THE LIMITS OF CRIMINAL LAW IN THAILAND AND CHINA: COMPARATIVE ANALYSIS

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The previous studies looked at the general parts of criminal laws of Thailand and China either in the context of studying specific offences or with the purpose to trace the development of the national systems of criminal laws in a historical dynamic. This study attempts to analyze the basic principles of criminal laws of those countries within the framework of different theories of legal reasoning. The consequentialist theories define criminal offence by looking at the social consequences or results of the act or its omission. Non–consequentialist theories are deontological in nature by affirming that certain offences are evil in themselves and to such an extent that the perpetrators deserve punishment irrespectively their social consequences. Criminal laws of Thailand and China express, to a different extent, a consequentialist type of legal reasoning which reinforces the authoritarian tendencies of political life. It is important to realize and acknowledge that criminalization has certain limits which have a non–consequentialist nature. Their violation will not only lead to the abuses of natural rights but will also result in the situation that can be precisely described as "the cancer of law:" an uncontrolled growth of law leading to the destruction of natural bonds which unite people into a political society. In this context, the idea of natural law obtains its great significance and importance.

KEYWORDS: criminal law, Thailand, China, natural law, positive law, criminalization.

ШИТОВ А. ПРЕДЕЛЫ УГОЛОВНО-ПРАВОВОГО РЕГУЛИРОВАНИЯ В ТАИЛАНДЕ И КИТАЕ: СРАВНИТЕЛЬНО–ПРАВОВОЙ АНАЛИЗ

Предыдущие исследования рассматривали общие части уголовного законодательства Таиланда и Китая либо в контексте изучения конкретных правонарушений, либо с целью проследить развитие национальных систем уголовного законодательства в исторической динамике. В этом исследовании предпринята попытка проанализировать основные принципы уголовного законодательства этих стран в рамках различных теорий юридического мышления. Консеквенциалистские теории определяют уголовное преступление, принимая во внимание социальные последствия либо результаты определенного действия или бездействия. Неконсеквенциалист-

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ские теории носят деонтологический характер, утверждая, что некоторые преступления являются злодеяниями сами по себе и до такой степени, что преступники заслуживают наказания, независимо от их социальных последствий. Уголовное право Таиланда и Китая выражает, в различной степени, консеквенциалистский тип юридического мышления, который усиливает авторитарные тенденции политической жизни. В статье аргументируется, что криминализация имеет определенные пределы, которые имеют неконсеквенциалистский характер. Их нарушение не только ведет к нарушениям естественных прав, но и приведет к ситуации, которую можно точно охарактеризовать как «рак права»: неконтролируемому росту законодательства, ведущему к уничтожению естественных связей, которые объединяют людей в политическую общность. В этом контексте идея естественного права приобретает большое значение и важность.
КЛЮЧЕВЫЕ СЛОВА: уголовное право, Таиланд, Китай, естественное право, позитивное право, криминализация.

Introduction

The need for comparing Thai and Chinese law is nowadays dictated by pragmatic interests. Recently, there is a significant increase in the political, economic, cultural, and social interaction between Thailand and China. A significant number of Thai people go to China for study, business, or tourism. A much greater number of Chinese people come to Thailand. It is inevitable that a greater cooperation between Thai and Chinese criminal law enforcement agencies is on the agenda. In order to combat international and domestic crime, there is certainly a need of harmonization of criminal law between these two countries. Chinese scholars have paid an increased attention to Thai law. For the rare exception, their work has not been published in English language (Chong–zhuan, 2010). The same can also be said about Thai scholars.

There is already a treaty between Thailand and China (1993) on extradition. Offences which are punishable under the laws of the two countries by the penalty of imprisonment or other form of detention for a period of more than one year or by any heavier penalty (including death penalty) are subject to this treaty (Article 2). Some extradition cases among the two countries brought attention of the media. In one case, China extradited six Thais accused in fraud by using internet phone calls operating from China (*MCOT online news*, 2012). In 2015, Thailand, deported 100 Uighurs to China, causing a widespread criticism among human rights activists (Denyer, 2015). Thailand was particularly criticized for failing to abide by its own extradition law (Cross Cultural Foundation, 2015). The famous criminal case known as Mekong River massacre also involved complex extradition procedures among Thailand, China, and Laos (Moore, & Eimer, 2012).

