BLACK MAGIC, SEX RITUALS AND THE LAW:
A Case Study of Sexual Assault by Religious Fraud in Thailand

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Abstract

This Article critically examines the criminalization of religious fraudulent sex as sexual assault (i.e., rape and indecent acts) in Thailand and makes descriptive and normative contributions to the fields of comparative criminal law and constitutional law. With respect to criminal law, we find that Thai courts utilize a creative doctrinal maneuver (i.e., a victim's naivety is a form of 'inability to resist') to convict alleged fraudsters with statutory provisions that do not readily criminalize fraudulent sex. We argue that while the doctrinal maneuver does desirably extend the otherwise limited scope of Thai sexual offense provisions, the emphasis on the cognitive deficiencies of the defrauded victim reflects a paternalistic victim-blaming that is problematic. With respect to constitutional law, we find that Thai courts are both comfortable in directly adjudicating religious claims, and intrinsically skeptical of any supernatural or religious claims involving sex as part of a ritual. We argue that while the assessment method of the Thai courts does not accord with principles of religious liberty espoused in the US and Europe, it is an inevitable outcome of the prevailing constitutional ordering and societal understanding of religious freedom in Thailand.

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Introduction

As the world's most populous Buddhist majority country[1]—a country whose religious landscape retains fascinating syncretic repertoires of magic and other supernatural ritual practices[2]—Thailand has attracted considerable scholarly attention on the role religion plays in different aspects of society. These include the religious influences in the political process (both historically[3] and contemporaneously[4]); religiously-infused societal and ethnic conflicts in Southern Thailand;[5] and the interactive dynamic between religion and economy.[6] This rich literature has also begun to explore the impact and influence of religion on the legal system, such as the continued tension between modern tort law and the traditional divine sense of justice.[7] There is also the critical inquiry into the

1. Pew Research Center, The Global Religious Landscape 32 (2012).

2. Kanya Wattanagun, *Karma versus Magic: Dissonance and Syncretism in Vernacular Thai Buddhism*, 6(1) Southeast Asian Stud. 115, 116–118 (2017); Justin McDaniel, The Lovelorn Ghost and the Magical Monk: Practicing Buddhism in Modern Thailand 100–109 (2011).

3. *E.g.*, Arjun Subrahmanyan, *Buddhism, Democracy and Power in the 1932 Thai Revolution*, 41(1) Asian Stud. Rev. 40 (2017) (discussing how the 1932 revolution that toppled the absolute monarchy did not alter the basic church-state arrangement and religious governance personnel, even as the previously status-inferior but numerically superior rural-based Mahanikai order sought to co-opt the revolutionary language of democracy, freedom and equality to challenge the dominant Bangkok based Thammayut order).

4. *E.g.*, David M. Engel, *Blood Curse and Belongings in Thailand: Law, Buddhism, and Legal Consciousness*, 3 Asian J.L. & Soc'y 71 (2016) (discussing the blood curse ritual—involving splashing the gates of government buildings with about 300 liters of human blood collected from 70,000 supporters—by 'red shirts' protesters and arguing that the ritual represents an attempt to express outrage over perceived violation of legal rights under the modern political system through traditional and divinity-infused conceptions of justice); Duncan McCargo, *Buddhism, Democracy and Identity in Thailand*, 11(4) Democratization 155 (2004) (arguing that Thai Buddhism has such intimate ties with the state such that it ceases to be a meaningful progressive force of democratization).

5. *E.g.*, Wattana Sugunnasil, *Islam, Radicalism, and Violence in Southern Thailand: Berijihad di Patani and the 28 April 2004 Attacks*, 38(1) Critical Asian Stud. 119 (2006) (highlighting the religious and cultural factors behind the radicalization and militancy in Southern Thailand that have been overlooked amidst more common explanations such as political, social and economic causes).

6. *E.g.*, Peter A. Jackson, *Royal Spirits, Chinese Gods, and Magic Monks: Thailand's Boom-Time Religions of Prosperity*, 7(3) South East Asia Res. 245 (1999).

7. *E.g.*, David M. Engel, *Rights as Wrongs: Legality and Sacrality in Thailand*, 39(1) Asian Stud. Rev. 38 (2015).

broader issue of (in)compatibility of the predominant belief system with rule of law,[8] democracy,[9] and constitutionalism.[10]

There is one peculiar interaction between religion and the Thai legal system that has thus far eluded academic discussion in the literature, whether in English or Thai.[11] Amidst the myriad of rituals and artifacts that are designed to procure favorable divine interventions,[12] sexual acts are sometimes involved. In particular, a purported religious specialist may claim that he[13] has certain supernatural powers capable of alleviating the adherent's problems, but needs to perform a ritual that involves sexual acts to do so. Some of these purported religious specialists are perceived as charlatans and have been prosecuted and convicted of sexual assault (*i.e.*, rape or indecent act).

This criminalization of religious fraudulent sex is intriguing from a comparative legal perspective. Religious fraudulent sex implicates the two controversial issues of religious fraud and fraudulent sex. Punishing religious fraud requires the court to ascertain the veracity of purported

8. *E.g.*, Björn Dressel, *Thailand's Traditional Trinity and the Rule of Law: Can They Coexist?*, 42(2) Asian Stud. Rev. 268, 271–277 (2018) (arguing that the trinity of nationalism, Buddhism and monarchy has become an inviolable state ideology in Thailand that has been used by political actors to undermine rule of law and democratic principles).

9. *E.g.*, David Ambuel, *New Karma: Buddhist Democracy and the Rule of Law in Thailand*, 19(4) Am. Asian Rev. 131, 155–162 (2001) (discussing how the 'traditional Buddhist value of the good, wise, and virtuous individual person as the only true source of a stable and good society'—*i.e.*, the emphasis on personal authority—has prevented democratic reform in Thailand from fully embracing the setting up of the necessary institutional checks and balances).

10. *E.g.*, Benjamin Schonthal, *Formations of Buddhist Constitutionalism in South and Southeast Asia*, 15(3) Int'l J. Const. L. 705, 707–708 (2017) (discussing the legal projects of using written constitutions to protect and preserve Buddhism in Thailand and Southeast Asia, and identifying the distinguishing factor of this Buddhist constitutionalism where the central issue is the meditating of relationships between governing elites and Buddhist monks, rather than applying transcendent commands through man-made law or conforming with requirements of secular-liberal protection of religious freedom).

11. *E.g.*, สุพิศ ประณีตพลกรัง [Supit Praneetpolkrang], ความผิดเกี่ยวกับเพศ ข่มขืนกระทำชำเรา อนาจาร แก้ไขใหม่ตามพระราชบัญญัติแก้ไขเพิ่มเติมประมวลกฎหมายอาญา (ฉบับที่ ๒๗) พ.ศ. ๒๕๖๒ [Sexual Offences: Rape and indecent act amended according to the criminal code amendment act (No. 27) B.E. 2562] (2019); คณพล จันทน์หอม [Kanaphon Chanhom], คำอธิบายกฎหมายอาญาภาคความผิด เล่ม 3 ลักษณะ 1 ถึงลักษณะ 9 [Explanation Of Criminal Law Offences, Vol. 3, Titles 1 to 9] (2018); วิเชียร ดิเรกอุดมศักดิ์ [Wichian Direk-udomsak], อาญาพิสดาร เล่ม 2 (ฉบับปรับปรุงใหม่ ปี 2561): หลักกฎหมายแก้ไขใหม่ล่าสุดและแนวคำพิพากษาฎีกาตามประมวลกฎหมายอาญา มาตรา 206–398 [Detailed Criminal Law, Vol. 2 (Revised Edition Year 2018): Most Recently Revised Legal Principles And Judgments Of The Supreme Court According To The Criminal Code Sections 206–398] (Jurisprudence Group 2018); เกียรติขจร วัจนะสวัสดิ์ [Kietkajorn Vachanasvasti], กฎหมายอาญาภาคความผิด เล่ม ๒ [Criminal Law Offences, Vol. 2] (6th ed. 2014); หยุด แสงอุทัย [Yoot Saeng-Uthai], กฎหมายอาญาภาค ๒–๓ [Criminal Law Books 2–3] (11th ed. 2013).

12. Jackson, *supra* note 6, at 263–273.

13. All the defendants in fraudulent sex prosecutions in Thailand have—insofar as the gender is disclosed—been men.

supernatural or religious claims. This ascertainment is not only fraught with evidential and conceptual difficulties, but also risks running afoul of religious freedom.[14] For fraudulent sex, courts have to navigate statutory provisions that typically do not expressly criminalize fraudulent sex where the victim is aware that he or she is engaging in sexual acts.[15] Academic debate also rages on about the normative desirability of punishing fraudulent sex in a context where deception is commonly perceived as widespread in sexual relationships.[16]

In this Article, we critically examine religious fraudulent sex cases in Thailand and make descriptive and normative contributions to the fields of criminal law and constitutional law.

With respect to criminal law, we investigate how alleged fraudsters are charged and convicted despite there being no explicit criminalization of fraudulent sex beyond impersonation in Thailand. As the first concerted inquiry in the English language literature into Thai sexual offenses, we critically set out the origin, evolution, and current manifestation of the relevant criminal code provisions. Thereafter, we examine the court's application of the criminal code provisions on religious fraudulent sex. We identify how the interpretation of the 'inability to resist' element by the Supreme Court (the apex court in Thailand) has evolved. Initially, the court held that sexual acts procured by fraud do not constitute sexual assault. The reason given for this approach is that the sexual acts are due to the victim ignorantly believing in the defendant's lies, and not because the victim is in a condition of inability to resist. Now, the court regards the victim's 'naivety' and 'stupidity' in believing the fraudulent claims of the defendant as rendering the victim in a condition of inability to resist. This leads to the defendant's conviction.

Normatively, we argue that while the emphasis on the cognitive deficiencies of the defrauded victim reflects a paternalism that is problematic, the expansion of situations which constitute inability to resist to include defendant-induced mistake is a small but welcome step away from the outdated patriarchal acquiescence of deception as part of seduction.[17]

With respect to constitutional law, we investigate how Thai courts assess the veracity of the defendant's claims. Situating the consistent cursory dismissal of the defendant's supernatural claims by the courts in the selective enforcement pattern of potential religious fraud, we submit that

14. *Infra* Subpart III.B.

15. *Infra* Subparts I.C.1 and III.A.

16. Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 Yale L.J. 1372, 1405 (2013); Hyman Gross, *Rape, Moralism, and Human Rights*, Crim. L. Rev. 220, 224–225 (2007). For a collection of ancient and contemporaneous accounts of deception in sex, see Wendy Doniger, The Bedtrick: Tales of Sex and Masquerade (2000).

17. Ben A. McJunkin, *Deconstructing Rape by Fraud*, 28 Colum. J. Gender & L. 1, 21–25 (2014); Ian Leader-Elliot & Ngaire Naffine, *Wittgenstein, Rape Law and the Language Games of Consent*, 26 Monash U. L. Rev. 48, 72–73 (2000); Susan Estrich, Real Rape 69–71 (1987).

the Thai courts are 1) comfortable in adjudicating religious claims, and 2) intrinsically skeptical of any supernatural or religious claims involving sex as part of a ritual.

We also argue that while the assessment method of the Thai courts does not accord with principles of religious liberty espoused in the US and Europe, it is an inevitable outcome of the prevailing constitutional ordering and societal understanding of religious freedom in Thailand that does not share Western aversion to state intervention on theological matters. Any reform would require fundamental changes to the underlying constitutional framework, which would be premature given the current instability of Thailand's political order.

This Article is divided into five parts. Part I examines the relevant statutory provisions in their social and historical context. Part II analyzes the court cases involving prosecution of religious fraudulent sex as sexual assault, with a particular focus on how the 'inability to resist' element is interpreted and how the veracity of the defendant's supernatural claims is assessed. Part III presents the normative arguments from the criminal law and constitutional law dimension. The final Part concludes.

