THAILAND

Fondness for authority undoes constitutionalism

Writing around a decade ago, leading political scientist Chai-anan Samudavanija observed how Thailand's military and bureaucracy historically had held exclusive legitimate authority to organise and mobilise large numbers of people. Political parties, by contrast, had been viewed with hostility and warned away from the sorts of activities with which they are ordinarily associated in other countries, such as calling for big meetings and building durable policies through coherent public debate. Laws were introduced to delimit the ability of secular groups to obtain popular support. "The military's main strategy was to allow for very limited political participation at the national level," Chai-anan observed. "For the military, the power of the state and political power were different matters." The appearance of representative democracy was belied by an amalgam of institutions designed to keep real authority located elsewhere.

However, even as Chai-anan wrote, things were changing rapidly. The military was on the back foot after the downfall of the previous coup leader after bloody protests in the capital during 1992, and growing numbers of civil rights groups together with conservative liberal forces managed to push through a charter that they hoped would balance new public demands with the interests of established powerful institutions and persons. The 1997 Constitution was the first to introduce notions of genuine constitutionalism, judicial review and popular involvement in all areas of social and political life in Thailand.

In 2006 that constitution was abrogated. Throughout 2007, the military and its allies have thoroughly and decisively reasserted their prerogative to determine the shape and direction of the country. Authoritarianism is back with a vengeance.

Old order versus new

For Thailand's old guard, the government of Pol. Lt. Col. Thaksin Shinawatra proved to be a sobering lesson in the dangers of someone aspiring to merge political strength with the actual power of state, through blatant use of personal and public capital. His shrewd blending of strategies for control worked in part because of his ability to manipulate the components of the 1997 Constitution, which had been written with a view to defending human rights and promoting the rule of law, but which for Thaksin were implements which could either be used for personal advantage or ignored.

This report contains extracts from a study on constitutionalism and human rights in Thailand published by the sister organisation of the Asian Human Rights Commission, the Asian Legal Resource Centre, in the June 2007 edition of its bimonthly periodical, article 2 *(vol. 6, no. 3). That document can be downloaded in full from:* www.article2.org.

To prevent Thaksin—or anyone else like him—from resurfacing, the military has concluded that it is necessary to deny any version of constitutional government that may again open the door to his methods. In short, this means denying any form of genuine constitutionalism at all, as it would necessarily oblige the military and its allies to be answerable to the legislature, not vice versa.

A soldier next to the Democracy Monument in Bangkok (Chiang Mai 108)

The thinking of the old order which underlay the coup was later summed up by a former coup leader, General Suchinda Kraprayoon. The general led the prior military takeover, in 1991. He was forced out of the prime ministership that he took unelected in 1992 after massive protests in Bangkok, in which hundreds were killed and injured. Around six months after the latest takeover, the *Matichon* newspaper asked him whether or not he still agrees with the idea that it is not necessary for the prime minister to be elected. Suchinda replied that he agrees "100 per cent", and continued

"And I don't agree with a constitution so full of details that it is impossible to move. The constitution shouldn't have many sections, only what's necessary. It should be written broadly... I also don't agree with holding public hearings, because what will the people know? Even I myself haven't read the previous constitutions, because I'm not a person who's interested in politics. Go and ask the people how many sections there are [in a constitution]—they don't know. So for what reason will you hold public hearings? What do the people know?"

In its plainest terms, the coup leaders thinking in both 2006 and 1991 consisted of the following givens: ordinary people know nothing; politicians have no legitimacy; constitutions are irrelevant. The question that must then be asked is what kind of constitutionalism can be developed under persons who have no genuine interest in constitutions?

Constitutionalism by force

In a special report in the middle of 2007, Basil Fernando, executive director of the Asian Human Rights Commission (AHRC), observed that legal systems exposed to extremely adverse conditions for a long period of time might, like some ecological systems, become unrecoverable. Among those causes of such conditions, he noted, is incessant meddling with the constitution:

"One of the most serious ways of interrupting the flow of a legal system is by constantly replacing or amending its written constitution. Where the constitution is subjected to

repeated meddling, and particularly where it is changed every time a new government comes to power by force, it is very difficult for a sound legal tradition to be established. If constitutional life is characterised by constant changes over a long period of time then people fail to obtain the knowledge and habits associated with genuine constitutional government. This is particularly the case where changes are made to the constitution at the behest of military rulers who are intent upon restricting the powers of the judiciary and legislature. Ultimately, they may succeed in causing widespread disillusionment and all but cease attempts at recourse through the parliament and redress through the judiciary.

"Displacement of constitutional law affects public law. Citizens' rights to challenge government actions depend upon constitutional protections. Where these are removed, restrained or subjected to repeated alterations, the practical activities of lawyers and human rights defenders in using the courts to defend human rights also are undermined. Judicial review of government actions may be tightly controlled or altogether eliminated. Restraints may be imposed on the use of writs or their equivalents. As the constitutional law on what constitutes abuse of power is shifting and confused, people steadily lose confidence and interest in the capacity of the courts to protect their interests as against those of the executive. Ultimately, notions of abuse of power may cease altogether, and confidence in the capacity of the courts to intervene in the interests of the public may be all but lost.

"While a constitution is suspended or being altered and public law is being diminished, the military and other extant authorities will have many good opportunities to expand their powers through the introduction of state security laws, emergency laws, anti-terrorism laws and other measures and institutions to block the flow of the legal system. These all serve to remove whatever measures may have existed through the courts and other institutions to prevent or inhibit arbitrary arrest, detention, torture, extrajudicial killing and forced disappearance. Such laws may go so far as to remove the possibility of judicial inquiries into suspicious deaths, or render the inquiries pointless by granting impunity to the perpetrators, no matter what the findings of the courts. Thus, the authorities may keep some legal measures for defence of rights on the ordinary statute books for the sake of appearance, knowing full well that any complaints lodged under them will anyhow be futile. In this way, not only the flow of constitutional law, but ultimately that of the entire criminal justice system is reduced and polluted."

And he further warned:

"At this point, the danger posed to the legal system should be obvious to all, although as in the case of ecological systems under threat there will still be some naysayers insisting that everything is perfectly normal, or that things are not as bad as they appear. Some may say that this is all part of a natural cycle: hot then cold, coup then constitution. However, the reaction of ordinary victims of abuse will show otherwise. From observation and experience, people will come to realise that lawyers, courts and even members of parliament cannot guarantee their rights. As life is now under the control of other agencies, the only way to obtain some redress is by appealing to them directly, even

where they are the same ones responsible for wrongdoing. Thus a person whose son has been killed by the police may go to a senior police officer to request justice, instead of the courts. A person who has been tortured by soldiers may be taken to another agency or authority within the army to request some compensation and disciplinary action against the alleged perpetrators. Not only the legal system as a whole, but also the persons associated with it—judges, lawyers, public prosecutors and other judicial officers—are thus reduced in value in the eyes of the public. They may have the same titles and sit on the same chairs in the same buildings as before, but over time it becomes public knowledge that they too are powerless. In their stead we see the re-emergence of feudal behaviour, as the sophisticated legal system needed for survival of a healthy and functioning modern society is steadily reduced in size and capacity: even where its external appearances remain, below the surface its life is gone. Once at this point, talk about defence of human rights through institutions of justice is meaningless. Redress depends not upon order and rationality but upon circumstance and dumb luck.

