The British Journal of Criminology, 2024, **64**, 343–360
https://doi.org/10.1093/bjc/azad033
Advance access publication 20 July 2023
Article

Judicial indifference in criminal sentencing: Explaining inequality of the Thai Fines

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Courts in many jurisdictions remain indifferent to criticisms for their overly harsh or unequal treatments. There has been a debate whether this is attributed to judges' individual dispositions or rather their environments. This article contributes to this debate by offering evidence from Thai courts about their indifference to inequality generated by the wealth-insensitive fine and fine-default custody. It argues that judges are situationally driven to adopt rigid framing about justice when performing duties, as a result of which judges develop indifference to the 'side-effects' of their frame-influenced decisions. The findings imply the possibility that the same mechanisms may exist in other jurisdictions and underline the need to address indifference to prevent failure in reforming for a more egalitarian system.

KEY WORDS: indifference, rigid framing, ethical blindness, sentencing, fines

INTRODUCTION

There has been socio-legal literature criticising courts of the over-harshness or inequality in their judgements. While one strand of arguments proposes that sentencers strategically deny moral responsibility (Tombs and Jagger 2006), the other contends the ingenious arrangement of the criminal justice process is more to blame (Tata 2019). Adding to this debate, this article argues that rigid framing is behind judicial indifference to courts' problematic practices and that situational factors tend to outweigh individual dispositions in perpetuating such indifference. This research improves on previous studies that focus on the proximate level of pressure, namely the caseload and resource constraints (see, e.g. Feeley 1979; Jacobson *et al.* 2015; Kohler-Hausman 2018), by also examining the more abstract level of pressure (i.e. ideology and organizational culture). It contributes to knowledge by providing evidence to the theory that the interactions among these multi-layered factors ripen the situation for rigid framing.

The said evidence is from the fieldwork about Thailand's criminal process. Although details about the Thai criminal justice system are not internationally well-recognized, its allegedly draconian penalties are notorious (McCargo 2020). Also heavily criticised is its propensity to under-protect rights and liberties, especially in political crimes (Winichakul 2020; TLHR 2021). Given the prevalence of court criticisms and Thai courts' indifference, Thailand is a

suitable jurisdiction to investigate the forces behind courts' challenged practices. The findings, while bound to Thailand, have extraterritorial implications in suggesting the factors and mechanisms that shield problematic judicial performances from changes.

This study focuses on court practice around the penal fine as the window on judicial indifference and its underlying mechanisms. Notwithstanding its trivial role, the fine is one of the most imposed sanctions in Thailand. Its banality and proneness to inequality (if issued wealth-insensitively) is suited as a case study of the overall sentencing system. Although generalization from a case study may be limited, an in-depth study of how the fine operates may reveal the commonalities behind judicial indifference across all modes of punishment. Indifference regarding the fine in Thailand is toward the impact-based inequality and disproportionality of a fixed-sum fine and fine-default custody. Thai courts adhere to wealth-disproportionate fining despite ethical challenges. Demystifying how and why this persistence occurs can explain indifference at a macro-level and can underline considerations needed for a realistic reform.

The best way to understand judicial indifference is, as Feeley (2013 [1983]) suggests, to empirically examine the system insiders' perspectives. This research's findings are thus drawn from fieldwork in Thailand in 2019, and between late 2020 to early 2021, during which the courts' sentencing routines were observed, judges were interviewed, and sample case files were examined. From the data, three common characteristics of fining are arguably the frames by which judges unconsciously wear while on duty. The frames of formalism, moralism and managerialism believably operate simultaneously, thus producing the rigid framing about justice and accounting for judicial indifference.

In the following paragraphs, I provide a theoretical framework of this study which centres on rigid framing and the corresponding multi-layered situational pressures. Subsequently, I summarize Thailand's sentencing and fining process before giving a critical review of Thailand's judicial culture. After describing research methods. I then discuss the evidence of Thai judges' three rigid frames: formalism, moralism and managerialism. This article ends with the analysis of situational mechanisms behind such rigid framing and indifference.

RIGID FRAMING AND THE MULTI-LAYERED PRODUCTION OF INDIFFERENCE

Rigid framing is a consequence of the inability to change cognitive frames and understand other perspectives of the same situation. Since cognitive frames are like picture frames that limit our perceptions of the world, inflexibility in changing frames can dogmatize one's interpretation of situations. Because frames are often unnoticeable and thus fairly immune to change, it is quite usual for frames to become locked and rigid, thereby making decision-makers blind to the multi-faceted reality and eventually adhering to the one-sided and opinionated viewpoint. Under this condition, decision-makers are also rendered temporarily blind to ethical problems of their conducts in question (Palazzo *et al.* 2012: 323).

Indifference, as a result of rigid framing, is context-dependent and more situational than dispositional. Although it is created by the interactions between the pre-context dispositions and pressures from the surrounding environments, the overwhelming power of situations exerts more influences in shaping a person's frames and decisions (see Milgram 1974; see also Lipsky 2010). Immersed in and driven by the situation's exigencies, decision-makers tend to unconsciously and provisionally adopt specific ethical frames that may even counter their normal moral reasoning in ordinary circumstances. With the fading of their original moral standards, decision-makers in the whirlpool of contextual pressures become morally disengaged or blind to the moral questionability of their actions (Palazzo *et al.* 2012; see also Kelman 1973).

Three layers of situational forces are simultaneously and interactively at play in generating powerful external pressures for ethical blindness. The three overlapping layers are ideological,

organizational and situational. Ideology is important in setting frames because it directs the prioritization of values and goals (Lipsky 2010: 47; Milgram 1974: 142). It also guides organizational structure and culture, which in turn create work environments that reinforce the guiding ideology (see Palazzo *et al.* 2012: 329). The street-level work environments impose proximate conditions, namely time pressure, that may make conformity to organizational conventions appear not only justifiable but also inevitable. The interactions among these three layers largely determine the risk of rigid framing, notwithstanding the person's pre-context frames (Palazzo *et al.* 2012). Where the three layers are in concert with one another, the risk of rigid framing and indifference is high; otherwise, the risk may be low or moderate.

