SHOULD THAI LAW PROTECT AN INDIVIDUAL FROM BEING INSULTED?

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Abstract

This research aims to propose the suitable rules in Thai law to protect an individual from being insulted. Now, the Thai law of insult protects the individual through the Criminal Code and the Civil and Commercial Code. Under the Criminal Code, two forms of insult are criminalised under s 393: (i) insulting an individual in his or her presence and (ii) insulting an individual by means of communication to the public. Under the Civil and Commercial Code, an insulted individual is protected by the general principle of tort law (s 420). Thai law also protects an individual from being defamed but by different specific rules. The Criminal Code has the Offence of Defamation Chapter (ss 326-333) having specific rules applicable to defamation; the Civil and Commercial Code also has specific provisions addressing the liability of the defamer (s 423) and the compensation which can be claimed by the defamed individual (s 447). One of the conclusions of this research will be that the specific rules relating to defamation provide better protection to defamed individuals than the rules relating to insults.

Having analysed the interest protected under the Thai law of insult, I found that the first form of insult aims to preserve public order and to protect the personality right, while the second form, together with tort law, mainly aim to protect the personality right. This interest is similar to the interest protected under the Thai law of defamation. Therefore, I propose that amendments should be made to the Criminal Code and the Civil and Commercial Code so that most of the rules applicable to defamation should be applicable to actions based on insult too.

I also examined the Thai law of insult and my proposed amendments at a conceptual level to determine whether Thai law needs to provide any protection to an insulted individual through the criminal and civil law. To find an answer, I mainly used the concepts of reputation adopted from Robert Post in his analysis of the common law of defamation. He identified a number of different aspects of reputation, and I argue that one of his concepts: the concept of reputation as dignity can be a basic to provide a rationale for the Thai law of insult.

Having analysed the dignity concept, I found that it contains technical terms such as dignity or rules of civility which make the concept hard to understand. I then reconstruct this concept by using Post's logic and referred to Erving Goffman's paper which Post adopted this concept from. I clarify that this concept is actually about having law as a means to protect an individual's personality (self-identity) from being substantially harmed. Under this concept, the personality of an individual is created through his or her demeanours and is confirmed by others by their acts of deference. The personality is harmed when others, who contact with him or her, refuse to perform the act of deference to confirm his or her personality; in other words, violating the society's rule of deference. If the violation is done privately between two individuals, it will be unclear whether the violator has no social competence, or the personality of the other individual is harmed. But when the violation is done in the presence of a third person, the harm to the personality can be clearer or substantial because the third person might agree with the violator and thereby refuse to confirm the self-identity which that individual has created. Law, in this case the law of defamation, can be a tool to protect this individual's personality when the violation is done by *speech*. This is because this law allows the harmed individual to use a court as an arena to argue that another individual violated the society's rule of deference and his or her personality should not be harmed.

This reconstruction of Post's concept can be a rationale for Thai law of insult with my amendment because the Thai law of insult can also be another means to protect an individual's personality. An insult can be seen as a violation to Thai society's rule of deference. The personality of an individual can be regarded as an interest protected under the law of insult. Insulted individuals should use the law of insult to have a court as an arena to argue that their insulters violated the Thai society's rule of deference in order to heal the harm to the personality. Thai law currently allows insulted individuals to use criminal or civil law to have a court as an arena to heal this harm. Thus, this concept can provide a rationale for Thai law to regulate insults. But it cannot answer why Thai law needs both criminal and civil law to protect insulted victims. Nonetheless, I argue that it is more suitable for Thai society to protect this individual by using both criminal and civil law than decriminalising criminal law of insult.

Furthermore, I also compared the Thai law of insult with German law to support my amendments to improve Thai law. German law is chosen mainly because, like Thai law, it also protects an insulted individual with both the criminal and the civil law. In German criminal law, insult and defamation are stated in the same Chapter of the Criminal Code (the *Strafgesetzbuch*, originally enacted in 1872). Moreover, I found that German law has a clearer standard to determine insulting content than Thai law, which could help to give better effect to the policy behind the Thai law of insult. In civil law, I found that German law also protects an insulted individual by the general principle of tort law, but German law has the clearer standard to determine the civil liability of insulters. An insult is regarded as a violation to the general personality right deriving from the German Constitution (the *Grundgesetz*, originally adopted in 1949) Articles 1 and 2. An insulter will be civilly liable when their violation to the personality right is serious. More importantly, the protection provided to an insulted individual must be balanced with the right to free expression of the insulter.

Not only does the comparison with German law support my amendments to improve Thai law, but it also suggests an additional way to provide suitable protection to an insulted individual in Thailand. German law regards an insult as a constitutional matter and the German Federal Constitutional Court therefore has a role in this conflict. This is because it is a conflict between the general personality right and the right to free expression, both of which are constitutional rights. German Courts which decide this conflict have to balance between the law protecting an insulted individual with the right to free expression, and the way they do so provide valuable lessons for Thailand.

From the above findings, the original contributions to knowledge achieved from this research can be summarised as follows. First, I found that the reconstruction of the concept of reputation as dignity can be a rationale for the Thai law of insult. Secondly, I found the more suitable ways to protect an individual from being insulted than the way provided under the current Thai law of insult under the Criminal Code and Civil and Commercial Code. Finally, I found an additional way for Thai law to protect an insulted individual by authorising the Thai Constitutional Court to have a role in balancing between the law protecting the individual and the right to free expression.

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Without the supports of every person mentioned here, this thesis would not have been finished.

Chapter 1 Introduction

1.1 Research Question and its Background

This thesis aims to find an answer to this question:

> '*Should Thai law protect an individual from being insulted?*'

As a Civil-Law country,[1] Thailand currently protects an individual from being insulted by the provisions stated in both the Criminal Code and the Civil and Commercial Code. The offence of insult found in s 393 of the Criminal Code penalises two forms of insult: (i) insulting an individual in their presence and (ii) insulting an individual by means of communication to the public.[2] Though the penalties are the same, the two forms of insult are conceptually distinct.[3]

As stated in the Criminal Procedure Code, the persons who can be the claimants in criminal cases are: (i) state prosecutors and (ii) the injured party.[4] The latter is a person who is injured by the commission of a criminal offence.[5] With the offence of insult the individual who is insulted, under either of these forms, is the injured party. The party can either file a complaint to an inquiry officer and let a state prosecutor prosecute the insulter or they can prosecute their insulter themselves.[6]

As these forms of insult are acts criminalised by the Criminal Code, the Supreme Court of Thailand recognised that an individual has a *right not to be insulted,* which is protected under tort law: the criminal wrong is a civil wrong also.[7] The insulted victim can sue their

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[1] See the discussion of Thai legal history in section 2.2

[2] The Criminal Code, s 393 'Whoever insults any person in his or her presence or by publication shall be liable to imprisonment for not exceeding one month or a fine of not exceeding one thousand bath, or both' translated by Amnart Netayasupha, Piyapohn Pisitpit and Benjaporn Watcharavutthichai, *The Criminal Code (Thai-English Edition) as amended in BE 2551* (Winyuchon 2013) 325

[3] See the discussion of this issue in section 3.2.3

[4] The Criminal Procedure Code, s 29 'These persons are authorised to be the claimants in criminal cases: (sub-section (i)) A prosecutor; (sub-section (ii)): The injured party.'

[5] The Criminal Procedure Code, s 2 (sub-section (iv)) 'The injured party is a person who is injured by a commission of a criminal offence…'

[6] This process will be further elaborated in section 3.2.5.

[7] '*The Supreme Court Decision No 124/2487* (1944)' Supreme Court Decisions BE 2487 (Thai Barrister 1944) 132; The detail of this case will be discussed in section 3.3.1.

insulter for compensation by using the general principle of tort law under s 420 of the Civil and Commercial Code.

Insulted victims can choose to prosecute their insulter under both criminal law and tort law or can choose which law they want to proceed. Therefore, it can be said that the Thai law of insult protects an insulted individual through both the Criminal Code and the Civil and Commercial Code.

While the Thai law of insult protects an individual from being insulted, Thai law also protects an individual from another type of speech, defamation. However, insult and defamation are regulated under different specific rules. The Civil and Commercial Code has the specific rules for defamation stated in ss 423 and 447, but insults are regulated by the general principle of tort law as mentioned above. In the Criminal Code s 393 is the only specific criminal provision applicable to insult. This section is found in Book III: Petty Offences, while the specific rules for the offence of defamation are found in ss 326-333 of Book II: Specific Offences.

Na-Nakorn, a former Attorney General of Thailand and a *Doktor der Rechte* from the University of Bonn,[8] argues that the offences of defamation and insult are similar because they both protect the interest in personal honour.[9] He provides Thai definition of the word 'honour', but his definition of 'honour' is confusing in Thai language and cannot readily be translated into English. Nonetheless the approach to identify the specific interest protected under these offences is not used by other legal commentaries. In the main legal commentary on Criminal Law written by Tingsapat, a former Supreme Court judge and a former dean of Faculty of Law, Thammasart University,[10] he does not identify personal honour as an interest protected under the offence of insult when he describes the offence of insult.[11] He explains the offence of insult by focusing on the acts which considered as

[8] 'Biography of Kanit Na-Nakorn,' (*Thairath Online*) <https://www.thairath.co.th/person/4698> accessed 7 October 2019
[9] Kanit Na-Nakorn, *Criminal Law: Specific Offences* (11th edn, Winyuchon 2010) 186
[10] 'Jitti' (*Faculty of Law Thammasart University*, 2019) <http://www.law.tu.ac.th/about/history/honourable/jiti/> accessed 25 November 2019
[11] Jitti Tingsapat, *Textbook on the Criminal Code Book II Chapter 2 and Book II* (Kiatkajorn Wachanasawas and Somchai Pongpattanasilp (eds), 7th edn, Petchrong 2011) 1237-1245

insults. He defines the term 'to insult' as stated in s 393 of the Criminal Code as 'to disparage, humiliates or verbally abuse.' And as we will see, the Supreme Court has used this definition to determine whether the content being used by the defendant is insulting.[12]

Nor does the former judge identify personal honour as an interest protected under the offence of defamation.[13] Instead, his description of the offence of defamation suggests that the interest protected under the offence of defamation is reputation.[14] Though the term 'reputation' is not defined, the judge explains that '*to injure the reputation*' as stated in section 326[15] as:

> to degrade an individual's value that appears in the society. In other words, to injure reputation is to make ordinary people in the society degrade that value or do not want to socialise with that individual.[16]

It can be taken from this explanation that reputation is a person's value which is estimated by people in his or her society.[17] Tingsapat also points out that some insulting words are not defamation if these words do not make people in the victim's society degrades the victim's value, such as accusing an individual of being a ghoul, who eats people.[18] As we will see this kind of accusation is considered as an insult because an insult in Thai law is word or statement which disparages, humiliates or abuses the victim. On the other hand, some defamatory statements are not insult, if the statement does not disparage, humiliate or abuse the victim (i.e. a polite statement) but it can make people in a society degrades the victim's value such as stating that the victim offers a bribe to a government officer.[19] Nonetheless, some statements can be insulting and defamatory, if those statement fit

[12] See section 3.2.1
[13] Tingsapat (n11) 398-515
[14] ibid 419
[15] The Criminal Code s 326, 'Whoever imputes anything about another person to the third party in a manner likely to impair the reputation of such person or to put such person to contempt or hatred is said to commit the offence of defamation and shall be liable to imprisonment for not exceeding one year or a fine of not exceeding twenty thousand bath or both.' translated by Netayasupha, Pisitpit and Watcharavutthichai (n2) 277-278
[16] Tingsapat (n11) 421
[17] ibid 419
[18] See the *Supreme Court Decision No 200/2511* (1968) (n189)
[19] See the *Supreme Court Decision No 2296/2514* (1971) (n283)

with the descriptions of defamation and of insult such as saying that a government officer the victim offers a bribe and comparing him to an animal. This statement is defamatory because it makes people in the society see the victim negatively (as a dishonest person). It is insulting because it disparages the value of the victim as a human. As I will show in this research, this is the factor used by Thai law to distinguish between defamation and insult.[20] I will argue in this thesis that defamation and insult are different acts which impact the personality right[21] without having to specify which aspect of personality right (honour or reputation) is harmed. (see figure 1.1).

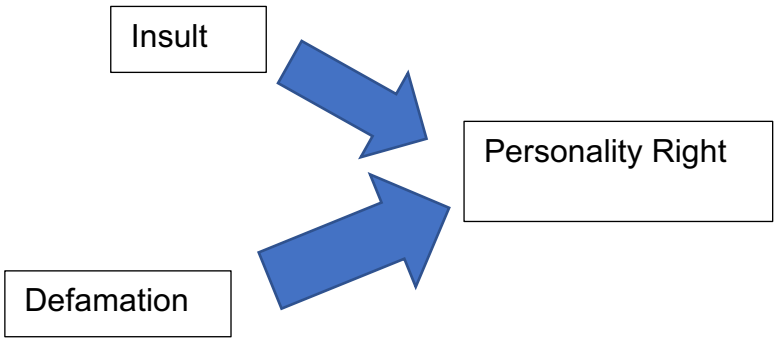

figure 1.1

The term 'personality rights,' Brüggemeier explains, is used as 'a metaphor for non-bodily aspects of the personality.'[22] This term suggests that the 'being' of an individual is protected by law not only from being bodily harmed or being defamed, but law also protect new non-bodily aspects of the persona such as dignity, autonomy, privacy.[23] As we will see in chapter 7, there is a term *Allgemeines Personlichkeitsrecht* ('General Personality Right') being used in German law. This General Personality Right includes many aspects

[20] See section 4.3.1
[21] See section 3.2.1, I will argue that the offence of insult aims to protect the personality right from being harmed by insults and I will argue in section 4.3.1 that the offence of defamation aims to protect the personality right from being injured through defamation.
[22]Gert Brüggemeier, Protection of Personality Interests in Continetal Europe. in Niall Whitty and Rienhard Zimmermann (eds), *Rights of Personality in Scots Law* (Edinburgh University Press 2014) 313
[23] ibid

of personality. I will use the term ‘personality right’ to call the interest in the ‘being’ of an individual.

Although the offences of defamation and of insult both protect aspects of the personality right, the specific rules applicable to protect defamed victims do not directly apply to protect insulted victims. These specific rules provide better protection to defamed victims than the rule protecting insulted victims. In this introduction, I will show one example to support my argument.[24]

Section 333 of the Criminal Code prescribes the offence of defamation as what is known in Thai law as “a compromisable offence”: this allows the injured party and their perpetrator to compromise their dispute without having to go to the Court (this issue will be further explained in section 4.3.5). The defamed individual, who files their complaint to the inquiry officer, can require their defamer to apologise as a condition to settle the dispute without having to go to the Court (see figure 1.2).

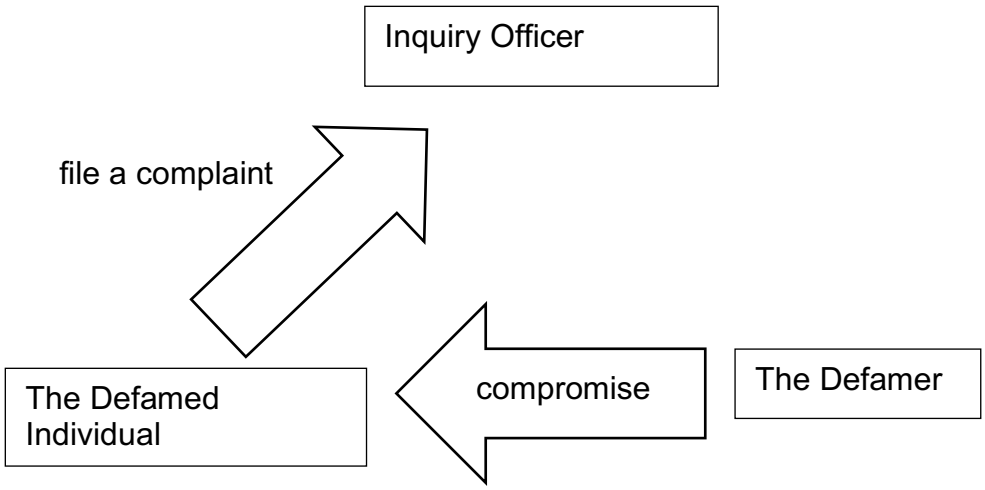

figure 1.2

[24] For the detail of this example see section 3.2.5.1

The Criminal Code, however, does not prescribe the offence of insult as a compromisable offence. The above compromisable process cannot be used by insulted individuals. In other words, the insulted individuals cannot require their insulters to apologise as a condition to settle their dispute. In case of insults as a Petty Offence, the Criminal Procedure Code prescribes that this type of offence can be settled if the alleged perpetrator pays the fine as fixed by the inquiry official[25] (see figure 1.3). Therefore, insulters can easily settle their dispute by paying the fine without having to apologise to their victim, or even to acknowledge its wrongfulness. Most importantly this process does not require the victim's consent. So the victim of an insult may end up with no real restoration of their personality right from being harmed.

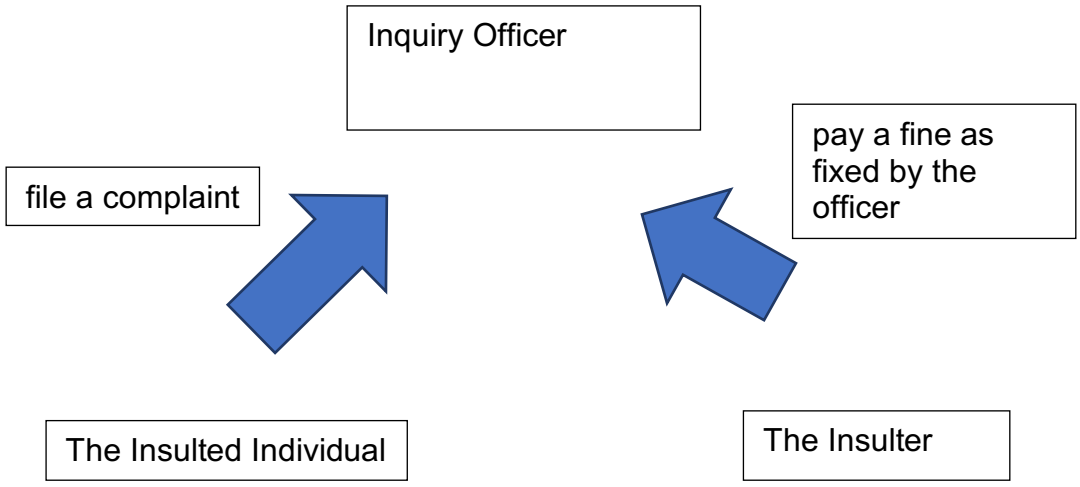

figure 1.3

This example shows that the rule governing the offence of defamation provides better protection to the personality right than that of the offence of insult. This is because the defamed victims can choose whether they want to compromise their dispute or not, but the insulted victim cannot be involved in the settlement process. This problem is caused by different specific rules applicable to defamation and insult. I aim to address this

[25] The Criminal Procedure Code, s 37 sub-sec (2)

problem by proposing an amendment to the Criminal Code to provide suitable protection to insulted individuals.

The problem of different rules between insult and defamation was already discussed by previous literature but mainly in the context of criminal law. However, I suspect whether their argument is still wholly valid. Pentakulchai had studied Na-Nakorn's argument mentioned above[26] by referring to a legal history of these offences.[27] He too suggests that both of these offences protect personal honour and proposes that the offence of insult should be relocated into the same chapter as the offence of defamation.[28] If the former is relocated, the specific rules under the latter offence will also apply to protect insulted individuals.[29] The relocation will provide better protection to these individuals.[30] However, as I mentioned, it is unnecessary from the perspective of Thai law to identify the specific interest being protected under the offences of defamation and of insult because both of them protect the personality right from being harmed by different content. Furthermore, the argument that the offence of insult protects *the* interest in honour may be outdated. This is because in 2014 the Supreme Court of Thailand in its the *Decision No 3711/2557* (2014) explained that insulting an individual in their presence is criminalised to prevent the physical fight between the insulted individual and the insulter after the former being insulted.[31] This decision implies that this form of insult also has an aim to preserve public order.[32] The argument that the offence of insult protects *the* interest in personal honour (as an aspect of personality right) may no longer be correct. Therefore, I want to question whether the proposal that the *whole* offence of insult should be relocated into the same chapter remains reasonable.

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[26] See the accompanying text of footnote 9

[27] Chalermchaisri Pentakungchai (2009), 'Protection of the Honour: A Study of Legal Virtues in Offences on the ground of Insult in comparison with Defamation' (LLM thesis, Dhurakit Pundit University) <http://libdoc.dpu.ac.th/thesis/132912.pdf> accessed 29 July 2019, 54-9; A legal history of these offences will be discussed in section 3.3.1

[28] ibid 125

[29] ibid

[30] ibid

[31] <https://deka.supremecourt.or.th>accessed 13 August 2019

[32] The detail of this decision will be discussed in section 2.2.

The above literature review shows that a proposal to improve the offence of insult to provide suitable protection to an insulted individual should clearly identify the aim (or aims) of the offence of insult. My proposal will evidently show the similarity of the offences of insult between of defamation before asserting that the former should be a part of the latter. It must also show that the offence of defamation provides better protection to the personality right than the offence of insult. My proposal to improve the offence of insult will be different from Pentakulchai because I will argue that this offence aims to protect an aspect of the personality right[33] and will compare with the aspect protected by the offence of defamation.[34] The identification and comparison will help me consider whether it is suitable to relocate the *whole* offence of insult into the Offence of Defamation Chapter for more suitable protection to an insulted individual. Moreover, this research will not only limit to the criminal aspect of insults as Pentakulchai. The law of insult in the context of civil law will also be analysed. I will discuss how civil law protects an individual from being insulted and being defamed in chapters 3 and 4. This will support my argument that the Thai law of defamation provides better protection to the personality right than the law of insult. I will propose amendments to the Criminal Code and the Civil and Commercial Code which will provide more suitable protection to insulted victims than the current law.

Although the literature mentioned above focuses on criminal law, it does not explain why an insult should be a crime. My proposal will also consider this issue by discussing concepts which have been used in other countries to provide a rationale for a law having similar functions. As Oster states in his study to understanding law of defamation: 'theory helps us answer deeper "why questions"'.[35] The interest protected under the Thai law of insult as found in chapter 3 will be examined at a conceptual level in chapter 5. The examination will find a rationale for Thai law to regulate insults and answer whether an insulted individual should be protected by both criminal and civil law, or they are sufficiently protected under civil law. My proposal to improve the Thai law of insult will also be examined at the conceptual level.

[33] See section 3.2
[34] See section 4.3.1
[35] Jan Oster, Theories of Reputation. in Andras Koltay and Paul Wragg (eds), *Comparative Privacy and Defamation* (Edward Elgar Publishing 2020) 48

Not only will this thesis focus on how an insulted individual should be suitably protect under Thai law, but I will also analyse the extent to which the protection provided affects the right to free expression of individuals. Since the law of insult regulates speech to protect an insulted person, the risk is always that the law may disproportionately limit the right to free expression of individuals, which is a constitutional right protected under the Constitution of Thailand BE 2560 (2017).[36]

In theory, the Thai law of insult focused on this research can limit the constitutional right to free expression, but this law has not generally been regarded as a threat to this constitutional right. When international organisations accuse Thailand of limiting this freedom, they do not mention the law of insult as the threat. The organisation "Article19",[37] for example, accuses the Thai law of defamation both in criminal and civil aspects of limiting the freedom of expression of individuals and the media.[38] Article19 also mentions other Thai laws affecting this freedom, being the Press Registration Act BE 2550 (2007),[39] the *lèse-majesté* offence,[40] the Computer Crime Act (2007).[41] The organisation points out that the offence of defamation has a very high penalty,[42] which can imprison defamers; thus, the offence threats anyone who wants to criticise the authorities.[43] Article19 argues that newspapers in Thailand are afraid of this offence; thus, they would only publish news relating to government wrongdoing when they have substantial evidence to prove their allegation before a court.[44] We can see the same phenomenon again when the Human Rights Committee asked Thailand about the right to freedom of expression: the committee focused on the offence of defamation and did not mention anything about the offence of

[36] This issue will be discussed in section 2.3.
[37] Article 19 is an organisation, which takes its name from Article 19 of the Universal Declaration of Human Rights, aims to promote the rights of freedom of expression and to information see Article 19, 'Impact of Defamation Law on Freedom of Expression in Thailand' (*Article19,* July 2009) <https://www.article19.org/data/files/pdfs/analysis/thailand-impact-of-defamation-law-on-freedom-of-expression.pdf> accessed 25 November 2019
[38] ibid [1.1]
[39] ibid [10.1]
[40] ibid [10.2]
[41] ibid [10.3]
[42] ibid [1.3]
[43] ibid [3.3]
[44] ibid [3.3]

insult.[45] The committee too regarded the offence of defamation as a threat to the freedom of expression by asking the Thai Government:

> [P]lease indicate the number of criminal proceedings brought forward during the period under review against human rights defender, journalist and other civil society actors for defamation (art. 326-328 of the Criminal Code).[46]

Thailand replied by saying the Government has the number of cases under the offence of defamation ss 326-328, but there is no official record of the cases against human rights defenders, journalists and other civil society actors.[47] Thailand points out that 'a clear definition and scope of some categories, particularly human rights defenders, is still debated and a work in progress among relevant agencies.'[48]

I deduce that these organisations do not regard the offence of insult as a threat to the right to free expression of individuals because the penalty of the offence is very low when compared to the offence of defamation. The penalty of the offence of insult is imprisonment for not exceeding one month or a fine not exceeding ten thousand baht (250£) or both.[49] The penalty of the offence of defamation can be significantly higher as imprisonment not exceeding two years and a fine not exceeding two hundred thousand baht (5,000£).[50]

Although my research focuses mainly on the Thai law of insult and not defamation, these organisations' accusations on the law of defamation may be also applied to the law of insult because both of these laws regulate speech to protect individuals.[51] It is suitable for me to analyse the above arguments of these organisations. First, I am not convinced

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[45] UN Human Rights Committee (HRC), *List of issues in relation to the second periodic report of Thailand*, 12 August 2016, CCPR/C/THA/Q/2, available at: https://www.refworld.org/docid/591e9cfb4.html [accessed 7 April 2021] [18]

[46] ibid

[47] Human Rights Committee, 'Replies of Thailand to the list of issues' (*United Nations Human Rights Office of the High Commissioner*, 11 November 2016) <https://tinyurl.com/293uje3m> [107]

[48] ibid

[49] The Criminal Code, s 393 (see the detail of this section in the text of footnote 2)

[50] The Criminal Code, s 328 (see the detail of this section in the accompanying text of footnote 289)

[51] The detail of the similarities between the offences of insult and of defamation will be shown in section 4.2.2.

with Article19's accusation that the offence of defamation is a *serious* threat to the freedom of expression because it is not easy for an individual to be found guilty under the offence of defamation. As we will see in chapter 4, an individual who is guilty of the offence of defamation must intentionally defame another individual.[52] Furthermore, the Offence of Defamation Chapter under the Criminal Code prescribes the *specific* justifications and defence to defamers. These provisions guarantee that in some circumstances individuals can express their opinions or statement without being liable under the offence of defamation.[53] These provisions can be seen as legal provisions guaranteeing that individuals will have their right to free expression. Moreover, the offence of defamation in Thai law allows the defamed victim and defamer to legally compromise their dispute.[54] There will be no criminal sanction imposed on the defamer if the dispute is settled.

Secondly, the criticism of the Human Rights Committee may be rather unfair in asking for numbers of '*cases against human rights defenders, journalists and other civil society actors,*' since the justifications and defences apply to everyone. As I briefly mentioned in the above paragraph, the Offence of Defamation Chapter prescribes the *specific* justifications and defence which guarantees that everybody in some circumstances can express their opinion or statement without being liable under the offence of defamation. They do not have to be human rights defenders or journalists to claim these justifications and defence. As we will see in this thesis, these rules apply to every individual regardless of who they are.[55]

Since the law of insult has not been regarded as a threat to the right to free expression of individuals, it is interesting to analyse whether its legal implementation actually limits that right.[56] Moreover, as will be shown in chapter 2, Thai law does not have a clear process to show that the right to free expression is balanced with the law which limits this right. Therefore, it is interesting to investigate how Thai law can be improved in this area.

[52] See section 4.3.3
[53] See section 4.3.4
[54] See section 4.3.5
[55] See section 4.3.4
[56] The finding of this analysis will be shown in the accompanying text of footnote 214.

The application of the law of insult in the online environment will be also discussed in this thesis. But there is no *sui generic* law regulating insults and defamation online.[57] This is because as we will see the provisions of Thai law which traditionally regulates insults and defamation are broad enough to regulate them.[58] However, I cannot analyse the detail of every aspect of online communication such as issues of online users' identity which cannot be easily identified; or issues of liability of Internet Service Provider. This is because these issues under Thai law are covered by the Computer Crime Act 2007,[59] a *sui generic* law regulating online crimes, but only specific offences are criminalised under this Act. These do not include defamation and insult. Illegal acts occurred online (beyond the scope of the Computer Crime Act) must be regulated by legal provisions of other laws. The issues of users' identity and liability of ISPs would be better analysed in research studies which aim to examine the Computer Crime Act 2007 or the Thai criminal or civil procedural laws.

The above research question and its background show that a proposal to improve the Thai law of insult must concern these issues: (i) the interest (or interests) as protected under the law of insult; (ii) the relationship between insult and defamation under Thai law (iii) the impacts of the law of insult on the right to free expression of individuals; and (iv) the need to protect an insulted individual by criminal as well as by civil law. The first three issues above will be discussed and analysed in the context of Thai law. The fourth will be explored at a more conceptual level.

In order to fully contextualise this research for those other than Thai readers, I will discuss the background of Thai law in chapter 2 before showing the research's findings. That chapter will also discuss the third issue: the status of the constitutional right to free expression and its relationship with the law of insult. Chapter 3 will discuss the first issue to provide a clear understanding of the Thai law of insult and identify its problems. Chapter 4 will show the relationship between insult and defamation under Thai law. It will evidently show that the law of defamation has specific rules which provide more suitable protection

[57] See the Computer Crime Act BE 2550 (2007) (amended 2560 (2017)) s 14
[58] See sections 3.2 and 4.3
[59] The Computer Crime Act 2007 (as amended 2017) addresses the process to identify online perpetrators in s 18 and liability of internet service providers in s 15.

to defamed individuals than the protection to insulted individuals provided by the law of insult. I will propose that the law of insult should protect an insulted individual at the same level as the law of defamation protects defamed victims.

The fourth issue, discussed in chapter 5, will move from Thai law to a conceptual level. The Thai law of insult and my proposal will be examined at the conceptual level to answer whether Thai law needs to protect an insulted individual by the criminal and civil law. My proposal to provide suitable protection to the insulted individual will also be examined to find out whether it can be supported by existing legal concepts.

Moreover, I will also compare the Thai approach with the law of insult of a Western country to find out whether my proposal can be supported by the comparison or whether there is another area of this law needs to be improved.

The original contribution to knowledge that this thesis aims to achieve will primarily be found in the proposal to improve the Thai law of insult; it will also be found in the detailed analysis of the existing Thai law itself. The originality is shown because this proposal is constituted from (i) the analysis of the Thai law of insult in both criminal and civil aspects, (ii) the examination of the Thai law at a conceptual level; and (iii) the comparison with the relevant rules of a developed country (see figure 1.4). The research methodology which will be used to constitute this proposal will be discussed in the next section.

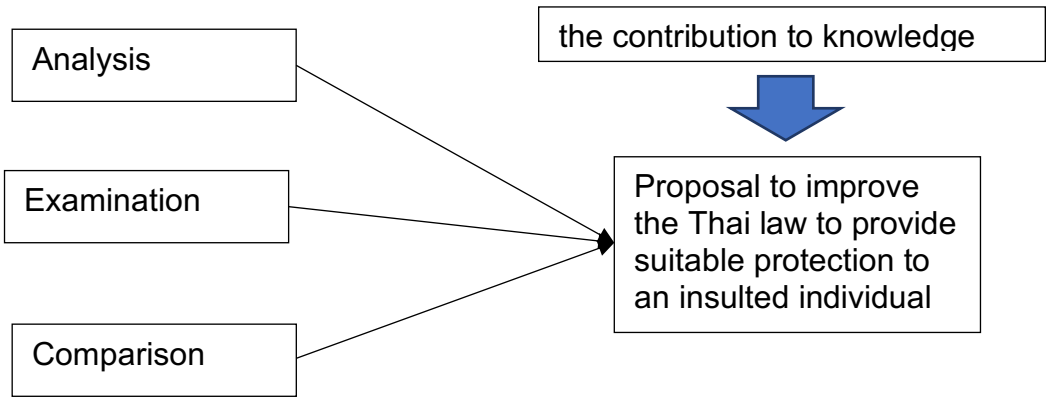

figure 1.4

1.2 Research Methodology and Findings

This research is doctrinal research which is 'the research process used to identify, analyse and synthesise the content of the law' as explained by Hutchinson.[60] This is because this research aims to show the content of the Thai law of insult and to argue that the Thai law of defamation provides more suitable protection to defamed victims than the law of insult provides to insulted victims. This research has to analyse and synthesise these laws to show that the latter is more suitable than the former. As the aim of this research is the content of the law of insult, doctrinal research method is appropriate for this aim because it will provide a proper understanding of legal doctrine. This understanding will be a foundation for further research either multidisciplinary or empirical research.[61]

The researcher using this doctrinal research method, Hutchinson explains, must examine the legislation and case law critically to combine and synthesis every significant aspect to 'establish an arguable correct and complete statement of law on the matter in hand.'[62] Thus, this method will help me provide a proper understanding on how Thai law of insult and of defamation protect an individual from being insulted or defamed. The amendments which I propose to provide more suitable protection to insulted victims will originate from the clear understanding of the Thai law of insult and of defamation.

To conduct the doctrinal method, Hutchinson says that it involves 'a two-part process: (i) locating the sources of the law and (ii) interpreting and analysing the text.'[63] By using this method, I combine information and data on the Thai law of insult and of defamation from secondary commentaries, Supreme Court Decisions, and scholarly publications to show how these laws apply to protect individuals.

[60] Terry Hutchinson, Doctrinal Research: Researching the Jury. in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2013) 9
[61] Rob Van Gestel and Hans W Miclitz, Revitalizing Doctrinal Research in Europe: What About Methodology? (European University Institute, Italy, EUI Working Papers Law 2011/05 2011) 28
[62] Hutchinson (n60) 9-10
[63] ibid 13

I intentionally put the commentaries before the Decisions because the status of the Supreme Court Decisions in Thailand is not binding authority as I will show in section 2.2. They do not bind the lower courts or the Supreme Court in subsequence cases though some decisions may have highly persuasive authority. The commentaries should be the starting point for those who use the doctrinal method in Thai law because the commentaries aim to describe how law applies in Thai society and provide Supreme Court Decisions as examples of legal applications. The commentaries being used in this research are written or edited by well-known legal scholars or former Supreme Court Judges or Judges in Thailand.[64] Some of the legal descriptions written by them were used by the Supreme Court in its decisions, such as the definition of insult provided by Tingsapat has been used in many Decisions.[65]

The legal commentaries will help me as a researcher on Thai law to locate relevant decisions and analyse them to provide clear understanding of the law. The commentaries will also help identifying 'key words' which should be used to search into the Supreme Court database website <http://deka.supremecourt.or.th>. This will allow me to find more updated Decisions which have not yet published in the commentaries. For example, I used the Thai term of 'humiliating,' which is one of the meanings of insult to search in the database and found more recent decisions (2020) which the Court used this definition to determine whether the defendant *insulted* the injured party.[66]

As court decisions are used as examples of legal interpretation, I will not limit my citation only to those of the Supreme Court or those published officially. Lower court decisions or the Decisions published as a news will also be analysed in this research because these

[64] For example, as shown in footnote 10, Tingsapat was a Supreme Court Judge and the Dean of the Faculty of Law, Thammasart Universityone of the oldest law school in Thailand; Kiatkajorn Wachanasawas who wrote *Textbook on Criminal Law* was also the Dean of the Faculty of Law, Thammasart University ('Biography of Professor Dr Kiatkajorn Wachanasawas (*Readgur*) <https://kasets.art/Fk1bl1> accessed 7 October 2019); Krailerk Kasamsant who wrote the Commentary on the Criminal Code Sections 288-366 was a Supreme Court Judge. ('Doctor of Philosophy Honorary Award Mae Fah Luang University' (*Mae Fah Luang University*, 18 February 2017) <http://archives.mfu.ac.th/database/files/original/3a72f2514683ba1c9779af9046cd617f.pdf> accessed 6 June 2022))

[65] The *Supreme Court Decisions No 1608/2564* (2021)*, 3851/2563* (2020)*, 13173/2558* (2015)*, 8919/2552* (2009)*, 1623/2551* (2008)

[66] The *Supreme Court Decision No 3851/2563* (2020) will be discussed in section 3.2.1.

decisions will also make my understanding of the law clearer. The scholarly publications will also be analysed because some of them provide legal history or analyse particular legal issues which are important to this research. These publications will help providing the clear picture of the Thai law of insult and of defamation.

The above discussion shows that the doctrinal method will help me explain how the law of insult applies and it will help me argue that the law of insult does not provide suitable protection to the personality right when comparing to the law of defamation. And the method will help me identify the aspect (s) of the Thai law of insult needed to be improved. This method will support my proposal to improve the Thai law of insult to provide suitable protection to personality right. The clear understanding of the law of insult and of defamation will be shown in chapters 3 and 4 respectively.

Not only will I analyse the law of insult to provide the clear understanding of the law, but in chapter 5, I will also examine the law of insult at the conceptual level by using the concepts which have been used to provide a rationale for protecting that the same or similar personality right in other countries. The examination should provide an answer whether Thai law should retain its current approach (protecting an insulted individual through both criminal and civil law) or adopt a new approach (protecting only through civil law).

Finally, in chapters 6-8, this research will study how another country which uses the approach which found in chapter 5 to identify which aspects of the Thai law of insult should be or can be improved. The doctrinal research method will be used to understand how this country uses its law to protect an insulted individual. By testing Thai law against the approach of another country will assist me to suggest which aspect of Thai law of insult can be improved.

The concept (which will be used to evaluate in chapter 5) and the country (which will be studied in chapters 6-8) are depended on the findings of their previous chapters. This is because I have to identify which interest is actually protected under the Thai law of insult to know which concept should be used to examine the law in chapter 5. Similarly, I must

examine the Thai law of insult at a conceptual level to know which approach Thai law should use to protect insulted individuals. Then I will compare Thai law with a developed country having that approach. Therefore, the main findings of this research must be presented here to justify the concept and country which will be used to evaluate and compare in this thesis.

In the criminal aspect, the Thai Criminal Code regulates two forms of insult: (i) insulting an individual in their presence; and (ii) insulting an individual by means of communication to the public. I will argue in chapter 3 that the personality right is *an interest* protected under the offence of insult, but the right is *not the only interest* protected under the offence. The first form aims to preserve public order as well as protecting the personality right. I will argue that it is suitable for Thai law to criminalise this form of insult, because this form of insult concerns public order which is an aim of criminal law. I will argue that the second form mainly aims to protect the personality right and will argue in chapter 4 that the law of defamation also aims to protect the personality right but in the different aspect. Chapter 4 will show that the offence of defamation provides more suitable protection to the personality right than the law of insult. This is because specific rules to protect defamed victims do not apply to protect insulted victims as I briefly mentioned. I will argue that insulted victims will be suitably protected by applying some rules of the law of defamation to insults. Specifically, I will propose an amendment to the Criminal Code for the second form of insult to be relocated into the same chapter as the offence of defamation.

In the civil aspect, I will show in chapter 3 that insulted individual can use the general principle of tort law (stated in the Civil and Commercial Code s 420) to sue their insulters. I will argue that the civil law of insult also aims to protect the personality right which is the same interest as the second form of insult. However, as in criminal law, I will argue that the current law does not protect insulted victims at the same level as it protects defamed victims as will be shown in chapter 4. The Civil and Commercial Code protects defamed victims by the specific rules, one of which allows defamed victims to ask the Court to order their defamers to take an appropriate measure to restore the injured party's reputation. The injured party, for example, can ask the Court to order the defamer to apologise as

compensation. Similar to the criminal aspect, I will propose an amendment to the Civil and Commercial Code for applying this rule to protect an insulted individual.

Since chapter 3 will show that the personality right is an interest as protected under the Thai law of insult, chapter 5 will examine this law and my proposed amendment with a legal concept which has been used to provide a rationale to the law which protects the similar interest. The Thai law and my proposal will be mainly examined through the prism of Post's concepts of reputation[67] which he adopted from Anglo-American common law. Although this concept is adopted from the common law, these concepts have been used to discuss laws which protect a personality right in many jurisdictions including Germany, which is a civil law country.[68] I will argue in chapter 5 that Post's concept of reputation as dignity can be a basic to provide a rationale for the Thai law of insult which mainly protects the interest in the personality right which is harmed by insults.

As will be clearly shown in section 5.3, Post adopted this concept from a work of Goffman.[69] This concept is complicated because it contains many technical terms such as 'the dignity of a person which must be confirmed by the respect' or 'rules of civility' which only regulate 'speech'. [70] But as we will see in section 5.3.1 Goffman's work does not focus on 'dignity' nor 'rules of civility.' He focuses on the self of an individual and the nature of deference and demeanour.

In Post's concept, he argues that an individual (A)'s reputation as *dignity* is harmed when another individual (B) who communicates with this individual (A), violates their society's *rule of civility*. The violation of this rule will be clearly shown when it occurs in front of a third person because this person may either see B as a person having no social competence or this person may agree with B and may regard A as an individual who should *not be treated with respect*, which is the case where *the reputation as dignity* is injured (see figure 1.5).

[67] Robert C Post, 'The Social Foundation of Defamation Law: Reputation and the Constitution' (1986) 74 Calif L Rev 691
[68] See the accompanying text of footnotes 432-434
[69] Post (n67) 709 (citing Erving Goffman, *Interaction Ritual* (Anchor Books 1967) 84-85)
[70] ibid 710

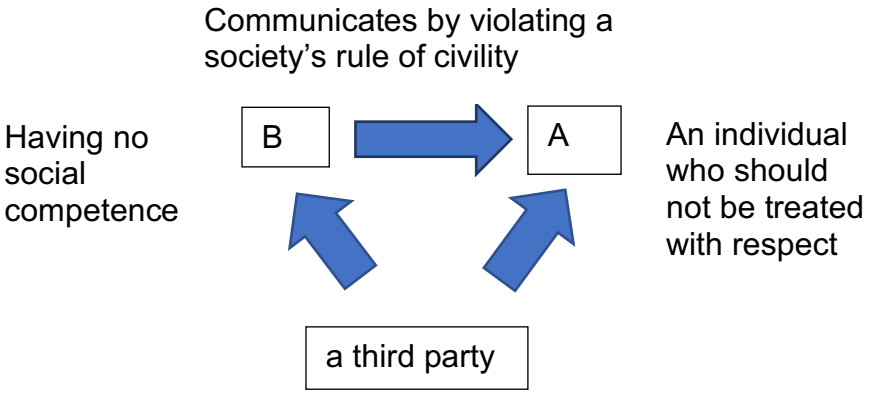

figure 1.5

Post argues that the law of defamation can be used to protect this *dignity* because this law allows a person who felt their *reputation as dignity* was injured to use a court as an arena to show the society that he (A) should not be treated that way.

I will show that the term *reputation as dignity* is the *self* of an individual as explained by Goffman.[71] Accord to Goffman, this *self* is created through his or her demeanour and is confirmed by acts of deference done by others, such as when a nurse responds to a doctor politely, this act confirms the doctor's self which he has built.[72] And I will clarify that an individual who violates a *rule of civility* is actually the individual who refuses to perform an act of deference to confirm the self of another individual. And we will see that the refusals to perform include the use of speech to harm the self of an individual. For example, Mr A has created his self through his behaviours as an honest politician and people in his society respect him as a good politician. Instead of showing a respect to Mr A, Miss B accuses him of being a dishonest person to a third party. In this case, the self which Mr A created as an honest politician is harmed.

In cases where the self of an individual is harmed by speech to a third party, the law of defamation can protect this self because the law allows the injured individual to have a

[71] Goffman (n69) 47-95
[72] ibid 61

court as an arena for him to argue that he should not be treated that way. Following the above example, Mr A as the injured person can use the Court as an arena for him to claim that he should not be seen as that kind of person. Mr B can also argue in this arena that it is justified to accuse Mr A.

From this clarification, I will argue that in the context of this research the *self* of an individual is the personality (or self-identity) of an individual. This personality is protected by the law of insult as 'the personality right.' This personality can be harmed by people who do not perform an act of deference of Thai society. Similar to defamation, the refusals include the use of speech to harm the self (or personality) of an individual. In insult cases, this personality is harmed when a person disparages, humiliates, or verbally abuses another person. The law of insult can be a tool to protect this personality from being harmed by allowing the insulted person to use a court as an arena (a forum) to heal his injuries. He can argue to the court to claim that those insulting words should not be said to him.

Furthermore, I will argue that the arena under Thai law is not limited to the Court. As we will see, under the Thai offence of defamation, it is possible for defamed victims to use other places such as police stations as arenas to heal their harmed. I will argue that insulted victim should also be able to use these arenas, too.

The above finding shows that a rationale for having the law of insult is to provide an arena for insulted victims to protect their personality. This finding, however, does not answer whether Thai law needs to protect an insulted individual by both criminal and civil law. This is because this finding only suggest that insulted victims and their insulters should have an arena to argue and defend their case. It would not be important if that arena is a criminal or civil court. Therefore, to answer this question, I have to consider which approach to protect an insulted individual is most *suitable* for Thai society. I will argue in section 5.6 that having both criminal and civil law of insult is indeed suitable to Thai society, but the Criminal Code and the Civil and Commercial Code ought to be amended as I propose.

Since my finding in relation to the above conceptual question is positive for protecting insulted individuals by both criminal and civil law, the Western country which will provide valuable lessons to Thailand must be the country having this approach. I choose to test Thai law against the approach of German law because of these reasons. First, the German Criminal Code prescribes the offence of insult in the same chapter as the offence of defamation. This is similar to my proposal to improve the Thai law of insult in the criminal aspect. The application of the German criminal law can show how the offence of insult as a specific offence impacts German society. Secondly, the general principle of tort law in the Thai Civil and Commercial Code, which is applied to protect an insulted individual, is copied from the German Civil Code. Therefore, to suggest an improvement to the Thai law in this area has historical precedent. Finally, the German constitutional provision which guarantees that human dignity shall not be violated was also copied into the Constitution of Thailand.[73] It is interesting to see how this provision impacts personal honour protected by the German law of insult. Furthermore, the German Constitution Article 5(1)(2) asserts that the right to free expression can be limited by a legal provision which protects personal honour.[74] The content of this Article is similar to the constitutional provision regarding the same constitutional right in Thai law,[75] which also prescribes that the right can be limited by a legal provision which protects the right of other persons. Therefore, it is interest to see how German law balances laws protecting an insulted individual with the right to free expression.

The two-part process to conduct the doctrinal method as explained by Hutchinson will be used to discuss German approach to protect insulted victims. First, I located the sources of German law in this area and found numerous pieces of literature which discusses

[73] See the accompanying text of footnote 127

[74] The German Constitution ('Basic Law'), Article 5(1)(2) ((1) *Every person shall have the right freely to express and disseminate his opinions in speech, writing, and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.*
(2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honor.) translated by Christian Tomuschat and others, 'Basic Law for the Federal Republic of Germany in the revised version published in the Federal Law Gazette Part III, classification number 100-1, as last amended by Article 1 of the Act of 28 March 2019 (Federal Law Gazette I p 404)' (*Gesetze im Internet*) <https://www.gesetze-im-internet.de/englisch_gg/index.html> accessed 20 November 2020

[75] See the Thai Constitutional provisions on the right to free expression in table 2.1 page 22 below

German law in the above issues in English.[76] Secondly, I used my experience as a Thai legal scholar to interpret and analyse the text. Since both Thailand and Germany use the Civil-Law legal system and many Thai legal provisions copied from German law, the applications of Thai law are similar to German law. For example, Thai criminal law has a general principle which prescribes that a person is criminally liable only when they commit an offence intentionally, unless there is a provision stating otherwise.[77] This knowledge will help me investigate whether the German criminal law also have this same general principle. The lessons which I will learn from German law will support my proposal to improve the Thai law of insult.

Lastly, it is important to point out that Thailand has no official translation for the Criminal Code, the Civil and Commercial Code and the Criminal Procedure Code. For the Criminal Code, I will use the translation by Netayasupha and others,[78] which is published in 2008. The provisions being discussed in this thesis are not significantly amended except for the penalty for insulting, which was amended in 2014. For the Civil and Commercial Code, I will use the English translation of Na-Nakorn.[79]

the provisions, which were copied into Thai law, because I found that the English versions of the original provision are easier to understand than the translations provided by a Thai author. For the Criminal Procedure Code, I will translate the provisions being used in this thesis by myself.

[76] For example: Oster(n35) ; James Q Whitman, 'Enforcing Civility and Respect: Three Societies' (2000) 109(6) Yale Law Journal 1279; Basil Markesinis, *Markesinis's German Law of Torts: a comparative treatise*, (John Bell, André Janssen and Colm Peter McGrath (eds), 5th edn, Hart Publishing 2019); Donald P Kommers and Russell A Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd edn Duke University Press 2012); Eric Hilgendorf, 'Human Rights, Human Dignity, and the Concept of Honour: A German Perspective' (2017) 25 Cardozo J INT;L & COMP L 499; Gregory J Thwaite and Wolfgang Brehm, 'German Privacy and Defamation Law: the Right to Publish in the Shadow of the Right to Human Dignity' (1994) 16(8) European Intellectual Property Review 336; Peter E Quint, 'Free Speech and Private Law in German Constitutional Theory' (1989) 48 MD L Rev 247

[77] The Criminal Code, s 59(1)

[78] Netayasupha Pisitpit and Watcharavutthichai (n2)

[79] Pinai Nanakorn, *English Translation of the Civil and Commercial Code of Thailand Book I and Book II (with the Official Thai Text*) (Winyuchon 2021)

1.3 Conclusion

This introductory chapter shows that the current law does not provide a suitable protection to an insulted individual when compared to the law of defamation which protects defamed victims. Although previous literature already discussed this issue and proposed a solution, it is questionable whether this solution is still valid because the Supreme Court of Thailand adopted a new approach on the offence of insult in 2014. Furthermore, the previous literature did not cover many interesting issues in this area such as the need for Thai law to protect an insulted individual by both civil and criminal law or how the Thai law protecting this individual is balanced with the right to free expression. Therefore, the solution proposed from this thesis constitutes a new approach and covers those interesting issues as will be shown in the following chapters.

Chapter 2 Background of Thai Law

2.1 Introduction

This chapter will discuss the background of Thai law, showing how the current Criminal Code and Civil and Commercial Code, which contain the law of insult, were results of the reformation of the Thai legal system, which began in the reign of King Rama IV and was successfully completed in the reign of King Rama VII.[80] In the reign of King Rama IV (1851-1868), Thailand had to reform its legal system because Western powers more or less encircled Thailand and western people who came to conduct business in Thailand accused Thai law of being uncivilised. The King Rama V later decided to modernise Thai law by using the legal tradition of Continental European countries, which codify their rules into code law. Section 2.2 will describe this background to provide the context of Thai law and will also show that disputes under the Criminal Code and Civil and Commercial Code are decided by the Court of Justice, which has the Supreme Court of Thailand as the highest Court of Justice in Thailand.

Not only will this chapter describe the history of the Codes which contain the law of insult, but it will also describe the background of Thailand as a democratic country. The Thai political regime was revolutionised from the absolute monarchy to the constitutional monarchy in 1932 during the reign of King Rama VII. Unlike the modernisation of Thai legal system, the revolution was initiated by a group of elite citizens called themselves as 'the People's Revolutionary Party.'[81] The King Rama VII was forced to relinquish his absolute status and became a constitutional monarch. Since the revolution Thailand has had the Constitution of Thailand as the highest hierarchical statute in Thai legal system. However, the political situation has not been stable. Thai democracy has faced many military coups, nine of which were successful.[82] One of the consequences of this is that there have been many constitutions repealed and promulgated in Thailand, there have

[80] Now it is the reign of King Rama X of the Rattanakosin Era (RE) in Thailand.
[81] See James R Klein, 'The Constitution of the Kingdom of Thailand, 1997: A Blueprint for Participatory Democracy' (*Constitution Net,* 8 March 1998), 5 <http://constitutionnet.org/vl/item/constitution-kingdom-thailand-1997-blueprint-participatory-democracy> accessed 16 September 2020
[82] See the accompanying text of footnotes 114-116

been many constitutions repealed and promulgated in Thailand. The fundamental rights, including the right to free expression, which should be the main interest of any constitution has not been the main interest under Thai Constitutions. These fundamental rights were clearly recognised under the 1997 Constitution and the constitutions since then have had the same pattern of recognition. The 1997 Constitution also established the Constitutional Court to rule on constitutional matters. However, as we will see in section 2.3.3, the main authority of the Court is to ensure that legal provisions do not contradict with the Constitution, but the Court is not authorised to review the constitutionality of decisions of the Court of Justice. Therefore, the Constitutional Court cannot rule whether a sanction imposed on the defendant by the Court of Justice limit their constitutional right. I will argue that the authority to review the Court of Justice's decisions is significant because it allows the Constitutional Court to guarantee that the sanction imposed on defendants will not disproportionately limit their constitutional right.

2.2 Background of the Criminal Code and Civil and Commercial Code

Kraivixien describes the reign of King Rama IV as 'a new era of Thai foreign relations.'[83] Thailand had entered into the Bowring Treaty with the United Kingdom and other similar Treaties with other western countries.[84] These treaties introduced the system of exterritoriality to Thailand.[85] This system limited 'the sovereignty of the country and undermined its very existence as an independent state because the nationals of the foreign Treaty Power were removed from the jurisdiction of the King's courts of justice,' as explained by Kraivixien.[86] These western countries established their consular courts in Thailand to handle disputes regarding their people.[87]

At that time, Thailand used the 'Law of the Three Great Seals,' as pointed out by Boonchalermwipas.[88] He asserts that this Law, especially in the fields of criminal law and criminal procedure law, was uncivilised.[89] This was because this Law allowed torture as

[83] Tanin Kraivixien (1963), 'Thai Legal History' 49 Women Lawyers J 6, 9
[84] ibid 9
[85] ibid 9
[86] ibid 9
[87] ibid 10
[88] Sawang Boonchalermwipas, *The Thai Legal History* (17th Winyuchon 2018) 140
[89] ibid

a means of extorting evidence and confession and had cruel penalties such as cutting the perpetrator's hand or foot; or whipping the perpetrator with a wire.[90] Therefore, Thailand was forced to reform its legal system in order for the exterritoriality clauses in these Treaties to be repealed. Kraivixien points out that the abrogation was completed in 1938 during the reign of King Rama VII.[91]

Kraivixien points out that Thai law was significantly reformed during the reign of King Rama V (1868-1910).[92] He says that the King established the Ministry of Justice in 1892 to unify the judicial system. The King assigned Prince Rabi of Rajburi who graduated from the University of Oxford to be the leader of the committee to revise the 'Law of the Three Great Seals.' The Prince suggested the King to replace the traditional rules by enacting what would be seen as more civilised rules into Acts. Torture as a means to extort evidence was finally prohibited and the cruel punishments were replaced by well recognised penalties. Furthermore, Kraivixien points out that numbers of legislation were also enacted to serve the development of Thai society. In this point, Boonchalermwipas says that the King promulgated many Acts including the Royal Decree on Defamation by Speech or by Publishing of Untrue Statements RE 118 (1900).[93]

Kraivixien also points out that during this period western legal concepts were adopted into Thai law.[94] He asserts that Thai law had initially been influenced by English law because many distinguished members of Thai legal profession including Prince Rabi, graduated from England, and were acquainted with English law. In this regard, the 1900 Royal Decree on Defamation was influenced by English law because Prince Rabi was the president of the committee to draft this Decree as argued by Pentakulchai.[95] Kravixien argues the content of this Decree was similar to the English defamation law.[96]

Although Kraivixien accepts that the English system was excellent, he argues:

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[90] ibid 142
[91] Kraivixien (n83) 16
[92] ibid 10
[93] Boonchalermwipas (n88) 198; Some rules of this Act will be discussed in section 4.2.1.
[94] Kraivixien (n83) 10
[95] Pentakulchai (n27) 74
[96] Kraivixien (n83) 10

> [I]t was peculiar to the English circumstances in which it originated and was developed; and it seemed most impracticable for any state to adopt a system of law that could not be found in any accessible form.[97]

Therefore, Kraivixien says, Thailand turned to the Continental tradition of codification. Boonchalermwipas argues that the King wanted Thailand to use this tradition because of a number of reasons.[98] First, codification of the law would combine Acts which had similar issues into one code, with the result that the 1900 Royal Decree could become a part of the Criminal Code. It would be easier for Thai court to use this Code to decide a case. Secondly, some Acts were outdated and inconsistent with the modern legal concept which had been already influenced in Thailand at that time. Codification would allow Thai law to adopt modern legal concepts such as the principle that safeguards the right of an accused perpetrator.

Kraivixien describes how the King set up a Royal Commission on codification in 1897.[99] This Commission consisted of a number of famous members of the legal profession both foreigners and Thais and included Prince Rabi. The first Criminal Code was successfully enacted in 1908. Kraivixien explains that this Code contained 'well-recognised principles of law' with certain modifications for Thai tradition.[100] Both Kraivixien and Boonchelermwipas point out that this Code was influenced by many criminal codes of European countries such as Germany, France, Hungary, the Netherland and Italy.[101] The 1908 Criminal Code was finally replaced by the current Criminal Code, which dates to 1956. In Boonchalermwipas' view, the rules of the current Criminal Code are not significantly different from those of the 1908 Code.[102] Apart from the 1908 Criminal Code, Kraivixien says that the Royal Commission also drafted the Civil and Commercial Code, which is the current civil code. Kraivixien points out that it took over thirty years to draft. This Code was influenced by German, French, Japanese and Swiss law. He points out

[97] ibid
[98] Boonchalermwipas (n88) 205
[99] Kraivixien (n83) 10
[100] ibid 14
[101] ibid 14; Boonchalermwipas (n88) 245
[102] Boonchalermwipas (n88)

that ‘the Code has been universally recognised as thoroughly sound piece of codification and the measure of success achieved by the Code has been great.’ The current Criminal Code and the Civil and Commercial Code have provisions which are currently applied to protect an individual from being insulted.

The Commission also drafted the Criminal Procedure Code, the Civil Procedure Code, and the Law on the Organization of the Courts. [103] The Criminal Procedure Code and the Civil Procedure Code have been currently used until now, but the Law on the Organization of the Courts was replaced by the Act for the Organisation of Courts of Justice B.E. 2543. According to this Act, disputes under criminal law and civil law are decided by the Court of Justice,[104] which has three levels: (i) the Courts of First Instance; (ii) the Courts of Appeal; and the Supreme Court of Thailand (see figure 2.1). Since insults are disputes under criminal and civil law, these matters are decided by the Court of Justice.

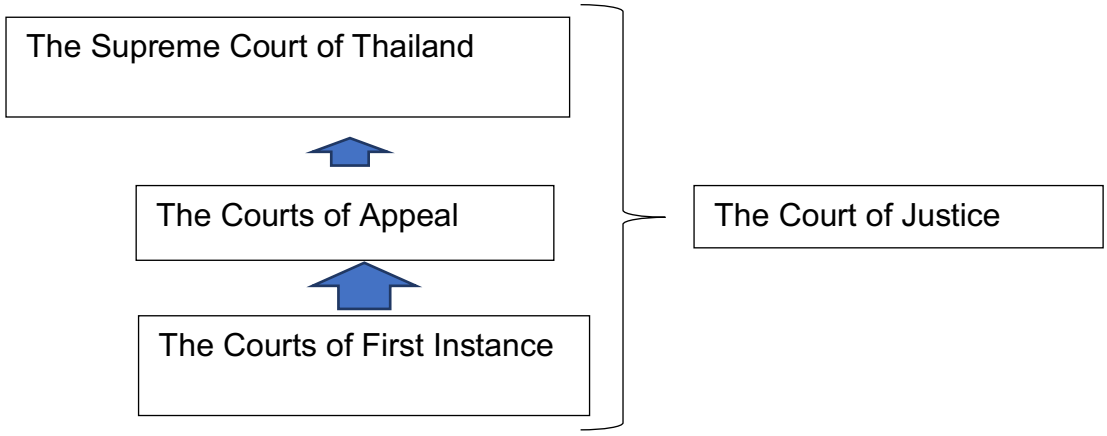

figure 2.1

Regarding the Supreme Court, as it serves a country using the Continental[105] tradition of codification, Kraivixien suggests that the Court is not bound to follow its own decision[106] though he points out that some Supreme Court decisions may have highly persuasive

[103] Kraivixien (n88) 14
[104] The Act for the Organisation of Courts of Justice B.E. 2543, s 1
[105] I am using ‘Continental’ to refer to the civil law systems in continental Europe, as opposed to the common law system in England.
[106] Kraivixien (n88) 23

authority. Nor do the decisions of either the Supreme Court or lower courts bind the Court of Justice in subsequence cases. The Court in latter case does not have to mention the previous decision to support its decision when it follows the old ruling. Nor does the Court have to explain why it makes a different ruling when the fact of its case is similar to the previous decision. This can be supported by the *Supreme Court Decisions No 20593/2556* (2013) *and No 3711/2557* (2014). These decisions had similar facts which strongly relates to an issue of this research, but the decisions contradict each other. The Supreme Court in both cases interpreted the offence of insult under s 393 of the Criminal Code which criminalises an individual who insults another individual in their presence. The *Supreme Court Decision No 20593/2556* (2013) is not published in the Supreme Court website but it is mentioned by Rattanachai.[107] He said that the defendant had insulted the claimant on a mobile phone and that the Court found the defendant had committed the offence of insult in the presence of the claimant under s 393. Likewise, in the *Decision No 3711/2557* (2014) (which is published in the Supreme Court website) the defendant also insulted the injured party on a telephone call.[108] But in this case, the Court dismissed the charge against the defendant, explaining that the defendant who insulted the injured party on a telephone did not commit the offence of insult, because the defendant and the injured party were not in the same physical location. Although the facts of both decisions were similar, the Court in *Decision No 3711/2557* did not mention the *Decision No 20593/2556*. Nor did it explain why it did not follow the ruling of the previous decision.

In the *Decision No 3711/2557 (*2014), the Supreme Court described that the offence of insult aims to prevent a physical fight between the injured party and the perpetrator after the former being insulted by the latter. This suggests that the offence of insult criminalises an individual who insults another individual in their presence because the offence aims to preserve public order. This decision is not the only case where the offence of insult was regarded as an offence aiming to preserve public order. The *Decision of the Attorney*

[107] Pupanat Rattanachai, 'Interpretation of Criminal Law: Abuse Case by Using Telephone' (2016) 8(3) Journal of Humanities and Social Sciences SRU 125, 140-141 (citing *the Supreme Court Decision No 20593/2556* (2013) The Centre of Cases of the Supreme Court)
[108] The *Supreme Court Decision No 3711/2557* (2014) (n31)

General No 409/2559 (2016) also has the same approach. In this case, the alleged perpetrator sent a direct message through an online messaging application which amounted to an insult to the injured party.[109] The perpetrator admitted that he did send the message, but he and the injured party were not factually in the same place.[110] The Attorney General confirmed the prosecutor's decision which refused to prosecute the alleged perpetrator under the charge of insult. The Attorney General also gave the same explanation as *Supreme Court Decision No 3711/2557* that s 393 aims to prevent the physical fight between the insulter and the injured party when the former insulted the latter. However, the Attorney General did not refer to the *Decision No 3711/2557* to support his opinion. It can be implied that the *Decision No 3711/2557* has a high persuasive authority, but it is not *binding* authority in the sense it would be in a common law system.

This brief background is designed to show that Thai law was influenced by legal concepts of other countries both from the common law and civil law systems. Furthermore, it also shows that the decisions of the Supreme Court of Thailand are no more than illustrative examples of legal interpretations, though some of which may have a high persuasive authority. Therefore, the *Supreme Court Decisions* mentioned in this research are offered only as examples of how Thai law is interpreted and not as a direct source of law itself.

2.3 Background the Constitution of Thailand

Thailand changed its political regime from absolute monarchy to constitutional monarchy since 1932. Unlike the modernisation of the Thai legal system which was initiated by the King Rama IV, Uwanno and Burns point out that this constitutional revolution was brought about by a group of young reformists composed mostly of lawyers and military graduates.[111] After Thailand became a democratic society in 1932, Uwanno and Burns assert that Thai political development was in a 'vicious circle,' in their article published in

[109] '*The Decision of the Attorney General No* 409/2559 (2016)' 82 Public Prosecutor Communication (2017) 82
[110] ibid
[111] Borwornsak Uwanno and Wayne D Burns (1998), 'The Thai Constitution of 1997: Sources and Process' 32 U Brit Colum L Rev 227, 228

1998.[112] This circle, as they describe, happened repeatedly. It started with accusations of corruption in civilian government and then a military coup was conducted to restore order.[113] The military normally promulgated an interim constitution, which would later be replaced by a so-called a permanent constitution. There had been seven successful military coups prior to 1997 according to Uwanno and Burns.[114] After 1997, there have been the other two successful military coups in 2006[115] and 2014.[116]

Even though Uwanno and Burns describe the vicious circle since 1998, their description remains mostly valid today. The Constitution of Thailand BE 2560 (2017), the current Constitution or a so-called a permanent constitution, was promulgated to replace an interim constitution of the military coup in 2014.[117] The 2017 Constitution clearly says that there had been 'Constitutional crises'[118] before the promulgation. These crises, it states, were caused by:

> persons ignoring or disobeying governance rules of the country, being corrupt and fraudulent, abusing power, and lacking a sense of responsibility towards the nation and the people, resulting in the ineffective enforcement of law.[119]

Therefore, it can be said that the political situation in Thailand has not changed after 1997.

The 2017 Constitution being purportedly promulgated to respond the constitutional crises caused by corrupt and fraudulent persons, the main interest of this Constitution is to

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[112] ibid 229
[113] ibid
[114] See Appendix B of ibid
[115] See '19 September 2006: The First Coup d'Etat within 15 years' (*Silpa Magazine*, 19 September 2018) <https://www.silpa-mag.com/this-day-in-history/article_2605> accessed 16 September 2020
[116] See The Standard Team '22 May 2014 the fifth anniversary of the Coup D'Etat by the National Council for Peace and Order (NCPO)' (The Standard, 22 May 2019) <www.thestandard.co/onthisday22may2557> accessed 16 September 2020
[117] The Constitution of Thailand BE 2560 (2017), Pre-amble (an English translation of the Constitution can be found in the Legal Opinion and Translation Section, Foreign Law Division under the Legal Duty of the Office of the Council of State, '*Thailand's Constitution of 2017 (Unofficial translation)*' (*Constituteproject*) <https://www.constituteproject.org/constitution/Thailand_2017.pdf?lang=en> accessed 11 October 2020))
[118] ibid
[119] ibid

prevent corruptions. The drafters of the Constitution called it 'the Anti-Corruption Constitution.'[120]

Although the 2017 Constitution aims to prevent corruption,[121] this Constitution also recognises the fundamental rights of individuals. Article 4 of the Constitution guarantees that 'human dignity, rights, liberties, and equality of the people shall be protected.'[122] There are many other fundamental rights recognised under the Constitution such as rights of privacy, reputation and family protected under Article 32;[123] or the right to free expression of individuals protected under Article 34.[124] However, the protection of the fundamental rights can be traced back only to the 1997 Constitution. As pointed out by Uwanno[125] and Burns, human dignity was recognised in the Thai Constitution for the first time in the 1997 Constitution,[126] which adopted this rule from the German Constitution as pointed out by Uttarachai.[127] Uwanno and Burns assert that this fundamental right had not been recognised in the Constitutions before the 1997 Constitution.[128] They argue that the constitutions before 1997 'have not been written as guarantees of the fundamental freedoms and obligations of the people, as constitutions are regarded in the West.'[129]

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[120] See 'The Twentieth Constitution of Thailand (Anti-Corruption)' (*Channel Three Thailand*, 6 April 2017) <www.news.ch3thailand.com/politics/40470> accessed 16 September 2020

[121] For example, the Constitution of Thailand BE 2560 (2017) Article 98 prescribes that a person having the following qualifications is prohibited from applying to be a candidate for a Member of the House of Representative:… (10) a person who was convicted by a final judgement for, *intern alia*, committing an offence against property which committed dishonestly under the Criminal Code; *The Constitutional Court Decision No 24/2564* (2021) is an example of cases which this provision was implemented. (See The *Constitutional Court Decision No 24/2564* (2021) <http://www.ratchakitcha.soc.go.th/DATA/PDF/2565/A/006/T_0007.PDF> accessed 21 February 2022)

[122] The Constitution of Thailand BE 2560 (2017), Article 4 (an English translation of the Constitution can be found in the Legal Opinion and Translation Section, Foreign Law Division under the Legal Duty of the Office of the Council of State (n117))

[123] The Constitution of Thailand BE 2560 (2017), Article 32

[124] The Constitution of Thailand BE 2560 (2017), Article 34

[125] Borwornsak Uwanno was a member of the Constitution Drafting Assembly for the 1997 Constitution. (See 'Professor Borwornsak Uwanno' (*Human Resource Information System*,) <https://hris.parliament.go.th/ss_detail.php?ssp_id=7853&lang=th> accessed 7 June 7, 2022)

[126] Uwanno and Burns (n111) 241

[127] Tian-Ngern Uttarachai (2014), 'Human Dignity and the Scope of Liberty of Expression: Newspaper and Its Presentation of Pictures' (LLM thesis, Chulalongkorn University) <http://cuir.car.chula.ac.th/handle/123456789/45494> accessed 11 November 2019 280

[128] Uwanno and Burns (n111) 229

[129] ibid 229-230

Those previous constitutions had been promulgated to guarantee that the governments under those constitutions can remain in power.[130]

2.3.1 The Constitutional Court and its Role to Protect Constitutional Rights

The previous section shows that the main purpose of Thai Constitutions has never been to protect fundamental rights. Nonetheless, the 1997 Constitution established the Constitutional Court. The main authority of the Court is to guarantee that legal provisions do not contradict with the Constitution, as pointed out by Uwanno.[131] The current Constitution also retains this authority to the Constitutional Court under Article 210(1) which states:

> The Constitutional Court has duties and authorities as follows:
>
> sub-section (1) to consider and adjudicate on constitutionality of a law or bill;
>
> sub-section (2) to consider and adjudicate on a question regarding duties and power of the House of Representative, the Senate, the National Assembly, the Council of Ministers or Independent Organs;
>
> sub-section (3) other duties and powers prescribed in the Constitution.[132]

Sub-section (1) shows that the Constitutional Court can rule whether a legal provision contradicts to the Constitution. The Constitutional Court can rule whether a provision being enforced in the Court of Justice's proceeding contradicts the Constitution. If that provision does so contradict, the Constitutional Court will rule that the provision is

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[130] ibid 230

[131] Borwornsak Uwanno (2003), 'The Constitutional Court under the Constitution of Thailand B.E. 2540 (1997) 1(1) King Prajadhipok's Institute Journal 4, 15; The Constitution of Thailand BE 2540 (1997), Article 264 (an English translation of the 1997 Constitution can be found in Ackaratorn Chularat 'Constitution of the Kingdom of Thailand 1997' (*AsianLII)* <http://www.asianlii.org/th/legis/const/1997/1.html> accessed 11 October 2020

[132] The Constitution of Thailand BE 2560 (2017), Art 210 (an English translation of the Constitution of Thailand can be found in the Legal Opinion and Translation Section, Foreign Law Division under the Legal Duty of the Office of the Council of State (n117)); An example of the duties and powers prescribed in the Constitution under Article 210(1) sub-sec (3) is an authority to order the cessation of an act which aims to overthrow the democratic regime of the government with the King as the Head of State (Article 49 of the Constitution of Thailand).

unenforceable. But if the Constitutional Court finds that a legal provision is not unconstitutional, the Constitutional Court will deny the motion. An example of this authority of the Constitutional Court can be shown in the *Constitutional Court Decision No 19-20/2556* (2013).[133] This case was decided when the 2007 was in effect.

