

Determining the offense of indecent act to be a state criminal offense

Nawamin Kanjanarotphan¹, Achariya Chutinun²

^{1,2}Dhurakij Pundit University, Thailand, therok2007@gmail.com

ABSTRACT

The offense of indecent act according to Section 278, Paragraph one, is considered a critical criminal offense and the penalty is high. At present, it is a compoundable offense and it is the serious offense that has a serious negative effect on the rights and freedoms of the victim's body and mind. It also affects the entire society causing insecurity and fear. This is the violation of the rules of society that have been regulated in order for members of society to live altogether peacefully. If the victim does not complain within a specified period of time which results in the case to be precluded by prescription without receiving reasonable judicial remedies and to punish the offenders more severely and efficiently, the offense of indecent act should be defined as the state criminal offense. Although the indecent act is a personal offense aiming at truly protecting the injured person, the indecent act has a high penalty. It is also the action that is very criminal affecting the public, morality and the peace of the society entirely. Therefore, it is needed to impose a penalty that is proportionate to the offense and as a punishment to deter, threaten, repeat offenses or imitate. Adhering to this approach, it will help or prevent the issue of rape as well.

Keywords

Indecent act, assault, state criminal offense

Introduction

1.1 Background and significance of problems

In the current situation in Thai society, it can be said that the crime is significantly increasing. The social problems become more and more like a shadow especially the crime. Among all those problems, no one can deny that one of the crimes affecting the psyche of society is indecent offense. In some cases, serious bodily harm occurs and may be severe to death.

From the past to the present, the problem of indecent act is that women or boys or girls have been indecent everyday. This can be found in newspapers, media or social media. Going back from the past to today, the number of women or children who have been sexually assaulted in public places and in the secret places becomes more and more severe day by day. The number of more violence has not decreased in any way. The perpetrators are both adults and children. Looking it entirely, it can be said that at present, the perpetrators of indecent acts are at almost all ages.

It can be said that the problem of pornography has an impact on society. This causes fear and paranoia of the people in society which is no longer a personal offense because it is a highly criminal act affecting the society wholly. Therefore, the offense of indecent act should be an offense that cannot be compromised or that of the state criminal.

Indolence is the humiliation of sex or doing thing with vengeance and anger. All can be indecent, for example, the husband gets angry on his wife so he undresses the wife's clothes for people to see outdoors (Thaweekiat Meenakanit, 2020, p. 475). Doing indecent act is sexually indecent. Just hugging, kissing, petting and touching the body are indecent (Ibid, 2020, p. 475). The indecent act is an act with the purpose or intent of inducing or suppressing sexual desire or emotions of oneself and others such as hugging, kissing, petting, touching other people's genitals. The indecent act must be done on the body of the person, even on the fabric. Forcing a person to seize one organ improperly is an act of indecency (Kanit Na Nakorn, 2016, p. 543).

An offense of indecency is an offense established to protect the sexual right and freedom. It is the right to self-determine in sexual affairs (Ibid, 2016, p.543). Therefore, requiring a sexual offense to be lodged within three months of that sex offense is not a tool to help protecting the victim but it makes the victim be treated unfairly instead. Some victims are threatened with assault, murder, persecution or psychological threat causing fear in order not to disclose the story to other people. This is why the victim is repeatedly assaulted and it is found that the victim often agrees with various factors after notifying the incident regardless of relatives to make a request in reputation, receiving money, or because it has been performed by an authority.

The offense of sex is like a seal for the victim. It can be seen that despite the act of indecency, but if it is not in public, in a community, or in a crowded public place, it is indeed an offense that can compromise. Although many laws have been revised, they are unable to protect the victim as efficiently as it should. The punishment of the offenders is not strong and is not severe or it must take place in the presence of public which is an opportunity for the offender to take advantage of the gap in order to be free from what he has committed.

