

RESEARCH ARTICLE

Rape Contested: Female Subjects in the Legal Formation of Rape in Thailand

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Abstract

The crime of rape has been postulated as an unlawful violation of an individual's rights or interests. However, this article argues that sexual violence against women in Thailand was traditionally viewed as a breach of an interpersonal hierarchy. It was not until the modern criminalization of rape that lawyers attempted to identify the victim's individual rights as the essence of the crime. By examining the legal techniques employed by these lawyers in drafting, implementing, and adjudicating the crime, the article contends that the voices and demands of female subjects of rape have been silenced or misplaced. The article will offer studies of legal techniques used by lawyers from various institutions in articulating rape and constructing its subjects from the 19th century to the present. This jurisprudence provides context for the current debate on sexual violence in Thailand and makes it possible to critically reassess the right-based conceptualization of rape law.

Keywords: rape law; legal technique; Thailand; gender and law; criminalization

1. Introduction

In 2020, Nalinrat Thuthubthim, dressed as a female student, sat on a stool near the iconic Sky Train station in one of the busiest districts in Bangkok (Gotinga, 2021). The November rain that had been pouring since the morning finally subsided. As the rain clouds began to dissipate, people, who had been waiting to join a political rally, started to gather around the station. Nalinrat was wearing her high school uniform: a white shirt, blue skirt, and black shoes, with her long hair neatly tied up in a ponytail. Her expression was somewhat distant and hard to read. Her back straightened up and her posture was still. Her most markedly visible feature, however, was her lips, taped together with thick and black electric tape. Upon closer inspection, she had red tint painted on her face and arms, mimicking wounds and injuries. In her hands, she held an A4 printed sign that simply said, “I was sexually assaulted by a teacher. Schools are not safe places” in the plainest language possible.¹

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Within hours, Nalinrat's photos were posted and shared on various social media platforms and made headlines in multiple newspapers (Mahira and Tostevin, 2020). Days and months after that, her protest enflamed the already widespread online discussion on various gender issues in Thailand through different hashtags, threads, and posts in the online space (Suhartono and Beech, 2020). Rape law and other legal instruments concerning sexual violence were subject to both public scrutiny and criticism. However, it also did not take long for the online gender movement in Thailand to face a backlash. Thai netizens coined a new derogatory term, "femtwit," shortened from feminists on Twitter, to chastise women who called themselves feminists and supposedly spread male-hatred online (Arunpreechawat, 2020). Nalinrat, who sparked the heated discussion of rape culture in Thai schools, was subjected to this and many other forms of online bullying, especially after the netizens found out that she worked as a model and cosplayer who had long graduated from high school. Subsequently, she was also threatened with a lawsuit for instigating the public (Mahira and Tostevin, 2020; see also Amnesty International, 2024). Once the public swiftly moved from debating the pervasive problem of sexual violence to join in the wider mass democratic protest of 2020–2021, demanding the end of the junta government and reform of the monarchy (Suhartono and Beech, 2020; Phasuk, 2020; McCargo, 2021; Horatanakun, 2024), Nalinrat's political gesture as well as her story gradually became lost in the midst of a more imminent political crisis of the nation.

Nalinrat's public protest, nevertheless, should not be remembered merely as a single isolated incident in history or simply as a personal expression of anger directed at the school and state. In fact, her protest raised a crucial jurisprudential question about the relationship between sexual violence, law, and the state. The fact that the subject of sexual violence, like herself, took up public space to speak loudly and powerfully against the prevailing silence of the law should not be overlooked. Why was it so difficult, if not impossible, for the law to recognize her declaration that "I was sexually assaulted by a teacher?" Why did the law persistently deny her allegation so that she had to take her claim to the street? Rather than attempting to understand what has gone wrong with the law or offering a promise, and perhaps an illusion, of future reform, this article looks backwards more than a century from the time of Nalinrat's protest in order to elaborate on the relationship, or lack thereof, between rape law, the most gruesome form of sexual violence, and its subject. This article, therefore, fundamentally asks how the legal subjects of rape have been constituted by Thai rape law. And in response, the article offers to unfold the jurisprudential constitution of the subject of rape from the 19th century to the present Thailand.

A subject, constituted by law, is never merely an abstract autonomous individual who will be subsequently assigned gender, race, or class by society.² As this article will show, rape law constructs its legal subject already endowed with specific social attributes. The

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² Feminist legal scholars have long argued that the gender-neutral definition of autonomy in rape law could not operate to protect women in the real world of patriarchy. This is because the autonomous individual in the law is usually assumed to be a masculine self and not a feminine self under the patriarchal system. See Du Toit (2009), Nedelsky (2011), and Conaghan (2019).

law accomplishes this through various legal practices such as judging, statutory writing, interpreting, and constructing legal doctrines. These legal practices, which will be collectively referred to as legal techniques, echo what Dorset and McVeigh called “technologies of law.” Technologies of law could be thought of “as a practice, device, technique or organisational strategy.” They are practical knowledge used to produce something (Dorsett and McVeigh, 2012, p. 55) and “capable of, authorising, changing or altering lawful relations” (Dorsett and McVeigh, 2012, p. 14).

This article will examine several legal techniques employed by jurists from the 19th century to the present. While these techniques will be expanded upon at different places in the article, they should be listed now. The first group of techniques are those practised by the judicial court. They include the technique of judicial narration (Section 2), the technique of judging (Section 4), and the technique of medico-legal interpretation (Section 5). The second group is exercised by those I call jurists, who engage in the task of legal drafting and producing doctrinal legal knowledge without the urgency to judge a case in front of them. Law teachers and legal technocrats fall within this category. These jurists employ the technique of linguistic translation (Section 4),³ and varieties of techniques related to legal doctrinal construction, such as legal translation (Section 4) and ethnographic visualization (Section 5). The last technique, the technique of factual capturing (Section 3), does not fall within the first two categories because its practice predated the modern establishment and reorganization of modern legal institutions, such as judicial courts, law schools, and government agencies.

The article will connect the minute, often tedious details of legal techniques in rape law, on the one hand, to the construction of the subject of rape law, on the other. It will do so by adopting the methodology of montages. The term “montage” as it is used in this article can be distinguished from the more common term “historical moment,” in which historical facts are described and repackaged as a moment in time. By contrast, the Cambridge English Dictionary defines montage as “a piece of work produced by combining smaller parts.” My use of montage reflects this general definition and specifically alludes to montage as a filmmaking technique. In films, a montage is an operation consisting of recording, assembling, and editing a series of images or shots to tell a narrative and advance the main plot of the film. Montage as a technique highlights its dual function to explicitly tell a story while implicitly advancing the plot. In this article, each montage focuses on a deliberately crafted story about how a particular set of legal techniques constructs the legal subject of rape. Simultaneously, each montage will also advance the main plot that links all montages together. The main plot, as will be clarified in the concluding section of the article, ultimately concerns the complex relationship between the modern Thai state and its legal subjects as understood through the study of legal techniques in rape law.

The article is organized around four montages. Each looks at a set of legal techniques used to construct the legal subject of rape law in Thailand. The first montage illustrates the use of the technique of judicial narration to build the legal doctrine of rape and impute facts to law in a semi-modern courtroom in 1895. The second montage shifts away from the courtroom to explore, albeit speculatively, how, at the end of the 19th century, rape was legally formulated and practised within an interpersonal and communal regime that regulated violence against women. The third montage draws from official legal documents, such as international treaties, statutes, court judgments, and writings of jurists, leading up to the implementation of the 1908 Penal Code. Following this paper trail, the montage traces the importation and translation of the English term “rape” into Thai, as well as the adjudication of rape under the Code. Finally, relying on the same type of official legal

³ It is important to point out that judges also employ the technique of linguistic translation, but they do not do so in a transparent and direct manner as the jurists usually do.

documents, the fourth montage examines the techniques and practices used in legislative drafting and judicial implementation of rape laws in the 1956 Penal Code, which revised the 1908 Code and remains in use today. These successive montages should not be read as a strictly historical transformation of rape law and its subject, but as a series of moving images—another name for montages—that unfolds a jurisprudential story of lawyers, their legal techniques, and the sometimes unexpected consequences of their practices that messily yet vitally entangle rape, state, authority, and law. While these montages cannot claim to be a history of rape law in Thailand, I have attempted to construct each montage with the utmost care for both historical facts and ambiguities.

2. The first montage: Narrating the crime of rape through judicial judgments in the Ayuthia Provincial Court 1895

Upon accepting his post as an advisor to King Chulalongkorn (1868–1910) of Siam⁴ in 1892, Gustave Rolin-Jaequemyns, a prominent Belgian international lawyer, brought with him to Bangkok not only the worldview of legal cosmopolitanism in which law reform should be pursued in the name of humanity (Koskenniemi, 2001, pp. 11–97; Koskenniemi, 2004) but also a group of liberal Belgian lawyers who shared his belief and prepared to help him achieve this ideal (Meyers, 1994; Tips, 1996). The progressive faction of the Siamese ruling elites, headed by King Chulalongkorn himself, was also eager to implement and experiment with the idea of modernization. This faction saw a self-imposed Western civilization as a shield against the impending threats of colonization from France and Britain.⁵ Robert J. Kirkpatrick, one of Rolin-Jaequemyns's close associates, his son-in-law, and his alter ego, began the legal cosmopolitan dream of the 20th century international lawyers at a small provincial court in Ayuthia, just outside Bangkok.⁶ Here, Kirkpatrick together with Prince Rabi,⁷ the king's beloved son who recently returned home upon completing his legal education at Oxford, presided together as both administrators and judges.⁸ Despite sharing a cosmopolitan and humanistic faith in the law, the two men soon discovered that progress and civilization could flourish only after the backlog of untried cases in the court had been cleared. Due to the Siamese practice at that time, suspects and witnesses were held in jail until the legal disputes were resolved. Kirkpatrick reported that some innocent witnesses had been in prison for 20 years, waiting for their cases to be judged (Tips, 1998, p. 33). To release the accused men and women from the appalling

⁴ Siam officially declared its change of name to the world on the National Day in 1939, one year after the end of extraterritoriality that lasted from 1855 to 1938. The name change implicates a complex process of nationalization that could not be covered in this article. In this article, I refer to the ambiguous polity of Siam before 1939 as Siam and the equally ambiguous but nationalist state of Thailand after 1939 as Thailand. To avoid confusion, I always refer to the modern state as a Thai state even though the experience of modernity began much earlier than 1939 and is difficult, if not impossible, to pinpoint. For the possibility and impossibility of defining when the Thai state became a nation-state, see Luekajornchai and Pasutarnchat (2021).

⁵ Various accounts have been written about the modernizing reforms during King Chulalongkorn reign (1868–1910). On the one hand, these watershed reforms were part of Siam's attempt to escape the threat of colonization from France and Britain. On the other hand, they were part of Chulalongkorn's opportunistic moves to strengthen the power of his progressive "new Siam" faction against the conservative "old Siam," as well as to consolidate the allegiance of local provincial lords to Bangkok. See Rajchagool (1994), Winichakul (2000b), and Kesboonchoo Mead (2004).

⁶ For the modernization and reorganization of provincial court and administration during Chulalongkorn reign, see Engel (1978) and Bunnag (1977). For the relation between the administrative reorganization and Bangkok's attempt to absorb other vassal states for its own capital gain, see Tzouvala (2019).

⁷ Prince Rabi was later named the founding father of modern Thai law (Loos, 2006).

⁸ Both Kirkpatrick and Rabi were part of the Special Commission, the Ayuthia Commission, sent by Chulalongkorn's government to inspect the provincial court of Ayuthia and make recommendations for reform (Tips, 1998, pp. 33–48).

conditions of the Siamese prison, the backlog of cases needed to be tried and judged in a speedy manner. Thus, following through with the necessary but mundane first step towards realizing their humanist cosmopolitan dream, Kirkpatrick and Rabi heard, tried, and then issued final verdicts in cases that were pending in the court. Sometimes, there was no need to hear the case at all because the suspects had long since passed away or had been imprisoned for a period of time much longer than deserved for their petty crimes.

Even though speed was of the essence, Kirkpatrick found himself caught up in one of the most scandalous cases in town. The trial, as evidenced in his Report of the Ayuthai commission⁹, demanded several court sittings and a parade of witnesses (Tips, 1998, pp. 212–8). In the matter labelled Case 159 in the year 1895, Nout appeared in the court accusing five men, led by Roun, of abducting his 17-year-old daughter, Amdaeng Bounnak. Nout claimed that the men asked his daughter to accompany them to a festival at a temple before allegedly assaulting her and taking her away on a boat. Kirkpatrick recorded Nout's statement in the court as follows:

My daughter told me that Roun took her in his boat and that Im, Nim and You assisted him. Then my daughter told Im to go and warn her uncle but he did not go. She told me that Roun had connection [sic] with her in the forest and then took her to the house of Lem and that there he had connection with her by force several times (Tips, 1998, p. 212).

Despite opting for the vague phrase “having connection with” instead of the more direct expression “sexual intercourse,” which would be used today,¹⁰ Kirkpatrick did not hesitate to record in his notebook that Roun and the others were accused of the crime of rape—the offence that Nout himself understood as an abduction. Without enumerating the essential elements of rape, such as sexual intercourse and a victim's lack of consent, Kirkpatrick narrated and highlighted Amdaeng Bounnak's unyielding physical resistance against Roun's violent use of force in what Kirkpatrick claimed to be his record of Amdaeng Bounnak's testimony:

... the other men in the boat assisted him to pull me in his boat ... As soon as the boat arrived in the creek, I [Amdaeng Bounnak] jumped to the bank. Roun followed me and brought me back to the boat ... there were many trees and Roun forced me to have connection with him but I resisted ... Then Roun took me to the house of Lem. ... Late at night, I was still screaming and shouting ... The next day, my father, mother, and relatives came and discovered me ... As soon as I saw them, I jumped from the window. Then my people fetched the *kamnan* (the head of the village) who arrested Roun.

This statement was vital to the legal dispute. Prior to 1890s, Siam had yet to produce any black letter laws that bore any resemblance to modern “civilised” law. Kirkpatrick's report, which is filled with numerous statements from the parties and witnesses preceding

⁹ Tips (1998) describes the report, written by Kirkpatrick and later personally kept as his estate, as “an oversized roll-call book of 284 pages” (p. 34). The report includes details of the Ayuthia court and its employees, conditions of prisons in Ayuthia, summaries of legal cases, and recommendations for reforms. The cases in this article come from the summaries of legal cases in the report.