"Ultimately, the notion of a constitution being replaced by military force is, from a legal perspective, an absurdity. While government propaganda may try to give the appearance of a decent and harmless coup, the effect of removing the paramount law of a country by force is to make clear that the country is lawless. The final arbiters in any conflict are not the courts but those with the firepower. The constitution, whatever constitution, has no real value. By implication, all the laws of the country, which are established under the constitution, are of limited worth, compared to that authority obtained by the barrel of the gun. Thus the country has devolved to an extremely primitive condition that will have lasting bad effects for generations, which, as in the case of ecological systems, can be reversed only through deliberate systematic measures to mitigate the damage already caused and prevent further harm from occurring."

The least dangerous branch

Many persons have wrongly interpreted the new constitution as giving dangerous authority to the judiciary in Thailand by virtue of a gamut of new powers it affords senior judges. Nothing could be further from the truth. By virtue of these powers, the upper courts are today far more compromised and weaker than before.

In 1787, Alexander Hamilton wrote in *The Federalist* that where powers of government are properly separated the judiciary poses the least threat to constitutional rights:

"Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Consitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor

WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."

The judiciary has no physical force of its own. Even for its judgments to be effected it relies upon police, corrections officers and bureaucrats. But although liberty has nothing to fear from the judiciary alone, Hamilton continued in the same passage, it has everything to fear from its union with other parts of government. A truly independent judiciary is a safeguard; a non-independent one is a grave threat:

"This simple view of the matter suggests several important consequences. It proves incontestably that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the executive. For I agree that 'there is no liberty if the power of judging be not separated from the legislative and executive powers' [Fn: Montesquieu, *The spirit of laws*, vol. 1, p. 181]. And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone [it] would have everything to fear from its union with either of the other departments..."

Some decades after Hamilton and his peers successfully advocated for their draft constitution, a French aristocrat observed that the great strength of America's political system lay in its courts. Alexis de Tocqueville marveled at how judges' authority was invoked at every turn, yet the constitution granted them no overt political powers:

"What a foreigner understands only with the greatest difficulty in the United States is the judicial organization. There is so to speak no political event in which he does not hear the authority of the judge invoked; and he naturally concludes that in the United States the judge is one of the prime political powers. When, next, he comes to examine the constitution of the courts, he discovers at first only judicial prerogatives and habits in them. In his eyes the magistrate never seems to be introduced into public affairs except by chance, but this same chance recurs every day."

Constitutional rights were guarded through strict interpretation of law and adherence to judicial practice. In this way, he concluded, the courts formed the strongest barrier against the rise of tyranny.

One event speaking to the diminished position of the senior judiciary and the facade of legality that the military regime has sought to throw across itself came at the end of May 2007, when senior judges participated in a charade to dissolve the former ruling party that was not of their making but was, thanks to their acquiescence to the country's military regime, made to appear one of their doing.

The military-appointed Constitutional Tribunal—comprising of six Supreme Court judges and three Supreme Administrative Court judges, including their presidents—on May 31 dissolved the Thai Rak Thai party on grounds of endangering and acting against the democratic state under the 1998 Organic Act on Political Parties, and removed the electoral rights of over one hundred party board executives, including Thaksin, for five years in accordance with Announcement No. 27 of the military coup group. Thus a group of judges appointed by an unelected and antidemocratic military regime made a decision on the actions of an elected political party that was alleged to have undermined democratic process. The decision was made on the basis of law established under a constitution that was scrapped by that very same military regime, with punishment approved and meted out to a group of individuals under one of its orders.

The May 31 decision brought to mind an important and highly relevant precedent, although not one from among those of the former military takeovers littering the modern history of Thailand that the tribunal's judges cited in their ruling. Rather, it is from the Supreme Court of the United States, which in 2000 was asked to decide on a handful of votes in Florida upon which the presidency was to be decided. Although the court upheld the petition of the current incumbent, four dissenting judges made clear that they should never have taken up the matter in the first place. Justice Breyer opened his dissenting opinion by flatly observing that, "The Court was wrong to take this case." He continued

"Of course, the selection of the President is of fundamental national importance. But that importance is political, not legal. And this Court should resist the temptation unnecessarily to resolve tangential legal disputes, where doing so threatens to determine the outcome of the election."

He concluded that above all else in cases of immense political importance the courts should be extremely wary to wade in and find a solution without carefully examining their standing and the consequences of their actions:

"Those who caution judicial restraint in resolving political disputes have described the quintessential case for that restraint as a case marked, among other things, by the 'strangeness of the issue', its 'intractability to principled resolution', its 'sheer momentousness, . . . which tends to unbalance judicial judgment', and 'the inner vulnerability, the self doubt of an institution which is electorally irresponsible and has no earth to draw strength from'. Bickel, [*The least dangerous branch*, 1962], at 184. Those characteristics mark this case.

"At the same time, as I have said, the Court is not acting to vindicate a fundamental constitutional principle, such as the need to protect a basic human liberty. No other strong reason to act is present... And, above all, in this highly politicized matter, the appearance of a split decision runs the risk of undermining the public's confidence in the Court itself. That confidence is a public treasure. It has been built slowly over many years... It is a vitally necessary ingredient of any successful effort to protect basic liberty and, indeed, the rule of law itself... we do risk a self-inflicted wound—a wound that may harm not just the Court, but the Nation.

"I fear that in order to bring this agonizingly long election process to a definitive conclusion, we have not adequately attended to that necessary 'check upon our own exercise of power', 'our own sense of self-restraint'. United States v. Butler, 297 U. S. 1, 79 (1936) (Stone, J., dissenting). Justice Brandeis once said of the Court, 'The most important thing we do is not doing.' Bickel, supra, at 71. What it does today, the Court should have left undone."

Justice Stevens went further. What underlay the petition to the Supreme Court, he said, was "an unstated lack of confidence in the impartiality and capacity of the state judges" to do their jobs. And he continued,

"The endorsement of that position by the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land. It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today's decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law."

It is worthy to note just how many of Justice Breyer's and Stevens's observations are applicable to what happened in Thailand this May (leaving aside the fact that the tribunal in Thailand had no constitutional principle to consider, in the absence of any constitution worthy of the name). Notwithstanding, the warning about the dangers to public confidence caused by incautious handling of a highly-politicised and loaded case went unheeded in Bangkok as it had done in Washington DC.

The coup of September 19 was itself an enormous demonstration of a lack of confidence in the capacity of the senior judiciary to resolve thorny political and legal problems and review the legality of government actions in Thailand. By appointing a new tribunal in the stead of the Constitutional Court and in the absence, for practical purposes, of any constitution at all, setting it on the former ruling party, the coup group cynically called upon the tribunal members not only to endorse the army's displacement of the preceding political order, but also its attack on a nascent legal order that may in time have posed a threat to its interests. By complying, the judges wounded their own authority and greatly risked lasting damage to public confidence in their integrity. Whether or not time will one day heal the wounds in Thailand remains to be seen, but as in the United States seven years earlier the identity of the real loser was undoubtedly the nation's confidence in the courts. Indeed, given the amount of attention it received, the decision will have caused a great deal of confusion about the role of the judiciary in its entirety.

Justice versus legality

In the lead up to the tribunal's May decision, the King of Thailand spoke twice about the importance of judges "maintaining justice". The king pointed out that more than ever

there was a question of public confidence in the judiciary and that the courts would be vital to the peace and survival of the country.

In light of the circumstances, the question that these remarks naturally prompt is whether or not it is possible to maintain any kind of justice in the contaminated moral and political atmosphere of a military dictatorship? What happens to justice when the army throws away the only genuine constitution that the country ever had? What happens to justice when it shuts down a higher court and sets up something else in its stead?

