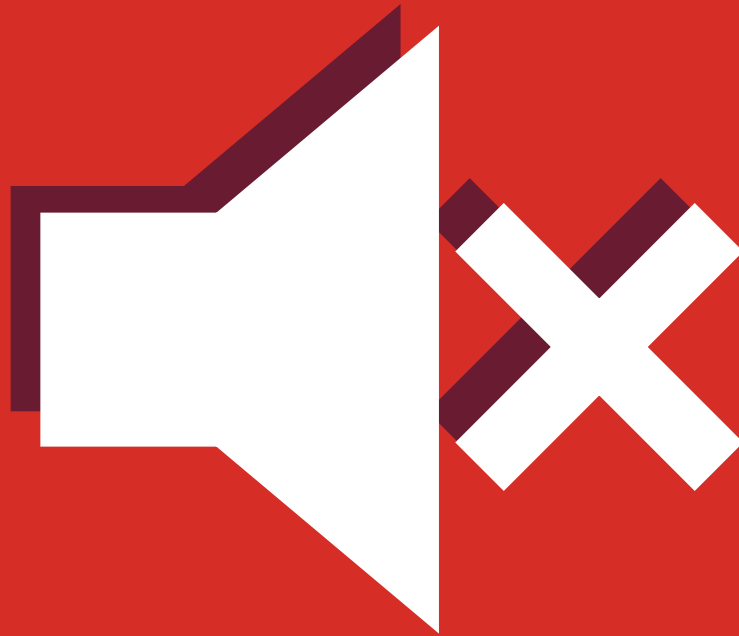


# TRUTH BE TOLD

Criminal defamation in Thai law and  
the case for reform

March 2021



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## 1. EXECUTIVE SUMMARY

Properly functioning political systems, economies, and societies require that people, companies, and other legal entities have access to mechanisms to protect themselves from slander and lies. International human rights law explicitly allows the right to freedom of expression to be restricted by law to protect the rights and reputations of others. In jurisdictions around the world, civil defamation laws have proved to be effective in guarding reputations from untruthful attacks. In Thailand defamation is also a criminal offence. Thailand's experience, like that of other countries, has demonstrated that criminal defamation provisions are unnecessary, susceptible to abuse, and detrimental to the enjoyment of the right to freedom of expression.

Section 326 of Thailand's Criminal Code establishes the crime of defamation, which is punishable by up to one year imprisonment. Defamation in written publications, broadcast communications, and other forms of media carries a penalty of two years' imprisonment under Section 328. Individuals who feel that they have been defamed may either report the case to the police or file a complaint directly with the court, giving private parties great power to initiate criminal proceedings against others.

Since 2015, public prosecutors have submitted thousands of criminal defamation cases to courts, with the number of cases increasing each year. Conviction rates have regularly topped 80 percent in these cases.

In recent years, companies and powerful individuals have increasingly initiated criminal defamation cases against individuals who have raised concerns about human rights abuses, labour rights violations, corruption, and other matters of public interest. ARTICLE 19 identified 58 such cases that have been initiated since 2014. The 116 people who were accused in these cases included workers, activists, journalists, human rights defenders, environmental defenders, whistleblowers, academics, and politicians. Although only nine of the cases have resulted in convictions, scores of individuals have been forced to endure lengthy and burdensome investigations and trials because of their efforts to expose injustice, support marginalised communities, or report on matters of public concern.

A series of frivolous cases filed by Thammakaset Company Limited underscores the danger posed by criminal defamation proceedings in Thailand. Since 2016, Thammakaset has launched 39 cases, most concerning civil or criminal defamation, against 23 migrant workers and human rights defenders who have reported on labour rights violations at a poultry farm run by the company. Despite repeated losses in courts—and the determination by a government agency that the company owed workers 1.7 million baht in unpaid wages—Thammakaset has continued to launch new cases. Several cases are based entirely on social media activity. To date, only one defendant has been found guilty by a court, and her conviction was overturned on appeal. Nevertheless, the vexatious litigation initiated by Thammakaset has been an expensive distraction and source of stress for key members of Thai civil society and has chilled the exercise of the right to freedom of expression in the country.

A significant consensus has emerged that criminal defamation laws are inconsistent with international human rights standards relating to the freedom of expression. In its General Comment No. 34, the UN Human Rights Committee urged states to consider decriminalising defamation and stated that custodial sentences are never an appropriate punishment for defamation. Compounding the risk of abuse, Thai law does not provide sufficient defences against defamation claims and fails to adequately prevent the abuse of defamation laws by government officials, corporations, or private individuals.

Despite the large number of states that retain criminal defamation provisions, there is a significant global trend towards decriminalisation. Since 1992, at least thirty states have decriminalised defamation, and more than a dozen others have eliminated imprisonment as a penalty for defamation. ARTICLE 19 urges Thailand to join their ranks. The government should repeal the Criminal Code's defamation provisions and amend the Computer Crime Act to bring it in line with international human rights law.

\* \* \*

ARTICLE 19 thanks Humans Rights Lawyers Association and the Freedom of Expression Documentation Center by iLaw for their support in developing this report. Both organisations have provided data concerning criminal defamation cases in Thailand and have contributed to the analysis found in the report.

## 2. CRIMINAL DEFAMATION IN THAI LAW

Thailand's Criminal Code establishes the crime of defamation. The 2017 Computer Crime Act (CCA) also contains a provision penalising the uploading of 'false computer data' that is likely to harm a third party. Both provisions are backed by custodial sentences. In addition to criminal penalties, civil remedies for defamation are available under Section 423 of the Thai Civil and Commercial Code.<sup>1</sup> The Thai government has implemented some measures ostensibly aimed at combatting frivolous defamation cases, including by incorporating provisions into the Criminal Procedure Code that protect against cases filed in 'bad faith'.<sup>2</sup> However, these steps have not prevented the application of defamation charges under the Criminal Code and the CCA in a manner that violates the right to freedom of expression.

### 2.1. Sections 326 – 333 of Thailand's Criminal Code

The defamation chapter of Thailand's Criminal Code is comprised of Sections 326-333. Three of these sections impose criminal liability for defamation: Sections 326, 327, and 328.

**Section 326** of the Criminal Code prohibits imputing 'anything about another person to the third person in a manner likely to impair the reputation of such person or to put such person to contempt or hatred'. Conviction carries a maximum sentence of one year imprisonment, a fine of up to 20,000 Thai baht, or both.<sup>3</sup>

**Section 327** prohibits imputation of a deceased person, which is 'likely to impair the reputation of the father, mother, spouse, or child of the decedent.' It carries the same penalty as Section 326.

**Section 328**, which carries a maximum penalty of two years' imprisonment and a fine of up to 200,000 Thai baht, prohibits defamatory statements committed by means of publication, broadcasting, or propagation through any other form of media.<sup>4</sup>

**Section 329** of the Criminal Code sets forth defences to defamation charges as follows:

Whoever expresses any opinion or statement in good faith:

1. By way of justification, self-defence or safeguarding his or her legitimate interests;
2. As being an official in the exercise of his or her duty;
3. By way of fair comment on any person or anything which shall be deemed as common public criticism; or

<sup>1</sup> Thai Civil and Commercial Code, Section 423: 'A person who, contrary to the truth, asserts or circulates a fact that is injurious to the reputation or the credit of another or his[/her] earnings or prosperity in any other manner, shall compensate the other for any damage arising therefrom, even if he[/she] does not know of its untruth, provided he ought to know it.'

A person who makes a communication the untruth of which is unknown to him[/her], does not thereby render himself liable to make compensation, if he[/she] or the receiver of the communication has a rightful interest in it.'

<sup>2</sup> Rights and Liberty Protection Department, Ministry of Justice, Royal Thai Government, 1<sup>st</sup> National Action Plan on Business and Human Rights (2019-2022), p.105, October 2019, available at:

[https://www.th.undp.org/content/dam/thailand/docs/UNDP\\_TH\\_National%20Action%20Plan\\_Eng..pdf](https://www.th.undp.org/content/dam/thailand/docs/UNDP_TH_National%20Action%20Plan_Eng..pdf).