¹⁰ In Thai traditional poetry, and law alike, the description of sexual intercourse is often convoluted. The analogy to nature and animals is used to vividly but indirectly describe the scene. In the Three Seals Law alone, there are numerous terms used to refer to sexual intercourse and these terms are used inconsistently. When the drafters of the 1956 Penal Code opted for the term *chamrao* to legally characterize the act of sexual intercourse, they also considered eight other terms, including having connection, that they claimed to find in old legal manuscripts.

a short paragraph of the judgment, reflects the legal procedures in Siam at that time. A legal dispute was resolved through a strict legal procedure in which the parties and the accompanying witnesses presented their statements in court and were questioned and cross-examined by each other. Ordinary people could seek help in writing and preparing their statements, but the parties had to represent themselves in court. The courtroom was controlled by the *Talākān* (ตะลาการ), who performed the dual roles of modern-day judge and prosecutor (see Baker and Phongpaichit, 2016, pp. 9–12). After the parties read out their statements, the *talākān* would match the statements that were in agreement, and conclude that they were indisputable truths. The *talākān* then separated out the contradictory statements before ordering an investigation to resolve the contradiction. The *talākān*'s power of investigation was typically expansive. He could order a trial by ordeal, a visitation of a crime scene, or require an oath to resolve the conflicting statements. More importantly, he could order *āyā* (อาญา), an umbrella term used to describe the infliction of corporal pain through torture and imprisonment, to elicit a confession from a suspect.¹¹ Once all statements were matched and the contradictions resolved, the *talākān* would hand down his verdict and the case was closed.¹² In the verdicts, the *talākān* could only order monetary compensation, as it was the most common form of legal remedy in Siam at that time (see Baker and Phongpaichit, 2023b). The power to punish, especially to order corporal punishment or imprisonment, belonged solely to the king, and the *talākān* had to ask for the king's approval before imposing such punishment.¹³ The outcome of this traditional legal procedure was neither a criminal prosecution nor a civil conviction in today's sense. The purpose of the Siamese legal process was to solve a conflict and arrange sufficient monetary compensation if needed. Cases like that of Amdaeng Bounnak had previously been resolved—through a set of established Siamese legal procedures—as interpersonal conflicts; yet the court where Kirkpatrick presided was a far cry from the traditional Siamese courtroom.

In Kirkpatrick's courtroom, some elements of the traditional legal procedures had already been disregarded or replaced with some forms of modern Western law. A legal case was, however, still moved forward by the parties' and witnesses' statements, and there was neither the appearance of legal representatives nor mention of any legal doctrines.¹⁴ Yet, some elements that the legal cosmopolitan lawyers might deem barbaric, such as an order of trial by ordeals, simply disappeared.

¹¹ This traditional criminal procedure is known in Thai as *Jāritmkhrābal* (จารีตนครบาล), or customary ordeal. The details of this specific procedure could be glimpsed from the legislation abolishing it in 1896, พระราชบัญญัติเลิกวิธีพิจารณาโจรผู้ร้ายตามจารีตนครบาล รศ 115 (Royal Decree Abolishing the Method of Examining Robbers According to the Customs of Bangkok) Available at พระราชบัญญัติยกเลิกวิธีพิจารณาโจรผู้ร้ายตามจารีตนครบาลลงวันที่มีนาคมรศ115 https://th.wikisource.org/wiki/พระราชบัญญัติยกเลิกวิธีพิจารณาโจรผู้ร้ายตามจารีตนครบาล_ลงวันที่_1_มีนาคม_ร.ศ.115 (Accessed: September 2024).

¹² These procedures could be inferred from various legal manuscripts, notably in the legal manuscripts on the Tenets of Indra (หลักอินทภาษ, *lak inthaphat*) (see Baker and Phongpaichit, 2023a) and *Lak Chai* (หลักไชย), commonly found in southern Thailand (see Kaewkarn, 1999; Liangsatharm, 2003; Onwimol, 2021).

¹³ The courts in Bangkok had the power to order criminal punishments without the king's approval in 1896. ประกาศสำหรับสนามสถิตยธรรมจะกำหนดโทษผู้แพ้คดีมีโทษหลวง รศ 115 (Announcement for Bangkok courts: The Bangkok courts will determine punishment for the losing party in a case with a serious offense 1896) in Prachum Kotmai Prajam Sok no. 15, p. 250. However, at the same period, the situation outside Bangkok was complicated because the power to order criminal punishments was shared between the local lords and Commissioners sent from Bangkok, who only sat in an appellate court in major provinces and had the power to order criminal punishment. The struggle between the local lords and the Bangkok commission over the power to criminally punish reflected the rivalry between them. See Bunnag (1977).

¹⁴ The scene of this forum becoming a modern courtroom during Chulalongkorn's reign is recorded in the diary of another Belgian jurist, Emile Jottrand. See Jottrand (1996); see also Tips (1998, pp. 17–29).

The older methods to investigate and elicit confessions were replaced by carefully constructed interrogations as narrated in the case report. With the mediating services of a translator, who usually sat between the foreign advisor and the Siamese judge (see Jottrand, 1996, pp. 8–9), Kirkpatrick recorded the parties' statements and produced a coherent and harmonious case report. Conflicting and inconsistent statements—the space where contentious versions of truth were traditionally resolved either by basic investigation or appeal to divine powers—were purged from the pages of the report. In the place of contradictions awaiting resolution, Kirkpatrick narrated a perfect crime of rape through Roun's use of force and Amdaeng Bounnak's resistance. Kirkpatrick's case report shows a new style of judicial writing that is clearly distinct from the traditional Siamese judgments, which, without any written judgments passed down to us from history, might not have been in writing and might have placed no importance on writing at all. With the modern legal procedure, Kirkpatrick was able to practice his technique of judicial narration, imputing facts from the testimonies to fit the two essential elements of the crime of rape in Western law: the sexual intercourse and the lack of the victim's consent (see Conaghan, 2019, pp. 158–63). At the end of the first hearing, Kirkpatrick and the committee of judges also found Roun guilty of “abducting Amdaeng Bounnak by force and committing rape on her against her will and by force.” Unlike the traditional *talākān*, the court also assumed the power of the modern judge to sentence Roun to two years in prison.¹⁵ The case itself, however, was far from over.

Several months passed. The case was appealed in the same court and to the same judges, as there was yet to be a separate appellate court in Siam. In the appeal session, new witnesses appeared with a new account of the incident. Amdaeng Bounnak, the victim in this case, also stepped up to lead the examination of these new witnesses. Strangely enough, the fresh perspectives of the witnesses started to produce testimony that completely reversed and jeopardized Amdaeng Bounnak's earlier statement about Roun's violence. Amdaeng Noi, a female neighbour, recounted the morning after the incident:

Next morning, I heard the mother [of Amdaeng Bounnak] calling for her daughter but Bounnak did not reply. When they threatened to call the *amphur* (the head of the village) Bounnak opened the window and replied. I heard Bounnak say to her mother: “Do not do any harm to Roun.” The mother asked whether Roun had done anything to her. Bounnak replied “no” (Tips, 1998, p. 216).

Another witness also testified that she heard Amdaeng Bounnak's mother call Roun “son-in-law” and claimed that “out of love for her son-in-law the mother had told him to abduct her daughter.” From Kirkpatrick's report, this new testimony was pivotal to reverse the earlier judgment. Roun was still found guilty of abduction and rape, but his sentence for rape was reduced to one year in prison “because of the fact that Bounnak did not oppose it.” For Kirkpatrick, the element of Amdaeng Bounnak's consent was proven by the new testimony, yet the conviction of rape was not quashed. To explain why, despite the lack of resistance, Roun was still convicted of rape, Kirkpatrick asserted that the court reduced Roun's sentence because “there exist extenuating circumstances . . . that Roun was allowed to visit at her house; that there had been a question of marriage between them which was prevented by some anonymous letters . . . (Tips, 1998, p. 217).” At the end of the case report, Kirkpatrick listed somewhat idiosyncratic facts that had not appeared before.

These complicated yet unelaborated facts had been omitted from the narrative of the rapist's use of force and the victim's resistance that Kirkpatrick had been trying to sustain throughout his report. Here, it is important to identify Kirkpatrick's style of writing and

¹⁵ Perhaps in this case, the presence of Prince Rabi, the king's son, would make the court's sentencing order more acceptable to all the local nobilities and observers in Ayuthia.

legal argument as the legal technique of judicial narration. Through his writing, he separated and reorganized the testimonies into what he considered essential for the conviction of rape, namely the statement about Roun's use of force, Amdaeng Bounnak's resistance, and her later expression of consent. He also dismissed other statements as extenuating circumstances, assigning them the function of reducing Roun's sentence but not reversing his conviction. What was apparent in the case report was the skeleton of the body of modern Western law, in which a crime comprises essential criminal elements, and the duty of a judge is to rework the facts of the case into those elements. While Kirkpatrick, through his Western eyes, successfully wrote and thus invented the crime of rape into legal reality in Siam, the extenuating circumstances that he had dismissed told another story of what really took place between Roun and Amdaeng Bounnak.

In his commentary on Kirkpatrick's case report, Walter E.J. Tips rightly points out that the key to understanding the case, and not Kirkpatrick's reformulation of it, lies with the anonymous letter preventing the marriage (Tips, 1998, p. 217). The letter was likely to have been written by Nout, Amdaeng Bounnak's father, who disapproved of her marriage to Roun. Without the father's blessing, the union could not proceed and, in Siam, "the classic means available to the lovers was to stage an abduction, followed by a reconciliation and the unavoidable marriage to avoid scandal." In other words, Amdaeng Bounnak and Roun seemed to have conspired to stage the abduction in order to escape from the tyranny of the father. This suggests that Amdaeng Bounnak was not the victim of an atrocious crime but a collaborator in an elaborate scheme. She was an active, autonomous person in her own right. Focusing solely on the isolated and contextless acts of violence and disregarding the community's understanding of them, Kirkpatrick failed to recognize the social performance that ordinary Siamese men and women would immediately call out as a staged abduction. Kirkpatrick's complete inability to read the social script of a staged abduction revealed his position as a stranger, and his case report as an application of a legal technique to transpose the world he was familiar with to the world he could not comprehend. Moreover, the report also illustrates the early but somewhat unenthusiastic attempt to westernize and modernize a legal form of sexual violence against women through the legal technique of judicial narration. By adapting the traditional legal procedure and reworking the legal narrative of the case, the new legal form of rape and its female subjects were constituted yet both were vague and unsettled. However, before moving on to unfold the formation of the legal subject, we must look beyond Kirkpatrick's report and into the very fabric of the Siamese community. There existed a force of law with its own communal codes, scripts, and protocols, which framed incidents of violence in a language the community understood. That force of law will be the focus of the next montage.

3. The second montage: Articulating violence against women in the community's practices of *issaraphap*

In order to understand how the Siamese community configured and regulated the violence akin to rape before the end of the 19th century, we must return to Nout, Amdaeng Bounnak's father, and his statements to the court. As the story was recounted, upon realizing that Amdaeng Bounnak was kidnapped, her family members immediately went on a hot pursuit to bring her back home. Only after returning to her father's house could Nout, and not Bounnak herself, bring his case to the court, accusing Roun of abduction. It is important to note that Nout first accused Roun of kidnapping, but it was Kirkpatrick who reformulated the event into an instance of rape. This brief account of what had transpired before the beginning of the proper trial tells us not only about the relationship between Nout and Bounnak, as he initiated the lawsuit on her behalf, but also an intriguing chain of events from the kidnapping to the hot pursuit, the return, and the assembly at the court.

To grasp the relationship between Nout and Bounnak, together with the chain of events leading up to the court case, this montage will begin by taking a bird's-eye view of the legal regime that governed lives of the Siamese. I will outline a broad legal regime in Siam known as the *issaraphap* (Is-sa-ra-phap อิศรภาพ) regime. By thinking jurisprudentially with *issaraphap*, I will argue that *issaraphap* could be portrayed as a legal regime, prescribing both interpersonal relations and their related bundle of duties to the members of the community. The regime also exercised its governing power by managing flexible, often gendered, interpersonal relations while maintaining an overarching social hierarchy in the community. I will then zero in on how *issaraphap*, with its power to legally authorize and manage gendered interpersonal relations, reconfigured violence against women. I will also show that the violence was understood as a breach of a specific gendered relation, resulting in a contestation of two men's legal claims over a female victim, such as the dispute between Nout and Roun over Bounnak. This contestation will be exemplified by exploring one of the important wrongs, called the wrong of *chū* (ชู้). Finally, I will continue to zoom in on how the *issaraphap* regime captured, differentiated, and articulated numerous acts of violence against women. I will do so by examining, what I call, the legal technique of factual capturing, used to both legally capture the facts of the violence, and enable a further categorization of the violence into different legal forms, such as kidnapping (*lakphā* ลักพา) and forced sexual intercourse (*khomkhēun* ข่มขืน).

In this montage, I will first describe the operation of the *issaraphap* regime by sketching how the regime broadly governed the communities. Then I will move to its arrangement and regulation of interpersonal relations between men and women, and finally to its legal articulation of the act of violence against women. In conclusion, I will then reconsider the staged abduction in Bounnak's case and propose an argument that the Siamese community regulated violence against women by assigning interpersonal legal relations and stipulating their duties. Violence against women was legally condemned not simply because of its unlawful use of force but because it breached the interpersonal relations between men and women. Such a breach demanded reparation and compensation rather than punishment. Hence, under the *issaraphap* regime, the violence was regulated within a framework of interpersonal relationships, and not by constituting the victim as an individual subject of the law.

3.1. Thinking jurisprudentially with *issaraphap*

The term *issaraphap* derives from the name of the Hindu god, Siva or, in Thai, *Isuan*, and generally refers to an intrinsically powerful individual whose power radiates to govern others (Aphornsuvan, 2014, p. 90).¹⁶ It is a politico-legal language¹⁷ used to describe a governing relation between two or more unequal entities.¹⁸ *Issaraphap*, it is important to note, is not a systematic legal regime, a well-articulated political theory, nor a perspicuous term. Yet, the expression appears to be versatile and was applied in diverse contexts. Hence, it has become a conceptual term that scholars studying the political operation of the Siamese state use to think with.¹⁹ In the area of family disputes, the mention of

¹⁶ Some historians prefer to translate *issaraphap* as authority, but, being a jurist and more sensitive to the legal connotations of authority, I prefer to use the term *issaraphap* without translation.