This case concerns s 72/5 of the Fertilisers Act. This section prescribed that if the Court (the Court of Justice) finds a legal person criminally liable under an offence of this Act, the representative of the legal person is presumed to be liable, unless the representative can prove that they were not involved in the commission of that offence. The representative of a legal person was prosecuted under this section in the Criminal Court (a type of the Court of Justice). During the criminal proceeding, he filed a motion to the Constitutional Court claiming that this provision contradicted the 2007 Constitution, which guaranteed that an accused must be presumed innocent, unless the claimant can prove that the accused is guilty. The Constitutional Court agreed with the representative and found that s 72/5 of the Fertilisers Act unconstitutional. Therefore, the court ruled that this provision was unenforceable. It should be noted that the Constitutional Court has no authority to establish a rule to replace the unconstitutional provision.

Article 210(1) authorises the Constitutional Court to consider whether *a legal provision* is constitutional, but it does not authorise the Court to rule whether the Court of Justice's *decision* contradicts with the Constitution. This is because, as I mentioned above, the *main authority* of the Constitutional Court is to ensure that *legal provisions* do not contradict with the Constitution. Nonetheless, Article 213 of the current Constitution clearly recognises a person's right to file a complaint to the Constitutional Court to claim that their right or freedom is violated[134] but the authority of the Constitutional Court to review the Court of Justice's decision has not changed. In the *Constitutional Court*

[133] The *Constitutional Court Decision No 19-20/2556* (2013) <http://www.constitutionalcourt.or.th/occ_web/download/article/file_import/center-law19-20_56.pdf> accessed 16 September 2020

[134] The Constitution of Thailand, Article 213 '*A person whose rights or liberties guaranteed by the Constitution are violated, has the right to submit a petition to the Constitutional Court for a decision on whether such act is contrary to or inconsistent with the Constitution, according to the rules, procedures and conditions prescribed by the Organic Act on Procedures of the Constitutional Court*.' translated by Legal Opinion and Translation Section, Foreign Law Division under the Legal Duty of the Office of the Council of State (n117)

Order[135] *No 9/2560* (2017), the Court held that the Court of Justice's adjudication on a case is not an *act* as stated under Article 213.[136] This case confirms that the Constitutional Court has no authority to review the constitutionality of the Court of Justice's decision. This case also suggests that defendants, being prosecuted and imposed by legal sanctions under any law, cannot complain to the Constitutional Court that those sanctions violate their constitutional rights. They can only claim that the law itself contradicts with the Constitution.

2.3.2 The Constitutionality of the Law of Insult

The current authorities of the Constitutional Court as discussed above do not allow insulters being prosecuted or sued under the law of insult to file their complaints to the Constitutional Court claiming that sanctions imposed by the Court of Justice limits their constitutional right, because the Constitutional Court is not authorised to review the Court of Justice's decision. [137] In other words, an insulter cannot claim that the Court of Justice's decision to imprison them under the offence of insult limits their constitutional right such as the right to free expression protected under Article 34(1), which states:

> A person shall enjoy the liberty to express opinions, make speeches, write, print, publicise and express by other means. The restriction of such liberty shall not be imposed, except by virtue of the provisions of law specifically enacted for the purpose of maintaining the security of the State, protecting the rights or liberties of other persons, maintaining public order or good morals, or protecting the health of the people.[138]

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[135] The order of the Constitutional Court is used when the Court refuses to accept the motion or disposes the case. (see the Organic Act on Procedures of the Constitutional Court B.E. 2561 (2018), s 77) <https://www.constitutionalcourt.or.th/occ_web/download/constitutionalcourt/lawrespon/statute/Organic%20Act%20on%20Prodecures%20of%20CC(2018).pdf> accessed 16 September 2020

[136] *The Constitutional Court Order No 9/2560 (2017)* <https://www.constitutionalcourt.or.th/occ_web/download/article/article_20180103091045.pdf> accessed 16 September 2020

[137] See the *The Constitutional Court Order No 9/2560 (2017)*; This authority of the Thai Constitutional Court is different from that of the German Constitutional Court because the German Court can review the constitutionality of the German Court of Justice's decision. This issue will be further discussed in chapter 8.

[138] Legal Opinion and Translation Section, Foreign Law Division under the Legal Duty of the Office of the Council of State (n117)

The insulter can only claim to the Constitutional Court that the law of insult itself is incompatible with the Constitution. It is possible for the insulter to claim before the Constitutional Court that the criminal law of insult limits their right to free expression under Article 34(1), because this law prescribes a penalty on an individual who talks about another individual. There is no *Constitutional Court Decision* which rules on this issue. However, I submit that it is unlikely that the Constitutional Court will hold the offence of insult unconstitutional because: (i) the freedom of expression can be limited and (ii) the penalty imposed on insulters is not high.

2.3.2.1 The Freedom of Expression Can Be Limited

As shown in the Article 34(1) of the Constitution, the right to free expression is not absolute because it can be limited to protect, *inter alia,* the right of other persons. The 1997 and 2007 Constitution also had the same pattern of protection as shown in table 2.1.

The 1997 Constitution	The 2007 Constitution	The current Constitution
Article 39: (1) A person shall enjoy the liberty to express his or her opinion, make speeches, write, print, publicise, and make expression by other means. (2) The restriction on liberty under paragraph one shall not be imposed except by virtue of the provisions of the law specifically enacted for the purpose of maintaining the security of the State, safeguarding the rights, liberties, dignity, reputation, family or privacy rights of other person, maintaining public order or good morals or preventing the	Article 45: (1) A person shall enjoy the liberties to express opinions, speeches, writing, printing, publication, and expressions by other means. (2) Restriction on liberty under paragraph one shall not be imposed except by virtue of law, specifically enacted for the purpose of maintaining the security and safety of the State, protecting the rights, liberties, dignity, reputation, family or privacy rights of the other person, maintaining public order or good morals or preventing the	Article 36 (1) A person shall enjoy the liberty to express opinions, make speeches, write, print, publicise and express by other means. The restriction of such liberty shall not be imposed, except by virtue of the provisions of law specifically enacted for the purpose of maintaining the security of the State, protecting the rights or liberties of other persons, maintaining public order or good morals, or protecting the health of the people.[141]

[141] translated by ibid

deterioration of the mind or health of the public.[139]	deterioration of the mind or health of the public.[140]	

Table 2.1 A comparison between the provisions which protect the right to free expression.

As we will see, the law of insult aims to protect a person's right. It is constitutionally allowed for this law to limit an individual's right to free expression because the limitation is done to protect a person's right. Not only is a person's right stated as an exception under the provision which protects the right to free expression in the Thai Constitution, but the current Constitution and the 1997 and 2007 Constitutions also recognise personality rights as a constitutional right shown in the table 2.2.

The 1997 Constitution	The 2007 Constitution	The current Constitution
Section 34(1) A person's family rights, dignity, reputation or the right of privacy shall be protected.[142]	Section 35 (1) A person's family rights, dignity, reputation and the right of privacy shall be protected.[143]	Section 32(1) A person shall enjoy the rights of privacy, dignity, reputation and family.[144]

Table 2.2 a comparison between provisions which protect a person's rights.

Therefore, the text of Article 34(1) show that it is constitutionally allowed for the law of insult to limit the right to free expression because the law aims to protect a person's right which also has a constitutional status.

Not only does the text of the constitution allow the right to free expression to be limited, but the Constitutional Court has held that a legal provision having an aim stated as an exception in the constitutional provision can limit the right to free expression.

[139] translated by Chularat (n131)
[140] translated by the Office of the Council of State, 'Constitution of the Kingdom of Thailand' (*Krisdika*) <http://web.krisdika.go.th/data/outsitedata/outsite21/file/Constitution_of_the_Kingdom_of_Thailand.pdf> accessed 11 October 2020
[142] translated by Chularat (n131)
[143] translated by the Office of the Council of State (n140)
[144] translated by Legal Opinion and Translation Section, Foreign Law Division under the Legal Duty of the Office of the Council of State (n117)

In the *Constitutional Court Decisions No 28-29/2555* (2012), decided when the 2007 Constitution was in effect, the Court ruled that the right to free expression under Article 45(1) of the Constitution can be limited by a legal provision having a purpose as stated in Article 45(2).[145] This *Decision* concerns the constitutionality of s 112 of the Criminal Code (so-called the *lèse-majesté* offence) which states:

> Whoever defames, insults, or expresses a grudge against the King, the Queen, the Heir to the Throne or the Regent shall be liable to imprisonment from three years to fifteen years.[146]

Defendants (who were prosecuted under the *lèse-majesté* offence in the Criminal Court) filed a motion to the Constitutional Court claiming that this offence contradicted constitutional rules including Article 45 mentioned above.[147] The Court described that the *lèse-majesté* offence was enacted to protect the Thai monarchy which is a very important institution in Thailand.[148] The Court explained that the King of Thailand is the head of the country; he is beloved by Thai people. Any defamation, insulting or expressing a grudge against the Monarchy are harmful acts against the feeling of Thai people who respect and revere the Monarchy and may enrage Thai people; thus, *this offence aims to maintain the security of the State* which comes within the exception stated in s 45(2) of the 2007 Constitution.[149] Therefore, the Court found that the *lèse-majesté* offence is constitutionally allowed to limit the Thai constitutional right to free expression.

Furthermore, in *Decision No 16-17/2549* (2006)[150] (decided when the 1997 Constitution was in effect), the defendants, who were prosecuted under s 48 of the Printing Act BE 2484 (1941) to the Criminal Court, filed complaints to the Constitutional Court claiming

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[145] The text of Article 45 of the 2007 Constitution is shown in table 2.1 page 44.
[146] The Criminal Code, s 112 translated by Netayasupha, Pisitpit and Watcharavutthichai (n2) 127
[147] The *Constitutional Court Decisions No 28-29/2555* (2012) <https://www.constitutionalcourt.or.th/occ_web/download/article/file_import/center28-29_55.pdf> accessed 16 September 2020 7
[148] ibid 12
[149] ibid 13
[150] The *Constitutional Court Decisions No 16-17/2549* (2006) <http://www.constitutionalcourt.or.th/occ_web/download/article/file_import/t16-17_49.pdf> accessed 16 September 2020

that this section was not compatible with the provision on right to free expression under the 1997 Constitution Article 39(1) and (2) quoted above.

It is important to note that the Printing Act was later repealed by the Printing Registration Act BE 2550 (2007).[151] Though the Act considered in this case were already repealed, the ruling of this case can show how the Constitutional Court interpreted the provision on the free expression under the Constitution.

The problematic section, s 48 of the Act prescribed that if there had been a commission of an offence under any law other than the Printing Act (in this case, the offence of defamation under the Criminal Code) by publishing content in a newspaper, the editors of which must be criminally liable as a principal of that commission. The Court found that the Constitution guaranteed that the right to free expression must be exercised without violating, *inter alia*, a person's right. The Court clearly said that the offence of defamation is a provision that prevents the exercising of this freedom to violate the other person's right. The Court also described that s 48 was another provision that prevented such exercising. The Court explained that the Printing Act wanted newspapers' editors to be responsible for editing, selecting and controlling their newspaper's content to prevent any publication that may violate the right of others. If that statement had been published, this right would have been violated. Since s 48 was a provision which protected a person's right; thus, freedom of expression can be limited by this provision and thereby this section was not unconstitutional.

The *Decisions No 28-29/2555* (2012) and *No 16-17/2549* (2006) confirm that legal provisions are not unconstitutional if they have a purpose stated within the exception of the free expression provision of the Constitution. This suggests that the legal provisions having that purpose can easily limit the constitutional right to free expression. This is a reason why I submit that it is unlikely that the Constitutional Court will rule the law of insult, either in criminal or civil aspect to be unconstitutional because this law aims to protect a person's right, which is stated in the exception under Article 34(1) of the Constitution. This approach, however, might cause a problem because, as the law is not unconstitutional,

[151] ibid

the Court of Justice may impose a penalty on the defendant without having concern to their right to free expression. For example, there was a defendant who was found guilty under the *lèse-majesté* offence and was ordered to be imprisoned for twenty years.[152] Moreover, there were cases where defendants were found guilty under the offence of defamation and ordered to be imprisoned, without suspending the punishment.[153] It is unclear whether the Court of Justice in these cases had concern to the right to free expression of the defendants when it imposed these penalties to them. I question whether this approach is suitable because legal sanctions can disproportionately limit the constitutional right to free expression, but the Constitutional Court has no role to consider this issue.

Furthermore, it is important to mention that this approach also impacts other constitutional rights. Defendants, for example, who are not released on bail cannot complain to the Constitutional Court that the Court of Justice's order which denies their bail violates their constitutional right to be presumed innocence.[154]

2.3.2.2 Low Penalty Imposed by the Offence of Insult

Apart from the text of the Constitution which allows the law of insult to limit the right to free expression as discussed above, the offence of insult, as a Petty Offence, does not prescribe a high penalty on the insulter. The practical impact of the enforcement of this law to the right to free expression would be minimal because the penalty for committing the offence of insult is '*imprisonment for not exceeding one month of a fine of not exceeding one thousand baht, or both.'* Thus, I submit that the rule under the Criminal Code which protects a person from being insulted does not seriously limit the free express of individuals.

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[152] 'Thailand's Extreme *Lese Majeste* Law Used to Sentence another Victim' (*Political Prisoner in Thailand*, 23 November 2011) <https://thaipoliticalprisoners.wordpress.com/2011/11/23/thailands-extreme-lese-majeste-law-used-to-sentence-another-victim/> accessed 1 April 2022

[153] For example see the *Supreme Court Decision No 4998/2558* (n300), the Court ordered the first defendant to be imprisoned for four months; the second defendant to be imprisoned for three months; the third defendant to be imprisoned for one month; the fourth defendant to be imprisoned for two months; Also see *Suthep* (2018) (n390), the Supreme Court ordered the defendant to be imprisoned for one year.

[154] The right to be presumed innocence is stated under the Constitutional of Thailand, Article 29(2)

Regarding the law of insult in civil aspect, as we will see in section 3.3, insulted individuals can claim compensation from their insulters by using tort law. The Court of Justice will order wrongdoers to pay for compensation calculated by the circumstances and the seriousness of their wrongful acts. The insulted individual may request a high compensation from their insulter, but the insulted individual has to prove that they suffer the harm as serious as they claim. Thus, the law of insult in civil aspect may not strictly limit the free express of individual.

However, my research aims to provide better protection to an individual who is insulted. My finding in criminal law may increase the penalty of the offence of insult and in civil law, it might be easier for an individual to sue another for insult. Therefore, it is important to find out how Thai law should protect an individual from being insulted without disproportionately limiting the constitutional right to free expression of another individual.

2.4 Conclusion

This chapter shows that the Criminal Code and the Civil and Commercial Code which contains the rules protecting an insulted individual has been influenced by western countries. Furthermore, it also shows that Thailand as a democratic country has the Constitution of Thailand as the statute having the highest hierarchy in the Thai legal system. But the Constitution does not aim at protecting the fundamental rights in the way that constitutions of Western countries do. The Constitutional Court was established in Thailand, but its case law shows that the right to free expression, as a fundamental right, can be easily limited by a statue. It can be implied by this case law that the law of insult is not unconstitutional. However, I question whether the current approach which allows a fundamental right to be easily limited by a statute is suitable.

In the next chapter, I will analyse the Thai law of insult and will show that the current law does not provide suitable protection to insulted individuals.

Chapter 3 How Does Thai Law Currently Protect an Individual from Being Insulted?

3.1 Introduction

As mentioned at the beginning of this thesis, Thai law protects an individual from being insulted through both the Criminal Code and Civil and Commercial Code. In criminal law, the Criminal Code provides general rules applicable to crimes and the specific rule applicable to insults. In civil law, the Civil and Commercial Code protects insulted individuals by the general principle of tort law. This chapter will analyse both of those general and specific rules applicable to insult and will identify problems which need to be solved.

First, I will analyse the applications of the offence of insult in section 3.2. This offence regulates two main forms of insult: (i) insulting an individual in their presence and (ii) insulting an individual by means of communication to the public. This section will also show that the offence of insult, as a criminal offence, only penalises a person who *intentionally* commit the offence of insult. And this section will argue that the offence aims to protect the personality right of an individual from being insulted. However, I will show that the personality right is *not the only interest* protected under the first form of insult. This form also aims to preserve public order. I will argue that it is suitable for this form to be stated as a Petty Offence. However, I will assert that the second form mainly aims to protect the personality right and will argue that a process to protect this right under this form and the sanction of the offence are not suitable. They are not suitable when compared with the process and sanctions provided under the offence of defamation, which will be discussed in chapter 4.

Secondly, I will discuss the law of insult as an aspect of civil law in section 3.3 to show that the offence of insult is the foundation of the civil law of insult. The Supreme Court of Thailand ruled that an insulted individual under the Criminal Code could also use the general principle of tort law to claim compensation from their insulters.[155] This is because

[155] See the *Supreme Court Decision No 124/2487* (1944) (n7)

the insulted individual has the *right not to be insulted* protected under the Criminal Code. This approach does show that the criminal and civil law of insult have the same interests, but since there is no requirement for criminal liability before civil liability can be recognised, I will argue that it is unnecessary to trace the *right not to be insulted* from the Criminal Code. Insulted individuals can use the same general principle but tracing the recognition of the personality right from the Constitution. Moreover, I will argue that the current rule under tort law does not provide a suitable form of compensation to insulted victims when compared to the compensation provided to defamed victims.

3.2 The Offence of Insult

It is important to point out again[156] that in the Thai Criminal Procedure Code, the injured party can personally prosecute their perpetrator or can file a complaint for the State to prosecute their perpetrator on their behave. Some decisions mentioned here have the public prosecutor as the claimant or have the injured party as the claimant.

Unlike in some other countries,[157] the offences of insult and of defamation in Thailand are not stated in the same Book in the Criminal Code, with the result that the specific rules applicable to defamation are not applicable to insults. The Criminal Code penalises insults as a Petty Offence stated under s 393. Tingsapat points out that Petty Offences are offences which aim to preserve public order.[158] Section 393 states:

> Whoever insults any person in his or her presence or by publication shall be liable to imprisonment for not exceeding one month or a fine of not exceeding ten thousand baht, or both.[159]

[156] See the accompanying text of footnotes 4-5
[157] See Zoltan Toth, The Regulation of Defamation and Insult in Europe. In Andras Koltay (ed), *Comparative Perspectives on the Fundamental Freedom of Expression* (Wolters Kluwer 2015) 487-517. (Toth says in Austria, the offence of defamation (section 111-113) and of insult (115) are stated in the Chapter four of the Special Part of the Criminal Code. In Germany, insult and defamation are stated in Chapter 14 of the Criminal Code.); the detail of the German law of insult will be discussed in chapter 5.
[158] Tingsapat (n11) 1163-4
[159] The Criminal Code, s 393 translated by Netayasupha, Pisitpit and Watcharavutthichai (n2) 325

I believe this translation mistranslates the word 'by publication.' One of the definitions of 'publication' by the Oxford English Dictionary is 'the issuing of a book, newspaper, magazine, or other printed matter for public sale or distribution; the action of making material publicly accessible or available in electronic form; and instance of this.'[160] This might suggest that an insult *by publication* must be done in a tangible form which communicates to the public. However, in Thailand this form of insult can be committed by announcing to the public without having to contain the insulting content in any tangible form.[161] The more appropriate term should be '*by means of communication to the public*.' Therefore, the English translation of s 393 should be:

> Whoever insults any person in his or her presence or by means of communication to the public shall be liable to imprisonment for not exceeding one month or a fine of not exceeding ten thousand baht, or both.

3.2.1 The Personality Right as an Interest Protected under the Offence

As briefly mentioned at the beginning of this thesis, the Supreme Court has considered the criminal liability of the defendants in insult cases by determining whether their acts were considered as 'insults.' The Court does not clearly identify the specific interest protected by the offence. In this section, I will argue that the personality right is an interest protected by this offence. Insults are acts of disrespect shown in two main ways: (i) the insulters do not respect or value the victim as a person or a human; (ii) the insulters severely disrespect their victims by using vulgar words or by using words that make them ashamed.

The term 'to insult' is defined by Tingsapat as: '*to disparage, to humiliate or to verbally abuse*.'[162] The Supreme Court has used this definition to consider whether the defendant insulted the injured party.[163] In the *Supreme Decision No 1623/2551* (2008),[164] for

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[160] 'Publication, n.' (*Oxford English Dictionary*) <https://www.oed.com/view/Entry/154060?redirectedFrom=publication+#eid> accessed 22 June 2022
[161] See the *Supreme Court Decision No 311/2491* (n173)
[162] Tingsapat (n11) 1237
[163] The *Supreme Court Decisions No 1608/2564* (2021)*, 3851/2563* (2020)*, 13173/2558* (2015)*, 8919/2552* (2009)*, 1623/2551* (2008)
[164] <http://deka.supremecourt.or.th/> accessed 13 August 2019

example, the defendant called the injured party, '*Thanai Hengsuay*,' which can be translated to 'terrible lawyer'. It should be noted that *Hengsuay* is not an ordinary Thai word for describing something with a terrible quality. This word is a slang used to degrade the quality of person or thing.[165] The Court explained that the defendant's act would be considered as a commission of the offence of insult if the words being said 'disparage, humiliate or abuse' the injured party. The Court used the Thai official dictionary to define '*Hengsuay'* as unreliable, low-quality, or terrible. Thus, the statement '*Hengsuay* lawyer' is a disparaging because it suggested that the injured party was an 'unreliable, low-quality or terrible' lawyer. Since the defendant said this statement in the presence of the injured party, the Court found the defendant guilty of the offence of insult.

Furthermore, in the *Supreme Court Decision No 3851/2563* (2020),[166] the Court used the above definition to consider whether the statements spoken by the defendant to the injured party were insulting. This case began when the defendant, a university lecturer, requested a document form the injured party, another member of the university's staff. The lecturer claimed that the staff (the gender of the staff was not identified in the Decision) gave him the wrong document. He then complained about the staff by saying those statements which made the staff prosecute him. In one of the statements, he said that the staff took advantage of another person and had no responsibility by using impolite words. The Court determined the fact of the case with the definition of insult to rule that this statement was made because the defendant was not satisfied with the service provided by the staff and the word did not disparage, humiliate or verbally abuse the staff. It was an impolite statement but not an insult. However, the Court found that the staff was insulted by other statements. The defendant accused the injured person of being a *Huaytak* person and compare the service provided by the staff to sexual intercourse. (The word *Huaytak* is also a slang[167], which has similar meaning as *Hengsuay.*) The Court

[165] The word *Hengsuay* was used as a Thai version of the word 'asshole' in the Thai version of the book 'The Asshole Survival Guide' by Robert Sutton. See Irisa Chansiri (tr), *ศิลปะการอยู่ร่วมกับคนเฮงซวย: The Asshole Survival Guide* (Amarin 2018). The title of the Thai version can be translated into English as 'The Art of living with *Hengsuay* People.'

[166] <http://deka.supremecourt.or.th/> accessed 23 May 2023

[167] 'ห่วยแตก' *Huaytak* (Londo Dict) <https://dict.longdo.com/search/%25E0%25B8%25AB%25E0%25B9%2588%25E0%25B8%25A7%25E0%25B8%25A2%25E0%25B9%2581%25E0%25B8%2595%25E0%25B8%2581> accessed 23 May 2023

found that this statement was not done merely to complain about the staff's performance, but the statement suggested that the staff was irresponsible and performed the work only for the staff's sexual satisfaction. This statement was capable of disparaging the staff; thus, it was an insult. Furthermore, the lecturer said that the staff had *Lew* DNA and provided a service without considering the feeling of the recipient. The Court described that *Lew* means bad or vile. (However, the word *Lew* is a slang.[168] It is not an ordinary Thai word for describing something with terrible quality.) The statement, the Court explained, means the staff was a terrible person and provided the service wrongfully. This statement is capable of disparaging the staff. Therefore, this statement was also insulting.

The *Decisions* No *1623/2551* and *3851/2563* show that the Court considered whether the defendant committed the offence of insult by determining whether the statement being used by the defendant is capable of insulting the injured party as defined by the Court: the test is an objective one, determined by the Court, and not a subjective one based on how the injured party felt.

There are many words considered as insults as explained by Tingsapat.[169] By referring to Supreme Court Decisions, he explains that comparing the injured party to an animal[170] and saying that the injured parties were *Hengsuay* persons[171] are disparaging words which are insults. And as shown in the *Decision No 3851/2563*, the words *Huaytak* and *Lew* DNA are also disparaging words. It is reasonable to believe the Court found these words disparaging because these words show that the defendants did not respect or value their insulted victims as persons or humans. In other words, an insulter who compares his victim to an animal suggests that the insulter did not respect his victim as a human. And the insulters who call their victims *Hengsuay*, *Huaytak* and *Lew* DNA did not respect the victims' capability or quality of being a human. This is why I argue that an

[168] 'เลว' Lew (Longdo Dict) <https://dict.longdo.com/search/%25E0%25B9%2580%25E0%25B8%25A5%25E0%25B8%25A7> accessed 23 May 2023
[169] Tingsapat (n11) 1237-1238
[170] ibid 1238 (citing the *Supreme Court Decisions No 2089/2511* (1968) and *311/2491*(1948))
[171] ibid (citing the *Supreme Court Decisions No 1623/2551(*2008)*, 1273/2473*(1935))

insult is an act of a person who does not respect or value the victim as a person or a human.

Regarding verbal abusing, Tingsapat refers to many cases where the Supreme Court found that the defendants who used a vulgar word against the injured party commit the offence of insult.[172] Some disparaging words such as calling a person *Hengsuay, Huaytak* or *Lew* is also verbal abuse in Thai. Although these words have their meaning as terrible, bad, or vile, they are not ordinary words used to describes person or thing with low quality. They are normally used for verbally abusing. Some vulgar words, however, are merely meaningless abuses such as calling a person '*I-Ha'*[173]*, 'E-Sud'.*[174] These are vulgar words in Thai. A person who uses these words against another person might be found guilty of the offence of insult. It is reasonable to believe the Court found these words insulting because they show that the defendants severely disrespected their victims. This is why I argue that an insult is an act of a person who severely disrespects another person by using vulgar words.

Regarding humiliation, Tingsapat says that the Supreme Court found that the defendant, who said he would touch the injured party's vagina, guilty of the offence of insult because this statement humiliated the injured party.[175] However, neither Tingsapat nor the Court clearly explain why this statement was capable of humiliation. As the word 'to humiliate' means 'to make someone feel ashamed or lose respect for himself or herself,'[176] it is reasonable to believe that the injured party in this case felt ashamed because a woman's vagina is a sacred organ of a woman. A person should not say that he would touch this sacred organ without her consent. Furthermore, in the *Decision No 1105/2519* (1976),[177] the Court found that the statement published in a newspaper saying that the injured party's head would be hit by a shoe was a *humiliating* statement. Nor did this Decision

[172] ibid 1237 (citing the *Supreme Court Decisions* No *2102/2521* (1978)*, 1989/2506* (1963)*,* and *273/2505* (1962); see also the *Supreme Court Decision No 19384/2557* (2014)
[173] The *Supreme Court Decision No 3800/2527*
[174] The *Supreme Court Decision No 2220/2518*
[175] ibid (citing the *Supreme Court Decisions No 439/2515*).
[176] 'humiliate' (Cambridge Dictionary) <https://dictionary.cambridge.org/dictionary/english/humiliate> accessed 23 May 2023
[177] <http://deka.supremecourt.or.th/> accessed 12 April 2019

clearly explain why this statement was capable of humiliation. It is reasonable to believe that the Court considered that the injured party should have felt ashamed because this statement was shown to the public that the injured party's head would be hit by a shoe in the public place. From these cases, I argue that 'to humiliate' in the sense of the offence of insult should mean to show an act of disrespect by making the insulted victim ashamed. In other words, the insulted victim in the former case was ashamed because her vagina would be touched. In the latter decision, the insulted victim was ashamed because the statement showed that his head would be hit in the public place. This is why I argue that an insult is an act of a person who severely disrespects his or her victim by using words that make the victim ashamed.

The above discussion shows that the insults regulated under s 393 are acts of disrespect shown by the insulters in two main ways: (i) the insulters do not respect or value the victim as a person or a human; (ii) the insulters severely disrespect their victims by using vulgar words or by using words that make them ashamed. If an act does not show disrespect in one of these two ways, it will not be considered as an insult, although the injured party might feel insulted. As we have seen in the *Decision No 3851/2563*, the Supreme Court ruled that one of the lecturer's statements was not an insult. The Court may regard that this statement did not disrespect the staff at the level which harm the value of the staff as a human. Neither did this statement contain vulgar words nor could this statement make the staff ashamed. This is because the statement was merely an impolite statement.

Furthermore, the Supreme Court found in the *Decision No 2874/2528* (1985)[178] that a sarcastic sentence was not insulting. This case began when the defendant complained about the injured parties for not washing dishes. The injured parties told the defendant: '*Mai Mee Kon Lang Chan*,' which can be translated literally to: 'No human washed the dishes.' The defendant then replied '*See Kon Mai Chai Kon Ror Ngai*,' which can be translated literally to: 'Aren't you humans?'. This sentence can be understood as the defendant was accusing the injured parties of not being humans. The injured parties prosecuted the defendant because of this sentence. The Supreme Court found that the

[178] <http://deka.supremecourt.or.th/> accessed 8 October 2020

sentence was only sarcastic; the meaning of this sentence is not capable of disparaging or humiliating or verbally abusing the injured parties. Therefore, the Court found the defendant not guilty of the offence of insult. Furthermore, in the *Decision No 3176/2516* (1973),[179] the Supreme Court found that an impolite word is not insulting. The defendant, a police officer, was prosecuted for saying to the claimant: '*Kub Rod Yee Yuan, Khor Jub Kum, Aow Bai Kub Kee Ma*'. This sentence means the claimant must be arrested for having annoying behaviour while driving. The Court explained that the word '*Yee Yuan*' in this sentence is an impolite word, which means annoying. But that word was not in itself capable of insulting the claimant.

From the ways to consider whether the act of the defendant is an insult, I argue that the right being protected is the personality right because the insults discussed above impact the "being" of an individual, which is the meaning of the personality right discussed at the beginning of the thesis. Therefore, it can be said that s 393 aims to protect the personality right from being harmed by acts of disrespected (see figure 3.1).

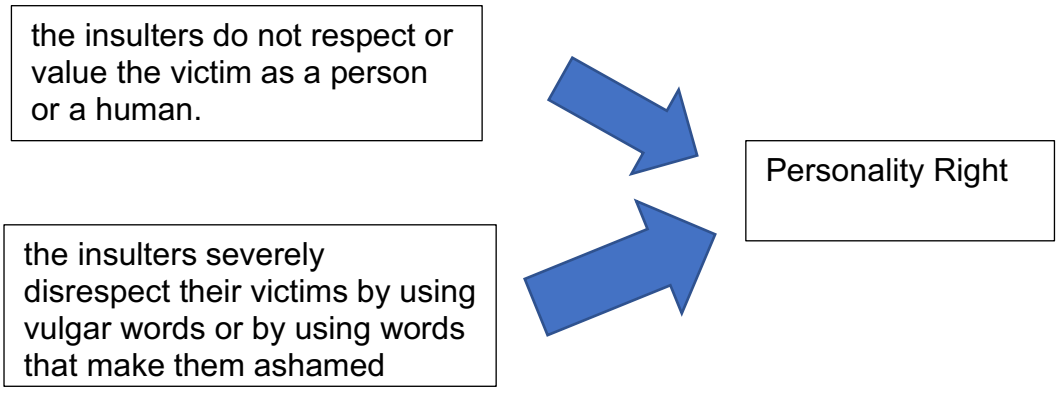

figure 3.1

However, I will show in section 3.2.3.1 that the personality right is not *the only interest* protected under this offence. This is because this offence does not penalise an individual who merely attacks the personality right of another person. The insulter must attack the personality right of his victim either: (i) in their presence or (ii) by means of communication

[179] <http://deka.supremecourt.or.th/> accessed 8 October 2020

to the public. It is no offence for one individual to tell another, in a private setting, that a third party is an animal or a *Hengsuay* person or to use a vulgar epithet to describe another individual.[180]

3.2.2 Intention as the Internal Element Required under the Offence

As a criminal offence, insulters are guilty under the offence of insult only when they commit the offence intentionally. This is because a general principle of criminal law stated in s 59(1) of the Criminal Code prescribes that a person is criminally liable only when they commit an offence intentionally, unless there is a provision stating otherwise.[181] There are two types of intention in Thai criminal law: (i) the doer knows their action will cause the effect as required by a provision in criminal law; or (ii) the doer could have foreseen that their action would cause such effect.[182] Therefore, insulters commit the offence of insult when they know their speech can disparage, humiliate or verbally abuse another individual; or they could have foreseen that their action would disparage, humiliate or verbally abuse another individual but they acted nevertheless. And as required by s 393, quoted in section 3.2, an insult is criminalised only when the insulter either: (a) insults his victim in their presence; or (b) insults his victim by means of communication to the public. Thus, these two forms of insult must also be done *intentionally*.

Since no direct evidence is possible of what is actually in anyone's mind the Thai Court use the rule of '*acta exteriora indicant interiora secreta: [exterior acts indicate interior secrets]*' to identify the defendants' intention in criminal cases.[183] The Court will use the fact presented by the claimant to indicate whether the defendant intended to commit an

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[180] See the *Supreme Court Decision No 200/2511* (1968) (n189)
[181] The Criminal Code, s 59(1) 'Any person shall be criminally liable only when such person commits an act intentionally, except in the case where the law provides that such person must be liable only when commits by negligence, or except in the case where the law clearly provides that such person must be liable even if such person commits an act unintentionally.'; The provisions that criminalise a person who commits an offence by negligence clearly have the term 'negligently.' An example of these provisions is s 291 of the Criminal Code: '*Whoever does an act so negligently that causes death to any person shall be liable…*' both ss 59(1) and 291 Translated by Netayasupha, Pisitpit and Watcharavutthichai (n2) 83, 251.
[182] The Criminal Code, s 59(2) 'To act intentionally is to act consciously and at the same time the doer desires or could have foreseen the effect of such doing.' Netayasupha, Pisitpit and Watcharavutthichai (n2) 83
[183] Kiatkajorn Wachanasawas, *Textbook on Criminal Law Book I* (10th edn, Krungsiam Publishing 2008) 161

offence. However, most of the official published Supreme Court Decisions do not clearly identify which fact presented by the claimant indicates that the defendant had the intention to insult the injured party.

Nonetheless, in the *Supreme Court Decision No 224/2523* (1980), the Court dismissed the charge of insult against the editor of a newspaper by saying the editor did not *intentionally* insult the injured party.[184] In this case, a politician prosecuted the editor of a newspaper for publishing his photo beside criminals' photos on the cover of the newspaper. He claimed that he was insulted by the newspaper. However, the Court found that the editor had no intention to insult the claimant. It explained that the issue of the newspaper in this case intended to show interesting incidents in the past year. Not only did the cover of this issue published the claimant's photo beside criminals' photos, but the cover also published other non-criminal events that had occurred in the past year. This case suggests that the fact which shows that a person having a role to manage information in the newspaper does not in itself indicate an intention to insult the injured party.

As such, the only persons who can be found liable under the offence of insult are those who intend to insult others. If someone is accused of committing the offence of insult but they have no idea that their act was an insult, they can defend themselves by arguing that they have no intention to insult. For example, in the online environment, if a hosting provider[185] is prosecuted under the offence of insult because the provider hosts its user's website, which contains insulting content, the provider can argue that it does not have an intention to commit the offence. Similarly, if an operator of a website is prosecuted under the offence of insult because its user posts insulting content on its website, the operator can argue that it does not have an intention to commit the offence. The provider and operator can argue that they do not know that their services were used by the insulter to insult the victim. Nor should they have known that their services would be used for the

[184] <http://deka.supremecourt.or.th/> accessed 3 June 2019

[185] The Organisation for Economic Co-operation and Development (OECD) describes: '*Web Hosting Providers supply webserver space and internet connectivity that enable content providers to serve content to the Internet*.'; See OECD, The Role of Internet Intermediaries in Advancing Public Policy Objectives (OECD Publishing 2011) 23

insulter to do that. The operator can still argue that it has no intention to commit the offence, even though the operator has an editorial function to show particular content of third parties to a particular user. This is because the *Supreme Court Decision No 224/2523* (1980) as shown above suggests that the fact that a person has an editorial role to manage content is not in itself the fact which indicates an intention to insult the injured party.

There might be a question whether the operator, who is aware of the insulting content but does not remove the content from its service, has an intention to insult the insulted victim. It is reasonable to assume that this fact may indicate the intention of the operator because the omission to remove suggests that the operator wants the insulted victim to be continuously insulted.[186] However, this does not mean that the operator will be criminally liable for committing the offence of insult because the claimant must prove that the omission itself can be considered as *an insult* criminalised under s 393.[187]

As briefly mentioned at the beginning of this section that an insult must be done intentionally. This requirement also applies to the forms of insult. Insulters who are guilty of the offence must also have an intention for their insult to be done by one of these forms. If they do not know that their insult would be done by one of these forms, the criminal law will not regard them as a person who have an intention to do that, and they will not be found guilty of the offence of insult. This is because s 59(3), another general principle of criminal law, guarantees that a person, who does not know the fact constituting the elements of the offence (i.e. does not know that their insult would be done by one of these forms), does not have the intention to commit the offence.[188] For example, an insulter

[186] There was the *Supreme Court Decision No 2822/2515* (1972), a defamation case. The Court found that the defendant committed the offence of defamation. This defendant knew the defamatory content in a letter and show this letter to a third party. This decision suggests that a person who knew the defamatory content and show the content to another person have an intention to commit the offence. This case implies that the fact that the website operator knew the insulting content and allow the content to show in its website may indicate the intention to the operator to insult the victim.

[187] For the detail of the issue of intermediary liability in Thai law please see Kanaphon Chanhom, 'Defamation and Internet Service Providers in Thailand' (School of Law Unversity of Washington) <https://www.law.uw.edu/media/1423/thailand-intermediary-liability-of-isps-defamation.pdf> accessed 23 May 2023

[188] The Criminal Code s 59(3), '*If the doer does not know the fact constituting the elements of the offence, it could not presume that the doer desired or could have foreseen the effect of such doing*.' translated by Netayasupha, Pisitpit and Watcharavutthichai (n2) 83

who verbally abuses his victim to a third party but *accidently* speaks near a microphone that connects to a speaker which can communicate to the public. This insulter did not know the fact that he was communicating his insult to the public although his insult was factually communicated to the public. Section 59(3) will apply to this example to guarantee that this insulter did not have an intention to insult by means of communication to the public. Therefore, he will not be guilty of the offence of insult because he does not have an intention to communicate his insult publicly.

3.2.3 The Forms of Insult Criminalised under the Offence

As already mentioned, there are two forms of insult. An insulter who insults another individual but neither in their presence nor by means of communication to the public does not commit this offence. This interpretation is confirmed by the Supreme Court in its *Decision No 200/2511* (1968).[189] In this case, the defendant told *a third party* that the claimant was a ghoul who eats humans. The Court admitted that accusing the claimant of being a ghoul is a verbal abuse, but this could not be the commission of the offence of insult. This was because the defendant did not make the accusation in the claimant's presence nor communicate this accusation to the public.

I will discuss the two forms of insult regulated under s 393 and will show that now the Supreme Court regards the first form of insult as aiming to protect the personality right and to preserve public order, while the second form of insult mainly aims to protect the personality right from being harmed by insults.

3.2.3.1 Insulting an Individual in their Presence

The first form of insult penalises an individual who insults another individual in their presence. Tingsapat points out that both insulter and insulted individual do not have to see each other but they must insult their victim within their earshot.[190] This interpretation is confirmed by the *Supreme Court Decision No 856-857/2502* (1959),[191] which found the

[189] <http://deka.supremecourt.or.th/> accessed 3 June 2019
[190] Tingsapat (n11) 1241
[191] <http://deka.supremecourt.or.th/>accessed 12 April 2019

defendant, who verbally abused the injured person after the person walked away for 6 metres, guilty of the offence of insult.

The insulter, who does not disparage, humiliate, or verbally abuse their victim within their earshot, are not guilty of the offence of insult. As we have seen in section 2.3, in the *Decision No 3711/2557* (2014),[192] the Supreme Court explained that both perpetrator and injured party must be in the same place when the former insults the latter under this form of insult. As describing by the Court, the offence of insult aims to prevent the physical fight between the injured party and the perpetrator after the former being insulted by the latter. This decision implies that if an individual is insulted in their presence: they should file a complaint against the perpetrator under s 393 rather than having the physical fight. This ruling shows that the Court *did not regard the personality right of the insulted person as the only interest protected under this form of insult.* This form of insult penalises an insulter only when the insult can cause the physical fight between the insulter and insulted person. This shows, in my view, that this form of insult also aims to protect the other interest, which is to preserve public order.

Furthermore, as also shown in section 2.3, the Attorney General also made a similar ruling in the *Decision of the Attorney General No 409/2559* (2016) that the insulter did not commit the offence of insult when the insulter sent through an online messaging application a direct message which insulted the injured party. This was because the insulter and victim were not in the same physical place when the insulter insulted the victim. The Attorney General also gave the same explanation as *Supreme Court Decision No 3711/2557* (2014) that s 393 aims to prevent the physical fight between the insulter and the injured party when the former insulted the latter.[193]

The approach of the *Supreme Court Decision* and *Decision of the Attorney General* shows that this form of insult does not only aim to protect the personality right but also aims to preserve public order, which is the purpose of the Petty Offences.[194] I believe this

[192] The *Supreme Court Decision No 3711/2551* (2014) (n31)
[193] the *Decision of the Attorney General No 409/2559* (2016) (n109)
[194] See the accompanying text of footnote 158

approach under Thai law is acceptable, because as we will see in section 3.3 it is possible for the insulted victim to be protected by using tort law, although they cannot use criminal law to protect their right. Furthermore, as we will see in 4.2.1, this approach was originated from a legal history of this offence. In the history, insults between individuals had been criminalised by a provision which required the insulter and insulted victim to be in the same physical place. The provision was stated in a Chapter of the Three Seal Law called 'Physical Fight and Verbal Abuse.' This shows that criminalisation of insult was originally aimed to prevent disputes from deteriorating into physical fights and a logical consequence of that is that a person who directly insults another person when they are not in the same physical location should not be a crime, because it will not lead to physical fighting: it will not interfere with public order.

As we will see under the offence of defamation in chapter 4, however, sending a message to someone in another physical space, whether by online or offline means, may amount to the offence of defamation, if the sender sends a direct message containing defamatory content against another person to a third party.[195]

3.2.3.2 Insulting an Individual by Means of Communication to the Public

The second form of insult criminalises an individual who insults another individual by means of communication to the public. I will show that the definition of 'by means of communication to the public' is *unclear* and will show that this form of insult only aims to protect *the* interest in the personality right from being harmed by insults. Nonetheless, as we will see in section 3.2.5, a process to protect the personality right under this form is not suitable for protecting this interest when compared to the process of the offence of defamation.

The Criminal Code s 393 does not clearly define the term: 'by *Means of Communication to the Public.'* In the *Supreme Court Decision No 311/2491* (1948),[196] the Supreme Court found that the defendant who, speaking to *people*, compared the injured party to a dog and a monkey guilty of the offence of insult by means of communication to the public.

[195] See how the offence of defamation applies in section 4.3
[196] <http://deka.supremecourt.or.th/> accessed 6 June 2022

However, in the *Decision*, the Court did not say *how many people* heard the defendant's words.

To consider whether an insult is done by means of communication to the public, Tingsapat proposes that we should consider these factors: (i) how many people receive the insulting content and (ii) the objective for communicating the content.[197] He supports his proposal by referring to the *Supreme Court Decision No 1105/2519* (1976),[198] already mentioned above. In this case, the editor of a newspaper published a news saying '*Miss Taew will use her shoe to slap Mr Suchart Boonkasem (the injured party)'s face…*' The Court said this statement, which was able to be *read by the public*, humiliated the injured party. Thus, the editor was found guilty of insulting the injured party by means of communication to the public. This case shows that publishing insulting content in a newspaper is a commission of this form of insult because, under Tingspat's proposal: (i) the content on a newspaper can be read by many people and (ii) the aim of publishing the content on a newspaper is for the public to know. I agree with this proposal, but I submit the second factor does not directly concern the meaning of '*by Means of Communication to the Public.'* The second factor is needed to be considered because it is a requirement for intention. As we have seen in section 3.2.2, insulters who are guilty of committing the offence of insult by means of communication to the public must know that their insult can be communicated to the public. In other words, they must have an objective to communicate the insult to the public. Some insulters may factually communicate insulting content against their victim to many people, but they may not aim for the public to know. As we have seen in the above example, an insulter who verbally abuses his victim to a third party but *accidentally* speaks near a microphone does not commit the offence of insult in this form because he did not have an intention to communicate the insult to the public. It can be seen that this insulter communicates his insulting content to many people, but he has no objective for the public to hear their content. This fact only constitutes the first factor. In my view, this insulter did insult the victim by *means of communication to the public.* But as I mentioned he did *not* commit the offence of insult because the insulter

[197] Tinsapat (n11)
[198] The *Supreme Court Decision No 1105/2519* (n177)

had no intention to commit the offence of insult by means of communication to the public. Therefore, the factor to consider whether an insult is done in this form should only focus on the amount of people receiving the insulting content, because the objective is a requirement for a person to have an intention to commit the offence.

In contrast, if an insulter has an objective for many people to receive his insult but no one receive this insult, it cannot be said that the insult is done by means of communication to the public. For example, Mr A hates Miss B and wants to insult her by using Facebook Live Video to communicate his insults to many people. While he is verbally abusing and disparaging her, he does not realise that he has no internet connection which can communicate his insults to many people. In my view, Mr A has an objective for many people to know but his insult is not factually communicated to the public. Therefore, he does not commit the offence of insult by means of communication to the public.

Although I argue that we should focus of the first factor of Tingsapat: '(i) how many people receive the insulting content', it is still unclear on the amount of people which can be considered as 'the public'. In this issue, I propose that the factor used by the Supreme Court in case of defamation should be applied in case of insult under this form. As we will see in section 4.3.2.2, the offence of defamation also penalises a perpetrator who commits the offence by means of communication to the public. This offence is not a Petty Offence and there are more Supreme Court Decisions and literature which discuss acts considered to be commissions by *means of communication to the public*.

Apart from the issue of unclear definition of 'by means of communication to the public,' insults under this form have another issue. Neither the *Decisions No 311/2491* and *1105/2519* (which found the defendants guilty of the offence of insult by means of communication to the public) nor s 393 says that insulting an individual under this form is there to prevent a physical fight between the insulter and their victim. The fact that communicating an insulting content to the public may amount to a commission of this offence without having to concern the physical fight between them shows that the aim of this form of insult is not to preserve public order (as with the first form of insult) but is more about protecting the personality right from being harmed by insults by means of

communication to the public. I will argue in section 3.2.5 that a process to protect the personality right is unsuitable when compared to the process under the offence of defamation.

3.2.4 Justification and Defence

Before discussing the process to protect the personality right, it is important to point out that Thai criminal law prescribes the *general* justification and defence for those who commit a crime. In theory, these justification and defence can also apply to insulter but in practice the justification may not apply to insults because of the nature of the commission of insult.

The *general* justification is stated under s 68:

> Whoever commits any act for the defense of his or her right or for a right of other persons so as to avoid a danger arising from a harmful act which violates the law and such danger is imminent, such act, if reasonably carried out under such circumstances, is a lawful defense, and such person shall not be guilty.[199]

A person can claim this justification if they commit an offence to defend their right such as a person who assaults another person to protect his life. The assaulter in this case has the justification under s 68 of the Criminal Code which guarantees that the assaulter will not be guilty of their commission. I do not think that an individual can insult another individual to protect their right. For example, if Mr A insults Mr B in B's presence or by means of communication to the public. There is no point for Mr B to insult Mr A back and claim that he did it to protect his personality right. However, in an example like this one, Wachanasawas argues that Mr B, as the victim may slap the insulter's mouth *lightly* to

[199] translated by Netayasupha, Pisitpit and Watcharavutthichai (n2) 89

stop the insult.[200] The slap is regarded as the offence under s 391.[201] The victim is justified to lightly slap the insulter and claims that the slap is a way to protect his personality right.

The *general* defence is stated under s 67:

> (1) Any person shall not be punished for committing any defence due to necessity:
>
> Sub-section (1) When such person is under coercion, or under influence of force that such person is unable to avoid or resist: or
>
> Sub-section (2) When such person acts in order to make himself or herself or other persons to escape from an imminent danger which is unable to avoid by other means, and which such person does not cause such danger by his or her own fault,
>
> (2) provided that the act is not carried out in excess of what is reasonable necessary under the circumstances.'[202]

The above provision shows that there are two defences under s 67. Those who can claim one of these defences will be not liable for committing that offence. For example, Mr A threats to kill Mr B, if Mr B does not insult Miss C. If he does insult her, he can claim the defence under s 67 (sub-sec)(1) because he committed the offence of insult under the coercion of Mr A.

In practice, there is no difference between claiming the justification or defence because the claimer will not be punished for their commission. However, in theory, those who claim the justification are not perpetrators because they are not guilty: there is no criminality from their commission. One the other hand, those who claim the defence are remain perpetrators; but criminal law will not punish them for their crime: the defences prevent

[200] Wachanasawas (n183) 375
[201] The Criminal Code, s 391, 'Whoever uses violence not amounting to bodily or mental harm against any person shall be liable to imprisonment for not exceeding one month.' Translated by Netayasupha, Pisitpit and Watcharavutthichai (n2) 325
[202] The Criminal Code, s 67 translated by ibid 89

the punishment of an act, but the act remains a crime. In Thai criminal law, the justification must be considered before the defences.

Apart from the justification or defence discussed above, the Criminal Code does not provide any *specific* justification or defence for insult. This is different from the offence of defamation which prescribes its own *specific* justifications and defence under s 329-331, as we will see in section 4.3.4. There might be a question, especially for those who comment upon another person on a public interest issue, but the comment contains some insulting words. For example, a person publicly comments on a politician's work which is a public interest issue and calls this politician *Hengsuay*. It is questionable whether this commenter should be punished for his insult. He might claim that he has the right to free expression to comment on the politician and he should be free to use any type of words. Nonetheless, this question is clearly answered if this person defames (not insults) his victim because the offence of defamation prescribes a *specific* justification for an individual who defames another individual on an interesting topic for the pubic.

3.2.5 The Processes to Protect the Personality Right

As I briefly mention at the beginning of the thesis, there are two processes for the injured party to prosecute their perpetrator: the injured party can either (i) file a complaint against the perpetrator to an inquiry officer (the police) and let a state prosecutor prosecute the perpetrator[203] or (ii) prosecute the perpetrator to the Court of Justice.[204] Since an insult is an offence of the Criminal Code, insulted individuals can choose which process they want to prosecute their insulters.

3.2.5.1 Filing a Complaint against the Insulter

If the insulted individual chooses the first process: filing the complaint to the police, *as the offence of insult is classified as a Petty Offence*, the insulter can settle the charge during

[203] The Criminal Procedure Code, s 123 'An injured party can file a complaint to an inquiry officer.'
[204] The Criminal Procedure Code, s 29 'These persons are authorised to be the claimant in criminal cases: (sub-sec (i)) Prosecutor; (sub-sec (ii)): Injured Party.'

the investigation procedure by paying the fine fixed by the inquiry official, as stated in the Criminal Procedure Code s 32 sub-section (2) and (3):

> 'Section 37 Criminal case may be settled as follows:
>
> …
>
> Sub-section (2) In case of Petty offences… when the alleged perpetrator pays the fine as fixed by the inquiry official;
>
> Sub-section (3) In case of Petty offences… committed in Bangkok Metropolis when the alleged perpetrator pays the fine as fixed by a local police officer which has a position as an inspector or a higher position or a commissioned police officer in charge of that function.'[205]

The above provision shows that the insulter does not have to defend themselves in the Court of Justice. I submit that the settlement procedure under this process is unsuitable for the second form of insult (insulting by means of communication to the public) as this form mainly aims to protect the personality right from being harmed by insults. This is because an accused insulter can easily settle the insulting charge against them by paying the fine.[206] This fine may be paid without the insulter giving any acknowledgement that their action was wrong or insulting, or any acknowledgement that the personality right of the victim has been harmed: it can be seen as nothing more than a cost of speaking. So the payment of the fine does nothing to heal the harm caused to the personality right. A much better model is that under the offence of defamation, which as we will see in section 4.3.5, requires the defamed person to consent to the settlement – and so the defamed person can insist on the criminal process going ahead, if he feels that the injury to his personality right to reputation is not healed by the settlement (for example by including an apology and an acknowledgement of wrongfulness).

[205] The Criminal Procedure Code, s 37

[206] The fine will not be exceeded ten-thousand baht (250£) as this amount is the maximum fine prescribed under s 393; This maximum fine was recently amended in 2015 from one thousand (25£) to ten-thousand baht.

There is an actual incident, *Lena Jung* (2019),[207] which can show this unsuitability. In this incident, Miss Lena Jung, a celebrity lawyer, humiliated another person online. She broadcasted on her Facebook Live Video complaining about a security guard of a department store who was exercising his duty to search her bag as a suspect for a security reason. In her clip, she complained that the guard disrespected her and called the department store manager for their responsibility. The manager brought the guard to apologise to her during the broadcast, but she continued to verbally abuse him online. The guard later quit his job claiming that he felt humiliated after being reviled online by Lena Jung. This matter did not go to the Court as the guard later stated in his interview that he did not want to prosecute the lawyer; he only wanted her apology.[208] In response, the lawyer refused to apologise.[209]

Nonetheless, having compared the *Lena Jung* incident with the *Supreme Court Decision no 1105/2519*,[210] I believe an argument can be made that Lena Jung might be guilty under the offence of insult by means of communication to the public because of these three reasons. First, Lena Jung humiliated and verbally abused the guard because she severely disrespected the guard by using words that made him ashamed and using vulgar words. Secondly, her actions can be seen by many people because she broadcasted on her Facebook page. Finally, the fact that she broadcasted on her page indicated that she knew that the public could see her insults; thus, she had an intention to insult the guard to the public.

However, had the guard prosecuted the lawyer by filling the complaint to the police, the impact on the lawyer would not be serious. This would be because the lawyer can easily settle the case by merely paying the fine as fixed by the inquiry official of the case and

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[207] Arnowe 'Security Guard being Sad because He was Insulted by Lena Jung who Claim that Guard should be Responsible' (*Amarin TV*, 16 March 2019) < http://www.amarintv.com/news-update/news-17907/351715/>accessed 16 March 2020

[208] Amarin TVHD 'Each Person's Opinion Ep: A Security Guard Lost his Job Because of Lena Jung?' (*Youtube*, 19 March 2019) <https://www.youtube.com/watch?v=pPsY_nNaKR4> accessed 16 March 2020

[209] 'Lena Jung Threats to Sue Security Guard Saying She Will Never Apology' (Sanook 20 March 2019) <https://www.sanook.com/news/7717366/> accessed 16 March 2020

[210] The *Supreme Court Decision No 1105/2519* (1976) (n177)

the settlement can be done without the consent of the guard. This legal process does nothing to address the harm caused to the personality right of the insulted victim and it does not therefore provide a mechanism by which the harm to the personality right could be healed. He remains humiliated, while she loses a tiny amount of money. The guard would never be able to require an apology from the lawyer by this process.

The above discussion and example show that the first process to protect the personality right under the offence of insult does not achieve its aim and so lowers the level of protection the law offers to a person's right. This is different from the rules under the offence of defamation, as we will see, defamed individuals can involve in the settlement process. Since the offence of insult by means of communication to the public mainly aims to protect the personality right, I will propose that an individual who is insulted under this form should also be involved in the settlement process.

Since the protection of the personality right provided by the offence of insult is low, it can be seen that the protection provided to freedom of expression is high under this offence. There is no need for insulters to be afraid when they insult their victim by means of communication to the public because they can easily settle the charge by paying a fine to the inquiry official. There is also an actual incident, Milli (2021), [211] where the alleged perpetrator preferred to pay the fine rather than defending herself by claiming that her expression must be protected by the Constitution. In this incident, Milli, a rapper, composed and sang a song about a country having a fox as its leader. She used some vulgar words in this song and said the fox did nothing for this country.[212] Nonetheless, the Prime Minister (PM) of Thailand (Prayuth Chan-O-cha)'s lawyer filed a complaint to the police claiming that the rapper insulted the PM by means of communication to the public. This case was finally settled by the rapper paying 2,000 baht (50£) as the fine to the inquiry officer. In my opinion, an argument can be made that the rapper should not be criminally liable for insulting the PM because she did not say the PM's name in her song.

[211] 'The Police Ordered Mili to Pay the Fine for 2,000 Bath After Her Confession' (*Nation TV*, 22 July 2021) <https://www.nationtv.tv/news/378829889> accessed 8 March 2022

[212] @theeraphon008, 'A Song for Dictatorship' (*Twitter*, 23 July 2021) <https://twitter.com/theeraphon008/status/1418400251023478784?s=29> accessed 8 March 2022

There might be a counterargument that everybody should have known that her song was about the PM. Nonetheless, she should not be found guilty of the offence of insult because her song should be protected under the right to free expression under the Thai Constitution because she merely criticised the PM, which is a government officer on a public interest topic. However, she did not have to defend her case because she chose to easily pay the fine to end the charge against her.

Notwithstanding my argument that this process to protect the personality right under the second form of insult is not suitable, this process is suitable for the first form of insult, because the "presence" form of offence aims to preserve public order, which should not be affected by the injured party's consent to the settlement.

3.2.5.2 Prosecuting the Insulter to the Court of Justice

The insulted individual may choose the second process: prosecuting the insulter to the Court. This process does not allow the insulter to settle the charge by paying the fine fixed by the police. The insulter must defend their case in the Court. However, if the Court finds the insulter guilty, the penalty imposed on the defendant will not be serious because the penalty prescribed under s 393 is low, as we will see in the next section.

3.2.6 Sanctions

If the insulter does not settle the case and is found guilty of the offence of insult, the Court may order the insulter to be imprisoned for a period not exceeding one month or a fine not exceeding ten thousand baht according to s 393, as quoted in section 3.2. None of the Supreme Court Decisions mentioned in this chapter, which found the defendants guilty of the offence of insult and stated the penalty imposed on them, imprisoned the insulters.[213]

The discussion of the offence of insult in section 3.2 can answer a question I raised in chapter 1[214] on whether the offence actually limits the right to free expression of individuals. Obviously, any prohibition of communication limits free expression, but in my

[213] See Annex I
[214] See the accompanying text of footnote 56

assessment the offence of insult does not do so to an unjustifiable or disproportionate level, not only because the offence of insult does not prescribe a high penalty on insulters but also because there is a process for any accused insulter to easily settle the insulting charge.

The above discussion of the offence of insult shows how this offence criminalises the two forms of insult under the Criminal Code. The first form of insult aims to preserve public order and protect the personality right from being harmed by insults, and the second form aims to protect the personality right from being harmed by insults done publicly. Regarding the first form of insult, I found that it is suitable to criminalise this form of insult because this form aims to preserve public order which is an aim of the Petty Offence as described by Tingsapat.[215] I also found that the settlement procedure during the investigation procedure is consistent with the aims protected under this form. On the other hand, I found that the second form of insult has the aim to protect the personality right. But if the injured party choose to file the complaint to the police, the settlement procedure under this process is unsuitable for protecting the personality right when compared to the process provided by the offence of defamation, as we will see in the next chapter.

3.3 Civil Law of Insult

Thai civil law does not have a specific rule to protect insulted individuals. They must use the general principle of tort law under the Civil and Commercial Code s 420 to sue their insulters. Section 420 is copied from s 823(1) of the German Civil Law (BGB)[216], as pointed out by Supanit.[217] Section 420 states:

> A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or any right of another person shall be regarded as committing a tort and shall be bound to make compensation therefor. [218]

[215] See the accompanying text of footnote 158
[216] The German Civil Code (BGB), s 823(1) will be quoted at the accompanying text of footnote 798
[217] Susom Supanit, *Textbook on Law of Torts* (7th Nitibunakarn 2012) 12
[218] translated by Nanakorn (n79) 79

I will show how the Supreme Court uses s 420 to protect an insulted individual and will analyse whether this general principle may cause any problems to an insulted victim. Furthermore, I will examine whether tort law can sufficiently compensate harms caused to the personality right by an insult.

3.3.1 Insults Regulated by the General Principle of Tort Law

There are two approaches to interpret the words '*another right of another person*' stated under s 420 to impose civil liability on insulters. The first approach derives from the *Supreme Court Decision No 124/2487* (1944).[219] Prior to this civil proceeding, the Court of Justice in the criminal proceeding, already found the defendant guilty of the offence of insult because she said the claimant was a dog. The claimant sued the defendant in this civil case for monetary compensation under s 420. The Court explained that 'another right of another person' under this section means a person's interest which others have a legal duty to respect. As insulting someone in the presence of the victim is a crime, the victim has *the right not be insulted*. The defendant's insult therefore was regarded as unlawfully harming this right of another person under s 420. Hence, the insulter must pay monetary compensation to the victim. This approach suggests that a criminal offence is a source of right under s 420. But it also suggests that this approach has a limitation because it relies on criminal law, a victim insulted outside the scope of criminal law may not be able to sue their insulter under tort law. For example, a victim who is disparaged by the insulter on a telephone may not be able to use tort law to sue the insulter because the criminal law does not criminalise this form of insult.

The second approach derives from the *Supreme Court Decision No 4893/2558* (2015).[220] The Court used s 420 in conjunction with a constitutional right to order the defendants to pay monetary compensation to the claimant. He sued a newspaper and its editor because the newspaper correctly identified him, a public figure, as a person in a leaked VCD of a couple having sexual intercourse. The claimant argued that his privacy right, recognised in the Constitution, was violated by a newspaper, and the Court, agreeing with this, said

[219] The *Supreme Court Decision No 124/2484* (1944) (n7)
[220] <http://deka.supremecourt.or.th/>accessed 6 June 2022

that the privacy right includes the right to have legitimate sexual intercourse in private; identifying the claimant as a person in the video was regarded as a violation of the claimant's privacy right. Although this case is not directly related to insult, the case suggests that the constitution can be regarded as another source of right under s 420.

Now the privacy right is recognised in Article 32(1) of the Constitution of Thailand. The English translation of this Article states:

> A person shall enjoy the rights of privacy, dignity, reputation and family.[221]

It is important to point out that the Article mistranslates the word 'dignity'. [222] As a Thai, I believe a better translation of this would be 'honour.'[223] Therefore, the English translation of this Article should be:

> A person shall enjoy the rights of privacy, honour, reputation and family.

It can be seen that the rights recognised under this Article are the rights of 'being' an individual. This Article shows that the personality rights are recognised as a constitutional right. Therefore, a person whose personality right is harmed should be able to sue their wrongdoer by claiming that the wrongdoer *intentionally or negligently, unlawfully injures* their personality right regarded as 'another right' under s 420.

Nasakul describes the word 'unlawfully' by saying that a wrongdoer 'unlawfully' injures their victim's right when the wrongdoer has no legal authority to do that.[224] The authority, she describes, can derive from contract[225] or the victim's consent or from legal provisions such as a police officer is authorised to arrest an accused perpetrator.[226]

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[221] translated by Legal Opinion and Translation Section, Foreign Law Division under the Legal Duty of the Office of the Council of State (n117)
[222] The word dignity is used in Article 4 to refer to human dignity (ศักดิ์ศรีความเป็นมนุษย์) but the original Thai word translated to dignity in Article 32 is 'เกียรติยศ'.
[223] Article 32(1) of The Constitution of Thailand uses the word 'เกียรติยศ' not 'ศักดิ์ศรี'. The Thai version of the Constitution of Thailand Article 32 states: 'บุคคลมีสิทธิในความเป็นอยู่ส่วนตัว เกียรติยศ ชื่อเสียง และครอบครัว'
[224] Waree Nasakul, *Textbook on The Civil and Commercial Code: Tort, Management of Affairs without Mandate and Unjust Enrichment* (Jarun Pakdeethanakul (ed), 5th edn, Krungsiam Publishing 2020) 89
[225] ibid 90 (citing the *Supreme Court Decision No 2494/2553*)
[226] ibid 91 (citing the *Supreme Court Decision No 6371/2558*)

Under this approach, it is possible for victims insulted outside the scope of criminal law to use s 420 in conjunction with the Constitution to sue their insulter because an individual has no legal authority to harm the personality right of others. In other words, there is no legal authority allowing an individual to verbally abuse another individual by using a telephone or text message online. Thus, the former might be civilly liable for insulting, although both of them are not in the same physical location. Nonetheless, the civil liability is subjected to another condition of s 420 which imposes the liability only on a wrongdoer who *intentionally or negligently* injures their victim's right. A person will not be civilly liable under this approach if they neither intentionally nor negligently injure the right of their victim. This issue will be discussed in the next section.

3.3.2 Internal Elements for the Civil Law of Insult

The two approaches to impose civil liability on insult require a different internal element for insulters. Under the first approach, insulters are civilly liable for insulting because they injure the *right not to be insulted* of another person as recognised under the Criminal Code. The insulters must commit the offence of insult; hence, they must intentionally insult another person as required in the Criminal Code. They will not be civilly liable under this approach unless they commit the offence of insult by intention. For example, a person, who speaks loudly near a microphone which he did not realise was connected to loudspeakers in a public place, will not be civilly liable for insulting the injured person under this approach, although the words of the speaker 'disparage, humiliate, or verbally abuse' the injured party and can be heard by the public. This is because the speaker does not *intentionally* commit the offence of insult.

Under the second approach, an insulter can be civilly liable for an insult because they unlawfully harm another person's personality right, which is a constitutional right. Civil liability under this approach does not rely on the offence of insult. Persons can be civilly liable if they do not *intentionally* insult their victim, but the insult is done by negligence. So, in the example above what would happen is the person might be found civilly liable under s 420 of the Civil and Commercial Code because there is no law authorising an individual to *negligently* harms another person's right, in this case the personality right.

This is because s 420 imposes liability on a wrongdoer when they either *intentionally* or *negligently* harm the victim's right.

Intention and negligence under Thai tort law are similar to those in criminal law, as described by Supanit.[227] The Criminal Code defines 'negligence' in s 59(4) as:

> To act by negligence is to commit an offence unintentionally but without exercising due care as might be expected from a person under such conditions and circumstances, and the doer was able to exercise such care but did not sufficiently do so.[228]

This section shows that a person acts negligently when he or she does not exercise due care as stated in s 59(4). To identify due care, Watachansawat explains that the Court will consider the act of the defendant under these three factors:[229] (i) whether the defendant had exercised their due care when they were performing the act; (ii) whether they had exercised their due care under their conditions when they were performing the act; and (iii) whether they had exercised their due care in the circumstances which they were performing the act. The Court will assume what a reasonable person should have done if the reasonable person were performing that act in the same conditions and circumstances. Because of these factors, a person who does not exercises the due care when speaking about another person can be civilly liable for insulting another person if the word he spoke is insulting. As I argue, the speaker who talks loudly about another person near a microphone *will not be civilly liable under the first approach* because this speaker does not intentionally insult another person by means of communication to the public. However, this act of the speaker might be seen as harming the personality right of another person by *negligence* because a reasonable person ought to have known that under this circumstance (speaking loudly near a microphone) the sounds of his voice could be heard by people in the public place.

[227] Supanit (n217) 15-17
[228] Translated by Netayasupha, Pisitpit and Watcharavutthichai (n2) 83-85
[229] Watachansawat (n183) 278-279

Under s 420, the doers will not be civilly liable if they do not *intentionally* or *negligently* harm the personality right of another person. As we have seen in the *Supreme Court Decision No 224/2523 (1980)* mentioned above,[230] the Court found that the editor of a newspaper did not intentionally insult a politician by publishing a photo of him beside photos of criminals on the cover of the newspaper. Since this was a criminal case, the Court only had to consider whether the editor has the intention as required by the Criminal Code to insult the injured party. Nonetheless, if this case were proceeded as a civil case under the second approach, I believe this editor would not be civilly liable. This would be because of these two reasons. First, the editor did not intentionally insult the injured party, as was found *Decision No 224/2523* (1980). Secondly, the editor's act could not be regarded as acting negligently, because the fact does not indicate that the editor had not exercised his due care when he decided to put a photo of the politician beside photos of criminals on the cover of the newspaper. By assuming what a reasonable person should have done if they were the editor in this circumstance, I believe it is reasonable for the editor to put the politician's photo in that place. The editor might be found acting by *negligence* if the editor *accidently* put the politician's photo as an illustration of an illegal event.

The above discussion shows that a person who is civilly liable for insulting must be the person who intentionally or at least negligently insults another person. Thus, in the civil case, the claimant must show to the Court that the defendant has one of these internal elements when they unlawfully harm the claimant's personality right. If the claimant is unable to show that, the defendant will not be liable under tort law. For example, Mr A is insulted on a social media website by Mr B. If Mr A wants to sue the operator of the website under tort law, Mr A has to show to the Court that the operator intentionally or negligently harmed Mr A's personality right. It is quite clear that the operator did not intentionally harm Mr A's right because the operator was not the actual person who intended to insult Mr A; Mr B was the actual wrongdoer. Thus, Mr A must prove to the Court that the operator negligently harmed the right by claiming that the operator did not exercise his due care. The Court will have to assume what a reasonable person should

[230] The *Supreme Court Decision No 224/2523* (1980) (n184)

have done if they were the operator in this circumstance. This shows the burden for the victim to sue the operator; thus, it might be easier for the victim, as Mr A, to sue the actual wrongdoer, Mr B rather than having to argue that the operator does not exercise their due care as explained above.

The second approach shows that it can provide broader protection to the personality right than the first approach because the second approach does not rely on the forms criminalised by criminal law. Furthermore, insulted victims can sue their insulters who negligently harm their personality right.

3.3.3 Compensation Provided to Insulted Victims

As stated in s 420 quoted at the beginning of section 3.3, a wrongdoer is liable to make *compensation* to the injured person for the injury. The general rule for considering the compensation is stated in s 438(1):

> The manner and extent of compensation to be made shall reasonably be determined by the Court in accordance with the circumstances and gravity of a tort.[231]

Supanit asserts that this section is copied from s 43(1) of the Amendment of the Swiss Civil Code (Part Five: the Code of Obligations).[232] She explains that in the Thai tort law the claimant has to prove the injuries caused to the claimant for the level of compensation which can be claimed.[233] However, in the *Supreme Court Decisions No 124/2487* and *No 4893/2558* (both mentioned in section 3.3.1), the Court did not strictly require the claimants to prove the injuries caused by the defendant to the claimant's personality right. In the former *Decision* the Court ruled that the defendant who injured the *right not to be insulted*, had to pay compensation to the claimant calculated by the circumstances and the seriousness of his harmful act. In the later *Decision* the Court ordered the defendants to pay one million baht (25,000£) as the compensation for injuring the claimant's privacy.

