



CONSTITUTIONALITY OF STATUTORY PRESUMPTIONS
WITH RESPECT TO THE CRIMINAL OFFENCE OF INSIDER TRADING

BY

MS. PITCHANIKA POHBUNCHERN

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF
THE REQUIREMENTS FOR THE DEGREE OF
MASTER OF LAWS IN BUSINESS LAWS (ENGLISH PROGRAM)
FACULTY OF LAW
THAMMASAT UNIVERSITY
ACADEMIC YEAR 2019
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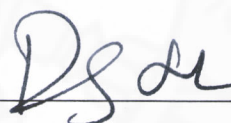
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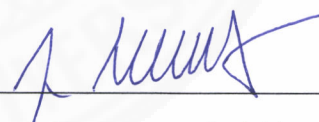
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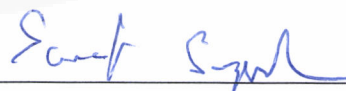
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ABSTRACT

The law governing insider trading in Thailand has been substantially changed in 2016 by the Securities and Exchange Act (No. 5) B.E. 2559. In addition to the change in elements of insider trading offence, the statutory presumptions of knowledge or possession of inside information have been introduced in an attempt to eliminate obstacles in law enforcement created by the high standard of proof in criminal law.

According to Section 243 and Section 244 of the Securities and Exchange Act (No. 5) B.E. 2559, certain groups of persons are presumed to have knowledge or possession of inside information of the issuing company. As a result, the burden to prove knowledge or possession of inside information which is one of the elements of insider trading offence provided in Section 242 is shifted to the persons subject to Section 243 and Section 244 of the Securities and Exchange Act (No. 5) B.E. 2559.

The provision which contains statutory presumptions in criminal cases like Section 243 and Section 244 have always raised the issue regarding the principle of presumption of innocence as recognized in the Constitution of the Kingdom of Thailand. The purpose of this thesis was therefore to analyze the constitutionality of

the statutory presumptions with respect to the criminal offence of insider trading contained in Section 243 and Section 244 of the Securities and Exchange Act (No. 5) B.E. 2559 under the 3 approaches; (1) Pattern Approach; (2) Rational Connection Approach; and (3) Principle of Proportionality Test Approach.

According to the result of analysis, the author found that the statutory presumptions contained in all subsections of Section 243 and Section 244 are constitutional under the Pattern Approach. However, the analysis according to the Rational Connection Test Approach and the Principle of Proportionality Test Approach resulted in the author's finding that Section 243(5) is unconstitutional. The presumption contained in this Section lacks a rational connection between the basic fact and the presumed fact (Rational Connection Test Approach). It is also not suitable to achieve the goal pursued (Principle of Proportionality Test Approach).

Keywords: Inside Trading, Statutory Presumption, Presumption of Innocence, Constitutionality

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CHAPTER 1

INTRODUCTION

1.1 Background and Problem

Insider trading is an act of buying or selling of securities by a person who has access to material information about the company's operation when such information has not been announced to the public. In many countries, this kind of trading practice is considered an illegal act because it is seen as unfair to other investors who do not know or have access to such information as the investors with inside information have more potential to make more profit than the other general investors in the market.

In Thailand, the measure against insider trading was put in place for the first time in 1984 under Section 42 Quintus of the Stock Exchange of Thailand Act B.E. 2527 (No. 2) ("**SEA 1984**") which was largely influenced by Rule 10 b-5 promulgated by virtue of Section 10 (b) of the Securities and Exchange Act of 1934 and Section 16 (b) of the Securities Exchange Act of 1934 of the United States. Section 42 Quintus was subsequently replaced by Section 241 of the Securities and Exchange Act B.E. 2535 ("**SEA 1992**").

Recently in 2016, the Securities and Exchange Act (No. 5) B.E. 2559 ("**SEA 2016**") which came into effect on 12 December 2016 was enacted with aims to ensure creditability of the Stock Exchange of Thailand and confidence of investors as well as to eliminate certain limitations under SEA 1992 which had prevented efficient enforcement of criminal penalties against offenders of securities related offences and also to introduce civil penalty which can be enforced against offenders in place of criminal penalties in order to ensure efficiency of enforcement and to provide more protection for investors¹.

¹ Securities and Exchange Act (No. 5) B.E. 2559 (2016).

Under the SEA 2016, there have been major changes in the provisions governing prevention of unfair securities trading practices in Thailand, one of which is insider trading offence. The provisions governing unfair trading practices under the SEA 2016 were influenced by the Derivatives Act B.E. 2546 and securities law of other countries such as United Kingdom, Australia, Singapore, Malaysia and Market Abuse Directive of European Union as well as experiences of the Office of Securities and Exchange Commission².

One of the major changes introduced by SEA 2016 is the statutory presumptions in relation to market misconducts for the purpose of easing the burden of proof of the authorities and eliminate limitations in criminal proceedings in order to improve the efficiency of law enforcement and to ensure successful criminal prosecution³.

For insider trading offence, Section 243 and Section 244 of SEA 2016 provide two lists of persons who are presumed to have knowledge or possession of inside information for the first time since 1984 as there was no such provision which provided statutory presumptions under Section 42 Quintus of the SEA 1984 and Section 241 of the SEA 1992.

According to Section 243 of SEA 2016, the first group of persons is presumed to have knowledge or possession of inside information as a result of certain

² Fiscal Policy Office, Bantuek Khorkhwam Rueang Rang Phraratchabanyat Lhaksap Lae Talad Lhaksap (Chabab Ti ...) Phor.Sor... [Memorandum on Securities and Exchange Bill (No...) B.E...(2014)] 4 (สำนักงานเศรษฐกิจการคลัง สำนักนโยบายการออม, บันทึกข้อความ เรื่อง ร่างพระราชบัญญัติหลักทรัพย์และตลาดหลักทรัพย์ (ฉบับที่ ...) พ.ศ. ...) 4.

³ Secretariat of the Senate, Ekkasan Prakop Kan Pitcharana Rang Phraratchabanyat Lhaksap Lae Talad Lhaksap (Chabab Ti ...) Phor.Sor. ... (Khanarattamontree Pen Phusanoe) [Documents in Support of Consideration in relation to the Securities and Exchange Bill (No...) B.E.... (Proposed by the Cabinet)] (2016) 10 (สภานิติบัญญัติแห่งชาติ, เอกสารประกอบการพิจารณา ร่างพระราชบัญญัติหลักทรัพย์และตลาดหลักทรัพย์ (ฉบับที่ ...) พ.ศ.... (คณะรัฐมนตรี เป็นผู้เสนอ) 10.

relationships or connections which they have with securities issuing companies by virtue of their performance of duties in both private and public sectors which allow them to obtain inside information (Section 243 (1), (2), (3), (4)), or, due to the reason of being juristic person operating business that is under other presumed persons' control (Section 243 (5)).

Moreover, under Section 244, the presumption of knowledge and possession of inside information is expanded to cover the second group of persons who are shareholders holding more than 5 percent shares (Section 244 (1)), corporate insider of group companies (Section 244 (2)), and close relatives of persons presumed to have knowledge or possession of inside information under Section 243 (Section 244 (3), (4), (5)) if they trade in a manner different from their normal practice.

In the law of evidence, a presumption of particular fact is the principle which allows court to presume the facts without aid of proof of such facts in dispute⁴. In general, statutory presumption contains 2 sets of fact i.e. basic fact and presumed fact. If the opposing party can prove such basic fact as provided by law, certain incident or fact will be presumed⁵.

In the context of criminal law, the issues regarding statutory presumptions have been topic of controversial discussion for a long time. Even though some legal scholars were of the opinion that the presumptions in criminal case are necessary as they would be beneficial with respect to the maintenance of public order especially

⁴ Khemchai Chutiwong, Kham Athibai Kotmai Laksana Phayan [Explanation on The Law of Evidence] (9th edn, Samnak Oprom Kotmai Ngae Netbanthittayasapha 2014) 25 (เพิ่มชัย ชุตินวงศ์, คำอธิบายกฎหมายลักษณะพยาน (พิมพ์ครั้งที่ 9, สำนักอบรมศึกษากฎหมายแห่งเนติบัณฑิตยสภา)) 25.

⁵ *ibid.*

for the criminal offences which are difficult to prove⁶, some viewed that statutory presumptions in criminal case violate the presumption of innocence principle⁷.

The presumption of innocence is the constitutional principle recognized in Section 29 Paragraph Two of the Constitution of the Kingdom of Thailand B.E. 2560 which provides that:

“Suspect or defendant in a criminal case shall be presumed innocent, and before the passing of a final judgment convicting a person of having committed an offence, such person shall not be treated as a convict”

Section 29 Paragraph Two of the Constitution is the provision which aims at protecting rights of the accused or defendants in criminal proceedings. Under the principle of presumption of innocence, the accused or defendant is presumed to be innocent until his or her guilt has been proven by a final judgment⁸. This principle is founded on the human right principle as appeared in Article 11 of the Universal Declaration of Human Rights which provides that:

⁶ Kraiphon Aranyarat, Bhot Wikhroe Kham Phipaksa Phon Krathop Khong Kham Winitchai Sarn Rattathammanoon Tee 12/2555 Thor Kham Samar Nai Karn Sawaengha Phayan Lakthan Phue Pisood Khamphid Khong Jamloei Nai Khadee Arya [Effects of Decision of Constitutional Court No. 12/2555 on Ability to Gather Evidences to Prove Guilt of Defendants in Criminal Case] [2012] <<http://public-law.net/publaw/view.aspx?id=1797>> accessed on 16 October 2019 บทวิเคราะห์คำพิพากษา ผลกระทบของคำวินิจฉัยศาลรัฐธรรมนูญที่ 12/2555 ต่อความสามารถในการแสวงหาพยานหลักฐานเพื่อพิสูจน์ความผิดของจำเลยในคดีอาญา เข้าถึง 16 ตุลาคม 2562.

⁷ Udom Rathamarit, Kham Athibai Kotmai Laksana Phayan Lakthan [Explanation on Law of Evidence (7th edn, Project for Promotion of Textbooks and Teaching Materials, Faculty of Law, Thammasat University 2019) 213 (อุดม รัฐอมฤต, คำอธิบายกฎหมายลักษณะพยานหลักฐาน (พิมพ์ครั้งที่ 7 โครงการตำราและเอกสารประกอบการสอน คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 2562)) 213.

⁸ Constitutional Court Decision of No. 12/2555

“Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.”

During the past period, the Constitutional Court of Thailand has rendered several decisions regarding the constitutionality of the provisions of law which contain statutory presumptions, for example, Section 54 of the Direct Sale and Direct Marketing Act B.E. 2545, and Section 245 (1) of the Copyright Act B.E. 2537.

After having reviewed several decisions of the Constitutional Court of Thailand as well as opinions and articles regarding the approaches applied for considering the constitutionality of laws in Thailand, the author found that there are 3 relevant approaches applied in assessment of constitutionality of statutory presumptions as follows:

(1) Pattern Approach

According to the decisions of the Constitutional Court, the provisions which are in conflict with the presumption of innocence principle under the Constitution are the provisions which provide presumptions of guilt of certain persons based on his or her status without any proof of his or her action nor intention. For example, according to the Decision No. 12/2555, Section 54 of the Direct Sale and Direct Marketing Act B.E. 2545 which provided that “the managing director or manager or the person responsible for the operation of such juristic person shall be liable to the punishment imposed by law in the case where the offender who is liable to punishment under this Act is a juristic person” was unconstitutional because the guilt of such managing director or manager or the person responsible for the operation of such juristic person was presumed based on basic fact associated with their status and not the presumption of fact on certain element of crime after the plaintiff could prove certain act related to the offence of which the defendant was accused. Therefore, it can be summarized that the provision of law would be considered unconstitutional if it provides status of defendant as basic fact and guilt of such defendant as presumed fact. This criteria of

consideration established by the Constitutional Court is explained by several legal scholars as “Pattern Approach”⁹.

(2) Rational Connection Test

In addition to the “Pattern Approach”, several legal scholars also expressed their opinions that the Constitutional Court should look further into the substance contained in each statutory presumption to consider whether or not there is any reasonable connection between the basic fact and the presumed fact according to the Rational Connection Test Approach as established by the Supreme Court of the United States¹⁰. In 2016, the Rational Connection Test Approach was explained by the Constitutional Court of Thailand in its Decision No. 3/2559 as the basic principle for determining scope of statutory presumptions¹¹.

(3.) Principle of Proportionality Test Approach

In addition to the “Pattern Approach” and the “Rational Connection Test Approach”, the Principle of Proportionality is generally accepted in several countries as well as international courts as the basic principle for determining validity of laws and government actions. In Thailand, the Principle of Proportionality is recognized in Section 26 of the Constitution of the Kingdom of Thailand B.E. 2560 which provides that the enactment of a law resulting in the restriction of rights or liberties of a person shall be in accordance with the principle of proportionality¹². However, even though

⁹ *Khemchai* (n 4) 122.

¹⁰ *ibid.*

¹¹ Constitutional Court Decision No. 3/2559.

¹² Boonsri Meewong-Ukot, Khotmai Ratthathammanun [Constitutional Law] (3rd edn, Project for Promotion of Textbooks and Teaching Materials, Faculty of Law, Thammasat

the principle of proportionality has been applied in several decisions of the Constitutional Court in which the main issues were regarding constitutionality of the provisions of law, this principle has not been applied in the Constitutional Court's previous decisions regarding the potential violation of the principle of presumption of innocence by certain laws.

Main Thesis Question

The main question of this thesis focuses on the constitutionality of statutory presumptions with respect to the criminal offence of insider trading contained in Section 243 and Section 244 of SEA 2016 under the principle of presumption of innocence. The analysis of the statutory presumptions contained in Section 243 and Section 244 of SEA 2016 will be thoroughly conducted based on the 3 approaches applied to determine constitutionality of laws as explained above.

Even though there have been several decisions of the Constitutional Court regarding the principle of presumption of innocence as well as researches which discussed the topic of constitutionality of several provisions of law containing statutory presumptions in criminal cases, the author is of the opinion that the result and summary derived from respective decision of the Constitutional Court or research concerning certain provision of law cannot be applied to other provisions of law which require different explanation with respect to its pattern, the connection between basic fact and presumed fact and its pursued legitimate objectives.

1.2 Objective

The objectives of this thesis are as follows:

University 2009) 506 (บุญศรี มีวงศ์อุโฆษ, กฎหมายรัฐธรรมนูญ (พิมพ์ครั้งที่ 3, โครงการตำราและเอกสารประกอบการสอนคณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 2562)) 506.

1. To study and understand the concept and elements of insider trading offence under SEA 2016 in general;

2. To study and understand the scope of statutory presumptions contained in Section 243 and Section 244 of SEA 2016;

3. To study and understand the concept of the presumption of innocence according to decisions of the Constitutional Court of Thailand, the Supreme Court of the United States of America and the European Court of Human Rights; and

4. To analyze the constitutionality of the statutory presumptions with respect to the criminal offence of insider trading contained in Section 243 and Section 244 of SEA 2016 with respect the presumption of innocence principle.

1.3 Hypothesis

The hypotheses of this research are as follows:

1. Statutory presumptions of knowledge or possession of inside information contained in Section 243 (1), (2), (3) and (4) are expected to be constitutional under the Pattern Approach, the Rational Connection Test Approach and the Principle of Proportionality Test Approach while Section 243 (5) is expected to be constitutional under the Pattern Approach but unconstitutional under the Rational Connection Test Approach and the Principle of Proportionality Test Approach;

2. Statutory presumptions of knowledge or possession of inside information contained in Section 244 of SEA 2016 are expected to be constitutional under the Pattern Approach, the Rational Connection Test Approach and the Principle of Proportionality Test Approach.

1.4 Scope of Study

The scope of this thesis can be divided into 5 Chapters as follows:

Chapter 1 This Chapter introduces background and main problem of this thesis and further explains research objectives, hypothesis and scope of study as well as expected contributions of this thesis.

Chapter 2 This Chapter focuses mainly on the concept of Thai insider trading law. In the first section, the author explains general concept of insider trading offence which includes definition and rationale of insider trading prohibition, evolution of insider trading in Thailand and critics concerning Thai insider trading law before the enactment of SEA 2016. The following section of this Chapter focuses on the elements of provisions governing insider trading offence under SEA 2016. The next section is dedicated to the presumption of knowledge and possession of inside information contained in Section 243 and Section 244 of SEA 2016 which will be the main subject of analysis. In addition, to gain further understanding, the author further explores the concerns and legal opinions regarding the statutory presumptions raised by legal scholars both before and after the enactment of SEA 2016.

Chapter 3 This Chapter focuses mainly on the concept of presumption of innocence principle in Thailand. It firstly provides perspective on the concept of presumption under the law of evidence by explaining definition and types of presumption, effect and justification of presumption as well as the concept of presumption in the context of criminal law. In the next section of this Chapter, the author considers the concept and scope of presumption of innocence under both international conventions and the Constitution of Thailand by studying several selected decisions of the Constitutional Court which provide precedent in interpretation of the principle of presumption of innocence. In addition, the author further studies the Rational Connection Test established by the Supreme Court of

United States which has been cited by many legal scholars as well as the Constitutional Court of Thailand as justification of the presumption in criminal law. In the last part, the Principle of Proportionality Test is explained as one of the basic principles generally used for determining constitutionality of laws.

Chapter 4 This Chapter analyses Section 243 and Section 244 of SEA 2016 with respect to the principle of presumption of innocence according to the concept and scope provided in Chapter 2 and Chapter 3 in an attempt to determine whether or not Section 243 and Section 244 are constitutional. The analysis of each section is conducted under 3 approaches: (1) Pattern Approach; (2) Rational Connection Test Approach; and (3) Principle of Proportionality Test Approach.

Chapter 5 This Chapter presents conclusion and recommendations regarding the result of analysis of the constitutionality of statutory presumptions with respect to the criminal offence of insider trading as contained in Section 243 and Section 244 of SEA, and, conclusions and recommendations regarding the suitable approach which should be applied in the assessment of constitutionality of statutory presumptions in general.

1.5 Methodology

The study in this thesis will be conducted based on documentary research and examination of Section 243 and Section 244 of SEA 2016 as well as opinions, articles, theses and books which are relevant to the concept of insider trading offence under Thai law and the principle of presumption of innocence in Thailand.

In addition, the selected decisions of the Constitutional Court of Thailand, the Supreme Court of United States and the European Court of Human Rights will be thoroughly examined in order to determine the criteria for determining the constitutionality under the Pattern Approach, the Rational Connection Test Approach and the Principle of Proportionality Test Approach.

1.6 Expected Contributions

The expected contributions of this thesis can be described as follows:

1. To provide knowledge and understanding on the concept and elements of Thai insider trading law under SEA 2016 in general;
2. To provide understanding on the statutory presumptions contained in Section 243 and Section 244 of SEA 2016 and to raise awareness of the related parties on such statutory presumptions especially the persons who are subject to such statutory presumptions;
3. To provide thorough analysis of the constitutionality of statutory presumptions contained in Section 243 and Section 244 of SEA 2016; and
4. To provide conclusions and recommendations obtained as a result of the analysis of constitutionality of statutory presumptions with respect to the criminal offence of insider trading contained in Section 243 and Section 244 of SEA 2016.

CHAPTER 2

GENERAL CONCEPT OF INSIDER TRADING

The purpose of this Chapter is to study and understand both previous and current Thai provisions governing insider trading offence, existing researches conducted by both Thai and foreign researchers as well as articles and books on insider trading offence and other issues which are associated with and can contribute to better understanding in insider trading law in general.

2.1 Overview of Insider Trading

2.1.1 Rational of Insider Trading

The establishment of stock exchange to serve as efficient fundraising function is based on 3 basic principles: 1) liquidity; 2) orderliness; and 3) fairness¹³. Fairness means all traders have equal access to information and therefore trading by any investor who has information which others do not know must be prohibited¹⁴. According to Songchai Chaolaem¹⁵, fairness is the most important principle. He viewed that the tools which can help ensuring fairness consist of regulations governing control over disclosure of information in order to ensure that all investors have equal access and regulations governing control over insiders who have information which affects change of securities' price.

¹³ Songchai Chaolaem, Naewthang Nai Kan Kaekhai Phanha Khotmai Kiawkab Kan Suekhai Lhaksap Doy Chai Sarasonthed Painai [A Proposal to Improve Laws Concerning Insider Trading], (Master of Law Degree Thesis, Ramkhamhaeng University 1998) 17 (ทรงชัย เชาว์แหลม, แนวทางในการแก้ไขปัญหารับปรุงกฎหมายเกี่ยวกับการซื้อขายหลักทรัพย์โดยใช้สารสนเทศภายใน) (วิทยานิพนธ์ปริญญาโทมหาบัณฑิต มหาวิทยาลัยรามคำแหง 2541) 17.

¹⁴ *ibid.*

¹⁵ *Songchai* (n 13) 18.

In view of Siriphong Chaiamnuaysilp, equal access to information served as essential factor in trading of securities because decision to trade is a result of knowledge of information and ideally the information received by seller and buyer must be equal¹⁶. He explained that trading on inside information would result in substantial damage to the public and the country's economy¹⁷.

Jirayuth Songnuan explained that the fact that certain investors could take advantage over others by means of using nonpublic information for seeking his own benefit would destroy the principle of fairness and undermine other investors' trust, and would finally prevent trading of securities¹⁸. As a result, the stock exchange would not be developed and this would affect the country's economy as a whole.

