

# THAILAND: MILITARY COUP 2006



A collection of statements marking one month of renewed military rule in Thailand

by the  
Asian Human Rights Commission  
Hong Kong



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*Cover photo: A protest against the coup outside the Royal Thai Embassy in Seoul, Republic of Korea, on 29 September 2006*

## Foreword

The 19 September 2006 military coup in Thailand led by General Sonthi Boonyaratglin abruptly ended the aggressive and autocratic caretaker government of Pol. Lt. Col. Thaksin Shinawatra. But the coup is a far greater tragedy for Thailand than the Thaksin administration ever was.

The Asian Human Rights Commission has since September 19 spoken out without compromise against the military assumption of power. There are many good reasons for this position, some of which are outlined in this dossier. Others will require a longer time to explore and articulate.

In its September 20 statement condemning the coup, which is not included here, the AHRC wrote that, "Thailand is today without a constitution and without the rule of law. The army is now unfolding a long-term strategy for consolidation of control."

That remark is even truer today than it was one month ago.

However, people in Thailand are not free to speak loudly about what is being done to their country today. At such a time, it is beholden on others to do so. The Asian Human Rights Commission is one of those others.

We at the Asian Human Rights Commission will continue to exercise our right to speak loudly in opposition to the military regime in Thailand. We are heartened by the many other voices we hear sharing our views. At the same time, we recognize the right of others to speak in support of the coup, even though we do not agree with them. We hope that they will extend the same respect to us.

We have prepared this dossier and are distributing it around the world to international groups, diplomatic missions, members of the media and other concerned persons and organisations to expand and deepen both talk and thought on the situation in Thailand since September 19. We hope that you will find it of use. Above all, we hope that it will lead to a return of genuine constitutionalism, rule of law principles, and protection for human rights in Thailand.

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*19 October 2006*

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## **What is benign?**

**AS-222-2006, September 21, 2006**

The September 19 military coup has been described by some persons as benign. Their reasoning goes that the government of Thaksin Shinawatra was bad and intransigent. Whatever way it could be removed was good. Even normally well-informed news media have evoked images of a quiet and non-violent coup that is expected to just “slip in and slip out”, in the words of one BBC correspondent.

The Asian Human Rights Commission rejects these arguments as naive and confused.

The Thaksin government was a civilian autocracy. It did not respect human rights, the rule of law or democratic principles. It manipulated the media, intimidated its opponents, and played with legislation and public institutions for its own advantage. It exacerbated violence, from wanton extrajudicial killings of supposed drug dealers across Thailand to the conflict in the south. It enormously expanded the power and influence of the police. It fixed an election and allegedly extorted vast sums of money.

But a military autocracy is worse than a civilian autocracy. Within hours of taking power, the army abrogated the constitution, banned political assemblies, commenced extralegal arrests, and authorised censorship. The Thaksin government sought to undermine the constitution, harass gatherings of political opponents, and control the media through advertising revenue and criminal defamation. But by its very nature, it did not have the audacity to abandon the country’s supreme law and ban civil rights. By contrast, and by its very nature, the army has already done so.

Today Thailand is without a parliament and a constitution. Its executive is under control of the army. Its judiciary is hobbled. Its media is threatened. It is in a very dangerous moment.

The argument in favour of a military coup is akin to the argument used by proponents of torture. Torture, they say, is sometimes a regrettable necessity. Where the lives of many are at stake, the physical integrity of one may be violated. Likewise, a coup is sometimes described as a regrettable necessity. Where a country is at stake, a government’s integrity can be violated.

Both arguments boil down to the same wrong-headed notion: that a coup, like torture, can be started and stopped with convenience. It cannot. Torture, once it is introduced into a system of investigation, mutates and spreads. It affects not only the victim but the persons who use it, their institutions and the perceptions of society about what is permitted and what is not. Likewise, a military that obtains power through a coup infiltrates and distorts all areas of governance, as well as public attitudes and expectations. Once admitted, it is not easily removed. Its presence is felt long after it is physically gone.

People in Thailand struggled for decades with a succession of military governments and their legacy. In 1992 they finally made a clean break with the past, culminating with the 1997 Constitution of Thailand. It was a remarkable achievement that followed years of hard work. The values it expresses reflect popular desires: respect for human dignity, rights to life and liberty, freedom of speech and assembly, a public media in the national

interest, protection of the environment. And tellingly, “the right to resist peacefully any act committed for the acquisition of the power to rule the country by a means which is not in accordance with the modes provided in this Constitution”. For all this they deservedly obtained high praise.

This coup has undone that struggle. What message is sent when yesterday’s supreme law is today no law? What message is sent about years of effort to build a government on democratic principles, however imperfect it may be, when it can be toppled at will? What sense of hope or expectation does it give for the future?

Above all, the consequences of this coup for the judiciary in Thailand are disastrous. Governments exercise power through the bureaucracy and police; armies through the barrel of a gun. Courts obtain their power from public confidence. The courts in Thailand had that confidence and were working vigorously to play an unprecedented role to solve pressing national problems. They have now been completely displaced from that role; the Constitutional Court has been suspended altogether. The public confidence that had been invested in the courts will now be greatly diminished, affecting all aspects of their working.

There is a saying that runs, “Afraid of the tiger, one invokes a tutelary, but the tutelary turns out to be worse than the tiger.” Today, Thailand has replaced a tiger with a tutelary. Happy that the tiger is gone, the terrible implications of how and by whom it was removed are not yet understood. But there is one certainty: no military coup just “slips in and out”. By nature, military rulers leave things behind to ensure that their interests endure. And by nature, those interests are contrary to the rule of law, human rights and genuine democracy. Proof of this can be found today in Pakistan and Burma, and in the leftovers of military dictatorships in virtually every country of South and Southeast Asia.

The question is not whether the coup is benign or malign. The question is, how much damage has it already caused, and how can it be mitigated?

The Asian Human Rights Commission reiterates its call to the Royal Thai Army for an immediate return to civilian control and restoration of the constitution, without any amendment other than that to pave the way for prompt and fair elections. It reiterates its call for continued strong international condemnation of the takeover, including from the United Nations. And it makes a special call to the international news media not to misunderstand and misrepresent the coup in Thailand through glib summations from casual observations: study the real consequences of the coup before reporting on it.

