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UNDERSTANDING THAI SENTENCING CULTURE

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This thesis is the result of the author's original research. It has been composed by the author and has not been previously submitted for examination which has led to the award of a degree.

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Abstract

Much has been written about the sentencing systems and practices of Western common-law jurisdictions, but little is known about those of Thailand, an Eastern civil-law country. This thesis fills this gap in the literature by identifying key characteristics of Thai sentencing culture and proposing a theory for understanding them. The focus is not on the Penal Code but on *Yee-Tok*, a judicially self-imposed form of sentencing guidance, the details of which are not publicly available and whose role in sentencing decision-making remains invisible to those beyond the judiciary. My aim is to find out how *Yee-Tok* works in the pursuit of consistency and accountability in sentencing.

The study finds that consistency and accountability are not alien concepts to Thai sentencers. Even though each lower court has a different *Yee-Tok*, evidence from focus groups of lower court judges appears to suggest that the differences between each *Yee-Tok* may be limited. In addition to the duty to sentence in accordance with the Penal Code monitored by the higher courts, Thai lower court judges, by convention, are expected to comply with *Yee-Tok* in their court and to consult their Chief Judge before departing from it. Although there is no statutory obligation to comply with *Yee-Tok*, this research finds that most judges appear to wish to comply with *Yee-Tok*. Consistency in sentencing outcomes in each court is achieved due to the compliance of all judges with the *Yee-Tok* of their court. Accountability in sentencing is understood as the need to ensure that sentencers adhere to judicial custom and observe high moral standards.

Three main characteristics of Thai sentencing culture were identified in this research: conformity in sentencing decision-making; the tendency to impose prison sentences relatively frequently; and the lack of demand in the eyes of the judiciary for public accountability in sentencing. These characteristics can be explained by a theory based on two conceptual building blocks: the judicial structure of a career judiciary; and Thailand's political, social and cultural context.

This study seeks to understand Thai sentencing. However, the findings also have implications for the fields of comparative criminal justice, comparative law and comparative judicial studies.

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CHAPTER 1

INTRODUCTION

> *… Knowing how and why things are as they are is a first, crucial step toward learning how to make them better.*
>
> (Bueno De Mesquita and Smith, 2011:xi)

SECTION 1: THE CASE FOR RESEARCHING THAI SENTENCING CULTURE

The original plan of this thesis was to study how the Scottish Sentencing Council will operate and to find out if Thailand could adopt the sentencing framework of Scotland. My initial assumption was in line with the recommendation of prominent sentencing scholars in Thailand (e.g. Jaiharn et al, 2006, 2011; Petchsiri et al, 2011) that Thai sentencing needs to be reformed by adopting western-style sentencing guidelines. Scotland was chosen as the site of my study since it appeared to be about to implement a sentencing guidelines mechanism[1].

Before researching the Scottish sentencing framework and analysing if it could be transplanted to Thailand, my supervisor and I agreed that I should first identify the main defects in Thailand's sentencing practice to interrogate my initial assumption that Thai sentencing needs to be reformed. A review of Thai sentencing literature revealed that previous researchers have based their recommendations on incomplete knowledge of how Thai sentencing works. The need for sentencing reform was justified simply because Thailand has no statutory sentencing principles or western-style sentencing guidelines. However, past researchers have written nothing on how actual Thai sentencing practice, especially *Yee-Tok* – a Thai-style sentencing guidance – works. Information on how *Yee-Tok* is used and what the actual sentencing decision-making process looks like is nowhere to be found in Thai criminal law and criminal procedure textbooks (e.g. Jaiharn, 2000, 2003; Na Nakorn, 2000, 2003; Meenakanit, 2008; Tingsapat, 2003; Wajanasawat, 2008). This suggests

[1] The Scottish Sentencing Council was not established until October 2015, 5 years after the passing of the Criminal Justice and Licensing (Scotland) Act 2010 which mandated its establishment.

that empirical research on the actual sentencing practice of Thailand is needed before evaluating Thai sentencing.

A great deal of literature exists on the sentencing systems and practices of Western countries and some developed countries in Asia such as Japan (Herber, 2009) and South Korea (Fiedler, 2010; Park, 2010). However, no international scholars have researched the sentencing system of Thailand. Some Thai scholars write about certain aspects of Thai criminal justice in English (e.g. Kittayarak, 2004; Yampracha, 2009), but no one has written about the sentencing system, let alone the actual sentencing decision-making process, of Thailand. Numerous studies on sentencing have been conducted by Thai scholars, but these researchers tend to take the actual sentencing decision-making process for granted and make no attempt to describe what the practice is. Past research has mainly focused on the legal rules and mechanisms of foreign countries and suggested ones for Thailand to borrow. Some Thai scholars have emphasised the need for statutory sentencing principles, as exist in other civil law countries (Mahakun, 1977; Saengsasitorn, 2002; Saengwirotjanapat , 2006) and other have suggested introducing more sentencing options and formulating sentencing guidelines such as those that are in place in some common law countries (Jaiharn et al, 2006, 2011; Petchsiri et al, 2011). The present study is the first attempt to place Thai sentencing in an international context in order to use Thailand as a case study for a richer understanding of the sentencing decision-making process.

It is widely accepted among Thai legal academics and practitioners that Thailand, formerly known as 'Siam', is a civil law country. However, the latest taxonomy of comparative legal scholars classifies the Thai legal system as a mixture of civil law, common law and customary law (Palmer, 2001, 2010; Örücü 2007b, 2010). The first legal code, modelled from the Codes of continental European countries, was promulgated in 1908 (Masao, 1908; Petchsiri, 1986). The Penal Code and the Criminal Procedure Code form the basic framework of the sentencing system. There are no overarching sentencing aims or statutory sentencing principles prescribed in the Penal Code such as exist in other civil law countries such as Sweden (von Hirsch, 1987; Jareborg, 1995), Finland (Lappi-Seppala, 2001), Germany (Bohlander, 2012) and Japan (Herber, 2009). In addition to minimum and maximum sentences

prescribed in the Penal Code, the judiciary of Thailand has regulated its sentencing discretion by creating the document known among judges, prosecutors and lawyers as *Yee-Tok*. As a form of sentencing guidance, *Yee-Tok* takes various forms: providing a recommended fixed or narrow range of sentence; stating the combination of recommended sentence and classification of seriousness for an offence; and when to require judges to commission a pre-sentence report. *Yee-Tok* differs significantly from 'Sentencing Guidelines'. There is no national *Yee-Tok* to be used for all courts of the first instance; each can formulate its own. Moreover, some Courts of Appeal have their own *Yee-Tok*. *Yee-Tok* is a confidential document which no one except sentencers can access. Although *Yee-Tok* is made for judges, they never refer to it in their written judgements. Furthermore, there is no written standard for compliance with and departure from *Yee-Tok* as there is for western sentencing guidelines. Typically, whether or not judges must comply with *Yee-Tok* depends on the policy of the Chief Judge. In practice, compliance with *Yee-Tok* is not monitored by appellate review but by organisational control. The Criminal Procedure Code explicitly requires judges to accompany their decisions with written reasons. However, Thai sentencers rarely give sentencing reasons and the appellate courts do not consider failure to give sentencing reasons as grounds to reverse or remand the decisions of the lower courts. The prosecution and defence can file an appeal against a sentence to the courts of appeal. Appellate review of sentence is done case-by-case and the appellate courts never issue any guideline judgments.

The previous paragraph does not provide the full picture of how Thai sentencing actually works. To reach a better understanding of Thai sentencing requires an investigation of Thai sentencing culture: the sentencing routine of judges and their attitudes and beliefs on sentencing.

The key research questions this research aims to address are:

1. What are the key characteristics of Thai sentencing culture?
2. How should they be understood?

SECTION 2: SENTENCING CULTURE AND ITS RELATIONSHIP WITH CONSISTENCY, ACCOUNTABILITY AND SEVERITY IN SENTENCING

To focus on sentencing culture is to realize that sentencers work as part of a group, not individually. Culture is a characteristic of the organisation, not of the individual, but is manifested in and can be measured from the verbal and non-verbal behaviours of individuals (Wilson, 2010:225). In the context of this thesis, 'Thai sentencing culture' refers to the way of life of Thai sentencers, including their knowledge, customs, norms and beliefs in relation to sentencing decision-making. In order to focus on the culture of only one group of individuals, 'sentencers' in this thesis mean only professional judges and only in the context of sentencing adult offenders.[2]

Thomas and Inkson (2004:24) discuss some characteristics of culture, including the fact that culture is shared, learned and has a powerful influence on behaviour. In a similar vein, Robbins and Judge (2008) propose that, apart from its function in providing a sense of identity for members, culture can guide and shape behaviour as it clarifies how things are done and what is important for the organisation. Trice (1993:20) also notes that through culture, members learn to define what is right and wrong to feel, think and do in the social context. Thus, understanding sentencing culture can shed some light on the actuality of sentencing practice, especially on how the concepts of consistency, accountability and severity in sentencing are understood and adhered to in sentencing practice.

Sentencing culture is closely related to the concept of consistency and accountability. Consistency fundamentally means treating like cases similarly, and the criteria for assessing case similarity and mechanisms for ensuring uniformity in making sentencing decisions, if any, are part of the sentencing culture. Moreover, accountability is best perceived as a relationship between decision-makers and the audience in which the latter can call the former to account for their decisions. Who should be considered the audience of sentencing decisions and how to give sentencing accounts are also part of the culture that sentencers must learn and be socialised into. Finally, the focus on sentencing culture can also illuminate the

[2] In sentencing youth offenders, section 23 of the Juvenile and Family Court Act 2010 requires a decision of a panel of two professional judges and two lay judges.

tendency of the sentencer to use more or fewer custodial sentences, as the priority of one sanction over others and the expected attitude towards the offender are what sentencers must learn throughout their judicial career.

Internationally, the perceived lack of consistency and accountability in sentencing has been one of the main driving forces behind its reform (Ashworth, 1992:183, 1995:255; Doob, 1995:202; Tata and Hutton, 1998:340). Considering the characteristics of Thai sentencing mentioned earlier, previous researchers in Thailand have pointed out the need for Thailand to have a clear, explicit, transparent and uniform sentencing framework (Mahakun, 1977; Promsurin, 1999; Saengsasitorn, 2002; Suparp, 2004a, 2004b; Jaiharn et al, 2006; Saengwirotjanapat, 2006). Their recommendations suggest a movement towards more consistent and accountable sentencing. I, therefore, chose the pursuit of consistency and accountability in sentencing as the focal points for explaining Thailand's sentencing system and practices to an international audience.

A review of literature on sentencing practices in civil law countries – the minority in international sentencing literature – confirms that the pursuit of consistency and accountability in sentencing is an international goal of every sentencing system. Yet, the theory of comparative criminal procedural law (Damaška, 1986) seems to suggest that the existence of judicial self-regulation of sentencing discretion, apart from appellate review of sentences, is a natural product of civil law jurisdictions. Nonetheless, the civil law-common law dichotomy alone cannot fully explain how the mechanisms for achieving such goals have been implemented. To discover how Thai sentencers put the concepts of consistency and accountability into practice we must know how they understand and interpret these concepts. It seems that the conventional approach of comparative legal research does not allow the researcher to answer this question.

SECTION 3: COMBINING THE COMPARATIVE LEGAL METHOD WITH SOCIO-LEGAL COMPARATIVE STUDY

To better understand sentencing practices in any country, I propose that one must understand how the concepts of consistency and accountability are interpreted by local practitioners, scholars and audiences of sentencing. Sentencers may not understand consistency and accountability in the same way that sentencing scholars do. By the same token, Thai sentencers may understand the concepts differently from their counterparts in western countries. To grasp the real nature of how the concepts are understood and interpreted, one must understand the political, social and cultural contexts which give rise to and sustain the interpretation. Both international and Thai sentencing scholars seem to overlook the need to understand sentencers' perceptions of consistency and accountability and how those two values are interpreted in the daily practice of sentencing. Some western sentencing scholars acknowledge that a better understanding of the sentencing decision-making process is a prerequisite for the success of any sentencing reform initiatives (Ashworth, 1995; 2003; Tata and Hutton, 1998; Tata, 2002a, 2002b; Hutton, 2002, 2006). Moreover, Tata and Hutton (1998:353) propose that if the pursuit of consistency and accountability in sentencing is a virtue, we should know how sentencers put these principles into practice. However, the best way to achieve this understanding is still debatable.

The dominant paradigm of sentencing scholars may be described as a legal-rational approach, which views consistency and accountability in sentencing in legal terms. However, Cotterrell (2006) argues that an adequate understanding of legal ideas is impossible without adopting a sociological perspective since 'what makes doctrine legal is its institutionalization; the fact that it is created, interpreted or enforced in certain socially established ways, through the use of recognized procedure and agencies' (p.1). Legal concepts are an outcome of historical, cultural, political or professional conditions; therefore we should assume that the way legal concepts like consistency and accountability are put into practice in sentencing may be different from country to country. Different countries may differently colour the definition of similar legal concepts, the importance attached to them and the test of their successful fulfillment (Cotterrell, 2007:136). The task of a comparative lawyer should not be a search for legal similarity but legal difference (Nelken, 2005; Örücü,

2007a). The ultimate aim of comparative research should be the appreciation of difference and acceptance that 'it is not so bad to be different' (Cotterrell, 2007). Adopting an interpretive approach in comparative sentencing research facilitates the task of having this appreciation.

SECTION 4: INCORPORATING EXPERIENCE AS A PRACTITIONER IN ACADEMIC RESEARCH

The practitioner-academic divide, the realization of irrelevant theories produced by academics and of untheorized and invalid practices of the practitioner, is increasingly perceived as a problem in many academic fields (see e.g. Anderson et al, 2001). As a practitioner who moonlights as an academic, I am quite familiar with the situation that Morison and Leith (1992:15) call 'the embarrassed silence between the academic lawyers and the practitioner'. While academics often criticise practitioners for misinterpreting the intention of the applicable laws and not doing their task properly, practitioners perceive these criticisms as a revelation of academic ignorance to what really goes on in actual practice. The disconnected knowledge between sentencing scholars and practitioners has huge implications for the initiatives and enforcement of sentencing reform movements. Experiences in the US and England and Wales demonstrate that when scholars promote just-deserts and consistency as normative principles and criticise the claim of individualised sentencing by the judiciary, practitioners perceive this pursuit of 'false' consistency as unjust and ask for sentencing discretion to be retained. This response has always been interpreted by scholars as a need to retain ownership over sentencing (Ashworth, 1992; Munro, 1992) and the reform movement proceeded with judicial opposition in the background. Tonry (1995) even warns judges in other countries about this opposition by illustrating how US judges have paid a high price for opposition of reform. Little attempt has been made to understand how the judiciary regards its role as sentencer (Tata, 2010), what its conception of just sentencing is and how it arrives at this conception. Rhetorically, one may ask: can the sentencers continue their work if they perceive it as unjust? Fox et al (2007) propose that practitioners engage in their practice with confidence that what they are doing is right. Many sentencing scholars

emphasize the need to understand actual sentencing practice; however, sentencing reformers have never seemed to try to gain a better understanding of this practice. Furthermore, access to the judiciary for research in some western countries is notoriously limited (Ashworth, 1995).

If the researcher wants to learn about the sentencers' conceptions of and adherence to consistency and accountability by employing an interpretive approach, one possible research method to fulfil this goal is ethnography. However, there are many limits on employing ethnography in sentencing research. Firstly, even though the judiciary grants access to the researcher, the academic researcher can observe only part of the reality and cannot be 'a real participant' in the sentencing decision-making process since it is a process of exercising state power to punish. Furthermore, Friedman (2002:186) observes that each culture guards some secrets from the outside that no stranger can ever hope to penetrate. The lack of background knowledge of the researcher on the socialisation of sentencers hinders their ability to understand the sentencing decision-making process from the viewpoint of the sentencer. Is a researcher who is also a practitioner in a better position to perform the task?

Although there is no evidence that the Thai judiciary denies access for academic research, Thai scholars have never employed ethnography to conduct sentencing research. Academic researchers in Thailand have limited understanding of the sentencing decision-making process, the socialisation of judges and the mechanism of *'Yee-Tok'*. To illustrate, Jaiharn et al (2006, 2011) recommend that policy-makers abolish the minimum sentence for all offences, since it bars the court from giving an appropriate sentence to each individual offender. It is implied by their recommendation that sentencers prefer to use sentencing discretion. They also suggest that Thailand should introduce a sentencing guidelines mechanism such as that found in England and Wales to ensure consistency in sentencing, which implies that the existing mechanism fails to achieve that goal. Petchsiri et al (2011) note that, since there are limited sentences that the court can choose from, the court has to imprison a considerable number of offenders, leading to the problem of prison overcrowding. They survey statutory sentences in some western countries and recommend that Thailand should introduce more sentencing options. Underlying their recommendation are two beliefs: that more choice is better; another is that if

there are more alternatives to imprisonment, judges will favour these alternatives over prison sentences.

Some Thai sentencers who conduct research to fulfil their academic requirements exclude their experiences from their studies and attempt to understand the sentencing practice of other judges by using questionnaires (Saengsasitorn, 2002; Suparp, 2004; Padungsub, 2006). They do not describe the actual sentencing decision-making process in their research. One explanation for this reluctance may be that when Thai practitioners turn, temporarily or permanently, into academics, they perceive their experience as practitioners as irrelevant and not objective enough to satisfy an academic audience. Another explanation may be that they assume that the actual sentencing practice is wrong and not worth understanding and describing. I have, myself, been a judge in Thailand since 2003. Between 2005 and 2006, I engaged in a research project on sentencing and intentionally excluded my experience from the research[3]. The research did not touch upon the fundamental issue of what the actual practice is, but did prescribe the preferred practice based on experiences in other countries. The recommendations in the research are purely academic and, not surprisingly, have never been considered for implementation by the judiciary. If Thai academics and practitioners allow this sharp division of labour to persist, how can academics grasp the actual practice of the Thai sentencing decision-making process?

In terms of gaining access and trust, I face no limits in accessing the judiciary for research and taking the role of a participant-observer. By virtue of belonging to the study's context, I am well positioned to access and explore the phenomenon under examination and accordingly can be considered 'an insider researcher' (Kim, 2012). Moreover, I possess first-hand experience of how consistency in sentencing is pursued in Thailand through the mechanism of *Yee-Tok* without any sentencing aim(s) or coherent legal rules prescribed in the Penal Code. I also have been socialised to understand that judges must be accountable for their decisions. This advantage places me in a suitable position to perform the role of judicial ethnographer since I am more likely to be able to grasp sensitive and hidden issues among the participants (Kim, 2012). However, before I enter the field to collect data

[3] See Jaiharn et al, 2006

from other Thai sentencers, I must decide at the outset how I should deal with my decade-long experience as a Thai sentencer.

I commenced this research with the explicit intention to incorporate my experience as a Thai sentencer in the research. Without referring to my experience, how can I explain the actual practice of Thai sentencing in the absence of both textbooks and research studies on the subject? Other methods which would allow me to collect a comparable amount of the same set of data would require a longitudinal study since the socialisation of sentencers spans over a long period of time. My reflection on the socialisation of Thai sentencers may be comparable to the data collected by longitudinal study and might be useful in identifying key themes of data that need to be further collected. Besides, I cannot deny the fact that as one of the Thai sentencers, I already understand how the concepts of consistency and accountability are put into actual sentencing practice. By making sense of my experience, I can conduct a preliminary analysis and provide a tentative answer to the research question, which can be used as guidance for data collection and further analysis. If research is about generating new knowledge, including my experience in the research is more likely to achieve such a fundamental task. Therefore, the question I asked myself is not whether I should include my experience in the research, but how to do it properly.

I am aware that relying on my experience alone could make it problematic for a subsequent researcher to validate the findings or replicate the method of this research. Nobody can relive my life and my analysis cannot be tested and repeated. The challenge is how to balance the advantages with the drawbacks. Therefore, rather than using my experience as the main source of research data, I treat it as an initial background intended to allow a preliminary analysis to be made and the formulation of working hypotheses which will be analysed in greater depth with further data collected by conventional research methods. The justification for this research design is to produce an academic piece of work which can be repeated and validated by future researchers.

SECTION 5: RESEARCH OBJECTIVES AND OVERVIEW OF THE THESIS

Mackenzie (2005:2) observes that what judges think about sentencing and how they approach the task are largely missing links in sentencing research. Her observation remains true both internationally and in Thailand. This research is ultimately aimed at filling this gap in sentencing literature. From the two main research questions described in section 1, the thesis aims to achieve the following objectives:

1. To explore numerous ways to place Thai sentencing in an international context and to investigate the potential and limitations of adopting a common law- civil law dichotomy to characterise Thai sentencing
2. To describe, characterise and critically analyse the mechanism of *Yee-Tok*
3. To explore the local meaning of what seem to be universal legal concepts such as consistency and accountability in sentencing, judicial legitimacy and judicial independence
4. To identify key characteristics of Thai sentencing culture
5. To construct a theory for understanding and explaining key characteristics of Thai sentencing culture
6. To use empirical evidence on Thai sentencing to contribute to a richer understanding of the sentencing decision-making process and the role of the judiciary in contemporary society

Chapter Outline

Chapter 2 of the thesis begins by providing background knowledge on Thai sentencing to international readers and by trying to identify the best way to understand how Thai sentencing operates. It describes the legal framework of sentencing and introduces the readers to *Yee-Tok*; compares some characteristics of Thai sentencing with those of reformed sentencing systems; discusses the concepts of consistency and accountability in sentencing; explores the pursuit of consistency and accountability in sentencing in civil law countries and finally points out the need to study how Thai sentencers put these concepts into practice.

Chapter 3 invites the reader to consider the broader contexts of Thai sentencing by examining its political, social and cultural contexts and reviewing the development

of Thailand's penal policies and practices, and argues that we should expect Thai sentencers to understand the concepts of consistency and accountability differently from western judges and have different ways of putting those concepts into sentencing practice.

Chapter 4 discusses the methods employed for collecting and analysing data to answer the research questions. It is divided into two parts. Part I justifies my research design by firstly examining why an interpretive approach is employed in this study. Then it explains the data collection methods, the research methods used, and the sequences of data collection. Next, it investigates the validity and reliability of the research methods and examines ethical considerations of the research. Part II elucidates how the hypotheses are formulated from a reflection on my experience as a Thai sentencer. It firstly describes the socialisation process of Thai sentencers, then examines their sentencing decision-making process, and finally discusses how the hypotheses were formulated.

Chapter 5 reports the findings of the fieldwork – focus groups and interviews of 27 judges – and outlines data yielded from multiple research tools such as ranking exercises, mock cases and photo-elicitation. Chapter 6 views the way Thai sentencers pursue consistency and accountability in sentencing through a regulatory lens, characterises it as one type of judicial self–regulation and draws a parallel between the regulation of sentencing decisions and that of the other discretionary decisions of Thai judges. Then it characterises the nature of *Yee-Tok* as a sentencing rule, investigates its legal characteristics and discusses the reluctance of Thai sentencers to treat it as law, as well as the limits of controlling sentencing discretion through judicial self-regulation.

Chapter 7 draws together the forgoing arguments to construct a theory for understanding and explaining the characteristics of Thai sentencing culture and discusses the implications of the study. The concluding chapter summarises the theoretical, methodological and practical contributions of the research, points out some limitations of the research and recommends the direction of future research.

CHAPTER 2

PLACING THAI SENTENCING IN AN INTERNATIONAL CONTEXT

> *The aim (of comparative law research) is to discover and understand differences between legal systems and legal institutions and explain the reasons for these in order to enhance knowledge and, at the same time, to discover similarities between different and diverse legal systems and find explanations for these.*
>
> (Örücü, 2007a: 54)

INTRODUCTION

The aim of this chapter is twofold. First of all, it provides background knowledge on Thai sentencing to international readers. Secondly, it seeks to identify the best way to understand how Thai sentencing operates. The chapter comprises four sections. Section 1 provides an overview of the Thai criminal justice system and the legal framework of sentencing and introduces the readers to *Yee-Tok*, a form of sentencing guidance. Section 2 then places Thai sentencing in an international context by comparing its characteristics with those of reformed sentencing systems. Section 3 examines the concepts of consistency and accountability in sentencing and demonstrates how employing these concepts can shed light on how Thai sentencing operates. Finally, section 4 identifies the limits of employing a civil law–common law dichotomy in understanding Thai sentencing and argues for closer study of how Thai sentencers put the concepts of consistency and accountability in sentencing into practice.

SECTION 1: AN OVERVIEW OF THAI CRIMINAL JUSTICE AND THE LEGAL FRAMEWORK OF THAI SENTENCING

Criminal Justice Process of Thailand

a) Investigation and Prosecution

Under the Thai Criminal Procedure Code, the criminal prosecution may be instituted either by the public prosecutor or by the victim and the person who has the power to

act on their behalf[4]. However, most criminal prosecutions are brought by public prosecutors. Since a criminal prosecution brought by the victim may not have been supported by a police investigation, the victim must prove the *prima facie* of the case to the court before the case can proceed to trial[5].

In the case of public prosecution, once an inquiry has been made by the police, the police inquiry officer has to submit the inquiry file to the public prosecutor for deliberation. The inquiry officer has to give his or her opinion on whether or not the alleged offender should be charged in court. S/he has to submit the file to the public prosecutor responsible in order to continue the process. The public prosecutor alone, by his or her discretion, decides whether the case will be continued or stayed[6]. The non-prosecution order does not bar the right of the victim to prosecute[7].

b) The trial

After the public prosecutor has filed the indictment in court and the trial begins, the status of the alleged offender becomes the accused. The trial is conducted by a professional judge without a jury. Thai judges perform the dual functions of fact-finders and sentencers. The presumption of innocence is considered important. The prosecution has a duty to prove his case to the satisfaction of the court that the accused is guilty; if not, he will be acquitted. Where any reasonable doubt exists as to whether or not the accused has committed the offence, the benefit of the doubt is given to the offender[8].

It is noteworthy that although Thailand adopted a unitary trial structure, where evidence relevant to sentencing is presented alongside evidence relevant to guilt and innocence (see e.g. Field, 2006), from continental European countries, evidence produced during trials in Thai courts is mainly concerned with the issue of guilt or innocence of the defendant, not about sentencing. Besides, a trial in Thailand is adversarial in nature, not inquisitorial (for some key differences between the two

[4] Section 28 of the Thai Criminal Procedure Code (CPC)
[5] Section 162 (1) of the CPC
[6] Section 141-143 of the CPC
[7] Section 34 of the CPC
[8] Section 227 paragraph 2 of the CPC

procedural traditions, see e.g., Field, 2006, 2009), conceived as a contest between two parties before an impartial judge rather than an investigation by an active judicial officer, and is not based on the *dossier* compiled by an investigative judge, since no such judicial position exists. Thai judges have no supervisory role over the pre-trial process, apart from issuing search and arrest warrants, granting bail and remanding the accused in custody, and prefer to be passive during a trial. Even though the pre-trial process could be said to be supervised by public prosecutors, they are not considered a judicial officer under the Thai legal system.

If the trial ends in acquittal, the defendant is released and the state cannot take further action on the same charge against him/her. If the trial court's judgment is guilty, the defendant has the right to appeal. The defendant may not only appeal against his/her conviction but also against the penalty. The judge or panel of judges makes the decision regarding guilt and punishment. A single judge can sentence the offender for a maximum of 6 months imprisonment and a 10,000 baht fine (about £180)[9]. To impose more severe punishments, the law requires a panel of two judges to perform the duty[10]. In the case of disagreement between two judges in the panel, the Criminal Procedure Code states that the disagreement must be resolved by adopting the opinion of the judge whose decision is more favourable to the accused[11].

The judge has discretionary power in sentencing under the limitations of the law provided for each offence. The sentencing choices available include the death penalty, imprisonment, confinement, fine, or forfeiture of property[12]. In general, petty offences are subject to a fine. Capital punishment may be imposed in heinous crimes, such as premeditated murder, or murder with cruelty, torture and other

[9] Section 25 (5) of the Law for the Organisation of the Court of Justice 2000 (as amended) (LOCJ)
[10] Section 26 of the LOCJ
[11] Section 184 of the CPC
[12] Section 18 of the Thai Penal Code (PC)

violent acts[13]. Capital sentences must be submitted to the Court of Appeal for review, even if no party has lodged an appeal[14].

c) The Execution of Punishments

If the court sentences an offender to the death penalty or imprisonment, the offender will be sent to prison and the Department of Corrections will be responsible for the execution of their sentence. When the court decides to suspend the sentence or defer sentencing, the offender will be released upon the condition of not reoffending for a certain period of time[15]. If the sentencer also imposes other conditions on the offender, s/he will be supervised by a probation officer from the Department of Probation.

Fines are imposed for less serious offences as a stand-alone sentence. For a moderately serious offence where the court suspends imprisonment, the court will always impose a fine. An offender who has been sentenced to pay a fine must pay the full amount in 30 days. Defendants can be detained in lieu of fines or apply to do community service instead of paying fines. An offender's property can also be confiscated for the payment of fines[16].

Parole is used as a measure to encourage inmates to behave well while incarcerated. It enables inmates to be released conditionally from prison, and undergo a supervision period until the end of the sentence. Inmates who are on parole still retain prisoner status until the end of the supervision period. Remission or Good Time Allowance is another measure that enables inmates to be released prior to the termination of their sentence. It was introduced to the Thai correctional system in 1978 as a result of overcrowding in prisons.

In addition to parole and good time allowance, the Thai government has another safety valve for overcrowding prisons. The government frequently releases a large number of offenders through the collective Royal Pardon mechanism. In practice, the

[13] Section 289 of the PC
[14] Section 245 paragraph 2 of the CPC
[15] Section 56 of the PC
[16] Section 29-30/1 of the PC

government will draft the Royal Pardon Decree to mark special occasions of the Monarchy such as anniversaries of the King and Queen's birthdays. This practice derives from Buddhism's belief that to have a good life now and after death one must make merit, and forgiveness is one way of doing so. The Royal Pardon provides a key opportunity for the Monarch to make merit by forgiving a large number of criminals.

The Royal Pardon Decree indicates which types of offence and offender are eligible for release or reduction of sentence. Each type of offence and offender is subject to a different degree of reduction. Also, the better the behaviour of the prisoner while in custody, the greater the reduction in sentence[17].

Thailand's Statutory Sentencing Framework

The Penal Code and the Criminal Procedure Code form the basic legal framework for sentencing. Sentencers in Thailand are career judges. Sentencing in less serious cases is done by a single judge, whereas a more serious sentence, punishable by imprisonment for more than 6 months or a fine of more than 10,000 baht requires a decision by a panel of two judges. In the appellate courts and the Supreme Court, all decisions, including sentencing, are made by a panel of three judges[18].

Career judges are recruited by the Judicial Commission and are appointed by His Majesty the King. Besides having certain qualifications such as being of Thai nationality, at least 25 years old, a graduate from law school, passing the examination of the Thai Bar Association to become a Barrister-at-law, and having no less than two years' experience working in legal professions[19], a candidate must pass a highly competitive examination administered by the Judicial Commission. Once the candidates are recruited, they will be appointed as trainee judges for at least one

[17] For the latest Royal Pardon Decree see http://www.ratchakitcha.soc.go.th/DATA/PDF/2558/A/023/1.PDF last accessed 2/12/15
[18] Section 27 of the LOCJ
[19] Section 26 of the Judicial Service of the Courts of Justice Act 2000 (As amended) (JSCA)

year[20]. Those candidates who complete the training with a satisfactory result will be approved by the Judicial Commission and tendered to the King for royal appointment to be a judge. A solemn declaration before the King is also required before taking office as a judge[21].

The Penal Code prescribes maximum punishments for all offences and provides both minimum and maximum punishments for most offences. Some offences are criminalised by Acts of Parliament. A judge has the power to choose from a wide range of penalties prescribed by criminal statutes. The Penal Code structures offences in a rather precise manner, with many typical aggravating or mitigating circumstances qualifying the offence as more or less serious, a technique somewhat similar to the English guidelines regarding broad offence sentencing ranges and narrower category sentencing ranges (see e.g. Ashworth, 2009). Compared to common law countries, the range of punishment in Thailand's criminal statutes is narrower since most offences carry both minimum and maximum sentences[22]. However, sentencers still have a considerable discretion in selecting a suitable sentence for each case. The Penal Code states mitigating factors such as young age[23], ignorance of the law[24], insanity[25], duress, necessity[26], excessive self-defence[27], provocation[28] and guilty plea[29], each in different sections of the Code, but does not state the specific rate of a sentencing discount for most mitigating factors. The Code also specifies a mandatory one-third or one-half premium for

[20] Regulation of the Judicial Administrative Commission on the training of judge trainee 2001 (as amended)

[21] Section 201 of the 2007 Constitution
[22] See Appendix A
[23] Section 73-76 of the PC
[24] Section 64 of the PC
[25] Section 65 of the PC
[26] Section 67 of the PC
[27] Section 69 of the PC
[28] Section 72 of the PC
[29] Section 78 of the PC

recommitting any offence or similar type of offence within 5 or 3 years respectively after release[30].

If the prosecution and defence are not satisfied with a sentence, they can file an appeal against the sentence to the courts of appeal. Appellate review of sentence is carried out case-by-case and the appellate courts never issue any guideline judgments. Parties who are dissatisfied with the appellate court's sentence can appeal to the Supreme Court as well, subject to some limitations[31].

The aim of sentencing is not prescribed by statute. Even though the Code prescribes factors that need to be considered before deferring a sentence or suspending an imprisonment sentence, (e.g. sex, age, criminal record, religion, behaviour, intelligence, education, health, mind-condition, temperament, occupation of the offender, the seriousness of the offence or other extenuating circumstances[32]), it says nothing about which factors should and should not be considered in deciding sentences. The Criminal Procedure Code prescribes the steps of the trial process and also states the requirement for giving reasons for the judgment[33]. In practice, Thai judges rarely give reasons for their sentencing decisions except in cases where they decide to suspend an imprisonment sentence. Given the lack of detailed rules, we might expect to find wide sentencing disparity. However, there is another feature of Thai sentencing which appears to encourage a stable pattern of sentencing outcomes and could be said to create consistency in sentencing: the *Yee-Tok*.

The *Yee-Tok*

The Thai judiciary has regulated its sentencing decisions by creating the instrument called *Ban Chee At tra Tode*, literally meaning 'a list of suggested sentences', but known among judges, prosecutors and lawyers as *Yee-Tok*.[34] When and why the first

[30] Section 92-93 of the PC
[31] Section 216-220 of the CPC
[32] Section 56 of the PC
[33] Section 186 (6) of the CPC
[34] The problems in translation and finding equivalent terms are widely recognised in both fields of comparative law and comparative criminal justice (Nelken, 2000:242, Hodgson,

Yee-Tok was created remains unknown, but the first available record which referred to its existence was the Supreme Court Decision No.1304/1957 (B.E.2500) in which the court held that simply complying with the *Yee-Tok* of the court without paying attention to circumstances of the case could not result in a just sentence.

Yee-Tok covers only 'common' offences which are frequently charged in that particular court such as narcotics offences, gambling, and theft, to name but a few. The Thai judiciary seems to believe that each province may have different views about the seriousness of the same offence, which may justify the variation of punishment. Therefore, each court of the first instance has its own version of *Yee-Tok*. The lower courts and the appellate courts also have different *Yee-Tok*. No *Yee-Tok* is publicly accessible, as its details are considered an official secret.

As a sentencing guidance, *Yee-Tok* performs various functions. The first one is a recommended sentence, stating the specific sentence for a particular offence. The second form is the combination of recommended sentence and classification of seriousness of an offence. The third form of guidance is to provide a narrower range of sentences than in the statute. The fourth form is to require judges to commission a pre-sentence report before sentencing. The last form of *Yee-Tok* is to recommend unsuspended imprisonment sentences but further prescribes that if judges want to suspend an imprisonment, they need to commission a pre-sentence report.

Although each court of first instance has its own *Yee-Tok*, the format of the *Yee-Tok* of all courts is similar. It looks like a table demonstrating the name and description of an offence, its statutory sentences, the recommended sentence and remarks on when to depart from the recommended sentence and how. All tables for each offence are combined into a thick book or binder.

2000:148; De Cruz, 2008). As De Cruz (2008:220) observes that any form of translation runs the risk of overlooking the conceptual differences between languages. Thus, I have decided to use the Thai term as calling *Yee-Tok* a sentencing guideline risks confusing international readers, since in very significant respects *Yee-Tok* differs from the Western concept of guidelines.

Table 2.1: *Yee-Tok* for Common Theft (Adapted from Padungsub 2006:45)

Statutory Sentence	Recommended Sentence (Before Reduction)	Remarks
Section 334 of the Penal Code imprisonment of up to 3 years and fine of up to 6,000 baht	Depends on the type and value of the stolen property: a) car: three years unsuspended imprisonment b) motorcycle: two years unsuspended imprisonment c) other property with a value not exceeding 5,000 baht (about £100) : suspended 6 month imprisonment and 6,000 baht fine d) other property with a value of more than 5,000 baht : between 6 months and 1 year unsuspended imprisonment	If there is a special circumstance which may warrant a suspended sentence, commission a pre-sentence report and consult the Chief Judge.

There are some peculiar characteristics of *Yee-Tok*. First of all, *Yee-Tok* is made by each court and is intended to be used by that court only. There is no national *Yee-Tok* for all criminal courts. Courts of first instance and Courts of Appeal also have different versions of *Yee-Tok*. Secondly, *Yee-Tok* derives from an unsystematic formulation. Some are made by the consensus of judges in the court. Some courts adopt *Yee-Tok* from others. Thirdly, *Yee-Tok* is a confidential instrument. The public prosecutor, the defence lawyer, the probation officer, the public and academics cannot access *Yee-Tok*. Sentencers do not refer to *Yee-Tok* in their written judgments. Lastly, there is no written standard for compliance with and departure from *Yee-Tok*. However, as will be elaborated on later in the thesis, the judicial custom of behaving in uniformity and the need to manage caseloads make compliance with *Yee-Tok* a social norm of Thai judges.

Some Distinctive Features of Thai Sentencing Law

a) Democratic/Undemocratic Criminal Statutes

Most criminal offences are prescribed in the Thai Penal Code which was first enacted by the democratic parliament in 1956. The penalties for some offences in the Penal Code have been increased by the edicts of the military coups. Some offences have been added by the Acts of the National Legislative Assemblies, the ad hoc entities appointed to function as the Parliament. The National Legislative Assemblies are well-known for enacting a great deal of legislation in a very short period of time. The offence of passport forgery was inserted in the Penal Code by the undemocratic National Assembly in 2008. Likewise, in September 2015, the military-sponsored Legislative Assembly criminalised the possession of child pornography. Interestingly, some of the most frequently charged offences are enacted by the undemocratic National Legislative Assemblies, such as the Road Traffic Act 1979, the Immigration Act 1979 and the Cheque Fraud Act 1991. All types of criminal statutes have been treated by the judiciary and the legal professions as equally legitimate. The issue of undemocratic criminal statutes has never been discussed by Thai scholars; hence no scholar has attempted to explain why the judiciary has never perceived these statutes as problematic. As I will elaborate later in the thesis, it seems that the lack of a liberal democratic mindset and the culture of deference shared by politicians, the legal profession and the public make this issue silent in Thai society.

b) Confidentiality of Yee-Tok

One distinctive feature of *Yee-Tok* is its confidentiality. Two justifications are usually given: fear of fabrication of facts by defendants, and the claim that there is no need to publish *Yee-Tok* since the prosecutor and defence lawyer are already familiar with it from their experience[35]. None of these justifications seem plausible. Some Thai practitioners and scholars have suggested the disclosure of *Yee-Tok* (e.g. Promsurin, 1999; Sawatditat, 2005; Padungsub, 2006); however, they did not answer the question of why it has been kept secret. It may be the case that keeping *Yee-Tok*

[35] See the appendices in Jaiharn et al (2006)

confidential signifies the hierarchy of Thai society. There is no need for defendants to know specific punishments in advance, it may be thought, since the court will kindly exercise the state power to decide what is best for the subordinate. No prosecutor or defence lawyer has asked to access *Yee-Tok* or use the 1997 Official Information Act to demand the judiciary to disclose[36].

c) Sentencing Without Clear Principles and Giving Reasons

There is no agreed-upon sentencing aim prescribed in Thai statutes. Past research has revealed that the individual differences of Thai judges affect the sentencing principles that they subscribe to (Sawasdisara, 1999). As mentioned earlier, the law does state a requirement to give reasons for the judgment. However, this requirement for giving reason is interpreted by Thai academics and practitioners as applying to only the conviction part of judgment and not to the sentencing decision. The prosecution and the defence lawyer rarely challenge sentencing decisions on the grounds of absence of reason-given. In the Supreme Court Decision No.7013/2001 (B.E.2544), the court held that a reason is only required if the sentencer mitigates a sentence 'outside normal practices'. Interestingly, it said nothing about how 'normal practice' should be defined.

Giving sentencing reasons and having sentencing principles are closely related. The rationale for giving reasons is to check if the sentencer adheres to the rules. Sentencing reasons will be meaningful if they refer to established sentencing principles. The way that the Supreme Court overlooks the significance of giving sentencing reasons undermines the inclusion of statutory sentencing principles in the Penal Code as some scholars (Mahakun, 1977; Saengwirotjanapat, 2006) have suggested.

[36] If there was an attempt to use the Official Information Act (OIA) 1997 to get access to *Yee-Tok*, the court may well deny the access by simply pointing to the exception in section 15 of the OIA that the disclosure 'will prejudice the efficiency of law enforcement'.

SECTION 2: THAI SENTENCING IN COMPARISON WITH REFORMED SENTENCING SYSTEMS

Introduction

In addition to an analysis of sentencing law, another way of presenting the legal practices of foreign countries to western scholars is to compare them with those of western countries. Bearing in mind the variation in sentencing practice within western countries, this section selects some characteristics of reformed sentencing systems in western countries rather than using one jurisdiction to compare Thai sentencing with.

What are the characteristics of reformed sentencing systems?

Multiple goals of sentencing reform are promoted by sentencing scholars: a sentencing system that is fair, evenhanded and consistent; that takes realistic account of key management interests; and that optimizes legitimacy, public assurance and public confidence (e.g. Tonry, 2005:66). Roberts (2012a:269) points out that there are two aims of sentencing reform in common law countries: constraining prison population and achieving principled sentencing, while Tata (2013:239-244) identifies five aspirations that have inspired sentencing reform in western countries: the promotion of genuine consistency in sentencing, the need for greater predictability in sentencing patterns, the value of openness and transparency, the promotion of public confidence in sentencing and a change in penal direction .

After reviewing Thailand's sentencing system and Thai sentencing literature and comparing them with sentencing literature in the English-speaking world, I propose that there are at least five characteristics of the reformed sentencing systems by which to assess Thai sentencing: structured, transparent and accountable, informed, nationalized and parsimonious sentencing.

1. Structured sentencing

a) The need to have sentencing standards and principles

The rule of law does not require that judges should be deprived of all discretion, but it does require that discretion should not be so unconstrained as to be potentially arbitrary (Bingham, 2010: 54). Sentencing decisions are arbitrary in the sense of not relying on any fixed or usable standard (Davis, 1982:80). Likewise, O'Malley (2011:12) notes that the rule of law requires judges to exercise sentencing discretion according to principles that are settled, consistently applied and reasonably predictable.

By structured sentencing, I mean that the sentencing system should be guided by a framework that prescribes sentencing principles and steps to take in reaching sentencing decisions. Without a proper sentencing framework, despite each judge reasoning competently and conscientiously, there is no guarantee that their moral reasoning will give them the same theory of relative-gravity-of-offences (Waldron, 2007:208).

Sentencing principles are principles that prescribe both normative and distributive functions of the sentencing system such as consistency, evenhandedness and fairness (Tonry, 2005:47). Another main function of having sentencing purpose or theory is that it provides a framework for evaluating subsequent changes in sentencing laws (Doob, 2011:287).

Sentencing scholars propose that the sentencing system should have a coherent sentencing rationale rather than prescribing numerous purposes for a sentencer to choose from: the so-called 'cafeteria approach' (Ashworth, 1995:252) or 'launder list approach' (Robinson, 2008:5). Coherent sentencing rationale need not to be a single one, but must identify the primary aim which, in defined circumstances, gives way to other purposes.

b) Principle of proportionality in sentencing

After the decline of faith in rehabilitation in the 1970s, the prevailing sentencing rationale in most western countries is just deserts theory, based on the principle of proportionality: the notion that the sentence should not be disproportionate to the

gravity of the offence and the responsibility of the offenders. Bottoms (1998:99) observes that, while proportionality is a very important principle, it cannot be allowed to become over-dominant in a sentencing system. However, van Zyl Smit (2012:403) argues that the most important restriction that human rights law places on the imposition of punishment is the principle of proportionality.

Von Hirsch (1976:99-100) explains that the minimum requirements of the sentencing system based on just deserts theory are graded levels of seriousness, which assign offences to various seriousness levels, prescribe a specific penalty for each level of seriousness and an increased penalty for reoffending and outline general principles governing aggravation and mitigation. Jareborg (1998:130) emphasises that multiple criminality is more important if sentencing is based on a proportionalist rationale and less important if based on a preventive rationale.

Finland (1976) Sweden (1988) and England (1991) have made clear in the law that a sentencing system based on fairness is concerned with proportionality or just deserts (Tonry and Hatlestad, 1997:5). O'Malley (2006:80; 2013:222) notes that the most fundamental sentencing principle developed by the Irish courts is the principle of proportionality.The German statute does not explicitly refer to the principle of proportionality but widely agrees in practice that rehabilitation and deterrence may be pursued only within a narrow range of penalties deemed consistent with the principle of proportionality (Albrecht, 1997:183).

c) Principle of equality in sentencing

In addition to the principle of proportionality, another sentencing principle presently in play is the principle of equality (Zedner, 2004:180). Applying the principle of equality to sentencing means that sentences imposed for the same offence and by the same court should ideally be the same as often as possible. The counter-argument would be that no two cases are alike. However, this statement implies that there is no consensus on which factors should be considered by the sentencing judge and which should not, implying a complete anarchy in sentencing (Doob and Brodeur, 1995:388). In addition to treating similar cases alike, equality requires the consistent application of a comprehensible normative principle or mix of principles to different cases (Alschuler, 2005:87). In other words, the principle of equality concerns

evenhandedness and consistency in sentencing. Nevertheless, genuine consistency of sentencing, as opposed to false consistency or 'uniformity of sentencing outcome', recognizes relevant and important differences between cases (Tata, 2013: 239).

Most sentencing scholars explain disparity and inconsistency in sentencing by referring to the lack of a coherent sentencing rationale. Disparity in sentencing was defined as not treating similar cases similarly and treating different cases in similar ways (Doob and Brodeur, 1995: 386; O'Malley, 2011:7). Disparity cannot be reduced, eliminated or even identified without specifying a primary sentencing theory (Doob and Brodeur, 1995:391; O'Malley, 2006:50, 2011:8). To illustrate, without a governing rationale of sentencing, how we can conclude that two cases are similar: by equal moral culpability, equal dangerousness or equal rehabilitative prospects? Roberts (1991:467) notes that unwarranted variation in sentencing can only be identified by reference to the purpose that sentencing is designed to serve.

To ensure evenhandedness and consistency in sentencing, the sentencing system must design a uniform or consistent approach for sentencers to follow. A uniform sentencing framework must include guidance on how to identify the proportionate starting point of a sentence and may or may not provide starting points or a range of starting points for some offences; it must specify which factors should be considered in aggravating and mitigating the starting point of a sentence; specify the scope for increasing and reducing the penalty for each aggravation and mitigation, and provide guidance on the weight of each factor and the effect of previous convictions and sentencing for multiple offences (Von Hirsch and Ashworth, 2005).

As for the impossibility and injustice of absolute proportionality, extremely uniform sentencing cannot be allowed to happen in reality. Sentencing without variation would be sentencing without justice (Roberts, 1991:469).The critical question is when does legitimate sentencing variation become unwarranted sentencing disparity? Legitimate variation means sentencing variation based on factors identified by statute or sentencing guidance. In order to adhere with the rationale of deserts theory, sentencers are only allowed to consider legal factors.

The problem in designing a good sentencing system, therefore, is clearly specifying what should be included and excluded in sentencing decision-making.

Some academics have pointed out the problem in excluding social factors. Criticizing the US federal sentencing system, Christie (2000: 160) argues that by excluding social factors such as education, employment and family ties from sentencing decision-making, important values, other than equality, are overlooked in the system of decision-making, creating an extremely unjust system.

Hudson (1998:240) observes that proportionality's weakness has been its failure to specify criteria for similarity and dissimilarity of offenders' situations. Justice, she notes, cannot be done unless difference is acknowledged and given its due. Zedner (2004:194) agrees on the need to consider social factors in sentencing but realises the difficulty in deciding which differences and difficulties should be taken into account.

Roberts (2011:1011) identifies the difference in approach towards consistency between the US and England and Wales. He notes that under most US schemes, consistency is achieved by requiring courts to conform to narrow sentence ranges and to justify any departures from these ranges by finding 'substantial and compelling reasons'. He concludes that most US schemes aim toward consistency of outcome. The English guideline system aims toward consistency of approach, permits greater flexibility of operation, and identifies steps that courts should follow when determining sentences; therefore ensuring that different courts follow the same sequence of steps.

Consistency of approach requires the system to ensure compliance with the approach. The form the guidance takes is also important for ensuring compliance. Roberts (2012b:339) observes that a guidance by words approach is unlikely to result in greater uniformity as it leaves too much discretion for individual judges. He also notes that guidance without restraint, like voluntary sentencing guidelines, has been shown to have no appreciable effect upon the face of sentencing and consistency may be hard to achieve (Roberts, 1991:473; 2011:1000).

d) Is Thai sentencing structured and principled?

Thailand has no sentencing rationale prescribed in the statute. The Thai judiciary has employed the mechanism of *Yee-Tok* for at least five decades. Its underlying aim is not officially stated, but it helps to structure the decision-making process by adopting

the seriousness of the offence as the main criterion for sentencing, specifying how the seriousness of each offence can be determined and recommending a sentence for the offence. It can shorten the decision-making process and help to ensure consistency of sentencing outcomes in the same court. Considering the lack of legal requirement to comply with *Yee-Tok*, different policies of compliance with and departure from *Yee-Tok* of different Chief Judges, and the fact that different courts use different *Yee-Tok*, it appears that Thai sentencing is far from being 'structured' in the western sense.

Although *Yee-Tok* is different from the sentencing framework described above, in my experience, it serves many important functions in Thailand's sentencing system. Firstly, the existence of *Yee-Tok* provides justification for the Thai judiciary to claim that it takes the aim of reducing sentencing disparity seriously. Also, at the same time, it can justify the confidential and advisory nature of *Yee-Tok* by referring to the idea of individualised justice.

Secondly, the informal and advisory nature of *Yee-Tok*, as the Thai judiciary claims, seems to compensate for the weaknesses in its formulation and justifies its confidentiality. If the sentencers are not legally compelled to comply with *Yee-Tok*, why does anyone care about how it is formulated? If the court can ignore it, why should the prosecution and defence need to know its details?

Thirdly, the presence of *Yee-Tok* provides judges with the necessary tool to manage their caseloads. They will learn how fast sentencing will be if they simply adhere to *Yee-Tok*. This may in turn create a very high compliance rate with *Yee-Tok* without any statutory requirements.

Finally, due to the fact that *Yee-Tok* has been created by the judiciary and is intended to be used by the judiciary only, it has created the judicial cultures of equality, evenhandedness and consistency in sentencing without being prescribed in statute.

2. Transparent and accountable sentencing

a) Rationale for transparency and accountability in sentencing

As demonstrated in the above section, a good sentencing system must have a clear and specific sentencing framework to ensure consistency of approach and outcome. Moreover, these frameworks must be open to the public in order to make sentencing more predictable and enhance public confidence in the system. They will become unusable if they are to be used and referred to only by sentencers. Besides, if standards of sentencing are kept secret, decisions cannot be meaningfully challenged.

One dimension of the virtue of transparency is predictability. Defendants and their lawyers should have a reasonable sense of what rules and facts apply in each case and what the implications of those rules and facts will be. Another dimension connected to individual cases is the honest exposure in public light of the reasoning that produced a particular sentence (Weisberg and Miller, 2005:31). Openness of the framework will allow dissatisfied parties to use the framework as a reference for appeal.

In addition to transparency, a good sentencing system must ensure that sentencers are held accountable for their sentencing decisions. They need to justify the reasons for their decisions by referring to the principles or standards outlined in the sentencing framework. The rationale for providing reasons is inspired by the fundamental values of predictability and accountability that distinguish the rule of law from arbitrary exercise of discretion by the courts (Clarke, 2011:157). Doob and Brodeur (1995: 383,388) relate the idea of accountability in sentencing to sentencing theory. They argue that accountability is about the set of guiding principles on sentencing and an explanation of how the sentence follows these guiding principles. For them, without the guiding principles, the sentencing decisions could be justified, but the judges would not be accountable for their decisions.

The necessity to give an account of decisions is enforced to compel the decider to cover the relevant points and disregard irrelevancies. A failure to give reasons for a decision would compromise the right of appeal because the losing party would be incapable of making an informed decision about his or her chances of success (Clarke 2011:157). Transparent and accountable sentencing will ensure the

effectiveness of appellate review of sentence. By giving sentencing reasons, the parties involved will know if the sentencing decisions failed to consider stated factors or misinterpreted the rules. Without the openness of the framework, they cannot evaluate if the reasons provided by sentencers were justified. The openness of the framework and the sentencing reasons given by the lower court are the best raw materials for the Court of Appeal to review sentences.

Piana (2010b:49-51) links the concept of accountability to the concept of constitutionalism and proposes that accountability may be thought of as a method by which the scope of power is limited. Accordingly, judicial accountability may be legal, managerial, societal, institutional and professional. In adopting this framework, the focus must be shifted from legal texts, and accountabilities need to be understood as they work in practice. The law is necessary but not sufficient in holding judges accountable (p.57).

b) Is Thai sentencing transparent and accountable?

In Thailand, the statutory sentencing framework in the Penal Code is published, but the instrument that spells out the exact sentence for most offences, *Yee Tok*, is confidential. Thus the Thai sentencing system seems to lack transparency. Even though the fact that Thai judges use *Yee-Tok* is well known to criminal justice practitioners and academics, its details are largely unknown: how it is formulated, how the sentencer learns about it, how it operates, what determines the decision to use or not to use it, why it is kept confidential, why sentencers comply with it without statutory obligation and what functions it performs in the sentencing system to name but a few. Careful empirical research on Thailand's sentencing practice is needed to inform the public of how this significant public function operates. While it is possible to describe the actual sentencing decision-making process and the mechanisms of *Yee-Tok* without disclosing its actual content, previous sentencing research in Thailand has not seemed keen to accept this challenge.

Without clear and coherent statutory sentencing principles and frameworks, it seems to be that the Thai sentencing system also lacks legal accountability. Besides, the confidentiality of *Yee-Tok* undermines the possibility of having democratic accountability since the public and other stakeholders cannot check if the courts

comply with self-imposed rules. Since the actual practice is largely unknown, however, it may be possible that there is another form of accountability enforcement within the system, but this remains invisible to academics.

3. Informed sentencing

a) The need for information in sentencing decision-making

Sentencing is an information-gathering exercise (Zedner, 2004: 173). Perfect sentencing standards will be meaningless if applied to insufficient information. Sentencing is a human process which requires information about both the offence and the offender. Information sufficient to prove guilt does not always encompass all the facts relevant to sentencing (p.183). Before making sentencing decision, a court should be informed as fully and accurately as possible about the offence and the offender (O'Malley, 2006:565). Information for judicial decision-making is not a luxury; it is a necessity (Knapp, 1993:696).

In common law countries, in cases where the offender is found guilty upon conviction or makes a guilty plea, the court will benefit from commissioning a pre-sentence report. The sentencing hearing is a separate process in which both the prosecution and the defence have a role in informing the sentencers. Roberts (2012b: 321) notes the role of Canadian prosecutors in highlighting the aggravating factors in the case and making a detailed sentencing submission to sentencers, while English prosecutors restrict their role to identifying important sources of aggravation.

In most civil law countries, a guilty plea cannot waive a trial. Even though there is no separate sentencing hearing, information on both the conviction and sentencing part of the case is gathered throughout the trial process. Therefore, in general, civil law courts do not need specific information to be compiled in a pre-sentence report before making a sentencing decision.

b) Is Thai sentencing informed?

Thailand has no procedure of sentencing hearings as in other civil law counties. However, Thailand's criminal procedure is different from other civil law countries

since the Thai law does not require a trial for most cases where the offenders plead guilty while other civil law countries tend to require a trial even in cases where a defendant pleads guilty. Moreover, as mentioned earlier that evidence relevant to sentencing is rarely presented during a trial in Thai courts. The problem in practice is that when an offender pleads guilty and the law does not require a trial[37] and even in cases that trials are conducted, sentencers have insufficient information to reach a just sentence unless they commission a pre-sentence report.

A large number of Thai practitioners and scholars (Chansue, 1993; Saengsasitorn, 2002; Kumpetch, 2003; Ansomsri, 2004; Suparp, 2004b; Wirayasiri, 2006; Sakulkloy, 2008; Nakprasom, 2010) recommend that sentencers seek more information before sentencing. Unfortunately, without knowledge of how Thai judges make sentencing decisions, we still do not know why they decide to seek additional information in one case and not in another, and the role of *Yee-Tok* in determining what information is relevant and irrelevant to each offence.

The pre-sentence report, if commissioned, may provide some useful information for a sentencer, but the parties of the case should have a role in challenging or supplementing information written in the report. There should be a separate procedure in Thailand that provides both the prosecution and the defence with an opportunity to draw the attention of the sentencer to the aggravations and mitigations of the case. The current 'mixed' system in Thailand seems to suffer from the worst of both worlds as Thai courts are more modest in conducting trials and more passive in seeking information during trials than other civil law countries and more reluctant to commission a pre-sentence report than common law countries. As a result, Thai judges often end up having insufficient information to make a meaningful sentencing decision.

[37] According to the CPC Section 176 Paragraph 1, the court does not have to conduct the trial in a guilty plea case that carries a minimum sentence of less than 5 years imprisonment. In narcotics cases, Section 13 of the Procedure for Narcotics Cases Act 2007 provides that a guilty plea can waive a trial in almost all cases except one that carries a minimum life or death sentence.

4. Nationalised/Centralised Sentencing

Sentencing reformers may face the problem of whether the new sentencing standard or framework must be applied across the jurisdiction or allow for local authority to amend the framework in response to the needs of the area. Bingham (2010:53) argues against local variations as it would be unjust if the severity of sentencing varied unduly in different parts of the country, resulting in 'a sentencing postcode lottery'. However, Weisberg and Miller (2005: 12) point out that some amount of 'local variation' would be important in reflecting particular localised crime patterns, knowledge and concerns, but could be problematic if it reflected local hostility to national policy choices. The US Sentencing Reform Act 1984 directs the United States Sentencing Commission to consider 'the community view of the gravity of the offense' and 'the current incidence of the offence in the community and the Nation as a whole'. The English sentencing guidelines also allow judges to take local prevalence of an offence into account in assessing the seriousness of an offence if there are 'exceptional circumstances' (Sentencing Guideline Council, 2003), and the English Court of Appeal has accepted the use of 'community impact statement' as justification for a heavier than usual sentence in many cases (Wasik, 2015:233). It seems that local variation could be acceptable if it is principled and within reasonable limits.

In the Thai context, the Penal Code – the basic framework of sentencing – is applied throughout the country, but *Yee- Tok* is different from court to court. Some Thai researchers have called for a national *'Yee- Tok'* (e.g. Sawatditat, 2005) to be used by all courts across the country, but some argue against a nationwide *Yee-Tok* since each region may have different views on offence seriousness (Saengwirotjanapat, 2006:47). It seems natural to conclude that localised *Yee-Tok* cannot achieve consistency of approach and outcome. Yet this conclusion remains implausible unless we try to address the reasons for different courts using different *Yee-Tok* and the extent of the differences between the *Yee-Tok* of different courts.

5. Parsimonious Sentencing

The principle of parsimony is one of the governing sentencing principles in western countries (Zedner, 2004:180). The parsimony approach is also one of the goals for sentencing reform (Ashworth, 1995; Von Hirsch, 1995; Tata, 2013). This principle holds that since imprisonment is the most severe sentence next to the death penalty, it should be imposed for only the most serious offences. In other words, it must be used as a last resort. Besides, as punishment is the infliction of pain to defendants who are assumed to have continued human and citizen status, it must always be imposed with a sense of restraint (Von Hirsch and Ashworth, 2005:9). Nevertheless, the argument for the parsimonious use of imprisonment is usually presented by referring to the cost-effectiveness in managing criminal justice resources; imprisonment is expensive and must not be used if the cheaper alternatives are available. A number of states have aimed to reform their sentencing system in order to reduce the use of imprisonment as a sanction (Ashworth, 1997:133).

Tonry (2007:3) notes that the assumption that there is a strong or straightforward relationship between crime rates and the use of imprisonment is incorrect. Some western countries such as the US, England and Wales, and Scotland have experienced decreasing crime rates but increasing prison populations, and vice versa.

To claim that prison population correlates with crime rate may be false reasoning in the western world. However, Thailand has experienced both increasing crime rates (although this is due only to an increase in drug offences) and prison population[38]. According to official statistics, Thai sentencers have consistently used non-custodial sentences for most cases. However, since the legislature prescribes very severe minimum and maximum sentences for drug offences, some drug offenders do not qualify for the use of non-custodial sentences and become the majority of the prison population. Moreover, when they are sent to prison, they stay there longer than other offenders.

Before 2002, most drug offences except drug abuse and possession carried a minimum five year sentence which the law requires a trial even when offenders plead

[38] This issue will be explored in more detail in the next chapter.

guilty. The legislature amended the law in 2002 to change the minimum sentence to four years in order to speed up the process. This change also allowed the court to use more suspended imprisonment for drug offences. However, this has proved ineffective as the number of imprisonments for drug offenders has risen continuously in the last decade. It appears that merely changing laws cannot change sentencing practices; thus, empirical research on how Thai judges justify their imposition of imprisonment for drug offenders may be needed before attempting to pass a new law.

Thailand can learn from the experience of western countries in the use of sentencing reform to reduce the prison population. England and Wales have demonstrated that reforms to community sentences might not reduce the prison population, but could be said to have effectively maintained or stabilised the use of short-term custody (Mills, 2012:19). Consensus on the wide use of community sentences and the need to reduce the prison population is not enough if an ideological commitment to reduce the use of custody is absent.

Attempts to address the problem of a high prison population must be broadly acceptable to the community; otherwise, criticism of the courts will intensify (Roberts, 2008: 116). Success in reducing imprisonment rates in Finland seemed to confirm that requirement (Proband, 1997:188). However, it seems that alternatives to custody are unable to do their job without resort to custody itself (Robinson, McNeill and Maruna, 2012:327). In addition to reducing the rate of imposition of imprisonment, attention also needs to be paid to the criminal justice system's response when offenders fail to comply with the terms of a community penalty (Roberts, 2008:118).

The attempt in this section to present Thai sentencing to an international audience by comparing Thailand's sentencing practice with that of reformed sentencing systems not only identified some defects in the Thai sentencing system, but also a large gap in the literature on how Thai sentencers actually make sentencing decisions. In the next section, I shift the discussion to the two most discussed concepts in sentencing literature: consistency and accountability in sentencing in

order to evaluate if employing such concepts can shed more light on how Thai sentencing operates.

SECTION 3: THE CONCEPTIONS OF CONSISTENCY AND ACCOUNTABILITY IN SENTENCING

Internationally, a perceived lack of consistency and accountability in sentencing has been one of the main driving forces behind the reform of sentencing (Ashworth, 1992:183; 1995:255; Doob, 1995:202; Tata and Hutton, 1998:340). Previous research in Thailand pointed out the need to have a clear, explicit, transparent and consistent sentencing framework (Mahakun, 1977; Promsurin, 1999; Saengsasitorn, 2002; Suparp, 2004b; Jaiharn et al, 2006; Saengwirotjanapat, 2006). The researchers' recommendations suggested a movement towards consistency and accountability in sentencing. One way to justify the need for sentencing reform is to use the framework of these scholars to assess if Thai sentencing practices are consistent and accountable. However, experience demonstrates that sentencing reform initiatives often fail to achieve their goal (see e.g. Alschuler, 2005; Sebba, 2013). This may be due in part to the fact that the sentencing decision-making process is complex and the concepts of consistency and accountability in sentencing are multifaceted.

Consistency in Sentencing

(a) A Legal-Rational Conception of Consistency

The basic definition of consistency in sentencing is that like cases ought to be treated alike and unlike cases should not receive the same sentence (Tata and Hutton, 1998:339). Sentencing is consistent when offenders who commit similar offences are punished with similar penalties by different sentencers, whether those sentencers sit in the same courtroom or different courtrooms (The Sentencing Commission for Scotland, 2006:9).

Consistency of approach in sentencing is a procedural mechanism that obliges a sentencing judge to follow a prescribed sequence of steps, or to consider prescribed

factors in arriving at a conclusion (Krasnostein and Frieberg, 2013: 270-271). It requires sentencers across the country and at all levels of the court system to take the same factors into consideration when deciding a sentence as well as regarding the same principles and purposes of sentencing and the same categories of aggravating and mitigating factors.

In order to ensure consistency of approach, it is important to reach an agreement on the aims of sentencing and on any further policies and principles that are to be pursued (Ashworth, 1992: 233). Most sentencing scholars explain disparity and inconsistency in sentencing by referring to the lack of a coherent sentencing rationale. Disparity in sentencing, the opposite of consistency, was defined as not treating similar cases similarly and treating different cases in similar ways (Doob and Brodeur, 1995: 386). For sentencing scholars who adopt the legal-rational conception of consistency, if sentencing lacks legal rules, then it must be discretionary and lacking any predictable patterns. However, policy-makers and scholars seem to disagree on the definition of unwarranted disparity in sentencing. The search for a single definition of 'similar case' is still continuing and dominates sentencing research. Some researchers criticise reformers for failing to take relevant factors in sentencing into account and accordingly failing to treat different cases differently (see e.g. Tonry, 1996; Alschuler, 2005). As a result, evaluative studies of sentencing reform based on a legal-rational approach are both ambivalent and ambiguous (Sebba, 2013:257).

This conception of consistency is directly related to the issue of justice. Inconsistent sentencing approaches and outcomes are condemned as unjust. It is widely suggested, by the legal-rational conception, that judges in common-law countries tend to see the concept of consistency as relatively unimportant since there are few explicit rules requiring them to consider such a value in sentencing. The belief in the close relationship between coherent sentencing principles and consistency in sentencing has facilitated the international movement for consistency, in large part because of the relative absence of legal rules. However, this belief blinds legal scholars to the possibility that consistency may have practical benefits to practitioners and therefore has already existed in the system without the assistance of more legal rules.

(b) An Interpretive Conception of Consistency

Another strand of sentencing scholars view sentencing as fundamentally socially produced and socially practised as opposed to being an application of legal rules or an exercise in moral philosophy (Tata, 2002a, 2002b; Hutton, 2002, 2006). As a social actor, a sentencer acts strategically in responding to the different expectations of various audiences. Legal rules are only one resource among many that the sentencer can use to fulfil those expectations.

According to this conception, consistency can exist in the sentencing system without the existence of intellectually coherent rules. Sentencers are social actors whose actions reproduce existing social structures. Part of the structure of sentencing is formed by legal rules, while another part is formed by social and organisational norms (Hutton, 2002:578). Decision-making behaviour is, by nature, a search for order and pattern. It is important for decision-makers to operate in a structured way and in a predictable environment (Hawkins, 2003:211). Consistency is achieved through the process of routinisation and typification to make same decisions repetitively. Matters are simplified and made sense of by seeking patterns, using past experience and aligning the present with the past. A matter deemed to be 'normal', 'typical' or 'routine' will be dealt with in normal, typical or routine ways (pp.212-213). The legal-rational approach views consistency as the need to treat like cases alike. While interpretive researchers do not reject the basic definition of consistency as the need to sentence similar cases similarly, they question the existence of absolute similarity of cases. The situated rationality of the decision-maker may not fit the conceptions of rationality held by the researcher or critic. Critics discern similarity in a case where none may have existed for the decision-maker (Hawkins, 2003:204-205). What scholars should firstly do is not to prescribe the criteria for assessment of similarity, but to describe and understand how judges assess the similarity of cases.

Using Bourdieu's conceptual approach, Hutton (2006:162) proposes that judges' sentencing behaviour is patterned because through their education and working experience they have learnt how to think, argue and make decisions in a judicial way. However, this pattern is far from uniform and inconsistencies are found alongside

consistencies. Hawkins (2003: 204) criticises that policy makers seem to be preoccupied with consistency in sentencing outcomes. He also points out that the reality is that inconsistency is inevitable and inconsistency of outcome may be regarded as a functional response to scarcity of resources.

