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# UNSHACKLING EXPRESSION:

A STUDY ON LAWS CRIMINALISING EXPRESSION ONLINE IN ASIA



ASSOCIATION FOR PROGRESSIVE COMMUNICATIONS (APC)

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# Unshackling expression: A study on laws criminalising expression online in Asia

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# The criminalisation of freedom of expression online in Thailand

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Freedom of Expression Documentation Centre, iLaw  
<https://freedom.ilaw.or.th/en>

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## Introduction: Background on the political situation in Thailand

Thailand is a sovereign country ruled by democracy with the King as the head of state. However, after a revolution against the absolute monarchy in 1932, Thailand has had at least 13 military coups with 11 unsuccessful rebellions and 20 constitutions. The time period under military governments is longer than that of elected governments.

The 1997 constitution created a new form of democratic government that led to the rise of a successful political party led by Thaksin Shinawatra, a millionaire businessman. The Thaksin administration and policies became popular among poor people in the countryside along with many corruption allegations. This phenomenon did not satisfy the traditional institutions such as the military, judiciary, bureaucrats and middle class society who cooperated to fight against the new emerging power, that of business politicians. The anti-Thaksin movement gathered with yellow as a campaign colour, as it is the colour of King Rama IX, while the pro-Thaksin movement adopted the colour red, as it is a symbol of the common people. The political conflict arose around 2005 with the “yellow shirt” demonstrations against Thaksin which led to a military coup on 19 September 2006. The “red shirt” movement fighting against the invisible power outside the constitution emerged in response.

Thaksin’s younger sister, Yingluck Shinawatra, was elected as prime minister after the junta-drafted 2007 constitution was enacted. But there are many movements and accusations against her. The big movement, which consisted of conservative groups, professional elites and some NGOs that opposed the political influence of the Shinawatra clan, and is called the People’s Democratic Reform Committee (PDRC), shut down the country for months in late 2013. The PDRC rose after Yingluck’s

government tried to pass a general amnesty (for her exiled brother), and after high-level corruption in a failed rice-subsidy scheme was revealed. Yingluck ordered the dissolution of the parliament and called for a new election, contradictory to the demand from protestors who were opposed to the election and called for the creation of a new ruling system by people’s assembly. This led to a deadlock and a military coup on 22 May 2014 led by General Prayuth Chan-o-cha in the name of the National Council for Peace and Order (NCPO).

With the justification of resolving the political conflict in society, the NCPO proceeded to impose martial law on 20 May 2014 and repressed individual liberties and freedoms using political and legal claims. In part, they achieved this through the speedy and forced promulgation of an interim constitution on 22 July 2014.

The absolute power of the NCPO is enshrined and entrenched in Sections 44, 47 and 48 of the interim constitution. Section 44 confers absolute power to the head of the NCPO to issue any executive orders and announcements deemed necessary for “the benefit of reform in any field and to strengthen public unity and harmony, or for the prevention, disruption or suppression of any act which undermines public peace and order or national security, the monarchy, national economics or administration of state affairs.” This enables General Prayuth, as the head of the NCPO, to override any checks and balances from the parliament and judiciary. Section 47 states that all executive orders and announcements issued by the junta are “lawful, constitutional, and final.” Section 48 grants immunity from prosecution to the members of the NCPO and all other individuals acting under the orders of the NCPO with regard to the coup, thus giving full discretion to the NCPO to govern without judicial oversight.

A considerable part of the NCPO’s strategy to maintain its hold on power is the use of the existing laws (Section 112 and 116 of the Penal Code) and enacting new laws to enhance military power in judicial process (Head of NCPO Announcement

No. 7/2014 and Order No. 3/2015), and also other laws to repress opponents to the establishment (the Public Assembly Act of 2015, the Computer Crimes Act, and the Referendum Act). The NCPO has summoned more than 1,300 people to report and forced them to be under an “attitude adjustment” programme. It has arrested at least 500 people on political grounds, and has also established jurisdiction of the military court over civilian cases under “national security” offences or charges against people who do not kneel before the NCPO.

As this report will show, the prosecution and conviction rates under existing criminal and civil procedure laws have increased dramatically. Arbitrary arrests and *incommunicado* detentions under the NCPO have become commonplace.

Indeed, the NCPO uses repression as a central strategy to enact and enforce its policies. This was clearly seen in the use of the Referendum Act in the August 2016 constitutional referendum. The Act, in effect, criminalised any form of campaigning against the junta-written constitution. Within this repressive environment, the new constitution entrenches the role of the military in the future politics of Thailand, with the Senate being fully appointed by the NCPO, a new electoral system that disadvantages large, established parties being instituted, and non-party members eligible to become the prime minister. In addition, Section 44 has also been used at least 160 times by General Prayuth to push through a raft of administrative and economic reforms. The NCPO-appointed National Reform Committee is also in the process of drafting a 20-year National Strategy Plan, which is a series of long-term policies that future elected governments will be legally forced to adhere to.

This report will focus on the legal means that the NCPO uses to entrench itself politically and repress dissent. Specifically, it will examine the use of provisions in the criminal code and civil procedure, executive orders and announcements, and laws approved by the rubber-stamp National Legislative Assembly.

### **Lèse majesté: Section 112 of the Penal Code**

The lèse majesté law in Thailand is located in Section 112 of the Thai Penal Code, and is classed under offences against the monarchy. Section 112 states: “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.”

Due to the fact that Thailand has a long-lasting history of absolute monarchy, the people’s beliefs

and national culture are very much based on the monarchy institution. This law became problematic during the reign of King Bhumibol Adulyadej, King Rama IX of the Chakri dynasty, who was in the Guinness Book of World Records as the longest reigning monarch. Before he passed away on 13 October 2016, King Rama IX had carried out a lot of royal projects for social benefit. During the military regimes in the 1950s to 1970s, the new ideology was promoted, the monarchy was established as the heart of the nation, and the penalty for lèse majesté offences was increased. The mainstream ideology among the Thai people considered the King as god and as a symbol of goodness. Thai constitutions usually state that the King shall be enthroned in a position of revered worship and shall not be violated. No person shall expose the King to any sort of accusation or action.

The lèse majesté law and its enforcement have become the most sensitive and controversial issue in Thai political conflict for the past 10 years. Political opponents have accused the other side of being disloyal to the monarchy and thus guilty of lèse majesté. This accusation is the most severe in Thai society. People who are accused of lèse majesté can be perceived by the society as wicked people and also a threat to national harmony.

During the crackdown on red shirt protests in 2010 that led to nearly a hundred deaths, the government accused protesters of being anti-monarchy. Soon after the crackdown a number of people were arrested under the charge of lèse majesté for expressing their views on the political conflict. The demand for reforming the lèse majesté law was also rising during that time. However, even the elected government led by Yingluck Shinawatra did not consider the proposal from the pro-democracy wing to amend the law.

From 23 May 2014 to 17 May 2017, under the NCPO regime, at least 90 people were charged with lèse majesté for peacefully expressing views on the King and other royal family members.<sup>1</sup> Since the political movement was restricted in other media, most of the cases concerned online expression, especially on Facebook.

### *The problems of the enforcement of Section 112*

The problematic aspects of the lèse majesté law have been discussed for years. Legal experts and other academics including those from many

<sup>1</sup> iLaw. (2016, 10 May). Interesting statistics concerning bail in 112 cases in NCPO era. *Freedom of Expression Documentation Centre*. <https://freedom.ilaw.or.th/en/blog/interesting-statistics-concerning-bail-112-cases-ncpo-era>

different political standpoints are agreed on many issues.

#### Problems with the legal provision itself

*High penalties:* The penalty of three to 15 years' imprisonment is too high and comparable to the penalty for the offence of preparation to commit insurrection, manslaughter, or kidnapping of a minor under 15 years of age. Even the minimum penalty of three years is too high. Although the case could be trivial, the Court is left with no discretion but to impose at least this penalty.

*Vague terms:* Besides "defamation", which has quite a clear definition in the Penal Code, there are some vague elements of the crime, particularly the terms "insult" and "threaten", which have been interpreted widely, covering a variety of acts or expressions. In practice, when the court has needed to explain how expressions were an alleged offence under Section 112, it has often failed to specify whether the allegedly infringing messages were defamation, insults or threatening, but has written a verdict to cover all three words.

*Same level of protection:* Section 112 protects persons holding different positions, including the King, the Queen, the Heir-apparent or the Regent, equally and indiscriminately, even though the penalty for damage done to the King should be more severe than for damage done to other personalities.

*Offence against security:* Section 112 is included under the Title on "Offences relating to the Security of the Kingdom". Therefore, its interpretation and enforcement can be cited for the sake of maintaining national security, and that would do a disservice to the defendants.

#### Problems related to its enforcement

*Broad interpretation:* Though an offence against Section 112 must be confined to defamation, insult and threatening of the persons protected by the legal provision, including the King, the Queen, the Heir-apparent or the Regent, in reality it has been subjected to extensive interpretation and use in order to criminalise a variety of actions without clear boundaries. It is difficult for ordinary persons to understand which kind of act constitutes the offence. The broad interpretation includes charges against persons who criticise King Rama IX's dog, King Rama V, and King Narasuan, who was the monarch over 400 years ago.

From its legal provision, Section 112 protects the persons holding four positions only and does not cover the "monarchy". Therefore, a criticism about the monarchy as an institution should be permissible without criticising the persons or making other

criticisms about other personalities relating to the monarchy. The other royal family members, the Privy Council, close aides, the Crown Property Bureau and the Royal Project are not protected by the legal provision, and any criticism of them should be permissible. But the general climate in Thai society and politics has made the boundaries of possible expression very dubious and risky to touch upon.

*Anyone can initiate a case:* Any ordinary person can bring a charge against another person invoking Section 112. The law does not oblige the injured party to make the complaint. As a result, Section 112 has been used to accuse many people, especially political opponents or business competitors.

In addition, given that Section 112 has been used for serious criminalisation, it has been abused to take revenge upon another person, even among people who are related to each other. Some examples are the case of an older brother who took his own younger brother to court on this charge by alleging that he had made *lèse majesté* remarks in their house,<sup>2</sup> or the cases in which fake Facebook pages have been created to retaliate against another person, accusing them of committing a *lèse majesté* offence as a result of personal conflict.<sup>3</sup>

*Climate of fear:* Law enforcement officials involved with prosecution under Section 112 have often found themselves subject to great pressure from society and as a result, it would be hard for them to make any discretion in favour of the defendants, i.e., by refusing to indict the case, allowing the alleged offenders to be released on bail, or dismissing the case. Less than half of the *lèse majesté* accused can access the right to bail due to the high amount of security, around 400,000 baht (USD 12,000), and the lack of court approval. The police usually pass the cases on to public prosecutors and the prosecutors issue prosecution orders in almost all cases. When the cases are in the hand of courts, which also theoretically exercise their judicial power on behalf of the King, the judges also exercise their legal knowledge under the traditional culture and the climate of fear.

*Military court procedure:* On 25 May 2014, three days after the military seized power, the NCPO issued Announcement No. 37/2014 to establish a new practice, under which civilians would be tried in military court for charges of an offence against the King and royal family, charges of an offence against national security, charges of defying any of the NCPO's

<sup>2</sup> "Yutthapoom: 112- Brother vs Brother". *Freedom of Expression Documentation Centre*. <https://freedom.ilaw.or.th/en/case/439>

<sup>3</sup> "Sasivimol: Posted messages on Facebook". *Freedom of Expression Documentation Centre*. <https://freedom.ilaw.or.th/en/case/681>

orders and announcements, and charges of usage or possession of firearms used in wartime.

