GRAVITY OF CRIMES RELATED TO SEXUAL OFFENSES AGAINST A CHILD BORN THROUGH ASSISTED REPRODUCTIVE TECHNOLOGY

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Abstract - The purpose of this study was to study and analyze the problematic situation of the enforcement of sexual offences according to Section 285 of the Criminal Code as amended by the Criminal Code Amendment Act (No. 27), 2019 in the case of a child born through assisted reproductive technologies according to the protects children born through Assisted Reproductive Technologies Act, 2015. The researcher used a qualitative study method through the collection of legislation from both the Criminal Code Civil and Commercial Code together with relevant documents and research. It was found that Section 285 of the Criminal Code requires offenders related to sex If the act is committed against the ascendants, descendants, brothers and sisters or parents and proximity from blood have to be punished more severely regarding the protects children born through assisted reproductive technologies Act 2015 as well as controlling medical scientific research on embryos and assisted reproductive technologies to prevent improper use. However, it does not define the blood relationship between the child and a legitimate husband or wife who wishes to have children, sperm, oval, or embryo donors, as well as those of the blood relatives of a legitimate husband or wife who wishes to have children and donors of sperm, oval, or embryo, so there might be problems on interpreting offenses and punishment on the offenders according to the Criminal Code, Section 285, the researcher saw that The Protection of A Child Born Through Assisted Reproductive Technologies Act, 2015 should be amended to cover such cases clearly.

Keywords - Sexual Offenses, Gravity of Crimes, Offense of Incest

I. INTRODUCTION

The 27th amendment to the Criminal Code Consolidation Act, B.E. 2019, has amended Section 285 to extend the application of sexual offenses by including acts committed against relatives, such as siblings, parents, and children who share blood relation. Previously, the law only applied to offenses committed against lineal descendants. This amendment aims to provide additional protection for individuals who are targeted by sexual offenses from various groups. The additional amendments are designed to provide further protection for family ties and blood relations, which are now more comprehensive than the original act. However, when considering the protection of children born through medical assisted reproductive technology under the Medical Assisted Reproduction Act, B.E. 2015, which allows for the use of medical assisted reproductive technology to achieve pregnancy rather than through intercourse or external fertilization, there are two methods that can be used: (1) using the embryos created by the husband's sperm and the wife's oval, which is covered by the law that allows for pregnancy, and (2) using the husband's sperm or the wife's oval or embryos donated by others, which is covered by the law that allows for individuals to become parents. However, using ovals from women who carry pregnancies is prohibited, which means that children born through medical assisted reproductive technology may not have blood relations with their fathers ormothers and their relatives. Furthermore, the Medical Assisted Reproduction Act, B.E. 2015, only amends and adds to the laws that protect children born through medical assisted reproductive technology to the husband or wife who is favored by the law in order to have children, as well as male or female donors who donate the sperm or ovals, or the embryos used for pregnancy - in accordance with family and inheritance laws, without any additional amendments regarding blood relations to complement the additional amendments made to Section 285 of the Criminal Code Consolidation Act. The writer therefore sees that this issue remains problematic for law enforcement in the future.

II. LITERATURE REVIEW

In this academic pursuit, there exists a conceptual framework and theoretical foundation that pertains to the penalization of transgressions related to gender committed by individuals who share a bloodline connection.

2.1 Concepts and theories in determining gravity of crimes

The term "gravity of crime" is not a word prescribed in the criminal law, but is a term that appears in textbooks and court judgments. Professor Jittin Tingsapat explained that "gravity of crime" is a fact that causes the penalty to be heavier. Similarly, [1] Professor Kiatkajorn Watchanasawad stated that angravity of crime is a reason that causes the offender to receive a heavier penalty. [2] In addition, some versions of the legislative decree use the term "getting more punishment" for gravity of crimes. [3] In terms of determining gravity of crimes in Thai criminal offenses, it can be inferred from dividing

offenses into different levels of severity, and each offense carries a different level of punishment that is proportional to the level of severity of the offense. This creates a mentality in drafting criminal laws by including some offenses that have both ordinary and gravity of crimes, in line with the idea of retribution, compensation, and deterrence of crimes.[4]

2.2 The concept of punishment for sexual offenses committed against persons who are related in kinship

Supatra Yodkhul has conducted a study, and it has been found, that sexual relations between individuals within the same family or closely related individuals is considered a serious criminal offense in many countries, even if the act is consensual. The primary reasons for this are as follows: [5]

(1) Religious reasons - Sexual relations between relatives, including marriage, is considered a taboo in many societies due to religious influences. Consequently, many countries regard such acts as a serious criminal offense categorized as "mala inse," associated with morality. If the law were to permit sexual relations between individuals with the same bloodline, it would violate the deep-rooted social instincts within people that accept human reproduction, unlike that of animals.