Accountability in Sentencing

(a) A Legal-Rational Conception of Accountability

Judicial accountability seems to mean different things to different scholars. Drechsel (1987) argues that the concept focuses on the extent to which the organisation of the judiciary is accountable to the public. It also relates to the questions of whether the judiciary is responsive enough to the demands of the public and which method of judicial selection could maximise its public accountability. Minegar (2011:385) notes that judicial accountability posits that judges and courts should be held responsible for their performance, their behaviour, and their rulings. He focuses on the question of the best method for ensuring accountability of the judiciary: letting the judges manage their own affairs or complete political control of appointment, promotion and discipline (p.386). Knapp (1993:689) proposes that two types of accountability are needed in sentencing. One type is case level accountability, requiring the judge to provide reasons for sentencing decisions so that all those interested in a case know the basis for the decision made and so that the decision can be reviewed. A second type of accountability is systemic accountability, whereby judicial decisions in the aggregate can be examined for policy and planning purposes. Sentencing scholars are most concerned with the first type of accountability, the accountability of an individual judge for their sentencing decisions (see e.g. Frankel, 1972). Sentencers need to justify their decisions by referring to relevant principles or standards in their reasons.

Doob and Brodeur (1995: 383,388) relate the idea of accountability of sentencing to sentencing theory. They argue that giving an account of one's behaviour implies using a medium that can be shared and understood by the party for which it is intended. Accountability in sentencing is about the set of guiding principles on

sentencing and an explanation of how sentencing decisions follow guiding principles. Ashworth (1992:225) concurs that reason giving without detailed guidance may prove unhelpful. The point of requiring reasons is to justify the sentence to the defendant, to the public, and to an appellate court that might review it; and this can only be a meaningful exercise if there are some established parameters for sentencing. Given the fact that the dominant sentencing paradigm promoted in western countries is just deserts, which aims for consistency in sentencing; consistency and accountability in sentencing are intertwined in the sense that sentencers will be held accountable only if they can explain their decision by referring to coherent rules crafted to ensure consistency.

(b) An Interpretive Conception of Accountability

Tata (2002b: 417) argues that all decision-makers who provide explanations or accounts of their decisions do so in a way which is dependent on the purpose(s) and audience(s) for whom it is intended. Sentencing accounts are socially produced to satisfy a range of often contradictory purposes and audiences, so we should expect them to be contradictory, vague and unrevealing. Hawkins (2003:213) proposes that the decision-maker always seeks to integrate his/her decision outcome into a rationale of thought and reasoning in order to make their decision defensible. An account given by a decision-maker may perform an expressive function rather than an instrumental one. The use of vocabulary that is recognizable and comprehensible helps make sense of the decision outcome to those with an interest in it (p.214).

While the legal-rational approach presupposes that the defendant, the public and the appellate courts are legitimate audiences of sentencing accountability (Ashworth, 1992), interpretive researchers urge scholars to question this presupposition in order to grasp the real meaning of an account of sentencing as socially produced. In other words, if accountability in sentencing is about giving an account of sentencing decisions, we should know who can call for an account and who is expected to provide explanations (Day and Klein, 1987:5 cited in Doob and Brodeur, 1995:383). 'A shared set of expectations and a common currency of justification' (Doob and Brodeur, 1995: 383) between those two groups is not unitary but depends on the audience of accountability.

What is the Evidence of Consistency and Accountability in Sentencing?

a) Evidence of Consistency in Sentencing

Although interpretive researchers propose that consistency and accountability are socially produced, they do not reject the basic definition of consistency as the need to treat like cases similarly and of accountability as the need to explain sentencing decisions to others. Furthermore, they do not deny that those two concepts can be measured and observed from everyday sentencing practices. There is general agreement in the literature from both strands of sentencing scholars that what counts as a similar case can be based upon the seriousness of the case and the criminal history of the offender (Ashworth, 1995; Tata and Hutton, 1998). To use those two criteria does not imply that no other criteria are relevant in sentencing practice. It only means that those are two basic criteria that scholars and practitioners seem to agree upon.

Tata and Hutton (1998) rightly observe that although there is considerable debate about the criteria upon which an assessment of seriousness should be based, there has been much less research on how judges assess the seriousness of a case. The research in this thesis attempts to fill this gap in the literature. As I will elaborate on later, the criteria for determining the seriousness of a case employed by Thai sentencers seem to be derived both from the text of Thailand's criminal statutes and *Yee-Tok*. The seriousness of narcotics offences is assessed by the type and quantity of drugs, while the seriousness of theft is assessed by the type and amount of stolen property. To illustrate, the sentencing of narcotics offence will be consistent only if sentencers follow the same steps in reaching sentencing decisions and impose similar sentences upon offenders who commit narcotics offences involving the same type and amount of drug and share the same pattern of previous convictions.

Another method for measuring consistency is to identify its negative evidence by assessing the extent to which the characteristics of a judge affect the sentencing approach and outcome. Sentencing scholars seem to agree that a difference in sentencing outcome resulting from differences between judges is not justifiable (see e.g. Anderson and Spohn, 2010; Krasnostein and Freiberg, 2013). Therefore, if this situation occurs in any sentencing system, we cannot claim that the sentencing

practice of that system is consistent. The problem of employing this measurement, however, lies in ruling out the influence of factors which may affect sentencing approach and outcome other than the individual differences of judges.

b) Evidence of Accountability in Sentencing

The foundation of the concept of accountability in sentencing is the need to hold sentencers responsible for their sentencing decisions by asking them to justify or explain their decisions to others. Much of the literature on sentencing accountability presupposes that the defendant, the public and the higher courts are legitimate audiences of sentencing accounts and the main form of giving sentencing account is to give reasons for sentencing decisions by referring to established legal rules. The implication for empirical researchers of this approach is that accountability in sentencing can be observed in three ways: the first is whether there is an established legal rule on sentencing, the second is whether the judge gives sentencing reasons, and the last is whether the reasons provided refer to the established legal rules (Ashworth, 1992; Doob and Brodeur, 1995). Piana (2010b:49) argues from the political scientist's point of view that, at the highest level of abstraction, accountability may be thought of as a means by which the scope of power is limited; therefore, accountability may be legal, managerial, societal, institutional or professional (p.50).

One disagreement between the legal-rational approach and the interpretive approach is whether or not accountability in sentencing should be associated exclusively with legal mechanisms of answerability. Interpretivists tend to argue that decision-makers attempt to justify their decision in some way and are always held accountable for their decisions to some extent. The task of the scholar is to focus on the audiences of accountability or the question of whom the sentencers should be held accountable to and in what manner.

Utilising insights from both sociologists and political scientists, this study plans to demonstrate evidence of accountability in Thailand sentencing practice; not only by looking at legal mechanisms for holding judges accountable for their sentencing decisions, but also by identifying the perceived audiences of accountability for Thai sentencers and the way they respond to the expectations of these audiences.

Previous Empirical Research on Consistency and Accountability in Sentencing

Numerous studies have been conducted worldwide which provide evidence of inter-judge and inter-court disparity in sentencing (see e.g. Hood, 1962; Palys and Bivorski, 1986; Kramer and Ulmer, 1996; Anderson et al, 1999; Anderson and Spohn, 2010). Although some scholars argue for the interpretive sociological conception of consistency (Tata, 2002a; Hawkins, 2003; Hutton, 2002, 2006), there has been no empirical research which has hypothesised in advance of the research that consistency in sentencing is a normal practice. Furthermore, empirical research on accountability in sentencing is nowhere to be found in international literature.

Previous Thai sentencing research has, for the most part, failed to contribute to international literature. Although some scholars note that the lack of sentencing principles may lead to sentencing disparity (see e.g. Mahakun, 1977; Saengsasitorn, 2002; Saengwirotjanapat, 2006), there is no empirical research which aims to illustrate the disparity, let alone consistency, in Thailand's sentencing practice. Most empirical studies have aimed to identify factors that affect sentencing decision-making, such as individual differences (Sawasdisara, 1999), previous occupation (Chanyachailert, 2003) or facts of the case (Sakulkloy, 2008) but ignore evidence of consistency or disparity in Thailand's sentencing practice. Moreover, accountability in sentencing is an underexplored area in the Thai academic arena.

A discussion of the concepts of consistency and accountability in sentencing in this section appears to suggest that these concepts can be employed to explain and understand how Thai sentencing operates. It is worth emphasizing that Thailand is a civil law country. As sentencing literature mainly discusses sentencing system and practice in common law countries, it is mandatory to explore further in the next section how the concepts of consistency and accountability in sentencing are understood and put into practice in civil law countries.

SECTION 4: THE PURSUIT OF CONSISTENCY AND ACCOUNTABILITY: A COMMON LAW ILLUSION?

'Individualised Sentencing' and 'Individualisation of Punishment': Similar or Different Discourses?

International sentencing literature is imbalanced. Much has been written about sentencing practices and reforms in common law countries, but little is known about those in civil law countries (Plesničar, 2013). To be fair, much has been written on sentencing in some Nordic civil law countries, particularly Sweden, Finland and Denmark (Jareborg, 1995; Tornudd, 1997; Von Hirsch, 1997; Proband, 1997; Wandall, 2006, 2010; Lappi-Seppala, 2001, 2012) but most of the existing literature does not go beyond legal texts and statistics. Sentencing literature produced in the last few years seems to emphasise the model of sentencing reform which can be adopted in common law countries (See for example, Roberts, 2012a). Underlying the sentencing literature in common law countries is the commitment to the principle of just deserts and proportionality, which applies both at the policy level and at the individual level of sentencing decision-making. However, literature on the sentencing practices of civil law countries points out that the basis of the sentencing system is the concept of individualisation of punishment (Herber, 2009; Plesničar, 2013; Hörnle, 2013; Albrecht, 2013), where proportionality is of the utmost importance and is set first by legislation, which determines sentencing ranges for specific offences, and then by the judiciary which aims to narrow the ranges to decide upon appropriate sentences in individual cases.

Individualised sentencing and consistency are the main discourses of justice in international sentencing literature (Tata, 2007). The term 'individualised sentencing' has two distinct meanings: the first refers to inter-case incommensurability (Tata, 2013:239), and another refers to the need to tailor a sentence to suit each individual offender. In common law literature, however, 'individualised sentencing' tends to be widely used in the former sense that every case is unique and cases cannot be compared. It conveys a particular approach to sentencing which posits that judges must take all relevant factors into account before sentencing an individual offender. The lists of relevant factors can hardly be identified in a coherent form (Hutton,

2013a). The claim that cases cannot be compared is criticised by some legal scholars as a 'judicial fetish' (Doob, 2011:285) or even 'absurd' (Von Hirsch, 2001:410). Structured sentencing is unacceptable for those who adhere to the notion of 'individualised sentencing' since it is impossible to establish the exact definition of 'similar cases' and an attempt to do so is unjust; therefore the pursuit of consistency is perceived as a threat to individualised sentencing (Krasnostein and Freiberg, 2013:268). The suggestion of sentencing scholars in common law countries is for the reformer to try to overcome this 'misconception' or 'shift away' from this individualised approach (Hutton, 2013a) and promote the maxim of 'treating like cases alike'. In other words, consistency and individualised sentencing in common law countries lie at different ends of the spectrum. The two discourses need to be rebalanced in favour of consistency (Krasnostein and Freiberg, 2013).

Although the term 'individualised sentencing' is sometimes used in the sentencing literature of the civil law world (see e.g. Wandall, 2010; Albrecht, 2013), it is widely accepted that the sentencing systems of civil law countries adhere to the concept of 'individualisation of punishment' (Field, 2006; Henham, 2012; Albrecht, 2013; Plesničar, 2013). This idea follows from post-Enlightenment thinking which holds that each human being should be considered unique and should be treated according to this uniqueness. In contrary to the hostile response to the claim of 'individualised sentencing' from common law countries, the concept of 'individualisation of punishment' is widely shared and praised by both academics and practitioners in civil law countries.

Comparative sentencing scholars have never explicitly explained if 'individualised sentencing' and 'individualisation of punishment' are similar or different notions. In order to place Thailand, a civil law country which also praises the notion of 'individualisation of punishment', in an international context, I need to provide at least a tentative answer to this puzzle. Plesničar (2013:474-475) and Albrecht (2013:235) note that, at a conceptual level, individualisation of punishment is not compatible with the maxim of 'treating like cases alike', because like cases are difficult to imagine if each offender is unique. It can be implied from their observations that both individualisation of punishment and individualised sentencing are approaches which support respecting the unique nature of each case and, as a

result, believe that no two cases can be directly compared. In other words, from the point of view of some civil law scholars, individualisation of punishment also implies inter-case commmensurability. Why is the notion more welcome in civil law countries than in common law countries? Does the greater focus on 'individualisation of punishment' mean that consistency and accountability are not important values in the sentencing systems of civil law countries? The sentencing literature of civil law countries seems to suggest the opposite.

The Place of 'individualisation of punishment' in Thailand's sentencing discourse

A primary commitment to consistency in sentencing over individualisation of punishment has never existed in Thailand. In contrast, it seems that both Thai scholars and practitioners agree that if fairness in sentencing is the ultimate aim, individualisation of punishment must be the dominating paradigm of the system (Saengwirotjanapat, 2006).

The Thai judiciary seems to give consistency and individualisation of punishment equal weight. The unofficial and confidential nature of *Yee-Tok* allows the judiciary to claim its commitment to both paradigms in 'crafting' a fair sentence (Tata, 2007). Although it is obvious from the existence of *'Yee- Tok'* that consistency appears to be given more weight. The crucial question that must be asked is why a highly trusted agency like the judiciary still has to promote the notion of 'individualisation of punishment' even though it contradicts its daily practice.

In Thailand's academic arena, as in most civil law countries (see e.g. Aber, 2009; Albrecht, 2013; Plesnicar, 2013), it is widely accepted that individualisation of punishment is a virtue, and that sentencing discretion is necessary for reaching just sentence. A review of Thai sentencing literature reveals that Thai sentencing scholars have recommended abandoning or improving *Yee-Tok* since it removes discretion from judges and leads to unjust sentences (e.g. Jaiharn et al, 2006). For these scholars, the most important tool for reaching just sentences is individualisation of punishment and, as a result, reducing unwarranted disparities has never been on

Thailand's research agenda. Thai sentencing scholars have never conducted research to prove that sentencing disparity exists in the system. One explanation may be that they trust the judiciary to adhere to uniformity in sentencing. However, a review of sentencing literature in civil law countries suggests that the positive attitude towards sentencing discretion among Thai scholars is partly caused by the culture embedded in civil law tradition.

The Thai judiciary's public adherence to individualisation of punishment seems to be purely pragmatic. On one hand, the judiciary realises that *Yee Tok* is not perfect since it does not cover all criminal offences and focuses only on some parts of an offence's seriousness; therefore, sentencing discretion is still necessary for crafting fair sentences in some cases. On the other hand, concern over interference with the individual independence of judges may make the judiciary feel reluctant to promulgate a national *Yee-Tok*. Leaving *Yee-Tok* to be localised can therefore be justified by dubbing it the mechanism for individualisation of punishment.

The positive attitude towards sentencing discretion in Thailand is partly due to the fact that the rehabilitative ideal in Thailand has never been confronted as a crisis. The survival of the rehabilitative ideal may due to the fact that Thailand's penal change seems not to be affected by 'law and order' politics and 'populist punitiveness' (Bottoms, 1995) as in some western countries[39].

Rehabilitative sentencing fits well with the paradigm of individualisation of punishment. In sentencing, the court must consider the likelihood of the offender being reformed, the required duration of rehabilitation and the rehabilitation programme that suits the offender's need rather than the seriousness of the offence. Since the offender may be successfully reformed earlier or later than the sentencer expected, the executive agencies which operate the programme must be the ones to decide the exact length of the sentence. This is not the case in Thailand's sentencing practice. Indeterminate sentencing, purely representative of rehabilitative ideal, has never been practiced in Thailand. Even though 'just deserts' and the principle of proportionality have never been promoted as the primary goal of sentencing, Thai sentencers have used crime seriousness as the basic framework for crafting just

[39] This issue will be discussed in the next chapter.

sentences since the pre-adoption of European Codes (Boonchalermvipas, 2000). Offenders who commit more serious crimes always receive more severe sentences regardless of their likelihood to be rehabilitated.

Justifying punishment in terms of rehabilitation fits well with the culture of forgiveness derived from Buddhism's belief in making merit. The Department of Probation and the Department of Corrections define the success of their work in terms of 'returning good citizens to society'; therefore they are agencies that support the rehabilitative ideal and individualisation of punishment, since those notions provide legitimacy for their organisations. The practice of collective royal pardon also illustrates that the western rehabilitative ideal and the Buddhist belief in making merit may not be incompatible in Thailand's context.

To summarise, sanquinity towards wide sentencing discretion is the best description of Thailand's sentencing environment. This has been shaped by both the civil law influence and the political, social and cultural context of Thailand. Accordingly, it might result in the distinctive way that Thai sentencers put the concepts of consistency and accountability into sentencing practices.

The Pursuit of Consistency and Accountability in Civil Law Countries

Recommendations concerning consistency in sentencing from the Council of Europe (1992) illustrate that the pursuit of consistency and accountability in sentencing goes beyond the civil law-common law dichotomy. The establishment of a sentencing commission and the promulgation of sentencing guidelines in South Korea (Fiedler, 2010; Park, 2010), one of the representatives of civil law countries in Asia, is another evidence that civil law countries also take the concepts of consistency and accountability in sentencing seriously. At the level of normative principle, the dominant sentencing paradigm in many civil law countries, including Thailand, is individualisation of punishment. However, scholars in civil law countries seem to agree that one of the requirements for justice in sentencing is consistency.

Tak (1995) notes the concerns of Dutch sentencing scholars over the problem of sentencing disparity. Plesničar (2013) observes that the established sentencing

practice of the judiciary in Slovenia controls a significant amount of sentencing discretion granted by the Penal Code and ensures consistency. Writing on the sentencing practice of Germany, Hörnle (2013) and Albrecht (2013) discuss the insufficient guidance of legal rules in helping judges to make sentencing decisions, the organisation of the German judiciary, the system of a career judiciary and how the German judiciary balances consistency in sentencing and individualised sentencing without a sentencing commission or sentencing guidelines. They emphasize the relationship between the professional socialisation of judges and sentencing practices. They also discuss the importance of the requirements to give sentencing reasons and the role of the appellate courts in reviewing those reasons. Herber (2009) makes the observation that in Japan, another civil law country, statutory sentencing principles are not useful for judges in making decisions. However, in the absence of coherent and open sentencing standards, the Japanese courts developed an unofficial tariff for processing cases and creating consistent sentencing outcomes. Wandall (2010) observes that in Denmark, the prosecution and court operate with a common understanding of a 'normal sanction' for any crime with a given criminal history. He also notes numerous internal mechanisms of the judiciary for structuring sentencing decisions and ensuring that information on previous similar cases is made available to judges (Wandall, 2006), as well as discussing the ways that decisions of judges may be influenced by colleagues (Wandall, 2010). Tak (1995) and Albrecht (2013) also note the requirement in the Netherlands and Germany respectively for judges to give sentencing reasons. However, they point out that the reasons given are uniform and do not reveal the real justification for the decision. McKee (2001) notes the requirement in the new Penal Code of France for the judge to provide explicit reasons when imposing a custodial sentence of less than six months. While Jaiharn et al (2006, 2011) propose that, as a civil law country, Thailand should adhere to the notion of individualisation of punishment and should abolish all minimum sentences, they also propose that Thailand should have sentencing guidelines to ensure consistency in sentencing. Mahakun (1977), Promsurin (1999), Saengsasitorn (2002), Suparp (2002) and Saengwirotjanapat (2006) all point out the need for Thailand to have a clear, explicit,

transparent and uniform sentencing framework and highlight the significance of giving sentencing reasons.

Ashworth (2002:230) rightly observes that there is no evidence of a single sentencing movement across Europe in recent years. I argue that despite the common goal of the pursuit of consistency and accountability in sentencing, sentencing practices in civil law countries are still different from those in common law countries as a result of two main factors. Firstly, the pursuit of consistency is not a dominant value of the sentencing system in most civil law countries. The pursuit of consistency in sentencing is subject to the presentation of sentencing decision-making in an individualised manner. Therefore, scholars and practitioners in most civil law countries believe that those two demands of justice (Hutton and Tata, 2000) must coexist in a just sentencing system. On the contrary, sentencing scholars in common law countries point out the need for the reformer to convince the sentencers that there is an alternative to individualised sentencing (Ashworth, 1995; Hutton, 2006, 2013a).

Even though lack of experience and data prevent me from proving whether or not common-law judges in the pre-reformed era compare one case with another, I can argue from the evidence in civil law literature and from my experience as a civil-law judge that we do compare cases even if the dominant paradigm of individualisation of punishment tells us that we cannot or even if we tell academic researchers that every case is unique. Making sentencing decisions in civil law countries involves placing individual cases on a scale or range of applicable penalties, a task that requires sentencers to compare the case at hand with a ‘normal case’. While consistency is important for the making of sentencing decisions, individualism is important for the presentation of such decisions to the audience (Albrecht, 2013:232-233). Albrecht (2013) argues that having statutory sentencing principles is important for German judges, not because it controls or directs them in making decisions, but because it facilitates the presentation of their decisions by applying the normative principles with the facts of the case and provides a framework for the appellate court to review their reasoning. He also notes that in Germany, judges are perceived as accountable when they adhere or seem to adhere to the principle of individualisation of punishment.

Secondly, literature in the civil law world points out the fact that consistency and accountability are socially produced as opposed to being a production of the legal rules. Compared to common law countries, statutory sentencing framework in civil law countries is far from 'lawlessness' (Frankel, 1972): having statutory sentencing principles is the norm; sentencing ranges in the Penal Code are quite narrow; and the requirement of giving sentencing reasons is strictly adhered to (Bohlander, 2012; Henham, 2012; Albrecht, 2013; Plesničar, 2013). However, literature from the civil law world illustrates the limited role of legal rules in the pursuit of consistency in sentencing, but highlights the significance of professional socialisation of judges and the internal mechanisms of the judiciary to maintain consistent approaches to and outcomes of sentencing. The paradox is that the majority of literature in the common law world frequently points out the need to have more legal rules. Does this mean that the judiciary in common law countries does not contribute to the pursuit of consistency as their comrades in civil law countries do? One explanation is that the judiciary in common law countries also has mechanisms to ensure a uniform sentencing practice similar to those in civil law countries, but mechanisms of learning and transmitting established sentencing practices in the judiciary remains unexplored by sentencing scholars. Another explanation might be that the differences in institutional characteristics of the judiciary and the socialisation of sentencing in both jurisdictions account for the different roles of the judiciary in the pursuit of consistency and accountability. This study attempts to contribute to the latter argument by using the Thai sentencing system and practice as a case study.

The relationship between types of judicial organisation and the way sentencing discretion is structured

It is undeniable that variations in the strategy for structuring sentencing discretion depends on the political and legal culture of the jurisdiction (see e.g. Ashworth, 2009; O'Malley, 2013), but what comparative sentencing scholars need is a theoretical model or an analytical framework to explain how such differences in political and legal cultures might affect the way sentencing discretion is structured.

Frase (2008) points out the need for comparative sentencing scholars to pay more attention to comparative law theories and notes that they are still far from developing a theory to explain cross-national differences and changes in sentencing, since they seem to overlook differences in sentencing procedure between countries and focus mainly on variations in sentencing severity and sentencing purposes. In his work, Frase (2008) demonstrates how Damaška's (1986) theory of comparative procedural law can be utilised to explain cross-national differences in sentencing procedure but limits his analysis to some western countries.

In his groundbreaking book 'The Faces of Justice and State Authority', Damaška (1986) proposes a model of comparative procedural law which aims to explain the variation in the ways justice is administered in modern states. His theory is based on the belief that there are links between forms of legal process and the character of government. Forms of legal process or procedural law, he suggests, are the result of the interaction between two variables: organisation of authority or judicial organisation and the dominant views on the functions of the justice system. For the first variable, he distinguishes between hierarchical and coordinate ideals of judicial authority and proposes that each ideal of procedural authority influences the shape of the legal process while the second variable is linked to the two extreme ideals of the functions of the government: – the reactive state and the activist state – each of which call for a different form of procedure.

It is noteworthy that in presenting his model, Damaška does not use sentencing procedure as an example. Frase (2008) notes the rarity of the use of Damaška's model in the field of comparative sentencing and the tendency of comparative sentencing scholars to obsess over variations in sentencing severity and purposes, but to overlook differences in sentencing procedure. Nevertheless, his attempt to utilize Damaška's model to explain differences in sentencing procedure between the US and western civil law countries is only a crude overview which touches upon many areas of sentencing procedure; namely the presence or absence of separate sentencing hearings, the role of the victim in the sentencing decision-making process and the existence of bargained or negotiated sentencing procedure.

According to Damaška (1986), there are two different modes of organizing judicial authority which he dubs as hierarchical and coordinate modes. These two ideals in organizing judicial authority are associated with the suitable procedural arrangements and are different in three conceptual elements: the attributes of officials, their relationship with each other and the manner in which they make decisions. For the first element, a judiciary can be organized as a professional/permanent organ or rely on untrained and transitory officials. In terms of the relationship between judicial officers, they may be locked into a strict network of superiority and subordination or treated as rough equals and organized into a single echelon of authority, while differences in the manner of decision-making can be the one pursuant to special or technical standards or informed by undifferentiated or general community norms (p.16).

The judicial organisations in civil law countries in which judges are regarded as civil servants are closer to the ideal type of hierarchical judicial authority. According to Damaška, the first element in this ideal is that judicial officers are permanently placed officials. Their works tend to be specialized and they have a strong sense of identity to distinguish between insiders and outsiders (p.18). He notes that judicial officials serving long terms in office in the hierarchical ideal allows for routinisation and specialization of tasks; thus cases which come to them cannot be unique and call for individualised justice. Damaška also observes that judicial officials in the hierarchical ideal tend to develop institutional thinking as they learn that the organisation does not tolerate consultation to personal conscience but must be univocal (p.19).

Apart from the professionalization of judicial officials, the hierarchical ideal of procedural authority is also characterized by a strict hierarchical ordering within the organisation. Officials are organized into several echelons, where power comes from the top and trickles down the levels of authority. Hence there are great inequalities among officials. Officials start their work at the lowest level with limited responsibility and gain more prestige and responsibility as they move into the higher level. Officials of a similar level are considered equal but contested matters among them must be referred to the superior. In this type of judicial organisation, there is a strong sense of order and a desire for uniformity. All members are expected to march

to the beat of a single drum. Decisions by low level officials are subject to superior review on a regular and comprehensive basis. Furthermore, this system discourages creativity. Those who step out of line and decide to make a difference are less likely to be promoted (pp.19-21).

Damaška notes that in the hierarchical ideal, appellate review is normal and the first decision is perceived as provisional. Moreover, reversal or modification of a decision does not necessitate a finding that the subordinate decision maker has erred or committed a fault; even if impeccable at the time of rendition, a judgement can be changed by superiors (p.49). The final element of the hierarchical ideal of judicial organisation is technical standards for decision-making. Damaška (1986:21) suggests that judges may use two different decision-making approaches: choosing between alternatives in order to achieve a desirable goal (technocratic orientation) or applying facts to the legal standard without considering any goals (legalistic orientation). He claims that the second approach is more prevalent for judges in the hierarchical ideal. Consideration of the preferred goal of judicial decisions is reserved for those who fashion the standards.

An interesting point that Damaška makes is that when the statutory standard is vague or flexible, the judiciary in the hierarchical ideal will establish conventions that foreclose many theoretically possible paths of interpretation which easily occur to an institutionally unrestrained legal imagination. It appears to be the case that it is natural for the judiciary in this ideal to craft mechanisms for pursuing consistency in any judicial decision, with or without pressure from outside sources and legal mandate. In other words, this judicial arrangement may prefer rules over discretion. Hence, individualised justice may be at best an ideal or a myth since it is readily exchanged for greater consistency in decision making across a wide range of cases.

Damaška's model appears to suggest that the existence of judicial self-regulation of sentencing discretion, apart from appellate review, seems to be a natural product of a jurisdiction having a hierarchical mode of judicial authority. This might explain why most civil law countries with their systems of career judiciary do not have a sentencing guidelines mechanism. The functionally equivalent mechanism to

sentencing guidelines may already be in operation but invisible to outsiders (Hörnle, 2013; Albrecht, 2013).

Key Differences in the Sentencing Process of Civil Law and Common Law Countries

Apart from the differences in judicial organisation, the sentencing processes in civil law countries are also different from those in common law countries in many respects. First of all, the sentencers in civil law countries are career judges whose decisions to pursue the judicial path are made much earlier in their career, while judicial appointment in common law countries follows on from an extensive legal career (Merryman and Pérez-Perdomo, 2007:34-35; Roach Anleu, 2010:90; Bohlander, 2012). An early start to a judicial career in civil law countries can promote a tendency to identify oneself in a particularly strong way with the expectations connected to the role of a judge (Hörnle, 2013:208). Secondly, judicial training in civil law countries is a prerequisite before appointment (Foster and Sule, 2010; Steiner, 2010), while training may not be a requirement of judicial appointment in common law countries. Moreover, formal training after appointment in common law countries is not always mandatory (Goldberg, 1985; O'Malley, 2013). Thirdly, civil law judges work in collegial form (Young, 1998; McKee, 2001; Steiner, 2010; Bohlander, 2012; Henham, 2012). While sentencing decisions are usually made by a single judge in the common law world, this rarely happens in civil law countries. Lastly, in civil law countries, decisions on the conviction and sentencing part of the judgement are intertwined. A separate proceeding for a sentencing hearing is not common in civil law countries (Field, 2006; Bohlander, 2012; Henham, 2012; Plesničar, 2013).

Distinguishing the differences in institutional characteristics of the judiciary between civil and common law countries is one thing, explaining how such distinctions affect the way sentencers put the concepts of consistency and accountability into practice is another. In light of the dominant paradigm of 'individualisation of punishment' in most civil law countries, it is possible that consistency and accountability in sentencing may be understood differently in both

legal traditions. However, the fact that a civil law country like South Korea has adopted the model of sentencing reform from the US, and that the Swedish and Finnish Penal Codes explicitly embrace the pursuit of consistency and uniformity in sentencing, illustrates that the reality is too subtle to be grasped by only the conventional taxonomy.

To borrow Max Weber's term, the civil law-common law dichotomy is only 'an ideal type', something we cannot find in reality in its pure form (Berger, 1963). Örücü (2007b) notes the mixture of influences on the modern legal system of Thailand since the end of the 19th century, in which the laws were modeled on many European countries of both legal traditions. As a result, Örücü questions any attempt to group the Thai legal system in the traditional classification of legal families. Harding (2001) even proposes that the concept of legal families makes no sense at all in South East Asia. I disagree with a complete jettisoning of the dichotomy. By using it to characterise Thai sentencing, I find it useful as a tool for explanation, in that presenting Thai sentencing by comparing it with that of other civil law countries is useful for an international audience unfamiliar with Thai sentencing. However, Thailand's sentencing practice is still different from that of other civil law countries in some aspects. Firstly, the Thai Criminal Procedure Code states clearly that a guilty plea can waive a trial in most cases while a trial is the norm in Germany and Japan even in cases where the defendant pleads guilty. Secondly, Thai public prosecutors cannot recommend sentences to sentencers like their counterparts in Germany, Japan or the Netherlands can. Thirdly, giving sentencing reasons is not the norm in Thailand as in Germany. Finally, Thailand has no statutory sentencing principles like in Germany, Finland, Sweden and Japan.

To summarise, a literature review of sentencing practices in civil law countries confirms that the pursuit of consistency and accountability in sentencing is an international goal of any sentencing system. Nonetheless, the civil law-common law dichotomy alone cannot explain how the mechanisms for achieving such goals have been implemented. To discover how Thai sentencers put the concepts of consistency and accountability into practice, we must explore empirically their understanding of the concepts and how this understanding has been shaped by Thailand's political, social and cultural contexts and the professional socialisation of sentencers. It seems

that the conventional approach of comparative legal research does not allow the researcher to answer this question.

The Relationship between the socialisation of sentencing and the way judges put the concepts of consistency and accountability in sentencing into practice

Socialisation is 'the process by which individuals acquire social competence by learning the norms, values, beliefs, attitudes, language characteristics, and roles appropriate to their social groups' (Lutfey and Mortimer, 2003: 183). As individuals enter a new professional role, they attempt to understand the skills, knowledge, and disposition needed to be 'socially accepted' as a member of that specific organisation (Lattuca III, 2012:25). Feldman (1992) observes that there are three organisational processes that constrain the exercise of discretion by legal decision-makers: formal training, informal socialisation with other members of the judiciary and organisational routines. Study of judicial socialisation is quite rare (see e.g. Carp and Wheeler, 1972; Goldberg, 1985; Darbyshire, 2011); research in the area of socialisation of sentencing is even rarer. The literature reveals that judicial socialisation can be formal or informal but the latter seems to be the most effective method by which new judges learn how to do their job (Goldberg, 1985: 434).

In the context of sentencing, socialisation of sentencing is the process by which sentencers learn to make sense of their task: what the demands of just sentencing are; whether two cases are comparable and how; how to assess the similarity of cases; what information needs to be considered before making decisions; whether they should provide explanation for their decision and to whom and in what manner, to name but a few. Sentencers can be socialised both through the formal training process and through observation of their peers. Scholars in common law countries seem to downplay the role of judicial socialisation in structuring sentencing, but advocate having clear sentencing principles (see e.g. Frankel, 1972; Ashworth, 1992). Ashworth (1992:231) even argues that 'training (cannot be a substitute for guidance and) is (therefore) limited by the amount of guidance available'. This view clearly overlooks the role of the judiciary in self-regulating sentencing discretion. However, scholars in some civil law countries explicitly criticise the limited role of

sentencing principles in helping judges make sentencing decisions and praise the role of judicial socialisation in fulfilling the task (Albrecht, 2013; Hörnle, 2013; Plesničar, 2013).

Understanding the socialisation of sentencing is fundamental to the understanding of consistency and accountability since it directly relates to the question of how social order is reproduced. Social reproduction is concerned with the ways in which social life becomes patterned and routinised. How is it that forms of social order persist despite the creative and transformative capacities of individuals? (Layder, 1994:132) Exploration of this area will reveal how judges learn the importance of uniformity of decisions, comparison of cases and how their perceptions of legitimate audiences of accountability have developed. Albrecht (2013) notes the role of the professional socialisation of the German judiciary in stabilizing the pattern of sentencing outcomes. He even argues that professional socialisation in Germany is more effective than sentencing guidelines in common-law countries. Feldman (1992) proposes that organisational limits are stronger than legal rules since they are 'reinforced not only by the expectations of others but also by the internalized expectations of the person of the role' (p.183). An understanding of socialisation of sentencing also has an impact on sentencing reform since the reformer can use organisational processes to reinforce desired behaviours and values. Unfortunately, this topic remains largely unexplored by sentencing scholars. Research is needed in both legal traditions to better understand how new sentencers are socialised in their organisations with the aim of developing a more complete understanding of the complexities surrounding the sentencing decision-making process. By seeking to identify the meaning and interpretation of consistency and accountability in Thailand's sentencing practice, this study intends to find out Thai sentencers develop such meanings and interpretations through the direct and indirect process of socialisation.

CONCLUSION

This chapter has described Thai sentencing by firstly providing an overview of Thai criminal justice and the sentencing system of Thailand and then juxtaposing it with those in western jurisdictions. The attempt to present Thai sentencing to an international audience not only identified some defects in the Thai sentencing system, but also a large gap in the literature on how Thai sentencers actually make sentencing decisions. In an attempt to do justice to Thai sentencing, the common law-civil law dichotomy was employed to characterise Thai sentencing, but it was clear that an additional conceptual framework is needed. I have argued that one way to characterise Thai sentencing is to explore how Thai sentencers understand the concepts of consistency and accountability in sentencing and put them into practice. Such empirical research requires an understanding firstly of Thailand's social, cultural and political context and a review of the dynamic of Thailand's penal change, and secondly an understanding of Thailand's judicial career and the socialisation process of Thai judges. The next chapter is devoted to the discussion of the former issue while the latter will be investigated in the second half of Chapter 4.

CHAPTER 3

VIEWING THAI SENTENCING IN ITS POLITICAL, SOCIAL AND CULTURAL CONTEXT

> *The Thai political worldview was and is firmly based upon the Buddhist cosmology with local archaic religious beliefs. There is no sharp dichotomy between secular and religious beliefs, but a continual shifting from one to the other as time and circumstance dictate. The central authority must encompass and order society morally, politically and economically. Harmony and unity thus are valued highly in the Thai polity, in which the authority must also possess the moral law or dhamma. Changes coming from the periphery or from the bottom were therefore regarded as disruptions of the natural order of the state.*
>
> (Aphornsuvan, 2000:8)

INTRODUCTION

In the previous chapter, I described Thailand's formal sentencing anatomy before comparing it with some of the characteristics of western sentencing scholarly concerns, and concluded that such comparison could partly demonstrate the character of Thai sentencing. With the aim of a richer understanding of how Thai sentencing works, section 1 and 2 of the chapter consider the broader context of Thai sentencing by examining its political, social and cultural context. The aims are to find out how state power, including the power to punish, is legitimated in Thailand, and to investigate the status of the judiciary in contemporary Thai society. In section 3 and 4, I review the development of Thailand's penal policies and practices to examine if western theories can explain Thailand's dynamics of penal change. The chapter concludes by arguing that Thai sentencing is best understood by referring to Thailand's political, social and cultural context.

SECTION 1: THAILAND'S POLITICAL, SOCIAL AND CULTURAL CONTEXT

A Political Context of Thailand

Thailand was formerly known as 'Siam'. The ancient laws of Siam are of Hindu origin and belong to the Hindu law system (Masao, 1905). Siam derived the ancient

legal code, the *Thammasat*, from the Mon people of South Burma; who had in turn derived it from the Hindu Code (Kittayapong, 1990). Ideally, the king had authority to enact laws because he embodied the cosmic law. Siam's monarchs embraced a version of Buddhism that obliged them, as well as their people, to obey its precepts. The concept of *karma* underpinned Thailand's traditional social hierarchy. The *karma* of the virtuous monarch reflected his infinite *bun*, the basis for merit. In the formal organisation of pre-modern Thai society, everyone had a numerical status rank, a *sakdina* that specified their place and privileges in the social hierarchy. In Weberian terms, Siamese society could be characterized as a system of traditional authority, since the people obeyed the command of the King due to the belief in the sanctity of age-old rules and powers.

Disguised in the form of trade treaties during the nineteenth-century, foreigners were exempted from the jurisdiction of Thai courts. Thailand's response was to modernize its legal and court systems. Recognizing the fundamental importance of modern law, King Chulalongkorn (Rama V) created a royal commission to study the problems with Thailand's legal administration and to draft Codes of law based on European Codes. The royal administrators also believed that new laws would lead to new patterns of thought and behaviour and would permit Thailand to assume its place among the civilized nations (Shytov, 2004; Engel, 2011).

Adopting European Codes as a model for the modernized legal system opened Thai legal culture to the influence of powerful new values, including the concepts of equality and human rights. These new values, along with other elements of European culture, were embraced by some elites; but the attraction was by no means universal. The existence of legal Codes in this period did not mean a move towards legal authority, since the Codes only applied to the ruled and not the ruler. Nevertheless, a slow transformation began which contributed to the overthrow of the absolute monarchy in 1932, by elites educated in the west, and the creation of a constitutional monarchy. It should be noted that the 1932 revolution was not a popular revolution but only the giving up of the Monarchy's absolute power in response to the petition of the military/bureaucracy elites. The notion of popular sovereignty and the principle of democratic representation have been introduced in the constitution since then. Hence Thailand should move towards a society of legal authority in which both

the ruler and the ruled must obey the same laws of society and in which the power-holder derives their authority from impersonal legal norms; a Constitution which recognized the citizen as the Sovereign.

However, parliamentary democracy was short lived. The military has frequently seized state power from the civilian government. The traditional authority of the pre-1932 period has been invoked every time the military has seized power. Its actions and declarations have been considered by Thai court as the acts of the sovereign[40]. The usual protocol of the coup is abrogating the constitution, promulgating an interim constitution, appointing a National Legislative Assembly or constitutional drafting committee to draft a new constitution and promising an election when the new constitution is ready (Harding and Layland, 2011). Before 1973, the coups seized power for a long period of time by themselves without the appointment of care-taker civilian governments. The 1991 and the 2006 coups, which were followed by the appointment of civilian care-taker governments, suggested that the military has become wary of seizing power for more than a brief period of time. Yet the May 2014 coup seemed to adopt a traditional approach where the coup leader appointed himself Prime Minister and high-ranking military officers as Ministers of important Ministries. The National Legislative Assemblies under the interim constitutions have been more productive than elected parliaments since they have enacted most of the legislation enforced in the Kingdom of Thailand. Law students study these laws and courts enforce them as the law enacted by the democratic parliaments.

By the mid- twentieth century, in a series of military regimes, the support of the monarchy became a powerful symbol of legitimacy. A new nationalism which

[40] The following holding of the Supreme Court in decision no. 1153-1154/1952 (B.E. 2495) summed up the legal conception of the Thai judiciary:

The Overthrow of a previous government and establishment of a new government by the use of force is perhaps illegal in the beginning until the people are willing to accept and respect it. When it is a government in fact, which means that the people have been willing to accept and respect it, any person who attempts by rebellion to overthrow that government violates the criminal law. (translation by Wilson 1962:269)

The problem of this decision, and similar ones made later, of the Thai Supreme Court is that the court fails to set the criteria to assess when the coup is 'accepted and respected by the people'.

combined the authority of the monarchy, symbolic representation of the nation, and the sacred power of Buddhism under a central administration closely connected to the government was promoted. Accordingly, a new source of political legitimacy was created; the traditional and charismatic authority of King Bhumiphol or Rama IX. The charismatic authority of the present King, who ascended to the throne in 1946, is not an inherited one. Before 1946, no Thai king had exercised any real power in the country for fourteen years. The present King has earned his authority due to his devotion to the life of the people (Pongsudhirak, 2008). The great respect for the present king is based not on his political power, but on the public perception of him as a highly moral King who cares for his people. The wide popularity of the King can be best understood in the context of complete mistrust in politicians who use their powers for private gains (Shytov, 2004). Owing to the fact that Thailand has never been colonized and the monarchy is one of the longest continuing institutions of Thai society, despite no constitution to date having granted legal authority to the Monarch, the present king has possessed both traditional and charismatic authority. Throughout the history of Thai politics, the King has played the role of mediator in times of conflict. The military coups, in order to ensure their legitimacy, have usually sought approval from the King after seizure of the state power. The position of the present King preserves the stability of Thai economy and society from the threat of a coup-constitution-election cycle.

The official state ideology, as represented in the national flag, is nation, religion and King. 'Nation' in this ideology is closely associated with 'Religion' and 'King', both of which are fundamental elements of the traditional Thai Buddhist theory of Kingship. According to this theory, the king, regarded as having been elected by a gathering of all the people, should reign justly as a protector on whom the people can rely, and should be guided by the restraints of the moral law of Buddhism. Accordingly, the concept of 'nation' in this ideology is different from that in Western liberal nationalism (Murashima, 1988:80).

As of November 2015, a total of 19 constitutions have so far been in use in over more than 80 years of Thai democracy. The constitution promulgated in 1997 is considered fundamental to Thai modern political reform. It borrowed new ideas and mechanisms emerging from foreign countries. After ten years of popular democratic

rule, on 19 September 2006, a group of military and police leaders seized control of the country's administrative power and abrogated the 1997 Constitution. The 18th constitution was approved by the majority of Thai people through the first referendum of the country and promulgated on 24 August 2007. It sought to build on the strengths of the 1997 Constitution while addressing its many weaknesses (Harding and Layland, 2011). Unfortunately, the 2007 constitution had only been enforced for about 7 years when it was abrogated by the military coup on the 22nd of May 2014. The interim constitution has been promulgated since July 2014 while the 20th constitution is being drafted.

Western readers may wonder how the Thai legal system functions within the context of frequent abrogation of constitutions. I believe that the framework proposed by Wilson (1962:265-269) more than 50 years ago remains relevant to the current political context of Thailand. Wilson notes that as the idea of a written constitution was introduced, in 1932, into a prior and vital political system with a fully developed body of legislation, a powerful structure of government, and a vigorous bureaucratic tradition, the country may in fact be said to have had at any given moment two constitutions: one unwritten and one written. In addition to the ephemeral written one, there has been a substantial structure of law and custom which has remained the foundation upon which government rests. The monarchy, the bureaucracy, the military, the courts of law, and the law Codes have traditional roots and genuine substance and continuity which make them institutions of considerable stability. Utilising this framework, one can understand why the Thai legal system does not collapse after the coups abolish written constitutions. Staging a coup to change the government seems to be acceptable under Thailand's unwritten constitution[41]. The fact that every constitution since 1949 has had one provision stating that 'in the case where no specific provisions of the present constitution are applicable, decisions shall be based on Thai constitutional custom'[42] seems to support Wilson's argument that Thailand may have two constitutions at any given

[41] Of course, the term 'unwritten constitution' is open to debate, as its existence is difficult to prove. One might argue that what stabilises Thai political and legal system is not 'an unwritten constitution' but an enduring power elite.
[42] See for example, Section 7 of the 2007 Constitution

moment. Constitutions not only supplement but are also shaped by each other. Nowadays Thailand cannot dispense with institutions like the Monarchy, the military, the National Legislative Assembly, the Cabinet, the Courts of Justice, the Election Commission, the National Anti-corruption Commission, the Human Rights Commission and the Constitutional Court. Although the appointment process of senior figures in some organisations may be changed from time to time, institutions in both military and civilian regimes of governments have carried on their work in the last two decades. Thus, the abolishment of the existing constitution and the drafting of a new constitution are best understood as an attempt to seek a workable balance in the work of all fundamental institutions within the Thai polity; and regular changes in the written constitution may shape the ideas within the unwritten constitution for those involved.

Thailand's political instability is the instability of key personnel and groups; not the instability of the basic political, social and economic system (Overholt, 1988). The Thai political system is 'a moving equilibrium' (Kulick and Wilson, 1992:3). The key players are the military/bureaucracy and politicians, with the King as the coordinator (Overhalt, 1988: 18). Kulick and Wilson (1992:40) argue that the dispersion of political power and the indigenous system of checks and balances among key players are the real strengths of Thai politics.

Four observations can be made from an examination of the Thai political context. First of all, due to political instability and the frequent abrogation of the constitutions by the military, legal authority has not been the dominating source of political legitimacy. Secondly, the fact that Thai courts have considered the declarations of the military coups to be legitimate legal rules of the sovereign is still in need of a plausible explanation. One possible explanation may be that Thai courts believe in the political legitimacy of the military. Another might be that it is only a passive acquiessence. Thirdly, the practice of the military coups seeking approval from the King after seizing state power suggests that they regard recognition from the King as the legitimation of their ruling power over the Thai people (Harding and Layland, 2011:31). Finally, the fact that the Thai people have rarely challenged undemocratic laws or protested against military coups may not necessarily imply that they accept

the the legitimacy of the coups. A simple explanation might be that they are too fearful to do so.

Thai Social Context

Traditionally, Thailand, like other Asian societies, has been more concerned with the individual as part of a group than with the individual alone. The basis of Thailand's political and social structure is the patron-client relationship (Neher, 1994a, 1994b). The mindset of this structure is that of a hierarchical relationship wherein one person perceives himself or herself to hold a superior position and the other should submit to the person of higher status who is considered his or her patron. Thai society is built on personal relationships not on principles or laws (Kulick and Wilson, 1992:33). Hierarchy, status, gratitude and personalism are the cement that holds the Thai society together.

Thai social structure is facilitated by the teaching of Buddhism. Buddhism, the religion of more than 90 percent of Thailand's people (Nimanandh and Andrews, 2009:72), believes in reincarnation and teaches that *karma* – the accumulated merit of an individual – determines individual fate. The concept of karma underpinned Thailand's traditional social hierarchy. Certain key aspects of a person's next rebirth are thought of as karmically determined: the family into which one is born, one's social status, physical appearance, character and personality (Keown, 1996:39; Keown, 2005: 6-7). The ultimate goal of Buddhists is to attain *nirvana* and end the cycle of rebirth; but the more easily attainable goal of most Buddhists is to accumulate merit in order to be reborn in a more fortunate condition (Keown, 1996:43; Harvey, 2001:67, Ruth and Ruth, 2007: 34)

Buddhists believe that those in authority are viewed as deserving of their high status because of their *karma*, which pertains to the sum of one's good and bad actions (Neher, 1994b:953). The foundations of Thai society depend on not questioning the authority of those further up in the hierarchy (Harding and Layland, 2011). Children are taught to be deferential to leaders and authority (Kulick and

Wilson, 1992:3), and criticism of rulers is tantamount to criticism of the state itself (Neher, 1994b:953).

Buddhism's teaching on 'the middle way' also promotes calmness, compromise and consensus among Thai people, which explains the pace of change in Thai society (Kulick and Wilson, 1992:5). Thai society prefers gradual change as opposed to revolution. Westernization and modernization were taken on board voluntarily with no loss of self-confidence. While colonial regimes impose European institutions on indigenous ones, Thailand's constitutionalism followed a different path. Thailand's rulers adopted systems and symbols of governance that had no historical foundation in Thailand, and with which its people had no prior experience, without rejecting many of the traditional ways of exercising authority at every level of society.

In the formal organisation of pre-modern Thai society after the 15th century, everyone had a numerical status rank, or a *sakdina* that specified their place and privileges in the social hierarchy (Baker and Phongpaichit, 2014). While *sakdina* became a relic after the end of the absolute monarchy, modern Thai society remains hierarchical. The monarch is still revered for his virtue and, many Thais believe, his sacred power (Shytov, 2004). The influence of Buddhism remains strong but, in an era of mass society, consumerism and middle class ambition, it has fragmented. Although much has changed, the institution of the monarchy and the hierarchy it represents still survive and their influence in both social relationships and politics are apparent.

According to the Thai worldview, the world is a moral continuum. All elements of the cosmos are related to each other in terms of power determined by virtue and moral value. It is the moral value of things which is their true nature and which determines their place in the universe (Wilson, 1962:73). Thus those who have power are believed to be good and to deserve power. In other words, Thailand's traditional belief is that power justifies itself (p.74). Neher (1994a:51) notes that 'Thailand's political culture, with its emphasis on deference to authority and hierarchical social relations, is not conducive to democratic rule'. Harding and Layland (2011) also point out that the very hierarchical nature of Thai society is the impediment to the rule of law and good governance.

Thai Cultural Context

Traditional Thai culture was also related to Buddhism. Admitting the social hierarchy to be the result of past *karma* has created a Thai culture of deference to authority. In the past, Buddhist temples were responsible for providing education for children. As the state-sponsored secular education has been promoted since the 1930s, Thais, especially those in urban areas, have been increasingly exposed to secular culture (Keyes, 1987). It seems natural to expect that this change would have led to a weakening of the influence of Buddhism; however, Engel (2011) observes that Buddhism still has a strong influence upon Thai people. He finds that Thais do not narrate their injuries in terms of their rights, but by referring to the Buddhist worldview. The ongoing influence of Buddhism is partly due to the fact that Buddhism is one of the national ideologies which have been embedded in the mindset of young Thais through the system of compulsory education.

The Thai individual, trained to be a functioning member of a society, learns early in life what rank they hold and how others are supposed to be treated according to their rank (Nimmanandh and Andrews, 2009:61). The culture of deference and hierarchical social relations can be observed in Thai language. Thai language has its ways of reflecting rank, age differences, social distance and the intimacy of a relationship (pp.75-76). Different words are used for differences in age and hierarchy and a form of 'higher Thai' should be used when talking about royalty, Buddhist monks or the Lord Buddha. Important civil servants and persons in high positions, including judges, always have the prefix *Tan* added to their first name (p.76).

Embree (1950) notes that one feature of Thai culture is an attitude of minding one's own business when it comes to matters of action. Kulick and Wilson (1992) point out two distinctive features of Thai culture which create difficulties for the implementation of democracy. The first is the value of saving face or self-respect. Thais always avoid confrontation and do not lend themselves to open debate (Nimmanandh and Andrews, 2009:71). The gravest social sin in Thai society is to make somebody, especially someone of a more senior position, lose face. The second feature is the culture of presenting gifts to the authority, which is an intrinsic part of social life and can be used to disguise corruption (Harding and Layland, 2011:173).

SECTION 2: HOW IS STATE POWER LEGITIMATED IN THAILAND?

Thailand's Current Conception of Political Legitimacy

Legitimacy is the property or quality of an authority that makes others feel obligated to defer voluntarily (Tyler, 2003). It has both empirical and normative dimensions. Both dimensions are intertwined since the belief of the subordinates in the authority implies their moral approval and provides an objective criterion for evaluating legitimacy (Hinsch, 2008). Since legitimacy is about the belief of the subordinates in the authority, it relates directly to the political system, social structures and the culture of the jurisdiction. In addition, if the power-holders want to sustain their legitimacy, they must ensure that they subscribe and adhere to the same beliefs as those of the audiences. The normative conceptions of legitimacy are not universal but contextual; different contexts require different normative conceptions of legitimacy (Beetham, 1991). The shared beliefs of the power-holders and the audiences are shaped by the political, social and cultural context of each jurisdiction.

The notion of popular sovereignty has been enacted in Thai constitution since 1932. The ideas of the rule of law and good governance have been discussed and claimed to be embraced by Thailand at least since 1997. The 2007 constitution clearly stated that all exercising of state power must be bound by the rule of law[43]. Thailand has a well-structured legal system and judicial system. The judicial system has never been directly intervened by the government, even at the time of the military regimes. State agencies and Thai people are equally bound by pre-enacted legislation. Most Thai laws are modeled on foreign or international laws. Do these facts suffice to conclude that Thailand has already embraced the rule of law as its conception of legitimacy?

Tamanaha (2004) divides the rule of law into two versions – formal and substantive – which form a continuum of implementation of the rule of law from thinner to thicker. The thinnest version of the rule of law is 'rule by law' which means that the state uses law as an instrument of government action. The next step on the continuum is embracing the notion of formal legality: the idea that law must

[43] Section 3 paragraph 2

be general, prospective, clear and certain. Thailand in its current situation can pass the tests of rule by law and formal legality. However, the formal version of the rule of law in liberal democratic states also embraces the idea of democracy, which implies that the law obtains its authority from the consent of the governed. This last element of the formal version of the rule of law is absent in Thailand, a state that has called itself a democracy since 1932. Thai politicians, the legal profession and the public appear to share the belief that law is the command of the *de facto* sovereign, not the *de jure* one. Therefore, the rule of law, even in the formal version, does not seem to be the only source of legitimacy in Thailand. I propose that, in light of Thai political, social and cultural context, while rule by law and legal formality provide the conception of legitimacy at the level of law enforcement, the current conceptions at the polity level are the beliefs in the traditional authority and charismatic authority of the present King and the culture of deference to those further up in the social hierarchy. Moreover, the belief in the inherent legitimacy of the *de facto* ruler or public officials also plays an important part at the level of law enforcement.

Rule of law *v. Lak Nititham*

The English concept of the rule of law is given various names by numerous Thai scholars but has become widely known among Thai legal scholars as *Lak Nititham. Lak* means principle, *Niti* means law and *Tham* refers to *Dhamma* or the teachings of the Lord Buddha about what human-beings ought to do. There is no record of who first coined the term but according to the official Thai dictionary, *Lak Nititham* means the fundamental principles of law.

Kraivixian (2009), the former justice of the Supreme Court and appointed prime minister and now a privy councillor, has tried to link *Lak Nititham* with traditional moral principles of the King or *tossapitratchatham*; especially the last principle of *avirodhana* or ‘not going wrong’ and the principle of natural law. He himself graduated from England and claims that Thailand should not adopt English conceptions of the rule of law but must develop its own conception of *Lak Nititham.* Unsurprisingly, he puts much faith in the judiciary to develop such a conception. It appears from the account of one of the most revered senior judges that *Lak Nititham*

requires only focus on the individual level of the person who exercises public power, not a structural development[44].

The 2007 constitution, which was abolished by the 2014 military coup, stated in Article 3 paragraph 2 that in exercising their power, the Parliament, the Cabinet, the courts, constitutional organs and public offices must adhere to *Lak Nititham*, but said nothing about what the concept means. This was the first time that legislation had referred to *Lak Nititham.* It appears that the aim of the drafters was for the Constitutional Court to develop the concept. Whether or not *Lak Nititham* and the rule of law are identical concepts is unclear. However, a review of Thai courts of justice and constitutional court decisions that have invoked the concept in adjudicating many cases appears to suggest that *Lak Nititham* is more similar to what Tamanaha (2004) calls the thin conception of the rule of law than the thick one. In decisions no. 1131/1993 (B.E.2536) and no. 1935/1998 (B.E.2541), the Supreme Court held that ex post facto criminal law and punishing future crimes violates *Lak Nititham*. In decisions no. 12/2012 (B.E.2555) and 19-20/2013 (B.E.2556), the Constitutional Court held that shifting the burden of proof in a criminal case violates *Lak Nititham* and held in decision no. 4/2013 (B.E.2556) that the admissibility of evidence in a criminal case examined by the foreign court in the absence of the defendant violates the right to a fair trial and *Lak Nititham*.

In other words, *Lak Nititham* seems to focus more on legal formality of the rule than the need for the rule to be democratically formulated. Therefore, the fact that

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[44] A parallel can be drawn here with the work of Thai political scientists. Bowornwathana (2008) notes that the transplantation of the concept of 'governance' into Thai polity has generated multiple interpretations and resulted in competing ideas on how to implement the concept. The first problem for the Thai policy makers was what to dub the concept: *thammarat* (meaning a just state) or *thammapiban* (meaning governing justly); they finally decided to go for the latter. One conception of *thammapiban* refers to Buddhist teachings of the Ten Guiding Principles for a King (*tossapitratchatham*); giving (*dana*); self conduct (*sila*); giving up (*parigaca*); straightness (*ajava*); gentleness (*maddava*); perseverance (*tapa*); non-anger (*akkodha*);not causing injury (*avihimsa*); endurance or patience (*khanti*); and not going wrong (*avirodhana*) (p.13). He argues that this conception which is widely understood in Thailand, due to its nationalistic flavour and simplicity, has reduced the complexity of the concept of governance from a multi-level to only individual level of analysis and overlooks the structural implementation of the concept.

legal rules can be made through non-democratic mechanisms such as the edicts of the military coups or their appointed legislative assembly is never perceived by the Thai courts as a violation of *Lak Nititham* [e.g. decisions of the Supreme Court no. 45/1953 (B.E.2496), 1662/1962 (B.E.2505), 1234/1980 (B.E.2523), 6411/1991 (B.E.2534), decision of the constitutional court no. 5/2008 (B.E.2551)]. The position of the Thai court is that once the coups succeed in controlling the government, they are the sovereign or *Rat tha tipat* of the country and thus have power to legislate either by issuing an edict or appointing a legislative assembly.

In Decision no. 15-18/2013 (B.E.2556), the Constitutional Court held that *Lak Nititham* is derived from the principle of natural justice. It takes precedent over written law and requires that power must be exercised in good faith and without conflict of interest. The court invoked the concept to hold that the attempt by the elected parliament to amend the constitution was unconstitutional and violated *Lak Nititham* since there were some procedural flaws in the process which were in bad faith. Furthermore, it held that the amendment from the half-elected and half-appointed Senate to the fully-elected one is inappropriate for the country and is beneficial only to politicians. The decision was rebuked by some Thai legal scholars as a distortion of the rule of law and a violation of democratic principles since the court defined the scope of *Lak Nititham* as it thought fit and directly interfered with the legitimate power of the elected parliament to amend the constitution[45].

[45] http://prachatai.org/journal/2013/11/49997 last accessed 1/12/15

The Legitimacy of the Judiciary in Thailand's context

'I, (name of the declarer) do solemnly declare that I will be loyal to His Majesty the King and will faithfully perform my duties in the name of the King without any partiality in the interest of justice, of the people and of the public order of the Kingdom. I will also uphold and observe the democratic regime of government with the King as Head of the State, the Constitution of the Kingdom of Thailand[46] *and the law in every respect'*

-The Declaration before taking Office of Thai Judges[47]-

The traditional belief and practice in Thailand was that the King was the fount and the administrator of justice. The people could present their cases to the King because the King was the sovereign who was responsible for deciding on all disputes in the country. Since the establishment of the Ministry of Justice in 1892 and the modernizing of the Thai judicial system, the King no longer provides justice directly to the people but via the judiciary. Therefore, Thai judiciary and most, if not all, of the Thai people have shared the common belief that judges are representative of the King (Kittayapong, 1990). This belief has survived the change of the political system in 1932. The notion of 'judging in the name of the King' has been enacted in every Constitution[48]. It should be noted that the judiciary is the only state authority which is clearly stated in the constitution as having power to exercise its duty in the name of the King. Thai judges cannot exercise their judicial power without taking their judicial oath and oath of allegiance before the King. Every judgment of the Thai courts also begins with the words 'in the name of the King'.

For the Thai judiciary, performing its duty in the name of the king is more than symbolic. The honour recognized by the highest law of the country reminds Thai

[46] Since all Thai judges take an oath to uphold the constitution, one may wonder why they do not feel uncomfortable with the fact that the constitution is regularly abolished by the coups. One explanation may be that the constitution the Thai judges vow to uphold is not the written but the unwritten one. See the discussion on the possibility that Thailand may have two constitutions at any given moment in section 1 of the chapter.
[47] As stated in Section 201 of the 2007 Constitution
[48] E.g. Section 197 paragraph 1 of the 2007 Constitution

judges to adhere to a higher moral standard than other government officials since, if they fail to do so, it will affect the image of the King.

In all polls conducted to gauge the opinion of the public regarding their trust of criminal justice agencies, the judiciary is consistently chosen as the most trustworthy agency in the Thai criminal justice system (e.g. King Prajadhipok's Institute, 2011). Even though Thailand adopted the system of a career judiciary in which most lower court judges are young, they receive a great deal of respect from the people despite their young ages and lack of experience. The honour is mostly derived from their status as those who judge in the name of the King. Thais always address judges as '*Tan'* or 'your honor' both inside and outside the courtroom. During their time at the judicial training institute, young trainee judges will be informed that they are expected to be a judge both inside and outside of the court as they will always be in the eye of the public, who expect them to have a high-standard of behaviour and good manners regardless of their age.

The high praise of the judiciary has allowed it to maintain independence from the interference of the legislative, the executive and even the newly established constitutional and administrative courts, which share judicial power. The insulation from outside interference in exercising its power makes the judiciary value its judicial independence. However, this insulation does not make the judiciary intoxicated with its wide discretion. On the contrary, respect from others forces the Thai judiciary to create numerous internal mechanisms to ensure that all judges perform their duties to a high standard. The 'normal practices' of judges need to be defined and the system must ensure that judges follow these practices and that those who step outside the line are sanctioned. Judicial culture has been developed, communicated and enforced among the judiciary for a century. Various rules, regulations and advice have been promulgated by the President of the Supreme Court. The Supreme Court also ensures that the lower courts follow its precedent in interpreting the law.

I do not intend to suggest that the Thai judiciary is above suspicion. Those who disagree with sentences are able to file an appeal to the higher courts. However, by all accounts, the judiciary as an institution and individual judges have been shielded

from radical criticism and challenges. The high respect for the judiciary is partly due to the perception of judges as representatives of the King. Another contributing factor is that the judiciary, as a state agency in a hierarchical society, is regarded as automatically entitled to power, so its actions are rarely questioned or obstructed.

In the first two sections of this chapter, I discuss Thailand's political, social and cultural context to illustrate the possibility that the way Thai sentencers see their role in Thai society and understand the concepts of consistency and accountability in sentencing may be shaped by these contexts. In the next two sections, the focus of my discussion is shifted from the broader contexts to specific issue of the development penal policies and practice in Thailand. The aim is to argue that Thailand's dynamics of penal change may not fit neatly with western models and that the understanding of Thailand's sentencing decision-making requires the understanding of its polical, social and cultural context.

SECTION 3: THE DEVELOPMENT OF PENAL POLICIES AND PRACTICE IN THAILAND

Western sentencing scholars seem to suggest that 'law and order politics' and 'populist punitiveness' (Bottoms, 1995) are one of the main drivers of penal change. While this may be true in western democracies, it may not be the case in an unstable democracy such as Thailand. This section is therefore intended to review the dynamics of Thai penal change which can be illustrated by changes in Thailand's political and social context as well as in its penal legislation and penal practices. Due to the fact that the criminal justice system of Thailand changed significantly at two periods – after the beginning of the 20th century and since 2000 – this section divides the development of penal policies and practices into two subsections: those of the 20th century and of the 21st century.

Penal Policies and Practices in the 20th Century

a. From 1908 to 1955: Establishing the modern criminal justice system

The laws derived from the earlier period were revised and completed in 1805 resulting in the written form of law books, namely The Law of Three Seals (Huxley, 1996). This law was the authority of the land until the reign of King Rama V, Chulalongkorn the Great, when there was an important reformation of the legal and court system with an open door policy on trading with foreign nations.

The Law of Three Seals dealt with criminal offences mainly by two sections: the *laksana aryaluang* and the *laksana jone.* The significant difference between them was that the former dealt with criminal offences against the king and government, while the latter dealt with those against the people in general. Siamese criminal law mainly covered offences against the King and Government which could cause riot or disorder in the country, such as treason and murder; but offences which only affected one individual normally were not criminal, such as cheating, fraud, or embezzlement (Kittayapong, 1990).

The degree of punishment or fine inflicted upon the defendant depended upon the status of the injured person; i.e. the higher their status, the more serious the punishment. This is evident in a section in the Law of Three Seals called *aiyakarn promsak* (The law of ranking status), which provides that injury to a high status person should be punished more severely than injury to a low status person (Boonchalermvipas, 2000). Traditionally, the king had power over the life and death of his subjects which included powers to sentence, amend sentences and grant an amnesty. Judges could not fix the term of imprisonment until the year of 1897 when King Rama V delegated this power to the judges of the newly established Ministry of Justice (Kittayapong, 1990).

The modern judicial reforms took place when the Ministry of Justice was established in 1892. The westernization of the legal system in Thailand during that time was one of many plans devised for the avoidance of colonization. Thailand appointed foreign legal advisers of different nationalities – French, British, Belgian,

Japanese and American – to administer the nation's judicial system and to sit in its national courts (Petchsiri, 1986:142-143).

The first Penal Code of the land was promulgated in 1908 as part of an attempt to modernize the country. Before that time, criminal offences were dispersed among various legislation and there was no clear distinction between criminal and civil sanctions. The Code was drafted by the royal drafting committee consisting of both foreign and Thai legal experts. It was claimed to be modeled on the best Penal Codes of that time (Masao, 1908).

The history of the drafting of the Thai Penal Code is a story of competition between the British and the French. It was first drafted in 1904 based on the Indian Penal Code which was derived from British Common Law. However, according to Franco-Siam treaty, Siam needed to appoint a French legal adviser to the drafting committee. M. Padoux, the French legal expert, thought the first draft was not suitable to Siam because common law takes times to develop while the continental system is easier to apply. This conflict caused the former chairman of the committee to resign and M. Padoux was appointed President of the Law commission for codification. He was largely responsible for drafting the Code and finished it in 1907 before sending it to Ministers for comment (Masao, 1908; Kittayapong, 1990).

The Code was in force with 17 amendments until the promulgation of the 1956 Penal Code. It is worth noting that the drafters of the 1908 Code still retained some characteristics of traditional law in the new Code, such as excusing theft among members of the same family and the distinction between compoundable and non-compoundable offences.

The Code was developed alongside the centralization of state power and the establishment of the Ministry of Justice at the end of the 19th century. In order to modernize the country to avoid colonialism, the government decided to increase the state power in Bangkok and unified the administrative system across the country. Before that time, administrative powers were dispersed among many large cities. As a result, the administration of justice throughout the country was for the first time

under the responsibility of the central government in Bangkok. The main focus of the development was to create a modern court system which aimed to enforce a modern legal system. It was believed that if Thailand had a modern legal system, western countries would accept its jurisdiction over their subjects and remove extra-territoriality under trade treaties (Petchsiri, 1986). The law school was established in the Ministry of Justice to train local lawyers to be judges. The Prince and former Thai students who graduated from England taught at the school; therefore, the teaching styles and materials were modeled from common law countries. This explains why Thailand, a country with a civil law's legal Codes, is familiar with the legal methods from both legal traditions.