A lot of *lèse majesté* cases with civilians as defendants went to military courts where some of the judges are military personnel without legal backgrounds. Under the military court's procedure, the court usually does not schedule the dates of trial continuously, so there is a large lapse of time between each witness examination; thus the trials take a long time. So far there has not been any *lèse majesté* case under military court where the defendant denied the charge. In many cases, the military courts also try the cases in secret. No observers, including the defendant's relatives, can be present in the courtroom.

#### Prosecutions of false claims using the *lèse majesté* law

A new phenomenon in the use of Section 112, which has appeared since the 2014 coup, is the arrest and prosecution of those who have close connections with the institution of the monarchy on charges of making false claims about the monarchy to seek personal benefit.

In November 2014, the prosecution of people charged with making false claims, fraud and *lèse majesté* which attracted much public attention involved a network of high-ranking police officers, led by Pol. Lt. Gen. Pongpat Chayapan, Commander of the Central Investigation Bureau, and Pol. Maj. Gen. Kowit Wongrunroj, Deputy Commander of the Central Investigation Bureau. At least 26 people have been accused of associating with this monarchy-citing network of high-ranking police, 19 of whom have already been charged with *lèse majesté*. Out of this number, 16 suspects have been brought to trial.

In October 2015, there was another similar prosecution of false claims under the *lèse majesté* law. Three people were accused of making false claims about the monarchy to seek personal benefit. They were Suriyan Sutjritpolwongse, aka Mo Yong, a well-known fortune teller who was involved in organising the "Bike for Dad" event; Jirawong Wattanathewasilp, his close associate; and Pol. Maj. Prakrom Warunprapa, an inspector in the Technology Crime Suppression Division. Suriyan died in custody and Pol. Maj. Prakrom reportedly committed suicide in his cell.<sup>4</sup>

There is no clear record of the number of people arrested for "false claims" since most of the

accused are related to the royal institution and are not known to the public. It is believed that there are more than 50 persons involved. Some of the suspects in the news report are relatives of the former Princess Srirasmi, Royal Consort to the Crown Prince.<sup>5</sup> The "false claim" *lèse majesté* cases are far more mysterious and scary than the cases against free expression.

#### *The impact of lèse majesté charges on society*

The massive number of people prosecuted under Section 112 and the harsh penalties applied, coupled with the trial procedure whereby most of the accused have been denied bail and the court has ordered a secret trial, have engendered a burgeoning climate of fear. It has engulfed the whole society with the notion that the monarchy is untouchable and people are supposed to practise self-censorship. They have to be cautious when discussing any issues about the monarchy during both personal and public communication. This has gravely compromised Thai people's knowledge and understanding about the monarchy.

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#### CASE STUDY 1: JATUPAT<sup>6</sup>

Jatupat or Pai, 25, was a student at the faculty of law at Khon Kaen University. He became a social activist and was a member of the Daodin group. He also participated in many activities in northeast Thailand together with people who were affected by economic development projects. Jatupat and the Daodin group organised many anti-NCPO activities.

On 2 December 2016 around 5:07 a.m., the Facebook account under the name "Pai Jatupat" shared a BBC Thailand article with a biography of the new King of Thailand. In the same Facebook post, Pai also copied part of the article. Lt. Col. Phitakpol Chusri, the acting head of the Civilian Affairs Division of Military Circle 23, saw Pai's post and filed a complaint with the police. On 3 December 2016, the police arrested Jatupat under a *lèse majesté* charge. Jatupat was detained at a police station for one night before he was released on bail on 4 December 2016.

4 AFP. (2015, 9 November). Thai fortune teller held under royal defamation law found dead. *The Guardian*. <https://www.theguardian.com/world/2015/nov/09/thai-fortune-teller-mor-yong-held-under-royal-defamation-law-found-dead>

5 Reuters. (2015, 11 March). Parents of former Thai princess jailed for insulting monarchy. *The Telegraph*. [www.telegraph.co.uk/news/worldnews/asia/thailand/11464642/Parents-of-former-Thai-princess-jailed-for-insulting-monarchy.html](http://www.telegraph.co.uk/news/worldnews/asia/thailand/11464642/Parents-of-former-Thai-princess-jailed-for-insulting-monarchy.html)

6 "Jatupat: shared BBC's article". *Freedom of Expression Documentation Centre*. <https://freedom.ilaw.or.th/en/case/756>

On 22 December 2016, the Khonkean Provincial Court was ordered to revoke Jatupat's bail after the police sought revocation of his bail on the grounds that he was still active on Facebook and showed disrespectful behaviour by mocking state authorities. Jatupat has been detained in prison since 22 December 2016, requesting bail at least 10 times; however, all requests were denied.

Jatupat first denied the charges and started to fight his case in the witness examination. Later, Jatupat changed his plea to guilty and the court sentenced him to five years in prison, which was reduced to two years and six months. He told the public that in such cases, there is no other option for the defendant.

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### CASE STUDY 2: PATNAREE<sup>7</sup>

Patnaree or Nueng is the mother of Sirawith, or "Ja New", a well-known democracy activist. Patnaree is a freelancer, working mostly as a housemaid. Patnaree was charged with lèse majesté. The alleged offence consisted of messages in Facebook Messenger where she had a conversation with Burin, a man who had been convicted in another lèse majesté case. The Military Prosecutor filed charges against her before the military court on 1 August 2016. The statement of accusation described that after Burin said something about the monarchy, Patnaree replied without attempting to stop Burin from saying such a thing. Patnaree was released on bail and is fighting her case in military court.

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### CASE STUDY 3: PONGSAK<sup>8</sup>

Pongsak or Sam is a tour agent from Kanchanaburi province. He participated in red shirt political rallies several times. Pongsak's name appeared on NCPO's summons order no. 58/2014 issued on 9 June 2014. However, he did not report to the NCPO.

Pongsak was arrested on 30 December 2014 at Phitsanulok Transport Station and accused of posting six photos and messages deemed to

be lèse majesté on his own Facebook account named "Sam Parr". He was charged with six counts under Section 112 of the Criminal Code (lèse majesté) and Section 14 of the Computer Crimes Act. Pongsak stated that during the interrogation the military did not hurt him, but threatened him to make him confess. The military also told him that this case was not a political case but was a matter of national security. The Bangkok Military Court ordered that his case would be tried as a closed-door trial and sentenced Pongsak to 60 years in jail. Since the defendant pleaded guilty, the court halved the sentence to 30 years in jail.

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### CASE STUDY 4: YUTTHASAK<sup>9</sup>

On 28 January 2014, Yutthasak, who is a taxi driver, provided service to an unknown passenger. During the ride, they discussed politics. It turned out that both had a different opinion. The passenger then used her mobile phone to record their conversation and used it as evidence to press a lèse majesté charge against Yutthasak the next day.

Yutthasak was arrested in June 2014, after the coup. He requested bail but the court denied his plea. In the deposition examination, Yutthasak pleaded guilty as he had no lawyer. The Criminal Court sentenced him to five years in prison which was reduced to two years and six months. He was released on 20 May 2016.

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### CASE STUDY 5: WICHAI<sup>10</sup>

Wichai, 33 years old, was accused under lèse majesté for creating a fake Facebook account with someone else's name and picture and posting messages deemed to be a defamation to the King. He was arrested in December 2016 after the owner of the Facebook account accused him.

In the statement of accusation, Wichai was charged for 10 counts by the military prosecutor. Wichai first denied all charges and wanted to defend his case but later changed his mind and confessed because the trial took too long. On 9 June 2017, Wichai was taken to military court

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7 "Patnaree: Facebook chat". *Freedom of Expression Documentation Centre*. <https://freedom.ilaw.or.th/en/case/768>

8 "Pongsak: Posting lèse-majesté messages on Facebook". *Freedom of Expression Documentation Centre*. <https://freedom.ilaw.or.th/en/case/650>

9 "Yutthasak: The taxi driver". *Freedom of Expression Documentation Centre*. <https://freedom.ilaw.or.th/en/case/575>

10 "Wichai: faked facebook". *Freedom of Expression Documentation Centre*. <https://freedom.ilaw.or.th/en/case/722>

to hear the verdict. For posting 10 lèse majesté messages on Facebook, the military court punished him separately for 10 counts, with seven years in prison for each count, totalling 70 years in prison for the whole case. The defendant confessed so that the penalty would be reduced by half, to three years and six months for each count. Thus, the defendant was sentenced to 30 years and 60 months, or 35 years.

The case of Wichai was marked as the case with the highest punishment that has ever been recorded.

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#### CASE STUDY 6: “TANET”<sup>11</sup>

“Tanet” is an alias of a man who has paranoid schizophrenia. “Tanet” was accused of sending an email to an English man with a link to some content that was deemed to be defamation of the King and the Heir. After being arrested, he was sent to have a mental examination and the doctor agreed that he has mental illness. “Tanet” told the doctor that he has heard whispers in his ears for years, telling him to do or not to do something, including sending the email which lead to the prosecution.

The defence lawyer argued that “Tanet” had sent the email under the influence of mental illness, with a doctor’s certification and testimony. The court sentenced him to five years imprisonment, reduced to three years and four months. The court was not convinced that while committing the offence, the defendant was oblivious to morality or was unable to control himself due to his mental disorder. Thus, the defendant could not cite it as a reason to exonerate himself.

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#### Sedition: Section 116 of the Penal Code

The sedition law in Thailand is located in Section 116 of the Thai Penal Code,<sup>12</sup> and is classed under offences against internal security in Sections 113 to 118 of the Thai Criminal Code.<sup>13</sup> Section 116 states:

Whoever makes an appearance to the public by words, writings or any other means which is not an act within the purpose of the Constitution or for expressing an honest opinion or criticism in order:

- To bring about a change in the Laws of the Country or the Government by the use of force or violence;
- To raise unrest and disaffection amongst the people in a manner likely to cause disturbance in the country; or
- To cause the people to transgress the laws of the Country, shall be punished with imprisonment not exceeding seven years.

While Section 116 is aimed at preventing expression which affects national security, Section 116 itself allows people to exercise their constitutionally protected right to freely criticise the government mandate, legislation and policy issued by the government as long as it is a good faith statement. Therefore, whether the expression of the people is a request to revoke or amend the laws or a request to change the government, as long as it is a peaceful expression without harm, those expressions shall not be considered as an offence under Section 116.

Before the NCPO regime, Section 116 was also used by many governments to charge leaders of big movements or demonstrations that demanded a change in government. In many of those cases, Section 116 was used to charge people with other less severe offences and many times the court dismissed sedition charges.

Under the military rule, sedition charges have frequently been used to target peaceful criticism of the military, its leaders, its policies and the May 2014 coup. From 22 May 2014 to 18 August 2017, at least 66 individuals (in 26 cases) have been charged with sedition under Section 116.<sup>14</sup> In most cases, the accused had just expressed their opinion peacefully.

#### *The problems of the enforcement of Section 116*

The main problems with the NCPO’s use of the sedition law are outlined below.

