MEMORANDUM
On

Thailand's Criminal and Civil Defamation Provisions

by

ARTICLE 19
Global Campaign for Free Expression

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I. Introduction

This Memorandum analyses the defamation provisions in Thailand's Penal and Civil Codes[1] for compliance with international standards.[2]

ARTICLE 19 is of the view that the defamation regime created by these provisions is in violation of international law. As far as the penal provisions go, our view is that defamation should not be criminal in nature; civil defamation laws provide adequate redress against harm to reputation and the criminal law is a disproportionate means of addressing this problem. Furthermore, the defences established by the various criminal defamation provisions are inadequate, failing to meet international standards in this area. Finally, the threat of imprisonment for defamation is grossly disproportionate and hence unjustifiable.

The civil defamation laws are less problematical than the criminal provisions. At the same time, the scope of these laws needs to be clarified, in particular in relation to opinions, and the system of defences should be enhanced.

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[1] The Penal provisions are available at: http://www.article19.org/docimages/1880.doc while the civil provisions are available at: http://www.article19.org/docimages/1882.doc.

[2] The analysis is based on an unofficial translation of the provisions. ARTICLE 19 accepts no responsibility for errors based on faulty or misleading translation.

Events in the country demonstrate the problems with the existing system. One case, for example, has received a lot of attention recently, that of Supinya Klangnarong, charged with both criminal and civil defamation for comments suggesting that the profits Shin Corp, a media conglomerate, had increased significantly since its founder, Thaksin Shinawatra, became Prime Minister. It is clear that, regardless of the truth of these allegations, they bear on a matter of great public importance and laws which restrict open public discussion about such matters need to be reviewed very critically.

This Memorandum analyses the defamation provisions of the Thai Penal and Civil Codes against international and comparative standards in this area. These standards are distilled in the ARTICLE 19 publication, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputations* (ARTICLE 19 Principles).[3] These Principles have attained significant international endorsement, including by the three official mandates on freedom of expression, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression.[4]

This Memorandum refers to jurisprudence from international judicial bodies in other regions of the world and other non-binding standard-setting, such as authoritative international declarations and statements, as well as the decisions of leading courts in countries around the world. These statements and decisions have no formal legal status in Thailand. However, they illustrate the manner in which leading experts have interpreted international and constitutional guarantees of freedom of expression. As such, they are good evidence of generally accepted understandings of the scope and nature of international guarantees of freedom of expression, which are binding on Thailand.[5] Furthermore, these documents provide valuable insight into possible interpretations of the scope of the constitutional guarantee of freedom of expression.

It may be noted that reliance on these comparative materials is particularly appropriate in the area of human rights. This has been affirmed by leading courts in countries around the world. For example, Lord Wilberforce, writing as a member of the Privy Council,[6] has noted that international human rights law is a relevant guide to interpreting domestic constitutional provisions.[7] Similarly, the High Court of Australia has noted: "[I]nternational law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights."[8]

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[3] London: ARTICLE 19, 2000.
[4] See their Joint Declaration of 30 November 2000. Available at: http://www.unhchr.ch/huricane/huricane.nsf/view01/EFE58839B169CC09C12569AB002D02C0?opendocument.
[5] See I. Brownlie, *Principles of Public International Law*, 5th Ed. (Oxford: Oxford University Press, 1998), p. 12.
[6] The Privy Council is the final court of appeal for a number of Commonwealth countries.
[7] *Minister of Home Affairs v. Fisher*, (1980) A.C. 319, pp. 328-9.
[8] *Mabo v. Queensland (No.2)*, (1992) 175 CLR 1, para. 42.

II. International Standards

II.A Freedom of Expression in General

Freedom of expression is a key human right, in particular because of its fundamental role in underpinning democracy. Article 19 of the *Universal Declaration on Human Rights* (UDHR), a United Nations General Assembly resolution,[9] guarantees the right to freedom of expression in the following terms:

> Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.

The UDHR, as a UN General Assembly resolution, is not directly binding on States. However, parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law since its adoption in 1948.[10]

The *International Covenant on Civil and Political Rights* (ICCPR)[11] elaborates on many of the rights included in the UDHR. Article 19 of the ICCPR guarantees the right to freedom of expression in terms very similar to those found at Article 19 of the UDHR. Thailand ratified the ICCPR on 29 October 1996 so that its provisions are formally legally binding.