## Someone had to do something?

AS-224-2006, September 25, 2006

On September 21 the Royal Thai Consulate General in Hong Kong wrote to the Asian Human Rights Commission. In the letter, the consul general said that despite the September 19 military coup “the courts... function as normal, with the exception of the Constitutional Court”. The Constitutional Court has been suspended in the absence of the 1997 Constitution. In an attached statement, the consulate added that the coup group had promised to “uphold the principles of the UN and other international organizations and comply with obligations under international treaties and agreements”.

The notion that courts under a military junta “function as normal” is of course ridiculous. So too is the notion that obligations under international treaties and agreements can be upheld.

A military coup necessarily displaces the foundations upon which the rule of law operates. Where an army unilaterally takes power by force and abrogates the national constitution, it is acting illegally to undermine everything upon which the courts stand. In an interview with The Times newspaper, a senior spokesman for the junta has admitted as much. “[The coup] is against the law... But sometimes, to break the deadlock, someone has to do something,” Major General Thawip Netniyom is reported as having said.

That “sometimes someone has to do something” is a neat phrase, because it can be used to justify anything. When the “someone” is an army clique and the “something” is a coup, a range of generic justifications must follow: the administration was corrupt; the nation was at risk; the people lacked unity. Hence the purported solutions: remove the administration; rescue the nation; reimpose unity.

What about legality? Regardless of whether or not a shot is fired, upon what authority does a junta order the creation of new state bodies, and the dissolution or recomposition of others? Upon what authority does it order the transfer, promotion or demotion of police and military officers and bureaucrats? Upon what authority does it nominate a new prime minister or propose a timetable for elections?

Certainly, legal systems are complicated, imperfect and time-consuming. That is because the management of a modern state, with many competing interests and demands, is complicated, imperfect and time-consuming. To bypass all of this because “sometimes someone has to do something” is not to solve any problems. It is to throw justice into the rubbish bin. And with it go the principles upon which human rights are protected, international laws written and courts established. This is not stability; it is not rule of law: it is its antithesis. It is dictatorship.

Thailand’s national laws and courts have since September 19 been thrown into limbo. Whereas in the months before the coup the superior courts were engaged in a tremendous effort to resolve the national impasse through application of law, their work has been rendered irrelevant. Whereas the lower courts had in recent times begun to directly invoke the 1997 Constitution, they are now bereft of any basis for assertion of fundamental rights.

Thailand's responsibilities to international laws have also ceased to have anything other than formal validity. The commitment to international law by the military junta is relevant only in terms of its attempts to obtain some international respectability. In practical terms, it is meaningless.

The struggle for human rights and democracy in Thailand has been set back by decades. There is no avoiding this uncomfortable fact. Nor is there any possibility of reversing it. It cannot be denied through light-hearted observations that everything may turn out alright. The disastrous consequences of this military takeover must be openly recognised, and efforts begun to address them.

The Asian Human Rights Commission calls upon all rights groups and concerned persons and agencies in Thailand and abroad to review every aspect of their work in the country. Now is the time to ask big questions of ourselves and others. We cannot be reduced to small talk. How can the courts in Thailand "function as normal" today? How can the country "comply with obligations under international treaties and agreements"? And how can anyone with an agenda for human rights and the rule of law in Thailand deny that perhaps in another five, ten or 15 years an army general may not again in a matter of hours tear up the constitution and appoint his own government on the pretext that "someone had to do something"? These are the questions that matter now. There is no more business as usual in Thailand.



## **No way forward but backward**

**AS-227-2006, September 27, 2006**

On September 27 the Bangkok Post newspaper published an article pointing to the likely shape of Thailand's new draft interim constitution in the wake of the September 19 military coup. The interim constitution is expected to grant amnesty to the coup leaders. It will set up a 250-member legislature with limited powers, and a 2000-member national assembly that will select a group of 200 persons out of whom 100 will be chosen by a remodelled junta. This group will in turn name 35 persons, out of which ten will be appointed by the junta, to draft the new permanent constitution under its guidance. The interim charter will also arrange for new judges to the Constitutional Court, and somehow simultaneously guarantee the courts' independence.

There are likely to be some differences between what the Post has reported and what is finally drafted, but the general outline is becoming clearer, and it is unsurprising. As the Asian Human Rights Commission has said from the start, the junta is determined to stay on in one form or another. This intention, and the interim constitution that will be required for that purpose, raise a lot more problems which the regime and its agents will struggle to address, as did the last dictatorship in 1991. They include the following.

How can the generals claim amnesty and Thailand meet its international obligations? The junta has said that it will honour all commitments to United Nations treaties, but UN experts have in recent times made plain that the granting of immunity through a blanket amnesty is contrary to international law. Domestic courts also are increasingly overturning such amnesties later. The very essence of article 2 of the International Covenant on Civil and Political Rights, to which Thailand is a party, is the even application of law and ending of sweeping impunity for criminal offences. Thailand has already been harshly criticised for shielding soldiers and police who commit human rights violations while operating under emergency regulations. Any amnesty to the junta will fly in the face of the country's obligations and do nothing to abate fears that army officers and police in Thailand are above the law. But as one of the coup group has already admitted that his is an illegal government, what alternative is there?

How will the new legislature and national assemblies be appointed? Like its predecessors, the regime is issuing one order after another abolishing, establishing, removing and assigning government bodies and their personnel at will. Most recently, appointees to new advisory panels said that they were not even informed before the appointments were "ordered" on national television. How are legislators and national assembly representatives to be selected? Will they be told beforehand? As in previous years, all these rearrangements are expected to be rubberstamped into law with the passing of the new constitution. So at what point does this process become "democratic"?

What will be the role of political parties? Political process depends upon party involvement. Is the business of forming an assembly to draft the new permanent constitution a matter for some persons handpicked by the military--and other persons handpicked by the handpicked persons--or is it a matter for a parliament to decide? If political parties are permitted to participate at some point, what will be their role? Their entry into any discussions will bring with it the usual conflicts and debates that are

inherent in the business of party politics, which will not be welcomed by the junta. But if parties are excluded or severely restricted, then what sort of political process will follow?

