The Truth and Probability in Thai Defamation Cases

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Abstract

Thai law does not clearly distinguish between defamation as a public wrong and defamation as an offence in private law. That leads to the abuses of criminal justice when an essentially private wrong is prosecuted and punished by means of criminal law. The defamation offences are criminalized in Thailand not so much on the basis of the actual harm to the victim, not on the basis of the vicious will to harm another, and not on the falsehood of defamatory statements. They are largely criminalized on the basis of probabilities whether any statement can impair one’s reputation or not. The paper argues that applying criminal law to cases where there is only a probability of harm can be done only in exceptional cases. The extensive application of criminal law in ordinary defamation cases should not be permitted. The law must protect the truth. Search for truth should not be reduced to the mere assessment whether or not the reputation of another person will likely be damaged by purportedly false claims. Instead, it must involve the search for the balance, if not harmony, between the right of free speech, public benefit, and the reputation of private individuals.

Keywords: Thai criminal justice, defamation, truth, probability, public interest.

1. Introduction

David Streckfuss has defined Thailand as a defamation regime, "a state whose very mentality and central impulse are defined by its understanding and use of defamation-based laws."[1] What is the most outraging for the author is that a person can be accused of defamation even though he or she makes a truthful statement. In the words of Police Lt. Col. Wattanasak Mungkandee, who brought charges against politicians for defamation of monarchy, "the truth can't be said." "Expressing an opinion like this," he stressed, "is forbidden under Thai law."[2] One can certainly agree with the moral reprehension of a system that imprisons people for making truthful statements. However, it must also be admitted that the critics of Thai defamation laws often miss a very important distinction between defamation as a civil wrong and defamation as a criminal offence. The difference between defamation as a civil wrongdoing and defamation as a criminal offence is extremely important for criminal justice. The confusion between them can lead to the oppressiveness of criminal law and to serious abuses of justice in individual cases.

The defamation laws can violate the right to speech which is guaranteed not only by international human rights agreements but also by the Thai Constitution: "A person shall enjoy the liberty to express opinions, make speeches, write, print, publicize and express by other means. The restriction of such liberty shall not be imposed, except by virtue of the provisions of law specifically enacted for the purpose of maintaining the security of the State, protecting the rights or liberties of other persons, maintaining public order or good morals, or protecting the health of

[1] David Streckfuss, "Truth on Trial in Thailand: Defamation," (Treason, and Lèse-majesté, London: Routledge 2010), 5.

[2] Ibid., 8.

the people.”[3] If we should agree with the ideas of John Stuart Mill,[4] that speaking truth is essential not only for the realization of one’s rights and duties but also for the wellbeing of State and good morals, then it will be obvious that any truthful statement must be excluded from both criminal and civil penalties. In other words, a truthful statement must present a defense against both criminal and civil law accusations. In criminal law, however, there can be an exception: the security of the state and public peace. In those exceptions, the matter is not about whether a statement is true or false, but whether there is a high probability that the statement will undermine the security of state or/and will destroy public peace.

Even though defamation laws in the West do not penalize truthful statements at present,[5] the essential element of criminal offence of defamation or label is not its falsehood, but a threat to public peace. It is appropriate here to cite a long quotation from the authoritative text of William Blackstone:[6]

“Of a nature very similar to challenges are libels, libelli famosi, which, taken in their largest and most extensive sense, signify any writings, pictures, or the like, of an immoral or illegal tendency; but, in the sense under which we are now to consider them, are malicious defamations of any person, and especially a magistrate, made public by either printing, writing, signs, or pictures, in order to provoke him to wrath or expose him to public hatred, contempt, and ridicule. The direct tendency of these libels is the breach of the public peace by stirring up the objects of them to revenge, and perhaps to bloodshed. The communication of a libel to any one person is a publication in the eye of the law; and therefore the sending an abusive letter to a man is as much a libel as if it were openly printed, for it equally tends to a breach

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[3] Thai Government, “Constitution of Kingdom of Thailand,” 2017, https://www.constituteproject.org/constitution/Thailand_2017.pdf

[4] John Mill, “On Liberty and other essays,” Oxford University Press, 1998.

[5] Roumeen Islam, “The Right to Tell: the Role of Mass Media in Economic Development,” World Bank Publications, (2002): 208.

[6] Sir William Blackstone, “Commentaries on the Laws of England in Four Books,” New York: W. E. Dean, vol. II (1838): 111.

of the peace. For the same reason, it is immaterial, with respect to the essence of a libel, whether the matter of it be true or false, since the provocation, and not the falsity, is the thing to be punished criminally; though, doubtless, the falsehood of it may aggravate its guilt and enhance its punishment."

The implication of Blackstone's dictum is that in criminal cases, it is not the truthfulness of allegedly defamatory statements that should be proven, but the likelihood of those statements to disturb public peace. This issue is of particular importance for Thailand where defamation as a criminal offence has been often used, or rather abused, for prosecuting essentially a private wrong. This extension of criminal law to private domain constitutes an abuse of criminal justice. An easiness of this abuse is already facilitated by the ambiguity of Thai criminal law which deserves a brief explanation.

2. Defamation in Thai Criminal Law

Defamation criminal cases are common in Thailand.[7] The reason for it is first, the unwillingness of the victim of defamation to institute private law proceedings, and the second, the scope of defamation laws includes political crimes, which are legally defined as "offences related to the security of the kingdom."[8] Thus, when we discuss defamation cases in Thailand, they fall into two different categories. The first category of cases is those where the victim is a private individual or an organization. The second category of Thai cases involves the lèse-majesté legislation which is well known in the world as one of the harshest. According to Section 112, "whoever, defames, insults or threatens the King, the Queen, the Heir-apparent or the Regent,

[7] Robert Smith & Mark Perry, ""Fake News" Legislation in Thailand: The Good, the Bad and the Ugly'," 6 Athens JL (2020): 243. At 253.