Here the distinction between justice and legalism is important. A strict adherence to legality is certainly possible under any kind of government, as observed by a British law lord, Steyn, in a speech from April 2006:

"History has shown that majority rule and strict adherence to legality is no guarantee against tyranny... in Nazi Germany, amid the Holocaust, pockets of the principle of legality (for what it was worth) sometimes survived. In Nazi Germany defendants sentenced to periods of imprisonment before the Second World War were left alone during the terms of their sentences. Only when their sentences expired did the Gestapo wait for them at the gates of the prisons and transport them to the death camps. So even in Nazi Germany an impoverished concept of legality played some role...

"In the apartheid era millions of black people in South Africa were subjected to institutionalised tyranny and cruelty in the richest and most developed country in Africa. What is not always sufficiently appreciated is that by and large the Nationalist Government achieved its oppressive purposes by a scrupulous observance of legality. If the judges applied the oppressive laws, the Nationalist Government attained all it set out to do. That is, however, not the whole picture. In the 1980s during successive emergencies, under Chief Justice Rabie, almost every case before the highest court was heard by a so-called 'emergency team' which in the result decided nearly every case in favour of the government. Safe hands were the motto. In the result the highest court determinedly recast South African jurisprudence so as to grant the greatest possible latitude to the executive to act outside conventional legal controls.

"Another example is Chile. Following the coup d'etat in September 1973, thousands were arrested, tortured and murdered on the orders of General Pinochet. The civilised and constitutionally based legal system of that country had not been formally altered. It was not necessary to do so. The police state created by General Pinochet intimidated and compromised the judiciary and deprived citizens and residents of all meaningful redress to law...

"Here I pause to summarise why I regard these examples of some of the great tyrannies of the twentieth century as containing important lessons. They demonstrate that majority rule by itself, and legality on its own, are insufficient to guarantee a civil and just society. Even totalitarian states mostly act according to the laws of their countries. They demonstrate the dangers of uncontrolled executive power. They also show how it is

impossible to maintain true judicial independence in the contaminated moral environment of an authoritarian state."

Thus, simple adherence to the law is not in any way sufficient to ensure justice. This is the fundamental distinction between the rule of law, and the rule by law. So upon what does justice, as opposed to legality, depend?

First, justice depends upon all persons being subject to ordinary laws and courts. But today in Thailand, certain categories of persons are beyond the law. Soldiers, police and other officials acting under emergency regulations in the south, or martial law that remains in effect in over half of the country, are protected from prosecution for acts that would otherwise be considered criminal. The coup leaders have also had an immunity clause for themselves inserted into the interim constitution, which will be carried over in some form or another after their time is up. Hence, there are no grounds upon which calls for justice can be made in Thailand until these differences before the law are addressed.

Second, justice depends upon some kind of judicial review of executive and legislative actions. It means that the courts are capable of commenting upon the legality or illegality of actions by the other parts of the state. Before the army took power last September 19 there had been a strong acknowledgment of the need for judicial review, in light of the many abuses of the former administration. Since that time, all discussion of the notion has ceased. As previously, the superior courts quietly acquiesced to the military takeover, and the judiciary was again made a subordinate, rather than an equal, of the other branches of government: the May 31 ruling being the superlative example of its compliance with the demands of the rulers of the day; hence, rule by, rather than of, law. As in South Africa during the apartheid era, the judges of Thailand have demonstrated to the regime that their hands can be safely relied upon. Thus, until this much more difficult problem of judicial subordination to other parts of government too is addressed, there can be no reason to anticipate a functioning "justice" system in Thailand soon. And unfortunately, whereas the 1997 Constitution had laid the foundations for the building of an independent judicial department of equal strength with the legislature and executive, no such thing can be expected of any constitution devised under the current military regime, no matter how hard it—and the drafters of the charter—may try to make it appear otherwise.

Martial law, emergency regulations, computer crimes, internal security and other patent ambiguities

On 27 September 2006, eight days after the coup, the country's ambassador to the United Nations told the General Assembly that we could "well expect that one of the first tasks of the new civilian government will be to do away with martial law".

Not only was no civilian government installed, martial law was kept in place across almost half of the country for over a year. It was also not lifted for the referendum that was held to endorse the military-backed constitution, which was passed by only around one third of total eligible voters in the country. It remains in effect in a number of parts of

the country where it has evidently been used not for security purposes but to delimit the space available for persons to actively campaign against military interests, be they direct or indirect, including environmentalists opposed to industrial projects on public land.

Under martial law, military authorities are exempted from ordinary laws and criminal process. They have the power to search and seize property and vehicles anywhere and anytime; stop and search persons at will; and reside in, destroy or relocate a dwelling. They can prohibit public gatherings, publications, advertisements, use of roads or public transport and communications. They can order someone to be held under house arrest. They can evict anyone from anywhere. And they can detain suspects for up to seven days for interrogation without access to a lawyer or courts, in contrast to the 48 hours provided under the ordinary criminal procedure law.

There were many reports of soldiers exercising their powers under martial law throughout the referendum to prevent campaigning that was viewed as hostile to the new constitution. Residences were raided, vehicles stopped and materials confiscated. Nonetheless, the results of the August 19 ballot were far less favourable towards the military than it might have expected, for all of its efforts and spending of public money to obtain the required Yes vote. Just over 14 million people out of the country's 45 million eligible voters crossed the box in favour of the charter. As only 25 million bothered to turn up at the poll booths, despite the saturating propaganda campaign in the weeks beforehand, this number was sufficient to carry the draft. This number of voters was far lower than in previous recent elections, which have all been at least 62 per cent. In fact, the last time that there was a less than 60 per cent voter turnout was in the March 1992 general election that was hosted by the previous military dictatorship; its leader then took over as prime minister and was ousted by massive street protests a couple of months later, precipitating the period of nascent democracy and moves towards genuine constitutionalism of the 1990s, culminating in the abrogated 1997 Constitution.

In the south, the emergency decree that remains in force over two years after it was introduced by the former government not only permits but also obliges extraordinary detention of suspects, by providing that, "Competent officials shall be empowered to arrest and detain suspects for a period not exceeding seven days... in a designated place which is not a police station, detention centre, penal institution or prison..." The effect of this clause—together with other parts of the decree—is to all but guarantee the use of torture, forced disappearance and extrajudicial killing, for which state officers need not fear consequences as they are anyhow exempt from prosecution if they have acted in "good faith". As the decree is so vague that anything could be construed as good faith, as victims are unwilling to complain, as police won't investigate and as judges are unlikely to hear any cases this amounts to a blanket impunity clause.

In June the regime also passed the Computer Crime Act BE 2550 (2007), ostensibly to prevent violations of computer privacy and block the spread of pornography through the Internet. These objectives are well and good; however, the act grants enormous powers to persons designated as "competent officials" to obtain, search and copy computer data, and seize hardware. It also obliges Internet service providers to preserve all user records

for 90 days, in the event that the said officials wish to access them. Section 14 imposes a maximum of five years' imprisonment on anyone found to have imported data that might "damage national security or cause public alarm". Section 20 allows that where data are disseminated that "might be contradictory to the peace and concord or good morals of the people" a competent official can seek a court injunction to stop this activity. Nowhere in the act is there any description of what exactly—or even broadly—might cause damage national security or contradict peace and morality. By contrast, section 21, on the restriction or destruction of data containing "undesirable instructions" stipulates what these constitute or may be found to constitute.