I. Sexual Offenses in Thailand

This Part presents the context of the case study by examining the origin and evolution of Thailand's sexual offense provisions against the underlying social backdrop and overall legal framework.

A. *Social Backdrop*

Situated in Southeast Asia between Myanmar, Laos, Cambodia and Malaysia, Thailand is the world's twenty-first most populous country with a population of around 69 million.[18] Thailand is considered a newly industrialized country. In 2017, it had a per capita nominal GDP of about US$6,729[19] and an overall midrange ranking of 83 in the UN Human Development Index.[20] The Thai population is ethnically diverse. According to the official Thai Government report in 2011, there are at least 62 recognized ethnic communities in Thailand, with the major ethnic communities including Thai (34 percent), Chinese (14 percent) and Laos (25 percent).[21]

The religious landscape, at first glance, appears more uniform. According to the Pew Research Center's 2012 global survey of religious groups, Buddhism is the overwhelmingly dominant religion in Thailand

18. The World Bank, *Data: Thailand*, https://data.worldbank.org/country/Thailand (last visited Nov. 1, 2019).

19. *Id.*

20. Human Development Report Office, Human Development Indices and Indicators: 2018 Statistical Update 35 (2018).

21. Committee on the Elimination of Racial Discrimination, Reports Submitted by States Parties under Article 9 of the Convention: Thailand 3 (2011), www.rlpd.go.th/rlpdnew/images/rlpd_1/HRC/CERD%201_3.pdf [https://perma.cc/4DE2-BMDX].

with 93.2 percent of the population as adherents, and Muslims and Christians make up 5.5 percent and 0.9 percent of the population respectively.[22] Similar figures are reported in the government statistics on religious congregations.[23] Notably, while the vast majority of Thais self-identify as Buddhist of the Theravada tradition,[24] actual religious practices often reflect tenets and rituals from animistic and Chinese Mahayana traditions.[25] In particular, the belief in supernatural magic and the employment of rituals to harness divine interventions to resolve worldly issues remain a core characteristic of the prevailing Thai religiosity.[26]

B. *Legal Framework*

Thailand officially became a constitutional monarchy in 1932. A largely bloodless revolution compelled the absolute monarchy of the Chakri dynasty—established in 1782 and still the royal house today—to divest power.[27] The corresponding introduction of a constitution and elections did not secure democracy for Thailand.[28] Military coups are of regular occurrence. The governance of Thailand is characterized by an oscillation between electoral democracy and military dictatorship.[29] The most recent coup was in 2014, which ushered in the military government headed by Prayut Chan-o-cha.[30] The military rule nominally ended in

22. Pew Research Center, *supra* note 1, at 46.

23. National Statistical Office, *Religious and Culture Statistics*, http://statbbi.nso.go.th/staticreport/page/sector/en/04.aspx [https://perma.cc/HRW8-GW87] (last visited Nov. 1, 2019).

24. For a critical discussion about the categorization and classifications of the various Buddhist groups/movements, see Cathy Cantwell, Buddhism: The Basics 141–161 (2010).

25. Wattanagun, *supra* note 2, at 119–127 (discussing the common concurrent beliefs in both the doctrine of karma (automatic outcomes premised upon volitional acts of an individual) and the power of magic (achieving of desired outcomes through instrumental rituals and supernatural intervention) among Buddhist practitioners in Thailand, and the rationalization adopted to syncretize the conceptual dissonance between the two beliefs); McDaniel, *supra* note 2, at 100–109 (arguing that seemingly animistic practices of ghosts, incantations, and apotropaic rituals are actually integral to the way many Thais interpret and practice Buddhism).

26. Peter A. Jackson, *Markets, Media, and Magic: Thailand's Monarch as a "Virtual Deity"*, 10(3) Inter-Asia Cultural Stud. 361, 363–364 (2009). *See also* Eric Cohen, *Fetuses in a Thai Buddhist Temple as Chaotic Irruption and Public Embarrassment*, 11(1) Asian Anthropology 1, 3–6 (2012) (discussing how the fetus is regarded differently in Thai Buddhism, *i.e.*, as a life whose killing is a sin—and in Thai folk religion, *i.e.*, as dangerous and powerful spirits that can be and often are harnessed through magic rituals involving remains of the fetus).

27. Chris Baker and Pasuk Phongpaichit, A History of Thailand 25–30, 115–119 (3rd ed. 2014).

28. Andrew Harding and Peter Leyland, Constitutional System of Thailand: A Contextual Analysis 11–14 (2011).

29. For a concise historical account of the coups prior to the most recent 2014 coup, see Paul Chambers, *Constitutional Change and Security Forces in Southeast Asia: Lessons from Thailand and Myanmar*, 36(1) Contemp. Southeast Asia 101, 107–114 (2014).

30. For discussions of the context, process, features and implications of the 2014

2019 after elections were held, though Prayut Chan-o-cha continues to lead the country as the new Prime Minister.[31]

The inevitable need to establish a new constitutional order after each regime change means that there have been numerous constitutions since 1932. Thus far, there have been twenty such constitutions.[32] This high turnover has diluted the importance of the constitution in the public consciousness and impeded development of a stable constitutional order.[33]

On the other hand, Thai legal codes and statutes have largely been insulated from the constitutional volatility.[34] The foundational laws (*e.g.*, the Penal Code, the Civil and Commercial Code) in force today remain premised upon laws introduced by King Rama V at the turn of the twentieth century. The legal reform then undertaken was part of an effort to create a modern Thai state.[35] There was, unsurprisingly, a concerted effort to draw inspiration from Western law.[36] However, unlike other colonized states in Southeast Asia where the transplanted 'modern' laws either

coup, see Claudio Sopranzetti, *Thailand's Relapse: The Implications of the May 2014 Coup*, 75(2) J. Asian Stud. 299, 301–304 (2016); Kitti Prasirtsuk, *Thailand in 2014: Another Coup, a Different Coup?*, 55(1) Asian Surv. 200, 201–204 (2014).

31. Thitinan Pongsudhi, *New Thai Cabinet Puts Power Grab on Display*, Bangkok Post (Jul. 12, 2019, 4:00 AM), https://www.bangkokpost.com/opinion/opinion/1710851/new-cabinet-puts-power-grab-on-display [https://perma.cc/34NR-UHLL].

32. Engel, *supra* note 4, at 75 n.7.

33. Harding & Leyland, *supra* note 28, at 33–34. *See* Pinai Nanakorn, *Re-making of the Constitution in Thailand*, 6 Sing. J. Int'l & Comp. L. 90, 93–103 (2002) (a concise overview of the purported functions and enacting circumstances of the various constitutions, and the repeated failed attempts of using the constitution to constrain military influence and involvement in the political process). *Cf.*, Tom Ginsburg, *Constitutional Afterlife: The Continuing Impact of Thailand's Postpolitical Constitution*, 7 Int'l J. Con. L. 83, 86–89 & 103–105 (2009) (discussing how unwritten constitutional norms and institutions may survive the frequent changes of the formal constitutions).

34. Harding & Leyland, *supra* note 28, at 33–34.

35. Adam Reekie & Surutchada Reekie, *The Long Reach of English Law: A Case of Incidental Transplantation of the English Concept of Vicarious Liability into Thailand's Civil and Commercial Code*, 6(2) Comp. Legal Hist. 207, 213–214 (2018). For a discussion on the European/Western imperial pressures and influences (*e.g.*, unequal treaties that granted extraterritoriality to foreign subjects) that shaped the modernization process—including that of law—in Thailand from the mid-nineteenth century to early twentieth century, see Tamara Loos, Subject Siam: Family, Law, and Colonial Modernity in Thailand 40–63 (2006). Similar experiences happened in other 'semi-colonized' states such as China and Japan: H. Sasamoto-Collins, *Progress Impeded: Constraints on Legal Equality in Post-Restoration Japan*, 20(3) Japan F. 337, 341–345 (2008); Richard S. Horowitz, *International Law and State Transformation in China, Siam, and the Ottoman Empire during the Nineteenth Century*, 15(4) J. of World Hist. 445, 462–465 (2004).

36. Loos, *supra* note 35, at 4 ('[M]ore than forty legal advisers from France, Britain, Japan, Ceylon, the United States, and Belgium served as officials').

originated from or were heavily influenced by the laws of the respective colonizing European powers,[37] the genealogy of Thai law is diverse.[38]

This dynamic is well evidenced in the Penal Code, the focus of this Article. The Penal Code was the first modern statute to be drafted during this reform. It was considered by the drafting committee as the easiest to draft and be understood by the courts,[39] especially when compared to the massive Civil and Commercial Code.[40] The drafting committee comprised members with legal education and training from Thailand, France, Japan and Britain.[41] Criminal law statutes from France, British India, Belgium, the Netherlands, Italy, Japan, Egypt, Germany, Denmark, and Hungary were reviewed in the drafting process.[42] A notable feature of the Thai drafting process is the choice of language. In contrast with the importation of Western law by other colonized jurisdictions in Southeast Asia, the Thai Penal Code was drafted in English before being translated into central Thai. This was partly due to the need for a common working language given the multinational background of the drafting committees.[43] However, the translation process meant the reforming Thai elites had more control over the content and meaning of these new laws.[44]

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37. Apirat Petchsiri, *A Short History of Thai Criminal Law since the Nineteenth Century*, 28(1) Malaya L. Rev. 134, 136–138 (1986).

38. Loos, *supra* note 35, at 65–66; Frank C. Darling, *The Evolution of Law in Thailand*, 32(2) Rev. of Pol. 197, 204–208 (1970). This partly reflects the deliberate choice to ensure no one country had undue influence over the process, and the consequences of unplanned events (*e.g.*, chance encounter and subsequent hiring, early death of existing expert). Loos, *supra* note 35, at 47–48 & 61–62. *See Alessandro Stasi, General Principles of Thai Private Law* 3–4 (2016) (discussing how the first draft of the Thai Civil and Commercial Code was prepared by a French legal advisor and based on the Code Napoléon of 1804, before being revised on the basis of the German Civil Code and the Japanese Civil Code). *See also* Reekie & Reekie, *supra* note 35, at 223–230 (discussing how the English legal education of key members of the drafting committee had contributed to the incidental transplantation of the English law concept of vicarious liability into the Thai Civil and Commercial Code).

39. อมรเทพ เมืองแสน [Amornthep Muangsaen], ประวัติศาสตร์กฎหมายไทย [The Thai Legal History] 76–77 (2017).

40. The Thai Civil and Commercial Code is loosely based on the German BGB, and covered the various substantive areas of contract, tort, property, family and inheritance. For a discussion of the difficult drafting process, see Reekie & Reekie, *supra* note 35, at 214–216; Stasi, *supra* note 38, at 3–4. For a recent commentary of the Thai Civil and Commercial Code, *see generally* Alessandro Stasi, Elements of Thai Civil Law (2016).

41. Loos, *supra* note 35, at 66.

42. *Id.* Thai legal scholars opined that the Criminal Codes of Italy and the Netherlands were significantly relied upon: แสวง บุญเฉลิมวิภาส [Sawaeng Boonchalermvipas], คำอธิบายกฎหมายลักษณะอาญา โดย ศาสตราจารย์ ดร. หยุด แสงอุทัย หนังสือที่ทรงคุณค่าทางวิชาการ [Explanation of the Criminal Law R.S. 127 By Professor Dr. Yoot Saeng-Uthai: A Book Of Academic Value] *in* หยุด แสงอุทัย [Yoot Saeng-Uthai], คำอธิบายกฎหมายลักษณะอาญา ร.ศ. ๑๒๗ [Explanation of the Penal Code R.S. 127] 13 (7th ed. 2018).