Surachet Cheeravinij¹⁹ explained that the law prohibited insider trading with an objective to maintain integrity of stock exchange as it would help

¹⁶ Siriphong Chaiamnuaysilp, Panha Khotmai Waduai Karnkratham Un Mai Pentham Kiawkab Kan Suekhai Lhaksap Koranee Kan Chai Khormun Pai Nai [Legal Problems Concerning Unfair Securities Trading Practice] (Master of Law Degree Thesis, National Institute of Development Administration 2014) 7 (ศิริพงษ์ ชัยอำนวยศิลป์, ปัญหากฎหมายว่าด้วยการกระทำความไม่เป็นธรรมเกี่ยวกับการซื้อขายหลักทรัพย์กรณีการใช้ข้อมูลภายใน) (วิทยานิพนธ์ปริญญาโทบริหารธุรกิจ สถาบันบัณฑิตพัฒนบริหารศาสตร์ 2557) 7.

¹⁷ *ibid.*

¹⁸ Jirayuth Songnuan, Panha Kiawkab Kan Chai Khormun Painai Suekhai Lhaksap Tam Mattra 241 Haeng Phraratchabanyat Lhaksub Lae Talhad Laksub Phor Sor 2535 [Problems related to Insider Trading under Section 241 of the Securities and Exchange Act B.E. 2535] (Master of Law Degree Thesis, Thammasat University 1998) 12 (จिरยุทธ์ ทรงนวล, ปัญหาเกี่ยวกับการใช้ข้อมูลภายในซื้อขายหลักทรัพย์ตามมาตรา 241 แห่งพระราชบัญญัติหลักทรัพย์และตลาดหลักทรัพย์ พ.ศ. 2535) (วิทยานิพนธ์ปริญญาโทบริหารธุรกิจ มหาวิทยาลัยธรรมศาสตร์) 12.

¹⁹ Surachet Cheeravinij, Panha Kiawkab Khammai Khong Khamwah "Phu Kiaokhong" Tarm Mattra 241 Haeng Phraratchabanyat Lhaksub Lae Talad Lhaksub Phor Sor 2535 [The Problems of the Definitions "Person Involved" in Securities Trading in Section 241

promote constant growth of the stock exchange, and one of the factors constituting integrity of the stock exchange was when investors are confident that they have equal access to inside information.

Jaruphat Sonaem explained that insider trading was based on the ground that officers, executives including directors of companies were deemed insider who knew or possessed inside information because those were persons who were aware of conditions and possibilities of their own business and that trading on inside information reflected unfairness in trading of securities and destroyed capital market as a result of abnormal return gained by such person trading on inside information²⁰.

2.1.2 Insider Trading Law Evolution in Thailand

In 1974 (B.E. 2517), the first securities law of Thailand i.e. the Stock Exchange of Thailand Act B.E. 2517 (“SEA 1974”) was enacted with the objectives to establish center for securities trading and encourage saving and funding in Thailand²¹.

of the Securities and Exchange Act B.E. 2535] (Master of Law Degree Thesis, Chulalongkorn University 1996) 10 (สุรเชษฐ์ ชีรวินิจ, ปัญหาเกี่ยวกับความหมายของคำว่า “ผู้เกี่ยวข้องฯ” ตามมาตรา 241 แห่งพระราชบัญญัติหลักทรัพย์และตลาดหลักทรัพย์ พ.ศ. 2535) (วิทยานิพนธ์ปริญญาโทมหาบัณฑิต มหาวิทยาลัยจุฬาลงกรณ์) 10.

²⁰ Jaruphat Sonaem, Phokratop Tor Kan Kaekhai Phraratchabanyat Lhaksap Lae Talad Lhaksap (Chabab Ti 5) Phor.Sor. 2559 : Koranee Suesa Kan Chai Khormun Painai Khong Borisad Nai Kan Sue Kai Hun [The Effects of The Amendment of The Securities and Exchange Act (No. 5) on Directors: A Case Study of Insider] (Master of Arts Independent Study, Thammasat University 2017) 12 (จารุพัฒน์ สนเอี่ยม, ผลกระทบต่อกรรมการจากการแก้ไขพระราชบัญญัติหลักทรัพย์และตลาดหลักทรัพย์ (ฉบับที่ 5) พ.ศ. 2559 : กรณีศึกษาการใช้ข้อมูลภายในของบริษัทในการซื้อขายหุ้น) (การค้นคว้าอิสระปริญญาโทมหาบัณฑิต มหาวิทยาลัยธรรมศาสตร์) 12.

²¹ ibid 55.

Later on 30 April 1975, trading in the Securities Exchange of Thailand officially started.²² Its name was changed to “Stock Exchange of Thailand” in 1991²³.

Thailand has constantly developed its securities regulations in response to demands of the market and focus on investor protection over the past 56 years²⁴. With respect to insider trading, the law governing this offence was enacted for the first time under Section 42 Quintus of the Stock Exchange of Thailand Act B.E. 2527 (No. 2) (“SEA 1984”)²⁵.

According to Section 42 Quintus of SEA 1984, there were 3 groups of persons who fell into the scope of prohibition of insider trading i.e. directors or executives of the issuing companies, persons holding securities more than 5 percent of the companies’ registered capital, and government officials or officers or directors of the companies who serve in a position or status which gives them opportunity to obtain non-public information as the law saw that only those groups of persons would have access to inside information²⁶.

Section 42 Quintus of SEA 1984 was subsequently replaced by Section 241 of SEA 1992. According to Section 241, the offence of insider trading occurs when person trades on information to which he has access by virtue of his special position which allows him to take advantage over other persons.²⁷

²² Stock Exchange of Thailand, ‘History of the Stock Exchange of Thailand’ <www.set.or.th/th/about/overview/history_p1.html> accessed on 4 September 2019.

²³ *ibid.*

²⁴ Jinn-Min (Jimmy) Lin, ‘The Evolution of Securities Law in Thailand’ (2018) International Immersion Program Papers 82 <https://chicagounbound.uchicago.edu/International_immersion_program_papers/82> accessed on 7 September 2019.

²⁵ (n 19) 87.

²⁶ *ibid.*

²⁷ *Songchai* (n 13) 26.

The Stock Exchange of Thailand explained in its official website²⁸ that insider trading refers to the incident when person by virtue of his position or status which allows him to have access to information that is material to change of price of securities trades on securities based on such information before it is equally disclosed to the public and therefore such person takes advantage over others and such trading practice is considered as unfair.

Recently in 2016, Section 241 of SEA 1992 was amended and replaced by Section 242 of SEA 2016. Under the new provision governing insider trading, insider trading means the act when person who knows or possesses inside information purchases or sells securities or enters into derivative contract, and, disclose inside information to other persons while one knows or ought reasonably to know that the receiver of such information may exploit such information for trading securities²⁹. Under the new provision, any person can commit the insider trading offence as there is no requirement of connection between the offender and the issuing companies.

2.1.3 Critics of Thai Insider Trading Law before SEA 2016

Before the enactment of SEA 2016, there were several critics regarding the provision governing insider trading under SEA 1992 and the enforcement of insider trading law raised by legal scholars conducting research on insider trading in Thailand which can be summarized as follows:

²⁸ Stock Exchange of Thailand, ‘Market Surveillance’

<https://www.set.or.th/th/regulations/supervision/surveillance_p1.html> accessed on 7 October 2019.

²⁹ Duangporn Arbhasil, Prasitthiphap Khong Kan Bangkhap Chai Khotmai Thai Puea Khuabkhum Kan Suekhai Lhaksap Doi Chai Khormun Pai Nai [Enforcement Efficiency of Thai Insider Trading Laws] (Thammasat Journal 36 (2)) 7 (ดวงพร อาภาศิลป์, ประสิทธิภาพของการบังคับใช้กฎหมายไทยเพื่อควบคุมการซื้อขายหลักทรัพย์โดยใช้ข้อมูลภายใน (วารสารธรรมศาสตร์ ปีที่ 36 ฉบับที่ 1) 7).

(1) Elements of Governing Provisions

According to the report of the Office of the Attorney General³⁰, elements of the offence including special intention provided under SEA 1992 were too long and could cause confusions. In addition, it explained that such provision was not in line with the general principle of criminal law which should provide concise and inclusive elements instead of providing excessively long explanations and principles which may possibly lead to confusions.

Similarly, the Memorandum prepared by the Fiscal Policy Office, Ministry of Commerce for presenting to the Permanent Secretary of the Ministry of Finance³¹ indicated that according to the assessment of the World Bank under Financial Assessment Program (FSAP), the elements of offences related to market misconducts under Thai securities law were complicated and unclear and as a result, the measures for prevention and suppression of such offences could not be implemented according to their objectives and this would finally reduce creditability and transparency of Thai capital market.

Songchai Chaolaem proposed that Section 241 of SEA 1992 should be amended in order to provide more clear provision which could cover all types of insider including temporary insiders such as lawyers, accountants and investment bankers³². In addition, he further proposed that insider trading prohibition should also cover the act of persons whose duties are not directly related to the

³⁰ *Siriphong* (n 16) 15.

³¹ Fiscal Policy Office, Bantuek Khorkhwam Rueang Rang Phraratchabanyat Lhaksap Lae Talad Lhaksap (Chabab Ti ...) Phor.Sor... [Memorandum on Securities and Exchange Bill (No...) B.E...(2014)] 2 (สำนักงานเศรษฐกิจการคลัง สำนักนโยบายการออม, บันทึกข้อความ เรื่อง ร่างพระราชบัญญัติหลักทรัพย์และตลาดหลักทรัพย์ (ฉบับที่ ...) พ.ศ. ...) 2.

³² *Songchai* (n 13) 123.

issuing company or its information but have been informed of such information by others (tippee)³³.

Regarding definition of inside information, Songchai Chaolaem suggested that there should be provision which provided clearer definition of information that was material to change of price of securities and also a list of examples of such information in order to ensure consistency in the court's exercise of its discretion.³⁴

(2) Penalty

Several researchers were of the opinion that the penalty to which insider trading offenders were subject under SEA 1992 was too low.

Siriphong Chaiamnuaysilp reported that insider trading offence carried penalty that was lower than the offence of misappropriation and fraud under the Criminal Code³⁵. He explained that offenders or persons who were going to commit the offence were not afraid of the law due to light penalties of insider trading offence and finally proposed that the penalties of insider trading should be increased for the purpose of deterring the crime³⁶.

Cynthai M. Pornavalai raised her concern that the current penalties for insider trading were insufficient and called for urgent reform to instill deterrence³⁷.

³³ *ibid.*

³⁴ *Songchai* (n 13) 126.

³⁵ *Siriphong* (n 16) 96.

³⁶ *ibid.*

³⁷ Cynthia M. Pornavalai, 'Insider Trading: Time for Reform and Tougher Penalties' *Bangkok Post* (Bangkok 5 February 2016) <<https://www.tilleke.com/resources/insider-trading-time-reform-and-tougher-penalties>> accessed on 19 August 2019.

Tippatrai Sealawong pointed out that experienced investors believed that insider trading was widespread because the risk was worth taking due to the reason that returns of violation were high compared to the sanctions³⁸. He further explained that Thai securities law and its enforcement had failed to deter insider trading because the monetary penalties and criminal charge provided in Thai regulations were minimal compared to other countries, and sanctions imposed by the SEC were vague to the investors and the general public³⁹.

Songchai Chaolaem raised interesting question that if the penalties imposed on insider trading offenders were adequate for deterring the violation especially the amount of fine which was only two time of the benefit gained as a result of such violation⁴⁰.

(3) Obstacles to Enforcement of Insider Trading

In addition to the issues regarding language of the provisions and level of penalties of insider trading, Sakda Thanitcul and Tir Srinopnikom identified that failure of enforcement of insider trading was contributable to time consuming process of criminal prosecution which involved several law enforcement authorities⁴¹. According to their research, the prosecution of insider trading involved at least five government agencies, namely, the Stock Exchange of Thailand, the Securities and Exchange Commission, the Division of Special Investigation, the public prosecutor, the

³⁸ Tippatrai Saelawong, 'Insider Traders Get a Smack on the Wrist' *Bangkok Post* (Bangkok 23 December 2015) <<https://www.bangkokpost.com/opinion/opinion/803560/insider-traders-get-a-smack-on-the-wrist>> accessed on 19 August 2019.

³⁹ *ibid.*

⁴⁰ *Songchai* (n 13) 112.

⁴¹ Sakda Thanitcul and Tir Srinopnikorn, 'Monetary Penalties: An Empirical Study on the Enforcement of Thai Insider Trading Sanctions' (2018) *Kasetsart Journal of Social Sciences* 1.

criminal court and monetary penalty was considered to be more effective tool imposed for regulating than a punishment based on traditional sanction in form of criminal penalties⁴².

According to Jinn-Min (Jimmy) Lin, another factor posted as obstacle to enforcement was reluctance in the country to take legal action against elite members of society for example business or political leaders⁴³. This is in accordance with the explanation of Weeraphong Boonyopart who considered that social status and financial power of the criminal was the most important obstacles to the enforcement of law against economic crime⁴⁴.

Similarly, the Memorandum prepared by the Fiscal Policy Office, Ministry of Finance explained that violations of the provisions under such law carried criminal penalties and criminal prosecution was time consuming process and involved several authorities⁴⁵. In addition, it was difficult to gather evidences to prove the offence related to securities in order to meet high standard of prove beyond reasonable doubt in criminal law⁴⁶.

⁴² *ibid* 6.

⁴³ *Lin* (n 24) 13.

⁴⁴ Weeraphong Boonyopas, Artchayakam Tang Setthakit [Economic Crime] (อาชญากรรมทางเศรษฐกิจ) (3edn, Nititham Publishing House Partnership 2001) 377 (วีระพงษ์ บุญโญภาส, อาชญากรรมทางเศรษฐกิจ (พิมพ์ครั้งที่ 3, นิตธิธรรม 2544)) 377.

⁴⁵ *Fiscal Policy Office* (n 31) 2.

⁴⁶ Jatuporn Bunditkul, Phraratchabanyat Lhaksap Lae Talad Lhaksap Phor.Sor. 2535 Kan Kamnhod Khorsannittan Thang Arya Waduai Kankratam Khwamphid Khong Phuborrihan Nitibukkhon Nai Khwamphid Kiawkab Kankratham Un Maipentham Kiawkab Kansuekhai Lhaksap [Securities and Exchange Act B.E. 2535 (1992): Presumptions of Proof for Criminal Liability of Corporate Officer Pertaining to the Offence of Market Abuse] (Master thesis, Chulalongkorn University 2008) 78. (จตุพร บัณฑิตกุล, พระราชบัญญัติหลักทรัพย์และตลาดหลักทรัพย์ พ.ศ. 2535 : การกำหนดข้อสันนิษฐานทางอาญาว่าด้วยการกระทำ

2.2 Insider Trading under SEA 2016

2.2.1 Enactment of SEA 2016

SEA 2016 was enacted to eliminate certain limitations under SEA 1992 which prevented efficient enforcement of criminal penalties against securities related offenders and also to introduced civil penalty which can be enforced against offenders in place of criminal penalties in order to ensure efficiency of enforcement and to provide more protection for investors⁴⁷.

Among other changes, amendments to the provisions governing market misconducts and the provisions imposing penalties for such practices were the main focus of the lawmakers

The amendments to the provisions governing market misconducts were influenced by the Derivatives Act B.E. 2546 and securities law of other countries such as United Kingdom, Australia, Singapore, Malaysia and Market Abuse Directive of European Union as well as experiences of the Office of Securities and Exchange Commission⁴⁸.

The Report on the Bill on Securities and Exchange Act (No. ...) B.E.... proposed by the cabinet⁴⁹ explained that the provisions of law governing securities

ความผิดของผู้บริหารนิติบุคคลในความผิดเกี่ยวกับการกระทำความผิดไม่เป็นธรรมเกี่ยวกับการซื้อขายหลักทรัพย์) (วิทยานิพนธ์ปริญญาโทบริหารธุรกิจ มหาวิทยาลัยสุโขทัยธรรมาธิราช 2551)

⁴⁷ Securities and Exchange Act (No. 5) B.E. 2559.

⁴⁸ *Fiscal Policy Office* (n 31) 4.

⁴⁹ Secretariat of the Senate, Ekkasan Prakop Kan Pitcharana Rang Phraratchabanyat Lhaksap Lae Talad Lhaksap (Chabab Ti ...) Phor.Sor. ... (Khanarattamontree Pen Phusanoe) [Documents in Support of Consideration in relation to the Securities and Exchange Bill (No...) B.E.... (Proposed by the Cabinet)] (2016) L (สภานิติบัญญัติแห่งชาติ, เอกสารประกอบการพิจารณา ร่างพระราชบัญญัติหลักทรัพย์และตลาดหลักทรัพย์ (ฉบับที่ ...) พ.ศ.... (คณะรัฐมนตรี เป็นผู้เสนอ) ฎ.

and stock exchange which were in effect at that time were not compatible with current situations especially the provisions governing prevention of unfair trading practices which failed to cover different forms of securities related offences and this affected investors. In addition, to eliminate the confusion as to the language of governing provisions, the elements of market misconduct offences have been improved to be clearer and not to be too complicated.

2.2.2 Elements of Insider Trading Offence under SEA 2016

There are 3 provisions governing insider trading under SEA 2016 i.e. Section 242, Section 243 and Section 244.

Section 242 which is the main provision provides that:

“No person who knows or possesses inside information related to a securities issuing company shall:

(1) Purchase or sell securities or enter into a derivatives contract related to securities, either for oneself or other persons, except in the following cases:

(a) Action in compliance with the law, the court’s order, or the order of an agency with the legal power;

(b) Action in accordance with the obligations to a derivatives contract that has been made before one becomes aware of or possesses inside information related to the securities issuing company;

(c) Action not agreed upon or decided by oneself but assigned to an approved or registered person under the law on executive of capital or investment to make a securities trading decision or enter into a derivatives contract related to such securities; or

(d) Action not having a characteristic of taking an advantage of other persons or any characteristic as specified in the notification of the SEC.

(2) Disclose inside information to other persons, either directly or indirectly and by any means, while one knows or ought reasonably to know that the receiver of such information may exploit such information for trading securities or

entering into a derivatives contract related to such securities, either for the benefit of oneself or other persons, except when such action does not have the characteristics of taking an advantage of other persons or has the characteristics as specified in the notification of the SEC.”

The elements of insider trading offence under SEA 2016 are changed compared to its former versions under SEA 1984 and SEA 1992. The author have reviewed and summarized the provisions governing insider trading according to the structure of crime which can be divided into 1) External Elements of Insider Trading Offence; and 2) Internal Elements of Insider Trading Offence as follows:

2.2.2.1 External Elements

(1) Actor

Section 242 of SEA 2016 prohibits acts of any person who knows or possesses inside information.

According to Section 42 Quintus of SEA 1984 and SEA 1992, person would be subject to insider trading offence when he/she traded on inside information which he has access by virtue of his office or position. The author notes that SEA 2016 no longer requires such connection or relationship which is used to be one of the elements of insider trading offence under SEA 1984 and SEA 1992

According to Jinn-Min (Jimmy) Lin, the amendments made to SEA 2016 have expanded the scope of persons falling within the provision of insider trading, and for that reason potential offenders of insider trading are not limited to just those who are employees of the listed company and any person who use the inside information for their personal gain including those who hold and disclose the inside information can also be held liable for insider trading⁵⁰.

⁵⁰ Lin (n 24) 10.

The foregoing explanation is in accordance with the information contained in the article written by Piya Techamuanwaiwi, the Director of Corporate Communications and Investor Services Department of the Securities and Exchange Commission who provides example of the range of persons who are subject to the provisions of insider trading under SEA 2016 is expanded⁵¹.

After having reviewed the scope of insider under SEA 2016 compared to the former versions of provisions governing insider trading, the author agrees that the scope of insider is expanded as no connection or relationship between potential offenders and issuing companies is no longer required.

SEA 2016 separately provides clear definition of inside information for the first time since the first version of insider trading law was in effect in Thailand.

Section 241 of SEA 2016 provides that “inside information means information that has not been generally disclosed to the public and is material to the change of price or the value of securities”.

(2) Prohibited Actions

Section 242 of SEA 2016 prohibits the person knowing or possessing inside information from doing the following actions:

- (1) trading securities;
- (2) entering into derivatives contract related to securities; and
- (3) disclosing inside information to others.

According to Section 241 of the SEA 1992, persons are prohibited from 1) purchasing or selling; 2) offering to purchase or sell; 3) inviting other

⁵¹ Pariya Techamuanwaiwit, ‘Securities and Exchange Act No. 5 : Knowledge on Inside Information’ *Post Today* (Bangkok, 7 August 2017) <<https://www.sec.or.th/TH/Template3/Articles/2560/ac-post-25600807-act-sea-inside.pdf>> accessed on 15 August 2019.

persons to purchase or offer to purchase or sell securities by using material non-public information and 4) disclosing such information so that he will receive consideration from the person who engages in the forgoing acts.

The prohibited acts under Section 42 Quintus of the SEA 1984 are similar to Section 241 of the SEA 1992 except for the disclosure of inside which was not prohibited under Section 42 Quintus of SEA 1984.

2.2.2.2 Internal Element

Internal element of insider trading offence is an intention of the defendant of insider trading case.

According to Paragraph One to Paragraph Three of Section 59 of the Criminal Code, the defendant will be considered to have intentionally committed insider trading offence when he/she is proved to have known all external elements constituting insider trading offence⁵².

The author notes that the special intention as required in Section 241 of 1992 was not provided in Section 242 of SEA 2016.

⁵² Section 59 Paragraph One, Two and Three of Criminal Code provides that:

“A person shall be criminally liable only when such person commits an act intentionally, except in case of the law provides that such person must be liable when such person commits an act by negligence, or except in case of the law clearly provides that such person must be liable even though such person commits an act unintentionally.

To commit an act intentionally is to do an act consciously and at the same time the doer desired or could have foreseen the effect of such doing.

If the doer does not know the facts constituting the elements of the offence, it cannot be deemed that the doer desired or could have foreseen the effect of such doing.”

