



Could Cyber Sexual Bullying Become a Crime? : The Threatening to Disseminate Private Sexual Images via Electronic Mails, A Case Study in Thailand.

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Abstract

Cyberbullying is a form of harassment occurring through digital devices such as mobile phones, computers, and tablets in various fashions, for instance, sending electronic mails, images, texts, hate speeches, rumors, and others through social media, namely, Facebook, Twitter, and Instagram. Cyber sexual bullying or sexting or sexual online focuses on harassment of another individual in a sexually explicit manner or to force an individual to disseminate his or her sexual or pornographic images or to engage in activities that are sexual by nature.

The purpose of cyberbullying is, on the one hand, to embarrass, terrify, or harass the victims. Besides, it can be for amusement or threatening for money. Statistics show that most victims are children and juveniles and, sometimes, adults. The impact of cyberbullying on victims was towards their psychological and behavioral health, such as social isolation, school dropout, depression, suicidal ideation, and suicide. For example, in South Korea, Sulli, a K-pop singer and actress, and in the U.S.A., Megan Taylor Meier and Jessica Logan, high school students, killed themselves as a consequence of cyberbullying. These spurred discussions on solutions to the problem in society and, therefore, legal punishment. The question is, "Could cyberbullying case become a crime or have legal consequences?" The answer is, "it depends on laws of the state and situations involved."

In Thailand, the Constitution of the Kingdom of Thailand guarantees the right to privacy of people; on the other hand, the privacy of the bullied persons in general. However, there is no specific law for cyberbullying, which occurs in several forms. This paper aims to study Thailand Supreme Court Decision No. 1188/2561, showing some areas of laws that could apply for some kinds of cyberbullying in specific cases and some extensions to the famous foreign cases. In this court decision, the victim had been threatened through electronic media to disseminate private sexual images online. According to the decision, it was a crime under Thailand Criminal Law; however, it does not constitute a crime under Thailand Computer Crime Act B.E. 2550. This paper also suggests that the Thailand administration be aware of cyberbullying and, thus, enact legislation to enforce and protect anyone from cyberbullying in schools and society.

Keywords: *Cyberbullying, Pornographic images, Sexting, Threatening, Computer crime, Sexual images.*

1. Introduction

The development of technology, computers, internet, and wireless equipment has made a significant impact on society and the behaviors of people. With the ability to communicate globally, vastly, and simultaneously in its positive aspect, it accelerates economic growth, such as an increase in electronic commerce, and the new opportunity of education, such as online degrees. On the other hand, technology can be a tool for "cyberbullying," which is a dangerous phenomenon that can occur anywhere and at any time, curbing victims' possibilities to escape (European Parliament, 2016, p.20).

Traditional bullying can happen face to face between a threatening person and a victim, or by sending a traditional letter. However, cyberbullying involves posting or sending electronic messages, which include pictures or videos aimed at harassing, threatening, or targeting another person. A whole range of social platforms, including chat rooms, blogs, and instant messaging, are used in cyberbullying (United Nations General Assembly, 2018, p. 3). Cyber sexual bullying or sexting or sexual online emphasizes harassing another individual in a sexually explicit fashion or the practice of sending or posting sexually suggestive text messages and images, including nude or semi-nude photographs, via cellular telephones or over the internet (Gross, 2017, p. 557).

With digital devices, the distribution of information is massive and speedy. For example, the distribution of sexual images can destroy the reputation of victims as soon as they are published online, and



it permanently stays until being erased from the network. Statistics show that most of the victims are children and juveniles, and at times happening at school (United Nations, 2019). Nonetheless, victims can be adults, such as bullying, which occurs in the workplace. (Piotrowski, 2017).

More importantly, the impact may be, at least, annoyance and can even cause depression and trauma. The psychological scar can cause some to dissociate themselves from family and friends, while others may break away from schools or workplaces. Nevertheless, some victims with an emotional breakdown can end up committing or attempting suicide (Brandau and Evanson, 2018). Such as a case in South Korea, Sulli, 25, a K-pop singer and actress, was bullied by a constant barrage of malicious online comments (BBC, 2019). Moreover, another case in the USA, Megan Taylor Meier, 13, a high school student, like Sulli, suffered from online insults (ABC News, 2009). Furthermore, Jessica Logan, 18, also a high school student, a victim of pornographic revenge, and her nude pictures went viral via cell phones at the hand of her boyfriend (CBS News, 2008). As a result, all of them ended up committing suicide.