¹⁷ By suggesting that *issaraphap* is a politico-legal language, instead of a term or word, I allude to the version of legal language offered by Yan Thomas in his study of Roman law as a legal language. This legal language does not open itself up for interpretation but dictates society to bend to its concrete definition. See Thomas (2021).

¹⁸ From my understanding, the term *issaraphap* seems to be found only in manuscripts from Bangkok and central Thailand. However, there may be similar social relations outside of Bangkok, expressed differently in local languages. In this section, I use the term "Siamese community" to loosely describe communities that were governed under the social relation of *issaraphap*, even if it was not explicitly expressed as *issaraphap*.

¹⁹ Thongchai Winichakul studies *issaraphap* in the context of the unequal relationship between two political polities. See Winichakul (1994). Thanet Aphornsuvan studies *issaraphap* in the context of slavery (see Aphornsuvan, 1998), and how *issaraphap* was used in the Thai nationalist historiography (see Aphornsuvan, 2018).

issaraphap could be found in the Law of Husbands and Wives in the Three Seals Law, compiled in 1805.²⁰ A woman was usually said to be “under the *issaraphap* of (name of her husband or father)” or it is said “that (name of her husband or father) has *issaraphap* over (name of the woman).” In this context, the *issaraphap* regime could be understood as a system of legal claims, expressing the unequal relationships between men and women in Siamese families as relations between a father and a daughter, as well as a husband and a wife.

In her seminal work, Tamara Loos (1998) rightly observes that *issaraphap* did not subjugate women to men by allowing men to own them as their property, but it designated their relationships as unequal. *Issaraphap* was not something that could be owned as inalienable private property but a legal claim that could be made by some groups of people in Siamese society because of their status (Loos, 1998, pp. 41–2). For superiors such as men, *issaraphap* was expressed positively as a capacity to govern someone else. Correspondingly, women were always under the *issaraphap* claim of someone else at a specific time and place, and lacked the capacity to make *issaraphap*-based claims. As a legal claim rather than a system of subjugation, *issaraphap* could be legally contested, transferred, and lapsed when certain conditions were met. For instance, the Three Seals Law stated that a daughter is automatically under the *issaraphap* of her father and, after getting married and gaining a new status as a wife, *issaraphap* would be transferred from her father to her husband (Sakonsatarnpitak, 1925, p. 35). When a woman divorced her husband, or was abandoned, she had to follow a set of rules and customs before her *issaraphap* could be transferred to her new spouse (Sakonsatarnpitak, 1925). In sum, *issaraphap* was a legal claim exercised over another person. The claim also indicated an unequal relationship between the two individuals. This relationship was alterable rather than fixed as a timeless proprietary ownership.

Additionally, while the *issaraphap* claim ascribed a relation between two individuals as hierarchical and unequal, it also assigned social duties to both parties in the relation. By placing women under *issaraphap*, the regime also placed them under the care and duties of the male head of household, who had to ensure the women’s well-being and provide for their subsistence. When the male head of household could no longer provide for the women under his *issaraphap*, many passages in the Three Seals Law suggested that the *issaraphap* between them came to an end. For instance, when a husband and wife were separated because of war, the Three Seals Law implied that the husband’s *issaraphap* over the wife disappeared (Sakonsatarnpitak, 1925, p. 12). If a husband abandoned a wife for a specific period of time, the Three Seals Law also stated that the matrimony would lapse, and the wife could find a new husband or return to her parents’ house (Sakonsatarnpitak, 1925, pp. 18–21).²¹ These fragments from the Three Seals Law imply that the legal and social responsibilities in Siamese communities did not derive from individual autonomy or the concept of an individual in any sense, but rather the *issaraphap* relations. More importantly, the duties bestowed by the *issaraphap* were not mere legal obligations; they were commands of the communities, deeply entwined with lives, leaving almost no boundary between society, individual experiences, and law. To be recognized as a husband

²⁰ The Law on Husbands and Wives is one of the categories of laws contained in the Three Seals Law manuscripts. Historians sometimes refer to the Law on Husbands and Wives as a section in the Three Seals Code of Law. However, I reject both the conceptualization of the Three Seals Law as a systematic legal code and of the Law on Husbands and Wives as a clearly defined section within the Three Seals Law. I would further argue that despite the label “law,” the Law on Husbands and Wives and the Three Seals Law only give the illusion of a “system of rules.” Chris Baker and Pasuk Phongpaichit have been advocating for the reading of these so-called traditional Thai laws, not through modern eyes trained only to see a system of rules but through a historical consciousness to see these manuscripts simply as archives. See Baker and Phongpaichit (2016, 2021a, 2021b).

²¹ However, if a husband took their shared valuables from the house and abandoned his wife, the *issaraphap* between them ended abruptly. The wife could also promptly bring a claim to the court asking for a fair redistribution of their shared assets. See Sakonsatarnpitak (1925).

under the regime, to make an *issaraphap* claim over a wife, required the actual performance of the duties related to the role of a husband.

As the regime that encroached on life by dictating the relations and duties that each member of the community owed to one another, the *issaraphap* regime was neither utterly strict nor completely lax. It was flexible enough to accompany the ebb and flow of life, while retaining the rigidity of the social hierarchy in the communities. It did so by generating, transferring, maintaining, and fixing breaches in interpersonal relations. Through the flexible assignment of relationships, the *issaraphap* regime always also ensured that individuals occupied various tiers within the fixed hierarchy and continued to uphold their positions within the hierarchy by performing their duties (see Errington, 2012). It maintained a fixed social hierarchy through the loose arrangement of interpersonal relations. The interconnection between the ever-changing interpersonal relations and the permanent hierarchy complicates the understanding of genders in Siam. The *issaraphap* regime might first appear as a gendered hierarchy that always places women under the *issaraphap* of their male heads of household, usually fathers and husbands. However, other social attributes apart from gender could also determine the social hierarchy and the unequal *issaraphap* relations.

For instance, there was a plethora of cases where the *issaraphap* over some palace ladies was exercised by their female patrons rather than their male head of household. Some noble women also assume *issaraphap* over their daughters after their husband's death.²² There was also a case in which a court lady escaped into the British legation, claiming British protection or *issaraphap*, over her against the *issaraphap* of her Siamese overlord.²³ These cases suggest that the ability to claim *issaraphap* over someone was determined not solely by gender but by the intersection of various social factors, such as gender, social status, and others. Men generally held a higher social rank than women, but noblewomen ranked higher in the social hierarchy than common men (Loos, 1998, p. 60). A male white foreigner was also placed above some Siamese noblemen and women. *Issaraphap* relations, therefore, were determined by various social attributes. The interplay of different social statuses and contexts that determined *issaraphap* relations allowed the regime to maintain its flexibility while preserving the unchangeable hierarchy.

In summary, the politico-legal language of *issaraphap* can be jurisprudentially sketched as the intertwined convergence of law and life. *Issaraphap* also operated as a legal claim to establish an unequal, and usually gendered, interpersonal relation between two individuals. This relation was always unequal because it was a legal expression of an unchangeable social hierarchy. Yet, the relation, not divisible into two autonomous individuals who are bound by a legal tie, became the fundamental legal wellspring. From that wellspring, not only did legal and social duties flow, but also prescriptive rules for the *issaraphap* relation were generated. Once the duties were neglected or the relation breached, the *issaraphap* regime repaired the breach, before reorganizing, transferring, and reestablishing a new *issaraphap* relation. This new relation was still unequal and had to be coherent with the timeless social hierarchical structure. Under the *issaraphap* regime, repairing the relationship and upholding the hierarchical structure were the two goals of utmost importance. This led to a question of how the regime formulated and regulated violence against an individual.

²² Whether commoners also adopted this practice is unknown, and whether this practice was common among noblewomen is also difficult to guess. There is a written record of such practice in National Archive of Thailand, King Rama VI, Ror Lor. 21.6/41 ฎีกาคุณหญิงทองคำไกรสีกสาวโทษพระศรีวิกรมมทิตยเกี่ยวข้องกับบุตรสาวของผู้ฎีกา (Petition of madam Thongkam Kaisi against Srivikramaditya, accusing him of being involved with her daughter) (6 August – 19 October 1921) cited in Bunnag (2011).

²³ National Archive of Thailand, King Rama V, Yor. 13/24 คำปรึกษาโทษเรื่องอำแดงแจ่ม (Discussion on the punishment of Amdaeng Jaem) (25 September 1909) cited in Bunnag (2011).

3.2. The *issaraphap* reconfiguration of violence against women

Proceeding from the jurisprudential observations in the previous section, this section elaborates the legal reconfiguration of violence against women as part of the interpersonal and hierarchical *issaraphap* regime. The *issaraphap* regime regulated Siamese communities by assigning to the members both the interpersonal *issaraphap* relations and the duties arising from those relations. Hence, the regime could not formulate violence against women as a violation of her body and autonomy because the regime lacked the concept or fiction of a person as an individual apart from her relations. Instead, under the specific operation of *issaraphap*, any violence against women was reconfigured as a violation or a breach of the *issaraphap* relation between the female victim and her father, husband, or superior guardian. Once the violence was committed, it would not be legally translated into an unlawful infliction of harm on the individual victim but would trigger a contestation of the *issaraphap* claim over the female victim. This contestation implied that the pre-existing *issaraphap* relation had been breached, hence the breach must be repaired and compensated through a court procedure.

For instance, in the case of Amdaeng Bounnak, her father might describe the event as a kidnapping of Bounnak from him. What actually transpired in the *issaraphap* regime was a contestation between two *issaraphap* claims over Bounnak: one from her father, to whom the law automatically granted *issaraphap* over his daughter, and another from the kidnapper, Roun, who also asserted his *issaraphap* over her by taking Bounnak away from her father's *issaraphap*. Through this situation, the violence associated with the kidnapping was reframed as a legal contestation between the father and the kidnapper for rightful *issaraphap* relations over Bounnak. Bounnak herself, however, had no separate legal standing because she only existed legally as part of either one *issaraphap* relation or the other. Thus, any forms of violence against women would not be recognized as violence per se, but rather as a threat to specific *issaraphap* relations, subsequently leading to the contest between two men to claim *issaraphap* over the female victim. In the Three Seals Law, one of the most common wrongs, once committed, resulting in the contestation of *issaraphap* over the woman, was the wrong of *chū*, inadequately translated into English as adultery. Unlike the contemporary understanding of adultery, *chū* had a much broader application. This is because the wrongfulness of *chū* did not stem from infidelity in marriage but from a serious breach of gendered and hierarchical *issaraphap* relations, which had to be amended by law and custom.

The wrong of *chū* followed its own logic. On the one hand, for a married woman, the accusation of *chū* took place when a wife was abducted from her husband or a wife was discovered to have had an affair with an adulterer. When the act of *chū* was exposed, the *issaraphap* of the wife became contestable. It is important to point out that the gravity of the wrong in *chū* lies in the breach of the *issaraphap* relation and not the amount of violence committed against the women. This could be illustrated by looking at the wrong of *chū nuer pua* (ชู้เหนือผ้า), or adultery above husband. The wrongfulness of *chū nuer pua* came from the fact that a wife had habitually committed adultery, therefore violating the established vertical hierarchy between men and women by behaving as if she occupied the same status in the hierarchy as her husband and, like him, was capable of seeking multiple spouses.

On the other hand, for an unmarried woman (a daughter), *chū* constituted a breach of a father's *issaraphap* over his daughter when she was abducted or discovered to have a lover without the parent's blessings. The adulterer could claim his *issaraphap* over the daughter against her father. The Three Seals Law dictated that to rectify the breach of the father's *issaraphap*, the kidnapper must reveal his marriage to the daughter and beg the father for forgiveness with a bouquet of flowers, candles, and incense. As long as the apology was correctly offered, the father was always compelled to accept the marriage and thus

transfer the daughter's *issaraphap* to the kidnapper-turned-son-in-law. Sometimes, as in the case of Amdaeng Bounnak, this kidnapping situation was legally defined as a case of kidnap (*lakphā*).²⁴ In this article, I use the term *chū* as an umbrella term to encompass all kinds of breaches specific to the gendered and hierarchical *issaraphap* relations.

The analysis of the wrong of *chū* illustrates a framework in which the *issaraphap* regime articulated violence against women as a conflict involving multiple *issaraphap* claims over the female victim. Perceived as a contestation between two men, the legal resolution to cases of violence against women, as Loos observes, tended to depend on the negotiations between the two male heads of household involved in the case. The negotiation, Loos comments, appeared to be determined by the social hierarchy of the male parties involved, thereby reinforcing the social hierarchy from which the *issaraphap* relations originated (Loos, 2008, p. 29). While a private negotiation was crucial to achieve legal resolutions in Siam (see also Engel, 1978, p. 22), I argue in the subsequent paragraphs that the process of resolving the contestation of *issaraphap* claims could not be left entirely up to the personal negotiations between the two male parties involved. Rather, both the parties and the court must exercise, what I will call, the legal technique of factual capturing in order to establish and build their arguments for the *issaraphap* claims over the women. This legal technique could be understood as one of the legal procedures in the trial of *issaraphap* contestation.

3.3. The legal technique of factual capturing and the regulation of violence against women under *issaraphap* regime

This montage began by sketching ways in which the *issaraphap* regime regulated Siamese communities by managing the interplay between interpersonal relations and social hierarchy. The montage also emphasized that the regime did not merely mirror society; instead, it integrated legal relations and duties into the very fabric of social lives, creating a seamless connection between lawful living and community life. This characteristic of the *issaraphap* regime blurred the line between law and life, and thus might lead to a conclusion that any legal dispute could be resolved through private negotiations between parties, with judges or the people of higher status as mere mediators. However, I argue instead that the resolution to legal disputes concerning *issaraphap* contestation required a certain procedure and technique that I call the legal technique of factual capturing.²⁵

The legal technique of factual capturing enabled parties and judges to capture facts as laws, instead of imputing facts into the legal framework, like the technique of judicial narration in which Kirkpatrick organized, imputed, or re-narrated facts into existing legal elements and doctrines. The legal technique of factual capturing involved identifying the most crucial facts that could support or refute a case. These crucial facts were not simply facts to be imputed into law; rather, they were legal rules in themselves. In the contestation of *issaraphap* claims, three law-facts had to be captured: the domicile of women, the location where the violent act was committed, and the commission of forced sexual intercourse. These three law-facts helped the court to identify the breach of the

²⁴ Some scholars observe that the distinction between *chū* and kidnap (*lakphā*) is that the former could be committed against married women, while the latter was only applicable to unmarried women. However, in one episode of a famous Thai folklore, Khun Chang Khun Pan, a son could also kidnap his mother from her new husband. It seems to me that *lakphā* connotes an act of kidnapping in general rather than being limited to be applicable to unmarried women. This kind of kidnapping in the folklore, after all, still involved the contestation of men's *issaraphap* claims over a woman.