How can the junta or its agents assign judges and assert that the judiciary will be independent at the same time? A cornerstone of any independent judiciary is the guarantee that the executive cannot appoint, dismiss or transfer judges. The capacity of courts to reach reasoned and legally-balanced decisions depends upon this separation of power. Where the executive removes and replaces judges, it has defeated the notion of an independent judiciary. That is why the 1997 Constitution of Thailand stipulated that Constitutional Court judges be nominated by an expert committee, chosen through secret ballot by the senate and approved by the king before they could take their seats. Army officers were not to be involved.

Writing in 1993, Professor Ted McDorman of the University of Victoria in Canada observed that constitutions in Thailand have been seen as nominal rather than normative. That is, they have served to validate the power of the ruling group, rather than lay down ground rules that everyone must obey. "Most political commentators have accepted that the role of a constitution in Thailand has been to legitimate the authority exercised by the then-dominant political forces," McDorman said. This is one reason why the country has had a new constitution virtually every time that power has changed hands.

The 1997 Constitution both validated the power of the people of Thailand as the new ruling group, and also began the long process of laying down some ground rules. It wrested a measure of authority away from conventional forces--the army and established elite--and attempted to place it in the hands of the public through autonomous agencies and new laws. Unfortunately, inadequate safeguards meant that it struggled to protect its institutions and stay its course in the face of the unrestrained aspirations of an elected tyrant and his supporters. But to deal with such problems under the terms laid down by the law is the challenge of a constitutional system of government. If the law does not work, it must be changed. If it is not changed willingly, people are entitled to engage in peaceful protest. Over the years, challenges are met, obstacles are overcome and genuine constitutionalism takes root.

It was this that the army could not stomach. Genuine constitutionalism means ground rules that the military too must obey. Genuine constitutionalism means that even army officers answer to the law. It means that ultimately the army is subordinate to other parts of government. For the generals, the former prime minister's real offence was not that he was corrupt; they could tolerate that. It was that he behaved as though superior to the military.

The junta is not the solution to Thailand's problems. It is the embodiment of those problems. While it is talking gently of reform, it is signalling a radical reversal. It is setting itself on the path to writing a new constitution by proxy. It has no recourse now but to attempt to push Thailand back to a pre-1997 model of government. There is no way forward for the junta but to take the country backward. For this reason it must be opposed. The Asian Human Rights Commission will continue to do so, at every opportunity.

# Misunderstanding the coup

AS-229-2006, September 29, 2006

There has been a lot of misunderstanding about the September 19 coup in Thailand. Many foreign correspondents, tourist bloggers and other casual observers have written that the local market is still busy, people are smiling politely as usual, and life seems to be going on like normal. The coup has been described as “courteous” and even “fun”; people are “cheery”. So what is all the fuss?

Better-informed persons have understood that the meaning of the coup is to be found in the destruction of things not physically located in a marketplace, or for that matter, under the tracks of tanks parked outside parliament. Its meaning lies among scattered laws, institutions and expectations, which having taken years to assemble will not be easily put back together again. Above all, it lies among the broken pieces of the 1997 Constitution of Thailand, and everything it represented.

The 1997 Constitution was not “just another constitution”. For this reason, the 2006 coup is not “just another coup”, as some commentators and protagonists would have us believe.

The 1997 Constitution was the first to be written by the people of Thailand for the people of Thailand. The assembly that wrote the draft was itself elected by popular vote, not handpicked by some general. Hundreds, if not thousands of independent civic groups were organised with the purpose of raising particular interests, widening public involvement and monitoring progress after the charter was enacted. In 2001 Dr Thanet Aphornsuvan of Thammasat University wrote that

“The new Constitution reflected the crystallization of 67 years of Thai democracy. In this sense, the promulgation of the latest constitution was not simply another amendment to the previous constitutions, but it was a political reform that involved the majority of the people from the very beginning of its drafting. The whole process of constitution writing was also unprecedented in the history of modern Thai politics. Unlike most of the previous constitutions that came into being because those in power needed legitimacy, the Constitution of 1997 was initiated and called for by the citizens who wanted a true and democratic regime transplanted on to Thai soil.”

Among other things, the 1997 Constitution made significant changes to the management of criminal justice in Thailand. For the first time, the rule of law truly became a part of the supreme law. On this, Dr Kittipong Kittayarak, a former director general of the Department of Probation has written that

“The Constitution has put great emphasis on overhauling the criminal justice system. The timing of the drafting of the Constitution also coincided with public sentiments for reform, triggered by public dissatisfaction of criminal justice as a result of the wide media coverage on the abuse of powers by criminal justice officials, the infringement of human rights, the long and cumbersome criminal process without adequate check[s] and balance[s], etc. The public also learned of conflicts in the judiciary and other judicial organs which at times were spread out and, thereby, deteriorated public faith in the justice

system. With such [a] background, the members of the Constitutional Drafting Assembly used the occasion to introduce a major overhaul of Thai criminal justice.”

Together with the many complicated institutional changes that followed came psychological changes: among judges, lawyers and the public. The higher courts in 2006 for the first time took a lead role in deciding issues of national importance. Courts at all levels were increasingly willing to invoke constitutional rights directly, and consider arguments on human rights principles. The notion of public interest litigation was becoming known and accepted among legal practitioners. People were gaining confidence in the capacity of the courts to address the many problems facing their society. The judiciary, historically by far the weakest leg of the state in Thailand, was at last beginning to flex some muscle. All of this has now been abruptly halted.

The 1997 Constitution was also of importance to many far beyond Thailand. It set an example to a region plagued by authoritarianism and the un-rule of law. As Professor Andrew Harding from the University of London has written, “Thai public law reform should be regarded as being of great significance in the context of the development of the new constitutionalism in Asia and the developing world generally.”

The Asian Human Rights Commission among many others has indeed regarded the 1997 Constitution as being of great significance. This constitution held out the prospect for affirmation of the rule of law and human rights through peaceful public involvement in a way that has not been replicated in any other country of Southeast and South Asia. It was not just a constitution for Thailand; it was a constitution for Asia.

The 1997 Constitution was flawed, and it was attacked. Thailand was not transformed overnight, and in fact it experienced many setbacks in the five years of government by Thaksin Shinawatra. But his government’s concerted assaults on constitutional institutions and principles can in no way be compared to what was done by the Thai military in a matter of hours on September 19.