#### Ambiguity of the legal provisions

Some of the essential elements of the offence under Section 116 are clear themselves; however,

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<sup>11</sup> “Tanet”: Sending an email with mental disorder. *Freedom of Expression Documentation Centre*. <https://freedom.ilaw.or.th/en/case/614>

<sup>12</sup> English translation sourced from: <http://library.siam-legal.com/thai-law/criminal-code-offense-internal-security-sections-113-118>

<sup>13</sup> English translation sourced from: <https://www.thailandlawonline.com/laws-in-thailand/thailand-criminal-law-text-translation#chapter-2>

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<sup>14</sup> iLaw. (2017, 13 September). Section 116: When ‘Sedition’ is used as the obstruction of freedom of expression. *Freedom of Expression Documentation Centre*. <https://freedom.ilaw.or.th/en/blog/section-116-when-%E2%80%99sedition%E2%80%99-used-obstruction-freedom-expression>

there are some gaps for the other parts which can be interpreted in many aspects, such as the words: “To raise unrest and disaffection amongst the people.” It is not certain what action is considered as the expression against Section 116. The lack of any guiding, objective speech test or standard to measure the seditious elements of speech is problematic due to the ambiguous nature of the terms “raise unrest and disaffection” or “likely to cause disturbance.” This ambiguity has clearly opened the floodgates for criminalising a broad pool of public and private speech.

The majority of sedition prosecutions centre around criticism that does not constitute direct or implicit advocacy of violence

Most of the recent cases do not genuinely constitute sedition. They are merely statements or conduct expressing one’s own opinion about the political situation, and generally lacking any exhortations or urging of lawlessness or violence. This originates from a distorted view of how speech can translate into action, and thus, fails to distinguish between legitimate criticism of the government and actual seditious speech. A central element to this distortion is that the limits on protected speech before it can be classed as seditious are extremely low, to the point where a simple expression of dissent is taken to mean exhorting disorder. This has the effect of censoring legitimate and good-faith criticisms of the NCPO.

Sedition prosecutions have been systematically directed at critics of the NCPO

The charges have been used as a repressive political tool to deter dissent by prominent anti-government critics such as ministers under the former Yingluck Shinawatra government (Chaturon Chaisang, Pichai Nariphthapan), renowned journalists (Pravit Rojanaphruk), human rights defenders (Sirikan June Chaorensri) and activists with a popular following (Sombat Boongam-anong). This is also evidenced by the increase in the frequency of sedition charges and prosecutions during periods of perceived political turbulence, such as immediately after the May 2014 coup; when there were rumours of corruption in military projects in late 2015; and during the trials of Yingluck Shinawatra and ministers in her former cabinet over a corruption allegation. When the military arrested and charged people for sedition, press conferences were usually held in order to spread fear among the public that charges for a severe offence had been granted as a result of dissent against the NCPO.

Burdens placed on the accused to fight national security charges

Section 116 falls under the Penal Code chapter of offences against national security and carries a severe punishment of up to seven years in prison. This penalty rate can lead to pre-trial detention for up to 48 days. During this period the accused has to find an amount of security to request bail. The courts usually require around 70,000 to 150,000 baht (USD 2,100 to 4,500) as a security for a sedition charge. However, in one case, the court called for 400,000 baht (USD 12,000) as a security; the accused did not have enough money, so he was detained in prison for the pre-trial duration.

The NCPO also issued Announcement No. 37/2014 through which civilian cases involving offences against national security are to be tried under the jurisdiction of military courts. The sedition charge therefore was used to charge NCPO opponents who the NCPO saw as untamed persons and wanted to put under control. Even though sometimes military courts dismissed sedition charges, the accused have never felt safe to be provided the rights to a fair trial.

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#### CASE STUDY 1: CHATURON CHAISANG<sup>15</sup>

On 27 May 2014, Chaturon Chaisang, the education minister under the former Yingluck Shinawatra administration, was arrested and charged with sedition for publicly stating his opposition to the 22 May 2014 military coup at a press conference at the Foreign Correspondents Club of Thailand (FCCT).

The statements in his speech included the following:

For dozens of years over these last years, I have indicated that in my opinion, no matter how difficult a problem the country was faced with, a coup was not the way out. If one did occur, then it would always exacerbate the problem. When the coup this time occurred, I had the same opinion and have indicated my opinion in opposition to the coup.

Coups are not the way out or solution to problems of divisiveness in society. If they come along they create even more divisiveness. What’s worrisome is that if those in power don’t manage things well it might create violence and increased loss.

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<sup>15</sup> “Chaturon: Defying NCPO order, Section 116, CCA”. *Freedom of Expression Documentation Centre*. <https://freedom.ilaw.or.th/en/case/600>

A coup is a process that is not democratic and that worldwide, as well as through most of Thai society, will not accept. It is bound to damage the country's image, damage cooperation with other countries, and increase economic problems of the country.

The conduct of General Prayuth and group who declared seizure of power thus conflicts with Article 68 of the Constitution. Orders of the NCPO during the time when there was still no Royal Proclamation appointing any NCPO head, are thus illegal orders.

I continue to confirm that I will use what rights and freedom I have to appeal for our land to be a democracy, beginning with an appeal to the NCPO to quickly return democracy to the people and allow elections according to democratic rule. In this, anything that I do will be peaceful and in compliance with Article 2 and in compliance with just laws.<sup>16</sup>

Chaturon's speech was clearly not seditious, but was only a criticism of the coup. Chaturon's speech does not pose a reasonably clear and imminent risk of violence, as the speech did not use inflammatory or provocative language, but was rather an opinion – and a fact-based reading of the political situation at the time. On the contrary, Chaturon explicitly stated that he would only act through peaceful and legal means.

The case is currently ongoing at Bangkok Military Court, with a slow process of witness hearings.

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### CASE STUDY 2: SOMBAT BOONNGAM-ANONG<sup>17</sup>

Sombat Boonngam-Anong, a social service worker and a former leader of anti-coup social movements, was arrested by the Technology Crime Suppression Division (TCSD) and charged with sedition and under the Computer Crimes Act on 5 June 2014 for posting messages on Facebook urging people to protest against the coup in a peaceful manner and to flash the three-finger salute (as popularised in the film series *Hunger Games*) as a symbol of defiance against the military junta. Currently, the case

has already conducted 10 witness hearings, and is still ongoing in Bangkok Military Court.

The urging of peaceful protest and the flashing of a symbolic salute directly shows that there was no counsel to violence nor was it an advocacy of violence. The three-finger salute, while viewed as controversial by the NCPO, is merely an expression of opinion. Under the bail agreement with military courts, Sombat was prohibited from participating in any political movements and travelling abroad without permission. The court procedure and the verdict may not mean to the society as much as the NCPO can keep Sombat under silence.

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### CASE STUDY 3: PONLAWAT<sup>18</sup>

Ponlawat was arrested on 27 March 2015 for distributing leaflets with the message "Wake up and rise now, all democracy lovers! Down with dictatorship! Long live democracy" and a picture of the three-finger salute. The leaflets were distributed at public places, including a kindergarten, a park, a school, a bus stop and a technical college in Rayong Province. The inquiry officer stated that the messages in the leaflets could cause conflict and confusion in society and could lead to violence. The case is currently being tried in a military court and the first witness examinations are being conducted.

The messages in the leaflets can be construed as advocating to pro-democratic sections of the public to overthrow the dictatorial NCPO regime and institute a democratic government in its place. However, Ponlawat's messages do not specifically contain any advocacy of violence, force, or the threat of violence to overthrow the government. Moreover, Ponlawat was not advocating for concrete action (as he did not provide specific plans to overthrow the government); his leaflets could be better described as advocating his belief or his principle of overthrowing governments.

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<sup>16</sup> Prachatai. (2014, 28 May). Chaturon Chaisang's speech before the arrest. *Prachatai English*. <https://prachatai.com/english/node/4048>

<sup>17</sup> "Sombat Boonngam-Anong: 116". *Freedom of Expression Documentation Centre*. <https://freedom.ilaw.or.th/en/case/604>

<sup>18</sup> "Ponlawat : Dropped leaflets in Rayong". *Freedom of Expression Documentation Centre*. <https://freedom.ilaw.or.th/en/case/659>

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#### CASE STUDY 4: PRAVIT ROJANAPHRUK<sup>19</sup>

Pravit Rojanaphruk, a renowned and award-winning journalist from the online newspaper *Khaosod English*, was charged with two counts of sedition for authoring and publishing a series of messages on Facebook (each message was posted on a separate date):

Junta representatives called me twice yesterday to express their displeasure over a photo of me showing the middle finger to the junta-sponsored draft charter. I told them in fact the photo was uploaded on Facebook and Twitter as a set of three pictures and it includes a photo of my giving a thumbs up to the same document. I am ready to defend freedom of expression and will neither run nor delete the photo. It's ironic that the very people who teardown the previous 2007 constitution in an act of military coup now want people to treat their own junta-sponsored draft charter [...].

With the junta now wanting to limit questions to junta leader General Prayuth to 4 per session, here's my four questions. 1) When will there really be free & fair elections? 2) When will you stop being a dictator while depending on taxpayers' money without their consent for your salary & perks? 3) When will you apologize to the people for having illegitimately seized power in a coup? 4) When will you stop fooling yourself & others by telling us through the song you claim to have written that you are only asking for a little time in power?

Yingluck's trial, with verdict coming soon will be a test of will of both those in power and pro-Yingluck Redshirts. She may become Thailand's most visited prisoner and Buddha knows what may happen from there.

Yingluck insists that the junta has already confiscated her money in the bank accounts prior to Aug 25 verdict while Prayuth flatly denied. If this is the case, what kind of justice is it?

A Voice TV reporter tweeted saying a soldier shouted expletive at her and other reporters and threatened to confiscate their cameras

while reporting about government's rice allegedly selling at a much lower rate than market price. Hail Prayuth's men in uniform and JuntaLand!

Severe flood hitting Sakon Nakorn and Sukhothai provinces. Wait until Prayuth is done with his weekly monologue first.

A local news source from TV station told me he heard no warning about incoming flash flood in Sakon Nakorn province. Looking at the pictures of row of cars being inundated and local hotel not moving their beds from now flooded ground floor and we could have guessed that. Military rule is top down. You wait for the order.

The case is still being investigated by police. In addition, Pravit was also charged under the Computer Crimes Act.

It should also be noted that during the legal proceedings against deposed Prime Minister Yingluck Shinawatra, there was a renewed spate of sedition charges by the NCPO to quell political dissent surrounding the trial. Pravit is also very active in criticising the NCPO on his personal Facebook and Twitter accounts. Pravit was, at least twice, summoned to report and detained in a military camp in order to stop him from expressing his opinions. But the military summons did not stop him. This case therefore can be considered as another step from the NCPO to suppress Pravit.

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#### CASE STUDY 5: PREECHA<sup>20</sup>

Preecha, a 77-year-old former schoolteacher, was arrested on sedition charges for giving food and flowers to a pro-democracy demonstrator who was leading a peaceful march and rally. The rally was protesting military trials of civilians. He was also convicted of a separate charge for violating the junta's ban on political gatherings; his sedition charges were dropped by a military prosecutor.

This is one of the most repressive uses of the sedition charge under the regime of the NCPO, as it was used in a way that is clearly distorted from its original conception, due to the political motivations of the government to repress any form of dissent. There could be no reasonable

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19 "Pravit Rojanaphruk: Sedition charges after Facebook posts". *Freedom of Expression Documentation Centre*. <https://freedom.ilaw.or.th/en/case/798>

20 "Preecha: gave flowers to the protester". *Freedom of Expression Documentation Centre*. <https://freedom.ilaw.or.th/en/case/692>

expectation that giving food and flowers to a demonstrator who was part of a peaceful protest would result in violence or lawlessness. The sedition charge was dropped, which indicates that the courts do understand the definition of advocacy.

