

“*Lèse-majesté*”: A Distinctive Character of Thai Democracy amidst the Global Democratic Movement

Professor Dr. Borwornsak Uwanno
Fellow of the Royal Institute
Secretary-General of King Prajadhipok’s Institute

Recently, certain Thai academics have put forward a proposal that *lèse-majesté* law in Thailand should be abolished. This call has been met with many comments and criticisms, in favour and against, from Thais and foreigners alike. All these views can be summarized into two main themes. First, a *lèse-majesté* offence contravenes the democratic principle of freedom of expression, and, second, *lèse-majesté* allegations have been abused by accusers for political gain.

This article aims to make an academic analysis to determine **whether this particular offence should be maintained**. If the answer is yes, then what is the conceptual basis? If no, then why is it so? Are there any problems with enforcement of the law? If so, how can these problems be resolved?

In order to make an academic analysis without relying on opinion, which may be subject to personal bias, this article will approach the issue from two angles: 1) democratic principles and criminalization of certain acts with regard to the Head of State, and 2) Thai culture and the *lèse-majesté* offence as a distinctive character of Thai democracy amidst the global democratic movement.

1. Democratic principles and criminalization of certain acts with regard to the Head of State

1.1 The Rule of law

Leading criminal law philosophers have argued that certain acts should only be criminalized when it is “fair” to do so (Dennis Baker, 2007; Joel Feinberg, 1984), and that objective reasons are needed to justify such criminalization, namely that there is a societal consensus that those acts are “harmful to the society”.

The word “harm” can mean harm to **public order**. Murder and theft, for example, affect not only the victims of such acts but also society at large because they create fear and disorder. It can mean harm to **security and economic conditions** of the society as well as harm to **good morals**. Many societies make statutory rape a criminal offence because even though the act itself may not necessarily cause harm to the **individuals** involved (as it is consensual), it is considered by the society to be **harmful to public morals** and is thus criminalized. Another similar offence is public nudity. This may not harm any particular individual, as the person appearing naked in public may enjoy the attention and others may enjoy watching. Nevertheless, the society regards it as immoral and makes it a criminal offence.

In sum, injury or harm to a victim is just part of the basis for criminalization of a certain act, and **it is the harm to the society that determines whether criminalization of that act is fair**. In some cases, as in the afore-mentioned examples, it may be that no one is

actually a “victim” in the sense of suffering harm, but the “victim” may be the society to which the act is unacceptable.

This criminological principle is part of “the rule of law” which is an essential principle of democracy that puts just law over human whim, and prevents humans from arbitrarily making any act a criminal offence.

1.2 Democratic principles and the protection of the Head of State

In addition to the rule of law, it is generally accepted that there are two main principles in democracy.

The first principle is that the ultimate power to govern lies with the people. The government must come from the consent of the people who may exercise such power themselves (direct democracy) or elect representatives to exercise the power on their behalf (indirect democracy). The people also participate in the administration of the state.

The second principle is that every one in society enjoys human dignity, equality and freedom, which may be limited only by laws enacted by the people themselves or by their representatives. There must also be mechanisms to protect against violation of such entitlements, and disputes must be settled by neutral and independent courts.

Any democracy, Thailand included, adheres to these two principles although they may implement them differently. Countries such as the United Kingdom, Belgium, Spain, Japan and Thailand are democracies with a monarch as Head of State, while others such as the United States, India and the Republic of Korea are democracies with a president as Head of State. But whatever the differences, all of these countries adhere to the aforementioned principles, particularly the latter.

Democratic nations also have diverse systems of government. The United States, the Philippines and the Republic of Korea use a presidential system under which the President is both the Head of State and Head of Government and has administrative powers as well as political responsibilities. Countries such as India and Germany, meanwhile, are governed by a parliamentary system under which the President is the Head of State, but governing and political responsibilities lie with the Prime Minister and the Government.

Countries with monarchs as Heads of State also have variations. Many, including the United Kingdom, Belgium, Norway, Japan and Thailand, have a parliamentary system under which the Monarch is the Head of State, does not govern but acts upon the advice of an elected government, and has no political responsibilities; hence the phrase: “The King reigns but does not rule”. On the other hand, monarchs in some other countries, particularly Muslim ones such as Saudi Arabia and Brunei Darussalam, both reign and rule.