²⁵ As alluded to in the first montages, the legal procedure in Siamese trials involved the matching of statements, visitation of a crime scene, and trials by ordeals etc. In the legal corpus of *Lak Chai* (หลักไชย), found in southern Thailand, a legal procedure in a trial was described in the vocabularies and poetry metre used to discuss war strategies. See Kaewkarn (1999), Liangsatdharm (2003), and Onwimol (2021). Trial procedures in Siam still remain an understudied topic in Thai legal history.

issaraphap relation, as well as to distinguish different violent acts that had triggered the breach. As will be elaborated below, the Three Seals Law, while reconfiguring violence against women as a breach of the *issaraphap* relation, further categorized different acts of violence into various legal forms such as *lakphā* (ลักพา), *chū* (ชู้), *khuenjai* (ขึ้นใจ), *chutkrā* (ฉุดคร่า), and *khomkhēun* (ข่มขืน). By reformulating the contestation into those legal forms, the court could identify the specific breach of the *issaraphap* relation and its gravity and could determine proper reparations and compensation. Similarly, it was essential for the parties involved to present these law-facts as factual evidence and testimony to the court, thereby building and supporting their claims in the trial. This montage has already referenced some legal forms, such as *lakphā* (kidnapping) and *chū*. This section will elaborate on these two terms and the most significant legal term in the history of sexual violence in Thailand, *khomkhēun*. I will turn now to the first law-fact.

The first law-fact to be considered is the domicile and physical movement of a woman. This law-fact was captured as one of the many important facts used in locating a woman's *issaraphap* relation. By placing women under the *issaraphap* relation, the regime also located them under the roof of a male head of household. Once the woman moved away from the domicile, a man's *issaraphap* over her could become questionable if not contested. For instance, in the case of Amdaeng Bounnak in Kirkpatrick's case, her family members went in hot pursuit after finding out that she was kidnapped in order to bring her back home, where they could declare the father's *issaraphap* over her. As she was kidnapped from home, her father's *issaraphap* over her immediately became contested by the kidnapper. Only after returning to her father's house could Amdaeng Bounnak be placed under her father's *issaraphap* again. Then the father could bring his *issaraphap* claim over her to the court. Similarly, in the case in which a court lady escaped into the British legation, the physical movement of the woman suggests or at least corresponds with the transfer of *issaraphap* itself. The Three Seals Law also follows this logic of physical movement as reflective of changes in *issaraphap* claims. The law placed a hefty fine²⁶ on a house owner who hid a daughter or a wife from their respective male head of household (Sakonsatarnpitak, 1925, p. 9). This is because doing so would deprive a man of the ability to bring the woman back home under his *issaraphap*. While it is an exaggeration to state that *issaraphap* governed the domicile and physical movement of women, it is plausible to suggest that *issaraphap* usually kept women under the domicile of the male head of the household who held *issaraphap* over her. The domicile of the woman is therefore one of the law-facts determining the *issaraphap* over the woman, and the act of taking the woman away from her usual domicile would contribute to proof of the breach of *issaraphap* over her.

Second, the seriousness of the breach of *issaraphap*, especially in the wrong of *chū* between husbands and wives, depended on the place where the affair or incident of violence was committed. For instance, if a husband found his wife and the adulterer having intercourse in his house, the law allowed him to exercise his customary right to revenge, killing both the wife and the adulterer if he so chose.²⁷ But if the act of *chū* involved taking the woman away from her house, the law distinguished the case of *chū* from other secret meetings between lovers through the place of the meetings.²⁸ In a legal manuscript found

²⁶ This is also evident in Kirkpatrick's case, where Liam, the owner of the house where Amdaeng Bounnak was hidden from her family, became one of the most important witnesses in the second hearing. Nevertheless, there was no record in Kirkpatrick's notebook of whether Liam was put on trial for hosting the kidnapped woman.

²⁷ The actual clause for this licence to kill read: "A woman is unfaithful to her husband; the husband catches the woman lying face-up and the lover face-down; if he wishes to kill the man, he must kill the woman as well, not kill the man alone; if he kills the woman alone, fine the husband according to rank as royal dues." Cited in Baker and Phongpaichit (2021b).

²⁸ This act might also be considered "chutkrā," meaning "to drag off by force" (see Loos, 2008) but the example I cite here comes from a northern manuscript where the law did not distinguish *chutkrā* from *chū*.

in the North-Eastern region, *chū* was deemed not to take place if the woman and the adulterer had intercourse in a forest away from any prying eyes (Channawej, 2017, pp. 77, 86). A secret rendezvous between lovers that was not literally “seen” by the public would not amount to a breach of *issaraphap*. This implies that one of the law-facts that must be captured to prove the *chū* was a public and physical act of kidnapping.

The public visibility of the act was also crucial in other contexts, especially when considered in relation to the third law-fact, which is the presence of forced sexual intercourse. The Three Seals Law captured different manners and variations of the public display of violence in many legal terms (see Loos, 2008, pp. 26–8). If the public display of kidnapping was followed by forced sexual intercourse, the Three Seals Law would encapsulate both the events of the kidnap and the sexual act in the single and elusive legal term of *khomkhēun* (ข่มขืน). While the Three Seals Law never defined *khomkhēun*, legal manuscripts in the North-Eastern region describe the act of *khomkhēun* in longer and more explanatory sentences, such as “a man has forced sexual intercourse with a woman and the woman screams until people hear her” (Channawej, 2017, p. 77). Interestingly, the explanation highlights not only the use of force in sexual intercourse but also the simultaneous and public display of the woman’s resistance.

This dynamic of force and resistance closely resembles the act that is understood as rape in Western law. It, perhaps, might not come as a surprise that the term *khomkhēun*, as the third montage will further elaborate, was selected as the Thai linguistic equivalent of the English term rape. However, within the regime of *issaraphap*, *khomkhēun* did not refer to the heinous crime of rape which has its own legal formation and development beyond its modern formulation as a sexual offence in the West (see Farmer, 2016). Under the *issaraphap* regime, *khomkhēun* was a law-fact that signified the factual event of forced sexual intercourse with a persisting display of the victim’s resistance. In the *issaraphap* contestation trial, if the fact of *khomkhēun* was established through witnesses’ testimonies or captured by the court, it would prove that the *issaraphap* relation between the injured woman and her husband had been challenged and breached by the person who had taken the woman away and had forced sexual intercourse with her. In short, under the *issaraphap* regime, *khomkhēun* was a fact captured by law in a particular trial, and could not be equated to the crime of rape in Western law.

The law-fact of *khomkhēun*, which involves the public display of abduction and the victim’s ongoing protest throughout the abduction, might be interpreted as indicative of the victim’s lack of consent or as a sign that the *issaraphap* regime would disregard her autonomy unless there was a physical display of protest. These concerns, however, do not seem to hold much weight within the *issaraphap* regime. This is because the regime did not operate under the assumption of individual qua individual, and therefore would not concern itself with the question of the woman’s consent as an independent element to be established in the case.²⁹ Yet, the public expression of resistance or “scream until the people hear her” was critical within the *issaraphap* regime. This public display served to alert the victim’s friends and family members to pursue and bring her back. Once the woman was returned to her original domicile, the male head of the household who had *issaraphap* over her could bring a claim to the court against the person responsible for the *khomkhēun*, meaning kidnapping and forcing sexual intercourse. This entire social and legal performance—where a woman was kidnapped or forced to have sexual intercourse, then returned to her original home before her father or husband initiated the *issaraphap*

²⁹ Additionally, the regime lacked legal techniques to infer the mental state and capacity of the parties involved in the case. As we shall see in the next montage, it was the introduction of the dichotomy between body and mind that marked a turning point for Siamese jurists, allowing them to deduce “intent” or other mental states from physical actions.

contestation trial—might be more accurately understood as a ritualized practice through which an *issaraphap* relationship could be breached and contested.

For example, in the case of a staged abduction, such as that of Amdaeng Bounnak, the ritual involving forced kidnapping, the woman's protest, and her return home; and in the subsequent court trial, the performance was repeated. Even though Bounnak's trial later revealed that she consented to be taken away, the ritualized performance of *khomkhēun* must be first performed to initiate the challenge to her father's *issaraphap* claim over her. This means that there were no legal and factual differences, at least in terms of how things transpired between the involved parties, between staged abduction and *khomkhēun*. However, once the trial began, it was up to a female victim like Bounnak to rally witnesses, and perhaps the whole community, to be on her side and prove to the court her version of the story. She must follow the legal technique of factual capturing, identifying crucial facts that would support her case.³⁰ Those crucial facts, the law-facts, were unimportant in Kirkpatrick's record of the case.

Without the complete transcript of Bounnak's case, and with only a few surviving written manuscripts of judgments or legal trials before the 1850s, questions regarding trial procedures and the full picture of how violence against women was regulated under the *issaraphap* regime will remain obscured and debatable. Yet, this montage has attempted to envision the *issaraphap* regime as an intertwined legal and lived experience where individuals exist only in relation to one another and to hierarchical communities. In this regime, violence against women is not merely an individual concern and not simply about two men contesting their *issaraphap* over a female victim.³¹ The legal technique of factual capturing implies that various legal forms of violence could be proved or disproved through trial procedures involving the entire community as witnesses in the trial.

As a legal regime that aimed not to protect individuals but communities, the *issaraphap* regime recognized and regulated violence against women by reconfiguring it into the breach and contestation of interpersonal relations concerning the female victim. By resolving the contesting *issaraphap* claims and ordering compensation for the breach, the

³⁰ Loos (2008) offers a cogent history of the role of consent in rape and sexual offences trials from the 19th century to the present. While drawing on many of her insights, this article focuses in particular on the techniques and practices of lawyers and, as a result, reaches somewhat different conclusions about consent. As illustrated in the four montages, a jurisprudential analysis of the techniques employed by these legal actors suggests that they did not—and perhaps could not—inquire into the subjectivity of the women who were the victims of sexual violence.

³¹ Indeed, there are other legal forms of sexual violence outside the scope of the Three Seals Law, such as forced slavery. The case of Amdaeng Meun, contained in the 1865 proclamation prohibiting parents from selling their children to pay off their debts (ประกาศพระราชบัญญัติลักษณะลักพา (Announcement on the Law Regarding Abduction) Available at <https://www.vajirayana.org/ประชุมประกาศรัชกาลที่-๔-ภาค-๗/๒๕๖-ประกาศพระราชบัญญัติลักษณะลักพา> (Accessed: September 2024). In this case, Amdaeng Meun's parents asked their chosen son-in-law, Phu, to kidnap their own daughter. However, Meun successfully escaped, only to go back home to be beaten black and blue by her parents. Finally, she ran away to Rid, her secret lover, and Rid brought the case to court seeking recognition of himself as Meun's rightful husband. Phu also alleged that Rid had committed the wrong of *chū* against Amdaeng Meun, considered as his now lawful wife. When King Mongkut (1851–1868) gave his verdict on the case, he condemned the parents as the real culprits. According to him, the staged abduction was not simply a forced marriage but the parents' devious act of selling their daughter to pay off their overdue debts. In the king's view, this abduction should be understood as typifying one of the entry points into slavery. Indebtedness was a common cause of self-enslavement in Siam and the sale of dependents, especially daughters, was a common means for parents to escape from debt-bondage. What is perhaps interesting about the king's proclamation is that, despite the obvious violence in this staged abduction, the use of force is not condemned in and of itself. Instead, the problematic aspects of the abduction are the interpersonal and familial conflicts and chaos that had ensued. One could read this case as another application of the legal technique of factual capturing in which the law-fact of the overdue debt was captured as the pivotal law-fact of the case, reformulating the sexual violence as more of an economic wrong of forced slavery. For a reading of this case through the lens of social class, see Loos (2008).

regime successfully maintained the interpersonal relations between individuals and the hierarchy of the community as a whole. This, of course, does not mean that the regime completely ignored individual victims, but rather suggests an alternate legal iteration and configuration of violence as a breach of the legal and social bonds of the community. Consequently, the legal subject of violence under the *issaraphap* regime was not the female victim, but a set of interconnected relations and the community as a whole. This community, nevertheless, collapsed abruptly once Siam began its path to modernization in the late 1800s. The interpersonal *issaraphap* hierarchy, along with the regulation of female residence and the public display of force and resistance in abduction, was erased and replaced by modern legal concepts with new legal techniques, particularly when the 1908 Siamese Penal Code criminalized and modernized violence against women.

4. The third montage: Translating and criminalizing rape circa 1908

In the first two montages, I have shown how forced sexual intercourse against a woman could be articulated, first, in the eyes of a cosmopolitan Western judge in Siam through the technique of judicial narrative, and, second, from the perspective of Siamese communities under the *issaraphap* regime and its legal technique of factual capturing. The two montages, while they might overlap in time and space, were separated by languages and archives. Archives here refers first to the materiality of Kirkpatrick's case notes, and the scattered and almost textless archive of *issaraphap* regime. Archives also include rules of practices that give rise to the content, style, and format of the material text or performance (see generally Foucault, 1972). Even though Kirkpatrick's case notes and the *issaraphap* regime recorded concurrent legal practices in late 19th-century Siam, they belong to different archives. That helps to explain why the *issaraphap* regime in the second montage could not straightforwardly transition into the modern crime of rape via Kirkpatrick's technique in the first montage. The two archives in the first and second montages were, in fact, never brought together to create a smooth transition from *issaraphap* to rape. This dissonance of the two montages, separated by two archives, suggests that the process, understood crudely as modernization, could not take place without having to first mediate differences in archives.