43. Muangsaen, *supra* note 39, at 78.

44. Loos, *supra* note 35, at 68–69 (discussing the translation of 'liberty' into the Thai term 'issaraphap', a term which according to historic usage leading up to the time

The end product, the Penal Code RS 127 with a total of 340 sections, was promulgated on June 1, 1908.[45]

C. *Statutory Provisions and Legislative History*

There have been three substantive amendments to the relevant sexual offense provisions since the enactment of Penal Code RS 127. These are discussed in turn.

C.1. First version: Penal Code (1908)

Section 243(1) and (2) of the Penal Code defined rape as:

> Whoever by violence or by any threat has sexual intercourse with any woman against her will, she not being his wife, is said to commit rape, and shall be punished with imprisonment of one to ten years and fine of fifty to five hundred ticals.
>
> Whoever by any fraudulent or deceitful means has sexual intercourse with any woman against her will, she not being his wife, shall be liable to the same punishment.[46]

There was a separate provision (Section 246) for sexual acts that do not amount to sexual intercourse (*i.e.*, 'indecent act on any person'). The provision had identical wording of the core elements (*i.e.*, by violence, by any threats, by any fraudulent or deceitful means).[47]

From a comparative perspective, this Thai offense of rape had two unusual features. First, there was no limitation on the type of fraud or deceit that would constitute rape. This seemingly broad criminalization of fraudulent sex, no less than that of rape, was a radical departure from both the common law and civil law positions. Under English common law of that era, there were only two types of deception that would vitiate consent for the purpose of rape: the deception must either have related to the 'nature of the act' or the identity of a married spouse.[48]

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of translation was 'conceptualized . . . [as] the condition of not being subject to the power of a superior', and which does not readily reflect the Enlightenment ideal of inherent individual equality and dignity).

45. Pen. Code R.S. 127 of 1908.

46. *Id.* at s.243.

47. *Id.* at s.246.

48. Karl Laird, *Rapist or Rouge? Deception, Consent and the Sexual Offences Act 2003*, Crim. L. Rev. 492, 495–498 (2014); Rebecca Williams, *Deception, Mistake and Vitiation of the Victim's Consent*, 124(1) L. Q. Rev, 132, 133–136 (2008). For an academic discussion right before the 2003 law reform in the U.K., *see* David Selfe & Vincent Burke, Perspectives on Sex, Crime and Society 79–86 (2nd ed. 2001). A similar position is adopted in the U.S., where the fraud has to be in the *factum* as opposed to fraud in the *inducement*: McJunkin, *supra* note 17, at 9–12; Patricia J Falk, *Rape by Fraud and Rape by Coercion*, 64 Brook. L. Rev. 39, 157–161 (1998). Nonetheless, there is a complication for common law jurisdictions in South Asia and Southeast Asia (*e.g.*, India, Singapore, Malaysia, Myanmar) which based their criminal statutes on the Indian Penal Code which was drafted in 1860 on the basis of English law with elements from civilian jurisdictions. David Skuy, *Macaulay and the Indian Penal Code of 1862: The Myth of the Inherent Superiority and Modernity of the English Legal System Compared to India's Legal System in the Nineteenth Century*, 32(3) Mod. Asian

The English criminal law statute did contain a provision that purported to punish the procurement of sex through any false representation as a lesser sexual offense when compared to rape.[49] This provision had been conceived by subsequent courts and scholars as a lesser sexual offense that mitigated the harshness arising from the narrow common law position on consent-vitiating fraud.[50] However, the provision was actually meant to address the exploitation of women and girls for the purposes of prostitution.[51] Indeed, various special elements of the provision vis-à-vis rape (*e.g.*, corroboration of sole witness's testimony, victim cannot be 'a common prostitute or of known immoral character') rendered the offense unwieldly and ineffective in punishing fraudulent sex.[52] There was even less criminalization of fraudulent sex in civil law jurisdictions. Jurisdictions such as France and Sweden did not have any provision relating to sex obtained via deception.[53] Where fraudulent sex was criminalized, as

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Stud. 513, 538–545 (1998). Section 90 of the Indian Penal Code, which applies to the entire statute including sexual offences, provides that consent is invalid if given 'under a misconception of fact'. Pen. Code (2013), s.90 (India). This is potentially a broad criminalization of all fraudulent sex as rape. However, courts and commentators have generally referred to the English common law approaches (notwithstanding the difference in wording and structure of the criminal statutes) and adopted the restrictive position at least until more recently. Surya Bala & Rahul Saha, *Make No Promises and Tell Me No Lies: A Critique of Deelip Singh v. State of Bihar Air 2005 SC 203*, Nat'l U. of Jurid. Sci. L. Rev. 149, 156–158 (2008); Jonathan Herring, *Does Yes Mean Yes—The Criminal Law and Mistaken Consent to Sexual Activity*, 22 Sing. L. Rev. 181, 184 (2002).

49. Criminal Law Amendment Act 1885 (48 & 49 Vict. c. 69), § 3 (Eng.).

50. *E.g.*, Neil Morgan, Oppression, *Fraud and Consent in Sexual Offences*, 25 Western Australian L. Rev. 225, 240 (1996); Peter Alldridge, *Sex, Lies and the Criminal Law*, 44 Northern Ireland Legal Q. 250, 251 (1993). This is also a common maneuver adopted by the courts: *e.g.*, *R v Mobilio* [1991] 1 VR 339, 353–354 (Austl.); *R v Linekar* [1995] QB 251, 257, 261 (Eng.). *See also* Jianlin Chen, *Lying about God (and Love?) to Get Laid: The Case Study of Criminalizing Sex Under Religious False Pretense in Hong Kong*, 51 Cornell Int'l L.J. 553 (2018) (discussing the use of this provision to punish religious fraudulent sex in Hong Kong).

51. Home Office, Setting the Boundaries: Reforming the Law on Sex Offences 29–30 (2000). *Cf.*, Susan Edwards, Female Sexuality & the Law 39 (1981) (discussing the debate at the Committee stage of the bill between Lord Bramwell who proposed an amendment to allow for rape by false pretenses and by fraud, and Mr. Hopwood that rape by fraud should only constitute a misdemeanor, and that the latter was given royal assent in light of s.3).

52. Jianlin Chen, *Fraudulent Sex Criminalization in Australia: Disparity, Disarray and the Underrated Procurement Offence*, UNSW L.J. (forthcoming).

53. Jean F. Moreau, Translator; Mueller, Gerhard O.W., Translator. French Penal Code of 1810 ss.330–340 (1959 version) [hereinafter *French Penal Code*]; Thosten Sellin; Translator. Penal Code of Sweden as Amended January 1st, 1972 c.6 s.2 (1972) [hereinafter *Penal Code of Sweden*] (unlawful coercion, abuse of authority and take advantage of unconsciousness/helplessness/deficiency). For academic discussion, see Michael Bohlander, Principles of German Criminal Law 195–212 (2009); Catherine Elliott, French Criminal Law (2001).

in the case of Germany[54] and Norway,[55] the punishable deceptions were restricted to those relating to marital relations.[56]

Second, and in sharp contrast to the broad criminalization of fraudulent sex as rape, the Thai provision adopted a very narrow approach vis-à-vis nonfraudulent conduct. The defendant must have used either 'violence' or 'threat' for the conduct to have constituted rape. This emphasis upon the use of 'violence' or 'threat' is a defining feature of criminal codes of civil law jurisdictions.[57] However, the criminal codes of civil law jurisdictions would also complement their rape provision with other sexual offenses that did not require the otherwise high threshold of violence and threats. Examples include: obtaining sex through abuse of position/authority; taking advantage of the person's unconsciousness, insanity, or deficiency; and, as discussed above, deception relating to marital relations.[58] On the other hand, the Thai Penal Code only had Sections

54. Gerhard O.W. Mueller, Translator; Buergenthal, Thomas, Translator. German Penal Code of 1871, s.179 (1961) [hereinafter *German Penal Code*] ('pretending to enter into a marital relation with her, or by creating or utilizing some other deception as a result of which she believes the sexual intercourse to be in the course of the marital relation').

55. Harald Schjoldager, Translator; Backer, Finn, Translator. Norwegian Penal Code of 1902 s.194 (1961) [hereinafter *Norwegian Penal Code*] ('deceives another into having sexual intercourse under the guise of marriage').

56. German Penal Code, *supra* note 54, at s.179 ('pretending to enter into a marital relation with her, or by creating or utilizing some other deception as a result of which she believes the sexual intercourse to be in the course of the marital relation'); Norwegian Penal Code, *supra* note 55, at s.194 ('deceives another into having sexual intercourse under the guise of marriage').

57. German Penal Code, *supra* note 54, at s.177 ('Anybody who by force or threat of immediate bodily harm forces a woman to submit to extra-marital sexual intercourse or who misuses a woman for extra-marital sexual intercourse after he has for that purpose placed her into a state where she lacks any will power to resist or brought about her unconsciousness shall be punished by confinement in a penitentiary.'); Norwegian Penal Code, *supra* note 55, at s.192 ('Anybody who, by using force or by causing fear for life or health, compels somebody to indecent relations, or is accessory thereto, shall be punished for rape'); Penal Code of Sweden, *supra* note 53, at c.6, s.1 ('If a man, by violence upon her or by threat involving imminent danger, forces a woman to have sexual intercourse, he shall be sentenced for rape'). *See* Michael Bohlander, *Mistaken Consent to Sex, Political Correctness and Correct Policy*, 71(5) J. Crim. L. 412, 420–425 (2007) (discussing the extensive comparative review of criminal law provisions on rape by the Trial Chamber II of the International Criminal Tribunal for the Former Yugoslavia (ICTY)).

58. *E.g.*, German Penal Code, *supra* note 54, at ss.174 (abuse of authority), 176(2) (taking advantage of unconsciousness of insanity) and 179 ('pretending to enter into a marital relation with her, or by creating or utilizing some other deception as a result of which she believes the sexual intercourse to be in the course of the marital relation'); Norwegian Penal Code, *supra* note 55, at ss.191 (threat), 193 ('insane, unconscious or for other reason incapable of resisting'), 194 ('deceives another into having sexual intercourse under the guise of marriage'), 198 ('Anybody who, by especially underhand conduct or by abuse of a dependency-relation, deceives another into indecent relations'), 199 (abuse of authority); Penal Code of Sweden, *supra* note 53, at c.6, s.2 (unlawful coercion, abuse of authority and take advantage of unconsciousness/helplessness/deficient). *Cf.*, French Penal Code, *supra* note 53, ss.330–340 (there was

243 and 246 for nonconsensual sexual offenses involving an adult victim.[59] In this regard, the common law jurisdictions approached rape via consent (or the lack thereof).[60] The breadth and flexibility of the concept of consent allowed the common law courts to similarly punish sex that was not procured through violence or threat without the need for separate statutory provisions. As discussed above, certain types of fraud can vitiate consent. Another example is where the victim lacks capacity to consent (*e.g.*, by reason of unconsciousness or insanity).[61]

C.2. Second Version: Criminal Code (1957)

The Penal Code was replaced by the Criminal Code BE 2499, which took effect in 1957. According to the explanatory remarks, this new Criminal Code was designed to consolidate the various amendments enacted over the preceding fifty years, and to align certain outdated rules with international practice and principles of the democratic regime.[62] The allusion to democratic principles reflected the constitutional consequences of abolishing absolute monarchy in 1932. The reference to international practice is unsurprising given the prevailing modernization ethos. The ideological struggle against communism also provided additional impetus for legal reform, especially vis-à-vis women's rights.[63]

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no definition of rape; s.332 merely stated that 'Any person who commits the felony of rape shall be punished by hard labor for a limited time,' and no other sexual offenses against adults; s.333 merely provided for aggravated penalty if the perpetrator is in a position of power/authority).

