

Research Report

CRIMINAL LIABILITY IN THAILAND AND CHINA

A COMPARATIVE ANALYSIS

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ดาวน์โหลดเมื่อ 28/03/2566 14:19:19 และหมดอายุ 27/04/2566

CHIANG MAI UNIVERSITY

2017

ABSTRACT

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.

This paper looks at the processes of criminalization in Thailand and China by looking at the expending extraterritorial jurisdiction of both countries and at the existence of any formal restraints on it. It is argued that sovereignty must not be understood as an absolute power of the states to penalize any behavior they perceive worthy of a criminal sanction. There are โดย วราลักษณ์ นาคเสน
ความหมายของคำว่า certain limits that are imposed by international law which consists not only of ever-changing international agreements, but also of the universal principles of natural law. Criminal laws in Thailand and China, being influenced by legal positivism, do not apply a natural law standard

in limiting extraterritorial effects of their criminal law policies. That leads to the situations of the conflict of jurisdictions, and more importantly to an unjustifiable criminalization of people beyond national borders. International law affirms such natural law principles as the prohibitions of double jeopardy and retroactivity of criminal laws. However, Thai and Chinese criminal laws reflect those prohibitions in a defective way. Chinese law admits a possibility to try and punish again those who have been already tried by a foreign tribunal. Thai law admits such a possibility in relation to some political offences. Retroactivity of criminal laws, even though prohibited by the respective provisions of both laws, nevertheless takes place through a defective promulgation of criminal laws. According to natural law theory, a proper promulgation of laws requires an effective communication to the subjects of law. Printing laws containing penalties in a Chinese or a Thai journal unknown to the mass of ordinary people cannot be considered as an effective communication. It is evident that without interpreting double jeopardy and retroactivity of law within the natural law tradition, these prohibitions become obscure and ineffective.

The last part compares legislative provisions of Chinese and Thai law pertaining to exemptions from criminal liability. Two types of exemptions are singled out. The first are mandatory exemptions when Chinese and Thai courts must not inflict punishment on a person who is justified or excused in committing an act otherwise defined as a crime. The second type are the exemptions which courts can grant by the exercise of discretionary powers. Chinese and Thai laws bear similar characteristics in defining mandatory exemptions. However, the scope of discretionary powers of courts to grant exemptions in Chinese law is much broader than in Thai law. The similarities and differences are explained by applying the theory of Leon Petrazycki. It is argued that the concept of intuitive law which was developed by Petrazycki is important in explaining and justifying the powers of the court not to inflict punishment if it is required to achieve the goals of criminal justice.

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