This third montage will illustrate the transition that most closely aligns with the modernization of *issaraphap* to rape, found in yet another archive. This transition is best understood as the criminalization of violence against women. Criminalization is defined here as a move from a social relationship framing to one of a state-sanctioned legal violation. While this move is not unique to the experience of Siam (see McVeigh and Rush, 1997; Farmer, 2016), criminalization in Siam required particular legal techniques. These techniques include linguistic translation, doctrinal construction, and judging. These new techniques were invented and utilized because criminalization took place in a specific archive, namely the state's archive comprising legislative drafting, codification, legal doctrinal construction, and the establishment of "modern" judicial courts. These activities were performed by various groups of legal elites, who saw themselves as modernizing agents and understood their activities as modernizing the legal system in Siam along the lines of Western civilization. As the montage will show, these modernizing agents had different visions of modernization, and their differences affected their techniques and activities. Before moving on to examine legal techniques involved in the criminalization of rape and its constitution of legal subjects, however, this montage will first introduce this new archive.

The archive for this montage, or for the criminalization of rape in Siam, begins with the material documents in which the English term "rape" as a crime appeared. When the word "rape" was officially introduced into the Thai linguistic space for the first time in the late

19th century, it occurred in a new and separate archive used for legislative drafting and treaty-making. What is unique about this archive, in comparison to both Kirkpatrick's case notes or the archive of the *issaraphap* regime, is that it contains both Thai and English language documents. This was a truly translingual space and not one in which one language was concealed or suppressed beneath the other. For the jurist who relied on these legislative archives, the task of translation and mediation between different languages was explicitly problematized and taken seriously. Their approach differed from that of Kirkpatrick, whose report is described in the first montage. Kirkpatrick wrote in a space where multiple languages were active, yet he re-narrated the courtroom events in a single language that was completely foreign, both legally and linguistically. The legislative drafting of rape and rape law was not simply an attempt by Siamese jurists to gaze into the Western worldview in which the crime of rape was situated and to re-describe the crime in Thai language. In fact, due to their various institutional roles, the legal elites involved in the process had different aims in introducing the crime of rape to Siam and used entirely different sets of legal techniques.

The first half of this montage will scrutinize the techniques used by modern-minded Siamese jurists of the late 19th century who spearheaded the various legal modernization reforms in Siam. It will examine first the technique of modern linguistic translation, in which two languages were artificially put together as equivalents (see generally Sakai, 1997, pp. 40–71). The second technique was that of doctrinal legal construction,³² in which jurists gave legal meaning to the linguistically translated Thai word for rape. The second half of the montage will look at Siamese judges. These judges were less concerned with the process of legislative drafting in which the techniques of linguistic and legal translation were predominantly employed. Instead, for them, the most important aspect of the emergent criminalization was that they acquired the ability for the first time to order criminal punishment without having to ask for the king's approval. This means that Siamese judges who were responsible to order criminal punishment also contributed to the construction of rape as a crime through their technique of judging and punishing, which enabled the legislated and translated term of rape to cultivate its meanings in real cases. By examining the intertwined process of legislative drafting, including the techniques of linguistic translation and of doctrinal legal construction, and the process of adjudication, including the technique of judging, this third montage re-describes the moment in which the concept of rape was introduced to Siam.

4.1. The travel and translation of the English “rape” to Thai “*khomkhēun*”

The earliest official written record of the English term *rape* in the Thai legal archive is found in the Chiangmai Treaty between Siam and Britain, signed in 1883 (Great Britain Foreign Office, 1882, pp. 78–84). This document is one of the notorious unequal treaties that extended and strengthened British extraterritoriality in Siam (see Tzouvala, 2019). In pursuit of their interest in the teak business in the newly conquered British Burma, the British sought to rely on Siam to exercise suzerainty over the northern kingdoms along the Siamese–Burmese borders in order to legally protect British interests (Barton and Bennett, 2010). The Chiangmai treaty established the unique system of the International Court, in which British Asiatic subjects were tried by Bangkok-appointed judges under Siamese law (Sayre, 1928, pp. 76–88; Iijima, 2008). More importantly, the treaty imposed reciprocal obligations in the extradition process, according to which the governments of Siam and Britain must cooperate to deliver persons accused of committing any of ten heinous crimes. In the English language version of the treaty, rape was listed as one of the ten crimes without any elaboration (Great Britain Foreign Office, 1882, pp. 78–84). However,

³² For a working definition of legal doctrine, see footnote 34.

the Thai language version of the treaty not only transliterated the lists into Thai but also provided brief explanations of each crime. For the crime of rape, the Thai language treaty transliterated the English term “rape” into “*rēp*” (เรป) in Thai and then defined *rēp* as forced sexual intercourse, taking place in any of five scenarios: against the woman’s will, the woman did not consent, the woman consented out of fear, the woman mistook the perpetrator for her husband, or the woman was under 11 years of age (Great Britain Foreign Office, 1884b, pp. 68–89; Great Britain Foreign Office, 1884a, pp. 90–2).

Whether the definition of *rēp* in the treaty was followed and enforced by the Chiang Mai International Court is unknown, but other legislation clearly shows that Siamese elites at that time began to understand *rēp* as a serious crime. The crime of rape was incorporated into the emerging corpus of Siamese written statutes in 1898 when the Statute on Rape was enacted. This statute, however, did not use the Thai transliteration “rap” but translated the English term rape into Thai as *khomkhēun luang prawēnī* (ข่มขืนล่วงประเวณี). The term combines *khomkhēun* with *luang prawēnī*, the latter meaning “having connection” or sexual intercourse. The statute bore a striking resemblance to the treaty. It defined rape as sexual intercourse that was done through any of four scenarios: against the woman’s will, the woman did not consent, the woman consented out of fear, or the woman was under 12 years of age.³³ These enumerated scenarios in the statutory definition are similar to the ones provided in the Chiangmai treaty. Without reading too much into this coincidence, it appears that one of the motivations behind the 1898 statute was to foster a better liaison and legal cooperation, especially in the extradition process, with foreign powers.

Regardless of the intention behind the enactment of the 1898 statute on Rape, the decision of the drafters of the statute to translate the English term rape into “*khomkhēun luang prawēnī*” should not be taken for granted. As discussed in the second montage, *khomkhēun* was not a newly invented word but had long been used as a linguistic proxy for a specific law-fact, dictating the male use of force and the woman’s corresponding act of protest in the complex *issaraphap* contestation trial. Through the process of linguistic translation, *khomkhēun* was lifted out of the hierarchical regime of *issaraphap*, which gave the term a specific meaning, and was presented simply as the Thai equivalent translation of rape in English. Although the term *khomkhēun* was laden with its own historical and social connotations, its construction as an artificial equivalent of the English crime of rape made it paradoxically a conduit that might carry the meanings and assumptions of the English term into the Thai language.

4.2. The Siamese jurists’ commentaries and the construction of rape as a legal doctrine

While the linguistic translation of the English rape into the Thai *khomkhēun* was completed in 1899, the process of legal translation had only just begun. The 1899 Statute on Rape brought to the emerging modern legal landscape in Bangkok a new legal language of rape that required further legal development. Rape was not only transmitted to Siam through linguistic translation but also simultaneously through legal criminalization. The four scenarios listed in the statute had to be explicated in a legal manner and, to achieve this, there was a need for legal doctrines to guide the reading and interpretation of the text.³⁴

³³ พระราชกำหนดข่มขืนล่วงประเวณี รศ 118 (Phrarāṭchakammaot khomkhēun Luang prawēnī Ror Sor 118 Statute on Rape RS 118) (9 April 1898) Available at: <https://www.ratchakitcha.soc.go.th/DATA/PDF/2442/002/16.PDF> (Accessed: September 2024).

³⁴ Legal doctrine as part of the European legal tradition has a theological root (see Neoh, 2013) and a long history of uses and development (see Berman, 2006; Samuel, 2012; Gordley, 2013). Outside Europe, the history and functions of legal doctrines are somewhat difficult to study since many of the legal doctrines were packed and exported to various colonies in various forms and methods. Fernandez and Dubber (2012) studied legal doctrines in the United States as these doctrines took the form and format of legal treatises. In this article, I adopt a broad

The task of legal doctrine building fell into the hands of a group of Siamese legal elites, who had returned home after completing a law degree abroad, as well as a multinational group of foreign legal advisors serving the Siamese government (see Kittayapong, 1990; Loos, 2006, pp. 49–71; Reekie and Reekie, 2021). Prince Rabi, who sat with Kirkpatrick at the Ayuthia court, took the lead in developing modern legal doctrine in Siam. Rabi worked in a translingual space where his documents contained both Thai and English terms.³⁵ He also actively translated, transliterated, or invented new vocabularies in order to build the corpus of modern Siamese law. His translation techniques, however, were not intended merely to achieve linguistic equivalence but were also informed by the self-imposed task of modernizing Siamese law along the lines of what was considered Western “civilization” (see Suwanapech and Plessis, 2021; Harding, 2008). With these motivations, and perhaps through his legal training at Oxford, Rabi invented and relied on a specific legal technique of legal doctrinal construction.

For the new generation of Siamese jurists, under Rabi’s leadership, the technique of legal doctrinal construction began with an act of linguistic translation. Typically, they would artificially construct a Thai word to serve as an approximate equivalent of a foreign legal concept. However, what determined whether the translation was “right” seems to have been their modern legal sensibility. In the early development of modern and Western criminal law in Siam, the jurists, for instance, were preoccupied with the question of how to legally infer a *mens rea*—a required mental component of a crime—from an action. In order to import the concept of *mens rea* to Siam, the jurists first translated the term *mens rea* into the Thai language before explaining it with different hypothetical scenarios. This task may have seemed logical and straightforward, but in reality there were several trials and errors before the translation of *mens rea*, “sounded right.” *Mens rea* was translated to Thai as *cēttanā* (เจตนา) *khwām tangcai* (ความตั้งใจ), and *citrakhāt* (จิตรหาฏ). Each translated term aimed to make the Thai term more closely approximate the meaning of *mens rea* (Rabi Bhadhanasakdi, 1909, pp. 44–58, 193–5). Before settling on a linguistic translation of *mens rea*, different hypothetical scenarios, especially unusual ones, were supplied by the legal elites to illuminate and demarcate the meaning of each translated Thai term. The scenarios also demonstrated how to “find” *mens rea* in different situations.

This technique of legal doctrinal construction cannot be equated merely with the systematization of law, which was the ostensible purpose of the legal codification project. Rather, the technique appears to have had two interconnected goals: first, the jurists aimed to establish a standard legal doctrine applicable to as many cases as possible; second, they sought to address differences and nuances between English and Thai languages by employing a casuistic or case-based approach.³⁶ As the English to Thai translation provided the jurists with new legal neologisms, the jurists regarded these

definition of legal doctrine, offered in Neoh (2013) emphasizing the use of legal doctrines to read and interpret a legal text: “Doctrine is supposed to help us to get to the deeper meaning. Doctrines provide one with the systematic conceptual tools by which a canonical text can be penetrated . . . However, doctrines are not arbitrary; instead, they are, supposedly, suggested by the text itself and they are to be discerned from within the text. Doctrines re-envision the text—they do not change the text as such . . . The process of doctrinization brings to the surface ideas that have been lurking in the text” (p. 189). This definition fits with my intention to move from a linguistic translation of a legal text from English to Thai, to a doctrinal building that focuses on making a sound legal doctrine that would help lawyers read the newly written and translated text of law.

³⁵ I borrow the concept of translingual space and translation from Liu (2000). Translingual space refers broadly to a space where one works across cultures and languages even without directly engaging in a linguistic translation. Reddy has discussed the same concepts in the context of translation of human rights in contemporary Thailand. See Reddy (2022).

³⁶ Johansen (1995) offers a working definition of casuistry in Islamic law that is relevant to the discussion in this article as follows: “Casuistry is neither case law nor the exemplification of norms in cases. Rather, it is a method that acknowledges that the validity of legal concepts is confined to certain boundaries and that one has to determine whether or not the individual case falls within these boundaries” (p.135).

neologisms not simply as new translated terms but as legal doctrines that must both reflect the text of the legal code and function as a standardizer in the application of the code. Working with these linguistic-neologism-cum-legal-doctrines, the jurists determined the boundaries of linguistically translated terms by applying them as legal doctrines to different scenarios and cases.

It is beyond the scope of this article to analyse the use of the case-based approach to fix both the excess of translation and the lack of legal standardization in the early years of Siamese legal modernization. However, it is important to point out that the case-based approach, or casuistry, has long been part and parcel of legal development and training in Europe (see Samuel, 2015; Hunter, 2020) as well as in Siam. One could perhaps think of the legal technique of factual capturing in the previous montage as a case-based technique because the technique also attempts to solve a practical problem by drawing from some topical facts and patterns of argument. In this montage, I want to raise the interconnected issue of linguistic translation and doctrinal construction and to describe, in the next paragraphs, how Rabi employed and exploited the new linguistic neologism of *khomkhēun* as rape to illustrate the concept of rape by introducing a new form of legal knowledge based on mind/body bifurcation, and to simultaneously instruct emerging Siamese jurists on practical legal application of the code.

In the discussion of rape law, mens rea did not present an immediate problem as part of the doctrinal construction. However, the question of how to infer intent from a physical action in rape cases arose when the jurists attempted to distinguish the phrases “against the woman’s will” and “the woman did not consent.” Prince Rabi responded to this legal-linguistic problem with his technique of legal doctrinal construction. He offered a brief commentary in Thai language on the 1899 Statute of Rape law explaining the distinction between these two phrases:

(1) *Against the woman’s mind* [ขึ้นใจหญิง]³⁷ and (2) *the woman did not consent* [หญิงมิยินยอม] might appear to be similar. However, (1) requires a physical attempt to run away or try to get away [from the forced sexual intercourse] and, (2) refers to situations in which a man pretends to be the woman’s husband during nighttime, the woman had no consciousness, or the woman was drugged until losing her consciousness (Rabi Bhadhanasakdi, 1901, p. 301).