59. Section 244 criminalizes anyone who 'has sexual intercourse with any girl under twelve years of age, with or without her consent': Pen. Code R.S. 127 of 1908. There is the prohibition of 'carnal intercourse against the order of nature' that arguably criminalized same-sex sexual intercourse (whether consensual or otherwise) and bestiality: Pen. Code R.S. 127 of 1908, s.242 ('Whoever has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment of three months to three years and fine of fifty to five hundred ticals.'). This provision was not retained during the enactment of the Criminal Code B.E. 2499 of 1956. Notably, there has been no explicit criminalization of incest. See Grant Evans, *When Brother-Sister Marriage Becomes Incest*, 21(2) Australian J. of Anthropology 228, 229–231, 233–234 (2010) (discussing how the common practices of royal marriages among brothers and sisters may explain why incest has not been, historically, a subject of significant discourse in Thailand).

60. Laird, *supra* note 48, at 495–498; Williams, *supra* note 48, at 133–136.

61. Ralph Sandland, *Sex and Capacity: The Management of Monsters?*, 76(6) Mod. L. Rev. 981, 983–986 (2013); Janine Benedet & Isabel Grant, *Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity, and Mistaken Belief*, 52(2) McGill L.J. 243, 269 (2007).

62. *See* หมายเหตุ [Statement of Grounds] *in* พระราชบัญญัติให้ใช้ประมวลกฎหมายอาญา พ.ศ. ๒๔๙๙ [Act Promulgating the Criminal Code B.E. 2499]. For a concise discussion of the various amendments during the period between 1908 and 1956, see Petchsiri, *supra* note 37, at 146–149.

63. *See* Duanghathai Buranajaroenkij, Political Feminism and the Women's Movement in Thailand: Actors, Debates and Strategies 4–5 (2017) (discussing the feminist movement during that period). *See also* Petchsiri, *supra* note 37, at 148–150 (arguing that the reference to communist threat was a pretext by the then-military government to consolidate and expand their power).

In the context of sexual offenses, the 1957 reform largely eliminated the unusual features of the Penal Code. Section 276(1) provided that:

> Whoever has sexual intercourse with a woman who is not the person's wife against her will, by threatening by any means whatsoever, by committing any act of violence, by that woman being in the condition of inability to resist, or by causing that woman to misunderstand him or her to be another person, shall be punished with imprisonment of four to 20 years and a fine of 8,000 Baht to 40,000 Baht.[64]

Like the Penal Code, there was a separate provision (Section 278) that had identical wording for the core elements of 'indecent act on any person.'[65]

The radically broad criminalization of fraudulent sex was curtailed such that only deception as to identity would suffice. Taking advantage of a person 'being in the condition of inability to resist' was added. 'Violence' was also given the relatively broad statutory definition of 'an act of violence against the body or mind of a person, whether it be physical or by another means, and include any act causing any person to be in a state of being unable to resist, whether it be by using a drug causing intoxication, by hypnotism or by another similar means.'[66]

This version brought the Thai approach to sexual offenses closer to that of civil law jurisdictions. Nonetheless, there remained notable differences in structure and wording. In terms of structure, a single provision continued to encompass all possible culpable conduct. This was unlike the practice in other civil jurisdictions where there were different provisions and correspondingly varied prescriptions of penalty for each culpable conduct.[67] In terms of wording, there was the curious inclusion of hypnosis in the definition of violence. While there had been concerns about the risk of hypnotized individuals being victims of sexual crime in Europe, these scenarios could have been and were dealt with under conventional criminal law without the need for statutory amendments to explicitly mention hypnosis.[68]

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64. Criminal Code B.E. 2499 (1956), s.276 (Thai.).

65. *Id.* at s.278.

66. *Id.* at s.1(6).

67. *Supra* Subpart I.C.1.

68. Heather Wolffram, *Crime and Hypnosis in Fin-De-Siecle Germany: the Czynski Case*, 71 Notes and Records 213, 217 (2017); William J Bryan, Legal Aspects of Hypnosis 153–160 (1962); George Trumbull Ladd, *Legal Aspects of Hypnotism*, 11 Yale L.J. 173, 192 (1902). A rare exception is the Criminal Code of the Republic of China promulgated in 1934, which mentioned hypnosis (together with force, threat and drug) as a means that will constitute rape: Xingfa (刑法) [Criminal Code] (1934), art. 221 (R.O.C.). Given the geographical, cultural and political proximity between Thailand and non-Communist China, it is likely that the inclusion of hypnosis in Thai Criminal Code was inspired by the Republic of China's Criminal Code. *See* Jianlin Chen, *Joyous Buddha, Holy Father, and Dragon God Desiring Sex: A Case Study of Rape by Religious Fraud in Taiwan*, 13(2) Nat'l Taiwan U. L. Rev. 183 (2018) (discussing the vigorous prosecution of religious fraudulent sex in the modern Republic of China, aka Taiwan).

C.3. Current Version: 2007 and 2019 Amendments

The current provision now stipulates:

> Whoever has sexual intercourse with another person against that person's will, by threatening by any means whatsoever, by committing any act of violence, by that person being in a condition of inability to resist, or by causing the person to misunderstand him or her to be some other person, shall be punished with imprisonment of four to 20 years and fine of 80,000 Baht to 400,000 Baht.[69]

The current provision reflects amendments in 2007 and 2019. The 2007 amendments were made pursuant to the constitutional guarantee of gender equality (*e.g.*, gender neutral language).[70] The 2019 amendments were made to refine the definition of "sexual intercourse," especially in terms of the boundary between rape (Section 276) and indecent acts (Section 278).[71] In both amendments, there was no change to the criminalized conduct vis-à-vis the obtaining of sex.

II. Sexual Assault by Religious Fraud

The enactment of the Criminal Code in 1957 posed core challenges to prosecutions of religious fraudulent sex, and many other types of fraudulent sex for that matter. The removal of the unusually broad statutory language of fraudulent and deceitful means in the original Penal Code meant that any successful conviction post–1957 would require some creative interpretation of the current sections 276 and 278 that otherwise only explicitly criminalize fraudulent sex through impersonation. This Part examines how the Thai Supreme Court has shifted from an initial narrow interpretation that excluded fraud as capable of constituting sexual assault (*i.e.*, rape or indecent act) to the current broad approach that regards the ignorance and naivety of the victims in believing the accused's deception as capable of constituting 'being in a condition of inability to resist' (and henceforth establishing the guilt of the accused). This Part also examines the readiness of the court in determining the falsity of the supernatural and religious claims, especially where sexual acts are involved.

A. *The Cases*

The Thai judiciary has made important progress in facilitating public access to Thai court judgments. This is especially so for Supreme Court judgments. Many—though far from all—of the judgments are now available through a searchable online database.[72] For lower court judgments,

69. Criminal Code B.E. 2499 (As Amended by the Criminal Code Amendment Act (No. 27) B.E. 2562 (2019)), s.276(1) (Thai.).

70. พระราชบัญญัติแก้ไขเพิ่มเติมประมวลกฎหมายอาญา (ฉบับที่ ๑๙) พ.ศ. ๒๕๕๐ [Criminal Code Amendment Act (No. 19) B.E. 2550] (2007).

71. พระราชบัญญัติแก้ไขเพิ่มเติมประมวลกฎหมายอาญา (ฉบับที่ ๒๗) พ.ศ. ๒๕๖๒ [Criminal Code Amendment Act (No. 27) B.E. 2562] (2019).

72. http://deka.supremecourt.or.th (last visited Nov. 1, 2019). The website did

the availability is more limited. Only selected judgments of recent years are available.[73] For this research, we started by using search terms involving luck, such as 'bad luck' [โชคร้าย], 'relieve bad luck' [สะเดาะเคราะห์], etc. From the three relevant cases in the initial search, we identified that 'ignorance' [ความเบาปัญญา], 'stupidity' [โง่เขลาเบาปัญญา] and related terms constitute the core avenue by which the court approached sexual offense cases involving fraud by the defendant. We proceeded to use these search terms, which enabled us to identify further relevant cases both on religious fraudulent sex and nonreligious fraudulent sex. We completed our search by crosschecking the various major criminal law textbooks in Thailand. As mentioned above in the Introduction, there is no discussion of religious fraudulent sex in the surveyed textbooks. For fraudulent sex, there is only discussion of deception as to identity. Such deception is expressly provided for in the statutory provision and is not relevant for this case study.[74]

The following are the four relevant Supreme Court cases.

A.1. Supreme Court Judgment No. 509/2529 (1986)75

The defendant met several religious novitiates in their place of residence at the temple.[76] He told the novitiates that they had bad luck, and he could relieve their bad luck through a ritual that involved sodomy. He committed sodomy with seven novitiates under this pretense.

The defendant was convicted of committing indecent acts with children[77] with regard to three of the victims who were under the age of thirteen.[78] For the other four victims that were at least thirteen years old at the time of the offense, the defendant was acquitted of the Section 278 charges. The Supreme Court held that it was the victims' 'ignorance' [ความเบาปัญญา] in believing the defendant's claim that sodomy was necessary for the luck-improving ritual that allowed the defendant to

not explain how the cases are selected for online access. There are a total of nearly 130,000 cases currently available in the online database, but there are usually 10,000 to 20,000 Supreme Court cases a year.

73. https://decision.coj.go.th/decision (last visited Nov. 1, 2019).

74. *E.g.*, Vachanasvasti, *supra* note 11, at 411. For relevant cases, see อัยการมหาสารคาม [Prosecutor of Maha Sarakham] v *นายเหลือ หรือ เล็ก พุง ฤทธิ์* [Mr. Lue or Lek Pung Lith], Supreme Court Judgment No. 1646/2532 (Supreme Court 1989); Supreme Court Judgment No. 233/2462 (Supreme Court 1919).

75. *พนักงานอัยการจังหวัดลำพูน* [Prosecutor of Lamphun Province] v *นายอุดม หรือ สมเกียรติ เล็บครุฑ* [Mr. Udom or Somkiat Lepkrut], Supreme Court Judgment No. 509/2529 (Supreme Court 1986).

76. The judgment did not mention the exact position/status of the defendant. The residence of novitiates is not publicly assessable, and accessible only to monks or persons permitted by the temple.

77. Criminal Code B.E. 2499 (1956), s.279. Prior to the amendments in 2007, sexual penetration that did not involve a man's penile penetration of a woman's vagina could only be charged with sexual offences relating to 'indecent act' rather than those relating to 'sexual intercourse.'

78. The age for the legal definition of 'child' was raised to fifteen in the 2007 amendments.

accomplish sexual penetration. The defendant's actions did not constitute a threat. Neither were the victims in a condition of inability to resist. Thus, the elements of Section 278 were not satisfied.

A.2. Supreme Court Judgment No. 5837/2530 (1987)[79]

As a preliminary note, this case is not a clearcut religious fraud case since the victim was ostensibly seeking treatment for her illness. The judgment also did not indicate any direct allusion to supernatural or religious representations by the defendant, who was a traditional healer (aka indigenous or folk healer). Nonetheless this case is included because Thai traditional healing typically involves both physical (*e.g.*, herbs, massage) and spiritual components (*e.g.*, rituals to draw on spirits and/or heal the spiritual self).[80]

On that note, the defendant in this case told the victim that he could cure her illness through a treatment ritual. The ritual involved burning a metal until it was red, stepping a foot covered in vegetable oil on the red metal and using the foot and hands to touch all over her naked body, including the breasts and vagina.

The defendant was acquitted by the Supreme Court in relation to the Section 278 charges. The Supreme Court held that the victim allowed the defendant to commit the indecent act due to being 'stupid' [โดยโง่เขลาเบาปัญญา] and 'believing without question' [หลงเชื่ออย่างงมงาย] that the defendant would be able to cure her illness through such a treatment ritual. The defendant's actions therefore neither fell within the definition of 'threat' nor rendered the injured party 'in a condition of inability to resist.'

