



ปกิณกะกฎหมาย

Examining Elements of Rape Offences

in Thailand*

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ในประเทศไทย

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“Short of homicide, ‘it is the ultimate violation of self’”

*Coker v Georgia*¹

Introduction

This descriptive article explains and, when appropriate, criticises one of the most serious offences in Thailand, rape. There are, of course, many more sexual offences

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¹ *Coker v Georgia*, (1977) 433 U.S 584 at 597.

which will not be dealt with in this paper, given its limited breadth. However, it is worth noting here that moral-based offences such as unnatural offences² and incest between adults over 15 are not recognised as criminal offences in Thailand. Moreover, prostitution, i.e. commercial sex, is not a crime *per se*.³ However, some conduct concerning prostitution such as procuring or running a brothel is against the law and punishable by imprisonment.⁴ Lastly, most non-consensual sexual activities are covered by the broad and uncertainly defined act of sexual assault stipulated in sections 278 and 279.

The opening sentence of this article summarises well the severity of the crime. Not only is personal and physical integrity infringed but also, and more importantly, the autonomy of the victim is severely violated. The rape victim is not treated as an autonomous agent, or even as a person, by the rapist. To worsen the scenario, it is frequently the case that the victim is blamed for being raped,⁵ let alone the fact that being raped in some countries means you are committing the crime of adultery.⁶ According to the 2017 data of the UN World Health Organization (WHO), more than one-third of women and girls around the world have experienced sexual abuses, including rape⁷. Additionally and, perhaps more shockingly, the majority (around 70-80 per cent) of sexual violence is committed by friends or/and family members⁸.

² The negatively judgmental term is adopted by some jurisdictions such as India and Malaysia to refer to a sexual intercourse against the order of nature. See section 377 of the Indian Penal Code and section 377A of the Malaysian Penal Code. The term does not reflect the viewpoint of the author on this issue.

³ *The Prevention and Suppression of Prostitution Act B.E. 2539*.

⁴ *The Penal Code*, sections 282, 283, and 286. See also *the Prevention and Suppression of Prostitution Act B.E. 2539* and *the Anti-Human Trafficking Act B.E. 2551*.

⁵ This phenomenon can be found around the world, not only in Thailand. See “Women ‘to blame’ for Being Raped,” The Daily Mail, accessed 17 September 2015, from <http://www.dailymail.co.uk/news/article-369262/Women-blame-raped.html>. For more discussion on this issue, see Joshua Dressler, *Understanding Criminal Law* (Newark: LexisNexis Matthew Bender, 2009) p.582.

⁶ Jon Boone, “Afghan Woman Jailed After Being Raped is Freed After Two Years in Kabul Prison,” The Guardian, (14 December 2011), accessed 17 September 2015, from <http://www.guardian.co.uk/world/2011/dec/14/afghan-woman-raped-freed-prison>; Elizabeth Strassner, “5 Countries That Respond to Rape Victims By Throwing Them in Prison,” Mic, (20 May 2013) accessed 17 September 2015, from <http://mic.com/articles/43075/5-countries-that-respond-to-rape-victims-by-throwing-them-in-prison>.

⁷ “Violence Against Women,” World Health Organisation, (29 November 2017) accessed 22 December 2017, from <http://www.who.int/mediacentre/factsheets/fs239/en/>.

⁸ For statistics in the US, see “Rape and Sexual Assault,” Office of Justice Programs, accessed 22 December 2017, from https://www.ncjrs.gov/ovc_archives/ncvuw/2005/pg50.html; “Perpetrators of Sexual



There are two provisions labelled rape in the Penal Code, sections 276 and 277. The first section deals with non-consensual sexual intercourse; while, the latter governs the case of having sexual intercourse with an underage person regardless of consent. As these offences share most elements, we will first examine section 276 in Part I, and then we will look further into section 277 to study some distinct elements in Part II. In Part III, we will examine some circumstances which could render higher punishment for rapists. In that part we examine mainly the issue of gang rape, and rape by people in positions of trust.

1. Section 276

There are two types of elements, like most other offences in Thailand, that need to be satisfied in order to constitute the crime of rape. One is external, and the other is internal.

A. External Elements

Section 276 paragraph 1: “*Whoever has sexual intercourse with a person without their consent by coercion, an act of violence, or in the condition that such person cannot resist, or by making such person to mistake the perpetrator for another person, the perpetrator shall be liable from 4 years to 20 years and fined from 80,000 to 400,000 THB.*”

From this provision, the crime of rape is *prima facie* committed when a person has sexual intercourse with another person without his or her consent. We will later visit the internal elements of the crime, without which a *prima facie* act of rape will be noncriminal conduct, but first there are two external elements that we need to examine. (1) Sexual intercourse (กระทำชำเรา) and (2) Lack of consent (ข่มขืน).

(1) Definition of sexual intercourse: Must it be penetrative?