The importance of comparing the criminal laws in China and in Thailand comes not only from the fact that the citizens of one country are often subject to the laws of another state. The processes of globalization require a better understanding of the laws among the countries with strong bonds of interaction. Both countries are affected by the principles of the rule of law and human

rights. It is of great importance to compare Chinese and Thai criminal laws to find out the presence of common values and ideas. One must keep in mind that according to the extradition treaty between China and Thailand (1993: Article 2(3)), when determining whether an act or its omission is an offence against the laws of both countries, it does not matter whether these laws place the conduct constituting the offence within the same category of crimes or denominate it by the same terminology. One has to look at the substantive content of the various offences in the both countries by means of statutory analysis (Sullivan, 1997).

The present paper has a less ambitious goal than attempting to compare extraditable criminal offences as they are found in the legislation of both countries. It is limited to the examination of general parts of Thai Penal Code (first enacted in 1956 B. E. 2499) and the Criminal Law of the People's Republic of China (enacted in 1979). More specifically, the paper deals with the fundamental principles of criminal law which determine the scope of possible criminalization. The existing works on Thai and Chinese criminal laws seem to miss this important element of the legal systems. Overall, Chinese criminal law has received a much greater attention than Thai law (Chen, 2008). The academic works are either too broad in scope, for example, by trying to understand criminal laws through examining the cultural and historical context (Ren, 1997), or too narrow by being constrained to one particular area, for example, computer crime, human trafficking, child abuse, death penalty, etc (Shao, 2012; Lu & Miethe, 2010; Feliciano, & Samson, 2002; Thilagaraj & Latha, 2013).

Even though the academic literature covering Thai Penal Code and the Criminal Law of the PRC is enormous, there is a lack of a concise comparative study of their fundamental principles.[1] The apparent neglect of the essential principles of law (including criminal law) and their replacement by historical studies has been characterized by the Russian philosopher Vladimir Solovyev as "a very common and obvious intellectual error in assuming the origin or genesis of a certain object in the empirical reality as the very essence of the object; the historical order is confused with the logical order and content of the object is lost in the course of its manifestation."[2]

The attention to the fundamental principles of criminal law becoming increasingly important since the forms of their manifestation have undergone a significant change in the course of history (Horowitz, 2004). There may be many ways to examine those principles. This paper takes the approach of natural law acknowledging its limitations in studying criminal laws in their dynamic. In contemporary writings on criminal law, the theory of natural law is often completely ignored or too quickly dismissed (Finkelstein, 2000, 393). Natural

[1] Some attempts to compare basic principles of Thai and Chinese criminal laws have been done in the past, but that was done not in a focused manner. See: Kim, 1972.

[2] Russian text in Solovyev (1914, Vol. 8, 530): "Весьма обычно стремление заменить теорию права его историей. Это есть частный случай той, весьма распространенной, хотя совершенно очевидной, ошибки мышления, в силу которой происхождение или генезис известного предмета в эмпирической действительности принимается за самую сущность этого предмета, исторический порядок смешивается с порядком логическим и содержание предмета теряется в процессе явления".

law theory, of course, has many variants whose even a brief description would bring us away from the object of our study. There are, however, some core ideas which unite such diverse thinkers as Aristotle, Aquinas, Grotius, Locke, Rousseau, Blackstone, Kant and many other representatives of this tradition. These core ideas will be presented when unfolding the basic principles of Thai and Chinese criminal laws.