A.3. Supreme Court Judgment No. 421/2554 (2011)[81]

The defendant was an abbot of a Buddhist temple. The victim went to the temple upon recommendation by a friend that the holy water ritual in the temple would relieve bad luck and enable the victim to reconcile with her lover. As the defendant was pouring holy water over the victim, the defendant caressed the victim's face and chest. Upon being asked by the victim, the defendant explained that the touching was to allow the holy water to enter and enchant her body. The defendant denied the touching at trial, but had confessed to the touching earlier to the

79. *พนักงานอัยการจังหวัดสมุทรปราการ* [Prosecutor of Samut Prakan Province] v *นายปรีดี นุช รักษา* [Mr. Pridi Nuch Raksa], Supreme Court Judgment No. 5837/2530 (Supreme Court 1987).

80. Siriratana Juntaramano, Janerawee Swangareeruk & Tanida Khunboonchan, *The Wisdom of Thai Indigenous Healers for the Spiritual Healing of Fractures*, 37(1) J. of Holistic Nursing 18, 18–19 (2019); Chula Viriyabubpa, *An Ethnography of Thai Folk Healing in Patients Suffering from Lomammapart, a Stroke-like Condition*, 17(3) Pacific Rim Int'l J. of Nursing Res. 282, 288–289 (2013).

81. *พนักงานอัยการจังหวัดนนทบุรี* [Prosecutor of Nonthaburi Province] v *นาย ผิน สายสิน หรือ สายสิงห์* [Mr. Phin Saisin or Saisingh], Supreme Court Judgment No. 421/2554 (Supreme Court 2011).

Sangha Inspector sent by the Religious Affairs Department[82] to investigate the case.

For this incident,[83] the defendant was charged and convicted under Section 278. The Supreme Court held that the victim's understanding that the touching was an aspect of the holy water ritual did not relieve the defendant of his wrongdoing. The victim believed the defendant because the victim was in a condition of inability to resist due to 1) the defendant's status as a monk whom the victim respected, and 2) the element of surprise engineered by the defendant (*i.e.*, the victim was not told beforehand about the touching).

A.4. Supreme Court Judgment No. 10007/2557 (2014)84

The defendant was a 'wise man'.[85] The two victims were sisters, aged 16 (Victim No. 1) and 12 (Victim No. 2). The victims' mother brought the victims to the defendant's hut for consultation regarding the victims' father who had abandoned the family. The defendant told the family that the victims had bad luck, and he could relieve the bad luck through a ceremony involving bathing in holy water. During the ceremony where the defendant was alone with Victim No. 1 whilst the victims' mother was waiting outside the room, the defendant told Victim No. 1 that for the ceremony to be effective, the defendant would need to have sexual intercourse with Victim No. 1. After the ritual, the defendant told Victim No. 1 to mention his actions to no one. The victims' mother brought Victim No. 1 to the defendant for the ritual many times after their initial encounter, and each time the defendant would have sexual intercourse with Victim No. 1.

The Supreme Court held that the defendant was guilty under Section 276. The Supreme Court found that Victim No. 1 was 'naïve to the world and stupid' [เยาว์วัยอ่อนต่อโลกมีความโง่เขลาเบาปัญญา] in 'believing without question' [หลงเชื่ออย่างงมงาย] the defendant's ploy that the ceremony would cure her bad luck and make her father remit money to the family. Thus, the fact that the victim allowed the defendant to

82. Sangha Inspectors are legally empowered to investigate any disciplinary issues of Buddhist monks and novices in the country. For discussion of church-state model in Thailand, *infra* Subpart III.B.

83. The defendant was also charged and convicted of attempted rape for a separate incident. After the holy water ritual, the defendant told the victim to return later that night for a gold charm ritual (*i.e.*, applying enchanted gold paint on the body). The victim obeyed. When the defendant tried to insert his penis into the victim's vagina midway through the ritual, the victim said she no longer wanted the gold charm. The defendant told the injured party to close her eyes and not speak, and tried to insert his penis again. The victim struggled and ran out of the room while shouting for help.

84. *พนักงานอัยการจังหวัดพิษณุโลก* [Prosecutor of Phitsanulok Province] *ν นาย สนั่น บางท่าโรง* [Mr. Sanan Bangtarong], Supreme Court Judgment No. 10007/2557 (Supreme Court 2014).

85. 'Wise man' in the sense of having knowledge of using holy water and traditional magic.

have sexual intercourse several times did not stem from the victim's will. Rather, it was because the victim was in a condition of inability to resist.

B. *Doctrinal Analysis*

Situating these four cases with other criminal cases involving religious fraud and fraudulent sex, two doctrinal takeaways emerged.

B.1. Evolving Receptivity to Fraudulent Sex Criminalization

Given the structure and wording of the statutory provision, it is not surprising that the Supreme Court approached these four cases primarily through the lens of 'condition of inability to resist.' These religious fraudulent sex cases do not involve any obvious threats or acts of violence, and do not involve mistake as to identity.

The court's approach has clearly evolved through the years. In the earlier two cases from the late 1980s (*i.e.*, Supreme Court Judgments No. 509/2529 and No. 5837/2530), the court acquitted the defendants. The court found that while the defendant was deceiving the victims, this did not constitute a condition of inability to resist. In the latter two cases from the 2010s (*i.e.*, Supreme Court Judgments No. 421/2554 and No. 10007/2557), the court reached the opposite conclusion, though with different reasoning. An immediate cause for the different reasoning is that there was an element of surprise (*i.e.*, the victim was not expecting the sexual touching beforehand) in Supreme Court Judgment No. 421/2554 (2011), but not in the other three cases. Thus, we will first analyze Supreme Court Judgment No. 10007/2557 (2014) in the context of doctrinal evolution from the two 1980s cases. We will then proceed to address the significance and takeaway from Supreme Court Judgment No. 421/2554 (2011).

B.1.a. 1986, 1987 and 2014: Stupidity is Now 'Inability to Resist'

In Supreme Court Judgment No. 10007/2557 (2014), the court found that the victim was in a condition of inability to resist and thus convicted the defendant. It is important to unpack the doctrinal maneuver engaged by the court in reaching this conclusion. The court did not hold that the deception per se rendered the victim in a condition where she could not resist. Rather, the inability to resist was primarily due to the victim's naivety and stupidity. This interpretation can be traced back to a 2006 Supreme Court decision involving fraudulent sex in a nonreligious setting.

The facts in Supreme Court Judgment No. 7631/2549 (2006)[86] are as follow: The defendant told three upper-secondary school students who were above the age of fifteen (*i.e.*, no longer minors for the purpose of sexual offenses) that he was a student inspector from the Ministry of Education. On the pretext of checking whether the students were consuming

86. *พนักงานอัยการสำนักงานอัยการสูงสุด* [Prosecutor of the Office of the Attorney-General] *ν นายสมชาย เอื้อพิชิตชัย* [Mr. Somchai Eaupichitchai], Supreme Court Judgment No. 7631/2549 (Supreme Court 2006).

drugs (in particular, whether they had concealed handkerchiefs soaked with inhalants), the defendant told the students to unbutton their shirts and proceeded to touch their breasts. The defendant was charged and convicted under Section 145 (falsely professing to be an official) and Section 278.

Section 278 posed ostensible difficulty for the court, since the defendant had not explicitly uttered any threats in the process (*e.g.*, claiming the students would be punished if they did not follow his instructions). If those threats had been made, the conviction would be straightforward given the express stipulation of 'any threat' in Section 278 and contemporaneous judicial interpretation.[87] One possible avenue for the court to sustain the conviction was to conceive 'threat' to include 'implied threat.' Namely, the defendant's claim that he was a student inspector connoted an implicit threat that failure to adhere to his instruction would result in punitive legal or official consequences.[88] Instead, the court held that the causative reason why the three victims adhered to the defendant's instructions was that their 'ignorance and naivety' [ความเบาปัญญาและอ่อนต่อโลก] caused them to believe that the defendant was an official with the relevant authority. This, according to the court, constituted the victims being 'in a condition of inability to resist.'

This allusion to the personal characteristics of the victims reflects the origin of the phrase 'in a condition of inability to resist'. As noted above in Subpart I.C.1, civil law jurisdictions typically have separate provisions to supplement the core rape provision. In particular, the 'taking advantage of the condition of inability to resist' provision in civil law jurisdictions is designed to cover sexual intercourse with an adult who is unconscious or impaired by mental disability. Notably, the scope of this provision has often been expanded by more recent modernizing amendments. Instead of mere 'unconsciousness' and insanity, the stipulated grounds for 'condition of inability to resist' may now include 'mental/emotional illness', 'intellectual defects' or 'physical disability.'[89] In this regard, the Thai courts' focus on the victims' ignorance/stupidity/naivety pays homage to the underlying civilian jurisprudential conception of 'in the condition of inability to resist.'

There is a general lack of English language literature on how courts in other civilian jurisdictions have contemporaneously interpreted this

87. *พนักงานอัยการสำนักงานอัยการสูงสุด* [Prosecutor of the Office of the Attorney-General] v *นายจาง เหยินเจี๋ย* [Mr. Zhang Yenjia], Supreme Court Judgment No. 7721/2549 (Supreme Court 2006) (an employer threatening to send an employee to the police to be prosecuted for illegal entry into the country). *See also* Vachanasvasti, *supra* note 11, at 411 (observing that 'threat' entails making the person fear that there is danger to life, body, fame, liberty or property of that person or of another person).

88. *See* Falk, *supra* note 48, at 83 n.233 (discussing a U.S. case which found that 'the defendant's position of authority [as a police officer], in and of itself, carried with it an implied threat').

89. Stephen Thaman, Translator. German Penal Code as Amended as of Dec, 19, 2001 (2002), s.179.

phrase, especially vis-à-vis fraud. Thus, we are unable to engage in a nuanced analysis of the extent to which the Thai courts' interpretation represents a divergence. Still, two observations on the matter may be made. First, the Thai courts' interpretation is unimaginable in Germany. The German courts have been very conservative when interpreting sexual offense provisions. For example, when interpreting the phrase 'a situation in which the victim is unprotected and at the mercy of the defendant's influence', the German Federal Court of Justice applied a very narrow reading to require that there be no objectively possible way of escaping the situation or otherwise calling for help. Thus, it does not suffice that a victim genuinely felt helpless and vulnerable, perhaps due to age or other personal characteristics.[90] Notably, this narrow interpretation was adopted even though the phrase was introduced in 1997 as part of a purported modernizing reform effort to provide better legal protection for sexual offense victims.[91] Second, and in sharp contrast with Germany, Chinese courts have adopted a curiously similar approach to Thailand. The Chinese courts have interpreted the 'other means' in the phrase 'by violence, coercion or other means' to include the use of deception to exploit the victim's stupidity and ignorance [愚昧无知].[92] More comparative research is certainly warranted in this aspect.

B.1.b. 2011: Abuse of Authority?

The court in Supreme Court Judgment No. 421/2554 (2011) shares an important similarity with the three other cases. Being deceived (*i.e.*, wrongly believing that touching is part of the holy water ritual) is per se insufficient for conviction. Nonetheless, the court went a different route in assessing whether the victim was in a condition of inability to resist. Instead of the victim's stupidity, naivety, or ignorance, the court focused on the defendant's status and the element of surprise.

Doctrinally, Supreme Court Judgment No. 421/2554 (2011) represents a judicial expansion of 'condition of inability to resist' to capture situations that are covered by distinct statutory provisions in other civil law jurisdictions. The allusion to the defendant's status mirrors the commonly found provision of criminalizing obtaining sex through abuse of position or authority.[93] Explicit stipulation on surprise is considerably

90. Tatjana Hornle, *The New German Law on Sexual Assault and Sexual Harassment*, 18 German L.J. 1309, 1311–1314 (2017).

91. *Id.* at 1311.

92. Wang Meimei Deng Qiangjian An (王某某等强奸案) [Rape Case of Wang and Others], Henan Sheng Nuzhou Shi Fayuan (河南省汝州市法院) [Henan Nuzhou Court] (2015) Ru Shaoxing Chuzi Disihao (汝少刑初字第4号) [4th Case of Court of First Instance, Ru Municipality, Criminal (Juvenile)]. For academic discussion, *see* Wang Longquan, *Qizha Jianyin Falü Sikao (欺诈奸淫法律思考)* [*Thoughts on Law on Deceptive Sex*], (3) Legality Vision 148 (2017); Luo Xiang, *Lun Qizhaxing Qiangjian (*论欺诈型强奸*)* [*On Rape by Deception*], 13(4) J. of Central South U. (Soc. Sci.) 413, 435–36 (2007).

