



Review article

The rule of law and the individualization of punishment in Thailand

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Abstract

The criminal justice system is the individualization of punishment, which is the most effective criminal process. The objectives of the article are: (1) to study the punishment of an individual under the rule of law; and (2) to study what factors are taken into consideration in criminal punishment, along with the discretion of the court. In Thailand, due process of law must prevail. The findings of the research found that under the rule of law, the judicial process should completely inspect two aspects of examination principle, namely, the facts surrounding the offense and the facts surrounding the offender, which will be transferred to the court in order to deliver the proper judgement by using the quality of being discreet. As suggestions for the Individualization of punishment, the judge would take the rule of law into consideration and set the standard of this task. The judgement must follow the basis of facts, which are applied from the examination principle, in order to judge/sentence the particular case equitably. This could utilize the “Criminal Enforcement Measures” applied to the appropriate person or offender.

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Introduction

The operation and implementation policies of criminal justice are: (1) the use of government power to people; (2) social benefits; (3) legitimacy; (4) ethics; (5) morality; and (6) humanity. According to the sample cases from Germany, Japan or other countries, the criminal enforcement through the criminal justice system, looking at the government’s official performance, are often subject to the rule of law, human dignity and human rights along with the ethics and morality.

Methodology

This article is a review of several documentary pieces of research by the authors about criminal justice and punishment over the past few years. The data collection method was from previous literature reviews and interviews of experts in criminal justice systems. All information was analyzed and criticized to reflect the malpractice of criminal justice and misconduct of individualization of punishment nowadays.

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Literature Review

The tasks or missions of the Criminal law and the Criminal procedure law consist of: (1) social protection; (2) legally protected right; and (3) prevention and suppression of the criminal offence, in which the criminal justice is relevant to society as demonstrated in [Figure 1](#) (Vorapatr, 2020).

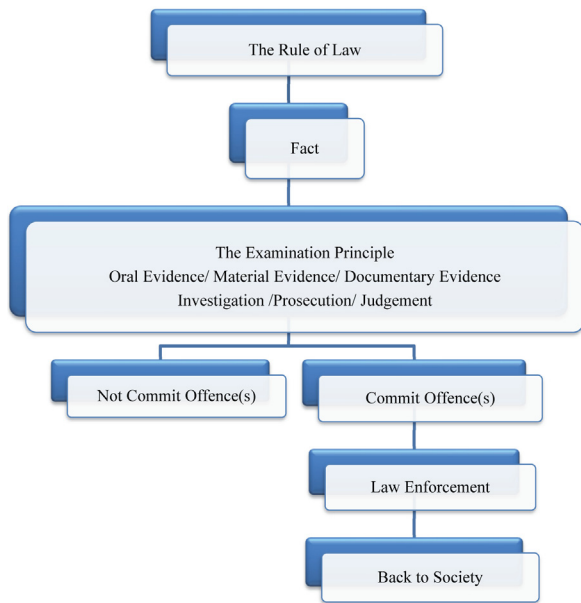


Figure 1 The relationship between the rule of law, the justice and society

Based on the aforementioned figure, the rule of law is the supreme measure leading to the examination principle (Roxin, 2014), which is the main point of criminal procedure law. This is the process to seek the truth, evidence without the intervention of false information, and being able to compile all documents completely and transfer them to the courtroom respectively. The court would consider the individualization of punishment properly and truly be in accordance with “The Proportionality Principle”. This is the principle of justice that leads to the effectiveness of the law and the justice system in every country.

