THE CONCEPTS OF TRUTH AND FAIRNESS IN THAI CRIMINAL PROCEDURE

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This study looks at the principles that shape the structure of the whole of Thai criminal procedure law. It examines how the search for truth is attempted to be reconciled with the idea of a fair trial or procedural fairness. The conflict between the search for truth on the one hand and guaranteeing procedural rights of the accused on the other is particularly problematic in the Thai context. Thai law affirms that some evidence cannot be admissible if it is obtained by a violation of certain procedural norms. At the same time, the law allows judges to admit some unlawfully obtained evidence in the interest of justice. The conflict between various legal norms cannot be solved without permitting judges to exercise broad discretion in striking the right balance between discovering the true facts and protecting the rights of the accused. Thai legal education and practice does not allow a broad judicial discretion in accepting or rejecting evidence on the grounds that it was obtained unlawfully. As a result, there is an attempt to build a sophisticated system of rules to accommodate the interests of justice and fairness in different situations. This system, however, lacks clarity and consistency.

Keywords: *Thailand, criminal procedure law, evidence, truth, fairness*

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INTRODUCTION

Thai procedural criminal law is an interesting object of study since it tries to accommodate both inquisitorial and adversarial models of trial.[1] It was first enacted in 1934, but it has been continuously revised to reflect the changes in Thai social, political, and economic life. Criminal procedure law in every country is constantly evolving in an effort to accommodate various conflicting social needs and demands. In the last ten years, Thai law underwent eight revisions.[2] The speed of the legislative change is such that many works written not long ago have become quickly outdated. The task of this paper is not to produce an up-to-date description of Thai criminal procedure, a description that will be out-of-date soon by another way of reform, but to understand the inner dynamic of the Thai criminal procedural law. There is a need to concentrate not so much on specific provisions of criminal procedure law as on the ideas that shape and determine their content.

The basic principles of the Thai Criminal Procedure Code are not indigenous. Thai criminal procedure is a product of the westernization of Thai law.[3] Several fundamental ideas underlie the whole normative structure of a contemporary code of criminal procedure. The first one is that criminal procedure must be set up in such a way as to guarantee as much as possible a true discovery of all elements of a criminal offense.[4] The second idea is that an accused must receive a fair trial, which is closely connected with the idea of human rights.[5] This idea affirms the concept of an individual autonomy. These two ideas may enter into conflict, particularly in the cases of the admissibility of evidence obtained illegally.

1. Kittipong Kittayarak, "The Thai Constitution of 1997 and its implication on criminal justice reform," *Resource Material Series of United Nations, No. 60: Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders* (2003): 107–17, 108, https://www.unafei.or.jp/publications/pdf/RS_No60/No60_13VE_Kittipong.pdf.

2. Thai Criminal Procedure Code 1934. Changes of this legislation can be found at the official website: https://www.krisdika.go.th/librarian/get?sysid=570066&ext=htm.

3. Apirat Petchsiri, "A Short History of Thai Criminal Law since the Nineteenth Century," *Malaya Law Review* 28 (1986): 134.

4. Tom Stacy, "The Search for the Truth in Constitutional Criminal Procedure" 91(6) *Columbia Law Review* (1991): 1369–1451.

5. Sarah J. Summers, *Fair trials: The European criminal procedural tradition and the European Court of Human Rights* (Oxford: Hart Publishing, 2007).

In this paper, I will examine how the search for truth is attempted to be reconciled with the idea of a fair trial or procedural fairness in Thai criminal law. The conflict between the search for truth on the one hand and guaranteeing procedural rights of the accused on the other is particularly problematic in the Thai context, as procedural practices are significantly depending on political upheavals experienced in recent Thai history, which oscillates between a military authoritarian government and occasional free democratic elections. These upheavals certainly affect the way criminal cases are decided. However, I will not attempt to draw generalizations in relation to the actual practice for a particular regime of Thai government. Rather, I will concentrate on the general characteristics that transcend the vicissitudes of Thai politics of the recent past. A more detached approach to the subject is certainly attractive for a non-Thai researcher, as it allows a cooler realm of academic thought by connecting to various legal traditions developed far from the warm shores of Thailand heated by its political change.

The tension between the search for truth and procedural fairness is a topic that has attracted enormous attention in the literature. It is worth giving a short description of general trends and approaches to the subject before examining the complexities of Thai law. The dynamic relationship between the search of truth and fair trial is generally acknowledged. Some scholars perceive the different degree of preference for either of them as depending on the guiding political ideology, or even as the foundational element for distinguishing between various legal systems.[6] It is asserted that the civil law tradition with its inquisitorial model of trial pays a greater attention to the search for truth, whereas common law with its adversarial model gives a greater weight to procedural fairness.[7] This gives rise to different roles of a judge, particularly in the way he or she handles evidence. The inquisitorial system gives more power to the judge to search for additional evidence, whereas in the adversarial system, the judge is simply an impartial arbiter who stands above all, including the state

6. See Bo Yin and Peter Duff, "Criminal Procedure in Contemporary China," *International and Comparative Law Quarterly* 59 (2010): 1117.

7. Jenny McEwan, "The Adversarial and Inquisitorial Models of Criminal Trial," in *The Trial on Trial, Volume 1, Truth and Due Process*, eds. Antony Duff, Lindsay Farmer, Sandra Marshall, and Victor Tadros (Oxford: Hart Publishing, 2004), 51–70 at 56.

power.[8] Some scholars perceive this difference as fundamental in distinguishing common law and civil law systems.[9]

The search for truth justifies broad powers given to the investigators, prosecutors, and judges to discover whether the accused is truly guilty or not. Fair trial puts limits on those powers. In the United States, these limits have been largely developed within the constitutional doctrine of a due process, which has been a subject of extensive scholarly discussion. "Fairness" of the criminal process as well as its outcome is often described by a no less abstract term, "reasonableness."[10] The view that the inquisitorial system favors the search for truth more than the adversarial system has been challenged. Elisabetta Grande wrote that two systems search for the truth by using different paths, and they have different assumptions about what type of truth can be discovered by means of a criminal procedure.[11] The inquisitorial system pursues an ontological or substantive truth, whereas the adversarial system does not believe in the existence of ontological truth and seeks what Grande calls "interpretive truth."[12] This assumption, however, does not apply to Thailand. The inquisitorial characteristics of criminal procedure, considered in the next section, seem to prevail over the adversarial, but it is certain that the dominant Buddhist culture favors the plurality of the perception of truth.

How truth and fairness in criminal trial are approached can vary significantly reflecting legal, political, and cultural values of the authors. For example, Joel Samaha perceived them in terms of a balance between the result and the process. The result is either convicting the guilty or acquitting the innocent. "In our constitutional democracy, we don't believe in catching, convicting, and punishing criminals at any price. According to one court, 'Truth, like all other good things, may be loved unwisely, may

8. Emilios Christodoulidis, "Communication and Legitimacy in the Courtroom," in *The Trial on Trial, Volume 1, Truth and Due Process*, eds. Antony Duff, Lindsay Farmer, Sandra Marshall, Victor Tadros (Oxford: Hart Publishing, 2004), 179–202 at 186.

9. Elisabetta Grande, "Dances of Criminal Justice: Thoughts on Systemic Differences and the Search for the Truth," in *Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Professor Mirjan Damaska*, eds. John D. Jackson and Máximo Langer (Oxford: Hart Publishing, 2008), 145–64.

