



Thailand's Experience of Emergency Powers in Response to COVID-19

Khemthong Tonsakulrungruang

A. What were the main mechanisms used to handle the COVID 19 challenges, both health and economic, in your country? How well did they work for the purpose?

Thailand was the first country outside China that reported a COVID-19 case, in January 2020. More cases followed as Prime Minister Prayuth Chan-ocha refused to implement a lockdown measure. Early cases were from Chinese tourists and those in the hospitality industry. But then, local transmissions began from Thais returning from abroad.

There is a long list of statutes that could be invoked to handle the COVID-19 challenge. The *Communicable Disease Act B.E. 2558* (2015) authorizes the Health Minister to (i) quarantine or detain a person, (ii) search residence, (iii) shut down a building, and (iv) close transportation. The *Goods and Services Price Act B.E. 2542* (1999) can be used to prevent profiteering of necessary goods e.g. medical masks and sanitary hand gel. Section 384 of the *Penal Code* has already been used to prohibit the dissemination of false news. However, these laws were not invoked.

The Government of Prayuth Chan-ocha is marked by incompetence. The Prime Minister himself is known for lacking leadership skill and his government is comprised of 20 parties. This coalition is weak and rebellious; the leader has not been able to control his team. The Ministry of Health and Ministry of Commerce were under the control of the Bhumjithai and Democratic Parties. As a result, there was little coordination and the COVID-19 situation quickly worsened.

By mid-March, more than a hundred new cases were emerging daily. PM Prayuth then declared an emergency under section 5 of the existing *Emergency Decree on Public Administration in Emergency Situation B.E. 2548* (2005) ("Emergency Decree 2005")¹ (see more on this decree in Part B below) by issuing a Declaration of an Emergency Situation in all areas of the Kingdom of Thailand as from 26 March B.E. 2563 (2020) ("Emergency Declaration 2020").² Pursuant to Emergency Declaration 2020 and under section 7 of Emergency Decree 2005, a Notification was then issued which transferred authority under various laws ([40 statutes](#)) from Ministers to the Prime Minister.³ PM Prayuth, as the head of the COVID Command, a special taskforce, then delegated these powers from his Ministers to the Secretary-Generals of those ministries. In sum, PM Prayuth took away power from his Cabinet (who

¹ In Thai, an emergency decree is *pra ratcha kam nod* and remains so even after the Parliament approves it. Most such decrees are a one-time order, that will not be referenced again (e.g. to amend an existing statute). Unlike others, the 2005 Emergency Decree provided an ongoing lawful basis for a Government to declare an emergency situation and issue subsequent measures as necessary. Those orders are then considered administrative rules.

² <http://www.mfa.go.th/main/contents/files/news3-20200326-161100-704953.pdf>

³ *Ibid.*

were his coalition partners) and delegated them to civil servants who were more obedient and efficient.

Regulation No.1⁴, which issued under section 9 of the Emergency Decree 2005 and pursuant to Emergency Declaration 2020, promulgated a series of [orders](#): (1) no entry into risky areas; (2) shut down of crowd facilities e.g. massage parlours, fitness gyms, fresh markets, and department stores; (3) shut down of borders; (4) no profiteering of necessary goods e.g. food, medicine, and drinking water; (5) no public assembly; and (6) no dissemination of false news. Moreover, the COVID Command encouraged people to avoid domestic travel and to wear a mask in public spaces. Later, the COVID Command banned the sale of alcoholic drinks to prevent social gatherings.

These measures were tremendously successful; the transmission rate immediately went down. By early May, Thailand was deemed safe. Currently, new cases are mostly found in the state quarantine for returning travellers. The Government has gradually lifted restrictions and life is almost back to normal as before COVID struck.

Unfortunately, this public health success is pyrrhic. While Thailand has been able to control the pandemic, the immediate shutdown caused unimaginable scale of economic damage. The Thai economy had already been struggling over the past two years. Thailand has one of the highest measures of economic disparity and most families are financially vulnerable as they have no savings for more than three months. The shutdown shocked the business sector, especially small and medium enterprises, which suddenly found themselves with no business and were forced to lay off employees. Millions were jobless within a matter of days. The Government responded slowly to the economic damage. It made no attempt to slow furloughing and discharging of employees. Economic relief packages came too slowly and were too paltry. The Government offered only 5,000 THB a month for three months. The registration process for this payment was rife with errors. Frustrated, many families committed suicide although the exact number is not revealed.

At the moment, the Government continues to extend the use of Emergency Decree 2005, 30 days at a time, until 30 September and probably longer.

B. Was a constitutional emergency power available? If so, was it used? If not, why not?

The Thai Constitution does not grant the Prime Minister an emergency power that may be used to suspend laws or limit rights and liberties of subjects. That kind of power can be found in interim charters that governed periods of authoritarianism. Military juntas have enjoyed such constitutionally conferred power, to override the legislative, executive, administrative, and even judicial powers without legal liability. The latest example is Section 44 of the 2014 Interim Charter.

