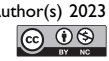
Article

Punishment & Society
2023, Vol. 25(5) 1254–1270



DOI: 10.1177/14624745221148662
journals.sagepub.com/home/pun


Cultural differences in control: How Thailand's order-centric legal mentality shapes its constraining lower-court practices

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Abstract

Studies in comparative penology still lack English writings about penal cultures in non-Anglo-European countries, particularly those that steer their focus away from imprisonment. This article fills this gap by giving accounts of penal control in Thailand and how its criminal justice practices differ from the Western models by which they were inspired. Although quite similar in forms, Thai court routines diverge from the West in the tightness of procedural control over defendants. This is the legacy of a selective importation of Western knowledge in response to Western colonial pressures in the past. With its own version of the rule of law and judicial culture of conformity, order is prioritised and control is emphasised arguably to the detriment of proportionality and due protection of defendants' rights. Such contrast to the liberal rights-based spirits of the Western-styled rule of law reflects cultural and socio-political differences which influence local adaptations of the Western-originated concepts. Although the propensity for crime control is defensibly prominent in many Western jurisdictions nowadays, this paper explains the Thai divergence in the underpinning legal mentality and intensity of control.

Keywords

culture, penal control, rule of law, criminal justice, Thailand

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Introduction

It has been proposed that many studies about cultural aspects in criminal justice and punishment are largely Anglocentric and binary, with an aim of comparing a particular system of punishment to the Anglophone jurisdictions, particularly the United Kingdom and the United States. Such a limited focus is insufficient to constitute comprehensive understanding of the diversity of penality (Brangan, 2020). Moreover, many works employ a macro perspective in explaining the historical shifts in sensibilities or contemporary trends of punishment with a strong focus on imprisonment. Therefore, there is a need for a thick description of the precise cultural forces and the local mechanisms that turn such forces into the institutionalised policies and practices in a particular setting (see Brangan, 2022; Garland, 2001, 2006: 438). Accordingly, Brangan (2020) argues for a non-Anglocentric approach in comparative penology with a broadened interest in the Southern and (post)colonial penal cultures, and an emphasis on penal practices that are not limited to imprisonment. This perception beyond the Anglo-European horizon and a carceral focus can arguably shed new knowledge into the familiar practices and provide new explanatory frameworks for penal differences.

This article contributes to the developing knowledge about penality outside the Global North by offering an analysis of Thailand's penal culture. Literature in English about criminal justice and punishments in South-East Asia, let alone Thailand, is still relatively thin. The region's tumultuous democratisation, Thailand being a notorious example, seems to draw more attention from scholars than penal sensibilities therein. However, as politics is part of culture, Thailand's intermittent relationship with authoritarianism is likely to be reflected in its penal policies and practices, and thus capable of clarifying further the politics-punishment dynamics beyond the Western repertoires. Furthermore, Thailand as a country of study has an additional advantage for comparative penology in that it was the only semi-colonial country in the region. Although not officially colonised like its neighbours, Thailand was both pressured and inspired by Western colonial powers to Westernise its traditional ways of perceiving and doing things. Interestingly, while being subordinate to the West, the Thai governing elites applied both the colonialist lens and techniques in administering the domestic affairs and ruling over the local population (Jackson, 2010). This Janus-faced response to Western colonialism and its impacts on many of the country's modernised institutions, including the legal and justice systems, distinguish Thailand from all other South-East Asian jurisdictions. Thereby, a cultural inquiry into the Thai criminal justice process promises valuable insights into how the semi-colonial legacy has hybridised Western concepts and practices, as well as shaped new meanings to the familiar stigmas and pains of punishment.

In this article, I intend to explain the cultural undertone of Thai criminal justice practices through the thick description of the lower-court proceedings, including fine enforcement. The fine as imposed and executed in the lower courts, precisely because of its petty and mundane nature, is apt to serve as evidence of how deeply rooted and pervasive the localised vision for criminal justice is. McCargo's (2020) study of Thai judges finds the dominance of the virtue-based and order-centric judicial ideology in the adjudication of political cases, particularly regarding lèse-majesté and sedition accusations. The aim of

this paper is to argue that this ideological foundation also pervades the day-to-day court routines, including those as banal as fining. It is this order-based, instead of the rights-based, Thai-ised version of the rule of law and the interrelated court structures and procedures that account for the incompatibility between the Western-originated liberal concepts and the localised order-centric practices. I also argue that the culture that creates penal sensibilities about stigma and denigration in Thailand is that which involves the popular Buddhist interpretation of status-based virtues and respectability. This culture-specific explanation, therefore, offers a new perspective on the already familiar phenomena in Western jurisdictions.

In the sections that follow, I summarise the epistemological strategy of the Thai ruling elites following the encounter with Western colonial threats. The legacy of this strategy has arguably been the foundation of the Thai judicial ethos that prioritises order over rights and liberties. This ethos is compatible with the Buddhist doctrine of *karma*, as prevalently understood to be endorsing the moralistic and individualistic attribution of blame. After describing research methods, I then discuss how this culture of order plays out in ordinary Thai court practices. Finally, I compare the judicial control in Thai criminal justice and that in the West. Given the limited length of this article, I do not compare Thailand to any jurisdictions in particular but to the West in general. The 'West' herein is a loose reference to Western countries with a colonialist history in South-East Asia and whose legal systems inspired the Thai ruling elites to 'Westernise' Thai legal traditions.