[231] translated by Nanakorn (n79) 210
[232] Supanit (n217) 212
[233] ibid 214

The Court did not explain why the claimants in both cases were entitled to those amounts of money as the compensation. These *Decisions* imply that if the claimant can prove that their personality right was harmed by the defendant, the Court can order the defendant to pay compensation to the claimant calculated by the circumstances and the seriousness of their harmful act instead of the injury which the claimants are able to prove.

The above two *Decisions* suggest that the claimants only have to prove that their right recognised by law is unlawfully harmed by the defendants. The claimants do not have to prove the damage caused to the defendants because the Court of Justice can order them to pay compensation to the claimant calculated by the circumstances and the seriousness of their unlawful act. This legal position might cause a problem, especially for the insults regulated under this second approach (using s 420 of the Civil and Commercial Code with Article 32(1) of the Constitution), because it is unclear which form of insult can make insulters liable. There might be many civil cases where victims sue their insulters under tort law for compensation from being insulted privately because the forms of insult under the second approach are not limited to those forms criminalised under the Criminal Code. It would be possible for the claimant in the *Decision No 200/2511*[234] to sue his insulter though the insulter only told a third party that he was a ghoul. It is questionable whether the victim as in this case should sue his insulter because there might be no substantial damage caused by this insult. To solve this problem, I will examine a rationale for regulating insults in chapter 5 to find out whether Thai tort law should regulate forms of insult which are unregulated by the criminal law.

The discussion of Thai law in section 3.3 shows that insulted victims can also use the civil law to protect their personality right. However, in my view there should be a clarification on the forms of insult regulated under tort law. Furthermore, we will see in section 4.4 that the Civil and Commercial Code s 447 prescribes the *specific* rules to protect personal reputation and the *special* compensation for defamed victims in civil cases. These specific rules, however, are not applicable to insulted individuals because the right injured is not

[234] The *Supreme Court Decision 200/2511* (n189)

specified in that section. Similar to criminal law, this suggests that Thai law does not protect insulted victims at the same level as defamed victims.

3.4 Conclusion

This chapter shows that Thai law currently protects an individual from being insulted by both the Criminal Code and the Civil and Commercial Code. In criminal law, the offence of insult under the former Code regulates two forms of insult as a Petty Offence: (i) insulting an individual in their presence and (ii) insulting an individual by means of communication to the public. I found that the first form of insult aims to protect the personality right from being harmed by insults and to preserve public order. It is acceptable and suitable for this form of insult to be stated as a Petty Offence, which is an offence to preserve public order.

However, I found that the second form of insult mainly aims to protect the personality right. There are problems derive from this form of insult. First, the factor to consider a commission of the offence of insult by means of communication to the public is unclear. Secondly, the offence of insult does not prescribe its *specific* justification which can guarantee that people have their freedom to comment on a public interest topic by any types of word. Nonetheless, the lack of the justification might not cause a serious problem because it is easy to settle their charge by paying the fine. Thirdly, it is unsuitable to state the offence of insult by means of communication to the public as a Petty Offence because the perpetrator who commits a Petty Offence is allowed to easily settle their charge by paying the fine to the police. To solve these problems, rules under the offence of defamation should be applied to this form of insult. As we will see in chapter 4, the offence of defamation prescribes better rules to regulate defamation. I will propose that some of those specific rules should be applied to insults.

In civil law, insulted victims are protected under the general principle of tort law by these two approaches. First, the insulted victims can claim that their *right not to be insulted* protected under the Criminal Code recognised as ‘another right’ is harmed. Secondly, the insulted victims can claim that their personality right, which is a constitutional right recognised as ‘another right’ is harmed. However, it is unclear which form of insult should

incur civil liability. Moreover, the general principle of tort law does not provide suitable protection to the personality right when compared to the specific rules of tort law which regulates defamation. As we will see in the next chapter, the Civil and Commercial Code provides the special compensation for defamed individuals, but this compensation is not applicable for insulted individuals. I will propose that this remedy should be applied to insulted individuals, too.

Chapter 4 How Does Thai Law Protect Another Personality Right?

4.1 Introduction

The offence of insult is not the only offence which regulates speech to protect an individual in the Criminal Code; there is the offence of defamation stated in Book II of the Criminal Code which also regulates speech to protect an individual. In section 4.2, I will discuss the relationship between the offences of insult and of defamation by showing that these offences in the legal history were regulated under the same rules but were separated when Thailand had its first Criminal Code in 1908. Nonetheless, I will show that the Supreme Court of Thailand sees these offence as similar offences. But I will argue that it is necessary for Thai law to regulate insults by means of communication to the public (the second form of insult currently regulated under s 393 of the Criminal Code) by using same rules under the offence of defamation because the relocation will allow this form of insult to be regulated under the same rules as defamation.

The rules of defamation will be discussed in section 4.3, which will show that the offence of defamation, as a criminal offence, only penalises a person who *intentionally* commits the offence of defamation. I will also show that the interest protected under this offence is the personality right but in the different aspect from the offence of insult and some content which is not regulated by the offence of insult can be regulated under the offence of defamation. Not only does the offence of defamation aim to protect defamed victims, but I will also show that this offence guarantees that in some circumstances, individuals can express their opinions or statement without being liable under the offence of defamation. Furthermore, I will show the offence of defamation has the more suitable process and sanctions to protect defamed persons than the offence of insult.

In section 4.4, I will discuss defamation in the aspect of civil law. I will show that the Civil and Commercial Code has the specific rule for protecting defamed victims and provides the special compensation for them. I will argue that this special compensation is better than that provided for insulted victims and will propose an amendment to the Civil and Commercial Code for the insult victims to be able to claim this special compensation.

4.2 Relationships Between the Offences of Defamation and of Insult

As we have seen in section 1.1, Na-Nakorn and Pentakulchai argue the offence of defamation and of insult are similar because both of them protect personal honour.[235] Pentakulchai proposes that the offence of insult should be added into the Chapter of the Offence of Defamation.[236] He presents the legal history of these offences since 1782 to support his argument and proposal. I will discuss and analyse his argument in section 4.2.1. I will suggest in section 4.2.2 that in practice the Supreme Court of Thailand already accepted that these offences are similar but not because both of them protect personal honour. But as we have seen it is unnecessary to identify the specific aspect of personality right protected by the offence of insult. It can be said that this offence protects the personality right. And we will see in this chapter that the offence of defamation also protects the personality right but in a different aspect. And I will depart from the proposal of Pentakulchai to the extent of arguing that it is unnecessary for both forms of insult to be relocated into the Offence of Defamation Chapter. Since the first form of insult aims to protect the personality right and to preserve public order as we have seen in section 3.2.3.1, it is suitable for this form of insult to remain as a Petty Offence. My development from the ideas of Pentakulchai is to argue that only the second form of insult should be relocated to the Offence of Defamation Chapter. This relocation will allow the second form of insult to be regulated by same rules of defamation, which will be explained in section 4.3.

4.2.1 The History of the Offence of Insult and Defamation since the Beginning of Rattanakonsin Era

Similar to Kraivixien's description of the history of Thai law,[237] Pentakulchai asserts that in the beginning of Rattanakosin Era (RE) (at the end of the 18th century), Thailand used the 'Law of the Three Great Seals'.[238] This law had the provision covering acts which are

[235] See the accompanying text of footnotes 26-28
[236] See the accompanying text of footnotes 29-30
[237] See section 2.2
[238] Pentakulchai (n27) 64-96

currently equivalent to insult and defamation in the chapter called 'Physical Fight and Verbal Abuse'.[239] This provision can be summarised and translated as:

> A person, with or without honour, who is verbally abused behind his or her back and aware of that abusing from another person, should not be serious with this issue. However, if that person is verbally abused in his or her presence, he or she can prosecute their abuser.[240]

It is worth noting here that what we understand today by the two separate concepts of insult and defamation both have their common roots to verbal abuse as used here. This provision shows that in the past Thai law had not penalised words which were not personally heard by the injured party but had regulated verbal abuse that occurred in the presence of the injured party. This is the first form of insult currently regulated today, as we have seen in section 3.2.3.1. It may be deduced from the very name of the chapter that the purpose behind this provision was to prevent a physical fight between the abuser and the person abused: the chance of the physical fight is low if the victim does not personally hear the abuse from the abuser, thus, the law did not criminalise this act. However, the chance of the physical fight is far higher if the victim directly hears the abuse from the abuser. This is why I argued that the first form of insult was originated from history.

Pentakulchai points out that the Law of the Three Great Seals had been enforced until Western people came to do business in Thailand in the reign of the King Rama IV.[241] These people introduced a printing technology into Thai society,[242] which obviously gave greater scope for written abuse to be circulated widely. Pentakuchai argues that the provision of the Law of the Three Great Seals became outdated, because it could not penalise a person who injured the reputation of another person by printed matters since it only criminalised the verbal abuse in the presence of the injured parties[243] Furthermore,

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[239] ibid 64 ('Physical Fight and Verbal Abuse' is translated from 'พระไอยการลักษณวิวาทต่าตี')
[240] ibid 65
[241] ibid 70
[242] ibid
[243] ibid

as we have seen in section 2.2, Western people perceived Thai law as being outdated and pressured Thailand to reform its legislation.[244] In response, the King Rama IV appointed Thai and Western legal specialists to reform Thai law that would be accepted by Western traders.[245] The specialists with the approval of the King decided to use the Civil Law legal system that was predominant in continental Europe at that time.[246]

During the drafting of the Criminal Code, Pentakulchai describes that Thailand had to announce the Royal Decree on Defamation by Speech or by Publishing Untrue Statements RE 118 (1900)[247] to regulate harmful statements by the printing technology because the Law of the Three Great Seals could not regulate these statements.[248] He says that defamation by printed matters caused more harm than verbal abuse in the presence of the injured party because the printed matter can make the public see the injured party negatively. (Also, of course, printed matter has more potential to cause harm because its lasts, while verbal abuse is ephemeral). He points out that s 3 of the Royal Decree repealed the Chapter of Physical Fight and Verbal Abuse[249] and asserts that s 6 of this Decree criminalised an individual who insulted another individual in his presence. It also criminalised an individual who defamed another without the requirement that the defamed individual must personally hear the defamatory content by themselves. Moreover, it criminalised an individual who publicly humiliated another individual in a manner which put this individual into hatred, ridicule or disparage by the public.[250] The penalty for committing one of these crimes was imprisonment for not exceeding two years or a fine of not exceeding one thousand baht (40£), or both. He anticipates that Thai law criminalised those acts because it copied from English law, since Prince Rabi, the

[244] ibid 76; see the discussion of this issue in section 2.2 above
[245] ibid 77
[246] ibid
[247] The Thai name is this Royal Decree is "พระราชกำหนดลักษณะหมิ่นประมาทด้วยการพูดหรือเขียนถ้อยคำเท็จออกโฆษณาการ". The Thai version of this Royal Decree can be found at 'The Royal Decree on Defamation by Speech or by Publishing Untrue Statements RE 118 (พระราชกำหนดลักษณะหมิ่นประมาทด้วยการพูดหรือเขียนถ้อยคำเท็จออกโฆษณาการ รัตนโกสินทร์ ศก 118)' (Ratchakitcha) <http://www.ratchakitcha.soc.go.th/DATA/PDF/2442/002/18.PDF> accessed 4 August 2022
[248] ibid 70
[249] See The Royal Decree on Defamation by Speech or by Publishing Untrue Statements RE 118, s 3
[250] ibid 72

president of the drafting committee of this Decree graduated from England.[251] Moreover, he says that the content of this Decree was similar to the English defamation law.[252] This Decree was already repealed after Thailand enacted the first Criminal Code (1908).[253] Thus, this Decree has had no influence since 1908. Nonetheless, the argument of Pentakulchai in this paragraph shows that Thai law responded to harmful speech on the printed matters by copying English law as a model to solve the problem. This law may not actually reflect the Thai culture. However, I believe Thailand had to adopt law from developed country (in this case English law) as a model in order to address Western people's claims that Thai law had been outdated and uncivilised.

Similar to Kraivixien and Boonchelermwipas mentioned in section 2.2, Pentakuchai argues that the 1908 Code was influenced by the Criminal Codes of European Countries.[254] However, under this 1908 Code, verbal abuse and defamation were significantly distinguished for the first time,[255] because they are stated in the different Books. Defamation under the Thai Code was criminalised in Book II: Specific Offences stated in s 282 of the Code, while verbal abuses were penalised under s 339 in Book II Petty Offences.[256] This is different from at least the German Criminal Code, which stated the offence of insult and defamation in the same chapter.[257] Pentakulchai argues that this separation was caused by the Drafting Committee of the Code who wanted to classify the offences in the Code into severe offences and petty offences; the latter offences are crimes which should not be severely punished.[258] He says that the Committee believed that the offence of insult was (unlike defamation) not a serious crime; thus, this offence was classified as a Petty Offence.[259] He also points out that this concept was later adopted into the current Criminal Code. This classification constituted the significantly

[251] ibid 75
[252] ibid
[253] See the Annex of the Criminal Code RE 127 ('The Criminal Code RE 127 (กฎหมายลักษณะอาญา รศ. 127) (*Parliament*) < https://dl.parliament.go.th/backoffice/viewer2300/web/viewer.php http://www.ratchakitcha.soc.go.th/DATA/PDF/2442/002/18.PDF> accessed 25 May 2023)
[254] ibid 81
[255] ibid 76
[256] ibid 79 (see the detail of the 1908 Code at the Criminal Code RE 127 (n 253))
[257] See the detail of the German criminal law of insult and defamation in chapter 6.
[258] ibid 80
[259] ibid 83

difference between the offences of defamation and insult which previously had the same penalty and regulated under the same rules.

As we have seen at the beginning of this thesis, the current Criminal Code, which replaced the 1908 Code, places the offence of defamation in Book II: Specific Offences; while the offence of insult is found in Book III: Petty Offences. The penalty of the latter offence is very low comparing to the former offences. We have seen that the penalty for insult is imprisonment for not exceeding one month or a fine of not exceeding ten thousand baht (250£) or both.[260] We will see that the penalty for defamation can be as high as imprisonment for not exceeding two years and a fine of not exceeding two hundred thousand baht (5,000£).[261] From these differences, Pentakulchai proposes that the Thai Criminal Code should be amended by moving the whole offence of insult from the category of Petty Offence into the same chapter of the offences of defamation, because he argues that both offences are similar.[262] I agree with Pentakulchai's argument that the offences of defamation and insult are similar, because these offences regulate acts which harm the personality right in a different aspect. As we have seen, the offence of insult protects the personality right from being harmed by insults,[263] and as we will see, the offence of defamation protects the personality right from being injured through defamation.[264] In fact, the Supreme Court practically regards these offences as similar, as we will see in the next section. However, it is still necessary for the offence of insult to be relocated to the same chapter as defamation because the relocation will allow insults to be regulated under the same rule. Furthermore, I do not completely agree with Pentakulchai's proposal, and would instead modify it so that only the second form of insult, insulting an individual by means of communication to the public, should be relocated into the Chapter of the Offence of Defamation. This is because insults by this means are criminalised mainly to protect the personality right. The first form of insult, insulting an individual in their presence, should, I argue, remain as a Petty Offence

[260] The Criminal Code, s 393
[261] The Criminal Code, s 328 (n289)
[262] Pentakulchai (n27) 105
[263] See section 3.2.1
[264] See section 4.3.1

because of the focus that this form of insult has on preserving public order by preventing physical fight between the insulter and the insulted person.

4.2.2 Similarities of the Offences of Insult and Defamation as recognised by the Supreme Court of Thailand

The Supreme Court of Thailand regarded the offences of defamation and insult as not significantly different is shown when the Court applied s 192 of the Criminal Procedure Code to cases of insult and defamation. This section forbids the Court of Justice from penalising the defendant beyond the claimant's complaint.[265] However, if the facts in the claimant's complaint and those found in the trial are not significantly different, the court is allowed to penalise the defendant as found in the trial.[266] The Supreme Court used this exception in its *Decision No 1105/2519* (1976), which already mentioned in chapter 3,[267] to penalise the defendant under the offence of insult, although the prosecutor initially prosecuted the defendant under the offence of defamation.

In this *Decision*, the prosecutor initially prosecuted the defendant under the offence of defamation. The prosecutor claimed that a news report *defamed* the injured party. However, the Court found that this statement was not defamatory, but that it did humiliate the injured party which can be considered as a commission of the offence of insult. The Court punished the defendant under the offence of insult by using the exception under s 192 mentioned in the above paragraph.[268] The application of s 192 in this case strongly suggests that acts which constitute the commission of the offence of defamation or insult are similar. This similarity may cause the injured party misunderstanding whether they were defamed or insulted. But this misunderstanding will not be the cause for the Court to dismiss the charge against the defendant. Thus, the Court can penalise the defendant

[265] The Criminal Procedure Code, s 192 (1) 'Neither judgement nor order shall be rendered for anything beyond the charge or request.'
[266] The Criminal Procedure Code, s 192 (2) 'If the Court found that the facts as appeared in the trial are different from the facts stated in the charge, the Court must dismiss the case. But if the difference is not a significant issue and the defendant has not stated the difference in his defence, the Court can penalise the defendant from the facts found in the trial.'
[267] The *Supreme Court Decision No 1105/2519* (n177)
[268] ibid

under the offence of insult, although the claimant claimed that the defendant committed the offence of defamation or *vice versa*.[269] This case confirms my argument that the Thai Court of Justice regards the offences of defamation and insult as similar offences. In my view, the Court is right to do so since both offences regulate speech affecting the personality right of the individual.

Even though the Supreme Court already ruled that the offences of insult and of defamation are not significantly different, it is still necessary to propose that the second form of insult should be relocated to the same chapter as the offence of defamation. This is because the relocation will allow this form of insult to be regulated under same specific rules as defamation. As we will see in the next section, the Offence of Defamation Chapter has specific rules which provide better protection to the personality right than the rule under the offence of insult. Furthermore, there is a clear factor to determine whether a perpetrator communicates their defamatory content by means of communication to the public. This factor can clarify which act should be considered as an insult done by the same means. Moreover, the offence of defamation prescribes *specific* justifications and defence to protect defamers from being found liable under the offence of defamation. The relocation will benefit insulters, too.

4.3 The Offence of Defamation

In this section, I will discuss the rules of the offence of defamation to show that this offence provides more suitable protection to the personality right than the offence of insult. First, I will show how the offence of defamation regulates acts which harm the personality right and compare with those regulate by the offence of insult. Though these acts are different, there might be some overlap between them. I will compare the standards which the

[269] In a case where the claimant initially prosecutes the defendant under the offence of insult, if the Court finds that the defendant did not commit the offence of insult but committed the offence of defamation, Section 192 (2) of the Criminal Procedure Code allows the Court to penalise the defendant under the offence of defamation. But s 192(3) forbids the Court from penalising the defendant more than the penalty prescribed under the offence prosecuted by the claimant. Therefore, the Court can find the defendant guilty of the offence of defamation but cannot penalise the defendant more than the penalty under the offence of insult. For example, in the *Supreme Court Decision No 834/2510* (1967), the Court also used s 192 of the Criminal Procedure Code to penalise the defendant under the offence of insult, although the claimant initially prosecuted the defendant under s 328.<http://deka.supremecourt.or.th/> accessed 13 August 2019

Supreme Court uses to identify defamatory and insulting content. Secondly, I will discuss acts considered as committing the offence of defamation in section 4.3.2. This section also shows that some acts which are not criminalised by the offence of insult can be regulated by the offence of defamation. Thirdly, I will point out that, as a criminal offence, the offence of defamation also requires the intention as the internal element in section 4.3.3.

Fourthly, I will show that the offence of defamation prescribes its *specific* justifications and defence in section 4.3.4. Not only does the offence of defamation aim to protect defamed victims, but I will also show that the offence prescribes the justifications and defence for defamers who commit the offence. These justifications and defence guarantee that, in some circumstances, individuals can express their opinion or statement without having to be liable under the offence of defamation. I will argue that the justifications should also provide to individuals who commit the offence of insult by means of communication to the public in those circumstance. They should be guaranteed that they will be free to use some insulting words in their expression or statement in those circumstances without having to be liable for insult. I will propose an amendment to the Criminal Code to relocate insults by means of communication to the public to protect these individuals. This relocation will allow this form of insult to be regulated by same rules as defamation.

Fifthly, I will point out that the offence of defamation is a compromisable offence in section 4.3.5. As an offence being a compromisable offence, the perpetrator and the injured party can legally settle their dispute before the final decision of the Court of Justice. Defamers can settle their dispute with their victims by offering their apologise to the victims. If the victims satisfy with the defamers' offer, the dispute will be settled. This can be done without having to impose any criminal sanction to the defamers. I will argue that this process provides better protection than the process under the offence of insult. My proposal to relocate the offence of insult by means of communication to the public to the same chapter as the offence of defamation will also solve this problem. An individual who is insulted by means of communication to the public will be able use the same process as the defamed victim.

Finally, I will compare the sanctions imposed for the offence of defamation with those imposed under the offence of insult in section 4.3.6. The offence of defamation prescribes the special sanctions which the Court can impose them on the defendant who was found guilty of the offence of defamation. I will argue that the sanctions prescribed under the offence of defamation are more suitable for protecting the personality right than the sanction for the offence of insult. My proposal to relocate the offence of insult by means of communication to the public to the same chapter as the offence of defamation will also allow individual insulted by means of communication to the public to ask for these special sanctions.

4.3.1 Defamatory Content and its Relationship with Insulting Content

The main rule of the offence of defamation states in s 326:

> Whoever imputes anything about another person to the third party in a manner likely to impair the reputation of such person or to put such person to contempt or hatred is said to commit the offence of defamation and shall be liable to imprisonment for not exceeding one year or a fine of not exceeding twenty thousand bath or both.[270]

What amounts to defamatory content under the offence of defamation is different from what amounts to insulting content. The content regulated under the offence of defamation as shown in section 326 is 'anything about another person… in a manner likely to impair the reputation of such person or to put such person to contempt or hatred.' Watchanasawat calls an offence having a phase: '*in a manner likely to*' or '*is likely to cause*' as an offence that has '*the circumstances of the perpetrator's act*' as its element.[271] To determine this element, Watchanasawat explains that the Thai Court has to consider

[270] Translated by Netayasupha, Pisitpit and Watcharavutthichai (n2) 277-279; This translation is mistranslated in the part that says, '*to the third party.'* The correct translation must be '*to a third party*', because the perpetrators who commit this offence do not have to impute a statement to *the* third party (the particular third party); they can impute a statement to a third party (any third party).
[271] Wachanasawas (n183) 248; See the *Decision No 6593/2559* (2016), the Supreme Court clearly said that the phase '*in a manner likely to impair the reputation of such person or to put such person to contempt or hatred*' of s 326 is *the circumstances of the perpetrator's act*.

whether a reasonable person would find that the perpetrator's act may constitute the result as required by that offence. The perpetrator can be guilty under that offence, although the result required by that offence may not have occurred yet. Therefore, defamatory content under this offence is content which can (i) make a reasonable person think that the reputation of an individual has been injured; or (ii) make that person hate or feel contempt toward that individual. The term '*to injure the reputation*', is explained by Tingsapat as:

> to degrade the personal value of the injured party that appears in the society. In other words, to injure reputation is to make ordinary people in the society degrade that value or do not want to socialise with the injured party.[272]

This explanation suggests that 'to injure the reputation' means to make a reasonable person think less of the injured party or see the injured party negatively. Tingsapat also clarifies that making a reasonable person hate or feel contempt for the injured party are not free-standing injuries but rather are merely types of injuring reputation.[273] I agree with Tingsapat's explanation because making a reasonable person hate and feel contempt towards the injured party can only be done by lessening the reasonable person's willingness to socialise with the injured party. This rule has been used by the Supreme Court to consider content regulated by s 326. If the Court finds the statement being said by the defendant could *not* make a reasonable person think less of the victim, the defendants will *not* be guilty of the offence of defamation. For example, in the *Supreme Court Decision No 256/2509* (1966),[274] the claimant prosecuted the defendant for the offence of defamation, because the defendant imputed to a third party that the claimant was a ghoul and compared him to a dog. He claimed that he was defamed by this statement, but the Supreme Court found that the accusations were impolite statements which do not injure his reputation nor make a third-party hate or feel contempt toward him. The Court explained that these statements cannot make a reasonable person believe that the claimant was ghoul or dog because it is impossible for a person to become

[272] Tingsapat (n11) 421
[273] ibid
[274] <http://deka.supremecourt.or.th/> accessed 13 August 2019

those things. The words were merely meaningless abuse and would be understood by the reasonable person as such. Furthermore, In the *Supreme Court Decision No 3073/2565* (2022), the prosecutor prosecuted the defendant under the offence of defamation because the defendant said that the injured party '*I Sandan Ma*,' which can be literally translated as the injured party had a character as a dog.[275] Similar to the *Decision No 256/2509*, the Court found that it is impossible for a person to have a dog character and would be understood by the reasonable person as such. Therefore, the Court found that this word is not defamatory. Thus, the defendant was not guilty under the offence of defamation.

Subject to the other elements which will be discussed below, the defamer who communicates the defamatory content can be found guilty of the offence of defamation. For example, in the *Decision No 4301/2541* (1998),[276] the defendant, a bank manager, was prosecuted by his supervisee because he said to a third person that the claimant had a family issue and had problems with others. She (the claimant) was transferred to another branch and her employment contract would soon be terminated. The Court found that a reasonable person who heard this statement would believe that the claimant was not a good person and often fought with her husband. She had many problems with her colleagues and her employment contract might be terminated. This statement could injure her reputation. Thus, the defendant was found guilty of the offence of defamation. And in the *Decision No 407/2523* (1980),[277] the Supreme Court found the editor of a newspaper guilty of the offence of defamation for publishing a statement saying that the claimant, a mayor, was a pervert and issued a bad cheque. The Court explained that this information could injure the reputation of the claimant. Thus, the editor was found guilty of the offence of defamation.

The above discussion shows that whether or not something is defamatory does not depend on the injured party's assessment of the words used but whether, in the opinion of the Court, the words used make a reasonable person see the injured party negatively:

[275] <http://deka.supremecourt.or.th/> accessed 8 June 2023
[276] <http://deka.supremecourt.or.th/> accessed 8 October 2020
[277] <http://deka.supremecourt.or.th/> accessed 8 October 2020

it is, in other words, an objective standard. As defamatory content is the content which injures a person's value evaluated by the society, it can be said that this content also injures the personality right but in the different aspect from the insulting content because the personality right being protected by the offence of insult does not concern the estimation of the society.

The discussion also shows that the method to consider whether acts are defamation or insulting is different. This is because, on the one hand, insults focus on acts of insulters who (i) do not respect or value the victim as a person or a human; or (ii) severely disrespect their victims by using vulgar words or by using words that make them ashamed. On the other hand, defamation focuses on the acts which make a reasonable person see the defamed victim negatively.

Therefore, if the statement being communicated does not show any acts of disrespect in the sense of the offence of insult, this statement will never be an insult under the offence of insult. As we have seen in the *Decision*s *No 4301/2541* (1998) and *No 407/2523* (1980), the defendants did not disparage, humiliate or verbally abuse the defamed victims, but the defendants used the statements which can make a reasonable person see the victims negatively. However, if the statement being said shows an act of disrespect and can make a reasonable person see the injured party negatively, this statement can both be defamation and insult. A person who makes this statement might be found guilty of the offences of defamation and insult if the person's act fit with the elements of both offences. In the *Decision No 445/2522* (1979),[278] the claimant prosecuted the defendant under the offences of defamation and of insult because the defendant told a *third party* that the injured party, a government officer, was '*Hia*' and '*Sud*' (these words are verbal abuses in Thai). The defendant also said that the injured party was a corrupted officer. The Court found that the accusation of corruption can injure the reputation of the injured party. The Court found the defendant guilty of the offence of defamation. Although the Court accepted that the words '*Hia*' and '*Sud*' are insults, it did not find the defendant guilty of the offence of insult. It is reasonable to assume that the

[278] <http://deka.supremecourt.or.th/> accessed 8 June 2023

defendant was not guilty of this offence because the defendant did not say the insulting words in the presence of the injured party or by means of communication to the public. The defendant said those insulting words to a third party. Furthermore, in the *Supreme Court Decision No 3920/2562* (2019), [279] the Court had to determine whether the statement saying '*Aow Thanai Hengsuay Tee Nai Ma Satul,*' is defamatory. This statement can be literally translated to 'Where did you get this terrible and vile lawyer?'. The Court confirmed that *Hengsuay* is an insulting word, which is similar to the *Decision No 1623/2551* (2008).[280] However, the Court further explained that the word *Satul* (a verbally abusing word) means vile. When the word *Hengsuay* is combined with *Satul,* these words mean terrible, unreliable, and vile. The Court found that these words can make a reasonable man degrade the value of the lawyer (the injured party in this case); thus, this statement is defamatory. The *Decisions No 445/2522* and *3920/2562* show that there can be an overlap between insult and defamation if the statement being said contains disparaging, humiliating or verbally abusing words and contains words which can make a reasonable person see the defamed victim negatively. Figure 4.1 shows the relationship between insult and defamation which injure the personality right.

[279] <http://deka.supremecourt.or.th/> accessed 6 June 2022
[280] The *Supreme Court Decision No 1623/2551* (2008) (n164)

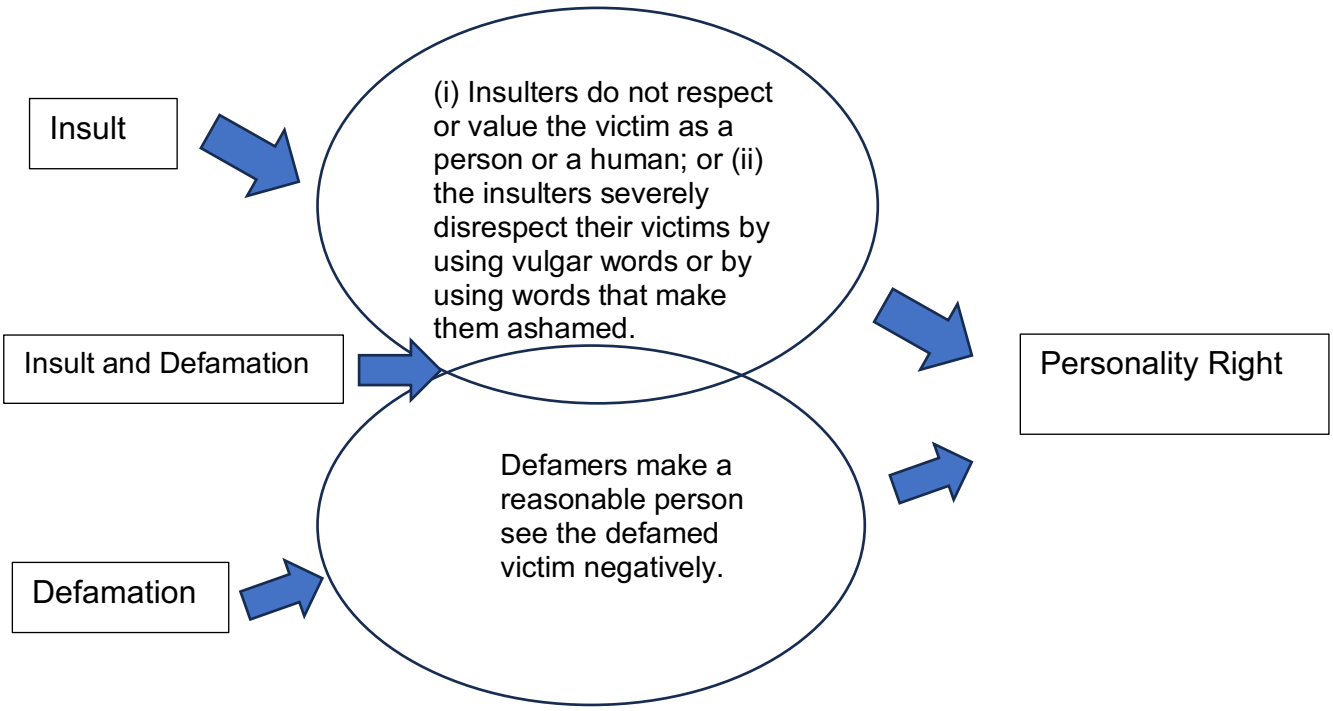

figure 4.1

4.3.2 Defamation Criminalised under the Offence of Defamation

Section 326, as quoted above,[281] penalises the perpetrator who commits the offence of defamation when they *impute* a defamatory statement to a third party. If the statement is communicated to the public, the penalty of the perpetrator will be higher as an aggravated offence according to s 328, quoted in section 4.3.2.2. The approach under the offence of defamation is different from the approach under the offence of insult because with insult the penalties are no more severe when insults are communicated to the public.

Section 4.3.2.1 will describe how the Supreme Court has interpreted 'to impute' to show that the offence of defamation can regulate an act which is not regulated under the offence of insult. Section 4.3.2.2 will discuss how the Supreme Court dealt with defamation by means of communication to the public to show that the factor to consider the commission

[281] see the accompanying text of footnote 270

of this form of defamation is clearer than the factor under the offence of insult under this form.

4.3.2.1 To Impute: To Communicate Defamatory Content

Section 326 criminalises a person who '*imputes anything about another person…'* Praneetpolkrung provides the Thai definition of the word 'to impute' as 'to say or to write a bad thing which harms another person.'[282] There are Supreme Court Decisions which found the defendants guilty of the offence of defamation because they said bad things to a third party.[283] Although the term 'to impute' suggests that it is an act of *saying or writing* something bad to a third person, the Court of Justice did not strictly define '*to impute*' as limiting to those acts. As we will see in the *Supreme Court Decision No 2822/2515* (1972)[284] and the *Criminal Court Decision No 797/2545* (2002), the Court did not strictly define the word 'impute.' This word means 'to communicate defamatory content.'

In the *Decision No 2822/2515* (1972), the Supreme Court found the defendant guilty under the offence of defamation because the defendant *showed a defamatory letter* to a third person, not because he *said* something bad to a third person. The defendant in this case was prosecuted because he showed a letter containing defamatory statement against the injured party to Mr Samran (a third party). The Supreme Court explained that *showing a defamatory letter* is not different from *an act of saying*. The Court used the fact that the defendant showed the statement in a letter to a third party to indicate that the defendant intended for the third party to know the information in the letter. Since the defendant knew that the letter had a defamatory statement against the injured party and showed to a third party, the Court ruled that the defendant was guilty of the offence of defamation from showing this letter. This ruling suggests that the Court did not interpret

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[282] Supis Praneetpolkrung, *Cases of Defamation – Insulting: Defamation or Insulting the King, Insulting a Public Officer, Insulting the Court of Judge, Defamation and Insult* (2019 Nititham) 52

[283] For example, see the *Supreme Court Decision No 2296/2514* (1971) ('The Court found the defendant guilty of the offence because he *said* to a third party that the claimant, a public officer, received a bribe from Mr S'); the *Supreme Court Decision No 2021/2517* (1974) *(*'The Court found the defendant guilty of the offence because he *told* a third party that the claimant stole his ducks without any proof that the claimant actually did.')

[284] The *Supreme Court Decision No 2822/2515 (*1972) <http://deka.supremecourt.or.th/>accessed 6 June 2022

the term 'to impute' strictly as limiting to the acts of saying and writing. The act of *showing a defamatory letter* to third party can be regarded as an imputation. It is important to point out that the Court did not find the defendant commits this offence because he *merely* showed the defamatory letter. The Court also used the fact that he *knew* the content of this letter and *showed* this letter to the third party to indicate that he *intentionally* defamed the injured party. This is because the offence of defamation is a criminal offence, a perpetrator is criminally liable only when they commit the offence intentionally.[285]

In the *Decision no 797/2545* (2002) of the Criminal Court (a first instance court), the defendant who published edited photos of the injured parties on the Internet was found guilty of the offence of defamation.[286] In this case, the defendant put the photos of the injured parties' faces onto pornographic photos and published those photos on the Internet. The prosecutor claimed that the defendant's action was an *imputation* because these photos could make the public believe that the injured parties, who were actresses, had an unacceptable career to Thai society.[287] The defendant pled guilty, and the Court found the defendant criminally liable of the offence of defamation. This ruling also suggests that the Court did not strictly interpret the term 'to impute' as limiting to the acts of saying and writing. The act of putting a person's face onto a pornographic photo and published the edited photos on the Internet can also be regarded as an imputation.

The above two cases show that the term 'to impute' is not strictly interpreted. They suggest that this word means 'to communicate defamatory content'. In other words, the defendant in the *Decision No 2822/2515* (1972) communicated defamatory content by showing the defamatory letter. The defendant in the *Decision No 797/2545* (2002) communicated defamatory content by posting an edited photo on the Internet.

Although the term 'to impute' is broadly interpreted, s 326 specifically requires that a perpetrator must communicate defamatory content to at least *one third party*.[288] This is

[285] See section 4.3.3
[286] The *Decision No 797/2545* (2002) cited in Sarawuth Pitiyasa, *Textbook on the Computer Crime Act BE 2550 and (No 2) BE 2560* (2nd edn, Nititham 2018) 194
[287] ibid 195
[288] As shown in the accompanying text of footnote 270, s 326 states: '*Whoever imputes anything about another person to a third party…*'

because this section clearly states that the imputation must be done to 'a third party.' It is understandable why this section has this condition because defamatory content regulated under this section must make a third party as a reasonable person degrade the value of the injured party or be unwilling to socialise with the injured party as discussed in section 4.3.1. The centrality of the reaction of the reasonable person is confirmed in the *Supreme Court Decision No 110/2516* (1973) which held that the offence of defamation does not penalise a person who directly communicates the harmful content against the injured party to the party himself or herself.[289] In this case, the Court found that the defendant, who sent a letter containing harmful information against the claimant directly to the claimant, did not commit the offence of defamation because he did not impute that statement to a third party.[290] However, as we have seen in section 3.2.3.1, a person who communicates harmful content directly to the injured party and no-one else may commit the offence of insult in the presence of the injured party if the content is disparaging, humiliating or verbal abusing. This is because the interest being protected is a person's personality right from being harmed by insults not the value of a person evaluated by a reasonable person.

The description of the offence of defamation shows a reason why I argue above that an individual who sends a *direct* message online containing defamatory content against another individual to *a third party* may be liable under the offence of defamation, although the sender will not be liable under the offence of insult if they are in different physical places.

4.3.2.2 Defamatory Content Communicated to the Public

As shown above the offence of defamation under s 326 can be committed if the defamatory content is communicated to *a* third party. But where it is communicated to the public more generally, this is an aggravated offence and the penalty imposed on the perpetrator will be higher according to s 328, which states:

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[289] <http://deka.supremecourt.or.th/>accessed 13 August 2019

[290] I literally translate this sentence from the *Decision*. As I mentioned above the Supreme Court interpreted the term 'to impute' widely.

> Where the offence of defamation is committed *by means of publication* of a document, a drawing, a painting, a film, a picture, letter made visible by any means, a sound recorder, a picture recorder, a letter recording instrument; by means of broadcasting or dissemination of pictures; or by propagation by any other means, the offender shall be liable to imprisonment for not exceeding two years and a fine of not exceeding two hundred thousand bath.[291]

Similar to the translation of s 393, I believe this translation also mistranslates the word 'by publication,' which might suggest that defamation by publication must be done in tangible forms which communicate to the public.[292] However, the text of s 328 shows that commissions of the offence under s 328 can be done by any other means without having to contain defamatory content in any tangible form. The more appropriate term should be 'by means of communication to the public.' The English translation of s 328 should be:

> Where the offence of defamation is committed *by means of communication to the public…*

The phase '*Where the offence of defamation is committed*…' under s 328 shows that the Court must consider whether the defendant did commit the offence under s 326 before determining whether they commit the offence under s 328. For example, in the *Supreme Court Decision No 1739/2523* (1980),[293] the defendant was prosecuted for publishing a notice on a newspaper asking the claimant to return the defendant's money. The defendant claimed that it had tried to ask the claimant to pay the money back many times, but the claimant refused. The Court found that it was rightful for the defendant to publish this notice, because the claimant actually owed the defendant. Thus, the Court found that the defendant did not commit the offence of defamation under s 326. Nor was the defendant guilty of s 328, although the content being prosecuted for was published on a newspaper.

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[291] Translated by Netayasupha, Pisitpit and Watcharavutthichai (n2) 279. (emphasis added)
[292] See a definition of the word 'publication' in the accompanying text of footnote 160
[293] <http://deka.supremecourt.or.th/> accessed 6 June 2022

The text of s 328 shows examples of acts which amount as communicating to the public. This is different from the offence of insult; it is unclear which acts amount to communication to the public, as we have seen in section 3.2.3.2. Nonetheless, this section does not clearly identify which factor should be used to consider the act which communicates defamatory content to the public. Kasemsant, a former Supreme Court Judge,[294] argues that the nature of the defamer's conduct should be the factor.[295] He says that a defamer who posts a defamatory notice against another individual everywhere in a village should be guilty under s 328, although only one person read that notice. This is because the nature of the defamer's conduct can make the public know the content.

By examining the Supreme Court Decisions provided by Praneetpolkrung as examples of the commissions of the offence of defamation under s 328,[296] when it is obvious that the defamatory content is communicated to the public such as the content was published in a newspaper, the published decisions do not clearly explain which factor was used to rule the defendant guilty of s 328.[297] Nor did the Supreme Court in the *Decision No 2778/2560 (2017)*[298] explain why it found the defendant publishing defamatory content on a website guilty under s 328. I believe that it is obvious for the Court to find that the conducts of defamers in these decisions can make the public read or see the defamatory content. Therefore, the Court did not have to explain why the defamers were found guilty under s 328.s

Kasemsant's factor has been used in cases where it was unclear whether the defamatory content was communicated to the public. In the *Decisions No 1101/2530* (1987)[299] and *4998/2558* (2015),[300] the Supreme Court determined the natures of the defamers' conducts to find them guilty under s 328. In the former decision, a judge was prosecuted

[294] See footnote 64
[295] Krailerk Kasemsant, *Commentary on the Criminal Code Sections 288-366* (2016 Legal Education of Thai Bar) 201
[296] Praneetpolkrung (n282) 112-121
[297] The *Supreme Court Decision No 1808-1809/2531;* The *Supreme Court Decision No 69/2529;* The *Supreme Court Decision 2499/2526;* The *Supreme Court Decision No 526/2525;* The *Supreme Court Decisions No 954-956/2525*
[298] <http://deka.supremecourt.or.th/> accessed 6 June 2022
[299] <http://deka.supremecourt.or.th/> accessed 6 June 2022
[300] <http://deka.supremecourt.or.th/> accessed 6 June 2022

because she sent a complaint to the judicial committee accusing the claimant, another judge of having bad behaviour. She also sent this complaint to other judges who had no authority to deal with her complaint. The Court found that the defendant knew that her accusation was untrue and found that her conduct could make this untrue accusation communicate to the public. Therefore, she was found guilty under s 328. In the *Decision No 4998/2558* (2015), the defendant was prosecuted because he distributed copies of a newspaper containing defamatory content to people in a public place. The Court found that this conduct can make the public know the content; thus, the Court found the defendant guilty under s 328.

Furthermore, there are cases where the Court considered the natures of the defamers' conduct and found them not guilty under s 328 because their conduct could not make the public know the content. In the *Decision No 223/2524* (1981),[301] the defendant was prosecuted because he sent a document accusing the claimant of violating the disciplines of a government officer to the provincial governor. According to the governmental protocol, a copy of this document must be sent to the Secretary of the Minister of Internal Affairs. The Court found that the defendant's conduct was a commission of the offence of defamation under s 326[302] not under s 328 because he did not aim for the public to know. In *Decision No 7788/2552* (2009), [303] the defendant, a seller of real estate, was prosecuted by one of his buyers because the defendant sent copies of a defamatory letter against the claimant to other buyers. The Court found that this act was not a commission of the offence of defamation under s 328 because the seller merely sent the letter to a group of people not to the public in general. In *Decision No 1612/2564* (2021),[304] the defendant was prosecuted because he sent a defamatory statement against the claimant to a Line (a mobile messaging application) group. The Court found that this act was not a commission of the offence under s 328 because the claimant aimed to send the defamatory message to a group of people not to the public. These decisions show that

[301] <http://deka.supremecourt.or.th/> accessed 6 June 2022
[302] The published decision does not explain why the Court found the defamer committed the offence of defamation under s 326.
[303] <http://deka.supremecourt.or.th/> accessed 6 June 2022
[304] <http://deka.supremecourt.or.th/> accessed 6 June 2022

the defamer's conduct is the factor for the Court to determine whether the defendant is guilty under s 328.

I believe an argument can be made for the last two decisions that the Court did not find the defendants guilty under s 328 because sending defamatory content to a specific group of people does not make the public in general know the content. Nonetheless, if the group of people is big such as every student of a university, this should be regarded as the public. In other words, sending defamatory content to this kind of group can itself be a commission of the offence under s 328. However, there is no clear line between a private group or the public. The circumstances and the context of the communication should be used to consider whether the communication is done to the public.

Therefore, the nature of the defamer's conduct is the factor to consider the liability of the defamers under s 328. This factor is clearer than the factor to determine the liability of a person who insults another to the public.[305] The nature of the defamer's conduct should be used as a guideline for considering the commissions of the offence of insult by means of communication to the public. An insulter should be guilty under the offence of insult by this means if the nature of the insulter's conduct can make the public know the insulting content. For example, an individual who verbally abuses another by posting video clip online can be considered as having committed the offence of insult by this means because the nature of this conduct can make the public know the insulting content.

4.3.3 Intention to Commit the Offence of Defamation

Similar to the offence of insult, to be guilty under the offence of defamation under ss 326 or 328 of the Criminal Code a person must commit the offence intentionally. This is because a general principle of criminal law as we have seen in section 3.2.2 also applies to the offences of defamation. Therefore, to be guilty the perpetrator of ss 326 or 328 must be shown to know that their act will injure the injured party's reputation or that they could have foreseen that the injured party's reputation can be harmed by the perpetrator's statement.

[305] See section 3.2.3.2

Like the cases involving the offence of insult, most of the official published Supreme Court Decisions do not clearly identify which act of the defamer presented by the claimant indicates that the defendant had the intention to defame the injured party. I believe the Court also used the rule of '*acta exteriora indicant interiora*' to identify whether the defendant has an intention to defame the injured party, as in cases of insult, because this is the general rule which Thai court has used to identify the intention of the perpetrators.

As seen in the *Decision No 2822/2515* (1972),[306] not only did the Supreme Court use the fact that the *defendant showed* a defamatory letter to a third person, but the Court also used the fact that he *knew the content* to punish him. These acts were used to indicate that he *intended* for the third party to know the information in the letter and to see the injured party negatively. Therefore, the defendant was found guilty of the offence of defamation. Furthermore, in the *Decision No 380/2503* (1960),[307] the Court used the fact that the defendant knew that the claimant had sexual intercourse with Mr Anan and told this information to a third party to indicate that the defendant could have foreseen that her action would injure the claimant's reputation. Therefore, the Court ruled that the defendant intentionally defamed the claimant. These decisions also show that the Court used the fact presented by the claimant to indicate that the defendant had intention to defame the injured party.

On the other hand, if the fact presented by the claimant cannot indicate that the defendant had the intention to harm the injured party's reputation, the defamatory charge against the defendant will be dismissed. For example, in the *Supreme Court Decision No 91/2503* (1960),[308] the Court found that the defendant, who filed a complaint to the police claiming that the claimant was a suspect of the offence of murder, did not intentionally defame the claimant because the defendant only intended to ask the police to protect him. Therefore, the claimants have the burden to prove that the defendant intended to defame the injured party. If the claimant cannot show the fact to support his claim the Court can dismiss the charge. Furthermore, defendants have the right to rebut the claimant's argument by

[306] The *Supreme Court Decision No 2822/2515* (1972) (n284)
[307] <http://deka.supremecourt.or.th/> accessed 6 June 2022
[308] <http://deka.supremecourt.or.th/> accessed 13 August 2019

showing a fact which indicates otherwise. If the Court finds the facts presented by the claimant were not convincing or those presented by the defendant were more convincing, the Court can dismiss the defamatory charge by explaining that the defendant had no intention to commit the offence of defamation.

The discussion in sections 4.3.1-3 shows how Thai law criminalises an individual, who defames another individual. We have seen that the factor to determine the liability of defamers under the offence of defamation by means of communication to the public is clearer than the offence of insult's factor. Thai Court can use this factor in case of insults by means of communication to the public without having to amend any provision.

In the next section, I will show that the Offence of Defamation Chapter prescribes the *specific* justifications and defence for defamers. I will argue that there should be *specific* justifications for insults by means of communication to the public, too. This will be possible if the Criminal Code is amended, as I will propose below.

4.3.4 The Justifications and Defence

Apart from having the right to claim the *general* justification or defence as described in section 3.2.4, the Offence of Defamation Chapter provides the *specific* justifications under ss 329 and 331 and *specific* defence under s 330 for defamers who commit the offence of defamation. These justifications and defence can be seen as legal provisions which allow individuals, in some circumstances, to express their opinions or statement without being liable under the offence of defamation.

4.3.4.1 Justifications

The offence of defamation provides the justifications for the defendant in ss 329 and 331. Section 329 states:

> Whoever expresses any opinion or statement in good faith:
>
> (sub-sec (1)) by way of justification, self-defence or safeguarding his or her legitimate interests;

(sub-sec (2)) as being an official in the exercise of his or her duty;

(sub-sec (3)) by way of fair comment on any person or anything which shall be deemed as common public criticism; or

(sub-sec (4)) by way of fair report of the open proceedings of any Court of meeting.

shall not be guilty of defamation.[309]

First and foremost, there is the general condition applies to sub-section (1)-(4): defamers must express any opinion or statement *in good faith*. This condition, Tingsapat describes, means the statement or opinion being expressed must be the statement or opinion which the defamers honestly believe to be true.[310] If they already knew that their expression was untrue, they will not be able to claim the justification under s 329.

Secondly, there is the *Supreme Court Decision no 6747/2560* (2017) which ruled that the defendants did not have to prove that their defamatory speech is justified because the claimant has a duty to prove that the defendant is guilty. [311] Therefore, in criminal defamation cases, not only must the claimant show to the Court that the injured party is *intentionally* defamed by speech, but the claimant must also argue that the speech is not justified by any justification provided under the Criminal Code. Otherwise, the Court can dismiss the defamatory charge if the Court found that the defamatory speech was justified.

The requirement for the claimant to prove that the defendant's speech is not justified under the Criminal Code might be seen as a huge burden because it implies that the claimant must prove a negative. But as we will see the Supreme Court has rules which can be used to determine the justification of each sub-section. For example, the Court has ruled that the defamer expresses any opinion or statement in *good faith* means the defamer has a reason to believe his or her statement is true. Thus, if the claimant wants

[309] Translated by Netayasupha, Pisitpit and Watcharavutthichai (n2) 279-281
[310] Tingsapat (n11) 461 (citing the *Supreme Court Decisions No 2411/2518* and *1203/2520*)
[311] <http://deka.supremecourt.or.th/> accessed 8 October 2020

to prove that the defamer's speech is not justified, the claimant can prove that the defamer did not express their statement in *good faith* by arguing that there is no reason for the defamer to believe that his statement is true, or he (the defamer) already knew that his statement is false. For example, in the *Supreme Decision No 1312/2542* (1999),[312] a newspaper was prosecuted for accusing the claimant of causing a loss to a bank and his employment contract was terminated. The Court found that the bank had already made a statement to clear those accusations, but the newspaper continued to accuse the claimant and argued that the bank's statement was fake. It would not be hard, I believe, for the claimant to prove that the newspaper in this case knew that its accusation was false because the claimant could prove that his former employer (the bank) had made the statement to clear those accusation. This can indicate that the newspaper had no reason to believe that its statement was true.

The detail of each sub-section of s 329 and of s 331 will be discussed to show how they apply in practice (see sections (i)-(v)). This will show that the offence of defamation allows individuals, in some circumstances especially under s 329 sub-sections (1) and (3), to have their freedom for expressing their opinions or statement without having to be liable under the offence of defamation. The justifications under the Criminal Code can be seen as legal provisions which protect the right to free expression as recognised under the Constitution. I will argue that individuals who insult others by means of communication to the public in those circumstances should also be protected from being liable under the offence of insult. And I will propose an amendment to the Criminal Code for these insulters to be able to use the justifications under s 329 as we will see below.

(i) Justification under s 329 (sub-sec (1))

First, s 329 (sub-sec (1)) concerns a person who commits the offence of defamation by expressing *any opinion or statement in good faith by way of justification, self-defence or safeguarding his or her legitimate interests.*

[312] <http://deka.supremecourt.or.th/> accessed 8 October 2020

Tingsapat describes an expression '*by way of justification'* as an expression on a matter which a person believes to be true.[313] He uses the *Supreme Court Decision No 1972/2517* (1974)[314] to support his description. In this case, a member of a co-operative was prosecuted under the offence of defamation because he published on a newspaper that the claimant, the chairman of a committee responsible for buying a land for the co-operative, was dishonest because he brought a land higher than the market price. The Court ruled that the defendant accused the claimant by *way of justification* because the defendant had already checked the market price from a government agency and asked the seller of this land before publishing the accusation. Therefore, the defendant was justified under s 329 (sub-section (1)) to accuse the claimant of being dishonest. Tingsapat's description and this case show that expression '*by way of justification'* and expression in *good faith*, the general condition discussed above, are the same condition: both require the defamers to have a reason to believe that their statement or accusation is true.

Furthermore, in the *Decision No 1183/2510* (1976), [315] the Supreme Court ruled that the justification under this sub-section also applies to the defamers who honestly believe that their statement was true, *although it was untrue*. Monks were prosecuted under the offence of defamation because they filed their complaint to the government agency responsible for Buddhist temples. These monks accused the temple's abbot of having immoral behaviour because he had sexual intercourse with a woman. Although the Court found that that the accusation was untrue, the Court ruled that the defendants filed the complaint in good faith *by way of justification* to protect their legitimate interest because there was a reason to believe that this accusation was true.[316] The Court also explained that it was justified for the monks to accuse the abbot because they were monks in the same temple. Therefore, the monks were not found guilty of the offence of defamation.

[313] Tingsapat (n11) 461
[314] <http://deka.supremecourt.or.th/> accessed 6 June 2022
[315] <http://deka.supremecourt.or.th/> accessed 6 June 2022
[316] The published decision does not clearly explain why the Court found that it was reasonable for the monks to believe their accusation was true.

These cases confirm that the defamers expressed their statement by *way of justification* under s 329 sub-section (1) when they honestly believe their accusation to be true. Defamers who already knew that their statement was untrue cannot claim this justification. In the *Supreme Decision No 1101/2530*,[317] the Court found that it was not justified for the defendant who already knew her accusation was untrue to accuse the claimant before the judicial committee.

Apart from '*by way of justification,*' this sub-section (1) also mentions '*self-defence or safeguarding his or her legitimate interests.'* This condition, Tingsapat describes, means the defamers must express statements to protect themselves or their legitimate interest.[318] He argues that there is no justification for a defamer to injure the reputation of another person by claiming that the defamer did it to protect the legitimate interest of a third party.[319] He refers to the *Decision No 3086/2522* (1979)[320] to support his argument. In this case, the defendant was prosecuted under the offence of defamation because he told Mr O that Mr O's lawyer (the claimant) embezzled money which the lawyer received from Mr S as Mr O's lawyer. The Court found that the defendant's accusation was untrue, and the defendant had no legitimate interest in his statement because he was Mr S's creditor who had no legitimate interest in this matter (see figure 4.2).

[317] See the *Supreme Court Decision 1101/2530* (n299)
[318] Tingsapat (n11) 462-3
[319] ibid 464-65
[320] <http://deka.supremecourt.or.th/> accessed 6 June 2022

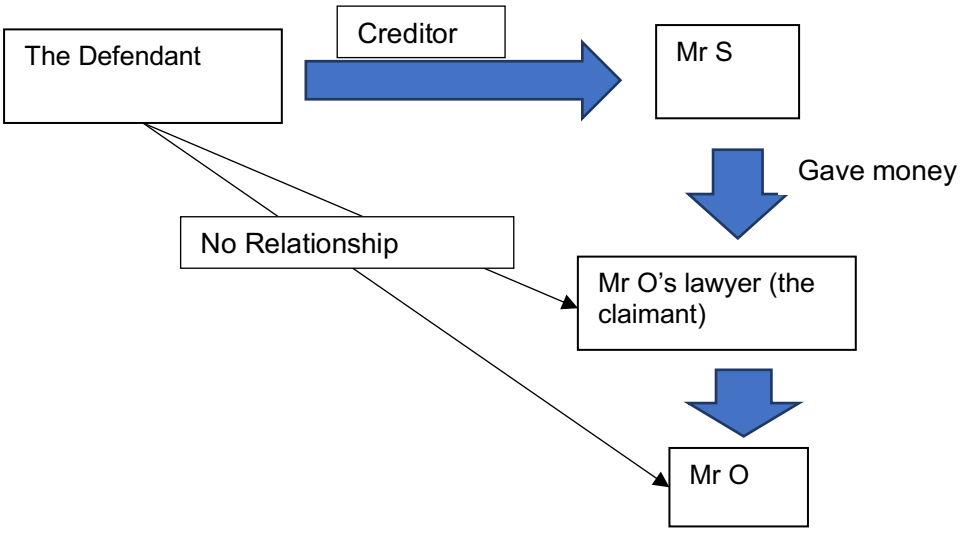

figure 4.2

Furthermore, in the *Decision No 4295/2531* (1988),[321] the managing director of a company prosecuted the defendant for defamation because the defendant accused the claimant of managing the company in bad faith which caused a loss to the company. The Court found that the defendant was neither shareholder nor director of this company who have a legitimate interest in the company. Therefore, the defendant cannot claim the justification under s 329. These two decisions confirm that s 329 sub-section (1) does not allow defamers who have no legitimate interest in their victims' matter to injure the victims' reputation. Nonetheless, as we will see in (iii) below, if that matter is a public interest topic, the defamers are able to claim the justification under s 329 sub-section (3).

Tingsapat's argument and the *Decisions No 3086/2522* (1979) and *4295/2531* (1988) show that defamers who can claim the justification under sub-section (1): (i) must express their statement by way of justification and (ii) this statement must be used to protect themselves or their legitimate interest. As shown in the *Decision No 1972/2517*, the defamer has the interest because the defamer and the claimant were members of the same co-operative. In the *Decision No 1183/2510* (1967),[322] the monk and the abbot were

[321] <http://deka.supremecourt.or.th/> accessed 6 June 2022
[322] The *Supreme Court Decision No 1183/2510* (1967) (n299)

monks in the same temple. These cases suggests that the Court does not strictly require the defamatory statement to be said to protect the defamers' *self interest*; the statement can be said to protect the interest of the defamers' organisations (such as co-operative or temple).

The above discussion shows that the offence of defamation does not strictly penalise defamers who injures the reputation of another. The defamers will not be guilty if they commit the offence of defamation by using the statement which they believe to be true to protect their legitimate interest. As s 329 clearly states: '*shall not be guilty of defamation*,' this sub-section only applies to the offence of defamation not to insults. Individuals cannot claim that they have a legitimate interest to insult another individual. For example, if the defendant in the *Decision No 1972/2517* did not merely accuse the claimant of being dishonest, but the defendant also said the claimant was the *Hengsuay* chairman. This defendant may claim that it was justified for him to accuse the claimant but there is no justification for him to call the claimant *Hengsuay*. Thus, the defendant might be found guilty under the offence of insult.

(ii) Justification under s 329 (sub-sec (2))

Secondly, s 329 (sub-sec) (2) concerns a person who commits the offence of defamation as being an officer exercising his or her duty. This sub-section guarantees that an officer who makes a defamatory statement during their duty will not be guilty of the offence. Tingsapat says that the government's spokespersons can use this justification during their duty to make a public statement, which they believed to be true but contains defamatory content.[323] In the *Decision No 1459/2541* (1998), [324] the Court used s 329 sub-sec (2) to dismiss a case where the director of a government agency was prosecuted under the offence of defamation, because he informed another agency that the claimant was dismissed, because the claimant was accused of committing the offence of theft. This

[323] Tingsapat (n11) 478
[324] mentioned in Kasamsant (n295) 209

case shows that officers who make defamatory statements during their duty will not be guilty under this justification.

Similar to the first sub-section, sub-section (2) applies to the offence of defamation not to the offence of insult. However, the inapplicability of sub-section (2) might not be serious as the first sub-section because officers should not use an insulting word while they are performing their duty.

(iii) Justification under s 329 (sub-sec (3))

Thirdly, s 329 (sub-sec (3)) concerns a person who commits the offence of defamation by expressing *any opinion or statement in good faith by way of fair comment on any person or anything which shall be deemed as common public criticism.*

Tingsapat describes that this sub-section applies to defamers who make a fair comment by using a statement which they understood to be true and should be said by a reasonable person.[325] The Supreme Court has ruled that the defamers could not claim this justification if they had no reason to believe that their accusation was true or knew that their accusation was false. As we have seen above, in the *Decision No 1312/2542* (1999), the Court found the newspaper guilty of the offence of defamation for accusing the claimant of causing a loss to a bank and his employment contract was terminated. The newspaper was not justified under s 329 sub-section (3) because the bank had already made a statement to clear those accusations, but the newspaper continued to accuse the claimant. Furthermore, in the *Decision 3/2542* (1999),[326] a newspaper was prosecuted for publishing an article stating that the claimant, a former Miss Universe, asked for 5 million baht for taking her nude photos. But there was no evident to support this article. The Court found that this newspaper mainly aimed to ruin the claimant's reputation. Thus, the newspaper cannot claim the justification under s 329 sub-section (3). Tingsapat's description and these *Decisions* show that the condition to consider 'a fair comment' is

[325] Tingsapat (n11) 479
[326] <http://deka.supremecourt.or.th/> accessed 6 June 2022

similar to the condition to determine 'good faith,' the general condition of s 329 discussed above.

The phase '…*on any person or anything which shall be deemed as common public criticism'* means the defamers under this sub-section must comment a person or thing on a topic which a reasonable person should comment on. To identify the topics fit with this description, Tingsapat argues that these topics must be public interest topics such as topics involving political works, public organisations' works.[327] These topics, he says, [328] should include behaviour of public persons such as public officers, [329] politicians, [330] monks,[331] or teachers, but the comments must not invade the privacy of these persons.[332]

We can see that this sub-section and sub-section (1) require defamers to have a reason to believe that their accusation or statement is true. These sub-sections are similar; the only difference between them is defamers who are justified under sub-section (1) must have a legitimate interest against their victims. As we have seen in the *Decisions No 1972/2517* and *1183/2519*, the defendants in those cases had their legitimate interest against their victim. But it is unnecessary for the defendants who are justified under sub-section (3) to have the legitimate interest. Therefore, people or newspapers can comment on those public interest topics without having to claim their legitimate interest in those topics. In the *Decision No 3553/2550* (2007), [333] for example, the Supreme Court found that it was justified under sub-section (3) for a newspaper to report a suspicion that the claimant, a politician, was involved in a corruption because the suspicion is a fair comment on a public interest topic. And in the *Decision No 3283/2537* (1994),[334] the claimant, a contractor who built a building for a public school, prosecuted a reporter because the reporter accused the claimant of submitting his work improperly. The Court found that it was justified under sub-section (3) for the reporter to make a fair comment on the claimant who performed a work for a public agency.

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[327] Tingsapat (n11) 479
[328] ibid
[329] ibid (citing the *Supreme Court Decision No 1551/2503* (1960))
[330] ibid (citing the *Supreme Court Decision No 3553/2550* (2007)
[331] ibid (citing the *Supreme Court Decisions No 2339-40/2532* (1989))
[332] ibid 481; See the *Supreme Court Decision No 407/2523* (n277)
[333] <http://deka.supremecourt.or.th/> accessed 6 June 2022
[334] <http://deka.supremecourt.or.th/> accessed 6 June 2022

Since sub-section (3) focusses on 'a public interest topic' The Court has ruled that a comment on a private matter is not a public interest topic under this sub-section. As we have seen in the *Decision No 407/2523* (1980),[335] the Court found the editor of a newspaper guilty of the offence of defamation for publishing a statement saying that a mayor was a pervert and issued a bad cheque because this information could injure the claimant's reputation. In this case the Court also explained that it was not justified for a newspaper to make that statement because this information is a private matter which has no public interest. Furthermore, the Supreme Court found in the *Decision 4295/2531* already discussed above[336] that the defendant had no legitimate interest to accuse the claimant who managed the company because the defendant was neither shareholder nor director of a company. The Court clearly said: 'the company is a private organisation. It is not a government agency or a public organisation which the defendant has a right to make a fair comment on.' This decision suggests that people have no right to make a comment on works of private company which are not related to the public. However, in 2020 a Supreme Court Decision suggested otherwise. In this case, the Court upheld the Court of Appeal's decision which found a human right defender not guilty of the offence of defamation.[337] The defender, Andy Hall was prosecuted by a company named Natural Fruit Ltd because he published the report named 'Cheap Has a High Price.' He alleged in this report that this company violated its migrant workers' labour and human rights. This allegation derived from his interview with these workers. The Supreme Court confirmed the Court of Appeal's ruling by saying 'Mr. Hall's research had been in the public interest.' Therefore, this case suggests that it is possible for people to be protected by sub-section (3) if the defamer can argue that their comment is a public interest topic though the comment is done to a private company.

Although there is the different requirement between sub-sections (1) and (3), the Supreme Court has not strictly distinguished between them. In some decisions, the Supreme Court used both sub-sections to find the defendant not guilty. In the *Decision*

[335] The *Supreme Court Decision No 407/2523* (1980) (n277)
[336] The *Supreme Court Decision No 4295/2531* (1988) (n321)
[337] 'Supreme Court Acquits Activist in Defamation Case' (*Bangkok Post*, 30 June 2020) <https://www.bangkokpost.com/thailand/general/1943516/supreme-court-acquits-activist-in-defamation-case> accessed 7 July 2020

No 3824/2536 (1993),[338] for example, the claimant, the abbot of a temple, prosecuted the defendant, the chairman of the temple committee, because the defendant sent an accusation to people and to the public officers who were authorised to regulate Buddhist temples. The defendant accused the claimant of mismanaging the donated money. The Court found that the defendant had asked the claimant to provide that detail of the donated money, but the claimant refused. The Court also found that the abbot's relative, who did not have a big business, was able to buy an expensive land. These circumstances were used to find that it was justified under s 329 *sub-sections (1) and (3)* for the chairman to accuse the abbot. It would be reasonable to believe that the chairman had a legitimate interest in his accusation as he was the chairman of the temple, of which the claimant was the abbot. It is legitimate for the chairman to suspect the abbot's behaviour because they involved in the same temple. And sub-section (3) was used because the donated money is a public interest topic. In the *Decision No 509/2553* (2010),[339] the defendant was prosecuted because he published on a newspaper accusing the injured party, a police officer, of abusing his power. The defendant argued that he filed a complaint to the injured party to prosecute another person, but the officer did not proceed the case. The Court found that it was justified under s *329 sub-sections (1) and (3)* for the defendant to accuse the injured party. I believe the Court used sub-section (1) because the defendant had a legitimate interest in his accusation because he filed a complaint to the officer. And sub-section (3) was used because works of the officer are public interest topics.

There are some decisions which the Court should also use sub-section (1), but it only used sub-section (3). For example, in the *Supreme Court Decision No 62/2535* (1992),[340] the defendant, a school's committee was prosecuted for defaming the injured party, the school's principal because the defendant accused the principal of embezzling a donated money. The Court found this accusation as a fair comment on a public interest topic. And in the *Supreme Court Decision No 12460/2547* (2004),[341] the defendant was prosecuted

[338] <http://deka.supremecourt.or.th/> accessed 6 June 2022
[339] <http://deka.supremecourt.or.th/> accessed 6 June 2022
[340] <http://deka.supremecourt.or.th/> accessed 6 June 2022
[341] <http://deka.supremecourt.or.th/> accessed 6 June 2022

because she sent a letter to a newspaper saying that the claimant, a police officer, exercised his duty wrongfully when he searched her house to arrest her brother. The Court found that this statement was a fair comment on a public interest topic. These two decisions, I believe, the Court should also use the justification under sub-section (1) rather than using only sub-section (3) because the defendants in both cases also had their legitimate interest in their statement. In the first case, the defendant expressed his statement to protect the interest in the defendant's organisation (school). The latter case, the defendant expressed her statement because she was a victim of the claimant's misconduct.

The overall discussion of s 329 sub-section (3) shows that the offence of defamation does not strictly penalise defamers. They will not be guilty if they make a fair comment on a public interest topic. However, this sub-section only applies to the offence of defamation not insult. A person who also uses an insulting word during their fair comment under this sub-section might still be guilty of the offence of insult, although this person might be able to claim the justification under this sub-section. There was an interesting decision of the Supreme Court on this issue. In the *Decision No 1861/2561* (2018),[342] a former PM prosecuted the defendants under the offence of defamation because they commented on his works as the PM and also compared him to a ghoul. For the comments, the Court found that it was justified under s 329 sub-section (3) because those comments were done by way of fair comments on a person which shall be deemed as common public criticism. For the comparison, the Court interestingly found that it was a disparaging statement, but it was impossible for the PM to become a ghoul. This comparison was merely meaningless abuse and would be understood by the reasonable person as such. Thus, the comparison was not defamatory.

The *Decision No 1861/2561* (2018) is interesting because the statements being prosecuted are defamatory and insulting. The Court dismissed the defamation charge but did not address the issue on the offence of insult. Under the current doctrine of the offence of insult, I question why the Court did not find the defendants guilty under the offence of

[342] <http://deka.supremecourt.or.th/> accessed 6 June 2022

insult because the comparison should be an insult. By examining the published decision, I found that the claimant *did not* prosecute the defendants under the offence of insult. This might be the reason the Court did not address the offence of insult, because as we have seen[343] the Criminal Procedure Code s 192 forbids the Court to penalise the defendants beyond the claimant's request. But it is possible for the Court to penalise the defendant under the offence of insult, although the claimant prosecuted the defendants under the offence of defamation, as we have seen in the *Decision No 1105/2519* discussed in section 4.2.2. Therefore, it is unclear why the Court did not penalise the defendants under the offence of insult. Under the current law, the defendants should be found guilty under the offence of insult because the comparison insulted the PM, and s 329 sub-section (3) is not applied to insult. Nonetheless, I agree with the result of this *Decision* because people should not be penalised for commenting on a public person such as a politician and they should not be penalised if their comments have an insulting word.

(iv) Justification under s 329 (sub-sec (4))

Fourthly, s 329 (sub-section) (4) concerns a person who reports information regarding the open proceedings of any Court or meeting. The information which can be justified under this sub-section must derive from the open Court's proceeding or open meeting and the information must be reported accurately. For example, in *Decision No 3654/2543* (2001),[344] the Supreme Court used s 329 sub-section (4) to dismiss a case where a newspaper was prosecuted under the offence of defamation, because the newspaper published the complaint against the claimant in a criminal case. The Court found that the newspaper was not guilty of the offence of defamation, because it reported the open proceeding of a court. Furthermore, in *Decision No 2976/2522* (1979),[345] the Supreme Court used the same sub-section to dismiss a case where a newspaper was prosecuted because it published a news report saying that the municipality of a province wanted to sell a land leased by Rachburi Hospital to this Hospital. If the hospital refused to buy, the municipality would expel the hospital out of its land. The Court found that this was the

[343] See section 4.2.2
[344] <http://deka.supremecourt.or.th/> accessed 6 June 2022
[345] <http://deka.supremecourt.or.th/> accessed 6 June 2022

information stated in the meeting of the municipality council. Therefore, the newspaper was not guilty of the offence of defamation because it reported the open meeting.