<sup>3</sup> Ammart Netayasupha, Piyapohn Pisitpit, Benjaporn Watcharavuthichai, Criminal Code, Winyuchon Publishing, 2013.

<sup>4</sup> International Commission of Jurists, Thailand: ICJ condemns the use of criminal defamation law to harass Angkhana Neelapaijit, 27 November 2019, available at: <https://www.icj.org/thailand-icj-condemns-the-use-of-criminal-defamation-law-to-harass-angkhana-neelapaijit/>.

4. By way of fair report of the open proceedings of any Court or meeting, shall not be guilty of defamation.

**Section 330** provides a defence to the crime of defamation if the accused can prove that the statement in question is true. However, true statements do not constitute a defence when the alleged defamation relates to private matters, and ‘such proof will not [be of] benefit to the public’.<sup>5</sup>

**Section 331** describes the application of defamation charges to statements made by parties or their lawyers in courts. **Section 332** empowers courts to order that defamatory content be destroyed and rulings published at the expense of the convicted. **Section 333** establishes the crime of defamation as a compoundable offense that can be acted on a by a relative in the event of the death of the injured person.

## 2.2. Computer Crime Act (CCA)

The CCA, passed in 2007 and amended in 2017, contains several provisions that have been used to criminalise content deemed defamatory.

**Section 14(1)** of the CCA makes it a crime to ‘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 the public, in which the perpetration is not a defamation offense under the Criminal Code’. Offences are punishable by imprisonment of up to five years or a fine of not more than 100,000 Thai baht, or both. Similar actions that are likely to damage an individual—as opposed to the public—are punishable by up to three years’ imprisonment, a fine of up to 60,000 Thai baht, or both.

Prior to the 2017 amendment, there was no distinction between actions damaging individuals or the public, with both being subject to a penalty of five years’ imprisonment.<sup>6</sup> Additionally, the previous version of the law lacked an intent requirement and did not restrict the provision’s use in cases also involving defamation under the Criminal Code.

In 2017, an appeal court held that after the 2017 amendment, Section 14(1) of the Computer Crime Act no longer covered defamation offences.<sup>7</sup> Despite this ruling, complainants continue to abuse the provision to target human rights defenders and others with spurious litigation on the basis of expression that tarnishes reputations.<sup>8</sup>

**Section 15** of the CCA penalises a service provider who cooperates, consents, or supports the perpetration of the offences under Section 14 by using a computer system under his or her control. Offences under Section 15 are punishable with the same penalty as under Section 14.

<sup>5</sup> Criminal Code, Winyuchon Publishing, 2013.

<sup>6</sup> See Thai Netizen Network, Thailand’s Computer-related Crime Act 2017 bilingual, 25 January 2017, available at: <https://thainetizen.org/docs/cybercrime-act-2017/>.

<sup>7</sup> Unofficial translation of the Appeal Court’ ruling on Criminal Case Black Case No.1675/2 and Red Case No.591/2, Natural Fruit Company Limited v Mr. Andy Hall, 16 January 2018, retrieved from <https://andyjhall.files.wordpress.com/2018/06/nf-judgement-english-translation-final.pdf>.

<sup>8</sup> Matchon Online, เข้าพบดร.แล้ว! สาวโพสต์ข่าวปลอมไวรัสโควิด-19 ถูกดำเนินคดีข้อหาหมิ่นฯ ผิดพ.ร.บ.คอมพ์, 15 February 2020, available at: [https://www.matchon.co.th/local/news\\_1976319](https://www.matchon.co.th/local/news_1976319).

**Section 16** of the CCA prohibits importing into a publicly accessible computer system ‘computer data...where a third party's picture appears either created, edited, added or adapted by electronic means or otherwise in a manner that is likely to impair that third party's reputation or cause that third party to be isolated, disgusted or embarrassed’. The Section was amended in 2017 to provide an exception for transfer to a computer system in good faith ‘by way of fair comment on any person or any object subjected to public criticism’. Offences under Section 16 are punishable by imprisonment of up to three years or a fine of not more than 200,000 Thai baht.

As a whole, the CCA is deeply flawed and incompatible with international standards relating to freedom of expression, as described in ARTICLE 19's analysis of the amendments to the law.<sup>9</sup>

### 2.3. Procedural Safeguards against criminal cases filed in bad faith or without merit

As described below, complainants in Thailand, particularly corporations, have abused defamation laws in Thailand to silence journalists, human rights defenders, and others raising concerns about human rights abuses.<sup>10</sup> As the number of these cases has increased, the Thai government has made some efforts to address vexatious defamation lawsuits.<sup>11</sup> In December 2018, Thailand's National Legislative Assembly amended the Criminal Procedure Code to include two provisions, Sections 161/1 and 165/2, that could be used to dismiss criminal cases against those acting in the public interest.<sup>12</sup>

**Section 161/1** provides: ‘In a case filed by a private complainant, if it appears to the court—or through examination of evidence called at trial—that the complainant has filed the lawsuit in bad faith or distorted facts in order to harass or take undue advantage of a defendant, or to procure any advantage to which the complainant is not rightfully entitled, the court shall order dismissal of the case, and forbid the complainant to refile such case again. The filing of a lawsuit in bad faith as stated in paragraph one includes incidents where the complainant intentionally violated a final court's orders or judgments in another criminal case without providing any appropriate reason’.

**Section 165/2** provides: ‘During the preliminary hearing, the defendant may submit to the court a significant fact or law which may bring the court to the conclusion that the case before it lacks merit, and may include in the submission as persons, documents or materials to substantiate the defendant's claims provided in the submission. In such case, the court may call such persons, documents or materials to provide evidence in its deliberation of the case as necessary and appropriate, and the complainant and the defendant may examine this evidence with the consent of the court’.

<sup>9</sup> ARTICLE 19, Thailand: Computer Crime Act, Legal Analysis, January 2017, available at: <https://www.article19.org/resources/thailand-computer-crime-act/>.

<sup>10</sup> These cases are sometimes referred to as strategic litigation against public participation (SLAPP), and may use criminal or civil lawsuits as a means of denying public participation. ARTICLE 19, Defining Defamation: Principles on Freedom of Expression and Protection of Reputation, 2017, Principle 6, available at: [https://www.article19.org/data/files/medialibrary/38641/Defamation-Principles-\(online\)-.pdf](https://www.article19.org/data/files/medialibrary/38641/Defamation-Principles-(online)-.pdf).

<sup>11</sup> Rights and Liberty Protection Department, Ministry of Justice, Royal Thai Government, 1<sup>st</sup> National Action Plan on Business and Human Rights (2019-2022), p.105, October 2019, available at: [https://www.th.undp.org/content/dam/thailand/docs/UNDP\\_TH\\_National%20Action%20Plan\\_Eng..pdf](https://www.th.undp.org/content/dam/thailand/docs/UNDP_TH_National%20Action%20Plan_Eng..pdf).

<sup>12</sup> International Commission of Jurists, Thailand: ICJ submits recommendations to strengthen Thailand's Anti-SLAPP Law, March 2020, available at: <https://www.icj.org/thailand-icj-submits-recommendations-to-strengthen-thailands-anti-slapp-law/>.



The adoption of Sections 161/1 and 165/2 was cited in the Thai government's National Action Plan on Business and Human Rights as evidence of the government's attempt to prevent the targeting of individuals acting in the public interest. However, to date, judges have refused to consistently apply these provisions in spurious criminal cases filed against activists, journalists, human rights defenders, and others.<sup>13</sup>

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<sup>13</sup> International Commission of Jurists, Thailand: ICJ submits recommendations to strengthen Thailand's Anti-SLAPP Law, March 2020, available at: <https://www.ici.org/thailand-ici-submits-recommendations-to-strengthen-thailands-anti-slapp-law/>.

