection rate did not increase significantly. The government decided to use existing legal apparatuses to implement disease control measures until a major boxing match at the Lumpini Boxing Stadium on 6 March 2020 became a super-spreader event that led to widespread infections. This juncture eventually led to the government's declaration of the State of Emergency on 25 March 2020; the first period of a national state of emergency took effect from 26 March 2020 to 30 April 2020.

Thailand managed to control the spread of the COVID-19 pandemic effectively in May, maintaining a steadily low infection rate without any dramatic surge of cases, often reporting zero new cases. However, later, a sizable cluster was found in Samut Sakhon's shrimp markets and fish piers, prompting the number of COVID-19 cases to soar. In response, the government re-introduced restrictions previously relaxed after their initial success in containing the virus. Notably, after the government discovered the cluster at Samut Sakhon's shrimp markets and fish piers, it announced that this outbreak was a new wave of infection because it had no link to the previous episode.

During this wave of outbreaks, the government issued rules that decentralize decision-making powers, delegating some authority on determining disease control measures to the Governor of Bangkok and other provincial governors. Furthermore, the government classified all areas across the nation into three different zones, depending on the level of severity of the pandemic situation in those areas: (1.) Maximum- and strict-control zone, (2.) Maximum-control zone, and (3.) Control zone. This measure stems from the fact that each area has experienced the impact of the COVID-19 outbreak at different levels of severity.

On 25 March 2021, the third wave of COVID-19 outbreak emerged from a cluster identified in an entertainment venue in Thong Lor. The cluster worsened the situation of the pandemic causing far-reaching infection throughout the country, including in prisons. Since then, the Prime Minister has extended the nationwide state of emergency every month 12 times; the latest extension lasting until 31 July 2021. Thailand has, therefore, been under a state of emergency for more than one year and counting. The government continues to use the ongoing wave of COVID-19 and the vaccination scheme that has not covered the entire population as a justification for its repeated extension of the state of emergency.

A total of 24 regulations have been issued under Section 9 of the Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005) (Hereinafter "Emergency Decree

Regulations") – some enacted with a legal basis from the Emergency Decree or other laws and others without a legal basis. Numerous measures laid out in these Emergency Decree Regulations impact people's exercise of their rights and liberties. Some examples include the ban on entering and exiting areas prone to virus infections, entering the country, gathering in a public assembly, and the measures determining conditions for reporting news, maintaining peace and order, controlling infectious diseases, and enforcing a curfew, among many other measures.

Among the rights and freedoms subject to extensive restrictions are freedom of movement, freedom of expression, freedom of assembly, and all the rights during the judicial process. Amid the vibrant mobilization of political activities in Thailand, the number of lawsuits stemming from the exercise of such freedom has risen in direct correlation with the COVID-19 situation. The declaration of a state of emergency has become one of the most critical challenges in exercising these freedoms.

Accordingly, Thai Lawyers for Human Rights (TLHR), an organization providing legal aid for those who exercised their freedom of political expression, has developed this report to identify the impacts of the declaration of a state of emergency to curb the spread of COVID-19. The report will demonstrate how the emergency measures do not only result in economic and public health impacts but also produce serious consequences on the freedoms of movement, expression, assembly, and the rights during the judicial process for those subject to lawsuits for exercising their rights and liberties. Additionally, the report will examine the issues of proportionality in emergency measures and the exemption of liability and propose recommendations for amending emergency laws.

Thai Lawyers for Human Rights
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Part 1: Impacts on rights and liberties

1.1 International human rights standards and derogations

COVID-19 has had a multi-dimensional impact in Thailand, including on people's rights and liberties. Thailand is a State Party with legal obligations to follow the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social, and Cultural Rights. As the government chose to declare a state of emergency to control the pandemic, it is permitted to curtail the rights enshrined in these covenants only to the extent required for such an emergency. Below are the different criteria for imposing restrictions on each type of right.

1. Freedom of movement

Article 12 of the ICCPR guarantees that everyone lawfully within the territory of a State shall have the right to liberty of movement and freedom to choose their residence within that territory. They shall also be free to leave any country, including their own. Such rights could be subject to some restrictions provided by law, necessary to protect national security, public order, public health, morals, or the rights and freedom of others, and consistent with the other rights recognized in this Covenant. Further, no one shall be arbitrarily deprived of the right to enter his own country.

2. Freedom of expression

Article 19 of the ICCPR states that everyone shall have the right to hold opinions without interference. They shall also have the freedom to seek, receive, and impart information and ideas of all kinds. However, the exercise of these rights may be subject to certain restrictions, which must be provided by law and are necessary for respect of the rights and reputations of others or the protection of national security, public health, or morals.

3. Freedom of assembly

Article 21 of the ICCPR guarantees the right to peaceful assembly. Restrictions of this right can only be imposed in conformity with the law and as necessary in a democratic society in the interests of national security or public safety, public order, public health, or morals, or the protection of the rights and freedoms of others.

In its General Comment No. 37, the Human Rights Committee referred to a peaceful assembly as an assembly that does not involve widespread and serious violence. The term "violence" in this context includes the use of physical force by participants against others that is likely to result in injury, death, or serious property damage. Mere pushing and shoving or disruption of vehicular or pedestrian movement or daily activities do not amount to "violence."¹ There must also be a presumption in favor of considering assemblies to be peaceful. Isolated acts of violence by some participants should not be attributed to others, to the organizers, or to the assembly as such.²

Participants can freely determine the purpose or expressive content of an assembly. In principle, the authorities must not intervene in the assembly's content when supervising

¹ CCPR/C/GC/37,para.15

² CCPR/C/GC/37,para.17

peaceful assembly or imposing any restrictions. Participants must be authorized to conduct assemblies within “sight and sound” of their target audience.³

The restrictions of rights to protect public health can occur in rare cases. However, this justification could be invoked where there is an outbreak of an infectious disease and gatherings are dangerous. Such restrictions may in extreme cases also be applicable where the sanitary situation during an assembly presents a substantial health risk to the general public or to the participants themselves.⁴

Only in exceptional cases may an assembly be dispersed. Dispersal may be resorted to if the assembly as such is no longer peaceful, or if there is clear evidence of an imminent threat of serious violence that cannot be reasonably addressed by more proportionate measures, such as targeted arrests. In all cases, the law enforcement rules on use of force must be strictly followed. Conditions for ordering the dispersal of an assembly should be set out in domestic law.⁵

4. Rights during the judicial process

Article 14 of the ICCPR guarantees the right to a fair trial in many dimensions, such as the right to be entitled to a fair and public hearing by a competent, independent, and impartial tribunal. The complete or partial exemption of external parties from a trial shall be applied for reasons of morals, public order, or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. Moreover, everyone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law.

In addition, the Human Rights Committee indicated, “It is impossible to guarantee the right to a fair trial upon the proclamation of derogatory measures to serve as a ground for refraining from the protection of non-derogable rights” and “it is prohibited to deviate from fundamental principles of a fair trial, including the presumption of innocence.” Therefore, “the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency.”⁶

5. Restrictions on rights and liberties during a state of emergency

Article 4 of the ICCPR prescribes that State Parties can take measures derogating from their obligations under the Covenant in time of public emergency, which threatens the life of the nation and the existence of which is officially proclaimed. Nonetheless, such measures shall be undertaken to the extent strictly required by the exigencies of the situation. It must also be ensured that the measures are consistent with the State Parties’ other obligations under international law and do not involve discrimination. Notably, some rights and liberties under specific provisions are considered non-derogable even during a state of emergency, including Article 6 on the right to life, Article 7 on the right to freedom from torture, Article 8 on the

³ CCPR/C/GC/37,para.22

⁴ CCPR/C/GC/37,para.45

⁵ CCPR/C/GC/37,para.85

⁶ CCPR/C/GC/29,para.16

right to freedom from slavery, Article 11 on the freedom from imprisonment for inability to fulfil a contractual obligation, Article 15 on the prohibition against the retrospective operation of criminal laws, Article 16 on the right to recognition before the law, and Article 18 on the right to freedom of religion and belief.

Any State Party intending to invoke their right of derogation shall inform the Secretary-General of the United Nations of the reasons behind their decision. Thailand has proclaimed a state of emergency since 26 March 2020 and notified the Secretary-General of the United Nations about this declaration of a state of emergency. The notification took effect on 5 June 2020.⁷

Even though State Parties can undertake some derogatory measures, the Human Rights Committee's General Comment No. 29 explains that they also shall not violate other rights not listed as non-derogable provisions in Article 4. For instance, they shall continue to guarantee the right to access remedies for violations, including those stemming from the performance of official duties, under Article 2, Paragraph 3,⁸ and the right to a fair trial.⁹

6. Interim Guidance – COVID-19: Focus on Persons Deprived of Their Liberty¹⁰

In March 2020, the Office of the United Nations High Commissioner for Human Rights, together with the World Health Organization, issued guidance with a focus on persons deprived of their liberty owing to COVID-19 issues. The emphasis was placed on persons deprived of their liberty because they are at disproportionate risk as a result of the COVID-19 pandemic. States have an obligation to protect the health of everyone held in detention facilities. This guidance proposes that States tackle prison overcrowding and calls for an immediate release of persons with underlying health conditions, persons with low-risk profiles and who have committed minor and petty offenses, persons with imminent release dates, those detained for offenses not recognized under international law, and those held in arbitrary detention. Persons deprived of their liberty shall also receive a medical examination upon admission. The authorities shall, thereafter, provide medical treatment if they are confirmed or suspected to have contracted the virus. All detainees must be able to access prompt medical care. Meanwhile, States shall provide information about health protection measures to all persons deprived of their rights and liberties and improve sanitation and cleanliness in detention facilities.