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#### CASE STUDY 6: RINDA PARUECHABUTR<sup>21</sup>

Rinda Paruechabutr, a single mother of two children, was charged with sedition for posting a rumour on social media that General Prayuth, the head of the NCPO, had transferred 10 billion baht to an offshore bank account in Singapore. She was imprisoned for three days after the military court in Bangkok ordered her pre-trial detention. She was then given bail, with the bail bond set at 100,000 baht (USD 2,800). However, the accusation of sedition was withdrawn. She is currently facing a charge under the Computer Crimes Act in civilian court.

Similar to the case of Preecha, this is also one of the clearly repressive uses of the sedition charge. A rumour about the prime minister does not constitute advocacy of violence or lawlessness. The idea that posting a negative rumour about the Prime Minister might lead to chaos and public disorder is an unsubstantiated link.

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#### CASE STUDY 7: THEERAWAN<sup>22</sup>

Theerawan, 57, was arrested on sedition charges for posting a photo of herself holding a red plastic bowl that was inscribed with Thai New Year greetings from former Prime Ministers Thaksin Shinawatra and Yingluck Shinawatra. The inscription read: “Although the situation is heated, it’s hoped that brothers and sisters will be soothed by the water in the bowl.” What Theerawan actually did was to take her own photo with the red bowl and send it via the LINE mobile messenger application. But the photo was forwarded and a reporter at *Thairath*, a leading newspaper, put the photo on the front page during the time that the public was discussing the gift from the former prime ministers.

She faced a pending trial at a military court and was looking at seven years in prison. Her bail bond was set at 100,000 baht (USD 2,800). To confirm that her charge was not a gross mistake by the judicial system, both the prime minister and deputy prime minister publicly justified the charge. Deputy Prime Minister Pravit Wongsuwon stated that her charge was “not groundless” and that she had clearly “violated the law”, while Prime Minister Prayuth declared that her crime was a “national security” offence. Her charges have since been dropped.

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#### The Computer Crimes Act 2007

The Computer Crimes Act or CCA was first issued in 2007. The law was widely used to criminalise online expression along with the Penal Code. On 16 December 2016, the rubber-stamp National Legislative Assembly unanimously revised the 2007 Computer Crimes Act, and criminalised broad forms of conduct and expression online. While the redrafting of the 2007 version of the law was expressly intended to combat phishing and online theft, it has been widely observed<sup>23</sup> that the rewriting of the new law will be used to silence critics of the NCPO and the monarchy.

The distinct change of the new amendments from the 2007 law is Section 18, which stipulates that law enforcement authorities can access “traffic data”, encrypted data and computer systems. In addition, in Section 20, the new amendments stipulate that a “Computer Data Screening Committee” will be formed. It will consist of nine members of a government-appointed panel. The committee has the power to recommend an authority to apply for a court order to block or remove “offensive” content which sometimes does not have to violate any law.

The new amendments that will importantly restrict freedom of expression are in Section 14, 15 and 20.<sup>24</sup> Section 14 states:

Any person who commits any of the following crimes shall be liable to imprisonment for not more than five years, or a fine of not exceeding one hundred thousand baht, or both:

- (1) dishonestly or deceitfully bringing into a computer system computer data which is distorted or forged, either in whole or

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21 “Rinda: posted a rumor that Gen. Prayuth transferred money to Singapore”. *Freedom of Expression Documentation Centre*. <https://freedom.ilaw.or.th/en/case/682>

22 Human Rights Watch. (2016, 30 March). Thailand: Sedition Charge for Red Bowl Photo. *Human Rights Watch*. <https://www.hrw.org/news/2016/03/30/thailand-sedition-charge-red-bowl-photo>

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23 Bangkok Post. (2016, 15 December). Computer bill deeply flawed. *Bangkok Post*. <https://www.bangkokpost.com/archive/computer-bill-deeply-flawed/1160845>

24 English translation sourced from: <https://thainetizen.org/docs/cybercrime-act-2017>

in part, or computer data which is false, in such a manner likely to cause injury to the public but not constituting a crime of defamation under the Penal Code; (2) bringing into a computer system computer data which is false, in such a manner likely to cause damage to the maintenance of national security, public safety, national economic security, or infrastructure for the common good of the Nation, or to cause panic amongst the public; (3) bringing into a computer system whatever computer data which constitutes a crime concerning security of the Kingdom or crime concerning terrorism under the Penal Code; (4) bringing into a computer system whatever computer data with vulgar characteristics, when such computer data is capable of being accessed by the general public; (5) publishing or forwarding computer data, with the knowledge that it is the computer data under (1), (2), (3), or (4).

If the crime under paragraph 1 (1) is not committed against the public but it is committed against any particular person, the criminal or the person who publishes or forwards the computer data as said shall be liable to imprisonment for not more than three years, or a fine of not exceeding sixty thousand baht, or both, and the crime shall be compoundable.”

### Section 14(1): “False information”

The statistics for the period July 2007 to December 2011<sup>25</sup> demonstrate that lawsuits under the CCA for which the Court of First Instance has already passed verdicts were mainly filed under Section 14(1). The offences most frequently found are defamation, fraud and offence against computer systems, respectively. Before the amendment in 2016, Section 14(1) was written as follows:

Section 14. If any person commits any offence of the following acts shall be subject to imprisonment for not more than five years or a fine of not more than one hundred thousand baht or both:

(1) that involves import to a computer system of forged computer data, either in whole or in part, or false computer data, in a manner that is likely to cause damage to that third party or the public.

The essential element of the offence under Section 14(1), in both the previous and the revised version, centres on “forged computer data or false computer data,” making it different from the common defamation laws. The initial objective of this section is to prevent and to suppress any fraudulent computer data practice such as creating a forged website to mislead internet users and induce them to reveal personal information, known as “phishing”. Section 14(1) is also aimed at filling a gaping hole in the offence of forgery of documents in the Penal Code.

However, during the 10 years of its enforcement, it turns out that Section 14(1) has been the section of the CCA that is the most used and is commonly used together with defamation lawsuits to criminalise content online, leading to the question of whether this is legislatively in accordance with its aim or not. It can be estimated that more than 10,000 cases have been filed with the police or courts every year under Section 14(1). Most of them are cases of individuals who posted something online that the individual accusers did not agree with or did not like. Some of these are cases between parties with unequal status, in which the legal procedure was used in order to silence critics or public participation on social interest topics.

### Impacts of implementing Section 14(1) for defamation cases

*Duplicate legislation:* Since the Penal Code has already covered the offence of defamation, and even if an imputation is made through the internet, it shall be regarded as a defamation offence by means of publication. The duplication could also lead to confusion in the interpretation and enforcement of laws, causing too many cases in the court procedure.

*Overly severe penalties:* According to the CCA, offences under Section 14(1) are subject to imprisonment for up to five years and a fine of up to 100,000 baht (USD 2,800) or both. Meanwhile, in the Criminal Code, defamation offences are subject to imprisonment for up to one year and a fine of up to 20,000 baht (USD 560) or both, and for defamation by means of publication, the offender shall be punished with imprisonment for up to two years and a fine of up to 200,000 baht (USD 5,600). Therefore, when implementing Section 14(1) on the issue of defamation, the penalty will become intensely increased.

*Cannot be settled through compromise:* Defamation cases often concern personal matters; hence, many cases are dismissed during the court process by reaching a compromise. A compromise reached by all parties can be compensation or making an apology. However, offences under Section 14(1) of the CCA

25 iLaw. (n/d) *The Research on the Impacts of the Computer-related Crimes Act B.E. 2550 (CCA) and State Policies on the Right to Freedom of Expression.* <https://ilaw.or.th/node/1798>

cannot be settled through compromise. Even if a settlement is made by a complainant and a defendant, the offence under Section 14(1) still remains. This creates an impact on the defendant and also unnecessarily makes cases pile up in the court process.

*No regard for good faith or public interest:* According to the Penal Code, Section 329-330, any alleged defamation deemed to be an opinion or statement expressed in good faith or any imputation proved to be of benefit to the public shall be considered of having a reasonable cause for exemption from guilt or penalty. However, under Section 14(1) of the CCA, neither the exercise of an individual's right to freedom to express his or her opinion in good faith, nor a criticism made in the public interest, can be claimed as a reason.

*Threat to freedom of the media:* Online media have been hugely increasing nowadays and even the mainstream media have adopted online channels as another medium of communication; thus, when a defamation charge occurs, Section 14(1) is likely to be integrated in the charge. This causes a greater burden to the media as well as to the accused. Also, the tendency for the media to be prosecuted under Section 14(1) is continually increasing, affecting the atmosphere of freedom in the society.

After the amendments, in the new version of the CCA enforced since May 2017, the phrases “dishonestly or deceitfully” and “but not constituting a crime of defamation under the Penal Code” were added to show the intention of the National Legislative Assembly drafting sub-committee to stop the enforcement of Section 14(1) against online criticism and comments. The compoundable and less harsh punishment conditions in paragraph two also show a good sign for online expression. However, the word “distorted” was added at the last minute by the drafting sub-committee to maintain the possibility of charging online opinion with Section 14(1). The new Section 14(1) has created confusion for interpretation. We have not yet seen any court's decision on the new Section 14(1) that benefits the future interpretation. On the other hand, cases under Section 14(1) in the court process are still going on and the number of cases is not decreasing.

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#### CASE STUDY 1: ROYAL NAVY VS. PHUKET WAN<sup>26</sup>

A journalist and an editor of *Phuket Wan*, a small local English news website in Phuket Province, were charged with criminal defamation and with Section 14(1) of the Computer Crimes Act for publishing an

article that accused the Thai Naval Force of being involved in and benefitting from trafficking of the Rohingya people. The Thai Royal Navy authorised a naval officer to report the case to the police.

The defendants argued that the news story published on the website actually referred to a Pulitzer Prize-winning report by Reuters. They had no intention to ruin the reputation of the Thai Royal Navy but were simply carrying out their journalism work. Moreover, when the Navy published its clarification on the report, *Phuket Wan* also publicised the Navy's statement. Later, the court dismissed the case, reasoning that Reuters is a reliable agency and therefore the information can be seen as truth.

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#### CASE STUDY 2: CANNED FRUIT FACTORY VS. ANDY HALL<sup>27</sup>

Andy Hall is a British researcher and a human rights defender. His studies focus on human rights violations against migrant workers. He was sued after publishing research on the violation of labour rights of migrant workers in the international private label products industry in Thailand. This case started in 2013, the court accepted the case in 2015 and the witness examinations began in 2016.

Hall fought the case on the grounds of academic rights and freedom of expression. The information published in his research was from interviews with 12 migrant workers who had already left the country because of fear of intimidation by the company. The plaintiff argued that the information provided by Hall was false and he had failed to verify the information with the company before publishing it. The Court of First Instance sentenced Hall to a fine of 150,000 baht (USD 4,200) and three years in prison with a suspension. The company also filed another three cases against Hall based on different grounds but on the same topic. Hall is now not in Thailand.

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#### CASE STUDY 3: THAI INDUSTRIAL EMPLOYER VS. LABOUR UNION MEMBER<sup>28</sup>

In mid-2010, Songkram Chimcherd, an employee of Thai Industrial Gases Plc and a member of the Thai Industrial Gases Labour Union, was accused

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26 “Thai Royal Navy vs Phuketwan news agency”. *Freedom of Expression Documentation Centre*. <https://freedom.ilaw.or.th/en/case/554>

27 “Andy Hall: Computer Crime case”. *Freedom of Expression Documentation Centre*. <https://freedom.ilaw.or.th/en/case/469>

28 “Songkram Chimcherd: member of the Thai Industrial Gases Labor Union (TIGLU)”. *Freedom of Expression Documentation Centre*. <https://freedom.ilaw.or.th/en/case/177>

of sending a defamatory email stating that a senior executive ordered him to stop participating in the Union's activities. Later, a settlement between the parties was made, but although the accuser withdrew the defamation charge, the lawsuit under the CCA could not be withdrawn, which meant that Songkram had to deal with the remaining case. However, the case was dismissed by the court since it could not be proved whether the defendant was indeed the email sender.