### 3. CRIMINAL DEFAMATION AND INTERNATIONAL LAW

In 1946, during its first session, the UN General Assembly declared that '[f]reedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the UN is consecrated'.<sup>14</sup> Freedom of expression promotes government transparency and aids accountability efforts for violations of human rights.<sup>15</sup> Further, the Human Rights Committee has noted that freedom of expression helps to ensure that all human rights norms are maintained.<sup>16</sup>

Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR), a human rights treaty that Thailand ratified in 1996, protects the right to freedom of expression. It provides that: 'Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice'.<sup>17</sup>

The UN Human Rights Committee's General Comment No. 34, which elaborates on states' responsibilities under Article 19 of the ICCPR, outlines a three-part test to determine whether a restriction on expression complies with international human rights law. First, the restriction must be provided by law. Second, it must be made in pursuance of one of the purposes laid out in paragraph 3 of Article 19: to protect the rights or reputations of others, national security, public order, public health, or public morals. This is a comprehensive list; no other government interests can justify a restriction of free expression. Third, the restriction must be necessary and proportionate to achieve its protective function.<sup>18</sup>

Thailand's defamation laws fail to meet this test for three reasons.

First, **Thailand's defamation laws provide for disproportionate penalties.**

The protection of reputation is listed as one of the legitimate state aims under Article 19 of the ICCPR. Civil defamation laws are an important means of addressing unwarranted attacks on reputations. Individuals and organisations should be able to recover compensation for untrue statements that damage their reputation. However, because civil defamation suits provide sufficient redress for reputational harm, criminal laws prohibiting defamation are unnecessary, and imprisonment as a punishment for defamation is disproportionate.

In General Comment No. 34, the Human Rights Committee urged states to consider decriminalising defamation, concluding that custodial sentences are never appropriate for defamatory statements.<sup>19</sup>

<sup>14</sup> GA Res. 59(I), at 95 (14 December 1946); Manfred Nowak, UN Covenant of Civil and Political Rights: CCPR Commentary 443 (2005).

<sup>15</sup> Ibid.

<sup>16</sup> UN Human Rights Committee, General Comment No. 34, UN Doc. CCPR/C/GC/34, paras. 2–4 (12 September 2011) [hereinafter General Comment 34].

<sup>17</sup> International Covenant on Civil and Political Rights, Article 19(2).

<sup>18</sup> ICCPR Article 19; Velichkin v. Belarus, Comm. No. 1022/2001, UN Doc. CCPR/C/85/D/1022/2001 §7.3 (2005); UN Human Rights Committee, General Comment No. 10, Freedom of Expression (Article 19), UN Doc. 29/06/83 para. 4 (1983); Article 19, Johannesburg Principles on National Security, Freedom of Expression, and Access to Information, UN Doc. E/CN.4/1996/39, Principle 1 (1996).

<sup>19</sup> General Comment No. 34, para.47.

Likewise, the European Court of Human Rights (ECtHR) has emphasised that imprisonment is never an appropriate penalty for defamation, no matter how egregious or blatant the defamatory statement.<sup>20</sup>

Second, **Thailand's defamation laws lack sufficient defences against defamation claims**, indicating that they are not sufficiently tailored to the harm they seek to address.

Thai law provides no defence protecting the right to state an opinion. Value judgments deserve a high level of protection, and in many jurisdictions, are afforded protection on the basis of the absolute right to hold opinions.<sup>21</sup>

Thai law provides only limited protection for those facing criminal defamation charges after making true statements. In the Criminal Code, truth is not a defence for defamatory statements on 'private matters' that do not benefit the public.<sup>22</sup> The term 'private matters' is vague and open to abuse. Further, while restrictions on truthful statements may be permissible to protect privacy, such statements are better addressed by privacy, rather than defamation, laws.<sup>23</sup>

In practice, Thai law does not provide adequate defences for comments made relating to matters of public concern. International law is especially protective of open political debate and the right to criticise public officials. The Human Rights Committee has stressed the importance of free expression in the political sphere to uphold the democratic form of government.<sup>24</sup> In General Comment No. 25, concerning participation in public affairs, the Committee wrote, '[t]he free communication of information and ideas about public and political issues between citizens, candidates, and elected representatives is essential. This implies a free press and other media able to comment on public issues and to inform public opinion without censorship or restraint'.<sup>25</sup>

The Criminal Code provides a defence for fair comment on any person or thing subjected to public criticism made in good faith, a provision that was incorporated into the CCA by the 2017 amendment. However, Section 329 of the Criminal Code places the burden on defendants to prove that opinions or statements on matters of public concern were made in good faith. In practice, the defence has not prevented the abuse of defamation laws to silence expression on matters of public concern. Additionally, neither the Criminal Code nor the CCA provides an exception for the fair and accurate

<sup>20</sup> Media Legal Defence Initiative & International Press Institute, Freedom of Expression, Media Law, and Defamation, 23 June 2015, available at: [https://issuu.com/internationalpressinstitute/docs/foe-medialaw-defamation\\_eng](https://issuu.com/internationalpressinstitute/docs/foe-medialaw-defamation_eng); *Bladet Tromsø and Stensaas v. Norway*, App. No. 21980/93, para. 64 (ECtHR 20 May 1999); *Cumpănă and Mazăre v. Romania*, App. No. 33348/96, paras. 111, 114 (ECtHR 17 December 2004); see also ARTICLE 19, Defining Defamation: Principles on Freedom of Expression and Protection of Reputation, July 2000, principle 4(a)(iv), available at: <https://www.article19.org/wp-content/uploads/2018/02/defining-defamation.pdf>.

<sup>21</sup> Defining Defamation: Principles on Freedom of Expression and Protection of Reputation, principle 13.

<sup>22</sup> Thailand Law Library, Defamation (Sections 326-333), Section 330, available at: <https://library.siam-legal.com/thai-law/criminal-code-defamation-sections-326-333/>.

<sup>23</sup> Defining Defamation: Principles on Freedom of Expression and Protection of Reputation, principle 4(a)(iii).

<sup>24</sup> *Aduayom et al. v. Togo*, Comm. Nos. 422–424/1990, UN Doc. CCPR/C/51/D/422/1990, 423/1990, 424/1990 para. 7.4 (1996); *Park v. Republic of Korea*, Comm. No. 328.1995, UN Doc. CCPR/C/64/D/628/1995 para. 10.3 (1998); Human Rights Committee, 128<sup>th</sup> mtg. at para. 20 (statement by Mr. Tomuschat), UN Doc. CCPR/C/SR.128 (1979).

<sup>25</sup> Human Rights Committee General Comment No. 25, UN Doc. CCPR/C/21/Rev.1/Add/7, para. 25, (12 July 1996).

reporting of 'words of others'.<sup>26</sup> Further internet intermediaries should be exempt from liability in circumstances where they have not been involved in modifying content.

Third, **Thai law fails to adequately prevent the abuse of defamation laws** by the government, corporations, or private individuals.

Instead, a range of actors frequently use defamation suits to silence discussion on issues such as corruption, human rights abuses, or political matters.<sup>27</sup> In their 2018 statement addressing criminal defamation charges against human rights defenders in Thailand, six UN Special Rapporteurs stated that it is 'critical for the Thai Government to revise its civil and criminal laws as well as prosecution processes to prevent misuse of defamation legislation by companies'.<sup>28</sup>

Section 28 of Thailand's Criminal Procedure Code provides that either victims or the public prosecutor can directly institute criminal prosecutions at courts.<sup>29</sup> Complainants often choose to file cases directly with the court, bypassing the police investigation phase in order to speed up the prosecution. This procedure facilitates the abuse of defamation laws by parties that wish to silence journalists, human rights defenders, and others by forcing them to spend time and resources responding to meritless criminal suits.

The abuse of Thailand's defamation laws shows that they are not carefully crafted to address reputational harm; instead, the overly broad laws criminalise legitimate expression.

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<sup>26</sup> Defining Defamation: Principles on Freedom of Expression and Protection of Reputation, principle 15(a)(iii).

<sup>27</sup> See Section 4.

<sup>28</sup> UN Office of the High Commissioner on Human Rights, Thailand: UN experts condemn use of defamation laws to silence human rights defender Andy Hall, 17 May 2018, available at: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23095&LangID=E>.

