

Criminal Penalty on Cyberbullying in Economic Analysis of the Law

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Abstract

Thailand has the world's second-biggest number of cases of bullied students. One form of bullying is "Cyberbullying". There are the issues of cyberbullying which is now a critical problem facing Thailand. The behavior of Bullying happens especially among children and juveniles. It has changed due to the digital evolution of communications among humans resulting in Cyberbullying through emails, networking, mobile phones, instant messages, and social networking.

The research analyzes the Penalty of Cyberbullying under Thai laws and foreign Law (Missouri State, USA) with Economic Analysis of The Law. The research also gives recommendations in domestic law and adds provisions that are related to Cyberbullying.

The research discusses the Cyberbullying problems in Thailand based on Thai Laws: Thai Criminal Code Section 326, Section 328, Section 393, and Thailand Computer Crime Act B.E.2560 (2017) including the comparisons with foreign provisions, namely Missouri Revised Statutes, and the Megan Meier Cyberbullying Prevention Act of the U.S. (Missouri State). The study reveals three problems under this research which are;

(1) The definition of Cyberbullying which none of the Thai laws articulates clearly and precisely; a precise definition of Cyberbullying and, the specific provisions are necessary for preventing crimes from Cyberbullying;

(2) The penalties for Cyberbullying crimes: Cyberbullying is a dangerous crime which an imprisonment penalty or financial penalties is necessary, according to theory of punishment;

(3) The suitable ratio of penalty of Cyberbullying according to the theory of Economic Analysis of The Law.

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1. Introduction

Bullying is now happening around the world, including Thailand and according to data from the Department of Mental Health (Ministry of Public Health), Thailand has the world's second biggest number of cases of bullied students. One form of bullying is "Cyberbullying". Cyberbullying is a significant problem, especially for teenagers and students, who are increasingly addicted to social media e.g., Facebook, Twitter, and Instagram that can easily be accessed through smartphones. Cyberbullying may be deemed as one of forms of traditional bullying, however the difference between bullying Cyberbullying and Traditional Bullying is the reaction of people, including law enforcement, trying to help victims. Squadron Leader, Dr. Boonruang Tri Ruangworawat, Director-General of the Department of Mental Health, explained about bullying among school children as reported in the news. He noted that bullying in schools is a violent behaviour with various forms: 1) Physical bullying which is often seen in every school, such as pushing, punching, pinching, pulling hair, and using a device instead as a weapon for intimidation, 2) Arousal bullying, such as making fun of a person, creating a sense of shame, excluding a person from the group to ignoring them or pretending they do not exist. 3) Verbal bullying such as, the use of profanity, and 4) Internet bullying, such as using social networks to make false claims about a person in order to humiliate the person.¹ Not only is Thailand now facing Cyberbullying as emerging serious social problem, but also in Europe, many parents are concerned about Cyberbullying. More than 80% of parents in France, Greece, and Portugal are concerned that their children could be bullied when they use the Internet or a mobile phone. Parents in Denmark, Slovakia, Sweden, and Finland seem more confident about their children's safety as over 69% are not at all, or not very worried about their children being cyberbullied by peers.² Organization for Economic Co-operation and Development (OECD) agrees that Cyberbullying is a real extension of physical bullying, however the problem is complex and extremely frightening because the area of action extends to endless possibilities. The Internet makes harassment possible even in the house. In the past, it was a safe place and was used to hide from being mistreated in a public place.³

¹ Department of Mental Health, the way to prevent bullying in the school, at <http://voicetv.co.th/read/SJvNgbEyg>, (accessed January 14, 2021).

² U.S. Legal, Cyber Bullying, Legal Definitions, at <https://definitions.uslegal.com/c/cyber-bullying/>, (accessed January 14, 2021).

³ See "New Millennium Learners Blog 'Cyber Bullying'," OECD Centre for Educational Research and Innovation CERI, Accessed 18 January 2021 Available on

As mentioned above, bullying is a form of violent behavior which causes physical, mental, and emotional pain to the bullied person (victim) or a group of people.

Presently, since there is no specific law regarding cyberbullying in Thailand, whenever there is a bullying case, defamation is applied as an offensive legal strategy from the Thai Criminal Code despite differences in action and consequences of defamation and Cyberbullying. Thai Laws do not clearly specify the definition of Cyberbullying, and there is on provision provide the specifically criminal penalties.

In foreign countries, they are also facing the cyberbullying problems. In the U.S., there is a specific provision for cyberbullying crime, which provision provides the specifically criminal penalties.

