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## **ROADBLOCK TO DEMOCRACY**

Military repression and Thailand's  
draft constitution

Thai Army soldiers keep guard as anti-coup protesters march towards their base after a protestor was detained following a protest at Bangkok's Victory Monument on 24 May 2014. © MANAN VATSYAYANA/AFP

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# Executive summary

On 7 August 2016, Thai citizens will vote in a referendum that will decide whether the draft constitution backed by Thailand's military junta, the National Council for Peace and Order (NCPO), will become the country's 20th charter since 1932.

Far from being the key step toward the achievement of what the NCPO has termed 'full and sustainable democracy,' the draft charter creates undemocratic institutions, weakens the power of future elected governments, and is likely to fuel political instability. If approved, the charter will allow the military and its proxies to tighten their grip on power and cement their influence in political affairs.

The NCPO tightly controlled and manipulated the constitution drafting process to ensure that the draft charter strengthened the role of the military and the unelected bodies in Thailand's political environment to the detriment of democratic institutions.

Authorities used decrees issued by the NCPO and repressive legislation, including the Referendum Act, to prevent individuals, civil society, and political parties from campaigning against the draft constitution. In the months leading up to the referendum, authorities stepped up the harassment, detentions, and prosecutions of activists and politicians critical of the draft constitution. From 27 April to 24 July 2016, authorities arbitrarily detained at least 41 people for criticizing or campaigning against the draft constitution. In addition, authorities detained at least 38 members of the anti-establishment United Front for Democracy Against Dictatorship (UDD) in connection with the group's attempts to establish referendum monitoring centers.

As part of the NCPO's ongoing repression of freedom of expression in the context of the referendum process, authorities targeted journalists and news outlets critical of the junta. In addition, police and military personnel regularly attended and monitored public discussions on the draft constitution. In many cases, authorities ordered organizers to cancel seminars and panel discussions on the draft charter. In others instances, authorities intimidated meeting participants.

While authorities continued to stifle public debate of the draft constitution, the NCPO mobilized considerable resources to promote the draft charter. Despite the requirement that key institutions involved in the preparation of the referendum be fair and impartial, their campaign to publicize the draft constitution lacked political balance and was marred by double standards and bias. Finally, the NCPO's refusal to allow independent observers to freely monitor the referendum casts serious doubts over the fairness of the process.

Whatever the outcome of the referendum, the NCPO will be able to maintain its hold on power. An affirmative vote on the draft constitution would allow the NCPO to legitimize and tighten its grip on power, while a rejection of the draft charter will only serve as an excuse for the NCPO to further delay their many promises to return Thailand to a democratic system.

## Chronology of key events since the 22 May 2014 coup

### 22 May 2014

Military coup d'état. The National Council for Peace and Order (NCPO)<sup>1</sup> seizes power and issues Announcement 7/2014, banning public gatherings of more than five people.

### 7 June 2014

NCPO issues Announcement 57/2014, banning political parties from holding meetings or undertaking political activities.

### 27 June 2014

NCPO head General Prayuth Chan-ocha says elections will be held in October 2015.

### 18 July 2014

NCPO issues Announcement 97/2014, banning criticism of the junta and the dissemination of information that could harm national security.

### 21 July 2014

NCPO issues Announcement 103/2014, an amendment to Announcement 97/2014, which bans criticism of the junta's work with dishonest intent to destroy its credibility.

### 22 July 2014

NCPO adopts an interim constitution with immediate effect.

### 31 July 2014

NCPO appoints the National Legislative Assembly (NLA), a 200-member legislative body dominated by active and retired military officers.

### 21 August 2014

NCPO head General Prayuth Chan-ocha becomes Thailand's 29th Prime Minister.

### 6 October 2014

NCPO appoints all 250 representatives who compose the National Reform Council (NRC), which is tasked with making proposals for reforms and approving a new draft constitution.

### 4 November 2014

NCPO, NRC, NLA, and Council of Ministers appoint a 36-member Constitution Drafting Committee (CDC) to draft a constitution.<sup>2</sup>

### 1 April 2015

NCPO lifts martial law and immediately issues Order 3/2015, a decree that grants the junta nearly all the same powers it held under martial law. The decree imposes severe restrictions on the right to freedom of opinion and expression and the right to freedom of peaceful assembly.

### 17 April 2015

CDC completes its draft constitution.

### 27 May 2015

NCPO Spokesman Colonel Werachon Sukondhapatipak says NCPO head General Prayuth Chan-ocha expects that elections will be held in September 2016.

### 13 August 2015

Public Assembly Act, which contains numerous limitations on the right to freedom of peaceful assembly, comes into effect.

### 6 September 2015

NRC rejects the draft constitution by a vote of 135-105, with seven abstentions. The NRC and the CDC are dissolved.

### 5 October 2015

NCPO handpicks a 21-member CDC, tasked with drafting a new constitution within six months.

NCPO head General Prayuth Chan-ocha appoints a 200-member National Reform Steering Assembly (NRSA) to oversee the junta's political and economic reform plans, with almost half of the members from the military and police.

<sup>1</sup> On 24 May 2014, the National Peace and Order Maintaining Council (NPOMC), the military junta that seized power from a democratically elected government two days earlier, changed its name to the National Council for Peace and Order (NCPO).

<sup>2</sup> The NRC appointed 20 members to the CDC, while the NCPO, NLA, and Council of Ministers each appointed five members. The NCPO also appointed the chair.

**26 January 2016**

NCPO head General Prayuth Chan-ocha says a general election will be held in July 2017.

**29 January 2016**

CDC unveils its draft constitution. CDC Chairman Meechai Ruchupan says the NCPO's plan to hold elections in mid-2017 will be delayed by a "minimum of two to three months."

**29 March 2016**

CDC Chairman Meechai Ruchupan makes public the final version of the draft constitution.

**7 April 2016**

NLA adopts the Referendum Act, which contains restrictions on the right to freedom of expression in relation to the draft constitution, by a 171-1 vote, with three abstentions.

**23 April 2016**

Referendum Act comes into effect.

**29 April 2016**

Election Commission (EC) issues a list of 'dos and don'ts' – a set of rules that govern individual and group conduct and actions that must be followed during the lead-up to the 7 August referendum on the draft constitution.

**10 May 2016**

Thai NGO Internet Law Reform Dialogue (iLaw) files a petition to the Ombudsman to seek the nullification of the restrictions on freedom of expression contained in Article 61 of the Referendum Act.

**6 June 2016**

Ombudsman forwards a petition concerning the constitutionality of Article 61 of the Referendum Act to the Constitutional Court.

**29 June 2016**

Constitutional Court rules that Article 61 of the Referendum Act is not in conflict with Article 4 of the 2014 interim constitution.

**14 July 2016**

NCPO issues Order 41/2016, which grants the National Broadcasting and Telecommunications Commission (NBTC) broad and unchecked powers to shut down radio or TV stations.

Supreme Administrative Court rejects a petition lodged by iLaw that sought to annul the EC's list of 'dos and don'ts.'

# Repressive legal framework limits draft charter debate

Thailand's legal framework stifles a free and open public debate on the draft constitution due to numerous provisions that impose severe restrictions on the right to freedom of opinion and expression and the right to freedom of peaceful assembly. Many of these restrictions, which are inconsistent with Thailand's obligations under international law, were introduced after the 22 May 2014 coup.

Authorities have frequently used repressive legislation and decrees issued by the ruling military junta, the National Council for Peace and Order (NCPO), to prevent individuals, civil society, and political parties from campaigning against the draft constitution. In addition, the Referendum Act contains specific provisions designed to prevent criticism of the draft constitution.

## **a. 2016 Referendum Act**

The junta-appointed National Legislative Assembly (NLA), about half of which are active and former military officers, approved the Referendum Act on 7 April 2016 with an effective date of 23 April 2016.<sup>3</sup> Authorities have frequently used this law to arbitrarily arrest and charge individuals who criticized or campaigned against the draft constitution (See below, *Restrictions, detentions, one-sided propaganda mar referendum process*).

Under Article 61 of the Act, "*anyone who disseminates text, images or sound, through newspapers, radio, TV, electronic media or other channels, that are either false or delivered in a violent, offensive, rude, inciting or threatening way, with the intention to influence voters to refrain from voting or voting in a certain way, or abstain from voting, shall be considered as a person who creates confusion in order to disrupt voting procedures.*" Violators face jail terms of up to 10 years, fines of up to 200,000 baht (US\$5,713), and the revocation of voting rights for a period of up to 10 years.