<sup>29</sup> Criminal Procedure Code, Section 28.

## 4. TRENDS IN CRIMINAL DEFAMATION PROSECUTIONS IN THAILAND

### 4.1. Criminal defamation cases are on the rise

According to data from the Office of the Attorney General, between January 2015 and September 2020 the police submitted 16,807 cases under Sections 322 – 328 of the Criminal Code to the public prosecutor.<sup>30</sup> Sections 322 – 325 cover the offence of confidential information disclosure, while Sections 326 – 328 cover criminal defamation. The Office of the Attorney General was unable to provide data for criminal defamation cases alone. According to this data, the annual number of cases initiated under these sections has been gradually increasing each year.<sup>31</sup>

The data from the Office of the Attorney General, given to ARTICLE 19 upon request, also records the number of cases the public prosecutor submitted to the Court of First Instance under Sections 322 – 328 of the Criminal Code per year and the outcome of each of those cases (See Figure 1). Between 2015 and 2019, the number of cases submitted to the Court of First Instance increased from 1,386 to 2,023. Between January 2015 and September 2020, there were 8,397 convictions in these cases, amounting to 83 percent of all cases. Less than three percent of cases resulted in an acquittal, with other cases ending because charges were withdrawn or other developments, including the death of the defendant, prevented the conclusion of the case.

*Figure 1: The result of cases under Sections 322 - 328 of the Criminal Code submitted to the Court by the public prosecutors between 2015 – 2020<sup>32</sup>*

Year	Conviction	Acquittal	Withdrawal	Other <sup>33</sup>	Total number of cases
2015	1,234	37	11	104	<b>1,386</b>
2016	1,426	39	15	110	<b>1,590</b>
2017	1,530	55	13	249	<b>1,847</b>
2018	1,639	49	29	297	<b>2,014</b>
2019	1,635	39	19	330	<b>2,023</b>
Jan–Sep 2020	933	22	13	313	<b>1,281</b>
<b>Total (Cases)</b>	<b>8,397</b>	<b>241</b>	<b>100</b>	<b>1,403</b>	<b>10,141</b>

While the number of annual convictions has been on the rise between 2015 and 2020, notably, the conviction rate has been gradually decreasing (See Figure 2).

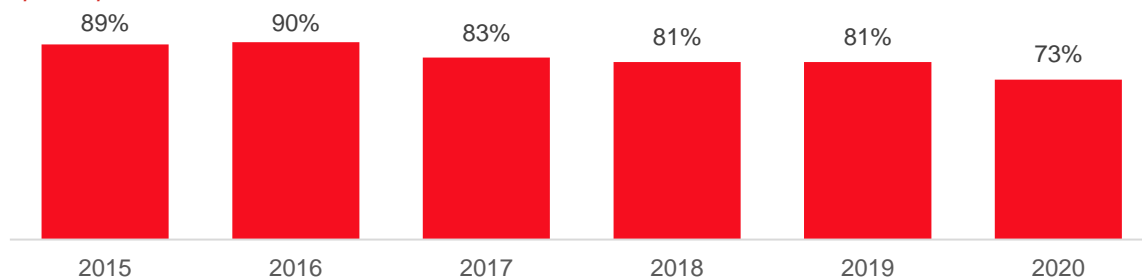
<sup>30</sup> The Thai legal system provides two approaches for filing a criminal defamation complaint. A defamation complaint may be filed with the police, inviting the public prosecutor to bring the case to the court; or a defamation complaint may be filed by the plaintiff directly with the Court of First Instance.

<sup>31</sup> 2015 = 2,117; 2016 = 2,593; 2017 = 3,012; 2018 = 3,197; 2019 = 3,367; 2020 (9 months) = 2,521.

<sup>32</sup> This data was given to ARTICLE 19 by the Office of the Attorney General in February 2021 upon request.

<sup>33</sup> Cases that were not concluded because of other reasons such as the escape or death of the defendant.

Figure 2: Conviction rates for cases under Sections 322-328 of the Criminal Code submitted to the court by the public prosecutors between 2015 – 2020



As described above, complainants may file cases directly with the court. Statistics provided to ARTICLE 19 by the Office of the Judiciary reveal that the combined number of criminal defamation cases filed at the court by the public prosecutor and directly by complainants have risen steadily for the past five years. 1,730 more cases were filed in 2020 than 2015, a 50% increase.

Figure 3: Total criminal defamation cases under Sections 326 – 333 of the Criminal Code filed at courts nationwide between 2015 – 2020<sup>34</sup>

Court	Year	2015	2016	2017	2018	2019	2020	Total
<b>Supreme Court</b>		40	46	50	59	62	61	<b>318</b>
<b>Appeal Courts</b>		315	400	440	523	548	558	<b>2,784</b>
<b>Courts of First Instance</b>		3,104	3,579	3,869	3,860	4,001	4,570	<b>22,983</b>
<b>Total Cases</b>		<b>3,459</b>	<b>4,025</b>	<b>4,359</b>	<b>4,442</b>	<b>4,611</b>	<b>5,189</b>	<b>26,085</b>

#### 4.2. The CCA continues to be used to suppress critical expression

Prior to its amendment in 2017, the CCA was often used in conjunction with criminal defamation charges under the Criminal Code to apply further legal pressure and compound the threat of penalties.

##### **Royal Thai Navy v Phuketwan Journalists**

On 16 December 2013, the Royal Thai Navy filed complaints against Alan Morison and Chutima Sidasathian of Phuketwan, a local online news outlet, for reproducing one paragraph from a Pulitzer Prize-winning article written by Reuters news agency implicating the Navy in the smuggling of the Rohingya refugees off the coast of Thailand.<sup>35</sup> On 17 April 2014, the journalists were charged with criminal defamation under Sections 326 and 328 of the Criminal Code, and Section 14(1) of the 2007 CCA. On 1 September 2015, the Phuket Provincial Court delivered a landmark ruling to acquit Alan Morison and Chutima Sidasathian of all charges.

<sup>34</sup> The Division of Planning and Budget, the Office of Judiciary, (28 January 2021); data provided to ARTICLE 19 upon request.

<sup>35</sup> International Commission of Jurists, Thailand: End prosecution of Phuketwan journalists for reporting on Rohingya trafficking crisis, 9 July 2015, available at: <https://www.icj.org/thailand-end-prosecution-of-phuketwan-journalists-for-reporting-on-rohingya-trafficking-crisis/>.

As described above, the 2017 amendment to the law inserted language preventing Section 14(1) from being used in tandem with criminal defamation charges under the Criminal Code. Since 2017, despite the amendment, individuals or institutions appear to have continued to initiate proceedings under Section 14(1) of the CCA proceedings against individuals for reputational damage.<sup>36</sup>

#### ***Airports of Thailand PCL v Danai Usama***

In March 2020, Danai Usama was arrested after he made a Facebook post about the lack of COVID-19 screening measures upon his arrival at Suvarnabhumi Airport. Airports of Thailand PCL authorised a lawyer to file a complaint against Danai under Section 14(1) of the CCA. The complaint alleged that his post was false and caused public panic by misleading the public that Suvarnabhumi Airport did not impose any coronavirus screening measures in March 2020. The complaint further alleged that the post caused damage to Airports of Thailand PCL.<sup>37</sup> Public prosecutors later indicted Danai under Section 14 of the CCA without specifying a subsection. His trial will begin in May 2021.

### **4.3. Criminal defamation cases are time-consuming and costly**

Thailand's judicial system is under strain. In 2019, nearly two million cases were filed with courts, of which more than 650,000 were criminal cases.<sup>38</sup> This heavy caseload has contributed to budgetary pressures and delays in the administration of justice. In 2011, the Thailand Development Research Institute estimated that the decriminalisation of defamation and check bouncing could result in a cost-saving to the criminal justice system of more than a billion Thai baht per year.<sup>39</sup> Given inflation and the above-described trends in criminal defamation cases, this figure is certainly much larger a decade later.