⁷ <https://treaties.un.org/doc/Publication/CN/2020/CN.194.2020-Eng.pdf>

⁸ General Comment No. 29, Human Rights Committee (CCPR/C/21/Rev.1/Add.11), Para 14

⁹ General Comment No. 29, Human Rights Committee (CCPR/C/21/Rev.1/Add.11), Para 11

¹⁰ IASC Interim Guidance on COVID-19: Focus on Persons Deprived of Their Liberty

1.2 Statistical overview of cases related to the exercise of rights and liberties

After the declaration of a state of emergency on 26 March 2020, political activities have taken place only sporadically. Still, many digital platform users have continued to make online criticisms about the State's implementation of their disease control policies. As a result, several have been charged with "entering false information into a computer system" under the Computer Crimes Act B.E. 2550 (2007). In June 2020, more political demonstrations began to take place following the disappearance of political activist Wanchalearm Satsaksit. However, the most significant juncture was the demonstration held at the Democracy Monument by the Free Youth Group on 18 July 2020, which prompted many political groups to mobilize and develop three collective demands: 1. Resignation of Prime Minister General Prayut Chan-ocha, 2. A new constitution, and 3. Reform of the monarchy. This trend of political awakening led to the increasing prosecution of people who exercised their freedom of expression and freedom of assembly.

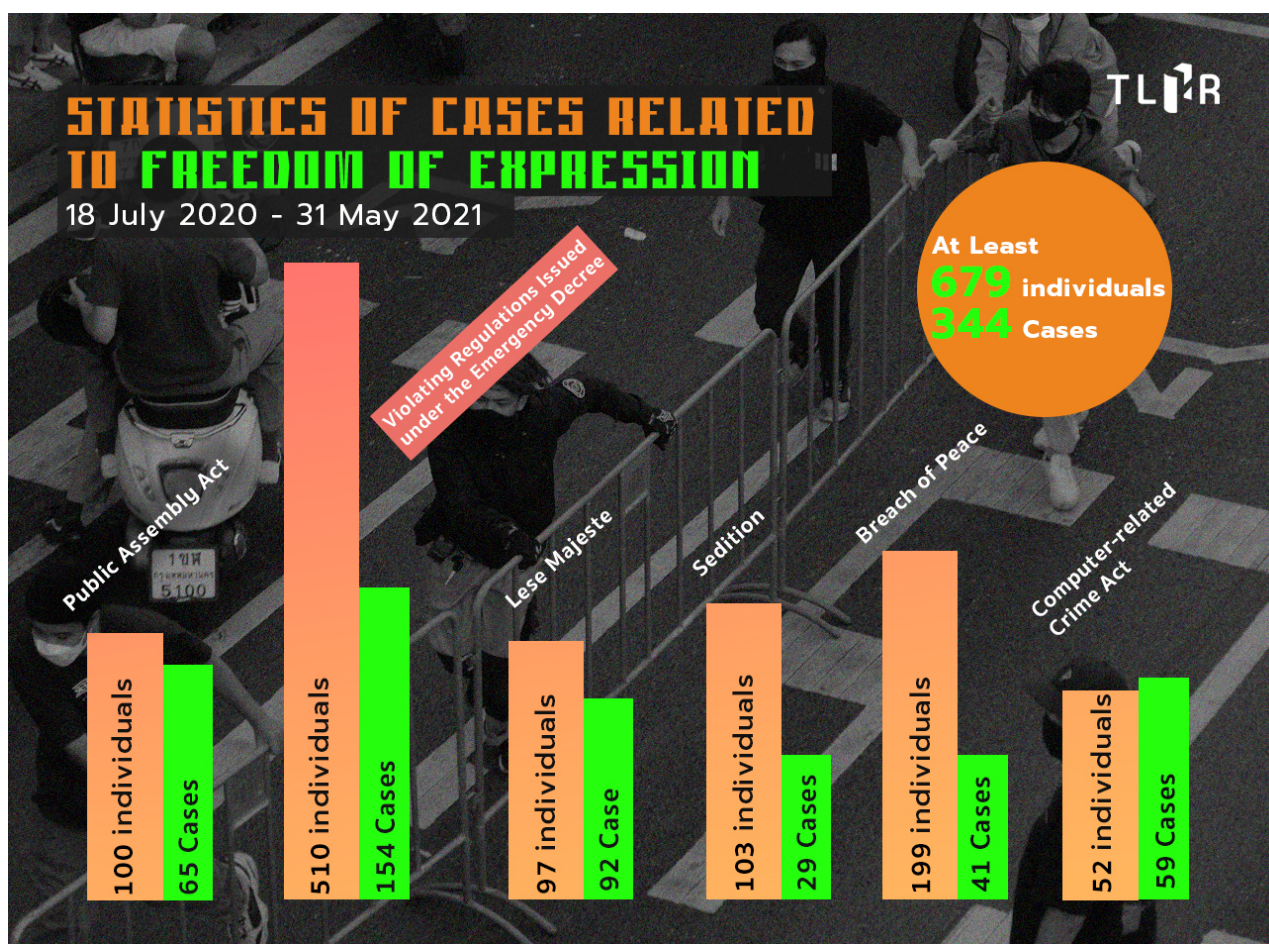
According to TLHR's overall statistical data, at least 679 people have been charged for their involvement in political demonstrations or expressing their political opinions in 344 cases from the Free Youth Group's first assembly on 18 July 2020 to 31 May 2021. The critical offenses in these cases can be categorized as follows:

1. "Lèse-majesté" offense under Article 112 of the Criminal Code: At least 97 people charged in 92 cases
2. "Sedition" offense under Article 116 of the Criminal Code: At least 103 people charged in 29 cases
3. "Gathering in an assembly to commit an act of violence and disturb the peace" offense under Article 215 of the Criminal Code: At least 199 people charged in 41 cases
4. Violations of the Emergency Decree: At least 499 people charged in 146 cases. Under this category, alleged violations in 23 cases took place during the declaration of a severe state of emergency in Bangkok, while 123 other cases stem from the breach of the Emergency Decree Regulations related to the COVID-19 pandemic.

According to the statistical data of cases documented from May 2020 onwards, the total number of persons charged for alleged violations of the Emergency Decree amounts to 510 persons in 154 cases. This figure includes those prosecuted for their participation in political rallies.

5. Offenses under the Public Assembly Act: At least 100 persons in 65 cases
6. Offenses under the Computer Crimes Act: At least 52 persons in 59 cases

In addition, TLHR found that, among those charged for alleged violations of the Emergency Decree Regulations, some of the accused in 36 cases face duplicate charges under the Public Assembly Act. This irregularity must be noted because Section 3(6) of the Public Assembly Act prescribes that this law shall not be enforced in cases of public assemblies taking place during a state of emergency.



1.3 Right to freedom of movement and COVID-19-related restrictions

Freedom of movement is one of the constitutional rights guaranteed under the Chapter on Rights and Liberties of the Thai People in the Constitution of the Kingdom of Thailand B.E. 2560 (2017). There are two main provisions related to freedom of movement: Section 38 and Section 39. Section 38 stipulates that, “A person shall enjoy the freedom of movement and the liberty of choosing their residence. The restriction of such liberties under paragraph one shall not be imposed except by virtue of a provision of law enacted for security of the State, public order, public welfare or town and country planning, or for maintaining family status, or for the welfare of youth.” It could be said that the definition of freedom of movement guaranteed under Section 38 primarily encompasses the liberty to travel within the country and choose their residence. This constitutional freedom is a fundamental right that might be restricted for the purposes specified above in Section 38. Nevertheless, Section 39 is another key provision linked to the freedom of movement, which imposes an absolute prohibition of restricting the right of any person of Thai nationality to enter the country.

Still, due to the situation of the COVID-19 outbreak, it has been argued that the pandemic has severely impacted national security and public health. Accordingly, restrictive measures limiting freedom of movement have been put in place to prevent the virus from spreading. For Thailand, such measures during the COVID-19 outbreak could be categorized into two groups, including the restrictions on the right to travel within the country and restrictions on the right to travel outside the country.

1. Restrictions on the right to travel within the country

This type of measure did not appear during the initial phase of the COVID-19 outbreak in Thailand. However, following the super-spreader event at the Lumpini Boxing Stadium, many measures restricting the right to travel within the country were put in place to curb the infection rates. The restrictions on the freedom of movement within the country could be classified into two sub-groups: Restrictions on the freedom of movement by determining a night-time curfew and restrictions on inter-provincial travels.