(2) Genetic reasons - Research has shown that sexual relations between individuals who share the same bloodline or a closely related bloodline has the potential to pass on genetic abnormalities to their offspring, increasing the risk of disabilities. The probability of this risk is higher if the bloodline is well-known. If the law allowed sexual acts between blood relatives, then eventually, the human race's gene pool would diminish.

(3) Sociological and anthropological reasons - Nature has dictated that sexual relations between individuals of the same bloodline or close kin should be regarded as unacceptable and frowned upon in society, even dating back to ancient times. The offender in this crime is often someone close to the victim, such as a parent, grandparent, sibling, or blood relative. Due to their familiarity and trustworthiness, they might be given an opportunity or have an advantage in committing the crime. This may include taking advantage of their influence over the victim's life, such as in cases where they are responsible for their well-being. Victims may find it difficult to report their offender or pursue legal action, as they have to confront them in their daily lives or may face consequences, such as being viewed negatively by others or even having their livelihood influenced bythe offender. The potential for repeat offenses is high in such cases.

Natthanaich Chalisarapong has conducted a study, [6] and, it was found that relatives are those who share the same lineage and can be counted, but excludes fathers, mothers, children, husbands, and wives. Meanwhile, kinship refers to social relationships that create roles and statuses for members of the family, which arise from bloodlines or marriage. Individuals in a family who are truly related are

[1] siblings, whether they share both parents or only one parent, who generally live in the same family,
[2] aunts and uncles who often have relationships with their grandchildren in a back-and-forth manner,
[3] those who live together with their spouse, which includes a considerable number of persons who choose to live together without registering their marriage for various reasons,
[4] persons related to the couple through marriage, such as the father-in-law, grandmother-in-law, son-in-law, and daughter-in-law, etc.

III. ANALYSIS

From my studies, laws and guidelines for the application have been discovered as follows:

3.1 The essence of the Child Protection Act for a child born through assisted reproductive technology

3.1.1 Reasons for promulgating the Act There are 2 essentials which are

(1) Mandating the preferred status of biological parents by law for children born through medically-assisted procreation should be appropriately aligned with the genetic relationship, as the current statutes regarding this matter do not correspond with the genetic relationship.

(2) Controlling the research and assisted reproductive technology related to embryos and assisted reproductive technology should not be used in inappropriate ways.

3.1.2 Surrogacy, when considering from articles 3, 21, and 22, has the following methods and conditions: (1) "Surrogacy" refers to pregnancy using any medically assisted method that extracts sperm and eggs from the human body, resulting in pregnancy that is not naturally occurring. The surrogate mother must be legally recognized, and this also includes the placement of the fertilized egg in the surrogate mother's reproductive organs to induce pregnancy without copulation, also known as "artificial insemination" (article 3).

(2) Achieving pregnancy can be accomplished by two methods: the use of the sperm from the husband and the egg from the legally recognized wife who desires

to pursue a surrogacy or the use of the sperm or egg from the husband or legallyrecognized wife who desires to pursue a surrogacy with someone else's egg or sperm, but the use of a woman's fertilized egg in surrogacy is strictly prohibited (article 22).

3.1.3 Parenthood and protection of a child born through assisted reproductive technologies

In accordance with the Child Protection Act for a child born through assisted reproductive technology 2015, Article 29, stipulates that children born through the use of sperm, eggs, or embryos from a donor, whether provided by a husband's legally recognized wife who desires to become pregnant, or by another woman, shall be the legally recognized child of the husband and the wife who desires to have a child.

Furthermore, any man or woman who donates sperm, eggs or embryos for the purpose of pregnancy or any child born through the use of such sperm, eggs or embryos shall have no rights or obligations to each other under commercial and civil law concerning family and inheritance. 3.1.4 Blood relation of a child born through assisted reproductive technology by law

1. The act of artificial insemination by introducing the semen of the husband into the reproductive organ of the wife to conceive without copulation may be required due to abnormality of the reproductive organ of either spouse preventing normal intercourse.
2. The act of artificial insemination by introducing the semen of another individual into the reproductive organ of the wife to conceive without copulation may be required due to the engagement of the husband.
3. Using the embryo resulting from the husband's semen and the favorite egg of the wife, which is legally allowed to be implanted to achieve conception, and then transferred to the uterus of another woman. This method results in a child with genetic relationships and lineage of both the husband and wife, as well as the host mother.
4. Using the embryo resulting from the husband's favorite semen, which is legally allowed to be implanted with a spouse's egg or another person's semen, and then transferred to the uterus of another woman. In this case, the child will have genetic relationships and lineage only from the husband and the host mother, but not from the wife and her lineage.
5. Using the embryo resulting from the wife's favorite egg, which is legally allowed to be implanted to achieve conception, and then transferred to the uterus of another woman. In this case, the child will have genetic relationships and lineage only from the wife and her lineage, but not from the husband and his lineage.