The passing of this so-called "act" again raises questions about the notion of law in Thailand, not least of all under the present military dictatorship. One of the key features of law, as it is properly understood, is certainty. This is a reason for its written codification: so that everyone may be informed of its contents and features, and so that the average person may be able to guide their behaviour accordingly. Where an act is so vague as to ensure that anything that the state deems threatening to its interests can fall within its ambit, upon what grounds can a person decide what to do or what not to do to stay within the confines of the law? Can it properly be called a law at all? This is the same feature of the emergency regulations over the southern provinces of Thailand, and the proposed new national security legislation, that have caused so many difficulties and so much anxiety.

Another basic principle of law is its enforceability. An act that cannot be enforced is good for nothing; in fact, it may have the opposite effect of what it intended, reducing the credibility of law-enforcement agencies and respect among the public for the notion of law itself. In this regard, section 17 of the new computer-related crimes act is particularly problematic, as it prescribes that persons not residing in Thailand responsible for offences under its other parts may also be "penalised within the Kingdom". How they would be investigated and penalised remains a mystery; however, in including this section the drafters are perhaps hoping to take aim at the international supporters of the former government, who have been running circles around it throughout cyberspace and getting their version of events through to people in Thailand via their computers at a time that the broadcast media—which is for the most part under the control of the armed forces and bureaucracy—is telling nothing, and the print media is telling only part.

General Sonthi Boonyaratglin

Meanwhile, a national security law has been tabled that owes much of its contents to the emergency decree operative in the south. The latest draft of the bill permits the head of the revamped Internal Security Operations Command (ISOC) behemoth—at the end of 2007 being the coup leader, General Sonthi Boonyaratglin, despite his having stepped down from the post of army commander—to curtail undefined security threats without requiring anything other than a wave of approval from the cabinet. It grants him powers to shut roads and stop vehicles, close public gatherings, keep someone under house arrest, order employers to report on employees, oblige

the police and civilian officials to cooperate with the army wherever and however necessary, issue preventive arrest orders, summon anyone to appear before a designated official on any grounds, search persons or vehicles or premises at will and seize anything.

None of this would require a declaration of emergency, as in the south, or even martial law, which remains in effect in many parts of the country, and there will be no recourse through judicial or legislative means. As in the south, all officers working under the security law will be protected against legal action.

General Sonthi has said that he wishes to remodel ISOC on the new US Department for Homeland Security, apparently either unaware or unconcerned about the amount of unease caused by the department among persons in the US concerned by excessive government and military power and declining civil liberties. And that is in a society with an active and genuinely independent legislature and judiciary, unlike those in Thailand. The bill that brought the department into effect was at least the subject of some sort of genuine debate, Senator Patrick Leahy referring to its provisions, like those in Thailand, as allowing for "vague, incoherent, or even obviously fictitious threats" to be used as a pretext for violating citizens' fundamental rights.

The key feature of all this is the pretence of legality. This pretence consists in the fraudulent notion that merely by describing something as law it is thereby made in to one, even when its contents are at best incoherent and at worst absurd. It consists in the fraud that by retaining some kind of legal procedure, citizens' rights are protected, even when established institutions for justice are bypassed. It consists in the special authority bestowed upon persons by simple fact of their being named "competent officials", even when the effect is to place them beyond the limits of ordinary law. Everything is thus arranged so that the appearance of legality persists in its absence, and each individual state officer can be simultaneously complicit and blameless. Thus, bad things only happen to bad people.

The pretence of legality is the opposite of the principle of legality, although it is characterised by superficial alikeness. "The principle of legality," Leandro Despouy, U.N. special expert on judges and lawyers, has written, "Relates to the need to have in place and to observe clear and precise provisions relating to [a] state of emergency." This can only be done through strict application of sound law and judicial oversight. Where law is vague, the courts marginalised, and ordinary procedures for obtaining evidence and detaining suspects are suspended, abuses are inevitable.

Feudalism comes before courts

According to an Associated Press news report in the middle of the year, police had arrested and charged a sergeant of the Royal Thai Army who was among a gang of around 30 that assaulted three British men in Nakhon Sawan, north of Bangkok, on 19 July 2007. No reason for the assault, which reportedly left one of the three seriously men injured, was given in the brief article; however, the interim prime minister of Thailand,

General Surayud Chulanont, was quoted as saying that the police should thoroughly investigate it.

In another article around the same time, from the Prachatai news service, General Sonthi was reported as having ordered that a committee be set up to investigate allegations of torture at the Ingkhayuthboriharn army camp in Pattani Province. At least 100 persons were being held at the camp without charge under emergency regulations. The general had reportedly said that if allegations of torture are found to be true then they will be referred to "the justice system".

Ronachai Chantra after the army assault (MCOT)

In August, a television station broadcast images of a group of soldiers in the north assaulting a teenager. In the August 11 footage shown by MCOT, a soldier at a checkpoint in Lamphun Province, south of Chiang Mai, knocked 17-year-old school student Ronachai Chantra off his motorcycle. Thereafter around ten of the troops stood around and kicked him in the head repeatedly as he knelt on the ground next to his fallen bike. Afterwards, he was seen wheeling it away, with a swollen and bloodied face; he was stopped and questioned by police before being taken to the local station to record details of the incident. According to an MCOT Chiang Mai radio broadcast of August 15, Lieutenant General Chirdej Kojarat, commander of the Third Army Area, said that an investigation had already been conducted and the soldiers had been warned and told to apologise to the victim. He said that the soldiers, from the 7th Infantry Division, had mistakenly thought that the teenager had thrown a bottle as he went past. In October the AHRC received a letter from the attorney general's office indicating that as of that time, "For this case the process has not yet passed from the inquiry official [the police] to the public prosecutor..."

Earlier, in response to the shooting of a group of youths in the south on April 9, an army officer was quoted as saying that the armed militia personnel were justified to fire in self-defence. Two young men and two boys died and a number of others were wounded when Village Defence Force volunteers shot at them in Bannang Sata, Yala. Explaining the incident, Colonel Akara Thiprot is reported to have said that the volunteers were right to shoot as the youths had attacked them with "sticks and stones"—a far cry from the standards set down in the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, that non-violent means must be used before shots are fired; even then, where the use of guns is unavoidable, law-enforcement officers are supposed to exercise restraint in proportion to the seriousness of the offence and respect and preserve human life. This means that shooting in self defence is justified only "against the imminent threat of death or serious injury" or where the person is threatening to cause similar harm to others. The principles stress that, "In any event, intentional lethal use of

firearms may only be made when strictly unavoidable in order to protect life", and that, "Exceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles."

Just a few days later, two teenagers were killed and three wounded in the neighbouring Pattani Province after they were shot without warning by passing troops. Personnel from Task Force 2 shot dead Sucheep Rabprayoon and Chemoosor Salae, both 15, on April 13 as they were playing with friends in Bana Subdistrict. The local authorities, including Governor Panu Uthairat, municipal council members and village-level officials all acknowledged that the soldiers were in error, as did the army, but no legal action was taken against those involved.

The question that naturally arises from all of these cases is why have soldiers accused of criminal acts apparently been treated differently from ordinary citizens? An alleged crime, whether assault on the street or torture in an army camp, obliges a criminal inquiry. The "justice system" is not a secondary, optional set of institutions upon which the army may choose to call after having conducted its own inquiries to determine innocence or guilt. In the first case, perhaps due to the fact that the victims were foreigners, the police and judicial process have rightly come in to the picture from the start; in the second they have been kept at bay by an army that is patently disinterested in having anything to do with either notions or institutions of justice where allegations pertaining to systemic torture, arbitrary detention, abduction and murder arise.