(1.) Restrictions on inter-provincial travels

The government issued ‘guidance’ rather than a directive imposing an authoritative ‘ban’ on inter-provincial travels in Provision 13 of Regulation No. 1 issued under Section 9 of the Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005).¹¹ Provision No. 13 of Regulation No. 1 recommends that people refrain from traveling to another province and minimize going out of their residence. However, in any case, where inter-provincial travel is necessary, travelers must undergo a screening test per measures determined by each provincial authority. After the government enacted this Regulation, each provincial authority followed the instructions by setting up screening checkpoints and creating a registration system for tracking the symptoms of those traveling across provinces within 14 days. Regulation No. 1 issued under the Emergency Decree does not prescribe any restrictions on the freedom of making inter-provincial travels. Still, provincial governors of at least four provinces, including Pattani, Yala, Narathiwat, and Phuket, exercised their authority under Articles 3 and 22 of the Communicable Diseases Act B.E. 2558 (2015) and Regulation No. 1 issued under Article 9 of the Emergency Decree to enforce an absolute ban on entering and exiting their provinces, citing the surge of infection rates in their respective areas. Eventually, many other provincial authorities followed suit, imposing measures to prohibit any entrance and exit in their provinces to prevent further COVID-19 infections.

(2.) Restrictions on the freedom of movement through a night-time curfew

The curfew measure differs from restrictions on inter-provincial travels because Regulation No. 2 explicitly prescribed it as a rule. During April 2020, the curfew prohibited any person from leaving their residence from 22:00 to 4:00 hrs.¹² In May, the government relaxed this measure, shifting the time to the periods between 23:00 to 4:00 hrs¹³ and 0:00 to 4:00 hrs, consecutively. Finally, at 23:00 hrs on 14 June 2020, the government lifted the curfew.¹⁴

¹¹ Regulation No. 13 provides guidance on inter-provincial travels, encouraging that people refrain from inter-provincial trips or delay their plans during that period unless it is absolutely necessary. People were also recommended to stay or work at their own residence. In case that it is necessary to travel to another province, they must immediately undergo a screening test and adhere to relevant official measures to facilitate the government’s efforts to track them down if they need further medical checkups or quarantine.

¹² Regulation No. 3 issued under Section 9 of the Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005) dated 10 April 2020

¹³ Regulation No. 7 issued under Section 9 of the Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005) dated 15 May 2020

¹⁴ Regulation No. 10 issued under Section 9 of the Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005) dated 12 June 2020

The necessity and proportionality of these curfew measures were widely questioned by many people, considering the extent to which they restricted people's rights during the pandemic. This report will interrogate this question further in the following part on proportionality.

2. Restrictions on travelling out of the country

Many countries have used the restrictions on traveling out of the country to manage the COVID-19 situation and ensure that the number of in-country infections did not increase. In Thailand, provincial governors, generally in border provinces, issued an order banning travel across land and sea borders for people of any nationality. For example, the Yala Provincial Governor issued Order No. 46/2563, banning people of any nationality from entering and exiting the province via its border with the neighboring country. On the other hand, some exemptions granted under Provision No. 3 of Regulation No. 1 issued under the Emergency Decree allow persons of Thai nationality to enter the country if they have a medical certificate that confirms their health and / or fitness for traveling.¹⁵ Crossing the border at the permanent checkpoint in Yala must be done during the official working hours from 8:30 to 16:30 hrs only.

With regard to air travel restrictions, there are two relevant key regulations: The Notification of the Civil Aviation Authority of Thailand on Practical Guideline for Air Operators Performing Flights into the Kingdom of Thailand¹⁶ and the Order of the Centre for the Administration of the Situation due to the Outbreak of the Communicable Disease Coronavirus 2019 (COVID-19).¹⁷ Under both regulations, any person of Thai nationality who wishes to enter the Kingdom is subject to several requirements, including refraining from entering a community area for 14 days, undergoing a screening test for identifying respiratory symptoms and fever at the international checkpoints, and possessing a “fit-to-fly” health certificate.

Regarding the government's enactment of restrictions imposed before entering the Kingdom, TLHR has an important legal observation that such measures could potentially be considered unconstitutional. Notably, they curtail the rights guaranteed under Article 39 of the Constitution which provides for an absolute safeguard for Thai people to be entitled to the right to enter the Kingdom. Nonetheless, the prevention of infectious diseases could be greatly beneficial for the public. The government's measures could have been permissible and neither contrary to nor inconsistent with Section 39 if they are enforced only upon the individual right-holders who have already arrived in or entered the Kingdom. Still, the government decided to design their measures to require persons intending to enter the country to undergo a screening procedure for detecting their potential respiratory symptoms and fever at the international checkpoints. Also, the measures require that they go into quarantine and follow orders from a disease control official at a venue determined by the official for at least 14 days.

¹⁵ Regulation No. 1 issued under Section 9 of the Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005) dated 25 March 2020

¹⁶ Notification of the Civil Aviation Authority of Thailand on Practical Guideline for Air Operators Performing Flights into the Kingdom of Thailand dated 19 March 2020

¹⁷ Order of the Centre for the Administration of the Situation due to the Outbreak of the Communicable Disease Coronavirus 2019 (COVID-19) No. 7/2563

Lawsuit for requesting the revocation of the Notification of the Civil Aviation Authority of Thailand

One key lawsuit stemming from the restrictions on traveling into Thailand was initiated by Arthit Suriyawongkul, a Thai national residing in Dublin, Ireland, who filed a petition for the Administrative Court to examine the legality of the Notification. The plaintiff also requested the Court to adjudicate via the electronic system to revoke the Notification under Articles 9(1) and 72(1) of the Act on Establishment of Administrative Courts and Administrative Court Procedure. The case's subject matter is the Notification of the Civil Aviation Authority of Thailand on Practical Guideline for Air Operators Performing Flights into the Kingdom of Thailand. Specifically, the lawsuit targets Provisions No. 4 and 5 which require passengers of Thai nationality who wish to enter the country to have a health certificate confirming that the passengers are fit to fly, and a letter issued by the Royal Thai Embassy, Thai Consular Office, or the Ministry of Foreign Affairs certifying that the passengers are returning to Thailand. The Central Administrative Court had ruled that it had examined the details of the said Notification and the criteria it prescribes. The Court found that this Notification was issued in the same manner as Regulation No. 1, Provision 3, Paragraphs 1(6), which had been enacted under Section 9 of the Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005) on 25 March 2020 and taken effect since 26 March 2020. Section 16 of the Emergency Decree stipulates that notifications, announcements, orders, and acts carried out under this decree shall not fall within the remit of the Act on Establishment of Administrative Courts and Administrative Court Procedure. The Administrative Court, thus, holds no jurisdiction to adjudicate on the dispute described in the petition. Accordingly, the Court labeled this lawsuit as Red Case No. 504/2563, refused to rule on this case, and ordered its dismissal from the Court's system.¹⁸

Nonetheless, the Supreme Administrative Court later overturned the ruling of the Central Administrative Court, arguing that the "the Notification of the Civil Aviation Authority of Thailand on Practical Guideline for Air Operators Performing Flights into the Kingdom of Thailand dated 19 March 2020 has a legal status as a by-law." The Court noted that the government, on 25 March 2020, declared a state of emergency and issued Emergency Decree Regulations, which shared the same content as the Civil Aviation Authority's Notification. However, the Notification was issued under the Air Navigation Act B.E. 2497 (1954). It is, therefore, not a legal act conducted under the Emergency Decree, which does not fall into the jurisdiction of the Administrative Court per the decree's Section 16. Hence, even though the disputed Notification contains the same substance as the Emergency Decree Regulation mentioned above, it did not automatically become legally invalid. Further, should the Administrative Court order the revocation of this disputed Notification, such a verdict would not collaterally repeal the Emergency Decree Regulation because both by-laws are separate administrative acts. Consequently, the Supreme Administrative Court overturned the previous ruling of the Administrative Court of First Instance and accepted to adjudicate this case.¹⁹

¹⁸ Information received from Bangkok Business Newspaper, Available at <https://www.bangkokbiznews.com/news/detail/874190>

¹⁹ Information received from Thai Rath Newspaper, Available at <https://www.thairath.co.th/news/local/bangkok/1993911>

1.4 Freedom of expression under the state of emergency

Before and during the declaration of a state of emergency, the government has attempted to use lawsuits as a tool for controlling individual exercises of their freedom of expression concerning the government's management of the pandemic. Notably, these individuals face charges under computer-related offenses, including allegedly inputting false information into a computer system and defaming others. Further, some people have also encountered lèse-majesté charges for criticizing the government's management of COVID-19-related affairs.

Lawsuits under computer-related offenses

After the declaration of a state of emergency, the Prime Minister issued Regulation No. 1 under Section 9 of the Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005). Its Provision No. 6 states, "It is prohibited to present or disseminate news through any media featuring content on 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 the public order or good moral of the people." This provision also tasks officials to issue warnings to cease such acts or order to correct such news. In cases where there were severe impacts, the authorities shall take legal actions against the violators in accordance with the Computer Crimes Act B.E. 2550 (2007) or the Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005).

While several government agencies and ordinary citizens communicated misinformation or information that create misunderstandings, the government selectively chose to control the dissemination of specific kinds of information. For example, Danai, a graffiti artist, was charged under Article 14(2) of the Computer Crimes Act for allegedly "importing false computer data into a computer system in a manner that is likely to cause a public panic" because he posted about his experiences with the government's COVID-19 measures when he arrived at Suvarnabhumi Airport from overseas.²⁰ In a separate recent case, Minister of Transport Saksayam Chidchob filed charges against "Rampueng", a Twitter user, under Article 14(1), which prohibits importing forged computer data, either in whole or in part, or false computer data, into a computer system in a manner that is likely to cause damage to that third party. The user merely posted a photo of a man resembling Saksayam who appeared to be in an entertainment venue in Thong Lor, a super-spreader venue causing the third wave of the COVID-19 outbreak and raised a question whether it was Saksayam in the photo. Previously, there was an amendment to ensure that Article 14(1) does not cover individual defamation cases. However, in reality, this legal provision is still invoked to file such a lawsuit.