There is, however, an emergency legislative power; in times of crisis, for the purpose of maintaining national security, public safety and economic interests, if the Cabinet is convinced that the case is urgent, it may issue an emergency decree, which would have the force of a parliamentary statute. The Cabinet must introduce that emergency decree to the House for approval as soon as possible. Examples of the first type of emergency decrees are those amending the Penal Code to introduce offences on terrorism.

The most well-known and controversial case of the use of the emergency power is the *Emergency Decree on Public Administration in an Emergency Situation B.E. 2548* (2005), which remains in force

⁴ <http://www.mfa.go.th/main/contents/files/news3-20200329-164122-910029.pdf>

and was the basis for the COVID-19 Emergency Decree 2020. Prime Minister Thaksin Shinawatra promulgated it in 2005 as a response to the Deep South violence where Muslim Malay separatists rose up against the Thai state. The Deep South region had already been under Martial Law, which conferred power to the Army Commander. Emergency Decree 2005 was considered a less harsh version of a security law, allowing more civilian control. Nonetheless, many critics of PM Thaksin were convinced that he used the Emergency Decree 2005 to apply a heavy-handed approach to crush dissidents with impunity. Although the Parliament did approve it to become a regular statute, Emergency Decree 2005 has become the “poster boy” of Thailand’s emergency power. It has been regularly invoked ever since in order to quell anti-government protests. Both pro- and anti-Thaksin Governments have enjoyed its service.

Another ground for invoking this emergency legislative power has been when the Cabinet has been convinced the country needs a new law on taxation or finance, urgently. It can then promulgate an emergency decree, allowing the Government to bypass the national budget plan. The Government of PM Prayuth Chan-ocha also promulgated [three emergency decrees](#) which would allow it to borrow up to THB 1.9 trillion for the purpose of COVID-19 economic relief. The House of Representatives subsequently approved all three decrees, which effectively gives them the force of an ordinary statute. This is the use of an emergency decree related to taxation and finance.

C. Was the legislature involved in the approval or scrutiny of the measures taken? How effective was legislative involvement?

The Thai Constitution dictates that, as soon as possible, the Cabinet must present the emergency decree before the House of Representatives for its approval. If the House rejects the decree, it ceases to be in effect but all acts committed prior to the House’s rejection are still deemed valid. So far, legislative oversight has been weak. The House is understandably inclined to accept the emergency decrees as the Prime Minister is from the House’s majority. Only three decrees, dated back to before 1990, were ever rejected by the House. Legislative oversight becomes even harder nowadays in a highly polarized political environment, where political parties diligently vote according to their party’s line.

But for Emergency Decree 2005, which had already been approved by the House in 2005, its invocation and use now rest solely on the Prime Minister’s discretion. The House cannot review or scrutinize his decisions under the decree, leaving it to judicial review.

D. Were there other forms of oversight of the responses to the pandemic; for example, through courts?

A promulgation of an emergency decree is subject to a review by the Constitutional Court, which can review whether the Government has a constitutional ground to issue a decree. The Constitutional Court had already upheld constitutionality of the Emergency Decree 2005, back in 2005.

Rules, orders, and actions issued or done in accordance with the 2005 Emergency Decree, on principle, should be under the Administrative Court’s jurisdiction because they are administrative rules, orders and acts. However, section 16 of Emergency Decree 2005 specifically exempts rules, orders, and acts prescribed by the decree from the Administrative Court’s review. That does not mean a government employee will be absolved of all liability. The 2005 Emergency Decree 2005 is still subject to the Court

of Justice's scrutiny.⁵ However, a review by the Court of Justice, the court with general jurisdiction, is not as rigorous as that of the Administrative Court, which is more familiar with the subject matter of government administration. The Administrative Court has tended to undertake a more aggressive review of administrative agencies, while the Court of Justice has tended to defer to the Government's discretion.

According to section 17 of Emergency Decree 2005, a government employee will not be held accountable to criminal, civil, and disciplinary liability if he or she acts in bone fide, not in a discriminatory or excessive manner, and proportionately. A victim may claim his or her loss from the agency, however, under the *Government Tort Act*. Section 17 may lead to moral hazard. Some agencies have aggressively and arbitrarily enforced orders. Within the first two weeks, more than 20,000 people were arrested and about 9,000 cases were brought to court for violating the Regulations, mostly for social gathering. In many cases, the police clearly over-reacted, raiding private residences or picking on migrant workers. Although the President of the Supreme Court advised judges to be lenient, considering alternatives to fines and imprisonment, in many cases, judges handed down harsh sentence, explaining that it was necessary as deterrent for others.