10. George C. Thomas III, *Double jeopardy: The history, the law* (New York: NYU Press, 1998), 22.

11. McEwan, see note 7 above.

12. Ibid., 147.

be pursued too keenly, may cost too much' (Pearce v. Pearce 1846, 950)."[13] Truth and fairness can also be seen as conflicting principles of justice: one aims at identifying a defendant as an offender, and another is called to protect defendants against abuse of state powers.[14] The conflict between these two principles has recently intensified in the West in the context of the War on Terror. It has become the center of a number of legal decisions in national and international courts, particularly the European Court of Human Rights, which has attracted enormous amount of literature.[15]

The academic discussion on finding the proper balance between truth and fairness considers largely the Western systems of criminal justice. Thailand's system has attracted very little attention. A number of English language works on Thai criminal procedures were published many years ago and are now largely outdated.[16] The issue of human rights and fair trial has received critical attention recently, although this attention has not yet resulted in a deep academic analysis of the normative structure of Thai criminal procedure law.[17] A number of interesting studies have been done in the context of a specific problem, for example, the practice of fair trial in transnational criminal proceedings. In those studies, the issue of truth and fair trial are unavoidably raised. For example, in one study, the decision of the Constitutional Court of Thailand was analyzed on its correspondence to the principle of fair trial.[18] The Constitutional Court

13. Joel Samaha, *Criminal Procedure*, 8th ed. (Belmont, CA: Wadsworth, 2012), 7.

14. Mireille Hildebrandt, "Trial and 'Fair Trial': From Peer to Subject to Citizen," in *The Trial on Trial, Volume 2, Judgement and Calling to Account*, eds. Antony Duff, Lindsay Farmer, Sandra Marshall, and Victor Tadros, (Oxford: Hart Publishing, 2006), 15–36 at 15.

15. Nihal Jayawickrama, *The judicial application of human rights law: National, regional and international jurisprudence* (Cambridge: Cambridge University Press, 2002); Anthony Amatrudo and Leslie William Blake, *Human rights and the criminal justice system* (London: Routledge, 2014); Summers, see note 5 above.

16. See John Huston, "A Preliminary Survey of Criminal Procedure in Thailand," *Syracuse Law Review* 16 (1964): 505–44; Norval Morris, "Human Rights and the Criminal Law in South-East Asia," *Tasmanian University Law Review* 1(1), (July 1958): 68–79.

17. Andrew Harding, "Thailand's Reforms: Human Rights and the National Commission," *Journal of Comparative Law* 1(1), (2006): 88–99.

18. Kitti Jayangakula, "The Practice of Thai Courts on the Right to a Fair Trail through Transnational Criminal Proceeding," *Social Science Asia* 2(3), (2016): 73–84 at 74, 83, http://doi.nrct.go.th/ListDoi/Download/229231/44790ebbad88d237708530ede2fe30cd?Resolve_DOI=10.14456/ssa.2016.21.

had to examine the constitutionality of the *Act on Mutual Assistance in Criminal Matters* B.E. 2535 (AMACM)[19] in relation to the admissibility of evidence obtained abroad but which could not be cross-examined during the trial in Thailand.[20] A provision of the legislation was declared unconstitutional because it allowed a criminal court to admit evidence without according the accused an effective opportunity to challenge it.[21]

There are many works published on the subject in Thai language that are not available to international readers. However, not many of them try to analyze the fundamental principles of criminal procedure law in their dynamic interaction.[22] Not unlike the English language publications, these Thai studies often cover specific issues, for example, restorative justice in the practice of criminal courts,[23] the legality of the orders of the military government that deal with criminal law and procedure,[24] the powers to control the decision of a prosecutor not to prosecute the accused,[25] or the role of new technology in the criminal procedure.[26]

19. English translation is available at: https://www.unodc.org/cld/en/legislation/tha/the_act_on_mutual_assistance_in_criminal_matters_b.e._2535/section_1-42/the_act_on_mutual_assistance_in_criminal_matters_b.e._2535.html.

20. See Constitutional Court of Thailand, Decision no. 4/2556 (2013). Thai text is available at: http://www.constitutionalcourt.or.th/occ_web/download/article/file_import/center4_56.pdf.

21. Kitti Jayangakula, see note 18 above.

22. ฉัตตมาศ วิเศษสินธุ์, "การศึกษาเปรียบเทียบการสืบสวนสอบสวนตามกฎหมายวิธีพิจารณาความอาญาของประเทศไทยกับประเทศมาเลเซีย" [Chattamat Wisetsin, Comparative study about investigation between Criminal Procedure in Thailand and Malaysia], *al-Hikmah Journal of Fatoni University* 7 (14), (2010): 93–100, http://www.e-majallah.ftu.ac.th/index.php/alhikmah/article/view/201/178.

23. ศิริชัย กุมารจันทร์, กรกฎ ทองขะโชค, เอกราช สุวรรณรัตน์, "กระบวนการยุติธรรมเชิงสมานฉันท์และสันติวิธีในศาลจังหวัดชายแดนใต้" [Sirichai Kumarjan et al., Restorative Justice and Peaceful Way of the Court in the Southern Provinces], *Assumption University Law Journal* 8(2), (2017): 68–88, http://www.assumptionjournal.au.edu/index.php/LawJournal/article/view/3135/2014.

24. นนทชัย โมรา, "ลำดับชั้นทางกฎหมายของประกาศคณะปฏิวัติ: วิเคราะห์ตามหลักนิติรัฐ" [Nontachai Mora, Legal status of the military junta' decrees: from the perspective of the rule of law], วารสารนิติศาสตร์และสังคมท้องถิ่น [Law and local society journal] 1(1), (2017): 1–25, https://e-journal.sru.ac.th/index.php/llsj/article/view/810.

25. พุฒิพร เจียรประวัติ, "คำสั่งไม่ฟ้องถ่วงดุลได้ด้วยใคร" [Putthiporn Jianprawat, Who is check and balance in non-prosecution order], *Research and Development Journal Loei Rajabhat University* 12(39) (2017): 1–12, https://www.tci-thaijo.org/index.php/researchjournal-lru/issue/view/8902.

26. คณพล จันทน์หอม, "การนำเทคโนโลยีสารสนเทศมาใช้ในการฟ้องด้วยวาจา" [Kanaphon Chanhom and Chachapon Jayyaphorn, Application of Information Technology to Criminal Information

Even though the issues of truth and fair trial are being raised, it does not appear that the dynamic interaction between these two fundamental principles has been systematically examined.[27] Before examining this interaction, it is important to grasp some unique principles of Thai criminal procedure when compared to other countries of the world.

I. THE UNIQUENESS OF THAI CRIMINAL PROCEDURE LAW

Thai criminal procedure law is codified and is subject, as has been noted above, to constant revision. The Criminal Procedure Code was first enacted in 1934. At the time of this writing, the last (34th) revision was made in 2019.[28] Even a brief survey of the code will be sufficient to conclude that it is a patchwork that reflects not only various historical changes but also different visions of legislation. The older provisions, reflecting the influence of the German and French models, are rather short and abstract, whereas the new provisions reflect some Anglo-American statutes in their attempt to be as precise and detailed as possible. The Thai law drafters have a penchant for borrowing anything they find attractive from anywhere without being much concerned about the logical consistency of their legislative framework. The lack of consistency becomes particularly apparent if one tries to define Thai criminal procedure as adversarial or inquisitorial.

Thai Criminal Procedure Code does not contain provisions that explicitly authorize the judge to request additional evidence in the same way as it is done in the inquisitorial system of a criminal trial. For example, German law states that "before the court decides on the opening of the

Cases], *Naresuan University Law Journal* 8(1) (2015): 88–113, https://so04.tci-thaijo.org/index.php/lawnujournal/issue/view/8947.

27. An exception might be an interesting work of Jiraporn Adchariyaprasita and Paiboon Chuwattanakij, who critically examined the role of truth in Thai criminal trial through a Thai novel with a Feminist perspective. See: จิราภรณ์ อัจฉริยะประสิทธิ์ และ ไพบูลย์ ชูวัฒนกิจ, "'ความจริง' ในกระบวนการยุติธรรมทางอาญาไทย: มุมมองทางกฎหมายในวรรณกรรมเรื่อง รากบุญ ของ ช่อมณี" [Jiraporn Srichaprasit and Paiboon Chuwattanakit, "The Truth" in Thai Criminal Justice System: Legal Perspectives on the Literature in Chomanee's Rak Boon], *CMU Journal of Law and Social Sciences* 10(2) (2018): 23–46, https://www.tci-thaijo.org/index.php/CMUJLSS/article/view/108630.

28. Kittipong Kittayarak, see note 1 above.

main proceedings, it may order particular [*einzelne*] evidence to be taken to help to investigate the case. The order shall not be contestable."[29] Thai law only states that the Court must examine whether there is a *prima facie* case. If there is none, the indictment shall be dismissed.[30] No powers to request particular evidence have been mentioned.