Whatever the form of democracy, it is commonly recognized that the Head of State has a status different from that of ordinary citizens, being not an individual but an institution and a representative of the state. This is both an **international customary law** and a **constitutional legal principle in democracies**.

Under **international law**, a president or monarch has a number of **privileges and immunities**. For example, a person may not sue the head of state while in office. This was why attempts to file charges against President Fidel Castro in Spain, or against President Jiang Zemin in the United States, or against President Robert Mugabe in the United Kingdom

were all dismissed by the courts of the respective countries. One exception was Augusto Pinochet, former president of Chile, whose case was prosecuted in a British court because as State Parties to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, both Chile and the United Kingdom waive the immunities of their heads of state.

The **constitutions** of democratic nations also accord the Head of State a status different from that of ordinary citizens:

Article 5 of the Norwegian Constitution of 1814 states that “The King’s person is sacred; he cannot be censured or accused.”

Article 13 of the Danish Constitution of 1953 states that “The King shall not be answerable for his actions; his person shall be sacrosanct. ...”

Article 88 of the Belgian Constitution of 1970 states that “The King's person is inviolable; his ministers are responsible.”

Article 56(3) of the Spanish Constitution states that “The person of the King is inviolable and is not subject to political responsibilities.”

Article 4 of Luxembourg’s Constitution states that “The person of the Grand Duke is inviolable.”

As evident from the above, the constitutions of countries with monarchies stipulate the monarch’s position as being sacred, revered or inviolable. Importantly, the protection accorded does not apply only to the **position of the monarch** but also to **his person**. This is reflected by the phrase “the person of the King”. The constitutional protection for a monarch is greater than that for a president.

Furthermore, democracies have laws which protect the Head of State and other institutions of the state such as the National Assembly and the Court.

The United Kingdom, an archetypal model of parliamentary democracy with a Monarch as the Head of State, has both common law principles and statutory laws to protect the Monarch, the Parliament and the Court.

The British monarch is protected by Section 3 of the Treason Felony Act 1848, which specifies a number of offences as treason felonies, including violation of the Queen’s honour. Advocacy of replacing the Queen with a President may, for example, be considered an offence under this law. Nevertheless, the last prosecution under this Act took place in 1883, and the Act has ever since become “dormant”, or in other words, not been enforced.

Under British common law, both the House of Commons and the House of Lords have the power to commit a person for “contempt or breach of privilege” against them by **deliberating and passing a resolution ordering sergeant at arms to hold that person in custody**. No adjudication by the court is required, and even if an appeal is made to the court, the court does not have jurisdiction and has to dismiss the case. (See Brass Crosby’s Case 19 St. Tr. 1147). This parliamentary power includes punishment for words or writings which falsely accuse or defame either House or their members. (Erskine May, 1983, p.124, 152)

Contempt of court is an offence under British common law and the Contempt of Court Act 1981. It may subject those held in contempt of court to both criminal

and civil offences for showing disrespect for the court, such as failure to obey a lawful order of the court, showing disrespect for the judge, disrupting court proceedings, or defaming the court through publication or advertisement. In the case of direct contempt, the court may order that the person concerned be imprisoned, while in the case of indirect contempt, the matter will be for the attorney-general to press charges.

Other democracies which have a monarch as the Head of State also have similar laws as the British. Norway, for instance, makes defamation against the King or the Regent an offence punishable by imprisonment of up to five years (Article 101 of the Criminal Code). If a person commits sexual offences against members of the royal family (Chapter 19), violates their personal liberty (Chapter 21), or defames them (Chapter 23), the penalty for their felonies may be double the usual penalty (Article 102). What is interesting is that *lèse-majesté* charges in Norway may be made only with the consent of the king.

In Belgium, defamation against the monarch carries a penalty of a prison term of six months to three years and a fine of 300-3,000 francs, while defamation against members of the royal family is punishable by two months to two years imprisonment and a fine of 100-2,000 francs. In the Netherlands, defamation against the monarch carries a penalty of a prison term of up to five years, and defamation against the consort has a penalty of four years imprisonment. In Spain, the penalty is a prison term of six months to two years for the same offence. Countries that do not have monarchies, such as Germany, Switzerland and Poland, also consider insulting foreign heads of state a criminal offence.

