

# Study of Intermediary Liability in Thailand: Hate Speech

Khemthong Tonsakulrungruang

## 1. Introduction

This paper will be divided into three main parts. The first will study Thailand's situation regarding hate speech. Although Thailand has experienced some forms of speech that have incited hatred and violence in the past, the recent growth in its severity and frequency is alarming. This first part will also try to identify groups that become victims of this hate speech.

The second part concerns Thailand's legal framework. It examines Thai laws in three levels. Beginning with constitutions, it will explore the scope of protection of freedom of expression, and grounds and procedure for the government to restrict such exercise of freedom. It will then move to the statutory level. Despite the absence of a specific act controlling hate speech, there are a variety of laws that can indirectly limit hate speech, namely, the Penal Code, the Public Broadcast Act, the Computer Crime Act, and orders of the National Council of Peace and Order (NCPO). This part examines these laws and pinpoints their weakness in dealing with hate speech. Finally, this part ends by looking at non-law instruments, such as the journalists' Code of Conduct. This part will also make mention of the Thai government's legislative attempt to control or limit hate speech and the public's responses over such changes.

The third part will focus on cases, both those in litigation and those already completed, regarding liability of a service-provider with hateful content on their website. These cases provide precedents, though vague, of how the court determines service-providers' liability.

## 2. Hate Speech in Thailand

This part concerns the general status of hate speech in Thailand. Analysis begins with the question of whether Thai legal system has formulated any concept of hate speech. If so, where does it appear? Later, it explores types of hate speech and case studies in Thailand.

### a. Concept of hate speech in Thai law

According to Thai constitutional law, a speech encompasses verbal, as well as other means of expressions, for example, printed, motion pictures, or recording.<sup>1</sup> However, hate speech is quite a recent phenomenon, so the topic has not been seriously studied. A clear cut definition has never been given. Only in the 2015 Constitution draft does the idea of hate speech materialize. The draft demanded its citizen to refrain from acting in the manner that may cause hatred among different groups or religions within the nation; nor should a citizen incite discrimination, rivalry, or violence.<sup>2</sup> Thus, the

---

<sup>1</sup> Radthathammanoon (§ 45 para 1) <2007>.

<sup>2</sup> Constitution Drafting Committee, the 2015 Constitution Draft § 27 para. 2 (2015) [http://www.parliament.go.th/ewtcommittee/ewt/draftconstitution/ewt\\_dl\\_link.php?nid=502](http://www.parliament.go.th/ewtcommittee/ewt/draftconstitution/ewt_dl_link.php?nid=502).

draft provided the first attempt to define hate crime, and hate speech, in Thai legal system.

In a report prepared for the National Legislative Assembly, hate speech was identified at three levels. Initially, it was a speech which aimed to divide “us” from “them.” Secondly, it incited hatred to a target group. Finally, it would trigger violent action toward that group.<sup>3</sup>

Still, the concept is far from complete. Often, during political demonstrations, harsh language is needed to arouse and mobilize the mass. Also, the leaders must need to attack the enemy with unpleasant speech. When will a rogue language become hate speech?

#### b. Incidents of Hate Speech

Because Thailand has just realized the seriousness of hate speech problem recently, information prior to 2006 is scarce. There is no systematic monitor of its use or consequence. However, several cases that made it to headlines of newspapers help shed light on the current situation. They identify groups that often directed the use of hate speech, as well as the manner and consequences of using such speech.

##### i. Political enemy

Using hate speech to attack a political enemy is common, and is becoming more commonplace. The most classic example for Thailand was that during the height of the Communism scare in Southeast Asia. The rightist government was concerned with the growing leftist student movement, so it launched a propaganda campaign against the movement. Right-winged newspapers and radio stations falsely accused students of sabotaging the monarchy. A famous abbot claimed that killing a communist was not a sin under the law of Buddhism, because a killer was doing a good deed.<sup>4</sup> All this propaganda employed obscene language and successfully dehumanized the left-winged student movement. Ultimately, it led to the massacre of hundreds of university students in the premise of Thammasat University and a nearby field on October 6<sup>th</sup>, 1976.<sup>5</sup> Militias tortured and murdered university students while police and soldiers stood by watching. Details of the killing were gruesome. More gruesome was a cheering crowd who were brainwashed by the state’s propaganda.<sup>6</sup> The incident is a taboo in Thailand’s modern history. But it forced surviving students to flee and join the Communism movement in the jungle, resulting in years of insurgency. Those involved in the October massacre have never been brought to justice.

---

<sup>3</sup> รัชดา สุขาสุวรรณ, *การปฏิรูปสื่อเพื่อควบคุมการเผยแพร่เนื้อหาสื่อที่สร้างความเกลียดชัง* 5-6 (2014).

<sup>4</sup> Chris Baker and Pasuk Phongpaichit, *A History of Thailand* 193-194 (1<sup>st</sup> ed. 2009).

<sup>5</sup> Id.

<sup>6</sup> *New Photos of 6 Oct 1976 Massacre Emerge*, Prachatai, <http://www.prachatai.com/english/node/2814>. (last visited Sep. 20, 2015)

Fast forwarding to after the 2006 coup d'état, the political conflict between supporters and opponents of the then Prime Minister Thaksin Shinawatra intensified. Both sides, Red-shirt supporters of Thaksin and Yellow-shirt opponents, employed hate speech to attack the others. The most common practice is name-calling. Thaksin is called Nor Chor Thaksin, the term is a title for a male inmate. This is to remind everyone that he is actually a fugitive on the run. His sister, the then Prime Minister Yingluck Shinawatra, is called E-Pu. Pu is her nickname but "e" is a negative reference to a female of low status. She is also called a prostitute. Both of them are considered traitors. On the other side, Abhisit Vejjajiva is considered a murderer, for ordering a crackdown on anti-government protestors with live rounds in 2010.<sup>7</sup> Collectively, Thaksin's supporters are referred to as the Red Buffaloes.<sup>8</sup> The animal is a symbol of a creature with low level of intelligence. Also, the moniker refers to the up-country origin of these people, most of whom are grassroots farmers from the North and the Northeast. His opponents are referred to as cockroaches, because they always miraculously survive judicial review and coup d'état, due to their strong connection with Thailand's elite establishment.<sup>9</sup>

Aside from name-calling, insults come in various manners. Thaksin's face was screened onto flip-flops and sold at a demonstration by People's Alliance for Democracy.<sup>10</sup> The Redshirt returned the similar favor to the Democrat party in their 2010 protest.<sup>11</sup> Rumor is another common technique used. Thaksin's party was accused of getting paid by Cambodia in exchange of Thailand's sovereignty.<sup>12</sup> It is also rumored that Yingluck is Thaksin's illegitimate child. Yingluck's enemy has also publicly questioned whether she has had affairs.<sup>13</sup>

All the above examples demonstrate lies, slander, rumors, and obscene language to delegitimize the others' cause of action. Unfortunately,

---

<sup>7</sup> Jatuporn gets jail for defaming Abhisit, Bangkok Post,

<http://www.bangkokpost.com/news/politics/461170/jatuporn-gets-jail-for-defaming-abhisit>. (last visited Sep. 20, 2015)

<sup>8</sup> My happy (pseudonym), *ตุ๊ดค่าควายแดง*, YouTube (May. 1, 2010), <https://www.youtube.com/watch?v=voh1yJqySIU>

<sup>9</sup> Bangkok Pundit, *Thailand: Some speech is divisive; some hate speech is allowed*, Asian Correspondent, Jul. 9, 2014, <http://asiancorrespondent.com/124562/only-some-vitriol-and-hate-speech-is-seemingly-bad/>

<sup>10</sup> Sam Jacob, *This flip flops are politics disguised as leisurewear* (2014).

<sup>11</sup> Bangkok Pundit, *Is the flip-flop seller a threat to national security?*, Asian Correspondent, Oct. 10, 2010, <http://asiancorrespondent.com/41315/is-the-flip-flop-seller-a-threat-to-national-security/>.

<sup>12</sup> Pavin Chachavalpongpan, *From Marketplace Back to Battlefield: Thaksin-Cambodian Relations in the Age of Militarized Politics*, in *Good Coup Gone Bad* 259-260 (Pavin Chachavalpongpan ed., 2014).

<sup>13</sup> ชิ่งลักษณ์ ชินวัตร กับเรื่องรักที่ลับ ๆ ล่อ ๆ, ASTV Manager Weekend, <http://www.manager.co.th/Daily/ViewNews.aspx?NewsID=9540000061934>. (last visited Sep. 22, 2015)

sometimes, words became actions. Online witch-hunts turned physical when people, fueled by hateful words, took action into their own hands. Two notable incidents were assault of academics who campaigned for a reform of the monarchy institution.

Professor Worajet Pakeerat was a founding member of Nitirat group which consisted of young legal lecturers from Thammasat University. He and his peers often received death threats from warning the society that lese majeste was being abuse and the offence should be softened.<sup>14</sup> These threats were made public.<sup>15</sup> His effigy was burnt.<sup>16</sup> Finally, two men, twin brothers, attacked him on his campus.<sup>17</sup> He escaped with minor injuries and the assailants were arrested. More shockingly was the fact that the large crowd still cheered two men as heroes and offered to pay for their fines or attorneys' fees.<sup>18</sup>

Another critic of the royal institution was Professor Somsak Jeamteerasakul, a historian from the same university. An unidentified group of men raided and salvo his house with small firearms. Luckily, no casualty was reported. Again, the attack was praised as a patriotic act and Somsak, according to the crowd, should have been injured or killed.<sup>19</sup>

Violence may come in a non-physical way. Many Thai nationals were harassed and later sought refuge abroad or could not return to their homeland. The most notable example was "Rose" Chatwadee Amornpat, a Thai who resided in London. Although she was not harmed physically, her family was subject to social sanction as a result of an online witchhunt.<sup>20</sup> Later, a Thai exchange student tried to track Rose down at her house. The student recorded his attempts to make contact with Rose, showing a fake gun, and spraying graffiti at the premises.<sup>21</sup>

---

<sup>14</sup> Prach Panchakunathorn, *Thailand: What did Nitirat propose on the lese majeste law?*, Asian Correspondent, Jan. 17, 2012, <http://asiancorrespondent.com/2012/01/what-did-nitirat-propose-about-the-lese-majeste-law/>.

<sup>15</sup> *Thailand: Assault and threats against human rights defender Professor Worajet Pakeerat*, Frontier Defender, <https://www.frontlinedefenders.org/node/17578>. (last visited Sep. 22, 2015)

<sup>16</sup> Id.

<sup>17</sup> Id.

<sup>18</sup> Id.

<sup>19</sup> *Unknown assailants attack Somsak Jeamteerasakul's house*, Prachatai, <http://www.prachatai.com/english/node/3866>. (last visited Sep. 22, 2015)

<sup>20</sup> Camillae Gazeau, *Thorns of the Thai rose*, New Mandala, May. 26, 2014, <http://asiapacific.anu.edu.au/newmandala/2014/05/26/thorns-of-the-thai-rose/>; Bangkok Pundit, *Thailand: Some speech is divisive; some hate speech is allowed*, Asian Correspondent, Jul. 9, 2014, <http://asiancorrespondent.com/124562/only-some-vitriol-and-hate-speech-is-seemingly-bad/>.

<sup>21</sup> *Thailand 'ultra-monarchists export vigilante justice*, Financial Times, <http://www.ft.com/intl/cms/s/0/05e101fa-2f2b-11e4-a054-00144feabdc0.html>. (last visited Sep. 22, 2015)

A target of hate speech can be beyond the border. The Cambodian King's sly patriotic rhetoric led to King Naresuan the Great, from Ayutthaya period, beheading him and washing his feet with the Cambodian King's blood. Later, it was proven that the initial insulting act had never happened.<sup>22</sup> Still, the story is still repeated during times of territorial disputes, such as in 2008 and 2010 - 2011.<sup>23</sup> Often, there were rumors of armed Cambodian reinforcement to the Redshirts.<sup>24</sup> Myanmar was, too, accused of burning down the city of Ayutthaya, Siam's former capital. Details of Myanmar's abuses were vividly described, however hard convincing evidence supporting such claims have never been found. The story of King Naresuan, who killed the Burmese prince over the battle for independence was reiterated and later captured on the state-subsidized propaganda film.<sup>25</sup> After the 2014 coup, when the western nations criticized the move, military supporters gathered before their embassies and condemned "western interventionism."<sup>26</sup> These attacks occurred online as evidenced in comments on embassies' social media accounts.

