



ชื่อเรื่อง: The Concept of Drug Offenses in Thai Criminal Justice

ชื่อผู้แต่ง: Alexandre Chitov

การอ้างอิงที่แน่นำ: Alexandre Chitov, 'The Concept of Drug Offenses in Thai Criminal Justice' (2566) 52(1) Thammasat Law Journal

ผู้สนับสนุนหลัก

Tax and Legal Counsellors

Seri Manop & Doyle



SATYAPON
& PARTNERS
THAILAND Intellectual Property Law Firm

CHANDLER MHM

ผู้สนับสนุนร่วม

CSBC
LAW OFFICES
www.csbc-law.com



DS&B DOMNERN
SOMGIAT & BOONMA

WEERAWONG C&P
WEERAWONG, CHINNAVAT & PARTNERS LTD.

โครงการวารสารนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์

คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ เลขที่ 2 ถนนพระจันทร์ แขวงพระบรมมหาราชวัง

เขตพระนคร กรุงเทพมหานคร 10200 โทร. 02 613 2162 อีเมล tu.lawjournal@tu.ac.th



The Concept of Drug Offenses in Thai Criminal Justice

ความผิดเกี่ยวกับยาเสพติดในกระบวนการยุติธรรม

ทางอาญาไทย*

Alexandre Chitov

Associate Professor, Faculty of Law, Chiang Mai University

อเล็กซานเดอร์ ชีอตอฟ

รองศาสตราจารย์ คณะนิติศาสตร์ มหาวิทยาลัยเชียงใหม่

วันที่รับบทความ 17 กรกฎาคม 2565; วันแก้ไขบทความ 16 กุมภาพันธ์ 2566; วันตอบรับบทความ 27 กุมภาพันธ์ 2566

Abstract

The recent developments of Thai law and policy concerning illicit use of drugs is characterized firstly by decriminalization, and secondly by attempting to introduce different rehabilitation programs as alternatives to imprisonment. The concept of Thai criminal law in relation of drug offenses, however, has not changed. This concept is determined by two principles. The first principle is that illegality of possessing a specific kind of drug is determined by an administrative regulation within five categories of narcotics. The second principle of Thai drug offenses law is the distinction between

* The author would like to thank anonymous reviewers for correcting the errors of the original draft of the paper. The possible remaining errors are of the author alone.

the intent to sell an illegal substance and the intent to possess it for personal use. The new law of drug offenses may not lead to a dramatic drop of cases because of the widespread practice of confessions. However, the new law affirms the principle of the individualization of punishment depending on personal characteristics of offenders. This can help Thai judges to better evaluate the nature of confessions made by the suspects and the accused. One implication of the new Drug Code for criminal justice is that the investigation officials will have to do much more work in gathering evidence than it was under the old law. The new law attempts to introduce a comprehensive system of governmental control over the abuse of narcotic substances that will be extremely difficult to enforce in Thai cultural and social context. The article offers an alternative concept of drug offenses.

Keywords: drug offenses, legal reform, criminal law, confession, evidence.

บทคัดย่อ

การลดทอนความเป็นอาชญากรรมของคดียาเสพติด และการใช้โปรแกรมบำบัดฟื้นฟูเพื่อให้ผู้ติดยาเสพติดกลับคืนสู่สังคมเพื่อทดแทนการจำคุก แสดงให้เห็นถึงพัฒนาการล่าสุดของกฎหมายไทย และนโยบายด้านยาเสพติด อย่างไรก็ตามลักษณะพื้นฐานของกระบวนการยุติธรรมทางอาญาของไทย ที่เกี่ยวข้องกับยาเสพติดยังไม่เปลี่ยนแปลง ลักษณะนี้ถูกกำหนดโดยหลักการสองประการ หลักการแรกคือความผิดกฎหมายในการครอบครองยาเสพติดชนิดเดชนิดหนึ่งนั้นถูกกำหนดโดยกฎหมายของผู้ฝ่าฝืน ให้อยู่ภายใต้ประมวลกฎหมายวิธีพิจารณาความผิด หลักการที่สองของกฎหมายว่าด้วยความผิดเกี่ยวกับยาเสพติดของไทยคือความแตกต่างระหว่างการครอบครองยาเสพติดเพื่อจำหน่ายและการครอบครองยาเสพติดเพื่อเสพ กฎหมายใหม่อาจไม่นำไปสู่การลดลงของจำนวนคดียาเสพติด เนื่องจากในทางปฏิบัติยังมีการยอมรับสารภาพเพื่อให้คดีจบไป อย่างไรก็ตามประมวลกฎหมายยาเสพติด ที่กำหนดให้ต้องปฏิบัติตามหลักการปรับโถงให้เหมาะสมแก่เจ้าหน้าที่และดุลยพินิจของศาล ในการเลือกมาตรฐานคดีที่ต้องการลงโทษ ซึ่งขึ้นอยู่กับลักษณะส่วนบุคคลของผู้กระทำความผิด ช่วยให้ศาลสามารถประเมินลักษณะของคดีที่ต้องลงโทษและจำเลยได้ดีขึ้น แต่อีกนัยหนึ่ง ผลของประมวลกฎหมายยาเสพติดฉบับใหม่คือพนักงานสอบสวนจะต้องทำงานมากกว่าแต่ก่อนในการรวบรวมหลักฐานกฎหมายใหม่พยายามที่จัดตั้งกลไกควบคุมของรัฐบาลที่ครอบคลุม สิ่งนี้จะเป็นเรื่องยากอย่างยิ่ง ที่จะบังคับใช้ในบริบททางวัฒนธรรมและสังคมของประเทศไทย บทความนี้นำเสนอแนวคิดทางเลือกของ



อาชญากรรมยาเสพติดที่สามารถแก้ไขปัญหาความเป็นธรรมของกระบวนการพิจารณาคดีสำหรับผู้ต้องหาในคดียาเสพติดโดยไม่ลดทอนประสิทธิภาพการบังคับใช้กฎหมาย

คำสำคัญ: ความผิดเกี่ยวกับยาเสพติด การปฏิรูปกฎหมาย กฎหมายอาญา การยอมรับสารภาพหลักฐาน

1. Introduction

Drug offenses in Thailand deserve much more attention and a much deeper analysis than what can be offered here within a single paper. They receive a significant international attention since the proliferation of drug trade in the infamous Golden Triangle and with massive human rights violations during the so-called “War on Drugs” conducted by a former Thai Prime Minister Thaksin Shinawatra.¹ The Thaksin’s legacy left a lasting imprint on Thai criminal justice, which was until recently characterized by draconian laws against drug sellers and even users. In the end, the experiment to suppress drug offenses by means of harsh criminal sanctions turned out unsuccessful. Thai government could not effectively suppress drug trade and its consumption. In 2021, a new law was enacted followed by the legalization of cannabis first for medical use, and later for personal use.² The underlying reason for the reform was an attempt to reduce an overwhelming prison population in Thailand as well as its economic cost and to improve the quality of rehabilitation programs. The previous policies to reduce substance abuse proved ineffective. Thailand occupies the leading position in the South-East Asia in terms of methamphetamine seizures in 2022.³

The recent developments of Thai law concerning illicit use of drugs is characterized firstly by decriminalization, and secondly by attempting to introduce different rehabilitation programs as alternatives to imprisonment. However, a recent scandal involving a Buddhist rehabilitation center in Kanchanaburi (Wat Tha Phu Rat

¹ David Streckfuss, *Truth on trial in Thailand: Defamation, treason, and lèse-majesté* (London: Routledge 2010) 311.