In addition, Article 63 of the Referendum Act prohibits the publication of opinion polls or surveys related to the referendum from seven days prior to 7 August until the end of voting day. Violators face imprisonment for up to three months or a 6,000 baht (US\$171) fine, or both.

On 29 April 2016, the Election Commission (EC) issued a list of 'dos and don'ts' – a set of rules that govern individual and group conduct and actions that must be followed during the lead-up to the referendum on the draft constitution. The list, which came into effect on 2 May 2016, repeated some of the prohibitions contained in Article 61 of the Referendum Act and added new ones. The new prohibitions include: 1) Organizing seminars or debates without the participation of a government agency; 2) Persuading others to wear shirts, pins, flags, ribbons or any sign that can influence voters, or sell such items for campaign purposes; and 3) Campaigning to influence voters' decisions.<sup>4</sup>

<sup>3</sup> Nation, *Junta chief defends make-up of National Legislative Assembly*, 2 August 2014

<sup>4</sup> Bangkok Post, *EC announces referendum do's and don'ts*, 29 April 2016

## Referendum Act challenged

On 10 May 2016, the Thai NGO Internet Law Reform Dialogue (iLaw) filed a petition to the Ombudsman to seek to nullify the restrictions on freedom of expression contained in Article 61 of the Referendum Act.<sup>5</sup> iLaw argued that the provisions were in conflict with Article 4 of the 2014 interim constitution, which guarantees human dignity, rights, liberties, and equality of the people protected by Thailand's international obligations.<sup>6</sup> On 6 June 2016, the Ombudsman forwarded the petition to the Constitutional Court to demand a ruling over the constitutionality of Article 61.<sup>7</sup> On 29 June 2016, the Constitutional Court unanimously ruled that Article 61 was not unconstitutional.<sup>8</sup> The court reasoned that the freedoms enumerated in Article 4 of the interim charter could be limited for the sake of national peace and order, good morality, or to protect other individual rights.<sup>9</sup> On 14 July 2016, the Supreme Administrative Court rejected another petition lodged by iLaw that sought to annul the EC's list of 'dos and don'ts'.<sup>10</sup>

### **b. NCPO Orders and Announcements**

Several orders and announcements issued by the NCPO impose severe restrictions on the right to freedom of opinion and expression and the right to freedom of peaceful assembly. Authorities have frequently used NCPO Order 3/2015 to arbitrarily arrest and prosecute individuals who criticized or campaigned against the draft constitution (See below, *Restrictions, detentions, one-sided propaganda mar referendum process*).



Thai police arrest a student for demonstrating at a shopping mall in Bangkok on 22 May 2015. © Pornchai Kittiwongsakul / AFP

[NCPO Announcement 7/2014](#), issued on 22 May 2014, bans public gatherings of more than five people, and provides a punishment of one year in prison or a 20,000 baht (US\$571) fine, or both, for violators.

5 Bangkok Post, *Group seeks referendum bill challenge*, 11 May 2016

6 Bangkok Post, *Group seeks referendum bill challenge*, 11 May 2016

7 Bangkok Post, *Ombudsmen petition charter court over referendum law*, 6 June 2016

8 Nation, *Referendum law not unconstitutional, court rules*, 29 June 2016

9 Prachatai, *Draft Referendum Act encourages social reconciliation: Constitutional Court*, 5 July 2016

10 Nation, *NDM's leaflets on charter deemed a crime, but EC will not press charges*, 15 July 2016



NCPO Order 3/2015, issued on 1 April 2015, contains similar restrictions on public assemblies. Article 5 of Order 3/2015 authorizes the military to issue orders that prohibit "*the propagation of news or the sale or distribution of any book publication or any other media that contains [...] information that is intentionally distorted to cause public misunderstanding that affects national security or public order.*" Article 12 of Order 3/2015 bans political gatherings of more than four people and prescribes prison terms of up to six months or a 10,000 baht (US\$286) fine, or both, for violators. Announcement 7/2014 and Order 3/2015 have been routinely used to detain activists and individuals who expressed their opposition to military rule. From 22 May 2014 to 31 May 2016, authorities arrested at least 225 individuals for the peaceful expression of criticism of military rule.<sup>11</sup>

NCPO Announcement 57/2014, issued on 7 June 2014, bans all political parties from "holding meetings or undertaking any political activity."

NCPO Announcement 97/2014, issued on 18 July 2014, bans "criticism of the work of the NCPO" and the dissemination of information that could harm national security, cause confusion, or incite or provoke "conflict or divisions" within the country by media outlets. Failure to comply with these provisions can result in the immediate shutdown of the offending news media.

NCPO Announcement 103/2014, an amendment to Announcement 97/2014 issued on 21 July 2014, changed the clause banning "criticism of the work of the NCPO" to criticism with false information with dishonest intent to destroy the credibility of the NCPO.

NCPO Order 41/2016, issued on 14 July 2016, grants the National Broadcasting and Telecommunications Commission (NBTC) the power to shut down radio or TV stations that broadcast information considered to be a threat to national security.<sup>12</sup> The order prescribes that radio and TV stations have no right to appeal against such closure.<sup>13</sup> The order also grants NBTC personnel immunity from criminal, civil, or disciplinary actions in connection with the adoption of any measures under the decree.<sup>14</sup>

### **c. 2007 Computer Crimes Act**

The Computer Crimes Act addresses offenses that involve the import to a computer system of "forged" or "false computer data" that is likely to cause damage to a third party or the public. Under Article 14 of the Computer Crimes Act, individuals found guilty of "*importing illegal or false computer content which could cause damage to a third party or [...] national security, or cause public panic*" face up to five years in prison or a 100,000 baht (US\$2,856) fine, or both. Article 15 imposes the same penalties for any "*service provider intentionally supporting or consenting to an offence under Article 14 within a computer system under their control.*"

The Computer Crimes Act has been used in recent years to prosecute media workers and human rights defenders, including *Prachatai* Executive Director Chiranuch Premchaiporn,<sup>15</sup> *Phuketwan* journalists Alan Morison and Chutima Sidasathian,<sup>16</sup> and labor rights defender Andy Hall.<sup>17</sup> Following the same legal applications of the Act noted in the previous cases, authorities indicated that those who posted "distorted facts about the draft constitution" on the internet could face legal action under Article 14 of the Computer Crimes Act.<sup>18</sup>

### **d. Article 116 of the Criminal Code ('sedition')**

Article 116 of the Criminal Code ('sedition') prescribes jail terms of up to seven years for individuals found guilty of expressing an "*opinion or criticism in order: (a) to bring about a change in the laws or the government by*

11 iLaw, *May 2016: Thailand badly criticized at the UPR, Ja New's mother arrested after replying to a chat sent by Burin, eight administrators of Prayuth-mocking-page released*, 17 June 2016

12 Nation, *NBTC given absolute power to close broadcast media*, 17 June 2016

13 AP, *Thailand tightens controls on media ahead of charter vote*, 14 July 2016; Nation, *NBTC given absolute power to close broadcast media*, 14 July 2016

14 Nation, *Junta tightens grip on media*, 15 July 2016

15 Prachatai, *Supreme Court rules against Prachatai in Internet intermediary liability case*, 23 December 2015

16 Phuketwan, *Navy Uses Computer Act to Sue Journalists*, 18 December 2013

17 Bangkok Post, *Andy Hall case closed: Interview wasn't in Thailand*, 18 September 2015

18 Prachatai, *Authorities to use Computer Crime Act to quell charter critics*, 17 February 2016

*the use of coercion or violence, (b) to raise confusion or disaffection among the people to the point of causing unrest in the kingdom, or (c) to have people violate the law."*

Authorities have increasingly used Article 116 of the Criminal Code to target peaceful criticism of the coup and the NCPO's policies and actions. From 22 May 2014 to 27 April 2016, authorities charged at least 47 individuals under Article 116.<sup>19</sup> In most cases, the charges stemmed from an overzealous, and sometimes inexplicable, application of Article 116. Examples include charges made against: 1) Former Education Minister Chaturong Chaiseng for a speech at the Foreign Correspondents' Club of Thailand (FCCT) in Bangkok, in which he criticized the 22 May 2014 military coup;<sup>20</sup> 2) Rinda Paruechabutr, a 45-year-old woman, for sharing a rumor about NCPO head General Prayuth Chan-ocha on social media;<sup>21</sup> 3) Theerawan Charoensuk, a 57-year-old woman from Chiang Mai, for posting a photo on Facebook of her holding a red plastic bowl inscribed with Thai New Year greetings from former Prime Ministers Thaksin and Yingluck Shinawatra;<sup>22</sup> 4) Eight people in Bangkok and Khon Kaen Province for their involvement in the creation of a satirical Facebook page entitled 'We Love General Prayuth';<sup>23</sup> and 5) Preecha Kaewbanpaew, a 77-year-old man, for giving flowers to a pro-democracy activist during a peaceful march in Bangkok.<sup>24</sup>

#### **e. 2015 Public Assembly Act**

The NLA adopted the Public Assembly Act on 9 July 2015. The law, which came into effect on 13 August 2015, requires protesters to apply for permission from police 24 hours in advance. It bans demonstrations within 150 meters of royal places, or within the compounds of Government House, Parliament, and courthouses, unless a specific area has been authorized and designated by authorities. It also bans rallies from 6pm to 6am and bars protesters from blocking entrances or creating a disturbance at government offices, airports, seaports, train and bus stations, hospitals, schools, and embassies. Violators of the law can face prison terms of up to six months or a fine of up to 10,000 baht (US\$286), or both.

