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Chiang Mai University Law Review

The vision of Chiang Mai University Law Review (CMULR) was designed to improve the quality of legal and social research at Chiang Mai University and in Thailand. CMULR may be the only Thailand law review with faculty/peer review of articles and notes, and a collaborative review of the publication process. Potential employers recognize that CMULR student members have learned how to conduct large amounts of legal research, to write a persuasive document to support a legal argument, and have proven editing skills, which shows their commitment to an intellectually demanding activity.

CMULR understands that its members and its readers are well-educated and that a purpose of the CMULR is to attract new and brilliant students to the Faculty of Law by providing them a unique legal education in Thailand which endorses the learning of the law in English, research without plagiarism, and excellent academic writing, all which surpasses other legal educational facilities.

CMULR is committed to initiating and encouraging legal scholarship in Thailand. CMULR provides the opportunity for the students to build connections within the legal community that may lead to important work after graduation. The role and position of Thailand's premier law review was the hope to foster a culture where the publication process is not an end in itself but a stepping stone to other scholarly endeavors.

CMULR is committed to the development of law and society in Thailand and Southeast Asia. Its objective is to promote critical thinking and social progress and to maintain itself as an objective and accurate source of legal information. Law Review membership is a prestigious one and students may strive to become a part of this scholarly organization.

CMULR is now a faculty and student-run legal journal. It focuses on articles and notes relating to Thailand and international comparative law. The publication is distributed online at the Chiang Mai University Faculty of Law website.

In summary, the long term vision is that students would join CMULR if they feel proficient in English, have a desire to improve research and writing skills, footnote accurately, understand uniform citations and prepare a document that the student can be proud of and publish.

A Note from the Editor-in-Chief



As Editor-in-Chief, I am delighted to introduce Chiang Mai University Law Review (CMULR) second issue, Volume 2. It is a vehicle for delivery of timely and thoughtful information and opinion on many areas of law. CMULR is a faculty and student-run legal journal that focuses on articles relating to Thai law which are of interest to the students in the Faculty of Law.

Additionally, our focus this year is team work of student member along with preparing younger member for the next year. More importantly, this law review is a stage/ an opportunity for people in legal community to express their vision that could contribute community. Therefore, we welcome all readers to explore these issues.

CMULR looks forward for submissions from members of the legal community including lawyers, judges, academia, researchers, experts and students. Submissions may be in the form of articles, essays, notes and comments on legal, social, cultural, political, human rights and international relation issues effecting Thailand.

Finally, on behalf of my fellow members, I would thank Dean of the Faculty of Law, Assistant Prof Dr. Pornchai Wisuttisak and Former Dean of the Faculty of Law, Assistant Prof Chatree Rueangdetnarong who granted us this special opportunity. Also, Assistant Dean, Foreign Affairs, Dr. Usanee Aimsiraun and Head of European – ASEAN Legal Studies Unit, Kanya Hirunwattanapong for all the support and encouragement, Dr. Pedithep Youyuenyong and Dr. Ploykaew Porananond for comments and suggestion to members of this law review, lastly and most especially Foreign Legal Expert, Susan Billstrom, J.D. for everything from the beginning of this law review until publication. This law review would not possible with your words of encouragement. Let this law review be a path for the next generation members to express their vision again.

From us to the world,
Thank you,
Pawarut Kerdnin, Editor-in-Chief

Helmet Hundred Percent in Chiang Mai University

by

Pawarut Kerdnin*

Abstract

Motorcycle accidents are among the leading causes of mortality in Chiang Mai. In fact, the World Health Organisation rates Thailand as world's deadliest country for fatalities on motorcycles, citing an average of 5,500 motorcyclist deaths annually. Moreover, on the average two students from Chiang Mai University (hereinafter known as "CMU") have died per year due to head injuries sustained while not wearing a helmet and being involved in motorcycle accidents. Therefore, CMU and Chiang Mai Traffic Police Division are attempting to increase the level of helmet wearing in CMU. However, firm rules and law enforcement remain unimplemented. Furthermore, students often do not wear helmets while they were ride their motorcycles. This paper intends to point out the value of the university student and the solutions to this problem. Injury and death due to motorcycle accidents, while not wearing a helmet is a national crisis.

Introduction

Thousands of people in Thailand lose their lives due to head injuries. Significantly, the total number of motorcycles in Thailand is about 20 million which means almost a third of the population owns a motorcycle. In February, 2016, a total of 20,342,403 motorcycles were registered in Thailand¹. Many of the deaths were based on uncertain circumstances and peoples lack of safety awareness various factors, for instance, ineffective law enforcement and the effect of motorcycle advertising (safety or the safety of others). As a result of those factors, Thailand is second rank in the world in terms of traffic fatalities, with 44 deaths per 100,000 people in accordance with the statistics from The University of Michigan Transportation Research in the United States².

In a speech delivered by the former Minister of Transport of Thailand, Mr. Wan Muhammad Nor Matha during an opening ceremony of a Road Safety Audit Conference held in Bangkok on June 14, 2001, he stated that "...the number of Thais who were killed during all war that our country has been engaged in are still far less than the number of people died because road accidents, we can no longer let this serious matter rest..."³

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1 จำนวนรถจดทะเบียนสะสม ณ วันที่ศูนย์กลางข้อมูลภาครัฐแบบออนไลน์, กรมการขนส่งทางบก (๒๙ ก.พ. ๒๕๕๙), Number of Vehicle Registered in Thailand, Central opening government data online under the Open Government License – Thailand, Department of Land Transport (Feb. 29, 2016),

<https://data.go.th/DatasetDetail.aspx?id=21372366-e78b-4d4a-b040-8a702eced5f> (last visited Feb. 15, 2017).

2 Michael Sivak and Brandon Schoettle, Mortality from Road Crashes in 193 Countries: A Comparison with Other Leading Cause of Death, University of Michigan's Transportation Research Institute, file:///C:/Users/HP/Downloads/102989.pdf (last visited Apr. 24, 2017).

3 Yordphol Thanaboriboon and Thaned Satiennam, Traffic Accidents in Thailand, IATSS Research Vol. 29 No.1 (2005), p.89

On January 1, 2016, Thailand became an official member of the ASEAN Economic Community (hereinafter known as the “AEC”). Significantly, Thailand is first in road cash fatality in ASEAN⁴ since 2014. “...the World Health Organisation rates Thailand as world’s deadliest country for fatalities on motorcycles, citing an average of 5,500 motorcyclist deaths annually.”⁵ Therefore, public safety ought to be seen as a concern of university public policy because of the enlarging population of the ASEAN student in the Thai university community.

From 2006 until 2015, 149 people who died in motorcycle accidents were not wearing helmets in Chiang Mai province.⁶ Furthermore, on average two Chiang Mai University students died every year.⁷ As a result, in 2015, CMU Administration⁸ established the “Helmet Hundred Percent in CMU” campaign (hereinafter known as the “Helmet Campaign”). This campaign is intended to increase the wearing of helmets while riding motorcycles in CMU which may result in fewer students losing their lives or sustaining injuries from motorcycle accidents. Furthermore, Associate Professor Ronnaphob Uaphanthasath, M.D., Assistant to the President for Student Development and Student Affairs stated that CMU will collaborate with Chiang Mai Traffic Police Division to enforce the Road Traffic Act, B.E. 2522 (1979) effectively at the front gate and back gate areas.⁹

Value of the University Student to Thailand

The university is the door to endless opportunities for people who seek to practice personal skills and develop their abilities to increase to a more valuable level of proficiency, increasing their employability and earnings in the job market. However, if a university student dies or sustains injury due to a motorcycle accident, the job market will inevitably lose a valuable resource. The university graduate, in Thai society is known as a “*pundit*”¹⁰ and is an invaluable part of the Thai quality labor market. Furthermore, the university is a part of human resource development

4 *Id.*

5 Foreign travel advice Thailand, Gov. UK, (May 30, 2017), <https://www.gov.uk/foreign-travel-advice/thailand> (last visited June 1, 2017).

6 สถิติคดีอุบัติเหตุการจราจรทางบกจังหวัดเชียงใหม่,สาเหตุจากไม่สวมหมวกกันน็อก, สำนักงานสถิติแห่งชาติ พ.ศ. ๒๕๔๙ ถึง ๒๕๕๘, The Situation of Traffic Accident Cause of The Accident in Chiang Mai Province, Thai National Statistical Office, Not wearing helmet from 2006 to 2015 [sic], <http://service.nso.go.th/nso/web/statseries/statseries21.html>, (last visited Dec. 16, 2016).

7 เฉลี่ยปีละ ๒ ศพ ม.ช. เพิ่ม ๑ มี.ค. ปรับจริง น.ศ.ไม่สวมกันน็อก,ไทยรัฐออนไลน์, (๒๓ ก.พ. ๒๕๕๘, เวลา ๑๘:๑๔)ม, On averagely 2 deaths CMU take action

8 About CMU: CMU Administration, Chiang Mai University, <http://www.cmu.ac.th/en/encmuboard.php?id=6&typid=2> (last visited Mar. 8, 2017).

9 Traffic Accident Cause, *supra* note 6, at para. 3.

10 Oxford Advance American Dictionary, Oxford University Press, (2011) “pundit: a person who knows a lot about a particular subject and who often talks about it in public”.



Student life is relevant because the student learns how to be a productive person. They may become potentially relevant people in the country. Furthermore, many ASEAN students live, study and work in Thailand. Therefore, as a host country, Thailand and its universities ought to concern themselves about international and national students' safety equally while they study in Thai universities. This means Thailand should be concerned about the human capital of other countries, as they are about their own.

Exemplar of Barack Obama

The 44th President of United states of America, He graduated from Harvard Law School where he excelled as a student, graduating magna cum laude and winning the election as president of the prestigious Harvard Law Review for the academic year 1990-1991. Although Obama was a liberal, he won the election by persuading the journal's outnumbered conservative staffers that he would treat their views fairly, which he is widely acknowledged to have done. As the first African American president in the long history of the law review.¹¹

Noticeably, a lot of things matter in university life. Obama dedicated his time at the university to develop his abilities for his future and became president of American from 2008 to 2015. Furthermore, in May, 2014, Obama released his ideal version of a transportation bill¹². The proposal has a specific provision that would allow the federal government to push for a mandatory helmet law¹³. Conceivably, each of the students in CMU will become one essential part of the Thai society, such as, police officer, teacher, doctor, truck driver or policy maker. By the same token, they could be Prime Minister/President and have substantial influence with calling for the enactment and enforcement of helmet laws. However, the development process will not matter if students do not wear helmets while riding motorcycle and sustain injuries or death. Consequently, the best thing to do is to wear the helmet.

Reasons Students do not Wear Helmets

In the 2016 academic year, CMU had a student population of approximately 36,000 persons¹⁴ who studied, lived at, and/or commuted to CMU. Most of them ride motorcycles for

11 Barack Obama: Life Before the Presidency, Miller Center of Public Affairs, University of Virginia, <http://millercenter.org/president/biography/obama-life-before-the-presidency> (last visited Dec. 16, 2016).

12 Added by Chris Callen on, *Obama Calls for Helmet Laws*, MRF News (May 7, 2014), <http://cyclesource.com/newsblog/?p=21660> (last visited Dec. 14, 2017).

13 *Id.*

14 รายงานสถิติจำนวนนักศึกษา, ภาคเรียนที่ ๑ ปีการศึกษาที่ ๒๕๕๙, จำนวนนักศึกษาที่มีสถานภาพ, สำนักทะเบียนและประมวลผล, มหาวิทยาลัย

transportation. Motorcycles are convenient for parking near class room buildings, canteens, CMU store, CMU main library, stadium or dormitories. The reasons for not wearing helmets are set forth as follows:

- Students are in a hurry.
- Helmets do not look good and/or are too sweaty, annoying, irritating.
- Students are just riding a short distance.
- Helmets are inconvenient to carry.
- Helmets might create a bad effect to the hair style.

Unfortunately, while motorcycles are the top selected transportation in CMU, 62 percent of riders occasionally rode motorcycles in university routes without helmets, statistics by Chiang Mai University Student Council, 2015¹⁵. Due to the fact that motorcycles are the most selected option of the majority of the student population in CMU, the wearing of helmets problem is a meaningful concern of the CMU Administration and Chiang Mai Traffic Police Division.

Effective Helmet Campaign

As a matter of fact, students are vigilantly watched by faculties of CMU. Each of the faculties is supervised by The Office of the CMU Council¹⁶, as per the Chiang Mai University Act, B.E. 2551 (2008), (hereinafter known as the “CMU Act”)¹⁷, due to a number of deaths caused by not wearing helmets. Therefore, CMU Administration endorsed the Helmet Hundred Percent campaign in 2015. However, after this campaign was promoted, students still did not wear helmets in CMU on a consistent basis. As a result, this campaign has not completely impacted the community. Although, CMU Administration does not have the authority as the Police Department does, which is the power to appoint officers to arrest or charge those students who were riding without a helmet under the CMU Act.¹⁸ However under the Declaration of Chiang Mai University, through the implementation of the Organize Vehicle Using Declaration, B.E. 2551 (2008) (hereinafter known as the “Declaration”) states that rider and passenger must wear a safety helmet while riding in and out, and always while riding CMU.¹⁹

เชียงใหม่, *Statistical report of CMU student*, (Semester 2016), available student status, Registration Office, Chiang Mai University, <https://www3.reg.cmu.ac.th/mis-reg/misreport/indexb.php> (last visited Dec. 14, 2017).

15 สภานักศึกษามหาวิทยาลัยเชียงใหม่, รายงานสรุปผลสำรวจ: การสวมหมวกนิรภัยขณะขับขี่รถจักรยานยนต์ของนักศึกษา, ๒๕๕๗, Chiang Mai University Student Council, *Helmet wearing survey report of CMU student*, (2014) available at Chiang Mai University Student Council office, CMU.

16 พระราชบัญญัติมหาวิทยาลัยเชียงใหม่ พ.ศ.๒๕๕๑, มาตรา ๒๕, Chiang Mai University Act (TH 2008), sec. 25, <http://web.krisdika.go.th/data/law/law2/%c103/%c103-20-2551-a0001.pdf>, (last visited Dec. 14, 2017).

17 *Id.* at sec. 7.