## ii. Different class

A political conflict also reveals Thailand's division between classes and inevitably between regions. Bangkok upper class is feeling threatening by the ascending of countryside lower class.<sup>27</sup> In 2010, when the Redshirts flooded the capital and occupied core business areas, Bangkokians complained of the unsightly scene and strong scent of peasants who camped in the middle of the capital. They described how disgusting it was to see people with skin darkened by sun and wrinkled with years of hard work in a field. More recent was the demonstration by the southern rubber plant owners. Southern Thailand is always the stronghold of the Democrat party, Thaksin's enemy. The region was significantly richer and more developed than the North and Northeast, the stronghold of Thaksin. Demonstrators justified their demand by explaining

<sup>22</sup> พลิกประวัติศาสตร์นอกตำราตามหาพระยาละแวก, เรื่องเก่าเล่าใหม่,

<https://cklanpratoom.wordpress.com/2013/12/08/%E0%B8%9E%E0%B8%A5%E0%B8%B4%E0%B8%81%E0%B8%9B%E0%B8%A3%E0%B8%B0%E0%B8%A7%E0%B8%B1%E0%B8%95%E0%B8%B4%E0%B8%A8%E0%B8%B2%E0%B8%AA%E0%B8%95%E0%B8%A3%E0%B9%8C%E0%B8%99%E0%B8%AD%E0%B8%81%E0%B8%95%E0%B8%B3/>. (last visited Sep. 20, 2015)

<sup>23</sup> พระยาละแวกคือใคร, Manager Online Newspaper,

<http://www.manager.co.th/mwebboard/listComment.aspx?QNumber=305350&Mbrowse=9>. (last visited Sep. 25, 2015)

<sup>24</sup> ผบ.หน่วยซีล แฉ จนท.รัฐ-เสื้อแดง เบิกทางชนเขมรติดอาวุธเข้ากรุง!, MThai News, <http://news.mthai.com/hot-news/politics-news/306480.html>. (last visited Sep. 25, 2015)

<sup>25</sup> *Thai Film Stirs Concerns about Burma Relations*, The Irrawaddy, [http://www2.irrawaddy.org/print\\_article.php?art\\_id=3638](http://www2.irrawaddy.org/print_article.php?art_id=3638). (last visited Sep. 25, 2015)

<sup>26</sup> *Ultra-royalists converge on US embassy*, Bangkok Post, <http://www.bangkokpost.com/news/politics/715016/ultra-royalists-converge-on-us-embassy>. (last visited Sep. 25, 2015)

<sup>27</sup> *The elite cannot turn back the tide of Thai politics*, Financial Times, <http://www.ft.com/cms/s/0/8a3b6ed4-d6b8-11e3-b251-00144feabdc0.html>. (last visited Sep. 29, 2015)

that they need more diverse and better diet than Northern or Northeastern residents, who survived on sticky rice and fish sauce.<sup>28</sup> The comment sparked fury and still repeated in political debates.

The peak of the rich-poor division was during the Bangkok shutdown campaign in 2014. Mob leaders publicly questioned if the country should respect the principle of equality. Should the poor be treated equally with the rich since they were stupid and less educated? They paid less tax so they deserved less right such as voting rights.<sup>29</sup> The blatant statement was repeated. More outrageous is the fact that the idea caught on with several people, who suggested Bangkok should expel all poor people from other provinces. They concluded that the poor should not be able to vote. This conclusion shook the very foundation of democracy. The idea resonated in the draft constitution and possibly the next constitution, further eroding the country's unity.<sup>30</sup>

### iii. Religious minority

Thailand is mainly a Buddhist country. Over 90 per cent of the population is Buddhists. The second largest religion is Islam with roughly four per cent. Christianity is even far fewer.<sup>31</sup> With heavy endorsement from the state, too easily Buddhists are insensitive to religious minorities. But insensitivity sometimes becomes intolerance, paranoia, or hatred, especially when it confronts religious minorities from different ethnicities. Islam is the main target of hate speech.

Islam is often viewed with skepticism understandably because of the Deep South violence. The Deep South of Thailand is populated with Muslim Malays, not Buddhist Thais like the rest of the country. The conflict is as much religion as it is other identities.<sup>32</sup> Residents of the South speak different language and practice different belief. Muslim insurgency has taken thousands of lives of government officials, as well as innocents.<sup>33</sup> News of roadside bombings and appalling murders reminds the audience of Arab terrorists,

---

<sup>28</sup> Yak Ratchaprason, คนได้กินหลากหลาย คนอีสานกินแค่น้ำปลากี่พอ, YouTube (Sep. 4, 2013), <https://www.youtube.com/watch?v=Ifb754Pk2DU>.

<sup>29</sup> "ปฏิรูปการเมืองไทย คัดกรองผู้มีสิทธิเลือกตั้ง" แคมเปญนี้คืออะไร ช่วยดูหน่อยค่ะ, Pantip, <http://pantip.com/topic/31376401>. (last visited Sep. 25, 2015);

*Thai Beer Loses Esteem After Heiress's Remarks*, N.Y. Times, [http://www.nytimes.com/2014/01/11/world/asia/thai-beer-loses-esteem-after-heiresss-remarks.html?\\_r=0](http://www.nytimes.com/2014/01/11/world/asia/thai-beer-loses-esteem-after-heiresss-remarks.html?_r=0). (last visited Sep. 25, 2015)

<sup>30</sup> Khemthong Tonsakulrungruang, *Pol-la-muang: The making of superior Thais*, New Mandala, Apr. 24, 2015, <http://asiapacific.anu.edu.au/newmandala/2015/04/24/pol-la-muang-the-making-of-superior-thais/>.

<sup>31</sup> Human Rights Resource Centre, *Keeping the Faith: A Study of Freedom of Thought, Conscience, and Religion in ASEAN* 483 (2015).

<sup>32</sup> Id at 504.

<sup>33</sup> Id.

hence deepening the distrust of Islam and Muslims. On one hand, Muslim insurgents deliberately slay monks as religious statements. Thus, the killing constitutes a hate crime.<sup>34</sup> On the other hand, the Buddhist Thai audience uses strong language in criticizing the insurgency movement and inciting violent retaliation too. The paranoia has spread to other parts of the country, such as when the local administration of Nan, the Northern province, rejected the plan to build a mosque. The online debate following that decision contained harsh language assuming all Muslims are terrorists.<sup>35</sup>

More apparent is when Muslims are migrants. Muslim Rohingyas, who fled Buddhist persecution in Myanmar and ended up on Thailand's shoreline, are not welcomed. They were likened to animals by the Prime Minister for their breeding clutches of offspring.<sup>36</sup> They were falsely accused of being lazy and ungrateful and acting up against Thai authority.<sup>37</sup> They might, as suggested by the Prime Minister, steal Thais' jobs.<sup>38</sup> Some even linked them to the Deep South violence. Buddhists encouraged the government to repatriate or persecute them for illegally entering the country. They were dubbed the lowest quality of the population.

### c. The Government's Responses

Governments are reluctant to curb hate speech problems. The state sometimes engaged in using hate speech to its political advantage. In 2010, the Thai army released the chart showing names of people who were plotting to take down the monarchy. Several intellectuals and activists whose names appeared in the chart were those who disagreed with the government. Later, the army spokesperson admitted that the chart was just a mere speculation.<sup>39</sup>

The National Human Rights Commission (NHRC) was created in 1997 as an independent agency to monitor Thailand's human rights situation. It is supposed to be the main agency dealing with the problem, but its annual reports, from 2010 to 2013 did not mention hate speech concerns. These reports referred to political

---

<sup>34</sup> Id at 505.

<sup>35</sup> *Buddhists Protest Mosque Construction in Northern Thailand*, Khaosod English, <http://www.khaosodenglish.com/detail.php?newsid=1425282802>. (last visited Sep. 25, 2015)

<sup>36</sup> *Dancing to nationalism's outdated tune*, Bangkok Post, <http://www.bangkokpost.com/opinion/opinion/619616/dancing-to-nationalism-outdated-tune>. (last visited Sep. 25, 2015)

<sup>37</sup> Facebook, <https://www.facebook.com/worathat.rattanaphan/posts/1021151707897954>. (last visited Sep. 29, 2015)

<sup>38</sup> *Rohingya migrants will steal jobs, says Thai PM*, Reuters Bangkok, <http://www.hindustantimes.com/world/rohingya-migrants-will-steal-jobs-says-thai-pm/story-yeQ2EgZfcxqP8MpxxeSWK.html>. (last visited Sep. 25, 2015)

<sup>39</sup> โอละพ่อ! เสธ. ใก้กู รับกลางศาล “พ้งลัมเจ้า” แก่ให้ข้อมูล นักวิชาการแดงพอใจถอนฟ้องหมิ่น “อภิลิทธิ-สุเทพ” หลุดด้วย, ASTV Manager Online, <http://www.manager.co.th/Politics/ViewNews.aspx?NewsID=9540000064381>. (last visited Sep. 25, 2015)

demonstrations and warned that they led to human rights violations.<sup>40</sup> The reports also warned of abuses of freedom by unprofessional press.<sup>41</sup> But the reports did not explicitly raise the issue of hate speech.

However, concerns over hate speech appeared in the Truth and Reconciliation Commission, an ad hoc, fact-finding body investigating the violence in April and May of 2010. The Commission discovered uses of hate speech by both sides of the conflict. Amid growing tension, the press and individuals employed hate speech to hurt their opponents.<sup>42</sup> The leaders of the Redshirts encouraged their followers to counter crackdown attempts by any means necessary.<sup>43</sup> The result was several shootouts and arsons during the crackdown. However, the government ignored recommendations from the Commission to respect human dignity and step up efforts to control hate speech.

### 3. Legal Framework

It is evident that hate speech has become a growing problem in Thailand. But, the government's response is still lagging behind. There is no statute dealing directly with hate speech, though the current government of General Prayuth Chan-O-Cha sometimes mentions the need to control divisive speech. However, there are a number of hard and soft laws which could be applied to curb some forms of hate speech, but these laws are not perfect tools either.

#### a. Constitutions

A constitution will provide the largest framework on how the state interprets freedom of expression, as well as a direct channel to petition offenses.

##### i. Constitutional Framework

A constitutional text provides a robust protection of freedom of expression in Thailand. The now defunct 2007 Constitution recognized a person's liberty to express his opinion in any form, be it verbal speech, written word in print, or any other means.<sup>44</sup> This protection is in line with the country's international obligations to ICCPR and the ASEAN Human Rights Declaration.<sup>45</sup> Also, the

---

<sup>40</sup> The National Human Rights Commission, Annual Report 2010-2011, at 31-32 & 39-40 (2012); The National Human Rights Commission, Annual Report 2012, at 41 (2013); The National Human Rights Commission, Annual Report 2013, at 12-13 (2014).

<sup>41</sup> The National Human Rights Commission, Annual Report 2012, at 46-47 (2013).

<sup>42</sup> Truth for Reconciliation Commission of Thailand, Complete Report July 2010 – July 2011, at 208, 214 (2012).

<sup>43</sup> Id. at 163-167.

<sup>44</sup> Radthathammanoon (§ 45 para 1) <2007>

<sup>45</sup> The Association of Southeast Asian Nations, ASEAN Human Rights Declaration, at § 23 (2013); International Covenant on Civil and Political Rights, Art. 19 <1966>.



2007 Constitution protected press, newspaper, radio, or television broadcasting from censorship and forced closure.<sup>46</sup>

However, this freedom is not absolute. The 2007 Constitution permitted the government to restrict the exercise of free speech for the purposes of; maintaining national security; protecting rights, liberties, dignity, reputation, family, or privacy of other individuals; maintaining public order or good morals; or preventing or halting the deterioration of the mind or health of the public.<sup>47</sup>

Restriction of rights and liberties had to follow procedures as provided in Section 29 of the 2007 Constitution.<sup>48</sup> Constitutional rights can be restricted only in a form of a parliamentary statute, a purpose of which matches the objective allowed by the Constitution. A measure must only be as necessary and it shall not affect the essential substances of that right. Moreover, that statute must be a law of general application, not targeting any specific individual or group.<sup>49</sup> Hence, an absolute and blanket ban of speech is not permissible under the Thai constitutional system. Also, it has to be content-neutral.<sup>50</sup>

The May 22<sup>nd</sup> of 2014 coup d'état brought an end to the 2007 Constitution. But the 2014 Interim Charter declares that it recognizes all rights and liberties protected under the previous constitution, democratic general principles, and international obligations.<sup>51</sup> Thus, freedom of expression is still protected currently. Nonetheless, the 2014 Interim Charter contains Section 44 which vests in the Junta leader an absolute power, with absolute impunity, to exercise legislative, executive, and judicial powers.