Since its enactment, authorities have invoked the Public Assembly Act numerous times to try to prevent activists from holding public demonstrations or activities or intimidate individuals who did not follow its provisions.<sup>25</sup>

#### **f. 2014 interim constitution**

The interim constitution, unilaterally drafted by the NCPO and enacted on 22 July 2014, contains several clauses that give the NCPO unrestricted power to limit fundamental freedoms. Article 44 of the interim constitution gives the head of the NCPO, General Prayuth Chan-ocha, absolute power to issue any decree deemed necessary for *"the benefit of reform in any field and to strengthen public unity and harmony, or for the prevention, disruption or suppression of any act that undermines public peace and order or national security, the monarchy, national economics or administration of State affairs."*

Between December 2014 and July 2016, General Prayuth invoked Article 44, without accountability and total immunity, at least 80 times.<sup>26</sup>

Article 47 of the interim charter declares that all decrees issued by the NCPO are "deemed to be legal, constitutional and conclusive." Article 48 exempts the NCPO and their subordinates from any accountability for their actions. These provisions effectively deny victims of human rights abuses access to the judiciary to seek remedies for actions taken by authorities to enforce NCPO orders.

19 iLaw, *Charges against individuals after 2014 coup*, 30 April 2016

20 iLaw, *Chaturon : Defying NCPO order, Section 116, CCA; Case #600*

21 iLaw, *Rinda; posted a rumor that Gen. Prayuth transferred money to Singapore; Case #682*

22 Khaosod English, *Woman charged with sedition for posing with red bucket*, 29 March 2015

23 iLaw, *April 2016: 8 Facebook page administrators charged under Section 116, "Wearing White and just standing" activists arrested, and Referendum Act now in effect*, 6 June 2016

24 Khaosod English, *Elderly man gets suspended sentence for giving flowers*, 23 May 2016

25 Prachatai, *Thai military forbids youth camp in Loei ore mine area*, 27 August 2015; Prachatai, *Military and police prevent anti-junta gathering in downtown Bangkok*, 5 September 2015; Prachatai, *Activist faces charge under new Assembly Act*, 19 February 2016; Prachatai, *Assembly Act hurts labour rights movement*, 31 March 2016; Prachatai, *Police intimidate activists rallying in Isaan*, 1 July 2016

26 iLaw, *Report on the Exercise of Power under Section 44 of the Interim Constitution of Thailand*, 5 July 2016

# NCPO manipulates constitution drafting process

The constitution drafting process was marred by serious shortcomings and subject to considerable National Council for Peace and Order (NCPO) meddling. The NCPO tightly controlled and manipulated the process in order to ensure that the draft charter strengthened the role of the military and the unelected bodies in Thailand's political environment to the detriment of democratic institutions. (See below, *The trouble with the constitution: Nine major flaws of the draft charter*).

## **Draft charter written by military-appointed body**

The current draft constitution, which will be voted on in the 7 August referendum, was written by a 21-member Constitution Drafting Committee (CDC) appointed by the NCPO on 5 October 2015. The CDC was tasked with drafting a new constitution within six months.<sup>27</sup> The CDC Chair, Meechai Ruchupan, participated in the drafting of the current interim constitution, adopted by the NCPO in 2014, and has a track record of drafting constitutions after military coups.<sup>28</sup> In 1991, after a military coup that overthrew a democratically elected government, Meechai was selected to draft a new charter. As drafted, the 1991 charter allowed persons not elected to Parliament to serve as Prime Minister.<sup>29</sup> In 2006, after the coup that deposed Prime Minister Thaksin Shinawatra, Meechai assisted with the drafting of orders and announcements issued by the junta and headed a junta-appointed panel that drafted the 2006 interim constitution.<sup>30</sup>

### **2015 draft constitution rejected**

The current draft charter is the second attempt by a CDC to write a permanent constitution since the May 2014 coup. The first 36-member CDC proposed a previous draft, which was subsequently rejected by the National Reform Council (NRC), an NCPO-appointed body.

The 250-member NRC, consisting mainly of bureaucrats, was created by the NCPO on 6 October 2014 to implement reforms, appoint a committee to draft a new constitution, and approve or reject the draft charter.<sup>31</sup> On 6 September 2015, the NRC rejected the draft constitution by a vote of 135-105, with seven abstentions.<sup>32</sup>

The first draft constitution contained a number of problematic clauses that would have weakened elected governments, effectively giving the military the means to intervene in politics. Namely, the charter would have created a 23-member military-dominated advisory committee empowered to seize control from the executive and legislative in times of national crisis, within five years of the promulgation of the constitution.<sup>33</sup>

<sup>27</sup> Reuters, *Thai junta picks panel to write constitution after draft rejected*, 5 October 2015

<sup>28</sup> Nation, *With extensive experience in law, Meechai takes over as boss*, 6 October 2015

<sup>29</sup> Bangkok Post, *Called up in the military's charter draft*, 11 October 2015

<sup>30</sup> Bangkok Post, *Called up in the military's charter draft*, 11 October 2015; Reuters, *Thai junta picks panel to write constitution after draft rejected*, 5 October 2015

<sup>31</sup> Bangkok Post, *All 250 National Reform Council members appointed*, 6 October 2014; iLaw, *So many processes, but all have the same function*, 25 September 2014

<sup>32</sup> BBC, *Thailand constitution: Military's council rejects draft*, 6 September 2015

<sup>33</sup> Constitution of the Kingdom of Thailand (draft) (2015), Articles 259, 280

## ***Military interference in the constitution drafting process***

Military pressure exerted on the CDC during the drafting process resulted in significant changes to the initial text written by the CDC. On 14 March 2016, the CDC received a set of proposals from the NCPO for changes to key provisions of the draft charter.<sup>34</sup> The NCPO's proposal on the Senate, relating to its composition and powers during the five-year transition period, was incorporated into the final draft made public by the CDC on 29 March 2016.<sup>35</sup> The proposal provided for a 250-member appointed Senate, selected by the NCPO, who would serve for a five-year term. Six of the 250 would be top-ranking officials from the military, police, and the Ministry of Defense.<sup>36</sup>

## ***Additional referendum question imposed by the junta***

In addition to its intrusion in the constitution drafting process, the NCPO insisted on the presence of an additional question on the referendum ballot. This additional question carries with it the risk of further eroding democratic principles.

The 7 August referendum ballot contains two questions: the first asks voters whether they approve or reject the draft constitution; the second asks whether a clause that allows senators and members of the House of Representatives to choose the Prime Minister during the five-year transition period should be included in the constitution.

The second question, imposed by the NCPO through its proxies, the National Reform Steering Assembly (NRSA) and the National Legislative Assembly (NLA),<sup>37</sup> provides no details about the number of votes needed for senators and members of the House of Representatives to elect the Prime Minister. As a result of this omission, the question, if answered affirmatively in the referendum, would trigger a process that could give senators considerable influence over the election of the next two Prime Ministers.