The burden of lengthy criminal defamation cases is felt most acutely by the accused. In recent years, many journalists, activists, and human rights defenders have endured years of investigation and legal proceedings only to be acquitted of all charges.<sup>40</sup> Expenses associated with these proceedings have often been paid out of the pocket of the accused. Long and exhausting legal battles based on criminal defamation accusations create an atmosphere of fear and self-censorship, severely inhibiting journalism and weakening civil society.

<sup>36</sup> See, for example, iLaw, Prasitchai: posted facebook criticizing Walailak University on its tree management, available at: <https://freedom.ilaw.or.th/en/case/877>.

<sup>37</sup> Human Rights Watch, Thailand: COVID-19 Clampdown on Free Speech, 25 March 2020, available at: <https://www.hrw.org/news/2020/03/25/thailand-covid-19-clampdown-free-speech>.

<sup>38</sup> The Office of Judiciary, The Annual Judicial Statistics, Thailand 2019 (B.E.2562), p.15, retrieved from <https://oppb.coj.go.th/th/file/get/file/20200917b91182bb643b81688c2951c955fa2513114251.pdf>, 4 March 2021.

<sup>39</sup> TDRI, The Economic Analysis of the Criminal Laws, August 2011, p. v, available at: <https://tdri.or.th/2012/09/s57/>. See also, Somkiat Tangkitvanich et al., An Economic Analysis of the Thai Criminal Justice System, TDRI, June 2020, available at: <http://tdri.or.th/wp-content/uploads/2012/09/t5j2010002.pdf>.

<sup>40</sup> See, for example, ARTICLE 19, Thailand: Act to prevent spurious lawsuits against human rights defenders, 12 June 2020, available at: <https://www.article19.org/resources/thailand-act-to-prevent-spurious-lawsuits-against-human-rights-defenders/>.

### ***Natural Fruit Co. Ltd. v Andy Hall***

In September 2016, Andy Hall, a human rights defender conducting research for Finnwatch, a Finnish NGO, was convicted on charges of criminal defamation under Sections 326 and 328 of the Criminal Code and Section 14(1) of the CCA.<sup>41</sup> Natural Fruit Co., a Thai fruit packaging company, filed complaints against Hall in 2013 after he authored a report about the unlawful working conditions of migrant workers at the company. Hall was initially sentenced to four years' imprisonment and was fined 200,000 Thai baht.<sup>42</sup> The Appeals Court later overturned this verdict in 2018, and Hall was acquitted of all charges.<sup>43</sup> The Court of Appeal ruled that the research was in the public interest for the benefit of consumers and made in good faith, thus constituting a defence under Section 329 of the Criminal Code.<sup>44</sup> Natural Fruit Co. Ltd. appealed this ruling. The Supreme Court upheld the Court of Appeal's ruling on 17 December 2019, six years after the initial complaint.<sup>45</sup>

## **4.4. Criminal defamation charges are used to target those working for the public interest**

As described above, criminal penalties—especially custodial sentences—are disproportionate responses to defamatory expression. Criminal defamation provisions are particularly damaging to human rights when they are used to target journalists, human rights defenders, whistleblowers and others carrying out work that is essential to inform and educate the public. In recent years, Thailand has seen a deluge of criminal defamation cases against individuals raising concerns about human rights abuses, labour rights violations, corruption, or government or corporate failures. Thai civil society has often used the framework of strategic litigation against public participation, or SLAPP, to refer to civil or criminal proceedings initiated with the principal objective of curtailing or deterring public criticism or opposition.

ARTICLE 19 analysed data collected by the Human Rights Lawyers Association (HRLA)<sup>46</sup> and Freedom of Expression Documentation Center by iLaw (iLaw)<sup>47</sup> to identify cases in which criminal defamation or CCA charges were used to target individuals who raised concerns about human rights abuses, government misconduct, or other issues of public concern.<sup>48</sup> ARTICLE 19 identified 58 such cases initiated between 2014 and 2020. 54 of these 58 cases included charges under Section 326 or 328 of the Criminal Code. Charges under the CCA were used alongside criminal defamation charges

<sup>41</sup> FinnWatch, Q&A: Criminal and Civil Prosecutions - Natural Fruit vs. Andy Hall, July 2020, available at: [https://finnwatch.org/images/pdf/Natural\\_Fruit\\_vs\\_Andy\\_Hall\\_QA\\_3July2020.pdf](https://finnwatch.org/images/pdf/Natural_Fruit_vs_Andy_Hall_QA_3July2020.pdf); and Bangkok Post, Decriminalise defamation, 8 June 2018, available at:

<https://www.bangkokpost.com/opinion/opinion/1480897/decriminalise-defamation>.

<sup>42</sup> The Observatory for the Protection of Human Rights Defenders and the World Organization against Torture, Urgent Appeal, THA003 / 0815 / OBS 067.4, 28 March 2018, available at:

<https://www.omct.org/en/resources/urgent-interventions/sentencing-of-mr-andy-hall-a-migrant-labour-rights-researcher>.

<sup>43</sup> Unofficial translation of the Appeal Court ruling on Criminal Case Black Case No.1675/2 and Red Case No.591/2, Natural Fruit Company Limited v Mr. Andy Hall, 16 January 2018, available at:

<https://andyjhall.files.wordpress.com/2018/06/nf-judgement-english-translation-final.pdf>.

<sup>44</sup> Ibid; The Supreme Court's Verdict on Criminal Case No.7326/2562, Natural Fruit Company Limited v Mr. Andy Hall, 17 December 2019.

<sup>45</sup> Finnwatch, Thailand's Supreme Court ruled in favor of Andy Hall in criminal defamation and computer crime case, 30 June 2020, available at: <https://finnwatch.org/en/news/743-thailand-s-supreme-court-rules-in-favour-of-andy-hall-in-criminal-defamation-and-computer-crimes-case>.

<sup>46</sup> Human Rights Lawyers Association, SLAPP Database, available at: <https://naksit.net/slappdatabase-center/>.

<sup>47</sup> Freedom of Expression Documentation Center by iLaw, available at: <https://freedom.ilaw.or.th/en/case>.

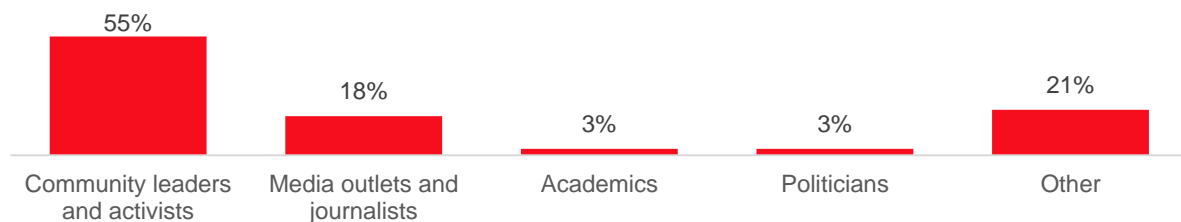
<sup>48</sup> In order to develop this list of cases, ARTICLE 19 reviewed cases identified by HRLA as SLAPP cases and cases identified by iLaw as involving the exercise of the right to freedom of expression.



in 23 cases, with three cases including only CCA charges. One case involved only Section 327 of the Criminal Code—defamation to a deceased person.

116 individuals faced charges in these cases, with some people being accused in multiple cases. 64 (55%) of the defendants were community leaders or environmental or human rights activists, and 21 (18%) were media outlets or journalists. Four (3%) were academics and three were politicians. The remaining 24 defendants (21%) were other individuals or private sector entities.

*Figure 4: Defendants subjected to criminal defamation SLAPP cases between 2014 and 2020*



In Thailand, many defamation cases have been filed by business enterprises to suppress reporting of unlawful working conditions, environmental impacts, and other human rights abuses.<sup>49</sup> 32 of the 58 cases (55%) from the HRLA and iLaw databases were filed by private companies or associations. However, cases were also brought by government officials (14%), government agencies (16%), private individuals (10%), and politicians (5%).