Similar to the justifications under other sub-sections, sub-section (4) shows that the offence of defamation does not strictly penalise defamers. They will not be guilty if they report information regarding the open proceedings of any Court or meeting, but this sub-section only applies to the offence of defamation not of insult. Although reporters are protected under this subsection from the offence of defamation, they might still be guilty under the offence of insult if its information contains insulting content. For example, a newspaper which reports a *Supreme Court Decision No 1623/2551* (2008)[346] might be found guilty of the offence of insult for reporting that the claimant was called a *Hengsuay* lawyer by the defendant because the report contains the statement saying the claimant is a *Hengsuay* lawyer, although this newspaper reported the information regarding the Court's open proceedings.

(v) Justification under s 331

Section 331 states:

> Any party in a case, or his or her lawyer who expresses any opinion or statement in the proceedings of the Court for interests of his or her case shall not be guilty of defamation.[347]

This is the other specific justification provided under the offence of defamation. It is justified under this section for parties in a case and their lawyer to express any opinion or statement in the proceeding of the Court for the benefit of their cases. In *Decisions No 563-565/2508* (1965), [348] the Supreme Court used s 331 to dismiss a case where the defendant was prosecuted under the offence of defamation, because he said that the claimant threatened him to confess in a Court proceeding. Since this statement was said in proceeding; he was not found guilty of the offence of defamation.

[346] The *Supreme Court Decision No 1623/2551* (n164)
[347] Translated by Netayasupha, Pisitpit and Watcharavutthichai (n2) 281
[348] <http://deka.supremecourt.or.th/> accessed 8 October 2020

Similar to the other specific justifications, section 331 does not apply to the offence of insult. However, the inapplicability of this section might not be serious because the parties in a case and their lawyer should not using an insulting language in the proceeding of the Court. Nor is it necessary for this justification to be applied in case of insult because the justified expression under this section is done in the Court's proceeding not done by means of communication to the public.

(vi) Summary

The above justifications show that Thai law does not always impose criminal liability on an individual who acts that would otherwise amount to defamation. Thai law allows defamers to have freedom to express their statement under the conditions as stated under ss 329 and 331. These defamers are not limited to newspapers or human rights defenders; everybody can benefit from these justifications. These justifications can be regarded as provisions which allow defamers under these circumstances to have their right to free expression protected by the Constitution.

Although these justifications guarantee the right to free expression of individuals, the justifications are only applicable for defamation because ss 329 and 331 clearly state that a person will *not be guilty of the offence of defamation*. These justifications do not apply to the offence of insult; thus, people who are protected under ss 329 and 331 (especially under s 329 sub-sections (1)(3) and (4)) might not be protected if they use an insulting word in their expression. To solve this problem, I propose that the justifications under s 329 should be provided to the second form of insult (insulting by means of communication to the public).[349] This would be done by amending the Criminal Code. The second form of insult should be stated as s 326/1 in the same chapter as the offence of defamation. The justifications under ss 329 (with some modifications) will also apply to an individual who insults another individual by means of communication to the public.[350] The right to

[349] As discussed in the sub-section immediately above, it is unnecessary for the justification under s 331 to apply in cases of insult.
[350] The proposed amendment of the Offence of Defamation Chapter can be seen in table 4.1 in section 4.5

free expression of people to express their idea will be better protected than the current law.

Defendants who make their comment to the public by way of justification to protect their legitimate interest will also be protected under s 329 sub-section (1) if their comment has an insulting word. Furthermore, this amendment will solve the problem of the *Decision No 1861/2561* (2018),[351] the Court would be able to rule that it is justified under s 329 sub-section (3) for the defendants to compare the PM as a ghoul because the comparison is done to a person in a public interest topic. Moreover, the amendment will also guarantee that a person who reports information regarding the open proceedings of any Court or meeting will not be found guilty of the offence of insult if that information contains insulting word.

Of course, the same argument would not apply to the other form of insult, insult to a person's face, because this form of insult protects the personality right from being harmed by insults and also aims to prevent the physical fight between insulter and insulted victim. The fight can be occurred between any person including between politician and ordinary individual. Though it might be justified to insult a victim under the circumstances under s 329, it might not be appropriate to do so in the victim's face because this form of insult might cause the physical fight. An insulter should not disparage, humiliate or verbally abuse another person at their presence in any circumstances because these acts might cause the physical fight between them, which the law aims to prevent.

4.3.4.2 The Defence

Although some defendants in defamation cases may not be able to use the justifications provided under ss 329 and 331, these defendants may be able to use the defence provided under s 330:

> (1) Where the person who is accused of defamation is able to prove that the imputation made by him or her is true such person shall not be punished.

[351] The *Supreme Court Decision No 1861/2561* (n342)

(2) But it is prohibited to prove where the accused defamation is the imputation concerning private matters, and such proof will not benefit to the public.[352]

Under this provision, defamers are not criminally liable if they can prove that their defamatory statements are true. But they are *not* allowed to prove this: (i) if they use private matters to defame the victim and (ii) there is no public interest in revealing the truth. Private matters, Tingsapat describes, are issues which are not related to a work of the defamed victim,[353] such as saying a police officer is a playboy is a private matter of the officer.[354] Issues which are in the public interest once revealed are information which the public has a legitimate interest to know.[355]

In *Decision No 1072/2507* (1964),[356] the Supreme Court explained that s 330 *prohibits* defamers to prove that their statement is true upon the above two conditions. It is *allowed* for defamers to prove the truth if the statement does not concern private matters or there is the public interest in revealing the truth. In this case, the defendants were prosecuted by a senior Buddhist monk because they accused the monk of immoral behaviour for having sexual intercourse with a woman. The Court found that the defendants' accusation had the public interest in revealing the truth, because Buddhism is the religion of most of Thai people who would not want their religion to be ruined. Since the claimant was accused to ruin Buddhism, this information has the public interest for Thai people. Thus, the defendants were allowed to prove that their accusation was true. It can be seen that the defendants were not prohibited by s 330(2) because there is the public interest in revealing the truth. (This section *forbids* defamers to prove when there is *no public interest* in revealing the truth.) This case corresponds with Tingsapat's definition of 'issues which are in the public interest once revealed,' as the Court said Buddhism is the religion of most of Thai people; thus, Thai people have a legitimate interest to know this information.

The *Decision No 1072/2507* shows that defamers are allowed to prove the truth in their statement if the statement does not fit with the conditions under s 330(2): no public

[352] Translated by Netayasupha, Pisitpit and Watcharavutthichai (n2) 281
[353] Tingsapat (n11) 497
[354] ibid (citing the *Supreme Court Decision No 952/2474*)
[355] ibid
[356] <http://deka.supremecourt.or.th/> accessed 6 June 2022

interest in revealing the truth because the behaviour of a monk has the public interest for Thai people. It can be implied from this *Decision* that the defamer should be allowed to prove that their statement is true if the statement was in the public interest, although the injured party is defamed by his (the injured party's) private matter. This is because s 330(2) prohibits defamers to prove when their statement fits with two conditions. Thus, it should be allowed to prove if the statement does not fit with only one condition. Similarly, the defamer should also be able to prove when the statement did *not* fit with the first condition: using private matters to defame the injured person. This means that defamers should be able to prove the truth if they defame their victim by using a true statement about the victim's work, although this statement may have no public interest in revealing the truth. For example, Mr A is a lazy teacher. Mr B tells a third person that Mr A is lazy which makes this person not want to socialise with Mr A. In this case, Mr B is allowed to prove that his statement is true because he does not use private matter to injure Mr A's reputation (this statement does not fit with the first condition), even though the public in general has no interest in knowing that Mr A is lazy.

Although the above *Decision* and my argument suggest that s 330 allows the defamers to prove the truth of their statement if the statement does not fit with one of the conditions stated in s 330(2), the Supreme Court has considered this section on both conditions. For example, in the *Decision No 1362/2514* (1971), [357] the Court allowed the defamers, who broadcasted on a radio, that a policeman (the injured party) asked for a bribe, to prove that their accusation was true. The Court explained that the defendants defamed the injured party (i) on his work; the defamatory statement is not the injured party's private matter. And (ii) there is the public interest in this issue because a police officer's behaviour is a public interest topic. Furthermore, in *Decision No 7435/2541* (1998), [358] the Supreme Court found that a newspaper which published the claimant's bad behaviour was allowed to prove that its publication was true. The Court explained that (i) his behaviour was not a private matter because the claimant was a member of a province's council, and his bad behaviour were done when he was a policeman. Therefore, the public has a legitimate

[357] <http://deka.supremecourt.or.th/> accessed 6 June 2022
[358] <http://deka.supremecourt.or.th/> accessed 8 October 2020

interest to know the behaviour of the claimant as a member of the council. These *Decisions* show the Court considered that the defendants' statements did not fit with both conditions of s 330(2) to rule that the defendants can prove that their statement was true. Furthermore, the *Decisions* also shows that an accusation on government officers of abusing their power are a public interest topic because these officers are public servants; it is legitimate for the public to know their behaviour.

The above cases are issues regarding public persons (monks, public officers). It is quite clear that the public has a legitimate interest in these public persons' behaviour. But if the defamatory statement concerns the victim's private matter and there is no public interest in revealing the truth, s 330(2) prohibits the defamer to prove the truth. For example, in the *Decision No 3252/2543* (2000), the defendant was prosecuted because she told a third party that, after the claimant had sexual intercourse with her, the claimant had tried to use a black magic to make her love him.[359] She also said that he asked her to give him money and mobile phone. The Court found that the defendant defamed (i) the claimant in his private matter and (ii) there is no public interest in revealing the truth. Therefore, the defendant cannot claim the defence under s 330 to prove that her statement was true. It is clear that the sexual intercourse is a private matter and there is no public interest in revealing the truth.

The Court also ruled that a person's debt is not a public interest issue. As we have seen in the *Decision No 407/2523* (1980) mentioned above,[360] the Supreme Court found the editor of a newspaper guilty of the offence of defamation for publishing a statement saying that the claimant, a mayor, was sued because he issued a bad cheque. The Court explained that this information was the mayor's private matter which is not a public interest issue. Thus, the defendant was not allowed to prove that his accusation was true. In the *Decision No 2272/2527* (1984),[361] the defendant was found guilty of the offence of defamation because he posted a notice on a wall saying that the claimant owed him 15,910 baht (398£) and did not repay back. Like the *Decision No 407/2523*, the Court

[359] <http://deka.supremecourt.or.th/> accessed 6 June 2022
[360] The *Supreme Court Decision No 407/2523* (n277)
[361] <http://deka.supremecourt.or.th/> accessed 13 March 2020

found that this accusation was the claimant's private matter which is not a public interest issue.

Although the Court in the *Decision No 2272/2527* and *407/2523* said that the defamatory statements in these Decisions fit with two conditions stated under s 330, it is reasonable to assume that the main focus under s 330 is on the second condition: no public interest in revealing the truth. This is because the Court might see that there was no benefit for the public to know that the mayor in the *Decision No 407/2523* and the claimant in the *Decision No 2272/2527* owed money to other persons. The Court might think that the newspaper in the former case should not involve in this matter, since there was no public interest in revealing the truth to the newspaper's readers. In the latter case, the Court might think that the defendant should use court proceeding to sue their debtor, instead of posting a notice saying that the claimant was his debtor. As we have seen in *Decision 1739/2523*,[362] it is allowed for the creditor, who had asked its debtor many times to return his money, to publish a notice on a newspaper to demand its debtor to return their money.

Nonetheless, I do not agree with the *Supreme Court Decisions No 407/2523* and *No 2272/2527* which prohibits the newspaper or creditor from proving that their statements were true by holding that there was no public interest in this information. This is because a part of the public, such as people who want to deal a business with those debtors, may have a legitimate interest to know this information. The defamer should be able to use s 330 if they intend for those people to be cautious with these debtors.

Furthermore, by having 'no public interest in revealing the truth,' as the second condition in s 330, this condition can limit its application to only issues impacting the public in general. Defamers cannot use this defence in cases where they use true information about the victim to warn another person if this information is defamatory and concerns the victim's private's matter. For example, Mr A, a hard-working politician, already divorced his wife because he did not take very good care of her. Mr A later has a romantic relationship with Miss X. Miss B, a third person, knows Mr A's behaviour regarding his ex-wife and warns Miss X. Once she is aware of Miss B's warning, she stops socialising

[362] The *Supreme Court Decision No 1739/2523* (n293)

with the politician. If Mr A prosecutes Miss B under the offence of defamation, she will not be allowed under s 330 to prove that her accusation is true, though her accusation is actually true.[363] This will be because her statement is (i) Mr A's private matter and (ii) there is only one person, Miss X, who has a legitimate interest to know this information. There is no public interest in revealing the truth in this case.

Although s 330 has its limitation to defend defamers, the above discussion shows that this section allows defamers to use truth as a defence to prevent them from being punished under the offence. Like the justification discussed in section 4.3.4.1, the defence under s 330 clearly states that '*the person who is accused of defamation…shall not be punished.'* As with the justifications discussed above, this defence is not available to insulters. However, I submit that it is *unnecessary* for this defence to apply to insults because this defence is a *pure* defence for defamation. Some true but defamatory statements should be said because the public has a legitimate interest to know this information such as facts about dishonest behaviour of a politician. In case of insult, it is an insult when the word being used is disparaging, humiliating, or verbally abusing. Disparaging and verbally abusing words are not information which can be proved to be true. As in the *Decision No 1623/2551*,[364] the defendant was found guilty of the offence of insult because he called his lawyer a *Hengsuay* lawyer. Although the Court defines *Hengsuay* as terrible, this is not a normal word used to describe thing with a bad quality. It is a slang to verbally abuse another person. Therefore, the insulter should not be allowed prove that their victim was *Hengsuay* because this word is a verbal abuse not a fact that the lawyer is terrible.

Although disparaging and verbally abusing words cannot be proven to be true, a true statement may in itself a commission of the offence of insult by humiliating a victim. We have seen in a civil case the *Decision No 4893/2558* (2015)[365] that true information can humiliate a person. The claimant in this civil case said that he was humiliated by a

[363] In a *Decision* published in Article19's report, the Supreme Court found the statements of a politician's family affair do not have 'anything to do with his duty as a politician and not benefit the public.' (See Article19 (n37) 11-12)
[364] The *Supreme Court Decision No 1623/2551* (n164)
[365] The *Supreme Court Decision No 4893/2558* (n220)

newspaper which correctly identified him as a man having sexual intercourse with a woman in a leaked VCD. This decision shows that a true statement about the victim's private life in itself can humiliate and harm the victim. It is unsuitable for humiliators who make their victim ashamed to have a defence to claim that their information is true because humiliation is an act of disrespect by using words that make insulted victim ashamed. Furthermore, there is no public interest in revealing the truth in the humiliating information, such as in the *Decision No 1105/2519,* there is no public interest to know the specific detail that the injured party's head would be hit by a shoe.

The discussion above shows that it is unnecessary for the defence under s 330 to be used in insult cases because the truth of the statement plays a different role in cases of defamation and insult.

4.3.5 The Offence of Defamation: a Compromisable Offence

The offence of defamation is usually described as a *compoundable* offence under s 333(1) which states:

> The offence in this Chapter is a compoundable offence.[366]

As an offence being 'compoundable,' there are consequences shown in the Criminal Procedure Code. The Procedure Code s 121(2) says that an inquiry official is not authorised to investigate a commission of a *compoundable offence* unless there is a complaint by the injured party.[367] Furthermore, s 35(2) of the Code allows the injured party of a *compoundable offence* to withdraw their complaint or to compromise with the perpetrator any time before the final decision.[368] Once the complaint is withdrawn or the dispute is compromised, the right (and the right of the inquiry officer) to prosecute the

[366] translated by Netayasupha, Pisitpit and Watcharavutthichai (n2) 281
[367] The Criminal Procedure Code, s 121 '(1) The inquiry officer has an authority to investigate any criminal cases; (2) but the investigation must not be initiated in a compromisable offence, unless there is a complaint by the injured party.'
[368] The Criminal Procedure Code, s 35(2) 'In case of a compromisable offence, the charge can be withdrawn or compromised any time before the final judgement. But if the defendant objects, the Court must dismiss the motion to withdraw.'

perpetrator will be terminated according to s 39 sub-sec (2) of the Code.[369] These consequences show that a *compoundable offence* is an offence which depends on the injured party's decision to prosecute and provides the injured party the right to compromise with the perpetrator. I believe it is more appropriate to call this offence as a 'compromisable offence' rather than a '*compoundable offence*,' because this offence allows the injured party and perpetrator to compromise their dispute. I will use the term 'compromisable offence' in this research rather than '*compoundable offence*' as translated by Netsupa, Pisitpit and Watcharavutthichai. The English translation of s 333(1) should be:

> The offence in this Chapter is a compromisable offence.

I will examine the background to compromisable offence in section 4.3.5.1 and will discuss how the offence of defamation, as a compromisable offence, applies in practice in section 4.3.5.2. This discussion will show that the compromise process provides better protection to defamed victims than the process which protects victims insulted by means of communication to the public. I will argue that the insulted victims should be able to use the compromise process to gain better protection to their personality right. This will be possible if the offence of insult by means of communication to the public is relocated to the same chapter as the offence of defamation as I propose.

4.3.5.1 The Background to Compromisable Offence

Augsorn presents the background to compromisable offences by suggesting that some offences are compromisable in Thai law, because they are neither serious crimes nor mainly impact the public.[370] He argues that Thailand has had compromisable offences in criminal law since the beginning of the Rattanakosin Era (RE) and even before that time.[371] Criminal cases, he argues, were able to be compromised between the injured

[369] The Criminal Procedure Code, s 39 'The right to prosecute is terminated: (sub-sec (2))… in compromisable offence, when the injured party withdraw their complaint or legally compromise their dispute.'
[370] Nopparat Augsorn (1989), 'Compoundable Offence in the Criminal Justice Process' (LLM thesis, Chulalongkorn University) <https://cuir.car.chula.ac.th/handle/123456789/32820> accessed 12 October 2020 5
[371] ibid 8

party and perpetrator in the early years of the RE period if the charges of those cases were not severe. This rule was adopted into the Criminal Code 1908 which stated that some offences, including the offence of defamation, were compromisable offences.[372] The adoption of the compromisable offence concept to the Criminal Code 1908 is consistent with Kraivixien's description that the Code had 'well recognised principles of law' with certain modifications for Thai tradition.[373] The current Criminal Code follows this pattern and prescribes the offence of defamation as a compromisable offence.[374]

Augsorn argues that Thai law prescribes compromisable offences from the nature of the offences.[375] He explains that some offences in Thai criminal law aim to preserve public order and protect the injured party's interest, such as offences affecting life and body, or offences against property. Compromisable offences, he argues, are offences which have these aims but mainly focus on protecting the injured party's interest than preserving public order. Since these offences focus on the injured party's interest and do not really engage the State's interest, Thai law allows the injured party to consider whether he or she wants to pursue their perpetrator or settle their dispute. The State only has a role to help them prosecute their perpetrator if they decide to do so.[376] This factor is clearly consistent with the nature of the offence of defamation. As discussed above, the offence of defamation mainly aims to protect the personality right from being injured through defamation.[377] Defamers can be punished for defamation, even though their commissions might not impact the public order. Individuals can be guilty of defamation, though they defame their victim to a third party behind the victim's back. Neither s 326 of the Criminal Code nor the Court requires the victim to personally hear the defamatory statement.

Having considered Augsorn's argument on the prescriptions of offences to be compromisable offences, I found that insulting an individual by means of communication

[372] ibid 9
[373] See the accompanying text of footnote 100
[374] Augsorn (n370) 9
[375] ibid 12
[376] ibid 12; On the other hand, Augsorn describes that if the offences having the aims to preserve public order and protect the injured party's interest but mainly focus on the former, the State will have the main role in criminal proceeding. The injured party is not allowed to settle their dispute or harm the state's case.
[377] See section 3.4.1

to the public, with its aim of protecting the personality right rather than any public interest, fits with the description of a compromisable offence. Neither the *Supreme Court Decision No 311/2491*[378] nor *No 1105/2519*[379] mentioned that this form of insult aims to preserve public order. This is different form the *Supreme Court Decision No 3711/2557* (2014) which clearly stated that the first form of insult (insulting a victim in his or her presence) aims to prevent the physical fight between the insulter and the victim. The lack of state interest in a compromisable offence suggests that Thai law should regulate insults by means of communication to the public as a compromisable offence rather than a Petty Offence.

The prescriptions of some offences as compromisable offences, Augsorn also argues, are consistent with the Thai custom, which aims to compromise a dispute by negotiation rather than using a legal process.[380] He asserts that people especially in the rural area want to compromise their dispute by using their traditional process such as asking their village headman to settle their dispute rather bringing their dispute to the Court.[381] Furthermore, the King of Thailand himself said '*Thailand is a land of compromise*' in the interview with Channel 4 about protesters who wanted to reform the Thai monarchy.[382] The argument that Thai tradition favours compromise over adversarial court process is consistent with the practices of the injured party of the offence of defamation today, as we will see in the next section.

4.3.5.2 How Does a Compromisable Offence Apply in Defamation Cases?

An offence can be compromised under Thai criminal law, when a legal provision clearly states that the offence is compromisable, such as s 333(1) quoted above.[383] Although the process to prosecute the defamer is the same process as under the offence of insult[384]

[378] The *Supreme Court Decision No 311/2491* (n196)
[379] The *Supreme Court Decision No 1105/2519* (n177)
[380] Augsorn (n 370) 17
[381] ibid 17
[382] Jonathan Miller, 'Exclusive First TV Interview: Thai King Say Country 'Land of Compromise' Amid Widespread Protests' (*Channel 4*, 1 November 2020) <https://www.channel4.com/news/exclusive-first-tv-interview-thai-king-says-country-land-of-compromise-amid-widespread-protests> accessed 4 November 2020
[383] There are other compromisable offences such as the offences of fraud (The Criminal Code, s 348)
[384] See section 3.2.5

(because they are criminal offences), the Criminal Procedure Code s 35(2) specifically allows the injured parties of a compromisable offence to compromise their dispute with the perpetrators any time before the final decision. The injured party can set a condition before the prosecution is dropped (such as requiring the defamer to publish an apology letter for the injured party on a newspaper) and this process also applies when the public prosecutor is the claimant. The case can be legally settled without having to go to the Court. The settlement can be done without imposing any criminal sanction on the defamer, but the settlement can heal the damage caused to the victim's reputation because defamed victims can ask for the apology from their defamers. This can be seen as a form of protection to the personality right to reputation provided under the offence of defamation. In other words, not only does the offence protect the reputation by prescribing defamation as a crime, but, as a compromisable offence, it also provides a process for the victim's reputation to be healed.

There are many incidents where injured parties and their defamers have legally compromised their disputes by means of apology.[385] In fact, the injured party can require the defamer to do anything the injured party wants as a condition of the settlement. For example, in *Sereepisuth* (2020), a politician asked another politician to prostrate on his feet as a condition to withdraw his defamatory charge.[386] However, the common condition for settlement is an apology, which can heal the damage caused to the victim's reputation. In *Tukky* (2019), for example, a woman filed her complaint under the offence of defamation against Tukky, a famous comedian, because her photo was posted on the comedian's Instagram account.[387] She claimed that the comedian accused her of having an unlawful occupation. She said that she wanted the comedian to apologise to her and clear her name. The comedian later said that she had already contacted this woman and

[385] See 'Businessman apologises to a soldier in a defamation case' (*Khaosod*, 10 October 2019) <https://www.khaosod.co.th/around-thailand/news_2961726> accessed 12 October 2020; 'Activists apologises to Committees of the National Anti-Corruption Commission' (*Matichon Online*, 18 November 2016) <https://www.matichon.co.th/region/news_364987> accessed 12 October 2020; 'A young man apologises to Sondthi after posting defamatory content in Sonthi's facebook page' (*Sondhitalk*, 29 July 2020) <https://sondhitalk.com/2020/07/29/7850> accessed 12 October 2020

[386] See 'Dr Tee Prostrates Sereepusith as a Condition to Withdraw Defamatory Charge' (*Naewna*, 31 January 2020) <https://www.naewna.com/politic/469879> accessed 12 October 2020

[387] Thairath Online, 'A woman filed a complaint against Tukky because of Tukky's Instagram Posting' (*Thairath*, 3 August 2019) <https://www.thairath.co.th/entertain/news/1629510> accessed 19 August 2019

apologised to her for the misunderstanding and that the woman already accepted her apology. The comedian also posted the apology statement to this woman on the comedian's Instagram. This incident shows that Thai criminal law provides a process to heal the damage caused to the injured party's reputation without having to go to the court. More importantly, the reputation can be healed without imposing any criminal sanction on the defamer.

Once their case is settled, the injured party's right to initiate the criminal prosecution against the defamer in their case is terminated according to the Criminal Procedure Code s 39 sub-section (2).[388] As mentioned, they can settle their disputes any times before the final judgment of their cases. In *Yingluck* (2018), for example, a former Prime Minister settled her defamation case with three presenters of a television program after the Court of First Instance and the Court of Appeal already found the presenters guilty of the offence of defamation.[389] The presenters agreed to apologise to the Prime Minister on their Facebook pages in return for the Prime Minister's agreement to withdraw her complaint. Since the Prime Minister withdrawn her complaint, her right to prosecute her defamers was terminated because of s 39 sub-section (2). Therefore, the sentence imposed on those presenters by the Court was also terminated. This case shows that the injured parties in defamation cases can use this process to heal the damage caused to their reputation without having to wait for the final decision of the Court. More importantly, this case shows that the offence of defamation can protect the personality right to reputation without imposing any criminal sanction to the defamer.

A defamation case, however, will not be settled if the defamed victim refuses to compromise with the defamer. In *Suthep* (2018),[390] for example, a former Deputy PM as the claimant prosecuted a former Director-General of the Department of Special Investigation as the defendant under the offence of defamation. Though the Court of First Instance and the Court of Appeal dismissed the charge, the defendant filed a motion

[388] The Criminal Procedure Code, s 39 is quoted in footnote 369.
[389] Thairath Online 'Sirichoke felt guilty for defaming Yingluck' (*Thairath*, 5 October 2018) <https://www.thairath.co.th/content/1390661> accessed 13 March 2019
[390] 'Tharit Imprisoned by the Supreme Court for One Year for Defaming Suthep' (*Thai Post*, 15 December 2018) <https://www.thaipost.net/main/detail/24269> accessed 28 March 2020

asserting that he had already apologised to the claimant and argued that the claimant agreed to settle this case during the Supreme Court's proceeding. However, the claimant later filed a motion to the Court saying no settlement had been reached. The Court therefore continued the proceeding and later found the defendant guilty of the offence of defamation. This case shows that defamers cannot force their victims to accept their apologies; the victims have the final decision to compromise the dispute. If a victim is not satisfied with the apologies or does not want the apologies, he or she can refuse the defamer's offer and allow their criminal cases to continue. This shows that the compromise process is based mainly on the injured party's satisfaction. This process, I submit, provides better protection to the personality right than the process provided under the offence of insult which allows the alleged perpetrator to pay the fine to the police to easily settle the disputed as discussed in section 3.2.5.

In some incidents, nonetheless, it was unclear whether the compromise process is really used to heal the damage caused to the personality right of defamed victims. In *Pasut* (2021), for example, Mr Pasut, an actor, filed complaints against online users under the offence of defamation.[391] The actor said one of them tried to apologise him, but he said that he only accepted Personal Protective Equipment (PPE) suits as an apology because he wanted to donate them to the hospital to help Covid-19 patients. Moreover, in *Anchalee* (2022), a news reporter filed a complaint against her defamer under the offence of defamation.[392] This defamer offered her 20,000 baht (500£) as an apology and asked the reporter to withdraw the charge against him. The report accepted the money and withdrawn the charge. She later donated 10,000 baht (250£) to Mr Pasut to buy PPE suits for the hospital. I question whether it is appropriate for the actor and reporter in these incidents to use the compromise process to ask for PPE suits or money to be donated later. But I submit that it was defamers' responsibility to deal with the consequences of their actions. Persons accused of committing the offence of defamation have a choice whether they want to do as their accusers require and settle the charge; or they can

[391] 'Art Pasut Faces His Defamers After Filing a Complaint on Defamation, Money Will Be Used for PPE' (*Nine Entertain*, 15 June 2021) <https://nineentertain.mcot.net/news-update-6355196> accessed 7 July 2022

[392] 'Sor Or Chor Reveal Money from Prosecution Will Be Send to Art for PPE' (The Truth, 1 June 2021) <https://truthforyou.co/50809/> accessed 7 July 2022

defend their cases to the Court by claiming the justifications or defence as we have seen in section 4.3.4.

Unlike the offence of defamation, there is no provision stating that the offence of insult is compromisable; thus, the offence of insult is a non-compromisable offence. Consequently, in theory, an inquiry official is authorised to investigate a commission of the offence of insult, even though there is no complaint by the injured person. The injured party cannot legally compromise with the perpetrator any time before the final decision: the matter is one in which the State (represented by prosecuting authorities) has an interest, independent of the interest of the victim. The state has a clear interest with the first form of insult (insulting in the presence of the insulted individual) because there is a public order risk of a physical fight between the insulter and the victim. It is appropriate for a police officer who witnesses the insult to arrest the insulter without any complaint of the insulted victim to prevent the fight. Furthermore, as an offence aiming to preserve public order, the injured party should not be allowed to compromise with the insulter, because that would be a private party interfering with the independent interest of the state. Therefore, it is suitable for this form of insult to be stated as a Petty Offence and not as a compromisable offence.

However, this justification does not work with the second form of insult (insulting an individual by means of communication to the public) which mainly aims to protect the personality right and does not engage any interest of the state. Insulted individuals under the second form should be able to require their insulters to heal the harm caused to their personality right, like defamed victims. The insulted victim should be able to require an apology as a condition for compromising his dispute in the same way as the defamed victims. This would be achieved by my proposed amendment. The second form of insult should be moved into the Offence of Defamation Chapter: that would make insults by means of communication to the public a compromisable offence and the process which is used for a defamed victim will be able to be directly used by the victim of insult.

Although Thai law does not clearly recognise insulters' right to compromise with their victims, in practice, the compromise process may be indirectly used under the offence of

insult. As we have seen in section 4.2.2, an insulted individual may regard insulting speech as defamatory speech and file the complaint to the police under the compromisable offence of defamation rather than the offence of insult. The police will process the case as defamation, which requires the injured party's consent to settle the case. There is an actual incident which can support my argument, in *Srisang* (2020), a former judge of the Thai Supreme Court filed his complaint under the offence of defamation against an online user who verbally abused the judge as an idiot person.[393] It is questionable whether the verbal abusing in this incident is defamation in Thai law because, as shown above, defamation must injure 'the personal value of the injured party that appears in the society.'[394] This verbal abuse, I believe, cannot harm this value but this statement can be considered as an insult, because this statement is an act of disrespect by using vulgar words. Nonetheless, this case was finally concluded by the apology of the user to the judge.[395] This incident may be seen as inconsistent with the pure doctrinal position of the Criminal Code, which does not prescribe the offence of insult as a compromisable offence but the fact that there is an overlap between defamatory and insulting content gives the law a useful flexibility, as this case illustrates. I believe allowing this case to be concluded has more benefit to both parties than strictly interpreting the law: since the judge was satisfied with the user's apology, there was no benefit to be gained by proceeding with this case. As an insult did not challenge public order there was no state interest engaged and the compromise process allowed the case to be settled swiftly and to everyone's satisfaction. Nor was there the free speech of the user to be considered, since the user felt guilty and personally apologised to the judge for what was effectively an abuse of that freedom.

The indirect application of compromise process in case of insult may help insult victims to heal the damage caused to their personality right. As we have seen in *Lena Jung* incident,[396] the guard wanted Lena Jung's apology from humiliating him. The guard may

[393] 'A Former Judge of the Supreme Court Files a Complaint against an Online User who Verbally Abuse the Judge as an Idiot Person' (*Thai Post*, 1 March 2020) <https://www.thaipost.net/main/detail/58540> accessed 12 October 2020
[394] See the accompanying text of footnote 272
[395] 'Judge Chuchart already Accepted the Apology from the Online User' (*Komchadluek*, 2 March 2020) <https://www.komchadluek.net/news/regional/420177> accessed 12 October 2020
[396] See the detail of this incident in the accompany text of footnotes 207-209

be able to achieve his aim by filing his complaint against her under the offence of defamation. Under the compromise process, his consent would be need if Lena Jung had sought to settle the case. This practice might provide more suitable protection to the personality right than the procedure of the offence of insult because the damage caused to the guard's right can be healed by Lena Jung's apology. If the case is settled, there will not be any criminal sanction impose on her. As seen in *Srisang,* this practice has already been used in Thai society. But if the case is not settled (Lena Jung refuses to apologises), the Court may finally find that Lena Jung's conduct was a commission of the offence of insult by means of communication to the public as in the *Decision No 1105/2519*,[397] although the initial charge is defamation.

The above analysis shows that the process to heal the damage to reputation can be indirectly applied to heal the harm caused to the personality right protected by the offence of insult. However, it would be more suitable to allow this process to be applied directly to protect insulted victims, and this could be achieved easily: by amending the Criminal Code as I propose insulting an individual by means of communication to the public will be a compromisable offence. Section 393 will only penalise insults done in the presence of the insulted party. The offence of insult by means of communication to the public as s 326/1 will be stated in the same chapter as the offence of defamation and would therefore be governed by s 333(1) which states: the offences in this chapter are compromisable offences.

4.3.6 Sanctions

The previous section shows that the defamed victim and the defamer can compromise their dispute without having to go to the court. But if the case is not compromised, the Court which finds the defendant criminally liable under the offence of defamation under ss 326 or 328 can order the defendants to be imprisoned or to pay the fine as stated in those sections. Furthermore, the Criminal Code s 332 enables the court in a defamation case to impose the special sanctions on defamers in defamation cases as follow:

[397] See section 4.2.2

> Section 332. In the case of defamation in which judgment is given that the defendant is guilty, the Court may make an order:
>
> sub-section (1) to seize and destroy an object or any part thereof in which appears defamatory statements;
>
> sub-section (2) to publish the whole or part of the judgment in one or more newspapers for once or several times at the expense of the defendant.[398]

Kasemsant explains that the claimant in a defamation case must clearly state in his or her complaint that they want the Court to impose these sanctions on the defendant.[399] Having these special sanctions suggest that not only does the offence of defamation aim to penalise defamers, but s 332 also provides processes for defamed victims to heal the damage caused to their reputation.

The first process under sub-section (1): the Court can order the defamatory content to be seized or destroyed. Tingsapat says that, under this process, courts in defamation cases can make an order to seize or destroy anything, such as leaflets, that has defamatory content.[400] For example, in the *Supreme Court Decision No 2822/2515*,[401] the prosecutor also asked the Court to order the letter having defamatory statement to be destroyed. Since the Court found that showing this letter to a third person was a commission of the offence of defamation, the Court also ordered this letter to be destroyed in its decision. Kasemsant further explains that if the content is written on a wall, the Court has its discretion whether the wall will be destroyed, or the content will be erased.[402]

Tingsapat argues that the Court can also order to seize or destroy a *third party*'s object which has defamatory content. He says that the third party who owns the object which contains a defamatory statement can be seen as taking part in the commission of the

[398] translated by Netayasupha, Pisitpit and Watcharavutthichai (n2) 281
[399] Kasemsant (n300) 219 (citing the *Supreme Court Decision No 950/2484*)
[400] Tingsapat (n11) 509
[401] The *Supreme Court Decision No 2822/2515* (n284)
[402] Kasemsant (n300) 219

offence of defamation. I agree with Tingsapat's interpretation, but there are more details needed to be clarified.

In Thai law, a person who takes part in the commission can be considered as a supporter under the Criminal Code s 86.[403] The supporter is a person who assists or facilitates the commission of another person (in this case the commission of the offence of defamation by the defamer). Therefore, any persons who allow a defamatory notice to show on their wall can be considered as the supporters if they knew the defamatory content and did nothing. In this case the Court can order the owner, as a supporter, to remove that content. But if a person does not have any act considered as assisting or facilitating the commission, Thai law does not regard him or her as the supporter; thus, the sanction under s 332 sub-sec (1) cannot be imposed on them. For example, Mr A wrote an e-book to defame Miss B and published this book to be downloaded on the Internet. Mr C downloaded this e-book but does not show the content to others. So, Mr C is not a supporter under Thai law. If the Court finds Mr A guilty of the offence of defamation, the Court cannot order the e-book downloaded by Mr C or Mr C's computer to be seized or destroyed because Mr C is not a supporter of the offence of defamation.

The second process under sub-section (2) is publishing the Court's decision to show the public that the Court had already ruled that the statement accusing the injured party was illegal. For example, in the *Supreme Court Decision No 2272/2527*,[404] the claimant also asked the Court to order the defendant to publish the Court's decision in newspapers. Since the Court found that the defendant committed the offence of defamation, the Court also order the defendant to publish the decision in newspapers as requested by the claimant.

As mentioned above, the claimant must clearly say that they want the Court to impose the sanctions under s 332 on the defendant. If the claimant does not think that publishing

[403] The Criminal Code s 86, ('Whoever, by any means, does any act to assist or facilitate the commission of an offence of another person, before or at the time of commission of the offence, even though the offender does not who of such assistance of facilitation, is said to be a supporter of such offence, and shall be liable to two thirds of the punishment provided for such offence.') translated by Netayasupha, Pisitpit and Watcharavutthichai (n2) 103
[404] The *Supreme Court Decision No 2272/2527* (n361)

the judgment will heal the harm caused to their reputation, they may not request the Court to impose this sanction on the defamer. For example, a victim whose reputation is injured by a person disclosing the victim's private matter may not request the Court to publish the decision. This is because the publication may disclose that matter and will continuously harm the victim's reputation.

The special sanctions under s 332 cannot apply to the offence of insult because this section clearly states: 'In the case of *defamation* in which judgment is given that the defendant is guilty.' These sanctions, I believe, provide a better way to heal the damage caused to the personality right than the sanction provided under the offence of insult, which only penalises insulters. The Court which finds the defendant guilty of the offence of insult cannot order the insulting content to be seized or destroyed. Furthermore, the Court cannot order the decision to be published in a newspaper at the expense of the defendant. However, by relocating the offence of insult by means of communication to the public into the Offence of Defamation Chapter and s 332 is amended to make these special sanctions applicable to this form of insult, these sanctions can be imposed on insulters who insults another person by this form.[405] The Court will be able to order the insulting content to be destroyed or seized. For example, Mr A hates Miss B. He creates a poster saying that Miss B is a *Hengsuay* person and idiot as a buffalo and put this poster on a wall of his house. When the Court finds him guilty under the offence of insult, the Court will be able to order him to remove the poster if the offence of insult is relocated to the Offence of Defamation Chapter. The removal will stop the harm caused to Miss B's personality right from being continuously insulted.

Furthermore, the publication of the judgement under s 332 sub-section (2) in case of insult will make the insulted victim satisfied because the judgment will show to the public that the insulter's speech is illegal. From the above example, if Miss B prosecuted Mr A under the offence of insult and requested the Court to impose the sanction under s 332 sub-section (2) on him and the Court finds him guilty of the offence of insult and orders him to publish the judgement on a newspaper, Miss B will be satisfied that the judgment is shown

[405] The proposed amendment of the Offence of Defamation Chapter can be seen in table 4.1 in section 4.5.

to the public that her insulter was found guilty. Moreover, the publication of the judgment might make readers of the newspaper realise that it is illegal to say those words: there will a risk of criminal prosecution to do so.

4.3.7 Summary

The above discussion of the offence of defamation shows that this offence provides more *suitable* protection to the personality right than the offence of insult by means of communication to the public which also aims to protect the personality right because of these three reasons. First, the specific justifications provided under the chapter of defamation do not apply to insults. The lack of specific justifications may cause a problem to those who use insulting words in their statement which is justified under the Chapter of Defamation. Secondly, the offence of defamation allows defamers to compromise their dispute with their victims. The final decision to settle the dispute is on the victim. No one can force the victim to do that. This is different from the offence of insult, as a Petty Offence, which allows insulters to easily settle their charge by paying the fine as fixed by the police. Finally, the offence of defamation prescribes the special sanctions which defamed victims can use to heal the damage to their reputation, but the offence of insult does not have these sanctions.

Because of the above problems I propose to relocate the offence of insult by means of communication to the public into the Offence of Defamation Chapter in the Criminal Code. This will allow rules under the offence of defamation to apply to this form of insult. Since the amended Chapter will also contain insults, it is no longer appropriate to call the Chapter as the Offence of Defamation. Thus, I also propose this Chapter should be called the Offences of Defamation and Insult.

4.4 Defamation regulated under the Civil and Commercial Code

In this section I will show how the Civil and Commercial Code regulates defamation. The Code provides the specific rule for regulating defamation under s 423 and the specific rule for compensation under s 447.

First, I will show that the Code provides the specific rule for regulating defamation in s 423(1). This is different from insults which are regulated by the general principle of tort law. I will show the main rule of s 423 to argue that this section cannot regulate insults. Secondly, I will show that the Code also provides the specific defence for defamers in s 423(2) and the Supreme Court of Thailand also applied the justifications under s 329 discussed in section 4.3.4.1 to civil defamation cases. The defamers who are eligible to use a justification under s 329 will not be liable under tort law. Finally, I will show that tort law provides special compensation to protect defamed victims. This compensation provides better protection to the defamed victims than the protection provided to insulted victims. Thus, I will propose an amendment to the Civil and Commercial Code for this compensation to be applied to protect insulted victims.

4.4.1 Wrongful Acts Regulated under Section 423

Civil defamation is regulated by tort law in s 423 of the Civil and Commercial Code, which states:

> (1) A person who untruthfully asserts or disseminates a statement of fact which injurious to the reputation or credit of another person or injurious to his earning or prosperity in any other manner shall be bound to make compensation to the other for any damage arising therefrom even though that person does not know the untruth of such statement, where he should have the knowledge thereof.
>
> (2) In case where a person conveys a communication without awareness of its untruth, the mere act of conveying such communication does not render such person to be liable to make compensation if such person or the recipient of the communication has a justified interest in it.[406]

Supanit points out that this section was copied from s 824 of the German Civil Code.[407] The English translation of s 423 is similar to s 824, which states:

[406] Nanakorn (n79) 196-197
[407] Sapanit (n217) 88

(1) A person who untruthfully states or disseminates a fact that is qualified to endanger the credit of another person or to cause other disadvantages to his livelihood or advancement must compensate the other for the damage caused by this even if, although he does not know that the fact is untrue, he should have known.

(2) A person who makes a communication and is unaware that it is untrue is not obliged to pay damages if he or the recipient of the communication has a justified interest in the communication.[408]

The Civil and Commercial Code s 423 shows that it regulates 'acts of asserting or disseminating.' Nasakul defines the term 'to assert' as 'to speak to another person' and defines the term 'to disseminate' as 'to make an expression which can make others understand its meaning such as expressions by photos or books.'[409] In practice, these terms are not clearly distinguished by the Supreme Court. The Court has interpreted them as including many types of expression which can make a third party understand the expression such as publishing a statement by a newspaper, [410] making a stage performance about a personal life,[411] or sending a motion to the King of Thailand.[412] the Court usually says in its Decisions: *the defendant was (or was not) civilly liable under s 423 because they stated or disseminated (or did not state or disseminate) an untrue statement*.[413]

The above discussion shows that the wrongful acts regulated under s 423(1) are not strict. However, the content regulated under this section must be *untrue* because this section

[408] translated by Langenscheidt Translation Service, 'German Civil Code: BGB' (*Bundesamt für Justiz*) <https://www.gesetze-im-internet.de/englisch_bgb/> accessed 4 November 2019; Markesinis argues that s 824 of the German Civil Code is not important because the interests protected by this section are protected by other sections and the scope of protection are wider than the protected s 824. (See Markesinis (n 76) 106)
[409] Nasakul (n224) 173
[410] <http://deka.supremecourt.or.th/> accessed 5 April 2020
[411]<http://deka.supremecourt.or.th/> accessed 5 April 2020
[412] <http://deka.supremecourt.or.th/> accessed 5 April 2020
[413] For example: See the *Supreme Court Decisions No 21420/2556 (2013), 10448/2553 (2010),* 2929/2543 (2000), 1479/2542 (1999) and *7055/2539* (1996) <http://deka.supremecourt.or.th/> accessed 5 April 2020

states: 'A person who *untruthfully* asserts or disseminates a statement of fact...' A person who expresses a true statement will not be civilly liable under s 423. The *Supreme Court Decision No 21420/2556* (2013), [414] for example, ruled that the defendant who published a true statement which injured the reputation of the claimant was not liable under s 423. In this case, a security investment company sued the governor of the Bank of Thailand for listing the company in a list of companies that had had cash flow problems. The Court dismissed the suit because it was true that those companies have those problems, though the listing had a detrimental effect of the value of the company.

Not only must the statement being made against the claimant be untrue, but it must also injure the interest in the 'reputation or credit' of another person or harm the 'earnings or prosperity of another person.' This might suggest that s 423 protects four different interests (reputation, credit, personal earning and prosperity), but in practice the Supreme Court does not clearly distinguish between these interests. The Supreme Court normally uses the terms '*reputation and credit*' to refer to the main interest protected under this section and says that harming this interest impacts the claimant's earnings or prosperity. The Supreme Court found claimants who have an important position are persons who have reputation and credit without explaining the difference. For example, in the *Supreme Court Decisions No 3805/2537* (1994) and *No1479/2542* (1999), the Court used the fact that the claimants had important positions in the society to support that they had *reputation and credit*. [415] In the *Decision No 3805/2537* (1994),[416] the Court found that the defendant who used an untrue statement to accuse the claimant of having an affair injured the claimant's reputation and credit and harmed his prosperity because it had the potential to make his supervisees disrespect him. In the *Decision No1479/2542* (1999),[417] the Court found that the defendant civilly liable under s 423 because he used untrue statements to tell other persons that the claimant, an officer of the Water Authority of Thailand, stole public tap water and used that water for a factory without authorisation.

[414] <http://deka.supremecourt.or.th/> accessed 13 August 2019
[415] The claimant of the *Decision No 3805/2537* was a Director of a State-own broadcast organisation; The claimant of the Decision No 1479/2542 had many prominent positions in the society such as an Associate Judge in the Labour Court.
[416] <http://deka.supremecourt.or.th/> accessed 5 April 2020
[417] <http://deka.supremecourt.or.th/> accessed 5 April 2020

The Court found that these statements injured the reputation and credit of the claimant and explained that these untrue statements harmed the claimant's earning because accusing the claimant of performing his duty unfaithfully may cause harm to his earning. These decisions show that the main interest protected under s 423 is reputation and credit, which is evaluated by the claimant's society. This interest is similar to the interest protected under the offence of defamation because the personality right protected by the offence is also a person's value evaluated by the society.

As the reputation and credit of a person are the main interest protected under s 423, Nasakul argues that acts of asserting or disseminating under this section must be done to a third party.[418] I agree with her because the reputation and credit of a person are the interests which must be evaluated by a third party. There should be a third party who receives the untrue information from the assertor or disseminator.

Because s 423 aims to protect the 'reputation or credit' of another person which is injured by *untrue statement*, s 423 cannot be used to protect an insulted individual, the focus of this thesis. We have seen that an insult is an act of disrespect (and not the using of an untrue statement to defame) and the interest being harmed is the personality right that is protected from being insulted (not those protected under s 423). The injured person must use s 420 (the general principle of tort law) to sue their injurer if the injurer did not use untrue statement. This argument is confirmed by the *Decision No 891/2557* (2014), where the Supreme Court found the defendant civilly liable for injuring the *reputation* of the claimants but did not impose the liability by using s 423 because the defendant did not use an untrue statement to harm the claimants' right. In this case, the defendant said to the public '*Puak Man Me Hia 7 Tua*'. The statement can be literally translated to: 'They (the claimants) are seven water lizards.' The word '*Hia'* is a Thai word for 'water lizard,' but this word is also a verbally abusing word using as an adjective for a mean behaviour.[419] The Court found that this statement injured the reputation of the claimant, but the Court imposed civil liability on the defendant by using s 420 not s 423. It is

[418] Nasakul (n224) 173
[419] The Thai meanings of the word *Hia* see Chanokporn Poorpatanakul, '12 Meanings of Hia' (*The Cloud*, 27 September 2019) <https://readthecloud.co/scoop-12meaningsofhia>accessed 7 July 2022

reasonable to assume that s 423 is not used because the *reputation* in this *Decision* was not injured by an *untrue statement* but injured by a verbal abuse. This case shows that s 423 focuses on the untrue statement being asserted or disseminated. It also shows that the reputation can be also protected by s 420.

4.4.2 Defences for Wrongdoers

Section 423(2) provides a defence for: (i) wrongdoers who communicate an untrue statement, which they do not know that their statement is untrue; and (ii) the wrongdoers themselves or the receiver has a justified interest in the statement. For example, Mr A honestly believes that Mr B paid a bribe to a government officer. Mr A tells Miss C (Mr B's boss) that her employee paid a bribe, but Mr B did not pay the bribe. Though Mr A's statement was untrue, Mr A can use the defence under s 423(2) to argue that he sent this statement to the receiver who has a justified interest because the boss should know her employee's behaviour.

Apart from using the defence provided under s 423(2), the wrongdoers can also use the justifications under the Criminal Code as their defence in civil case. This is because no criminal liability is imposed on defamers who can claim the justifications. The wrongdoers being sued under s 423(1) can claim that their acts are justified by the Criminal Code; thus, their act are not unlawful. This interpretation is confirmed by Supreme Court Decisions, one of which is the Decision in civil proceeding against Andy Hall[420] (the same human rights defender mentioned in section 4.3.4.1(iii)). He was sued under the Civil and Commercial Code s 423 by Natural Fruit Company (the same company as the criminal case) because in his TV interview, he accused the company of violating its migrant workers' labour and human rights. The Court in civil proceeding found that the Court in criminal proceeding already found that it was justified for Hall to make this accusation under s 329 sub-section (3). The Court in the civil proceeding therefore found that Hall's act was not done unlawfully. Thus, the civil charge against Hall was dismissed. Furthermore, in another case, the Supreme Court dismissed the civil defamation claim

[420] Prachatai, 'The Supreme Court Dismissed the Civil Charge Against Andy Hall by a Can Food Company' (*Prachatai*, 5 May 2021) <https://prachatai.com/journal/2021/05/92976> accessed 8 July 2022

against the defendant by using s 329 sub-section (1).[421] The defendant was sued because she gave her interview saying that the claimant (a hospital) made her child disabled after she gave birth at this hospital. The Court dismissed the claim by explaining that her interview was done by justification to protect her legitimate right.

The application of the justifications under the Criminal Code to tort law shows that the justifications also benefit wrongdoers in tort law, too. As these justifications only apply to defamation, they cannot protect an individual who asserts or disseminates a statement which is justified by one of these justifications but contains insulting content. For example, if the mother in the above Decision also said in her justified interview that the doctor who delivered her child was a *Hengsuay* doctor, she might be civilly liable under s 420. This problem is caused because the justifications are currently applicable to defamation not to insults. But this problem can be solved if the Criminal Code is amended as I proposed above, persons who insult another by means of communication to the public will have the same justifications as defamers.

4.4.3 Compensation

As we have seen in section 3.3.3, the Civil and Commercial Code prescribes the general principle for compensation under s 438(1). Persons who are injured by wrongful acts can claim monetary compensation from this section. However, in case the injury to *reputation*, the Civil and Commercial Code provides the special compensation under s 447, which states:

> In case where any person causes damage to another's reputation, the Court may, at the injured person's request, order such person to take a reasonable action in restoring that other's reputation in lieu of awarding compensation or in addition to awarding compensation.[422]

[421] 'The Suit for 100 Mil. Bath by Phrayathai Hospital Dismissed by the Supreme Court' (*Hfocus,* 8 October 2018) <https://www.hfocus.org/content/2013/10/5060> accessed 12 July 2022)
[422] Nanakorn (n79) 204

Supanit points out that this section is copied from s 723 of the Japanese Civil Code.[423] She describes that normally claimants whose reputation is injured use the Civil and Commercial Code s 447 to require their defendants to correct the untrue statement to restore the claimants' reputation. For example, in the *Decision No 126/2517* (1974),[424] the Supreme Court found that the defendants were liable under tort law for publishing in a newspaper an untrue statement which injured the claimant's reputation. The Court ordered the defendants to correct the statement in the newspaper. Claimants, Supanit argues, can also use this section to ask their wrongdoer to apologise as a reasonable action under s 447. This shows that defamed victims can use tort law to ask their defamers to heal the damage caused to their reputation. Furthermore, this section shows that the claimant still has their right to ask for monetary compensation.

As the right injured in a case of insult is not reputation but is the personality right that is protected from being insulted. Insulted victims, I believe, cannot use this section to require their insulters to take a reasonable action to restore the victims' personality right because this right is not listed in s 447. This shows that defamed victims have better protection than insulted victims. It can be seen, again, that Thai law does not provide suitable protection to insulted individuals when compared to defamed individuals. Insulted individuals should be able to require their insulter to take a reasonable action to heal their personality right: an apology can also heal the damage caused to this personality right similar to reputation (perhaps more easily). For example, the personality right of the claimant in *Supreme Court Decisions No 124/2487* was harmed by the comparison of him to a dog. The apology by the insulter might easily heal this harm. This suggests that the insulted victim should be able to require an apology in the same way as the defamed victim can do. Therefore, I propose that s 447 should be amended to solve this problem by adding the right of an insulted victim to request the court to order the insulter to heal the damage caused the victim's personality right.[425] Therefore, insulted victims who can

[423] Supanit (n217) 271
[424] <http://deka.supremecourt.or.th/> accessed 8 October 2020
[425] The proposed amendment of the Civil and Commercial Code can be seen in table 4.2 in section 4.5.

prove that their personality right is harmed under the general principle of tort law in s 420 will be able to ask for the special sanction under s 447.

4.5 Conclusion

This chapter shows that Thai law has specific rules for protecting reputation, another personality right, by the Criminal Code and the Civil and Commercial Code. The rules are better than those under the law of insults.

In the Criminal Code, first, the offence of defamation prescribes the *specific* justifications which protect defamers in many circumstances. Secondly, the offence of defamation is a compromisable offence which does not allow defamers to settle their disputes easily. The defamers can only settle upon the victims' consent. Thirdly, the offence of defamation provides two special sanctions which can be imposed on defamers if they were found guilty: (i) the defamed victims can ask the Court to order the defamatory content to be seized or destroyed; and (ii) the defamed victims can ask the Court to order the judgment to be published in a newspaper at the expensed of the defamers.

In order to bring these sensible rules into the law of insult, I propose an amendment to the Criminal Code to provide more suitable protection to insulted victims than the current law. First, the two forms of insult should be separated: the form of insult which regulates insulting an individual in their presence should be stated as a Petty Offence as follows:

> Section 393 Whoever insults any person in his or her presence shall be liable….

Secondly, the second form of insult: insulting an individual by means of communication to the public should be added in the Offence of Defamation Chapter. This addition will change the Chapter's name and some sections as follow:

The current Offence of Defamation Chapter	The proposed amendment to the Offence of Defamation Chapter
Chapter III the Offence of Defamation	Chapter III the Offence*s* of Defamation and *Insult*
Section 326…	

	Section 326/1 Whoever insults any person by means of communication to the public shall be liable to…
Section 329 (1)… (2) shall not be guilty of defamation.	Section 329 (1)… (2) shall not be guilty of defamation or *insult*.
Section 330…	
Section 331…	
Section 332 In the case of defamation in which judgment is given that the defendant is guilty, the Court may make an order: 'sub-section (1) to seize and destroy an object or any part thereof in which appears defamatory statements;	Section 332 In the case of defamation or *insult* in which judgement is given that the defendant is guilty, the Court may make an order: 'sub-section (1) to seize and destroy an object or any part thereof in which appears defamatory or *insulting* statements; …
Section 331 The offence in this Chapter is a compromisable offence.	Section 331 The offence*s* in this Chapter *are* compromisable offence*s*.

Table 4.1 the proposed amendment to the Offence of Defamation Chapter

The above proposed amendment will, first, provide justifications to guarantee that insulters will have their freedom to express their opinion or statement without being liable under the offence of insult. These justifications will protect insulters in these circumstances from being liable under tort law, too. Secondly, the amendment will make the offence of insult by means of communication to the public a compromisable offence which, for reasons given above, has a better process for protecting insulted victims than the current law. Thirdly, the amendment to s 332 will also provide a better remedy for insulted victims than the current sanction stated under s 393.

In the Civil and Commercial Code, it provides the specific rules to regulate defamation and provides the special compensation under s 447 which allows persons whose reputation being injured to ask the Court for their defamers to take a reasonable action to restore their reputation. Insulted victims cannot use this compensation because the right

being injured in cases of insult is not listed in s 447. Therefore, I propose that this special compensation should also be applied to insults by amending s 447 of the Civil and Commercial Code as follows:

The current s 447	The proposed amendment to s 447
Section 447 In case where any person causes damage to another's reputation, the Court may, at the injured person's request, order such person to take a reasonable action in restoring that other's reputation in lieu of awarding compensation or in addition to awarding compensation.	Section 447 In case where any person causes damage to *the personality right of another person*, the Court may, at the injured person's request, order such person to take a reasonable action in restoring that *the personality right* in lieu of awarding compensation or in addition to awarding compensation.

Table 4.2 the proposed amendment to s 447

This amendment will allow insulted victims who can prove that their personality right is harmed by the insulter under s 420 to use this amended section to require their insulters to take a reasonable action to heal the harm to their personality right such as requiring an apology in the same way as defamed victims can require their defamers to do.

The findings of this chapter, however, only show how the Thai law of insult can be improved in the Thai context. But it has not yet answered why Thai law needs both criminal and civil law to protect the personality right from being harmed by insults. In the next chapter, I will examine the Thai law of insult with my proposed amendment at a conceptual level to determine: (i) whether Thai law needs to impose both criminal and civil liability on insulters; and (ii) whether there is a conceptual rationale to support my proposed amendments.

Chapter 5 What is the Rationale under Thai Law to Protect an Individual from Being Insulted?

5.1 Introduction

In chapter 3, I sought to show that it is acceptable and suitable for Thai criminal law to criminalise the first form of insult (insulting an individual in their presence) because this form of insult aims to preserve public order and to protect the personality right of individuals. And in chapter 4, I sought to show how to improve the Thai law of insult to provide more suitable protection to insulted victims. In this chapter, I will investigate: (i) why Thai law needs to protect an individual from being insulted and (ii) whether Thai law needs to protect this individual by both criminal and civil law.

To answer these questions, I will examine concepts adopted from other countries having law that has a similar function as the Thai law of insult. This is because this Thai law was influenced by some developed countries.[426] I will determine whether their concepts can be a rationale for Thai law to regulate insults by criminal and civil law.

We have seen in chapters 3-4 that Thai law distinguishes between defamation and insult by using different specific rules to protect different aspects of the personality right. This is different from other countries which had influenced the Thai legal system; they do not clearly distinguish between insult and defamation.[427] Therefore, a concept being used to provide a rationale for Thai law of insult can be the concept adopted for the law of defamation.

In defamation law, Post presents reputation as the underlying concept protected under the common law of defamation.[428] He argues: 'common law of defamation has at various times in its history attempted to protect reputation as property, as honour and as

[426] See sections 2.2 and 4.2.1, Thailand enacted the Royal Decree on Defamation by Speech or by Publishing Untrue Statements RE 118 (1900) which had a provision to regulate speech between individual by copying English defamation law.
[427] See footnote 157
[428] Post (n67)

dignity.' [429] His argument has been mentioned by numerous writers in different jurisdictions. Ardia uses Post's concepts to understand how defamation law in the US operates in the online context. [430] Milo argues that 'aspect of reputation in modern defamation law can be understood as primarily reflecting three values: property, honour and dignity.'[431] He also used these concepts to discuss the law of defamation in the US, England, South Africa, and Australia.[432] Oster presents a similar idea as Post by arguing that in English-speaking scholarship there is a concept of reputation as property which defines 'reputation from the judgement of a third party.'[433]

Although Post's concepts were adopted from *the common law of defamation*, they are also mentioned by literature discussing German law, which is a Civil-Law country and one that strongly influenced the development of Thai law. Oster argues that in German scholarship and even legislation reputation can be seen as 'an intrinsic value of a human being.'[434] He calls this German concept as 'reputation as honour or dignity.' Furthermore, Cheung and Schulz also argue that Post's concepts of reputation, especially the concept of dignity, can be used to explain German law. [435] Moreover, these concepts are mentioned in some Thai literature on defamation, though without analysis of these concepts in the context of Thai law.[436]

Post adopts the three concepts by considering the dictionary definition of 'reputation' and analysing a rule of the common law.[437] He says that the Oxford English Dictionary defines 'reputation' as 'common or general estimate of a person with respect to character or other

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[429] ibid 693
[430] David S Ardia, 'Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law' (2010) 45 Harv CR-CL L Rev 261
[431] Dario Milo, *Defamation and Freedom of Speech*, (OUP 2008)
[432] ibid 26-42
[433] Oster (n35) 49
[434] ibid
[435] Anne SY Cheung and Wolfgang Schulz, 'Reputation Protection on Online Rating Sites' (2018) 21 Stan Tech L Rev 310, 317
[436] See Sirot Tongkum, 'The Offences of Insult and Defamation: a Comparative Study from the Three Seal Law until the Criminal Code' (2006) (LLM thesis, Chulalongkorn University) <http://cuir.car.chula.ac.th/handle/123456789/56623> accessed 27 August 2020, 9-10; Rosarin Yooyen and Kitinun Chunsuebthaeo, 'Legal Measure relating to Online Defamation cases' (2020) 8(1) Nakhonsawan Buddist College Journal 301-310, 306
[437] Post (67) 692

qualities.'[438] This definition, he asserts, merely shows that reputation exists 'in the social apprehension that we have of each other.'[439] From this he seeks to find out what the common law protects by defamation law.[440] He says:

> But by looking carefully at the nature of the "injuries affecting a man's reputation or good name" defamation law is actually designed to redress, one can uncover a more focused image of the exact kinds of social apprehension that defamation law considers "normal," or "desirable," or deserving of the law's protection. In this sense defamation law presupposes an image of how people are tied together, or should be tied together, in a social setting. As this image varies, so will the nature of the reputation that the law of defamation seeks to protect. [441]

This passage shows that reputation protected under the common law of defamation can be different depending on the images of the relationship between people in a social setting which the defamation law presumes.

Under the first concept, reputation as property, [442] Post explains that an individual's reputation can be regarded as an intangible property created through his or her efforts and estimated by a marketplace. Under this concept, injuring an individual's reputation is seen as destroying his or her efforts. The damage to reputation can be evaluated because the value of reputation is determined by the marketplace in the same way as the marketplace evaluates the value of a property. The law of defamation is, therefore, important to guarantee that an individual's efforts will not be destroyed and can be recovered. The monetary compensation provided under this law is a means to recover the injury caused to those efforts. As this concept focuses on the reputation evaluated by a marketplace, this reputation is different from the interest protected under the Thai law of insult (the focus of this thesis) because the law of insult mainly aims to protect an

[438] ibid (citing 8 Oxford English Dictionary 496 (James Murray ed 1910))
[439] ibid
[440] ibid (citing 3 W Blackstone, Commentaries on the Laws of England 123)
[441] ibid 692-693
[442] ibid 693-699

individual's feeling which is not evaluated by a marketplace. This concept is not relevant to the focus of this thesis; thus, it will not be discussed.

The second (reputation as honour) and the third (reputation as dignity) concepts, however, are relevant to the focus will be discussed in sections 5.2 and 5.3. Although the second concept has the name 'honour' which is similar to Na-Nakorn's argument on the offence of insult,[443] the discussion will show that this concept sees 'honour' as the status of a person which his or her society gives to them from their social roles. An example of this honour is the honour of the king or queen. The honour cannot be seen as a value which can be calculated by marketplace; thus, monetary compensation cannot effectively restore the honour. From this perspective, defamation law must define and enforce the ascribed status of social roles[444] and the law can restore the honour by vindication. As we will see honour can be vindicated by punishing the defamers under criminal law. Since the concept sees honour as the ascribed status, defamation law under this concept will be used to confirm the status of particular social roles.[445] Thus, this interest is different from the personality right protected under the Thai law of insult, which does not focus on the status of a person.

The third concept, reputation as dignity, can be a basic to provide a rationale under Thai law to protect an insulted individual (the focus of this thesis). As I mentioned briefly in section 1.2, this concept is very complicated because Post developed this concept from Goffman's work, which is not directly related to 'dignity'. I will discuss both the works of Goffman and Post and will seek to simplify this concept. This concept will be reconstructed to argue that it is mainly about having *law as a means to protect an individual's personality.*

In section 5.4, I will use the reconstruction of Post's concept to argue that it can be a rationale for the Thai offence of defamation. Since the basic of this concept is adopted for defamation, it is appropriate to examine this offence although the offence is not the focus

[443] See Na-Nakorn's argument at the accompanying text of footnote 9
[444] Post (n67) 703
[445] ibid (stating: 'in a deference society defamation law has the potential to be used either as a potent method for reaffirming the importance to the whole society of the status of particular social roles…')

of my thesis. I will then examine the law of insult in section 5.5 to argue that the reconstruction of Post's concept can answer the first question mentioned at the beginning of this chapter: *Why does Thai law need to protect an individual from being insulted?* But it does not provide an answer to the second question: *Is it necessary for Thai law to protect insulted victims by both criminal and civil law?* This question has to be answered from the context of Thai law. I will argue in section 5.6 that it is *acceptable* and *suitable* for Thai law to have the current approach: protecting insulted individuals through criminal and civil law.

5.2 Reputation as Honour

First, I will discuss the concept of reputation as honour as presented by Post. Secondly, I will analyse this concept from a perspective of Thai law to argue that the concept is more relevant to the *sui generic* provisions under the Criminal Code which protect a person having a particular social status than the Thai law of insult. Thirdly, there are arguments which explain why German law protects personal *honour* under the law of insult (the same law as the focus of this thesis). I will also discuss these arguments because Thai law was influenced by German law during the reformation of the Thai legal system. Finally, my analysis of those arguments will show that the personality right as an interest protected under the offence of insult is similar to personal honour protected under the German law of insult. But the underlying concept of this German law originated from German history. It is unsuitable to use this concept as a rationale for the Thai law of insult which has a different root.

5.2.1 Discussion of the Concept

This concept, Post asserts, deriving from: 'an ancient tradition which views the worth of reputation as incommensurate with the values of the marketplace.'[446] In other words, a good name is more important than mere money. This tradition was influential during the beginning of defamation law in England. Post asserts that there are many aspects of

[446] Post (n67) 699 (stating: 'Bible says '[a] good name is rather to be chosen than great riches' (*Proverbs 22.1*); and Shakespeare observes that a 'purse' is merely 'trash' when compared to the value of a good name.')

honour,[447] but the kind of honour which was significant for the development of defamation law is:

> a form of reputation in which an individual personally identifies with the normative characteristics of a particular social rule and in return personally receives from others the regard and estimation that society accords to that role.[448]

Individuals cannot create this kind of honour through effort or labour, but this honour derives from 'the virtue of the status with which society endows his [or her] social role.'[449] Post exemplifies that a king has his honour as kingship without having to work to gain this honour as kingship, he receives this honour which is attributed by the society.

Post says that the concept of reputation as honour presupposes an image of society as a 'deference society,'[450] which has 'pervasive and well established' social roles. These roles provide 'the point of reference both for the ascription of social status and for the normative standards of personal conduct.' The defamation law in this deference society protects reputation as shared social perceptions which is a public good.[451] As argued in the above paragraph, a king has reputation which can be seen as honour; thus, an insult to the king not only harms the king as a person, but the insult also harms the social status which the society gives to the king.[452] Post says that this function of defamation law can be seen in the law of seditious libel which criminalised any speech 'that may tend to lessen [the King] in the esteem of his subjects, may weaken his government, or may raise jealousies between him and his people.'[453]

Post asserts that defamation law under this concept cannot merely provide compensation for injuries capable of pecuniary admeasurement, because reputation in this conception is seen as the value of a good name which 'can scarcely be comprehended by pecuniary

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[447] ibid
[448] ibid 699-700
[449] ibid 700
[450] ibid 702 (citing FML Thompson, English Landed Society in the Nineteenth Century 7, 23 (1963))
[451] ibid
[452] ibid
[453] ibid (citing W Blackstone, Commentaries of the Laws of England 123).

damages.'[454] Defamation law should restore honour by 'vindication,' which is the process for status to be rehabilitated.[455] He explains that honour can be vindicated by punishing the defamers.[456] He says that traditional common law allowed libel victims to have two choices for suing their defamers: (i) civil proceeding; and (ii) criminal prosecution.

Post says that civil proceeding can vindicate the honour. [457] He claims that *Lord Townsend v Hughes* is an early civil case which can be understood as vindicating the claimant's honour.[458] In this case,[459] the defendant was sued because he said that the claimant was 'an unworthy man, and acts against law and reason.' [460] The Court confirmed the jury's verdict which ordered the defendant to pay the claimant four thousand pounds for damages. One of the jury clearly said they gave this amount of damages to the claimant: '(not that he was damnified so much) but he might have the greater opportunity to shew himself noble in the remitting of them.'[461] However, Post asserts that civil proceedings cannot fully vindicate honour because of some rules; for example: truth is a complete defence, but the truth does not matter when the issue is whether the honour of a person with a social status is harmed.[462]

Post says that the truth or falsify of libel was not important in criminal prosecution of common law [463] and the defendant was not allowed to prove the truth by way of justification.[464] In this sense, the criminal defamation law was suitable for vindicating honour because it focused on the issue of the defendant's affront to the honorific status

[454] ibid 703
[455] ibid 703-704
[456] ibid 704 (saying: 'The punishment is similar to the action of revenging, which is the earliest meaning of 'vindication.')
[457] ibid 705-6
[458] ibid 705 (citing *Lord Townsend v Hughes* 86 Eng Rep at 994 (1677))
[459] 86 ER *Lord Twonsend v Dr Hughes* 994, 994
[460] Post (n67) 705
[461] ibid
[462] ibid
[463] The common law offences of defamatory libel in English law have been abolished by the Coroners and Justice Act 2009, s 73.
[464] Post (n67) 705 (saying: 'It is not material whether the libel be true' citing De Libellis Famosis, 3 Co Rep 254, 255 pt. v, fol. 125, 77 Eng Rep 259, 251 (1605));

of the claimant's role.[465] Therefore, criminal defamation law was more suitable than civil law to protect reputation as honour from Post's perspective.

5.2.2 Analysis of the Concept of Reputation as Honour from a Thai Perspective.

The above discussion shows that the reputation as honour is different from the personality right as an interest protected under the Thai law of insult. We have seen that the Thai law of insult does not protect the personality right as an interest deriving from a particular social role. Instead, it protects insulted individuals regardless of their social status. The root of the law of insult did not protect honour deriving from different social classes but aimed to prevent a physical fight.[466] This perspective still has been influenced in Thai law as shown in the *Supreme Court Decision No 3711/2557* (2014) and the *Decision of the Attorney General No 409/2559.*[467] The law of insult cannot be seen as a law to protect honour under Post's concept. Therefore, the concept of reputation as honour cannot be a rationale for the Thai law of insult.