The referendum's second question has come under fire for its language, which could influence voters to choose 'yes' to the adoption of the clause in the constitution.<sup>38</sup> On 8 April 2016, Election Commission (EC) member Somchai Srisuthiyakorn voiced concern over the wording of the additional question, saying that it appeared to be written in a leading manner, and contained jargon that would confuse voters.<sup>39</sup> The following day, NLA Spokesman Jetn Sirathranont rejected criticism over the question and said the NLA deemed the wording suitable and that it was too late to change the phrasing of the question.<sup>40</sup>

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34 NCPO Secretary-General Theerachai Nakwanich, *Proposals for guidelines on the amendment of transitory provisions of the draft constitution*, 13 March 2016; Nation, *NCPO proposes major change to key political structure in transition*, 16 March 2016

35 Ministry of Foreign Affairs of the Kingdom of Thailand, *Press Releases: The Dissemination of the Final Constitution Draft and the issuance of the Head of the NCPO's Order No. 13/2559*, 3 April 2016

36 According to Article 269(c) of the draft constitution, the six are: the Permanent Secretary of the Defense; the Supreme Commander in Chief; Army Commander in Chief; the Navy Commander in Chief; the Air Force Commander in Chief; and the Police Commissioner General.

37 Bangkok Post, *PM vote floated as additional referendum question*, 1 April 2016; Nation, *NLA approves question on Senate role in choosing PM*, 8 April 2016; The NRSA, a 200-member body appointed by the NCPO to oversee the its political and economic reform plans, voted (by 136 votes to 3) to push the second question through to the NLA, which approved its inclusion (by a 152-0 vote and 15 abstentions) on the referendum ballot on 7 April 2016.

38 The second question on the ballot reads as follows: "***In order to ensure continuity in the implementation of national reform under the national strategy during the five-year transition period***, [emphasis added] do you agree that a joint sitting of Parliament should be allowed to vote to select a Prime Minister and that this should be included in a provisional clause [of the draft charter]?"

39 Nation, *EC says additional referendum question is 'too leading'*, 9 April 2016

40 Bangkok Post, *NLA rules out change to extra referendum question*, 9 April 2016



The Election Commission unveils a sample ballot for the referendum set for August. © Thanarak Khunton/Bangkok Post

### **Possible outcomes: A 'win-win' situation for the junta**

Whatever the outcome of the 7 August referendum, the NCPO will be able to maintain its hold on power. An affirmative vote on the draft constitution would allow the NCPO to legitimize and tighten its grip on power, while a rejection of the draft charter will only serve as an excuse for the NCPO to further delay the return to a democratic system. The two-question ballot means there are four possible outcomes of the 7 August referendum:

- 1) **Yes-Yes:** This would be the most desirable outcome for the NCPO; the draft charter would go back to the CDC, who would add the provision allowing the Senate and House of Representatives to choose Prime Ministers during the five-year transition period.
- 2) **Yes-No:** The draft constitution would be adopted without any additional changes.
- 3) **No-Yes:** In this scenario, the NCPO could claim that it would need to draft a new charter that empowers the Senate and House of Representatives to choose a Prime Minister in accordance with the referendum result. However, it is unclear whether a rejection of the draft charter would render any vote on the additional question moot.
- 4) **No-No:** The junta has not clearly stated what will happen if the draft constitution is rejected in the 7 August referendum. NCPO head Prayuth suggested a new constitution would need to be drafted and adopted.<sup>41</sup> However, it remains unclear what body would be tasked with the drafting and what timeline would be set for the process.

<sup>41</sup> Khaosod English, *Referendum Law Upheld as Prayuth Unveils 'Plan B'*, 29 June 2016; Nation, *I was being sarcastic about writing draft: Prayut*, 13 July 2016; Bangkok Post, *Government gives green light to TV debates*, 22 July 2016

# Restrictions, detentions, one-sided propaganda mar referendum process

After the Constitution Drafting Committee (CDC) made public the final version of the draft constitution on 29 March 2016, the National Council for Peace and Order (NCPO) moved to silence any potential source of public criticism of the draft charter. On 19 April 2016, NCPO deputy head General Prawit Wongsuwan declared that the NCPO would not allow any campaigning in the run-up to the 7 August referendum and warned the public not to discuss the content of the draft constitution.<sup>42</sup>

## ***Charter critics detained, public debate stifled***

With the addition of the Referendum Act to the NCPO's arsenal of repressive laws (See above, *Repressive legal framework limits draft charter debate*), authorities stepped up the harassment, detentions, and prosecutions of activists, politicians, and media persons and outlets critical of the draft constitution. From 27 April to 24 July 2016, authorities arbitrarily detained at least 41 people for criticizing or campaigning against the draft constitution.

### **Chronology of arbitrary detentions**

**On 27 April 2016**, police in Khon Kaen Province detained a 59-year-old woman under Article 61 of the Referendum Act for posting criticism of the draft constitution on Facebook two days earlier.<sup>43</sup>

**On 23 June 2016**, military personnel detained 13 activists, including seven members of the pro-democracy group New Democracy Movement (NDM), in Samut Prakan Province on the eastern outskirts of Bangkok.<sup>44</sup> Police charged the 13 with violating NCPO Order 3/2015 and Article 61 of the Referendum Act for distributing leaflets that urged voters to reject the draft constitution in the 7 August referendum.<sup>45</sup> Six of the activists were released on bail the next day, while the remaining seven were detained until 6 July 2016.<sup>46</sup>

**On 24 June 2016**, authorities in Bangkok briefly detained seven activists for possession of campaign material that urged voters to reject the draft constitution and brought charges against them under the provisions of NCPO Order 3/2015.<sup>47</sup>

**On 2 July 2016**, police in Bangkok briefly detained five activists for questioning after they led a large group of demonstrators who held up a banner and released balloons with a message that called for fairness in the 7 August referendum.<sup>48</sup>

**On 5 July 2016**, police in Bangkok briefly detained a group of seven university student activists after one of them refused to remove a t-shirt that urged voters to reject the draft charter.<sup>49</sup>

**On 10 July 2016**, police in Ratchaburi Province detained four activists under Article 61 of the Referendum Act after finding booklets that criticized the draft constitution in one of the activists' pickup truck.<sup>50</sup> Police also detained *Prachatai* journalist Taweesak Kerdpoka, who was travelling with the four activists to report on their activities, under the same law.<sup>51</sup> The five were released on bail the next day.<sup>52</sup>

42 Prachatai, *No campaign on draft charter allowed: Deputy junta head*, 19 April 2016

43 Prachatai, *Autism Fundraiser arrested under Referendum Act*, 28 April 2016; Nation, *Suppression of critics is a national disgrace*, 3 May 2016

44 Prachatai, *Pro-democracy activists face charges over draft referendum campaign*, 23 June 2016. The 13 activists detained were: Rangsiman Rome, Korakoch Saengyenpan, Somsakol Thongsuksai, Anan Loket, Thirayut Napnaram, Yuttana Dasri, Nantapong Panmat, Worawut Butmat, Konchanok Thanakhun, Tueanjai Waengkham, Pimai Ratwongsa, Rackchart Wong-arthichart, and Phanthip Saengathit.

45 Prachatai, *Pro-democracy activists face charges over draft referendum campaign*, 23 June 2016; Prachatai, *Activists risk 10 years jail term over draft referendum campaign*, 25 June 2016

46 Reuters, *Thailand jails seven activists over referendum campaign*, 24 June 2016; Prachatai, *Activists risk 10 years jail term over draft referendum campaign*, 25 June 2016; Bangkok Post, *Released students vow to continue anti-charter fight*, 7 July 2016

47 Nation, *New attempt to free seven jailed student activists*, 28 June 2016

48 Bangkok Post, *Activists held and released after political balloon launch*, 2 July 2016

49 Prachatai, *Police detain 7 students over 'Vote No' t-shirt*, 5 July 2016

50 Prachatai, *Prachatai journalist detained for reporting on referendum*, 10 July 2016; Bangkok Post, *Students, reporter released on bail*, 11 July 2016. The four activists detained were: Pakorn Areekul, Anucha Rungmorakot, Anan Loket, and Panuwat Songsawatthai.