Section 44 states that if the NCPO Chief deems it necessary to protect the public interest, upon the NCPO's approval, they may issue an order. The nature of said order could be legislative, executive, or judicial depending on whatever the case may be. Moreover, the order and its implementation shall be deemed constitutional, legal, and final.<sup>52</sup>

As a result General Prayuth Chan-O-Cha, the NCPO leader and the Prime Minister of Thailand, could exercise his prime ministerial power to enforce a

---

<sup>46</sup> Radthathammanoon (§ 45 para 3) <2007>

<sup>47</sup> Id. at § 45, para 2.

<sup>48</sup> Id. at § 29.

<sup>49</sup> Id. at § 29 para 2 & 3.

<sup>50</sup> Id. at § 29 para 3.

<sup>51</sup> <รัฐธรรมนูญแห่งราชอาณาจักรไทย (ฉบับชั่วคราว) พุทธศักราช 2557> <มาตรา ๔> [<The 2014 Interim Charter> <§ 4>] B.E. 2557.

<sup>52</sup> Id. at § 44.

normal statute or choose to exercise the supreme power in capacity of the Junta leader. Prayuth has issued orders to curb exercises of free speech, as well as physically arrested outspoken people.<sup>53</sup> Unless repealed by a statute, these NCPO orders will remain valid.

In April 2015, the Junta-appointed Constitution Drafting Committee released its first draft of the to-be 2016 Constitution. In addition to standard protection of freedom of expression, the draft mentioned that, as a citizen of Thailand, a person must not incite hatred among the nation or between religions or provoke discrimination, rivalry, or violence.<sup>54</sup> The second draft, released in August 2015, softened the language by urging the state to educate people to not incite hatred among the nation or between religions or provoke discrimination, rivalry, or violence.<sup>55</sup> This was the most tangible response from the state to hate speech problem. It would provide a framework for further attempt to control or regulate the use of hate speech and hate crime.<sup>56</sup> Unfortunately, the draft was rejected in September 2015.<sup>57</sup> It remains to be seen if the next constitution draft, due in next April, will pay similar attention to the problem.

## ii. Direct Channel to Petition

The 2007 Constitution prohibited a person or a party from overthrowing the democratic government. Should one witness such attempt, he could require an Attorney-General to investigate and file a lawsuit to the Constitutional Court, requesting a stay.<sup>58</sup> This applied to private actors, as well as the government. This channel can be used to stop the use of hate speech to mobilize anarchical demonstration Thailand witnessed over the past few years. However, the Constitutional Court has never ruled any demonstration unconstitutional.<sup>59</sup> The Constitutional Court saw the People's Democratic Reform Council

---

<sup>53</sup> *Junta's Phase 2 crackdown*, Political Prisoners in Thailand, <https://thaipoliticalprisoners.wordpress.com/2015/12/26/juntas-phase-2-crackdown/>. (last visited Dec. 29, 2015)

<sup>54</sup> Constitution Drafting Committee, the 2015 Constitution Draft, at § 26 (2015) [http://www.parliament.go.th/ewtcommittee/ewt/draftconstitution/ewt\\_dl\\_link.php?nid=502](http://www.parliament.go.th/ewtcommittee/ewt/draftconstitution/ewt_dl_link.php?nid=502).

<sup>55</sup> *Id.* at § 27.

<sup>56</sup> Constitution Drafting Committee, *ตารางสรุปเจตนารมณ์รายมาตราของร่างรัฐธรรมนูญแห่งราชอาณาจักรไทย*, at 1/23 (2015) [http://www.parliament.go.th/ewtcommittee/ewt/draftconstitution/ewt\\_dl\\_link.php?nid=496](http://www.parliament.go.th/ewtcommittee/ewt/draftconstitution/ewt_dl_link.php?nid=496).

<sup>57</sup> *Draft constitution rejected by NRC*, Bangkok Post <http://www.bangkokpost.com/news/politics/682280/draft-constitution-rejected-by-nrc>. (Last visited Sep. 25, 2015)

<sup>58</sup> Radthathammanoon (§ 68) <2007>

<sup>59</sup> <The Constitutional Court> No. <5/2557>, <Jan. 8, 2014>.

Shutdown campaign in early 2014 as a peaceful assembly which was permissible under the Constitution.<sup>60</sup>

b. Statutes and Equivalents

Parliamentary statutes and equivalents are primary tools to control the use of speech. Most restraints are in the Penal Code, but there are a few other laws. However, they are not sufficient in handling the problem. There were calls for the government to enact a specific law to regulate hate speech and the government said it was considering legislating one. But, it is unclear if the government really understands the concept of hate speech. A hate speech law can become a tool to harass and suppress those whose opinions are not with the authority.<sup>61</sup> The law could broaden the scope of hate speech, so as to entirely prohibit any criticism of the government.

i. Lese majeste

Section 112 of the Penal Code, or better known as lese majeste law, is probably the most controversial law in Thailand. Numbers of prosecutions rose at an alarming rate in recent years.<sup>62</sup>

The Penal Code provides protection to the monarchy, which has always been one of the most important public institutions. But, according to the text, not every member of the royal family benefits from this protection. Section 112 says whoever defames, insults, or threatens the King, the Queen, the Heir-apparent or the Regent, shall be punished with imprisonment of three to fifteen years.<sup>63</sup> Thus, only four people, the King, the Queen, the Crown Prince, and the Regent, if there is any, will be protected from harmful speech.

The original intention of lese majeste was to protect a person, but recent reading of the law has been expanded massively to cover the entire royal institution.<sup>64</sup> The scope of application now includes King Naresuan of the

---

<sup>60</sup> ขวางเลือกตั้งไม่ชัด "มาตรา 68" ?, Khaosod Online,

[http://www.khaosod.co.th/view\\_newsonline.php?newsid=TVRNNU1qUXpPREkwTmc9PQ==](http://www.khaosod.co.th/view_newsonline.php?newsid=TVRNNU1qUXpPREkwTmc9PQ==). (last visited Sep. 25, 2015)

<sup>61</sup> *Move to outlaw hate speech in Thailand needs careful handling*, AsiaOne, <http://news.asiaone.com/news/asia/move-outlaw-hate-speech-thailand-needs-careful-handling> (last visited Sep. 25, 2015); *Fears of abuse as Thailand ponders hate speech law*, Anadolu Agency, <http://www.aa.com.tr/en/world/fears-of-abuse-as-thailand-ponders-hate-speech-law/83794>. (last visited Sep. 25, 2015)

<sup>62</sup> *UN experts express 'grave concern' over 21 lèse majesté cases*, Prachatai, <http://www.prachatai.com/english/node/5142>. (last visited Sep. 29, 2015)

<sup>63</sup> <ประมวลกฎหมายอาญา> <มาตรา ๑๑๒> [<Penal Code> <§ 112>] B.E. 2499.

<sup>64</sup> International Federation for Human Rights, *Dark Ages: Violation of cultural rights under Thailand's lese-majeste law*, 8-12 (2015).

Ayutthaya dynasty<sup>65</sup> and the reign, not a person, of King Rama IV, King Bhumibol's great grandfather.<sup>66</sup> Even a non-monarch such as the Privy Council<sup>67</sup> or a royal canine pet is protected too.<sup>68</sup>

Because a lese majeste trial is usually kept secret and the speech in question cannot be made public, it is difficult to know the court's precedent exactly. But, it seems that the scope of acts that fall into lese majeste is also much broader than just defamation, an insult, or a threat. The false rumor concerning the King's health is considered harmful to the King.<sup>69</sup> A question or a criticism about Thai history violates lese majeste.<sup>70</sup> Other forms of speech, such as wearing a black shirt on an auspicious day,<sup>71</sup> or corruption under the name of the monarchy can constitute violation of law.<sup>72</sup>

As a result, lese majeste is both broader and narrower than limiting hate speech. It prohibits only speech that is harmful to the royal family, not harmful speech in general. But harmful speech, according to the state's interpretation, can refer to speech other than incitement of hatred or violence. It could be a mere statement of unfavorable or embarrassing facts.

Despite international calls to revamp the scope of application, the court seems to be firm on its reading of the law. So, precedent is unlikely to change anytime soon.

## ii. Crime Against Amicable Foreign States

---

<sup>65</sup> *Renowned royalist Sulak sued for lèse majesté for defaming ancient king*, Prachatai, <http://www.prachatai.com/english/node/4416>. (last visited Sep. 29, 2015)

<sup>66</sup> *Supreme Court rules to have lèse-majesté cover Thailand's former-king*, Prachatai, <http://prachatai.org/english/node/3746>. (last visited Sep. 29, 2015)

<sup>67</sup> *Thaksin Shinawatra May Face Lese Majeste Charges after Slamming Privy Council*, Chiang Rai Times, <http://www.chiangraitimes.com/thaksin-shinawatra-may-face-lese-majeste-charges-after-slamming-privy-council.html>. (last visited Sep. 29, 2015)

<sup>68</sup> *บันทึก อานิชา กับ มาตรา 112*, Prachatai, <http://www.prachatai.com/journal/2013/08/48374>. (last visited Sep. 29, 2015)

<sup>69</sup> *Thiranan Vipuchanun, Khatha Pachachirayapong, Somjet Itthiworakul and Thatsaporn Rattanawongsa*, Political Prisoners in Thailand, <https://thaipoliticalprisoners.wordpress.com/pendingcases/thiranan-vipuchanun-and-khatha-pachachirayapong/>. (last visited Sep. 29, 2015)

<sup>70</sup> *Renowned royalist Sulak sued for lèse majesté for defaming ancient king*, Prachatai, <http://www.prachatai.com/english/node/4416>. (last visited Sep. 29, 2015)

<sup>71</sup> *3 lèse majesté complaints filed against women wearing black around King's birthday*, Prachatai, <http://www.prachatai.com/english/node/4584>. (last visited Sep. 29, 2015)

<sup>72</sup> *Brothers of Thai ex-princess jailed for lese majeste*, BBC, <http://www.bbc.co.uk/news/world-asia-31990182>. (last visited Sep. 29, 2015); *Parents of Thai ex-princess given jail term for lese majeste*, BBC, <http://www.bbc.co.uk/news/world-asia-31828475>. (last visited Sep. 29, 2015)

According to Section 133 of the Penal Code, a person who defames, insults, or threatens the Sovereign, Queen, Consort, Heir-apparent or Head of Foreign State shall be imprisoned for one year to seven years or fined from two thousand to fourteen thousand Baht, or both.<sup>73</sup> Section 134 extends such protection to a foreign representative appointed to Thailand shall be punished with imprisonment of six months to five years or fine of one to ten thousand Baht, or both.<sup>74</sup> Basically, these are lese majeste for foreign heads of state or his representative with lighter sentence.

Another offence is an insult to the flag or other symbolic emblem of the friendly, foreign state.<sup>75</sup> An offender shall be imprisoned no more than two years or fined no more than four thousand bahts, or both.<sup>76</sup>

Despite worsening ties with other states and widespread insult to the heads of state or destruction of their flag, these laws are rarely invoked.

### iii. Treason

Since the 2014 coup, the number of cases concerning treason have soared. Generally, treason refers to an attempt to make unlawful changes in the government, secession, coercion to the government, public unrest, or sedition. There are five speech-related treason offences in the Penal Code.

First, treason includes a threat to commit a violent act in order to overthrow the constitution or one of the three branches of power, an act to secede the Kingdom, or an act to seize power from the administration.<sup>77</sup> It is punishable by death or life imprisonment.<sup>78</sup>

Second is an offence for instigating police or the army to desert their duty or commit a mutiny, which may result to five years imprisonment.<sup>79</sup>

Third, anyone who expresses a wish to a crowd by word, written expression, or any other means to bring about change to the constitution or the government by force or violence. The third offense also includes anyone who encourages unrest within the people so much that it causes disturbance to the country, as well as anyone who encourages people to breach laws. Those who commit this offense shall be imprisoned for up to seven years. The only two

---

<sup>73</sup> <ประมวลกฎหมายอาญา> <มาตรา ๑๓๓> [<Penal Code> <§ 133>] B.E. 2499.