This conclusion, however, does not mean that Thai law never protects persons with particular social roles, but Thai law normally has had *sui generic* provisions to protect these persons. The Royal Decree on Defamation by Speech or by Publishing Untrue Statements RE 118,[468] which was enacted during the drafting of the first criminal code, regulated the acts currently known as insult and defamation in s 6 and regulated the acts currently known as the commissions of the *lèse-majesté* offence in s 4. The current Criminal Code also addresses these different types of commissions under different provisions and titles. The Code has the *sui generic* provisions which penalise the perpetrators who do not respect persons with the particular status identified in these provisions. These provisions are the *lèse-majesté* offence (the Criminal Code s 112[469]) and ss 133-134 which penalise those who defame, insult or express a grudge against the

[465] ibid (saying: 'the victim's honour is vindicated by punishing the defamer. Therefore, vindication in criminal cases is seen as 'the action of avenging or revenging.')
[466] See section 4.2.1 and see the accompanying text of footnote 238 ('A person, *with or without honour*…' is translated from 'บุคคลที่มีศักดินา หรือไม่มีศักดินา'.)
[467] See Section 3.2.3.1
[468] The Royal Decree on Defamation by Speech or by Publishing Untrue Statements RE 118 (n247)
[469] The text of the *lèse-majesté* offence is quoted in the accompanying text of footnote 146

King, the Queen or the Heir to the Throne of any foreign States and the accredited representative of those foreign States. These sections protect the persons with particular social rules; as such they are examples of the provisions which protect of reputation as honour explained by Post. These *sui generic* provisions, however, are not the focus of this thesis which aims to investigate how Thai law should protect individuals from being insulted regardless of their social status, so this concept of reputation as honour is of no assistance.

5.2.3 Personal Honour as Protected under German Law of Insult

Whitman provides another explanation of honour.[470] Unlike Post, who includes honour as a type of reputation, Whitman distinguishes between the interests in reputation and in honour.[471] He says that the interest in the former ensures that '*shameful or discreditable things about us do not become public knowledge*'; whereas he defines the interest in honour as *'an interest in making sure that other people show respect not only in the public sphere but also in private settings.'* In his paper, he asserts that the interest in honour is protected in German and French law by their 'law of insult' and argues that this law is 'a species of law that the United States fundamentally lacks.'[472]

Whitman suggests[473] that the German law of insult is found in the Criminal Code s 185, which states:

> Insult is punished by imprisonment for a term of up to one year or by a fine, and where the insult is made by means of physical assault [*mittels einers Tätlichkeit*], by a term of up to two years or by a fine.[474]

[470] Whitman (n76)
[471] ibid 1292
[472] ibid 1293; See the detail of this argument in the accompanying text of footnotes 640-644; See also Hilgendorf (n76) 499 (asserting: 'It is worth pointing out that the protection of "honour" or a "right to respect" by criminal law is much more emphasized in Europe than in the US, where the "freedom of speech" tops considerations of "honour" or "respect."')
[473] ibid 1297
[474] The English translation of s 185 is copied from Whitman (n76) 1298. This translation is different from the one translated by Micheal Bohlander (2010), Europa (*Europa*, 2010) <https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/criminal_code_germany_en_1.pdf> accessed 7 October 2019

Whitman identifies that the critical operative concept under this section is 'respect.'[475] He says this section criminalises 'words, gestures, or behaviour that show *Mißachtung oder Nichtachtung*, "disrespect or lack of respect" for another.' The law of insult must be interpreted under 'a concept of honour and of words and acts that "sully the honour."'[476] To support his interpretation, he refers to a commentary which explains that:

> 'Insult,' which is not precisely described in the section ... is to be understood as an attack on the honor of another person ... through expressions of lack of respect, low respect, or disrespect.'[477]

From this brief explanation, it is interesting to notice that s 185 of the German Criminal Code does not use the term 'honour,' but Whitman argues that this section protects honour. And the honour protected under the offence of insult under the German Code is different from the honour under Post's concept, because the German law of insult does not suggest that this section aims to confirm the status of particular social roles.

However, Whitman interestingly argues the German law of insult is regarded as protecting honour, because this law had been influenced by the traditions of social hierarchy and Germany's Nazi history.[478] Unlike today which everybody can be protected by the law of insult, Whitman asserts that at the eighteenth and nineteenth centuries this law 'generally applied only to certain high-status people.'[479] This law derived from old duelling practices; insults criminalised today were illegal acts committed against duelling aristocrats. The law of insult was a rule that had compelled low-status persons to show respect to high-status ones. This shows, Whitman asserts, that the law of insult did indeed protect honour in the

[475] Whitman (n76) 1296
[476] ibid 1302
[477] ibid 1302 (citing OLG [Court of Appeal for Selected Matters], NJW, 38 (1985), 1720 (FRG))
[478] ibid 1313-1332; Whitman's argument on the origin of the law of insult is cited by other literature See Elena Yanchukova, 'Criminal Defamation and Insult Laws: An Infringement of the Freedom of Expression in European and Post-Communist Jurisdictions' (2003) 41 Colum J Transnat'l L 861, 869; Robert A Kahn, 'Cross-Burning, Holocaust Denial, and the Development of Hate Speech Law in United States and Germany' (2006) 83 U Det Mercy L Rev 163, 181
[479] ibid 1314; For the history of the law of insult before eighteen century see Allyson F Creasman, 'Fighting Words: Anger, Insult, and 'Self-Help' in Early Modern German Law' (2017) 51 *Journal of Social History* 272

eighteenth and nineteenth centuries in a way similar to the honour as shown in Post's concept.

Whitman argues that the German law of insult originated from the history of 'indigenous German social pressures' rather than ancient Roman law. [480] This is similar to Creasman who argues that German law regarding 'verbal insults' was 'a blending of the Roman-canon law delict of *injuria* which the traditional German medieval concept of *Beleidigung*.'[481] Whitman says that early modern monarchies and princedoms had tried to supress aristocratic duelling.[482] Many German localities had statutes which aimed to invite 'insulted' duelling aristocrats to come into court rather than duel. Whitman asserts that the ancient Roman law of insult did not fit with the duellist culture at that time because Roman law primarily concerned persons of immense social prestige; insults under the Roman law 'took the form of a severe physical thrashing.'[483] But the duellists in Germany are 'status equals, sensitive to a fault, showed themselves ready to die over a slight, or even a mere touch-over even minor failures to make the *outward show of respect*.'[484] The German law of insult was established to respond to this situation by aiming to reduce the evil of duelling.[485] The duellists would reduce their violent behaviours, if they had 'a forum in which the insults they received could be punished.'[486] Furthermore, jurists in the eighteenth and nineteenth centuries normally defined insults from the perspective of duellists. Whitman exemplifies that one important jurist in this period, who was familiar with Roman law, said that insults were acts 'with a very specific bearing honour, such as spitting on a person, or slapping him.'[487] These acts were common in the world of duelling, as suggested by Whitman. [488]

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[480] ibid 1315
[481] Creasman (n479) 275 (citing Dreßler, deutsche Beleidigungsrecht, 11-15)
[482] Whitman (n76) 1315; See Creasman (n479) footnote 128 ('…duelling remained a popular means of rescuing injured honor until well into the nineteenth century.')
[483] ibid 1315-16
[484] ibid 1316
[485] ibid 1317
[486] ibid
[487] ibid (citing 2 CARL GEORG WÄCHTER, LEHRBUCH DES RÖMISCH-TEUTSCHEN STRAFRECHTS 89 (Stuttgart, Metzler 1826)
[488] ibid

Furthermore, he argues that the ancient Roman law, which provided monetary compensation for an insulted victim, could not provide sufficient remedy to those aristocratic duelists. This is because these duellists regarded that it was:

> severe dishonour to accept the money damages in 'satisfaction' of an insult. Insults were to be avenged through violence, not through litigation, and least of all through money payment.[489]

Therefore, German statutes in this period provided for remedies with 'an orientation toward the restoration of honour – in particular, forced apologies or retractions.'[490]

The idea that it was dishonourable to receive monetary compensation from being insulted, Whitman points out, is reflected in the German Civil Code of 1900, where the draftsmen refused to make a broad provision for money damages to compensate injuries to 'nonmaterial' interest.[491] The wording in the German Civil Code does not includes cases of insult as cases where courts can provide monetary compensation for 'nonmaterial' injuries for the claimant.[492] Similar to Whitman, Markesinis also points out that the feeling widely accepted at the time of the drafting of the Civil Code in Germany determined 'inferences with honour, reputation, and other such personal interest should not be vindicated an action for damages.'[493] He says that this attitude can be seen in the Drafting Committee of the Civil Code's report stating that it would be unacceptable for 'the dominant opinion among the population to place non-material values on the same level as property interest and to make good with money interferences with non-material

[489] ibid 1316
[490] ibid
[491] ibid 1319 (citing s 847 of the BGB: '(1) In case of injury to the body or to health as well as in the case of false imprisonment, the injured party can also demand an equitable reparation in money for harm that is not monetary.
(2) A similar claim is available to a woman, against whom a crime or a misdemeanour against good morals has been committed, or who has been led to permit extramarital sexual relation through trickery, threats, or through misuse of relation of dependency.'); This section was already repealed (See the detail of this issue in section 7.4.1 German Law of Damages).
[492] ibid; Whitman clarifies that until 1974 judges could use s 188 of the Criminal Code to make a quasi-civil award of damages to the injured party in an insult action.
[493] Markesinis (n76) 43

interest.'[494] The arguments of Markesinis and Whitman are very interesting as they show that honour and other personality rights were not able to be vindicated by German civil law.

Whitman points out that in the nineteenth century the individuals considered capable of being insulted were extended from the aristocratic duellists to the higher middle class.[495] Although more people were protected by the law of insult, he asserts that the view that there were higher and lower statuses in the society still existed in this period,[496] and this view was clearly sanctioned by statute. The German law of insult in this period 'differentiated carefully among the grades of "insultability" of persons of different social status.' This law also aimed to require social inferiors show proper deference to social superiors.[497] To support his statement, he provides an example of the statute of 1840 which provides:

> Insults… are to be criminally punished in the following cases:
>
> I If the affront to honor [*Ehrenkränkung*] consists of a coarse physical assault [*großeren Tätlichkeiten*];
>
> II If the insult is directed at person to who the insulter owes particular respect or deference [*Achtung order Ehrerbietung*], on account of the insulter's social status or his relationship to the insulted persons…[498]

Obviously, this old section is different from the current s 185 because neither the term '*Achtung* (respect)' nor 'Ehre (honour)' is mentioned in the current section. However, respect and honour are still important to the current law of insult,[499] as will be shown in

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[494] ibid (citing *Protokolle der Kommission für di Zwite Lesung des Entwurfs des Bügerlichen Gesetzbuchs*, Vol. I (1897), pp 622-3)
[495] Whitman (n76) 1319 (citing UTE FREVERT, EHRENMANNER: DAS DUELL IN DER BURGERLICHEN GESELLSCHAFT 136 (1991), 85)
[496] ibid 1320
[497] ibid
[498] ibid (citing Criminalgesetzbuch für das Kőnigriech Hannover [Criminal Code for the Kingdom of Hannover] v 8.8.1840 ch 10, art 265, *reprinted in* 2 SAMMLUNG DER DEUTSCHEN STRAFGESETZBŰCHER 140 (M Stenglein ed, Munich, Keiser 1858))
[499] ibid 1321

chapter 6. Respect in this old law of insult, Whitman says, was *hierarchical* respect which is different from egalitarian respect.[500] The status inequality was finally removed from the statute book in the Imperial Criminal Code of 1871,[501] which includes the current law of insult under s 185.[502] However, Whitman states: '…changing statutes is not the same as changing law, even in the civil-law world.'[503] He points out that the dominant opinion of the jurists during the enactment of this provision claimed that the law of insult protected honour.[504] In particular, the dominant opinion regarded the honour protected under the law of insult to be 'external honour' which is an honour measured from the objective social valuation of a person.[505] To support the idea that the law of insult might not protect people of low social status, Whitman refers to an 1890 decision which explained:

> Every person has the right to claim a certain degree of respect [*Achtung*] from his fellow citizens…. As a general matter, the concept of the general valuation of persons [*Wertschätzung*] comprises all the types into which honour is customarily divided - that is to say, honour associated with one's social status [*die bürgerliches des Standes*], sexual honour, and so on. These types of honour are specifically mentioned in order to show that the offense of injury to honour is not always measured according to the same standard, but differs according to the prevailing norms in the social circle of the person who has been insulted.[506]

It can be implied from this explanation that s 185 might not protect low status people. This argument is consistent with Hilgendorf's.[507] He argues that, in the late 19th century until the enactment of the Basic Law, the law of insult only protects 'the "factual" concept of

[500] ibid
[501] See the text of s 185 quoted in the accompanying text of footnote 533
[502] Whitman (76) 1323; See Hilgendorf (n76) 512 (saying 'the rules under section 185 of the German Criminal Code has not been changed since the enactment, although there had been criminal law reformed in Germany.')
[503] Whitman 1323
[504] ibid
[505] ibid 1324
[506] ibid (citing 38 ARCHIV FŰR STRAFRECHT 434, 435 n 4 (Berlin, Decker 1891)
[507] Hilgendorf (n76) 513

honour' or 'external honour', which is 'a reflection of a person's "good reputation" whereby that person's self-image also played a role.'[508]

Nonetheless, Whitman presents an interesting idea that during the Nazi period in Germany (1933 to 1945) every German regardless of his or her social status had the right to honour and could seek to vindicate their right in courts.[509] He describes the many steps taken by the Nazis to change the concept of honour in Germany.[510] The most important step the Nazis took from Whitman's view was the proposition that all German regardless of their social status had German honour;[511] thus, this proposition proposed that '*every German was a person of honour*'.[512]

After the Nazi era, Whitman argues that everybody in Germany, and not just those regarded as 'German', are entitled to have honour at least in theory.[513] In this period, he states that the German legal concept of honour shifted its focus to human dignity because of the Basic Law, which was promulgated in 1949.[514] Its Article 1(1) provides: '*Human Dignity shall be inviolable*…'[515], with the implication that dignity came from being a human, not from having a particular status in society. Hilgendorf argues that the guarantee of the inviolability of human dignity was adopted as a response to the specific modern instances of extreme injustices in Europe which includes the atrocities committed under National Socialism.[516] The guarantee of human dignity requires the State to take action against

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[508] ibid
[509] Whitman (n76) 1325
[510] ibid 1327 (For example, Whitman claims that Nazi legal thinkers announced that honour was the basic of the Nazi law. This idea of honour involved honour which criminalised sexual relation between Aryan and non-Aryans. Moreover, he claims that Nazi tried to insist that all Germans should defend their honour by duelling.)
[511] ibid 1328
[512] ibid 1329 (in this point, Whitman himself says: The Nazi,…, were largely *responsible* for establishing that all Germans (though of course not all persons; and of course only those "Germans" who matched the Nazi definition) had a legally cognizable share of social honor. (emphasis in the original) (see ibid 1284)
[513] ibid 1332
[514] ibid
[515] The Basic Law, Article 1(1) translated by Tomuschat and others, 'Basic Law for the Federal Republic of Germany in the revised version published in the Federal Law Gazette Part III, classification number 100-1, as last amended by Article 1 of the Act of 28 March 2019 (Federal Law Gazette I p 404)' (*Gesetze im Internet*) <https://www.gesetze-im-internet.de/englisch_gg/index.html> accessed 20 November 2020
[516] Hilgendorf (n76) 501; it is important to point out that Moyn challenges the argument that human dignity was adopted as a response to the atrocities see Samuel Moyn, The Secret History of Constitutional Dignity. in Christopher McCrudden (ed), *Understanding Human Dignity* (British Academy 2013); This issue will be discussed in the accompanying text of footnotes 542-544 below.

human dignity violations.[517] He also explains that human dignity covers many subjective rights including the right to minimum respect,[518] and the guarantee of human dignity constitutes the 'normative' concept of honour,[519] apart from the factual concept mentioned above. Under the normative concept, every individual can be insulted without having to consider their reputation or self-image.

As the factual concept of honour has been influenced since the enactment of the German Criminal Code and the normative concept influenced by the Basic Law, Hilgendorf suggests that the Criminal Code has, as a consequence, a 'dualistic concept of honour'. He also refers to a decision of the German Federal Court of Justice (*Bundesgerichtshof*: BGH) in 1957 to support this:

> Insult targets the intrinsic honour possessed by every individual as a bearer of spiritual and moral value, as well as his [or her] prestige based on this honour and his [or her] good reputation in society and in the community. The essential foundation of this intrinsic honour, and the core of each human being's right to be treated with honour, is the inalienable human dignity each person acquires at birth. Art 1 of the German Federal Constitution not only guarantees the inviolability of human dignity, but makes respecting and protecting human dignity the express duty of all state authority. The right of individual honour, meaning both intrinsic honour and good reputation, is a right protected by § 185 of the criminal code. This right stems from intrinsic honour. It requires that each person to be treated in accordance with his [or her] intrinsic honour as a human being.[520]

It follows that everybody in Germany regardless of their social status can be protected under the law of insult after the promulgation of the Basic Law.

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[517] ibid
[518] ibid 508-9 (stating: 'the concept of human dignity covers these subjective rights: (i) right of minimum subsistence level, (ii) right of autonomous self-development, (iii) right of freedom from pain, (iv) right of privacy), (v) right of spiritual and emotional integrity, (vi) fundamental equality of rights and (vii) right to a minimum respect.')
[519] ibid 513
[520] ibid 516 (citing 11 Bundesgerichtshof [BGHst] [German Federal Supreme Court] 67(70))

Not only does Article 1(1) of the Basic Law impact the protection of honour in criminal law, but Whitman points out that it also affects the protection of personality rights in civil law.[521] The combination between Articles 1(1) and 2(2) of the Basic Law creates the general personality right (*Allgemeines Personlichkeitsrecht)* in private law. It is therefore possible for a person whose personality right is violated to claim monetary compensation through tort law.[522]

It seems that the legal perspective under German law was changed from personal honour into human dignity reflected in the Basic Law. However, Whitman argues that the current enforcement of the law of insult has not escaped from its roots.[523] He says that respect is still 'the fundamental working term of insult jurisprudence'. He argues that the law of insult penalises the kinds of sensitive insults which have sources from old duelling norms. He argues that a standard example of an insulting gesture in German analysis is the insulting slap (*Ohrfeige)* - which is of course a famous duellist's gesture.[524] Therefore, he claims that the underlying concept on respect under the law of insult has not really been changed since the nineteenth century.[525] Honour remains the value protected by the law of insult, even though the law does not mention this term. He also claims that the law of insult continues to focus around acts that are *ehrenrührig* (sullying the honour) *or Ehrenkränkungen* (affront to the honour).[526] Whitman concludes his discussion of the law of insult by pointing out that the concept of the German law of insult is about a form of 'high-society concept of civility'.[527] The civil behaviour under the law of insult is the kind of civility that was 'characteristic of upper-status behaviour in centuries past: It remains civility that revolves around the highly formalistic, often thoroughly insincere, outward show of respect.'[528]

[521] Whitman (n76) 1333
[522] This issue will be elaborated in chapter 7.
[523] Whitman (n76) 1334
[524] ibid; As will be shown in the accompanying text of footnote 714, Slapping is also an example physical insult under German law provided by Hilgendorf.
[525] ibid 1336
[526] ibid
[527] ibid 1337
[528] ibid

Although Whitman argues that the focus on human dignity had not significantly changed the approach of the law of insult in Germany, Oster argues that human dignity does indeed significantly influence rules which protect personal honour.[529] He argues that the concept of reputation as honour and dignity 'is deeply rooted in German scholarship, case law and even legislation.'[530] Similar to Whitman,[531] Oster points out that human dignity under the Basic Law has influenced German Courts to protect personality rights, which include personal honour, beyond the actual text of the Constitution.[532] Oster argues that ss 185-7 protects honour. Section 185-7 states:

> Section 185
>
> The penalty for insult is imprisonment for a term not exceeding one year or a fine and, if the insult is committed by means of an assault, imprisonment for a term not exceeding two years or a fine.
>
> Section 186
>
> Whoever asserts or disseminates a fact about another person which is suitable for degrading that person or negatively affecting public opinion about that person, unless this fact can be proved to be true, incurs a penalty of imprisonment for a term not exceeding one year or a fine and, if the offence was committed publicly or by disseminating material (section 11 (3)), a penalty of imprisonment for a term not exceeding two years or a fine.
>
> Section 187
>
> Whoever, despite knowing better, asserts or disseminates an untrue fact about another person which is suitable for degrading that person or negatively affecting public opinion about that person or endangering said person's creditworthiness incurs a penalty of imprisonment for a term not exceeding two

[529] Oster (n35) 50
[530] ibid 49
[531] See the accompanying text of footnotes 521-522
[532] Oster (n35) 50

> years or a fine, and, if the act was committed publicly, in a meeting or by disseminating material (section 11 (3)), a penalty of imprisonment for a term not exceeding five years or a fine.[533]

Oster argues that German scholarship and legislation regard ss 185-187 as concerning 'crimes against honour' not as 'crimes against reputation'.[534] This is similar to Brugger who also says that these sections concern the honour of a person.[535]

Section 186, Oster says, 'punishes for defamatory statements of *fact* about a third person that the defendant cannot prove to be true,'[536] while, s 187 'penalises defamatory statements of *fact* about a third party that the defendant knows to be false.' Similar to Oster, Hilgendorf and Brugger also say that ss 186-187 only apply to assertions of fact.[537]

For s 185, Oster says, penalises two forms of communications: 'the communication of derogatory opinion (as opposed to facts) to third persons' and 'the communication of derogatory opinions and defamatory facts to the claimant himself or herself.'[538] Oster argues that ss 185-187 protect the 'outer honour' and 'inner honour'.[539] The outer is protected under ss 186-7 and a part of s 185 which criminalises the communication to third persons.[540] Oster points out that the outer honour is 'reputation,' which is a subcategory of honour'[541] whereas, the 'inner honour' or 'self-esteem' is protected under s 185 which criminalises the communication directly to the claimant. As we will see in section 6.3.1, other literature also provides similar explanation of s 185 as Oster.

Oster argues that German law sees reputation as a sub-category of honour and honour as a part of dignity. He uses Immanuel Kant's works to explain this legal mindset. He claims that Kant differentiates between 'esteem by others' and 'human dignity'; the latter

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[533] translated by Bohlander (n474)
[534] Oster (n35) 51
[535] Winfried Brugger, 'The Treatment of Hate Speech in German Constitutional Law (Part I-II)' (2003) 4 German LJ 1, 23-24 ('Brugger 2003')
[536] Oster (n35) 50
[537] Hilgendorf (n76) 521; Brugger (n535) 23-24
[538] Oster (n35) 50
[539] ibid 50-51
[540] ibid 51
[541] ibid

has value not a price. Therefore, Oster concludes: 'a theory of honour (and reputation) that derives from human dignity must thus treat honour and reputation as an intrinsic value; a human being has honour because he or she is a human being.' Oster then uses this concept to explain some aspects of the German laws of defamation and insult. He says that human dignity requires a person to respect another person as a human being; thus, a human must not be subject to ridicule. He argues that this idea is reflected in ss 186-7 as well as s 185 in case of the communication of derogatory opinion to third persons. He also argues that s 185 protects inner honour because human dignity requires a person's self-esteem to be protected. This argument is similar to Hilgedorf's argument which asserts human dignity protects many subjective rights including the right to minimum respect, mentioned above.

However, it is important to point out that Moyn challenges the argument that the recognition of human dignity under the Basic Law Article 1 was adopted to respond to the atrocities of the Nazi era.[542] His explanation of human dignity is also different from Oster's. Moyn argues: 'There were no Kantian in Germany of note after the Second World War…'[543] He claims that the constitutionalisation of dignity was first done by the Irish.[544] This argument shows a different view on the origin of human dignity in the German Basic Law. However, it is unnecessary for the purpose of this thesis to examine whose argument is correct because their arguments are related to the human dignity's origin. The importance of human dignity to this thesis, in my view, is the application of the human dignity provision to protect an individual's personality right. As mentioned above, it has been possible for a person whose personality right is injured to claim monetary compensation through tort law because the Basic Law recognises the human dignity.[545]

[542] Moyn (n516) ('stating: West Germans writing the Basic Law were not yet concerned the Jewish tragedy.')
[543] ibid
[544] ibid ('stating: Contrary to familiar beliefs, it was not West Germany that first constitutionalized dignity as a leading principle anyway. That distinction belongs to the Irish.)
[545] This issue will be discussed in detail in chapter 7.

5.2.4 Analysis of the German Law of Insult from a Thai Perspective

The above discussion of personal honour under German law shows that the German law of insult is similar to the Thai criminal law of insult. Oster's identification of 'inner' and 'outer' honour can be easily used to describe the Thai offence of insult, though it does not use that terminology. It can be said that the offence of insult under the Thai Criminal Code protects 'inner-honour' by criminalising an individual who insults another individual in their presence (the first form of insult); this offence also protects 'outer-honour' by criminalising an individual who insults another individual by means of communication to the public (the second form of insult). However, as we have seen, the concept of honour is clearly connected with the German law of insult because this law was originated to protect the 'honour' of aristocrats, as argued by Whitman. This is different from the Thai law of insult which focus on 'acts considered as insults.' The Thai law does not specifically focus on the specific interest protected under this law. Furthermore, the legal history of the Thai law of insult in section 4.2.1 shows that the Thai law of insult under the Law of the Three Great Seals had not regulated insults between individuals to protect the honour of a person with a particular social status. Insults between individuals in Thai history were regulated to preserve public order by preventing the physical fight between insulter and insulted victims. Moreover, the text of s 393 of the Thai Criminal Code does not suggest that only individuals having particular social status are protected from being insulted under that section. Indeed, as my analysis in section 5.2.2 shows Thai law has *sui generic* provisions to protect people with a particular social status. Therefore, it is not appropriate to argue that Thai law of insult protects 'inner' and 'outer' honour as Oster has argued for German law.

We have seen in chapter 2 that the Constitution of Thailand has recognised that human dignity is protected since the 1997 Constitution by copying this recognition from the German Basic Law.[546] It might not be suitable to say that a rationale for the offence of insult is the human dignity which was adopted into Thai law for only twenty-six years. This is because the offence of insult has been prescribed in the Criminal Code enacted before 1997. Furthermore, we have seen that there is an argument that human dignity is

[546] See the accompanying text of footnote 127

recognised in Germany because of the atrocities in its past. But Thailand did not adopt human dignity into the 1997 Constitution to respond to any instance of extreme justice as Germany, but rather human dignity was adopted to show that Thai law prescribes a duty of the State to protect the human dignity of people in the Constitution.[547] All this means that it is inappropriate to easily claim that human dignity as protected by the Thai Constitution is a rationale for the offence of insult.

Nor I do think it is appropriate to use the German concept of inner honour for the Thai offence of insult. This is because, as argued by Whitman, this type of honour is criminalised in German law because it had been a crime against the aristocratic duellists or higher middle class. This perspective is different from the Thai offence of insult, which criminalises an insult in the presence of an insulted victim in order to preserve public order. This is why I argue that the German approach cannot provide a rationale for this form of insult under Thai law.

Whitman's argument also provides a rationale for criminalising insults by explaining that it was considered dishonourable to receive money as compensation to an affront to honour. It is quite clear that this argument is clearly related to German tradition, which aimed to invite insulted aristocrats to come to the Court rather than duel. Since Thai law has not used the offence of insult under the Criminal Code to protect a person with a particular social status, it is unreasonable to use Whitman's argument as a rationale for having this offence. Nor is it appropriate to claim that Thailand needs to criminalise insults because it would be dishonourable to receive money as compensation to an affront to honour. This has never been the problem with Thai law, as we have seen, the Supreme Court recognised the legitimacy of providing monetary compensation for an insulted victim since 1944.[548] Therefore, Whitman's argument cannot be a rationale for the Thai law of insult, in both criminal and civil aspects.

[547] Uttarachai (n127) 280-282
[548] See the discussion of *Supreme Court Decision No 124/2487* (1944) in section 3.3

5.3 Reputation as Dignity

The concept of reputation as dignity is briefly described in section 1.2, which shows that this concept is different from Oster's concept of reputation as honour and dignity. This is because Post adopted this concept from Goffman's work rather than from a constitution. In the USA this concept was mentioned in a powerful and influential passage in Justice Stewart's concurring opinion in *Rosenblatt v Baer*, which connected reputation with dignity.[549] However, Post notices that the passage does not clearly explain why reputation, that is to say an estimation of a person regarding his or her character or other qualities, can impact the dignity of a person, which is, 'private personality,' (the words used by Justice Stewart).[550] Post then used Goffman's work[551] to explain the relationship between 'reputation' and 'dignity.'[552]

In this section, I will first discuss the main idea of Goffman's work to connect this work with the concept of reputation as dignity. It is important to point out that Goffman's work being cited does not directly discuss 'dignity.' Goffman mainly discusses the nature of deference and demeanour which are sub-topics of rules of conduct (see the relationship between (i) deference and demeanour and (ii) rules of conduct in figure 5-1). This discussion will show that an individual's self is created through his or her demeanour and is confirmed by acts of deference done by others.

Secondly, I will discuss and analyse how Post used Goffman's idea to explain the relationship between 'reputation' and 'dignity'. My discussion will show that Post regards the self of an individual as the individual's dignity. As we will see the way Post describes dignity is similar to Goffman's discussion of the self. Similar to the self of an individual, which has to be confirmed by acts of deference, dignity, Post argues, must 'be confirmed

[549] Post (n67) 707 (citing 383 US 75, 92 (1966) 'The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being – a concept at the root of any decent system of ordered liberty. The Protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments…'(Stewart J, concurring))
[550] ibid 708
[551] Goffman (n69)
[552] Post (n67) 709

by the respect that is due.'[553] He also argues that the dignity can be harmed when others who contacts this individual do not perform the respect which he or she deserves. The dignity, in this case, is not confirmed. The law of defamation can protect this dignity by determining whether a society's *rules of deference and demeanour are broken in form of speech*. He collectively calls these rules as *rules of civility*. My analysis will argue that this concept is too complicated because it contains some technical terms such as 'the dignity of a person which must be confirmed by the respect' or 'rules of civility' which only regulate 'speech'. I will clarify this concept and make this concept easier to understand. I will argue that it is unnecessary to collectively call those rules as 'rules of civility.' This is because acts of others harming the dignity are acts breaking 'rules of deference' of the society. If this dignity is protected by defamation law, the law should only concern the society's rules of deference broken by speech.

Thirdly, I will discuss another perspective on 'rules of civility' by Whitman. This discussion will show that rules of civility under this perspective does not only govern speech. These rules are mainly about respect which is a basic concept of the German law of insult.

Finally, I will reconstruct Post's concept of reputation as dignity by using his logic but with clearer terms. I will argue that an individual's self is personality (or self-identity) of an individual and will argue that this concept is about 'protecting the personality of an individual from being harmed by speech.' I will describe this concept in context of Thailand by using it to provide a rationale for the offence of defamation in section 5.4, since the basic of this concept is developed for defamation. This concept will also be used to provide a rationale for the law of insult in section 5.5.

5.3.1 Discussion of Goffman's Paper

In Goffman's paper, he used an observational study of mental patient in a modern research hospital to explain the nature of deference and demeanour.[554] In this paper, he argues that deference and demeanour are actions guided by rules of conduct.

[553] Post (n67) 710
[554] Goffman (n69) 47-48

First, Goffman discusses the nature of the rules of conduct by explaining that the rules of conduct can impose on an individual in two ways: directly as obligations and indirectly as expectations.[555] Obligations establish how an individual 'is morally constrained to conduct himself [or herself],' while expectations establish how others are bound to act in regard to him [or her]'.[556] Goffman provides an example of individual's obligation and expectation as:

> A nurse,…, has an obligation to follow medical orders in regard to her patients; she has an expectation, on the other hand, that her patients will pliantly co-operate in allowing her to perform these actions upon them. This pliancy, in turn, can be seen as an obligation of the patients in regard to their nurse.[557]

Goffman implies from this example that an individual's obligation will normally be another individual's expectation.

An individual who participates in maintaining a rule of conduct, either as obligations or expectations, tends to 'become committed to a particular image of self,' as argued by Goffman.[558] Regarding obligations, the individual becomes the sort of person who follow the rule to himself or herself and to other individuals as these individuals will expect him or her to do so. Regarding expectations, the individual will expect others to properly perform their obligations as impacting him or her because their action to him or her will show 'a conception of him [or her].'[559] Goffman further asserts that an act governed by a rule of conduct also communicates to confirm the self of both obligating and expecting individuals. In his example, Goffman says that a research psychiatrist tended to expect his patients to come regularly for treatments. When the patients performed their obligation to do so, they will be seen by the staff and others on the ward as patients who appreciated the treatment. And for the psychiatrist, those staff and others will see him as a person who could establish a "good relation" with patients. This example shows that third parties

[555] ibid 49
[556] ibid
[557] ibid
[558] ibid 50
[559] ibid 51

who are aware of this situation will be the ones who confirm the selves of both obligating and expecting individuals.

On the other hand, Goffman points out that an act governed by a rule of conduct but does not comply with the rule is also communicated. But the communication will not confirm the selves of both individuals: they both have a risk of becoming discredited. Following the above example, when a patient declined to perform his or her obligation to meet with a research psychiatrist, this inaction is communicated to those in the ward suggesting that this patient was too sick to know what was good for him or her. This shows that the obligating individual's self is not confirmed. It also shows that the self of the expecting individual, a psychiatrist, is also harmed is because the non-compliance may suggest that the psychiatrist was not 'the sort of person who was good at establishing relationships.'

The above discussion shows that either the compliance or non-compliance to a rule of conduct becomes an expression to a third party for confirming or disconfirming the selves of both obligating and expecting individuals. They both are essential because the obligating person cannot show himself or herself as the sort of person when nobody expects him or her to do so. A patient, for example, cannot express himself to a third party as a person appreciating the treatment if a research psychiatrist does not show up to treat him.

Rules of conduct, Goffman asserts, can be distinguished into two classes: symmetrical and asymmetrical.[560] He says the former is '*one which leads an individual to have obligations or expectations regarding others that these others have in regard to him [or her]*.' An example of these symmetrical rules is a rule of conduct prohibiting an individual from stealing others' property. The individual has an obligation not to steal a property of others; others also have the same obligation. The asymmetrical rule, Goffman says, is '*one that leads other to treat and be treated by an individual differently from the way he [or she] treats and is treated by them*.' An example of the situations governed by these rules is when a doctor gives an order to a nurse, but the nurse cannot give an order back.

[560] ibid 52

Goffman says there are many ways to distinguish the rules into types. In his paper he distinguishes them into 'substance and ceremony.'[561] He defines a substantive rule of conduct as '*one which guides conduct in regard to matters felt to have significance in their own right, apart from what the infraction or maintenance of the rule expresses about the selves of the person involved*.'[562] This rule can be found in law, morality or ethics.[563] The rule which prohibits stealing (an example of symmetrical rules) is also an example of this substantive rule. This rule aims to protect the property of others; the matter is important in itself. Furthermore, the compliance of this rule is an expression to confirm the selves of those who follows the rule as the sort of individuals respecting the proprietary right.

Regarding the ceremonial rules (the focus of Goffman's paper),[564] which he defines as:

> [O]ne which guides conduct in matter felt to have secondary or even no significance in their own right, having their primary importance – officially anyway – as a conventionalized means of communication by which the individual expresses his [or her] character or conveys his [or her] appreciation of the other participants in the situation.[565]

He clarifies that his definition is different from the general idea of 'ceremony' which implies '*a highly specified, extended sequence of symbolic action performed by an august actor on solemn occasions when religious sentiments are likely to be invoked*.'

The ceremonial rules as defined by Goffman are incorporated in 'etiquette.'[566] He says that the acts complying with the ceremonial rules carry ceremonial messages.[567] These acts can be expressed in many ways such as "… *gestural, as when the physical bearing of an individual conveys insolence or obsequiousness; spatial, as when an individual*

[561] ibid 53 (stating: 'Students of society have distinguished in several ways among types of rules, as for example, between formal and informal rules.')
[562] ibid
[563] ibid 55
[564] ibid (stating: 'All of our institutions have both kinds of codes, but in this paper attention will be restricted to the ceremonial one.')
[565] ibid 54
[566] ibid 55
[567] ibid

precedes another through the door or sits on his [or her] right instead of his [or her] left…' [568] He argues that the acts having ceremonial messages have certain basic components, two of which: *deference and demeanour* are discussed in his paper. I will discuss their nature and their impacts on actors and recipient. (The relationships between the rules of conducts and ceremonial rules and deference and demeanour are shown in figure 5.1) It is important to point out here that deference and demeanour are not two distinct components; there are relationships between these two components.[569]

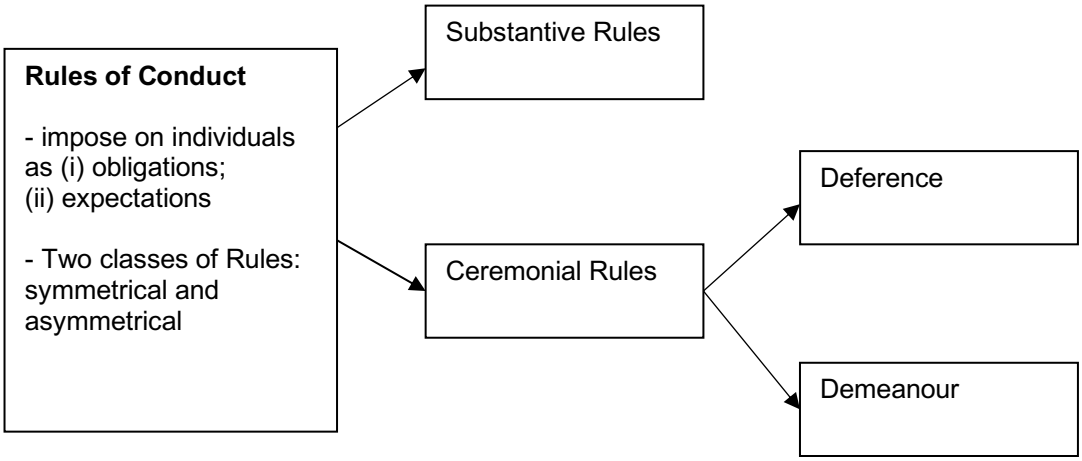

Figure 5.1

Deference as described by Goffman is 'a component of activity which functions as a symbolic means by which appreciation is regularly conveyed to a recipient of this recipient, or of something of which this recipient is taken as a symbol, extension or agent.'[570] He explains that the symbolics of appreciation show that an actor 'celebrates and confirms his [or her] relation to a recipient.' Deference may be seen in salutations, compliments, and apologies occurring during social intercourse. These activities are referred by Goffman as "status rituals" or "interpersonal rituals."[571] The term ritual is used

[568] ibid
[569] ibid 81-85
[570] ibid 56
[571] ibid

because the individual must guard and design the symbolic implications of his or her acts while in the immediate presence of an object that has a special value for him or her.[572]

As an act of deference conveys appreciation to the recipient, Goffman further argues that the actor performing an act of deference may have 'a sentiment of regard for the recipient'. But on some occasions, Goffman says, the actor may not have that sentiment when performing the act to the recipient and the recipient may not know this fact. [573] This because the act of deference does not show what the actor actually thinks.

Apart from having the sentiment of regard, acts of deference may '*contain a kind of promise, expressing in truncated form the actor's avowal and pledge to treat the recipient in a particular way in the on-coming activity*.'[574] Actors who perform an act of deference promise 'to maintain the conception of self that the recipient has built up from the rules he [or she] involved in.'[575] According to Goffman, an example of this act of deference can be seen when a nurse responds to a doctor by saying 'Yes, Doctor.'[576] This act confirms the doctor's self which he has built. But if a recipient is not treated with acts of deference which he or she believes they deserve, they may feel that their position is not stable. This may suggest that the actor is trying to change his or her relationship with the recipient.

Although the term deference may be understood as an act done by a subordinate to his superordinate as an asymmetrical rule of conduct, Goffman argues that deference can be symmetrical: an individual with equal status can perform to one another.[577] It is also possible for a superordinate to perform an act of deference to his or her subordinate. This situation can be seen when a high priest responds to his subordinate as 'Bless you, my son,' as described by Goffman.

In case of demeanour, Goffman describes it as an 'element of the individual's ceremonial behaviour typically conveyed through deportment, dress and bearing, which serves to

[572] ibid 57
[573] ibid 58
[574] ibid 60
[575] ibid
[576] ibid 61
[577] ibid 59 (stating: '[I]n some societies, Tibetan for example, salutations between high-placed equals can become prolonged displays of ritual conduct…)

express to those in his [or her] immediate presence that he [or she] is a person of certain desirable or undesirable qualities.'[578] This description shows that an individual can have a good or bad demeanour depending on his or her qualities. Goffman says that a well demeaned individual normally has these qualities: '*discretion and sincerity; modesty in claims regarding self: sportsmanship; …*'[579]

To identify whether an individual has the above qualities, Goffman stresses that it depends on others to evaluate him or her when he or she conducts themself during social intercourse.[580] An individual, Goffman explains, cannot verbally claim that he or she is a well demeaned person, but he or she can try to conduct himself or herself in a good way for others to confirm that he or she is that kind of person. Goffman clarifies that an individual creates an image of himself [or herself] through demeanour, but this image is meant for others to confirm.

As mentioned,[581] there are relationships between deference and demeanour, one of which is a clarification that an act of the actor to his or her recipient can be seen as deference or demeanour.[582] Goffman asserts:

> An act through which the individual gives or withholds deference to others typically provides means by which he [or she] expresses the fact that he [or she] is a well or badly demeaned individual.[583]

One of the relationships is used by Post in his concept of reputation as dignity.[584] It is the argument that deference and demeanour constitute different, but connected, images. Deference images, on the one hand, tend to show that the recipient (the individual being deferred) obtains a place in a social level.[585] On the other hand, demeanour images focus

[578] ibid 77
[579] ibid
[580] ibid 78
[581] See the accompanying text of footnote 569
[582] For the detail of these relationships see Goffman (n69) 81-85
[583] ibid 81
[584] See Post (n67) 709-710; Post quotes a paragraph of Goffman's paper about 'demeanour image and deference image.'
[585] Goffman (n69) 82

on demeanours of the actor in social interactions. The demeanour images show the actor's qualities.[586] These two images are connected because they normally provide justification or warrant for each other.[587] The demeanour image of an individual provides a justification for others to defer him, and the deference image shown by an actor will normally guarantee that the recipient will respond with good demeanour.

Furthermore, Goffman argues that these two images suggest that an 'individual must rely on others to complete the picture of him [or her] of which he himself [or she herself] is allowed to paint only certain parts.' [588] This argument, I believe, derives from the demeanour image's function which can only show the individual's qualities but cannot confirm his [or her] place in a social level. The place can only be confirmed by the deference images shown by others to him or her. By combining these images, we can see the complete picture of the particular individual. In conclusion, this picture is the self of an individual deriving from (i) his or her demeanour when contacting others and (ii) the acts of deference done by others to him or her.

5.3.2 Discussion and Analysis: Reputation as Dignity Presented by Post

In this section, I will discuss and analyse how Post adopted the above idea of Goffman on demeanour and deference to support his concept on reputation as dignity.

In his concept, Post states:

> Identity is… continuously being constituted through social interactions. For Goffman these interactions take the form of rules of 'deference and demeanor.'[589]

[586] ibid 82-83
[587] ibid; However, Goffman clarifies that the relatedness of deference and demeanour can be 'overstress.' He says 'the failure of an individual to show proper deference to others does not necessarily free them from the obligation to act with good demeanor in his [or her] presence… Similarly, the failure of an individual to conduct himself with proper demeanor does not always relieve those in his [or her] presence from treating him [or her] with proper deference.'
[588] ibid 84
[589] Post (n67) 709

This statement suggests that an individual's self which is created through this individual's demeanour and is confirmed through deference by others is the individual's identity from Post's perspective. However, as my discussion of Goffman's paper shows: deference and demeanour are *components* of activity.[590] They are not 'the form of rules' which requires an actor to conduct in the particular way, as Post argues. However, Post is not incorrect to call these components 'forms of rules' because they can be seen as requirements for creating the self of an individual.

Post used Goffman's discussion on the self to connect the law of defamation with the concept of dignity.[591] Post argues that the self is dignity because he says dignity is: 'a ritual and ceremonial aspect of self'.[592] Post's discussion on dignity is similar to the self discussed by Goffman. As Post states 'Dignity can only be confirmed by the respect that is due.' This is similar to the self which has to be confirmed by others through acts of deference. Post also argues that dignity is at risks because:

> [I]n any social transaction the "chain of ceremony" may be broken, and hence a "complete man" may fail to be socially constituted. In this way our sense of intrinsic self-worth, stored in the deepest recesses of our 'private personality,' is perpetually dependent upon the ceremonial observance by those around us of rules of deference and demeanor.[593]

This statement suggests that the dignity of an individual can be harmed by those around him or her from acts of those which do not comply with rules of deference and demeanour. Post then argues that the law of defamation can protect this dignity by monitoring whether a society's rules of deference and demeanour are broken *in form of speech*. He calls rules of deference and demeanour which govern *speech* as '*rules of civility*.'[594]

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[590] See the accompanying text of footnotes 568-569
[591] Post (n67) 710 (stating: 'Goffman account provides a theory for connecting the law of defamation to the concept of dignity.')
[592] Post (n67) 710
[593] ibid
[594] ibid (stating: 'When rules of deference and demeanor are embodied in speech, and hence are subject to the law of defamation, I shall call them "rules of civility."')

Post's finding which regards the self of an individual as dignity and connect this dignity with law of defamation is interesting, but there are two points needed to be clarified. First, the dignity under Post's concept is different from human dignity under German law. As discussed in section 5.2.3, human dignity derives from being a human; it does not have to be created nor confirmed.

Secondly, Post's argument on defamation law protecting the dignity (or the self) by governing *both rules of deference and demeanour* of a society might not be accurate because it should govern only rules of deference. On the one hand, the act of deference is the one which affects the self or dignity of the recipient because this act can confirm the self of the recipient, such as when a nurse responds to a doctor by saying: 'Yes, sir.' This confirms the doctor's self which he has built. But if an actor does not perform an act of deference to confirm the self of the recipient; in other words, breaking a rule of deference of a society, this can harm the self of the recipient. On the other hand, we have seen that Goffman describes demeanour as an 'element of the individual's behaviour typically conveyed through deportment, dress and bearing, which serve to express to those in his [or her] immediate presence *that he [or she] is a person of certain desirable or undesirable qualities*.'[595] Post used this description to define 'rules of demeanours'.[596] Since demeanour is an element of the actor's behaviour which shows that he (the actor) has certain qualities, his (good or bad) demeanour can only represent his qualities. His demeanour cannot impact the self or dignity of others (his recipients). Therefore, I believe it is too wide to say that the law of defamation monitors *both rules of deference and demeanour* because the law of defamation, at least in Thailand, does not concern the demeanour of an actor.[597] The law of defamation should only concern whether speech violates the society's rule of deference because this violation might impact the self of the

[595] Goffman (n69) 77 (emphasis added)
[596] Post (n67) 709 (stating: 'Rules of demeanor define conduct by which a person express 'to those in his immediate presence that he is a person of certain desirable or undesirable qualities.')
[597] There is section 388 of the Criminal Code, which penalise a person who 'does any shameful act in public by being naked, indecently exposing his or her body, or does any other obscene acts.' translated by Netayasupha, Pisitpit and Watcharavutthichai (n2) 322; This offence can be regarded as a law regulating demeanour under Thai law.

recipient especially when a third person is aware of the violation because this violation can disconfirm the recipient's self from the third person's perspective.

Under Post's concept of reputation as dignity, he says that defamation law protecting reputation as dignity has two functions: (i) to protect the dignity of an individual and (ii) to enforce the society's rules of civility of society.[598] I will discuss these two functions and provide my analysis on them.

5.3.2.1 Reputation as Dignity by Post: Protecting the Dignity of an Individual

Post describes that the law of defamation, which governs a society's rules of civility, does not protect the dignity of an individual in every situation; it does not protect the dignity when a violation of the rule occurs privately between the actor and his or her recipient.[599] This is because it is unclear whether the actor or recipient will be seen negatively unless the violation is communicated to third parties.[600] Post refers to Goffman's situation on a rule of conduct as an example: the actor is the patient who did not perform his obligation to attend the therapeutic hours for the psychiatrist who expected his patients to do so.[601] This, Post claims, is 'an ambiguous situation,' because both actor and recipient have the risk of being discredited.[602] They have the risk because, according to Goffman, when a violation communicated to third parties, they may regard the patient as a person who was 'too sick to know what was good to him' or they may see the psychiatrist as a person who is not good at establishing a 'good relation' with his patients.[603]

Similarly, Post argues that when the actor violates a 'rule of civility' when he or she contacts with the recipient privately, it is unclear whether the social competence of the actor or the dignity of the recipient has been impaired.[604] (As we have seen, Post argued that the *rules of civility* govern speech, therefore the violation in this case must be done

[598] Post (n67) 711
[599] ibid 710
[600] ibid 711
[601] Goffman (n69) 50-51
[602] Post (n67) 711
[603] This issue is discussed in section 5.3.1.
[604] Post (n67) 711

by speech.) I believe it is unclear because there is no one to decide whether the actor has bad behaviour or the dignity (or self) of the recipient is harmed.

The issue will be clearer if the violation is occurred in front of third parties. Post explains that, on the one hand, the third parties may see the actor as having no social competence for violating the rule of civility. On the other hand, the recipient may lose his dignity because he is not treated with the respect as he deserves.[605] This is because the third parties may agree with the actor and see the recipient as a person who should not be 'treated with civility'. This recipient can be regarded as badly as being excluded from being a member of his society.

The membership of a society is identified by rules of civility, as argued by Post. Members are respected but non-members are regarded as 'deviants.'[606] Post asserts that the law of defamation can help an individual from being excluded when the society's rule of civility is broken in form of speech which makes this individual disrespected or lose his dignity. This is because the law of defamation allows the excluded individual, as the claimant, to argue in a court that the defendant's inappropriate speech broke a rule of civility of the claimant's community. The defendant can also defend himself by arguing that his speech is justified by that the claimant's conduct. The court will be 'an arena' to decide this dispute. The court's ruling for the claimant means that the defendant broke the rule and will suggest the community that the claimant should be treated with respect. Therefore, the claimant's dignity is rehabilitated, as Post calls this process 'rehabilitation.'[607] In contrast, he asserts that if the court agrees with the defendant, this decision will confirm that the individual is a non-member, who should not be treated with respect.[608]

The above argument is very complicated because Post connects the 'self' as presented by Goffman with 'dignity.' And this dignity is harmed when an actor violates a 'rule of civility' (which Post has his own explanation of this term[609]) when the actor contacts with

[605] ibid
[606] ibid
[607] ibid 713
[608] ibid
[609] ibid 710 (stating: 'When rules of deference and demeanor are embodies speech and hence are subject to the law of defamation, I shall call them "rules of civility".')

the recipient, especially when the violation is occurred in front of third parties. These third parties may see the recipient as a person who should not be 'treated with civility,' because the recipient can be seen as 'a non-member' of the society. The recipient in this case must use the law of defamation to 'rehabilitate his dignity'. Although this argument is complicated, the underlying logic of this argument is very convincing. I will clarify three points of this argument to make this concept easier to understand.

First, Post's situation on the actor-*rules of civility*-recipient can be explained from the perspective of *deference* and *demeanour*, without having to use Post's term '*rules of civility*'. On the one hand, the actor's speech can be seen as his bad demeanour, but, as I argue the demeanour image only impacts the actor himself. On the other hand, this speech can be seen as the actor refusing to perform an act of deference,[610] which the recipient deserved, in other words: 'breaking a rule of deference.' This inaction can impact the image of the recipient or 'the self or dignity of this recipient' because it disconfirms the recipient's self. The impact will be clearer when the violation communicates to third parties because they may agree with the actor and will disconfirm the self (or dignity) of the recipient. As this recipient's self is harmed by a person who breaks a *rule of deference* not the rules of demeanour, I argue that it is unnecessary to use the term '*rules of civility*.' And as the harm in this case impacts 'the self of an individual,' there is no need to connect this concept with *the respect as being a member of the society*. Therefore, this concept should focus on 'rules of deference' and 'the self of an individual.'

The law of defamation can protect the recipient's self by allowing him to use the Court as an arena for him to argue that the actor's speech violated his society's *rule of deference*. The Court will consider whether the actor's speech *broke* the rule. If the Court finds that the actor broke, this decision will reconfirm the recipient's self which he has built. This point confirms my argument that the law of defamation under this concept only focuses on 'deference.' Furthermore, this aspect of the concept shows that *the self (or dignity)* of an individual *is actually* the *reputation* of an individual, as an aspect of the personality right. This self can be built through his demeanour and must be confirmed by acts of

[610] As shown in the accompany text of footnote 583, the act of an actor can be seen as the actor's act of deference or demeanour.

deference by others. Others who do not perform those acts harm the self of this individual. This is similar to an individual's reputation as his or her property which can be created and can be injured but the different is the reputation in the dignity concept cannot be measurement by the marketplace.

Secondly, it is important to clarify that the law of defamation which regulates rules of deference to govern speech should not limit to face-to-face interactions between the actor and recipient expressing to third parties. Rules of deference must also govern situations where actors use speech which breaks the rules against another individual to a third party, although that individual is not present in the conversation. This is because it is possible for an individual's self to be harmed, even though this individual does not personally hear the speech. For example, Mr A has built himself through his demeanour as an honest politician. People in his society have shown their acts of deference to confirm that he is this kind of politician. One day, Mr B accuses Mr A of corruption to a third party without the presence of Mr A. Although the accusation is not done in Mr A's presence, it is possible for his self which he has built as an honest politician can be harmed by this accusation. This is because the third party may no longer see Mr A as an honest politician.

Finally, the application of the law of defamation only in cases where violations are communicated to third parties suggest that law should be involved only when the harm to the self can be clearly seen or 'the self is harmed substantially.' The law is not involved when it is unclear whether the self is actually harmed such as cases where the actor uses speech which violates a rule of deference directly to the recipient without anyone knowing.

5.3.2.2 Reputation as Dignity by Post: Enforcement of Community's Rules of Civility

According to Post, the court in a defamation case must consider whether a society's rule of civility is broken by inappropriate speech to identify whether the individual should be respected as a member of the society. Post argues that the law of defamation under this understanding can be regarded as having another function (apart from protecting a

person's dignity): 'the enforcement of community's rules of civility.'[611] This is because the court must consider the community's rules of civility before it confirms that the defamed individual should be respected as a member of the community. The process shows that the community's rule must be considered in every defamation case.

The above discussion suggests that the function to enforce the rules of civility is connected with the function to protect individual's dignity. However, in some cases, Post asserts, common law only focuses on the function to enforce the community's rules and refuse to protect the dignity if the rules of that community are not worth to be enforced.[612] To support his argument, he referred to a US case, *Connelly v McKay*.

In this case,[613] the claimant, who maintained service station and rooming house supported by truck drivers, sued the defendant for falsely and maliciously stating that the claimant informed the names of truck drivers who violated the Interstate Commerce Commission rules to the Interstate Commerce Commission. The claimant claimed that numerous truck drivers stopped doing business with him and requested five thousand dollars as damages for the injuries to his reputation. The Court found that the statement being sued for was not defamatory. Post notice that this statement may be seen as impacting the claimant's reputation as dignity because the statement could make members of the community regarding him as a non-member.[614] But the Court refused to enforce the claimant's claim by finding that the statement was not defamatory. This case, Post asserts, shows that the law of defamation cannot be used to maintain the 'kind of deviant community constituted by the civility rules of interstate truckers.'[615] He explains that the Court made this decision because defamation law has to determine defamatory words by 'class of persons who react to the publication.' The common law of defamation, he describes, has approached this issue by using the perspective of 'a considerable and respectable class in community', the perspective of 'right-thinking persons', or 'the

[611] Post (n67) 713
[612] ibid 714
[613] *John J Connelly v Francis D McKay* 176 Misc 28 NYS2d 327 685, 685
[614] Post (n67) 714
[615] ibid

perspective of 'society.. taken as it is.'[616] These approaches reflect the defamation law's function to maintain community's rules as Post argued, because the groups of people being used by the Court use to assume their reactions represent each community's view or community's norm.

The function to maintain community's rules can also be seen an English case, *Byrne v Deane* as pointed out by Milo.[617] In this case, a golf club's member claimed that his reputation was injured because he was accused of reporting illegal gaming to the police.[618] He sued the proprietors and the secretary of a golf club because there was a paper on the club's wall having words which suggests that the claimant informed the police of illegal gambling machines in the club. However, the Court says:

> [T]he words were not capable of a defamatory meaning. To say a man that he had put in motion the proper machinery for suppressing crime could not on the face of it be defamatory.'[619]

Milo argues that providing a redress in a case like this would 'offend against the community rules of civility.'[620]

The approaches of *Connelly v McKay* and *Byrne v Deane* show that courts may not enforce some unacceptable community rules and standards of behaviour, even though the accusations did harm the claimants from their perspective. These approaches also show that the court did not *actually enforce* community rules in every case, but it had to *consider* whether it would enforce these rules by assuming the reaction of the group of people representing the society's view in every case. Therefore, I argue that it is more suitable to say that defamation law has a function to *consider* community rules rather than to *enforce* the rules.

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[616] ibid 715
[617] Milo (n431) 40
[618] [1937] 1 KB 818, CA
[619] ibid
[620] Milo (n431) 40

As Post sees the law of defamation as a tool to govern a society's *rules of civility* to protect the *dignity of an individual*, it is understandable for him to argue that the law requires the court to consider whether the *rules of civility* should be enforced. However, as I argue it is too wide to use the term '*rules of civility*,' because the law of defamation does not concern 'demeanour' which is one of the aspect of rules of civility as presented by Post. The law only focuses whether the society's rules of deference are violated to protect the self of an individual. Therefore, it can be said, from my view, that the statements for which being sued in *Connelly v McKay* and *Byrne v Deane* can also be seen as the statements which did not violate the rules of deference of the claimants' societies (without having to use the term 'the rules of civility').

As I argue that the law of defamation should be a tool to govern a society's *rules of deference* before ruling that an individual's self must be protected. The court in defamation cases use defamation law to perform this function when it assumes the reaction of the group of people representing the society's view. The finding of the content as defamatory suggests that the society's rule of deference is violated. This argument might suggest that the function to consider the community's rule of deference is connected to the function to protect an individual's self. But these functions are connected only in cases which the court finds that the statement for which being sued is defamatory. This finding suggests that the statement violated the society's rule of deference; thus, the self of the claimant must be protected. However, when the court finds the statement is not defamatory, it suggests that there was no violation of the society's rule of deference. The claimant in this case will not be protected, although the claimant felt that he was harmed by that statement. As we have seen the claimants in *Connelly v McKay* and *Byrne v Deane* cannot sue their defendants for defamation, even though the claimants felt that they were harmed by the defendant's speech.

The discussion in section 5.3.2 shows that a society's defamation law is an important tool to protect the self of an individual from being harmed by others. But the law does not protect this self from every harm. It protects when the self is harmed by those who use *speech* which violates the society's *rule of deference*, and the violation must be communicated to a third party because the harm must be substantial. Therefore, I argue

that Post's concept of reputation as dignity is actually about protecting an individual from being harmed substantially by speech.

5.3.3 Discussion: 'Civility' and 'Rules of Civility' as defined by Whitman

There is another perspective on rules of civility by Whitman who disagrees with Post's interpretation of Goffman's work.[621] Whitman does not see rules of civility as deriving from rules of demeanour and deference and these rules do not govern only speech. He argues that deference and demeanour in social interactions are closely tied to social rank and social standing.[622] To support his argument, he quotes Goffman's argument about the deference and demeanour images, already discussed above:[623]

> Deference images tend to point to the wider society outside in the interaction, to the place *the individual has achieved in the hierarchy of this society*. Demeanor images … pertain … to the way in which the individual handles his position [in rank-ordered society]….'[624]

Although Whitman notes that there is a symmetrical interaction[625] which suggests that demeanour and deference can be seen among people with equal status, he claims that the quoted statement suggests that deference and demeanour are about social hierarchy.

I believe an argument can be made here that when Goffman himself presents an idea on deference, he clearly says that an act of deference can be done between people with equal status or by superordinate to sup-ordinate individuals.[626] Therefore, it is possible for the one with equal status to perform their act of deference to another having the same status or for a high-class individual to do so to a lower-class individual. Hence, an actor who refuses to perform an act of deference to confirm the recipient's self can be regarded as breaking a rule of deference, although the actor has the same status as or higher status than the recipient. For example, the relationship between employer and employee

[621] Whitman (n76) footnote 353
[622] ibid 1382
[623] See the accompanying text of footnotes 585-587
[624] Whitman (n76) (citing Goffman (n69) 82-83) (emphasis added)
[625] ibid footnote 351
[626] See the accompanying text of footnote 577

can be regarded as subordinate and super-ordinate but the employer has no right to wrongfully accuse his employee of being a lazy person to a third party. This accusation should also be regarded as a violation of a rule of deference and this violation can be regulated by defamation law.

From Whitman's perspective, he sees 'civility' as one of the two aspects of good manners; the other aspect is decency.[627] He defines 'civility' as 'the practices that involve showing respect to others'[628] and 'decency' as 'the practices that aim to avoid giving offence or call attention to gross or bestial aspects of life.'[629] He says:

> [C]ivility and decency presuppose different problems of social structure. Rules of civility address problems in the maintenance of hierarchical social order among human beings; rules of decency speak, as a general matter, to problems in differentiating the human from the bestial.'[630]

From these differences, Whitman argues that when these two rules have been adopted into the legal system the laws of civility and of decency have different purposes.[631] The rules of civility, he describes, can be distinguished into: 'rules that require what can be called the *outward show of respect* and rules that call for *the sincere acknowledgement of the equality of others.*'[632] Figure 5.2 shows the relationship between the good manners to rules of civility.

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[627] Whitman (n76) 1288
[628] ibid 1289 (stating: 'These practices include forms of address (the use of 'Sir' and 'Madam'), forms of deportment (bowing, shaking hands), and other forms of deference such as yielding another on the street; they also include refraining respectfully from telling ethnic jokes or indulging in ethnic slurs.)
[629] ibid 1289 (stating: 'These practices include such thing as the maintenance of delicacy in table manner, restrain from exposing one's nudity, and refusal to use obscene expressions in public.)
[630] ibid 1289
[631] ibid 1290 (stating: 'There is law of civility and there is law of decency. The two have different purposes and appear in different societies in different measures.')
[632] ibid 1290 (emphasis in the original); (stating: 'Within the category *civility*, moreover, it is important to make a further distinction, between rules that require what can be called the *outward show of respect* and the rules that call for the *sincere acknowledgement of the equality of others.*')

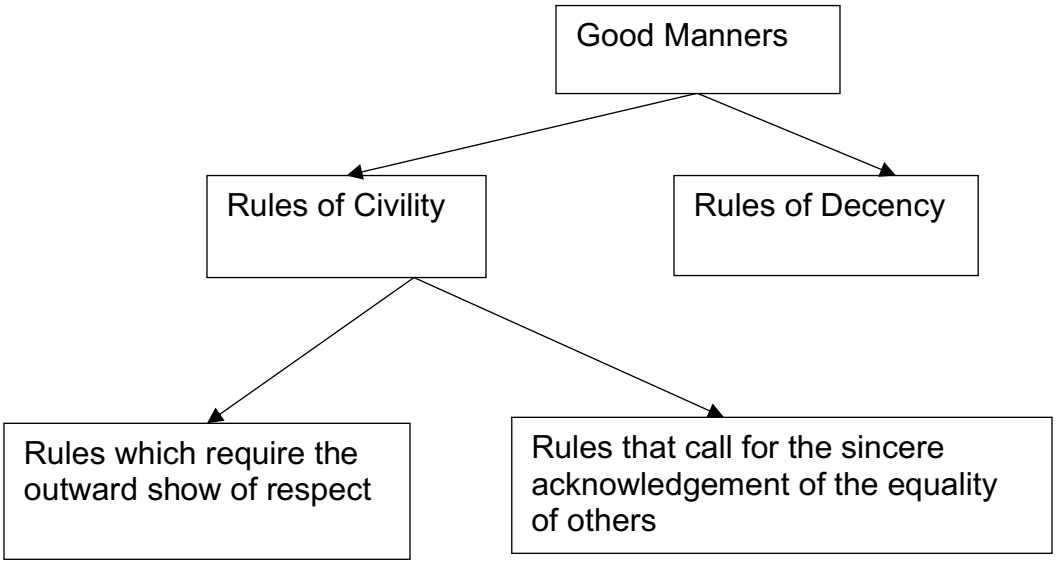

figure 5.2

Whitman asserts that the first requirement (the outward show of respect) is the form of 'civil' interaction, but he points out that numerous literature points out a flaw under this requirement. They regard this requirement as 'a highly unusual form of ethical interaction – a form in which truth-telling carries no positive value.' This may be because an actor, who shows respect, may not actually respect the recipient. This point corresponds with Goffman's argument, discussed above,[633] that the actor who performs his or her act of deference may *not* actually have 'a sentiment of regard for the recipient' and the recipient may not know this fact because is the act of deference does not show what the actor actually thinks.

Nonetheless, Whitman argues that this requirement has a positive value because a person, who violates these rules, is only required to perform 'a ritualistic apology'. The apology does not have to be sincerely meant, because the requirement for the outward show of respect is only a form of expression.[634] To support his argument, Whitman explains:

[633] See the accompany text of footnote 573
[634] Whitman (n76) 1291

> The use of the apology as a remedy also reflects the character of the outward show of respect as involving interaction between two individuals. Because the victim of a failure to show respect has been insulted by one person, the wound to that victim's subjective sense of dignity can ordinarily be salved by an individual apology.[635]

For the second requirement, rules that call for '*the sincere acknowledgement of the equality of others,*' Whitman explains that it is forbidden under these (social) rules to 'glory in the social inferiority of particular classes of person.' [636] This requirement 'aims to create or affirm a deeper dignitary structure of society at large.' He asserts that rules of civility can be violated by a person who tells an ethnic joke even without the presence of the individual who belongs to the ethnic group and may be offended by the joke. He says that the teller violates these rules of civility because the victim of the violation has been faced with a larger social pattern of disrespect: as such an apology cannot restore the victim's sense of dignity. He argues that the victim might want the joke-teller to 'undergo some sort of transformation of inner state of mind – some experience of conversion or re-education.'

Whitman argues that rules of civility which requires the outward show of respect can be seen in the German law of insult under s 185 of Criminal Code.[637] As we have seen, this provision aims to criminalise words, gestures, or behaviour that show 'disrespect or lack of respect' for another'.[638] It is illegal in Germany for an individual to disrespect another individual because German law had been influenced by the traditions of social hierarchy, which forced low-status persons to show respects to high status persons. But now everybody can be protected by the law of insult after the promulgation of the Basic Law, which guarantees that human dignity shall not be violated. And this human dignity includes the right to minimum respect.[639]

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[635] ibid 1291
[636] ibid 1291(stating 'Americans are familiar with rules of civility requiring *the sincere acknowledgement of the equality of others*. These rules are important for an analysis of the problem of hate speech.')
[637] ibid 1295-1298
[638] See section 5.2.3
[639] See footnote 518 above

Unlike in German law, Whitman argues that the rules of civility which requires the show of respect cannot be found in the US law.[640] He presents many legal rules in the US which might be regarded as these rules of civility, [641] but he argues that they are not the law of civility as in German law. For example, he asserts that some criminal law in the US regulates 'abusive language'. However, he claims: 'A mere *show of disrespect,* without an immediate threat of violent breach of peace, is not punishable in the United States.'[642] Furthermore, he asserts that in the US, while police officers are protected from abusive language by special provisions, defendants in such cases are mostly acquitted. Moreover, he says that there is tort law which penalises insulting language, but this tort law only requires 'common carrier, innkeepers, and public utilities to show courtesy to all commers.'[643] This tort law aims at guaranteeing access in certain broadly commercial contexts and is not about guaranteeing respect for honourable people as in Europe. He also discusses tort law which regulates 'defamatory and libellous statements' in the US, but he asserts that Americans do not generally agree with 'the very idea that mere incivility might give rise to tort liability.'[644]

Whitman's perspective shows that rules of civility are about the *respect* which an individual should perform to another individual either: (i) by directly expressing his or her respect to another individual or (ii) by sincerely recognising the equality of others. Defamation law in Whitman's opinion does not regulate rules of civility because defamation is not an act by which a person directly disrespects another person. Defamation is an act which the defamer convinces a third party to see the defamed victim negatively; in other words, disconfirming the victim's self to a third party. Therefore, the defamation law does not regulate rules of civility in Whitman's perspective. However, it is unnecessary for the purpose of this thesis to identify whether the approach of Post or Whitman is correct because their discussion is limited context of American law. But the Whitman's perspective suggests that law of civility also protect an individual's self which is substantially harmed because German law seriously protects personal honour due to

[640] Whitman (n431) 1382-3
[641] ibid 1295-98
[642] ibid 1376
[643] ibid 1377
[644] ibid 1378 (citing W Page Keeton et al., Prosser and Keeton on the Law of Torts § 12 (5th ed 1984), 59)

its history. Insults occurred privately between the actor and recipient, which are seen as an ambiguous situation as argued by Post can be clearly seen as affronting the honour of the recipient because of the influence of social hierarchy to German law.

5.3.4 Reconstruction of the Concept of Reputation as Dignity – Law as a Means to Protect an Individual's Personality from Being Substantially Harmed by Speech

As I argue the concept of reputation as dignity is complicated because it contains many technical terms, I will reconstruct this concept in this section by using easier terms to explain Post's logic. I will argue that the self of an individual in this context is personality (self-identity) of an individual and this concept is actually about 'protecting an individual's personality from being substantially harmed by speech.' I reconstruct of this concept as 'Law as a Means to Protect an Individual's Personality Self from Being Substantially Harmed by Speech' and will describe this concept in context of Thailand.

As we have seen, an individual's self is created through his or her demeanours and is confirmed by others through their deference; thus, this self is personality (self-identity) of an individual. When the actor contacts with this individual but does not perform an act of deference, which this individual deserves, the personality of this individual, which he has built is harmed. Defamation law can protect this personality but does not protect it in every situation. This personality can be protected only when it is harmed by *speech* which violates a *rule of deference* of the society and the speech must communicate to a third party because law only involves when the harm is substantial.

Defamation law does not protect the personality which is not substantially harmed such as when the actor uses speech violating a society's rule of deference against the recipient, but no one is aware of this situation because it is unclear whose personality is harmed. For example, *Phra*[645] A, a Thai Buddhist monk has conducted himself morally under the Buddhism Code of Conducts. People in Thai society respect him as a well-disciplined monk. One day, Mr B tells the monk in private that he knows that the monk had sexual

[645] In Thailand, when a man becomes a Buddhist monk, he will be no longer called 'Mr'; he will be called '*Phra*'.

intercourse with a woman. It is unclear from this situation whether Mr B is telling the truth or *Phra* A should no longer be respected as a monk.

The harm to an individual's personality is clearer if the actor uses speech violating a society's rule of deference against the individual to a third party because the third party might believe the actor and sees that individual negatively. Following the above example, instead of directly confronting *Phra* A, Mr B tell people in the public that the monk had sexual affairs. *Phra* A's personality is substantially harmed in this case because those people might believe Mr B and no longer regard *Phra* A as a respected monk. In this case, defamation law can help *Phra* A restore his self-identity as a respected monk by allowing him to use Thai Court as an arena to argue that Mr B accusation violates a rule of deference of Thai society. This will give the Court an opportunity to consider the Thai society's rules of deference by assuming the reaction of group of people representing the community's view to the content. The decision which finds the content defamatory and finds that defendant guilty of the offence of defamation will suggests that the speech broke the society's rule of deference, and the self-identity of the defamed victim will be restored.

