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Opening remarks H.E. David Lipman, Head of the EU Delegation to Thailand

It really is a great pleasure to welcome you on behalf of the European Union to this two day seminar on reconciliation and freedom of expression. I am particularly encouraged by the level of participation today, including very prominent Thai and European experts with whom we have been working to promote human rights and democracy. Your contribution over the next few days in this discussion of this very crucial topic will certainly shape the future direction of debate on this matter. I would like to thank everybody who is participating very much for coming here today.

I hope the seminar today and tomorrow will bring together experiences and ideas on various topics relevant to freedom of expression in Thailand. European experiences and perspectives could be helpful to the Royal Thai Government, civil society, academics and the general public who are all striving to protect and promote freedom of media and expression.

Today's seminar, which has been crafted with great care and in close collaboration with trusted partners from different parts of Thai society, could not be timelier. Human rights, democracy and freedom of expression are universal and indivisible values that the European Union wishes to uphold. Thailand has worked to strengthen its democratic foundations and strives to provide better protection of human rights for its people. The European Union stands ready to support Thailand's endeavour. This seminar is a testament to our commitment. We also reaffirm our determination to continue to be Thailand's partner in advancing human rights and democracy, building on our sound relationship and dialogue as equal partners. In this connection, I very much hope that we can conclude our PCA, which will advance our mutual goals and interests in a constructive and effective manner. The European Union has followed the political situation in Thailand in recent years with great attention. We have noticed positive developments and we would like to congratulate the Royal Thai Government and the Thai people for their commitment to working together to foster national reconciliation. We have also observed increasingly frank and open debate on freedom of expression in Thailand as well as the active participation of civil society, academia and the general public on the issue.

Against this back drop, however, we are deeply concerned by the cases of Amporn, Chiranuch, and most recently, Somyot, that seriously compromise the room for public debate and freedom of expression of the Thai people. The European Union would therefore like to contribute to objective and open debate on this important topic by providing a forum for academics, legal experts and practitioners from Thailand and Europe to share their views and experiences so that we can learn from each other. I also hope the seminar will foster professional networks among participants and contribute to our cooperation in the future. Our role, and the role of European Union, is to interact. Today, we have gathered together stakeholders from across the Thai political spectrum, NGOs, civil society and European

experts in their field, to discuss the universal right to freedom of expression and the positive ramifications that this can have upon reconciliation.

I'm particularly delighted to have Professor Timothy Garton Ash with us today, a renowned Oxford scholar, historian and political commentator: he will share his experience and provide a solid architecture for the debate to follow. Throughout the seminar, legal practitioners Mr. Augustin Hidalgo and Mr. Peter Thomsen will be on hand to provide insights into the legal practices in Spain and Denmark, respectively. We are also kindly joined by Mr. Tjaco Van Den Hout, an old colleague and friend and former ambassador to Thailand from the Netherlands. We will also hear from a range of prominent Thai voices, notably: the Permanent Secretary of the Prime Minister's Office, Professor Tongthong; Commissioner of the National Human Rights Commission, who is here with us this morning - Dr. Niran; major scholars, such as Dr. Thitinan, who will join us later, and Dr. David Streckfuss, who is here with us at the moment; the practitioners on the ground; and a number of media outlets, including the BBC (for example, I see Jonathan Head who will be joining us later); also my good friend, Professor Vitit, will also be moderating one of the round tables. Indeed, the roundtables will be instrumental to the success of the seminar. In spirit of the headline topic "Freedom of Expression", we have structured the sessions where we will invite and encourage participation from the floor. Allow me to stress again the EU's dedication to the cause of freedom of expression as a universal right and the cornerstone of democracy, which has been long standing. This is not just within the European Union but outside as well, and on this issue the European Union stands strong and united. We took the step together to make the charter of fundamental rights legally binding, to document with detail freedoms, citizen's rights and justice, and this is to guarantee the protection of the fundamental rights of our citizens.

To start the proceedings we will hear first from Dr. Niran, Commissioner of the National Human Rights Commission, whose life work has been dedicated to the extension of human rights; and Professor Timothy Garton Ash, who I mentioned earlier, will take the floor to develop the ground for human rights to freedom of expression. After that we hope to have a short question and answer session. I very much hope that we will have a dynamic debate today and tomorrow. I urge each of you to get involved in the roundtables where we hope to see a flourishing of ideas. I look forward to addressing you all at the end of the seminar. I will finally finish off with one quote that I think is very important. This comes from the famous French philosopher, writer and academic Voltaire. Voltaire said, and I paraphrase this into English as my French isn't that good, basically "I do not agree with what you have to say. In fact, I don't agree with a single word that you are saying. But I defend to the death your right to say it." Thank you very much.

Opening plenary: keynote addresses on reconciliation and freedom of expression

Professor Timothy Garton Ash, Professor of European Studies at Oxford University

What I want to do is two things. One is to give an abbreviated historical and comparative framework for the whole conversation we are having. The second thing is to say a couple of words from outside about Thailand, and how Thailand is viewed in the broader international landscape in the discussion of freedom of expression.

First of all, the large picture, what we are experiencing today is an unprecedented encounter between a very ancient principle or theme and completely novel circumstances. Many of the

issues that arise are as a result of that clash. The discussion of our principle goes back at least to the axial age of the 6th century BC. You look at the works of Confucius, the Ancient Greeks and later the ancient Indian emperor, Ashoka. The classic themes of free speech are already present in writings and have been debated ever since. On these, I'd like to say three simple things.

First of all, freedom of expression is not just one among many different freedoms, it is the freedom upon which all other freedoms depend; it is the oxygen of all other freedoms. It is so important for at least four basic reasons. First of all, because it is the only way to express our own full individual humanity and communicate to others. It is the only way in which you can really learn what it means to be me and how I can learn what it means to be you. The more free expression we have, the more chance we realise the humanity and communicate to others. Secondly, and classically, free speech is a primary value because of its importance in enabling us to reach or approach the truth. Only if we have all the available facts and all the known arguments in front of us are we able to get as close as we can to the truth. This argument goes back to the time of John Stewart Mill and others. Thirdly, free speech means the totality of forms of expression – movies, music, dance, graffiti, and even the colour of your shirt – red, black, yellow. I am wearing a pink shirt, which in the Thai context might be considered as neutral, but which in some countries might be considered to be a 'pinko' or a left liberal. Free speech is essential to good government because we must have all available facts, including information about what public and private powers are doing. Hence, freedom of information is as important as freedom of expression. Only if we hear the policy alternative can we make up our mind sensibly about what is the best policy, this goes back to ancient Greece, and it was true then as it is true now. Of course the highest form of that, an idealized form of that principle, is the idea of democracy, in which everyone has equal voice before equal vote. Last but not least, free speech is central to the way we manage to live with diversity. It is actually by talking about differences, and not repressing discussion of our differences, that we learn to understand where other people are coming from and navigate these differences.

Free speech is not unlimited speech. It is not everybody saying whatever comes into their head. The whole debate about free speech is about two things. Firstly, what are the legitimate limits to free speech? This entails balancing the good of free speech against other goods, such as privacy, reputation or national security. Most of the literature on free speech is about that question and lots of the upcoming debates during these two days will be about that. But there is another question that people did not talk about enough - even if it should be realized by law, without question, we may not choose to speak up to the limits to the law; the right to offend does not imply the duty to offend. What makes free speech work is conventions, rules and standards, both written and unwritten, which are not in the law of the land and not in executive orders. In Buddhist tradition, there is a very strong emphasis on the notion of the right speech. The British equivalent of Buddhist right speech is the editorial guidelines of the BBC. If you look at the Leveson inquiry into the British media, to a limited extent it was about people breaking the law but a lot of the really bad stuff that happened in terms of intrusion of privacy, smears, lies etc. was not breaking the law but was just very bad journalism.

There is a whole area of the debate which is not about what the law should allow. Even 60 years ago when Article 19 was first drafted, the question was what are going to be the rules of the game in our country, whether in Thailand, India, Britain or the United States? The principle was when in Rome, do as the Romans do. But because of two developments that simply no longer holds: one is the sheer scale of mass migration, which means that in many of

the large cities of the world you have people from all over the world living together - 300 hundred languages are spoken in London, by people with different cultures and norms - the second is the internet, which connects over two billion people. According to the latest figures of the international telecommunication union, 85 out of 100 people in the world have a mobile phone; not all of these have internet access, but soon, there might be three to five billion people with access to the Internet via a mobile phone. In some ways, we are all becoming neighbours and live in the same country. The question is how we manage the question of free speech in such a transformed world. How do we apply those old principles under the new circumstances?

One of the changes is that the state is no longer necessarily the crucial actor. There are at least four levels at which our effective level of freedom of expression is decided. The first is the whole structure of international treaties, organizations and networks, of which 19, concerning political rights and its realization, are a very important part. But for example, the European civil rights instrument is a very important instrument. So there is this whole international layer.

Then, there is a layer of the state. Bill Clinton once said, "I propose that China trying to control internet is like trying to nail jelly to the wall." China has spent the last 15 years trying very hard to prove that Bill Clinton is wrong. It is doing quite well, showing a powerful determination over the Internet, although the battle continues.

Thirdly, there are what I call the private powers. If Facebook were a country, it would be the 3rd largest country on earth by population, after China and India. What Facebook does, for example in its privacy settings, is far more important than what France does. What Google does is far more important than what Germany does.

Finally, on the fourth level, there are self-empowered, self-mobilizing communities using the possibilities the Internet offers. Look at social media and the Arab Spring. Look for example at the role of social media in the protests against the gang rape in India last month.

The effective freedom of expression in any given place, at any given time, is the result of interaction of those four different kinds. This is why we have developed this major research project at Oxford University. We think what we really need is international and trans-cultural discussion about what should be the underline norms - the basic principles for freedom of expression - which may then be realized by the law of states, international regulations, in the policy of the private powers or by us as citizens. First work on what the basic underlying principles should be. The website is in thirteen different languages, which at least in principle (without censorship and barriers to Internet access) would reach some 80% of the world's online population. What we have on the website is ten drafted principles for debate. We would love you all to come online and join the debate on these principles. Each principle is illustrated with a whole series of case studies, analytical discussion pieces, blogs, VDO and so on. The first principle is that we all human beings must be free and able to express ourselves and seek, receive and impart information and idea regardless of frontiers. You will recognize that as the simplified version of Article 19, with two differences: First, it starts with the words 'we all human beings'; Secondly, there are two words, 'free' and 'able', that mean you have to have the effective right, which means having Internet access, adequate literacy, education and so on. Number two, we defend the Internet and all other forms of communication against illegitimate encouragement by both public and private powers, and so it goes on through media, hate speech, discussion of knowledge, threats of violence. Number

seven is a principle which in many Islamic countries, but also in India, is hugely controversial - we respect the believer but not necessarily the content of the belief. We've worked very hard to boil down to that simple formula, which is violently rejected, and I emphasize 'violently' in many countries. And so down through the limits justified by privacy, national security, public morality and intellectual property. Please do come and join us on the web site. Join the debate and encourage your students and activists to do so.

Against that very broad background, behind each of this, there's a whole world of case studies. The question is where Thailand seems to fit when someone looks at it in a global perspective. Surprise, surprise, Thailand comes up with headline 'criticism of the Thai King' and the case study on the US blogger, James Gordon, who is sentenced to two and a half years in a Thai prison for uploading links on his blog (published in the US) to the unauthorized biography of your King. This actually takes us to the perception of Thailand, which is I'm afraid, perhaps unfairly, of a country which has particular problems with internet freedom in relation with the peculiar offence of lèse-majesté. If you go around the world talking about this issue, there are a handful of countries that keep getting mentioned: China obviously gets mentioned all the time; Turkey gets mentioned quite a lot; Thailand gets mentioned really quite a lot. Because cases like this, leading to very long prison sentences for lèse-majesté offences, simply have had a huge impact on the perception of freedom of expression in this country in the wider world. You will spend the next two days discussing in detail. I just put this on the table as a general statement. If you say 'Thailand' to the people in the freedom of expression or Internet freedom communities around the world, the reaction is a slightly negative one, which is a pity. In drawing to a close, let me make four comments or suggestions which relate to this.

The first goes back to the point I made. This is not just all about the law; what the law allows or doesn't allow. If you look at the Indian media, or the British media, the laws are not so bad but the practice is a problem. The tabloid newspapers and sensational TV channels in India and Britain can get away with almost everything, and they do. When one talks about media, there is a really important discussion to be had about the ethics of the profession, about self-restraint and rules that we choose to follow, even though they are not demanded by the law. That can apply also to issues around how we talk about religion and community. Our fourth draft principle here is 'we speak openly and with civility about all kinds of human difference', and both words are equally important. Of course there are exceptions to this rule, for instance, we wouldn't want our comedians to speak with civility otherwise it would not be funny. That is a norm, which in my view should not be enforced by law. I don't think you should do what many continental European countries do, you should not enforce civility by law, but I think that you should choose very carefully how you speak about human differences. Secondly, as far as the law is concerned, when I look at your Computer Crime Act or the lèse-majesté provision in a comparative perspective (the Indian IT Act, which has many similar faults) the same characteristic faults recur again and again - over broadness in the drafting of legislation, with terms that allow for very expansive interpretation. In German, the wording means the elastic/rubber paragraph. Disproportionate application of those laws by the responsible authorities and the police results in a chilling effect upon wider society, even if there are only a small number of cases. If you are looking to improve the laws in the way they are implemented, then I think if you keep in mind those three general characteristics (over broadness, disproportionate application and chilling effect), one can think about the desirable reform.

Thirdly, even if you have the most perfect set of free speech laws and regulations on earth and Thailand becomes the absolute model of how freedom of expression should be handled, there is still the issue of the internet. There you are faced with a choice. If you want to be absolutely consistent in applying your own norms, standards and law, you have to build the great firewall of Thailand like the great firewall of China. You have to have an iron curtain around the whole electronic world of your media. Do you really want to pay that price? Do you want to have that degree of control, just to ensure it is 100% applied? Can I say briefly, to give you an example of what I think is a commonsensical, pragmatic and reasonable compromise? For historical reasons, you will well understand, Germany criminalizes the offense of denying the holocaust of the European Jews. That is a criminal offence in Germany. If you go on Google.de, the default Google website in Germany, certain holocaust denying websites will not be found and there will be a notice at the bottom of the homepage stating 'complying with German law, certain links have been removed'. You can go to the website called chillingeffects.com and you can see the court order. Germany has that norm. I personally disagree with it. There is no offence of holocaust denial in the United States and I don't think the effects are worse than in Germany, but one can respect it. But, since Germany is not prepared to build a new electronic Berlin wall, a great firewall of Germany, all one needs to do is to put you in touch with the search engine google.com/nr and that takes you by default to the American Google website where you can see all the holocaust denial rubbish in the world. You could say that's totally inconsistent. If the Germans believe that they shouldn't see this stuff, they shouldn't be able to see this stuff. I personally believe that the world we are living in is a pretty sensible, reasonable liberal compromise. There is a question of your own laws but there is also a question of the spirit with which you deal with the stuff slashing across the frontier of the Internet.

Finally, one of the things about the global free speech debate is that a country's free speech record itself becomes an international news story. Since newspapers have difficulty in hanging onto more than one story at a time about their own country, let alone about any other, there is normally one story about free speech in country X. So, the free speech story about China is about censorship and the great firewall of China, the free speech about Burma today is an inspiring story about the lifting of censorship, you all know what the global free speech story about Thailand is today; I have mentioned it before, the combination of the problems around Internet freedom and lèse-majesté is the story. What is interesting is that countries can change the story about their own free speech story. If they take certain decisive steps and do so very visibly and publicly, the free speech about that country can change. If it is simplistically negative, it can suddenly become too simplistically positive, as happened about Burma. So, that's an encouraging conclusion. I hope that the next time I come back to speak here I can report the global free speech about Thailand has been completely transformed.

Open discussion – questions and answers

Question:
It is symbolic of the great divide in Thailand that while we are in here talking about free speech, the agency responsible for blocking a million URLs is meeting in the next room.

Question:
I would like to ask Professor Ash how he would react to Thai's who claim that lèse-majesté law and the Computer Crime Act have been maintained to protect the uniqueness of Thai culture, in which universal reverence toward HM the King is central?

Prof. Ash*:*
It could be obvious to you and in the contents of everything I have said, the West and Europe and anybody else can't tell Thailand what to do. In particular, I wouldn't dream to tell anybody else what to do. The spirit of the whole project is precisely to open up the debate across cultures about what the norms of freedom of expression should be. What we can say, I think with an emphasis, is that first of all it really stands out across the globe in the extremity, both terms of legislation and severity of the punishment. We have a few monarchies around Europe too. In Britain, there are a few conventions that might be reserved, but not many I have to tell you, about what we say about our own royal family, but the idea that somebody should be sentenced to 10 years in prison simply for publishing a story deemed offensive to the King is disproportionate according to an acceptable norm of freedom of expression. One has to express one's shock and outrage. I hope you take that in the spirit that is intended.

Question:
One problem is the lack of public space for discussion. The National Human Rights Commission has been accused over the past year of being one-sided or too sluggish on the issue of section 112. From personal experience, when I interviewed the witnesses of the 2010 protests, I tried to mention one of the core issues being different perceptions over the issues surrounding the monarchy within different protest movements, and there was a point during the session of interviews when I was stopped with the words 'we have to talk about this another time'.

Prof. Ash:
There are two points. The first is the need for a well-functioning public sphere. What you need is forums and media where you get the important points of view presented to society in the same place, on the same television channel, in the same forum. The problem we have all over the world now is that we are losing that. What we're getting instead of neutral public debate, where you hear the case of yellow and the red and maybe you come out pink, is multiple partialities. Even in the United States, CNN gives you both points of view. You have Fox news shrieking from the right, giving you one half of the truth; MSNBC is shrieking from the left, and giving you the other half. If you watch MSNBC you have one view of the world, if you watch Fox you have another. The same problem occurs on the Internet. It should be the great place where you hear all points of view, in fact you get fragmentation on the Internet where people are going off alone in the information cocoon, where they meet several people who have the same paranoid view of the world as they do, or the same weird ideas. How do we preserve the genuinely public sphere in this new world where fragmentation of information in the Internet is a universal problem? Back to the gentleman who asked earlier about what we really understand about the depth of cultural sensibility; maybe we don't, but I think, in the world I describe, we really need the international public sphere where it is possible for someone to come here and say, "I may be wrong but it seems to me that it is disproportionate," but equally you are free to come to Paris, London or Berlin and say, "it seems to me that your media writes about wisdom, yet holocaust denial is proscribed by law - this is not consistent." We should be open to do that too, so we need a well-functioning international public sphere.

Question:
What do you feel about the overall trend in freedom of expression globally - right or wrong direction? Is it on the march? Is it in retreat? In Thailand, in the past five years, there have been precipitous declines in terms of freedom of expression. This is counterpoint to the earlier comment, the coincident with that decline has been a rise in the ability to talk about this to

some extent. Five years ago, the chilling effect of lèse-majesté would have prevented something like this conference. These days, it is not so remarkable. We can discuss it in an academic way, looking at the model globally with the things you mention about the firewall in China and the criminalization of holocaust denial in Germany, it is a reason to believe that overall the freedom of expression is on the march.

Prof. Ash:
I believe this is a decisive period for the future of free speech, which comes once every few centuries. The combination of the great technological change (which in our day is the Internet and mobile phone) and political/intellectual change (which is the multiplication of the states, the relative decline of the west, USA and Europe, along with the renaissance of the great part of Asia), makes this one of the pivotal moments when the terms are set anew. The battle is in this room today. It is in India and in China. The historical record shows that uncertainty and anarchy don't last forever. The system settles down to a new kind of order. It will be decided in two countries, the world of democracy and the world of dictatorship. India, which is democratic, has a whole range of issues that go backward on free speech. If the culture of free speech becomes retrenched in India, you will have an incredibly important pivotal state. In China, it is not the real battle between the world outside the great firewall of China. The real battle is inside the great firewall of China, between Chinese citizens who are pushing for more freedom of expression. Journalists went on strike because the front page of the editorial was completely rewritten by the propaganda chief. Nobody knows how that battle is going to play out. My hunch is that it's going to play out in 5-10 years with more freedom of expression. We do not know how the battle will end. I hope that Thailand also does its part to make sure that the historical battle is won.

Comment:
The brainstorm today is very good for developing Thailand's polity with the King as the head of state. Thai culture focuses on giving assistance. We seek mutual benefit and it is quite difficult to be separated. So, the freedom is limited by knowledge, tradition and benefit. Our awareness is blocked by the media. So, to improve the media is to improve freedom of expression. I am not so sure how much we can improve our democracy but Thailand can move toward democracy in the way that the project is proposing today, with concrete information leading to concrete action.