Judicial process is the use of state power with citizens. All citizens must be treated equally under fair law in order for the rule of law to succeed. According to the working process, it is acknowledgeable that conveying people into the judicial process will be equitable. Within the process of justice from the outset until the end, the process must still be “reasonable and fair” in each stage

of the proceedings of a fair trial. The important principles of the criminal procedure include the public prosecution, the principle of substantive truth, the principle “Audi alteram partem”, the principle of morality, the principle of public trial, the principle of directness, the principle of presumption of innocence; also known in Latin as “In dubio pro rio”, and the principle of free evaluation (Nanakorn, 2009) of evidence setting as the foundation throughout the rights and liberties protection, being treated equally, evidence which proves whether right or wrong, the “Beyond Reasonable Doubt”, the judgement, and the principle of proportionality. The processes stated above lead to true fairness of the proceeding.

The achievement of the criminal proceeding is the decision in the final step of the particular case, which means the criminal justice system is capable of differentiating between the offenders and innocent people reasonably. In case of a criminal offense, the judge appropriately sentences the individual to a punishment.

After the trial, if the court detects an offence by the defendants, the discretion of using the criminal sanction will be applied to the defendants. The word “Criminal sanction” is considered a serious matter in the way of Criminal Procedure Law. There are several relevant theories and law principles for the application, and such also include interpretation of law, procedures, and principles used by the state power to act on people on who measures will be enforced (Meier, 2009).

When the state of the quality of people in various aspects deteriorates and misbehaviors increase such as through crimes, the trend is to turn to an empowered government, and the law issues more rules (Payutto, 2009) to enforce and punish such with the aim to maintain the right balance of human coexistence in society.

The use of criminal enforcement principles is the result of human thoughts and substantial development from the past, continuously to the present. It is a tool that helps to monitor human behavior in the existence of society to create “The state of equilibrium of society.”

Criminal Sanction

Criminal sanction means any sanctions in criminal law that will apply to offenders, including penalties, measures of safety and other criminal sanction (Nanakorn, 2013).

Other criminal sanction in Thai criminal law is action such as the seizure and destruction of objects or some part of the objects that contain defamatory statements, judgement propaganda, in which the defendants are responsible for the payment (Criminal Code Section 332).

Moreover, criminal sanction regarding “general prevention” and “special prevention” is that...

“General prevention” is the objective of punishment that has been accepted in criminal law, that is to say, the court utilizes the punishments to intimidate others who commit similar crimes or to be a role model that warns the people to refrain from that idea (Sanguthai, 1994).

Furthermore, Special prevention is another criminal law objective to prevent people breaking the law in the same cases by punishments or using measures of safety (Sanguthai, 1994).

On the one hand, the definition of “Penalty” means the human creations in order to command to those who violate the law and social regulation. This action impacts on the legal interest of other people or the common legal interest. According to the criminal structure in each offence, it also provides a response to victims who have suffered from any damages, the citizens and the state in order to maintain policing and national security (Vorapatr, 2015).

The punishment naturally frightens people and shows the negative impact of breaking the criminal provisions. (Saenkosik, 1982) It might be in the way of property, freedom, and life etc.

The adaptability of punishments must therefore respond to society in that punishments will apply to individuals when criminal offenses are committed. It must be defined in relation to the context of that society and must be used through a fair process which directly indicates the blamed offender.

In the past, the punishments were established by those who had the authority, giving the offenders a sentence with negative effects. However, in today’s criminal law, the enactment and the penalty often have the processes and mechanisms whereby people of that society are more likely to be involved in the process. The list of criminal sanctions is clearly determined in the law. The government will proceed as prescribed by law or regulation aimed at protecting individual rights as regulated in the Thai Criminal Code: Section 2.

“Section 2: A person shall be criminally punished only when the act done by such person is provided to be an offence and the punishment is defined by the law in force at the time of the doing of such act, and the punishment to be inflicted upon the offender shall be that provided by the law.”

As in Germany, the Exercise of authority enables the government to punish the offender. It starts from the Criminal Code, Section 1, which says “No crime, no punishment without law; in Latin “nullum crimen, nulla poena sine lege”, which results in “Principles in Criminal Law” and “Constitutional law”, which consist of

4 significant points (Nanakorn, 2014).