For Sulli's death, in the meantime, it is under investigation (Fatt, 2019). However, the incident triggered the fashion of going anonymous or fake online identity on the internet, in which people can give nefarious comments without revealing the real names (Reuter, 2019). For Megan Taylor Meier, a fake profile of the Myspace account was created for spamming and then sent negative messages to her. The defendant according to the federal district court vacated the jury's verdict convicting the defendant regarding the Computer Fraud and Abuse Act (CFAA) by the violation of the Myspace terms and conditions as "unauthorized access" or use that "exceeds authorized access," which was a minor offense (the United States v. Drew, 2009). For Jessica Logan, her parents brought a lawsuit against the Community School Board of Education and her boyfriend; the case was ultimately ruled and to enforced the Board to revise the policy regarding cyberbullying in schools. However, the plaintiff failed to prosecute these cases (Logan et al. v. Sycamore Community School Board of Education et al., 2012). As a result, The Jessica Logan Act (House Bill Number 116, 2012) and Megan Meier Cyberbullying Prevention Act (H.R. 6123, 2008) were introduced in the U.S.A.

As cyberbullying has become of critical worldwide, in Thailand, likewise, there has been a rising concern about the situation, especially as a serious impact on Thai youths (Nattharat et al., 2014). A report shows that 17.4% of Thai youths were victims of cyberbullying, and this caused a high risk of poor emotional-behavioral functioning (Nonglak B, Orawan L, Chawanun C, and Atsawin N, 2019). In the legal aspect, there is currently no specific law for cyberbullying. Suggestions on new competent law against cyberbullying have been widely discussed in previous studies. Kanathip Thongraweewong (2015) compared the Cybersafety Act to Thai laws. Nacharee Cayabutra and Yodsuk Kosaiyakanon (2017) studied legal measures for the protection of rights to privacy from cyberbullying. Methinee Suwannakit (2017) examined legal measures to protect children and juveniles from cyberbullying. Thanatsamon Chan-Aran (2017) studied the guarantee and protection of the right to privacy of cyberbullying victims. However, this paper indicates that, though there is no specific law concerning cyber bullying—which is in several forms, some types of cyberbullies are criminal offenses by Thailand's laws, extorting money from a victim to reveal private images online, the case of Supreme Court Decision no. 1188/2561.

The aim of this paper, firstly, is to explain the Supreme Court Decision no. 1188/2561 and analyze applicable laws concerning the specific circumstance and also compare Supreme Court Decision no. 1188/2561 with the famous foreign cases mentioned above. The decision shows that this cyberbullying is not only an annoyance, but also, in some situations, bullying yields some legal consequences, even imprisonment. Secondly, this study is an endeavor to obtain legislation for preventing and resolving the cyberbullying in Thai society.

2. Thailand Supreme Court Decision no. 1188/2561

I. The fact and summary of the case.

The plaintiff and the defendant were legally married in Denmark and had one child. The plaintiff also had a daughter from a former marriage. After married, they had a joint business as a consultant to sell



furniture, and both deposited the money gained from this business to a bank in Hong Kong. In July 2015, they were separated, and then the plaintiff had a new lover.

According to the plaintiff's complaint, the defendant sent several messages to her—on 21 September 2015, over the Skype program, on 23 September 2015 and on 24 September 2015 over the Line application program—and requested for 100,000 Hong Kong dollars. The defendant had also blackmailed her over sex photographs and videos of her with other men while she was still in marital status with him. As the plaintiff did not give him as requested, later on September 26, 2015, the defendant sent such nudity materials to the plaintiff's daughter via private electronic mail.

The plaintiff claimed the punishment for the defendant by

1) The Thailand Criminal Code Section 309: an offense of a person's liberty, Section 326: Defamation, Section 338: Threatening to reveal secret (Blackmail).

2) The Thailand Criminal Code Section 80: The attempt to committing an offense, Section 90: One single act but affects several provisions, Section 91: the scale of the punishment.

3) The Thailand Computer Crime Act B.E. 2550 Section 14: import to a computer system of any illegal computer data, including a pornographic nature that is publicly accessible.

Besides, the plaintiff requested to confiscate and destroy the photo and video files.

II. The Court Decisions.

In preliminary examinations (or the preliminary hearing-before accepting the criminal lawsuit, due to the Criminal Procedure Law, in case the individual is a plaintiff not a public prosecutor-the judge must find that such evidence provides probable cause to believe that the crime was committed and that the crime was committed by the defendant.)

The Court of First Instance indicated that it was a prima facie case-having legal ground and sufficient evidence to the verdict-but only in accordance with The Criminal Code Section 309, 338, and 80 and Thailand Computer Crime Act B.E. 2550 Section 14. Other charges were dismissed. On the contrary, the defendant denied all charges.