In 2004, Thai law introduced the practice of pretrial evidence inspections[31] in a form that is almost identical to some U.S. jurisdictions.[32] A Thai judge appears to play the passive role of a facilitator who ensures that the parties agree on the scope of evidence to be taken during the forthcoming trial. It contrasts sharply with a pretrial role of a German judge who may, even without an application, undertake the necessary investigatory acts in some circumstances.[33]

It would be, however, incorrect to define the Thai system of trial as purely adversarial. In relation to offenses punishable by 5 years' imprisonment or more, the Thai Court cannot accept a guilty plea until examining the supporting evidence.[34] In relation to any offense, when unsatisfied with the evidence adduced by the prosecutor, the Thai Court may demand the complete inquiry file from the public prosecutor for judicial examination.[35] Thai law, particularly in appeal cases, accepts in theory the principle of the inquisitorial trial similar to the one expressed in German law: "the court shall, in order to establish the truth, *ex officio* extend the taking of evidence to all facts and means of proof which are relevant to the decision."[36] When looking at the scope of powers of Thai courts regarding admissibility of evidence, the inquisitorial characteristics clearly dominate: "any materials, documents or oral evidence which are likely to prove the

29. German Criminal Procedure Code, Section 202. "Einzelne Beweiserhebungen" is sometimes translated as "taking individual evidence." See https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p1578. Since the term "individual evidence" can have a different meaning, I prefer the term "particular evidence."

30. Thai Criminal Procedure Code, Section 167. Thai text: ถ้าคดีไม่มีมูล ให้พิพากษายกฟ้อง.

31. Ibid., Section 173/1.

32. See, e.g., Pennsylvania Code, Rules of Criminal Procedure: 234 Pa. Code Rule 573, Pretrial Discovery and Inspection, http://www.pacodeandbulletin.gov/Display/pacode?file=/secure/pacode/data/234/chapter5/s573.html.

33. German Criminal Procedure Code, Section 165.

34. Thai Criminal Procedure Code, Section 176.

35. Ibid., Section 175.

36. German Criminal Procedure Code, Section 244. Thai Criminal Procedure Code, Section 208.

guilt or innocence of the accused are admissible."[37] There are exceptions regarding admissibility of evidence, and these exceptions make Thai law very different from other jurisdictions.

The unique characteristic of Thai law consists in an attempt to distinguish between "the evidence that has arisen not duly" (ที่เกิดขึ้นโดยมิชอบ) from "the evidence that has arisen duly but has been derived by acting wrongfully or has been derived by means of the data arisen or derived wrongfully" (ที่เกิดขึ้นโดยชอบแต่ได้มาเนื่องจากการกระทำโดยมิชอบหรือเป็นพยานหลักฐานที่ได้มาโดยอาศัยข้อมูลที่เกิดขึ้นหรือได้มาโดยมิชอบ).[38] It seems that the latter obscure legal clause refers to evidence that has been lawfully available but was unlawfully obtained. Thai academics and practitioners interpret the first category of evidence as strictly excluded, whereas the second category may be admitted if it is more advantageous in rendering justice.[39]

The distinction is a comparatively recent development of Thai criminal procedure. It was introduced by the Amendment of the Criminal Procedure Code Act (No. 28) in 2008.[40] The language of the enacted Section 226/1 certainly lacks clarity. It is not surprising, therefore, to observe that Thai academics and practitioners encounter difficulty in distinguishing these two concepts. Phromphan Chonthawornphong attempted to clarify the difference by singling out six types of the evidence that have arisen not duly and three types of evidence that have arisen duly but were derived wrongfully.[41] The six types of the first category are the following: (1) evidence is obtained through inducement, promise, threat, deception;[42] (2) confession or statement made at the time of the arrest;[43] (3) taking a statement from the accused without informing him of his rights;[44] (4) evidence obtained from children without following the prescribed

37. Thai Criminal Procedure Code, Section 226.

38. Ibid., Section 226/1.

39. Phromphan Chonthawornphong [พร้อมพรรณ ชลถาวรพงศ์], "การรับฟังพยานหลักฐานที่ได้มาโดยมิชอบตามประมวลกฎหมายวิธีพิจารณาความอาญา," คณะนิติศาสตร์ จุฬาลงกรณ์มหาวิทยาลัย [The Admissibility of Unlawfully Obtained Evidence under Thai Criminal Procedure Code] (2560), http://www.library.law.chula.ac.th/home/file.aspx? ID=949.

40. Thai text is available at https://library2.parliament.go.th/giventake/content_law/law070251-1.pdf.

41. Phromphan Chonthawornphong, see note 39 above, 234.

42. Thai Criminal Procedure Code, Section 226.

43. Ibid., Section 84.

44. Ibid., Section 134/4.

procedure;[45] (5) evidence obtained from entrapment; and (6) evidence obtained from wiretapping an induced conversation.[46] The three types of the second category are following: (1) evidence obtained from unlawful arrest, search, or seizure; (2) "the data was arisen or derived wrongfully";[47] and (3) evidence obtained from wiretapping a not-induced conversation. An "induced conversation" is a problematic term of Thai jurisprudence. It means a conversation that is initiated by a person with the secret intention to collect evidence without letting other person know about it. In practice, it may not be easy to characterize as "induced" a conversation that occurs in a routine course of events.

The above categorization of different types of illegal evidence reflects the practices of Thai courts to some extent.[48] However, its superficiality is apparent. The circumstances of real life are so diverse, and the complexity of the interests of justice can be so complicated that making a fair judicial decision in relation to admissibility of unlawful evidence for the interests of justice cannot be solved by a detailed list of exceptions. The judges must exercise discretion. This necessity of discretion is well expressed in the English case of *Karuma v. R*, in which the defendant was convicted for unlawful possession of weapons based on evidence that was obtained unlawfully (the police did not have the authority to search). Even though its test of admissibility has now been replaced in English law,[49] it is appropriate to present it here in full as expressing a more flexible approach. In *Karuma*, Lord Goddard stated:

> In their Lordships' opinion the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained. While this proposition may not have been stated in so many words in any English case there are decisions which support it, and in their Lordships' opinion it is plainly right in principle . . . There can be no difference in principle for this purpose between a civil and a criminal case. No

45. Ibid., Section 133 bis.

46. The last two types are not explicitly mentioned in Thai Criminal Procedure Code.

47. Thai Criminal Procedure Code, Section 226/1.

48. Phromphan Chonthawornphong herself referred to the decision of the Supreme Court of Thailand (2281/2555), which did not fit well into a rigid classification. See note 39 above, 239.

49. Kelly Pitcher, *Judicial responses to pre-trial procedural violations in international criminal proceedings* (The Hague: TMC Asser Press, 2018), 181–260, at 224.

> doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused . . . If, for instance, some admission of some piece of evidence, e.g., a document, had been obtained from a defendant by a trick, no doubt the judge might properly rule it out.[50]

But he might not. There must be a complex balance between the interests to discover the truth and to treat the accused fairly.

In Thailand, there is a general reluctance to acknowledge openly that there is not a clear-cut rule for admissibility of evidence. The job of Thai judges is to apply rules strictly, and there is a fear of the painful work of balancing competing interests that are protected by law. So far, Thai courts do not display a complex reasoning in trying to find a balance between a search for truth and procedural fairness in dealing with admissibility of unlawfully obtained evidence. A rather mechanical vision of law can be clearly seen in one of the leading Thai cases in which evidence was obtained by inducement. In the case 4077/2549 (2006), the Supreme Court overruled the conviction of the defendant who sold CDs in violation of copyright law.[51] The evidence was obtained by the copyright owner by inducing the defendant to sell the materials to his proxy. In that case, the Supreme Court applied Section 2/4) of the same law, arguing that the copyright owner who induced the commitment of the offense was not an injured person and therefore did not have standing to sue the defendant. Certainly, the copyright owner suffered from illegal sales of his works, but procedurally, he could sue only a person who has violated his rights. Since he induced the defendant to violate his rights, he cannot be considered as an injured person in the meaning of the procedural law. One explanation of this decision is a lack of moral disapproval of copyright violators in an Asian society.[52] Perhaps the judges were unwilling to penalize a person whose actions are not perceived as socially dangerous or intrinsically evil. However, their decision was not based on

50. Kuruma Son of Kaniu (Appeal No. 35 of 1954) v The Queen (Eastern Africa) [1954] UKPC 43 (8 December 1954).

51. The accusation was brought under the Copyright Act 1994, Sections 4, 6, 8, 15, 31, 70, 75, and 76.

52. Matthew W. Parker, "Dying to Spite the Graveyard: Thailand and the Necessity of Creating a Culture-Based IP Enforcement Paradigm," *Asian-Pacific Law & Policy Journal* 18 (2016): 93, at 100.

the reasoning derived from a principle, but on an application of a legal formality.