This concept that dissects situational pressures into multiple overlapping layers extends our understanding about situation-led moral indifference. Psychologists like Kelman (1973) and Milgram (1974), along with sociologists like Bauman (1989), have long theorized that certain situational contexts can weaken decision-makers' moral restraints to such an extent that they are morally disengaged from adverse impacts of their decisions. However, these theories focus solely on the proximate conditions or processes that cause apathy. Kelman (1973: 38) suggests three interrelated processes of moral disengagement: authorization, routinization and dehumanization. From his controversial experiments, Milgram (1974: 133, 145–6) concludes that people who believe they are obeying authority are in the 'agentic state' in that they perceive themselves to be simply agents of the authority and hence become morally irresponsible for their actions. This sense of authority implies the perception of legitimacy that can be created absent coercion. Nevertheless, examining merely the immediate situation may overlook the less visible factors that also help produce and strengthen such a perception. In this regard, Durkheim's (1964 [1915]) theory about rituals is useful in highlighting how the mutual reinforcements between the proximate environment of a ritual and the less tangible organizational and ideological forces in the forms of group conventions and beliefs can regenerate the legitimacy of group norms. By harmoniously acting with other group members in a ritual, one feels the 'effervescence' of group solidarity, which in turn validates the collective beliefs for which that ritual is organized. Rituals and their regeneration of legitimacy, therefore, demonstrate the multi-layered process of authorization. This demonstration may remain obscure if we investigate only the immediate context of the situation.

Likewise, Kelman's street-level processes of routinization and dehumanization are deeply connected with the more abstract Weberian ideology and the culture of managerialism. Modernity's obsession with Weberian rationality necessitates routinization because it can ensure speed, consistency and certainty, the epitomes of the Weberian goal of efficiency (see Bauman 1989; Lipsky 2010: 140–1). The exaltation of efficiency above other values is the characteristic of managerialism which tends to promote assembly-line management so much that it dehumanizes both the workers and the clients—the former being routine-bound and robot-like and the latter being framed as the processed object. Dehumanization in exchange for ultra-efficiency is manifest in the 'McDonaldized' organization. According to Ritzer (2019: 167), McDonaldization centres on functional rationality which promotes efficiency and quantifiable goals. The overlooking of substantive rationality and its nonquantifiable objectives spawns 'the irrationality of rationality' and perpetuates indifference to the eroded abstract values, namely justice.

THAILAND'S CRIMINAL SENTENCING AND FINING

Thailand's legal system was modernized in the early 20th century to remove Western extraterritoriality and to expand the central ruling power nationwide (Loos 2006: 43-5). Before the reform, criminal procedure was rife with arbitrariness, delay and brutal corporal punishment (see Engel 1975). To rationalize the system, many foreign advisors were hired to help design

the new legal regime (Loos 2006). Eventually, Thailand followed the Continental approach of codification to improve the existing concepts with the compatible Western ideas instead of transplanting the alien Western values to Thailand's indigenous culture (Padoux 1990 [1909]).

Punishment under the reformed criminal law comprises death penalty, imprisonment, confinement, fine and confiscation of property (The Criminal Code, hereinafter 'CC', Section 18). The fine is offence-based, fixed-sum and, at the time of modernization, deliberately expensive to adversely affect offenders (Padoux 1990 [1909]). The fine-able rates became anachronistically negligible as time went by before the tenfold increase in 2017. Nevertheless, the fine's penal role is inferior to imprisonment. Not only is the latter authorized in virtually every offence, even where the law mandates the combination of imprisonment and the fine, generally the latter can be waived but not the former (CC, Section 20).

The dominance of custody is perceivable in the use of confinement for fine-default offenders. Although property seizure is legally prescribed as another method of fine enforcement, confinement is the de facto default. Confinement is activated immediately if offenders cannot tender full payment on the sentencing day, bypassing the 30-day payment period provided in the law (Boonyopas *et al.* 2008: 104). The Supreme Court repeatedly confirms the legality of this practice on reasonable suspicion of payment evasion.[1] Despite the term 'confinement' which signifies less stringent conditions than imprisonment, offenders are grounded in confinement facilities the majority of which are located in the local prison's compound, albeit in different buildings. The length of custody is determined using a fixed formula for conversion from the default fine. This formula has been revised several times to respond to money's changing value. The latest adjustment was in 2016 to raise the conversion rate to 500 baht per day in custody (CC, Section 30). This fixed rate is largely based on the mandatory minimum wage (Boonyopas *et al.* 2008: 128). Although the law authorizes only up to two years of confinement, courts may still seize offenders' properties to collect the 'residual fines', i.e. those exceeding the equivalent amount of two years in custody.[2]

The concerns for disproportionality of imposing custody on fined offenders brought about the introduction of non-custodial enforcement alternatives, particularly community service (CC, Section 30/1). According to the law, offenders who cannot pay the fine may file a motion for community service, using the 500 baht/day conversion rate to determine the duration of the measure but not exceeding two years. Judges are strongly advised by the judicial regulation to notify this alternative to the offenders.[3] However, before 2020, judges rarely complied with this advice and they hardly approved the motion. The lack of notification and difficulty in getting approvals resulted in few community service motions and approving orders (Boonbandit 2019). This alternative to fine-default custody sank into oblivion, before being revived in 2020 with the Courts of Justice's initiative to reduce all unnecessary uses of custody.[4] The effect of this initiative in the long run remains to be seen. Still in its early days, as the data of this study indicate, judges seemed inert to implement the scheme and they still based their conversion decisions on grounds of offence severity, rather than financial (in)ability.

The omission of wealth-based considerations is consistent throughout the fining process. With the offence-based and fixed-sum structure, judges routinely levy the fine with no means

1 See, e.g. Supreme Court Judgements (*Dika*) no.3287/2534 (AD 1991), 4897/2550 (AD 2007), and 4899/2550 (AD 2007).

2 Revision of the Practice Guideline and Procedures for Court Officials and Appointed Court Officers in the Execution of the Criminal Code Section 29/1 [Internal Circulation of the Office of Courts of Justice (OCJ) No. Sor Yor. 024/Wor.7 (Por) dated 13 January 2022].

3 The Courts of Justice's Regulation on Counting Community Service Days and Practice Guideline on Community Service as an Alternative to the Fine and the Change of Confinement Location (No.2) 2017.

