

Position Paper

Restrictions on freedom of expression through the lèse-majesté law in Thailand

General political context

The political situation in Thailand has been volatile for the past few years. Thaksin Shinawatra, leader of the Thai Rak Thai (TRT) Party, came to power in 2001, as a result of elections. During his administration, the human rights situation deteriorated with extrajudicial executions carried out in the framework of the fight against drug trafficking; abusive restrictions on freedom of expression, notably through libel cases; acquisition of a major television station by Thaksin's company; killing of human rights defenders involved in the defence of natural resources for local communities; widespread corruption in favour of the ruling elite.¹ The Thaksin government, however, took some measures in favour of the poorer sections of the population; it established in particular a universal health care system.

Thaksin was ousted by a military coup in September 2006. The TRT Party was dissolved in May 2007 by the Constitutional Court.² Under military rule, a new Constitution was hurriedly drafted and adopted in 2007 by a military approved assembly. In an attempt to give it a democratic pedigree and, by extension, democratic credentials to its proponents, a pseudo referendum was held with massive publicity for a yes vote and prohibition on adverse criticism. With no alternative choice, the vote was only marginally in favour of the unsatisfactory constitution. A general election was subsequently held in December 2007, won by the People Power Party (PPP) – the party that had replaced the TRT. The political forces that had been overthrown by the coup consequently came back to power. Samak Sundarajev was elected Prime Minister.

¹ See Concluding observations of the UN Human Rights Committee concerning Thailand, CCPR/CO/84/THA, 8 July 2005 at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.CO.84.THA.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.84.THA.En?OpenDocument), paras. 18 and 19 in particular.

² The TRT Party was dissolved for violating the election law, and 111 party executives, including Thaksin, were barred from political office for five years.

Protests against that government were subsequently led by the PAD, the People's Alliance for Democracy, starting in August 2008, and the Government House in Bangkok was occupied by the protesters. The PAD demanded that Samak step down. A civil court ordered the eviction of the PAD from the Government House, and arrest warrants were issued against 9 PAD leaders on charges of inciting insurrection. On 2 September 2008, after clashes between pro- and anti-government protesters, the Prime minister declared a state of emergency. The Constitutional Court disqualified Prime Minister Samak from office on an allegation of conflict of interest.³ Somchai Wongsawat became Prime Minister and he lifted the state of emergency. Somchai Wongsawat was in his turn disqualified by the Constitutional Court and, on 15 December 2008, Abhisit Vejjajiva, leader of the Democrat Party, became Prime Minister of Thailand.

The PAD supporters have been called the “yellow shirts”, while Thaksin's supporters are labelled the “red shirts”. Both groups are heterogeneous, but yellow shirts are generally described as bringing together mainly urban residents, certain businessmen and some academics; while red shirts are depicted as people from the rural areas and businessmen close to Thaksin. Observers consider that most elements of the military support the yellow shirts behind the scene. Several events have been largely interpreted as demonstrating that the Queen supports the PAD. As described above, the judiciary itself appears subservient to the PAD. The divide of Thai society between Red and Yellow shirts seems deeply entrenched and new political turmoil cannot be excluded in the future.

Although the King has no power under the Constitution, the monarchy is at the core of the political debate in Thailand today. The most respected institution is being used in the framework of the struggle between the Red and the Yellow shirts, and misused by both sides to pursue their own political interests.

All individuals interviewed and organisations met by FIDH⁴ unanimously converge to consider that the lèse-majesté crime is being used by the current government against political opponents in a much more systematic way than used to be the case in the past. Protecting the image of the King serves today as a pretext to stifle political dissents. Furthermore, FIDH fears that lèse-majesté may have a broader chilling effect on intellectuals, academics and civil society actors at large.

Some academic circles and human rights advocates suggest this provision should be amended, but those voices are a clear minority because of the fear surrounding this issue, which is a taboo subject in Thailand.

³ For more details on that crisis see International Crisis Group, Thailand: Calming the Political Turmoil, Asia briefing n° 82, 22 September 2008.

⁴ A FIDH delegation was in Bangkok, Thailand, from 14 to 23 February 2009 and from 1 to 10 May 2009.