Freedom of expression is also protected in the three regional human rights systems, at Article 10 of the *European Convention on Human Rights*[12] Article 13 of the *American Convention on Human Rights*[13] and Article 9 of the *African Charter on Human and Peoples' Rights*.[14]

The guarantee of freedom of expression applies to all forms of expression, not only those which fit in with majority viewpoints and perspectives. The European Court of Human Rights has repeatedly stated:

> Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man … it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'.[15]

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[9] UN General Assembly Resolution 217A(III), adopted 10 December 1948.
[10] See, for example, *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd Circuit).
[11] UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976.
[12] Adopted 4 November 1950, E.T.S. No. 5, in force 3 September 1953.
[13] Adopted 22 November 1969, in force 18 July 1978.
[14] Adopted 26 June 1981, in force 21 October 1986.
[15] *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, 1 EHRR 737, para. 49. Statements of this nature abound in the jurisprudence of courts and other judicial bodies around the world.

International law permits limited restrictions on the right to freedom of expression in order to protect various interests, including reputation. The parameters of such restrictions are provided for in Article 19 of the ICCPR, which establishes a strict three-part test. This test, which has been confirmed by the UN Human Rights Committee,[16] as well as international courts,[17] requires that any restriction must be (1) provided by law, (2) for the purpose of safeguarding a legitimate interest, including protecting the reputations of others, and (3) necessary to secure this interest. In particular, in order for a restriction to be deemed necessary, it must restrict freedom of expression as little as possible, it must be carefully designed to achieve the objective in question and it should not be arbitrary, unfair or based on irrational considerations. Vague or broadly defined restrictions, even if they satisfy the "provided by law" criterion, are unacceptable because they go beyond what is strictly required to protect the legitimate interest. Equally, *sanctions* which are disproportionate to the harm caused by a particular expression have been held not to be *necessary* to achieve legitimate aims and have, accordingly, been held to violate the guarantee of freedom of expression in their own right.

II.B Freedom of Expression and the Media

The guarantee of freedom of expression applies with particular force to the media. The Inter-American Court of Human Rights has stated: "It is the mass media that make the exercise of freedom of expression a reality".[18] The media as a whole merit special protection under freedom of expression in part because of their role in making public,

> …information and ideas on matters of public interest. Not only does [the press] have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog'.[19]

This has been recognised by constitutional courts in countries around the world. For example, the Supreme Court of Japan has stated:

> Reports by media on political matters provide important information necessary for the people's political judgement and serve the people's rights to receive information. Freedom of press is thus particularly important among rights to freedom of expression guaranteed under Article 21 of the Constitutional Law.[20]

And the Supreme Court of Appeal of South Africa has held:

> [W]e must not forget that it is the right, and indeed a vital function, of the press to make available to the community information and criticism about every aspect of public, political, social and economic activity and thus to contribute to the formation of public opinion. The press and the rest of the media provide the means

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[16] For example, in *Laptsevich v. Belarus*, 20 March 2000, Communication No. 780/1997.

[17] See, for example, *Goodwin v. United Kingdom*, 27 March 1996, Application No. 17488/90 (European Court of Human Rights).

[18] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 34.

[19] See, for example, *Colombani and others v. France*, 25 June 2002, Application No. 51279/99 (European Court of Human Rights), para. 55.

[20] *Nishiyama v. Japan*, 31 May 1978, Keiji-hanreishu 32 Kan, 33go, p. 457

> by which useful, and sometimes vital information about the daily affairs of the nation is conveyed to its citizens—from the highest to the lowest ranks. Conversely, the press often becomes the voice of the people—their means to convey their concerns to their fellow citizens, to officialdom and to government.[21]

II.C The Thai Constitution

The Thai Constitution contains detailed provisions relating to freedom of expression, as well as freedom of the media. Some of the relevant provisions for current purposes include the following:

> **Section 37**
> A person shall enjoy the liberty of communication by lawful means. The censorship, detention or disclosure of communication between persons including any other act disclosing a statement in the communication between persons shall not be made except by virtue of the provisions of the law specifically enacted for security of the State or maintaining public order or good morals.
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> **Section 39**
> A person shall enjoy the liberty to express his or her opinion, make speeches, write, print, publicise, and make expression by other means.
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> The restriction on liberty under paragraph one shall not be imposed except by virtue of the provisions of the law specifically enacted for the purpose of maintaining the security of the State, safeguarding the rights, liberties, dignity, reputation, family or privacy rights of other person, maintaining public order or good morals or preventing the deterioration of the mind or health of the public.
>
> The closure of a pressing house or a radio or television station in deprivation of the liberty under this section shall not be made.
>
> The censorship by a competent official of news or articles before their publication in a newspaper, printed matter or radio or television broadcasting shall not be made except during the time when the country is in a state of war or armed conflict; provided that it must be made by virtue of the law enacted under the provisions of paragraph two.
>
> The owner of a newspaper or other mass media business shall be a Thai national as provided by law.
>
> No grant of money or other properties shall be made by the State as subsidies to private newspapers or other mass media.