Related concepts and theories

2.1 Principles for determining personal offenses

Regarding the criminal offense, in principle, it must be an offense against the nation. In the event of a personal offense or what the law calls compoundable offense, it is an exception that requires specific laws with the statements that being compoundable must be compromised by the victims. Therefore, it means an offense that has a specific victim other than the state can be considered collectively damaged (Kiatkajorn Watjanasawat, 2006, p. 13). Thus, any offense is specified as compoundable offense. The law will specifically indicate an offense that is not a compoundable offense as national criminal offense (Kanit Na Nakorn, 2020, p. 122).

2.1.1 Concepts and theories in determining criminal liability

An offense of indecent act is common and exists with a number of fundamental concepts and theories in defining it. The concepts may be different or similar in each aspect. In order to understand this matter, the following principles are explained.

2.1.2 Concepts and theories in determining criminal punishment

Punishment is an act that is detrimental to the punished person who may be affected detrimentally on the body, mind, or property. This punishment is a tool for public judgment which consists of the following points. Punishment is a method involving pain, torture, as a result of judging by certain social values. In addition, many scholars have proposed the idea that punishment is an instinctive act. It is a complex process. Some crimes and acts are perceived as wrong causing the non-balancing society and harming the interests of individuals or members. The reaction of sanctions is thus contributing to the disruption of the equilibrium. As a result, punishment may be just one of many reactions to the violation of law (Atchariya Chutinan, 2020, p. 237).

2.1.2.1 Objectives and criminal penalties

1) To intimidate and deter offense

In punishing the offenders, there is a purpose that seems to be clear to deter repeated offenses of that person and to make others fear and not dare to imitate. The purpose called "general deterrents" is such as the introduction of the death penalty. The death penalty is believed to deter others from imitating crime as stated by Sir James Stephen (HMSO, 1653, p. 237). There are different types of punishment, such as flogging, imprisonment, laboring inmates, etc. These kinds of punishment have to do with the natural principle that man desires to be comfortable and avoid suffering. Therefore, punishment creates special deterrence. By this special restraint, it focuses on the perpetrators of their own fear of punishment and not dare to commit any more offenses in the future.

2) To cut off the ability to commit offense

Regarding the cutting off the ability to commit an offense, the imprisonment is to cut in capacity for the offenders not to commit another offense within the time he is imprisoned. Similarly, the death penalty is to cut off the ability of the perpetrator forever. Forfeiture of property used or in possession of an offense under Section 33 (1) of the Criminal Code is also consistent with this purpose. The injection to reduce sexual desire for offenders of rape is a new form of punishment used in some countries correspondent with this objective (Pokpong Sisanit, 2020, p. 204).

2.2 Factors in determining personal offenses

The compoundable offenses have the principles of prosecution mainly based on the will of the victims. The authority of the competent official and the power of the court can be obtained only when the victim makes a complaint. The grievance must be made within three months. Otherwise, the case will be precluded by prescription.

The compoundable offense contains three characteristics which are:

- 1.) It is an offense with less crime.
- 2.) It is a moral offense which is very personal matter to respect the will of the victim or have genuine personal legal virtue.
- 3.) It is an offense really intending to protect the victim.

However, in Thai legal system, to enact an offense as a compoundable offense does not seem to have a clear set of rules (Kanit Na Nakorn, 2020, p.122).

2.3 Legal virtue in the interpretation of criminal law

The "legal virtue" is not something that can be tangled using the five senses. However, it is the image in the mind which is an abstract. Especially, the legal virtue is something useful or something of value in the living of human beings in society.

In living peacefully of human beings in society, everyone must respect and not infringe on the interests or values of living altogether. Infringing on the interests or the value of living altogether violate the legal virtue. The legal virtue can be defined as followed.

Legal virtue means "benefit or value of living altogether protected by law" or "benefit protected by law".

One of the tasks of the criminal law is to protect legal virtue not to harm or be threatened. The renunciation of legal virtue is related to the legal virtue only individually. The private sector cannot waive the legal virtue that is a collective matter because it is a matter of public order in the society entirely. Regarding the collective legal virtue, a person has no power to waive (Ibid, 2020, p.149). Legal virtue is divided into 2 categories as follows.

(1) Personal legal virtue is life, physical safety, ownership of the person who owns this virtue. These may be able to allow others to violate but we have to consider whether the law truly aims to protect the private sector or not.