2.2.2.3 Statutory Presumptions

Section 242 and Section 243 of SEA 2016 provide two lists of persons presumed to have knowledge or possession of inside information.

As there was no such provision which provided statutory presumption under Section 42 Quintus of the SEA 1984 and Section 241 of the SEA 1992, the author notes that this is the first time in Thailand which the statutory presumption is provided for insider trading.

2.2.2.4 Penalty

Under SEA 2016, there are 2 types of penalty which can be imposed on the persons accused of coming insider trading cases: (1) Criminal Penalty; and (2) Civil Sanction

(1) Criminal Penalty

Section 296 of the Securities and Exchange Act B.E. 2535 (as amended) provides that:

“Any person who contravenes Section 242 shall be liable to imprisonment for a term not exceeding two years or a fine from five hundred thousand baht to two million baht, or both.”

According to Section 296, the defendants of insider trading case may be subject to the following criminal penalties:

- (1) Imprisonment for not more than 2 years;
- (2) Fine from 500,000 Baht to 2,000,000 Baht; and
- (3) Both imprisonment and fine.

(2) Civil Sanction

In addition to criminal penalty, the following civil sanctions may be imposed on the offender of insider trading by the authority according to Section 317/1 and Section 317/4:

(1) Civil penalty under Section 317/5;

(2) Compensation in an amount equal to the benefit received or should have been received from committing insider trading offence under Section 242

(3) Suspension of trading in securities on the Stock Exchange or the over-the-counter center, or derivatives contracts on the Derivatives Exchange for a specified period not exceeding five years;

(4) Ban from serving as a director or executive in a securities issuing company or a securities company within a specified period not exceeding ten years;

(5) Reimbursement of investigative expenses incurred by the Securities and Exchange Commission Office.

2.3 Statutory Presumptions contained in Section 243 and Section 244

2.3.1 Presumption of Knowledge or Possession of Inside Information

One of the new approaches introduced by the SEA 2016 to combat with market misconducts is statutory presumption.

As explained in the documents prepared by the cabinet to the National Legislative Assembly in support of consideration on the SEA 2016, the presumptions are provided to ease the authorities' burden to prove and improve the efficiency of prosecution⁵³. The Fiscal Policy Office, the Ministry of Finance viewed that

⁵³ *Secretariat of the Senate* (n 49) 10.

as there were certain limits in criminal proceedings and successful criminal prosecution was often prevented by the high standard of proof beyond reasonable doubt, the proposal to impose measures which could reduce those limits in prosecution of market misconducts would play an important role in preventing and suppressing criminal offences under the SEA 2016.⁵⁴

With respect to insider trading offence, as stated in the foregoing section of this Chapter, there are 2 groups of persons who fall within the scope of presumptions provided in Section 243 and Section 244 of SEA 2016. The first group of persons is presumed to have knowledge or possession of inside information due to certain relationships or connections they have with securities issuing companies or by virtue of their performance of duties which allow them to obtain inside information in both governmental and private sectors, or, due to the reason of being juristic person whose business is under the control of other presumed persons.

Section 243 provides that:

“It shall be presumed that the following persons have known or possessed the inside information under Section 242:

(1) director, executive or controlling person of a securities issuing company;

(2) employee or staff of a securities issuing company who holds a position, or is in the line of work, responsible for or capable of accessing inside information;

(3) any person who is able to know inside information by performing duties as auditor, financial advisor, legal advisor, asset appraiser or any other person whose duties are related to inside information, including employees, staffs or colleagues of the aforesaid persons who hold a position or is in the line of work involved in the performance of duties related to such inside information;

⁵⁴ *Fiscal Policy Office* (n 31) 4.

(4) director, sub-committee member, representative of a juristic person, agent, staff, employee, advisor or operator in a governmental agency, the SEC Office, the Stock Exchange, the over-the-counter center or the Derivatives Exchange, who is in the position or the condition that can access inside information through performance of duties;

(5) juristic person whose business is under control of the persons under (1) (2) (3) or (4).”

According to Section 244 of SEA 2016, the presumption of knowledge and possession of inside information is expanded to cover the second group of persons who are shareholders holding more than 5 percent shares, corporate insider of group companies, and close relatives of persons presumed to have knowledge or possession of inside information as provided in Section 243 if they trade in a manner different from their normal practice.

Section 244 provides that:

“It shall be presumed that the following persons, who have traded securities or entered into a derivatives contract in a different manner from their normal practice, have known or possessed the inside information under Section 242:

(1) holder of securities exceeding five percent of the securities issuing company’s total securities sold, including the securities held by spouse or cohabiting couple and minor children of the securities holder;

(2) director, executive, controlling person, employee, or employee of business in the group of the securities issuing company, who holds a position or the line of work responsible for or capable of accessing inside information;

(3) parent, descendant, child adopter or adopted child of the persons under Section 243;

(4) sibling of the same blood parents or sibling of the same blood father or mother of the persons under Section 243;

(5) spouse or cohabiting couple of the persons under 243 or the persons under (3) or (4).

Business in the group of a securities issuing company under (2) means parent company, subsidiary or affiliate of the securities issuing company in accordance with the rules as specified in the notification of the SEC.”

2.3.2 Concerns and Legal Opinions regarding Statutory Presumption with Respect of Criminal Offence of Insider Trading before SEA 2016

Before the enactment of SEA 2016, one of the important issues raised by many scholars was the high standard of proof in criminal prosecution.

According to Siriphong Chaiamnaysilp⁵⁵, the principle of proof beyond reasonable doubt required in criminal case was not suitable to securities-related offences including insider trading where most evidences were in the possession of offenders who had expertise and ability to conceal evidences and therefore it was difficult for the relevant authorities to meet such standard.

The Memorandum of the Fiscal Policy Office of the Ministry of Finance cited the result of assessment of Thai capital market supervision under Financial Sector Assessment Program (FSAP) conducted by the World Bank which indicated that the efficiency of law enforcement in Thai capital market was unsatisfied due to the high standard of proof under the proof beyond reasonable doubt principle.

Surachet explained that as a criminal offence, insider trading was subject to the elements of crime consisting of both external and internal elements.⁵⁶ Regarding internal element or criminal intention, he stated that it was difficult to prove intention of the offender of the business related offences⁵⁷. He proposed that, in order to fix such problems regarding high standard of proof in insider trading case and to

⁵⁵ *Siriphong* (n 16) 96.

⁵⁶ *Surachet* (n 19) 116.

⁵⁷ *ibid.*

increase the efficiency of enforcement, the burden of proof should be reversed to defendants by giving authority to the SEC to presume that there was commission of offence after having examined evidences of trading and to reverse the burden of proof to the defendant⁵⁸.

Siriphong Chaiamnuaysilp explained that insider trading law which was then in effect focused on criminal prosecution which required proof beyond reasonable doubt⁵⁹. He proposed that due to the difficulties which occurred during the process of criminal prosecution, civil sanction should be implemented in order to increase law enforcement efficiency in the capital market like other countries, for example, United States, Singapore and Malaysia⁶⁰.

In contrary to other legal scholars mentioned above, Jirayuth Songnuan was of the opinion that presumptions should not be provided⁶¹. To support his argument, he explained that stock exchange served as secondary market to promote primary market as a source for raising funds and allocating them to businesses, and therefore the government should ensure that the investors were confident and interested in trading in the stock exchange regularly and continuously. In order to accomplish the objectives of the principles of stock exchange which consisted of: 1) liquidity; 2) orderliness; and 3) fairness, it was the government's responsibility to control and issue regulations to ensure fairness of trading in order to prevent any damage to the investors. In his opinion, what would ensure such successful control over the stock exchange was legal measures which, however, should not be too strict. Jirayuth suggested that the presumption of law which would be provided in order to ease the authorities' burden to prove the defendant's wrongdoing and to ensure efficiency in the efficiency of law enforcement would create burden on the investors acting in good faith and would prevent such investors from participating

⁵⁸ *ibid.*

⁵⁹ *Siriphong* (n 16) 9.

⁶⁰ *ibid.*

⁶¹ *Jirayuth* (n 18) 277.

in the stock exchange. As a result, the objectives of the stock exchange would be accomplished.

2.3.3 Concerns and Legal Opinions regarding Statutory Presumption with Respect of Criminal Offence of Insider Trading after SEA 2016

After the enactment of SEA 2016 which provides the presumption of facts under Section 243 and Section 244, Duangporn Arbhasil who conducted study on efficiency of enforcement of Thai insider trading law under SEA 2016 reported that the amended act was seen to be more efficient than the former act since the SEA 2016 was equipped with clearer and broader definition of insiders, the presumption on knowledge and possession of insider information which lead to easier and quicker proceedings. However, according to the interviewees who expressed their opinions regarding the efficiency of insider trading law, 2 groups of interviewee i.e. general persons and legal experts raised their concerns regarding the presumption of knowledge or possession of inside information under Section 243 and Section 244. For the group of general persons, even though they were of the opinion that such presumptions would facilitate the gathering of evidences to prove the facts that defendants committed insider trading and filled the gap of law, concerns that Section 243 and Section 244 would cause problems as to the process of fact finding for those investors who acted in good faith and would finally cause damage to those who were subject to such presumptions. In view of the interviewed legal experts, the presumption of knowledge or possession of inside information was considered an advantage as it would help simplify the legal process because the burden of proof to rebut the presumption was shifted to the alleged offenders. However, those legal experts also expressed their concerns that the presumptions of law would cause negative effect on the alleged offenders as the burden of proof would be shifted to them. Her study further reported interesting question as to the protection of those persons subject to the presumption of possession or knowledge of inside information which was asked by those legal experts as they saw that if those persons who are

subject to the presumption of knowledge or possession of inside information fail to prove that they did not commit the crime, they would be punished. In view of the researcher, she agreed with the interviewees who expressed their concerns that the presumption of knowledge or possession of inside information could cause negative effects to the persons who did not commit insider trading. She further explained that by covering persons who have close relationship with corporate insiders such as parents, children, and siblings, the scope of presumptions was considered too broad.

Jaruphat Sonaitem reported opinions on the presumptions of knowledge or possession of inside information provided by SEA 2016 from perspective of the persons who served as directors of listed companies that such presumptions of knowledge or possession of inside information affected them by imposing the burden of proof when they wished to trade securities of the Company for which they were working as trading of securities of their companies was normal practice for them⁶². In addition, the directors interviewed by Jaruphat saw that the new law did not provide clear provisions as to the process of proving themselves in order to rebut the presumptions. With regard to the presumptions covering other surrounding persons under Section 244, this research reported that the interviewed directors saw that the scope of such presumptions was too broad and could cause certain risks to them⁶³.

⁶² Jaruphat (n 20) 41.

⁶³ Ibid.

CHAPTER 3

STATUTORY PRESUMPTIONS AND PRESUMPTION OF INNOCENCE

3.1 Concept of Statutory Presumptions in Criminal Law

3.1.1 Introduction

In general, the problems which will be decided by the court can be divided into 2 types: (1) problem of law or legal problem which means the matter of interpretation of law and application of law to particular fact which the court is not required to rely on the evidences adducted by the parties; and (2) problem of fact or factual problem which means any statement or circumstance claimed by the parties⁶⁴.

In general, the court is required to hear and decide the cases with respect to the problem of relevant fact according to the evidences adducted by the parties and is not allowed to base its decisions on its own knowledge or other information that is not derived from the evidences except for the facts which falls into the scope of exceptions to the above mentioned rule⁶⁵.

According to the explanation on the law of evidence of several Thai scholars, the facts which are not required to be proved by evidences in criminal law are the same as those in civil cases which consist of (1) general known fact; (2) indisputable fact and (3) facts accepted by certain party according to Section 84 of the Civil Procedure Code which also applies in criminal case by virtue of Section 15 of the

⁶⁴ Udom Rathamarit, Kham Athibai Kotmai Laksana Phayan Lakthan [Explanation on Law of Evidence (7th edn, Project for Promotion of Textbooks and Teaching Materials, Faculty of Law, Thammasat University 2019) 50 (อุดม รัฐอมฤต, คำอธิบายกฎหมายลักษณะพยานหลักฐาน (พิมพ์ครั้งที่ 7 โครงการตำราและเอกสารประกอบการสอน คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 2562)) 50.

⁶⁵ Ibid 204.

Criminal Procedure Code⁶⁶. However, it should be noted that the provisions of the Civil Procedure Code shall apply in criminal cases only to the extent permissible in the context of criminal law. For example, the fact accepted by the other party according Section 100 of the Civil Procedure Code or Section 125 of the Civil Procedure Code cannot be applied in criminal law⁶⁷.

The concept which determines that which party will have the obligation to prove respective facts to the court is called “burden of proof” which plays an essential role in legal proceedings as it has direct effect on the case result in both civil and criminal cases.

Udom Ratta-amarit explained that “burden of proof” is obligation of respective party to adduce evidences in order to prove their claims according to the standard of proof required by law and if the party bearing the burden of proof fails to provide evidences in accordance with such standard of proof required by law, it will result in such party losing the case⁶⁸.

With respect to criminal case, some legal scholar explained that Section 174 of the Criminal Procedures Code⁶⁹ is the provision which provides regulations for determining burden of proof in criminal case⁷⁰. However, after considering the provision of Section 174, it can be seen that Section 174 of the Criminal Procedures Code deals with the order of proof.

⁶⁶ *Udom* (n 64) 207 - 209.

⁶⁷ *Udom* (n 64) 209.

⁶⁸ *Udom* (n 64) 71.

⁶⁹ Section 174 of the Criminal Procedure Code provides that:

“Before adducing evidence, the prosecutor is entitled to open the case for the purpose of stating to the Court the case for the prosecution, that is to say, by setting forth the nature of the charge and the evidence which he proposes to bring in order to prove the guilt of the accused. The Prosecutor shall then adduce the evidence for the prosecution.”

⁷⁰ *Udom* (n 64) 217.

Some legal scholars, on the other hand, use Section 227 of the Criminal Procedures Code⁷¹ as a ground for determining which party shall bear to burden of proof in criminal case. However, after considering the provision of Section 227, it can be seen that Section 227 of the Criminal Procedures Code explains the standard of proof in criminal case, which is a different matter from the burden of proof.

Jaran Phakdeethanakul⁷² explained that as there is no provision regarding the burden of proof in Criminal Procedure Code, Section 84/1 of the Civil Procedure Code is applied by analogy by virtue of Section 15 of the Criminal Procedure Code. Section 84/1 of the Civil Procedure Code which provides that:

“The party that alleges any fact in support of his opposing party’s words shall be required to prove the fact. If there is a presumption in law or a reasonable presumption appearing from the usual state of event, favorable to a party, such a party shall be required to prove only that he has satisfied the condition of getting the benefit of that presumption completely.”

However, the author views that the burden of proof in criminal case is determined by the principle of presumption of innocence recognized in the Constitution. Therefore, even though there is no provision which directly deal with the burden of proof provided in the Criminal Procedure Code, it is generally explained that

⁷¹ Section 227 of the Criminal Procedures Code provides that:

“The Court shall exercise its discretion in considering and weighing all the evidence taken. No judgment of conviction shall be delivered unless and until the Court is fully satisfied that an offence has actually been perpetrated and that the accused has committed that offence.

Where any reasonable doubt exists as to whether or not the accused has committed the offence, the benefit of doubt shall be given to him.”

⁷² Jaran Phakdeethanakool, Kotmai Laksana Phayan Lakthan [Explanation of Law of Evidence] (14edn, The Institution of Legal Education of Thai Bar Association 2019) 286 (เจริญ ภักดีธนากุล, กฎหมายลักษณะพยานหลักฐาน (พิมพ์ครั้งที่ 14 สำนักอบรมศึกษากฎหมายแห่งเนติบัณฑิตยสภา 2561)) 286.

a plaintiff always bears the burden to prove all elements of crime of the alleged offence⁷³ due to the reason that the defendant in criminal case is protected by the principle of presumption of innocence according to the constitutional principle and therefore, the plaintiff, as the party who alleges that the defendant has committed the offence shall bear the burden to prove to challenge such presumption

Statutory presumptions are explained by legal scholars as the exception to the general rule with regard to the burden of proof in criminal case as it can shift the burden of proof from the plaintiff to the defendant and allows court to presume certain facts without aid of proof of such facts in dispute⁷⁴.

Normally, each statutory presumption is established on two sets of particular fact as follows⁷⁵:

(1) Basic fact which serves as a condition for establishing presumed fact; and

(2) Presumed fact which is the conclusion of fact drawn from basic fact. Where the law provides statutory presumption, the party who is beneficial from such presumption shall only have to prove the fact provided as condition for the statutory presumption is satisfied.

3.1.2 Types of Statutory presumption

Statutory presumption can be divided into 2 types as follows:

(1) Irrebuttable Presumption

⁷³ Constitution Court Decision No. 12/2555

⁷⁴ Khemchai Chutiwong, Kham Athibai Kotmai Laksana Phayan [Explanation on The Law of Evidence] (9th edn, Samnak Oprom Kotmai Ngae Netbanthittayasapha 2014) 25 (เพิ่มชัย ชุตินวงศ์, คำอธิบายกฎหมายลักษณะพยาน (พิมพ์ครั้งที่ 9, สำนักอบรมศึกษากฎหมายแห่งเนติบัณฑิตยสภา)) 25.

⁷⁵ ibid 25.

This type of presumption (sometimes referred to as conclusive presumption) cannot be challenged by evidences. When the party who is beneficial from the statutory presumption can prove the basic fact provided by law, the certain fact will be absolutely presumed by the court regardless of the evidences which prove to the contrary of such presumed fact. Normally, the provisions providing this type of presumption usually use the term “is deemed to (ถือว่า)” or “shall be deemed to (ให้ถือว่า)”.

Example of ir rebuttable presumption:

Section 60 of the Criminal Code which provides that

“Whenever any person intends to commit an act against a person, but the effect of the doing of such act occurs to another person mistakenly, it shall be deemed that such person intentionally commits such act against the person who suffers from the bad effect of such doing.”

(2) Rebuttable Presumption

Rebuttable presumption means statutory presumption which can be challenged by evidences of the other party. When the party who is beneficial from the statutory presumption can prove the basic fact as provided by law, the court shall presume the presumed fact unless the other party can prove otherwise. The provisions providing this type of presumption usually use the term “is presumed” (“สันนิษฐานว่า”) or “shall be presumed” (“ให้สันนิษฐานว่า”).

Example of rebuttable presumption:

Section 54 of the Direct Sales and Direct Market Act B.E. 2545 as amended by the Direct Sales and Direct Market Act (No. 3) B.E. 2560 (2017) provides that:

“In the case that the offender is a juristic person under this Act, if such offence of the juristic person was committed as a result of order or action of the

managing director, the manager, or any person responsible for the undertaking of business of such juristic person, or in the case that such person is obliged to give order or perform certain act but has failed to give such order or perform such act causing the juristic person to commit such offence, such person shall be charged for such offence unless he can prove that he is not involved in such offence of the juristic person.”

3.1.3 Justification of Statutory Presumptions in Criminal Law

The reasons which have been explained to justify statutory presumption which are sometimes referred to as justification of relaxation of the principle of presumption of innocence in criminal case can be summarized below.

(1) Easy Access to Evidences

Some legal scholar explained that statutory presumption can be justified in the case where the defendant is the only person who knows about particular fact.

(2) High standard of burden of proof in criminal case

In every criminal case, the prosecution is required to prove guilt of the defendant beyond reasonable doubt to ensure that innocent people will not be subject to conviction. However, on the other hand, the government officers in justice system have to work harder in order to collect and gather all evidences which will be used to prove to meet such standard of proof required by law. Such high standard of proof sometimes unintentionally allows real offenders to escape conviction especially in the case where evidences are difficult to gather, for example, economic crimes. For such reason, some legal scholars explained that it is justifiable

to establish statutory presumption as the easiest way to ease such high standard of burden of proof beyond reasonable doubt in criminal law⁷⁶.

(3) Government policy to suppress particular crime

Normally, the court has its sole discretion to consider evidences presented by the parties in order to summarize the facts related to the issue of the case. However, in some particular cases, the legislative intervened such decision making process of the court by establishing statutory presumptions related to particular facts in order to promote the government's policy to suppress certain crimes⁷⁷. Such intervention of the legislative is explained as justifiable as it helps ensuring consistency in the court decisions.

3.1.4 Patterns of Statutory Presumption in Criminal Law

As explained above that statutory presumption contains two sets of particular facts: (1) basic fact; and (2) presumed fact. In the context of criminal law, the

⁷⁶ Weeraphon Tungsuwan, Karn Chai Khorsannitthan Tam Khotmai Nai Khadee Yasheptit Paitai Lhak Nititham [Use of Legal Presumptions in Narcotics Case under the Rule of Law] (Individual Study, Institute of Constitutional Studies 2015) 7 (วีระพงษ์ ตั้งสุวรรณ, การใช้ข้อสันนิษฐานตามกฎหมายในคดียาเสพติดภายใต้หลักนิติธรรม) (เอกสารวิชาการส่วนบุคคล วิทยาลัยรัฐธรรมนูญ สำนักงานศาลรัฐธรรมนูญ 2558) 7.

⁷⁷ Apiwat Soodsaw, Panha Kiawkab Bot Sannitthan Khwamrabphid Tang Arya Khong Bukkhon Phu Mi Amnart Krathamkan Taen Nitibukkhon Nai Rabop Khotmai Khong Pratetthai [Problems Related to Presumptions of Criminal Liability of Persons Authorized to Act on Behalf of Juristic Persons in Thai Legal System] (2016) 13 (3) Chula Niti Journal 109 (อภิวัฒน์ สูดสาว, ปัญหาเกี่ยวกับบทข้อสันนิษฐานความรับผิดชอบทางอาญาของบุคคลผู้มีอำนาจกระทำการแทนนิติบุคคลในระบบกฎหมายของประเทศไทย (วารสารนิติจุฬา ปีที่ 23 ฉบับที่ 3)) 109.

basic fact is usually based on status of defendant or action of defendant while presumed fact is usually guilt of defendant or certain element of crime.