1.3 Equality, freedom of expression and social protection

Democracy values equality and freedom, particularly the freedom to express and disseminate opinions. But equality is not so simplistic or naïve that it renders all forms of discrimination incompatible with the principle. Certain forms of discrimination exist for valid reasons and needs. Recruitment of employees and admission examinations due to limited places are considered fair discrimination and widely accepted as not inconsistent with the principle of equality. Providing Heads of State or organs of state with greater protection than for ordinary citizens is also fair discrimination practiced by all countries and not regarded as contradicting equality. As Aristotle said, to treat unequals equally is unfair. Positive discrimination to assist the disabled or disadvantaged more than ordinary people can and should be done without contradicting the principle of equality.

The same goes for freedom. Philosophers all over the world recognize that unlimited freedom could lead to anarchy and disorder. In this regard, Article 4 of the 1789 French Declaration on the Rights of Man and of the Citizen states: “Liberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights. These limits can only be determined by law.”

This principle also appears in the 1948 United Nations’ Universal Declaration of Human Rights, particularly Article 19 on freedom of opinion and expression as well as Article 29 (2) which states: “In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing

due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”

In fact, all democracies agree that freedoms have limits, but that such limitations must be placed by law enacted by the people or by their representatives. No country would say that freedom of expression allows a person to verbally attack, insult or defame anyone. On the contrary, every country agrees that freedom of expression can be limited when it comes to the need to protect the reputations or honour of others (hence making insult and defamation an offence), juveniles (e.g. in many countries, distributing adult pornography is permissible but distributing child pornography is not), public morals (e.g., in Thailand, the sale and showing of pornographic movies are prohibited, as is the opening of casinos, while in Muslim countries, male homosexual relations are considered a serious crime) and public order and security (e.g., recruiting people to take part in terrorist acts is unlawful).

The problem occurs when this freedom of expression is exercised in different countries. Questions arise as to what “morals” means and to what extent these should be protected. Each country defines the extent and degree of limitations on freedom of expression differently. There is also a similar problem with the definition of “security or public order”.

This is actually the heart of the problem. In spite of a mutual recognition that freedom of expression may be limited, it remains a matter of debate **as to what kinds and to what degree** such limitations should be.

A further problem is **who is to decide** when one country believes that a limitation cannot be imposed on a particular matter, but another believes that it can.

In the United States and the United Kingdom, freedom of expression can be enjoyed to such an extent that a person may criticize Jesus Christ, pornographic movies may be shown publicly, and gay men may kiss in public places. But in Muslim countries, these acts cannot even be done privately and with consent, not to say publicly; they are considered serious criminal offences because they contradict Islamic religious principles and laws.

Who, then, is democratic and who is not? Who is right and who is wrong?

These problems and questions relate to the profound relationship between law and ethics. What is good or right is what should be done, because it is ethical. What is bad or wrong is what should not be done, because it is harmful to society.

If we believe that only a single set of rights and wrongs exist in the world, which is what “we” believe to be right and wrong, we would become an ethical dictatorship which wants to impose one’s own beliefs as global standards. The academic terminology for this is ethical absolutism.

On the other hand, if we believe that no country is right or wrong but that each is democratic in its own way based on its own social, cultural and ethical norms, thereby creating diversity, then we will better and more easily appreciate others without passing judgment on them based on our own standards. The term for this is ethical relativism.

Those who open their minds and respect human dignity, cultures and the ways of life of other societies, recognize diversity and listen to reason, will appreciate that democracy, equality as well as freedom of expression may differ across countries and

societies in accordance with the culture and ethics of the majority of people in each country and society. What is important is that despite this diversity, the principles of democracy, equality and freedom must remain intact.

The heart of the matter is that “society” must be the point of departure, given that different forms of government have been invented to serve the interests of each society. Even the root of present-day democracy itself is based on the theory of the social contract.

When a society takes on democracy as the best form of government, with the major principles mentioned above, particularly equality and freedom with limitations, then that society should have the right to self-determination to specify details of such limitations so long as these principles are respected.

In this connection, that British society regards contempt of court or contempt of parliament as an offence, and the British Court or Parliament may punish the offenders without undertaking procedures normally applied in general cases, is the right thing to do for that society. The British do not have the right to call other societies undemocratic because they do not have similar offences. Similarly, no open-minded person would accuse Britain of being undemocratic or lacking the rule of law simply because its Court and Parliament may take it upon themselves to punish those held in contempt without going through normal procedures, which is in effect discrimination.