Chinese and Thai penal laws: ideas and the language

The modern Chinese criminal law was promulgated in 1979. It has been revised on several occasions. Thai Penal Code was promulgated in 1956 (B. E. 2499). It has also been amended several times. There is a great difference between the Chinese and Thai criminal codes. The Chinese criminal law is loaded with ideas. Thai penal code is loaded with technicalities. The first words of the respective laws illustrate well the difference. The Chinese law declares the fight against crime, appeals to the concrete experience and actual circumstances, affirms the principle of constitutionality, and propose the two fundamental goals of the law: punishing crimes and protecting the people (*Criminal Law of the People's Republic of China* Article 1). The characteristic emphasis on punishing crimes rather than criminals and the appeal to the constitution are not, however, the signs of a liberal theory of criminal law. Rather they are the expressions of the amazing amalgam of the philosophical traditions of Ancient China and the Marxist–Leninist ideology (Ren, 1997, 91).

In contrast, Thai Penal Code is devoid of any significant ideological content. The law begins with legal definitions. Perhaps, coincidently, the first term has to be defined is an ethical concept: dishonesty. The lawgiver simply defines "a dishonest act" (โดยทุจริต) as pursuing any advantage which one should not receive lawfully (Thai Penal Code, Section 1). Thai legislation does not spell out the meaning of "lawful" (โดยชอบด้วยกฎหมาย). It is difficult to explain the attempt to define one ambiguous term by means of another, not less ambiguous one, unless we assume that such a definition is rendered in order to avoid any appeal to moral standards of an honest behaviour. Another moral concept: guilt is not only left undefined but it is missing in Thai Penal Code all together. The substitute term มีความผิด is somehow incorrectly translated as *guilty*.[3] The Thai word means literally *to have a mistake*. The English words such as "dishonest" or "guilty" appear to bear stronger moral connotations than their Thai counterparts. For example, Thai legal term of dishonesty ทุจริต comes from Sanskrit words *dur* (bad) and *carita* (behavior) that also presupposes some ethical perception. However, it describes an external act of behavior rather than the inner motivation of an acting person (as the English word implies).

These linguistic peculiarities of Thai Penal Code betray a general tendency of Thai criminal law to be technical as much as possible, without entrusting Thai courts with the task to apply law in a manner that requires a complex balance of conflicting moral reasons and interests. Thai Penal Code attempts to put in

[3] The most popular translation is at http://thailaws.com/law/t_laws/tlaw50001.pdf.

place a mechanism which operates with simple concepts and with the judges who are not easily disposed to apply moral reasoning to pass a legal decision. Law is seen as a type of technology rather than the *ars boni et aequi.*[4]

Apart from the poorly defined concept of being dishonest, it is not so easy to find other moral concepts, that reflect *boni et aequi,* in Thai Penal Code. For example, the term "repentance" or "repent" (รู้สึกความผิด) is used only once (Section 78). Chinese law appeals to the same term (悔改 or 悔) 6 times. In contrast, Quran, which forms the basis of Sharia law (although roughly twice bigger in volume than the criminal codes of Thailand and China) uses the word repent (تَبَاتَ) in various grammatical forms 87 times! This comparison illustrates well the ideological gap between official laws of Thailand and China on the one hand, and the Islamic population in the restive regions of some parts of those countries on the other.

The fact that Chinese criminal law is more open to the moral categories than Thai law may be difficult to explain considering the fact that there is a popular claim that the Buddhist values are and must be reflected in Thai law (Sucharitkul,1998). The official website of Thai Office of the Judiciary has made references to Buddha 28 times only on a single front news page![5] The use of Buddhist moral exhortations made by Thai judges is reported to be very common in hearing criminal cases.[6] The reason for this inconsistency between the written and spoken judgements of Thai courts lie first of all in a moral vision of a judge as an inferior religious profession when contrasted to Islam, and also the already mentioned perception of law as a type of technology.

The apparent avoidance of moral categories and the preference of neutral technical legal terms may be found in all countries which have accepted the idea of codification (Miller, 2012, 281). Both Thai and Chinese criminal laws display the desire to achieve a uniform application of clear rules contained in the codes. Nevertheless, the whole of Chinese criminal law is animated by the ideas which are absent if not alien to the spirit of Thai law.