Prof. Ash:
We live in a constitutional monarchy too. We have a Queen. God bless her. She has just celebrated her diamond jubilee. There was an amazing outpouring of public love and affection across the nation. Even the people who would never suspect of it found themselves quite moved by the old lady standing for about five hours in the pouring rain. It was the most incredible outpouring of deep affection and respect for the Queen and the institution of the monarchy in a country where you can say anything you like about the Queen, let alone Prince Harry. We have well-functioning parliamentary democracy, which benefits enormously from having a hugely respected monarch, who is completely above politics and whose political views are simply unknown. Many Republican friends think we should abolish it and have a president. I think it is a huge asset to have this enormously respected figure who is a very neutral constitutional monarch. You can have both. You can have that and you can have freedom of expression. That is the experience I would like to share with you. If we had laws that told us that we could not say anything nasty about the Duke of Edinburgh or Prince Harry, we might end up having less affection for the monarchy. If we have laws stating how

to love your wife and never say anything nasty to her, you might not love her quite so well. Voluntary affection is better. That would be my humble suggestion.

Plenary: media landscape in Thailand, moderated by Dr. Thitinan Pongsudhirak, Director, Institute of Security and International Studies (ISIS), Chulalongkorn University

"Legal challenges to media freedom" **by Mr. Sinfah Tunsarawuth, independent media lawyer**

I will start by saying that despite what happened in Thailand in the '50s, '60s or '70s, I would say that Thai people and the Thai media still enjoy relatively high levels freedom of expression and free press compared to neighbouring countries in this region. I would say that the problem with Thai media, particularly the mainstream media, is the quality. Not that they don't have freedom. It's very sad to hear that even with current conditions that guarantee freedom of expression and media freedom, the Thai media does not make good use of the freedom granted by the constitution.

For the newspapers and even the broadcast media, investigative reporting is the exception rather than the rule. It's very sad that Thailand, which is the only country in Southeast Asia, apart from the Philippines, that can really claim that media can enjoy freedom; we need foreign organizations to encourage Thailand to conduct investigative reporting. They have sent experts to train Thai journalists, even though the media has the chance to learn by doing, but they don't. I will talk about the legal challenges faced by newspapers, broadcasters and online media. For newspapers, which you will have a session on later, the central legal threat to Thai newspapers is defamation. At certain point's major newspapers have to employ in-house lawyers, mainly just to go to the court to defend the newspaper - their job is only to go to the court. However, many of those defamation cases sued by individuals have been settled out of court. In other words, this has nothing to do with court mediation but two parties negotiating. At other times, the newspaper has to print an apology in the newspaper for the injured party to withdraw their court case. Because defamation is a criminal crime, it is what we call legally compoundable. If the injured person decided not to pursue the case, the state cannot do anything. The state cannot sue the newspaper on behalf of the injured person.

For broadcasting, the monopoly is controlled by the state. Actually I don't see any legal issue concerning broadcasters - they have never been sued for defamation as far as I am aware. The problem with Thailand's radio and television is that they are very conservative and extremely self-censored. It's very sad that such as the soap opera called "Beyond the Cloud" was pulled from the schedule by channel 3. The program had some characters that refer to existing government agencies and of an exiled leader. For the new media and online media, the main issue is the Computer Crimes Act. I have been involved with this seminar for at least six months. Initially, the number of lèse-majesté cases had been dropping after Yingluck's government came into power, it's definitely been dropping since last year. And when the EU called to confirm about the seminar, by November or December I was wondering what I'd have to say about lèse-majesté because there was not much of interest then. But last week, thanks to Somyot's case, the whole world saw that freedom of expression is under attack in Thailand. It is very timely for the EU to have this seminar and session on lèse-majesté. However, I really want the world to look at Thailand in the bigger picture, lèse-majesté is only one issue. There is no law to prevent media and Thai people from expressing political opinions. If you look at this book, from I-law; they have conducted research on the Computer

Crimes Act since the law came into force in July 2007. This research covers four and a half years during the peak of political crisis. Out of the over three hundred cases which have been prosecuted under the Computer Crimes Act, over one hundred cases are of personal defamation, not lèse-majesté - there were only forty plus lèse-majesté cases. Look at the bigger picture. There are cases of URLs that have been blocked for expressing political opinion under the Computer Crimes Act. Apart from the lèse-majesté and defamation allegations, the other type of cases that have been prosecuted concerned pornography websites. Again, I want to ask you to look at the bigger picture. I know that in lèse-majesté cases the sentence in Thailand is very disheartening. I am not a lawyer but I follow cases, and one of the cases is Khun Suwicha Thakong - he is one of the first people who was sentenced to jail under the Computer Crimes Act. He was sentenced for 10 years for two video clips that he posted on YouTube about the King. I visited him in jail twice. He will be one of the people I would call "productive" - he should not spend time in jail at all. He doesn't go to college, he only finished high school, but he worked in oil rig firm. He earned a lot of money and he can send his son to an international school in Bangkok. Since he went to jail, his son has had to drop out from that school and study in a normal Thai school (by the way he was pardoned and later I heard that he is working in Laos), it might be difficult for him to find a decent job here in Thailand because of that jail term. I will stop from here and allow other speakers to speak.

"Media operation – difficulties and challenges from an international media perspective" **by Mr. Nirmal Ghosh, President of FCCT**

I'm here because I'm the president of the FCCT. Not all foreign journalists are members of the FCCT. Furthermore, the foreign media community is far from the homogenous bloc construed in popular perception. We have a rainbow of foreign media in our community. For example, we have Japanese, Chinese, Asian, European and American journalists. All media organisations do come to the topic they cover coloured by their own cultural background and informed by their own history. The FCCT is not a professional association, it is a social club. Democracy and freedom of expression feature in our charter because those are environmental enablers of press freedom, but we do not make public statements on legal issues. Our response to cases such as Somyot's is to maintain the middle ground as an open space of free and constructive discussion and debate, to bring light to the issue and hear all sides, we draw the line at prejudice and hate. We must always remember that foreign journalists should be here to tell the stories that have been written by Thais and decided by Thais.

In times of conflict and social tension, the foreign media is often a convenient target for people who want to provoke a reaction and get someone on board with their point of view. Thailand is a remarkably free and engaging environment for international media - I must stress that there are no issues or complaints of accessibility - you have the free run of the news. Any issues faced by foreign media are not different from other countries which have an open media environment and may or may not undergo similar turmoil, civil strife and conflicts. However, there are pressures, not least the shadow of Article 112 or the Computer Crimes Act. These pressures are peculiar to Thailand. With 112, issues focus on the vagueness of the law and its penalties; its expanding application is an issue which causes a chilling effect.

Let me look back at the history of the last few years. When the FCCT's former Vice President Jonathon Head was accused of lèse-majesté, a complaint was filed but he was not charged. The complaint automatically triggers police enquiries. This happened in 2008 or 2009. It happened at the same time as Chakrapop Penkhae, a former Thaksin Shinawatra spokesman,

spoke at the club and was charged with lèse-majesté for what he said at the club. Over both these cases, I was cross-questioned by the police. Later, someone filed a complaint against the entire board of the FCCT and several of us had to appear at the police stations to make a statement. In the end, the complaint against Jon was not pressed and the complaint against the board was not taken up. There were also some back channel contacts with the government at the time of this issue expressing concern about the consequences.

In 2009 and 2010, there was also pressure on the foreign media concerning its style and its take on reporting the news on Thailand. In our conversations with the government, we had robust arguments from foreign journalists and government spokesmen. Jon put across the government's point of view. It is our job to listen and gather information to get inside to what is going on. This maintains our objectivities and discards any personal bias that might creep in. That's a professional challenge. Pressure was put on me through different channels but I will not make a big deal out of it. Some are par for the course for the foreign media. At the end of the day, it is the host country's right and privilege to grant and withdraw visas and accreditation. If you get kicked out of the country, that's one thing. If you have a problem with accreditation and visa, you cannot complain. It depends on particular cases in specific circumstances.

There are pressures on the street too and these are a real concern. The foreign press was castigated in 2009 and 2010, essentially for not saying things that one side wanted to hear. The big TV networks bore the brunt because they are the most visible. You see that the BBC's Jonathan Head and later CNN's Dan Rivers emerged as particular targets of attack in those years. The trial by public opinion is troubling - a radio host once offered to pay people to assault Jonathan Head. It is outrageous. Let's be clear about it. Nothing is done about it as far as I can tell. Nothing was done to explain to the people that this is not ok. Foreign media have been dismissed en masse as being in the pay of Thaksin Shinawatra. These thoughts were expressed freely in writing on the Internet and in public speeches, with no evidence at all. It made operating on the ground and in the streets a bit edgy at times. We should look back further than recent political turmoil so that all this is not seen as one-sided.

In 2002, the President of the FCCT had his visa revoked over a small article that appeared in a magazine regarding HM the king and Thaksin Shinawatra who was the PM at the time. There was quite a major hoo-ha over this. I should read out for you the "committee to protect journalists" opening paragraph: "During 2002, Thailand's reputation as a regional haven of constitutionally guaranteed free expression was frequently assaulted by the country's powerful PM Thaksin Shinawatra and his political allies. The government booted radio and TV programs off the air, threatened Thai journalists with financial investigation and foreign reporters with expulsion. It engaged in angry exchanges with the press." So this has been going on for some time.

I arrived here about 10 years ago; I covered Krue Sae and Takbai in 2004, the 2006 coup and all the political troubles. In the course of this, there was no interference at all in our coverage of the conflict in the South. I have seen the space for discussions of the role of monarchy in Thailand broaden considerably. Yet to be realistic about it the political divide has coloured the Thai media and the foreign media is seen through the prism of the political divide. We know that the monarchy is an emotive subject, foreign journalists must be sensitive to the political bias and sensitivities of their local colleagues. As such, in some places it is not a good idea to take a translator or fixer from Bangkok because they may not be trusted. This is true for example in the Deep South. In conclusion, when reporting the core issue of the monarchy,

which is the heart of Thailand's identity, we are constrained. The effect of 112 is insidious and therein lies a danger that we as foreign media have to be aware of and seek to work around and accommodate. Discussion is stifled, ideas are stifled. There is no critical scrutiny in reportage of absolutely critical aspects of the Thai system. With the apparent widening of 112 and CCA, people are worried about stepping on a landmine. That does not help us explain the realities of Thailand to the outside world. It is professionally challenging. There is much more now out there in the public domain than there was 10 years ago when I first got here. It is possible to work with available materials and do a good job, I believe, given the context of the constraints and the apprehension. That is our job. I'll close with a practical example, which applies to me. At our newspaper, about a dozen of us started public Facebook pages as part of the whole engagement of the media landscape. We had to go online, blog and Facebook. So, I have a public Facebook page. It is only worthwhile for getting conversations started, acting as a catalyst for nice interchange with the public out there if people are able to leave comments. My question to our lawyers in Singapore was what happens if I am on leave, I'm up trekking on a mountain for 7 days, and someone makes a comment which commits lèse-majesté? I asked this question a couple years ago. The lawyers still have not got back to me on it because they do not know. These are some of the practical issues you have to deal with and you have to keep it in the back of your mind.

Open discussion – questions and answers

Moderator:
I think it's fair to say that the finest hour of the media freedom in Thailand was in 1992. When they were working on decree 32 there were dark days when you had to watch CNN to get the real news. Then the military-supported government at that time was overthrown. There was a flourishing landscape of media freedom that manifested in the creation of independent television. And ITV was very popular, in those days we had all kinds of talk shows such as Ban Mueng, a liberal political talk show. That whole process culminated in the drafting of the 1997 constitution, including Articles 39 and 40 which guaranteed media freedom. And then we went downhill again after that. We had elections in 2001 – 2002. The decade after 1992 was pretty good in terms of the free media landscape. The decade after 2002 was not so free. In 2002, Thaksin Shinawatra harassed, coerced, censored, blocked visa renewals, investigated the tax records of journalists, intimidated academics and so on. Eventually, he bought ITV. Since the 2006 coup, the landscape changed dramatically from the '90s. There was a lot of control and more censorship. I noticed one thing, the parameters of LM and CCA expanding, before we didn't have so much discussion about LM and CCA. I think very few cases or discussions or issues or reports.

One question for us is why more issues are landed in CCA and LM territory, because that is the source of the problem. The other area outside LM, defamation law suits, people less of a problem. Maybe if we talk about Mr Sinfah, in the big picture, maybe things are not so bad. The LM, CCA space is very small. Still, if you are in that space, it's a very big space. Questions, comments, the floor is open.

Question:
Well, sometimes I feel a little bit disconnected when I listen to a lot of the speeches and I read similar articles on the situation of the media. I feel that sometimes the most glaring issue is completely neglected. For example, after April 10 2010, state-run television showed not one single image of dead red shirt protesters. There was always this clip that showed injured soldiers. There was no real discussion of the issue. I mean, the threats while working on the

street is quite a regular issue, I mean I get threatened quite often and warned quite often. Politicians accuse journalists of being on this side or that side even though we are trying to be as objective as we possibly can. So we see it as a little bit disconnected. We talk here a lot about the theory of how it should be, while on the street it's completely different. So how can we connect good intentions to the actual experience working as a journalist on the street? How are things going to change there? How would you make that connect?

Moderator:
To connect what and what exactly?

Question:
Your theory as is working on the street. I mean, the disconnect I am feeling.

Moderator:
Yes, Okay. Mr. Nirmal said he's not clear what the question is.

Question:
It's not really a clear question. It's just seen that much of the discussion here in this room is in terms of theoretical framework, which has sometimes very little to do with actually working as a media member.

Mr. Nirmal:
I agree with you on this. That's why I mentioned the constraints that we have on the street and the fact that we are accused of bias so on and so forth, all of which makes operating on the street quite edgy and quite risky. But yeah, I agree with you that there are two different worlds over here.

Moderator:
Okay, we will take that as a comment.

Pravit Rojanaphrok:
Regarding what Khun Sinfah mentioned about the freedom of Thai media. I think one thing which was left unsaid is the level of self-censorship from the mainstream Thai media. Particularly regarding anything mildly critical that's coming from the media on the Thai monarchy. This has placed the mainstream Thai mass media into a position of an appendage or part of the apparatus of the lèse-majesté law itself. Now when you mentioned that nobody from the internet has been charged, right? Let us also keep in mind that, as Nirmal has suggested, I have no Facebook account, and part of the reason for that is the fact that you might have to deal with people who might post what would be found as defaming the monarchy and you end up really having to edit and delete all those comments. So, there is a lot of self-censorship going on. Not just by the mainstream Thai mass media but ordinary social network users themselves. Thank you.

Moderator:
So, there is a comment that there is growing self-censorship in the mass media when it comes to the issue of the monarchy.

Question:
It was mentioned that there were 25 ISPs in Thailand but in fact there are quite a larger number of ISPs that exist for corporate or educational reasons. In fact there are more than 125

Thai ISPs, the way censorship occurs in Thailand is that the ICT ministry determines what should be censored and then expects these ISPs to do dirty work for them. Which is why when you live in Nontaburi and use TOT website X might not be censored but if you live in Bangna and use CAT, it is censored. In fact, I would like to ask about the implications of the government expecting the ISPs, which are independent commercial operators, to do their dirty work/to be their police force.

Question
Khun Sinfah, is the MICT consistent? Do they have a reliable standards and parameters that ISPs and OSPs can work with?

Mr. Sinfah:
I really cannot answer that question. But I can add that it is required by law. If MICT ask a service provider to block the web and they don't do it, the MICT can do it themselves. The authority, the power, is provided by the Computer Crimes Act. There is no point in discussing this. I don't know if it's going to be better or worse but the ministry is working on new draft legislation. And we can expect that this draft will be submitted to the cabinet, probably this year. And then it will go through the parliamentary process. But definitely, they are working on the new draft. I asked them the point of what kind of new elements they will include - he states that they will definitely include the social media.

Chiranuch Premchaiporn:
Like Mr. Sinfah said, in the big picture Thai media freedom is not too bad, but I also like the analogy of Mr. Nirmal - that since CCA is reinforced, we step on the landmine. Everywhere can be the landmine. But students just don't know, they ignore what has happened and what's going on around them, they just focus on what interests them. In the big picture, the people in society feel they are free and they don't have the problem at all. But freedom of expression is by unpredictable circumstances. You don't know when you will step on the landmine. Once it happens, it becomes like a life and death issue. This is something that I think is really important. The issue of lèse-majesté and also the CCA occur more frequently. I think the CCA itself amplified the issue because the CCA already include all the people - producers and users come together. So, right now, media freedom has to be more engaged with civil freedom. I think this is a very important period of time that we need to discuss and find solutions of for our society. Thank you.

Moderator:
I'm going to bring this session to the close. The problem that we have is that more roads are leading to LM and CCA space, more cases and more issues. This is something that I think this forum is designed to partly address, and find the way forward. The goal posts are shifting and the monarchy has been securitized as a national security concern now. The ruling last week made a very solid example of the trend. So, I would like to congratulate the organizers and thank them again for this very progressive and bold forum today. Thank you to the speakers for sharing their thoughts and their time.

Round Table 1: Institutional framework (the role of national regulating institutions in contributing to freedom of expression), moderated by Ms. Nattha Komolvadhin, Thai PBS

Ms. Supinya Klangnarong, Commissioner of the National Broadcasting and Telecommunications Commission (NBTC)

Question from moderator: What does NBTC think about the freedom of expression? Does it have any mechanism to monitor this issue?

The issue directed related to NBTC is broadcasting. The media landscape is still confusing because no agency acts as the centre of this issue. Newspapers are not supervised; they must register but do not need a license, unlike TV, radio or movies. NBTC collects the fee.

NBTC has two major missions. The first one is the licensing process. During the past five to ten years, Thailand experienced a booming media landscape, exemplified by the 7,700 new unlicensed radio stations. Earlier, there were only the 525 state-owned radio stations of the Royal Thai Army. Now, the issue of freedom and cheaper technology awaken the people's interest. Now, ICT and NBTC are legalising these stations for further supervision. The toughest penalty is shutting down the station. Shutting down certain stations is considered discrimination. Lebanon chooses amnesty and Thailand is doing the same. We are legalising these unlicensed stations. Misleading advertisements are a tough mission for FDA and the problem of NBTC. There is a fine line between the freedom of expression and social responsibility. It is the responsibility of NBTC to monitor hate speech, discrimination and misleading advertisements. Earlier, there were only six state-owned TV stations but now there are more than 1,000 cable TVs and Thaicom satellite TV. No one supervised this expansion. Earlier, satellite TV was not supervised and it could present any content. To put this under supervision has therefore become the challenge of the regulator. This year, almost 10,000 stations will be licensed. NBTC is doing the auction for 48 stations of digital terrestrial. In Thailand, we should refrain from the content about the king that is against section 112 and Lèse-majesté, that causes self-censorship, anyone expressing an opinion on the camera must identify themselves. Moreover, free TV is quite conservative therefore we hardly see love scenes or obscenity and the programs are rarely charged with Lèse-majesté. The issue about the monarchy has a strong impact on people's feeling.

In terms of the landscape, the content is more various, in both positive and negative respects. It is like Thailand is opening its window. It will get both a beautiful view and breeze and pollution and insects. NBTC must create good regulation. It can regulate by exactly complying with section 37. The regulator has authority to ban the radio or TV stations that undermine national security but this has not been done. Last year, NBTC fined the "Thailand's Got Talent" TV program that broadcasted a photo of a woman who bared her chest to paint a picture. We never ban radio or TV by using section 37. Lastly, Channel three decided to self-censor the "Nua Mek" drama series, which featured political content. Despite an increasingly open environment, self-censorship is deeply rooted in Thailand. Even though Thailand has NBTC, the media still do not feel confident about this issue. The solution of this may not lie on strict regulation or self-regulation. We should find the balance and how NBTC act on this.

Question from moderator: In case of hate speech, some media has a clear standing point. Does NBTC need to monitor?

We are in the first step, issuing the licenses. Then, we can enter the next process. We are discussing how to supervise this issue. The first model is self-regulation. The government hardly takes part in the supervision. It will play a role in case of a law violation. Now, section 37 has been revised again and again. As for the positive, the law can be interpreted in different ways but the negative is the abuse of law. It needs to be regulated as little as possible. The second model is heavy-handed regulation of content. It is difficult to use this

model because there are thousands of stations. The third one is co-regulation. The government takes part in supervising the press ethics. This is hard to judge and highly sensitive, such as in cases of mocking the disabled or hate speech. There should be a professional association to take care of this. If any media group violates the code of ethics more than five times they should face a penalty, for example their license will not be renewed. This will affect press freedom as well. We should therefore listen to the press' opinion. The media will be displeased if the regulation is too strict but the public will be displeased if the regulation is not.