That Belgium, the Netherlands, Norway, Spain, Thailand and other countries consider defamation against their monarchs a more serious offence than defamation against ordinary people is also within the rights of these societies, because the cultural and moral norms of the majority of their peoples deem such an offence to be “harmful” to society.

In fact, there are other examples of different limitations on freedom due to different societal conditions. For instance, freedom of expression in most Eastern countries is limited by prohibitions against distribution of pornography; freedom of occupation is limited by prohibitions against gambling or casinos; and freedom over one’s own body is limited by sodomy laws in some countries. No democrat would judge these countries or societies to be undemocratic simply because they have different cultures and ethical values.

2. Thai culture and *lèse-majesté*: A Distinctive Character of Thai Democracy amidst the Global Democratic Movement

2.1 Thai laws reflecting Thai cultures and ethics

The structure of offences of insult or defamation in the current Thai Criminal Code is divided into three groups and six levels:

The first group is insult or defamation against **ordinary persons**. Insult against another person in his or her presence under Section 393 has a penalty of imprisonment for a term not exceeding one month or a fine not exceeding 1,000 baht, or both. The penalty for defamation under Sections 326 to 333 is imprisonment for a term not exceeding one year or a fine not exceeding 20,000 baht, or both. The penalty for defamation by means of publication is imprisonment of up to two years or a fine of up to 200,000 baht.

The second group is insult or defamation against **state officials** or **the Court**. Insulting officials (Section 136) carries a penalty of imprisonment for up to one year or a fine of up to 20,000 baht, or both. Insulting the Court or the judge (Section 198) presiding over a

case carries a penalty of imprisonment for four to seven years, or a fine of 2,000 to 14,000 baht, or both.

The third group is insult against **the Head of State of foreign countries or *lèse-majesté***. Insulting or threatening the King, Queen, Consort, Heir-apparent or Head of State of foreign countries (Section 133), which is an offence against the friendly relations with foreign states, is punishable by one to seven years imprisonment or a fine of 2,000-140,000 baht, or both. The penalty for defaming, insulting or threatening the Thai Monarch, the Queen, Heir-apparent or Regent is imprisonment for a term of three to fifteen years. Insulting or defaming a representative of a foreign state accredited to the Royal Court has the penalty of imprisonment for a term of six months to five years or a fine of 1,000-10,000 baht, or both.

It is clear from the above that the Thai Criminal Code classifies offences of insult or defamation in accordance with the status of and relations among persons in line with ethical norms in Thai society. This has made Thai laws different from those of other countries in a number of respects. For instance, deliberate homicide (Section 288) is punishable by death, life imprisonment, or imprisonment for 15 to 20 years, while murdering an ascendant (e.g. parents and grandparents), an official in the exercise of his or her duties, etc. (as specified under Section 189) carries a mandatory death sentence. This is because in Thai society, parricide is, based on its religious and ethical norms, an unforgivable sin and the gravest act of ingratitude.

The offence of theft (Section 334) carries a penalty of imprisonment of up to three years and a fine not exceeding 6,000 baht. But if such theft involves Buddha statues or religious objects (of any religion) which is venerated by the public or a national treasure (Section 335 *bis*), the penalty is imprisonment for three to ten years and a fine of 6,000 to 20,000 baht. The offence of theft of religious objects is probably non-existent in Western law because Thais and westerners have different ways of showing respect for religion.

Section 71 on theft further stipulates that a husband stealing from wife or *vice versa* shall not be punished. If the offence is committed by a descendant against his or her ascendant or *vice versa*, or by a brother or sister of the same parents against each other, then the offence shall be deemed compoundable and the Court may inflict less punishment than that provided by the law for such offence. These provisions reflect the fact that where theft occurs among parents and children, or brothers and sisters, the society allows these persons to “forgive” each other. This also may not exist in Western laws.

There are many other instances that demonstrate the differences between the ethics and culture of the majority of the Thai people as appears in Thai laws on the one hand, and the ethics and laws of Western countries on the other. For example, Thai law prohibits a descendant from suing his or her ascendant as this is considered an act of ingratitude (Section 1562 of Thai Civil and Commercial Code) and revocation of a gift cannot be claimed except for an act of ingratitude on the part of the receiver (Section 531).

2.2 Monarchs in Thai cultures and ethics

The 26 countries which have monarchies may be classified into two major groups.