1. Customary law is forbidden to punish individually.
2. The case shall not be decided by analogy to the provision most nearly applicable.
3. Criminal law must be explicitly regulated.
4. Criminal law is not the retroactive legislation.

The above does not mean strictly only according to the written regulations, but it is also necessary to have more interpretation in some complicated cases. The interpretation must be done strictly and not explained arbitrarily. In the case of an interpretation, in order to comply with the law, it can be implemented appropriately.

Individualization of Punishment

Humans are not equal in wisdom in distinguishing good and bad. The offenders must be prosecuted, and the criminal sanction must be implemented. Once, it has been proven that the person has actually broken the law, in the use of criminal enforcement measures, it is important to take into account the reasons and facts in determining those measures. The reasons for using criminal enforcement on individuals represent the objectivity in enforcing the measures according to the rule of law.

Therefore, the proposition of the criminal sanction must always have a framework, the guidelines for judicial discretion that states why those measures are applied to each offender. In addition to the facts of an offense, the evidence relating to the offender has to be considered as well, as cited in Thailand Criminal Procedure Code; Section 131...

“Section 131 The inquirer shall be empowered to conduct an inquiry in person or by means of commission in order to obtain information as to the background and habitual conduct of the accused; prescribed that all the information obtained must be informed to the accused.”

Section 131 is related to the inspection of the facts of the offender being essential for the prosecutor to make the discretion or for the sake of exercising discretion when determining the penalties. (Nanakorn, 2009). Having complete information on all offenders is, therefore, important for choosing to use criminal sanction and to determine the severity or level of punishments in relation to such offenses.

From the writer’s point of view, the approach to process of equity of people means this process can access the information of all people, including those who enter the judicial process. The judges are free to know the details of the accused or the defendant in all aspects circumspectly before the final decision is announced. After that, the result would certainly be fair and proper.

The dimensions of the measures must be considered from three facts (Vorapatr, 2014);

1. The dimension of the fact in actions, the punishments according to the structure of criminal liability in any offences which are regulated in the criminal law.

2. The dimension of the fact in offenders, the judicial process is required to understand and know the offenders well in order to be discreet or judge the individuals and to give the offender access guaranteed with fair trial based on “Individualization of Punishment.”

3. The dimension of being in coexistence in society after liberation. Therefore, the effect on the offenders, victims, and society shows whether they can gain from the benefits or negative impacts for coexistence in society.

Another important issue is “Individualization of Punishment.” It is the relationship of the determination of punishment between the offender and the criminal offence that one has committed and getting punished in the proper way. The reform of the offender is important to prevent recidivism. This case is a matter of primary intention to change the offender’s mindset. The punishment is necessary to access and understand the important information about the offender sufficiently.

Discussion

Discretion of Individuality

The discretion of the judge in applying criminal sanction against the defendant is very important. If mistakes are made, it may cause many negative effects. The term “The Exercise of Penalty” is the court discretion which determines the criminal sanction and one of the offences. (Nanakorn, 2013). The issue is the appropriateness of the discretion, which stipulates the punishment must have a fair proportion. According to the Individualization of Punishment, which factors could be taken into account? In European countries, under Civil Law System, such significantly refers to the fact from the Judicial process called “Inspection process” as two factors mentioned below;

1. The facts of behavior in offenses and the violence of the offenses.

2. The individual’s information, the history, behavior, personality, gender, economic, financial status, the cause of offense, etc. of each defendant.

The result of the exercise of discretion of penalty will come out as a penalty in the judgment. It can be said that “Exercise of discretion of penalty” is the result of criminal offenses consistent with the behavior, the form of the offense and the violence.

As the process of prosecution and judgement has been executed, and there is the possibility of enforcing a penalty on the offender, “Exercise of discretion of penalty” must consider more than just determining the punishment. Such must consider changing the behavior of the offender, which is a mechanism of the criminal justice system, which can be implemented as well. In addition, there is another important factor to focus on; what the habitual behavior of the offender is, in order to achieve the goal of criminal law. Therefore, the Exercise of discretion of penalty must consider the offenders in three dimensions; the past, the present, and the future (Vorapatr, 2014).