93. *E.g.*, German Penal Code, *supra* note 54, at s.174; Norwegian Penal Code, *supra* note 55, at s.199 (abuse of authority); Penal Code of Sweden, *supra* note 53, at c.6, s.2.

rarer. A notable example is the 2016 amendment to the German Penal Code which included the insertion of 'exploits a moment of surprise' as one of the aspects of conduct that would constitute sexual assault.[94]

The difference in facts likely explains this alternative approach. The defendant in Supreme Court Judgment No. 421/2554 (2011)—an abbot of a temple—is of notably higher official status than the other defendants in the other three religious fraudulent sex cases. Similarly, the defendant did not inform the victim that touching would occur before performing the ritual, unlike in the other three cases. These two distinctions make the finding of condition of inability to resist relatively straightforward. Even from a lay person's common sense understanding, high official status and surprise make resisting a request more difficult. These two distinctions also render the Supreme Court Judgment No. 421/2554 (2011) less useful in prosecuting religious fraudulent sex. Most of the supernatural and magic rituals underpinning religious fraudulent sex are premised on animistic and other non-Theravada traditions[95] and usually do not involve official monks. As with the three other religious fraudulent sex cases, it is also common for the defendant to explicitly declare in advance that sexual acts are necessary for the ritual.

B.2. Readiness in Determining the Falsity of the Religious Claims

Notwithstanding the different outcomes in terms of conviction, the four cases surveyed in Subpart II.A all share a consistent feature. The courts in all four cases found the supernatural/religious claims made by the defendants to be false. Unsurprisingly, the manner in which the courts arrived at this factual finding depends on the context and nature of the supernatural/religious claims.

Where the claims were made in an official mainstream religious setting, as in the Supreme Court Judgment No. 421/2554 (2011), the task of the court is ostensibly more straightforward. Instead of assessing religious truth per se (*e.g.*, whether the defendant has supernatural power to improve luck), the court is evaluating whether the defendant has misrepresented the religious doctrines of the mainstream religion (*e.g.*, the requirement of a Buddhist holy water ritual). The latter is by no means without controversy, as evidenced by the evolving jurisprudence in Western countries. For example, the United Kingdom's highest appellate court in the 2014 case of *Khaira v. Shergill* 'significantly unsettled'[96] the prevailing judicial orthodoxy when it adopted a more permissible attitude in adjudicating what is the correct interpretation of a religious doctrine.[97] Nonetheless, the Thai court in Supreme Court Judgment

94. Hornle, *supra* note 90, at 1311.

95. *Supra* Subpart I.A.

96. Satvinder S. Juss, *The Justiciability of Religion*, 32 J.L. & Religion 285, 299–304 (2017) (discussing the significance and impact of the case, in light of previous judicial attitudes and practices).

97. Khaira v. Shergill [2014] UKSC 33, para.57. *See* Peter Smith, *The Problem of the Non-Justiciability of Religious Defamations*, 18(1) Ecclesiastical L.J. 36, 51–52

No. 421/2554 (2011) was aided by the fact that there was a regulatory authority tasked with monitoring and supervising Buddhist monks and which had already investigated the defendant. Thus, the court could rely on the findings (including the defendant's confession) of the regulatory authority and proceed on the premise that touching was not part of the holy water ritual.

This avenue is not available for the three other religious fraudulent sex cases where the religious and supernatural claims were made in the context of folk religion and superstition. The unavailability of the lower courts' transcripts and the general succinctness of Thai Supreme Court judgments prevented an in-depth analysis on how the courts made the findings on the veracity of the defendants' respective claims.[98] However, one consistent feature across the three cases is that the courts all chastised the victims' intelligence in believing the defendant (*i.e.*, victim was stupid, ignorant, or naive). This suggests that the courts considered the defendant's claims as obviously false such that no further explanation or justification was necessary.

Notably, it appears that involvement of sexual acts is the key trigger for this finding of falsity. A quick survey of recent Thailand newspaper reports revealed headlines such as "Man Gets 22 Years for Sexual Black Magic Scam,"[99] "Arrest in 'Love Potion' Sex Abuse Case,"[100] and "'Fortune Teller' Conned Girls into Sex."[101] Each of these headlines represents a distinct case. Evidently, prosecutions against religious fraudulent sex is a feature of Thai criminal law enforcement. Closer examination of these reports indicates that sexual offense charges are not always utilized. In the first two cases (*i.e.*, 'sexual black magic' and 'love potion'), the charges levied were actually the cheating offenses, namely Section 341 which

(2016) (discussing how the *Khaira* case is likely to lead to an increase in defamation cases involving religion).

98. Pawat Satayanurug & Nattaporn Nakornin, *Courts in Thailand: Progressive Development as the Country's Pillar of Justice*, in Asian Courts in Context 433 (Jiunn-rong Yeh & Wen-Chen Chang eds., 2014).

99. *Man Gets 22 Years for Sexual Black Magic Scam*, Bangkok Post (Oct. 13, 2015, 4:51 PM), https://www.bangkokpost.com/thailand/general/728204/man-gets-22-years-for-sexual-black-magic-scam [https://perma.cc/2NU5-DQFH]; *ศาลสั่งจำคุก 22 ปี 8 เดือน 'หมอการเวก' ลวงเหยื่อทำเสน่ห์ข่มขืน* [*Court Sentences 'Mor Karawake' to Imprisonment of 22 years 8 months Luring Victims Seeking Magic to be Raped*], Thairath Online (Oct. 13, 2015, 4:13 PM), https://www.thairath.co.th/content/532028 [https://perma.cc/YD5E-3HF8].

100. *Arrest in "'Love Potion"' Sex Abuse Case*, Bangkok Post (Aug. 15, 2015, 6:12 AM), https://www.bangkokpost.com/thailand/general/656904/arrest-in-love-potion-sex-abuse-case [https://perma.cc/M644-FZFM]; *จับเณรแอ หื่น-ทำเสน่ห์* [*Arrest Nen Air: Lust-Making Charm*], Thairath Online (Aug. 15, 2015, 5:30 AM), https://www.thairath.co.th/content/518368 [https://perma.cc/EL6P-HLCQ].

101. Sonthanaporn Inchan, *"Fortune Teller" Conned Girls into Sex*, Bangkok Post (Feb. 23, 2019, 5:22 PM), https://www.bangkokpost.com/thailand/general/1633890/fortune-teller-conned-girls-into-sex [https://perma.cc/XQP3-FN96].

punished "dishonestly deceives a person . . . [to] obtain property"[102] and supplementary provisions for aggravated cheating.[103]

Tellingly, it is rare that religious fraud prosecutions only involve monetary fraud,[104] notwithstanding the ample opportunities of such fraud in Thai society where magic and other rituals harnessing supernatural power are commonly practiced.[105] An exception garnered from recent newspaper reports actually helps prove the rule. In the 2015 report titled "'Magic' Monk Busted for Fraud," [106] a Buddhist monk who was the head of a monastic center was arrested on fraud charges. The arrest followed complaints that the monk had claimed that he could transform ordinary stones into 'lek lai' (a highly sought-after metal amulet). There are two distinguishing features from the usual folk or religious superstitious claims. First, the defendant was an official monk and the concern here was more about misrepresentation of Buddhism than false claims of supernatural power. Second, the claim has a secular dimension, given that 'lek lai' is akin to a precious gemstone and is traded in Thailand.[107]

Putting all these together, we submit that there are two important characteristics of the Thai courts' approach to assessing religious and supernatural claims in religious fraud cases. First, the courts are comfortable pronouncing the falsity of these claims, whether vis-à-vis the official Theravada Buddhism or as an objective fact. It is particularly telling that neither the judgments nor the newspaper reports raised or suggested an argument relating to the competency of the court.

Second, there is an intrinsic skepticism of any purported ritual that involves sexual acts which underpins the courts' adjudication of these religious and supernatural claims. This is not only evidenced in the courts' cursory dismissal of the defendant's claims, but also reflected in the selective prosecution of property fraud cases compared to those that involve

102. Criminal Code B.E. 2499 (As Amended by the Criminal Code Amendment Act (No. 19) B.E. 2550 (2007)), s.341 (Thai.).

103. *E.g.*, *id.* at ss.342 (impersonation) and 343 (fraud against public).

104. Not all fraud involving religious personnel or organizations are religious fraud. For example, a religious leader may seek donation under the guise of doing charitable work or building places of worship. The false claims in this example is secular in nature and capable of objective verification (*e.g.*, receipts, bank statements). Law enforcement actions against such solicitation/charitable fraud and other financial misfeasance by religious organizations are common in Thailand: *e.g.*, *Ex-monk Nen Kham Given 114 Years*, Bangkok Post (Aug. 9, 2018, 3:31 PM), https://www.bangkokpost.com/thailand/general/1518678/ex-monk-nen-kham-sentenced-to-114-years-in-jail [https://perma.cc/7F5C-6DZY]; King-Oua Laohong, *Embezzlement Scandal: Amlo Freezes B134m Held by Ex-Monks*, Bangkok Post (Jun. 30, 2018, 4:00 AM), https://www.bangkokpost.com/thailand/general/1494798/amlo-freezes-b134m-held-by-ex-monks [https://perma.cc/8BJ6-66ET].

105. *Supra* Subpart I.A.

106. Wassayos Ngamkham, *"Magic" Monk Busted for Fraud*, Bangkok Post (Jul. 28, 2015, 3:05 PM), https://www.bangkokpost.com/thailand/general/636748/magic-monk-busted-for-fraud [https://perma.cc/QJ5F-RBE2].

107. *About Lek Lai*, https://www.lek-lai.com/about-lek-lai [https://perma.cc/3XV2-RUXY].

sexual acts. Indeed, charging the defendant with property fraud rather than sexual assault has the doctrinal advantage of simplicity. Falsehood would suffice without needing to navigate the requirement of 'condition of inability to resist.' From this perspective, it is notable that a common feature of the four religious fraudulent sex cases surveyed in Subpart II.A is that no significant sum of monies was reportedly involved, which precluded prosecution of the cheating offenses.

III. Normative Arguments

The doctrinal analysis of the evolved receptivity of naivety as 'inability to resist' and the ready assessment of defendants' supernatural claims implicate normative considerations from, respectively, the fields of criminal law and constitutional law. This Part examines these considerations in turn.

A. *Criminalizing Fraudulent Sex by Protecting Naivety: One Small Step Forward?*

This Subpart critically examines the Thai courts' evolved interpretation from two perspectives. First, the *extent* to which fraudulent sex criminalization has been expanded by the doctrinal change. Second, the *method* by which fraudulent sex criminalization has been expanded.

A.1. Extent: More Criminalization is Desirable Given the Low Starting Point

The issue of criminalization of fraudulent sex is controversial, and has often generated intense disagreement among legal scholars as to what types of fraudulent sex should be punished (if at all) and what is the appropriate offense for punishment. A recent illustrative example of the dynamic is the debate stirred up in U.S. legal literature by Jed Rubenfeld. In his 2013 article, Rubenfeld argued for a radical conception of rape that is premised on self-possession rather than sexual autonomy, with the chief implication being that fraudulent sex should not be regarded as rape.[108] He further argued against criminalizing fraudulent sex as a lesser sexual offense (*i.e.*, not called rape and with lesser penalties), on the grounds that deception is not only prevalent in sexual relationships, but is also an integral component of romance.[109] Unsurprisingly, the article prompted many vigorous responses from different scholars. While the responses generally disputed the claims in Rubenfeld's article, the actual objections varied.