The Constitution also provides generally for restrictions on rights as follows:

> **Section 29**
> The restriction of such rights and liberties as recognised by the Constitution shall not be imposed on a person except by virtue of provisions of the law specifically enacted for the purpose determined by this Constitution and only to the extent of necessity and provided that it shall not affect the essential substances of such rights and liberties.

[21] *National Media Ltd. and Others v. Bogoshi*, [1999] LRC 616, p. 628 (references omitted).

> The law under paragraph one shall be of general application and shall not be intended to apply to any particular case or person; provided that the provision of the Constitution authorising its enactment shall also be mentioned therein. The provisions of paragraph one and paragraph two shall apply *mutatis mutandis* to rules or regulations issued by virtue of the provisions of the law.

It may be noted that the scope of restrictions envisaged under Section 29 is narrower in three respects than those envisaged under Section 39. First, Section 29 requires restrictions to be necessary and not to affect the essential substance of the right so restricted. Second, Section 29 restrictions are limited to purposes determined by the Constitution, whereas Section 39 provides a list of grounds for restriction which may be assumed to be broader than that. Third, Section 29 requires restrictions to be general in nature, and not to be directed at particular persons, whereas Section 39 does not so limit restrictions.

We are not aware of how courts have assessed the relationship between these two sections, if indeed this has arisen in the jurisprudence. It would be preferable if Section 29 were treated as a general limitation on restrictions on rights, applicable to all such restrictions, and Section 39 were understood as further limiting restrictions specifically in the area of freedom of expression.

III. Analysis of Thailand's Defamation Regime

Our treatment of the Thai defamation regime falls into four main parts. In the first part, Section III.A, we outline our concerns with criminal defamation law *per se*. In our view, criminal defamation cannot be justified both because it is disproportionate and because it is unnecessary, given that civil defamation laws provide adequate protection for reputations. In the second part, we provide an outline of defences which have been widely recognised as necessary if defamation laws are to be consistent with international standards. In the third part and fourth parts, respectively, we assess the Thai criminal and civil defamation rules against these standards.

III.A The Legitimacy of Criminal Defamation

Articles 326-333 of the Thai Penal Code establish the offence of criminal defamation. They provide for various penalties for this crime, including up to two years' imprisonment where the defamation is by means of publication or otherwise in permanent form.

International law recognises that freedom of expression may be limited to protect individual reputations but defamation laws, like all restrictions, must be proportionate to the harm done and not go beyond what is necessary in the particular circumstances. Criminal defamation provisions breach the guarantee of freedom of expression both because less restrictive means, such as the civil law, are adequate to redress the harm and because the sanctions they envisage are disproportionate to the harm done.

Criminal defamation provisions find their roots in laws designed to prevent a breach of the peace or, to use a more modern term, to maintain public order. Public order is clearly

a legitimate ground for restricting freedom of expression and it is explicitly listed as such in Article 19(3) of the ICCPR. Furthermore, most countries use the criminal law to penalise expression that poses a sufficiently close and serious threat to public order, for example, in the form of a criminal prohibition on inciting others to crime. It is, however, no longer necessary to protect reputations to maintain public order. In other words, this historical rationale for criminal defamation no longer pertains.

There are two main principled reasons why criminal defamation laws fail to meet the necessity part of the test for restrictions on freedom of expression. The first is that a criminal prohibition is a disproportionate response to the problem of harm to reputation. The second is that criminal defamation laws are not the least restrictive means to achieve the legitimate aim of protecting reputations; civil laws are sufficient to serve this goal and, being a less intrusive remedy, should be preferred over criminal laws.