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#### CASE STUDY 4: DOCTOR VS. PATIENTS' RIGHTS ACTIVIST<sup>29</sup>

Preeyanan, a patients' rights activist who was the mother of a son with a disability caused by medical error during his birth, posted a message on her Facebook account about the unjustness of the Medical Council of Thailand and demanding a reformation. The Medical Council of Thailand saw the message as a false statement which damaged its reputation and filed the charges directly to the court under Computer Crimes Act Section 14(1) and defamation.

The court has already conducted preliminary hearings and decided to accept the case for consideration. This case is still going on at Nontaburi Provincial Court.

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#### CASE STUDY 5. PTT OIL COMPANY VS. CRITIC<sup>30</sup>

In 2014, PTT Public Company Limited, the biggest state-owned petroleum production company in Thailand, filed a criminal defamation charge and a charge under section 14(1) of the CCA against Saran, an administrator of the Facebook page "Take Back Thai Energy". The case is based on 21 Facebook posts accusing PTT of fraudulent practices, causing the rise of energy prices, hiring a third party to use violence against protesters, and interfering with the media.

The Court of First Instance ruled that the information that the defendant posted on the Facebook page was false because the evidence brought by the plaintiff was more admissible than the defendant's. The Court therefore sentenced him to 40 months in prison without suspension. Later the Court of Appeal suspended the prison

penalty but ordered him to pay fine of 800,000 baht (around USD 24,000). The case is still under consideration by the Supreme Court.

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iLaw's database has documented at least 52 cases under Section 14(1) of the CCA that are lawsuits against faithful criticisms, media agencies, social activists, human rights advocates or environmentalists. These cases can also be seen as strategic litigation against public participation (SLAPP).

#### *Sections 14(2) and 14(3): Information against national security*

Sections 14(2) and 14(3) of the Computer Crimes Act are usually not used alone to charge people. In the national security-related cases, the main offence is usually *lèse majesté* or sedition. People who express opinions online and are charged under offences against national security would be charged together with CCA Section 14(2) or 14(3) or sometimes both subsections. But when a case continues until the process of reaching a verdict, the court will punish the accused under *lèse majesté* or sedition as they are the same act and violate several provisions of the law under Section 90 of the Penal Code.

However, the new Section 14(2) of the CCA has provided many broader elements of the offence, for example, "public safety", "national economic security" and "infrastructure for the common good of the Nation". These terms are open to broad interpretation and new ways of prosecution under this law.

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#### CASE STUDY 1: EIGHT FACEBOOK ADMINISTRATORS<sup>31</sup>

On 27 April 2016, police arrested Natthika Worathaiyawich, Harit Mahaton, Noppakao Kongsuwan, Worakit Sakamutnan, Yothin Mangkhangsangsa, Thanawat Buranasiri, Supachai Saibut and Kannasit Tangboonthina for authoring and disseminating satirical commentary on the Facebook page "We Love General Prayuth". These eight suspects are also the creators and administrators of the page. They have been charged with violating Section 14(1), (2) and (3) of the Computer Crimes Act, in conjunction with Section 116 of the Thai Penal Code. The case is currently on trial at Bangkok Military Court.

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<sup>29</sup> "Preeyanan: CCA case for criticizing Medical Council of Thailand". *Freedom of Expression Documentation Centre*. <https://freedom.ilaw.or.th/en/case/804>

<sup>30</sup> "PTT company vs Admin of 'take back Thai energy' FB page". *Freedom of Expression Documentation Centre*. <https://freedom.ilaw.or.th/en/case/777>

<sup>31</sup> "Eight Administrators of the Facebook page 'We love General Prayuth'". *Freedom of Expression Documentation Centre*. <https://freedom.ilaw.or.th/en/case/716>

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## CASE STUDY 2: THANAKORN<sup>32</sup>

In December 2015, Thanakorn was arrested and charged with violating Section 14 (2) and (3) of the CCA for copying and disseminating an infographic explaining the Rajabhakti Park military corruption scandal and for satirising the King's dog. He was also charged with sedition and lèse majesté for this conduct. He was detained in prison for months since the court denied his request for bail. Later the military court changed its order and gave him a provisional release. The case is still in the process of witness examination in military court.

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## CASE STUDY 3: KATHA<sup>33</sup>

Katha was an employee in a stock trading firm. After posting a message about a sell-off on the stock exchange, he was arrested and was accused of using “Wet Dream” as his alias to post messages on the Fah Deaw Kan webboard. He was charged for two counts including posting false statements that caused panic among the public and compromised national security, a breach as per the Computer Crimes Act, Section 14(2).

He denied all charges, claiming that the stock market had failed due to a rumour circulating before the post was published. However, the court did not agree with him. The Court of Appeal sentenced him to two years imprisonment for each count, or four years all together. The penalties were subsequently reduced by one third, and so the defendant was sentenced to two years and eight months in prison.

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### Section 15: Intermediary liability

Section 15 of the revised CCA states:

Any service provider who provides cooperation to, consents to, or connives at the commission of any crime under section 14 within a computer system under his control shall be liable to the same punishment as the criminal under section 14.

The Minister shall issue an announcement determining processes for the giving of warnings, the termination of the circulation of computer data, and the removal of such computer data from computer systems.

If the service provider successfully proves that he has observed the announcement issued by the Minister by virtue of paragraph 2, he needs not to undergo the punishment.<sup>34</sup>

This is the only provision which criminalises internet service providers (ISPs). Before the amendment, the definition of ISPs under Thai law was very broad and included all kinds of service providers: internet service providers, content providers, platform providers and server hosting had the same liabilities under Section 15. The uncertainty of the time period for ISPs in the previous version of Section 15 also led to a culture of following law enforcement officials' recommendations and self-censorship among ISPs. The amendment of the CCA brought a new hope with the “notice and takedown” process for ISPs to avoid legal charges.

However, to implement the new provisions of the CCA, the Ministry of Digital Economy and Society has created a new notice and takedown system<sup>35</sup> with unreasonably short and restrictive time limits for ISPs to remove “infringing” online material. The time limits are as follows:

- Online material violating Section 14(1) must be removed within seven days after the complaint has been received.
- Online material violating Section 14(2) and 14(3) must be removed within 24 hours after the complaint has been received.
- Online material violating Section 14(4) must be removed within three days of the complaint being received.

The system allows anyone, including police officers, security officers, individuals, business competitors or any internet users, to send a notice to ISPs to take down any content. The system has also created a big burden for ISPs to consider whether the alleged infringing content is a violation of laws or not. In practice, it is foreseen that ISPs tend to remove almost all content they have received notifications for. On the other hand, law enforcement officials will use

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32 “Thanakorn : Clicked like on lèse majesté facebook page and satirized royal dog”. *Freedom of Expression Documentation Centre*. <https://freedom.ilaw.or.th/en/case/702>

33 “Katha: Wet dream (Stock falling case)”. *Freedom of Expression Documentation Centre*. <https://freedom.ilaw.or.th/en/case/83>

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34 English translation sourced from: <https://thainetizen.org/docs/cybercrime-act-2017>

35 iLaw. (n/d). DE Ministry giving clear warning for notice and takedown of data breaching national security within 24 hours. *iLaw*. <https://ilaw.or.th/node/4607>

the procedure under Section 15 and the Ministry's regulation to send notifications to ISPs to take down content that the government perceives as a threat.

The process of disputing a takedown under the new regulation is also quite onerous for an "infringing" internet user. First, there is no boilerplate counter-notice that is available to the internet user, and second, ISPs have full discretion to decide whether to re-upload the existing content. In addition, internet users are considerably disadvantaged as there is no legal avenue for them to dispute the takedown of their material.

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#### CASE STUDY: CHIRANUCH PREMCHAIPORN<sup>36</sup>

Chiranuch Premchaiporn, the director of the Prachatai website, an independent online news network, and web administrator of the Prachatai webboard, was charged as an intermediary for her failure to comply with the timely removal of allegedly illegal messages from the webboard. The messages were deemed an insult to the King, the Queen or the Heir Apparent. Chiranuch was accused of being complicit or consenting to have the opinions posted on the Prachatai webboard under Section 15 of the CCA.

Chiranuch was arrested on 6 March 2009. She fought the case and got bail. She argued that she had done her duty to remove any illegal content but the posted messages were too numerous and she could not remove them fast enough.

The Criminal Court dismissed the charges for nine messages, given that Chiranuch did try to remove them. For the only one message that stayed for 20 days before she received a warrant and removed it, the Court deemed her as complicit or consenting. Therefore, Chiranuch was sentenced to one year in prison and a fine of 30,000 baht (roughly USD 900). The penalty was reduced by one third.

The plaintiff and the defendant submitted an appeal. The Court of Appeal later reaffirmed the first verdict and the defendant submitted the case to the Supreme Court. On 23 December 2015, the Supreme Court again reaffirmed the verdict. The case has now ended and leaves the only interpretation precedent of the online intermediary liability in Section 15 of the CCA before the Ministry's regulation has set a new practical standard.

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<sup>36</sup> "Chiranuch Premchaiporn: Director of Prachatai". *Freedom of Expression Documentation Centre*. <https://freedom.ilaw.or.th/en/case/112>

#### Laws against peaceful assembly

Under the NCPO regime, the right to peaceful assembly has been severely curtailed through unilateral executive orders and legislation passed by the rubber-stamp National Legislative Assembly:

- NCPO Announcement No. 7/2014 (issued on 22 May 2014)<sup>37</sup> – Public gatherings of five people or more are banned, with violators facing a punishment of one year in prison or a fine of 20,000 baht (USD 560) or both.
- NCPO Announcement No. 57/2014 (issued on 7 June 2014)<sup>38</sup> – Political parties are banned from organising meetings or carrying out any political activity.
- Head of NCPO Order No. 3/2015 (issued on 1 April 2015)<sup>39</sup> – Article 12 of this executive order bans political gatherings of five people or more. Violators face a prison term of up to six months or a fine of 10,000 baht, or both.
- The Public Assembly Act (issued on 9 July 2015, and in effect from 13 August 2015).<sup>40</sup>

The Public Assembly Act contains a series of restrictions on public assemblies:

- It requires protesters to "notify" the local police 24 hours in advance about the objective, date, place and time of the assembly. The authorities, however, have the power to allow or not allow the protest. This notification system seems to be a permission procedure.
- It bans demonstrations within 150 metres of royal places, or within the compounds of the Government House, Parliament and courthouses, unless a specific area has been authorised and designated by the authorities.
- It bans rallies from 6 p.m. to 6 a.m.
- It bans the use of amplifiers from midnight to 6 a.m.
- It prohibits protesters from blocking entrances.
- It prohibits any disturbance at government offices, seaports, train or bus stations, hospitals, schools and embassies.

