

# Thailand's Law on Criminal Online Falsehoods: A Critical Discussion

*Lasse Schuldt\** and *Puditt Ovattananavakhun*<sup>†</sup>

## Abstract

*This article critically discusses the Thai criminal law applicable to online falsehoods, namely Section 14 para. 1(1) and (2) of the Act on Computer-Related Offences. Linking developments in Thailand to global and Southeast Asian fake news discourses, the article's main part sheds light on several interpretational and constitutional complexities. Conflicting concepts of falsity, structural inconsistencies and an uncertain ambit of protected interests are found to persist, despite legislative amendments. It is argued that criminal punishment should depend on proof of actual rather than likely damage. In the light of recent constitutional jurisprudence, the level of punishment is found to constitute a disproportionate restriction of the right to freedom of expression. The article provides an in-depth analysis that contributes to the evolving scholarship on the challenges of regulatory responses to fake news. It concludes that education in media literacy and critical reflection are the approaches best suited to enhance society's resilience against manipulated information.*

Keywords: Fake news — Computer crimes — Free speech

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\* Assistant Professor, Faculty of Law, Thammasat University, [lasse@tu.ac.th](mailto:lasse@tu.ac.th).

<sup>†</sup> LLB (Thammasat University); LLM (University College London), [puditt.ova@gmail.com](mailto:puditt.ova@gmail.com).

## I. INTRODUCTION: CRIMINAL ONLINE FALSEHOODS AND THE FAKE NEWS PARADIGM

In 2007, the Thai National Legislative Assembly enacted the Act on Computer-Related Offences 2007.<sup>1</sup> It was Thailand's first law criminalising the distribution of false information through computer systems. The relevant provisions, namely Section 14 para. 1(1) and (2) constitute Thailand's anti-fake news law. This article discusses its development, enforcement, interpretation and constitutionality. Despite Thailand's ostensible frontrunner position among countries criminalising fake news, it is argued that multiple legal uncertainties have remained. Meanwhile, however, online falsehoods have become a ubiquitous phenomenon, with governments around the world vowing to eradicate them. The newly created laws focus on the protection of public interests, as opposed to reputational concerns as under traditional defamation laws.

Since the 2016 Presidential Election campaign in the United States, the discourse on the threat from fake news has been spreading globally. The former U.S. President Donald Trump, who himself allegedly benefited from false news stories on social media before the election,<sup>2</sup> popularised the term, frequently labelling traditional mainstream media as “fake.”<sup>3</sup> The global public as well as governments on all continents rapidly adopted the term.<sup>4</sup> Google Trends shows that the interest in “fake news” has indeed risen—quite specifically since September 2016.<sup>5</sup>

The fake news paradigm has also attracted significant academic attention. Initial reservations against adopting the allegedly imprecise term<sup>6</sup> have largely given way to pragmatic acceptance.<sup>7</sup> While academic publications had previously referred to

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<sup>1</sup> พระราชบัญญัติว่าด้วยการกระทำความผิดเกี่ยวกับคอมพิวเตอร์ พ.ศ. 2550, ราชกิจจานุเบกษา เล่ม 124 ตอนที่ 27 ก หน้า 4 (18 มิถุนายน พ.ศ. 2550) [Act on Computer Related Offences 2007, Government Gazette vol 124 pt 27 kor p 4 (18 June 2007)] (Thai).

<sup>2</sup> Hunt Allcott and Matthew Gentzkow, “Social Media and Fake News in the 2016 Election” (2017) 31(2) *Journal of Economic Perspectives* 211, 212.

<sup>3</sup> John Brummette, Marcia DiStaso, Michail Vafeiadis, and Marcus Messner, “Read All About It: The Politicization of ‘Fake News’ on Twitter” (2018) 95(2) *Journalism & Mass Communication Quarterly* 497.

<sup>4</sup> Rosa Scardigno and Giuseppe Mininni, “The Rhetoric Side of Fake News: A New Weapon for Anti-Politics?” (2020) 76(2) *World Futures* 81, 82.

<sup>5</sup> Google Trends, “fake news” (regions with low search volume not included) <<https://trends.google.com/trends/explore?date=all&q=fake%20news>>; the data show that Southeast Asian countries figure prominently among those where the search term has been most prevalent: Behind leading Brazil, the Philippines and Singapore follow on the second and third places while the United States is ranked fifth. Among the top 50 countries, Malaysia is placed on 15, Thailand on 44, Indonesia on 47, and Vietnam on 48.

<sup>6</sup> Joshua Habgood-Coote, “Sthitop Talking about Fake News!” (2019) 62(9–10) *Inquiry* 1033.

<sup>7</sup> Jessica Pepp, Eliot Michaelson, and Rachel Sterken, “Why We Should Keep Talking About Fake News” (2019) *Inquiry* <<https://doi.org/10.1080/0020174X.2019.1685231>>; Jana Laura Egelhofer, Loes Aaldering, Jakob-Moritz Eberl, Sebastian Galyga, and Sophie Lecheler, “From Novelty to Normalization? How Journalists Use the Term ‘Fake News’ in their Reporting” (2020) *Journalism Studies* <<https://doi.org/10.1080/1461670X.2020.1745667>>.

a variety of different phenomena as “fake news”—for instance, news satire and parody, the fabrication or manipulation of reports, advertising techniques, propaganda, and the discrediting of traditional news or of dissenters<sup>8</sup>—the majority now appear to understand the term broadly to mean intentional misinformation, particularly perpetrated via social media. As for the effects of online falsehoods, it is frequently asserted that they may lead to a loss of trust in institutions and modes of governance, contribute to an increase in social polarisation, spread hate, or incite to violence;<sup>9</sup> effects that may be accelerated by selective information exposure and so-called “filter bubbles” on social media.<sup>10</sup> Due to the alleged agenda-setting power of deliberately false information,<sup>11</sup> the truth is described as being increasingly subject to contest. As a result, terms such as “alternative facts” or “post-truth” have found their way into everyday language.<sup>12</sup>

At the same time, research shows that the fake news label has also become a discursive tool to discredit unwanted information, media outlets and politicians.<sup>13</sup> It has been argued that “fake news” is a Laclaudian floating signifier “lodged in-between different hegemonic projects seeking to provide an image of how society is and ought to be structured.”<sup>14</sup> Thus, while online falsehoods have become a legitimate concern for societies and governments around the world, the fight against them has been frequently abused in order to justify unwarranted or excessive restrictions of constitutionally protected free speech. This Janus-faced character of the fake news

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<sup>8</sup> Edson C. Tandoc, Zheng Wei Lim, and Richard Ling, “Defining ‘Fake News’: A Typology of Scholarly Definitions” (2018) 6(2) *Digital Journalism* 137.

<sup>9</sup> Paul Mozur, “A Genocide Incited on Facebook, With Posts From Myanmar’s Military” *New York Times* (15 October 2018) <<https://www.nytimes.com/2018/10/15/technology/myanmar-facebook-genocide.html>>.

<sup>10</sup> Edda Humprecht, “Where ‘Fake News’ Flourishes: A Comparison Across Four Western Democracies” (2018) 22(13) *Information, Communication & Society* 1973; Dominic Spohr, “Fake News and Ideological Polarization: Filter Bubbles and Selective Exposure on Social Media” (2017) 34(3) *Business Information Review* 150; Herman Wasserman, “Fake News from Africa: Panics, Politics and Paradigms” (2020) 21(1) *Journalism* 3; Homero Gil de Zúñiga, Brian Weeks, and Alberto Ardèvol-Abreu, “Effects of the News-Finds-Me Perception in Communication: Social Media Use Implications for News Seeking and Learning about Politics” (2017) 22(3) *Journal of Computer-Mediated Communication* 105.

<sup>11</sup> See Chris J. Vargo, Lei Guo, and Michelle A. Amazeen, “The Agenda-Setting Power of Fake News: A Big Data Analysis of the Online Media Landscape from 2014 to 2016” (2018) 20(5) *New Media & Society* 2028.

<sup>12</sup> Silvio Waisbord, “Truth is What Happens to News” (2018) 19(13) *Journalism Studies* 1866.

<sup>13</sup> Sander van der Linden, Costas Panagopoulos, and Jon Roozenbeek, “You Are Fake News: Political Bias in Perceptions of Fake News” (2020) 42(3) *Media, Culture & Society* 460; Anne Schulz, Werner Wirth, and Philipp Müller, “We Are the People and You Are Fake News: A Social Identity Approach to Populist Citizens’ False Consensus and Hostile Media Perceptions” (2020) 47(2) *Communication Research* 201; Christopher A. Smith, “Weaponized Iconoclasm in Internet Memes Featuring the Expression ‘Fake News’” (2019) 13(3) *Discourse & Communication* 303.

<sup>14</sup> Johan Farkas and Jannick Schou, “Fake News as a Floating Signifier: Hegemony, Antagonism and the Politics of Falsehood” (2018) 25(3) *Javnost – The Public* 298.

discourse calls to mind the “war on terror” and its two-decade-long global utilisation to extend governmental powers under the banner of national security.<sup>15</sup>

The growing body of literature on regulatory responses to fake news discusses the promise and the challenges of state-led approaches, self-regulation, and models where fake news is simply “swamped” by truth.<sup>16</sup> While some publications focus more on the question of “how” rather than “if” the phenomenon should be regulated,<sup>17</sup> others have called for careful consideration as to whether governments and technology corporations should become the arbiters of truth.<sup>18</sup> The European Commission has recommended increasing the pressure on social media companies and improving media literacy through enhanced curricula at schools and universities.<sup>19</sup> In Southeast Asia, ASEAN member states favour a stronger role for governments in terms of monitoring and clarification, and the creation of laws, norms and guidelines.<sup>20</sup>

## II. SOUTHEAST ASIA’S LEGAL WAR ON FAKE NEWS

In hindsight, Thailand’s criminalisation of online falsehoods foreshadowed a global legislative trend in which Southeast Asian countries quickly took a leading role, making the region the world’s foremost laboratory for anti-fake news laws.<sup>21</sup> This part outlines the major legislative steps across the region, before addressing the Thai developments in a more detailed manner.