In the commentary, Rabi distinguishes the two legal phrases by referring to the woman’s physical resistance and mental disaccord. The first phrase “*against the woman’s mind*” refers to physical and visible resistance while the second phrase “*the woman did not consent*” is limited to the mental inability to consent because of deception or drug use. From the commentary, Rabi seemed to assume and recognize a woman’s autonomy to act according to her will. However, he also had the practicality of the statute in mind. Rabi further constructed legal doctrines, not with the direct aim of recognizing the autonomy of the victim, but to prevent a practical legal problem that could arise as to how to determine a woman’s will. This legal question could be answered, according to Rabi, by scrutinizing the woman’s action and other facts of the case. To find out whether the forced sexual intercourse was committed “*against the woman’s mind*,” the jurist could legally draw a conclusion from her physical resistance. On the other hand, to determine whether *the woman did not consent*, the jurist could draw inferences from circumstantial facts such as the existence of deception or the use of drugs. Thus, in this commentary, Rabi introduced to the regime of rape law a bifurcation between mind and action, and he offered a legal

³⁷ The term *jai* in Thai that Rabi used literally means heart but could be used to refer to mind, spirit, or will in English. I deliberately avoid translating *jai* to will in order to distance the Thai legal formula for rape from the popular Anglo-American legal formula of rape as sexual intercourse against her will.

method to infer a mental stage, be it mind or consent, from the facts of the case. The phrases “*against the woman’s mind*” and “*the woman did not consent*” became new linguistic-neologism-cum-legal-doctrines that carried with them two different legal meanings. The former correlated to the material reality of physical resistance, while the latter corresponded to the circumstantial facts of the case. This legal know-how on how to legally prove the mental state of the victim added another layer to the meaning of rape, and re-illustrated rape as an event that required a form of coercion to the mind of the victim. His commentary could be an instruction on how to read the physical resistance and other facts of the case as evidence of the coercion of the mind. It is important to note that this reading of rape as a crime that involved a mental state of the victim was first introduced into Thai jurisprudence in Rabi’s commentary.

Nevertheless, in spite of Rabi’s commentary, when the 1908 Penal Code was finally promulgated, the Drafting Commissions³⁸ decided to drop the phrase *the woman did not consent* (Rabi Bhadhanasakdi, 1909, pp. 191–2). Instead, the commissions defined rape as “whoever uses physical or verbal acts to have sexual intercourse with a woman *against the woman’s mind*, that person commits rape.” The code also separately defined rape by deception as “whoever uses deception to have sexual intercourse with a woman *against her mind*, that person commits rape.” Rabi quickly expressed his disagreement with this language in his treatise on the code, especially with regard to its focus on “*against the woman’s mind*” inferred from physical resistance. Nevertheless, as a commentator on the law as it was finally enacted, Rabi still provided an analysis of the crime of rape. Again relying on his legal technique of doctrinal construction, he listed and explained four hypothetical scenarios in which rape could be found according to the code. While the four scenarios described by Rabi aim to guide the Siamese judges in their application of rape law to the facts of the cases, the judges did not seem to follow Rabi’s instruction as they faced the reality that criminalization brought to the Siamese society.

4.3. The Siamese judges and the legal technique of judging

Rabi’s commentaries illustrate how the legal doctrine of rape was constructed through a process of linguistic translation followed by a distinctive legal technique of doctrinal construction, combining linguistic translation with a specific casuistry method. However, these techniques were only adopted by the small group of jurists who assumed the role of legal textbook writers. Siamese judges at the beginning of the 20th century did not share the jurists’ preoccupation with discerning a mental element of a crime from the material facts of the case. Instead, the judges were more concerned about how to exercise their newly acquired power to order criminal punishments.³⁹ As mentioned earlier, until 1896, the Siamese judiciary had no discretion to order any criminal punishment without the king’s approval. Rather than engaging in the abstract process of identifying *mens rea* for a crime, the judges assumed the role of just arbiters whose main duty was to impose punishment in proportion to the crime committed. As the court must respond to the actual cases before them, they could not rethink the crime of rape from a blank page like the jurists. Instead, because of their institutional function, judges had to apply and develop a technique of rendering judgment. The exercise of this technique can be exemplified in a

³⁸ The codification of the 1908 Penal Code began in 1897, and there were several commissions whose members also changed from time to time. Rabi was part of the commission in 1897 but decided to leave around 1904. He claimed his workload at the Ministry of Justice as the reason but many historians believe he had a political conflict with the king. See Kesboonchoo Mead (2004). For the process of codification in general see Loos (2006) and Pongsapan (2013).

³⁹ The judges at that time came from various backgrounds, including foreign advisors, conservative Siamese elites, and progressive Siamese elites. See Reekie and Reekie (2021).

case of attempted rape decided in 1912 (*Supreme Court Decision 59/RS131*), four years after the promulgation of the 1908 Penal Code.

In that case, the Supreme Court in Bangkok explained the application of section 243 (rape) of the Penal Code (Sutthamwinichai, 1914, pp. 144–7). The defendant, Jem, was charged with attempted rape as he was found to sneak into the victim's, Amdaeng Hun, house. The court accepted the fact that Jem attempted to rape the victim because multiple witnesses saw Hun resisting. However, the court pointed out that Jem and Hun were part of the same extended family and shared the same provincial hometown. Therefore, the court held, they should settle this dispute between themselves. Framing the case as a private and community matter, the court refused to order the minimum one-year imprisonment as punishment for rape but reduced the sentence to six months. The court also reasoned that it was the defendant's first offence and the defendant had been well-behaved and, therefore, the reduction of the punishment was suitable. This case shows the lingering legacy of the *issaraphap* regime and its formulation of violence against women as a breach of community and interpersonal relations.⁴⁰ More importantly, it affirms that the court was willing to follow the old reconfiguration of such violence and to exercise its discretion to sidestep the application of the Code and the crime of rape.

The court's exercise of its power to judge was not only part of its experimentation in judging and punishing with the modern Penal Code but also part of the court's search for justice in the modern system. The case of Jem and Hun shows that the main legal problem that arose around rape cases after the promulgation of the Code was not about the manner in which the woman resisted or her lack of consent, as Rabi envisaged. Instead, the court faced the problem of injustice produced by the Code's absence of a distinction between criminal, and family and community matters. The 1908 Penal Code produced a new and expansive space of crimes and extended the state's power to punish. However, by so doing, the Code also imposed a heavy penalty on offenders who might not be subject to any imprisonment at all under the traditional *issaraphap* regime. What had been traditionally understood as family and community matters, such as the abduction of women, was rearticulated as a serious and punishable crime. This sudden criminalization of forms of violence that had been traditionally understood as community issues led to a situation the court deemed unjust. Therefore, as the 1912 case illustrated, the court was keen to circumvent the Penal Code, or, to put it directly, to lessen the punishment mandated by the Code, in order to redress an injustice that would otherwise result from this modern criminalization.

The Supreme Court's decisions on the matter of *chū* or adultery provide additional examples of how the judges intended to sidestep rather than apply specific sections of the 1908 Penal Code. The wrong of *chū* had been recognized as the most important violation in the *issaraphap* regime, yet it was not included as a crime in the Code. Despite the absence of *chū* or adultery as a crime, ordinary people continued to bring cases of *chū* and perhaps expected the courts to resolve these conflicts as family matters. However, because of the requirements of the Penal Code, many *chū* disputes were rearticulated as criminal matters. In the early 1900s, there were many cases pleaded on the accusation of murder, especially the murder of an adulterer by a husband. As mentioned earlier, the right to revenge was legal under the *issaraphap* regime if the husband found the wife and the adulterer having sexual intercourse in the husband's house, but no such right was included in the 1908 Penal Code. The court, therefore, attempted to justify this form of revenge by explaining that the husband committed the murder to protect his reputation, as in the case *Dika 1466/131* in 1912, or because he was enraged by the adulterer, as in the case *Dika 19/128* in 1909.⁴¹

⁴⁰ Loos (2008) examines court cases from 1900s to 1920s, after the implementation of the statute of rape and the code. Many cases show the remnants of the *issaraphap* regime in various forms.

⁴¹ These two cases are found in National Archive of Thailand, Sor Mor. 3.8/62 คำพิพากษาฎีกาพื้นฐานคดีอาญา (Fundamental court judgments for criminal cases) (25 September 1909).

These cases showed an attempt by the court, not only to restore justice to the parties but also to systematize law based on the modern legal structure of offences and mitigation factors. Anger as a mitigating factor, for instance, might be drawn from the common law distinction between murder and manslaughter but was used, in the Siamese context, to justify and recognize the husband's traditional right to revenge. The judges, like the jurists, also worked with the new linguistic-neologism-cum-legal-doctrine, such as anger. However, the judges' techniques of judging encouraged them to confront the broader context of both the society and the parties affected by the rapid criminalization and modernization of law. By contrast, the jurist's technique of translation and legal doctrinal construction allowed them to distance themselves from the impact of their law-making. Both the judges and jurists in this transitional period in Siamese legal history shared the sensibility of legal modernity and supported the effort to modernize law. The techniques they employed, nevertheless, led to different understanding of the crime of rape.

The early statutes on rape and the 1908 Penal Code not only criminalized and modernized rape by inserting the crime of rape or *khomkhēun* as a new linguistic neologism-cum-legal-doctrine, but they also profoundly changed legal practices in Siam. Although lawyers from various new legal institutions collectively pursued the modernization project, it is evident that they employed different and uncoordinated legal techniques to engage with this new doctrine. Hence, they constructed multiple meanings of modern law in general and the crime of rape in particular. Nonetheless, what united judges, legal drafters, and textbook authors in their separate pursuits and institutional functions was the common language of law, created by the translation and appropriation of English legal terms and concepts. Therefore, despite the discordant and unstable interpretations and applications of the 1908 Penal Code and its legal terms, the judges and jurists had successfully invented their own legal dialect along with a distinct body of legal knowledge and legal practice. This style of professionalized practice distinguished them from the rest of the society, and the rest of the modern state bureaucratic officers, marking the core of their identity as modern Siamese lawyers (see Kesboonchoo Mead, 2004, pp. 134–42). By highlighting this emerging group of lawyers, this montage has shown that criminalization and modernization of law in Siam cannot be rhetorically described as an epoch-breaking transition from a community-based regime to a modern, liberal, and individual-centric legal regime. The watershed and immediate impact of the 1908 Penal Code was not the social transformation but the creation of a professionalized class of Siamese lawyers with their own worldviews, discourses, and scholarship as well as their own institutions, such as law schools and judicial courts.

While the criminalization of rape and the constitution of the subject of rape were not at the forefront of their efforts, these issues could only be illuminated by looking at the broad legal modernization project at that time. Through the translation and criminalization of rape, the jurists and judges had successfully built a façade of law and legal institutions over what had previously been understood by laypersons in the community as a breach in interpersonal *issaraphap* relations. The crime of rape, in the world of jurists and judges, was a legal doctrine that must be explained, interpreted, applied, and judged by the emerging legal profession endowed with a distinctive form of knowledge and trained to be fluent in the new language of the law. Because of the plethora of legal techniques from different legal institutions, no clearly defined subjects of rape emerged from this montage, yet the path was now established for the later development of rape as a crime and a legal doctrine.

5. The fourth montage: Visualizing the crime of rape in Thai society circa 1956

As described in the previous montage, the early period in the formation of modern law after the 1908 Penal Code addressed the wrong of rape with legal doctrines, legal institutions, and multiple legal techniques. Yet, that period also produced inconsistent interpretations. The opportunity to reconcile the differences did not arise until 1939, when Thailand began to overhaul the 1908 Penal Code. A new Penal Code was finally promulgated in 1956. Yet, rather than providing a meeting place to articulate and reconcile different interpretations and applications of rape, the sub-committee on Reviewing the Revision of the Penal Code (RRPC) decided to write the definition of rape anew. Over the decades of the revision, the RRPC engaged in several debates and finally agreed to drop both the phrase *against the woman's mind* [ขึ้นใจหญิง] and *the woman did not consent* [หญิงมิยินยอม]. Section 276 of the Code defines rape as whoever uses force to have sexual intercourse with a woman who is not his wife by 1) coercion, 2) physical assault, 3) incapacitating the woman to resist, or 4) deceiving the woman to mistake the identity of the defendant. The construction of the new legal phrases, interestingly, was not the product of a linguistic translation from English to Thai but a selection of the most appropriate Thai words that were thought to convey the meaning of rape. The search for the proper Thai words and their subsequent interpretation also became entangled with the rise of the Thai nation-state, which significantly influenced the practices and techniques of both the legal drafters during the revision, and judges after the revision. The first half of the fourth and final montage focuses on the work of legal drafters as jurists who practised the new technique of ethnographic visualization. The second half turns to the work of judges who also adopted the new technique of medico-legal interpretation. What joins these two techniques is the use of images in legitimizing the law and the state.⁴²

5.1. Ethnographic visualization of Thai women and the drafting of the 1956 Penal Code

The RRPC followed two working principles in their drafting of the code. First, the RRPC referred to foreign codes around the world in order to compare the Thai words with the words used in other codes translated into English. In the discussion of rape alone, the Italian Code, the Code of the Republic of China, and the English law were mentioned. Second, the selection process involved a method of casuistry, similar to the one employed by Prince Rabi, in which the RRPC attempted to apply the selected words to different hypothetical scenarios and determine whether the words could precisely bear on them. This process of elaborating a term or a concept based on scenarios or hypothetical situations is, as we have seen in the previous montages, not new. What is remarkable, however, about the RRPC is their employment of the technique of ethnographic visualization to enhance richness and vividness of the hypothetical scenarios that they sketched out.

In the RRPC's meeting on 6 October 1942, the members debated whether to drop the phrase "against her will" from the Code and each member referred to various scenarios to support their positions (The Sub-committee on Reviewing the Revision of the Criminal Code, 1942). When considering the phrase "incapacitating the woman to resist," for example, they cited a situation in which a senior government officer might abuse his power in order to rape a junior female government officer. The discussion of rape by deception also referred to various examples, such as the magical transfiguration of the

⁴² This montage draws from insights in Rey Chow (1995) studying the use of female images by male directors in Chinese films to legitimize the nation.

rapist into the victim's husband, the requirement of sexual intercourse between a hermit and the female victim to activate black magic,⁴³ a deception as to the marital status of the rapist, as well as a doctor deceiving a female patient to have sexual intercourse as part of the medical procedures. In the debate on whether to drop the phrase “*against the woman's mind* [ขึ้นใจหญิง],”⁴⁴ the members also considered the practice of arranged marriage that they deemed common among the overseas Chinese in Thailand, as well as a situation in which a daughter might agree to have sexual intercourse with a judge in order to help her accused father.