This research has questioned on the suitable ratio of penalty of Cyberbullying according to the theory of Economic Analysis of The Law. “Law Economic Analysis” is the science of legal’ studied, the theory of law, legal interpretation, law designation, analysis value of law and the laws’ effect on human behavior and related society by using neoclassical economics methodology and rational choice model.⁴ Most criminals believe that crime is a reason. When the expected benefits beyond the expected cost, they would make a crime; at the same time, there will be no crime, when they are expected to cost higher than the expected benefit. Thus, it is necessary to find the expected benefit and expected cost of criminals. The expected cost of criminal activity consists of the magnitude of punishment and probability of being caught. Criminals will consider two things: the magnitude of punishment, and the probability of being apprehended before they decide to do wrong. Therefore, these two will combine into the expected costs of criminals according to the equation.⁵

“C: the expected cost” = “M: magnitude of punishment” x “P: probability of being apprehended”

Magnitude and probability are always related in economics and real-life. Both a big magnitude and a high probability are important. In another words, if there is only big magnitude with low probability or small magnitude with high probability will be the

<https://www.oecd.org/edu/cei/centreforeducationalresearchandinnovationcerithenewmilenniumlearnersblog.htm>,

⁴ Pokpong Srisanit, Legal Academic Seminar in the topic of “General principle of Law Economical Analysis”, Rapeepatanasak Institutes, Office of the Court of Justice and Thailand Development Research Institute, 26 June 2010

⁵ Steven D Levitt and Thomas J.Miles, “Empirical study of criminal punishment” in A. Mitchell Polinsky and Steven Shavell, Handbook of Law and Economics, Volume 1, Elsevier,2007,p.459.

second important. If comparing “a big magnitude with low probability” with “small magnitude with high probability”, in some situation, the small magnitude with high probability is more important. As the result, the Probability of apprehension is a key factor to calculate the cost of crime.⁶

2. Cyberbullying under Thai laws

In Thailand, although there is no specific law provided a criminal penalty for cyberbullying crime, there are relevant provisions in Thai Criminal Code and Thailand Computer Crime Act. Section 326 of the Thai Criminal Code provides that “Whoever, imputes anything to the other person before a third person in a manner likely to impair the reputation of such other person or to expose such other person to be hated or scorned, is said to commit defamation and shall be punished with imprisonment not exceeding one year or fined not exceeding twenty thousand Baht, or both.” The offence of defamation could be applied to the bullying behaviors. Also, if the bullying done in public, especially cyberbullying which is mostly done through social media, internet, emails, networking and other electronic devices, such actions may be deemed as Offense of Defamation by Publication under Section 328 of Thai Criminal Code.⁷ And, sometime the shall be deemed as the Offense of Insulting under Section 393⁸ which is the petty offences, under Book III of the Thai Criminal Code with a small penalties: imprisoned not out of one month or fined not out of one thousand Baht, or both.

In Thailand, Computer Crime Act relevant provisions of cyberbullying provided in Section 14 and Section 16.

The offense under Section 14 is the offense of using a computer system to do crimes in different actions. Section 14 has been adjusted by Section 8 of the

⁶ Pokpong Srisanit, Advance Criminal Law, 3rd (Edited) publication, 3 September 2020, Winyuchon. Page 105.

⁷ Section 328 of Thai Criminal Code provided that *“If the offense of defamation be committed by means of publication of a document, drawing, painting, cinematography film, picture or letters made visible by any means, gramophone record or another recording instruments, recording picture or letters, or by broadcasting or spreading picture, or by propagation by any other means, the offender shall be punished with imprisonment not exceeding two years and fined not exceeding two hundred thousand Baht.”*

⁸ Section 393 of Thai Criminal Code provided *“Whoever, insulting the other person in his presence or by publication, shall be imprisoned not out of one month or fined not out of one thousand Baht, or both.”*

Computer-Related Crime Act (No. 2), B.E. 2560.⁹ The intention of Section 14 does not intend to punish the offender of defamation by advertising which such the offense of defamation with advertising had been specifically stipulated in the Thai Criminal Code.

In Section 16¹⁰, it is related to the retouch of computer data in case of person's picture led to the damage which is a type of being insulted or defamed by electronic or other processes. For the differentiate from Section 14 is a perform actions by bringing data into a computer system but in case of Section 14 which is an action which is not an insulting or defamatory according to that criminal law that is separated, which not bringing defamation to apply to Section 14.