The amendments of the 1908 Penal Code were largely amendments which added new offences or amended penalties in response to the political, social and economic context of the country at the time. To illustrate this, in 1927, at a time when the country was an absolute monarchy but there was a perceived threat of a demand for democracy, the punishment for attempting to change the regime of the government was increased, while at the dawn of the period of the constitutional monarchy and democracy in 1936, similar offences were amended to provide exceptions for constructive criticism of the government. Furthermore, during the period of the military regime between 1939 and 1941, the penalties for offences against the state and offences of public officials were increased and the new offence against the Prime Minister was introduced. Offence against the Prime Minister was later repealed when the civilian government took control in 1944. The last amendment in 1956 added new offences relating to partnership and companies in response to the promulgation of the Civil and Commercial Code[49].

The main sentencing options in the 1908 Penal Code were the death penalty by beheading, imprisonment and fine. It should be noted that the Code did not allow whipping which had been a traditional punishment used as a sanction. The mode of execution was changed to firing squad in 1934 and was to be carried out in the prison

[49] Details of all amendments can be searched through www.ratchakitcha.soc.go.th by using the search term "กฎหมายอาญา"

rather than in a public place in response to the change of political regime from absolute monarchy to constitutional monarchy in 1932.

It is noteworthy that before 1934, the sentence of death penalty could not be implemented unless approved by the King. This requirement was removed by the 1934 amendment. Besides life imprisonment, the maximum imprisonment term was 20 years. Most offences carried both minimum and maximum sentences. The sentencing range was made intentionally narrow by the drafters so newly-trained judges could easily sentence an offender (Masao, 1908). The judge pronounced a sentence of a fixed and determinate term. The Code provided that imprisonment of up to one year could be suspended. The scope of suspension of imprisonment was extended in 1951 to include imprisonment of up to two years and probation orders were introduced as a condition that could be imposed on an offender who received a suspended sentence. The proceedings for juvenile offenders were prescribed in the Juvenile Court Act 1951 and the Juvenile Proceedings Act 1951, which also included the introduction of the probation service for juveniles. However, no probation office for adult offenders was established during the time that the 1908 Penal Code was in force.

The Code did not clearly state the aim of punishment. Before 1936, there was no legal framework on how to deal with inmates. The 1902 Prison Act which predated the Code did not specify if the prison should provide a rehabilitation programme, but did state that well-behaved prisoners were entitled to good time remission. The 1936 Prison Act, which is still in force today, provided for the first time the main purpose of using imprisonment – to rehabilitate the offender and reduce recidivism – the aim which is still adhered to and narrated in official documents. The 1936 Act mandated the operation of all prisons to the Department of Corrections, Ministry of Interior[50]. Before that time, governments had changed the placement of the prison administration office several times. The Act spells out the details of treatment of prisoners from reception, classification, promotion and reduction of inmates' class, prison work, education and training, medical treatment, benefits of good-behaviour and sanctions for misbehaviour to parole procedure. The act also has two provisions

[50] The 1936 Prison Act (as amended) http://www.correct.go.th/lawcorrects/lawfile/10001.pdf last accessed 29/4/15

which have never been implemented: the provision of the Prison Supervision Committee, in which a judge is one of the members, and the provision of prison communes for well-behaved prisoners, which provide a more relaxed environment and allow prisoners to live with their spouses or relatives. Good time remission was reintroduced in 1977. The official reason was to motivate prisoners to behave well and cooperate with rehabilitation programmes, as well as to reduce recidivism and encourage the earlier release of prisoners. In 1980, the new measure for early release was introduced to create more motivation for the prisoner to behave well. Prisoners who had committed less serious offences and had less than 2 years left of their sentence to serve could now be sent to do community service outside of prison. Community service days are counted as good time remission and prisoners are entitled to reward.

It is noteworthy that the establishment of the modern criminal justice agencies in Thailand did not go hand in hand with the democratization of the country. The modern criminal justice system was installed before the arrival of democracy in 1932.

b. From 1956 to 1999: The crystallization of rehabilitation as the goal of punishment

The new Penal Code of 1956 is still in use today with some amendments and retains some frameworks of the 1908 Code. Like its predecessor, it was drafted by a group of legal experts appointed by the government. The Code prescribes both minimum and maximum sentences for most offences. The main available sentences are the death penalty (the method of which was changed from firing squad to lethal injection in 2003), imprisonment, detention, fine and confiscation. The old Code originally allowed imprisonment of up to one year to be suspended but later extended its scope to include sentences of up to two years, and this structure was retained in the new Code. Suspension of imprisonment can be combined with probation orders or some additional requirements. In addition to punishments, the new Penal Code also prescribes measures of safety which can be imposed on the offender such as binding over, being sent to hospital or bans from some occupations.

The amendments of the 1956 Penal Code have reflected the political and social context during the time they were made. Between 1956 and 1971, the period of military regimes with no elected parliament, it was amended three times simply to increase the penalties for some offences. The 1971 amendment was done through the decree of the military coup, and extended the maximum period of the limited imprisonment term from 20 to 50 years as well as removing the upper limits for sentencing multiple offences. The declared aim was to deter would-be criminals and maintain public order. In the period of civilian government in 1975, the conversion rate for detention in lieu of fine was amended. The 1976 military coup followed its predecessors in amending the Penal Code to increase the maximum penalties for general deterrence. The targeted offences were offences against the state.

In 1977, the Department of Prosecution proposed the suspension of prosecution initiatives which aimed to divert some minor offenders from prosecution and subject them to supervision by an officer for a certain period of time. The Ministry of Justice, which was then responsible for court administration, argued that prosecutors have no discretion under the Code of Criminal Procedure to suspend prosecution, and subjecting the offender to supervision amounted to imposing a probation order, which could only be carried out by the judiciary. The Suspension of Prosecution bill did not succeed, but triggered changes to the penal system of Thailand (Yampracha, 2000). In 1979, the appointed National Legislative Assembly passed the Probation Act and the Central Probation Office was established in the Ministry of Justice. It was later expanded into the Department of Probation in 1992.

During the period of the so-called ‘Half-fruit democracy’ between 1979 and 1988 where Thailand had elected members of parliament, appointed senate and a military Prime Minister, the Penal Code was amended several times to increase the penalties for some offences. The 1983 amendment set the upper limits for sentencing multiple offences. Before 1983, as a result of the 1971 amendment by the decree of the coup, an offender who was convicted of multiple offences could end up with sentences of a hundred years. This could not be justified by any sentencing principles. The amendment set the maximum imprisonment term to 50, 20 or 10 years depending on the seriousness of the convicted offence. At the time of the elected PM, the 1989

amendment introduced community service orders as a condition for suspended imprisonment.

The 1991 military coup and later caretaker governments in 1992 were responsible for the two amendments of the Penal Code which again aimed to increase penalties for some offences. The appointed National Legislative Assembly passed the new 1991 Juvenile and Family Court Act and reorganized the Public Prosecution Office from Department of Prosecution, Ministry of Interior to Office of the Attorney General, an independent agency reporting directly to the Prime Minister. The aftermath of the military coup and the middle class protest in 1992 had led to demand for political reform in Thailand and the result was the 1997 constitution. The new constitution provided for the election of both the House of Representatives and the Senate. It also established the Constitutional Court, the Administrative Court, the Election Commission, the Ombudsman, the National Human Rights Commission and the National Anti-Corruption Commission. The roles of elected senators were to check and balance the power of the members of parliament and to select the candidates for watchdog agencies.

At the end of this period, Thailand experienced an unprecedented rise in the number of drug offences from about 60,000 cases in 1990 to about 160,000 cases in 1996. The most commonly abused substance was methamphetamine. The government responded in 1996 by reclassifying methamphetamine from a psychoactive substance to a class 1 narcotic, the sale of which attracts more severe punishment. The government assumed that more severe sentences would deter actual and potential offenders. The change indeed made possession and distribution of methamphetamine subject to more severe sentences. Furthermore, the Narcotics Act has a non-rebuttable presumption of intention to sell, which makes possession of even a small amount of methamphetamine more likely to be considered a serious offence. The Supreme Court also responded to legislative change. A review of the Supreme Court's decisions since 1996 revealed that the court became less tolerant to the possession of small amounts of methamphetamine. Moreover, in cases where the defendant was charged with both possession with an intention to sell and selling methamphetamine, they must be sentenced for both offences; while under the Psychoactive Act the defendant will be sentenced only for the charge of selling

methamphetamine. In short, possessors and dealers of methamphetamine have been given harsher sentences since 1996. Unfortunately, the number of drug offences continued to rise, and from 1996 to 1999 the prison population had climbed from about 100,000 to 200,000 prisoners. Thanks to the government policy, the dealing of methamphetamine has become a high risk-high return business: a review of the Supreme Court's decisions found a nearly four-time increase in the market price of methamphetamine from about 40 baht per tablet in 1993 [Decision No. 689/1993 (B.E. 2536)] to 150 baht per tablet in 2004 [Decision No. 7326/ 2004 (B.E.2547)].

Penal Policies and Practices in the 21st Century

a. *From 2000 to 2005: The restructuring of the criminal justice system, managerialism, human rights and penal policies*

In addition to the aim of bringing more accountability to elected politicians, the 1997 constitution was influenced by the international ideas of good governance and new public management as well as the criminal justice reform agenda accumulated by government agencies during the earlier period. The ideas of good governance and new public management were also promoted by the World Bank and the International Monetary Fund (IMF) which have played an important role in setting the policy agenda in Thailand since the economic crisis in 1997. As a result, the constitution included numerous provisions related directly to the operation of the criminal justice process, such as the separation of the court of justice from the Ministry of Justice, the new responsibility for judges to issue search and arrest warrants and measures to compensate victims of crimes and of justice miscarried[51]. The constitution provided that all provisions must be implemented by 2002. Besides the change in the Ministry of Justice, another sign of the reorganisation of criminal justice agencies was the transfer of police administration in 2000 from the Department of Police, Ministry of Interior to the Office of the National Police, where it reports directly to the Prime Minister. The government that won the general

[51] Details of the 1997 constitution can be viewed through http://www.ratchakitcha.soc.go.th/DATA/PDF/2540/A/055/1.PDF last accessed 29/4/15

election in 2001 executed the public sector reform in 2002 which included the reorganisation of the Ministry of Justice.

As the 1997 constitution provided for the separation of the court of justice from the Ministry of Justice, the Office of the Courts of Justice was established in 2000 and the MOJ needed to establish its new mandate. The then government planned to reorganize the MOJ from the Ministry of Judicial Administration, its former legal mandate since 1892, to the Ministry of Justice Administration. There had been strong debate before 2000 over whether the Department of Probation, Department for Observation and Protection of Juveniles and the Department for Execution of Judgement should be placed under the umbrella of the court of justice or the MOJ. The government decided that those offices perform executive functions and should therefore be placed under the umbrella of the MOJ. As a result, in 2000 the new MOJ comprised only those three departments. The 2002 public sector reform transformed the MOJ into the Ministry of Criminal Justice Administration by incorporating the Department of Corrections from the Ministry of Interior; placing the Office of the Attorney General, Office of the Narcotics Control Board and Office of the Anti-Money Laundering under the direct supervision of the Minister of Justice; and establishing new agencies in the ministry: the Department of Special Investigation, Department of Rights and Liberty Protection, the Office of Forensic Science and Office of Justice Affairs.

The amendment of the Penal Code in 2002 illustrated the idea of prescribing more sentencing options to allow the court to reduce prison populations. Its aim was to allow the offender to apply to do community service in lieu of fines and to expand the scope of suspended sentences to up to 3 years imprisonment. The promulgation of the Drug Rehabilitation Act 2002 also aimed to divert drug addicts from the mainstream criminal process. However, the amendment of the Narcotics Act in the same year indirectly increased the punishments for some offences of drug trafficking. To illustrate, before 2002, possession of methamphetamine with 20 grams of pure substance weight was presumed as possession with intent to sell, whereas after 2002 only 0.375 grams is enough to trigger a presumption of intent to sell. Since the presumption is non-rebuttable, more small-time possessors and dealers of methamphetamine have ended up in prison since 2002.

It should be noted that the government declared a war on drugs between 2002 and 2003 when it implemented a severe crackdown on drug dealers and encouraged small-time drug dealers to surrender to the authorities to exchange for immunity from prosecution. Thousands of alleged drug dealers had been murdered during this period but the official explanation of their deaths was that it was a conflict between criminals. The official statistics illustrate that the prison population substantially decreased in 2003 and 2004 as well as the number of offenders arrested on drug charges, but both numbers later began to rise again

The influence of human rights on penal legislation and practices began to emerge in 2003[52]. The Penal Code was amended to make the mode of execution more humane and to prohibit against imposing the death penalty on juveniles. Four prisoners were executed by lethal injection in 2003. New offences were inserted in the Code in 2003 and 2004: acts of terrorism and offences relating to forgery of electronic cards. The addition of acts of terrorism into the Code shows the influence of the 9/11 incident in the US on the domestic policy of far eastern countries like Thailand.

The idea of New Public Management has affected all criminal justice agencies. As mentioned earlier, New Public Management was a result of the 2002 public sector reform. It has become common for all agencies to have a strategic plan, action plan and performance evaluation. It has also been argued that criminal justice agencies must work as a system, with each working towards the same goal. The National Justice Administration Plan was first promulgated in 2004. The Office of Justice Affairs, Ministry of Justice is responsible for drafting and monitoring the implementation of the plan[53], and has tried to include all stakeholders, including the public, in the drafting process. However, the plan is only advisory, not mandatory, and its ability to direct the actual practice is still limited. Furthermore, the plan does not aim to mandate the operation of the judiciary, whose independence is guaranteed by the constitution. All plans emphasize, among others, rehabilitation of offenders

[52] Thailand has become a party to the Convention on the Rights of the Child (CRC) since 1992 and to the International Convention on Civil and Political Rights (ICCPR) since 1997.
[53] For the latest National Justice Administration Plan of 2015-2018 see http://phitsanulok.moj.go.th/wp-content/pdf/model%20scheme.pdf last accessed 1/12/15

and reduction of recidivism as main goals of the criminal justice system. A common strategy in every national justice administration plan is to promote alternative justice, including restorative justice. Since 2003, restorative justice programmes have been developed and implemented by the probation office, prisons and juvenile and family courts. When Thailand hosted the 11th United Nations Crime Congress in 2005, the country's progress in implementing restorative justice programmes was applauded by the international community. The amendment of the Criminal Procedure Code at the end of 2005 to allow victims to file an application for restitution in criminal cases also provided legislative framework for expanding restorative justice programmes in adult criminal courts.

b. 2006 to present: Penal Policies and Practices during political instability

The aftermath of the 2006 military coup brought some changes to the criminal justice system. The first evidence was the changing role of the judiciary. The coup abolished the 1997 constitution and promulgated the 2007 constitution. The new constitution, which was in force until the 22nd of May 2014, retained the watchdog agencies of its predecessor but transferred the task of choosing candidates for these agencies from the Senate to the selection commission consisting of, among other members, the Presidents from all three courts: the court of justice, the constitutional court and the administrative court. The Senate in the 2007 constitution was comprised of two types of member: half elected and half appointed. The selection of the appointed senate follows a similar process to that of the watchdog agencies. More importantly, the 2007 constitution allowed the judiciary to introduce legal bills, which are directly related to its operation, to the parliament. The first bill introduced and later promulgated was the new Juvenile and Family Court Act 2010 which, among other things, tried to insert a judicial oversight over restorative justice programmes facilitated by the executive.

Another piece of evidence of change in penal policy in the aftermath of the 2006 coup was the hyperactivity of the appointed National Legislative Assembly in passing penal laws. Between 2007 and 2008, the appointed Assembly amended the Penal Code four times and passed five amendments to the Criminal Procedure Code. It should be noted that the bills for every amendment had already been prepared by

the bureaucracy but were not introduced to the parliament by the earlier government. The aims of the 2007 Penal Code amendments were to add the new offence of passport forgery and to amend the definition of rape. The new definition of rape was introduced to appreciate the equality of rights between man and woman. The latest amendment in 2008 changed the age of criminal liability of children to be more in line with medical research and the Convention on the Rights of the Child.

The amendments of the Criminal Procedure Code made during 2007 and 2008 had numerous purposes. Some aimed to correct problems caused by earlier amendments. One amendment aimed to encourage the use of technology, including electronic monitoring, as an alternative to pre-trial detention and using imprisonment as a sanction and to facilitate the earlier release of some types of prisoner. Another aimed to overhaul the entire law on criminal evidence which had remained unamended since the promulgation of the Code of Criminal Procedure in 1935.

The appointed Assembly also enacted the Act for the Procedure for Narcotics Cases of 2007. The aim of this act is to expedite the proceedings of narcotics cases by allowing a guilty plea to waive a trial in more cases and limiting the opportunity to bring narcotics cases to the Supreme Court. According to the new rules, all first appeals in narcotics cases must be filed in the narcotics division of the central Court of Appeal in Bangkok; and accordingly, nine regional Courts of Appeal lost their jurisdiction over narcotics cases. Moreover, all second appeals in narcotics cases to the Supreme Court have been changed from appeal as of right into ones that require leave to appeal. As a result, fewer narcotics cases go to the Supreme Court and most cases become final at the central Court of Appeal. This also means it takes less time for the offenders to begin serving their sentences.

The 2007 act has made the jurisprudence on narcotics cases more confusing since both the central Court of Appeal and the Supreme Court can set a precedent. In relation to sentencing, the monopolization of jurisdiction by the central Court of Appeal has made some courts of first instance borrow the *Yee-Tok* of the central Court of Appeal to be a model for their *Yee-Tok*.

Under elected governments between 2009 and 2013, although there was no change in the Penal Code, some changes in practices should be mentioned. In 2009, two drug

traffickers were executed after the last execution in 2003. These were the last executions in Thailand to date. Even though a mitigation of guilty plea has been part of the business of Thai criminal courts since the promulgation of the 1908 Code, the idea that it is the responsibility of judges to ensure that guilty offenders plead guilty as early as possible to benefit from the maximum reduction of sentence has only existed in some criminal courts since 2008. The Office of the Courts of Justice established the Centre for Social Harmony and Peace nationwide in 2012[54]. Its aim is to ask the judge acting as a facilitator in the centre to encourage offenders to plead guilty by explaining the elements of the crime charged, the trial process and the benefits and drawbacks of letting the case go to trial. According to unofficial evaluation, the centre has proved to be successful in terms of generating more guilty pleas and shortening waiting time for trials (since there were fewer cases).

The last couple of years have witnessed a clear sign from the Office of the Courts of Justice and the Ministry of Justice to tackle the problem of prison overcrowding. The main strategy of the Office of the Courts of Justice is to encourage judges to use more alternatives to custodial sentences. The former President of the Supreme Court issued formal advice on the use of a deferred sentencing in 2012, but its effect on actual sentencing outcomes remains unevaluated. The 2014-2017 strategic plan of the Office of the Courts of Justice continues the mission to encourage more frequent use of non-custodial sentences by formulating the standard of imposing non-custodial sentences for similar offences and ensuring that judges adhere to this standard. It is intended that at least 90 percent of Thai judges will uniformly use non-custodial sentences for cases of similar facts by the end of 2017.

The Ministry of Justice has adopted a dual track policy in dealing with prison overcrowding. On one hand, it has promoted the use of alternatives to custody and has encouraged earlier release of prisoners by using electronic monitoring (EM). The 3-month EM pilot project for juvenile offenders was implemented in December 2013[55] and the pilot project for adults has been in effect in some courts in Bangkok

[54] For details on how this Centre operates see Chapter 5 pp.126-128.

[55] *www.matichon.co.th/news_detail.php?newsid=1359629260&grpid=03&catid=03 last accessed 13/5/13*

since March 2014 for the offence of drink driving[56]. Summary courts in other provinces have begun using EM since the beginning of 2015[57]. From a review of the rationale of the pilot project, I am afraid that EM will not be used as an alternative to custody but as an alternative to other non-custodial sentences such as community service. It remains to be seen which group of offenders will be the next target group of EM.[58] However, the MOJ is starting to build more prisons, including a super-max one. Although both agencies seem to agree on the need to solve prison-overcrowding, the idea of putting a cap on the imprisonment rates of Thailand remains alien to Thai policy makers and practitioners.

The latest military coup in May 2014 had some impact on the criminal justice system. The coup abrogated the 2007 Constitution and initially acted as both the parliament and the government. It issued some edicts to create new criminal offences and amend some provisions in the Code of Criminal Procedure and other criminal statutes. In addition, it has removed the jurisdiction of the ordinary courts in cases concerning national security and given them to the military court. To be fair, the coup had legal advisers to prepare such legislation. However, the lack of democratic legitimacy of these laws cannot be denied. As of November 2015, the Interim Constitution is in effect, the appointed National Legislative Assembly has been installed and the new government – in which the prime minister is also the coup leader – has governed the country. The National Legislative Assembly passed two Penal Code amendment acts in February 2015 to create new offences, adjust the elements of some sexual offences and increase penalties for some offences[59]. It promulgated another Penal Code amendment act in September 2015 to criminalise

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56 http://www.manager.co.th/Crime/ViewNews.aspx?NewsID=9570000026494 , *www.manager.co.th/Crime/ViewNews.aspx?NewsID=9570000121602* last accessed 27/4/15

57 www.sklmc.coj.go.th/news_view.php?id_news=522 last accessed 27/4/15

58 In November 2015, the criminal procedure code amendment bill was approved by the National Legislative Assembly to allow the use of EM for those who are granted bail, see http://library2.parliament.go.th/giventake/content_nla2557/d102958-09.pdf last accessed 1/12/15

59 www.ratchakitcha.soc.go.th/DATA/PDF/**2558**/A/010/43.PDF , http://library2.parliament.go.th/giventake/content.../law10-130258-48.pdf last accessed 27/4/15

the possession of child pornography[60]. As of the end of November 2015, the Assembly is about to pass another Penal Code amendment act which will expand the scope for suspending imprisonment and fines[61]. The current Minister of Justice is a military officer who is also a member of the National Council for Peace and Order (NCPO), a group of military officers who staged the latest coup. The NCPO is now supervising the process of 'reforming the country' and 'returning happiness to the Thai people'. The direction of Thailand's penal policy remains to be seen.

SECTION 4: THAILAND'S UNIQUE DYNAMICS OF PENAL CHANGE?

Making Sense of Thailand's Penal Change

a. Penal Welfarism or Culture of Control?

During the past two decades, Thailand has experienced skyrocketing imprisonment rates: from 126 per 100,000 of the population in 1992 (73,309 prisoners) to 491 per 100,000 of the population in March 2015 (International Prison Brief, 2015). The number of prisoners in March 2015 was about 330,000 while the official maximum capacity was only 200,000. Does it suffice to conclude that Thailand is also jettisoning the rehabilitation ideal and moving towards what Garland (2001) calls 'a culture of control'? I would argue that due to its political, social and cultural context, Thai penal change may not fit neatly with that model.

The idea of using punishment to rehabilitate offenders can be traced back to the promulgation of the 1936 Prison Act. It was further expanded upon with the establishment of the probation office and the promulgation of the Probation Act in 1979. The amendments of the Penal Code in 1971 and 1976 by the coup leaders to increase the penalties for some offences should be interpreted as attempts to deter political enemies and to restore public order; not as changes in the trajectory of penal policy and practices.

[60] http://library2.parliament.go.th/giventake/content_nla2557/law86-080958-84.pdf last accessed 1/12/15
[61] http://library2.parliament.go.th/giventake/content_nla2557/d092458-01.pdf last accessed 1/12/15

Regardless of how the policy makers derive their political power, elected or appointed, the contemporary penal policy of Thailand since the 1980s has been determined by experts in bureaucracy. The influence of the media and the public in penal policy making are limited. Contemporary penal policies have been influenced by human rights standards to which Thailand must adhere and international practices. Restorative justice, electronic monitoring of offenders and sentencing guidelines have been increasingly discussed among Thai academics and practitioners. The influence of 'managerialism' in the criminal justice system following the promulgation of the 1997 constitution and the 2002 public sector reform has changed the methods of running and evaluating the criminal justice process, but did not seem to affect the dominance of the rehabilitative ideal. Nowadays, academics, practitioners and policy-makers still discuss the ultimate aim of punishment in terms of rehabilitation.

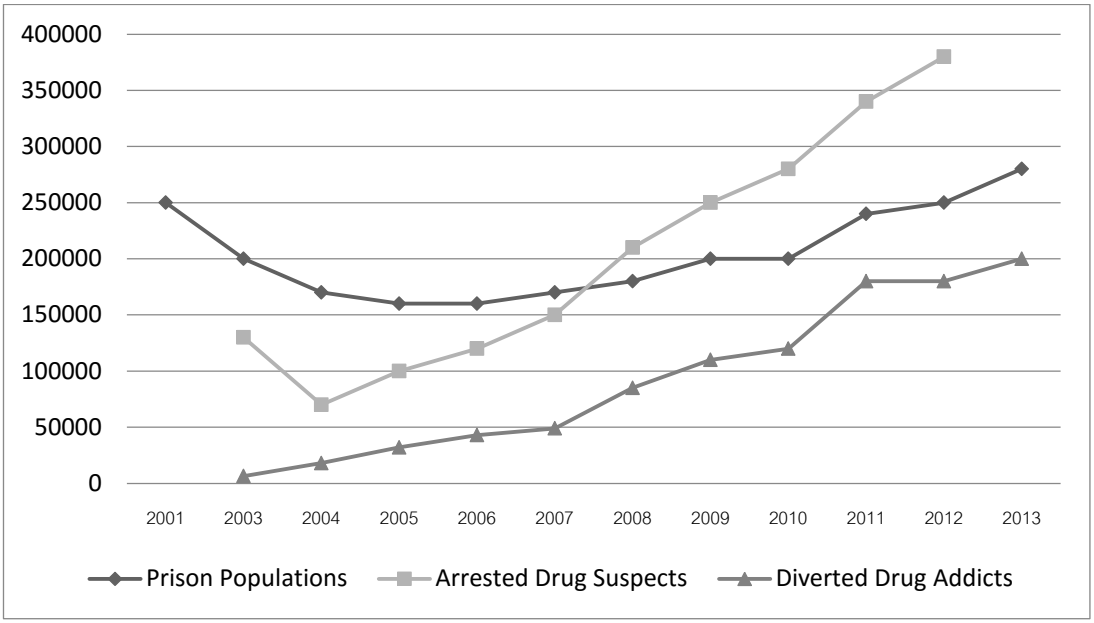
Interestingly, adherence to the rehabilitative ideal has nothing to do with being a welfare state as Garland (2001) proposes, since Thailand has never been a welfare state. While the UK and the US became welfare states after WWII, Thailand also changed its economy from a nationalist economy, in which the state owns numerous enterprises, into capitalism and a free market. Most state enterprises have been privatized since the 1960s but some public utilities were still owned by the state. With the help of the US during the cold war period, the Thai economy developed dramatically and started to compete in the world market. Between 2001 and 2004, the Thai government privatized more state enterprises including natural gas, airports, communication and telephone enterprises. The same government also established a free trade area with other countries, a policy which is still in effect today. Some welfare programmes, such as a free healthcare service and free compulsory education, are new phenomena in Thailand. Besides the fact that they are not actually 'free', these programmes are merely populist policies aimed at attracting voters rather than a movement towards becoming a welfare state. Thailand has been adopting a free market economy while still retaining the rehabilitative ideal or penal welfarism.

b. A Punitive or Non-punitive Society?

Cavadino and Dignan (2006) propose that the political economy of a jurisdiction accounts for the degree of punitiveness of its penal policy. They argue that a country that adopts an economic regime of neo-liberalism is more likely to end up with more punitive policies. Adopting their model to explain the development of Thailand's penal policy involves some problems. The first is that although Thailand shares some characteristics of a neo-liberal economy, such as the strong emphasis on a free-market and extreme income differentials, its social and political contexts are significantly different to other neo-liberal countries. To illustrate, Thai society is not egalitarian but hierarchical, and Thailand has never experienced 'law and order' politics in the sense that politicians try to politicize crime and punishment issues to maximize their votes. As mentioned earlier, the experts, not the politicians, control the substance in the development of Thailand's penal policy. Moreover, it appears that, throughout the 21st century, the military-sponsored legislative assemblies have enacted more criminal justice legislation than the elected parliaments.

Another problem of using Cavadino and Dignan's model to explain Thai penal policy is the way in which they use imprisonment rates as a proxy for punitiveness. The experience of Thailand demonstrates that even though the prison population is increasing, it can hardly be concluded that Thailand's penal policy is becoming more punitive. First and foremost, the rising prison population during the past two decades has gone hand in hand with the sharp rise in arrests of drug offenders, both drug users and drug traffickers (see figure 3.1). The fact that since 2002 drug addicts have been diverted from the criminal justice process and treated as patients instead of offenders is the best illustration of the 'inclusive' penal policy and its substantial degree of 'tolerance'.

Figure 3.1: Prison Population, Number of Arrested Drug Suspects and Number of Drug Addicts Diverted to Mandatory Rehabilitation Programmes in Thailand from 2001-2013



Source: Office of the National Police, Office of the Narcotics Control Board, Department of Corrections and Ministry of Justice, Thailand

Secondly, Thailand's legal framework encourages offenders to take part in rehabilitation programmes, and the actual time served in prison significantly depends on the behaviour of the prisoner. In other words, the prisoners are always welcome to return to the community.

Thirdly, collective royal pardons are extensively used to release the prisoners or commute the punishment in order to provide a chance for offenders to return to the community. During the reign of the present King, from 1946 to 2015, 33 collective royal pardon decrees have been promulgated, with the latest in March 2015; not to mention numerous individual pardons granted by the royal prerogative of the King. It is noteworthy that the collective royal pardon decrees were not promulgated primarily to ease prison-overcrowding but to mark important events of the Nation such as certain birthday anniversaries of the King and the Queen, the Golden and the Diamond Jubilees and the promulgation of the new constitution. Their message was

that at auspicious moments of the nation, everybody is included in the celebration. This is also another example of an inclusive penal policy.

Fourthly, although prison conditions in Thailand are notoriously poor and far from international standards, they are not the result of intentional policy to use hard treatment as a punishment but the consequence of prison overcrowding. Considering that the government decided to stop the practice of shackling prisoners in 2013 as well as the role of Thailand in promoting standard minimum rules for women prisoners – the so-called Bangkok Rules – it seems that Thailand takes human rights seriously in crafting and implementing penal policy.

Fifthly, the demand for 'truth in sentencing' is absent in Thailand. The term of imprisonment imposed and that actually served are significantly different due to routine enforcements of good time remissions, parole releases and collective pardons. These practices have never attracted criticism from the public, the media or even the judiciary.

Finally, Thai criminal justice agencies realise the importance of informal social control. They have developed partnerships with the community and civil society in crime prevention, dispute resolution and rehabilitation of offenders. Supervision of offenders in the community is not done by only professional probation officers but also by volunteer probation officers. The notion of restorative justice is widely accepted by Thai criminal justice agencies since it emphasizes the partnership between formal and informal social control.

The fact that Thailand retains the death penalty can easily be interpreted as a level of punitiveness. However, the change in the method and place of execution in 1934; the later change of the method to lethal injection, which is widely accepted as the most humane method of execution; the ban on imposing it on juvenile offenders in 2003; and the *de facto* moratorium on the carrying out of the death penalty from 2003 to 2008 and since 2009 convey that Thai policy-makers always consider the possibility of change in this mode of punishment. It is noteworthy that the collective royal pardon decrees always have a provision to commute the death penalty of deathrow inmates to life imprisonment.

The National Justice Poll on sentencing (2005) found that the majority of the Thai public still believed that the death penalty needs to be retained. However, the main reason for not abolishing the death penalty in Thailand does not seem to be that the policy-makers response to public opinion, but may be because there is no international obligation for abolition. Recall that the Thai public has a limited role in shaping penal policy. Thailand is a member of the International Covenant on Civil and Political Rights (ICCPR) which does not prohibit the use of the death penalty, but limits its use to only 'the most serious crimes'. The UN Human Rights Committee has criticized the Thai government for using the death penalty for drug traffickers[62]. However, the international community overlooks the fact that it is widely believed in Thai society that drug trafficking is the most serious crime, and is even more serious than murder since it destroys not only the life of an individual but a whole family or community.

It is noteworthy that the Rights and Liberties Protection Department of the Ministry of Justice includes abolition of the death penalty as one of the missions of the National Human Rights plan 2014-2018[63]. It remains to be seen how much the political crisis of the country since the end of 2013 and the latest coup will delay the process of abolition of the death penalty. Nevertheless, the fact that government officials can implement a plan to abolish the death penalty while the public still support it is another example of why I argue that Thailand's penal policy appears to be insulated from penal populism.

Another piece of evidence of the absence of law and order politics in Thailand was when the media reported the rape and murder of a school girl in July 2014. One TV star ran a campaign for imposing mandatory death penalty for rape[64]. The campaign

[62] http://www.nhrc.or.th/2012/wb/img_contentpage_attachment/45_file_name_3592.pdf last accessed 1/12/15
[63] http://www.rlpd.go.th/rlpdnew/images/rlpd_1/2556/thaigov_Plan3/10plan3.pdf last accessed 1/12/15
[64] http://www.dailynews.co.th/entertainment/250889/บุ่มล่า%201%20แสนรายชื่อ%20เพิ่มโทษข่มขืนเป็นประหารชีวิต last accessed 27/4/15

received massive popular support but was sharply criticized by academics[65] and triggered no response from the government or criminal justice agencies

If penal populism, the culture of control and the new punitiveness cannot explain the dynamic of penal change in Thailand, how can we explain the rise of the prison population?[66] It seems that empirical research on how Thai judges justify the use of imprisonment in narcotics cases can shed some light on this.

How Should Thai Sentencing be Best Understood?

Should criminal justice policy be responsive to political direction or public expectations? The story of Thailand's penal change illustrates how penal policy can be developed without any clear political direction or influence by the public. It is a story of top-down policy making directed by experts in the bureaucracy. Penal legislation and practices are products of what the experts and the policy makers agree upon as appropriate to the social context of the country at the time. Thailand may not follow the same path of modernity and capitalism as western countries, which partly explains why western theories of penal change face limits when being applied to Thailand's context. However, since Thailand's economy has been linked to the world economy since the middle of the 19th century, the effect of globalization on the development of penal policy cannot be denied. Rational policies driven by concerns for human rights and international standards have been approved both by the elected parliaments and appointed legislative assemblies. Experts and policy makers always look at other jurisdictions and international standards as models to aspire towards in improving the criminal justice system. While the experts set the content of the penal change of the country, the pace of change is largely shaped by political context. Ironically, while political instability in the last few years has hindered the future of Thailand's penal reduction, it has allowed Thailand to be insulated from 'law and order' politics, to maintain a rational penal policy and to retain faith in the rehabilitation ideal.

[65] www.matichon.co.th/news_detail.php?newsid=1405012458 last accessed 27/4/15
[66] For some explanations to the rising population in Thailand see Appendix B

CONCLUSION

At the end of chapter 2, I argued that research on how Thai sentencers put the concepts of consistency and accountability in sentencing into practice can contribute to a richer understanding of Thai sentencing in particular as well as sentencing decision-making in general. In this chapter, a review of Thailand's political, social and cultural context and the dynamic of Thai penal change suggests that we should expect that Thai sentencers may understand the concepts differently from western judges and have different ways of putting them into sentencing practice. More importantly, what seems to be an illegitimate practice from a normative notion of democratic legitimacy may be acceptable in Thailand's context. International sentencing literature presupposes the existence of the established democracy and the adherence to the rule of law when it discusses and evaluates sentencing practice in any jurisdiction. This chapter questions this universal approach when it comes to understanding sentencing practice in a transitional democracy with a culture of deference to authority such as Thailand. As Karstedt (2013:132) points out: 'what is held as legitimate within a social group is deeply embedded and shaped by its culture, social structures, and political institutions, and change with these contexts'.

The combined argument of the previous chapter and this chapter, therefore, is that Thai sentencing is best understood in its political, social and cultural context. The preference for the use of imprisonment among Thai sentencers revealed in this chapter also calls for empirical research on their decision-making processes, especially on how Thai judges perceive their role in Thai society and justify their use of imprisonment. Such research may shed more light on where the problem actually lies and illuminate the area requiring reform rather than merely juxtaposing objective elements of Thai sentencing with those of western sentencing.

In the next chapter, I will explain how the empirical research which focuses on how Thai judges understand the concepts of consistency, accountability and severity in sentencing is designed, discuss the methods employed for collecting and analysing data on these characteristics of Thai sentencing culture, and elucidates how the hypotheses of the research are formulated from a reflection on my experience as a Thai sentencer.

CHAPTER 4

METHODOLOGY

> *Reflexive self awareness is integral to what it is to be human. Not only can the individual exist in multiple identities by being immersed in them, but they can also adopt different perspectives towards themselves by standing back and reflecting. Not only can we think of our own personal world as if it were that of someone else, we can also think of someone else's world as if it were our own. This gives us the capacity for empathy and openness to the idea that other people's world may be different from our own.*
>
> (Muncey, 2010:16)

INTRODUCTION

The aim of this chapter is twofold. The first aim is to discuss the methods and strategies that were employed in collecting data to answer the research question, and the second is to illustrate how the working hypotheses are formulated. This chapter is therefore divided into two main parts. Part I, which deals specifically with the issue of research design, consists of 3 sections. Section 1 identifies the ontological and epistemological position of the research to illustrate why an interpretive approach is employed in this study. Section 2 then explains the mixed method of data collection and the samples of the research. Next, section 3 discusses the validity, reliability and ethical considerations of the methods chosen. Part II, which focuses mainly on the formulation of working hypotheses on the mechanisms of Thai sentencing based upon reflection on my experience of being a Thai sentencer from March 2003 to August 2012, consists of 4 sections. Section 4 describes the socialisation process of Thai sentencers; Section 5 examines the sentencing decision-making process of Thai sentencers; and Section 6 conceptualizes Thailand's sentencing decision-making process as collective decision-making. Finally, section 7 hypothesises what I expect to be the perspective of other Thai sentencers on sentencing decision-making.

PART I: RESEARCH DESIGN

SECTION 1: PHILOSOPHICAL ASSUMPTIONS AND METHODOLOGICAL IMPLICATIONS

It is traditionally acknowledged that the choosing of a particular paradigm is not only determined by the nature of the research problem, but also by the researchers' own assumptions about the nature of reality and knowledge. The basic ontological choice that social scientists are faced with is encapsulated in the constructivism-objectivism debate (Grix, 2002), which questions whether the object of investigation is the product of consciousness (constructivism) or whether it exists independently (objectivism).

My adopted ontological position is constructivism since I believe that there is no reality waiting to be unearthed; rather, it needs to be constructed. Moreover, the 'reality' to be investigated is the product of individual consciousness of each human-being rather than being objective and external to them. In relation to my research question, forming an understanding of how Thai sentencers make sentencing decisions requires understanding it from their perspective, in addition to the meaning they give to their work and their perception of themselves as sentencers. The world of sentencers, in my opinion, is socially constructed and given meaning by the social actors themselves; therefore, it will be understood through an examination of their perceptions and actions. In effect, adopting a constructivist position is to deny that one real world exists 'out there', independently of what individuals perceive.

While the term 'positivism' is used to refer to epistemologies 'which seek to explain and predict what happens in the social world by searching for regularities and causal relationships between its constituent elements' (Burrell and Morgan, 1979: 5); the epistemology of 'anti-positivism' (or 'interpretivism') contends, in contrast, that the social world can only be understood from the point of view of the individuals who are directly involved in the activities under study.

In regards to the research in question, the adopted constructivist ontological position calls for a particular set of epistemological assumptions about 'the best ways of enquiring into the nature of the world' (Easterby-Smith et al., 2002: 31). Given

that the reality of the world of sentencers is considered to be subjective and constructed on the basis of the shared meanings of sentencers, knowledge of this reality will also be subjective and based on 'experience and insight of a unique and essentially personal nature', rather than being acquired and transmitted objectively in a tangible form (Burrell and Morgan, 1979: 2). The epistemological position adopted for the study is thus interpretivist. Interpretive researchers try to get inside the heads of their subjects to try to see the world as they do (Mcneill and Chapman 2005:99). The underlying assumption of this approach is that if we want to explain social actions, we have to understand how participants make sense of the world.

The chosen research paradigm also influences the type of data to be collected. Indeed, under an interpretivist paradigm, considerable emphasis is placed upon the quality and depth of the data in order to generate a rich picture and explain and understand human behaviour. It is also well recognised in the literature that the use of different research methods is useful under an interpretivist paradigm for obtaining different perceptions of the social phenomena under examination (Easterby-Smith et al., 2002). Combining a reflection on my professional experience as a Thai sentencer with focus groups and individual interviews with other Thai judges may therefore provide a rich picture of the process of identity formation and how sentencers learn their occupational culture.

SECTION 2: METHODS AND SEQUENCES OF DATA COLLECTION

The Employment of Mixed Methods

The use of multiple methods of data collection is deliberately employed in this study to collect data on the occupational culture of Thai sentencers from three different perspectives. The first perspective is the perspective of lower courts' judges who participate in the focus groups. The second perspective is that of the Chief Judges who monitor the sentencing performance of sentencers in each lower court. The last is the perspective of appellate judges who were previously sentencers in the lower courts and now work as sentencing reviewers.

a. A reflection on experience as a method of formulating working hypotheses

The ideal research method for the study of judicial culture seems to be ethnography: a study which follows participants from the beginning of their career and observes the process of judicial socialisation. The obvious problem in conducting this kind of study is gaining access to the judiciary for research. Even though I may not face this difficulty in getting access, such research requires a longer period of time than my PhD study provides. Moreover, I have already gone through the process of identity transformation and have my own meaning and perception of Thai sentencers' occupational culture. Therefore, I decided to take advantage of my experience as a Thai sentencer to reflect on what the occupational identity of Thai sentencers is and how it is developed.

Without referring to my experience, how can I explain the actual practices of Thai sentencing in the absence of both textbooks and research studies on the subject? To collect a comparable amount of data from other sentencers would require a longitudinal study, since the socialisation of sentencing spans over a long period of time. My reflection, especially on the socialisation of sentencing, may be comparable to the data collected by longitudinal studies and might be useful in identifying key themes of data that need to be collected. Besides, I cannot deny the fact that as one of the Thai sentencers, I already understand what Thai sentencers' occupational culture is. By making sense of my experience, I can conduct a preliminary analysis and provide a tentative answer to the research question which can be used as guidance for data collection and further analysis. If research is about generating new knowledge, including my experience in the research is more likely to achieve such a fundamental task.

I am fully aware that my experience of Thai sentencing culture cannot represent or substitute that of other Thai sentencers, just as theirs cannot substitute mine. Moreover, relying on my reflection alone could make it problematic for a subsequent researcher to validate the findings or replicate the method of this research. Nobody can relive my life and my analysis cannot be tested and repeated. The challenge is how to balance the advantages with the drawbacks. Therefore, rather than using my experience as the main source of research data, I treat it as an initial background

intended to allow a preliminary analysis to be made and the formulation of working hypotheses which will be analysed in more depth with further data collected by conventional research methods. The justification for this research design is to produce an academic piece of work which can be repeated and validated by future researchers.

b) Documentary Analysis

Adopting personal reflection as the method of formulating hypotheses relies heavily on memory and personal recollection. This raises many issues related to the validity of this method which will be discussed later. Mcneill and Chapman (2005:153) note that people's recollections are always partial and, to some extent, fictional. Memory researchers found that intentional recall can be faster if the memory system is in retrieval mode (Conway and Loveday, 2010:56). To be in this mode, retrieval cues or memory cues are needed. (Bernecker, 2008:50)

Bernecker (2008) notes two types of retrieval cues: verbal reminders and sensory cues. Muncey (2010:57-64) proposes many tools that can be used to recall memories such as visual imagery, artefacts and metaphors. In addition to these tools, this research uses the following secondary data as tools for the recollection of memories: sentencing legislation, judicial manuals, internal regulations of the judiciary, official statistics, the decisions of the Supreme Court, previous research, personal diaries and the electronic files of my judgements written between March 2003 and August 2012. These data also serve as a verification of memories and provide additional information on some specific issues.

In addition to using documents to facilitate recollection, this research relies on documents for data on the political, social and cultural context of Thailand. Superficially, this part of the thesis seems irrelevant to the research question. However, occupational identity and the culture of Thai sentencers are not developed in a vacuum. Both sentencers and their organisations draw meaning from Thailand's political, social and cultural context. In the same vein, understanding the development of Thailand's penal policy and practice helps readers to understand why the occupational identity of Thai sentencers has developed in the way it has. The development of democratic governance of the country, the criminal justice policy-

making process and the status of the judiciary in the criminal justice system and in society are all relevant to the question of how sentencers see themselves and how they perceive the expectations of others. The works of both international and Thai scholars are drawn from to establish a balanced account of Thailand's political, social and cultural context and the development of Thailand's penal policy and practice.

c) Focus Group Interviews of Sentencers

Focus group interviews aim to explore how judges perceive their identity as sentencers and how well they internalize the professional identity promoted by the organisation. Furthermore, the group interview allows me to see how different judges in the same court interact when considering a topic and how they react to disagreement. Moreover, the interviews can help to identify attitudes and behaviours which are considered socially unacceptable, such as sentencing without considering the *Yee-Tok* of the court.

Focus group interviews purport to understand and interpret the social construction of meaning for each group and synergy in the group interaction usually prompts greater breadth and depth of information. Also, comparison or contrast of views within a group leads to greater insight into experiences.

Simply asking judges about abstract concepts like consistency and accountability is more likely to yield abstract answers or expressions of professional ideology (Morrison and Leith, 1992:14) rather than answers that reflect their real interpretation of the concepts (Halliday and Schmidt, 2009:45-46). This research experiments in using visual data and vignette as mock cases[67] to collect multifaceted data on judges' perceptions of their own occupational identity as Thai sentencers.

The strength of focus groups as research method lies in their ability to collect data on group dynamics and interactions. Unfortunately, some researchers who adopt the method present the data as if it was collected through individual interviews. As Thai sentencers do not only work as a group in the panel but also work in an organisation

[67] Details on how these instruments were used can be found in Appendix K.

which has a distinctive culture, data on group dynamics in focus groups can shed some light on group dynamics in the real lives of Thai sentencers.

Throughout the research design, I was afraid of the possibility that the more senior judges would dominate the group discussion, so I recruited a group of judges of as similar levels of seniority as possible. In the actual focus group, however, the most senior participant did not dominate the group discussion as I expected; in fact, the most senior judge in some groups tended to talk less than the less senior ones.

Nevertheless, the way participants opened the discussion demonstrated the respect for seniority among Thai judges. When I asked participants to explain their choices of important values in sentencing, participants encouraged the most senior judge in their groups to talk first and they then took turns to add their opinions by following the order of seniority. As the discussion went on, levels of seniority seemed to be less influential and participants expressed their opinions in no particular order of seniority.

Participants seemed to talk about their work comfortably and without hesitation. This may be partly due to the fact that they considered me as one of them. They paid attention throughout and never picked up their mobile phones. My role was to encourage the silent ones to talk. Generally, in each focus group, there were some who contributed and engaged actively and some who preferred to be passive. As the discussion went on, some participants directed questions to other members or even tried to analyse the opinions of others.

In the groups with female participants, their roles varied from group to group. In some groups, female participants contributed to every issue of discussion and even directed discussions, while in some groups they needed encouragement from the facilitator before making contributions. It is noteworthy that in one group with 2 female judges, they tended to support the opinions of each other and reinforced each other's arguments.

Although participants referred to the possibility of applying life experiences, including from previous occupations, in making sentencing decisions, their responses in sentencing the mock case conveyed that gender, previous occupation or other

social identities play no observable roles in the sentencing decision-making process. Female judges did not express increased sympathy towards female offenders while one male judge confessed that he may commission a pre-sentence report if a female defendant was pregnant. Judges who were former defence lawyers fully realised the benefit to defendants of having defence lawyers, but made no suggestions on how to deal with the problem of the majority of defendants waiving their right to a court-appointed lawyer. One graduate of criminology openly condemned the rigidness of *Yee-Tok* for not allowing him to use his wisdom; but admitted that, as a judge, he must always follow it. What matters most for them are *Yee-Tok* and responses from colleagues, which they perceive as part of their occupational identity.

Consensus and disagreement of opinions could be found among group members in all focus groups. Yet the reader should recall from the discussion in chapter 3 that the preservation of self-esteem or 'face' and the avoidance of conflict are part of Thai culture. By and large, participants in each group went along with the discussion of other members. They tried to reach consensus and avoided conflict on fundamental issues. Disagreement happened only in part of the discussions. The standard pattern of contribution was 'I agree with you that… but…' This reflects what is to be expected from Thai judges in their relationships with their colleagues outside of the focus group. Nevertheless, the interaction between group members and the degree of going along with each other's opinions may depend on their relationships with each other outside the focus group.

d) Individual Interviews of Chief Judges and Appellate Judges

By definition, an organisation is a group of people who work in some way towards a common goal (Kenny, Whittle and Willmott, 2011). It is a responsibility of the organisation to make sure each member has an identity that fits with its goal. Employees are the public face of an organisation and organisations are therefore keen to control the 'impressions' that their members give to customers. Appropriately managed occupational identities will help organisations to achieve their objectives and improve their performance. Individual interviews are used in this study to explore the occupational identity which the judiciary aims to cultivate in its

members, as well as the role of Chief Judges as court managers and appellate judges as sentencing reviewers in fulfilling these important tasks in the organisation.

Samples and Generalisability

Generalisability concerns the question of whether we can safely conclude that what is true of the sample in the research is also true of others in the population. It relates to the notion of representativeness and how to select the proper sample for data collection (Mcneill and Chapman 2005: 10). Qualitative research methods such as unstructured interviews and ethnography, aim to retrieve more in-depth information. Therefore, they involve smaller samples than other methods. This creates the potential problem of unrepresentative samples and subjectivity of the findings.

The level of attention that the researcher should pay to the issue of representativeness and generalisability depends on the research aim. Arber (1993:71) rightly points out that where the researcher's aim is a wider understanding of social processes or social action, the representativeness of the sample may be of less importance. Fielding (1993:156) also confirms that, in the case of ethnography, a smaller sample is not problematic since it puts a great emphasis on 'depth', 'intensity' and 'richness'. He also emphasizes that the demanding nature of ethnographical work does not allow the researcher to claim that the findings can be generalized to all similar settings (p.169).

My first step is to decide on the kind of judges I need to interview. The target population of the research is judges who work in the lower courts across the country. In 2014, there were more than 3,000 judges working in the courts of first instance across Thailand. Not all of them have experience of working in various courts. The question which must be asked is: how much experience is enough for Thai judges to fully absorb the effect of socialisation? Buchanan II (1974) proposes that organisational socialisation can be divided into three stages which occur during the first five years of being a new member of an organisation. He notes that the fifth year anniversary of membership of the organisation is the beginning of the outcome stage of socialisation. My experience also confirms that after 5 years on the bench, Thai

judges will have had the opportunity to be socialized from the judicial training institute, their tutors and their colleagues and Chief Judges in different courts. Thai judges are normally appointed to work as a provincial court judge in their third year on the bench. They have to work at the court for at least 1 year to ask for a rotation. Some may be rotated to another court after one year, but most judges are rotated to other courts after 2 or more years. The focus of this study is, therefore, judges who have been working in the court for at least 5 years. Working in more than one court means they will have an opportunity to observe the differences or similarities in *Yee-Tok* of different courts, the different policies of the Chief Judges towards compliance with *Yee-Tok*, as well as having different types of colleagues.

Previous sentencing research in Thailand has preferred to send questionnaires to a large sample of judges: 500 judges (Sawasdisara, 1999); 352 judges (Sangsasitorn, 2002); 1,249 judges (Suparp, 2002) and 380 judges (Chanyachailert, 2003). Recall that this research aims to gain a richer understanding of sentencing decision-making in Thailand by adopting a qualitative research method. Considering the amount of time and effort involved in conducting this kind of research, especially when considering the need to translate data from Thai to English, a smaller sample than those used in the quantitative research previously conducted in Thailand is inevitable.

Random sampling is quickly ruled out, not only because generalisability is not the main objective of qualitative research, but also because this method would not allow a pool of judges with at least 5 years' experience to be drawn from every court. It is common in Thailand for a newly appointed judge to be assigned to work in provincial courts in rural areas. When they gain more experience and seniority, they can ask to be rotated to bigger cities near the capital. Accordingly, most judges with more than 5 years' experience tend to work in cities close to Bangkok.

Purposive sampling – sampling where the researcher uses their judgement to select cases to include based upon their relevance to the research question – was therefore adopted. I purposely selected four courts of first instance which have more than 6 judges with at least 5 years' experience. Two courts were selected from two different regions (out of 9 regions across the country) since I have learnt from my experience

that courts in the same region tend to study the *Yee-Tok* of neighbouring courts. Finally, I contacted the Chief Judges of each court to inform them of the rationale of the research and asked for permission to interview judges in their courts. I also asked to interview them in the role of the court managers. Between four to six judges with similar levels of seniority were recruited from each court to participate in the study. A group of this size is confirmed by the literature to create an easy to manage group dynamic (Carey and Asbury, 2012).The total number of participants in the 4 focus groups was 19. The homogeneity of the group aims to allow the identification of similarities or differences between judges who have shared a similar socialisation process. It also ensures that a senior judge will not dominate the discussion of the group.

Regarding the appellate judges, there are 10 appellate courts in Thailand. The Court of Appeal in Bangkok handles appeals against the judgements and orders of three civil courts, three criminal courts and three provincial courts in Bangkok. Moreover, since 2008, it is responsible for handling appeals in narcotics cases from all criminal and provincial courts across the country. Meanwhile, the nine regional Courts of Appeal handle appeals in both civil and criminal cases from the provincial courts in their regions. The division of cases among regional Courts of Appeal is consistent with the jurisdiction of the courts of first instance which is also divided into region 1 to 9.

To collect data on the expectations of the appellate courts regarding the sentencing decisions of the provincial courts, I interviewed judges from the Court of Appeal in Bangkok and from one regional Court of Appeal. The Court of Appeal in Bangkok was selected since it is responsible for appeals against sentences in narcotics cases, which form the majority of cases in both criminal and provincial courts. One regional Court of Appeal was also selected to allow a comparison of their approach in reviewing sentencing decisions made by the provincial courts with the approach of the Court of Appeal in Bangkok. The four participants at the appellate court level consisted of two male and two female judges.

In total, 27 Thai judges participated in the study and more than 10 judges participated in the pre-pilot and pilot focus groups. The size of the sample is

comparable to previous qualitative sentencing research such as that conducted by Mackenzie (2005) who interviewed 31 judges in Queensland, Australia. Statistically, this number is less than 1 percent of all Thai judges; however, the amount of qualitative data from the focus groups and interviews is sufficient to be a raw material of my analysis and accordingly to answer my research questions.

SECTION 3: VALIDITY, RELIABILITY AND ETHICAL CONSIDERATIONS

Qualitative researchers seem to disagree over whether they should assess their research on the same terms as quantitative research (Hammersley, 1998:58). My position is that every research method must take into account the issues of validity, reliability, generalisability and ethics (LeCompte and Goetz, 1982:31). However, considering the distinctive commitments of qualitative research to naturalism, understanding and discovery (p.8), I will explain how I plan to address each standard of assessment.

a) Validity

Validity refers to the problem of whether the data collected provides a true picture of what is being studied (Mcneill and Chapman, 2005:9). Is my experience a valid picture of Thai sentencing? My reflection demonstrates how I, as one of the Thai sentencers, make sense of the task of sentencing and makes sentencing decisions. My reflection is also supported by secondary data which provides verification. Moreover, the reader should recognize the aim of this research as providing knowledge that is absent and cannot be acquired by conventional research methods. This knowledge can provide a source of hypotheses for future detailed investigation using other methods as well (Fielding, 1993:155). Nevertheless, it is understandable that some readers will be sceptical about the potential lack of validity of this method. A remark by Jewkes (2011: 63) aptly addresses this concern: ‘it is a threat with a corresponding gain’. My responsibility is to make clear to the reader how I will validate my research.

I adopt thick description as a validity procedure for the reflection I used to formulate hypotheses. Through my thick description of life as a Thai sentencer in

part II of this chapter, credibility is established through the lens of the readers who read a narrative account and are transported into a setting or situation (Creswell and Miller, 2000:129). Testing the hypotheses with data from focus group interviews with other Thai sentencers is another method of validating my reflection, since it will illustrate how closely what I describe fits with their understanding of life as a Thai sentencer. It should be noted that the use of mixed methods does not assume that my narratives fit with the understanding of other sentencers; even if the research shows no similarity between my description and theirs, it will be worth exploring why.

b) Reliability

The method of collecting evidence is reliable if anybody else using the same method comes up with the same result (Mcneill and Chapman, 2005: 9). In other words, reliability is satisfied when the research being repeated would lead to the same results being obtained. Ethnography is usually criticized as unreliable since it cannot be repeated. However, Mcneill and Chapman (2005:22, 24) point out that each method has strengths and weaknesses; where the survey researcher may claim reliability, the ethnographer will claim validity. They also suggest that observation, as used in ethnography, may uncover unexpected behaviour that could be further investigated by a survey.

My reflection could be criticized as unreliable. Generally speaking, other researchers cannot repeat this part of the research since no one can relive the life of others. However, this will be compensated by the use of focus groups and individual interviews as additional methods, as these methods can be repeated by future researchers.

This research did not try to prove whether insider or outsider researcher can produce more accurate and trustworthy data. Quality of research does not depend on the status of the researcher as insider or outsider, but on the researcher's ability and understanding of how to conduct the research and interpret the data (Kim, 2012). As Hawkins (2003:215) puts it: 'one way towards more intelligent and sensible regulation might be by understanding better the phenomenon to be regulated'. It is hoped that this work will encourage the cooperation between practitioners and academics in understanding the complex social phenomena of sentencing. Unless this

understanding is grasped, sentencing reform seems to be ‘a vain hope’ (Hawkins, 2003) or ‘a lost cause’ (Sebba, 2013).

c) Ethical Considerations

Scholars of research methods point out three ethical considerations which are important to make before commencing research: the need to obtain informed consent before entering the group; the need to protect the privacy and identity of individuals; and the need to avoid inflicting physical, social and emotional harm on the group (Mcneill and Chapman 2005: 101).

Even though the hypotheses of this study are formulated from reflection on my experience, I am aware that I have not lived and worked in a vacuum. My story of being a sentencer has involved other people and places. The anonymity of other people is, therefore, strictly adhered to in the research. Moreover, as both the researcher and, to some extent, the subject of the research, I have to ensure that the research brings me no harm. As a member of the Thai judiciary, I have to follow judicial ethics in keeping some official documents confidential. Therefore, some data which are considered confidential, such as the details of *Yee-Tok,* are adapted before being presented in the research. This follows the same method used in previous research on *Yee-Tok* in Thailand carried out by other sentencers (e.g. Sawatditat, 2005; Padungsub, 2006), which has never been challenged or declared as unethical. Nevertheless, it is inevitable for research of any kind to reveal truths which may make some people uncomfortable. This research is no exception. The most important ethical consideration of this research is to ensure that, in finding a balance between what to reveal and to conceal, members of the Thai judiciary is not harmed in any way by the research.

Another ethical issue concerns the recruitment process. In order to test hypotheses formulated from my reflection, I interviewed some judges and Chief Judges. My challenge was to ensure the fair selection of participants since my research is qualitative and involves only a small sample size. To guarantee smooth access to courts and to approach only judges who fit the sampling criteria, all participants were recruited through my network of contacts, but I did not know most of them

personally. However, I am aware that my position as a judge may have had some effect on the willingness of some participants to participate.

Ethical approval from the university's ethics committee was sought before the commencement of interviews in Thailand. All participants gave informed consent and signed a consent form before participating in the research[68]. Since they are professionals and not vulnerable, they can give fully informed consent. Each potential participant had an opportunity to ask questions about the study before signing the consent form, and most of them did. The form covered consent to be interviewed and audio recorded. Moreover, each participant in the focus group promised to keep conversations confidential. In order to achieve consent, I explained clearly the purpose of the research, provided assurance that the research would bring participants no harm and explained how I planned to protect their confidentiality and anonymity. The data from focus groups and interviews were kept confidential and used only by myself. The transcript was quoted word by word but the identities of interviewees are not revealed in the research.

PART II: THE FORMULATION OF HYPOTHESES

SECTION 4: THE SOCIALISATION PROCESS OF THAI JUDGES

The aim of this section is to utilise my reflections on the socialisation process of Thai sentencers to inform my methodology and to combine them with the discussions on the broader context of Thai sentencing in earlier chapters and on Thailand's sentencing decision-making process in later sections of this chapter to formulate hypotheses.

Socialisation of sentencing is the process by which a sentencer learns about acceptable behaviour and practice in sentencing. It comprises two learning processes: conditioning and modeling (Delaney, 2012). A sentencer firstly learns the expectations of the judiciary by associating certain sentencing behaviours (such as complying with *Yee-Tok*) with rewards and others with punishments. Moreover,

[68] See Appendix J

sentencers can observe and imitate the sentencing behaviour of their mentors and colleagues. As mentioned in chapter 3, the understanding of the socialisation of sentencers is fundamental for the understanding of how they put the concepts of consistency and accountability in sentencing into practice. Yet sentencing scholars tend to have limited information on how judges make sense of the sentencing task, how they learn to be a sentencer and how they make sentencing decisions.

Becoming a Trainee Judge

a) Newcomer

Thai sentencers are professional judges. Any law graduate with a minimum age of twenty-five and at least two years experiences in the legal profession who passes the judicial examination can be appointed as a Thai judge. A judge is one of the most well paid occupations in Thailand's public sector. Most judges want to continue their career to the time of retirement, and if possible, to reach the rank of the Supreme Court's Justice. To be appointed as a Thai judge is not easy. The selection examination is notoriously competitive. There are three types of examination that law graduates can take to become a Thai judge: namely, examination for general candidates, exclusive selection for candidates with a Master's degree from a Thai university, and exclusive selection for candidates with a Master's or higher degree from a foreign university, known among Thai legal practitioners and law students as big, small and tiny exams. Not all types of examination are conducted every year: the Judicial Commission decides which type of examination should be held. Each type of examination has different competitive rates as illustrated in the following table. The latest figure from the last couple of years demonstrates the increasing competitiveness for all types of judicial examination. The point is that when it is very demanding to enter the organisation, nobody wants to leave early.

Table 4.1 Percentage of Success Rates for Thailand's Judicial Examinations 2003-2015

Year	Percentage of success rates (for each type of examinations)		
	General candidates	Only those with graduate degree from Thailand	Only those with higher degree from abroad
2003	4.75	-	-
2004	0.98	1.95	-
2005	3.01	-	96.43
2006	3.23	16.46	73.68
2007	0.75	-	-
2008	1.71	9.23	89.65
2009	-	4.51	79.37
2010	0.34	-	-
2011	0.54	-	-
2012	0.19	1.40	35.06
2013	0.66	-	-
2014	-	1.36	17.57
2015	0.83	0.69	10.21

Source: Office of the Judicial Commission, Thailand

b) Judicial Training

According to the Regulation on Judicial Training of the Judicial Administrative Commission, a trainee judge must be trained for at least one year before being considered for appointment as a junior judge. The judicial training comprises two forms: theoretical and practical. The first month of the training is theoretical and cultural orientation at the Judicial Training Institute. It covers everything from judicial ethics, judicial customs, judicial manner and necessary skills in different kinds of proceedings. After the orientation, a trainee judge is assigned to be trained in the civil courts and the criminal courts in Bangkok.

At the criminal court, each trainee judge is assigned to be trained with a senior judge who has been a judge for more than ten years. The Thai judiciary call this trainer 'a tutor'. Thai criminal courts' judges perform the duties of both fact-finders and sentencers. As fact-finder, a judge hears the testimony of a witness and records it on a tape/digital recorder by summarizing their testimony. The court officer then

transcribes the recording and sends it back to the court for verification. A judge reads the typed testimony out loud, and if the witness and the parties do not object they must endorse by signing. After the examination of witnesses from both parties, a panel of judges has to decide if the defendant is guilty or not.

The tutor is the one who introduces a trainee judge to *Yee-Tok*. They learn from the tutor how to use it, their duty to keep it confidential, and the requirement to consult the responsible Deputy Chief Judge of the court[69] in departing from *Yee-Tok* or in sentencing cases which are not covered by *Yee-Tok*. A trainee judge learns how to conduct trials and how to make sentencing decisions not only from their tutor but also from another judge in the panel. The main method of learning is to observe behaviours of other more senior judges on the bench, their interactions with others in the courtroom and their style in writing judgements and orders. The responsibility of a trainee judge is to accompany the tutor to the courtroom well-prepared.

Besides the normal work of conducting trials, every day or week (depending on the policy of the Chief Judge) each panel takes turn to perform the duty of *Wain-Chee* for that day or the whole week. The idea of having this special unit is to allow other judges to conduct trials without the distraction from routines. During the day or week of *Wain-Chee*[70] the panel is not assigned specific cases for which to conduct trials. Two or more judges and their trainees, if any, are responsible for all routine judicial functions: issuing or denying search and arrest warrants; reviewing applications for pre-trial detention; granting or denying bail and examining witnesses in advance of trial day if the parties prove that the witness is likely to be absent at trial.

The obvious problem of *Wain-Chee* is that judges deal with different tasks and each carries its own rules to be applied and expectations to be fulfilled. Another is the huge number of guilty plea cases waiting to be sentenced each day, usually by only 2 judges. Judges also cannot control the pace of work since it depends on other agencies and people: the timeliness of the police in filing applications for pre-trial

[69] Before 2012, only the civil, criminal and specialised courts in Bangkok had a position of 'deputy Chief Judge'.
[70] For a detailed discussion on what to expect at *Wain-Chee* see Appendix C.

detention, of the prosecutor in filing indictment, and of the offender's relatives or lawyers in filing an application for bail.

Working as a Junior Judge and Trial Judge in Bangkok

Once the first session of practical training is finished, the trainee judges are summoned back to the Judicial Training Institute for another session of theoretical training. After the fulfilment of the training and a performance evaluation, a trainee judge will be appointed as a junior judge in Bangkok for another year. It is stated in the Thai constitution that before taking office a judge must take a judicial oath[71] before the King. Therefore, all newly appointed junior judges must fulfil this requirement. The audience with the King is considered by Thai judges as a privilege and one of the most prestigious days of their judicial life. It is the rite of passage for a new judge in the sense that after taking an oath, they can fully claim that they work in the name of the King.

During this period, junior judges have limited judicial power, including that of sentencing. All junior judges are assigned to work with a more senior judge as a panel of two judges. According to the Law, two junior judges cannot form a panel[72]. Junior judges alone can sentence an offender to imprisonment of no more than six months or fines not exceeding 10,000 baht[73]. If they wish to go beyond the statutory limit they must consult the senior judge in their panel. Together, the panel of judges in a court of first instance can impose any sentence, including the death penalty. The consultation within a panel will not be so burdensome for rookie judges if they refer to *Yee-Tok*. It should be noted that not all junior judges work in criminal court; some work in civil courts, other specialised courts or as a research judge in the higher

[71] The full judicial oath can be found in Chapter 3.
[72] Section 26 of the LOCJ
[73] Section 25 (5) of the LOCJ

courts[74]. In the latter case, they do not have an opportunity to practise sentencing skills.

It is noteworthy that the work of junior judges is under close supervision by the training committee appointed by the judiciary. They are subject to an official evaluation before being promoted to a full-fledged judge. According to the Regulation of the Judicial Administrative Commission on the performance assessment of junior judges 2002, a junior judge is evaluated in two main areas: judicial performance and judicial ethics, which in practice are closely related. To illustrate this, a close examination of the ethical part of the evaluation form reveals that a junior judge is expected to adhere to both the law and to judicial customs and must respect seniority. Therefore, when it comes to assessing performance in any judicial task including sentencing, the assessor must first identify if there is a judicial custom to carry out this task and then evaluate if a particular junior judge has complied with the applicable custom. If not, the judge will get a lower score both in the performance and ethical parts of the evaluation. In relation to making sentencing decisions, the assessor seems to expect compliance with *Yee-Tok* and a consultation with the Chief Judge in the case of departure from it.

After one year as a trainee judge and another year as a junior judge, upon the satisfactory performance evaluation, the rookie judge will be appointed as a fully-fledged judge. As a general rule, these newly appointed judges, with at least two years of experience in the judicial world, must be appointed to work in other provinces throughout the country. However, they usually have to wait for about one year in Bangkok before being appointed as a provincial court judge. Working as a trial judge in Bangkok is not very different from working as a junior judge except that they have more experience in managing their caseload and using *Yee-Tok.*

Being appointed as a junior judge means taking responsibility for one's own decisions, both as a fact-finder and a sentencer. This is the first time that a judge will fully realise the importance of their decisions on the life, liberty and property of other people. Most judges are very anxious in weighing evidence and deciding if the

[74] During my time as a junior judge, junior judges were not allowed to work in other courts except 3 civil and 3 criminal courts in Bangkok.

defendant is guilty or not. Once the conviction part is decided, they feel relieved and tend to pay less attention to the sentencing part of the decision, especially if there is *Yee-Tok* for that offence. Therefore, sentencing by complying with *Yee-Tok* contributes to the management of anxiety for a junior judge.