3.2 Punishment for offenses related to kinship under the Criminal Code

Thai society is a society with religious and moral beliefs about kinship relations. The Thai CriminalCode therefore uses kinship as a serious offense and offenses related to kinship as an exemption and reduction of punishment.

(1) In the case of an exemption from punishment, for example, Section 71, the first paragraph, stipulates that the commission of an offense involving certain property offenses. If it is an act done by a husband against his wife or the wife acts against her husband, the offender will not be punished.

(2) In the case of reduction of penalty, i.e. Section 71, paragraph two, stipulating that the commission of an offense involving property. For some offenses, if it is an act done by an ascendant against a descendant, the successor acts against the ancestors or brothers or sisters of the same parents act against each other. Although the law does not prescribe it as a compoundable offense, it shall be a compromising offense. Besides, the court may inflict a lesser penalty on any amount than what is required by law for that offense.

(3) In case the court will not punish; for example,

1. Tampering with primary evidence to help a father, mother, son, daughter, husband or wife avoid punishment, or to receive a reduced sentence (Article 184, in conjunction with Article 193).

2. Assisting a father, mother, son, daughter, husband or wife who has committed an offense, or is accused of committing an offense, but is not guilty, in order to avoid punishment (Article 189, in conjunction with Article 193).

3. Providing shelter, hiding, or any other assistance to a father, mother, son, daughter, husband or wife who is evading capture by the authority of the court, investigating officers, or law enforcement officers with the power to investigate criminal cases, to prevent apprehension (Article 192, in conjunction with Article 193).

4. Behaving as a procurer, shelterer or participant in a meeting with persons known to be offenders under Part 2 of the Criminal Code, if done to assist a father, mother, son, daughter, husband or wife (Article 214, second paragraph).

(4) In the case that the law specified as gravity of crimes
1. If the offense relates to the act of incest (Sections 276, 277, 277 bis, 277 ter), the offense regarding sexual impropriety (Sections 278, 279, 280), and the

offense related to the mediation of prostitution (Sections 282, 283), it is an offense against the family, the heirs, brothers, sisters, and those related by blood (Section 285).
2. The offense of killing a family member (Section 289(1))

An exception to the penalty, reduction of penalty, granting of discretion to the court not to impose a penalty, and being the cause of trouble. The scope of those involved, which includes the offender, the victim, and others related to them, can be seen as follows:

1. Individuals who are related by blood, including (1) the family members, in some cases, only counting the father and mother as intimate, (2) the heirs, in some cases, counting only the children as intimate, and (3) brothers and sisters, in some cases, including siblings who share the same father or mother. Relatives related by blood.
2. Individuals related by law, including spouses. In this case, it has been stated that the court tends to follow the law regarding spouses.

3.3 Guidelines for court rulings on family relations
From studying the civil and commercial law and the criminal law, it has been found that there are discrepancies in the definition of family members as follows:

3.3.1. Civil and commercial law stipulates family members in three categories: General provisions, family law, and inheritance law.

1) General provisions stipulate persons who are eligible to file a petition for incapacity, including spouses, parents, grandparents, ascendants, and descendants such as son, daughter, grandchild, great grandchild, etc.
2) Family law stipulates family members as including husband and wife, father and mother, children, guardians, and adoptive parents.
3) Inheritance law stipulates persons who are entitled to inherit outside of family members according to family law, including heirs, siblings with the same parents, and siblings with the same father or mother, as well as grandparents and aunts and uncles.

Considering the court's judgments, when it comes to family law issues, the court will rule that the persons concerned have the right and responsibility towards each other under family law only when they have a legal relationship. However, when it comes to inheritance law, the court has ruled that "the right to inherit is reserved only for true heirs by blood, while adopted children are not direct heirs."

3.3.2 In matters of criminal verdicts, particularly in cases related to husband and wife, the court will adhere to legal relations. For example, a husband who commits an offense related to property that would otherwise be exempt from punishment under section 71 must be legally married to his wife. In cases involving lineage and inheritance, such as the supreme court decision in case number 3756-3757/2550, blood relations will take precedence over legal relations.[7] For example, Supreme Court Judgment No. 1384/2516, although in textbooks it is seen that it means only legitimate ancestors.[8] As it pertains to criminal law, a strict interpretation must be followed. For relationships that are not based on blood relations, such as in cases of testate succession for adopted children, even though they may have the right to inherit under commercial and civil law, they do nothave the same hereditary relationship and lineage. However, when it comes to being a biological parent, if the court recognizes the true biological relationship, it can mean the same for both father and mother in terms of inheritance for the child.