The spirit of Chinese Criminal Law is well reflected in its Article 2: "The aim of the Criminal Law of the People's Republic of China is to use criminal punishments to fight against all criminal acts in order to safeguard security of the State, to defend the State power of the people's democratic dictatorship and the socialist system, to protect property owned by the State, and property collectively owned by the working people and property privately owned by citizens, to protect citizens' rights of the person and their democratic and other rights, to maintain public and economic order, and to ensure the smooth progress of socialist construction." Security of the state is the ultimate value of the criminal law policy in China. Even though security of the state is also protected by Thai law, and indeed, by any other domestic laws, the sacrifice of the private interests to the idol of public security is demanded, expected,

[4] A Roman law maxim: "The law is the art of goodness and equity."

[5] See: http://www.iprd.coj.go.th/news.html (accessed on 30.01.2017).

[6] This information has been obtained from informal conversations with Thai lecturers and Thai graduate students. The use of such moral exhortations is regrettably a neglected part of Thai legal research.

and enforced nowhere in the world to the greater extent than in China, for the exception, perhaps, of the North Korea.

Criminal Law in the Far East and its natural limits

Despite the differences in the ideological presentation of criminal laws in China and Thailand, there is one important similarity. It will be easily perceived from the reading of Thai and Chinese criminal laws that their underlying ideas and concepts can justify a criminalization of basically any act or its omission. They are the products of legal positivism which makes the concept of crime devoid of any quality of the conduct or activity itself (Farmer, 2016, 5). In other words, there are no any inner moral constraints on the scope of criminal law legislation. Unlike the Western democracies, Thailand and China lack the history of an effective application of constitutional law constraints on the scope of criminal law.

In the West, there has been always an appeal to the individual liberty as the sufficient idea to limit the use of the criminal sanction. "The definition of an offense must be constructed in a way that makes the infringement of liberty justified in light of the harm the prohibited conduct inflicts" (Finkelstein, C., 2000, 335). The idea of liberty may be self–evident in the West, but it is not so in the East. Liberty was never a goal in itself in the Far Eastern cultures (and perhaps was not such an absolute goal in the Western culture until the times of John Stuart Mill (1859)). Therefore, replanting the positivist penal codes in those cultures without accepting the ethos of liberty can be compared to a savage who begins driving a car without knowing how to use its breaks. The need for finding workable constraints on the expanding application of criminal law is apparent. Natural law theory does provide such a constraint. Even though a natural law theory may not be the only basis for the criticism of the extensive reach of the modern criminal law codes (Husak, 2008, 57), it is argued that the concept of liberty makes little sense without accepting wholeheartedly a theory of natural law from whose bosom the idea of liberty sprang forth (Hamburger, 1993; Rhonheimer, 2005).

In this respect, the idea of natural law as the constraint on criminal law may not only provide an additional justification to protect liberty, it also can meet better the needs of the Far Eastern countries in adopting the Western type of legal codes and at the same time in imposing an appropriate constraint on the processes of extensive criminalization. In comparison to the idea of liberty, natural law suits better to the prevailing moral views in the Far East on criminal justice. Common good is at the centre of the Eastern philosophy of law particularly in Confucianism (Solomon, 2014). It also underlines the Buddhist thought (Macy, 1991, 239).

Natural law theory invites a meaningful examination of modern Asian criminal laws on the issue whether their prohibitions meet the demands of the common good (Finnis, 2011, 261). A natural law theory allows a researcher to see clearer whether "the administration, or working–out, of the criminal law's prohibitions is permeated by rules and principles of procedural fairness ('due

process of law') and substantive fairness (desert, proportionality), which very substantially modify the pursuit of the goal of eliminating or diminishing the undesired forms of conduct" (ibid.).

In Asian context, the liberal concept of criminal law, as it has been developed in the West after the Second World War with its rejection of natural law tradition, can have hardly any application. According to H. L. A. Hart, criminal law must not attempt to enforce a particular form of moral conduct unless it is harmful to others (Hart, 1963). In the East Asia, criminal law has a greater goal than securing individual rights. Indeed, it is a "natural" element of criminal law to secure a moral cohesion among the members of the society. The idea of harm is not the only basis for limiting criminalization. In the words of John Finnis: "The decision to extend legal order into the field, by way of criminal law, contract and tort law, new institutions for inspection, complaint–investigation, arbitration, etc., is justified not only by the desirability of minimizing tangible forms of harm and economic loss but also by the value of securing, for its own sake, a quality of clarity, certainty, predictability, trustworthiness, in the human interactions of buying and selling, etc." (Finnis, 2011, 272).