Question and Answer Session

Question:
It was observed that university students do not know the globally significant case of Somyot. Why do Thai newspapers not publish this news?

Ms. Supinya:
This is a sensitive matter in Thai society. Everyone is afraid to talk about it. The media is concerned about causing conflict so they self-censor even when NBTC does not intend to take action. However TPBS, satellite TV and websites did broadcast the news, it is up to the editor's or owner's judgment. This remains to be further discussed. The penalty of section 112 is too severe and it should be reviewed. The justice process should be reformed from upstream to downstream. The media should be braver, just like the article "Facing Up Lèse-majesté" in the Bangkok Post.

Comment:
The Thai government feels that it can arrogate itself to legislate morality. When the government attempts to legislate morality it filters down through all kinds of media. We're missing the Internet service providers association and the webmasters association, so that form of media is not represented. What is happening in the media here is that nobody knows where they stand. They do not know what is legal or illegal. We don't know what national security is because it simply means anything that government wants it to mean. Equally, Lèse-majesté means anything that government wants it to mean. So we'll never know if we are doing wrong or not. We are on the side of caution because none of us wants to go to jail for 10 years.

Question:
About the Nua Mek series, I have heard that NBTC is considering the last three episodes. How long does it take to answer in what way it is inappropriate? Normally, we have Article 112 for the defamation of the royal family. Do other counties have a defamation law for the President? The foreigners may wonder about Lèse-majesté law but I think they should understand the Thai context as well.

Question:
I would like to ask about the Press Legislation Act. About Mr. Somyot's case, it is as if the act is meaningless. The act said that the editor should not take responsibility for content they have not written. Under the CCA, the compromise cannot be made for a defamation case. The electronic transaction development agency is being amended and the section about defamation was removed. However, the issue of national security remains in the act. However, even though how well the law is amended, the judge can find the way to get you anyway, can't they?

Ms. Supinya:
About Nua Mek, NBCT has the right to request the tape only after it is on air. Otherwise, it is considered their property. Self-censorship is not illegal but affects the viewers. There is controversy within NBTC and we have not reached the conclusion. I look at the consumers' side. The channel's self-censorship is not right because it did not notify the audiences beforehand and did this without reasonable explanation. Channel Three should apologize or make it up to the viewers. Some committee said the channel banned itself. Personally, I don't think it is relevant to section 37. Channel Three is too scared. Using their discretion to ban themselves affected the viewers. So, it should compensate the viewers.

For section 112, I agree that we should review the content. The parliament should start it but the political situation is sensitive. If parliament does not amend the law, we cannot do it. This issue is left to the judgment of the police, court and prosecutor. Another solution is to find the way to compromise and decide clearly whether each scenario is legal, illegal or neutral. This will lessen the intimidating ambience and the chance of self-censorship. We are making it as clear as possible for radio and TV. However, we have to consider if the framework can cause problems. NBTC must discuss and find neutral ground, while other stakeholders, such as ICT for computer or Ministry of Culture for movies, need to make the framework clear as well.

Question:
Normally, we need someone to tell us if we dress properly. Just like TV broadcast, if we look at models in different countries, such as in USA, Europe, South Korea, China or Arab states, what are their pros and cons compared to Thailand? In the future, do the media need clear-cut ethics like professional careers, such as doctors, engineers and architects? As a mother, I do not feel comfortable watching Raeng Ngao drama. What is the consumers' right in consuming this information?

Ms. Supinya*:*
We are trying to study the model. In the USA, it is free but also has a penalty for obscenity. The UK is strict for hidden ads, such as high-sodium or high-fat food. I focus on the ads first because it is quite easy to solve the problem of false ads. It is scientific. If FDA said it is wrong we can take an action. Even though it is not as easy as I thought, we are doing the code of ethics like other professional careers. However, this is a very sensitive issue. We should encourage the press to regulate themselves, but NBTC have not decided whether it should be self or co-regulation. We may try co-regulation and be stricter with violent content. Another issue that needs to be dealt with, dealing with inappropriate shows for children, is rating. In the past, it was done by the Ministry of Culture but it is not consistent with the reality. After the licensing, we will propose the rating. The show time of the programs will be appropriate with the content. This can be the compromise. We need to consider the ethics to renew the license. Moreover, consumers should have media literacy. We have to take care of the whole system. It is like we are opening the window. If there is too much pollution we may have to close the window. When we close the window we can't see anything and have less freedom. What NBTC can do is to put up a screen or curtain. The people in the house should be immune as well. Thailand should have media literacy for children and train the teachers how to teach.

Comment:

In Mr. Somyot's case you don't have to read the full judgment. If you just read the two-page summary by the court, immediately provided to the press after the sentence, you will see that his lawyer missed the points in the charges. The charges sued him for publishing and disseminating the article deemed to commit Lèse-majesté. In the hearing, his lawyer concentrates too much on trying to prove to the court that he was not the person who wrote the article. However, one of witness or staff testified in the court that he is involved in selecting the article to publish in the magazine. That is negative to him. The law won't be changed in the next few years. Instead of trying to look for a way to revise it, the best strategy is to improve the defence. We need better lawyers to defend the people accused of Lèse-majesté. About the press, the new law is the Press Legislation Act and the older one is the Press Act. Even though the new act relieves liability of editors, there is still a new definition of editor in the new law. If you can prove that you are the one involved in the publication you are still liable.

Round Table 2: Challenges in the field from journalists' perspectives

Mr. Pravit Rojanaphruk, Journalist at the nation

The space for debate is limited. I do have a fortnightly commentary, I could express myself in The Nation. Of course, there are limitations there. The editor has expressed concern that I should exercise utmost care in writing about the lèse-majesté law. For those who know, I also contribute to Prachathai. Most of the articles are in Thai. Lately on Twitter I tested the limits a few days after Somyot's eleven year verdict. I tweeted in Thai and English. It was something like "I don't love the king but I don't love Thaksin either". The response was huge. I have 4,500 followers. The responses from those I haven't met before were overwhelmingly negative, ranging from inviting me to stay overseas for the rest of my life, to calling me un-Thai, calling me an animal and calling me unpatriotic. I said look this is a grey area, I am not breaking the lèse-majesté law. We need the space to speak critically about the king. The sad thing about the Thai media is that it has become part and parcel of the mechanism that ensures near absolute censorship on anything mildly critical about the Thai monarchy. The enemy is not without but within, it's the mainstream mass media. For example, today in the Bangkok Post, there is a decent editorial facing up to lèse-majesté, however, I caught this problematic paragraph, it said, "there is no disagreement among Thais. All citizens want to protect the national institution." A month ago, I was hitchhiking in a red shirt's car, they were playing a CD of this Thai red shirt who has stayed in the United States, he was saying all sorts of bad things against the king and Thaksin. We should stop lying to ourselves that all Thais love the king. Yet, the Bangkok Post went on to state that all citizens love the king and the national institution. It added that no rational persons or groups have called for abolishing laws which protects his majesty and the royal family. Mr. Somsak Jeamteerasakul, lecturer at Thammasat University, has been treated almost as persona non grata by the mainstream mass media. Nobody really interviews him. I think he is one of the most knowledgeable people in regards to the lèse-majesté law. This is the problem of the law in Thailand. The media just ignore dissenting perspectives. The media is part of a mechanism perpetuating the mind-set of universal love for the king. It gets to the point where I feel that we are living in the middle ages of Europe. The middle age means if you question god, you will be burnt.

It's not just about the number of people who have been sent to jail, it's the tip of the iceberg. One former lèse-majesté detainee, Mr. Suchart Nakbangsai, spent 2 years in jail. Somyot's wife is also here with us today. We would have expected that the Thai Journalist Association (TJA) would issue some sort of decent statement. There were no statements. However, I am

not surprised. I also confirmed with Somyot's wife, Ms. Sukanya, whether the TJA has expressed any concern while Somyot was being detained for 21 months and denied bail 12 times. The answer is no. The TJA has never issued any statements. This is how bad things have become. The TJA position is that we are not going to do anything on the law. Let me wrap up by saying that there is a growing number of Thais who are unsatisfied with the limits imposed by the lèse-majesté law. I know a number of young Thai journalists who share my concerns. However, they think that their career is still way ahead. They don't want to jeopardize that. I am aware of their sympathies but they have very little way to express themselves publicly. It's almost career suicide. I mean that you will not become an editor if your position on the lèse-majesté law is strongly against it. The hope is not with the mainstream mass media. People like me are like black sheep.

Sometimes when I go to cover the lèse-majesté trial, I ask Ms. Atchara from the Bangkok Post why is it just you and me and someone from Prachathai. The rest are not interested at all. There are only 3 journalists from 3 organizations, two are from mainstream mass media and we are from English language. I think both the Nation and the Bangkok Post acknowledge some senses of barbarity of the law. Some aspect of this western liberal idea has permeated English language Thai media. It's not on the Thai language and it's not even in Matichon. There is little hope. Now, someone just spoke about the Computer Crimes Act which is almost like an appendix to the lèse-majesté law. If you can read Thai go on Facebook or twitter, I myself dare not to re-tweet some of the comments. Some of the tweets are very strong. I think there is no stopping these people who know their rights. They want a country where the institution of the monarchy can be scrutinized in accordance with democratic system. I have little or no hope in the mainstream mass media.

Mr. Pakorn Puengnetr, Head of South Desk, Isara Institute

There are 4 main challenges when reporting the news. The first challenge is security. Southern news is mainly linked to the military. The Thai government empowers the military to take ownership of this issue through an organization called the Internal Security Operations Command. In the past, this organization was not formal, it didn't have a legal basis to their work. Independent media has always been viewed as opposed to the government. We have been asked whether we love the nation or not. Some issues are not related to national security. One of the cases I investigated was the case of a GT200, or airship, which cost 350 million baht but cannot be used. Recently, it was the case of Rohingya. During the investigation I happened to go to the area with the Minster of Defence. I heard it clearly when he was on the phone that this case has soldiers involved. There is a Colonel, Major and a First Lieutenant involved in this case. They had a meeting around lunch time. In the evening when the Minister went back to Bangkok he said it was a misunderstanding, there is no soldier involved. The military provided the truck to transport Rohingya after they were arrested, but the soldiers did not kill Rohingya. Do you believe this? This is similar to the case when police tried to clear the prostitute area but found a policeman there, he may claim that he is attempting to arrest them but in fact he might be one of the guests. There is no further investigation. Actually, we arrested more than 5,000 Rohingya in 2008-2009. It increased from 1,000-2,000 in 2006 and 2007. Right now, the military claimed that they have arrested 1,400 Rohingya. I think the figure is very small if we compare to the number in the past. We need to question if the security agencies have internal issues among themselves.

When I raised this question to the secretary of the National Security Council he mentioned that this involves national security not human trafficking. They are only economic labourers

waiting to be sent to a third country. This is how they avoid answering my question. I am often threatened by many parties. Sometimes they try not to let me interview, do not want to answer my questions, or send somebody to convince me to write the news for the benefit of national security. In the area, there is a problem of misuse of an emergency employment fund which amounts to 4,500 baht per month. The military uses this 4,500 baht to hire a reporter to write only what the military want to report.

The second challenge is the way that we present news. We have to understand that there are very few reporters who dare to write news. Reporters like Khun Pravit are very rare in Thai Media. News in Thailand focuses on reporting daily news. It follows the trend. It is very difficult to stick to one case from the beginning until the end. Apart from working for Isara Institute, I also work at The Nation. Last night I had to write news about CCTV. I used to publish news about the burning of CCTV cameras in the South. The news covers whether there was corruption to this case or not. I already submitted my news but unfortunately it couldn't get published. This is because there was more interesting news to publish which is the arrest of Somchai Khunploem. If there is breaking news like this, southern news or less popular news would not get published. I will now have to go back and start writing news about Somchai's case. This kind of reporting reflects Thai society. Thai people like to follow news in general. They don't like to go into detail. When I first used twitter I had information about democrat party dissolution. I tweeted that the democrat party use the tactic of legal perspective. The democrat party do not fight on the basis of whether they are right or wrong. The next day I posted more information but nobody followed me anymore because they started to follow other news. The reporters are now trying to catch only the news that will sell. Sometimes, the government is their only source of news. They don't even conduct real investigations into whether the case is real. Another classic case was when 11 teachers were shot in the South. Nobody reported the root cause of the case. We often see one-sided news in Thai Society.

The last challenge resides in the local community. I would like to split into two parts. Civil society is one, with a particular focus on human rights. Another part is the local community. I am not a Muslim so they often don't want to talk to me, so I need to use local people to help me.

Questions and comments

Question:
I have one question and one comment. The question is actually feedback we hear from journalists who are covering issues like land grabbing. On the front, it's a very straightforward issue where a lot of villages are struggling to keep their land. Journalists are facing problems because sometimes you come to a point where the land and the businesses that are involved have some royal patronage. So, they have to stop their investigation. It comes to the point where they are unable to talk to the villagers. They know the issue but they cannot go any further because that's where the stop is. You cannot pursue anymore because it has the royal patronage ownership. While the journalists are not challenging the concept of lèse-majesté or the institution, they are unable to pursue a very straightforward story because of this background. I want to find out from the journalists here what they think are ways to overcome that. Do you face this problem?

Second, what can you do? The big gap here is the clear line between mainstream and non-mainstream journalists. I think that gap really needs to be bridged. I think the journalist community needs to have much stronger solidarity.

Question:
Do you know what you can say and you can't say relating to the monarchy?

Pravit Rojanaphruk*:*
I hope you aware that someone has filed a police complaint against me in relation to 6-7 articles I have written in Thai for Prachathai. Those articles were criticism of the lèse-majesté law. It gets to the point where many of these royalists can't differentiate when they see anyone criticizing the law. They think the person is either paid by Thaksin or wants to overthrow the monarchy institution. I am not surprised because Ambassador Lipman was also accused of having taken Thaksin's money. He will be receiving some visitors tomorrow morning I suppose. There will be some protest in front of the EU office. The answer is no, there is a grey area. The Nation is very concerned. I always remind them not to worry; I am not breaking the law. Although I don't love his majesty the king I don't despite him. I express concern when I see his health failing. That's a human being. I said I am saddened as well. I even tweeted the other day that despite what you may think of me, the day his majesty passes away I would probably shed tears. There is no will to change by the mainstream mass media. In fact, there is a very strong will to perpetuate and protect the law.

Comment:
I am probably the most relevant person to speak about this because my husband is an editor. What I want to say is that lèse-majesté law does not just to punish or charge journalists. Now, it's punishing the editor. We have the Printing Act which launched 5 years ago. That's not going to help in this case. When we have defended we use this Printing Act to say that he is just the editor. According to the act, he is not accountable for the article that was not written by him. The verdict was given that he printed or published the article. That's stopped you from doing this thing. We have to stand firm and say that it's not the right thing and this should stop in Thailand otherwise we cannot say or express anything. Even we didn't say anything like in the case of Mr. Jeng Dokjik. It was interpreted that he refers to someone else. Your question on whether we know what we can say or what we can't say, this is a very grey area. Anything you write in your article, if people don't like you, they can claim that you want to destroy democracy or the monarchy. What we can do is to educate people that this is not the right thing. We should have freedom to express ourselves. The intention is not to change the system. We want to live together although we disagree.

Question:
With this discussion we should understand that the vast majority of Thai journalists are busy with day to day business. It comes to the cultural component here. It is completely opposed to what Mr. Pravit was saying. Most Thais will learn in school the duty of every Thai including that the duty of every journalist is the protection of state, religion, and monarchy. One of the issues is trying to engage in meaningful conversation with our own colleagues. The problem is that there is no public space available where an open and a frank discussion can be conducted. We need independent organizations that create a public space.

Pravit Rojanaphruk*:*
Dr. Niran spoke in the morning session. He said he had done his best. Did you know that Dr. Niran was on the receiving end when someone filed a police compliant claiming that he violated the lèse-majesté law by criticizing one of the royal projects? The National Human

Rights Commission is just a joke. I think the burden will be upon individuals who wish to see Thailand being more free and democratic to act out. When I tweeted I do not love the king, this is a mere test to say we need to have this area. The area where clearly I am not expressing any hated message toward the monarchy institution. My intention is to reaffirm the right to speak critically. It's not to perpetuate the mind-set like the Bangkok post saying everyone loves the king. When people ask me why I am so obsessed about the issue, it's such a big issue not being able to speak frankly about one of the most important institutions in Thailand. We would have untold negative repercussions on rational faculty.

***Comment**:*
I just want to address the point on the royal project or royal initiative. I went to Chiang Mai three weeks ago. This is the point where I think we should form a public discussion about the monarchy or talk about Article 112. I went to this sub-district which has been under the royal initiative for almost 30 years. They should have the right to make decisions on how the budget should be spent. In fact, they cannot make their own decisions, it has to go to the committee. Villages want to leave this project but they cannot discuss this. When we talk about this thing in Thailand, if it's a kind of constructive argument then you can discuss. It is not the case when it relates to royal projects. We have to create more spaces for discussion of this issue.

Comment:
When I was arrested at the police station they had a press conference. They showed me to the press and said that the police arrested someone who broke the lèse-majesté law by selling VCD and Wikileaks documents. When I was on bail and I read the article in ASTV manager, they reported that police arrested someone who breaks lèse-majesté law. They don't report on the content of the case. Thus the audience may think that I am a bad person because I break the law. They don't know what the content of that document is. I would like to say that when police arrest someone, they should report the content of the case as well. I think many cases did not break lèse-majesté law. I want media to provide a summary of the case and let the audience decide whether it breaks the law or not.

Comment:
Mr. Pakorn just mentioned one of the very important topics that relate to southern provinces of Thailand. He particularly mentioned the role of the Internal Security Operations Command. I would like to clarify on the point of mass media, freedom, and human rights. My understanding is that Internal Security Operations Command is a unit that works like the military although they follow a different law. The Internal Security Act makes this unit more prominent. We know that they pay money to the press working in the area. I also work in three southern provinces. I seldom get interviewed by reporters. I don't understand why they don't ask about the facts. We ever get a chance to use the public press because it is under the control of the military. The military will play an important role in the future if we face issues similar to those in the southern provinces. We need to prepare ourselves. We may see less freedom of expression if this unit becomes more and more prominent. The scope of the Internal Security Operations Command remit includes drug suppression, forestry, alien trafficking and royal protection. This is the warning from me that our freedom has been intervened.

Pakorn Puengnetr:
I have worked in this field for almost 20 years. I can say that it's a cultural norm within the media. They will try to avoid reporting details about lèse-majesté. Please try to understand the situation. Not everyone agrees with this current situation but it is the culture. To have more

public space to speak out we would like the government authority to try to change it. I want to say that the policeman who used to read out the content of the case himself received a police complaint for reading this publicly. So, the media will try not to present the content of the case.

***Pravit Rojanaphruk**:*
I thank Pakorn for his good work. The problem with the south is the bias of mainstream mass media. It is the problem of Bangkok-centrism, all of the mainstream mass media are based in Bangkok. There are two narratives which are symptomatic of these biases. First, they refer to Southern insurgents as southern goons. The word goon does not mean much. It doesn't reflect separatist ideology at all. These people are no goons. Second, is the word Thai-Muslim. I always say please refer to them as Thai-Malay Muslim because they are Muslims of various ethnicity. More importantly, the Malay identity of the Thai-Malay Muslim is very much alive. If you go to the three southern provinces they mostly speak a variant of Bahasa Malaysian. The rationale is that if you suggest there will be an election for the governor of Pattani, most people would say you are handing Pattani to Malaysia on a silver platter. It is that sort of negativity and narrow-mindedness which is the heart of the issue.

Question:
I will be a prisoner once again for the lèse-majesté case soon, after a 5 month hiatus. The question is if you are the reporter, would you be interested in reporting this type of news?

Question:
The event in Pratunam reflects my life as a reporter. It showed that life as a reporter is very risky: risk of losing life and risk self-emotion. Our job is to report news. Some news is true and some is not. We have to fight with our own feeling. How would you feel if what you report is not true but you have to report it? My second point is that we have seen much southern news. There are so many that teenagers take this as a model. As a reporter, we are under pressure to report this news. How do we overcome this challenge? How do we show that we are a good reporter?

