

An Analysis of the Judicial Procedure of Juvenile Cybercrime in Taiwan: Viewpoint from Paraphilia

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1. Introduction

This paper focuses on two issues, the first one is how paraphilia has been construed in Taiwan's legal circles, and the second is the judicial procedure for juveniles committed cybercrime, which is associated with his paraphilia.

Compulsory treatment has been adopted to treat sex criminals in Taiwan for some time (Art. 91-1 of Criminal Code). However, the criminal disposal of paraphilias, especially exhibitionism, usually has its roots in Public Indecency, catalogued as "Indecent Exposure" under the Criminal Code. As shown in related literature, this is because prosecutors and judges find the basis of their decisions on the penalty under the Code solely on the fact that whether one has committed an *actus reus of the incedent exposure* and endangered public interest (Wang Shenghao 2010). Therefore, the *actus reus* becomes the sole criterion for a behavior to be construed as "public indecency". Moreover, because the adversary system and Evidence Rule have been included in Code of Criminal Procedure in recent years in order to determine whether

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an Indecent public behavior is a sheer joke or performed due to one's mental illness, and psychiatric assessments and other tests are also applied as auxiliary when needed. Since there has been few legal empirical studies on paraphilias such as exhibitionism, and these manners of such acts are so diverse that it is hard to define the paraphilias. Hence, an exhibitionist would be judged as violating Public Indecency without any further exploration into their motives or reasons for doing so. However, since there has been theories claiming that if one perform exhibitionism due to one's mental illness, one is also likely to commit sexual assault in the future, it makes the motives or reasons of any exhibitionists not to be neglected. This is one of the main topics of this paper's focal points.

The second issue of this paper is about the judicial procedure for juveniles committed such public indecency in cyberspace whose act is associated with paraphilia. Taiwan's Juvenile Law was modeled after and heavily influenced by Japan's, and has been changed by later amendments based on Anglo-American legal system. The judicial procedure for juveniles greatly differs from that for adults. The first article of Juvenile Law clearly states that the Law is stipulated to ensure the sound growth of juveniles. Under this requirement, the judicial procedure dealing with juvenile exhibitionists is more subtle than that for grown ones. This feature forms the basis the second issue of this paper.

This paper adopts a methodology of traditional legal researches, i.e., documentary analysis.

2. Definition of Paraphilia

According to Taiwanese medical literature, it is said that sexual deviant behaviors more commonly seen among males than females. This is because that male paraphilias are more likely to be seen as violating laws while fe-

male ones only draw attentions without being taken as mentally ill (Jhou 1997). Paraphilia as a kind of psychopathy is defined in DSM IV as follows:

They include Exhibitionism (exposure of genitals), Fetishism (use of non-living objects), Frotteurism (touching and rubbing against a nonconsenting person), Pedophilia (focus on prepubescent children), Sexual Masochism (receiving humiliation or suffering), Sexual Sadism (inflicting humiliation or suffering), Transvestic Fetishism (cross-dressing), and Voyeurism (observing sexual activity).

(APA 2000)

To sum up, paraphilia in a broad sense is a common name for sexual deviant behaviors.

Paraphilias are viewed as sex crimes. It is relatively difficult to find paraphilia studies in epidemiology and legal science because, as psychopathological studies pointed out, people tend to avoid public conversations on topics about sex, let alone paraphilia (Jhou 1997). Laws about paraphilia date back to 1964 when James gave his definition in which paraphilias were divided into three types according to different law applications. The first type includes behaviors that violate heterosexual monogamous family ethics such as bigamy, incest, and adultery. The second includes those that are driven by sexual urge socially recognized as normal but manifested in a distorted way such as rape, indecent assault, illegal sex, sex murders, pedophilia, and sex work. The third includes morbid tendencies such as homosexuality, transvestic fetishism, fetishism, and exhibitionism (James 1964). It is reasonable to derive from above that paraphilia is a quite general concept that covers various behaviors from sexual assault to frotteurism.