(2) Collective legal virtue is various security laws, labor protection laws, or offenses of rape in the presence of public acts under the Criminal Code, Section 281 (Thaweekiat Meenakanit, 2010, p. 161). The owner of this virtue cannot waive because the law aims to create peace to the public.

2.4 Human right and penalty

In accordance with the United Nations Universal Declaration of Human Rights, the brutal punishment and cruel treatment of offenders or prisoners are not promoted with two reasons. Firstly, the brutal punishment and the cruel treatment of the offenders inevitably cause unnecessary suffering. Secondly, such practice does not recognize the dignity of humanity. The brutality will be

harmful to both the criminal and the society. The criminal will suffer unnecessary suffering and will also result in the criminal to be stubborn, get used to or indifferent to punishment. It does not lead to fade while creating a moral deterioration in society making members not appreciate the value of humanity (Atchariya Chutinan, 2020, p. 232).

2.5 Principles of penalties appropriate for the offenders

The principles of punishment suitable for the offenders are that there must be a penalty that is suitable for the offender considering the fact that each human being has different ability to take responsibility. There are also different types of people who should be punished less or even without punishment at all. The concept of punishment directly aims at the offenders without wanting to affect other people. It aims to improve, correct, nurture the perpetrators' habits so that they can return themselves to good citizenship and return to society (Saleilles, 1968, p. 177). The punishment by making the offenders suffering hardship or experiencing bad effects in some cases are unsuitable for the perpetrator and are unable to make the offenders behave better. Proper punishment for wrongdoing is based on the concept that each human being's wrongdoing is determined by his personality, traits of the offenders, and external circumstances.

2.6 Principles for determining personal and national crime

Regarding the criminal law, when it comes to the nature of the law, it is classified as the public law on offenses and criminal penalties as a provision for the relationship between the private and the public. Although some crimes have been committed directly to the private sector to be damaged, such offense is still regarded as affecting the public as a whole. The government has to take action against and suppress without requiring anyone to complain (Jitti Tingsaphat, 2003, p. 2). This offense is called national crime. There is also another type of offense that must include the condition of the victim's prosecution. This manner of offense is called compoundable offense.

Foreign law

3.1 Japan

For the criminal prosecution in Japan, the private sector will not have the power to prosecute criminal cases on their own. The law provides that such duties belong to the public prosecutor. In prosecuting the prosecution, it is the principle of criminal proceedings at discretion. This allows the prosecutors to exercise their discretion widely. The criminal proceedings in Japan are to use the principles of criminal prosecution by the government. This is the state lawsuit (Dando Shigemitsu, 1965, p. 120) with the prosecutor representing the government in exercising power without a private prosecution system, prosecution by the police, grand jury system, or the data investigation system (Harittaya Vudhayakorn, 2010, page 88) by the judge. This

system is called the system of monopoly in prosecution power.

However, although the victims do not have the power to prosecute criminal cases themselves, they may complain to the prosecutor or the police in order to prosecute the perpetrator in the offense that is compoundable. When studying the evolution of the Criminal Code of Japan, it can be seen that the Criminal Code was initially dominated by French law. It was later dominated by German law making some crimes compoundable offenses. It is likely to hold the same rules as the German Criminal Code which is an offense that is a minor offense. The offense is that the victim has a legitimate interest in concealing a secret and such offense is a family affair (Ibid, 2010, p.89).

3.2 Federal Republic of Germany

The German Criminal Code is divided into two parts; general part and specific part. The general provisions comprise the basic assumptions of this code and the general rules applicable to all offenses. The provisions of specific part are the specific provisions related to individual offenses (Foster, Sule, 2010, p. 89). For the Federal Republic of Germany, any act that would be an offense must be the use of force or cause danger (Bohlander, 2009, p. 201). An offense of indecent acts as stated in the German Law is stipulated in the Criminal Code, Section 177, offenses of indecent act, sexual harassment, and rape.

Any act that would be an offense of indecent act, sexual harassment, and rape according to Section 177 would be an act of sexual act to another person or is it a sexual harassment against others. This is an offense under Section 177 whether such indecent act will occur by the offender to commit indecent act against the victim or a third party who is the perpetrator or even the offender's consent for the victim to commit their own offense. The act is also an offense under Section 177 of the German Criminal Code (Vawian Petcharat, 2018, p. 39).