According to the contents of basic fact and presumed fact explained above, patterns of statutory presumptions in criminal law can be categorized into 4 patterns as follows:

(1) Statutory presumption under which status of defendant gives rise to guilt of defendant;

Example:

Section 71 of the Building Control Act B.E. 2522 provides that “In case there is a violation or non-compliance with section 21, section 22, section 34, section 42, section 52 paragraph six, section 57 or section 60, it shall be deemed to be committed by the owner or occupier of building, operator, superintendent, or appellant under section 52, as the case may be, or under the direction of such person, unless such person proves that it is committed by other person.”

According to Section 71 of the Building Control Act B.E. 2522, certain persons are presumed to have violated or failed to comply with certain provisions of the Building Control Act B.E. 2522 as a result of their status of such person as a building owner, building occupier, operator, superintendent or appellant.

However in 2017, this Section has been amended by the Act Amending Provisions of Laws Relating to Criminal Liability of Juristic Person Representatives B.E. 2560

(2) Statutory presumption under which status of defendant gives rise to certain element of crime;

Example:

Section 48 Paragraph Two of Forest Act B.E. 2484 provides that:

“Within transformed timber control area, no person shall transform timber, establish transformed timber factory, establish transformed timber trading place, possess transformed teak, or possess other transferred timber more than 0.20 cubic meter, except by license of a competence officer and act in compliance with specified in the Ministerial Regulation and condition specified in licensing.

For the purpose of paragraph one, log or wood sunken in river or canal within fifty meter in radius of a transformed timber place and nobody represented as owner shall be deemed to be in possession of a licensee of timber factory in which his or her factory established in such area.”

According to Section 48, a person is presumed to have possession of sunken log or wood due to his/her status as a licensee of timber factory and the possession of such sunken log or wood is one of the elements of crime provided in Paragraph One of Section 48.

(3) Statutory presumption under which certain action of defendant gives rise to guilt of defendant

Example:

Section 211 of Criminal Code provides that:

“Whoever meets in the meeting of secret society or criminal association, the person is said to commit the offence of being a member of such secret society or criminal association unless such person can show that he attended such meeting without the knowledge that being the meeting of secret society or criminal association.”

According to Section 211, a person is presumed to commit the offence of being the member of such society or association if such person is in the meeting of secret society or criminal association.

4) Statutory presumption under which certain action of defendant gives rise to certain element of crime

Example

Section 269/9 Paragraph Two of Criminal Code provides that:

“Whoever disposes of or acquires for the purpose of the disposal of a forged passport as prescribed in Section 269/8 shall be liable to imprisonment from three years to twenty years and a fine of sixty thousand baht to four hundred thousand baht.”

Section 269/9 Paragraph Three of Criminal Code provides that:

“Where the offender has in his or her possession of at least two copies of the forged passports in accordance with Section 269/8, it shall be preliminarily presumed that such possession is for the purpose of disposal.”

According to Section 269/9 Paragraph Three, if any person has in his or her possession at least two copies of forged passport, such person is presumed to have such forged passports for the purpose of disposal which is one of the elements of crime of the offence provided in Paragraph Two of the same section.

The patterns of statutory presumptions in criminal law are summarized in the below table for the purpose of analysis of this research in the following section:

Patterns of Statutory presumption in Criminal Law⁷⁸

Pattern	Basic Fact	Presumed Fact
Pattern 1	Status of Defendant	Guilt of Defendant
Pattern 2	Status of Defendant	Certain Element of Crime
Pattern 3	Action of Defendant	Guilt of Defendant
Pattern 4	Action of Defendant	Certain Element of Crime

3.1.5 Effect of Statutory Presumptions on Burden of Proof

With respect to the statutory presumption, there are different views towards the result of statutory presumption with respect to certain offence or criminal element thereof on the burden of proof. The legal scholars who have provided explanations for the result of statutory presumptions on the burden of proof in criminal case can be divided into 2 groups as follows:

(1) Statutory presumption does not reverse the burden of proof from the Plaintiff to the Defendant

⁷⁸ Panot Yongyut and others, Khor Sannithan Tam Khotmai Nai Khadee Aya Ti Khad Rue Yang Tor Ratthathammanun Matta 39 Wak Song: Botwikhro Khamwinitchai Khong Sanratthathammanoon Ti 12/2555 [Presumption of Law in Criminal Case which is Contrary to Section 39 of the Constitution: Analysis of Decision of Constitutional Court No. 12/2555] (2012) 7 (5) (Kridsadeekasarn) 16, 18. (ปณต ยงยุทธ และคณะ, ข้อเสนอพื้นฐานตามกฎหมายในคดีอาญาที่ขัดหรือแย้งต่อรัฐธรรมนูญ มาตรา 39 วรคสอง: บทวิเคราะห์คำวินิจฉัยของศาลรัฐธรรมนูญที่ 12/2555 (กฤษฎีกาสาร ปีที่ 7 ฉบับที่ 5 2555) (2012) 16, 18.

Udom Ratamarit viewed that statutory presumption did not reverse the burden of proof from the Plaintiff to the Defendant. According to his explanation, in the case that the law provides statutory presumption, the Plaintiff still bears the burden to adduct evidences in order to prove the offence of the defendant to the court beyond reasonable doubt and such statutory presumption only leads to the defendant's additional obligation to present evidences in order to challenge such presumed fact not the burden of proof to the Defendant⁷⁹.

(2) Statutory presumption reverses the burden of proof from the Plaintiff to the Defendant.

Some legal scholars viewed that when there is statutory presumption, the burden of proof will be reversed from the plaintiff to the defendant.

Jaran Phakdeethanakool explained statutory presumption as the exception to the principle regarding determination of burden of proof as provided in Section 84/1, that is, the alleging party bears the burden of proof, as it resulted in the reversal of burden of proof from the plaintiff who alleged the offence of the defendant to the defendant⁸⁰.

Khemchai Chutiwong explained that where statutory presumption is provided by law, the party claiming the benefit from such statutory presumption only has obligation to prove basic fact of such presumption in order to have certain fact presumed by the court and the burden of proof will be reversed to the opposing party who wishes to challenge such presumed fact. He furthered explained that, for that reason, statutory presumption is generally provided for the case where it is difficult to find evidences because the evidences are normally in the sole possession and

⁷⁹ *Udom* (n 64) 214.

⁸⁰ *Jaran* (n 72) 226.

knowledge of the defendant as the statutory presumption can reverse the burden of proof to the defendant who is in the better position to provide evidences⁸¹.

Thai Constitutional Court also explained in several decisions that the statutory presumption reversed the burden of proof. For example, in the Constitutional Court Decision No. 3/2559, the Constitutional Court explained that the statutory presumption in Section 9 of the Act Concerning Offences Relating to the Submission of Bids to Government Agencies B.E. 2542 reversed the burden of proof to the defendant.

The author agree with the 2nd group of legal scholars who viewed that statutory presumption reversed the burden of proof to the defendant.

3.2 Principle of Presumption of Innocence

3.2.1 Overview of Principle of Presumption of Innocence

3.2.1.1 Meaning and Scope of Presumption of Innocence

According to Black's Law Dictionary, "the principle of presumption of innocence refers to where a person may not be convicted of crime unless the government proves guilt beyond reasonable doubt placed on the accused to prove innocence"⁸². This principle is grounded on the concept of human rights to

⁸¹ *Khemchai* (n 74) 118.

⁸² Black's Law dictionary

which every accused of crime is entitled⁸³ and also referred to as fundamental principle of procedural fairness in criminal law⁸⁴.

The Human Rights Committee (HRC) interpreted that “the presumption of innocence serves as fundamental tool for protecting human rights by imposing on the prosecution the burden of proving the charge, guaranteeing that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensuring that the accused has the benefit of doubt and requiring that persons accused of a criminal act must be treated in accordance with this principle”⁸⁵.

The extent to which this principle operates varies in different jurisdiction. However, it can be briefly summarized that this principle presumption of innocence operated at two different levels as follows⁸⁶:

(1) Presumption of Innocence during criminal trial

At this level, this principle serves as a general tool to ensure that where a person is subject to criminal prosecution, the prosecutor bears the burden to prove the defendant’s guilt, and such proof has to meet the beyond reasonable doubt standard⁸⁷. At this level, the purpose of this principle is to place the burden of proof in criminal case on the plaintiff and all relevant government officers and to

⁸³ Ndiva Kofele-Kale, ‘Presumed Guilty: Balancing Competing Rights and Interests in Competing Economic Crimes’ (2006) 40 *The International Lawyer* 909, 916.

⁸⁴ Pamela R. Ferguson, ‘The Presumption of Innocence and Its Role in the Criminal Process’ (2016) *Criminal Law Forum* <<https://link.springer.com/content/pdf/10.1007/s10609-016-9281-8.pdf>> accessed on 17 December 2019 131, 133.

⁸⁵ Human Rights Committee, *General Comment No. 31 Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial* (2007) para. 30.

⁸⁶ Andrew Ashworth, ‘Four Threats to the Presumption of Innocence’ (2006) 10 *The International Journal of Evidence & Proof* 241, 243.

⁸⁷ *ibid.*

ensure that the accused shall not have burden to prove their innocence which will be finally decided by the court according to the evidences presented by the plaintiff⁸⁸.

(2) Presumption of Innocence in criminal process

The presumption of innocence is not limited solely to the treatment of the accused during trial or the evaluation of evidences but also extends to treatment before and throughout trial⁸⁹. This principle also requires other certain obligations throughout the entire criminal proceedings. At this level, the presumption of innocence is interpreted to serve as a tool to ensure that the pre-trial procedures should be carried out as if the defendant were innocent so far as possible⁹⁰. This wider scope of the presumption of innocence principle is supported by several international human right instruments, for example, according to the Directive (EU) 2016/343, the presumption of innocence would be violated if a suspect or an accused person are referred to by public authorities in public statements as being guilty when guilt of such person has not been proved according to law⁹¹. In addition, the right to remain silent

⁸⁸ Arnon Mamout, Botwikhro Khamwinitchai Khong Sanratthathammanoon: Khamwinitchai Ti 12/2555 Kab Lhaksannitthan Khampenphuborrisut Naithana Sitkhanpuenthan Lae Khorpitcharana Poemterm Prakan Auen (Ton Ti 1) [Analysis on Decision of the Constitutional Court: Decision No. 12/2555 and the Principle of Presumption of Innocence as Fundamental Right and other Considerations (Part 1)] (2012) 41 (4) (Thammasat Law Journal) 815, 826. (อานนท์ มาเม้า, บทวิเคราะห์คำวินิจฉัยของศาลรัฐธรรมนูญ: คำวินิจฉัยที่ ๑๒/๒๕๕๕ กับหลักสันนิษฐานความเป็นผู้บริสุทธิ์ในฐานะสิทธิขั้นพื้นฐาน และข้อพิจารณาเพิ่มเติมประการอื่น (ตอนที่ ๑) (วารสารนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ ปีที่ 41 ฉบับที่ 4)) 815, 826.

⁸⁹ *Kofele-Kale* (n 83) 918.

⁹⁰ Ashworth (n 86) 243.

⁹¹ Article 4 (1) of EU Directive 2016/343 provides that “Member States shall take the necessary measures to ensure that, for as long as a suspect or an accused person has not been proved guilty according to law, public statements made by public authorities, and judicial decisions, other than those on guilt, do not refer to that person as being

and the right not to incriminate oneself as provided in Article 7 (1)⁹² and (2)⁹³ of the EU Directive 2016/343 are also important aspect of the principle of presumption of innocence.

However, given the main question of this thesis, only the narrower level at which the principle of presumption of innocence operates will be examined.

As explained by several legal scholars that the presumption of innocence is considered as the least controversial fundamental right. This explanation is supported by that fact that the presumption of innocence can be found in many international human rights instruments as follows⁹⁴:

(1) Universal Declaration of Human Rights (“UDHR”)

UDHR was adopted by the United Nations General Assembly on 10 December 1948. It is generally agreed to be the foundation of international

guilty. This shall be without prejudice to acts of the prosecution which aim to prove the guilt of the suspect or accused person, and to preliminary decisions of a procedural nature, which are taken by judicial or other competent authorities and which are based on suspicion or incriminating evidence”.

⁹² Article 7 (1) of EU Directive 2016/343 provides that “Member States shall ensure that suspects and accused persons have the right to remain silent in relation to the criminal offence that they are suspected or accused of having committed”.

⁹³ Article 7 (2) of EU Directive 2016/343 provides that “Member States shall ensure that suspects and accused persons have the right not to incriminate themselves”.

⁹⁴ Anthony Gray, 'Constitutionally Protecting the Presumption of Innocence' (2012) 31 U Tas L Rev 132 134.

human rights law which sets out fundamental human rights to be universally protected⁹⁵.

Article 11 (1) of UDHR provides that:

“Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.”

(2) International Covenant on Civil and Political Rights (“ICCPR”)

In ICCPR, the presumption of innocence is guaranteed as part of the right to fair trial under Section 14 which are derived from the general rights of the Universal Declaration of Human Rights⁹⁶. Section 14 of ICCPR provides that:

“Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.”

(3) European Convention on Human Rights

Article 6 (2) of the European Convention on Human Rights provides that:

"Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law".

In addition to the international human rights instruments, the principle of presumption of innocence also find its place in the constitutions and national human right instruments of several countries.

⁹⁵ United Nations, ‘Universal Declaration of Human Rights’

<<https://www.un.org/en/universal-declaration-human-rights>> accessed on 21 December 2019.

⁹⁶ *Kofele-Kale* (n 83) 918.

3.2.1.2 Rationale of Presumption of Innocence

The rationales which support the strong position of the principle of presumption of innocence as a widely recognized fundamental right can be summarized as follows:

(1) Severe consequences of criminal conviction

It is undeniable that legal and social consequences of criminal conviction are severe and can destroy the entire life of convicted person even after his or her time of punishment. For example, in some countries, the person convicted of criminal offence is disqualified from employment or registration. Given the said reasons, it is accepted by several human right instruments that the fundamental rights of persons can be justified only after conviction of competent court following fair procedures⁹⁷. With respect to fair procedures, it is important that innocent persons should not be convicted and suffer the adverse consequences of such criminal conviction and this is when the principle of presumption of innocence plays its role as a vital protection for preventing innocent persons from criminal conviction⁹⁸.

(2) Imbalance of power between state and citizen

Some scholars explained that as the state has advantages over its citizen in terms of its far-reaching power related to investigation, prosecution, trial and sentencing, the state is required to treat each of its citizens as if his or she is innocent unless and until the guilt is proved. Therefore, this principle serves as an express limitation on the state's power to impose punishment on its citizens and

⁹⁷ *Ashworth* (n 86) 247.

⁹⁸ *ibid.*

operate to balance that power against the liberties of the individual given the state's almost unlimited power to impose punishment on individuals⁹⁹.

(3) Mistakes in criminal procedures

Given the nature of fact-finding in criminal procedures which can only happen after the events which lead to the conviction, no absolute accuracy cannot be expected out of it. As the mistakes in criminal procedures have been recognized, the presumption of innocence serves as a tool to allocate risk associated with wrong conviction by setting high standard which requires that no person should be convicted if there is still reasonable doubt in order to ensure that the decision is correct¹⁰⁰.

3.2.2 Presumption of Innocence in Thailand

The presumption of innocence was firstly recognized in Thailand in 1949 under Section 30, Paragraph One of the Constitution of the Kingdom of Thailand B.E. 2492 (1949)¹⁰¹. The principle has found its place in the following versions of Thai Constitution until present, for example, Section 32 of the Constitution of the Kingdom of Thailand B.E. 2517 (1974)¹⁰², Section 31 of the Constitution of the Kingdom of

⁹⁹ *Kofele-Kale* (n 83) 922.

¹⁰⁰ Anthony Davidson Gray, 'The Presumption of Innocence under Attack' (2017) 20 *New Criminal Law Review: An International and Interdisciplinary Journal* 569, 599.

¹⁰¹ Section 30 of the Constitution of the Kingdom of Thailand B.E. 2492 provided that "a suspect or defendant in criminal case shall be deemed innocent".

¹⁰² Section 32 of the Constitution of the Kingdom of Thailand B.E. 2517 (1974) provided that "a suspect or defendant in criminal case shall be deemed innocent".

Thailand B.E. 2540 (1997)¹⁰³, and Section 39 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007)¹⁰⁴.

In the Constitution of the Kingdom of Thailand B.E. 2560 (2018) which is currently in effect, this principle is recognized in Section 29 Paragraph Two under Chapter 3 governing rights and liberties of Thai people.

Section 29 Paragraph Two of the Constitution of the Kingdom of Thailand B.E. 2560 (2018) provides that:

“A suspect or defendant in a criminal case shall be presumed innocent, and before the passing of a final judgment convicting a person of having committed an offence, such person shall not be treated as a convict.”

The Constitution Court of Thailand explained that the principle of presumption of innocence aimed at protecting rights of the suspects or defendants in criminal case by presuming that the suspects or defendants were innocent until the court rendered final decision that such persons were guilty.¹⁰⁵ Under the principle of presumption of innocence, the prosecutor shall have the burden to prove all elements of crime specified by law and the defendants shall not have to prove his/her innocence¹⁰⁶.

The fact that this principle is recognized in the constitution of Thailand indicates the importance of this principle as part of the supreme law of the

¹⁰³ Section 31 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997) provided that “a suspect or defendant in criminal case shall be deemed innocent”.

¹⁰⁴ Section 39 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) provided that “a suspect or defendant in criminal case shall be deemed innocent”.

¹⁰⁵ Constitutional Court Decision No. 12/2555

¹⁰⁶ Manit Jumpa, Kham Athibai Ratthathammanun Haeng Ratcha-anachakthai [Explanation of the Constitution of the Kingdom of Thailand (B.E. 2550) Part 1] (3rd edn, Chulalongkorn University Press 2012) 229 (มานิต จุ่มปา, คำอธิบายรัฐธรรมนูญแห่งราชอาณาจักรไทย (พ.ศ. 2550) เล่ม 1 (พิมพ์ครั้งที่ 3 สำนักพิมพ์แห่งจุฬาลงกรณ์มหาวิทยาลัย 2555) 229.

Kingdom¹⁰⁷. Moreover, according to personal opinion of one of the panel judges of the Constitutional Court which rendered the Constitutional Court Decision No. 3/2559¹⁰⁸, the principle of presumption of innocence was regarded as right of the people which shall be protected by the constitutional convention under the constitutional regime of government with the King as head of the state even when the Constitution being in effect at that time provide no express provision regarding the principle of presumption of innocence¹⁰⁹ due to the fact that this principle was included in several versions of the Constitution of the Kingdom of Thailand. For that reason, the whole legal system of Thailand is subject to this principle and all concerned parties are required to protect and act in accordance with this principle as one of the fundamental rights of the people in the Kingdom of Thailand¹¹⁰.

The scope in which the presumption of innocence applies in Thailand is discussed in the following section

¹⁰⁷ Section 6 of the Constitution provides that the Constitution is the supreme law of the State. The provisions of any law, rule or regulation or any acts, which are contrary to or inconsistent with the Constitution, shall be unenforceable.

¹⁰⁸ Personal Decision in Relation to Constitutional Court Decision No. 3/2559 of Mr. Boonsong Kulbuppha.

¹⁰⁹ Section 4 of the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014) provided that Subject to the provisions of this Constitution, all human dignity, rights, liberties and equally of the people protected by the constitutional convention under a democratic regime of the government with the King as the Head of State, and by international obligations bound by Thailand shall be protected and upheld by this Constitution.

¹¹⁰ (n 108).

3.3 Constitutionality of Statutory presumptions in Criminal Law

As explained in the foregoing section, the principle of presumption of innocence is the constitutional principle contained in Section 29 Paragraph Two of the Constitution of the Kingdom of Thailand B.E. 2560 aiming at protecting rights of the accused or defendants in criminal proceedings by presuming that he or she is innocent until his or her guilt has been proven by a final judgment¹¹¹.

The decision regarding the constitutionality of law with respect to the principle of presumption of innocence is in the jurisdiction of the Constitutional Court of Thailand as provided by Section 210 (1) of the Constitution of the Kingdom of Thailand B.E. 2560 (2)¹¹². During the past period, the Constitutional Court of Thailand has rendered several decisions regarding the constitutionality of the provisions of law which contain statutory presumptions, for example, Section 54 of the Direct Sale and Direct Marketing Act B.E. 2545, and Section 245 (1) of the Copyright Act B.E. 2537.

Therefore, it is essential to study and discuss the decisions of the Constitutional Court of Thailand in order to understand the scope to which the principle of presumption of innocence applies in Thailand as well as the standard criteria used for considering the constitutionality of statutory presumption with respect to the principle of presumption of innocence.

3.3.1 Pattern Approach

According to the author's research, it can be summarized that the criteria of consideration established by the Constitutional Court is explained by several

¹¹¹ Constitutional Court Decision No. 12/2555.

¹¹² Section 210 (1) of the Constitution of the Kingdom of Thailand B.E. 2560 provides that the Constitutional Court has duties and powers to consider and adjudicate on the constitutionality of a law or bill.

legal scholars as “Pattern Approach”¹¹³. To understand the standard established by the Constitutional Court, the author has selected 3 decisions of the Constitutional Court as follows:

3.3.1.1 Constitutional Court Decision No. 11/2544

(1) Summary of Facts

The prosecutor of Prae Province prosecuted Mr. Nakhorn Duangkaew and Mr. Suban Saraphan for the offence of possession of 48.5 grams of heroin which consisted of 39.5 grams of heroin hydrochloride for sale without permission. Prae Provincial Court and the Appeal Court decided that both defendants were guilty for the offence under Section 15 Paragraph Two of the Narcotics Act B.E. 2522. Both defendants lodged an appeal to the Supreme Court arguing that the prosecutor could not prove that both defendants sold the heroin and they could not be held liable for the offence under Section 15 Paragraph Two of the Narcotics Act B.E. 2522 as the said provision was contrary to Section 33 of the Constitution of the Kingdom of Thailand B.E. 2540 and therefore could not apply to both defendants’ case.