Order, virtues and responsibilisation: Explaining the Thai legal mentality

Before the encounter with Western colonialism at the turn of the 20th century, Thailand – then known as Siam – was a hierarchical society, ruled by a monarch, and deeply entrenched in Buddhist justifications for the inegalitarian status quo. Although neither originated from nor was exclusive to Buddhism (Burley, 2014), the concept of *karma* is significant in Buddhist beliefs about moral responsibility. It refers to a transcendental law of justice which allocates 'deserved' consequences to the person's moral deeds. According to this conception, good consequences are attributed to good merits that are generated by good deeds, and the same rule applies to awful consequences and demerits from foul deeds. It is the accumulation of merits and demerits that determines each person's well-being in the present life and the next (Finnigan, 2022). Hence, despite the person's inability to control the conditions of her difficult present life, logically she still has only herself to blame because she accrued those causal demerits in her past rebirths.

Notwithstanding the contradiction with another central Buddhist teaching of *anatman* (no-self) (Finnigan, 2022), many Thais seem not to concern themselves with the dilemma between free will and determinism in Buddhist philosophy and appear to settle with the easily comprehensible logic of *karmic* responsibility. Thus, the Thai traditional world-view equates status to virtues and trusts those in the superior position to wield power (see Streckfuss, 2011: 67–69) because 'power does not corrupt and absolute power is

absolutely virtuous' (Winichakul, 2014: 86). In this cosmology, it is important to preserve the order of social hierarchy not only because social inequality is natural but also because those at the top of the society, deemed the most virtuous and the wisest, are the best people to rule the society.

Clearly, this interpretation of Buddhism serves to entrench the elites' privileges derived from unequal distribution in an unequal society, while also shielding them from accountability for their exercises of power. On the other hand, the intrinsic idea of responsibilisation (i.e., taking self-responsibility for every life problem notwithstanding its external root causes (see Wakefield and Fleming, 2009)) stigmatises and degrades people of lower status to the extent quite akin to victim-blaming (see Burley, 2014). Stereotyped as having lesser virtues, wisdom and respectability, the lower-rung population is perceived with scepticism regarding their ability to abide by society's rules. Therefore, to uphold social harmony and order, these 'less virtuous' social members must yield to the 'righteous' instructions of the 'morally superior' authorities and perform their status-based duties without protests or questions (Mulder, 1996: 154). Accordingly, protesting against social hierarchy and inequality does not only threaten to destabilise social order but is also viewed as immoral (Mulder, 1996: 171) because, after all, their disadvantaged position is all their own doing.

Such a conventional outlook also underpinned the Thai pre-modernised legal system, as reflected in punishments being varied on people's social standings (see Quaritch Wales, 1934: 193). The status-based sentencing, among other things, was perceived as uncivilised in the eyes of the colonialist traders. Consequently, when Thailand was pressured by the looming threat of colonisation to sign unequal trade treaties with the West, extraterritoriality was a mandatory clause (Loos, 2006: 41–44). Since the implications of these treaties turned Thailand into a semi-colony (Jackson, 2010), to restore complete sovereignty Thailand needed to Westernise its entire legal and bureaucratic systems. This was both to appear civilised in the eyes of the West and to amplify the centralised ruling power using superior Western administrative techniques (Jackson, 2004a).

Because knowledge management was directed by the Thai elites themselves, rather than foreigners like in Thailand's colonised neighbours, the ruling elites were able to strategise what and how to import in order to achieve their goals while not jeopardising the social order that privileged them (see Engel, 1975: 17). The solution was the epistemological bifurcation, by which the Western technical knowledge was fully adopted whereas the critical socio-political concepts – namely the rule of law – were transformed via translation to be compatible with the existing sets of values (Winichakul, 2010). For example, the prevailing word choice for the rule of law is *lak nititham* with *tham* referring to *dharma* or the Buddhist universal moral truth (Mérieau, 2018: 292). What ensued was a success of the bifurcated Westernisation in that the 'modernised' legal and justice systems appeared up to the Western standards but the ideology that underpinned them was still far from the liberal preference for rights, liberties and equality as advocated in the Western-styled rule of law (see Jackson, 2004a).

To date, the traditional Thai worldview that justifies inequality, supports the authorities' use of power, and assigns moral blameworthiness based on social hierarchy has remained in the general society. This inequality-promoting perspective is consistently

reproduced in school teachings, the propagation of family values and the press (Mulder, 1996: 171–172). According to such a framework, the nation is likened to a body in which each person, like each organ, has a different function and each must perform one's duties for the whole society/body to survive (Kesboonchoo Mead, 2004: 150). This metaphor reflects the priority of collective interests, unity and order, thereby supporting the popular discourses of duties over rights and the ignorance of structural inequality.