<sup>74</sup> Id. at § 134.

<sup>75</sup> Id. at § 135.

<sup>76</sup> Id.

<sup>77</sup> Id. at § 116 (1).

<sup>78</sup> Id.

<sup>79</sup> Id. at § 116 (2).

exemptions are if the act is permissible under the constitution, or made in good faith.<sup>80</sup>

Fourth, instigating a strike or a shutdown for the purpose of changing a law of the land, coercing the government, or intimidating the public shall be punished by imprisonment not exceeding seven years or fine not exceeding fourteen thousand Baht, or both.<sup>81</sup>

Finally, section 118 prohibits a person from making a contemptuous act to the national flag or a symbolic emblem of the nation. Violation of this offense results in imprisonment no more than two years or fine no more than 4,000 Baht, or both.<sup>82</sup>

#### iv. Defamation

Defamation or slander is an act of accusing someone to the third party in a manner likely to hurt reputation of the accused or expose the accused to hate or scorn.<sup>83</sup> Defamation leads to imprisonment of no more than one year or a fine of no more than 20,000 Baht, or both. The scope of defamation covers even those who have passed away, as the Penal Code perceives that it could impair reputation of relatives.<sup>84</sup>

Perhaps defamation is the most likely tool to be used against hate speech. Slandorous messages range from corruption to insanity to adultery.<sup>85</sup> The objective of defamation is not to protect an individual from false information, but from damage to his reputation.<sup>86</sup> Thus, the court will not prove whether the statement is true, but focus on likelihood of damage. Additionally, the court will not need the message be obscene or rude. Rather, the court must look to how reasonably convincing the message is to its audience.<sup>87</sup> Thus,

---

<sup>80</sup> Id. at § 116 (3).

<sup>81</sup> Id. at § 117.

<sup>82</sup> Id. at § 118.

<sup>83</sup> Id. at § 326.

<sup>84</sup> Id. at § 327.

<sup>85</sup> <The Supreme Court of Justice> <472/2520>, <1977>, accusing another woman her husband's mistress; <The Supreme Court of Justice> <97/2541> <1998>, accusing another woman a mistress of the chief police officer; <The Supreme Court of Justice> <526/2525> <1982>, the Provincial Governor involved in hiring a hitman killing a journalist; <The Supreme Court of Justice> <2296/2514> <1971>, the city mayor involved in corruption of meat concession; <The Supreme Court of Justice> <3316/2525> <1982>, accusation of corruption; <The Supreme Court of Justice> <1628/2500> <1957>, accusation of bribery.

<sup>86</sup> Kanaphon Chanhom, คำอธิบายกฎหมายอาญาภาคความผิด เล่ม ๑, 271 (2015).

<sup>87</sup> Victims were accused of being ghosts. The Supreme Court decided that such accusations would never convince any sound-minded person to believe. Thus, they were not defamation. See <the Supreme Court of Justice> <570/2473> <1930>; <the Supreme Court of Justice> <256/2509> <1966>; <the Supreme Court of Justice> <200/2511> <1968>.

defamation overlaps with hate speech when that message causes the public to believe the story and disdain the person. But, in a case of using obscene or lewd language against someone, it might not constitute defamation if the accusation obviously could not be true. The use of offensive language to simply attack that person's dignity will not be counted as defamation since there is no accusation involved.<sup>88</sup>

Another problem with defamation is that a victim, either an individual or a group, must be identifiable. If the message refers to a group too large no one might have standing to claim legal action.<sup>89</sup> For example, a slander made against Islam does not attack any Muslim in particular. Thus, no Muslim has standing. A reference to the military could not provide sufficient standing for the Royal Thai Army to pursue the case since the word "military" might refer to any of Thailand's armed forces.<sup>90</sup>

Slander might not constitute defamation if the comment is made upon good faith, in defense of a speaker's fair and lawful stake, in a capacity of an official acting under the law, in a manner where a person or a matter is normally subjected to public criticism, or in a report at an open proceeding of the court or other meeting.<sup>91</sup> This exemption opens a loophole, as it allows the court to exercise highly subjective discretion. The court has to determine if the speech in question falls into one of these four conditions and is made in good faith. This is especially problematic in a case of a political figure whose private life is compromised. A comment regarding one's private matter might or might not be in good faith or normally subjected to public criticism. A good faith standard is quite vague and the court might be biased in interpreting a speech in favor of certain groups.

Nonetheless, if a speaker can prove that his speech is true, he is still guilty but may not be punished. A speech cannot be proven, however, if that speech concerns personal matters that do not benefit the public interest.<sup>92</sup>

Defamation is only a crime against person's reputation. So, a victim must file a complaint to the police within three months and the victim could decide to drop the case at will.<sup>93</sup> In reality, a case is dropped if apology is made, usually in public.

#### v. Insult

---

<sup>88</sup> Jitti Tingsabhat, *คำอธิบายประมวลกฎหมายอาญา ภาค ๒ ตอน ๒ และภาค ๓* 414-416 (7<sup>th</sup> ed. 2010).

<sup>89</sup> <The Supreme Court of Justice> <448/2489> <1946>; <The Supreme Court of Justice> <1636/2522> <1979>.

<sup>90</sup> <The Supreme Court of Justice> <3945/2539> <1996>.

<sup>91</sup> <ประมวลกฎหมายอาญา> <มาตรา ๓๒๕> [<Penal Code> <§ 329>] B.E. 2499.

<sup>92</sup> Id. at § 330.

<sup>93</sup> Id. at § 96 and 333.

An insult is only a petit offence, which requires no proof of intention. It cares not with the content, but focuses on the language. An insult can be outright or advertised, but the punishment is light with one month imprisonment, 1,000 Baht fine, or both.<sup>94</sup>

vi. Causing Fear or Fright

Threatening others into fear or fright is a petit crime. The punishment is punished by one month imprisonment, 1,000 Baht fine, or both.<sup>95</sup>

vii. Dissemination of False Information

A person who, with malicious intention, disseminates false information and causes alarm among public, shall be punished by one month imprisonment, 1,000 Baht fine, or both. However, the information must be false and the comments must frighten the public.<sup>96</sup>

viii. Instigating a Crime

Hate speech leads to various criminal behaviors, be it vandalism, assault, or murder. Those who commit the aforementioned crimes will definitely be prosecuted. But, will the one who encourages these crimes be liable too? According to the Penal Code, instigation of a crime comes in two forms.

First, an instigator is a person who employs, forces, asks for, or by other means causes another person to commit a crime.<sup>97</sup> By simply encouraging another to commit a crime, an instigator shall be liable for one-third of the punishment provided for the offence committed. But, if the crime is successfully carried out after being instigated,, the instigator becomes a principal and shall receive the same punishment as his accomplice.<sup>98</sup> The difficulty is that it must be proven that the speaker deliberately delivered his speech to cause a crime. That means the speaker must specifically address a certain person a crime must be a direct and foreseeable result of that speech.

Second, instigation can be made publicly. Propaganda or publication to the general public urging them to commit an offence will result in a punishment of no less than six months imprisonment, or one-half of the offense's sentence.<sup>99</sup>

---

<sup>94</sup> Id. at § 393.

<sup>95</sup> Id. at § 392.

<sup>96</sup> Id. at § 384.

<sup>97</sup> Id. at § 84 para 1.

<sup>98</sup> Id. at § 84 para 2.

<sup>99</sup> Id. at § 85 para 1.



Once a crime is successfully carried out, the instigator will receive a full sentence.<sup>100</sup>

So far, hate speech that leads to a specific crime is punishable under Thai criminal law. Hate speech after the crime, such as showing appreciation or sympathy to a criminal is, however, not an assistance to a crime and therefore not punishable.<sup>101</sup>

Despite widespread incitements and a few incidents of crime, not one instigator has been brought to justice.

#### ix. Protection of Buddhism

The Sangha Council Act provides the Supreme Buddhist Abbot, or the Sangha Raja, protection similar to the Monarchy. Defamation, insult, or threat to the Sangha Raja results in one year imprisonment, a 20,000 Baht fine, or both.<sup>102</sup> Although the offence resembles that of the lese majeste, punishment is noticeably lighter. This protection is specifically for the Supreme Abbot. Other religions, Christianity or Islam, do not enjoy such benefit. Interestingly, it does not protect the whole body of Buddhism, so this is not a blasphemy law.

Also, the Sangha Council Act penalizes a person who accuses the Sangha body that such an act that might cause disgrace or division within the body with one year imprisonment, a 20,000 Baht fine, or both too.<sup>103</sup>

#### x. The Computer Crime Act

The Computer Crime Act is the main tool for the Thai state to control the internet community. It allows the government to surveil traffic and shut down or block contents which it considers dangerous or harmful.<sup>104</sup> The statute was passed by the National Assembly under the regime of General Surayud Chulanond, appointed by the Council of National Security who carried out the 2006 coup d'état.

Originally, the Computer Crime Act was intended to deal with more advanced forms of crime, such as hacking, data theft, or disruption of cyber system. It would hold a person who introduces malicious and destructive software into computer system. However, in the final version, the law regulates conventional crime that is committed on internet too.

---

<sup>100</sup> Id. at § 85 para 2.

<sup>101</sup> Id. at § 86.

<sup>102</sup> <พระราชบัญญัติคณะสงฆ์> <มาตรา ๔๔ ทวิ> [<The Sangha Council Act> <§44 bis>] B.E. 2505.

<sup>103</sup> Id. at § 44 tri.

<sup>104</sup> <พระราชบัญญัติว่าด้วยการกระทำความผิดเกี่ยวกับคอมพิวเตอร์> [<The Computer Crime Act>] B.E. 2550.

The heart of the Computer Crime Act is Section 14. Five years imprisonment, or a fine of 100,000 baht, or both, is imposed on a person who commits the following act;<sup>105</sup>

- (1) input, into computer system, forged computer data in whole or in part or false computer data in a manner likely to cause injury to another person or the public;
- (2) input, into computer system, false computer data in a manner likely to cause injury to national security or public panic;
- (3) input, into computer system, any computer data which is the commission of the offence relating to national security or terrorism according to the penal code;
- (4) input, into computer system, any obscene computer data which is accessible to the public;
- (5) publish and forward computer data with the knowledge of the foresaid offence according to (1) (2) (3) and (4).

Thus, a speech that endangers nationality security or social unity is within the scope of the Computer Crime Act. Those who might not introduce but help disseminate the speech are also principals in crime too.

Not only is a user punishable for introducing bad content into the internet system, but so is the service provider. A service provider is a person, either a natural person or a juristic person, who;<sup>106</sup>

- (1) either in his own name or in the name of or for the benefit of another person, serve other person in accessing to the internet or capable to communicate by other means passing through computer system;
- (2) stores computer data for the benefit of another person under (1).

Thus, a service provider is the one who provides a channel for others to access to the internet or stores data for such purposes. A service provider who “intentionally supports or consents to commit the offence” in “the computer system under his control” shall receive the same punishment.<sup>107</sup> This imposes a duty of care to the service provider to monitor the content within its system regularly. Even if a service provider does not support such speech, a failure to detect and remove that speech in a timely manner might imply consent.

---

<sup>105</sup> <พระราชบัญญัติว่าด้วยการกระทำความผิดเกี่ยวกับคอมพิวเตอร์> <มาตรา ๑๔> [<The Computer Crime Act> <§ 14>] B.E. 2550.

<sup>106</sup> Id. at § 3.

<sup>107</sup> Id. at § 15.

In the case where a crime is committed beyond the Kingdom's borders, a service provider is a foreign person, and the Thai government or a Thai citizen suffers from that action, that service provider is still liable under this Act.<sup>108</sup> Thus, even a foreign service provider could be punished under this act if that service provider travelled to Thailand.

