

**Office of the United Nations High Commissioner for Human Rights  
Regional Office for South-East Asia**

**Technical Note on the key human rights principles for  
the 2015 constitution of the Royal Thai Government**

In light of the on-going constitution drafting, this technical note summarizes some key human rights principles that should be incorporated in the new constitution to ensure it is in line with Thailand's obligations under international human rights law. This note should be read together with the Technical Note on the National Human Rights Commission of Thailand in the draft 2015 constitution.

While noting that a constitution covers a broad range of issues, such as the structure and functions of the State institutions, division of powers, decision making processes and bill of rights, this technical note focuses on a few selected key areas, namely the right to participate in public affairs, right to remedy, distinction between citizens and non-citizens and the constitution drafting process. These areas were chosen based on the review of the human rights section of an early draft<sup>1</sup> and also in the light of some of the current public debates concerning.

**1. Right to participate in public affairs**

Article 25 of the International Covenant on Civil and Political Rights (ICCPR), to which Thailand is a State party, provides the rights of every citizen to take part in the conduct of public affairs, the right to vote and to be elected and the right to have access to public service. Article 25 lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant.<sup>2</sup> As a State party, Thailand is required under the Covenant to adopt measures to ensure that its citizens enjoy these rights whatever form of constitution or government the country takes.

Participation in public affairs

The ICCPR article 25(a) provides that every citizen shall have the right and the opportunity “[t]o take part in the conduct of public affairs, directly or through freely chosen representatives”. Such participation can be direct when citizens act as parliamentarian or hold executive positions or when they take part in a referendum or other electoral processes. Participation can also be “indirect” through their chosen representatives.<sup>3</sup> Representatives for citizens’ indirect participation in public affairs must be freely chosen and that they are accountable through the electoral process for their exercise of that power.<sup>4</sup> In this regard, the United Nations Human Rights Council in its resolution 19/36 of 19 April 2012 has also reaffirmed that “democracy is based on the freely expressed will of people to determine their own political, economic, social and cultural systems ...”

**Recommendation:** The new constitution should ensure that representatives of citizens are freely chosen and accountable through the electoral process. The new constitution should ensure that both houses of the legislature are elected bodies so that the will of the Thai people may be freely expressed and respected through the electoral process. The proposal to have one house of the parliament appointed is inconsistent with the principles of democratic governance as expressed in the ICCPR and the Human Rights Committee.

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<sup>1</sup> OHCHR would like to thank the Constitution Drafting Committee for sharing the draft constitution and engaging with us constructively.

<sup>2</sup> Human Rights Committee, General Comment No. 25 (CCPR/C/21/Rev.1/Add.7)(1996), para. 1.

<sup>3</sup> Ibid., para. 6.

<sup>4</sup> Ibid., para. 7.

### Right to vote and to be elected

The ICCPR article 25(b) establishes specific provisions concerning the right of citizens to participate in the conduct of public affairs as voters or as candidates for elections. Genuine periodic elections that are universal and equal suffrage and held by secret ballot are essential to ensure the accountability of representatives for the exercise of the legislative or executive powers vested in them. Such elections must be held at intervals which are not unduly long and which ensure that the authority of government continues to be based on the free expression of the will of electors.<sup>5</sup>

Persons entitled to vote must be free to vote for any candidate for election and for or against any proposal submitted to referendum or plebiscite, and free to support or to oppose government, without undue influence or coercion of any kind which may distort or inhibit the free expression of the elector's will.<sup>6</sup>

**Recommendation:** The new constitution should provide and protect citizens' rights to vote and to be elected at genuine and periodic elections held by universal and equal suffrage and by secret ballots without undue influence or coercion.