However, the prescription of paraphilia in Taiwan's law is confusing. Ac-

According to Criminal Code, sexual assaults are taken as violations of sexual autonomy while paraphilias has been interpreted to be included in Public Indecency of sex offenses in Criminal Code and in other acts such as Sexual Harassment Prevention Act and Maintenance of Social Order Act. Generally speaking, criminal sanctions of paraphilia nowadays are based mainly on Public Indecency of Criminal Code or Sexual Harassment Prevention Act. The definition of sexual harassment goes as follows in Sexual Harassment Prevention Act:

Article 2. Excluding sexual assault crimes, the so-called sexual harassment in the Act refers to the sexual statements or sexual behavior violating another person's wishes and also to the following situations:

A. If a person's obedience to or rejection of another's sexual advances were made a condition of obtaining, losing or reducing their rights and interests in work, education, training, services, plans or activities.

B. If texts, pictures, voices, images or other objects are used to inundate or intimidate; or if languages and behaviors of discrimination, and insults or other methods are adopted. – For such reasons, the other's person's dignity of character is impaired. Or if another person feels scared, feels disliked with hostility or feels offended ; or if another persons' work, education, training, services, plans, activities or other normal habits are improperly influenced.

After the legislation of Sexual Harassment Prevention Act, some paraphilia cases hence can be appropriately handled. However, according to the three criteria that form the basis of the act: (a) the behavior concerned is not a sexual assault; (b) the behavior concerned is sex-related and inflicted upon another against their will; (c) the behavior concerned satisfies A or B; the act covers behaviors so broadly that virtually all cases involving sexism are included. As a result, the act is itself insufficient to deal with paraphilia com-

prehensively and thoroughly enough. As a result, the act itself is so broad and should be defined more narrowly enough to notify the people which act is prescribed or prohibited.

3. Judicial Procedure for Juveniles with Paraphilia in Taiwan

According to Juvenile Law, juvenile delinquency cases, different from committed by adults, are divided into two kinds: protection cases and criminal cases. Generally speaking, the former is more commonly seen than the latter, for the only juveniles above fourteen who have committed severe crimes will be subjected to criminal sanction, and on the other hand, those below the age will only be taken to protective procedure .

Figure 1. Flowchart of juvenile courts dealing with juvenile delinquency cases¹⁾

From 7 years old to 12 years old → Child Protection Procedure
From 12 years old to 18 years old (Protection Case) → Juvenile Protection Procedure
From 12 years old to 14 years old (Criminal Case) → Juvenile Protection Procedure
From 14 years old to 18 years old (Criminal Case) → Juvenile Criminal Procedure
According to current judicial procedures for juveniles in Taiwan, the program is as follows: For children between 7 and 12 years of age who are in conflict with the

1) See

<http://www.judicial.gov.tw/work/work08/01%E5%B0%91%E5%B9%B4%E6%B3%95%E9%99%A2%EF%BC%88%E5%BA%AD%EF%BC%89%E8%99%95%E7%90%86%E5%B0%91%E5%B9%B4%E4%BA%8B%E4%BB%B6%E6%B5%81%E7%A8%8B%E5%9C%96.pdf>, visited on March 20th, 2009.

law, the Child Protection Procedure is applicable.

For pre-delinquent juveniles between 12 and 18 years of age (Protection Case), the Juvenile Protection Procedure is applicable.

For criminal juveniles between 12 and 14 years of age (Criminal Case), the Juvenile Protection Procedure is applicable.

For criminal juveniles between 14 and 18 years of age (Criminal Case), the Juvenile Criminal Procedure is applicable.

Taiwan Kaohsiung Juvenile Court has proclaimed: “Juvenile exhibitionists are rarely seen and would be subjected to Juvenile Law. It is also possible that they be assessed by psychiatric institutions or evaluated and counseled by psychological counselors.²⁾” From data stated above, along with others offered by juvenile case judges, all cases of juveniles committing public indecency (i.e. exhibitionism), whether online or in real life, are taken to protection. The general procedure goes as follows:

Figure 2. Protective Procedure

Juvenile → Investigations before trial → Judge → Juvenile Protection Court or Juvenile Criminal Court

The juvenile judicial program is as follows:

The juvenile is investigated before trial. Then a court session is held for the judge to determine whether protective or criminal sanctions are applicable to the juvenile. If a criminal sanction is decided, the case is transferred to the prosecutors. This part of the program is similar to the procedures adopted in Japan.