Legal Framework

Laws regarding lèse-majesté in Thailand have been in its criminal code since 1908 and have also been enshrined in every constitution the Kingdom has ever had. Under the 2007 Constitution of Thailand⁵, “The King shall be enthroned in a position of revered worship and shall not be violated. No person shall expose the King to any sort of accusation or action.” (Section 8).

“A person can invoke human dignity or exercise his rights and liberties in so far as it is not in violation of rights and liberties of other persons or contrary to this Constitution or good morals.” (Section 28).

The Constitution protects the right to freedom of expression (Sections 45⁶ to 48) and to freedom of information (Section 36⁷).

Defamation is dealt with in articles 326 to 333 of the penal code, which provides for one year in prison and/or a fine – up to two years in prison in certain circumstances. FIDH recalls that the UN Special Rapporteur for the promotion and protection of the right of freedom of opinion and expression considers that “sanctioning libel and defamation by prison sentences is not proportionate. Furthermore, he is of the view that criminal law is not appropriate for regulating such offences. [...] Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, as necessary, with appropriate civil defamation laws.”⁸ “Sanctions for defamation should not be so large as to exert a chilling effect on freedom of opinion and expression and the right to seek, receive and impart information; penal sanctions, in particular imprisonment, should never be applied.”⁹

The lèse-majesté crime is defined in the Penal Code, in the sections dealing with internal security (article 112): “Whoever defames, insults or threatens the King, Queen, the Heir-apparent or the Regent, shall be punished (with) imprisonment of three to fifteen years.”

Contrary to the offence of defamation, the lèse-majesté crime does not require that the victim files a complaint: the law can be invoked by anybody. It is a non-compoundable offence, meaning an offence against the state, and not against an individual. The current King never filed a lèse-majesté case himself and even declared in an often quoted speech in 2005 that the King can make mistakes and that people should be able to criticize him. However, until recently very few individuals have dared to call for the repeal of the law as there is a clear fear that anyone calling for such action could be considered as not loyal to the king and eventually charged with lèse- majesté

⁵ The provisions of the Constitution quoted in this note are taken from an unofficial translation available at <http://www.asianlii.org/th/legis/const/2007/1.html#C03P06>

⁶ Section 45: “A person shall enjoy the liberty to express his opinion, make speech, write, print, publish, and make expression by other means.

The restriction on liberty under paragraph one shall not be imposed except by virtue of the law specifically enacted for the purpose of maintaining the security of State, protecting the rights, liberties, dignity, reputation, family or privacy rights of other person, maintaining public order or good morals or preventing or halting the deterioration of the mind or health of the public.”

⁷ Section 36: “A person shall enjoy the liberty of communication by lawful means.

The censorship, detention or disclosure of communication between persons including any other act of disclosing a statement in the communication between persons shall not be made except by virtue of the law specifically enacted for security of the State or maintaining public order or good morals.”

⁸ See Special Rapporteur, E/CN.4/2003/67, 30 December 2002, para. 73.

⁹ See Promotion and protection of the right to freedom of opinion and expression, UN Doc.E/CN.4/1999/64, §28.

Under Article 112 of the Penal Code, the scope of lèse-majesté is limited to criticism of the King, the Queen, the Crown Prince and the representative of the King. However, in October 2008, a democrat MP who has since then become the Minister of Justice, Mr. Piraphan Salirathavibhaga (also spelled Peerapan Saliratvipak), reportedly suggested to amend the Computer Crimes Act to “boost the efficiency of law enforcement to detect smears against the monarchy on the Internet”.¹⁰ This amendment was not adopted. In addition, in November 2008, MPs from the Democratic Party have proposed harsher penalties for persons defaming the Thai monarchy via the Internet or computer (up to 20 years in prison), including for persons uploading defamatory remarks.¹¹ This proposal was eventually not adopted.

