

Litigating on the Free Flow of Information in Thailand
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1. Most important 5 case laws and why?

The most important recent cases are

- The 2012 Constitutional Court decision concerning the constitutionality of the lèse-majesté law
- The 2013 Somyot Prueksakasemsuk lèse-majesté verdict
- The 2013 King Mongkut lèse-majesté Supreme Court verdict
- The 2013 Natural Fruit defamation case against British migration researcher Andy Hall
- The 2013 Katha Pajariyapong computer crime verdict

2. National trends in terms of issues/decisions?

Thailand is a paradoxical country in terms of freedom of expression. The longstanding political dominance of the military following the end of the absolute monarchy in 1932 received a major setback following a bloody Army crackdown on peaceful protests in May 1992. This paved the way for the relatively liberal ‘people’s constitution’ of 1997, and the codification of a broad range of human rights. From the early 1990s, Thailand was regarded as part of the ‘third wave’ of democratization, with a vibrant and open print media sector which was the envy of the wider Southeast Asian region. But this image of Thailand as a beacon of free expression was always somewhat simplistic, since certain areas of public debate – notably those relating to the monarchy – were strictly off-limits.

In 2001, former police officer turned billionaire telecommunications tycoon Thaksin Shinawatra became prime minister. His political party threatened Thailand’s traditional establishment by successfully tapping into the resentments and aspirations of lower-income voters, especially those from the populous North and Northeast regions. Thaksin was ousted by a military coup in 2006, not long after an important royal speech in which the King called upon Thailand’s top judges to solve the country’s political problems. Since then Thailand has been deeply divided between pro- and anti-Thaksin groupings, and tensions between the two have repeatedly spilled over into massive street protests – including those currently paralyzing parts of central Bangkok. A combination of political polarization and royally ordained judicialization of politics has brought freedom of expression issues very much to the fore, both exposing existing faultlines and bringing new problems to the surface.

Broadly speaking, there are three major national trends worthy of note:

Libel and Defamation

The first is a well-entrenched culture of libel and defamation suits, often brought by leading public figures, including politicians, against critical journalists, political opponents and social activists. More recently, such suits have also been brought by corporate interests, including international companies, in a misguided attempt to protect their reputations – typically having the opposite effect. Anyone facing defamation charges needs immediate access to sufficient funds for bail, to avoid incarceration. Thai newspaper editors spend much of their time on court appearances; for this reason, the legally registered editor is rarely the person who actually edits the newspaper. A particularly troubling aspect of Thai defamation laws is the provision for criminal defamation, which can carry a punishment of up to two years in jail.¹ In addition, Thai defamation laws also apply to deceased persons, and charges may be brought by surviving relatives. Though a public interest or fair comment defence may be offered, the courts may choose to reject it if it concerns ‘personal matters’.²

The 2013 Andy Hall case is a particularly egregious example of a defamation suit which has been deployed to stifle research and activism that aims to investigate abusive labor practices.³ Andy Hall is a British researcher formerly affiliated with Thailand’s Mahidol University. In 2012 he was one of the researchers who undertook an investigation into labor practices at food factories in Thailand, commissioned by the Finnish NGO Finnwatch.⁴ The investigation found evidence of extensive abuses of illegal migrant Burmese workers in factories supplying goods for international markets. Natural Fruit, the owners of a pineapple processing factory named and criticised in this report, responded by pressing charges against him for criminal libel, as well as charges under the 2007 Computer-related Crime Act.⁵ Like a number of previous cases, the Andy Hall case reflects attempts by business

¹ Section 326 Whoever, imputes anything to the other person before a third person in a manner likely to impair the reputation of such other person or to expose such other person to be hated or scorned, is said to commit defamation, and shall be punished with imprisonment not exceeding one year or fined not exceeding twenty thousand Baht, or both.

Section 327 Whoever, imputing anything the deceased person before the third person, and that imputation to be likely to impair the reputation of the father, mother, spouse or child of the deceased or to expose that person hated or scorned to be said to commit defamation, and shall be punished as prescribed by Section 326.