In Malaysia, where the former Prime Minister Najib Razak called fake news the “new plague,”<sup>22</sup> an Anti-Fake News Act was adopted in April 2018, just a month before

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<sup>15</sup> Adam Hodges, *The ‘War on Terror’ Narrative – Discourse and Intertextuality in the Construction and Contestation of Sociopolitical Reality* (Oxford University Press 2011).

<sup>16</sup> Albert Alemanno, “How to Counter Fake News? A Taxonomy of Anti-fake News Approaches” (2018) 9(1) *European Journal of Risk Regulation* 1; Petros Iosifidis and Nicholas Nicoli, “The Battle to End Fake News: A Qualitative Content Analysis of Facebook Announcements on How it Combats Disinformation” (2020) 82(1) *International Communication Gazette* 60.

<sup>17</sup> Rebecca K. Helm and Hitoshi Nasu, “Regulatory Responses to ‘Fake News’ and Freedom of Expression: Normative and Empirical Evaluation” (2021) *Human Rights Law Review* <<https://doi.org/10.1093/hrlr/ngaa060>>, arguing for criminal sanction as an effective regulatory response; Young Min Baek, Hyunhee Kang, and Sonho Kim, “Fake News Should Be Regulated Because It Influences Both ‘Others’ and ‘Me’: How and Why the Influence of Presumed Influence Model Should Be Extended” (2019) 22(3) *Mass Communication and Society* 301.

<sup>18</sup> Irini Katsirea, “Fake News’: Reconsidering the Value of Untruthful Expression in the Face of Regulatory Uncertainty” (2018) 10(2) *Journal of Media Law* 159; Jack Andersen and Silje Obelitz Sør, “Communicative Actions We Live By: The Problem with Fact-Checking, Tagging or Flagging Fake News – the Case of Facebook” (2020) 35(2) *European Journal of Communication* 126.

<sup>19</sup> European Commission, “Tackling Online Disinformation: A European Approach” COM (2018) 236 final, 26 April 2018.

<sup>20</sup> ASEAN, 14th Conference of the ASEAN Ministers Responsible for Information (AMRI), Framework and Joint Declaration to Minimise the Harmful Effects of Fake News, 10 May 2018.

<sup>21</sup> Lasse Schuldt, “Truth vs. Free Speech: How Southeast Asia’s War on Fake News Unfolds” (*Verfassungsblog*, 7 December 2019) <<https://verfassungsblog.de/truth-vs-free-speech>>.

<sup>22</sup> Sumisha Naidu, “Free Speech Thriving in Malaysia but Fake News a Plague: PM Najib” *Channel*

UMNO's historic electoral defeat. At the time, evidence of Najib Razak's alleged involvement in the 1MDB corruption scandal was mounting and was being shared on social media, which might have been a reason for the law's quick passage. Section 4 of the Act provides that "any person who, by any means, maliciously creates, offers, publishes, prints, distributes, circulates or disseminates any fake news or publication containing fake news" commits a crime. Fake news was defined as "any news, information, data and reports, which is or are wholly or partly false" (Section 2). Thus, the law criminalised the spreading of falsehoods, regardless of any probable or actual damage. After the May 2018 election, the Mahathir Mohamad administration pursued the goal of repealing the Act—a campaign promise that was eventually delivered in December 2019. Mahathir himself, however, had previously described the law as "good."<sup>23</sup> His successor in the office of Prime Minister, Muhyiddin Yassin, has said that he would make use of various laws to combat misinformation on the Internet.<sup>24</sup>

Another prominent case is Singapore, where the Protection from Online Falsehoods and Manipulation Act 2019 (POFMA) was passed by Parliament in May 2019. It entered into force in October of the same year. POFMA's Section 7 makes it a crime for anybody to make available a false statement of fact to end-users in Singapore that is likely to have negative effects on enumerated public interests. These include national security, public health, safety, tranquillity, finances, international relations, presidential or parliamentary elections or referenda, peaceful relations between different groups, and public confidence in the performance of state authorities. The type of statements the Act considers to be false is defined in Section 2(2)(b) which stipulates that "a statement is false if it is false or misleading, whether wholly or in part, and whether on its own or in the context in which it appears." The Singaporean government has made it clear that it considers it "not conventional warfare, but a battle within all our societies" to fight against hate speech and fake news that "spread like wildfire."<sup>25</sup>

In the Philippines, the COVID-19 pandemic triggered the enactment of the Bayanihan to Heal As One Act (Republic Act No. 11469). The Act gave the president emergency powers and criminalised the creation, perpetration and spreading of "false information regarding the COVID-19 crisis on social media and other platforms, such

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*News Asia* (19 April 2017) <<https://www.channelnewsasia.com/news/asia/free-speech-thriving-in-malaysia-but-fake-news-a-plague-pm-najib-8741726>>.

<sup>23</sup> FMT News, "Tackle Fake News Without Hindering the Truth, Says Dr M" *FMT News* (4 October 2019) <<https://www.freemalaysiatoday.com/category/nation/2019/10/04/tackle-fake-news-without-hindering-the-truth-says-dr-m>>.

<sup>24</sup> Emmanuel Santa Maria Chin, "Muhyiddin: Enough Laws to Curb Fake News Even Without Repealed Act" *Malay Mail* (30 January 2020) <<https://www.malaymail.com/news/malaysia/2020/01/30/muhyiddin-enough-laws-to-curb-fake-news-even-without-repealed-act/1832860>>.

<sup>25</sup> Channel News Asia, "Terrorism and 'Fake News' Key Security Threats the World Faces: Ong Ye Kung" (*Gov.sg*, 30 January 2019) <<https://www.gov.sg/news/content/channel-newsasia---terrorism-and-fake-news-key-security-threats-the-world-faces>>; Prime Minister's Office Singapore, "PM Lee Hsien Loong at the 29th Inter-Pacific Bar Association Annual Meeting and Conference" (*Prime Minister's Office*, 25 April 2019) <<https://www.pmo.gov.sg/Newsroom/PM-Lee-Hsien-Loong-at-the-29th-Inter-Pacific-Bar-Association-Annual-Meeting-and-Conferenc>>.

information having no valid or beneficial effect on the population, and . . . clearly geared to promote chaos, panic, anarchy, fear, or confusion” (Section 6(f)). While further anti-falsehood legislation was still pending in the lower house and the Senate, this provision effectively became the Philippines’ first anti-fake news law. At the same time, President Rodrigo Duterte had repeatedly labelled accurate news as fake,<sup>26</sup> and the government itself was found spreading falsehoods.<sup>27</sup>

In Indonesia, the pending draft revision of the Penal Code aims to introduce an anti-falsehood provision in Article 309(1). The draft provision stipulates that “any person who broadcasts fake news or hoaxes resulting in a riot or disturbance shall be punished.”<sup>28</sup> The Indonesian government had already launched a new cybersecurity agency in 2018, which monitors the internet for fake news and holds regular briefings.<sup>29</sup> Due to a perceived COVID-19-related infodemic,<sup>30</sup> the first weeks of the pandemic saw dozens of people arrested for spreading false information online. Similar arrests took place in Vietnam, where in early 2020 the government stipulated administrative fines for people who provide and share fake, untruthful, distorted and slanderous information on social media. COVID-19 also triggered the Cambodian government to enact the Law on National Administration in the State of Emergency. It restricts the publication of information that could cause panic or chaos.

Academic literature with a focus on free speech on the Internet in Southeast Asia has so far largely focused on the effects of improved internet access on political participation,<sup>31</sup> and issues of cyber-repression and defamation.<sup>32</sup> Publications on the

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<sup>26</sup> Editorial Board, “A Philippine News Outlet is Exposing Duterte’s Abuses. He Calls it Fake News” *Washington Post* (13 December 2018) <[https://www.washingtonpost.com/opinions/a-philippine-news-outlet-is-exposing-dutertes-abuses-he-calls-it-fake-news/2018/12/12/c97a0d5a-f722-11e8-8d64-4e79db33382f\\_story.html](https://www.washingtonpost.com/opinions/a-philippine-news-outlet-is-exposing-dutertes-abuses-he-calls-it-fake-news/2018/12/12/c97a0d5a-f722-11e8-8d64-4e79db33382f_story.html)>.

<sup>27</sup> Maria A. Ressa, “Propaganda War: Weaponizing the Internet” *Rappler* (3 October 2016) <<https://www.rappler.com/nation/148007-propaganda-war-weaponizing-internet>>.

<sup>28</sup> Alliance of Independent Journalists, “2018 Year-End Note” *Asian Forum for Human Rights and Development (Forum-Asia)* (8 January 2019) <<https://www.forum-asia.org/?p=27974>>.

<sup>29</sup> Kate Lamb, “Indonesian Government to Hold Weekly ‘Fake News’ Briefings” *The Guardian* (27 September 2018) <<https://www.theguardian.com/world/2018/sep/27/indonesian-government-to-hold-weekly-fake-news-briefings>>.

<sup>30</sup> Crispin Maslog, “Scientists Call for Media Sobriety Amid COVID-19 Fake News ‘Infodemic’” *Asia Pacific Report* (11 March 2020) <<https://asiapacificreport.nz/2020/03/11/scientists-call-for-media-sobriety-amid-covid-19-fake-news-infodemic/>>.

<sup>31</sup> Debbie Goh, “Narrowing the Knowledge Gap: The Role of Alternative Online Media in an Authoritarian Press System” (2015) 92(4) *Journalism & Mass Communication Quarterly* 877; Mai Duong, “Blogging Three Ways in Vietnam’s Political Blogosphere” (2017) 39(2) *Contemporary Southeast Asia* 373; Aim Sinpeng, “Participatory Inequality in Online and Offline Political Engagement in Thailand” (2017) 90(2) *Pacific Affairs* 253; Ross Tapsell, “The Smartphone as the ‘Weapon of the Weak’: Assessing the Role of Communication Technologies in Malaysia’s Regime Change” (2018) 37(3) *Journal of Current Southeast Asian Affairs* 9.