² ‘Thailand cannabis: From a war on drugs to weed curries’ (BBC News, 21 June 2022) <<https://www.bbc.com/news/61836019>> accessed 15 July 2022.

‘Notifications of the Ministry of Health Re: Specifying the Category V Narcotic Substance 2565 BE (2022 AD)’ (Royal Thai Government Gazette, 8 February 2022) <http://www.ratchakitcha.soc.go.th/DATA/PDF/2565/E/035/T_0008.PDF> accessed 15 July 2022.

³ UNODC, ‘Synthetic Drugs in East and Southeast Asia: Latest developments and challenges’ (2022) <https://www.unodc.org/roseap/uploads/documents/Publications/2022/Synthetic_Drugs_in_East_and_South_east_Asia_2022_web.pdf> accessed 23 November 2022.



Bamrung's drug rehabilitation facility)⁴ undermined trust in this reform after the accusation of a massive abuse of the rehabilitation measures committed jointly by “organized gang involving police, temple and rescue workers”⁵ was made.

The reform of Thai drug offenses law is geared not only by the realization that imprisonment does not prevent further reoffending. But it is also moved by practical considerations to reduce prison population and the cost of penal system. Drug-related offenses represent a special category of criminal cases in Thailand. They constitute by large the majority of all criminal cases heard by Thai courts and yield the most prison sentences.⁶ At the time of writing (July 2022), there are over 175,000 prisoners convicted of drug offenses, and almost 38,000 detainees who are either suspects or accused of crimes related to drugs.⁷ However, there is a significant drop in the number of the detained people on the illegal drug charges comparing to the previous year. In July 2021, there were more than 200,000 convicted prisoners and 45,000 detainees who were either suspects or accused of drug-related crimes.⁸ The reduction of the convicted prisoners as well as other categories of the detainees is explained by the fundamental reform of Thai drug offenses law.

⁴ Wassayos Ngamkham and Piyarat Chongcharoen, ‘Temple rehab a 'site for torture' (Bangkok Post, 23 September 2021) <<https://www.bangkokpost.com/thailand/general/2186127/temple-rehab-a-site-for-torture>> accessed 15 July 2022.

⁵ ibid.

⁶ Amy Sawitta Lefevre, ‘Soaring prison population prompts Thailand to re-think 'lost' drug war’ (Reuters, 17 July 2016) <<https://www.reuters.com/article/us-drugs-thailand-prisons/soaring-prison-population-prompts-thailand-to-re-think-lost-drug-war-idUSKCN0ZX01J>> accessed 10 July 2020; Samantha Jeffries and Chontit Chuenurah, ‘Gender and imprisonment in Thailand: Exploring the trends and understanding the drivers’ (2016) 45 International Journal of Law, Crime and Justice, 75-102. For the updated statistics see http://www.correct.go.th/eng/number_by_type_of_offenses.html.

⁷ Department of Corrections, Ministry of Justice, ‘Statistics report of prisoners in drug cases across the country’ (July 1, 2022) <http://www.correct.go.th/rt103pdf/report_index.php?report=drug> accessed 15 July 2022.

⁸ ibid.

2. Thai Drug Offenses Law and Its Reform

Thai drug offenses law appears to be a very dynamic legal branch. Drug offenses were largely contained in a separate legislation: Narcotics Control Act, B.E. 2519 (1976),⁹ Narcotics Act, B.E. 2522 (1979),¹⁰ as well as many other statutes. In 2002, during the time when Thaksin Shinawatra was a prime minister, the law was amended. Increased penalties were introduced even for possession of small amounts of illegal substances. The legislation was continuously amended until it was finally repealed in 2021 with the promulgation of the Act to Use the Narcotics Code B.E. 2564,¹¹ and the Narcotics Case Trial Act (No. 2) B.E. 2564.¹² These acts came into effect on December 9, 2021.

The new law introduced the concept of a ‘serious drug offense’. It is defined as “production, import, export, distribution, and possession of drugs, except possession for personal use, as well as conspiring, supporting, assisting, or attempting to commit such offenses.”¹³ The personal use and possession for personal use offenses are not considered as serious drug offenses, although they are still criminalized. The penalty for personal use is very low: imprisonment not exceeding one year and/or a fine of up to THB 20,000.¹⁴ The possession for personal use, however, is penalized by two years of imprisonment and/or a fine of up to THB 40,000.¹⁵ Where a possessor of drugs for

⁹ พระราชบัญญัติป้องกันและปราบปรามยาเสพติด พ.ศ. 2519 [Narcotics Control Act, B.E. 2519 (1976)] <https://www.oncb.go.th/Publishing/Images/Pages/NARCOTICS_LAW/NARCOTICS_CONTROL_ACT.pdf> accessed 15 July 2022.

¹⁰ พระราชบัญญัติยาเสพติดให้โทษ พ.ศ. 2522 <<http://web.krisdika.go.th/data/law/law2/%C207/%C207-20-9999-up date.pdf>> accessed 15 July 2022.

¹¹ พระราชบัญญัติใช้ประมวลกฎหมายยาเสพติด พ.ศ. 2564 <http://www.ratchakitcha.soc.go.th/DATA/PDF/2564/A/073/T_0001.PDF> accessed 15 July 2022.

¹² พระราชบัญญัติวิธีพิจารณาคดียาเสพติด (ฉบับที่ 2) พ.ศ. 2564 <http://www.ratchakitcha.soc.go.th/DATA/PDF/2564/A/073/T_0081.PDF> accessed 15 July 2022.

¹³ ประมวลกฎหมายยาเสพติด พ.ศ. 2564 มาตรา [Section] 1.

¹⁴ ibid Section 162.

¹⁵ ibid Section 164.



personal use is not involved in another crime, the court may issue an alternative sentence to imprisonment, e.g., undertaking a drug treatment program.¹⁶

In contrast, possession of illicit drugs with the intent to sell or otherwise distribute can still involve harsh penalties: imprisonment for not more than fifteen years and a fine not exceeding THB 1.5 million if there are no aggravating circumstances.¹⁷ The death penalty can be imposed only on a leader of a criminal network or if national security is affected.¹⁸ The threshold of minimum sentences is removed for a few exceptions.¹⁹ In cases where the minimum is still required, the courts receive extensive powers to reduce penalties below the minimum after taking into account the defendant's individual circumstances.²⁰ The removal of the minimum sentences in most cases allows judges to substitute prison sentences with probation.