It is worth noting that in October 2007, some members of the military-appointed National Legislative Assembly had proposed an amendment to extend the scope of the lèse-majesté law in order to protect also the members of the privy council and representatives appointed by His Majesty the King from defamation, insults or threats. This amendment was subsequently withdrawn.¹²

In lèse-majesté cases, the question is not whether what the suspected offender said corresponds to the truth. The only criterion is whether what has been said or done is construed as offensive to the King. This differentiates the lèse-majesté crime from the defamation crime, whereby the proof of the truth of any impugned statement should fully absolve defamation defendants of any liability in relation to an allegation of harm to reputation. Indeed, no one should be held liable in defamation for statements which are true.¹³

The Computer-related Crime Act was adopted in 2007. It extends the crime of lèse-majesté to the Internet. Under section 14 of that Act, shall be liable to imprisonment for a term not exceeding five years and/or to a fine whoever inputs “into a computer system computer data that is an offence against national security or terrorism according to the Criminal Code”, and whoever “publish(es) or forward(s) any computer data with the full knowledge that such computer data is” prohibited under the above-mentioned provision (informal translation) and shall be liable to imprisonment for a term not exceeding five years and/or to a fine.¹⁴ Under section 15, a service provider who intentionally supports or give consent to the commission of an offence under section 14 in the computer system under his/her control, shall be liable to the same penalty as under section 14.

On 23 January 2009, the Senate decided to set up a subcommittee to study and follow enforcement of laws and standards relating to protection of the monarchy. The objective is to identify ways to ensure greater compliance with the lèse-majesté law, including by proposing legislative amendments if relevant. In addition, in early 2009, a website was created to « protect the King » which makes it possible for any citizen to report lèse-majesté cases.¹⁵ According to the BBC, the site has managed to block 4,818 websites in its first 24 hours of operation.¹⁶ In January 2009, the Justice Ministry allegedly

¹⁰ http://www.nationmultimedia.com/2008/10/30/politics/politics_30087202.php

¹¹ <http://www.thailawforum.com/news/2008/news-Nov2-08.html#2>

¹² See notably <http://www.nationmultimedia.com/worldhotnews/30052420/SOCIETY-MUST-PROTECT-FREEDOM>

¹³ According to Article XIX, even the crime of defamation in Thailand is not in conformity with international human rights standards since the right to prove truth is limited to statements made in the public interest, while it should be the general rule – see Article XIX, Memorandum on Thailand's Criminal and Civil Defamation Provisions, London, October 2004.

¹⁴ See text of the law on

http://www.etcommission.go.th/documents/laws/draft/cc_act_en_unofficial.pdf

¹⁵ Accessed at <http://www.protecttheking.net/>

¹⁶ <http://news.bbc.co.uk/2/hi/asia-pacific/7871748.stm>

reported that over 10,000 websites contain messages insulting to the monarchy. According to the Information and Communication Ministry (ICT), 2,000 such websites have already been blocked.¹⁷

FIDH considers that article 112 of the Thai Penal Code is incompatible with the right to freedom of expression enshrined in article 19 of the UDHR and article 19 of the ICCPR, ratified by Thailand in 1996. The harsh prison sentences for *lèse-majesté* (up to 15 years in prison) appear blatantly disproportionate in relation to the harm caused and the impossibility to exculpate oneself by demonstrating the truth of the statements. To a lesser extent, the defamation provisions included in the Penal Code and Sections 14 and 15 of the Computer-related Crime Act do not conform to Thailand's international human rights commitments either. In addition, more than the legislation itself, it is the use that is being made of that provision that raises strong concerns.

Application of *Lèse-majesté* legislation

Lèse- Majesté law has been applied in the past in the context of a high media attention. Social activists such as Sulak Sivaraksa were charged with this crime in the 1980s and 1990s because they allegedly criticized the King; Sulak was eventually acquitted.¹⁸ Frenchman Lech Tomasz Kisielewicz who in 1995 allegedly committed *lèse-majesté* by making a derogatory remark about a Thai princess while on board a Thai Airways flight in international airspace was taken into custody upon landing in Bangkok and charged with offending the monarchy. He was detained for two weeks, released on bail, and acquitted after writing a letter of apology to the King.¹⁹ A more recent example, which took place in a quite tense political context, is the *lèse- majesté* charges filed by the former Premier Thaksin Shinawatra against his political opponent Sondhi Limthongkul during the political crisis of 2005 and 2006. The latter fled the same charges against Thaksin provoking a political turmoil in the country. Thaksin's alleged *lèse-majesté* was one of the stated reasons for the Thai military 2006 coup.²⁰