<sup>32</sup> Ronald Deibert, John Palfrey, Rafal Rohozinski, and Jonathan Zittrain (eds), *Access Contested. Security, Identity, and Resistance in Asian Cyberspace* (MIT Press 2012); Liu Yangyue, “Controlling Cyberspace in Malaysia. Motivations and Constraints” (2014) 54(4) *Asian Survey* 801; Elvin Ong, “Online Repression and Self-Censorship: Evidence from Southeast Asia” (2019) 56(1) *Government and*

Southeast Asian fight against fake news and the corresponding legislation, however, are still scarce. Nonetheless, the techniques Singaporeans use to authenticate information they encounter on social media have been analysed.<sup>33</sup> An edited volume on fake news and elections in Southeast Asia is currently forthcoming.<sup>34</sup> And in Thailand, to which we will now return, a study has investigated social media literacy and the impact of fake news on public opinion in Bangkok.<sup>35</sup>

### III. DEVELOPMENT AND ENFORCEMENT OF THAILAND'S CRIMINAL LAW ON ONLINE FALSEHOODS

In comparison to neighbouring Malaysia and Singapore, the enactment of Thailand's Act on Computer-Related Offences 2007 was an early legislative response to what would later become the fake news threat. It was part of a broader legislative project going back to 1998, aimed at developing Thai law with a view to keeping pace with advancements in information technology.<sup>36</sup> In 2017, the Act was changed and amended in various respects.<sup>37</sup> This part outlines the development and enforcement of the Thai criminal law on online falsehoods, and the accompanying government discourse.

The Thai Criminal Code has long criminalised false statements of fact that amount to defamation due to their negative effect on the reputation of another person (Sections 326 to 333). The criminal provisions are accompanied in private law by a specific defamation tort that provides a claim for damages (Section 423 of the Civil and Commercial Code). Thai mass media laws do not explicitly address the

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Opposition 141; Garry Rodan, "The Internet and Political Control in Singapore" (1998) 113(1) Political Science Quarterly 63; Aim Sinpeng, "State Repression in Cyberspace: The Case of Thailand" (2013) 5(3) Asian Politics & Policy 421.

<sup>33</sup> Edson C. Tandoc, Richard Ling, Oscar Westlund et al., "Audiences' Acts of Authentication in the Age of Fake News: A Conceptual Framework" (2017) 20(8) New Media and Society 2673.

<sup>34</sup> James Gomez and Robin Ramcharan (eds), *Fake News and Elections in Southeast Asia* (Palgrave Macmillan 2021, forthcoming).

<sup>35</sup> นันทิกา หนูส และวิโรจน์ สุทธิสีมา, "ลักษณะของข่าวปลอมในประเทศไทยและระดับความรู้เท่าทันข่าวปลอมบนเฟซบุ๊กของผู้รับสารในเขตกรุงเทพมหานคร" (2562) 37(1) วารสารนิเทศศาสตร์ 37 [Nuntika Noosom and Viroj Suttisima, "The Analysis of Fake News and The Level of Media Literacy of Users in Bangkok" (2019) 37(1) Journal of Communication Arts] 37 (Thai).

<sup>36</sup> Besides the Computer Crime Act, the project aimed to develop an Electronic Transactions Act, an Electronic Signature Act, an Act on the Development of Inclusive and Equal Information Infrastructures, a Personal Data Protection Act, and an Act on Electronic Money Transfer; see สาวตรี สุขศรี และคณะ, อาชญากรรมคอมพิวเตอร์?: งานวิจัยหัวข้อ "ผลกระทบจากพระราชบัญญัติว่าด้วยการกระทำความผิดเกี่ยวกับคอมพิวเตอร์ พ.ศ. 2550 และนโยบายของรัฐกับสิทธิเสรีภาพในการแสดงความคิดเห็น" (โครงการอินเทอร์เน็ตเพื่อกฎหมายประชาชน (ไอลอว์) 2555) [Sawatree Suksri, *Computer Crime? Research Title: Impact of the Computer-related Crime Act 2007 and State Policies on the Right to Freedom of Expression* (iLaw) 2012] (Thai) 168, with footnote 6.

<sup>37</sup> พระราชบัญญัติว่าด้วยการกระทำความผิดเกี่ยวกับคอมพิวเตอร์ (ฉบับที่ ๒) พ.ศ. 2560, ราชกิจจานุเบกษา เล่ม 134 ตอนที่ 10 ก หน้า 24 (24 มกราคม พ.ศ. 2560) [Act on Computer Related Offences (No 2) 2017, Government Gazette vol 134 pt 10 kor p 24 (24 January 2017)] (Thai).

distribution of false information. They do, however, prohibit the broadcasting of information or the import of printed material which induces to overthrow the administration under the democratic form of government with the King as Head of State; or which is likely to negatively affect national security, public order or good morals; or which is obscene, or may cause a serious deterioration of the mind or health of the people.<sup>38</sup> Thai consumer protection law prohibits false or exaggerated advertisements.<sup>39</sup> In addition, the Criminal Code prescribes punishment for the malicious dissemination of false information that causes people to panic (Section 384). The latter provision's goal to protect public order conforms with some of the aims pursued by the relevant provisions of the Act on Computer-Related Offences.

Interestingly, initial drafts of the Act which were drawn up between 2002 and 2006 and which used the title "Computer Crime Act"<sup>40</sup> did not contain any content-related provisions. These were added in later versions which were approved by the Legislative Assembly further down in the legislative process, after the military coup of September 2006.<sup>41</sup> The vast majority of the Act's substantive criminal provisions are genuine computer-related crimes such as unauthorised access to computer systems, deletion of data, and similar acts (Sections 5 to 13). The scope of these sections is largely comparable to the requirements to signatories made by the "Budapest Convention"—the Council of Europe's Convention on Cybercrime of 2001.<sup>42</sup>

As for the content-related provisions, Section 14 para. 1(1) and (2), which deal with the dissemination of false information through computer systems, form part of a Section that also criminalises the entry into a computer system of computer data which constitutes an offence against the security of the Kingdom, or which constitutes terrorism, or which is obscene (Section 14 paras. 1(3), (4)). Another content-related Section deals with the dissemination of images that affect another person's reputation (Section 16). The latter part of the Act (Chapter 2, or Sections 18 to 31) stipulates the powers of executive officials and courts in relation to investigations and other interventions. The power to suppress or remove information from computer systems (Section 20) is particularly noteworthy.

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<sup>38</sup> พระราชบัญญัติการประกอบกิจการกระจายเสียงและกิจการโทรทัศน์ พ.ศ. 2551, ราชกิจจานุเบกษา เล่ม 125 ตอนที่ 42 ก หน้า 14 (4 มีนาคม พ.ศ. 2551) [Broadcasting and Television Businesses Act 2008, Government Gazette vol 125 pt 42 ก p 14 (4 March 2008)] (Thai) s 37; พระราชบัญญัติจัดแจ้งการพิมพ์ พ.ศ. 2550, ราชกิจจานุเบกษา เล่ม 124 ตอนที่ 93 ก หน้า 1 (4 มีนาคม พ.ศ. 2551) [Printing Recording Act 2007, Government Gazette vol 124 pt 93 kor p 14 (4 March 2008)] (Thai) s 10; see also วนิดา แสงสารพันธ์, หลักกฎหมาย: สื่อสารมวลชน (พิมพ์ครั้งที่ 6, วิทยุชน 2557) [Wanida Saengsaraphan, *Principles of Law: Mass Media Laws* (Winyuchon, 6th edn 2014)] (Thai) 108, 125.

<sup>39</sup> พระราชบัญญัติคุ้มครองผู้บริโภค พ.ศ. 2522, ราชกิจจานุเบกษา เล่ม 96 ตอนที่ 72/ฉบับพิเศษ หน้า 20 4 พฤษภาคม 2522 [Consumer Protection Act 1979, Government Gazette vol 96 pt 72 (special part) p 20 (4 May 1979)] (Thai) s 22 para 2(1).

<sup>40</sup> "พระราชบัญญัติอาชญากรรมคอมพิวเตอร์."

<sup>41</sup> Sawatree, *Computer Crime* (n 36) 169.

<sup>42</sup> Thailand is not a signatory.



The initial wording<sup>43</sup> of Section 14 was as follows:

Section 14. Any person who perpetrates the following offenses shall be subject to imprisonment not exceeding five years or a fine not exceeding one hundred thousand baht, or both:

- (1) put into a computer system forged computer data, partially or entirely, or false computer data, in a manner that is likely to cause damage to another person or the public;
- (2) put into a computer system false computer data in a manner that is likely to damage national security, or cause panic in the public;
- (3) put into a computer system any computer data which is an offense about the security of the Kingdom or is an offense about terrorism, according to the Criminal Code;
- (4) put into a computer system any computer data which is obscene, and that computer data is accessible by the public;
- (5) disseminate or forward any computer data when being aware that it is computer data as described in (1), (2), (3) or (4).

During the first years of its existence, the Act was enforced with varying intensity. While the restriction of website access figured most prominently,<sup>44</sup> criminal investigations and prosecutions for the distribution of illicit content also formed part of the enforcement by police and judicial authorities. Between July 2007 and December 2011, at least 215 criminal proceedings were launched that focused on content-related crimes under the Act (Sections 14 to 16). About half of these cases dealt with defamation, others with royal defamation, fraud and obscenity, and six of them with national security.<sup>45</sup>

In the following years until the Act's amendment, charges under Section 14(1) mostly focused on defamation.<sup>46</sup> Among the allegedly defamed persons were private individuals, juristic persons, politicians, state officials and institutions of the state. During this period, defamation charges were frequently based on the Act on Computer-Related Offences—rather than on Sections 326 to 333 of the Criminal Code—if the relevant acts were committed online. In a notable Supreme Court decision, Matichon Public Company Limited was found criminally liable under Sections 15 and 14(1) for publishing false information on its news website “Matichon Online.” The Court decided in the final instance that the story falsely named the plaintiff as the core leader of a rubber farmers’ protest in Nakhon Sri Thammarat.<sup>47</sup>

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<sup>43</sup> English translation (slightly corrected by the authors) taken from Thai Netizen Network, “พ.ร.บ. คอมพิวเตอร์ 2560 ไทย-อังกฤษ Thailand's Computer-related Crime Act 2017 bilingual” *Thai Netizen Network* (25 January 2017) <<https://thainetizen.org/docs/cybercrime-act-2017/>>.