In the legal sphere, the emphasis on social harmony and order has been translated to the judicial organisation and culture that are strictly hierarchical and heavily reliant on homogeneity in practices. The concerns for judicial homogeneity are to such an extent that departures from the centralised rules, long-standing conventions and higher-court precedents may trigger peer suspicion of misconduct or dishonesty (McCargo, 2020; Yampracha, 2016). Apart from fear, solidarity also drives judicial unity as judges are socialised to be prideful of their virtuous institution. Established during the time of royal absolutism as the monarchy's judicial arm (Engel, 1975: 59, 78), the judiciary derived its authority from the king, deemed the ultimate source of virtues. This perception has persisted even after the fall of absolute monarchy in 1932 because the judiciary has never been essentially restructured to have democratic connections with the people (Pakeerat, 2013: 15). It is self-governing and insulated from external oversights and public scrutiny (Yampracha, 2016). Moreover, the mandatory oath-taking ceremony before the monarch and the honorific phrase 'judging in the name of the King' continue to affirm the perceived royal origin of judges' legitimacy. This continued royal association, coupled with public praise regarding their having passed the remarkably difficult (yet rote memory-based) recruitment examination, have placed judges among the elites (McCargo, 2020). At the higher end of the social hierarchy and insulated from criticism and feedback, judges appreciate the benevolence, dignity and respectability of their judgeship status. This creates a sense of belonging to the judicial community and in-group loyalty, which together prioritise conformity over criticality, creativity and other competing values (McCargo, 2020.).

Perceivably, discretionary consistency is the benefit of this conformist culture and it was often mentioned by judges in this study. However, Thai court culture encourages conformity to extreme legalism, by which law is isolated from 'dirty' politics and removed from complicated socio-economic contexts (see McCargo, 2020: 21, 31). Furthermore, the influences of the Thai traditional worldview also conflate judges' legal rationality with Buddhist morality (see McCargo, 2020: 12, 76) whose moralistic blame attribution generates the propensity for crime control over due process. Therefore, Thai judicial performances are often commented as conservative, pro-government and under-protect fundamental rights and liberties (see, e.g., Dressel, 2018: 272; Muntarbhorn, 2004: 341). This is evidenced in Thai courts' constant ratification of coups (Yampracha, 2016: 223) and coup decrees (see TLHR, 2020), the justifications of which usually imply the ambiguous concepts of 'peace and order' and 'national security'. The subjugation of democracy and rights-based values to such vague purposes suggests that the essence of the invoked order is dissent-free quietude and the appearance of social unity (Jackson 2004b: 184). This conception of order hardly tolerates the 'cacophony' of disagreements and hardly seriously advocates equality, fundamental rights

and liberties, and penal proportionality. The section following the next gives examples of the specific lower-court practices that embody such a conception. The embodiment of the order-centric paradigm in something as mundane as the lower courts' everyday process strongly corroborates the argument that the rule of law, as understood by Thai judges, fundamentally differs from its Western rights-based origin (see Winichakul, 2020).

Research methods

I was a Thai judge on leave while conducting this PhD research on how the fine operates and is perceived in Thailand. I divided data collection into two legs of fieldwork. The first leg was between mid-September and late October 2019, with visits to three Thai trial courts for court observations and semi-structured interviews with judges. I selected the courts based on differences in sizes and locations. Court One was a big and busy city court in Thailand's industrial area. Court Two was a medium-sized court of a small and relatively quiet jurisdiction in Thailand's central plain. Court Three was a large court in a largely rural and mountainous province. Additionally, I interviewed some appellate judges for reflections from the higher court. The focus of this leg was on how judges sentenced, enforced and regarded the fine.

I revisited Court Two from December 2020 to February 2021 in the second leg to probe defendants' experiences and perceptions of their court journey, focusing specifically on the fine. I also interviewed Court Two judges and the judge of the central administrative unit for their thoughts on the judiciary's just-launched policy promoting community service for fine default. As the three courts visited in the previous leg were found to have commonalities in types of prosecuted offences and court practices, I selected Court Two as a single venue for the second leg primarily because of ease of access.

Being a judge, albeit on leave, made me an insider to the Thai courts and this explained my ease of access to and the cooperation I received from the court staff. Although I did not know most participating judges and court officials because I avoided recruiting known colleagues, they were willing to be candid when I approached them for participation. This would not have happened this easily had I not been considered as one of them. Nevertheless, to avoid biases and pre-conceived ideas from my insider experience, I placed primacy on my researcher/outsider identity by following the observed court practices from the start to the finish. Likewise, I designed interview questions to be as naïvely-sounded as possible, to which answers may have been obvious to court professionals. This estrangement strategy enabled me to perceive clues to key findings that had been previously overlooked because of my insider familiarity with the setting.

In both legs, I interviewed 27 judges in Thai and audio-recorded the sessions. I also observed the arraignment-cum-sentencing process known as the *wain-chee,* which is the first post-indictment procedure wherein the judge inquires defendants about their plea. If a guilty plea is entered and no further hearing is mandatory, the judge can pronounce and enforce the sentence immediately. This daily routine by which most cases are disposed of can represent the culture that underlies the Thai penal process. Observation in the first leg followed the flow of the case, from indictment to sentencing

and thereafter. The second leg targeted defendants' court experiences, from their arrival at the court to when the *wain-chee* process was over. Therefore, I shadowed and interviewed recruited defendants through to the end of their court journey.

Because the aim of data collection was about the fine, defendants were recruited based on their likelihood of being fined with no addition of immediate imprisonment. Predicting the sentence was possible since Thai judges normally follow the in-house and confidential offence-based 'sentencing guidelines', known as the *yee-tok* (Yampracha, 2016), thus making sentencing patterns easily discernible after a few days of court observation. According to these patterns, judges usually imposed the fine to supplement suspended imprisonment at the lower end of the fining range. Standalone fines were not common and usually levied in cases involving petty offences, namely gambling. Therefore, recruited defendants were limited to those prosecuted for petty or moderate offences (most involved minor possession of drugs) and none were career criminals. Due to the resource constraints of a small PhD project, I could only recruit 15 defendants, 14 men and one woman.