The term "Panglossianism," introduced by Frederick Schauer and taken from a character in Voltaire's novel, *Candide*,[53] applies well to Thai judicial practices. According to Schauer, a Panglossian judge or official is the one who fails to perceive the truth that law is a matter of competing rights and interests. This distorted picture of law "may not only hurt all of us, but also harm the very goals, policies and rights that the Panglossian is shortsightedly attempting to protect."[54] A Thai judge tends to perceive law as a body of clearly defined rules that must be applied in a uniform manner. There is something more than a cognitive dissonance in facing the view that law is driven by contradictions. The roots of Panglossian attitude, as Schauer thought, are rooted not only in a psychological uneasiness in facing the conflict, but also in the vision of law.

A Panglossian judge can be found in any part of the world. The Thai legal environment, however, may be particular favorable for this. The reason for it is a lack of the idea of equity as it was formulated by Aristotle:

> What concerns equity and the equitable—how equity stands in relation to justice and the equitable in relation to the just—is the next thing to speak of. For they appear, to those who examine them, to be neither simply the same thing nor each in a different genus . . . For the equitable, though it is better than the just in a certain sense, is just, and it is not because it belongs to a different class of thing that it is better than the just. Therefore, the just and the equitable are the same thing, and although both are serious, the equitable is superior. This is what produces the perplexity, because although the equitable is just, it is not what is just according to law. The equitable is instead a correction of the legally just. The cause of this is that all law is general, but concerning some matters it is not possible to speak correctly in a general way. In those cases, then, in which it is necessary to speak generally, but it is not possible to do so correctly, the law takes what is for the most part the case, but without being ignorant of the error involved in so doing. And the law is no less correct for all that: the error resides not in the law or in the lawgiver but in the nature of the matter at hand . . . This is in fact the nature of the equitable: a correction of law in the respect in which it is deficient because of its being general. For this is

53. Frederick Schauer, "Rights, Constitutions and the Perils of Panglossianism," *Oxford Journal of Legal Studies* 38(4), (2018): 635–52.

54. Ibid., 652.

> the cause also of the fact that all things are not in accord with law: it is impossible to set down a law in some matters, so that one must have recourse to a specific decree instead.[55]

In other words, the task of a judge is not simply to apply legal rules in a machine-like manner to a certain set of circumstances, but to ensure that this application is both just and equitable. The problem with Thai lawyers is that by attempting to incorporate foreign rules on admissibility of evidence, they fail to give incorporate equity at least similarly to English law, which received direct and often indirect influence of the Aristotelian ideas.[56] Even though Thai traditional law in the past had some idea of equity, its application was often lacking.[57] With the reception of the Western law, the neglect of equity in favor of *jus strictum* became apparent.[58] This is particularly obvious in the resistance of some Thai academics to the idea that Thai judges may exercise broad discretion in relation to the "evidence that has arisen not duly."[59] The study of common law, and particularly of the U.S. common law, turns into a futile attempt to derive from precedent law a precise list of situations when the evidence must be excluded.[60] This futility comes not only from the fundamental differences existing between the tradition of common law and the system of civil law based on codes and different roles of judges. The existence of objectively universal standards of admissibility of law is difficult to prove as law is largely a product of a particular set of political, economic, and cultural circumstances. Each country has its own dynamic in shaping the overall legal structure as well as the specific practices of admissibility of evidence.

Thus, there is a need for Thai lawyers to consider the rules of evidence not as a universal machine-like technology that can and must be used everywhere in the same way. Rather, the rules on admissibility of evidence have to be examined in a certain context. Nor possible is it to reduce the

55. Aristotle, *Nicomachean Ethics*, Vol. 10, 1137a, b.

56. Alan Cromartie, "Epieikeia and Conscience," in *The Oxford Handbook of English Law and Literature, 1500–1700*, ed. Lorna Hutson (London: Oxford University Press, 2017), 320, 321.

57. Frank C. Darling, "The evolution of law in Thailand," *The Review of Politics* 32(2), (1970): 197, 203.

58. Preedee Kasemsup, "Reception of Law in Thailand-A Buddhist Society," in *Asian Indigenous Law*, ed. Masaji Chiba (New York: Routledge, 2009), 267, 288.

59. Phromphan Chonthawornphong, see note 39 above, 242.

60. Ibid., 243.

examination of those rules to a simple conflict between a "due process model" and "crime control model."[61] In real life, both models may coexist without contradicting each other. The conflict between the truth and the procedural rights is more complex and can involve different ideologies.

II. THE IDEA OF TRUTH AND FAIRNESS IN THAI CRIMINAL PROCEDURE

The idea of truth held by Thai judges is, at its best, understood by comparison with English law of the past. The dictum of Lord Goddard quoted above is certainly based on the idea that the primary task of judges is to find out the truth. The fundamental questions they must answer are the following: Is it true that the offense took place? Is it true that the defendant committed the offense? Is it true that there are no circumstances that excuse the offender completely or partially for what he has done? If some evidence is obtained in an unlawful way but it helps to answer these questions, then, according to Lord Goddard, it should be admissible. However, such admission should not be unfair to the defendant. In other words, the search for truth must not lead to unfairness.

If fairness limits the search for truth, then its definition becomes paramount. It would be a vain thing to look for a uniform definition of fairness not only in Thai but also in English legal literature.[62] It seems that Givelber and Farrell were right in conceptualizing fairness in terms of a sentiment.[63] Therefore, it is understandable that Thai law does not contain the definitions of fairness. However, the idea of fair trial is explicitly affirmed in Section 8 of the Thai Criminal Procedure Code.[64] Several provisions in this legislation are generally associated with the idea of a fair trial: the right to have a defense lawyer,[65] the right to examine the

61. Herbert Packer, *The limits of the criminal sanction* (Stanford, CA: Stanford University Press, 1968), 163.

62. George P. Fletcher, *The grammar of criminal law: American, comparative, and international, Volume I, Foundations* (New York: Oxford University Press, 2007), 136.

63. Daniel Givelber and Amy Farrell, *Not guilty: Are the acquitted innocent?* (New York: NYU Press, 2012), 94.

64. Thai text: นับแต่เวลาที่ยื่นฟ้องแล้ว จำเลยมีสิทธิดังต่อไปนี้ (๑) ได้รับการพิจารณาคดีด้วยความรวดเร็ว ต่อเนื่อง และเป็นธรรม. English translation of the provision: From the time of being sued, the defendant has the following rights: 1. to receive a speedy, continuous and fair trial.

65. Thai Criminal Procedure Code, Sections 7 and 8 (2).

evidence,[66] the right to be silent,[67] and the right to contact relatives upon the arrest.[68]

It is apparent that all these procedural rights do not in any way limit the powers of the court to find out the truth. Moreover, they are necessary preconditions to obtain a fuller view of the facts of the case. This vision of truth as not conflicting with fairness is well reflected in the famous book by John Stuart Mill, *On Liberty*.[69] Mill was passionate to defend the rights to free speech on the grounds that nothing should be neglected "that could give the truth a chance of reaching us."[70] In criminal cases, following this thread of thought, the procedural rights of the accused to defend themselves are protected for the sake of discovering the truth.