The proposal by General Sonthi to establish a committee to investigate cases of torture was nothing other than the same method of using fraudulent non-criminal investigations to displace and undermine the judicial process as was used by the former government. After the 2004 killings at both Krue Se and Tak Bai, the then-prime minister ordered the setting up of political inquiries. Although these pointed the finger at certain army officers, not one has ever been held criminally liable for the hundreds of deaths and injuries that occurred on those occasions, 78 of them in army custody. This is despite the fact that a post-mortem inquest in 2006 identified General Pallop Pinmanee and two of his subordinates as the officers responsible for the Krue Se killings, thereby obliging the public prosecutor to refer the case to the police for criminal investigation; nothing has been heard of it since.

General Pallop Pinmanee

Nor was there any further evidence of actions by the police or prosecutor by the end of 2007. On the contrary, General Pallop was reappointed to a senior post in the Internal Security Operations Command, of which he was deputy director at the time of the killings in 2004. He has since made it known that he intends to stand for parliament in forthcoming elections.

Together these cases speak to the level of impunity enjoyed by all state officers in Thailand, and the decrepit and deformed condition of its investigative agencies. In a functioning legal system, a police force goes to work irrespective of the identity of the accused; in Thailand, it is apparently first necessary for it to be reassured by senior persons that it should do its job. Thus, what should be the norm must instead first be insisted upon before being done. In the last few years, the AHRC has documented literally hundreds of cases that prove this point: not one has yet been properly investigated and successfully prosecuted.

In response to the killings in Bannang Sata, Colonel Akara was quoted as saying that there would be no legal action against the volunteer militia personnel as they had acted according to the rules of engagement. This much is correct. The rules of engagement, such as they exist in southern Thailand, give all security personnel a free hand to kill, detain, search and destroy with complete impunity. Thus, feudalism reigns over the courts, impunity over law.

Police reforms without public participation or commonsense

During 2007 the interim prime minister repeatedly stressed the need for extensive police reforms. Few people would disagree; even police officers themselves acknowledge that the force is in need of an overhaul. The problem is that his government has not been the one to do it.

One of the most important reasons that the proposed reforms will not work is that not only the police but the public have no conviction in them.

Reforming an entire police force is an enormously difficult task for any society, not least of all one where it has heavy entrenched power at all levels and has been built upon corruption and self-financing, and it is one that can only succeed through strong and active public involvement and backing. The police will naturally be opposed to anything that makes them more accountable or subject to outside control, but where the public is the driving force behind change and is unprepared to tolerate their excesses any longer then it becomes more difficult for them to resist.

The experience of Hong Kong in reforming a much smaller and less powerful force than that in Thailand is informative. In the 1960s the Hong Kong police had unparalleled power and influence, and were enormously corrupt: they were involved in all areas of crime in the territory, including illicit trading in drugs, gambling and prostitution. In the early 1970s the public rallied and demanded change after a senior officer fled with millions of dollars obtained through illegal activities. He was extradited and jailed. In the process, the Independent Commission Against Corruption was set up, with the police force as its first target. In its early days the commission's headquarters was literally surrounded and stormed by outraged police, forcing it to reach a compromise on prosecutions of many officers. And in 1977 its investigations provoked a mass police walkout. In different circumstances, such incidents may have been enough to kill off or severely weaken this important fledgling agency. However, the critical element was the

public interest: the people of Hong Kong were not prepared to go back to the old days. They would no longer accept that policing had to be corrupt and contrary to their interests. With overwhelming support, constant media attention and intense pressure from all quarters, reforms ultimately proved a success; today Hong Kong has one of the most efficient and law-abiding police forces in Asia.

By contrast, in Thailand there is no evidence of public support for the proposed police reforms at all. This is in large part because the participation of ordinary persons there in matters affecting their day to day lives—other than contrived participation for the purposes of the regime's propaganda—has been suspended since the September 19 coup of last year.

Another reason that the reforms will fail is that they consist largely of generic solutions that they don't address the real problems. Decentralisation of policing may be a good idea in principle but in Thailand it may prove to be highly regressive. The police in Thailand had their origins as a decentralised force. Local governors organised and used units as their personal security and paramilitary forces. Over time power became concentrated in Bangkok in order to diminish the control of governors, local politicians and others over the police. Thus, the capacity of national-level politicians, including the former prime minister—himself once a police officer—to influence and control the police increased, without really rubbing out the influence of local authorities. The current proposal may well end in a reversion to the earlier model of locally politicised police, rather than nationally politicised ones, and no change in the overall level of influence and corruption.

The real issue for the police in Thailand is command responsibility. The notion that superior officers should be held fully accountable for the wrongdoing of subordinates has not yet entered into the system of policing there in any significant way. On the contrary, command responsibility is understood largely as senior officers defending their subordinates against allegations of wrongdoing, even in the most absurd circumstances: such as when a police station commander sued a senior forensic scientist for implying that his men had shot and killed someone illegally. There is no way that the problem of command responsibility will be addressed through the current proposed reforms, under the current interim government, and nor does it appear to be given the weight that it deserves by any concerned agencies, including United Nations bodies.

In February the AHRC director, Basil Fernando, wrote a letter to the head of the Criminal Justice Reform Unit of the UN Office on Drugs and Crime, Mark Shaw, in response to information that the office had offered to assist the Surayud administration in its police reform efforts, explaining that the priority for any work on policing in Thailand must be command responsibility:

"Without command responsibility being enforced within the police hierarchy, superior officers are untouched by allegations that their subordinates have tortured suspects, falsified evidence, doctored records, and otherwise ignored procedure. Without command responsibility, there is no way to combat the intimate relationships between the police and organised crime in Thailand, the line between which has been described as being so

fine as to be non-existent. Without command responsibility it will be impossible to introduce the notion of accountability into the police force, and without accountability there can be no reform. The key issue for all police reform must therefore be command responsibility."

He concluded the letter by asserting that:

"The aim of any police reform in Thailand must be much more than to break the links between the police and politicians. It must be informed by serious understanding of the deep problems in policing there that have developed over the last century—not merely the last few years—and aim to break the links between the police, organised crime and the military that have been forged and multiplied throughout this period. The success or failure of your contribution will be measured in these terms."

The letter went unanswered.

Kalasin, police, killings, disappearances, torture

The need for effective police reforms, rather than that proposed by the current administration, is borne out by the stories of dozens of victims of the police in Kalasin District, part of the northeastern province by the same name, which the AHRC has documented over the last year.

The Kalasin police appear to have killed repeatedly: at very least 24 times between 2004 and 2006. There is little doubt that there are other victims: bodies have never been found, or have been cremated before proper identification. The intense fear of the police that hangs over the province means that the families of victims and witnesses are terrified to speak out. Their fear is justified. A witness in the case of one teenager later found dead was warned that if she told the truth she would "hang like that kid".