The Court of First Instance adjudicated that the defendant was guilty of the Criminal Code Section 309, 326, 338 assembling Section 80, and Thailand Computer Crime Act B.E. 2550 Section 14. This was one single action but violated in several provisions, the punishment was based on Section 338 (blackmail), one which is the most severe sentence, and according to the Criminal Code Section 90, the imprisonment was two years. However, under The Criminal Code Section 78, as the defendant provided important and useful information, the defendant obtained a penalty reduction by one third. Therefore, the imprisonment was, in fact, one year and four months.

The defendant appealed to the Appeal Court.

The Appeal Court adjudicated that the defendant was guilty by The Criminal Code Section 309, 338 assembling Section 80, and The Computer Crime Act B.E. 2550 Section 14(4). The Court upheld all the judgments of The Court of First Instance.

The defendant submitted the petition to the Supreme Court. In the question of facts (This contradicts of the question of laws)

The Supreme Court determined that the facts were final that the plaintiff and the defendant were legally married, and the defendant sent several messages via electronic devices to the plaintiff, as mentioned.

First of all, an issue to determine was whether the accusation of money extortion (blackmail) was legal and clear under the Criminal Procedure Code Section 158 (5) ("A charge shall be made in writing, and shall contain... (5) To the extent giving the defendant a clear understanding of the charge, all acts alleged to have been committed by the defendant, the facts and particulars as to the times and venues of such acts, as well as the persons or articles concerned. As for a case of a defamatory offense, the words, writings, pictures, or other matters in connection with the offense shall fully be indicated in or annexed to the charge.")



The Supreme Court decided that the plaintiff's accusation, as according to the attempt to extort money (blackmail) under The Criminal Code Section 338, was precise and clear. Regarding the indictment, the plaintiff explained that the defendant threatened her over the Skype program in Danish, requesting for 100,000 Hong Kong dollars. If the plaintiff did not transfer the money to the defendant, the defendant would reveal the secret by making public the plaintiff's photographs and videos that the plaintiff had sexual affairs with a Thai man. Later, when the plaintiff did not consent to the payment, the defendant imported to the computer system, pornographic videos, of the plaintiff having sex with a man. The reveal of intimate pictures and videos caused damages to the plaintiff. Therefore, the lawsuit of the plaintiff was relevant to the Section 158 (5). The defendant's objection to the decision of this issue of the Appeal Court was dismissed.

Second, another issue to determine was whether the accusation of the import to a computer system of any computer data of a pornographic nature that is publicly accessible was relevant to the Criminal Procedure Code Section 158 (5), which requires a clear description of all facts and the allegations.

The Court disagreed with the accusation of the Thailand Computer Crime Act B.E. 2550 Section 14(4) and dismissed this allegation as several reasons;

1) At the beginning, the plaintiff stated that the defendant imported to the computer system, of pornographic videos, in which the defendant had sex with a man. Also, the videos were made by the defendant and posted on www.gmail.com, which made them accessible by the general public. It is considered public because it is a social media website, which can be linked to others, such as plus.google.com.

2) At the end, however, the plaintiff explained that the defendant used the electronic address named stxxx@gmail.com, a private electronic address; only the defendant knows the password use of access to the emails. The defendant, to humiliate the plaintiff, then sent the plaintiff's pictures and videos of her having sex with the other man to the electronic mail address of the plaintiff's daughter.

The indictment demonstrated, in the defendant's opinion, the pornographic information was sent to the public computer system. However, it was clear that the information was sent directly only to the plaintiff's daughter; the general public cannot be accessed without knowing the password to enter the computer system. Accordingly, the defendant was not guilty under The Computer Crime Act 2550 Section 14(4) and The Criminal Procedure Code Section 158 (5).

The Court decided that the defendant did not offend The Computer Crime Act 2550 Section 14(4).

Third, another issue to determine was whether the defendant's action was the offense of threatening to disclose the secret (blackmail) or the offense to the liberty of a person. According to the defendant's statement, he reaffirmed that he sent several messages to the plaintiff requesting 100,000 Hong Kong dollars. The defendant also threatened the plaintiff that if the payment were not made, the sexual pictures and videos of the plaintiff would be sent to the plaintiff's daughter. This action offended the Section 338; Whoever, compelling the other person to give or to agree to give oneself or the other person the benefit in the nature to be the property by threatening to disclose the secret, to cause injury to the compelled person or the third person, up to the compelled person submit to the same, such person to be said to commit blackmail, and shall be imprisoned as from one year to ten years and fined as from two thousand baht to twenty thousand baht.