III.A.1 Proportionality

It is well-established that restrictions on freedom of expression meet the necessity part of the test only if they are proportionate, in the sense that the goal they secure outweighs the harm done to freedom of expression. As the Inter-American Court of Human Rights has stated: "[T]o be compatible with the Convention, the restrictions must be justified by reference to governmental objectives which, because of their importance, clearly outweigh the social need for the full enjoyment of the right Article 13 guarantees."[22]

Of particular importance here is the chilling effect that criminal prohibitions on defamation have on freedom of expression. The "chilling effect" refers to the fact that such restrictions affect expression well beyond the actual scope of the prohibition. Individuals will be deterred from publishing anything which, even on a slight probability, may risk falling foul of the rules due to the extreme consequences this may entail.

Both international and national courts have noted this "chilling effect" in their jurisprudence. In *Lingens v. Austria*, the European Court of Human Rights recognised that criminal sanctions for defamation can lead to the censorship of important expression. Referring to the fine imposed on the applicant for defamation, the Court stated:

> In the context of political debate, such a sentence would be likely to deter journalists from contributing to public discussion of issues affecting the life of the community. By the same token, a sanction such as this is liable to hamper the press in performing its task as purveyor of information and public watchdog.[23]

As a result of this threat, the Court recognised the need for restraint when applying criminal sanctions for abuse of the right to freedom of expression

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[22] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 18, para. 46.

[23] *Lingens v. Austria,* 8 July 1986, Application No. 9815/82, para.44.

III.A.2 Least Restrictive Remedy

It is well established that the guarantee of freedom of expression requires States to use the least restrictive effective remedy to secure the legitimate aim sought. This flows directly from the need for any restrictions to be necessary; if a less restrictive remedy is effective, the more restrictive one cannot be necessary. As the Inter-American Court of Human Rights has noted:

> [I]f there are various options to achieve [a compelling governmental interest], that which least restricts the right protected must be selected.[24]

As a result, to the extent that civil defamation laws are effective in appropriately redressing harm to reputation, there is no justification for criminal defamation laws. Perhaps the best evidence of the sufficiency of civil defamation laws in redressing harm to reputation comes from the growing number of jurisdictions where they are either the preferred means of redress or growing in popularity, even though criminal defamation laws are still on the books. This is the case, for example, in many European countries, including Austria and the Netherlands. In other countries, criminal defamation laws have fallen into virtual desuetude. There has been no successful attempt to bring a criminal prosecution for defamation in the United Kingdom for many years and no private actor has even attempted to do so for over 20 years.[25]

A number of countries have recently completely abolished criminal defamation laws. These include Ghana (2001), Sri Lanka (2002) and the Ukraine (2001), none of them countries with higher development rankings, according to the United Nations Development Programme, than Thailand.[26] These countries have not experienced any noticeable increase in defamatory statements, either of a qualitative or quantitative nature, since they abolished criminal defamation.

In the United States, criminal defamation laws have never been upheld by the Supreme Court.[27] Other US courts have also struck down criminal defamation laws and they have been repealed in some States, including California and New York.

The experience of a range of countries where criminal defamation laws have been struck down by the courts, repealed by the authorities or fallen into virtual disuse shows that such laws are not necessary to provide appropriate protection for reputations. In these countries, civil defamation laws have proven adequate to this task. Furthermore, this experience is not limited to established democracies but also includes countries undergoing a transition to democracy, and from different regions of the world.

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[24] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 18, para. 46.

[25] Historical attempts include *Goldsmith v. Pressdram* [1977] QB 83, *Gleaves v. Deakin* [1980] AC 477 and *Desmonde v. Thorpe* [1982] 3 All ER 268. None of these cases have gone to trial because either the plaintiffs failed to obtain leave to proceed or the cases were discontinued.

[26] See UNDP, *Human Development Report 2003: Millennium Development Goals: A Compact Among Nations to End Human Poverty* (Oxford University Press, Oxford, 2003).

[27] They have been struck down on at least two occasions. See *Garrison v. Louisiana*, 379 U.S. 64 (1964) and *Ashton v. Kentucky*, 384 US 195 (1966).