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<sup>37</sup> English translation sourced from: [http://library2.parliament.go.th/giventake/content\\_ncpo/ncpo-annonce7-2557.pdf](http://library2.parliament.go.th/giventake/content_ncpo/ncpo-annonce7-2557.pdf)

<sup>38</sup> English translation sourced from: <http://www.mea.or.th/moi/pomc/doc/ncpo57.pdf>

<sup>39</sup> English translation sourced from: [http://library2.parliament.go.th/giventake/content\\_ncpo/ncpo-head-order3-2558.pdf](http://library2.parliament.go.th/giventake/content_ncpo/ncpo-head-order3-2558.pdf)

<sup>40</sup> English translation sourced from: <https://tlhr2014.wordpress.com/2015/11/06/thailands-public-assembly-act-2015-procedures-on-notification-of-public-assembly-authorized-equipments-for-crowd-control-and-limitation-of-utilizing-the-sound-amplification-equipments>

In the event that local police consider any assembly as a violation of the stated conditions, the police must first ask the protesters to disperse. If the protesters do not comply, the police need to seek a civil court's permission to force the protesters to disperse.

Violators of these provisions face a prison term of up to six months and a fine of up to 10,000 baht, or both. To date, at least 20 people have been charged for violating these conditions. Mostly they were charged for not informing the police in advance, using amplifiers without permission, or organising an assembly in a restricted area. These are offences with low penalties.

### *The problems of the enforcement of NCPO orders*

NCPO Announcement No. 7/2014 was issued almost immediately after the military staged a coup on 22 May 2014. Its aim was to disperse all the political demonstrations that lasted for months before the coup and caused chaos within the country. And the NCPO also needed the power to control dissent and prohibit people from opposing the unlawful coup. However, the announcement has never been abolished or amended until today.

After martial law was lifted on 1 April 2015, Head of NCPO Order No. 3/2015 was issued to give special power to military officers instead of the martial law. The provision to prohibit political gatherings was also prescribed in Article 12 with half the penalty rate. Therefore, it was confusing since the NCPO had two provisions that ban political gatherings at the same time. In practice, after 1 April 2015, Head of NCPO Order No.3/2015 was used by security officers to prohibit all kinds of gatherings including academic seminars or discussions on other social issues.

People who defy these orders and gather under the NCPO regime can also be arrested and taken to an "attitude adjustment" programme, and if they comply, the NCPO can release them without charges. However, there are at least 278 people who were charged for defying NCPO Announcement No. 7/2014 and Head of NCPO Order No.3/2015. The cases of defying any NCPO orders or announcements are all taken to military courts.

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#### CASE STUDY 1: APICHAT<sup>41</sup>

Apichat was arrested and charged with violating Announcement No. 7/2014 for participating in a protest against the May 2014 coup in front of

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41 "Apichat: Protest Against the Coup". *Freedom of Expression Documentation Centre*. <https://freedom.ilaw.or.th/en/case/679#detail>

the Bangkok Arts and Cultural Centre on 23 May 2014. The protest consisted of 500 members of the public but the officers claimed that Apichat stood out because he was holding a paper sign and shouting loudly. Apichat was also charged with violating Section 216 of the Criminal Code for failing to disperse after authorities had ordered the assembly to do so. The case is still ongoing in the Court of Appeal.

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#### CASE STUDY 2: CHAINARIN<sup>42</sup>

Chainarin was charged under Announcement No. 7/2014 for a public assembly at the Siam Paragon shopping mall, displaying a sign stating "The coup makers fear A4 paper, [the] A4 paper is coming to you now", and reading a poem critical of the May 2014 coup. He was also charged under Section 215 of the Criminal Code. Chainarin was then taken to military court in Bangkok where he confessed. The court sentenced him to three months in prison with suspension and a 5,000 baht fine.

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#### CASE STUDY 3: SEVEN DAO DIN ACTIVISTS<sup>43</sup>

On 22 May 2015, seven student activists from Khon Kaen University, members of the community rights activist group Dao Din, were arrested and charged under Order No. 3/2015 for gathering at the Khon Kaen Democracy Monument and displaying a banner protesting the May 2014 coup, on the anniversary of the coup. They were all charged on the day of arrest. All of them declared civil disobedience by not reporting or participating in the process under the NCPO orders. One of them was already arrested and prosecuted. The case is still ongoing in the Khon Kaen military court.

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#### CASE STUDY 4: NATCHACHA AND THATCHAPONG<sup>44</sup>

A total of 38 activists were arrested for participating in a symbolic assembly in front of the Bangkok Arts and Cultural Centre on the

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42 "Chainarin : Defying the NCPO order and Ciminal Code Article 215". *Freedom of Expression Documentation Centre*. <https://freedom.ilaw.or.th/en/case/610#detail>

43 "7 Dao Din: Hold Banner against the Coup". *Freedom of Expression Documentation Centre*. <https://freedom.ilaw.or.th/en/case/683>

44 "Natchacha and Tatchapong: Took action in front of the BACC". *Freedom of Expression Documentation Centre*. <https://freedom.ilaw.or.th/en/case/688#detail>

one-year anniversary of the May 2014 coup. All of them were released the next morning but later nine of them were summoned to be charged under Announcement No. 7/2014. Seven of them declared civil disobedience by not reporting or participating in the process under the NCPO orders. But two persons decided to cooperate and fight the case. The case is still ongoing in the military court.

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#### CASE STUDY 5: RESISTANT CITIZEN GROUP<sup>45</sup>

Anon Nampa, Pansak Srithep, Wannakiat Choosuwan and Sirawith Sereethivat were charged under Announcement No. 7/2014 for participating in a symbolic activity called “My Dear Election” in front of the Bangkok Arts and Cultural Centre on 14 February 2015. The assembly was considered as a political activity since it talked about an election. The case is still ongoing in the military court.

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#### CASE STUDY 6: EIGHT ACADEMICS<sup>46</sup>

Eight academics were accused of defying Head of NCPO Order No. 3/2015 after they delivered a statement titled “Universities Are Not Military Camps” at a hotel in Chiang Mai to protest against Gen. Prayuth’s speech accusing university lecturers of teaching students the subject of democracy. Later, six academics reported to the commander of the military unit in Chiang Mai and signed a memorandum of understanding in which they agreed to not participate in any political movement. The charges against those six academics, therefore, were withdrawn.

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#### CASE STUDY 7: RATCHABURI REFERENDUM MONITORING CENTER

On 19 June 2016, the United Front for Democracy against Dictatorship (red shirt movement) prepared for the opening of the Center for Referendum Watch nationwide to monitor possible fraud in the 7 August 2016 military-run

constitutional referendum. One of the centres was set up in Banpong district of Ratchaburi province. Around 20 persons came to take a picture with a banner of the centre. Even though the activity at Banpong ran smoothly without intervention from the authorities, such as in other provinces, later on someone went to report the case to the police. As a result, 18 individuals were summoned to acknowledge the charges under Head of NCPO Order No. 3/2015. All the persons accused denied the charges, and they were released on the same day without depositing bail bonds.

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#### *The problems of the enforcement of the Public Assembly Act*

There were many discussions on a public assembly law for almost 10 years before the Public Assembly Act 2015 was passed by the junta-appointed parliament, the National Legislative Assembly. At the early stage of its enforcement, many groups and movements did not know that it existed, as there was no public participation during the drafting and consideration process. Some of them were prohibited from gathering, some were arrested and charged. After news reports on the charges, the wider public acknowledged the existence of the new law.

However, since the act is quite new, there is no legal precedent from the court to interpret the provisions and low-level officers do not understand the law thoroughly. There are some provisions that are still debatable with regard to their interpretation such as the definition of “public spaces” or the “royal county”.

In practice, assemblies on political and non-political issues are treated differently. In one instance, even though the organisers informed the local police 24 hours in advance and complied with all conditions under this Act, political activities were still banned claiming the power of Head of NCPO Order No. 3/2015. The non-political activities were allowed to proceed except for an assembly near the parliament or government house, on the grounds that it was the “royal county” area.

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#### CASE STUDY 1: “JUST STANDING” ACTIVITY<sup>47</sup>

On 27 April 2016, the police arrested 16 individuals, including human rights lawyer Anon Nampa, for participating in a peaceful symbolic

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45 “My Dear Election”. *Freedom of Expression Documentation Centre*. <https://freedom.ilaw.or.th/en/case/658>

46 “Academics delivered a statement titled ‘Universities Are Not Military Camps’”. *Freedom of Expression Documentation Centre*. <https://freedom.ilaw.or.th/en/case/700>

47 “Anon: Just standing (second case)”. *Freedom of Expression Documentation Centre*. <https://freedom.ilaw.or.th/en/case/759#uploads>

protest at the Victory Monument. The protest, “Just Standing”, demanded the release of nine individuals who were abducted and held in military custody on the same day. Anon Nampa, the leader of the Resistant Citizen movement<sup>48</sup> and organiser of the assembly, was charged with violating the Public Assembly Act for failing to notify the authorities about the assembly in advance, and was convicted of the charges by a municipal court. He was fined 1,000 baht.

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#### CASE STUDY 2: SATHANONT<sup>49</sup>

A participant at an organised charity activity called “A March to Inform of Merit” in Sakon Nakhorn province was charged under the Public Assembly Act. The activity aimed to invite local villagers to participate in a cultural activity to protect the community’s river. In addition to the accusation of failing to notify the authorities, Sathanont was also charged under the Traffic Act for obstruction of the public highway. The case is still ongoing.

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#### CASE STUDY 3: SAMA-AE<sup>50</sup>

Sama-ae, a fisherman from an association of fisherfolk, was charged for publicly gathering and delivering a letter to the Minister of Agriculture and Cooperatives to call for an amendment to the Fishing Act. He was charged for failing to notify the local police. He fought the case on the grounds that he and his friends gathered to submit the letter only, without an intention of public gathering. The case has since been dismissed.

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#### CASE STUDY 4: ANTI-MINING PROTESTERS IN PHICHIT<sup>51</sup>

A total of 27 villagers in Phichit province were charged for gathering on a road that vehicles of the Akara Mining Company were using to transport the ore from the gold mine. In addition,

the villagers were also charged under Section 309 of the Criminal Code<sup>52</sup> for extorting the company. The protesters were fighting against the operation of the gold mine which they felt had an impact on the environment in their homeland. The court gave them suspended sentences.

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#### *Overall analysis on freedom of assembly*

NCPO Announcement No. 7/2014 and Order No. 3/2015 completely remove the freedom of peaceful assembly. This blanket removal is a violation of Thailand’s obligation under the International Covenant on Civil and Political Rights (ICCPR) and is designed as a content-based restriction by the NCPO as a large majority of protests in this time were against the legitimacy of military rule and the military coup. As observed in the cases in this report, most of the charges under these two executive orders are activities directly against the NCPO.

The many restrictions imposed by the Public Assembly Act show that these laws violate the principle of proportionality. The principle of proportionality dictates that the least intrusive restrictions should be prioritised by the authorities to ensure that the nature and character of the assembly are not fundamentally altered. However, the restrictions imposed by the Public Assembly Act on the locations, time and manner of assembly are not the least intrusive restrictions, and would fundamentally alter the nature and character of the assembly. For example, should a certain assembly intend on protesting an act of a ministry or the National Legislative Assembly, their rationally selected location of assembly outside the Government House or the Parliament would only be permissible if the protest is not within the compounds of those buildings or takes place at a distance further than 150 metres away from the buildings. This restriction has the effect of changing the character of the assembly should it be essential for the assembly’s message and methods that their location should be within the compounds of the buildings or at a proximate distance outside of them. The alteration of the character and nature of the assembly is also enabled by the other restrictions, if the group intends on using an amplifier to convey its message, or if it chooses to operate between 6 p.m. to 6 a.m. These restrictions also could potentially interfere with the message communicated by the assembly.