From many years of hard work, the Asian Human Rights Commission can state unequivocally that nothing good ever comes from a military coup. People in Burma understand this, as do people in Pakistan. People in the Philippines, Indonesia, Cambodia, Korea and Bangladesh have their own stories to tell. Nepal is just now emerging from the tragedy of a military takeover under the guise of a “royal coup”. And past generations of people in Thailand have known it too. The consequences of military dictators in these countries are still being felt today, regardless of whether or not the army has stayed in power. They are found in corrupt and irrational policing; widespread extrajudicial killing, torture and forced disappearance; weakened judiciaries; confusion about the law and its purpose; and authoritarian institutions with democratic facades.

Military coups are not fun, polite or cheerful. They are contrary to the values of justice and human rights. They are contrary to the interests of the public. They are in every sense offensive to international law and the norms upon which civilised societies in the 21st century are being built.

In the words of Professor Harding, the dangers and consequences of the 1997 Constitution of Thailand failing were “somewhat awesome to contemplate”. Those

dangers and consequences will now be felt, and like it or not, they must be contemplated-and fought against. They must be fought against not only for Thailand, but for the whole of Asia. This is a fight that cannot and will not be left to the people of Thailand alone. For the Asian Human Rights Commission, it is our fight too.

## The right man for what job?

AS-232-2006, October 4, 2006

When General Sonthi Boonyaratglin led the armed forces of Thailand to overthrow the caretaker government of Pol. Lt. Col. Thaksin Shinawatra on September 19, the military indicated that it would withdraw from politics within two weeks, having set in place an interim constitution and premier. Interim constitution and premier are now there as promised. And predictably the military has not withdrawn from its political role.

The interim constitution secures the power of the coup group while trying to give the opposite impression. As informed observers have already noted since it was announced on October 1, the charter gives the remodelled junta authority of appointment and decision making over the heads of any new government. Apart from appointing the prime minister, and chairperson and deputy chairperson of the temporary parliamentary assembly, the junta will appoint a 2000-member body which will select 200 persons from among its ranks, among whom the generals will again select 100, who will be responsible for setting up a 35-person constitution drafting group, among whom 25 will be drawn from the 100 and ten will be handpicked by, yet again, the junta. Questions over the criteria and procedure for selection of the 2000, 200, 100, 35, 25, ten or whatever numbers of persons for whatever posts remain wholly unanswered, and largely unasked.

All this pointless whittling down of persons in order to write a new permanent constitution is apparently intended to distract attention from the fact that it is the junta deciding who does what. It is also apparent that suggestions from law experts to make changes to the document while it was still in draft, which reportedly had as its main author the same person as the 1991 interim constitution, were ignored. It is not surprising that academics and other legal professionals have expressed grave concerns. Of section 34, which allows the junta to call the council of government ministers for a meeting in which to air its views any time it pleases, former senator Thongbai Thongpao wrote in his Sunday Bangkok Post column that it “is not very clever” as it “spoils the pledge of non-interference in the civilian administration”. A cartoon on the independent news website Prachatai put the situation more simply: the constitution drafting assembly is sealed off by a barbed wire fence; two ordinary citizens are left to cling to the fence and shout from the outside.

However, expressions of doubt about the constitution and serious questions over its many omissions have been eclipsed by the admiration gushing from all quarters for the junta’s new prime minister, General Surayud Chulanont. The general, who has been defined as a “civilian” by virtue of his having not so long ago stepped down from the post of supreme commander after a lifetime of military service, is said to have accepted the post reluctantly. The media and others have fallen over themselves to unabashedly extol his virtues. He has been repeatedly described as “the right man for the job”, “a man of integrity” and having “impeccable credentials”.

All of this emphasis on the person rather than the law greatly undermines the prospects for genuine constitutionalism in Thailand. The maintaining of law above government--not the other way around, as has been practiced in Thailand--depends upon effective institutions. Where institutions are functioning and trusted, they resist the incursions of

individuals, good or bad. By contrast, where reliance is placed on the individual, order is maintained for only so long as a “good” person is in place, and even then without any guarantees.

The experience of 1991 is instructive. When a junta then appointed Anand Punyarachun as interim prime minister, he too was widely welcomed and lauded as the “right man for the job”. A diplomat and businessman, not a military careerist and personal friend of the coup leaders as in the current events, Anand worked assertively in the public interest. However, ultimately he too was unable to prevent the military from obtaining a constitution that reaffirmed its political role and paved the way for the coup leader to become prime minister, resulting in the protests and bloodshed of May 1992. Only subsequently did lengthy discussion and struggle lead to the 1997 Constitution and with it some hope for the building of lasting institutions that might become the foundations for the rule of law in Thailand. This hope was greatly damaged by Pol. Lt. Col. Thaksin and his government; however, it took the army to destroy it completely.

The Asian Human Rights Commission asserts that under the new interim constitution there is no right man for the job. What job is it that can be performed under this temporary charter other than to comply with the junta? Who will perform this job other than persons appointed by the generals? What sort of permanent constitution can be expected other than one that meets the objectives of the military? The notion that any of this will “strengthen [Thailand’s] democracy in both form and content”, as claimed by one government mouthpiece, is absurd.

The Asian Human Rights Commission calls for intense domestic and international discussion on the contents of this temporary charter and its implications for Thailand. It is this document, not the office of prime minister, which bespeaks the intentions of the junta and indicates the future of the country. It can and should be read in full: in English, <http://www.mfa.go.th/web/35.php?id=17706> (Ministry of Foreign Affairs website); in Thai: <http://www.thairath.co.th/promote/constitution/constitution.php> (Thai Rath website).

## How to make courts independent?

AS-238-2006, October 6, 2006

A few years ago, some senior United Nations staff in Cambodia met with a government minister to discuss the state of the country's courts. They expressed concern about their lack of independence, and asked what intentions the government had to address this problem. "Don't worry," the minister told them simply, "I will make them independent."