As in the previous law, the amount of penalty depends on the category of the illegal drug and on the intent of possessing it. These are the two principles which constitute the core of the concept of a drug offense in Thai criminal law. In order to punish a user of drugs, the drug itself must be specified in one of the five categories of narcotics.²¹ Putting on the list is done by an administrative regulation.²² In other words, criminalization or decriminalization of the use of a particular drug is done not by an act of legislation, but by administrative discretion. The way how administrative decisions are made is less transparent than when passing legislative acts and can be easily abused in any jurisdiction of law.²³ The new code is by no means a text which can be easily understood by ordinary Thais.²⁴ Thai law attempts to install an extremely complicated system of administrative control over the production, movement

¹⁶ ibid Section 166.

¹⁷ ibid Section 145.

¹⁸ ibid.

¹⁹ ibid Sections 145, 171, 172.

²⁰ ibid Section 152.

²¹ ibid Section 29.

²² ibid Section 30.

²³ Lord Denning, *The Discipline of Law* (London: Butterworth 1979) 61.

²⁴ This is the opinion of many Thai law students in my criminology class in Chiang Mai University.

(including export and import), distribution, and use of an enormous and ever-increasing number of substances that can be potentially abused. The necessity of administrative control over those substances cannot be questioned. What can and must be questioned is the attempt to define drug offenses as depending on a decision of an administrative body to list a particular substance in any of the five categories mentioned in the legislation.

The second principle of Thai drug offenses law is the distinction between the intent to sell or otherwise distribute an illegal substance and the intent to possess it for personal use. In practice, it leads to the separation of drug offenders into two categories. One is the distributors together with all those who materially benefit from this distribution, and another is the users. The first is punished much harsher than the second. Under the old Thai legislation, anyone found in possession of a certain amount of one of the listed drugs was “regarded” (Thai: ให้ถือว่า) intending them for sale. At one point, the legislation was amended by replacing the word “regarded” with “presumed” (Thai: ให้สันนิษฐานว่า).²⁵ This amendment was praised as a significant improvement of the drug offenses legislation.²⁶

The problem with the old law was whether it violated the standard of the presumption of innocence or not. The accused was regarded or presumed, according to the Section 15 (para 2) of the old Narcotics Act B. E. 2522, to have the intention to sell simply on the basis of the amount found in his or her possession. This presumption can be rebuttable or irrebuttable.²⁷ The rebuttable presumption shifts the burden of

²⁵ พระราชบัญญัติยาเสพติดให้โทษ พ.ศ. 2522 มาตรา [Section] 15 และ 17 <<http://web.krisdika.go.th/data/law/law2/%C207/%C207-20-9999-update.pdf>> accessed 15 July 2022.

²⁶ Akbar Patcharavalan and Gloria Lai, ‘Thailand amends drug law to reduce penalties and ensure more proportionate sentencing’ (International Drug Policy Consortium, 15 February 2017) <<https://idpc.net/blog/2017/02/thailand-amends-drug-law-to-reduce-penalties-and-ensure-more-proportionate-sentencing>> accessed 15 July 2022.

²⁷ Adrian Keane and Paul McKeown, *The Modern Law of Evidence* (Oxford University Press 2012) 653; อุดม รัชอมฤต, ‘ผลของข้อสันนิษฐานตามกฎหมายต่อการกำหนดหน้าที่นำสืบในคดีอาญา’ (1997) 25 (2) วารสารนิติศาสตร์ 304, 312 <<http://www.tulawcenter.org/sites/default/files/Nitisat%20Journal%20Vol.25%20Iss.2.pdf>> accessed 23 November 2022.



proof on the accused who must prove his innocence if the prosecution can prove the fact of possession. The irrebuttable presumption does not permit any defense. In criminal cases, the irrefutable presumption is considered in the developed countries as violating the presumption of innocence.²⁸ In fact, even rebuttable presumption in drug cases was sometimes successfully challenged in some jurisdictions as violating the presumption of innocence as well.²⁹ Accordingly, a number of human rights experts express the view that establishing the intent to sell illegal substances from the specified amount that is found in the possession of the defendant does violate this fundamental principle.³⁰

There is, however, a contrary view according to which the conviction of a person as guilty of possessing drugs with the intention to sell on the basis of a specified amount does not contradict the presumption of innocence.³¹ In Thailand, this view was advanced by Prof. Dr. Udom Ratta-amarat.³² He argued that reverse burden is necessary in the cases where the proof of criminal intent is hardly possible directly, therefore the legislator establishes certain facts as sufficient in indicating the presence of criminal intent.³³ If the prosecutor can prove that the defendant had a certain amount of illegal substances, then it is the burden of defendant to provide additional evidence to prove his innocence. Prof. Udom describes it as the persuasive burden which is different from the evidential burden.³⁴ Since the latter is always on the prosecution, the principle of the presumption of innocence is not violated. The

²⁸ Jefferson L. Ingram, *Criminal Evidence* (10th edn, Lexis-Nexis 2009) 148-149.

²⁹ Simon NM Young, 'Human Rights in Hong Kong Criminal Trials' in Paul Roberts and Jill Hunter (eds) *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Oxford: Hart Publishing 2012) 72.

³⁰ United Nations, High Commissioner for Human Rights (OHCHR), 'Drug-related Offenses, Criminal Justice Responses and the Use of the Death Penalty in South-East Asia' (2019) <<https://bangkok.ohchr.org/wp-content/uploads/2020/01/Drug-Related-Offenses-2018.pdf>> accessed 23 November 2022.

³¹ Paul Roberts, 'Drug Dealing and the Presumption of Innocence: The Human Rights Act (Almost) Bites' (2002) 6 (1) *The International Journal of Evidence & Proof* 17, 22.

³² อุดม รัตตอมฤต (n 27).

³³ *ibid* 304-305.

³⁴ *ibid* 310.

distinction between two types of burden of proof is supported by a number of the writers belonging to the tradition of Common law.³⁵

One can agree with the view that reverse burden does not in principle violate the presumption of innocence providing that this presumption is rebuttable and additional mechanisms are in place to prevent the conviction of an innocent defendant.³⁶ Some of those mechanisms are offered in Thai criminal procedural law. The right of the accused to be represented by counsel and the right to gain access to exculpatory evidence in the prosecutor's possession is affirmed, for example, in Section 8 of the Thai Criminal Procedure Code. The right to confront and cross-examine adverse witnesses is protected by Section 87 of the same law. However, in relation to the reversed burden these guarantees alone are not sufficient to ensure that the possessor of an illegal substance is guilty beyond a reasonable doubt.³⁷ It is vital that the court must take into consideration the evidence of the accused that his or her character is inconsistent with the charges against him.³⁸ If the opportunity to present this type of evidence is not actually given to the accused, the principle of the presumption of innocence is violated by bringing conviction on the basis of a mere possession of an illegal substance. There were many reports in the past that point to the fact that the Thai courts interpreted the provisions of the Section 15 (para 2) of the old Narcotics Act B. E. 2522 as irrebuttable and refused to examine the claims of the accused that they were not even aware of the drugs in their possession.³⁹

This practice was challenged before the Thai Constitutional Court which decided in 2002 by the majority of 12 votes to 2 votes that the law did not violate

³⁵ *ibid.* Adrian Keane and Paul McKeown use a similar distinction between the legal burden of proof and the evidential burden of proof. See Adrian Keane and Paul McKeown (n 27) 80.