Question:
There were more comments after the decision than there were before on judicial thinking. Not only that, the judiciary is starting to feel pressure. They are making public statements trying to justify their judgment. The reason we didn't see so many before is because of the remarkable development of lèse-majesté cases. Suchart gave his confession and made his way but the others like Surachai, Somyot and Ekkachai are not confessing. That forces the court to justify what they are trying to do. I think Ekkachai's case is very interesting because he is forcing the court to say exactly what lèse-majesté is. The other thing is about education. I think the opposite way. They should have less education. I have been in Thailand for 30 years. I remember people saying in 1980 that we need to have more critical thinking. I don't think it works from the system inside because it is still the same people who are teaching. If the Ministry of Education was to disappear and we were to rethink the entire thing, then maybe it would work. The show like Eyes Open Movement didn't come from educated people, it came from people figuring things out when they went along.

Question:
We don't want to see anyone go to prison because of speech. Please reconsider what you plan to do. We should find some other way around. The other question is what is the solution? For me, I think for the media to work they still need to be protected, especially those who work in

the field on many issues that challenge authority. The media needs support and safeguards for them to work freely and present powerful stories. We ensure the quality of reporting. We need to affirm media freedom through guarantees. Another point about lèse-majesté; we have had more chance to talk about this in the last 3-4 years. I don't know if we should focus on lèse-majesté or not. We still need to discuss this issue but need to make it broader in aspect. The problem is not about lèse-majesté but it is about criticism of authority.

Comment:
In my point of view, I think that media need to present facts. Everyone is trying to talk about their own case. The role of the media is how to present all information from all parties. We should let the audience make their own decision. For Article 112, I may say that Bangkok people are lucky. They will need to go through justice process. For southern cases, some of them did not even have chance to fight because some of them committed suicide. I agree with Khun Jiranoot on how to protect media to give them freedom to express. The media also need to put up with lots of pressure. Sometimes media cannot freely report the news. In November 2008, the EU launched a book called guideline on protection of human rights. The Ministry of Justice was very much interested but it has disappeared now.

PLENARY: LEGAL AND SOCIAL FRAMEWORK FOR FREEDOM OF EXPRESSION, moderated by Professor Vitit Muntarbhorn, Faculty of Law, Chulalongkorn University.

***"Experiences from Europe"* by H.E. Tjaco Van Den Hout, former Ambassador of the Kingdom of the Netherlands to Thailand and former Secretary General at the Permanent Court of Arbitration in the Hague.**

I feel that any human rights sub-system can only be fully appreciated when placed against the background of the global system. I will say a few words about that system first, after which I will narrow my focus down to Europe and discuss a number of issues relevant to this seminar. Freedom of expression is protected by all major international human rights instruments. At the global level, these instruments are the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The former is considered by many human rights lawyers as part of customary international law while the latter is, as its title suggests, an outright treaty that binds the States that have signed and ratified it. Freedom of expression is protected in Article 19. We've heard a few words about this already. As we know, Article 19 protects freedom of expression with regard to both offline and online content. Article 19 has 3 paragraphs:

- Everyone shall have the right to hold opinions without interference.
- Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive or 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.
- The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order, or of public health or morals.

The human rights system of the United Nations encourages its Member States' compliance with their obligations under the Covenant by a system of monitoring and reporting carried out by the United Nations Human Rights Committee. This committee, not to be confused with the inter-governmental Human Rights Council, is a body of independent experts that examines States' reports under the ICCPR. It receives individual complaints from citizens of States that have ratified the optional protocol. The committee also issues "General Comments." These General Comments are issued whenever States' reports reveal an apparent need for further interpretation and clarification of specific provisions in order to ensure their proper compliance. This system is complemented by the so-called "special procedure" whereby thematic rapporteurs monitor States' compliance with certain specific standards, such as those regarding freedom of expression under Article 19. The post of the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (SR) is currently held by Frank La Rue. In his report to the Human Rights Council and the United Nations General Assembly, a comprehensive picture emerges of the developments and challenges to the system regarding freedom of expression, both through traditional means and on the internet. The picture is far from pretty. In his recent report the SR notes that criminalization of expression by certain governments is aimed in particular at journalists and members of the media. With such legislation the government can suppress information unwelcome to them and prevent journalists from reporting on similar matters in the future. According to the SR, this practice creates an atmosphere of intimidation and discourages future reporting on topics of public interest. This is happening in many countries today.

Government restrictions concerning freedom of expression, he reminds us, must satisfy the three-part test. The three- part test is spelled out in art 19, paragraph 3, of the Covenant together with General Comment no. 34:

- The restriction imposed must be provided by law which is clear and accessible to everyone.
- (2) The restriction must be proven necessary and legitimate to protect (a) the rights or reputation of others; (b) national security or public order; (c) public health or morals;
- (3) The measure must be proportionate and the least restrictive means to achieve the purported aim.

Article 19, paragraph 3, also applies to the operation of websites, blogs, and other internet related dissemination systems. The SR points out that permissible restrictions generally should be content specific and not prohibit a site or information dissemination system from publishing material solely on the basis that it may be critical to the government or the political-social system. I refer, in this respect, to paragraph 43 of General Comment no. 34.

Turning to the topic that my fellow panellists will be discussing, I should mention that the SR reports that such legislation on defamation, including lèse-majesté, is often used to unjustly restrict the right of freedom of expression. It is frequently used to mask the determination of authorities to retaliate against criticism and exert undue pressure on the media. In many parts of the world, defamation, including lèse-majesté, remains classified as a criminal offence with the danger of unjustified criminal prosecution. For greater detail I would refer you to paragraph 47 of General Comment no. 34.

At the European level the monitoring mechanisms for freedom of expression also speak out against the criminalization of defamation and prison sentences. The European Union with its Charter of Human Rights does so. The Organization for Security and Cooperation in Europe with its Media Freedom Representative does so, and the Council of Europe does so.

The legal framework of freedom of expression of the European human rights system is crafted by the Council of Europe with Article 10 of the European Convention on Human Rights (ECHR) and the relevant case law of the European Court of Human Rights (ECtHR) articulating this right. Let us look at Article 10 of the European Convention:

- Everyone has the right of freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authorities and regardless of frontiers. This article shall not prevent States from requiring licensing of broadcasting, television, or cinema enterprises.

- The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

47 European countries, Member States of the Council of Europe (CoE), have subscribed to the Convention, which draws inspiration from the Universal Declaration. The main task of the Council of Europe is to promote common democratic and legal values among its Member States. The European Convention of Human Rights and the European Court of Human Rights jointly provide protection to the citizens of the CoE's Member States from human rights violations. Individuals have direct access to the Court and play an active role in seeking redress (compensation) for reported rights violations.

Let us look at the European Court of Human Rights and case-law with regards to freedom of expression and defamation. In its case-law the ECtHR bases its view on the notion of "democracy" while not giving a precise definition of this notion. The Court does mention its essential features: pluralism, tolerance and broadmindedness. Without these features, according to the Court, "there is no democratic society". We can also conclude that, in the opinion of the Court, open public debate is vital for a successful democratic society. Consequently, the discretion (freedom of manoeuvre) of States to restrict the right to freedom of expression and information in matters of public interest, including political issues, is very limited. Further, from this case-law it follows that legal provisions which give politicians, members of the government and senior officials special protection against defamation is incompatible with Article 10 of the ECHR. Over the last 20 years, from the *Lingens* judgement (1986) to the *Otegi Mondragon* and *Tusalp* judgments (2011 and 2012, respectively), the Court has consistently “applied the notion of a high tolerance threshold where politicians, members of the government and heads of state are concerned”. The ECtHR has not proscribed criminal provisions on defamation but it has criticized the use of criminal sanctions in response to actions considered to be defamatory. The Court position is based on the importance of protecting citizens in general, and journalists in particular, "from not being dissuaded to voice their opinions on issues of public interest for fear that they might be prosecuted." The Court has criticized the excessive use of criminal law provisions noting that the application of a criminal sanction has major repercussions for journalists' capacity to

exercise their duties. In this context "the mere existence of criminal law provisions on defamation is likely to have a chilling effect and therefore impinge on the freedom of expression and information."

Proportionality equally applies to civil law provisions and lawsuits claiming excessive damages as a result of defamation. According to the Court, civil sanctions, when so severe as to be punitive in nature and which fail to respect the procedural guarantee of Article 6 of the Convention, also constitute major obstacles to the exercise of the right to freedom of expression. In two articles in the Bangkok Post, specifically on lèse-majesté, I wrote that the relevant legislation in Europe was seldom used and if it were the punishment was usually mild (usually a small fine). I went on to point out the importance of the ECHR and the role of the ECtHR as to how national courts deal with lèse-majesté cases. Since then, new cases have come before the European Court of Human Rights. I will turn to one for them. The two are Otegi Mondragon versus Spain on the 15 March 2011. The other is Tusalp versus Turkey dated 23 February 2012. I would recommend that those interested visit the Court's website and read the full text of the judgment. I will focus on Otegi Mondragon.

In this particular case, the ECHR decided that an elected representative's conviction for causing serious insult to the King of Spain was contrary to his freedom of expression. The case concerned a criminal conviction of a politician of the Basque political party, Mr. Arnaldo Otegi Mondragon, following comments made to the press during an official visit by the King to the province of Biscay. During the press conference Otegi Mondragon, as spokesman for his parliamentary faction, stated in reply to a journalist's question that the visit of the King to Biscay was "a genuine political disgrace". He explained that the King as "supreme head of the Guardia Civil (police) and of the Spanish armed forces" was the person in command of those who had tortured those detained in the police operation against a local newspaper. Otegi Mondragon called the King "he who protects torture and imposes his monarchical regime on our people through torture and violence". Otegi Mondragon was convicted for insulting the King on the basis of Article 490, paragraph 3, of the Spanish Criminal Code. He was sentenced to 1 year imprisonment and suspension of his right to vote during that period. The Spanish court qualified comments impugned as "value judgments and not statements of fact, affecting the inner core of the King's dignity".

The ECtHR considered this criminal conviction a violation of Article 10 of the Convention. As Otegi Mondragon's remark had not been a gratuitous personal attack against the King, nor did they concern his private life or his personal honour. The Court acknowledged that Otegi Mondragon's language could be considered provocative. It reiterated that it was permitted in the context of a public debate of general interest to have recourse to a certain degree of exaggeration or even provocation. The King being the symbol of the State "could not be shielded from legitimate criticism, as this would amount to an over-protection of Heads of State in monarchical systems". The phrases used by Otegi Mondragon addressed to journalists at the press conference concerned solely the King's institutional responsibility as Head of State and symbol of the State apparatus and of the armed forces. The comments had been made in public and in a political context outside the "essential core of individual dignity" of the King.

The ECtHR further emphasized the severity of the sentence. "While the determination of sentences was in principle a matter for the national courts, a prison sentence imposed for an offence committed in the area of political discussion was compatible with freedom of

expression only in extreme cases such as hate speech or incitement to violence." The Court continues: "Nothing in Mr. Otegi Mondragon's case justified such a sentence."

We have briefly looked at the global human rights system and subsequently in greater detail the European sub-system. We then explored recent case-law of the European Court of Human Rights. It is clear that when the Court examines defamation cases, it undertakes an analysis (textual and contextual) of the circumstances of the case before it. As the case-law has developed the Court has refined the criteria governing that analysis at all stages of the case examination as regards "existence of interference", the "quality of the law", "legitimacy of aim" and the "necessity of interference in a democratic society". In virtually all cases, it is this test of "necessity" which is decisive in the Court's judgments. The necessity test entails autonomous notions that do not appear in the Convention text but have been developed in the Court's case-law. These include the "pressing social need", "State's margin of appreciation", "potential impact of remark found to be defamatory" and, most importantly, the notion of "proportionality of the interference in relation to the legitimate aim pursued".

"Lèse-majesté law – its content and application" **by Dr. David Streckfuss, Independent scholar**

I change the name of my presentation to "A Comparative Survey of the Content and Application of the *Lèse-Majesté* Law", with primary reference to Europe, as this has been arranged by the EU. I will also make a reference to other constitutional monarchies in terms of *lèse-majesté* law. In December of 2011 through to January or February 2012, there was a new notion that had been talked about by the supporters of *lèse-majesté* law in Thailand. Previous to that, supporters always said Thailand is a unique country so and we have a unique way to express cultural heritage, the *lèse-majesté* law and the monarchy itself. But, in December 2011 and early 2012, there began a new way to justify the law. Proponents of the law started to compare it to other constitutional monarchies. This brings us to the issue of comparisons, the topic of our presentation this morning: to test how comparable the European constitutional monarchies are to Thailand's monarchy in respect to the *lèse-majesté* law.

First, we'll be looking at the content of a number of laws. Then, we'll be looking at some of the restrictions that apply to its use. We'll then be turning to possibly related issues involving the constitutions of different countries and what status is given to the monarch under those constitutions. Then, we'll be looking at the application, primarily the frequency, of use.

Most countries that have a monarchy have some form of *lèse-majesté* law. Belgium, for instance, has a separate provision. One protects the monarch and another protects other members of the royal family. In the Netherlands, one part of the Article protects the monarch and another, with lesser punishment, protects the spouse of the monarch, heir apparent and his/her spouse. Under a third section of that law, the royal family is protected against public insult, but to a much lesser degree. In Norway, a rather concise construction of the *lèse-majesté* law protects just the King and the regent against defamation. In Spain, a rather more detailed version of the *lèse-majesté* law is set in the penal code. The first protects the monarch; the second section protects his/her consort, the heir apparent, his/her consort, regent and members of regency. Curiously, the ancestors and descendants of the King are also covered by the law. Then, there is a separate provision that prohibits the misuse of the royal image. In Thailand, the King, Queen, heir apparent and the regent, if there is one, are protected.

In some constitutional monarchies there is no *lèse-majesté* law as such, instead it's merely an intensification of regular defamation law. In Denmark, for instance, in the section of the criminal code, "Crimes against the Constitution and the Supreme Authorities, terrorism, etc." there is no *lèse-majesté* law as such but it stipulates that for certain common crimes, like defamation committed against the monarchy, the punishment is doubled. In Denmark, lesser infractions of defamation can lead to one year in jail and more serious ones can lead to two years in jail. That could be doubled for the defamation of the royal family and could lead to four years in jail. And in some constitutional monarchies, such as Japan and Cambodia, there is no *lèse-majesté* at all.

The *lèse-majesté* law is not the same for any two countries, reflecting unique and cultural approaches that come from the historical experience of those countries. At the same time, they have similar gist. Two countries cover just insult of the monarch. Norway just covers defamation of the monarch. Spain includes both slander and insult of the monarch. Thailand adds threats to insult and defaming.

Some countries add some restrictions on the use of *lèse-majesté* law as well. Norway, in its criminal code, adds that the prosecution of the *lèse-majesté* cases "shall be initiated only by order of the King or with his consent".

In Sweden, cases of insulting the head of a foreign state "may not be instituted without an order of the Government or a person authorized by the Government." This may also apply to *lèse-majesté* cases. In Denmark, there are exceptions to common defamation, therefore those exceptions might apply also to the *lèse-majesté* cases; those exceptions are if the truth can be proved, if the statement was made in good faith, or if it was said in the name of public good.

There may be some relationship between where the *lèse-majesté* law is placed within the criminal code. For Belgium, the *lèse-majesté* law is a separate law. In three instances (in the Netherlands, Spain, and Sweden) the law is in its own section in the criminal code. In another three instances (Denmark, Norway and Thailand) the law appears in the national security or treason section of the criminal code.

Does that make a difference in terms of incarceration or prosecution? We will see that below. But before going to that I want to review with you the status conferred by the different constitutions to the monarch.

In Europe's constitutional monarchies, only two of them give the monarch a sacred-like status. Denmark's monarch is "sacrosanct". Norway's is "sacred". In other cases, sometimes they are inviolable. Legally, they are "not answerable for their actions". They are "not subject to prosecution". The monarch "cannot be censured, accused or prosecuted". In other countries outside Europe, they are also inviolable. They are "immune from liability". They are "not liable to any proceedings whatsoever in court". In Thailand, the constitution confers to the monarch "a status of revered worship".

Does this means that the monarch or monarchy according to the constitution cannot be criticized or commented on? Generally, no - it only means that they can't be tried in court. But in some countries, such as Bahrain, Thailand and Morocco, it implies that no comment or criticism can be made. In Morocco, for instance, the monarch can submit laws before parliament but there can be no criticism or comment made about such submissions.

A legal side note that might concern the monarch's relationship to the constitution is something worth looking at. So, with the exception of the UK and Sweden, the monarch in all of the other five major monarchies in Europe take an oath to obey or act in accordance with the constitution. Even in minimally democratic constitutional monarchies, like Bahrain and Jordan, the monarchy takes such an oath. That is not the case for Thailand where the King does not have to pledge to honour or act in accordance with the constitution.

Finally, we get to the issue of punishments.

For the European monarchies, *lèse-majesté* laws have maximum punishments of two to five years. Sweden has the doubling effect for common laws when applied to the monarchy. It depends on how you define outrage against the monarch, but it seems that in Sweden there is a possibility of a maximum six-year sentence for *lèse-majesté*. But generally, two to five years is the maximum punishment for violations of *lèse-majesté.* The lowest maximum sentence is in Spain two years. It also has lowest the minimum sentence - of six months. In Belgium, there are different levels for the monarch and other persons. The same is the case in the Netherlands. There are different punishments for insulting the King or Queen and royal consort. It is interesting to note that Jordan and Morocco are on the lower side of maximum punishments. It is surprising, but well known, that Thailand's minimum sentence for *lèse-majesté* is more than the maximum sentence for Jordan, Morocco, and Belgium

Thailand's maximum sentence of fifteen years is three times higher than the maximum elsewhere in the world. So Thailand has every right to claim to be unique. It has distinguished itself from all other monarchies, both past and present.

Thailand has bucked history. Over the last 120 years there has been a general reduction of *lèse-majesté* punishments throughout the world. The law has been used with decreasing frequency as well. Thailand has gone in the opposite direction. From 1900 to 1908, the maximum sentence for *lèse-majesté* or other crimes relating to treason was three years. At the time, it was rather modest and even progressive. In 1900, the maximum sentence in the world was eight years in Spain and Russia and five years in Germany. Thailand was ahead of the game at that time. In 1908, when the first criminal code in Thailand was implemented, the penalty was increased to a maximum of seven years imprisonment. It meant there were a number of cases where people got a few months in jail since there was no minimum sentence. By 1950, when the revised criminal code came into effect, there were very few cases: less than one per year with, relatively speaking, rather lower punishments. After the military coup in 1958, under Sarit Thanarat, the situation changed. The anti-communist law was used more and more along with *lèse-majesté* prosecutions.

Yet, it wasn't as bad as after 1976, following the massacre of students of Thammasat University. About two weeks after the military group that carried out the coup increased the penalty for all defamation-based laws. In particular, the penalty for *lèse-majesté* was changed from seven-year maximum sentence to a three- to fifteen-year sentence. They also increased the penalty for contempt of court and religion, to a maximum of seven years, the same as the penalty for *lèse-majesté* under the absolute monarchy. There was even discussion in November to December 2008 of increasing the penalty in Thailand to five years minimum and 25 years maximum. It was submitted to parliament but luckily it didn't go anywhere. There was a talk of increasing the coverage in Thai law to cover privy councillors and the sons and daughters of the King as well, but neither did these come to pass.

Let's go back to Europe. Over the past 10 years there have been a number of royalists or royal watchers in Europe who seem to keep a careful eye on the news and catch any incidents of *lèse-majesté.* In one minor case, a French gentleman travelled to Monaco for the weekend. He got drunk and said bad things about the prince. He was put in jail for seven days. So if such minor cases as this are reported, we can assume that larger cases are reported on the internet. I could find only eight cases. How did those cases end up? They resulted in three convictions resulting in fines from 400 to 3,000 Euros. There were two that resulted in seven-day sentences. There was one that resulted in a four-month sentence. There was one that resulted in a suspended one-year sentence that was later overturned by the European Court of Human Rights.

Thailand is not just unique for the severity of punishment, but also unique for the frequency of use. We have the statistics from the Office of Attorney General which has been very glad to share their statistics every year with me. Every year since 2005, there has been general rise in the number of cases. Yesterday, Mr. Sinfa said that *lèse-majesté* prosecutions were not part of the big picture, but it seems like just one case of *lèse-majesté* is serious enough given the heavy sentences and other conditions surrounding the legal process. Without a doubt, *lèse-majesté* prosecutions create a chilling effect. Even when there are "just" 30 cases in a year, that is serious enough.