Rotating to Provincial courts

a) Adapting to a new environment

As mentioned earlier, it is mandatory for all newly appointed judges to be assigned to work in the provincial courts throughout the country[75]. In terms of sentencing work, *Yee-Tok* plays an important role in the sentencing decisions of provincial courts, as it does in criminal courts in Bangkok. However, in provincial courts, the judge is responsible for adjudicating both civil and criminal cases. This means more cases to deal with and more anxiety.

Regarding only criminal cases, sentencing decisions are only one among numerous types of decision that provincial courts' judges have to make. Others can be considered equally important, such as the decision to remand or grant bail and the decision to issue search and arrest warrants. Each decision also has its own conception of justice which a judge is expected to pursue. It is worth reemphasizing that in criminal cases, Thai judges do not only deal with guilty pleas but also cases where a plea of not guilty is made. Their roles during trials are both umpire and fact-finder. The conclusion of a trial does not mark the end of their role as a trial judge in the case, since they then have to analyse the evidence and write a fully-reasoned verdict. Once they are satisfied that the prosecution has proved the guilt of the accused beyond reasonable doubt, they must decide upon a sentence and include it in the same written judgement.

In carrying out the tasks of fact finders and sentencers in criminal cases, expediency is one among other requirements of doing justice. The Office of the

[75] Of course, the Judicial Commission has the power to allow an exception in some cases such as serious illness of judges or their family members which requires medical treatment available only in the capital city.

Courts of Justice has encouraged its courts to pursue this goal. According to 2013 and 2014 official statistics, about 80 percent of criminal cases in the lower courts across Thailand were concluded within 1 month from the day of filing an indictment[76].

b) A Frequent Rotation

Judges in the courts of first instance in Thailand will be rotated to another court on the first of April every year. According to the Regulation of the Judicial Commission on the appointment, rotation and promotion of judges, judges in the court of first instance cannot work in the same court for more than five years. After working in each court for one year, each judge of the court of the first instance is entitled to ask for rotation to other courts. Some judges, especially less senior ones who start their work as a trial judge in rural provincial courts, prefer to ask for rotation every year in order to move closer to the bigger cities or to the capital city. Judges do not always know for sure if they will be rotated to the court they choose since they do not know if more senior judges are also interested in working in that court. Therefore it is common for judges to list dozens of courts as their choices for rotation. When the Office of the Courts of Justice receives applications for rotation from all judges across the country, they will match the applications with the list of seniority of courts and judges and then announce the rotation list before the commencement of rotation period.

The courts to which judges are assigned depend on the match between the level of seniority of courts and judges. The court of justice has a list of seniority of courts which is updated from time to time. The list is based on many criteria including the distance of the court from the capital city. Generally speaking, the least senior court is the court which is located furthest from the capital city. This results in the tendency for people living in rural areas to have their cases adjudicated by less senior

[76] This statistic means that more than 80 percent of criminal cases in Thailand are resolved by guilty pleas as the trial cannot be conducted and concluded within one month from the day of indictment. This may also imply that in the majority of guilty plea cases, judges do not commission a pre-sentence report as doing so normally requires more than one month from the day of indictment.

judges than people in urban areas[77]. The seniority of judges depends on the year each judge enters the judiciary. If many judges take the same examination to enter the judiciary, their level of seniority depends on their scores in the examination. In the case that many judges get similar scores, the ballot will be used to decide the level of seniority.

Writing on the work of lower courts in Connecticut US, Feeley (1979:66) notes that although rotation minimizes the appearance of collusion and overfamiliarity that continuous presence in a single courtroom would foster, it also reduces judges' already low interest in overseeing the administration of the court. This also seems to apply to the case of lower courts in Thailand. Frequent rotation indeed makes Thai judges reluctant to challenge the established practices of the court by seeking alternative or more effective ways of carrying out a task. Generally, the first six months at the new court are devoted to learning about working environments, key players in the locality, court officials and court culture. If judges want to be rotated after one year, they must spend some time learning which courts they wish to be rotated to. Once they are rotated to another court, a similar cycle resumes until they feel settled and stay at the court for more than one year.

c) *The Importance of Yee-Tok in Routinisation of Cases: Police Crackdown During Long Holidays*

The best illustration of the importance of *Yee-Tok* to sentencers is the work of the sentencers in Provincial and Summary Courts during long holidays. According to the Summary Court and Summary Proceeding Act 1956, suspects charged with a crime punishable by an imprisonment of up to three years or a fine of up to 60,000 baht who admit their guilt to the police must be prosecuted at the summary court within 48 hours after their arrest. Therefore the Summary Court, called *Kwaeng Court* in

[77] Since 2012, the position of 'a deputy Chief Judge' has existed and judges who have already been transferred to the big cities will be asked to be appointed as a deputy Chief Judge in the provinces again. This initiative succeeds in sending more senior judges to work in the provinces as a deputy Chief Judge receives an extra monthly allowance so most judges are willing to be appointed to the position. The name of the position was changed to 'a primary presiding judge' in April 2015 as the fact that each court has many deputy Chief Judges, 10 or more in some courts, appears to send a confusing message to the public and other government agencies.

Thai, must be open during weekends and long holidays, from 8.30 am to 12.30 pm, to deal with this type of case. Generally, two judges are assigned to work each day. Since not every province has a summary Court, e.g. Thailand has 77 provinces but has only 20 summary courts outside Bangkok, the Act for the implementation of Summary Proceedings in the Provincial Court 1977 provides that in provinces with no summary court, the provincial court must use the summary proceedings in summary cases as well. Accordingly, most of the provincial courts must be open during weekends and long holidays to deal with summary cases in place of summary courts. When suspects are brought to the court alongside the indictment, the judge will ask them to confirm their guilty pleas and then proceed to impose a sentence.

Most Thai people in the provinces work in the big cities. They return home during long holidays, especially the traditional Thai new year festival or *Songkran* Festival in mid-April. Due to the increasing death toll from car accidents in the last few years, the Thai government has campaigned against drink driving during long holidays. It is a policy of every police station to establish sobriety checkpoints and arrest all drink-drivers. Since the penalty for drink driving falls within the jurisdiction of the summary court, it is not an exaggeration to call the summary courts and some provincial courts during the *Songkran* Festival 'drink-driving' courts. In my experience, the daily average indictments for drink driving cases during this festival are between fifty and a hundred cases depending on the policy of the police station. Some police commissioners even set a daily quota for arrests of drink-drivers and this inevitably affects the number of cases that go to court. Since their guilt is so obvious from their blood alcohol levels, most drink driving suspects admit their guilt and are brought to the court. Even if we assume that the prosecutor commences to file indictments at the very opening hour of the court, how can the court sentence one hundred defendants within four hours? Should we or should we not expect the court to treat each case individually?

Yee-Tok is the only thing the sentencer needs when dealing with a huge number of cases. The *Yee-Tok* sentence for drink driving in most courts varies according to the type of vehicle and blood alcohol level[78]. It is better to ride a motor cycle while you

[78] See Yee-Tok for common drink-driving in Appendix G.

are drunk in Thailand than to drive a car. The most decisive factor of the sentence, however, is the blood alcohol level: the higher the level, the higher the likelihood of being given a prison sentence or a longer period of probation and community service. Offenders, therefore, are classified and sentenced as a group by their vehicle and range of blood alcohol level. There is no need to adjourn the case for a pre-sentence report since it is believed that all necessary information is already presented in the indictment. Recall that most accused have to resume their work in the big cities so they may not like the idea of adjournment. Moreover, most of them are notified by the police or the prosecutor that the court will sentence on the same day of being indicted so they do not need to prepare to file an application for provisional release. Looking at *Yee-Tok*, writing a hundred judgments and reading them to the defendants consumes a lot of time, but still leaves sufficient time for the court officers to collect fines, issue probation orders or writs of imprisonment and conclude other administrative work within office hours. Moreover, it seems to be the only win-win solution for all audiences during this festive time: the government fulfils its policy, the police get the number of arrests they want, prosecutors secure convictions, defendants pay for their offences, learn their lessons then go back to work, and the sentencers close the case.

d) The Role of the Chief Judge in ensuring compliance with Yee-Tok

The Chief Judge of the provincial court is the one who sets and enforces the compliance policy with *Yee-Tok*. Some Chief Judges may ask all judges to consult them before departure from *Yee-Tok*, while some grant a free departure policy without consultation. Some Chief Judges also review the sentencing decisions of judges to determine whether they are consistent with *Yee-Tok*; if they are not, judges may be asked to justify their reasons for departure to the Chief Judges. However, in practice, the policy of the Chief Judge does not influence the decision to comply with or depart from *Yee-Tok*, as it may seem to be the case. Recall that all Thai judges, during their judicial training, learn the case management functions of *Yee-Tok* and the principle that complying with *Yee-Tok* requires no further explanation. Therefore, the system has established a built-in incentive for compliance without legal mandate.

All judges realise that departure from the norm requires justification, regardless of whether the Chief Judges require it or not.

e) Updating Yee-Tok

There are many reasons for the updating of *Yee-Tok*. Updating, or merely compiling, the whole *Yee-Tok* is the first task for some newly appointed Chief Judges. Some Chief Judges consult all judges in the court if punishments for some offences need to be reviewed to be made more severe or more in line with the *Yee-Tok* of appellate courts. Regardless of the justifications, the updating process is usually commenced by the Chief Judge, who will appoint judges in the court to a committee to update the *Yee-Tok*. Most provincial courts' judges have experience in participating in this process. The court has never allowed other agencies officially to give input into the updating process. Typically, the most senior judge will be the chairperson who may prepare the draft amendment of the *Yee-Tok* for the committee to consider or ask other judges to perform this duty. The draft amendment of *Yee-Tok* is normally prepared through comparison with *Yee-Tok* of another court (preferably one in the same region); not by researching past practices, sentencing theories or research studies. The *Yee-Tok* for narcotics offences may be copied from the Central Court of Appeal in Bangkok, which has been the sole court responsible for reviewing appeals of narcotics offences since 2008. Once the draft *Yee-Tok* is prepared, the chairperson may convene the meeting or just send the draft for other judges to consider. The draft must be approved upon consensus of the committee. It should be noted that sometimes a draft amendment may not be prepared, but instead the committee will simply discuss which sentences should be amended during the meeting. Some Chief Judges participate in the meeting but some do not. However, the updated *Yee-Tok* enters into force upon their approval.

f) Sentencing decision-making and performance evaluation of Thai Judges

Judicial promotion in Thailand is mainly based on seniority and not on performance evaluation, providing that judges adhere to the Code of Judicial Conduct. Typically the level of seniority cannot be changed. However, it may be lowered as a disciplinary sanction for judicial misconduct. Nevertheless, each judge of the court of first instance is subject to an annual performance evaluation by the Chief Judge.

Generally speaking, judicial sentencing decision-making plays no significant role in the performance evaluation process. The ability to use sentencing discretion appropriately is indeed one of the criteria on which all lower court judges are assessed annually. By and large, whether and how this criterion is assessed depends on the Chief Judge. Some may consider compliance with *Yee-Tok* as a proxy of correctly used discretion while some may not. Moreover, the fact that the appellate courts amend the sentences of the judges of the lower courts does not imply the poor performance of the latter. Lower court judges and court administrators seem to consider sentencing amendments by the higher court as an application of mercy rather than application of rules or principles. The performance evaluation of Thai judges also provides no incentive for giving sentencing reasons. The Chief Judges and the higher courts who review sentencing decisions have never criticised the failure to give reasons or remanded the case to the lower courts. Besides, a judge who tries to provide sentencing reasons gains no further benefit in doing so.

Although merely disregarding *Yee-Tok* is not judicial misconduct, I have known two events which demonstrated the drawback of doing so. The first was when one judge was accused of misconduct by having a conversation in a restaurant with the defence lawyer of the defendant who appeared in their court, and later awarding a suspended sentence for that defendant. The investigation committee found that a suspended sentence was a departure from the *Yee-Tok* of the court and there was no evidence of a consultation with the Chief Judge. Fortunately the judge was cleared from the allegation of judicial corruption due to the fact that there was no policy in that particular court requiring consultation before departure. However, this case led to a tightened policy of compliance and the updating of *Yee-Tok* in that court, as well as the anxiety of the accused judge. Another case was when some of the judges of one court decided to amend the *Yee-Tok* for a particular offence without the approval of the Chief Judge. Their justifications for doing so were unclear, however, there were officially charged with judicial misconduct and faced disciplinary sanctions. The socialisation of the Thai sentencers which I have gone through seems to signal the clear message that compliance with *Yee-Tok* does no harm to sentencers. In contrast, departure from *Yee-Tok* or challenging its legitimacy is more demanding and risky.

SECTION 5: THE THAI SENTENCING DECISION-MAKING PROCESS

An Indictment as a Main Source of Information

Thai criminal procedure, as in other civil law countries, does not recognize the separate procedure of a sentencing hearing. Both conviction and sentencing decisions are made at the same time and written in the same judgement. The first step in the sentencing decision-making process of Thai judges, after being satisfied with the conviction part of the case, is a reading of the indictment of the public prosecutor. The indictment contains some information including name, age, sex, occupation and address of the offender, time and place of their crime, the details of the crime committed, which is usually limited to the facts that fit elements of crimes provided by the statute. In the case that the defendant pleads guilty, and the minimum sentence for that offence is less than 5 years imprisonment – or life imprisonment in the case of narcotics offences – the judge can impose a sentence without conducting a trial. They have a choice between imposing a sentence upon the defendant entering the guilty plea, which most of them do, or commissioning a pre-sentence report and adjourning sentencing.

The Significance of the Guilty Plea

The smooth operation of the Thai criminal process, as in the US and the UK, relies heavily on the guilty plea. About 90 percent of the criminal cases in provincial courts which I worked in were guilty plea cases[79]. Although this already seems to be a high figure, the Office of the Courts of Justice designed a mechanism to attract more guilty pleas in 2012. The Centre for Social Harmony and Peace has been established in some courts since 2008 and follows the logic that more guilty plea cases mean less trial cases and shorter waiting times for trials.

In November 2008, administrators of the Bangkok South Criminal Court initiated a pilot project to inform defendants of their rights and encourage the guilty accused

[79] This may be due to the fact that the rate of sentencing reduction for a guilty plea in Thailand is tempting. According to section 78 of the PC, the court can give credit to a guilty plea up to one-half reduction, compared with up to one-third in England and Scotland.

to plead guilty as early as possible. They dubbed this process 'social harmony and peace process' or *Krabuan Karn Samannachan Lae Santi Withee* in Thai, and established the first permanent Centre for Social Harmony and Peace in February 2010.

The role of the Centre is to make the accused and the victim well informed about their rights. It is the responsibility of the judge who facilitates the process to make the accused who actually commits crime feel remorse, plead guilty and compensate their victim. The process is conducted outside the courtroom in a meeting-like manner. The offender, the victim (if any) and their families can participate in the process. The meeting begins with the judge acting as a facilitator introducing him/herself, explaining the process and encouraging both sides to tell the truth. A judge then discusses the advantages and drawbacks of going to trial and the legal rights of the offender and the victims. Next, the parties will have an opportunity to tell their version of the story and to ask questions of the judge. The judge who convenes the meeting must prepare to answer questions, which have never been addressed to and answered by judges in an ordinary courtroom, such as the possible sentence for similar cases, elements of the crimes charged and the justifications and excuses for those offences.

The main purpose of the Centre is to encourage an earlier guilty plea from the accused by informing them what the responsible citizen should do for society and for the victim if they violate the law. The informal environment of the meeting room, the more engaged role of judges and some procedural safeguards make both the accused and the victim feel more comfortable to talk about the crime and its aftermath. Among the important safeguards is the fact that the accused's lawyer can attend the meeting; if the meeting fails the same judge cannot preside over the subsequent trial; and all information derived from the meeting cannot be used as evidence during the trial. It is claimed that the process encourages the accused and the victim to provide information that is necessary for judges to carry out more just sentencing.

Since the Centre targets the defendant who pleads not guilty, it deals with all types of offences, including serious offences such as robbery and murder and victimless crime such as drug possession and trafficking. It is also responsible for mediating in

the case that the Mediation Centre fails to help the parties to reach an agreement. The Centre for Social Harmony and Peace of the Bangkok South Criminal court has succeeded in terms of generating more guilty pleas and shortening the waiting time for trial. It is also claimed that the Centre can reduce the number of appeals to the higher court. Unsurprisingly, this success led to the expansion of the programme to twenty-seven other provincial courts in 2011. It then became a nationwide policy in 2012[80].

The Total Control of the Sentencer over the Additional Information

The applicable law provides that the judge can commission a pre-sentence report in any case, provided that the defendant has never been imprisoned or has only been imprisoned for an offence committed by negligence or a petty offence. In practice, however, the decision to commission a pre-sentence report is not primarily guided by the law or the need to gain more information. If the court has *Yee-Tok* for that offence and the judges feel that the case is only one of common cases frequently charged in the court, most of them will pass a sentence immediately. In contrast, if the judges do not agree with the recommended sentence in the *Yee-Tok* or if the court does not have *Yee-Tok* for that offence, most judges will commission a pre-sentence report and adjourn sentencing. This situation often happens when the *Yee-Tok* recommends unsuspended imprisonment but the judge thinks otherwise.

Most of the time, the judges form a suitable sentence in their minds before receiving the pre-sentence report. However, they sometimes change their minds after getting additional information from the pre-sentence report. If the judge wants to depart from the *Yee-Tok*, they will use the additional information in the pre-sentence report to defend their decision to the Chief Judges. If the court does not have *Yee-Tok* for that offence, most judges will find ways to reach the uniform sentence for that kind of case, such as searching the electronic database of the Supreme Court's

[80] To get a picture of how this process works see the introductory video at https://www.youtube.com/watch?v=KGDXzyJ4MTE last viewed 1/12/16

decisions[81], asking colleagues or consulting the Chief Judges. They rarely base their sentencing decision on the facts of the case alone.

If the judge has to sentence the defendant after the trial, it seems that the record of the trial will provide additional information for their sentencing decision. However, during the trial both parties tend to present only evidence to prove or disprove elements of the crime, which may not be useful for making a sentencing decision. Hence, once the judges decide that the defendant is guilty, their main raw materials for making a sentencing decision are the indictments and *Yee-Tok*. It should be noted that Thai judges rarely commission a pre-sentence report following the trial. If judges want to depart from *Yee-Tok* they may cite the information in the trial record as a justification to the Chief Judges.

Consultation and Writing Judgement

Once the suitable sentence has been decided upon, the judge needs to consult another judge in the panel if the sentence is more than 6 months imprisonment or a 10,000 baht fine. The law requires two judges to sign the judgement in such cases. Furthermore, if the sentence departs from *Yee-Tok* and the Chief Judge requires consultation, the judge must consult and seek approval from the Chief Judge before writing the judgement; the final step of the process. As mentioned earlier, Thai judges rarely give sentencing reasons. To illustrate, the standard form in the sentencing part of the judgement for unsuspended imprisonment is:

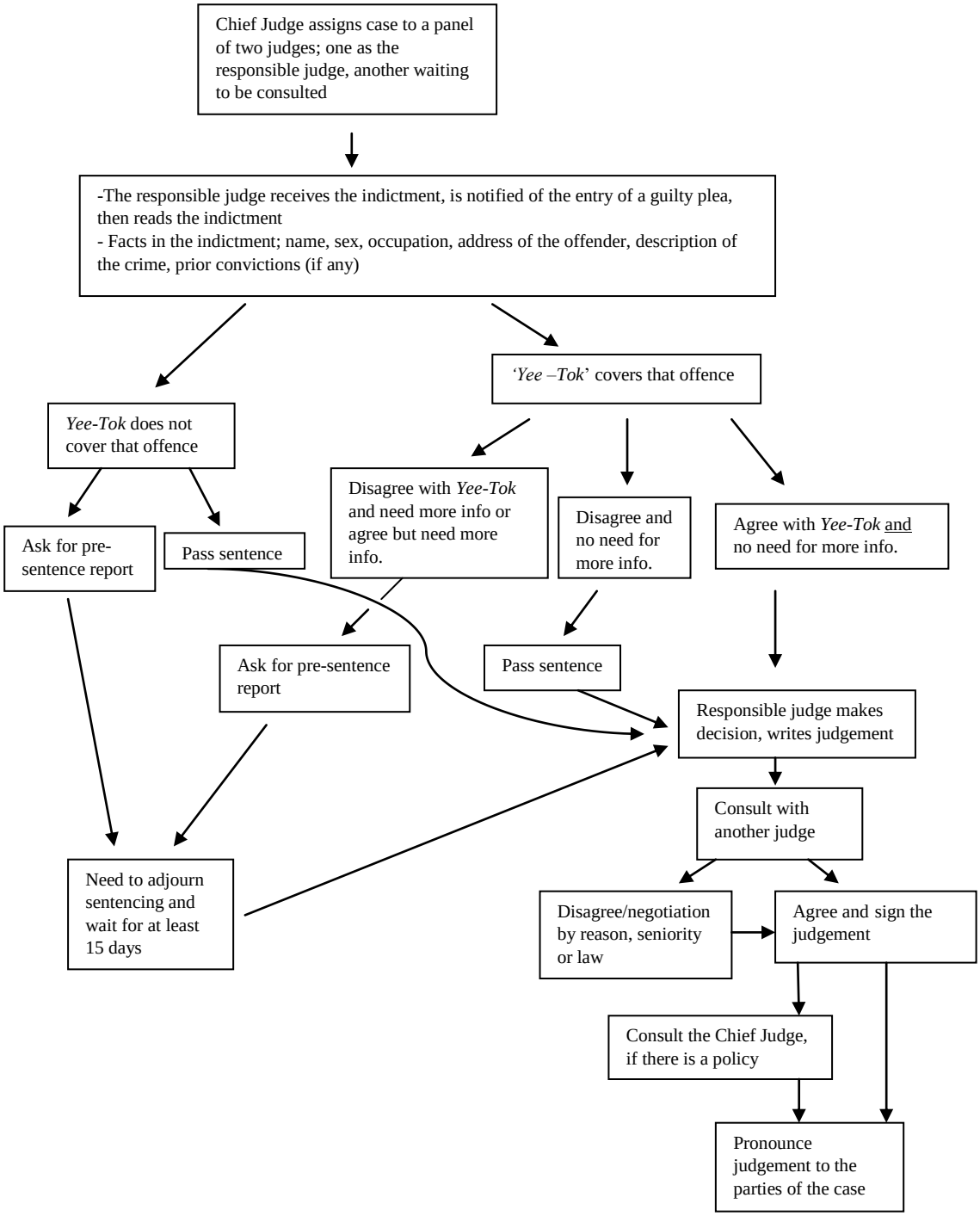
"The defendant is guilty of (name of the offence). The punishment is … years imprisonment. The defendant pleads guilty, so the court reduces the sentence by half to… years' imprisonment."

[81] This database is available to the public at http://www.deka2007.supremecourt.or.th/deka/web/search.jsp last accessed 17/2/16

The form for the suspended imprisonment is:

"The defendant is guilty of (name of the offence.) The punishment is ... years' imprisonment and ... baht fine. The defendant pleads guilty, so the court reduces the sentence by half to... years' imprisonment and... baht fine. Considering the pre-sentence report (if any), the defendant has no prior convictions, therefore the imprisonment is suspended for... years. However, the defendant must report himself to the probation officer every... months and perform .... hours of community service."

Figure 4.2: Diagram of the Sentencing Decision-Making Process of Thai Judges in Guilty Plea Cases



Limited Roles of Other Stakeholders

As demonstrated earlier, the roles of other stakeholders in the sentencing decision-making process of Thai judges are quite limited. The contribution from the pre-sentence report of the probation office seems to be helpful. However, the judges are the ones who decide if they need the report and for what purpose. The public prosecutor and the defence lawyer rarely ask to access the reports, let alone to challenge them. The input from the public prosecutors is limited to the facts in the indictment and the evidence they present during trial. They cannot recommend sentences to the judge as their comrades in other civil-law countries such as Japan, Germany and the Netherlands do. The defence lawyer can submit a plea of mitigation but they rarely do so. Furthermore, in most cases, their pleas alone are unlikely to affect the previously formed decision of the sentencer.

In some cases, especially cases involving compoundable offences such as fraud, embezzlement, criminal damage or non-compoundable offences with actual victims such as assault, indecent assault, causing death or serious bodily harm by dangerous driving, the victims can provide information on their views to the offender and the compensation they receive from the defendant to the courts directly through their petitions, indirectly through the plea of mitigation of the defendant or through the pre-sentence report. It should be noted that whether the voice of the victims should be a decisive factor of the case is framed by both the criminal statutes and the *Yee-Tok*.

SECTION 6: THAI SENTENCING AS COLLECTIVE DECISION-MAKING

How does the Thai judiciary make judges value 'uniformity'?

Hörnle (2013:208) notes that an early start to a judicial career in civil law countries can promote a tendency to identify oneself in a particularly strong way with the expectations connected to the role of a judge. This fits nicely with the case of Thailand. Thai trainee judges develop their professional identity through the training process and interaction with other judges. Trainee judges learn the two most important values in judicial culture – respect for seniority and uniformity – during this period. In relation to sentencing, the main purpose of the training is to teach

trainee judges that compliance with *Yee-Tok* and uniformity in sentencing decisions is the norm. They will also learn, from training as well as from later interaction with their peers, that compliance with *Yee-Tok* helps them to process the case and does no harm to them. In contrast, departure from *Yee-Tok* or challenging its legitimacy is more demanding and risky.

Organisational researchers observe that when members of an organisation feel uncertain about what to do, they are more likely to identify with the group (Hogg, 2007). This observation can be confirmed in the way Thai judges are trained. For each trainee, regardless of their previous professional background, a common feeling is uncertainty over what is acceptable and unacceptable judicial behaviour. They firstly learn that regardless of their age or seniority in other social contexts, their judicial seniority is determined by their performance during the judicial examination. Therefore, they must show respect to their juniors at university who have become judges before them. Thailand has a unique way of showing respect by *Wai*: putting your palms together at chest level and bowing your head. Failure to *Wai* your senior is a serious offence for a trainee judge. This creates a problem when a trainee judge goes to work in the courthouse for the first time: how can they determine which people are judges and which are not? And among trainee judges who dress similarly, who are more senior than them? Some decide to play it safe by doing *Wai* to everybody they see in the court to avoid losing marks during the training.

All Thai trainee judges learn the significance of adhering to high moral standards and the importance of being perceived by the public as impartial judicial officers. They have been socialised to understand that the safest way to secure a smooth judicial career is to conform to the 'normal practice' of judges. Anomaly always comes at a price: hostile attitudes from supervisors and colleagues, time and effort in justifying innovative practices and the possibility of being accused of misconduct. Through professional socialisation, a Thai sentencer learns to value uniformity in making decisions even in the absence of legal mandate or public outcry for consistency in sentencing.

The value of uniformity is sustained throughout the judicial career by the process of interaction between judges. Each individual judge has a desire to fit in with the

organisation of the judiciary. They want to be respected by peers and fear of losing faith by supervisors and colleagues. Moreover, the criteria for the performance evaluation which emphasises uniformity and conformity to judicial norms also provides a disincentive for judges to deviate from the normal practices of sentencing.

Appellate Reviews of Sentences and Precedents of the Supreme Court

a. Appellate Review of Sentences

In Thailand, parties who are dissatisfied with a sentence imposed by the court of first instance can file an appeal against the sentence to the responsible appellate courts subject to the seriousness of the case in question. There are 10 Courts of Appeal across the country. Appeals against sentences in narcotics offences have to be filed in the central Court of Appeal in Bangkok. Review of sentence is done case by case and the appellate courts have never issued a guideline judgement. Some Courts of Appeal have their own *Yee-Tok* which they use as a framework to correct the sentences of the lower court.

Complying with *Yee-Tok* does not guarantee that the parties of the case will not file an appeal since the details of *Yee-Tok* are technically regarded as an official secret and judges have never referred to *Yee-Tok* in their sentencing decisions. Although some prosecutors and defence lawyers can learn the patterns of sentencing from experience, we cannot assume that they will not file an appeal when the sentencing falls within the normal pattern. Complying with *Yee-Tok* also does not guarantee that the sentence will not be amended by the appellate court. The appellate court uses its own *Yee-Tok*, if any, as a reference; not that of the lower court. In the past, lower court's judges did not seem to perceive the amendment of sentences by the appellate court as a problem or a sign that their sentences were wrong, since the court administrators did not consider high reversal rates as a sign of low performance. However, when court administrators have made a great effort to lower the reversal rates, some courts of first instance have responded by adopting the *Yee-Tok* of the responsible appellate court as its own. This approach guarantees that if a judge complies with *Yee-Tok*, it is less likely that the sentence they impose will be amended by the appellate court.

b. Precedents of the Supreme Court

It is assumed that civil law and common law traditions differ in the role of precedent as the source of law and attitude towards the principle of *stare decisis.* In today's reality, the difference between the two traditions lies in whether legal scholars and practitioners treat precedent as a *de jure* or *de facto* source of law. In both traditions judicial decisions play an important role in legal education and legal findings. Civil law courts do use precedents. Compliance may not be mandated by statute but by other factors like hierarchy, shared tradition, concern for equality of justice, fear of reversal and reprimands from above. (Merryman and Pérez-Perdomo, 2007:47)

In Thai context, scholars always emphasize that precedents are not the source of law and that law students should not pay attention to them. In reality, legal education in both the law schools and the bar association rely heavily on the analysis of the Supreme Court's decisions. Also it is part of Thai judicial culture and stated clearly in the Code of Judicial Conduct that the lower courts must follow the precedent of the higher court.

In relation to sentencing, it should be noted that the Supreme Court of Thailand is not authorized to issue guideline judgements like the appellate court in England and Wales or Scotland. Generally, sentencing issues come to the Supreme Court through two channels. The most common one is through appeals against sentences filed by the prosecution or the defence. The likelihood that an appeal against a sentence will reach the Supreme Court is minimal for less serious offence due to some limitations in the Code of Criminal Procedure. However, the Supreme Court has widely used its power in sentencing by declaring that even in the case that no parties file an appeal against sentence, if the case comes to court and the court considers the sentence imposed by the lower courts as too harsh, it can reduce the sentence. By deciding on a case by case basis, the court can set numerous precedents on sentencing laws. Three main areas of precedents on sentencing laws should be noted: the custody threshold, mitigation of guilty plea and mitigation of substantial assistance to authorities in narcotics cases.[82]

[82] Details of these precedents can be found in Appendix D.

When a judge in the lower court wants to sentence an offence which is not covered by local *Yee-Tok*, it is tempting to think that they will exercise wide discretion. However, the reality is that they will refer to the Supreme Court's decisions database to search for guidance. If the precedent reveals that the offence can be punished with a non-custodial sentence, a judge will not hesitate to follow the precedent since they can justify their decision to the Chief Judge by simply referring to the previous decision of the highest court. In the case that there is no precedent on such an offence, a judge can ask the court officer to search the database of previous judgements in that court or ask judges in other courts for advice. The aim is to try to compare the case at hand to other cases which have been previously decided upon.

The Roles of the Judicial Commission, the President of the Supreme Court and the Office of the Courts of Justice

The Judicial Commission is vested with the power to appoint, promote, transfer and discipline Thai judges. To depart from *Yee-Tok* without consulting the Chief Judge tends to be perceived by the Judicial Commission as misconduct. However, the fate of the accused judge still depends on the circumstances. Upward departure, which does not benefit the defendant and is less likely to be induced by corruption, tends not to lead to dismissal from office of the alleged judge as downward departure does. Additionally, the greater the frequency of departure, the harsher the sanction. Furthermore, departure involving narcotics cases is likely to be treated as more serious than departure in other, milder cases, such as drink driving[83].

In the last decade, it has become common for the President of the Supreme Court to issue a policy statement. On 27 September 2012, the then President of the Supreme Court issued official advice[84] to judges relating to the use of deferred sentencing. This advice followed a policy statement by the same President encouraging greater use of alternatives to custody. This is the first time that a President of the Supreme Court exercised their power authorized by the Law for

[83] For details on the role of the Judicial Commission see Appendix E.
[84] A detailed discussion on this Advice can be found in Appendix F.

Organisation of the Court of Justice to issue advice aiming to structure sentencing discretion. The successive President of the Supreme Court who took office in October 2013 did not have a specific policy on sentencing, but the current President, who has been in office since October 2015, promulgated a policy encouraging greater use of alternatives to custody. Besides, the Office of the Courts of Justice's Strategic Plan for 2014-2017 set a goal for the courts to uniformly impose alternatives to custodial sentences by the year of 2015[85] and for 90 percent of judges to impose non-custodial sentences equally by the year 2017 in cases of a similar nature.

SECTION 7: THE FORMULATION OF HYPOTHESES

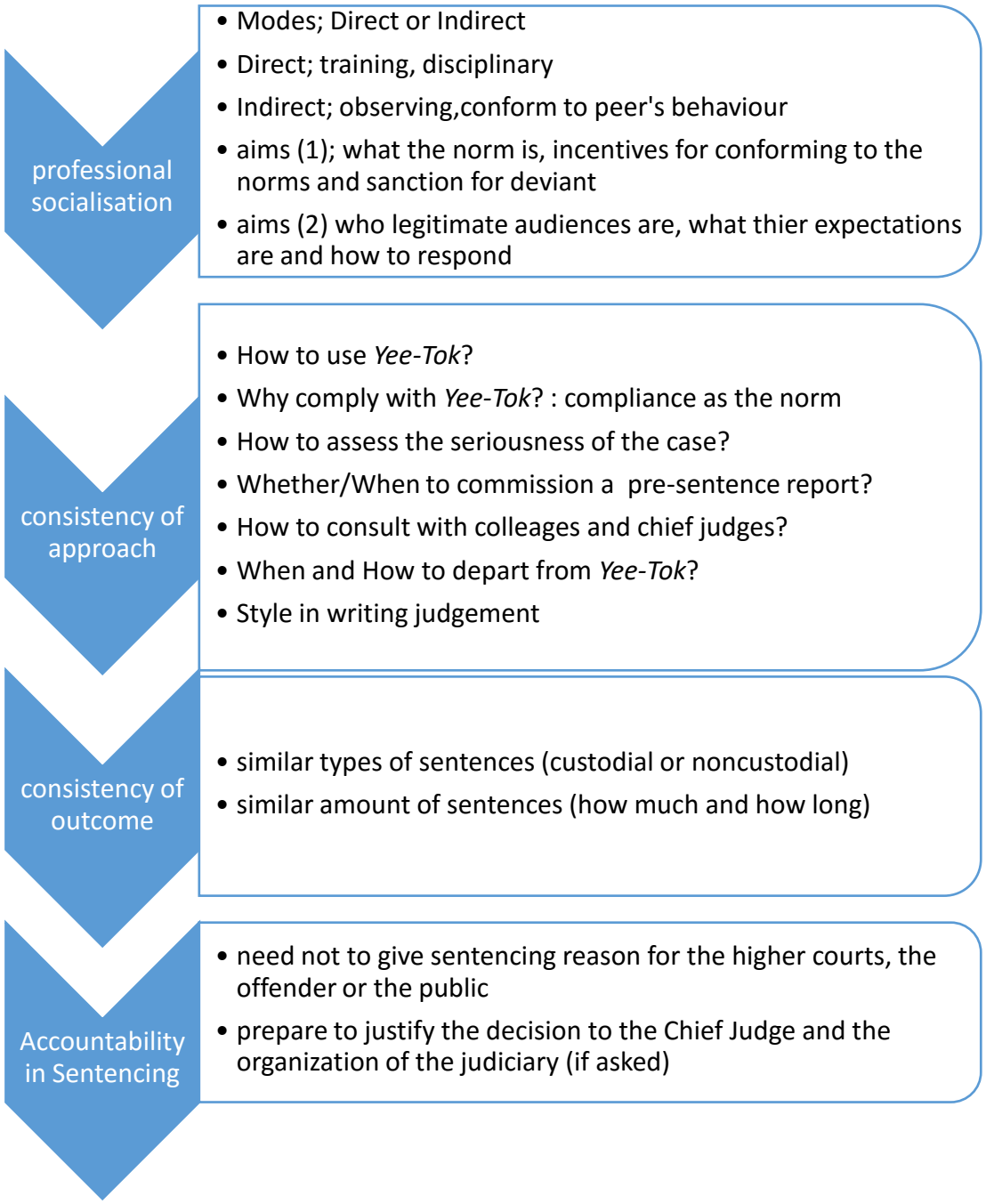
The Role of Professional Socialisation in the Development of Understanding of Consistency and Accountability

Judging from the absence of coherent sentencing principles, the localised and confidential nature of *Yee-Tok* and the failure to give sentencing reasons, those who adopt the legal-rational approach may easily jump to the conclusion that Thai sentencing lacks consistency and accountability and accordingly needs to be reformed. However, my experience illustrates that, despite some unique characteristics of Thai sentencing, consistency and accountability do not seem to be alien concepts to Thai sentencers.

Through professional socialisation, a Thai sentencer learns to value uniformity in making decisions without legal mandate or public outcry for consistency in sentencing. Moreover, they learn who the legitimate audiences of sentencing accountability are. Figure 4.3 shows how professional socialisation may affect consistency and accountability in Thailand's sentencing practice.

[85] As of November 2015, this standard is yet to be formulated.

Figure 4.3: How Might Professional Socialisation Affect Consistency and Accountability in Thailand's Sentencing Practice?



Consistency in Thailand's Sentencing Practices

As mentioned in the forgoing chapters, there is no evidence of consistency or disparity in sentencing in Thailand's sentencing literature. However, absence of evidence does not mean consistency is absent from Thailand's sentencing practice. A large proportion of our decisions are made in concert with other people; we anticipate how others will react, we ask for advice, we use others as sounding boards as we deliberate and we ask them what they would do (Beach and Connelly, 2005:23). Making sentencing decisions is no exception. I argue from my experience and aim to prove with more empirical evidence that consistency does exist in Thailand's sentencing practice. Despite the absence of a statutory sentencing principle that prescribes the notion of 'treating like cases alike and different cases differently', Thai sentencers are socialised to value consistency. Consistency in the Thai sentencing system is not assisted mainly by rules but by organisational norms and the need to process cases through the mechanism of *Yee-Tok*. For offences covered by *Yee-Tok*, Thai sentencers who work in the same court follow the same procedures and reach similar outcomes when sentencing offences of a similar level of seriousness and offenders with a similar history of prior conviction.

The situation seems to be more complex for the observer when trying to capture inter-court consistency in Thailand. Recall that each court of first instance has its own *Yee-Tok*, therefore we should expect to observe inconsistency across courts. However, my experience illustrates that each court tends to imitate the *Yee-Tok* of others and so the recommended sentences of different *Yee-Tok* may not be as different as scholars may expect them to be. Therefore, to some extent, the outcome of sentences may be consistent across courts. Furthermore, the fact that all Thai judges, regardless of which court they work in, are familiar with *Yee-Tok*, undergo the same form of socialisation at the Judicial Training Institute and share a similar working environment appears to suggest that their approach to sentencing is likely to be consistent with judges in other courts.

Accountability in Thailand's Sentencing Practice

Thai sentencers realize that the scope of their sentencing power is limited, not only by criminal statutes but also by organisational norms. They are also fully aware that sentencing decisions must be supported by justification. However, the understanding of accountability in sentencing of the Thai sentencers is also shaped by the political, social and cultural contexts of Thailand. Recalling the legitimacy of the Thai judiciary as a representative of the king, the lesser adherence to the notion of popular sovereignty, the hierarchical social status and the culture of deference to authority discussed in chapter 3, we should assume that the Thai judiciary prefers to monitor its own accountability rather than respond to demand from outside stakeholders, if any.

Accountability in sentencing for Thai sentencers seems to mainly involve making their decisions accountable to the Chief Judge and the organisation of the judiciary, not to the higher courts, the offender or the public. Adhering to the Code of Judicial Conduct and to judicial customs appears to be more important than explaining their decisions to others. Moreover, Thai sentencers are socialized to understand that sentencing in compliance to *Yee-Tok* requires no further explanation. This might explain why Thai sentencers rarely give sentencing reasons and the higher courts never consider failure to do so as grounds for reversal or remand of the decisions of the lower courts, even though the Criminal Procedure Code clearly prescribes that judges must provide reasons for their decisions.

Thailand's political, social and cultural context may also account for the lack of demand for sentencing accountability from the media and the public. This passivity may have, in turn, sustained the conception of accountability of the Thai judiciary, especially on the question of who can call for accountability from sentencers.

Hypotheses Formulated

From a reflection on my experience and a review of the literature, four hypotheses on how Thai sentencers put the concepts of consistency and accountability in sentencing into practice were formulated as follows:

1. Consistency and accountability are among the most important values that Thai sentencers need to be aware of in making decisions.
2. In guilty plea cases in which a recommended sentence is provided by *Yee-Tok*, Thai sentencers pass a sentence in compliance with *Yee-Tok* without commissioning a pre-sentence report.
3. Thai sentencers are more concerned with being accountable to the Chief Judges and the Judiciary than to the public or the parties of the case.
4. Chief Judges expect Thai sentencers to be accountable to them by following their policies on compliance or departure from *Yee-Tok*.

CONCLUSION

This chapter described and justified the research methodology and methods employed in the study. It discussed why mixed methods of data collection were used and interpretative approach was adopted, and how reflection on my experience as a Thai sentencer can be used to formulate hypotheses. The analysis of my experience has shown that consistency and accountability do not seem to be alien concepts to Thai sentencers; but the discussion on Thailand's political, social and cultural context in Chapter 3 and on Thailand's judicial career and socialisation in this chapter suggest that we should expect to observe different ways of putting the concepts into sentencing practice than those depicted in western literature. Four working hypotheses were formulated from my reflection and will be tested with the data from focus groups and interviews with other Thai sentencers. In the next chapter, I will discuss the findings from the fieldwork, examine how other Thai sentencers perceive their sentencing work and investigate their claims of how Thai sentencing operates.

CHAPTER 5

PERCEIVING SENTENCING TASKS: THE FINDINGS

> *Where human beings live or work in compact groups, in which they are personally known and to which they are tied by feelings of personal loyalty, very potent and simultaneously very subtle mechanisms of control are constantly brought to bear upon the actual or potential deviant.*
>
> (Berger, 1963:87)

INTRODUCTION

Having formulated hypotheses based upon reflection on my experience and the literature, I used these hypotheses to design the focus group protocol and interview questions and then collected data from the twenty-seven judges who participated in the research. This chapter reports the findings of the fieldwork conducted in Thailand between June and August 2014 and lays a foundation for a more analytic discussion in the following two chapters of the thesis. The chapter follows the protocol and structure of the data collection and comprises seven sections. Section 1 describes participating courts and judges. Section 2 discusses the important values that need to be considered in making sentencing decisions. Section 3 examines compliance with and departure from *Yee-Tok* in narcotics cases. Next, section 4 investigates participants' self-perception of their lives as sentencers in comparison to other occupations through the use of photo-elicitation. Section 5 and 6 move the focus of the description from sentencers in the lower courts to the Chief Judges of the provincial courts and appellate judges. These double sections analyse the expectations of court administrators and sentencing reviewers regarding the sentencing decisions of the lower courts, as well as their attitudes towards some of the characteristics of *Yee-Tok*. The final section tests the findings against the hypotheses formulated from my experience.

SECTION 1: PARTICIPATING COURTS AND JUDGES

Provincial courts and their judges

Thai courts of justice are classified into three levels consisting of courts of first instance, Courts of Appeal and the Supreme Court. Regarding courts of first instance with criminal jurisdiction, there are three criminal courts and three provincial courts in Bangkok and one hundred and six provincial courts in other provinces. As of October 2013, out of the total of 4,320 Thai judges[86], 3,110 judges were working in courts of first instance.

The target population of this study was judges who work in provincial courts outside Bangkok, since they form the majority of Thai sentencers. Only judges who have worked for at least 5 years were recruited to participate, since they have worked in at least 1 criminal court in Bangkok and 2 provincial courts. It is noteworthy that provincial courts' judges in Thailand are responsible for adjudicating both criminal and civil cases. These provincial courts are classified geographically into nine regions across the country. The administration of provincial courts in each region is presided over by the responsible Chief Justice of the region. Two regions were purposely selected as research sites due to the fact that they consisted of a large number of judges with more than five years' experience on the bench. Two provincial courts from each region were selected through my personal network of contacts and due to the convenience of getting access to the judges in these courts. At least one judge from each court was approached and asked to be a gatekeeper.

Court Green and Court Blue are part of the administrative office of region X, which supervises eleven provincial courts in total. Both courts are located in the western part of Thailand within a two hundred kilometre radius from Bangkok. Out of twenty-five judges working in Court Green, four – judges A, B, C and D – participated in the focus group; while five out of eighteen judges from Court Blue – judges E, F, G, H and I – participated in the focus group.

[86] With the population of about 67 million, this produces a low judge-to-population ratio (6.45 judges per 100,000 population), compared with an average of 18.9 judges per 100,000 population in European countries (see Report of the European Commission for the Efficiency of Justice, 2013:631).

Court Orange and Court Brown are part of the administrative office of region Y, which supervises ten provincial courts in total. Both courts are located in the eastern part of Thailand within a three hundred kilometre radius from Bangkok. Out of twenty-eight judges working in Court Orange, six – judges J, K, L, M, N and O – participated in the focus group; while four out of ten judges of Court Brown – judges P, Q, R and S – participated in the focus group. In total, 19 provincial courts' judges, 15 male and 4 female, took part in this study.

According to the official statistics from 2013, each judge in participating courts was responsible for trying and adjudicating between 400 to 700 cases annually. About 60 percent of these were criminal cases, the majority involving narcotics. The most commonly used illegal drug in Thailand is methamphetamine. The official statistics revealed that in 2012, about 90 percent of criminal cases in Court Blue and Court Green were guilty plea cases[87].

Three out of four focus groups consisted of both male and female judges. The youngest participant was 32 years old, while the oldest was 57. The most experienced participant had worked as a judge for 15 years, while the least experienced had been a judge for only 5 years. The following tables provide information on age, work experience, previous occupation and time worked at the current court of all participants as well as the number of provincial courts at which they have previously worked. In order to ensure the anonymity of participants, I decided not to link each element of background information together.

Table 5.1: Age of Participating Provincial Courts' Judges

Age	Number of participants (N=19)
31-40	9
41-50	6
51-60	4

[87] This ratio is similar to provincial courts at which I have previously worked.

Table 5.2: Work experience of Participating Provincial Courts' Judges

Work experience (years)	Number of participants (N=19)
5	2
6-10	11
11-15	6

Table 5.3: Previous Occupation of Participating Provincial Courts' Judges

Previous occupation	Number of participants (N=19)
Lawyer	9
Legal officer in government offices	8
Media	1
Prosecutor	1

Table 5.4: Time spent at Current Court of Participating Provincial Courts' Judges

Time at current court	Number of participants (N=19)
Less than 1 year	1
1-2 years	4
2-3 years	10
3-4 years	3
More than 4 years	1

Table 5.5: Number of Provincial Courts that Participating Provincial Courts' Judges have previously worked at

Number of Provincial courts previously worked at (including the current one)	Number of participants (N=19)
2	3
3	10
4	4
5	3

The majority of the provincial court judges in Thailand who participated in this study were former lawyers in their late 30s or early 40s, who have worked as judges for at least 5 years in more than 2 provincial courts and have worked at their current court for at least 2 years. The observations that can be made from the background data on the participants are that the majority of Thai sentencers start out as practicing lawyers similar to those in the US or the UK, but seem to be younger and have less experience than their Western counterparts. Thai lower courts' judges work at many courts throughout their judicial career since all provincial courts' judges are first assigned to work in a rural area and can then ask for rotation to bigger cities every year. According to the regulations on the appointment of judges, judges in the lower courts cannot work in the same provincial court for more than 5 years.

The following table provides an overall picture of Thailand's judicial career, which theoretically spans for 45 years: from the day of being appointed as a trainee judge to the day of retirement.

Table 5.6: Thailand's Judicial Career

Level of Court	Level of Salary	Positions	Time Before promotion to the next level
The Supreme Court	5th	President of the Supreme Court	Retirement at the age of 65; the judge can then decide whether or not to be a senior judge for another 5 years.
Central/Regional Courts of Appeal	4th	Vice President of the Supreme Court Presiding Justices of the Supreme Court Justices of the Supreme Court President of the Central Court of Appeal President of the Regional Courts of Appeal Vice President of the Central Court of Appeal Vice President of the Regional Courts of Appeal Judges of the Central Court of Appeal Judges of the Regional Court of Appeal	- The highest level of salary is reserved for the President of the Supreme court -Most judges retire at this level at the age of 65; they can then be appointed as senior judges until the age of 70.
Courts of the First Instance [Criminal Courts, Civil Courts, Provincial Courts, Kwaeng (summary) courts, Juvenile and Family courts and other specialized courts e.g. Tax, IP and Bankruptcy Courts]	3rd	Vice President of the Central Court of Appeal Vice President of the Regional Courts of Appeal Judges of the Central Court of Appeal Judges of the Regional Court of Appeal Chief Judges of the Courts of First Instance Chief Judges of the Regional Administrative Offices Deputy Chief Judges of the Courts of First Instance Presiding Judges of the Courts of First Instance Judges of the Courts of First Instance	-There are 2 scales of salary at this level: the lower and the upper. After 3 years of receiving a level 3 salary, judges will be promoted to the upper scale of salary in this level upon a satisfactory performance evaluation. - They then have to wait until they are promoted to judges in the central or regional Courts of Appeal to receive level 4 salaries. - On average, judges will be at this level for about 10 years.
	2nd	Judges of the Courts of First Instance	-5 years -There are 5 scales within this level: during the 5-year-period their salaries are increased every year upon a satisfactory performance evaluation.
	1st	Junior Judges	1 year upon a satisfactory performance evaluation
	Not ranked	Trainee Judges	1 year upon a satisfactory performance evaluation

Source: The Judicial Service of the Courts of Justice Act 2000 (As amended)

Chief Judges of the Provincial Courts

Each provincial court is presided over by the Chief Judge. As of July 2014, one must work as a judge for at least 15 years before being appointed Chief Judge. This waiting time is longer than in the past since Thai judges now retire at the age of 70, whereas before 2007 the age of retirement was 60. On average, Thai judges work as Chief Judges for 3 or 4 years before being appointed presiding judges in the civil and criminal courts in Bangkok or in other specialized courts. Most Chief Judges ask to

be rotated to other provinces after one year, since they are first assigned to work in rural areas due to their low level of seniority. Therefore, it is common for Thai judges to work as Chief Judges in 3 or 4 provincial courts.

All four Chief Judges of Court Green, Court Blue, Court Orange and Court Brown were interviewed in order to collect data on their expectations on the sentencing decisions of judges in their courts. For the sake of convenience, the Chief Judges are referred to as Chief Judge Green, Blue, Orange and Brown respectively. Since the recruitment process of this study focused mainly on the provincial courts' judges, not the Chief Judges, it was difficult to include both male and female Chief Judges in this study, and as a result all participating Chief Judges are male. However, they vary in terms of their backgrounds as court managers: one has worked as a Chief Judge in 2 provincial courts, one has been a Chief Judge of the same court for 2 consecutive years and two have been Chief Judges in the provincial juvenile and family courts before moving to provincial courts. All were experienced Chief Judges since they had been a Chief Judge for at least 2 years.

Appellate Judges

There are ten appellate courts in Thailand. The Court of Appeal in Bangkok handles appeals against the judgements and orders of three civil courts, three criminal courts and three provincial courts in Bangkok. Moreover, since 2008, it is also responsible for handling appeals in narcotics cases from all the criminal and provincial courts across the country. Meanwhile, the nine regional Courts of Appeal handle appeals in both civil and criminal cases from the provincial courts of their regions. The divide of cases among regional Courts of Appeal is consistent with the jurisdiction of the courts of first instance in regions 1 to 9. According to 2013 and 2014 official statistics, the decisions made by the lower courts in about 5 to 6 percent of criminal cases were reviewed by the Courts of Appeal.

To collect data on the expectations of the appellate courts on the sentencing decisions of the provincial courts, I decided to interview judges from the central Court of Appeal in Bangkok and one regional Court of Appeal. The Court of Appeal

in Bangkok was selected since it is responsible for appeals against sentences in narcotics cases, which form the majority of cases in both criminal and provincial courts. One regional Court of Appeal was also selected to allow comparison of the data on their approach in reviewing sentencing decisions with the data collected from the Bangkok Court of Appeal.

To be appointed as an appellate court's judge, one must have judicial experience of more than 20 years. Generally speaking, appellate judges are responsible for both civil and criminal cases. However, the narcotics division was established in the Court of Appeal in 2008 and, as a result, judges from the narcotics division of the Court of Appeal only deal with appeals in narcotics cases. The main business of both the Court of Appeal and regional Courts of Appeal are criminal cases, as is the case in the lower courts. Nevertheless, the caseload in the Courts of Appeal is far less drastic than in the provincial courts. Each appellate court's judge is responsible for only at least 12 cases a month or 144 cases a year, and works as part of a panel of 3 judges which must consult each other before making any decisions.

As of July 2014, 87 judges were working in the narcotics division of the Court of Appeal. Through my personal network of contacts, two judges, X and Y, were approached and interviewed. For the regional Court of Appeal, I located the gatekeeper in one regional Court of Appeal and succeeded in recruiting another two out of 54 judges from that court: judges T and V. The four participants at the appellate court level consisted of two male and two female judges.

SECTION 2: THE IMPORTANT VALUES TO BE CONSIDERED IN MAKING SENTENCING DECISIONS

Information on the important values to be considered in making sentencing decisions was collected through a ranking exercise. The idea of a ranking exercise was to provide a 'warm up' to the discussion and to seek the individual opinions of judges before engaging in the group discussion. The choice of statements for this exercise was guided by the literature review and my experience as a Thai sentencer. Eight statements which capture some values to be considered in making sentencing

decisions were included in the questionnaire[88]. The questionnaire was distributed to the participants shortly before the start of the focus group. Those who came to the room first did the exercise while waiting for the others. Each participant was asked to select their top three most important values in making sentencing decisions from the list. None of the participants took longer than 5 minutes to finish the exercise. 18 out of 19 participants selected statements from the list, but one participant chose to identify values other than those provided in the list.

The following table illustrates the most popular statements chosen by the participants in the ranking exercise.

Table 5.7: Statements chosen by participants in the ranking exercise

Statements	Number of participants (N=18)			
	chosen as top three	ranked 1st	ranked 2nd	ranked 3rd
Tailor-making sentences to suit each defendant	18	11	5	2
Sentencing in a way that can be monitored by the public and the media	0	0	0	0
Sentencing offenders who commit similar crimes equally	9	2	4	3
Sentencing in accordance with the aims of punishment	8	2	1	5
Uniformity of judges in making sentencing decisions	4	2	1	1
Sentencing on the basis of sufficient information	7	2	5	0
Independence of each judge in making sentencing decisions	8	0	2	6
Sentencing in a way that will not be amended by the higher courts	1	0	0	1

[88] See detail of the questionnaire in Appendix K.

After the ranking exercise, the first session for all focus groups was devoted to discussing the important values in making sentencing decisions. The discussion allowed each participant to clarify their choices and get responses from their colleagues. It also provided an opportunity both for participants to contemplate each statement and for me as a researcher to clarify what I meant by each statement. Therefore, the focus of the discussion was somewhat different from the individual answers of participants. The values most commonly emphasized as important by the majority of participants in the group discussion were tailor-making sentences to suit each defendant, uniformity of judges in making sentencing decisions and sentencing on the basis of sufficient information. For Thai provincial courts' judges, the ideal is to try to devise the most suitable sentence for each individual offender. It is unnecessary for offenders who commit similar crimes to be sentenced equally. It all depends on the circumstances of offenses and offenders. Participants realized that to achieve this ideal requires sufficient information. However, considering their caseload, they admitted that, in practice, uniformity in sentencing trumps other values and *Yee-Tok* prevails most of the time.

SECTION 3: COMPLIANCE WITH AND DEPARTURE FROM *YEE-TOK* IN NARCOTICS CASES

After asking to discuss sentencing decision-making in quite an abstract manner, participants were presented with a mock indictment on narcotics case (see Appendix K). Firstly, they were asked to evaluate if the mock indictment had the same amount of information as in the real indictment filed by the Thai prosecutor. All participants confirmed the validity of the mock indictment subject to some minor technical corrections. They were then asked to sentence the female offender in the mock indictment in the scenario that she pleaded guilty and they had no additional information except the indictment: the same scenario that they face every day.

The offence in the mock case was selling two tablets of methamphetamine[89]. In cases involving a small amount of the drug, the statutory punishment for this offense is imprisonment of 4 to 15 years, or a fine of 80,000 to 300,000 baht, or both. Under section 78 of the Thai Penal Code, a guilty plea can reduce the sentence by up to one-half. Moreover, a sentence of less than 3 years can be suspended under section 56 of the Code. Therefore, legally, the offender in the mock case still has a chance to be awarded a non-custodial sentence.

All participants agreed that two tablets of methamphetamine are considered a small amount and that the offender should receive only the statutory minimum sentence: 4 years' imprisonment or an 80,000 baht fine or both. They realized that, given the sentence reduction for a guilty plea, it would be possible to suspend the imprisonment term. However, they admitted that selling methamphetamine is perceived as a serious offence and the *Yee-Tok* of their courts recommends a custodial sentence unless there are 'special circumstances' that warrant departure from *Yee-Tok*[90]. Therefore, all of them would comply with *Yee-Tok* and impose a custodial sentence, unless the defendant provides them with information that qualifies as 'special circumstances'.

Judge A summarized the decision making process in the mock case as follows:

> Since I was a trainee judge until now, cases like the mock case are both common and uncomplicated. Sentencing street dealers requires the judge to consider only the quantity of the drug and to pick the applicable sentence recommended by *Yee-Tok*. If the offender pleads guilty, it means they admit that all information in the indictment is true. Selling two tablets of methamphetamine is a minimal amount and should attract only the statutory minimum sentence. However, in this type of case, *Yee-Tok* recommends a custodial sentence and does not suggest the commissioning of a pre-sentence report. Moreover, as I mentioned, this type of case is common; therefore it is almost impossible to commission a report in all cases considering the caseload and limited time.

The fact that Thai sentencers usually impose custodial sentences even for drug dealers selling only small amounts was also revealed in the qualitative research on female drug prisoners by Havanont et al (2012). The researchers questioned why judges did not exercise their discretion by imposing lenient sentences for dealing

[89] A narcotics case was chosen as these cases form the majority of criminal cases in Thai courts.
[90] For an example of *Yee-Tok* for selling methamphetamine, see table G2 in Appendix G.

small amounts of drugs. The findings of this research contributes to a better understanding of the phenomena, since they illustrate the extent to which *Yee-Tok* determines sentencing outcomes in narcotics cases.

Participants cited the caseload at *Wain-Chee*[91], a procedure in which a panel of two judges takes turns to be responsible for issuing all routine orders and sentencing about 30 to 50 criminal cases daily, as the main justification for not commissioning pre-sentence reports in narcotics cases[92]. Some participants commented on the low quality of the reports and the reliability of the reports' writers. As Judge S put it:

> Sometimes we don't commission a report since it's useless. We may want to know why the offender in the mock case sold two tablets of methamphetamine. She was using drugs at home and the police informer encouraged her to sell them, or she sold drugs directly to children at school. Both circumstances warrant different sentences. However, the practice of the probation officer in writing a report is to ask the offender to describe the circumstances of an offence. The offender may lie about the circumstances for her benefit. The pre-sentence report is useless unless the report writers change their practice. They should ask the neighbours of the offender and people who live in their community about the circumstances of an offence and the characteristics of the offender.

Another reason cited for not commissioning a report is that judges could not ask for additional information unless the offenders help themselves by filing a plea in mitigation or asking judges to commission a report. They realised that the offenders who can retain their lawyers are in a better position than the poor ones who rely on court-appointed lawyers since the majority of offenders who decide to plead guilty waive their right to an appointed lawyer. As a result, in cases like the mock indictment, most judges will comply with *Yee-Tok* and the offenders are more likely to be given custodial sentences.

There are no official statistics on how many defence lawyers are appointed by courts throughout the country each year. However, according to the statistics of one criminal court in Bangkok, in 2013 the court appointed lawyers in only 5.5 percent of

[91] For information on what to expect at *Wain-Chee* see Appendix C.

[92] The Thai term for a pre-sentence report is *Rai Yan Kan Suep So*, which literally means investigative report. The term implies nothing on when and whether the court should commission a report.

all criminal cases[93]. It should be noted that this number included lawyers who were automatically appointed to accused persons without lawyers because the charges against them carried a maximum sentence of the death penalty[94]. Therefore, the real figure for appointed lawyers upon the invocation of the right to counsel was less than 5.5 percent. This figure is fascinating given that most offenders in Thailand cannot afford to retain their own lawyers and the right to an appointed lawyer is available to all offenders regardless of their economic status. Havanont et al (2012) sent questionnaires to thousands of female drug prisoners across Thailand and found that only 28.7 percent of them could retain their lawyers and that more than 50 percent of them waived the right to a court-appointed lawyer. These figures indicate that most drug offenders who plead guilty in Thailand are unrepresented.

It seems that participants agreed on the fact that it is the responsibility of the offenders in narcotics cases to provide relevant information to the court if they want to be treated differently from other offenders. They claimed that the Thai government has continually informed the public that selling methamphetamine is a serious crime and deserves imprisonment. Therefore, it was said, offenders should not be surprised if they are given custodial sentences. Judge L recapped this point as follows:

> Narcotics offences affect the whole of society. That's why *Yee-Tok* suggests custodial sentences. Imposing non-custodial sentences is the exception and rarely happens. It must be justified by 'special reasons' which can be made known to sentencing judges only by the filing of a plea in mitigation or other similar petitions by the offenders. If they file such a petition, we can verify it by commissioning a pre-sentence report. If they don't, we must remain passive.

Some participants commented on the fact that the drug trade involves a huge amount of money and this makes judges more cautious in departing from the norm in this type of case. Some also cited the fact that their colleagues have been accused of corruption and faced disciplinary sanctions due to deviation from the norm as a

[93] There were no official statistics on the issue but I used information from many sources available on the court website, see http://www.crimc.coj.go.th/info.php?info=news_module2 last accessed 2/12/15

[94] According to Section 173 paragraph 1 of the CPC, if the defendant is younger than 18 or the case is a capital one, the court *must* appoint a lawyer to defendants who do not have a lawyer even if the defendant does not ask for one. For other cases punishable by imprisonment, paragraph 2 of the same section provides that the court must appoint a lawyer only in the case that the defendant does not have one and *demands* the court to appoint a lawyer.

justification for adhering to *Yee-Tok* in narcotics cases. Nevertheless, one participant noted that the policy of the Chief Judge plays an important part in making decisions regarding departure from *Yee-Tok*. If their policy is flexible, it is more likely that the judge will depart from *Yee-Tok*.

The findings revealed that the main criterion for assessing the seriousness of a drug dealing offence, according to *Yee-Tok*, is the type and amount of drug. Interestingly, the US federal sentencing guidelines seem to follow a similar equation: the type of drug plus the amount of drug equals the sentence (Spohn, 2002: 279; Weinstein and Quinn, 2000:277)[95].

Without the existence of *Yee-Tok*, sentencers have discretion authorized by applicable laws to commission a report, to choose among minimum and maximum sentences and to decide whether an imprisonment term should be suspended. *Yee-Tok* and its mechanisms for ensuring compliance limits discretion in all decisions, and in the case of drug dealing, even make it disappear. It is indeed a sentencer who decides how much discretion they should have in each case; however, this decision is structured by judicial custom. As Judge N explained:

> For Thai judges, following precedents is part of our judicial custom. If we disregard precedents, other judges will raise their eyebrows and even question our integrity. Judges have no choice but to impose custodial sentences in accordance with custom for fear of being accused of having vested interests in the case.

In another focus group, Judge H. and Judge F. repeated the same concern:

> **Judge H:** Imposing a non-custodial sentence in a case of selling drugs or possession with an intent to sell and involve a police's informer? Bingo! Your colleagues and Chief Judge will shout 'Why have you done this? Nobody did it before.'
>
> **Judge F:** What makes judges worry most when making sentencing decisions is the patron-client system in Thai society. Anything that seems incompatible with common practices is deemed to be a result of dishonest practice of those involved in the process. Even using information in the investigation process which is included in the court's record in justifying a lenient sentence can land a judge in hot water. You'll surely be asked; 'Will you do this in every case?'…

[95] Quantity of drug is one of the criteria used to assess the seriousness of drug offences in Thai *'Yee-Tok'*, US federal sentencing guidelines and sentencing guidelines in England and Wales. However, *'Yee-Tok'* gives a great deal of weight to the quantity of drug and says nothing of other criteria such as the defendant's role in the supply chain.

In a similar vein, Judge B pointed out that level of seniority does matter in making a decision to depart from *Yee-Tok*:

> …in practice, it is not uncommon for the presiding judges in three criminal courts in Bangkok, who are former Chief Judges of provincial courts, to commission a pre-sentence report and impose a non-custodial sentence in cases involving selling small amounts of drugs. The question for provincial courts' judges like us is, do we dare to do the same thing? The answer is we do not.

However, Judge Q explained to his group that it may not necessarily be the case that the senior judge will be bolder than a junior one when it comes to departing from the norm in narcotics cases:

> Judges who commission a report in this type of case (narcotics cases) tend to be newcomers who still try to achieve the ideal of tailor-making sentences. But the experienced ones are less likely to commission a report.

It is noteworthy that the biggest concern of Thai sentencers at all levels of the court is downward departure from *Yee-Tok* since this can be interpreted as a sign of corrupt practice[96]. The common understanding is that upward departure does not benefit the offender, so it is less likely that a decision to upwardly depart from *Yee-Tok* originates from corrupt intentions.

SECTION 4: LIFE AS A THAI SENTENCER

The final session of the focus group involved the presentation of 7 pictures to participants in the focus group and asking them to compare and contrast their work with the work of the person(s) in the pictures. Each picture was presented one at a time in the sequence of factory worker, painter, figure skater, scientist, teacher/student, doctor and news anchor (see Appendix K). The instruction I gave to the participants was 'Please look at this picture and decide whether what the person(s) is doing in their work is similar or different from what you are doing as a sentencer'.

The final session served many purposes. First of all, it allowed the participants to see themselves through the eyes of other occupations. In an attempt to compare and

[96] Compare this attitude with the review of the minutes of the Judicial Commission's Meetings in Appendix E.

contrast their work with that of people in other occupations, the participants could reflect on their own occupation in a way that they may have never done before. This process of comparing and contrasting their work with other occupations can shed more light on what they perceive that they can do and cannot do as a Thai sentencer. Secondly, it may raise some related issues which were not discussed in the forgoing sessions. Although I selected all pictures from my perspective of life as a Thai sentencer and a review of sentencing literature, I could not control how they would be interpreted. It is a popular expression that a picture is worth a thousand words. The power of pictures provoked some thoughts that even I as a researcher had never thought of. Thirdly, the use of pictures empowered the participants in the sense that it allowed them to focus on issues salient to them rather than emphasizing my preconceptions or agendas. During the final session, I remained silent most of the time and kept the follow up questions to a minimum. Lastly, viewing pictures linked the abstract discussion in the first session with the concrete discussion of the mock indictment and acted as a summary of all the discussions in the focus group.

a. Sentencers as factory workers

Once presented with the picture of factory workers, participants immediately identified themselves as factory workers. They referred to the environment at *Wain-Chee* as a factory where they must produce the same product repeatedly in the same manner, work against the clock and have no control over the input. This image was clearly illustrated by participants from Court Blue:

> **Judge G:** When we're at *Wain-Chee* it's like working in a factory. Our work is routine and machine-like. Every job must be concluded within the day.
>
> **Judge F:** It's not only like working like a machine; it's like being in a sweatshop.
>
> **Judge H:** We're talking about *Wain-Chee* at this court, not others with lesser caseloads. If you show this picture to courts with no problems with caseloads, they may see nothing similar to their work. But here it is like a machine, standing by a conveyor belt which keeps moving and bringing more work. If you can't keep up with the normal pace of work, the product will fall off the belt and you have to start it again.
>
> **Judge I:** The products are identical, regardless of whom the sentencing judges are. We make it from pre-determined specifications.