The first is “constitutional monarchy”, in which the monarch is the Head of State, reigns but does not rule, and acts upon the advice of a government which is elected by the people and has the power to govern. Countries such as the United Kingdom, Belgium, Norway, the Netherlands, Spain, Japan and Thailand belong to this group.

The second group is “ruling monarchy”. Countries in this group are mostly Islamic countries such as Saudi Arabia, where the King chairs meetings of the Council of Ministers, and Brunei Darussalam.

Nevertheless, within the first group of constitutional monarchy, there are three variations:

The first is a monarchy which has a long history dating back to ancient times and which, after the change to democracy, has retained its mystique and revered status as well as strict royal traditions. Countries within this category include the United Kingdom and Japan, where the Queen or the Emperor is not very closely engaged with the people.

The second is a monarchy which also has a long history but where, following the change to democracy, royalty comport themselves similarly to commoners. The monarch may drive or ride a bicycle to department stores. Royal court traditions are not as strict as in the first category. Monarchs in this category include those of Scandinavia, i.e., the Queen of Denmark, the King of Sweden and the King of Norway, and the Queen of Netherlands. The bonds between the monarch and the people are not prominent.

The third is a monarchy which has a long history dating back to ancient times, has an exalted religious and social status as well as strict royal traditions, but has close bonds with the people, who love and respect them for the monarch’s contributions to their well-being. The most evident example of this category is the Thai monarch.

Foreigners may have seen images of King Chulalongkorn or of the present King sitting in the Royal Barge or dressed in kingly attire at royal ceremonies. But Thais have seen not only these images of magnificence, which reflect the continuity of Thai history and traditions, but also those of the King and Queen and their children sitting on the ground and conversing in plain language with ordinary people in remote, harsh areas of the country where no one wanted to go. Royal development projects, which today number more than 3,000, were thus initiated, reflecting the monarchy’s closeness to the people.

The bond between the Thai monarchy and the Thai people is unique. It is not one between the Head of State as a political institution and the people as holders of sovereign power. It is a special relationship with certain characteristics that may be difficult for foreigners to appreciate:

2.2.1 *Deva-rāja* (god-king) or *Dhamma-rāja* (righteous king)

Some foreign writers have explained that Thais regard their king as a god-king based on the Brahmin concept of *deva-rāja*. This is not entirely wrong considering the roots of some royal traditions in Thailand. But in fact, Buddhist beliefs are more dominant. In the *Agganna Sutta* on the origins of the world and the social order, Buddha said that the king, or *Khattiya*, is “*mahāsammata*” (“the people’s choice” or one whom the public acclaims as their leader), a “*rāja*” (one who brings happiness or contentment to others). The king attains such a position by his “virtues”, not his “vices”. Buddha further said that “the

king is best among those who value clans. But he who has knowledge and virtue (*dhamma*) is best among gods and men.”

In this regard, the concept of “*dhamma-rāja*”, which means a king who rules with righteous principles (e.g. the ten *rāja-dhamma* or principles of a righteous king, the twelve principles of *cakkavatt-vatta* or duties of a universal ruler, and *saṅgaha-vatthu* or principles of benefaction), is more important than that of *deva-rāja*. Examples in this regard have been set by King Ashoka the Great of India, and in Thailand’s case, King Thammaracha Lithai of the Sukhothai era and His Majesty King Bhumibol, who has acted in keeping with his Accession Oath before a grand audience that “We shall reign **with righteousness**, for the benefit and happiness of the Siamese people.” (Please see the author’s work entitled “The Ten Principles of a Righteous King and the King of Thailand”.)

2.2.2 From “political institution” to “principal social institution”

The monarch is the Head of State and thus a political institution. Although he has no political agenda and acts on the basis of advice from an elected government, the monarch remains a “political institution” which is – in the words of Walter Bagehot – a “dignified part of the constitution”, while the Council of Ministers and the National Assembly are the constitution’s “efficient parts”.