Lawsuits under the royal defamation offense against critics of the government's COVID-19-vaccination scheme

After Prime Minister Prayut Chan-o-cha made a public statement on 19 November 2020 that the government would use all laws to prosecute protesters, the enforcement of Article 112 of the Criminal Code, which prohibits "defaming, insulting or threatening the King," significantly and rapidly increased. Among those charged under this law are at least six critics who have spoken about the government's COVID-19 vaccination scheme. For instance, on 18 January 2021, Progressive Movement's Leader Thanathorn Juangroongruangkit delivered a lecture

²⁰ Information received from Thai Lawyers for Human Rights, Available at <https://tlhr2014.com/archives/19670>

titled "Royal Vaccine: Who Benefits and Who Doesn't?" via a live broadcast, discussing King Rama X's status as the main shareholder of Siam Bioscience Co., Ltd., a company designated to manufacture AstraZeneca's vaccines which were expected to be Thailand's only main vaccine at the time. Following the event, Thanathorn was charged with allegations of *lesè-majesté*, libel, and violation of Article 14 of the Computer Crimes Act.²¹

In a separate case, on 25 January 2021, two members of the United Front of Thammasat and Demonstration - Parit Chiwarak and Benja Apan – delivered a speech during a rally titled “Unmasking Siam Bioscience” in front of Srijulasap Tower. Both of them have been charged with four offenses, including *lesè-majesté* and violations of the Emergency Decree Regulation, Communicable Disease Act, and Controlling Public Advertisement by Sound Amplifier Act.²²

In another case, five students and protestors in Lampang Province have been charged with *lesè-majesté* for allegedly hanging the sign with the message “Royal budgets > COVID-19 vaccines” on Ratsadapisek Bridge on 30 December 2020.²³

Further, a female student of Rajabhat Chiang Rai University who runs the “Free Youth CEI – Free Chiang Rai” was also arrested under a warrant showing a *lesè-majesté* charge against her for allegedly hanging the “Royal budgets > COVID-19 vaccines” sign near King Rama X’s portrait.

Piyarat “Toto” Chongthep, a leader of the “We Volunteer” Group, was charged with defaming the King and violating Article 14(3) for allegedly creating seven vinyl signs criticizing the government’s vaccine procurement and sharing the picture of these signs on Facebook and Twitter accounts whose usernames are “Toto Piyarat – Piyarat Chongthep” and “We Volunteer,” respectively.²⁴

Suthipongse “Heart” Thatphithakkul, a renowned former signer and MC, was charged under the *lesè-majesté* law and Computer Crimes Act for posting his criticisms of the government’s measures on COVID-19 vaccines on Facebook.²⁵

The enforcement of Provision No. 6 of the Emergency Decree Regulation No. 1, as well as the prosecution of critics under the Computer Crimes Act and the *lesè-majesté* law, does not only foster a climate of fear in the society, it also deprives people of the opportunity to access, learn, and share new information about the pandemic in a timely manner, which is essential for maintaining good personal health and preventing and suppressing the pandemic. Therefore, the use of these laws has resulted in significant damage for the people rather than serve the purpose of preventing the spread of the pandemic, as well as restricting freedom of expression as guaranteed under Article 19 of the ICCPR.

²¹ Information received from Prachatai. Available at <https://prachatai.com/journal/2021/05/93042>

²² Ibid

²³ Ibid

²⁴ Ibid

²⁵ Ibid.

1.5 Freedom of assembly during a state of emergency

Double weaponization of the Emergency Decree and Public Assembly Act

Within the past year, political protestors have faced various charges for exercising their rights to freedom of expression and assembly. Initially, after the declaration of the emergency situation and subsequent lockdown from April to May 2020, not many political activities took place. However, the commemoration event for the tenth anniversary of the 19 May 2010 military crackdown on Red-Shirt protestors and the disappearance of political exile Wanchalerm Satsaksit occurred in early June 2020. This series of incidents prompted many people to organize activities to demand justice from relevant government agencies. During that period, the authorities began to press charges against those involved in such activities as alleged violations of Emergency Decree Regulations.

Meanwhile, Section 3 of the Public Assembly Act B.E. 2558 (2015) (Hereinafter “Public Assembly Act”) stipulates that the Act shall not be applied during the declaration of the state of emergency. Instead, one must comply with the Emergency Decree. Therefore, protestors who participated in political activities during that period would face charges for violating the Emergency Decree, not the Public Assembly Act.

Once the COVID-19 outbreak subsided, Prime Minister Prayut Chan-o-cha issued Regulation No. 13 under the Emergency Decree, in which Paragraph 1 stipulates, “The organization of group activities or the people’s exercise of their rights to assemble may be carried out within the scope of the exercise of rights and liberties under the constitution and other laws per the criteria prescribed by the law on public assembly.” The Regulation took effect on 1 August 2020.

There is also an issue with the implementation of the foregoing Regulation. While it is only a subordinate law, it contradicts Section 3 of the Public Assembly Act. Even if the law on public assembly could then be reactivated, the scope of enforcement remained unclear because the law extensively covers rules, duties, rights guarantee, judicial oversight mechanisms, and penalty.

Furthermore, the Regulation prescribes that the law enforcement shall adhere to legal principles in the public assembly law, but the authorities did not only use the Public Assembly Act to prosecute the protestors. During this period, they also continued to charge them for violating the Emergency Decree Regulation in at least 36 cases.

Emergency Decree Regulation No. 13 had taken effect until 25 December 2020. Then the Prime Minister issued Emergency Decree Regulation No. 15 whose Provision No. 3 states, “It is prohibited to assemble, to carry out activities, or to gather 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.” Consequently, after 25 December 2020, the authorities stopped enforcing the Public Assembly Act and instead used this provision to impose a stringent ban on gatherings in crowded venues.

However, Emergency Decree Regulations No. 16 to No. 24 did not contain any provisions directly related to assemblies. Rather, they provided rules for gathering in different types of controlled areas. At the time, Bangkok was categorized as the maximum-controlled area. Under Provision 3(2) of Emergency Decree Regulation No. 18, it is prohibited to organize

activities with many participants where there could be risks of causing a pandemic outbreak. Provision 1(2) of Emergency Decree Regulation No. 20 bans any group activities with 50 or more participants. Provision 3 of Emergency Decree Regulation No. 22 bans any group activities with 20 or more participants. Provision 4 of Emergency Decree Regulation No. 24 bans any group activities with 50 or more participants.

The declaration of the State of Severe Emergency in Bangkok due to the escalation of protests

When Emergency Decree Regulation No. 13 was still in force, the Prime Minister decided to declare the state of severe emergency in Bangkok from 15 October 2020 to 22 October 2020. He also issued an additional Regulation under Sections 9 and 11 of the Emergency Decree whose Paragraph 1 “prohibits any gathering or illegal assembly of five or more people in any places or any acts that could instigate public unrest and disorder.” The Regulation also cites the political turmoil during protest activities and the alleged attempt to interrupt a royal motorcade on 14 October 2020. During this period, there were two overlapping declarations of the state of emergency in place in Bangkok. As a result, the prosecution against those violating the Emergency Decree must primarily follow the provisions under the Regulation issued under Sections 9 and 11 of the Emergency Decree.

However, at that time, police officers chose to prosecute protestors under the Public Assembly Act, among other charges, in at least two cases – the one linked to the #19OctRally demonstration at Kasetsart Intersection and the other linked to the #19OctRally demonstration in front of the Bangkok Remand Prison.