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48 <https://www.facebook.com/Resistantcitizen>

49 “Sathanont: Public assembly case from merit activity”. *Freedom of Expression Documentation Centre*. <https://freedom.ilaw.or.th/en/case/796>

50 “Sama-ae: Fish Flok’s Public Assembly Act case”. *Freedom of Expression Documentation Centre*. <https://freedom.ilaw.or.th/en/case/708>

51 “Villagers in Phichit Protest against Mining”. *Freedom of Expression Documentation Centre*. <https://freedom.ilaw.or.th/en/case/782>

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52 “Illegal Detention (Sections 309-311)”. *Siam Legal*. <http://library.siam-legal.com/thai-law/criminal-code-illegal-detention-sections-309-311>

The requirement to notify authorities should also take the form of a notice of intent, and not a request for permission. This is essential to recognise that spontaneous assemblies, due to their nature and character of organisation, would make it impossible for the organisers to notify within the set time limits. However, the notification restriction in the Public Assembly Act does not recognise this, and thus, discriminates against spontaneous public assemblies.

NCPO Announcement No. 7/2014, Order No. 3/2015 and the Public Assembly Act do not respect the right of individuals to use public spaces. As stated, most of these highlighted cases involve public assemblies at shopping malls or national-historical landmark or commemoration sites. However, these laws have been used to disrupt the use of public spaces for assemblies. The use of these spaces is integral to the success of the assembly in conveying its message, as typically, these public spaces are chosen based on the specific target audience of the assembly.

Local ordinances and low-level criminal law are also used to repress public assemblies. For example, the Cleanliness and Good Order Act has been used against activities such as scattering post-it notes and distributing leaflets, and the Amplifier Act 1950 has been used against many organisers of street activities.

## Contempt of court

Contempt of court laws in Thailand are broadly distinguished between “insult of the court” (conventionally, indirect contempt) and “contempt of court” (direct contempt). Provisions governing “insult of the court” are found in Section 198 of the Penal Code, which states:

Whoever insults the Court or the judge in a trial or adjudication of the case, or obstructs the trial of adjudication of the Court, shall be punished with imprisonment of one to seven years or fined of 2,000 to 14,000 Baht, or both.

The provision governing “contempt of court” (direct contempt) is found in Section 30 of the Civil Procedure Code, which states:

The Court shall have the power to give to any party or any third person present in the Court such directions as it may think necessary for the maintenance of order within the precincts of the Court and for the fair and speedy carrying out of the trial. Such power includes the power to prohibit the parties from taking any vexatious, dilatory or superfluous proceeding.

Section 31 of the Civil Procedure Code<sup>53</sup> lists types of behaviour that qualify as contempt of court offences. These are:

- Refusal to comply with any directions given by the court.
- Improper behaviour within the court’s precincts.
- Presenting false evidence or statement(s) to the court during an inquiry to have the court’s fee waived.
- Intentionally evading court orders if said party knows that they will be served with a Court order or document(s).
- Inspecting the file(s) of a case or obtaining a copy of the file(s).
- Disobeying a court order to appear in court.

These actions fall into the direct contempt category. Section 33 of the Civil Procedure Code states:

Where in any court, any party or person commits contempt of court, the court shall have the power to punish the offender whether to order him or her to leave the court room or sentence up to 6 months in prison or fine up to 500 Baht or both.

These provisions in the Civil Procedure Code grant the court special and arbitrary powers to punish an “offender” immediately without having to conduct an inquiry or witness examination or allowing the defendant to face trial.

In addition, contempt proceedings are conducted in a different manner to a normal criminal proceeding in these ways:

- Judges in contempt cases have the power to deliver a verdict and sentence (if convicted) to defendants immediately, if the offence happened before the judges. This is intended for the proceedings to run smoothly. Supreme Court Decision No. 4617/2004 states that this immediate-sentencing power does not depend on whether the offence was conducted in visible sight of the court or if the court knows about the offence from other evidence. In addition, the offence does not have to be reported to the police. It is clear that the rights of the defendants to trial proceedings are violated.
- Supreme Court Decision No. 635/2016 established that the trial proceedings for a contempt case are not a general criminal trial proceeding. The rights of the defendant set out in the Criminal

<sup>53</sup> English translation sourced from: [https://www.imolin.org/doc/amliid/Thailand\\_The%20Civil%20Procedure%20Code.pdf](https://www.imolin.org/doc/amliid/Thailand_The%20Civil%20Procedure%20Code.pdf)

Procedure Code do not exist in the Civil Procedure Code. Trials can proceed with defendants not being legally represented. As the inquiry process is a fact an inquiry, not a witness examination, the accused is not required to swear under oath.

- Even though the inquiry process needs to be conducted, it can be conducted without the presence of the accused. The court can conduct the process by itself where the court acts as an injured person, an accuser, a prosecutor, an inquirer and the decision maker by itself.

In the midst of long-lasting political conflict, the judiciary institution continues to exercise its power to interpret the laws, to adjudicate and to rule decisions on cases. However, there have been many cases where those holding power enact laws and implement them to suppress opposition. The court therefore has been pulled to play a part as the law enforcement institution and oftentimes the political actors claimed for their own legitimacy from the court orders. Many times in recent memory, courts' decisions have created a big impact on Thai politics and society – For example, the decision that the election was invalid in 2014, and the decision to revoke political parties and ban more than 100 politicians from electoral rights for 10 years in 2006. Both decisions led to political dead ends and opened a walkway for military coups.

During political conflict, where those with anti-establishment political views are prosecuted in court, discontent arises and the society begins to question the performance of the court. Offences of insult of court and contempt of court, therefore, are used against them to obstruct anti-establishment movements and restrict criticism and verbal attack against the court by people who are politically suppressed.

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#### CASE STUDY 1: SUDSA-NGUAN SUTHEESORN<sup>54</sup>

Sudsanguan Sutheesorn, Picha Wijitsilp and Darunee Kritboonyalai were sentenced to a month of imprisonment after being found guilty by the Supreme Court under “contempt of court” on 8 November 2016. The three individuals led a protest in front of the Civil Court on 21 February 2014 to protest the decision of the Civil Court in invoking the Emergency Law declaration. The protesters laid a wreath of flowers in front

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<sup>54</sup> “Case: Sudsanguan: Protested in front of Civil Court”. *Freedom of Expression Documentation Centre*. <https://freedom.ilaw.or.th/en/case/754>

of the Civil Court with a message reading “for the injustice of the Civil Court.” The Supreme Court’s reasoning for the judgement was that the act of the three defendants in assembling a group of protesters outside the Civil Court was an attempt to pressure the Court and sabotage the judiciary. The Supreme Court opined that this act could deprive the court of its impartiality as it could be pressured to make a judgement that the protesters view favourably.

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#### CASE STUDY 2: SEVEN ACTIVISTS<sup>55</sup>

Benjamas (a pseudonym), Narongrith, Panupong, Akhom, Payu and Sirawith were charged with contempt for participating in an organised symbolic activity outside the fence of Khon Kaen Provincial Court to show their support toward a defendant (Jatupat “Pai Dao Din”) in a lèse majesté case. The protestors used pieces of wood to imitate a tilted scale, with a military boot hanging on one side and an empty bucket on the other. There was also the reading of a statement, song singing, and encouragement to lay down a white rose on the base of the scale. Sirawith was given a suspended sentence of six months in prison and a 500 baht fine, while the other six activists were given one year of probation and 24 hours of community service.

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#### CASE STUDY 3: WATTANA MUANGSOOK<sup>56</sup>

Wattana Muangsuk, a former MP from the Pheu Thai Party, was given a suspended sentence of two years and fined 500 baht for conducting a Facebook Live transmission while he was detained in the detention room of the Criminal Court. Wattana was brought to obtain pre-trial detention for his sedition case, which was due to a Facebook post calling for support on the Yingluck Shinawatra rice-pledging scheme case. The cause of his contempt of court was not the content of what he said in the live feed but because he defied the court’s regulation that photos or videos are prohibited in the court building without permission.

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<sup>55</sup> “Case: Contempt of Court case against activists (Khon kaen Provincial Court)”. *Freedom of Expression Documentation Centre*. <https://freedom.ilaw.or.th/en/case/772>

<sup>56</sup> “Case:Wattana: Contempt of Court by Facebook Live”, *Freedom of Expression Documentation Centre*. <https://freedom.ilaw.or.th/en/case/802>

## *Overall analysis on contempt of court*

With regard to the Thai offence of “insult of the court”, similar to other countries, there is an inherent clash between maintaining the authority of the judiciary, the right to a fair trial and freedom of expression. However, the Thai treatment of “insult of the court” differs from other countries in that there is no strict legal test to determine if an “offence” has been committed. These strict legal tests that exist in other countries ensure that freedom of expression is not infringed unjustly. In addition, a defence to be established on truth and fair comment and the social need for public interest is not supported in Thai “insult of the court” cases. As demonstrated by the Supreme Court’s legal reasoning in the case of Sudsa-nguan, there is no clear and sound legal test applied to show how the “offence” has a high likelihood of undermining and prejudicing the administration of justice and that the legal process was seriously prejudiced.

Another problem arises from the lack of a clear and consistent interpretation of the word “court vicinity”. A Facebook post conducted at the offender’s house was once interpreted as a punishable act with intention to cause damage in the court vicinity. The case against seven activists was for an activity clearly conducted outside the court’s fence but near the court sign, while there was a court decision to punish a person who wrote and submitted a complaint letter against judges to official bodies outside the court building.

The legal proceedings for contempt cases are conducted in a special procedure that violates the rights of the accused. That legal representation for defendants is not a requirement for the trial is a violation of Article 14 of the ICCPR. Decisions by judges are often made in a short space of time, demonstrating that judges do not give sufficient consideration to determine if the trial proceedings in question have been impeded or prejudiced or if the reputation of the judiciary has been impaired.

## **Section 61 of the Referendum Act of 2016**

In April 2016, the junta-appointed parliament passed the Referendum Act 2016 for the constitutional referendum on 7 August 2016. The draft constitution was written by a committee appointed by the NCPO without any public participation in the drafting process. The draft also installed many new mechanisms to ensure the military roles in politics; for example, it appointed 250 senators, set up the ethical standards for politicians, and established that the national strategy would be drafted by the junta. The NCPO therefore needed this draft to pass

the referendum with as little resistance as possible. The Referendum Act of 2016 was enacted for a constitutional referendum and to control the political atmosphere before the referendum date. Section 61 was the main problem of this law, as it limited freedom of expression on criticism of the draft constitution. Section 61 of the Referendum Act states:

Any person who commits following acts; (1) to cause confusion to affect orderliness of voting,

Anyone who publicizes text, images or sound, through either newspaper, radio, television, electronic media or other channels, that is either untruthful, harsh, offensive, rude, inciting or threatening, with the intention that voters will either not exercise their right to vote, or vote in a certain way, or not vote, shall be considered as a person causing confusion to affect orderliness of voting.

Any person commits the act to cause confusion to affect orderliness of voting shall be punished with imprisonment of not exceeding 10 years and a fine of up to 200,000 Baht. The Court may order to revoke his/her right to vote of not exceeding five years.

If the offences are committed by a group of five persons or more, each person shall be punished with imprisonment of one to ten years, a fine from 20,000 to 200,000 Baht and a 10-year revocation of voting right by court.<sup>57</sup>

The Referendum Act of 2016 caused a lot of problems in the society because the legislators did not limit the officials’ authority and did not try to protect people’s freedom of expression. Therefore, there were a lot of innocent people who were affected by this act.