Analyze the problem and the effect of determining an indecent offense as a compoundable offense

For an analysis of pornography liability under Thai criminal law, the researchers have analyzed the problems of various offenses that can be applied to the offenses of indecent offenses including solutions and suggestions for solving these problems.

If an offense of indecent act is defined as a compoundable offense, it will have both positive and negative consequences as follows:

(1) Freedom of the victim to decide to prosecute the offender

A compoundable offense is an offense that will affect the privacy and personal legal virtue of the victim greatly. Therefore, the victims should be free to decide if they wish

whether to prosecute the offenders or not if it is a person in the same family (Phatchara Hongsuwan, 2012, p.106).

(2) Participation of the victim in criminal proceedings

In a compoundable offense, the will of the victim is a condition that gives legal action to government officials. If the victim does not show the intention that he or she intends to prosecute the offender by not reporting the complaint, the investigation officers will have no power to investigate. The prosecutor will not have the power to prosecute the case to the court. Besides, if the offender is a member in the family, when there is the reconciliation to one another, the victim may not report a complaint in order to condone the offender.

(3) Receiving compensation for damages incurred

That the victim agrees to settle in an offense which can be settled under the terms of law is a case where offender is a family member to mediate and agree to the victim. The victim may inform the offender the suffering they have suffered and claim the damages arising from the commission of the offense. As for the offender, if it is the case of the family member, when the offender is aware of what he had done, he may agree to compensate the damage caused to the victim.

The researchers saw that the following aspects of the actions of the Supreme Court's judgments would be helpful in dividing any indecent offenses to be compromised and it was a state criminal that could be divided into 2 types:

1. The indecent act to be compoundable is in the case being far from rape.

Judgment of Supreme Court No. 5694/2541 (Thaweekiat Meenakanit, 2020, p. 279): Embrace the woman's shoulder without knowing each other before.

Judgment of Supreme Court No. 985/2546 (Ibid, 2020, p. 279): Pull the woman's pants off.

2. The indecent act that is a criminal offense will be in the immediate vicinity of rape.

Judgment of Supreme Court No. 233/2562 (Thaweekiat Meenakanit, 1988, p. 1961): Pretending to be husband of the woman to sleep with, striptease, and the woman feels awakened to escape is just an offense to indecent.

Judgment of the Supreme Court No. 2268/2529 (Ibid, 2531, p. 1961): Holding the female arm not to wriggle, crouching on the lower abdomen of the women with men in underwear is still not trying to rape.

For the appropriateness in determining an offense of indecent act as the state crime, the researchers think that the measure that can solve the problem would be to define an offense of indecent act as state criminal offense. It must be done by touching the genitals of the victim. If it is an indecent act without touching the genitals of the victim and far from being rape, it is still a compoundable offense.

However, in the matters of spouse or between husband and wife, if it is a lawful act between husband and wife, it can be regarded as related to the family institute. This indecent offense is considered inferior in content compared to the unity of the family. If all are considered the state crimes, they will yield bad effects in many aspects such as divorce problem, problems that occur to children, and the amount of cases proposed to the court.

Therefore, the researchers saw that the matters of spouses should be maintained. Adhering to this approach, it will help or prevent the issue of rape. When the benefit and punishment are weighed, if the indecent act is a compoundable offense, there are several ways that the victim may reconcile. Thus, when the benefits received are greater than the penalty, it inevitably leads to repeated offenses because the offender would have the impression that it was an offense that could be compromised by any means or gap. The criminals often weigh the benefit of the outcome and the disadvantage. If the results were greater than the disadvantages, it would likely lead to an offense. If the offense of indecent act is still a compoundable offense, it is indeed a problem that is deeply rooted in society and may cause more serious events to later.