4 See Internal Circulation of the OCJ No. Sor. Yor. 025/Wor.944 dated 25 November 2020 Re: The Implementation of Community Service to Substitute Fine Payment.

inquiry and no systematic considerations of means information. At the stage of enforcement, certainty of full collection dominates, and this accounts for the activation of immediate confinement upon nonpayment on the sentencing day. Similarly, confinement order is entered with no inquiry into each offender's payment ability (see Boonyopas *et al.* 2008: 127–8).

This complete dismissal of means-based treatment is contrary to the day-fine system applied in some European countries (see Kantorowicz-Reznichenko and Faure 2021) and means-sensitive fine enforcement in non-day-fine jurisdictions like England and Wales (see Moore 2001). The adoption of means-sensitive fining/fine enforcement in these countries reflects the understanding that formal equality, which insists on offence-based sentencing, can cause inequality of impacts as the same fine weights differently for offenders of different means (see Faraldo-Cabana 2017: 79–80). However, as discussed later, the data in this study show that Thai judges tend to understand equality in a formal sense, and this partly explains judges' omission of means inquiry in their fining practice.

Participating judges justified this omission of means inquiry partly on the speed-driven sentencing. The vast majority of criminal cases in Thailand is finalized in a procedure called the *wain-chee*, an arraignment-cum-sentencing process for defendants who plead guilty and for whom no hearing is required. The *wain-chee* is administered daily by the rotating panel of judges on duty, who will preside and sentence all cases that need no further hearings. This speedy sentencing amidst the bulky caseload generates the need for mass case management and assembly-line routines to guarantee both speed and consistency (Yampracha 2016). The race against time seems to pressure judges into adopting wealth-insensitive practice. However, as discussed below, other pressures including judges' ideology and organizational culture are also present.

A CRITICAL REVIEW OF THAILAND'S JUDICIAL CULTURE

Among numerous socio-legal studies about criminal procedure in the West, the notable works include Carlen's (1976) analysis of how the controlling elements of the English magistrates' courts manipulate defendants. Jacobson *et al.* (2015) find that the English crown courts also place centrality on court professionals while marginalizing court users. Feeley (1979) and Kohler-Hausman (2018) similarly report the punitive experience of the pretrial process. Tombs and Jagger (2006) attribute the perpetuation of such unempathetic judicial practices to judges' use of neutralization techniques. Nevertheless, Tata (2019, 2020) disagrees and posits that sentencing is driven by social interactions in courts rather than judges' dispositions and deliberations.

Comparable research about Thai sentencing practice is relatively few and knowledge is still lacking. However, a few recent studies fill the gap by exploring how judges exercise discretion with a focus on the contexts, not the individuals. Yampracha's (2016) study describes how Thai judges prioritize internal conformity in their decision-making and become indifferent to the overharsh sentences. McCargo (2020) later investigated Thai judicial structures and culture that underlie Thai courts' controversial decisions in political offences. His findings about judges' elitism and insularity corroborate Yampracha's. In addition, Winichakul's (2020) critical observation sparks a novel perspective about the causal connection between the 'Thai-ized' version of the rule of law and the courts' alleged under-protection of rights and liberties.

To summarize their findings, Thai courts are centralized and hierarchical, not unlike courts in other civil law countries; however, they practically apply the common law doctrine of stare decisis, whereby the Supreme Court precedents are strictly followed (Yampracha 2016: 135). This is conspicuous in the judicial recruitment examination whose focus is on rote memorization of judicial precedents, instead of critical understandings of the law (McCargo 2020: 33). Once recruited, novice judges are trained to cherish conformity to centralized standards by learning the consequences of deviation, i.e. peer suspicion of corruption and the unappealable

disciplinary actions (Yampracha 2016: 133–6). Moreover, judges are still bound in an administrative chain of command and subject to annual evaluation by their 'supervisors' (Yampracha 2016: 253). This organizational context provides a strong incentive for judges to just follow their peers, particularly in the form of an in-house and confidential numerical 'sentencing guidelines' known as the *yee-tok* (Yampracha 2016: 136).

Conformity is also induced by the collective self-perceived superiority and political insularity. Unlike in several Western jurisdictions, Thai Courts of Justice are constitutionally self-regulating with neither parliamentary oversight nor windows for public scrutiny. This creates complete insularity from external opinions (McCargo 2020: 45, 100–2). Furthermore, besides their socially respectable and elite status, being insulated from the public promotes judges' self-congratulatory perception, especially of their infallibility (McCargo 2020; Yampracha 2016: 244). Such pride corroborates their opinion of politics as 'dirty', as opposed to their 'virtuous' duty of upholding justice (McCargo 2020). This explains why judges deem attempts to make courts more democratically accountable dangerous and adamantly reject them (Yampracha 2016: 248–9).

The mentality behind judges' derogatory view of politics is related to what Winichakul (2020) critiques as the elites' order-centric and inegalitarian ideology. He argues that Thailand's ruling elites imported the West's concept of the rule of law and 'Thai-ized' it with the indigenous non-liberal ideology to not jeopardize their privileged status (Winichakul 2010, 2020). This localization is evidenced, for example, in the term *tham* in *lak nititham*, the local translation for the rule of law. This term connotes Buddhist dharma whose interpretations by the Thai elites justify social inequalities (Mulder 1996), the rulers' exercise of power, and the priority of duty over rights (see Kesboonchoo Mead 2004: 150). Winichakul (2020) contends that this Thai-ized understanding of the rule of law is continually passed on to the insulated judges, thus making judges' sense of justice more inclined towards preserving law and order than rights and liberties.

The prominent example of judges' law-and-order mentality was the consistent imposition of harsh sentences on drug offenders in the recent past. Then, Thailand's drug policy was driven by the war-on-drugs discourses and the moralistic framing of drug problems. For decades, terror of drug proliferation demonized everyone that involved with drugs, however tiny their roles were. This resulted in the frequent use of imprisonment, even in minor drug possession or drug dealing cases (see Yampracha 2016: xxiv–xxv). Prison population skyrocketed, spawning more problems of over-crowdedness and inhumane prison conditions (FIDH 2017). Alarmed by this predicament and finally aware of the ineffectiveness of the aggressive policy, Thai legislators enacted the Narcotics Code of 2021 to repeal the allegedly draconian Narcotics Act and to switch to a more lenient and rehabilitative approach (Chitov 2023). Whether the new law can reduce prison population remains to be seen. Nevertheless, if judges continue to hold a condemning stereotype of drug offenders and if sentencing remains as mechanical as apparent in this study, success in decarceration is still doubtful.