### Non-discrimination and restrictions

The ICCPR article 25(a) also provides that "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions...[t]o take part in the conduct of public affairs..." No distinctions are permitted between citizens in the enjoyment of these rights on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>7</sup>

Any restrictions on the right to vote or to stand for elections must be justifiable on objective and reasonable criteria. Persons who are otherwise eligible to vote or to stand for election should not be excluded by unreasonable or discriminatory requirements, including because of political affiliation.<sup>8</sup> Party membership should not be a condition of eligibility to vote or a ground of disqualification for candidacy either.<sup>9</sup> Such disqualification could be considered as discrimination based on "political opinion" or "other status" under ICCPR article 2, and consequently "unreasonable restrictions" under ICCPR article 25.

**Recommendation:** The new constitution should ensure that no unreasonable restriction is placed on the right to vote or to be elected, including those based on political party memberships or political affiliation.

### Freedom of expression, assembly and association

In order to ensure the full enjoyment of rights under article 25 of the ICCPR, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This requires the ability of the media to comment and report on public issues without censorship or restraint and to inform public opinion. Consequently full enjoyment and respect for the rights guaranteed in articles 19, 21 and 22 of the Covenant are critical, including freedom to engage in political activity individually or through political parties and other organizations, freedom to debate public affairs, to hold peaceful demonstrations and meetings, to criticize opponents, to publish political material and to campaign for election and to disseminate and advertise political ideas.<sup>10</sup>

**Recommendation:** The new constitution should ensure provision and protection of rights to freedom of expression, assembly and association that are subject to limitations only in the interests of national

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<sup>5</sup> Ibid., para. 9.

<sup>6</sup> Ibid., para. 19.

<sup>7</sup> Ibid., para. 3.

<sup>8</sup> Ibid., para. 15.

<sup>9</sup> Ibid., para. 10.

<sup>10</sup> Ibid., para. 25.

security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others, as allowed under the ICCPR (restrictions should be legal, proportional and necessary to protect a legitimate interest identified in the applicable article of the Covenant).

## 2. Right to remedy

Under international law, States are obliged to ensure the investigation and prosecution of gross human rights violations. This is explicitly required by some human rights treaties, and under international humanitarian law for acts amounting to war crimes. The obligation to investigate and prosecute gross human rights violations also corresponds to the duty on States to ensure an effective remedy, which is clearly established in various international instruments provide the right to remedy for victims of human rights violations.<sup>11</sup> For example, the ICCPR places an obligation on States parties to ensure an effective remedy for any person whose rights or freedoms have been violated (article 2(3)(a)). This applies whether or not the alleged perpetrator acted in an official capacity. States parties are further obligated to ensure enforcement of such remedies, once granted (article 2(3)(c)). Similarly, article 14 of the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment provides victims of torture the right to fair and adequate compensation.

An effective remedy encompasses both access to justice and reparation for harm suffered.<sup>12</sup> Thus, under article 2(3)(a) of the ICCPR, States parties are also required to take effective steps to investigate violations of human rights recognized as criminal offences and to bring to justice those who are responsible for these violations, as well as to provide an effective remedy to the victims. When gross violations of human rights have been committed, disciplinary and administrative remedies do not adequately satisfy the obligation of States to provide an effective remedy. The Human Rights Committee, the body that monitors states' implementation of the ICCPR stated, "As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant."<sup>13</sup>

**Recommendation:** The new constitution should not include immunity or amnesty that would prevent victims of human rights violations from seeking remedies from a competent judicial, administrative or legislative authority, in contravention of their right to remedy.

The 2007 Constitution of the Kingdom of Thailand explicitly provided the right to liberty in life and person and prohibited torture, ill-treatment or other cruel or inhuman treatment, arbitrary arrest and search under section 32. The section further provided that when such right or liberty is affected, "the injured person, the Public Prosecutor or any other person, in the interest of the injured person, has the right to file an application to the Court for an order stopping or revoking such act, and, for this purpose, there may be determined appropriate means or remedies for injury sustained." The paragraph had provided a critical constitutional basis for victims of alleged human rights violations to seek remedies at the court.