³⁶ Jackson Allen, 'Rethinking the relationship between reverse burdens and the presumption of innocence' (2021) 25 (2) *The International Journal of Evidence & Proof* 115, 123.

³⁷ ประมวลกฎหมายวิธีพิจารณาความอาญา พ.ศ. 2477 มาตรา [Section] 227.

³⁸ Graham C. Lilly, Daniel J. Capra and Stephen A. Saltzburg, *Principles of Evidence* (St Paul: West Academic Publishing 2019) 84.

³⁹ Nutthanuch Mekara, 'Thai drug laws and practices: disproportionate punishment against women minor drug offenders.' (2020) 1 (1) *Journal of Humanities, Social Sciences, and Arts*, 12-40, 28-30.



the principle of presumption of innocence in defining possession of a certain amount of illegal substances with the intention to distribute.⁴⁰ Even though the majority of the court did not find a constitutional violation in the law itself, the facts have been established: the Thai courts often interpreted the Section 15 (para 2) of the old Narcotics Act B. E. 2522 in the past as establishing an irrebuttable presumption of the intent to distribute if the possession of a certain amount of illicit substances was exceeding the amount written in the legislation.⁴¹ It was noticed by one of the judges in Thai Constitutional Court that accepting an irrebuttable presumption is insufficient for the conclusion that the accused is guilty beyond reasonable doubt.⁴² The Constitutional Court's ruling was made 20 years ago. More recent cases clearly indicate that Thai courts began to consider the presumption as rebuttable.⁴³ In order to be effective, a rebuttable presumption, however, is conditioned by a respectful treatment of the accused by giving him the opportunity to clear himself of the suspicion to possess illegal substances for distribution rather than for a personal use. In real situations, there is always a danger that finding a substance in possession is used to intimidate the accused to make the confession of crime, or there is a danger that the police will fabricate the case by 'informing' a suspect that a significant amount of an illegal substance is found in his possession.⁴⁴

⁴⁰ Thai Constitutional Court 11/2544 (2002) <https://www.constitutionalcourt.or.th/occ_web/download/article/file_import/center11_44.pdf> accessed 23 November 2022.

⁴¹ ibid 112 and 185.

⁴² ibid 186-187.

⁴³ Thai Supreme Court 1047/2563 (2020); นิติบัญญัติที่สันนิษฐานว่า เป็นการกระทำเพื่อจำหน่ายซึ่งยาเสพติดให้โทษประเภทที่น่าสนใจ: ภาระการพิสูจน์ของโจทก์กับบทบัญญัติที่สันนิษฐานว่า เป็นการกระทำเพื่อจำหน่ายซึ่งยาเสพติดให้โทษประเภทที่ 1 (2021) 10 (2) วารสารรามคำแหง ฉบับนิติศาสตร์ [Ramkhamhaeng Law Journal] 241 <<https://so05.tci-thaijo.org/index.php/lawjournal/article/view/256451>> accessed 1 December 2022.

⁴⁴ Lloyd Neubauer, 'Tourists Are Reporting a Dramatic Surge in Harassment by Thai Police' (Time, 25 January 2015) <<https://time.com/3674200/thailand-tourism-police-corruption-shakedown-extortion/>> accessed 15 July 2022. The abuse of police powers is not uniquely a Thai problem. In Russia, police officers fabricated hundreds of cases of drug related offenses. See 'Expendables of the "quota" system' (Istories, 31 March 2021). <<https://istories.media/en/investigations/2021/03/31/expendables-of-the-quota-system/>> accessed 15 November 2022.

In the context of the abundance of the reports on the abuses of power by Thai police,⁴⁵ setting a specific amount of an illicit substance as a major indicator of the intent to sell it, may lead to the wrong convictions if the accused is unaware of his or her right to challenge the statutory presumption of the intent to sell. It is noteworthy that there are some countries where the legislator does not specify the exact amount of the possession of illegal substances that can indicate such an intent.⁴⁶ Despite significant changes in Thai legislation, the exact amount of illicit substances in the possession is still important for establishing the intent to use or the intent to possess, but this amount is now established not by the legislation, but by a ministerial regulation.⁴⁷ In other words, if a person is found in the possession of a smaller quantity than prescribed by the Ministry of Health in a ministerial regulation, the person receives a light punishment or no punishment at all since he or she has it for consumption rather than for distribution.⁴⁸

The reasonableness of defining intent to use or distribute exclusively by the amount of the illicit drug is, however, questionable. Firstly, drug users often share the substances they acquire for personal use among their friends. There are cases that took a significant time for the final decision in which an accused argued that the drugs in his possession were for himself and for the friends rather than for sale.⁴⁹ In those cases, it is not uncommon for a court of the first instance to condemn the accused for the possession to distribute, and for the appeal and the Supreme courts to overturn that decision. Secondly, the sellers may carry a small amount with them.

⁴⁵ Wasant Techawongtham, 'Police power must belong to the people' (Bangkok Post. 4 September 2021) <<https://www.bangkokpost.com/opinion/opinion/2176263/police-power-must-belong-to-the-people>> accessed 15 November 2022.

⁴⁶ Lorenz Böllinger, 'Drug law and policy in Germany and the European community: Recent developments' (2014) 34 (3) Journal of Drug Issues, 491-510, 499-500; German Government, 'Gesetz über den Verkehr mit Betäubungsmitteln' (1981) Para 29-30 <http://www.gesetze-im-internet.de/btmg_1981/BJNR106810981.html> accessed 15 November 2022.

⁴⁷ ประมวลกฎหมายแพ่ง พ.ศ. 2564 มาตรา [Section] 107.

⁴⁸ ibid Section 165.

⁴⁹ Thai Supreme Court 2443/2560 (2017); Thai Supreme Court 1047/2563 (2020).



The controversial issue is whether or not it is according to the principle of legality to let an administrative organ criminalize the possession of a particular substance, and to specify the amount of the substance found in the possession which would involve a heavier penalty. This principle of legality requires that the exact definition of a criminal offense must be established by law alone and its meaning must be clear for those to whom the law is addressed. This principle sometimes is interpreted strictly as *nullum crimen nulla poena sine lege parlamentaria*,⁵⁰ which means that all essential elements of criminal offense must be established by an act of parliament. This strict interpretation finds its clearest expression in the 1789 French Declaration of the Rights of Man and of the Citizen.⁵¹ The European Court of Human Rights interpreted this principle less strictly.⁵² The administrative regulations or executive decrees can specify criminal offenses but they are subject to a number of conditions among which are an easy public accessibility to the regulations and their public awareness.⁵³ In other words, the principle of legality may permit clarification of the norms of criminal law by an administrative regulation if it is necessary for protecting the public interest, but this delegation of the legislative powers must be limited. In the UK, accordingly, a violation of the provision of an administrative regulation does not involve long prison sentences or a threat of death penalty.⁵⁴

One should still welcome the recent legislation. The law facilitates confiscation of the financial proceeds from the illegal trade. The reform of drug offenses law aims

⁵⁰ Maria Kaiafa-Gbandi, ‘Approximation of substantive criminal law provisions in the EU and fundamental principles of criminal law’ in Francesca Galli & Anne Weyembergh (eds) *Approximation of substantive criminal law in the EU. The way forward* (Bruxelles: Editions de L’Université de Bruxelles 2013) 97.