18 *Id.*

19 ประกาศมหาวิทยาลัยเชียงใหม่เรื่องการใช้รถและมาตรฐานการบังคับผู้ฝ่าฝืนระเบียบมหาวิทยาลัยเชียงใหม่ว่าด้วยการจัดระเบียบการใช้รถในพื้นที่มหาวิทยาลัยเชียงใหม่, ข้อ ๘, Declaration of Chiang Mai University by implementation of Organize Vehicle Using B.E. 2551(2008), art. 8, http://www.arc.cmu.ac.th/facmu_news/doc/4903.pdf, (last visited Apr. 10, 2017).

Moreover, it is compulsory to act in accordance with this Declaration, as stated in article 15: “the Director of Security and Organize Vehicle Using Center authorized to issue tickets for whomever violates the regulation, declaration or order, whichever is bound by the Declaration in Chiang Mai University, and fines (no more than 400 baht) or expenses, attached thereto.”²⁰ However, no CMU employee is authorized to issue tickets at this time. This has been in process for 2 years. According to the Declaration, Article 1, Paragraph 17: the compulsory administrative fine due to infractions of this Declaration refers to the Ministerial Regulation, Volume 10, B.E. 2542 (2008) “which allows the fines as set forth above, which is attached to the declaration.”²¹ In summary, today the police are not allowed to issue tickets and fines for not wearing a helmet in CMU. However, the traffic police at the police checkpoint at the front and back gate may issue tickets and fines.

Conversely, the Traffic Police Department has the authority to fine a person who violated the helmet law on the “path”²². Only the police officer is authorized to enforce the helmet law section under The Road Traffic Act, B.E. 2522 (1979) stating in Section 140:

...when the traffic officer or competent official finds by oneself or by using any device that the driver violates or fails to comply with the provisions of this Act or other law concerning such conveyance, he or she may give a warning or issue a traffic ticket requiring the driver to pay determined penalty fine. Conjointly with section 122 the motorcycle driver and passenger must wear crash helmets for safeguarding while driving and traveling.²³

According to the meaning of the “path” which is present in The Road Traffic Act Section 4(2), the roads in CMU do not qualify as paths because CMU does not allow people entrance to campus publicly referring to the Thai Supreme Court Decision No. 790/2523.

Notwithstanding the above, the Helmet Campaign has been promoted around CMU, signs have been posted, and the helmet law has been implemented, perhaps without enforcement. Yet, the CMU community continues to habitually ride a motorcycle without a helmet; due in part to the police officer’s lack of enforcement and “bury your head in the sand”²⁴ attitude to enforcement of the helmet law, including established traffic check points on public roads. Moreover, police officers usually use the excuse that the “Traffic police have no budget”.²⁵

20 *Id.* at art. 15.

21 *Id.* at art. 1, para. 17, ดูเพิ่มเติม: กฎกระทรวง ๑๑๐ พ.ศ.๒๕๔๒, see: Declaration, Article 1, Paragraph 17, (TH 2008), <http://regu.tu.ac.th/quesdata/Data/A1010.PDF> (last visited Apr. 10, 2017).

22 The Road Traffic Act, B.E. 2522 (TH 1979,) sec. 4(2) “Path” means a road, lane, bus lane, road shoulder, pavement, pedestrian crossing, junction, ramp, bend, bridge, and public square used in traffic, and includes private path where the owner allows the public to use in traffic, or where the traffic officer announces to be a path under this Act, but not includes a railroad.

23 *Id.*, at sec. 140.

24 Cambridge Online Dictionary: “bury your head in the sand”: To refuse to think about unpleasant facts, although they will have an influence on your situation”, <http://dictionary.cambridge.org/dictionary/english/bury-have-your-head-in-the-sand#translations> (last visited Feb. 15, 2017).

25 Charlie Claxton, Chiang Mai City Life, *Far From Safe Thailand Traffic as Fatal as ever, Where are the cops?* para. 12, <http://www.chiangmaicitylife.com/citylife-articles/far-from-safe-thailands-traffic-as-fatal-as-ever/> (last visited Feb. 15, 2017).

Solutions for Chiang Mai University

To date, the CMU Administration and Chiang Mai Traffic Police Division are aware of the lack of helmet phenomenon in CMU. The students have remained unwilling to change. Therefore, the solutions to this problem shall be separately stated in the spheres of internal performance, external performance, changes to the existing laws, CMU implement new regulations and habitual awareness.

Internal Performance

The provisions of CMU Act, Section 44, states CMU must assure quality education in order to develop quality and the standard of the university through university regulation. During the development process if the student becomes sick, disabled or dead due to a motorcycle accident, those students shall not able to develop their skills effectively, resulting in the decrease of quality and standard of university. Therefore, preventing the motorcycle accident is under the provision of this Act. CMU should shape a regulation that if any CMU students whether they are driver or passenger are riding a motorcycle without wearing helmet, shall not be given permission to enter the university. Give the authority to the CMU officer to record the student number, eliminate the right to request CMU gate permission, take a photo of the motorcycle identification number/license, and surveillance by CCTV or camera.

Moreover, if any CMU student repeats this infraction, this should become a part of their permanent record which may be a scholarship consideration based upon the fact that the student did not follow this small rule in the university, habitually. Thus, the scholarship recipient has to bear the consequences of whichever national or international scholarship that may apply. As a part of the speech of Admiral William H. McRaven²⁶ at University of Texas at Austin 2014 Commencement Address, he stated that "...the little thing in life matter, if you can't do the little thing right, you never will do the big thing right..."²⁷

External Performance

Indeed the Traffic Police is the authorized group to implement and enforce the helmet law. As an administrative officer subsidized by Royal Thai Police, it is under the control of the executive branch. Therefore, the Traffic Police officers who are responsible for "paths" around CMU should set the policy to enforce the helmet campaign, create traffic check points around CMU, and expand the use of CCTV/cameras and actually fine people who are in violation of the law. The proceeds of the fines may be utilized to pay for the CCTV and the extra police enforcement at the traffic check points. The expensing of the money from the fines must be transparent to the community.

26 Commander of United States Special Operation command: *William H. McRaven Biography*, para. 4, <https://www.utsystem.edu/chancellor/biography> (last visited Apr. 11, 2017).

27 Admiral William H. McRaven speech, *Commencement Address at University of Texas at Austin* (2014), <https://www.youtube.com/watch?v=pxBOLFLei70&t=58s> (last visited May 19, 2017).

Habitual Helmet Awareness

Habitual awareness is a form of automatic and routine behavior. It is behavior that people repeat because they feel comfortable and they believe what they will do is a right decision. It is efficient to do something by habit, and not to constantly reason with oneself about what is the best thing to do²⁸. The best period of time to teach habitual behavior to a child is during the first five year old of child's life. During this critical development period, the parent's behavior is the role model of child, as Dr. Klein stated: "*Parents of toddlers are under constant observation*"²⁹. For instance, when a parent rides bicycle or a motorcycle wearing a helmet at that time they are under observation. As a result of observation, the child may be aware of the helmet due to follows a four step process: watching and listening, processing the information, attempting to copy a behavior, and practicing³⁰. Therefore, parents should wear helmets in order to subliminally encourage the child to model the same behavior for the child's safety in the future.

Changes to the Existing Laws

Amend the Road Traffic Act, Section. 4(2) that establishes the meaning of "path" to include the university roads. The meaning of path should be expanded to include internal road in CMU. This would enable the CM Police to enforce the helmet law at CMU. The Police would then be required to ticket and fine students, faculty, staff and other visitors to CMU for violation of the helmet law. More importantly this would enable to fines received to fund and supports the CCTV. Therefore, the Road Traffic Act ought to be amended to extend the meaning of path.

CMU Implement of New Regulations

The CMU Act, Section 25(3) has authorized the General Administration Section to coordinate with relevant departments to draft rules, regulations and declarations for the university. Therefore, the CMU Council ought to amend the Declaration by implementation of Organize Vehicle Using by adding Article 14.7, in Chapter 3 that the permanent record of violation is compulsory for a scholarship consideration.

28 Evaluation of Energy Behaviour Change Programmes, frame work, useful theory, *Habitual Behaviour* [sic], http://www.cres.gr/behave/framework_theory_2.htm (last visited Apr. 11, 2017).

29 Chana Stiefel, *What Your Child Learns By Imitating You*, Around the House, para.2, <http://www.parents.com/toddlers-preschoolers/development/behavioral/learning-by-imitating-you/>, (last visited Apr. 11, 2017). See also: Why it is important to share and act on this information, *Child Development and Early Learning*, para. 2, <http://www.factsforlifeglobal.org/03/index.html>, (last visited Apr. 11, 2017).

30 *Id.* at para. 10.

The Crime of Rape in Thailand

by

*Surampha Thongsuksai**

Abstract

Rape is one of the most violent crimes. It remains widespread around the globe causing multi-dimensional critical effects to victims. There are rape cases which are reported to police in every region of Thailand. The statistics by the Royal Thai Police indicates that reported rape cases are decreasing every year. However, there is also research that indicates that there are actually more non-reported rape cases than reported cases. This legal research paper will focus on situation of rape in Thailand and discuss the issue of media reports of rape in newspapers, rape scenes on television, the justice system and victim's attitude toward the justice system. This research will demonstrate how important and critical the rape situation is in Thailand and solutions to decrease rape in society.

Introduction

The crime of rape is one of the most violent crimes which appear all around the world. It causes multi-dimensional critical effects to victims both psychologically, such as, depression, distrust of others or dissociative identity disorder, etc., and physically, such as, urinary infections, pregnancy, sexually transmitted diseases (HIV, genital warts, etc.). Rape crime is a global problem and has been reported in various countries regardless of socioeconomic status.¹ In Thailand, there are laws to protect rape victims and punish rapists. According to Constitution of the Kingdom of Thailand of 2017, Section 28, Paragraph 1: “a person shall enjoy the right and liberty in life and body...” and Paragraph 4: “a torture, brutal act or punishment by cruel or inhumane means shall be prohibited”.²

In the Criminal Code (TH 1956), Title IX, offences relating to sexuality: The general meaning of rape is in Section 276 Paragraph 2:

The sexual intercourse in accordance with the first paragraph means an act done with the intention to gratify the sexual desires of the offender by using the sexual organ of the offender to do by any means to the sexual organ, anus or mouth of another person, or by using any object to do by any means to the sexual organ or anus of another person.³

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1 Samantha Gluck, *Effects of rape: psychological and physical effects of rape*, <https://www.healthypace.com/abuse/rape/effects-of-rape-psychological-and-physical-effects-of-rape/> (last visited on June. 15, 2017).

2 รัฐธรรมนูญแห่งราชอาณาจักรไทย พุทธศักราช 2560, Constitution of the Kingdom of Thailand, (TH 2017) <https://drive.google.com/file/d/0B8qyXUJ2gK-ARDBNNEllbHBRREk/view> (last visited on Apr. 15, 2017).

3 พระราชบัญญัติให้ใช้ประมวลกฎหมายอาญา พ.ศ.๒๔๙๙ มาตรา ๒๗๖(๒) Criminal Code, B.E.2499 (TH 1956), sec. 276 (2) <http://web.krisdika.go.th/data/law/law4/%BB06/%BB06-20-9999-update.pdf> (last visited on Feb. 12, 2017).

In Thailand in 2016, there were 697 cases reported to Pavena Foundation for children and women, increasing from year 2015 (658 cases). The youngest victim was 1 year 5 months, raped and murdered by step-father. The oldest victim was 78 year old, raped by a neighbor.⁴

This legal research paper will focus on situation of rape in Thailand and discuss the issue of media reporting rape in newspapers and rape scenes on television which may affect the attitudes towards rape. It will also address the justice system and how the victims feel about justice system and the underreporting of the crime. This research will demonstrate how important and critical the rape situation is in Thailand and how rape might be decreased in our society.

Situation of Rape as Portrayed through the Media

Television contributes significantly to attitudes on rape. There are many Thai dramas showing rape scenes and violence that makes it as acceptable behavior for some reasons, such as, for revenge. There are some scenes in Thai television dramas that make it appear to be alright to rape female lead character, whom the male lead character thinks she had previously committed some bad act. Therefore, as a punishment makes it look like she deserves to be treated that way. Most storyline starts with hatred. The male and female lead characters hated each other beginning.

As the story goes they began to love each other. Before getting to the point they love each other, the female lead character usually has gone through sexual harassment from the male. They start with the kiss and ended up raping the female. Instead of that being condemned, the male is praised by other characters for being romantic. TV dramas have a major impact to Thais; therefore, it leads people to have attitude towards gender discrimination and sexual abuse as something common.

Rape Culture is an environment in which rape is prevalent and in which sexual violence against women is normalized and excused in the media and popular culture. Rape culture is perpetuated through the use of misogynistic language, the objectification of women's bodies, and the glamorization of sexual violence, thereby creating a society that disregards women's rights and safety.⁵

There is a campaign regarding unpublished "tempted" rape myths that are the norm. The campaign is requesting TV dramas to stop presenting rape scenes, has attracted more than 60,000 signatures. These signatures symbolize that a lot of people agree with this idea. Nitipan Wiprawan, who launched this campaign asked associate producers and TV media to stop creating, launching or re-running, and also deprive rewards of TV dramas with rape

4 สรุปลสถิติมูลนิธิปวีณาหงสกุลเพื่อเด็กและสตรี (องค์กรสาธารณประโยชน์) การรับเรื่องขอความช่วยเหลือและเรื่องราวร้องทุกข์ประจำปี พ.ศ.๒๕๖๐, มูลนิธิปวีณาหงสกุลเพื่อเด็กและสตรี, <http://www.pavenafoundation.or.th/index.php/stat-profile/annualreport> (last visited on Jan. 30, 2017).

5 Rape Culture, <http://www.marshall.edu/wcenter/sexual-assault/rape-culture/> (last visited on Feb. 04, 2017).

scenes.⁶

Justice System Fails Rape Victims

The law enforcement does not reliability as it should be. A lot of women do not report their rape cases to the police. There were 13,412 cases reported to police in the period from 2009 to 2013.⁷ Statistics issued jointly by the National Research Institute and the National Police Bureau show that a woman or child is raped in Thailand almost every 15 minutes. The three groups committing the most rapes were:

1. Step fathers
2. Friends of the victims and
3. Neighbors (step fathers being the worst culprits).

The foundation cited several main reasons for rape - male dominance in society over women; media influence such as scenes on television soaps showing leading men raping women; rapists with mental problems who themselves were abused as children; the influence of drugs in society; and the vulnerability of some rape victims.⁸

In addition, some men who are rapist are also the murderers of the victims. After committing the crime of rape, they attempt to cover it up by then committing the murder. This high rate of rapes cases establishes the fact that rape is a serious crime in Thailand. There are news articles regarding rape reported in newspapers and/or on television. For example: The gruesome murder took place at the victim's apartment room in Tambon Kaeng Khoi, Kaeng Khoi district of Saraburi on Friday night. He said he decided to slip into the victim's room after the light in her room was off by unlocking the door from the inside through a gap in the window mesh. He admitted he tried to rape her but she resisted his attempt and cried for help so he decided to use a knife which he carried with him to slash her throat.⁹

Under-reporting is due to multiple of factors whether it be social attitudes that often blame victims that dress provocatively or lack of trust in judicial system. In some cases, the woman is intimidated by the step father or friend or neighbor. Most of the rape victims are women, however, there are just a few female police officers. In addition, a lawsuit for rape

6 Nitipan Wiprawit, *Abolition of rape seduction motto is normal*, (3/26/2014), <https://www.change.org/p/nbtcupdate-เลิกเพยแพยคดีการล่อลวงข่มขืนว่าเป็นสิ่งปกติ-supinya> (last visited on Feb. 04, 2017).