RESEARCH METHODS

I collected data for this research during two legs of fieldwork in Thailand: between September and October 2019, and between December 2021 and March 2022. I applied three methods for triangulation: court observation, interviewing judges, and sample case file analysis. The major research venues were three courts of first instance of different sizes and locations in Thailand's central region. Court One was a big city court in a busy commercial, industrial and residential area. Court Two was a medium-sized court in a so-called

suburban province of the adjacent largely populated city. Court Three was a large-sized court with a jurisdiction over a large rural territory. All three courts had general jurisdiction over both felony and misdemeanour offences, and all were stationed by judges with over five years of judicial experience. In leg one of fieldwork, I visited all three courts and spent roughly two weeks at each court. Post-leg one, the Office of the Courts of Justice (OCJ) started to promote the use of community service. In leg two, I visited only Court Two to probe judges' responses to this initiative.

In all three courts, I analysed 224 purposefully sampled case files, observed 192 *wain-chee*, moderated three focus groups with twelve judges participating, and conducted three one-to-one interviews with the chief judge of each court. I held another focus group with three judges from the Central Court of Appeal (CCA). In leg two, I conducted additional interviews with eight *wain-chee* judges from Court Two, and one judge from the OCJ. All interviews were in Thai and audio-recorded with each participant's written consent. I, the Thai native speaker, solely transcribed and translated interview data from Thai to English.

Table 1 presents details of the interviewed judges in this study. The names of the judges and the trial courts are anonymized for judges' confidentiality.

The University of Strathclyde had ethically approved the methodology before fieldwork began.

I cross-checked data from the case files, observations and interviews to ascertain judges' fining practice. Then, I relied on interview data for explanations or judicial justifications of the practice. For analysis, I applied the concept of rigid framing while thematically coding the data to identify judges' common frames. Afterwards, I used Kelman's (1973) processes of indifference and Bauman's (1989) critique of modern bureaucracy in mapping the framing processes in the Thai sentencing setting. Subsequently, I referred to the multi-layered origins of indifference to probe if judges' frames were associated with the multi-layered situational pressures. Using Durkheim's (1964 [1915]) theory of group solidarity, Ritzer's (2019) McDonaldization thesis, and Winichakul's (2020) argument about the Thai-ized rule of law, I found the coherent multi-layered interrelations among the Thai dominant legal ideology, the judicial culture of homogeneity, and procedural constraints that validate managerialism. The confluence of such forces arguably underpins the processes that rigidly frame judges' perceptions about justice and perpetuates judges' indifference.

FORMALISM, MORALISM AND MANAGERIALISM: THE THREE RIGID FRAMING

Formalism

The majority of judges in this study understood equality in a formal sense and they put great importance on sentence consistency. This explains the virtually unquestioned legitimacy of the offence-based fixed-sum fining, by which offenders of similar offences are theoretically subject to the same quantum of fines despite income disparity. To this group of judges, formal equality is just and proportionate, whereas means-based sentencing was regarded as discriminatory because the rich would be more heavily punished solely because of their greater wealth. Judge J was articulate in this reasoning:

> [T]here would seem to be a double standard. I'm rich so I'm subject to this rate. Am I bound to the higher fine? Am I wrong to have been born rich? I don't have any money; I am poor. So, I will be charged with this [lower] rate instead. It's the same law but with two rates of the fine: one rate for the rich and another for the poor.

Table 1. Details of the interviewed judges

Participant	Court	Years on the Bench
Judge A	One	18
Judge B	One	21
Judge C	One	15
Judge D	One	22
Judge E	One	11
Chief Judge One	One	25
Judge F	Two	18
Judge G	Two	18
Judge H	Two	12
Chief Judge Two	Two	20
Judge I	Three	19
Judge J	Three	18
Judge K	Three	16
Judge L	Three	17
Chief Judge Three	Three	20
Judge M	CCA	29
Judge N	CCA	29
Judge O	CCA	29
Judge P	Two	20
Judge Q	Two	12
Judge R	Two	13
Judge S	Two	20
Judge T	Two	20
Judge U	Two	12
Judge V	Two	13
Judge W	Two	12
Judge X	OCJ	N/A

Mirroring this logic, Judge F also sharply remarked, 'Affluence is not a crime to be considered deserving a more substantial fine'. Under this 'double standard' perspective, held by most participating judges, the idea of wealth-proportionate fining—even in the likes of the European day-fine—was flatly rejected. However, judges in the minority had the opposite view. Understanding that the same fine causes different degrees of pains to people of different means, this group of judges regarded that equality should also be judged by the sentence's impacts, as Judge K commented:

> The value of money is different for different people. To sanction otherwise would exact punishment for uneven people and cause unequal punishment in my mind. Although the amount is equal, the impact of punishment is not the same in reality.

Nevertheless, this group of judges still considered offenders' means as merely indicative of the offence's gravity, as demonstrated in Judge O's rumination: 'But, in fact, the circumstances are inseparable from the financial status. If we see that the defendant is so well-off that he didn't have to violate the law but he did it anyway, this will increase the gravity'.

In the observed practice, means information could hardly affect culpability assessment and sentencing decisions because they were based on the offence's gravity. While offenders' poverty may evoke sympathy and induce a lenient sentence for offences of negligible blameworthiness, judges deemed it irrelevant in cases of severe reprehensibility, as Chief Judge One explained:

> [T]he circumstances are primary and then [comes] this [consideration on the financial conditions]. If the circumstances are severe, despite the defendant's poverty or whatever, he will have to suffer the consequences.

The insignificance of means information explains the absence of means inquiry. Serious investigation about offenders' financial ability was considered unnecessary, even in a very rare case where judges took offenders' wealth into account at sentencing. Because in such a case, judges may glean a rough estimate from basic information, namely offenders' occupations, in the case file and from offenders' appearances observed in the hearing. Moreover, participating judges normally consulted each court's *yee-tok* (the in-house, confidential and offence-based 'sentencing guidelines'), in fixing the fine regardless of offenders' wealth.