#### ***Tungkum Ltd. v Thai PBS***

In November 2015, Thai PBS and four journalists were charged with criminal defamation under Sections 326 and 328 of the Criminal Code and Sections 14(1) and 16 of the CCA after they broadcasted a news report alleging that the mining firm Tungkum Ltd. engaged in mining operations that caused environmental damage in Loei Province. Tungkum Ltd. also sought 50 million Thai baht in damages and the revocation of Thai PBS's operating license for five years. Though the case was eventually dropped under the defence that Thai PBS was acting in good faith, it is possible that these charges deterred additional reporting on the subject. Moreover, Tungkum Ltd. has brought at least 19 other criminal and civil lawsuits against 33 other Loei residents, seeking an additional 320 million Thai baht in damages.<sup>50</sup>

Of the 58 cases recorded, the prosecutor dropped six (10%), while nine (16%) resulted in convictions and prison sentences ranging from two months to eight years and fines ranging from 6,000 to 800,000 Thai baht. Nine cases (16%) were withdrawn and 20 cases (34%) resulted in acquittals. The most common basis for acquittal among these cases was the finding that the defendant had, in good faith, made a 'fair comment' on a public matter in line with the defence established by Section 329(3) of the Criminal Code.

#### ***Criminal defamation cases brought by Thammakaset Company Limited***

A series of vexatious cases launched by Thammakaset Company Limited against migrant workers, journalists, and human rights defenders perfectly illustrates the dangers posed by Thailand's criminal defamation provisions.

<sup>49</sup> OHCHR, Thailand: UN experts condemn use of defamation laws to silence human rights defender Andy Hall.

<sup>50</sup> Fortify Rights, Appeal Court to issue ruling on rights-violating case against journalists tomorrow, 19 March 2018, available at: <https://www.fortifyrights.org/tha-inv-2018-03-19/>.

In June 2016, 14 migrant workers from Myanmar submitted a complaint to the Department of Labour Protection and Welfare (DLPW) and the National Human Rights Commission of Thailand (NHRCT) alleging that Thammakaset Company Limited, a Thai poultry farm company registered in Lopburi province, failed to pay minimum wage and overtime wages, did not provide adequate rest time and holidays, and confiscated workers' identity documents. The DLPW in Lopburi Province issued a ruling that found the company in violation of the Labour Protection Act and ordered it to pay 1.7 million Thai baht in unpaid wages to the 14 migrant workers.<sup>51</sup> The Supreme Court subsequently upheld the DLPW's findings and compensation order in January 2019.<sup>52</sup>

The company has responded to these developments by launching a string of increasingly frivolous lawsuits and criminal cases against its accusers. Since 2016, Thammakaset has brought 39 cases, most concerning civil or criminal defamation, against 23 defendants for allegedly causing damage to the company's reputation.<sup>53</sup> The first case, filed by Thammakaset in October 2016 under section 326 of the Criminal Code, was against the 14 workers who submitted the complaint to the NHRCT. The Don Muang Sub-District Court dismissed the case, finding that the workers filed the complaints in good faith to defend their own rights, invoking a defence provided by Section 329(1) of the Criminal Code.<sup>54</sup>

Subsequent cases have targeted those who supported the workers, reported on their accusations, or commented on the company's strategy of legal harassment.<sup>55</sup> The accused include migrant workers and labour rights activists,<sup>56</sup> current and former employees of human rights organisation Fortify Rights,<sup>57</sup> a former commissioner of the National Human Rights Commission of Thailand,<sup>58</sup> an academic,<sup>59</sup> and a journalist.<sup>60</sup> Several of the 14 defendants in the first case have also been accused in subsequent cases. Some cases were based exclusively on a tweet by the accused.

<sup>51</sup> Department of Labour Protection and Welfare, Lopburi Province, The Labour Inspector Order No.20/2559, Mr Tun Tun Win and 13 others v Thammakaset Company Limited (Farm 2), 1 August 2014.

<sup>52</sup> World Organisation Against Torture (OMCT), within the framework of the Observatory for the Protection of Human Rights Defenders and 88 other organizations, Joint Letter to the Prime Minister of Thailand, New lawsuits brought by Thammakaset Company Limited against human rights defenders, 14 February 2019, available at: <https://www.omct.org/en/resources/urgent-interventions/new-lawsuits-brought-by-thammakaset-company-limited-against-human-rights-defenders>.

<sup>53</sup> International Federation of for Human Rights, Thailand: Thammakaset Watch, 8 March 2021, available at: <https://www.fidh.org/en/issues/human-rights-defenders/thailand-thammakaset-watch>.

<sup>54</sup> See Don Muang Kwaeng Court Verdict, Black Case No.2769/2559, Red Case No.1353/2561, Criminal Case between Thammakaset Co.Ltd. v Mr Tun Tun Win and 13 others, 11 July 2018.

<sup>55</sup> ARTICLE 19, *et al*, Thailand: Open letter on lawsuits brought by Thammakaset Company against human rights defenders, 14 February 2019, available at: <https://www.article19.org/resources/thailand-open-letter-on-lawsuits-brought-by-thammakaset-company-against-human-rights-defenders/>.

<sup>56</sup> Thailand: UN experts condemn use of defamation laws to silence human rights defender Andy Hall, 17 May 2018, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23095>; ARTICLE 19, *et al*, Thailand: Drop defamation complaints against rights defenders, 3 December 2018, available at: <https://www.article19.org/resources/thailand-drop-defamation-complaints-against-rights-defenders/>.

<sup>57</sup> Fortify Rights, Thailand: Drop Lawsuit by Chicken Company Against Three Women Human Rights Defenders, 23 November 2020, available at: <https://www.fortifyrights.org/tha-inv-2020-11-23/>; Fortify Rights, Thailand: Prevent Attacks on Free Expression by Businesses, 9 June 2020, available at: <https://www.fortifyrights.org/tha-inv-2020-06-09/>.

<sup>58</sup> International Commission of Jurists, Thailand: ICJ condemns the use of criminal defamation law to harass Angkhana Neelapajit, 27 November 2019, available at: <https://www.icj.org/thailand-icj-condemns-the-use-of-criminal-defamation-law-to-harass-angkhana-neelapajit/>.

<sup>59</sup> Fortify Rights, Thailand Human Rights Defender: Ngamsuk Ruttanasatoin, 17 September 2019, available at: <https://www.fortifyrights.org/tha-inv-pro-2019-09-17/>.

<sup>60</sup> ARTICLE 19, Thailand: End harassment of Suchanee Cloitre, human rights defenders, 26 October 2020, available at: <https://www.article19.org/resources/thailand-end-harassment-of-suchanee-cloitre-human-rights-defenders/>.

To date, former Voice TV journalist Suchanee Cloitre is the only individual to be convicted in a criminal case initiated by Thammakaset, and her conviction was subsequently overturned on appeal.<sup>61</sup> Other cases have been dismissed, resulted in an acquittal, or are ongoing.

#### 4.5. Criminal defamation cases for negative hotel reviews

In a recent trend, hotels have brought—or have threatened to bring—defamation charges against guests who have left negative reviews. No such cases have yet led to a conviction.

##### ***Sea View Kho Chang***

In September 2020, Wesley Barnes, an American expatriate living in Thailand, was arrested and charged with criminal defamation by publication after posting negative comments on TripAdvisor about his stay at the Sea View Kho Chang resort. After being detained for two nights, Barnes agreed to formally apologise, and the hotel dropped the charges against him. He faced up to two years in prison.<sup>62</sup>

##### ***Ambassador City Jomtien Hotel***

In February 2021, the Ambassador City Jomtien Hotel threatened to charge Topp Dunnyawitt Phadungsaeng with defamation after he posted several photos and videos on Facebook about the conditions of his 14-day COVID-19 quarantine at the hotel. A day after his posts, the hotel issued a statement calling on a ‘certain group of people’ to stop posting ‘false information’ intended to damage the hotel's reputation. In its statement, the hotel threatened to pursue civil and criminal charges ‘to the utmost’ against Phadungsaeng.<sup>63</sup>

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<sup>61</sup> Ibid.