Some participants compared the work at *Wain-Chee* to rubber stamping or a machine in which they do not have to think about anything but filling out the judgement form and signing. Participants in one focus group made recommendations for change at *Wain-Chee* such as diverting cases from courts and assigning more judges to the work. As Judge O described:

> Manpower is crucial. Here, if we commission too many pre-sentence reports, the probation officer will say that they can't finish the jobs within the normal time. We can't control the number of cases coming to court. How can we work differently from factory workers? One option is to assign more judges to work at *Wain-Chee*. Two judges can't sentence 50 cases or even 100 cases a day. You can't expect us to do anything but rubber stamping. We're indeed factory workers, making the same products, the same sentences. Court officials prepare judgement form for us to fill out and sign.

The discussion on the fact that different judges must carry out their sentencing tasks in the same manner led the group to tackle the issue of quality control. Participants realised that their Chief Judges do not check in detail whether they have complied with *Yee-Tok*. They were also fully aware that their sentences can be amended by the Courts of Appeal since they have different *Yee-Tok* from the lower courts. However, they did not seem to be worried about the possibility of having their sentencing decisions amended by the higher courts.

b. Sentencers as painters

Participants noted that to make the punishment fit the individual offender is an art which requires imagination. However, they realized that sentencers cannot use much imagination in their work like the painters do. Interestingly, two groups noted that painters still have the edges of the canvas to limit their imagination in the same way that judges have *Yee-Tok*, applicable laws and the facts of the case to limit their sentencing discretion. Another group claimed that *Yee-Tok* does not prevent them from being like a painter if they possess sufficient information. Since different painters paint different pictures, participants noted the fact that their life experiences can be useful in making sentencing and other judicial decisions. As Judge D noted:

> Viewing sentencing as an art reminds me that each painter has different skills and imaginations just as judges differ in terms of previous occupations and life experiences. It's possible that they'll bring such differences into the making of sentencing decisions.

> That's one reason why they reach different sentences for what seem to the outsider to be similar cases.

c. Sentencers as figure skaters

Provincial courts' judges work as a panel of two judges. When presented with this picture, they could see themselves as a team of figure skaters. They noted the fact that the two members of the panel must consult each other before making decisions. Inspired by the picture, one participant recommended that a panel should consist of both a male and a female judge to benefit from different points of view.

In the picture, it is a male skater who takes the lead. However, it is not necessarily the case that the responsible judge in any particular case will take the lead. Participants noted that consultation must be based on valid reasons and the facts of the case, even though it is judicial custom to respect the opinion of the responsible judge. Judge Q summarized the consultation process within the panel as follows:

> Generally, we respect the opinion of the responsible judge. We'll let them present and justify their opinion first. If we, as a member of the panel, think that the facts of the case warrant a different sentence from the one the responsible judge proposes, we can comment or suggest another sentence. Moreover, if we can identify special circumstances in the case, we must point them out to the responsible judge. If they confirm that they had already considered these circumstances but insist on their previous opinion, we must respect their decision. As I said, we won't let conflict happen.

Regarding the possibility that members of the panel may disagree over sentencing decisions, participants responded that it is unlikely to occur due to the fact that they always use *Yee-Tok* as a framework for consultation and that they usually respect the opinion of the responsible judge. As Judge F put it:

> It (working as a panel) is like doing a social dance, you need to know how to do it without stamping on your partner's foot.

d. Sentencers as scientists

Participants actively contrasted their work with the work of scientists. They noted that there are no fixed formulas in sentencing as there are in science. That is why they thought that similar cases can be treated differently if this is justified. As Judge R explained:

> Sentencers can't work like scientists. In science, mixing solution A with substance B must produce C, but there's no such formula in sentencing.

In another focus group, Judge A and Judge D seemed to argue over whether there is a formula for sentencing:

> **Judge A:** There's no formula in making sentencing decisions since there's no such thing as similar cases.
>
> **Judge D:** Fixed formulas can be used in some cases. Crafting just sentences isn't like making food in that if you add the same amount of ingredients each time you'll always get the same taste.

Interestingly, no participants referred to *Yee-Tok* as a fixed formula in sentencing.

e. Sentencers as teachers/students

Participants in one focus group noted their experiences as a student while being a trainee judge. When asked what their tutors taught them, here were the responses of participants in Court Green:

> **Judge A:** They gave me *Yee-Tok*.
>
> **Judge B:** Nothing in particular except *Yee-Tok*
>
> **Judge C:** They told me to comply with *Yee-Tok*

Another group observed that judges are always students since they are always learning new things from their Chief Judges and their work. As Judge G noted:

> **Judge G:** When I was a rookie judge, I didn't dare to ask offenders about other topics except those directly related to the charge. I have learnt from my experiences which topics can be discussed and which cannot be. We learn from experience.

Regarding the role of teacher, Judge S observed one difference between the work of a teacher and a sentencer then explained:

> Teachers are totally different from us. They have plenty of time to explain to students how much 22 minus 11 is, while we are not allowed to explain to the offender why he receives 2 years' imprisonment for selling 5 tablets of methamphetamine and we can't guarantee to him that everyone who sells the same amount of drugs as him will also get 2 years. We can't explain or even refer to *Yee-Tok* in our sentencing decisions.

Nevertheless, all participants agreed that sentencers should play a role of teacher in sentencing. In pronouncing a sentence, a judge must explain the justification for imposing the sentence by referring to the facts of the case and make the offender feel

remorse and be willing to change into a law-abiding citizen[97]. However, they noted that this is a demanding and risky task. Some judges do not dare to talk directly to the defendant for fear of being perceived as partisan. Nevertheless, they gave some examples of how judges can be teachers:

> **Judge R:** Teaching moral lessons to offenders is part of the job of Thai sentencers. However, judges rarely carry out this task for fear of being accused of being inappropriate or not impartial. At *Wain-Chee*, before announcing judgements, I spoke directly to the offenders, asked them their motives for committing their crimes and taught them that what they did was wrong. In the case of failing to report for military service, I reminded the offender that it is a constitutional duty of Thai men to do military service. The aim was not only to educate the offenders but also their relatives who were waiting to hear the judgement. To help alleviate disorganisation of Thai society, judges must take this role seriously. In cases where I imposed a non-custodial sentence, I also reminded the offenders that it was their last chance; if they commit a crime again they will be imprisoned. In cases where I imposed a custodial sentence, I advised the offender to behave well in prison in order to benefit from good time remission. I try to make all offenders feel that although they made a mistake, society still cares for them.
>
> **Judge G:** I can give one example of a case where I took the role of a teacher. It was a case of burglary. The offender and the victim were neighbors. The stolen property was a necklace which was later returned safely to the victim. The victim didn't ask for compensation from the offender but wanted to preserve a good relationship as neighbors. I told the offender that he should plead guilty if he actually committed a crime. Moreover, I told him that if he was guilty, he should sincerely apologise to the victim, since he forgave the offender and didn't ask for any compensation. I also mentioned that the offender shouldn't get angry at the victim for reporting the crime to the police. The offender did as I suggested and the victim accepted his apology. I can't remember the exact sentence I gave to the offender but both of them left my courtroom happy.
>
> **Judge S:** I have taken the role of a teacher in some cases. In sentencing one case of sexual offence, I also educated the relatives of the offenders and the victims on the subtlety of the law on sexual offences. Most of them don't realize that some traditional ways of life are considered illegal.

In the picture, the teacher is explaining a lesson to the student. Some focus groups also discussed the issue of whether sentencers should explain the justification for their sentencing decisions. Most judges seemed to agree that all justifications must be included in the written judgement. In the case that the media or the public do not understand the sentence given by the court, the sentencing judge must not engage directly with the media but leave the task of explanation to the responsible person of

[97] Thai judges have no statutory duty to do so, compared with the duty of English judges to give reasons for and to explain effect of sentence to the offender in ordinary language (Section 174 of the Criminal Justice Act 2003).

the court; e.g. the Chief Judge or the spokesperson of the Office of the Courts of Justice.

f. Sentencers as doctors

It is not difficult for judges to see themselves as doctors since they consider their work to be curing social diseases. Participants noted the importance of correctly diagnosing the cause of an offence and prescribing the suitable sentence for each individual offender. As Judge R put it:

> The prescription must be appropriate for each patient. Two patients may have a fever but may be prescribed a different dose of medicine. One may be given a lower dose because he is elderly.

Patients must provide information on their symptoms to ensure the correct diagnosis and prescription. Judges also require information from the offender to devise an appropriate sentence. However, participants noted that patients have no incentive to lie to the doctor since this could harm them, while it can be fairly assumed that offenders may provide false information to the court or to the writer of the pre-sentence report to get a more lenient sentence. Moreover, the offender is not the only one who provides information to the court, but also the prosecution. This explains why judges always verify information given in the plea in mitigation by commissioning a pre-sentence report. Judge N expressed the following concern:

> Sometimes when the offender presents mitigating facts, we tend to disbelieve them. They have an incentive to lie for survival. In whom can we trust? We tend to trust the probation officers who write pre-sentence reports since they are government officials and have no vested interest in the case. Moreover, they gather information from both offenders and victims.

In the same way as different doctors can give different opinions on and treatments to the same symptoms, participants noted the fact that the same case may be perceived and sentenced differently by the lower and higher courts. They felt the fact that their sentences were amended by the Court of Appeal did not mean that they had made a mistake. As Judge H commented:

> …When patients explain their symptoms, one doctor may diagnose it as X disease while another may insist that it's Y. Such is the case in our job: the court of first instance imposes X sentence, the offender disagrees and files an appeal, then the Court of Appeal amends the sentence into Y.

Judge K also observed another difference between judges and doctors in relation to the impact of their work and noted:

> Doctors can make patients recover from their symptoms, but we can't guarantee that the offender won't reoffend. Some offenders whom we sent to prison continued committing crimes there. Take the case of prisoners selling drugs from prison as an example. They're beyond reform.

g. Sentencers as news anchors

Judges are high-ranking government officials and are always in the eye of the public. Working in the courtroom is not so different from working in front of the camera. As Judge H put it:

> In the courtroom, we're at the centre and are always watched. They perceive us as the owner of the case. Outside the courtroom we're ordinary people but may be respected by the public. That's all. But we can't expect all members of the public to respect us. It all depends on how we behave.

In a similar vein, participants from Court Green actively discussed this issue:

> **Judge D:** Judges are always in the eyes of their colleagues, the public and the media. Every one of their words and expressions are monitored.
> **Judge A:** The public follow their moves as closely and swiftly as the cameraman follows the news anchor.
> **Judge B:** Even the act of tooth-picking can be captured by the camera.
> **Judge A:** Judges must be careful of every word they utter in the courtroom.

The picture shows only what the camera can capture in the same way that the public and the media base their criticism of sentencing decisions on only what they can see; i.e. different sentences for what they perceive as similar cases. Judge F and Judge D pointed out the same issue in different groups:

> **Judge F:** I think this is the most important picture which best captures our work as Thai sentencers. What the public perceives of sentencers is similar to what they perceive of news anchors. They only see what the camera captures and broadcasts; they don't know what's going on behind the scenes. They criticize our sentencing decisions of using double standards based on the length and types of sentences we impose. Some even compare our decisions with the decisions of the constitutional court, which belongs to a different court system and adopts a different procedure. They only do a rough comparison without knowing the reasons behind a decision.
>
> **Judge D:** I can see the benefit for academics if they know how judges decide upon sentences. However, it may not be what the public wants. It's impossible to compare sentencing in one case with another since we deal with different sets of facts. The judiciary can explain this to the public by pointing out different facts that justify different sentences. I'd say that what the public doesn't understand are not the

> principles of sentencing, but why judges give different sentences to what they perceive as similar cases. They concern much with the length of sentences but not at all with principles in sentencing. They don't try to understand that different prison terms are products of cases with different facts.

Therefore, participants suggested that it is more than desirable for the Office of the Courts of Justice to explain to the public what lies behind a sentencing decision in the case of criticism. As the discussion in Court Brown went on:

> **Judge Q:** If we think about the organisation of the judiciary, it must have a spokesperson to engage directly with the news media and inform the public. The information about court decisions reported by the news media is usually incomplete and misleading. The judiciary must give accurate information to the public.
>
> **Judge S:** The judiciary should educate the public on the matter of sentencing. Information on social media is extremely wrong. In one murder case in which the court imposed life imprisonment but the offender was released after serving 10 years in prison, the media blamed the court even though it is the Department of Corrections which is responsible for the parole process. If we don't inform the public, they will think that such misleading information is true.

SECTION 5: EXPECTATIONS OF THE CHIEF JUDGES

Four Chief Judges were individually interviewed on different days. The interviews lasted between 30 to 60 minutes. The participants were not sent the list of questions in advance but were notified shortly beforehand that they were going to be interviewed on the topic of sentencing. The questions asked are listed in Appendix L.

As mentioned earlier, Chief Judges are appointed from ordinary judges who already have experience as sentencers. Although 2 to 3 months of training is required before appointment, participating Chief Judges noted that supervising the sentencing decision-making of judges is not included in the curriculum of the training. Therefore, the way each Chief Judge crafts their policy on compliance with and departure from *Yee-Tok* seems to derive from the experience of each Chief Judge.

Given their lack of special training, it was interesting to find out that all participating Chief Judges expected judges in their courts to comply with *Yee-Tok* and to consult them in the case of departure, if it is clearly stated in *Yee-Tok* that the consultation is required. However, some Chief Judges may be stricter than others on adherence to the policy of compliance with and departure from *Yee-Tok*. Comparing the positions of the four Chief Judges:

> **Chief Judge Blue:** I'm not so strict in insisting that they must consult me in every departure but just tell them in my policy that they should do so. Our organisation has a Code of Judicial Conduct to which judges must adhere. Departure from *Yee-Tok* without consultation with Chief Judges is considered by the Judicial Commission as a violation of judicial custom, especially in the case that the Chief Judge has already notified them of this requirement. But I'm not strict like that.
>
> **Chief Judge Brown:** I do as stated in *Yee-Tok*: if it requires consultation with me before departure, I expect judges to consult me if want to depart from *Yee-Tok*….
>
> **Chief Judge Green:** For your information, this court had *Yee-Tok* put in place before I was transferred to work here. If *Yee-Tok* requires consultation with me before departure so be it. I will strictly enforce its mechanisms…
>
> **Chief Judge Orange:** ... Departure from *Yee-Tok* is always welcome if justified. As I said, strictly complying with *Yee-Tok* can be unjust. In reviewing case files, I don't check if judges comply with *Yee-Tok* since I strongly believe that they're fully aware of the requirements for departure. *Yee-Tok* in this court is updated by a committee consisting of judges. It's based on their consensus. Also, I convene a meeting with all judges monthly.

They all admitted that they do not and cannot review all sentencing decisions due to the caseload and the fact that the sentencing judges must be responsible for their own behaviour outside of the judicial norms. As Chief Judge Green explained:

> I can't review all of their sentencing decisions. The principle is that sentencing is the exercise of the discretion of each individual judge in which other judges, including me as a Chief Judge, cannot intervene. In reviewing daily case files, I don't focus on whether or not judges have complied with *Yee-Tok* in making sentencing decisions. It's just impossible to do so. Judges sometimes make mistakes in making other decisions which require my immediate response and advice to solve the problem. They are not only responsible for making sentencing decisions.

Moreover, Chief Judges do not consider amendment of the sentencing decisions of judges by the higher courts as a sign of judges' poor performance. Participants pointed out that *Yee-Tok* is not perfect, but is necessary for inexperienced judges. It is only a rough standard and is flexible enough to depart from if there is a justifiable reason. For the Chief Judges, strict compliance with *Yee-Tok* may not necessarily achieve just sentencing. As Chief Judge Blue and Chief Judge Orange noted:

> **Chief Judge Blue:** In my opinion, the range of statutory penalties for each offence is quite wide. The law authorizes judges to exercise discretion in selecting an appropriate sentence for each case. It is extremely risky if the judiciary allows all judges to exercise their discretion since the majority of them are inexperienced. The just sentencing that the judiciary expects means that judges should sentence similar offences similarly, except in cases with special circumstances. Inexperienced judges can potentially give different sentences to cases with similar facts. That's why we have *Yee-Tok* to act as a rough standard in sentencing and prevent disparity in sentencing among judges.

> **Chief Judge Orange:** The judiciary expects judges to deliver just sentencing by ensuring uniformity in making sentencing decisions through the mechanism of *Yee-Tok*. It's a rough standard of sentencing. However, strictly adhering to *Yee-Tok* can lead to injustice. To illustrate, for causing death and bodily injury by negligent driving, the sentences prescribed by *Yee-Tok* vary mainly by the vehicle of the offender, which is obviously unjust. Sentencers must also consider the circumstances of the offence and the effect on the victim. In a similar vein, *Yee-Tok* for theft varies sentences by the amount of property stolen while the manner of theft should be given more weight. Shoplifting is ubiquitous since potential shoplifters can easily find the opportunity. It should be treated as less serious than burglary even though the amount of property stolen in shoplifting cases is much higher than in burglary. Those who comply with *Yee-Tok* without thinking creatively are those who want to play safe.

Regarding the consultation process before departure, all Chief Judges noted that it was done case by case and that they did not use the consultation in one case as a precedent for the others, it all depended on the facts of the case. For a guilty plea case in which the offence is covered by *Yee-Tok*, they expect judges to comply with *Yee-Tok* and not commission a pre-sentence report. They acknowledged the limited resources of the probation office, which is responsible for writing the report, and also questioned the reliability of the report. More importantly, Chief Judge Green noted that the existing process is efficient since it took a month for a probation officer to write one report while a judge spent only 5 or 10 minutes sentencing one case without a report.

When asked about the policy and official advice of the President of the Supreme Court and Office of the Courts of Justice on the promotion of using non-custodial sentences[98], all participants noted the unclear implementation plan of central administration. They were fully aware of such a policy but did not know how to implement it. As Chief Judge Blue put it:

> I'm fully aware of the advice and strategic plan; however, the implementation of the plan depends on the budget, which must be allocated from the central administration to courts. There are many policies waiting to be implemented. I'm trying as hard as I can to implement all of these policies.

Chief Judge Brown recommended that the administrative office of the region take the lead if they want this policy to be implemented, whereas Chief Judge Green noted the negative attitude of judges toward non-custodial sentences.

[98] See the discussion on the Official Advice in Appendix F.

Participating Chief Judges saw the benefit of having a regional *Yee-Tok* and of the courts of first instance adopting the *Yee-Tok* of the Courts of Appeal. However, some noted that whole transplantation must be avoided and there must be room for local variations. All disagreed on the idea of all courts across the country adopting the *Yee-Tok* of the Court of Appeal as their own in narcotics cases. Lastly, they strongly opposed the idea of disclosing or publishing the details of *Yee-Tok*. This, they believed, would create false expectations and confuse the public since the benefits of *Yee-Tok* lie in its flexibility, not predictability. It is also unnecessary to disclose the details of *Yee-Tok* since it is not law and since the minimum and maximum sentences for all offences are already known by the public. If the details of *Yee-Tok* cease to be confidential, only certain groups of people will use the knowledge for their benefit. The following comment of Chief Judge Orange captured the shared concern of participating Chief Judges:

> I think if we had a standardized mechanism for formulating *Yee-Tok*, disclosure may be useful. The mechanism being used now is not perfect. In this court, even for some common offences, we still do not have *Yee-Tok*. At best, *Yee-Tok* is only a minimum standard which can always be departed from. Disclosing its details to the public would create false expectations. If we don't comply with it, the public will lose trust. In practice, the majority of offenders are from the lower class of society. They are undereducated and tend to be exploited by those who are more educated.

SECTION 6: EXPECTATIONS OF THE APPELLATE COURTS

Four appellate judges were asked questions in semi-structured interviews (see Appendix M). The method used was a group interview with two judges from the same court since it was the preferable choice of participants. There was one interview in the Court of Appeal and another in one regional Court of Appeal. The interviews lasted between 60 to 90 minutes. The participants were not sent the list of questions in advance but were notified shortly beforehand that they would be interviewed on the topic of sentencing.

Thailand has a career judiciary system. No one can be appointed as a judge in the Court of Appeal unless they have previously worked as a judge in the courts of first instance. Appellate courts' judges in Thailand have all previously worked as Chief Judges and judges in both Bangkok and other provinces. They know the mechanism

of *Yee-Tok* well and all of them have been tutors to trainee judges. When they move to the Courts of Appeal, they are also introduced to the *Yee-Tok* of the court.

The working environment of sentencers in the appellate courts is different from provincial courts in many aspects. First of all, the caseload problem in the Court of Appeal is not serious as in the provincial court. Courts of Appeal adopt the so-called 'quota system' in which each judge must adjudicate a minimum number of cases monthly. The general quota is 12 cases per month or 144 cases a year for each judge, compared to 700 cases a year for each judge in Court Orange. It is the responsibility of the administrative team – the president, the vice-president and the secretary – of each court to ensure that all judges are assigned to both fast track and complex cases. Cases involving only an appeal against a sentence are classified as fast track cases, where the only task of the judge is to apply the *Yee-Tok* of the Court of Appeal to the facts of the case, without the need to check whether the lower courts have complied with their own *Yee-Tok.*

Secondly, judges in the appellate courts work in a panel of three, not two, judges. Therefore, it is less likely that a panel will be unable to reach a majority opinion. Thirdly, the panel of judges is not solely responsible for the final product of the Courts of Appeal. Once a panel finishes the draft decision, the written decision along with the case files will be sent to a team of principal and junior research judges which reviews both issues of facts and laws as well as applicable precedents. The research judges also review whether the sentencing decisions of the panel comply with *Yee-Tok* of the court. When a mistake is spotted, a research judge will notify and consult the panel responsible for that decision to correct the mistake. The reviewing process usually takes a considerable amount of time since the judges in the Courts of Appeal are more senior than the research judges and they may therefore feel reluctant or embarrassed to correct their decisions upon the suggestions of less senior judges. The final draft of the decision must be approved by the President or the responsible Vice-President before it is announced to the parties of the case. Given the complexity of the process, it takes about 6 months to adjudicate a fast track case in the Courts of Appeal.

Fourthly, the Courts of Appeal review the sentencing decisions of the lower courts without conducting any hearings. The appellate judges do not have an opportunity to meet the prosecutor, the defence lawyer, the offender, the victim and the witness. What they do is only to review all documents in the case file.

Lastly, the Courts of Appeal have more information at their disposal than the provincial courts. As the mock indictment exercise illustrated, what the provincial courts' judges have is only an indictment and they are less likely to commission a pre-sentence report. On the contrary, when the defendant or the prosecution file an appeal against a sentence, the appellate courts have in their possession the case file of the lower court, the application for appeal and supporting documents. They can ask the lower court to commission a pre-sentence report or conduct a hearing with some witnesses for them.

Participating appellate judges realized that provincial courts have their own *Yee-Tok.* They expected provincial court judges to comply with their own *Yee-Tok* and not to perceive the amendment of a sentence as a sign of a mistake or poor performance. As Judge T and Judge V of one regional Court of Appeal described:

> **Judge T:** … The sentencing decisions of each court are similar within that court. Judges comply with *Yee-Tok* of their courts and consult with the other members of the panel and Chief Judges. However, they don't compare their sentences with those of other courts in the same region. When appeals against sentences reach the regional Court of Appeal, we remember the sentences for similar cases that we used to impose. Our decisions are limited by our standards…
>
> **Judge V:** …we can't compel them (lower courts' judges) to comply with our *Yee-Tok*. However, if they don't use it, their sentences will be surely amended by us. Their standards and our standards can be different. I don't think the *Yee-Tok* of the regional Court of Appeal can be applied to all provincial courts in the region….

However, they criticized the disparity in sentencing among the lower courts in cases not covered by *Yee-Tok.*

Judge X from the Court of Appeal, who at first provided a textbook-like response, later repeated the same mantra as the provincial courts' judges that selling drugs is a serious offence which should be punished with imprisonment. Therefore, suspension of imprisonment in narcotics cases is only allowed in exceptional cases:

> **Judge X:** I have quite high expectations of them (lower courts' judges). I expect them to consider criminological theories in sentencing. I want them to identify the

> cause of the crime and devise the most suitable sentence for each offender. Their sentences must fit the circumstances of the commission of the offence, the social context and the characteristics of the offender. They must aim towards rehabilitation and impose suspension of imprisonment and probation. The legislature should introduce more non-custodial measures so the criminal statutes can help judges in that regard.
>
> **Researcher:** Do you still have the same expectations in narcotics cases?
>
> **Judge X:** Indeed. But I also expect them to consider *Yee-Tok* as a sentencing standard to ensure consistency among judges. Just sentencing requires both individualised sentences and consistency. Narcotics cases are different from other criminal offences in the sense that they affect the whole of society. That's why imprisonment is used as the main sentence for these offences: in order to remove drug offenders from society.

Regarding judges' strict adherence to *Yee-Tok* in narcotics cases, Judge Y proposed that it is partly due to fear of being accused of corruption and hostile attitudes from colleagues:

> …*Yee-Tok* does not allow suspension of imprisonment, why bother commissioning a report? Your colleagues and Chief Judge may criticize you as lazy for not finishing the case within the day the offender pleads guilty. Some judges only commission a report to prolong the case…
>
> … We must admit that we can use less discretion in narcotics cases than in other criminal cases, as they're considered such serious offences. Deviation may be seen as motivated by corruption. Moreover, the research judges won't approve our draft decision if we don't comply with *Yee-Tok* unless there are special circumstances in the case.

Participants from the Court of Appeal raised the interesting issue that the policy of encouraging more frequent use of non-custodial sentences will not work unless it is incorporated into the *Yee-Tok* of the court. They cited the recent amendment of the *Yee-Tok* of the Court of Appeal to allow more room for the use of non-custodial sentences in narcotics cases as a prime example.

All participants saw the benefits of using the same *Yee-Tok* for all levels of courts since it would reduce the number of appeals against sentences. Nevertheless, Judge T raised the issue of violation of the independence of judges if the lower courts are required to adopt the *Yee-Tok* of the Courts of Appeal:

> … Sentencing is the exercise of the discretion of each individual judge. All judges are independent in exercising such discretion. Nowadays, their discretion is already limited by the *Yee-Tok* of their courts. Compelling them to use the *Yee-Tok* of the higher court would be to impose more limits. It's a violation of the individual independence of judges.

Judge Y noted that both sides of the argument are plausible and it is difficult to decide which policy is the best option. Judge X suggested the use of one *Yee-Tok* for narcotics case while leaving room for local variations:

> **Judge Y:** I can see both benefits and drawbacks. I once worked in a provincial court in which its own *Yee-Tok* and the *Yee-Tok* of the regional Court of Appeal were different for the offence of using an overweight lorry on a public road. The result was that, if there was an appeal against a sentence, the regional Court of Appeal always amended the sentence in compliance with its *Yee-Tok*. I wanted to sentence in compliance with the *Yee-Tok* of the higher court but I couldn't. I had to use the *Yee-Tok* of my court and risked having my decisions amended by the regional Court of Appeal. This is the drawback of using different *Yee-Tok*, it brings more work to the higher court. If both levels of court use the same *Yee-Tok*, the number of appeals against sentences will decrease since offenders will soon learn that their sentences are unlikely to be amended by the higher court. However, I'm not sure what the right thing to do is: making lower courts' judges think like the judges of the appellate courts or letting each provincial court formulate its own *Yee-Tok*. In practice, I believe that lower courts always try to learn the *Yee-Tok* of higher courts. We can't be completely independent from others. Even the Court of Appeal keeps up with the precedents of the Supreme Court and makes its decisions compatible with the precedents as much as possible. There are always two arguments on the need of using a single *Yee-Tok*. When I was a provincial court's judge, the deputy chief justice of the region wanted to promote the use of a regional *Yee-Tok*, but the chief justice disagreed by citing the need to maintain the independence of judges in each court in making sentencing decisions.

Participants from the narcotics division of the Court of Appeal pointed out that 80 percent of appeals are appeals against sentences, while participants from the regional Court of Appeal noted that appeals against sentences filed in their court are minimal. This means there is little room for local variation in narcotics cases, given that Judge Y noted that criminal courts in Bangkok adopt the *Yee-Tok* of the Court of Appeal as their own.

All participants strongly disagreed with the idea of disclosing the details of *Yee-Tok* to the public, citing the reality of Thai society in which some people and government officials are willing to manipulate the law for their benefit.

Judge V perceived it as an alien idea in Thai context:

> What is the benefit of disclosure? To prepare themselves for being a prisoner? The public already know what conduct is considered as crime and carries a penalty. If we want to disclose *Yee-Tok* like sentencing guidelines in western countries, we must have the same characteristics of society and a similar standard of criminal justice agencies to those countries. I can't see the benefit of disclosure to the Thai public.

Participants thought disclosure would make the mechanism of *Yee-Tok* less flexible and may harm the trust of the public in the judiciary. Even though departure from *Yee-Tok* must always be justified, explaining justifications to the public is not always easy and can be misleading. Therefore, Thai society is better off if *Yee-Tok* is kept secret. As Judge X put it:

> … if the details of *Yee-Tok* to be disclosed are incomplete, disclosure will invite more appeals from parties. I agree with the idea of disclosure only if the details of *Yee-Tok* are logical and complete like the sentencing guidelines in the US. … If Thailand uses sentencing guidelines which are published like in the US, some people will fabricate information for their benefit. For some Thais, their only concern is survival against legal sanctions. They aren't concerned about transparency.

Judge Y repeated the concern of his colleague when he noted:

> We are not trying to preserve power. But we must accept the fact that Thai people still believe that legal sanctions are only for ordinary people who don't have money.

SECTION 7: TESTING THE HYPOTHESES

The accounts of provincial courts' judges revealed a similar pattern in their judicial training and career as that which I reflected on from my experience in the previous chapter. They referred to the training at the judicial training institute and how their tutors taught them to use *Yee-Tok*. Besides, all of them have worked in more than two provincial courts and shared a similar experience to mine. The findings discussed above confirmed most, if not all, of the hypotheses. First of all, I found that Thai sentencers are well aware of the requirements of consistency, accountability and uniformity in sentencing. Their conceptions of consistency will be explored further in the next chapter. Although they praised the idea of individualisation of punishment, in which punishments are tailor-made to fit the circumstances and background of each defendant, uniformity seems to be the most important value in practice. It should be noted that if the focus is only on consistency of approach in sentencing, then consistency and uniformity can be found both inter-judge and inter-court. Participants from all focus groups approach the task of sentencing in a similar way. However, the fact that each court has different *Yee-Tok* appears to suggest that consistency of outcome may be possible only within each individual court. Participants from all groups praised the idea of local variation and the practice of

different lower courts having different *Yee-Tok.* Although they could see the benefits of having a regional *Yee-Tok* and adopting the *Yee-Tok* of the higher court, they seemed reluctant to adopt the practice. The attitudes of the Chief Judges and the appellate judges towards the sentencing review of the higher court conveyed that they did not perceive disparity of sentencing across courts as unjust.

Secondly, the responses of participants in all focus groups to the mock indictment illustrated how influential *Yee-Tok* is to the sentencing decision-making process of Thai judges in guilty plea cases covered by *Yee-Tok* such as narcotics cases. Since most defendants plead guilty at *Wain-Chee,* and narcotics cases form the majority of criminal cases in Thai courts, the same pattern of sentencing decision making as revealed in the mock indictment session should be observed in other guilty plea cases which are covered by *Yee-Tok* as well. The findings supported my argument that three main sentencing decisions are guided by *Yee-Tok*: the decision to commission a pre-sentence-report, the decision on the selection of type and amount of sentence and the decision to suspend imprisonment. Furthermore, this research found that sentencers are more cautious about departing from *Yee-Tok* in narcotics cases than in other cases.

Thirdly, Thai judges realise that their sentencing decisions are monitored by the Chief Judges and the judiciary as an organisation. They know that they are expected to account for their decisions by complying with *Yee-Tok* and following the policy of the Chief Judges. However, my hypothesis that judges are less concerned with the public than with the Chief Judge may need to be reconsidered since they admitted that they were aware of being watched by the public and the news media and always take all criticisms on board. The fact that all focus groups discussed criticisms from the news media in cases of public interest conveyed that, to some extent, participants considered the public as their audience. Nevertheless, it seems that as long as the public do not have practical mechanisms to hold sentencers to account or to gain a response to their demands, the main audience of sentencing accountability remains the organisation of the judiciary.

Finally, Chief Judges revealed that they indeed expect judges in their court to follow their policies on compliance with and departure from *Yee-Tok* – even

appellate judges share this expectation. However, the study revealed that Chief Judges fulfil their expectations not by reviewing all the sentencing decisions of judges but by making it known to the judges that if they step out of line, they will be held responsible for their own actions. I have always believed that Chief Judges review all sentencing decisions to check that they comply with *Yee-Tok*. This study revealed that my eleven-year-old belief may not be true for all Chief Judges.

CONCLUSION

In this chapter, I examined how the Thai sentencers who participated in the research explained the work and lives of Thai sentencers. The findings demonstrate the breadth and depth of data yielded from multiple research tools such as a ranking exercise, a mock case and photo elicitation. The study found that Thai sentencers prefer to present sentencing tasks as an exercise of discretion in tailoring sentences to each offender, even though in practice they routinely use *Yee-Tok* in making sentencing decision. The accounts of other Thai sentencers confirmed my hypotheses that consistency and accountability in sentencing are not alien concepts to Thai sentencers. Nevertheless, the concepts are put into sentencing practice through *Yee-Tok*, informal written rules, and numerous unwritten social conventions that Thai sentencers are socialised into; not through formal mechanisms with legal authority such as statutory sentencing principles or western-style sentencing guidelines. Armed with this finding, in the chapter that follows I characterise Thailand's approach in controlling sentencing discretion as one type of judicial self-regulation and discuss the nature of *Yee-Tok* and the social conventions of Thai sentencing in more detail.

CHAPTER 6

PURSUING CONSISTENCY AND ACCOUNTABILITY IN SENTENCING THROUGH JUDICIAL SELF-REGULATION

> *Could the judiciary function as an adequate source of (sentencing) guidance and of change? Much depends, here, on the structure of the sentencing system and the legal tradition to which it belongs.*
>
> (Ashworth, 1992:203)

INTRODUCTION

Having described the main findings of this research on how Thai sentencers perceive their task, this chapter discusses the mechanism of *Yee-Tok* and the roles it plays in the pursuit of consistency and accountability in sentencing. The chapter commences in section 1 by examining the way Thai sentencers pursue consistency and accountability in sentencing through a regulatory lens, characterising it as one type of judicial self–regulation and drawing a parallel between the regulation of sentencing decisions and other discretionary decisions of Thai judges. Section 2 then characterises the nature of *Yee-Tok* as sentencing rule and its legal characteristics, and discusses the reluctance of Thai sentencers to treat it as law as well as the implications of such discussion in the understanding of how Thai sentencing works. Next, section 3 investigates the way Thai sentencers pursue consistency and accountability in sentencing through informal rules and conventions in more detail. It examines participants' conception of consistency, explores the social conventions of Thai sentencing, and discusses the kind of consistency and accountability Thai judges are pursuing. Finally, section 4 draws some lessons from *Yee-Tok* and points out some limitations of pursuing consistency and accountability in sentencing through judicial self-regulation.

SECTION 1: CONTROLLING SENTENCING DISCRETION THROUGH JUDICIAL SELF-REGULATION

Viewing sentencing decisions through a regulatory lens

An attempt to control sentencing discretion can be perceived as a form of regulation since it involves 'the constitution of a form of authority to achieve ordering in an area of life that has come to attention as showing tendencies to disorder, perversity or excess' (Clarke, 2000:3). In order to gain a richer understanding of Thai sentencing practice, this chapter adopts a regulatory lens in viewing sentencing decision-making. Such a lens has an advantage over the legal paradigm, which focuses mainly on the legal rules, since it seeks to identify all regulatory mechanisms not only through a mechanism of deterrence but also through informal sanctions and the internalisation of compliance (Parker and Braithwaite, 2003:133). Regulation means more than the enforcement of legal or formal rules (p.119), and effective regulatory techniques require a mix of persuasion and command-and-control (Haller, 2010:227). Any regulatory regimes comprise three basic requirements: the setting of standards; processes for monitoring compliance with standards; and mechanisms for enforcing standards (Parker et al, 2004:1).

The regulatory lens fits well with the sociological perspective on law and the idea of legal pluralism. It implies the plurality of authorities or normative orders over one social setting; among those are state or formal laws (Davies, 2010:805; Cotterrell, 2006:34). By focusing on social relations within a community of judges, the findings of this study depicted the dynamic interconnections between multiple normative orders over the sentencing decision-making process of Thai judges. The sentencing decisions of Thai judges are not only subject to the limitations of legal rules in the Penal Code, but also to the limitations of self-imposed rules such as *Yee-Tok* and other social conventions of Thai judges.

The main focus of this study is not on all regulatory mechanisms of Thai sentencers, but specifically on how the Thai judiciary self-regulates its sentencing decisions. The power to self-regulate is often seen as a key feature of professionalization (Seneviratne, 1999:26; Haller, 2010:217). There is often tension between the interests of the professions and the public in regulation (Haller,

2010:217). The search for the most effective methods of regulating professions requires a review of the mechanisms of self-regulation.

Self-regulation means more than guideline-judgement of the appellate court

In one authoritative book on Western sentencing law and policy, Ashworth (2009) recognises judicial self-regulation as one technique for reducing sentencing disparity alongside statutory sentencing principles, narrative sentencing guidelines, numerical guideline systems and mandatory sentencing. However, he unfortunately limits his analysis of judicial self-regulation to only guideline judgement and appellate review of sentences. In my opinion, the use of sentencing guidelines in magistrates' courts in England and Wales since the late 1980s (see e.g. Turner, 1992; Turner and Wasik, 1993) should also be considered judicial self-regulation since it was initiated by the Magistrates' Association. My point is that the judiciary can play more roles in self-regulating sentencing discretion than through appellate review alone but these mechanisms may not be visible to outsiders. The ways in which the Thai judiciary pursues consistency and accountability in sentencing through the mechanism of *Yee-Tok* and other social conventions will be discussed later in the chapter.

Different regulatory mixes for different areas of discretionary decisions

Sentencing decisions are only one among many discretionary decisions that Thai judges have to make on a daily basis. The legislature may craft detailed rules in some areas of judicial decision-making to ensure consistency but leave the judiciary to self-regulate in other areas. Comparing the mode of regulation for sentencing decisions with those of other decisions can shed light on the effectiveness and efficiency of different regulatory mixes. Two types of discretionary decision-making, which seem to be subject to more rules than sentencing decision-making and have considerable practical significance, were selected for analysis: the decision to fix the remuneration for court-appointed lawyers and the decision to grant or deny bail.

a) Discretion in fixing the amount of remuneration for court-appointed lawyers

Court-appointed lawyers in Thailand are entitled to be compensated by the state for the service provided. Section 173 paragraph 3 of the Thai Criminal Procedure Code only states that the rates of remuneration must be in accordance with the Regulations of the Judicial Administrative Commission, and the 2005 and 2007 Regulations on the subject classify cases into 3 categories based upon the maximum sentence of the case and set the minimum and maximum rates for each category. The margin between the minimum and maximum rates is wide: between 6,000 and 40,000 baht in one category. The regulations state that in fixing the amount, the court must consider the complexity of the case, and the time, effort and other resources spent in delivering the service. However, they do not specify whether the person who is responsible for fixing the amount should be a trial judge or a Chief Judge.

In practice, the decision to fix the amount of money to be compensated to the lawyers is made by one judge, not a panel, by merely reviewing the case file. It is obvious that consistency of approach among decision-makers is ensured since each decision-maker must follow the same criteria in the regulations. Compared to sentencing decision, this decision is more subject to rules since the Regulations, which are published and accessible to the stakeholders, clearly set the criteria that need to be considered. Yet consistency of outcome, even in the same court, cannot be easily achieved by the mere existence of the criteria since different judges may have different views on the complexity of cases, even when they fall within the same category, and the contribution of the lawyer to the result of the case. As a result, one judge may fix a maximum rate while another might grant a minimum rate to similar cases.

Thai courts do not solve the problem of inconsistency in this decision by formulating some kind of *Yee-Tok* for making the decision. In the past, court-appointed lawyers never asked the higher court to review the decision of the lower court but chose to complain to the Chief Judge. Recently, however, some lawyers have decided to file an appeal against the decision of the lower court, but the Supreme Court has held in numerous cases that if the rate fixed by the lower court falls within the range in the regulations, the decision is not subject to review by

either the appellate courts or the Supreme Court [the Supreme Court's decisions no.9907/2011 (B.E.2554), 10109/2011 (B.E.2554), 16408/2012 (B.E.2555), 3661/2013 (B.E.2556)]. In some provincial courts, the Chief Judges pursue consistency in their own courts by limiting the number of decision-makers. If only the Chief Judge or the most senior judge of the court who is authorized by the Chief Judge is responsible for fixing the remuneration, consistency of outcome within the court is ensured. Nevertheless, it can be argued that a trial judge is in a better position to evaluate the contribution of the lawyer to the case than a Chief Judge. Moreover, limiting the number of decision-makers may not be a good policy if one aims to avoid the possibility of corruption. To date, the regulation system for this decision has been localized in the same way as *Yee-Tok*: different courts adopt different approaches in dealing with this decision, with some allowing a trial judge to fix the amount of money and others only allowing the Chief Judge or the most senior judge to perform the task.

b) Discretion to grant or deny bail

Section 106 of the Thai Criminal Procedure Code provides that a suspect and an accused have the right to apply for bail. Section 107 further states that the application for bail must be dealt with swiftly and bail must be granted as a rule. Section 108 then specifies the factors which need to be considered in granting or denying bail: seriousness of the charge; available evidence to support the charge; circumstances of the offence; reliability of the surety and the security; the likelihood of flight; potential dangers of the applicant being on bail and the opinions of the victim, the investigating officer and the prosecutor, if any. Section 108/2 also mandates that objections of the witness must be considered. In order to ensure that denial of bail is an exception, section 108/1 emphasizes that it is allowed only on the following grounds: that there is probable cause that the suspect or the accused will evade, tamper with evidence or reoffend; that the surety or the security is not reliable and that granting bail will obstruct the investigation or trial proceedings. The same section also states that the decision to deny bail must be accompanied by a clear and concise written justification.

In addition to the detailed rules in the Criminal Procedure Code, the Presidents of the Supreme Court have also promulgated numerous regulations and official advice on the issue[99]. These additional rules specify forms and details of application, proceedings, who is permitted to act as a surety, what can be considered as a security and what amount of bail should be fixed for a particular offence. In contrast to the mechanism for regulating sentencing decisions, the decision to grant or deny bail is subject to statutory principles, published guidelines and the clear requirement to justify the decision with written reasons. Consistency of approach does not seem to be a problem but, as with other types of discretionary decision, consistency of outcome is hardly achieved by the mere existence of these rules.

The decision to grant or deny bail is always made by one judge but is subject to a review of the appellate courts and appeals of this kind are routinely decided by the appellate courts. The problem in practice is that different judges have different opinions towards the statutory criteria, especially on how the seriousness of the charge should be assessed. To illustrate, in the case of drug dealing, how many tablets of methamphetamine sold should be considered adequately 'serious' that granting bail is not justified? A judge of the lower court who denies bail and an appellate judge who later grants bail to similar accused may hold different opinions towards the seriousness of the case or other relevant factors specified in the statute.

Since the more centralized approach in regulation cannot ensure consistency of outcome within the court, and allowing inexperienced judges to make the decision results in unnecessary appeals to the appellate courts, some provincial courts adopt a policy that only a Chief Judge or the most senior judge of the court can grant or deny bail. In practice, the approach ends up differing from court to court in the same way as *Yee-Tok*.

A review of how the Thai judiciary self-regulates other discretionary decisions demonstrated the concern of Chief Judges in trying to pursue consistency of outcome

[99] See e.g Official Advice of the President of the Supreme Court on the Uniform Standard for the Setting of the Amount of Bail 2004, Regulations of the Courts of Justice on Bail 2005, Regulations of the President of the Supreme Court on the Handling of the Application for Bail 2005

within their courts. Although the decision to fix the remuneration for court-appointed lawyers and the decision to grant or deny bail are subject to more legal rules than sentencing decision, these rules, in themselves, cannot ensure consistency of outcome within the court. The Thai judiciary appears to allow each court to adopt a localised approach as in the case of regulating sentencing discretion. Some courts solve the problem by limiting the number of decision-makers, while the others choose to tolerate inconsistency of outcome.

SECTION 2: UNRAVELLING THE MYSTERIES OF *YEE-TOK*

Is *Yee-Tok* a sentencing rule?

Broadly speaking, a rule is 'a general norm mandating or guiding conduct or action in a given type of situation' (Twining and Miers, 2010: 80). For something to be considered a rule, it needs to be prescriptive, general, to both guide and serve as a standard for behaviour and provide one kind of justifying reason for action (p.81). Applying the above definition and characteristics to *Yee-Tok*, it is obvious that *Yee-Tok* is a rule. Firstly, it prescribes factors that need to be considered in sentencing a particular type of offence and recommends sentences. It also guides the decision to commission a pre-sentence report. Secondly, it is general since it applies to types of cases instead of to any particular case. Thirdly, compliance with *Yee-Tok* serves as a standard by which the Chief Judge can assess the sentencing decisions of judges in the court. Finally, judges can justify their sentencing decisions to their colleagues and Chief Judges by simply referring to *Yee-Tok*.

When legal scholars advocate the implementation of more rules to constrain the discretion of the sentencers, they mean only legal rules, i.e., rules with legal mandate (e.g. Ashworth, 1995). However, empirical research by social scientists reveals that the discretionary power of legal practitioners is not only constrained by legal but also by social rules: the social and organisational context of decision-making (Hawkins, 1992, 2003; Baumgartner, 1992; Feldman, 1992). Social rules have no legal mandate. Therefore, they are not subject to the rule of law's values such as predictability, certainty and non-retroactivity. The audience of decision-making can

demand the decision-making follows only legal rules and not social rules. Thus, the legitimacy of the legal decision is assessed only by reference to the applicable legal rules (Schneider, 1992). The question is if *Yee-Tok*, as a sentencing rule, is law?

Is *Yee-Tok* law?

At first glance, *Yee-Tok* is not law since it has no legal mandate. It is formulated by judges in each court to help them exercise their sentencing discretion. However, on closer inspection, it does affect the rights of the defendant since it specifies which circumstances give rise to the imposition of a custodial or non-custodial sentence. Although there is no legal requirement for judges to comply with *Yee-Tok* and no legal right for offenders to be sentenced in compliance with *Yee-Tok*, it seems to have a similar effect to formal laws made by the legislature.

Participants in this study perceived *Yee-Tok* as a binding rule in their decision-making. They admitted that there would be a negative impact upon their career if they ignored it. However, they did not treat *Yee-Tok* as a legal rule and emphasised that 'it is not law'. For Thai judges, the preference is to treat *Yee-Tok* as an informal rule which can only be invoked within the judiciary. It is not my aim to objectively assess whether participants' claims that *Yee-Tok* is not law is right or wrong. However, it is useful to investigate if it is, theoretically and practically, possible for the legal system to treat an informal, self-imposed rule like *Yee-Tok* as law.

Legal philosophers tend to disagree about how to define law. Legal positivists and natural lawyers hold extremely different views and there are variations even among legal positivists (see e.g. Wacks, 2012). Hart (1994) offers what seems to be a circular definition: that law is something that is recognised as such by legal officials. His definition may not be useful in objectively evaluating the legal characteristic of *Yee-Tok*, but it does illuminate the undeniable fact that it is the legal officials, especially the judiciary, who decide what law is and is not in any jurisdiction.

Classification of rules by types of rule-maker is common in the field of administrative law. Nevertheless, textbooks on administrative law only distinguish between primary legislation made by the legislature and delegated or secondary

legislation produced by the government office under power delegated by Parliament (e.g. Faulkes, 1995; Jackson and Leopold, 2001). Such a classification cannot shed light on the legal status of *Yee-Tok* since the Thai parliament does not delegate power to craft sentencing rules to the judiciary. If *Yee-Tok* cannot be characterised as delegated legislation, how can we classify it?

Twining and Miers (2010:43) classify codes of practice, guidelines, directions, statements of principles and codes of conduct as 'soft law' as opposed to 'hard law' which is assumed to be binding, authoritative and effective. The problem with this classification is who decides how 'soft' or 'hard' the particular rule of law is: the law-maker or the court?

Baldwin (1995, 2003) notes that governments seek to influence behaviour by employing a variety of types of rule: formal statutes, rules under delegated power, or informal administrative prescription. He classifies legal rules in England and Wales into three types by the authority and types of rule-makers: primary rules made by the legislature, secondary rules produced by the government office in power to legislate, which is itself conferred by a statute of legal forces, and tertiary rule which is also made by the government office but the rule-maker does not have explicit authority to produce such rules. He cites code of practice, circulars and guidelines as examples of tertiary rules. These rules do not create rights that are directly enforceable through legal proceedings although they may produce indirect legal effects.

Applying Baldwin's classification of rules to *Yee-Tok*, it seems to be that *Yee-Tok* can be classified as a tertiary rule. Firstly, it is made by the judiciary without a mandate from the legislature. Next, it has legal effects since it specifies which circumstances give rise to the imposition of non-custodial sentences, but the defendant has no right to invoke it for their benefit. The impact of the realisation that there is technically a possibility to give legal effect to informal rules such as *Yee-Tok* is profound. All types of legal rule claim legitimacy to ensure compliance (Baldwin, 1995). They equally claim legitimacy through five rationales: legislative mandate, accountability or control, due process, expertise and efficiency (pp.41-46). More importantly, transparency and accessibility are key aspects of the rule-making process for all types of rule. Baldwin (2003: 733) also notes the problem of tertiary

rules in England and Wales since there is no obligation on the applier of a rule to disclose the existence or content of the rule. His observation aptly applies to the case of *Yee-Tok*. The point is that it is the judiciary who decides whether or not to give legal effect to administrative rules. However, the situation of *Yee-Tok* is different from other tertiary rules since it is crafted by the judiciary.

It is not uncommon in other legal systems for the court to recognise the legal status of tertiary rules. Baldwin (1995:92) cites numerous cases where the English court recognised the legal status of tertiary rules, and held that, according to the doctrine of 'legitimate expectations', a public body should be bound by self-imposed rules. A similar approach was also found in the Netherlands where it is widely known that the prosecutor is responsible for demanding the sentence that the court should impose by referring to the prosecution's guidelines. Research has shown that judges consider themselves bound to follow such guidelines (Kelk, 1995). These guidelines are similar to *Yee-Tok* in terms of the lack of legal mandate. However, the main difference is that *Yee-Tok* is confidential while the Netherlands' prosecution guidelines are publicly available and accessible (Brants and Field, 1995:146). Furthermore, the Netherlands' Supreme Court recognises the legal status of the prosecution's guidelines and holds that, because of general principles of fair trial and due process, it can be invoked by the citizen and scrutinised by the Supreme Court (p.136).

If, theoretically and practically, it is possible for the judiciary to treat an informal rule such as *Yee-Tok* as law, why do Thai judges continue to deny its legal status? One explanation is that the Thai legal system may have different rules of recognition from other legal systems and under the Thai system an informal rule like *Yee-Tok* is not recognised as law. Yet the review of the decisions of the Thai administrative court appears to suggest that the Thai court previously recognised the legal status of tertiary rules. To illustrate, the Supreme Administrative Court held in the decision no.387/2006 (B.E.2549) that the power to make an administrative rule must be authorized by the statute. However, it adopted a different approach in evaluating if a circular of the government office, which is normally made without apparent authorisation by the statute, is law. The test employed by the court is that if the circular aims to formulate a general rule affecting the rights and duties of the people and, not only as mere guidance for the officials, it is recognised as a legal rule and

can be scrutinised by the court [Decisions no.118/2001 (B.E.2544), 464/2009 (B.E.2552), 473/2013 (B.E.2556), 284/2014 (B.E.2557)]. Therefore, even in the Thai legal system, it is possible to treat *Yee-Tok* as law, if we accept that it creates 'a general rule of sentencing'.

Bearing in mind the fact that different courts use different *Yee-Tok* and that appellate courts apply their *Yee-Tok* in cases where parties file an appeal against a sentence, some might argue that the sentencing rules in *Yee-Tok* is time and place specific and not general, unlike the statutory sentences in the Penal Code that apply across the country to courts of all levels. Thus it seems that the puzzle on the legal and/or non-legal nature of *Yee-Tok* cannot be tackled individually but must be addressed simultaneously with its localised, time and place specific and confidential nature. If the legal nature of *Yee-Tok* is not so clear-cut, why do Thai sentencers resolutely claim that it is not law?

The reluctance to treat *Yee-Tok* as law and the need to preserve ownership over sentencing

The reluctance of the Thai elite to let the people know details of the law has a long history. In 1805, King Rama I arranged for the compilation of laws into a single code known as 'law of three seals'. Only three copies of the code were printed to which public access were not permitted, and anyone trying to publish the code was punished. Thai legal historians have offered explanations to this practice. Boonchalermvipas (2000) proposes that in the pre-modern Siamese society, law and morality were not separated. People already knew what the law prohibited and there was therefore no need to know the details. The actual punishment of the crime was for the authority to determine and not for the people to know. The public knowing too many details of the law could disrupt the law's smooth enforcement. Huxley (1996) notes that by keeping the details of law confidential, the central administration was in a stronger position than the people since they were the only ones who knew the applicable law. This historical mindset may still be alive and well in the minds of Thai judges.

The claim of the participants that there is no need to disclose *Yee-Tok* since it is not law can be rebutted on two grounds. Firstly, the above analysis illustrates that *Yee-Tok* shares a characteristic with tertiary rule, to which it is possible to give legal status. Secondly, it is wrong to claim that only laws need to be disclosed to the public. The Thai public has the right to access official information under the Official Information Act 1997, although to date there has been no official demand to gain access to *Yee-Tok* through this channel. The judiciary has also made available to the public some advice and guidance of the President of the Supreme Court on other areas of judicial decision-making as discussed in the first section of this chapter.

It seems to be that participants were well aware of the effect of treating *Yee-Tok* as law but continued to deny its legal status simply because they did not want it to be treated as law by others, being aware that laws need to be publicly available and accessible. An analysis of the legal status of *Yee-Tok* and the claim that it cannot be disclosed are inextricably linked. Denial of the legal status of *Yee-Tok* could be seen as one among many justifications participants cited to silence the idea of disclosing *Yee-Tok*. The real question is: why do Thai judges dislike the idea of making *Yee-Tok* available and accessible? I propose that one answer may lie in the nature of the judiciary as a profession.

'Professions are somewhat exclusive groups of individuals applying somewhat abstract knowledge to particular cases' (Abbott, 1988:318). The survival of any profession lies in its ability to maintain an optimal level of abstraction. In the context of Thai sentencers, the abstract knowledge they claim to possess is how to tailor sentences to suit the facts of each case and the characteristics of each individual offender. The image of the task of sentencing portrayed for the audience of sentencing decisions is a complex one which involves a balancing act of competing interests. Keeping *Yee-Tok* secret contributes to the maintenance of such an image of ownership over abstract knowledge and preserves the 'mystique' of sentencing.

The finding of this study depicts that the sentencing decision-making process through the use of *Yee-Tok* is not complex as participants claimed. Applying *Yee-Tok* to the facts of the case is straightforward and simple. Sentencing drug offences requires only information on the type and amount of drug, not the motive or

characteristics of the offender. Sentencing in compliance with *Yee-Tok* does not involve an application of an abstract knowledge which the Thai sentencers claim to possess. Allowing outsiders to know of the simplicity of *Yee-Tok* undermines the Thai sentencers' claims of being masters of the subtle task of sentencing.

The implications of the treatment of *Yee-Tok* as an informal rule rather than law

Recall that Thailand's criminal statutes specify the minimum and maximum sentences for most offences and only maximum sentences for the rest. Mandatory sentences are very rare and reserved for the most serious offences. It can be implied from the criminal statutes that the legislative intent is for judges to exercise sentencing discretion on a case by case basis. To put it simply, the legal obligation of Thai judges is to exercise discretion and tailor sentences to suit each offender, not to pursue consistency in sentencing.

Yee-Tok is formulated and operates in the shadow of law. Its mechanism ensures consistency in sentencing among judges in each court. Without the statutory mandate for the pursuit of consistency, it is officially unknown why the Thai judiciary has formulated *Yee-Tok*. One plausible explanation is that the Thai judiciary has realized that one element of justice in sentencing is consistency (Hutton and Tata, 2000). The responses from some participating Chief Judges confirmed this explanation. They admitted that 'just sentencing' requires treating like cases alike. Another explanation is that the judiciary has created *Yee-Tok* simply for practical reasons. To begin with, *Yee-Tok* helps inexperienced judges in dealing with many cases in a short period of time. Furthermore, requiring judges to comply with *Yee-Tok* and to consult with the Chief Judge in a case of departure are means of holding judges accountable for their sentencing decisions. By formulating this mechanism, however, the Thai judiciary risks being accused of acting against legislative intent in not exercising discretion. The judiciary is fully aware that *Yee-Tok* has no legal mandate, which is why judges never refer to it in the written judgement. The defence lawyer who knows the details of *Yee-Tok* cannot use it as a ground for appeal since no offender has a legal right to be sentenced according to *Yee-Tok*.

In a civil law country like Thailand, the judiciary is not a legitimate rule-maker. Appellate decisions in civil law countries are only evidence of law, not sources of law (Fletcher, 1996; Zweigert and Kötz, 1998; Merryman and Pérez-Perdomo, 2007; de Cruz, 2008). However, it is noteworthy that the Thai judiciary also adopts some elements of the doctrine of precedent from common law countries. In the absence of legal rules on selecting an appropriate sentence, the Thai Supreme Court does not take the same path as the English Court of Appeal in crafting legal rules by itself, but relies on *Yee-Tok* and other social rules. Nevertheless, the Thai Supreme Court has crafted some sentencing rules which technically do not have binding power, but Thailand's Code of Judicial Conduct obliges judges to follow the precedent of the Supreme Court. Three main areas of precedents on sentencing law exist: the custody threshold, mitigation of guilty plea and mitigation of substantial assistance to authorities in narcotics cases[100].

The Thai public can expect the court to sentence within statutory range but not within the range provided by *Yee-Tok*. By presenting *Yee-Tok* as a localised and confidential decision-making tool, the Thai judiciary expresses to the public that sentencing decision-making is always an exercise of discretion. The judiciary cannot make *Yee-Tok* more formal by having a national *Yee-Tok* and disclosing its details since doing so openly demonstrates that the judiciary creates sentencing rules without legal mandate.

Since the sentencing rules *Yee-Tok* created are not treated as legal rules, they are not intended to be subject to the rule of law's values of predictability and transparency. Realising the nature of *Yee-Tok* as an informal rule to regulate legal discretion unravels the three mysteries of *Yee-Tok*: why each lower court has different *Yee-Tok*, why the lower court has different *Yee-Tok* from the appellate courts and why the details of *Yee-Tok* cannot be disclosed. I shall in turn deal with each mystery.

[100] See details of these precedents in Appendix D.

a) Why does each court of first instance have its own Yee-Tok?

The idea of having different sentencing rules for different courts in the same jurisdiction seems to be an alien concept to international sentencing scholars. Minnesota has only one sentencing guideline to be applied across the state (e.g. Frase, 2013) as does England have a single set of guidelines to be followed by every court across the country (e.g. Ashworth and Roberts, 2013). Bingham (2010:53) even criticizes the practice of varying sentences geographically describing it as a 'sentencing postcode lottery'.

However, Thai sentencers consider it unjust to sentence without taking local variations into consideration.

As Judge R explained:

> People in the north-eastern and southern part of Thailand have different manners, habits, preferences and modes of operation in committing identical crimes. We can't sentence them equally for similar offences.

Judge B made a similar point when noted:

> Even in narcotics cases, *Yee-Tok* of provincial courts are different. For courts located along the border, the aim is to deter the importation of drugs and the sentencing of such offences may be harsher than other provincial courts or even the Court of Appeal. The Court of Appeal aims at the overall picture but does not consider local variations.

Chief Judge Orange also concurred:

> …Having single *Yee-Tok* for some offences can be unjust, such as carrying or possessing firearms without a permit. In an area where the government fails to protect the security of the people, it may be inappropriate to impose custodial sentences to offenders for having firearms to protect themselves.

On closer examination, the claim of pursuing local variation is not as plausible as it seems to be. Lower court judges are not locals as there is a rule prohibiting judges from working in their hometowns and that of their partners[101] to prevent corruption which may result from familiarity. On top of that, judges are not trained on the

[101] Section 27 of the Regulation of the Judicial Commission on the appointment, promotion, rotation and the increase of salary and allowance of judicial officers 2011 (As amended)

Around October or November each year, lower court judges are asked to submit the application form for rotation to another court in April next year. A judge has to provide information on their hometown and that of their partner in the application form and the judiciary will not rotate them to work in this province(s). For a glimpse of the form see http://www.ojc.coj.go.th/userfiles/file/2015-11-12_1.pdf (last accessed 18-11-15)

characteristics of the locality and the needs of the locals before appointment. Furthermore, the practice of frequent rotation to another court after 1 or 2 years and the judicial regulations that bar lower court judges from working in the same court for more than 5 years[102] prevent most judges from learning about local characteristics and needs. Besides, bearing in mind the discussion on *Yee-Tok* in chapter 4, it is formulated by judges who are not locals, without input from the community or other local practitioners and not based on analysis of the local crime statistics or on anticipation of the impact of the *Yee-Tok* on the amount of crime in the community. Finally, in my experience, the interaction between judges and people in the community outside the courtroom is very limited, if any; again, this occurs as a result of the strict Code of Judicial Conduct that aims to prevent corruption. How could judges who work in these organisational settings know if their *Yee-Tok* was in the best interests of their locality?

More importantly, allowing each court to have its own *Yee-Tok* is not the only way to appreciate local variation in sentencing. National *Yee-Tok* can be formulated to be used across Thailand, but allows judges to take local prevalence of an offence into account in assessing the seriousness of an offence on a case by case basis if there are 'exceptional circumstances', as in the case of English sentencing guidelines (see e.g. Wasik, 2015).

The need to maintain 'local variation' as the criteria for assessing offence seriousness appears to be merely a justification for each court having its own *Yee-Tok*, so whether the details of *Yee-Tok* of different courts are similar or different is beside the point. Although admitting that their courts always study the *Yee-Tok* of neighbouring courts and appellate courts, participants claimed that they needed to have their own *Yee-Tok*. Having different *Yee-Tok* may remind judges and send a message to others that each court is independent of each other and of the central administration when it comes to exercising sentencing discretion.

[102] Section 18 paragraph 1 of the Regulation of the Judicial Commission on the appointment, promotion, rotation and the increase of salary and allowance of judicial officers 2011 (As amended) and the annexed table

b) Why do appellate courts use different Yee-Tok from the lower courts?

Providing an opportunity for the defendant and the prosecution to file an appeal against a sentence is the norm of criminal procedure in England and Wales (Pattenden, 1996; Thomas, 2003; Ashworth and Redmayne, 2010), Ireland (O'Malley, 2006, 2011, 2013), Scotland (Brown, 2010), Canada, France (Madden, 2011) and Germany (Bohlander, 2012; Albrecht, 2013; Hörnle, 2013). Underlying the practice of appellate review of sentence are the aims of giving the parties involved in the case the opportunity to have an unlawful sentence quashed and to ensure the uniform application of legal rules and principles on sentencing (Pattenden, 1996; Madden, 2011). Moreover, since all human beings, including trial judges, are fallible, a review of sentence by the appellate court allows some legal errors to be detected and corrected (Madden, 2011).

The task of the appellate court is to ensure that the first instance court has complied with the relevant rules and procedures. Undoubtedly, the fact that the Thai appellate courts use different *Yee-Tok* from the lower courts and apply their *Yee-Tok* to correct the sentencing decisions of the lower court will puzzle international readers. How can an appeal court apply different standards to the court of first instance? The key to this puzzle lies in understanding the nature of *Yee-Tok* from the point of view of both Thai sentencers in the lower courts and sentencing reviewers in the appellate courts: as a social rule, not a legal rule, of sentencing. I argue that lower and higher courts' judges in Thailand feel that they adopt similar legal rules and principles of sentencing but are subject to some different social rules.

Firstly, it is wrong to claim that there are no sentencing rules in Thailand. The Thai Penal Code and other criminal statutes prescribe maximum and minimum sentences. The Code also specifies rules to mitigate a penalty in the case of duress (Section 67), insanity (Section 65), provocation (Section 72), excessive self-defence (Section 69), a plea of guilty and other extenuating circumstances (Section 78); to aggravate a penalty in the case of recidivism (Sections 92 and 93); to calculate sentences for multiple offences (Sections 90 and 91) and to suspend imprisonment sentences (Section 56). However, missing from the statutes are rules on how to select the appropriate sentence for each case from the statutory range and what the relevant

factors for sentencing are. The Thai Penal Code prescribes no basic sentencing principles as Section 46 of the German Penal Code does (Bohlander, 2012; Albrecht, 2013; Hörnle, 2013).

The task of the Thai appellate courts in reviewing the sentencing decisions of the lower courts is to ensure that the courts of first instance observe the earlier-mentioned legal rules prescribed by the Penal Code and criminal statutes. Their focus is on legal rules of sentencing, not social rules. Therefore the lower and higher courts in Thailand always use the same legal rules and standards in sentencing despite having different *Yee-Tok*. If the lower courts made an error in applying the legal rules of sentencing, such as imposing a sentence lower than the statutory minimum [e.g. the Supreme Court's Decision No. 388/2009 (B.E. 2552), No.6589/2010 (B.E.2553)], failing to add a recidivist premium to an offender who reoffends [e.g. the Supreme Court's Decision No. 3980/2004 (B.E. 2547)] or suspending the sentence for an offence which is not punishable by imprisonment [e.g. the Supreme Court's Decision No. 6576/2008 (B.E. 2551)], their sentences are legally wrong and will be amended by the higher courts.

It is worth emphasizing that Thailand is a civil law country which does not expect the higher courts to craft sentencing rules and principles but to limit their role by simply interpreting and applying what the statutory framework provides (e.g. Merryman and Pérez-Perdomo, 2007). In contrast with the expected role of the English Court of Appeal to craft guidance on how to select an appropriate sentence for any offence (Pattenden, 1996; Thomas, 2003), the Thai appellate courts are not authorized, or even expected, to issue any guidance. They may amend the sentences of the lower courts by claiming that they are not appropriate to the circumstances of the particular case, but they cannot issue general principles on crafting appropriate sentences for offences.

The Thai appellate courts are not responsible for assessing if lower courts' judges comply with the *Yee-Tok* of their own courts. It is the responsibility of the Chief Judge of every court of first instance to ensure that each judge in their court adheres to *Yee-Tok*. The fact that the sentence imposed by the lower court is different from the one recommended by the *Yee-Tok* of the appellate court warrants the amendment

of the sentence, not because the former is wrong, but because the latter is obligated to adhere to its social rule, the *Yee-Tok* of the appellate court. The enforcement of *Yee-Tok* as a social rule of sentencing requires a mechanism of accountability through consultation with the Chief Judge, not through the process of appellate review as with the enforcement of legal rules.

In substituting the *Yee-Tok* of the lower court with that of their own to amend the sentence imposed by the former, the appellate judges did not feel that the lower court judges had made a mistake or that the rules of their own *Yee-Tok* was superior or more authoritative than those of lower courts. The simple reason for this substitution is that appellate judges have no choice but to comply with their own *Yee-Tok.*

As Judge V. from one regional Court of Appeal put it:

> …we can't compel them (the lower courts) to comply with our *Yee-Tok*. If they don't use it, their sentences will surely be amended by us. Their standard and our standard can be different. I think the *Yee-Tok* of this regional Court of Appeal can't be applied to all provincial courts in the region. Take, for example, the case of using overweight lorries on public roads, in some provinces where using overweight lorries is the norm, the court may feel more tolerant of the offence… Even in the same region, each province has a different density of offences. This warrants different sentences for similar offences. In the majority of cases, people in the provinces do not file appeals against sentences. It implies that they are satisfied with the sentencing decisions of their courts. They don't care about standards in other courts.

The message conveyed to the lower court judge whose sentence is amended is not that *Yee-Tok* of the appellate courts is better and must prevail in all cases, but seems to be simply this: 'you did well in complying with your *Yee-Tok*, but unfortunately your decision was appealed and we had no choice but to apply our *Yee-Tok* and amend your sentence. If you are uncomfortable with the decision being amended, our *Yee-Tok* is always available to copy'.