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<sup>11</sup> International Covenant on Civil and Political Rights (article 2); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (article 14); International Convention on the Elimination of All Forms of Racial Discrimination (article 6); Convention on the Rights of the Child (article 39); The Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV) (article 3); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977 (article 91); and the Rome Statute of the International Criminal Court (articles 68 and 75).

<sup>12</sup> United Nations, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (A/RES/60/147)(2005), available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>.

<sup>13</sup> Human Rights Committee, *General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (CCPR/C/21/Rev.1/Add. 13)(26 May 2004), available at [http://tbineternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.13&Lang=en](http://tbineternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.13&Lang=en)

**Recommendation:** The new constitution should retain section 32 of the 2007 Constitution, including the sub-paragraph that provided the right to file an application to the court for injunction and remedies for human rights violations.

### 3. Distinction between citizens and non-citizens

International human rights law is founded on the premise that all persons, by virtue of their essential humanity, should enjoy all human rights without discrimination unless exceptional distinctions – for example between citizens and non-citizens – serve a legitimate State objective and are proportional to the achievement of that objective.<sup>14</sup>

Under the ICCPR, with the exception of articles 13 and 25, the rights set forth in the Covenant apply to everyone, irrespective of his or her nationality or statelessness. The general rule is that each one of the rights under the ICCPR must be guaranteed without discrimination between citizens and non-citizens.<sup>15</sup> The same general rule applies to the International Covenant on Economic, Social and Cultural Rights that has the identical article on non-discrimination as the ICCPR.<sup>16</sup> The ICCPR allows the rights of non-citizens to be qualified only by such limitations as may be lawfully imposed under articles 13 (rights of aliens subject to possible expulsion) and 25 (participation in public affairs).

Therefore, among other rights, non-citizens should have right to be free from torture or inhuman treatment, slavery, forced labour, child labour, refoulement and violations of humanitarian law. They also have the right to freedom of expression, association and assembly, labour rights (including rights to collective bargaining, workers' compensation, healthy and safe working conditions), right to health and right to education.

**Recommendation:** The sections that relate to rights in the new constitution should not differentiate citizens and non-citizens, except concerning the right to participate in public affairs, to vote and to have access to public service.

### 4. Drafting process

A human rights framework should guide not only the substance of the constitution itself, but also the process leading to the adoption of the constitution. Both tracks should be in compliance with international human rights norms. Notably, citizens' right to participate in public affairs under the ICCPR, discussed above, includes that their participation in the constitution making processes.<sup>17</sup> This also means that States have to ensure, throughout the process, that human rights, particularly the freedom of expression, assembly and association are respected, protected and fulfilled.

In Thailand, the 10 month nationwide-imposition of martial law, a number of NCPO Announcements<sup>18</sup> and the NCPO Order No.3/2558 have severely limited freedom of expression, assembly and association.

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<sup>14</sup> OHCHR, The Rights of Non-Citizens (United Nations, New York and Geneva, 2006), available at <http://www.ohchr.org/Documents/Publications/noncitizensen.pdf>, at 7.

<sup>15</sup> Human Rights Committee, General Comment No. 15: On the position of aliens under the Covenant (1986), available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11)

<sup>16</sup> ICESCR, article 2(2).

<sup>17</sup> Human Rights Committee, Marshall v. Canada (CCPR/C/43/205/1986)(1986).

<sup>18</sup> NCPO Announcement No. 79/2557 sets conditions of broadcasting of radio stations; NCPO Announcements No. 97 and 103/2557 prohibits criticism of the NCPO's operations.

Such restrictions have prevented people in Thailand from enjoying the right to participate in public affairs, including restricting their ability to fully engage in the on-going constitution making process.

**Recommendation:** The constitution drafting process should be conducted in an environment where all people in Thailand enjoy freedom of expression, assembly and association. Any restriction incompatible with the ICCPR in this regard should be immediately lifted.