As it has been indicated previously, Thai Penal Code lacks provisions which define clearly the basic principles of criminal law such as the protection of common good. That, however, does not mean that this principle is completely absent. It can be seen in many articles dealing with specific offences. However, the lack of clear formulation of such principles makes Thai Penal Code a less coherent body of legal rules. As for the Chinese criminal law, it is the interests of the state security and the protection of a certain political form of government that permeates the general part of criminal law. The will of the judiciary is subjected to the Communist vision of public good, which is not so much *common* as belonging to a particular *class* interest. This class bias can be clearly seen in a consequentialist type of legal reasoning expounded in a number of criminal provisions of the Chinese law.

Deontological and Consequentialist types of reasoning in Chinese and Thai criminal laws

Legal reasoning in criminal cases as well as in other branches of law tend to take either a form of deontological or a form of consequentialist reasoning (Shytov, 2001, 54). Deontological reasoning evaluates actions by their intrinsic values, while consequentialist reasoning evaluates them by their beneficial or harmful results. Both types of reasoning may lead to the same judgment, but they arrive at it by a different road. A deontological reasoning will condemn an act of murder simply because it holds that any act of intentional killing is evil in itself. A consequentialist reasoning will condemn the same act because it harms the society as a whole.

It has been noted that much of the modern codification of criminal law is based on the consequentialist type of reasoning (Dubber, 2014, 18). Bentham's principle of utility is arguably the best expression of the consequentialist reasoning. According to Bentham (1780, 1996), criminal codes should appeal

to the reason of a person who makes his rational choices to avoid pain and obtain pleasure. The consequentialist type of reasoning is not the only one which informs the content of criminal law and its academic discussions. Lindsay Farmer (2016, 3) noticed that the contemporary discussions of criminal law turn around the "debate between consequentialist conceptions of 'harm' and non–consequentialist theories of 'legal moralism." Within those theories, there is a significant variety.

Any code of criminal law presents a complex body of rules which may be justified or disapproved by applying a particular deontological or consequentialist theory of law. The Chinese Criminal Law is different from Thai Penal Code and the criminal codes of other countries in terms of its attempt to give a comprehensive definition of crime. Crime is defined as "an act that endangers the sovereignty, territorial integrity and security of the State, splits the State, subverts the State power of the people's democratic dictatorship and overthrows the socialist system, undermines public and economic order, violates State–owned property, property collectively owned by the working people, or property privately owned by citizens, infringes on the citizens' rights of the person, their democratic or other rights, and any other act that endangers society and is subject to punishment according to law. However, if the circumstances are obviously minor and the harm done is not serious, the act shall not be considered a crime" (*Criminal Law of the People's Republic of China* Article 13). The essential element of crime is its social danger. The idea that anything that endangers the State, people's democratic dictatorship, etc. was first realized in the Soviet criminal codes, and was brilliantly criticized by Solzhenitzyn (2003).

The Chinese definition of crime is an extreme form of the consequentialist reasoning which largely defines crime in terms of its consequences. If consequences are not serious then it should not be seen as a crime. Thai Penal Code is also based on the consequentialist reasoning, although it is less extreme, and largely follows the continental law tradition which defines crime within the positivistic framework as anything which is penalized by the State. Such definition, or rather its lack, leaves room for other types of legal reasoning.

The idea of criminal law, as expounded by Bentham, is that a subject of the law is threatened by the legal sanction to such an extent that makes him to give up an accomplishment of a forbidden act. The threat of punishment must be real and involve more pain than the pleasure obtained from the forbidden act. Accordingly, Chinese criminal law threatens effectively with a significant amount of pain. It may contribute to the fact that China is one of the safest countries in the world in terms of the rates of violent crime. The homicide rate in China, for example, is significantly lower than in the US, and much lower than in Thailand (Peerenboom, 2008, 137; UNODC, 2013, 127). Chinese law reflects well the pragmatism of the utilitarian consequentialism. The Utilitarians, such as John Stuart Mill, would be very much surprised to find their ideas so well reproduced in a country like China which they considered far less advanced to follow the enlightened principle of utility.