[8] Thai Penal Code Book II. Sections 112, 133-134.

shall be punished with imprisonment of three to fifteen years.” David Streckfuss counted that between 2006 and 2009, there were 765 court cases of lèse-majesté.[9] (Streckfuss 2010, 6). This period might be exceptional, but the prosecution on the basis of Section 112 is still common today.[10]

Section 326 of Thai Penal Code applies to defamation of a private person. It is classified in the category of “offences against liberty and reputation” and is punishable with imprisonment of not more than one year,[11] or not more than two years, if it is done by means of publication.[12] Both Sections of Thai Penal Code are unsatisfactory. Defamation in the category of “offences related to the security of the kingdom” is not defined in law. That means that judges in criminal cases are not restrained to punish everyone whose behavior seems *to them* defamatory. It is obvious that there must be a clear standard of defamation to prevent the abuse of justice. The definition of reputation offences is also defective. It remains rather broad: anything imputed 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.[13] It appears that the “anything” does not necessarily need to be false.

In the Thai legal system, the determination of guilt and punishment involves three steps that are similar to the criminal codes of Germany and France.[14] At the

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[9] David Streckfuss, *Truth on Trial in Thailand: Defamation, Treason, and Lèse-majesté*, (London: Routledge 2010),: 6.

[10] For the recent case see: ‘Protester gets 2-year royal insult sentence.’ (Bangkok Post, 4 March 2022) Accessed 15 July 2022, https://www.bangkokpost.com/thailand/politics/2274075/protester-gets-2-year-royal-insult-sentence

[11] Thai Penal Code. Section 326.

[12] Ibid. Section 328.

[13] Ibid. Section 326.

[14] Mohamed Elewa Badar and Iryna Marchuk, “A comparative study of the principles governing

first step, the court examines whether all the elements of the offense including intent or negligence as provided by law are present or not. If the elements are not complete, the court will dismiss the lawsuit. If they are complete, then the second step is to consider whether there is an exception to the actions of the defendant permitted by law. For example, there is no guilt for a person who acted in self-defense.[15] The third step involves consideration whether there is a reason for exempting the guilty person from punishment.

Section 326 of Thai Penal Code specifies the elements of the offense of defamation. According to this article, anything that is likely to impair the reputation of another person or to expose such another person to be hated or scorned, is considered as defamation that deserves punishment. It does not matter whether the offender acted in good faith or not, or whether he speaks truth or lie. The latter does not affect the presence of all the elements of the offence of defamation. Section 329, however, sets up the exceptions to the criminal liability for the acts of defamation:

"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."

Further, Section 330 sets up exemptions from punishment for those who are guilty of defamation: "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

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criminal responsibility in the major legal systems of the world (England, United States, Germany, France, Denmark, Russia, China, and Islamic legal tradition)," *Criminal Law Forum*, Vol. 24. No. 1. (2013): 1-48.

[15] Thai Penal Code. Section 38.

shall not be allowed to prove if such imputation concerns personal matters, and such proof will not be benefit to the public.”

It means that making a true statement does not exempt a person from the guilt of defamation, but only in some cases from the punishment. The reasonableness and the morality of the Thai provisions on the elements of defamation of a private person is questionable. It creates a society of cowards who are afraid to speak the truth because the truth can likely impair the reputation of a bad person.

Thai law is very different in this aspect from German law. Section 187 of the German Criminal Code, states: “Whoever, despite knowing better, asserts or disseminates an untrue fact about another person which is suited to degrading that person or negatively affecting public opinion about that person or endangering said person’s creditworthiness incurs a penalty of imprisonment for a term not exceeding two years or a fine, and, if the act was committed publicly, in a meeting or by disseminating content (section 11 (3)), a penalty of imprisonment for a term not exceeding five years or a fine.”[16] One of the elements of the offence of defamation in German law is asserting or disseminating an untrue fact. The second element is that the guilty person does it with the knowledge of its untruthfulness. Both elements of defamation are absent in Thai definitions of defamation in Section 326 of the Penal Code, making the latter too broad and oppressive to those who have a noble habit of speaking the truth.

One must add here that the exemption from guilt (Section 329) and the exemption from punishment (Section 330) are not applicable to the offence of Section 112. It is comparatively easy to correct the defects of Section 326 by adding

[16] German Government, “Criminal Code,” Accessed 2021 https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html

two additional elements to it: the act must be done in bad faith and a false assertion is made. At the same time, it would be reasonable to attach the exemptions of criminal liability and the exemptions of punishment to Section 112 to clarify the law and to limit the apparently unlimited discretion of Thai judges in its application.

In any case, it is reasonable that after the accusation of defamation is made, the defendant has the burden to prove the truthfulness of his or her statement. The same appears to be in relation to any act in good faith, such as when the imputation is done for self-justification or defense, or for the protection of a legitimate interest, or as a fair comment on any person or thing subjected to public criticism.[17]

A much more difficult task is to persuade Thai lawyers in the unreasonableness of penalizing people for probabilities of harm. The broad definitions of offences against reputation and of possible defenses raise the issues of truth and procedural fairness. Truth normally concerns the facts. Thai law, however, concerns with the probability that the imputation would likely impair the reputation of another person or expose him to be hated or scorned. In other words, Thai law actually avoids the burdensome task to prove the fact by being satisfied with the proof of probability.[18] Can probabilities be true, or the truth should deal only with the facts? Is it fair to punish a person for probabilities? These are the apriori questions the answers to which will certainly affect our assessments of Thai law.