Previously, there was no definition of sexual intercourse provided by the Code. However, the Supreme Court and scholars defined it as penile penetration *per vaginam*.⁹

Violence: Statistics,” Rainn, accessed 22 December 2017, from <https://rainn.org/get-information/statistics/> sexual-assault-offenders. For Thai statistics, Sirintip, “สุร้า’ ต้นเหตุล่วงละเมิดทางเพศ ส่วนใหญ่ผู้มีเพศคนใกล้ตัว,” สำนักงานกองทุนส่งเสริมและสร้างสรรค์สุขภาพ, (14 มีนาคม 2555) accessed 22 December 2017, from <http://www.thaihealth.or.th/Content/19169-.>

⁹ Supreme Court decision number 1048/ 2518; see Kietkajorn Vachanasvasti, *Criminal Law: Specific Offences Vol 2*, 6th edition, (Bangkok: Krungsiam Publishing, 2014) pp.407-408 (written in Thai: เกียรติธรรม วัฒนา

The crime of rape was complete when there was penetration, however slight.¹⁰ Therefore, according to this definition, the principal¹¹ had to be a male¹² and the victim had to be a woman. And a penetration performed by using organs or objects other than the penis of the offender would not be recognised as rape. Moreover, oral and anal penetration were also not rape but the lesser offence of sexual assault.

However, since September 2007, the Penal Code has been amended to define many more forms of sexual activity as rape. The amendment provides a specific definition of intercourse as stated in section 276 paragraph 2. The paragraph reads as follows:

“Sexual intercourse, as per paragraph one, means an act done with the intent to gratify the sexual desires of the offender by using the sexual organ of the offender to do by any means with the sexual organ, anus, or oral cavity of another person, or by using any object to do by any means with the sexual organ or anus of another person.”

The first limb of the above definition is the “special intention” (เจตนาพิเศษ) of sexual gratification which is a new internal element of the crime, which we will discuss later. According to the current definition, the crime is now gender neutral. Both men and women can commit the crime and, at the same time, are vulnerable to be victimised. The amended law is welcome, as it broadens the scope of the crime; however, due to it being poorly drafted by the 2007 junta and an unelected Parliament, it was unclear whether penetration was required for the act to constitute rape.

Some prominent legal commentators previously argued that since the law provided the term “using...to do by any means with...”, if the offender used his penis to touch the victim’s genitals, rape would have been successfully committed. There was no need for penetration. This interpretation is in accordance with the Committee on the

สวัสดิ์, กฎหมายอาญาภาคความผิด เล่ม 2, พิมพ์ครั้งที่ 6 (กรุงเทพ: กรุงสยาม พับลิชิ่ง, 2557) น.407-408); Jitti Tingsaphat, Criminal Law Part 2 Vol 1, (Bangkok: Jirat Publishing, 2005) p.734 (written in Thai: จิตติ ติงสะพัด, กฎหมายอาญา ภาค 2 ตอน 1 (กรุงเทพ: จิรัชการพิมพ์, 2548) น.734).

¹⁰ Supreme Court decisions number 1646/2532 and 848/2548.

¹¹ However, a female could be guilty of the crime of rape as an inciter, joint-principal, or an aider.

¹² A woman could be a joint-principal of the crime, but a male perpetrator was required and he had to be the one who commits the act of penetration; see Supreme Court decision number 250/2510; Tingsaphat, *supra note* 11, p.735.



Elimination of Discrimination against Women.¹³ However, this line of interpretation faced criticism by other scholars.¹⁴ If this strict and literal interpretation of paragraph 2 is true, there would be eleven ‘possible’ forms of rape;

- (1) D touches his penis ‘with’ V’s vagina
- (2) D touches his penis ‘with’ V’s penis
- (3) D touches his penis ‘with’ V’s anus
- (4) D touches his penis ‘with’ V’s oral cavity
- (5) D touches her vagina ‘with’ V’s vagina
- (6) D touches her vagina ‘with’ V’s penis
- (7) D touches her vagina ‘with’ V’s anus
- (8) D touches her vagina ‘with’ V’s oral cavity
- (9) D touches an object ‘with’ V’s vagina
- (10) D uses an object ‘with’ V’s penis
- (11) D touches an object ‘with’ V’s anus

However, the Supreme Court disagreed with this view and decided in 2010¹⁵ and more recently in 2012¹⁶, that an act of penetration, despite not being stipulated in the Code, is still required as a constituting element of the rape offence.

In Supreme Court decision 15309/2553, the defendant forced the victim, who was under 13, to lick his penis, but he did not insert his penis into the victim’s oral cavity. There was, thus, no penetration. The defendant was acquitted of rape but guilty of sexual assault, contrary to section 279.

The 2553 case is the first case where the Court ruled that a form of penetration is required. Moreover, the Court explained that lips are just the entrance of the oral cavity but not the oral cavity itself. The oral cavity is the space inside one’s mouth, excluding

¹³ *R. P. B. v the Philippines* (2011) CEDAW/C/57/D/34/2011, para.9. In this case, The treaty body of the UN Convention on the Elimination of all Forms of Discrimination Against Women specialized on women’s human rights gives a recommendation to the Philippines to ‘review the legislation of rape so as... to remove... any requirement of proof of penetration...’.

¹⁴ Ronnakorn Bunmee, “Attempted Rape in 2010,” Family Administrative Works Pairojana: a compilation of articles in memory of 60th anniversary of Professor Dr Pairojana Kambhumsiri, pp.151-189 (written in Thai: รัตนกรรณ์ บุญมี, “พิยาภรณ์ที่มีขึ้นกระทำชำเรา ปี 2553,” ครอบครัว งานบริหาร อาจารย์ไพรожัน รุ่วนี้ก็อธิบายที่รัฐลึกในโอกาสอายุครบ 60 ปี ศาสตราจารย์ ดร. ไพรожัน กัมพูสิริ, น.151-189).