Interestingly, section 14 is the only offence where a service provider must held jointly be liable. Other crimes, such as importation of a photograph that has been altered in order to cause embarrassment, contempt, shame, or hatred to another person, do not require similar joint liability.<sup>109</sup>

In order to investigate the wrongdoing, an official in charge can be authorized by a court to access to computer system, as well as confiscate data.<sup>110</sup>

In addition to imprisonment and fines, if that computer data might concern national security, terrorism, or be contrary to public order or good morals, an official in charge, upon the ministerial approval, can ask the court to halt publication of that data.<sup>111</sup> Technically, a police officer or an official from the Ministry of Information and Communication Technology can ask for the court's permission to block a website in question. In the three years after the law had been enacted, Thailand had blocked 81,213 numbers of websites on various grounds.<sup>112</sup> The most common ground was lese majeste at 60,790 webpages, then obscene and nudity at 19,395 webpages, then illegal drugs and abortions at 357 webpages, and then gambling at 246 webpages, respectively.<sup>113</sup> The other grounds include contempt of Buddhism, urging unrest, and phishing content.<sup>114</sup>

#### xi. Telecommunication Law

Providing internet service requires a license from the National Telecommunication Commission (NTC) according to the National Telecommunication Act.<sup>115</sup> Violation results in criminal punishment up to

---

<sup>108</sup> Id. at § 17.

<sup>109</sup> Id. at § 16.

<sup>110</sup> Id. at § 18 and 19.

<sup>111</sup> Id. at § 20.

<sup>112</sup> Sawatree Suksri, *อาชญากรรมคอมพิวเตอร์? : งานวิจัยหัวข้อ “ผลกระทบจากพระราชบัญญัติว่าด้วย*

*การกระทำความผิดเกี่ยวกับคอมพิวเตอร์ พ.ศ. 2550 และนโยบายของรัฐกับสิทธิเสรีภาพ ในการแสดงความคิดเห็น*, 59 (2012).

<sup>113</sup> Id. at 60.

<sup>114</sup> Id.

<sup>115</sup> <พระราชบัญญัติการประกอบกิจการโทรคมนาคม> <มาตรา ๘> [<The Telecommunication Act> <§ 7>] B.E.

five years imprisonment and 10,000,000 Bahts fine.<sup>116</sup> The NTC has the authority to legislate rules and regulations for service providers to follow.<sup>117</sup> In the NTC's regulation on criteria and procedures for applying for internet service provider license, it imposes a duty to the service provider that, for the benefit of the society, a service provider must exercise precaution that users shall not abuse the service or distribute information that harms public order or good morals.<sup>118</sup> A service provider shall support governmental agencies and private entities to build discipline in internet use for better understanding and creativity.<sup>119</sup> The NTC can revoke a license if it needs to maintain national security, public interest or to protect public order or good morals.<sup>120</sup> Thus, failure to comply with the NTC's order and recommendation could be regarded as a breach of the above condition and provide a grounds for the revocation of a license.

## xii. Section 44 of the Interim Charter

When the Thai army, under the auspices the National Council of Peace and Order (NCPO), seized power from a democratic government of Yingluck Shinwattra, it became the supreme authority. Its orders are laws. General Prayuth Chan-Ocha, the Chief of the NCPO and the Prime Minister, issued several orders under the Martial Law Act. Later, the Interim Charter was enacted and the Prime Minister could switch to using his power according to Section 44 of the Interim Charter.

Once the coup d'etat was carried out, the NCPO asked in its Order 12/2557 for cooperation from online social network providers and operators.<sup>121</sup> They should refrain from circulating messages that incite violence, lawlessness, or resistance to the authority.<sup>122</sup> Otherwise, the NCPO would terminate such service and summon a person in charge for further legal action.<sup>123</sup>

---

<sup>116</sup> Id. at § 67.

<sup>117</sup> Id. at § 8.

<sup>118</sup> <ประกาศคณะกรรมการกิจการโทรคมนาคมแห่งชาติ เรื่อง

หลักเกณฑ์และวิธีการขอรับใบอนุญาตการให้บริการอินเทอร์เน็ต> <มาตรา ๕๕> [<The National Telecommunication Commission's Regulation on Criteria and Procedures for Applying for Internet Service Provider License> <§ 15>] B.E. 2548.

<sup>119</sup> Id.

<sup>120</sup> <พระราชบัญญัติการประกอบกิจการโทรคมนาคม> <มาตรา ๑๖> [<The Telecommunication Act> <§ 16>] B.E. 2544.

<sup>121</sup> <ประกาศคณะรักษาความสงบแห่งชาติ ฉบับที่ ๑๒/๒๕๕๗ เรื่อง ขอความร่วมมือจากสื่อสังคมออนไลน์> [<The National Peace and Order Council (NCPO) order 12/2557>] B.E. 2557.

<sup>122</sup> Id.

<sup>123</sup> Id.

Later, Order 17/2557 employed more commanding language.<sup>124</sup> It stated that all internet service providers must show up at the Office of the National Broadcasting and Telecommunication Commission and monitor, regulate, and block distribution of news that could incite internal disruption or affect public order or good morals.<sup>125</sup> This order is meant to filter anti-establishment news from circulation within the country.

The most important order concerning hate speech is the NCPO Order 97/2557, concerning the cooperation of the NCPO and the distribution of news to the public. The Order prohibits any individual, including editor, moderator, press, in print, television, radio, from inviting a person or persons who are academics, former civil servants, or former courts employees, or watchdog agency employees, to give an interview or opinion in a manner that might escalate a conflict, confuse the society, or lead to violence.<sup>126</sup>

Moreover, the same order asked media, public and private, including those in electronic forms and service providers of online communication channels, to circulate news given from the NCPO and refrain from distributing news of the following nature:<sup>127</sup>

- (1) False or possibly slanderous or inciting hatred accusation to the Monarchy institution, the Heir-Apparent, and all members of the royal family.
- (2) News that endanger the national security or defaming other persons.
- (3) Criticism to the NCPO, its agents, or involving parties.
- (4) Confidential recordings, pictures, or videos of governmental agencies.
- (5) News that might lead to confusion, provocation to dispute or division within the nation.
- (6) Invitation to resist the NCPO and the state authority.
- (7) Instigation to assault a person that might lead to confusion or panic.

The NCPO could block such distribution and pursue legal action against a violator.

Another important order is the NCPO Order 26/2557. It concerns internet surveillance. The Permanent-Secretary of the Minister of Information and Communication Technology shall set up a body, working closely with service providers, to surveil and even to access to computer data traffic and websites that contain messages that incite unrest, violence, lawlessness, or resistance

---

<sup>124</sup> <ประกาศคณะรักษาความสงบแห่งชาติ ฉบับที่ ๑๗/๒๕๕๗ เรื่อง ขอความร่วมมือจากสื่อสังคมออนไลน์> [<The National Peace and Order Council (NCPO) order 17/2557>] B.E. 2557.

<sup>125</sup> Id.

<sup>126</sup> <ประกาศคณะรักษาความสงบแห่งชาติ ฉบับที่ ๙๗/๒๕๕๗ เรื่อง ขอความร่วมมือจากสื่อสังคมออนไลน์> <มาตรา ๒> [<The National Peace and Order Council (NCPO) order 97/2557> <§ 2>] B.E. 2557.

<sup>127</sup> Id. at § 3.

against the NCPO. This surveilling body can block circulation of such information and pursue legal action against those who made or generated them.<sup>128</sup>

In general, it is obvious that the NCPO is fully aware of the power of press, especially on internet, in circulating information that undermines its authority. Thus, it exercises its supreme power to monitor online speech by citing necessity to protect the Royal family, social unity, national security, peace, and public order or good moral. Some measures could be pervasive to individual's rights and liberties, such as accessing to data and blocking flow of information.<sup>129</sup>

### c. Non-law instruments

In addition to “hard-laws,” the Thai press also attempts to create their own soft-laws, codes of conduct, and guidelines.<sup>130</sup> There are several press associations, but most of their directives are similar. On the largest scale, reports must be in accordance with human rights, dignity, and privacy of those who appear in news. In order to balance the tone, press is encouraged to respect and allow the accused to present their perspective.<sup>131</sup> Although there is no direct clause that prohibits or regulates the use of hateful speech, members of these associations are reminded to consider the benefit of the public, as well as public order and good morals. Thus, they imply avoidance from cursing.

Nonetheless, these soft-laws are far from perfect. The internal mechanism to discipline its own member fails to produce a sense of accountability. Scandals of newspapers, both online and in print, that launch hate speech at their enemies abound. Despite calls for disciplinary action, none have ever been carried out.

---

<sup>128</sup> <ประกาศคณะรักษาความสงบแห่งชาติ ฉบับที่ ๒๖/๒๕๕๗ เรื่อง ขอความร่วมมือจากสื่อสังคมออนไลน์> [<The National Peace and Order Council (NCPO) order 26/2557>] B.E. 2557.

<sup>129</sup> *Thailand: Country Report*, Freedom House, <https://freedomhouse.org/report/freedom-world/2015/thailand>. (last visited Sep. 29, 2015)

<sup>130</sup> เป็ครงานวิจัย *Hate Speech* คำพูดเกลียดชังออนไลน์ไทย นิยามหลายระดับ กำกับด้วยศรัทธาประสงก์, Thai Netizen Network, <https://thainetizen.org/2013/07/online-hate-speech-in-thailand-research-chula/>. (last visited Oct. 1, 2015)

<sup>131</sup> *The News Broadcasting Council of Thailand Regulation on Professional Ethics of Radio and Television B.E. 2553*, § 6, 7, and 11, the News Broadcasting Council of Thailand, [http://www.newsbroadcastingcouncil.or.th/?page\\_id=142](http://www.newsbroadcastingcouncil.or.th/?page_id=142) (last visited Oct. 1, 2015); *The Broadcast Journalists Association Regulation on Ethics B.E. 2555*, § 3, the Broadcast Journalists Association, <http://www.newsbroadcastingcouncil.or.th/wp-content/uploads/2012/09/%E0%B8%A3%E0%B8%B0%E0%B9%80%E0%B8%9A%E0%B8%B5%E0%B8%A2%E0%B8%9A-%E0%B8%88%E0%B8%A3%E0%B8%B4%E0%B8%A2%E0%B8%98%E0%B8%A3%E0%B8%A3%E0%B8%A1-TBJA-%E0%B8%9B%E0%B8%A3%E0%B8%B0%E0%B8%81%E0%B8%B2%E0%B8%A8%E0%B9%83%E0%B8%8A%E0%B9%89-6-%E0%B8%81.%E0%B8%84.55.pdf>. (last visited Oct. 1, 2015)

At present, similar attempts to regulate themselves among internet service providers are not found. There is no code of conduct on how to deal with hate speech or hateful content.

#### 4. Cases and Precedents

A few selected cases would help shed some light on the application of the abovementioned laws. Although not perfect, these cases demonstrate to readers of how the Thai government and the courts interpret the laws. They benchmark the breadth of their reading. Most cases are already over but some are still in trial.

One caveat should be mentioned is that in order to fully understand these cases, context matters. One needs to be aware of Thailand's political development as a background to these cases, in particular, what had happened before, to which political fraction the suspect belonged, or who was the government at time of the crime.

##### a. Prachatai Webboard Administrator<sup>132</sup>

Prachatai is an online newspaper that offers “breathing” space for non-conventional perspectives. It also provided a webboard service, which was popular among those who sought different views on politics. But, as the post-coup political situation became more suppressive, risk of lawsuit became significantly higher. Prachatai was under the government's surveillance, so it decided to close its webboard service in 2010. But, the government had already found messages on the webboard service that violated the lese majeste law. Prachatai also violated section 14(3) of the Computer Crime Act. Chiranuch Premchaiporn, the director and administrator of the webboard, was charged with section 15 of the Computer Crime Act. Her offence was that, as a service provider, she failed to exercise due care in the removal of unlawful content.

Chiranuch admitted that all ten postings had been displayed on the Prachatai webboard for twenty days. But, she plead not guilty. Most importantly, Chiranuch claimed that an administrator was only a service provider and that she could have never anticipated the post in advance of its posting, nor could she read and filter all posts on the webboard. Furthermore, Prachatai, under her directorship, always cooperated with the government to remove illegal posts per the police and ICT's request. The webboard was also designed with a volunteering system. The board provided a function for webboard members to delete any posts by themselves.

