

Mandate of the Special Rapporteur on the independence of judges and lawyers

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(Please use this reference in your reply)

17 October 2024

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the independence of judges and lawyers, pursuant to Human Rights Council resolution 53/12.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning the **impact that several Thai laws and regulations¹ have on the independence of the judiciary and the separation of powers**. As it stands, the appointment process for the Constitutional Court, as outlined in the 2017 Constitution, along with the authority granted to the executive under the Constitution's "transitory provisions" chapter, may significantly undermine judicial independence as the majority of the Court's members were appointed through a process controlled by the Senate, which is made up of individuals directly appointed by the military junta or NCPO, thus ensuring strong executive influence in the appointment of these judges. In addition, since regulations allow adjudication by judges to be subject to hierarchical supervision, there appear to be **significant risks to the individual independence of Thai judges due to unwarranted interferences**, including undue influence from other judges, when deciding specific cases.

According to the information received:

Following the 2014 coup, the military junta, operating under the name of the National Council for Peace and Order ('NCPO'), drafted a new constitution that was subsequently adopted in 2017. The 2017 Constitution provides a role for the Senate in the process of appointing Constitutional Court Justices. Pursuant to section 269 of the 2017 Constitution, the Senate was composed by 250 senators appointed by the military junta, or NCPO. The last appointments of Constitutional Court Justices and of the Supreme Administrative Court Judges happened with a composition of the Senate made under the 'transitorial' phase of the Constitution.

The information suggests that the processes, as stipulated in the 2017 Constitution of the Kingdom of Thailand ('2017 Constitution') and the Act on the Establishment of Administrative Courts and Administrative Court Procedure B.E. 2542 (1999), did not genuinely and effectively ensure independence from other State powers and external forces.

Moreover, section 11(1) of the Law for the Organization of the Courts of Justice B.E. 2543 (2000) and the Regulation on Judicial Service of the Courts

¹ Section 204 of the 2017 Constitution of the Kingdom of Thailand; Section 10 of the Regulation of the Constitutional Court Governing the Court's Procedures B.E. 2562 (2019); Section 15 of the Act on Establishment of Administrative Courts and Administrative Court Procedure B.E. 2542 (1999); Sections 105 and 109 of the Regulation of the Senate's Meeting B.E. 2562 (2019) Section 11 (1) of the Law for the Organization of the Courts of Justice B.E. 2543 (2000); Regulation on Judicial Service of the Courts of Justice regarding the Reporting of Important Cases in the Courts of the First Instance and the Appeal Courts to the President of the Supreme Court, and the Reporting and Reviewing of Case Files in the Offices of the Chief Justices of the Regions B.E. 2562 (2019).

of Justice regarding the Reporting of Important Cases in the Courts of the First Instance and the Appeal Courts to the President of the Supreme Court, and the Reporting and Reviewing of Case Files in the Offices of the Chief Justices of the Regions B.E. 2562 (2019) allow the review of draft judgments and orders by senior judges before the finalization of the judgment to be delivered to the parties. While the comments made by senior judges are not binding, they may exert undue pressure on judges.

Appointment of Constitutional Court Justices

According to section 200 of the Constitution, the Constitutional Court comprises nine Justices. Section 203 specifies that their selection is the responsibility of the Selection Committee, which is composed of the Chairperson² and eight other members³.

Section 204 of the Constitution mandates that individuals selected for the position of Constitutional Court Justice must obtain approval from the Senate, with the votes of at least half of the total number of existing Senate members.

Section 105 of the Regulation of the Senate's Meeting B.E. 2562 (2019) outlines that a Standing Committee should be formed to assess the candidates' personal history, behavior and ethical conduct. This Committee consists of 15 Senators, and the evaluation process must be completed within 60 days, with a possibility of extension for an additional maximum of 30 days. As stated in section 109, the meetings of the Committee have to be conducted in secrecy, with participation limited to individuals relevant to the meeting and approved by the Committee.

Section 10 of the Regulation of the Constitutional Court Governing the Court's Procedures B.E. 2562 (2019), issued under the Organic Law on the Constitutional Court B.E. 2561 (2018), prohibits "the distortion of facts or laws in the [Constitutional] Court's orders or judgments, or criticism of the Court's orders or judgments in bad faith, or using rude, sarcastic, provoking, or threatening language."

The Present Constitutional Court Justices and the Appointment Process in 2020

Currently, out of the nine sitting Justices of the Constitutional Court, seven were appointed under the 2017 Constitution with the approval of the Senate composed by section 269, with 250 Senators appointed by the military junta or NCPO. Of these seven Justices, six were appointed in 2020 and another one in 2023.