Here is another set of seemingly incongruous statistics from the Office of the Judiciary. I've been told by a Deputy Attorney General that we should trust the court's numbers more than those of the Office of Attorney General. I don't know. There are very different things here. This is the number of charges, not the number of cases, as counted by the Office of the Attorney General. In this case, there were no new cases of *lèse-majesté* at all in 2002. Right after the coup in 2007, there were 126 new cases or charges of *lèse-majesté* sent to the lower court for prosecution. That number tripled by 2010, with 478 new charges of *lèse-majesté*. Since 2011, the number of new charges has come down considerably and probably for 2012, I would hazard a guess that the number will have come down even further. It may seem that there have been more cases in 2012, but I am guessing that the fewer cases that there are, are more publicized and have become bigger issues. But most of those cases were initiated in the previous administration of the Democrat Party. We have to see what the exact number is next year when the statistics are reported, but it seems like that there has been a reduction.

For the 20 cases or so that have been adjudicated in the last year, the average sentence is about 8 years in jail. This makes it quite different. We have the punishment, frequency and seriousness of sentences increasing. Last week, we had the case of Mr. Somyot who was given 10 years for *lèse-majesté*. Does it make a difference where the *lèse-majesté* law is placed in the criminal code? In other places I don't think this is the case. Even in Europe, in those countries with higher punishments for *lèse-majesté,* the cases are not treated as high crimes. I assume we will find out in the next session. Suspects in Europe, of course, are routinely given bail. In Denmark's Greenpeace case, the suspects were given bail prior to sentencing. In Thailand's case, Mr. Somyot has been refused bail 12 times so far. In the report that will come out from the working group of the National Human Rights Commission of Thailand, of the 50 or so cases the committee examined, 75% of people were not given bail. It does make a difference because it is the courts who confirm the seriousness of these cases. They say it's a serious crime. It's in the national security section of the criminal code.

As for some concluding remarks, it seems fair to say that in terms of the text of the *lèse-majesté* law, the people covered in the law, the constitutional designation, the status accorded

to the monarch, where the law is placed within criminal code; these are all rather similar at the end of the day around the world. What makes it different is the punishment, the lack of restriction on the law's use and the frequency of application.

The Thai law enforcement system, its prosecutors and its courts, have seemingly shown little discretion in accepting and prosecuting *lèse-majesté* cases. It will continue to be a challenge for Thailand to have a *lèse-majesté* law, and for it to be used in this way and still maintain that it is a democratic country. One really has to wonder at what point (or have we already reached that point?) does the use of the *lèse-majesté* law that is intended to protect the institute of the monarchy begin to work against the long-term interest of the monarchy?

Thank you very much.

***"Thailand*'s *lèse-majesté law – from a historical perspective"* by Mr. Sulak Sivaraksa, Director of Sathirakoses-Nagapradeepa Foundation**

After 1995 I was charged three more times for lèse-majesté but I was acquitted in all cases. Let me begin with the few basic facts, many of which have been frequently cited in the mass media. The notorious Article 112 of the Thai criminal code clearly states that "whoever defames or insults the King, the Queen, the heir or the regent shall be punished by imprisonment of 3-15 years." In terms of reinforcement during the period of 2005-2011, the Court of Appeal reached a guilty verdict in more than 400 cases of lèse-majesté. About 10 or more cases are still pending in the Supreme Court.

In 2006 only 30 cases of lèse-majesté reached the court in the first instance. By mid-2011, however, the number had jumped to almost 500 cases, an increase of 1500%. Not surprisingly, during the same period, the country's ranking in the Reporters Without Borders 'Press Freedom Index' also took a sharp dive: from 59th out of 278 countries in 2004 to 253rd in 2010. At present, the threat posed by the lèse-majesté law, however, is far greater in terms of freedom of expression. In my view, lèse-majesté law has been criticized for taking a life of its own, moving far beyond its original intention, and that is threatening the security of the very institution it professedly protects. Being highly resistant to change and to reason; therefore, being a potential threat to anyone and everyone. No one seems to be able to stop its destructive motion, not even the monarch himself. The harshness of the imprisonment (3-15 years) implies that there is an equally strong desire to break it. This does not bode well for the monarchy as a symbol and so called unifying factor. Moreover, in general the harsher the punishment of lèse-majesté law, the more dangerous the law breaker must be assumed to be. For instance, the law breaker must be presumed to be a threat, a terrorist, a national traitor, a foreign agent, a subhuman. This assumption shows hatred and paves the way to all kinds of human rights abuses and violations, beyond undermining the freedom of expression. At threat also is the future of the monarchy, hence, there is urgent need to abolish or amend Article 112. How then did we get this point?

I will attempt to partially answer this by providing a few historical snap shots. Let me begin with an English book that was published recently to mark the auspicious occasion of His Majesty the King's 6th - 7th cycle birthday anniversary. The book's title was: King Bhumibol Adulyadej, A Life's Work, Thailand's Monarchy in Perspective. It was by and large intended as a hagiography and summary of arguments made in three English books on the Thai monarchy which are banned in the Kingdom. Interestingly, a section of the book concerned the issue of lèse-majesté, in particular the King's will on this matter. It was made clear in a

royal speech that was delivered on the eve of his birthday anniversary in 2005. In the speech the King emphasized that: 1. A monarch is an only human being who can and should be criticized; 2. Pending lèse-majesté cases must be put to an end and individual imprisoned on this charge should be released; 3. The use of the lèse-majesté law would ultimately hurt rather than benefit the monarchy. The King also clarified the meaning of the English saying "the King can do no wrong," he pointed out correctly that this saying implies that the monarch is not a mere human being. It is as if the monarch is flawless, divine and so on. Instead, the King insisted he was a human being; the King can do wrong, and therefore, can be criticized. He stated "If someone or a citizen suggested that the King is wrong, then I would like to be informed of their opinion. If I'm not, that could be problematic. If we hold that King cannot be criticized or violated, the King could end up in a difficult situation." The King further pointed out that if it is legally prohibited to criticize the monarch and individuals are imprisoned for perpetuating the crime of lèse-majesté law, then "the monarch would have to bear the negative consequences…If they get sent to prison, I'd pardon them. If they don't go to prison, I won't sue them. Because those who violated the King and are punished are not the only ones who are in trouble. It will be the King who was in trouble. It is strange, but the lawyers like to send those to prison for allegedly for violating the King." The opinion of Anan Panyarachun, former Prime Minister and the principle adviser to the book editor board was also reproduced. He stated that "the King never said anything to me, but my personal view is that I don't like the law. Yet, I think you have to understand that in this country the King is held in a certain position which is inviolable. Thai people will never, ever, tolerate criticism of the King. That is their feeling. Sometimes I wonder about Thai people, thinking that they are more Catholic than the Pope. I always believe that Thais are more royalist than the King." Article 112 is really harmful to the King. The King is well aware of this fact. Perhaps the defamation law is insufficient to protect the royal family. The King is also concerned about international public opinion about this matter yet he cannot whirl Article 112 away. Perhaps Thai people do not want to abolish or amend Article 112 because they are more royalist than the King. As Anan asserted "they know full well that the King expressed his desire since it is regularly repeated in the media, but they continue to act as if they don't know and at the same time they claim to be his royal subjects. Unfortunately, many political parties have also expressed their opposition to amending Article 112, despite the fact that the law violates people's freedom and rights as well as jeopardizing the monarchy. A number of politicians probably want to use Article 112 to silence their critics or bring down their opponents. They want to leave out the most people who benefit out of this Article, in their political struggle. It is a powerful political weapon indeed. I had the privilege to be falsely charged with lèse-majesté 3 times due to the regime of Artit Kamlangake, Sujinda Kraprayoon and Thaksin Shinawatra. The high number of the lèse-majesté cases in the last few years must also be analysed in the context of life and death struggle among the only khaki groups and political fractions in the Kingdom.

More than one century ago, King Rama V wanted Siam to be admitted to the international society of civilized states. He embarked upon various reforms, some of them quite progressive. In 1873 he stated "we acknowledge the necessity for building more equal relationships between different groups in society. No more class oppression. Since the abolition of prostration, the country has become more prosperous. In Siam the practice of prostration reaffirms the existence of oppression which is unjust. Furthermore, there are other practice must be abolished or at least reduced in the degree strictness. But to eliminate all the practice at once will be impossible. The process has to be gradual and timely at the end of the process, Siam will re-emerge as a much more prosperous Kingdom." As such, the Royal Siamese Gazette in 1873 summarized his wish lists "from now on Siamese are permitted to

stand up before the military. To display the act of respect, Siamese may take a bow instead. Taking a bow will be a new form of paying respect. The military may first question the reason behind the abolition of prostration. Let me ask, how will the change assist in developing Siam? They must know now that abolition of this practice is indeed to show the world that Siam rejects suppressive and unjust practices. Powerful countries which have been successful in refraining from oppressing their own people are now enjoying prosperity. Henceforth, members of the royal family, senior and junior bureaucrats who wish to have an audience with the King at his residence or in public places, please adopt this new recommended practice as instructed by the King." It is clear that King Rama V wanted Siam to be governed according to the accepted standards of civilization. He didn't seem to think that Siam should deem itself as absolutely unique, and through him again the current of international norms and practices. When field marshal Sarit Thanarat came to power in the late 1950s, which was called a revolution, King Rama V's instruction was brushed aside. Despite the fact that he claimed he was loyal to the monarchy, many practices abolished by the King, such as prostration and crawling, returned with a vengeance and have remained in place ever since. Aided by his chief propagandist Luang Vijit Watakarn, Sarit resorted to the protection of the monarchy and the religion as his prime source of legitimacy. Today many Thais have idolised King Julalongkorn, Rama V; this is not Buddhist practice. They have wilfully forgotten his wish to keep up with changing times and to make resilient change to show the world that Siam rejected any oppressive and unjust practice. The amendment of Article 112, which is suppressive and unjust, will be a right move in this direction.

The 1932 revolution abolished absolutism and turned Siam into a constitutional monarchy. The new constitution, however still contains a clause prohibiting lèse-majesté. Yet, in the time of absolute monarchy, the punishment of lèse-majesté was up to 3 years imprisonment. During Sirit's dictatorship it was increased to up to 7 years. In 1976, during the Thanin Kriwichain's premiership with full dictatorship the punishment was 3-15 year imprisonment. A minimum 3 year imprisonment was unprecedented. The military removed Thanin from power a long time ago. He has now become a privy counsellor but the draconian law is still with us. To briefly sum up, the lèse-majesté law today is even harsher than during the time of absolute monarchy. And the harsh punishment is a direct by-product of military dictatorship. Although we claim to be a democracy and our government has ratified the declaration of human rights, there has been no serious attempt to alter the amendments made to Article 112 by the dictatorial government. If the monarchy wants to be a part of Thai society in the future it must undertake numerous reforms. If Thais, especially those who declare themselves to be the King's royal subjects, want the monarchy to be part of their society in the future then they must allow the amendment of Article 112. If Siam claims to be a constitutional monarchy, then we must use the law and juristic system to enable the monarchy to exist with dignity under the constitution. The monarch and members of royal families must not have any special privileges outside the law. The law must grant justice to all; anyone and everyone can be subject to criticism. In particular, this will help ensure the accountability and answerability of public figures.

The amendment of Article 112 can take various forms. I proposed a compromise version. It goes as follows; in the short run the severity of the punishment should be drastically reduced. As it stands, Article 112 is a the threat to the survival of the monarchy, I suggest the minimum of 3 years imprisonment clause should be revoked and a maximum of 3 – 7 years should be more than sufficient. The whole process of charging someone in lèse-majesté must also be made a lot stricter. It is very free for all to accuse and the police automatically press charges. Instead, every accusation must be carefully scrutinized. This will lessen the burden on both

the people and the police. The Nitirat group at the Thammasat University has suggested that the office of his majesty's principle private secretary be in charge of screening lèse-majesté charges. I find this to be a plausible suggestion. In the long run, however, the meaning of democracy with the monarch as the head of the state must be clearly and carefully unpacked. The people must be clear about the monarch's role, duty etc. The point is how to make the monarchy most beneficial for the people. We have many existing models to learn from such as those of Japan, Britain, Norway, Sweden and the Netherlands. As for the question, why we need to preserve the monarchy and keep it under the constitution, Josh Powell provided us with an illuminated answer several decades ago. I will end my talk by quoting Josh Powell: "the function of the King in promoting stability and acting as a sort of keystone in a non-democratic society is of course obvious. But he also has or can have the function of acting as an escape route for dangerous emotion. A French journalist said to me once that the monarchy was one of the things that had saved Britain from fascism. What he meant was that modern people can't get along without drums, flashes and royal parades. And that it is better that the focus is some figure that has no real power; in a dictatorial regime, the power and the glory belong to the same person. It is at any rate possible that while such a distribution of function exists, a Hitler cannot come to power. On the whole European countries which have more successfully avoided the fascism tend to be monarchies. The conditions seemingly are that the royal family shall be long established and taken for granted, shall understand its own position and shall not produce strong character with political ambition. This has been fulfilled in Britain and Scandinavia."

Thank you

Round Table 3: Lèse-majesté law – its application, challenges and implications, moderated by Dr. David Streckfuss

Mr. Augustín Hidalgo, Senior Prosecutor at Attorney General's office (Spain)

Do you know something? 112 is the European emergency phone number. Isn't it funny? What a coincidence! We also have Lèse-majesté criminal cases in Spain but only a few cases are brought to trial. How can that be? This is what I'm going to explain in my presentation.
In my opinion the main issue about Lèse-majesté is the existence of competing interests, the collision between two valuable interests. On one hand the right to free speech (or expression) and on the other the right to honour and the special protection that the Crown needs, and as a result, the need to draw lines, to find a balance between them.

In this presentation I summarize as much as possible how Spanish law and Spanish criminal courts face this conflict. We could say that in Article 1 of the Spanish Constitution, we hint (according to Spanish legislation) not only where the cause of the problem is, but also the basis, in order to find a solution to the collision of those significant legal goods protected by law. This Article not only establishes which political form the Spanish state is, the parliamentary monarchy, but also sets out freedom and political pluralism as the highest values of Spain as a democratic State.

Pointing out what the main issue is, and in order to offer you the big picture or the current legal situation of Lèse-majesté in Spain, in this presentation I would like to outline the following:

1. What the King means according to the Spanish Constitution.
2. How slander and defamation against the King is punished in the Penal Code.

3. How honour and free speech as fundamental rights are enshrined in our legal system.
4. And finally, I would also like to briefly speak about the interpretation that the Constitutional Court holds regarding this issue.

What does the Crown and therefore the King mean according to the Spanish Constitution?
As we can read in Article 56, the King is the Head of State, the symbol of its unity and permanence. In Spain, the King doesn't have any power to legislate; his acts shall always be countersigned. Without such countersignature they shall not be valid. What then are his tasks? He arbitrates and moderates the regular functioning of the institutions; assumes the highest representation of the Spanish State in international relations, especially with those nations belonging to the same historic community; and exercises the functions expressly conferred on him by the Constitution and the law. And also, as a consequence of that symbolic function, the King is not accountable, therefore he is not liable in any case, neither in civil nor in criminal matters.

Article 490/3 of the Criminal Code states that 'whoever commits slander or defamation against the King or any of his ascendants or descendants, the Queen Consort or the Queen's Consort, the Regent or any member of the Regency, or the Heir to the Throne, while carrying out the duties of office or due to or on occasion thereof, shall be punished with a sentence of imprisonment of six months to two years if the slander or defamation are serious and with that of a fine of six to twelve months if not'. Article 491 states that 'slander and defamations against any of the persons mentioned in the preceding Article, and outside the cases foreseen therein, shall be punished with the penalty of a fine from four to twenty months' and that 'The punishment shall be imposed of a fine from six to twenty- four months upon whoever uses the image of the King or of any of his ascendants or descendants, or of the Queen Consort or the Queen's Consort, or the Regent or any member of the Regency, or Heir to the Throne, in any way that may damage the prestige of the Crown.'

Case law has stated that in the reading and enforcement of Slander and Defamation against the King 'It is necessary to look into the correlatives ordinary offenses, slander and defamation, since they are used to describe this criminal offence' (Supreme Court Decision 29/11/1983). So, according to Article 205 Criminal Code, 'slander involves accusing another person of a felony while knowing it is false or recklessly disregarding the truth.' And according to Article 208, 'defamation is the action or expression that harms the dignity of another person, detracting from his reputation or attacking his self-esteem'. Article 490 of the Penal Code also lays down an explicit aggravating circumstance when slander or defamation is committed against the King or any member of the Crown while carrying out the duties of office, or due to or on occasion of it, and that's because the Spanish Supreme Court affirms it is an offence that shields two legally-protected interests 'on one hand the honour and dignity of the Highest Bodies of the State, and on the other the principle of authority that is necessary for the proper and normal functioning of the State.' In addition to that, but in an indirect way, the honour, as a private right of the people that represent the institution (Supreme Court Decision 26/01/1983). But, in the case that the slanderous allegations against the King and his family members are spoken when they aren't carrying out their duties, the penalty is lowered to a fine, because here the criminal offence mainly protects the honour, as a personal right of the individual behind the institution, more than the King or the Crown itself. Some scholars point out that in such a case, why are these actions not criminalized as an ordinary slander or defamation? They consider that in these circumstances the Crown doesn't need or deserve any extra protection.

In Chapter 2 of Section 1 related to the Fundamental Rights and Public Liberties, the Constitution elaborates on those values that are the foundation of the legal order, enshrining honour and free speech, both of them are people's basic and inherent rights, essential parts of human dignity providing also (Article 10 Spanish Constitution) that: The principles relating to the fundamental rights and liberties recognized by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain. So, we have to bear in mind: Article 19 of the Universal Declaration of Human Rights, Article 19 of the International Covenant on Civil and Political Rights and Article 10 of the European Convention on Human Rights. All of them state basically the same: Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media. But this right is not unlimited; Article 20/4 of the Spanish Constitution, Article 19/3 of the International Covenant on Civil and Political Rights and Article 10/2 of the European Convention on Human Rights, establish that the exercise of these freedoms, since they carry with them duties and responsibilities, may be subject to formalities, conditions, restrictions or penalties. The Spanish Constitutional Court states that free speech can't justify any interference on the right to honour when it comes to the ultimate core of human dignity; it is not an unlimited right, it doesn't allow an alleged right to insult. The Spanish Constitution (Decision 171/90) doesn't outlaw the use of hurtful or annoying words; however it excludes those expressions that are only humiliating. And these limitations are not only justified by the respect of other rights and freedoms, in particular the right to honour, but the necessary protection of other values, other interests and among them, the King (i.e. the Crown) as one of the main institutions of the state.

Therefore, there are legal boundaries, limits to the right of freedom of expression as we've just seen. But here the main problem emerges, where do we set those limits? When do we criminalise statements related to the King and when do we not? The Decision of the 15th of February 1990 by the Spanish Constitutional Court is a milestone in terms of the establishment of boundaries between different fundamental rights and other valuable interests, and consequently makes the difference between what is an offence and the scope of the right to free speech. In this case, the Constitutional Court overruled a decision made by the Supreme Court on 19 October 1987, in which a journalist was convicted of slander against the king for publishing an article that contained a political and social criticism of the organization and purpose of the Football World Cup of 1982, and the use that was made of the football championships political regimes throughout history, relating it to the Spanish monarchy, its origins and its relationship with the former regime; that was, as you know the Franco dictatorship.

The Constitutional Court concluded that the 'right to express ideas and beliefs is an overriding right over honour, particularly when it comes to the formation of public opinion on political or social issues. Therefore, honour as the outer limit of freedom of expression and information is even more weakened when those entitled to it are people exercising public functions or are involved in matters of public importance, since they are forced to endure the risk that subjective rights of personality could be affected by opinions or information of general interest. Focusing the entire problem just to the limits indicated in Article 20/4 of the Constitution, that it seems to place at the same level rights concerning ideological freedoms with other fundamental rights (like the right to honour), would mean a restriction of the greater scope that the Constitution sets for the right of freedom of speech and expression".
That is because freedom of speech is the way to express another fundamental right: freedom of ideology as enshrined in Article 16 of the Constitution, and 'without ideological freedom

enshrined in the Spanish Constitution the higher values of our legal system that are the foundations of the social and democratic state of law wouldn't be effective'. The judgment also points out that 'although there are no absolute or unlimited rights, the ideological freedom is essential for the effectiveness of higher values, especially political pluralism, that's why the scope of this right should not be restricted or have more limits in its manifestations than those that are necessary for the safeguarding of public order protected by law'.