¹⁵ Supreme Court decision number 15309/2553.

¹⁶ Supreme Court decisions number 1390/2555 and 4164/2555.

the lips. Therefore, because the defendant touched the victim's lips with his penis but did not put it inside her mouth, he did not penetrate the victim's oral cavity. To follow this line of argument, it is difficult to think of an example of oral penetration *per vaginam*. Even though the tongue penetrating into the vagina would be called oral sex in a layperson's term, the act is not oral intercourse in the realm of this section. This is because there is no penetration into the victim's oral cavity. Also, it could not be vaginal intercourse, the form of intercourse in which there is penetration into the victim's vagina - as in this case it is the defendant's vagina that is being penetrated.

Two cases in 2012 confirm the interpretation and set a precedent. In Supreme Court decision 4164/ 2555, the defendant, who was the swimming teacher of a 6-year-old student, asks the victim to sit on a bathroom sink before licking her genitals and trying to insert his penis into her vagina, but due to the size of her vagina, the act cannot be completed. The defendant committed the act on at least 10 different occasions. The issue, in this case, was whether the defendant is guilty of completed rape or just attempted rape. The Supreme Court ruled that the amended law just broadens the possible forms of sexual intercourse; however, the requirement of penetration still exists. The Court interprets the law to mean that to be rape the defendant's penis must penetrate into the victim's vagina, anus or oral cavity. If he uses another object such as an artificial penis, that object must also penetrate the victim's vagina or anus. The defendant was therefore guilty of attempted rape of a child under his control, contrary to section 277 in conjunction with sections 285 and 80. He was sentenced to 8-years of imprisonment for each of his acts. Decision no. 1390/2555 came to the same conclusion.

Not only does the Supreme Court require a form of penetration as an element of rape, but also the 2007 Parliament. It is very clear from the minutes of Parliament that the amended section wishes to punish as rape only the sexual act of penetration.¹⁷ Additionally, the previous draft explicitly uses the term "penetrate" (สอด), but it was changed because the term 'penetrate' does not include the case of a male being raped by a woman.¹⁸ Moreover, to interpret the law in this way makes it consistent with the

¹⁷ In the minutes of National Assembly no. 31/2550 on 20 June B.E. 2550 (รายงานการประชุมสภานิติบัญญัติแห่งชาติ ครั้งที่ 31 วันที่ 20 มิถุนายน 2550), especially the statements of the Chairperson of the Committee considering this bill (Mr.Bawonsak Uwanno) on pp.37-38 (Somboon 9/1 and 9/2) and that of the President of the National Assembly (Meechai Ruchuphan) on p.39 (Pinyada 10/1).

¹⁸ *Ibid.*



meanings of the Thai word ‘ชำเรา’ (sexual intercourse) which is derived from the Khmer (ancient Cambodian) language. In Khmer the word means “deep” implying the idea of penetration.¹⁹ In his current textbook on criminal offences, Professor Vachanasvasti has changed his position to support the idea of penetration as a constitutive element of rape.²⁰

Bearing in mind that penetration is an external element of the crime, actions in the scenarios (2), (5), (7), (8) and (10) could not constitute rape as there could be, at least to the extent of my imagination, no penetration. However, when referring to an act of penetration, it is not necessary that the defendant must be the one who penetrates the victim directly. The crime is, subject to some limitations, also committed when the defendant forces the victim to penetrate the defendant or to penetrate himself or herself with an object. Below is an attempt to give a list of possible forms of rape according to the amended law subjected to the requirement of penetration.

- (1) D uses his penis or an object²¹ to penetrate V's vagina.
- (2) D forces V to use her vagina to perform an act of penetration with D's penis or with an object.
- (3) D uses his penis or an object to penetrate V's anus.
- (4) D forces V to use his or her anus to perform an act of penetration with D's penis or with an object.
- (5) D uses his penis to penetrate V's oral cavity.
- (6) D forces V to use his or her oral cavity to perform an act of penetration with D's penis.
- (7) D uses her vagina to perform an act of penetration with V's penis
- (8) D forces V to use his penis to perform an act of penetration with D's vagina.

Note here that to use an object penetrating someone else's mouth does not constitute rape. The same is also true if a female defendant forces someone else to use an object to penetrate her own genitals. Additionally, as mentioned earlier, the crime is

¹⁹ For more information, see the memo of the Council of State no. 2071/2482 on 8 November B.E. 2482 (บันทึกของคณะกรรมการคุ้มครองสิทธิฯ เลขที่ 2071/2482 ลงวันที่ 8 พฤศจิกายน 2482).

²⁰ Vachanasvasti, *supra note* 11, 437; see also Tweklat Menakanist, *Criminal Law Specific Part and Petty Offences*, 12th edition, (Bangkok: Vinyuchon, 2016) p.200 (written in Thai: ทวีเกียรติ มีนังกนิษฐ์, ค่ำอธินาຍกฎหมายอาญา ภาคความผิดและโทษไทย, พิมพ์ครั้งที่ 12 (กรุงเทพ: วิญญาณ, 2559) น.200).

²¹ An object includes an innocent third party's genitals or the sexual organ of an animal. Therefore, if D forces T, an innocent third party, to use his penis or an object to insert into V's vagina, that also constitutes rape.

complete at the moment of penetration, however slight.²² There is no requirement of ejaculation²³, orgasm²⁴, or hymen breaking.