His Majesty the King’s deeds and contributions over the more than 60 years of his reign – be they his tireless dedication in alleviating socio-economic problems faced by Thai people to “narrow the gap” of what the government had not done or in places the government had not reached through implementation of over 3,000 royally initiated projects, or his intervention to prevent escalation of the crisis between the government and the people during the events of 14 October 1973 and May 1992 – have transformed the Thai monarchy from a “dignified political institution” to an “efficient social institution” in the same manner as the family or religion. The monarch therefore is not a “demi-god” unreachable and cloaked in mystique but rather a “father”, as Thais call him, whom Thai people love and respect. Such a relationship is more than that between the Head of State and the people in western societies. How Thais feel towards their King was clearly demonstrated when hundreds of thousands of Thais, at their own behest, thronged Rajadamnern Avenue to wish their King well on the occasion of the 60th anniversary of his accession to the throne, or when they kept round-the-clock vigils at Siriraj Hospital where the King was admitted. This is the basis of a provision which appears in every Thai constitution – that “The person of the King shall be enthroned in a position of revered worship and shall not be violated. No person shall expose the King to any sort of accusation or action” (Section 8 of the present Thai Constitution). This provision is the “**effect**” of Thai culture and ethics, not the “**cause**” which coerces Thai people to respect the King as alleged by some.

This culture of paternalistic governance also explains a phenomenon which may not take place anywhere else. When the Thai King is unfairly criticized, most Thais feel like their own parent is being attacked and cannot accept it – much in the same way that Thais do not accept anyone demeaning the Buddha or even statues that represent him.

The *lèse-majesté* offence means not just harm to the monarch but also to the “father” of most Thais – **a serious social offence comparable to ingratitude towards one’s**

own father. It is therefore not surprising that the “father” himself does not want to take offence (as apparent in His Majesty’s remarks on 4 December 2005) and feels that criticisms of him can be done. Most Thais, however, still wish to maintain the law in order to protect the institution they revere from harm. In other words, *lèse-majesté* is regarded as not just harmful to the person insulted but to Thai society, ethics and culture. This is in line with the criminological principle that certain acts may be criminalized if there is a societal consensus that they are harmful to society and constitute a limitation on freedom of expression. It is not dissimilar to the limitation on freedom of expression as regards criticism of God and the Prophet in Muslim countries, which is not understood by some Westerners, who ridiculed the Muslim prophet revered by all Muslims, thereby creating a controversy that almost led to worldwide violence.

All this demonstrates that **in Thai society**, the *lèse-majesté* offence has its basis not only in the principles of international law or constitutional law but also in Thai ethics, culture and Buddhist principles which are unique to Thai society. In a similar vein, some Western countries may protect their Parliaments through contempt-of-parliament laws (which Thailand does not have), or protect their Courts through contempt-of-court laws, while Muslim countries protect their God and faith. Individual freedom of expression thus ends when it comes up against what each society wishes to protect.

This is in fact the beauty of diversity. No true democrat should want every society to use a single set of standards and place individual freedom of expression above the needs and consensus of the majority of that particular society. Someone who wishes to do so, if such a person exists, should not be called a democrat but an ethical despot. Conversely, it is the recognition of ethical and cultural diversity based on the concept of ethical pluralism that is democratic and open-minded because it appreciates the right to self-determination of each society.

2.3 *Lèse-majesté* offence and its abuse for political gains

While Thais, including this author, believe that the *lèse-majesté* law remains necessary given Thai ethics and culture, we also recognize that in many cases the law has been abused for political gain in political conflicts. There have been regular reports of protagonists of political conflicts accusing one another of *lèse-majesté*. Be that as it may, a more in-depth analysis will show that there are two aspects of such accusations. One is that the accuser wants society to condemn or apply social sanctions – given the people’s respect for the King – against the accused, which could result in a decline in popularity if the accused is a politician. The other is the legal aspect which could subject the accused to criminal punishment.

The author does not have the exact statistics of *lèse-majesté* cases. But according to an interview given by the Chief of the Police Central Investigation Bureau, there are currently 32 cases pending with the police. Four of these are being prosecuted while the remaining 28 are being investigated (www.suthichaiyoon.com). Comparing this number with statistics from Norway on Crime against the Constitution and the Head of State (statistics Norway www.ssb.no) between 1993 and 2007, in which there were seven such cases in 2007 (including cases which are not against the Head of State), we see that the number of *lèse-*

majesté cases in Thailand is much higher. A higher number may be interpreted in a number of ways. It could be because Thais love and are protective of the monarchy and do not want anyone to unfairly criticize the institution. It could also be that people accuse one another out of their own interests (such as personal dislike or political motivation).