Similar to the two functions of defamation law as presented by Post, defamation law under my concept also has two functions: (i) to consider the society's rule of deference and (ii) to protect an individual's personality. Defamation law requires the Court to consider the community's rule of deference before the Court can confirm that the defamed victim's personality is harmed because defamation law only protects the personality which is harmed by speech violating the society's rule of deference. It is possible for defamation law to only perform the first function by considering that the defendant's speech does not violate Thai society's rule of deference. In this case, the individual who claimed to be harmed by this speech will not be protected, even though this individual felt that his personality is harmed. For example, in the *Supreme Court Decision No 3015/2543* (2000),[646] the claimant prosecuted the defendant under the offence of defamation because she (the defendant) said to a third party that he (claimant) was '*Jao Choo*,' which can be translated to 'playboy.' The Court found that this word does not make a reasonable

[646] <http://deka.supremecourt.or.th/> accessed 13 August 2019

person who heard this word to see the claimant negatively; this word is not defamatory. This case suggests the Court considered Thai society's rules of deference by assuming a reasonable person's reaction and found that the word '*Jao Choo*' did not violate the rule. Thus, the Court refused to protect the claimant although the claimant felt that he was harmed by this speech.[647]

In the next section, I will use the concept of 'Law as a Means to Protect an Individual's Personality from Being Substantially Harmed by Speech' to provide a rationale for the offence of defamation because the basic of this concept is developed for defamation. It is more appropriate to apply this concept to the offence of defamation, before continuing to examine whether this concept can also apply to the Thai law of insult (the focus of this thesis).

5.4 Law as a Means to Protect an Individual's Personality from Being Substantially Harmed by Speech: a Rationale for the Thai Offence of Defamation

This concept can provide a rationale for the Thai offence of defamation to regulate defamation. As we have seen, the offence of defamation penalises defamers who communicates defamatory content against their victims to a third party.[648] This offence does not penalise the actor who communicates the harmful content against the injured party to the party himself or herself.[649]

The offence protects defamed victims' personality by allowing them to use the Thai Court of Justice as their arena to show that their defamers' speech violates Thai's society's rule of deference and to suggest that they (the victims) should not be seen that way. This arena can also be used by the defamers to defend themself by arguing that the speech is not defamatory. In other words, their speech does not violate the Thai society's rule of deference.

[647] More examples can be found in the next section.
[648] See section 4.3.2.1
[649] See the *Supreme Court Decision No 110/2516* (1973) (n289)

The decisions which find the content either defamatory or not defamatory will show the scope of rules in deference of Thai society. For example, in the *Decision No 3015/2543* mentioned above, the Supreme Court found that the word '*Jao Choo*' was not defamatory. And in the *Supreme Court Decision No 1052/2555* (2012),[650] the defendant was prosecuted because she said to a third party impolitely that the injured party was her debtor. By assuming a reasonable person's reaction to this statement, the Court found that it was not defamatory because it is normal for an individual to be a debtor. Nothing in this statement suggested that the injured party was dishonest. These decisions show examples of statements which do not violate Thai society's rule of deference. In contrast, in the *Decision No 1229/2537* (1994),[651] the Supreme Court found that it was a defamatory statement for a wife to accuse her husband of being a disloyal person. And in *Decision No 2371/2522* (1979),[652] the Supreme Court found that it was a defamatory statement to accuse a woman of being a prostitute. The statements from the last two *Decisions* can be seen as examples of speech violating Thai society's rule of deference. These Decisions shows that the offence of defamation has been used to consider rules of deference of Thai society.

The decisions which consider the liability of the defendant can suggest two main positions of the claimant. First, the ruling for the defamed individual suggests that this individual should not be seen as that kind of person. Secondly, the ruling against the defamed individual may suggest two sub-positions: (i) it is acceptable to accuse the individual as that kind of person because the accusation does not violate Thai society's rule of deference; or (ii) it is justified to accuse the individual as that kind of person.

5.4.1 Ruling for the Defamed Individual

The decisions which find the defendant guilty of the offence of defamation suggest that defamed victims should not be seen as those kinds of person, such as the claimant in the

[650] <http://deka.supremecourt.or.th/> accessed 13 August 2019
[651] <http://deka.supremecourt.or.th/> accessed 13 August 2019
[652] <http://deka.supremecourt.or.th/> accessed 13 August 2019

Decision No 1229/2537 should not be seen a disloyal person and the injured party in the *Decision No 2371/2522* should not be seen as a prostitution.

As we have seen, the claimant in a criminal defamation case can ask the Court to order the defendant to clearly show that the defendant's speech is illegal. This is because the Criminal Code s 332 sub-section (2) prescribes the right of the defamed victim to ask the Court to publish the decision, which found the defendant guilty of defamation on a newspaper. This publication will communicate to the public that the claimant should not be seen as that kind of person. Furthermore, it is important to point out that if the victim choses to sue the defamer under tort law, the victim can also ask the Court to order the defamer to take a reasonable action to restore the victim's reputation such as asking the defamer to apologise the victim as we have already seen in section 4.4.3. This reasonable action will clearly communicate to the public that the defamer was wrong to defame his or her victim and the victim should not be seen as the defamers accused.

Moreover, the arena for a defamed victim to argue that his or her personality is harmed under the Thai offence of defamation is not limited to the Court of Justice. As a compromisable offence,[653] the arena to heal the harm can be the police station where the victim and the defamer settle their dispute. This is because, as we have seen, the settlements of the defamatory charge can only be done upon the victim's consent. The settlements, which normally include the apology from the defamers, can show that the defamers were wrong to defame their victims and can suggest that the victims should not be seen as the defamers accused.

5.4.2 Ruling against the Defamed Individual

The ruling which finds the defendant not liable for defamation can suggest two sub-positions of the victim depending on the detail of the Court's decision. First, the ruling suggests that it is acceptable to accuse the defamed victim as that kind of person because the accusation does not violate Thai society's rule of deference, even though the victim

[653] See Section 4.3.5

felt that he or she is harmed by the speech. Examples of these case are the *Decisions No 3015/2543* (2000) and *No 1052/2555* (2012) mentioned above.

Secondly, the offence of defamation guarantees that it is justified to injure the reputation of an individual under circumstances as stated in s 329 or 331. The justifiable speech can be seen as the speech that *does* violate Thai society's rule of deference, but it is justified for the defamers to do so. But if an individual use this speech in other circumstances, the individual might be liable for defamation. For example, in the *Decision No 1183/2519*,[654] the Supreme Court found the defendants not guilty of defamation for accusing the abbot of a temple of having sexual intercourse. This is because they were monks in the same temple as the abbot and they had a reason to believe that their accusation was true. Furthermore, the accusation was filed to the government agency responsible for Buddhist temples. The Court regarded this accusation as an expression of statement in good faith by way of justification to safeguard their legitimate interest under s 329 sub-section (1). An argument can be made here that the accusation *violated* Thai society's rule of deference because the accusation was defamatory. If these monks did not reasonably believe that their accusation was true, the Court would have found them guilty of the offence of defamation.

The above reasoning must also be used for the defence under s 330 which prevents the defamer from being held criminally liable for defamation under the conditions stated in this section. The ruling which finds the defendant not liable because of s 330 can also suggest that the speech did violate a rule of deference of Thai society, but it is justified to do so. For example, in the *Decision No 1362/2514,* [655] the radio broadcaster was prosecuted under the offence of defamation for accusing a policeman (the injured party) on radio of receiving a bribe. The Supreme Court allowed the broadcaster to prove that his accusation was true because the accusation corresponded with the conditions stated in section 330 (2). Thus, if the broadcaster can prove that his accusation was true, he will not be criminally liable of defamation. An argument can also be made here that the accusation *violated* Thai society's rule of deference because the accusation was

[654] The *Supreme Court Decision No 1183/2519* (n315)
[655] The *Supreme Court Decision No 1362/2514* (n357)

defamatory. If the broadcaster cannot prove his accusation to be true, the Court would have punished him for defamation.

The above discussion shows that the concept of Law as a Means to Protect an Individual's Personality from Being Substantially Harmed by Speech can provide a rationale for the offence of defamation and this offence can perform the functions as required by this concept suitably. In the next section, I will show that this concept can also provide a rationale for the Thai law of insult, but this law cannot perform those functions as suitable as the offence of defamation.

5.5 A Rationale for Thai Law to Regulate Insults

As we have seen in chapter 3, Thai law regulates insults by both criminal law and tort law. The criminal law does not criminalise every form of insult. It penalises: (i) an insulter who insults an individual in their presence; and (ii) an insulter who insults his or her victim by means of communication to the public. Section 3.2.3.1 shows that the first form of insult is criminalised to preserve public order. Thus, the second form of insult is the only form which needs a rationale, because it engages no direct interest of the state.

I will show in section 5.6.1 that the second form of insult can be seen as another means (apart from the offence of defamation) to protect an individual's personality from being harmed. Furthermore, I will apply this concept in section 5.6.2 to argue that the application of tort law to regulate insults under the second approach (using s 420 of the Civil and Commercial Code with Article 32(1) of the Constitution) should be applied only when an individual's personality is substantially harmed. Moreover, in section 5.6.3 I will examine whether the law of insult can perform its functions to protect the personality from being harmed as suitable as the offence of defamation.

5.5.1 What is a Rationale for Regulating Insults by Means of Communication to the Public?

The concept of law as a means to protect an individual's personality from being harmed substantially argues that defamation law must protect the personality when it is

substantially harmed. However, this law should not be the only law which can protect the personality. As I argued in section 5.3.4, the German criminal law of insult can be seen as another law protecting the self (or personality) from being substantially harmed. The offence of insult by means of communication to the public should be another means to protect the self, too.

As I argue that the personality right, which is 'the "being" of an individual' is an interest protected under the offence of insult under both forms, this argument corresponds with my concept which argues that law must protect an individual's *personality* from being harmed substantially. This is because, the offence of insult regulates disparaging, humiliating, or verbally abusing speech,[656] and these types of insulting speech in themselves can harm the self-identity of an individual. For example, when someone is compared to an animal, this comparison harms the 'being' of an individual because it degrades a person to be an animal.

We have seen that the offence of insult does not mainly focus on protecting an individual's personality. The first form of insult, insulting in the presence of the insulted victim, aims to protect the personality right and to preserve public order. There will be no criminal liability if an insult in the presence of the insulted victim does not impact public order such as the defendant who insulted his victim on telephone as shown the *Supreme Court Decision No 3711/2557* (2014). The second form of insult, insulting by means of communication to the public, also suggests that the personality must be harmed substantially. Criminal liability is only imposed when the insult is communicated to the public; insults communicated to a few people is not penalised under the offence of insult. Therefore, an argument can be made that the offence of insult, which criminalise the second form of insult, is another means to protect an individual's personality from being substantially harmed.

[656] See section 3.2.1

5.5.2 What is a Rationale for using Tort Law to Regulate Insults?

We have seen that tort law under the second approach can be interpreted to regulate many forms of insult beyond the scope of criminal law. This approach might be problematic because it is unclear which form of insult can make insulters civilly liable: Can individuals who are insulted behind their back sue their insulters? Is it possible for insulted victims to civilly sue their insulters if they are insulted on a telephone or direct message online?

My concept of law as a means to protect an individual's personality from being substantially harmed can provide an answer to these questions. So for example the victim in the *Supreme Court Decision No 3711/2557* (2014)[657] could only seek monetary compensation under tort law if he could show substantial harm, for example, by showing that the insulter telephoned him many times to insult him.

The rationale that tort law should protect an insulted victim's personality from being harmed substantially can apply in cases where an individual is insulted behind his or her back such as in the *Supreme Court Decision No 200/2511* (1968),[658] which the defendant told a third person that the claimant was a ghoul. The claimant in this case should be able to sue the insulter under tort law for monetary compensation if the claimant can prove that the accusation harmed the claimant's personality substantially by showing that he was boycotted by his friends even when they did not believe that he was actually a ghoul.

Therefore, the tort law under the second approach should be used to protect insulted individuals who can prove that their personality is harmed substantially.

5.5.3 How Does the Thai Law of Insult Protect an Individual's Personality?

As we have seen, the offence of defamation protects the defamed victim's personality by allowing the victim to use the Court of Justice as an arena to argue that his or her personality is harmed by the defamer's speech. The decision for the victim will suggest

[657] The *Supreme Court Decision No 3711/2557* (n31)
[658] The *Supreme Court Decision No 200/2511* (n189)

that he or she should not be seen as the defamer accused. The Court also uses the offence of defamation to perform the function to consider Thai society's rule of deference. I will show in section 5.6.3.1 that the law of insult either under the Criminal Code or tort law can also perform these functions. But I will argue that the law of insult does not perform these functions as suitably as the offence of defamation. I will discuss the problems which make the law of insult unsuitable for performing these functions in section 5.5.3.2.

5.5.3.1 How Does the Thai law of Insult Perform its Functions to Protect an Individual's Personality?

Similar to the offence of defamation, insulted victims can either use the offence of insult or tort law to prosecute or sue their insulter to the Court of Justice, which will be an arena for the victims to heal the harm to their personality (or self-identity). However, as we will see in section 5.5.3.2(i), some insulted victims may not be able to use the Court as their arena because their insulters may avoid criminal prosecution by paying the fine as fixed by the police to settle the charge.

The insulters who are prosecuted or sued in the Court of Justice can defend themselves by arguing that their speech is not insulting.[659] As we have seen, the Court will consider whether the speech is capable of disparaging or humiliating or verbally abusing the insulted victim. This consideration can be regarded as the Court determining whether the speech violates Thai's society's rule of deference before confirming that the victim should not be insulted. This suggests that the law of insult also has a function to consider Thai society's rule of deference. (As this rule of deference regulates speech, which is disparaging or humiliating or verbally abusing, this rule is different from the rule of deference which regulate defamatory speech.)

The decisions which find the content either insulting or not under the law of insult will show the scope of a rule in deference of Thai society. For example, in the *Decisions No*

[659] If the insulted victim personally prosecutes their insulter to the Court of Justice, the insulter cannot pay the fine as fixed by the police to settle the charge.

2874/2528[660] and *3176/2516,*[661] the Supreme Court found that sarcastic sentences and impolite words are not insulting speech. These decisions show examples of statements which do not violate Thai society's rule of deference. In contrast, those decisions which found the content insulting are examples of statements which do break Thai society's rule of deference. As we have seen in the *Supreme Court Decision No 311/2491,* [662] it is an insult to compare the injured party to a dog or a monkey. And in the *Supreme Court Decision No 1105/2519,*[663] it is an insult to publish a statement saying that an individual would be hit by a shoe of another individual. These statements can be seen as examples of speech violating Thai society's rule of deference. Furthermore, if the insulted victim sues his or her insulter under tort law and the Court finds the defendant's speech insulting,[664] this speech can be seen as an example of speech violating Thai society's rule of deference, too. These Decisions suggest that Thai society's rule of deference is enforced by the Thai law of insult.

The decisions which consider the defendant's liability for insult can suggest two positions of the victim. First, the ruling for the victim suggests that it is unacceptable for the victim to be insulted. Thus, the *Supreme Court Decisions No 311/2491* and *1105/2519*, which found the defendants guilty of the offence of insult suggest that the victims should not be insulted. However, section 5.5.3.2(ii) will show that the victim cannot ask the Court to order the insulter to publish the Court's decision on a newspaper. Nor can the victim ask the court to order the insulter to take a reasonable action to heal the harm to the victim's personality. These are different from the Thai law of defamation.

Secondly, the ruling against the insulted victim can suggest only one position: it is acceptable to say those words to another person because those words do not violate Thai society's rule of deference, though that person might feel insulted by those words. Examples of these cases are Supreme Court Decisions[665] which found that sarcastic

[660] The *Supreme Court Decision No 2874/2528* (n178)
[661] The *Supreme Court Decision No 3716/2516* (n179)
[662] The *Supreme Court Decision No 311/2491* (n196)
[663] The *Supreme Court Decision No 1105/2519* (n177)
[664] See the *Supreme Court Decision No 124/2487* (n7)
[665] The *Supreme Court Decisions No 2874/2528* (n178) and *No 3176/2516* (n179)

sentences and impolite words are not insulting speech. These decisions suggest that it is acceptable for an individual to say those sarcastic sentences or impolite words to another individual, though the latter individual might feel insulted. However, section 5.5.3.2(iii) will show that the insulters cannot claim that it is justified for them to insult their victims. This is different for the offence of defamation.

5.5.3.2 The Problems which Make the Law of Insult Unsuitable to Perform its Functions

(i) Insulters May Avoid a Criminal Prosecution

The offence of insult is currently a Petty Offence. If an individual being insulted by means of communication to the public files the complaint for the State to prosecute his or her perpetrator on their behalf, the insulter, as the perpetrator of a Petty Offence, can easily settle the charge against them by paying the fine as fixed by the police.[666] As I already argued, the fine does not suggest that the insulter felt guilty for his insult. Nor does the fine suggests that the speech should not be used against the victim; it only suggests that the insulter has money to pay. There will be no arena for the victim to heal his or her harm if the insulter chooses to settle the case.

Although insulted victims can prevent their insulters from settling the charge by personally prosecuting the insulters to the Court, the rule under the offence of insult is different from the offence of defamation's rule. As we have seen, the offence of defamation, as a compromisable offence, does not allow the defamer to settle their dispute without the defamed victim's consent,[667] regardless of the process the victim chose to prosecute the defamer. To solve this problem, the offence of insult by means of communication to the public should be prescribed as a compromisable offence as I proposed in chapter 4 above. This amendment will allow insulted victims to prevent the insulter from avoiding the criminal prosecution. Moreover, the arenas for them to show that they should not be

[666] See section 3.2.5.1
[667] See *Suthep* (2018) (n390)

insulted can be the Thai Court of Justice or other places such as the police station similar to the offence of defamation.

(ii) The Right for the Insulted Victims to Show that They Should Not be Insulted

We have seen that a defamed victim can ask the Court in the criminal case to order the defamer to publish the Court's decision on a newspaper. And in a civil case, the victim can ask the defamer to ask the Court to order the defamer to take a reasonable action to restore the victim's reputation, such an apology to the victim. The publication of the decision or the defamer's apology can show people in the public that the defamer's speech is unacceptable in Thai society and the victim should not be defamed. However, the insulted victims do not have these rights under the current law. They cannot ask the Court in criminal proceeding to order the insulters to publish the Court's decision in a newspaper. Nor can the victim ask the insulter to apologise to the victim. Therefore, people in the public may not acknowledge that the insulter's speech is wrong. This problem, however, can also be solved by the amendments I proposed in chapter 4. The amendment to the Criminal Code will allow insulted victims in criminal proceeding to ask the Court to order the insulters to publish the Court's decision on a newspaper. And the amendment to the Civil and Commercial Code will allow insulted victims of civil proceeding to ask the Court to order the insulters to apologise the victims as a reasonable action to heal the harm to victim's personality.

(iii) The Right of the Insulters to Defend Themselves

Under the current law, insulters can only argue that their speech is not insulting. They cannot claim that it is justify under some circumstances to insult another individual. For example, Mr A who criticises Miss B by way of justification to protect his legitimate interest can claim the justification under s 329(1) to protect him from being liable under the offence of defamation. But if he also uses an insulting word such as calling her a *Hengsuay* person, he cannot claim that it is justified for him to insult her. This shows that the Thai law of insult does not provide a suitable right for speakers in insult cases. This problem can be also solved by the amendment I proposed in chapter 4. The amendment to s 329

of the Criminal Code will allow an individual (such as Mr A) to claim that it is justified under s 329 sub-section (1) for him to defame and *insult* another person.

5.6 Does Thai Law Need to Protect Insulted Victims by both Criminal and Civil Law?

The analysis in section 5.5 shows that the reconstruction of Post's concept can be a rationale for Thai law to protect an insulted individual. But the law needs to be amended as I proposed in chapter 4 so the law can perform its functions as suitably as with the offence of defamation. Once the Criminal Code and Civil and Commercial Code are amended as I propose, they can be strong tools to provide suitable protection to an individual's personality. This finding, unfortunately, does not answer the question whether Thai law needs to protect insulted victims by both criminal and civil law. This is because the reconstruction of the concept only argues that the individual whose personality is harmed should have the Court as an arena to heal his or her harm. They can either use the criminal or civil law of insult to have this arena.

To answer the question, I believe it depends on the choice whether Thai law wants to show its preference for (i) protecting the personality right (as I show in section 2.3.2.1 this right is protected under Article 32(1) of the Constitution) or (ii) protecting the freedom of individuals to speak (or as a constitutional term 'the right to free expression' protected under Article 34). This is because, as we will see in section 5.6.1, the current position of Thai law, which regulates insults by both Criminal Code and tort law, shows the preference to protect the personality right over the right to free expression, because insulted individuals in criminal law can use governmental resources to prosecute their insulters. But insulters have to personally hire their lawyer to defend themselves.

If Thai law decides to decriminalise insults by means of communication to the public because this form of insult engages no direct interest of the state, the decriminalisation may suggest that the right to free expression will be *relatively* favoured. This is because the insulted victim's right to use governmental resources to prosecute their insulter will be terminated immediately after the decriminalisation. It will be *relatively* harder for insulted

victims to protect their personality right because they have to hire their lawyer to prosecute their insulters. Nonetheless, I will argue in section 5.6.2 that Thai society is more beneficial from having the current position than decriminalising insults by means of communication to the public.

5.6.1 The Current Status of Thai law of Insult: A Preference for Protecting the Personality Right

In criminal law, as we have seen in 3.2.3.2 (i) insulted victims, who wants to protect their personality right, have two options: (i) filing the complaint to a police officer or (ii) personally prosecuting their insulters in the criminal court. If the victim chooses the first option, the case will be proceeded with mainly by governmental resources. With the amendment that I propose, the insulter will no longer be able to settle the charge by paying a fine to the police, because insults by means of communication to the public will be a compromisable offence. With my proposed amendment, under both options, the insulted victims will be able to choose whether they want to compromise or proceed. If they compromise, there will be no legal sanction imposed on the insulters.

If the victim proceeds, the criminal court will be an arena for the victim, on the one hand, to claim that the defendant's word broke a rule of deference. The defendant, on the other hand, can defend their speech by claiming that their speech was not insulting. Not only will my proposed amendment benefit insulted victims, as I argued, but the amendment will also benefit insulters, who would be able to use the justifications under s 329 of the Criminal Code. The amendment therefore will also help the insulters to defend their case. If the Court agrees with them and dismisses the charge against them, this decision will suggest that it is acceptable for them to say that word to the insulted victims. But if the court rules for the insulted victim, the decision suggests that the insulter broke the rule of deference and will also suggest to the community that the victim should not be called by that word. My proposed amendment will also allow the claimant to request the Court to order: (i) an object which shows insulting statements to be seized or destroyed; and (ii) the judgment to be published in a newspaper at the expense of the defendant.

If insulted victims want to protect their personality right by tort law, they only have one option: they must personally sue the insulters to the Court of Justice as a civil case. The process will be similar as the criminal process described above. The insulted victim may compromise the dispute through a settlement agreement, or proceeding to the Court, which will be an arena for the claimant. As with criminal process, if the Court in a civil case agrees with the defendant (insulter) and dismisses the charge against the claimant, this will suggest that it is acceptable for the defendant to say the word (or words) for which being sued to the claimant. And if the court rules for the insulted victim, this will suggest to people in the public that that word (or those words) should not have been said to the claimant. My proposed amendment will also allow the claimant to request the Court to order the insulter to take a reasonable action to heal the harm to the victim's personality such as asking for an apology from the insulter (similar to civil defamation).

The comparison between the criminal and civil processes shows that the different between them is the right of insulted victims to use governmental resources to protect their personality in criminal law. This is why I argue that the current position of Thai law shows the preference to protect the personality right over the right to free expression: victims have access to governmental resources, but those accused of insulting another person have to hire their own lawyer to defend their freedom.

If insults by means of communication to the public is decriminalised, it will be *relatively* harder for insulted victims to protect their personality comparing to the current situation, because they will need to personally hire a lawyer to sue their insulters. The victim and insulter have to use their own resources to argue and defend their case. Although the process of civil law may be regarded as striking a fairer balance between the personality right and freedom of expression than criminal case, in context of Thai law, which has had the criminal insult for a very long time,[668] I believe that the decriminalisation of this form of insult can be seen as the right to free expression of individuals is *relatively* favoured when comparing current situation because the decriminalisation will immediately take away the benefit which the victims currently have. The right of the insulted victim will be

[668] See section 4.2.1

seen as *relatively* decreasing, while the freedom of expression will be seen as *relatively* increasing. The victims, which previously have access to governmental resources (from police officers to public prosecutors), have to hire their lawyer to sue their insulters as civil cases. In other words, it will be harder for insulted victims to sue their insulters.

5.6.2 Benefits from the Criminalisation of Insults

I believe Thai society will benefit from criminalising insult by means of communication to the public more than decriminalising it, but this offence of insult ought to be amended as I proposed in chapter 4. The reasons for keeping the law of insult can be described as follows.

First, by having a criminal offence of insult, Thai society is benefited because speech which communicated to the public is controlled by the offence. As insults are words which disparage, humiliate or verbally abuse another person, there is no value worth protecting when a person insults another person. An insulter will face criminal lability for communicating these types of words to the public. Knowing that there is a risk of being prosecuted under the offence of insult will make communicators cautious when they communicate to the public.

Secondly, the right to free expression of individuals as recognised under the Constitutional of Thailand[669] will not be seriously limited though it is easy to prosecute insulters under criminal law. As shown in section 3.2.6, I argued that the offence of insult does not negatively limit the freedom. Nor do I believe that insults by means of communication to the public with my proposed amendment will seriously impact the freedom. This is because this form of insult will be a compromisable offence, which allows the insulter to compromise their dispute with their victims any times before the final decision. Once the dispute is compromised, no legal sanction will be imposed on the insulter.

Finally, the right to free expression of individuals is not the only fundamental right protected in the Thai constitution, but the personality right is also protected as a

[669] See the Constitution of Thailand 2017, Article 34 (n117)

constitutional right.[670] Although the current position suggests that personality right is favoured, violations of the personality right by insults, in my view, is worse than limiting the right to free expression. As we have seen, words which the *Supreme Court Decisions* found insults such as *Hengsuay, Huaytak, Lew DNA* or *Hia* can be seen merely as abuses of the right to free expression. And with my proposed amendment the right to free expression in insult cases will be better protected because it will be clear that there are justifications for a person to use these insulting words in some circumstances.[671]

From these reasons, I believe it is *acceptable* for Thai law to protect individuals from being insulted by both criminal and civil law, subject to the amendments I proposed in chapter 4.

5.7 Conclusion

This chapter shows that the concept of reputation as dignity of Post can be a basic for provide a rationale for Thai law to protect an insulted individual. This concept is actually about protecting an individual's personality from being substantially harmed. This concept can be a rationale for Thai law to protect insulted victims because law is an important tool to protect these victims. It allows them to use the Court of Justice as an arena to argue that their personality rights are substantially harmed by insulters' speech. With my proposed amendment to add insults by means of communication to the public as a compromisable offence, insulted victims of this form of insult will be able to have other places (such as a police station) as arenas for them to make that argument.

Though the concept of reputation as dignity can be a basic to provide a rationale, it does not give an answer to my main question: why Thai law needs to protect insulted victims by both criminal law and tort law. To answer this question, I argue that it depends on the choice whether Thai law wants to show its preference to protect the personality right of insulted victims or the right to free expression of individuals. The current approach (using criminal law and tort law to protect insulted victims) suggests that Thai law *relatively* prefers to protect the former over the latter. This approach, I argue, is more suitable for

[670] See the Constitution of Thailand 2017, Article 32 (n117)
[671] See section 4.3.4.1(vi)

Thai society than protecting insulted victims only by tort law because of these three reasons.

First, Thai society is benefited from having a criminal offence of insult because this offence controls speech communicating to the public. People will be aware that they might be prosecuted if they disparage, humiliate or verbally abuse another person which can be heard by people in the public. Secondly, the right to free expression of individuals will not be seriously limited, though it is easy for individuals to be prosecuted under the offence of insult. With my proposed amendment, insulters and their victims will be able to compromise their dispute without having to go to the Court. There will no criminal sanctions imposed on insulters if the dispute is settled. Finally, both the personality right (protected by the law of insult) and the right to free expression are recognised by the Thai Constitution as constitutional rights. Although the current position suggests that the personality right is favoured, this position is suitable for Thai law because violation of the personality right by insults, in my view, is worse than limiting the right to free expression as shown in section 5.6.2.

Thus far the findings of this research have shown how Thai law of insult should be amended to provide suitable protection to an insulted individual. The proposed amendment can be supported by the Concept of Law as a Means to an Individual's Personality from Being Substantially Harmed which I adopted from the Concept of Reputation as Dignity by Post.

Next, I will compare the Thai approach to protect insulted victims with the approach of a developed country to learn the lessons from this country and to identify which area the Thai law of insult should be improved. I choose Germany as the country for Thai law to learn from. Although the cultures between Thailand and Germany are different as already discussed in section 5.2.4, the lessons from German law can provide valuable lessons for Thai law because of these three reasons. First, German law also protects insulted individuals by both criminal and tort law, which is the same approach which suitable for Thai society as I argued. The German Criminal Code prescribes the offence of insult in the same chapter as the offence of defamation. The German approach can provide

valuable lessons for Thai law when insults by means of communication to the public becomes a specific offence in Thai law. Secondly, Germany is one of the western countries which has influenced Thai law since the Criminal Code and Civil and Commercial Code were drafted. We have seen that some legal provisions on tort law are copied from German law. The comparison can show how German law uses these provisions to protect insulted individuals. Finally, the provision under the Thai constitution which protects the right to free expression is similar to that of the German Constitution. The comparison can show how Germany as a developed country deals with the conflict between the free expression and the personality right.

The comparison between Thai and German law will be divided into the following three chapters discussing how German law protects an individual from being insulted from three perspectives: (i) criminal law (chapter 6); (ii) civil law (chapter 7); and (iii) constitutional law (chapter 8).

Chapter 6 Comparative Analysis between the German and Thai Criminal Law of Insult

6.1 Introduction

This chapter is the first of three chapters which compare German and Thai law protecting an individual from being insulted. This chapter will compare the criminal aspect of insults. First, I will provide my primary observation on German law to provide a general idea of German law in the area of insults in section 6.2. Secondly, I will discuss the German approach on the criminal law to protect an insulted individual in section 6.3. This section will show that the law aims to regulate acts of disrespect and sets out the standard to consider which expression is an insult. Thirdly, I will identify which aspect of the German approach would be suitable for adoption into Thai law in section 6.4. Fourthly, I will discuss arguments which assert that the German law of insult can regulate hate speech in section 6.5 and I will finally analyse whether Thai law of insult can be used as a hate speech regulation in section 6.6.

Before presenting the comparative analysis between German and Thai law, it is important to discuss the German judicial system. As insults are both criminal and civil matters, the courts in these matters from the highest to the lowest as pointed out by Thwaite and Brehm are: (i) *Bundesgerichtshof* (the Federal Court of Justice: BGH); (ii) *Oberlandesgericht* (the Appeal Court: OLG); (iii) *Landgericht* (the District Court (LG)); and (iv) Amtsgericht (the County Court). [672] Furthermore, an insult in German law can also be viewed as a constitutional issue because it is a conflict between two constitutional rights under the German Constitution (*Grundgesetz*: Basic Law): (i) the general personality right (*Allgemeines Personlichkeitsrecht*) and (ii) the right to free expression. The Federal Constitutional Court (FCC) also has a role in this conflict because the FCC was established to consider issues relating to the Basic Law.[673]

[672] Thwaite and Brehm (n76) 337
[673] ibid 337

6.2 General Features of German Law of Insult

German law prescribes insult and defamation in the same chapter: chapter 14 of the German Criminal Code: 'Insult'.[674] This chapter includes s 185 called 'Insult',[675] s 186 called 'Malicious gossip' [676] or 'defamation' [677] and s 187 called 'defamation,' [678] 'slander,'[679] or 'intentional defamation.'[680] To avoid confusion especially for the offences under ss 186-7, I will refer them with the numbers of the sections. Section 185 -7[681] are already quoted in chapter 5.

As these sections are stated in the same chapter, it can be implied that German criminal law conceives defamation and insult as *related* offences. Literature does not clearly separate between these types of illegal speech. As shown in chapter 5, Oster argues that these sections are regarded as crimes against honour.[682] Griffen calls the offences under these sections as 'three types of defamation related offences.'[683] Lipstein and Gutteridge who wrote a report on the Law of Defamation in 1945 regarded these sections as types of defamation.[684] They asserted that the main distinction between these types in German law was 'whether the defamatory statement recites facts which are untrue, or whether it is merely insulting.'[685] They described that the former statement as regulated under s 186 when it made to third parties. They point out that it is an aggravated offence under s 187 if the untrue statement is made with full knowledge that it is unfounded. Regarding s 185, they argued that it regulated a defamatory statement which was merely insulting when the statement was 'directed against the defamed person, who must be present.'[686] This

[674] The title is translated by Bohlander (n474)
[675] The title is translated by ibid
[676] The title is translated by ibid
[677] This title is called by Griffen (See Scott Griffen, 'Defamation and Insult Laws in the OSCE Region: A Comparative Study' (*Organization for Security and Co-operation in Europe*, 7 March 2017) <https://www.osce.org/fom/303181> accessed 16 March 2021 111; and Hilgendoft (n76) 515)
[678] The title is translated by Bohlander (n474)
[679] The title is called by Griffen (n677)
[680] This title is called by Hilgendorf (n76)
[681] quoted in the accompanying text of footnote 533
[682] See the accompanying text of footnote 534
[683] Griffen (n677) 101
[684] Kurt Lipstein and Harold Gutteridge, 'DEFAMATION in European Systems of Law' in Paul Mitchell, *A History of Tort Law 1900-1950* (Cambridge University Press 2015) 335-6
[685] ibid 336
[686] ibid

argument, however, may be no longer accurate, because insults criminalised under this section can be committed when the injured person is not present, as will be shown below.[687] Nonetheless, it can be implied from this literature that insults in German law are regarded as a type of defamation.

Although the text of ss 185-6 does not clearly state that insult or defamation under s 186 must be intentionally committed, Weigend points out that the German Criminal Code s 15 prescribes: '*only intentional commission of a crime is punishable unless the statute explicitly extends liability to negligent conduct*.'[688] Since insult and defamation are crimes, insulters and defamers are criminally liable only when they intentionally insult or defame another. This is consistent with a point made by Lipstein and Gutteridge, who asserted that in German criminal law, the claimant 'must prove that the defamatory statement[689] was made wilfully.'[690]

Not only does the Chapter of Insult in the German Criminal Code prescribe criminal liability on insult and defamation, but the Chapter also prescribes justifications which can be used by insulters in s 193, as will be quoted below.[691] Furthermore, s 200 of the Code allows the victim of an insult committed publicly or by disseminating material to ask the court to order the conviction be publicly announced upon request.[692]

6.3 Discussion: The Law of Insult in German Criminal Law

6.3.1 Insults Regulated under Section 185

As we have seen in section 5.2.3, Oster suggests that s 185 criminalises two main forms of communications: the communication of derogatory opinion to third persons and the

[687] See the accompanying text of footnotes 694-699
[688] Thomas Weigent (2010), 'Germany' in Kevin Jon Heller and Markus D Dubber (eds), *The Handbook of Comparative Criminal Law* (Standford University Press) 261
[689] As shown in the accompanying text of footnote 684, Liptstein and Gutteride do not clearly distinguish between insult and defamation. They generally call these unlawful acts 'defamation.'
[690] Lipstein and Gutteridge (n684) 339; See also Winfried Brugger, 'Ban on or Protection of Hate Speech – Some Obersavations Based on German and America Law' (2002) 17 Tul Eur & Civ LF 1, 5 (asserting 'Insult is generally understood to be an illegal attack on the honour of another person by *intentionally* showing lack of respect or expressing disrespect (emphasis added)).' ('Brugger (2002)'
[691] See the accompanying text of footnote 717
[692] The German Criminal Code, s 200(1)

communication of derogatory opinion or defamatory fact to the insulted person themselves. These forms of communication are similar to the ways to express disrespect covered in s 185 quoted by Whitman:

> *[S]uch an expression of disrespect is possible in three different ways:* (1) through the expression of an insulting judgment of value made to the victim; (2) through the expression of an insulting *judgment of value* made to a third party*;* and (3) through *an assertion of fact, sullying the honour,* made to the victim himself [or herself]*...*'[693]

The first and third ways are similar to Oster's second form of communication, while the second way is similar to Oster's first form of communication. The forms of insult criminalised under s 185 show that insults regulated under the German criminal law are not limited to communication directly to the injured party who must be present. [694] Thwaite and Brehm also asserts that this section also regulates 'an attack on the reputation of somebody else through a *publication* …'[695] Moreover, there is a decision of the Mannheim Regional Court which found the defendant criminally liable under s 185 of the Criminal for insulting Prof Dr B.[696] The defendant did not insult the professor in his presence but instead published a press release on the Internet and distributed it as brochures to the public.[697] This press release had referred to the professor by name and compared his work to German scientists during Nazi times.[698] The Court found that the statement is insulting.[699]

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[693] Whitman (n76) 1302-3 (quoting OLG [Court of Appeal for Selected Matters], NJW, 38 (1985), 1720 (FRG))
[694] See the accompanying text of footnote 638
[695] Thwaite and Brehm (n76) 343 (citing Nichtachtung, MiÕachtung oder Geringschätzung: OLG Munich, NJW, 1993, at 2998)
[696] This decision was found in the domestic proceeding of *Annen v Germany* (no 6) no 3779/11 ECtHR, 18 October 2018 [10]
[697] *Annen v Germany* (no 6) [8]
[698] *Annen v Germany* (no 6) no 3779/11 [8] (saying 'A part of this press release stated 'Prof Dr B uses embryos – people – for research purpose at the University of Bonn that were murdered in Israel and then sold to Germany for significant sums of money. During Nazi times, German scientists performed research experiments of Jews and then murdered them.')
[699] Ibid [9] (stating: '[T]he court found that, when viewed in its entirety, the press release had exceeded the permissible bounds of abusive criticism. The court based this decision on the fact that the implication that the scientists had been guilty not just of committing murder but of doing so for deeply despicable

Oster's description and Whitman's quotation show that insulting content under s 185 can be either value judgment (opinion) or factual assertion. Hilgendorf also points out that this section covers both of them.[700] He explains factual assertions as 'statements *about* facts that can be either correct or false, and which can be proven by (empirical) examination,' while the value judgments are 'statements of opinion which cannot be empirically verified, such as saying that a person is an idiot.' Hilgendorf clarifies that a statement either as a factual assertion or value judgment is insulting under s 185 when the statement shows contempt or disrespect by seeking 'to deprive the affected person of his intrinsic value as a human being or his [or her] ethical or social value, and thereby infringes upon his [or her] absolute and fundamental right to be treated with respect.'[701] Similarly, Thwaite and Brehm referring to a court's decision in 1992 assert that an insulting statement is one 'which the moral, personal or social value of a person is denied in part or in whole by the attribution of negative qualities.'[702] Like these authors, Whitman quotes a court decision in 1985 which shows the similar standard to consider expression showing a lack of respect or disrespect expression under the German law of insult:[703]

> [I]t is necessary that the offender express *disrespect or lack of respect* in the specific sense that the moral, personal, or social valuation or worth [*Geltungswert*] of the victim is wholly or partially denied through the ascription of *negative qualities*.[704]

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motives had been a central theme running through the press release and had escalated in the phrase "The time has finally arrived to overcome the spirit of Auschwitz". It concluded that the applicant had intended to imply that the scientists carrying out stem-cell research had been prompted by the same criminal, sadistic and dehumanising motives as those responsible for performing unimaginably cruel mass experiments on humans, such as Mengele in Auschwitz. Given Prof. Dr B.'s position as a doctor and scientist, this implication had been severely insulting.')

[700] Hilgendorf (n76) 521

[701] ibid 522 (citing Strafgesetzbuch [StGB] [Criminal Code], § 185, analysed in Karl Lackner & Kristian Kuhl, Strafgesetzbuch: Kommentar, ref 4 (28 ed 2014)

[702] Thwaite and Brehm (n76) 343 ('citing OLG Düsseldorf, NJW, 1992 at 1335 (conviction of editor a magazine who after receiving a notice of parking violation for his car had published article that described traffic control authorities as 'colony of hawkers' and 'a colony of cashier's vultures' who were 'unthinking paragraph riders.')

[703] Whitman (n76)1303 (quoting OLG [Court of Appeal for Selected Matters], NJW, 38 (1985), 1720 (FRG))

[704] ibid (quoting ibid)

The decision also provides details of the above three aspects of the victim, being (i) their moral, (ii) their personal and (ii) their social valuation or worth. For the first aspect: it is an insult, 'if the victim is reproached with immoral or illegal behaviour, or if it is insinuated that the victim could engage in such behaviour.'[705] The decision explains that it is an insult in the second aspect to reproach another person as having inadequate elementary aspects of humanity.[706] Finally, the decision says that it is an insult in the third aspect to refuse to acknowledge the victim's capacity to perform in their profession or other social tasks assigned to them.[707]

From these factors, Whitman argues that when a person is rejected merely because of their ethnicity this is not an insult under the German law of insult.[708] This is because this section does not aim to regulate 'mere rudeness and tastelessness' as long as these actions are not 'coarse expression of disrespect.'[709] As he quotes:

> The mere rejection of another person is not an insult. For this reason, with regard to expression of hostility to ethnic non-Germans [*ausländerfeindlichen Äußerungen*], it is a question of interpretation whether there has also been an intent to express the view that the targeted person is of lesser value…; the same is true for refusals to admit certain groups of person to bars, etc., which qualify as an insult only if they are to be understood as meaning that the owner of the establishment regards the targeted persons as unworthy of being served by him…[710]

On the issue of ethnicity, Theil also points out that a German court once found that it was not a crime for a far-right party to make election posters which depicted 'ethnically stereotyped people on a flying carpet with the caption 'Have a good flight home.''[711]

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[705] ibid (quoting ibid)
[706] ibid (quoting ibid)
[707] ibid (quoting ibid)
[708] ibid (citing SCHÖNK-SCHRÖDER STRAFGESETZBUCH § 185, at 1385-6))
[709] ibid 1304 (cited ibid)
[710] ibid 1303-4 (citing ibid)
[711] Stefan Theil, 'The Online Harms White Paper: Comparing the UK and German approaches to regulation,' (2019) 11(1) Journal of Media Law 41, 44 (citing Higher Regional Court Munich, 5 St RR (ii) 9/10, 9 February 2010, NJW 2010, 2150)

However, Theil notices that this poster can be seen as 'hate speech on the grounds of race, religion and ethnic origin.'

Hilgendorf argues that an insult under s 185 can be committed by using a true factual assertion which is made in an insulting manner such as a publication of 'an accurate description of a minor transgression'.[712] Furthermore, he and Whitman point out that gestures or other behaviour can also be regarded as insults under German law.[713] Hilgendorf exemplifies insulting gestures as slapping or spitting on people.[714]

Although German law has a standard to consider insulting content, Hilgendorf proposes that the standard must: 'at least in principle be verifiable on an intersubjective basis,' because this standard can impose criminal liability on a person.[715] However, he accepts that it is not easy to establish this standard because of 'the great diversity of perceptions and understandings of honour.' Moreover, he points out that the Internet causes more problems on considering insulting content because a statement may be protected under the freedom of expression rule in one country but may incur criminal liability in another country.[716]

6.3.2 Justifications for Insulters

Hilgendorf points out that the Criminal Code provides a special defence for insulters stated in s 193:

> Safeguarding legitimate interests. Critical opinions about scientific, artistic or commercial achievements, similar statements which are made to exercise or protect rights, or to safeguard legitimate interests, as well as remonstrations and reprimands by superiors against their subordinates, official reports or judgments by a civil servant and similar cases only entail criminal liability to the

[712] Hilgendorf (n76) 521
[713] ibid; Whitman (n76) 1296
[714] Hilgendorf (n76) 521; As we have seen in section 5.2.3, Whitman argues that the law of insult derived from old duelling practices and the insulting slap (*Ohrfeige*) is a famous duellist's gesture.
[715] ibid 525
[716] ibid

extent that the existence of an insult results from the form of the statement or the circumstances under which it was made.[717]

Hilgendorf suggests that the 'safeguarding of legitimate interest' is the most important condition of this section.[718] The press or other media which publishes insulting reports can use this defence against a claim for insult, if the 'reporting satisfies the public's legitimate interest in information, and, proportionality is maintained.' Hilgendorf, argues that this section is reflected from the Basic Law Article 5(1) which protects the right to free expression.[719] As we will see in section 8.2.3, Article 5(1) has influence when s 193 of the Criminal Code is interpreted.

6.4 Analysis: Which Aspects of the German Law Should be Adopted into Thai Law?

Section 185 of the German Criminal Code criminalises an individual who directly insults another individual mainly to protect personal honour. As I already mentioned in section 5.2.4, it is unnecessary for Thai law to adopt the German approach because this approach was originated from German history which penalised insults against aristocrats. This is because the Thai approach which regulates an insult directly to its victim aims to protect the personality right *and public order*. This approach was originated from Thai legal history.[720] There is no need for Thai law to use the German approach, which is influenced by German history.

The discussion in section 6.3.1 shows that the forms of insult criminalised under s 185 are wider than those of s 393 of the Thai Criminal Code. The Thai offence of insult penalise only two forms of insult. Individuals will never commit the Thai offence of insult, if they communicate an insulting statement against the injured party to *a* third party.[721] But it is possible in German law to commit the offence of insult under s 185 by

[717] This section is translated by Bohlander (n474)
[718] Hilgendorf (n76) 523
[719] ibid 523; See also Thwaite and Brehm (n76) 346 (stating: 's 193 is the statutory enactment of Article 5 (freedom of expression).')
[720] See section 4.2.1
[721] See the *Supreme Court Decision No 200/2511* (n189)

communicating insulting statement to a third party as argued by Whitman.[722] It is unnecessary to follow this German approach because Thailand regulates a communication to a third party by the law of defamation.

Nonetheless, the discussion of German law of insult shows that the standard for considering insulting content should: 'at least in principle be verifiable on an intersubjective basis' since it can impose criminal liability on a person, as argued by Hilgendorf. This argument shows the principle to consider insults must be clear. As I clarify from Thai Supreme Court Decisions in chapter 3, insults regulated under s 393 are: acts which (i) do not respect or value the victim as a person or a human; or (ii) severely disrespect their victims by using vulgar words or by using words that make them ashamed. This clarification can provide a principle to consider whether acts are insulting or not. For example, it can be said that the insults in the *Supreme Court Decisions No 418/2480, 2089/2511,* and *311/2491* can be regarded as acts which do not respect or value the insulted victims as humans because the insulters compared the insulted victims to animals. The insults in the *Supreme Court Decisions No 3800/2527* and *2220/2518* can be regarded as acts which severely disrespected insulted victims by using vulgar words because the words '*I-Ha*' and '*E-Sud*' are vulgar words which are meaningless abuse in Thai. Furthermore, the insult in the *Supreme Court Decisions No 439/2515* can be regarded as severely disrespect the insulted victim by using words that make her ashamed because the defendant said that he would touch the injured party's vagina, which is a sacred organ of a woman. My clarification can provide better explanation why the insulters must be criminally liable for their insults.

Lastly, I acknowledge that Hilgendorf argues that it is not easy to establish the standard to consider insulting content because of the diversity of perceptions and understandings of honour.[723] In my view, this task might not be hard for the Thai Court to consider whether acts are insulting because Thai Court has to use Thai standard to consider whether an

[722] See the accompanying text of footnote 693
[723] See the accompanying text of footnote 716

act fits with (i) the definition of insult which the Supreme Court has ruled; or (ii) my clarification of acts considered as insults.

6.5 Discussion: The German Criminal Law of Insult Being Used as a Hate Speech Regulation

As s 185 of the Criminal Code regulates disrespectful expressions, Brugger places this section as a hate speech provision under the Criminal Code in his 2002 and 2003 articles;[724] the other provision is s 130 which aims to preserve public peace.[725] He describes hate speech in his 2002 article as: *'utterances which tend to insult, intimidate, or harass persons on account of their race, colour, ethnicity, gender, or religion, or which are capable of instigating violence, hatred, or discrimination against such persons*.'[726] Examples of this speech are '*aggressive utterances directed at individuals or groups on account of their race nationality ethnic origin, gender, religion*.'[727]

Brugger asserts that most of the targets of hate speech are groups of individuals.[728] Nonetheless, he argues that s 185 can regulate hate speech against an individual as well as a group of individuals.[729] However, as I will argue below, the concepts of honour protected by s 185 as presented by Brugger himself is wider than hate speech as defined by him, and sits uneasily in the context of groups.

Whitman also discusses the German law of insult in the context of hate speech.[730] He identifies a subarea of the law of insult which he called 'the law of collective insult,' used to protect a group of individuals. He points out that this aspect of the law is a foundation of the German hate speech regulation. Although he does not define hate speech, he asserts that rules of civility used to deal with hate speech, as we have seen in section 5.3.3, should aim to require: '*the sincere acknowledgement of the equality of others*.' It is forbidden under these rules to 'glory in the social inferiority of particular classes of

[724] 'Brugger (2002) (n690) 1, 5; Brugger (2003) (n535) 23-28
[725] Brugger (2002) (n690) 5; Brugger (2003) (n535) 28-38
[726] Brugger (2002) (n690) 5
[727] ibid 11
[728] ibid 2
[729] Brugger (2003) (n535) 28-38
[730] Whitman (n76) 1310

persons.' He clarifies these rules as generally forbidding 'the use of ugly racial epithets and nasty ethnic jokes.' This prohibition is similar to Brugger's description of hate speech because the utterances on 'account of their race, colour, ethnicity, gender, or religion' can be regarded as glorying the social inferiority of a person. Therefore, the law which regulates hate speech should be the law to guarantee that the equality of others must be recognised.

Whitman says that the law of insult has been used to protect Jews from 'disrespectful' insults, including the denial of the Holocaust.[731] Similarly, Kahn asserts that Jews can use the law of insult to protect their honour[732] and there is a *sui generic* provision criminalising a person who denies, minimises, or trivialises the Holocaust.[733] These actions have been held to insult Jews in Germany,[734] but Jews had not been able to use the Criminal Code s 185 to protect their honour before the Basic Law was promulgated.[735]

I will discuss arguments on applying the German law of insult as a hate speech regulation to protect an individual or a group of individuals in this section and will analyse whether this German approach can be applied on the Thai law of insult in section 6.6.

6.5.1 Regulating Hate Speech against an Individual by section 185

The definition of hate speech provided by Brugger shows that it normally targets a group of people. However, he asserts that an individual may be attacked by hate speech, which can be regulated under s 185.[736] By providing a similar explanation of s 185 as Hilgendorf, Whitman, Thwaite and Brehm,[737] Brugger says that s 185 protects two levels of honour.[738]

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[731] ibid 1310
[732] Kahn (n478) 184-184
[733] ibid 191; See Hilgendorf (n76) 519 (describing: 'Holocaust denial', … as the denial of the mass murder of the Jews in Auschwitz and other Nazi camp. Holocaust denial has been held to insult to both surviving German Jews and the victims who perished in the camps); See the detail in section 6.5.2
[734] Kahn (n478) 186-191
[735] ibid 181-184
[736] Brugger (2003) (n535) 23
[737] Brugger (2002) (n690) 8 (stating: 'Insult is generally understood to be an illegal attack on the honour of another person by intentionally showing lack of respect or expressing disrespect.')
[738] ibid 9; Brugger actually identifies three levels of honour protected under ss 185-7 but the third is honour protected under ss 186-7, which is less relevant to this thesis.

However, I believe only the part of the first level can be regarded as using the law of insult to regulate hate speech, as will be shown below.

The first level, Brugger explains as 'the status of a person who enjoys equal rights and who is entitled to respect as a member of the human community irrespective of individual accomplishments.'[739] This first level of honour is protected because everybody must be respected since the Basic Law Article 1(1) guarantees the protection of the dignity of all human being.[740] This description is consistent with Hilgendorf's argument that human dignity constitutes the intrinsic honour which allows everybody to have honour.[741] Brugger exemplifies expressions which violate the honour under this level as:

> [A] human being is called subhuman or worthless, when verbal attack is based on an assertion of racial inferiority, or when being equated with an animal amount to the denial of his or her humanity.[742]

Regarding the denial of a person's humanity, Brugger says that *Strauss Caricature*, decided by the FCC[743] shows an example of the honour protected under this first level.[744] We will see the detail of this case in section 8.3.4. The FCC affirmed the criminal court's verdict, which found the creator of caricature committed the offence of insult, because this creator drew the state prime minister of Bavaria (Franz Joseph Strauss) as 'a copulating pig.'[745] The FCC said:

> [What] was plainly intended was an attack on the personal dignity of the person caricatured. It is not his human features, his personal peculiarities, that are brought home to the observer through the alienation chosen. Instead, the intention is to show that he has marked 'bestial' characteristics and behave accordingly. Particularly the portrayal of sexual conduct, which in man

[739] ibid
[740] ibid
[741] See the accompanying text of footnotes 518-519
[742] Brugger (2002) (n690) 9
[743] This case was decided by the Constitutional Court because in German law the Constitutional Court can review whether a decision of courts in criminal or civil matters see chapter 8.
[744] Brugger (2002) (n690) 10 (cited 75 BVerfGE, 369 (1987), *Strauss Caricature* Case)
[745] ibid

> still today forms part of the core of intimate life deserving of protection, is intended to devalue the person concerned as a person, to deprive him of his dignity as a human being… a legal system that takes the dignity of man as the highest value must disapprove of [such a portrayer].[746]

I agree that the parody picture of the state prime minister of Bavaria was an insult to him because this picture attacked his humanity, which is a factor to considered insulting content discussed in section 6.3.1. However, I question whether this picture can be regarded as hate speech against the minister because he was not insulted on the account of his 'race, colour, ethnicity, gender, or religion.' Nor was this picture 'capable of instigating violence, hatred, or discrimination' against him. As we have seen in Brugger's examples, the aggressive utterance must direct to the victim because of 'their race, nationality, ethnic origin, gender or religion.'[747] If this picture was interpreted as capable of inciting hatred against the minister, it does not incite hatred because of those features.

I believe the only part which can be regarded as regulating hate speech under Brugger's description is the verbal attack based on an assertion of racial inferiority, which he provides as an example of the violations of the honour under this first level. However, it should be noted that German law does not strictly criminalise speech which may seem discriminating against ethnicity, as shown above from Whitman and Theil.[748] The approach of German law as identified by them suggests that it is not a commission of insult *per se* to state an impolite expression based on their nationality under German law. But it can be an insult if the expression has a term suggesting that the victim is unworthy as human because this term is insulting in itself.

The second level of honour identified by Brugger is connected to the 'preservation of minimum standard of mutual respect or civility in public – 'an outward show of respect.'[749] This level, he argues, derives from 'the constitutional protection of the personality as provided by Art 2(1). It is a violation of honour under this level to accuse another person

[746] ibid (cited 75 BVerfGE, 369 (1987), *Strauss Caricature* Case, 380)
[747] See the accompanying text of footnote 727
[748] See the accompanying text of footnotes 709-711
[749] Brugger (2002) (n690) 9

of having 'severe moral or social character faults or having intellectual short comings.'[750] This level is clearly consistent with Whitman's explanation of the law of insult, which focuses on the outward show of respect. However, I note that the affront to honour under this level does not concern 'race, colour, ethnicity, gender, or religion.' Nor is the violation 'capable of instigating violence, hatred, or discrimination' against the person being insulted because of these features. Therefore, I am not convinced that the affront to this level of honour can be regard as hate speech.

The above discussion shows that s 185 does not have an aim to regulate hate speech. This section aims to regulate the outward show of respect as shown by Whitman, but it can regulate hate speech if hate speech fits with the description of insult under this section.

6.5.2 Regulating Hate speech against a Group of People by the Offence of Insult

As mentioned most of hate speech targets a group of people, Whitman and Brugger assert that the hate speech on a group of people can be regulated under s 185 of the German Criminal Code as 'collective insult'.[751] Brugger clearly describes that this collective insult is different from insulting statements aiming to attack an organisation 'performing recognised social task that are capable of forming a common will on account of their organisational structure and existing independently of any change in membership.'[752] This object of the insulting statement in the latter case is the organisation rather than members of the group. If this organisation is a government agency, legislative body or political organisation, these organisations are protected under s 194(3) and (4) of the Criminal Code as pointed out by Hilgendorf.[753]

The collective insult identified by Brugger as hate speech is an insulting attack on 'members of groups with unifying traits.'[754] He says that groups can be targets of the collective insult: 'if they are clearly set apart from the general population and if there is no

[750] ibid
[751] Whitman (n76) 1310; Brugger (2002) (n690) 11
[752] Brugger (2003) (n535) 16
[753] Hilgendorf (n76) 518
[754] Brugger (2003) (n535) 16

doubt that each individual member of the group is an intended target.'[755] He also argues that if a 'group is too large and cannot be clearly identified', no individuals in this group may be regarded as being insulted collectively. In his 2002 article, he mentions the FCC's decision which set aside the convictions under the s 185 on the defendants who distributed a statement 'soldiers are murderers.'[756] The FCC observed that that it is not 'entirely clear whether every German soldier, only certain German soldiers, or every soldier in the world was the target of the attack.'[757] Although 'soldiers are murderers' cannot be regarded as a collective insult, Hilgendorf specifically asserts that 'soldiers in German armed forces' is an example of group that can be collectively insulted by a derogatory remark.[758]

As mentioned, [759] Whitman and Kahn point out that Jews can be a group of people being protected from disrespectful insults, which includes the denial of the Holocaust. Hilgendorf and Brugger also presents the same idea.[760] Hilgendorf explains that Jews were victims of Nazi persecution.[761] Holocaust denial i.e. the denial of the mass murder of the Jews in Auschwitz and other Nazi camps has been held to insult both surviving German Jews and the victims who perished in the camps.[762] Hilgendorf argues that it is an insult at least to the survivors because:

> [N]azi persecution of Jews in Germany has provoked such deep and profound injury in many of the victims that a denial of the persecution and mass murder of the Jews is not only false and absurd, but it is also experienced personally by survivors as very hurtful and insulting.[763]

However, Hilgendorf argues that this logic cannot explain why this denial is capable of insulting the deceased victims of the Holocaust because it is impossible to 'inflict pain' on

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[755] ibid
[756] Brugger (2002) (n535) 12 (citing 93 BverfGE 266, 300 ff (1995) = Decisions 659, at ff)
[757] ibid
[758] Hilgendorf (n76) 519
[759] See the accompanying text of footnotes 731-732
[760] Hilgendorf (n76) 519; Brugger (2002) (n690) 16
[761] Hilgendorf (n76) 519
[762] ibid 519-20
[763] ibid 520

the deceased.[764] He also argues: 'it is doubtful the dead can be insulted when people in the present (shamefully and stupidly) deny the facts of their persecution by Nazis.'

Although Hilgendorf accepts that Holocaust denial is an insult only to the survivors not the deceased or the living Jews, Youngs points out that the BGH decided 'denial that the Holocaust took place is an insult to all living Jews.'[765] This decision was later confirmed by the Federal Constitutional Court.[766]

We can see that German law has already recognised Jews as a group of individuals who can use the law of insult to prosecute Holocaust denial. However, Kahn argues that before the Nazis took power in Germany Jews had not been regarded as a group which could use the law of insult to protect themselves from 'anti-Semitism.' [767] During this time, the German Criminal Code already had the law of insult and the Code also had already criminalised 'incite class hatred.' But Kahn argues that Jews could not use these laws against anti-Semites. Courts in both Imperial and Weimar Germany dismissed their lawsuits,[768] by explaining that the insult must aim directly against 'a specific set of individuals.''[769] Nonetheless, Kahn argues that German courts identified other groups of individuals as specific sets of individuals, which are: 'the judiciary of Prussia, the conservative legislative majority in a given electoral district, large property owners, and the officer class'.[770] The list of these groups, he says, show 'the distribution of power and status in late nineteenth century Germany.' Kahn's argument that the law of insult only protects a group of people with power and status in Germany consistent with Whitman's argument that the law of insult was used to protect a high status of people, as shown in section 5.2.3.

[764] ibid
[765] Raymond Youngs, *English, French & German comparative law* (3 edn, Oxfordshire 2014) 309 (cited BGHZ 75, 160)
[766] ibid 309 (cited BVerGE 90, 241 (Auschwitz lie)
[767] Kahn (n478) 181
[768] ibid
[769] ibid 182
[770] ibid

After the Second World War, Kahn points out that Jews started to become a well-defined group, which can be protected under the law of insult. He quotes the BGH's decision to support his statement:

> When someone today speaks disparagingly about, 'the Jews,' then it is generally to be accepted that he intends that group of persons, against whom the National Socialist persecution of Jews were directed.[771]

Although Jews became a group which could be collectively insulted, Kahn points out that there was *Nieland*, a case during 1958-9 where Jews were not protected from anti-Semitism.[772] In this case, a judge dismissed the charges against Nieland who distributed pamphlets entitled: '*How Many World (Money) Wars Must the People Lose?*'. Nieland was charged under the law of insult because he called the gassing of six million Jews a lie. He was also charged with endangering the state because these pamphlets contained a passage saying that Jew must not have any important jobs such as positions in the government. This statement 'endangered the state', as argued by Kahn since it requested 'a return to the Nazi dictatorship and persecutions.' The judge, however, dismissed these charges by using the same logic as the pre-Second World War period: 'Nieland's pamphlet was not directed against all Jews, but merely against 'International Jewry', a much smaller group.' Kahn argues that this case led the Federal Parliament in 1960 to replace s 130 of the Criminal Code dealing with class hatred, with a new law forbidding racial incitement.[773] He also points out that the Federal Prosecutor later filed a new complaint against the pamphlet itself, [774] which led the BGH to find the pamphlet endangering the state.[775]

From the change of perspective on anti-Semitism after the Second World War and the responses to *Neiland*, Kahn argues that there had been a decline in anti-Semitism.[776] But

[771] ibid 185 (citing NJW 1952, 1183)
[772] ibid
[773] ibid 186
[774] ibid; In Robert A Kahn, *Holocaust Denial and the Law [a Comparative Study]* (Palgrave Macmillan 2004) 66 (saying: 'the federal prosecutor's office brought a proceeding against the pamphlet under s 93 of the German Criminal Code which authorises prosecution against written materials.')
[775] ibid 186 (citing BGHSt 13, 32 (1959)
[776] ibid 187

he argues that in the late 1970s a new threat was emerged: Holocaust deniers claimed that Nazi persecution did not happen. These deniers, Kahn argues, posed a new legal challenge because they 'often said little against the Jews directly.' Kahn points out that this denial is different from Nieland's statements, which called for discriminations against the Jews.

Though Jews have already been 'insultable group' because of the persecution by the Nazis, Kahn asserts that Holocaust denial posed a new question: whether the group of people who believe that the Holocaust did happened can be an 'insultable group.'[777] This issue was determined by an appellate court in *Zionist Swindle* (1978), in which the complainant was not Jewish but had a Jewish grandparent.[778] The court found that 'there could be no insult because the group harmed consists of the 'countless' number of people who accepted the Holocaust as a historical fact.'[779] Kahn ironically comments this decision as the Holocaust is legally protected truth but the fact that 'countless' people believe it happened made the complainant lose legal protection.[780] Furthermore, Kahn points out that one commentator criticises this position as: 'what if a Jew was not willing to file the insult complaint or, worse still what would happen when the last Holocaust survivor died?'[781] However, the BGH later reversed the appellate court by explaining: 'By characterising the Holocaust as a Zionist swindle perpetrated on Germany, the statements were a direct attack of the self-conception of those singled out for persecution as Jews.'[782] Kahn interprets this explanation as: 'Holocaust denial affected all Jews not only those who survived the Holocaust.'[783] Nonetheless, the BGH used a very narrow argument to uphold the complaint: 'the complainant had a Jewish grandfather, he would have been classified as a mixed-bred, which would be subject to the Nazi-era Nuremberg laws.'[784]

[777] Kahn (n478) 187
[778] ibid
[779] ibid
[780] ibid
[781] ibid (citing Thomas Blanke, Comment, 12 Kritische Justiz 198-99 (1979))
[782] ibid (citing BGHZ 75 at 161)
[783] ibid
[784] ibid 188 (citing BGHZ 75 at 165)

Kahn describes the ruling in *Zionist Swindle* as expanding the class of Jews to prosecute under the law of insult. However, the argument on the Nuremberg laws made some people worried; thus, the Federal Government expanded the standing to prosecute under the law of insult.[785] Therefore, s 194 of the Criminal Code was amended to allow the government to bring Holocaust denial case under the law of insult without having an official complaint.[786] This amendment, Kahn argues, suggests that 'whoever denied the holocaust insult not only to Jews, but the entire nation of Germany.'

The discussion of the background on using the law of insult to protect Jews from anti-Semitism (particularly on Holocaust denial) shows that the law of insult can be used as a hate speech regulation to protect a group of people from being collectively insulted. Though Hilgendorf argues that the denial insults only the 'survivors' of the incident,[787] I am more convinced with the argument that the denial should be regarded as an insult to all living Jews. The denial of Holocaust can be regarded as an anti-Semitic speech because it implies that the violation of human dignity of Jews is a lie. I am convinced that not only does the denial injure the feeling of the survivors of the incident, but the denial also harms the feeling of the Jews whose predecessors were exterminated in the Holocaust.

Not only is the application of the law of insult to protect Jews as shown above consistent with hate speech as described by Brugger, but this application also shows that this law can require the sincere recognition of the equality of others, which is another requirement of the rules of civility as identified by Whitman.[788] I believe Holocaust denial can be regarded as a refusal to recognise the equality of Jews in Germany: to refuse this fact can be regarded as not recognising their equality.

Furthermore, it is important to note that not only does Holocaust denial amount to a collective insult to Jews regulated under s 185, but s 130 was also amended to specifically

[785] ibid
[786] ibid
[787] See the accompanying text of footnote 764
[788] See the accompanying text of footnote 636

penalise the Holocaust denial: it has been illegal to deny, minimise, or trivialise the Holocaust.[789] This provision is another hate speech regulation identified by Brugger.[790]

The discussion in section 6.5.1 shows that the criminal law of insult does not have the main aim to regulate hate speech, but the law can be a foundation to regulate hate speech against a group of people as shown in cases of Jews and the Holocaust denial. Nonetheless, section 6.5.2 shows that it had not been easy for the law of insult, which historically protected the aristocrats, to protect another group of people. It has been possible for the law of insult to protect this group because of social circumstances in Germany, which experienced the mass murder of Jews in the past.

6.6 Analysis: Should Thai Law Adopt the German Approach to Regulate Hate Speech by the Law of Insult?

The Thai law of insult is not a hate speech regulation. The *'race, colour, ethnicity, gender, or religion'* of a person being insulted is not a factor to consider insulting speech. Nor is an insult a type of speech which is *'capable of instigating violence, hatred, or discrimination against such person*.'

Under Thai law, it is not a commission of the offence of insult to call a person by using the word(s) which describes the feature of a group of people with that feature, such as LGBT or any ethnicity, for example, calling a person gay or lesbian; or calling a foreigner by using a slang which represents their nationality. This is because the insulting expression under Thai law must be disparaging or humiliating conduct, or verbally abusing.[791] Using those words against a person, although impolitely, is not disparaging or humiliating conduct, or verbal abuse. Therefore, the Thai law of insult does not criminalise a person who uses the word(s) which describes the feature of a group of people, unless the word(s) is insulting. For example, the word '*Farang*' is defined by Oxford English Dictionary as 'The Thai term for a foreigner, esp. a European.'[792] Calling

[789] Kahn (n478) 191
[790] Brugger (2003) (n535) 28
[791] See section 3.2.1
[792] 'farang, n.' (Oxford English Dictionary) <https://www.oed.com/view/Entry/68146?redirectedFrom=farang#eid> accessed 4 August 2022

a European individual *Farang* is not an insult under Thai law because this word does not show an expression which is disparaging, humiliating, or verbally abusing. Using this word, however, can be an insult if this word is used with an insulting word such as *Farang Hengsuay*. It is an insult because of the word *Hengsuay*.

The overall position of Thai law would not be changed if Thai law uses the standard to consider an insult as I clarify: insults are acts that (i) do not respect or value the victim as a person or a human; or (ii) severely disrespect their victims by using vulgar words or by using words that make them ashamed. I do not think merely calling persons by their sexual preference or by their nationality can be regarded as content which do not respect that person as a human. Nor can this content be regarded as act which severely disrespect their victims by using vulgar words or by using words that make them ashamed. It might be different if a word is used which disparages a sexual preference or nationality: 'poof', or 'yid', for example. Furthermore, Thailand does not have an experience of discriminating against any particular sexual preference or nationality as German had with Jews in the past: this means that there is no political/moral imperative, as was felt in Germany to extend protection to whole groups.

Nor is it a commission of the offence of insult to express a grudge against the groups of people who have the same particular feature, under the current position of Thai law. This is because the text of the offence of insult specifically states: 'a person who insults *any person*…'[793] Therefore, a particular person must be the injured party of the insult. It would be hard to argue that a particular group of people, which is not a legal person, can be collectively insulted under Thai law. Although no published Thai Supreme Court Decision can confirm my argument, there are *Supreme Court Decisions No 295/2505* (1962),[794] *448/2489* (1946),[795] which can show how the Supreme Court considered the collective defamation under the offence of defamation. The Supreme Court ruled that a group's member can be an injured party of a collective defamation if the defamatory statement aimed to defame *every person* in that specified group. The groups being defamed under

[793] See the text of s 393 of the Criminal Code quoted at the accompanying text of footnote 159
[794] <http://deka.supremecourt.or.th/>accessed 13 August 2019
[795] <http://deka.supremecourt.or.th/>accessed 13 August 2019

these decisions were very small, and they were not defamed because of their *race, colour, ethnicity, gender, or religion.* In the *Decision No 295/2505*, the lawyers in a province of Thailand were accused of being unreliable. At that time there were only ten lawyers in that province and so each could legitimately claim to be the target of the defamation. In the *Decision No 448/2498*, the monks in a temple were accused of having immoral behaviour; there were only six monks at that time. These decisions suggest that if the numbers of people in the particular group were vast, it would be unclear which person was defamed by the defamatory statement. Therefore, I think that accusing a group of people with the particular feature as having negative quality cannot be a commission of defamation nor insult under Thai law, because Thai law aims to protect *a right of a person* not a right of a group of persons. Only if the group is so small as to amount to a group of identifiable individuals it would be possible to argue that each individual has been defamed or insulted.

The German approach, however, shows that the law of insult can regulate hate speech against a particular group of people such as Jews by penalising those who deny the Holocaust. It is an insult because it harms their feeling. If Thai law adopt this German approach, not only would the law of insult protect an individual from being insulted, but it would also make a group of people which can be *clearly identified in Thai society*: 'insultable group'. The group would then be able to use the law of insult to prosecute those who use speech which harms any member of the group's feelings. Nonetheless, two issues are needed to be clarified. First, the offence of insult should be amended as I propose, otherwise the offence will not effectively protect the members because the current law allows those insulters to easily settle their disputes.[796] Secondly, as a Thai, I am curious whether Thai society does have that kind of group, because Thai society has not faced a horrible experience as shown in the lessons learned from German law. This question, however, is beyond the scope of this research, which mainly aims to find out how Thai law should protect an insulted *individual*. The finding which suggests that the law of insult can regulate hate speech is a benefit which can be achieved from having this

[796] See 3.2.5.1

law, but it would be another study to investigate which group in Thai society ought to be an ‘insultable group’.

6.7 Conclusion

This chapter shows how German criminal law protects an insulted individual. German law recognises defamation and insult as related offences prescribed in the same chapter which is different from Thai law. This chapter also shows that German law considers insulting content by determining whether the content seeks to deprive the insulted victim of their intrinsic value as a human being or their ethical or social value. This standard is clearer than the current standard to determine insulting content under Thai law. Thus, the Thai standard to consider acts as insults should be clear as German law. As clarified in chapter 3, acts considered as insults are: acts that (i) do not respect or value the victim as a person or a human; or (ii) severely disrespect their victims by using vulgar words or by using words that make them ashamed. My clarification can provide a better explanation why the insulters must be criminally liable for their insults.