7 *Rape at the national level, count*, Knoema, <https://knoema.com/atlas/Thailand/topics/Crime-Statistics/Assaults-Kidnapping-Robbery-Sexual-Rape/Rape-count>, (last visited on Feb. 06, 2017).

8 *Shocking Thai rape statistics*, Thaivisa News, (Aug. 01, 2016), <http://www.thaivisa.com/forum/topic/35352-thaivisa-daily-news-thaivisa-daily-news-shocking-thai-rape-statistics-1-august/> (last visited on Feb. 06, 2017). See also: *A woman or child is raped every 15 minutes in Thailand - study shows*, Thaivisa News, <https://www.thaivisa.com/forum/topic/935171-a-woman-or-child-is-raped-every-15-minutes-in-thailand-study-shows/> (last visited on June 27, 2017).

9 *Man arrested for killing a schoolteacher in rape attempt*, Thai PBS Reporters, (Jul. 03, 2016), <http://english.news.thaipbs.or.th/170925-2/> (last visited on Feb. 09, 2017)

takes a long time. The questions that the police will ask are information about before and while an incident is occurring. For example, what did the offender do, how was his behavior, could the victim resist and where are wounds, etc.¹⁰ All of these questions may make victims uncomfortable to tell a “shame” story that just happened and discuss these matters with the police.

This makes victims afraid to report crimes and some victims think that it is difficult for victims to seek justice in Thailand, as is indicated by this rape victim’s interview:

Khwan, the victims that State Railway of Thailand (SRT) employee raped her on a train, said that the process of judgment has to be modified. At first when she reported a crime, female police officer refused to take a report and didn’t receive a well-treated. When she was in court, she felt like she was raped again. The question of defense attorney hurt her feeling and reduce humanity values such as, what is offender’s penis size or how long is it. The question should be moderated and make the victim feel better, not the other way around. Besides, Yaowalak (Khwan’s lawyer) said: The problem is police officer didn’t take a report and claim that a case isn’t in jurisdiction. Some personnel in process judgment had a prejudice against women and made victims didn’t get a truly fairness.¹¹

Presently, the most severe penalty for rape is the death penalty, when the commission of the offence causes death to the alleged victim. A few years ago, there is terrible news regarding the rape and murder, of 13-year-old girl, who was raped and thrown from overnight train which was widely criticized in Thai society.¹² Many people call for the death penalty for all rapists without sentence reduction. There are both strengths and weaknesses to this claim. If the claim passes, those who think of committing the crime of rape may not commit it and this punishment will act as a deterrent. In other cases, the rapist may kill victims to hide the rape. However, this legislation may not be enacted as two out of three countries in the world abrogate the death penalty in upholding the fundamental right to life that is enshrined in Article 3 of the Universal Declaration of Human Rights: “Everyone has the right to life, liberty and security of person... No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”¹³ Thailand is a one of country that remains the death penalty in law. However, in practice the death penalty has not applied since 2009.¹⁴

10 Pol.Col.Pakin Na Ranong, (Feb. 10, 2017). Telephone interview.

11 เสียใจจากเหยื่อ...เมื่อกระบวนการยุติธรรมข่มขืนซ้ำ, โพสต์ทูเดย์, <http://www.posttoday.com/analysis/report/306056> (last visited on Feb. 12, 2017).

12 Kocha Olarn and Hilary Whiteman, *Thailand horrified after 13-year-old girl raped, thrown from train*, (Jul. 10, 2014), <http://edition.cnn.com/2014/07/09/world/asia/thailand-teen-train-rape/> (last visited on Feb. 13, 2017).

13 Universal Declaration of Human Rights, (1948), art. 3 and art. 5, http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf (last visited on June 12, 2017).

14 ยุติโทษประหาร (Terminate the death penalty), <https://www.amnesty.or.th/our-work/death-penalty> (last visited on June. 24, 2017).

Offence of Rape: Thailand Criminal Code

Pursuant to the Thai Criminal Code¹⁵, the punishment for rape can range from a fine to life in prison. Listed below are the punishments from the least severe to the most severe:

Whoever commits sexual intercourse with any person by threatening by any means, by doing harm, by exploiting a situation in which such person is unable to resist, or by causing such person to mistake the offender for anyone else...¹⁶

...or whoever commits sexual intercourse with a child not yet over fifteen years of age who is not wife or husband, irrespective of having consent of such child shall be liable to imprisonment from four years to twenty years and fine of eight thousand baht to forty thousand baht.¹⁷

...sexual intercourse with a child not yet over thirteen years of age, the offender shall be liable to imprisonment from seven years to twenty years and a fine of fourteen thousand baht to forty thousand baht, or imprisonment for life.¹⁸

The penalty is increased if committed by carrying or using gun or explosive, by commission in the company of persons in the nature of destroying a female or a male¹⁹, committed in the company of persons in the nature of destroying a girl or a boy without consent of such child, by carrying gun or explosive or by using weapons²⁰ or if the commission of the offence according to the first paragraph of section 276, or the first or second paragraph of section 277 or if the commission of the offence according to the third paragraph of section 276, or the fourth paragraph of section 277, causes grievous harm on the alleged victim or death to the alleged victim.²¹

Solutions to Minimize Rape in Society

- Improve the justice system.

There are few female police officers in Thailand. In 2014, there are 216,958 police officers. 200,637 (92.48%) are male officers. There are just 16,321 (7.52%) female officers.²²

15 พระราชบัญญัติที่ใช้ประมวลกฎหมายอาญา พ.ศ.๒๔๙๙ Criminal Code, B.E. 2499 (TH 1956)

16 *Id.*, sec. 276.

17 *Id.*, sec. 276, sec.227.

18 *Id.*, sec.277

19 *Id.*, sec. 276.

20 *Id.*

21 *Id.*, sec.277 bis, sec.277 ter.

22 ยุทธศาสตร์การบริหารทรัพยากรบุคคล ของสำนักงานตำรวจแห่งชาติ พ.ศ.๒๕๕๗-๒๕๖๖ (Human Resource Strategy of Royal Thai Police 2014 – 2023), สำนักงานตำรวจแห่งชาติ, <http://www.human.police.go.th/download/310757.pdf> (last visited on June. 24, 2017).

By contrast, most rape victims are women. The female police officer comfort female victims better as said by Police Lieutenant General Amarin Akarawong, the academy's director. "Female victims of crime will feel more comfortable with a female officer." Increasing female officers may result in the number of rape cases reported.²³ However, most importantly all officers should be educated about how they should treat and comfort the victims. Then, ensure that legal system punish the criminal who committed the crime, not the victim, by investigating without gender discrimination or bias towards the rape case.

- Change attitude towards rape.

Create gender equality attitudes. Most of victims often blame herself that she is a cause of problem, for example, "I was raped because I dress provocatively." or "I walked alone in the dark at night." Do not be afraid to report a crime. All people should be supported in reporting crime. The purpose of enforcement of criminal laws is to protect public health and safety. Further, improve attitudes not to violate women. In addition, stop producing or broadcasting television dramas with rape or sexual violent scenes. The most important thing is to respect others. This should be part of our education since childhood.

- Men and women combat Rape Culture.

Avoid using language that objectifies or degrades women.

Speak out if you hear someone else making an offensive joke or trivializing rape. If a friend says she has been raped, take her seriously and be supportive. Think critically about the media's messages about women, men, relationships, and violence.

Be respectful of others' physical space even in casual situations. Always communicate with sexual partners and do not assume consent. Define your own manhood or womanhood.

Do not let stereotypes shape your actions and join a student or community group working to end violence against women.²⁴

23 Thomas Bell, *Thailand to recruit first women police officers*, The Telegraph, (Jan. 23, 2009), (<http://www.telegraph.co.uk/news/worldnews/asia/thailand/4320591/Thailand-to-recruit-first-women-police-officers.html>) (last visited on June. 25, 2017).

24 *Rape Culture*, Women's Center, <http://www.marshall.edu/wcenter/sexual-assault/rape-culture/> (last visited on Mar. 06, 2017).

The Death Penalty in Thailand Should be Abolished

by

*Prakan Pitagtum**

Abstract

The purpose of this Essay is to consider problems and purposes of death penalty in Thailand, as retribution, deterrence and incapacitation that may not accomplish the reduction of criminal rates. The death penalty breaches the Universal Declaration of Human Rights (1948) and a mistaken judicial decision may lead to the execution of an innocent person. It compares the Statistics of Murder Rates in Death Penalty States and Non-Death Penalty States in the United States of America, and in Thailand, the Organic Act on Counter Corruption B.E. 2542 (1999) which includes the death penalty Section 123/2, as amended by the Organic Act on Counter Corruption B.E. 2558 (2015). The purpose of death penalty has failed and breaches the basic of human “right to life”. Thailand should be concerned and begin to reflect on the damages and failures of purpose of death penalty and look forward to the idea of eliminating the death penalty, with Hong Kong and Macau as models of the abolishment of the death penalty and as countries with lower crime rates than Thailand, which still retains the death penalty.

Introduction

The first death penalty laws in world history originated in approximately 18 century B.C. and can be found in the Code of King Hammurabi of Babylon. “In the fifth century B.C., the Roman Law of the Twelve Tablets also contained the death penalty...Death sentences were carried out by such means as beheading, boiling in oil, burying alive, burning, crucifixion, disembowelment, drowning, flaying alive, hanging, impalement, stoning, strangling, being thrown to wild animals, and quartering (being torn apart)“.¹

“A death penalty is the sentence of execution for murder and some other capital crimes (serious crimes, especially murder, which are punishable by death). The death penalty, or capital punishment, may be prescribed by...legislature for murder and other capital crimes”.²

In the history of Thailand during the Rattakosin period, the “Law of Three Seals” was codified during the reign of King Rama I in 1805³. There were 21 different kinds of death penalties and usually were the result of rebellion or defamation insults or threatens to nobility and royals. Many of the executions were very cruel, for example, smashing the

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1 History of Death Penalty Laws, Find Law, (2017), <http://criminal.findlaw.com/criminal-procedure/history-of-death-penalty-laws.html> (last visited on Apr. 5, 2017).

2 Death Penalty Law and Legal Definition, <https://definitions.uslegal.com/d/death-penalty-law/> (last visited on Apr. 23, 2017).

3 โทษประหารชีวิต : หลักคิดด้านสิทธิมนุษยชน (2014), พ.ต.อ. วันชัย ศรีนวนลัด, http://118.174.12.141/document/documents/documents/Individual_Study_227.pdf, (last visited on May 6, 2017).

head until the brain is visible and then a very hot iron ingot was inserted into the brain⁴. “Execution methods were changed in 1935 to death by firing squad. In 2003, execution methods changed again. This time to the use lethal of injection and the last executions in Thailand were in 2009”.⁵ The death penalty remains the formal form of execution in Thailand today.

In 2016, 104 countries abolished the death penalty for all crimes:

- 7 countries abolished for ordinary crimes only
- 34 countries abolished in practice
- 57 countries retain the death penalty.⁶

Thailand is one of 58 countries which retains the death penalty. Death penalty or capital punishment in Thailand is a legal penalty under the Criminal Code (TH 1956), Section 18, Article 1.⁷ The death penalty may be a punishment for 36 crimes. The death penalty is an authorized punishment according to the Criminal Code, which includes, but is not limited to:

- Offences against the king, the queen, the heir-apparent and the regent
- Offences against the internal security of the kingdom
- Offences against the friendly relation with foreign states
- Terrorization
- Malfeasance in judicial office
- Offence relating to causing public danger
- Offence causing death, relating to sexuality
- Offence of extortion, blackmail, robbery and gang-robbery
- Drug trafficking
- Corruption⁸

The research to date has tended to focus on criminal punishment as retribution, deterrence and incapacitation, rather than a human rights violation. However, the purpose of this essay is to analyze and consider the problems of death penalty in Thailand, any human rights violations which may exist and any alternative forms of punishment.

4 จำเป็นหรือไม่เหยียวยาสังคมด้วย “โทษประหารชีวิต”, ผู้จัดการรายวัน, <http://www.manager.co.th/Daily/ViewNews.aspx?News-ID=955000126985> (last visited on May 6, 2017).

5 Capital Punishment - Execution in Thailand, <http://thaicriminology.com/execution-in-thailand.html> (last visited on Apr. 23, 2017).

6 Death penalty, <https://www.amnesty.org/en/what-we-do/death-penalty> (last visited on June 6, 2017).

7 พระราชบัญญัติให้ใช้ประมวลกฎหมายอาญา พ.ศ.๒๔๙๙ มาตรา ๑๘ Criminal Code, B.E.2499 (TH 1956), sec. 18, art. 1, <http://web.krisdika.go.th/data/law/law4/%BB06/%BB06-20-9999-update.pdf> (last visited on Apr. 23, 2017).

8 *Id.*

Thailand Death Penalty

There are 4 possible purposes of for jail and/or prison sentences in Thailand:

1. Retribution: for revenge and punishment that someone deserves because they commits a crime.
2. Deterrence: the threat of punishment deters people from engaging in illegal acts.
3. Reformation: for change habit of convicted people.
4. Incapacitation: prevents future crime by executed.⁹

1. Retribution: The primary reason of the death penalty may be “retribution”. Retribution is another word for revenge to violent crimes. However, the desire for vengeance may be obsolete for human beings and perhaps revenge against someone who was convicted is not the best way to resolve the problem. The injured person or victim may not receive anything from the death of convicted person except only the feeling of revenge and of satisfaction. Moreover, to agree with the revenge for capital punishment may ultimately mean support and encouragement to violate human rights in order to feel revenge or satisfaction. However, does this really reduce the crimes?