The problem with Chinese law of criminal law is that the pursuit of utility can justify many acts which a natural law theorist would perceive as intrinsically evil.

That can be applied to every utilitarian theory including that one of Bentham and Mill. "Mill's utilitarian analysis proposed that the end was the only relevant reality to account for. Thus, "Did you maximize utility?" was the singular pertinent ethical question. Consequently, there was no wrong way of maximizing utility" (Daly, 2008, 65–66). Mill himself would certainly protest against such a conclusion, since he was not a consistent utilitarianist. That can be seen in his passionate defence for liberty as having value in itself (Weinreb, 1987, 309).

The implications of a consequentialist reasoning on defining criminal offences are far–reaching. They can be already seen in the construction of elements of crime. The definition of intentional crimes is different in Thai and Chinese criminal laws. Chinese law define intentional crimes in acts committed by a person who clearly knows that his act will entail harmful consequences for the society, but who wishes or allows such consequences to occur (*Criminal Law of the People's Republic of China* Article 14). Thai law defines an intentional act as an act with the knowledge of and awareness in what one does, and at the same time the actor desires or can foresee its result (Thai Penal Code, Section 59). It is noteworthy that the Thai legislation utilizes the word *prasanga* (ประสงค์) for "desire." It is not a common Thai word and has a complex meaning in the Buddhist literature.

From the point of view of a natural law theory, such a definition of intent is too broad. Intention must be perceived within the moral categories of good and evil (Blackstone, 1765, I, 2), and it must involve "a fixed design or will to do an unlawful act" (ibid., IV, 2). According, to Blackstone, it is the depravity of the will which is punished rather than the act itself. The act serves only as an "open evidence" since unlike divine judgment, "no temporal tribunal can search the heart, or fathom the intentions of the mind" (ibid). That is why "an unwarrantable act without vicious will is no crime at all." Thus, the Thai law definition fails to acknowledge that it is only the vicious intent which is liable to punishment.

The same conclusion can be applied to the definition of intent in Chinese law too even though the Chinese definition appears to be more specific. It is conditioned by the fact that the actor realizes harmful consequences for the society. Instead of the viciousness of the will, it emphasizes a negative consequence for the society. The Thai definition can accommodate any concept of criminal intent including the one of natural law. It is more difficult to do for the Chinese definition. That can be illustrated by the example of Roskolnikov in the classical novel of Dostoyevsky "Crime and Punishment" (1866), who, following the consequentialist type of reasoning, commits a murder of an evil old woman: a money–lender, to benefit the society. The Chinese definition may justify such an act. It is still unlikely that Roskolnikov would be declared innocent by a Chinese court nowadays, although he might be at the time of the Chairman Mao. Chinese judges nowadays will likely take a deontological ground to hold any murder as evil disregarding its social consequences. The situation may be more complicated in intentional killing a terminally ill person by a doctor to extract his organs to save the life of another person. The sanctity of life, so well presented in the natural law tradition, finds very little protection in the contemporary Chinese law (Nie, 2005).

It would be a simplification to describe natural law as purely deontological. Within the tradition of natural law, there is a great variety of theories. Some of them may combine both elements of deontological and consequentialist reasoning (Shytov, 2013). What is most important for any idea of natural law is that it involves, in the words of a Russian legal philosopher, Ivan Ilyin (1956, 48), a "conscientious acceptance of law" that guarantees the existence of positive law among autonomous moral agents. The idea of natural law comes from "the necessity of accepting law by each individual in a conscientious spiritual decision," since "law in its essence regulates external behavior of people, by raising in their souls particular motives: it always appeals to a reasonable and willing consciousness that guides external actions of a man" (ibid.).[7] In this context, the question arises to which extent Chinese and Thai criminal laws appeal to human consciousness by using the principles of natural law. One of those principles is legality.