The information suggests that the appointment of the components of the Constitutional Court had suffered a strong influence by the provisional Senate appointed by the military junta or NCPO. For example:

² President of the Supreme Court

³ President of the Supreme Administrative Court, persons appointed by the Independent Organs under the Constitution, President of the House of Representatives, and Leader of the Opposition in the House of Representatives

- On 2 September 2019, the Senate's Standing Committee started to investigate five nominees submitted by the Selection Committee. Initially, the timeframe for the investigation was set at 45 days, but it was extended four times, totalling over 160 days, without any reasons provided for such an extension beyond the permissible period under section 105 of the Regulation of the Senate's Meeting B.E. 2562 (2019). The report resulting from this investigation was submitted confidentially to the Senate.
- On 11 February 2020, one candidate Justice was rejected by the Senate, while the other four candidates were approved. The Senate justified its rejection decision by stating that the nominee had not held a position in the Supreme Administrative Court for the required five years, which contradicted the criteria outlined in section 200 of the 2017 Constitution. This decision was made despite the letter submitted by the plenary meeting of the Supreme Administrative Court, which explained that no judge in the court had served for more than five years.

Rulings of the Constitutional Court Concerning Elections

The Constitutional Court under the Organic Act on Political Parties B.E. 250 section 94 has the power of ruling on the dissolution of a political party. Pursuant to section 94 the Constitutional Court can dissolve a political party for acts which have an impact on the government or security of the State. The information suggests that the provisional Senate, appointed by the military junta or NCPO, may then shape the Court in its favour, and may use it as a political tool to suppress opposition and stifle political competition.

On 14 May 2023 the Move Forward Party (MFP), which have been part of the opposition, won the general elections. On 12 July 2023, one day before the voting for Thailand's Prime Minister after the 14 May 2023 general elections, the Constitutional Court accepted a complaint against the MFP, the winner of the elections. The complaint was based on the MFP's advocacy for the amendment of section 112 (*lèse-majesté*⁴) of the Criminal Code as a key electoral promise.

This provision has drawn numerous comments and recommendations from international human rights bodies, including UN Special Procedures and the UN Human Rights Committee, which have urged Thailand to review section 112 in line with the International Covenant on Civil and Political Rights (ICCPR)⁵.

On 31 January 2024, Thailand's Constitutional Court unanimously ruled that the MFP violated section 49, paragraph 1 of the 2017 Constitution by

⁴ Concerns regarding the use of *lèse-majesté* law in Thailand were previously raised in communications dated in THA 5/2011; THA 9/2011; THA 10/2011; THA 13/2012; TH 1/2014; THA 3/2014; TH 13/2014; THA 9/2015; THA 1/2017; TH 7/2017; THA 3/2019; THA 8/2020; THA 11/2020; THA 6/2021; THA 1/2023; and THA 2/2023. In addition, UN Special Procedures have called on Thailand to “amend or repeal” Section 112 (*lèse-majesté*) of the Criminal Code to bring the provision in conformity with international human rights law and standards in THA 9/2015, THA 13/2014, THA 5/2011.

⁵ Section 112 of Thailand's Criminal Code stipulates that “whoever defames, insults, or threatens the King, the Queen, the Heir-apparent, or the Regent, shall be imprisoned for three to fifteen years”.

proposing to amend section 112 (lèse-majesté) of the Criminal Code, using this proposal in their 2023 election campaign, and continuing to advocate for the amendment after the May 2023 election.

On 7 August 2024, the Constitutional Court ordered the dissolution of the MFP, which finished first in May 2023 election, saying it violated the constitution by proposing an amendment of a law against defaming the country's royal family. Additionally, the Court imposed a 10-year ban on political activity for those who held the party's executive positions.

Internal Independence: The Supervisory Review of Draft Judgments and Orders

Section 236 of the 1997 Constitution of the Kingdom of Thailand stated that "any judge not present at the hearing of a case shall not deliver a judgment or decision on that case, except in cases of force majeure or other unavoidable necessity as prescribed by law." Additionally, section 249 established that "the trial and adjudication by judges shall not be subject to hierarchical supervision." These provisions were removed from the 2007 Constitution, which was drafted by a junta-appointed group following the 2006 coup d'état, and are absent from the current 2017 Constitution.