Conclusion and recommendations

An offense of indecent act under Section 278, first paragraph, since the introduction of the Code on 1st April, 1957, is defined as a compoundable offense. If the victim does not report the complaint or even if the victim has notified the complaint for more than 3 months, the law will not be able to punish the perpetrator as well. Moreover, even if the victim reported the complaint and later the offender successfully negotiated the settlement of the victim, the criminal case will be terminated immediately making the offender have the base of indecent acts saved from criminal punishment. From this reason, the offense of indecent act which affects the body and mind as well as the feelings of the victim should be the compoundable state crime.

According to the study, it is found from the offense of indecent acts under Section 278, first paragraph, of the Thai Criminal Code that the age of the complaint is a condition of criminal proceedings. If it does not take place in public or causes the victims to be seriously harmed or died, the law defines it as a compoundable offense. That indecent act is regarded as one of the sources of rape. In the act of rape and sexual acts, there is always an indecent act. In this case, the researchers saw that although the indecent act is a personal offense aiming at truly protecting the victim, the indecent act has the severe penalty. In addition, it is an action that is very criminal affecting the entire society, morality and social peace. It causes fear and insecurity. Therefore, the penalty is needed to impose to be proportionate to the offense as a punishment to deter, threaten, repeat offenses or imitate. The act of indecency is to cause damage to the victim's body, mind, liberty and reputation. It is an improper act that should therefore be the state criminal offense.

The researchers thus proposes to amend the provisions of Section 278 by specifying a new offense in the second paragraph giving the nature of the indecent act under the

first paragraph by touching the genitals of any nature causing the perpetrated to become more punished.

If the commission of the offense under the first paragraph has been done by touching the genitals in any way, threatening anything, using any kind of force in which the person is in a state of being unable to resist or mislead that person as another person, the offender shall be punished with imprisonment of six months to ten years and a fine from ten thousand baht to two hundred thousand baht.

Section 278, the original second paragraph should be the third paragraph.

References

- [1] Kiatkhajorn Watjanasawat. (2006) Explanation of Criminal Law, Section 1 (9th edition). Bangkok: Jirarat Printing.
- [2] . (2016). Criminal law, offense section (11th edition). Bangkok: Winyuchon.
- [3] Kanit Na Nakorn. (2020) Criminal law, general section (7th edition). Bangkok: Winyuchon.
- [4] Jitti Tingsapat. (1988). Explanation of Criminal Law, Section 2, Part 1 (5th edition). Bangkok: Legal Education Bureau of Thai Bar Association.
- [5] Thaweekiat Meenakanit. (2020). Criminal Code Reference (43rd edition). Bangkok: Thammasat University.
- [6] Pokpong Sisanit. (2020). Advanced criminal law. (3rd edition). Bangkok: Winyuchon.
- [7] . (2020). Human rights Bangkok: Winyuchon.
- [8] Phatcharaphorn Hongsuwan. (2012). Causes of criminal cases to be settled: study some of the basic offenses between husband and wife. Master's thesis Faculty of Law. Dhurakij Pundit University. Bangkok.
- [9] Vawiwan Petcharat. (2018). Meaning of Indecent Acts under the Criminal Code. Master's thesis. Faculty of Law. Thammasat University, Bangkok.
- [10] Haruthai Wutthayakorn. (2010). Age, grievance, rape and compressive obscene: Study only in case of the victim is a minor. Master's thesis, Faculty of Law. Dhurakij Pundit University, Bangkok.
- [11] Atchariya Chutinan. (2013). Criminal Law, section of offense (5th edition). Bangkok: Dhurakij Pundit University.
- [12] . (2020). Criminology and penology (4th edition). Bangkok: Winyuchon
- [13] . (2019). "Jurisprudence in the interpretation of criminal law of Thailand".
- [14] Sutthiparithat Journal. Year 33. Issue No. 107 July - September.
- [15] H.M.S.O. Report of the Commission on capital Punishment, Command Report 8432. London: n.p., 1653.
- [16] Michale Bohlander. "Principles of German Criminal Law" Oxford; Portland, Oregon: Hart Publishing, 2009.
- [17] Nigel Foster, Satish Sule. "German legal system and laws." Fourth Editon. Oxford: Oxford University Press, 2010.
- [18] Raymond Saleilles, the Individualization of Punishment, 2015.