The analysis of Thai Criminal Procedure Code indicates that Thai legislators have a very similar vision of truth. Section 166 and Section 172 both require that the proceeding continue only after the defendant is brought to the court and "the court believes that this is *truly* the defendant." [71] The same Sections state that the court "should question the defendant whether it is *true* that he committed the offense."[72] Section 176 is of a particular importance as it requires from the court to hear supporting evidence in the cases where the defended pleaded guilty if the charged offense is serious (over 5 years' imprisonment) "until the court is satisfied that it is *true* that the defendant committed the offense."[73] Section 226/3 requires exclusion of hearsay evidence unless "it is believable from the condition, nature, source and circumstantial fact of such hearsay evidence that *the truth* of the case may be proved by such evidence" (emphasis added). Section 227 provides a general rule that "the court shall exercise its discretion in considering and weighing all the evidence taken. No judgement of conviction shall be delivered unless the court is certain that it is *true* that the offense is committed and the defendant is the

66. Ibid., Section 8 (4–6).

67. Ibid., Section 83.

68. Ibid.

69. John Stewart Mill, *On Liberty* (London: Walter Scott Publishing, 1901), https://www.gutenberg.org/files/34901/34901-h/34901-h.htm.

70. Ibid., 40.

71. Emphasis is added. This is literal translation of Thai text: เมื่อศาลเชื่อว่าเป็นจำเลยจริงแล้ว

72. Emphasis is added. This is literal translation of Thai text: และถามว่าได้กระทำผิดจริงหรือไม

73. Emphasis is added. This is literal translation of Thai text: ศาลต้องฟังพยานโจทก์จนกว่าจะพอใจว่าจำเลยได้กระทำผิดจริง

offender."[74] In other words, both truth and fairness are well reflected in Thai Criminal Procedure law.

One should expect that taking these ideas seriously would naturally bring along a principle of equity when deciding difficult cases involving evidence that was obtained in violation of the procedural safeguards of individual liberty. Surprisingly, the principle is absent in legal reasoning of Thai judges. There are certainly some cases where judges were moved by the sense of equity, but they did it in a rather intuitive way without providing reasonable justification. Several cases can be given as the examples of this finding.

III. UNLAWFULLY OBTAINED EVIDENCE IN THAI CRIMINAL CASES

As previously stated, Thai law does not allow admission of evidence that has been obtained through unlawful means.[75] However, in some cases, vaguely formulated as when "the evidence that has arisen duly but has been derived by acting wrongfully or has been derived by means of the data arisen or derived wrongfully,"[76] the courts are permitted to admit it "if it will be more advantageous in rendering justice than being disadvantageous due to an impact on the standard of criminal justice system or basic right and liberty of people."[77] If we construct the meaning of this clause as permitting admission of evidence that has been legally available but was unlawfully obtained, then all evidence that could have been obtained lawfully falls into this category. That includes confession or statement made at the time of the arrest;[78] taking a statement from the accused without informing him of his rights;[79] evidence obtained from children without following the prescribed procedure;[80] evidence obtained from some types of entrapment; and evidence obtained from wiretapping

74. Emphasis is added. This is literal translation of Thai text: อย่าพิพากษาลงโทษจนกว่าจะแน่ใจว่ามีการกระทำผิดจริงและจำเลยเป็นผู้กระทำความผิดนั้น

75. Thai Criminal Procedure Code, Section 226.

76. Ibid., Section 226/1.

77. Ibid.

78. Ibid., Section 84.

79. Ibid., Section 134/4.

80. Ibid., Section 133 bis.

an induced conversation.[81] Further, one could expect that the requirement of determining what is more advantageous in rendering justice than disadvantageous should entail some reasoning of equitable nature. These expectations are thwarted after reading Thai legal texts that attempt to classify some of those types as strictly inadmissible.[82]

It is not only the reluctance of admitting a policy that gives judges broad discretion that characterizes a rather limited construction of the scope of admissible evidence. There are also deeper causes for resisting the intrusion of the principles of equity or fairness into Thai legal reasoning. Thai language, as well as its normative expression of law, does not distinguish between "just" and "fair" as most European languages permit to do.[83] "Just" in Thai is *yuti-tham* (ยุติธรรม), whereas "fair" is *tham* (ธรรม). The difference lies only in a preposition, and the meanings are synonymous, although the second term has a larger range of meaning. The Thai concepts "fair" and "just" have strong Buddhist and even Hinduist contours. The Sanskrit equivalent is *dharma*, which relates not so much to a moral sentiment of fairness and justice (in the meaning of David Hume[84]) as to a due course of action. As a result, a fair trial is not the one that the moral sense of the accused or the public accepts, but a trial that conforms to a due pattern. This linguistic peculiarity favors a positivist approach to the concept of a fair trial. A due pattern is prescribed by law, and there is not an apparent need for a judge to search public conscience and apply public moral sense in deciding on whether unlawful evidence is incompatible with the idea of fair trial. *A priori*, it is already incompatible. Such a perception of fairness certainly does not always deaden the moral sense of Thai judges.

One of the leading cases involving the admissibility of evidence obtained unlawfully is the case of Mr. Somchai,[85] who sued two persons for maladministration,[86] extortion,[87] and trespass.[88] The official case report does not offer facts for public scrutiny. It only states the general nature of

81. The last two types are not explicitly mentioned in Thai CPC.
82. Phromphan Chonthawornphong, see note 39 above, 234.
83. Fletcher, see note 62 above, 136.
84. David Hume, *A treatise of human nature*, Book III, Part II (1739) (various editions).
85. Thai Supreme Court, 2281/2555 (2012).
86. Thai Penal Code, Section 157.
87. Ibid., Section 337.
88. Ibid., Sections 362, 364, 365.

accusation and that the defendants contested it. The trial court found the second defendant guilty and sentenced him to 3 years' imprisonment. The charges against the first defendant were dismissed. A peculiarity of this case was that the second defendant went to talk to Mr. Somchai and to a witness after the criminal proceedings had been initiated. He secretly taped the conversation without their knowledge, and then submitted it as an evidence of his innocence. The trial court rejected it as unlawful. The Appeal Court overturned the decision on the grounds that the evidence of the defendant was admissible.

The plaintiff appealed to the Supreme Court. The Supreme Court agreed with the Appeal Court that unauthorized recording is a forbidden practice and the evidence should not be generally admitted according to Section 226. One could expect that the main reason for admitting evidence was that it helped to establish the truth of the defendant's innocence. That was not the main reason for the Thai Supreme Court judges. The main reason for them was the fact that the defendant was not acting in a capacity of a government official, and therefore this exclusionary rule did not apply. Thai concept of a fair trial—or perhaps we should call it a *dharmic trial*—does not apply to this case with the wrongfulness of clandestine taping *per se*. A due pattern of collecting evidence applies only to officials since historically *dharma* was never egalitarian, and different classes of people have different *dharmas*. In the end, the court also mentioned Section 226/1, arguing that the use of evidence was more beneficial to the administration of justice than the disadvantages caused by the impact on the standards of the criminal justice system. One certainly must commend the overturning of the trial court's decision. What is surprising, however, is the attempt to limit the rule on inadmissibility of secret taping to officials only. Suppose the recording was done by an acting official in this case (although it is very unlikely to be done in favor of the defendant); would the decision of the Supreme Court be different despite the fact that the evidence clearly points at the innocence of the accused? The likely decision would be similar to the decision of the trial court because the accepted Thai view of law does not permit the broad discretion of judges to admit any evidence that is reliable in establishing the truth, and because wiretapping an induced conversation is classified by Thai lawyers as subject to the strictly exclusionary rule.[89]

89. See note 40 above.

No doubt that in many cases, evidence obtained by inducement, promise, threat, deception, or other unlawful means according to Section 226 of the Thai Criminal Procedure Code should not have been admitted. However, the widely held view among Thai lawyers that this section does not permit exceptions leads often to a casuistic play with the meanings of the terms. Does a statement by police that the accused will be punished severely if he does not confess constitute a threat? Or that an offender will receive a lenient penalty by disclosing other perpetrators constitute a promise? The Supreme Court affirmed that such statements are not a threat or promise in the meaning of Section 226.[90] Thus, the denial of the duty of Thai judges to apply this provision in a flexible way to achieve fairness in any given case leads to distorting the meaning of the terms as widely understood by the public. What a "threat" means for an ordinary Thai will not be "a threat" for a Thai police officer, prosecutor, or judge.