Numerous international statements attest to the general illegitimacy of criminal defamation law as a restriction on freedom of expression and, in particular, the possibility of imprisonment for defamation. The UN Human Rights Committee, the body with responsibility for overseeing implementation of the ICCPR, has repeatedly expressed concern about the possibility of custodial sanctions for defamation.[28] The UN Special Rapporteur on Freedom of Opinion and Expression has asserted that imprisonment is not a legitimate sanction for defamation.[29] In his Annual Report to the UN Commission on Human Rights in 2000, and again in 2001, the Special Rapporteur went even further, calling on States to repeal all criminal defamation laws in favour of civil defamation laws.[30] Every year, the Commission on Human Rights, in its resolution on freedom of expression, notes its concern with "the abuse of legal provisions on criminal libel".[31]

In their joint Declarations of November 1999, November 2000 and again in December 2002, the three special international mandates for promoting freedom of expression – the UN Special Rapporteur, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression – called on States to repeal their criminal defamation laws.

The ARTICLE 19 Principles, reflecting this clear international tendency, call for the complete repeal of criminal defamation laws. At the same time, in recognition of the fact that many countries still have such laws in place, Principle 4 notes that prison sentences, suspended or otherwise, should never be imposed for defamation.

Based on the foregoing, we recommend that the defamation provisions in the Penal Code be repealed altogether. If criminal defamation laws remain in force, however, they should be amended so as to minimise the potential for abuse or unwarranted restrictions on freedom of expression in practice. An essential element of this should be the removal of the possibility of imprisonment for defamation.

Recommendations:

- The criminal defamation regime should be repealed in its entirety.
- In the event that it is retained, the available penalties should be reduced considerably to ensure that they are strictly proportional to the harm done. In particular, in view of the extreme and disproportionate nature of imprisonment for defamation, all provision for prison sentences for defamation should be removed from the Penal Code.

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[28] For example, in relation to Iceland and Jordan (1994), Tunisia and Morocco (1995), Mauritius (1996), Iraq (1997), Zimbabwe (1998), Cameroon, Mexico, Morocco, Norway and Romania (1999), Kyrgyzstan (2000), Azerbaijan, Guatemala and Croatia (2001), and Slovakia (2003).

[29] *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1999/64, 29 January 1999, para. 28.

[30] See *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 52 and *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2001/64, 26 January 2001.

[31] See, for example, Resolution 2000/38, 20 April 2000, para. 3.

III.B General Principles of Defamation Law

III.B.1 Liability for True Statements

It is clear that proof of the truth of any impugned statements should fully absolve defamation defendants of any liability in relation to an allegation of harm to reputation. This is recognised in many countries around the world and reflects the basic principle that no one has the right to defend a reputation they do not deserve. If the matter complained of is true, the plaintiff has no right to claim that it should not be publicised.

This is reflected in Principle 7(a) of the ARTICLE 19 Principles, which states: "In all cases, a finding that an impugned statement of fact is true shall absolve the defendant of any liability."

International and national courts have also held that a defendant in a defamation case should always be allowed to prove the truth of their statements. In *Castells v. Spain*, Castells, then a senator, had been charged with insulting the government in a magazine article about violence in the Basque Country. The Court ruled that the failure of the Spanish courts to allow Castells to prove the truth of his statements was a violation of his right to freedom of expression which could not be justified in a democratic society.[32]

Closely related to the question of the implications of proof of truth is the question of whether or not falsity should be presumed or, to put it another way, the question of where the burden of proof should lie; with the defendant to prove truth or with the plaintiff to prove falsity.

It seems clear that the heavy onus on the State to justify any restriction on freedom of expression dictates that it be presumed that a statement is true until and unless the contrary is shown. This rule should at least apply to statements relating to matters of legitimate public interest, given the importance of open debate about them.

A number of courts have adverted to the chilling effect of a requirement to prove truth for purposes of civil defamation law. For example, the House of Lords, holding that a local authority did not have a right to sue for damages for defamation, noted:

> The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech. … What has been described as 'the chilling effect' … is very important. Quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available. This may prevent the publication of matters which it is very desirable to make public. [33]

[32] *Castells v. Spain*, 24 April 1992, Application No. 11798/85, para. 48.

[33] *Derbyshire County Council v. Times Newspapers Ltd* [1993] 1 All ER 1011 (HL), pp. 1017-1018. Similarly, the US Supreme Court has stated: "Allowance of the defense of truth … does not mean that only false speech will be deterred. … Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is, in fact, true, because of doubt whether it can be proved in court or fear of the expense of having to do so." *New York Times v. Sullivan*, 376 US 254, 279 (1964), pp. 278-9.