The only question central to the case was intermediary liability of webboard administrator. The Appeal Court debated about the cost of a service provider to monitor all online activities.<sup>133</sup> Chiranuch pointed out that, at the peak of the political conflict, there were 20,000-30,000 users and approximately 2,800 postings daily.<sup>134</sup> Such amount of traffic exceeded her ability to monitor. The Appeal Court rejected her

---

<sup>132</sup> จีรนุช เปรมชัยพร: ผอ.ประชาไท, iLaw, <http://freedom.ilaw.or.th/case/112>. (last visited Oct. 1, 2015)

<sup>133</sup> Id.

<sup>134</sup> Id.

claim.<sup>135</sup> If the amount of burden was beyond her personal capacity, Chiranuch had to employ more staffs to undertake such task. The court held that relying on the self-reporting function as designed in Prachatai webboard was insufficient. These reporters were lay users, who volunteered to help, but they were not subject to liability like the service provider was.

Despite the Appeal Court conceding that Chiranuch could not block the posts before they were shown to public, the court still held that it was her duty to take them down in due time.<sup>136</sup> Ultimately, the court reasoned that her inaction implied her consent to display such message. The Appeal Court did agree that the Computer Crime Act did not specify the length of time.<sup>137</sup> However, in the instant case, the twenty day period was sufficient to constitute her consent.<sup>138</sup> Although Chiranuch promptly complied with the police's request to remove lese majeste content, her action could not rescue her from criminal conviction.

The Appeal Court also cited her educational background in mass communication and the much revered status of the monarchy of Thailand as the contributive factor to constitute her liability. The Appeal Court then ordered pending eight months imprisonment.

This case is one of the earliest cases concerning free speech in Thailand. The accused was herself a well-known human rights advocate. Thus, it received international attention, as well as attention from internet users and other service providers.<sup>139</sup> It became the precedent to determine service providers' liability in later cases.<sup>140</sup> But it is not final yet. The Supreme Court is due to deliver its opinion at the end of 2015.<sup>141</sup>

#### b. Thai E-News Editor<sup>142</sup>

This case concerned Somsak Pakdeedej, an editor of Thai E-News website. Somsak was actually a *nom de plume*. He published an article written by Giles Ung-pakorn, a Thai scholar who fled Thailand to the UK after being charged with lese majeste.

---

<sup>135</sup> *Court of Appeal finds Prachatai Director guilty in lese majeste-related case*, Prachatai, <http://www.prachatai.com/english/node/3738>. (Dec. 29m 2015)

<sup>136</sup> Id.

<sup>137</sup> Id.

<sup>138</sup> จีรนุช เปรมชัยพร: ผอ.ประชาไท, iLaw, <http://freedom.ilaw.or.th/case/112>. (last visited Oct. 1, 2015)

<sup>139</sup> *Thailand: Freedom of the press*, Freedom House, <https://freedomhouse.org/report/freedom-press/2013/thailand>. (last visited Oct. 1, 2015)

<sup>140</sup> Annie Harrison, *Thailand Awaits Pivotal Verdict on Liability for Internet Intermediaries*, Electronic Frontier Foundation, Apr. 18, 2012, <https://www.eff.org/deeplinks/2012/04/thailand-awaits-pivotal-verdict-liability-internet-intermediaries>.

<sup>141</sup> *Supreme Court rules against Prachatai in Internet intermediary liability case*, Prachatai, <http://www.prachatai.com/english/node/5725>. (last visited Dec. 29, 2015)

<sup>142</sup> สมศักดิ์ ภัคดีเดช: เผยแพร่บทความ, iLaw, <http://freedom.ilaw.or.th/case/643>. (last visited Oct. 1, 2015)



Gildes' article was deemed by the 2014 Junta a violation of the lese majeste law. Soldiers apprehended Somsak quickly after the coup.<sup>143</sup> Somsak was court-martialed. His bail was denied, a normal treatment to lese majeste suspects.<sup>144</sup> He was also charged with section 14 of the Computer Crime Act for introducing illegal speech onto the internet.

Because the trial was confidential, a normal procedure for a lese majeste case, no one knows what the content in question was exactly. International observers were not allowed to witness the trial. Somsak confessed to the crime.<sup>145</sup> His nine-year sentence was reduced by half. Unlike Chiranuch in the previous case, Somsak was a principal in the crime, not an intermedium.

c. Voice of Thaksin Editor<sup>146</sup>

Somyod Phruksakasemsuk was an editor of Voice of Thaksin magazine. In 2010, the magazine published two articles written by a pseudonym of Chit Pollachan. Somyod was not arrested until a few days after he began to campaign for revocation of the lese majeste law. Thus, his arrest might have been politically motivated. The arrest was made under the administration of Abhisit Vejajiva, Thaksin's political opponent.<sup>147</sup> Somyod himself was wrongfully accused of involvement in sabotaging the Thai monarchy, an accusation that the military later admitted was untrue.<sup>148</sup>

Somyod plead not guilty.<sup>149</sup> He argued that articles were written in an ambiguous manner since they did not spell out names of any real persons.<sup>150</sup> Since the trial was confidential, details of the articles are poorly known. One article seemed to be an account recalling the transition from Thonburi dynasty of King Taksin to Chakri dynasty. The government argued that, by playing with two names, Thaksin and Taksin, this account tried to hint that the royal family had supported change in politics<sup>151</sup> and it thus defamed the monarchy. Another article was the play script

---

<sup>143</sup> Id.

<sup>144</sup> Id.

<sup>145</sup> Id.

<sup>146</sup> สมยศ บรรณานิติการนิเทศสาร *Voice of Taksin*, iLaw, <http://freedom.ilaw.or.th/case/61>. (last visited Oct. 1, 2015)

<sup>147</sup> *Thailand: Editor Convicted for Insulting Monarchy*, Human Rights Watch, <https://www.hrw.org/news/2013/01/23/thailand-editor-convicted-insulting-monarchy>. (last visited Dec. 29, 2015)

<sup>148</sup> สมยศ บรรณานิติการนิเทศสาร *Voice of Taksin*, iLaw, <http://freedom.ilaw.or.th/case/61>. (last visited Oct. 1, 2015)

<sup>149</sup> Id.

<sup>150</sup> Id.

<sup>151</sup> Id.

referring to the 1976 Massacre.<sup>152</sup> Somyod insisted that it depended on each individual reader's opinion.<sup>153</sup> Many might not find these articles offensive, but some might be able to link them to the King. Opinions diverged. Somyod's expert witnesses could not determine if it undoubtedly referred to, defamed or threatened the royal family, because Somyod could not be confidently certain that the writer was defaming the king. Somyod decided to publish articles to honor the writer, who was actually a former minister from Thaksin's party.

The court of the first instance agreed that Thai laws no longer require an editor to be jointly liable for any publication under his editorship.<sup>154</sup> But, Somyod intentionally published articles that he knew was defaming the monarchy.<sup>155</sup> Thus, he was a principal in violating lese majeste. The court of the first instance sentenced him to eleven years of imprisonment. The Appeal Court upheld the decision.<sup>156</sup> At the moment, the case is in the Supreme Court.

Somyod's case was another that drew international attention. Human rights bodies closely observed it and the Ministry of Foreign Affairs had to release a statement updating the public on the case.<sup>157</sup> The court's level of cruel treatment of Somyod was notable. His bail was denied more than sixteen times although his relatives set it as high as one million bahts.<sup>158</sup> The court justified the denial of his bail based on Somyod's displayed tendency to flee.<sup>159</sup> Somyod claimed that the denial of his bail hindered him from effectively defending himself.<sup>160</sup> Despite these attentions, the court was firm on its ruling.

#### d. ASTV Webmaster<sup>161</sup>

---

<sup>152</sup> Id.

<sup>153</sup> Id.

<sup>154</sup> Id.

<sup>155</sup> Id.

<sup>156</sup> Id.

<sup>157</sup> Amnesty International, *Thailand: Release activist imprisoned for allegedly insulting the monarchy*, (2014), <https://www.amnesty.org/en/latest/news/2014/09/thailand-release-activist-imprisoned-allegedly-insulting-monarchy/>; Ministry of Foreign Affairs of Kingdom of Thailand, *The Thai Criminal Court's Ruling on Mr. Somyot Prueksakasemsuk*, (2014), <http://www.mfa.go.th/main/en/media-center/14/31975-The-Thai-Criminal-Court>.

<sup>158</sup> ลูกชาย “สมยศ” หอบเงินสด 1 ล้าน ยื่นประกันตัวพ่อคดีหมิ่นเบื้องสูง, Manager Online Newspaper, <http://www.manager.co.th/Crime/ViewNews.aspx?NewsID=9570000133503>. (last visited Oct. 1, 2015)

<sup>159</sup> สมยศ บรรณาธิการนิตยสาร *Voice of Taksin*, iLaw, <http://freedom.ilaw.or.th/case/61>. (last visited Oct. 1, 2015)

<sup>160</sup> Human Rights Watch, *Thailand: Courts Denying Bail in Lese Majeste Cases*, Human Rights Watch, Feb. 24, 2012, <http://www.hrw.org/news/2012/02/24/thailand-courts-denying-bail-lese-majeste-cases>.

<sup>161</sup> นิรันดร์: เผยแพร่เอกสารลับเท็จ, iLaw, <http://freedom.ilaw.or.th/case/656>. (last visited Oct. 1, 2015) ; *ASTV webmaster arrest warrant approved*, Bangkok Post,

ASTV is accused of being an online newspaper that is a mouthpiece of anti-Thaksin movement.<sup>162</sup> The owner of ASTV is Somdhi Limthongkul, the leader of the People's Alliance of Democracy.<sup>163</sup> Somdhi is well connected with the military and elite Bangkok establishment. Nirun Yaowapa was a webmaster when he uploaded the Palace's press release on the King's health condition in early 2015.<sup>164</sup> Later, on the same day, it was proven that the press release was false.<sup>165</sup> The press release was removed and he was dismissed from his position. Nirun then reported himself to the police who charged him with lese majeste and a computer crime. Because the crime happened during the Junta's regime, he was court-martialed.

Nirun got released on bail.<sup>166</sup> The Military Court reasoned that he showed no tendency to flee since he voluntarily reported himself in.<sup>167</sup> Nirun plead guilty.<sup>168</sup> The Military Court then sentenced him to two years and six months of imprisonment.<sup>169</sup> But, the sentence pended for three years.<sup>170</sup> This decision is significantly lighter than other lese majeste case. More importantly, his sentence was only pending, the first of its kind. The military court's leniency was unusual.<sup>171</sup>

e. Somsak Boonngamanong<sup>172</sup>

Sombat Boonngamanong is a high-profile social activist.<sup>173</sup> He has long been known as a critic of military interventions in Thai politics. When the NCPO seized power,

---

<http://www.bangkokpost.com/news/security/468568/webmaster-sought-for-lese-majeste>. (last visited Oct. 1, 2015)

<sup>162</sup> Glen Lewis, *Thai Media and the "Thaksin Ork pai" (get out!) movement*, in *Political Regimes and the Media in Asia* 137 (Krishna Sen and Terrence Lee eds., 2008).

<sup>163</sup> Chris Baker and Pasuk Phongpaichit, *A History of Thailand* 269 (1<sup>st</sup> ed. 2009).

<sup>164</sup> *Police Summon News Editor For Publishing Fake Royal Statement*, Khaosod English, <http://www.khaosodenglish.com/detail.php?newsid=1422963456&typecate=06&section=>. (last visited Dec. 29, 2015)

<sup>165</sup> Id.

<sup>166</sup> *Military court grants bail to ASTV-Manager editor facing lèse majesté*, Prachatai, <http://www.prachatai.com/english/node/4777>. (last visited Dec. 29, 2015)

<sup>167</sup> Id.

<sup>168</sup> นิรันดร์: เพยแพร่แถลงการณ์เท็จ, iLaw, <http://freedom.ilaw.or.th/case/656>. (last visited Oct. 1, 2015)

<sup>169</sup> Id.

<sup>170</sup> Id.

<sup>171</sup> *Court suspends sentence in Manager lese majeste case*, Bangkok Post, <http://www.bangkokpost.com/news/crime/714880/court-suspends-sentence-in-manager-lese-majeste-case>. (last visited Sep. 20, 2015)

<sup>172</sup> สมบัติ บุญงามอนงค์ : 116, iLaw, <http://freedom.ilaw.or.th/case/604>. (last visited Oct. 1, 2015)

<sup>173</sup> Id.