Summary of the Criminal Penalty under the Law related to Cyberbullying in Thailand with Economic Analysis of The Law show in the table below:

⁹ Section 14 of Thailand Computer Crime Act provided *“Any person who perpetrates the following offenses shall be subject to imprisonment up to five years and a fine not exceeding one hundred thousand baht, or both*

(1) put into a computer system forged computer data, partially or entirely, or false computer data, in a manner that is likely to cause damage to other person or the public

(2) put into a computer system false computer data in a manner that is likely to damage the national security,

(3) put into a computer system any computer data which is an offense about the security of the Kingdom or is an offense about terrorism, according to Thai Criminal Code;

(4) put into a computer system any computer data which is obscene and that computer data may accessible by the public;

(5) disseminate or forward any computer data when being aware that it was the computer data as described in (1), (2), (3) or (4).”

¹⁰ Section 16 of Thailand Computer Crime Act *“Whoever enters a picture of another person into computer system where such picture is created, edited, added or amended electronically or by any other means in a manner which is likely to cause such other person to be defamed, denounced, detested or humiliated, shall be liable to imprisonment for a term not exceeding three years and a fine not exceeding Two Hundred Thousand Baht.”*

Summary the Criminal Penalty under the Law related to Cyberbullying in Thailand with Economic Analysis of The Law						
	Thai Criminal Code			Thailand Computer Crime Act		
	Section 326 ¹¹	Section 328 ¹²	Section 393 ¹³	Section 14 ¹⁴	Section 14 P.2 ¹⁵	Section 16 ¹⁶
Imprisonment	≤1 year	≤ 2 year	≤ 1 month	≤5 year	≤ 3 year	≤ 3 year
Fine	≤ 20,000 THB	≤ 100,000 THB	≤ 10,000 THB	≤ 100,000 THB	≤ 60,000 THB	≤ 20,000 THB
“C = M x P: Expected Cost = Magnitude of Punishment x Probability of Apprehension”¹⁷						
Magnitude of Punishment (M) ¹⁸	100,000	200,000	3500	1,012,500	607,500	567,500
Probability of Apprehension (P) ¹⁹	0.1 (assume that the Probability of Apprehension equally)					
Expected Cost (C) ²⁰	20250	46500	3500	101250	60750	56750

¹¹ Section 326 of Thai Criminal Code

¹² Section 328 of Thai Criminal Code

¹³ Section 393 of Thai Criminal Code

¹⁴ Section 14 of Thailand Computer Crime Act

¹⁵ Section 14 Paragraph2 of Thailand Computer Crime Act

¹⁶ Section 16 of Thailand Computer Crime Act

¹⁷ “Theory of Law Economical Analysis’s formula to find the Expected Cost Crime” Pokpong Janvit, “Economic Analysis of Laws : Concept and Literary review”, Economic Analysis of Criminal Laws , Office of the Thailand Development Research Institute, 2554, page19 Steven D Levitt and Thomas J. Miles, “Empirical study of criminal punishment” in A. Mitchell Polinsky and Steven Shavell, Handbook of Law and Economics, Volume 1, Elsevier,2007,p.459.; Pokpong Janvit, “Economic Analysis of Laws : Concept and Literary review”, Economic Analysis of Criminal Laws , Office of the Thailand Development Research Institute, 2554, page19

¹⁸ Probability (“P”) at 0.1 and assumed that the value of freedom is 500 Baht per day.)

¹⁹ Thai Criminal Code, Section 30 Paragraph 1 give a value of freedom at 500 Baht.

²² Thai Criminal Code, Section 30, Paragraph 1, provided that “In case of the detention on lieu of fine, it shall be taken hold of rate of two hundred Baht per one day,.....”

The value of 500 Baht per day for the freedom cost is only an average value, some may be lower and some may be higher.²¹

3. Cyberbullying in Foreign law (Missouri State, USA)

All 50 states of the U.S. now have implemented physical bullying laws and 48 of them have included electronic harassment, however Cyberbullying law has been adopted in only 23 states. Most of the states pay attention to the importance of bullying and electronic harassment by implementing the laws. Megan Meier was an American girl who committed suicide by hanging herself just three weeks ago before her 14th birthday. A year later, Meier's parents prompted an investigation into the matter and her suicide was attributed to Cyberbullying through a social networking website Myspace. Lori Drew, the mother of a friend of Meier, was indicted on the matter in 2008 but was acquitted in the 2009 case *United States v. Drew*.²² In the Megan Meier persecutor tried to use the law to process the case with the Defendant under Criminal Law, however it showed that no regulations could be applied to the case, the court cannot punish the Defendant. Later case, Megan Meier had become a study case and led to enact the provision of cyberbullying and passed to the House Judiciary Subcommittee to be the Megan Meier Cyberbullying Prevention Act.