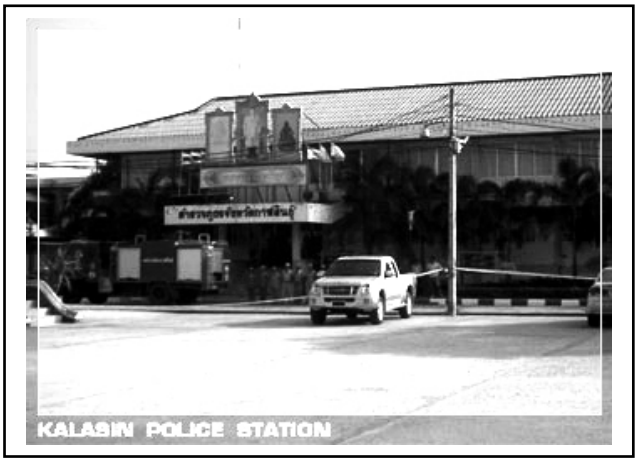
The "kid" was 17-year-old Kietisak Thitboonkrong, who was found tortured to death and dumped in a field after he had been arrested on 16 July 2004. His grandmother had waited for him after police told her on July 22 that he would be sent home on bail, but he never arrived. At around 6pm, Kietisak called her and in a shaking voice urged her to come back to the police station quickly. "They didn't tell the truth to you, grandma. It is not as they said," he told her. "They are going to take me away and kill me. Hurry come and help me, I'm on the second floor." After that the line was cut. At about 6:30pm, Kietisak also called his uncle and urged him to come and get him immediately. He said that he heard his grandmother's voice downstairs at the station; but no one was able to meet him. The mobile phone that Kietisak used to call on both occasions was in the possession of a witness at the police station, who has confirmed that he was there and that

he called his grandmother and uncle with the phone, but does not know what happened to him after that.

On July 26, after Kietisak's body was found in part of a neighbouring province, about 30km away, it was sent for autopsy at a regional hospital. The autopsy revealed bruising on his head, chest and legs, cuts on the chest and both wrists, rope tied around the neck and injuries to the elbows. He appeared to have been dragged along the ground and rope tied around the neck. Persons who had been present when the body was recovered said that the boy's feet and slippers were not dirty, although the surrounding area was muddy due to heavy rain. There were also reportedly many other prints around the area that were clearly not those of farmers. An examination at the Central Institute of Forensic Science (CIFS) in Bangkok confirmed the findings and found many more wounds on the body, including cuts on the wrists that had been caused by the victim being pulled by handcuffs. The victim's testicles also had been crushed. It concluded that he had died from suffocation caused by the rope being wrapped around his neck several times by someone else, who had then made it to appear that he had committed suicide by hanging.

An investigation team from the National Human Rights Commission (NHRC) of Thailand obtained the telephone records for the mobile phone that was used by Kietisak and confirmed that the phone calls matched the witness tesimonies, and that he had still been in the police station at 6:30pm, after which time he disappeared, contrary to the police record, which shows that he was released at 4:35pm. It also found that he was recorded as having been arrested together with another youth, Adul Nathongchai, who later complained that they had been beaten up by the police to obtain forced confessions. Adul had been bailed out and released on July 19. When the NHRC personnel checked the police records of the charges, they found that the photographs submitted in evidence were not clear and that the signatures on the confessions appear to have been forged.

After the NHRC found the gaps in the police version of events, the police changed their story to say that an officer had seen Kietisak outside of the station (after being released) at about 6pm but thinking that he had absconded brought him back and then re-released him at about 7pm. In September 2006 the NHRC recommended to the government that there be an independent investigation into the case, involving all personnel alleged to have been involved, including senior officers, and that the family of the victim be compensated.



Kalasin District Police Station (Police website)

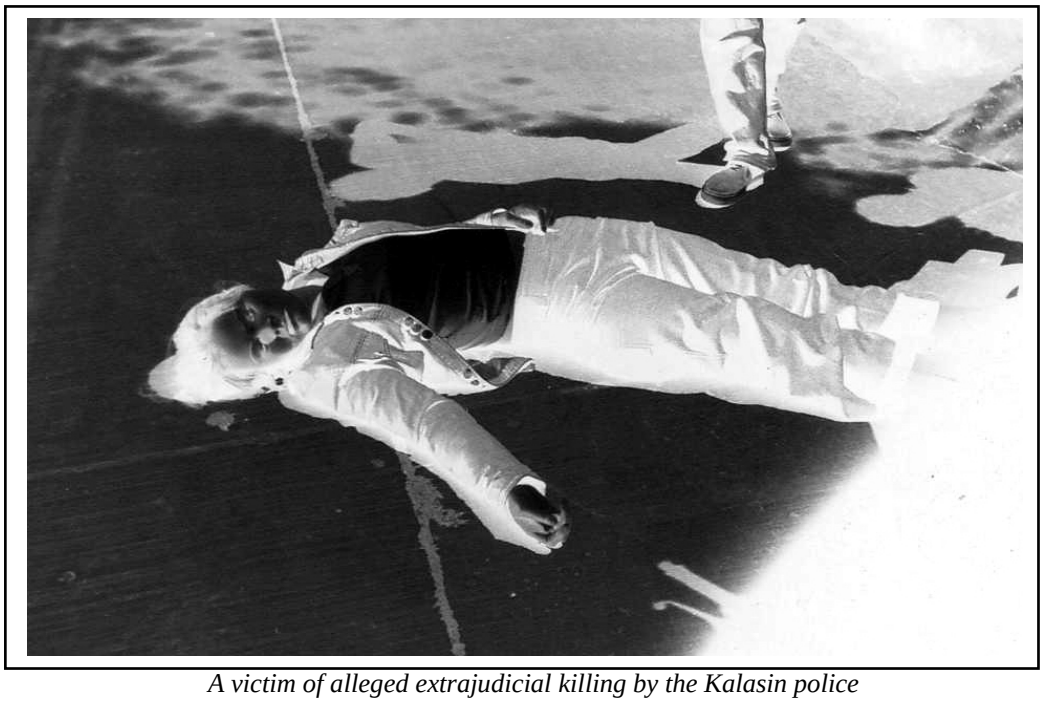
Meanwhile, in June 2005, the Department of Special Investigation (DSI) took up the case, but like all other human rights cases in its hands under the former administration,

failed to make any progress. In October 2006, an officer of the DSI told journalists that it had interrogated and done lie detector tests on 12 police from Kalasin and that so far five of them had been identified as possible perpetrators, but up to now none are known to have been charged. On the contrary, investigating officer Sumitr Nansathit has been promoted.

Here are some of the other cases over which the Kalasin police are suspected, which speak to a pattern of torture, abduction and murder under their watch:

1. Namphoon Dolrasamee (22) was shot from the side by an unknown man on a motorcycle at 1:30pm on 11 February 2004 while herself riding a motorcycle with her sister Narumon past the Prompan Grill meat shop, Kalasin District. After her motorcycle crashed to the ground, the man walked directly to her and shot her head twice, killing her immediately. The police kept Namphon's body for two days without allowing her family to see it, after which an official from the CIFS conducted an autopsy, but the family was apparently not informed of the findings. Namphon had earlier been arrested for drug trafficking but was acquitted. Her family believes that her death was part of the Kalasin District Police operations in the second phrase of the "war on drugs" launched by the former government.

2. Wan Yuboonchu, a merchant from Ponngam District, disappeared with his wife Sommai Yuboonchu after visiting a dentist in Kalasin District on 4 May 2005. Two unknown men with caps were video recorded using the couple's ATM card to withdraw money from their account after they disappeared. The family filed a complaint to the Kalasin District Police and Kamalasai District Police, but there was no progress. A relative, Atthrot Yubonchot, also claimed that the couple had been abducted to Cambodia



A victim of alleged extrajudicial killing by the Kalasin police

and asked for ransom from their immediate family for their return. After money was paid but the couple did not return, the family complained to the Crime Suppression Division (CSD) in Bangkok. Atthrot and Somboon, a policeman from Ponngam Police Station, Kamalasai District, were prosecuted and Atthrot was found guilty of blackmail and sentenced to eight years in jail (Penal Code section 338). He was bailed out pending appeal. Somboon was acquitted for lack of evidence. The CSD personnel also searched the house of a Kalasin District Police officer, where they found a cap similar to the one worn by the men who withdrew money from the couple's account. However, they have not obtained enough evidence with which to prosecute him.