Certainly, the use of probabilities to establish an act of defamation is not unique for Thai law. In the above quoted German definition of defamation in German law, one does not need to prove the facts that the statements negatively affected public opinion about the victim or damaged his or her creditworthiness. It is sufficient,

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[17] Thai Penal Code, Section 329.

[18] Thai text of Section 326: ผู้ใดใส่ความผู้อื่นต่อบุคคลที่สาม โดยประการที่*น่า*จะทำให้ผู้อื่นนั้นเสียชื่อเสียง ถูกดูหมิ่น หรือถูกเกลียดชัง ผู้นั้นกระทำความผิดฐานหมิ่นประมาท

along with other elements of the offense, to prove that the statements are suitable for the harm to the victim’s honor. Another example is the Canadian Penal Law. Its Section 298 (1) states: “A defamatory libel is matter published, without lawful justification or excuse, that is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or that is designed to insult the person of or concerning whom it is published.”[19]

The definitions of German and Canadian laws are potentially dangerous for the rights of people to express their opinion. They are more dangerous in a developing country where judges are less morally motivated to protect the freedom of expression, or where they are used to a mechanical application of rules without paying a due attention to the motives of the defendants, or they can be easier subject to political or business influences. It is far safer to limit criminal law of defamation only to the cases where there is a fact of harm beyond reasonable doubt leaving the balance of probabilities to civil litigation.

3.Truth and Probability in Defamation Cases

It is certainly important to define what we mean by truth and probability. The classical definition of truth is found in the *Metaphysics* of Aristotle: “To say that what is is not, or that what is not is, is false; but to say that what is is, and what is not is not, is true; and therefore also he who says that a thing is or is not will say either what is true or what is false.”[20] Before making this famous statement, Aristotle wrote that “nor indeed can there be any intermediate between contrary statements, but

[19] Government of Canada, “Criminal Code 1985” Accessed 14 July 2022, https://laws-lois.justice.gc.ca/eng/acts/c-46/index.html

[20] Aristotle. Metaphysics, “Oxford: Clarendon Press,” 2003. 4.1011b. 25.

of one thing we must either assert or deny one thing, whatever it may be."[21] Probability is generally defined as "likelihood; appearance of truth; verisimilitude. The likelihood of a proposition or hypothesis being true, from its conformity to reason or experience, or from superior evidence or arguments adduced in its favor."[22]

There are cases of defamation where there is no need to prove probability of harm to reputation if the facts of the harm are already apparent. For example, the victim was dismissed from job, or he was verbally or physically abused as the result of defamatory statements. However, the Thai law, as it is expressed now, does not require the fact of the harm to occur already. It is sufficient if the statements "will likely impair the reputation of other person or to expose such other person to be hated or scorned."[23] In other words, Thai law requires that judges make probability judgements. Probability is a quantifying measure.[24] The standard of beyond reasonable doubt, that applies to criminal cases, warrants that the probability must be very high, almost certain. This would go along with Section 227 of Thai Criminal Procedure Code which states that "no judgement of conviction shall be delivered unless the court is certain that it is *true* that the offence is committed and the defendant is the offender."[25]

Even if we accept a very high threshold of probability for successful defamation cases, the problem of whether defamation *truly* occurred is not easily solved. The decision will much depend on the value judgements of judges concerning what constitutes a good reputation and what kind of statements possess

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[21] Ibid. 4.1011b. 20.

[22] See 'Probability' Accessed 15 July 2022, https://thelawdictionary.org/probability/

[23] Thai Penal Code. Section 326.

[24] Frank Plumpton Ramsey, "*Truth and Probability" in: Foundations of Mathematics and Other Logical Essays, Edited by R. B. Braithwaite*, Ch. VII, (London: Kegan, 1931),: 156-198.

[25] Thai Criminal Procedure Code. Section 227, Emphasis is added, This is literal translation of Thai text: อย่าพิพากษาลงโทษจนกว่าจะแน่ใจว่ามีการกระทำผิดจริงและจำเลยเป็นผู้กระทำความผิดนั้น

a nature that likely impair the reputation. It assumes the existence of moral values that are essential for a good reputation and that can be equally applied to the majority of cases. Moral values may differ in society. An accusation that a person is a fornicator will be accepted differently in a traditional Muslim society in the south of Thailand and in a modern cosmopolitan Bangkok. Indeed, such a statement may be considered among some people as not offensive at all.

The existence of generally accepted moral standards of a good reputation may in itself be an issue of probability. Supposed that there are public moral values generally accepted which form the idea of a good reputation. If the probability of the existence of common moral values is very high, then a Thai judge may face another difficult dilemma. He believes that a person must also speak truth, and it is a part of a good reputation. However, a truthful statement may still be punished according to Thai Penal Code, if such statement “concerns personal matters,” and there is no benefit of this statement to the public.[26] Again, the benefit is also a matter of probability. What is considered by the public as a useless and outrageous statement, may be not without benefit, if such a statement is directed to convince, even unsuccessfully, the members of the public of their moral errors. In the Christian history, many prophets were persecuted, expelled, beaten, stoned to death (and later idolized) for making truthful and, at the same time, defamatory statements.[27]

It is unlikely that Thai judges would spend much time on reflecting about the nature of truth and probability. They will likely apply their intuition in whether a statement will likely impair the reputation or expose to hatred and scorn. The problem is that judicial intuition in applying very vague provisions of Thai criminal law

[26] Thai Penal Code, Section 330.