Some cases have been brought already in relation to the current use of emergency powers. Prior to the invocation of Emergency Decree 2005, the Civil Aviation Authority of Thailand (CAAT) issued a rule that prohibited a passenger from boarding an inbound flight unless he or she presented a fit-to-fly certificate. A fit-to-fly certificate is, however, not a normal medical procedure, forcing a person to travel to a hospital and pay an extra charge for a certificate that does not guarantee that he or she is free from COVID-19. In brief, a fit-to-fly certificate is a placebo that places an excessive burden on a passenger, resulting in hundreds, if not thousands, of Thais left stranded abroad. On 25 March 2020, a Thai student in Dublin decided to bring a case to the Central Administrative Court. On 3 April 2020, the Civil Court dismissed the case, reasoning that the CAAT's requirement was by then replaced by a similar rule under Emergency Decree 2005. Thus, it could no longer review the merits of the case. He then filed another complaint challenging that similar measure under Emergency Decree 2005 with the Civil Court, which refused to accept the case for consideration. The Civil Court simply dismissed the case, stating that the Prime Minister acted according to the law and no element of illegality was found. The Civil Court's deferential stance meant that many Thais were left suffering indefinitely while waiting for repatriation flights.

F. What do you expect to be the longer term consequences of this experience with emergency power on representative government in your country?

In a highly polarized country, the experience under Emergency Decree 2005 in relation to its use to address COVID-19 can be interpreted in two very different ways. Those who support PM Prayuth admired how swift and effective the Government became. They are convinced that a democratic government, which arguably operated prior to the invocation of Emergency Decree 2005 to deal with COVID-19, is ill-equipped to handle a national crisis. However, they are probably the minority, who suffer little from PM Prayuth's shortcomings, e.g. upper-class Bangkokians and government employees. The majority's opinion is negative about this episode.

⁵ As a general principle of law, any legal dispute that does not fall under a jurisdiction of any specific court, shall be within the Court of Justice's (COJ) jurisdiction. The CoJ is the court of general jurisdiction in Thailand, dealing in particular with private law, civil and criminal cases.

On the one hand, Thais are very used to living under an emergency power. From 2014 to 2019, OM Prayuth ruled Thailand as the head of the junta. Thais lived under Section 44 of the 2014 Interim Charter, which was arguably worse than the 2005 Emergency Decree. PM Prayuth exercised Section 44 power to suppress rights and liberties as well as bypass ordinary statutes with absolute impunity. The judiciary refused to review PM Prayuth's abuses of power. The use of Emergency Decree 2005 to handle COVID-19 is unlikely to deteriorate the rule of law further than what the junta had already done.

On the other hand, PM Prayuth is no longer the junta leader. He is now a democratically elected prime minister and the public expects him to conform with some democratic norms. The use of the 2005 Emergency Decree exposed how poorly he operates as a chief of his ministers. He fails to perform and upsets the public. This adds up to growing discontent, which has been simmering for years. It finally exploded in July when the Government announced another extension of the COVID-19 restrictions and the state of emergency. Thousands of people are now protesting and demanding for changes.

G. What positive or negative lessons can be taken from this experience in your country for the use of emergency procedures and the role that representation plays?

Thai political culture is heavily influenced by authoritarianism, the legacy of decades under military dictatorship that is still ongoing today. That explains why oversight mechanisms fail to scrutinize an exercise of emergency power, even in a democratic period. The House of Representatives did not reject the promulgation of 2020 Emergency Decree in relation to COVID-19, which drew on the strong emergency powers provided by the 2005 Emergency Decree. Nor did it challenge the three emergency decrees on loan and bailout, although it is likely that the Government will eventually waste them all. The judiciary too does not function as it is supposed to. As a result, rights and liberties of Thais are left very vulnerable.

COVID-19 is a crisis much needed by PM Prayuth. In February, the Constitutional Court dissolved the main opposition party, the Future Forward Party. The decision triggered mass protests which were escalating and spreading rapidly when COVID-19 struck. By invoking the 2005 Emergency Decree, not only did PM Prayuth issued measures to curb transmission of COVID-19, but he also prohibited political gatherings. Although PM Prayuth finally lifted the ban on public assembly, protesters are still regularly charged with violations of the Emergency Decree.

When PM Prayuth cannot lead his cabinet, the emergency power allows him to rely on civil servants who often raise no dissent. As a result, PM Prayuth, a soldier by training, set a very simplistic goal of totally eradicating COVID-19. That simplistic goal has proved very costly as PM Prayuth's policies did not balance other concerns, such as the economic and social impacts of his measures. The 2005 Emergency Decree, in this sense, helps exemplify PM Prayuth's incompetence at the cost of people's livelihood.

Biography: *Khemthong Tonsakulrungruang joined the Faculty of Law, Chulalongkorn University, Thailand, in 2009. He lectures various courses in constitutional and administrative laws. His areas of interest include freedom of expression, religious freedom, public accountability, and environmental policy. Khemthong graduated from the Faculty of Law, Chulalongkorn University before earning his LLM at Yale Law School. He has a PhD from the University of Bristol School of Law, UK. Khemthong participated in the Melbourne Forum in 2019.*