Moreover, this chapter also shows that the German law of insult can be used as a hate speech regulation which protect Jews, as an insultable group. This is an interesting approach, which could be adopted into Thai law for protecting groups of people which can be clearly identified in Thai society. However, there are two issues which need clarifications: (i) the law of insult would need to be amended as I propose earlier, in order to prevent those who insult groups of people from simply settling their dispute; (ii) there should be another study to identify which group can be protected under this approach.

Chapter 7 Comparative Analysis between German and Thai Civil Law of Insult

7.1 Introduction

This is the second chapter that compares the German and Thai legal approaches to the protection of an insulted individual. This chapter mainly focuses on the civil aspect of this issue. First, I will show how the German civil law protects insulted individuals by using the general principle of tort law in section 7.2. This section will also show that the BGH recognised that every person has the general personality right after the Basic Law was promulgated in 1949. Personal honour as the interest protected under the criminal law of insult became a part of this personality right. Secondly, I will argue in section 7.3 that this German approach can support my proposal to protect an insulted individual by using the general principle of tort law with a constitutional provision. Thirdly, I will show in section 7.4 that it had not been easy for German Courts to provide monetary compensation for infringements of the general personality right, though this right is recognised by the BGH. This is because the infringements normally constitute 'non-pecuniary loss' and the *Bürgerliches Gesetzbuch* (BGB, or German Civil Code) only allows this loss to be compensated by money for specific cases, which do not include violations of the personality right.[797] However, I will show that the BGH has provided reasons to award monetary compensation for non-pecuniary loss from the violation of this right. More importantly, I will show that the BGH adopted the rule to consider which infringement of the general personality right can incur civil liability. Finally, I will show in section 7.5 that this rule can provide a guideline for Thai law to consider whether the personality of an individual is substantially harmed by an insult.

7.2 The Civil Liability for Insults

In a civil aspect, insulted individuals are protected under the general principle of tort law as stated in s 823 of the BGB:

[797] See BGB, s 253 'Intangible damage (1) Money may be demanded in compensation for any damage that is not pecuniary loss only in the cases stipulated by law. (2) If damages are to be paid for an injury to body, health, freedom or sexual self-determination, reasonable compensation in money may also be demanded for any damage that is not pecuniary loss.' translated by Langenscheidt Translation Service (n408)

> Section 823 (1) A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this.
>
> (2) The same duty is held by a person who commits a breach of a statute that is intended to protect another person. If, according to the contents of the statute, it may also be breached without fault, then liability to compensation only exists in the case of fault.[798]

It may be presumed from this section that German law imposes civil liability on insulters by using s 823(2) in conjunction with the offence of insult under s 185 of the Criminal Code. This is because s 185 can be regarded as '*a statute intended to protect another person*.' This presumption is consistent with Handford's description of s 823(2), which points out that the provisions in the German Criminal Code are statues intended to protect another person as stated in s 823(2).[799] Thus, insulted or defamed victims can use this section to sue their insulters or defamers.[800] However, according to the Memorandum of Gutteridge and Lipstein submitted to the Committee on the Law of Defamation in 1945[801] before the Basic Law was promulgated in 1949, they argued that claims for damages under s 823(2) BGB in conjunction with a criminal offence could be brought only upon proof of special damages.[802]

The discussion of Handford, Lipstein and Gutteridge shows that the interest in personal honour as protected by the criminal law of insult have already been protected by s 823(2) but it had not been easy to acquire monetary compensation by applying s 823(2) in conjunction with the criminal law. This difficulty, I believe, can be explained by German people's perspective in the past, which regarded honour as something that cannot be

[798] Section 823 BGB is translated by ibid
[799] P R Handford, 'Moral Damage in Germany' (1978) 27(4) The International and Comparative Law Quarterly 849, 853
[800] ibid 857
[801] This memorandum can be found in the Appendix of Paul Mitchell, *A History of Tort Law 1900-1950* (Cambridge University Press 2015)
[802] Lipstein and Gutteridge (n684) 345

compensated by money.[803] Furthermore, I will show in section 7.4 that the law of damages in German law does not aim at monetary compensation. As Handford points out that monetary compensation in German civil law is a secondary remedy.[804]

The approach for insulted victims to sue their insulters was changed after the Basic Law was promulgated. The BGH recognised the general personality right as deriving from Articles 1(1) and 2(2) in *Schacht* (1954). A person whose personality right is infringed can sue their infringer by using s 823(1) because this personality right is recognised as 'another right' as stated therein.[805] I will discuss this personality right from *Schacht* to show how and why it was recognised by the BGH in section 7.2.1 and will discuss literature related to this personality right in section 7.2.2.

7.2.1 *Schacht*: The Origin of the General Personality Right

This case[806] derived from a lawyer of Dr S sent a letter as an attorney requesting a newspaper to make a correction under the Press Act[807] on an article regarding his client. Instead of making the correction, the newspaper published this letter as an article in 'Letters from Readers'.[808] The claimant asserted that this article did not mention the contents regarding the Nuremburg judgment concerning his client which he included in his original letter. The lawyer then sued the newspaper claiming that this publication injured his personality right, because the content was 'falsified by omission.' He also insisted that he had acted as an attorney. By publishing his letter as 'Letters of Reader', the public might be misled that this letter was 'a mere expression of opinion by a reader'. The lawyer requested the Court to order the newspaper to publish a statement that the lawyer had sent his letter to the newspaper as a lawyer.[809]

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[803] See the accompanying text of footnotes 489-494
[804] Handford (n799) 868
[805] See section 823 quoted at the accompanying text of footnote 798
[806] BUNDESGERICHTSHOF (First Civil Senate) 25 May 1954 BGHZ 13, 334 = NJW 1954, 1404 = JZ 1954, 698 (with an approving note by Helmut Coing) (*Schacht*) translated by FH Lawson & BS Markesinis in Markesinies (n76) 284-7
[807] See Thwaite and Brehm (76) 349 (explaining 'In Germany, the Press Act is a law of each individual state, which allows injured persons to exercise their right of Reply.')
[808] *Schacht* (n806) 285
[809] ibid

The *Landgericht* (District Court) granted the lawyer's request under s 823(2) BGB in conjunction with ss 186 and 187 of the German Criminal Code but the Oberlandesgericht (OLG) (Appeal Court) rejected the claim. The OLG agreed that the publication contained an untrue statement of fact, but this statement was not 'apt to injure his [the lawyer's] credit, nor bring him into contempt or lower his dignity in public opinion.'[810] The OLG's decision was reversed by the BGH, which restored the District Court's decision. However, the BGH agreed with the OLG's reasoning that it had not yet been proven of the violation of the lawyer's right under s 823(2) in combination with ss 186-7.[811] But the BGH noticed that the OLG failed to consider whether the newspaper disparaged the lawyer's personality right. The BGH explained that there is 'the general personality right' (*Allgemeines Personlichkeitsrecht)* deriving from Article 1(1) of the Basic Law which guarantees that human dignity must be respected and Article 2 which recognises 'the right to free development of his personality,' as long as this right does not violate the right of another person or does not conflict with the constitutional order or morality.[812] The BGH held that this personality right of the claimant was infringed by the newspaper's publication.

The BGH acknowledged that this general personality right has a limitation which requires 'a balance of interests.'[813] If there are justified private or public needs, which outweigh the interest of the holder of personality right, the general personality right will not be protected. In this case, the BGH found that the newspaper had no justifiable interest worth protecting which could be used against the lawyer. An unauthorised publication of private notes, the BGH explained, was 'an inadmissible attack on every human being's protected sphere of secrecy'. A modified reproduction of the note also infringed the author's personality right because the unauthorised alteration could spread a false picture of his personality. Since the claimant sent the letter to the newspaper demanding for a correction, the newspaper was entitled to either: (i) 'publish the text in an unshortened form or, restricting itself to the

[810] ibid (explanation added)
[811] ibid 285
[812] ibid 286
[813] ibid

required correction, to make clear that there had been a correction.'; or (ii) refuse to publish the letter.[814] But the newspaper had no right to publish it as 'Letters from Readers.'

The BGH also found the publication of the letter as 'Letters from Readers' contained untrue statement of facts and this letter could be interpreted differently from the claimant's intention, because this letter was published as 'Letter of Readers'. The BGH agreed with the LG's finding that this publication disparaged the claimant.[815] Therefore, the BGH reversed the OLG's order and restored the LG's decision.

Markesinis clarifies the issue on the general personality right by arguing that this right was developed because 'the human personality' is protected under the Basic Law Articles 1 and 2.[816] He points out that it was 'desirable and necessary' after the Second World War that these constitutional provisions should impact private law. He suggests that there was a willingness for the human rights provisions to be applied 'not only vertically (to control the state)' but also horizontally affecting 'the relations of private citizens'[817]. Therefore, the general personality right is protected because of the influence of the Basic Law to private law. This doctrine was clearly adopted in *Lüth* (1958) by the Federal Constitutional Court as argued by Quint.[818]

7.2.2 The Scope of the General Personality Right

Legal literature regarding the general personality right under German law points out that this right can protect many aspects of personality, [819] which includes the interest in personal honour under the law of insult (the focus of this thesis). Märten, for example,

[814] ibid 287
[815] ibid (stating 'the LG was right in regarding the publication complained of, which according to its findings had become known to an extraordinarily wide circle of persons, as a continuing disparagement and therefore that demand for revocation was justified.')
[816] Markesinis (n76) 44
[817] ibid 43-44
[818] Quint (n76); The issue of the influence of the Basic Law to private disputes will be elaborated in section 8.2.
[819] For example: see Cheung and Schulz (n435) (saying: 'the right of personality corresponds with the tort of defamation under English or US common law and guarantees the right to free development of one's personality.'); Ulrich Magnus, 'Damages for Non-Pecuniary Loss in German Contract and Tort Law' (2015) The Chinese Journal of Comparative Law 289, 294 (saying: 'a general personality right includes and protect the immaterial facts of a person's identity, including the person's dignity, private sphere and social reputation beyond the borders of the criminal law of defamation and insult.')

says the general personality right protects various aspects such as the right to one's image (*Recht am eigenen Bild*), personal honour (*Ehrschutz*) and privacy (*Schutz der Privatsphäre*).[820] Beverley-Smith, Ansgar and Angés identify the most important categories of general personality rights as: (i) intrusion into the private sphere; (ii) the publication of personal information; (iii) defamation cases; (iv) false light cases; and (v) appropriation of personalities.[821] Among these categories, the third category is strongly related to this thesis.

The third category, Beverley-Smith, Ansgar and Angés explain, covers the commissions of the offences under ss 185-187 of the Criminal Code.[822] As mentioned, a person committing the offence under these provisions are civilly liable under s 823(2) of the BGB.[823] We have seen in *Schact* that the LG imposed the newspaper's duty by using s 823(2) with ss 186-7.[824] These authors, however, say that the general personality right can provide more protection than those particular sections because the perpetrator of the crime must intentionally commit those offences.[825] Wrongdoers can be civilly liable for injuring the general personality right by intentionally or negligently defaming or insulting another person.[826] The authors specifically say that in some decisions the BGH did not apply ss 185 or 186, though these sections would have been applicable.[827] To support their statement, they refer to *Fernsehansagerin*.[828] In this case, a TV programme presenter had been compared to a 'milked-out goat' who would belong in 'a cheap second-class night club in St Pauli'.[829] Beverley-Smith, Ansgar and Angés say that this comparison constituted an insult under the Criminal Code but the judgment was based on the general personality right. Moreover, as we will see in *Herrenrieter* (section 7.4.2)

[820]Judith Janna Märten, 'Personality Rights and Freedom of Expression: A Journey through the Development of German Jurisprudence under the Influence of the European Court of Human Rights' (2012) 4 J Media L 333, 334
[821] Huw Beverley-Smith, Ansgar Ohly and Agnès Lucas-Schloetter, *Privacy, Property and Personality: Civil Law perspectives on commercial appropriation* (Cambridge 2005) 114-5
[822] ibid
[823] See the accompanying text of footnotes 799-802
[824] See the accompanying text of footnotes 809-810
[825] Huw Beverley-Smith, Ansgar Ohly and Agnès Lucas-Schloetter (n821) 117-8
[826] ibid
[827] ibid
[828] ibid (citing BGHZ 39, 124 – *Fernsehansagerin*)
[829] ibid in footnote 123

and *Gingseng Root* (section 7.4.3) below the personality right violated can be regarded as reputation, but the BGH says that the defendant in these cases violated the 'general personality right,' which is a much wider right than personal reputation protected under defamation law.

The above discussion shows that personal honour as the interest protected under the German law of insult is as an aspect of general personality right in private law. However, there is *Brandt,* a case where the BGH still used the German Criminal Code s 185 with s 823(2) BGB to impose civil liability on an insult. This is a unique case as asserted by Handford. In this case, Willy Brandt, the former German Chancellor, successfully sued in respect of an insulting remark, but the Court ordered the defendant to make a payment to charity.[830] Handford describes that pure insults criminalised under s 185 may not be serious enough to constitute invasions of personality right.[831] As we will see in section 7.4.3, the BGH adopted the doctrine in *Gengseng Root*, that a remedy will be granted for a violation of personality right only when the harm suffered by the claimant is of a sufficient degree of seriousness.[832] Therefore, the BGH used s 823(2) with the Criminal Code to impose liability on the defendant.

The discussion in this section shows that the general personality right adopted from *Schacht* covers many aspects of personality right, which includes (but it is not limited to) the interests protected under the German criminal law of insult.[833] Insults and defamation in German private law are regarded as personality right violations.

7.3 Analysis: Should Thai Law Use the Same Approach to Regulate Insults in Civil Law?

As I showed in section 3.3, the Thai general principle of tort law (s 420 of the Civil and Commercial Code) was copied from s 823(1) of the BGB. But Thai law did not copy s

[830] ibid (citing (1961) LG, May 30 unreported, 8 0 61/61.)
[831] Handford (n799) 873
[832] ibid 866; See *Gingseng Root* (section 7.4.3) below the BGH rules that monetary compensation will only be provided to a 'serious violation of personality right')
[833] See Thwaite and Brehm (n76) 338-9 (stating: 'Although defamation has existed as a civil wrong since the Civil Code came into effect, its elements are now largely shaped by the Constitutional personality right.')

823(2), which directly imposes civil liability on a person who breaches *a statute that is intended to protect another person.* Nonetheless, the Supreme Court of Thailand did impose civil liability on an insulter by describing that he wrongfully harmed the *right not to be insulted* of his victim. This right was protected as 'any right' under s 420 and traced back to the offence of insult. This Thai approach is similar to the German law as shown in the introduction of section 7.2. Insulted victims can sue their insulters by using s 823(2) with s 185 of the German Criminal Code. The approach to combine tort law with criminal offences shows that the forms of insult criminalised under the Criminal Code are also regulated by the Thai general principle of tort law. In other words, victims, who are insulted (i) in their presence or (ii) by means of communication to the public, can use the general principle of tort law with the offence of insult to sue their insulters.

As shown in section 7.2.1, the BGH later recognised the general personality right as deriving from the Basic Law. Every type of personality right became an aspect of the general personality right protected under s 823(1) as shown in section 7.2.2. This means personality rights are mainly protected by s 823(1). This approach is similar to the second approach to protect insulted victims in Thai civil law. As I argued in section 3.3, insulted victims should be able to use tort law to sue their insulters by claiming that their personality right protected by the Thai Constitution is harmed. Thus, victims who are not insulted by one of the forms criminalised by the Criminal Code should be able to sue their insulters under tort law. For example, a person who is insulted behind his back should be able to sue his insulter, although this person cannot prosecute his insulter under the Criminal Code. However, I already noticed that this approach may cause a problem because there might be many civil cases where victims sue their insulters under tort law for compensation from being insulted privately because this approach is not limited to the forms of insult criminalised by the Criminal Code. Nonetheless, I already proposed in section 5.5.2 that only individuals who can prove that their personality right is substantially harmed from insulters' speech can use tort law to protect their right. Therefore, it is helpful to learn the German approach to see how German law has responded to this problem.

7.4 Discussion: The German Law of Damages and its Application to the General Personality Right

As we have seen in section 7.2, the BGH recognises that the general personality right is deriving from the Basic Law, but we will see that it had not been easy for German courts to provide monetary compensation for violations of this right. This is because the BGB does not clearly allow the monetary compensation for these violations. As argued by Magnus when the BGB was draft, there was a fear that:

> [T]he mischief of the former *actio iniuriarum* (an action which allowed for monetary damages also in case of defamation and insult) would be revived, whereas it had been because this cause of action was deemed to have led to many vexatious proceedings.[834]

Magnus also provides a similar argument as Whitman that monetary compensation would contradict the perspective of the upper class of German people resisting compensating the violation of honour through money.

When the BGH decided to provide monetary compensation for an infringement of the general personality right for the first time in *Herrenreiter* (1958) (section 7.4.2), the Court explained that this infringement mainly constitutes 'immaterial damage' or 'non-pecuniary loss'. But the Court acknowledged that s 847 BGB (already repealed) allowed monetary compensation to be granted for this damage or loss only in the specific cases which did not include the infringements of personality rights. Nonetheless, the Court granted money damages by interpreting that repealed section to include a personality right violation. Section 7.4.2 will show that the BGH had to find reasons to support its decision for providing monetary compensation for this violation.

Markesinis points out that the BGH later changed its reasoning for providing money damages in *Ginseng Root* (1961) and *Caroline von Monaco I* (1995)[835] (sections 7.4.3-

[834] Magnus (n819) 293 (citing B Mugdan, *Die gesammten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich* vol II (Decker 1899) 517)
[835] Markesinis (n76) 44

7.4.4). He suggests that the method used by the German courts to provide a remedy to injured parties to make this protection completed was 'less straightforward.'[836] He asserts that the BGH has to interpret the law '*contra legem* to allow that kind of monetary compensation.' But he points out that the FCC already confirmed that the interpretation of the BGH to provide monetary compensation does not violate the constitutional order in *Soraya* (1973).[837]

To understand how the BGH provides monetary compensation for violations of personality right, I will discuss the general rule of damages in German law in section 7.4.1 to describe the rules of damages applicable to violations of the general personality right. And I will discuss case law to show how the BGH was able to confirm that monetary compensation can be granted for those violations in sections 7.4.2-4.

7.4.1 The Law of Damages

Magnus and Coors point out that the general principle of German law on damages is '*Naturalrestitution* ('natural restitution', i.e. restoration in kind),'[838] which was codified into s 249(1) BGB which states:

> A person who is liable in damages must restore the position that would exist if the circumstance obliging him to pay damages had not occurred.[839]

Magnus explains that the principle of natural restitution means: 'loss should be made good *in natura*; the debtor owes the injured person restoration in kind.'[840] He asserts that this principle applies to every type of infringement, whether it is material or immaterial loss. Although this section is stated in the general part of the law of obligation, this section

[836] ibid
[837] ibid; The detail of Soraya (1973) can be found in BUNDESVERFASSUNGSGERICHT (FIRST DIVISION) 14 FEBRUARY 1973 BVERFGE 34, 269 = NJW 1973, 1221 = JZ 1973, 662) ('*Soraya*') translated by H Baade in Basil Markesinies and Hannes Unberath, *The German Law of Torts: A Comparative Treatise*, (4th edn, Hart Publishing 2002), 404
[838] Magnus (n819) 292; Corinna Coors, 'Restoring Lost Honour: The Assessment of Libel Damages in Germany' (2016) 27 Ent L R 128, 131
[839] Section 249 of the BGB is translated by Langenscheidt Translation Service (n373)
[840] Magnus (n819) 292

is applicable to breach of contract and/or the commission of a tort, as pointed out by Markesinis.[841]

Handford points out that s 249 also covers 'various orders of an injunctive nature, such as an order for the retraction of a defamatory statement, or an *Unterlassungsklage* restraining further harm if such harmed is imminent.' [842] The *Unterlassungsklage* is explained by Gutteridge and Lipstein as 'an action in the nature of an injunction.'[843] They assert that a person may apply to the court for the *Unterlassungsklage* to prohibit the defendant from publishing the defamatory statement in the future if it is likely that the act will be repeated in the future.[844]

Regarding monetary compensation, Magnus points out that the BGB does not allow this kind of compensation for immaterial loss in every case, because the general rule for requesting money damages for the loss stated in s 253(1) BGB:[845]

> Money may be demanded in compensation for any damage that is not pecuniary loss only in the cases stipulated by law.[846]

Thus, money damages can be acquired for immaterial or non-pecuniary loss when a legal provision clearly allows. The Federal Constitutional Court (FCC) in *Soraya* (1973) pointed out that s 847 was clearly regarded by the draftsmen of the BGB as 'an exception to the general rule laid down in s 253.'[847] Section 847 was moved to be s 253(2) when the BGB was amended in 2002 as pointed out by Magnus.[848] Section 253(2) states:

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[841] Markesinis (n76) 192 (stating: 'This provision is to be found in the general part of the law of obligations quite simply because an obligation to pay compensation can arise from brearch of contract and/or the commission of a tort. German authors, judges and practitioners thus apply it directly to tort situations without hesitation.)
[842] Handford (n799) 854
[843] Lipstein and Gutteridge (n684) 347
[844] ibid 348
[845] Magnus (n819) 292
[846] translated by Langenscheidt Translation Service (n408)
[847] *Soraya* (n837)
[848] Magnus (n819) 297

> If damages are to be paid for an injury to body, health, freedom or sexual self-determination, reasonable compensation in money may also be demanded for any damage that is not pecuniary loss.[849]

Magnus describes that s 847 (or now s 253(2)) was a provision which had allowed monetary compensation for non-pecuniary loss for the specific cases since the Code was enacted.[850] This section, he particularly asserts, did not allow the monetary compensation for non-pecuniary loss from the violation of a person's honour or reputation. The reasons for limiting the monetary compensation in this case were already mentioned in section 5.2.3. But after the BGH recognised the general personality right, the BGH in *Herrenreiter* confirmed that the claimant whose personality right was violated could claim money damages from the violation, although the infringement caused immaterial damages. Therefore, s 253(1) has not been able to restrict monetary compensation for the general personality right violations.[851]

It can be seen that the current s 253(2) does not include a violation to personality right as a condition for requiring monetary compensation for the non-pecuniary loss. This may imply that the 2002 reformation overruled the case law on the general personality right, but Magnus points out: 'it is common ground that the reform did not intend to interfere in any way with the case law on the general personality right.'[852] Therefore, monetary compensation for non-pecuniary loss for personality right infringements can be awarded, although s 253(2) (the current version of s 847) does not include the infringement of this right as a condition for requiring monetary damages for non-pecuniary loss.[853]

The above discussion shows that monetary compensation has not been the primary remedy in German civil law; the law mainly aims at 'natural restitution' or restoration in

[849] translated by Langenscheidt Translation Service (n408)
[850] Magnus (n819) 293
[851] ibid 294
[852] ibid 298 (citing Bundestags-Drucksache 14/7752 p 25)
[853] See Coors (n828) 132 (Coors mentions many cases after 2002 which German courts provide monetary compensation for violations of the general personality right such as: 'In 2004, Princes Caroline's daughter received compensation of 150,000 DM for an unauthorised publication of baby photograph. In 2009, the German court granted €400,000 to the Princess Madeline of Sweden acquired as compensation from numerous false reports, title stories and photomontages about the princess.)

kind. Furthermore, there had been a perspective against monetary compensation for non-pecuniary loss for personality right violations when the BGB was drafted. Thus, the BGB has not stated these violations as cases where monetary compensation for that loss can be acquired. Although the law of damages was reformed in 2002, the BGB did not addressed this issue. Therefore, the BGH has had to develop its reasoning for providing monetary compensation for non-pecuniary loss from personality right violations as we will see in the case law discussed in sections 7.4.2-4 immediately below.

7.4.2 *Herrenreiter*

Herrenreiter[854] is the first case in which the BGH granted monetary compensation for non-pecuniary loss for personality right violations.[855] The Court had to consider whether monetary compensation could be provided for the claimant whose photograph was used in a poster without his permission to advertise sexual potency medicine.[856] The Court did not identify the aspect of personality right violated in this case: the Court simply ruled that the company violated his 'general personality right' by using the claimant's photograph without his permission.[857] The right violated in this case may be regarded as personal reputation. Thwaite and Brehm uses this case as an example of a defamation case.[858] As shown in section 7.2.2, the general personality right under German civil law includes many aspects of personality right. And it therefore does not matter which type of personality is violated since the German civil law uses the same rule to protect every personality right.

Unlike the claimant in *Schact*, the claimant in *Herrenreiter* claimed for 'the damages which he suffered as a result of the dissemination of the poster.'[859] Both the LG and OLG

[854] Bundesgerichtshof (First Civil Senate) 14 February 1958 BGHZ 26, 349 = NJW 1958, 827 (with partially approving and partially critical note by Larenz in JZ 1958, 571 and an approving article by Coing in JZ 1958, 558) ('*Herrenreiter'*) in Markesinies (n76) 287-291
[855] See Markesines (n76) 44 (stating: the *Herrenreiter* case (case 13) – the Court argued in favour of the analogical extension of the old s 847 (no s 253 (2) BGB) and granted damages for the *first time* (emphasis added))'
[856] *Herrenreiter* (n854) 287
[857] ibid
[858] Thwaite and Brehm (n76) 343
[859] *Herrenreiter* (n854) 287

ordered the defendant to pay damages to the claimant.[860] The defendant appealed to the BGH. Although the BGH dismissed the appeal, the Court said that it did not agree with the reason used by the lower Courts to award monetary compensation for the claimant. Both Courts used 'a method of assessing damages developed for breaches of copyright' to assess the damages in this case.[861] The Courts considered 'the license fee which he [the claimant] could have demanded if a suitable contract had been arrived at between the parties.' [862]

The BGH found that the claimant did not suffer 'any tangible pecuniary loss.'[863] The Court explains that the claimant demanded:

> satisfaction for the fact that a widely disseminated poster, by making him, one might almost say, 'ride' for the purpose of advertising of defendant's tonic – and a sexual one at that – humiliated him and made him an object of ridicule.[864]

The BGH states: 'it was absurd to award damages on the basic of a fictitious license agreement.'[865] Therefore, the BGH found that the claimant's claimed could not be granted by the reasoning used by the OLG. The BGH then found that the claimant did not suffer any pecuniary damage; thus, the Court had to consider whether the claimant was able to request monetary compensation for non-pecuniary loss for the personality right violation. The Court confirmed that he could claim the compensation because of these three main reasons. First, the Court acknowledged that the Basic Law Articles 1 and 2 constitute the general personality right which is protected under s 823(1) as 'another right.' These constitutional articles 'are directly concerned with the protection of inner realm of personality.'[866] A violation of this protection mainly constitutes 'immaterial damage,'

[860] ibid 288
[861] ibid
[862] ibid (explanation added)
[863] ibid 289
[864] ibid
[865] ibid
[866] ibid 289-90

expressed in a degradation of personality.'[867] The Court asserted that it is a requirement from the Constitution to protect this inner realm.

Since the violation caused immaterial damage, secondly, the Court had to determined s 847, the applicable rule for immaterial damage at that time. This section, the Court explained, allowed monetary compensation for non-pecuniary loss in cases of, *inter alia*, 'deprivation of liberty.' The Court acknowledged that the deprivation had been interpreted as restricting freedom on bodily movement, but the Court extended the application of s 847 to include deprivation of inner freedom. The BGH said that the claimant had inner freedom because his personality right in his image concerned his freedom to decide when he wanted to publish his image.

Finally, the BGH used these two following reasons to support the conclusion that the deprivation of inner freedom was included in s 847, and the Court can provide monetary compensation for non-pecuniary loss from this deprivation.[868] First, the BGH said that even before the Basic Law came into force an injury to liberty under s 847 was often interpreted to include 'any attack on the undisturbed exercise of the will.'[869] Since the Basic Law protects the general personality right by recognising human dignity and the right to free development of the personality, the interpretation of the BGB that civil law cannot protect personality rights should be changed.[870] Thus, it is unacceptable to protect the inner freedom without providing some compensation for immaterial damage.[871] Secondly, the BGH said that the deprivation of inner liberty is similar to deprivation of bodily freedom because both of them render 'natural restitution impossible'.[872] The BGH therefore said that there was no reason to forbid the interpretation of s 847 to include injuries to the right to free exercise of the will.[873]

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[867] ibid 290
[868] ibid
[869] ibid
[870] ibid
[871] ibid
[872] ibid 418; See Magnus (n819) 292 (explaining 'nature restitution' is a principle adopted into s 249 BGB. Natural restitution means 'the loss should be made good *in natura*; the debtor owes the wronged individual restoration in kind.')
[873] ibid

This decision shows that it is possible under German law for an injured party whose personality right is infringed to claim monetary compensation for non-pecuniary loss, although s 847 did not include an infringement of personality right as a case where money damages can be granted for the non-pecuniary loss. However, Magnus points out that the reasoning given in this case was not used by the BGH in later cases.[874] This point is shown in the FCC's decision in *Soraya* (1973), which the FCC pointed out that the BGH still reaffirmed the result of *Herrenreiter* but has no longer provided monetary compensation for the non-pecuniary loss by extending an interpretation of s 847.[875] The FCC asserted that the extension was questionable, because the general rule to request monetary compensation for this loss stated in s 253 (now s 253(1)) forbids the extending interpretation.[876] As we will see in the next sections, the BGH has used different reasoning to provide monetary compensation for non-pecuniary loss from personality right violations.

7.4.3 *Ginseng Root*

This case was translated by Lawson and Markesinis.[877] The approach used by the BGH to provide monetary compensation in this case was different from that in *Herrenrieter*. The BGH in *Ginseng Root* did not focus on s 847 but on s 253 (now s 253(1)) which allows monetary compensation for immaterial loss only in the cases designated by law. The Court did not provide this compensation by extending an injury to freedom as in *Herrenreiter*, but the Court explained that it had to protect the general personality right which derives from Articles 1(1) and 2(2) of the Basic Law.

The defendant in *Ginseng Root* was a company which dealt in a tonic containing ginseng, which is used as a stimulant.[878] In the defendant's advertisement for this tonic, the

[874] Magnus (n819) 294
[875] *Soraya* (n837) 404
[876] ibid (stating: 'This analogy argument was questionable, because the word 'only' in s 253 explicitly prohibits an analogical extension of provisions, such as s 847, which engraft exceptions upon the general rule of s 253.')
[877] Bundesgerichtshof (Sixth Civil Senate) 19 September 1961 BGHZ 35, 363 = NJW 1961, 2056 (with approving notes by W Rotelmann = NJW 1962, 736 and H Hubmann = *VersR* 1962, 350, 562) ('*Ginseng Root*') translated by FH Lawson & B S Markesinies in Markesinies and Unberath (n791) 420
[878] ibid

claimant was referred to as 'an important scientist expressing an opinion on its value.' The claimant, however, was a law professor who had brought a ginseng root from Korea for his colleague, a pharmacology professor.[879] The claimant claimed:

> [H]e had suffered an unauthorised attack on his personality right and that the advertisement gave rise to the impression that he had, for payment, issued an opinion on a controversial topic in a department of knowledge not his own, and unprofessionally lent his name to adverting a doubtful product.[880]

The LG awarded damages to the clamant. The defendant's appeals to both OLG and BGH were unsuccessful. The BGH found that the defendant unlawfully disparaged the claimant's personality right, by saying:

> The reference to research by the plaintiff, which lacked any objective foundation, was in the circumstances calculated to make him an object of ridicule in society and lessen his scholarly reputation. Moreover, he was bound to feel outraged by the way his name was used in advertising a preparation recommended as a sexual stimulant.[881]

The BGH also found that the facts of this case were similar to that of *Herrenreiter* because the claimants of both cases did not claim for material damages. The BGH mentioned that the claimant in the previous case was awarded 'immaterial damages' which has a satisfactory function for compensating the violation of his personality right.[882] The BGH asserted that it agreed that 'satisfaction may be awarded to a person affected by the blameworthy infringement of his personality right.'[883] However, the BGH did not use the same approach as the previous case.

The BGH provided monetary compensation by pointing out that the high value of the protection of human personality under Articles 1 and 2 of the Basic Law had not been

[879] ibid
[880] ibid
[881] Ibid
[882] ibid 421
[883] ibid 423

recognised when the BGB was originally promulgated.[884] When the BGH recognised the general personality right and protected it under s 823(1), the Court 'drew for civil law purposes the consequences resulting from the rank the Constitution assigned to the worth of human personality and the protection of its free development.'[885] A problem the BGH had to deal with was that BGB s 253 (now s 253(1)) only allows monetary compensation for non-pecuniary loss in cases expressly stated by the law, which do not include a violation of personality right. From this limitation, the BGH asserted that the protection of general personality right would be incomplete if there was no suitable sanction for the violation of this right. Since Article 1 requires the public power to protect the sacred dignity of the human being, and Article 2(1) recognises the right of a human being to free development of his personality at the head of the fundamental right, the BGH described that it is unacceptable to protect only personality rights mentioned in Art 2(2).[886] This limitation would imply that the 'civil law does not pay attention to the value-decision of the Constitution.'[887] The limitation of damages for immaterial loss from violations of general personality right would mean 'injury to dignity and honour of a human being would remain without any sanction of the civil law, which deals with the disturbance of essential values and makes the doer of the injury owe satisfaction to the victim for the wrong done to him.'[888]

To support its decision to provide monetary compensation, the Court compared injuries to body, health and freedom to an injury to the general personality right.[889] The BGH said that the factual aspect of an injury to the general personality right is not as clear as the injuries to body, health or freedom.[890] The BGH said that the violation of general personality rights needs to be balanced against 'the competing rights of the 'offender', among which the right to free expression of opinion deserves particular attention.'[891]

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[884] ibid 421
[885] ibid
[886] ibid 422; The Basic Law, Article 2(2) 'Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law.' translated by Tomuschat and others (n74)
[887] ibid
[888] ibid
[889] ibid 422
[890] ibid
[891] ibid

Thus, it is not easy to identify which action is a compensable violation of personality right.[892] The BGH noticed that it would be danger if the BGH allows everybody who is affected by the violation to acquire compensation for immaterial loss because a person injured insignificantly may inappropriately claim compensation to make a gain.[893]

The BGH explained that monetary compensation provided to the injured person from violations of the personality right mainly has the function of providing satisfaction.[894] A person who is entitled to receive monetary compensation to satisfy their injury must be the person 'whose injury cannot otherwise be redressed.'[895] This is generally the case: 'when the doer of damage is blamed for a serious fault or when an injury to a personality is objectively significant,' as explained by the BGH.[896] Therefore, the BGH concluded that civil law will only protect the personality right when this right is seriously disturbed.

The personality right violation in this case, the BGH found, was serious because the violation was 'a wanton attack on the personality right of another person out of a desire to increase the force of one's commercial publicity.'[897] The BGH said that the injuries to the claimant were significant because readers who saw the defendant's advertisement may assume that the claimant allowed the claimant's name to be used for money consideration.[898]

This case has three interesting issues. First, the defendant's advertisement can be seen as an injury to the claimant's reputation as the BGH described that the defendant's advertisement made him 'an object of ridicule in society and *lessened his scholarly reputation*.'[899] However, the court did not impose the civil liability on the defendant from s 823(2) in conjunction with the criminal law of defamation. The liability was imposed

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[892] ibid
[893] ibid (stating: 'if for every overstepping of the limits, however petty, compensation for immaterial loss were to be awarded to the person affected, there would a danger that unimportant injuries would be used inappropriately to make a gain.')
[894] ibid (stating 'In injuries to the general personality right the satisfaction function of damages for pain and suffering advances into the foreground as that of compensation recedes.')
[895] ibid
[896] ibid
[897] ibid
[898] ibid 422-3
[899] See the accompanying text of footnote 881 (emphasis added)

because the defendant seriously violated the claimant's personality right. This case confirms my assessment that the general personality right in German law is a much wider right than reputation. This is because not only does the advertisement harm the reputation of the claimant, but it also makes him humiliated as 'an object of ridicule.'

Secondly, the BGH provided a new reasoning for awarding monetary compensation for the injuries of personality right violations: since a personality right violation is a constitutional right infringement, the Court has a duty to protect this right by providing monetary compensation. Therefore, s 253 (now s 253(1)) could not prevent that Court from providing the compensation. This monetary compensation as described by the Court has the satisfactory function and this compensation will be provided only to cases where the injury to personality right is serious. The *Ginseng Root* case shows that it is allowed to grant monetary compensation for non-pecuniary loss from a personality right violation, but the reasoning for providing this compensation must be convincing.

Finally, the Court pointed out that the violation needs to be balanced against other rights which include the right to free expression.[900] This point shows that the personality right is not absolute, but it needs to be balanced against other interests.[901]

7.4.4 *Caroline of Monaco I*

The previous section shows that the BGH in *Ginseng Root* said that monetary compensation has the satisfactory function, and the compensation can be provided only when the violation was serious. The BGH in *Caroline of Monaco I*[902] added that monetary compensation also has a preventive function.

The defendant in this case published magazines in Germany. Two of these magazines contained 'a completely fictitious interview with the claimant, Princess Caroline of Monaco, along with an article containing false statements about her intentions to

[900] See the accompanying text of footnote 891
[901] The German approach to balance between protecting the personality right with other rights will be discussed in detail in chapter 8.
[902] Bundesgerichtshof (Sixth Civil Devision) 11 November 1995 BGHZ 128, 1 = NJW 1995, 861 ('*Caroline of Monaco I*') translated by Irene Snook in Markesinis (n76) 621-624

remarry...'[903] Among other requests, the claimant sought monetary compensation for non-pecuniary damage to her right to personality. The OLG ordered the defendant to pay around €15,000 as damages, but the claimant considered this compensation to be too low and so she appealed.

The BGH acknowledged that the defendant had already been ordered to print the two corrections, but the Court found that this order did not limit the claimant from claiming for money compensation.[904] The Court opined that it would determine the facts of each case to decide whether the order for retraction can limit the claimant's right to claim monetary compensation. The Court explained that a claimant still has his or her right for monetary compensation in these cases: (i) the infringement aimed at 'the very essence of one's personality'; or (ii) the claimant has to obtain a corrective statement by a court order because the wrongdoer refuses to retract.[905] In the present case, the BGH found that the claimant's personality right was seriously injured by 'the contents of the publication, their distribution numbers, and the defendant's motives and degree of culpability.'[906] Furthermore, the claimant had to bring her case to the court to order the defendant to retract and correct.[907] The claimant therefore was entitled to receive the monetary compensation, even though the defendant was ordered to print two corrections. These corrections were not enough for satisfaction of the wrong done to the claimant.

To confirm that the claimant was entitled to receive monetary compensation, the BGH uses the similar reasoning as in *Ginseng Root,* which is monetary compensation for the infringement of the general personality right is not compensation under s 847 BGB (now s 253(2)). The compensation is a legal form of redress which is based on the protective mandate enshrined in Articles 1(1) and 2(1) Basic Law. This monetary compensation aims to make the victim satisfied. And the BGH also pointed out that the monetary compensation also has another purpose which is preventive.

[903] ibid
[904] ibid (stating: 'Some legal authors are of the opinion that such retraction usually suffices to remove the breach of the right of personality [references omitted].')
[905] ibid 621-2
[906] ibid 622
[907] ibid

The BGH concluded that the OLG's view was too narrow because the OLG did not consider the fact that the defendant violated the claimant's personality right for personal gain. Nor did the OLG consider the preventive purpose. The BGH considered that the defendant deliberately used the claimant's personality as a means to increase the circulation of its publication and pursuing its own commercial interest. The BGH said that the monetary compensation should make the defendant feel unpleasant, otherwise the claimant's personality right would not be protected from 'irresponsible compulsory commercialisation of her personality.'[908] Therefore, the BGH held:

> An order to pay monetary compensation can only properly serve the purpose of preventing … required by the right of personality, where the amount of compensation due represents a correlation to the fact that the right of personality was infringed for reasons for personal gain. [909]

Therefore, the BGH quashed the OLG's decision and referred the case back to lower court. The BGH also noted that the monetary compensation can be seen as a real deterrent. But the BGH said that the monetary compensation for violation of personality right cannot be too high otherwise the freedom of the press will be unduly limited.[910] Markesinis reports that the princess was finally awarded DM 180,0000 (€90,000) instead of DM 30,000 (€15,000).[911]

This case has two interesting points. First, not only does civil law have the satisfactory function for the victim, but the civil law also has a function to prevent the infringement. Secondly, the BGH in this case also mentioned that monetary compensation for personality right infringement cannot be too high, otherwise the compensation will unduly interfere with the freedom of press. This point confirms my argument that the German Court has to balance between protecting the personality right with other rights.

[908] ibid 622
[909] ibid
[910] ibid
[911] Markesinis (n76) 624

7.5 Analysis: Which Aspect of the German Law of Damages Can Improve Thai Law?

The first thing to point out is the problematic section (s 847 of the BGB) was copied into the Thai Civil and Commercial as s 446, as pointed out by Supanit.[912] The content of s 446 is similar to s 847[913] of the BGB. Section 446 states:

> (1) In case of causing damage to the body or heath of a person or in case of causing a person to be deprived of liberty, the injured person may also claim compensation for other damage which is not pecuniary loss. This claim is not transferrable and does not devolve upon heirs unless its acknowledgement has made a contract, or an action has been instituted in pursuance thereof.
>
> (2) A woman who is injured by the commission of an immoral crime is entitled to make a similar claim.[914]

Although Thai law has had the similar rule as German law, the Supreme Court of Thailand did not have any issue when it provided monetary compensation for the insulted victim since 1944 in the *Decision No 124/2487*.[915] Nor did the Court have a problem when it provided monetary compensation for the person whose privacy right was invaded in 2015 in its *Decision No 4893/2558* (2015).[916] This may be because s 253(1) of the BGB was not copied into the Civil and Commercial Code. There is no rule to limit monetary compensation for non-pecuniary loss in Thailand.

Section 446(1) is described by Supanit as a rule which allows the injured party under s 446(1) and the injured woman under s 446(2) to claim monetary compensation for non-pecuniary loss apart from the compensation which they are entitled to claim. To understand this description, the structure of the law of damages under Thai tort law must be explained. Section 438(1) quoted in section 3.3.3 is the general rule for damages. The injured parties can claim compensation from their wrongdoers by using this rule. Thai law

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[912] Supanit (n217) 265
[913] The BGB, s 847 is quoted at footnote 491 above.
[914][914] translated by Nanakorn (n79) 204
[915] See section 3.3.1
[916] The *Supreme Court Decision No 4893/2558* (n220)

also provides the specific rules for each type of injuries. The injured party whose reputation was injured, for example, is entitled for the compensations as stated in s 447 and discussed in section 4.4.3 apart from the monetary compensation provided under s 438(1).

In case of injury to body or heath, there is a specific rule for the injured party to claim monetary compensation as stated in s 444, which states:

> In the case of causing damage to the body or heath, the injured person is entitled to compensation for expenses incurred by him and also damages for total or partial loss of ability to work both at the present time and at the future time.
>
> If, at the time of rendering judgement, it is impossible to ascertain the extent of damage, the Court may enter in the judgement a reservation of the right to revise such judgement within a period not exceeding two years.[917]

Therefore, an injured party whose body or heath was injured can claim the compensation as stated in s 444. And this injured party can claim monetary compensation for non-pecuniary loss under s 446, because s 446 is another specific rule which allows the injured party to claim apart from ss 444 and 438.

Similarly, s 446 allows an injured party whose liberty was deprived or the injured woman under s 446(2) to claim the same compensation for non-pecuniary loss apart from the compensation which they can claim under the general rule.[918]

The interpretation of s 446 implies that this section will not cause a problem to injured parties whose personality right is harmed because the Supreme Court can use the general rule under s 438(1) to provide monetary compensation for violations to personality rights. Section 446 is seen as a specific rule which provides an additional compensation

[917] translated by Nanakorn (n79) 203

[918] See the *Supreme Court Decision No 805/2487* as an example of monetary compensation for non-pecuniary loss for deprivation of liberty; See the *Supreme Court Decision No 2573/25*18 as an example of monetary compensation for the injured woman under s 446(2)

to the injured party in cases stated in s 446. This section is not prescribed as a prohibition for the Court to provide monetary compensation for non-pecuniary loss for personality right violations as in German law. Therefore, Thai law does not face the same problem as German law when the Thai Court has to provide monetary compensation for insulted individuals.

Though Thai law does not have a problem for providing monetary compensation to insulted victims, there are two aspects which Thai law in civil law aspect can learn from the German law, especially to solve the problem I raised in section 3.3: there might be many civil cases where victims sue their insulters for insults which are not criminalised by the Criminal Code.

By learning from the German approach, first, the problem I raised might not be as serious as I worried. This is because Thai law does not have to choose between using the general principle of tort law with (i) the offence of insult or (ii) the constitutional provision. The right of injured parties who are insulted by the forms criminalised by the Criminal Code (such as the claimant in *Decision No 124/2487* (1944)) should remain the same because I do not propose to decriminalise insults. As we have seen, in *Brandt*[919] mentioned by Handford, though the BGH already used s 823(1) with the Basic Law in other cases, the BGH still used s 823(2) with s 185 in this case to impose civil liability on the defendant. There is no requirement for the violation to be serious. Therefore, the right of the insulted victims, which they currently have, will not be impacted by my proposal to use tort law with the constitutional provision.

The only persons who have to use the general principle of tort law with the constitutional provision are those being insulted outside the scope of criminal law. For example, those who are insulted by telephone or those who are insulted behind their back. These are cases which require the boundary. As I argued an insulted victim should only be allowed to sue his insulter when he can prove that his personality is substantially harmed by the insult as proposed in section 5.5.2. The German approach on *Ginseng Root* and *Caroline of Monaco I* can show how to set the boundary of the personality which is substantially

[919] See the accompanying text of footnotes 830-831

harmed because the BGH ruled that the monetary compensation in these cases was provided because the personality right was seriously injured. In the former case, the personality right was seriously harmed because the violation was done for the commercial purpose.[920] And the BGH in the latter case considered the content of the publication, the number of distributions, the motive and degree of culpability of the defendant to find that the claimant's personality right was seriously injured.[921] These cases suggest that a violation of the personality right was not the only factor which made the violator civilly liable to pay monetary compensation; there are also *the circumstances which make the violation serious*. This lesson suggests that in Thai law insulted victims who have to use the general principle of tort law with the constitutional provision to protect their personality right must be required to show the circumstance which makes the violation serious apart from showing that their personality right is harmed under the requirement of s 420 of the Civil and Commercial Code. Insulted victims in the examples in section 5.5.2, in my view, can show this circumstance. As for the victim who is insulted by telephone many times, he can prove to the Court of the circumstance that the insulter had called to insult him. Since the insults were done many times, it would not be hard for the victim to record the calls from his insulter as evidence to show the Court. And as for the victim who is insulted behind his back which lead to a third party to boycott the victim. The victim can prove to the Court of the circumstance that a third party actually believed the insulting word and boycotted the victim by asking the third party to testify to the Court. These victims should be able to claim compensation from the insulters by showing these circumstances. And with my proposed amendment, the Court can order the insulters to apologise to the victims as a reasonable action to heal the harm to the victim's personality right.

Secondly, the German approach shows that the protection provided to personality right must be balanced with other rights. Thus, when the Thai Court considers whether an insulted victim is entitled to be compensated, the Court should consider a balance between protecting the personality right of the victim and the competing right of others, as shown in *Gingseng Root* and *Caroline von Monaco I*. Therefore, an individual, who is

[920] See the accompanying text of footnote 897
[921] See the accompanying text of footnote 906

insulted during a discussion of a public interest matter, may not be able to claim monetary compensation. For example, if the former prime minister in the *Supreme Court Decision No 1861/2561*[922] sued his defendants by using tort law because the defendants compared him to a ghoul in a political discussion. Thai Court must consider whether the former PM's personality right or the defendant's right to free expression should be protected. This case, however, will be easily decided if the Thai *Criminal Code* is amended as I propose. As we have seen in section 4.4.2, the amendment will regard individuals who are able to claim the justification under s 329 of the Criminal Code as those who do not unlawfully *injure the right* of others. Consequently, the former PM would not be able to claim for monetary compensation in this case.

7.6 Conclusion

This chapter shows that German civil law protects insulted individuals by using s 823 in conjunction with the general personality right as deriving from the Basic Law. The general personality right covers many aspects of the personality right including the personal honour as the interest protected under s 185 and right to privacy. These personality rights are protected under the same rules. The German approach is similar to the approach that I proposed in section 3.3. However, the German approach also shows that Thai law does not have choose between using the general principle of tort law with (i) the offence of insult or (ii) the constitutional provision. As long as Thai law penalises insults, insulted victims can use the general principle with the criminal offence. The only insulted victims who have to use the constitutional provision are those being insulted outside the scope of the criminal law. As I already acknowledged in chapter 3, there might be a problem from this approach because it will be unclear which form of insult can incur civil liability on insulters. I proposed my solution in chapter 5 above that insulted victims should only be allowed to use tort law to sue their insulters when they (the victims) can prove that their personality is substantially harmed by the insult. The lessons from German law in *Ginseng Root* shows that the substantial harm can be proved if there is a circumstance which makes the harm substantial such as the insulted victim was insulted many times by telephone. Thus, the Thai Court should allow insulted victims, who use the general

[922] The *Supreme Court Decision No 1861/2561* (n342)

principle of tort law with the constitutional provision, to request compensation only when they can prove that their personality right was seriously injured.

Moreover, the German approach since *Schacht* shows that the protection provided to a personality right should be balanced with the right to free expression. Thus, the protection provided to the personality right is not absolute. This approach, if adopted into Thai law, will require the Thai Court of Justice to consider the wrongdoer's right to free expression before it decides to protect the personality right of the victim. This approach may solve the problem I raised in section 2.3.2.1. I questioned whether the Court had concerned the right to free expression of defendants before it imposed legal sanctions on them. The detail of this German approach will be discussed in more detail in the next chapter.

Chapter 8 How Does German Law Balance between Protecting an Insulted Individual with the Right to Free Expression? Should Thailand Adopt this Approach?

8.1 Introduction

This is the final chapter which discusses the German legal approach to protect insulted individuals. Not only can this issue be discussed in criminal and civil law as shown in chapters 6 and 7, but the issue in German law can also be viewed from the constitutional perspective. As we have seen in chapter 7, the Basic Law (the German Constitution) is engaged in disputes between insulters and their victims. Victims are protected by the general principle of tort law in conjunction with the general personality right deriving from the Basic Law Articles 1(1) and 2(1), but as this chapter will show some insulters may claim that their right to insult is protected under Article 5 of the Basic Law, which protects the right to free expression.[923] The FCC therefore has a role in these disputes. This is because the Basic Law Article 93(4a) allows an individual in the disputes to file the constitutional complaint to FCC if he or she believe the decision of a court in criminal or civil matters does not sufficiently protect their constitutional right.

Article 93(4a) empowered the FCC to rule 'on constitutional complaints, which may be filed by any person alleging that one of his basic rights… has been infringed by public authority.' [924] Under this paragraph, the complaint can be 'brought against any governmental action, including judicial decision, administrative decrees, and legislative acts,' as explained by Kommers and Miller.[925] They also point out that the person filing the complaint must 'exhausting all available means to find relief in the other courts.'[926] If

[923] In criminal law, see *Strauss Caricature* (section 8.3.4); In civil law see *Schacht* (section 7.2.1)*, Gingseng Root* and *Caroline of Monaco I* (sections 7.4.3-4)
[924] The Basic Law, Article 94 'The Federal Constitutional Court shall rule…(4a) on constitutional complaints, which may be filed by any person alleging that one of his basic rights or one of his rights under paragraph (4) of Article 20 or under Article 33, 38, 101, 103, or 104 has been infringed by public authority' translated by Tomuschat and others (n74)
[925] Kommers and Mille (n76) 12
[926] ibid 11; see The Federal Constitutional Court Act (Bundesverfassungsgerichts-Gesetz, BVerfGG), s 90(2) 'If legal recourse to other courts exists, the constitutional complaint may only be lodged after all remedies have been exhausted. However, the Federal Constitutional Court may decide on a constitutional complaint lodged before all remedies were exhausted if the complaint is of general relevance or if prior recourse to other courts were to the complainant's severe and unavoidable

the FCC finds that the person's constitutional right is violated by the judicial decision, Dannemann points out that the decision can be quashed.[927] Because of this authority, the decision of a court in criminal or civil matters can be reviewed by the FCC.

This chapter will show that the FCC has used this authority to balance between laws protecting personality rights and other constitutional rights. First, I will discuss *Lüth*, an important case of the FCC and literature which analysed this case in section 8.2. This case involved the constitutional right to free expression as protected under Article 5(1) of the Basic Law as will be quoted below.[928] This constitutional right finds its limits '*in the provisions of general laws, in provisions for the protection of young persons and in the right to personal honour'* according to Article 5(2).[929] In *Lüth*, the FCC balanced a provision of general laws with the right to free expression by ruling that the laws under Article 5(2) cannot easily limit the right to free expression. The laws under Article 5(2) must be interpreted compatibly with the Basic Law.

Secondly, I will show how *Lüth* was applied in cases involving a conflict between personality rights and the right to free expression in section 8.3, which will clearly show the FCC's role in this conflict. The case law will show the German approach to balance laws protecting personality rights with other constitutional rights. The right to free expression is not easily limited by laws which protect a personality right. The FCC has repeatedly asserted that the free expression right is important for a democratic society. However, the case law will also show that this right is not absolute because it may be limited when it is necessary to protect the personality right from being seriously harmed.

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disadvantage.' translated by Christoph, 'Federal Constitutional Court Act (Bundesverfassungsgerichts-Gesetz, BVerfGG)' (*German Law Archive*, 16 August 2013) <https://germanlawarchive.iuscomp.org/?p=221 > accessed 8 April 2021

[927] Gerhard Dannemann, 'Constitutional Complaints: the European Perspective' (1994) 43(1) The International and Comparative Law Quarterly 142, 149; See The Federal Constitutional Court Act, s 95(2) 'If the Court grants a constitutional complaint that challenges a decision, the Federal Constitutional Court shall reverse the decision; in the cases referred to in § 90 sec. 2 sentence 1, it shall remand the matter to a competent court.' translated by ibid

[928] See the accompanying text of the footnote 934

[929] See the accompanying text of the footnote 950

Finally, I will analyse whether the German approach to balance between these rights should be adopted into Thai law in section 8.4. It is important to point out in this introduction that the Thai Constitutional Court has no authority to review the Court of Justice's decision, as we have seen in section 2.3.2. Furthermore, the Constitutional Court's case law implied that the right to free expression can be easily limited by a statute.[930] Therefore, if Thai law adopts the German approach, the Thai law in this area will be significantly changed.

8.2 *Lüth*

Lüth is translated by Weir.[931] This case did not concern the personality right focused on this thesis, but its ruling has been applied in cases regarding the personality right as will be shown in section 8.3. In Quint's critical analysis of *Lüth*,[932] he says that its result was reached from a complicated and difficult doctrinal journey.[933] This case concerned the constitutional right to free expression, which mostly conflicts with the personality right. The Basic Law guarantees a person's right to free expression under Article 5(1), which states:

> (1) Every person shall have the right freely to express and disseminate his opinions in speech, writing, and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.[934]

Lüth was sued under the BGB s 826 by the distributor of the film '*Unsterbliche Geliebte*' directed by Harlan,[935] because Lüth had called for a boycott against the film. The court in civil matters in this proceeding granted the injunction against Lüth prohibiting him from

[930] The *Constitutional Court Decisions 28-29/2555* (2012) (n125) and *16-17/2549* (2006) (n130))
[931] BUNDESVERFASSUNGSGERICHT (FIRST DIVISION) 15 JANUARY 1958 BVERFGE 7, 198 = NJW 1958, 257 ('*Lüth*') translated by Tony Wier in Markesinis (n106) 275-279
[932] Quint (n76) 252-290
[933] ibid 254
[934] translated by Tomuschat and others (n74)
[935] *Lüth* (n931) 276; See Quint (n76) 252 (describing: 'Harland was a former director of a racist films under the Nazi.')

calling another boycott.[936] Since the Basic Law allows a person to file the constitutional complaint to the FCC to argue that a judicial decision violates his constitutional right, Lüth filed this complaint to the FCC claiming that his right to free expression was violated by the injunction granted by the civil court.[937] The FCC confirmed that his right was violated by the injunction.[938] The FCC provided two main reasons to support its ruling. First, the FCC ruled that he could claim his right to free expression protected under the Basic Law against another individual, because private law must be interpreted compatibly with the Basic Law (see section 8.2.1). Secondly, Lüth's right remained protected, although the right to free expression can be limited by the laws stated in Article 5(2) of the Basic Law (see section 8.2.2). As we will see, the FCC described that these laws cannot easily limit the right to free expression because these laws must be influenced by the Basic Law. This description is significant in cases regarding a personality right because a personality right protected by civil law must be balanced with the right to free expression, as we will see in section 8.3. I will further discuss *Schmid-Speigel* (see section 8.2.3) to show that *Lüth* ruling also applied in criminal matters.

8.2.1 The 'Indirect' Effect of Constitutional Values on Private Legal Relations

For the first main reason, the FCC in *Lüth* held that the basic rights must influence the rules of private law by explaining:

> [T]he Basic Law erects an objective system of values in its section on basic rights, and thus expresses and reinforces the validity of the basic rights [references]. This system of values, centring on the freedom of the human being to develop in society, must apply as a constitutional axiom throughout the whole legal system: it must direct and inform legislation, administration, and judicial decision. It naturally influences private law as well; no rule of private law may conflict with it, and all such rules must be construed in accordance with its spirit.[939]

[936] ibid
[937] *Lüth* (n931) 276
[938] ibid 275
[939] ibid 277

Quint provides the detail of this issue by explaining that German law regards 'objective' value as 'a value that is applicable in general and in the abstract' regardless of any specific relationship.[940] By asserting that the basic rights in the Basic Law have an objective value, these rights are significant and must exist in every legal relationship.[941] Because of their importance, these rights must be protected against an impairing either by the state or private individuals.[942] Therefore, s 826 BGB, as an applicable provision in this case must be interpreted consistently with the Basic Law.[943] Quint further explains that the basic rights can only influence the rules of civil law but they cannot overrule these rules.[944] The applicable constitutional principle must be used to interpret private law.[945] This doctrine imposes 'an obligation on the lower courts to use their powers creatively to alter or adapt a rule of the civil law when a constitutional value is implicated.'[946] Therefore, the constitutional right was applicable in this case, but it was only applied indirectly.[947]

In Weir's translation, the FCC stated that it must consider whether the impact of the basic rights in private law have been correctly applied by courts in private disputes.[948] The FCC also acknowledged that its authority is limited:

> [I]t is not for the BVerfG [FCC] to check judgments of civil courts for errors of law in general; the BverfG [FCC] simply judges of the 'radiant effect' of the basic rights on private law and implements the values inherent in the precept of constitutional law.[949]

The FCC acknowledged that it is neither 'a court of review' nor 'over-review' for the civil courts but the FCC asserted that it cannot forfeit its consideration on judgments which

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[940] Quint (n76) 261
[941] ibid
[942] ibid 262 (citing 7 BverfGE 198, 205 (1958) (stating: 'Because the basic rights establish 'objective' values, then, those rights must apply not only against the state exercising its authority under public law; according to the Constitutional Court, the Basic rights must also have an effect on the rules of private law which regulate legal relations among individuals.')
[943] *Lüth* (n931) 277
[944] Quint (n76) 263
[945] ibid
[946] ibid (citing 7 BVerfGE 198, 205-7 (1958))
[947] ibid 264
[948] *Lüth* (n931) 277
[949] ibid 278 (explanation added)

are not compatible with the Basic Law or leave these uncorrected judgments unchecked. This authority shows that it can review the civil court's decision if the decision disregards the influence of the constitution. It is important to note that the FCC later confirmed that the Court can also review the decision of a court in *criminal matters* as we will see in section 8.2.3.

8.2.2 A Balance of Interests

The above section shows that Lüth could claim his right to free expression against another private party. The FCC, however, recognised that Article 5(2) of the Basic Law prescribes the limitations of the free expression as follows:

> *These rights* shall find their limits in the provisions of general laws, in provisions for the protection of young persons and in the right to personal honour.[950]

'These rights' mentioned above are the rights protected under Article 5(1) quoted above.[951] The FCC had to rule whether private law such as s 826 in this case can be 'the general laws' as stated in Article 5(2).[952] To answer this question, the FCC pointed out that the right to free expression is significant to 'a free and democratic state,' since this right allows 'the conflict of opinion' which is vital to the free and democratic state. It is unreasonable for the Basic Law to construct the scope of this important right by a mere statute. As the constitutional values must influence private law, the general laws which limit this right must recognise its significant value with 'a presumption in favour of freedom of speech in all areas, especially in public life.'[953] The FCC therefore ruled that the limitations imposed by the general laws are also limited by the basic rights under Article 5(1). This ruling is described by the literature as 'a principle of reciprocal effect (*Wechselwirkung).*'[954]

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[950] The Basic Law, Art 5(2) translated by Tomuschat and others (n74) (emphasis added)
[951] The text of Article 5(1) is shown in the accompanying text of footnote 934.
[952] *Lüth* (n881) 278
[953] ibid
[954] Quint (n76) 283; Markesinis (n76) 53; Pawel Lutomski, 'Private Citizens and Public Discourse: Defamation Law as a Limit to the Right of Free expression in the US and Germany' (2001) 24(3) German Studies Review 571, 576

Having pointed out that the general laws cannot easily limit the basic rights, the FCC then confirmed that private law can be a 'general law' within the meaning of Article 5(2). The Court referred to the Weimar Constitution which regards 'general laws' as any laws:

> which 'do not forbid an opinion as such and do not envisage the expression of opinion as such,' but rather 'serve to protect a legal interest which deserves protection without regard to any particular opinion' and protect 'a community value superior to the activity of freedom of opinion.[955]

The Court acknowledged that a person's right to free expression can impact another person's interest which should be protected.[956] This interest may be protected by the general laws, which must include private law.[957] If the expression impacts the interest protected by the general laws, 'a balance of interests' must be applied to consider whether the right under Article 5(1) or the protected interest has a superior claim.[958] This is because the general laws must be interpreted by recognising the significance value of the basic rights under this Article.

'A balance of interests' mentioned by the FCC is called the technique of *ad hoc* balancing by Quint.[959] Quint clarifies how the FCC weighed between the interests of Lüth and the film's distributor. He says that the FCC found that Lüth's speech had more value than the film producer's interest because Lüth's speech was not motivated by his economic goal,[960] and the speech 'reflected his general political views concerning an issue that was essential importance for the German people.'[961] Furthermore, many people in Germany had protested against this film for these similar reasons.[962] In contrast, the Court found that the film producers only had private economic interests in distributing the film; thus,

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[955] *Lüth* (n931) 278
[956] ibid 279
[957] ibid (saying 'It is unacceptable to hold that the Basic Law protects only the expression of opinion and not its inherent or intended effect on others,…' and 'the expression of opinion is free in so far as its effect on the mind is concerned; but that does not mean that one is entitled,….., to prejudice interests of another which deserve protection against freedom of opinion.')
[958] ibid
[959] Quint (n76) 288
[960] ibid (citing 7 BVerfGE 198, 215-16 (1958))
[961] ibid (citing ibid 216)
[962] ibid (citing ibid 216-7)

there was more weight in protecting Lüth's expression than the producer's interest in generating profits. [963]

Lüth shows how the FCC balanced the right to free expression under Article 5(1) with an interest protected under a law stated in Article 5(2). The laws mentioned in Article 5(2) cannot easily limit these rights because the constitutional values must influence private law. The provision which limits the right to free expression has to recognise the significant value of the free expression. German courts which apply this provision must consider a balance of interests when there is a conflict between constitutional right and other interests. The result of a case having this type of conflict is hard to predict as commented by Lutomski, because the balancing implies that there are 'no predetermined priorities;' it requires the court to consider all the specific facts and laws of that case.[964] However, *Lüth* shows that there is a presumption to favour free expression in public discussions.[965] It also shows that economic interests are considered to be less weighty in the balance than the general public interest in free expression.

Lutomski asserts that since *Lüth* the FCC has followed this ruling to protect statements which have been made to public discussions.[966] He argues that the presumption is an important step for considering a balance of interest.[967] This presumption has continued to other cases as we will see in case law in section 8.3.

Moreover, it is interesting to notice that Article 5(2) also allows the rights under Article 5(1) to be limited by laws which protect *personal honour* (the focus of this research). German courts must also consider a balance of interests when weighing between the interests in the free expression and personal honour from all relevant facts of the case, as pointed out by Barendt. [968] Therefore, the right to free expression cannot be easily limited by laws which protect personal honour.[969] Barendt's point can be confirmed by

[963] ibid 286 (citing ibid 218-9)
[964] Lutomski (n954) 583
[965] See the accompanying text of footnote 953
[966] Lutomski (n954) 583
[967] ibid
[968] Eric M Barendt, *Freedom of Speech*, (2nd edn, OUP 2007) 214
[969] ibid

decisions of the BGH in civil matters discussed in chapter 7. The BGH already considered a balance of interests in *Schact* even before the *Lüth* ruling as the BGH acknowledged that the general personality right has a limitation which requires 'a balance of interests.'[970] Furthermore, after *Lüth*, the BGH in *Ginseng Root* and *Caroline von Monaco* also mentioned that it had to find a balance of interests between protecting personality right and freedom of expression.[971] In criminal matters, although it is unclear from *Lüth* since the ruling stated that it can review whether a *civil court* recognised the Basic Law's influence on the BGB, the FCC later ruled that it can also review whether the decision of a *criminal court* considered the influence of the Basic Law on the Criminal Code in *Schmid-Spiegel*,[972] as we will see in the next sub-section.

8.2.3 *Schmid-Spiegel*

In *Schmid-Spiegel,*[973] the FCC confirmed that Article 5(1) also influences the Chapter of Insult in the Criminal Code. This case, as described by Kommers and Miller, concerned the complainant, a high-ranking state judge, who took part in a public debate with *Der Spiegel*, a weekly magazine. The complainant delivered 'a hard-hitting speech,' in which, he noticed that '95 percent of the press in Germany was economically dependent on employers unfriendly to trade unions.' *Der Spiegel* then responded to this speech by accusing the complainant of having 'communist sympathies' in the article entitled 'Arrested on the Volga.' However, the magazine had reliable information to the contrary as noted by Kommers and Miller. The complainant later wrote an article on a daily newspaper to respond to this accusation. He said the magazine lied about him and compared its political reporting to pornography. The editor and publisher of the magazine then prosecuted the complainant.

[970] See the accompanying text of footnote 813
[971] For *Ginseng root*, see the accompanying text of footnote 891 and for *Calorine von Monaco I* see the accompanying text of footnote 910
[972] 12 BVerfGE 113 (*Schmid-Spiege*l Case 1961) in Kommers and Miller (n76) 450-453 (*Schmid-Spiegel*)
[973] ibid

In the translation of this case published on the website of the University of Texas School of Law,[974] it says the court in criminal matter found that the first part of the article written by the complainant was directed against the 'Arrested on Volga' article, but the second part (comparing it to pornography) was directed against the magazine itself. The court found the defence under s 193 of the Criminal Code (quoted in section 6.3.2) could be partly used for the claimant. It could be used for the first part of the complainant's article, because the statements were made to protect his honour. But it could not be used for the second part because this part devalued the magazine's content which was a significant attack on the honour of the editor and publisher.[975] The criminal court therefore found the complainant guilty under s 185 and was sentenced to a fine of 150 Deutsche Mark or one week's arrest. The complainant then filed a complaint to the FCC claiming that his right to free expression under Article 5 was violated by this judgement.[976]

Similar to *Lüth*, the FCC confirmed that it cannot review decisions regarding the application of statutory law by courts in criminal matters, but it can review if these decisions 'fail to orient their judgments to the value system of the Basic Law, thus infringing the fundamental rights of the convicted person.'[977] The FCC found that the criminal court's judgment incorrectly recognised the right to free expression's value when it interpreted and implemented the statutory provisions on insults.[978] It had misunderstood the importance of the formation of public opinion as recognised in the Basic Law.[979]

The FCC refers to *Lüth* to describe that the basic right to free expression under the Basic Law Article 5(1) is important for a democratic society,[980] as this right allows 'the conflict of opinion' which is vital to the free and democratic state. The FCC further explained: 'Only free public discussion on topics of general importance guarantees the free formation

[974] [BVerfGE 12, 113) (engl. Translation) in the website of The University of Texas School of Law, https://law.utexas.edu/transnational/foreign-law-translations/ , [Nomos Verlagsgesellschaft] ('[BVerfGE 12,113]') (I)(2)(b) accessed 18 July 2022
[975] ibid
[976] ibid (I)(3)
[977] *Schmid-Spiegel* (n972) 450 (stating 'These decisions can be reviews only when courts, in applying statutory provisions for the protection of personal honor, fail to orient their judgements to the value system of the Basic Law, thus infringing the fundamental rights of the convicted person.'
[978] [BVerfGE 12,113](n1174) [III] (n974)
[979] ibid
[980] ibid [III][1]

of public opinion.'[981] Hence, Article 5(1) includes the right for people to take part in such public discussion.[982] According to the FCC the significance of public-opinion formation must be recognised when s 193 is interpreted.[983] This was the point which the criminal court had failed to do.[984] Although the criminal court found that the complainant only had a justifiable interest to protect his honour in the first part of his article,[985] the criminal court did not recognise the importance of public opinion-formation in the article.[986] The FCC explained that the criminal court should justify the protection to this article by referring to Article 5(1) which guarantees a free debate because the complainant participated in a public discussion with the magazine.[987] Furthermore, in the second part, which the magazine was compared to pornography, the FCC held that the complainant had a legitimate interest in his article.[988] The FCC acknowledged this article as a response to the Arrested on Volga article and found the article was an attack to the complainant's honour, which drew third parties into the conflict.[989] Nonetheless, the FCC recognised that the magazine's article was consistent with 'the public task of the press of informing the citizens about public matters.'[990] However, the FCC also held that the complainant equally had the right to reply to the Magazine, because Article 5(1) guarantees the right 'to every citizen of contributing through free expression of opinion-formation.'[991] Therefore, the FCC found that the complainant's right under Article 5(1) was infringed by the criminal court's decision.[992]

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[981] ibid
[982] *Schmid-Spiegel* (n972) 451
[983] [BVerfGE 12,113] (n924) [III][1]
[984] ibid
[985] ibid [III](2) (stating: 'the question whether the complainant's reply in the press to the press attack by the 'Spiegel' was the appropriate means of defence has in effect rightly been answer affirmatively.)
[986] ibid
[987] ibid [III][2](a)(b)
[988] ibid [III][2](c)
[989] ibid [III][2](c) (The FCC stated 'These [interests affected by the Arrest on Volga article] were not the complainant's personal honour. Instead, the 'Speigel', by examining the complainant's political past, had deal above all with the topic of the occupation of high judicial office by an allegedly unsuitable person, that is, had taken a position on a conflict over personnel policy and the trustworthiness of justice into which, alongside the complainant, former Minister President Dr. Maier and Justice Minister Dr. Haussmann were drawn (explanation added).'
[990] [III][2](c)
[991] [III][2](c)
[992] [III][2](d)

This case confirms Lutomski's argument that the right to free expression is presumptively favoured in public discussions. More importantly, this case shows that the *Lüth* ruling is also applied in criminal cases. The basic rights under Article 5(1) must therefore influence the criminal law of insult as well. The law of insult cannot easily limit the right to free expression. German courts in criminal matters must also consider a balance of interests when weighing between the interests of free expression and personal honour because the applications of laws limiting the constitutional right are also restricted by the Basic Law.

In the next section, I will discuss how the *Lüth* ruling has particularly applied to cases relating to personality rights to show the FCC's role in balancing between protecting the personality right and other constitutional rights.