The total number of persons currently charged or under investigation for LM crime is unknown. Local sources diverge in that regard, ranging from 10 to 30 persons charged under that provision or under investigation. Some local actors warn on the existence of many other cases at the stage of investigation. More than half of the cases recorded by local groups reportedly concern critics of the current government or the army, be they academics, journalists or political activists. Chotisak Onsoong (student activist) and Jitra Kotchadej (union activist) e.g., are among the cases still under investigation by the police. The BBC's south-east Asia correspondent and Foreign Correspondent Club of Thailand (FCCT) vice-president Jonathan Head has not been charged but is also the subject of ongoing investigations in a *lèse-majesté* case since April 2008. In 2008, the BBC correspondent was accused of *lèse-majesté* 3 times. In the most recent case Watanasak filed new charges highlighting a conspiracy connecting Thaksin Shinawatra, Jakrapob Penkhair and Jonathan Head to Veera Musikapong at the FCCT.

The Central Investigation Bureau (CIB) commissioner Lt General Worapong Chewpreecha said in March 2009 that CIB is "trying to wrap up

¹⁷ <http://www.prachatai.com/english/news.php?id=960>

¹⁸ "A Critic May Now Look at a King", Macan-Markar, Marwaan, The Asian Eye, 18 May 2005

¹⁹ <http://dic.academic.ru/dic.nsf/enwiki/468099>.

²⁰ During the Songkran 2009 unrest, Thaksin Shinawatra accused Privy Council President of masterminding the 2006 military coup. Royalists interpreted this as an attack on his Majesty Bhumibol.

32 cases of lèse-majesté.²¹ In addition, as a consequence of the Computer-related Crime Act of 2007, an unknown number of websites considered as slanderous of the King were closed down. However, no comprehensive information is being made publicly available by the authorities on the lèse-majesté cases and procedures, presumably because they prefer to avoid any public debate on this issue.

FIDH was able to confirm, through various interviews, the following cases:

- In March 2007 Swiss national Oliver Jufer was convicted of lèse-majesté and sentenced to 10 years for spray-painting on several portraits of the king while drunk in Chiang Mai, Thailand. Jufer was pardoned by the king on 12 April 2007.²²
- On 20 September 2007, Khun Chotisak Onsoong attended a cinema in Bangkok. When it came time, as is the custom, for patrons to rise at the beginning of the movie for the royal anthem, Chotisak remained seated. The case is reportedly still under investigation.
- Ms. Boonyean Khongpam was condemned on 6 November 2008 to 12 years in prison, a sentence that was reduced to six years because she pleaded guilty. She is currently detained in the Bang Khen Women's Prison in Bangkok.
- Harry Nicolaidis, an Australian author, was condemned to six years in jail, that were reduced to three years in January 2009 because he pleaded guilty. On 21 February 2009, he was pardoned by the King and released.
- Two other persons are currently in jail pending their trial: Mr. Suwicha Thakhor (an engineer arrested in January 2009 for posting comments on the Internet considered as insulting to the monarchy) and Ms. Charnchoengsilpakul Darunee (nicknamed Da Torpedo) -a pro-Thaksin activist- in detention since September 2008 – her trial was scheduled to be held in June 2009. However, it was delayed as her lawyer filed an appeal against the court's decision to hold a closed trial. The presiding judge ordered hearings to be held in secret, citing national security concerns. The appeal of the defence of Ms. Darunee is based on the grounds that Thailand's constitution guarantees defendants the right to a public trial. Her case is highly politicized as she even made outspoken comments and attacks on the country's revered King Bhumipol Adulyadej, warning him that the monarchy would be overthrown by a popular revolution.
- Thossaporn Ruethaiprasertsung was arrested and charged with lèse-majesté for making photocopies of leaflets with contents allegedly negative to the monarchy and the Privy Council.²³
- Six persons have been set free on bail: Mr Somkieat Pongpaiboon, Mr. Sontai Limtuongkul (also spelled Sondhi Limthongkul), Mr Charnvit Jariyanukul, Mr Veera Musikapong and Mr Jakrapob Penkhair²⁴ (pro-Thaksin politician), Mr. Sulak Sivaraksa (an academic).
- Three persons fled to other countries for fear of being jailed under the lèse-majesté law: Mr Chucheeq Chewasut, Mr. Suchart Nakgangchai and Mr Giles Ungpakorn (leftist commentator, social activist and academic).