2. Deterrence: In Thailand, the death penalty may be a punishment for 36 crimes. According to the chart below, it may be shown that the death penalty does not necessarily reduce criminal rates as the state suggests. For example, statistical analysis of the murder rate in the United States of America are set forth below:

Statistic of Murder rate in Death Penalty states and Non-Death Penalty states in USA

Year	2000	2001	2002	2003	2004	2005	2006	2007
Murder Rate in Death Penalty States	5.70	5.82	5.82	5.91	5.71	5.87	5.90	5.83
Murder Rate in Non-Death Penalty States	4.25	4.25	4.27	4.10	4.02	4.03	4.22	4.10
Percent Difference	35 %	37 %	36 %	44 %	42 %	46 %	40 %	42 %
Year	2008	2009	2010	2011	2012	2013	2014	2015
Murder Rate in Death Penalty States	5.72	5.26	5.00	4.89	4.95	4.72	4.75	5.15
Murder Rate in Non-Death Penalty States	4.05	3.90	4.01	4.13	4.09	3.88	3.70	4.13
Percent Difference	41 %	35 %	25 %	18 %	21 %	22 %	28 %	25 %

Source: www.deathpenaltyinfo.org

Deterrence: States Without the Death Penalty Have Had Consistently Lower Murder Rates

⁹ Vichai Dechutipong, *Pros and Cons of Death Penalty in Thailand* (page 9), http://elib.coj.go.th/Ebook/data/judge_report/jrp2555_10_25.pdf (last visited on Apr. 23, 2017).

Therefore, as show in the above chart, the death penalty does not appear to reduce the murder rate and does not deter crime. According to the statistics of the murder rate in the U.S.A. from 2000-2015, non-death penalty states reflects a murder rate less than death penalty states.

3. Incapacitation:

Incapacitation refers to the effect of a sentence in terms of positively preventing the sentenced person from committing future offenses. This concept is different from the theory of specific deterrence in which an offender is punished to make him/her understand the specific consequences of his/her offense. Incapacitation aims to prevent future crimes by taking away the offender’s ability to commit offenses.¹⁰

It may be possible to prevent future crime by execution in the event that a suspect does not kill anyone, however, does commit a crime that the law provides shall be punished by death, which results in the suspect, having been found guilty of the non-homicidal crime, is sentenced to death. It appears unreasonable because for some crimes which are not nonviolent, the person who committed the offense should not be punished by death, for example, crimes under the Amendments, which became effective on July 12, 2015, of the Organic Act on Counter Corruption B.E. 2542 (1999) (hereinafter commonly known as the “Anti-Corruption Act”).¹¹

The Anti-Corruption Act Section 123/2 “state officials or foreign officials or people working for international organizations who call for or take bribes in return for malfeasance or negligence in duty for the benefit of bribers, shall be punished with imprisonment of five to twenty years or life imprisonment and fined one hundred thousand to four hundred thousand Bath or by death”.¹²

Thailand Corruption Rank 2012-2016



Source : www.tradingeconomics.com : *Transparency International*

10 Incapacitation [Sentencing] Law and Legal Definition, <https://definitions.uslegal.com/i/incapacitation-sentencing> (last visited on Apr. 23, 2017).

11 John Frangos and Michael Ramirez, *Thailand: Important Amendments to the Counter-Corruption Act*, (8/17/2015), <http://tulleke.com/resources/thailand-important-amendments-counter-corruption-act> (last visited on May 7, 2017).

12 พระราชบัญญัติประกอบรัฐธรรมนูญ ว่าด้วยการป้องกันและปราบปรามการทุจริต (ฉบับที่ ๓) พ.ศ. ๒๕๕๘, The Organic Act on Counter Corruption, B.E. 2542 (TH 1999), amended by the Organic Act on Counter Corruption B.E. 2558 (TH 2015), https://www.nacc.go.th/download/article/article_20150914114130.pdf (last visited on Apr. 23, 2017).

As shown in the above chart: “Thailand is the 101 least corrupt nation out of 175 countries, according to the 2016 Corruption Perceptions Index reported by Transparency International. Corruption Rank in Thailand averaged 69.91 from 1995 until 2016, reaching an all-time high of 102 in 2013 and a record low of 34 in 1995”¹³. The Anti-Corruption Act was implemented in 2014, however, in 2016 ranking of corruption has increased to 101. Some believe this is due to the new military regime.¹⁴

Human Rights Violations

The death penalty may be stated to be “cruel and inhuman” punishment which violates two essential human rights. In Thailand, the main religion is Buddhism, which teaches followers to abstain from killing. Moreover, Constitution of Kingdom of Thailand 2017, sec. 4: “Subject to the provisions of this Constitution, human dignity, rights, liberties and equality Thai people shall be protected under this Constitution”.¹⁵

According to the United Nations, Universal Declaration of Human Rights (1948) (hereinafter known as the “Declaration”), Article 3: “Everyone has the right to life, liberty and security of person” and Article 5: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”¹⁶. Moreover, Thailand is one of 48 countries voted in favor of the Declaration and Thailand has joined UDHR regarding 10 treaties, such as, CAT - Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, CERD - International Convention on the Elimination of All Forms of Racial Discrimination¹⁷.

Therefore, Thailand has joined UDHR and this is reflected in the Constitution (2017), Section 4 that “human dignity, rights, liberties and equality shall be protected under constitution”¹⁸ included in which are the existing international obligations.

In addition, the death penalty is irreversible. The decision to use the death penalty against someone who was found guilty in a court of law, may lead to an innocent person’s death. For example, “Cameron Todd Willingham was executed in 2004 for allegedly setting fire that killed his three daughters. After he was convicted of the crimes and was executed, evidence revealed that Todd did not set the fire that

13 Thailand Corruption Rank, Trading Economics, <http://www.tradingeconomics.com/thailand/corruption-rank>, (last visited on May 7, 2017).

14 John Fernquest, *Why does corruption continue to plague us?*, Bangkok Post, (Jan. 31, 2017), <http://www.bangkokpost.com/opinion/opinion/1190017/why-corruption-continues-to-plague-us>, (last visited on June 5, 2017.)

15 Constitution of Kingdom (TH 2016), sec. 4, <http://www.ratchakitcha.soc.go.th/DATA/PDF/2560/A/040/1.PDF>, (last visited April 23, 2017).

16 Universal Declaration of Human Rights, (1948), art. 3 and art. 5, http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf, (last visited on Apr. 23, 2017).

17 Reporting status for Thailand, United Nations Human Rights Office of The High Commissioner, http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/countries.aspx?CountryCode=THA&Lang=EN (last visited on May 7, 2017).

18 Pakorn Nilrapunt, *Thailand’s Constitution of 2014*, <https://www.constituteproject.org/constitution/thailand.pdf> (last visited on Apr. 23, 2017).

caused their deaths”¹⁹. However, he had already died. Moreover, the result of his wrongful conviction and execution, may also have caused his innocent family members to suffer his wrongful death.

In Thailand there has been a suspicious case that the convicted might be innocent. In the Koh Tao Double Murder Case: “Two Myanmar migrant workers have been sentenced to death after being convicted by a Thai court of the 2014 murders of two young British tourists on a holiday island in a case mired in controversy and a dispute over DNA testing”²⁰ and during the March 1, 2017 appellate court decision upheld the death sentence of the two Myanmar migrant workers for murder of two British on Koh Tao in 2014.²¹

Although this case has many facts in dispute, such as, the “DNA taken from the alleged murder weapon, a garden hoe, does not match the DNA of the two Burmese men on trial for murder”²² and alleged police forced confessions. “The two Myanmar nationals claimed that during their interrogation police tortured them including by stripping, beating, kicking and threats of electric shocks to extract confessions.”²³ Given these disputes, it appears that two of convicted suspects might be innocent.

Non-Death Penalty Countries

As previously stated, in 2016, 104 countries have abolished the death penalty for all crimes.²⁴ For example, one country in Asia, China, with the separate jurisdictions of Hong Kong and Macau, set forth as follows:

Hong Kong and Macau are separate jurisdictions under the Chinese “one country, two systems” principle, and both of these countries have now abolished the death penalty.

Capital punishment effectively ceased in Hong Kong before its formal abolition. The last execution took place there in November 1966, when the authorities put a convicted murderer to death.

The Hong Kong government formally abolished the death penalty after the Legislative Council voted in favour of legislative measures to abolish it in 1991 and April 1993. The sentences of all those who had been condemned to death at the time were commuted to life imprisonment. Before its abolition,

19 Cameron Todd Willingham, *Innocent and Executed*, <http://camerontoddwillingham.com> (last visited on Apr. 22, 2017).

20 The straitstimes, *Thai double murder*, <http://www.straitstimes.com/asia/se-asia/thai-double-murder-two-get-death-penalty> (last visited on Apr. 22, 2017)

21 Feliz Sol omon, *Pair Convicted of Koh Tao Murders Have Lost an Appeal Against the Death Penalty*, (3/1/2017), <http://time.com/4688100/thailand-koh-tao-murder-death-penalty> (last visited on June 12, 2017).

22 Jon Ferquest, *Koh Tao Murders: No DNA match says Dr. Pornthip*, (9/3/2015), <http://www.bangkokpost.com/learning/learning-news/689964/koh-tao-murders-no-dna-match-says-dr-pornthip> (last visited on June 12, 2017).

23 Thailand: *Torture claims in Koh Tao murder case must be investigated*, (12/24/2015), <https://www.amnestyusa.org/press-releases/thailand-torture-claims-in-koh-tao-murder-case-must-be-investigated> (last visited on June 12, 2017).

24 *Death penalty*, <https://www.amnesty.org/en/what-we-do/death-penalty/> (last visited on June 6, 2017).

capital punishment was mandatory in Hong Kong for murder, treason and piracy with violence.

Macau was a Portuguese colony until it was returned to the People's Republic of China on 20 December 1999. The last execution took place in Macau during the 19th century. The death penalty was abolished in both Portugal and Macau under the 1976 Portuguese constitution. Furthermore, Article 39(1) of the Penal Code of Macau (law 11/95/M), which was adopted in 1995 after consultation with the Chinese government, states that: "There shall not be a death penalty nor perpetual penalties or security measures of unlimited or undefined duration."²⁵

Hong Kong formally abolished the death penalty in 1993 and now Hong Kong has a crime rate very low in comparison with Thailand, which still retains the death penalty and has a higher crime rate than Hong Kong for violent offenses.²⁶

And another example from other country from Europe that has abolished the death penalty is the Netherlands:

The last execution for murder in the Netherlands took place on the 31st of October 1860 when 27 year old Johann Nathan was hanged. Capital punishment for murder was abolished 10 years later on the 17th of September 1870. It continued in force for treason and military offences and war crimes. Thirty nine people were executed for war related crimes, the last being W.A. Albrecht on the 21st of March 1952. Abolition for these crimes came on the 11th of April 1982. Protocol No. 6 was adopted on the 1st of May 1986.²⁷

Moreover, "Netherland steadily declining crime rate that resulted five prisons will close in the next few year because there isn't enough of it to fill prisons and cost of maintaining them is too high".²⁸

The results of this study indicates that the death penalty may not actually obtain the desired results as proposed by the judicial intent of the purposes of the death penalty. Moreover, the death penalty does not appear to deter crime. Retribution and incapacitation are violations of the Human Right Declaration and execution the convicted person may have the consequence of killing an innocent person.

25 History of the death penalty in Hong Kong and Macau, https://www.amnesty.org.hk/en/our-work/abolish-death-penalty/history_of_death_penalty_in_hong_kong_and_macau (last visited on Apr. 18, 2017).

26 Asia Crime index, https://www.numbeo.com/crime/rankings_by_country.jsp?title=2017®ion=142 (last visited on Apr. 18, 2017).

27 The end of capitol punishment in Europe, <http://www.capitalpunishmentuk.org/europe.html>, (last visited on June 5,2017).

28 Frida Garza, The Netherlands keeps having to close its prisons due to a lack of prisoners, (3/22/2016) <https://qz.com/644914/the-netherlands-keeps-having-to-close-its-prisons-due-to-lack-of-prisoners>, (last visited on June5, 2017).

Solutions

In order to abolish the death sentence in Thailand, the Thai government should change the laws, step by step.

- Firstly, the government should look for statistical information and assistance from human rights organizations, such as, Amnesty International (Thailand), the National Human Rights Commission or the United Nation Offices of High Commissioner for Human Rights.
- Secondly, the government should consider the damage resulting from the death penalty and failure of purpose of the death penalty and should provide information to people on how important it is to abolish the death penalty and give examples regarding the abolition of death penalty in other country, such as, Hong Kong and Macau. Also the Netherlands crime is very low.
- Finally, The National Assembly of Thailand should authorize new legislation and amend the Criminal Code to abolish the death penalty. Then look for peaceful means and processes to replace the death penalty from the newly amended law, such as, the person who was sentenced to death, may have the sentence commuted to life imprisonment and/or, arranged conditions for life imprisonment reduction according to the seriousness of the offense committed.
- Since under the present military regime, which is unlikely to pass such legislation, democratic elections should be held in order to have an elected Parliament which may be more favorable to such amendments to the present Criminal Code.

Prostitution in Thailand: Should Female Prostitution be Legal?

by

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Prostitution in Thailand is illegal. The Thai government has enacted the laws which made prostitution illegal. However, pursuant to Thai history, the rate of problems increased because Thai laws have weaknesses. The causes for failing to solve the problem by law is that prostitution is not only a legal problem, it is an economy, societal, capitalist, policy and income problem. The laws have not solved the problems. As a result, some people think one way to solve the problems is by making prostitution or sex work legal; however, most Thai people disagree with the legalization of prostitution. This essay considers if female prostitution should be legalized in Thailand through an analysis of female prostitution problems, prostitution history, Thai laws regarding prostitution, a comparison between the liberal and the conservative sides, and the best way to solve the problems.

Introduction

Thailand is identified as a source, transit, and destination country for human trafficking and the sex trade, and its capital, Bangkok, is notorious for being the “World’s Sex Tourism Capital”. Sex trafficking and the sex trade, in which thousands, if not millions are exploited, is an ever-growing problem in Thailand and one of the world’s most critical human rights issues.¹

Prostitution and sex trafficking in Thailand are illegal according to Thai laws, and this presents significant issues which the government attempts to solve, from the past to present. The one way to solve the problem is by making prostitution or sex work legal; however, pursuant to Thai history since 1960, most Thai people disagree with the legalization of prostitution.² They resist this change in the law because Thailand is a Buddhist society which has an ingrained culture and a conventional tradition. If the government created an amendment to the law which made prostitution legal, it may create a conflict and destroy the good image of society within and outside Thailand. From two conflicting sides, there is a question as to whether legal prostitution is appropriate for Thai society or not.