(2) Lack of consent (չມີສິນ)

Unlike the English Sexual Offences Act 2003 which provides the definition of consent for the purposes of sexual offences, the Thai Penal Code does not directly provide a definition of consent. However, section 276 stipulates that to be a rape, the offender must commit the act either

- 1) by coercing, or
- 2) by using an act of violence, or
- 3) in the condition that the victim cannot resist, or
- 4) by rendering the victim to mistake the offender for another person.

We shall discuss these four possible conditions which would turn an act of sexual intercourse into a rape.

1) Coercing

This first condition is straightforward. If someone coerces another to have sexual intercourse with him or her, it is rape. It need not be a fatal threat as long as the victim fears that his or her interests – including monetary interests – will be infringed if he or she refuses to comply with the defendant's coercion. If the intercourse is non-consensual; it is rape. In a 2006 case,²⁵ an employer made a threat to his foreign employee that if she did not have sex with him, he would take her to the police. The employee was afraid of being sent back to her country as she resided in Thailand illegally; she then consented to the sexual intercourse. The employer was convicted of rape, and sentenced to 3 years and 4 months in jail.

²² Supreme Court decisions number 874/2491 and 1133/2509 (In the latter case, the defendant used his penis to penetrate into a 9-year old girl's vagina but for only the length of a *distal phalange* (ເຫຼົ້າປະເມີນທີ່ອຳນັ້ນມື່ອ), the court decided that the defendant had completely committed rape.

²³ Supreme Court decision number 4083/2548.

²⁴ Supreme Court decision number 1646/2532 (The defendant had penetrated into the victim's vagina only one time but the victim then suddenly realized that the defendant was not her husband and ordered the defendant to stop.)

²⁵ Supreme Court decision number 7721/2549.



To constitute coercion, the offender need not make a verbal threat. For example, in Supreme Court decision 2759/ 2532, surrounding a female victim with multiple male offenders was found to be a threat thus rendering the victim to be in a situation where she could not resist. In this case, the victim was taken by force from her friends while walking back home by three male defendants who later took turns having sex with her. Even though none of the defendants made a threat or coerced her to have sex with them and the victim herself did not expressly object to the intercourse, the Supreme Court decided unanimously that it was rape and sentenced them to jail for 7 years and 6 months each.

2) Using an act of violence

An act of violence is a specific term defined by section 1(6) as meaning “*an act of violation against someone’s body or mind, regardless of using physical force or any other means, and includes any act causing another person to be in the condition that he or she cannot resist by using intoxicants, inducing hypnosis, or any other means*” . By this very broad definition, touching is an act of violence as it is a use of force against someone else’s body.²⁶ Therefore, if D uses physical force - not just a verbal threat - to have sexual intercourse with V against her will²⁷, that will be a classic example of rape.

3) In the condition that the victim cannot resist

We might imagine that the victim of rape would say no out loud when he or she is about to be raped. The requirement for verbal protesting is both psychologically incorrect²⁸ and not legally required by the law. If the victim is unconscious²⁹ or heavily intoxicated, he or she is in a condition where they cannot resist the act of sexual intercourse; therefore, such sexual intercourse constitutes rape, even if the inability to resist is not caused by the accused, i.e. the victim might be already unconscious when the offender meets her. In

²⁶ Supreme Court decision number 1609/2516.

²⁷ Supreme Court decision number 805/2490.

²⁸ One of the common reactions of sexual victims is called tonic immobility – a loss of the ability to mobilise or speak. Anna Möller *et al* suggest that more than 70 percent of victims may experience this condition. See Anna Möller, Hans Peter Søndergaard and Lotti Helström, “Tonic Immobility During Sexual Assault – a Common Reaction Predicting Post-traumatic Stress Disorder and Severe Depression” *Acta Obstetricia et Gynecologica Scandinavica*, Vol. 96, No.8, 932 p.932 (2017); Kasia Kozlowska and others, “Fear and the Defense Cascade: Clinical Implications and Management” *Harvard review of psychiatry*, Vol.23, No.4, 263, p.263 (2015); and Amy F. T. Arnsten, “Stress Signalling Pathways that Impair Prefrontal Cortex Structure and Function” *Nature Reviews Neuroscience*, Vol. 10, No.6, 410, p.410 (2009).

²⁹ Supreme Court decision number 382/2522.

7008/2554, a mobility impaired person asked her father not to have sex with her, but she could not resist due to her disability, therefore her father's act of sexual intercourse was rape. A similar case also happened to a non-disabled victim in which a daughter was raped by her father. In this case, the victim did not scream or say no, but she tried to push him away when she realized that her father was trying to penetrate her. However, due to her gender and age, she knew that she could not physically resist her father, who was stronger than her. After a few pushes she laid still and no longer tried to push him away until he finished. The Supreme Court decided in 16001/2553 that the defendant, who was the father, was guilty of raping a child under 15-year old who was under his control contrary to section 276 in conjunction with section 285. He was guilty because the victim was in a situation where she could not resist. He was sentenced to be in prison for 16 years.

Furthermore, the Supreme Court has interpreted the term 'cannot resist' to cover several cases such as taking the victim far away from where he/ she is familiar with³⁰, being unable to seek help³¹, and being surrounded by a group of defendants³².

