Health Before Rights and Liberties: Thailand's Response to COVID-19

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On 13 January, Thailand was the first country outside of China to confirm a COVID-19 case. Despite calls to restrict inbound travel, especially from China, the government of Prayuth Chan-ocha rejected the idea due to concerns over the economy and foreign relations. More cases followed. By early March, the situation reached a peak of over one hundred new confirmed cases per day. Prayuth invoked the Emergency Decree on Public Administration in Emergency Situation, B.E. 2548 (2005; 'the 2005 Emergency Decree') on 26 March 2020. At present, new cases are down to a single-digit figure per day. However, the 2005 Emergency Decree may not be the appropriate tool, as it has misled the public's understanding of the pandemic and allows the government to employ unnecessarily harsh measures, leading to over-criminalization and arguable abuses of power.

The 2005 Emergency Decree

The 2005 Emergency Decree was promulgated under the administration of Prime Minister Thaksin Shinawatra, whom many critics labelled as a strong authoritarian under the cloak of electoral democracy. Originally, the Decree was the key mechanism for dealing with Muslim Malay insurgency, which has been ongoing since 2004. The law thus contains several provisions bestowing upon the Prime Minister wide-ranging emergency powers purportedly to eliminate threats to national security.

The 2005 Emergency Decree is a less pervasive version of the martial law that would grant the army virtually unlimited power. The 2005 Decree still allows a civilian government to take a leading role in resolving an emergency situation. But it transfers the decision-making power from the cabinet to a special taskforce comprised of cabinet members, high-ranking civil servants, and armed forces commanders. The prime minister, with the endorsement of the cabinet, can declare a state of emergency throughout the Kingdom or in specific parts thereof. A period of emergency cannot exceed three months from its declaration, while successive extensions of no more than three months can be imposed by the prime minister, again with the consent of the Cabinet. In addition to the Deep South conflict, the 2005 Emergency Decree was frequently invoked to repress anti-government riots in Bangkok from 2008 to 2014. More importantly, Sections 9 and 11 of the 2005 Decree grant the PM an extensive degree of discretionary power, including a curfew, search and detention, in picking and choosing measures that best suit an existing situation. Violation of the emergency order results in no more than two years imprisonment and up to 40,000 THB fine, a large sum in comparison to a daily wage of 300 THB.

In tandem with its wide-ranging list of emergency powers, the 2005 Emergency Decree, it must be emphatically noted, also notoriously provides state officials with impunity. Section 5 of this law allows the Cabinet to approve a three-month declaration of a public exigency with no need to obtain approval from Parliament. In addition, an ouster clause is present in Section 16, excluding the Administrative Court from reviewing any regulations and orders enacted by the PM under this Decree. The Decree is still subject to the jurisdiction of the Court of Justice which is nevertheless known to be more deferential to the government.

Prayuth's declaration of a state of emergency was accompanied by six Ordinances under Section 9 of the 2005 Decree. In summary, these by-laws impose six COVID-19 response measures; (1) a semi-lockdown order, closing places of social gathering e.g. movie theatres, department stores, boxing rings, (2) shutting

down borders and airports, requiring a fit-to-fly health certificate, (3) banning profiteering of surgical masks and other protective gears, (4) prohibiting social gathering, (5) prohibiting the spread of fake news, (6) imposing curfew from 10 pm to 4 am. These are minimum standards. Each province may impose more measures as necessary. For example, the COVID-19 taskforce recommended a ban on the selling of alcohol and that nationwide every province voluntarily impose a ban.

Originally, the emergency situation was to last until 30 April. It has now been extended to 31 May 2020.

Assessment of the Emergency Order

Prayuth Chan-ocha declared that health must come before rights and liberties. His statement reflects a deep-seated authoritarian-oriented thinking. While this revelation is not surprising, for he had been the junta leader from 2014 to 2019, it serves as a reminder that COVID-19 put Thai people's rights and liberties in a precarious situation.

Accountability

There are a few pieces of legislation that the government may invoke to tackle COVID-19. Notably, the 2015 Communicable Diseases Act provides several measures including a lockdown, border shutdown, and a quarantine. The 1999 Price Control Act and the 1954 Anti-Hoarding Act would be sufficient to prevent and punish profiteering behaviour. The 2006 Computer Crime Act could stop the spread of fake news. Social congregations at night time such as gambling and motorcycle racing are already illegal under the current criminal law. All of them authorize the agencies to effectively monitor and control the public's behaviour but they would not absolve the agencies from accountability. Also, the 2005 Decree allows the PM several exclusive extraordinary powers which impose greater limits upon political rights, namely media control and curfew.