<sup>44</sup> Between July 2007 and December 2011, access to 81,213 internet addresses (URLs) was blocked under Section 20 of the Act, see Sawatree, *Computer Crime* (n 36) 71.

<sup>45</sup> Sawatree, *Computer Crime* (n 36) 75; 175, with footnote 14.

<sup>46</sup> Fifty-nine of 100 cases documented for this period by ศูนย์ข้อมูลกฎหมายและคดีเสรีภาพโดย ไรลอร์ [iLaw Freedom of Expression Documentation Center] (Thai) <[https://freedom.ilaw.or.th/case?k=&p=&d\\_from=&d\\_to=&Offense=1%2B2](https://freedom.ilaw.or.th/case?k=&p=&d_from=&d_to=&Offense=1%2B2)> Section 14(1) and 14(2) preselected.

<sup>47</sup> Thai Supreme Court Decision 319/2560.

In several cases, charges under Section 14(1) were brought in combination with charges under Section 112 (royal defamation) or 116 (sedition) of the Criminal Code.<sup>48</sup> At the same time, the less frequent cases under Section 14(2) dealt with the online distribution of false information likely to impact public interests—namely having a negative effect on national security or causing panic to the public.<sup>49</sup>

In 2017, after ten years of enforcement, the Act on Computer-Related Offences was changed by the National Legislative Assembly, which had been in charge of legislation since the military coup of May 2014. Additional criminal provisions were inserted among the computer-related crimes (Sections 5 to 13) as well as the content-related crimes (Sections 14 to 16/2). The competences of officials (Sections 18 to 31) were expanded, in particular regarding powers to block access or remove information from computer systems (Section 20). Section 14 received a second paragraph, while numbers 1 and 2 of the first paragraph were also subject to important modifications:<sup>50</sup>

Section 14. [Changes marked]

Any person who perpetrates the following offenses shall be subject to imprisonment not exceeding five years or a fine not exceeding one hundred thousand baht, or both:

(1) with ill or fraudulent intent, put into a computer system distorted or forged computer data, partially or entirely, or false computer data, in a manner that is likely to cause damage to ~~another person or~~ the public, in which the perpetration is not a defamation offense under the Criminal Code;

(2) put into a computer system false computer data in a manner that is likely to damage the maintenance of national security, public safety, national economic security or public infrastructure serving national public interest, or cause panic in the public;

(3) – (5) . . . [unchanged]

If the offense under Paragraph One (1) has not been perpetrated against the public but against a particular individual, the perpetrator or a person who distributes or transfers the computer data shall be subject to imprisonment not exceeding three years and a fine not exceeding sixty thousand baht, or both, and it is a compoundable offense.

The National Legislative Assembly considered the changes in Section 14 necessary in order to render the provision better suited to respond to current threats of advanced technologies, and to enhance its clarity. As regards Section 14 para. 1(1), only actions committed with ill or fraudulent intent should be criminalised. In addition, the drafters explicitly excluded defamation from the Section's scope, as they considered that the Act's purpose was to protect public interests rather than personal reputation. Accordingly, Section 14 para. 2 was added to render Section 14 para. 1(1) a

<sup>48</sup> iLaw, Documentation (n 46).

<sup>49</sup> Nine of 100 cases documented for this period by iLaw, Documentation (n 46); for instance “K Thong Bomb Bangkok” <<https://freedom.ilaw.or.th/case/84>>; “ปอท. VS เสริมสุข กษิตประดิษฐ์” [“TCSD VS Sermasuk Kasitipradit”] <<https://freedom.ilaw.or.th/case/483>>; “รินดา: โปสเตอร์ข่าวลือประยุทธ์โอนเงินหมื่นล้าน” [“Rinda: Posted Rumor that Prayuth Transferred 10 Billion”] <<https://freedom.ilaw.or.th/case/682>>; “สมลักษณ์ คดีที่สาม: โปสเตอร์วิจารณ์เหมืองทองคำ จ.พิจิตร” [“Somlak 3rd case: Posted Comment on a Gold Mine in Phichit Province”] <<https://freedom.ilaw.or.th/case/750>>.

<sup>50</sup> For all changes, see Thai Netizen Network, “Computer-related Crime Act” (n 43).

compoundable offence for cases where public interests would not be infringed.<sup>51</sup>

The amendment stopped defamation charges from being brought or pursued under the Act. The Supreme Court, for instance, dismissed charges brought by King Power Suvarnabhumi Company Limited against administrators of the website Manager Online, based on Section 14 para. 1(1) of the Act on Computer-Related Offences, while confirming a concurrent conviction based on Section 328 of the Criminal Code. The case dealt with defamatory statements made at a rally of the People's Alliance for Democracy that were reproduced on the website.<sup>52</sup> Another Supreme Court decision equally rejected defamation charges due to the subsequent change of Section 14 para. 1(1).<sup>53</sup> A further case against Manager Online website administrators ended with an acquittal by the Supreme Court, as the special intent required by the new Section 14 para. 1(1) could not be proven.<sup>54</sup> In yet another case, however, the Supreme Court dismissed charges based only on concurrences, though the facts of the case would also have allowed a rejection with reference to the change in law.<sup>55</sup>

Overall, the number of cases based on Section 14 para. 1(1) apparently dropped, rendering Section 14 para. 1(2) the more frequently used provision. False information that would likely affect national security or cause public panic were the most important legal grounds in a practical sense, despite the introduction of additional protected interests.<sup>56</sup>

At the same time, the global fake news discourse was reaching Thailand. Government and military officials began to frequently refer to the threat from online falsehoods, speaking of “cyber and hybrid warfare,” hidden enemies, and political parties trying to educate young people with falsities.<sup>57</sup> Fake news was described as

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<sup>51</sup> สำนักกฎหมาย สำนักงานเลขาธิการวุฒิสภา ปฏิบัติหน้าที่สำนักงานเลขาธิการสภานิติบัญญัติแห่งชาติ, เอกสารประกอบการพิจารณาร่างพระราชบัญญัติว่าด้วยการกระทำความผิดเกี่ยวกับคอมพิวเตอร์ (ฉบับที่ . . .) พ.ศ. . . . (2559) [Office of Legal Affairs, Secretariat of the Senate, acting as the Secretariat of the National Legislative Assembly, Supplementary Documents for the Consideration of the Draft Act on Computer-Related Offences (No ...) Year ... (2016)], as cited in สราวุธ ปิตียาศักดิ์, คำอธิบายพระราชบัญญัติว่าด้วยการกระทำความผิดเกี่ยวกับคอมพิวเตอร์ พ.ศ. ๒๕๕๐ และ (ฉบับที่ ๒) พ.ศ. ๒๕๖๐ พร้อมด้วยประกาศกระทรวงที่เกี่ยวข้อง (นิติธรรม 2561) [Sorawuth Pitiyasak, *Explanation of the Act on Computer-Related Offences B.E. 2550 and (No 2) B.E. 2560 With Relevant Ministerial Announcements* (Nititham 2018)] (Thai) 166.

<sup>52</sup> Thai Supreme Court Decision 2778/2561.

<sup>53</sup> Thai Supreme Court Decision 6794/2561.

<sup>54</sup> MGR Online, “ศาลฎีกาพิพากษากลับ ยกฟ้อง ‘MGR Online’ เสนอข่าว ‘สายป้ายแอลอีดี’” [“Supreme Court Dismisses Case Alleging ‘MGR Online’ Published News on ‘LED Sign Graft’”] (Thai) *MGR Online* (20 August 2020) <<https://mgronline.com/crime/detail/9630000085486>>.

<sup>55</sup> Thai Supreme Court Decision 2148/2562.

<sup>56</sup> iLaw, Documentation (n 46), for instance “พล.ท.พงศกร: แชร์ข่าวปลอมเรื่องกาแฟบิกป้อม” [“Gen. Pongsakorn: Shared False News about Big Pom’s Coffee”] <<https://freedom.ilaw.or.th/case/861>>; “ปิยนุตร: วิจารณ์คดียุบพรรคทษช” [“Piyabutr: Commented on TSN Party Dissolution”] <<https://freedom.ilaw.or.th/case/864>>; “กฤษกร: ทำกิจกรรมลอยอังคารผู้ว่าอุบลฯ” [“Kritkorn: Organized Floating of Ashes of Ubon Ratchathani Mayor”] <<https://freedom.ilaw.or.th/case/884>>; “‘สายน้ำ’: แชร์โพสต์พล.อ. ประยุทธ์หนีคดีกบฏจากเพจ KonthaiUK” [“Sainam’: Sharing a Post From KonthaiUK Facebook Alleging That Prayuth Flees Coup Case”] <<https://freedom.ilaw.or.th/case/894>>.

<sup>57</sup> Bangkok Post, “Apirat: Fake News Feeds ‘Hybrid War’” *Bangkok Post* (9 August 2019) <<https://www.bangkokpost.com/thailand/general/1727615/apirat-fake-news-feeds-hybrid-war>>.

being “embedded within every aspect of our society.”<sup>58</sup> Ministerial spokespersons announced legal action against fake news spreaders.<sup>59</sup> Besides the Act on Computer-Related Offences, charges could also be brought based on two post-coup announcements (ประกาศ; *prakat*) from the National Council for Peace and Order (NCPO), which prohibited the publication of false information by the media and any unreasonable criticism of the NCPO based on false information.<sup>60</sup> The orders were revoked shortly before the elected government assumed office in July 2019.