Nevertheless, only a few *lèse-majesté* cases have appeared before the Supreme Court. Over the past one hundred years since the promulgation of the Criminal Law 1908 through to the enforcement of the present Criminal Code, there have been only four such cases before the Supreme Court, namely Cases No. 1081/2482 (1939), 861/2521 (1978), 1294/2521 (1978) and 2354/2531 (1988). Another Supreme Court case – Case No. 3304/2532 (1989) – was not a criminal case but involved the dissolution of a foundation due to *lèse-majesté*.

In one of the afore-mentioned four Supreme Court cases, namely, Case No. 1081/2482 (1939), the judges found the defendant not guilty. They deemed that the defendant, while acting as a healer, claimed to be a magician with a magic dagger that could make a person insane, dead or turn into anything, and that he could summon the king or constitution to pay him homage, and that he was afraid of no one except his parents, Buddha, *dhamma* and *sangha* (the Buddhist monkhood). The Supreme Court concurred with the Court of Appeals that the defendant made such claims only to persuade people that he was a magic healer but with no intention of harming anyone, and that his words did not cause anyone to hate or hold in contempt any other person. (The Court of Appeals found that the defendant's statement was a mere claim and was not intended to threaten or defame the King, and that it was a foolish statement.) This shows that the Court considered "intent" as the basis for their deliberations.

In the other three cases, the Supreme Court found the defendants guilty but the penalties imposed were not as severe as the maximum permitted by law. In Case No. 861/2521 (1978), the Court convicted the defendant to one year imprisonment, while in Case No. 1294/2521 (1978), the sentence was two years imprisonment. In Case No. 2354/2531 (1988), the Court imposed a higher penalty as it found that the defendant had intent to insult on two occasions, or two counts, and thus committed him to four years imprisonment.

The severity of the *lèse-majesté* offence has significantly been reduced due to the benevolence of His Majesty the King. In most cases, if he learns of the matter or if there is a petition for a royal pardon for this offence, His Majesty will either express his wish that the case not proceed, or grant a pardon. The latest instance was the case of Harry Nicolaidis, an Australian author who was sentenced to three years imprisonment but served a little over a month of his prison term before being granted a royal pardon. Mr. Nicolaidis said in an interview that:

"On the king's 81st birthday I saw fireworks in the distance. Some prisoners had tears in their eyes, praising a man they regard not just as their king but their father. I may not be Thai, but I am a son, and I know what it means to love a father. I am applying for a royal pardon. I pray the king learns of my plight so I might enjoy his grace."

It was unfortunate that Mr. Nicolaidis had not petitioned to the King before being imprisoned. Had His Majesty the King learned of his plight before the court issued its

verdict, Mr. Nicolaidides' case might have been dropped. A number of earlier cases were, as the attorney-general and prosecutors in charge of those cases could testify.

His Majesty the King has always shown and acted with mercy and compassion. Most people and critics would not know this because it has never made the news. But those who have received his clemency know and can provide testimonials. Among them is an independent academic respected by many, who has been charged with *lèse-majesté* a number of times.

In his remarks on the eve of his birthday anniversary on 4 December 2005, His Majesty the King said:

“... under the constitutional monarchy, the King can do no wrong. ... Actually, to say that the King can do no wrong is an insult to the King because why can the King do no wrong, ... this shows that the King is not human. But the King can do wrong. ...”

His Majesty summed up that the King could be criticized, saying:

“But when we say do not criticize, do not violate [the King] because the Constitution says so, in the end the King is troubled. It means that if the King cannot be criticized, that if the King must be criticized, must be violated but cannot be violated, then the damage is done to the King, the King is not a good person. If Thai people, firstly, do not dare and they, secondly, love the King, they do not want to violate. But foreigners often violate the King, and they laugh at the King of Thailand that he cannot be violated, that the king is not a good person,” and

*“... Actually, they should be put in jail. But because foreigners said so, they are not put in jail. No one dares send people who insult the King to jail because the King will be troubled. They accuse that the King is not a good person or at least is sensitive. When someone insults him a little, he told to send them to jail. Actually, the King has never told anyone to send them to jail. Under previous kings, even rebels were not sent to jail, they were not punished. King Rama VI did not punish rebels. Until the time of King Rama IX, who were rebels? There had never been any. **Actually, I do the same thing: do not send people to jail but release them. Or if they are in jail, release them. If they are not in jail, do not sue them because it would cause trouble. The person who is insulted is troubled.***