To sum up, freedom of expression, in any topic regarding public opinion on matters concerning the state or general public interest, operates as a defence and therefore excludes any criminal liability, that is because: the right to freedom of expression covers not only perfect and rational argument, but also statements aimed to provoke emotional responses from the public, since the political dialogue and discussion can also occur in a language expressive of emotional attitudes; the Constitution does not exclude its own challenge made by legitimate means; the Constitution does not institute the right to freedom of speech only for those opinions considered correct; criticism of institutions is not excluded from the constitutional right to freedom of expression, in such cases criticism, overriding the right to honour, gets the character of a constitutional right; freedom of expression should always be prevalent in those criminal offenses which protect not only the right to honour but, as the first interest, the protection of the dignity of certain constitutional institutions, in the matter at hand, the King.

I'll finish by rephrasing a quote by Robert H. Jackson, former United States Attorney General and Justice of the Supreme Court in the mid-fifties of the last century: 'even if the price of freedom of speech or of the press means that we must put up with, and even sometimes pay for, a good deal of rubbish, I feel that a real Democracy, without any doubt, is worth it.'

Mr. Peter Mork Thomsen, Legal Practitioner (Denmark)

I would like to point out that I have seen some similarity between Denmark and Thailand over these last few days. In Denmark, we have a Queen that enjoys great support and affection. The Queen is the head of state. She is also the head of our church. She is by constitution given a near sacred status. Our lèse-majesté law can – as in Thailand – be found under the Penal code under a chapter of national security and terrorism. When you read the Danish lèse-majesté provision you can see that there is a possibility of sentencing defaming statements against the Queen with up to 4 years imprisonment. In many ways I can identify with Thai uniqueness that I have heard about. In Denmark, we also find ourselves quite unique regarding our culture and relationship to our Queen. I also have to say that the similarity with the situation in Thailand stops here. The Danish lèse-majesté law does not include mandatory minimum punishment; we go from a fine up to 4 years imprisonment. The differences, however, lay mostly in the application of the Danish lèse-majesté law. The provision is there to punish defaming statements made towards the Queen but we do not apply the provision; we do not use it. I had hoped that there would be some judicial representatives here. I hope that what I am about to say is not too technical. I would like to talk a bit more about judicial discretion; from the point of view of a Danish judge, how we apply a provision such as Thai's lèse-majesté law.

Judicial discretion is often defined as the power or right of making discrete choices among competing courses of action. The judge is given a mandate to administer justice fairly within the wording of the law. Judges are said to have discretion to pursue any lawful course. Many people would, and have, argued that there should be no such thing as judicial power or judicial discretion; courts are the mere instruments of the law and can do nothing by will. It is

said that the use of judicial discretion leads to inconsistency because different judges might exercise their discretion differently, and lawmakers around the world are often seen trying to limit the scope of judicial discretion by introducing mandatory sentencing, or – as the case regarding the Thai lèse-majesté law – mandatory minimum sentencing. The Thai lèse-majesté law has a minimum sentence of 3 years imprisonment, which limits the scope of the Thai judges' judicial discretion. The judge here has, as far as I understand, no possibility of sentencing an offender to less than 3 years imprisonment. It is a classic example of limiting the judges' ability to apply their discretion to the individual in often very different cases. The law, however, consists of more than the relatively hard-edged and unambiguous rules. It consists of more than just those crisply decisive normative standards that we have in mind when we refer to legal rules. The law also includes policies and principles; criteria of decisions that have a generality and breadth which distinguishes them from legal rules as they are traditionally conceived, and as judges we need to add these policies and principles to our conception of what a legal order typically includes. Principles and policies thus provide guidance in the interpretation of hard-edged rules in situations where different and conflicting interpretations of the rules are possible. As examples of general principles I can mention the principle of proportionality - which in popular terms can be said to convey the idea that the punishment of an offender should fit the crime; the principle of legal clarity - the law must provide those subject to it with the ability to regulate their conduct etc. Another less legal, but important, factor is always to use a good portion of common sense. When interpreting a law we also need to consider why this particular law is necessary in our society and when it comes to a criminal provision such as the Thai lèse-majesté law, what kind of actions the legislature wants to regulate and the reasons behind it. We need to understand the basic fundamentals of the law in order to apply it correctly in the cases presented to us. Judicial discretion is often being criticised in a mistaken perception that it is about giving effect to the will of the judge. It is however a misconception or a misuse of judicial discretion, in that such discretion should always and only be used for the purpose of giving effect to the will of the legislature, or, in other words, to the will of the law.

Please allow me to come up with a few explanatory examples. I am sure that violence is prohibited in Thailand, but I am just as sure that the judiciary in Thailand does not apply these laws to the contestants of a kickboxing match (muay thai). We do not apply the wording of the criminal provision to such a case because the legislature did not intend that to be the case. I am aware that the example is poor, but what if the violence was not part of the sport itself; no consent what so ever. I feel certain that if I were to tackle someone in the streets of Bangkok I would put myself in risk of a criminal conviction. However what if I did the exact same thing during a soccer match? Thailand vs. Denmark. Your striker has a free run to the goal, the ball is nowhere near me, but I kick him down to prevent him from scoring. Would that be a case for the courts? I would think not; it was not that kind of behaviour that the legislator wanted to criminalise when prohibiting violence.

The reason I was invited to speak on this seminar is that I was the leading judge in the most recent lèse-majesté case in Denmark. A case against Greenpeace and a group of Greenpeace activists crashing the Queen's state dinner during the climate summit "COP 15" in Copenhagen in December 2009. Pictures of these Greenpeace activists – standing in the Queens Reception Room unfolding a banner with a political statement – went around the world, and they were all charged with numerous offences including the Danish lèse-majesté law. The defendants' did break an entry to the Queens dinner and did as such – by the wording of the law – commit a crime punishable according to the Danish lèse-majesté law. When deciding the case we obviously studied the law – that had been so rarely used – and found that

the law was passed in 1933 following other provisions criminalising defaming statements made towards the Queen or King. The “new” provision was however more widespread in its usage, but still with the focus on protecting the Queen or King from defaming statements. This we could see by reading the debates in Parliament in connection with the passing of the law. To make it short, we found that the provision could no longer be used as it was originally intended, since freedom of speech in today's Denmark is considered a primary freedom and all the more important when it comes to conveying ideas that challenges the established order. To put it in the words of professor Ash, freedom of expression is not just one freedom amongst other freedoms, it is the freedom upon which most other freedoms and democracy is based. It would thus be a breach of the Danish constitutional right to free speech to punish value judgment statements made towards the Queen any harder than similar statements made towards anyone else. With that landmark remark we actually put the Danish lèse-majesté law – as for defaming statements of any political nature – to a well-deserved sleep. We did not have to state that in our case because it was beside the point of the case, but we did so in order to bring clarity on the legal status on lèse-majesté in Denmark, to give guidance as to what actions are considered criminalized under this outdated provision; a guidance that is all the more important when one is dealing with a very widespread or unclear law. We recognised that the Danish lèse-majesté provision was meant to serve as a protection to the Queen or King, aiming as a deterrent to anyone wanting to cause them harm. We thus found that only actions aimed directly at causing the Queen harm was criminalized under the provision, and that other action which by coincidence, or just indirectly involved the Queen, was to be excluded. We found that the action by the activists was not aimed at causing the Queen any harm. They wrongfully crashed a state dinner to deliver a political message. They did it, however, with no intention on harming the Queen, and at a place where the press was present and transmitted live from the scene, and they did not cause any serious disturbance to the dinner. We therefore did not find it necessary to apply the lèse-majesté law to the case and thus acquitted the defendants on that charge. We used much the same reasoning as in the examples mentioned before. We did find the defendants guilty on other charges but that is another story.

I would like to share my view about the Thai lèse-majesté law. I am not here to tell you what to do in Thailand. I am not part of imperialistic EU mission. I have studied your provision and some of your case-law as far as I could understand. I understand that the Constitutional Court of Thailand has decided that the provision as such is constitutional, and my guess would be that the reasoning behind the decision is similar to the point of view by the Thai Government as it is expressed in the UN opinion 35/2012 from 23 November 2012, where it is said that it is a matter of national existence and the law is set up to avoid the risk of the country disintegrating into fractions. It is thus serious issues which the penalty stipulated in the provision supports – calling for a minimum of 3 years imprisonment. I was wondering if it was worthwhile considering if the penal code 112 would be applicable in just any case concerning defaming or insulting statements towards the King. The provision does limit the freedom of free speech and need therefore be limited in its interpretation. From a legal point of view it seems that the application at least calls for some qualifying criteria of necessity and causality, so that the act of the offender has to instigate a real threat to national security – potentially with a requirement of evidence to show that effect. Defaming statements obviously differ in gravity depending on the sender, the number of receivers, the context in which the statement is presented and so forth. Is the act of an ignorant tourist vandalizing a picture of the King or a statement put forward by the town drunk to be taken seriously? Can statements from the likes of them pose a threat to national security?

When it comes to the lèse-majesté law in Thailand there seems to be room for necessary judicial discretion in at least limiting the number of cases brought to court or leading to a conviction. Things need to be balanced and be done also in the light of proportionality and common sense. The courts also need to provide clear guideline to the population on what action is criminalized and what actions are not.

Mr. Jon Ungpakorn, **Chair of the Working Group on the *lèse-majesté* law, Subcommittee on civil and political rights, National Human Rights Commission**

Let me begin with the commercial. The organisation I work with has the database on criminal cases of Article 112 and the Computer Crimes Act. It is in Thai and English and is by no means complete but useful for anyone who wants to study. The web address is freedom.ilaw.or.th. It includes some of the judges' statements and what is said to be the crime which led to the prosecution. I am not surprised there are no judges and prosecutors here; it is unfortunate because we have all these very important guests who should be listened to so I hope the EU will publish a paper on what was said here in Thai also. I'm on a committee regarding broadcasting with a senior prosecutor; he's the editor of a magazine and is always asking for articles. If it's in Thai, I'll give it to him and ask him to publish it in his journal because it is difficult to get through to the judiciary and prosecutors in Thailand.

If we look at *lèse-majesté* in Thailand we should look at the context and environment. The argument I get very often for keeping *lèse-majesté* is that it doesn't affect freedom of expression. In Thailand, you are allowed to say anything you like, except to defame the king. Who needs to defame the king? We have perfect freedom except for this one thing because the King is above the law and does not have the power to prosecute people. So, we need to keep this law. However, the atmosphere around the monarchy is very threatening, having been built up through the time of the dictatorship. Even in recent years, in so-called democratic years, it has been built up and makes it difficult to speak of the monarchy without praising the monarchy. For example, one day not a few years ago I felt very uncomfortable going out on the street without wearing a yellow shirt, because everyone wore a yellow shirt. I am an obstinate person, I said I am not going to wear a yellow shirt; I don't want to be forced to wear a yellow shirt. Even a red shirt, no one can force me to wear particular clothes.

That is the kind of atmosphere which has been built up. Not only must you not slander but to not actively praise or not to stand up with the royal anthem could lead to prosecution. It's a propaganda atmosphere because if we listen to radio and TV you only hear praise. I'm working as the advisor with the national broadcasting and telecommunication commission. Every radio and TV station must have royal news at 8 p.m. It would be very difficult to argue why the radio and TV stations must have the royal news? What would be wrong if it doesn't have that? That is something you don't discuss in Thailand.

When you look at the judiciary, it is very conservative in Thailand and it sees itself as chief protector of the monarchy. It doesn't see itself as the champion of the human rights of the ordinary citizen. The interpretation of the law is very much to the letter. That is why the judiciary is not taking a progressive view toward *lèse-majesté* cases but is actually using its discretion to interpret in the worst way. In a historic case, Weera Musikapong was convicted 40 years ago. He was making a political campaign for election. He said, "If I was born in a palace, I would live a comfortable life and don't have to work hard." For that, he went to prison. This is very broad interpretation. The judge said there is the only one palace in

Thailand and there is the only one who lives in the palace, that is the king, so, you are defaming the king. It'll take a lot of time.

Article 112 means that what people say at home, they cannot say in public. I believe if you could hear what people in Thailand say at home, maybe 75-80% of them would face prosecution under Article 112. This is not just the red shirts but yellow shirts also. The only person who wouldn't ever be prosecuted is Dr. Tul, the multi-coloured shirt. He's the only real royalist around. You can't speak about the monarchy; this is harmful to the monarchy because it leads to speculation, gossip and questions that can't be asked in the press about the role of the monarchy in various historical events. This is like a pressure cooker, which builds steam. People are talking about this thing. In modern society, people start saying at home and then they do it on Facebook. Once they say on the Facebook, if they are not careful, anyone can read that. In Thailand we have vigilante groups who are looking for the people who are defaming the monarchy - they will find it on Facebook. In one case, the brother of a person who writes on Facebook has a quarrel with him, so he goes to the police and says 'look at the Facebook of my brother. He is defaming the monarchy.' You need a concerted campaign to tackle these problems. I agree with Prof. Suluck that the pressure from outside the country is still important. It's important that even in case of Mr. Somyot the EU came out with the statement. The judge read that statement, they replied and were angry, but it has an effect. We need more commissions, independent organisations coming out and people like Mr. Anand [Panyarachun]. We need to reform our education and judiciary. Without reform we will continue to have this problem. Most children have grown up in this environment, from nursery schools upward, praising the monarchy. The most fervent groups in the internet are young people who have been brought up in the atmosphere that violating the monarchy is a sin, a crime. The working committee that I'm working on and Dr. Nirun's sub-committee on political and civil right of National Human Right Committee have prepared the report on Article 112. Look at the number of cases and problems in interpretation and the problem of not granting bail. We have come out with recommendations of amendments to Article 112. Rather conservative amendments. That is going back to history. We look back. Before now, there is a maximum seven year penalty and no minimum. We recommend going back to the seven years maximum penalty. After the 1932 change from absolute monarchy, *lèse-majesté* had an exception where the comments are made in good faith in the public interest, within the boundary of the constitution or as normal criticism as can be expressed on the government. We propose the sentence to be reduced to seven years, meaning that normal expression of view and criticism regarding the monarchy should be acceptable, not liable to prosecution. It should be acceptable. Like the Nitirat Group, we argue that the accusation should come only from the Office of His Majesty's private secretary.

Questions and comments

Question:
Mr. John, how much hope do you hold out that your recommendation will find any sort of positive response as we have seen with Nitirat's recommendation? They were straightaway painted as overthrowing the monarchy. Mr. Worachet from Nitirat has been beaten up, so how much hope do you actually hold out that your recommendation will find a positive response?

Question:
The argument of the royalists in Thailand states that if we minimise the penalty to 2-3 years, the loyalty of the people to the monarch might be lessened. In the case of countries like those

in Europe you have no minimum penalty; do you think that the loyalty of people toward the monarch has been disgraced?

It is very good to hear from speakers that they are drafting law and they are making submissions. They have an avenue to change things. Most of us don't have the avenue, we are powerless. This kind of meeting has evolved a lot. I remember 2 years ago every speaker has to begin by saying personally I love the king, then, they can go ahead to say what they want; that's no longer necessary. The thing that we cannot tolerate is laughter and satire. This can be one weapon we use. The second weapon is difficult. I just found out that there is no word in Thai for indignation; I feel that we have to introduce it. Regarding the sentencing of Somyot, we have to show indignation, express indignation, and write indignantly as a way of showing our feeling. This is the recommendation: laughter, satire, and indignation.

Question:
What is being defended in your respective countries? Is it the institution or the King or Queen? What needs to be defended? Another question is what is the relationship between lèse-majesté and treason? Last question, is there any debate about the law itself. Should it be eliminated? Is there any debate at all in the European context?

Answer from H.E. Van Den Hout:
I would like to address the question regarding a possible relationship between loyalty towards the monarchy and criminal punishment for lèse-majesté. The question seems to imply that the harsher the punishment, the greater the loyalty. The reverse is actually true. We have seen in the application of lèse-majesté laws in Europe that it actually often achieves the exact opposite of what the legislation intends (animosity towards and alienation from the monarchical system that the legislation is supposed to protect). That's my general point on this. I should say that the graph that David projected in the previous session regarding prison sentences in Europe for lèse-majesté might look impressive on the white screen but has little relevance for today or, for that matter, for the previous seven decades. We do not apply such sentences anymore. We have to remember that there is a difference in what one reads in our respective penal codes and the actual application today of the code's provisions. Prison terms are hardly ever applied in Europe in connection with lèse-majesté and the prison sentence of Otegi Mondragon is not the rule but, rather, the exception. The Spanish court system handed down a judgment with a prison sentence but the European Court of Human Rights immediately determined a violation of Article 10 and excessive punishment. As a result, the prison term for this offence was suspended. I am sure that the Spanish judiciary, unlike the Danish which is pretty much in line with ECHR, is reviewing its criteria and the way it will be addressing future cases of lèse-majesté in order to be closer in line with most recent case-law of the ECHR.

With regard to treason, it is delinked from and not associated with lèse-majesté. So in my opinion it is not relevant here. Whether European countries have a presidential or monarchical (and hereditary) system is frankly neither here nor there. Freedom of expression is close to sacrosanct especially when it is in the form of open, public debate on issues of public interest; it has the greatest protection. Any type of restrictions in that particular area is very limited indeed.

Answer from Mr. Hidalgo:
Regarding the first question, whether loyalty has anything to do with penalty or not. I feel that it has nothing to do with it. Loyalty has more to do with what the monarchy does or does not

do in the performance of their duty, or even when they are on holiday. In Spain we don't punish harshly slander and defamation against the Crown and in my opinion this fact doesn't diminish loyalty to the Crown at all.

Answer to the second question. The Criminal Code only can be involved when a significant legal good has been harmed, for example: life or property. We have to bear in mind that if we want to use the criminal code against any misdemeanour, and in order to choose the offence to be applied, we must focus on which is the legal good protected by that concrete offense. In this case, which is the protected legal good? As I mentioned, according to Spanish case law *lèse-majesté* protects two legal goods. One of them is honour or dignity of the highest body of the state and the other one is the principle of authority that is necessary for the proper functioning of the State.

Answer to the third question. As I've just said, it is indispensable to determine which legal good is protected by law. In Spain, treason, as an offence, protects national security. If you say any slanderous allegation about the king you are in no way affecting national security. So, according to the Criminal Code, Spaniards could commit treason when taking up arms against Spain under enemy flags or inducing a foreign power to declare war on Spain.

As to the last question. I feel that there is a trend in Europe and Spain that advocates for the decriminalisation of slander and defamation against heads of the state, whether it is a King or a President of Republic. The European Court of Human Rights has in several decisions stated that increased protection of heads of state by a special law (higher than the common system of defamation) is inconsistent with the spirit of the Convention. In addition to that, there is a Resolution of the Parliamentary Assembly of the Council of Europe calling the member states to remove from their defamation legislation any increased protection for public figures, and abolish prison sentences for defamation. Also, the Council of Europe in the Declaration on Freedom of Political Debate in the Media goes even farther, stating that any public institutions of the State should not be protected by criminal law against defamatory or insulting statements.

In Spain, there is a political party that on two different occasions has proposed the abolishment but they haven't succeeded yet because, for the time being, they are a minority in the parliament. I want to tell you something that could be considered an anecdote but I feel that it is significant. A few months ago, the Queen of Spain sued an online dating site that encourages extramarital affairs for using her photograph in an advert without her permission for "damage to her honour and dignity." The company published a photo-shopped picture of the Queen with her arms seemingly draped around a semi-naked young man. It appeared alongside the slogan in Spanish of: 'Now you no longer have to spend the night alone'. The adverts were all over Madrid. The Queen decided to sue this company taking a civil action; in this case not the Queen and nor the Public Prosecution Service started any criminal action. I feel this could be deemed a step forward toward decriminalisation.

Answer from Mr. Thomsen:
Denmark has decriminalised defaming statements. We have not seen a case of a defaming statement against the Queen since 1933. In Denmark, you can say whatever you want about the Queen as long as it is true or a matter of public interest. There are things that have been said about the Queen of Denmark but these cases did not go to court. Denmark is a very good example that you can have both a population that is very loyal and affectionate to the royal family but have freedom of speech. Polls suggest that 80% of the population is in favour of

the Queen. It's a huge majority. We practice civility. Many of them see the Queen as family. They see statements against her as they see statements made against the family. This is taken into consideration when you speak with people. We can have both, which is good example. It is not considered unusual to make statements about the Queen. Many republicans support the Queen because they like her. We are not afraid of our uniqueness. There is no debate on *lèse-majesté* in Denmark. We don't use it anymore.