As a result, courts and authoritative commentators have argued that the onus should be on the plaintiff to prove falsity, rather than on the defendant to prove truth, at least in the context of statements on matters of public interest. In the *New York Times Co. v. Sullivan* case, the U.S. Supreme Court held that, in relation to statements about public officials, the onus was on the plaintiff not only to prove that the statements were false, but also that they had been published in malice or with reckless disregard for the truth.[34] The UN Special Rapporteur on Freedom of Opinion and Expression agrees, having stated: "The onus of proof of all elements should be on those claiming to have been defamed rather than on the defendant".[35]

The need for this is particularly evident in the context of media reporting where, in practice, proof of truth, according to the strict rules of evidence, "can prove exceedingly hard for a media defendant because of the journalistic practice of promising confidentiality to those who provide information…. Sources, even if not promised anonymity or confidentiality, may be unwilling to appear in court to testify against a plaintiff".[36]

Recommendations:

- No one should be held liable in defamation for statements which are true. Accordingly, truth should be a full defence to any charge of defamation.
- Where an allegedly defamatory statement relates to a matter of public concern, the plaintiff should bear the burden of proving that the statement was false.

III.B.2 No Liability for the Expression of Opinions

Courts around the world, international and national, regularly distinguish between opinions and statements of fact, allowing far greater latitude in relation to the former. ARTICLE 19 takes the view that statements of opinion should never attract liability under defamation law.[37] At a minimum, such statements should benefit from enhanced defamation protection.

The European Court of Human Rights, for example, has on numerous occasions distinguished between statements of fact and of opinion. For example, statements of opinion are not susceptible of being proven true. As the European Court has often noted:

> In its practice, the Court has distinguished between statements of fact and value judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible to proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right [to freedom of expression].[38]

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[34] *Ibid.*, pp. 279-80.
[35] *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 52.
[36] McGonagle, M., *Media Law, 2nd Edition* (Dublin: Thomson Round Hall, 2003), p. 82.
[37] ARTICLE 19 Principles, Principle 10.
[38] *Dichand and Others v. Austria*, 26 February 2002, Application No. 29271/95, para. 42.

The European Court of Human Rights has not gone quite so far as to accord opinions absolute latitude, holding that freedom to express value judgements is not entirely unfettered. In practice, however, the Court allows a considerable degree of leeway to statements of opinion. For example, in *Dichand and others v. Austria*, the Court stressed that the discussion was on a matter of important public concern[39] and recalled:

> It is true that the applications, on a slim factual basis, published harsh criticism in strong, polemical language. However, it must be remembered that the right to freedom of expression also protects information or ideas that offend, shock, or disturb.[40]

Recommendation:

- Defamation law should distinguish clearly between expressions of opinion and expressions of fact and should provide that the former are not actionable in defamation. At a minimum, opinions should benefit from a high degree of protection against defamation actions.

III.B.3 Reasonable Publication

It has been widely recognised that defamation laws which do not allow for any errors in relation to statements of fact, even if the author has acted in accordance with the highest professional standards, cannot be justified. A strict liability rule of this nature is particularly untenable for the media, which are under a duty to satisfy the public's right to know and often cannot wait until they are sure that every fact alleged is true before they publish or broadcast a story. Even the best journalists make honest mistakes and to leave them open to punishment for every false allegation would be to undermine the public interest in receiving timely information. A more appropriate balance between the right to freedom of expression and reputations is to protect those who have acted reasonably, while allowing plaintiffs to sue those who have not.

In a case involving statements held in the national court to be false and defamatory, the European Commission of Human Rights stated:

> [F]reedom of the press would be extremely limited if it were considered to apply only to information which could be proved to be true. The working conditions of journalists and editors would be seriously impaired if they were limited to publishing such information.[41]

In that case, which involved statements in the media based on an official report, the European Court held that to hold the defendants liable in defamation for these statements would be a breach of the right to freedom of expression, even though it accepted that the statements were, in fact, inaccurate.[42]

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[39] *Ibid.*, para. 51.
[40] *Ibid.*, para. 52.
[41] *Tromsø and Stensås v. Norway*, Report of 9 July 1998, Application No. 21980/93, para. 80.
[42] *Tromsø and Stensås v. Norway*, 20 May 1999, Application No. 21980/93.