Despite the ouster clause, an invocation of the 2005 Emergency Decree is still in theory subject to constitutional constrains. Section 3 limits an exercise of governmental power under the Rule of Law. Section 25 states that the government's attempt to restrict rights and liberties of Thais must meet the proportionality test. However, the few lawsuits by Thais who were stranded overseas that challenge the Prime Minister's fit-to-fly requirement as imposing unnecessary burden on them were rejected by both the Administrative Court and the Civil Court. Regrettably, both courts did not apply the proportionality test to the order. While the Administrative Court stated that the presence of an ouster court strips it from reviewing such requirement, the Civil Court chose to defer to the government by declaring that the promulgation of the order at hand did not constitute a tort. Currently, Parliament is not in session so there is no chance for the opposition to question the government. The opposition is requesting an extraordinary session to debate on the government's response to the viral pandemic. But the government refuses to grant such request.

There are a number of reports of wrongful and arbitrary arrests. Many of those who were caught breaking a curfew actually had a permit but officers simply ignore it. They often receive little press coverage and no officer has been held accountable. Recently, the President of the Supreme Court instructed judges that they should avoid handing out imprisonment sentencing because it would be excessive. It remains to be seen if his peers will follow the advice.

Political Rights

By late February, the Prayuth government was facing escalating public fury and a possible massive street protest. The anger was sparked by the Constitutional Court's dissolution of the key opposition party, a move the majority of Thais believed was politically motivated and harassment. Dissatisfaction soon grew into other topics such as Prayuth's failure to rescue the country's sinking economy and to clean the government of corruption. The pandemic, therefore, offers Prayuth much-needed cover and respite.

While the country is under the lockdown, the government remains active. Thais have to remain vigilant. The army proposed a plan for armoured vehicle procurement that cost several billions of Baht. The government plans to cut down the budget for the universal health care system. Most recently, the cabi-

net is preparing to enter into the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) without proper public consultation. All of these moves have incited public outcry and criticism online. Although the government eventually agreed to withdraw them, it condemns people for not paying respect to the government and the army in the time of crisis, even threatening to charge critics with defamation. One artist was charged under the Computer Crime Act for spreading false information, which concerned his comment on the airport's lax screening of tourists.

The 2005 Emergency Decree might provide the government an excuse from public scrutiny but the opposition is active too. They are experimenting with a new channel to express their voice such as online mob from home. Again, the government criticizes such activity as wrong timing.

Socio-economic Impact

Even though the government does not prioritize rights and liberties in the fight against COVID-19, its socio-economic impact cannot be easily disregarded. As the government withheld much information, confusion reigned. When the lockdown was announced without advanced notice, millions found themselves either jobless or on furlough. Small- and mid-sized businesses are hit particularly hard because they are more vulnerable to the shutdown. Thailand has one of the worst economic disparities in the world, meaning that the majority of Thais have little savings and live in rented accommodation. A lockdown deprives them of their living place and food. Here, the 2005 Emergency Decree proves itself inadequate to address socio-economic grievances.

Unfortunately, the rise of militarism in recent years has oriented the entire bureaucracy towards national security concerns, for example, cracking down on dissenters, rendering it ill-suited to the pandemic which presents a totally new kind of threat. Many officers show no leniency to those in trouble. There are even reports of homeless people being arrested for breaking the curfew. Moreover, the bureaucracy is highly centralized, possessing expansive and immense power, but factionalism prevents the whole administration to work in unison.

The result is a very slow response to socio-economic concerns. The initial economic relief package came out with too little too late. It was offered, first, to 3 million Thais before being extended to 9 million. Still it fails to cover at least 20 million individuals who registered for such relief package. The registration itself was so plagued with troubles that many families committed suicide out of frustration and hopelessness. For example, the registration must be done online, leaving the most vulnerable, often with no smartphone or internet, with no access to aid. Many applicants are rejected for unknown reason. Angry protesters stormed the Ministry of Public Finance only to be told to appeal, again, online. The Government shows a very callous attitude toward public participation as it appears reluctant to listen to economists who publicly suggest the government to adopt a more universal coverage and simplify the registration and payment process.

Where the government fails, private individuals try to step in. Many benevolent individuals organize handout of food and cash to the less fortunate compatriots. But instead of assisting such charitable activity, the government tries to control, and in effect, discourage, donation due to fear that such activity would help spread the virus when people come into close contact to receive offerings.

Recommendation

Our assessment raises a question whether the 2005 Emergency Decree is the best response to the COVID-19 pandemic. The answer is ostensibly negative. It allows the arbitrary exercise of power and an excessive encroachment upon human rights. The state of emergency is even less persuading if considering experiences from several other countries such as Taiwan. Rather than adopting a national security-oriented approach, the Taiwanese government succeeds in responding to the pandemic by leveraging soft powers, notably public health technologies such as health monitoring QR code and open databases.

As formal check-and-balance mechanisms, the judiciary and legislature, no longer function, freedom of expression becomes more important than ever. Thais must insist on their rights to monitor, question, and criticize the Government. The 2005 Emergency Decree should not curb public criticism of the government's response to COVID-19 as well as other matters. The virus pandemic is a public health crisis, not a national security threat, and should be treated accordingly. The Government should avoid employing the 2005 Emergency Decree and utilize instead the existing legislation suited for the crisis. In a longer term, Thailand must reconsider its constitutional design in order to build a more stable and decisive government.

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