For example, Tom Dougherty agreed with Rubenfeld that a proper recognition of sexual autonomy would indeed entail criminalizing all fraudulent sex, and argued that the law should be amended as such.[110]

108. Rubenfeld, *supra* note 16, at 1423–1442.

109. *Id.* at 1416–1417.

110. Tom Dougherty, *No Way Around Consent: A Reply to Rubenfeld on "Rape-by-Deception"*, 123 Yale L.J. Online 321, 331 (2013).

Patricia Falk was similarly sympathetic to the notion that sexual autonomy is violated for deception, but opined that 'I do not believe the right to sexual autonomy should be understood as virtually unlimited' and that 'not all cases that might fall under the umbrella of rape-by-deception should be treated equally.'[111] Thus, instead of a blanket criminalization of all fraudulent sex, she advocated that the existing recognized categories of consent-vitiating fraud should be expanded judiciously to include deceptions that are based on deceptions by professional actors or scenarios involving abuse of authority.[112] Deborah Tuerkheimer was less receptive to sexual autonomy as the conceptual justification for rape law and advanced the alternative concept of sexual agency which seeks to recognize the various constraints in which consent to sex may be exercised. The implication is that not all fraudulent sex should be considered as rape. The reason for this is that from the perception of sexual agency, misinformation is a matter of degree and one of many possible forms of constraints.[113] Nonetheless, in contrast to Rubenfeld, she is open to criminalizing fraudulent sex as a lesser criminal offense.[114]

This lack of consensus among the scholarly community is similarly reflected in the diversity in how legislative and judicial approaches to fraudulent sex criminalization have evolved from the initial global reluctance.[115] For example, England amended its criminal law statute to expand the prior narrow common law categories of consent-vitiating fraud to include fraud as to the purpose of the act (from only fraud as to the nature of the act) and fraud as to the identity of any person known personally (from only fraud as to the identity of the spouse).[116] Some local legislatures went further and expanded rape to include all forms of deceptions. Examples include certain states and territories in the United States (*e.g.*, Tennessee)[117] and Australia (*e.g.*, Australian Capital Territory).[118] On the other hand, Germany abolished the crime of obtaining sex through marital deception in 1969, such that no form of fraudulent sex is currently subjected to direct criminalization.[119] In terms of the judiciary, Israeli courts have taken an expansive interpretation of 'deceit in respect

111. Patricia J. Falk, *Not Logic, But Experience: Drawing on Lessons from the Real World in Thinking about the Riddle-by-Fraud*, 123 Yale L.J. Online 353, 365–366 (2013).

112. *Id.*

113. Deborah Tuerkheimer, *Sex Without Consent*, 123 Yale L.J. Online 335, 344–346 (2013).

114. *Id*.

115. *Supra* Subpart I.C.1.

116. Sexual Offences Act 2003, c.42, s.76 (U.K.). For an overview of the reform, *see generally* Jennifer Temkin & Andrew Ashworth, *The Sexual Offences Act 2003: (1) Rape, Sexual Assaults and the Problems of Consent*, Crim. L. Rev. 328 (2004).

117. Falk, *supra* note 48, at 109–110.

118. Jonathan Crowe, *Fraud and Consent in Australian Rape Law*, 38(4) Crim. L.J. 236, 239 (2014).

119. Thomas Vormbaum, A Modern History of German Criminal Law 227 (Bohlander ed. & Margaret Hiley trans., 2013).

of the identity of the person' such that it would include a scenario where a married Arab man falsely presented himself as a Jewish bachelor seeking a longterm relationship.[120] In contrast, the Western Australian Court of Appeal was split as to whether the legislative provision 'a consent is not freely and voluntarily given if it is obtained by force, threat, intimidation, deceit, or any fraudulent means' would include all forms of deceptions.[121]

We submit that on the question of the *extent* of fraudulent sex criminalization, the adoption of a more expansive interpretation by the Thai Supreme Court is normatively desirable. While there is lack of a clear consensus in both scholarly opinions and legal practices, the general trend is towards greater criminalization of fraudulent sex. This is unsurprising and arguably inevitable given the extremely low starting baseline of minimal criminalization. More critically, the initial baseline rests on a problematic normative foundation. Guyora Binder observed that crimes—whether relating to property (theft) or sex (rape)—were historically envisaged as a challenge to a sovereign's authority and consequently resulted in the emphasis of manifest violence over fraud and other culpable conduct.[122] By the nineteenth century, recognition of value and importance of the property interest had prompted expansion of criminal liability to cover fraudulent acquisition of property.[123] However, 'the transformation of rape awaited the emergence of a feminist reform movement in the late twentieth century, and remains incomplete.'[124] More pointedly, Ben A. McJunkin argued that the law's reluctance to criminalize fraudulent sex reflects an underlying notion of seduction based on normative masculinity where men derive power and social status through sexual conquest.[125]

While the ardent advocacy for sexual autonomy does not necessarily equate to support for criminalization of all fraudulent sex, there is certainly room for expansion in the specific context of Thailand. Currently, only fraud as to the identity of the perpetrator is provided for in the sexual offense provisions. This is a position that is substantially narrower[126] than even the conservative English common law position prior to recent legislative reform.

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120. Amit Pundik, *The Law of Deception*, 93 Notre Dame L. Rev. Online 172, 172–173 (2018).

121. *Michael v Western Australia* [2008] WASCA 66 (WA CA). For critical discussion of the court's reasoning of the decision, see Jianlin Chen, *Two Is a Crowd: An Australian Case Study on Legislative Process, Law Reform Commissions and Dealing with Duplicate Offences*, Statute L. Rev. (2020).

122. Guyora Binder, Criminal Law 240–241 (2016).

123. *Id.* at 244–254.

124. *Id.* at 240.

125. McJunkin, *supra* note 17, at 21–25. *See also* Leader-Elliot & Naffine, *supra* note 17, at 73 ('The conventions of seduction, with their associated mythologies of activity and passivity, allow the seducer a two-way bet on acquittal of rape . . . Her inner 'no' can be trumped by a literal 'yes', secured by tolerated threats or tolerated forms of fraud.').

126. The Thai provision is broader in one aspect: fraud as to the identity is not limited to that of the victim's spouse.

A.2. Method: Emphasis on Victim's Naivety is Paternalistic Victim-Blaming

The *method* by which this expanded criminalization of fraudulent sex is achieved is more debatable. From a broader institutional perspective, that this expansion was facilitated by the courts rather than the legislature is *prima facie* less desirable. Courts have to interpret statutes, and devise interpretations to meet everchanging social conditions. Even for civil law jurisdictions, this is not unheard of and not always frowned upon by scholars.[127] Nonetheless, for a topic as controversial as sexual offenses in general and fraudulent sex in particular, it is preferable that any significant change to criminal liability be undertaken through amendment of the statutes. Moreover, amendment by the legislature is more likely to produce a coherent structure of the various offenses.

More problematic is the specific judicial maneuver employed by the Thai courts. There are two major shortcomings in utilizing victim's naivety or stupidity as the core criterion in fraudulent sex criminalization.

First, it may result in the ironic situation where the more sophisticated the deception employed by the perpetuator, the more likely he/she is to be acquitted. The Thai courts' finding that the victim's naivety or stupidity was the causative factor in permitting the performance of the sexual acts implies that the Thai courts viewed that ordinary adults would readily recognize the falsity of the defendant's claims. Indeed, the lies told by the defendants in the Thai cases appear either easily verifiable with basic precaution (*e.g.*, checking identity badges to verify status as school inspector) or so outlandish as to trigger immediate suspicion (*e.g.*, sexual acts as part of rituals to improve luck or health). However, if the defendants had employed elaborate deceptive mechanisms that would have deceived prudent adults, then the courts would be hard-pressed to still find that the victim was naïve and stupid and hence in a condition of inability to resist. This would result in acquittal, even if the defendant is arguably more morally culpable and socially dangerous in the latter scenario.[128]

Second, and more materially, the Thai courts' doctrinal maneuver effectively enshrines victim blaming into the criminal offense. Victim blaming is the analytical discourse that focuses on ways in which victims of crime contributed to their victimization.[129] This is particularly prevalent in the context of rape and sexual assault, where persistent misogynistic societal attitudes continue to fuel various rape myths premised on

127. Thomas Lundmark & Helen Waller, *Using Statutes and Cases in Common and Civil Law*, 7(4) Transnat'l Legal Theory 429, 456–459, 469 (2016); Hans-Bernd Schäfer, *The Relevance of Law and Economics for the Development of Judge Made Rules: Examples from German Case-Law*, 40 European Econ. Rev. 989, 989 (1996).

128. Notably, this anomaly can be avoided if the courts are willing to further expand the interpretation, possibly by finding that the victim was rendered in a position of inability to resist by the defendant's elaborate deceptions.

129. Helen Eigenberg, *Victim Blaming*, in Controversies in Victimology 21–22 (Laura J. Moriarty ed., 2008).

gendered stereotypes of 'real' rape victims.[130] Victim blaming is detrimental to both the victim and law enforcement. The attribution of blame to the victim for the occurrence of crime can constitute a form of revictimization where the victim suffers from guilt and shame that persists long after the crime and impedes the victim's recovery.[131] Victims are also less likely to come forward to report the crime, due to the fear of being ridiculed by their peers and law enforcement officers in the process.[132] Moreover, this focus on how the victim's flawed decisionmaking contributed to the sexual offense (rather than the employment of deception by the defendant) continues to play into the longstanding (and arguably outdated) patriarchal acquiescence of deception as part of seduction.[133]

From this perspective, while the evolved recognition of naivety and stupidity as a condition of inability to resist does extend legal protection to vulnerable victims, it comes at the hefty price of unfairly castigating the victim for falling prey to perceived unsophisticated scams. A small, but qualified, step forward.

B. *State Evaluation of Supernatural Claims: Different Types of Religious Freedom?*

This Subpart critically situates the Thai courts' approach towards assessing religious/supernatural claims against the liberal democratic understanding of religious freedom and the substantially different conception in the Thai constitution and society.

The Thai courts have no qualms in finding that a particular religious or supernatural claim is false. This is *prima facie* at odds with the prevailing conception of religious freedom in Europe and the United States. It is a well-established principle under the European Court of Human Rights (ECHR) jurisprudence that the religious freedom clause of the European Convention on Human Rights includes a duty on the state to be neutral and impartial on religious matters, which in turn bars the state

130. Sokratis Dinos et al., *A Systematic Review of Juries' Assessment of Rape Victims: Do Rape Myths Impact on Juror Decision-Making?*, 43 Int'l J. of L. Crime and Just. 36, 46–47 (2015); Francis X. Shen, *How We Still Fail Rape Victims: Reflecting on Responsibility And Legal Reform*, 22 Colum. J. Gender & L. 1, 14–24 (2011). *Cf.*, David Gurnham, *Victim-Blame as a Symptom of Rape Myth Acceptance? Another Look at How Young People in England Understand Sexual Consent*, 36 Legal Stud. 258, 263–265 (2016) (arguing that one should be more circumspect in attributing the practice of victim blaming to simply rape myth acceptance, since it obscures discussion and recognition as to how a victim's actions may increase one's risk/vulnerability to sexual offences).

131. Karen G. Weiss, *Neutralizing Sexual Victimization: A Typology of Victim's Non-Reporting Accounts*, 15(4) Theoretical Criminology 445, 461 (2011).

132. Sarah Bothamley & Ruth J. Tully, *Understanding Revenge Pornography: Public Perceptions of Revenge Pornography and Victim Blaming*, 10(1) J. of Aggression, Conflict and Peace Res. 1, 3 (2018); Cassandra Cross, *No Laughing Matter: Blaming the Victim of Online Fraud*, 21(2) Int'l Rev. of Victimology 187, 201 (2015).