3. Suphan Donchompoo, a 49-year-old municipal councilor, disappeared with his 46-year-old wife Lamyong Donchompoo at 1pm on 7 April 2006 while putting up posters for a local candidate for the senate, Chaimai Waramitra, between Baan Nongtae and Baan Nongbua, Huangue Subdistrict, Yangtalad District, Kalasin Province. They were seen being put into a sedan; another vehicle, a pick up, was with the sedan, and someone also drove their own car away. The family lodged a complaint at the Yangtalad Police Station on 9 April 2006 but there has been no progress in the case. Suphan's family believe that the Kalasin District Police were involved as he was indebted and had conflicts with them; also, the couple's youngest daughter was allegedly involved in drug trafficking and normally used the pick up which they had driven that day.

4. In mid-February 2004, Pravit Sattawuth (a.k.a. Pednoi), 22, fought with some people in his house on Thasinca Road in Kalasin district. His neighbors said that a policeman was involved. After, the police came and took him away. When he returned home, he told his mother that they had assaulted him. On February 24, three policemen from Kalasin District Police Station again came to Pravit's house. They were not in uniform. They brought him to the police station. Pravit's girlfriend went to the station to look for him, but he was not there. At that time, the "war on drugs" was in its first month of operation and the police had arrested many teenagers over drug-related crimes. The police had earlier come to Pravit's house and accused him of being an addict and a drug dealer. According to the family, Pravit had earlier used amphetamines, but had quit the habit in early 2003. Around 6-7 pm of the same day, Pravit's body was found in Kudnamkin public park. According to his relatives, the post-mortem examination showed that he had been severely tortured before his death. A boy working in a Caltex gas station owned by a policeman from Kalasin nicknamed Montry later found Pravit's wallet and returned it to his parents. Local people believe that Montry was connected with the young man's death. Nobody now knows about the whereabouts of the boy who worked in the gas station, and Pravit's friends have gone to work in Bangkok.

5. On 19 July 2004, police arrested 15-year-old Krischadol Pancha (a.k.a. Micky) and two friends, Surasak Poonklang (a.k.a. Tam) and Rames Teerathassiripoj (a.k.a. New) for alleged robbery in Chumchon Market. Micky was reportedly arrested while he was paying fines in the police station; Tam and New were arrested at their homes, without any arrest warrants being shown. The police told the three to give up the 2300 Baht (USD 55) and knife that they had allegedly used in the robbery; however, they denied the accusations and were allegedly beaten by the police. The next day Micky obtained bail.

His grandmother, Thip Pancha, went to Kalasin District Police Station after lunch to bail him out and pick him up. A policeman told her that the release order had not yet arrived, and asked her to wait at home. In the evening, when Micky had not come home, Thip went back to the station again to ask his whereabouts. This time a policeman told her that he had been released, and asked her to go back home and wait. Thip wondered why the police released her grandson in the absence of his guardian. Micky has never been seen since. According to witnesses, the police told Micky that they would drop him at home; a policeman who was not in uniform allegedly took him out of the police station at around 3pm. At that time the other two friends were still detained in the police station and waited for their relatives to come. The three were later found guilty of robbery; Tam and New were sent to juvenile detention in Khon Kaen. Thip forfeited bail because Micky never came to court.

6. Oynapa Sukprasong, a 34-year-old businesswoman, was a broker for the government lottery who paid "protection" money to the police to run other gambling activities on the side. In 2004, a second group of police sent their representative to demand money, but she refused because she was already paying to another group. The latter group then searched her house twice, and seized her son's computer. They subsequently detained her and her secretary, Wanthana Thakpama, overnight without filing charges. She then stopped her underground lottery business and also ceased paying the police. One to two weeks before she was taken away, a factory worker of hers who used to be an agent for the illegal lottery was also taken away for interrogation. On 2 December 2004, Oynapa and Wanthana went to the Buddhist ceremony at Buengwichai in Kalasin district. Oynapa's red van was found abandoned on 227th St in Huay Srithon. That night some of the policemen whom Oynapa used to pay came to her house and talked to her husband, Opas Sukprasong. They asked him if his wife had gone missing, and if he would like them to find her. Opas quarrelled with them and asked, "Why did you take a woman and not me instead?" The police left and said that he could call them if he needed help. Oynapa and Wanthana were never found. Provincial police investigations revealed only that one witness had seen three men putting the women in a car on the day they disappeared. No progress was made in their inquiries.

The characteristic of most of these cases, and most incidents of police torture and abuse in Thailand, is that the victims are ordinary persons accused of small criminal offences: robbery of a motorcycle, theft of some jewellery, gambling with friends. Sometimes torture is used to extract a confession; whether the victim is a real suspect or not is irrelevant. The torture is often extremely brutal: Kietisak had his genitals crushed; others have had theirs squeezed, burnt and electrocuted.

Routine torture and killing send a message to society that the police are both dangerous and unstoppable. Family members who try to complain, such as Kietisak's grandmother, find themselves up against the entire local police structure, not just individual officers. Superiors of accused police at all levels routinely defend their subordinates against accusations of wrongdoing, rather than investigate or discipline them; a police station commander whose men were accused by a forensic scientist of extrajudicial killing sued her himself. In other cases the alleged perpetrators have sued family members, such as

the mother of one torture victim in Ayutthaya. Investigations go on for years without result, and in the meantime the accused remain at their posts. Even in prominent cases, such as the trial of five police in connection with the disappearance of human rights lawyer Somchai Neelaphaijit, the accused continue in active service, despite criminal inquiries or charges pending against them.

Little wonder that victims take some cash and disappear, rather than seeking out justice. Ordinary victims, their families and general public understand only that the law-enforcement system cannot stop the police, for the reason that they control it. There are no effective independent channels for receiving complaints and investigating them, despite many calls for their establishment, including from the United Nations. Prosecutors eat from the hands of the police and the courts defer to the side of authority rather than applying the benefit of the doubt as required in principle. The perpetrators have the psychological and institutional reassurances that they are safe; it is everyone else that needs to watch out.

Now that Thailand has, at the start of October, finally acceded to the UN Convention against Torture—after years of work by many persons, among them human rights advocates and personnel in its justice ministry—it must back the move with the legal and institutional changes needed to give it effect. They include:

1. Amending domestic law so as to comply with the convention. At the moment, Thailand's penal code does not cover acts of torture. The offences of bodily harm it describes are limited in scope, and apply to all offenders equally, whereas torture is an offence specific to state agents (in their official capacity) or others acting on their behalf.

Not only is the government required to change the law, but it must also ensure that the penalties it imposes take into account the very serious nature of the offence. For models in the region, drafters can look to Hong Kong, which prescribes life imprisonment for torture under its 1993 ordinance, and Sri Lanka, which set a mandatory minimum seven years in a 1994 act.

2. Establishing a specialised unit to receive and investigate complaints, gather evidence and prosecute the accused. Attempts in recent years to diminish police dominance of criminal investigation—such as by setting up new agencies under the justice ministry and reforming procedure—have at every point been thwarted or compromised by the same entrenched authority that they have been aimed at delimiting.