[27] Bible, Gospel according to Mathew, Chapter 5 accessed 15 July 2022 https://biblehub.com/matthew/5.htm

on defamation can be affected by political bias.[28] Certainly, Thai judges in defamation cases do not deal only with the probabilities whether a statement can impair one's reputation. They can look at the truth whether a victim of defamatory statements has suffered actual harm. However, to label a person guilty, probability is sufficient. The application of criminal law to the cases where there is probability of harm can be certainly justified in some exceptional cases, such as public peace or state security. But in private quarrels, such an application is unjustifiable.

4.Truth and Vicious Will

The aims of criminal law are different from tort. The latter aims at compensating the victim. The former aims at punishing a vicious will in the words of Blackstone.[29] Without the proof that the defendant acted with a vicious will, or evil intent, the application of criminal law, particularly in defamation cases, is unjustifiable. It is possible to argue that in defamation criminal cases, the emphasis should shift from proving the probability of harm to the actual harm, or at least to the proof of the vicious will to harm the victim. Many systems of criminal law have moved far away from understanding criminal intent as a vicious will. The intent and motivation to commit crime are often distinguished. Professor Douglas Hussak justly criticized this trend in criminal law jurisprudence. He wrote:

"Roughly, criminal justice is dispensed in two stages: first it is decided whether the defendant is liable; if so, it is next determined to what extent he is to be punished. It is beyond dispute that motive is relevant to the latter inquiry. Thus, a bad motive might aggravate, or a good motive might mitigate, the severity of the defendant's punishment - but the goodness or badness of his motive does not bear on the prior issue of his liability. Commentators should

[28] สมชาย ปรีชาศิลปกุล, "การเมืองเชิงตุลาการ," CMU Journal of Law and Social Sciences 9 (1) (2016): 82.

[29] Sir William Blackstone, "Commentaries on the Laws of England in Four Books (New York: W. E. Dean, 1838)," vol. II: 361.

have been more critical of the thesis that motives are and ought to be material to sentencing, but not to liability... . Modem penal codes typically identify only four culpable states (purpose, knowledge, recklessness, and negligence) that are relevant to the defendant's liability. All other "mentalistic" factors that bear on his blameworthiness are consigned to the sentencing stage. Foremost (but not alone) among these is his motive. But there is no good reason why the mens rea component of liability should be construed so narrowly as to include only these four "mental states."”[30]

Thai cases of defamation serve as a good example of discarding the motives of making statements when proving intent to defame. Let us look at one example of defamation cases that fall within the category of offences against the security of the kingdom. Mr. Ampon, a singer, denied the charges of sending SMS messages containing the materials deemed defamatory towards Thai king.[31] The defendant was accused of sending defamatory messages 4 times to a secretary of the Thai Prime Minister in 2010. The receiver reported to the Technology Crime Suppression Division (POI). The accused was arrested in August 2010 and his three phones were seized. In January 2011, the prosecutor filed the case in court, accusing Mr. Ampon of the crime of the Lèse-majesté under Section 14 (2), (3) according to the Computer Crime Act and Section 112 of the Criminal Code. The court hearings began in September 2011. The prosecution submitted evidence that the messages were sent from the device belonging to the defendant and from the area where he resided. However, there was no actual evidence that he typed the message. The court passed a guilty verdict in November 2011. Each act of sending was considered as a separate offence punishable by 5 years of imprisonment, with the total term of imprisonment of 20 years. The defendant appealed in February 2012 but withdrew 2 months later hoping to submit

[30] Douglas N. Husak, “'Motive and Criminal Liability' 8 Crim Just Ethics 3-13,” (1989), 3.

[31] Public Prosecutor v. Mr. Ampon, (2011) Ratchada Court, Bangkok. 4726/2554, accessed 15 July 2022 https://freedom.ilaw.or.th/case/21#the_verdict

a request for the royal pardon. One month later, the defendant died in a prison hospital.

In Ampon case, note that it is unknown to the public what the content of the statements was, and we cannot determine whether the probability of harm played a significant role in the judicial decision-making process. Before considering whether the court examined any evidence that could establish the defendant's malicious intent, it is essential to note that bail was denied for 63 days. In the end, the Court of Appeals allowed it, but Mr. Ampon was detained again shortly thereafter. Applications for parole were denied based on the seriousness of the offense, despite the fact that the defendant was 60 years old and suffering from cancer. The right to be released on bail is certainly not an unlimited one, as bail can be refused if it is in the interest of justice, and indeed for the sake of preserving the truthfulness of evidence. According to Thai law, the bail can be refused if "the accused or defendant may abscond, may tamper with evidence, may cause another danger, or his bail is unreliable, and finally, the provisional release would impede or imperil an official inquiry or judicial trial.[32] In Ampon case, the reason for denial of bail did not seem to relate to the interest of preserving the truthfulness of evidence. The prosecution had secured the mobile phones that allegedly were used in committing the offence, and they had access to all data possessed by the mobile phone operators. Since the case received high publicity, there was no lack of people willing to offer a high security for the provisional release. Because the accused was seriously ill, many people believed that there was little likelihood that he would attempt to run away. The escape of a terminally ill defendant is certainly a matter which the judges are in a better position to decide upon. However, the matter of bail in this case may indirectly point at one important issue that directly relates to the truth and fairness in a defamation case.

[32] Thai Criminal Procedure Code Section, 108/1.

One possible explanation of the refusal to release on bail is the existence of what is called “an institutional bias” in the cases of Lèse-majesté. The concept of “institutional bias” was largely developed in relation to racial discrimination.[33] It points at a certain system of beliefs and values which influence or predispose judicial decisions against the accused. The offences of Lèse-majesté are punished severely. If the probability is high that the defendant is guilty then his procedural rights, and indeed, the higher standard of proof of guilt in criminal case may be affected considering the value of monarchy protected by the criminal law system.