History

In Thailand, there is evidence that the history of prostitution began in the Ayutthaya Kingdom. In the Ayutthaya Kingdom, BE 2398 (1855) there existed a place for prostitution

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1 Rachel Carter, *Sex Trade & Trafficking in Thailand*, (2017), <http://infoagr.am/sex-trade-and-trafficking-in-thailand>, (last visited on Jan. 4, 2017).

2 พงษ์ธร สำราญ, *Legal problems concerning the prostitution in massage parlour*, p.4, <http://eprints.utcc.ac.th/1838/3/1838summary.pdf> (last visited on Jan. 4, 2017).

called Sampheng and the owner was required to pay a tax to the government.³ The prostitute in this period was a slave or woman who was taken by an official or a landowner to sell her for sex. After that, Thailand enacted the Bowring Treaty in B.E.2398 (1855) (Treaty of Friendship and Commerce between the British Empire and the Kingdom of Siam) which made social changes in the administration, migration of Chinese and repealed slavery during the reign of King Rama 5⁴. At this time there were a lot of poor people. As a result, prostitution increased and extended to many other cities. The government in this period enacted a Road Maintenance Act in the reign of King Rama 5 and charged money from the owner of a prostitute and the prostitute as well⁵. Therefore, in Thai history, from Sampheng to the Bowring Treaty to the Road Maintenance Act, prostitution was never deemed illegal, it was simply taxed by the Thai governments.

In B.E. 2437 (1894) the Road Maintenance Act was abolished. Thereafter, in B.E.2473 (1930) Thailand amended the Law of Three Seals Act which allowed husband to have many wives. As a result of the amendments to the Act, and the language: 1 man and 1 woman only could marry, many ex-wives found themselves outside of a marriage and therefore it was necessary to find work, and in many cases as a prostitute. Apart from that, a lot of rural women were cheated or tricked into prostitution. However, the government then enacted the Thailand Prevention and Suppression of Prostitution Act, BE 2503 (1960).⁶ As a result, prostitution became illegal. The history from past to perhaps the present, the causes of the high rates of prostitution and sex trafficking exist in Thailand.

Thai Law regarding Prostitution

Although, Thailand abolished Thailand Prevention and Suppression of Prostitution Act B.E. 2503 (1960), there remains many important laws to provide criminal enforcement and punishment for prostitution, for example:

1. Constitution of Thailand, B.E.2559 (2016)
 - 1.1 General Provisions section 4, 5
 - 1.2 Rights and Liberties of the Thai People section 27, 29, 30, and 31⁷
2. Thailand Penal Code
 - 2.1 Offence relating to sexuality section 276, 277, 277bis, 277ter, 282, 283, 283bis, 284 and 286
 - 2.2 Offence against liberty and reputation section 310, 310bis, 312ter, 317, 318, 319 and 320⁸

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 ร่างรัฐธรรมนูญแห่งราชอาณาจักรไทย พ.ศ. ๒๕๕๙ B.E.2559, Draft Constitution of Thailand (TH 2016), http://www.rd.go.th/publish/fileadmin/user_upload/kormor/newlaw/dc616.pdf

8 ประมวลกฎหมายอาญา พ.ศ. ๒๔๗๙ B.E.2499, Criminal Code (TH 1956), (last visited on Jan. 10, 2017).

3. Thailand Prevention and Suppression of Prostitution Act B.E. 2539 (1996) (hereinafter known as TPSPA) section 5, 6, 7, 9, 10, 11, 12⁹
4. Anti-Trafficking Persons Act B.E. 2551 (2008)¹⁰

Failing to Solve the Problem

Although there are laws and acts for solving prostitution problems, the rate of problems has increase because Thai laws have weaknesses. The Thai Criminal code specifically states the illegality of prostitution, however, it has a weakness because it does not allow for litigation with an accomplice. In addition, there is no reliable measure for establishing the income of the prostitute. Apart from that, the TPSPA states a penalty for the defendant, however, it is limited to a “mistake” as defined by law. This act has a purpose to penalize someone who concerned with prostitution. The prostitute could be found guilty for the contact, persuading or advertising prostitution or mingling in a place of prostitution. Other prostitution is not defined by law. You are guiltless.

“Each year, around 10 million tourists arrive in Thailand. It is estimated that approximately 60% of the tourists who visit Thailand are males, and of those, 70% come specifically for sex. That means that in the past few years, approximately 4,200,000 men came to Thailand for the sex industry.”¹¹ In addition, in a 1996 survey, the Public Health Ministry conducted a survey that recorded that there were 7,318 sex establishments all over Thailand, including: brothels, massage parlors, karaoke bars, discotheques, night clubs, bars, and restaurants.¹²

The cause of failing to solve the problems of prostitution by law is not only a legal problem, it is a prostitute’s problem, a problem about attitude because some families do not support prostitution, the prostitute does not have an opportunity for study, or had a family with poverty problems. Another problem is economy and societal: a problem about attitude and values in society because in the past, men could have many wives and prostitution which was legal. Moreover, capitalism problems may enhance values about luxury living which could make someone agree with prostitution. Finally, policy and income also add to problems that may lead to an increase of prostitution problems.¹³

Comparison between the Two Sides

Liberal side: Support Making Prostitution Legal

In Thailand, prostitution is illegal but the rate of prostitution continues to increase.

9 พระราชบัญญัติป้องกันและปราบปรามการค้าประเวณี พ.ศ. ๒๕๓๙ BE 2539, Thailand Prevention and Suppression of Prostitution Act (TH 1996)

10 พระราชบัญญัติป้องกันและปราบปรามการค้ามนุษย์ พ.ศ.๒๕๕๑ B.E 2551, Anti-Trafficking Persons Act (TH 2008)

11 Rahab Ministries, *Prostitution in Thailand*, p.1, http://www.wouk.org/rahab_international/pdf_files/Prostitution%20in%20Thailand.pdf (last visited on Jan. 13, 2017).

12 *Id.*, p. 2

13 *Id.*, p. 22

Therefore, some groups of people think the best way to solve the problem is to make prostitution legal like it is in Switzerland. They think prostitutes are not disgusting because it is a profession of honest not serpentine work. Moreover, prostitution may earn a great deal of money per year for the country. Based on this logic, prostitution should be legalized so that prostitutes may receive welfare from the government as in other careers.

Another reason to make a prostitution is legal is that it has been shown to enhance the relationship between the business owners and commercial sex workers. Although, prostitution is illegal, today, the business owner needs to send some “money” to some groups of people who have power in society, such as, bribes for protection. If prostitution is legal, those powerful and influential groups may lose their power, and perhaps a prostitute may be able to earn more money, and not be exploited by the business owner and the powerful groups. Also, regarding the AID or HIV problems, the rate of infection may be controlled if a prostitute is able to have health checks by a doctor frequently. Moreover, if prostitutes need to have a license and send tax to the government, there will be more control over the prostitution business.

Jantawipha Arphisuk, Secretary of the Center for Protection Women’s Rights (Empower) says that the prostitution career is an honest career and important labor in Thailand. If this career was guaranteed to be a legal career, a relationship between the owner and a labor would be better. A problem with exploitation will decrease. In addition she says, “Prostitution should have the standard life like any other labor in society.”¹⁴ Her opinion is accord with a scholar of Empower Foundation. She says prostitution is not a moral problem which is solved by mercy or pity. She say “Prostitution is not a legal problem which solved by a penal punishment, but, prostitution is a human rights problem which solved by giving a chance equality in society, respect for right and respect for Human Dignity.”¹⁵

Conservative Side: Oppose Making Prostitution Legal

The subject regarding the legality of prostitution has been argued for a long time because it may be the case if prostitution is legalized, it will increase the problems. One of the most important problems of prostitution, it has been argued, is the spread of HIV/AIDs. If prostitution is legal and a prostitute registration was required, the HIV/AIDs problems may decrease because a doctor will be required to check their health frequently, however, this is not the only focus regarding this topic. If prostitution is legal, it is argued that it will create a lot of problems.

For example, a lot of women dare to choose to work in this career because it appears that the prostitution career is easy for earning a lot of money; however, if it is legal there will be legal controls, and she might be afraid to choose this way. Another problem is foreigners know Thailand is the ‘land of smiles’, and Thailand has a good culture. If Thailand promotes

14 สารคดี, โสภณณีถูกกฎหมาย ควรยอมรับหรือปฏิเสธ, (July. 28, 2011), <http://www.sarakadee.com/feature/2000/12/vote-support.htm>, (last visited on Jan. 20, 2017).

15 เอ็มพาวเวอร์ รับรางวัลโบริว่แดง ในงานเอดส์โลก, Empowerfoundation, (2008), <http://www.empowerfoundation.org/thai/sexytalk.html>, (last visited on Jan. 20, 2017).

making prostitution legal, it will destroy Thailand's image and will affect other women who are not engaged in this career. Prof. Dr. Lalita Lerksumran, Former Member of Parliament, Vice-President of Youth Women and Elderly Affair Committees says if prostitution was the legitimate profession it will open the way for more women into this profession. Moreover, it will destroy a beautiful brand image of Thailand. Finally, most of the people in the country do not agree that prostitution is a legitimate profession.¹⁶

Apart from that, Rahab Ministries states regarding the legality of prostitution:

Prostitution is inherently damaging and exploitative to women. Our experiences in Thailand have shown that legalization will not help women in prostitution; rather, it will put more money and power in the hands of the procurers, pimps, and brothel owners. Legalization will also put women at risk of increased sexual harassment, contribute to further family breakdown, and lead to younger and younger girls becoming involved. We believe that the legalization of prostitution says to men, "Go ahead— it's OK to sexually abuse women." Research from countries that have already legalized prostitution shows that the legalization or decriminalization of prostitution does not empower the women in prostitution but does everything to strengthen the sex industry. Research conducted by the Coalition against Trafficking in Women International (CATW) proves that:

1. Legalization/decriminalization of prostitution and the sex industry promotes sex trafficking.
2. Legalization/decriminalization of prostitution and the sex industry increases child prostitution.
3. Legalization/decriminalization of prostitution and the sex industry does not protect the women in prostitution and does not promote women's health.
4. Legalization/decriminalization of prostitution and the sex industry does not control the sex industry it expands it. It boosts the motivation of men to buy women for sex in a much wider and more permissible range of socially acceptable settings.
5. Women in systems of prostitution do not want the sex industry legalized or decriminalized.¹⁷

What is the Best Way?

Thailand should not make a prostitution legal. Firstly, our society and culture does not support legal prostitution. Some of the people think the guidelines of Switzerland can be applied in our country. In Switzerland, there are approximately 14,000 prostitutes and they earn in their country about 118,055 million baht per year. A prostitute in Switzerland needs to have a license for prostitution and before they engage in prostitution, they need to have a work permit and a health insurance license. A prostitute in Switzerland is controlled by a

¹⁶ โสภณีนีอุกกภูมัย คารยอมรับหรือปฏิเสธ, *Supra* note 14.

¹⁷ *Prostitution in Thailand*, *Supra* note 11 at p. 5.

government. So, problems from prostitution in Switzerland have decreased.¹⁸ In Thailand, there is a different culture. The Thai culture is not receptive and open hearted to prostitution. In addition, the society does not support legal prostitution. Thailand has economic and political problems which are not like Switzerland.

Secondly, in the Thai experience, prostitution is not only a legal problems, it is a social, economic and political problem. The problems cannot be solved only by law. Therefore, amendment to the laws for legality of prostitution does not solve all of the problems.

Solutions

Finally, instead arguing about the legality of prostitution, better solutions to the problems should be discussed. For example:

Education programs are useful and necessary regarding prostitution especially for children. Most of the prostitutes are poor. They do not have a chance for education, therefore, they may feel their only option is to work in this career. The government should spread education to everyone. Moreover, train children to develop their skills and teach them how to deal with problems and obstacles in real life.

The government should solve economic problems in order to increase the opportunity for more jobs and initiate a policy for solving unemployment. In addition, the government should assist women in finding jobs, especially for women who do not want to work as a prostitute.

Equality is important and it should be promoted in society. Women are not inferior to men. Women should receive a chance to work like a men and receive equal wages and benefits.

Social attitudes should change regarding prostitution. Thailand society is resistive and has a bad attitude towards prostitution. Therefore, a woman who is working in the prostitution career fear a change in their career because they are afraid of being banned from society. Thus, society should change its attitudes and give a chance and support a women who want to change themselves. Moreover, teach our children to have a good attitude towards prostitution.

18 โสเภณีถูกกฎหมาย ช่วยปราบทุจริต รักษาศีลธรรม, Bangkokbiznews, (May. 2, 2014), <http://www.bangkokbiznews.com/blog/detail/579187> (last visited on Jan. 28, 2017).

The Forbidden Love of Homosexuality

by

Waratchaya Chaiwut*

Abstract

A homosexual is a person who is attracted to people of the same sex. The number of homosexuals is increasing more than in the past perhaps because of human rights and basic thought becoming more liberal. However, there are two main religions which do not accept homosexuals and also try to use the religion in order to resist homosexual behavior. In many countries, the Supreme Court of that country, has made judicial decisions which allows homosexuals to marry legally. Thus, it is the point of this essay is to show the conflicts with religious resistance and the judicial judgments among some countries.

Introduction

The main purpose of this research is to present the human rights in the context of homosexuality in daily life and find reasons why homosexuality is grievously forbidden in some countries, especially in Middle Asia¹, while there are many other countries where it is widely accepted. A homosexuality is a “person who is sexually attracted to people of the same sex”², often referred to as, gay, bisexual and lesbian or as the individuals in same-sex relationships. Traditionally accepted relations are between a man and a woman. A man has a gender as male and a woman has a gender as female. This demonstrates there are commonly only two genders. Religion in Middle Asia has influenced the laws regarding anti-homosexuality. Even though, the reality is that some portion of the people in any society are attracted to the same sex and may want legal marriage. Examples of the Church of the Latter-day Saints and the Christian religion, Sharia Law and the Muslim religion, and Buddhism will be examined.