In November 2019, the government introduced a new mechanism in the fight against fake news when it inaugurated its “Anti-Fake News Center.”<sup>61</sup> The Center operates a website as well as Facebook and Line accounts where allegedly false news is corrected, and allegedly true news is confirmed. In addition, it has the power to refer cases to the police for further investigation. At the launch of the Center, the responsible Minister referred to fake news as “one of the critical threats that could harmfully affect people's lives and the economy.”<sup>62</sup>

Another temporary anti-falsehood law was enacted in late March 2020, two months into the global COVID-19 pandemic. After the Thai government had declared an emergency, a related stipulation (ข้อกำหนด; *khokamnot*) prohibited anyone, under threat of criminal punishment, from spreading false information about the COVID-19 situation in Thailand in a manner creating public fear, and from distorting information so that it could create misunderstanding leading to disturbances in public order or good morals.<sup>63</sup> Due to the merely temporary character of this stipulation, however, we maintain our focus on the permanent anti-falsehood provisions of the Act on Computer-Related Offences, and proceed to their critical evaluation.

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<sup>58</sup> Khaosod English, “Thailand to Set Up Center to Combat ‘Fake News’” *Khaosod English* (22 August 2019) <<http://www.khaosodenglish.com/news/crimecourtscalemity/2019/08/22/thailand-to-set-up-center-to-combat-fake-news>>.

<sup>59</sup> Wassana Nanuam, “Prawit Wants ‘Fake News’ Crackdown” *Bangkok Post* (27 June 2019) <<https://www.bangkokpost.com/thailand/politics/1702408/prawit-wants-fake-news-crackdown>>.

<sup>60</sup> ประกาศคณะรักษาความสงบแห่งชาติ ฉบับที่ 97/2557, ราชกิจจานุเบกษา เล่ม 131 ตอนพิเศษ 138 ง หน้า 10 (23 กรกฎาคม 2557) [Announcement of the National Council for Peace and Order No 97/2557, Government Gazette vol 131 special pt 138 ngor p 10 (23 July 2014)] Item 3(1); ประกาศคณะรักษาความสงบแห่งชาติ ฉบับที่ 103/2557, ราชกิจจานุเบกษา เล่ม 131 ตอนพิเศษ 143 ง หน้า 10 (30 กรกฎาคม 2557) [Announcement of the National Council for Peace and Order No 103/2557, Government Gazette vol 131 special pt 143 ngor p 10 (30 July 2014)] (Thai) Item 1.

<sup>61</sup> ศูนย์ต่อต้านข่าวปลอม ประเทศไทย [Anti-Fake News Center Thailand] (Thai) <<https://www.antifakenewscenter.com>>; see Lasse Schuldt, “Official Truths in a War on Fake News: Governmental Fact-Checking in Malaysia, Singapore, and Thailand” (2021) 40(2) *Journal of Current Southeast Asian Affairs* 340.

<sup>62</sup> Suchit Leesa-Nguansuk, “Centre Goes Live to Fight Fake News” *Bangkok Post* (2 November 2019) <<https://www.bangkokpost.com/business/1785199/centre-goes-live-to-fight-fake-news>>.

<sup>63</sup> ข้อกำหนด ออกตามความในมาตรา ๙ แห่งพระราชกำหนดการบริหารราชการในสถานการณ์ฉุกเฉิน พ.ศ. ๒๕๔๘ (ฉบับที่ ๑), ราชกิจจานุเบกษา เล่ม 137 ตอนพิเศษ 69 ง หน้า 10 (25 มีนาคม 2560) [Stipulation Enacted under Section 9 of the Emergency Decree on Public Administration in Emergency Situations 2005 (No 1), Government Gazette vol 137 special pt 69 ngor p 10 (25 March 2020)] (Thai) Item 6.

## IV. INTERPRETATIONAL PITFALLS

Despite the amendments of 2017, the interpretation of Section 14 para. 1(1) and (2) has remained doubtful in several respects. The uncertainties laid out in this part raise fundamental questions about the purposes pursued by the Act. Two main contentious issues can be distinguished: The meaning of “false” (1.) and the scope of the protected interests (2.).

### A. The Meaning of “False”

Up until the present, drafters, scholars and courts apparently have not agreed on the question of what is “false” in the sense of Section 14 para. 1(1). Early drafts of Section 14 covered only the act of introducing forged (ปลอม; *plom*) computer data<sup>64</sup> into a computer system. The provision was meant to close a gap in the law: provisions dealing with the forgery of documents (Sections 264 to 269 of the Criminal Code) were only applicable to paper documents.<sup>65</sup> Thus, the new law was necessary to protect the trustworthiness<sup>66</sup> of computer data. During the legislative process, however, the Council of State proposed the inclusion of additional paragraphs covering false computer data (ข้อมูลคอมพิวเตอร์อันเป็นเท็จ; *khomun khomphiotoe an pen thet*), computer data that constitute an offence against the security of the Kingdom, as well as obscene computer data. These proposals were later included in Section 14 as Nos. 2 to 4.<sup>67</sup> At that point in the drafting process, therefore, No. 1 dealt with forged computer data and No. 2 with false computer data. Had this version been enacted, the apparent difference between the two provisions would have constituted the following: Forged computer data, analogous to forged documents, would have been understood as data that has been changed by a person who pretends to be the original data creator; false computer data, by contrast, would have been untruthful data as regards content—in other words, false statements of fact.

Significant interpretational uncertainty ensued, however, when the National Legislative Assembly (NLA) decided to include false, besides forged, computer data

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<sup>64</sup> Computer data (ข้อมูลคอมพิวเตอร์) is defined in Section 3 of the Act as “data, statements or set of instructions contained in a computer system, the output of which may be processed by a computer system including electronic data according to the Law on Electronic Transactions”; translation taken from Thai Netizen Network, Computer-related Crime Act (n 43).

<sup>65</sup> Sawatree, *Computer Crime* (n 35) 175ff.; มานิตย์ จุมปา, คำอธิบายกฎหมายว่าด้วยการกระทำความผิดเกี่ยวกับคอมพิวเตอร์ (พิมพ์ครั้งที่ 2, วิญญูชน 2554) [Manit Jumpa, *Explanation of the Law on Computer-Related Offenses* (2nd edn, Winyuchon 2011)] (Thai) 93.

<sup>66</sup> The integrity of computer data against alteration is protected by Section 9 of the Act.

<sup>67</sup> See Manit, *Computer-Related Offenses* (n 65) 93; จอมพล พิทักษ์สันตโยธิน, “‘ข้อมูลเท็จ’ การฟ้องหมิ่นประมาท กับพ.ร.บ.คอมพิวเตอร์ 2550” *Thai Netizen Network* (18 มิถุนายน 2016) [Jompon Pitaksantayothin, “‘False Information,’ Defamation Charges and the Act on Computer-Related Offenses 2007” *Thai Netizen Network* (18 June 2016)] (Thai) <<https://thainetizen.org/2016/06/defamation-computer-crime-act/>>.

under No.1, as well as the element of likely damage to another person.<sup>68</sup> In addition, the NLA further decreased the provision's resemblance to Section 264 of the Criminal Code by deleting the phrase “to cause another person to believe . . .” (เพื่อให้บุคคลอื่นเชื่อว่า; *phuea hai bukkhon uen chuea wa*).<sup>69</sup> No. 1 was thus not meant to be a mere gap-filler for data forgery but to serve the additional<sup>70</sup> purpose of protecting the truth.<sup>71</sup> With one pen stroke, No. 1 now also addressed false statements of fact—an area already covered by No. 2.<sup>72</sup>

The fact that police, prosecutors and courts mainly relied on Section 14(1) of the Act's 2007 version to bring charges of defamation<sup>73</sup> demonstrates that the provision was widely interpreted as protecting the truthfulness of computer data. Though defamation was subsequently explicitly excluded from the Section's scope, the NLA in 2017 confirmed its intention to protect the content-accuracy of information, not only through Section 14 para. 1(2), but also through the addition into No. 1 of another alternative: the introduction of distorted (บิดเบือน; *bitbuean*) computer data. Distortion of computer data apparently occurs where the perpetrator “does not tell 100% of the truth” or “does not tell the truth that should be told.”<sup>74</sup> As a result, Section 14 para. 1(1) maintained its twofold character as a provision that protects both the trustworthiness and the truthfulness of computer data. Earlier scholarly interpretations that focused exclusively on trustworthiness have therefore been superseded.<sup>75</sup> A recent Supreme Court decision apparently also considers that the Section covers computer data that is false as regards content.<sup>76</sup> This overlap between No. 1 and No. 2 is not only systematically unfortunate, but raises important questions as to the protected interests of these provisions. Below, we will further discuss this issue.

As far as Section 14 para. 1(1) and (2) protect the truthfulness of computer data, the provisions address statements of fact that can be proved true or false. They are not applicable to opinions reflecting personal standpoints. This is in line with the tort of defamation (Section 423 of the Civil and Commercial Code), which also distinguishes

<sup>68</sup> Jompon, “False Information” (n 67).

<sup>69</sup> *ibid.*

<sup>70</sup> Manit, *Computer-Related Offenses* (n 65) 95, appears to interpret the term only from the perspective of truthfulness as regards content.

<sup>71</sup> It needs to be noted, though, that forgery crimes may also protect the truthfulness of information under certain circumstances, see Sections 267 and 269 of the Criminal Code.

<sup>72</sup> That also seems to be the opinion of Sorawuth Pitiyasak, *Computer-Related Offenses* (n 51) 170.

<sup>73</sup> Using the provision as a legal ground for defamation charges might have ignored the drafters' intention at least in this regard, see Sorawuth Pitiyasak, *Computer-Related Offenses* (n 51) 167.

<sup>74</sup> Sorawuth Pitiyasak, *Computer-Related Offenses* (n 51) 169.