⁵¹ ‘French Declaration of the Rights of Man and of the Citizen’ (1789) Article 8 <<https://www.elysee.fr/en/french-presidency/the-declaration-of-the-rights-of-man-and-of-the-citizen>> accessed 15 November 2022.

⁵² European Court of Human Rights, ‘Guide on Article 7 of the European Convention on Human Rights’ (2022) <https://www.echr.coe.int/Documents/Guide_Art_7_ENG.pdf> accessed 15 November 2022.

⁵³ Cian C. Murphy, ‘The Principle of Legality in Criminal Law Under the ECHR’ (2009) 2 European Human Rights Law Review, 192-207. <<https://ssrn.com/abstract=1513623>> accessed 15 November 2022.

⁵⁴ Gabriel Hallevy. *A Modern Treatise on the Principle of Legality in Criminal Law* (Berlin, Springer-Verlag 2010) 37-38.

at reducing Thai prison overpopulation and substituting punishment with treatment of drug addicts. It shows that Thailand makes a serious effort to make its drug offenses law conform the UN recommendations to promote non-custodial alternatives to prison for people suspected or convicted of minor, non-violent drug offenses.⁵⁵ According to Professor Dr. Surasak Likasitwatanakul, Director of the Center for Criminal Law and Criminology at the Faculty of Law of Thammasat University,⁵⁶ one of the most positive developments of new law is this emphasis on using alternatives to imprisonment. The use of the alternatives may lead to the reduction of recidivism which remains very high. In 2019, around 15% of former offenders return to prison within the first year after being released, around 25% during their second year, and around 32% return to prison during their third year after being released.⁵⁷ This statistic proves that a policy of massive imprisonment does not lead to rehabilitation.

3. Confessions in Drug Cases

The new drug offenses law may not lead to a dramatic drop of cases in relation to those who are accused of the intent to sell illegal substances. Dr. Surasak explained the remaining high number of the detainees in drug offenses by the prevailing practice of making confessions and by the transitional provisions enacting the code which permit to use the old provisions concerning the presumption for sale.⁵⁸ There

⁵⁵ Gloria Lai and Unchisa (Un) Eaimtong, 'Thailand reforms drug laws to reduce impacts of criminal justice system' (International Drug Policy Consortium, 23 December 2021) <<https://idpc.net/blog/2021/12/thailand-reforms-drug-laws-to-reduce-impacts-of-criminal-justice-system>> accessed 15 November 2022.

⁵⁶ วิวัฒน์ กอสัมพันธ์ และ กรศุทธิ์ ขอพ่วงกล่าง, 'สรุปผลสำนักงานวิชาการทัวร์ “ประมวลกฎหมายยาเสพติดใหม่: ประชาชนได้อะไร คดียาเสพติดจะลดลงหรือไม่?”' (ศูนย์กฎหมายอาญาและอาชญาวิทยา คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์. 2 December 2021) <<https://www.law.tu.ac.th/seminar-summary-new-narcotic-drugs-act/>> accessed 15 July 2022.

⁵⁷ 'Recidivism Statistics of Prisoners' (Thailand's Department of Corrections, 2022) <<http://www.correct.go.th/recstats/index.php/en/home>> accessed 22 November 2022.

⁵⁸ วิวัฒน์ กอสัมพันธ์ และ กรศุทธิ์ ขอพ่วงกล่าง (n 56).



are, however, certain procedural safeguards that can limit the use (or rather abuse) of confessions in penalizing drug sellers.

The principle of inadmissibility of forced confessions has been clearly articulated by the Supreme Court's decisions for a long time.⁵⁹ The practice, however, persists.⁶⁰ Torture is only an extreme form of forcing confession. Another form is threatening the suspect that the members of family will be arrested unless the crime is confessed.⁶¹ The practice of forced confessions is particularly detrimental in juvenile cases. The case before the Supreme Court⁶² can serve as an example. The defendant was a minor (15 years old) who was sued under the old Narcotics Act B.E. 2522. The prosecutor claimed that he and another accused were found in the possession of a significant amount of methamphetamine tablets (weighing 7.900 grams at the amount of 14,000 baht). The minor denied the knowledge of the possession of drugs, stating that at the time of the arrest, he was together with the other accused accidentally, as his motorcycle was broken and he needed a lift from the latter. According to the minor, he was arrested, tortured in the police station, and gave confession out of fear.

The Court of First Instance did not believe this account and pronounced the defendant guilty. The punishment, however, was not inflicted on minors according to the common practice of Thai juvenile courts.⁶³ Even though the defendant denied charges at the trial, his earlier confession was considered as a mitigating circumstance by the trial court in its description of the deserved penalty which was in the end replaced by the educational measure of sending the defendant to the correction

⁵⁹ Thai Supreme Court 473/2539 (1996).

⁶⁰ Kanna Hayashi and others 'Experiences with policing among people who inject drugs in Bangkok, Thailand: a qualitative study.' (2013) 12 *PLoS medicine*, No. 10.12, e1001570; Vachiravitch Ittithanasuphavitch, Khanitta Chotchun & Palida Muensakda, 'A Comparison of Laws and Punishments of Thailand and Japan.' (2017) 1 (1) *Asian Political Science Review* 41, 48.

⁶¹ Thai Supreme Court 473/2539 (1996).

⁶² Thai Supreme Court 8148/2551 (2008).

⁶³ Alexander Shytov, 'International Standards of Fairness in Thai Legislation on Criminal Procedure in Juvenile Cases: Statute on Establishing Juvenile and Family Court and the Process of Considering Juvenile and Family Cases, 2010, 2016.' (2019) 2 (1) *ASEAN Journal of Legal Studies* 40.

institution for one year which should not be considered as punishment. The defendant appealed, and the appeal court reversed the decision. The prosecutor filed the case to the Supreme Court which upheld the decision of the Appeal Court by finding the evidence of the guilt insufficient, and applying the principle that if there is any reasonable doubt, the benefit of doubt should be granted to the accused.⁶⁴ Another reason for overturning the conviction of the juvenile was that the confession of the defendant cannot be admitted as reliable evidence if it is made at the time of arrest according to the Thai Criminal Procedure Code.⁶⁵

This case proves that the procedural guarantees against forced confessions can be ignored by the trial courts.⁶⁶ Another noteworthy characteristic of Thai trial courts is using confessions as the grounds for the reduction of penalties in a machine-like manner. In this case, the defendant denied the confession made at the time of the arrest, however, the trial court still used it for the reduction of penalty as a mitigating circumstance. Many decisions viewed by the author are strikingly similar. Much attention is paid to the facts, the time and the location when a drug dealer is arrested with the exact quantity of the illegal substances. After that the arrested usually confesses the crime, and the court is largely satisfied. The rest of the decision appears to be a mathematical exercise of reducing penalty in a computer-like manner. What is missing is the personality of the offender and the examination of the reasons of him committing drug offenses that would determine an appropriate penalty. The criminological principle of the individualization of punishment⁶⁷ appears to be a rarity

⁶⁴ Thai Criminal Procedure Code Section 227.