General Prayuth prohibited public gathering or resistance.<sup>174</sup> Sombat defied that order.<sup>175</sup> He used his social media accounts to express his criticism to the army's decision and organize flash mobs to show people's resistance.<sup>176</sup> As soon he was on top of the most wanted list, the Junta summoned him, but he refused to show up.<sup>177</sup> On his account, he dared that the Junta had to forcefully arrest him. Later, the Junta charged him with two offences.<sup>178</sup> The Junta first alleged that Sombat committed treason by expressing his wish to the public to encourage unrest or cause disturbance to the country.<sup>179</sup> Secondly, the Junta alleged that he committed his crime on his social media account, which imported false or harmful information into the system, hence a violation of the Computer Crime Act.<sup>180</sup>

According to the NCPO order, his case fell within the jurisdiction of the military court.<sup>181</sup> Sombat challenged the constitutionality of that order, but the Military Court refused to refer his case for the Constitutional Court's review.<sup>182</sup>

His case is still in trial, but he was released on bail, which is unusual for a case of this nature.<sup>183</sup>

#### f. The Lanna Secession<sup>184</sup>

In February 2014, three grassroot redshirt activists and local farmers hung a sign saying "This country cannot offer justice. We support Lanna's Secession from

<sup>174</sup> *After coup, Thai army summons Shinawatra family*, Associated Press, <http://www.dailymail.co.uk/wires/ap/article-2635947/After-coup-Thai-army-summons-Shinawatra-family.html>. (last visited Dec. 29, 2015)

<sup>175</sup> *Thai police arrest 'taunting' anti-coup activist*, BBC, <http://www.bbc.co.uk/news/world-asia-27727510>. (last visited Dec. 29, 2015)

<sup>176</sup> Id.

<sup>177</sup> Id.

<sup>178</sup> *Thai anti-coup leader Sombat Boonngamanong released on bail*, ABC News, <http://www.abc.net.au/news/2014-07-02/thai-anti-coup-leader-released-on-bail/5567726>. (last visited Dec. 29, 2015)

<sup>179</sup> สมบัติ บุญงามอนงค์ : 116, iLaw, <http://freedom.ilaw.or.th/case/604>. (last visited Oct. 1, 2015)

<sup>180</sup> Id.

<sup>181</sup> <ประกาศคณะรักษาความสงบแห่งชาติ ฉบับที่ ๓๗/๒๕๕๗ เรื่อง  
ความคิดที่อยู่ในอำนาจพิจารณาพิพากษาคดีของศาลทหาร> [<The National Peace and Order Council (NCPO) order 37/2557>] B.E. 2557.

<sup>182</sup> ศาลทหารไม่สั่งให้ศาลรัฐธรรมนูญตีความเรื่องเขตอำนาจเหนือคดีพลเรือน, iLaw, <http://freedom.ilaw.or.th/blog/MilitaryCourtJurisdiction>. (last visited Dec. 28, 2015)

<sup>183</sup> สมบัติ บุญงามอนงค์ : 116, iLaw, <http://freedom.ilaw.or.th/case/604>. (last visited Oct. 1, 2015)

<sup>184</sup> ออด: ดิฉันย้ายแยกประเทศ, iLaw, <http://freedom.ilaw.or.th/th/case/638>. (last visited Oct. 1, 2015)

Thailand.”<sup>185</sup> Lanna was the ancient Northern Kingdom that was annexed to Siam more than a century ago.<sup>186</sup> In recent conflicts, when the Northerners complained of injustice and disparity with Bangkok, they would often mention the idea of secession.<sup>187</sup> Evidences of any real attempt to secede were absent.<sup>188</sup>

These three activists were court-martialed. They explained that their action was to protest the court’s double standard in treating different political fractions.<sup>189</sup> The military court disagreed. The court concluded that such double standard was simply the suspects’ imagination.<sup>190</sup> However, as the three suspects confessed, their four year imprisonment sentences were reduced by one-quarter to three years each.<sup>191</sup> These sentences were suspended for five years.<sup>192</sup>

g. Yingluck Shinawatra

Yingluck’s defamation case is a series of three related cases. The then Prime Minister Yingluck went to discuss a business plan with five businessmen at one luxurious hotel in Bangkok.<sup>193</sup> The trip was private.<sup>194</sup> But, Chawanon, the Democrat party’s spokesperson, told the press later that Yingluck might visit the hotel for a secret purpose that might jeopardize the public interest.<sup>195</sup> Chawanon’s assistant, Mallika Boonmeetrakul, also raised a question publicly of whether Yingluck’s behavior was ethical or led to a conflict of interest.<sup>196</sup>

---

<sup>185</sup> Id.

<sup>186</sup> Id.

<sup>187</sup> Id.

<sup>188</sup> Id.

<sup>189</sup> Id.

<sup>190</sup> Id.

<sup>191</sup> Id.

<sup>192</sup> Id.

<sup>193</sup> *PM urged to clarify hotel meet*, Bangkok Post, <http://www.bangkokpost.com/archive/pm-urged-to-clarify-hotel-meet/280928>. (last visited Dec. 28, 2015)

<sup>194</sup> Id.

<sup>195</sup> *Democrats call on Yingluck to explain Four Seasons meeting*, The Nation, <http://www.nationmultimedia.com/politics/Democrats-call-on-Yingluck-to-explain-Four-Seasons-30184494.html>. (last visited Dec. 28, 2015)

<sup>196</sup> *Criminal Court acquits Malika of defaming Yingluck over hotel meeting*, Thai PBS, <http://englishnews.thaipbs.or.th/criminal-court-acquits-malika-of-defaming-yingluck-over-hotel-meeting>. (last visited Dec. 28, 2015)

Later, Chawanon and two other Democrat members held their usual TV program, which was aired on the Democrat's Bluesky Channel.<sup>197</sup> They discussed if Yingluck's visit was actually private.<sup>198</sup> They suggested the Prime Minister was having an affair.<sup>199</sup> Sexual innuendo was incinuated. Yingluck filed defamation charges against Chawanon, Mallika, and two other Democrat members.<sup>200</sup>

The court dismissed the case of Chawanon as a spokesperson of the Democrats and Mallika.<sup>201</sup> The court agreed that Yingluck's behavior might lead to suspicion, but since she was a public figure, her opposition could question and criticize her in good faith.<sup>202</sup> The court found that the speech on the TV program defamed Yingluck without just cause.<sup>203</sup> The court ordered a one-year imprisonment sentence, with two additional years pending.<sup>204</sup> The three Democrat members also had to advertise their apology to the Prime Minister in public for seven days.<sup>205</sup> The three appealed the ruling and the case is still in trial.<sup>206</sup>

#### h. Phuket Wan News Website<sup>207</sup>

Phuket Wan is a local news website in the southern island of Phuket.<sup>208</sup> In recent years, as the number of Rohingya migrants began to rise, Phuket Wan started

---

<sup>197</sup> Three Dems indicted for defaming PM, Bangkok Post, <http://www.bangkokpost.com/print/400311/>. (last visited Dec. 28, 2015)

<sup>198</sup> Id.

<sup>199</sup> Id.

<sup>200</sup> *PM's defamation case against 3 Democrats to go ahead*, The Nation, <http://www.nationmultimedia.com/politics/PMs-defamation-case-against-3-Democrats-to-go-ahead-30207706.html>. (last visited Dec. 28, 2015)

<sup>201</sup> *Criminal Court acquits Chavanond of defaming Yingluck on Four Seasons business meeting*, ThaiPBS, <http://englishnews.thaipbs.or.th/criminal-court-acquits-chavanond-of-defaming-yingluck-on-four-seasons-business-meeting> (last visited Sep. 20, 2015); *Court drops Yingluck's private meeting defamation suit*, Bangkok Post, <http://www.bangkokpost.com/news/politics/542751/court-drops-yingluck-private-meeting-defamation-suit>. (last visited Sep. 20, 2015)

<sup>202</sup> *Criminal Court acquits Malika of defaming Yingluck over hotel meeting*, Thai PBS, <http://englishnews.thaipbs.or.th/criminal-court-acquits-malika-of-defaming-yingluck-over-hotel-meeting>. (last visited Dec. 28, 2015)

<sup>203</sup> *3 ex-MPs get suspended jail term for defaming Yingluck*, Bangkok Post, <http://www.bangkokpost.com/news/politics/671220/3-ex-mps-get-suspended-jail-term-for-defaming-yingluck>. (last visited Sep. 29, 2015)

<sup>204</sup> Id.

<sup>205</sup> Id.

<sup>206</sup> Id.

<sup>207</sup> กองทัพเรือ vs สำนักข่าวภูเก็ตหวน, iLaw, <http://freedom.ilaw.or.th/case/554> (last visited Oct. 1, 2015) ; *Thai Phuketwan journalists acquitted of defaming navy*, BBC, <http://www.bbc.co.uk/news/world-asia-34111886>. (last visited Oct. 1, 2015)

investigating the exploitation of these migrants. In June of 2013, Phuket Wan published a report on the Rohingya situation.<sup>209</sup> In that report, a reporter referred to Reuters' report and concluded that "The Thai naval forces usually earn about 2,000 baht per Rohingya for spotting a boat or turning a blind eye, said the smuggler, who works in the southern Thai region of Phang Nga (north of Phuket) and deals directly with the navy and police."<sup>210</sup> The Reuters' series of reports won the 2014 Pulitzer Prize later.<sup>211</sup> Three days after publishing the report, the Royal Thai Navy denied involvement in Rohingya trafficking.<sup>212</sup> Phuket Wan published the Navy's statement too.<sup>213</sup> However, the Royal Thai Navy decided to charge the editor and a reporter with defamation and computer crime.<sup>214</sup> Reuter's journalists, however, were never charged.

Chutima, the reporter, identified herself as a writer of this article.<sup>215</sup> But, she claimed that she had checked the validity of all sources of information.<sup>216</sup> Moreover, she argued that did not introduce this article to the website, so she should not be charged with a computer crime.<sup>217</sup> Alan Morison, the editor, maintained that he acted in good faith and provided an opportunity to all parties to defend themselves.<sup>218</sup>

The case of Phuket Wan received international attention. There was a protest before the Thai embassy in Australia, Alan's motherland.<sup>219</sup> The Office of High Commissioner for Human Rights released a statement calling for the Thai government to drop the case.<sup>220</sup> It expressed concern on the abuse of defamation as a means to

---

208 กองทัพเรือ vs สำนักข่าวภูเก็ตหวน, iLaw, <http://freedom.ilaw.or.th/case/554> (last visited Oct. 1, 2015)

209 Alan Morison and Chutima Sidasathian, *Thai Military Profiting from Trade in Boatpeople, Says Special Report*, Phuket Wan, Jul. 17, 2013, <http://phuketwan.com/tourism/thai-military-profiting-trade-boatpeople-says-special-report-18454/>.

210 Id.

211 *Reuters wins Pulitzer Prize for International reporting*, Thomson Reuters, Apr. 15, 2014, <http://thomsonreuters.com/en/articles/2014/reuters-receives-2014-pulitzer-prize.html>.

212 กองทัพเรือ vs สำนักข่าวภูเก็ตหวน, iLaw, <http://freedom.ilaw.or.th/case/554> (last visited Oct. 1, 2015)

213 Id.

214 Id.

215 Id.

216 Id.

217 Id.

218 Id.

219 Id.

220 The Office of the High Commissioner for Human Rights, United Nations Human Rights Office urges Thailand to drop charges against Phuketwan Journalists, (2014), <http://bangkok.ohchr.org/files/ROB%20Press%20Statement%20140715.pdf>.

curb press freedom by sending a chilling effect to other reporters.<sup>221</sup> SEAPA (Southeast Asia Press Alliance) expressed similar concern.<sup>222</sup> The case was monitored closely by the International Commission of Jurists.<sup>223</sup> Alan and Chutima also petitioned to the National Human Rights Commission, because they saw this lawsuit as an attempt to silence press.<sup>224</sup> However, there was no investigation from the NHRC.<sup>225</sup>

After two years, the court of the first instance dismissed the case in September of 2015.<sup>226</sup> The Court touched upon three questions. First, does the Royal Thai Navy have standing?<sup>227</sup> The report mentioned the Thai naval forces, which are broader than the Royal Thai Navy.<sup>228</sup> However, the layperson might still understand that the word “naval forces” to refer to the Royal Thai Navy and it thus creates standing for recourse.<sup>229</sup> On this point, it seemed that the Court departed from its precedent that defamation must be specific to persons.