8.3 Discussion: Application of *Lüth* Ruling in Cases of Personality Rights

Quint argues that German courts in civil matters protect the general personality right as deriving from the Basic Law Articles 1(1) and 2(1) because the Basic Law influences private law from *Lüth* ruling.[993] Markesinis agrees with this argument as already shown in chapter 7.[994] This section will show another impact of *Lüth* ruling in cases where the German courts had to decide conflicts between the personality right and other constitutional rights, mostly the right to free expression under Article 5(1). German courts must consider a balance of interests in these conflicts because the application of laws which limit the free expression right, must be influenced by the Basic Law. The FCC can review whether those courts' decisions correctly recognised the values of constitutional rights. However, the FCC later adjusted its authority in *Mephisto* (1971)[995] as pointed out by Quint,[996] Markesinis,[997] Kommers and Miller.[998] The FCC asserted in *Mephisto* that its authority to review a judicial decision was limited by stating:

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[993] Quint (n76) 273-281
[994] See the accompanying text of footnotes 816-817
[995] For a summary of this case see Lutomski (n954) 584-5; for an English translation of this case see Markesinis and Unberath (n837)
[996] Quint (n76) 291
[997] Markesinis (n76) 283
[998] Kommers and Miller (n76) 461

> [I]t cannot review the facts as found and evaluated, the construction of mere law or its application in the individual case, which are matters for the regular courts [references]. These principles apply equally when review is sought of the balancing of the protection afforded to the parties to a civil suit…'[999]

The FCC further asserted:

> [I]t can only hold that the basic right of the losing party has been infringed if the judge has either failed to recognise that it is a case of balancing conflicting basic rights or has based his judgment on a fundamentally false view of the importance, and especially the scope, of either of those rights.'[1000]

This decision, Markesinis explains, means civil courts had to evaluate the competing interests by themselves.[1001] The FCC would intervene in the evaluative process: 'only if the civil law decision was based on a fundamental misconception of the basic rights and their radiating effect.'[1002] An example of a case in which the FCC intervened because of the misconception is the *CSU-NPD* case (1982) (see section 8.3.5).

The approach of *Mephisto*, however, was later adjusted in *Deutschland-Magazin* (1976) as also pointed out by those authors.[1003] The FCC asserted that it would intervene in the evaluative process if the asserted basic right in that case is seriously infringed by the judgment of a civil court.[1004] The asserted basic rights include personal honour as we have seen in section 7.2.2, German law regards personal honour as an aspect of the general personality right. Therefore, not only is personal honour an exception for limiting people's right to free expression under Article 5(2), but personal honour also has a

[999] Markesinis and Unberath (n837) 402
[1000] ibid 402;
[1001] Markesinis (n76) 282
[1002] ibid 283; see also Quint (n76) 304 (stating 'the constitutional right of the complainant was not violated, as long as criminal or civil courts do not make a mistake in the general principle involved and weigh the interests, although these courts may have a different decision if the FCC would have weighed the interests by itself.')
[1003] Quint (n76) 318; Kommers and Miller (n76) 461 (stating '*The Deutschland Magazine Case* (1976) expressed the First Senate's dissatisfaction with the existing standard of constitutional review. It shifts away from the approach used in the early 1970s toward a more heightened degree of judicial scrutiny of certain encroachments on speech.')
[1004] ibid 320

constitutional status as a personality right. Sections 8.3.2-3 will show that the asserted basic rights can be the right to free expression or the general personality right. Furthermore, this adjusted approach is used in criminal cases relating to personal honour as we will see in *Strauss Caricature* (see section 8.3.4).

The following sub-sections will discuss cases relating to personality rights and some literature discussing rules adopted from those cases to show the FCC's role in balancing between protecting the personality right and other constitutional rights. First, I will discuss the *Deutschland-Magazin*, in which the FCC adjusted its authority to review the decision of a civil court. The FCC guaranteed that it can consider how the Basic Law should influence the law in that case to balance between protecting the personality right and other constitutional rights if the asserted basic right is seriously infringed by that decision. Secondly, I will discuss *Echternach* to show how the adjusted approach worked. The FCC was able to consider how the Basic Law should influence the law in this case and found that the civil court's decision incorrectly protected the right to free expression. Thirdly, I will discuss *Böll* to show that not only is the *Deutschland-Magazin* approach able to protect the right to free expression, but this approach can also protect a personality right. Fourthly, I will discuss *Strauss Caricature* to show that the *Deutschland Magazin* approach was also applied in a criminal case. Fifthly, I will discuss *CSU-NPD* to show that the FCC can also intervene when a court's decision was based on a fundamental misconception of the basic rights. Finally, I will summarise the German approach in conflicts between personality right and other constitutional rights. The summary will be analysed to consider whether Thai law should adopt the German approach in section 8.4.

8.3.1 *Deutschland-Magazin:* The Standard of Review Being Heightened

Although the *Mephisto* ruling limited the FCC's authority to intervene in the evaluative process of civil courts,[1005] the FCC later modified its approach in *Deutschland-Magazin.* It ruled that it can intervene in that process if the asserted basic right in that case is seriously infringed by a decision of a court in civil matters.

[1005] See the accompanying text of footnote 990

This case, Quint explains, concerned a dispute between the manager of Deutschland Magazine and a labour union press service.[1006] The manager sued the union for libel and requested an injunction to forbid the union from claiming that the magazine was 'a right-radical hate sheet,' either by the same words or words having the same meaning.[1007] The court in civil matters decided to forbid 'any repetition of that specific phrase' but did not forbid the use of words having the same meaning.[1008] The court accepted that the union's criticism was a serious accusation. The court also commented that if this criticism had been made in less inflammatory language, the criticism might be constitutionally justified.[1009] This decision was later upheld by the FCC. It cited the *Mephisto*'s decision which ruled that it had no duty to interpret or apply private law. Nor could it replace the judgment of the private law courts. The FCC had a duty to 'assure that the private law courts have taken constitutional norms and standards into account.'[1010] However, Quint notices that the FCC did not substantially rely on the *Mephisito* as the FCC indicated:

> [S]ome circumstances can justify a heightened standard of review in private law cases. The Constitutional Court must be allowed a certain degree of discretion to adjust the standard of review according to the nature of the individual case.[1011]

The FCC pointed out that the severity of the basic right violation would impact the degree of constitutional review on the judicial judgment.[1012] If the sanction imposed on a speaker is severe, the constitutional review will be more intense than a minor sanction. In this case, the FCC found that the sanction imposed on the speaker was not severe because the civil court only prohibited a repetition of the precise phrase as described by Quint.[1013] Thus, the FCC did not adjust the standard of review of the civil court.

[1006] Quint (n76) 318-322
[1007] ibid 318 (citing 42 BVerfGE 143 '*Deutschland-Magazin'*)
[1008] ibid 319
[1009] ibid (citing *Deutschland-Magazin,* 145-6)
[1010] ibid
[1011] ibid 320 (citing *Deutschland-Magazin,* 148)
[1012] ibid
[1013] ibid 321

This case shows that the FCC can intervene in the evaluative process of civil court by considering how the Basic Law should influence the law in that case to balance between protecting the personality right and other constitutional rights. But the FCC will only do so when the complainant's basic right was severely violated by that decision. The next case will show how the *Deutschland-Magazin* ruling worked when the basic right was severely violated.

8.3.2 *Echternach*: Protecting a Basic Right under Article 5(1)

The FCC used the *Deutschland-Magazin* ruling as the reason to intervene in the evaluative process of a court in *Echternach*. Quint summarises the fact of *Echternach* as:

> [A] political party official, Jürgen Echternach, wrote an article attacking the Deutschland Foundation, publisher of the Deutshland-Magazin. Among other things Echternach stated that in establishing a 'Konrad Adenauer Prize,' the foundation had 'misused the name of Konrad Adenauer for [the benefit of] right-wing sectarians.' The article also asserted that the Foundation was nationalistic enterprise… in democratic clothing.[1014]

The Foundation sued Echternach for libel. The civil court ordered Echternach not to repeat the above remarks, either in the same words or words having the same meaning. The FCC reversed this order by referring to the *Deutshland-Magazin* ruling: the FCC can review the civil court's order if the order severely infringed the protected basis rights.[1015] The FCC found the order significantly infringed the basic right of Article 5.[1016] This was because the order forbade Echternach from repeating the precise remark and also prohibited him to use words having the same meaning.[1017] Consequently, in Quint's words:

[1014] ibid 322 (citing *Echternach*, 164)
[1015] ibid (citing *Echternach*, 165-6) (stating: 'The more a civil court's decision infringes the predicates of free existence and actions that are protected by a basic right, the more searching must be the Constitutional Court's investigation to determine whether the infringement is constitutionally justified.')
[1016] ibid 323
[1017] ibid 322

> [T]he Constitutional Court was required not only to review the general principle employed by the lower court but also to consider specific mistakes in the application of those principles.[1018]

The FCC found that the civil court misinterpreted how Article 5(1) influenced the general laws.[1019] The FCC once again recognised the importance of having free expression in public discussions by saying that Echternach's criticisms were 'the normal sort of expression that is found in public political disputes.'[1020] It was too much for the civil court to require Echternach's statement of opinion to be accompanied by supporting factual discussion. Consequently, the FCC ruled that the civil court's decision violated the Basic Law Article 5.[1021]

Quint explains the distinction between *Deutschland-Magazin* and *Echternach* by saying that the FCC in *Echternach* found that the speaker's right was severely violated because the civil court prohibited all forms of expression on the specific issue; in *Deutschland-Magazin*, the court only forbade the specific form of expression.[1022] From this distinction, it was justified for the FCC to intervene in the evaluative process of the civil court in *Echternach* but was not justified to do so in *Deutschland-Magazin*.

Echternach shows that the FCC applied the *Deutschland-Magazin* ruling to review the civil court's order because the right to free expression under Article 5(1) was severely violated by the order. Quint states that the FCC later applied the *Deutschland-Magazin* ruling in many other cases both in civil[1023] and criminal[1024] matters. One of the criminal cases is *Strauss Caricature*, which will be discussed in the section 8.3.4.

[1018] ibid 323 (citing *Echternach* 169)
[1019] ibid 323
[1020] ibid
[1021] ibid (citing Echternach, 170-71)
[1022] ibid
[1023] See ibid 330-1 (citing 54 BVerfGE 129 (1980) ('Art Critique'); For the summary of this case see Kommers and Miller (n76) 454)
[1024] Quint (n76) in footnote 263 (citing 43 BVerfGE 130 (1979) (Political Leaflet) ('criminal libel conviction requires closer review by the Constitutional Court than civil judgement because criminal conviction impose greater burden.')

Echternach and the above paragraph may suggest that the FCC preferred to protect the right to free expression over a personality right, by applying the *Deutschland-Magazin* ruling. However, Quint states that this ruling can also be applied to protect a personality right which constitutes a limitation to freedom of expression, as we will see in *Böll*.[1025]

8.3.3 *Böll*: Protecting Personality Right in a Civil Case

The facts and ruling of *Böll* (1980) are also described by Quint.[1026] Heinrich Böll, the well-known novelist (and indeed a Nobel Prize winner), sued a television commentator for the accusation that his public statement was motivating violence.[1027] The commentator said:

> Heinrich Böll characterized the liberal state [Rechtsstaat] – against which the [terrorists'] violence was directed – as a 'pile of dung' and said that he saw only 'the remnants of decaying power, which are defended with rat-like rage.' He accused the state of pursuing the terrorists 'in a pitiless hunt'.[1028]

Böll claimed that the commentator had violated his personality right.[1029] The BGH found that the commentator's remarks were protected speech under the Basic Law Article 5(1). This was because the statements that Böll actually made could make the ordinary reader understand these statements like the message which the commentator claimed to be made by Böll, although the commentator misquoted Böll's statements.[1030] As we will see, this finding was later reversed by the FCC.

Böll then filed his complaint to the FCC claiming that his personality right as protected by the Basic Law was infringed because he did not receive damages from the violation of his personality right. Comparing this complaint to all cases mentioned above, we can see that this complaint is different. The complainants in those cases claiming that their *right*

[1025] ibid 331 (stating: 'other cases show that in some circumstances the heightened judicial review of *Deutshland-Magazin* can also work to limit the freedom of expression.')
[1026] See ibid 331-334 (cited 54 BVerfGE 208 (1980) '*Böll*')
[1027] ibid 331-2
[1028] ibid in footnote 265
[1029] ibid 332
[1030] ibid (stating: 'The BGH found that, although the commentator may have misquoted Böll's remark, the statement that Böll actually made could convey to ordinary reader a message not unlike the message attributed to him by the commentator.'; citing *Böll,* 211-3)

to free expression was violated because, in those cases, the courts imposed liability on them. But the complainant in *Böll* claimed that his *personality right* was violated because the BGH dismissed his case. Quint asserts that this case was 'a novel and interesting problem' of the FCC at that time.[1031]

The FCC took the nature of the commentator's statement and the broad impact of television into consideration.[1032] The FCC, interestingly, found that Boll's personal honour was severely injured because he was accused of 'intellectual complicity in terrorism,' but the BGH refused to protect him from this accusation. Since personal honour which is Böll's constitutional right was severely injured, it was justified for the FCC to conduct a substantial constitutional review of the BGH's decision.

The FCC then found that Böll's right of personality was violated by the BGH's decision because the BGH had applied an improper standard in deciding the case.[1033] The FCC explained that it was improper because the BGH: 'replaced Böll's decision about the meaning of his own language with the possible misinterpretation of the "average reader or listener."'[1034] Furthermore, the Court said the commentator's statements were not protected by Article 5(1) of the Basic Law because:

> [I]ncorrect citations – like any other false statements – are not protected speech. If there was a question about the meaning of Böll's remarks, the commentator should have made it clear that he was transmitting an interpretation of those remarks rather than a purported quotation.[1035]

The FCC therefore ruled that Böll's right of personality had been infringed and remanded the case back to the BGH for determining the precise scope of the infringement.[1036] Quint says that the BGH later issued a judgment in Böll's favour.[1037]

[1031] ibid
[1032] ibid 333
[1033] ibid 333
[1034] ibid in footnote 272 (cited Böll 218-9)
[1035] ibid (cited Böll 219-22)
[1036] ibid 334
[1037] See Quint (n76) in footnote 273

Böll shows that the severe infringement to a constitutional right is not only limited to the right to free expression under Article 5. The constitutional rights include the general personality right as deriving from Articles 1(1) and 2(1). The FCC can also review whether the decisions of criminal or civil courts correctly recognise the significant of the personality right in their case. This shows that the *Deutschland-Magazin* ruling is not mainly used to protect the right to free expression. Instead, the ruling allows the FCC to correct the decisions which do not correctly balance the protection between personality right and the right to free expression. Apart from *Böll*, Kommers and Miller argue that there were other cases which the FCC chose to protect the personality right over the right to free expression after weighing these rights.[1038]

8.3.4 *Strauss Caricature*: Protecting Personal Honour in a Criminal Case

This section will show that the *Deutschland-Magazin* ruling is also applied in a criminal case, *Strauss Caricature*. This case is similar to *Böll* because the FCC preferred to protect the personality right over another constitutional right after balancing between these interests.

The fact of this case was described by Kommers and Miller.[1039] The Bavarian Minister-President Franz Josef Strauss prosecuted the complainant under s 185, because the complainant (a caricaturist) drew the minister-present as 'a pig engaged in sexual activity,' and published these caricatures in a magazine.[1040] In these caricatures, 'the pig is copulating with another pig attired in judicial robes, with several of the drawings bearing Strauss's unmistakable facial features.'[1041] The court in criminal matters found the complainant guilty under s 185. The complainant then filed a constitutional complaint to the FCC claiming that his guilty verdict infringed his constitutional right. But the FCC found the criminal court's judgement did not violate the complainant's fundamental right.

[1038] Kommers and Miller (n76) 477-8 (referring to 99 BVerfGE 185 (1998) ('*Scientology Case*'), 114 BVerfGE 339 (2005) ('*Stasi Stolpe Case*') and 97 BVerGE 391 (1998) ('*Sexual Abuse Case*')
[1039] 75 BVerfGE 366 ('Political Satire Case) in Kommers and Miller (n76) 465-467
[1040] ibid 465
[1041] ibid

To understand this case, it is important to provide some background of the constitutional right asserted in this case. The basic right to which the complainant referred *was not* the right to free expression but was the right to artistic freedom protected under Article 5(3) which states:

> (3) Art and scholarship, research, and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution.[1042]

The text of this paragraph may suggest that the freedom is an absolute right: no limitation can be imposed. However, the FCC has ruled since *Mephisto* that the artistic freedom can be limited by another constitutional right.[1043] Therefore, it has been possible to limit this artistic freedom.

In *Strauss Caricature*, the complainant claimed that his artistic freedom was violated by the criminal court's judgment. However, the FCC found that the judgment did not violate the freedom. The FCC's reasons to support its finding are interesting. As shown in the translation of this case published on the website of the University of Texas, School of law,[1044] the FCC confirmed that it has no authority to review whether a court in criminal and civil matters apply ordinary laws correctly,[1045] which is similar to *Lüth* and *Schmid-Spiegel*. The authority to review depends on the severity of the decision of that court which impacts 'the sphere of the person convicted.'[1046] Interestingly, the FCC asserted that a decision is always subjected to a strict review when the decision imposed a criminal sanction on a person claiming to have the free expression or artistic freedom. In a case like this, the FCC reviewed: 'whether the decisions are based on a view of the meaning

[1042] translated by Tomuschat and others (n74)
[1043] See Basil Markesinis, 'Privacy, Freedom of Expression and the Horizontality Effect of the Human Rights Bill: Lessons from Germany' (1999) 115 LQR 47, 52 (stating: 'At first sight, therefore, artistic creation seems to receive greater protection than free speech. Once again, things are not what they appear to be since the courts have developed the technique of delimiting the ambit of one human right by testing it against others found in the Constitution itself.')
[1044] [BVerfGE 75, 369] (engl. Translation) in the web site of The University of Texas School of Law, https://law.utexas.edu/transnational/foreign-law-translations/, [Nomos Verlagsgesellschaft] accessed 18 July 2022
[1045] ibid (C)[I](1)
[1046] ibid (C)[I](1)

and scope of the fundamental right claimed that is in principle wrong.'[1047] The FCC would also review 'whether ordinary law was interpreted in accordance with the fundamental right.' [1048] Therefore, the FCC in *Strauss Caricature* had to determine whether the complainant's caricatures were protected as a basic right under Article 5(3). Furthermore, it had to find out whether the criminal judgment correctly identified the scope of protection of this right and assessed the caricatures corresponding to the structural characteristics specific to art. Moreover, it had to consider whether the judgment set the limit on the artistic work protected under Article 5(3) correctly.

First, the FCC found that the caricatures are artworks within the meaning of Article 5(3),[1049] because the caricatures 'are the formed outcome of free creative action in which the complainant brings his impressions, observations and experiences into direct display.'[1050]

Secondly, the FCC found that the criminal judgment being complained on correctly identified the scope of protection of this right.[1051] As the criminal court considered whether the caricatures were allowed as a satire, this showed that the court acknowledged the level of protection provided under Article 5(3) and the Article's impact on the criminal law which protects honour.[1052] Furthermore, the FCC found that the method to determine the 'honour-injuring' character of the caricatures was correct because the criminal court determined the 'core statement' and 'form' of the caricatures separately. The FCC also found that both the core statement and the form of the caricatures in this case attacked the honour of the Minister-President.

Finally, the FCC found that the judgment correctly set the limit on the artistic work and correctly balanced the conflict between the artistic freedom of the complainant and the general personality right of the Minister-President.[1053] The FCC acknowledged that it is

[1047] ibid
[1048] ibid
[1049] ibid (C)[I](2)
[1050] ibid
[1051] ibid (C)(I)(4)(a)
[1052] ibid
[1053] ibid (C)(I)(4)(b)

normal for caricatures to be exaggerating and that individuals like the Minister-President are targets for public satirical or criticism. However, the FCC found that the caricatures in this case went beyond 'the limits of acceptable.'[1054] These caricatures shown an intention to 'attack on the personal dignity of the personal caricatured.'[1055] Therefore, the FCC found that the criminal court correctly ruled that the attack of human dignity as in this case could not be justified by artistic freedom.[1056]

This case confirms that the *Deutschland-Magazin* ruling is also used in criminal cases. Since the judgment which imposes a criminal sanction on a person is regarded as severe violation of constitutional right, the convicted person can file the complaint for the FCC to review the guilty verdict. The FCC has to balance between protecting the constitutional rights (the right to free expression or to artistic freedom) and personality right. The result can either favour the personality right as shown in *Strauss Caricature* or the right to free expression as shown in *Schmidd-Spiegel*.

There is another interesting case (*CSU-NPD)* regarding a conflict between the personality right and the right to free expression because the FCC described the scope and effect of the right to free expression on opinion and factual assertion. The FCC also stressed the importance of free expression in public discussions in this case. Kommers and Miller argue that the *CSU-NPD* case followed the trend of heightened standard of review from *Deutschland-Magazin*.[1057] As we have seen in section 8.3.1, the FCC is justified to intervene in the evaluative process of the court in civil matters if the decisions of civil courts seriously infringed the constitutional rights. However, I will argue that the FCC in *CSU-NPD* case did not follow this trend since it did not justify its intervention from the serious infringement of the right. As I will show the FCC intervened because it found that

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[1054] ibid
[1055] ibid; The FCC's reason to support its finding is already quoted in section 6.5.1 (see the accompanying text of footnote 697)
[1056] ibid (C)(II)
[1057] Kommers and Miller (n76) (stating: 'The First Senate, citing *Lüth*, noted that any judicial ruling imposing a serve chill on freedom of expression would invite close scrutiny. Here, however, the chill was not regarded as serve. The union was free to express its opinion of *Deutschland-Magazin* in words equally capable of conveying its animosity without intimating, as the original statement did, that the magazine was advocating unconstitutional goals. *This trend in the Court's jurisprudence toward greater scrutiny continued with the CSU-NPD case*. (emphasis added)')

the civil court incorrectly considered the scope and effect of the right to free expression.[1058]

8.3.5 *CSU-NPD*: The Differences between 'Opinion' and 'Factual Assertion' and 'The Importance of the Right to Free Expression in Public Discussions'

As described by Kommers and Miller, the complainant in this case was a candidate for an election from the Social Democratic Party (SPD). He accused another party, the Christian Social Union (CSU), of being 'the NPD of Europe.'[1059] These authors explains that this phase was a reference to 'West Germany's extreme right-wing National Democratic Party, sometimes described as a neo-Nazi organisation.'[1060] The CSU sued the complainant for the accusation and the court in civil matters granted 'a temporary restraining order enjoining the candidate, under threat of a civil damages suit, from repeating his charge.'[1061] The complainant then filed a complaint to the FCC against this order claiming this order violating his right under Article 5. The FCC later found that this order violated the complainant's constitutional right.

The translation published on the website of the University of Texas, School of Law shows that the FCC recognised that its authority was limited to deciding whether the court in civil matters in this proceeding suitably 'assessed the scope and effect of the fundamental rights in the area of the civil law.'[1062] The FCC acknowledged that this authority can be changed if the fundamental right was severely infringed by the civil court decision by referring to the *Art Critique* (this decision followed the *Deutschland-Magazin* [1063] *).* However, the FCC found that it was *unnecessary* to determine the severity of the decision, because there were errors that were 'wrong in principle' in the interpretation of the scope of the right to free expression under Article 5(1) in this decision.[1064] The FCC states that

[1058] See the accompanying text of footnote 1064
[1059] ibid 462
[1060] ibid
[1061] ibid
[1062] [BVerfGE 61, 11] (engl. Translation) in the web site of The University of Texas School of Law, https://law.utexas.edu/transnational/foreign-law-translations/, [Nomos Verlagsgesellschaft] ('[BVerfGE 61, 11]') [B][I] accessed 18 July 2022
[1063] This case is mentioned in footnote 1023 above.
[1064] [BVerfGE 61, 11] [B][I] (stating: 'Whether this is the case need not however to be gone into, since the decision displays errors of interpretation based on a view of the significance of the fundamental right

the civil court in this proceeding: 'inadequately determined the scope and effect of the fundamental right to free expression of opinion.'[1065] This is why I argue that the FCC in *CSU-NPD* did not follow the trend of *Deutschland-Magazin,* since the FCC can correct a decision that incorrectly interpreted the scope and effect of the right to free expression.

There are two main errors in the civil court's decision.[1066] First, it was incorrect for the civil court to find the statement being complained of an untrue statement rather than an expression of opinion.[1067] It was because this finding derived from the misjudgment of the civil court, since the civil court had to use consider Article 5(1) to evaluate the complained statement.[1068] Secondly, the court's justification for limiting the fundamental right under Article 5(1) did not consider some important rules.[1069] Therefore, the FCC must correct these errors.[1070]

First, the FCC explained that the right to free expression under Article 5(1) covers both opinion and factual assertion, but they are protected differently.[1071] The FCC pointed out that the right to free expression mainly concerns the speaker's own opinion because this right aims 'to produce mental effects on the environment, to act to mould opinion and to persuade others.'[1072] Since opinions normally aim to persuade others, opinions are generally protected under Article 5(1). The value or truthfulness of an opinion is not important. Furthermore, the FCC once again confirmed that there is a presumption to favour the right to free expression if an opinion is expressed in the conflict of opinion in public matters.[1073] 'Harsh and exaggerated' opinions are protected under Article 5(1), but

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guaranteed in Article 5(1), first sentence, GG, and in particular of the scope of its area of protection, that is wrong in principle, thereby already reaching the threshold of infringement of objective constitutional law that the Federal Constitutional Court is bound to correct (cf BVerfGE 18, 85 [93]).')

[1065] ibid (B)(I)(3)

[1066] ibid (B)[II]

[1067] ibid

[1068] ibid (B)[II](1)(a) (stating: 'This constitutional position has been fundamentally misjudged by the Regional Appeal Court. The Court could not escape from the need to take Article 5(1), first sentence, GG into account in evaluating the sentence complained of by terming the complainant's utterance for civil law purposes as a false factual claim…')

[1069] ibid (B)[II]

[1070] ibid (B)

[1071] ibid (B)[II][1](a)

[1072] ibid

[1073] ibid (referring to *Lüth*)

this type of opinion must be determined whether it is regulated by laws which limit expression under Article 5(2).

In contrast, Article 5(1) does not protect factual assertions *at the same level as* opinions.[1074] The assertions are protected as long as they contribute to the formation of an opinion.[1075] Because the intentional assertion of untrue facts cannot contribute to the formation, it is not protected under Article 5(1). Furthermore, the presumption in favour of free expression only applies strictly to factual assertions meaning that the assertions are more easily to be limited under Article 5(2) than the expression of opinion.

Because of the differences between opinion and factual assertion, the FCC held that the term 'opinion' under Article 5(1) must be interpreted broadly. If an expression 'is characterized by the elements of taking a stance, of having one's way of thinking or of opining,' this expression is protected under Article 5(1).[1076] However, if those elements combine with a factual assertion that makes them inseparable,[1077] the factual element should not be the factor to refuse the finding that the statement is an opinion because this method will curtail the protection to the free expression. From this description, the FCC found that the statement, 'the CSU is the NPD of Europe' is not a false assertion that the CSU is a non-existent NPD of Europe.[1078] This statement is an expression of opinion because the meaning of this statement showed the element of 'having one's mind and opinion.'[1079] Furthermore, the FCC considered the complainant's circumstance when he expressed this statement. As he said this statement during an election, it was clear that he expressed his view to persuade his hearer. Although this statement also has a factual element, this element should not be used to deny that the nature of the statement as an opinion. Therefore, the FCC found that this statement is an opinion.

[1074] ibid
[1075] ibid
[1076] ibid
[1077] ibid
[1078] ibid [II](1)(b)
[1079] ibid

For the second error, the FCC referred to the civil court's decision which found that the complainant's statement was allowed to be regulated under Article 5(2).[1080] This decision disregarded the significance of the right to free expression which must be used to interpret the laws which limit that right.[1081] Since the complainant's statement was made in a debate during an election, which is 'a situation in which the political clash of opinions is intensified to the utmost,'[1082] the FCC recalled the *Lüth* ruling that there is the presumption to favour the free expression for making a contribution to the conflict of opinions in a matter substantially concerning the public.[1083] As this statement was said during an election, the FCC found that also this fact enhanced the presumption to favour free expression. Consequently, the FCC found that the civil court misinterpreted a law which limits the free expression of the complainant.[1084]

This case is an example of cases where the FCC found that the civil court's decision incorrectly considered the constitutional right's scope and effect. The FCC is allowed to correct the mistake. Barandt also described that the FCC has a role to ensure that the constitutional provisions are suitably interpreted and applied to the cases.[1085] He says the courts in criminal and civil matters must determine the meanings of the accusations and consider whether they insult or defame the claimant. The FCC can intervene in this process 'if a perverse interpretation has been placed on a statement, so that it falls outside the scope of freedom of speech or if the judge has excluded, without good grounds, possible meanings which would be protected speech.'[1086] Barendt exemplifies cases in which the FCC exercised this role.[1087] One of them is *Anti-Strauss Placard*[1088] involving convictions on the complainants, who protested against Franz-Josef Strauss (the Minister-President mentioned in section 8.3.4) by displaying banners 'Strauss covers up Fascists.'[1089] The criminal court interpreted these banners as Strauss was protecting a

[1080] ibid [II](2)
[1081] ibid [II](2) (referring to *Lüth*)
[1082] ibid [II](2)(a)
[1083] ibid (referring to *Lüth*)
[1084] ibid [II](2)(b)
[1085] Barendt (n918) 217
[1086] ibid
[1087] ibid (referring to 82 BVerfGE 272 (1990) and 82 BVerfGE 43 (1990))
[1088] This title was given by Kommers and Miller (n76) in their book chapter 8, footnote 59.
[1089] ibid (citing 82 BVerfGE 43 (1990))

murderer.[1090] The FCC found the criminal court incorrectly convicted the complainants. Markesinis provides more detail on this case.[1091] He argues that the FCC reviewed these convictions because the criminal court determined the content as 'a formal insult (*Formalbeleidigung*),' which was an offence attracting criminal sanctions.[1092] Thus, this determination can impact the scope of basic rights.[1093]

8.3.6 Summary

The case law discussed above shows that courts in criminal and civil matters must interpret laws which protect a personality right by recognising the constitutional value of the right free expression following the *Lüth* ruling. I extract four interesting issues from the case law, which can be seen as the German approach in this area. This approach will be analysed whether it can be adopted into Thai law in section 8.4.

First, the FCC has a role to guarantee that laws which protect a personality right must recognise the constitutional value of the right of free expression (including the right to artistic freedom) because the FCC is authorised to review the decision of a court in criminal or civil matters. But it can review the court's decision under one of these conditions: (i) the decision based on 'a fundamental misconception of the basic rights and their radiating effect,' as shown in section 8.3.5; or (ii) the decision severely violated the basic right of the complainant, as shown in sections 8.3.2-4. We have seen that the FCC used this authority to ensure that the laws stated under Article 5(2) cannot easily limit the right to free expression as protected under Article 5(1).

Secondly, the case law shows that German courts have to balance the interests between the right to free expression and personality rights because these Courts must interpret

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[1090] ibid

[1091] Markesinis (n1023) 67 (saying: 'the criminal court convicted the complainant under s 186 of the Criminal Code')

[1092] As we have seen in chapter 6, an insult is a criminal offence under German criminal law.

[1093] ibid (stating: '…Constitutional Court held that whenever the lower courts determined the content of the communication in a way that might have serious constitutional implications they would have to explain their reasons or expose themselves to constitutional review. Thus, serious legal consequences could flow from describing a statement as a factual assertion (*Tatsachenbehauptung*), a value judgment (*Werturteil*), or a formal insult (*Formalbeleidigung*, as in this case) since the latter was an offence which attracted criminal sanctions. In such cases the classification of the statement by the ordinary court might well affect the ambit of basic rights and was thus subject to review.)

the laws in their cases by recognising the influence of the Basic Law. Lutomski and Barendt assert that it has not been easy to predict the outcomes of these conflicts because of this requirement.[1094] However, as we have seen from the above case law, the presumption in favour of the right to free expression in public discussions (adopted since *Lüth*) has been repeatedly confirmed by the FCC. Since 1980, Lutomski argues, there had been a trend for the FCC to favour the free expression right in public discussions over personality right.[1095] He mentions cases of the FCC and the BGH to support his argument.[1096] Similarly, Barendt argues that expressions are protected from criminal or civil suit when 'defamatory remarks are made incidentally in the course of a contribution to public discourse.'[1097] He refers to the *CSU-NPD* and the *Schmid-Spiegel* as examples of cases which the FCC protected to expressions in public discussions.[1098] Furthermore, in an article published in 2017, Hilgendorf argues that the FCC: 'has emphasized the significance of freedom of expression particularly in political debate, and has many times held that freedom of expression must prevail over the protection of personal honour.'[1099] The above literature suggests that the presumption favouring freedom of expression in public discussions is still applicable in German law.

Thirdly, the *CSU-NDP* case shows that the right to free expression in German law covers both opinion and factual statements. Although this case was decided in 1982, literature discussed the right to free expression published after 2000 also presents the same idea. Jouanjan argues that both opinion and factual statements are protected under Article 5(1), but the latter is only protected when it supports the formation of opinions.[1100] He asserts that opinions are protected regardless of their value or impact, but they will not be protected when they exceed the limitations stated in Article 5(2).[1101] Similarly, Barendt argues that the right to free expression covers both opinion and factual expression but

[1094] Olivier Jouanjan, 'Freedom of Expression in the Federal Republic of Germany' (2009) 84 Ind LJ 867; Barandt (n968) 218 (stating: 'On the other hand, the requirement to balance free speech and reputation rights in the light of all the relevant facts leads to less certainty.')
[1095] Lutomski (n954) 586
[1096] ibid (citing 82 BVerfGE 272 (1990), 82 BVerfGE 43 (1990))
[1097] Barendt (n968) 214-5 (citing 93 BVerfGE 266, 294 (1995) 'Soldiers are muderers')
[1098] ibid
[1099] Hilgendoft (n76)
[1100] Jouanjan (n1094) 871
[1101] ibid 870-871

they are differently protected.[1102] This is because, as we have seen in *CSU-NDP*, the free expression right mainly focuses on the speaker's own opinion; thus, opinions are generally protected, but factual assertions are protected as long as they support the formation of an opinion. This suggests that opinions and factual expressions have different values. Therefore, the FCC can vacate the decision of civil or criminal court if these courts incorrectly interpreted Article 5 which protects the free expression, as we have seen in the *CSU-NDP* and *Anti-Strauss Placard.*

Finally, the *Böll* and *Strauss Caricaure* show that a personality right has a constitutional status which can be used to limit the right to free expression. It is possible for a person to claim to the FCC that their personality right was not sufficiently protected by criminal or civil courts. This claim will allow the FCC to ensure that those courts provide suitable protection to the general personality right.

8.4 Should Thai Law Adopt the German Approach?

8.4.1 The Current Status of Thai Law

It is clear that the German approach is different from the Thai approach. There is no requirement in Thai law for the Thai Constitution to influence Thai ordinary laws (such as the Criminal Code, the Civil and Commercial Code and other Acts). Although the Supreme Court of Thailand used a similar approach as the BGH to protect the privacy right,[1103] the Court did not mention that it had to protect the right because of the influence of the Thai Constitution. Nor is the Thai Constitutional Court authorised to review the Court of Justice's decision as the FCC under German law. In Uwanno's paper on the Thai Constitutional Court, he asserts that constitutional courts are mainly established to determine the constitutionality of legal provisions.[1104] He also compares the authorities of the FCC with the Thai Constitutional Court's authorities and asserts that the FCC's *main*

[1102] Barendt (n968) 60 (stating: 'There used to be some uncertainty whether the former freedom covers the communication of facts as well as the expression of opinion. But it is now clear that a distinction between facts and opinions could only be drawn with difficulty); See ibid 869-873
[1103] See the *Supreme Court Decision No 4893/2558* (n220)
[1104] Uwanno (n131) 4-5

authority is to determine the constitutionality of legal provisions.[1105] He regards the FCC's authority to consider constitutional complaints as *one of the other authorities* of the FCC. Since the Thai Constitutional Court already has its main authority to consider the constitutionality of legal provisions, it is understandable why the Thai Constitutional Court has not had the same authority as the FCC.

However, we have seen that the FCC has applied the authority to review decisions of civil and criminal courts to guarantee that the constitutional right to free expression is not easily limited by statutes. German courts must balance the interests between protecting personality rights with other rights. And we have seen that the FCC adopted the presumption in favour of the right to free expression in public discussions which has been applied in later cases to protect the right to free expression. These are different from Thai law. As shown in the *Constitutional Court Decisions No 16-17/2549* and *28-29/2555* in section 2.3.1, the legal provisions having a purpose stated in the free expression provision of the Thai Constitution are not unconstitutional. Thus, the Court of Justice can use these legal provisions to impose liability on violators without having to concern their right to free expression.

8.4.2 Should Thai law Adopt the German Requirement to Review the Court of Justice Decision?

If the Thai law allows the Constitutional Court to review the Court of Justice's decision as German law does, the Constitutional Court will be able to ensure that the constitutional right to free expression will not be easily limited by statutes. The Constitutional Court will be able to require the Court of Justice to recognise constitutional rights before the Court of Justice decides the case. The Court of Justice must balance the interests between protecting a constitutional right with other rights. Although, in German law, there are concerns that the results of cases having this type of conflict are not easy to predict because the balance suggests that there is no priority between these rights,[1106] the lesson from German law shows that there is a 'the presumption in favour of the right to free

[1105] ibid 10
[1106] See the accompanying text of footnote 964

expression in public discussion,' which has been used by German Courts. Thus, the result of this type of case is not too hard to predict.

As for Thai law, the requirement for the Thai Court to recognise constitutional rights might not be a huge burden when the Court of Justice applies the 'offence of defamation' to protect 'the personality right' because the Offence of Defamation Chapter of the Criminal Code prescribes *specific* justifications and defence for defamers as we have seen in section 4.3.4. These justifications and defence can be a basic for the Court to recognise the constitutional right to free expression and a guideline to balance the right to free expression with the personality right. This guideline can be seen as a Thai approach to balance between these rights similar to 'the presumption in favour of the right to free expression in public discussion,' used by German courts.

By considering these justifications (especially under s 329 sub-section (1) and (3)) and defence in defamation case, the Court can show that it had already concerned the right to free expression of the defamer before it decided its case. For example, in the *Supreme Court Decision No 1972/2517*,[1107] the Court ruled that it was justified under s 329 sub-section (1) for a member of a co-operative to accuse the chairman of a committee responsible for buying a land for the co-operative of being dishonest on a newspaper. This is because the accusation was done by way of justification since the member had a reason to support his accusation. In the *Supreme Court Decision No 3553/2550*,[1108] the Court ruled that it was justified under s 329 sub-section (3) for the newspaper to suspect whether the claimant, a politician, was involved in a corruption. And in the *Supreme Court Decision No 7435/2541*,[1109] the Court found that a newspaper which published the claimant's bad behaviour was allowed to prove its publication to be true as the defence under the offence of defamation under s 330. The application of the justifications and defence in these cases can be seen as the Court had already concerned the right to free expression of the defamers before it decided its case.

[1107] The *Supreme Court Decision No 1972/2517* (n314)
[1108] The *Supreme Court Decision No 3553/2550* (n333)
[1109] The *Supreme Court Decision No 7435/2541* (n358)

Furthermore, the text of the justifications and defence under the offence of defamation can suggest how Thai law balances the freedom of expression of the defamer and the personality right to reputation of the victim in two main matters. First, the focus is on 'public interest'. We have seen that s 329 sub-section (3) guarantees that a person who makes a fair comment on *a public interest topic* will not be guilty of defamation. And s 330 allows the defamer to prove that their accusation was true if there is a *public interest* in revealing the truth. These provisions suggest that the defamer's right to free expression in public interest topics is considered to be weightier than the reputation of the victim.

Secondly, the focus in Thai law is on the legitimate interest of the defamer. We have seen that s 329 sub-section (1) guarantees that persons who express their statement by way of justification to *safeguard their legitimate interest* will not be guilty under the offence of defamation. This provision suggests that when defamers have their *legitimate interest* in their expression, their right to free expression is also considered to be weightier than the victim's reputation. The right to free expression is weightier, even though their expression has no public interest.

Although the requirement to recognise constitutional rights might *not* be a huge burden for the Thai Court in criminal defamation cases, this requirement might be a burden for other legal provisions which do not have their own justification or defence such as the offence of insult, the focus of this thesis. The Court must consider whether it should protect the victim's personality right or the insulter's right to free expression. But insulters under Thai law do not have specific justifications, which can be regarded as a legal provision recognising the insulter's right. Nor is there a guideline for balancing those interests. For example, in the *Supreme Court Decision No 1105/2519*,[1110] which the Court found the editor of a newspaper guilty of the offence of insult by means of communication to the public because it published a news report saying the injured party's face would be slapped by a shoe. The Court should have considered whether the Court should protect the editor's right to publish incidents happened in Thai society or the injured party's personality right in the news before finding the editor guilty of the offence of insult. This

[1110] The *Supreme Court Decision No 1105/2519* (n177)

problem, however, can be easily solved if the Criminal Code is amended as I proposed in chapter 4. The Court of Justice will be able to use the justifications under s 329 as a provision to recognise the insulter's right and a guideline in insult cases similar to defamation cases. With the amendment what would happen in *Decision No 1105/2519* would not change. The Court would find that the justifications under s 329 did not apply in this case because there is no value for the newspapers' reader to know that the injured person's face would be hit a shoe. Although the result would not be changed, the Court of Justice will be able to show that it has already concerned the right to free expression apart from focusing on protecting the victim's right.

The requirement for the Thai Court to recognise constitutional rights can also benefit the personality right of the victim. As shown in *Strauss Caricatures,* it is acceptable to limit the constitutional right to free expression to protect the personality right which was severely violated. Thus, this requirement will also guarantee that other constitutional rights such as the personality right will be suitably protected. Furthermore, as shown in *Böll,* an individual can claim that their personality right is violated by the court decision which dismissed their case. Therefore, the claimant who disagrees with the Court of Justice's decision to dismiss their charge should be able to file a motion to the Constitutional Court to review whether the decision suitably recognises the constitutional right of the claimant.

The requirement for the Thai Court to recognise constitutional rights will also benefit disputes in civil matters. Similar to criminal cases, the Court of Justice in civil cases must consider whether it should protect the defendant's right to free expression or the claimant's personality right before it decides the case. The proposed amendment to the *Criminal Code* can help the Court in *civil* proceedings, too. This is because the justifications, which will apply in criminal cases, will also apply to civil cases as we have seen in section 4.4.2.

Lastly, it is important to point out that the requirement for the Thai Court of Justice to recognise constitutional rights does not only provide more suitable protection to the personality rights and the right to free expression. But the requirement can also be a tool

to protect other constitutional rights. It will be possible for defendants who have not yet found guilty but are ordered to be imprisoned during criminal proceeding to file a constitutional complaint to the Constitutional Court to claim that the imprisonment order violate the defendants' constitutional right (the right to be presumed innocence). This will allow the Constitutional Court to determine the constitutionality of this order.

Consequently, I propose that the Constitutional Court should be able to review the Court of Justice's decision in the same way as in German law. It will be possible for the Thai Constitutional Court to have this authority by amending Article 210(1) as follows:

> The Constitutional Court has duties and powers as follows:
>
> (sub-section (1)) to consider and adjudicate on constitutionality of a law or bill;
>
> (sub-section (2)) to consider and adjudicate on a question regarding duties and power of the House of Representative, the Senate, the National Assembly, the Council of Ministers or Independent Organs;
>
> (sub-section (3) other duties and powers prescribed in the Constitution)
>
> *(sub-section 4) to consider whether the Court of Justice's decision appropriately recognised constitutional rights.*

The *italic* words are the addition sub-section, I propose. This authority will allow the Constitutional Court to perform its authority as I described above. Nonetheless, it is important to point out that the scope of this authority should be limited as in regard to the FCC, which will be discussed in the next section.

8.4.3 The Proposed Scope of the Constitutional Court's Authority

The Thai Constitutional Court should be authorised to review the Court of Justice's decision under one of these conditions. First, the Court of Justice incorrectly interprets the influence of the constitutional right to its case. Secondly, the constitutional right of the complainant is severely violated by the Court of Justice's decision.

In the context of Thai law, the first condition may happen when the Court of Justice interprets a legal provision in a manner which inappropriately limits the right to free expression. For example, we have seen in section 4.3.4.2 that the Supreme Court found that a person's debt is not an issue which is in the public interest once revealed.[1111] The defendants who published statements that the claimants were debtors were not allowed to prove that the statements were true because these statements had no public interest. I already argued that I disagree with this reasoning because this information may benefit some people as a part of the public (such as people who want to do a business with those debtors). The defendants should be able to use s 330 if they intend for others to be cautious with these debtors. If these defendants agree with me, they should be able to argue to the Constitutional Court that this interpretation inappropriately limited their right to free expression.

The second condition may occur when the Court of Justice orders the defendant to be imprisoned without suspending the penalty such as in *Suthep* (2018).[1112] The Supreme Court there found the defendant guilty under the offence of defamation for defaming Mr Suthep. The defendant was ordered to be imprisoned for one year without suspending the penalty. He should be able to file a complaint for the Constitutional Court to review the Court of Justice's decision.

Apart from these conditions, the Constitutional Court should not be authorised to review the Court of Justice's decision on a non-constitutional issue such as in the *Supreme Court Decision No 224/2523* (1980)[1113] which the Court dismissed the charge because the editor did not *intentionally* insult the injured party. The claimant should not be able to file his constitutional complaint for the Constitutional Court to review the question of intention because it is not a constitutional matter.

[1111] See *The Supreme Court Decision No 407/2523*; the *Supreme Court Decision No 2272/2527*; and the *Supreme Court Decision No 407/2523* mentioned in section 4.3.4.2.
[1112] *Suthep* (n390)
[1113] The *Supreme Court Decision No 224/2523* (1980) (n184)

8.5 Conclusion

This chapter shows that the FCC is authorised to review the judgment of courts in criminal and civil matters. The FCC in *Lüth* adopted a rule that the interpretations of the criminal and civil law must be influenced by the Basic Law. Therefore, the laws which limit the constitutional right to free expression cannot easily limit this right. This ruling has also been applied in insult cases, which is a conflict between the personality right and the right to free expression (including artistic freedom). The laws protecting insulted individuals in German law cannot easily limit the constitutional right to free expression. A balance of interests must be considered when there is a conflict between constitutional rights.

I propose that Thai law should authorise the Thai Constitutional Court to review the Thai Court of Justice's decision. This will allow the Constitutional Court to require the Court of Justice to balance between protecting the personality right and the right to free expression, which are constitutional rights under the Thai Constitution. Thai law already has a guideline for the Court of Justice to consider this balance under defamation law because the Offence of Defamation Chapter provides its own *specific* justifications and defence. Although this guideline cannot be directly used in insult cases, with the amendment to the Criminal Code proposed in chapter 4, this guideline can be used in cases of insult. This will allow the Court to show that it already concerned the insulter's right to free expression before it decided whether the personality right of the victim will be protected. And the Constitutional Court will have a role to review whether these rights are suitably protected. This approach will provide more suitable protection to an insulted individual than the current approach, which does not require the Court to consider the balance between these rights.

Chapter 9 Conclusion

To conclude, I will first answer my research question set out at the beginning of this thesis. My main findings will be summarised to answer the question. Secondly, I will point out the original contributions to knowledge achieved from this research. Finally, I will discuss this research's limitations and recommend areas for future research.

9.1 Answering the Research Question

As shown at the beginning of this research, this study aims to answer this question:

> '*Should Thai law protect an individual from being insulted?*'

I found that it is acceptable for Thai law to protect this individual by criminal and civil law.[1114] But the Criminal Code and the Civil and Commercial Code containing the rules protecting this individual should be amended. Insulted individuals should be protected at the same level as defamed persons protected under the law of defamation under these Codes. By learning from the German approach in chapter 8, I also discovered that this question can also be discussed from a constitutional perspective. The Thai Constitutional Court should be involved in disputes between insulted individuals and their insulters because these disputes can be regarded as a conflict between constitutional rights. Therefore, I also propose an amendment to the Constitution of Thailand to add this authority to the Court.

In section 9.1.1, my finding will be summarised to show why it is acceptable to protect an insulted individual by both criminal and civil law. In sections 9.1.2-3, I will present my proposed amendments to the Criminal Code and the Civil and Commercial Code with the summary of the supporting reasons. In section 9.1.4, I will also present my proposed amendment to the Thai Constitution with the summary of the supporting reasons.

[1114] See section 5.6

9.1.1. Protecting an Insulted Individual by Criminal and Civil Law

Thai criminal law currently protects an insulted individual through the offence of insult under s 393 of the Criminal Code. This Code regulates two forms of insult: (i) insulting an individual in their presence; and (ii) insulting an individual by means of communication to the public. I found that *an* interest protected under this offence is the personality right which is the right of *being* an individual.

The personality right is not the only interest protected under the first form of insult because this form also aims to preserve public order. As shown in section 3.2, the *Supreme Court Decision No 3711/2557* (2014) ruled that an insulter is guilty under this form of insult if they insult their victim when both of them are in the same physical place. The Court explained that the offence of insult aims to prevent the physical fight between them. The Attorney General also gave the same explanation in 2016. I found that it is *acceptable* for Thai law to have this approach because an insulted victim can use tort law to protect their personality right. Furthermore, in the history of this offence, Thai law clearly stated that a verbal abuse was only penalised when the victim personally heard the abuse.[1115] Since this form of insult aims to preserve public order, this can be a rationale for this form to be stated as a criminal offence.

In contrast, I found that the second form of insult (insulting an individual by means of communication to the public) mainly aims to protect the personality right of the insulted individual.[1116] Supreme Court Decisions, which found the insulters guilty under this form, did not say that this form aims to prevent the physical fight as the first form.[1117] Therefore, public order cannot be a rationale for criminalising this form of insult.

In civil law, as shown in section 3.3, the Supreme Court in its *Decision No 124/2487* recognised the insulted individual's right to sue his insulter under the general principle of tort law under s 420 of the Civil and Commercial Code in conjunction with the offence of insult. The insulted individual has the *right not to be insulted* protected by this offence.

[1115] See section 4.2.1
[1116] See Section 3.2.3.2
[1117] See the *Supreme Court Decisions No 311/2491* (n196) and *No 1105/2519* (n177)

This approach implies that it is necessary to have the criminal offence of insult as a source for civil liability. However, I propose the other approach to protect an insulted individual under civil law, which I developed from the *Supreme Court Decision No 4893/2558* (2015). The personality right as an interest protected under the offence of insult has already been recognised as a constitutional right. An insulted victim can use the general principle of tort law in conjunction with the constitutional right to sue their insulter. Insulted individuals can claim that their constitutional right is harmed by their insulters. The approach to combine the general principle of tort law with the constitutional right is similar to the German approach in civil law as shown in chapter 8. Furthermore, the lessons from German civil law show that Thai law does not have to choose between these approaches. If insulted victims find the approach of the *Decision No 124/2487* is suitable for them, they can use this approach by claiming that their *right not to be insulted* protected under the Criminal Code is injured. Therefore, victims being insulted under either the first or second form of insult under the Criminal Code can use this approach to protect their right.

Although the approach in *Decision No 124/2487* suggests that it is necessary to have the Criminal Code as the source of right, the other approach does not require the offence of insult as the source. Insulted victims can use the general principle of tort law with the constitutional right to protect their personality right. This approach, however, raises a question whether Thai law needs to criminalise insults to protect an individual (apart from the first form of insult which is criminalised to preserve public order as mentioned above).

This question is answered by my examination of the Thai law of insult at a conceptual level in chapter 5. The examination shows that Post's concept of reputation as dignity (adopted from Goffman's work) can be a basis to provide a rationale for Thai law to regulate insults. The analysis of this concept shows that it is about having law as a means to protect an individual's personality from being harmed substantially because law allows the harmed individual to use the Court as an arena to heal the harm. The personality of an individual can be regarded as an interest protected under the law of insult. This personality is harmed by people' speech which violates Thai society's rule of deference. The harm must be substantial such as the violation is done to the public. The law of insult, under the Criminal Code or tort law can help this individual by allowing them to use a

court as an area to heal their injury. Furthermore, the lessons from German civil law suggest the way to consider the substantial harm. As discussed in section 7.5, the injured person must show the circumstance which made the violation of the personality right substantial. An example of these circumstances in insult cases, in my view, is the fact that the victim is insulted by telephone many times.

The examination of the Thai law of insult at a conceptual level can provide a rationale for Thai law to regulate insults. Unfortunately, it cannot explain why Thailand needs to protect insulted individuals by both criminal and civil law since individuals can claim their right under either one of these laws to have the Court as their arena to heal their injury. To answer this question, I argue that it depends on the choice whether Thai law wants to show its preference for (i) protecting the personality right (as I show in section 2.3.2.1 this right is protected under Article 32(1) of the Constitution) or (ii) protecting the freedom of individuals to speak (or as a constitutional term 'the right to free expression' protected under Article 34). The current approach under Thai law suggests that Thai law prefers to protect the personality right over the right to free expression because an insulted individual can use governmental resources to protect their right. A person accused of insulting another person, however, has to hire their lawyer to defend their right to free expression. If the second form of insult is decriminalised, it can be seen as striking a fairer balance between protecting the personality right and the right to free expression. Insulted individuals will no longer be able to use governmental resources to protect their right. Both insulted individual and insulter will have to use their own resources to argue and defend their case. However, Thai law has allowed insulted individuals to use governmental resources to protect their right for a long time. The decriminalisation, I believe, will be seen as *relatively* favouring to the right to free expression of individuals when compared to the current situation. The decriminalisation will immediately take away the benefit which insulted individuals currently have.

The current status of Thai law, I argue, is more suitable to Thai society for these reasons.[1118] First, Thai society is benefited from having a criminal offence of insult

[1118] See the detail of these reasons in section 5.6.2

because this offence controls speech communicating to the public. People will be aware that they might be prosecuted if they use words which insult another person to the public. Secondly, the right to free expression will not be seriously limited because, with my proposed amendment, the offence of insult will be a compromisable offence and there will be the *specific* justifications provided to insulters. Thirdly, both the personality right (protected by the law of insult) and the right to free expression are recognised by the Thai Constitution as constitutional rights. Although the current position suggests that the personality right is favoured, this position is suitable for Thai law because violations of the personality right by insults, in my view, is worse than limiting the right to free expression. Therefore, *it is acceptable* for Thai law to regulate insults by criminal and civil law.

Since it is reasonable for Thai law to protect insulted individuals by both criminal and civil law, I will present my proposed amendments to the Criminal Code and Civil and Commercial Code which will provide better protection to insulted individuals with the summary of the supporting reasons in the next two sections.

9.1.2 The Amendment to the Criminal Code

First, the forms of insult under s 393 should be separated. The first form of insult (insulting an individual in their presence) should be stated in the same position but the second form of insult (insulting an individual by means of communication to the public) should be relocated to the Offence of Defamation Chapter as s 326/1. Since a form of insult is added into the Chapter, the name of the Chapter should also be changed to 'the Offences of Defamation and of Insult' as a reflection to the addition.

> 'Section 393 Whoever insults any person in their presence shall be liable….'
>
> *Chapter III The Offences of Defamation and Insult*
>
> 'Section 326/1 Whoever insults any person by means of communication to the public shall be liable to…'

This amendment is proposed because the first form of insult aims to protect *the personality right and to preserve public order*. It is suitable for this form of insult to be

stated as a Petty Offence, which aims to preserve public order. However, as the second form of insult aims to protect the personality right. This aim is similar to the offence of defamation which aims to protect the personality right but in a different aspect.[1119] This relocation will put the offence of insult in a more suitable place of the Criminal Code. In German criminal law these two offences are stated in the same chapter. More importantly, the relocation will allow some specific rules under the Offence of Defamation Chapter to be applied in cases of insults. These rules will protect individuals insulted by means of communication to the public at the same level as those being defamed.

First, the second form of insult will become a compromisable offence by s 333 of the Criminal Code. Individuals insulted under this form will be able to use the compromisable process to heal the harm caused to their personality right in the same way as defamed individuals heal the harm from being defamed. Insulters will not be able to easily settle their charge by paying a fine as fixed by the police. The settlement will need the insulted individual's consent. Not only does this process provide better protection to the insulted individual, but this process can also be supported by my reconstruction of Post's concept of reputation as dignity, which argues that the injured individual should have an arena to argue that he or she should not be treated that way. With my proposed amendment, the arena can be the Court or a police station where the victim can argue that their insulter broke the Thai society's rule of deference. The insulter can accept that they actually did and apologise to the insulted individual. The harm caused to the latter's personality right will be healed without having to impose any criminal liability on the insulter. Not only is this more suitable for the parties, but it also saves state resources.

Secondly, I propose to amend s 332 to allow an individual insulted by the second form to ask the court to impose the special sanctions on their insulters:

> Section 332 In the case of defamation or *insult* in which judgment is given that the defendant is guilty, the Court may make an order:

[1119] See section 4.2.2

sub-section (1) to seize and destroy an object or any part thereof in which appears defamatory or *insulting* statements;

sub-section (2) to publish the whole or part of the judgement in one or more newspapers for once or several times at the expense of the defendant'

The *italic* words are the words I proposed to add to the original section 332. The amendment of sub-sec (1) will allow the insulted individuals to ask the court to order the insulting statement to be seized or destroyed.[1120] As discussed in section 4.3.6, this special sanction can stop the harm to the victim's personality right from being continuously insulted.

The amendment will also allow the insulted victims to ask the court for publishing its judgement at the expense of the insulters. As shown in section 5.5.3.2(ii), this amendment will help the victims to show the public that they should not be insulted. The amendment will make the law of insult perform its function to protect an individual's personality suitably.

Finally, I also propose to amend s 329. This amendment is different from the first two amendments because this amendment will be beneficial to insulters. These amendments will allow persons who insult another by means of communication to the public to have these justifications. The amended section will be:

Section 329 Whoever expresses any opinion or statement in good faith:

sub-sec (1) by way of justification, self-defence or safeguarding his or her legitimate interests;

sub-sec (2) as being an official in the exercise of his or her duty;

sub-sec (3) by way of fair comment on any person or anything which shall be deemed as common public criticism; or

[1120] Please see section 4.3.6 which discusses how s 332 (1) sub-section (1) currently applies to defamation.

sub-sec (4) by way of fair report of the open proceedings of any Court of meeting.

shall not be guilty of defamation *or insult*.'

The *italic* word is my proposal to add to the above section. This amendment will allow the insulter insulting under the second form to have s 329 justifications in the same way as the defamers have these justifications. This amendment will also benefit wrongdoers in civil cases as shown in section 4.4.2.[1121]

9.1.3 The Amendment to the Civil and Commercial Code

In civil law, as discussed in section 9.1.1 insulted victims have to use the general principle of tort law with (i) the offence of insult or (ii) the constitutional provision to sue their insulters. Since I do not propose to decriminalise insults from Thai law, the victims can choose which approach they want to claim for the compensation under tort law. For the first approach, they have to prove that the insulter commits the offence of insult either (i) in their presence or (ii) by means of communication to the public. In the second approach, I argue, they have to prove that their personality right is substantially harmed by showing the circumstance which makes the harm substantial.

Once the insulted victims prove that their personality right is harmed by the insulter, they will be able to claim the compensation stated in the Civil and Commercial Code. As I propose to amend s 447 of the Civil and Commercial Code, this will guarantee that insulted individuals will be able to ask the Court to order their insulters to apologise in the same manner as defamed individuals can ask their defamers to do so. The amended section will be:

> Section 447 In case where any person causes damage to *the personality right of another person*, the Court may, at the injured person's request, order such person to take a reasonable action in restoring that other's *personality*

[1121] See the accompanying text of footnotes 420-421

right in lieu of awarding compensation or in addition to awarding compensation.

The *italic* words are my proposal to add to the above section. This amendment is similar to the amendment to s 332 sub-sec (2) because it will help insulted victims to heal the harm caused to the personality right by asking the Court to order their insulters to apologise as a reasonable action to heal the harm to the victim's personality right. This amendment will also make the law of insult perform its function to protect an individual's personality suitably.

9.1.4 The Amendment to the Constitution of Thailand BE 2017 (2560)

In order to require the Court of Justice to consider a balance between protecting the personality right of the victim and the competing right of others, as the German Courts do, it is necessary for Thai law to have an entity to ensure that the Court of Justice do so. This entity in Germany is the Federal Constitutional Court. Therefore, I propose that the Thai Constitutional Court should be this entity in Thailand. This will be possible if the Constitution Article 210 is amended as follows:

The Constitutional Court has duties and powers as follows:

(sub-section (1)) to consider and adjudicate on constitutionality of a law or bill;

(sub-section (2)) to consider and adjudicate on a question regarding duties and power of the House of Representative, the Senate, the National Assembly, the Council of Ministers or Independent Organs;

(sub-section (3) other duties and powers prescribed in the Constitution)

(sub-section 4) to consider whether the Court of Justice's decision appropriately recognised constitutional rights.

Sub-section 4 is my proposed amendment, which will authorise the Constitutional Court to review whether the Court of Justice appropriately balanced between protecting the

personality right and the right to free expression. My proposed amendment to s 329 of the Criminal Code will help the Court of Justice both in criminal and civil cases to recognise these constitutional rights. By determining a justification under this section, the Court can show that it already considered the right to free expression before it decided to protect or not to protect the personality right. And the Constitutional Court will have a role to review whether the Court of Justice's decision appropriately recognised these constitutional rights. This approach will require the Court of Justice to show in its decision that it already concerned the right to free expression before it ordered the defendant imprisoned or otherwise punished. The right to free expression will not be easily limited by a statue under this approach.

9.2 Original Contributions to Knowledge

There are three main original contributions to knowledge achieved from this thesis: (i) a rationale for the Thai law of insult and for why it is appropriate for Thai law to offer an insulted individual protection under the criminal and the civil law; (ii) providing a more suitable ways to protect an insulted individual under criminal and civil law; (iii) suggesting an additional way to provide more suitable protection to an insulted individual through constitutional law.

First, not only does this thesis discuss how the Thai law of insult works, but it also analysed *why* Thai law needs to protect an insulted individual. Apart from the first from of insult which is criminalised to preserve public order, my reconstruction of the concept of reputation as dignity can be a rationale for regulating insults. Furthermore, this thesis also presents an idea that it is acceptable for Thai law to have the current position: criminalising the second form of insult (insulting an individual by means of communication to the public) because of the three reasons summarised in section 9.1.1.

Secondly, this thesis proposes more suitable ways to protect insulted individuals in criminal and civil law. I propose that these individuals should be protected as the same level as defamed individuals protected under the Thai law of defamation. The insulted individual will be protected at that level if some provisions related to insult and defamation in the Criminal Code and Civil and Commercial Code are amended as summarised in

sections 9.1.2-3. My proposal is adopted from the current Thai law which protects defamed individuals. This proposal is supported by my reconstruction of Post's concept of reputation as dignity and by a comparison with German law. This proposal is different from Pentakulchai's which only focused on the criminal aspect of insult. My research covers both criminal and civil aspects of insult. In the criminal aspect, my proposal is more updated than his because I also considered the new approach adopted by the Supreme Court in 2014.

Finally, this thesis found an additional way to protect an insulted individual. By learning from German law, I found that constitutional law can have a role in disputes regarding insults because an insult can be seen as a conflict between constitutional rights. If Thai law adopts the German approach in constitutional law by authorising the Constitutional Court to review Court of Justice's decisions, the Constitutional Court will have a role in protecting the personality right harmed by insults. Not only will the personality right be beneficial from this approach, but the right to free expression will also benefit. This is because the German approach requires courts in civil and criminal matters to balance between protecting these constitutional rights. This additional way will provide *suitable* protection to insulted individuals because this way does not focus on protecting the personality right of the victim, but it also concerns other constitutional rights such as the right to free expression.

9.3 Research Limitations and Recommendations for Future Research

9.3.1 Research Limitations

Although this thesis achieved the original contributions to knowledge as I claimed above, I accept that this research has its limitations. Other researchers may overcome these limitations. First, this thesis discusses how the law of insult applies in the online environment and shows the current status of the law on online service providers. But this thesis does not evaluate whether this status is suitable to the new online media because this thesis focuses on 'an insulted individual.' The evaluation should be done by the research which focuses on 'online service providers.' By understanding the functions and

roles of these providers in online communications, researchers would be able to make a judgment whether the current status needs to be improved or not.

Secondly, this thesis does not cover the issue of insults done by online users whose identity cannot be easily identified, as already stated at the beginning. The more suitable and additional ways to protect an insulted individual as proposed will not be achieved if the insulter is not identified. However, this problem is not specifically about the Thai law of insult. It is the problem under Thai procedural law generally. Thailand has not amended its Criminal Procedure Code and Civil Procedure Code to respond to problems caused by those online users. Though there is a provision under the Computer Crime Act 2007 (amended in 2017) which can be used to identify online users who commit criminal offence, the provision is not applicable in civil law. There should be another study which aims to analyse the effectiveness of this provision in criminal offences and propose to adopt a suitable rule used in civil law.

Thirdly, the German approach was chosen to be compared with Thai law because my finding in chapter 5 shows that it is acceptable for Thai law to protect an insulted individual by criminal and civil law. Germany is the appropriate choice because it is a developed country which also regulates insults by criminal and civil law. And German law has influenced Thai legal system since the enactment of the Criminal Code and the Civil and Commercial Code. It is obvious that lessons which I learned from German law are limited because my access to German law was limited to legal literature written in English. But I hope that the findings in my thesis might aid other researchers who can understand the primary German materials for more detailed comparison between Thai and German law. For example, they can research on the factors which German Courts used to consider the seriousness of personality right violations.

Fourthly, the German approach in the constitutional law shows that the Thai Constitutional Court can be a tool to protect other constitutional rights (apart from the personality right and freedom of expression). However, I have not yet discussed the implications of my proposals for other constitutional rights in detail. But I hope this finding can aid other

researchers to analyse this issue from the constitutional perspective and find out whether there will be problems if the Thai Constitutional Court has this authority.

9.3.2 Recommendations for Future Research

Apart from the limitations discussed above, there are interesting issues found during this study which can be further researched on. First, the underlying concepts which used to examine the Thai law of insult can be used to examine laws having similar functions. As shown in section 5.4, the concept of reputation as dignity is used as a basic to provide a rationale for the offence of defamation. Other researchers can use other concepts discussed by Post to examine laws in other areas such as examining the law of defamation which protects business organisations by the concept of reputation as property or examining the *lèse-majesté* offence by the concept of reputation as honour. These researchers may find interesting rationales which may lead to the more suitable ways to protect those organisations or the monarchy.

Secondly, the finding in chapter 5 shows that it is suitable for Thai society to protect an insulted individual by criminal and civil law is my preference with supporting reasons. Other researchers may have different judgments and may believe that civil law is sufficient to protect an insulted individual. Those who have this judgment can propose to decriminalise the offence of insult and choose to compare the Thai civil law of insult with the law of country which protects an insulted individual only by civil law.

Thirdly, the finding in chapter 6 shows that the offence of insult can be a foundation for regulating hate speech in Thai society. This finding suggests that some groups of people which can be clearly identified would be able to use the offence of insult to regulate hate speech against them. However, as I already stated in section 6.6, another study should be done to identify whether Thai society actually has those groups of people. Again, I hope that other researchers can build upon my work to find the answer to this question.

Finally, the finding in chapter 8 shows that the *specific* justifications under the Criminal Code can be a guideline for the Court of Justice to balance between protecting the personality right and the right to free expression. Having these justifications is ‘better’ than

the current situation which has no clear guideline to balance them. Nonetheless, I have not yet proved that this guideline is consistent with an underlying concept to protect the right to free expression because I mainly focus on ‘an insulted individual’. Other researchers may answer this question by examining my findings on the *specific* justifications and the defence under the Offence of Defamation in section 4.3.4 to find out whether these justifications and defence are consistent with any underlying concept for protecting the right to free expression.

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Annex I: Summary of the Supreme Court Decisions which found the defendant guilty under the offence of insult (mentioned in Chapter 3)

The *Supreme Court Decision* No:	Claimant (s)	Defendant (s)	Speech being found insult	The Form of insult	Penalty imposed by the Court
1623/2551	Public Prosecutor	Ms. Kanungnit Thammawattana	Disparage Speech (ทนายเฮงซวย)	insult in the presence of the injured party	ordered to pay a fine of 1,000 baht (25£)
418/2480	Public Prosecutor	Mr Sanong Sumatra	Disparage Speech (กรรมการอำเภอหมาๆ)	insult in the presence of the injured party	ordered to pay a fine of 100 baht (2.5£)
2089/2511	Ms Chan Podmine	Mr Kaew Nonnachat	Disparage Speech (‘อีหมาไปควักเอากระดูกแม่มึงเจ็ดชั่วโคตรมาสู้กับกู อีหน้าหมูอีหน้าหมา’)	insult in the presence of the injured party	ordered to pay a fine of 100 baht (2.5£)
311/2491	Public Prosecutor	Mr Samuth Pratheep Na Talang	Disparage Speech (นายกเทศมนตรีเป็นสุนัข)	Insult the injured party by means of communication to the public	N/A
1273/2473	Mr Puong	Mr Promt	Verbal Abuse (ไอ้หน้าด้าน)	Insult in the presence of the injured party	Ordered to pay a fine of 2 baht (0.05£)
515/2481	Public Prosecutor	Mr Num Sae-lim	Verbal Abuse (กูจะไปฟ้องหีแม่มัน)	Insult in the presence of the injured party	N/A
291/2482	Public Prosecutor	Mr Sa-ngan Natawan	Verbal Abuse (‘ฉายหาหัวควยอะไรเข้าหน้าเข้าตา’)	Insult in the presence of the injured party	N/A

1442/2495	Public Prosecutor and Ms Arromlarp Owartwith	Second Lieutenant Chet	Verbal Abuse (‘อีร้อยควย อีดอกทอง’)	Insult in the presence of the injured party	N/A
2102/2521	Public Prosecutor	First Lieutenant Suppasak Yosatorn	Verbal Abuse (อีดอกดำ)	Insult in the presence of the injured party	Ordered to pay a fine of 500 baht (12.5£)
1989/2506	Public Prosecutor	Mr Prasong Wongsuriya	Verbal Abuse (กูไม่เอามึงให้เสียน้ำ อีหน้าหัวควยพรรค์นี้’)	Insult in the presence of the injured party	Ordered to pay a fine of 200 baht (5£)
272/2502	Pubic Prosecutor	Mr Panya Songpracone	Verbal Abuse (‘เมีย ผู้ใหญ่บ้านนี้แต่งตัวสวยน่าอยากล่ำสักที’)	Insult in the presence of the injured party	Ordered to pay a fine of 100 baht (2.5£)
439/2515	Public Prosecutor	Mr Choo	Humiliate (‘ออกมาซิกูจะจับหีมึงให้มึงดู’)	Insult in the presence of the injured party	Ordered to pay a fine of 200 baht (5£)
1105/2519	Public Prosecutor and Mr Suchart Boonkasem	Mr Somsak Sompaokaymesil	Humiliate the injured party by publishing in a newspaper ‘วันก่อนเดินผ่านตลาดหักรอ ได้ยินเสียงเจ้แต๋วมาดามของคุณประเสริฐ มานะประเสริฐศักดิ์ บก. แหลมทองตะโกนลั่นกลางตลาดว่า ถ้าคนชื่อ สุชาติ บุญ	Insult the injured party by means of communication to the public	Ordered to pay a fine of 300 baht (7.5£)

			เกษมเดินผ่านหน้าร้านเมื่อไรจะถอดรองเท้าตบหน้าซักทีเสียเท่าไรก็ยอม'		
19384/2557	Public prosecutor	Ms Sasiwan	Verbal Abuse 'อีกระหรี่ อีหน้าหี อีดอกทอง อีสัตว์'	Insult in the presence of the injured party	Ordered to pay a fine of 1000 baht (25£)