Nevertheless, the plaintiff did not consent to such payment; it was, consequently, an attempt to blackmail.

Also, the defendant claimed that the money in the Hong Kong bank account had derived from the joint business, and the defendant had the right to obtain it. Due to this issue, the Court indicated that to claim for the money, the defendant must exercise his rights in a legitimate way (not blackmail). Besides, the messages sent to the plaintiff did not appear to contain any messages referring to the business, and the money the defendant requested did not appear to be the money derived from the joint business. The Court agreed to the decision of the Appeal Court for the defense of "the Blackmail." The objection of the defendant was not reasonable to make the consequences the judgment of this issue changed.

The Supreme Court reversed part of the judgment of the Appeal Court and concluded that;



1) The defendant was not guilty concerning the Computer Crime Act B.E. 2550 Section 14 (4).

2) The defendant was guilty of threatening to reveal a secret (blackmailing) concerning the Criminal Law Code Section 338.

The acts of the defendant were one single act against several provisions, according to the Criminal Code Section 90; the punishment should be the most severe sentence, which was imprisonment for one year. However, under the Criminal Code Section 78, the defendant obtained a one-third reduction in the imprisonment term due to his well-participated trials in the court procedure, the final imprisonment, therefore, was eight-month time. Besides the amendment, the others are as the Appeal Court's judgment.

III. The analysis of the case

The Supreme Court Decision No. 1188/2561 was a significant cyber sexual bullying that demonstrated a threat to disclose a secret, the intimate sexual images, and the defendant extorted money via electronic devices. The analysis will be within the areas of the Criminal law Section 338, and the Computer Crime Act B.E. 2550 Section 14(4).

1) Thai Criminal Code Section 338 (Blackmail): The action was relevant to and completed all the elements of the blackmail law. However, if the threat to reveal secret is not for the money, or for any benefit such as doing the distribution for humiliating a person, it is not a blackmail crime under Section 338, though it is bullying and hurtful victims. For example, Jessica Logan was the victim of pornographic revenge, and the nude pictures of her went viral via cell phones because of her boyfriend.

2) The Computer Crime Act B.E.2550 Section 14(4) states the pornography delivered to the computer system.

(1) Under Section 14(4), although it concerns the delivery of pornography, such law did not define "Pornography," and it leaves for courts to determine.

It is concluded according to the Supreme Court Decisions that;

"Pornography is the shameless and ugly sexual explicit, a contrast to art which represents the beauty and works of the artist. The art or pornography is determined by neutral individuals, not an ultra-conservative nor person who seems to oppose any change. This picture of a naked female figure intended to show the healthy body of that person in sunbathing. Her breasts were seen, but her sexual organ was dim. Besides, it was a lesson on how to draw the body's figures. This picture was not shameless or ugly which induces the sexual lust, therefore, not pornography" (Supreme Court Decision No. 978/2492 and 1223/2508).

"In the picture, it was one woman exposing her breasts; a fabric-covered her sexual organ but not all. Also, her manners were inappropriate, shameless and ugly; lying with wide open legs. The other woman was sitting on a seat, with wide open legs, covered by translucent fabric, intended to show the sexual organ. Therefore, it provoked the sexual lust, it was pornography" (Supreme Court Decision No. 6301/2533).

"It was a fashion show, with models dressed in the bathing suits, trimmed with a thin lace. With spotlights on the stage, audients could see through the lace, the body of the models. This did not differ from nudity. This show intended to please audients in an entertainment place which was in a pornographic way" (Supreme Court Decision No. 5519/2531).

"There were 7 images with 7 women. The first one was a naked woman, standing and hugging a man. The second portrayed a woman in translucent underwear with a man holding her in one hand, and the other hand cuddling her chest. The third, a woman, exposing her breasts, was using a handset of telephone pressing her sexual organ. The forth, naked woman, covered her body with a fishing net, with one hand was touching her breast and the other hand was touching her sexual organ. The fifth, a woman was exposing her breasts by opening her blouse and putting her hand into her skirt. The sixth showed a woman wearing underwear, exposing her breasts and touching her sexual organ. The seventh showed a woman exposing her breasts, wearing shorts and touching her sexual organ.

Regarding the decision, each image, even though the sexual organ was not clearly seen, all images were provoking sexual lust. In addition, the pictures of naked women, which some parts of sexual organs



could be seen, could be regarded as pornographic images. Moreover, they were not artistic images that represent the body's complete figures. Also, the text clearly describes it as male and female sexual intercourse by expressing the emotions of them in a provocative way of sexual lust. Even if the text did not provide the profanity, it could be regarded as pornographic text" (Supreme Court Decision No. 3510/2531).