⁶⁵ Thai Criminal Procedure Code Section 84 (4): “Any statement given by the arrestee to the official conducting the arrest, or to the administrative or police official in the course of the arrest or receipt of the arrestee, shall be excluded from evidence if it be an admission of guilt regarding the offense alleged.”.

⁶⁶ Other examples can be found at: Thai Supreme Court 5028/2560 (2017); Thai Supreme Court 2443/2560 (2017).

⁶⁷ Alexandre Chitov, *Criminology in Criminal Justice: from a comparative law perspective* (Chiang University Press 2022) 400.



even in juvenile cases.⁶⁸ The Thai courts are largely preoccupied with rather technical aspects of the admissibility of evidence paying little attention to the reasons of delinquent behavior and its appropriate treatment.

The unjust practice of ignoring individual differences in imposing penalty by trial courts can be seen in one older case of selling narcotics which reached the Supreme Court.⁶⁹ Three people were arrested and charged with the crime of possessing drugs with the intention to sell. During the arrest and the investigation, all of them confessed. However, the confession of the second defendant was withdrawn during the trial. The trial court reduced sentence only for the third defendant on the basis of her confession. The first and the second defendant received a higher penalty: 25 years and 4 months of imprisonment not because of their worse criminal inclinations or a greater danger for the society, but because the second defendant denied the guilt altogether and the first defendant, even though confessing his own crime, gave testimony maintaining the innocence of the second defendant who was his girl-friend. It seems that the attempt to shield the loved one was considered by the appeal court differently from the trial court. It reduced the penalty (to 19 years of imprisonment) on the basis of his confession but kept the heavy penalty for the girl-friend unaffected. What mattered for the appeal court the most in determining penalty is not the character of the offender but the fact of confession.

The Supreme Court reversed the decision of both courts in relation to the girl-friend, not because of a better assessment of her character but on the ground that the evidence of the prosecution lacked credibility. It was found that she was in an intimate relationship with the first defendant but there was no sufficient evidence that she was involved in selling drugs. The court took into consideration that the confession statement was written by a police officer which she had to sign after being arrested late at night and then interrogated until the following morning for 8 hours by different officials. The court displayed sympathy to this defendant by assuming that

⁶⁸ See Alexander Shytov and Boonchoo Na Pomphet, *Thai juvenile delinquency justice and its perception by minor offenders* (Faculty of Law, Chiang Mai University 2007).

⁶⁹ Thai Supreme Court 1029/2548 (2005).

she suffered from fatigue, physical and mental exhaustion. This decision of the Supreme Court stands in a sharp contrast with the fabric of the Thai criminal justice system that shows very little sympathy for the fatigued possessors of the illegal substances that may not be even aware of the nature of their possession.

In this context, the new Narcotics Code is a significant achievement. The introduction of Section 165 of the new law is particularly important. This section requires from judges to aim at drug rehabilitation rather than at punishment, and to follow the principle of the individualization of punishment depending on personal characteristics of offenders such as “age, history, behavior, habits, intelligence, education, burden in raising a family, using drugs for pain relief, the need for other reasons, physical and mental state, environment, being coerced to deceived to use of drugs, or become a tool of drug dealers or any other reasonable cause”. This provision will help Thai judges to better evaluate the nature of confessions made by the suspects and the accused.

4. Obtaining Evidence in Committing Drug Offenses

One implication of the new Drug Code for criminal justice is that the investigation officials will have to do much more work in gathering evidence than it was under the old law in order to meet the requirements of the Section 165. It is doubtful, however, that will affect the desire of the police to extract confessions from the possessors of illegal substances. Obtaining evidence that clearly proves the intent without a confession is difficult. The search, arrests, and even interrogation are routinely done by lower rank police who may not comprehend themselves that the possession is a rebuttable presumption of the criminal intent. They would press the suspects to confess by saying that since he or she is found in the possession, it is in the interest of the accused to confess the crime rather than to face the risks of a long prison sentence by defending one’s innocence. The police are simply not motivated to defend the innocent but to show the achievements in suppressing crimes. One Thai police officer in private conversation with the author expressed the view that



following all the procedures prescribed by Thai Criminal Procedure Code is unnecessary and tedious task that impairs the efficiency of the police operations. Such an attitude can easily lead to simulated obedience to the requirements of law. There claims that Thai police is guilty of massive violations of the rights of the suspects of various criminal offenses.⁷⁰ The amended legislation on Narcotics Case Trial Act (No. 2) B.E. 2021 will unlikely change the apparently widespread practice of coerced confessions since it does not provide any additional guarantees to prevent abuses of police powers in drug-related cases.

Since the fact of the possession of drugs remain the cornerstone of Thai drug offenses law, the new legislation will also unlikely solve the problem with the common way that the police use to gather evidence in relation to drug offenses: entrapment. The legality of this practice has been questioned in a number of courts' decisions in some of which the appeal courts and Supreme Court overturned the convictions of the trial courts. In a landmark criminal case,⁷¹ an undercover police officer bought 0.549 grams of a psychotropic substance with was mixed with an anti-obesity drug for 250 baht (an insignificant amount) from the defendant, a seller in a pharmacy shop, in 2001. Selling this substance was a violation of several provisions of Psychotropic Substances Act B.E. 2518 which was in force at that time. The defendant denied the accusation at the trial stating that she did not know that the anti-obesity drug contained a psychotropic substance and that the drug was acquired for her personal use. The Court of First Instance accepted the evidence by inducement. It ruled that the defendant was guilty and sentenced her to 5-year imprisonment, and then reduced the sentence to 3 years and 4 months considering that the defendant "pledged guilty to confession at the arrest and investigation level, which is useful for considering the reasons for mitigation."

The appeal court, however, dismissed the case on the ground that the evidence was obtained by entrapment and therefore cannot be admitted. It applied Section 226 of Thai Criminal Procedure Code which states that any evidence that has

⁷⁰ Wasant Techawongtham (n 45).

⁷¹ Thai Supreme Court 2429/2551 (2008).

been obtained through entrapment, promise, threat, deception, or other unlawful means is not admissible. Prosecution challenged the decision before the Supreme Court which concurred partly with the appeal court. However, it found the defendant guilty of illegal possession and sentenced her to 1 year imprisonment and a fine of 21,000 baht. Similarly to the trial court, the Supreme Court accepted confession at the time of arrest as a mitigating circumstance and granted a suspended sentence of 8 months of imprisonment.