<sup>75</sup> See, on the Act's 2007 version, Sawatree, *Computer Crime* (n 36) 176; พรเพชร วิชิตชลชัย, คำอธิบายพระราชบัญญัติว่าด้วยการกระทำความผิดเกี่ยวกับคอมพิวเตอร์ พ.ศ. ๒๕๕๐ (สำนักงานศาลยุติธรรม, โรงพิมพ์ดอกเบี๋ย ๒๕๕๐) [Pornpech Wichitchonchai, *Explanation of the Act on Computer-Related Offenses B.E. 2550* (Office of the Judiciary, Dokbia Printing 2007)] (Thai) 26.

<sup>76</sup> MGR Online, Supreme Court Dismisses Case (n 54).

between facts and opinions.<sup>77</sup> It differs, however, from criminal defamation, which covers both statements of fact and opinions. This can be seen most explicitly in Section 329 of the Criminal Code, which provides a justifying ground for opinions (ความคิดเห็น; *khwam khit hen*) and statements (ข้อความ; *kho khwam*) if made in good faith.<sup>78</sup> Another distinguishing feature is the fact that a person can be found criminally liable of defamation even if the relevant statement of fact was true,<sup>79</sup> which again distinguishes criminal from civil defamation.<sup>80</sup> It also distinguishes criminal defamation from the Act on Computer-Related Offences: Sections 14 para. 1(1) and (2) demand of the plaintiff to prove that the statements in question were false. The general rules of criminal procedure regarding the burden of proof<sup>81</sup> apply.

For a statement to be subjectively false, the perpetrator must have acted with intention regarding all elements of the offence (Section 59 of the Criminal Code), including the falsity of the facts in question.<sup>82</sup> Besides the question whether the statement was objectively and subjectively false, it also must have had the likely effect of impairing one of the protected interests. This raises further interpretational uncertainties—which we will deal with in the following part.

## B. The Scope of Protected Interests

The preceding part revealed that Section 14 para. 1(1) of the Act on Computer-Related Offences protects both the trustworthiness and the truthfulness of computer data, while No. 2 focuses exclusively on truthfulness. However, the provisions do not protect trustworthiness and truthfulness for their own sake, but stipulate that the action in question must be likely to cause damage to the public (No. 1) or to damage the maintenance of national security, public safety, national economic security, or public

<sup>77</sup> พจน์ ปุષปาคม, คำบรรยายประมวลกฎหมายแพ่งและพาณิชย์ ว่าด้วยละเมิด (สำนักอบรมศึกษากฎหมายแห่งเนติบัณฑิตยสภา 2520) [Phoj Pusapakom, *Explanation of the Thai Civil and Commercial Code Regarding Torts* (Legal Education Institute of the Thai Bar Association 1977)] (Thai) 474.

<sup>78</sup> คนไท กวนหิน, ปัญหาทางกฎหมายเกี่ยวกับเสรีภาพในการแสดงความคิดเห็นของบุคคลในระบบกฎหมายไทย (วิทยานิพนธ์ นิติศาสตรมหาบัณฑิต คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 2554) [Khonthai Kuanhin, *Legal Problems Related to Freedom of Expression of Persons in the Thai Legal System* (Master Thesis, Thammasat University 2011)] (Thai) 141.

<sup>79</sup> See also David Streckfuss, *Truth on Trial in Thailand* (Routledge 2011) 10: “defamation is not designed to produce the truth.”

<sup>80</sup> This has been explained with the character of criminal law that also protects public order, see อนันต์ วิมลจิตต์, ความผิดฐานหมิ่นประมาทในทางอาญา (วิทยานิพนธ์ คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 2495) [Anan Wimonjit, *The Offense of Criminal Defamation* (Master Thesis, Thammasat University 1952)] (Thai) 94ff. Note that this publication based its analysis on the Criminal Code of 1908. The (current) Criminal Code of 1956 contains the, albeit limited, possibility in Section 330 to prove that an allegation was true. In addition, criminal defamation is a compoundable offense (Section 333).

<sup>81</sup> See อุดม รัฐอมฤต, คำอธิบายกฎหมายลักษณะพยานหลักฐาน (พิมพ์ครั้งที่ 7 โครงการตำราและเอกสารประกอบคำสอน คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 2562) [Udom Rathamarit, *Explanation of the Law of Evidence* (7th edn, Project for Promotion of Textbooks and Teaching Materials, Faculty of Law, Thammasat University 2019)] 71; จริญ ภักดีธนากุล, กฎหมายลักษณะพยานหลักฐาน (พิมพ์ครั้งที่ 14 สำนักอบรมศึกษากฎหมายแห่งเนติบัณฑิตยสภา 2561) [Jaran Phakdeethanakool, *Explanation of the Law of Evidence* (14th edn, Legal Education Institute of the Thai Bar Association 2019)] 286.

<sup>82</sup> In addition, Section 14 para 1(1) requires the special intent of “ill or fraudulent intent.”

infrastructure serving national public interest, or to cause panic to the public (No. 2).<sup>83</sup> Thus, both provisions aim to protect public interests. Indeed, the Act's 2017 amendment effectively removed individual interests from No. 1 with the deletion of "likely damage to another person," and the clarification that the offence must not be defamation. No. 2 had from the outset protected only public interests. However, Section 14 para. 2, also introduced in 2017, at least partly conserves the protection of individual interests by extending the scope of Paragraph 1(1) to cases where the offence "has not been perpetrated against the public but against a particular individual." Such offences are compoundable, and the punishment must be reduced.<sup>84</sup>

A problematic issue already alluded to concerns the relationship between the interests protected in No. 1 and No. 2. Damage to "the public" (ประชาชน; *prachachon*) in No. 1 and damage to the more specific public interests in No. 2 resemble the relationship between a *lex generalis* and a *lex specialis*. In other words, if national security, public safety, national economic security or public infrastructure serving national public interest are likely to be affected, or if public panic is likely to be caused, one would assume that this amounts to a likely damage to the public. The objective elements of No. 1 would be fulfilled as well. Since 2017, however, No. 1 requires a specific (ill or fraudulent) intent which is not required by No. 2. These systematics seem to indicate that the likely damage to the interests protected by No. 2 was considered particularly severe by the drafters. As far as false computer data is concerned, No. 1 could therefore be classified as a "fall-back" provision for less severe cases which, in compensation, requires an elevated subjective threshold. With regard to "misleading" computer data, however, No. 1 is the only applicable provision as No. 2 only covers false computer data. Thus, again, the systematics of the provision seem not entirely consistent.

Finally, significant practical problems are caused by the statutory requirement to prove that damage or panic was "likely" (โดยประการที่น่าจะเกิด . . . ; *doi prakan thi na cha koet* . . . ). Judges need to determine in hindsight whether and how third persons were to react to the news. The anticipated reaction of the audience becomes, retrospectively, the threshold for criminal liability. This reflects the character of Section 14 para. 1(1) and (2) as a discursive crime that needs an audience, just like defamation.<sup>85</sup> Although, would a judge need to have *ex-post facto* "prophetic powers" to decide the case?<sup>86</sup>

Some examples may help to illustrate this issue. In one instance, the police and the prosecution considered that the message of a social media user, according to which the Prime Minister and his wife had transferred a substantial amount of money to

<sup>83</sup> With regard to the Act's 2007 version, the Constitutional Court found that the elements of Section 14(2) were sufficiently certain, Thai Constitutional Court Order 46/2555; Sawatree, *Computer Crime* (n 36) 179, however, argued that it was one of the most problematic provisions.

<sup>84</sup> Welcoming the amendment, ไอลอร์, "#พรบคอม แก่ไขใหม่แล้ว คดี 'ปิดปาก' มีแต่แนวโน้มจะเพิ่มขึ้น" [iLaw, "#ComAct Newly Amended: 'Gag' Cases Will Follow Rising Trend"] (Thai) (20 March 2017) <<https://ilaw.or.th/node/4399>>.

<sup>85</sup> Streckfuss, *Truth on Trial* (n 79) 21ff.

<sup>86</sup> *ibid* 53.



Singapore, was likely to damage national security. Both the first instance and the appeals court dismissed the case, however.<sup>87</sup> In another case, the authors of a news article that referred to a *Reuters* report claiming that Thai naval forces earned money from omitting to perform their duties regarding the trafficking of Rohingya people were brought to criminal trial. The court, however, considered that damage to national security was not likely. It also rejected the likelihood of a public panic.<sup>88</sup> A further example could be the case of a person who falsely claimed on social media that a provincial authority was to close a dam, risking floods. An additional message called on the public to attend a mock cremation ceremony for the provincial governor. The court found that the posts were likely to cause public panic and pronounced a 4-year prison sentence, suspended for two years, and a fine of 110,000 baht.<sup>89</sup> Public panic-related charges were also brought in relation to claims that the Deputy Prime Minister had bought expensive coffee cups; in response to allegations that the Prime Minister fled rebellion charges; and in reaction to criticism of the Thai Raksa Chart Party dissolution.<sup>90</sup>

None of these cases seem to indicate a concrete threat to national security or a risk of immediate outbreak of public panic. This provokes the question of which level of probability needs to be applied. Scholarly commentary argues that the perspective of an average person (วิญญูชนคนธรรมดาทั่วไป; *winyuchon khon thammada thua pai*) should be adopted.<sup>91</sup> This would be in congruence with the standard applied to the tort of defamation.<sup>92</sup> As a consequence, proof of an “abstract panic”<sup>93</sup> rather than concrete evidence would be required. Section 14 para. 1(1) and (2) therefore provide significant interpretational leeway to authorities and, in the final instance, courts, which are neither able nor willing to conduct opinion polls to test the public’s reaction to certain messages. At the same time, it goes without saying that individual assumptions and preferences are not suitable guidance for judicial decision-making.

An approach to limiting the interpretational uncertainty could be to require proof of an “ill or fraudulent intent” not only concerning No. 1, but also No. 2. A

<sup>87</sup> iLaw, Documentation (n 46) “รินดา: โพสต์ข่าวลือประยุทธ์โอนเงินหมื่นล้าน” [“Rinda: Posted Rumor that Prayuth Transferred 10 Billion”] <<https://freedom.ilaw.or.th/case/682>>.