It is noted that the Decisions could probably be the guidelines of "pornography." However, some information, though the plaintiff claimed as pornography, it might not be according to the court interpretation. For example, the view of the ugliness and the shame might differ from person to person and depends significantly upon sociocultural contexts, despite the court's emphasis on the opinions of ordinary people. Besides, it is also always controversial whether the information or the images are artistic or pornographic, which are sometimes difficult to determine. For example, the nudity, some might see them more aesthetic than indecency.

(2) Under Section 14(4), the law requires the distributed data to be "publicly accessible." In contrast, if pictures are circulated among limited groups such as over a private line account, a private electronic mail, a private cell phone, or a private personal computer, it might not be illegal. The term "public" is similar to the term "pornography" and must be interpreted by the court. It is noted that some applications allow a limited number of persons in a group but some groups contain a large number of members, it might not be against Section 14(4), though revealing the secret of someone in a group might hurt or destroy the reputation of a victim.

(3) The main objective of The Computer Crime Act B.E. 2550 is the cybersecurity and national security of information and communication, such as illegal access into the network, protection of information lost, even though some provisions refer to pornography or modifying images of other people by electronic means. (Section 16)

Unlike cybersecurity, cyberbullying mostly concerns emotional response and psychological damage to the victim. More importantly, the compensation regarding the psychological damage such as getting depressed, stressful, embarrassed is not allowed in Thai law.

Some might argue that in Thai Criminal Law Code provides "the defamation law" under Section 326 and defamation by publishing under Section 328, however, the plaintiff must prove to the court the elements of the Sections. For example, the plaintiff is supposed to be hated or scorned by others. In contrast, if the plaintiff feels depressed, embarrassed by himself or herself, it might not be defamed under the law. (Section 326 states that "Whoever, imputes anything to the other person before a third person in a manner likely to impair the reputation of such other person or to expose such other person to be hated or scorned, is said to commit defamation, and shall be punished with imprisonment not exceeding one year or fined not exceeding twenty thousand Baht, or both")

Therefore, the Thai Criminal Code Section 338 (Blackmail) and the Computer Crime Act B.E.2550 Section 14(4) may not be relevant to all cases of distribution of private sexual images.

3. Conclusion

As cyberbullying, including cyber sexual bullying, is an important and severe problem among youths and sometimes adults in the digital age. It is essential to prevent cyberbullying and protect people from the bully, help them from harassment, depression, and embarrassment, which can result in breaking away from schools or committing suicide.

From a legal point of view, as cyberbullying differs from traditional bullying, the specific anti-cyberbullying laws have been enacted in some states which recognize cyberbullying as a threat, for example, the U.S.A., the death of Jessica and Meier sparked the State legislative reform concerning cyberbullying. According to Jessica, the Ohio law, Jessica Logan Act (House Bill Number 116, 2012) effective on November 4, 2012, requires schools to prohibit cyberbullying (bullying by electronic means). According to Megan, Megan Meier Cyberbullying Prevention Act (H.R. 6123, 2008) amended the federal criminal code to impose criminal penalties on anyone who transmits in interstate or foreign commerce a communication intended to coerce, intimidate, harass, or cause substantial emotional distress to another person, using electronic means to support severe, repeated, and hostile behaviors.



In Thailand, the existing laws such as Civil or Criminal law or Computer crime law has not covered all expenses of cyberbullies. Furthermore, the damages from emotional distress are not subjected to compensation so far. Therefore, the victim probably might be denied by law enforcement. A suggestion thereby is to enact a specific law, amend, or modify the Criminal Code by adding cyberbullying as a criminal offense or cybercrime. Also, sound punishments should be set corresponding to today's technology that makes all the distributions of information massive and fast.

On the other hand, for the youths, cooperation amongst schools, families, and victims is the key to the solution to cyberbullying. For instance, schools should outline policy against cyberbullying, including the procedure and provide education for children and parents regarding fair usages and dangers of digital devices, including social media, and others, how to respond when bullying occurs. The family could help the victim, particularly in the psychological environment, by talking to each other, including providing a safe online environment for children at home. Ultimately, for all who are prone to cyber bullying should understand the extent of technology and have an awareness of its danger to help society free from cyberbullying. Besides, the study of The Court Decision in other legal avenues is suggested to find the applicable laws for specific cases in Thailand.

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