51 AP, *Thai news website says its reporter detained while reporting*, 10 July 2016

52 Reuters, *Thailand frees on bail four held for opposing draft constitution: lawyer*, 11 July 2016

**On 23 July 2016**, police and military personnel in Chiang Mai Province arrested a 63-year-old man under the Referendum Act for distributing leaflets that criticized the draft constitution.<sup>53</sup> On the same day, police in Bangkok arrested a man in his 30s under Article 61 of the Referendum Act.<sup>54</sup> Police suspected him of sending thousands of anti-draft charter letters in Chiang Mai Province.<sup>55</sup>

**On 24 July 2016**, it was reported that police and military personnel in Lamphun Province arrested a 33-year-old man on charges of causing disturbances under the Referendum Act.<sup>56</sup>



NDM activists leave the Bangkok Military Court after 12 days in detention for distributing leaflets on the draft charter referendum in Samut Prakan Province. © Taweechai Tawatpakorn / Bangkok Post

In an episode that illustrated the authorities' overzealous and absurd enforcement of the Referendum Act, on 23 July 2016, police in Kamphaeng Phet Province announced they had charged two eight-year-old girls under the Act for allegedly tearing down voter lists attached to a noticeboard at a local school.<sup>57</sup> If convicted, the two would not face jail time as Thai law exempts anyone under the age of 10 from criminal punishment.<sup>58</sup>

In addition to the numerous instances of arbitrary detention of critics of the draft charter, authorities also imposed other significant restrictions on public debate of the draft constitution. Police and military personnel regularly attended and monitored public discussions on the draft constitution.<sup>59</sup> In many cases, authorities ordered organizers to cancel seminars and panel discussions on the draft charter.<sup>60</sup> In others instances, authorities intimidated meeting participants.<sup>61</sup>

53 Nation, *Raids find 'evidence of distorted' charter draft*, 24 July 2016

54 Prachatai, *Military detains parents of alleged anti-draft charter letter sender*, 25 July 2016; Nation, *Raids find 'evidence of distorted' charter draft*, 24 July 2016

55 Prachatai, *Military detains parents of alleged anti-draft charter letter sender*, 25 July 2016

56 Nation, *Raids find 'evidence of distorted' charter draft*, 24 July 2016

57 Bangkok Post, *Raids net 'distorted' charter letters*, 24 July 2016

58 AFP, *Thai cops charge eight-year-old girls under junta law*, 23 July 2016

59 Bangkok Post, *Group seeks referendum bill challenge*, 11 May 2016; Prachatai, *Police confiscate flyers on draft charter from academic*, 25 April, 2016; Bangkok Post, *Heed voice of women, govt urged*, 20 June 2016

60 Prachatai, *Seminar about new charter draft aborted at junta's order*, 4 February 2016; Bangkok Post, *Amnat Charoen authorities close same charter forum twice*, 13 February 2016; Bangkok Post, *Junta gives students runaround at football game*, 14 February 2016; Prachatai, *Seminar on draft charter aborted over junta's political gathering ban*, 27 February 2016; Bangkok Post, *Charter talks banned*, 2 April 2016; Khaosod English, *Junta Bans Bookstore Talk on Draft Charter*, 2 April 2016; Bangkok Post, *Group seeks referendum bill challenge*, 11 May 2016

61 Prachatai, *Police confiscate flyers on draft charter from academic*, 25 April, 2016; Prachatai, *Police ask organiser of seminar on draft charter whether he has a brain*, 15 June 2016; Bangkok Post, *Group seeks referendum bill challenge*, 11 May 2016

## **Referendum monitoring centers – no; peacekeeping centers – yes**

The NCPO's crackdown on opponents of the draft constitution was particularly harsh on members of the anti-establishment United Front for Democracy Against Dictatorship (UDD), also known as 'red shirts.' Authorities detained at least 38 UDD members in connection with the junta's response to the group's efforts to establish referendum monitoring centers.

Despite early statements by NCPO head General Prayuth Chan-ocha that the 'red shirts' would be allowed to set up referendum monitoring centers, in mid-June the NCPO barred the establishment of such centers.<sup>62</sup> In 43 provinces, authorities prevented the opening of referendum monitoring centers and subjected UDD members to arbitrary detention, threats, and harassment, which included surveillance, the seizure of campaign material, and home raids.<sup>63</sup>

Between 17 and 19 June 2016, authorities in nine provinces detained at least 19 UDD members and supporters as part of the crackdown on the group's referendum monitoring centers.<sup>64</sup>

On 19 June 2016, police in Bangkok stormed the premises of the UDD-affiliated TV station *Peace TV* and prevented UDD leaders from holding a televised event to mark the opening of referendum monitoring centers nationwide.<sup>65</sup>

On 22 June 2016, police issued summons for 19 UDD core members to answer charges of violating a ban on political gatherings under NCPO Order 3/2015 in relation to the group's attempt to launch referendum monitoring centers in Bangkok on 5 June 2016.<sup>66</sup>

On 18 July 2016, police in Udonthani Province detained 19 people, who had joined the opening of a local UDD referendum monitoring center on 19 June 2016, at a local police station and charged them under NCPO Order 3/2015.<sup>67</sup>

Following its actions against the UDD members and supporters, the NCPO decided to establish 'peacekeeping centers' at the district and province level nationwide to detect violations of the Referendum Act and the Public Assembly Act, and to ensure the smooth conduct of the 7 August referendum.<sup>68</sup>

## **Journalists, news outlets targeted**

In June and July 2016, as part of the NCPO's ongoing repression of freedom of expression in the context of the referendum process, authorities targeted journalists and news outlets critical of the junta.

On 22 June 2016, the Election Commission (EC) summoned *Matichon Weekly* cartoonist Arun Watcharasawat in connection with the publication of a cartoon that criticized the draft constitution that was rejected by the National Reform Council (NRC) in September 2015 (See above, *2015 draft constitution rejected*).<sup>69</sup> On 30 June 2016, the EC decided it would not take action against the cartoonist after the cartoon was removed from the online version of *Matichon Weekly*.<sup>70</sup>

62 Nation, *All UDD anti-fraud centres to open nationwide on June 19*, 9 June 2016; Nation, *EC denies referendum law violates charter*, 26 May 2016; Prachatai, *Junta leader retracts earlier statement, prohibits referendum watch centres*, 19 June 2016; Prachatai, *At least 10 accused of violating junta's order over referendum watch centres*, 20 June 2016

63 TLHR, *No Freedom, No Fairness: Running a Campaign at the Expense of Your Freedom - A review of violations of human rights prior to the Constitutional Referendum in Thailand*, 15 July 2016

64 TLHR, *No Freedom, No Fairness: Running a Campaign at the Expense of Your Freedom - A review of violations of human rights prior to the Constitutional Referendum in Thailand*, 15 July 2016

65 Nation, *Police foil UDD's kickoff of anti-fraud centres*, 19 June 2016

66 Bangkok Post, *UDD bosses called in over gatherings*, 23 June 2016; Prachatai, *Junta accuses red shirt leaders of violating ban on political gatherings*, 21 June 2016; Nation, *19 UDD leaders to face charges over violating ban on gathering*, 22 June 2016. The 19 UDD core members summoned were: Jatuporn Prompan, Nattawut Saikuar, Tida Tawornseth, Prasit Chairsisa, Weng Tojirakarn, Nisit Sinthuphrai, Saranwut Sarankate, Yongyuth Tiyapairat, Korkaew Pikulthong, Veerakan Musikapong, Songkhram Kijpairote, Somwang Asarasi, Yotwarit Chuklom, Thanawut Wichaidit, Kirkmontri Rujsotthirapat, Aree Krainara, Somchai Jaimung, Sakrapee Phromchart, and Pornsak Srilamut.

67 Prachatai, *Almost 20 red shirts in Isaan summoned for joining referendum watch campaign*, 14 July 2016

68 Reuters, *Thailand sets up security centres ahead of referendum*, 4 July 2016; Bangkok Post, *Peace centres set up for charter referendum*, 3 July 2016

69 Khaosod English, *Matichon Cartoonist Summoned for Criticizing Charter, But Not the One Going to a Vote*, 22 June 2016

70 Nation, *EC decides against prosecuting 'Matichon' over 2015 charter cartoon*, 1 July 2016



On 12 July 2016, military and police personnel in Bangkok raided the offices of the online news website *Prachatai* to search for campaign material that criticized the draft constitution.<sup>71</sup> The raid, which failed to uncover such material, occurred two days after the arrest of *Prachatai* reporter Taweesak Kerdpoka under Article 61 of the Referendum Act (See above, *Charter critics detained, public debate stifled*).<sup>72</sup>

On 21 July 2016, the National Broadcasting and Telecommunications Commission (NBTC) suspended UDD-affiliated *Peace TV's* broadcasting license for 30 days.<sup>73</sup> The order stemmed from three programs broadcast in March 2016, which the NBTC claimed violated NCPO Announcements 97/2014 and 103/2014.<sup>74</sup>

The authorities also vowed to step up surveillance of social media in the lead-up to the 7 August referendum.<sup>75</sup> On 16 June 2016, officials from the EC, the police Technology Crime Suppression Division (TCSD), and the Ministry of Information and Communication Technology announced the formation of a joint working committee tasked with monitoring the internet to detect violations of the Referendum Act.<sup>76</sup>

### ***NCPO propaganda in full swing***

While authorities continued to stifle public debate of the draft constitution, the NCPO mobilized considerable resources to promote the draft charter.