This story is relevant to Thailand today. The military generals who took control of the country on September 19 seem to have the same misunderstanding about the nature of justice and the meaning of judicial "independence". They too appear to think that having abolished the constitution and disbanded one of the country's three highest courts, ordering the establishment and composition of a new tribunal in its stead, judges can be made independent by virtue of saying that it is so.

Section 18 of the Constitution of Thailand (Interim) 2006, which was signed into law by the head of the military junta, reads: "Judges are independent in the trial and adjudication of cases in the name of the King and in the interest of justice in accordance with the law and this Constitution." Section 35 goes on to order the appointment of a new tribunal in place of the Constitutional Court, comprising of judges from the two remaining senior courts.

These provisions in fact do nothing to ensure the independent functioning of courts in Thailand. The independence of judges cannot simply be declared. It is by the effective functioning of institutions and maintenance of safeguards that judges obtain true independence. The declaration in this so-called constitution is also itself directly contradicted by the order to replace a superior court with a tribunal, and stipulation of its membership, on the signature of a military officer who obtained power by force.

Above all else, the independence of judges is ensured by security of tenure. This means that judges cannot be removed and appointed on the whims of the executive or any other part of government. It means that courts cannot be opened and closed on the prerogative of any one person or agency outside of the judiciary. It means that judges, once appointed, are not easily or quickly removed.

Innumerable commentaries and precedents established around the world recognise security of tenure as vital to the integrity of the courts and maintenance of the rule of law. In the Federalist Papers, three framers of the United States constitution note that "nothing will contribute so much as this to that independent spirit in the judges". It follows that the 1985 UN Basic Principles on the Independence of the Judiciary have declared: "Judges, whether appointed or elected, shall have guaranteed tenure."

The 1997 Constitution of Thailand, while by no means perfect, laid down clear guidelines with checks and balances designed to protect judges' independence, through procedures for appointment and maintenance of tenure. It recognised the principle of independence through serious efforts to see it obtained via institutional arrangements. The interim constitution has no such contents. Nor does the junta have any genuine interest in such matters. Its appointing of a new constitutional tribunal instead defies the very notion of



judicial independence. Its orders to various government agencies to go after members of the former government reveal that its interests are limited to the exercise of “justice” as justification for its own illegal acts, rather than to uphold any notions of the rule of law.

The Asian Human Rights Commission calls upon the new interim prime minister of Thailand, General Surayud Chulanont, to abandon the planned establishment of new judicial and legislative bodies until after the holding of a new election. The sole purpose of the interim government should be the making of arrangements for an elected legislature. At that time, not before, discussions may begin for the drafting of a new permanent constitution and arrangements for the superior courts.

The Asian Human Rights Commission also calls upon the judiciary in Thailand to resist all attempts at interference in its workings by the military junta. Specifically, it calls upon the Supreme Court and Supreme Administrative Court to refuse to establish the proposed Constitutional Tribunal, on the ground that it amounts to a grave violation of judicial independence. It calls upon the superior courts to again take up the role of judicial review in matters concerning the entire nation, as they were doing prior to September 19, and declare the assumption of power and declaration of a new interim constitution by the coup group illegal. And it calls upon members of the legal profession, in particular the Lawyers Council of Thailand, to take a lead role in discussing the implications of the abrogating and redrafting of the constitution and scrapping of the Constitutional Court on the independence of judges in Thailand.

To be sure, the courts in Thailand are not independent today. No pronouncement by an army officer will make it so. But a determined response from judges, legal professionals and concerned persons there could go some way towards restoring what has been lost since September 19.

## **Celebrating 11 October 1997**

**AS-246-2006, October 11, 2006**

The Asian Human Rights Commission joins with people in Thailand today to recall and celebrate the ninth anniversary of their 1997 Constitution.

It was on 11 October 1997 that for the first time the people of Thailand realised their popular aspiration towards government based upon a rational set of standards applied to all persons, rather than one set of standards for rulers and another for everyone else. This aspiration arose from the 1992 protests against military rule and deep frustrations at decades of unaccountable governments.

The 1997 Constitution was unprecedented. It was the first to be drafted by an elected assembly, rather than persons handpicked by the army--the earlier model to which the latest military junta is reverting. The drafters met and discussed the shape and contents of the constitution with people all over the country. Hundreds of interest groups were established to raise and carry forward discussion on and around the drafting. Social debate and exchange flourished.

The constitution initiated extensive changes to all branches of government and their procedures, alongside strong affirmations of constitutional rights. These were to be furthered through new institutions and laws, and were upheld by the courts. When protestors against the Thai-Malaysian gas pipeline project were prosecuted, they were acquitted after asserting their rights to assemble and express their opinions freely under the constitution, as were local administrative officers sued by a company for organising meetings against a proposed phosphate mine. Officials of the Anti-Money Laundering Office were found guilty of breaching the constitutional right to privacy of five social activists whose bank accounts and other personal financial details they had illegally investigated. A lawyer sued the public prosecutor for denying him a job because of a physical disability; the court decided that he had suffered discrimination in breach of the constitution.

There were also many innovations. Radio and television broadcasting were identified as national resources to be used in the public interest (section 40): the ground upon which media rights campaigner Supinya Klangnarong successfully stood in court against the huge resources of the former prime minister's telecommunications empire. Government departments had to inform people of any project that may affect their local environment or quality of life before giving it approval (section 59): the basis for a 2004 judgment against the industry minister and overturning of a mining concession in Khon Kaen that had not first been subject to public debate.

New innovations encouraged new thinking and behaving. Jinthana Kaewkhao, the organiser of a protest against a power plant concession in Prachuab Kiri Khan, won her case after the court defended not only her rights to free assembly and speech but also her right to participate in the management and preservation of natural resources under section 46 of the new constitution. The court went on to observe that this and other new provisions in the law were specifically intended to develop a democratic administration

that obliged greater involvement by ordinary persons in public and political life than had earlier charters.

The 1997 Constitution marked a great advance in the thinking of people in Thailand on constitutional issues and the management of their society. It enriched the behaviour of millions. It also constituted a great advance in the notion of consensus. Whereas “consensus” had earlier been understood in terms of patronage--what the elite decided on behalf of everyone else--it was now understood as mature agreement among the general public. Ordinary people throughout the country soon demonstrated a better grasp of the true meaning of consensus than had the traditional authorities.