(2) Main Issue of the Case

The main issue of this case was regarding the constitutionality of Section 15 Paragraph Two of the Narcotics Act B.E. 2522. In the Decision No. 11/2544, the Court determined whether or not Section 15 Paragraph Two was contrary to Section 33 of the Constitution of the Kingdom of Thailand B.E. 2540 which was then in effect.

¹¹³ *Khemchai* (n 74) 122.

(3) Relevant Laws

(3.1) Narcotics Act B.E. 2522

Section 15 provides that:

“No person shall produce, import, export, dispose of or possess narcotics of category I, unless the possession necessary for the benefit of the government as permitted by the Minister specifically for the respective person or case as deemed appropriate.”

The production, import, export or possession of narcotics of category I consisting of pure substance of 20 grams or more shall be deemed the production, import, export or possession for sale”.

(3.2) Constitution of the Kingdom of Thailand B.E. 2540

Section 33 provides that:

“The suspect or the accused in a criminal case shall be presumed innocent.”

(4) Statutory presumptions

(4.1) Compositions of Statutory Presumptions

The statutory presumption contained in Section 15 Paragraph Two of the Constitution of the Kingdom of Thailand B.E. 2540 consists of the following elements:

1) Basic Fact

The basic fact contained in Section 15 Paragraph Two is as follows:

1. Production of narcotic of Category 1 consisting of pure substance of 20 grams or more; or
2. Import of narcotics of Category 1 consisting of pure substance of 20 grams or more; or

3. Export of narcotics of Category 1 consisting of pure substance of 20 grams or more; or

4. Possession of narcotics of Category 1 consisting of pure substance of 20 grams or more.

2) Presumed Fact

If the plaintiff can prove one of the basic facts explained above, the law shall presume that the offender produce, import, export or possess the narcotics of Category 1 for the purpose of sale.

(4.2) Type and Pattern of Statutory presumption

1) The statutory presumption contained in the said law falls into the scope of the 3rd Pattern under which certain action of the defendant gives rise to guilt of defendant as explained in Section 3.2.2 above.

2) The statutory presumption contained in Section 15 Paragraph Two of the Narcotics Act B.E. 2522 is irrebuttable presumption as the presumed fact cannot be challenged by the defendant.

(5) Decision

The Constitutional Court decided that the statutory presumption contained in Section 15 Paragraph Two of the Narcotics Act B.E. 2522 which provided that the person who produces, import, export or possess certain amount of narcotics shall be presumed to do such for the purpose of selling the narcotics was constitutional with respect to the presumption of innocence on the following grounds:

1) The amount of narcotics specified in Section 15 Paragraph Two was just the criteria for imposing more severe punishment on the defendants as the defendant would have been punished for the production, import, export or possession of any amount of the narcotics.

2) Before the liability of defendant under Section 15 Paragraph Two can be presumed only after the plaintiff has proved that the defendant has actually committed the offence of production, import, export and possession of narcotics Category 1.

(6) Author's Note

1) Section 15 of the Narcotics Act B.E. 2522 was amended 2 times by the Narcotics Act (No. 5) B.E. 2545 and the Narcotics Act (No. 5) B.E. 2560.

Section 15 of the Narcotics Act B.E. 2522 which is currently in effect provides that:

“No person shall produce, import, export, dispose of or possess narcotics of category I, unless the Minister permits for the necessity of the use for government service.

The application for a permission or the permission shall be in accordance with the rules, procedures and conditions prescribed in the Ministerial Regulations.

The production, import, export or possession of narcotics of category I in quantity as the followings shall be presumed as production, import, export or possession for the purpose of sale:

(1) Dextrolyzer or LSD is of the quantity computed to be pure substances of zero point seventy five milligrams or more or is of narcotics substances thereof of fifteen doses or more or is of pure weight of three hundred milligrams or more;

(2) Amphetamine or derivative amphetamine is of the quantity computed to be pure substances of three hundred seventy five milligrams or more or is of narcotics substances thereof of fifty doses or more or is of pure weight of one point five grams or more; or

(3) Narcotics of category I unless (1) and (2) is of the quantity computed to be pure substances of three grams or more.”

According to the new provision, it is noted that the presumption contained in Section 15 is no longer an irrefutable presumption. The person who is presumed to be guilty for the production, import, export or possession for the purpose of sale now has the opportunity to challenge the presumed fact.

3.3.1.2 Constitutional Court Decision No. 12/2555

On 28 March 2012, the Constitutional Court rendered its 5-4 decision regarding the constitutionality of statutory presumptions in criminal law with respect to principle of presumption of innocence. The details of this decision can be summarized as follows:

(1) Summary of Facts

Asian James Co., Ltd. (“Asian James”) was prosecuted for the offence under Section 19¹¹⁴ and Section 46 the Direct Sales and Direct Market Act B.E. 2545 in Buriram Provincial Court. Buriram Court ruled that Asian James was guilty for the said offences and imposed a fine of THB 500,000. Mr. Phitan Chiawhataphong (“Mr. Phitan”), as the managing director of Asian James was also prosecuted and punished for the same offences as Asian James by virtue of Section 54 of the Direct Sales and Direct Market Act B.E. 2545 which provides that:

“In the case that the offender is a juristic person under this Act, the managing director, the manager, or any person responsible for the undertaking

¹¹⁴ Section 19 of the Direct Sales and Direct Marketing Act B.E. 2545 provides that “a direct sale business operator or direct marketing business operator shall not carry on his or her operation in a way that persuades other persons to participate in a direct sale or direct marketing network upon an agreement to give certain benefits calculated from the increasing number of participants in return of finding additional participants to join the network”.

of business of such juristic person shall be charged for such offence unless he can prove that he is not involved in such offence of the juristic person.”

When the case went to the Supreme Court, Mr. Phitan objected that Section 54 of the Direct Sales and Direct Market Act B.E. 2545 was contrary to Section 39 Paragraph Two of the Constitution of the Kingdom of Thailand B.E. 2550 because the said provision provided that the managing director had to be liable for the offence of the relevant juristic person without any proof of the plaintiff that the managing director actually committed the said offence. In addition, Mr. Phitan claimed that, such statutory presumption resulted in the reversal of burden of proof to the defendant and also limit the court’s authority to hear and consider the evidences presented by the plaintiff which may be beneficial to the defendant. For such reason, he stated that he was not protected under the principle of the presumption of innocence under the Constitution of the Kingdom of Thailand.

(2) Main Issue of the Case

The main issue of this case was regarding the constitutionality of Section 54 of Direct Sales and Direct Market Act B.E. 2545. In the Decision No. 12/2555, the Court determined whether or not Section 53 was contrary to Section 39 Paragraph Two, Section 40 (5) and Section 30 of the Constitution of the Kingdom of Thailand B.E. 2550 which was then in effect.

However, given the relevancy of the main question of this thesis, only the issue regarding Section 39 Paragraph Two with respect to the principle of presumption of innocence will be discussed.

(3) Relevant Law

(3.1) Section 39 Paragraph Two of the Constitution of the Kingdom of Thailand B.E. 2550 provided that:

“A suspect or defendant in a criminal case shall be presumed innocent.”

(3.2) Section 54 of the Direct Sales and Direct Market Act B.E. 2545 provided that:

“In the case that the offender is a juristic person under this Act, the managing director, the manager, or any person responsible for the undertaking of business of such juristic person shall be charged for such offence unless he can prove that he is not involved in such offence of the juristic person.”

(4) Statutory presumptions

(4.2) Composition of Statutory presumption

The statutory presumption contained in Section 54 of the Direct Sales and Direct Market Act B.E. 2545 consists of the following elements:

1) Basic Fact

There were two sets of basic facts in Section 54 as follows:

1. Commission of alleged offence under the Direct Sales and Direct Market Act B.E. 2545 by juristic person; and
2. Status of Certain Persons i.e. 1) managing director; 2) manager or 3) responsible person of the offending juristic person.

In the case that the plaintiff is beneficial from such statutory presumption contained in Section 54, the plaintiff only has to prove that the juristic person committed the offence and that the defendant was the managing director, the manager or the responsible person of such juristic person in order to have the benefit of such statutory presumption.

2) Presumed Fact

If the plaintiff can prove the 2 basic facts explained above, the law shall presume that the managing director, the manager, or any person

responsible for the undertaking of business of such juristic person shall be charged for such offence.

(4.2) Type and Pattern of Statutory presumption

1) The statutory presumption contained in the said law falls into the scope of the 1st Pattern under which status of defendant gives rise to guilt of defendant as explained in Section 3.2.2 above.

2) The statutory presumption provided by Section 54 of the Direct Sales and Direct Market Act B.E. 2545 is rebuttable presumption as it allows the party who is not beneficial from the statutory presumption to challenge the presumed fact by proving that he is not involved in such offence of the juristic person.

(5) Decision

The Constitutional Court decided that the statutory presumption contained in Section 54 of the Direct Sales and Direct Market Act B.E. 2545 which specified that managing directors, managers or persons responsible for the undertaking of business where no connection between those persons and the offence of juristic person was shown was unconstitutional on the following grounds:

1) The statutory presumption contained in Section 54 of the Direct Sales and Direct Market Act B.E. 2545 was the presumption which led to the presumption of guilt of the defendant without any proof of certain action nor intention of the defendant by the plaintiff, and as a result the burden to prove the defendant's innocence was reversed to the defendant.

2) The guilt of the defendant under Section 54 was presumed based on certain status of the defendant (basic fact) and not just the presumption of certain element of crime after the plaintiff has proved certain act of the defendant which is related to the alleged offence.

3) The statutory presumption contained in Section 54 of the Direct Sales and Direct Market BE. 2545 was contrary to the rule of law which required

that the plaintiff in criminal case shall have the burden to prove all elements of the alleged offence.

4) Rights and liberties of relevant persons could be limited without any reasonable evidences presented to prove that such persons has committed any act or had any intention related to the alleged offence.

(6) Author's Note

1) The author notes that the Constitutional Court Decision No. 12/2555 which ruled that Section 54 was unconstitutional was not anonymously passed by the panel judges of the Constitutional Court. 4 out of 9 judges of the Constitutional Court viewed that Section 54 of the Direct Sales and Direct Market B.E. 2545 was not unconstitutional. For that reason, the author looked further into the reasons explained by those particular judges which can be summarized as follows:

1.1 Jaroon Intajarn explained in his personal opinion that the provision of Section 54 of the Direct Sales and Direct Market B.E. 2554 was constitutional and not contrary to the principle of presumption of innocence as he viewed that the statutory presumption contained in such section did not reverse the burden of proof to the defendant because the fact that juristic person was just entity recognized by law and did not actually exist and all its actions had to be done through its representatives who had the authority to do certain acts on its behalf. Therefore, he further explained that the proof of offence of juristic person under the Direct Sales and Direct Market B.E. 2545 could be regarded that the offence of the person responsible for the undertaking of business of such juristic person had been proved¹¹⁵. Moreover, he viewed that the fact that Section 54 provided opportunity to the defendant to challenge the presumed fact and prove his innocence indicated that the law was beneficial to the plaintiff and the defendant.

¹¹⁵ Personal Opinion in Relation to Constitutional Court Decision No. 12/2555 of Mr. Jaroon Intajarn.

1.2 Supoj Khaimook's personal opinion that Section 54 of the Direct Sales and Direct Market Act B.E. 2545 was constitutional was made based mainly on the same ground as Jaroon Intajarn's decision. However, he also explained the justification of this statutory presumption by focusing on the intention of the law, serious effect of the offence on society and difficulty with respect to evidence gathering¹¹⁶.

2) In 2017, 5 years after the decision was rendered, Section 54 of the Direct Sales and Direct Market Act B.E. 2545 has been amended by the Direct Sales and Direct Market Act (No. 3) B.E. 2560 (2017). The amended provision provides that:

“In the case that the offender is a juristic person under this Act, if such offence of the juristic person was committed as a result of order or action of the managing director, the manager, or any person responsible for the undertaking of business of such juristic person, or in the case that such person is obliged to give order or perform certain act but has failed to give such order or perform such act causing the juristic person to commit such offence, such person shall be charged for such offence unless he can prove that he is not involved in such offence of the juristic person.”

The author notes that according to the amended Section 54, there are additional elements related to the actions of the managing director, the manager or responsible person of the offending juristic person. As a result of such amendment, the plaintiff is required to prove that those persons have given certain order or performed certain act, or failed to give certain order or person certain act in according to the proof beyond reasonable doubt standard as required in criminal cases, and those persons' guilt cannot be presumed based solely on their status related to the offending juristic person without proof of such order and act of the defendant by the plaintiff.

¹¹⁶ Personal Opinion in Relation to Constitutional Court Decision No. 12/2555 of Mr. Supoj Khaimook.

3) After the Constitutional Court rendered its decision no. 12/2555 in 2012, there were several decisions which held that other provisions in several laws which presumed guilt of representatives of juristic persons who committed offence in order to hold those persons responsible for such alleged offence of the juristic person were unconstitutional for the same reasons explained by the Constitutional Court in the decision no. 12/2555. Those decisions were Constitutional Court Decision No. 5/2556 (Section 74 of the Copyright Act B.E. 2537¹¹⁷), Constitutional Court Decision No. 10/2556 (Section 78 of the Telecommunications Business Act B.E. 2544¹¹⁸), Constitutional Court Decision No. 11/2556 (Section 28/4 of the Entertainment Place Act B.E. 2509¹¹⁹), Constitutional Court Decision No. 19-20/2556 (Section 72/5 of the Fertilization Act B.E. 2509¹²⁰).

¹¹⁷ Section 74 of the Copyright Act B.E. 2537 provided that in case a juristic person commits an offence under this Act, it shall be deemed that all directors or managers of the juristic person are joint offenders with the juristic person unless they can prove that the juristic person has committed the offence without their knowledge or consent.

¹¹⁸ Section 78 of the Telecommunication Business Act B.E. 2544 provided that in the case where the offender liable under this Act is a juristic person, the managing director, or manager or any person responsible for the operation of such juristic person shall be liable for the punishment prescribed for such offence, unless such action is proved to be committed without his or her acknowledgement or consent.

¹¹⁹ Section 28/4 of the Entertainment Place Act B.E. 2509 provided that where an offender under this Act is a juristic person, director, manager or person responsible for an operation of the juristic person, such person shall be liable to a punishment under such offence unless such person can prove that he or she has no involvement in a commission of offence by the juristic person.

¹²⁰ Section 72/5 of the Fertilization Act B.E. 2509 provided that where an offender under this Act is a juristic person who must be punished under this Act except for the case under Section 72/2, managing director, manager partner, juristic person representative or person responsible for an operation of the juristic person, such

In 2017, the above mentioned provisions held unconstitutional by the Constitutional Court of Thailand were amended by the Act Amending Provisions of Laws Relating to Criminal Liability of Juristic Person Representatives B.E. 2560.

3.3.1.3 Constitutional Court Decision No. 3/2559

On 1 June 2016, the Constitutional Court rendered its 8-1 decision regarding the constitutionality of statutory presumptions in criminal law with respect to principle of presumption of innocence. The details of this decision can be summarized as follows:

(1) Summary of Facts

The prosecutor prosecuted Fresenius Medical Care (Thailand) Co., Ltd. (“Fresenius”) for the offence under Section 3 and Section 4 of the Act Concerning Offences Related to the Submission of Bids to Government Agencies B.E. 2542. Mrs. Surang Phromsiri (“Mrs. Surang”), as the managing director of the Fresenius was also prosecuted under Section 9 of the same act. Both defendants denied and Mrs. Surang objected that Section 9 of the Act Concerning Offences Related to the Submission of Bids to Government Agencies B.E. 2542 was contrary to Section 4 and Section 5 of the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 because it contained statutory presumption which presumed her guilt without any proof of her action or intention and used action of other person as condition for presuming her guilt.

person shall be liable to a punishment specified by law for such offence unless such person can prove that he or she has no involvement in a commission of offence by the juristic person.

(2) Main Issue of Case

The main issue of this case was regarding the constitutionality of Section 9 of the Act Concerning Offences Related to the Submission of Bids to Government Agencies B.E. 2542. In the Decision No. 3/2559, the Court determined whether or not Section 9 was contrary to Section 4 and Section 5 of the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 which was then in effect.

(3) Relevant Law

(3.1) Constitution of the Kingdom of Thailand (Interim)

B.E. 2557

Section 4 provides that:

“Subject to the provisions of this Constitution, human dignity, rights, liberties and equality previously enjoyed by the Thai people with the protection under Thailand’s constitutional convention of the democratic regime of government with the King as Head of State and Thailand’s existing international obligations shall be protected under this Constitution.”

Section 5 provides that:

“Whenever no provision under this Constitution is applicable to any case, any action shall be taken or decision shall be rendered in accordance with Thailand’s constitutional convention of the democratic regime of government with the King as Head of State, provided that such constitutional convention shall not be contrary to or inconsistent with this Constitution.”

(3.2) Act Concerning Offences Relating to the Submission of Bids to Government Agencies B.E. 2542

Section 9 provides that:

“If the offence committed under this Act is in the interest of any juristic person, it shall be deemed that the managing partner, president, executive

or the person empowered to run the business of such juristic person or the person responsible for the operation of the juristic person on such matter are also co-principals in the commission of the **offence** unless it can be proven that they take no part in the commission of such offence.”

(4) Statutory presumption

(4.1) Composition of Statutory presumption

The statutory presumption contained in Section 9 of the Act Concerning Offences Related to the Submission of Bids to Government Agencies B.E. 2542 consists of the following elements:

1) Basic Fact

There were two sets of basic facts in Section 9 as follows:

1. Commission of alleged offence under the Act Concerning Offences Related to the Submission of Bids to Government Agencies B.E. 2542 by any person which results in the interest of the juristic person

2. Status of Certain Persons i.e. 1) managing partner; 2) manager director; 3) executive or person who has authority to undertaking business of the juristic person; 4) person responsible for the undertaking of related business.

In the case that the plaintiff is beneficial from such statutory presumption contained in Section 9, the plaintiff only has to prove that certain offence was committed and led to certain interest of the juristic person, and that the defendant was the managing partner, manager director, executive or person who has authority to undertake business of juristic person or person responsible for the undertaking of related business in order to have the benefit of such statutory presumption.

The presumption contained in this section is broader than the presumption contained in Section 54 of the Direct Sales and Direct Market Act B.E. 2545 as guilt of the managing partner, managing director, executive, authorized

person or responsible person is presumed according to the commission of offence of any person not just the juristic person for which those persons are responsible.

2) Presumed Fact

If the plaintiff can prove the 2 basic facts explained above, the law shall presume that 1) managing partner; 2) manager director; 3) executive or person who has authority to undertaking business of the juristic person 4) person responsible for the undertaking of related business shall be charged for such offence

(4.2) Pattern and Type of Statutory presumption

1) The statutory presumption contained in the said law falls into the scope of the 1st Pattern under which status of defendant gives rise to guilt of defendant as explained in Section 3.2.2 above.

2) The statutory presumption contained in Section 9 of the Act Concerning Offences Related to the Submission of Bid to Government Agencies B.E. 2542 is rebuttable presumption as it allows the party who is not beneficial from the statutory presumption to challenge the presumed fact by proving that he is not involved in such commission of offence.

(5) Decision

The Constitutional Court decided that the statutory presumption contained in Section 9 of the Act Concerning the Offences Related to the Submission of Bids to Government Agencies B.E. 2542 which provided that the managing partner, managing director, executive, authorized person or responsible person shall be responsible for the commission of alleged offence that is in the interest of the juristic person for which those persons are responsible was unconstitutional with respect to the presumption of innocence on the following grounds:

1. The statutory presumption contained in Section 9 of the Act Concerning the Offences Related to the Submission of Bids to Government

Agencies B.E. 2542 resulted in the presumption of guilt of the defendant without any proof of action or intention of the defendant by the plaintiff.

2. The guilt of those persons under Section 9 was presumed based on action of “any person” who committed the offence under the Act Concerning the Offences Relating to the Submission of Bids B.E. 2542 which was broader than the statutory presumption which presumed that those persons shall be guilty if the juristic person for which they were responsible committed certain offence.

3. There was no rational connection between the basic fact and the presumed fact constituting the statutory presumption contained in Section 9 according to the principle of rational connection which was considered the basic principle for statutory presumptions.

4. The statutory presumption contained in Section 9 was contrary to the basic principle of criminal liability under Section 59 of the Criminal Code which provided that a person or juristic person shall be criminally liable only when there has been an action of such person.

5. The guilt of the defendant under Section 9 was presumed based on certain status of the defendant (basic fact) and not just the presumption of certain element of crime after the plaintiff can prove certain act of the defendant which is related to the alleged offence.

(6) Author’s Note

1. The author notes that the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 did not expressly recognize the principle of presumption of innocence in the same manner as other versions of the constitutions of Thailand. However, the Constitutional Court of Thailand interpreted that the principle of presumption of innocence was regarded as constitutional convention of the democratic regime of government with the King as Head of State as this principle was recognized in all previous constitutions, for example, Section 30 Paragraph One of the Constitution of the Kingdom of Thailand B.E. 2492, Section 28 Paragraph One of the

Constitution of the Kingdom of Thailand B.E. 2517, Section 32 Paragraph One of the Constitution of the Kingdom of Thailand B.E. 2521. Therefore, the Constitutional Court used Section 4 and Section 5 of the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 as a ground for recognizing the principle of presumption of innocence.