Religion

The Church of the Latter-day Saints and Christianity

At first, being homosexual was expressly resisted by western religions. For example, the law of chastity of the Church of Jesus Christ of Latter-day Saints states, “Sexual relations are proper only between a man and woman who are legally and lawfully wedded as husband and wife.”³

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1 Worldatlas, Middle East, <http://www.worldatlas.com/webimage/countrys/me.htm> (last visited on May 8, 2017).

2 Homosexual. Cambridge Dictionary Online, <http://dictionary.cambridge.org/dictionary/english/homosexual> (last visited on Jan. 4, 2017).

3 The Council of the First Presidency and Quorum of the Twelve Apostles to Church leaders, Same-sex Marriage, <https://www.lds.org/topics/same-sex-marriage?lang=eng> (last visited on June 19, 2017)

Leviticus 18:22 states: “Do not have sexual relations with a man as one does with a woman; that is detestable.”⁴

Leviticus 20:13 states: “If a man has sexual relations with a man as one does with a woman, both of them have done what is detestable. They are to be put to death; their blood will be on their own heads.”⁵ It indicates that homosexuals cannot receive an opportunity to marry and love each other. This religion believes the following:

- the main purpose of human creation of god is god created a first man and woman who names are Adam and Ava, marry and breed
- there are only male and female in the world
- if there are any more than two genders, it will be against the will of god

However, there is always solution for people who are homosexual and believe in god which is forgiveness.

Sharia Law and the Muslim Religion

Similarly, Sharia Law⁶ is a main Islamic regulation which governs the Muslim religion.⁷ It is strictly enforced and is a part of the constitutional law in some countries, where there is no separation of church and state. There are a lot of Muslims in south Thailand and they are influenced by these regulations. According to south Thailand, before adjudication will be enforced, the judges must consist of a person who knows and understands the Sharia Law well in order to help the judges make adjudication which only relates to Sharia Law. On the other hand, in other courts, there are not judges versed in Sharia Law. Nevertheless, Sharia Law is less strict in some countries in middle and west Asia than particularly Saudi Arabia. In Islamic attitudes, homosexuality is a vile form of fornication⁸ and homosexuals will be punished by death. For example:

Quran (7:80-84) states: “... Muslim scholars through the centuries have interpreted the “rain of stones” on the town as meaning that homosexuals should be stoned, since no other reason is given for the people’s destruction.”⁹

Quran (7:81) states: “... homosexuality as different from (and much worse than) adultery or other sexual sin. According to the Arabic grammar, homosexuality is called the worst sin, while references elsewhere describe other forms of non-marital sex as being “among great

4 Leviticus 18:22, New international Version, Bible Hub Online, <http://biblehub.net/search.php?q=leviticus> (last visited on Jan. 5, 2017).

5 *Id.* at 20:13.

6 ⁶ *Sharia Law – List of Key Rules*, Billionbibles.Org, <http://www.billionbibles.org/sharia/sharia-law.html> (last visited on Nov. 16, 2016),

7 Cambridge Dictionary Online, *upra* Note 2 at Muslim.

8 The Religion of Peace, *What does Islam teach about Homosexuality*, <https://www.thereligionofpeace.com/pages/quran/homosexuality.aspx> (last visited on Jan. 5, 2017).

9 *Id.* at Quran (7:80-84).

sins”...”¹⁰

Quran is the written rule of Sharia Law which is the highest law for Islam. “The Quran (Koran) is the Holy Book of Islam and the religion’s most sacred text.”¹¹ Therefore, the above verses are examples which state homosexuality is not explicitly accepted and is the worst sin in Islam.

Religion still greatly influences the highest law of many countries, such as, in Saudi Arabia and Iraq. In the way of religion, a person who is a homosexual in Saudi Arabia or Iraq may be in violation of the law. Underlying those regulations is the basis of scientific thought because the human race will survive if men and women are married and always procreate. Homosexuality is same-sex and expressly shows that they cannot procreate. As the number of homosexuals is increased, procreation is decreased.

Buddhism

In the faith of Buddhism, Buddhists believe that people who were born homosexual, have sinned in a previous life. There are no rules to enforce and punish those homosexuals in Buddhist societies. The main dogma is the Four Noble Truths, explained as: the first teaching ever given by the Buddha was to five student monks, such as, the truth of suffering; the truth of the cause of suffering¹²; the truth of the end of suffering and the truth of the path leading to the end of suffering. These truths use reason to solve problems and also are a basis upon which to make decisions. However, there is one of regulation in Tripitaka, Vinaya scriptures No. 4 states “a man, who is not homosexual, is only accepted to ordain in this religious.”¹³ In this context, most Buddhists accept homosexuals to be a part of society. Moreover, Buddha set them free to be friends or work like other people, however, they may not be ordained. There are no regulations in Buddhism to not allow same-sex marry. Which means in Buddhism homosexuals can marry a person who is the same-sex.

Law

Same Sex Marriage Case in the United States

Every religion may have different basic thoughts. If a homosexual lives in different countries, they will be subjected to different laws and rules. It is difficult to say which religious teachings are most just because homosexuality is stated by many religions to be unnatural and if everyone had been born homosexual, it would have been impossible to procreate new humans. However, if they are born homosexual, it is perhaps difficult, if not impossible, for them to change into being heterosexual. On June 26, 2015, the Supreme Court in United States adjudicated to allow same-sex marriage a right nationwide and ruled by a 5-to-4 vote

10 *Id.* at Quran (7:81).

11 *Id.* at Quran Introduction, (last visited on June 8, 2017).

12 *Unit two: the four noble truths*, BuddhaNet, <http://www.buddhanet.net/e-learning/buddhistworld/whats-thera.htm> (last visited on Jan. 20, 2017).

13 ประเด็นวิเคราะห์ เกย์-กระเทย ในทางพระพุทธศาสนา, Zeslogo, <http://board.postjung.com/756174.htm> (last visited on Jan. 9, 2017).

that the Constitution guarantees a right to same-sex marriage.¹⁴ President Obama welcomed the decision, saying it “affirms what millions of Americans already believe in their heart and today, we can say, in no uncertain terms, that we have made our union a little more perfect.”¹⁵

The above statement by President Obama is in contrast to the ways of some Christian religion and Islamic thought. In this way, it is very difficult to understand the U.S. Supreme Court judgment regarding same-sex marriage because the main religion in United States is Christianity and it is may be stated by some that Christ was expressly strict for people who are same-sex. On the other hand, at the present, the base of American thought is liberty and there exists a separation of church and state. These may be the basis of the judgment. The decision of the Supreme Court case is stated, as follows:

SUPREME COURT OF THE UNITED STATES

OBERGEFELL ET AL. v. HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 14–556. Argued April 28, 2015—Decided June 26, 2015*

Groups of same-sex couples sued their relevant state agencies in Ohio, Michigan, Kentucky, and Tennessee to challenge the constitutionality of those states’ bans on same-sex marriage or refusal to recognize legal same-sex marriages that occurred in jurisdictions that provided for such marriages. The plaintiffs in each case argued that the states’ statutes violated the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment, and one group of plaintiffs also brought claims under the Civil Rights Act. In all the cases, the trial court found in favor of the plaintiffs. The U.S. Court of Appeals for the Sixth Circuit reversed and held that the states’ bans on same-sex marriage and refusal to recognize marriages performed in other states did not violate the couples’ Fourteenth Amendment rights to equal protection and due process.

The Court held that the Due Process Clause of the Fourteenth Amendment guarantees the right to marry as one of the fundamental liberties it protects, and that analysis applies to same-sex couples in the same manner as it does to opposite-sex couples. Because there are no differences between a same-sex union and an opposite-sex union with respect to these principles, the exclusion of same-sex couples from the right to marry violates the Due

14 Adam Liptalk, *Supreme Court Ruling Makes Same-sex Marriage a Right Nationwide*, (June 26, 2015), https://www.nytimes.com/2015/06/27/us/supreme-court-same-sex-marriage.html?_r=0 (last visited on Jan. 25, 2017).

15 The Telegraph, *Barack Obama on gay marriage landmark*. <http://www.telegraph.co.uk/news/worldnews/barackobama/11701913/Barack-Obama-on-gay-marriage-landmark.html>, (last visited on June. 9, 2017).

Process Clause of the Fourteenth Amendment. The Equal Protection Clause of the Fourteenth Amendment also guarantees the right of same-sex couples to marry as the denial of that right would deny same-sex couples equal protection under the law. Marriage rights have traditionally been addressed through both parts of the Fourteenth Amendment. The First Amendment protects the rights of religious organizations to adhere to their principles, but it does not allow states to deny same-sex couples the right to marry on the same terms as those for opposite-sex couples.¹⁶

Regulation in England and Wales

England and Wales are two countries in Europe. The beginning of histories of these countries was a base of faith in Christ. There was no permission for the same sex to marry. However, legislation in United Kingdom drafted the marriage for same sex couples. Jurisdiction and Recognition of Judgments 2014 regulation: to marriages of same sex couples and proceeding for “the divorce of, or annulment of a marriage, a same sex couple or the judicial separation of a married same sex couple as regards the law of England and Wales.”¹⁷

Regulations 3 and 4 provide that if a court of an EU member State (other than the United Kingdom) gives judgment in respect of the divorce of, or annulment of a marriage of, a same sex couple or the judicial separation of a married same sex couple, that judgment must be recognized in England and Wales unless any of the matters in regulation 5 apply.¹⁸

The above indicates that religion is separated from law, i.e., a separation of church and state. It shows homosexuals will receive more liberty in life and it is possible that many countries will hold similar judgments and regulations as a basis for drafting laws.

Organizations which Provide Support for LGBT Rights

The UN Foundation and Gap, Inc. raise awareness and support for the United Nations’ LGBT rights (Lesbian, Gay, Bisexual, and Transgender) around the world with a focus on the Free & Equal campaign.¹⁹ Free & Equal is an unprecedented UN global public education campaign for lesbian, gay, bisexual and transgender (LGBT) equality. A project of the UN Human Rights Office, Free & Equal raises awareness of homophobic and transphobic violence and discrimination, and promotes greater respect for the rights of LGBT people everywhere. The campaign engages millions of people around the world in conversations to help promote the fair treatment of LGBT people and generate support for

16 Obergefell v. Hodges, 576 U. S. 2584, 2015 WL 2473451, (2015), https://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf (last visited on June 22, 2017).

17 Jurisdiction and Recognition of Judgments, regulation 2014 the marriage (same sex couples) http://www.jordanpublishing.co.uk/practice-areas/family/news_and_comment/UKsi20140543m#.WTuf62iGO00 (last visited on June 8, 2017).

18 *Id.*

19 *What We Do: Supporting LGBT Rights around The World*. United Nations <http://www.unfoundation.org/features/lgbt-rights.html?referrer=https://www.google.co.th/> (last visited on Mar. 1, 2017).

measures to protect their rights.²⁰

There are many international organizations which support homosexuals, such as, ILGA (International Lesbian, Gay, Bisexual, Trans and Intersex Association), IGLYO (International Lesbian, Gay, Bisexual, Transgender and Queer Youth and Student Organization), and, ILG Law (International Lesbian, Gay, Bisexual, Transgender & Intersex Law Association).²¹

Some countries also have organizations to support a homosexual's rights, such as, Sexual Minorities Uganda, Blue Diamond Society in Nepal.

Solutions

In the past, homosexuals used to be considered "forbidden love" for the same sex due to influence of religion. If the homosexual attempted to love or marry, they would be severely punished. Some Muslim countries in middle Asia have had inequitable punishment in the past and even at the present. Thus, there is media news that reports these situations.

On the other hand, Christians also have had rules regarding the same-sex in the past and now and these rules are still enforced. However, they are not stricter than Sharia Law because the Christian rules are based on humanity. If any rule or action is against humanity, it must be unenforced.

For Asian, Taiwan is the first country to allow the same-sex get marry.²² "This explanation is a step forward in the history of Taiwan's same-sex marriage," said Yu Mei-nu, a Taiwanese legislator.

Nowadays, the basis of thought for liberty is widely placed in daily life and it influences people's thought. For example, the United States now allows same sex marriage. England and Wales have drafted regulations regarding marriage of the same sex, and there are international organizations to support them. Therefore, "forbidden love" for homosexuals is not prohibited anymore.

It is difficult to change the old thoughts of religions to be new thoughts of societies which are more liberal, but it can change if we know how to open minds so wide and try to understand what they are. Homosexuals are human like other people and including yourself. Being human must have rights to do everything equality whenever they do not cause violence in society.

20 *Id.*

21 List of LGBT rights organizations https://en.wikipedia.org/wiki/List_of_LGBT_rights_organizations (last visited on June 8, 2017).

22 Katie Hunt and Karina Tsui., *Taiwan is closer to being 1st Asian place to allow same-sex marriage*, CNN, <http://edition.cnn.com/2017/05/24/asia/taiwan-same-sex-marriage/index.html> (last visited on June 10, 2017).

The Defective Aspects of Franchise Business Law in Thailand

by

Natnicha Panchai*

Abstract

Franchise business plays a key role in Thailand economy and this bides well for the increasing of franchise business both in Thailand and flows from the domestic to the ASEAN region. Despite the good sign of the economic expansion, Thailand has not enabled the draft legislation of the Franchise Business Act B.E.2551 (2006) for 10 years. While there is no specific law for the franchise business, the franchise operations must be in compliance with all relevant acts. In addition, sometimes the present laws are efficient for certain situations, however, there are unclear areas and scopes of enforcement that need to actually balance the rights between the parties. Because of the uniqueness of the franchise business, the confusion regarding the legal procedures and the interpretations which may arise in areas, such as, the aspects of exclusive dealing and territories in the Trade Competition Act and Intellectual Property Act regarding the format in the trademark licensing agreement. Notwithstanding that, if the draft Franchise Business Act will be enacted hereafter, there are some areas which have gaps and loopholes and this requires further discussion and additional legislation. For example, the limited enforcement, the foreign franchisor without any presence in Thailand, or a foreign franchisor which establishes an entity outside Thailand which hires a Thai franchisee, who in turn collects money from the sale of products in Thailand is not subjected by this Act. Therefore, the draft act needs intense scrutiny before its final enactment by expanding the enforcement coverage. Though the implemented franchise business law in Thailand is vague, the franchise business continues to grow in recent years. It consequently must have a fully functioning Franchise Business Law without loopholes. This comment attempts to classify the weaknesses in both the present relevant law and the draft Franchise Business Act and express the solutions to facilitate the functional legislative act for the betterment of the economy in Thailand and ASEAN.