The principle of legality in Chinese and Thai criminal laws

The presence of the principle of legality in Chinese and Thai law may not be attributed to the direct influence of natural law tradition. Despite their specific ideological and cultural influences, Chinese and Thai criminal laws are exposed to the process of globalization, as well as to the influence of international law with its ideas of human rights and the rule of law (Ren, 1997; Peerenboom, 2002; Blasek, 2015; Gao, Zhang, & Tian, 2015). There are several common principles which are reflected virtually in every national body of criminal law.

Overall, the Chinese Criminal Law attempts to give a comprehensive list of general principles of criminal law. For example, it mentions the principle of equal applicability of law (Chinese Criminal Law, Article 4) and the principle of the proportionality of punishment to the committed offence (ibid., Article 5). In contrast, Thai law does not mention them. It is more concerned with specific rules and definitions rather than with general principles. This increased attention to the specific rules rather than to general principles is also characteristic for German Criminal Code and, to a lesser extent, the French Penal Code. The Thai Penal Code follows largely the German model. In contrast, the Chinese Criminal Law is influenced by the Soviet pattern of criminal law with a strong ideological element in it (Chen, 1999, 169). A judge must have a clear social awareness of the purpose of criminal legislation to be able to apply the rules effectively.

The principle of legality is the only fundamental principle which is recorded in Thai Penal Code (the same applies to the German Criminal Code, 2013, Title I). It has long be affirmed as a basic principle of natural law (Thomas Aquinas, 1265–1274, II. I. 90. 4). It requires that only those acts which are explicitly defined as criminal acts in law may involve prosecution and punishment (Thai

[7] Perhaps, "spiritual decision" can be better rendered in English as "a moral decision" and "willing consciousness" as an "active mind". The Russian text: право по существу своему регулирует внешнее поведение людей, создавая в их душах особые мотивы: оно всегда обращается к разумеющему и волящему сознанию, как *руководителю* внешними поступками человека.

Penal Code, Sec. 2). In the Criminal Law of the PRC, this principle is affirmed in Article 3. It demands that criminal law should be promulgated so that citizens would know the rules to which they are being held liable. All statutes containing criminal law penalties should be officially published, so that people will know them. This need for promulgation is a requirement of procedural natural law (Fuller, 1969, 96).

The contemporary state of both Thai and Chinese criminal laws is that they fail to adhere to the principle of legality in the sense of natural law theorists as an *effective* communication to the public. There are a number of provisions of criminal law whose application is bound to compliance with indefinite administrative rules. This is particularly seen in the criminal offences against the environment (Thailand. The Enhancement and Conservation of National Environmental Quality Act, B. E 2535. Chapter 7) or food safety (Thailand. Food Act B. E. 2522. Chapter 8). The mass of administrative regulations do not have the same juristic force as criminal law statutes, but nevertheless, they determine whether or not a person should be prosecuted and punished according to the general principles of criminal law.

One has to admit that this quasi–criminal administrative law does not involve a heavy penalty in Thailand (for the exception of the forestry law) and is contained in various statutes rather than in the Penal Code. The situation is different in China. Its major criminal law statute have a number of articles (Article 137 on construction offences, Article 163 on enterprise law offences, Articles 184–190, on banking law offences, Article 222 on advertisement law offences, Article 225 on offences against market order, Articles 285–286 on computer offences, Article 288 on broadcasting offences, and many others) whose applicability depends on whether or not the accused violated some "State regulations." Most of them contain long prison sentences.

Article 96 of the Criminal Law of the PRC defines the violation of State regulations as "violation of the laws enacted or decisions made by the National People's Congress or its Standing Committee and the administrative rules and regulations formulated, the administrative measures adopted and the decisions or orders promulgated by the State Council." According to the *Constitution of the People's Republic of China*, (2006) Article 85 and Article 86, the State Council is the executive body of the highest organ of state power; it is the highest organ of State administration which is composed of the Premier, the Vice-Premiers, the State Councillors, the Ministers in charge of ministries, the Ministers in charge of commissions, the Auditor-General, and the Secretary–General. Only in 2010, China passed 921 administrative laws and regulations. "From the 5th to the 8th National People's Congresses, after nineteen years economic reform, administrative regulations made by the State Council were over 750" (Peng He, 2011, 34). It is obvious that an average citizen is ignorant of their content.

