

THE EFFECTIVENESS OF THE RECENT AMENDMENT OF THE NARCOTICS ACT AND THE SUPREME COURT DECISION ABOUT THE NUMBER OF OFFENCES IN NARCOTICS CASES

*Nitchan Hadsarang**

I. ILLICIT DRUG SITUATION IN THAILAND

A. Overview

Illicit drugs have been one of the biggest problems in Thailand for a long time. Among the various types of drugs, methamphetamine is the most problematic one. According to the statistics from the Office of the Narcotics Control Board, between 2011 to 2016, there were approximately 100,000 methamphetamine cases each year, followed by cannabis or kratom cases with the approximate number between 6,000 and 20,000 each year. The government has been engaging in the war against illicit drugs, especially methamphetamine, for years with the approach of harsh measures to eliminate and isolate drug offenders by using a very strict narcotics law and strong punishments. Despite this effort, the situation did not get better, and even got worse. Prisons have been crowded with drug offenders while the number of drug cases has not been significantly decreased. According to recent statistics, Thailand's incarceration rate ranks among the world's top ten¹. Thus, the government decided to change its approach towards illicit drugs in the hope of solving the problem of crowded prisons; hence, the amendment to the Narcotics Act B.E. 2522², namely, the Narcotics Act (No. 6) B.E. 2560³. Although this amendment has been in effect for only about a year, I will address it in this paper.

Apart from, and not directly related to, the problem of the crowded prisons is a somewhat disputable interpretation and application of law specifically in narcotic cases by the Supreme Court of Thailand, which I think, results in a peculiar outcome of punishment that I will also address in this paper.

This paper will be based mainly on category I narcotics (more details in the next section below) defined in the Narcotics Act B.E. 2522 with emphasis on methamphetamine because the majority of the prisoners in Thailand are those convicted of possession of methamphetamine for disposal and/or for the actual disposal of it⁴.

B. Methamphetamine

Methamphetamine has been the most widespread drug in Thailand for years. It is commonly being distributed in two forms. The first one is in the form of a pill. Methamphetamine pills usually have low quantity of pure substances. They often have the colour of orange and sometimes green. But in recent years, the quantity of pure substances of methamphetamine pills has been higher. The other form of methamphetamine is a crystalline white powder which typically has a very high quantity of pure substances. Methamphetamine traded in Thailand is mainly produced in the Golden Triangle⁵ area (the mountainous area that overlaps Thailand, the Republic of the Union of Myanmar and Lao People's Democratic Republic). It is smuggled through the country's border in the northern part of Thailand and then is distributed to the other parts of the country. Methamphetamine has been spreading among workers, truck drivers, as well as teenagers and young children, often causing them mental and physical problems.

* Judge of the Chiang Mai Juvenile and Family Court, Thailand.

¹ https://www.oncb.go.th/SitePages/narcotics_effect.aspx. (available in Thai only).

² <http://www.prisonstudies.org/highest-to-lowest/prison-population-total>.

³ A.D. 1979.

⁴ A.D. 2017.

⁵ http://www.correct.go.th/stat102/display/drug_select_date_user.php (available in Thai only).

⁶ [https://en.wikipedia.org/wiki/Golden_Triangle_\(Southeast_Asia\)](https://en.wikipedia.org/wiki/Golden_Triangle_(Southeast_Asia)).

II. LEGAL FRAMEWORK

A. Narcotics Act B.E. 2522

1. Overview

This act criminalizes and sets out the main rules and punishments for narcotics offences. It classifies narcotics into five categories which are:

- category I consisting of dangerous narcotics such as heroin;
- category II consisting of ordinary narcotics such as morphine, cocaine, codeine, medicinal opium;
- category III consisting of narcotics which are in the medicinal form and contain narcotics of category II as ingredients in accordance with the rules prescribed by the minister⁶ and published in the Government Gazette;
- category IV consisting of chemicals used for producing narcotics of category I or category II such as acetic anhydride, acetyl chloride;
- category V consisting of narcotics which are not included in category I to category IV such as marijuana, kratom plant.

Methamphetamine falls into category 1 of this act.

2. Estoppel

Prior to the amendment by the Narcotics Act (No. 6) B.E. 2560, section 15, paragraph 3, subparagraph (2) states that the production, import, export or possession of narcotics of amphetamine or derivatives of amphetamine of the quantity computed to be pure substances of 375 milligrams or more or is of narcotics substances thereof of 15 doses or more or is of pure weight of 1.5 grams or more shall be *regarded*⁷ as production, import, export or possession for disposal. This estoppel prohibits offenders from defending themselves or presenting any evidence to prove that they have no intention to dispose of the narcotics.

3. Punishments

Punishments range from fine or imprisonment to the death penalty depending on the category and quantity of the pure substances of narcotics. According to section 66, paragraph 1 of this act, anyone who disposes or possesses for disposal narcotics of category I without permission and in a quantity computed to be pure substances, or in the number of dosages, or in net weight, that does not reach the quantity prescribed in section 15, paragraph 3 will be liable to imprisonment for a term of 4 to 15 years, or a fine of 80,000 to 300,000 baht⁸, or both. And in paragraph 2, if the narcotics under paragraph 1 are of a quantity computed to be pure substances of the quantity prescribed in section 15, paragraph 3, but not over 20 grams, the offender will be liable to imprisonment for a term of 4 years to life and a fine of 400,000 to 5,000,000 baht⁹. And in paragraph 3, if the narcotics under paragraph 1 are of a quantity computed to be pure substances over 20 grams, the offender will be liable to imprisonment for life and a fine of 1,000,000 to 5,000,000 baht¹⁰, or the death penalty.