<sup>62</sup> Richard C. Paddock, American Could Face Prison in Thailand After Posting Negative Reviews of a Resort, *New York Times*, 28 September 2020, available at: <https://www.nytimes.com/2020/09/28/world/asia/thailand-koh-chang-defamation.html>.

<sup>63</sup> Richard C. Paddock & Muktita Suhartono, “Worst 14 days of my life”: Complaints about a Thai hotel quarantine lead to a defamation threat, *New York Times*, 19 February 2021, available at: <https://www.nytimes.com/2021/02/19/world/worst-14-days-of-my-life-complaints-about-a-thai-hotel-quarantine-lead-to-a-defamation-threat.html>.

## 5. WORLDWIDE TREND TOWARDS DECRIMINALISATION OF DEFAMATION

According to a 2018 UNESCO report on global trends relating to freedom of expression and the media, at least 130 UNESCO member states had a defamation provision in their criminal code.<sup>64</sup> However, in recent decades, an increasing number of states have repealed their criminal defamation laws. Since 1992, at least thirty states have fully decriminalised defamation. 14 more states have removed imprisonment as a penalty for defamation. Numerous other states have either partially repealed their criminal defamation laws or have made pledges to repeal those laws in the near future. The clear trend since 2000 has been towards decriminalising defamation. As many of the governments of the states listed below realised, criminal defamation poses a significant threat to free expression.

**States that have fully decriminalised defamation since 1992 (30):** New Zealand (1992),<sup>65</sup> Ghana (2001),<sup>66</sup> Ukraine (2001),<sup>67</sup> Bosnia and Herzegovina (2002),<sup>68</sup> Estonia (2002),<sup>69</sup> Sri Lanka (2002),<sup>70</sup> Cyprus (2003),<sup>71</sup> Georgia (2004),<sup>72</sup> Mexico (2007),<sup>73</sup> Ireland (2009),<sup>74</sup> Maldives (2009),<sup>75</sup> Moldova (2009),<sup>76</sup> Timor-Leste (2009),<sup>77</sup> United Kingdom (2009),<sup>78</sup> Armenia (2010),<sup>79</sup> El Salvador (2011),<sup>80</sup>

<sup>64</sup> UNESCO, World Trends in Freedom of Expression and Media Development Global Report 2017/2018, 2018, available at: [http://www.unesco.org/ulis/cgi-bin/ulis.pl?catno=261065&set=005B0BC365\\_3\\_169&qp=1&lin=1&ll=1](http://www.unesco.org/ulis/cgi-bin/ulis.pl?catno=261065&set=005B0BC365_3_169&qp=1&lin=1&ll=1).

<sup>65</sup> Inter-American Commission on Human Rights, Brief of the Allard. K. Lowenstein International Human Rights Clinic as Amicus Curiae, In the Matter of Emilio Palacio Urrutia et al., No. P-143611, April 2013, p. 25, available at: [https://law.yale.edu/sites/default/files/area/center/schell/commission\\_no\\_p-143611\\_amicus\\_lowenstein\\_clinic\\_english.pdf](https://law.yale.edu/sites/default/files/area/center/schell/commission_no_p-143611_amicus_lowenstein_clinic_english.pdf).

<sup>66</sup> PEN South Africa, 'Stifling Dissent, Impeding Accountability: Criminal Defamation Laws in Africa', 22 November 2017, p. 1, available at: <http://pensouthafrica.co.za/wp-content/uploads/2017/11/Stifling-Dissent-Impeding-Accountability-Criminal-Defamation-Laws-in-Africa.pdf>.

<sup>67</sup> IACHR, Brief of the Allard. K. Lowenstein International Human Rights Clinic as Amicus Curiae, In the Matter of Emilio Palacio Urrutia et al., No. P-143611, at 23.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid., at 26.

<sup>71</sup> Ibid., at 23.

<sup>72</sup> Ibid.

<sup>73</sup> In Mexico, defamation was decriminalised at the federal level only. It is still a criminal offence in some Mexican states. Thomson Reuters, Critics are not criminals: Comparative study of criminal defamation laws in the Americas, 2 March 2016, p. 15, available at: <https://www.trust.org/contentAsset/raw-data/add1a4ac-a185-439b-aeaa-abe687933639/file>.

<sup>74</sup> Organization for Security and Cooperation in Europe, Defamation and Insult Laws in the OSCE Region: A Comparative Study, March 2017, p. 29, available at: <https://www.osce.org/files/f/documents/b/8/303181.pdf>.

<sup>75</sup> IACHR, Brief of the Allard. K. Lowenstein International Human Rights Clinic as Amicus Curiae, In the Matter of Emilio Palacio Urrutia et al., No. P-143611, at 26.

<sup>76</sup> OSCE, Defamation and Insult Laws in the OSCE Region: A Comparative Study, March 2017, at 29.

<sup>77</sup> Brief of the Allard. K. Lowenstein International Human Rights Clinic as Amicus Curiae, In the Matter of Emilio Palacio Urrutia et al., No. P-143611, at 26.

<sup>78</sup> OSCE, Defamation and Insult Laws in the OSCE Region: A Comparative Study, March 2017, at 29.

<sup>79</sup> Ibid.

<sup>80</sup> IACHR, Brief of the Allard. K. Lowenstein International Human Rights Clinic as Amicus Curiae, In the Matter of Emilio Palacio Urrutia et al., No. P-143611, at 22.

Kyrgyzstan (2011),<sup>81</sup> Montenegro (2011),<sup>82</sup> Grenada (2012),<sup>83</sup> Tajikistan (2012),<sup>84</sup> Macedonia (2012),<sup>85</sup> Jamaica (2013),<sup>86</sup> Romania (2014),<sup>87</sup> Zimbabwe (2014),<sup>88</sup> Burkina Faso (2015),<sup>89</sup> Norway (2015),<sup>90</sup> Lesotho (2018),<sup>91</sup> Malta (2018),<sup>92</sup> Kazakhstan (2020),<sup>93</sup> and Sierra Leone (2020).<sup>94</sup>

**States that have abolished imprisonment as a penalty for criminal defamation (14):** Bulgaria (2000),<sup>95</sup> France (2000),<sup>96</sup> Central African Republic (2004),<sup>97</sup> Cote d'Ivoire (2004),<sup>98</sup> Moldova (2004),<sup>99</sup>

<sup>81</sup> Ibid., at 26.

<sup>82</sup> OSCE, Defamation and Insult Laws in the OSCE Region: A Comparative Study, March 2017, at 29.

<sup>83</sup> IACHR, Brief of the Allard. K. Lowenstein International Human Rights Clinic as Amicus Curiae, In the Matter of Emilio Palacio Urrutia et al., No. P-143611, at 22.

<sup>84</sup> UN Office of the High Commissioner for Human Rights, 'Preliminary observations by the United Nations Special Rapporteur on the right to freedom of opinion and expression, Mr. David Kaye at the end of his visit to Tajikistan, 9 March 2015, available at:

<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=17193&LangID=E>.

<sup>85</sup> OSCE, Defamation and Insult Laws in the OSCE Region: A Comparative Study, March 2017, at 29.

<sup>86</sup> Thomson Reuters, Critics are not criminals: Comparative study of criminal defamation laws in the Americas, at 69.

<sup>87</sup> OSCE, Defamation and Insult Laws in the OSCE Region: A Comparative Study, March 2017, at 29.

<sup>88</sup> G. Feltoe, Defamation: protecting reputation or suppressing media freedom?, 5 February 2018, available at: [https://zimlil.org/zw/journal/2018-zelj-01/%5Bnode%3Afield\\_ipubdate%3Acustom%3AY/defamation-protecting-reputation-or](https://zimlil.org/zw/journal/2018-zelj-01/%5Bnode%3Afield_ipubdate%3Acustom%3AY/defamation-protecting-reputation-or).

<sup>89</sup> Nani Jansen Reventlow, Litigation, available at: <https://www.nanijansen.org/litigation/>.