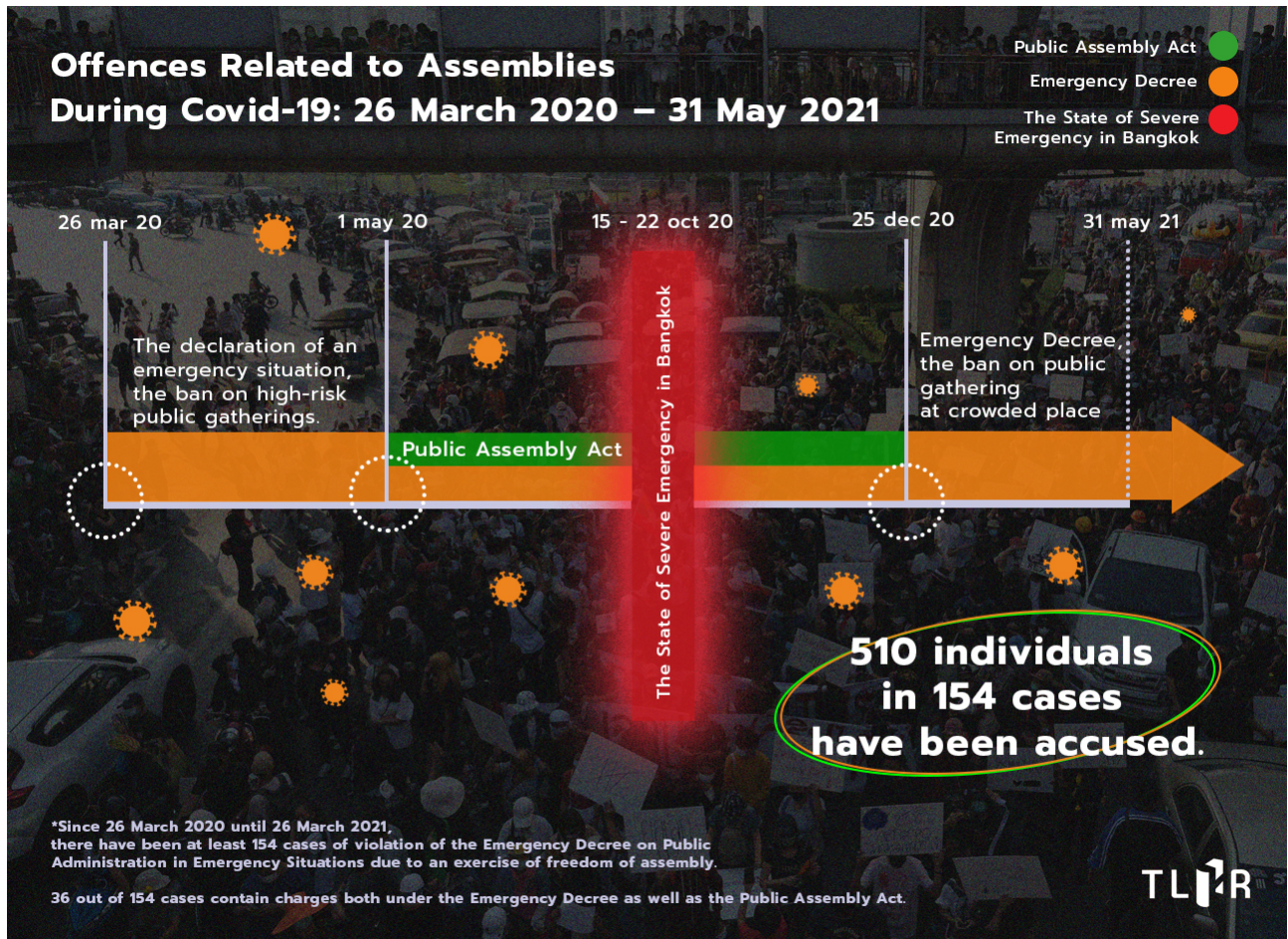
During this period, the authorities also filed charges under Section 110 of the Criminal Code against protestors who participated in the demonstration on 14 October 2020 when the royal motorcade drove past the protest venue near the Government House. The protest caused some delay to the royal motorcade. After the incident, five protestors were accused of “committing an act of violence against the Queen.” If found guilty, they could face imprisonment from 16 to 20 years.

Also, one of the two defendants detained while awaiting trial had been subject to discriminatory treatment, as he was placed in solitary confinement at the Bang Kwan Central Prison, a maximum-security prison for security detainees. The authorities also monitored his activities in the cell closely through surveillance cameras. The Director-General of the Corrections Department attempted to justify the surveillance by claiming that it was part of the prison’s mandatory quarantine measures for preventing the spread of COVID-19.

Surge of cases in direct correlation with the escalation of political tension

From 26 March 2020 to 31 May 2021, at least 510 people have been charged with alleged violations of Emergency Decree Regulations in 154 cases. Among these cases, the accused in 36 cases have faced joint charges under both Emergency Decree Regulations and the law on public assembly.

Moreover, apart from the Emergency Decree Regulations and the law on public assembly, the authorities have also used many other serious offenses to charge the protestors, such as the offenses of lesè-majesté, sedition, criminal association, and illegal assembly.



Freedom of assembly under the state of emergency

1. Prioritizing control over political protests

Freedom of assembly is considered one of the fundamental freedoms for any democratic regime. It is also guaranteed under Article 21 of the ICCPR. State parties of the ICCPR must respect such freedom and provide protection for those who wish to exercise it. During a public emergency, State parties may derogate from their obligations to Article 21. However, while they may be permitted to impose some restrictions or curb certain freedoms upon declaring a state of emergency, Section 4 of ICCPR still requires them to take only steps that are strictly necessary and proportionate to the situation.

However, it has become evident that, throughout the past year, the authorities permitted both public assemblies and other non-assembly activities featuring a gathering of many people to take place, especially after the first wave of the pandemic outbreak subsided. However, political protests have been subject to additional scrutiny and stringent law enforcement, even though they are held peacefully in venues that are not crowded or prone to risks of mass

transmission. Protestors continuously faced, and continue to face, charges and encounter a series of violent crackdowns carried out in a manner that fails to respect international human rights standards.

Meanwhile, there is no report that any political assemblies throughout the past year have led to an outbreak of COVID-19.

2. Inconsistent law enforcement which burdens the protestors

While the Communicable Disease Act B.E. 2558 (2015) is the most pertinent law for tackling the ongoing pandemic outbreak, the government has chosen to impose the Emergency Decree and declare an emergency situation over the past year. Under this exceptional legal regime, the Emergency Decree, which had been designed for security-related public emergency, has been misused for the wrong objectives and turned into a political weapon for clamping down on freedom of assembly.

The inconsistent law enforcement also involved the issuance of the Regulations under the Emergency Decree as a subordinate law to suspend the enforcement of the Public Assembly Act. In spite of these Regulations, the authorities still cherry-picked different legal provisions from the Act to determine conditions and penalties for prosecuting the protestors.

While the authorities selectively enforced some sections of the Public Assembly Act, they conversely did not comply with other key provisions, such as the requirements to ask for the Court's order to terminate a public assembly or adhere to a plan for overseeing a public assembly. This inconsistency was manifest in the case of the protest crackdown on 17 November 2020 in front of the Parliament at Kiak Kai Road and the shooting of journalists on duty during the protest crackdown on 20 March 2021 at Khao San Road.

3. Absence of accountability and oversight efforts through judiciary mechanisms

The Emergency Decree provides legal immunity for the authorities exercising powers under almost every provision of the law. Section 16 stipulates that a Regulation, Notification, Order, or action issued under this Emergency Decree shall not be subject to the law on administrative procedures and the law on the establishment of Administrative Court and Administrative Court Procedure.

Section 17 of the Emergency Decree also prescribes that a competent official and any person having identical powers and duties as the competent official under this Emergency Decree shall not be subject to civil, criminal, or disciplinary liabilities arising from the performance of their duties to stop or prevent an illegal act. Such performance must be in good faith, non-discriminatory, and reasonable in specific circumstances, and must not exceed the extent of necessity. Nonetheless, this provision does not preclude the right of a victim to seek compensation from a government agency under the law on liability for the wrongful act of officials.

However, many people have previously attempted to employ oversight mechanisms in judiciary bodies. Yet, they found several limitations stemming from the exception mentioned earlier of the Administrative Court's jurisdiction and absence of accountability for the authorities.

For example, the lawsuit for revoking the state of severe emergency, which was initiated in October 2020, was subject to undue delay, with The Court deferring the settlement of issues to June 2021. Meanwhile, the Civil Court decided to dismiss the tort lawsuit in the case of the shooting of journalists on duty during the protest crackdown on 20 March 2021 at Khao San Road only within one day. Furthermore, the most recent tort case on another protest crackdown on 17 November 2020 in front of the Parliament was filed to the Court on 26 March 2021. However, the Administrative Court did not accept to rule on this case because the determination about whether the defendants omitted their duties or committed any violations of the law must be carried out in line with the procedures laid out in the Public Assembly Act. Accordingly, the Court of Justice shall have the jurisdiction to rule on this case instead.

1.6 Impacts on rights during the judicial process in freedom of expression cases

The judiciary branch has also been among the state institutions affected by the COVID-19 pandemic. During severe outbreaks, the Courts of Justice postponed some types of trials, developed an online system, and issued the Regulation of President of the Supreme Court on the Electronic Procedures B.E. 2563 (2020). However, this Regulation does not apply to criminal procedures. Therefore, trial proceedings in criminal cases could not be carried out via electronic systems.

1. Detention of individuals under Article 112 of the Criminal Code constitutes arbitrary detention, and pre-trial detention contradicts the principle of the presumption of innocence

The detention of any individual under Article 112 of the Criminal Code violates Article 19 of the ICCPR. On 8 February 2017, the UN Special Rapporteur on the promotion and protection of freedom of opinion and expression issued a statement calling on the Thai authorities to stop using lèse-majesté provisions as a political tool to stifle critical speech. The statement emphasized, “Public figures, including those exercising the highest political authority, may be subject to criticism, and the fact that some forms of expression are considered to be insulting to a public figure is not sufficient to justify restrictions or penalties.” Further, the expert underlined, “Lesè-majesté provisions have no place in a democratic country. I urge the authorities of Thailand to take steps to revise the country’s Criminal Code and to repeal the law that establishes a justification for criminal prosecution.”²⁶ Moreover, the UN Working Group on Arbitrary Detention has also found the detention of individuals under Article 112 to be arbitrary.²⁷

Political detainees were held in official custody following their prosecution and denied their right to bail during three critical periods. The first period was from August to September 2020. Then the next one took place in October 2020, when many activists were indicted under Article 116 of the Criminal Code. Subsequently, the pre-trial detention for individuals indicted under Article 112 in the 19 – 20 September Demonstration case began on 9 February 2021. As the public prosecutor rushed to file indictment orders, each of the accused got sent to prison one by one. Accordingly, from 9 February to 1 June 2021, up to 26 political protestors were

²⁶ Information received from the Facebook page of the Office of the United Nations High Commissioner for Human Rights, Regional Office for South-East Asia. Available at

<https://www.facebook.com/OHCHRAAsia/photos/a.657330534369993/915273288575715/>

²⁷ Information received from Thai Lawyers for Human Rights. Available at <https://tlhr2014.com/archives/12695>

detained while awaiting inquiry and trial. Sixteen of them have been charged under Article 112. Currently, one protestor involved in political demonstrations remains in pre-trial detention.²⁸ It must be noted that any detention of individuals while awaiting inquiry and trial violate the principle of the presumption of innocence until proven guilty in accordance with Article 14 of the ICCPR. As this measure has been implemented during the COVID-19 outbreak, it has caused 11 political detainees to contract the virus from the prisons.