3.4 Draft of the Amended Criminal Code (Version ...) B.E. ... (sexual offenses), proposed by Ms. Suwannee Siriwetchapun et al., has a rationale for amending Article 285, which requires that a person who is related to the victim by consanguinity, sibling-hood, or is the same father or mother, or a blood relative, must be subject to a higher penalty. This is because such persons are considered to have close relationships that are trusted and do not suspect or guard against each other, and this is to provide greater protection for the victim.
Upon considering the rationale for the amendment, it can be seen that the proposer of the draft law also recognizes that the close relationship that arises is due to being family and blood relatives.

IV. SYNTHESIS

Although there was an amendment to criminal law article 285 that expanded the protection for family members or blood relatives of the victim committed by the offender by designating it as an gravity of crime, leading to a more severe punishment for the offender to restrain and suppress such wrongful acts, a problematic issue was identified from the study.

4.1 The amendment to Article 285 seeks to provide protection to victims who are related by blood or marriage, including grandparents, siblings, and step-parents, in cases of sexual offenses. However, this approach focuses on the trust of the victim in their family or blood relatives, rather than direct blood ties. This is in line with the Child Protection Act of 2015, which allows for the use of assisted reproductive technology to conceive a child using the egg or embryo of a donor, provided it is done with the legal

consent of the husband and wife, who intend to raise the child, and it fosters relationships within their family and blood relatives.

Nevertheless, according to the legal precedent of criminal cases, family ties based on bloodlines still hold significance, as illustrated by the use of the term "blood relatives" in the amendment to Article 285, which refers to relatives with a blood relationship to the victim regardless of their direct relationship. This stands in contrast to the previous list of relatives, which included grandparents, siblings, and step-parents. This interpretation of the law prioritizes blood ties over relationships, such as in cases where a surrogate is used to conceive a child instead of the husband's egg, and the resulting child has no genetic relation to the father, and not even to the paternal blood relatives. If an uncle, who is a blood relative of the father, has committed a sexual offense against thatchild, the court cannot prosecute him under Article 285, even though the uncle has greater status and relationship to the child than the non-blood-related father.

4.2 The Protection of Children Born through Assisted Reproductive Technology Act (2015) in Section 29(2) mandates that individuals who donate sperm or eggs for use in assisted reproduction, as well as resulting embryos or children, are not entitled to any legal or commercial rights or obligations related to family and inheritance law. However, this does not exclude them from being legally responsible for their actions as biological parents. It should be noted that there may be complications in enforcing this law, particularly in cases where the donor is genetically related to the child born through assisted reproduction technology. If the court considers blood relationship as a factor in sentencing someone under Section 285 for sexual offenses against their biological child, without taking into account the relationship between the perpetrator and the victim, the court may disregard their familial status and ties altogether. Conversely, if the court ignores blood relation entirely, this may create two problems: first, it may be difficult for the general public to accept the court's verdict, as it is widely believed that sexual relations between individuals who share the same bloodline is no different than those between animals; second, regardless of the situation, individuals who donate sperm or eggs for use in assisted reproduction should be considered "biological relatives" of the victim, and the court should not overlook this aspect of the case in their interpretation of the law.

4.3 The fact that children have been born with the assisted reproductive technology is an undeniable truth that cannot be revoked or invalidated, just like in cases of surrogacy. Therefore, the children who were born with the help of medical technology that violates the Child Protection Act of 2015, such as those conceived through artificial insemination, which involved the use of sperm of a male who has no biological connection to the child, are considered to have violated said act. It remains to be determined whether the male donor is considered to be a biological or a familial relative of the child.

V. CONCLUSION AND FUTURE WORK

The author recognizes that Article 285 of the Criminal code is a statute that seeks to establish gravity of crime for individuals who commit offenses related to gender, relying on the trust and placement of the victims concerning the offenders who are family members or blood relatives. Thus, the focus is on the relationship between the offender and the victim, which is linked to the issue of blood relationships that involve religion, morality, and genetics. However, with the advancement of medical technology to the point where family relationships and bloodlines are no longer straightforward, the legal system has enacted laws to protect children born with the help of medical technology. This acknowledges the use of assisted reproductive technology in childbirth. Unfortunately, the amendment to Article 285 that was passed in 2019 did not include provisions protecting children born through assisted reproductive technology when it comes to family and blood relationships. Also, the author sees that the law needs to be amended so that children born through assisted reproductive technology have the same legal recognition and relationship with the family and blood relatives of the spouse or partner who wishes to have children, as those who are born biologically. This should include siblings who have the same biological parents or those who share one parent or those who are blood relatives under Article 285 of the Criminal code, with provisions added to the Child Protection Act for children born through assisted reproductive technology.

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