Institutional bias is a subconscious phenomenon which a judge may not be aware of. It is expressed in the less willingness to provide procedural benefits to the accused and in a severe degree of penalty. The punishment of 20 years for sending 4 SMS messages to a single person appears to a foreign observer as certainly disproportionate even if the vicious will is manifest. In comparison, murders are punished in Thailand with the imprisonment from 15 to 20 years.[34] A court in a civilized country would likely adopt in a similar case, which would be rare anyway, the idea of a continuous offence.[35] The Thai court, in contrast, perceived in each single act of sending a separate offence. It is unclear from the report whether or not all messages were identical.

We do not have access to evidence to conclude that the judges in this case were actually influenced by institutional bias. However, it is difficult to explain the unwillingness to grant bail to a dying man and the 20 years of imprisonment for sending a few SMS messages. What is obvious in this case is that the Thai court was

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[33] Larry J. Siegel, *Criminology: Theories, Patterns and Typologies*, 13th Ed. (Boston: Cengage Learning, 2016),: 54.

[34] Thai Penal Code, Section 288, Death penalty is also possible but rarely inflicted.

[35] Gilles Dutertre, *Key Case-law Extracts - European Court of Human Rights* (Strasbourg: Council of Europe, 2003),: 237.

rather preoccupied with the proof of the origin of messages rather than with the intent and motives of their possible sender. During the trial, after the court was satisfied with the proof that the defamatory messages originated from the phone of the defendant, the burden of proof actually shifted on the latter to prove that he was innocent. It is certainly reasonable for the court to affirm that the lack of direct evidence that the defendant had typed himself the defamatory messages should not be used in the favour of the accused. The nature of crime is such that it would be unreasonable to expect that the defendant would have any direct witnesses to his illegal activity. As the judge stated, "it is necessary to establish the intent from the circumstantial evidence presented by the plaintiff."[36] When the sufficient evidence is presented that the defendant is the person who is likely the originator of the message, it is reasonable to shift the burden of proof on the defendant.

However, it is also reasonable to expect that the prosecutor provides some evidence of the vicious will, for example, some instances in which the defendant displayed disrespect for monarchy. It is worrying that the case report does not contain reference to any corroborative evidence which could prove that the defendant was the author of the messages. An analogy can be drawn with the Californian law which states that a mere possession of stolen property, without some corroboration, is not sufficient to prove a defendant's guilt: "this corroborating evidence need only be slight and need not by itself be sufficient to warrant an inference of guilt."[37] If there was no corroborating evidence, then the case presents a dangerous precedent.

In this respect, the examination of possible motives and their indicators must be provided by the prosecution. Without corroborative evidence, the demand of the court to provide proof of innocence by the accused contradicts the idea of

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[36] Thai text of the decision: จำเป็นต้องอาศัยเหตุผลประจักษ์พยานแวดล้อมที่โจทก์นำสืบเพื่อชี้วัดให้เห็นเจตนาที่อยู่ภายใน

[37] Jefferson Ingram, *Criminal Evidence* (New York: Lexisnexis, 2009),: 162.

presumption of innocence and the right to be silent. The right to be silent is acknowledged in a number of legal provisions of Thai Criminal Procedure Code[38] while the principle of presumption of innocence is affirmed in Thai Constitution.[39] This case displays a dangerous tendency for the whole range of cases in which the defendant denies that he was a sender of electronic messages. It seems that the court was satisfied with proving a single fact that an electronic message with illegal content originated from the device controlled by the defendant in order to establish his guilt. The truth that some electronic messages can be easily falsified or spoofed or put on somebody’s website without authorization can be easily overlooked in this approach.

The trial of Ampon reveals something more than the institutional inclination to punish severely any act of disrespect for the monarchy. It shows that without examining the motives of the offender or finding some indicators of vicious will, there is a high risk of committing an act of injustice towards the accused. Proving vicious will is certainly difficult. William Blackstone wrote:

“a fixed design or will to do an unlawful act is almost as heinous as the commission of it, yet, as no temporal tribunal can search the heart or fathom the intentions of the mind, otherwise than as they are demonstrated by outward actions, it therefore cannot punish for what it cannot know. For which reason, in all temporal jurisdictions, an overt act, or some open evidence of an intended crime, is necessary, in order to demonstrate the depravity of the will, before the man is liable to punishment. And, as a vicious will without a vicious act is no civil crime, so, on the other hand, an unwarrantable act without a vicious will is no crime at all. So that, to constitute a crime against human laws, there must be first, a vicious will; and, secondly, an unlawful act consequent upon such vicious will.”[40]

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[38] Thai Criminal Procedure Code. Sections 83, 134/4, 165.