One cannot deny that Thai courts do have significant leeway in interpreting the provisions on admissibility of evidence according to their moral sense. Nor are they disregarding the inner perception of the accused. In an old case,[91] a defendant, together with her husband, was arrested for being in possession of a fake banknote. A friend of the husband told the defendant that if she confesses, her husband will be released, and she, being a female, would not receive any punishment. The court did inflict punishment, and the defendant appealed claiming her innocence. The Appeal Court overturned the decision. The Supreme Court concurred, arguing that this confession was not, as the court put it, "a heartfelt confession."[92] The insensitivity to whether the confession is heartfelt or not would prevent judges from perceiving the truth. In some cases, the reliability of evidence depends on the ability of judges to have sympathy with the accused. However, the recent developments of Thai procedural law make such a more humane approach more difficult.

The introduction of Section 226/1 in 2008 and its interpretation in trying to draw a precise line between evidence that is not admissible under any circumstances (Section 226) and evidence that can sometimes be admitted (Section 226/1) makes Thai law less flexible and makes Thai judges less committed to strike the right balance between truth and

90. Thai Supreme Court, 6243/2554 (2011).
91. Thai Supreme Court, 102/2474 (1931).
92. Thai text: ไม่ใช่คำรับโดยน้ำใสใจจริง

fairness. There are a number of pre-reform cases in which Section 226 was interpreted in a flexible way, which can hardly be possible nowadays. In one case, the search warrant issued by the court wrongfully indicated the number of the house to be searched.[93] The police officer corrected the mistake and conducted the search even though he was not authorized to make such a correction. The Supreme Court admitted that such mistake might invalidate the search warrant, yet the evidence obtained by the unlawful search was, nevertheless, declared admissible. In another case,[94] the police officers conducted a search of someone suspected of receiving stolen property.[95] The search was conducted with the violation of the procedure prescribed by Sections 102 and 103 of Thai Criminal Procedure Code: the search warrant did not contain the details of what was to be searched. The initial court admitted the evidence as the proof of the guilt of the defendant. The Appeal Court overturned the decision and dismissed the case. The Supreme Court reversed the decision of the Appeal Court and agreed that the evidence must be admitted even though the search warrant was defective. The Supreme Court affirmed that the failure to follow the prescribed procedure might impair the reliability of the obtained evidence, yet that could not invalidate completely the usefulness of the evidence in establishing the truth. The courts must be cautious in relying on it, but it does not mean that it should be outright rejected if it supports other evidence of the guilt or innocence of the defendant.

The same line of reasoning was applied in the cases in which the issue was whether the evidence of a minor should be admitted if it was collected in violation of Section 133 bis. This section requires that a minor must be interviewed "separately in an appropriate place with attendance of a psychologist or social welfare worker, a person requested by the minor, and a public prosecutor." In one murder case,[96] the trial court dismissed the case because the requirements of Section 133 bis were not fulfilled in questioning the witness who was 13 years old, even though the defendant made a confession. The Appeal Court and the Supreme Court overturned the decision, arguing that the analogous requirements in relation to hearing a minor witness were fulfilled during the court's proceedings, and that

93. Thai Supreme Court, 5144/2548 (2005).
94. Thai Supreme Court, 837/2483 (1940).
95. See Thai Penal Code, Section 357.
96. Thai Supreme Court, 5294/2549 (2006).

there was other evidence (the confession) pointing at the guilt of the accused.

However, the earlier case law was not consistent, and the desire for consistency underlined the reform of criminal procedure in 2008. In an earlier case,[97] the Supreme Court dismissed the case stating that the failure to follow the requirements of Section 133 bis gives rise to the provisions of Section 226 of the Criminal Procedure Code on the exclusion of unlawfully obtained evidence. The brief report of the case, which is available on the official website,[98] does not indicate that there were any facts of inducement, promise, threat, or deception in collecting evidence. The post-reform case law points at a more rigid approach. Any evidence obtained by not complying with Section 133 bis is inadmissible even if it is vital for prosecuting a murderer and the witness was 17 years old, as one recent decision of the Supreme Court indicates.[99] The attempt to classify all unlawfully obtained evidence as strictly forbidden or admissible in some situations will not save Thai law from contradictions and inconsistency, but it will certainly make Thai judges less responsive to the demands of fairness in diverse situations of life. Judicial application of Section 226/1, which warrants judicial discretion more than any other, lacks any reasoning on the scope and meaning of the general principles of truth and fairness. That is particularly apparent in cases of drug abuse.

IV. SUBSTANTIVE TRUTH V. FAIRNESS IN THAI DRUG OFFENSES CASES

Drug offenses in Thailand deserve much more attention and a much deeper analysis than what can be offered here. They receive significant international attention because of the proliferation of the drug trade in the infamous Golden Triangle and the massive human rights violations during so-called the "War on Drugs" conducted by former Thai Prime Minister Taksin.[100] Drug-related offenses represent a special category of criminal cases in Thailand. They constitute the majority of criminal cases

97. Thai Supreme Court, 4209/2548 (2005).

98. Thai Supreme Court 4209/2548.

99. Thai Supreme Court, 1273/2559 (2016).

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

heard by Thai courts and yield the most prison sentences.[101] The search and arrest of suspected drug dealers are routinely done by a low-rank police officer. In many situations, following all the procedures prescribed by Thai Criminal Procedure Code is considered by the police as an unnecessary and tedious task that impairs the efficiency of the police operations. The whole of Thai criminal justice must constantly face two fundamental questions: First, does the failure to follow the prescribed procedures of search and arrest necessarily affect the reliability of evidence in terms of its truthfulness? Second, should this failure invalidate the obtained evidence on the grounds of unfairness toward the accused? These questions pertain to other types of crime, but they are particularly conspicuous in illegal drug cases.

Until recently, a violation of procedural requirements did not prevent convictions, perhaps because drug offenses are perceived by many in Thai establishment as threatening national security.[102] Obtaining evidence that clearly proves the intent to sell drugs is difficult. In Case 3119/2550 (2007)[103] before the Supreme Court, the defendant was arrested in 1998 (nine years before the final decision) for selling methamphetamine tablets weighing 0.45 grams to a spy police for the amount of 500 baht. He was searched, and more methamphetamine tablets were seized, together with the sum of 1,300 baht that was presumably obtained from the sale of drugs. Later, he was prosecuted for the violation of the Narcotics Act B.E. 2522, 1979, Sections 4, 7, 8, 15, 66, for possessing Category I drugs for sale.[104] The defendant confessed at the time of arrest but revoked his confession at the time of trial, saying that the confession was forced by beating. The Court of First Instance ruled that the defendant

101. Amy Sawitta Lefevre, 'Soaring prison population prompts Thailand to re-think 'lost' drug war," *Reuters* (July 16, 2016), https://www.reuters.com/article/us-drugs-thailand-prisons/soaring-prison-population-prompts-thailand-to-re-think-lost-drug-war-idUSKCN0ZX01J; Samantha Jeffries and Chontit Chuenurah, "Gender and imprisonment in Thailand: Exploring the trends and understanding the drivers," *International Journal of Law, Crime and Justice* 45, (2016): 75–102. For some statistics, see Thai Department of Corrections, Ministry of Justice, "Number of convicted prisoners by type of offences," http://www.correct.go.th/eng/number_by_type_of_offences.html.

102. James Windle, "Why do South-east Asian states choose to suppress opium? A cross-case comparison," *Third World Quarterly* 39(2), (2018): 366–84.

103. Thai Supreme Court 3119/2550.

104. English translation is available at http://www.fda.moph.go.th/sites/Narcotics/en/Shared%20Documents/Narcotics-Act-B.E.2522.pdf.

was guilty and sentenced him to 5 years' imprisonment. The Appeal Court reduced punishment to 2 years and 8 months imprisonment in accordance with Section 78 of the Penal Code. This section allows judges to reduce penalty by not more than one-half, if there is a mitigating circumstance such as: lack of intelligence, serious distress, previous good conduct, the repentance and the efforts made by the offender to minimize the injurious consequence of the offense, voluntary surrender to an official, the information given to the Court for the benefit of the trial. The case report, however, does not indicate what was considered as a mitigating circumstance for the Appeal Court.