Introduction

Thailand has a well-developed infrastructure and has become one of the strongest Eastern Asian economies over the past decade. Among various businesses, the franchising business is rapidly growing under the Thailand and ASEAN economy. Thai government intends to facilitate and support the regulation and commercial environment for the franchising sector. Thai Ministry of Commerce has proposed the draft Franchise Business Act, B.E.2551 (2006) (hereinafter known as the “draft Act”)¹ to the Parliament in order to promote the franchising business. Nevertheless, the effort to pass the draft Act has been an ongoing process for almost 10 years. To wit, Thailand has no specific law that governs the

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1 ร่างพระราชบัญญัติการประกอบธุรกิจแฟรนไชส์ พ.ศ.2551, Draft Franchise Business Act, (2006), http://www.lawamendment.go.th/index.php/laws/item/351-topic_351 (last visited on Feb. 12, 2017).

franchising business. While the franchising business is booming, the franchising agreement is subjected to many relevant acts at once which depend on the relationship of the circumstances between the parties. Thus, this paper aims to elaborate on the exemptions and restrictions of the pertaining laws governing franchising business including the draft Act and offer solutions as to how the act may be shaped.

Franchise Definition and Growth of the Franchising Business in Thailand

Franchise Definition:

...the franchising agreement is a legally binding agreement which outlines the franchisor's terms and conditions for the franchisee... It governs duties, right, and obligations between the parties. The franchisor transfers to the franchisee a concept, a brand and know-how while the franchisee agrees to obey to all the specification of the franchisor.²

Franchising agreement means the operation of a business in which one party called a 'franchisor' agrees to let the other party, the 'franchisee', use its intellectual property right, or to use its right to operate a business during a specified time or in a specified area, such operation being under the direction of the franchisor's business plan, and the franchisee having a duty to reimburse the franchisor.³

According to the definition above, the franchising agreement is legal binding between parties, one called "franchisor" who transfer his or her right to allow another party called "franchisee" to use the franchisor's form, systems, procedure, and intellectual property according to the contractual terms in the agreement within period of time. By the agreement, the franchising business is under controlled of the franchisor's plan whereas the franchisee has a duty to pay franchising fees to the franchisor.

Growth of Franchising Business in Thailand

In Thailand, the franchise sectors have an annual growth rate of 10 percent each year. Currently, there are a total of 730 franchise systems with a total of approximately 65,000 outlets in Thailand. Apart from the total franchise system, 295 systems are international, including the United States, and 435 systems are local. About 28 percent of franchise market shares is food retails of quick service and casual dining, while bakery and beverage (including coffee shops) are about 15 percent of the total. Franchises of services (including education and child development) are about 12 percent. International franchise businesses control 60 percent of the total market value.⁴ The total market value is projected to grow 10 percent

2 Lucas Nicolet, Alan Adcock & Albert Kong, *Franchising in Thailand- Some current issues*, Asia Franchise Business Opportunities, (Apr.-Jun. 2011), http://www.tilleke.com/sites/default/files/2011_Franchising_Thailand_Current_Issues_0.pdf (last visited on Feb. 12, 2017).

3 Draft Franchise Business Act, *supra* note 1 at sec. 4.

4 Mr.Nalin Phupoksakul (Sr. Commercial Specialist), *Thailand - Franchising Industry Sector, Summary*, (Sept. 8, 2016), <https://www.export.gov/article?id=Thailand-Franchising-Industry-Sector> (last visited on Feb. 15, 2017).

in the next few years. The growth is expected due to Thai government policies to promote SMEs and entrepreneurs through franchising. The growth is enhanced by investors who would like to expand their businesses and are looking for new business opportunities as the franchise is has lower risk of business.⁵

Franchising Business in Thailand

Currently, Thailand has no specific law to for a comprehensive governance and guidelines for franchising businesses. Nevertheless, there are multiple relevant laws governing the franchises businesses. The laws are discussed as below:

- (1.) Thailand Civil and Commercial Code (1992)⁶
- (2.) Trademark Act B.E. 2534 (1991)⁷
- (3.) Trade Secret Act B.E. 2545 (2002)⁸
- (4.) Trade Competition Act B.E.2542 (1999)⁹
- (5.) Unfair Contract Term Act B.E. 2542 (1999)¹⁰
- (6.) Product Liability Act B.E. 2522 (1979)¹¹
- (7.) Foreign Business Act B.E. 2542 (1999)¹²
- (8.) Thai Revenue Code B.E. 2481 (1938)¹³

However, the draft Franchise Business Act was released to public in 2006. Now, it is still in consideration in the National Legislative Assembly. It provides the definition of franchising agreement as currently above and stipulates 4 main objectives, follows:

- To stipulate the criteria
- To appoint the committee
- To stipulate protective measure
- To stipulate criminal and administrative penalties

5 *Id.*

6 ประมวลกฎหมายแพ่งและพาณิชย์ พ.ศ.2535, Civil and Commercial Code (TH 1992), <http://web.krisdika.go.th/data/law/law4/%BB03/%BB03-20-9999-update.pdf> (last visited on Mar. 13, 2017).

7 พระราชบัญญัติเครื่องหมายการค้า พ.ศ. 2534, Trademark Act (TH 1991), <http://www.ipthailand.go.th/th/dip-law-2/item/พระราชบัญญัติเครื่องหมายการค้า-พ-ศ-2534.html> (last visited on Mar. 13, 2017).

8 พระราชบัญญัติความลับทางการค้า พ.ศ.2545, Trade Secret Act (TH 2002), <https://ip.hrdi.or.th/kmfiles/20162404220916.pdf> (last visited on Mar. 13, 2017).

9 พระราชบัญญัติการแข่งขันทางการค้า พ.ศ.2542, Trade Competition Act (TH 1999) , <http://econ.tu.ac.th/archan/rangsun/ec%20460/กฎหมายเศรษฐกิจ/การแข่งขันและการผูกขาด/พรบ.%20การแข่งขันทางการค้า%20๒๕๔๒.pdf> (last visited on Mar. 13, 2017).

10 พระราชบัญญัติว่าด้วยข้อสัญญาที่ไม่เป็นธรรม พ.ศ.2540, Unfair Contract Term Act (TH 1997), <http://web.krisdika.go.th/data/law/law2/%C749/%C749-20-2540-001.pdf> (last visited on Mar. 13, 2017).

11 พระราชบัญญัติคุ้มครองผู้บริโภค พ.ศ.2522, Product Liability Act (TH 1979), [http://forprod.forest.go.th/forprod/IT/PDF/พรบ.คุ้มครองผู้บริโภค%20\(ฉบับล่าสุด\).pdf](http://forprod.forest.go.th/forprod/IT/PDF/พรบ.คุ้มครองผู้บริโภค%20(ฉบับล่าสุด).pdf) (last visited on Mar. 13, 2017).

12 พระราชบัญญัติการทำงานของคนต่างด้าว พ.ศ.2551, Foreign Business Act (TH 1999), http://bangkok.immigration.go.th/acts/act_alien-work2551.pdf (last visited on Mar. 13, 2017).

13 พระราชบัญญัติให้ใช้บทบัญญัติแห่งประมวลรัษฎากร พ.ศ.2481, Thai Revenue Code (TH 1938), <http://web.krisdika.go.th/data/law/law4/%BB08/%BB08-20-9999-update.pdf> (last visited on Mar. 13, 2017).

Exemption and restriction in the franchise business law and solution

There are 3 significant exemptions discussing intellectual property, trade competition and unfair contract term law aspects according to the facts. And also 1 restriction under the draft Act that requires an amendment.

Trademark through the Franchise Agreement

The trademark will be protected under the law since it has been registered and then the owner also automatically has the exclusive right in its trademark as set forth in the (2.) Trademark Act 1991 Chapter 2, Section 44¹⁴. According to Chapter 5, Section 68¹⁵, the owner of the trade mark can institute a license agreement which allows the others to use owner's trademark. If the franchisor needs to transfer its exclusive right to the franchisee. Firstly, the trademark licensing agreement must be in writing and importantly registered with the Department of Intellectual Property (DIP).¹⁶ After granted by DIP, the franchisee is able to legally use the trademark in accordance with the provisions of Chapter 5, Section 70¹⁷.

The problem is that it is unclear if the franchise agreement has to be registered with the DIP or not. However, there are 2 points of view of Thai courts; first one is if the franchise agreement is not registered, the agreement is void¹⁸. The second one considers the trade mark licensing agreement is a part of the franchise agreement¹⁹. This means that, even though the provision of trademark use is not registered, the franchise agreement is valid. The franchise agreement with any use of trademark is recommended to be registered for the trademark licensing agreement. It is to prevent legal disputes regarding the trademark over the franchise agreement.²⁰ In practice, some franchisors separate the trademark licensing agreement in order to register the agreement with DIP.

Fixing Terms and Conditions in Franchise Contracts

In the (4.) Trade Competition Act 1999, Chapter 3, Section 25²¹, prohibits and restricts the franchisor to engage in any conduct considered as monopoly, reduction of competition or restriction of competition with the franchisees in the market. The examples of prohibited conducts are price fixing, exclusive supplier, exclusive product line, geographic exclusivity, and applicability to foreign franchisors.

14 Trademark Act, *supra* note 7 at sec. 44.

15 *Id.* at sec. 68.

16 กรมทรัพย์สินทางปัญญา, Department of Intellectual Property, <https://www.ipthailand.go.th/th/home.html> (last visited on June. 3, 2017).

17 Trademark Act, *supra* note 7 at sec. 70.

18 Sriwan Puapondh and Alan Adcock, *International franchising: Thailand*, Tilleke&Gibbins Int'l, Ltd. Bangkok Thailand, pp.5-6 (May, 2016), http://www.tilleke.com/sites/default/files/2017_Jan_International_Franchising_Thailand.pdf (last visited on April. 20, 2017).

19 *Id.*

20 Stephen Frost and Teerakarn Noichiaum, *Franchising in Thailand - Seventh heaven or something else!*, Bangkok Int'l Assoc., (2012), www.bia.co.th/legalupdates/Franchise%20tax%20article%20140612.doc (last visited on Feb. 2, 2017).

21 Product Liability Act, *supra* note 11 at sec 25.

Thus, the terms and the conditions in the franchise agreement must not infringe the trade competition law. In reality, the franchisor is able to fix the area and price to its franchisee by following the provision in Section 25 of the Thai Trade Competition Commission²² which permits the act of exclusivity in dealing and in geographical territories only in the case of the franchise operation. The problem is the definition and scope which is necessary, as solely determined by the franchisor, in the franchise business to protect and preserve the benefit to the franchisor under the provision, is too broad. Therefore, the solution may be considered as it infringes Section 25 of the Trade Competition Act.²³

Less Bargaining for the Franchisee

According to the (5.) Unfair Contract Term Act B.E. 2542 (1997) Section 4 and 11²⁴, the franchise term of agreement is void, if it has an unfair condition, such as, limiting the liability for breach of contract, termination without reasonable ground or overly exploitation of preferential clauses. Even if the franchise agreement is subjected to prohibition under the Unfair Contract Term Act, it is difficult to enforce the prohibitions of the Unfair Contract Term Act against the agreement. This is because the franchise business is based on reliance and harmonized relationships between the franchisor and franchisee. The franchisor generally has superior bargaining power over franchisee. The franchisee is under controlled by the franchisor and franchisee must comply with various condition set by franchisors. Franchisee has to face difficulty in bargaining on contractual terms with the franchisor.²⁵

Due to the intricacy and extraordinary nature of the franchise business, as it relates to many aspects of law, the parties must rely upon each other to operate the franchise system. For this reason, in order to tackle the issues on price fixing or area fixing in the sale of goods and services under the (4.) Trade Competition Law, and the less bargaining power of the franchisee which is governed by the (5.) Unfair Contract Term Act, there should be a specific law governing the scope and right of franchisors and franchisees in the franchise agreements. The condition in the franchise agreement must be interpreted or justified in the case there is a claim from the franchisee to the Franchise Business Committee²⁶. The Franchise Business Committee is established by the draft Act to oversee and regulate franchise businesses or some related-franchise similar businesses. In addition, the specific law should govern the formation of contractual conditions as to make sure equal bargaining power between franchisor and franchisee exist.

22 แนวทางปฏิบัติตามมาตรา 25 แห่งพระราชบัญญัติการแข่งขันทางการค้า พ.ศ.2542, Trade Competition Provision, sec. 25 (TH 2009), pp. 8-9, <http://otcc.dit.go.th/wp-content/uploads/2015/07/Guidelines-under-Section-25.pdf> (last visited on Mar. 13, 2017).

23 Frost & Noichiaum, *supra* note 20.

24 Unfair Contract Term Act, *supra* note 10 at sec 4, 11.

25 กฎหมายเกี่ยวกับการประกอบธุรกิจแฟรนไชส์ในประเทศไทย, *Relevant Laws govern Franchise business in Thailand*, ThaiFranchiseCenter, (Sept. 30, 2015), <http://www.thaifranchisecenter.com/document/show.php?docuID=920> (last visited on Feb. 12, 2017).

26 Franchise Business Committee is established by Draft Franchise Business Act with the responsibility to oversee and regulate the franchise business or some related franchise similar business, *Supra* note 1.

Scope of Enforcement under the Draft Franchise Business Act B.E.2551 (2006)²⁷

As provided under Section 3²⁸, the franchisor that conducts their business overseas enters the franchise agreement outside Thailand jurisdiction is not governed by this draft Act. The legal gap is that the draft Act, if passed, will apply the franchise business that establishes their agreement overseas. Accordingly, the foreign franchisor normally enters into an agreement commonly known as the Master Franchise Agreement²⁹ with a Thai franchisee, known as, the master franchisee in order to allow the master franchisee to grant Sub-franchise Agreements³⁰ with other sub-franchisees. Following this example, the Master Franchise Agreement is not subjected to the draft Act. However, the law is applicable to the Sub-franchisee Agreement between the master franchisee and the sub-franchisee.³¹ Therefore, the content of the draft Act needs to be further vetted. The foreign franchisor (foreigner natural of person) whose are domiciled outside Thailand or the foreign company (juristic person, established in another country) should be subjected to the draft Act in order to prevent unfair foreign franchise agreements that operate franchise businesses in Thailand.

Conclusion

As provided above, the franchise business in Thailand is at rapid rate of growth and the growth lead to important economic development. Therefore, the government needs to support and facilitate the Thai market by encouraging entrepreneurs, especially some new start-ups. Fortunately, the Thai government has paid its attention to the large franchise business growth by firstly implementation of SMEs Promotion Act³² and by the framework which facilitate the flow of the franchise business in Thailand.³³ Although Thailand has struggled to pass legislation on the franchise business for 10 years, the enactment of the Draft Franchise Business Act is possible. Nevertheless, the draft Act should be vetted for public discussion and should be amended as to create an effective governance of the franchise business in a practical way. The passage of the draft Act would lead to the certainty of the franchise business law and facilitate development of the franchise business environment in Thailand.