At recruitment, I explained my passive judicial role and active researcher status, with an emphasis on my independence from the authorities and my non-interference in their cases. Defendants gave their consent voluntarily and none seemed worried about my dual identity. Each named one's own pseudonym and was interviewed with open-ended questions. The interview was conducted in Thai in a private room inside the court's holding area where defendants were held throughout the *wain-chee*. I handwrote observation and interview data on field notes since using audio-recording devices was prohibited. After each observation, I transcribed the handwritten data immediately. The average time each participant spent in the *wain-chee*, was nearly four hours – the shortest being one and a half hours and the longest being seven hours. The total hours spent for observation in both legs in round numbers is 120.

The Ethics Committee at the University of Strathclyde had approved research methods for each leg of fieldwork before each leg began.

Order-centrism in Thai criminal procedure

The wain-chee process and the fine enforcement

On the first court date post-indictment, defendants who arrive at the court – either previously released on bail or remanded in custody – are escorted down to the access-restricted holding area, usually located in the court basement. Defendants are held there throughout the *wain-chee* (the arraignment-cum-sentencing process), even during the court hearing which is conducted through a live video link. Because no unauthorised outsiders, not even defendants' relatives, are allowed inside this court space, the *wain-chee* hearing is generally closed to public observation. This non-public and remote nature is among the distinctions that differentiate the Thai process from its Western counterpart.

Another distinctive aspect of the *wain-chee* is the informal plea inquiry conducted just after each defendant's court arrival. Because legal aid for non-capital charges is not mandatory, most defendants arrive at court without an accompanying lawyer. At the

reception, a court official casually asks them about their plea despite the lawyer's absence. If the answer is guilty, the official then prepares the patterned sentencing form for that defendant's offence, leaving blank only the mode and severity of punishment to be filled by the *wain-chee* judges. Normally, by consulting the *yee-tok* (the in-house confidential and numerical 'sentencing guidelines'), judges can fill out the form without consulting their co-panellist and pronounce the sentence almost immediately. If the answer is the contrary, the written order to adjourn the case for a pretrial hearing is prepared. This informal inquiry significantly expedites the process and predetermines the conclusion of the *wain-chee* hearing: either ending in the sentence or case adjournment.

Reliance on the pre-hearing declaration explains why some judges observed in this study appeared confused and even frustrated when defendants contradicted themselves by entering a different plea (usually a not-guilty plea) in the *wain-chee* hearing or by requesting legal aid which equals pleading not guilty. Apparently, the smooth and rapid flow of the hearing was disrupted by this unexpected script, and I often noticed the judge immediately inquiring about this change of heart. Some even explained the implications of such a change to the point that many defendants reverted to their original guilty plea. Note that this communication occurred without a lawyer because the pleading guilty defendants waived their right to legal representation – viewing it as costly and unnecessarily prolonging their court journey. Nevertheless, in general if the defendant insists on the changed answer, the judge has no options but to adjourn the case for a pretrial hearing and quickly call the next case. Busy as it is, the *wain-chee* cannot be paused for long and the need for fast case processing reigns.

While judges are preparing the sentences in their chamber upstairs, defendants held downstairs in the holding area wait for the hearing about which they are not explained. After an average wait time of two hours, they are called to stand before the television screen on which appears the judge at the desk. The judge calls the defendant one by one and asks if each requires legal aid. Upon hearing nay, the judge explains the charges, makes a plea inquiry and pronounces the sentence immediately if a guilty plea is entered and no more hearing is required. Normally, each hearing ends in less than a minute, with the judge following the questioning protocol and the defendant simply replying 'no' to legal aid and 'guilty' to the plea inquiry.

This cursory, routine and almost one-sided communication makes the *wain-chee* hearing appear ritualised, rather than a meaningful inquiry for sentence individualisation. The management of the 'off-scripted' defendants, like in the second preceding paragraph, highlights the hearing's performative nature. This is because, despite the 'disruption' caused, the hearing can still be concluded in less than five minutes (either with an adjournment or a sentence) and judges often dismiss defendants' questions by directing them to ask court officials. Unbeknownst to the judges or perhaps apathetic regardless, there are generally no court officials stationed inside the holding area except for the court police officers who are neither assigned nor trained to give defendants advice about the court process. The only reliable help for defendants is their accompanying friends or relatives who wait upstairs to seek information from court officials on their behalf. However, because defendants are prohibited from going out unless the judge

orders otherwise, they are forced to remotely communicate with their loved ones either through their mobile phone or other means available. The holding area is no place for those who come to court alone and have no means to reach out to anyone. In such a case, defendants are left to their own fate, completely voiceless and powerless, inside the system that never places them at the centre to begin with.

The importance of having a helping person at the *wain-chee* is glaring when defendants are fined because, while being held in the court basement, they are demanded to tender full payment by the court's closing hour to avoid custody for 'fine default'. At the time of fieldwork, converting the unpaid fine to hours of community service was neither commonly ordered by judges nor widely known to defendants. Judges and court officials were silent about this option to defendants and judges often rejected the motion for conversion out of distrust and concerns for efficient enforcement.[1] Therefore, there were then only two fine settlement methods in general practice: full payment or fine-default detention. Since most defendants were legally illiterate and unaided by lawyers, they had no ability to foresee the imminent fine and were often unable to pay from their wallets while in the holding area. To release defendants, the helping friends or family members had to dig their own pockets or get instant money from elsewhere (usually from local usurers) to pay the fine on defendants' behalf. Such a necessity for others' money to liberate defendants evokes the image of ransom money irrespective of the courts' legitimate reasons for imposing the fine.