Answer from Mr. Jon:
How can we change things in Thailand? I don't see any quick change but I see gradual erosion toward reforming Article 112. To begin with, we have seen promising signs in recent years. One promising sign is that the media is starting to give more publicity on these cases. A few years ago, Chiranuch from Prachathai's case was not mentioned in the Thai media mainstream. She was mentioned in the New York Times and the important newspapers around the world. Now, we have more discussion in the media on *lèse-majesté* and computer crime cases.

The more extreme the judgment, the more public opinion we get. We could see in two cases. One is the case of elderly man who was convicted for 8 years for sending 2 SMS to the secretary of Prime Minister Abhisit. The second case is Somyot's case. These are two cases where we see reaction from society saying that this is too much. With Somyot's case, we have seen a very long list from NGOs who have signed many petitions on this issue. The wording of this said that Thai society needs to respect people with different opinion. This is important for reconciliation for living together. I think comments and views will allow future reform of Article 112.

This is the same with the report that we have been preparing at the national human rights commission. The report comes from a working group and goes to Dr. Nirun's subcommittee on political affairs where I believe it will pass. The question is whether it will pass the National Human Rights Commission itself, which has stated that it is not going to recommend amendments to Article 112. We must make sure that report is publicised and leads to more discussion. I am optimistic of change but it will need a lot of effort. I also thank the EU office and our friends for their efforts to help with this.

Round Table 4: Computer Crimes Acts – its application, challenges and implications, moderated by Ms. Gayathry Venkiteswaran, Executive Director of Southeast Asian Press Alliance (SEAPA)

***Moderator*:**
My name is Gayathry from the Southeast Asian Press Alliance, a regional network of press freedom groups. The first thing I would say is I will be the only English speaking person in this panel - panellists are going to be speaking in Thai. Please get your translation equipment. I'm very happy to be here to moderate this session that will be a discussion on CCA in terms of application, implications and recommendations. We will start with the current challenges and implications and then have some time to look at measures that have been put in place and recommendations as for CCA is concerned and in terms of online and internet freedom.

Ms. Chiranuch Premchaiporn, Prachathai.com
I have a few concerns regarding the enforcement of the existing law. The documents provided in front of the main conference room derive from personal observation and from the study by iLaw; it is available in both languages. Firstly, the court orders were gathered from the cases

of Section 20 of the Computer Crimes Act. It was specified that MICT can appeal to the court to block access to websites that are deemed to be offensive or compromise national security. Over the past 5 years, the report showed that of 142 court orders out of 156 were issued on the day the complaint was filed. In section 20, it allowed for official censorship; the court is to be the mechanism to balance and scrutinise complaints and law enforcement to prevent abuse of power from the MICT. In this circumstance, doubts are raised in the aspect of screening and investigating procedure. In the recent case of the Nitirat website, which showed the historical document of the People's Party Declaration in times of change from absolute monarchy to constitutional monarchy - the website was blocked. The Nitirat website, which is a group of legal academics, contacted the MICT to verify the case and the MICT replied that they had the court order. This case proved the lack of scrutinizing and investigating measures. The law stipulated in Section 20 that, if the officer or the MICT were to block a particular website, a court order will be sent to ISPs to block the website. From the focus group study of ISP representatives, the way in which the MICT requested cooperation was very interesting. Let me quote one of the ISPs in the focus group "If we do not cooperate, even without a court order, how will they perceive us? If it was the case of lèse-majesté, no one can refuse cooperation. It would not be any problem if they were pornographic websites. If we do not cooperate, legally, it is fine but we will be black listed." In my point of view, this represents the problem of freedom and access to information. This is the failure of judgment especially when it comes to lèse-majesté in the context of threats to national security. As a suspect, people from all sectors will consider them as guilty without question; such a failure made it easy for officials to file complaints. But those who were prosecuted will be in a grave position. The first law suit under the Computer Crimes Act was an OSP called 212 Café web board and they exited the business. The other is the case of Khun Thantawut, who was accused of posting a message which violated Article 112, as well as being an OSP for United Front for Democracy Against Dictatorship, under Sections 14 and 15. The suspect denied all charges; he claimed that he was not the owner of the website and not the person who posted the message; he was hired as a website designer. Under Section 15, many others were prosecuted. What we are interested in is the definition and scope of a service provider, what the process of digital forensics is and its implication to evidence analysis and observation.

Mr. Arthit Suriyawongkul, Coordinator of the Thai Netizen Network

The main problem of this law is that it has no clear definition to distinguish the differences of computer data and content. In this law, both computer code or software and digital content are regarded as computer data; this has repercussions on the interpretation of the law. Referring back to the case of Khun Chantawut, the evidence and proof of his crime was the traffic log; this log file keeps record of how and when the website was accessed by certain IPs through protocol FTP and traffic log. The court ruling stated that the defendant had access to FTP which was a special authorisation inaccessible to normal users. Therefore, the defendant was found guilty because he was the one who could input, edit and remove data on the website. However, there were flaws in this case, for example the log file presented at the court was not recorded on the same date as when the defendant was accused of committing the crime. Another issue was that the court ruling did not consider the level of authorisations and access of the website administrator. The owner of the website Pantip.com, the largest website in Thailand, has proposed that the proportionality of punishment of an administrator must be different according to his/her authorisation level. However, the current Computer Crimes Act stipulated that the website administrator's charge will be the same level as the person who committed the crime themselves. Take a look at an example from the other case of Khun Ampol or Argong, who were sentenced to a 20-year imprisonment - 5 years for each SMS message. In that case, the electronic evidence could not rule out that Khun Ampol was the

sender of the text messages, but the burden of proof in this case was on the defendant, who must provide proof to defend himself. This contradicts the criminal law principle that the defendant remains innocent until proven guilty.

***Moderator*:**
Some of these examples are very technical but I think it is fundamentally the problem that you are trying to share with the CCA.

***Ms. Chiranuch*:**
According to my personal experience with the CCA, I had to be prepared to defend my case. The incoming data coming on to the webpage is not like information on a piece of paper. The webmaster should not be held accountable to the content within the website. Another thing that worsens the case is that the court judges will be the same one who judges the case. I would like to concentrate on my case: I was prosecuted because the messages that other people posted remained on the web board for 20 days. The court ruled it as an implied consent, although it did say in the law that it was intentional, allowing and supporting for commission of the offence under Section 14. The judges were using discretion and interpretation of the law and its intention around whether or not the service provider should be accountable. However, the law is not specific and mentions the timeframe for it to be considered as implied consent. There was also no procedure or guideline on this matter. It takes many resources to monitor and police data on the web, is it necessary? Or as Professor Ash mentioned earlier, should Thailand have the great firewall? We wouldn't want that. There is a problem in sense of security in Thailand. It is not the system of security that we focus on. The enforcement of the law, not the law itself is the big problem. The authorities and officers enforcing the law should have a better understanding of the implications of the law.

Mr. Arthit:
In my opinion, the CCA is necessary in Thailand. It is understandable if the swiftness in enforcing the law was meant for fundamental infrastructure or information security. However, by blocking the web it seems that the law has been enforced incorrectly. We need to define the distinction between the data for computer systems to read and the content for humans to read. Currently, CCA as well as Articles 14, 15 or 20 interpreted computer data as both system data and content. Article 14 Clause 1 stipulates that it is a national crime and is a non-compoundable offense. It is reasonable that Article 20 is enforced on the threat to data systems' fundamental information infrastructure, but it is problematic if we assume the system data and the content are the same thing. If the change in definition cannot be done, at least we must rectify Article 20 with regard to the blocking of access to websites because there is a difference between threats of data system and messages. Therefore, I would like to propose the following examples of supposedly Article 20, Clause 1, relating to malware and data threat; timely issue of a court order is expected with support of data experts. Another example of Clause 2 is the content that can be judged without doubt, and the court ruling is clear in copyright cases or faulty advertised information like fake medicine. With Clause 3, in the ambiguous cases, the court needs to add a transparent screening and scrutinizing process before issuing the court order. This will help prevent negative criticism of the law.

Question and Answer:

Moderator:
There are similar examples in the South East Asian region for computer crime provisions, for example in Malaysia, that has no specific guideline. There are many countries where the court

has been inclining towards making quick judgments. I want to open the floor for some questions and discussion and maybe come back to making the conclusion about where to head.

Comment:
I find that the Computer Crimes Act is a completely unnecessary Act as it duplicated the existing law. We are able to combat all the existing crimes under the Computer Crimes Act under the criminal code. I think it is significant that the Computer Crimes Act was first thought of in 1996. This in fact far predates the MICT which was only set up under Thaksin Shinawatra's administration. As I see it, the law facilitates the worst assessors of government. We must not forget that in the initial draft of the CCA they included the death penalty in the CCA. Did I say that loudly enough - the death penalty? If that is not excessive, what is? I hope Ms. Surangkana did not write it herself. But in any case, the provision for censorship, it looks very fair on the surface. You now have to go to the court to get the court order, but in fact the practice is that you have the MICT bringing thousands of URLs to the court. ICT has determined that these were not very cultured for Thai society. But the court is just another step. No judges ever look at that. There is no public oversight or academic oversight. There is no transparency in the process. To this day we have no idea how many web pages are blocked and we have no idea the category for which they are blocked. All we have is a single statement from the MICT which states that it cost 2178 baht per URL, 75 bucks, to block each website. There is no transparency. You have not included the public in the process, no human rights group, or civil society has been invited to be part of the process. All we did was protest. I did agree, we were not given any mechanism from the beginning to participate in the process.

Question:
After this presentation, I understand that many aspects of Thai law are not clear. Even the criminal code is not clear. We have to look at the core and we have to look at the organic law or real law. You cannot go into detail very much to amend. The law is a tool; it has become a tool for politicians to neglect citizens and stifle the expression of the media. There should be a public space and centre that allows for free expression. For example, Facebook could become a place for complaints, information sharing and bridging between organisations for the benefit of the people. The drafting of the law should also consider prevention, control and remedy, while making the law as clear as possible to lessen the conflict in society.

Ms. Chiranuch:
I want to add to the point about transparency. We have to admit that a censorship law may be necessary. What we need to focus on is the transparency of the process. In Germany for example, if you attempt to access a blocked website, it will show details of the court order explaining why the website was blocked, such a process is transparent. The other issue is the redundant law; I am not a lawyer, and therefore I do not understand the reasoning behind having both laws, and whether this causes any problems in the enforcement of the law. There are many double charged defamation cases from both CCA and criminal law in which the penalty became harsher. Hence, the question is, can we take out the redundant law? After the law has been enforced for over 5 years it is very timely for us to review the law. It is a great opportunity for the Electronic Transaction Development Agency to invite participation from all sectors to review the law academically.

Mr. Arthit:

In my stand point, we need both the CCA and criminal law; some of the legal provisions cannot be in place for one another. Defaming, lèse-majesté, pornography and many others are covered under criminal law but this does not cover system information related crimes. The new drafting of the CCA law will add espionage as a crime. There is a Supreme Court ruling that existing criminal law cannot be applied; for instance in the case of copying computer data, which is distinct from stealing, given the fact that the original is still there. I still insist that the CCA should focus on traditional computer crimes surrounding system data and information.

Moderator:
You know you said that this is the right opportunity and this is the time, maybe if there is a good amendment we could actually set a standard for the region on how you can deal with these issues. Thank you very much to our panellists. Thank you everyone.

PLENARY: PRESENTATIONS OF ROUND TABLE DISCUSSIONS

Round Table 1: Mr. Sinfah Tunsarawuth, independent media lawyer (in place of Nattha Komlovadhin)
My session is round table 1, the role of national regulators contributing to the freedom of expression. Ms. Supinya Klangnarong is the commissioner of National Broadcasting and Telecommunications Commission (NBTC). Ms. Supinya was talking mainly about the broadcasting arm of NBTC and mentioned that NBTC will consider licensing the broadcast of TVs and radios. They'll give licenses to all existing radios and TV channels, but they are not sure if it's possible. We discussed yesterday the soap opera on Channel Three. Under NBTC law, section 37 allowed NBTC to ban any content that is unlawful from broadcast media. She said they did not invoke the law for Channel Three's show; it did not break the law. She mentioned drafting a code regarding what will be seen and the materials which are considered detrimental to public order. If NBTC comes out with such a code, it will probably give broadcasters a better guideline of what they can or can't do.

Round Table 2
The discussion was entitled "Challenges for local media". We were privileged to be able to hear from some of Thailand's best and bravest journalists. We had on our panel: Pravit Rojanaphruk, who has been an outstanding reporter and commentator on Thailand's political convulsions over the past decade for The Nation newspaper, and he has gone further than almost any journalist in challenging the lèse-majesté law and the official consensus on attitudes to the monarchy; and we have Pakorn Puengnetr, who runs the Isara Institute, which undertakes the enormously difficult task of documenting the conflict in the Deep South of Thailand. It's clear that from the detailed description of the working environment that the challenges for local journalists go beyond the lèse-majesté law, the Computer Crimes Act or the criminal defamation law. They described routine obstruction, deception and intimidation by local officials, law enforcement agencies, local business figures and the military; sometimes all four, acting in concert. And they accepted that they have to work with very little prospect of any protection in Thailand's judicial system; it's a very vulnerable environment for them. Pravit described his own efforts to challenge the official orthodoxy in Thailand regarding attitudes to the institute of the monarchy and the intense hostility he has encountered, even to mild and non-committal statements on social media. We were also fortunate to have in our audience a number of people who have been prosecuted (or whose family member have been prosecuted) under the lèse-majesté law. They described their efforts to get prosecutors to spell out exactly how the law had been violated. We had Khun Somyot's

wife in the audience, pointing out the discrepancy of her husband being jailed for 11 years for an article that he didn't actually write. Another young man, Khun Akachai, who has been prosecuted for distributing a foreign TV documentary on the lèse-majesté law, is trying to get prosecutors to explain to him how that had violated the law itself. David Streckfuss was in the audience, who of course is a long–established authority on lèse-majesté law, and he pointed out that these efforts to get the prosecutor to explain how the law had been violated require the defendant to plead not guilty, thereby risking a much longer sentence. It's a very strong incentive for the defendant to plead guilty, in which case there is a requirement for the court to explain what you have done wrong. So they are taking a lot of risk, but this is slowly forcing the courts now to give some justification for the verdicts that they give. We concluded in our discussions that the prevailing attitudes of most government officials and the Thai public mean that the space to challenge their assumptions is still a very limited one. There was a lot of disappointment expressed over the failure of the Thai Journalists Association, or any organization, to defend those who want to debate official views. Those very few journalists who are brave enough to do that are still very exposed and very vulnerable. Clearly, a lot more needs to be done to protect them.

I would like to add a couple of personal observations that came out of this discussion. One, which applies to many countries, is that nourishing the freedoms which are being explored by these brave Thais does ultimately depend on the existence of a strong and independent judiciary. Thailand clearly needs better and braver judges and lawyers to stand up to those who wield power. I also think editors and proprietors in the media should be encouraged to defend their staff more strongly (or defend them at all) and to help expand the limits of debate in this country, perhaps through provocative documentaries or editorials. That is one example. Comparisons can be made in discussion with Thai officials from the experience elsewhere; to think back to the time when civil rights activists in the US defended equal treatment for African Americans in the South of America and the time when the first European activists stood up for gay and lesbian rights, at that time, they too were subject to intense public hostility. It is surely better for officials to be on side of those trying to widen the space for debate, rather than the side of the lynch mobs. There has been a lot that talk in Thailand about immutability of Thai values, all countries have their values which they treasure, but those values change. They have to change for humanity to progress. It is flying in the face of that progress to criminalize those who merely wish to challenge or question those values. After all, it is worth remembering that one of the greatest concerns expressed by Thailand's vital foreign investment community, which is responsible for so much of this country's impressive economic success, has been over the limited thinking skills of its workforce; there is a link, I feel, between the rigid defence of official dogma here, and the shortage of enquiring, questioning minds coming out of this country's schools and universities.

Round Table 3: Dr. David Streckfuss, Independent scholar

We started out with H.E. Tjaco, then we had Augustín Hidalgo, the prosecutor from Spain; we had Peter Mørk Thomsen, a judge from Denmark; and Jon Ungpakorn, who has been working with the committee who submitted the report on lèse-majesté and the CCA.

There were not so many recommendations. It was more a question of understanding the European experience. A few things came up that I thought noteworthy. One thing is that the first Article of the Spanish constitution guarantees a thriving society that has diversity. That is linked to lèse-majesté, freedom of expression and freedom of ideology. It went to the European Court of Human Rights. He also pointed out that the Queen's image has been used in a website advertisement that linked her with extra-marital affairs. She chose to go to a civil court to sue the company instead of using lèse-majesté. There's a movement away from

criminalization, not just lèse-majesté but defamation in general. Another thing that struck me is from Denmark. The judge said that we need to strengthen the right for those who are criticizing the existing order. It strikes me as an incredibly progressive position and a part of a vision in Denmark which is quite impressive. The question in Thailand is that if we want to amend Article 112 and CCA, people are often charged and accused of being un-Thai. There is nothing like that in Europe. What is important is the diversity of ideology. It does not become a national security issue to criticize or comment on the monarchy. What is a national security crime? It's like another country invading our country. That is a clear national security issue. It is like releasing official documents that may impair the ability of state. There isn't an issue of treason for criticizing the monarchy. There appears to be confusion in Thailand about the merging of the King and the monarchy. Is the King or monarchy the same person or the monarchy one thing and the King or Queen's personal choice another thing? Prof. Jon talked about the situation in Thailand, such as the pressure to wear a yellow shirt. This coerced loyalty, such as standing up in theatre, creates a different atmosphere in Thailand, which is not very healthy. Prof. Jon felt that there is movement and report coming out. One suggested more indignation - just being pissed off and angry and push it forward. Satire was also mentioned. But we can see that Mr. Somyot's satire is not very much appreciated in Thai courts.

Round Table 4: Ms Gayathry Venkiteswaran, Executive Director of Southeast Asian Press Alliance (SEAPA)

My name is Gayathry from the Southeast Asian Press Alliance. I was moderating the roundtable on the Computer Crime Act - its application, challenges and implications. On the panel were Ms. Chairanuch from Prachathai and Mr Arthit from Thai Netizen Network. At some point it seemed to be a little bit of a technical discussion, but I think it was very useful. Some of the problems within CCA were actually problematized - its implication, its enforcement of the law. The panellists shared their own experiences while observing that what the law professes to be seems to be a protection against crime, but it has been proactive in suppressing expression online. An absence of mechanisms is making it more problematic. Even if there are court orders that are required for taking down websites, these were problematic because they are not subject to scrutiny and the process is non-transparent. The three main sections that were considered problematic were sections 14, 15 and 20. We heard that there are plans to amend the law in the hope of addressing some of these concerns, particularly in section 14. But even if the law is improved, how will the implementation change? 5 years since its inception, as Khun Chiranuch said, is a good time to review the law. Unfortunately, she was one of the first cases of this legislation. Whether the amendment will be able to address the problem of enforcement and the lack of competency of officials who are involved in the monitoring is a real issue. Also, this is not a unique problem to Thailand because legislation of online activity, e-governance, and computer related crime or content censorship has become a trend in the region. I think it's an opportunity to improve the amendment to lead the region toward legislation that can protect rather than to punish. Considering the legal framework to understand the spirit in which the laws are enacted but then also thinking about how it can be forward thinking. The aim is to be able to balance the concerns about legitimate crime as well as the ability to exercise the right of free expression. The absence of clear guidelines, murky procedures under the law, and the broadness of interpretation are areas which the amendment needs to improve. There were questions about being cheated online, forgery and fake information. That seems to dominate the debate, so I think the challenge is to protect the public from crime without diluting freedom of expression online. It's really a test for MICT if they can do that. The final point is the lack of public participation in the process. If this is taking place now there is a need for various stakeholders

to be involved in the amendment. It was pretty much the theme in the last day. I think it's also very good to move into the procedure, the mechanism of the law and how the law is being implemented. You may have a good law but if the implementation is not good enough, then we will actually have more disadvantages.

Question and Answer

Question:
I can't wait to see the transcript being published at end of this. I was most interested when Peter was talking about the judges in Denmark; whether discretion should be exercised on the judge level, or prosecution level, and the utility of using different standards when deciding whether to move forward with the case. We have not seen much of this kind of thinking and consideration, I think it'd be interesting to have that translated and get comments back because I think that one of the hopes that Dr. Kittipong's 2009 committee had was to find alternatives for criminal prosecution for lèse-majesté and the Computer Crimes Act. This would provide more information about the thinking that goes behind the judges and for the prosecutor to consider before moving forward.