2. The postponement of trials or examination hearings for these cases while the accused or defendants were in detention caused a delay in the proceedings and deprived them of the right to bail

The COVID-19 situation has affected the Criminal Court's judicial process, most notably three bail request hearings for defendants in the 19 – 20 September Demonstration case. First, the Court postponed the hearing for Parit Chiwarat and Chai-amorn Kaewwiboonpan on 6 May 2021, citing that they had not finished their mandatory quarantine.²⁹ Second, the Court postponed the hearing for Panupong Chadnok on 11 May 2021, claiming that he came into close contact with a COVID-19 patient.³⁰ Third, the Court postponed the hearing for Chukiat Saengwong on 3 May 2021 because he contracted COVID-19.³¹ On 14 May 2021, the Court suspended the practice of summoning defendants or detainees for in-person hearings at the Court and online trials via video conference until 27 May 2021. To justify this decision, the Court cited petitions from relevant agencies, including the Letter from the Bangkok Remand Prison No. *Yor Thor* 1768/57 dated 28 April 2021 and Letter from the Office of the Court of Justice No. *Sor Yor* 016/*Wor* 486 dated 12 May 2021. Later, on 19 May 2021³², the Court ordered, "Upon careful consideration, the Court's executive board views that the accused shall testify before the Court for ensuring the equality in the Court's indictment decision. Therefore, the examination hearing for the accused shall be put off until 1 June 2021 at 10:00 hrs. The accused shall present themselves in person at the Court or via video conference on the appointment date." This order reflects that the judges who followed it lacked independence and are bound by the opinions of the "executive board."

From this information, we could see that the COVID-19 situation has affected the criminal proceedings by delaying the defendants' rights to bail. In addition, it is important to note that, in other cases, the Criminal Court and other courts has been arranging trials via video conference per the Regulation of the Office of the Judiciary on the Criminal Procedures in Court Involving Detainees Held in Prison or Detention Facilities During the Coronavirus Disease 2019 B.E. 2563 (2020).³³ In most cases, the Court does not conduct a hearing on bail requests but rather exercises its discretion to grant temporary releases or determine conditions for such releases. Therefore, the joint measure between the Court and the prison to suspend trials and hearings violate the defendants' right to bail and the right to be entitled to an independent tribunal in line with the principle of the right to a fair trial enshrined in Article 14

²⁸ Information received from Thai Lawyers for Human Rights. Available at <https://tlhr2014.com/archives/27450>

²⁹ Information received from Thai Lawyers for Human Rights. Available at <https://tlhr2014.com/archives/29401>

³⁰ Information received from Thai Lawyers for Human Rights. Available at <https://tlhr2014.com/archives/29555>

³¹ Information received from Thai Lawyers for Human Rights. Available at <https://tlhr2014.com/archives/29312>

³² Information received from Thai Lawyers for Human Rights. Available at <https://tlhr2014.com/archives/29841>

³³ <https://jla.coj.go.th/th/content/category/detail/id/21/iid/186983>

of the ICCPR. Further, it also contradicts the Interim Guidance on COVID-19 for Persons Deprived of Their Liberty.

3. Individuals intending to observe the trials were subject to extensive screening processes as the authorities claimed these measures were necessary during the COVID-19 outbreak

According to the principle of a fair trial under Article 14 of the ICCPR, any trial proceedings must be carried out openly for the public. However, in the 19 – 20 September Demonstration case, public trial observations encountered several challenges. On 7 and 8 April 2021, the Court set up five checkpoints that observers were required to pass before entering the trial room. These checkpoints were installed outside the Court building, at the entrance gate and the Court's door on the ground floor, and in front of and inside the trial room. These rigorous screening processes disallowed ordinary citizens from accessing the trial on these dates. In contrast, numerous officials from the Department of Corrections were present in the courtroom to supervise the defendants. Typically, the Criminal Court has only one checkpoint at its gate on the ground floor. Even though the Court did not conduct the trial in secret and provided a room for broadcasting the trial via video conference for observers, ordinary citizens were not permitted to enter the room.³⁴ The Criminal Court issued a statement to clarify the rationale behind this measure, citing its necessity for preventing the spread of COVID-19.³⁵ Still, TLHR found that this measure has not been applied to all cases. Instead, it has been discriminatorily invoked only for cases linked to political demonstrations.

4. The COVID-19 situation in prison severely affects the health conditions of detainees

From 9 February to 1 June 2021, 26 individuals prosecuted for exercising their right and freedom of political expression were held in detention.³⁶ According to TLHR's documentation records, 11 political detainees had contracted COVID-19 during this period. The first reported case was Chukiat Saengwong, who tested positive on 24 April 2021.³⁷ However, there were previous reports about COVID-19 infections among prisoners, and the prison authorities also attempted to force three political activists held at the Bangkok Remand Prison to undergo COVID-19 tests in the middle of the night.³⁸ However, both the prisoners and those monitoring the situation outside could not access any clear information about the pandemic situation inside the prison. Later, many political activists, including Anon Nampa and Panussaya Sitthijirawatanakul, contracted COVID-19 during their detention. This incident prompted the public to demand the authorities to disclose more information. As a result, the Department of Corrections began to make public reports about the COVID-19 situation in prisons in early May.³⁹ According to the Department of Corrections' data, between 1 April and 25 June 2021,

³⁴ Information received from Thai Lawyers for Human Rights. Available at <https://tlhr2014.com/archives/28234>

³⁵ Information received from Khaosod News. Available at https://www.khaosod.co.th/politics/news_6305271

³⁶ Information received from Thai Lawyers for Human Rights. Available at <https://tlhr2014.com/archives/28234>

³⁷ Information received from BBC Thai, Available at <https://www.bbc.com/thai/international-56871605>

³⁸ Information received from Thai Lawyers for Human Rights, Available at <https://tlhr2014.com/archives/27607>

³⁹ Information received from The Matter, Available at <https://thematter.co/brief/142877/142877>

the cumulative number of confirmed COVID-19 patients in 12 prisons accounted for 35,884 cases. Meanwhile, no infection was detected in 127 remaining prisons. Out of this total number, 30,608 patients have fully recovered, whereas 37 of them passed away.⁴⁰

The COVID-19 pandemic poses a greater danger in prisons due to the existing issues of overcrowding, poor well-being of detainees, and limited access to healthcare. The activist suffering from the most serious health conditions was Sakchai Tangjitsadudee, a 63-year-old detainee who had been held since 24 February 2021 for the case in which he was accused of obstructing a prison van. Sakchai was found to be positive for COVID-19 on 11 May 2021. During his bail request hearing on his bail request via video conference, Sakchai, who was then hospitalized at a field hospital, collapsed and had to be transferred to the Intensive Care Unit. According to the information received from another detainee in the same case, he had been suffering from poor health conditions for several days but could not access any medical care. The Court granted bail for Sakchai later on that day. It must be noted that the Court needed to have an external hospital accept the defendant before issuing a bail warrant for him. Initially, the defendant could not find any hospital that could host him, so this bureaucratic requirement caused some delay in the release process. After his release, he still had to remain in the hospital for 43 days.⁴¹

5. The right to family visitations and access to a lawyer

In terms of visitation rights, TLHR found that family members could pay visits to the detainees via the Line application only once a month during February and May 2021.⁴² On the other hand, lawyers could visit them via video conference during their 14-day quarantine period. The measure allowing family members to have only one visit per month could create problems for the detainees in case that they did not have a lawyer and would like their family to find one for them. Therefore, their access to a lawyer could be delayed by this measure.

Additionally, Sam Samat, a stateless defendant charged in the case linked to a demonstration in front of the First Infantry Regiment, had been detained since 26 March 2021.⁴³ His lawyer learned that he contracted COVID-19 on 25 May 2021, yet could not reach him while he was receiving medical treatment at a field hospital under the Central Correctional Hospital. Once he got transferred back to the Bangkok Remand Prison on 15 June 2021, his lawyer requested to visit him on 18 June 2021. Still, the authorities from the Department of Corrections denied this request. They informed the lawyer that any defendant who has left and then returned to the prison must undergo a 28-day quarantine. During this period, no visitation via video conference is permitted.