In order to use criminal sanction by the court with the particular offence, the court will determine such as follow (Nanakorn, 2013):

1. To determine the type of criminal sanction.

2. To determine the level of criminal sanction which is specified in the previous point.

3. To determine the enforcement of criminal sanction based on the second point.

From the consideration of the sanction, it can be seen that the discretion of the court to determine the penalty does not mean only the determination of level or type of the penalty but also other criminal enforcements in the law and knowing how to apply the criminal sanction. For this reason, the discretion in determining the penalty means the reprieve, awaiting sentence, and the condonation etc. (Criminal Code Section 55).

“The Exercise of discretion of penalty” is an indicator of the fairness of the criminal justice and shows the result of the standard in the efficiency of the criminal justice to investigate the truth from the defendant and mainly from the criminal behavior. This will be scrutinized by society, and affect its trust in the justice system.

Determination of Criminal Punishment

The provisions of the criminal law determine what level the penalty should be and also the penalty type. The court will only use discretion within the scope of the law. The penalty must therefore “conform with the law” It cannot be administered other than as the law has regulated except if there is another commutation provided by the law (Criminal Code Section 23).

The discretion of the Court is not independent enough to choose the criminal enforcement measures and to impose more penalties than that regulated in the Thai Criminal Code. There is no general section for the Court to use its discretion in punishments, but there is for some specific cases, for example Section 78, which mentions extenuating circumstance and giving the Court the

discretion in punishment. But, other than that, in regards to some offenses where the offender has committed several distinct and different offences, the court may conclude to one offence according to Section 48 and Section 263. Moreover, Section 223 has reduced the punishment whenever the act causes small damages. These aforementioned sections compel the court to impose a penalty, not to give the court the discretion. The discretion of punishments must consider (Sanguthai, 2011).

1. The objective of the punishment, that is, the consideration of the retributive punishment, the deterrence punishment, and the incapacitation punishment (Vorapatr, 2012).

2. The objective of the enforcement, that is, in the dimension of having a good quality life in the future, to consider the offender, to allow the offender to live without committing an offense and have social responsibility and protect society (Vorapatr, 2012). The punishment is a form of social prevention from the offender including General Prevention and Special Prevention.

One important thing is to determine the penalty, then observe how it affects the offender and society by taking into account that each offender has a different sense of punishment. The punishment must be administered appropriately for each offender.

In considering the rules for discretion in determining the penalty, the courts or related parts must act by examining criminal law about punishment, the purpose of punishment and the purpose of enforcement that is generally accepted in Law (Nanakorn, 2012).

Results

Punishment Misconduct

One of the most widely accepted aspects of criminal law is “No penalty without misconduct” or “Nulla poena sine culpa”. This principle has two meanings: to be punished must be due to gross misbehavior, and it is impossible to punish more than the offence (Nanakorn, 2012).

Punishment is the return for an offense, and the court must have the proper punishment for the severity of the offense, that is to say, if there is a lot of badness, then the punishment should be very severe. In the meantime, the punishment being achieved according to the theory of relativity or not is the second important matter because of the law that provides the criminal penalties. The offenders hopefully realize that they have committed the crime and accept the mistakes. In fact, the offenders who did very harmful acts will be punished severely. For this reason, the

penalty must be given according to the Individualization of Punishment. There are some people who have committed minor offences, for example, and they have never committed an offense before but were influenced by an old wrongdoer, and other people have committed gross misconduct because they are the leader of a gang persuading others to commit crimes. However, regarding the Individualization of punishment (Sanguthai, 2011), the women offenses related to drugs in various ways become a more complex problem.