What is stated above is in fact the operating procedure of a juvenile court

2) Data provided by Taiwan Kaohsiung Juvenile Court and Taiwan Juvenile Counseling Association.

after a case was sent in. As for the procedure for dealing with cases of juveniles committing public indecency before the court taking over them is as follows:

There are three ways to deal with a juvenile delinquency case: removal of a case, request, and report. Removal of a case means that when on duty, prosecutors, judicial police officers or courts should engage in a case upon knowing it to be a crime. Request means that the guardian of a juvenile has the right to ask the court to deal with a case. Report means that everyone is allowed to make testimonies of juvenile crimes they witnessed. With the right to prior deliberation, juvenile courts will accept cases deal with through one of the above three ways, which completes the procedure of the acceptance of a case (Chen & Cai 2009). Thus, a juvenile exhibitionism case will be accepted through this procedure via one of the above three ways.

After the acceptance of a case, an investigation will be launched, and it consists of two important stages in sequence: pre-trial investigation and court investigation. A pre-trial investigation involves the juvenile probation officer making an investigation report after interrogating the juvenile delinquent and his/her legal representatives, which will later be sent to court investigation. And a court investigation involves the judge opening a court to investigate the crime and examine the evidences. The main difference is that the former is performed by investigators while the latter by judges. It's worth noting that pre-trial investigations play a very important role in trials. For although judges are allowed to neglect the opinion of the investigation reports, they still greatly affect the judgments made by subsequent court investigations in most of the cases (Chen & Cai 2009).

In general, investigators engaging in pre-trial investigations often use the pre-trial investigation form (see appendix). As for juvenile pathological paraphilias, investigators can send them to hospitals or counselors for psychological assessments.

Afterward the post-investigation disposal is separated into three different types:

“First, No Trial: this means no trial will be opened. No Trial is further divided into Must-be-no-trial, which means that it must be the case that no trial is opened, and Can-be-no-trial, which means that it may be opened but no trial is held.

Second, waiver (by the court) to the prosecutor: this means a case, after investigation, should be turned over to the prosecutor if it is a criminal case. If the prosecutor decides not to prosecute, the case will be carried on by juvenile court as a ‘juvenile protection case.’

Third, the trial begins...”(Chen & Cai 2009)

In general, because adult paraphilias receive relatively light punishments compare to other types of crime, juvenile delinquents committing paraphilic behaviors mostly receive protective procedure only. Thus, after investigation, cases will be on trial in one of the three ways mentioned above.

A deliberative trial is usually adopted to deal with juvenile delinquency cases, and the trial shall not be open to public. A deliberative trial requires that the judge, the investigator, the juvenile’s legal representative, the juvenile’s defender, and the juvenile concerned all participate in the trial and discuss the proper treatment. The trial is not open to public in order to protect the juvenile concerned (Chen & Cai 2009).

See the following figure for a deliberative trial. Generally speaking, in protection cases a round table deliberative trial will be held as shown by the next picture; in criminal cases a criminal court will be held as shown by the next second picture, which is similar to a criminal court held for an adult case.

It is worth noting that Taiwan’s pre-trial investigations and deliberative trials are modeled after Japan’s, which can be seen in the following figures.

After the deliberative trial comes the final procedure of deciding the criminal sanction. According to related literatures, “depending on the judge’s opinions, there can be two possible results after the trial, none-protective measure and protective measure. The former means that the judge deems the protective measures not appropriate for the case. The latter can be divided further into the following four modes of punishment.

1. Reprimand, holiday consulting may be ordered:

Reprimand is pronounced by the judge. The holiday consulting is to be held three to thirty times by the juvenile protection officer.

2. Protective procedure, labor services may be ordered:

A protective procedure requires the juvenile concerned to report to the juvenile protection officer in the court every month to receive supervision and guidance up to three years. The protection officer pay a visit to the juvenile concerned at any time in order to confirm his/her actual status. Labor services are 3-to-50-hour community services assigned to foster the diligent and law-abiding attitude in the juvenile.