In 2008, the Parliament amended the Law for the Organization of the Courts of Justice B.E. 2543 (2000), granting high-ranking judges the authority to provide a "contrasting opinion" after reviewing the case files assigned to lower-ranked judges. Section 11 of the Law for the Organization of the Courts of Justice B.E. 2543 (2000) was added through the Act Amending the Law for the Organization of the Courts of Justice (No. 3) B.E. 2551 (2008). The law grants the President of the Supreme Court, the President of the Court of Appeal, the presidents of regional courts of appeal, chief justices of courts of first instance, and chief judges the authority to "provide a contrasting opinion after reviewing the file of any case" and to "offer suggestions to judges regarding obstacles in carrying out their duties." According to Section 29, these officials, along with their deputies, have the power to write and sign judgments, as well as to express dissenting opinions in certain courts "during the adjudication of any case, should there be force majeure or any other unavoidable necessity preventing the justice who forms a panel of the trial from further adjudicating such case"⁶.

Additionally, under sections 7-9 of the 2019 Regulation on Judicial Service of the Courts of Justice concerning the Reporting of Important Cases in the Courts of First Instance and Appeal Courts to the President of the Supreme Court, as well as the Reporting and Reviewing of Case Files in the Offices of the Chief Justices of the Regions B.E. 2562 (2019), sitting judges in courts under the jurisdiction of regional chief justices are required to report and submit case files, along with draft judgments and orders for certain cases, to these chief justices for supervisory review, unless otherwise directed by the

⁶ a) at the Supreme Court: the President or Vice-Presidents of the Supreme Court;
b) at the Court of Appeal or regional courts of appeal: the President of the Court of Appeal, presidents of regional courts of appeal, Vice-Presidents of the Court of Appeal or vice-presidents of regional courts of appeal, as the case may be;
c) at courts of first instance, chief judges of courts of first instance, chief judges of regions, deputy chief judges of courts of first instance, deputy chief judges of regions, or chief judges, as the case may be.

chief justices of the regions.

Cases subject to supervisory review include those related to national security (including the lèse-majesté law under section 112 of the Criminal Code); terrorism cases; criminal cases carrying sentences of more than 10 years' imprisonment, life imprisonment or the death penalty; certain drug-related offences; civil cases where the value of the property or the disputed amount exceeds 5 million Thai baht (approx. USD 144,175); contempt of the court cases; cases that have generated significant public interest; or cases related to prominent figures such as judicial authorities, members of the executive, members of independent institutions under the constitution, high-ranking military and police officers.

The 2019 Regulation also stipulates that a reviewing timeframe of at least 15 days should be allowed. The chief justices of each region may assign such tasks to their deputies or other senior judges, but their comments must be approved by the chief justices themselves or their deputies. Section 14 explains that this practice is adopted to "preserve the standard of judgments or orders" and ensure that "the discretion of the courts is exercised in a coherent manner." If there are any inconsistencies, "there should be a special reason outlined in the draft judgment or order, for the sake of justice."

While I do not wish to prejudge the accuracy of these allegations, I would like to express my serious concern about the appointment process of the Constitutional Court Justices as stipulated in the 2017 Constitution of the Kingdom of Thailand which may not genuinely and effectively ensure independence from other State powers and external forces. The Court of Justice and the Senate have the duty to uphold the principles of judicial independence, both institutional and internal, and to conduct the appointment process of judges independently from other State authorities and potentially intrusive non-State actors.

I recall that international standards provide that the independence of the judiciary shall be guaranteed by the State, so I note with concern that the body which the Constitution designates to appoint these judges was itself appointed by the military junta. This situation would be incompatible with the standards on fair trial that provide that the judiciary should function without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

In this regard, I am particularly concerned about the above-mentioned appointment process of Constitutional Court Judges, given the Constitutional Court's power to dissolve political parties, since it may grant a significant advantage to some political parties in contravention of human rights related to participation in the conduct of public affairs, democratic principles, and the separation of powers.

Moreover, I express my concern about the risks to the individual independence of Thai judges from unwarranted interferences, including undue influence from other judges, when deciding a particular case. This concern arises because Thai law and regulations allow the review of draft judgments and orders by senior judges before the finalization of the judgment to be delivered to the parties. While the comments made by senior judges are not binding, they may exert undue pressure on judges.

All judges must be free to carry out their professional duties without political interference or undue pressure or influence. In this regard, I would like to recall that the right to a fair and public hearing by an independent and impartial tribunal is provided for in international human rights standards, and that a competent and independent tribunal is one of the guarantees of a fair trial. The requirement of independence concerns, in particular, the procedure and qualifications for the appointment of judges, the guarantees relating to their security of tenure and the guarantees of respect for their independent decisions.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention, I would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Please indicate the measures taken to ensure that appointments for the judiciary under consideration comply with the international standards described in the annex.
3. Please explain the measures taken by Your Excellency's Government to comply with Thailand obligations under articles 2, and 14, of the ICCPR and article 8, and 10 of the UDHR.
4. Please indicate the measures taken to guarantee the independence of judges in the country, in compliance with the Basic Principles of Independence of the Judiciary. The instrument is described in the annex.
5. Please indicate what measures have been taken to ensure that judges are able to carry out their legitimate work in a safe and enabling environment without fear of threats or acts of intimidation and harassment of any sort due to hierarchical supervision.