Distrustful and efficiency-minded judges

The *wain-chee* and fine enforcement practices described above are fraught with elements of control and court-centric objectives. Court staff participants reasoned that physical security necessitated the holding of unconvicted defendants in the access-restricted area. Since all incoming cases flood to the *wain-chee*, escorting many defendants to and from an ordinary courtroom may guarantee neither the safety of court staff nor the prevention against defendants' absconding. Administratively, it is also more efficient to manage a large group of people inside a single location by using control mechanisms of closed walls and restricted access.

The concerns for security and efficiency also apply to the ultra risk-averse fine enforcement, according to which judges disregard the disproportionality of custody following the defendant's failure to immediately and fully pay the fine. The security in this context is symbolic in the sense that punishment must always be exacted and that it is grave injustice to let offenders walk free from a poorly executed sanction. Guaranteeing sanction enforcement requires efficiency. Thereby, symbolic security and administrative efficiency were often implied together by the interviewed judges as justifications for such harsh treatment.

Moreover, judges seem to be extra mindful of consistency and speed in their practices, perceivably from their regular use of the *yee-tok* which serves well both objectives. However, their reliance on numerical sentencing guidelines is so automatic that one interviewed judge commented, 'It's the exercise of discretion by applying none of it' (Judge I, Court Three). Another judge even expressed a preference for official standards over

autonomous discretion, reasoning that '[n]either the [judicial] policy nor the recommendation can save the judge's neck [if things go wrong]' (Judge R, Court Two). These comments reflect judges' strong culture of homogeneity and fear of non-conformity, all for the benefits of objectivity and predictability (and a by-product of speed) but at the expense of tailored decision-making for individualised punishment.

Judges' emphasis on security (physical or symbolic) and efficiency (in the forms of consistency and speed) imply the prioritised need for the orderly administration of justice. Aside from order, the over-reliance on custody at the pre-sentence stage and fine enforcement suggests judges' deep and rampant distrust of defendants, whose status places them at the lowest rung of the virtue hierarchy in the traditional Thai outlook. Many judges interviewed in this study stereotyped defendants' moral characters as cunning, exploitative and lazy. This explains why they preferred the extreme risk aversion of always equating non-fine payment to evasion of punishment that triggers immediate custody for 'fine default'. Because of its prompt enforceability and no dependence on defendants' cooperation, detention is the only option appropriate for the 'untrustworthy' defendants. Such distrust is vividly present in this remark: 'Some defendants are so shrewd. They have money but just don't pay. When they see the opportunity [to evade paying the fine], they just exploit it. We must be careful' (Judge A, Court One). Furthermore, the fact that they are already condemnable for having committed a crime aggravates this negative moral judgement to such a degree that some interviewed judges typecast defendants to be unworthy of rights-based treatments, as one judge unequivocally declared, '[T]here's no need for us to take care of or protect the offenders. It seems like we are pampering the offenders without taking into account what the victims may think' (Judge T, Court Two).

Stupefied and docile defendants

Contrary to judges' widely shared stereotypes, defendants recruited in this study were a far cry from being described as cunning or exploitative. Most were ignorant of the law and very compliant with the system. All feared the prospect of custody and its looming threat had made waiting for their court date extremely agonising. Ot (male, 34) described the experience as 'suffocating' because 'I didn't know what to expect here [at the court]. If only I had had some clues, I would have been able to prepare myself'. Jo (male, 25) admitted that the whole week preceding his court date was much more painful than paying his fine. Like Ot, he attributed his pains to the anxiety over the uncertainty of his case outcome. Because participating defendants were legally illiterate and none could confidently predict their likely sentence, most were mentally prepared for the worst like Witsanu (male, 29) who admitted, 'I'm keeping my fingers crossed … I don't want to go inside [the prison]. I can't hope for anything. If I hope, I'll be disappointed. I have to come to terms with it'.

Interestingly, despite the fear of imprisonment, the idea of missing the first court date and disappearing never occurred to any of the interviewed defendants. Chin (male, 33) said doing so would uselessly prolong the inevitability of his *karmic* consequence ('It's my *karma*. I can't get away from my action no matter what'). Yot (male, 62),

whose self-deprecation about his own poverty and legal ignorance was outstanding, admitted, 'Nobody wants to come to court. But since it's the order … [i]t's impossible … not to come'. He added he could not afford to miss the court date (i.e., abscond), reasoning that 'I'm making a living here. I never think of moving. I can't go anywhere'. Tong (male, 21), notwithstanding his biting criticism of the justice system, consciously chose to appear in court and plead guilty because he 'wanted [the case] to end quickly' and because he viewed resistance was futile. To both the fatalistic like Chin and Yot and the strategic like Tong, surrendering to the system was commonly perceived as the best approach to manage the undesirability of their situation. When the grips of the authorities and the cosmic justice of *karma* were too powerful to evade or challenge, obedience was the only way to ensure the quickest and the least painful ending to their criminal justice ordeals.