The brevity of the official case reports leaves many questions unanswered. Why did both the Court of First Instance and the Appeal Court give a mild punishment according to Section 66 of the Narcotics Act? This law prescribes imprisonment for a term of 4 to 15 years, or to a fine of 80,000 to 300,000 baht, or to both. The courts were clearly sharing the same inclination to give the lightest possible remedy. Could it be that the courts were persuaded by the truthfulness of the defendant's claim that he was beaten and the confession was forced? If so, why did they not dismiss the case altogether?

There were other procedural violations according to the defendant, who maintained that the evidence submitted by the prosecutor should not have been admitted because it was obtained by search without a warrant, and he was not informed about his rights at the time of the arrest before being questioned, as required by Section 134/4 of Thai Criminal Procedure Code. These procedural violations as well as the forced confession did not affect the outcome of the case, likely because the courts perceived the arrest of the defendant at the moment of the sale as convincing beyond reasonable doubt of his guilt. The Supreme Court stated that the absence of a warrant does not affect the reliability of evidence. The same conclusion was reached in relation to the fact that the defendant was not given a notice of his right. The court agreed that the evidence prior to giving the notice of rights is not admissible, but it does not affect the reliability of other evidence submitted by the prosecution. In other words, if some evidence clearly points at the guilt of the accused, other evidence, even obtained with gross violations of procedural rules, does not affect the outcome of the process. Truth prevails over procedural fairness.

The multiple procedural problems of arresting, investigating, prosecuting, sentencing, and correcting offenders lead to a significant reform of

drug offenses legislation in 2016.[105] Many aspects of the reform relate directly to the place of truth and fairness in criminal trials. Under the previous Thai legislation, anyone found in possession of a certain amount of one of the listed drugs was "regarded" (Thai: ให้ถือว่า) as intending them for sale. The amended legislation replaced the word "regarded" with "presumed" (Thai: ให้สันนิฐานว่า).[106] Even though the reform has been praised as a significant improvement of drug offenses legislation,[107] the basic standard remains the same: no presumption of innocence. It is the burden of the accused to prove that drugs in excess of what is specified in the legislation are not for sale. With the rejection of the presumption of innocence as the fundamental principle of criminal procedure, drug offenses law in Thailand reminds one of the dreadful image of a South-Asian divinity devouring the dwellers of the world in the innumerable flaming mouths of his terrible body.[108] Not many who find themselves in possession of illegal drugs can escape the crushing teeth of Thai criminal justice.

A remarkable feature of Thai drug offense cases is that they are rarely tried, since most offenders prefer to plead guilty, making the justice process look like a machine producing its results (convictions) with amazing efficiency. As with any machine, this process may malfunction particularly when the issues of truth and procedural fairness emerge. Many cases discussed below illustrate the fact that when the defendants chose to contend the accusations, the Appeal Court and the Supreme Court managed to correct the instances of disregarding truth and procedural fairness on lower levels of criminal justice. However, it is done not by reliance on the general principles of truth and fairness but by a strict interpretation of Section 226, as discussed above.

In the case before the Supreme Court 8148/2551 (2008),[109] the defendant was a minor (15 years old) who was charged under the Narcotics Act

105. iLaw, ผ่านแล้ว! กฎหมายยาเสพติดใหม่ เปิดช่องคนขายไม่ถูกประหาร เพิ่มโอกาสให้ผู้ต้องหาพิสูจน์ความบริสุทธิ์ (Dec. 2, 2015), https://ilaw.or.th/node/4352.

106. See Thai Government, Narcotics Act, 2016, Section 17. Thai text is available at: http://web.krisdika.go.th/data/law/law2/%C207/%C207-20-9999-update.pdf.

107. Akbar Patcharavalan and Gloria Lai, "Thailand amends drug law to reduce penalties and ensure more proportionate sentencing," *International Drug Policy Consortium* (Feb. 15, 2017), https://idpc.net/blog/2017/02/thailand-amends-drug-law-to-reduce-penalties-and-ensure-more-proportionate-sentencing.

108. See Bhagavad Gita, 11:27–29.

109. Thai *Supreme Court 8148/2551* (2008) https://deka.in.th/view-412050.html.

B.E. 2522, Sections 4, 7, 8, 15, 66, 67, 102. He was found in the possession of drugs. The case report does not specify the amount. It also does not indicate whether the defendant was prosecuted for the offense of possessing illegal drugs for personal consumption or for sale. The defendant confessed at the time of the arrest but later denied the charges. The Court of First Instance ruled that the defendant was guilty. The punishment, however, was not inflicted on minors according to the common practice of Thai juvenile courts.[110] He was sent to a Juvenile Correction Institution for one year, which is not considered as punishment. Even though the defendant denied charges at the trial, his earlier confession was considered as a mitigating circumstance by the trial court in its description of the deserved penalty, which was in the end replaced by the educational measure of sending the defendant to the correction institution. The defendant appealed, and the Appeal Court reversed the decision. The prosecutor filed the case to the Supreme Court, which upheld the decision of the Appeal Court.

The Supreme Court stated that the evidence of the plaintiff is not admissible since the confession was not admitted as reliable evidence at the time of arrest, according to Section 84(4) of the Thai Criminal Procedure Code. The law says:

> Any statement given by the arrestee to the official conducting the arrest, or to the administrative or police official in the course of the arrest or receipt of the arrestee, shall be excluded from evidence if it be an admission of guilt regarding the offense alleged. If the statement is not the said admission, it may be adduced as evidence for proving the guilt of the arrestee only when the rights under paragraph 1 or section 83, paragraph 2, whichever applies, have been informed to the arrestee.

In other words, the confession of guilt is admissible only in the process of interrogation, not during the arrest.

It is difficult to understand why, since the confession had been revoked by the defendant, the trial court still considered it as a mitigating circumstance in defining the due penalty. One explanation could be that the court used a standard form of the decisions by filling in the personal details of this defendant, with the main text largely identical for every

110. Alexander Shytov & Boonchoo Na Pomphet, *Thai Juvenile Delinquency Justice and Its Perception by Minor Offenders* (Chiang Mai University, 2007).

drug case.[111] A Thai expert in criminal procedure, Dr. Panarairat Srichaiyarat, in the conversation with the author, expressed her doubts that this practice was possible. However, the author had access to a number of criminal cases in several Thai juvenile courts several years ago, and there was a striking similarity of the text of many drug-related criminal cases.

Regrettably, in its review of this case, the Supreme Court in did not comment on this issue. Even though the trial court imposed an educational measure instead of punishment, and there was clear evidence that the defendant was in the possession of drugs, the Supreme Court dismissed the accusation because the procedural guarantees of fair trial were not observed. Apart from the unlawfulness of the confession, the Supreme Court, after examining the arrest records, found that it contained a handwritten message that the defendant confessed the wrongdoing, and that there was no record that the notification of the rights was made. The notice of the rights was served later, but it was not complete: it did not mention the right to refuse to testify. In the view of the court, the unfairness of the procedure overweighed the "benefits" of sending a juvenile drug misuser to a correctional institution for reeducation.

Being found guilty in an adult case certainly carries more severe consequences for the accused. In one case before the Supreme Court,[112] three people were arrested and charged with the crime of possessing drugs with the intention to sell. During the arrest and the investigation, all defendants confessed. However, the confession of the second defendant was withdrawn during the trial. The third defendant, by confessing his crime, received a more lenient prison sentence of 19 years. The first and the second defendants received higher penalties, 25 years and 4 months imprisonment, because the second defendant revoked her confession, and the first defendant, even though also confessing his crime, gave a testimony maintaining the innocence of the second defendant. The Appeal Court subsequently reduced the sentence (of 19 years' imprisonment) for the first defendant but upheld the verdict and the sentence for the second defendant.