Under the military rule, from 25 April 2017 to 7 August 2017, at least 64 individuals have been arrested or charged under Section 61 of the Referendum Act and from 19 June 2017 to 30 July 2017, at least 131 individuals have been charged under Head of the NCPO Order No. 3/2015 and other laws for participating in activities related to the referendum.<sup>58</sup>

57 Thai Lawyers for Human Rights. (2016, 12 July). Vote-No Activists and Reporter Prosecuted under Constitution Referendum Act. *Thai Lawyers for Human Rights*. <http://www.tlhr2014.com/th/?p=1107>

58 “Table of charges against Referendum Act of 2016”. *Freedom of Expression Documentation Centre*. <https://freedom.ilaw.or.th/en/node/363>

## *The problems arising from the legal provision itself*

### Ambiguity of the law

There are several ambiguities in the legal provision, for example, the terms “harsh”, “offensive” or “inciting”. It is difficult to know which expression constitutes an offence against this section. Moreover, there are no definitions for these words in the Penal Code. This is against the principle of the Criminal Code that there should be clear definitions, so people can know their rights and freedoms.

### Criminalising rude words

Expressing oneself with “rude” words may not be proper, but under normal circumstances it is not illegal. Moreover, there are no clear definitions explaining which words constitute rudeness. The interpretation of which words are rude is subjective and depends on the situation.

### Limiting point of view

The use of the term “untruthful” in this act causes problems because when people read the draft constitution, they use their own experiences, ideas and beliefs to interpret the draft constitution. This means that people could have opinions on the draft constitution that might be different from those of the individuals who wrote it.

## *The problems arising from its enforcement*

### Use of the Referendum Act to threaten dissent

The military government kept advertising the good aspects of the draft constitution through millions of leaflets, all television channels and all kinds of media. Even Gen. Prayuth, the head of the NCPO, gave an interview to say that he would vote in favour of the draft. The drafting committee refused to join any debate, given that it was not its duty as a neutral body. But campaigns against the draft were strictly repressed. All of the people who were arrested and charged were “Vote No” supporters. The Election Commission also played an active role to threaten and prohibit people from campaigning.

For example, Somchai Srisutthiyakorn, a member of the Election Commission, said that he was told that there was a Facebook page of one political movement which sold t-shirts. Those t-shirts had messages that might affect the voters, so this might qualify as an offence under Section 61 of the Referendum Act. The political movement that Somchai mentioned was the New Democracy Movement and the message on the t-shirts was: “Vote No for the future we didn’t choose”.

### Use of the Act to lay charges for unclear offences

An example of this was the case of “Vote No” stickers in Banpong District, in which the five defendants were allegedly carrying anti-constitution materials. However, they were charged with only the “Vote No” stickers with a message “Do not accept an unchosen future”. Even in the complaint that was filed with the court, there is no clear explanation of how such messages violate the law.

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### CASE STUDY 1: CHUWONG<sup>59</sup>

Chuwong, a lawyer and leader of the Krabi Landless Peasants Group, posted a message on Facebook stating that he would vote no to the draft constitution on 7 July 2016. Someone saw his message on Facebook and went on to report the case to the police. On 15 July 2016, the police requested the court to issue an arrest warrant against Chuwong under the Referendum Act. Chuwong went to report to the police on 16 July and denied the charge. The police released him on bail on the same date with a cash deposit of 150,000 baht.

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### CASE STUDY 2: “VOTE NO” STICKERS<sup>60</sup>

On 10 July 2016, Pakorn, Anan and Anucha, three New Democracy Movement activists, and Taweesak, a Prachatai journalist, were taken to Ban Pong police station for allegedly carrying anti-constitution material in their car. Later on, Phanuwat, a student from Maejo University, was taken from his residence in Ratchaburi to the police station. They were charged with violating Section 61, paragraph 2 of the Referendum Act for distributing the stickers, and were detained at the Ban Pong police station. On 11 July 2016, Ratchaburi Provincial Court granted bail to the five for 140,000 baht each. The trial of this case has finished. The court will render a verdict on 29 January 2018.

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### CASE STUDY 3: PIYARAT<sup>61</sup>

Piyarat, a 25-year-old activist, went to cast his vote at a polling station in the Bangna District Office on 7 August 2016, which was

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59 “Chuwong: Posted Status Vote No to Draft Constitution”. *Freedom of Expression Documentation Centre*. <https://freedom.ilaw.or.th/en/case/724>

60 “Vote No Sticker at Banpong District”. *Freedom of Expression Documentation Centre*. <https://freedom.ilaw.or.th/en/case/730>

61 “Piyarat: Tearing Referendum Ballot”. *Freedom of Expression Documentation Centre*. <https://freedom.ilaw.or.th/en/case/732>

the referendum date. After receiving a ballot, Piyarat tore it into pieces and shouted, “Down with dictatorship, long live democracy.” The authorities immediately arrested Piyarat along with Thongtham and Jirawat, who filmed and uploaded the incident on social media, under the Referendum Act for disrupting the peace in a polling station.

On 26 September 2017, the Phra Khanong Provincial Court acquitted the three defendants of the charge of conspiring to create disorder in a polling station under the Referendum Act. As for Piyarat, who tore up his ballot, the court sentenced him to two months in prison and fined him the sum of 2,000 baht for destroying another’s property. Piyarat’s prison sentence was, however, suspended for a year.

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### **Spread news, create fear: A more effective tool than legal measures**

Apart from exercising legal powers to arrest and prosecute individuals for political dissent, the NCPO government has also used social or psychological measures to create a climate of fear in the public. Whether or not the NCPO planned to create a climate of fear, freedom of expression in Thailand has been affected. When people began to feel uncertain of how much they could express their opinion, they started to censor themselves and politics became a taboo topic in the society.

Normally, when the NCPO government uses legal actions to arrest political dissidents and charges them with sedition or *lèse majesté*, the NCPO holds a press conference. The NCPO has never prohibited any media reports about charges against political dissidents, so stories of their arrest and punishment could spread out.

Moreover, for the last three years under the NCPO government, officials have taken turns to provide news about new measures to control online media, most of which were just threats. For example:

- On the afternoon of 28 May 2014, six days after the coup, there was some anti-coup protest which had been organised via Facebook. Then Facebook went offline for one hour, but the NCPO denied that they had any part in it. This demonstrated the NCPO’s power to the people, and that the NCPO could do it if they wanted to.<sup>62</sup>
- On 6 January 2015, the Cabinet accepted the principles of 10 drafts of digital security laws. One of them was the draft of the National Cyber Security Act, which contained Section 35 that allowed officials to spy on internet communication, email and phone calls without any court warrant. This caused a widely known public disagreement. In the end, these 10 drafts of digital security laws had to be put on hold, but eight of them were enacted one after another. However, most of those acts were about arrangement of the organisation’s structure.<sup>63</sup> The draft National Cyber Security Act and the draft Online Privacy Protection Act had not been enacted yet and there was not any sign if they were going to be enacted soon.
- In September 2015, there was news reported that the government was developing a policy to create a single gateway system to take control over internet communication, even though this was not practical in Thailand. A single gateway was beyond the capabilities of Thailand’s current technology and capital expenditure. Moreover, the government would have had to pass laws to take back the gateway’s business which was now in the hands of the private business sector. Thus, this was hardly possible in reality. After news about this controversial policy was widespread, the society was against it. People were afraid that they might be under surveillance and blocked from information that the government did not want them to know.
- On 8 March 2017, the National Reform Steering Assembly (NRSA), a junta-appointed assembly for national reform purposes, introduced the draft “Media Registration Act”. This draft law enforced all the media including online media such as Facebook fan pages to register with the National Press Council of Thailand and be under the regulation of a code of ethics. After this draft came out to the public, it was opposed by Thailand’s professional media organisations. The NRSA subsequently amended the draft many times. It should be noted that the NRSA did not have legislative power and it could only give suggestions. Thus, in order for the draft to become a law, the cabinet would have to approve it and then the National Legislative Assembly would have to pass it. However, there is no longer any consideration of this draft.

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62 Becker, O. (2014, 28 May). Thailand’s Military Denies Briefly Banning Facebook. *Vice News*. <https://news.vice.com/article/thailands-military-denies-briefly-banning-facebook>

63 Thai Netizen Network. (2015, 15 January). Thailand’s Digital Economy-Cyber Security Bills [English translation]. <https://thainetizen.org/2015/01/digital-economy-cyber-security-bills-en>

- On 12 April 2017, the Ministry of Digital Economy and Society released a prohibition order preventing people from contacting three persons, Somsak Jeamteerasakul, Pavin Chachavalpongpun and Andrew MacGregor Marshall. The order was announced on online media so people would not dare to go and see these three's Facebook posts. This raised the question as to whether being a "friend" on Facebook with these three persons was legal or not. Hours later, Captain Somsak Kaosuwan, Deputy Permanent Secretary, Ministry of Digital Economy and Society, explained that this order had no legal effect.
- In May 2017, Provincial Police Region 1 announced that even though it could not arrest persons who posted content against the monarchy on Facebook who were in exile abroad, it had eyes on those Facebook pages. What we should bear in mind is that visiting and reading content on social media were not illegal under any existing laws.
- On 8 June 2017, the National Broadcasting and Telecommunication Commission (NBTC) announced an "over the top" system to regulate online content. The NBTC ordered all online media that had an online platform, for example, YouTube and Facebook, to register. The NBTC reasoned that YouTube and Facebook, which provide platforms for live streaming, are also broadcasters. This was all self-interpretation. Since then, the NBTC has not issued any rule or regulation on how to register with it and there is no one really registered with the "over the top" system. Under the NBTC Act, there is not any section that grants the NBTC such power.
- On 3 July 2017, the NRSA, through its steering committee on mass communication reform, released a "suggestion report" which

recommended a system through which all mobile phones, especially prepaid phones, would need to be registered with the NBTC, using fingerprints and facial scan identification cards all across the country. This became big news online and offline, even though this was only a suggestion report which would not be brought to practice and in fact, such a system was beyond the capabilities of Thailand's current technology and beyond its legal authority.

Most people who were interested in freedom of expression or followed the news would not have enough time to do in-depth research on these matters. What they could do was just follow the hot news. They could not have known if these policies or proposed laws would be enacted in reality and affect their freedom or not.

Thus, most people would just remember that the government tried to legislate to regulate online media, to suppress freedom of expression and to access people's online personal data. However, most of them do not know that those regulations and measures cannot be carried out in reality.

The public's confusion and misunderstanding regarding those measures and the government's legal authority brought fear to the society, since people do not truly know what the government could and could not do. Self-censorship was the first thing people would do to guarantee their own safety. This climate of fear affects freedom of expression online and we have to say that this has had more effect than enforcing the laws.

If the military government really intended to use these social and psychological measures to threaten the people, it was a successful plan. It suppressed freedom of expression without enforcing any laws or arresting any political dissidents, and the NCPO did not have to waste any time on legal processes.

# UNSHACKLING EXPRESSION: A study on laws criminalising expression online in Asia

Freedom of expression and opinion online is increasingly criminalised with the aid of penal and internet-specific legislation. With this report, we hope to bring to light the problematic trends in the use of laws against freedom of expression in online spaces in Asia.

In this special edition of GISWatch, APC brings together analysis on the criminalisation of online expression from six Asian states: Cambodia, India, Malaysia, Myanmar, Pakistan and Thailand.

The report also includes an overview of the methodology adapted for the purposes of the country research, as well as an identification of the international standards on online freedom of expression and the regional trends to be found across the six states that are part of the study. This is followed by the country reports, which expound on the state of online freedom of expression in their respective states.

With this report, we hope to expand this research to other states in Asia and to make available a resource that civil society, internet policy experts and lawyers can use to understand the legal framework domestically and to reference other jurisdictions.

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