Regardless of the strategic significance of docility, the interviewed defendants seemed to view their behaviour as not being coerced. Most understood that the system-induced anxiety and the hardships of the ever-present pretrial custody were legitimate because it was the rule and such pains must have been imposed for a reason. Cloud (male, 22) found a meaningful purpose in his penal agonies. Framing them as a wake-up call to reset his life's course, he pondered, 'it was good that [the case] happened'. Many others also attributed the pains they had endured to their own faults. For example, Chin needed to wait for five hours post-sentence to have his fine settled by his previously deposited bail money. He must wait this long to avoid 'fine default' custody because he lacked the cash to make instant payment as the court demanded. Nevertheless, despite the inability to predict his fine and the immense stress caused by this immediate collection, Chin blamed himself for this long wait: 'It's wrong of me to not have instant cash ready. It's my fault not to have money now. It's my fault. I can't manage myself'. Likewise, notwithstanding her panic about having to pay a relatively massive fine within a few hours before the court's closing time, Gift (female, 31) commented, 'This is the way things are in our country. Wrongdoers must be punished. I admit that I broke the law'. Her resignation coincided with Witsanu's explanation of his hard prison days during his previous conviction and his time in remand custody in the present case: 'It's a consequence of committing an offence. It's *karma* and life in prison is the payment for one's *karma* so that all is offset. When you commit bad deeds, you have to pay for it'.

Defendants' self-blaming or fatalistic resignation despite their procedural pains may appear counterintuitive. However, I had no reason to doubt that it was contrived. Given that I interviewed them in a private setting and that they understood my non-professional and non-interference position, they had no incentives to embellish their responses to appease the authorities. The stress and anxiety that I observed throughout their day in court seemed genuine. Moreover, many defendants shared their resentment towards the disrespectful treatments they had allegedly received post-arrest from the police officers (e.g., name-calling, withholding necessary information, and soliciting bribes). Such candour made their self-blame convincing, strange though it may seem. The commonality of this attitude among the recruited defendants, although they were all charged with minor or moderate offences and there were only 15 of them, at least suggested the invalidity of judges' stereotyping of all defendants as slyly playing the system.

Cultural differences in criminal justice control

The controlling and coercive nature of the *wain-chee* is not unique to Thailand. Neither are contrasts in perspectives between the distrustful judges and the denigrated defendants. Research in the Anglo-Saxon jurisdictions consistently reports the manipulative court process, the stereotyping court practitioners and the disempowered defendants (see, e.g., Carlen, 1976; Feeley, 1979; Jacobson et al., 2015; Kohler-Hausmann, 2018). The coerciveness of court procedure is found to control defendants for managerial purposes, and the ceremonial court hearing that marginalises defendants, instead of pivoting around them, serves to stage defendants' obedience. Degrading symbolism is rampant. Moreover, studies in the United Kingdom find that sentencers usually perceive defendants, particularly those who are fined, as exploitative and untrustworthy (Moore, 2004; Morris and Gelsthorpe, 1990; Young, 1987). By contrast, many presumed untrustworthy defendants turn out to be the 'can't-pay' rather than the 'won't-pay' (Crow and Simon, 1987; Morris and Gelsthorpe, 1990; Nicholson, 1990). Therefore, the criminal procedures in Thailand and the West seem to share the functions of control and degradation, and defendants on both sides of the world seem to share quite the same kinds of pains.

Furthermore, the seemingly exotic doctrine of *karma* that underpins the Thai penal mentalities also shares the language of merit and deservingness like that used in Western meritocratic discourses. Having historical roots in Protestant Providentialism, the Western secular notion of moral responsibility still reflects a providential faith, according to which one is responsible for one's own fate and life's success is attributed to one's superior virtues. This rhetoric of self-responsibility justifies social inequality and gives rise to punitiveness in moral judgements (Sandel, 2020). The result, thereby, is not so different from responsibilisation propelled by the belief in *karma*, although the spiritual explanations offered by both belief systems may be dissimilar.

Nevertheless, notable differences still lie in the details and degrees of control. While it is arguable that Western, especially Anglo-Saxon, jurisdictions nowadays prioritise crime control objectives via harsh punishments and managerial justice administration (Garland, 2001), judicial control at the arraignment in those courts is unlikely to be as tight as in Thailand whose courts hold defendants in the access-restricted area throughout the process. Moreover, fine enforcement in the West can be said to be less risk-averse by not resorting to immediate fine collection and fine-default custody like in Thailand. This higher intensity of Thai procedural control reflects both deeper distrust and lesser concerns for proportionality and protection of defendants' rights. As discussed above, the liberal rights-based spirits of the Western-styled rule of law are rather alien to the Thai legal worldview. To many Thai practitioners, law is meant to preserve order which is understood to be smooth and calm (*sa-ngop-riap-roi*) with negligible tolerance for dissents and rights-based disruption (see Jackson, 2004b: 184). Moreover, the Buddhist concepts of moral responsibility and virtue-based social worth are prominent in Thai legal consciousness rather than fading into the background like in many Western secular societies. These cultural influences may partly explain the differences between Thailand and the West regarding the degrees of distrust and procedural control.

The status-based attribution of blame, according to the Thai notion of Buddhism, corresponds to and most likely underpins court architectural and procedural designs. By placing vertical distance between judges and defendants, the former in the chamber upstairs and the latter in the court basement, both judges and defendants are constantly reminded of their moral worth and the deserved level of respectability. Such distancing additionally removes judges from the proximity of defendants, thus disallowing the former to see the flesh-and-blood humanity of the stereotyped latter (see Bauman, 1989: 184). The repetitive uses of custody and its threat on defendants not only subject them to physical and psychological hostilities but also imply the blameworthiness that warrants such disrespectful treatments. Defendants who are exposed to such recurrent exposure of stigma are vulnerable to self-mortify and internalise the degradations (Goffman, 1961: 7). Coupling this self-mortification with the belief in the retributive *karma*, self-blame for procedural pains as expressed by defendants in this study is not so irrational as it may appear.