Section 328 If the offence of defamation be committed by means of publication of a document, drawing, painting, cinematography film, picture or letters made visible by any means, gramophone record or another recording instruments, recording picture or letters, or by broadcasting or spreading picture, or by propagation by any other means, the offender shall be punished with imprisonment not exceeding two years and fined not exceeding two hundred thousand Baht.

² Section 329 Whoever, in good faith, expresses any opinion or statement:

- By way of self justification or defense, or for the protection of a legitimate interest;
- In the status of being an official in the exercise of his functions;
- By way of fair comment on any person or thing subjected to public criticism; or
- By way of fair report of the open proceeding of any Court or meeting, shall not be guilty of defamation.

Section 330 In case of defamation, if the person prosecuted for defamation can prove that the imputation made by him is true, he shall not be punished. But he shall not be allowed to prove if such imputation concerns personal matters, and such proof will not be benefit to the public.

³ For case notes created by the legal NGO ilaw see: <http://freedom.ilaw.or.th/en/case/469>

⁴ See *Cheap has a High Price, Responsibility problems relating to international private label products and food production in Thailand*, Finnwatch, January 2013.

⁵ Details of the case may be found at the website: <http://andyjhall.wordpress.com/about/>

interests to suppress legitimate scrutiny of their commercial practices, and to create a climate of intimidation calculated to deter researchers from investigating labor abuses.⁶

Lèse-majesté

The second trend is the widespread use of Article 112 of the Thai Criminal Code which aims to curb criticism of the Thai monarchy. It reads simply

Section 112: 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.⁷

For decades the lèse-majesté law was rarely invoked, but since 2006 the number of cases has dramatically increased, peaking in around 2009 with more than 100 new cases.⁸ Many of those charged with 112 offences are associated with the political movement that supports controversial former premier Thaksin Shinawatra, ousted in a military coup in September 2006. 112 is a problematic law for a number of reasons.

Although lèse-majesté is generally viewed internationally as a crime of defamation,⁹ in the Thai Criminal Code it is grouped with legislation to protect national security – in other words, it is legislation along the ‘treason spectrum’.¹⁰ The exalted status of the Thai monarchy means that any perceived slight directed at the institution can readily be construed as a threat to the Thai nation, and produce strong emotional reactions. Under such circumstances, it can be difficult for defendants to receive a fair trial. A further problem is that anybody can accuse anybody else of lèse-majesté, and the police are then duty-bound to investigate. In a number of recent cases, judgements have appeared to extend the scope of the already extremely broad lèse-majesté laws, just as a variety of groups have called for these same laws to be reformed and more tightly delimited.

In November 2013, the Supreme Court overturned a prior decision by the Court of Appeal and convicted a 112 defendant for defaming Rama IV (King Mongkut, of *The King and I*), who died in 1868.¹¹ Prior to this ruling, jurists were broadly agreed that the 112 legislation applied only to the current King, Queen, and heir to the throne (the legislation also covers the Regent, an office which has been vacant since the 1940s). While the court did not impose a custodial sentence, the ruling sent a clear signal that the eventual passing of the current monarch, King Bhumibol, would not mean open season for retrospective criticism of his reign. The judgement was less about Rama IV than about Rama IX.

⁶ For a media report see <http://www.telegraph.co.uk/news/worldnews/asia/thailand/9900745/British-human-rights-activist-faces-Thai-jail-threat.html>

⁷ <http://www.thailandlawonline.com/laws-in-thailand/thailand-criminal-law-text-translation#chapter-1>

⁸ Figures from the Thai Foreign Ministry cited in David Streckfuss, ‘Freedom and Silencing under the neo-absolutist monarchy regime in Thailand 2006-2011’, in Pavin Chachavalpongpun, *Thailand’s Fearlessness: Free Akong*, (no place or date of publication, apparently Bangkok 2011), pp. 35-36.

⁹ Defamation has its own section, covering Articles 326 to 333 of the Criminal Code, as part of Chapter 9, ‘Offences Against Liberty and Reputation’.

¹⁰ Article 112 forms part of Chapter 2 of the Criminal Code, headed ‘Offences Relating to the Security of the kingdom.’