27 Draft Franchise Business Act, *supra* note 1.

28 *Id.*, at sec. 3.

29 Master Franchise Agreement is the contractual relation between a foreign franchisor and a Thai franchisee. This contract will allow the Thai franchisee to grant the sub-franchise rights to other Thai entrepreneurs, Wiley Rein, LLP, Franchise Watch Int'l Franchise Development Series, (Dec. 12, 2015), <http://www.wileyrein.com/newsroom-newsletters-item-5408.html>, (last visited on Feb. 12, 2017).

30 *Id.*, Sub-franchisee Agreement is the contractual relation between a Thai franchisee (which is granted the right from the foreign franchisor) and Thai sub-franchisee (the other Thai entrepreneurs).

31 *Id.*

32 พระราชบัญญัติส่งเสริมวิสาหกิจขนาดกลางและขนาดย่อม, SMEs Promotion Act (TH 2000), http://www.thailaw.com/thailaw3_68.pdf (last visited on June 3, 2017).

33 Pornchai Wisuttisak, *The Thai Regulatory and Commercial Environment for Franchising under the AEC Integrating Market, Brief Overview of Thai Regulatory Framework of Franchise Sectors*, (Oct. 3-6, 2014), p. 5, [file:///C:/Users/ABC/Downloads/Pornchai+WISUTTISAK+-+Thai+Regulatory+on+Franchising+-+Nguyen+Ba+Binh%20\(3\).pdf](file:///C:/Users/ABC/Downloads/Pornchai+WISUTTISAK+-+Thai+Regulatory+on+Franchising+-+Nguyen+Ba+Binh%20(3).pdf) (last visited on Feb. 12, 2017).

Nationality Acts of Thailand: In Violation of the Fundamental Right

by

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Abstract

This note considers the problems of Thai Nationality Law. In Thailand, a person may apply for Thai citizenship by two ways: first, they must be born of a father or mother of Thai nationality “by birth”, whether within or outside Thailand; or second, they must be “born in Thailand”. However to be “born in Thailand”, the parents of the child must hold Thai nationality, otherwise he/she will not obtain Thai nationality. Moreover, the child will have stateless status, which means he/she is excluded fundamental rights, such as, the right to education, to work, and to be not convicted of committing the crime that he/she did not commit. The Nationality Act should be amended. This amendment will mitigate the increasing number of stateless people. Thailand may use other methods to assist in solving the problems. For instance, the Thailand Project is an example of an organization utilizing education by granting scholarships to stateless people. The statelessness problem is very important to be concerned about because it is considered a global problem.

Introduction

According to the Nationality Act B.E. 2508 (1965)¹ (hereinafter referred to as the “Nationality Act”), Thai nationality may be obtained “by birth” which means a person automatically acquires Thai nationality, with the condition that one of his/her parents is Thai regardless of which country he/she is born. In legal terminology this is called *jus sanguinis*² or “the right of blood”. Another way to obtain Thai nationality is to be born in the territory of Thailand³, which is called *jus soli*⁴ or “the right of soil”. The territory of Thailand includes “any Thai vessel or airplane irrespective of any place of Thai vessel or airplane”.⁵

In any case, to acquire Thai nationality by *jus soli*, a person must not fall under the exception⁶, which will be discussed later. What if a person is not able to acquire Thai nationality by either *jus sanguinis* or *jus soli* as set forth in the requirements? What will happen to those

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1 พระราชบัญญัติ สัญชาติ พ.ศ. ๒๕๐๘ มาตรา ๗, Nationality Act, B.E. 2508, (TH 1965), sec. 7., <http://www.refworld.org/pdfid/506c08862.pdf> (last visited on Feb. 24, 2017).

2 Merriam-Webster “jus sanguinis: a rule that a child’s citizenship is determined by its parents’ citizenship”, <https://www.merriam-webster.com/dictionary/jus%20sanguinis> (last visited on Feb. 24, 2017).

3 Nationality Act, *supra* note 1.

4 Merriam-Webster, *supra* note 2: “jus soli: a rule that the citizenship of a child is determined by the place of its birth”.

5 ประมวลกฎหมายอาญา พ.ศ. ๒๔๙๙ มาตรา ๔, Criminal Code, B.E. 2499 (TH 1956), sec. 4. http://thailaws.com/law/t_laws/tlaw50001.pdf (last visited on Feb. 24, 2017).

6 Nationality Act, *supra* note 1.

who do not have nationality? These questions are pertinent to how Nationality Act of Thailand violates the fundamental rights of the “stateless”⁷ person.

The Nationality Act has been amended five times. The latest amendment is the Nationality Act (No. 5) B.E. 2555 (2012), in order to deal with the problems concerning nationality and to be compatible with the status quo of Thailand.

Whereas it is expedient to solve nationality problems for Displaced Thais who have Thai ethnicity, but have become subjects of other States because of territorial succession of the Thai Kingdom, therefore Thai nationality by birth shall be conferred upon those who do not yet possess other nationality and have migrated into and resides in the Kingdom for a consecutive period, which can be proved by civil registration evidences, under a way of life as Thai. More, in order to follow principle of ‘jus sanguinis’ under law on nationality, the children of these Displaced Thais who do not yet possess other nationality or who already acquired Thai nationality shall as well acquire Thai nationality by birth. This Act, therefore, shall be enacted.⁸

However, it appears that the problem still exists and the problem is reflected in the previous paragraph which relates to the acquisition of Thai nationality.

The Acquisition of Thai Nationality by Birth

The Nationality Act, section 7, designates the acquisition of Thai nationality and that the following persons acquire Thai nationality by birth:

First, A person born of a father or a mother of Thai nationality, whether within or outside the Thai Kingdom;

Second, A person born within the Thai Kingdom.”⁹

However, there is a special condition in order to acquire Thai nationality for one who is born in the territory of Thailand:

A person born within the Thai Kingdom of alien parents does not acquire Thai nationality if at the time of his birth, his lawful father or his father who did not marry his mother, or his mother was:

- (1) the person having been given leniency for temporary residence in Kingdom as a special case;
- (2) the person having been permitted to stay temporarily in the Kingdom; or

7 Merriam-Webster, *Surpa* note 2: “stateless: lacking the status of a national”.

8 Nationality Act, *supra*, note 1.

9 *Id.*

(3) the person having entered and resided in the Thai Kingdom without permission under the law on immigration.[...] ¹⁰

In other words, the person who is born in Thailand, and his/her parents do not hold Thai nationality, does not acquire Thai nationality. In addition, it is likely to increase the number of “stateless persons” if the parents did not have any other nationalities. Due to the fact that there are currently about 440,000 people registered as stateless, it is likely that the number of stateless persons in Thailand will increase. ¹¹

The Stateless Persons in Thailand

Since 1962, the “world’s worst military dictatorship” has ruled over Burma (Myanmar). The number of human rights violations inflicted by the junta upon ethnic minorities is countless, consisting of crimes that include an epidemic of ethnic cleansing by rape as a weapon of war, the kidnapping of children made to serve as soldiers, and the displacement and forced labor of millions. Some ethnic minorities and hill-tribe people are denied citizenship at birth. Hundreds of thousands of families and individuals have fled, crossing the border into Northern Thailand. There they are denied political refugee status, but allowed to live within tight “districts of constraint” with very few rights. They have no legal bond with any country and are therefore stateless. In Thailand, this means that they are denied the right to vote, travel, own property, work legally or have access to education and health care. ¹²

The problem of stateless persons is considered as a global problem ¹³ due to the fact that they are not entitled to the right of nationality. This may increase the chances of other fundamental rights being violated ¹⁴ including, but not limited to, the right to education, to work, and to travel. ¹⁵ In short, the person who does not have the right to nationality has lost the right to have fundamental rights also. ¹⁶ Therefore, it is necessary for individuals to have nationality. The right to nationality is stated in the following international declaration and conventions: United Nations Universal Declaration of Human Rights (1948), article 15 which

10 *Id.*

11 Nantanee Jedsadachaiyut and Nadia Al-jasem, *Overcoming statelessness in Thailand one case at a time*, UNHCR, (Nov. 24, 2016), <http://www.unhcr.org/en-us/news/latest/2016/11/5836af624/overcoming-statelessness-thailand-case-time.html> (last visited on Feb. 27, 2017).

12 *Statelessness in Thailand*, The Thailand Project, <http://www.thethailandproject.org/who-we-help-stateless.html> (last visited on Feb. 27, 2017).

13 *The worlds stateless*, Institute on Statelessness and Inclusion, (2014), p. 5, <http://www.institutesi.org/worldsstateless.pdf> (last visited Feb. 27, 2017).

14 *Right to a Nationality and Statelessness*, OHCHR, <http://www.ohchr.org/EN/Issues/Pages/Nationality.aspx> (last visited on Feb. 27, 2017).

15 *Supra* note 12.

16 *Trop v. Dulles*, 356 U.S. 86, 102, 78 S.Ct. 590, 2 L.Ed.2d 630, (1958), [https://1.next.westlaw.com/Document/Id4c-587819c1d11d991d0cc6b54f12d4d/View/FullText.html?transitionType=UniqueDocItem&contextData=\(sc.Search\)&userEnteredCitation=356+U.S.+86](https://1.next.westlaw.com/Document/Id4c-587819c1d11d991d0cc6b54f12d4d/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.Search)&userEnteredCitation=356+U.S.+86) (last visited on June 30, 2017).

states that “Everyone has the right to nationality”.¹⁷ It also appears in the Convention on the Rights of the Child (1989), article 7: “1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality [...]”¹⁸ and International Convention on the Elimination of All Forms of Racial Discrimination (1965), article 5: the “state shall undertake to guarantee the right of everyone notably in the enjoyment of the right to nationality”.¹⁹

It appears that the Nationality Act is contrary to the objectives of the declaration and conventions which Thailand has ratified or accessed. These objectives attempt to advocate individuals the right to nationality. Furthermore, the Nationality Act states that a person born within Thailand is in inherent violation of the immigration law and may be charged and punished for the violation.²⁰ This is another problem of the Nationality Act.

Convicted yet Innocent

The Nationality Act: The person who is born within the Thai Kingdom and has not acquired Thai nationality under paragraph one shall reside in the Thai Kingdom under conditions stipulating in the Ministerial Regulation, but principles of national security as well as human rights have to be considered concurrently. The person shall be deemed to have entered and resided in the Thai Kingdom without permission under the law on immigration unless the Ministerial Regulation is formulated.²¹

Unfortunately, the person is not only a stateless person, “[t]he person shall be deemed to have entered and resided in the Thai Kingdom without permission under the law on immigration”.²² It appears that he/she is punished and convicted of committing the crime that he/she did not commit. The reasoning behind this conviction is that the person was simply born to stateless parents or born to non-Thai parents of nationality in the territory of Thailand. Furthermore, the person in question has not done any action to enter nor leave the country, whether legally or illegally. And the passage below is the case of person affected by this Nationality Act:

On 20th July 2009, police officers had raided and arrested Pol or Abdulla, a three years old boy--a child of a registered migrant worker, who is permitted to work and temporarily reside in Thailand, while his mother was selling Roti in a farmer market in Mueang District, Samutprakarn

17 United Nations Universal Declaration of Human Rights, (1948), art. 15., www.un.org/en/universal-declaration-human-rights/ (last visited on Feb. 27, 2017).

18 Convention on the Rights of the Child, (1989), art. 7., <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx> (last visited on Feb. 27, 2017).

19 Int'l Convention on the Elimination of All Forms of Racial Discrimination, (1965), art. 5. <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx> (last visited on Feb. 27, 2017).

20 Nationality Act, *supra* note 1.

21 *Id.*

22 *Id.*

Province. The boy was detained at Suan Plu immigration center, with a possibility that he could face deportation at 22.00 pm on 27 July 2009. The boy was allegedly charged of illegal entrance to the Kingdom, under the provision of Section 54 of the Immigration Act 1979.²³

The Nationality Act “is contrary to Criminal Code: section 2, the Constitution of the Kingdom of Thailand B.E. 2560: Section 39, the International Covenant on Civil and Political Rights: Article 15 and the Universal Declaration of Human Rights: Article 11 (2). These protect individuals from being charged or punished for criminal acts that they did not commit.”²⁴

V. Solutions to the Problems

The Thai government has pledged to attain zero statelessness by 2024.²⁵ In order to eliminate statelessness, the Nationality Act should be amended. This amendment will mitigate the increasing number of stateless people because the child who is born of stateless parents will automatically hold Thai nationality if he/she is born in Thailand. Moreover, amending the Nationality Act will act as an advocate of fundamental rights of individuals, such as, right to nationality, to education, and to be presumed innocent until proven guilty.

As a state party to the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, Thailand is legally-bound to uphold the human rights principles named therein.²⁶ Therefore, Thailand should work diligently to immediately create a Magisterial Regulation and further amend the Nationality Act in order to be in compliance with international human rights standards and also provide accessible remedies for those who are in need and do not have Thai nationality.

In addition, Thailand may use the education system as a method to solve the statelessness problem. The Thailand Project is an example of an organization utilizing this method by granting scholarships to stateless people.²⁷ “These unprecedented scholarships to study abroad challenge the Thai government first to acknowledge the stateless recipients as valuable participants in society, and then to authorize their freedom of movement. This enables potential scholars to enroll at an institution of higher education within the United States of America.”²⁸

23 *Protect Pol (Abdulla) and every child born on Thai soil from illegal immigrant parents who had been permitted to temporarily reside on special basis*, Prachatai, (Aug. 8, 2009), <http://www.prachatai.com/english/node/1340> (last visited on Feb. 27, 2017).

24 *THAILAND: Children’s immigration status under threat*, AHRC, (Mar. 30, 2013) <http://www.scoop.co.nz/stories/WO1303/S00302/thailand-childrens-immigration-status-under-threat.htm> (last visited on Feb. 27, 2017).

25 Jedsadachaiyut & Al-jasem, *supra* note 11.

26 Int’l Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 22.

27 *Higher Education as Humanitarian Aid*, The Thailand Project, <http://www.thethailandproject.org/higher-education-as-humanitarian-aid.html> (last visited on Mar. 15, 2017).

28 *Id.*