<sup>90</sup> OSCE, Defamation and Insult Laws in the OSCE Region: A Comparative Study, March 2017, at 29.

<sup>91</sup> Hoolo 'Nyane, Abolition of criminal defamation and retention of *scandalum magnatum* in Lesotho, *African Human Rights Law Journal*, 2019, available at: <http://www.scielo.org.za/pdf/ahrlj/v19n2/10.pdf>.

<sup>92</sup> Maltese Department of Information, Press Release by the Ministry for Justice, Culture and Local Government, 18 April 2019, available at:

<https://www.gov.mt/en/Government/DOI/Press%20Releases/Pages/2019/April/18/pr190837en.aspx>.

<sup>93</sup> Paolo Sorbello, Kazakhstan Decriminalizes Defamation, Keeps Hindering Free Media, *The Diplomat*, 6 July 2020, available at: <https://thediplomat.com/2020/07/kazakhstan-decriminalizes-defamation-keeps-hindering-free-media/>.

<sup>94</sup> ARTICLE 19, Sierra Leone: ARTICLE 19 welcomes the decriminalisation of defamation and seditious libel, 25 July 2020, available at: <https://www.article19.org/resources/sierra-leone-decriminalisation-of-defamation/>.

<sup>95</sup> IACHR, Brief of the Allard. K. Lowenstein International Human Rights Clinic as Amicus Curiae, In the Matter of Emilio Palacio Urrutia et al., No. P-143611, at 24.

<sup>96</sup> OSCE, Defamation and Insult Laws in the OSCE Region: A Comparative Study, March 2017, at 30.

<sup>97</sup> IACHR, Brief of the Allard. K. Lowenstein International Human Rights Clinic as Amicus Curiae, In the Matter of Emilio Palacio Urrutia et al., No. P-143611, at 25.

<sup>98</sup> Ibid.

<sup>99</sup> ARTICLE 19, Defamation Law and Practice in Belarus, Moldova, and Ukraine, June 2006, p. 8, available at: <https://www.refworld.org/pdfid/4756cfef0.pdf>.

Serbia (2005),<sup>100</sup> Cambodia (2006),<sup>101</sup> Croatia (2006),<sup>102</sup> Argentina (2009),<sup>103</sup> Costa Rica (2010),<sup>104</sup> Croatia (2011),<sup>105</sup> Albania (2012),<sup>106</sup> Finland (2014),<sup>107</sup> and Benin (2015).<sup>108</sup>

**States that have decriminalised defamation on matters of public interest or for communications about public officials:** Panama (2007),<sup>109</sup> Argentina (2009),<sup>110</sup> Uruguay (2009),<sup>111</sup> Latvia (2009),<sup>112</sup> Lithuania (2015).<sup>113</sup>

**States that have pledged to decriminalise defamation or abolish prison sentences for defamation in the near future:** Mongolia (2015),<sup>114</sup> South Africa (2016),<sup>115</sup> India (2018),<sup>116</sup> Italy (2020).<sup>117</sup>

<sup>100</sup> IACHR, Brief of the Allard. K. Lowenstein International Human Rights Clinic as Amicus Curiae, In the Matter of Emilio Palacio Urrutia et al., No. P-143611, at 24.

<sup>101</sup> Toby Mendel, International Seminar on Defamation: Building a Regional Advocacy Platform, p. 2, available at: <https://www.article19.org/data/files/pdfs/conferences/defamation-conf-paper.pdf>.

<sup>102</sup> OSCE, Defamation and Insult Laws in the OSCE Region: A Comparative Study, March 2017, at 30.

<sup>103</sup> IACHR, Brief of the Allard. K. Lowenstein International Human Rights Clinic as Amicus Curiae, In the Matter of Emilio Palacio Urrutia et al., No. P-143611, at 22.

<sup>104</sup> Ibid. at 23.

<sup>105</sup> Ibid. at 24.

<sup>106</sup> Ibid.

<sup>107</sup> Imprisonment as a penalty for defamation was abolished in Finland except in cases of aggravated assault. OSCE, Defamation and Insult Laws in the OSCE Region: A Comparative Study, March 2017, at 30.

<sup>108</sup> PEN South Africa, 'Stifling Dissent, Impeding Accountability: Criminal Defamation Laws in Africa', at 10.

<sup>109</sup> In 2007, Panama decriminalised defamation regarding acts or omissions by public officials. IACHR, Brief of the Allard. K. Lowenstein International Human Rights Clinic as Amicus Curiae, In the Matter of Emilio Palacio Urrutia et al., No. P-143611, at 22.

<sup>110</sup> In 2009, Argentina decriminalised defamation on matters of public interest. Ibid.

<sup>111</sup> In 2009, Uruguay amended its penal code to remove criminal liability for statements made on a matter of public interest or about public officials. Ibid.

<sup>112</sup> In 2009, Latvia repealed Arts. 156 and 158 of its Criminal Code, which criminalised intentional defamation and defamation through the mass media. International Press Institute, 'Media Laws Database: Latvia', available at: <http://legaldb.freemedia.at/legal-database/latvia/>.

<sup>113</sup> In 2015, Lithuania repealed Arts. 155 and 290 of the Criminal Code, which decriminalised 'insult' and 'insult of a civil servant'. International Press Institute, 'Media Laws Database: Lithuania', available at: <http://legaldb.freemedia.at/legal-database/lithuania/>.

<sup>114</sup> In 2015, Mongolia's Parliament approved a new Criminal Code which would decriminalise defamation. However, the enactment of the new Code has been delayed and has not yet taken effect. International Press Institute, 'Media Laws Database: Mongolia', available at: <http://legaldb.freemedia.at/legal-database/mongolia/>.

<sup>115</sup> In 2016, South Africa promised to repeal its criminal defamation law. However, this has not yet occurred. PEN South Africa, 'Stifling Dissent, Impeding Accountability: Criminal Defamation Laws in Africa', at 3.

<sup>116</sup> On 2 April 2018, India's Congress promised to decriminalise defamation. Satya Prakash, Towards decriminalising defamation, *Tribune India*, 8 April 2019, available at: <https://www.tribuneindia.com/news/archive/nation/towards-decriminalising-defamation-754955>.

<sup>117</sup> In 2020, the Constitutional Court of Italy ruled in that, if the Italian Parliament did not amend the country's criminal defamation law, the Court itself would abolish prison sentences as a penalty for defamation. International Press Institute, Major step forward in push to scrap prison sentences for criminal defamation in Italy, 10 June 2020, available at: <https://ipi.media/major-step-forward-in-push-to-scrap-prison-sentences-for-criminal-defamation-in-italy/>.

## 6. RECOMMENDATIONS

1. Thailand should uphold its obligations under Article 19 of the International Covenant on Civil and Political Rights and implement all accepted recommendations made in relation to freedom of expression from its second cycle Universal Periodic Review.
2. The Thai government should repeal Sections 326 – 333 of the Criminal Code.
3. The Thai government should amend the Computer Crimes Act to ensure compliance with international standards relating to the right to freedom of expression, including by removing all criminal penalties for defamation.
4. Until such time as defamation is decriminalised:
  - The judiciary should use the Criminal Procedure Code Sections 161/1 and 165/2 or other available provisions to dismiss frivolous or vexatious criminal complaints instituted against the exercise of freedom of expression in retaliation for criticism, reports or comments on human rights abuses or other matters of public concern;
  - The judiciary should refrain from imposing custodial penalties in defamation cases; and
  - Public prosecutors should exercise powers granted under Section 21 of the Public Prosecution Organ and Public Prosecutors Act to recommend to the Attorney General the non-prosecution of criminal defamation cases that are not in the public interest.
5. The judiciary should collect and disseminate statistics concerning the use of Sections 161/1 and 165/2 of the Criminal Procedure Code to dismiss frivolous criminal cases.
6. The Thai government should review all other laws that address harmful speech, including incitement to discrimination, hostility, or violence, to ensure that they are in line with international human rights standards and that they are not used to undermine freedom of expression.