The degraded status of defendants explains their being reduced to 'dummy players' (Carlen, 1976: 81) in the cursory *wain-chee* hearing. By rapidly processing cases according to the tacitly scripted questions and guidelines for decisions, judges conduct this hearing as if it is a ritual in which they are both the participants and the principal audience. In such a performative setting, defendants become extra-performers, rather than the protagonists as envisioned by the due process principle. Because of the minimal significance of their role and the distancing of live-link communication, judges hardly pay close attention to them. The main purpose of defendants' presence in this 'scene' is merely to express their docility before the bench. This expression, either borne out of strategic resignation or genuine repentance, serves to convince judges (being the principal audience of this performance) of the legitimacy of their practices. Since judges are distanced and not positioned to observe how the unintelligible and unfriendly pre-hearing process induces defendants' docility, the true reasons for such appearance are the 'backstage' reality veiled to them. So long as what appears 'on stage' is convincing, judges tend to take it at face value (see Goffman, 1959). As defendants have an obvious incentive to avoid or reject the criminal justice system, their outward submissiveness is sufficient as a proxy for justice in the practitioners' eyes (Tata, 2020: 105).

The ritual-like composition of the *wain-chee* also has another function: to strengthen the solidarity among judges. Rituals, if performed collectively, do more than just express and solidify collective faiths. They are found to preserve and even amplify the solidarity of those who participate in such rituals. Through the generated 'effervescence' of being a part of a unified collective, one often feels the sacredness of group harmony to such an extent that it is elevated above all other values (Durkheim, 1915: 215–219). Although the *wain-chee* is not an activity judges perform together in a large assembly, its ritualised and scripted nature constantly reminds conforming judges that they are acting in cohesion with their peers. Mentally seeing themselves in harmony with their fellow judges instils the sense of belonging and in-group loyalty that propel the cycle of traditions that sustains judicial solidarity and conformity.

Given the conceivably shared social functions of the criminal justice system across jurisdictions, the analysis in the preceding paragraphs may extend beyond the borders of

Thailand. However, since the Thai judicial culture highly values homogeneity and judicial socialisation strongly encourages camaraderie over autonomy, the solidarity function of the ritualised court routines is likely to be more prominent in Thailand than jurisdictions that give more weight to internal judicial independence. Moreover, Thai judges and defendants are possibly more psychological distanced than their Western counterparts, due to the Thai judiciary's political insulation, the elite status, the Buddhist-inspired meritocracy, and the weak influence of the rights-based rule of law. This greater distance may make defendants' docility appear much more convincing and its 'backstage' shaping more obscure or irrelevant to judges' perceptions. This contributes to the regenerated cycle of Thai judicial indifference in which judges wholeheartedly embrace the legitimacy claim of their practices and dismiss all ethical challenges regarding disproportionate treatments and the under-protection of defendants' rights.

Conclusion

This article contributes to the field of comparative penology beyond the Anglo-European focus by offering a description of Thai criminal justice culture, which is a legacy of an epistemological bifurcation at the turn of the 20th century. The propensity for control in Thai lower-court practices is a product of the legal mentality that is yet to incorporate the rights-centric spirits of the Western-styled rule of law. Other results of the bifurcated legal Westernisation include the Thai judiciary's prioritisation of homogeneity over internal judicial autonomy, and the structural and psychological distances between judges and defendants. Moreover, Thai Buddhist interpretations that justify the virtue-based social hierarchy aggravate this distancing to the point that Thai judges tend to be indifferent to their arguably overtight control in the system. The ritualised court routines and the distancing architecture and procedures both embody the Thai culture of control and function to perpetuate it. These elements of rituals and distancing court designs may trigger similar impacts in the West but the intensity of procedural control in Thailand may be heavier due to different cultural roots.

Acknowledgements

I would like to thank the editor-in-chief and the anonymous reviewers for their constructive comments that significantly improved the manuscript.

Declaration of conflicting interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) received no financial support for the research, authorship, and/or publication of this article.

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Note

1 Since 2020, the judiciary's administrative unit has promoted the use of community service to address the inequality of detaining 'the can't-pay' for fine default. The impacts of this promotion in the long run remain to be seen.

References

Bauman Z (1989) *Modernity and the holocaust*. Cambridge: Polity Press.

Brangan L (2020) Exceptional states: The political geography of comparative penology. *Punishment & Society* 22(5): 596–616.

Brangan L (2022) Making sense of penal difference: Political cultures and comparative penology. *Punishment & Society*. Epub ahead of print 24 August 2022. DOI: 10.1177/14624745221117521.

Burley M (2014) Karma, morality, and evil. *Philosophy Compass* 9(6): 415–430.

Carlen P (1976) *Magistrates' justice*. London: Martin Robertson & Company Ltd.

Crow I and Simon F (1987) *Unemployment and magistrates' courts*. London: NACRO.

Dressel B (2018) Thailand's traditional trinity and the rule of law: Can they coexist? *Asian Studies Review* 42(2): 268–285.

Durkheim D (1915) *The elementary forms of the religious life*. Translated by JW Swain. Reprint. London: George Allen & Unwin Ltd, 1964.