The U.S. Code Section 881: Cyberbullying has clearly provided definition and Scope of interpretation.

Section 881²³. Cyberbullying

“(a) Whoever transmits in interstate or foreign commerce any communication, with the intent to coerce, intimidate, harass, or cause substantial emotional distress to a person, using electronic means to support severe, repeated, and hostile behavior, shall be fined under this title or imprisoned not more than two years, or both.”

“(b) As used in this Section—”

²² Zetter, Kim)November 20, 2009.("[Prosecutors Drop Plans to Appeal Lori Drew Case.](#)" [Wired News.](#)

²³ [H.R.1966 - 111th Congress \(2009-2010\): Megan Meier Cyberbullying Prevention Act | Congress.gov | Library of Congress.](#) at <https://www.congress.gov/bill/111th-congress/house-bill/1966/text>, (accessed 25 February 2021)

“(1) the term ‘communication’ means the electronic transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received;” and

“(2) the term ‘electronic means’ means any equipment dependent on electrical power to access an information service, including email, instant messaging, blogs, websites, telephones, and text messages.”

Although the provision does not directly define the word “Cyberbullying”, however when read together both “communication” and “electronic means” can easily understand the action with deem as cyberbullying.

Megan Meier Cyberbullying Prevention Act specifies both imprisonment and financial penalties for Cyberbullying crime under the United States Code Section 881. “..., shall be fined under this title or imprisoned not more than two years, or both.” Section 881 of the United States Code is the sub-title of title 18 of the Code, and the fine penalty of any Section under this title shall follow the 18 U.S. Code Section 3571 - Sentence of fine.²⁴ In this case, the financial penalty when a defendant is an individuals and crime does not cause serious damage and does not result in death, the amount of the fine shall be no more than is 5,000 USD according to Sub-Section (b) (5).

When apply Megan Meier Cyberbullying Prevention Act with Economic Analysis of The Law and the result shows below.

Analysis the Criminal Penalty under Megan Meier Cyberbullying Prevention Act with Economic Analysis of The Law			
Megan Meier Cyberbullying Prevention Act			
	Imprisonment	Fine	Expected Cost
Section 881. ²⁵	≤ 2 year	≤ 5,000 USD	16686.93

The value of freedom represented at 50USD per day for the freedom cost in USA, so there are 7.6 times different when compare to living cost in Thailand, and the average exchange rate is at 1USD: 30.5592THB. Therefore, from the formula “C = M x P”, and “C = M x P” [(365 x 2) x (50 x 30.5592)] + (5,000 x 30.5592) = 1,268,206.8, x 7.6 (which is different living cost between USA and Thailand, according to the minimum wage per day of both countries.) = 16,686.93.

²⁴ 18 U.S. Code Section 3571 - Sentence of fine | U.S. Code | US Law | LII / Legal Information Institute (cornell.edu) [Online] Accessed 26 February 2021, Available at <https://www.law.cornell.edu/uscode/text/18/3571>

²⁵ Section881. of Megan Meier Cyberbullying Prevention Act

4. Problems and Analysis problems of Cyberbullying with Theory of Law Economical Analysis

The study reveals three problems under this research which are;

First, the definition of Cyberbullying which none of the Thai laws articulates clearly and precisely; a precise definition of Cyberbullying and, the specific provisions are necessary for preventing crimes from Cyberbullying. The Section 326, Section 328, and Section 393 of the Thai Criminal only provided widely provisions for offense of defamation, offense of defamation by publication and offense of insulting. Also, the Section 14 and Section 16 of Thailand Computer Crime Act which is the specific law for computer and cybercrime does not mention Cyberbullying. Although the crime under Section 16 which is entering fake photos into computer system, and Cyberbullying may be deemed as defamation or insulting, sometime the characteristic of Cyberbullying may be different. At the same time, in foreign countries, especially, Missouri State, USA, had enacted the specific laws for Cyberbullying which has a clear definition and scope of interpretation.

Second, the penalties for Cyberbullying crimes: Cyberbullying is a dangerous crime which, an imprisonment penalty or financial penalties is necessary according to theory of punishment.