NCPO-appointed bodies, such as the Constitution Drafting Committee (CDC) and the National Legislative Assembly (NLA), assisted the EC in its effort to disseminate and explain the provisions of the draft charter and the additional referendum question (See below, *The trouble with the constitution: Nine major flaws of the draft charter*). In addition, the NCPO enlisted about 100,000 army cadets to encourage eligible voters to participate in the referendum.<sup>77</sup>



'Ror Dor' army cadets from Wat Nuannoradit School hand out fliers to passers-by at Bangkok's Victory Monument to encourage people to vote in the draft charter referendum. © Apichart Jinakul / Bangkok Post

<sup>71</sup> Prachatai, *Prachatai News Office Raided by Police, Soldiers*, 12 July 2016

<sup>72</sup> Nation, *Police fail to find anti-draft material during search of 'Prachatai' office*, 13 July 2016

<sup>73</sup> AFP, *Thai junta shuts TV channel as poll looms*, 22 July 2016

<sup>74</sup> Nation, *Order to suspend Peace TV not related to previous case: NBTC*, 8 July 2016; Bangkok Post, *CDC slams 'seven reasons to vote no'*, 12 July 2016

<sup>75</sup> Prachatai, *Deputy junta head urges police to increase social media surveillance*, 22 April 2016

<sup>76</sup> Bangkok Post, *EC vows 24-hour surveillance of charter 'saboteurs'*, 17 June 2016

<sup>77</sup> Reuters, *Thailand's military cadets trained for roles at polling stations on Constitution referendum day*, 15 June 2016

Despite the requirement that key institutions involved in the preparation of the referendum, such as the EC and the CDC, be fair and impartial, their campaign to publicize the draft constitution lacked political balance and was marred by double standards and bias.

On 25 May 2016, a song released by the EC to encourage voters to vote in the 7 August referendum reflected the EC's biased view of the electorate.<sup>78</sup> The song had lyrics that were directed at Thailand's different ethno-political groups and sung in regional dialects by popular Thai artists. The lyrics instructed Thais from the north and the northeast (strongholds of supporters of former Prime Ministers Thaksin and Yingluck Shinawatra) not to "let anyone dictate" their votes.<sup>79</sup> In contrast, Thais in the south (a bastion of the pro-establishment Democrat Party) were given no such guidance and were described as people who "love democracy and freedom."<sup>80</sup> Following heavy criticism of its lyrics, the EC replaced the controversial song with one that did not make specific reference to any of Thailand's regional groups.<sup>81</sup>

In early July, the NLA released a two minute and 39-second long video clip to explain the second question on the referendum ballot. The video contained animations that showed ballot papers with the 'yes' box being crossed.<sup>82</sup>

In contrast, on 8-9 June 2016, the EC threatened with prosecution under the Computer Crimes Act any individual who shared on the internet a video of a song that criticized the draft constitution.<sup>83</sup> The song was composed and performed by a group of anti-junta activists.<sup>84</sup>

On 6 July 2016, advocates from the Thai NGO Internet Law Reform Dialogue (iLaw) filed a complaint with the Administrative Court to demand the cancellation of a state-produced TV and radio show that they said was entirely devoted to praising the draft constitution.<sup>85</sup> iLaw claimed that only EC, CDC, and NLA members had appeared on the three episodes aired since the 30-minute show, broadcast on all state-owned TV and radio stations, started on 27 June.<sup>86</sup> On 14 July 2016, the Administrative Court rejected iLaw's complaint and claimed the organization had no standing to file the complaint because it was not an 'affected party.'

### ***No independent observers allowed***

The NCPO's refusal to allow independent observers to freely monitor the 7 August referendum cast serious doubts over the fairness of the process. On 22 June 2016, Deputy Prime Minister Wissanu Krea-ngam said the government had no intention of allowing international monitors to observe the 7 August referendum.<sup>87</sup> On 27 June 2016, the head of the nonpartisan domestic election monitoring group *We Watch* confirmed that no Thai organizations would be granted accreditation as referendum observers.<sup>88</sup>

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78 Nation, *EC's referendum song redone after criticism of lyrics in original version*, 10 July 2016

79 AFP, *Thai election body slammed for 'insulting' campaign tune*, 9 June 2016

80 AFP, *Thai election body slammed for 'insulting' campaign tune*, 9 June 2016

81 Nation, *EC revises controversial campaign song*, 13 June 2016; Nation, *EC's referendum song redone after criticism of lyrics in original version*, 10 July 2016

82 Nation, *EC asks NLA to pull song on extra referendum question*, 10 July 2016

83 Prachatai, *Election Com to sue people sharing, involving in charter referendum MV*, 8 June 2016; Nation, *EC stands firm on referendum despite dispute*, 10 June 2016

84 Bangkok Post, *EC supports 'fair' debate on charter*, 10 June 2016; Nation, *EC stands firm on referendum despite dispute*, 10 June 2016

85 Khaosod English, *iLaw Sues to Get 'One-Sided' Referendum Show Taken Off Air*, 6 July 2016; Nation, *Rights advocates petition court against latest EC announcement*, 7 July 2016

86 Khaosod English, *iLaw Sues to Get 'One-Sided' Referendum Show Taken Off Air*, 6 July 2016

87 Nation, *Govt rejects call for UN to observe charter referendum*, 23 June 2016

88 Khaosod English, *Thai Election Monitor Fumes Over Being Barred from Thai Referendum*, 27 June 2016

# The trouble with the constitution: Nine major flaws of the draft charter

Thailand's military junta, the National Council for Peace and Order (NCPO), said it conceived the draft constitution as a key step toward the achievement of "full and sustainable democracy." However, a review of key provisions of the draft charter shows that it creates undemocratic institutions, weakens the power of future elected governments, and is likely to fuel political instability.<sup>89</sup> If approved in the 7 August referendum, the charter will allow the military and its proxies to tighten their grip on power and cement their influence in political affairs. With regard to the protection of human rights, the draft constitution's significant flaws and omissions result in weaker safeguards of fundamental freedoms.

## 1) Junta decrees remain in effect [Article 279]

All announcements, orders, and acts of the NCPO and the head of the NCPO already in force are considered constitutional and lawful. NCPO orders and announcements can only be repealed or replaced by the new Parliament. This allows the continuation of NCPO orders and announcements that are inconsistent with Thailand's obligations under international law or the draft charter itself.

## 2) NCPO, proxies maintain grip on power [Article 269]

The transition period allows for a 250-member Senate, appointed for a five-year term. The NCPO would select 50 members from a list of individuals submitted by the Election Commission (EC), 194 from a list of individuals submitted by an NCPO-appointed committee, and six seats would be reserved for top-ranking officials in the military, police, and the Ministry of Defense.<sup>90</sup>

## 3) Undemocratic institutions [Articles 107, 113]

After the five-year transition period, the Senate will be comprised of 200 appointed members who cannot be members of a political party. A fully-appointed Senate is a significant step backward from the 1997 and 2007 constitutions - in which all and half of the senators were elected, respectively.

## 4) Senators have veto power over constitutional amendments [Article 256]

On their first reading, constitutional amendments require the approval of at least 50% of the total number of Members of Parliament (MPs) and senators. However, the vote on the amendment will fail if it is not supported by a minimum of one-third of the Senate. On the third and final reading, the procedure is basically the same in that an amendment will fail if not supported by at least one-third of the Senate.

## 5) Prime Minister may be a person who is not an elected MP [Articles 158, 159, 272]

The King appoints the Prime Minister after he/she is elected by the House of Representatives by a majority vote of the MPs.<sup>91</sup> If, for any reason, during the five-year transition period, MPs in the House of Representatives fail to elect a Prime Minister from the lists of eligible candidates nominated by political parties and a joint session of both houses of Parliament is demanded by at least 50% of the MPs, then such joint session can exempt the election of a Prime Minister from the members of the political parties sitting in Parliament by an affirmative vote of two-thirds of the total number of MPs and senators (500 of 750 votes). The House of Representatives would then vote on the nominee for Prime Minister by an absolute majority

<sup>89</sup> The analysis is based on an unofficial English-language translation provided by the Institute for Democracy and Electoral Assistance (IDEA), the Office of the United Nations Resident Coordinator in Thailand, and the International Commission of Jurists (ICJ) and is available at: [http://www.un.or.th/wp-content/uploads/2016/06/2016\\_Thailand-Draft-Constitution\\_EnglishTranslation\\_Full\\_Formatted\\_vFina....pdf](http://www.un.or.th/wp-content/uploads/2016/06/2016_Thailand-Draft-Constitution_EnglishTranslation_Full_Formatted_vFina....pdf)

<sup>90</sup> According to Article 269(c) of the draft constitution, the six are: the Permanent Secretary of the Defense; the Supreme Commander in Chief; Army Commander in Chief; the Navy Commander in Chief; the Air Force Commander in Chief; and the Police Commissioner General.