This case illustrates an explicit restriction on the defendant's right to access a lawyer and other rights linked to the judicial process. Such a restriction constitutes a violation of Article 14 of

⁴⁰ Information received from INN News, Available at https://www.innnews.co.th/news/news-general/news_132531/

⁴¹ Information received from BBC Thai, Available at <https://www.bbc.com/thai/thailand-57169895>

⁴² Information from Line Today, Available at <https://today.line.me/th/v2/article/omEKZj>

⁴³ Information received from Thai Lawyers for Human Rights. Available at <https://tlhr2014.com/archives/28556>

the ICCPR, which guarantees the right to a fair trial that cannot be compromised even during a state of emergency.⁴⁴

Part 2: Proportionality of emergency measures and exemption of liability

2.1 Proportionality of the declaration of the state of emergency in response to COVID-19

In all states governed by the rule of law or democratic principles, any measure that could potentially restrict people's rights must always be strictly necessary (proportionate). The current Constitution affirms this principle in a written provision developed from precedents in previous court rulings. This principle consists of three sub-principles: (1.) Appropriateness – The State's restrictions must be appropriate for achieving the desired result, (2.) Necessity – The State's restrictions must limit people's rights and liberties as little as possible, and (3.) Strict proportionality – the restrictions of people's rights and liberties must be balanced off by the public interests gained from these measures.

Various disproportionate measures enacted under the Emergency Decree

The Thai government has imposed several restrictions that impact people's rights to control the spread of COVID-19. However, the proportionality of many measures have been questioned widely by the public. There are two types of measures that are interesting to examine in terms of their proportionality: Measures that may not be proportionate due to an internal factor and those that may not be proportionate due to an external factor.

Measures that may not be proportionate due to an internal factor: One might say that this type of measure has some substance that inherently violates the principle of proportionality within itself. The curfew order is one key example of such measures. The specific prohibition of leaving one's residence at night is neither effective nor appropriate for controlling the spread of communicable disease and could even pose obstacles to disease prevention efforts. Without this measure, people could leave their residences to make purchases or spend their money any time, including at night. However, due to this measure, many people rushed to buy their necessities before the curfew hours. Accordingly, several places such as stores and shopping malls became overcrowded. Another example of disproportionate measures is the requirement for any person of Thai nationality who wishes to enter the country to obtain a medical certificate to affirm that they are fit to travel. This medical certificate could not serve as actual evidence that its owner does not have COVID-19. Therefore, this rule has created an unnecessary burden for rights holders.

⁴⁴ CCPR/C/GC/29.para.16

Measures that may not be proportionate due to an external factor: This kind of measure might be lawful during the height of COVID-19 outbreaks. However, the key external factor was the significant decrease in reported COVID-19 cases, which had been almost non-existent since 13 May 2020. Despite this factor, some measures continued to restrict people's rights severely without delivering any benefits for the public. Instead, they became a weapon for suppressing people's rights in the name of disease control. For instance, the government ordered the closure of the Big Mountain Music Festival by invoking its power under Article 9 of the Emergency Decree, citing that the high density of festival participants may lead to a pandemic outbreak. Still, the government did not impose the same measure on state agencies' meetings or seminars organized in the same manner.

Proportionality issue of official COVID-19 responses

At present, the government has implemented various measures with the proportionality issues mentioned above – be it the night-time curfew, prohibition of drinking alcoholic beverages at restaurants or eateries, or the ban on entering the country without a medical certificate affirming the traveler's fitness to travel. These measures were not subject to scrutiny by the Administrative Court, which is operated by judges with expertise in public law under the inquisitorial system that facilitates the protection of people's rights. This challenge is due to Article 16 of the Emergency Decree that excludes the Administrative Court's jurisdiction during a state of emergency. This legal provision poses obstacles for guaranteeing the protection of people's rights and liberties amid the current COVID-19 situation.

The situation in Thailand could be compared to a case study in a country where people's rights and liberties receive strong protection, such as Germany. We could say that, in Germany, the principle of proportionality is always taken into account when the government determines measures that could restrict people's rights. For example, the Decree of North Rhine-Westphalia ranks different COVID-19-related measures from the least to the most restrictive ones for people's rights. The requirement for people to maintain a physical distance of 1.5 meters has been ranked as the least restrictive measure. The requirement of wearing a face mask is the second least restrictive one. If wearing the mask could no longer effectively prevent the spread of the virus, the government must introduce an additional measure to limit the number of people who can enter a venue. Further, in case these three measures listed earlier still could not combat the COVID-19 outbreak effectively, the government needs to implement a ban on conducting business or doing activities in public spaces, which is the measure that will impact people's rights and liberties the most.⁴⁵

2.2 Exemption of liability for the exercise of power under the Emergency Decree

Typically, during a state of emergency, it is imperative that state agencies hold ultimate decision-making powers in suppressing or preventing the exigencies of the situation. Such a concentration of power allows these agencies to eliminate hesitancy and increase courage in deciding about the exercise of powers lest they would later be held accountable in cases of missteps. The Emergency Decree on Public Administration in Emergency Situations B.E. 2548

⁴⁵ Page 21, Witcha Nethatsanai, Legal measures of the Federal Republic of Germany for preventing and compensating for the impacts of COVID-19, Administrative Court Journal Year 20, 4th Issue (October-December) 2020.

(2005) also contains a similar provision that excludes the liability for the exercise of power in Section 17.⁴⁶

Scope of the liability exemption

Section 17 determines the scope of liability exemption which covers almost every legal territory. It prescribes that competent officials under the Emergency Decree shall not be subject to any civil liabilities (i.e., demands for compensation), criminal liabilities (i.e., imprisonment and fine), and administrative liabilities. It is also not permissible to penalize officials performing duties under this Decree as long as they exercised their powers to terminate or prevent illegal acts per legal conditions stipulated in Article 17. Nonetheless, this clause does not preclude the right of a victim affected by the exercise of emergency powers to seek compensation by submitting a petition to a government agency or filing a lawsuit to the Court under the Act on Liability for Wrongful Acts of Officials.

Currently, the agency administering state affairs during a state of emergency is the Centre for Covid-19 Situation Administration (CCSA). Initially, the CCSA was under the supervision of the Secretariat of the Prime Minister; however, now it has assumed a special status as an agency under the Emergency Decree without direct affiliation with any administrative agency. Accordingly, under Section 5, Paragraph 2 of the Act on Liability for Wrongful Acts of Officials, the Ministry of Finance serves as the primary government agency responsible for any damages caused by the administration of CCSA.

Persons protected under the liability exemption clause

Two groups of persons enjoy the legal protection under the liability exemption clause under Section 17: competent officials, and persons having identical powers with the competent officials under the Emergency Decree. The competent officials are individuals appointed directly to perform duties under this Decree, including the Permanent Secretary of the Ministry of Public Health, who has been appointed under Provision 3(1) of the Order of the Prime Minister No. 4/2563. Meanwhile, those with identical powers with competent officials include any person performing their duties by invoking powers under the Emergency Decree. However, in some cases, the government has issued announcements indicating that the category of competent officials shall not encompass some types of state officials, including civil servants or employees of ministries, ministerial bureaus, and departments. Therefore, if individuals in these groups exercised the powers under the Emergency Decree, they will not be subject to any liabilities.

Conditions for the exemption of liability

Any person exercising power under the Emergency Decree will be entitled to the liability exemption as long as they do not violate the following conditions specified by Section 17:

⁴⁶ A competent official and a person having identical powers and duties as a competent official under this Emergency Decree shall not be subject to civil, criminal or disciplinary liabilities arising from the performance of functions for the termination or prevention of an illegal act if such act was performed in good faith, non-discriminatory, and was not unreasonable in the circumstances or exceed the extent of necessity, but this does not preclude the right of a victim to seek compensation from a government agency under the law on liability for wrongful act of officials.

1). The exercise of power must aim to prevent and terminate illegal acts

The objective of the official's exercise of power must be to advance the public interests. In other words, it must aim to prevent and terminate any act that is unlawful under the announcements, orders, or laws related to the declaration of a state of emergency. If the official's use of power has other motives, such as personal interests or other types of public interests irrelevant for the prevention and termination of illegal acts under emergency laws, they shall not be entitled to the liability exemption under Section 17.

2). The exercise of power must be carried out in good faith

When exercising power under the Emergency Decree, the official must believe that they are authorized to do so in good faith. However, on condition that the official know that they have no legal capacity to use such power but persist on violating the legal provisions and invoke the power to restrict people's rights and liberties, they shall not be entitled to the liability exemption under Section 17.

3). The exercise of power must be non-discriminatory

Discrimination occurs when there is an implementation of measures that distinguish certain groups of people and treat them differently from other groups in matters with the same substance. Discriminatory acts under Section 17 must be unfair and unworthy of any consideration.

4). The exercise of power must be must neither be disproportionate nor exceed the extent of necessity

The exercise of power to restrict people's rights must be reasonable and proportionate to the exigencies that require such restrictions. The restrictions must be suitable for achieving the desired objective in line with the principle of appropriateness. They must also be the least restrictive option per the principle of necessity. Further, the public must gain more benefits than the losses suffered by private parties following the principle of strict proportionality.

Nonetheless, the actual enforcement of Section 17 of the Emergency Decree remains to be seen because the Court has not delivered any verdict related to this clause in any lawsuits stemming from the situation of the COVID-19 outbreak or about facts of the cases therein.