Drawing on the illustrations provided by these scenarios, the members discussed different images and roles of women in society. Unlike the previous montages in which a certain phrase or linguistic proxy conveyed a simple act of force and resistance (Kirkpatrick) or an abstract notion of mind and body (Prince Rabi), the explosion of images in the RRPC's debates shows a technique of concept construction that derives from fragments of illustrative images. The textual definition of rape as well as the new legal phrases introduced by the RRPC carried with them rich images of Thai women in different professions, races, and roles. What tied these diverse images together was the overarching narrative of the Thai nation-state and the portrayal of women whom the state asserted and claimed to have the authority to protect and rule over as its subjects.

Among various scenarios, two notable images of Thai women emerged from the RRPC's debate over rape law. The first image is that of a filial daughter. Members of the RRPC described the practice of forced marriage as common among the overseas Chinese in Thailand (see also Bao, 1999; Bao, 2003). When a woman was forced to marry and then had sexual intercourse with her husband, she might physically and externally protest this marriage by, for instance, crying or attempting to flee. However, even though her external manifestation of protest would constitute a lack of consent, the committee members argued that the forced marriage scenario should not fall within the ambit of rape law. The marriage, the members argued, might not be forced against the will of a filial daughter, who, despite her physical protestation, would mentally accept sexual intercourse with the man of her parent's choice. These dutiful daughters were not seen as victims of rape but rather as “good” and obedient daughters. The good woman in Thailand, as Harrison rightly observes, is determined by her relationship to the institution of the family (Harrison, 1999, p. 168). Rape law, as the RRPC understood it, reflected and absorbed this image of “good women” by refraining from intervening in the private lives, and left them to be governed by their families.

The second and more important image is the village woman. In discussing whether rape by deception should be considered “against the woman's mind,” members of the RRPC were worried about the case in which a woman might believe the deceptive words of a hermit or a doctor who asserted the need to have sexual intercourse with her as part of a magical spell or a medical procedure. The committee members thought that these cases might fall outside the scope of “against the woman's mind” and that the law would fail to protect Thai people who “are still largely stupid” (the Sub-committee on Reviewing the Revision of the Criminal Code, 1942, p. 5). For this class of women, the RRPC deemed it necessary that the law should not permit them to act freely of their own will. Even though the woman willingly agreed to have intercourse, the law should override her choice and should protect her and prosecute her deceiver.

⁴³ The term black magic might be somewhat misleading; however, I intend to use the term to cover a range of activities, following Chen and Triratpan (2020) and their analysis of black magic and rape cases in Thailand.

⁴⁴ Some members referred to this phrase in Thai as *against the woman's mind* [ขึ้นใจหญิง]. Others stated the phrase in English as “against her will.” The meeting was primarily conducted in Thai, with English terms and phrases spoken here and there. This was hardly an instance of bilingualism but more likely to be a linguistic experience after colonialism.

The RRPC ethnographically visualized these two images of Thai women as part of their law-making process. This was a relatively new technique. The images of women in rape law could perhaps be glimpsed in the earlier montages but the images were never produced directly to formulate or justify a legal debate. While both images suggest that the RRPC was concerned with tailoring the law specifically to Thai society, the fabulous imagining of female subjects within the Thai nation-state demonstrates the nationalist ideology common among legal elites at that time. The first image represents a middle-class urban woman as an obedient daughter, whose autonomy and virtues should be protected by her family rather than the law. In her study of the portrayal of women in nationalist fiction written during the reign of King Rama VI (1910–1925), Thamora Fishel argues that the image of the good woman for the nation is linked with an ambiguous understanding of Western modernity (Fishel, 1999, pp. 158–62). Siamese women must be liberated and Westernized, adopting Western gender roles and beauty standards. However, they cannot be too “westernized”; their obedience to Western norms and liberty must be “circumscribed by bourgeois notions of domestics and sexual respectability.” This means that, while adopting Western norms and values, women must nevertheless perform their roles as a dutiful wife and a benevolent mother.⁴⁵ In turn, these women will be rewarded with love, care, and loyalty from their husbands. Reflecting Fishel’s argument, the RRPC seemed to adopt this image of bourgeois and urban women, a cultural construct worthy of the love of nationalistic male elites.

By contrast, the second image depicted an uneducated, superstitious rural woman perceived as incapable of acting autonomously. This image reflects the stereotype of rural women as mired in the traditional way of life and, hence, as spiritually vulnerable and materially lacking. The construction of this image of rural women, as a homogenous and powerless group, could be traced back to the Thai state’s attempt to legitimize its authority to rule, notably by creating what Thongchai Winichakul (2000a) called *the Others within* (คนไทย/คนอื่น). Thongchai coined this phrase in his study of the Bangkok elites’ travelogue and ethnographic reports of the hinterlands from 1885 to 1910 which, he argued, othered rural people (*chāo bānnōk ชาวบ้านนอก*) at the margins of society as the docile others. The Bangkok elites viewed themselves as carrying the burden of civilized urban people (*chāo muang ชาวเมือง*) and could claim it was their responsibility to civilize and rule those people of the other villages. Building on Thongchai’s argument, Sinith Sittirak (2019) wonderfully traces how the pre-existing image of rural people had been further constructed during the wave of transnational development movement in the 1980s.⁴⁶ Even in this later period, the Thai state continued to characterize rural Thai women as “little more than victims of, for example, poverty, male violence or traditional belief systems.” The Thai state, as declared in its Five Year Plan on Woman and Development (1982–1987), must “improve their status economically, socially, and politically as well as to include their participation in all aspects of the country’s

⁴⁵ For a glimpse into the image of the urban Thai women under today’s neoliberalism and capitalism, see Duangwiset (2017).

⁴⁶ It is important to contrast Sittirak’s work on the images of rural women during the development era with other studies on the image of the rural people in the same period. Craig J. Reynolds (2001), for instance, argues that the turn to “local knowledge (*phum panya ภูมิปัญญา*)” among the Thai public intellectuals in the 1980s reversed the early images of the rural people in the 1900s as barbaric and uncivilized. Soowiraanon and Tejapira (2015) points to the invention of the “vernacular Thai” in Thai graphic design during the 1990s when the image of everyday and mostly rural objects and images, such as banana leaves, tuk-tuk, and rice paddies, were brought back into graphic design and advertisements catered to urban audiences. Suviranon argues that vernacular Thai is neither barbaric (the image in the 1900s) nor wise (the image during the local knowledge movement) but nostalgic and post-modern. What Sittirak added to the studies of the images of rural people during the development era is that, despite these discursive changes, the image of rural women as poor and backward seems to be maintained throughout the period, at least in the eyes of the state and the law.

development” (p. 64). It is perhaps not surprising that RRPC in the 1940s adopted the same attitude. By overriding the will of rural women whom they deemed uneducated and incapable, the urban legal elites could position themselves as benevolent rulers embarking on a civilizing mission or a development programme. As late as 2014, the Thai Supreme Court employed nationalist images and reasoning to find that the victim was “innocent and foolish” enough to believe that having sexual intercourse with the rapist would bring her luck (*Supreme Court Judgment 10007/2557*; see also Chen and Triratpan, 2020). The repeated reconstructions of rural women as poor and uneducated continued for more than a century. The crime of rape was one of many contexts in which the image was reaffirmed.

5.2. Images of Thai women and the Thai Supreme Court after 1956

If the RRPC, through its technique of ethnographic visualization, constructed images of rape victims as poor and stupid women to justify the state’s intervention to override the women’s autonomy, the same, yet more complicated, technique of constructing such images could also be found in court judgments. As we have seen, the RRPC decided to remove both the phrases “against her mind” and “without her consent” and instead adopted the use of force as the sole requirement in rape law. The use of force was conceptualized as an external force used by the rapist, and any inquiries into the victim’s state of mind or its external manifestation were likely irrelevant.⁴⁷ To confirm pre-existing violence and force in rape cases, the court soon turned to employing the victim’s wounded body as the clearest evidence of force (Preechasilpakul, 2015). The information on the victim’s wounded body had also become easily available and was presumptively credible because it was contained in medical reports since the beginning of the 20th century (Pearson, 2020). Relying on concrete and scientifically rationalized medical knowledge, the court could draw from the victim’s medical reports the graphic details of any abrasive wounds around the vulva, bleeding, traces of seminal fluid inside her vagina, and tears to the hymen. With clear and detailed information about the victim’s body, Thai courts began to draw heavily on medical expertise not only to determine the use of force but also to

⁴⁷ This is contrasted with the application of mens rea, or guilty mind, and actus reus, or guilty act, in rape cases in common law, particularly English common law. To establish mens rea for the crime of rape under English law, the defendant must have believed that the victim did not consent. This means that if the defendant genuinely believed that the victim consented to the sexual intercourse, he would not be guilty of rape because he lacked the required mens rea. The necessary actus reus is that the defendant engaged in sexual intercourse with the victim when the victim did not consent. Therefore, consent and the enquiry into the victim’s state of mind are integral components of both mens rea and actus reus of rape. In Thai criminal law, by contrast, the actus reus, referred to as the external element of a crime, requires the use of force (ข่มขืน), sexual intercourse (กระทำการชำเรา), and one of four scenarios: 1) coercion, 2) physical assault, 3) incapacitating the woman to resist, or 4) deceiving the woman to mistake the defendant’s identity. In Thai law, the mens rea, regarded as the internal element of a crime, requires only the intention to commit the actus reus.

Therefore, in the Thai legal framework, consent or the victim’s state of mind is not explicitly included in either the actus reus or mens rea of the crime. Thus, the law does not necessitate the examination of the victim’s consent in rape cases. In the absence of any formal inclusion of consent in the crime of rape, many scholars have long debated whether consent could be implied in the text of the law. Many believe that the victim’s consent is implicitly encompassed within the actus reus requirements of the use of force and sexual intercourse. See Duangkangtai (2015). However, the court has yet to adopt and establish the interpretation that consent is included in the actus reus requirement. See Bunmee (2010) and Duangkangtai (2015). Consent therefore is not a contentious issue in Thai rape law.

Furthermore, it is crucial to note that Thai rape law emphasizes the proof of the guilty act (actus reus), whereas in English law, the emphasis is typically on the guilty mind, specifically whether the defendant believed that the victim consented. As this montage will demonstrate, the Thai focus on the guilty act necessitates tangible and embodied proof of rape. Another way to explain the important distinctions between the Thai and Anglo-American models of rape is to describe the former as a force-based model, prevalent in civil law jurisdictions, and the latter as a consent-based model, prevalent in common law jurisdictions. See Eriksson (2011).

prove that sexual intercourse had occurred and sometimes even the defendant's intent to commit the crime. While these detailed reports helped the courts in their legal doctrinal analysis, the graphic images of these bodily wounds also tended to confirm the image of women in rape law as poor and pitiful victims of extreme violence rather than autonomous legal subjects capable of granting or withholding consent.

The Thai court's usage of medical reports after 1956, nevertheless, was not an innovation. Wounds, injuries, dead bodies, and human psychology are deeply implicated with law and legal trials. The medical advancement that provides narratives and understanding about human bodies and their decay also goes hand in hand with the development of new legal doctrines, rules, and procedures.⁴⁸ While recognizing the complexity and history of the medico-legal regime, this montage intends to examine a specific legal technique of medico-legal interpretation that the Thai Supreme Court has employed to legally interpret the wording of the 1956 Penal Code, particularly the requirement of forced sexual intercourse as the most important element to establish the crime of rape. On the one hand, the montage shows that the court relied on these medical reports to justify and legitimize the judicial interpretation of the code. On the other hand, the excessive and disturbing graphic description of the female bodies in the reports also renders it easier for the court to visualize, fantasize, and speculate about rape as an event told through wounded and injured bodies. Ultimately, the montage will illustrate how the legal technique of medico-legal interpretation enables the court to conjure up legitimate and medically certified images of the victims' bodies, sometimes only of wounds and injuries without the rest of the bodies, and how these images were used to aid the textual doctrinal interpretation of the code. It is through the function of the technique, rather than the court's conscious or unconscious attempt to discredit the victims, that the victim's voice and story are erased. To examine this technique, I will first look at a series of cases involving the attempted rape of little girls by adult males and, second, the Thai Supreme Court's attempt to formulate a legal definition of sexual intercourse.

In the first group of cases, the Supreme Court had already found that the victims were all underage and lacked the capacity to consent to sexual intercourse. However, the court needed to further decide whether the defendants were guilty of rape as opposed to attempted rape.⁴⁹ Specifically, the court had to determine whether sexual intercourse between a young girl and a grown man is possible at all. If such act is impossible, the defendants would only be guilty of attempted rape with reduced sentences. In a case decided in 1978, the Supreme Court ruled that the defendant was not guilty of rape but only of attempted rape because when he tried to penetrate the vagina of a female child, it was too small for his penis to penetrate and the attempts only left wounds around her sexual organs (*Supreme Court Judgment 1673/2521*). Even though the court accepted that, due to the scattered wounds on the victim's body, the defendant had evidently tried to penetrate the victim, because the size of her vagina rendered the act of sexual intercourse

⁴⁸ In the area of rape law, Kolsky (2010) documented how the colonial courts in India used medical reports, expert witnesses, and the victim's bodies to establish evidence of "real rape" while regarding the female victim's voices as untrustworthy. Bourke (Bourke, 2007; Bourke, 2012) splendidly shows how medical and psychiatric publications and knowledge influenced both legal doctrines, such as *mens rea*, and trials of rape in England and the United States. In the Thai context, Pearson (2020) traces the arrival of modern medicine in Siam at the end of the 19th century and how this modern knowledge affected the legal articulation of death. Yet, the use of bodies as evidence in Siam could be traced further back to the Three Seals Law, where the compensation for the wrong of *chū* depended on whether the adulterer touched, kissed, or had sexual intercourse with the female victim. The history of Thai law and the body is yet to be written.