Similarly, the Judicial Committee of the Privy Council has noted the chilling effect of a rule which penalises any statement which is inaccurate:

> [I]t was submitted that it was unobjectionable to penalise false statements made without taking due care to verify their accuracy.... [I]t would on any view be a grave impediment to the freedom of the press if those who print, or *a fortiori* those who distribute, matter reflecting critically on the conduct of public authorities could only do so with impunity if they could first verify the accuracy of all statements of fact on which the criticism was based.[43]

The nature of the news media is such that stories have to be published when they are topical, particularly when they concern matters of public interest. As the European Court of Human Rights has held:

> [N]ews is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.[44]

As a result, an increasing number of jurisdictions are recognising a 'reasonableness' defence – or an analogous defence based on the ideas of 'due diligence' or 'good faith' – due to the harsh nature of the traditional rule according to which defendants are liable whenever they disseminate false statements or statements which they cannot prove to be true. This provides protection to those who have acted reasonably in publishing a statement on a matter of public concern, while allowing plaintiffs to sue only those persons who have failed to meet a standard of reasonableness.[45]

Recommendation:
- Defamation law should recognise a defence of reasonable publication.

III.B.4 Exemption for Certain Categories of Statements

Certain kinds of statements should never attract liability for defamation. Generally speaking, this is where it is in the public interest that people be able to speak freely without fear or concern that they may be liable for what they have said. This would apply, for example, to statements made in court, in the legislature and before various official bodies. Equally, fair and accurate reports of such statements, in newspapers and elsewhere, should be protected.[46]

Principle 11 of the ARTICLE 19 Principles details the types of statements which should attract such protection:

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[43] *Hector v. Attorney-General of Antigua and Barbuda*, [1990] 2 AC 312, p. 318.
[44] *The Sunday Times v. the United Kingdom (No. 2)*, 24 October 1991, Application No. 13166/87, para. 51.
[45] See the ARTICLE 19 Principles, Principle 9.
[46] See, for example, the following decisions by the European Court of Human Rights: *A. v. the United Kingdom*, 17 December 2002, Application No. 35373/97 (members of the legislature should enjoy a high degree of protection for statements made in their official capacity); *Nikula v. Finland*, 21 March 2002, Application No. 31611/96 (statements made in the course of judicial proceedings should receive a high degree of protection); and *Tromsø and Stensås v. Norway*, note 42 (media and others should be free to report, accurately and in good faith, official findings or official statements).

(a) Certain types of statements should never attract liability under defamation law. At a minimum, these should include:

i. any statement made in the course of proceedings at legislative bodies, including by elected members both in open debate and in committees, and by witnesses called upon to give evidence to legislative committees;
ii. any statement made in the course of proceedings at local authorities, by members of those authorities;
iii. any statement made in the course of any stage of judicial proceedings (including interlocutory and pre-trial processes) by anyone directly involved in that proceeding (including judges, parties, witnesses, counsel and members of the jury) as long as the statement is in some way connected to that proceeding;
iv. any statement made before a body with a formal mandate to investigate or inquire into human rights abuses, including a truth commission;
v. any document ordered to be published by a legislative body;
vi. a fair and accurate report of the material described in points (i) – (v) above; and
vii. a fair and accurate report of material where the official status of that material justifies the dissemination of that report, such as official documentation issued by a public inquiry, a foreign court or legislature or an international organisation.

(b) Certain types of statements should be exempt from liability unless they can be shown to have been made with malice, in the sense of ill-will or spite. These should include statements made in the performance of a legal, moral or social duty or interest.

Recommendation:

- Defamation law should provide protection against defamation for statements in the categories described above.

III.C Detailed Analysis of Criminal Defamation

As noted above, ARTICLE 19's primary recommendation is that the Thai criminal defamation provisions be repealed in their entirety and replaced, as necessary, with appropriate civil defamation laws. At the same time, we recognise that this may not necessarily happen in the near future and, as a result, we provide the following detailed critique of specific provisions in the Penal Code.

III.C.1 Defences

The Thai criminal defamation law does provide for certain defences. Section 329 of the Penal Code provides that the expression of any opinion or statement in good faith will not be defamatory in four situations, namely where the expression: is by way of self justification or for the protection of a legitimate interest; is about an official in the exercise of his or her duties; is a fair comment on any person or thing subjected to public criticism; or is a fair report of the open proceedings of any court or meeting.

Section 330 further provides that truth is a defence, but proof of truth is not allowed where the imputation concerns a personal matter and such proof is not of public benefit. Section 331 further provides that statements made in court by parties or their lawyers are not defamatory.