<sup>88</sup> *ibid* “กองทัพเรือ vs สำนักข่าวภูเก็ตหวาน” [“Thai Royal Navy vs Phuketwan News Agency”] <<https://freedom.ilaw.or.th/case/554>>.

<sup>89</sup> *ibid* “กฤษกร: ทำกิจกรรมลอยอังคารผู้ว่าอุบลฯ” [“Kritkorn: Organized Floating of Ashes of Ubon Ratchathani Mayor”] <<https://freedom.ilaw.or.th/case/884>>.

<sup>90</sup> *ibid* “พล.ท.พงศกร: แชร์ข่าวปลอมเรื่องกาแฟปักป้อม” [“Gen. Pongsakorn: Shared False News about Big Pom’s Coffee”] <<https://freedom.ilaw.or.th/case/861>>; “สายน้ำ: แชร์โพสต์พล.อ.ประยุทธ์หนีคดีกบฏจากเพจ KonthaiUK” [“Sainam’: Sharing a Post from KonthaiUK Facebook Alleging that Prayuth Flees Coup Case”] <<https://freedom.ilaw.or.th/case/894>>; “ปิยบุตร: วิจารณ์คดียุบพรรคทษช” [“Piyabutr: Commented on TSN Party dissolution”] <<https://freedom.ilaw.or.th/case/864>>.

<sup>91</sup> Mani, *Computer-Related Offenses* (n 65) 97.

<sup>92</sup> Phoj, *Torts* (n 77) 475; see also ไพจิตร ปญญพันธ์, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ลักษณะละเมิด (พิมพ์ครั้งที่ 11, นิติบรรณการ 2548) [Phaijit Punyaphan, *Explanation of the Thai Civil and Commercial Code – Torts* (11th edn, Nitibannagan 2005)] (Thai) 55: “Even if no one believes it.”

<sup>93</sup> Lasse Schuldt, “Abstract Panic: On Fake News, Fear and Freedom in Southeast Asia” *Verfassungsblog* (14 April 2020) <<https://verfassungsblog.de/abstract-panic-on-fake-news-fear-and-freedom-in-southeast-asia/>>.

stronger focus on the subjective elements of the crime would indeed approximate online falsehoods to defamation, where Thai scholars have considered that intention forms the core of the crime.<sup>94</sup> However, it also appears undesirable to render the provision a crime of conscience, where bad intentions turn the balance. A more precise objective threshold would be preferable. It appears that this could only be achieved by requiring proof of actual—rather than likely—threats to the protected interests. Such a solution might not only suffice from the perspective of penal policy, but also better safeguard the constitutional right of freedom of expression—to which we turn now.

## V. CONSTITUTIONAL REQUIREMENTS

This part discusses the criminalisation of online falsehoods from the perspective of constitutional law. The contentious issues are related to the statutory restriction of free speech, and they include: The general constitutional protection of falsehoods (1.) and the proportionality of criminal punishment (2.).

### A. The General Constitutional Protection of Falsehoods

Thai constitutional law has protected individual rights to differing extents over the course of the past ninety years. While the temporary Constitution Law of June 1932 did not contain any rules on rights or liberties, the permanent Constitution of December 1932 broadly stipulated in Section 14 the protection of several individual rights, including the rights to speak, write and publish.<sup>95</sup> Beginning with the Constitution of 1949, a pattern of constitutional provisions emerged that distinguished the scope of a right from enumerated grounds for restrictions.<sup>96</sup> The pattern reflects the general constitutional doctrine related to individual rights that defines a right's general scope (*Schutzbereich*) that might then, in a second step, be subject to restrictions for constitutionally defined purposes.

While Thai scholarly literature has devoted most of its attention to developing and clarifying constitutional standards for restrictions,<sup>97</sup> the scopes of rights have often remained undefined. Doctrinally speaking, however, this question might be

<sup>94</sup> Streckfuss, *Truth on Trial* (n 79) 145 with reference to จิตติ ดิงศภัทย์ [Jitti Tingsapath].

<sup>95</sup> จักรกฤษณ์ กาญจนสุนัย, การจำกัดเสรีภาพในการแสดงความคิดเห็นของบุคคลโดยกฎหมาย (วิทยานิพนธ์ บัณฑิตวิทยาลัย จุฬาลงกรณ์มหาวิทยาลัย 2524) [Jakkrit Kanchanasun, *The Restriction of Freedom of Expression of Persons by law* (Master Thesis, Chulalongkorn University, 1981)] (Thai) 194-5.

<sup>96</sup> This pattern was adopted in the Constitutions of 1968, 1974, 1978, 1991, 1997, 2007 and 2017; see for Constitutions until 2006, Khonthai, *Legal Problems* (n 78) 82–89.

<sup>97</sup> วรเจตน์ ภาคีรัตน์, “เงื่อนไขการตรากฎหมายจำกัดสิทธิและเสรีภาพของประชาชน : ‘มาตรฐาน’ ในการควบคุมตรวจสอบความชอบด้วยรัฐธรรมนูญของกฎหมาย” (2543) 30(2) วารสารนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 184 [Worajet Pakeerut, “The Requirements for Legislation that Restrict the Rights and Liberties of the People” (2000) 30(2) *Thammasat Law Journal* 184] (Thai) 184–94; ธีระ สุธีวรังกูร, “การคุ้มครองสิทธิและเสรีภาพของบุคคลที่รัฐธรรมนูญรับรอง” (2542) 29(4) วารสารนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 578 [Teera Suteevarangkul, *The Protection of Rights and Liberties of Persons Guaranteed by the Constitution* (1999) 29(4) *Thammasat Law Journal* 578] (Thai) 578–92.

considered upstream to the discussion on restrictions; if a right is not applicable to a given case in the first place, the issue of restrictions becomes a moot point. Thus, the question arises as to whether freedom of expression in Thai constitutional law generally also protects falsehoods. In a word: Are false statements of fact included in its scope? If that is not the case, Section 14 para. 1(1) and (2) of the Act on Computer-Related Offences would not amount to a restriction of that right. The constitutional mechanism that requires legislators to conform restrictions to the constitutionally permitted purposes would not be triggered.<sup>98</sup>

The question of whether falsehoods are protected speech has been discussed in foreign legal systems, including Germany and the United States of America. Based on its wording, Article 5(1), first sentence<sup>99</sup> of the German Basic Law of 1949 has been interpreted by the German Constitutional Court to protect primarily the expression of opinions. Consequently, statements of fact are protected only to the extent that they are a prerequisite for the formation of opinions. Thus, the protection of freedom of expression ends where the factual assertions can contribute nothing to this constitutional prerequisite of formation of opinion. Seen from this perspective, incorrect information is not an interest that merits protection. The Federal Constitutional Court starts with the supposition that a factual assertion which the asserting party knows is untrue, or which has been proven untrue, is not encompassed by the protection afforded by Art. 5(1), first sentence. As the distinction between value judgments and factual assertions can be difficult in a given case,<sup>100</sup> the Court would usually extend the protection to the entire statement. However:

the correctness of the factual portions can then play a role in the context of the balancing. If the expression of opinion contains factual assertions which the asserting party knows are untrue, or which have been proven untrue, then the basic right of freedom of opinion routinely will yield to the legal interest protected by the statute that limits the basic right.<sup>101</sup>

German constitutional law thus affords false statements of fact only limited constitutional protection, and may exclude them entirely from Article 5's scope if they do not at all contribute to the formation of opinions. In contrast, the First Amendment

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<sup>98</sup> Note, however, that the general freedom of action under Section 25 of the Constitution of the Kingdom of Thailand B.E. 2560 (2017) would still apply.

<sup>99</sup> "Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures and to inform himself without hindrance from generally accessible sources."

<sup>100</sup> บุญศรี มีวงศ์ไขษะ, "คำอธิบายวิชากฎหมายรัฐธรรมนูญเปรียบเทียบ: รัฐธรรมนูญเยอรมัน" (โครงการตำราและเอกสารประกอบการสอน คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 2535) [Boonsri Weewongukote, "Explanation of Comparative Constitutional Law: The German Constitution" (Books and Teaching Materials Project, Faculty of Law, Thammasat University 1992)] (Thai) 141–42.

<sup>101</sup> Federal Constitutional Court of Germany (*Bundesverfassungsgericht*), judgment of 9 October 1991, 1 BvR 1555/88, BVerfGE 85, 1 ("Bayer Shareholders"), B.II.3.; English translation by University of Texas at Austin School of Law <<https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=625>>; see also judgment of 13 April 1994, 1 BvR 23/94, BVerfGE 90, 241 ("Auschwitz lie") <<https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=621>>.

of the Constitution of the United States of America does not provide a textual basis for distinguishing between opinions and factual statements.<sup>102</sup> Moreover, the U.S. Supreme Court has held that the liberal conception of free speech in U.S. constitutional law also generally prohibits the government from criminalising falsehoods:

The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth. . . . And suppression of speech by the government can make exposure of falsity more difficult, not less so. Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates.<sup>103</sup>

The Thai Constitutional Court has so far not addressed this question. Constitutional scholarship, however, has touched upon the issue. Notably, Khonthai Kuanhin has argued for the inclusion of statements of facts (การแสดงข้อเท็จจริง; *kan sadaeng kho thet ching*) into the scope of freedom of expression. While acknowledging that the Thai term for freedom of expression (การแสดงความคิดเห็น; *kan sadaeng khwam khit hen*) literally refers to the expression of opinions, he adopts a functional approach and plausibly considers that facts contribute to the formation of public opinion in an important manner.<sup>104</sup> Occasionally, Thai legal scholarship has also referred to Article 19(2) of the International Covenant on Civil and Political Rights (1966)<sup>105</sup> which stipulates that the right to freedom of expression includes the freedom to seek, receive and impart “information and ideas of all kinds.”<sup>106</sup>

The wording of the current Thai Constitution of 2017<sup>107</sup> may not directly allow a definitive conclusion. Section 34(1), first sentence, provides that “a person shall enjoy the liberty to express opinions, make speeches, write, print, publicise and express by other means.”<sup>108</sup> Even if the provision’s first element, the liberty to express opinions, does not include the right to impart factual statements, the remaining

<sup>102</sup> “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

<sup>103</sup> *United States v. Alvarez* (2012) 567 U.S. 709, 727–28 [U.S. Supreme Court].