Reliance on the *yee-tok* is another manifestation of sentencing formalism. Corroborating Yampracha's (2016) findings, judges in this study confirmed the importance of the *yee-tok* in achieving sentence consistency. Although participating judges agreed that departure from the *yee-tok* is permissible, in practice it seemed rather an exception than the norm. The conventional deference to the *yee-tok* is noticeable in the following quotes: 'If there's a *yee-tok* reference, in principle we'll follow it' (Judge D); 'Judges in principle must deliver sentences according to the *yee-tok*' (Judge F); 'First of all, we are bound by the *yee-tok*. It's the exercise of discretion by applying none of it' (Judge I).

Culturally, the *yee-tok* exerts great control in sentencing discretion. Its offence-centric standards offer a convenient means by which sentences can be delivered swiftly, objectively and consistently. However, over-emphasis on consistency makes compliance with the *yee-tok* so rigid that exercising individualized discretion is very difficult. Judge G admitted:

> To divert from the *yee-tok* might cause problems. It may induce suspicion of corruption or things like that. The suspicion might be false but diverting from the *yee-tok* compels us to provide excuses. That's why judges will have to conform to the patterns, to the standards of the *yee-tok*, despite the authority to use discretion otherwise. But this seeming opportunity [to exercise discretion] turns out to be limited or rather closed, so we have to first defer to the *yee-tok*.

Another embodiment of formalism is the felt need to enforce full collection of the fine and guarantee the certitude of the state's penal power. This strong need to uphold the formal sacrality of state punishment can even outweigh the need for proportionality. The routine of immediate confinement for fine default clearly showcases the willingness to err on the side of certainty to the detriment of proportionality. The rigid money/time conversion rate, which guarantees objectivity and consistency, again manifests the priority of form over substantive individualization. Formalism aside, such preference for penal certainty is also driven by moralism and managerialism.

Moralism

When asked about the penal purpose of the fine, all participating judges answered either deterrence or retribution. They were apparently concerned with the proper moral message and proportionality when replying that the fine is most appropriate in crimes of avarice, and that it is too lenient to be used as a standalone in non-petty offences. Nevertheless, they usually clustered the fine lowly in the punishable range regardless of offence category and severity. From all the sample cases sentenced with the fine ($N = 181$), 65.74% ($N = 119$) of the fine is at a lower end of the statutory range. Judges also admitted that petty fines were prevalent and fines at a higher end were rare.

Besides compliance with the *yee-tok*, participating judges gave various reasons for this practice: sympathy with most offenders who are poor, the need to leave room for more severe offending in the future, and habituation to routine. Noticeably, none of these justifications are grounded on optimal proportionality or sentence utility. Furthermore, they were adamant to supplement suspended imprisonment with the fine to make offenders 'have some tastes of punishment', although the fine was usually trifling. Likewise, despite awareness of potential disproportionality, they were willing to impose confinement for fine default right on the sentencing day. Judge E explained that this was out of fear that offenders might 'disappear into thin air'.

The emphasis on ensuring that offenders are punished rather than on optimizing sentencing impacts suggests that participating judges considered the fine's primary purpose to be communicative of moral disapprovals. However, instead of announcing proportionate retribution, judges' fining practice seems to announce simply that something has been done about the crime. Resonating Durkheim's argument about punishment restoring social solidarity (Durkheim 1960 [1933]), the fine—here as a symbol of public condemnation—serves to re-affirm the society's core values and to restore collective faith in them.

This predominantly symbolic role appears to underlie judges' preoccupation with sending the right message across. The exclusion of a standalone fine from non-petty crimes, especially those against bodily integrity, partly originated from the concerns over the 'leniency' and 'misfit' of its monetizing allusion against the 'innermost and most basic aspects of the person' (Simmel 2004: 365). Considerations about moral compatibility between the crimes in question and responding actions are salient in judges' decisions on whether to convert the default fine to hours of community service. According to the law, community service is authorized as an alternative for the 'can't-pay' offenders. Thus, logically, inability to pay should suffice for judges to permit this alternative. However, many judges in this study ignored financial inability and instead (dis)approved community service based on offence-based criteria as if community service was an alternative sanction not just an alternative fine enforcement method.

To most participating judges, community service is inadequate to address greed-driven offences and publicly harmful crimes. Such opinion coincides with the Courts of Justice's 2003 regulation on community service that recommends against approving conversion to community service in cases involving serious crimes.[5] The epitomes of offences in this category, as raised in most interviews, are drug dealing and drug possession. Several interviewed judges referred to the moralistic war-on-drugs discourses that drugs are, according to Judge Q, 'a great danger to the society'. This framing underpins participating judges' punitive stance towards narcotic activities, however minor. For example, Judge S declared an intention to not allow community service even in cases of minor involvement with drugs because '[m]inor drug dealers or possessors or whoever, they already know that drugs are harmful'.

5 The Courts of Justice's Regulation on Counting Community Service Days and Practice Guideline on Community Service as an Alternative to the Fine and the Change of Confinement Location 2003.

Judges' strong disapproval of all kinds of drug activities tends to induce disapproval of characters. The greedy, selfish and exploitative nature of drug-related crimes appears to cloth drug offenders in the same detestable fabric. Consequently, many participating judges deemed drug offenders to be on the lowermost rung of judges' moral echelon. This is conspicuous in their low opinion of drug dealers and possessors who comprised the majority of drug offenders in all three visited courts. For instance, despite the internal rule that judges inquire offenders about payment ability and notify them of the community service alternative, Judge I candidly admitted, 'If it's a drug case, I will pay no attention and I'm not even willing to ask them questions'. Another reason for this indifference was participating judges' belief that drug dealers, being 'profit-driven', can afford the fine from their crime proceeds, as Judge U put it: '[T]hey have money, so they'd better pay. If they don't intend to pay, they deserve to be confined for the outstanding fine. It's their decision, their choice to be confined instead of paying the fine'.

This conviction appears to persist despite the counterargument, shared by a few judges such as Judge W, that most prosecuted drug offenders are petty dealers who are normally too poor to pay off their fine. Such a condemning attitude justifies immediate custody of fine-default drug offenders despite the original non-custodial sentence, as Judge I ruminated, 'They are on the borderline where imprisonment is also warranted'. The post-sentence revisiting of the offence's custody-worthiness was participating judges' common practice in deciding whether to permit fine enforcement through community service. However, the centrality of offence reflects the idea that community service is an alternative sentence and the custody-worthiness is likely to frame judges' comparison of severity to be between community service and imprisonment, not the fine. Therefore, it makes sense for judges to regard community service as too lenient and inappropriate for drug crimes, and to reject many motions for community service outright.