Finally, the ratio of penalty of Cyberbullying: The suitable ratio of penalty can be solved by three problems as follows to prevent the crime; the criminal penalty is necessary to prevent the crime. According to the theory of punishment, there are five different criminal penalties: death; imprisonment; confinement; Fine; Forfeiture of property. Sometimes, the penalty may have more than one kind of penalties.

According to the Theory of Law Economical Analysis, the magnitude of punishment or the size of punishment related to the expected cost of crime which both are the main factor to motivate a criminal to commit a crime. To effectively prevent the Cyberbullying crime, the size of penalty should be suitable for the expected cost of crime. The following table showed the analysis the Criminal Penalty of cyberbullying crime with Economic Analysis of The Law comparing to the Thai laws and Megan Meier Cyberbullying Prevention Act.

Analysis the Criminal Penalty under Megan Meier Cyberbullying Prevention Act with the Economic Analysis of The Law compare with the related Thai Laws			
Thai Criminal Code			
	<u>Imprisonment</u>	<u>Fine</u>	<u>Expected Cost</u>
Section 326 ²⁶	≤ 1 year	≤ 20,000 THB	20250
Section 328 ²⁷	≤ 2 year	≤ 100,000 THB	46500
Section 393 ²⁸	≤ 1 month	≤ 10,000 THB	3500
Thailand Computer Crime Act			
	<u>Imprisonment</u>	<u>Fine</u>	<u>Expected Cost</u>
Section 14 ²⁹	≤5 year	≤ 100,000 THB	101250
Section 14 P.2 ³⁰	≤ 3 year	≤ 60,000 THB	60750
Section 16 ³¹	≤3 year	≤ 20,000 THB	56750
Megan Meier Cyberbullying Prevention Act			
	<u>Imprisonment</u>	<u>Fine</u>	<u>Expected Cost</u>
Section 881. ³²	≤ 2 year	≤ 5,000 USD	16686.93

5. Recommendations

1) Add a new provision for the future of Cyberbullying prevention in Thai Criminal Code to provide a clear definition of Cyberbullying.

To add a new provision and enact a new Section to describe the definition of Cyberbullying. Specifically, the definition of Section 326 which shows that

“Whoever, imputes anything to the other person before a third person in a manner likely to impair the reputation of such other person or to expose such other person to be hated or scorned, is said to commit defamation and shall be punished

²⁶ Section 326 of Thai Criminal Code

²⁷ Section 328 of Thai Criminal Code

²⁸ Section 393 of Thai Criminal Code

²⁹ Section 14 of Thailand Computer Crime Act

³⁰ Section 14 paragraph2 of Thailand Computer Crime Act

³¹ Section 16 of Thailand Computer Crime Act

³² Section881of Megan Meier Cyberbullying Prevention Act

with imprisonment not exceeding one year or fined not exceeding twenty thousand Baht, or both”; therefore, the provision should be added as below:”

“Whoever transmits any communication using electronic means to support severe, repeated, and hostile behavior in a manner likely to impair the reputation of such other person or to expose such other person to be hated or scorned, is said to commit the offense of Cyberbullying shall be punished with imprisonment not exceeding one year and six months or fined not exceeding Eighty Thousand Baht, or both.”

“Cyberbullying” shall include online sexual harassment, attack or threaten with negative content through online, impersonating someone else’s in content through online deceitfully and create group on social media for harming others.

2) Amend and add the other paragraphs to describe and define the definition of “communication using electronic means” in the new Section.

The definition of specific wording is necessary when interpretation of the provision of law. In the new recommended Section has two words: “communication” and “electronic means”. In order to amplify the meaning, the researcher would like to give a recommendation to provide the definition as below.

“Communication” means any communication between a person to a person through and including, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”

“Electronic means” means any equipment dependent on electrical power to access an information service, including email, instant messaging, blogs, websites, telephones, and text messages.”

3) Set the reasonable penalty for the Cyberbullying crime

From theory of Law Economic Analysis, the researcher would like to recommend to set both imprisonment and/or financial penalty for Cyberbullying. The recommendation for the penalty has concerned with the damage of crime which may factor and set between Section 326 and Section 328 of the Thai Criminal Code. After studied and analyzed on the related law of Cyberbullying in terms of definition, interpretation, and penalty, the researcher believes the recommendation to adding a new provision will fix the loophole of the Cyberbullying problem in society.

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