From the perspective of lower courts' judges, having a sentencing decision amended by the higher courts does not necessarily mean that they have failed to observe the applicable rules. If the reason for amendment is failure to observe the law, such as imposing lower sentence than statutory minimum, they must take the amendment on board in making subsequent decisions. However, if the reason for

amendment is simply to better suit the circumstances of the case, it means that the sentence is not legally wrong but may not be in line with the *Yee-Tok* of the appellate court. Such amendments send a message that the sentencing judge did not violate the legal or social rules of sentencing and can carry on their existing practice. Participating Chief Judges also did not consider the amendment of the sentencing decisions of their subordinates by the higher court as a sign of poor performance on the part of lower court judges.

c) Why can't the details of Yee-Tok be disclosed?

Why has a mechanism for delivering "consistency" in sentencing been created if it is not publicly available? It appears that the Thai judiciary is not alone in this regard. A parallel can be drawn between the practice of the Thai judiciary in keeping *Yee-Tok* secret and the position of the Scottish judiciary in denying public access to the Sentencing Information System (SIS) (Tata, 2010: 211). Superficially, the practice of keeping the details of *Yee-Tok* confidential seems to be at odds with the requirement of transparency in sentencing and the rule of law. On closer inspection, however, the opposite may be true. The Thai judiciary could demonstrate its adherence to the rule of law by keeping *Yee-Tok* confidential.

In a democratic state, the public is represented by the legislature. The fact that the Thai legislature grants sentencing discretion to judges implies that they want judges to tailor sentences on a case by case basis for each offender. They do not mandate judges to value consistency in sentencing. The ultimate value of the Thai sentencing system, implied by criminal statutes, is individualisation of punishment. Although *Yee-Tok* serves many practical purposes and helps judges to pursue consistency in sentencing, these functions are not what the legislature intends.

The benefits of *Yee-Tok* aside, the undeniable fact is that in the Thai legal system, as well as in other civil law countries (e.g. Merryman and Pérez-Perdomo, 2007), crafting legal rules is the domain of the legislature and not the judiciary. Thus, *Yee-Tok* needs to be treated as a social rule binding only to judges. The public has no legitimate interest in accessing the details of *Yee-Tok*. Unless the legislature

mandates the pursuit of consistency in sentencing and recognises the legal status of *Yee-Tok*, participants claimed that the judiciary is not obliged to disclose the details of *Yee-Tok* to the public.

One common response of the participants to the idea of disclosing details of *Yee-Tok* was that it would be dangerous to Thai society since the rich defendant could manipulate the facts of the case to benefit from *Yee-Tok*. Underlying such responses was the realization of the inequality in Thai society. In my opinion, social inequality is not a strong justification for keeping the details of *Yee-Tok* from the public if they are legitimately entitled to know it. It appears that participants did not recognise the right of the public to know the details of *Yee-Tok*.

SECTION 3: PURSUING CONSISTENCY AND ACCOUNTABILITY IN SENTENCING THROUGH INFORMAL RULES AND CONVENTIONS

The conception of consistency in sentencing of Thai sentencers

a) The coexistence of consistency and individualisation of punishment

Participants from all three groups – provincial courts' judges, Chief Judges of the provincial courts and appellate judges – are aware that just sentencing consists of two contradicting requirements; consistency[103] and individualisation of punishment. They tend to value the latter over the former. The discussion of Court Blue clearly illustrated the point:

> **Judge E:** For me, the most important factor to be considered is the circumstances of the committing of an offence. Offenders who commit the same crimes can receive different sentences since the circumstances of their cases are different. Even co-offenders in the same case can be given different sentences.
>
> **Judge G:** The aim is to make the sentence fit the offender, but in the pursuit of this aim the judge must also consider the seriousness and circumstances of an offence. Another concern is imposing different sentences from other judges. That's the reason why we must have *Yee-Tok*: to set the minimum and maximum range of

[103] The concept of consistency in sentencing has no equivalent term in Thai. The English concepts of consistency and disparity in sentencing are nowhere to be found in Thai literature but Thai judges understand the need to treat similar cases similarly as the requirement of equality of outcome or *Khwam thao thiam* and the need for all judges of the same court to consider *Khwam pen ekka pap* or uniformity in making decisions.

acceptable sentences for each offence. I emphasize that there are many factors that need to be considered before crafting the suitable sentence for an offender.

Judge H: In practice, I consider many factors, such as the seriousness of an offence and the need to make sure that similar crimes receive equal sentences. However, like Judge E said, it all depends on the circumstances of the crime in question and it's not necessary for the co-offenders in the same case to get similar sentences.

Judge I: I'd like to draw your attention to the fact that statutory penalties for most offences are wide. The drafters just specify penalties in terms of minimum and maximum sentences. The implication is for judges to use discretion to craft sentences for each case. The first discretion is the discretion to decide which factors should be considered in making sentencing decisions; another is what sentence should be imposed within the statutory range. In practice, judges consider many factors; the age and characteristics of the offender, the circumstances of the crime, and seriousness of the offence. Every element must be taken into account. Therefore, similar offences can receive different sentences.

However, the structure of the career judiciary makes uniformity in making decisions the overarching goal of the organisation. Therefore, the search for just sentencing in every case must be exercised within the working conditions of the organisation and in compliance with *Yee-Tok*.

This research revealed that preferable sentencing aim of each sentencer plays a minimal role in making sentencing decisions. In the real practice of Thai sentencers, they do not justify their sentencing decisions by referring to any philosophical sentencing aims. As Judge B and Judge D discussed:

Judge B: It (the sentencing aim) has a minimal influence in practice because the main framework is *Yee-Tok*. If we allow each judge to sentence in the way that they prefer, it's arbitrary, not discretion. Different judges have different opinions on sentencing aims. I may prefer rehabilitation to other aims but another judge might value deterrence. This is obviously a double standard. Since we can't allow this situation to occur, we must have the uniform standard of *Yee-Tok*. It's flexible but not too much in order to avoid extremism.

Judge D: …*Yee-Tok* is not based on any specific sentencing aim but focuses on how to sentence in accordance with the seriousness of each offence. Within the range of sentences recommended by *Yee-Tok*, specific sentences can be crafted to reflect the sentencing aim the judge wants to achieve.

In cases covered by *Yee-Tok*, some criteria are provided to assess the seriousness of the offence which are intended to be used in comparing case similarity. Complying with *Yee-Tok* guarantees a minimum requirement of consistency since at least some criteria of similarity are met. The meaning of compliance with *Yee-Tok* from the viewpoint of the judiciary is that the sentencing decision is adequate and acceptable. In other words; *Yee-Tok* sets the minimum standard of how justice in

sentencing can be achieved. Interestingly, this minimum standard is what Thai sentencers perceive as the expectation from the public. As Judge Q pointed out:

> If there is no difference between two cases of a similar offence, I agree that the level of seriousness is similar and we must impose an equal sentence for both cases. However, in reality, even cases of similar offences have different facts. Speaking of *Yee-Tok*, I'm not denying its benefit in recommending sentences based on the seriousness of each offence to ensure that similar offences must be sentenced equally. Nevertheless, it varies sentences based upon some of the general facts of each offence, not all relevant facts. It's useful since the public can't understand the details of each case and we can't justify our decision to them in every case. The public only look at the overall picture of each offence and *Yee-Tok* adopts the same logic.

b) Countless ways of assessing case similarity

Since *Yee-Tok* is only a minimum standard, it implies that there is always another way to achieve just sentencing in any case. Participants pointed out that *Yee-Tok* does not consider all relevant facts of the offence; therefore, other methods exist for establishing case similarity than those adopted by *Yee-Tok*. They rejected the idea that all relevant factors for each offence can be identified. Judge I noted that discretion to decide which factors are relevant in assessing an offence's seriousness is the first discretion that a sentencer has to exercise.

To illustrate the status of *Yee-Tok* as only the minimum standard, *Yee-Tok* for theft varies sentences only by the amount of stolen property; but participants in Court Brown argued as follows:

> **Judge R:** ….I never agree that sentencing theft must consider only the amount of stolen property as *Yee-Tok* recommends. You can't conclude that all cases which involved up to 5,000 baht of stolen property are equally serious and must be sentenced equally. Assessing seriousness must take into account the manner in which the crime was committed and the characteristics of the offender and the victim…., for example, say a billionaire and a poor employee bought themselves a motorbike; let's say that their motorbikes cost the same price, and two offenders then stole the motorbikes from the victims. Both offenders cannot be sentenced equally. We must consider how many months the poor employee saved the money to buy a motorbike. It may take him a whole year to accumulate enough savings. Unfortunately, Thai judges don't consider this in practice. They just look at *Yee-Tok*, and ask, what is the sentence it recommends? Does it require consultation in case of departure? And with whom? That's it! …
>
> **Judge Q:** I agree partly with Judge R on the consideration of the economic status of the victim. However, most cases of theft which come to this court involve poor victims. For victims of comparable economic status, the sentence in every case should be equal and *Yee-Tok* must be applied.

Researcher: Does an indictment include information on the economic status of the victim?

Judge Q: No, it doesn't. The lack of information is one of the reasons why we can't achieve our ideal. The caseload and limited number of judges at *Wain-Chee* also prevents us from seeking additional information.

Judge S: … In the case of theft, information on an indictment is insufficient. We may impose a custodial sentence on an offender who steals to feed their children or sick parents but impose a non-custodial one to habitual offenders. Those who steal because of poverty shouldn't be imprisoned…

To recap the forgoing discussion, Judge R argued that judges sentencing theft must consider the economic status of the victim. The same amount of loss has a greater impact on the poor victim than the rich one. Therefore, offenders who steal from the poor must receive harsher sentences than those who steal the same amount of property from the rich. Judge Q agreed and raised another important issue that once judges admit the economic status of the victim as a relevant factor in sentencing, it will become another criterion of case similarity. Judge S then suggested that the motives of the offender should also be taken into account. It seems that the criteria for case similarity of theft are not exhaustive and it is the sentencing judge who selects the applicable criteria for each case. A judge who decides to comply with *Yee-Tok* can claim that only the amount of property matters, and that their sentence is both consistent with other judges who comply with *Yee-Tok* and suitable for the offender, considering the amount of information they possess. Judges who commission a report to seek more information can also make similar claims that they aim to achieve both consistency and individualisation of punishment.

To further demonstrate the countless ways of assessing case similarity, consider the facts of the three hypothetical cases of theft in table 6.1, inspired by the discussion in Court Brown:

Table 6.1: An illustration of how similarity in cases of theft can be conceived

Offender	Amount of property	Economic status of the victim	Motives of the offender
1	3,000 baht	poor	Family hardship
2	5,000 baht	rich	Extra money for holiday
3	4,000 baht	poor	To buy drugs

Let's say that *Yee-Tok* recommends 6 months imprisonment for theft of property not exceeding 5,000 baht. How would a judge sentence offenders 1 to 3? If a judge relies on information on the indictment, they would comply with *Yee-Tok* and give all three offenders the same sentence, because all three cases are similar in the eyes of *Yee-Tok*.

What if a judge commissions a pre-sentence report and finds information on the economic status of the victim and the motive of the offender? The sentences depend on a judge's criteria of offence similarity. If they believe that only the amount of property matters, they may not see differences between the three cases. On the contrary, if they give additional weight to the economic status of the victim, case 1 and 3 may be similar but different from case 2. In a similar vein, if they consider the motive of the offender but not the economic status of the victim, case 2 and 3 seem to be similar but different from case 1. When they consider all factors, all three cases cease to be similar cases. Other participants also suggested other relevant factors in sentencing theft such as the manner of commission, compensation to the victim and the offender's behaviour after the crime. The latter seemed to matter for Judge F who noted:

> … I usually consider behaviour of an offender after the crime to make just sentencing. I consider whether the offender feels remorse. The type of offenders who speak disrespectfully to the court or treat the victim without respect will undoubtedly get harsher sentences than other offenders who commit similar offences.

The reality of the work of the sentencers is not only that additional information can make similar cases seem different, but also that the same information can be interpreted differently by different judges. Consider the following discussion in Court Brown on how to assess the culpability of an offender who was charged of stealing a duck, but the pre-sentence report revealed that he also stole a mobile phone from the same victim:

> **Judge S:** The twist of the story is that the sentencing judge found out that the offender not only stole a duck but also a mobile phone. This implied that the offender had a wicked mind. A custodial sentence was justified.
>
> **Judge Q:** That may not be the case. Sometimes it's a matter of luck that the offender sees an opportunity to steal, and there was some valuable property present at the scene. He got a chance and he grabbed it.
>
> **Judge R:** But the facts revealed by the report implied that the offender is not a good citizen, so we can give him a suitable sentence.

Judge Q: Maybe more facts are needed on the circumstances of the crime to decide the offender's culpability.

Thai sentencing as a social process

To better understand the sentencing decision-making process in Thailand, one must acknowledge the fact that sentencing decisions are collectively produced by a community of judges rather than by an individual judge making decisions in a vacuum. Viewing sentencing decision-making as a parallel and serial decision-making process facilitates the discussion on the social conventions of Thai sentencing in the later part of this section.

a) Parallel decision-making

In Thailand, most sentencing decisions are not the decisions of individual judges but of a panel of two or more judges. Moreover, in the case that the sentencing judge wants to depart from *Yee-Tok,* the decision-making process must involve another decision-maker, the Chief Judge. Hawkins (2003) notes that when the decision is made in parallel by numerous decision-makers, the outcome may be influenced by other social features such as status, expertise and charisma.

In the lower courts of Thailand, a panel of judges is formed by the Chief Judge, generally, consisting of judges from different levels of judicial seniority. In cases that the law requires a decision by two judges, two members of the panel must consult with each other. The Chief Judge assigns a case to the panel by identifying one judge as the judge responsible for conducting the trial, recording the testimony of all witnesses and writing judgements; and another as a panelist judge whose role is mainly supportive. It is noteworthy that the Thai term for the responsible judge is *'Chaokhongsamnuan'* which literally means 'owner of the case'.

The Criminal Procedure Code does not specify that the opinion of the responsible judge must prevail. Section 184 of the Criminal Procedure Code provides that if a panel cannot reach a majority opinion, the decision which is less harmful to the defendant must prevail. Participants in focus groups admitted that, in practice, they would not let the situation be settled by law. Although they reluctantly admitted that

it is the responsible judge who takes the lead in making decisions, their overall discussion conveyed the practice of respecting the opinion of a responsible judge who is 'the owner of the case'. The common strategy is for the responsible judge to justify their decision to their colleague and for the panelist judge to express their opinion and concerns. If the responsible judge insists on their opinion, it must be respected. Underlying this practice are the values of harmony and reciprocity. Thai judges avoid conflict with their colleagues and expect to be treated in the same way.

The participants did not discuss the importance of level of seniority in determining the outcome of a decision within a panel; however, I propose that it may subconsciously play a significant role. To illustrate, having a more senior position is evidence of survival in the organisation. To stay healthy in the organisation without being disciplined conveys that the practices and opinions of a more senior judge have been effective and satisfactory. Having their opinion challenged by a more senior judge can make a junior judge lose confidence and change their opinion even though they are the responsible judge of the case, regardless of the impact of the change of opinion on the defendant.

Once a panel reaches its decision, another parallel decision from the Chief Judge may be required in the case of departure from *Yee-Tok*. In the interviews with Chief Judges, the standard for approval of departure was nowhere to be found. In a consultation with the Chief Judge, only a responsible judge, not a panelist judge, meets the Chief Judge. As long as the responsible judge can justify the departure by pointing out the relevant facts of the case, the departure is approved. I had succeeded every time in convincing the Chief Judges to approve my decisions to depart from *Yee-Tok*. The participants in the focus groups did not discuss the success or failure of their consultations with the Chief Judge, but the responses of Chief Judges in the interviews illustrated that approval was almost automatic.

b) Serial decision-making

That sentencing is a serial process involving numerous decision-makers is no mystery to international sentencing scholars. However, the previous literature was driven by the need to better understand the sentencing decision-making process by going beyond the analysis of decision-making within the judiciary. I do not deny the

benefit of that approach but decide to limit the examination to serial decision-making process within the judiciary.

Viewing sentencing decision-making as a serial process illustrated that sentencing decisions for each case can be handled by various decision-makers in the organisation, with different priorities and resources (Hawkins, 1992). The above discussion on the decision of the Chief Judge to approve or disapprove a departure from *Yee-Tok* illustrated that a Chief Judge and sentencing judge have different priorities in approaching sentencing for the same case. Once the case goes to the higher court, it will be dealt with by a panel of three appellate judges and a team of research judges with different priorities and resources from judges in the lower courts. The perspective of serial decision-making problematizes the notion of case similarity since even a single case can be perceived and dealt with differently by different actors in the process, let alone comparing different cases.

The eight social conventions of Thai sentencing

The enforceability of *Yee-Tok* depends on the adherence to other social rules of Thai sentencing. These social rules can be seen as part of the 'survival kit' for Thai judges in the sense that if they observe the rules, they will survive in the organisation. Eight social rules articulated by participants in the study will now be analysed with insights from sociologists, social psychologists and behavioural economists.

a) Stick to Yee-Tok and you'll be fine

Complying with *Yee-Tok* is the norm of Thailand's sentencing practice. It is part of 'judicial custom' and is binding to all judges. All participating Chief Judges and appellate judges expected provincial courts' judges to adhere to the *Yee-Tok* of their own court. Appellate judges are also expected to comply with the *Yee-Tok* of their courts. Sentencing in compliance with *Yee-Tok* requires no further explanation to anyone. In contrast, departure from *Yee-Tok* is a demanding business, especially for less senior judges.

Social psychologists offer two explanations for the question of why people conform to social norms: namely, the need to be right and the need to be accepted by other people (Gross, 2010). Utilizing these insights, I offer two explanations why Thai judges comply with *Yee-Tok*. Firstly, the fact that most judges comply with *Yee-Tok* can make them feel that it provides just sentencing. If its use led to unjust sentences, why would judges comply with it? When most judges comply with *Yee-Tok*, it sends a message to other judges that compliance with it is the right thing to do.

Another explanation is that judges may not be concerned with whether *Yee-Tok* leads to just sentencing, and are in fact mainly concerned with how other judges think of them. They desire to fit in with others and make a favourable impression on them. If judges perceive that compliance is what others expect, they simply comply with it whether or not it leads to a just sentence.

From the findings, I argue that, in reality, the decision to comply with *Yee-Tok* is driven by both the need to be right and the need to be accepted by other people. Although participants criticized the incompleteness of *Yee-Tok*, they did not openly criticize it as unjust. They need to maintain their dignity and satisfy themselves that they are doing what they are supposed to do.

It seems to be common wisdom in sociology and social psychology that human beings are prone to conformity. However, the system of career judiciary in Thailand makes the cost of non-conformity more salient to judges. As a judge in a civil law country, a Thai judge is a bureaucrat who hopes to make a career by moving up the hierarchy of judicial jobs (Schneider, 1992).To smoothly climb the career ladder from a lower court judge to a Chief Judge or higher courts' judge, a judge must demonstrate their loyalty by conforming to the expectations of the organisation. Deviation must be swiftly sanctioned both informally through peer pressure and formally through discipline. The judiciary always makes the cost of deviation salient by regularly disseminating information on the disciplinary sanctions of judges to courts across the country.

b) Do as other judges do

When individuals make decisions they are often influenced by what other people like themselves are saying and doing (Kilduff, 1992). Thai judges are no exception. Asked why they did not commission a pre-sentence report in narcotics cases, all participants in the focus groups responded that no judges commissioned a report in this type of case. A similar response was given when asked why they were less likely to impose non-custodial sentences in narcotics cases. Some judges pointed out that if they decided to deviate from the norm in one case, they must be prepared to answer the question 'Will you do this in every case?'

In the focus group of Court Blue, Judge H. and Judge F. expressed the following concern:

> **Judge H:** Impose a non-custodial sentence in a case involving the sale of drugs or possession with intent to sell and involve a police's informer? Bingo! Your colleague and Chief Judge will shout 'Why have you done this? Nobody did it before.'
>
> **Judge F:** What worries judges most in making sentencing decisions is the patron-client system in Thai society. Anything that seems incompatible with common practices is deemed to be a result of dishonesty among those involved in the process. Even using information in the investigation process which is included in the court's record in justifying a lenient sentence can land a judge in hot water. You'll surely be asked; 'Will you do this in every case?'…

Some participants referred to the fact that the appellate courts and the Supreme Court also did not impose non-custodial sentences in narcotics cases; therefore, it was their duty as lower courts' judges to follow precedents of the higher courts. As Judge N noted:

> For Thai judges, following precedents is part of our judicial custom. If we disregard precedents, other judges will raise their eyebrows and even question our integrity. Judges have no choice but to impose custodial sentences in accordance with custom for fear of being accused of having vested interests in the case.

Participants were also aware of the risk of being accused of corruption in the case of departure from *Yee-Tok* without consulting the Chief Judge. Although deviation from the norm of sentencing in itself is not considered a serious misconduct, most judges do not dare to take the risk. The discussion in Court Orange demonstrated what happens when the risk of being accused of corruption is salient for a sentencing decision maker:

> **Judge O:** … In one court near Bangkok, if I remember correctly, judges will commission a pre-sentence report in this type of case (referred to the mock indictment). But for this court, it's dangerous to commission a report in the first place without any actions from the offender. Do you have any vested interests in the case? Narcotics cases are different. No judge wants to deviate from the norm. It's unlike other criminal cases like theft, robbery or handling stolen property.
>
> **Judge K:** Especially in this court, we must be very careful.
>
> **Researcher:** What happened in this court?
>
> **Judge J:** Some judges of this court used to be accused of corruption. Compliance with *Yee-Tok* makes other judges feel safe.

c) The defendants must help themselves

In Thailand, there is no law that mandates the court to commission a pre-sentence report in particular types of case as in the case in England and Wales (e.g. Wasik, 1992, 2013) and Scotland (e.g. Tata, 2010). The rule in the Thai Probation Act is that the court can commission a report in the case that it considers imposing suspended imprisonment and section 56 of the Penal Code states that imprisonment of up to three years can be suspended. Furthermore, according to the established practice of Thai judges, the sentence reduction for an early guilty plea is one-half. Therefore, theoretically, it means that the court can commission a report in guilty plea cases that carry a minimum sentence of less than 6 years, since after the one-half reduction the net sentence will not exceed 3 years. In practice, however, Thai sentencers have learnt that they should not commission a pre-sentence report unless the defendants help themselves by filing a plea in mitigation or other similar petitions. They justified their practice by citing the caseload at *Wain-Chee* and the fear of losing impartiality if initiating the commissioning of reports by themselves.

Participants realised that most defendants are poor and unrepresented but they seemed not to be troubled by the fact that their attempt to maintain impartiality had left the majority of defendants worse-off and ended up in the prison while the rich defendants enjoyed the help of their lawyers in filing plea in mitigation, had a pre-sentence report commissioned for them and possibly received more lenient sentence. In other words, it appears that an attempt to maintain impartiality has made Thai judges take side with rich defendants and have prejudice towards the poor ones.

Nothing in the statutes provides that 'defendants must help themselves', but the statement was repeatedly echoed by participants in this research. Unsurprisingly, the modified conception of work allows the sentencers to blame defendants for the failure in achieving individualisation of punishment in each case. This strategy freed the sentencers from the perceived responsibility for outcomes and reduced the strain between resources and objectives (Lipsky, 1980).

To claim that 'the defendant must help themselves' is a 'technique of neutralisation' (Sykes and Matza, 1957) for Thai judges, enabling them to protect themselves both from self-blame and blame from others in failing to achieve the ideal of individualisation of punishment. Analysing their accounts revealed the process of denials at work (Cohen, 2001). They denied their responsibility to seek information before making sentencing decisions; the unfairness of the existing practice; and the victimhood of the defendants by blaming them for not filing a plea in mitigation.

The research found that Thai judges also adopted client differentiation as a coping strategy. They do something for some defendants that they are unable to do for all (Lipsky, 1980). Cases involving narcotics are less likely for Thai judges to commission a pre-sentence report on without the initiative from the defence; whereas they are more likely to do so in the case of theft or other offences against property. In a similar vein, they openly admitted that represented and unrepresented defendants are treated differently by them; and that most defendants are not in a position to help themselves. By differentiating among clients, however, Thai sentencers are satisfied that the ideal conception of their job – tailoring the sentence to suit the offender – can be achieved even for a small proportion of work.

It is noteworthy that some participants did try to help offenders by commissioning a pre-sentence report without waiting for the defendant to file a plea in mitigation. As judge Q noted:

> I observed special circumstances in one case myself. It was a case involving methamphetamine use, assault of a government official and obstruction of the work of a government official. The offender pleaded guilty. I considered the offences serious and decided to impose a custodial sentence. However, before announcing the judgement, I met the offender for the first time and found that his body was covered in bruises and bandages. I commissioned a pre-sentence report and found that the

> offender took drugs and was intoxicated when committing the crime. He couldn't control himself and assaulted the military officers at the checkpoint.

Judge M also expressed willingness to commission a report if observing that the defendant is pregnant and/or has small children. It seems to be the case that there is a possibility for a judge to adjourn sentencing and commission a pre-sentence report if they notice unusual circumstances on the part of the defendant. This can be explained by what behavioural economists call 'the identifiable victim effect' (Ariely, 2010:241). Judges are willing to express their empathy in commissioning a pre-sentence report only when the information is individualised either in the plea in mitigation or in the fact that they see the face of a defendant and hear their stories.

d) Don't trust the offenders

Participants realized that information from defendants is crucial for them in tailoring sentences to suit the circumstances of the case. However, Thai judges expressed their concerns that information from defendants may not be trustworthy since they have an incentive to provide false information, i.e. to receive more lenient sentences than they should receive. The common practice is for the sentencer to commission a pre-sentence report to verify information given by the defendant.

Thai judges are very cautious in maintaining their impartiality. They are well aware of working in a society based upon patron-client relationships where the majority of people try to avoid the enforcement of law at all costs. Their point of view is compatible with the findings of legal anthropologists (e.g. Engel, 2005) that legal consciousness is still lacking among Thai people. The fear of corruption is pervasive in the Thai judiciary. Thai sentencers are socialised to act tough, show no mercy and impose custody as a rule. Leniency towards the defendant needs to be monitored and justified. Thai judges are most concerned with avoiding being perceived as sympathetic to the defendant. They tend to rely on insufficient information presented by prosecutors rather than initiating the information gathering process themselves. Commissioning a pre-sentence report without the initiative from the defendant can be interpreted as not being impartial. This explains why commissioning a pre-sentence report is an exception to normal practice. The same

logic also applies to imposing non-custodial sentences to offences which judges perceive as serious, such as drug dealing. Thai judges are more careful in downward departure from *Yee-Tok* than upward departure since the former can be interpreted as showing sympathy to the offender, which may be a result of corrupt practice. The departure from *Yee-Tok* which the Chief Judge will scrutinise most closely is downward, not upward departure.

e) Always respect the opinion of 'the owner of the case'

Most sentencing decisions in the courts of first instance of Thailand are made by a panel of two judges. For each case, one judge is assigned to be a responsible judge or *chaokhong sumnuan*, which literally means 'the owner of the case'; while another judge is assigned to be a panellist judge. It is the responsible judge who makes the initial decision of the panel and then consults with the panellist judge. Since a majority opinion cannot be reached for a pair of judges, section 184 of the Code of Criminal Procedure prescribes that the decision which is most beneficial to the defendant must prevail. In practice, however, participants did not want to let conflicts of opinion be resolved by the law, as doing so might jeopardize the relationship within the panel. Their strategy, as a rule, was to respect the opinion of the responsible judge but to allow the panellist judge the opportunity to express their concerns.

A panellist judge is the first person who assesses whether a responsible judge imposes a sentence in compliance with *Yee-Tok*. If there is a departure, it needs to be justified first to a panellist judge. It is noteworthy that, in my experience, a panellist judge rarely asks to see a case file but usually relies on the presentation of facts from a responsible judge. The system is therefore based on trust between members of the panel.

The convention of respecting the opinion of 'the owner of the case' contributes to the harsher sentences imposed upon defendants since the statutory safeguard in section 184 of the Criminal Procedure Code is not enforced. This legal rule specifies clearly that when in disagreement, the opinion which is most beneficial to the defendant, i.e. the more lenient sentence, non-custodial rather than custodial, must prevail. Yet in actual practice, convention trumps the law.

f) Take your Chief Judges seriously

According to Thailand's Code of Judicial Conduct and the related legislation[104], it is the duty of Chief Judges to monitor the judicial behaviour of judges in their courts. Failure to do so is deemed a breach of discipline. Most *Yee-Tok* provides that departure from it requires a consultation with the Chief Judge. The study does not only reveal that it is impossible for Chief Judges to review all sentencing decisions to determine if they comply with *Yee-Tok* but also that frequent departure without consultation, if found out, must be disciplined.

Frequent departure from *Yee-Tok* without consultation was perceived by participant Chief Judges as a sign of corrupt practice. Experienced judges have learnt throughout their careers that consultation with the Chief Judges is almost automatic. All participants in Court Green revealed that, throughout their judicial careers, their Chief Judges have always approved their departure from *Yee-Tok*. Judges are well aware of the details of the *Yee-Tok* of their court and realize that compliance is the norm. If they want to depart but decide not to consult with the Chief Judge, it implies that they have something to hide.

The fact that a responsible judge comes to consult a Chief Judge sends at least three messages: that the judge takes *Yee-Tok* and judicial custom seriously; that the judge is in possession of some information which justifies the departure; and that it is less likely that a decision to depart is motivated by corruption. The whole process of consultation should be interpreted as a ritual to confirm the decision of a panel and to endorse acceptable practice, rather than being an independent decision made by a Chief Judge. This explains why Chief Judges did not keep track of the results of their consultation and preferred to have a case-by-case consultation.

I believe that Chief Judges monitor compliance with *Yee-Tok* in every case but have never discussed the issue with my colleagues. Participants were not sure if the Chief Judges review all of their sentencing decisions, but tended to believe that it is impossible for the Chief Judges to review every decision. It seems to be the case that

[104] See e.g. section 11 of the Law for the Organisation of the Court of Justice 2000 (As amended)

when compliance is the norm, discussions about the system to ensure compliance among judges is deemed inappropriate.

g) Having a sentencing decision amended by the higher courts is inconsequential

As explained earlier, the role of the Thai appellate court is to ensure that the lower courts observe the legal, not the social, rules of sentencing. Most appeals against sentences were filed by defendants on the grounds that the sentences were too harsh, not that the sentencing judges misapplied sentencing laws. Judges are very careful when it comes to applying laws and mistakes in the application of sentencing laws are rare. As a result, participating Chief Judges did not treat the amendment of sentencing decisions by the appellate courts as a sign of poor performance on the part of judges in their court. Participating appellate judges did not expect judges of the lower court to sentence in accordance with the *Yee-Tok* of the appellate courts. They accepted the value of local variation in making sentencing decisions.

Lower court judges admitted that having their sentencing decisions amended by the higher courts did not have a negative impact on their judicial career. As the discussion in Court Brown demonstrated:

> **Judge S:** I feel nothing negative (when my decisions are amended). I'm confident that the more experienced judges in the higher courts surely have some justification in amending my decision. Also, I know that their work involves many judges who consult with each other. Judges can have different opinions towards one legal problem. I strongly believe that each judge must deliver justice as they see fit. The decision which I perceive as just may be perceived by the higher courts as unjust. You can't say which opinion is right or wrong.
>
> **Judge P:** I also feel nothing negative about sentencing decisions being amended. I try to see the benefit of them being amended by carefully studying the decisions of higher courts and adopting them in my own sentencing practice, if it's practical.
>
> **Judge Q:** I don't think it has any effect on our judicial career.
>
> **Judge R:** Even though it doesn't affect our career, sometimes it does affect our feelings…

h) Be realistic, that's the best you can do

The study reveals that Thai sentencers who participated in the research were well aware of the discrepancy between sentencing service provision and service ideal. For Thai provincial courts' judges, the ideal is to try to devise the most suitable sentence for each individual offender. It is unnecessary for offenders who commit similar crimes to be sentenced equally. It all depends on the circumstances of the offences and the offenders. Participants realized that to achieve the ideal requires sufficient information. However, considering their caseload, they admitted that in practice uniformity in sentencing trumps other values and *Yee-Tok* prevails most of the time.

They expressed their concerns that defendants who pleaded guilty may not indeed be guilty as charged, that most defendants are not in a position to help themselves in filing a plea in mitigation, that the probation office does not have sufficient staff to write a pre-sentence report in every case, that there are some unjust criminal statutes and that they cannot tailor sentences in most guilty plea cases at *Wain-Chee*. They managed to retain dignity and pride in their work and were satisfied that they were trying to do justice by creating their own conceptions of job and client as other 'street-level bureaucrats' do (Lipsky, 1980). More importantly, their main strategy was to identify themselves as bystanders to, not the perpetrators of, the injustice in the process. Rookie judges may feel uncomfortable with the practice, but as they gain judicial experience, everything is normalised; practices once seen as unusual or intolerable become accepted as normal (Cohen, 2001:188).

Lipsky (1980) proposes that lower court judges are street-level bureaucrats since they regularly deal with clients, have less control over conditions of work and usually use their wide discretion to make significant decisions which affect the lives of the clients. These characteristics can be found in the work of Thai sentencers as well. They have wide sentencing discretion authorized by the criminal statutes, they sentence numerous offenders at *Wain-Chee* and their decisions affect the property, liberty and even life of their clients.

In addition to the findings on coping strategies identified by Lipsky (1980) demonstrated previously, this research also revealed that Thai sentencers always try to individualise the sentencing process by spending time in teaching moral lessons to

defendants and their relatives and preparing to change their decision in light of new information. They frequently emphasised to the researcher that they deviated from the routine in some cases and took pride in narrating their experiences to other members in the focus group. Recall the findings in chapter 5 that the ideal for Thai sentencers is to tailor a sentence to suit each offender, individualising the sentencing process may be one strategy they employ to fulfil this ideal.

What kind of consistency and accountability are Thai sentencers pursuing?

a) Consistency of approach or outcome or both?

Do all Thai judges follow the same principles and approaches in sentencing? Can they do so since each court has different *Yee-Tok*? My analysis reveals the positive answers to both questions. The format of *Yee-Tok* is uniform across courts. The underlying principles of *Yee-Tok* seem to be just deserts and the principle of proportionality which call for the use of seriousness of offence and culpability of the offender as the main criteria for crafting an appropriate sentence for offences and offenders (Von Hirsch and Ashworth, 2005). For each offence covered by *Yee-Tok*, similar criteria for assessing case seriousness are adopted across courts, e.g. type and amount of drugs for narcotics offences and amount of stolen property for theft.

In addition to consistency of approach, Thai sentencers also pursue consistency of sentencing outcome, but this is limited to consistency of outcome within the same courts. Out of three different types of sentencing disparity identified by Spohn (2002:134-140): inter-jurisdictional, intra-jurisdictional and intra-judge disparities, Thai sentencers seem to be more concerned with the last two than the first one. Participants in the research rejected the idea of pursuing consistency of outcome across courts on two grounds. First of all, they claimed that local variation must be considered in assessing the seriousness of an offence. Secondly, each court is independent from each other so they cannot simply adopt *Yee-Tok* of another court. In other words, inconsistency of outcome among courts helps each court to maintain a sense of independence.

The confidentiality of *Yee-Tok* makes it impossible to examine the actual extent of the differences in sentencing outcome recommended by different *Yee-Tok*. Nevertheless, responses from participants revealed that the differences may not be as extensive as they seem to be. Participating Chief Judges admitted that they always compared *Yee-Tok* of their courts with those of neighboring courts. Participating lower court judges acknowledged the practice of using *Yee-Tok* of other courts as a model for their own courts. It seems to be the case that the actual differences are less important than the sense of difference.

Human beings have two fundamental needs: assimilation and differentiation. On one hand, they have a strong desire to feel included in social groups, but on the other hand, they want to achieve distinctiveness (Pickett and Leonardelli 2008: 57-58). Optimal distinctiveness theory (ODT) proposes that both needs can be satisfied simultaneously through identification with social groups and subsequent comparison between one's ingroups and outgroups (p.58). The practice of different courts in Thailand using different *Yee-Tok* seems to make sense when utilizing the perspective of ODT. The practice allows judges in each court not only to feel included in their social groups but also to achieve distinctiveness in comparison with other courts.

b) perceived audiences of accountability and the way Thai sentencers respond to the expectations of audiences

The literature on accountability is vast and covers many definitions and forms of accountability. Lindberg (2013:209) proposes 'the core concept of accountability', which posits that, at the general level, there are four characteristics of all types of accountability: an agent ('A') to give an account; a domain subject to accountability; an agent to whom A is to give an account ('P'); and the right of P to require A to justify decisions within the domain and to sanction if A fails to justify. It follows from this model that accountability is a relationship between two agents or institutions over particular responsibilities or domains. In relation to sentencing, an analysis on accountability in sentencing must firstly ask to whom the sentencers must give an account on sentencing decisions they make.

In making sentencing decisions, Thai lower courts' judges are expected to comply with *Yee-Tok* of their court and follow a policy of departure set by the Chief Judges.

The Chief Judges are the main audience of sentencing accountability. The appellate judges also expect lower courts' judges to follow *Yee-Tok* of the lower courts. Participants did not perceive the public as the direct audience of sentencing accountability. Public opinion and attitude has no role in the way judges make individual sentencing decisions or in formulating the rules of *Yee-Tok*. The invisibility of the details of *Yee-Tok* is not perceived by the Thai judiciary as problematic. At the organisational level, the Thai judiciary demonstrates its accountability to the public, not by letting them participate in the rule-making process or publishing the rules of *Yee-Tok*, but by ensuring that judges adhere to judicial norms and customs in making sentencing decisions.

SECTION 4: LIMITATIONS OF PURSUING CONSISTENCY AND ACCOUNTABILITY THROUGH JUDICIAL SELF-REGULATION

The Problem of Legitimacy

Baumgartner (1992) points out that predictability of decision-making generated by social context may not be perceived as legitimate by those involved. In the case of *Yee-Tok,* it is formulated without any input from other criminal justice practitioners, academics or the public. The outsiders are not aware of, let alone allowed to criticize, the notion of offence seriousness adopted by *Yee-Tok*. To illustrate, this research found that *Yee-Tok* adopts the type and amount of drug as the main criterion for assessing the seriousness of narcotics offences. However, the outsiders do not know of this criterion and do not have an opportunity to criticize its use.

Yee-Tok generates uniformity in sentencing decision-making but by adopting the arguably narrow conception of the offence seriousness and offender characteristics that are relevant to sentencing, the system ends up creating 'the arbitrariness of uniformity' (Stith and Cabraness, 1998: 121)**.** Its nature of confidentiality hinders its potential to be a measure of public and democratic accountability since the public have no opportunity to discuss the acceptability of the consistency pursued.

Without legal mandate, *Yee-Tok* helps judges to pursue consistency within the same court, but not across courts or across the country. Some participants in the

lower court noted that the situation of different levels of court using different *Yee-Tok* could be perceived by offenders as unjust and could undermine the trust of the public in the judiciary.

Although it is intended to be used only by judges, *Yee-Tok* has a great impact on the work of other agencies, especially probation offices and prisons. Ashworth (2009:254) rightly points out that judicial self-regulation is not a suitable means for determining the policies to be pursued with respect to imprisonment. Every time the court amends its *Yee-Tok* to give more or less custodial sentences in any particular type of case, it means more or less work for probation offices and prisons. Formulating *Yee-Tok*, or updating it, is a formulation of sentencing policy, but it lacks input from other agencies. Moreover, how can probation offices and prisons efficiently and effectively manage their resources without knowing the details of applicable *Yee-Tok*?

Furthermore, *Yee-Tok* cannot perform resource management functions like the English (Ashworth and Roberts, 2013) or the Minnesota sentencing guidelines (Frase, 2013) since it lacks democratic legitimacy and accountability. To use more or less custody as a sanction is a value and political judgement. Those who propose the policy need to be held accountable for its failure, if this occurs. This avenue of accountability is missing in the mechanism of *Yee-Tok*.

The fact that the existing mechanism of *Yee-Tok* lacks democratic accountability, however, does not automatically lead to the conclusion that it needs to be reformed as previous researchers in Thailand have recommended. Recall the broader political, social and cultural context of Thailand and my argument in chapter 3 that the evidence of legitimacy is contextual. As the future of Thai democracy still hangs in the balance, nobody can predict if Thailand will transplant the normative framework of sentencing from western countries. At the time of writing, there is no sign that the Thai court of justice perceives its crisis of legitimacy and the demand for reforming the mechanism of *Yee-Tok.*

The Link between the Lack of Legal Authority and Rates of Compliance

Sentencing scholars usually question the effectiveness of voluntary guidelines in reducing sentencing disparities (e.g. Turner and Wasik, 1993; Robert, 2009; Ashworth, 2009). Their main concern is that without legal authority there is no guarantee that judges will comply with the guidelines. Therefore, the natural approach of sentencing reformers is to impose the legal duty to judges to 'have regard to' or 'to follow' the guidelines (Roberts, 2011). Underlying such concerns is the belief in the singularity of authority in the domain of judicial regulation.

In the case of Thailand, Thai sentencers comply with *Yee-Tok* without legal obligation. The findings of the research revealed the multiple authorities at play in regulating the judiciary, among them formal law enacted by Parliament. Thailand's experience illustrates that securing judicial compliance to sentencing guidance may not necessarily require legal authority. Much depends on the judicial structure and judicial culture of the jurisdictions. It seems to be that the benefit of having legal authority like the sentencing guidelines in England and Wales lies not in its effectiveness in securing a higher compliance rate, but in that the audience of sentencing decision-making such as the parties of the case, the news media and the public can refer to the legal authority to demand that the judiciary observe sentencing guidance and to monitor whether it does so, something which the mechanism of *Yee-Tok* seems to be lacking.

The danger of too much consistency

Differences in legal systems and political, social and cultural contexts aside, Thai sentencers perform a similar role to those in western common-law countries in balancing the two competing visions of justice in sentencing: consistency and individualised sentencing (Hutton and Tata, 2000). As in other balancing exercises, sentencers must face the tensions between the two notions of justice that they are trying to balance and accept that there is an inevitable tradeoff in the balancing. On one hand, consistency requires making sentencing decisions in accordance with general rules laid down in advance. The benefits are predictability and equality of

decisions and transparency and efficiency of decision-making, but at the cost of losing individualised, case-by-case, judgements (Shauer, 2009:193-194). On the other hand, individualised sentencing requires discretion and flexibility in making judgements without the limits of detailed, specific and determinate rules but at the cost of losing certainty, constraint and predictability (p.195).

One possible drawback of overreliance on self-imposed rules is that the agency may apply its self-imposed rules in an inflexible way, so as to fetter the discretion it is required to exercise and lead to injustice in individual cases (Turpin and Tomkins, 2012:121). In the case of Thailand, participants admitted that in sentencing narcotics cases, which form the majority of criminal cases in Thai courts, they always comply with *Yee-Tok* which specifies the simple rule to vary sentences only by looking at the type and amount of drugs. As a rule, they must also impose custodial-sentences unless defendants introduce information which justifies the imposition of non-custodial ones. A combination of the simplicity of the rules in *Yee-Tok* and the culture of conformity among Thai sentencers ensures consistency in sentencing decisions among judges of the same court, but without consideration of the characteristics of the offender and the circumstances of each case, can they claim that they make the 'correct decision' and do justice in every case? The tendency to impose custodial sentences for narcotics offenders is another danger of too much consistency in Thailand's sentencing system. The lesson from Thailand is that when the rules are too rigid and compliance is the norm, the end result may not always be satisfactory.

The lack of input from outsiders

Once the judiciary perceives sentencing tasks and controlling sentencing discretion as its sole responsibilities, it is less likely to seek opinions and information from those outside the judiciary in performing the tasks. Apart from the issue of legitimacy in monopolizing the task, the lack of input from others limits the effectiveness of self-regulation measures as a decision-making aid. To illustrate, in the formulation of English sentencing guidelines, important input is sought not only from criminal justice practitioners, academics and the public, but also scholars of decision sciences (Dhami, 2013). On the contrary, Thailand's *Yee-Tok* is formulated on

the basis of zero input from outsiders. It is widely accepted among psychologists and behavioural economists (e.g. Sutherland, 1992; Ariely, 2008, 2010) that professionals are subject to cognitive errors as ordinary people and that they need help in making decisions. I believe that decision-making science has much to offer in the improvement of the form and details of *Yee-Tok*, yet the existing method of formulating and updating *Yee-Tok* does not allow these insights to be utilized in practice.

CONCLUSION

This chapter characterises the Thai approach in pursuing consistency and accountability in sentencing as judicial self-regulation, critically analyses the nature of *Yee-Tok* as written, yet informal, sentencing rules and investigates the unwritten social conventions of Thai sentencing. It illustrates that the absence of legal rules on sentencing does not necessarily render the sentencing decision arbitrary. The mechanism of creating informal rules, providing incentives for observing these rules and sanctioning deviation in the career judiciary of Thailand generates consistency in sentencing practice in the same way as sentencing guidelines and guideline judgements in common law countries.

Yee-Tok has existed in the Thai penal system without any challenge to its legitimacy from the stakeholders. Comparing its functions to those of sentencing guidelines in the US and England and Wales illustrates the limitations of *Yee-Tok* as a tool for resource management and a measure for democratic accountability. Having more legal rules may not make Thailand's sentencing practice more consistent, since this study reveals that what really matter in practice are *Yee-Tok* and the social conventions of the judiciary. Yet legal rules can contribute to more public and democratic accountability in sentencing. In the following chapter, I draw together what has been discovered throughout the thesis to construct a theory to understand how Thai sentencers pursue consistency and accountability in sentencing. The relationships between judicial structure, judicial legitimacy, judicial independence and sentencing decision-making will be explored to illustrate how Thai sentencing should be best understood and what implications can be drawn from this understanding.

CHAPTER 7

UNDERSTANDING THAI SENTENCING CULTURE: THEORY AND IMPLICATIONS

> *…it can be difficult not to fall foul of two opposing dangers. On the one hand, there is the risk of being ethnocentric – assuming that what we do, our way of thinking about and responding to crime, is universally shared or, at least, that it would be right for everyone else. On the other hand, there is the temptation of relativism, the view that we will never really be able to grasp what others are doing and that we can have no basis for evaluating whether what they do is right. To get beyond these alternatives requires a careful mix of explanatory and interpretative strategies.*
>
> (Nelken 2009: 291-292)

INTRODUCTION

This thesis argues that while Thai sentencing culture and practice is different from that of Western countries in several respects, there are some lessons that can be learnt from a mutual understanding. This penultimate chapter, which is divided into 4 sections, draws arguments throughout the thesis to construct a theoretical framework for understanding and explaining key characteristics of Thai sentencing culture and discusses the implications of the study. Section 1 and Section 2 synthesise the arguments from earlier chapters to construct a theory for understanding the Thai way of delivering justice in sentencing based on two conceptual building blocks: the judicial structure of a career judiciary and Thailand's political, social and cultural context. Next, Section 3 suggests how the study of Thai sentencing can contribute to the work of international sentencing scholars in understanding legal decision-making in general and sentencing decision-making in particular. Finally, section 4 reevaluates the future of Thai sentencing in light of more empirical data on how Thai sentencing works.

SECTION 1: PULLING ALL THE THREADS TOGETHER

Judicial Structure and sentencing decision-making

Russell (2010) reviewed empirical judicial research and called for the next wave of research with an aim to show how differences in judicial recruitment, career patterns and judicial education between common law and civil law countries influence judicial decision-making. This work adds to the literature by revealing how the system of career judiciary in Thailand influences the sentencing decision-making of judges.

It is worth emphasising that, throughout the thesis, I do not try to argue that judicial decision-making in civil law and common law countries is different beyond comparison. My goal is only to illustrate how the judicial structure of Thailand fits with the ideals and practices of the judiciary in other civil law countries. At best, the civil law-common law dichotomy is only an ideal-type, not a stereotype (see e.g. Jörg, Field and Brants, 1995; Field, 2006, 2009). Thus, the reality should be more complex than the dichotomy suggests and differences at the ideal level must not be conflated with those in reality. Numerous empirical research studies on judges in common law countries also depict a picture of judges who seek cooperation with others and are subject to peer pressure and organisational constraints (e.g. Feldman, 1992; Darbyshire, 2011). Socio-legal research has found that judicial decision-making processes in England and Wales are social and collective processes which put more emphasis on presenting 'a single voice' in judicial decisions than in the past (e.g. Darbyshire, 2011; Paterson, 2013). Researchers also note the sense of 'seniority' and the emergence of a 'career path' within the judiciary in England and Wales (e.g. Darbyshire, 2011; Shetreet and Turenne, 2013). Yet some seem to remain sceptical about the prospect of 'judicial cloning' where judicial appointment is largely controlled by senior judges (Shetreet and Turenne, 2013; Paterson, 2013). The *de facto* existence of the doctrine of precedent in civil law countries is also widely accepted among comparative scholars (e.g. Zwigert and Kotz, 1998; Merryman and Pérez-Perdomo, 2007). With these caveats in mind, I can proceed to illustrate how the Thai judiciary may share methods of regulating sentencing

decision-making and holding judges to account for their sentencing decisions with other civil law countries.

As in other civil law countries, systems of rotation, working conditions, promotion and performance evaluation of Thai judges are controlled by the central administration of the judiciary (e.g. Merryman and Pérez-Perdomo, 2007). As in France and Germany (Bell, 2001; Foster and Sule, 2010), seniority and good service are the determinants for promotion for the Thai judiciary. Generally, civil law judges have long judicial careers which start early in life and can last for 40 years or more (Bell, 2001). The average age of successful candidates who enter the judiciary in most civil law countries is under 30, while the usual age of retirement is at least 65 (see e.g. Japan (Abe, 1995); Austria (Stawa, 2005); France (Errara, 2005); Germany (Riedel, 2005); Italy (Di Federico, 2005); Spain (Poblet and Casanovas, 2005)). They are expected to spend their lives climbing the judicial career ladder from the lower courts to upper judicial positions. Thus, they tend to behave in the manner that the organisation promotes.

Moreover, civil law judges are recruited from inexperienced and unproved law graduates. They are more likely to rely on their training and socialisation than on their personal experience. Also, from the organisation's point of view, it needs to have measures for regulating its inexperienced members (Ramseyer and Rasmusen, 1997). In the career judiciary of civil law judges, creativity is not rewarded and has never been held in high regard. On the contrary, deviation from established practice can be perceived as misconduct. Civil law judges carefully consider advice from their superiors since promotion is partly dependent on their views and receiving good reports from them (Foster and Sule, 2010). The image of civil law judges is 'operators of a machine designed and built by legislators' (Merryman and Pérez-Perdomo, 2007:36). This image was evident in the accounts of participating Thai judges who were of the opinion that their sentencing work is comparable to the work of factory workers.

Regarding the working conditions of judges, Künnecke (2006) points out that the German judiciary sets a quota of cases for judges to complete within a certain period of time and gives a time limit for writing decisions and emphasizes that failure to

observe these requirements is demonstrated in personal assessments and affects the promotion of judges. The Thai judiciary also set a quota of cases for judges and a time limit for writing decisions. Moreover, Thai judges are regularly rotated to another court. Although the main criterion for assigning a judge to any court is their level of seniority, judicial performance also plays a part in the process. As Abe (1995) notes in the case of Japan, the judiciary can use the system of rotation to award or punish judges.

Civil law judges work closely in a panel of two or more judges. The findings of my research suggest that this structure provides an opportunity for judges in the same panel to monitor each other's decisions. Civil law judges are fully aware that they are not only bound by law but also by judicial custom and that deviation from judicial custom and norms will be sanctioned. Civil law countries are more concerned with judicial accountability than the personal independence of judges. However, accountability mainly means internal accountability by way of internal pressure through promotion and discipline. There is always tension between supervision and the personal independence of judges in countries with a career judiciary.

'Judicial Independence' and sentencing decision-making

One of the requirements of the rule of law is judicial independence (Bingham, 2010). The doctrine has two components: independence from certain forces and independence to do justice impartially (Jackson, 2012). The guarantee of judicial independence is not a virtue in itself but exists to ensure that judges apply laws impartially without any pressure (Piana, 2010a:24).

Sentencing literature contains a great deal of discussion on the tension between the invocation of the doctrine of judicial independence and the need for sentencing reform (Ashworth, 1995, 2000, 2003, 2013; Tonry, 1995; Munro, 1992). Most sentencing scholars are concerned with the need to correct the misunderstanding that judicial independence means that sentencing decisions are under the sole responsibility of the judiciary. Jackson (2012) notes that judicial independence has both institutional and personal aspects. The former is concerned with insulating the

judiciary from the interference of the legislative and executive branches of the government, while the latter focuses on the individual independence of each judge from any pressure either from outside or inside the judiciary. Previous sentencing literature, mostly written by scholars from common law countries, has focused on discussing the institutional aspect of the doctrine. The findings of this research demonstrate the concerns of Thai judges about the personal aspect of the doctrine of judicial independence.

All versions of the Thai constitution guarantee the institutional independence of the Thai judiciary. Thai judges have security of tenure and hold their judicial office until the age of retirement. Since 2000, judicial administration, appointment, promotion and discipline have been the responsibility of the independent Office of the Courts of Justice, which is not part of the executive. The majority of commissioners in the Judicial Administration Commission and the Judicial Commission are elected from and by judges.

However, when we consider Thailand's political context, the reality of Thailand's institutional judicial independence and the relationship between the Thai executive and judiciary is more complex. For the majority of the time between 1932 and 2015, Thailand has been governed directly or indirectly by military governments. The Thai judiciary has not once challenged the legitimacy of the military coups, nor held its decrees per se unconstitutional. The military governments have not directly interfered with the day to day work of the judiciary. After the 2006 and 2014 military coups, some senior judges were appointed Minister and Director-General in governmental departments and members of the National Legislative Assemblies, a practice that never happened or was allowed under civilian governments. The latest coup has also limited the jurisdiction of the ordinary court in national security cases and has created new offences by decree of the coup leaders. The jurisdictions for these offences have been transferred from ordinary courts to the military court.

In countries with a career judiciary system, the apex of the judiciary exercises tight control over the adjudicatory decisions of lower court judges, using powers apart from review on appeal – such as by controlling the working conditions, or salary increases or professional advancement of lower court judges (Jackson, 2012).

Reviewing literature on judicial independence in civil law countries revealed a recurring theme of tension between organisational control and the individual independence of judges (e.g. Japan: Abe (1995); the Netherlands: de Lange (2012); France: Garapon and Epineuse (2012); Belgium : Allemeersch , Alen and Dalle (2012); Italy: Di Federico (2012); Germany: Bohlander (2000), Seibert-Fohr (2012)).

A review of the development of judicial independence in England reveals a power struggle between the judiciary and the monarchy since the 17th century which resulted in the separation of powers between the two institutions (see Shetreet and Turenne, 2013 Ch.2). Recalling the discussion on the perception of a Thai judge as the only state agent who acts in the name of the King, it is not surprising that the Thai judiciary has never tried to gain independence from the institution of the monarchy. By maintaining dependence on or a link with the monarchy, the Thai judiciary has cultural capital and a source of legitimacy to claim both authority and special status within Thai society.

According to the Thai Code of Judicial Conduct, when making decisions, an individual judge is independent or *It Sa Ra* from all influences both outside and within the judiciary. Section 37 of the Code requires judges not to interfere with the work of other judges. The commentary of the Code even states that, if a judge is confident that their opinion is right, there is no need to worry whether it will be reversed on appeal, since this reversal does not necessarily imply that they have made a mistake. Nevertheless, as public officials, judges are subject to a chain of command in administrative areas which is clearly stated in section 16 of the Code of Conduct. Section 19 also prescribes the duty of Chief Judges to report commission of disciplinary offences by their subordinates.

The battle over sentencing authority between the legislative bodies and the judiciary is absent in Thailand. It is widely accepted that judges have sentencing discretion only within the scope authorized by the statute, and legislative bodies can amend sentences or introduce new sentencing structures as it sees fit. To date, however, the Thai legislature has failed to provide sentencing rules on how to select a sentence in the statute and has left the judiciary to regulate its sentencing decisions within a loose statutory range. The need to self-regulate sentencing discretion has

created tensions between the Thai judiciary and its judges. As this study reveals, Thai judges feel that it is their right to select an appropriate sentence in each case subject to the limits set by the legislature. They acknowledged that *Yee-Tok* interferes with their independence.

The focus groups with provincial courts' judges and the interviews with Chief Judges and appellate judges in Thailand revealed that the Thai judiciary strives to strike a proper balance between the guarantee of adherence to judicial customs and norms and the retention of the individual independence of each judge. The judiciary has not formulated a national *Yee-Tok* but allows and encourages each court to have its own *Yee-Tok*. Even though there have been efforts by some senior judges to make lower courts adopt the *Yee-Tok* of the higher courts or to have a regional *Yee-Tok*, these efforts were voluntary and were not openly promoted by the judiciary. In this structure, each lower court maintains its independence from neighbouring courts and the higher courts in making sentencing decisions, even though the mechanisms for formulating and enforcing *Yee-Tok* and its forms seem to be similar across courts[105].

Thai judges did feel that *Yee-Tok* interferes with their independence in crafting sentences which they consider 'just'. From their point of view, *Yee-Tok* is something that restricts their freedom, as reflected in the way they described the practice of departure from *Yee-Tok* as *'Hak*[106] *Tok'*, literally meaning escape from *Yee-Tok*. However, they conceded that it is necessary as a tool for regulating a large number of judges who may have different preferences in sentencing. The current system can be seen as a compromise between the values of uniformity and consistency on the one hand and the individual independence of judges on the other. This explains why Thai judges felt that the judiciary cannot demand more than each court having its own *Yee-Tok*. While previous sentencing literature has pointed out the tension between the institutional aspect of judicial independence and the demands of other agencies to reform sentencing, this study illustrates the tension between the personal aspects of judicial independence and the efforts of the judiciary to self-regulate its sentencing decisions.

[105] Participants admitted that in the process of formulating and updating *Yee-Tok*, they learn from *Yee-Tok* of neighbouring courts and courts of appeal.
[106] The verb *'Hak'* is widely used in the statement *'Hak Cook'* meaning escape from prison.

The findings appear to suggest that a sense of independence is of crucial importance to participating judges. Regardless of how limited their sentencing discretion is in actual practice, they claimed that they were independent decision-makers. Even though they admitted the practice of imitating the details of *Yee-Tok* of neighbouring courts and higher courts, they strongly opposed the idea of having only one version of *Yee-Tok.* A sense of independence from other courts may compensate for the lack of personal independence of each judge in making sentencing decisions. It may be the case that maintaining a sense of independence is one mechanism Thai judges employ to feel dignity in their work. This sense of being an independent decision-maker free from hierarchical command in individual cases may be an important trait that distinguishes judges from other civil servants.

Judicial self-perception of its legitimacy and democratic/public accountability in sentencing

Judicial legitimacy and sentencing discretion are closely related. If the judiciary is perceived by the public as legitimate, the public will empower it to use discretion (Tyler, 2003). The declining confidence in the judiciary and its legitimacy crisis is also one of the impetuses for sentencing reform in many countries (Morgan and Clarkson, 1995).

Beetham (1991) notes that the first condition of legitimate power is that it must conform to 'the established rules'. Is the rule of law the established rule of legitimacy in Thailand? Throughout the thesis, I have argued that it is not the only source of state legitimacy. Besides, owing to its political context, the Thai conception of the rule of law, known in Thailand as *Lak Nititham,* may not be completely compatible with those of western liberal democracies[107]. Sentencing is the exercise of the state power to punish by one state official called a judge. In a democratic state, power flows from the people through a periodic election in accordance to a supreme law of the state called a constitution. Both elected and appointed government officials are required to exercise state power on behalf of the people. However, as the case of

[107] See Chapter 3

Thailand illustrates, legal and constitutional legitimacy is not the only source of political legitimacy.

Max Weber defined domination as the probability that a command within a given specific context will be obeyed by a given group of persons, and distinguished three ideal types of legitimacy upon which a relationship of domination may rest: traditional, charismatic and legal (Giddens, 1971; Allen, 2004). In traditional legitimacy, authority rests on belief in the sanctity of immemorial traditions and norms, while charismatic legitimacy derives from devotion to the exceptional sanctity, heroism and personal magnetism of a heroic figure. The last type of legitimacy, legal-rational, is described by Weber as the normal means of domination in modern western societies (Hunt, 1978; Cotterrell, 1992). It derives from properly enacted rules and is given to office holders rather than specific persons (Allen, 2004). While the first two ideal types are founded upon personal authority, obedience to legal domination is owed to the legally established impersonal order (Hunt, 1978:115).

Thailand's political context demonstrates how traditional, charismatic and legal-rational authorities can coexist in modern society. Thailand's lack of a colonial history means that the premodern system of political legitimation was never destroyed by an occupying imperial power and has persisted into the era of twenty-first century globalization, being deployed as a central element of elite strategies for dealing with the West throughout the nineteenth and twentieth centuries (Jackson, 2010). In Thailand, traditional and legal authorities go hand in hand. The exercise of state power is traditionally subject to the rule of virtue and morality, not the rule of law. All power must be exercised for the benefit of the people. Politicians are not perceived as more legitimate than appointed civil servants. Both are representatives of the people so long as they honestly perform their duties for the common interest of the Thai people. Elected politicians cannot claim absolute power if they fail to adhere to the rule of morality (Shytov, 2004:303).

While elected politicians seek legitimacy directly from the people, unelected government officials, including the judiciary, claim traditional legitimacy and the status of representatives of the people through the institution of the monarchy. It is

widely believed in Thailand that the monarch is the representative of the people whose power has never been absolute but always subject to the rule of morality (Hawison and Kitirianglarp, 2010:189). This belief has been alive and well even though the Thai political system changed from an absolute monarchy to a constitutional monarchy in 1932. The Thai term for the civil servant is *'Kha Ratchakarn'*, literally meaning 'servant of the monarchy' (Baker and Phongpaichit, 2014:163). Although the civil servant must implement the policies of elected politicians, they do not perceive themselves as subordinate to politicians.

Thailand's political context is by no means unique. Beetham (1991:129) notes that in contemporary societies the principle of popular sovereignty coexists with other beliefs about the rightful source of legitimacy. The division of sovereignty between elected and unelected institutions can also be found in other countries such as Turkey and Iran (Shambayati, 2008). Wei (2006) also notes that in China, the main source of authority is moral principles, not laws. Moreover, nonelected officials in China tend to receive more respect than elected ones, as long as they govern according to the principles of justice.

The political situation in Thailand since 1932 can be understood as either a battle between, or an attempt to balance, these two sources of political legitimacy (Pongsudhirak, 2008: 144). Thailand's roller coaster history of democracy since 1932, with 19 constitutions and 18 military coups – the latest on the 22nd of May 2014 – illustrates that constitutional legitimacy through election has never been allowed to be a dominant source of political legitimacy. In the past decade, Thailand has witnessed a clash between those who believe and those who do not believe in western-style democracy. The anti-government demonstration which led to the latest military coup in 2014 asked for 'true democracy', but denied the legitimacy of elected government and prevented the people from casting their votes. The coup leader promised to return democracy to the country, but the present government and legislative assembly were appointed by the coup and those who dare to openly dissent are prosecuted or summoned to be detained for a short period in order to have

their attitude 'adjusted'[108]. Moreover, the coup has suspended local elections but appointed civil servants to supervise local politics.

In Thailand, both elected politicians and military coups can form a legitimate government with the power to legislate and administrate the country. The most cited reasons for staging a coup are the corrupt practices of politicians, or, their failure to protect the institution of the monarchy, or, to deliver services to the people. The common practice of the coup is to abolish the constitution, which is the source of legitimacy for politicians. Without constitutional legitimacy, the coup must invoke legitimacy from another source. It has become an established practice for the coup-maker to ask the King to legitimate its power to rule the country. Once the coup is endorsed by the King, its legitimacy cannot be questioned (Harding and Layland, 2011).

It is worth emphasising that although all military coups have abrogated the constitution and arranged for the drafting of a new one, they have kept the legal system of the country intact and never directly interfered with the daily business of the judiciary. Laws in force in Thailand come from different sources including elected parliaments, appointed National Legislative Assemblies and edicts of the military coups. All are equally legitimate in the eyes of Thai courts. Government officials must exercise their power according to the law. The judiciary acts as the guardian of the rule of law to ensure that all legislation is adhered to by officials and the people. For Thai legal scholars and practitioners, the concern is not how the law is made but what its content looks like.

The nature of Thai politics as a moving equilibrium (Kulick and Wilson, 1992) in which elected politicians never gain permanent supremacy has insulated Thailand from 'law and order' politics and 'populist punitiveness' (Bottoms, 1995). The review of the dynamics of penal change in Thailand in chapter 3 illustrated that the criminal justice policy of Thailand is always controlled by experts in the civil service, including the judiciary. The fact that the judiciary plays an important part in shaping penal policy demonstrates that there is minimal opportunity for other

[108] http://www.bbc.co.uk/news/world-asia-34249428 last accessed 1/12/15

stakeholders to propose policies that the judiciary perceives as 'threatening' to its domain.

The Thai judiciary is also bound by the law. It cannot exercise power outside the scope of the legislation. However, the traditional discourse within the organisation of the judiciary and Thai society is that judges are representatives of the King, who is traditionally believed to be an embodiment of the Thai people. This belief has elevated the status of the judiciary over other criminal justice agencies. Moreover, it is widely believed that judges must adhere to higher and more demanding moral standards than other civil servants. It is not surprising that surveys consistently find the judiciary to be the most trusted government office. With the high trust from the public, there is no perceived demand for injecting democratic accountability or other forms of accountability into the judiciary.

The perception of being trusted by the public, the traditional narrative of 'judging in the name of the King' and the Thai culture of deference to authority seems to allow the Thai judiciary to operate the sentencing system as it sees fit. Within statutory ranges of sentence, the Thai judiciary regulates its sentencing power through the mechanism of *Yee-Tok*.

Thai judges are not different from Western judges in the fact that the former draw legitimacy from traditional sources while the latter do not. Cotterell (1992:229) notes that all judicial work can be thought of as having its authority grounded to some extent in both tradition and charisma, as the US Supreme Court draws traditional authority from timeless constitutional principles and English judges claim charismatic authority through the image of impartiality and objectivity in their decision-making. The difference may lie in the fact that, in Thailand, tradition is constantly invoked by the judiciary and treated as a necessary element of legal authority.

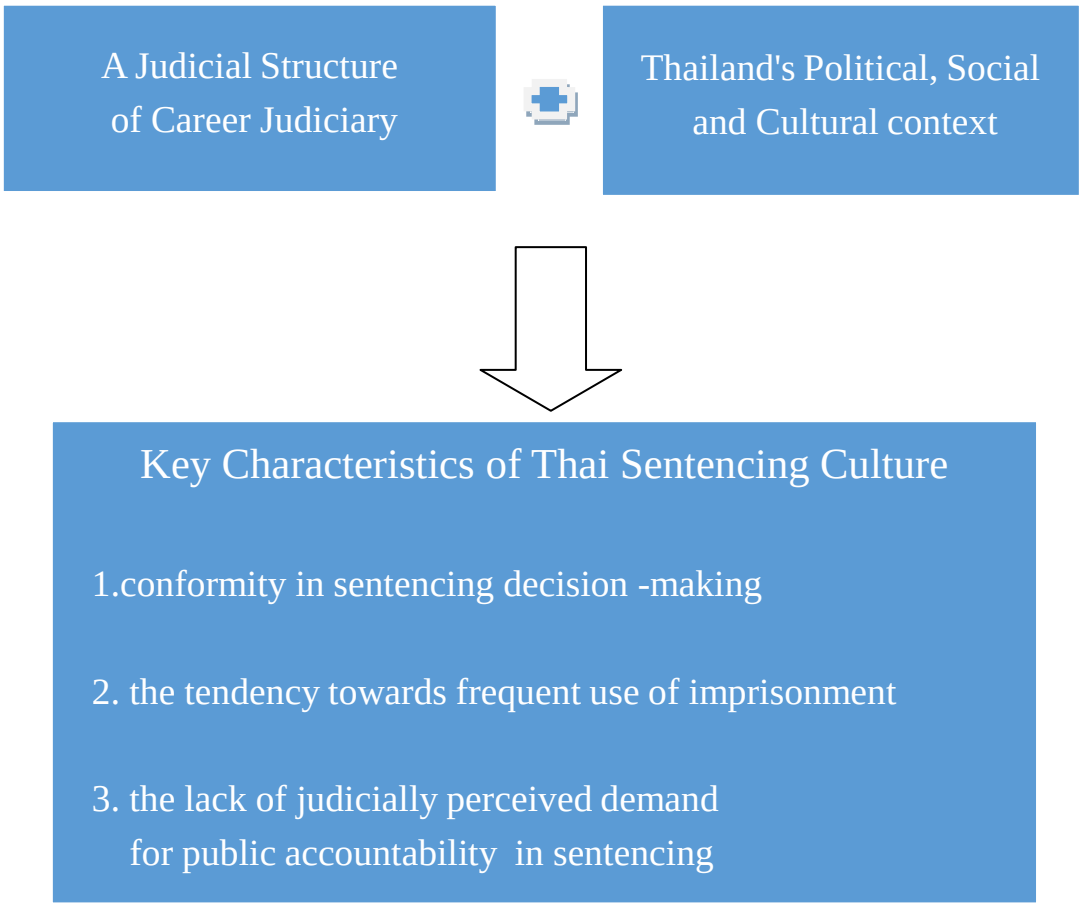
All this said, it is important not to exaggerate differences. The tendency to keep sentencing decisions invisible to outsiders and the idea that only the judge/civil servant can be trusted to possess public information seems to apply to the judiciary across the democratic/non-democratic divide. Thus, the effect of political context on the way sentencing discretion is structured should not be exaggerated. To illustrate,

the Scottish judiciary developed the Sentencing Information System in the 1990s, but resolutely denied public access (Tata, 2000). Individualised sentencing as praised and practiced in Scotland may be as secretive as *Yee-Tok*. The pre-guidelines English sentencing system was also far from transparent (Ashworth, 2003) and the post-guideline system is not immune to criticism, as it is arguable whether the transparency it aims to produce is meaningful (see e.g. Hutton, 2013b). True democracy, in which the public can fully exercise its right as the true owner of public services, and the notion of open justice remain aspirations even in countries widely recognised as established democracies (see Brooke, 2010 especially Ch.5). Those in power never surrender their power voluntarily regardless of political regimes. Hence, there are still ways to improve sentencing in any jurisdiction to make it more publicly accountable. Nevertheless, there seems to be more opportunity for the public to demand change in democratic regimes than in their less/non-democratic counterparts.

