

Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; and the Special Rapporteur on the situation of human rights defenders

REFERENCE: :

27 May 2016

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the rights to freedom of peaceful assembly and of association; and Special Rapporteur on the situation of human rights defenders, pursuant to Human Rights Council resolutions 25/2, 24/5, and 25/18.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning **the Referendum Act, adopted on 7 April 2016 and entered into effect on 22 April 2016.**

According to the information received:

On 7 April 2016 the Referendum Act was adopted in Thailand, criminalizing expression that is critical about the draft constitution ahead of the constitutional referendum on 7 August 2016. The Referendum Act went into effect on 22 April 2016.

Article 61 states that “anyone who publishes text, images or sound, through either newspaper, radio, television, electronic media or other channels, that is either untruthful, harsh, offensive, rude, inciting or threatening, with the intention that voters will either not exercise their right to vote, or vote in a certain way, or not to vote, will be considered as a person creating confusion so that the vote will not proceed properly”. The maximum penalty under this provision is ten years' imprisonment and a fine of up to 200,000 Baht (approximately 5,600 USD).

Since the Referendum Act's entry into force at least 25 persons have been detained or charged over public and social media protests, including posts on *Facebook*. On 27 April 2016, the Election Commission lodged the first complaint on the basis of the Referendum Act. The complaint accused members of an unnamed *Facebook* group of violating the Referendum Act for criticism of the draft constitution and the scheduled constitutional referendum. Allegedly the

Election Commission had copies of all messages on the *Facebook* page of the group even though the messages had been deleted from the page.

We express serious concern that the overly broad language of the Referendum Act and the lack of clear terms do not conform to the standards of international human rights law on the right to freedom of expression, as set out in article 19 of the ICCPR, ratified by Thailand on 29 October 1996. Restrictions on the right to freedom of expression may only be invoked under the strict criteria established in article 19(3) of the ICCPR. Article 61 of the Referendum Act does not meet this threshold.

We are particularly concerned that the Referendum Act severely restricts expression and access to information about the draft constitution, which is a matter of high public and political interest, and where all forms of opinions should be freely expressed, contradicted, and debated by individuals, associations and by the media. An open and encouraged environment for public discourse is a condition for an informed participation during the constitutional referendum. We express our concern that the Referendum Act is one among a series of legislative changes that have been introduced with a potential deterrent effect on the exercise of the right to freedom of expression in Thailand, in particular on those expressing dissenting and critical views.

We express equal concern at the alarmingly high number of arrests under the Referendum Act, which suggests that the restriction on freedom of expression is not being applied in a strict and narrow manner as required by international human rights law. Restrictions on the right to freedom of expression should only be invoked in limited and genuine instances of threats to national security and public order. We are concerned that the Referendum Act gives law enforcement agencies unfettered discretion to arrest and charge individuals who are legitimately exercising their right to freedom of expression.

We are also concerned about the deleterious effect of the Referendum Act on the legitimate activities of civil society and human rights defenders, including on their exercise of the right to freedom of association, the right to participate in public affairs and the right to publish, impart or disseminate information and knowledge on all human rights and fundamental freedoms, and to study, discuss and hold opinions on the observance of these rights, as reiterated in articles 8 and 6 respectively of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, also known as the UN Declaration on Human Rights Defenders.

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.

It is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention. We would therefore 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 provide information about the justification for the Referendum Act, and how its provisions, particularly Article 61, is compatible with the right to freedom of expression as guaranteed under international human rights law, such as Article 19 of the ICCPR.

3. Please provide information regarding the guidance given to law enforcement officials for the execution of the Referendum Act of 1948. Specifically, how are officials defining “harsh”, “offensive”, “rude”, and “inciting” under Article 61?

4. Please provide detailed information about the arrests made on the basis of the Referendum Act since 27 April 2016, and explain how these arrests comply with international human rights law.

We again urge your Excellency’s Government to take all necessary measures to ensure that legislation and its application is in full compliance with international human rights law. We request that your Excellency’s Government take all necessary interim measures to halt the application of the Referendum Act, thereby preventing the recurrence of further violations.

We would appreciate receiving a response within 60 days.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

Your Excellency’s Government’s response will be made available in a report to be presented to the Human Rights Council for its consideration.

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

Michel Forst
Special Rapporteur on the situation of human rights defenders

Maina Kiai
Special Rapporteur on the rights to freedom of peaceful assembly and of association

David Kaye
Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

Annex
Reference to international human rights law

In connection with above alleged facts and concerns, we would like to appeal to your Excellency's Government to take all necessary steps to secure the right to freedom of opinion and expression and freedom of association in accordance with fundamental principles as set forth in articles 19 and 22 of the International Covenant on Civil and Political Rights respectively.

We moreover wish to reiterate the principle enunciated by Human Rights Council Resolution 12/16, which calls on States, while noting that article 19, paragraph 3, of the ICCPR provides that the exercise of the right to freedom of opinion and expression carries with it special duties and responsibilities, to refrain from imposing restrictions which are not consistent with paragraph 3 of the article, including on (ii) the free flow of information and ideas, including practices such as the banning or closing of publications or other media and the abuse of administrative measures and censorship, and on (iii) access to or use of information and communication technologies, including radio, television and the Internet. We would also like to draw the attention of your Excellency's Government to the principle enunciated in the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, as endorsed in E/CN.4/1996/39 of 1996, which states that everyone has the right to obtain information from public authorities, including information relating to national security, and that in all laws and decisions concerning the right to obtain information, the public interest in knowing the information shall be a primary consideration.

We also wish to refer your Excellency's Government to the fundamental principles set forth in the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, also known as the UN Declaration on Human Rights Defenders. In particular, we would like to refer to articles 1 and 2 of the Declaration which state that everyone has the right to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels and that each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms. Furthermore, articles 6 and 8 provide for the right to freely publish, impart or disseminate information and knowledge on all human rights and fundamental freedoms, and to study, discuss and hold opinions on the observance of these rights; as well as the right to effective and non-discriminatory access to participation in public affairs.

Finally, we wish to refer to Human Rights Council resolution 24/5, in which the Council [r]eminds States of their obligation to respect and fully protect the rights of all individuals to assemble peacefully and associate freely, online as well as offline, including in the context of elections, and including persons espousing minority or dissenting views or beliefs, human rights defenders, trade unionists and others, including migrants, seeking to exercise or to promote these rights, and to take all necessary measures to ensure that any restrictions on the free exercise of the rights to freedom of

peaceful assembly and of association are in accordance with their obligations under international human rights law” (OP2).