*People who violate the King and are punished are not in trouble. The King is. This is also strange. Lawyers like to launch suits, arrest people and send them to jail. So the lawyers teach the prime minister to sue, to punish. So I tell the prime minister who tells him to punish, do not punish. To punish is not good. In the end, it is not the prime minister who is in trouble. **The King is in trouble.** Or maybe someone wants the King to be in trouble. I do not know. They commit wrong. They insult the King in order that the King is in trouble. And truly the King is in trouble. When people insult us, do we like it? We do not. But if the prime minister punishes them, then it's not good ...”*

This royal remark is very clear and needs no interpretation. It reflects His Majesty the King's democratic spirit and benevolence in the most straightforward way.

In this connection, when a certain foreigner who regards himself an expert on Southeast Asian history and studied defamation law for his thesis, wrote in an article that “It is the law itself that makes its enforcement and abuse so terrible. There are no limits on the law”, the statement is clearly biased and incorrect. There are at least two limitations on the

law. The first is that to make a case, one has to look at the **intent**, and if the case makes it to the court, the court will have to use its discretion to impose a penalty that is not disproportionately severe for the offence. The other limitation is His Majesty the King's benevolence. His Majesty has indicated that he does not wish to see the law be used too often, that he allows fair criticism, and that he does not wish to see anyone being imprisoned. Nevertheless, this foreigner was correct in saying that the worrying aspect of this law is the fact that "the police or anyone can use the law to accuse anyone else."

This last point calls for a serious review whether we will let anyone to accuse others using this law, fostering the notion that such accusations are levelled for political gain, and hence His Majesty's remark that he "is troubled", or whether and how we will redress this issue.

Conclusion and Recommendations

As a Thai and a lawyer, this author believes that the three groups of insult and defamation laws in Thailand, including the *lèse-majesté* law, are consistent not only with the principles of international law and constitutional monarchy, as well as with the principle of criminology on criminalization of acts in accordance with democratic principles. They also place limitations on freedom of expression which reflect the ethical and cultural norms that most Thais adhere to, and which are not inconsistent with the human rights principles enshrined in the United Nations' Universal Declaration of Human Rights.

Be that as it may, certain improvements should be made regarding the enforcement of the law to prevent abuse. The approach used in Norwegian law could be applied. That is, for the third group of cases, which include *lèse-majesté* and offences against foreign Heads of State, the attorney-general should be the sole authority to file complaints, investigate and press charges, so that accusations will not be as easily made as they are now. In addition, the use of discretion by the attorney-general should be final and cannot be used as grounds for filing charges in civil, criminal or administrative courts, so that the attorney-general will not be sued for allegedly neglecting to perform his or her duties under Section 157 of the Criminal Code. Indeed, in Case No. 3509/2549 (2006) the Supreme Court did sentence a prosecutor to imprisonment for failing to perform his duty. All this is to ensure that Thailand's major legal institution has made thorough deliberations before taking any action.

As for Section 112 of the Criminal Code, it should be left as it is. The penalty under this provision should not be increased as some have proposed, as a maximum sentence of 25 years imprisonment would be disproportionate to the offence. Besides, whether a law remains sacred does not depend solely on the penalty but rather on the Buddhist law of impermanence (*Anicca*): things arise, exist and perish. Take the case of the British Treason Felony Act 1848, which used to be enforced until it became dormant in 1883. In 2001, The Guardian newspaper mounted a legal challenge to the Act in the High Court alleging that the Act was inconsistent with the Human Rights Act 1998 and therefore could no longer be enforced. The case was dismissed by the Court and went to the House of Lords on appeal. The House agreed that the litigation was unnecessary, and that the action was a mere "consultation" or a "hypothetical" case. Nevertheless, Lord Steyn expressed his opinion that

"the part of Section 3 of the 1848 Act which appears to criminalise the advocacy of republicanism is a relic of a bygone age and does not fit into the fabric of our modern legal system. The idea that Section 3 could survive scrutiny under the Human Rights Act is unreal."
(Wikipedia, the Treason Felony Act 1848)

As the Buddhist law of impermanence states, everything, the *lèse-majesté* offence included, arises, exists and perishes, as the society's ethical and cultural norms evolve also in accordance with this same Buddhist law. Nothing is permanent.

"The only permanent thing is impermanence."