⁴⁹ Sections 80–82 of the current Thai Penal Code define an attempt to commit a crime. Essentially, a person attempts to commit a crime when the wrongful act is impossible to carry out, the person voluntarily abandons the wrongful act, and the person neither completes the act nor carries it to the intended result. If a person is found to attempt to commit a crime, his or her sentence will be reduced.

impossible, the defendant was found guilty only of attempted rape. In a later case decided in 1991, the court found that a defendant had not penetrated the victim (his daughter) but simply rubbed his penis around her vagina, as evident in the medical confirmation of abrasive wounds. Therefore, the defendant had no intention to rape her. More recently, in 2012, the Supreme Court arbitrarily ruled that the reddened wounds around the victim's sexual organs did indeed indicate the defendant's intention to rape her (*Supreme Court Judgment 4164/2555*). However, since the victim was only six years old, it was impossible for the defendant to penetrate and, hence rape the child. The impossibility of completing the intended crime meant that the defendant could be found guilty only of attempted rape, even though he had made this attempt on more than ten occasions. From these cases, the court's distinction between rape and attempted rape based on the size-compatibility of the parties' sexual organs appears to have been founded on judicial pseudo-science and the judges' own observation of the victim's wounds without any attempt to medically prove the impossibility of the penetrative act. The images of the female bodies from the reports allow the court to further fantasize the manner of rape, and use that scientifically supported fantasy to aid the interpretation of the law.

In a second group of cases, the court's reliance on and manipulation of medical reports can be illustrated in a debate on whether the act of ejaculation, as evidenced by the trace of seminal fluid on the victim's body, or penetration, proved by wounds around the victim's vagina, should be the deciding factor in determining whether sexual intercourse had fully taken place. This debate derives from a precedent case in 1966 holding that a person was guilty of rape when he had penetrated into the victim's vagina for about one finger joint (*ongkhulī อongkhulī*), even without ejaculating or tearing the victim's hymen (*Supreme Court Judgment 1133/2509*). The Supreme Court in 1989 settled the debate and declared that traces of seminal fluid, whether inside or outside the victim's vagina, could never be used as evidence for or against the occurrence of sexual intercourse between the parties (*Supreme Court Judgment 1646/2532*). The act of ejaculation, the court reasoned, did not sufficiently signify the accomplishment of sexual intercourse as laypeople understood it. Instead, the court concluded that as long as the defendant penetrated the victim's vagina, even slightly, the defendant could be guilty of rape. In other words, a rapist would not be found guilty of rape if his sexual organs only made contact with the victim through the use of force; he could only be found guilty of rape if the contact turned into penetration.⁵⁰

While the Supreme Court justices relied on graphic details of bodily wounds to guide their legal interpretation, they would paradoxically ignore the medical reports in cases of gang rape or where extreme violence was evident. As we have seen, the wording of section 276 on rape in the 1956 Penal Code allows the court to give due weight to the evidence of coercion rather than engaging in the task of inferring the victim's will and consent. The focus on physical coercion and violence in rape was also intensified by a minor yet impactful legislative change following the successful military coup of 1971. To legitimize the regime, the junta claimed the purpose of the coup was to protect peace and public order. The regime issued a new decree imposing harsher punishment on gang rape and prohibiting any private settlement between the parties if the rape occurred in public or resulted in serious injuries or the death of the victim (*Announcement of the Revolutionary Council No 11, 1971*). As the coup leaders sought to establish their legitimacy to rule by disseminating the images of injured and decimated bodies, the Supreme Court

⁵⁰ The court's imagination of sexual intercourse as a penetrative act takes its most strange form in a case decided in 2010 (*Supreme Court Judgment 15309/2553*). This case does not directly involve the use of medical report since the report might not be of much help when the sexual activities are oral. However, the court distinguished between different oral acts in order to mark the designated point of penetration in oral sexual activities. See Bunmee (2019).

corroborated their efforts by tracing the images of gang-raped women who had lost the ability even to resist such atrocity.

After the legislative changes, the number of gang rape prosecutions and appeals surged.⁵¹ In these cases, the Supreme Court seemed to forego scrutinizing the wounds on the victim's body as evidence of the crime but focused instead on narrating the violence that the victim received (see *Supreme Court judgment 2770/2515*; *Supreme Court judgment 527/2518*; *Supreme Court judgment 2740/2523*). The violent event of gang rape is described by the court as effectively "incapacitating the woman to resist" (*Supreme Court judgment 2770/2515*; *Supreme Court judgment 3863/2533*). The legal term "incapacitating the woman to resist" was also used in a case where the victim was intoxicated and lost the ability to resist (*Supreme Court judgment 2382/2522*). In the cases of gang rape, the females were portrayed as the victims of extreme male violence that totally rendered physical and mental resistance impossible. To construct the female subjects as the victim of violence, the court narrated in detail the events that transpired, such as the place of the occurrence and the number of rapists involved. The court also provided the socio-economic backgrounds of both the victim and the rapists to further demonstrate the violence of the attack, such as the age gap between the victim and the rapists (*Supreme Court judgment 2770/2515*).⁵² Even without referring to the medical reports, the court maintained the construction of women as voiceless victims of violence. This image of the thoroughly terrorized victims recalls the image of village women, imagined by the RRPC to legitimize their claim to overwrite the women's autonomy. Similarly, the court's visualization of the gang-raped victims, and the corresponding image of the rampant gang rapists as violent and dangerous criminals, also authorizes the claim of the state to rule. The atmosphere of criminality built on these images justifies and legitimatizes not only the need for harsher punishment but also for a stronger state, established by the coup, to protect peace and public order.

Unlike the experimental period after enactment of the 1908 Penal Code, the period following the drafting and implementation of the 1956 Penal Code made evident a set of new legal techniques and, thus, a new conceptualization of rape. By 1956, the Thai nation-state had taken a concrete form and jurists assumed the role of servants of the state. These factors contributed directly to the changing legal techniques used by both legal drafters and judges. The RRPC incorporated old casuistry techniques that had been practised since the era of the 1908 Code into a new imagining of the Thai nation-state, populated with people of various races, roles, and occupations. This resulted in a form of law-making that was textually positivistic yet visually nationalistic. Consequently, the new female subjects of the crime of rape were interpellated based on the urban-rural discriminatory divide. Similarly, the judges also exploited the availability and credibility of medical reports to visualize, fantasize, and speculate on the occurrence of rape. They also depended on the graphic descriptions produced in the reports to aid the legal interpretation of texts and

⁵¹ Many gang rape cases went all the way to the Supreme Court because of technical legal questions concerning prosecutorial discretion, such as whether a person prosecuted for gang rape could be prosecuted based on other offences, or whether a person assisting the rape but refraining from having sexual intercourse with the victim could be convicted of gang rape. These types of cases suggest confusion over the criminality of gang rape even at the prosecutorial level. Like other group criminal liabilities such as conspiracy and crime syndicate (known as *ang-yi*; *อังยี* in Thai), the criminality of the accused derives from the mere fact that the accused is a member of a gang or syndicate that is involved in a criminal act. In other words, gang rape is prosecuted based solely on the accused's association with a criminal gang, while rape is prosecuted based on the guilty act and mind of an individual regardless of his or her association with an organization. While categorized as sexual offences, both rape and gang rape seem to operate on different fundamental principles and logics as to why the acts are recognized as crimes in the first place.

⁵² Somchai Preechasilpakul published a comprehensive account of how the Supreme Court relied on the socio-economic backgrounds of rapists and victims to animate and justify their judgment on rape cases. See Preechasilpakul (2015).

doctrines of rape. The new female subjects constructed by these techniques were the voiceless female victims whose injured bodies became a scene of violent violation. Finally, in the legislative amendment enacted under the junta in 1971, female subjects of gang rape were simply assumed to have injured or deceased bodies. Many legal cases during that time did not delve into the subtleties of legal doctrine or statutory interpretation, and instead quickly ruled that the violence inflicted on female bodies was rape. All in all, this montage presents a different set of legal techniques that constructed and utilized images to animate the crime of rape, effectively erasing the agency, the voices, and the stories of the female subjects. These subjects, in return, were used to legitimize the legal drafters' nationalism, the court's pseudo-science sexual fantasy, and finally the authoritarian state's violence.

6. Conclusion

The four montages depict different techniques used to constitute a legal subject of rape. Throughout the montages, jurists and judges of different eras, races, training, and responsibilities have attempted to devise various legal techniques that would allow them to complete their lawyerly tasks of creating, implementing, and adjudicating the law. Kirkpatrick, a Western judge in Siam at the crossroad to modernity, imagined a legal form of rape as a crime violating an individual female victim and thus relied on the technique of judicial narration to impute facts of the case to the Western criminal elements of rape. The laypeople and the court in the *issaraphap* regime, however, understood sexual assaults and other violence against women through the lens of social relationships, specifically as a breach of interpersonal *issaraphap* relations and the community hierarchy. The subject of the breach was not a person but a set of social relationships. In the third montage, the Western-trained Thai jurists took it into their own hands to modernize and criminalize rape. They were occupied with the lawyers' urgent needs for legal doctrines and the practical application of those doctrines. At the same time, their counterparts, the judges in the modern Siamese courts, also found themselves confounded as to how to apply and interpret the new legal code and legal doctrines. What jurists and judges ended up producing through their techniques was not a legal subject as such but a particular and peculiar lawyerly language and knowledge to discuss rape. The final montage presented a new kind of legal technique, one that involves the use of images and visualization in the task of legal drafting and judicial judgment. While clearer images of the subjects of rape emerged from this montage, the subjects of rape became bifurcated. There seemed to be two sets of rape law: one for urban women and another for rural women. Also, with the use of medical reports to paint the image of rape, wounds and injuries on the victims' bodies have become the subject of rape law. Who is the subject of rape, and how do rape laws constitute such subjects? It appears that these questions have multiple answers. Different legal techniques produced different legal subjects. All jurists and judges were engaged in specific legal mandates of their eras. Yet, throughout the multiplicity of legal techniques, legal actors, and legal projects, there are two themes that run through all the montages: the state and modernity.

Through the four montages, rape takes on various legal forms, shifting from a breach of the interpersonal *issaraphap* relation to a crime focused on the rapist's force and the victim's mental and physical resistance, and finally to a sexual crime where the victim's femininity was constructed based on an urban/rural divide and the injuries resulting from sexual violence. These changes in the laws—from a private matter to a crime and ultimately to a sexual crime—not only reflect the rapid shifts in legal techniques but, more alarmingly, indicate a reduced distance between the Thai sovereign state and its subjects in less than a century. When the violence was treated as a social relation under the

issaraphap regime, law was considered a community-based medium, mediating and distancing the almost absent state from its subjects. As the violence was formally criminalized and sanctioned by the state in 1908, the law as a social relation was supplanted by jurist-made law. Professionalized modern lawyers claimed a monopoly on knowledge about violence against women and established a legal authority, through law codes and scholarship, to determine the consequences of such acts. Lawyers, guided more by their profession than nationalism, became mediators between the still amorphous nation-state, expressing its authority through obscure lawyers' language, and its equally ill-defined legal subjects. The final construction of rape in 1956 coincided not only with the rise of a nation-state that needed justification and legitimization through gendered discourses but also with the court's reliance on medico-legal evidence to buttress their fantasy and speculation of rape and the victim. The interplay among the nation-state, gender dynamics, scientific knowledge, and the use of images in these legal techniques requires a further and more careful investigation. However, the final montage suggests increasing complexity in both state formation and its dependence on and relationship with the law. From the first to the fourth montage, one can discern the transformation of law regarding rape from a decentralized form of social control regulating communal and interpersonal relations to an assemblage of legal and political techniques within a more opaque modern nation-state. This transformation correlates with the changing form of the state from the late 19th century to the present.

Furthermore, the four montages coincide with the period of legal modernization in Thailand, extending from the late 19th century to the present. The discourse of modernity and the quest to become modern serve as both the impetus and motivation for all the techniques described in this article, from Kirkpatrick to Prince Rabi and the RRPC. These figures had differing visions and understandings of what legal modernity in Thailand should entail. Surprisingly, none of these versions of legal modernity place direct emphasis on the familiar trope of gender equality or individual autonomy as the lynch-pin of their legal modernity. None of the lawyers, as their techniques reveal, perceived law as a means of protecting autonomous victims of rape; however, all of them, in their own ways, engaged seriously with the doctrinal and practical operation of rape law in Thailand. By re-describing the story of Thailand aiming to become modern as a series of separate yet interconnected montages of legal techniques and practices, different forms of legal modernities in Thailand emerged as multivalent. The forms of modernity depicted in the four montages are no longer singular, and the transition from one form to another is neither linear nor straightforward. Yet, despite the multiplying, conflicting, and complementary forms of legal modernity in Thailand, all these complexities are essential parts of the same long, ongoing project of Siamese/Thai modernization from the late 19th century to the present.

Finally, despite the pluralities in both legal techniques and legal subjects of rape in Thailand, the four montages may still offer some instructive insights to comprehend Nalinrat's public protest in 2020. In terms of methodology, this article has shown that the study of rape law does not have to be exclusively legal, doctrinal, positivistic, and so incubated in the legal world. Nor does the study need to be empirical, social, historical, and so isolated from legal principles and technicalities. Instead, by paying attention to the legal techniques of lawyers and institutions, the account of rape law can be perceived as legally social. Applying this methodology to the protest, the gender movement in Thailand in 2020 can be viewed as a new montage in which girls, women, and their allies spoke up and sought to challenge the monopoly of schools, the state, and the law in controlling and deciding matters of sexual violence. Read in terms of legal techniques, the silence of the law in response to Nalinrat's public protest may be interpreted as a lack of both legal techniques for lawyers to heed and incorporate the victims' perspectives into the law, and political techniques for government officials to translate the people's demands into the

language and operation of the law. The invention and cultivation of these legal and political techniques, however, will be neither easy nor straightforward. It will require more than just a common politico-legal goal of recognizing individual autonomy or advancement of women's rights.

As the 2020 gender movement snowballed into a nationwide protest against the junta regime, the cumulation of both gender and political issues testifies to the current entanglements of the state, law, and gender in Thailand. This entanglement, as this article has shown, is neither novel nor unexpected, but can be perceived as the lingering experience of modernity. However, the modernity that the protest invoked was no longer the creation of a modern legal profession or a legitimization of a modern nation-state, but a form of modernity understood through the prism of human rights and gender equality. This form of modernity, however, must be built on the current form of rape law in Thailand that has inherited diverse contradictions: nationalist presumptions, pseudo-science, pedantic legal doctrinal interpretation, linguistic differences, and the vestiges of the *issaraphap* regime. What technique and in what form a new legal understanding of rape and the female subject will emerge remains to be seen.

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