Any serious efforts to eliminate torture in Thailand will also be strongly opposed, and policymakers and human rights advocates alike will have to consider how a properly trained and well-equipped unit can be established to handle cases and resist the influence of torturers and their bosses. For this, advice and assistance should be sought from relevant United Nations bodies as well as other countries with similar experiences.

3. Making greater efforts to protect, to compensate and rehabilitate victims. Justice depends upon the physical security of complainants and witnesses. At present, it is incredibly easy for police and other state officers in Thailand to threaten or cajole almost anyone. A relatively new witness protection law does not guarantee prompt assistance in cases of imminent danger. And even where given, protection may last only a short time, and be offered by the police themselves.

People who have been tortured in Thailand can at present be compensated under a general law for victims of crime. However, this act does not take into account the many special circumstances that arise in cases of torture, such as the need for fast and sometimes expensive medical treatment, and long-term counseling for psychological trauma.

Money alone will not suffice, least of all when it may not be paid until years later. There has been a great deal of work on rehabilitating and compensating torture victims in recent years, and there are many experienced and interested groups worldwide to whom the authorities in Thailand can go for useful advice and assistance.

How to not complete a trial

Most persons do not associate Thailand with lengthy delays in trials of the sort that are seen in some countries in the region. However, the AHRC in 2007 documented and issued an appeal on a case that has been heard in the Bangkok South Criminal Court since 1993. The four defendants stand accused of having plotted to kill the then-Supreme Court president. The defence maintains that the police set them up; no material evidence has been brought against them, despite two senior officers having testified from 1995 to 2006. But the case goes on anyhow. So far it has been heard nearly 500 times, by an incredible total of 93 different judges. Two of the four defendants were imprisoned for seven years before receiving bail; if found innocent, they will be entitled to claim compensation from the government for this period of detention.

The court has authority and grounds on which to stop the case. It is obliged by law to see that trials are “speedy, continuous and fair”, and it is entitled to order that no more evidence be given and the proceedings be halted where reason exists to do so. It can also order that the case be closed where the charges have not properly complied with law. The Constitution Court in 2000 made a related ruling that was favourable to the defendants. The defence has since repeatedly applied for the case to be closed, without success.

Careful study of the case gives rise to many serious questions about the state of criminal justice and the judiciary in Thailand. Why didn't the court set down a strict timetable for hearings and ensure that all parties kept to it? Why didn't it admonish the two senior police officers for failing to appear in court on scheduled dates? Why did it allow the prosecution to cover for the apparent lack of evidence by playing for time? Why did it refuse the applications for the case to be closed, despite the ruling of the superior court? And why hasn't it put it to a stop to the trial at any time in the six years since?

The AHRC has documented and reported to the justice ministry of Thailand on various cases where hearings have gone on with no apparent purpose other than to prolong the misery of the defendants, while in other instances the accused have been handed lengthy jail terms after barely having enough time in which to insist that they were tortured by the police investigators. Hearings frequently persist despite a manifest lack of evidence, or where evidence has been completely mutilated by the police and prosecution, either deliberately or negligently.

A senior justice ministry bureaucrat in 2006 acknowledged that some 30 per cent of criminal cases go to Thailand's courts without evidence. The figure is conservative. Cases going to court on the back of police investigations do not require preliminary hearings; they go directly to trial, in contrast to those lodged by private litigants. The police have little incentive to come up with material proof of a crime: in most ordinary criminal cases, coercing or beating a confession out of the accused, whether the real perpetrator or not, is sufficient. In some cases it may be necessary to threaten to implicate other persons in the crime unless they agree to collaborate. The public prosecutor goes along with the police version, knowing full well that when the accused retracts his confession in court the judge will side with the police. Nobody has any incentive to do anything differently, or any better.

One of the main defects in Thailand's judiciary is its lack of leadership. There is no body of well-established standing senior judges working cooperatively to give it marked direction and purpose, as exists in many jurisdictions. Some individual judges are highly regarded within the profession, but few if any could be considered household names, and there is no corpus of such persons upon which the public can place strong expectations.

The case in the Bangkok South Criminal Court is one among many that point to the need for drastic overhaul of Thailand's criminal procedure. The failure to bring the trial to a prompt conclusion amounts to a violation of the defendants' fundamental rights under both national and international law. Ultimately, its 14-year duration has defeated any prospects that the case can be fairly adjudicated, let alone by a succession of 93 judges. This failure is a disservice not only to the defendants but also to the court itself. The reputation and credibility of the judiciary can hardly be improved when the courts are themselves responsible for such protracted abuse.

The ailments suffered by Thailand's courts cannot and will not be addressed by an interim administration under military control, or by any government that comes to power through a fraudulent constitutional process. However, individual judges can set examples,

by using the powers vested in them to ensure that they meet their obligation to try cases quickly, continuously and fairly. Among those things that they can do as a matter of course are to

1. Instruct all parties to a case, including witnesses who are state officers, to appear at court on time and according to a fixed schedule, subject to penalties—including dismissal of the charges—for failure to comply;

2. Postpone hearings only in exceptional circumstances;

3. During opening proceedings, and at any point throughout a trial, ascertain that witnesses and evidence do exist upon which to bring the charges, and that they will be brought to the court in a timely and professional manner; and,

4. Review and where necessary dismiss cases at any time that it becomes apparent that no such evidence as promised in fact exists and can be presented to the court.

Conscientious application of the existing legal authority of the courts in Thailand, although not a comprehensive remedy to the judiciary's problems, would go a long way to improving its integrity in the eyes of the public and protecting the basic rights of plaintiffs and defendants alike.

The fondness for authority and Thailand's contradiction

In his classic essay on conservatism, Friedrich Hayek identifies two of its defining characteristics as a fear of uncontrolled social forces and a fondness for authority. "The conservative feels safe and content," Hayek writes, "Only if he is assured that some higher wisdom watches and supervises change, only if he knows that some authority is charged with keeping the change 'orderly'." For a conservative, he continues, who wields power is more important than how:

"In the last resort, the conservative position rests on the belief that in any society there are recognizably superior persons whose inherited standards and values and position ought to be protected and who should have a greater influence on public affairs than others."

Here in a sentence is a synopsis of the thinking that dominated government in Thailand for most of the last century, and which obtained new ground under military rule in 2007. It is a manner of thinking inimical to genuine constitutional rule. It is also hostile to the building of institutions through which notions of legal and social equity may be expressed.

While the interim government has repeatedly mouthed its concern for the rule of law and human rights, it has throughout 2007 proved that in reality it is diametrically opposed to them. The general election set for the end of December will do nothing to change this.

The military has already re-cemented its position at the centre of key institutions and regardless of whatever else happens it will use its renewed authority to full effect.

The people of Thailand are now caught in strange and contradictory circumstances. On the one hand, the social and economic life of their country is undeniably in the 21st century. On the other hand, its political and legal life has now been firmly thrown back to the 1980s. As a result, many good persons will likely withdraw from public life completely, while others who may have contributed to them will now be reluctant or unwilling to do so. The parliament, courts and legal profession will likely lose good people, as the former returns to an elite bureaucratic mode of government and the latter become more and more politically compromised and corrupted. Fewer persons also will seek to obtain redress for grievances through these institutions, and will instead turn to outside avenues and feudal remedies in order to gain partial satisfaction, rather than get nothing at all.