3. Placement and counseling:

The juvenile concerned will be removed from the dysfunctional family and sent to a proper welfare or cultivation institute up to two years, but an up-to-two-year extension may be requested if necessary, though once only.

4. Reformatory school:

The juvenile concerned will be sent to a reform school subordinate to Ministry of Justice for three years at most, e.g. Changhua Juvenile Reform School.

It should be noted that a procedure named “under observation” is also important. A judge may, if necessary, pronounce a ruling to send a juvenile to a juvenile investigator for observation within six months in order to determine

whether to apply protective measures and which protective measure to apply.”(Chen & Cai 2009)

The above concludes the judicial procedure for juvenile delinquency in Taiwan. Reprimand, holiday consulting, and protective procedure are the main protective measures used to punish juveniles violating Public Indecency.

4. Conclusion

In conclusion, psychiatric assessments play an important role in criminal sanction on people with pathological paraphilia. In an adult case, the punishment of Public Indecency is imposed, while in a juvenile case, protective measures are taken as the proper response to avoid eternal damages to the juveniles. However, because the protective measures adopted or ordered are so slight that it is possible that the juvenile would commit crimes again.

Although cybercrimes are prevalent today, cases of exhibitionism are still rarely seen in Taiwan. Exhibitionists on the internet are usually taken to be committing sexual harassment instead of public indecency, and are fined to various extents. These phenomena revealed the past practical opinion that conducts performed on the web cannot be said to be identical with “public” conducts carried out in real life. It can be seen, from the above opinion, that how to interpret for conducts carried out on the web is still a controversial issue.

However, the identifications of the legal status of public indecency and cyber- exhibitionism in the judicial procedure are more consistent for juvenile cases than for adult ones. A probable reason is that adult delinquency is established on the basis of whether the act satisfies the constituent requirements of a crime, while the treatments of juvenile delinquency aimed at correcting the juvenile’s behavior. Therefore, the protective measures for

juveniles are more subtly designed. Since Juvenile Law imposes very slight protective measures on juveniles committing Public Indecency or cyber-exhibitionism, and people with pathological paraphilia are very likely to commit the same crimes again, more discretion is needed on the criminal sanction imposed on those who engage in such behaviors, whether adult or juvenile.

The important thing is that, when facing a normal sex criminal who commits public indecency, punishments is probably sufficient for reducing their recidivation for they still have their rationality intact. However, when it comes to pathological paraphilias, it is not merely insufficient to punish them, it is simply categorically mistaken to punish them in order to reduce their probability to recommit the same crime. Pathological paraphilias require different disposals than ordinary criminals. To accomplish this, we are in need of a better instrument for prosecutors and judges to discern pathological criminals from ordinary ones, and we are also in need of a discriminating enough system of disposals for paraphilia crime and exhibitionism.

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Appendix

Questionnaire of Investigation (based on questionnaire made by Investigation & Protection Bureau of Taiwan Kaohsiung Juvenile

Court)

- Name: _____ Gender: _____ Nickname: _____ Birth Date: _____
- ID number: _____ Height: _____ Weight: _____ Cell phone: _____
- Permanent address: _____ Phone: _____
- Address: _____ Phone: _____
- Profession: student worker cookery service industries commerce looking for a job jobless other answer
- Tattooed or not: yes no Location: _____ Figure: _____
- Health: excellent good normal emaciated sickly other answer _____
- Intelligence: exceptional smart average slow
- Mental state: normal neurasthenia schizophrenia bipolar disorder suspected mental illness Temperament: _____
- Addicted to drugs or not: yes What kind of drug _____ once What kind of drug _____ no
- Smoking or not: yes _____ packet per day once, secretly sometimes none
- Drinking or not: alcoholic _____ bottle per day good drinker sometimes no
- Addicted to betel nut or not: yes How many per day? _____ sometimes no
- Gambling or not: yes What kind of gamble? _____ Location: _____ sometimes What kind? never
- How much pocket money a month? _____ From whom: father mother friend part-time job other recourse _____
- Hobbies: _____