2. There has been no amendment to the provision contained in Section 9 of the Act Concerning the Offences Relating to the Submission of Bids to Government Agencies B.E. 2542 since the Constitutional Court rendered its decision no. 3/2559. Therefore, Section 9 is not currently in effect as it is contrary to the constitution as the supreme law of the state.

3.3.2 Rational Connection Test Approach

In addition to the approach for determining the constitutionality of statutory presumptions in criminal law established by the Constitutional Court of Thailand as explained in Item 3.2.2 above, several Thai legal scholars proposed that the Constitutional Court should consider not only the patterns of statutory presumptions. It is suggested that the substances constituting respective statutory presumption should also be examined in order to determine whether or not there is rational connection between the fact giving rise to the presumption (basic fact) and the fact that is presumed upon the finding of such fact (presumed fact).

Khemchai Chutiwong explained that the decisions of the Constitutional Court have set the precedential standard with respect to the “Pattern” of the statutory presumptions in criminal law by ruling that the presumption of certain element of crime is not unconstitutional¹²¹. However, he further proposed that the enactment of statutory presumptions in criminal law should be subject to certain limitation with respect to the substances constituting the presumptions according to

¹²¹ *Khemchai* (n 74) 122.

the principle of rational connection established by the Supreme Court of the United States¹²².

According to his analysis of the Constitutional Court Decision No. 12/2555, Arnon Mamont explained that the Constitutional Court viewed that if the plaintiff is still required by relevant law to prove certain element of crimes before the presumption can be drawn, such statutory presumption is not considered unconstitutional¹²³. However, he pointed out that such established standard could potentially lead to problems if the action prescribed as the basic fact and the result which can be presumed upon such basic fact are irrational or there is no rational connection between the basic fact and the presumed fact¹²⁴.

Charan Pakdeethanakul explained that the statutory presumptions should not be arbitrarily specified but should be subject to the rational connect test according to the precedent of the Supreme Court of United States. According to his explanation, the rational connection means that the statutory presumptions are considered valid only when there is rational connection between basic facts and presumed facts¹²⁵.

After having reviewed series of the Constitutional Court Decisions with respect to the constitutionality of statutory presumptions in criminal law, the author noted that the Constitutional Court of Thailand only cited the so-called “rational connection test” as a ground for rendering statutory presumption in criminal law invalid once in 2016 in its decision no. 3/2559.

In its decision no. 3/2559, the Constitutional Court of Thailand ruled that Section 9 of the Act Concerning Offences Relating to the Submission of Bids to Government Agencies B.E. 2542 was unconstitutional on the ground that there was no rational connection between the basic fact and the presumed fact in addition to its

¹²² *ibid.*

¹²³ Arnon (n 88) 842.

¹²⁴ *ibid.*

¹²⁵ Jaran (n 72) 194.

Pattern Approach previously established in its decisions prior to 2016. Moreover, the Constitutional Court explained such rational connection test as one of the basic principles which shall be applied when considering establishing statutory presumptions in criminal law¹²⁶.

To gain further understanding with respect to the rational connection test established by the Supreme Court of the United States, the author views that it is necessary to study the origin of the rational connection test by examining the relevant decisions of the Supreme Court of the United States as follows:

3.3.2.1 Tot v. United States

The rational connection test was initially established in 1943 in Tot v. United States. The presumption in question was contained in Section 2 (f) of the Federal Firearms Act provides that:

“It shall be unlawful for any person who has been convicted of a crime of violence or is a fugitive from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this Act.”

The statutory presumption contained in Section 2(f) consists of the following sets of fact:

Basic Fact

Possession of firearm or ammunition by:

(1) A person who has been convicted of a crime of violence;

or

(2) A person who is a fugitive from justice

Presumed Fact

¹²⁶ Constitutional Court Decision No. 3/2559

Such possessed firearm or ammunition was shipped or transported in interstate or foreign commerce.

In *Tot v. United States*, the Supreme Court explained that “Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience.”¹²⁷

According to the above explained “Rational Connection Test”, the Supreme Court held that the statutory presumption in Section 2(f) of the Federal Firearms Act was invalid on the ground that there was no connection between the basic fact proved and the ultimate fact presumed as it viewed that the presumption created by the law did not reflect any argument which could be derived from experience.

3.3.2.2 *Leary v. United States* (1969)

In 1969, the Supreme Court of the United States rendered its decision regarding the validity of the statutory presumption contained in 21 U.S.C. Section 176a which provided that “whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to the law knowing the same to have been imported or brought into the United States contrary to law, and whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient”.

The statutory presumption above consists of the following sets of facts:

Basic Facts

¹²⁷ *Tot v. United States* 319 U.S. 463 (1943) 467 - 468.

Possession of marihuana

Presumed Facts

(1) Marihuana was imported or brought into the United States illegally; and

(2) The defendant knew of the unlawful importation or bringing in.

The Court stated that “a criminal statutory presumption must be regarded as “irrational” or “arbitrary,” and hence unconstitutional, unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. This standard was subsequently referred to as the “more likely than not” test.¹²⁸”

As it viewed that it could not be presumed that possessors of marihuana mostly “know” that their marihuana was imported illegally, and the presumption of knowledge is therefore not permissible unless it appears that the high rate of importation or the fact that their marihuana was grown aboard are in their knowledge of most of possessors, the Court held the statutory presumption contained in Section 176a in the part related to the defendant’s knowledge of unlawful importation or bringing in unconstitutional.

3.3.2.3 Turner v. United States (1970)

In 1970, the Supreme Court of the United States rendered its decision regarding validity of the statutory presumption contained in Section 174 of 21 U.S.C. which provided that:

“If any person knowingly receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction be fined not more than \$5,000 and

¹²⁸ Leary v. United States 396 U.S. 6 (1969) 8.

imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

The statutory presumption contained in Section 174 consists of the following set of facts:

1. Basic Fact

Possession of narcotic drug

2. Presumed Fact

Knowingly receiving, concealing, buying, selling or in any manner facilitating the transportation, concealment or sale of such narcotic drug after being imported or brought in knowing that such narcotic drug has been imported illegally.

In *Turner v. United States*, the decision of the Court on validity of the statutory presumption can be divided into 2 parts as follows:

- (1) Statutory presumption with respect to heroin;

The Court held that the presumption which might be drawn under Section 174 with respect to the possession of heroin was valid according to the more-likely-than not standard applied in *Leary v. United States* which was regarded as one of the criteria of the rational connection test further established from *Tot v. United States*. The Court viewed that the mere possession of heroin sufficiently justified the presumption that such person possessing heroin knew that the heroin was illegally imported and thus constituted the offence under Section 174 was supported by the fact that heroin could not be legally made in the United States and there were overwhelming evidences which showed that all heroin consumed in the country was illegally imported¹²⁹. Therefore, the Court concluded that it was more likely than not to infer that the possession of heroin equaled to possession of imported heroin and

¹²⁹ *Turner v. United States* 396 U.S. 398 (1970) 415.

that they are confident that the person possessing the heroin was aware of the “high probability” that the heroin in his possession had originated in a foreign country.

(2) Statutory presumption with respect to cocaine

On the contrary, with respect to the possession of cocaine, the Court held that the statutory presumption contained in Section 174 was invalid. The Court explained that, unlike heroin which could not be legally manufactured in the country, the facts showed that much more cocaine was lawfully produced in the country more than the amount of cocaine being smuggled into the country and there was sufficient amount of Cocaine stolen from domestic legal sources to negate the presumption that the cocaine in question came from abroad or that the person possessing must have known that it was illegally imported¹³⁰.

3.3.3 Principle of Proportionality Test Approach

In addition to the Pattern Approach and the Rational Connection Test Approach explained in Items 3.3.1 and 3.3.2 above, the principle of proportionality is generally accepted as the approach used for assessing validity of laws which result in restriction of the people’s rights and liberties¹³¹. This principle has been widely

¹³⁰ Ibid 419.

¹³¹ Bunjerd Singkaneti, Rai-ngan Kansuesawichai Rueang Lhak Khwam Dai Sadsuan” (“Principle of Proportionality”) Nai Kantruadsob Khobkhet Amnatrat Tam Matta 29 Khong Ratthathammanun Haeng Ratcha-anachakthai (Phutasakkarat 2550) [Research Report on the Principle of Proportionality for Inspection of Scope of State Power according to Section 29 of the Constitution of the Kingdom of Thailand B.E. 2550] (Office of the Constitutional Court, 2015) 7 (บรรเจิด สิงคะเนติ, รายงานการศึกษาวิจัย เรื่อง “หลักความได้สัดส่วน” (“Principle of Proportionality”) ในการตรวจสอบขอบเขตอำนาจรัฐ ตาม มาตรา 29 ของรัฐธรรมนูญแห่งราชอาณาจักรไทย (พุทธศักราช 2550) (สำนักงานศาลรัฐธรรมนูญ 2558)) 7.

recognized as the general principle in public law in Germany, France, Switzerland and other countries as well as in international courts¹³².

With respect to the cases concerning questions of reverse burden of proof in criminal law and the principle of presumption of innocence, the principle of proportionality has become standard approach applied by courts in several jurisdictions such as England, Germany, Canada as well as the European Court of Human Rights¹³³.

In previous decisions of the European Court of Human Rights in which the validity of the provisions of law containing statutory presumptions enacted by the member states was assessed according to the principle of presumption of innocence recognized in Article 6(2) of the European Convention on Human Rights, for example, in the case of *Salabiaku v. France*, *Falk v. the Netherlands*, *Janosevic v. Sweden*, the European Court of Human Rights explained that “A person’s right in a criminal case to be presumed innocent and to require the prosecution to bear the onus of proving the allegations against him or her is not absolute, since presumptions of fact or of law operate in every criminal law system and are not prohibited in principle by the Convention, as long as States remain within reasonable limits, taking into account the importance of what is at stake and maintaining the rights of the defence”¹³⁴. This

¹³² Bunjerd Singkaneti, Lak Phunthan Kiawkap Sitthi Seriphap Lae Saksi Khwampen Manut [Fundamental Principle of Rights, Liberties and Human Dignity] (6th edn, Winyuchon 2019) 24, 30 (บรรเจิด สิงคะเนติ, หลักพื้นฐานเกี่ยวกับสิทธิเสรีภาพและศักดิ์ศรีความเป็นมนุษย์ (พิมพ์ครั้งที่ 6 วิญญูชน 2562)) 24, 30

¹³³ Stumer, Andrew “Proportionality and the Presumption” *The Presumption of Innocence: Evidential and Human Rights Perspectives*. London: Hart Publishing, 2010. 88-118. Bloombury Collections. Web. 16 Sep. 2018.

<http://dx.doi.org/10.5040/9781472565136.ch-004> 120, 132

¹³⁴ *Falk v. The Netherlands* App no 66273/01 (ECTHR, 19 October 2004).

statement delivered by the European Court of Human Rights has been the common formulation applied in cases concerning reversal of the burden of proof¹³⁵.

In Thai legal system, the principle of proportionality was previously accepted as the general principle of law before it was recognized in written form as part of the Constitution of the Kingdom of Thailand in 1997¹³⁶.

Section 29 of the Constitutionality of the Kingdom of Thailand B.E. 2540 (1997) provided that:

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

After the enactment of the Constitution of the Kingdom of Thailand B.E. 2540, the principle of proportionality has since become the main tool for protecting fundamental rights and liberties of the people as one of the basic constitutional principles constituting the Rule of Law for the purpose of imposing restriction on government intervention, determining scope of the state authority which has an effect on the validity as well as legality of government actions with an aim to provide protection for people’s rights and liberties¹³⁷. This principle has been applied by the Constitutional Court and the Administrative Court of Thailand as criteria for determining validity of laws, rules, regulations enacted by the legislative branch and the administrative branch¹³⁸.

In the Constitution of the Kingdom of Thailand B.E. 2560 which is currently in effect, the principle of proportionality is recognized in Section 26 which provides that:

¹³⁵ Stumer (n 133) 99.

¹³⁶ Bunjerd, *Research Report on the Principle of Proportionality* (n 124) 7-8.

¹³⁷ Bunjerd, *Fundamental Principle of Rights, Liberties and Human Dignity* (n 125) 24.

¹³⁸ Ibid 295.

“The enactment of a law resulting in the restriction of rights or liberties of a person shall be in accordance with the conditions provided by the Constitution. In the case where the Constitution does not provide the conditions thereon, such law shall not be contrary to the rule of law, shall not unreasonably impose burden on or restrict the rights or liberties of a person and shall not affect the human dignity of a person, and the justification and necessity for the restriction of the rights or liberties shall also be specified”.

According to the Constitutional Court, Section 26 is the provision which recognizes and protects the people’ rights and liberties by ensuring that in enactment of law which results in limitation of rights and liberties of person, the legislative branch or any organization exercising state power shall take into account the principle of proportionality¹³⁹. The Court further explained that the enactment of such law to restrict rights and liberties of persons shall be subject to the scope of suitability, necessity and proportionality or balance between public interest which would be obtained and rights or liberties of the persons which would be deprived¹⁴⁰.

The Constitutional Court and the Administrative Court of Thailand have delivered several decisions regarding constitutionality of certain provisions of law and government actions in which the principle of proportionality under Section 26 of the Constitution of the Kingdom of Thailand B.E. 2560 was applied. For example, Constitutional Court Decision No. 8/2561 regarding the constitutionality of Section 51 Paragraph Three of the Anti-Money Laundering B.E. 2541, Constitutional Court Decision No. 4-5/2562 regarding the constitutionality of Section 44 Paragraph One of the Consumer Cases Procedure Act B.E. 2551, Constitutional Decision No. 8/2562 regarding constitutionality of Section 60 Paragraph One and Paragraph Two of the Organic Act on the National Human Right Commission B.E. 2560 and Administrative Court Decision 2253/2546.

¹³⁹ Decision of Constitutional Court Decision No. 8/2562.

¹⁴⁰ *ibid.*

However, after having reviewed series of decisions of the Constitutional Court regarding the constitutionality of law with respect to the presumption of innocence explained in Item 3.4.2, the author notes that the Constitutional Court did not apply the principle of proportionality in its assessment in order to determine whether or not the provisions which contained statutory presumptions in criminal law were contrary to the principle of presumption of innocence in its previous decisions and has focused mainly on the Pattern Approach.

Wasin Daengpradab proposed that the principle of proportionality should be applied by the Constitutional Court of Thailand to determine the constitutionality of statutory presumptions in criminal law with respect to the presumption of innocence due to the reason that the proportionality test would allow the Constitutional Court to review objective for which the statutory presumption was established, connection between the statutory presumption and the objective, rationality of the basic fact and the presumed fact as well as the weighting between public interest and affected right of individual¹⁴¹. He explained that by applying the principle of proportionality, the reasons in the decisions of the Constitutional Court would be delivered in a more systematic manner and could be used as a precedent by the administrative branch as well as the legislative branch to avoid any acts contrary to the Constitution¹⁴².

According to the Research Report on the Principle of Proportionality for Inspection of State Power according to Section 29 of the Constitution of the Kingdom of Thailand B.E. 2550 submitted to the Office of the Constitutional Court, the Constitutional Court was encouraged to apply the principle of proportionality in its

¹⁴¹ Wasin Daengpradap, Kansannitthan Wah Bukkhon Tukkhon Pen Phu Borisud: Lhaksan Lae Khor Yokwen Bang Prakan [Presumption of Innocence: Principle and Exceptions] <<https://www.krisdika.go.th/data/activity/act229.pdf>> accessed on 20 June 2020 15. การสันนิษฐานว่าบุคคลทุกคนเป็นผู้บริสุทธิ์ : หลักการและข้อยกเว้นบางประการ) เข้าถึง 20 มิถุนายน 2563.

¹⁴² Ibid.

decision for determining the constitutionality of law by taking into accounts all three elements of the principle i.e. (1) Principle of suitability; (2) Principle of necessity; and (3) Principle of Proportionality in a narrow sense¹⁴³.

3.3.3.1 Three Step Test of Principle of Proportionality

To be able to determine the constitutionality of the statutory presumptions under the proportionality test, it is essential to understand the following 3 elements constituting the principle of proportionality¹⁴⁴: The assessment according to the below requirements is widely known as the 3-step test of the principle of proportionality which has been used by several national courts¹⁴⁵.

(1) Principle of Suitability

Under the principle of suitability, the question of whether the measure selected is capable of achieving the pursued legitimate objective is asked¹⁴⁶. The law in issue will not be considered suitable if it cannot contribute to the pursued objective¹⁴⁷.

(2) Principle of Necessity

The principle of necessity is concerning the question of whether the measure selected for the pursued objective is the least possible impairment of the protected rights¹⁴⁸. The measure in question will not be considered

¹⁴³ Bunjerd, *Fundamental Principle of Rights, Liberties and Human Dignity* (n 125) 244.

¹⁴⁴ *ibid* 293-294.

¹⁴⁵ Janneke Gerads, 'How to Improve the Necessity Test of the European Court of Human Rights', 11 *Int'l J. Const. L* 466 (2013) 469.

¹⁴⁶ Stumer (n 133) 136.

¹⁴⁷ Bunjerd, *Fundamental Principle of Rights, Liberties and Human Dignity* (n 125) 30.

¹⁴⁸ Stumer (n 133) 136.

necessary if there is still other alternative which can contribute to the pursued objective and has less effect than the selected measure¹⁴⁹.

(3) Principle of Proportionality in a Strict Sense

The principle of proportionality in a strict sense deals with the question regarding the balance between public interest and individual's right which will be affected. Under this principle, the question of whether restriction is justified when comparing the benefit to the goal being pursued to the impact on rights¹⁵⁰. The selected measure will not be regarded as proportionate measure if there is no balance between the two factors that is when the individual's rights to be impaired exceeds the public interest to be derived¹⁵¹.

To gain further understanding of the scope of application of the principle of proportionality for the purpose of analysis which will be conducted in Chapter 4, the author has selected Decision No. 4-5/2562 of the Constitutional Court of Thailand in which Section 26 of the Constitution of the Kingdom of Thailand was applied for the purpose of assessing the constitutionality of Section 44 of the Consumer Case Procedure Act B.E. 2551, and, decision of the European Court of Human Right i.e. *Falk v. The Netherland*.

3.3.3.2 Constitutional Court Decision No. 4-5/2562(a)

Summary of Facts

The civil action was filed against Bali Hai Co., Ltd., as the seller, with Pattaya Provincial Court for the breach of condominium unit sale and purchase

¹⁴⁹ Bunjerd, *Fundamental Principle of Rights, Liberties and Human Dignity* (n 125) 30.

¹⁵⁰ Lasse Schuldt, 'Publishing Secrets: A Case Study on the Balancing of Press Freedom and Public Interests in European Human Rights Jurisprudence' (การเปิดเผยข้อมูลลับของทางราชการ: การศึกษาแนวคำพิพากษาของศาลสิทธิมนุษยชนยุโรปในการสร้างสมดุลระหว่างเสรีภาพของสื่อมวลชนและผลประโยชน์ของรัฐ) (2019) 48 (4) (Thammasat Law Journal) 769.

¹⁵¹ Ibid.

agreement by failing to transfer the ownership of condominium unit to the purchasers. Come Global Co., Ltd., as the 6th defendant, and Keen Tech Co., Ltd., as the 7th defendant as the shareholders of Bali Hai Co., Ltd as well as the persons who held the position of directors of Bali Hai Co., Ltd. were held jointly liable to the purchasers due to the reason that Bali Hai Co., Ltd. was incorporated or acts in bad faith, or has a deceitful behavior against Consumers according to Section 44 of the Consumer Case Procedure Act B.E. 2551.

(1) Main Issue of the Case

Whether or not Section 44 of the Consumer Case Procedure Act B.E. 2551 was contrary to Section 37 Paragraph 1 and Paragraph 2 and Section 26 of the Constitution of the Kingdom of Thailand B.E. 2560.

(2) Relevant Law

1. Consumer Case Procedure Act B.E. 2551

Section 44 of provides that:

“In a case which a Business Operator against whom the legal action is brought is a juristic person, if it appears that such juristic person is incorporated or acts in bad faith, or has a deceitful behavior against Consumers, or there is an embezzlement of the juristic person’s property to become beneficial to any person, and the juristic person’s property is insufficient to satisfy the obligation as per the plaint, upon the request of a party, or if the court thinks fit, the Court shall have the power to summon partners, shareholders, or person having the power to control the operation of the juristic person, or the person receiving property from such juristic person to be the joint defendant, and shall have the power to adjudicate that such persons be jointly liable for the obligation owed to the Consumer, unless such person proves his or her innocence in such act, or in case of person receiving property from

such juristic person, proves that he or she acquires the property in good faith and for value”.

2. Constitution of the Kingdom of Thailand B.E. 2560

Section 26 provides that:

“The enactment of a law resulting in the restriction of rights or liberties of a person shall be in accordance with the conditions provided by the Constitution. In the case where the Constitution does not provide the conditions thereon, such law shall not be contrary to the rule of law, shall not unreasonably impose burden on or restrict the rights or liberties of a person and shall not affect the human dignity of a person, and the justification and necessity for the restriction of the rights or liberties shall also be specified”.

Section 37 provides that:

“A person shall enjoy the right to property and succession.

The extent and restriction of such right shall be as provided by law.”

(3) Decision

The Constitutional Court considered that Section 44 of the Consumer Case Procedure B.E. 2551 was constitutional under the proportionality test recognized in Section 26 of the Constitution of the Kingdom of Thailand B.E. 2560 based on the following reasons:

(1) Principle of Suitability

The Constitutional Court viewed that the statutory presumption contained in Section 44 of the Consumer Protection Case Procedure B.E. 2551 was suitable as it can be used as a tool to ensure the accomplishment of the objectives and intentions to protect consumers who were in inferior position, and to prevent related persons from denying their liability by using juristic person status as an excuse.