SECTION 2: CONSTRUCTING A THEORY FOR THE UNDERSTANDING OF THAI SENTENCING

This thesis searches for a conceptual framework to understand how Thai sentencing works. It proposes, as illustrated in figure 7.1 that follow, that the basic building blocks of Thai sentencing culture are Thailand's judicial structure and its political, social and cultural context. These two building blocks are used to explain the three main characteristics of Thai sentencing culture identified and discussed in earlier chapters: conformity in sentencing decision-making, the tendency towards frequent use of imprisonment and the lack of judicially perceived demand for public accountability in sentencing.

Figure 7.1: A Theory for the Understanding of Thai Sentencing Culture



The two basic building blocks of the theory

Judicial structure can partly explain how Thai sentencing works. Although it can explain why the Thai judiciary formulated *Yee-Tok* and why Thai judges comply with it, it cannot explain certain characteristics of Thai sentencing, especially the confidential nature of *Yee-Tok* and why Thai judges sentence so many offenders to imprisonment. Moreover, judicial self-regulation of discretionary decisions requires legitimacy which is contextual. What is deemed a legitimate self-regulated practice in one country may not necessarily be acceptable in another, even though both have a career judiciary. Attitudes towards judicial discretion, the status of the judiciary in society and the need to hold the judiciary publicly accountable for its decisions cannot be explained by referring to differences in judicial structure alone; reference

must also be made to differences in political, social and cultural context. In other words, it seems to be that the Thai sentencing system operates as it is not only because it operates within a career judiciary but also because it works in Thailand's political, social and cultural context.

Thai judges pursue both consistency of approach and outcome in sentencing. Judges in both lower courts and appellate courts adopt the same approach in sentencing. They comply with *Yee-Tok* of their own court. *Yee-Tok* of each court shares a similar form and principles. All *Yee-Tok* are based on the principle of proportionality and the seriousness of the offence is the main criterion for selecting an appropriate sentence. Moreover, the criteria for assessment of the seriousness of each offence are uniform, e.g. type and amount of drug for drug offences and type and amount of stolen property for theft. Consistency of outcome, however, is pursued mainly within each individual court. The *Yee-Tok* of different courts may recommend different sentences for similar offence because the sentence recommended by *Yee-Tok* is mostly a specific quantum of sentence, not a range of sentences. The extent of differences, however, seem to be minimal due to the fact that participants admitted they always compare the *Yee-Tok* of their court with those of neighbouring courts and the appellate courts which have jurisdiction over their court.

The value of accountability is to guarantee that any exercise of state power must be subject to some limits. It relates to both the ideals of the rule of law and democracy. In the context of sentencing, accountability means a formal process for justifying sentencing decisions (Hutton, 2013b:99). The main form of accountability in sentencing is legal accountability: sentencing decision-making based on legal rules which are predictable and accessible. In Thailand, judges are held accountable to legal rules in the sense that they must sentence within a statutory range. Yet the important legal rule of sentencing – a rule on how to select sentence – is absent from the statute. Besides the loose legal rules, Thai judges are also accountable to *Yee-Tok*, judicial self-imposed rules which are confidential to the public and other stakeholders. These rules bind judges in the same way as legal rules. The system of sentencing accountability in Thailand can be characterized as mainly professional accountability in which power is controlled by peers on the basis of their knowledge

and expertise (Piana, 2010a:30). What seems to be lacking in Thailand's mechanisms for ensuring sentencing accountability is a mechanism for public or democratic accountability where the public and other stakeholders can check if judges follow the rules, demand that the judiciary observe their self-imposed rules, criticize the content of the rules or even participate in formulating the rules. Nevertheless, these missing elements are not perceived by participants as problematic and illegitimate.

The Thai judiciary commits itself to the rule of law but does not hesitate to take the role of rule-maker when the legal rules of sentencing are absent. The practice of making sentencing rules seems to be at odds with the expected role of the judiciary in civil law countries; but it cannot ensure uniformity and coherence in the system, which is the main task of the judiciary in a career judiciary, without formulating some rules. The Thai judiciary sidesteps the problem by treating rules it creates as non-legal. This thesis suggests that, at least from the point of view of the power-holder, the present system is perceived as legitimate. Future research is needed to address the question of the perception of the audience of the legitimacy of the existing practice.

The political, social and cultural context of Thailand are changing, but without a clear trajectory. Thailand's democratic regression in the last decade and the continuing practice of the Thai judiciary in recognizing both democratic and non-democratic statutes as law seem to suggest a decoupling between the rule of law and democracy in contemporary Thailand. While it is widely accepted that the rule of law and democracy are separate political ideals, each supports the other in the development of liberal democracies. Western countries enjoy the luxury of both ideals, so Western sentencing scholars take these two ideals for granted when evaluating sentencing policy and practices of the jurisdictions. This thesis suggests that a more contextual approach may be required to understand the sentencing practice in other regions of the world.

Having outlined the proposed theory, it is time to demonstrate how this theory can be utilized to explain three characteristics of Thai sentencing culture: conformity in sentencing decision-making, the tendency towards frequent use of imprisonment and the lack of judicially perceived demand for public accountability in sentencing.

Explaining Conformity in Sentencing Decision-Making

1. Judicial Structure

Thai judges are relatively young and inexperienced. They enter the judiciary early in life upon graduation from university and the bar with the aim of continuing their judicial career for 30 to 40 years. Their progress up the career ladder depends on their ability to meet the expectations of the organisation. In other words, within a career judiciary, there is a built-in mechanism for ensuring conformity to expected judicial behaviour and uniformity of judicial decisions. Each judge is held accountable to a more senior judge within the judicial hierarchy. As a result, accountability of judicial decisions is achieved at the expense of the personal independence of each judge.

Through promotion, rotation and sanction, countries with a career judiciary have numerous ways to incentivize judges to toe the judiciary's line and discipline those who step out of line. As discussed earlier, the self-regulation of sentencing discretion seems to be a natural procedure in this type of judicial structure. Although a review of literature from civil law countries does not reveal English or American style sentencing guidelines formulated by the initiatives of politicians, the existence of self-formulated judicial or prosecutorial sentencing guidelines are common in Germany, the Netherlands and Japan.

The enforcement of self-regulating guidelines like *Yee-Tok* is ensured by the centralized style of judicial administration commonly found in civil law countries. The system of appeal against sentence is long established and commonly used in these countries. Therefore, local variations must be kept to a very limited scope.

The existence of a local *Yee-Tok* in each court of first instance appears to be at odds with the notion of centralized control to ensure uniformity. On closer inspection, however, differences in the details of local *Yee-Tok* seem to be minimal since all share common structures and logic. Moreover, the fact that Courts of Appeal have their own *Yee-Tok* and apply them to cases to amend the sentences of the lower courts implies that the sentences imposed are uniform to a certain degree. Besides, the majority of cases are narcotics cases, in which appeals can be reviewed

only by the central Court of Appeal in Bangkok. This means sentencing in narcotics cases is subject to the *Yee-Tok* of the central Court of Appeal when an appeal against a sentence is filed, even though each lower court has its own *Yee-Tok*. As discussed in earlier chapters, the appearance of local variations within the Thai sentencing system does not undermine the central authority of the judiciary, but allows each court and judge to claim and feel their independence.

2. Thailand's Political, Social and Cultural Context

Conformity is not only an important value within the Thai judiciary but also in Thai society. Thai culture can be characterized as collectivist as opposed to individualist. Respect of seniority and deference to authority are important values instilled by all social institutions. Thailand's political instability and the frequent military coups also facilitate the culture of deference and conformity since a democratic culture that values individual rights and differences in opinion has not yet been consolidated.

The frequent military coups may also have had some effect on the structure of the judiciary and the limited scope of creative judges to challenge the established norms and practices within the judiciary. To begin with, in the heyday of Thai democracy, the 1997 constitution (the so-called 'People's Constitution') stated that the Judicial Commission, the only entity that can appoint, promote, rotate and discipline Thai judges, was to consist of 12 members elected by judges. At that time, each judge could elect 12 members: 4 from the Supreme Court, the appellate courts and the courts of first instance respectively. To be elected, the candidates needed votes from lower court judges who form the majority of the organisation. This was the first time that democratic values and processes were injected into the Thai judiciary. Senior judges did not seem to like the idea of democracy within the judiciary since it undermined the principle of seniority and they felt that senior judges must have more say and control in the organisation. They succeeded in gaining more control in the aftermath of the 2006 coup. The 1997 constitution was abolished and the 2007 edition stated that, out of the 12 members in the Judicial Commission, judges from courts of first instance could elect only 2 members from their peers. The 2000 Act on Judicial Service of the Court of Justice was also amended in early 2008 to allow the appointment of the Chief Judge of the courts of first instance and the Chief Justice of

the regions from higher courts judges. The amendment in effect has led to a situation where the 2 elected representatives of the lower court judges are not exactly their peers since they are senior judges who are appointed to be administrators of a lower court. The number of representatives of the Supreme Court was increased from 4 to 6, but they are now elected by only their peers in the Supreme Court and do not have to rely on the votes of lower court judges. Moreover, canvassing for votes in an election for both the Judicial Commission and Judicial Administration Commission has been banned since early 2008 and doing so is deemed by the statute as grave judicial misconduct. The candidates can only introduce their academic and professional background and their vision for the judiciary, if any, via the website of the judiciary. It appears that the Thai judiciary does not want its organisation to be tainted by electoral politics. Hence, the opportunities for a junior and creative judge to have any significant role in judicial administration or challenging established judicial norms and practices are quite limited.

For most Thai judges who are not from wealthy or noble families, being appointed as a judge elevates them to a higher position in the social hierarchy. The starting salary of a trainee judge is twice as much as that of other civil servants with equivalent age and academic qualifications and their salary will be roughly equivalent to that of an executive in other public agencies after only 10 years on the bench. Furthermore, due to the beliefs that judges adhering to high moral standards and because they are representatives of the King, even a junior judge is treated by the public and other civil servants as a very senior official. Apart from having a higher economic and social status, Thai judges receive higher honours than other civil servants. Thailand has an honours system as in the UK where all public servants are awarded honours for their service to the country on the birthday of the King. Which honours are awarded is subject to the regulations of the office of the Prime Minister. According to the regulations, judges receive the highest level of honours almost two times faster than other public servants of the same age[109]. To illustrate, most Thai judges, except those who start their judicial career later than the average, are awarded

[109] Regulations of the Prime Minister's Office on the nomination for the award of the honours of the most exalted order of the white elephant and the most noble order of the crown of Thailand 1993 (As amended)

the Knight Grand Cross (First Class) of the Most Noble Order of the Crown of Thailand in their late thirties, while other public servants have to wait until their late forties or fifties to receive a similar level of honour. It is noteworthy that if a judge is dismissed from office, all honours awarded to them will be taken away. Besides, it has become a common practice in the last couple of years for the Thai news media to report the revocation of the honours of judges and other public servants.[110] Since judicial service in Thailand's context is not only a job but a status, losing it will have a devastating impact on both judges and their families. The high economic and social status that comes with appointment to the judiciary may explain why Thai judges tend to be reluctant to be creative and prefer to conform to the established norms and practices.

Explaining the Tendency Towards Frequent Use of Incarceration

1. *Judicial Structure*

Frase (2008:365) proposes that in a career/bureaucratic judiciary such as that in European civil law countries, there is a preference for maintaining or lowering sentencing severity. Missing from his analysis is an explanation of why the judiciary in such jurisdictions has to maintain the level of sentencing severity. In other words, although they may be more insulated from politically-driven pressure to increase sentencing severity than in a system where judges are elected or politically selected (Tonry, 2007), why do they care about maintaining the status quo? From my experience as a Thai sentencer and the findings of this thesis, Thai judges seem to be indifferent to the overall sentencing severity of the whole system. They have nothing to gain either in increasing, reducing or maintaining the current level.

Both Tonry (2007) and Frase (2008) seem to assume that judges in civil law countries have a professional ethos of penal reduction. This may be empirically true in western civil law countries, but again this ethos does not seem to follow naturally from the judicial structure. In a similar vein, it may be assumed that the shared

[110] See for example http://www.isranews.org/isranews-news/item/34836-ratchakitja_889.html last accessed 7/10/15

feeling of Finnish judges that high prison rates are a disgrace contributed to the success of Finland in reducing its prison population (Lappi-Seppala 2004, 2007), but it might not be the case that this belief is shared among civil law judges around the world.

It appears that the judicial structure of a career judiciary cannot in itself shed light on the issue of the more or less frequent use of imprisonment. Much depends on the default-setting of the central administration of the judiciary. If they see imprisonment as a default setting, it is more likely for the sentencing system to go in that direction. As I discussed earlier, civil law countries have a built-in mechanism to incentivize uniformity, but if the default-setting and shared belief is the limited use of custody, the opposite trend may be found.

2. Thailand's Political, Social and Cultural Context

In chapter 3, I pointed out the limitations of Western theories of penal change in explaining the rise of the prison population of Thailand. After the fieldwork, I found that the mechanism of *Yee-Tok* and its surrounding conventions may also have resulted in the rising prison population of Thailand. The Thai sentencing procedural arrangement appears to guard against overly lenient sentences rather than overly harsh sentences. Imposing more lenient sentences than those recommended by *Yee-Tok* can be perceived as a sign of corrupt practice carried out to help the defendant. Downward departure seems to attract more severe disciplinary sanctions than upward departure. The pursuit of consistency in sentencing and the fear of being accused of corruption make Thai judges reluctant to use custodial sentences sparingly. *Yee-Tok* usually recommends custodial sentences and most judges comply with it. To impose a non-custodial sentence is considered a departure which requires consultation with the Chief Judge. Besides, Thai judges take the established practice seriously when it comes to departure from *Yee-Tok*. Judges in the lower courts may avoid the burden of consultation and peer pressure simply by imposing custodial sentences in compliance with *Yee-Tok*. Although those decisions are subject to appeal to the appellate courts on the grounds that they are too harsh, the appellate judges are also bound by their *Yee-Tok* to not impose overly lenient sentences. They are subject to peer pressure and the requirement of consultation the same as lower courts' judges.

Statistics on the pervasive use of imprisonment by Thai courts in the last decade[111] seems to suggest that the use of custody cannot be reduced without a substantive change in the details of *Yee-Tok*. This default setting towards the use of custody as a sanction could be one driver of punitiveness in Thailand's sentencing system.

In order to understanding this default setting, a discussion on the sources of the fear of being accused of corruption is inevitable. Such fear, I propose, could possibly come from 4 sources:

a. Judges' insecurity over their work due to political instability
b. A low level of public trust in the judiciary
c. The characteristics of Thai society
d. The judicial duty to demonstrate 'moral integrity'.

a) Does working in a political environment where military coups can occur at any time make Thai judges feel insecure?

Although Thailand has had 18 military coups in the last 83 years, the military regime has never directly interfered with the day to day work of the judiciary. Thai judges have never been fired because of ruling against the expectations of the regime. Besides, the coups have never 'packed' the court in order to ensure a favourable ruling. Unlike other civil servants who were reshuffled and transferred to other departments by the power of the military regime, as demonstrated by 3 changes in the Director General of the Department of Probation within 1 year after the 2014 coup, Thai judges have a security of tenure and can only be transferred to another court with the approval of the Judicial Commission. Compared to the situation of the judiciary in some countries after military coups where some judges were dismissed or even killed and the jurisdictions of the ordinary courts were sidestepped or curtailed (Ginburg and Mustafa, 2008), it could be argued that the relationship between the military and the judiciary in Thailand is relatively amicable. It is less likely that having a military government running the country will make Thai judges feel insecure in their jobs.

[111] See figure B1 in Appendix B.

The Thai judiciary has never ruled that staging a coup is illegal and unconstitutional but has given legal status to the decrees of the coup leaders. By doing so, the Thai court struck down some decrees which were in violation of some fundamental principles of the rule of law, such as those that created retrospective criminal offences[112]. The Thai judiciary has never openly challenged the military regime and seems to be willing to cooperate by accepting appointment to work in the National Legislative Assembly, the Cabinet or governmental departments. Nevertheless, some Thai military coups did indirectly interfere with the work of the ordinary courts either by making them work as a military court to bypass an appeal process, or removing their jurisdiction in cases concerning national security.

It is noteworthy that the decision of the Thai judiciary to go along with the military regimes is not unique: such an approach seems to be common among judiciaries across the civil law-common law divide (see e.g. Ginburg and Moustafa, 2008). All military regimes in the age of globalization need the judicial system to remain functional in order to attract foreign investors. They seldom govern through repressive power and do not bypass the judicial system altogether. It is also rare for the judiciary to express hostility towards the military coups, although a handful of judges in some countries did resign in the aftermath of the coups. However, the judiciaries in some countries may try to exert their power of judicial review over the work of the military governments, while some may decide to remain passive.

Shapiro (2008: 334-335) notes that the judiciary faces the legitimacy paradox in deciding whether or not to cooperate with the military regime. Most military coups justify their intervention by promising to bring more democracy to the country; thus, challenging the regime may undermine the legitimacy of the judiciary. Yet simply going along with the regime not only legitimates the regime but also undermines the public's trust in the judiciary.

I propose that there are many explanations for the alliance between the courts and the military in Thailand. First of all, both organisations have been vested with the same mission of building and modernizing the nation-state since the end of the 19th century (Wilson, 1962; Baker and Phongpaichit, 2014). The mentality of being part

[112] Decisions of the Supreme Court No. 1/ 1946 (B.E.2489), No.1136/1993 (B.E.2536)

of a ‘strong state’ with the preoccupation of the internal and external security of the country still lives on in both institutions to the present. Secondly, both institutions were developed before the arrival of democracy in Thailand. They are not used to the ideas of popular representative government and accountability. They share the belief that politics is a dirty game among politicians chasing power and consider themselves as above-politics or even anti-politics. For the Thai courts, challenging the military regime would violate their professional duty to remain apolitical. Thirdly, the Thai courts and the military share similar institutional values which prioritise loyalty, discipline and circumspection over independence, intelligence and audacity. Those who do not conform to organisational norms and practices will never be promoted in either institution. It is noteworthy that scholars who study the role of courts after coups in other civil law countries such as Chile (Hilbink, 2008) and Turkey (Shambayati, 2008) also arrive at similar conclusions on the institutional similarity between the military and the judiciary in civil law countries. Fourthly, the source of power of the Thai military and judiciary has no direct linkage to the Thai people. Their appointment and promotion are based on merit. Alternatively, they have consistently drawn their legitimacy from the institution of the monarchy. The military usually claims that they are soldiers of the King, while judges claim that they are representatives of the King. The alliance between the courts and the military may lead to a greater tolerance of each other’s work.

b) Lack of trust from the public and the high level of corruption within the judiciary

That Thai judges avoid being accused of corruption at all costs may have something to do with the lack of trust from the public, public perception towards corruption within the judiciary or the high level of corruption within the judiciary as portrayed by the news media. However, public opinion surveys consistently find the Thai judiciary to be the most trusted and perceived as the least corrupt public agency. The real extent of corruption within the Thai judiciary, as in other instituions, is hard to assess. Yet, the number of judges dismissed on the grounds of corruption is minimal, although the number has been increasing lately, as demonstrated in table 7.2.

Table 7.2: The number of Thai judges disciplined between 2012 and 2014

Type of sanction	2012	2013	2014
Expulsion[113]	3	1	3
Dismissal[114]	2	-	1
Discharge[115]	-	-	7
Suspension from promotion or salary increase[116]	2	2	5
Reprimand	1	6	7
Total Number	8	9	25

Source: Office of the Judicial Commission, Thailand

Even though some high-ranking judges were expelled and discharged in 2014 on the grounds of corruption – one of those expelled was a former Vice-President of the Supreme Court[117] –, the news did not seem to create much controversy in Thai society. Nevertheless, the fact that the number of judges being disciplined is increasing and the public know about it may trigger more fear of being accused of corruption within the Thai judiciary.

[113] This is the most severe disciplinary sanction reserved for the most serious disciplinary offences such as receiving bribes, committing a criminal offence and being sentenced to imprisonment, and failing to comply with the rules, regulations and customary practices of judicial service and ethics where such failure seriously damages the judicial service (Section 77 of the Act for the Judicial Service of the Court of Justice 2000). Those who are expelled or dismissed lose both their honours and pension.

[114] This sanction is used when there are some mitigating circumstances which justify a more lenient sanction than expulsion (Section 78).

[115] This sanction is used when there are some mitigating circumstances which justify a more lenient sanction than dismissal or in cases where there is no conclusive evidence to support an accusation of a serious offence, but it is deemed that the conduct of the accused judge is disgraceful and to allow him/her to remain in office may have adverse effects on the judicial service (Section 79). Judges who are discharged lose their honours but are still eligible to receive their pension.

[116] This sanction is for non-serious offences, but a review of the minutes of the meetings of the judicial commission from 2010 to 2014 as discussed in Appendix E. revealed that once a judge was disciplined by this sanction, it was more likely for them to be considered ineligible for promotion to Deputy Chief Judge or Chief Judge; positions of more prestige and higher earnings.

[117] http://www.thairath.co.th/content/442119 last accessed 7/10/15

c) The Characteristics of Thai Society

It is widely accepted by both Thai and international scholars that contemporary Thai society remains hierarchical. The basis of the social structure is the patron-client relationship (Neher, 1994a, 1994b). The mindset of the patron and the client is that of a hierarchical relationship wherein one person perceives himself or herself to have superior attributes while the other person would submit to the higher status of the person considered his or her patron. Thai society is built on personal relationships, not on principles or laws (Kulick and Wilson, 1992:33). Hierarchy, status, gratitude and personalism are the cement that holds society together. The Thai individual, trained to be a functioning member of society, learns early in life what rank they hold and how others are supposed to be treated according to their rank (Nimmanandh and Andrews, 2009:61).

Participants frequently referred to the patron-client system in Thai society to criticize the work of the police and prosecutors and to argue against the idea of making details of *Yee-Tok* publicly available. According to their view, the ordinary Thai people are trapped within a social structure based on this relationship and tend to disregard the law. If they see a way to avoid the effects of the law, including bribing officials, they will not hesitate to do it. Besides, other criminal justice practitioners tend to be corrupt since they cannot resist the effect of the patron-client system within Thai society.

Thai judges appear to regard themselves as a special breed of civil servants who can resist the temptation of corruption and the strong effect of the patron-client relationship in Thai society. Adhering to higher ethical standards is what makes them think that they are more trustworthy than other criminal justice practitioners, especially the police and prosecutors who tend to be tempted by corrupt motives. They claimed that they are supervising the work of other criminal justice agencies but strongly denied the need to have others monitoring their judicial work. For them, the existing mechanism of internal control within the judiciary is already effective.

The Thai news media usually report that rich offenders receive more lenient sentences than poor ones. The common tone of report is that rich offenders always

get non-custodial sentences even for causing death[118] and a victim cannot get justice unless rich offenders are imprisoned[119].

d) 'Honesty' as the Ultimate Value of the Thai Judiciary

Section 1 of the Thai Code of Judicial Conduct states that the essential duty of judges is to administer justice to parties with honesty, justness, legitimacy and in accordance with customary practice. Judges are trusted to explicitly express to the public their strict and complete adherence to these principles by exercising their judicial independence and respecting the integrity of the judiciary.

Since the beginning of their judicial career, Thai judges have learnt that an ideal judge is an honest judge not a creative one. Although all candidates must pass tough judicial examinations, those who succeed still have to be rigorously vetted. The names of the successful candidates are published in newspapers and court websites and time is allowed for the general public to send information on the behaviour of those candidates. Once appointed, judges are expected to maintain an image of honesty throughout their career. Any doubt over judicial integrity, even without conclusive evidence of corruption, is sufficient for the dismissal of a Thai judge from office.

It is obvious from the Code of Judicial Conduct that honesty is not only a personal trait that a judge must have, but a good Thai judge must maintain an image of being honest. Being honest is not enough; they must act in a way that proves that they are indeed honest. Thus, a constant fear of being accused of corruption is one way to

[118] See for example the case of causing death by negligent driving in 2010 resulting in the death of 9 people where the defendant, who was from a wealthy family, received suspended imprisonment from both the lower and appellate courts (http://www.thairath.co.th/content/498224 last accessed 1/12/15)

In Court Green, Court Blue and Court Brown's focus groups, participants claimed that the sentence imposed in the case was justified as the defendant was only 17 years old and the news media misunderstood in comparing sentences imposed for juveniles with those of adult offenders.

[119] See for example another causing death by driving case involving a wealthy defendant who suffered from a mild form of mental illness where the Supreme Court amended the suspended sentence imposed by the Court of Appeal and replaced it with 2 years unsuspended imprisonment. The media reported the opinion of the deceased's relative claiming that justice had finally been done (http://www.dailynews.co.th/regional/348780 last accessed 1/12/15)

ensure the maintenance of an image of honesty and being free from corruption. In other words, what distinguishes a good judge from a bad one is this fear.

The Thai judiciary takes both the actuality and the appearance of corruption equally seriously. Besides the Code of Judicial Conduct, numerous judicial norms have been developed to guarantee the image of honesty. To illustrate, Thai lower court judges are prohibited from working in their hometowns and the hometowns of their partners. Moreover, they cannot work in a single court for more than 5 years in order to not develop too much familiarity with the locals.

Explaining the Lack of Judicially Perceived Demand for Public Accountability in Sentencing

1. Judicial Structure

In a career or bureaucratic judiciary, internal auditing and professional accountability are the norm. They prefer rules over discretion, but self-imposed rules tend to be confidential and not publicly available. In Japan and Germany, scholars know of the existence of self-imposed rules for sentencing and praise its role in ensuring consistency, but do not criticize its confidentiality.

That the confidentiality of self-imposed sentencing rules rarely triggers controversy may be due to the fact that most civil law countries have separate constitutional and administrative courts to deal with cases concerning the work of the legislative and executive branches of the government, leaving ordinary courts to deal with civil and criminal cases. In this fragmented or parallel judicial structure, accountability of the judiciary to the public is only required for the work of the court that interferes with the political domain. The work of the ordinary court is not political and therefore internal/professional accountability should suffice.

The sentencing judges in this type of judicial structure may tend to downplay the importance of injecting more public accountability into sentencing, as Thai judges saw no benefit of making the details of *Yee-Tok* publicly available and accessible.

2. *Thailand's Political, Social and Cultural Context*

Thailand's political context of transitional democracy with frequent military coups, its social context of a hierarchical society with a patron-client relationship under Theravada Buddhism's worldview and its cultural context of deference to authority give rise to a distinctive form of judicial legitimacy which does not view sentencing discretion as inherently dangerous and downplays the need for public accountability of judges. According to traditional Thai beliefs, the righteous behaviour of the leaders was a precondition of their possession of power. That meant that those who had power were thought to be good and deserving of it (Aphornsuvan, 2000:28). Thai governmental culture prefers internal auditing as the main mechanism of accountability (Bowornwathana, 2008). The frequent military coups also hinder the consolidation of the ideas of democratic representation and accountability within Thai society and the judiciary.

In the contexts of western jurisdictions, the rule of law may require a sentencing system with a clear and coherent sentencing framework, since western legal actors are supposed to draw legitimacy mainly from legal rules and must be accountable to them. The lack and invisibility of rules in Thailand seem to be the worst nightmare of those who advocate the western conception of the rule of law. The findings suggest that the opposite may be true for Thailand. The lack of a legal framework for sentencing and the confidentiality of *Yee-Tok* are not perceived by those within the judiciary as illegitimate since the Thai judiciary can draw legitimacy from traditional sources. The focus of control is not on the level of decision making, but on the personal morality of the decision-maker. If the morality and ethical standards of judges can be ensured, there is no need to have clear and transparent rules which outsiders can access and use as a benchmark to assess judicial decisions. Public confidence in the sentencing system is not guaranteed by the presence and transparency of legal rules but by the existence of disciplinary mechanisms to ensure that sentencers always comply with judicial norms. In Thailand's context, the law reigns supreme not because it is made by an elected parliament or is clear and predictable, but because it is enacted and enforced by morally good people.

Through the system to ensure the high ethical standards of judges, a distinctive form of consistency and accountability in sentencing is pursued within the Thai judiciary.

Apart from the aforementioned battle over how judicial members of the Judicial Commission should be elected, the changes in the appointment of non-judicial members also demonstrate the attitude of the Thai judiciary towards democratic accountability. The 1997 constitution stated that 2 non-judicial members of the Judicial Commission must be appointed by the Senate, which was fully elected by the people. The 2007 constitution changed nothing on the surface, but because it changed the structure of the Senate from a fully-elected chamber to a half-elected, half-appointed one, it undermined the idea of having a representative of the people within the judiciary. After the 2014 military coup abolished the 2007 constitution and promulgated an interim constitution while drafting the new one, the term of the non-judicial members expired and the positions were filled by candidates selected by the appointed National Legislative Assembly. It is clear that, at the moment, having non-judicial members in the Judicial Commission does not represent democratic accountability at all.

The Constitutional Drafting Committee published its first draft in June 2015 which included a provision expanding the number of non-judicial members of the Judicial Commission from 2 to one-third. One former Justice of the Supreme Court, who are now a privy councilor, wrote an open letter to the Prime Minister (the same general who staged the coup in 2014) arguing that increasing the number of non-judicial members will undermine judicial independence[120]. Weeks later, the same former Justice wrote another letter to the Prime Minister claiming that even having one non-judicial member in the Judicial Commission is unacceptable[121]. In addition, an open letter signed by more than 2,000 judges of all levels was sent to the Chairman of the Constitutional Drafting Committee pointing out their concerns over the change in the

[120] http://www.isranews.org/isranews-article/item/39559-letter_39559.html last accessed 7/10/15
[121] http://www.isranews.org/isranews-article/item/39758-court_39758.html last accessed 7/10/15

number of non-judicial members of the Judicial Commission.[122] Not surprisingly, the Constitutional Drafting Committee removed the provision on the composition of the Judicial Commission from the final draft[123]. Although this draft constitution, later dubbed by international press as the 'fake constitution'[124], was not approved by the National Reform Council and Thailand is again in the process of drafting its dream constitution, this phenomenon exemplified the influence of the Thai judiciary in preventing the implementation of a policy that it perceives as a threat to its conception of 'judicial independence'.

SECTION 3: INTERNATIONAL IMPLICATIONS FROM THE STUDY OF THAI SENTENCING

Considering the discussion on Thailand's political, social and cultural context throughout this thesis, it is tempting to conclude that Thai sentencing has nothing in common with that of other countries, especially those in the west. Differences aside, I argue that an attempt to understand Thai sentencing can contribute to a richer understanding of the sentencing decision-making process and the judiciary. The findings support the argument of legal realists that legal decision-making is not only influenced by law but also by other normative orders and even the emotions of legal decision-makers, and that an absence of legal rules to govern legal decision-making may not render judges' decisions illegitimate in the eyes of the audience. Furthermore, to perceive a judge as mainly a powerful figure may not acknowledge the significant fact that they may be powerless within their organisation. Moreover, it appears to be the case that the causal relationship between the independent judiciary, the rule of law and democracy needs to be reexamined as Shapiro (2008) suggests. Finally, the literature on the politics of punishment may need to go beyond the politicians' manipulation of the public fear of crime and seek a description for the relationship between politics and punishment in non-democracies, as well as

[122] http://www.manager.co.th/Daily/ViewNews.aspx?NewsID=9580000078833 last accessed 7/10/15
[123] http://www.tnamcot.com/content/231789 last accessed 7/10/15
[124] http://www.eureporter.co/world/2015/09/07/eu-called-on-to-take-stringent-action-over-fake-thailand-constitution last accessed 7/10/15

discussing fear on the part of those who have the power to punish as its focus of analysis. I shall discuss each issue respectively.

Law is only one among other normative orders that influence legal decision-making

The rule of law requires that legal decision-makers must be accountable to laws which are clear, general and predictable. In the context of sentencing, a clear set of principles is required to govern sentencing decision-making. Without legal rules and principles, sentencing decision-making is nothing but arbitrary. In other words, the rule of law seems to suggest the impossibility of pursuing consistency and accountability in sentencing without legal rules to govern the task.

By using Thailand as a case study, the empirical evidence of the thesis supports the argument that consistency and accountability in sentencing can be achieved without the presence of comprehensive legal rules (e.g. Tata and Hutton, 1998; O'Malley, 2013). Despite the absence of legal rules on how to select a sentence except the statutory minimum and maximum sentences, Thailand's sentencing decision-making is not arbitrary but rule-governed, consistent and predictable. The sentencing rules on how to hold judges accountable for their sentencing decisions are nowhere to be found in the Thai statute. Yet every Thai sentencer is held accountable to the Chief Judge of their court in making sentencing decisions. Their power to sentence is always limited by *Yee-Tok* and the social conventions which they have been socialised into. These rules perform the same task as legal rules in the pursuit of consistency and accountability in sentencing.

The hybrid legal nature of *Yee-Tok* should be of interest to future legal scholars. As discussed in Chapter 6, on the one hand *Yee-Tok* shares similar characteristics to legal rules in that it is written, generally applicable, and failure to apply it is sanctioned; yet, on the other hand, it lacks some key elements of legal rules such as the judiciary not being authorized by law to formulate it, the parties of the case or the public being unable to demand the court to apply it to the case, and its application not being assessed by the higher court. Its true legal status is largely dependent on the

judiciary who creates and owns it: when it comes to monitoring compliance with *Yee-Tok*, they treat it as law, but when it comes to the question of making its details publicly accessible they treat it as only a non-legal decision-making tool.

The existence of *Yee-Tok* points out the difficulty in drawing a line between rule and discretion. From the perspective of the Penal Code, *Yee-Tok* limits or structures sentencing discretion granted by the Code but, as discussed earlier, lower court judges, their Chief Judges, and even the senior judges in the Judicial Commission treat it as a rule that must be applied, and failure to do so must be sanctioned. Hence, we cannot make the claim that a sentencer in any jurisdiction has more or less discretion unless we know all normative orders within the social settings of sentencing in each jurisdiction.

Thailand's sentencing practice illustrates that Thai judges, as legal decision-makers, are not only socialised into law but into other normative orders such as judicial culture and norms. The judicial structure of a career judiciary requires Thai judges to learn and observe judicial customs in order to ensure the uniformity and coherence of legal decision-making. Civil law countries adopt a bureaucratic structure of the judiciary to guarantee judicial independence and the rule of law (Piana, 2010a:20-21). As a result, in a career judiciary, the law needs authority from other normative orders to be sovereign.

Acknowledging the plurality of authority over legal decision-making suggests that understanding legal decision-making requires more than the understanding of legal rules. Moreover, consistency seems to be an inherent aim of legal decision-making in a career judiciary with or without the presence of detailed legal rules (Damaška, 1986). Besides, legal decision-makers are also held accountable to non-legal rules. In other words, legal rule in itself cannot make legal decision-making more consistent and accountable, since consistency and accountability can be achieved without legal rule. Scholars from civil law countries have noted that even in countries with detailed statutory sentencing principles, such as Japan and Germany, consistency of sentencing is achieved not because of legal rules but because of non-legal rules and conventions enforced by the judiciary (e.g. Aber, 2009; Albrecht, 2013).

To observe how other normative orders influence legal decision-making may be difficult in a jurisdiction with detailed legal rules, since there may be difficulty in distinguishing between the influence of legal and non-legal rules. A study of Thai sentencing offered a great opportunity to explore the influence of non-legal authorities on legal decision-making, since legal rules on sentencing apart from statutory minimum and maximum sentences are largely absent. This study suggests that international sentencing scholarship should seek to identify and understand non-legal authority which influences legal decision-making in their jurisdictions.

Legal decision-making could be influenced by the emotions of legal actors

Lawyers tend to believe that law is reason free from emotion (Bornstein and Weiner 2010:2). The decision-making model derived from this belief is one of rationality based on cost-benefit analysis. Acknowledging the role of emotions in legal decision-making seems to be at odds with the ideal of the rule of law. How can the law reign supreme if legal actors are not faithful to only the letter of the law? For the law to rule, legal decision-makers must set their emotions aside and behave like a dispassionate actor (p.5). Reason is the mechanism by which emotions, interests, and force are supposedly kept in check (Schlag, 1998:20). The claim that a human-being is a perfect decision maker who makes decisions based on a completely rational analysis of a situation has been rejected by psychologists (Sutherland, 1992), behavioural economists (e.g. Ariely, 2008, 2010) and neuroscientist (Berthoz , 2006). The conventional view of legal scholar, however, remains that emotion is corruptive and should be avoided (Blumenthal, 2010: 185). Yet the orthodox view has been challenged by the growing body of empirical research which finds that the legal system does recognize the role of emotions in legal decision-making (p.186).

This thesis added to the literature by revealing that emotions play a crucial role in the sentencing decision-making process of Thai judges. To begin with, as a judge in a career judiciary, Thai judges seem to take their career progress into account in making any judicial decision. They fear behaving differently from their peers or deviating from organisational norms, and comply with *Yee-Tok* in most cases. One judge imposed a custodial sentence for fear of being criticized by his colleagues,

despite the high likelihood that the appellate court would impose a non-custodial sentence on appeal. Most participating provincial courts' judges did not commission a pre-sentence report in narcotics cases since 'nobody had done it before'. They were aware of being monitored by the Chief Judge. The fear of behaving differently from their peers was also evident from the responses of Chief Judges and appellate judges who participated in the study.

The apparent fear for Thai sentencers is the fear of being accused of corruption. They admitted that the patron-client relationship is an important characteristic of Thai society. They felt that the accused may do anything to avoid punishment, including bribing criminal justice officials. The more serious the charge, the more likely the offender may try to bribe officials. Thai judges' response was to maintain impartiality by not showing sympathy or leniency[125] to the defendants unless the defendants help themselves by filing a plea in mitigation. They feared that if they commissioned a pre-sentence report without the initiative from the defendant, the Chief Judge and their colleagues would accuse them of having a corrupt motive.

The findings revealed that the fear of behaving differently from their peers and the fear of being accused of corruption made Thai judges reluctant to commission a pre-sentence report in narcotics cases and reluctant to use custodial sentences sparingly, especially for narcotics offences which form the majority of criminal cases in Thai courts[126]. To overcome both fears, Thai judges stick to *Yee-Tok* and impose custodial sentences as the norm, which added to the alternative explanation of the rising prison population in Thailand discussed in Appendix B. Besides fear, which could be characterised as a main emotion of Thai sentencers, this research also found other emotions at play in the sentencing decision-making process: frustration, respect, distrust, despair, anger and worry, to name but a few.

First of all, participating lower courts' judges were frustrated that their working conditions, especially at *Wain-Chee*, barred them from achieving the ideal of

[125] Thus, mercy and compassion seem to have a very limited role in Thailand's sentencing decision-making process as the system makes judges choose between their career progress and the fate of the defendants.

[126] According to the 2014 official statistics, almost 50 percent of criminal cases in Thai courts were narcotics cases.

individualisation of punishment. Their coping strategy was to blame the defendant for their failure to achieve this ideal. Participants claimed that it is the duty of the defendant, not theirs, to provide information useful in crafting a sentence. Another frustration was with the performance of probation officers in writing pre-sentence reports, which led some judges to decide not to commission a report even in typical cases. A parallel can be found in the case of English judges. Darbyshire (2011:428) found that in one Crown Court, the circuit presiding judge sent a memo asking judges not to request pre-sentence reports unless necessary after the probation officer failed to submit a report in time because of staff shortages. It appears that Thai judges who have previously worked as civil servants seem to feel less frustrated with the existing practice than those who previously worked as private lawyers. Nevertheless, both groups admitted that they make sentencing decisions in the same way to overcome both of the fears already discussed.

Secondly, respect and trust play a significant part in the sentencing decision-making process, sometimes even trumping the law. The study revealed that the decision-making process within a panel of two judges in the lower courts was influenced by respect for the opinion of the responsible judge. Even though the applicable law states that the opinion which is most beneficial to the offender must prevail, the outcome in practice is determined by respect, not law. The respect for seniority that was evident in the way participants behaved in the focus groups appears to suggest that it might play some part in the sentencing decision-making process as well. The respect for the Chief Judge as the most senior judge of the court suggests that the whole decision-making process may not be determined purely by rational analysis of the facts of the case.

Thirdly, Thai judges seem to distrust other stakeholders in the sentencing process. They felt that they cannot trust the information that the defendant provides, but must ask the probation officer to verify it. They also accused police officers and prosecutors of corrupt practice. They discredited comments by the news media by claiming that they are ignorant of the actual decision-making process. More importantly, they did not trust the behaviour of those involved in the process, apart from themselves, if the details of *Yee-Tok* are made accessible.

Fourthly, a sense of despair was obvious in the focus group whose members consisted of judges with more than 10 years' experience. One judge described judges as those who live downstream and must accept the water as it is. Participants in Court Blue described certain facts of Thai sentencing: that *Wain-Chee* is like a sweatshop and there is no escape except moving to another factory (court); that an innocent defendant may plead guilty; that judges are forced to apply unjust laws and that rich defendants are in a better position than poor ones who rely on court-appointed lawyers. Since they accepted the reality, they saw no hope in improving the process or doing things differently.

Fifthly, it seems to be the case that some judges expect the defendant to behave in a particular way during the process. Failing to meet such expectations can make some judges angry and lead them to impose harsher sentences than should be given. To illustrate, Judge F admitted imposing harsher sentences for defendants who disrespect judges or mistreat the victim. Judge G also expected defendants in cases of causing death by negligent driving to use their own money to compensate the victims' families, regardless of how much they are compensated by the insurance company. Any postponements in compensation or unnecessary adjournments of the case caused by the defendants could lead to harsher sentences than in other similar cases.

Lastly, Thai judges, especially less senior ones, seem to worry about making sentencing decisions. New judges do not know how to sentence and must overcome this worry by simply following established practice. In not-guilty plea cases, Thai judges are both fact-finders and sentencers. They may not be sure about the guilt of the offender, but must still select a sentence. Such diffidence might affect the sentence they impose.

To acknowledge the role that emotions play in legal decision-making is to accept the fact that a judge, a legal and sentencing decision-maker, is a human-being, not a machine. It problematises the notion of impartial judges and the claim that 'justice is blind'. Yet, the findings suggest that decision-making influenced by emotions is not arbitrary but predictable. An attempt to regulate legal decision-making needs to take

the emotions of decision-makers into account rather than regarding them as inevitably corruptive.

The final observation is that the line between reason and emotion may not be easily drawn. To illustrate, the fear of being accused of corruption can be interpreted as a rational analysis of cost-benefit of the decision, not the influence of emotion. Therefore, reason and emotion is another 'ideal-type' that researchers should handle with care.

Functions of legal rules in legal decision-making

Three functions of legal rules are discussed in the literature on legal decision-making: instrumental, expressive and legitimating functions (e.g. Hawkins, 1992; 2003). Legal scholars acknowledge the instrumental function of legal rules. They tend to assume that legal rules always influence legal decision-making. That may explain their fear over the lack of legal rules in place to govern some legal decisions. They also admit the function of legal rules in legitimating the legal process (Schlag, 1998). The expressive function of rules in presenting legal decision-making to the audience is also recognized by some legal scholars (e.g. Hawkins, 2003; Albrecht, 2013).

This thesis adds empirical evidence to the debate on the functions of legal rules in legal decision-making by firstly illustrating that some functions which legal rules aim to achieve, such as consistency and accountability, can be achieved through non-legal rules and conventions as well. Thailand's pursuit of consistency and accountability in sentencing in the absence of legal rules could challenge the supremacy of law in legal decision-making. Secondly, the findings suggest that the central role of legal rules in the legal decision-making process may be undermined by the fact that not only reason but also the emotions of legal actors could influence legal decision-making. Finally, legal decision-making may not draw legitimacy solely from the legal rules. As in the case of Thailand's sentencing decision-making process, the lack of legal rules on sentencing does not result in a crisis of legitimacy for the Thai judiciary.

Are judges the powerful, the powerless or both?

Criminological research seems to draw a sharp contrast between researching the powerful and the powerless. The former is used to describe criminal justice practitioners while the latter is widely accepted to include those who are labeled as 'deviants' (Lumsden and Winter, 2014). Judicial and sentencing research also tends to portray judges as the powerful who obsess over the preservation of their ownership of sentencing policy (Ashworth, 1995, 2003) and are usually criticized as being out of touch (Darbyshire, 2011). This thesis argues that the sense of the power or powerlessness of judges is fluid. Any power is contextual and never absolute. Judges can be powerful in some senses but powerless in others. Also, the same judicial act can be perceived by different people, including judges themselves, as both an act of power or of powerlessness.

A Thai sentencer seems to have unrestrained sentencing power vested by criminal statute and can exercise that power to imprison, fine or even end the life of others if mandated by the law. They can decide whether they need to commission a pre-sentence report or to suspend an imprisonment term. Thus, in this sense they are a very powerful figure in society whose powers should be tamed and whose accounts should be strongly criticized. Yet, as the findings reveal, their powers are not absolute, but are subject to higher powers within the judicial organisation. Moreover, as a judiciary within a transitional democracy, the Thai judiciary must also be subject to the power of the governments of the day, be they democratic or non-democratic ones. When it comes to making sentencing decisions, judges of the court of first instance seem to be almost powerless. Their decisions on selecting appropriate sentences, commissioning pre-sentence reports and suspending or not suspending an imprisonment term are restrained by *Yee-Tok* of their courts, peer pressure and judicial conventions; and are monitored, directly or indirectly, by Chief Judges, their colleagues and the Judicial Commission. If they choose to step out of line, they will be disciplined.

My point is that judges everywhere work in an organisation and must be subject to a certain level of organisational control. The level of this control may vary across the divide in judicial structure. Judicial researchers should bear in mind the fact that

judges can be perceived as powerless in their own organisation. Following from this realization is a more empathetic approach in interpreting and analyzing research data. The skeptical lens of previous researchers may provide some valuable insights into the judicial world, but such insights remain partial. As a way of seeing is always also a way of not seeing, we, the researchers, should strive to find new ways to view the phenomena of interest.

Judicial Independence, the Rule of Law and Democracy

The conventional belief of promoters of the rule of law such as the World Bank and the IMF is that the rule of law is the foundation of democracy and the independent judiciary is a prerequisite for the entrenched rule of law. Therefore, as the judiciary becomes more independent, it is expected that a country will become more democratic. However, studies on the role of the courts in authoritarian or semi-democratic regimes have found that expanding the role and independence of the court may not lead to greater democracy in the country (Shapiro, 2008; Ginsburg and Mustafa, 2008).

A study on Thai sentencing adds to the literature on comparative courts and politics. First of all, it illustrates that conceptions of the rule of law, judicial independence and other legal and political concepts are not universal. When the concepts are transferred across jurisdictions, new meanings and understandings will be added to the concept. Besides, to guarantee acceptance among local scholars and practitioners, foreign legal concepts will be dubbed with local terms and explained by comparison with existing legal or even moral concepts. As a result, the Thai concept of *Lak Nititham* and the western concept of the rule of law may not be entirely interchangeable. In a similar vein, judicial independence in Thailand's context may have different meanings to western countries. Thus, to assume that promoting the rule of law through enhancing the institutional independence of the judiciary will lead to a stable democracy may be too simplistic. A parallel can be drawn between this observation and that of some comparative criminal justice researchers who found that different jurisdictions respond differently to transnational

police investigative techniques (Brants and Field, 2000) and international penological trends (Field and Nelken, 2010).

Secondly, an independent judiciary may not necessarily be an ally to the democratic movement of the country. By institutional design, the judiciary, especially in civil law countries, is anti-majority and apolitical (Hilbink, 2008; Shambayati, 2008). They must continue their work regardless of the political climate. In a country with an unstable political climate and frequent military coups such as Thailand, the judiciary always sides with the unelected force of the country. The attempt to inject democratic values into the Thai judiciary seems to have failed.

The Politics of punishment, the politics of fear

The close relationship between political context and penal practice is widely accepted among western scholars. However, the central analysis seems to focus on the fact that politicians in a democracy are more likely to manipulate the fears of the public over crime through the claim of 'populist punitiveness' (Bottoms, 1995). This study on Thai sentencing seems to call for a more universal theory on the politics of punishment. First of all, western theories appear to lose their explanatory power when applied to jurisdictions where democracy is not the only game in town like Thailand. Political instability in Thailand begs the question of whether the fear of crime among the Thai public has also been manipulated and by whom. It appears that even the military regimes take the issue of crime seriously and seem to be more productive in promulgating laws than elected governments. Secondly, it may be the case that the public's fear of crime is not the only fear that matters in the analysis of the politics of punishment and the understanding of penal change. The story of Thai sentencing reveals that fear on the part of those who have the power to punish affects the way that they punish and their preference for one type of punishment over others. This study suggests that more research on the relationship between the fear and concern over job security of the penal actors, their penal decision-making and their stance towards the promulgated penal policy is needed to better understand the politics of punishment and the dynamics of penal change.

SECTION 4: REEVALUATING THE FUTURE OF THAI SENTENCING

Does Thailand need sentencing reform?

As mentioned in chapter 1, my initial assumption before coming to Scotland was that Thai sentencing needs to be reformed using the model of western sentencing guidelines. It is worth reexamining whether my assumption has changed in light of the richer understanding of Thai sentencing provided by the research.

As discussed in chapter 2, the two main approaches to sentencing reform in western countries are the legal-rational approach, which aims towards principled sentencing and consistency in sentencing, and the parsimony approach, which aims towards penal moderation in the sparing use of imprisonment as a sanction (e.g. Ashworth, 1995; Tata, 2013). The discussion of the dynamics of penal change in Thailand in chapter 3 and the accounts of participants in chapter 5 demonstrated that Thailand shares both aspirations of sentencing reform. Thai sentencing aims to pursue consistency and accountability in sentencing and also intends to reduce the prison population. However, the findings suggest that much needs to be done for Thai sentencing to live up to its aims. The prison population has been on the rise and the sentencing decision-making process remains largely invisible to the public. Although participants did not perceive the lack of transparency in sentencing as problematic, the expectation of the international community for the return of Thailand to a democratic path appears to suggest that, sooner or later, Thai sentencing will need to be more publicly accountable. This indicates the need for Thailand's sentencing reform. Yet, the remaining question is: should Thailand adopt western sentencing guidelines as I had earlier assumed?

Do universal aspirations imply a universal model of sentencing reform?

While western sentencing scholars do not claim the universality of western sentencing reform models but mostly recommend the need to consider the political and legal cultures of different jurisdictions (Ashworth, 1992, 2009; Clarkson and Morgan, 1995; Roberts, 2009; O'Malley, 2006, 2013), Thai sentencing scholars tend to assume such universality (e.g. Jaiharn et al, 2006; Petchsiri, et al, 2011). Thai

scholars also tend to overlook the fact that there are variations within western models of sentencing reform. Yet, their recommendations appear to be arbitrary and based mostly on the western mechanism that they believe to be most suitable for Thailand.

Ashworth (1992) offers a valuable insight in stating that each jurisdiction must design its sentencing reform mechanism based on what it has already done best. This approach calls for knowledge on the actual sentencing decision-making process. Previous sentencing researchers in Thailand did not base their recommendations on discussion of how *Yee-Tok* operates and proposed models of sentencing reform which overlooked the existence of *Yee-Tok.*

The findings of this research contribute to a better understanding of Thai sentencing and can be employed to design a realistic model of Thailand's sentencing reform. By realistic model, I mean a model that is based on actual practice, not on the false assumptions of previous sentencing scholars, and a model that takes into account Thailand's political, social and cultural context in order to ensure the likelihood and smoothness of implementation.

The unlikelihood of Thailand having Western-style sentencing guidelines

As mentioned earlier, the reformed Thai sentencing system should aim to be more publicly accountable and more effective in reducing the use of custody as a sanction. I propose that such aims can be achieved by developing the mechanism of *Yee-Tok*, not necessarily by adopting western sentencing guidelines.

There is nothing inherently wrong with Thailand adopting a sentencing guidelines mechanism. However, numerous questions need to be answered before doing so. Firstly, why are sentencing guidelines preferable to other western sentencing reform models such as statutory sentencing principles or guideline judgements? Secondly, what kind of guideline is suitable for Thailand: a numerical or a narrative one and why? Thirdly, considering Thailand's context, is it possible for the government to create a sentencing commission consisting of both members from within and outside of the judiciary to draft guidelines as is the case in the US or England and Wales?

Finally, and most importantly, what should Thai judges do with *Yee-Tok* if they have guidelines?

The findings of this research seem to indicate that to adopt western sentencing guidelines in Thailand would be both unjustified and unrealistic. The research revealed that *Yee-Tok* has already aided in the pursuit of consistency and accountability in Thailand. Therefore, what is needed is not a mechanism to generate consistency, but to publicly articulate an account of consistency. The Thai sentencing system needs legal rules to perform an expressive function and a legitimating function. Arguably, what is lacking is only a mechanism to make the whole system 'look better', not to make it substantively better in terms of consistency. There is no evidence to support the claim that sentencing guidelines perform expressive and legitimating functions better than other measures. Furthermore, at the moment, it is unlikely that the government will interfere with the work of the judiciary by establishing a sentencing commission to draft the guidelines. The idea that the Thai judiciary will allow others to have a say in the formulation of sentencing guidance is also unimaginable. Lastly, it is unwise to jettison *Yee-Tok*, the mechanism that has aided in the pursuit of consistency and accountability for many decades, for costly measures with no possibility of success in Thailand's context.

Predicting the likelihood of Thailand reforming its mechanism of *Yee-Tok*

I began this thesis with the aspiration of reforming Thai sentencing. The findings of the thesis, however, seem to suggest that the previous recommendations of having a national *Yee-Tok* or disclosing the details of *Yee-Tok* may be a false hope, at least in the near future. The judiciary will not change the existing practice unless it is demanded by civil society or strong political will; elements which are very much lacking in Thailand's political instability.

The research did illuminate the way towards penal reduction, but again this very much depends on the judiciary actively changing the details of *Yee-Tok* to presumptively use non-custodial sentences instead of imprisonment. Finland provides proof that the judiciary can reduce the use of custody by itself without

demand from outside. The challenge is how to convince the senior figures in the Thai judiciary that the overuse of imprisonment and high imprisonment rates are a disgrace and to instill the value of penal reduction within the Thai judiciary. Bearing in mind the fear of Thai judges of being accused of corruption, it is less likely that each court of first instance will amend its *Yee-Tok* to recommend non-custodial sentences as a starting point unless this is demanded by the central administration.

To make *Yee-Tok* recommend non-custodial sentences as a norm is to reverse existing logic. This could be done by recommending non-custodial sentences as a starting point instead of custodial sentences and making it more difficult for judges to impose custodial sentences, such as requiring them to commission a pre-sentence report before imposing a custodial sentence. Doing so requires strong leadership from the judiciary as it would be the implementation of a policy which seems to be soft on crime. Yet in Thailand's context, it is not unusual for the judiciary to promulgate policies encouraging non-custodial sentences, such as the official advice of the President of the Supreme Court in 2012. However, the findings reveal that if the judiciary aims to encourage more frequent use of non-custodial sentences, it needs to do more than merely issue advice.

A review of the policy statements of the three Presidents of the Supreme Court since 2012 reveals that a clear policy for reducing the use of custody as a sanction is yet to be formulated. The main policy of the central administration remains only to 'encourage' the use of alternatives to imprisonment in order to make punishments more 'diverse' and to suit the circumstances of offences and the characteristics of offenders[127]. Senior judges seem to be oblivious to the international lesson that more frequent use of alternatives may not lead to lesser use of imprisonment, since alternatives tend to become alternative to each other rather than alternative to custody.

Formulating a national *Yee-Tok* which recommends non-custodial sentences as a starting point or has a mechanism to make it more difficult for judges to impose imprisonment seems to be the only way to effectively make Thai judges use

[127] For the policy of the current president of the Supreme court who has been in office since the 1st of October 2015 see http://www.opsc.coj.go.th/info.php?cid=3 last accessed 7/10/15

imprisonment more sparingly. However, this is unlikely to happen in the near future. It may be criticized by some judges as interfering with their independence. However, bearing in mind the Thai judicial custom of respecting seniority and the characteristics of Thailand's judicial administration discussed elsewhere in the thesis, such criticisms cannot stop the implementation of the policy. Besides, as demonstrated in Chapter 6, the central administration of the Thai judiciary has already exerted its authority in other discretionary decision-making processes of judges such as the decision to set the amount of bail, without any resistance from judges. The key to success in regulating the decision to set the amount of bail seemed to lie in the fact that the central guidelines exist alongside the local guidelines. If the Thai judiciary decides to exert its authority in the field of sentencing, it does not have to start from scratch but can learn from its own experience in other areas.

CONCLUSION

This chapter firstly proposed a theoretical framework for understanding Thai sentencing culture based on the judicial structure of a career judiciary and Thailand's political, social and cultural context. Three characteristics of Thai sentencing culture – conformity in sentencing decision-making, the tendency towards frequent of imprisonment and the lack of judicially perceived demand for public accountability in sentencing – were investigated through the lens of both conceptual building blocks. The chapter then discussed the international implications of the study on the fields of comparative sentencing, comparative law, comparative penology and comparative courts and politics and the practical implications of the research for the prospect of Thailand's sentencing reform. In the concluding chapter, I will revisit my research objectives, discuss the contributions of the thesis and its limitations and then recommend directions for future research.

CHAPTER 8

CONCLUSION

> *Every research project is, in some way, a project of 'first impression'- a de novo attempt to find the world through a new slice or with a new lens. Uncertainty and doubt are the researcher's faithful companions.*
>
> (Halliday and Schmidt, 2009:6)

This thesis is indeed a project of 'first impression'. An attempt to make sense of the sentencing system and practices of my home country and to present them to an international audience has introduced me, a legal practitioner whose entire professional life has involved only 'the black letter law', to an unfamiliar theoretical framework and methodology. The story of Thai sentencing depicted and discussed in the thesis is mainly that of Thai sentencing culture: the ways of life, attitudes and beliefs of Thai sentencers, especially their ideas of what is right and wrong to think, feel and do in relation to sentencing decision-making; not an analysis of sentencing legislation and decisions. In this concluding chapter, I revisit the research objectives set out at the beginning of the research to evaluate if the research has fulfilled its aims; summarise the original and significant contributions to knowledge of the thesis; discuss the limitations of the study and recommend areas for future research.

SECTION 1: A REVISIT OF RESEARCH OBJECTIVES

This thesis set out to fulfil the following objectives:

1. To explore numerous ways of placing Thai sentencing in an international context and to investigate the potential and limitations of adopting a common law- civil law dichotomy to characterise Thai sentencing
2. To describe, characterise and critically analyse the mechanism of *Yee-Tok*; a Thai-style sentencing guidance
3. To explore the local meaning of what seem to be universal legal concepts, such as consistency and accountability in sentencing, judicial legitimacy and judicial independence
4. To identify key characteristics of Thai sentencing culture

5. To construct a theory for understanding and explaining key characteristics of Thai sentencing culture
6. To use empirical evidence on Thai sentencing to contribute to a richer understanding of the sentencing decision-making process and the role of the judiciary in contemporary society

Has the thesis delivered on its promise? To begin with, the research demonstrates different approaches for presenting Thai sentencing to western audiences and argues that, although only an ideal-type, the civil law-common law dichotomy is a good starting point for understanding Thai sentencing.

Secondly, the thesis has sought to explain the mechanism of *Yee-Tok*: describing what it looks like, how it is formulated, how it is used, how judges are socialised into it, characterizing it as a set of sentencing rules and unraveling its three mysteries. These are: why different lower courts have different *Yee-Tok*, why lower courts use different *Yee-Tok* from appellate courts, and why it is said that the details of *Yee-Tok* cannot be disclosed.

Thirdly, the research points out that what seem to be universal legal concepts can be perceived differently in different contexts. It illustrates the Thai judicial conception of concepts such as the rule of law, consistency and accountability in sentencing and judicial independence, and how judges put them into sentencing practice. To illustrate, the Thai conception of the rule of law, or, *'Lak Nititham'*, seems to be a requirement for the adherence to high moral standards on the part of both rule-maker and rule-enforcer; not a requirement that the government and its officials must be bound by legal rules set in advance. The Thai judicial conception of judicial independence also put more emphasis on institutional independence than the personal independence of each judge in making judicial decisions. Additionally, accountability in sentencing in Thailand's case refers not to public but professional and personal accountability.

Fourthly, although it set out to focus mainly on how Thai judges put the concepts of consistency and accountability in sentencing into practice, the thesis identifies three key characteristics of Thai sentencing culture: conformity in sentencing decision-making, the tendency towards frequent use of imprisonment, and the lack of

judicially perceived demand for public accountability in sentencing. The thesis finds that an attempt to understand how Thai judges conceive the concepts of consistency and accountability can also shed light on their preferred sentence types.

Fifthly, the study proposes a theory for understanding the way Thai sentencers pursue consistency and accountability in sentencing. The theory consists of two building blocks: the judicial structure of a career judiciary and Thailand's political, social and cultural context.

Finally, by viewing Thai sentencing as a case study, the thesis contributes to a richer understanding of the sentencing decision-making process in general. The findings support the arguments of some researchers (e.g. Tata, 2002a, 2002b; Hutton, 2002, 2006; Hawkins, 1992, 2003) that sentencing decision-making is more of a social process than an exercise of moral philosophy or legal decision-making; therefore, it is not only influenced by law, but also by other normative orders, social and organisational practices, and even the emotions of legal decision-makers. The absence of legal rules for governing legal decision-making may not render the decisions illegitimate in the eyes of the audience. The detailed discussion on Thailand's political context and the role and status of the Thai judiciary in Thai society will, I hope, be of interest to scholars of Thai studies and comparative law and courts.

SECTION 2: A SUMMARY OF CONTRIBUTIONS TO KNOWLEDGE

Theoretical Contributions

This research put empirical flesh on the theoretical bones of western scholarship. Perspectives from the theory of street-level bureaucracy (Lipsky, 1980), the theory of legal decision-making (Hawkins, 2002, 2003), the theory of comparative procedural law (Damaška, 1986), theories of penal change (Garland, 2001; Cavadino and Dignan, 2006; Tonry, 2007) and insights from sociologists, social psychologists and behavioural economists were utilised to explain empirical data from Thailand. The study points out the need to understand sentencing decision-making in its natural settings, and linked the sentencing decision-making process with the broader

political, social and cultural context of the jurisdiction. It also reveals that a civil law-common law dichotomy is relevant in explaining similarities and differences between legal and criminal justice systems, as long as it is used as an ideal type and not a stereotype. Moreover, the research argues that common political and legal concepts such as the rule of law, consistency, accountability and judicial independence are understood differently in different jurisdictions. More importantly, the study demonstrates that the system of career judiciary in Thailand has significant implications for the sentencing decision-making process of its judges. However, more research is needed to determine if the judicial structures in other civil law and common law countries also play a role in shaping the sentencing decision-making process and how.

Comparative sentencing literature predominantly discusses sentencing systems in developed countries with established democracies. Language differences may be part of the reason for the limited literature on the sentencing systems and practices of the non-English speaking world. This study fills the gap in the literature by illustrating how sentencing in a non-western developing country works. The pictures depicted may be somewhat different from the existing literature, but the aim is not to claim that Thai sentencing is unique. The main purpose is to call for future single country and comparative sentencing research which pays more attention to differences in judicial structures and political, social and cultural contexts of the jurisdictions under study.

The empirical evidence from Thailand supports the arguments of previous researchers who have questioned the ability and even the necessity of the law to make legal decision-making consistent (e.g. Tata and Hutton, 1998; Hawkins, 2002, 2003). Thai law has no statutory solution to the question of how to select an appropriate sentence for each case, but the gap is filled by *Yee-Tok* and conventions, which suggests that the values of the rule of law, such as predictability and accountability, can be achieved through methods other than law. More importantly, the findings indicate the significance of tradition and emotion in legal decision-making.

The focus on the life and work of Thai sentencers with reference to Thailand's political, social and cultural context depicts both comparable and contrasting images of sentencers from those shown in mainstream sentencing literature. On one hand, comparative sentencing scholars should be aware that sentencers are not similar everywhere. In some jurisdictions such as England and Wales, sentencing power is shared among lay magistrates and professional judges. Even though sentencers in civil and common law countries may do the same job in crafting an appropriate sentence, their judicial lives are somewhat different and the effects of this difference on sentencing decision-making cannot be overlooked. In a similar vein, judges in established democracies, non-democratic regimes and transitional democracies may approach the task of sentencing differently. Moreover, the status of the judiciary in any society and public trust in it are far from universal, even within Western societies (Cotterrell, 1992:206). Discussion of these differences seems to be limited in much of the current sentencing literature. On the other hand, similarity in judicial work and life can also be found across the divide of judicial structure if the researcher looks at the level of practice and not at an ideal. It is hoped that the theory for understanding Thai sentencing proposed in this research may inspire a similar approach to understanding sentencing practice in other non-western jurisdictions.

This thesis provides data on Thai sentencing for future researchers, both in Thailand and internationally, to criticise and develop further. Apart from theoretical contributions to the field of comparative sentencing and comparative sociology of law, this research sheds light on the issue of power and power relations in contemporary Thailand. By using Thai sentencing as the focal point, the research contributes to the literature on Thai culture, politics and society, especially to those who are interested in comparative law and courts in non-established democracies.

The study also contributes to the field of comparative sociology of law and punishment. Garland (1990) proposes that penal practices, including sentencing, are signifying practices, which all have social and cultural meaning. This thesis demonstrates how Thailand's political, social and cultural contexts are depicted in the way *Yee-Tok* is used and treated by the Thai judiciary.

Methodological Contributions

This thesis is to date the first and only sentencing study, both in Thailand and internationally, which uses the professional experience of the researcher to formulate hypotheses combined with the use of focus groups, interviews and photo elicitation. It is the first cross-cultural research on sentencing decision-making conducted in Thailand. Cultural sensitivity has been considered throughout the research process. In addition, both forward and back translation (Liamputtong, 2010:151) were employed to preserve the original meanings of participants' accounts. The language barrier is addressed by paying attention to different conceptions of common legal concepts.

The research shows that there is no clear boundary between professional and academic knowledge and that criticism of incorporating the professional knowledge of the researcher into the research as being too subjective can be overcome by combining it with other conventional research methods such as individual and focus group interviews and supporting it with objective documents. The utilisation of focus groups in judicial research allows the researcher to collect information on group dynamics among judges and on the consensus and conflicts of their opinions towards any particular issues. Moreover, the use of pictures to elicit information and encourage discussion in focus groups can generate rich data on judicial life and work. These methods should be employed and developed further by subsequent judicial researchers, especially those trying to grasp judicial self-conceptions of judging and sentencing.

The focus on the interpretive understanding of Thai sentencing could be taken to suggest the irrelevance of the civil law- common law dichotomy to the analysis. However, this research demonstrates the robustness of combining the traditional comparative legal method – the utilising of legal families – with comparative sociology of law in an attempt to understand Thai sentencing.

Another methodological contribution of the research is that this research is done by a sentencer turned sentencing researcher. Moreover, it intended to incorporate the practical experience of the researcher into the research, as well as seeking more data from other judges. The challenge was how to manage my identity as both an insider

and an outsider throughout the research process and how to combine empathic and suspicious orientations when interpreting data from fieldworks.