This pattern of decision-making regarding community service continued in the early months after the Courts of Justice's community service promoting initiative. Notwithstanding its aim of reducing unnecessary use of custody, the initiative does not tackle judges' moralistic outlooks that underlie rejections of community service motions filed by the 'morally unworthy' offenders. Although it resulted in the nearly three-fold rise from 4,593 approvals in 2019 to 12,645 in 2020[6] when the initiative was launched, such impressive escalation was mostly attributed to the top-down policy push.[7] Therefore, it remains to be seen how well the initiative will fare in the long run if the root causes grounded in deep moralism are left unaddressed.

Participating judges also generally viewed offenders negatively. Although non-drug offenders may not be perceived as equally dangerous and disdainful, they were similarly distrusted. Many judges typecast both drug and non-drug offenders alike as the 'won't-pay'. Absent detailed means information, judges shared a stereotypical portrait of a typical offender as lazy, cunning and exploitative. Judge D explained, 'Some defendants are so shrewd. They have money but just don't pay. When they see the opportunity, they just exploit it. We must be careful'.

Such stereotypes are not totally groundless. Many participating judges experienced first-hand the 'untrustworthiness' of fined offenders. Besides community service, offenders may avoid being in default by requesting for instalment payment or an extended 'due date'. These alternatives were not commonly announced and not widely known among offenders. Nevertheless, few who knew about them filed a motion for one option or another. At first, judges had approved

6 Data from the Department of Probation.
7 Interview with Judge X who monitored the initiative's progress at the OCJ (interviewed on 9 February 2021).

the motion only to discover later that offenders defaulted and fine enforcement was difficult. Eventually, they changed to reject nearly every motion, as Judge L conceded:

> The reason of our rejection of [the defendants'] motions is because our past approvals often ended up in non-payment … It's because we used to allow them instalment payment but they defaulted and we had no securities at all … If we approve their motions, they will default …

Moreover, as Judge L recounted, '[O]ur experience has taught us that, despite our rejection, they could still come up with payment',[8] defendants' 'sudden' ability to pay after the rejection of a community service motion corroborates judges' distrust of offenders. This belief that offenders are cunningly playing the system justifies judges' moral judgement that offenders are generally undeserving of information about non-custodial alternatives. Judge T was unequivocal in this stance: '[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'.

Therefore, offenders in this study were left uninformed about non-custodial alternatives. Judge J remarked, 'It should be [offenders'] business, not the court's, to keep protecting every bit of their rights'. This line of thinking explains many participating judges' refusal to notify offenders about non-custodial enforcement methods. Although other judges referred to the *wain-chee*'s breakneck pace when reasoning that such notification would cause delay, the negative stereotypes of offenders appear to also influence judges' preference for speed over offenders' rights. Such moral judgements seem to additionally induce judges to prefer certainty of punishment through immediate fine-default custody.

Furthermore, distrust of offenders is distinct in the *wain-chee*'s distancing. Instead of an in-person hearing in an ordinary courtroom, the observed *wain-chee* occurred remotely, via a live video-link, between the presiding judge in the chamber upstairs and defendants down in the basement. Although not yet convicted, defendants must remain in the access-restricted holding area in the basement throughout the *wain-chee*. For fined offenders, to exit was through full fine payment or judges' approval of their motion for non-custodial alternatives. Otherwise, they were not allowed out; nor were their closed ones allowed in. Both judges and court officials explained that this strict security measure was to prevent defendants' escape. However, because escape rarely occurs, this seeming overprotection implies court staff's deep distrust of offenders. Also, this strict pre-sentence holding of defendants also implicates the perception that offenders are unworthy of more dignified treatments.

Managerialism

Criminal procedure in Thai courts can be said to be McDonaldized because it appears to prioritize managerial goals of security, certainty and speed over the meaningful protection of rights and liberties. One of the distinct aspects of the observed *wain-chee* was the frantic pace with which judges and court officials routinely processed each case. Inundated with a daily bulky caseload, every observed *wain-chee* was a race against time to clear up that day's load before the cycle renewed the next day. Concerns for speed and consistency were, hence, natural. This elucidates the importance of the *yee-tok*, for it ensures consistency while enabling quick case disposal. Moreover, the *wain-chee*'s fast-paced rhythm was salient in the perfunctory hearing, during which the exchange between the judge and each defendant was script-like and usually lasted less than a minute. To maintain this quick flow, judges seemed to strip unnecessary parts

8 However, according to the experienced finance official of Court Three, instead of playing the system, offenders often resorted to predatory lenders for emergency cash to pay the fine and avoid custody.

of their 'script dialogue'. The removed parts comprised questions about offenders' means and explanations about the community service option. Interviewed judges cited floods of caseload in defence of their silence about non-custodial alternatives. Judge I elaborated:

> Initially, when this regulation had just come out, we complied with it. But as time went by, with the caseload. Well, at the *wain-chee*, if you see the works at the *wain-chee*, cases flood right in and there's no chance to have this inquiry [about financial ability].

Judge D had a similar view and described the courts' practice then. This was before the 2020 community service initiative:

> [I]t depends on the chance. If the defendant is clueless and doesn't bring up the subject, we don't tell them, see? Because it increases the workload… [S]ome courts … are overloaded so they abstain from giving this information [about community service].

Judge H also acceded to have withheld information about community service because giving it 'will take a long time' and court officials were already there to help:

> Partly why I don't explain [about community service] is because defendants must file a motion [for community service] … [a]nd there are many details to fill out… A verbal conversation won't do because these details must appear in writing, a motion rather. So, I think that when defendants cannot pay the fine, the officials downstairs would notify them.

Note the shift of responsibility from judges to court officials who were expected to do all non-adjudicative tasks for judges, thus leaving only the 'essential' judicial works to the judges. The distinction between the 'core' and 'non-core' judicial tasks resulted in participating judges' perceived boundary of duty to be not beyond the announcement of sentence. Judge T declared, 'We only decide on the guilt and the degree of the sentences … It's not that judges have to concern themselves with every issue'. Therefore, judges' post-sentence passivity was deemed normal. Enforcement of sentence is, as Judge N confirmed, 'for the officials to manage'. This division of labour is helpful in speeding up the process like in the assembly-line production. However, it also entrenches the belief that judges need not protect offenders' rights; recall Judge T's 'pampering the offenders' quote above. Since court officials purportedly stand by for assistance[9], offenders can and should help themselves in requesting for alternatives to fine-default custody.