The court went on to determine whether the report constituted defamation. The piece in dispute cited a reliable news agency, so a reporter and an editor were acting in good faith.<sup>230</sup> Therefore, this report is not defaming the Navy.<sup>231</sup> Since the act was not defamation, no longer shall the court decide on the computer crime offence.<sup>232</sup>

Most importantly, in its dicta, the court questioned if the computer crime act had originally been intended to accompany the use of defamation.<sup>233</sup> The two laws have

---

<sup>221</sup> Sophie Brown and Kocha Olarn, *U.N. condemns Thai court case against journalists over people trafficking report*, CNN, Apr. 14, 2014, <http://edition.cnn.com/2014/04/14/world/asia/thailand-phuketwan-media-defamation-court/>.

<sup>222</sup> Southeast Asian Press Alliance, *[Thailand] Authorities should thank, not sue Phuketwan journalists*, Southeast Asian Press Alliance, Jul. 14, 2015, <http://www.seapa.org/?p=11177>.

<sup>223</sup> Kingsley Abbott, *Thailand: end prosecution of Phuketwan journalists and repeal criminal defamation laws*, Int’l Comm’n Jur., Sep. 1, 2015, <http://www.icj.org/thailand-end-prosecution-of-phuketwan-journalists-and-repeal-criminal-defamation-laws/>.

<sup>224</sup> กองทัพเรือ vs สำนักข่าวภูเก็ตหวน, iLaw, <http://freedom.ilaw.or.th/case/554> (last visited Oct. 1, 2015)

<sup>225</sup> Id.

<sup>226</sup> *Australian, Thai journalists acquitted of defaming Thai navy*, CNN, <http://edition.cnn.com/2015/09/01/asia/thailand-phuketwan-defamation-trial/>. (last visited Oct. 1, 2015)

<sup>227</sup> กองทัพเรือ vs สำนักข่าวภูเก็ตหวน, iLaw, <http://freedom.ilaw.or.th/case/554> (last visited Oct. 1, 2015)

<sup>228</sup> Id.

<sup>229</sup> Id.

<sup>230</sup> Id.

<sup>231</sup> Id.

<sup>232</sup> Id.

<sup>233</sup> Id.



totally different purposes and nature.<sup>234</sup> The Computer Crime Act contains much more severe penalties, so strong that the government is unable to drop the charge at will.<sup>235</sup> Therefore, the authority should drop the practice of filing two offences together.<sup>236</sup> This is the latest and most significant development in the use of Computer Crime Act. Other defamation cases would definitely benefit from the new reading of the law.

i. Peace TV<sup>237</sup>

Peace TV is different from all above cases in that it operates under the Public Broadcasting Act, which is not included here.<sup>238</sup> It still presents the use of the Junta's order.

Peace TV is a TV station whose owners are supporters of Thaksin.<sup>239</sup> It was banned temporarily after the coup.<sup>240</sup> When it began operation again, its moderator made a comment that “if the government does not view those with opposing opinions their enemy, the atmosphere would be friendlier. Having said this, do not use this statement as a ground to close the channel again.”<sup>241</sup> The moderator also warned that a bombing in Samui in the South might be caused by the authority and local politicians to the disadvantage of the Redshirts.<sup>242</sup>

These statements were in contradiction to the NCPO Order 97/2557, which prohibited “seditious” speech.<sup>243</sup> Peace TV failed to cooperate with the NCPO to build social unity.<sup>244</sup> The National Broadcasting and Telecommunication Commission then

---

<sup>234</sup> Id.

<sup>235</sup> พ.ร.บ.คอมพิวเตอร์ฯ มาตรา 14(1) ยานแรงผิดขนานสำหรับการหมิ่นประมาทออนไลน์, iLaw, <http://freedom.ilaw.or.th/blog/CCA1401>. (last visited Oct. 1, 2015)

<sup>236</sup> Id.

<sup>237</sup> Committee to Protect Journalists, *Authorities shut TV news station in Thailand*, Committee to Protect Journalists, Apr. 29, 2015, <https://cpj.org/2015/04/authorities-shut-tv-news-station-in-thailand.php>.

<sup>238</sup> <พระราชบัญญัติการประกอบกิจการกระจายเสียงและกิจการโทรทัศน์> [<Public Broadcasting Act>] B.E. 2551.

<sup>239</sup> กสทช. สั่งระงับการออกอากาศทีวีสีแดงชั่วคราว, Prachatai, <http://freedom.ilaw.or.th/case/665>. (last visited Dec. 28, 2015)

<sup>240</sup> Thai 'Red Shirt' leader rails against TV ban threat, AFP, <https://www.yahoo.com/news/thai-red-shirt-leader-rails-against-tv-ban-062205541.html>. (last visited Dec. 29, 2015)

<sup>241</sup> กสทช. สั่งระงับการออกอากาศทีวีสีแดงชั่วคราว, Prachatai, <http://freedom.ilaw.or.th/case/665>. (last visited Dec. 28, 2015)

<sup>242</sup> Id.

<sup>243</sup> <ประกาศคณะรักษาความสงบแห่งชาติ ฉบับที่ ๙๗/๒๕๕๗ เรื่อง ขอความร่วมมือจากสื่อสังคมออนไลน์> <มาตรา ๒> [<The National Peace and Order Council (NCPO) order 97/2557> <§ 2>] B.E. 2557.

<sup>244</sup> Thai 'Red Shirt' leader rails against TV ban threat, AFP, <https://www.yahoo.com/news/thai-red-shirt-leader-rails-against-tv-ban-062205541.html>. (last visited Dec. 29, 2015)

exercised its power under the National Broadcasting Act to revoke Peace TV license.<sup>245</sup>

Peace TV appealed the NBTC's revocation to the administrative court.<sup>246</sup> It claimed that the NBTC did not follow proper procedures as set in its regulation.<sup>247</sup> The NBTC argued that its decision to revoke a license was based on the Memorandum of Understanding between Peace TV and the NBTC, not a statute.<sup>248</sup> The Central Administrative Court disagreed with the NBTC. Because the agency did not follow procedural safeguards, the order was likely unlawful.<sup>249</sup> Also the impact of this revocation would be tremendous and irreparable, because it led to the dismissal of hundreds of Peace TV's employees.<sup>250</sup> The Central Administrative Court then awarded an injunction in favor of Peace TV.<sup>251</sup> The case is still ongoing.

## 5. Conclusion

Hate speech is commonly used in three areas. First, it has long been used to attack political enemies. This technique is popular; even the state has launched or endorsed the use of it at times. Hate speech effectively delegitimizes and dehumanizes people of different political ideals. Evidence warns that the consequence of continued hate speech could be alarming. Besides irreconcilable social division, hate speech in politics has led to violence of all levels, i.e. an organized mass murder, personal assaults, and degrees of intimidation. It also strained Thailand's ties with neighboring countries.

Another use of hate speech is amid Thailand's socio-economic struggle. Economic and social disparity is high in Thailand and grassroots attempts to ascend these divisions had worried the old establishment, who has long controlled Thailand's resources. Hate speech has been unleashed to attack the grassroots stereotype. As it goes more extreme, users of hate speech have started questioning if all Thais should really be made equal. Hate speech is endangering the very foundation of democracy and equality.

The other use of hate speech is to attack non-Buddhist community. For those religious minorities, the problem is as much about their religions as their ethnicities. The state endorses

---

<sup>245</sup> Id.

<sup>246</sup> ศาลปกครองสั่งคุ้มครองชั่วคราว "พีชทีวี" เหตุ กสทช. เพิกถอนใบอนุญาตโดยไม่ได้ไต่สวน, Prachachat, [http://www.prachachat.net/news\\_detail.php?newsid=1437037058](http://www.prachachat.net/news_detail.php?newsid=1437037058). (last visited Oct. 1, 2015)

<sup>247</sup> กสทช. สั่งระงับการออกอากาศทีวีสีแดงชั่วคราว, Prachatai, <http://freedom.ilaw.or.th/case/665>. (last visited Dec. 28, 2015)

<sup>248</sup> Id.

<sup>249</sup> Id.

<sup>250</sup> Id.

<sup>251</sup> *Admin court allows Peace TV back on air*, Bangkok Post, <http://www.bangkokpost.com/news/general/625380/admin-court-allows-peace-tv-back-on-air> (last visited Oct. 1, 2015); ศาลปกครองสั่งคุ้มครองชั่วคราว "พีชทีวี" เหตุ กสทช. เพิกถอนใบอนุญาตโดยไม่ได้ไต่สวน, Prachachat, [http://www.prachachat.net/news\\_detail.php?newsid=1437037058](http://www.prachachat.net/news_detail.php?newsid=1437037058). (last visited Oct. 1, 2015)

Buddhism and violent incidents fueled by intolerance, which is expressed through hateful speech. The problem is particularly acute if the target is the Muslim aliens.

Thus, it is obvious that the hate speech problem is serious. It threatens social unity, civilians' lives, foreign relations, as well as democracy. But, the state's response is slow. Even when the political leader announced that he would tackle hate speech, it is unclear, as the abovementioned cases have shown, that the government really understands the situation and the public's concern. Indeed, the state enjoys the use of it for personal short term benefit, without caring about the long term consequence.

Constitutional laws traditionally provide robust protection against the state's usurpation of free speech. But, it is typical that the law also described various grounds to limit such freedom. These grounds were written in quite a broad language. Moreover, the recent undemocratic happening reminds us that the citizen's rights and liberties are more vulnerable than ever.

Legislation regarding hate speech is only piece-meal and incomplete. Instigation of crime fails to link hate speech to the crime which is its result. Thus, hate speech is partially regulated by different parliamentary statutes and equivalents. The Penal Code is the primary source of protection, together with a few others. These laws generally aim to protect either important public institutions, personal dignity or public order.

Important public institutions under the protection include the monarchy, both Thai and foreign, Sangha Raja who is the supreme leader of Thai Buddhism, national security, and the democratic government. At present, an application of these laws is being expanded and that leads to concern that the state is unlawfully encroaching upon freedom of speech. The most notable examples are those cases regarding lese majeste. Other examples of this encroachment on freedom of speech are treason cases, both under the Penal Code's treason offence and the NCPO's orders.

Defamation is another essential tool to curb hate speech, but its weakness is that the law could only protect persons who could prove their standing. Furthermore, there is exemption from liability. This exemption is subject to the court's interpretation. Unfortunately, in times of political crises, when the society is so divisive, such discretion might create a proclivity toward bias on certain sides of the conflict. The cases seem to suggest so.

Violations of public order are usually petit offences, such as circulating rumors or causing panic. The trivial punishments for petit offenses are insufficient to deter the crime. Moreover, rarely they are invoked.

More specifically to intermediary liability, internet service providers are subject to two statutes. They must acquire a business license from the NTC under the National Telecommunication Act. This license can be revoked if a service provider fails to comply with the NTC's or the government's regulations and recommendations. The Computer Crime Act is another statute that governs service providers' liability. The state may ask a service provider to take down the message in question, but it may also persecute the owner of that message. In the latter case, a platform provider could not escape its responsibility.

As Prachatai case shows that the Thai legal system does not accept the concept of free passage. The ASTV case confirms that a service provider might not always be held liable.

But, a service provider's inaction could constitute implied consent and lead to conviction as an accomplice. The court was tough when it disregarded the webboard administrator's hardship in monitoring online speech. Since there are only two cases that directly deal with this topic, and each one concerns a party from different political fraction, it is hard to safely draw any clear conclusion. Perhaps, the outcome is determined more by the side to which the speaker belongs than the text of the law.

However, in general, an attempt to control hate speech is too much and too little at the same time. The government is too active in its attempts to limit speech that harms certain public institutions or its regime. As a result, the government significantly suppresses freedom of speech. On the other hand, the government pays too little attention to hate speech that incites hatred and violence against its dissenters or marginalized groups.

Regulating hate speech is an urgent task for Thailand. It will not be easy. The tension is obvious. Controlling hate speech is a preemptive measure to stop Thailand from sliding into civil war or anarchy. Let us not wait till words turn into action. But that enthusiasm to curb hate speech could easily transform into suppression of dissenting ideas, especially if the state is discriminating against certain groups. A delicate balance between freedom and social peace must be made.