

CONSTITUTIONALITY OF STATUTORY PRESUMPTIONS WITH RESPECT TO THE CRIMINAL OFFENCE OF INSIDER TRADING^{*}

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Abstract

In 2016, the Securities and Exchange Act (No. 5) B.E. 2559 (“SEA 2016”) has introduced the statutory presumptions of knowledge or possession of inside information of certain groups of related persons in Section 243 and Section 244 with respect to the criminal offence of insider trading to eliminate obstacles in law enforcement created by the high standard of proof in criminal cases. In Thailand, the issue regarding the validity of the provisions which contain statutory presumptions in criminal cases like Section 243 and Section 244 has been a topic of discussion among legal scholars as it can possibly lead to the unconstitutionality of such provisions due to violation of the fundamental right to be presumed innocent as recognized in the Constitution of the Kingdom of Thailand as the supreme law of the state.

In order to analyze the constitutionality of the statutory presumptions contained in Section 243 and Section 244 of SEA 2016, this article applies documentary research method under the 3 different

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approaches generally used to assess the constitutionality of statutory presumptions; (1) Pattern Approach; (2) Rational Connection Test Approach; and (3) Principle of Proportionality Test Approach.

According to the result of the 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 conducted 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 due to its lack of rational connection between the basic fact and the presumed fact and its failure to achieve the goal pursued under the suitability test.

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

1. Introduction

Insider trading is an act of buying or selling 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 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 the efficiency of enforcement and to provide more protection for investors¹.

Under SEA 2016, there have been major changes in the provisions governing the 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 the United Kingdom, Australia, Singapore, Malaysia and the Market Abuse Directive of the

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

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.

2. Statutory Presumptions of Knowledge or Possession of Inside Information

According to Section 243 of SEA 2016, 5 groups of persons are presumed to have knowledge or possession of inside information as a result of certain 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)).

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 สำนักงานนโยบายการออม, 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.

Section 243 of SEA 2016 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;

(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).

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)), a 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.

Section 244 of SEA 2016 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.

3. Principle of Presumption of Innocence

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

difficult to prove⁴, some viewed that statutory presumptions in criminal case violate the presumption of innocence principle⁵.

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 that⁶:

“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 that aims at protecting the 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 judgment⁷. This principle is founded on the human rights principle as appeared in Article 11 of the Universal Declaration of Human Rights.

⁴ 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.

⁵ 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 (อุตม รัฐอมฤต, คำอธิบายกฎหมายลักษณะพยานหลักฐาน (พิมพ์ครั้งที่ 7 โครงการตำราและเอกสารประกอบการสอน คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 2562)) 213.

⁶ Constitution of the Kingdom of Thailand B.E. 2560

⁷ Constitutional Court Decision of No. 12/2555

4. Assessment of Constitutionality of Statutory Presumptions under the 3 Different Approaches

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 which have been applied in the assessment of the constitutionality of statutory presumptions as follows:

4.1 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. Therefore, it can be summarized that the provision of law would be considered unconstitutional if it provides the status of the defendant as a basic fact and guilt of such a defendant as a presumed fact. This criterion of consideration established by the Constitutional Court is explained by several legal scholars as “Pattern Approach”⁸.

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

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

⁸ Khemchai Chutiwong, Kham Athibai Kotmai Laksana Phayan [Explanation on The Law of Evidence] (9th edn, Samnak Oprom Kotmai Ngae Netbanthittayasapha 2014) 122 (เข็มชัย ชุติวงศ์, คำอธิบายกฎหมายลักษณะพยาน (พิมพ์ครั้งที่ 9, สำนักอบรมศึกษากฎหมายแห่งนิติบัณฑิตยสภา, 2557)) 122.

After considering the elements of statutory presumptions contained in Section 243 and Section 244, the author found that the statutory presumptions contained in Section 243 fall into the scope of Pattern 2 and the statutory presumptions contained in Section 244 fall into the scope of Pattern 2 and Pattern 4.

4.2 Rational Connection Test Approach

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 States⁹.

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 is asked¹⁰.

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 the 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 depend¹¹.

⁹ *ibid.*

¹⁰ Jaran Phakdeethanakool, Kotmai Laksana Phayan Lakthan [Explanation of Law of Evidence] (14edn, The Institution of Legal Education of Thai Bar Association 2019) 194 (เจริญ ภักดีธนากุล, กฎหมายลักษณะพยานหลักฐาน (พิมพ์ครั้งที่ 14 สำนักอบรมศึกษากฎหมายแห่งเนติบัณฑิตยสภา 2561)) 194.

¹¹ *Leary v. United States* 396 U.S. 6 (1969) 8.

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 was 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.

As a result of the above explanation, the author found 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.

4.3 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 the 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.

¹² Boonsri Meewong-Ukot, Khotmai Ratthathammanun [Constitutional Law] (3rd edn, Project for Promotion of Textbooks and Teaching Materials, Faculty of Law, Thammasat University 2009) 506 (บุญศรี มีวงศ์อุโฆษ, กฎหมายรัฐธรรมนูญ (พิมพ์ครั้งที่ 3, โครงการตำราและเอกสารประกอบการสอนคณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 2562)) 506.

The analysis of the constitutionality of statutory presumptions contained in Section 243 and Section 244 under the Principle of Proportionality Approach was divided into 3 parts according to the 3 elements of the principle of proportionality as follows:

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 objective¹³ or in other words, 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 the efficiency of criminal prosecution against insider trading offence.

(2) Selected measure;

The measure selected in order to achieve the legitimate objective of improving the 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 took into consideration the result of the analysis conducted in the previous part under the Rational Connection Test. This is due to the reason that the lack

¹³ 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.

of a rational connection between basic facts and presumed facts 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 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 a 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 a 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.

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 another equally effective measure that can increase the efficiency of criminal proceedings against insider trading offence. Once and if such a 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.

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.

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 a 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 challenges 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 pass the necessity test.

4.3.3 Principle of Proportionality Test 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. Under this principle, the question of

whether a restriction is justified when comparing the benefit to the goal being pursued to the impact on rights¹⁴.

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 the 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's 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.

5. Conclusions and Recommendations

5.1 Constitutionality of Statutory Presumptions with Respect to Criminal Offence of Insider Trading

¹⁴ Lasse Schudt, 'Publishing Secrets: A Case Study on the Balancing of Press Freedom and Public Interests in European Human Rights Jurisprudence' (2019) 48(4) *Thammasat Law Journal* 760, 769.

5.1.1 Conclusion

According to the analysis conducted under the Pattern Approach, the Rational Connection Test Approach, the Principle of Proportionality Test Approach, the constitutionality of the statutory presumptions contained in Section 243 and Section 244 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

However, 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 a rational connection between the basic fact and the presumed fact unless there is another factor which can increase the 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 the 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 a 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 persons.

5.2 Advancing the Assessment of the Constitutionality of Statutory Presumptions

5.2.1 Conclusion

The analysis conducted separately under the 3 different approaches 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 the respective approach.

However, after taking all questions under the 3 different approaches into consideration, the author views that all 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 said conclusion can be explained 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 proof 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 a certain element of a 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 the 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 is 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 the constitutionality of the statutory presumptions.

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Meewong-Ukot B, Khotmai Ratthathammanun [Constitutional Law] (3rd edn, Project for Promotion of Textbooks and Teaching Materials, Faculty of Law, Thammasat University 2009) (บุญศรี มีวงศ์อุโฆษ, กฎหมายรัฐธรรมนูญ (พิมพ์ครั้งที่ 3, โครงการตำราและเอกสารประกอบการสอนคณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 2562))

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