2.3 Issues of the exemption of liability for the State's implementation of COVID-19 measures

Currently, the Court has not delivered any ruling related to Section 17 of the Emergency Decree on the liability exemption in cases that took state officials to trial for exercising their emergency powers. However, it is manifest that the liability exemption for officials under Section 17 has violated many legal principles as follows:

1). The liability exemption does not align with the principle of "liability without fault"

The principle of "liability without fault" (*La responsabilité sans faute*) is the key element defining the administrative branch's accountability mechanics which require the provision of remedies to injured parties, even in cases where the administrative parties did not commit any unlawful act or violations. This principle suggests that no individual shall suffer from injuries without being able to access reparation. France has developed two conceptual foundations for the principle of liability without fault: Risk-induced liability (*La responsabilité pour risqué*)

and liability based on the breach on the principle of equality before public burdens (*La responsabilité pour la rupture de l'égalité devant la charge publique*).⁴⁷ These concepts were derived from the theory of national solidarity (*solidarité nationale*). Therefore, when States make lawful interventions and incurred damages for the interests of the public or the States, or when State officials hold no liability for such interventions, the individuals shouldering greater burdens than they need to bear in the public interest deserve to be compensated for those damages.

Taking into account the theory mentioned above, the liability exemption is not in accord with the principle of “liability without fault.” In some cases, the exercise of emergency powers also caused damages for parties who are not involved with the situation or incident that prompted law enforcement. Accordingly, State officials must be held liable for the damages caused by their own actions, even including those carried out under the given legal conditions. The State should still provide compensation for those bearing the damages or burden from the actions it has taken in the name of public interests.⁴⁸

2). The burden of proving whether officials complied with legal conditions under Section 17 rests upon the people

Additionally, it is the people’s burden to prove whether the officials carried out their duties during a state of emergency in accordance with the legal conditions prescribed in Section 17. In other words, those who filed a lawsuit against the authorities during this period must demonstrate that the officials exercised their emergency power in the name of public interests in bad faith, disproportionately, or discriminatorily. According to legal scholar Wasan Chompusri, the accuser’s responsibility to bear the burden of proof is particularly challenging in practice as it is difficult to show the Court that the authorities’ performance of duties does not meet the proper legal conditions. Such a burden of proof which rests upon the people illustrates an important problem with the liability exemption for state officials during a state of emergency.⁴⁹

3). The liability exemption under Section 17 may be contrary to or inconsistent with the spirit of some constitutional provisions on the right to bring charges against state agencies

Wasan Chompusri proposes that the Constitution provides a legal framework for the protection of rights and liberties of the people in cases that state officials committed or omitted any acts that caused damages. The charter allows injured parties to pursue legal action against a responsible state agency to access remedy for such damages.⁵⁰ For instance, Section 41 of the Constitution of the Kingdom of Thailand B.E. 2560 (2017) grants protection for people’s right to sue a state agency, stating, “A person and community shall have the right to (3) take legal action against a State agency as a result of an act or omission of a government official, official or employee of the State agency.” The Emergency Decree’s provision that imposes a restriction on people’s right to pursue legal action or exempt the liability for state official’s acts or

⁴⁷ Page 67, Analysis of key cases and rulings, Legal principles from administrative cases concerning the State’s accountability for damages during protests (Verdicts of the Supreme Administrative Court Aor 711/2555 and Aor 1442/2560),

⁴⁸ Wasan Chompusri, The Enforcement of the he Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005) and Protection of People’s Rights and Liberties, Thesis for the Master of Laws, Class of 2016, Chulalongkorn University, p. 322.

⁴⁹ Ibid

⁵⁰ Ibid

omission might cause issues and constitute inconsistency with the spirit of Section 41 of the Constitution.

Part 3:

Recommendations for amending laws related to public health emergencies

In the wake of the global COVID-19 outbreak, each country has been handling the pandemic differently. Some countries have chosen to use existing emergency powers under their Constitutions or legislative acts. For instance, the Federal Republic of Germany did not declare a state of emergency at the federal level but has been attempting to control the pandemic through the Act on the Prevention of Communicable Diseases (Infektionsschutzgesetz, IfSG),⁵¹ which has a relatively high threshold of the protection of individual rights. The Administrative Court could also review the legality of measures implemented under this Act. Moreover, this Act stipulates that people shall be entitled to compensation in a case where their properties were damaged or destroyed due to causes related to epidemic hygiene.⁵² In some countries, including France, the governments responded to the pandemic by enacting a new law on public health emergencies to concentrate the decision-making power and ensure unity of the States' response to public health disasters. However, the substance of such legislation on public health emergencies has been subject to strong criticisms within academia because it is almost indifferent from any other emergency laws.⁵³

In Thailand, the government has enforced the Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005). This law was not originally designed for the purpose of dealing with public health disasters. However, it has been deployed in response to the current public health disaster because its substance grants the executive branch broad decision-making powers. The study in this report found that this Decree has fostered a social environment where fundamental rights could be violated disproportionately to the public interests gained from its enforcement. Therefore, through the systematic examination and assessment of the law, TLHR proposes two types of measures to resolve the current situation on the violation of fundamental rights as follows.

3.1 Amendment of provisions within the Emergency Decree

The foremost cause leading the enforcement of the Emergency Decree to foster severe restrictions on people's fundamental rights is the endless declaration of a state of emergency,

⁵¹ Andrea Kießling and Anika Klafki, Fighting COVID-19 – Legal Powers and Risks: Germany, retrieved from <https://verfassungsblog.de/fighting-covid-19-legal-powers-and-risks-germany/>

⁵² § 65 IfSG It is currently debated within the academia whether the order to terminate some activities, such as the cancellation of a football match, would fall under the scope of this Article.

⁵³ Sébastien Platon, From One State of Emergency to Another □ Emergency Powers in France, retrieved from <https://verfassungsblog.de/from-one-state-of-emergency-to-another-emergency-powers-in-france/>

which is subjected to no oversight by other institutions. In countries including Italy, Spain, France, or Germany, the extension of a state of emergency generally requires approval from the legislative institution. The legislative branch will ensure checks and balances by considering the length of extension and appropriateness of the continuous use of emergency powers. Meanwhile, the Thai Emergency Decree does not permit this type of mechanism. Accordingly, the Emergency Decree should be amended, especially Section 5, which prescribes that only the Cabinet's approval is required to extend the state of emergency. It shall be added that the Parliament must agree upon every extension of the state of emergency.

Secondly, any subordinate laws issued under the Emergency Decree, including orders, announcements, and regulations, could not be reviewed by the Administrative Court. Section 16 prescribes that the Administrative Court does not hold the jurisdiction to investigate the exercise of emergency powers. Therefore, no judicial institution has direct authority to inspect and revoke restrictions on people's rights and liberties, which may be unlawful administrative acts. When brought to the Civil Court, these by-laws can only be challenged in tort claims that could merely demand compensation. The Court of Justice has no authority to revoke any administrative act directly. Further, it is likely to dismiss this kind of tort case because the exercise of power in question is authorized under the law.

Moreover, the Administrative Court employs the inquisitorial system for its trials. Meanwhile, the damaged parties must file a lawsuit with the Court of Justice, which uses the accusatorial system. Accordingly, individuals affected by the exercise of emergency powers have to bear the burden of seeking evidence by themselves. In some cases, they lacked the capacity to bring witnesses and evidence which belong to state agencies to the Court. Therefore, the exclusion of the Administrative Court's jurisdiction for reviewing actions carried out under the Emergency Decree results in undermining the appropriate protection of people's rights and liberties. TLHR thus proposes for the amendment of the Emergency Decree through the removal of the phrase "And the law on the establishment of Administrative Court and Administrative Court Procedure" from Section 16.

3.2 Enactment of legislation concerning public health emergencies

Even though Thailand does not have a specific piece of legislation enacted for managing public health disasters, many relevant domestic laws could be used for such a purpose, such as the Communicable Diseases Act B.E. 2558 (2015), Disaster Prevention and Mitigation Act, B.E. 2550 (2007), and State Administration Act B.E. 2538 (1995). However, TLHR observes one critical legal challenge in the current system. At present, some measures or actions taken under these relevant administrative laws might be subject to requirements under the Administrative Procedure Act B.E. 2539 (1996), which is central legislation binding state officials to adhere to stricter criteria for guaranteeing fairness. At times, this legal hurdle might cause delays in the government's response to public health disasters.

One intriguing option to ensure rapid responses to public health disasters and secure a practical guarantee that people's rights and liberties will not be disproportionately restricted is enacting a new law to address public health emergencies in particular. TLHR's studies found that such legislation on public health emergencies could be drafted using the Communicable Diseases Act B.E. 2558 (2015) as a model. The Communicable Diseases Act provides a comprehensive power for determining measures to deal with infectious diseases. Still, the Act provides that

the main competent organizations shall be local administrative organizations (Provincial Administrative Organizations) and the central administrative organization (The National Committee on Communicable Diseases). TLHR, on the contrary, proposes for the incorporation of some provisions that vest the power of managing communicable diseases with local administrative organizations as in the Disaster Prevention and Mitigation Act, B.E. 2550 (2007). This move could fill the gap by empowering localities and increasing the number of organizations to strengthen the responses to public health disasters.

Nonetheless, the management of public health disasters requires united and immediate responses. The specific legislation on public health emergencies could allow for the implementation of different measures or authorize the exercise of power in response to public health emergencies that are not subject to requirements under the Administrative Procedure Act. Still, these measures and administrative actions under the law on public health emergencies must be subject to scrutiny under the Administrative Court to guarantee the protection of people's rights and liberties. Moreover, the extension of a state of public health emergency must be approved by the Parliament to ensure that the separation of powers is not jeopardized by emergency powers and prevent the executive branch from perpetuating the state of emergency as we are witnessing in the current situation in Thailand.



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