(2) Principle of Necessity

In order to consider constitutionality of Section 44, the Constitutional Court firstly referred to the objectives of the Consumer Procedure Case B.E. 2551. According to the note explaining reason and necessity for promulgating the Consumer Case Procedure B.E. 2551, the Constitutional Court explained that the law was promulgated in order to ensure fairness to consumers who were in inferior position to the business operators in terms of knowledge, bargaining power and ability to defend themselves in court by providing court proceedings which are suitable for consumer cases and can allow the consumers to exercise their rights against the business operators in case of damage arising from any illegal acts of the business operator.

In addition, the Court viewed that the provision in Section 44 only provided rebuttable presumption of civil liability under which the plaintiff was still required to prove certain conditions before such liability of partners, shareholders or controlling persons can be presumed i.e. the fact that such juristic person is incorporated or acts in bad faith, or has a deceitful behavior against Consumers, or there is an embezzlement of the juristic person's property to become beneficial to any person, and the juristic person's property is insufficient to satisfy the obligation as per the plaint, In addition, the Constitutional Court viewed that the presumption was related to civil liability not criminal liability

Given such objective of the Consumer Protection Case Procedure Act B.E. 2551, the Constitutional Court considered that the statutory presumption contained in Section 44 of the Consumer Protection Case Procedure B.E. 2551 was necessary and reasonable.

However, the author views that the Constitutional Court did not properly apply the principle of necessity according to the correct understanding of the necessity as its arguments focused on the benefit which would be obtained from the law in question and the fact that the presumption was related to civil liability instead of investigating the issuing of whether there is any other available alternative

which is equally effective yet less restrictive than the presumption provided by Section 44 of the Consumer Protection Case Procedure B.E. 2551.

(3) Proportionality in a Strict Sense

The Constitutional Court viewed that Section 44 did not violate the right in property of the related persons by requiring such persons to be jointly liable to the consumers as it did not change or affect the right to hold shares of such persons. In addition, by comparing the right and freedom of the persons guaranteed by the Constitution with the common interest of the society as a whole according to the objectives of the Consumer Protection Case Procedure B.E. 2551 to protect consumer.

For the above reasons, the Constitutional Court viewed that Section 44 was proportionate.

3.3.3.3 Falk v. The Netherlands

(1) Summary of Fact

Mr. Joost Falk (“Mr. Falk”) was fined for failing to give way to a pedestrian who wanted to cross the road at the pedestrian crossing. However, Mr. Falk claimed he did not drive the car registered in his name at the time of the incident and the actual driver who had committed the offence was Mr. B.

Mr. Falk complained that the imposition of the administrative fine on him on the basis of strict liability rule had violated his right to be presumed innocent under Article 6 (2) of the European Convention on Human Rights

(2) Main Issue

Whether or not Article 5 of the Respect for Traffic Regulations Act violated Article 6 (2) of the European Convention on Human Rights.

(3) Relevant Law

1. Domestic Law

Article 5 and Article 8 of the Respect for Traffic Regulations Act provides that:

“Where the offence has been committed by a registered car motor vehicle and the identity of the actual driver could not be established at the material time, the fine is imposed on the registered owner of the vehicle unless the registered owner demonstrates that his or her vehicle was used by another person against his or her will and that he or she was unable to prevent his use, or that the vehicle was commercially hired out for a period not exceeding three months, or that at the material time he or she had already sold the vehicle to another person who had provided a written warranty against liability.

2. International Law

Article 6 (2) of the European Convention on Human Rights provides that:

"Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law".

(4) Decision

The Court found that Section 5 of the Respect for Traffic Regulations Act did not violate Article 6 (2) of the European Convention on Human Rights on the following grounds:

(1) The European Court of Human Right explained that even though the right to be presumed innocent in criminal case is not absolute, the state members are required to remain within the reasonable limits by taking into account the importance of what is at stake and maintaining the rights of the defence which means that the measure selected has to be reasonably proportionate to be the legitimate aim pursued.

(2) Regarding the importance of what is at stake, the Court explained that the law was enacted to ensure that traffic offences would not go unpunished while the authorities must not have to bear acceptable burden.

(3) With respect to the right of the defence, the Court explained that the person subject to Article 5 of the Act has a chance to challenge the statutory presumption by raising the argument according to Article 8.

(5) Author's Note

The author notes that the decision of the European Court of Human Right did not strictly follow the 3-step approach under the principle of proportionality. However, even though the Court did not refer to it directly, the author views that the reasoning of the European Court of Human Rights is in accordance with the proportionality in a strict sense test under which the question regarding the balance of public interest and the individual's affected right is asked.

CHAPTER 4

ANALYSIS AND DISCUSSION

This Chapter analyses the statutory presumptions contained in Section 243 and Section 244 of SEA 2016 based on the principle of presumption of innocence according to the concept and scope provided in Chapter 2 and Chapter 3 in an attempt to determine whether or not Section 243 and Section 244 are constitutional.

The analysis of each section is conducted according to the following 3 approaches generally accepted as criteria for assessing the constitutionality of the statutory presumptions:

- (1) Pattern Approach;
- (2) Rational Connection Test Approach; and
- (3) Principle of Proportionality Test Approach.

4.1 Pattern Approach

The Pattern Approach as established by the Constitutional Court of Thailand focuses mainly on the pattern of elements of the statutory presumption. Under this Approach, the statutory presumption will be held to be in conflict with the presumption of innocence principle under the Constitution if it provides presumptions of guilt of certain person based on his or her status without any proof of his or her action nor intention.

According to the said precedent of the Constitutional Court of Thailand, the following rules can be inferred:

- (1) If the plaintiff has to prove the defendant's status before certain element of crime can be presumed, such statutory presumption will not be held unconstitutional as the presumed fact is not the defendant's guilt.
- (2) If the plaintiff has to prove the defendant's certain act or intention before the defendant's guilt can be presumed, such statutory presumption will not be

held unconstitutional as the defendant's guilt is presumed after the plaintiff has proved certain action of the defendant ; and

(3) If the plaintiff has to prove the defendant's certain act or intention before element of crime can be presumed, such statutory presumption will not be held unconstitutional as the presumed fact is not the defendant's guilt.

Therefore, the constitutionality of statutory presumption with respect to the principle of presumption of innocence under the Pattern Approach can be summarized as follows:

Pattern	Basic Fact	Presumed Fact	Constitutionality
Pattern 1	Status of Defendant	Guilt of Defendant	Unconstitutional
Pattern 2	Status of Defendant	Element of Crime	Constitutional
Pattern 3	Action of Defendant	Guilt of Defendant	Constitutional
Pattern 4	Action of Defendant	Element of Crime	Constitutional

4.1.1 Analysis of Statutory Presumptions contained in Section 243

The elements of statutory presumptions of knowledge or possession of inside information contained in Section 243 of SEA 2016 are as follows:

1. Basic Fact

According to Section 243 of SEA 2016, the plaintiff to whom the presumption is favorable is required to prove that the defendant is either one of the following persons:

(1) director, executive or controlling person of a securities issuing company;

(2) employee or staff of a securities issuing company who holds a position, or is in the line of work, responsible for or capable of accessing inside information;

(3) any person who is able to know inside information by performing duties as auditor, financial advisor, legal advisor, asset appraiser or any other person

whose duties are related to inside information, including employees, staffs or colleagues of the aforesaid persons who hold a position or is in the line of work involved in the performance of duties related to such inside information;

(4) director, sub-committee member, representative of a juristic person, agent, staff, employee, advisor or operator in a governmental agency, the SEC Office, the Stock Exchange, the over-the-counter center or the Derivatives Exchange, who is in the position or the condition that can access inside information through performance of duties;

(5) juristic person whose business is under control of the persons under (1) (2) (3) or (4).”

Therefore, the basic fact of the statutory presumption contained in Section 243 of SEA 2016 is the defendant’s status.

2. Presumed Fact

Once the plaintiff has proved to the court that the defendant is the person specified in Section 243, the defendant will be presumed to have knowledge or possession of inside information.

Knowledge or possession of inside information is one of the elements of insider trading offence, according to Section 242 of SEA 2016,

For that reason, it can be concluded that the statutory presumptions of knowledge or possession of inside information contained in Section 243 fall into the 2rd Pattern and is constitutional under the Pattern Approach.

4.1.2 Analysis of Statutory Presumptions contained in Section 244

The elements of statutory presumptions contained in Section 244 are as follows:

1. Basic Fact

The plaintiff as the party to whom the statutory presumption contained in Section 244 is favorable has to prove the following facts to the court:

(A) The defendant is one of the following persons:

(1) holder of securities exceeding five percent of the securities issuing company's total securities sold, including the securities held by spouse or cohabiting couple and minor children of the securities holder;

(2) director, executive, controlling person, employee, or staff of business in the group of the securities issuing company, who holds a position or the line of work responsible for or capable of accessing inside information;

(3) parent, descendant, child adopter or adopted child of the persons under Section 243;

(4) sibling of the same blood parents or sibling of the same blood father or mother of the persons under Section 243;

(5) spouse or cohabiting couple of the persons under 243 or the persons under (3) or (4).

(B) The defendant has traded in a different manner from their normal practice.

Therefore, the basic facts of the statutory presumption contained in Section 244 of SEA 2016 are the defendant's status and action.

2. Presumed Fact

Once the plaintiff has proved to the court that the defendant is the person specified in Section 244, and, the defendant has traded in a different manner than his normal practice, the defendant will be presumed to have knowledge or possession of inside information.

Knowledge or possession of inside information is one of the elements of insider trading offence, according to Section 242 of SEA 2016,

For that reason, it can be concluded that the statutory presumptions of knowledge or possession of inside information contained in Section 244 fall into the 2nd Pattern and the 4th Pattern as shown in the above table, and will therefore be held constitutional under the Pattern Approach.

4.2 Rational Connection Test Approach

The constitutionality of statutory presumption under the Rational Connection Test Approach depends mainly on the connection between the basic fact and the presumed fact. Under this approach, the question of whether or not there is a rational connection between the basic fact and the presumed fact will be asked.

Unlike the Pattern Approach, in order to answer such question, the substance of each statutory presumption will have to be analyzed according to the criteria set by the decisions of US Supreme Court which explained that the rational connection between the presumed fact and the basic fact can only be established when common experiences suggest that the presumed fact is more likely than not to flow from the proved fact (basic fact) on which it is made to depend.

With respect to the statutory presumptions contained in Section 243 and Section 244, the constitutionality of these statutory presumptions under the Rational Connection Test Approach will be analyzed according to the following criteria:

(1) If, considering the status of persons (basic fact), the knowledge or possession of inside information (presumed fact) is more likely than not to happen, the statutory presumptions contained in Section 243 or Section 244 will be held constitutional; and

(2) If, considering the status of persons (basic fact), the knowledge or possession of inside information (presumed fact) is not likely to happen, the statutory presumptions contained in Section 243 or Section 244 will be held unconstitutional.

According to common experience, the author views that the presumption that one knows or possesses inside information should start with certain connection

such person has with the issuing company. This is due to the reason that the fact that the persons who are, in certain ways, directly connected to the issuing company know or possess inside information is more likely than not to flow from the connection with the issuing company. On the other hand, to presume that the persons who are not connected to the issuing company know or possess any material information of such organization which has not yet been disclosed to the public would be contrary to what common experiences have suggested.

With regard to the term “connection”, even though there are various types of relationship which may allow persons to be connected to the issuing company, the author views that the connection which can be used to support the rational connection of presumption of knowledge or possession of inside information should be limited to only the connection through relationships which can be commonly found in normal business practice. Example of relationships which can be commonly found in normal business practice are as follows:

(1) Managing Power

These group of persons include persons working in managerial positions such as director, executive, or any other position having the power to control the issuing company.

(2) Contractual Relationship

Persons may be connected to the issuing company through various types of contracts they have entered into with the issuing company. The examples of 2 types of contract commonly found in normal business operation are as follow:

(a) Employment Relationship

Persons having employment relationship with the issuing company mean staff and employees working in whatsoever position for the issuing company under the contract of employment.

(b) Independent Contractor Relationship

Persons having independent contractor relationship with the issuing company mean the persons working or providing services to the issuing company under the service agreement, for example, lawyer, financial advisor, auditor as well as employees and staff of such persons.

(3) Legal Duties

Certain persons may be required by law to perform duties related to the issuing company, for example, duties to regulate the stock market and the issuing companies. The persons who are connected to the issuing company through the performance of legal duties include but are not limited to the staff, employees, directors, executives of the regulatory body such as the Stock Exchange of Thailand, the Office of the Securities and Exchange Commission.

(4) Shareholding Relationship

In principle, persons can be considered to having connection with the issuing company by way of holding shares regardless of the number of shares held by them. However, given number of securities issued by the listed companies, the author views that, for the purpose of this analysis, the scope of persons who have connection with the issuing company through shareholding relationship should be limited by the number of shares held by respective shareholders. This issue will be further addressed in the part of Section 244 (1).

(5) Controlling Power

Two or more juristic persons can be connected through the controlling power or participation in decision making with respect to certain matters of the business operation. The juristic persons who are connected to the issuing company include but are not limited to parent company, subsidiary and affiliate.

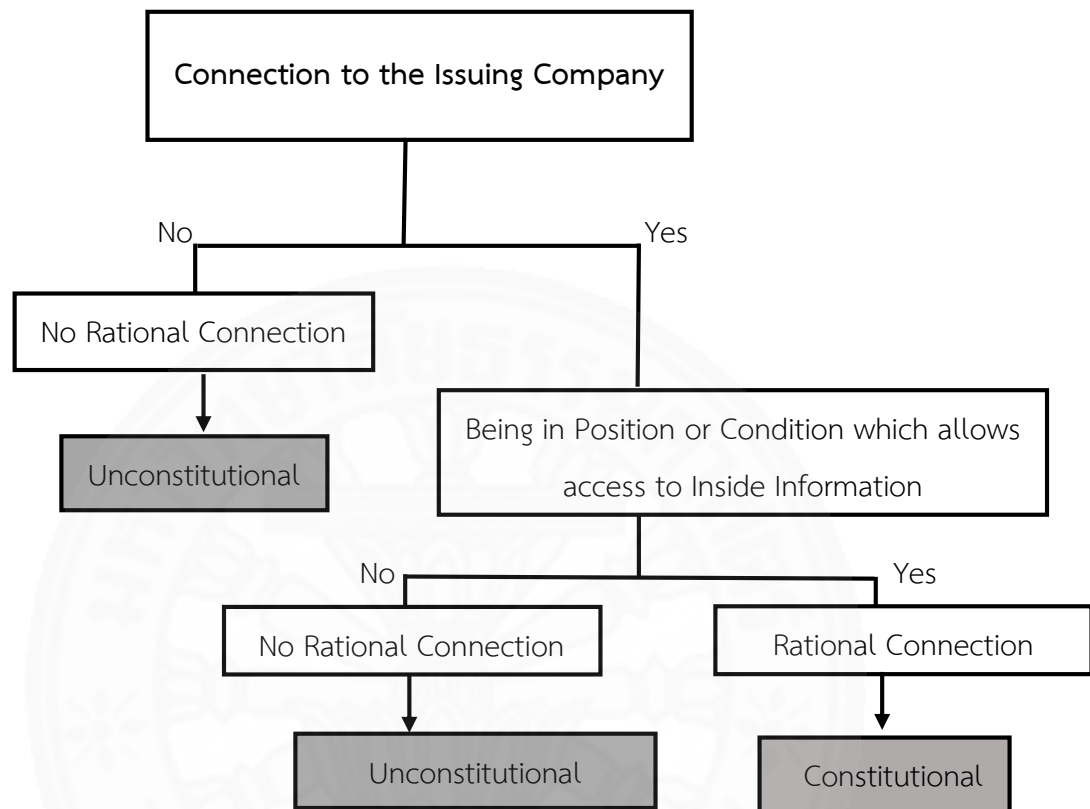
However, to infer that all connected persons know or possess information of the issuing company does not seem to be reasonable in the author's view as in most cases, the knowledge or possession of information of connected persons is only limited to what is really related to their roles or responsibilities.

For example, in the case of employment relationship, the employee working in marketing department usually has no access to information related to ongoing legal case of the company which will have material effect on the price of his company's securities once such information has been disclosed to the public. However, if such legal case is directly related to the dispute with the customer responsible by such marketing officer, it can be reasonably presume that such marketing officer is in the position to have knowledge of information related to the legal case.

For that reason, the author views that in order to establish rational connection between the presumed fact and the basic fact, there should be requirement as to another factor which indicates that such person is in the position or condition which allows him to know or possess inside information in addition to the connection between the persons and the issuing company. By determining if the persons are in such position or condition, the author views that what should be taken into consideration includes position of the relevant person in the organization, contractual obligation, actual responsibilities or legal obligations. If the foregoing factor reasonably suggests that such person is in the position or condition to have access to the inside information, it can then be inferred that such person has knowledge or possession of inside information.

As a result of the above explanation, the author views that the knowledge or possession of inside information of the issuing company is more likely than not to flow from the status of those persons who are directly connected to the issuing company and work in the position or condition which allows them to know or possess inside information. The foregoing explanation can be summarized in the below flowchart which will be used for the purpose of analysis of the statutory presumptions contained in Section 243 under the Rational Connection Test.

Rational Connection between the Basic Fact and the Presumed Fact



4.2.1 Analysis of Statutory Presumptions contained in Section 243

4.2.1.1 Director, executive or controlling person of a securities issuing company as specified in Section 243 (1);

It is clear from the provision of Section 243 (1) that the director, executive¹⁵² or controlling person¹⁵³ is connected to the issuing company through the managerial position they hold in the issuing company. Even though Section 243 (1) does not clearly specify that these persons must be in the condition or position which allows them to have access to inside information, it is normally reasonable to presume from their legal obligations and responsibilities provided by law that such persons are in the position or condition which allows them to know or possess the information related to the business of the company especially the information which has material effect on security price as they are required by law to perform duty of supervising overall business of the company or have influence over policy making, management or operation of the company in a significant manner. In addition, according to Section 89/20 of the Securities and Exchange Act B.E. 2535, the

¹⁵² According to Clause 2 (16) of Notification of the Securities and Exchange Commission No. Kor Jor. 17/2551 Re: Determination of Definitions in Notifications relating to Issuance and Offer for Sale of Securities, “Executive” means manager or the next four executives succeeding the manager, the persons holding equivalent position to the fourth executive and shall include the persons holding the position of manager or equivalent in accounting or finance departments.

¹⁵³ According to Clause 2 (18) of Notification of the Securities and Exchange Commission No. Kor Jor. 17/2551 Re: Determination of Definitions in Notifications relating to Issuance and Offer for Sale of Securities, “Controlling Person” means a shareholder or any other person who by behavior has influence over policy making, management or operation of the company in a significant manner, whether as a result of being a shareholder or authorized under an agreement or any other matter

director and the executive are also required by law to be responsible for the truthfulness or lack of material information which has to be disclosed to the shareholders and the public such as financial statement, matters for submission to the general meeting.

The above reasons indicate that there is a rational connection between the basic fact (status of director, executive or controlling person of securities issuing company) and the presumed fact (i.e. knowledge or possession of inside information) as the fact that the director, executive or controlling person of the company has knowledge or possession of inside information is more likely than not to flow from their status as a director, executive or controlling person of the issuing company.

4.2.1.2 Employee or staff of a securities issuing company who holds a position, or is in the line of work, responsible for or capable of accessing inside information as specified in Section 243 (2);

The employee or staff of the issuing company is connected to the issuing company through the employment relationship. As the scope of presumption of knowledge and possession of inside information under Section 243 (2) is limited to only the employees or staff who works in position, is in line of work, responsible or capable of assessing inside information, the author views that there is a rational connection between the basic fact (i.e. status of employee or staff of a securities issuing company who holds a position, or is in the line of work, responsible for or capable of accessing inside information) and the presumed fact (knowledge or possession of inside information) of the statutory presumption contained in Section 243 (2)

4.2.1.3 any person who is able to know inside information by performing duties as auditor, financial advisor, legal advisor, asset appraiser or any other person whose duties are related to inside information, including employees, staff or colleagues of the aforesaid persons who hold a position or is in the line of work involved in the performance of duties related to such inside information as specified in Section 243 (3);

Even though the persons subject to Section 243 (3) are not connected to the issuing company by way of performing duties under the relationship of employment, such persons are connected directly to the issuing company through the relationship of independent contractor. As the scope of presumption contained in Section 243 (3) is clearly limited to only the persons who are able to know inside information, the author views that there is a rational connection between the status of such persons and their knowledge and possession of inside information.

For the employees, staff, or colleagues of such persons mentioned above, the author also views that these group of persons is also connected to the issuing company under the same type of relationship. As the provision does not cover all employees or staff or colleagues of the auditors, financial advisor, legal advisor, asset appraiser but provides requirement that such person must hold a position or is involved in the performance of duties related to inside information, the author views that there is a rational connection between the status of persons subject to Section 243 (3) and their knowledge or possession of inside information.

4.2.1.4 director, sub-committee member, representative of a juristic person, agent, staff, employee, advisor or operator in a governmental agency, the SEC Office, the Stock Exchange, the over-the-counter center or the Derivatives Exchange, who is in the position or the condition that can access inside information through performance of duties as specified in Section 243 (4);

The persons subject to the statutory presumption contained in Section 243 (4) are not connected to the issuing company under both employment and independent contractor relationship. However, the author views that these persons are connected to the issuing company through the performance of their regulatory duties. In addition, the provision in Section 243 (4) clearly requires that the persons must be in the position or condition which allow them to learn about confidential information of the company through the performance of their duties.