- Relationship with parents: father: father adoptive father step-father unknown father mother: mother adoptive mother step-mother unknown mother

● Family:

Title	Name	Birth year	Profession	Education	Parenting style	Notes
Father					<input type="checkbox"/> corporal punishment <input type="checkbox"/> scolding <input type="checkbox"/> advice <input type="checkbox"/> neglect <input type="checkbox"/> indifference <input type="checkbox"/> spoil <input type="checkbox"/> other style:	<input type="checkbox"/> alive <input type="checkbox"/> dead
Mother					<input type="checkbox"/> corporal punishment <input type="checkbox"/> scolding <input type="checkbox"/> advice <input type="checkbox"/> neglect <input type="checkbox"/> indifference <input type="checkbox"/> spoil <input type="checkbox"/> other style:	<input type="checkbox"/> alive <input type="checkbox"/> dead

(other people living together)

Title	Name	Relationship	Birth year	Profession	Education

- Financial condition: wealthy above middle class well-to-be barely living poor Monthly income
- How do parents get along: good OK silent indifferent having quarrels sometimes always always having quarrels orphan separation divorce

- How do siblings get along with you: no siblings good OK silent indifferent always having quarrels always fighting
- Who is your best friend in family? _____ Why? _____ no such person
- Do any of your family: drink gamble had a criminal record mental illness violent tendency away from home have an affair selling or addicted drugs
- Parents' attitude toward the party (multiple choice) : showing concern poor communication nagging stern indulgence maltreatment
- Who raised up the party (multiple choice) : father mother grandfather grandmother maternal grandfather maternal grandmother other people
- Did the party always go home late ? no yes Reason _____ at o'clock. How many times _____
- Had the party ever run away from home? no yes Reason? _____ How many days? _____ How many times? _____
- Your religion: Buddhism Taoism Christianity Catholicism other religion none
- Education: _____ Run to where: _____ Source of money: _____

School	Department	Grade	Teacher's name	Period of study	Location	Notes
				—		<input type="checkbox"/> transfer <input type="checkbox"/> suspension <input type="checkbox"/> dropout <input type="checkbox"/> at school <input type="checkbox"/> graduation
				—		<input type="checkbox"/> transfer <input type="checkbox"/> suspension <input type="checkbox"/> dropout <input type="checkbox"/> at school <input type="checkbox"/> graduation

				—				
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- Had any demerit mark? no yes How many _____ Why? _____ transfer suspension dropout at school graduation
- How many light demerit marks _____ Why? _____ How many warnings _____ Why? _____
- Had any merit marks? no yes How many great merit marks _____ Why? _____
- How many small merit marks _____ Why? _____ How many merit marks _____ Why? _____
- Had the party ever played truant or had absenteeism? no yes How many lessons of absenteeism? _____ How many lessons of playing truant, why _____
- GPA: _____ conduct performance _____ favorite or skilled subject _____ hateful subject _____
- How did the party get along with classmates: good OK silent indifferent always having quarrels always fighting
- Activities the party likes to engage in with classmates: _____
- About residence: rented relative's friend'shis own How long has the party lived there? _____
- The residence is located in: construction site country red-light district military dependents district residential & commercial area commercial area residential area industrial area
- The vicinity of residence: bustling noisy tranquil quiet clean messy isolated crowded
- Relationship with neighbors: good bad quarrel indifference conflict respect kind
- Friends are (multiple choice) : classmates neighbors colleagues adults from other communitiesrogues peers adults other people
- Where did you get to know these friends (multiple choice) school courtplayground when shopping introduced by other _____

- friends KYV internet working places other places
Do you have a job? no yes _____ How long _____ Monthly income? _____
How did you spend your money? _____ How do you like this job? _____
- Do you have a criminal record? no yes _____ How many? What kind of charge: _____
Did the party admit to committing the crime? yes. What's his confession? no _____
- Why did you commit this crime? _____
For what? _____
How many people were in it? _____ How did it happen? _____

● Have this crime affected the party in any way? _____

● What does the party think about this crime? _____