The appeal courts and the Supreme Court do not always overturn cases in which police used entrapment to obtain evidence. In fact, the evidence obtained by entrapment is not challenged in many cases. A case before the Thai Supreme Court 3119/2550 (2007)⁷² is an example. The defendant was arrested in 1998 (9 years before the final decision!) at the time of selling methamphetamine tablets weighing 0.45 grams to a spy police at the amount of 500 baht. He was prosecuted for the violation of the Narcotics Act B.E. 2522, (1979) for possessing drugs of category I for sale.⁷³ The issue in this case was not whether the evidence was obtained illegally or not. The main issue was about the evidence of the genuineness of original confession made by the defendant. He confessed at the time of arrest but withdrew his confession at the time of trial, saying that the confession was made out of fear as he was beaten. The trial court accepted the evidence of the prosecution. It ruled that the defendant was guilty and sentenced him to 5 years of imprisonment. The appeal court and the Supreme Court, even though reducing the penalty, agreed with the guilty verdict. This case is of interest firstly because the practice of entrapment was not challenged, secondly, the procedural violations (search without a warrant, not being informed

⁷² Thai Supreme Court 3119/2550 (2007).

⁷³ The courts largely applied Section 66 of the Narcotics Act: “any person who disposes of or possesses for disposal narcotics of category I without permission and in quantity computed to be pure substances, or in number of used dosage, or in net weight, that does not reach the quantity prescribed in Section 15 paragraph three, shall be liable to imprisonment for a term of four to fifteen years, or to a fine of eighty thousand to three hundred thousand baht, or to both.” English translation is available at: <http://www.fda.moph.go.th/sites/Narcotics/en/Shared%20Documents/Narcotics-Act-B.E.2522.pdf>.



about the rights of the accused⁷⁴⁾ at the time of the arrest were discarded as not affecting the results of the process, and thirdly, the penalty was reduced by the appeal court on the basis of Section 78 of the Penal Code. This section allows judges to reduce penalty by not more than one-half, if there is a mitigating circumstance such as: lack of intelligence, serious distress, previous good conduct, the repentance, and the efforts made by the offender to minimize the injurious consequence of the offense, voluntary surrender to an official, the information given to the Court for the benefit of the trial. The case report, however, does not indicate what was considered as a mitigating circumstance by the appeal court. The report, nevertheless, indicates that the appeal court and the Supreme Court are more willing to follow the principle of the individualization of punishment than the trial courts.

The problem with the entrapment is that without it, it is very difficult to prove the intent to sell the illegal substances. Therefore, it is understandable that the courts are unwilling to apply Section 226 to the evidence when an undercover police offered to buy drugs. This practice can lead to the violation of the right to fair trial.⁷⁵ It is not uniquely a Thai problem. The UK courts face the same problem. The UK courts developed a standard which helps to distinguish cases where entrapment is permitted and where it is not.⁷⁶ It is acceptable to induce a drug dealer to sell drugs if officers were to provide him with “an unexceptional opportunity to commit a crime” and he then freely took advantage of that opportunity.⁷⁷ It is not acceptable, however, to use inducement if officers instigated an offense by offering inducements and luring a person into a course of action he would not normally have followed.⁷⁸ To apply a similar standard in Thai law would involve a significant extension of the amount of evidence that is required to convict a seller of illicit substances.

⁷⁴ See Thai Criminal Procedure Code Section 134/4.

⁷⁵ *Teixeira de Castro v Portugal* (European Court of Human Rights, 9 June 1998) <<https://www.hri-dp.org/contents/587>> accessed 15 November 2022.

⁷⁶ Dan Squires, ‘The Problem with Entrapment’ (2006) 26 (2) Oxford Journal of Legal Studies 351, 357.

⁷⁷ The UK House of Lords, *Regina v. Looseley*. (25 October 2001) para 23 <<https://publications.parliament.uk/pa/ld200102/ldjudgmt/jd011025/loose-1.htm>> accessed 15 November 2022.

⁷⁸ *ibid* para 46.

5. An Alternative to Thai Concept of Drug Offenses

The problems with the practice of forced confessions and entrapment deserve certainly a much deeper examination that can be offered in this paper and an expertise that the author does not claim to possess. The brief analysis offered above is, however, sufficient to indicate that the new legislation will unlikely solve the problems with ensuring fair trials in Thai drug cases. The main reason is that Thailand uses the concept of drug offenses which can be easily abused in the process of law enforcement. As indicated above, the Thai concept of drug offense is based on two cornerstones: first, the drug must be listed in an administrative regulation, and second, in order to determine whether the offense is to distribute the drug or simply to possess for personal use is determined by the amount of the drug which is again set up by an administrative regulation. This concept of drug offenses is not uniquely Thai. It can be found in many jurisdictions, for example Austria.⁷⁹ However, countries like Austria, have a different capacity and legal culture which can facilitate the enforcement of this law better than it can be done in Thailand.⁸⁰ The attempt to apply such a concept in Thailand leads to the increase of police malpractices, overregulation with a poor enforcement, and the spread of corruption.

There is an alternative concept of drug offenses. At the moment Thailand's' drug offenses are *mala prohibita*. It is possible, however, to define some drug offenses as *mala in se*. The difference is important. For the first type of offenses, there is a need for a complex of administrative regulations that should define the drugs and their quantities that entail a particular legal sanction. For the second one, there is no need for the additional administrative definitions of crime, as in other instances of *mala in se* such as murder, theft, etc. The example of the drug offense which is *mala in se* is an intentional sale of legal substances to children with the knowledge that

⁷⁹ Austrian Government, 'Suchtmittelgesetz. BGBl. I Nr. 112/1997' Section 28, 28a, 28b <<https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10011040>> accessed 15 November 2022.

⁸⁰ William Klausner, *Thai Culture in Transition*. (Bangkok: Siam Society 2000).



those substances will be used for sniffing. The Scottish case *Khalid v. H.M Advocate* can illustrate well the concept of drug offense as *mala in se*.⁸¹ In this case the accused supplied 'glue sniffing kits' to a number of children, which they used for the purpose of inhalation. The problem was that there had been no criminal law legislation that penalized such an act at that time. The court held the acts of supplying by the defendant, however, as criminal since it caused injury to the health of the children. It applied an authoritative dictum if a deed "amount to a real injury, it shall be sustained to infer punishment..., no matter how new or how strange the wrong."⁸²

The drug offenses as *mala in se*, will require evidence of harm or its likelihood that is resulted from the sale of the drug. There can be additional legal mechanisms that encourage victims of drug trade and the members of their families to sue the sellers, producers, investors of illegal drugs both in criminal and civil cases by improving procedural rules and providing legal aid in obtaining compensation from the offenders. The strict rules on admissibility of evidence should not be applied to victims so strict as to officials even though the Thai Supreme Court held that admissibility rules of the Thai Criminal Procedure Code do not forbid applying to a private person.⁸³

⁸¹ Scottish High Court of Justiciary. *Khalid v. H.M Advocate*. [1984] SLT 137; Alexander Shytov, *Conscience and Love in Making Judicial Decisions* (Dordrecht: Kluwer 2001) 179.