No society remains stuck in time. Conditions change, new issues emerge, and old ones persist. In Thailand, deep divisions again became painfully evident under the government of Pol. Lt. Col. Thaksin Shinawatra. However, solutions cannot be found in one person taking matters into his own hands and ordering everyone else to comply, as General Sonthi Boonyaratglin has done. Although this may create the illusion of momentary calm, its ultimate consequence can only be greater disharmony. When people have become accustomed to a legitimate role in public debate it cannot simply be taken away from them. They will find alternative ways to express their doubts. They will resort to their own methods to obtain solutions, with or without the approval of others. Discontent again spreads and society grows more fractious.

Good constitutions do not die simply because bad governments abuse them. The Constitution of India was not destroyed by Indira Gandhi’s dictatorial emergency rule in the mid 1970s; it was used by the people to oppose and defeat her. The Constitution of Nepal did not die despite the efforts of King Gyanendra to reimpose absolute monarchy; again people fought back and restored their democracy. Nor is the Constitution of the United States of America dead, despite the immense abuse of powers by the Bush administration. So it is also for Thailand. The 1997 Constitution was not killed by the Thaksin government, as some people have said; nor can the army get rid of it.

The September 19 coup group may have torn up the paper on which the 1997 Constitution was written, but it cannot erase its spirit. The generals cannot undo the history of popular involvement that led to its drafting, nor can they deny the intensity of interest and awareness in the drafting process that it generated. The only way out for them now is to open the way for public consultation and return to the hard work of the 1990s, to the foundations for a new society laid on 11 October 1997. Only in this way can those foundations be built upon and improved. Anything less will be a fraud, which when exposed will spell further disorder and conflict in Thailand.

Today, October 11, the Asian Human Rights Commission celebrates the 1997 Constitution of Thailand and congratulates its people on their marvellous achievement. The reports of its death are exaggerations. The 1997 Constitution is alive; alive among the people who made it.

## **Courts must rule on coup**

**AS-249-2006, October 13, 2006**

The Nation newspaper of October 8 reported Professor Worachet Pakeerut of Thammasat University as saying that coups would continue in Thailand for so long as the courts there recognise the amnesties that perpetrators pass for themselves. Worachet had said that there “was a discrepancy in the Thai judicial system that recognised law written by people in power even though the law was against morality and people’s common sense”.

This “discrepancy” is the crux of Thailand’s problems. For as long as its higher judiciary legitimises illegal takeovers of power, there will be illegal takeovers. For as long as the orders of generals are written into law through new constitutions, there will be fictional constitutionalism.

The October 1 interim constitution is just the latest conspicuous example of a law written in defiance of both morality and common sense. Under its section 36

“All announcements and orders of the Council for Democratic Reform or orders of the Leader of the Council for Democratic Reform issued as of 19 September B.E. 2549 (2006) until the date of promulgation of this Constitution, be they in any form or enforced in a legislative, executive, or judicial manner, shall continue to be in force. These announcements or orders as well as any actions taken under them, whether before or after the promulgation of the Constitution, shall be deemed lawful and constitutional.”

As of October 13 there are 36 such announcements and 28 such orders listed on the website of the Council for National Security, the renamed coup group. Apart from scrapping the former government, the 1997 Constitution and Constitutional Court, they impose martial law, repeal earlier laws, amend the Royal Thai Police Act 2004, restrict free speech and movement, ban political gatherings, and set up new bodies. All have the force of parliamentary acts. What is more, section 36 clearly envisages more orders and announcements from the coup group in the future, despite the pretence of a 250-person assembly, comprising mainly of sitting and retired generals and bureaucrats, to do the work of government for the coming year.

Under section 37 of the interim constitution, the coup leaders have by implication admitted the illegality of their actions, and placed themselves beyond the law:

“All matters that the Leader and the Council for Democratic Reform, including any related persons who have been assigned by the Leader or the Council for Democratic Reform or who have obtained orders from the persons assigned by the Leader or the Council for Democratic Reform pursuant to the seizure of State administration on 19 September B.E. 2549 (2006) to take actions prior to or after said date for enforcement of legislative, executive, judicial purposes, including meting out punishment and other administrative acts, whether as principal, supporter, instigator or assigned person, which may be in breach of the law, shall be absolutely exempted from any wrongdoing, responsibility and liabilities.”

Equivalent sections can be found in previous constitutions of Thailand, with the important exception of the 1997 Constitution: the only one adopted through popular process, not force of arms or other autocratic means. Any permanent constitution approved by the current junta is also bound to adopt such provisions.

The problem with all of this is that, as pointed out by Professor Worachet, it is against common sense. How can an unconstitutional act be made constitutional simply by saying that it is so? How can an illegal act be made legal by declaring it thus? This is not legal pragmatism, as suggested by some; it is patent absurdity. It is the opposite of common sense; it is nonsense. It is also a blatant breach of international law and obligations to which the new government has promised to adhere: just one among many contradictions that have emerged in recent weeks.

With the 1997 Constitution, the higher courts in Thailand obtained unprecedented authority. In a 2003 paper Dr. James Klein described how,

“Thailand’s fifteen previous constitutions had been subservient to code and administrative law designed by the bureaucracy to regulate individuals in society by restricting their fundamental rights and liberties... Thai politicians, the military and senior civilian bureaucrats had always reserved for themselves the power to interpret the meaning of law and the intent of the constitution.”

By contrast, the 1997 Constitution sought to make itself the basis of law, with government agencies subordinate to it, rather than vice versa. This was nothing short of a revolutionary change, and it was bound to bring conflict and problems. So the Constitutional Court and some independent agencies--notably the Election Commission--became mired in controversy. Why should this be surprising? The development of new institutions, particularly where they challenge established authority, is by its very nature provocative. And before September 19 Thailand’s senior courts were addressing this conflict: a conflict that in essence was over whether society should be founded upon the rule of law or the rule of lords. They had public support and the backing of His Majesty the King. So what has changed since then? And where are they now?

The highest form of contempt of court is the extralegal removal of a judiciary and legislature, as happened in Thailand on September 19. It cannot be allowed to go unchallenged. If the superior courts meekly accept what has been done, as in previous years--and as if the 1997 Constitution never existed--they will lose the public confidence needed to address all issues of national concern in the future.