¹¹ See discussion at <http://www.prachatai.com/english/node/3751>

A second troubling case saw a man known as ‘Kenji’ convicted for ‘attempted lèse-majesté’, on the basis of images allegedly found on his computer.¹² The images in question had never been distributed, and thus it is difficult to see how either an act of defamation or any threat to national security had been carried out. He was sentenced to three years and four months in jail on these charges, reduced by half because of his confession.

In another case, Somyot Prueksakasemsuk, a journalist and social activist was tried on 112 charges.¹³ But even the prosecutors were quite open about the fact Somyot had never defamed the monarchy himself. Two articles published in *Voice of Taksin* magazine had allegedly defamed the King, but were written in the form of historical allegories and never mentioned the King directly. Somyot had not written the articles. Somyot was held responsible for the article because he was the named inside the cover as editor of *Voice of Taksin*. But strictly speaking, he was not legally the editor: in Thai law, the editor has to be registered as such at the National Library of Thailand, which he was not – a point confirmed his trial by no less a witness than the director of that library. Recent legal changes mean that magazine editors are no longer legally responsible for defamatory articles they publish, in any case. Despite this Somyot was sentenced to a total of eleven years in jail in 2013. He has never been granted bail and is currently appealing.

Attempts by the courts to broaden the scope of the Article 112, seen in different ways in these three cases, run counter to a growing view that the existing law is already too wide-ranging. The further reifications of the law seen its application to past Kings, conviction for ‘attempted’ 112, and its application to unregistered ‘editors’ are all slaps in the face for those calling for 112 reform, who come from a wide range of political perspectives. These extensions have been accompanied by a troubling 2012 Constitutional Court judgement, which rejected a challenge to the constitutionality of the 112 law on extremely vague grounds. The key passage of the judgement read as follows:

The Constitutional Court sees that the principle of Section 112 of the Penal Code is in line with providing protection to the king, an institution and head of the state of Thailand. The provision of penalty for offenders is needed to maintain public order and good morals of the people in accordance with the rule of law, which is the morality and ethics of the law. Therefore, Section 112 of the Penal Code is not contrary to the rule of law under Section 3 paragraph two of the Constitution.¹⁴

Lawyers for Somyot had argued that the maximum jail sentence of 15 years for 112 charges was excessive, and thus violated the 2007 Constitution.

Computer Crime

In 2007, a national assembly appointed by a military junta passed a large number of troubling bills, including a wide-ranging Computer-related Crime Act (CCA). Since then, Thailand’s ICT Ministry has blocked huge numbers of web pages, and numerous prosecutions have been brought under the Act. While the legislation is often said by the authorities to be targeted at purveyors of child pornography and online fraudsters, many of the prosecutions have been political in nature. In a number of high-profile cases, the offence in question was essentially one of lèse-majesté, but the

¹² For case notes created by the legal NGO iLaw see <http://freedom.ilaw.or.th/en/node/123>

¹³ For case notes created by the legal NGO iLaw see <http://freedom.ilaw.or.th/en/case/61>

¹⁴ <http://prachatai.com/english/node/3401>

defendants were charged under computer crime provisions. In effect, the CCA is functioning as a surrogate lèse-majesté law, though carrying lower sentences. Deploying this law against suspects attracts less domestic and international opprobrium than bringing 112 charges.¹⁵

The well-known Chiranuch Premchaiporn case is just one example of this trend. She is the editor of the Prachatai online news service, who faced prosecution for not removing 'inappropriate' messages from the agency's web board quickly enough.¹⁶ Her landmark case clearly established the CCA's principle of 'intermediary liability'. Chiranuch's crime was one of omission, not of commission.¹⁷ In 2012 she received a suspended eight month jail term and a fine of around \$650; she is currently appealing her case. Another prominent case is that of former stockbroker Katha Pajariyapong. Katha was accused of posting derogatory messages concerning the King's health on the *Fa Diai Kan* (Same Sky) web board in October 2009, and causing the stock market to crash.¹⁸ He was convicted and sentenced to four years in jail on Christmas Day, 2012. He has been on bail pending an appeal, the result of which will be heard on March 5, 2014.