Liamputtong (2010:112-118) points out the benefits and drawbacks of both insider and outsider statuses and has suggested the combination of the two in actual research. I took advantage of being an insider in terms of smoothness in getting access to the judiciary and having preexisting knowledge of the culture and language of participants, and sought to overcome its drawbacks by occasionally employing the outsider status to ask participants critical questions.

Willig (2013:44) notes that the process of understanding something always requires both elements of suspicion and empathy since each interpretive orientation aims for a different type of knowledge: empathic interpretation aims to generate understanding, while suspicious interpretation purports to generate explanation. This study shows how a combination of these two interpretive orientations can be achieved in actual research. Accounts from participants were not taken at face value but were critically analysed to seek the underlying meanings in order to simultaneously answer both the how and why questions of the phenomena.

Practical Contributions

My dissatisfaction with Thailand's current sentencing practice was evident in my initial plan to transplant the Scottish sentencing model to Thailand. However, I later realised that researching the actual practice of sentencing and the mechanism of *Yee-Tok*, which are invisible to the eyes of outsiders, must be the first and most significant step in the sentencing reform movement. The findings of this research, if widely disseminated to academics, practitioners and the Thai public, could stimulate interest in greater transparency to Thailand's sentencing system and practice.

Although Thai policy-makers are not the primary audience of this research, the research provides a foundation for better informed and realistic decisions on the future of Thai sentencing. It should give policy-makers a clearer picture of the actuality of Thai sentencing. Besides, it illustrates not only the substance but the dynamics of change of penal practices in Thailand, as well as the likelihood and

unlikelihood of comprehensive sentencing reform in Thailand. Since the research is an empirical and not normative, the result may be utilised either to support, or, to silence the sentencing reform initiative. On one hand, it places Thai sentencing in an international context and provides information to Thai policy-makers on where Thai sentencing stands if evaluated by western standards. On the other hand, it provides numerous grounds for the policy-makers to defend the status quo by referring to Thailand's political, social and cultural context. Nevertheless, it is worth emphasising that the movement to reform sentencing to reduce the prison population has already existed in Thailand for many decades without any tangible success. Two significant practical contributions of the research to the prospects of penal reduction in Thailand are the revelations that the practice of complying with *Yee-Tok* contributes to the rising prison population and that the prospect of reform to reduce the use of custody lies in the reform of *Yee-Tok*. Unless legal rules are incorporated in the social rules of *Yee-Tok*, their enforcement by Thai judges cannot be ensured.

SECTION 3: RESEARCH LIMITATIONS AND RECOMMENDATIONS FOR FUTURE RESEARCH

Research Limitations

An obvious limitation of the research lies in the fact that it is the first study on how *Yee-Tok* works and has no directly related research to rely on. Therefore, the hypotheses for the research needed to be partly drawn from reflections on my personal experience, which could be criticised as subjective. Another limitation is that the details of *Yee-Tok* are considered an official secret. Therefore, I cannot examine the extent of consistency of approach and outcome within and across courts directly by comparing details of their real *Yee-Tok*, but must draw implications from my professional experience and the accounts of the participants.

The relatively small sample of judges who participated in the research, although comparable with other similar qualitative research and justified by the richness of the data collected, limits the generalisability of the findings. Further, the main focus on sentencers only also restricts the ability to achieve a fuller picture of how Thai

sentencing works. The work of probation officers in writing pre-sentence reports and reporting breaches of probation conditions, of defence lawyers in filing pleas in mitigation, advising their clients to plead guilty and filing appeals against sentences, of the public prosecutor in drafting indictments and filing appeals against sentences and of prison officers in good time remission are all crucial to the fuller understanding of how Thai sentencing works, but were deliberately left out of this research.

The research can provide only a partial picture of judicial legitimacy in Thailand's context since it examined the empirical evidence only from the point of view of judges, who are the power-holders of legitimacy, but not from the point of view of the public audience. It could be argued that the Thai public and other stakeholders may not perceive current sentencing practice and the existing mechanism of *Yee-Tok* as legitimate, but have no opportunity to express their concerns.

Recommendations for Future Research

First and foremost, research on the decision-making processes of probation officers, defence lawyers, public prosecutors and prison officers in Thailand is needed for a fuller understanding of how Thai sentencing works. Apart from investigating their roles in the sentencing process, future research must qualitatively examine their knowledge and understanding of *Yee-Tok* and how this may affect their decision-making.

Secondly, research on public knowledge and opinion of existing sentencing practice needs to be conducted in order to better evaluate the legitimacy of the current practice.

Thirdly, research on the work of Thai judges conducted by purely academic researchers may be needed to assess the reliability and trustworthiness of this research or to use the findings of this research as a foundation for an in-depth investigation on particular issues, such as the decision-making process within a panel or the commissioning of a pre-sentence report. Such research should aim for a wide

sample of judges in order to gain data from judges across the country and across different levels of courts.

Fourthly, the effect of collective pardon on the original sentence imposed by the court, as well as public opinion and the attitudes of criminal justice professionals towards the practice, remain unexplored.

Fifthly, although this research revealed that *Yee-Tok* appears to be based on just deserts and the principle of proportionality, further research is needed to evaluate whether the whole sentencing system and practice is based on such principles or to propose how Thai sentencing based on just deserts should look.

Sixthly, the defects of the Penal Code pointed out in Appendix B, which have contributed to the preference for imprisonment over other sanctions, should be further investigated by future researchers.

Seventhly, further research on Thai sentencing carried out by international researchers is more than welcome. It is hoped that this work, with its emphasis on not only legal but also sociological perspectives on Thai sentencing, succeeds in attracting international scholars to research the legal and criminal justice systems of developing countries like Thailand.

Eighthly, comparative sentencing research on consistency and accountability in sentencing in other civil law countries or in non-democratic countries and those with transitional democracies, should be done more frequently in order to gain an empirical understanding of how sentencing actually works and how sentencing decision-making should be best understood.

Finally, the findings of the study appear to suggest some flaws in Thailand's criminal legal aid system. Two interesting questions which need to be further explored are why most criminal defendants waive their right to a court-appointed lawyer and why Thai judges seem to be content with this practice. If the lawyer can help to provide more sentencing information, why the court does not discourage defendants from waiving their rights? Empirical research on how defendants experience the sentencing process may shed some light on this issue.

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APPENDIX A: A Range of Sentences for Some Offences Prescribed in the Thai Penal Code and Criminal Statutes

Table A1: Offences Against the Person

Offences	Penalties
Homicide	15-20 years imprisonment, life imprisonment or death penalty
Aggravated Homicide (murder of an ascendant, an official in the exercise of his functions, premeditated murder and etc.)	Death Penalty
Causing death by negligence	Imprisonment of up to ten years, fine up to 20,000 baht or both
Assault not resulting in bodily harm	Imprisonment of up to one month, fine up to 1,000 baht or both
Assault resulting in bodily harm	Imprisonment of up to 2 years, fine up to 4,000 baht or both
Assault resulting in grievous bodily harm (Deprivation of the sight, hearing, cutting of the tongue or loss of the sense of smelling; Loss of genital organs or reproductive ability; Loss of an arm, leg, hand, foot, finger or any other organs; Permanent disfiguration of face; Infirmity or chronic illness which may last throughout life; Infirmity or illness causing the sufferer to be in severe bodily pain for over twenty days or to be unable to follow the ordinary pursuits for over twenty days)	Imprisonment from 6 months to 10 years

Table A2: Offences Against Property

Offences	Penalties
Common Theft	Imprisonment of up to 3 years and fine up to 6,000 baht
Aggravated theft (at night; disguising himself, or by impersonating another; by falsely pretending to be an official; by carrying arms, or by having two persons upwards participating; in a dwelling place, official place or place provided for public service; upon a thing used or possessed for public benefit; upon a thing belonging to or in possession of the employer and etc.	Imprisonment from 1 to 5 years and fine from 2,000 to 10,000 baht If the commission fall within more than two subsections of aggravations; imprisonment from 1 to 7 years and fine from 2,000 to 14,000 baht
Robbery	Imprisonment from 5 to 10 years and fine from 10,000 to 20,000 baht
Aggravated Robbery (used the same aggravations as theft)	Imprisonment from 10 to 15 years and fine from 20,000 to 30,000 baht
Robbery resulting in bodily harm	Imprisonment from 10 to 20 years and fine from 20,000 to 40,000 baht
Gang robbery	Imprisonment from 10 to 15 years and fine from 20,000 to 30,000 baht
Aggravated gang robbery (used the same aggravations as theft)	Imprisonment from 10 to 20 years and fine from 20,000 to 40,000 baht
Robbery or gang robbery by wearing the soldier or police uniform, carrying or using gun or explosive, using the conveyance so as to commit the offence for taking such thing away or for escaping from the arrest	Increase the applicable penalties by half

Table A3: Majors Narcotics Offences

Offences	Penalties
Possession of small amount of Class I drug (Methamphethamine, Heroin) [The law sets the exact amount of drug.]	Imprisonment from 1 to 10 years or fine from 20,000 to 200,000 baht or both
Selling or Possession with intent to sell a small amount (set by the law) of Class I drug	Imprisonment from 4 to 15 years or fine from 80,000 to 300,000 baht or both
Selling or Possession with intent to sell a moderate amount (set by the law) of Class I drug	Imprisonment from 4 years to life imprisonment and fine from 400,000 to 5,000,000 baht
Selling or Possession with intent to sell a large amount (set by the law) of Class I drug	life imprisonment and fine from 1,000,000 to 5,000,000 baht or death penalty
Manufacturing, importing or exporting Class I drug (regardless of the amount)	life imprisonment and fine from 1,000,000 to 5,000,000 baht
Manufacturing, importing or exporting Class I drug with intent to sell	Death Penalty

APPENDIX B: Alternative Explanations to the Rise of Prison Population in Thailand

In 1957, there were about 19,000 prisoners in Thailand's prisons. It took almost 40 years to reach 100,000 prisoners in the 1990s[128]. However, the number doubled from 1995 to 2000[129]. The discussion in chapter 3 illustrates the limitations of western theories of penal change in explaining the situation in Thailand. The rising prison population and harsh prison conditions in Thailand are not deliberate choices of Thai policy-makers. In the last two decades, there have been no changes to penal policy and practice which can be said to have increased the harshness of penal policy. On the contrary, numerous policies have been implemented to reduce the use of custody as a sanction and ease the problem of prison overcrowding. Nevertheless, if anyone is to be blamed for the rise of the prison population, the policy-makers and criminal justice practitioners are the obvious targets. I propose that the rise of the prison population and the problem of prison overcrowding in Thailand are consequences of six related factors: the defects of the Penal Code; the increasing number of drug offences; the failure of experts; the lack of cooperation between the Ministry of Justice and Office of the Courts of Justice; the failure of the judiciary; and political instability since 2006. I will deal with each issue respectively.

a) The Defects of the Penal Code

The Thai Penal Code seems to prioritize the use of imprisonment over other sanctions. First of all, the Penal Code prescribes long imprisonment terms compared to other countries. Aside from life imprisonment, the longest imprisonment term in Thailand is 50 years; much longer than 15 years in Germany (Bohlander, 2012:177) or 20 years in the Netherlands (Tak, 2003:41). The Code also states that in reducing the death penalty to an imprisonment term, a one-third reduction means to reduce the death sentence to life imprisonment and a one-half reduction can either reduce the death penalty to life imprisonment or 25 to 50 years' imprisonment as the court sees fit, and that in reducing the life imprisonment term, the term must be converted to 50

[128] http://www.correct.go.th/journal/j2/new2.html last accessed 27/4/15
[129] http://www.prisonstudies.org/country/thailand last accessed 27/4/15

years imprisonment[130], while in Germany, life imprisonment can be reduced to no less than 3 years' imprisonment (Bohlander, 2012:193). It is noteworthy that before 1971, the maximum imprisonment term apart from life imprisonment was only 20 years. The term was extended by the edict of the 1971 coup and has remained unchanged.

Secondly, the provisions for recidivist premium and for sentencing of multiple offences prolong the imprisonment terms that the court can impose for current offences. If the defendant has a previous conviction, the court must add a one-third or one-half premium, depending on the types of offence in their previous and current convictions, to the imprisonment term imposed for the current offence[131]. Thus, a sentence of 3 years' imprisonment that a sentencer considers a proportionate sentence for the current offence must be increased into 4 years or 4 years and 6 months, as the case may be, for an offender who has a previous conviction. The rule for calculating the sentence for multiple offences is simply to sum up the sentences for all offences and subject this to the maximum ceiling of 10 years, 20 years or 50 years depending on the seriousness of the offence[132], whereas in other countries the limit for sentencing multiple offences is 15 years in Germany (Bohlander, 2012:196) and only up to one-third of the sentence added on for the most serious offence in the Netherlands (Tak, 2003:85).

Thirdly, in Thailand, a probation order and a community service order are not stand-alone sentences. In order to impose these non-custodial sentences, the Thai court must first impose an imprisonment term and then suspend the imposition or the execution of imprisonment. In other words, non-custodial sentences are imposed to cases which pass the custody threshold. This seems to send confusing messages on the severity of sentences to a sentencing judge. Fourthly, the use of suspension of imprisonment is restricted to only offenders with no previous conviction. This disqualifies a considerable number of defendants from the use of non-custodial

[130] Section 52,53 of the PC
[131] Section 92, 93 of the PC, Section 97 of the Narcotic Act 1979 (as amended)
[132] Section 91 of the PC

sentences[133]. Finally, as it stands, the framework for imposing fines does not make fines attractive to sentencers as a primary sentence. The amount of fine for most offences is obsolete, since it has not been amended since 1956. Besides, the Code does not adopt the day-fine system found in Germany or require the court to consider the means of the offender in fixing the amount of fine as in the Netherlands or the UK.

b) Increased in the Number of Drug Offenders Entering the System

The second factor which accounts for the rising prison population is the number of arrests of drug offenders which has increased at an unprecedented rate in the last two decades: from about 90,000 drug offenders in 1992 to about 400,000 offenders in 2012. Although in the last decade, rates of violence and property crimes have declined significantly, the rates of drug offences have skyrocketed (Janekarn, 2012). From 1999 onwards, more than 60 percent of convicted prisoners have been convicted of drug offences (Office of the Justice Affairs, 2012). There seems to be a shared consensus among criminal justice practitioners in Thailand that drug dealing and drug trafficking are serious offences which do not qualify for non-custodial sanctions. Therefore, drug offenders are more likely to receive prison sentences. Moreover, it has long been believed that drug offenders benefit less from collective pardons than other offenders. Considering the fact that sentencing practices in the last few years have not changed significantly, more drug offenders entering the system means more drug offenders ending up in prisons. Since 2002, numerous measures have been implemented to ease the problem of prison overcrowding, but the most promising measure, the diversion of drug addicts from prosecution, seems to be effective in reducing the prison population for only a couple of years.

The question of why drug offences have been increasing needs to be further explored. Social change may account for more people using drugs and this demand might explain the rising supply. However, we need to examine whether there have been any changes in the policies and practices of the police in arresting drug offenders. In the past few decades, the governments have increased the reward

[133] This failure will be addressed if the Penal Code amendment pending in the National Legislative Assembly, as of November 2015, is passed.

money for law enforcement officers in narcotics cases, with the amount of reward money depending on the amount of drugs seized. I am not arguing that this policy has created more incentive to arrest drug offenders, but it needs to be further examined. The restructuring of the police force in 1991 in which it changed from a Department in the Ministry of Interior to an independent agency that reports directly to the Prime Minister could also have contributed to its increase in manpower and budget.

Moreover, the effect of changes in drug policy since 1996 which have made drug dealing a high-risk, high-return business cannot be denied. The latest scandals in prisons in which convicted drug traffickers have continued their business while serving their sentences in prisons[134] with some even hiring prison guards to facilitate their business[135] illustrate that a severe punishment cannot deter either actual or potential drug offenders. Turning to the demand side, although the government has implemented a treatment policy for drug users and more and more drug users have taken advantage of the treatment programme, critics doubt official claims about the success of mandatory rehabilitation programmes (Pearshouse, 2009). Increasing numbers of both drug users and drug traffickers in the system conveys that the criminal justice system has failed to suppress drugs on both the demand and supply sides.

c) The failure of experts

The third factor that contributes to the soaring prison population is the failure of experts to respond to increasing problems. During the peaceful political climate and booming economic conditions from 2002 to 2005, experts in criminal justice agencies failed to overhaul the sentencing framework in the Penal Code and to set a clear goal on the reduction of the prison population. Numerous prisoners could have been broken down into drug offenders, remand prisoners and prisoners serving short sentences and realistic goals and measures should have been set for a reduction in each group of prisoners. Unfortunately, experts aimed only at a short term solution

[134] http://www.manager.co.th/Local/ViewNews.aspx?NewsID=9580000032192 last accessed 27/4/15
[135] *www.thairath.co.th/content/452268* last accessed 27/4/15

by diverting drug users from the system, but did not take advantage of the political and economic climate to generate a political will of penal reduction. They should have set a goal to bring down the prison population to actual capacity at the beginning of the new millennium, and their failure to do so has left Thailand with no safeguard against the soaring number of drug offenders in the criminal justice system. Nevertheless, the success of the experts in implementing rational penal policy largely depends on the security of their jobs. If they are regularly reshuffled, it is less likely that rational policies will be implemented. The fact that the Director General of the Department of Probation has been reshuffled 3 times from May 2014 to September 2015 appears to suggest the limited role of the experts in the military government.

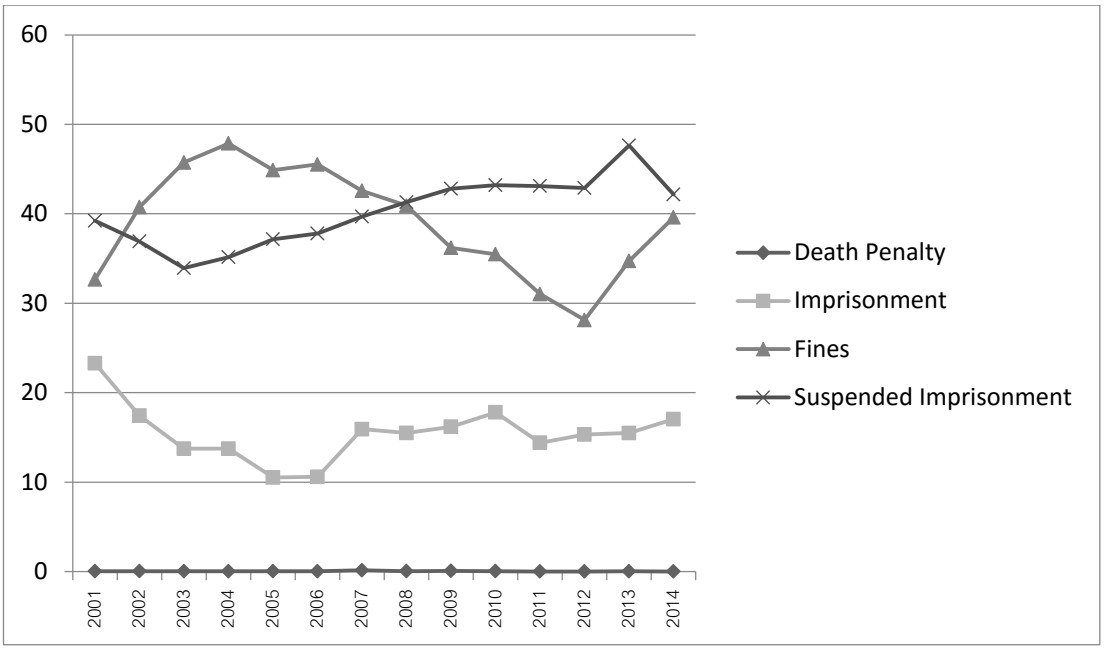
d) Ineffective cooperation between Agencies

The fourth factor that can explain the rise in prison population is the ineffective cooperation between the Ministry of Justice and the Office of the Courts of Justice since 2000. Experiences in other countries demonstrate that the government engaging with the judiciary is key to the success of penal reduction. The former permanent secretary for justice of Thailand also admitted this insight (Kittayarak, 2010). However, the transformation of the identity of the Ministry of Justice from Ministry of the Court Administration to Ministry of Justice Administration since 2000 has come with a huge price in relation to reducing prison population. It appears that having its own administrative office has made the judiciary more hostile to the initiatives or policies of the Ministry of Justice. As mentioned in chapter 3, the national justice administration plan does not mandate the operations of the court of justice. The fragmentation of policy formulation and implementation can produce only a piece meal measure, not a comprehensive policy which requires a review of justifications for using imprisonment and a clear goal of penal reduction. Lappi-Seppala (2007) notes that the success of Finland in bringing down its prison population began with a shared consensus of the policy-makers and practitioners that the high imprisonment rate was a disgrace; this consensus remains absent in contemporary Thailand.

e) The failure of the judiciary

Cavadino and Dignan (2013) propose that court decisions are the crux of the penal crisis. Even though their grand theory of penal change cannot apply to Thailand, their anecdote on the responsibility of the court in the penal crisis can apply to Thailand's situation. The distribution of sentences in the last few years illustrated in the following figure shows that Thai sentencers consistently send a considerable proportion of convicted persons to prison. The road towards decarceration started in 2001 has been reversed since 2006. On average, 15 percent of all sentenced defendants in the last decade received unsuspended imprisonment, of which more than 60 percent are awarded a prison sentence of less than 3 years, which in principle can be suspended. Moreover, an increase in the use of suspended sentences usually results in decrease in the use of fines (see figure B1).

Figure B1: Percentage of Defendants Sentenced by Courts of First Instance, Classified by Types of Penalties from 2001 to 2014



Source: Office of the Courts of Justice, Thailand

In addition to convicted prisoners, remand prisoners and convicted prisoners awaiting results of their appeals amount to about one-fourth of the overall prison population. If the judiciary takes the presumption of innocence and the rights of the suspect and defendant to bail seriously, this number should be decreasing but the

constant figure between 2008 and 2011 (Office of Justice Affairs, 2012) demonstrated otherwise.

However, the failures of the Thai judiciary occur not only in the role of sentencer but also in the role of policy-maker. Before the separation of the Court of Justice from the Ministry of Justice in 2000, judges were experts in the field of penal policy. The preparations of legal bills introduced by the MOJ were overseen by judges who graduated from western countries. During the time of acting as the only experts in the field, judges suggested no changes towards penal reduction.

After the separation of the Court of Justice from the Ministry of Justice, Thailand has two key penal policy-makers: the Office of the Courts of Justice and the Ministry of Justice. The judiciary, through the policy statement of the President of the Supreme Court and the strategic plan of the Office of the Courts of Justice, has its own policies and plans to promote alternative measures to custody, but these policies and plans are impractical and unrealistic. Moreover, there has been no attempt from the central administration exert its influence in changing the recommended sentences in *Yee-Tok*. The current strategic plan of the Office of the Courts of Justice aims to create a uniform standard for imposing alternatives, but not to change the level of sentencing severity. It fails to set a clear goal for the reduction of the use of custody for particular offences or offenders. According to 2012 and 2013 statistics, among the offenders who were awarded unsuspended imprisonment, about 78 percent received a sentence of less than three years; a sentence which legally can be suspended. This means that there is more room for the judiciary to contribute to the lesser use of custody.

As previously mentioned, there are three main groups of prisoners which penal policy should aim to reduce: non-convicted prisoners; drug offenders; and non-serious offenders. For the first group, the judiciary should review rules on setting the amount of money bond for each offence, types of security and conditions of bail to reduce the number of remand prisoners. For drug offenders, the judiciary should consider if the seriousness of some narcotics offences can be reviewed and should vary the seriousness of drug offences not only by type and quantity of drugs, but also by the role of the offender in the commission of the crime. For non-serious offences,

the judiciary should seek a consensus among judges on the seriousness of some offences which should not attract custodial sentences and incorporate this consensus into *Yee-Tok*.

f) Political instability

Kittayarak (2010) notes that frequent political changes led to inconsistent penal policies in Thailand. Since 2006, although the experts still control the substance of penal policies, they need a stable government to implement them. The Ministry of Justice and Office of the Courts of Justice may have their own plans to reduce the use of custody as a sanction and to ease prison overcrowding, but they need a suitable budget to implement the plan. Lesser use of custody means greater use of non-custodial measures and a higher budget needs to be invested into rehabilitation programmes in the community. Since 2005, each Thai government has had to deal with street protests on political issues on a daily basis and has not been able to concentrate on dealing with social issues such as reducing the prison population. Obviously, the political will for penal reduction cannot be created in this political environment. Unless the political groundwork is settled, penal reduction in Thailand seems to have no future.

APPENDIX C: What to expect at *Wain-Chee*

The main task of judges working at *Wain-Chee* is to deal with all criminal indictments filed by the public prosecutor. The Criminal Procedure Code requires the prosecutor to bring the accused to the court alongside the indictment unless they have already been remanded in custody. Therefore, when the court receives the indictment, it normally asks the defendant about their plea on the same day. Under the Criminal Procedure Code and the Act on the Procedure for Narcotics Cases 2007, a guilty plea can only waive a trial for an offence that carries a minimum sentence of less than five years' imprisonment or less than life imprisonment for narcotics offences. If defendants plead guilty and a trial is not required by law, it is the responsibility of a panel of judges at *Wain-Chee* to pass sentence. Adjournment means a defendant has to apply for bail, a procedure which requires time and effort both from the defendant and court officials and is less likely to be concluded in the same day. Since the decision to adjourn means a defendant has to be detained awaiting sentencing, in practice, Thai judges try to avoid adjourning sentencing and sentence most cases on the day of indictment.

Performing the task of *Wain-Chee* in the criminal courts of Bangkok, which are the training grounds of all trainee judges, would be impossible without *Yee-Tok*, since more than a hundred cases are awaiting sentencing on some days. It is a responsibility of trainee judges to draft judgments, including sentencing decisions, for their tutors. The tutors can assess if their trainees correctly and swiftly used *Yee-Tok* in processing cases.

The protocol for dealing with a guilty plea case at *Wain-Chee* is as follows. Firstly, once the indictment is filed and an offender presents at the court, court officials then ask the defendants if they have a lawyer or need a court-appointed lawyer. If they have a lawyer or waive their right to a court appointed lawyer, court officials will ask their pleas. If they plead not guilty or need a court-appointed lawyer before entering a plea, the case will be adjourned to later date, typically about two or more weeks later.

Next, if defendants plead guilty and have a lawyer or waive their right to a court-appointed lawyer, which the majority of them do, court officials will ask the

defendants to sign a court form to confirm their plea. This form along with an indictment and a case file will then be sent to a panel of judges at the *Wain-Chee* room or the judges' chamber where various case files are placed on the table and each judge picks them up case by case to read, make sentencing decisions and write judgements on. If the offenders file a plea in mitigation, it is also included in a case file. It is noteworthy that at *Wain-Chee*, cases are not formally assigned to one judge as a responsible judge and another as a panelist judge like cases at trial. A judge who picks a case to sentence is considered the responsible judge of the case.

Later, after each judge reads the indictment and other documents in a case file, makes a decision and writes a judgement (which in most cases is prepared in advance as judgement forms), they will consult another judge on their panel and the Chief Judge if required. After both judges on the panel sign the judgement, one judge will take a judicial gown and go to the courtroom to conduct a formal arraignment and announce the sentence.

Finally, during a formal procedure, which is the first time that a judge meets defendants, and usually the only time if it is a guilty plea case, the judge asks defendants to confirm that they waive their right to a court appointed lawyer and that they plead guilty. Once they confirm both, the judge will announce their sentencing decision. In this procedure, a judge also meets defendants who plead not guilty, or who plead guilty but the judge decides to commission a pre-sentence report; or in cases where the law requires a trial upon a guilty plea, asks them to confirm their pleas and tells them the date of their next court appearance.

Making and announcing sentencing decisions for guilty plea cases are only part of the job. Judges at *Wain-Chee* must deal with the task of issuing the writs for the enforcement of sentences they imposed and ensure that each writ is accurately issued and signed within the official hours of the court. Prison officers are always the very last persons to leave the court since they have to wait for the writs of imprisonment to take offenders to prison. Sometimes sentenced offenders apply for bail after the announcement of sentences and the court has to decide whether to grant or deny bail before issuing a writ of imprisonment.

APPENDIX D: Precedents on Sentencing of the Thai Supreme Court

Three main areas of precedents on sentencing law should be noted: the custody threshold; mitigation of a guilty plea; and mitigation of substantial assistance to authorities in narcotics cases. Regarding the custody threshold, the Supreme Court plays an important part in prescribing which offences are serious enough to not qualify for non-custodial measures. It also provides criteria for the seriousness of some offences. Eight examples should suffice to illustrate this role. Firstly, driving overloaded lorries on public roads was held to be serious and to not qualify for unsuspended imprisonment but a short imprisonment term should be converted into a detention [Decisions No.2157/2002 (B.E.2545), 8913/2010 (B.E.2553)]. Secondly, it held that using methamphetamine while driving does not qualify for non-custodial sentences [Decision No.7683/2001 (B.E.2544)]. However, it largely depends on the type of vehicle; using methamphetamine while driving a personal car is not considered as serious [Decision No.1031/2000 (B.E.2543)] as doing so while driving lorries [Decision No.1030/2000 (B.E.2543)].

Thirdly, the Supreme Court held that the seriousness of theft depends on the amount of property stolen [Decision No.2283/2000 (B.E.2543)]. Moreover, fraud involving multiple victims, theft of a small amount of coins from a public phone and theft of a motorcycle were held not to be qualified for non-custodial sentences [Decisions No. 4005/2008 (B.E.2551), 985/2004 (B.E.2547) and 100/2004 (B.E.2547) respectively]. Fourthly, possession of an unregistered handgun is generally serious [Decisions No.8635/2006 (B.E.2549), 2307/2007 (B.E.2550), 10338/2010 (B.E.2553)]. Nevertheless, it also depends on the type of gun and the manner of possession [Decision No.2058/2004 (B.E.2547)] Sixthly, vote buying in local elections is considered so serious that only imprisonment can be justified [Decisions No. 7114/2001 (B.E.2544), 226/2007 (B.E.2550)]. Seventhly, an offence of handling stolen property was held to be serious since it encourages theft [Decision No. 1935/2000 (B.E.2543)] but its seriousness was reduced if committed between relatives [Decision No.552/1999 (B.E.2542)].

Finally, the court held that, generally speaking, causing death by negligent driving is not a serious offence [Decision No.5539/2002 (B.E.2545)]. However, it can be gleaned from numerous decisions that five main factors define seriousness for this offence: degree of negligence; type of vehicle; remorse of the offenders; number of victims; and compensation to the deceased's family by the offenders [Decisions No. 8992/2000 (B.E.2543), 77/2004 (B.E.2547), 5207/2006 (B.E.2549), 7352/2006 (B.E.2549), 7705/2006 (B.E.2549)].

In relation to mitigation of a guilty plea, section 78 of the Penal Code only authorizes the court to reduce a sentence by up to one-half, but says nothing about how to vary the rate of reduction. The precedent of the Supreme Court defines the rate of reduction at different stages of criminal proceedings, reduction credit for confession after arrest and during the investigation period, the process for calculating the reduction for multiple offences, the criteria for calculating the reduction in death penalty cases and cases where the court cannot give credit to a guilty plea.

In Decisions No. 7554/2005 (B.E.2548) and No. 1130/2010 (B.E.2553) the court held that confession after arrest can reduce a sentence by up to one-third. In Decisions No. 6652/2005 (B.E.2548) and No. 4825/2010 (B.E.2553) the court held that if a defendant charged with multiple offences pleaded guilty to all charges, sentence reduction for a guilty plea must be given to each charge before calculating the sentence. To illustrate, if the defendant is charged with trespass and assault, pleads guilty to both charges and the court decides to sentence each offence with 1 year of imprisonment, it cannot combine the sentence for both offences into 2 years and then reward a one-half credit of a guilty plea which would result in a 1 year remaining sentence, but must reduce the sentence for each charge from 1 year to 6 months then combine the sentence for both charges into 12 months, which is 360 days under the law. If the judge uses the wrong method of calculation, the defendant will end up in jail for 1 year (365 or 366 days) which is longer than the preferable method of the Supreme Court.

In Decisions No. 132/2002 (B.E.2545), 4211/2003 (B.E.2546), 100/2008 (B.E.2551), the Supreme Court held that in a case in which the prosecution evidence is overwhelming, the court should not give credit for a guilty plea; for instance, in

narcotics cases in which an undercover police officer buys drugs from the defendants and then comes to court to testify, or murder cases in which the crime is commited during the daytime in front of numerous eyewitnesses. In order to decide whether the evidence against the defendant is overwhelming or not, the court must consider the strengths and weaknesses of the prosecution's evidence. In the case that it is weak, even a late guilty plea after the prosecution witness testifies can be given credit of a one-third or one-half reduction [Decisions No.482/2004 (B.E.2547), 6766/2004 (B.E.2547)]. However, in cases where a guilty plea can waive a trial according to the law, the judge must give credit to all guilty pleas and cannot claim that the prosecution's evidence is overwhelming [Decisions No. 10766/2008 (B.E.2551), 628/2009 (B.E.2552)].

Regarding mitigation of substantial assistance to authority in narcotics cases, Section 100/2 of the Narcotics Act 1979 (as amended in 2002) only states that the court can sentence below the minimum sentence as it thinks fit, but specifies no definition on what behaviour can be considered 'substantial assistance' and how to vary the mitigation. The Supreme Court set precedents on what can be considered substantial assistance, what evidence suffices to prove assistance and rates of sentence reduction. To illustrate, information that defendants give to the authorities must be clear, and able to be further investigated [Decision No.4597/2007 (B.E.2550)], unknown to the authorities and impossible to be known by normal investigation [Decisions No.6550/2006 (B.E.2549), 7087/2012 (B.E.2555)]. Information given but not be used to arrest other offenders cannot benefit the defendants [Decisions No.3072/2010 (B.E.2553), 2886/2011 (B.E.2554)] Furthermore, in cases which qualify as substantial assistance, a minimum sentence of life imprisonment can be changed to 25 or 30 years' imprisonment [Decisions No. 7872/2008 (B.E.2551), 6555/2004 (B.E.2547)] while in other cases a statutory minimum sentence can be reduced by one-half [Decision No.6804/2007 (B.E.2550)].

In addition to setting the precedents on the substance of sentencing decisions, the Supreme Court also set some precedents on the process of sentencing decision-making. In the Supreme Court decision No.7013/2001 (B.E. 2544), the court held that sentencing reasons are required if a sentencer mitigates sentences 'outside normal practice'. Interestingly, it said nothing about how to define 'normal practice'.

In that case, the Supreme Court did not remand the case to the lower court to justify its abnormal practice, but rather amended the sentence to what it perceived as 'the normal practice'. It should be noted that in sentencing borderline cases – the cases that legally required for the use of deferred sentencing or suspended imprisonment – Thai sentencers usually give reasons for their sentences by referring to factors prescribed in the Penal Code. Even if they fail to refer to these factors, the Supreme Court, in decision no.5721/2001(B.E.2544), held that the fact that a sentencing judge awarded an unsuspended sentence implied that they had already considered factors prescribed in the Penal Code; therefore they did not need to refer to those factors in the judgment.

APPENDIX E: The Judicial Commission and its Role in Sentencing

According to the Judicial Service Act 2000, the Judicial Commission is vested with the power to appoint, promote, transfer and discipline Thai judges. When judges are dismissed from office, the order of dismissal must be published in the national gazette. It has become a practice of the Thai news media in the last couple of years to report those publications on their websites. A search through the websites of the national gazette and the media found that between 2005 and 2014 a handful of judges were dismissed on the ground of grave misconduct every year. The lowest number was one judge per year in 2005 and 2006 while the highest was 8 judges in 2014[136].

The Thai Judicial Commission comprises 15 members, of which 12 are judges elected by their peers, while 2 non-judicial members are selected through a political process. The President of the Supreme Court is both an *ex officio* member of the commission and its president. The commission meets regularly and generally holds more than 20 meetings each year. Only summaries of the meetings of the commission, not minutes, are available on the official website of the Office of the Courts of Justice. However, judges can ask the Office of the Judicial Commission to send an edited version of the minutes to them via an official email account and all minutes are available in the libraries of all courts across the country.

A content analysis of the minutes of more than 100 meetings of the Judicial Commission of Thailand between 2010 and 2014 reveals that the commissioners are most concerned with the exercise of judicial discretion in two areas: the discretion to grant bail and sentencing discretion. For the latter, what the Thai judiciary expects from sentencers is clear: to comply with *Yee-Tok* of their own courts. Departing from *Yee-Tok* without consultation with the Chief Judge tends to be perceived by the Judicial Commission as misconduct. However, the fate of the accused judge still depends on the circumstances of their alleged behaviour. Upward departure, which does not benefit the defendant and is less likely to be induced by corruption, tends not to lead to the judge's dismissal from office as downward departure does. Besides,

[136] For more detail see Chapter 7.

the more frequent the departure, the more serious the sanction. Furthermore, departure involving narcotics cases is more likely to be treated as more serious than departure in other milder cases, such as drink driving.

To illustrate, in 2010, two similar cases of judges who departed from *Yee-Tok* without consultation with their Chief Judges appeared before the commission. In the first case, the alleged judge tried to persuade a defendant to plead guilty by telling him that he would receive a harsher sentence if he stuck to the not-guilty plea. When the defendant refused to change his plea, the judge gave him a harsher sentence than that recommended by *Yee-Tok*. The majority of the commissioners perceived this misconduct as not serious enough to warrant the severest sanction of expulsion, and imposed only a one-year suspension of promotion.[137] Another case involved a judge who departed from *Yee-Tok* of the court by imposing a non-custodial sentence in a case where *Yee-Tok* recommended a custodial one without consulting the Chief Judge of the court; a downward departure. A review of a random sample of 100 criminal cases sentenced by the accused judge found that 24 cases departed from *Yee-Tok* without evidence of consultation with the Chief Judge. The commission therefore unanimously dismissed that judge from office.[138]

The question of whether departure from *Yee-Tok* without consultation is in itself a grave judicial misconduct was reintroduced to the commission in January 2011.[139] Some commissioners were of the opinion that, if there is no other evidence of corruption, merely departing without consultation is not a serious misconduct since each judge is an independent decision-maker; while others argued that disparity in sentencing has a negative impact on the image of the judiciary, and while judges are independent, they still have to listen to other judges and conform to a majority opinion. The issue was not resolved at that time, but in September 2011 the

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137 Minutes of the Judicial Commission meeting no. 12/2010 (B.E. 2553) 21 June 2010, pp.27-30.

138 Minutes of the Judicial Commission meeting no. 18/2010 (B.E. 2553) 6 September 2010, pp.10-20.

139 Minutes of the Judicial Commission meeting no. 1/2011 (B.E. 2554) 24 January 2011, p.7.

commission imposed a two-year suspension of promotion to a judge who departed from *Yee-Tok* without consultation with the Chief Judges and imposed a non-custodial sentence on a drug dealer.[140] In November of the same year, the commission had to consider whether the fact that 6 judges from the same court amended details of their *Yee-Tok* without consulting their Chief Judge was a judicial misconduct.[141] The majority of the commissioners found no evidence of corruption in the acts of the 6 accused judges and took into consideration the fact that the amendment of *Yee-Tok* was to impose a harsher sentence. It decided in favour of the accused judges in January 2012 by concluding that they did not commit any misconduct.[142]

Although it seems that departure from *Yee-Tok* in itself is not treated by the Judicial Commission as a serious misconduct, the fact that an accused judge has been disciplined on the grounds of departure from *Yee-Tok* will haunt that unfortunate judge throughout their judicial career. The very same fact will be raised every time the judge is to be promoted to a deputy Chief Judge, a Chief Judge and other administrative positions and when their salary is to be raised. In other words, to commit even one judicial misconduct is unforgettable and unforgivable. In December 2013, the commission promoted one judge to a Chief Judge, but noted the fact that he had previously departed from *Yee-Tok* without consultation with his Chief Judge.[143] The same judge whose promotion had been suspended for one year in 2010 on the grounds of departure from *Yee-Tok* without consultation with the Chief Judge was to be promoted to be a deputy Chief Judge in 2014, but was denied the opportunity by

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140 Minutes of the Judicial Commission meeting no. 17/2011 (B.E. 2554) 12 September 2011, pp.30-35.

141 Minutes of the Judicial Commission meeting no. 19/2011 (B.E. 2554) 21 November 2011, pp.7-10.

142 Minutes of the Judicial Commission meeting no. 3/2012 (B.E. 2555) 24 January 2012, p.41.

143 Minutes of the Judicial Commission meeting no. 28/2013 (B.E. 2556) 16 December 2013, p.28.

the majority of the commissioners.[144] In the same meeting, the commission also did not approve the promotion of another judge who had never been disciplined, but whose former Chief Judge reported that he had previously departed from *Yee-Tok* without consultation.[145]

The commission not only expects judges to comply with *Yee-Tok* of their courts and to consult with their Chief Judges in the case of departure, but also requires Chief Judges to monitor whether judges in their court comply with *Yee-Tok* and consult them in the case of departure. Moreover, Chief Judges are expected to evaluate the justifications for departure given by a responsible judge. In June 2013, one Chief Judge was disciplined on the grounds that he failed to evaluate the justification given by a responsible judge for departure and approved a non-custodial sentence for what seemed to be a serious case.[146]

[144] Minutes of the Judicial Commission meeting no. 1/2014 (B.E. 2557) 6 January 2014, pp. 55-56.
[145] Supra note, p.58.
[146] Minutes of the Judicial Commission meeting no. 12/2013 (B.E. 2556) 3 June 2013, pp.17-21.

APPENDIX F: Official Advice on Sentencing of the President of the Supreme Court

On 27 September 2012, the then President of the Supreme Court issued official advice to judges relating to the use of deferred sentencing. This advice followed the policy statement of the same President to encourage more frequent use of alternative measures to custodial sentences. This was the first time that a President of the Supreme Court exercised their power, authorized by the Act for Organisation of the Court of Justice, to issue advice aiming to structure sentencing discretion. This instrument could be interpreted as the first step by the Thai judiciary to use the power from central administration to structure sentencing decision-making as opposed to the localised mechanism of *Yee-Tok*.

Section 56 of the Penal Code authorizes sentencers to use two different kinds of non-custodial sentences: deferred sentencing and suspended imprisonment. In order to qualify for the use of these two sentences, the case must be one in which the court decides to impose a sentence of imprisonment not exceeding 3 years, and in which the defendant has not been sentenced to time in the prison in the past, or has been previously sentenced to imprisonment but the previous imprisonment was for an offence committed by negligence or a petty offence.

Deferred sentencing means the court pronounces that an offender is guilty but sets no specific sentence, and the offender will be released upon a general condition of not reoffending during a certain period of time. Suspended imprisonment means the court not only pronounces the conviction but also imposes a specific imprisonment term on the offender. The imprisonment term will be suspended upon a general condition of not reoffending during a certain period of time. Those who receive deferred sentencing or suspended imprisonment may be subject to other specific conditions such as being supervised by a probation officer, doing community service, attending drug rehabilitation programmes or refraining from certain types of behaviour.

These two sentences were enacted in the Penal Code in 1956, but the differences between the two are still confusing. Sentencers often do not know when to impose

deferred sentencing and when to impose suspended imprisonment, since the legal texts just state that they are subject to the same requirements but say nothing about their differences. *Yee-Tok* never specifies the recommended sentence in terms of deferred sentencing and official judicial statistics only contain the statistics for suspended imprisonment.

The 2012 official advice begins with the declaration of its aims to encourage more use of deferred sentencing and to ensure uniformity in using this sentence. The advice then specifies cases in which the court should use deferred sentencing: first, it refers to cases in which *Yee-Tok* allows the use of suspended imprisonment; then it urges sentencers to use deferred sentencing in more cases and prescribes criteria for the court to consider, such as whether an offence is caused by poverty or leads to only petty damages to the victim; the offender's remorse and effort to restitute the victim; the relationship between the offender and the victim; whether they have already reconciled; whether it is a negligent offence where the victim is the family member of the offender; and other similar factors that lead the court to conclude that the offender should not have a criminal record.

The advice specifies special conditions that sentencers can impose on an offender who is awarded deferred sentencing in addition to conditions that had already been spelled out in the legal texts, such as donating money to charity (upon the offender's consent), curfew orders, consultation with a psychologist or psychiatrist etc. The advice also informs the courts that, in addition to the probation officer, they can appoint other persons who are willing to supervise the offender to be a supervisor.

The last part of the advice deals with the policy of higher tolerance to breaches of conditions by an offender. The advice suggests to sentencers that, in addition to sentencing an offender who breaches conditions or reoffends to imprisonment, they should consider using other alternatives such as cautioning, amending conditions or sentencing the offender to suspended imprisonment.

In the past, the President of the Supreme Court issued official advice and internal regulations concerning the use of discretion in granting provisional release and setting bail bonds, which proved to succeed in structuring courts' decisions to be more uniform and predictable. The advice of the President is not legally binding, but,

as mentioned throughout the thesis, the Thai judiciary has a culture of taking advice from senior judges seriously. Therefore, it is expected that Thai judges should increasingly use deferred sentencing in response to the official advice. Unfortunately, the statistics on the use of such sentences is not available to confirm or disconfirm this expectation.

APPENDIX G: Case Studies of how *Yee-Tok* is used

To illustrate how *Yee-Tok* is used in practice, four types of offences have been selected as case studies: two types of victimless crimes and two types of crimes with victims. These four offences are frequently dealt with by Thai courts. The idea of distinguishing between victimless crimes and crimes with victims is to illustrate how victims can influence sentencing decision-making. The details of *Yee-Tok* have been adapted since they remain to be considered as an official secret. Although the structure and form of *Yee-Tok* illustrated in this section are similar to that of the real one, the recommended sentences shown in all *Yee-Tok* of this part are not 'real'.

Yee-Tok and the sentencing process of some victimless crimes

a) Sentencing Drink Drivers

Table G1: *Yee-Tok* for Common Drink Driving (not resulting in bodily injury or death)

Statutory Sentences	Recommended Sentences (Before Reduction)	Remarks
Section 43 (2),160 ter. of the Road Traffic Act 1979 (as amended) imprisonment of up to 1 year or paying a fine from 5,000 to 20,000 baht or both and suspension of driving license for at least 6 months or revocation of license	Depending on type of vehicle **Motorcycle** -4 months imprisonment and 8,000 baht fine -suspended imprisonment for 1 year and suspension of driving license for 6 months - report to a probation officer every 3 months and do community service **Personal Car** -4 months imprisonment and 10,000 baht fine -suspended imprisonment for 1 year and suspension of driving license for 6 months - report to a probation officer every 3 months and do community service **Lorry, Taxi and Bus** -4 months unsuspended imprisonment (no condition of reporting or community service) and suspension of driving license for 6 months -if the circumstances of a crime are not serious, suspended imprisonment for 1 year and impose a fine of 12,000 baht, report to a probation officer every 3 months and do community service	Number of hours of community service depends on blood alcohol level (BAL) BAL 50 – 99 mg% 12 hours BAL 100 – 199 mg% 24 hours BAL from 200 mg% 36 hours

Drink driving cases are routinely filed in Thai courts, mostly during weekends and holidays. During national holidays, the Thai media broadcast a campaign against drink driving and the police routinely set up sobriety checkpoints. Common drink driving, which does not result in any bodily harm to others, is considered a less serious offence. The statute sets a maximum sentence of imprisonment and a fine, but does not specify what factors need to be considered in judging the seriousness of each case. *Yee-Tok* aims to fill this gap in the statute and make sentencing drink driving simpler by asking judges to look for two sets of information in an indictment: type of vehicle and blood alcohol level. Therefore, judges can impose a sentence without the need for a pre-sentence report. Throughout my time as a sentencer, I never commissioned a pre-sentence report in drink driving cases.

Different types of vehicle are treated as a proxy for different levels of duty of care. For example, if you decide to drink, you should be more careful in deciding to drive a car than a motorcycle since a potential accident could be more severe. The seriousness of the offence is then illustrated in a higher fine for drink driving a car than a motorcycle. Since a higher blood alcohol level means lesser control of the vehicle and greater likelihood of causing severe damage if an accident occurs, it should attract more severe punishments. *Yee-Tok* responds to this logic by demanding offender with higher blood alcohol levels to do longer hours of community service than others.

In my experience, drink drivers always waive their right to a court-appointed lawyer and plead guilty. They come to court with an expectation of paying fine and going back home on the same day. The police and the prosecutor are the ones who inform the defendants on the expected amount of fine. Seasoned practitioners know that the court varies sentences by type of vehicle and blood alcohol levels. However, since the details of *Yee-Tok* are technically confidential, the police and the prosecutor may not know the exact amount of fine for a particular offender. Thus it is common for some defendants to claim that they did not bring enough money to pay the fine since they rely on the advice of the police and the prosecutor.

Once a judge becomes a master at using *Yee-Tok*, sentencing common drink driving becomes a routine. A hundred drink drivers or more can be sentenced in one day without the need for adjournment or commissioning pre-sentence reports.

b) Sentencing Dealers of Methamphetamine

Table G2: *Yee-Tok* for Selling Methamphetamine or Possession of Methamphetamine with intent to sell (Class 1 Narcotics)

Statutory Sentences	**Recommended Sentences (Before Reduction)**	**Remarks**
Section 15, 66 of the Narcotics Act 1979 (as amended) [the statute classifies this offence into 3 categories by the quantity of drugs]		
I. Not exceeding 15 units of usage (e.g. tablet), 1.5 grams of net weight or 0.374 grams of pure substance weight - 4 to 15 years imprisonment or 80,000 to 300,000 baht fine or both	-Not exceeding 5 tablets, 0.5 g. of net weight or 0.125 g. of pure substance weight; 4 years imprisonment [+200,000 baht fine if imprisonment is suspended] -Not exceeding 10 tablets, 1 g. of net weight or 0.250 g. of pure substance weight; 5 years imprisonment [+300,000 baht fine if imprisonment is suspended] -Not exceeding 15 tablets, 1.5 g. of net weight or 0.374 g. of pure substance weight; 6 years imprisonment [+400,000 baht fine if imprisonment is suspended]	Only for category I offence, if there is a special reason and the defendant has never been convicted of narcotics offences, the imprisonment term can be suspended for 3 years but they have to pay a fine and be placed under the supervision of a probation officer.
II. pure substance weight from 0.375 grams but not exceeding 20 grams- 4 years to life imprisonment and 400,000 to 5,000,000 baht fine or both	375 to 1 g; 6 years imprisonment and 500,000 baht fine 1to 2 g; 7 years imprisonment and 600,000 baht fine For each additional gram; Add another one year of imprisonment and 50,000 baht fine [more details in real *Yee-Tok*]	

III. pure substance weight exceeding 20 grams- life imprisonment and fine 1,000,000 to 5,000,000 baht or death penalty	20 to 100 g; Life imprisonment and 1,000,000 baht fine 101-250 g; Life and 2,000,000 baht fine 251-500 g; Life and 3,000,000 baht fine 501-750 g; Life and 4,000,000 baht fine 751-1,000 g; Life and 5,000,000 baht fine Exceeding 1,000 g; death penalty	

Selling methamphetamine and possession of methamphetamine with intent to sell are common offences which are routinely filed in the criminal courts in Bangkok and provincial courts across Thailand. It is clear from the statute that punishment for these offences varies by quantity of drugs and the main index of quantity is the weight of the pure substance. One may ask why greater quantity attracts more severe punishment. The answer may be that more quantity means more harm if distributed. Information on types and quantity of drugs is included in an indictment by the public prosecutor.

Since *Yee-Tok* mainly focuses on the quantity and pure substance of methamphetamine, there is no need for judges to seek additional information on family background or motives of an offender. It is noteworthy that although *Yee-Tok* authorizes non-custodial sentences for small-amount drug dealers, non-custodial sentences for dealers of methamphetamine are very rare. Most judges seem to share the perception that drug dealing is a serious offence. I have never commissioned a pre-sentence report in this type of case and never sentenced drug dealers to non-custodial measures. However, user-dealers of small amounts of methamphetamine are legally diverted from the mainstream of criminal justice and benefit from rehabilitation programmes. The problem is that, to benefit from the diversion mechanism, an offender must be charged by the police with both drug use and drug dealing. If the police only charge *de facto* user-dealers with an offence of drug dealing, they will not be diverted from the main process and are more likely to be given custodial sentences.

Sentencing Crimes with victims

a) sentencing common thieves

From a statutory perspective, common theft is a non-serious offence which carries a maximum sentence of up to 3 years' imprisonment, a sentence which can be suspended. The statute leaves discretion to courts to decide the amount and suitable types of sentence. *Yee-Tok* varies sentences for common theft by type and amount of stolen property[147]. The reason behind this is to justify the seriousness of theft by harm and to try to quantify harm objectively.

Information on type and amount of stolen property is included in an indictment. Therefore, by and large, there is no need to commission a pre-sentence report. However, since theft is an offence with victims and an indictment does not contain information on the victim, judges may commission a pre-sentence report in some cases to know if the victim has been compensated by the offender and also the victim's version of the event. It is noteworthy that in crimes with victims such as theft, a probation officer as well as a trial judge can arrange victim-offender mediation.

Some offenders who have lawyers may file a plea in mitigation which includes information on compensation made to the victim. In that case, the court may commission a pre-sentence report to verify the claim. For crimes with actual victims such as theft, the point in commissioning of a pre-sentence report is to seek information not only on the offender but also on the victim.

[147]For an example of *Yee-Tok* for common theft see Table 2.1 in Chapter 2.

b) Sentencing Negligent driving resulting in death of the victim

Table G3: *Yee-Tok* for Causing death by Negligent Driving

Statutory Sentences	**Recommended Sentences (Before Reduction)**	**Remarks**
Section 291 of the Penal Code imprisonment of up to 10 years and paying a fine up to 20,000 baht [This offence covers all types of causing death by negligent acts, not only by driving.]	Depending on type of vehicle <u>Motorcycle</u> -3 years imprisonment [and 12,000 baht fine if imprisonment is suspended] <u>Car</u> -4 years imprisonment [and 15,000 baht fine if imprisonment is suspended] <u>Lorry, Taxi and Bus</u> -5 years imprisonment [and 20,000 baht fine if imprisonment is suspended]	- Whether or not to suspend imprisonment depends on whether the relatives of the deceased are satisfied with the compensation offered by the defendant. - In the case of Lorries, Taxis and buses, consultation with the Chief Judge is required before imposing suspended imprisonment. - If deciding to suspend imprisonment, suspend for at least 2 years.

Thailand has no specific offence of causing death by dangerous driving as exists in England and Wales (see e.g. Ashworth, 2006). Such an offence is included in the general offence of causing death by a negligent act. The statute states only a maximum sentence of 10 years' imprisonment and a 20,000 baht fine and leaves the court with the task of seeking the criteria for varying seriousness of the offence.

Driving a car requires a higher duty of care than riding a motorcycle and failing to observe the applicable standard of care should attract more severe punishment: longer imprisonment terms and severer fines. In deciding whether or not to suspend imprisonment, *Yee-Tok* requires the court to seek information on compensation made

to the relatives of the deceased by the offender. Normally, a judge has three ways to obtain this information.

The first scenario is where the prosecutors include this information in an indictment. This scenario is becoming more and more common since it is widely practised in police stations to arrange victim-offender mediations in this type of case. The second way is for defence lawyers to file a plea in mitigation claiming the payment of compensation and bringing the relatives of the deceased to court to confirm the compensation. In this scenario, a judge may commission a pre-sentence report to verify this information. The last mechanism is for the judge to commission a pre-sentence report without any initiative from the parties.

Defendants in this type of case know, either from the police, the prosecutor or their lawyer, that they need to reach an agreement with the deceased's family. Their insurance companies will facilitate the process. Most companies ask the defendant to plead not guilty unless the agreement on compensation has been concluded.

In some cases in which the family of the deceased ask for unrealistic compensation, the court may try to mediate the parties to reach an agreement or refer the case to the mediation centre of the court. In facilitating the mediation, a sentencing judge considers the financial backgrounds of both the offender and the victim. It should be noted that, even if an agreement on compensation has not been reached, the court can suspend imprisonment if it is satisfied from the circumstances of the case that the defendant has tried to demonstrate their remorse, e.g. attending the funeral, admitting their guilt at the outset or waiting for police at the scene. Therefore, in practice, the imprisonment term can be suspended even though the relatives of the deceased are not satisfied with the compensation.

Appendix H: Participant Information Sheet for Judges

Name of Department: School of Law, Faculty of Humanity and Social Science
Title of the Study: How does Thai sentencing work? Unveiling occupational identity of Thai sentencers

This research is conducted by Supakit Yampracha, Judge of the Office of the Courts of Justice, Thailand as part of his doctoral study at the School of Law, University of Strathclyde, UK. The study is fully funded by the royal government of Thailand.

The purpose of the research is to find out how Thai sentencing works or how Thai sentencers make sentencing decisions.

The nature of the investigation is the focus group interview; a group discussion among judges with the researcher acting as a facilitator. Participation is voluntary and you are not obliged to take part if you do not wish to. Your Chief Judge has already been notified of this recruitment process. Once you decide to participate, you still retain the right to withdraw from the study at any time.

As a participant of this research, you are expected to take part in a discussion in a focus group. Each focus group consists of between four to six judges who are working in the same court as you. The broad topic of the discussion is how you see yourself as a Thai sentencer. The researcher will facilitate the group discussion by using pictures and mock cases and asking questions. The focus group will last between 1 and 2 hours and will be conducted on the arranged date and time between all participants and the researcher at the conference room of your court. Your dedication of time and energy to participate will be fully appreciated.

The targeted population of this study are judges who have at least 5 years experience on the bench. Moreover, the study needs 4 to 6 judges with at least 5 years experience who work in the same court to participate in each focus group. Your court fits the criteria so the researcher invites you to take part in the research.

If you decide to participate, your personal identity will be kept confidential and anonymous. In other words, the reader of the research findings cannot identify you from what they read. What you say in the focus group will be audio-recorded, transcribed and quoted word by word in the research. The results of the investigations will be published in the researcher's PhD thesis. All data will be accessed and used only by the researcher and will be later securely destroyed.

The University of Strathclyde is registered with the Information Commissioner's Office who implements the Data Protection Act 1998. All personal data on participants will be processed in accordance with the provisions of the Data Protection Act 1998.

Thank you for reading this information – please ask any questions if you are unsure about what is written here.

If you are willing to be involved in the project, you will be asked to sign a consent form to confirm this.

If you do not want to be involved in the project, thanks anyway for your attention.

Should you have any questions regarding this research please contact;

Researcher: Supakit Yampracha

Status: PhD Student
Department: School of Law, Faculty of Humanity and Social Science
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This investigation was granted ethical approval by the University of Strathclyde Ethics Committee.

If you have any questions/concerns, during or after the investigation, or wish to contact an independent person to whom any questions may be directed or further information may be sought from, please contact:

Secretary to the University Ethics Committee
Research & Knowledge Exchange Services
University of Strathclyde
Graham Hills Building
50 George Street
Glasgow
G1 1QE

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Appendix I: Participant Information Sheet for Chief Judges/Appellate Judges

Name of Department: School of Law, Faculty of Humanity and Social Science
Title of the Study: How does Thai sentencing work? Unveiling occupational identity of Thai sentencers

This research is conducted by Supakit Yampracha, Judge of the Office of the Courts of Justice, Thailand as part of his doctoral study at the School of Law, University of Strathclyde, UK. The study is fully funded by the Royal government of Thailand.

The purpose of the research is to find out how Thai sentencing works or how Thai sentencers make sentencing decisions.

The nature of the investigation is the semi-structured interview of Chief Judges/appellate judges in their roles as court managers/sentencing reviewers. Participation is voluntary and you are not obliged to take part if you do not wish to. Once you decide to participate, you still retain the right to withdraw from the study at any time.

As a participant of this research, you are expected to be interviewed by the researcher. The broad topics of the interview are how you expect a Thai sentencer to react and what roles you have played to ensure that judges in your court have the expected occupational identity. The interview will last between 30 minutes and 1 hour and will be conducted on the arranged date and time between you and the researcher at your office. Your dedication of time and energy to participate will be fully appreciated.

The targeted population of this study are Chief Judges of the provincial courts which have at least 4 judges of at least 5 years experience working there/ appellate judges in the central Court of Appeal and one regional Court of Appeal. Your court fits the criteria so the researcher invites you to take part in the research.

If you decide to participate, your personal identity will be kept confidential and anonymous. In other words, the reader of the research findings cannot identify you from what they read. What you say in the interview will be audio-recorded, transcribed and quoted word by word in the research. The results of the investigations will be published in the researcher's PhD thesis. All data will be accessed and used only by the researcher and will be later securely destroyed.

The University of Strathclyde is registered with the Information Commissioner's Office who implements the Data Protection Act 1998. All personal data on participants will be processed in accordance with the provisions of the Data Protection Act 1998.

Thank you for reading this information – please ask any questions if you are unsure about what is written here.

If you are willing to be involved in the project, you will be asked to sign a consent form to confirm this.

If you do not want to be involved in the project, thanks anyway for your attention.

Should you have any questions regarding this research please contact;

Researcher: Supakit Yampracha

Status: PhD Student
Department: School of Law, Faculty of Humanity and Social Science
Telephone: +44 (0)141 444 8400
E-mail: supakit.yampracha@strath.ac.uk

Chief Investigator: Professor Cyrus Tata

Status: Primary supervisor

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This investigation was granted ethical approval by the University of Strathclyde Ethics Committee.

If you have any questions/concerns, during or after the investigation, or wish to contact an independent person to whom any questions may be directed or further information may be sought from, please contact:

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Appendix J: Consent Form for Participants

Name of Department: School of Law, Faculty of Humanity and Social Science
Title of the Study: How does Thai sentencing work? Unveiling occupational identity of Thai sentencers

- I confirm that I have read and understood the information sheet for the above project and the researcher has answered any queries to my satisfaction.
- I understand that my participation is voluntary and that I am free to withdraw from the project at any time, without having to give a reason and without any consequences.
- I understand that I can withdraw my data from the study at any time.
- I understand that any information recorded in the investigation will remain confidential and no information that identifies me will be made publicly available.
- I consent to being a participant in the project
- I consent to being audio recorded as part of the project Yes/ No

(PRINT NAME)	
Signature of Participant:	Date:

Appendix K: Focus Group Instruments

1. **Pre-focus group questionnaire**

Questionnaire for Participants

Name of Department: School of Law, Faculty of Humanity and Social Science

Title of the Study: How does Thai sentencing work? Unveiling occupational identity of Thai sentencers

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Part 1: Background Information

Date:

Name:

Age:

Judge-Trainee Class of:

Year of entry the judiciary:

Previous Occupation:

Number of Provincial courts previously worked at:

Duration in the current court:

Part 2: Ranking Exercise

Please select the three most important values in sentencing from the list provided and rank your choices.

Tailor-making sentences to suit each defendant
Sentencing in a way that can be monitored by the public and the media
Sentencing offenders who commit similar crimes equally
Sentencing in accordance with the aims of punishment
Uniformity of judges in making sentencing decisions
Sentencing on the basis of sufficient information
Independence of each judge in making sentencing decisions
Sentencing in a way that will not be amended by the higher courts

1…….

2…….

3…….

2. Mock Indictment

Mock Indictment

Name of Defendant…… Mrs. Somsri Deesamur

Sex……. Female *Age*……. 24 *Occupation*……. Employee

Address…… Bangkok

Charges…… Selling of Type I Narcotics

Facts…….

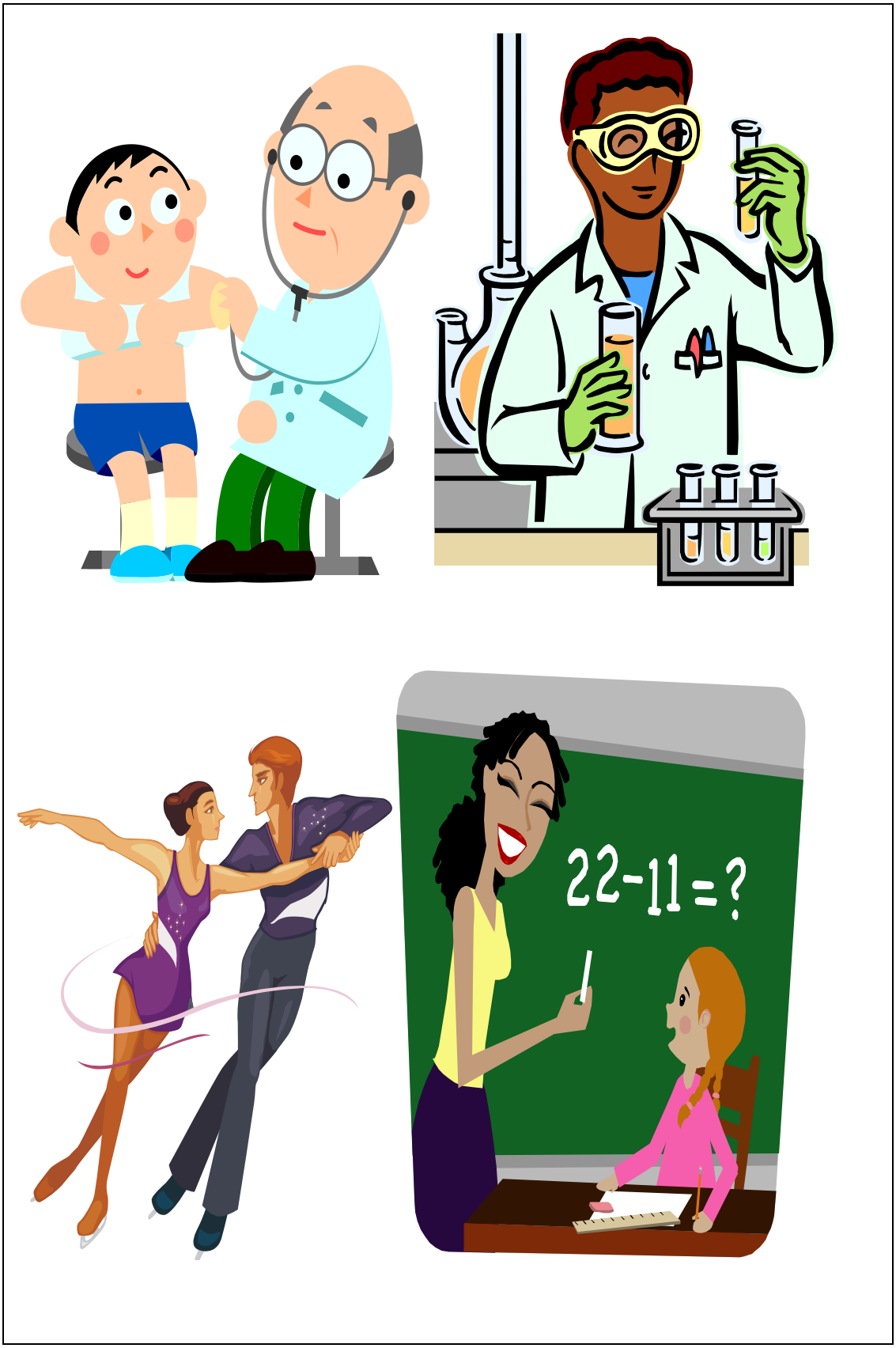
During the daytime of 24th November 2013, the defendant sold 2 tablets (weighed 0.02 grams) of methamphetamine which is a Type I Narcotics drugs to an unnamed police informant at the price of 500 baht. The alleged crime took place at Chatuchak District, Bangkok. The defendant was arrested soon after the commission of the crime with the money received from the alleged transaction.

Previous Conviction….. None

Applicable Laws…… Section 15 and 66 of The 1979 Narcotics Act (as amended)

Recommendations Convict and sentence the offender for the charged offence

3. Pictures



Appendix L: Interview Schedule for Chief Judges

1. In your opinion, what is the judiciary's conception of 'just sentencing'?

2. How can you ensure that judges in your court share the same conception of just sentencing?

3. What is your policy on the compliance and departure of *Yee-Tok*? and How do you arrive at that policy?

4. What would you do if sentencers in your court do not follow your policy?

5. What is your role on the implementation of the policy and official advice of the President of the Supreme Court and Strategic plan of the Office of the Courts of Justice?

Appendix M: Interview Schedule for Appellate Judges

1. What is the expectation of the Courts of Appeal to the sentencing decisions of lower court judges?
2. Each provincial court sentences similar offences differently. What would the Courts of Appeal do when the parties file appeals against sentences?
3. In case that the appellate judges decide to amend the sentences of the lower court, do they consider it as the mistake on the part of the latter?
4. How do the Courts of Appeal seek additional information?
5. What would be the advantages and disadvantages of compelling lower courts to use the *Yee-Tok* of higher court?
6. Do appellate judges agree with idea of disclosing and publishing details of *Yee-Tok* ?
7. What is the role of the Courts of Appeal in implementing policy and official advice of the President of the Supreme Court and strategic plan of the Office of the Courts of Justice to promote the use of non-custodial sentences?