In this context, natural law imposes a constraint on the amount of criminal laws. The number of rules cannot exceed the ability of an average citizen to get familiar with them and follow them. Natural law tradition lies at the intellectual

root of the political movement towards law codification.[8] It was striving to achieve a state in which an average citizen knows the laws and acts accordingly (Sellers and Tomaszewski, 2010, 28). The idea of a penal code was conceived primarily as to have the only book which would describe all forbidden acts and specify the penalties for committing them. It is obvious that neither Thai nor Chinese criminal code reflects this idea.

In the West, the introduction of criminal codes was an attempt to decriminalize certain moral offences all together (Fraser, 1990, 571), or to reduce penalty for them (Friedland, 1981, 328, Franck and Nyman, 2003). Initially, the idea of a penal code pursued a goal of protecting moral autonomy of an individual. However, it turned out very soon as a double–edged sword which can be used for an increased state control of social life by means of an increased criminalization. Crime ceased to be a moral offence. "It follows that being criminal in the modern sense is not, and cannot be, a quality of the conduct or activity itself, but must be understood as intrinsically linked to the emergence of criminal law" (Farmer, 2016, 5).

The contemporary criminal codes are influenced to a significant extent by the Western liberal thought (Dubber, 2014; Lee and Robertson, 2012). However, in Thailand and in China, they have a tendency to reinforce the authoritarian tendencies of political life. Before the introduction of criminal law codes, crime in the Far East had an organic nature (Petchsiri, 1987). The crime was not created by the state, rather it was a moral offence penalized by an act of a sovereign. With the introduction of penal codes in Thailand and China, the situation has changed. Both systems of law experience expansion of criminalization never seen before. The scope of criminal laws in Thailand and China is enormous and stretches far beyond the limits of penal codes. The Thai and Chinese criminal laws by containing complex legal jargon, by being bound to innumerable statutes and administrative regulations are unable to communicate effectively its content to their subjects. Their form contrasts sharply with the ideal of natural law. The latter promotes an image of a citizen who accepts criminal law as morally binding (Ilyin, 1956, 48), a citizen who acts conscientiously to keep within the limits of law. The Chinese and Thai criminal laws appear to be rather an instruments of oppression and fear.

Conclusion

The underlying principles and forces of criminal law in Thailand and in China appear to be different from each other and from the Western legal codes. In the West, the penal codes were originally perceived as the safeguards of political and individual freedoms against the arbitrary powers of the state, even though at a later stage they were also used to restrict those freedoms. In contrast, Chinese and Thai criminal legislation was adopted from authoritarian traditions. Thailand followed the pattern of criminal law in the imperial Germany and Japan

[8] In this respect, Bentham should be classified as a natural law theorist despite his criticism of the idea of natural law (Fuller, 1969, 97).

at the beginning of the twentieth century, while China was heavily influenced by a totalitarian communist regime of the Soviet Union. In those countries, criminal codes were the means of the increased control over population. They removed the tradition ethical limits on the exercise of political powers embodied in Confucianism in China and the ethics of Dharmashastras in Thailand.

It is important to realize and acknowledge that criminalization has certain limits. Their violation will not only lead to the abuses of natural rights and freedoms but will also result in the situation that can be precisely described as "the cancer of law:" an uncontrolled growth of law leading to the destruction of natural bonds which unite people into a political society. In this context, the idea of natural law obtains its great significance and importance. Originally, the natural law tradition was the intellectual source for the ideas of codification even though it was rejected by many advocates of legal codes. However, many principles of natural law, such as the principle of legality, have been retained. It has been demonstrated, that without accepting the idea of natural law, its underlying principles are distorted as it is apparent in the modern codes of criminal law in Thailand and China.

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