I would appreciate receiving a response within 60 days. Past this delay, this communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#). They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, I urge that all necessary interim measures be taken to halt the alleged violations, such as a suspension of the rules and regulations that allow the review of draft judgments and orders by senior judges, as first step to considering the their full repeal.

I may publicly express my concerns in the near future as, in my view, the information upon which the press release will be based is sufficiently reliable to

indicate a matter warranting immediate attention. I also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations. The press release will indicate that I have been in contact with your Excellency's Government's to clarify the issue/s in question.

Please accept, Excellency, the assurances of my highest consideration.

Margaret Satterthwaite
Special Rapporteur on the independence of judges and lawyers

Annex

Reference to international human rights law

In connection with above alleged facts and concerns, I would like to draw the attention of your Excellency's Government to the relevant international norms and standards that are applicable to the issues brought forth by the situation described above.

I draw the attention of your Excellency's Government to article 14 of the International Covenant on Civil and Political Rights (ICCPR), ratified by Thailand on 29 October 1996, that provide that everyone is entitled to a fair and public hearing by an independent and impartial tribunal established by law.

Article 14(1) of the ICCPR enshrines the requirements of independence and impartiality of the judiciary. In its general comment 32 (2007) on article 14, the Human Rights Committee emphasized that the right to equality before courts and tribunals serves as a procedural means to safeguard the rule of law and is "an absolute right that is not subject to any exception." (CCPR/C/GC/32, paragraph 2). Article 14 requires States to adopt appropriate measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them (para. 19). The requirement of independence "refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature." Moreover, article 14 provides for the principle of equality before competent, independent and impartial courts and tribunals. The Human Rights Committee clearly stated that "[a] situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal" (para. 19). Fair trial guarantees can never be subject to derogatory measures that would circumvent the protection of non-derogable rights (CCPR/C/GC/32, paragraph 6).

The independence of the judiciary is an essential requirement of the democratic principle of separation of powers, which stipulates that the executive, the legislature and the judiciary constitute three separate and independent branches of Government. The principle of the separation of powers is the cornerstone of an independent and impartial justice system. According to this principle, the Constitution, laws and policies of a country must ensure that the justice system is truly independent from other branches of the State. Within the justice system, judges, lawyers and prosecutors must be free to carry out their professional duties without political interference and must be protected, in law and in practice, from attack, harassment or persecution as they carry out their professional activities.

The principle of the independence of the judiciary has also been enshrined in the Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders

held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, which establish that the independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country.

Principle 1 provides that it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

Principle 2 provides that the judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

Principle 4 states that there shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

Principle 6 entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

The Basic Principles also provide guidance on a series of further requirements, including qualifications and selection of judges (principle 10), conditions of service (principle 11), security of tenure (principle 12) and disciplinary, suspension or removal proceedings (principles 17–20). With regard to the accountability of judges, the Basic Principles provide that judges can only be removed for serious misconduct, disciplinary or criminal offence or incapacity that renders them unable to discharge their functions (principle 18). Any decision to suspend or remove a judge from office should be taken in accordance with a fair procedure (principle 17), and be taken in accordance with established standards of judicial conduct (principle 19).

Furthermore, the values enshrined in the Bangalore Principles are complementary. Regarding the first Value on independence, judges shall be independent in relation to society and parties to disputes, and independent of judicial colleagues. Judges also “shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom.” The Commentary on the Bangalore Principles elaborates that judicial independence means freedom from undue external influence and freedom from other judges’ undue influence (para. 39).

Finally, according to the Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region, adopted at the 6th Conference of Chief Justices, held in Beijing in August 1997, and signed by the President of the Supreme Cour of Thailand, the “(i)ndependence of the Judiciary requires that; a) The judiciary shall decide matters before it in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source; and b) The judiciary has jurisdiction, directly or by way of review, over all issues of a justiciable nature” (paragraph 3). The statement also notes that: “(j)udges should be subject to removal from office only for proved incapacity, conviction of a crime, or conduct that makes the judge unfit to be a judge” (paragraph 22); and “(t)he remuneration and conditions of service of judges should

not be altered to their disadvantage during their term of office, except as part of a uniform public economic measure to which the judges of a relevant court, or a majority of them, have agreed” (paragraph 31). The statement also highlights that “Executive powers which may affect judges in their office, their remuneration or conditions or their resources, must not be used so as to threaten or bring pressure upon a particular judge or judges” (paragraph 38).