Engel DM (1975) *Law and kingship in Thailand during the reign of King Chulalongkorn*. Ann Arbor: The University of Michigan, Center for South and Southeast Asian Studies.

Feeley MM (1979) *The Process is the punishment: Handling cases in a lower criminal court*. New York: Russell Sage Foundation.

Finnigan B (2022) Karma, moral responsibility, and Buddhist ethics. In: Vargas M and Doris JM (eds) *Oxford Handbook of Moral Psychology*. Oxford: Oxford University Press, pp.7–23.

Garland D (2001) *The culture of control: Crime and social order in contemporary society*. Oxford: Oxford University Press.

Garland D (2006) Concept of culture in the sociology of punishment. *Theoretical Criminology* 10(4): 419–447.

Goffman E (1959) *The presentation of self in everyday life*. Reprint. London: Penguin, 1990.

Goffman E (1961) *Asylum: Essays on the social situation of mental patients and other inmates*. New York: Anchor Books.

Jackson PA (2004a) The performative state: Semi-coloniality and the tyranny of images in modern Thailand. *Sojourn: Journal of Social Issues in Southeast Asia* 19(2): 219–253.

Jackson PA (2004b) The Thai regime of images. *Sojourn: Journal of Social Issues in Southeast Asia* 19(2): 181–218.

Jackson PA (2010) The ambiguities of semicolonial power in Thailand. In: Harrison RV and Jackson PA (eds) *The Ambiguous Allure of the West: Traces of the Colonial in Thailand*. Hong Kong: Hong Kong University Press, pp.37–56.

Jacobson J, Hunter G and Kirby A (2015) *Inside crown court: Personal experiences and questions of legitimacy*. Bristol: Policy Press.

Kesboonchoo Mead K (2004) *The rise and decline of Thai absolutism*. Milton Park: RoutledgeCurzon.
Kohler-Hausmann I (2018) *Misdemeanorland: Criminal courts and social control in an age of broken windows policing*. New Jersey: Princeton University Press.
Loos T (2006) *Subject Siam: Family, law, and colonial modernity in Thailand*. Ithaca: Cornell University Press.
McCargo D (2020) *Fighting for virtues: Justice and politics in Thailand*. Ithaca: Cornell University Press.
Mérieau E (2018) Buddhist constitutionalism in Thailand: When rājadhammā supersedes the constitution. *Asian Journal of Comparative Law* 13: 283–305.
Moore R (2004) The methods for enforcing financial penalties: The need for a multi-dimensional approach. *Criminal Law Review* September: 728–744.
Morris A and Gelsthorpe L (1990) Not paying for crime: Issues in fine enforcement. *Criminal Law Review* December: 839–851.
Mulder N (1996) *Inside Thai society: Interpretations of everyday life*. Amsterdam: The Pepin Press.
Muntarbhorn V (2004) Rule of law and aspects of human rights in Thailand: From conceptualization to implementation? In: Peerenboom R (ed) *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the US*. London: RoutledgeCurzon, pp.340–364.
Nicholson L (1990) *A survey of fine defaulters in Scottish courts*. Edinburgh: The Scottish Office Central Research Unit.
Pakeerat W (2013) 'Kan patirup ongkon tulakan: Khwam thathai nai boribot kanmueang Thai' [reforming the judicial institution: Challenges in Thai political contexts]. *Interviewed by Julaniti's Editors for Julaniti* 10(2): 12–29.
Quaritch Wales HG (1934) *Ancient Siamese government and administration*. London: Bernard Quaritch Ltd.
Sandel MJ (2020) *The tyranny of merits: What's become of the common good?* London: Allen Lane.
Streckfuss D (2011) *Truth on trial in Thailand: Defamation, treason, and lèse-majestè*. Milton Park: Routledge.
Tata C (2020) *Sentencing: A social process, re-thinking research and policy*. Cham: Palgrave Macmillan.
TLHR – Thai Lawyers for Human Rights (2020) When the court affirms NCPO authority long after its rule: Lessons learned from the case against 'Polawat's' anti-dictatorship leaflet distribution. Available at: https://tlhr2014.com/en/archives/19246 (accessed 21 October 2022).
Wakefield A and Fleming J. (eds) (2009) *The SAGE dictionary of policing*. London: Sage.
Winichakul T (2010) Coming to terms with the west: Intellectual strategies of bifurcation and post-westernism in siam. In: Harrison RV and Jackson PA (eds) *The Ambiguous Allure of the West: Traces of the Colonial in Thailand*. Hong Kong: Hong Kong University Press, pp.135–152.
Winichakul T (2014) The monarchy and anti-monarchy: Two elephants in the room of Thai politics and the state of denial. In: Chachavalpongpun P (ed) *'Good Coup' Gone Bad: Thailand's Political Developments Since Thaksin's Downfall*. Singapore: ISEAS Publishing, pp.79–108.
Winichakul T (2020) Nitirat aphisit lae ratchanititham prawattisat phum panya khong rule by law baep Thai [Legal privileged state and royalist rule of law: The genealogy of the

Thai-style rule by law] [Keynote address in Puey Ungpakorn lecture series no.17]. Thammasat University. 9 March.
Yampracha S (2016) Understanding Thai sentencing culture. PhD Thesis, University of Strathclyde, UK.
Young P (1987) Punishment, money and legal order: An analysis of the emergence of monetary sanctions with special relevance to Scotland. PhD Thesis, University of Edinburgh, UK.

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