There is a small precedent. In March 1993, after the 1991 coup group had already been removed from power by public protest, the Supreme Court of Thailand found that a committee set up to investigate the former government was unconstitutional, and in so doing it overruled order 26 of the coup group. The time has come to build upon that example, and overrule some more. The job for the superior courts now is not to rule on the former government; it is to rule on the present one.

The Asian Human Rights Commission calls upon the higher judiciary of Thailand, and in particular the Supreme Court, to take a position on the illegal and unconstitutional assumption of power by the armed forces in Thailand of September 19. It calls upon the

upper courts to assess the legality of the interim constitution of October 1, especially sections 36 and 37. It calls upon them to assess the implications of these provisions, among others, for the future of Thailand. It calls upon them to do this for the sake of their own integrity, and for the preservation of the values, laws and institutions of the 1997 Constitution. And it calls upon them to do this to make military coups history in Thailand.

Under the 1997 Constitution the people of Thailand gave substantial power to their courts. They did so for good reason. The courts must not betray them by allowing that power to be snatched away so easily. They must rule on the coup.

## **Military junta won't bring justice to south**

**AS-255-2006, October 18, 2006**

In the days after the September 19 coup in Thailand there was some expectation that bloodshed in the south may lessen. Like a lot of other things, this has not happened. Reports of bombings and shooting continue, and the scale of incidents has perhaps escalated. Among those killed was a village headman who had lodged complaints over the brutality of security officers who raided his village in September.

The new military junta has reassured the public that solving the conflict is a top priority. Its prime minister is visiting Malaysia to discuss the persistent attacks near the border, while the head of the junta, army commander in chief General Sonthi Boonyaratglin, has revived some earlier joint agencies for the southern provinces.

The warring in the south was greatly inflamed by the government of Thaksin Shinawatra. The use of emergency regulations; alleged abduction, torture and killing of local residents by security forces; slaughters in April and November 2004 and wanton mismanagement of government agencies and personnel in the region all exacerbated it. The cynical use of political appointees to investigate cases that should have been handled by judicial agencies guaranteed impunity to army officers and police responsible for deaths in custody, mass killings and other gross abuses. The malicious pursuit of innocent persons by the public prosecutor in their stead, which continues to this day, has damaged confidence among local people in the impartiality of the courts.

In 2005 the government established the National Reconciliation Commission ostensibly to come up with solutions to the conflict, and in fact as a means to deflect growing public criticism of its policies. The commission did its work thoroughly and in May 2006 submitted a 132-page report. It clearly explained that the problems in the south were essentially the same as those facing rural communities throughout the country, heightened due to tensions produced by the overwhelming presence of security forces in response to the separatist agenda of a small number of persons. Among the primary causes of the conflict, the commission identified unconstrained abuses of administrative power and violent measures by state authorities, together with injustices arising from the existing judicial process and administrative system. Its recommendations included that the judicial system in the south should be reconfigured through coherent administration, improved efficiency, greater monitoring and changed attitudes.

The government and security establishments mouthed appreciation about the report, but did nothing to implement it. A deputy prime minister was assigned the task of looking at ways to realise its recommendations, which came to nought. General Sonthi, who at that time was directly responsible for the region, also expressed support for the findings but apparently did not attempt to put them in to practice. It seems unlikely that his new military administration will do any more.

Military-led governments have a habit of worsening, not solving, internal conflicts. Soldiers respond to conflict in the manner that they have been trained. This is contrary to notions of justice and fair trial. Thomas Hobbes, in his classic treatise on the state, *Leviathan*, rightly observes that, "All men that are ambitious of military command are

inclined to continue the causes of war and to stir up trouble and sedition”. Irrespective of whether or not the national leadership is interested to obtain peace, many persons in the army, police and other agencies will be keen to have more violence. And as the junta has severely curtailed all civil and political rights in Thailand, state security personnel will have freer hands to do as they please and be subject to less scrutiny and criticism from outside parties than before.

The September 19 coup has set back the development of the judiciary in Thailand by years. At present, not only does the south subsist under emergency regulations, which the regime has not sought to lift, but the entire country has been kept under martial law for nearly one month. The 1997 Constitution and Constitutional Court have been abolished. The superior courts have been subjected to blatant interference and forced back into a role of subservience to the executive. The fundamental rights of all persons in Thailand have been greatly violated.

Under these circumstances, it is nonsense for the military-run administration to talk about solving the conflict in the south. The southern bloodshed is intrinsically linked to justice issues. With the entire justice system compromised and the military’s position strengthened by the coup, security forces across Thailand, and certainly those in the south, will feel fewer obligations to mend their ways or submit to the orders of civilian agencies.

Above all, the new military regime in Thailand will not stop the fighting in the southern provinces because it is acting in its own interests, not those of the public. It lacks sincerity and credibility. Rather than being something best ended, the conflict in the south may at a later time better serve as another convenient pretext to retain various powers after the junta’s supposed expiry date. In the meantime, overtures towards peace make a nice sound in contrast to the noises from its aggressive and uncompromising predecessor and aid in the regime’s efforts to rehabilitate itself in the eyes of the world through attempts to justify the unjustifiable events of September 19. So its mouthing on about the south is set to continue.

The Asian Human Rights Commission calls for concerned persons in Thailand to examine and question the motives of the new military-led government in promoting peace in the south, and assess its implications in view of conditions in the country as a whole. Many questions that need to be asked at this time have not yet been asked. Many more persons, particularly from the concerned region and professional groups, need to be querying the prospects for justice at a time that Thailand is under military rule and martial law, its judiciary is hobbled, and its people are bereft of a constitution and the means to protect their fundamental rights.

The Asian Human Rights Commission also calls for serious re-examination and discussion of the National Reconciliation Commission’s report. This is the best guide we have so far for what needs to be done by the government of Thailand to address the conflict in the south. Until its advices are made meaningful, the violence will persist. And a prerequisite to proper implementation of the commission’s findings is the ending of military rule in Thailand, as well as the writing of a constitution by an assembly of persons answerable to the public, not to the army. There is no other way to justice in the south, and without justice there will be no peace.