4) Rendering the victim to mistake the offender for another person

Although, to the extent of my knowledge, there is no case decided by the Thai Supreme Court where the defendant is guilty of rape because he or she deceived the victim to think he or she is someone else, examples of this condition are not difficult to think of. For example, if a man lies to his sister-in-law that he is her husband who is his identical twin, and she believes him and has sex with him mistakenly thinking he is her husband, the man is guilty of rape. A more realistic case, perhaps, will be a notorious English case, where a woman pretending to be a man asks her 'girlfriend' to be blindfolded when having sex with her.³³ The defendant was found guilty of sexual penetration and sentenced to six years in prison.³⁴ However, she was not guilty of rape due to the fact that section 1 of the Sexual Offences Act 2003 of England requires that

³⁰ Supreme Court decision number 5772/2549.

³¹ Supreme Court decision number 27/2474.

³² Supreme Court decision number 2759/2532.

³³ Helen Pidd, "Woman who posed as man to dupe friend into sex is jailed after retrial," The Guardian, (20 July 2017) accessed 25 December 2017, from <https://www.theguardian.com/uk-news/2017/jul/20/gayle-newland-jailed-for-tricking-female-friend-into-sex>.

³⁴ She was initially sentenced to be imprisoned for 8 years by the Chester Crown Court, however, the conviction and sentence were quashed. The case was retried by the Manchester Crown Court who found her guilty of sexual assault by penetration but sentenced her to only 6 years in jail.



the act of rape must be a penile penetration committed by a male. The offence of sexual assault by penetration is, nonetheless, punishable by life imprisonment,³⁵ the same penalty imposed for rape. No doubt that if a similar situation happens in Thailand, it will be rape, not just sexual assault, which imposes a significantly lower punishment.

10007/2557: Fraud in the inducement vs Fraud in the factum: Lack of consent

What will happen if consent is given as a result of a fraud? An invalid consent will turn a non-criminal act of sexual intercourse to be criminal rape. This is a topic of strong importance, but it was not much academically discussed until the case 10007/2557 was decided by the Supreme Court. Below are the summarised facts and decision of the case:

“Father and mother of Miss T, aged 16 years old, divorced. Wishing her father to send her maintenance, Miss T goes to see Mr S, a mage who claims that he has supernatural power. Miss T asks Mr S to use his supernatural power to make her father give her money. Mr S lies to Miss T that he could make her father transfer money to Miss T by performing a ritual. However, for the ritual to achieve that goal, Miss T needed to be expelled from evil spirits by letting him perform penile penetration of her vagina. Since she believes that by doing so her father will transfer maintenance to her, Miss T allows Mr S to perform the act which he does until he ejaculates. After the incident, Mr S tells Miss T that she needs to come back and perform the “ritual” again several times, if she does not come back, the ritual will fail, and her father will not transfer money to her. Miss T is convinced by that statement, she thus goes back to see Mr S for another four times, and every time Mr S performs penile penetration of her vagina. After that Miss T’s mother finds out about the incidents, she then makes a report to the police. The Court rules that since Miss T is a young and inexperienced person; by allowing Mr S to penetrate her vagina several times, she does not consent to it and is in the condition that she cannot resist. Therefore, Mr S is guilty of rape and is sentenced to thirty years’ imprisonment.”

With all due respect, I believe this case, even though decided with good intentions, is wrongly ruled and goes beyond the letter of the law. Miss T is above 15 years old, albeit being a minor according to the civil law, she is legally capable of exercising her autonomy including giving consent on the sexual matter. By reasoning that

³⁵ *The Sexual Offences Act 2003*, s.2.

she is young and inexperienced, the Court deems that a young and inexperienced person should be protected and controlled by the criminal law more than other people, a decision that is not authorised by Parliament through the Criminal Code. Additionally, she revisits the mage five times in total, even though she has a lot of opportunities to tell or consult with her mother. Especially regarding the last four acts, it is difficult to see that she is in the situation that she cannot resist. She is lied to, that is correct, but she is not lied to about the fact that she is going to have sexual intercourse with Mr S. There is no fraud in factum; it is just an inducement similar to a case where a man lies to a woman that he loves her or he uses his wealth to obtain her consent to sexual intercourse. As long as she knows that 1) it is sexual intercourse and 2) he is the person she is going to have sex with (not someone else), and 3) there is no threat, the consent is valid, and the act should not be rape, unless the legislators explicitly introduce a law otherwise.³⁶

B. Internal Elements

There are two mental elements which need to be fulfilled. The first one is the general intention according to section 59. The second one requires that for sexual intercourse to be rape, it must be done for the actor to obtain sexual gratification. This internal element is called special intention or motivation.

³⁶ For more criticism, see Ronnakorn Bunmee, "Rape by fraud: A comment on Supreme Court decision no. 10007/2557 and Beyond," *Thammasat Law Journal*, Vol.46, No. 3, pp.647-663 (2017) (written in Thai: รอนกรรณ์ บุญมี, "การข่มขืนกระทำชำเราโดยหลอกลวง : วิเคราะห์คำพิพากษาศาลอุच្�ាតิปักษ์ที่ 10007/2557 และการกระทำอื่นๆ," *วารสารนิติศาสตร์*, ปีที่ 46, ฉบับที่ 3, น.647-663 (2560)).