For the above reasons, the author views that the fact that those persons specified in Section 243 (4) know or possess inside information is more likely than not to flow from their status or position which normally allows them to obtain inside information of the related company, and therefore there is a rational connection between the basic fact and the presumed fact.

4.2.1.5 Juristic person whose business is under control of the persons under (1) (2) (3) or (4) as specified in Section 243 (5)

As it can be clearly seen that there is no relationship commonly found in the normal business practice between the persons subject to Section 243 (5) and the issuing company, the issue to be analyzed for this subsection would be whether being under the control of the person who are directly connected to the issuing company is sufficient to establish any connection of this group of persons to the issuing company.

The author views that these persons' knowledge or possession of inside information of the issuing company would be considered to be rationally connected to their status of the persons being under the control of the connected persons only when taken into consideration together with other factor which suggests that these persons have a higher chance than other general persons to learn about inside information as it can increase the possibility of the knowledge or possession of inside information, for example, the unusual trading behavior. As there is no additional fact which can indicate that these persons have higher chance than

other general persons to have access to inside information required in Section 243, the author views that there is no rational connection between the basic fact and the presumed fact contained in Section 243 (5).

4.2.2 Analysis of Statutory Presumptions contained in Section 244

With regard to the statutory presumptions contained in Section 244, it should be noted that, in addition to the status of certain person, Section 244 also provides that such persons must have traded securities or entered into a derivatives contract in a different manner from their normal practice (hereinafter referred to as “**Unusual Trading Behavior**”) as another basic fact required to be proved before the knowledge or possession of insider information can be presumed.

This leads to question that whether the Unusual Trading Behavior is sufficient to establish rational connection between the status of persons and their knowledge or possession of inside information in the case where such persons are not directly connected to the issuing company within the scope of the term “connection” explained above.

First of all, the author views that the fact that certain person has Unusual Trading Behavior alone does not indicate that such person has knowledge or possession of inside information as there are many other reasons which can reasonably explain Unusual Trading Behavior. However, this fact can possibly lead to a reasonable explanation as to the presumption of the knowledge or possession of inside information of certain persons when taken into consideration together with other factor which suggests that such persons have a higher chance than other general persons to learn about inside information as it can increase the possibility of the knowledge or possession of inside information in the case of Unusual Trading Behavior and thus establish rational connection between the basic facts and the presumed knowledge or possession of inside information. In other words, by comparing with other possible explanations, the knowledge or possession of inside information is more likely than

not to flow from the Unusual Trading Behavior of the persons who have a higher chance to know inside information of the issuing company more than other persons.

Therefore, for the purpose of analysis of Section 244 under the Rational Connection Test, the issue of whether or not the persons subject to each subsection have higher chance than general persons to know or possess inside information will be taken into consideration.

4.2.2.1 holder of securities exceeding five percent of the securities issuing company's total securities sold, including the securities held by spouse or cohabiting couple and minor children of the securities holder as specified in Section 244 (1);

It can be clearly seen from the provision that the persons subject to Section 244 (1) are connected to the issuing company by way of holding its securities. However, unlike Section 243 (2), (3) and (4), Section 244 (1) does not provide that such shareholders must be in the position or condition which allows them to be able to have access to inside information. Regardless of their connection with issuing company, the author views that it would not be reasonable to infer that all shareholders know or possess material information of the issuing company as according to the law, the shareholders do not normally participate in the day-to-day operation of the company in which they hold securities and only control the company through their voting rights in the shareholders' meeting.

This leads to the question that which number of securities held by respective shareholder is sufficient to reasonably indicate that such shareholder is in a position to know inside information and therefore establish rational connection between the status of shareholder and his knowledge or possession of inside information.

According to the Notification of the Securities and Exchange Commission No. KorChor. 17/2551 Re: Determination of Definitions in Notifications

relating to Issuance and Offer for Sale of Securities, there are 3 defined terms which should be taken into consideration for the purpose of comparison as follows:

(1) “control” means holding of shares with voting rights of company in an amount exceeding 50 percent of the total number of the voting rights of such company;

(2) “controlling person” means, among other things, a person who has voting rights, whether directly or indirectly, more than 25 percent of the total number of shares with voting rights of the company;

(3) “major shareholder” means a person holding shares of the securities issuer more than 10 percent of the total number of shares with voting rights of the securities issuer including shares held by related persons;

The above mentioned defined terms refer to shareholders who have control over the issuing companies and therefore can be reasonably presumed that they have access to inside information of the Company. Given the number of securities held by the persons subject to Section 244 (1), the author views that it would not be reasonable to presume that the shareholders holding 5% of the securities of the company are in the position to know inside information and therefore there is no rational connection between the status and their knowledge or possession of inside information.

However, as a result of holding certain amount of securities, it can be reasonably expected that those persons have higher chance than other general persons to learn about inside information of such company in which they hold securities. Therefore, if these persons have traded in a different manner than their normal practice, there would be a rational connection between the basic fact and the presumed fact.

4.2.2.2 director, executive, controlling person, employee, or employee of business in the group of the securities issuing company, who holds a position or the line of work responsible for or capable of accessing inside information as specified in Section 244 (2);

According to Section 244 Paragraph Two, the term “business in the group of a securities issuing company” under (2) means parent company, subsidiary or affiliate of the securities issuing company in accordance with the rules as specified in the notification of the Securities and Exchange Commission.

According to the Notification of the Securities and Exchange Commission No. KorChor. 17/2551 Re: Determination of Definitions in Notifications relating to Issuance and Offer for Sale of Securities, the terms “parent company”, “subsidiary” and “affiliate” are defined as follows:

“Parent company” means company having any of the following characteristics:

- (a) company which has control over securities issuer;
- (b) company which has control over the company under (a);
- (c) company which has control over the company under (b)

and the company in the chain of control upward beginning with control over the company under (b);

“subsidiary company” means company having any of the following characteristics:

- (a) company over which securities issuer has control;
- (b) company over which the company under (a) has control;
- (c) company under the chain of control beginning with that

under control of the company under (b)

“associate company” means a company in which securities issuer or subsidiary company has authority to participate in decision making related to the company’s financial policy and business operation, but has no control over such policy and is not deemed as subsidiary company or joint ventures.

In case where securities issuer or subsidiary company holds shares directly and indirectly in an aggregate amount of twenty percent or more, but not exceeding fifty percent of the total number of the voting rights of such company, it shall be presumed that securities issuer or subsidiary company has the authority to take part in the decision making under Paragraph 1 except where it is proven otherwise.

As “Parent Company”, “Affiliate” and “Subsidiary Company” are not the same legal entity as the issuing company, the persons subject to Section 244 (2) do not fall within the scope of the connected person explained above as they do not have direct contractual relationship with the issuing company.

However, given that these persons work for the companies that are connected to the issuing company in the position or the line of work responsible or capable of accessing the material information of the issuing company which has not been published, the chance that these persons know or possess such information is definitely higher than other general persons. Therefore, if these persons have traded in a different manner from their normal practice, the author views that there is a rational connection between the basic fact and the presumed fact in this case.

4.2.2.3 Parent, descendant, child adopter or adopted child of the persons under Section 243 as specified in Section 244 (3);

The persons subject to Section 244 (3) do not fall within the scope of connected persons as they are not in any way directly connected to the issuing company. However, considering their personal relationship with the connected persons under Section 243, the chance that these persons know or possess inside information of the issuing company is higher than other general persons. Therefore, if these persons have traded in a different manner from their normal practice, the author views that there is a rational connection between the basic fact and the presumed fact.

4.2.2.4 sibling of the same blood parents or sibling of the same blood father or mother of the persons under Section 243 as specified in Section 244 (4);

The persons subject to Section 244 (3) do not fall within the scope of connected persons as they are not in any way directly connected to the issuing company. However, considering their personal relationship with the connected persons under Section 243, the chance that these persons know or possess inside information of the issuing company is higher than other general persons. Therefore, if these persons have traded in a different manner from their normal practice, the author views that there is a rational connection between the basic fact and the presumed fact.

4.2.2.5 spouse or cohabiting couple of the persons under 243 or the persons under (3) or (4) as specified in Section 244 (5).

The persons subject to Section 244 (5) do not fall within the scope of connected persons as they are not in any way directly connected to the issuing company. However, considering their personal relationship with the connected persons under Section 243, and, the persons who have personal relationship with the connected persons under Section 244 (3) and (4), the author views that the chance that these persons know or possess inside information of the issuing company is higher than other general persons. Therefore, if these persons have traded in a different manner from their normal practice, the author views that there is a rational connection between the basic fact and the presumed fact.

With respect to Section 244 (3) (4) (5), there might be an argument that those persons may not be in contact with the connected persons regardless of their personal relationship with the connected persons and therefore it is not reasonable to infer that such persons have a higher chance than other general persons

to know or possess inside information. However, as the Rational Connection Test Approach is based on the fact suggested by common experience, the author views that the statutory presumptions which includes only closest relatives of the connected persons (i.e. parent, descendant, child adopter or adopted child, sibling of the same blood parents or sibling of the same blood father or mother) is in accordance with the common experience which suggests that the persons who are close relatives are normally in contact with each other and therefore increase the possibility that these persons have known or possessed inside information in the case that they have changed the way they trade.

The issues of whether or not other relatives whose relationship with the connected persons may be further compared to the persons subject to Section 244 (3), (4), (5), for example, aunt, uncle, grandfather etc. should also be subject to the presumption of knowledge or possession of inside information may be considered in future research.

4.3 Principle of Proportionality Approach

The analysis of constitutionality of statutory presumptions contained in Section 243 and Section 244 under the Principle of Proportionality Approach will be divided into 3 parts according to the 3 elements of the principle of proportionality.

However, as the factors to be taken into consideration for the purpose of analysis of Section 243 and Section 244 are the same, the author views that it is not necessary to analysis Section 243 and Section 244 separately.

4.3.1 Principle of Suitability

Under the principle of suitability, the question of whether the measure selected is capable of achieving the pursued legitimate objective or in other word, whether the selected measure is rationally connected to the pursued objective

is asked. The selected measure in issue will not be considered suitable if there is no rational connection between the selected measure and the pursued objective.

In order to consider whether the statutory presumptions contained in Section 243 and Section 244 are suitable, 2 factors are required to be considered as follows:

(1) Legitimate objective of Section 243 and Section 244;

The objective of Section 243 and Section 244 is to improve efficiency of criminal prosecution against insider trading offence.

(2) Selected measure;

The measure selected in order to achieve the legitimate objective of improving efficiency of criminal prosecution against insider trading offence is to lower the burden of proof on the part of the prosecutor by employing the statutory presumptions of knowledge or possession of inside information of certain groups of persons.

To answer the question of suitability, the author firstly takes into consideration the result of analysis conducted in the previous part under the Rational Connection Test. This is due to the reason that the lack of a rational connection between basic fact and presumed fact indicates that such statutory presumption cannot contribute to the pursued goal which is to increase the efficiency of criminal prosecution of insider trading. Instead, the efficiency of criminal prosecution is rather decreased because criminal investigations are likely to be launched without a reasonable suspicion.

As the analysis under the Rational Connection Test indicates that only the rational connection of the basic fact and the presumed fact Section 243 (5) cannot be established, only Section 243 (5) fails the suitability test in this step. For remaining statutory presumptions contained in Section 243 and Section 244 which have passed the Rational Connection Test, they would be considered suitable if they can contribute to the accomplishment of the pursued legitimate objectives.

Given the provision contained in Section 242, the prosecutor is required to prove the following external elements of insider trading offence if the statutory presumptions of knowledge or possession of inside information do not exist:

- (1) Prohibited action
- (2) Knowledge or possession of inside information

However, according to the law of evidence, the statutory presumptions can shift to the defendant the burden to prove the elements of crime which are provided as presumed fact. This means that, as a result of the statutory presumptions contained in Section 243 and Section 244, the prosecutor does not have to prove the knowledge or possession of inside information of the offender which is one of the essential elements of insider trading offence provided in Section 242 of SEA 2016 and will be required to prove only the prohibited action of the offender. For the reason that burden of proof on the prosecutor part is lowered, the criminal prosecution taken against person committing insider trading offence is likely to be more successful. Therefore, the legitimate objective being pursued that is the increase of efficiency in criminal proceedings can be accomplished by the selected measure.

According to the reasons explained above, the author concludes that the statutory presumptions contained in Section 243 and Section 244 are suitable under the principle of suitability except for Section 243 (5).

4.3.2 Principle of Necessity

With respect to Section 243 and Section 244 of SEA 2016, the issue required to be considered in order to answer the question of necessity starts with the issue of whether or not there is other equally effective measure which can increase the efficiency of criminal proceedings against insider trading offence. Once and if such measure can be identified, the next question is whether or not it is less harmful to the right to be presumed innocent of the defendant compared to the rebuttable presumption of knowledge or possession of inside information.

Given that the objective being pursued is to increase the efficiency of criminal proceedings, the author views that other available alternatives which are not within the context of criminal law, such as civil sanction or administrative measure, should not be taken into consideration even though they may be equally or even more effective with regard to the achievement of the more successful enforcement of insider trading law.

After having duly examined all possible alternatives within the scope of criminal law, the author has found other 2 potential alternatives which should be taken into consideration as follows:

1. Improvement of criminal proceedings

To increase the efficiency of criminal proceedings against insider trading offence, the government may choose to improve the process of investigation and fact-finding. This may, for example, include employment of new technology in order to ensure that all relevant evidences are gathered and can be used in the court to meet the requirement of standard of proof beyond reasonable doubt or reorganization of the entire system by removing unnecessary steps of investigation process. With respect to the “less restrictive” question, this choice undoubtedly creates less harm to the right to be presumed innocent than the statutory presumptions of knowledge and possession of inside information as it does not in any way create any burden on the part of the defendant. However, there is no guarantee regarding the effectiveness of this alternative due to the difficulty in proving the element of knowledge or possession of inside information and the issue of whether or not such difficulty which has prevented the successful criminal proceedings against insider trading offence can be overcome remains questionable.

Therefore, even though this alternative is less restrictive, it is not equally efficient compared to the statutory presumptions of knowledge or possession of inside information provided in Section 243 and Section 244.

2. Irrebuttable presumptions

To increase the efficiency of criminal proceedings, another type of statutory presumption i.e. irrebuttable presumption may be provided instead of rebuttable presumption. In this case, the provision of Section 243 and Section 244 would provide that certain groups of persons are deemed (instead of “presumed”) to have knowledge or possession of inside information. In the case of rebuttable presumptions, even though the prosecutor would not have to prove the element subject to the presumption at the beginning, it would still be required to bear the burden of proof if the defendant successfully challenge the presumed fact. However, in the case of the irrebuttable presumption, as the defendant would not have a chance to challenge the presumed fact, the prosecutor would have no further obligation to prove in the case that the defendant successfully challenged the presumed fact. As a result, the prosecution’s burden of proof with respect to the knowledge or possession of inside information would not only be lowered but it would be entirely removed.

For the above reasons, as to the question of effectiveness, the irrebuttable presumption can definitely contribute to the pursued objective of increasing the effectiveness of criminal proceedings. However, this alternative would create more harm to the right of the persons subject to the rebuttable presumption according to the reasons explained above.

Based on the above analysis of the 2 alternatives available, it can be seen that there is no other measure which is equally effective and less restrictive. The author therefore concludes that the statutory presumptions contained in Section 243 and Section 244 of SEA 2016 passes the necessity test.

4.3.3 Principle of Proportionality in a Strict Sense

The answer to the question of whether the statutory presumptions contained in Section 243 and Section 244 are proportionate in a strict sense, the careful

balancing of public interest which will be obtained and the right of individual being affected is required.

As already explained in the foregoing assessment under the suitability test and the necessary test, the statutory presumptions contained in Section 243 and Section 244 were introduced in order to increase the efficiency of criminal proceedings against insider trading offence. Once the pursued objective is achieved, what will surely happen is less violation of insider trading law. This can increase confidence of investors in the market and also indicates more fairness in trading practice in the stock market. As the stock exchange plays an important role in the country economy as a source of fundraising to the business and a source of fund saving to the people, this will benefit the country's economy as a whole. With respect to the affected right of the individual, the author views that the persons subject to statutory presumptions contained in Section 243 and Section 244 are not left with no ground to challenge their presumed knowledge or possession of inside information given that such statutory presumptions are rebuttable. Moreover, they also have grounds to claim that even though they have knowledge or possession of inside information their actions fall within the scope of exceptions as provided in Section 242. For these reasons, the author finds a balance between the public interest and the right of the individual and therefore concludes that the statutory presumptions of knowledge and inside information contained in Section 243 and Section 244 pass the principle of proportionality test in a strict sense.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

This Chapter presents conclusion and recommendations regarding the result of analysis of the statutory presumptions with respect to the criminal offence of insider trading conducted in Chapter 4 under the Pattern Approach, the Rational Connect Test Approach and the Principle of Proportionality Approach, and, the suitable approach for assessment of constitutionality of the statutory presumptions in general.

5.1 Constitutionality of Statutory Presumptions with respect to Criminal Offence of Insider Trading according to the Pattern Approach, the Rational Connection Approach and the Principle of Proportionality

5.1.1 Conclusion

According to the analysis conducted in Chapter 4, the constitutionality of the statutory presumptions contained in Section 243 and Section 244 under the Pattern Approach, the Rational Connection Test Approach, and the Principle of Proportionality Test Approach can be summarized as follows:

(1) Section 243

Approach Section	Pattern Approach	Rational Connection Approach	Principle of Proportionality
Section 243 (1)	Constitutional	Constitutional	Constitutional
Section 243 (2)	Constitutional	Constitutional	Constitutional
Section 243 (3)	Constitutional	Constitutional	Constitutional
Section 243 (4)	Constitutional	Constitutional	Constitutional
Section 243 (5)	Constitutional	Unconstitutional	Unconstitutional

(2) Section 244

Approach Section	Pattern Approach	Rational Connection Approach	Principle of Proportionality
Section 244 (1)	Constitutional	Constitutional	Constitutional
Section 244 (2)	Constitutional	Constitutional	Constitutional
Section 244 (3)	Constitutional	Constitutional	Constitutional
Section 244 (4)	Constitutional	Constitutional	Constitutional
Section 244 (5)	Constitutional	Constitutional	Constitutional

According to the result of analysis, only Section 243 (5) is considered unconstitutional under the Rational Connection Test Approach and the Principle of Proportionality Test due to its lack of rational connection between the basic fact and the presumed fact which indicates that Section 243 (5) fails the Rational Connection Test Approach and the Principle of Proportionality Test Approach.

5.1.2 Recommendation

Following the conclusion explained in Item 5.1.1 above, it is recommended that the unconstitutional statutory presumptions of knowledge or possession of inside information with respect to the criminal offence of insider trading contained in Section 243 (5) be removed from Section 243

Given the fact that their business is under the control of the connected persons, the author views that the chance that the juristic persons subject to Section 243 (5) may have known or possessed inside information of the issuing company is higher than other general persons. However, such fact alone cannot establish rational connection between the basic fact and the presumed fact unless there is other factor which can increase possibility of knowledge or possession of inside information. For the same reason used to support the rational connection between

the basic fact and the presumed fact of the statutory presumptions contained in Section 244, the author views that the most possible explanation which can establish rational connection is Unusual Trading Behavior.

For that reason, it is recommended that the provision contained in Section 243 (5) should be moved to Section 244. As a result, there would be rational connection between the knowledge or possession of inside information and the Unusual Trading Behavior of the person who has a higher chance to know or possess inside information than other general person.

5.2 Advancing the Assessment of the Constitutionality of Statutory Presumptions

5.2.1 Conclusion

The analysis conducted separately under the 3 different approaches in Chapter 4 may seem to be different given the fact that the factors which are taken into consideration in an attempt to determine the constitutionality of law vary according to the criteria required by respective approach

However, after taking all questions under the 3 different approaches into consideration, the author views that all the issues which have been analyzed under the Pattern Approach and the Rational Connection Test are actually incorporated as part of the assessment under the Principle of Proportionality Test. The explanation for the said conclusion is as follows:

(1) Pattern Approach

According to the precedent of the Constitutional Court of Thailand, the statutory presumption which fails the Pattern Approach is the presumption under which the defendant's guilt is presumed without any prove of the defendant's action or intention. The same result would be derived from the assessment of the statutory presumption under the necessary test of the Principle of Proportionality Approach as the presumption of guilt would be considered to be more restrictive than other

available measures, for example, presumptions of certain element of crime even when they can also contribute to the same legitimate objective being pursued.

(2) Rational Connection Test

According to the Rational Connection Test Approach, the statutory presumption which fails the Rational Connection Test is the presumption under which there is no rational connection between the basic fact and the presumed fact. The same result would be derived from the assessment of constitutionality of the said statutory presumption under the first step test of the Principle of Proportionality Approach due to the reason that the lack of rational connection between the selected measure and the pursued objective means that such statutory presumption cannot contribute to the pursued objective and the statutory presumptions in question would then fail the test of suitability.

5.2.2 Recommendation

According to the above conclusion, it can be seen that, by following the 3-step test of the Principle of Proportionality Approach alone, the Constitutional Court will have an opportunity to look into and analyze every aspect of the statutory presumptions and render relevant decisions in a more systematic manner. Moreover, the extent to which the fundamental right to be presumed innocence is limited as created by the statutory presumption will remain within the scope of rationality, suitability, necessity and proportionality which are the essential factors that should not be compromised and taken for granted.

For these reasons, the separate assessment under the Pattern Approach and the Rational Connection Test approach are no longer necessary and it is therefore suggested that the Principle of Proportionality Test should be applied in the assessment of the Constitutional Court of Thailand to determine constitutionality of the statutory presumptions.

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Publications	
	Pitchanika Pohbunchern, ‘Constitutionality of Statutory Presumptions with Respect to the Criminal Offence of Insider Trading’ (Master of Laws Thesis, Thammasat University, 2020)