<sup>91</sup> Prior to a general election, political parties are required to nominate a maximum of three persons to be considered for Prime Minister (Article 88). A nominee is selected from the nominees of the political parties who have at least 5% of MPs in the House of Representatives. The nominee must then be endorsed by at least 10% of the total number of existing MPs in the House of Representatives (Article 159).

vote. In this case, the House of Representatives may nominate a person who is not an elected MP to serve as Prime Minister.

**6) Prime Minister, Ministers can be removed for lack of “ethical standards” or “apparent honesty” [Articles 82, 160, 170]**

A petition signed by a mere 10% of the total number of MPs in the House of Representatives or by 10% of the total number of senators is sufficient to lodge a complaint to the Speaker of their respective assemblies in order to begin an impeachment process to remove a cabinet minister, including the Prime Minister, from office if he/she does not possess “ethical standards” or “apparent honesty.” The vague terminology, coupled with the low threshold necessary to lodge a complaint, makes this system susceptible to abuse.

**7) Stronger, unchecked ‘independent’ institutions [Articles 213, 224, 235]**

The draft constitution gives ‘independent’ institutions, such as the Constitutional Court, the National Anti-Corruption Commission (NACC), and the EC disproportionately broad and unchecked powers. Allowing such institutions, which have traditionally been highly politicized and accused of bias, to become stronger increases the risk of political instability as they can directly scrutinize the government’s actions without any checks and balances.

The NACC and the EC are granted powers to launch investigations on their own without the requirement of a formal complaint by a third party. This increases the risk of them staging a ‘judicial coup’ by filing lawsuits and initiating proceedings against the government. In addition, the Constitutional Court is able to examine complaints based on petitions filed directly by individuals, without the requirement that the dispute be screened by the Prosecutor General or the Ombudsman.

**8) Toothless National Human Rights Commission [Article 247]**

As outlined in the draft charter, the National Human Rights Commission lacks some of the key powers it needs to effectively fulfill its duties as a National Human Rights Institution in line with the Paris Principles. Notably lacking from the draft constitution are provisions that ensure its ability to: seek information related to human rights violations and raise these issues with the government; encourage the ratification of, and ensure the effective implementation of national legislation with international human rights instruments; and receive complaints from individuals and seek a solution.

**9) Weak protection of fundamental human rights [Articles 27, 34, 42, 44, 47, 54, 57, 59]**

While the 1997 and 2007 constitutions contained provisions protecting the right to a fair trial, the draft constitution is notably lacking such a provision.

The draft charter’s clause on freedom of opinion and expression is not in line with international law in that it does not guarantee the right to seek, receive, and impart information and ideas of all kinds. The restrictions on the right to freedom of opinion and expression contained in the draft constitution are also inconsistent with international law, as they do not specify that such restrictions must conform to the strict test of ‘necessity.’ Similar safeguards are absent from the draft charter’s provisions with regard to the right to freedom of peaceful assembly.

Protection from all forms of discrimination on the basis of sexual orientation is also absent from the draft charter. The provision on the right to health allows for free access to public health services for “impoverished persons,” without defining this category of persons.

In addition, rights related to education, natural resources, and information, previously listed under ‘Rights and Liberties of the Thai people’ in the 1997 and 2007 constitutions, have been relegated to ‘Duties of the State.’ This categorization means that individuals may no longer be able to seek remedy in cases where these rights are violated under the framework of the draft charter.

## Thai civil society rejects draft charter

Thai civil society groups, activists, students, community-based human rights defenders, academics, and media organizations have voiced their collective concern over the draft constitution's content and the restrictions on public debate in the lead-up to the 7 August referendum.<sup>92</sup>



Several members of a campaign group show stickers encouraging people to 'Vote No' to the draft charter near Bangkok's Victory Monument on 14 February 2016. © Pornprom Satrabhaya / Bangkok Post

Many of the groups urged a rejection of the draft charter on the grounds that: 1) it would not guarantee fundamental rights; 2) it paves the way for a non-elected Prime Minister and has a fully-appointed Senate; 3) it would be difficult to amend in the future; and 4) it was drafted by a military-appointed committee. Some civil society groups called for a more participatory charter drafting process and an independent drafting body to be set up if the present draft is rejected on 7 August.<sup>93</sup>

On 3 May 2016, the National Human Rights Commission of Thailand (NHRCT) issued a statement that recommended the public be allowed to express its opinions on the draft constitution in line with Thailand's international obligations under the International Covenant on Civil and Political Rights (ICCPR). The NHRCT also said that the Referendum Act should allow all parties to express their opinions on the draft constitution.<sup>94</sup>

<sup>92</sup> Matichon Online, *Joint meeting "Don't accept the NCPO's draft constitution" by Thai Academic Network for Civil Rights*, 17 April 2016; Platform of Concerned Citizens, *Joint Statement on the Referendum of the Draft Constitution to be held on August 7, 2016 (as of April 28, 2016)*, 13 May 2016; Nation, *Prayut open to UN offer of help on restoration of democracy*, 22 June 2016; Thai Journalists Association, *An official joint statement by professional media organizations, Subject: The limitations on freedom of the press in accordance with the NCPO's announcement*, 15 July 2016; Platform of Concerned Citizens, *Joint Statement on the Referendum of the Draft Constitution to be held on August 7, 2016 (as of 21 July 2016)*, 21 July 2016; Nation, *Big referendum turnout likely, poll suggests*, 24 July 2016; Bangkok Post, *Civil opposition to the constitution starts to grow*, 24 July 2016; Nation, *Raids find 'evidence of distorted' charter draft*, 24 July 2016; Nation, *Civil society groups say draft violates rights*, 25 July 2016

<sup>93</sup> Nation, *Civil society groups say draft violates rights*, 25 July 2016

<sup>94</sup> NHRCT, *Statement of the National Human Rights Commission of Thailand on the Referendum of the Draft Constitution*, 3 May 2016

# International community slams referendum process restrictions

Over the past year, the United Nations (UN), the European Union (EU), and many foreign governments have publicly expressed concern over the absence of an open debate on the draft constitution and the drastic measures taken against those who have criticized the draft constitution.

- **24 September 2015:** The EU Delegation to Thailand called on the Thai government to respect freedom of speech and assembly during the constitution drafting process and to abide by Thailand's obligations under the International Covenant on Civil and Political Rights (ICCPR).<sup>95</sup>
- **8 October 2015:** The European Parliament adopted a resolution on Thailand, which called on the NCPO to ensure a constitution based on democratic principles, including human rights and the rule of law.<sup>96</sup> During the debate, Members of the European Parliament (MEPs) condemned the NCPO for its delays in drafting a new constitution.<sup>97</sup>
- **25 February 2016:** Dutch Ambassador to Thailand Karel Hartogh reaffirmed the need for free and fair elections, an inclusive constitutional process, and the full restoration of the freedoms of expression and assembly.<sup>98</sup>
- **7 April 2016:** EU Ambassadors voiced concern over the prohibition of expression of dissenting opinions, and urged the Thai government to uphold the principles of freedom of expression and opinion in the lead-up to the 7 August referendum.<sup>99</sup>
- **11 April 2016:** The Canadian Embassy in Thailand urged authorities to ensure Thai citizens would be able to engage in a "free and inclusive debate" on the draft constitution.<sup>100</sup>
- **22 April 2016:** UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein expressed growing concern about "tight curbs on dissent" ahead of the 7 August referendum. He stressed the need for the general public, members of political parties, civil society, including NGOs, journalists, and academics to be given "the space to express their views without fear of harassment, reprisals or arrests."<sup>101</sup>
- **1 May 2016:** Japanese Foreign Minister Fumio Kishida expressed hope that Thailand would make "swift progress" towards the restoration of a civilian government "while listening to the people" in the context of the 7 August referendum.<sup>102</sup>
- **12 May 2016:** US Ambassador to Thailand Glyn Davies voiced concern over limitations on freedom of expression and political gatherings in Thailand, and called for the Thai government to allow open discussion and free participation in relation to the 7 August referendum.<sup>103</sup>

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95 European Union Delegation to Thailand, *Local EU statement on the political situation in Thailand*, 24 September 2015