The Computer-related Crime Act has opened up a second front for the defence of the monarchy; but both the Chiranuch and Katha cases have raised serious questions about how far investigators and prosecutors have the requisite skills and knowledge to handle the technical issues involved in an area where miscarriages of justice could easily take place. The testimony of the lead witness in the Katha case, an investigator from the IT Ministry, was riddled with factual inconsistencies that the judges apparently failed to grasp or chose to ignore. Similar problems plagued the Chiranuch case. Not only are CCA charges more political than criminal in their substance, but they suffer from very serious procedural and technical shortcomings.

3. Are court deliberations taking account of international, regional norms? Other jurisdiction?

In all three of the areas discussed here, it is clear that court deliberations are taking very little account of international or regional norms.

There has been little public debate about Thailand's harsh defamation laws, and while there have been intermittent international calls for them to be reformed, no real headway has been made.¹⁹

Attempts by various international bodies including the European Union to promote discussion of Article 112 have met with silence from the Thai judiciary, and protests from conservative activists.²⁰ Prominent Thai scholars such as former dean of the Chulalongkorn University law faculty Professor Bowornsak Uwanno have often presented arguments in defence of

¹⁵ For a detailed assessment of the 2007 CCA, see Sawatree Suksri, Siriphon Susonsinwut and Oraphin Yinyongpathana, *Computer Crime: Impact of the Computer-related Crime Act 2007 and State Policies on the Right to Freedom of Expression*, Bangkok: iLaw 2012.

¹⁶ For case notes created by the legal NGO iLaw see: <http://freedom.ilaw.or.th/en/case/112>

¹⁷ For a useful article summarizing key issues in the case see <http://www.prachatai.com/english/node/3246>

¹⁸ For case notes created by the legal NGO iLaw see: <http://freedom.ilaw.or.th/case/83>

¹⁹ For such a call see Duncan McCargo, 'Thailand', *Countries at the Crossroads 2007*, New York: Freedom House, p. 8, www.refworld.org/docid/4738692d2.html

²⁰ <http://prachatai.com/english/node/3504>

Article 112 to English-speaking audiences.²¹ Such arguments typically include claims that foreigners fail to understand the cultural and historical context of Thai reverence for the monarchy.

A 2012 book published by the NGO iLaw sought to place the 2007 Computer-related Crime Act in comparative context, demonstrating that many of its provisions were unnecessarily draconian compared to similar legislation enacted in other countries.²² But there have been no serious moves to reform the controversial legislation, despite widespread agreement that it was badly drafted and hastily promulgated.

4. How do court decisions influence information flows, expression, media, journalism?

The growing number of *lèse-majesté* and CCA cases, coupled with the longstanding level of libel and defamation suits have all combined to create a climate of media repression in Thailand. Whereas Thailand was placed 65, 82 and 59 in the World Press Freedom Index for 2002, 2003 and 2004 respectively, since the 2006 coup it has plummeted to between 122 (2006) and 152 (2011), with a 2014 place of 130. Thailand's alarming transformation from a beacon of free expression in Southeast Asia, to a place where journalists and even academics struggle to find space to articulate provocative and critical views has been an extremely abrupt one.

The primary result of the combined effects of these laws has been to drive commentary underground and online, through the proliferation of fake Facebook accounts where taboo topics and subversive opinions may be circulated with relative impunity. The net result is a debasement of the quality of public debate and civic life, which contributes to the very high levels of political polarization now seen in Thailand's increasingly fraught anti-government street protests.

²¹ For a collection of Bowornsak's English articles on the topic of 112, see <https://facthai.wordpress.com/2009/04/14/lese-majeste-thai-culture-and-abuse-of-law-dr-bowornsak/>

²² Sawatree Suksri, Siriphon Susonsinwut and Oraphin Yingyongpathana, *Computer Crime: Impact of the Computer-related Crime Act 2007 and State Policies on the Right to Freedom of Expression*, Bangkok: iLaw 2012.