²¹ <http://www.nationmultimedia.com/breakingnews/read.php?newsid=30087173>

²² BBC News, Sensitive heads of state, 29 March 2007:
http://news.bbc.co.uk/2/hi/in_depth/6498297.stm

²³ Prachatai, Woman arrested for photocopying offensive leaflets in Nakhon Ratchasima, 18 April 2009. See below.

²⁴ In March 2008 Police Colonel Watanasak Mungkijakarndee filed a case against Jakrapob Penkhair for comments made in an FCCT event in August 2007.

➤ More recently, Ms. Chiranuch Premcahiporn, Prachatai webmaster,²⁵ was arrested on 6 March 2009 in Bangkok by the Crime suppression division of the police under article 15 of the Computer-related Crime Act. She was released on bail the same day.

On 4 March 2009, an international campaign was launched calling for a reform of Thailand's lèse-majesté Law. The coordinators of the campaign announced, in a Press Release on 4 May 2009, that more than 214 dignitaries, scholars and citizens from various countries around the world have signed on the letter addressed to the Prime Minister of Thailand to reform the law. Among other demands, the campaign called on the Thai authorities to consider taking action to withdraw the current lèse-majesté charges and work to secure the release of those convicted under this law.²⁶ During various meetings of the FIDH delegation, held in May 2009, including with the Deputy Permanent Secretary of Justice and members of the National Human Rights Commission, it was generally acknowledged that public discussions on lèse-majesté legislation should not be a crime under the law.

²⁵ Prachatai is an independent online news website launched under the Thaksin government to respond to increasing interference by the government in the media.

²⁶ Press Release, 4 May 2009, International Campaign for Reform of Thailand's lèse-majesté Law.

Recommendations:

In light of the above, it appears clearly that the lèse-majesté law constitutes a powerful political and social "hammer"²⁷ in Thailand. FIDH makes the following recommendations to the Thai government:

- The information regarding the number of investigations concerning LM cases, the number of persons charged and the number of websites blocked should be made public by the government. The current policy of secrecy only feeds rumors and speculation regarding the extent to which this law is being used and misused.
- The Minister of Justice should make sure that this law is never used as a political tool to silence members of the opposition or intellectuals and other activists who disagree with government policies.
- The relevant Parliamentary Committee should carry out a comparative study of equivalent legislation in other constitutional monarchies in order to identify avenues to amend the Penal Code to prevent any abuse of lèse-majesté provisions in the future, in violation of the right to freedom of expression. In this sense, the jurisprudence of the European Court of Human Rights (in Strasbourg) would be an interesting example of how several legal systems face the problem of defamation of monarchs. According to the Court "common defamation laws" suffice to protect heads of state ... from remarks that damage their honor or reputation or are insulting".²⁸

The judiciary should comply with Thailand's international obligations and apply lenient sentences in respect with international human rights standards on lèse-majesté cases. The Courts have been reportedly extremely severe regarding sentences applied to those convicted on lèse-majesté charges. In many cases, prior to acceptance of the accused of the charges, the maximum imprisonment is traditionally applied. The right to an open and fair trial should be guaranteed in all circumstances. FIDH draws the attention of the Thai judiciary to the danger that closed trials represent regarding the guarantee of individual's rights during judicial processes without public scrutiny. The judiciary should fully exercise its constitutional role and uphold the public liberties respect by mitigating the effects of lèse-majesté law until its revision.

²⁷ As it was called by Anderson in:

http://www.upiasia.com/Human_Rights/2008/04/28/lese_majeste_in_thailand/2852/

²⁸ Colombani and others v France 2002, Press Release issued by the Registrar, 25/06/2002, available on : <http://www.echr.coe.int/Eng/Press/2002/june/Colombanijudepress.htm>.

See also Pakdemirli v Turkey 2005, Press release issued by the Registrar, 22/02/2005, available on : <http://www.echr.coe.int/Eng/Press/2005/Feb/Chamberjudgments220205.htm>