133. McJunkin, *supra* note 17, at 21–25; Leader-Elliot & Naffine, *supra* note 17, at 72–73; Estrich, *supra* note 17, at 69–71.

from assessing the legitimacy of religious beliefs.[134] In the United States, the Supreme Court in the landmark religious fraud case of *U.S. v. Ballard* affirmed that the First Amendment prohibits state actors, including the courts, from assessing the veracity of a religious claim.[135] Indeed, this aversion towards making determinations on religious matters is reflected in the English common law doctrine of nonjusticiability—developed without any constitutional or statutory prescriptions of religious freedom—that requires 'issues of the truth or falsity of religious doctrines [to be] non-justiciable.'[136]

However, this conception differs from the prevailing constitutional ordering and societal understanding of religious freedom in Thailand.

The Thai constitution has always enshrined the basic principles of equality (including that of religion) in its various iterations over the years.[137] There has also been progressive expansion of the concept of religious freedom. The initial brief provision regarding the liberty to profess a religion was subsequently elaborated to include the liberty to profess a religious 'sect' and observe religious principles and precepts.[138] Yet the potential of any of these constitutional provisions to import the Western conception of state neutrality and impartiality in religious matters is undercut by the parallel constitutional provisions relating to the special status of Buddhism.[139]

For example, Article 9 of the 2007 Constitution (the constitution in force prior to the most recent military coup) provides that the 'King is a Buddhist and Upholder of religions.'[140] It is further provided in Article 79 that the 'State shall patronize and protect Buddhism which the majority of Thais have followed for a long time and other religions. It shall also

134. Research Division, Overview of the Court's Case-Law on Freedom of Religion 19 (Council of Europe/European Courts of Human Rights, 2013). *See* Anna Su, *Judging Religious Sincerity*, 5 Oxford J.L. & Religion 28, 36–37 (2016) (discussing the recent emergence of the sincerity test to replace the belief-conduct distinction that was previously used to manage religious accommodation challenges under ECtHR jurisprudence). For a critical discussion on the desirability of continued adherence to the duty of neutrality and impartiality in the EU, see Andrea Pin, *Does Europe Need Neutrality? The Old Continent in Search of Identity*, BYU L. Rev. 605 (2014).

135. United States v. Ballard, 322 U.S. 78, 84–87 (1944). *See* Stephen Senn, The Prosecution of Religious Fraud, 17 Florida St. U. L. Rev. 325, 333–335 (1990) (observing that, notwithstanding common perceptions and subsequent court citation to the contrary, the Supreme Court did not in fact directly hold that the sincerity test may be used for securing convictions of religious fraud, but merely that questions of religious truth cannot be put to the jury).

136. *See* Frank Cranmer, *Case Comment: Thomas Phillips v Thomas Monson*, 16(3) Ecclesiastical L.J. 393, 393 (2014). For a discussion on the doctrine of nonjusticiability of religious issues in English courts, see Juss, *supra* note 96, at 291–295.

137. Engel, *supra* note 4, at 75.

138. Preeda Sataworn & Chaiyan Chaiyaporn, *Toleration and Religious Freedom in the Thai State: Tolerator and Tolerated*, 39(2) Warasān Sangkhomsāt [J. of Soc. Sci.] 1, 9–11 (2008) (categorizing the various constitutions into three era).

139. *Id.* at 10; Engel, *supra* note 4, at 75.

140. Constitution B.E. 2550 (2007), art. 9 (Thai.) (hereinafter *2007 Constitution*).

promote the good understanding and harmony among followers of all religions as well as encourage the application of religious principles to enhance virtues and develop quality of life.'[141] Similarly, the 2017 Constitution reproduces Article 9 of the 2007 Constitution in Article 7. Article 67 of the 2017 constitution also echoes Article 79 of the 2007 Constitution by reaffirming the preferred status of Buddhism in terms of state patronage and protection.[142]

Critically, the provisions regarding state patronage of Buddhism reveal not only the constitutionally enshrined preference for Buddhism, but also envisage an active state role in shaping Buddhism doctrines in the name of the public good. In the 2007 Constitution, the religious principles to be encouraged by the state are meant to 'enhance virtues and develop the quality of life.'[143] In the 2017 constitution, these principles are promoted 'for the development of mind and wisdom.'[144]

This constitutional conception of state as having a legitimate role in reforming religion[145] is in fact a longstanding Thai tradition that preceded the establishment of constitutional monarchy in 1932. Since the founding of the Chakri Dynasty in 1782, there has been a deliberate attempt to reform Thai religion by outlawing perceived deviant religious practices.[146] The king has the responsibility to preserve the purity of both law and religion.[147] Post–1932, there has been a series of statutes designed to maintain religious orthodoxy. For example, a 1969 statute empowered the Religious Affairs Department with regulatory discretion in the legal recognition of new religious movements.[148] The currently in force Sangha Act of BE 2505 (1962) established the Sangha Supreme Council, the Buddhist administrative organization empowered by legal and

141. *Id.* at art. 79. For discussion of the special treatment of Buddhism in the 1997 constitution, see Andrew Harding, *Buddhism, Human Rights and Constitutional Reform in Thailand*, 2(1) Asian J. Comp. L. 1, 4–8 (2007).

142. Constitution B.E. 2560 (2017), art. 67 (Thai.) (hereinafter *2017 Constitution*) ('The State should support and protect Buddhism and other religions. In supporting and protecting Buddhism, which is the religion observed by the majority of Thai people for a long period of time, the State should promote and support education and dissemination of dharmic principles of Theravada Buddhism for the development of mind and wisdom development, and shall have measures and mechanisms to prevent Buddhism from being undermined in any form. The State should also encourage Buddhists to participate in implementing such measures or mechanisms.').

143. 2007 Constitution, *supra* note 140, at art. 79.

144. 2017 Constitution, *supra* note 142, at art. 67.

145. Sataworn & Chaiyaporn, *supra* note 138, at 15 ('[T]he state could use political power or coercive means into the religious domain in order to protect the good morals and encourage the application of religious principles to create virtue').

146. Engel, *supra* note 4, at 79 ('[T]he Law of the Three Seals, was closely connected to Rama I's broader effort to reform Thai religion. Indeed, some provisions of the new law code spoke directly to the deviant regional religious practices that Bangkok sought to root out by declaring them unlawful.').

147. Schonthal, *supra* note 10, at 717; Engel, *supra* note 4, at 79.

148. McCargo, *supra* note 4, at 165.

criminal sanctions to ensure compliance with the internal religious orders (*e.g.*, order to disrobe a monk).[149]

The societal conception of religious freedom echoes these constitutional and statutory prescriptions. State prosecutions of perceived deviant denominations, including allegations about incorrect religious interpretation, do not generate significant public debate about freedom of religion.[150] A telling example is the state crackdown of Wat Thammakai in the late 1990s. Wat Thammakai is a religious movement that promotes unorthodox meditation techniques as quick gateways to nirvana. The state levied on the movement a combination of criminal prosecutions of secular law (*e.g.*, embezzlement) and denunciation of the religious teachings by the Buddhist administrative organization and the Religious Affairs Department. As observed by Duncan McCargo, '[p]ractically no prominent Thai scholar or public figure spoke out openly in defense of the movement's freedom to advocate divergent religious ideas . . . Even Santi Asoke, an organization that [had its Buddhist credentials expunged for unorthodox practices, and] might be expected to support the principle of religious freedom, was quick to condemn Wat Thammakai.'[151]

From this broader perspective, the Thai courts' approach towards religious fraud is unsurprising, and arguably inevitable. As part of the state organ, it is expected that the courts will contribute to the overall state effort in assessing and policing religious deviancy. This insight mutes any criticism of the Thai courts' approach to evaluating the veracity of religious claims insofar as the criticism is premised on the liberal democratic (or Western) conception of religious freedom. There are undoubtedly important benefits flowing from prohibiting state assessment of religious truth. There are immediate concerns about competency, as well as broader issues of religious discrimination.[152] Indeed, it is the bloodied conflicts over which is the true religion[153] and the brutal suppression of heretics and cults[154] that spurred the emergence of religious freedom in

149. For discussion of these laws and evolution, see Schonthal, *supra* note 10, at 715–717; Sataworn & Chaiyaporn, *supra* note 138, at 16–25.

150. Sataworn & Chaiyaporn, *supra* note 138, at 33–34.

151. McCargo, *supra* note 4, at 165. *See also* Harding , *supra* note 141, at 8 (observing that in Thailand, 'the view is commonly held that Theravada Buddhism *is* the state religion' even if 'as a statement of contemporary constitutional law it is simply incorrect').

152. Caleb E. Mason, *What is Truth? Setting the Bounds of Justifiability in Religiously-Inflected Fact Disputes*, 26 J.L. & Religion 91, 101–102 (2011); Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 Harv. L. Rev. 933, 953–954 (1989).

153. For discussion of the European wars of religion in the medieval era, *see generally*, The European Wars of Religion: An Interdisciplinary Reassessment of Sources, Interpretations, and Myths (Wolfgang Palaver, Harriet Rudolph & Dietmar Regensburger eds., 2016). *See also* R v Lady Portington (1692) 91 Eng. Rep. 151 (a seventeenth century English case holding that under the monarch's power and obligation to 'see that nothing be done to . . . Propagation of a false Religion', the monarch may order a trust for 'a superstitious use' to be applied to a 'proper use').

154. Ani Sarkissian, The Varieties of Religious Repression: Why Governments

the first place. Nonetheless, given that the courts' approach is in fact pursuant to the articulated constitutional prescriptions on religious freedom, the fault lies with the constitution. Any reform to the courts' approach would require and should be preceded by fundamental changes to the underlying constitutional church-state framework. Given the societal backing for the current constitutional order relating to religion, a judicial intervention to preclude the prosecution and/or conviction of such religious fraud cases (*e.g.*, perhaps by importing the requirement that judges cannot assess the veracity of religious, theological, or supernatural claims) risks triggering harsh public and political backlash and subsequent loss of judicial legitimacy.[155]

Conclusion

The criminalization of religious fraudulent sex lies in the fascinating intersection of criminal law and constitutional law. Both areas of law are intimately influenced by societal, political and historical factors that are unique to a jurisdiction, no less in the particular subfield of sexual offenses and religious freedom. This case study reveals the idiosyncratic structure, specifics and legislative history of Thai criminal law, and the creative but somewhat problematic doctrinal maneuver employed by the Thai courts to expand the criminalization of fraudulent sex. This case study also illustrates how the judicial readiness to determine the falsity of perceived unorthodox religious claims is in fact pursuant to the Thai constitutional order that allows and expects the state to police undesirable and deviant religious doctrines and practices. Hopefully, these findings have not only enriched our understanding of the fascinating dynamic of law, religion and society in Thailand, but also demonstrated the rich and fertile ground for further research.

Restrict Religion 1–3 (2015). For discussion of the Medieval Inquisition, *see generally* Carole A. Myscofski, *The Magic of Brazil: Practice and Prohibition in the Early Colonial Period, 1590–1620*, 40(2) Hist. of Religion 153 (2000); Margaret Mott, *The Rule of Faith over Reason: The Role of the Inquisition in Iberia and New Spain*, 40 J. Church & St. 57 (1998).

155. For critical discussions on the limits of the courts in pushing for liberal democratic principles in authoritarian regimes, see Po Jen Yap, *Constitutional Fig Leaves in Asia*, 25 Washington Int'l L.J. 421, 424–440 (2016); Tamir Moustafa, *Law and Courts in Authoritarian Regimes*, 10 Ann. Rev. of L. & Soc. Sci. 281, 283–293 (2014). *See also* Jianlin Chen, *Regulating Religious Fraud in Taiwan and Hong Kong: A Comparative Study on the Convergences and Deviations in the Understanding of Religious Freedom*, 7 Chinese J. Comp. Law 150, 175–179 (2019) (observing that, notwithstanding purported adherence to liberal democratic conceptions of religious freedom in their respective constitution, the courts in Taiwan and Hong Kong still readily determine that any religious claims involving sex are false).