The Supreme Court reversed the decision, arguing that the evidence of the prosecution lacked credibility. It was found that the second defendant

111. Ibid.

112. Thai Supreme Court 1029/2548 (2005).

was in an intimate relationship with the first defendant, but there was no sufficient evidence that the second defendant was involved in selling drugs. The court took into consideration that the confession statement was written by a police officer and signed by the second defendant. Further, it was taken into consideration that the defendant was arrested late at night and then interrogated until the following morning for eight hours by different officials. The court said that her confession was the result of fatigue, and physical and mental exhaustion.

The decision of the Thai Supreme Court is remarkable. It is not often that a written court decision displays sympathy to a fatigued, exhausted woman. Thai decisions are normally short and void of any sentiment. The decision of the Supreme Court stands in a sharp contrast with the decisions of the trial and appeal courts, which can be described in moral terms as *hard-hearted*.[113] The first defendant was given a harsher penalty by the trial court for providing evidence in favor of his loved one while he himself confessed his crime. The contrast is striking as the Supreme Court's decision runs against the fabric of the Thai criminal justice system: a machine or soulless mechanism that disregards the moral character of the accused. A simple possession of a specified amount of illegal substances can destroy the life of an innocent possessor who may not be even aware of the nature of his possession.

Before the introduction of Section 226/1, the principle of inadmissibility of forced confessions was already articulated by the Supreme Court's decisions. The underlying reason for this is that the forced confession is inadmissible not simply because it is unfair to force confession *per se*, but because its truthfulness is doubtful. In one older case,[114] the defendant was arrested and was forced to confess that he was in the possession of drugs under the threat that, if he refused to confess, other members of his household would be arrested. He was made to confess that he had drugs with the purpose of sale. In the court, the defendant withdrew the confession, admitting that he had illegal drugs in possession for his own use, not for sale. The Court of the first instance still admitted the confession, but the decision was overturned on appeal. The Supreme Court agreed with the decision of the Appeal Court. It took into consideration that the confession was

113. Gospel according to Mark, 3:5.

114. Thai Supreme Court 473/2539 (1996).

forced and the defendant feared that the members of his household would be arrested. The Supreme Court dismissed other evidence as not sufficient to prove that the defendant had an intention to sell drugs.

Cases of inducement provide further examples of the decisions in which the higher courts dismissed the findings of the trial courts as lacking truthfulness. The higher courts constructed broad provisions of Section 226 of the Thai Criminal Procedure Code as excluding any evidence that has been obtained through inducement, promise, threat, deception, or other unlawful means. In one case, an undercover police officer bought 0.549 grams of a psychotropic substance that was mixed with an anti-obesity drug for 250 baht (an insignificant amount) from the defendant, a seller in a pharmacy shop, in 2001.[115] Selling this substance was a violation of several provisions of the Psychotropic Substances Act 1975. The defendant denied the accusation at the trial, stating that she did not know that the anti-obesity drug contained a psychotropic substance and claimed that the drug was acquired for her personal use. The Court of First Instance ruled that the defendant was guilty and sentenced her to 5 years' imprisonment, and then reduced the sentence to 3 years and 4 months, considering that the defendant "pleaded guilty to confession at the arrest and investigation level, which is useful for considering the reasons for mitigation." This is another example of the practice of Thai courts to reduce penalty in the cases when a person made confession at earlier stages of investigation but later revoked it.

The Appeal Court dismissed the case on the ground that the evidence was obtained by inducement and therefore cannot be admitted. Prosecution challenged the decision before the Supreme Court which concurred partly with the Appeal Court. However, it found the defendant guilty of illegal possession and sentenced her to 1 year's imprisonment and a fine of 21,000 baht. Similarly to the trial court, the Supreme Court accepted confession at the time of arrest as a mitigating circumstance and granted a suspended sentence of 8 months imprisonment. The Supreme Court apparently accepted the view that the unfair methods of obtaining evidence should not leave the person unpunished who is guilty of illegal possession. The common judicial practice that a revoked confession still

115. Thai Supreme Court 2429/2551 (2008).

can be used as a reason for a mitigated and suspended sentence reveals a mechanic approach to criminal justice.

CONCLUSION

The cases discussed above display a general approach of the Thai courts to perceive truth and procedural fairness not as opposing or conflicting principles but as mutually supporting. Discovering truth makes trial fair, and maintaining fair procedures will likely lead to the truth. It has, however, one important condition to operate efficiently: the courts must be granted a broader discretion to define better the procedural conditions under which truth and fairness harmoniously co-exist.

The paradox of Thai judicial practice is that while accepting the principle of co-existence of truth and fairness, Thai judges are not expected to go beyond a rather mechanical application of procedural rules. The analyzed cases show the inclination of the Thai criminal justice system to avoid considering how truth and fairness should be reconciled within the circumstances of a particular case. Accommodation of both—the search for truth and securing procedural fairness—is done intuitively by subsequent invocation of a suitable procedural norm without much thought of being consistent with other cases. This lack of reasoning makes Thai courts' decisions less instructive, not transparent, and potentially subject to error.

There are can be several explanations of why Thai courts' decisions lack any rational discourse on truth and procedural fairness. The most obvious one is the peculiarity of Thai legal education. Thai law students are taught to memorize more than to reflect or engage in a philosophical discourse. Bringing the issues of truth and fairness within the ambit of judicial reasoning is hardly possible without grasping a pro-societal moral philosophy of criminal law. The core of such a philosophy is that crime is an immoral act that warrants a particular reaction of the community, in the person of a judge.

Another explanation is that Thai courts do not take on the role of the moral spokesperson of the Thai nation. In other words, a Thai judge in criminal cases perceives himself not as a voice of community condemning the offender, but as a government functionary whose job is simply to apply rules. In other words, Thai judiciary have a weak moral ground. A moral

foundation of judicial power is essential for a democratic form of the government. Alexis de Tocqueville perceived the authority of court in a democratic country exactly in its ability to appeal to a moral sense of abiding by law rather than in the physical power to coerce an external compliance.[116]

Law in a democratic country must involve reasoning that reflects general principles and values affirmed by the society. At the moment, the scope for this reasoning is limited since Thai law does not permit broad judicial discretion, particularly in relation to accepting or rejecting evidence on the ground that it was obtained unlawfully. As a result, there is an attempt to build a sophisticated system of rules. As one can see from the discussion of this paper, the introduction of Section 226/1 in the Thai Criminal Procedure Code, although it allows judges to exercise some discretion, creates an uncertainty about how this provision can be reconciled with Section 226 of the same law, which is interpreted, perhaps wrongly, as leaving no room for judicial flexibility.

Certainly, this system can sometimes accommodate the social interests of justice and fairness in different situations, but it does not motivate a Thai judge to an action responsive to diverse social needs. The moral sense of judges concerning the social justice of their decisions is restrained, if not utterly suppressed, by legal formalism. Establishing Thai criminal law on a strong moral foundation will address the fundamental weaknesses of the present system, which makes it problematic to reconcile the competing moral demands to find truth and to respect the procedural rights, particularly in drug offense cases. It is certainly not sufficient to look only at the specific rules governing the admissibility of evidence. One has to deal with the overall vision of law as the instrument to achieve the moral goals of the community, for example, in addressing the vice of the drug trade and the damage of drug consumption.

Having said that, one cannot deny that truth is certainly a central category of Thai criminal procedure law. Similarly to other countries, the search for truth is limited by the requirements of a fair trial. However, Thai law is very positivistic in that it limits the role of a Thai judge to a strict application of legal rules without the necessity to look at social,

116. Alexis de Tocqueville, *Democracy in America* (1835). Historical-Critical Edition of *De la démocratie en Amérique*, ed. Eduardo Nolla, translated from the French by James T. Schleifer, A Bilingual French-English Edition, Vol. 1 (Indianapolis: Liberty Fund, 2010), 19/06/2019. https://oll.libertyfund.org/titles/2285#Tocqueville_1532-01_EN_1467.

cultural, or moral implications of his or her decision. There is a fear of discretion and of an active position of a judge in defining admissibility rules. Since judicial activism presupposes a greater role of a judge's social values, we will be right to conclude that Thai law on criminal procedure suffers from rigidity and may be not well-suited to solve complex social contradictions in a democratic society.