# One month on, fact vs. fiction

AS-258-2006, October 19, 2006

It is now one month since the armed forces of Thailand under General Sonthi Boonyaratglin took power on September 19. Since that time, the coup group and government officials have been creating a fictional version of what they have done, are doing and will do. To mark this occasion, the Asian Human Rights Commission lists some of the bigger fictions, and contrasts them with fact.

**FICTION: “There was no other way to avert a national tragedy”**

FACT: The military regime has not produced any evidence to show that widespread violence was imminent, as it has claimed. There were certainly worrying conflicts, some of them planned, between supporters and opponents of the caretaker government of Pol. Lt. Col. Thaksin Shinawatra. However, there is nothing to prove that these would have threatened national security. Large-scale protests were set to resume, but those held earlier in the year had ended without any public disturbances. Meanwhile, the courts had been working to overcome obstacles to new elections, and had been taking up petitions with good progress and public support. The spectre of grave national instability, which has been conjured up by dictators throughout modern history as a routine pretext to obtain power by force, lacks believability.

**FICTION: “The majority of people in Thailand support the coup”**

FACT: There is no way to verify this statement. The coup group has used images of people in Bangkok giving flowers and food to soldiers as propaganda, nationally and internationally, to claim that it had popular backing. But opponents and critics of the coup have been banned from organising protests or other actions. A taxi driver who sprayed his vehicle with protest slogans and drove it into a tank at high speed later said from hospital that he was not a strong supporter of the previous government, but he had been upset at all the flowers and smiling troops giving the impression that there were not many people who disagreed with the coup. Talk shows, community radio stations, websites and other avenues for free public expression have been shut down or closely monitored. The media has been ordered to “cooperate” with the regime, and has largely complied.

**FICTION: “The military will step down after one month”**

FACT: The coup group, renamed the Council for National Security, is set to remain in power until a new government is elected; at least one year. In the meantime, its leadership has done exactly what it accused the previous government of having done: it has promoted its own people to positions of authority. General Sonthi has himself also become director of the powerful Internal Security Operations Command, a post normally reserved for the prime minister.

**FICTION: “A civilian prime minister will be selected within two weeks”**

FACT: The new prime minister is a retired careerist general and personal friend and colleague of the coup leaders who led troops involved in the May 1992 massacre, for which no military officers have ever been called to account.

**FICTION: “An interim civilian legislature will include persons from all social sectors”**

FACT: The interim legislature has been rightly named “the assembly of generals”. Out of 242 of the 250 members named so far, 76 are serving or retired generals and senior officers. Most other members are bureaucrats, businesspeople and some academics. By contrast, there is one labour representative, and four from political parties.

**FICTION: “The military will be placed under the interim constitution and the Council for National Security will be limited to specific security issues”**

FACT: The coup group is above the constitution; everyone else is below it. This is a traditional form of constitutionalism in Thailand. Only the 1997 Constitution was placed above all persons, because it was written in collaboration with the people and for the people, not by persons handpicked by generals, for generals. The interim constitution makes the Council for National Security the most powerful body in Thailand, with the means to control every aspect of the country’s political workings while the law remains in effect. The legislature and other bodies it is setting up are merely its proxies.

**FICTION: “The interim constitution will fully guarantee civil liberties and rights”**

FACT: The interim constitution has no guarantees of rights and liberties. A generic provision protecting human dignity and rights as per customary practice and international obligations is meaningless, as it is without substance, lacks any institutional means for enforcement and is anyhow contradicted by reality.

**FICTION: “Many law experts looked at the interim constitution and were very happy”**

FACT: The advices of law experts on the interim constitution were largely ignored. The version passed is virtually identical to the interim constitution of the 1991 coup group. It has been strongly and repeatedly criticised by law experts.

**FICTION: “General elections will be held within one year, if not sooner”**

FACT: The minister responsible for the office of the prime minister has estimated that it may be 17 months before elections can be held. Like its predecessors, the military regime is now looking for ways to extend its tenure.

**FICTION: “One of the first tasks of the interim government will be to end martial law”**

FACT: The clear intention of the junta is to retain martial law for as long as possible, in order to prevent persons associated with the former government from organising against it. Meanwhile, emergency regulations remain in force in the south, despite the government’s claims that it seeks peace with insurgent groups there, and the earlier condemnation of these regulations by a United Nations rights expert. The regulations could also at any time be put in force anywhere else in the country, in lieu of martial law.

**FICTION: “The courts are independent”**

FACT: The Constitutional Court has been recomposed as a tribunal and set the task of finalising earlier cases on constitutional violations by political parties. Like military regimes the world over, the coup group is messing with the higher judiciary for its own purposes, with the consequence that the entire judicial system is compromised.

**FICTION: “The government will continue to meet all its international obligations”**

FACT: Thailand’s international human rights obligations were underpinned by the 1997 Constitution. In its absence, there is no legal foundation for compliance, and the institutions for protection of human rights in Thailand have been sorely damaged. Ongoing restrictions to freedom of speech, assembly, movement and other civil rights all breach international law, as does the amnesty that the coup leaders have granted themselves.

**FICTION: “This is only a brief intervention to restore and strengthen democracy”**

FACT: This is the biggest fiction of them all. It is also patent nonsense. Democracy is not strengthened by military coups. Nor does this coup group have any such intention. Having scrapped the only truly democratic constitution that the country ever had, however imperfect, it is now acting to reinforce established authority against the growth of other parts of society which were outside of its control. As the Asian Human Rights Commission has repeatedly said since September 19, the true intention of the coup group is to restore and strengthen the role of the armed forces in the political life of Thailand. This is the opposite of democracy.

The generals have in the past month successfully consolidated their power. Having spread its fictions for one month, there are many more to come. Thailand is now in even greater danger than it was on September 19. The Asian Human Rights Commission joins with all persons in Thailand who are struggling against the coup, and reiterates its calls made a day after the takeover, with an added sense of urgency:

1. The coup group must immediately renounce power and allow for a genuine caretaker civilian government to take control.
2. The Supreme Court of Thailand must declare the coup illegal and order a return to genuine constitutional rule.
3. The international community must persist in its condemnation of the coup until the coup leaders and their proxy government step down and proper measures are put in place for a return to civilian government.

Let there be no more government by military decree in Thailand.