(1) General Intention

This requirement is not complicated in the case of section 276 but will be a little more complex when it comes to section 277, statutory rape. In non-statutory rape, for this element to be satisfied, the actor must commit the act (1) knowing that the victim either does not consent or is in a state such that he or she cannot consent to the intercourse;³⁷ and the actor either (2.1) desires to commit the intercourse or (2.2) foresees the fact that he is going to penetrate the victim sexually, but the victim is ignorant of that fact.³⁸

The actor will not be guilty of rape as long as he honestly believes that the victim consents to the intercourse, however unreasonable the belief is.³⁹ It is not enough to prove beyond a reasonable doubt that the actor “should have known” that the victim did not consent to it. Rape is a serious crime, and, except for section 285/1 regarding age which will be discussed below, there is no provision which states that it is enough for the crime to be committed by an act of negligence or recklessness.⁴⁰ The crime, as the law currently stands, must be committed intentionally.⁴¹

(2) Special Intention: Obtaining sexual gratification

Due to the massively expanded definition of sexual intercourse, many acts will be now regarded as rape, while they were previously not. Therefore, to prevent the law from catching innocuous acts, this new motivation was added to exclude some penetrative action from the scope of criminal law. For example, it is necessary for a gynaecologist to perform a pelvic examination for many medical reasons. However, by inserting some device into the patient’s vagina, the examination does not constitute rape. Likewise, in Thailand, it is required by regulations that a prisoner must be examined by a doctor before registering.⁴² The examination includes a rectal examination which requires a penetration of the prisoner’s

³⁷ *The Penal Code*, s. 59 para. 3

³⁸ *The Penal Code*, s. 59 para. 2. The first type is called desiring intention or direct intention. The second one is called foresight intention or indirect intention.

³⁹ *The Penal Code*, s. 62 paras 1 and 2.

⁴⁰ *The Penal Code*, s. 59. para. 1. There is not ‘yet’ a concept of reckless in the Thai criminal law.

⁴¹ Cf, *the English Sexual Offences Act 2003*.

⁴² *The Regulation of the Minister of Interior in conformity with section 58 of the Penitentiary Act B.E. 2479*, s. 35, in conjunction with, *the Penitentiary Act B.E. 2560*, s. 76.

anus. Again, this examination does not fall into the definition of sexual intercourse, unless the doctor or the gynaecologist performs the examination to obtain sexual gratification.

2. Section 277 (Rape of a child – Statutory Rape)

Section 277 paragraph 1:

“Whoever has sexual intercourse with a child under fifteen years old who is not his wife or her husband regardless of the child’s consent, the perpetrator shall be liable from four years to twenty years and fined from eighty thousand to forty thousand THB.”

Basically, this offence is similar to section 276 as to criminalizing the act of sexual intercourse without consent. Therefore, the discussions and explanations of both external and internal elements of section 276 are applicable here. Not only are the elements similar, but the punishments provided are also currently exactly the same. However, two things which need to be further explained when it comes to section 276 are the age and the marital status of the victim.

A. Age

A victim of statutory rape must be a child under 15 years old. It does not matter if it is a he or a she, or whether or not he or she is a *sui juris* person. The concept of *sui juris* is private law and is not involved when we consider the criminal liability of a person, both as a victim and a perpetrator.⁴³ Even though a person is *sui juris*, as long as he or she is below 15, he or she cannot have sex with a person who is not his or her spouse. If he or she does that, the person engaging in that sexual intercourse would be guilty of raping a child contrary to section 277, despite the underage person consenting to the act.

Fifteen is the line drawn by Parliament, as the age that the state allows people to exercise their autonomy on sexual matters. Therefore, a person cannot legally consent to any sexual activities until reaching that particular age. Any consent given is deemed absolutely invalid, and the act will fall within the scope of the criminal law. This is true

⁴³ *The Penal Code*, ss. 73-75.



even if the child is the one who approaches or even incites the defendant to have sex with him or her.⁴⁴

I am of strong opinion that children should not be exposed to sexual activities until they reach certain age where their autonomy has fully developed, and the law should protect them from sexual predators or anyone who tries to exploit their innocence. However, the current justification provided by many scholars seems, to me, to be unclear and no empirical evidence is provided.⁴⁵ Therefore, I will not discuss in this paper why it is important to protect children from having early sex.

How old is the victim?

A person is protected by section 277 until he or she is fifteen years old. According to the Civil and Commercial Code, section 16, a person is fifteen at 0.00 on the day prior to his 15th birthday, regardless of the time he was born. In 7841/2552, the victim had consensual sexual intercourse with the defendants on the 5th of March 2004. Since she was born on the 5th of March 1989, she was fully and suddenly 15 on the 4th of March 2004. Therefore, on the day of the intercourse, she was no longer protected by section 277 and the defendants were not guilty of the crime.⁴⁶ To speak more precisely, even if she had sex on the 4th of March 2004, the person who had sex with her would also not be guilty of section 277.

Am I required to know that the victim is underage?

Yes, and No. Section 277 provides punishment for two levels, the first one for those having sexual intercourse with a person aged from 13 but still below 15, and a heavier punishment for those having sexual intercourse with a child below 13.

If the victim is already 13 but still below 15 and the defendant honestly, even if not reasonably, believes that the victim is already 15 or above 15, the defendant is not guilty of section 277. This is because section 59 paragraph 3 requires that one will act intentionally only when he is aware of the facts corresponding to the external elements

⁴⁴ *R v G* [2008] UKHL 37, para 45.