Question:
The very first comment from the stage referred to the president of the Thai Journalist Association, and the difficulty of finding the right balance about making sure you like the story - you don't upset one party then you don't upset another. I can't get a head around that because it's the job of journalist to provide the truth. Why do they need to worry about this?

***Comment*:**
I think this comment is… Essentially, the media is often partial. It's nice to have media who are really balanced. They are often accused of not being so. There are plenty of media that are not balanced. Then this comment makes no sense. The Thai Journalist Association needs to stand up for people who are practicing journalism, not to judge which is acceptable and which is not.

***Comment*:**
I don't want to be here criticizing Thai newspapers or Thai media. It's not my job here in this session. But I think many Thai people who sit here read Thai newspapers. You will see that Thai newspapers are partial, in many occasions being emotional and taking the side of one party, hostile to the opposite party. And this is what happened. I was once a Thai journalist for a long time before I went to study law. I had been advising the Thai Journalist Association for many years. I worked with Chavaraong since we were still very young. It's not easy to change the habit or practice of Thai newspapers.

Comment:
Just to add to the thread of partiality and lack of impartiality of the Thai media, I think that one of the strongest pieces of evidence that we could find is to look back at the editorial right after the coup in 2006 and see how many newspapers defended the coup.

Comment:
Not only newspapers, but Thai people in general.

Comment:
Was that impartial then?

Comment:
It doesn't matter how many people supported the coup, alright? But we can't claim that Thai media is impartial when it writes its editorials, including Matichon, which is now considered a red shirt newspaper. Matichon defended the coup in 2006. We just have to be fair first. It doesn't matter if you are partial or not. We have to start the debate by not distorting the facts, and the fact is Thai media has hardly been impartial at all, particularly on the lèse-majesté issue. It's just part of the whole mechanism which is censoring all critical news about the monarchy from the Thai public. It's just as simple as that. We start from there.

Comment:
We have several issues here. One is the failing of Thai media, or accused failing. I think that Pravit's point is valid and that is the debate that can be had; the debate is whether the media and journalists should be protected for doing their job, rather than criminalizing their opinion or what they do. So, in the end, having weak Thai media could be criticized but should not be prosecuted.

Comment:
So, from looking across Asia and listening to discussion over the last couple of days and following the events of Thailand for quite a few years, I think something that would be very helpful is to make this less of a Thai-centric debate. The problem of lèse-majesté is really just one particular subset of criminal defamation that clearly violates international law; it's very clear on the limits and restrictions that can be placed on freedom of expression - Government certainly can restrict but those restrictions themselves must be limited. I think the Thai government, for those who very much support Article 112, has been helpful to get it away from the institution of the monarchy. And you get them debated at the UN level, for instance, you get Thai judges and prosecutors to speak with their counterparts. Actually, in my opinion Thai judges have engaged with us on difficult human rights issues such as extradition, execution, forced disappearances and torture. I have a very strong feeling that criminal defamation, lèse-majesté and the Computer Crimes Act are not topics that Thai judges are deeply engaged in. I think Thai civil society should also look towards what other countries have done regarding these issues. This has become so focused on Thai government. As Jonathan would have known, Turkish civil society has dealt with this for years. It would not be a bad idea for Thai civil society to engage with their counterparts, not just within the region but across the world, to see what different kinds of civil disobedience, legal challenges and satirical challenges are possible even within this restrictive environment. I think this has been a very helpful event in terms of raising this discussion but the other side might not have been adequately represented here. We haven't heard from anyone in the Thai government to actually say; this is why we want it and why we need it. Actually, that is why Somyot's case is so significant because we do see the judges explaining what the case was about. I'm not going to suggest that everybody martyr themselves for freedom of expression, but these cases as they go up on appeal are very useful, and I think we should support that. My question for the panel is that. A lot of discussion now is on lèse-majesté but the difficulty that Thai journalists have is also a central concern. We heard that the students in an International Relations class have not even heard of Somyot's case. Looking at the region, the question is that even if the lèse-majesté and similar restrictions were removed, do you really think that Thai freedom of expression will be where it should be? And what is Thai civil society going to do in terms of the impartiality of its media, and its ability to engage in investigative journalism, and its ability to provide discussion that is the function and purpose of the Article 19 ICCP and UDA?

Moderator:
I'd like to ask a question back if you can come back. I was intrigued by you having words with judges on other issues like disappearances and so on. Have you ever approached judges or prosecutors regarding the lèse-majesté, what kind of response did you get?

Comment:
I haven't because our engagement with them so far was extremely topical. As I am sure you will appreciate the discussion of counter terrorism and insurgencies are emotive in their own way, so the last thing we want to do is throw this bombshell in there. But having said that, the Thai judiciary are not keen to be criticized or to be put on the spot. At the same time, just look at the response over the last few years, some of these are very difficult issues. There is room for optimism on the context of this particular issue. Nevertheless, I think it's something that hasn't been tried enough both with the judiciary and civil society.

Comment:
I just want to add that it's definitely not easy. I work with the national press council of Thailand to revise criminal defamation under the penalty code. We invited the judges and prosecutors, even the policemen that are involved in the investigation process, to our session. Very few showed up even though we invited them individually. You see the influence of power, authority and the connection of the Thai Journalist Association with those senior people in newspaper industry - very few of them show up.

PLENARY: FREEDOM OF EXPRESSION AS A VEHICLE FOR RECONCILIATION AND CLOSING REMARKS, moderated by Ms. Gayathry Venkiteswaran, Executive Director of Southeast Asian Press Alliance

Mrs. Veronique Arnault, Director of Human Rights and Democracy, European External Action Service
You said we have to look forward but we can't look forward if we don't understand and know the past. The EU bears the scars of terrible conflict. Our Member States have been among the worst human rights offenders in the past. Hopefully, we have learnt our lesson. That's why it makes it so special to have the EU speak about reconciliation. I will just quote the President Van Rompuy when he received, in the name of the union, together with the president Barroso, the Nobel Prize for the EU. It was all about reconciliation. He said "in politics as in life, reconciliation is the most difficult thing. It goes beyond forgiving and forgetting or simply turning the page'. I think those words already say a few things. They say that you can't deny the past. You can't silence the past. You have to talk about and confront it. You have to work towards the future together. What you need for this is to have very clear goals and principles. For the European Union, we have the goal of peace and stability which is based on respect for human rights, democracy and the rule of law. These principles underpin all policies internally and externally. I know we are seen as preaching and sometimes people tell us you preach in what you do internally. I think we are very much aware of this; we can be credible outside if you are credible inside.

What is important is to be able to rely on text which is the basic treaty and the charter of fundamental rights, which is a modern constitution on human rights for Europe. This is very clear in the Lisbon treaty. Whatever we do outside of the union we have to carry this principle with us. That means, specifically on Human rights, we have adopted at the EU level (that means 27 heads of state in government which is the highest decision making political level for

us) a strategic framework for human rights and democracy with an action plan for over 3 years. Within this action plan, we have identified the development of guidelines for freedom of expression, including on the internet, with a particular focus on the promotion and protection of journalists, and freedom of expression of the press as a next goal. This is something we are going to develop this year. What I heard today and yesterday will be very important for us to inspire us. We need to have goals and we need to have very well documented principles. I want to recall that what Ambassador Van Den Hout said this morning is based on the UN principle and the council of Europe system, which is basically the same principle.

We have certain tools in external policy which I won't develop unless you are interested. We have our bilateral relations. For example, what is happening here today is the initiative that Mr. Lipman, my colleague, is clearly showing - that we try and engage in a dialogue with partners, sharing experiences and see where we can bring each other something. We also of course work at the UN and other multi-lateral frameworks. We have good partnerships in Geneva and New York which are the human rights forums, this includes Thailand. Thailand, for example, supports the EU and we have worked closely together in putting forward a resolution in the UN for the last 2 years on freedom of religion and belief. I mention freedom of religion and belief because it's very much linked to freedom of expression. Basically, you can't distinguish between the two.

We also have ways of funding journalists, NGO's and the development of civil society. There is a key instrument for this which is the instrument for democracy and human rights. I think it's unique because we help civil society. We think that civil society is a necessary compliment to institutions, to ensure democratic life. Last but not least, we need to have systems of sanctions or control. For example, in Syria and Iran the export of technology can be used effectively to stop freedom of expression. Journalists know how the new technologies can be extremely positive yet can also be manipulated. We are looking into better control of exports of technologies which could impede freedom of expression.

One thing which was clear, and I don't want talk too much about the EU, however, it goes back to what was said in the last 2 days. We have all said that freedom of expression is not only one freedom among others but the freedom upon which all the other freedoms depend. I mentioned freedom of religious belief, and association; those were the words of professor Ash during the introduction. But it is not an absolute freedom; I think that it is very clear. There are limits. What are the conditions to limit this absolute and major right which is freedom of expression? First of all, the limits have to be very limited. It has to be limited to how it can affect an individual. That includes privacy, personal data and discrimination. In the UN system, it is not the right of a group or institution or the nature of religion. We defend the right of individuals, not of groups or institutions. Secondly, limitations have to be enshrined in law. At the EU level, we have clear criminalization of certain things, particularly in regard to racism and xenophobia. Anything that constitutes incitement of violence based on race, religion, origin, national of ethnic, sex and dissent is criminalized. Child pornography is also a strict limitation to freedom of expression. It is very precise and only used in extremis. Thirdly, you need to have proportionality. That means limitations have to be necessary, efficient and limited to concrete cases. Fourthly, these limitations can be challenged in court. It is very important to have a justice system or independent body who can say yes or no, this limitation which has been applied to this individual is legal, legitimate, or not. We have to trust the justice system as being of quality. That would include the training of judges. At the EU level, we are trying to build a network of judges, which is difficult because they have a lot

of work, but we think that the EU dimension and international dimension is critical to their work. It is also important to understand the evolution of law over time. The ambassador of The Netherlands explains about the history of lèse-majesté. Some of these laws dated back centuries or ages, much the blasphemy laws. Some of these laws are too old fashioned to be of use. The law exists but implementation of the law takes into account the context and evolution of the modernization of society. At the end of the day, what is important is to have an appeals process. In Europe, we have an extensive individual appeals process.

Limitations to freedom of expression have to be limited, challengeable, and predictable. We have talked about case-law consistency, which is important for citizens to make life predictable. Why is freedom of religion so important for a country and for reconciliation? It's necessary for good governance. I am quoting from professor Ash "it's important to have policy alternatives expressed by political groups, expressed by newspapers, magazines, parliament, by civil society. It is important to have a justice system and transparency of democratic decision making". Freedom of expression helps with this. Freedom of expression should be there to fight corruption, which is present in all of our systems. It's very important to have freedom of expression for the management of diversity. In the 27 Member States, we talk. It's better to talk than to fight. We learn from each other. More importantly, you learn that if you don't understand, it's not because this person is against you or is necessarily wrong. You have to try to understand and sometime it takes months or ages. You learn respect and tolerance and learn through the management of diversity, through freedom of expression, how to live with your neighbours; to respect the believer, and not the belief. You don't make a value judgment but try to understand each other.

In Summary, I hope you are convinced that the Europeans who came here did not come as teachers, but to share experiences in the same way we share among our 27 countries. We have different models, such as the French and British models. Comparative study of various systems is important. See what is best in you circumstances. The trend is also important. In human rights, we should never compare Myanmar/Burma with Norway. You just need to look at the trend – positively or negatively. This seminar understands the context and specificities of Thailand and places Thailand in a regional context. The ASEAN charter on human rights reiterates the key nature of freedom of expression for all ASEAN Member States. Globally, we are in the same boat. We have the same questions. We are in the same situation and we know that technology is faster than a human brain. We need to be able to relate to each other's experience and not feel that we are all alone. I come here with the message from the EU that the EU and Thailand want to work in partnership and with full respect with each other. Freedom of expression is a necessary vehicle for reconciliation. Silence brings fear, fear brings violence; we try to fight with words but not weapons.

Ms. Matilda Bogner, Regional Representative of the UN Office of the High Commissioner for Human Rights

Good afternoon everybody, I am very pleased to be here. Unfortunately I wasn't able to attend the whole event but I must say that it's a very interesting even to come to this afternoon's session to discuss the issue. Our office has been following this issue closely within Thailand for some time. I think it's incredibly important that there is debate and discussion among Thai academics, journalists, activists and the population at large as well as the international community that works here. I would like to thank the EU for organizing this and allowing such a forum in which we can discuss these issues.

Let me start by saying that in relation to the issue of reconciliation, I'm certainly not an expert. My expertise is in the area of human rights. However, what I can say as a person who is representing the United Nations is that issues of human rights, peace and security are interlinked and are all necessary if any of them are to move forward. If a country wishes to enjoy peace and security, they must show respect for human rights. The international human rights system has developed significantly over recent years and provides very strong guidance in terms of how to do it. Thailand as a member of the United Nations has subscribed to the thinking that peace, security and human rights are linked. It does logically follow to say that freedom of expression must be expressed if Thailand wishes to enjoy peace and stability. Discussion related to freedom of expression will often focus on the importance of balancing the exercise of individual liberty with the duty of the state to act proportionately in the interest of public safety, to prevent disorder, to prevent crimes and to protect the rights of others. These are the two issues that are often trying to be balanced. In the absence of clear domestic laws that balance those in line with the international standard, experience has shown that individuals can be subject to a number of abuses under international human rights law. The recent case of Somyot is an illustration of the use of the laws by the courts here in Thailand in a way that violates the obligations Thailand has under international human rights law. There was a decision by the United Nations working group on arbitrary detention (prior to the recent verdict) in relation to Somyot's case that concluded that his detention was arbitrary, the decision requested the government of Thailand to take all necessary steps to "release Somyot and accord him an enforceable right to compensation" and that is in accordance with the international covenant to the civil and political rights to which Thailand is a party. So there are clear issues in terms of law in Thailand and its compatibility with international human rights law. As has been pointed out by previous speakers, international human rights law has clearly defined and described the scope of freedom of expression including its permissible limitations. The universal declaration on human rights, the international covenant on civil and political rights, amongst others, does guarantee this right.

Interestingly, although freedom of expression is able to have limitations, freedom of opinion is an absolute right that cannot have limitation. I find it interesting in terms of the debate and discussion that was happening previously about the way people feel it's acceptable to *think* about the monarchy or to *think* about the structures within Thailand here. And what people think is the absolute right, although in terms of how they express it, there are possibilities to limit it. The Human Rights Committee of the United Nations, the body that oversees the international covenant on civil and political rights and monitors its implementation at the global level, has stated that freedom of expression constitutes the founding stone of every free and democratic society; that freedom of expression enables citizens to exchange information to challenge injustice, to influence the public discourse as well as national policies and laws. It also creates spaces where citizens can question the actions of government even in the most difficult of times.

Unjustified restrictions on free speech would therefore cause harm to democratic life and stand in contradiction to international human rights law. In 2011 the Human Rights Committee helped to clarify how we should interpret freedom of expression in the context of international standards. It put out what we call general comment number 34. I think there has been some discussion around that over the last two days. I think that is incredibly important and I would urge all of you to read it in detail. It is not incredibly long but it's not that short either - it's about 15 pages or so - but it does go through, in detail, what it sees as the permissible limitations on freedom of expression. I feel that it does provide very solid

guidance to countries on how they can deal with these issues. I understand that copies were circulated so I really do urge you to read through that.

In terms of what it says, I would like to go into a little more detail in relation to a couple of points. While Article 19 allows two areas of restrictions which may relate either to the respect of rights or reputation of others or to the protection of national security, public order or public morals, the Human Rights Committee has interpreted it as “when the state party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself.” So, one has to look at the restrictions and to see if they are consistent with the overall idea of freedom of expression. Further, it states that “the relation between right and restriction between norm and exception must not be reversed.” So, it must not be a situation where the whole swathes are restricted in terms of freedom of expression. “The committee considers that the state party must demonstrate in a specific and individualized fashion, the precise nature of the threat, and the necessity and proportionality of the specific action being taken to respond to this threat". This means that restrictions must be narrow and specifically defined, and used only for particular purposes.

The committee also considers the mere fact that certain forms of expression may be considered to be insulting to a public figure is not sufficient to justify to the imposition of penalties. Moreover, all public figures including those exercising the highest political authority, such as heads of state and government, are legitimately subjected to criticism and political opposition. Accordingly, the committee expressed concern regarding laws on such matters, such as lèse-majesté. This is globally, not specifically in relation to Thailand. And further, stated that the law should not provide for more severe penalties solely on the basis of the identity of the person that may have been impugned. So, it means that the law cannot provide higher penalties for saying something about one person than saying it about another. The committee further stated that “defamation laws must be crafted with care to ensure that they do not serve in practice to stifle freedom of expression”. It goes on to say that "care should be taken that the state parties avoid excessively punitive measures and penalties. States should consider the decriminalization of defamation and in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty". I think that needs to be taken into account in Thailand and in many other countries.

I will conclude by saying that every country has its own path to travel in terms of how to move towards compliance with international human rights standards. As mentioned in the previous speech, if we look back at Europe, which has seen some of the worst human rights abuses in the world. But it we do look back, we also see that countries have travelled far moving toward legal protections of human rights. There has been progress in terms of legal protections in many parts of the world. So I hope that this event will bring some of these issues for discussion and put forward some solutions for consideration, and has in some small way helped to move Thailand towards a state where it can better protect freedom of expression. Thank you.

Closing remarks by H.E. David Lipman

Thank you so much. I will keep it short because it has been a long two days for all of you and I think the shorter I am the better it is. Let’s talk about three or four things, first of all in terms of follow up. We fully intended to publish the transcript in English and Thai. This will be an important follow up. To make sure that these people who, for one reason or another, are

unable to join us today. We hope that there will be a proper follow up. We talked about freedom of expression, the space to discuss in Thailand. I think it is important to understand that if we had tried to organize a seminar like this a few years ago, or maybe even 6 months ago, there is no way I could have done it. In some ways, what we are doing today does represent mild progress, and I say that I honestly believe that the fact that we are here today is an important step forward. The EU made a statement about the case of Somyot. We have to talk about this because this came just before this seminar and it's very important. Two things that I think important come out from all this already; firstly the judge, the chief judge of the case, actually felt compelled to try and justify the verdict in the face of our criticism. I think it's quite interesting that it's probably the first time that anything like that has happened. Our statement has also provoked demonstrations and a lot of activity on Facebook where we have thousands of comments. Most of them were positive, by the way. Demonstrations took place today this morning, in front of the European Union building, with about 50-60 people demonstrating peacefully. And that's fine because that's what the freedom of expression is all about. People want to make a peaceful demonstration and this is good. There was no problem at all. And that in itself is good. A lot of people have unfortunately been absent from the proceedings today, particularly judges, prosecutors and civil servants. I'm happy for Mr. Tongtong, who is my friend and is from the Prime Minister's Office, coming here. I noted this on a personal basis, but never the less he is here, and that is very important for us and for me personally. And I thank you. We should try to do better of course and we have to see that we can involve more in the discussion.

I say this to my colleague, Veronique Arnault, who comes from Brussels particularly and who is my Human Rights Director. I think what we doing here today in Thailand will be a model for other parts of the world. I encouraged you to think about that because I had a lot of support from her to bring all this together. I think that was what I wanted to say. I'm not going to summarize the discussion because that has already been done. I have to finish up with a few words of thanks to everybody. Before that I want to say the European Union is here to interact not to interfere. This is all about dialogue, it's about interacting not interfering. There is the difference. I hope that we've done this successfully over the last couple of days. Last but not least, I must thank, first and foremost, my political counsellor Beatriz Martins who, without her, none of this would be possible, and particularly her team. I would like everybody to give them a round of applause. Secondly, I would like to thank particularly David Streckfuss and Sunai because they were our technical advisors to help put all of this together, to help us select the speakers and bring all the speakers here. Now I'm going to run through a few things. Of course, I would like to thank our master of ceremonies, Khun Patcharee, who has done a wonderful job for the last two days. I would like to thank the excellent interpreters at the back, in the booth that helped to make this possible. I would like to thank my colleague Veronique Arnault, who came from Brussels, for her giving me a lot of support to help make this possible. There was Timothy Garton Ash, through to my friend and former colleague Tjaco Van Den Hout and lots more. But I have to thank particularly also my two friends, my gurus, Professor Vitit who just left and Thitinan, who has been an inspiration, who bring all of this together. Thank you, in particular, the media who has been here. Particularly, Jonathan Head, who is my friend and Khun Pravit who has been very bold. And finally, last but not least, thank you for being with us over the last two days.