⁸² *ibid* 140.

⁸³ Thai Supreme Court 2281/2555 (2017) decided for the defendant who submitted evidence obtained in the violation of the strict rules of admissibility (Section 226 of Thai Criminal Procedure Code) by secretly recording the conversation with a co-plaintiff and a witness. The court, however, accepted the evidence (on the basis of Section 226/l) and dismissed the case. The brevity of the official report can give a wrong impression that the court actually used a less strict standard for the evidence collected by a private person, than for an official. See Alexandre Chitov, 'The Concepts of Truth and Fairness in Thai Criminal Procedure.' (2021) 24 (1) New Criminal Law Review 59. On the contrary, the Thai Supreme Court stated that Section 226 does not prohibit applying it to an ordinary person. The author is grateful to the anonymous reviewer for pointing out this error. In a more recent decision, the Thai Supreme Court 3782/2564 (2021) rejected the evidence of the victim obtained by means of secret recording of his conversation with the defendant as inadmissible.

It will be in the interest of the civil society in Thailand to ease the task of investigating and prosecuting the criminals who exploit the victims of drug addiction by encouraging the victims themselves, their families, and non-governmental organizations that protect the victims of drug abuse to initiate legal proceedings to obtain compensation from the offenders. From this point of view, the new Thai law has a wrong emphasis. Instead of encouraging decentralization and democratization of the mechanisms of dealing with drug offenses, it presents an attempt of a comprehensive system of governmental control that will be extremely difficult to enforce in the context when gathering evidence of proving guilt becomes more arduous for investigation officers.

This alternative concept does not mean that all the administrative regulations and controls should be disposed of. The public interest still requires a strict administrative control over the production, the distribution, and the use of the substances that can be easily abused or harm particular individuals and the society as a whole. The penalties for the violation of administrative regulations, however, should not be criminal by their nature but purely administrative. The distinction between criminal and administrative penalties is not clear for many Thai lawyers. The first involves punishment. The second involves an administrative penalty which is different from punishment by its scope and intensity. Administrative penalties do not involve deprivation of liberty (unless for a very short period of time) or death penalty. Another difference is that administrative penalties do not require strict rules of admissibility of evidence as in criminal cases. Entrapment becomes a less controversial practice. The confessions are not necessary, and even an irrebuttable presumption of possession of drug for sale will be acceptable as fair in purely administrative proceedings.

Thus, the alternative concept of drug offenses is based on a sharp distinction between a criminal offense that would involve the necessity to prove the actual or potential harm of distributing the drug irrespective whether it is permitted or not permitted by an administrative regulation (*mala in se*) on the one hand, and a purely



administrative offense penalized by administrative fines without involving the complexities of the criminal legal procedure on the other hand.⁸⁴ The benefits of this alternative concept of drug offenses are obvious. In order to prosecute a criminal, more evidence is required. Only the most serious cases will be prosecuted. The prosecutors and the courts will be less burdened by the amount of cases, and the cost of legal proceedings will be significantly less. Possessors of illegal substances will be handled by administrative procedures. The Thai police will deal with the small drug users and small dealers without being compelled to force confessions and worry about the legality of entrapment. The administrative courts will perform the function of control over the acts of the police whose powers will become less menacing for ordinary people living in Thailand.

Certainly, the critics will object by saying that a purely administrative concept for the majority of drug offenses will not deter sufficiently enough the potential offenders. It is true, but the experience of the Thai war of drugs has proven that even draconian laws are not able to prevent the vice of drug addiction. The existing Thai concept of drug offenses leads to the situation when either all drug offenders are punished equally severely, or the evildoers who exploit drug addiction for their evil aims will go unpunished. Even though the new Thai legislation slackens its grip on drug users, there is no guarantee that the policy will never return to the infamous war on drugs again. Thai criminal law needs consistency and stability. This can only be achieved by defining criminal drug offenses on the basis of ethical principles of *mala in se* rather than by the demands of political expediency.

6. Conclusion

The Thai concept of drug offenses contributes to the fact that most cases are rarely tried, since most offenders prefer to plead guilty being caught with possession of a certain amount of drugs and being persuaded that it is in their interest to plead guilty. The legal conceptual framework makes the justice process look like a machine

⁸⁴ Hans Kelsen, *General Theory of Law and State* (Routledge 2017) 274.

producing its results (convictions) with amazing efficiency. That, however, does not help to suppress the vice of drug consumption and can easily lead to the abuses of justice. Even though the new Thai legislation will result in a more lenient treatment of the offenders found with the possession of a smaller amount of illegal substances, the old concept of drug offenses persists. As the result, it will not be easy to bring a more individualized approach in treating drug offenders into the Thai criminal justice system with its inclination to find a mechanical solution to complex moral dilemmas. It is easy for a judge (and, indeed, for the investigation officer and prosecutor) to do his task by sentencing a confessing offender to a reduced number of years in prison without addressing deep moral and social causes of the offense. Criminal law process loses its moral foundation. The core of this foundation is that crime is an immoral act which warrants a particular reaction of the community in the person of a judge.⁸⁵ In other words, the judge in criminal cases is a voice of community morally condemning the offender. This moral foundation of judicial power is essential for a democratic country. Alexis de Tocqueville perceived the authority of court of a democratic country exactly in its ability to appeal to a moral sense of abiding by law rather than in the physical power to coerce an external compliance.⁸⁶ At this time, Thai courts must still do much more to become the moral spokesmen of Thai nation.

The nature of Thai law in drug cases remains the same. It is exclusively *mala prohibita*. The inability to recognize that some drug offenses can amount to *mala in se*,⁸⁷ leads to the inconsistent fluctuations in Thai legal policies. The discretion of the executive to define the content of drug offenses should be replaced by the discretion

⁸⁵ Alexander Chitov, 'The communicative theory of punishment and repentance' (2018) 4 Law Journal of the Higher School of Economics 162.

⁸⁶ Alexis de Tocqueville, *Democracy in America: Historical-Critical Edition of De la démocratie en Amérique*, (ed) Eduardo Nolla, translated from the French by James T. Schleifer. A Bilingual French-English editions (Indianapolis: Liberty Fund 2010) 1 <https://oll.libertyfund.org/titles/2285#Tocqueville_1532-01_EN_1467> accessed 15 July 2022.

⁸⁷ Scottish High Court of Justiciary. *Khalid v. H.M Advocate*. [1984] SLT 137; Alexander Shytov (n 81) 179.



of the judiciary to identify the scope of harm of the drug trade that warrants a criminal sanction. The recent reform of Thai legislation points at the increased powers of judges to apply their discretion, and therefore it is a positive step to the goal when the rule of law replaces the rule of politicians. When applying law, judges must look not only at the specific rules offered by new legislation and related administrative regulations. They must also not lose the overall vision of law as the instrument to achieve moral goals of the community in suppressing the vice of drug's trade and consumption.