[39] Constitution of Thailand, 2017, Section 29 accessed 15 July 2022 http://www.constitutionalcourt.or.th/occ_en/do wnload/article_20170410173022.pdf

[40] Sir William Blackstone, “Commentaries on the Laws of England in Four Books,” vol. II, New York:

In other words, criminal law affirmed in Blackstone's theory aims at punishing vicious will. An outward action, as in the present case, of defamation serves as proof of the vicious will. The approach of Thai court is fundamentally different. It punishes not so much the will itself, but a single act of sending SMS message whose content the court interprets as defamatory, without disclosing even in general terms the content of the messages to the public. The Thai court is not concerned with the moral guilt of the accused, but with the outward actions labelled as wrong ones. In contrast, Blackstone, insisted that the age, education, and character of the offender: the repetition (or otherwise) of the offence; the time, the place, the company, play an important role in indicating vicious will.[41]

The true description of the offence for Blackstone must include the description of the moral character of the offender among other things listed above. The true description of the offence for Thai court is limited to some words of an SMS message unknown to the public. For Blackstone, the trial aims at the process of bringing up all relevant facts which would beyond reasonable doubt point to the guilt of the offender. Thai judges seem not interested in the idea of guilt in the sense of Blackstone. For them, guilt and wrongdoing are the same thing. In fact, Thai language confuses these two concepts. Thai judges are unable to take the view of Blackstone that the wickedness of the heart is a fundamental concept in defining the degree of the guilt.[42] Guilt has degrees for Blackstone. For Thai judges, guilt cannot have degrees. If a person does something which is described as wrong in a Thai legal provision, then he is guilty. The result of this simplistic or rather defective understanding of guilt is far-reaching in relation to suppressing social evils.

W. E. Dean, (1838): 369.

[41] Ibid.

[42] Ibid.

The implication of Blackstone for the cases similar to Ampon is that the prosecution needs some additional evidence of the defendant expressing his disparaging attitude to monarchy made on some other occasions in order to conclude that it was the defendant who was truly the originator of the messages. The vicious will must have some other manifestations apart from the few SMS messages in the given case. In the Psalms of Solomon,[43] which speaks about the truthfulness of a just man, it is written that sin does not dwell upon sin in the house of such a person. There is a striking difference between the way the truth or truthfulness is perceived between Solomon, who is believed to be the wisest judge ever lived, and a Thai judge. For the psalmist, a criminal offender will have some other signs, speaking in Blackstone’s terms, of a vicious will. Corroborative evidence is vital. If Solomon has to decide the case of Ampon, he will certainly have to look at the moral character of the accused to prove his guilt. It would not be fair to disregard any evidence which points at the viciousness of Ampon’s will. If no such evidence is presented, the guilty verdict would be unfair. There is nothing in the case report that indicates that such evidence was adduced to the court.

5. Public Interest and Defamation

In some societies, there can be strong reasons for not permitting defamatory statements against the head of the state if it is necessary for public security and public order. It is, however, can be in public interest to criticize lower officials in order to prevent maladministration. Mr. Saral, an environmental activist, was sued for the crime of defamation of a former Minister of Energy under Section 14 (1) (5) of

[43] Septuagint, “Psalms of Solomon. 3.6.,” accessed 15 July 2022 http://ccat.sas.upenn.edu/nets/edition/31-pssal-nets.pdf

Commuter Offences Act and Section 328 of Thai Penal Code.[44] The defendant was an administrator of a Facebook page "Returning Thai Energy". In his posts, he criticized the plaintiff as being a fraudulent selfish politician who obstructs the reform of the energy sector of Thai economy. The defendant contested the accusation arguing that either Section 329 or Section 330 of the Penal Code are applicable. The Court of the First Instance found the remarks defamatory and sentenced the defendant to 9 months of imprisonment without parole. The defendant appealed. The Court of the Appeal reaffirmed the judgement but changed the sentence: release on probation with a fine of 30.000 baht.

In this case, both courts applied what appears to be a balance of probabilities test to a criminal case. Since Sections 329 and 330 offer the exemptions either from criminal liability or punishment, the burden of proof in Thai law lies on the accused. This may appear strange for a foreign lawyer since it is an international practice that the evil intent in criminal cases of defamation requires "that plaintiffs must show that the defendants either knew that the defamatory meaning of their statement was false or were reckless in regard to the defamatory meaning's falsity."[45] The Thai courts found the evidence of truthfulness adduced by the defendant insufficient. Indeed, the statements that a person is selfish are difficult to prove by specific facts. The possibility of proving that the plaintiff is guilty of fraud was even more reduced by the Appeal court who refused the request of the defendant to order the disclosure of documents from the Office of the Auditor General (OAG) which could prove the correctness of the statements. Thus, the defenses of good faith and truthfulness are in practice very difficult to apply.

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[44] Piyasvasti Amranand v. Mr. Saral (2016), Bangkok South Criminal Court No: a. 3325/2558, Court: Appeals Court No: 13041/2016, accessed 15 May 2020 https://freedom.ilaw.or.th/case/773

[45] *Kendall v. Daily News Pub, Co*. 716 F.3d 82 (3d Cir. 2013).

The intent to defame is implied by Thai courts on the basis of the judicial assessment of the content of the statements and absence of sufficient proofs of the good faith submitted by the defendant. The probability that the statement is damaging to the reputation of the plaintiff is sufficient for application of criminal law sanctions. The idea that criticism of governmental officials or businesses is in public interest and therefore should be exempted from the ambit of criminal law is not accepted by Thai courts.

Thai law apparently does not follow a widely accepted principle that the criminal offence of defamation is different from its civil law counterpart.[46] The harm of defamation must be particularly serious to warrant the application of criminal law. In English law, the plaintiff in defamatory cases must prove damage to his reputation. On the contrary, Thai Court of Appeal clearly acknowledged that in Saral case the plaintiff had not suffered serious damage to reputation, and still affirmed the conviction.[47]

Criminal cases of defamation should pursue the public interest. Therefore, it is reasonable to limit the range of criminal libel cases only to the situations when the public interest is directly affected, particularly when there is a real threat to public peace.[48] That is not the practice of Thai law in which any, even trivial, offence to reputation of a private person is subject to criminal law involving the employment of the whole totality of justice system at the expense of taxpayers. The truth which a judge in a Thai criminal case of defaming a private individual has to find out has nothing to do with a public interest. This very unwise practice is easily perceived in

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[46] Hugh Jones and Christopher Benson, *Publishing Law*, (London: Routledge, 2006),: 183.