The discretion of penalty expects consistency of “Misconduct Principle”, “General Prevention”, and “Special Prevention” as the standard of the individualization in a punishment (Sanguthai, 2011).

Therefore, misbehavior is one of the most important criminal liability structures in determining criminal offenses against offenders individually.

Facts Accompanying the Use of Discretion of Penalty

The facts in exercising discretion of the punishment include both facts explicitly provided by law and facts not explicitly provided by law (Nanakorn 2013).

1. The facts clearly regulated in the law are the facts that represent various matters effecting the determination of the penalty or the discretion in reducing the penalty scale, for instance in section 72: Hot blooded person, and in section 76: Age of the offenders.

2. The facts not explicitly provided by law are about the circumstances of the offenses or the facts about the history and behavior of the offender. The provision of the Criminal Procedure Code, Section 131 and Section 138, states that the investigators shall have discretion carrying out the investigation to prove the presumption of innocence of the suspects or determine the punishment of the court; therefore, the information to make an order of non-prosecution can be done by a public prosecutor and the court. (Nanakorn, 2013)

Recidivism

The challenge of the mission of the criminal law, the organization, and the personnel of judicial process is social phenomenon or the result of the effectiveness of using criminal law and criminal justice, the responsibility of working in the criminal justice process and social responsibility. The consequences of determining criminal penalties are therefore a reflection of the quality and efficiency of the protection of people in society who follow the Rule of Law.

The mission of modern criminal law of “Special Prevention” consists of many aspects including clashing

against juvenile offenders, recidivist, intoxication without the knowledge, and against an act by negligence (Nanakorn, 2013).

The problem of “juvenile criminals” is important to pay attention to. Some part of the problem comes from juvenile delinquency, which cannot be resolved. When growing up, they commit crimes. It is important that the offender within this range of age is taken good care of.

The role of legal measures in the sanction of young inmates mostly requires and must be carried out with appropriate measures in this period.

If the punishment can solve all problems, citizens will have a good quality life in society, but if it cannot be resolved, crime will continually happen.

The punishment is therefore important and necessary to reach the offenders. The determination of punishment must take into account the measures of punishment and the future dimension of the offender and society.

Recidivists are those who are more likely to commit the same offenses again. The basic idea of increasing the punishment for the offender is to focus on the tendency to commit another offense. Furthermore, regarding the offender with a motivation (Schmidhäuser, 2013), and the behavior of recidivism, the court has the power to increase the penalty for the offender appropriately, such as increasing the penalty by one-third or increasing the penalty by a half. (Criminal Code Section 92–93).

Conclusion and Recommendation

Criminal enforcement measures are designed or created to protect society as normal as people live life happily and are safe. Moreover, it is also a tool to train humans in order to live together with others in society. The use of enforcement measures relies on the power of punishments according to the judgment of the court, which results in the following changes.

1. From the discretion of the offender, the appropriate punishment with the action, the misbehavior and the violence will create “fairness” and can lead to changes in the personality and behavior of the offender and also encourage the offender to be aware of such actions and to live in the future without any offenses and being socially responsible.

2. The victim of the discretion in determining the appropriate and fair criminal penalties inevitably affects confidence in the criminal justice process while the offender receives appropriate punishment. Revenge will not happen due to the fact that the judicial process is dependable and provides true justice.

3. In society, the determination of appropriate criminal penalties will lead to the exercise of judicial power that is based on the trust of people and frightened those who think to commit crimes and in accordance with the constitution, which gives importance to the protection of individuals.

From the study, there are suggestions regarding the criminal procedure with good quality. The appropriate punishment for individuals and people who exercise discretion of penalty need to stick to the rule of law as a framework and process as a basis. The final judgement must be based on factual information obtained through the Examination Principle in order to bring the case into “fairness” individually. All mentioned above aim to achieve criminal sanction appropriately for individuals.

Conflict of Interest

The authors declare that there is no conflict of interest.

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