⁴⁵ The justification of this offence is, from my view, more like (soft) paternalism coupled with moralism. One, however, might argue that actually it is the Harm Principle playing an important role here as to protect long-term physical and psychological negative effects inflicted on the child having an underage sex, despite giving consent.

⁴⁶ They are still guilty of section 319. However, the offence is protecting the parents of the victim but not the victim herself.

of the crime. Therefore, because the defendant does not know that the victim is younger than 15, he has no intention to commit the crime of statutory rape. In 7233/2549, the victim was a mixed-race girl, and because of her appearance, the defendant believed that she was above 15 which in fact she was not. Therefore, the defendant was not guilty of section 277 but was guilty of the last paragraph of section 276 (gang rape). The defendants were each sentenced to 12 years imprisonment. However, if it is *de facto* consensual sexual intercourse and if the defendant believes that the victim is above 15, he will be guilty of neither section 276 nor 277.⁴⁷

In marked contrast, if the victim is below 13, the mistake of age is not a defence to section 277. The law was recently changed in 2015 by introducing section 285/1. Consequently, if the victim deceives the defendant that she is 16 years old, where she is in fact 12, and the defendant honestly and reasonably believes that she is over 15 and then has sex with her, he will be guilty of section 277 paragraph 3 imposing a more severe punishment. In this scenario, the child will not be considered as a 'legal' victim according to section 2 (4) of the Criminal Procedure Code and thus cannot lodge a complaint or prosecute the defendant by herself. However, as section 277 is a non-compoundable and public offence, the police can investigate, the public prosecutor can prosecute, and the Court can convict the defendant without requiring the 'victim' to initiate the case.

To put it in another way, one can be guilty of child rape even if he has no intention. This is very controversial, and as a criminal law scholar, I cannot support this amendment. My argument is that strict liability should never be used with an offence having a high level of censure and punishment such as rape.⁴⁸ This law basically follows the Sexual Offences Act 2003 of the UK and the same crime has been challenged on the ground of human rights violations (rights to fair trial and privacy) to the then House of Lords⁴⁹ and also to the European Court of Human Rights⁵⁰, despite being inadmissible.

⁴⁷ Supreme Court decisions number 19960/2555, 6405/2539, and 5176/2538.

⁴⁸ Andrew Ashworth, "Sexual Offences: Sexual Offences Act 2003 s.5 - Rape of Child under 13 - Defendant under 18," *Criminal Law Review*, Vol.10, 818, p.818 (2008); A. P. Simester, *Appraising Strict Liability* (Oxford: Oxford University Press, 2005).

⁴⁹ *R v G* [2008] UKHL 37.

⁵⁰ *G v UK* [2011] (Application no. 37334/08).



What if both the victim and the defendant are below 15?

If it is consensual sex, both of them will be the victim and the defendant at the same time. However, due to sections 73 and 74, a person below 15 will be automatically and unconditionally excused from any criminal liability. Therefore, no one would be convicted and punished. Likewise, if it is non-consensual sex, the one who forces the other to have sexual intercourse will be the sole defendant, but again because of the infancy defence, he or she will not be convicted.

B. Marital Status

It is always a crime to have sexual intercourse with a person below 15 unless one is the legal spouse of the child. This statement inevitably leads to the question that if the spouse forces his or her below-15 wife or husband to have sex with him or her, whether or not he or she will be guilty of rape. Obviously, he or she will not be guilty of section 277. Can we apply section 276 instead? To answer this question, we need to see what the relationship between the two sections is. It has been argued that, because of the poorly drafted amendment, marital rape in the case where the victim is under 15 is not a crime. This is because section 277 is the specific provision of section 276, therefore if it is a matter of sexual intercourse with a child; section 276 which is the general provision must give way to section 277.⁵¹ Even though it is quite absurd to think in this way, as marital rape is no longer a defence against section 276⁵², *a fortiori*, it should not be a defence of this, in a sense, more serious crime; this explanation is plausible and the law framers should soon amend the section again.

Moreover, according to the amended law, even if the defendant, who is below 18, and the victim, who is above 13, decide to marry each other with the court's permission, the law no longer fully excuses the defendant anymore. Section 277 paragraph 5 only allows the court to mitigate the punishment imposed on the defendant. It does not make much sense for the legislators to fully exempt the husband or the wife from being guilty of any crime when he or she forces his or her young spouse to have sexual intercourse.

⁵¹ Twekiat Menakanist, Annotated Penal Code, 35th edition (Bangkok: Vinyuchon, 2016) p.458 (written in Thai: ทวีเกียรติ เมนาคนิษฐ์, ประมวลกฎหมายอาญา ฉบับอ้างอิง, พิมพ์ครั้งที่ 35 (กรุงเทพ: วิญญาณ, 2559) น.458).

⁵² The law has changed since September 2007. Newly decided cases also confirm that the marital exemption no longer exists, see Supreme Court decisions number 302/2559 and 4355/2558.

3. Aggravated Cause/Consequence

Both rape and statutory rape provides higher punishment for the defendant if the defendant, as the result of raping the victim, causes death or grievous bodily harm,⁵³ given that the consequence is an ordinary one according to section 63.