<sup>104</sup> Khonthai, *Legal Problems* (n 78) 142–43; see also ปริญญ์ เทวานฤมิตรกุล, สารานุกรมรัฐธรรมนูญแห่งราชอาณาจักรไทย (พ.ศ.2540) (องค์การคำของคุรุสภา 2544) [Prinya Thewanarumitkul, *Encyclopaedia of the Constitution of the Kingdom of Thailand* (1997) (Trade Organization of the Teachers’ Council 2001)] (Thai) 106.

<sup>105</sup> Thailand is a State Party.

<sup>106</sup> วนิดา แสงสารพันธ์, ขอบเขตการใช้เสรีภาพในการแสดงความคิดเห็นของประชาชนตาม บทบัญญัติรัฐธรรมนูญแห่งราชอาณาจักรไทย พุทธศักราช 2550 (มหาวิทยาลัยกรุงเทพ 2555) [Wanida Saengsaraphan, *The Extent of the Application of Freedom of Expression According to the Constitution of the Kingdom of Thailand, B.E. 2550* (Bangkok University 2012)] (Thai).

<sup>107</sup> รัฐธรรมนูญแห่งราชอาณาจักรไทย, ราชกิจจานุเบกษา เล่ม ๑๓๔ ตอนที่ ๔๐ ก หน้า ๑ (๖ เมษายน ๒๕๖๐) [Constitution of the Kingdom of Thailand, Government Gazette vol 134 pt 40 kor p 1 (6 April 2017)] (Thai).

<sup>108</sup> บุคคลย่อมมีเสรีภาพในการแสดงความคิดเห็น การพูด การเขียน การพิมพ์การโฆษณา และการสื่อความหมายโดยวิธีอื่น; English translation by the Office of the Council of State.

elements all appear to be of equal rank rather than constituting sub-categories of the first. The provision thus apparently protects a more general freedom of “expression” (การสื่อความหมาย; *kan sue khwam mai*) in contrast to a narrow conception of freedom of “opinion.”

This relationship between the Section's elements stands in an interesting contrast to the wording of Section 39 of the Thai Constitution of 1991 in the version of its fifth amendment of 1995, which introduced the term “liberty to express opinions” (การแสดงความคิดเห็น; *kan sadaeng khwam khit hen*) for the first time into the text of a Thai Constitution.<sup>109</sup> This provision differed from later wordings in the important respect that the liberty to express opinions was apparently meant to be exercised “by” (โดย; *doi*) making speeches, writing etc.,<sup>110</sup> thereby indeed relegating these latter elements to sub-categories of the freedom to express opinions. However, the Constitutions of 1997, 2007 and 2017 removed the “by.” Thus, even considering that in these Constitutions the “liberty to express opinions” itself is confined to imparting opinions, the comparison with the text of 1995 appears to confirm that the remaining elements do not seem to be limited in that respect.

If factual statements are thus generally covered by Section 34(1) of the 2017 Constitution, this logically applies to both true and false statements, in the absence of any evidence to the contrary. Consequently, Section 14 para. 1(1) and (2) of the Act on Computer-Related Offences constitutes a restriction of freedom of expression which needs to satisfy the constitutional requirements laid down in Section 34(1) and 26 of the 2017 Constitution, including proportionality—to which we now turn.

## B. The Proportionality of Criminal Punishment

Besides the requirement that restrictions of rights must pursue the constitutionally permitted purposes,<sup>111</sup> every limitation must also be proportionate. This is explicitly stipulated in Section 26(1) of the Thai Constitution of 2017 and is considered a fundamental principle of Thai public law.<sup>112</sup> As this article cannot expound the genesis and scope of the principle of proportionality in Thai scholarship and jurisprudence,<sup>113</sup>

<sup>109</sup> See the different versions in Khonthai, *Legal Problems* (n 78) 82–89; in the decades before, it was argued by some scholars that the term was too imprecise to be used in a Constitution, see วิษณุ เครืองาม, “เสรีภาพในการแสดงความคิดเห็น” (2524) 11(4) วารสารนิติศาสตร์มหาวิทยาลัยธรรมศาสตร์ 570 [Wissanu Krea-ngam, “Freedom of Expression” (1981) 11(4) Thammasat Law Journal 570)] (Thai) 570–76: “theoretical language rather than constitutional language” (571).

<sup>110</sup> บุคคลย่อมมีเสรีภาพในการแสดงความคิดเห็นโดยการพูด การเขียน การพิมพ์ การโฆษณา และการสื่อความหมายโดยวิธีอื่น.

<sup>111</sup> Section 34(1), second sentence, allows restrictions of freedom of expression for the purposes 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 the people.” The security of the State as well as public order seem to be sufficient general grounds for the restrictions contained in Section 14 para. 1(1) and (2) of the Act on Computer-Related Offences.

<sup>112</sup> วรเจตน์ ภาคีรัตน์, กฎหมายปกครอง ภาคทั่วไป (นิติราษฎร์ 2554) [Worajet Pakeerut, *Administrative Law. General Part* (Nitirat 2011)] (Thai) 57.

<sup>113</sup> See ศรีรัตน์ งามนีสัย, หลักความพอสมควรแก่เหตุ: พัฒนาการและการปรับใช้ในระบบกฎหมายไทย (วิทยานิพนธ์คณะ

it focuses on recent jurisprudence of the Constitutional Court of Thailand with respect to the proportionality of criminal punishment.<sup>114</sup>

In recent years, the Court has referred to the principle of proportionality, including the three-step test of suitability, necessity, and proportionality in the narrow sense, in several of its decisions.<sup>115</sup> In decision 30/2563, however, the Court for the first time invalidated a criminal law provision (also) due to the disproportionality of the prescribed punishment. The case dealt with two announcements by the National Council for Peace and Order (NCPO) which were issued in 2014 after the military coup. The announcements functioned as the legal basis for ordering persons to report to the NCPO, and stipulated a criminal penalty of up to two years' imprisonment and/or a fine of up to 40,000 baht in case of non-compliance. In late 2020, the Constitutional Court declared these announcements unconstitutional. Besides finding a retroactive character, the Court judged them disproportionate based on a comparison with Section 368(1) of the Criminal Code. This Section criminalises the refusal to comply with an official order, and stipulates a penalty of up to ten days' imprisonment and/or a fine of up to 5,000 baht. This stark discrepancy regarding the prescribed punishment led the Court to find the NCPO announcements disproportionate according to Section 26 of the 2017 Constitution.<sup>116</sup>

The Constitutional Court's reasoning provokes the comparison of Section 14 para. 1(2) of the Act on Computer-Related Offences with Section 384 of the Criminal Code, which was mentioned earlier in this article. Section 384 criminalises the malicious dissemination of false information, thereby causing the people to panic. It stipulates a punishment of up to one month's imprisonment and/or a fine of up to 10,000 baht. Section 14 para. 1(2) of the Act on Computer-Related Offences criminalises, among the other alternatives, the—not necessarily malicious—entry of false computer data into a computer system that is likely to cause the public to panic. The stipulated punishment is imprisonment for up to five years and/or a fine of up to 100,000 baht. Thus, despite the fact that Section 384 demands a specific intent in the form of malice, and the additional fact that Section 384 demands an actual, not only likely instance of panic, Section 14 para. 1 prescribes a punishment which is more than 60 times higher regarding imprisonment and ten times higher regarding the fine. With a view to the Constitutional Court's decision 30/2563, it appears doubtful whether this discrepancy can be reconciled with the principle of proportionality as applied by the Court.

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นิติศาสตรมหาวิทยาลัยธรรมศาสตร์ 2550) [Sirat Ngamnisai, *The Principle of Proportionality: Development and Application in the Thai Legal System* (Master Thesis, Thammasat University 2007)] (Thai); Worajet, *Administrative Law* (n 112) 57–62.

<sup>114</sup> Khonthai Kuanhin, *Legal Problems* (n 78) 165, questions the proportionality of Section 14(1) and (2) of the Act's 2007 version on the ground that the provision criminalises falsehoods that do not address any individual person, unlike defamation. However, the Act on Computer-Related Offences aims to protect other interests than personal reputation. These aims do not, on their own, appear disproportionate.

<sup>115</sup> For instance, Thai Constitutional Court Decisions 8/2561; 4–5/2562; 8/2562.

<sup>116</sup> Thai Constitutional Court Decision 30/2563, 8–9.

## VI. CONCLUSION

Pre-empting the global trend to criminalise online falsehoods, Thailand adopted the Act on Computer-Related Offences before the dawn of the fake news era. In recent years, the political and legal awareness of the topic has sharply risen. The relevant provisions of the Act, however, reveal several interpretational and constitutional complexities that deserve critical evaluation. In particular, this article raised questions regarding the systematic structure of Section 14 para. 1(1) and (2) and the meaning of “false” computer data. More importantly, it was shown that the statutory requirement of damage or panic that is “likely” to occur may result in uneven and disparate law enforcement. Proof of actual damage was therefore suggested as an alternative that would also limit the impact on the constitutional right to freedom of expression. This right fully applies, as statements of fact are within its scope of protection. Finally, the prescribed criminal punishment seems hardly in accordance with recent jurisprudence of the Thai Constitutional Court.

The case of Thailand thus reflects the challenges in finding the right response to the apparent fake news threat. Developing a constitutionally sound balance between regulation and *laissez-faire* requires not only an understanding of social media’s technological, aggregational and psychological aspects, but also a consideration of chilling effects on the formation of public opinion. Speech without any measurable adverse effects on protected interests might not deserve to be criminalised. At the same time, society’s resilience against the manipulatory potential of fake news needs to be enhanced and reinforced. Education curricula will need to focus on media literacy and critical reflection skills to an even higher extent than is already the case. This continues to be the most promising approach to prevent fake news from falling on fertile ground, while limiting the collateral damage on constitutional liberties.

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