Concerns for speed in the fast-paced *wain-chee* also explain why participating judges opposed the European day-fine, besides the 'double standard' argument. Even judges who agreed with the day-fine's egalitarian premise doubted its feasibility for fear of delay caused by a pre-sentence means inquiry. Chief Judge One commented that checking offenders' means before sentencing may stall the process:

> Problems will ensue about the sources of this information regarding defendants' assets. This may be time-consuming and may hold up the sentencing process, since now judges must wait for the information about each defendant's income to tailor the fine accordingly.

9 Many participating judges believed that court officials are ready to assist offenders with the latter's queries. However, this belief is contrary to observation data. In all the observed *wain-chee*, court officials were stationed upstairs behind the service counter, while offenders in the *wain-chee* were held in the basement holding area throughout the process. The only agents of authority present in the holding area were the court's police officers whose duty did not include giving information and legal assistance. Given no direct duty and specialization, although many observed officers tried to answer offenders' questions, their answers were often either too general or misleading. Many did not even know about the community service alternative. Thereby, no explanations about this alternative were given to offenders, in contrast to judges' conviction.

A means inquiry is foreseeably lengthy because Thailand lacks comprehensive databases or credible fact-checking apparatuses regarding a person's wealth. Given this paucity of verification tools, judges must rely on offenders' declaration of their own financial status. Nevertheless, participating judges opined that offenders have incentives to deceptively under-report their income. Therefore, 'double standard' aside, concerns for speed and accuracy additionally underlie judges' scepticism of wealth-sensitive fining.

Difficulties to administer property enforcement was another ground raised by judges to prefer using fine-default custody. Participating judges complained about the lack of court personnel to investigate the whereabouts of defendants' enforceable assets. They also referred to coordination difficulties with the prosecutors, who are also supposed to enforce the fine. Judge D reasoned that property enforcement is difficult because 'no one cares to do it' and that 'this task [of property enforcement] is heavy and the [courts'] workload is immense … [C]ourt staff must be complaining … [i]f they have to carry this civil execution burden …' Likewise, the prosecutors, in Judge D's opinion, 'also perceive themselves to be loaded with works and duties'. Therefore, the system provides no motivations for anyone to collect the fine via property enforcement.

Difficulties in administering property enforcement render the fine's penal effects uncertain. Moreover, approving non-custodial alternatives—i.e. instalment payment, extension of payment due date, or community service—was viewed by participating judges as increasing the risk of fine default and offenders' 'disappearance', thus making punishment even more uncertain. Since the penal system's legitimacy also hinges on the guarantee of punishment, uncertainty in penal enforcement raises great concerns. From formal rationality perspective, judges are rational in preferring custody for fine default as it can ensure certainty while adding no extra burden on court staff. This propensity for managerialism is noticeable in the comment of Judge L:

> [O]ur past approvals [of motions for non-custodial enforcement] often ended up in non-payment and hence our recurrent problem of our inability to administer property enforcement. Who will be the one to seize and sell [defendants'] properties for us?...We used to encounter this situation and [fine default] would create more work for us, wouldn't it? But if we deny the motion outright, we won't have to be bothered with property enforcement. Otherwise, we would have to carry out property seizure for the outstanding fines, another task for the matter that should have already ended.

Managerialism and its efficiency-centric mantra encourage the use of routine to speed up complex tasks while maintaining mechanical consistency (Lipsky 2010; Palazzo *et al.* 2012). However, routinization breeds complacence with the status-quo and inertia (see Samuelson and Zeckhauser 1988). Judges S, U and V, interviewed after the launch of the community service promotion initiative, expressed their unenthusiasm for cooperation. Judge V conceded to have learnt how to decide about the community service motion when forced to consider it at the *wain-chee*. Information overload, according to this participant, disincentivizes judges from updating their knowledge:

> Actually, we will know about [the new law and the new policy] when we have to implement them, don't we? Only then will we search for information. There are so many things to know and to remember. Sometimes, I may have read about them but I didn't remember. It's difficult to say.

Besides inertia, habituation to routine also generates uneasiness regarding change. Judges R and S openly argued for the standardization and routinization of decision-making about community service, even if it would limit their own discretionary power. To them, non-custodial fine

enforcement is an unfamiliar terrain where criteria of good discretion are unclear. Thereby, an established standard is important for them to avoid making 'bad' decisions, as Judge R clarified, 'Neither the policy nor the recommendation can save the judge's neck [if things go wrong]'.

Such inertia and uneasiness regarding non-custodial alternatives appear to sustain participating judges' indifference to the custody-prone practice. Habituation to means-insensitive fining and fine-default custody seemingly narrows their vision of other possibilities. Likewise, efficiency-centric routines seem to restrict their focus on only managerial goals. This common presence of managerialism, in concert with formalism and moralism, forms rigid framing that arguably underpins judges' indifference to the overharsh treatments of the Thai fining system.

MECHANISMS OF JUDGES' RIGID FRAMING

As discussed earlier, the three rigid frames—formalism, moralism and managerialism—are the product of the multi-layered pressures in the criminal justice context. Those layers comprise ideology, organization pressure and street-level constraints. Ideologically, it is arguable as Winichakul (2020) posits that the prevailing understanding of the rule of law in Thailand is different from the concept's liberal core. Thailand's traditional ethos is moralistic and hierarchical with an emphasis on personal duties and boundaries of one's social status (Kesboonchoo Mead 2004: 150; Mulder 1996). This inegalitarian and paternalistic foundation is contrary to the ideas of inalienable rights and liberties, human dignity and equal participation at the heart of the Western-styled rule of law (Mulder 1996). The ruling elites' strategic importation of Western knowledge at the turn of the 20th century accounted for the 'Thai-ization' of the rule of law's liberal concepts. Accordingly, justice has been virtually equated to public morality and security, even at the cost of rights and liberties (Winichakul 2010, 2020).