There are many causes which will increase the severity of punishment; however, this paper will focus on two reasons which are gang rape, and when the victim is a person under the control of the offender.

A. Gang Rape

To be a gang rape; there must be at least two perpetrators, and at least two perpetrators must attempt to commit the crime. Please consider these examples:

One consent and one non-consent: If Adam has consensual sexual intercourse with Catherine, but after that without her consent, Adam holds Catherine's hands and let Bane penetrate her, Adam is just a joint-principal of Bane in committing rape contrary to sections 276 paragraph 1, 83. Neither of them is guilty of gang rape contrary to section 276 paragraph 3, for the penetration committed by Adam is legal.⁵⁴

One penetration: Anthony and Brad invade Cole's room to rape him and only Brad performs penile penetration of Cole's anus. However, Anthony restrains Cole to facilitate Brad's act. Anthony and Brad are equally guilty of rape contrary to sections 276 paragraph 1 as the joint-principal and the principal respectively. Neither of them is guilty of gang rape as there is only one penetration.⁵⁵

Three defendants, two penetrations: Arthur, Billy, and Dominic drag Cersei to a nearby forest. Arthur forces her to perform oral sex on his penis, while Billy commits a penile penetration *per vaginam*; however, Dominic just take off his clothes and stands by. Because his penis is not erect, he personally does not perform any penetration with Cersei. All of them, Arthur, Billy and Dominic, are similarly guilty of gang rape contrary to section 276 paragraph 3, the first two as principals and the last one is the joint-principal.⁵⁶

⁵³ Penal Code, ss. 277 bi and 277 tri.

⁵⁴ Supreme Court decision number 2073/2537.

⁵⁵ Supreme Court decision number 1202/2529 (Grand Chamber).

⁵⁶ Supreme Court decisions number 1403/2521 and 1313/2533.



Waiting nearby and taking a turn: First, only Albert enters Sue's room, and when he finishes raping her, Brooke enters the room and rapes Sue. They commit the crime together as they planned in advance; both of them are guilty of gang rape.⁵⁷ However, if they do not act in concert, they will be guilty of common rape (section 276 paragraph 1), but not of gang rape.⁵⁸

One penetration, one attempt: Antonio penetrates Beth's vagina while she is unconscious. Bosco places his penis on Beth's lips, but because his penis is not erect at that time, he does not penetrate Beth's oral cavity. Both Antonio and Bosco are guilty of complete gang rape contrary to section 276 paragraph 3 even though Bosco's conduct *per se* constitutes only attempted rape.⁵⁹ However, if Bosco only takes off her clothes and touches Beth's breast without trying to penetrate her, his act *per se* does not constitute even attempted rape; therefore, in the latter scenario Antonio will be guilty of rape contrary to section 276 paragraph 1 as the principal and Bosco will be equally guilty of the same crime as the joint-principal.⁶⁰

B. Section 285

If the victim is the defendant's descendant, a student under the care of the defendant, a person under control of the defendant due to an official duty, a person under authority, guardianship, or custodianship of the defendant, the defendant will be given a 1/3 higher punishment.⁶¹ However, it must be noted that, for a person to be sentenced to a higher punishment because of an aggravating fact, section 59 paragraph 3 and section 62 paragraph 2 require that the defendant must know of the fact.

The defendant's descendant is limited only to a biological descendant. If the victim is the biological child of the defendant and he knows of that fact, even though he is not the legally-assumed father of the victim, he will be given a higher punishment according to section 285.⁶² On the contrary, if the defendant is the step-father and has stayed with the victim every day since the victim was born but he is not the biological

⁵⁷ Supreme Court decisions number 8412/2557 and 7346/2557.

⁵⁸ Supreme Court decisions number 1965/2524 and 1444/2530.

⁵⁹ Supreme Court decisions number 3051/2525 and 3007/2532 (Grand Chamber).

⁶⁰ Supreme Court decision number 1202/2529 (Grand Chamber).

⁶¹ *The Penal Code*, s. 285.

⁶² Supreme Court decision number 2993/2530.

father of the victim, he will not be punished more severely by section 285.⁶³ Nonetheless, if the defendant is an adoptive father, he will be punished more severely, since the victim is under his legal authority but not because the victim is his descendant.

For a student under care, the victim must be under the care and control of the defendant. Having status as a student and teacher in the same institute is not enough to increase the punishment.⁶⁴ The defendant must have authority directly over the student-victim at the time the crime is committed; therefore, since a school principal has authority over every student during the school hours, if he rapes one of his students, even though he does not directly teach the student, he will be given a higher punishment.⁶⁵

Conclusion

This paper is not intended to be an analysis paper and it does not aim to propose new issues regarding rape offences in Thailand. Rather, it is the author's intention to introduce and explain the basics of the law on rape in Thailand to foreigners who are interested in Thai criminal law or foreign students/researchers who might wish to do a comparative research on Thai sexual offences but cannot access Thai literature and court decisions. I hope this might be a good starting point.

Having said that, I do believe many controversial points analysed in this paper are never deeply discussed by papers written in Thai. So, I also hope Thai readers will gain some benefits from reading this paper and engage more significantly on these "taboo" issues.

⁶³ Supreme Court decision number 219/2554.

⁶⁴ Supreme Court decisions number 9704/2539 and 421/2546.

⁶⁵ Supreme Court decision number 2693/2516.