Analysis
While these defences are to be welcomed, it is clear that they do not meet the standards set out above. The right to prove truth is limited in a manner that simply cannot be justified, in particular by requiring that impugned statements on personal matters were made in the public interest. First, depending on how the idea of public interest is interpreted, this requirement could unduly fetter open debate in society. Allegations regarding personal matters may contribute in very general ways to public debate so that, although the allegations are important, it may be hard to show that they are in the public interest. Second, one should be allowed to articulate true statements regardless of whether or not they are deemed to be in the public interest. Third, in our experience, the concept of public interest as a barrier to proof of truth in defamation cases has often been widely abused as a basis for sanctioning clearly legitimate statements.

ARTICLE 19 strongly recommends that this limitation on the right to prove truth be removed from the law. At a minimum, the onus of proof should be on the plaintiff, to show that the allegations lack any public merit.

The third part of section 329, protecting fair comment regarding someone subjected to public criticism, may be a form of protection for opinions but, otherwise, the criminal law does not recognise any difference between opinions and statements of fact. As noted above, ARTICLE 19 recommends that opinions be absolutely protected. At a minimum, the law should provide greater protection for opinions.

Much of section 329 can be seen as a form of reasonable publication defence; indeed, this defence is known in many jurisdictions as a good faith defence.[47] At the same time, it is clear that the scope of the section 329 defence is substantially narrower than the defence as recognised in international and comparative law, described above, which applies to all matters of public concern. The section 329 defence would not, for example, protect many statements made in good faith about the environmental or other harmful activities of a private company, regardless of whether or not these were in the public interest. This is a very serious limitation on this important defence.

Section 329 provides some protection for fair reporting on court processes and other meetings, while section 331 protects certain statements made in court. As with reasonable publication, however, these defences are too narrow. They do not, for example, cover statements made by witnesses in court, fair reporting on official reports or fair reporting on official press statements not made in a meeting. The scope of this protection should be significantly enhanced.

Recommendations:

- Section 330 should be amended so that proof of truth always constitutes a full defence to a charge of defamation.
- The defamation provisions should be amended so that opinions are always

[47] ARTICLE 19 uses the term reasonable publication in an attempt to bring under one concept the different ways in which this defence has been articulated in difference defamation systems.

protected from defamation liability or, at a minimum, so that they receive greater protection than statements of fact.

- The scope of protection pursuant to section 329 for statements made in good faith, or made reasonably, should extend to all statements on matters of public concern.
- The scope of protected statements under the third part of section 329 and section 331 should be substantially extended in accordance with the recommendations in Part III.B.4.

III.C.2 Elements of the Offence and Onus of Proof

It is not entirely clear to us from a simple reading of the defamation provisions what is required to be proved by the prosecution but, at least on the face of these provisions, the only elements of the offence appear to be a showing that an imputation was made and that that imputation has harmed someone's reputation. In our view, this is seriously inadequate in the context of criminal defamation law.

In accordance with general principles of criminal law, the onus should be on the party bringing the case to prove all elements of the offence, and on the criminal standard of beyond a reasonable doubt. Such elements should include the core factors which constitute the offence, as well as a *mens rea*, or mental, element. In the case of defamation, ARTICLE 19 is of the view that falsity is a core constituent element of the offence since, as noted above, one cannot defend a reputation that is not deserved.

The mental element of the offence should consist of two things. First, the prosecution should be required to prove that the accused acted with knowledge that the statements were false, or at least with reckless disregard for the truth. Falsity is a core element of the offence and this should be reflected in the *mens rea* requirement. Furthermore, the mental element should include an intention to cause harm to the person whose reputation has been harmed. Simple proof of an intention to make the statement is wholly inadequate to protection of the presumption of innocence, as well as to the appropriate protection of reputation.

These views are set out in the ARTICLE 19 Principles at Principle 4(b)(ii) as follows:

> [T]he offence of criminal defamation shall not be made out unless it has been proven that the impugned statements are false, that they were made with actual knowledge of falsity, or recklessness as to whether or not they were false, and that they were made with a specific intention to cause harm to the party claiming to be defamed….

ARTICLE 19 is not aware of the standard of proof applicable to criminal defamation cases in Thailand. In accordance with well-established principles of criminal law, however, this standard should be beyond all reasonable doubt or something similar. To convict where there remains a doubt as to the guilt of the accused would breach the presumption of innocence; a presumption that is applicable to criminal defamation as to all crimes.

Recommendations:

- A party bringing a criminal defamation case should have to prove that the