In the order-centric paradigm, the quietude of the dissent-free society is believed to represent peace and order (see Cheesman 2015: 35, 260–61), and claiming one's rights against the status quo, even for legitimate causes, is regarded as disrupting the peace (see Mulder 1996: 171). Despite decades after legal modernization, this order-over-rights ideology has persisted among Thai lawyers and judges, as evidenced in court decisions that subordinate fundamental rights to preserving public order (see Winichakul 2020; TLHR 2021). In this study, this mentality is manifest in judges' normal imposition of fine-default custody even on the 'can't-pay' offenders.

Organizationally, the centrality of order strengthens the importance of coherence and conformity. The Thai judiciary seems to prioritize these values at the expense of criticality and creativity. This preference for conformity is observable in the rote-memory-based judicial recruitment examination, the training and socialization that repeat the importance of internal rules and standards, and the top-down disciplinary process that is unappealable (Yampracha 2016; McCargo 2020). This organizational structure and culture create a robust incentive for conformity either by fear of being punished or by discomfort of being different. Such an incentive is evident in judges' hesitance to depart from the *yee-tok*. Judge G clearly articulated this point in the earlier quote about the risk of getting suspected of corruption.

Order in the form of judicial homogeneity is not only sustained through fear but also through group solidarity. Judges' elite status and their immunity from public scrutiny make them 'a special breed of civil servants' (Yampracha 2016: 244). This sense of superiority is widely shared among judges and amounts to a collective sense of pride (McCargo 2020). The constant reiteration of judicial unity during their training and socialization invigorates judges' sense of collectivity and induces group loyalty, the effect of which tends to elevate group conformity over other values on the judges' scale of moral priorities (see Kelman 1973: 44–45).

This effect is much amplified at the level of day-to-day operations, whereby peer pressure motivates judges to follow traditions like their colleagues. Group conformity in judicial performance makes judges' daily routines somewhat resemble collective rituals that can generate

effervescence from acting in harmony with other group members (see Durkheim's 1964 [1915]). The emergent pride and joy of solidarity ultimately instils faith in the group and solidifies group loyalty. It is this sentiment of solidarity, created by the judicial culture and day-to-day 'rituals', that generates the aura of authority surrounding judicial conventions with which judges comply. This is how the ideology of order, the organizational culture of homogeneity, and the street-level unified routines co-produce Kelman's (1973) process of authorization that contributes to judges' moral indifference, along with the other two processes.

Kelman's (1973) other two processes of routinization and dehumanization are also present in the Thai sentencing setting and they are also affected by the multi-layered pressures. The order-centric ideology and the judicial culture of homogeneity align with the imported Weberian rationality for they all cherish consistency and certainty (see Weber 1977 [1948]). Additionally, immense caseload and time constraints in processing cases strengthen the Weberian demand for speed, consistency and certainty. The outlook for managerial efficiency endorses routinization because routines facilitate and standardize complex tasks (Lipsky 2010: 140–1). However, routines habituate and create resistance to change. Moreover, with its mechanical processing, routines also dehumanize: first by stripping judges of discretion, as apparent in the necessity of the *yee-tok*, and second by reducing defendants to merely the 'processed' object (see Bauman 1989).

Dehumanization in the *wain-chee* is aggravated by its distancing element. This is clearly observable in the live-link hearing, in which judges and defendants are physically vertically apart while engaging in remote communication. Although efficient in maintaining court security, this management reduces defendants' humanity to merely a two-dimensionally framed display on a screen (Mulcahy 2011: 177–8). The obscured humanity impairs the sentiments of inclusivity and empathy, thus opening the door to denigrating stereotypes of defendants (see Bauman 1989). As already described above, judges in this study placed defendants in the bottom of the moral-worthiness ladder. The vertical distance between judges and defendants is likely to reinforce this image.

Furthermore, by placing defendants far apart from the judges, judges are forced to see only the 'frontstage' of the procedure where defendants appear willing and obedient before them. Voluntary and compliant defendants are arguably the most illustrative evidence of the system's legitimacy (Tata 2020: 105). By repeatedly observing this 'evidence', judges can be convinced in the followed conventions, notwithstanding the 'backstage' works that potentially produce reluctant conformity (see Jacobson *et al.* 2015). Distancing, therefore, renders any reasons to empathize null and enables judges to feel absolved of moral responsibilities regarding their practice.

CONCLUSION

Fining and fine enforcement in Thailand's criminal sentencing practice are means-insensitive and significantly relying on fine-default custody. Judges tend to be indifferent to the concerns for impact-centric equality and substantive proportionality. Such indifference is explainable as the product of rigid framing that locks judges' perceptions in certain strict and narrow frames. Judges' commonly shared lenses of formalism, moralism and managerialism co-create the projection of justice as formal, moralistic and inseparable from managerial efficiency. The confluence of such frames is more situationally driven by the multi-layered interactions of ideology, organizational culture and street-level pressure. The resulting frames underpin judges' preference for formal equality and certainty of punishment, guaranteed by the fixed-sum fining and custodial enforcement. Indifference to substantive inequality and disproportionality in the fining context may mirror courts' indifference to the rights-based interests in non-fine settings. More studies are necessary to confirm this hypothesis but one thing is clear: addressing judges' indifference requires more than legal amendments.

Considering the entanglement of ideology, organizational culture and work environments, reform needs to tackle all these fronts to mitigate contextual forces behind judges' rigid framing. The rights-based foundation of the rule of law needs to be mainstreamed so that the idea may be earnestly taken up by the courts. Meanwhile, the judicial structure should be reorganized to become less top-down and affirm internal judicial independence so that criticality and creativity are more welcome. Public scrutiny of judicial performance should also be allowed so that judges receive external feedback and become less insular. Simultaneously, judicial tasks should be de-McDonaldized by emphasizing more on the quality of sentencing, not the quantity. Decriminalization and/ or diversion can be one way to achieve this goal by alleviating judges' caseload and removing necessities for mechanical sentencing, thus freeing up time for careful individualization.

ACKNOWLEDGEMENTS

I would like to thank the anonymous referees for their invaluable comments that improved the manuscript.

CONFLICT OF INTEREST

The author declares to have no known competing financial interests or personal relationships that could have appeared to influence the work reported in this paper.

This research did not receive any specific grant from funding agencies in the public, commercial, or not-for-profit sectors.

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