[47] Piyasvasti Amranand v. Mr. Saral, (2016) Bangkok South Criminal Court No: a. 3325/2558. Court: Appeals Court No: 13041/2016, accessed 15 May 2020 https://freedom.ilaw.or.th/case/773. Thai text of the judgment: พฤติการณ์แห่งคดีไม่ได้ทำให้โจทก์เสียหายมาก นับว่าเป็นการกระทำความผิดที่มีลักษณะไม่ร้ายแรงนัก

[48] Hugh Jones and Christopher Benson, *Publishing Law*, (London: Routledge, 2006),: 183.

Saral case in which there was no mentioning of public benefit such as preventing a threat to public peace. The fact that the defendant was an environmental activist with a long history of acting in the public interest was ignored in determining his guilt, although it may have affected the sentence. It is certainly against the public interest to prosecute and imprison those who act on public behalf.

It is not in the public interest to punish true statements even though these statements can damage somebody's reputation. A person must be able to defend his or her reputation facing criticism and affirming the truth, not by using the mechanism of criminal justice to force the critics to silence. The injustice of Thai defamation law is apparent in Saral case.

The defendant was a person who clearly believed that he had spoken the truth, and the law, according to him, was used to suppress the truth from the public. The case is perceived by the defendant as deeply unfair. It shows that the law and the trial in Thailand can be potentially used to suppress the truth. Certainly, it is possible that the statements of the defendant were not true in this case. However, the main problem here is that the defendant was not given access to the documents that could prove his truthfulness. Moreover, he was punished for the intent to protect the public interest. An attempt to suppress truth by means of judicial proceedings is not uncommon in Thailand as another case indicates.

In the CSI LA' Page case,[49] a Thai Provincial court in Ko Samui issued thirteen arrest warrants for spreading false news on Facebook. Nine people were arrested for

[49] The case was reported in Thai news website: "จับ-คุมสอบ 9 คนแชร์ข้อความ 'เพจ Csi La' ระบุสาวอังกฤษถูกข่มขืนเกาะเต่า," (ประชาไท, 5 กันยายน 2561) Prachatai 5 September 2018 accessed 15 July 2020 https://prachatai.com/journal/2018/09/78575. The news was also reported by Daily Mail: Faith Ridler. "British backpacker is raped and robbed after having her drink spiked on Thai island where tourist Hannah Witheridge was murdered," Daily Mail, 21 August 2018 accessed 15 July 2020 https://www.daily mail.co.uk/news/article-6083847/british-backpacker-raped-robbed-having-drink-spiked-thai-island.html.

sharing news about a rape of an English woman at Ko Samui. Thirteen people were accused of violating Thai Computer Offences Act (2017).[50] The main story of the news was that Thai police did not investigate the complaint of a British tourist that she was raped. The accused in the end were not prosecuted due to public outcry and the failure to follow the rules of criminal procedure. The charges were dropped not because of the truthfulness of the statements or because of public interests. The arrest warrants were apparently defective as the words of accusation did not match the exact wording of the provision of the statute that penalizes “bringing dishonestly or deceitfully into a computer system computer data which is distorted or forged, either in whole or in part, or computer data which is false, in such a manner likely to cause injury to the public.” In the arrest warrants, the words: “dishonestly or deceitfully” were missing. There are cases where Thai judges did not ignore the truth and did not support the application of law that suppress it. In those cases, they do affirm a noble ethical approach to truth and fairness. The case of Mr. Maitri[51] can serve as a good example. The court dismissed the case, and the prosecutor did not appeal. The defendant was prosecuted under Article 14(1) of the Computer Offences Act for posting on the Facebook allegedly false information and a video clip about the violence of the army against villagers in Gongphakping district Chiang Dao in Chiang Mai Province. It was claimed that many people, including children and old

[50] Thai Computer Offences Act (2017), Section 14.1(1): 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 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.

[51] Public Prosecutor v. Mr. Maitri Jamroensuksakul, (2016) Chiangmai Court, Chiangmai. 1676/2558 Reported in “คดีถึงที่สุดแล้ว หลังอัยการไม่อุทธรณ์คดี ‘ไมตรี’ พ.ร.บ.คอมพิวเตอร์,” Tlhr, 15 August 2016, accessed 15 July 2020 https://www.tlhr2014. com/wp-content/uploads/2016/08/maitree_verdict.pdf

people, had been beaten by the army officers. According to the plaintiff, these claims were false. The defendant denied all charges.

Remarkably, the case was dismissed not for the sake of public interest. The court based its decision on the lack of evidence to prove that the defendant was the originator of the video clip or the one who shared it. It did not accept the reliability of two witnesses from the army force, who testified that the clip was downloaded from the page of the defendant. The electronic evidence itself was declared unreliable because it was presented in a downloaded form without capturing the screen and without seeing the URL address which could point at the identity of the sender of the clip. The court said that there was no evidence that the submitted electronic evidence had not been edited or modified.

Further, the court maintained that Section 14(1) applies only to the cases when defendant knew that the data was distorted or forged. Since the prosecutor did not prove that the defendant could not be held guilty. Most importantly, the court found that the defendant posted information believing that it was true after hearing the testimony of the villagers who claimed that the acts of violence by the army had taken place indeed. In this case, the Thai court took the inner perspective of the defendant. It used an approach which is diametrically opposite to the one in the case of Mr. Saral discussed above.