96 European Parliament, *European Parliament resolution of 8 October 2015 on the situation in Thailand (2015/2875(RSP))*, P8\_TA(2015)0343, 8 October 2015

97 EurActiv, *MEPs condemn Thai junta*, 8 October 2015

98 Embassy of the Kingdom of the Netherlands in Bangkok, Thailand, *Netherlands Ambassador meets with the Prime Minister of the Kingdom of Thailand*, 25 February 2016

99 Ministry for Foreign Affairs of Finland, *EU countries' ambassadors concerned over developments in Thailand*, 7 April 2016

100 Embassy of Canada to Thailand - Ambassade du Canada en Thaïlande, *Embassy of Canada Statement on NCPO Order 13/2559*, 11 April 2016

101 UNOHCHR, *UN Human Rights Chief deeply concerned at growing military role in Thai Government*, 22 April 2016

102 Ministry of Foreign Affairs of Japan, *Japan-Thailand Foreign Ministers' Meeting*, 1 May 2016

103 Nation, *Davies reiterates US concerns over rights*, 13 May 2016

- **13 May 2016:** Swedish Ambassador to Thailand Staffan Herrström stressed the importance of freedom of expression and freedom of assembly in the context of the 7 August referendum.<sup>104</sup>
- **17 May 2016:** Chair of the European Parliament's (EP's) Delegation for relations with the countries of Southeast Asia and the Association of Southeast Asian Nations (ASEAN) Werner Langen stressed the importance of an inclusive process that allowed for "an open debate among all stakeholders" ahead of the 7 August referendum.<sup>105</sup>
- **13 June 2016:** In his opening speech to the 32nd session of the UN Human Rights Council (HRC), UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein emphasized that "free, fair and dynamic public debate on the draft constitution" was essential for Thailand's return to "sustainable democracy." He also voiced his concern over the fact that critics of the draft constitution had been charged with sedition.<sup>106</sup>
- **20 June 2016:** In a phone conversation with NCPO head General Prayuth Chan-ocha, UN Secretary-General Ban Ki-moon stressed that an open and inclusive debate on the draft constitution would be essential to ensuring the charter's legitimacy.<sup>107</sup>
- **29 June 2016:** UN Deputy Secretary-General Jan Eliasson expressed concern over the restrictions on the freedoms of expression and assembly ahead of the 7 August referendum.<sup>108</sup>
- **4 July 2016:** Swedish Ambassador to Thailand Staffan Herrström reiterated the EU's concerns over the restrictions on freedom of expression and freedom of assembly ahead of the 7 August referendum.<sup>109</sup>
- **7 July 2016:** The Foreign Affairs Committee of the German Bundestag criticized the content of Thailand's draft constitution, noting that the text "does not strengthen a separation of powers," and called on the NCPO to allow people to discuss and vote on the draft charter "free of repression."<sup>110</sup>
- **15 July 2016:** Ambassadors of Canada, the US, 20 EU member states with a diplomatic presence in Thailand, and the EU Delegation in Thailand expressed concern over prohibitions on peaceful public expression limiting debate on the draft constitution, and urged the government to allow people to "engage in open dialogue."<sup>111</sup>
- **26 July 2016:** UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression David Kaye expressed serious concern over restrictions on freedom of expression and access to information and urged the government to uphold Thailand's obligations under the ICCPR. He also called on the government to encourage an "open environment for public discourse" in the lead-up to the 7 August referendum.<sup>112</sup>

104 Embassy of Sweden in Bangkok (Facebook page), 13 May 2016

105 EurActiv, *EU to Thailand: 'Free and fair elections' or face consequences*, 20 May 2016

106 UNOHCHR, *Hate is being mainstreamed* - global update by the High Commissioner at the 32nd session of the Human Rights Council, 13 June 2016

107 Secretary-General Ban Ki-moon, *Readout of the Secretary-General's phone call with H.E. Mr. Prayut Chan-O-Cha, Prime Minister of Thailand*, 20 June 2016

108 Secretary-General Ban Ki-moon, *Readout of the Deputy Secretary-General's meeting with H.E. Mr. Virasakdi Futrakul, Vice Minister for Foreign Affairs of Thailand*, 5 July 2016

109 Embassy of Sweden Bangkok, *Ambassador Staffan Herrström's monthly newsletter for June*, 4 July 2016

110 EurActiv, *German lawmakers denounce Thailand's draft constitution*, 7 July 2016

111 Bangkok Post, *Let's talk about this*, 15 July 2015

112 UNOHCHR, *UN Expert urges Thailand to ensure free debate ahead of the constitutional referendum*, 26 July 2016

### Draft constitution and referendum process raised at the UPR

During Thailand's second Universal Periodic Review (UPR) on 11 May 2016, the government accepted a recommendation that called on Thai authorities to encourage public debate on the draft constitution.<sup>113</sup> However, it failed to accept another recommendation that called for the lifting of the Referendum Act's restrictions on the exercise of fundamental freedoms to allow people's participation in the political reform process.<sup>114</sup>

In line with ASEAN's principle of non-interference into member states' internal affairs, no government in ASEAN has spoken out about Thailand's draft charter and referendum process.

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113 "Encourage public debate on the draft Constitution" (Republic of Korea); UN Human Rights Council, 25th session, *Draft report of the Working Group on the Universal Periodic Review*, 13 May 2016; UN Doc. A/HRC/WG.6/25/L.13 Para 5.29

114 "Lift undue restrictions on the exercise of fundamental freedoms, particularly section 61 of the referendum law and NCPD Order number 7/2557, to allow all Thai people to participate fully in the political reform processes, including efforts to produce a new constitution" (United States of America); UN Human Rights Council, 25th session, *Draft report of the Working Group on the Universal Periodic Review*, 13 May 2016; UN Doc. A/HRC/WG.6/25/L.13 Para 6.14



# Recommendations to the Thai government

## ***General recommendations***

1. Cease the arbitrary detention of individuals, including media professionals, who exercise their right to freedom of opinion and expression in relation to the draft constitution and drop any charges brought against them.
2. Stop intimidation and all acts of harassment against individuals in relation to their criticism of the draft constitution.
3. Guarantee in all circumstances the right to freedom of opinion and expression and the right to freedom of peaceful assembly in accordance with Thailand's obligations under international human rights instruments the country has ratified.
4. Amend Articles 61 and 63 of the 2016 Referendum Act to remove prison terms for offenses stemming from the legitimate exercise of the right to freedom of opinion and expression.
5. Repeal NCPO Announcement 7/2014 and Article 12 of NCPO Order 3/2015 and lift all other restrictions that are inconsistent with Thailand's international legal obligations with regard to the right to freedom of peaceful assembly.
6. Repeal NCPO Announcements 97/2014 and 103/2014, NCPO Order 41/2016, and Article 5 of NCPO Order 3/2015 to allow the media to operate freely and independently.
7. Repeal NCPO Order 57/2014 to allow political parties to hold meetings and undertake political activities.
8. Amend the 2007 Computer Crimes Act to remove prison terms for offenses stemming from the legitimate exercise of the right to freedom of opinion and expression.
9. Amend Article 116 of the Criminal Code to make it compliant with Thailand's international legal obligations with regard to the right to freedom of opinion and expression.
10. Amend Article 10 of the 2015 Public Assembly Act to replace the prior authorization system with a prior notification procedure.
11. Lift all other restrictions that are inconsistent with Thailand's international legal obligations with regard to the right to freedom of opinion and expression and the right to freedom of peaceful assembly.
12. Arrange country visits for the United Nations (UN) Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association.
13. Sign and ratify the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR).

***Recommendations if the draft constitution is accepted***

14. Hold a general election in line with international standards without delay and allow for open public debate and campaigning by political parties prior to the election and the presence of independent election observers.
15. Take practical steps to allow open public debates on the constitution, including for the public to recommend amendments.

***Recommendations if the draft constitution is rejected***

16. Repeal Articles 44, 47, and 48 of Thailand's interim constitution.
17. Ensure a transparent and open process, with public involvement, for the selection of members of an independent constitution drafting committee.
18. Establish a clear timeline for the holding of another referendum.
19. Allow meaningful public consultation and participation prior to, and during the drafting process of a new constitution.
20. Take practical steps to promote a free, open, and informed public debate on the new constitution.
21. Ensure that all provisions of the new constitution conform to democratic standards, are in line with international law, and protect fundamental human rights.
22. If a constitution is approved in a new referendum, hold a general election in line with international standards without delay and allow for open public debate and campaigning by political parties prior to the election and the presence of independent election observers.

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