Another instance when a Thai Court dismissed accusation of defamation was a high-profile case of *"Big Island Inc."*[52] The defendants, a Phuket newspaper on line in English language, reprinted Reuters report that stated that "the Thai naval forces usually earn about 2,000 baht per Rohingya for spotting a boat or turning a blind eye, said the smuggler, who works in the southern Thai region of Phang Nga (north of

[52] Royal Thai Navy v. Big Island Inc. Et Al., (2015) Phuket Court, Phuket. No: 2161/2557, accessed 15 July 2020 https://freedom.ilaw.or.th/case/554#detail

Phuket) and deals directly with the navy and police.”[53] The Royal Thai Navy argued that this report was defamatory. The court rejected this claim. The basic reasoning of the Thai court was simple. The plaintiffs were not the originators of the news but only transmitters. The originator is a respected news agency which the court described as trustworthy. The case received wide publicity. Representatives of many international and domestic human rights organizations, as well as the media, attended the hearings. It is difficult to say to what extent the publicity of the case and the pressure of the international and domestic human rights organizations influenced the non-guilty verdict of the court. It is, however, apparent, that the Thai court has accepted the idea that a news report by a trustworthy news agency cannot be counted as defamation, and it is not against law to reprint such a report.

The case is remarkable for its way of handling evidence. The computer or personal electronic records of the defendants were not seized. The evidence against them was based exclusively on the materials available for the public. The defendants did not deny that they were reprinting the materials, but they argued that their action was lawful. The defendants called some academics and experts in human rights and computer law as witnesses. Their testimony was not about the facts but about the meaning of law.[54]

One can conclude that Thai case law in relation to defamation cases against reputation of private individuals remains inconsistent. It is without doubt that courts will come to different decisions when facing the conflict between public interest in

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[53] Jason Szep and Stuart Grudgings, “Special Report: Thai Authorities Implicated in Rohingya Muslim Smuggling Network,” (Reuters, 17 July 2013) accessed 15 July 2020 https://www.reuters.com/article/us-myanmar-exodus-specialreport/special-report-thai-authorities-implicated-in-rohingya-muslim-smuggling-network-idusbre96g02520130717

[54] One (Witness No. 5: Sautri Sukhasri) was a lecturer from Thammasat University. Another (Witness No. 6: Saranan Jivasurat) was the director of the Bureau of Research and Development Electronic Transaction Development Office (Public Organization).

the freedom of speech and protecting personal dignity and reputation. However, Thai law lacks clear principles which would guide the application of defamation law. The most apparent defect is that the courts do not examine the motives of defamatory statements, and that the proof of the falsehood of the statement is not required to convince a defender of public interest.

6. Conclusion

One can conclude that Thai law on defamation is defective. In the case of defaming private individuals, it should penalize only the most serious cases in which the harm to the victim is apparent. The facts of harm must be proved beyond reasonable doubt. The cases where there is only probability of harm to private individuals should belong largely to civil law. In exceptional cases, it should be possible to punish a person for defamatory statements without proving harm if the vicious will to defame is proved. That cannot be done without examining the motivation of the defendant. In those cases, the truth must be proved that the defendant acted in bad faith and made false statements.

There is no doubt that it is a legitimate use of criminal law to use a probability test for penalizing the statements that are likely to undermine state security and destroy public peace. Where there is no danger to state security or public peace, a probability test should not apply. Therefore, the courts are under the duty to weigh the possible impact of defamatory statements. Further, a probability test should be applied to protect the honor of the King, the Queen, the Heir-apparent or the Regent. But in the circumstances of unlikelihood of the threat to the security of the state and public peace, a true statement must not lead to a punishment. This is not only because the freedom to speak the truth is the essential element of freedom of speech, but it is also in the interests of protecting monarchy that it will not degenerate into tyranny.

In defamation cases, no existing legislative mechanisms can provide always a clear answer, and the courts must exercise their discretion to strike the right balance between public interest, freedom of speech, and protecting the dignity of people. Criminal law should not be considered as the primary tool to protect the dignity of private individuals against the abuses of the freedom of speech. In some cases, analyzed above, one can see a worrying tendency of Thai courts to use criminal law to punish private wrongdoings without any regard to the public interest. The wrongs which Thai judges are trying to penalize has often nothing to do with the actual harm, public danger, and the necessity to punish people driven by a malicious intent to defame others. The defendants are forced to provide evidence of their truthfulness and at the same time they are denied access to public documents that can prove their innocence (Saral case).

It must be emphasized again that in defamation against private individuals, only false statements made in bad faith should be criminalized. The issue of truth, however, is not only about the facts of defamatory statements. Nor can finding truth be reduced to the mere assessment whether or not the reputation of another person will likely be damaged by purportedly false claims. Instead, the issue of truth must involve the search for the balance, if not harmony, between the right of free speech, public benefit, and the reputation of private individuals.

Any system of criminal justice can be abused. The renowned work of Solzhenitsyn “Gulag Archipelago” contains a record of witnesses of the abuse of justice when innocent people were convicted for political and non-political offences.[55] The legislative ambiguity of the defamation offenses in Thailand can facilitate the abuses of justice. The Thai cases discussed above may not be characteristic for the application of criminal law on defamation in Thailand. It is

[55] Aleksandr Solzhenitsyn, “The Gulag Archipelago, 1918-1956: an Experiment in Literary Investigation,” Vol. 3. New York: Random House, (2003).

obvious, that some Thai judges do resist an extensive application of criminal law to restrict the freedom of speech. To avoid the ambiguity of Thai law, it will certainly help to draw a clear line between defamation as a public wrong and defamation as a tort. The biggest problem with Thai criminal justice in defamation cases is that it tends to look at some external proofs of an illegal action without taking seriously the moral perspective of the accused. In the end, motives are important to establish a criminal intent.

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