According to section 67 of this act, the punishment for an offender who possesses narcotics of category I without permission will be liable to imprisonment for a term of 1 to 10 years, or a fine of 20,000 to 200,000 baht¹¹, or both. That means an offender who possesses methamphetamine with the computed pure substances less than 375 milligrams or at a dosage less than 15 or the net weight less than 1.5 grams will be punished with less severity.

From the abovementioned section 66 and section 67 with the estoppel set forth in section 15, paragraph 3, subparagraph (2), we can see that the differences of punishment between the accusation for the possession of methamphetamine and the possession for disposal of methamphetamine are quite large. Moreover, in practice, there is a classified norm of each courthouse for adjudicating various cases including narcotics, and specifically, methamphetamine. This norm governs the final punishment that will be given to the convicted defendant. These factors seal the fate of the convicted defendant and end up sending more and more people to jail.

⁶ Minister of Public Health.

⁷ Emphasis added.

⁸ Approximately 2,500 to 9,500 US\$.

⁹ Approximately 12,700 to 159,800 US\$.

¹⁰ Approximately 31,900 to 159,800 US\$.

¹¹ Approximately 600 to 6,300 US\$.

B. Narcotics Act (No. 6) B.E. 2560

The most recent amendment of the Act in 2017 is aimed to help solving the prison overcrowding problem. This amendment changes the estoppel provision in section 15, paragraph 3 by replacing the word “regarded” with “presumed”. So, for narcotics crime committed from 16 January 2017 onwards, defendants can now deny the charge of possession for disposal and present their evidence in court to prove that the possession of the narcotics is not for disposal. This amendment aims to reduce the number of prisoners as I mentioned earlier. But from what I have seen and adjudicated in narcotics cases, especially methamphetamine cases, I have found that only a few defendants took advantage of this newly amended provision. I will address this problem in the next section.

C. Supreme Court Decision

According to section 91 of the Criminal Code, if a defendant commits more than one distinct and different offence, the court shall punish that defendant for each of the offences. This provision would be obvious if the committed offences are distinct and different in their natures. For example, if someone possessed narcotics and when a police officer tried to arrest him/her, that person killed the police officer, it is clear that this person committed two distinct and different offences of possession of narcotics and murder. But what if the situation is not that clear cut? For instance, if someone is a drug dealer and he/she possesses 100 tablets of methamphetamine for disposal and then sells 50 of them to another person, is it only one offence or two offences since he/she has the intention from the start to sell the methamphetamine. Now, if that same person possesses 100 tablets of methamphetamine for disposal and then sells all of them to another person, how many offences this time?

There is nothing in section 91 or the other provisions that talk about how to distinguish these two examples. To answer these questions, the Supreme Court of Thailand ruled that, for the first instance, the possession of 100 tablets of methamphetamine for disposal constitutes an offence, and since the offender only sells half of them to another person, it constitutes another offence. While in the latter instance, the offender sells all of the methamphetamines that he/she possesses with the intention of disposal; thus, the offender is deemed to commit only one offence. Consequently, the first offender will receive higher punishment than the second offender.

Because Thailand uses the civil law system, there is no judge-made law like in those countries with common law system. But the Supreme Court's decisions are treated as precedent of interpreting and applying laws so they have binding force. This issue will also be addressed in the next section.

III. UNDERLYING PROBLEMS

A. The Effectiveness of the Newly Amended Section 15

In the real world, at least, from my own experience, I only saw a few cases in which the defendants admitted that they possessed the methamphetamine but denied that the possession was for disposal. Most of the time, the defendants either plead guilty to the whole charge or plead not guilty at all. This maybe because of two reasons: one, if they plead guilty to the whole charge, they will normally get half deduction of the final punishment. Two, if they admit the possession of the methamphetamine but deny that it is for disposal, they have the burden to prove it because the law “presumes” that the possession is for disposal. And it is quite hard to prove. If they are lucky enough to prove it, then the baseline of the punishment will be somewhat lower, but if they are unsuccessful, they will usually get only one-third or one-fourth deduction of the final punishment. It means that this recent amendment of section 15 is not that effective in practice.

B. Supreme Court Decision

As I explained earlier, it is very surprising that the outcomes of two cases are quite different: one who is not-so-good a drug dealer that he can sell only a portion of the methamphetamines in his possession, and the other one who is a competent drug dealer that can sell all of the methamphetamine in his possession. For example, a defendant who is charged with the possession of 15 tablets of methamphetamine for disposal and disposes 14 of them, will get at least 8 years of imprisonment before the deduction (a minimum of 4 years for the possession for disposal and another minimum of 4 years for the disposal in accordance with section 66, paragraph 1 of the Narcotics Act). Meanwhile, another defendant who is charged with the possession of 15 tablets of methamphetamine for disposal and disposes all of them will get only at least 4 years of imprisonment before the deduction. Is the punishment proportional for the crimes committed by these two

defendants?

A Supreme Court case dating back to 1979, case no. 1074/2522, states that, the defendant's possession of heroin for disposal means that he had the intent to dispose of it. And the amount of heroin he disposed of was the same amount he possessed for disposal, so his act constitutes one offence.

In 1976, case no. 638/2519, states that, the possession of heroin and the disposal of it have separable intent even though the heroin that the defendant disposed of was part of the heroin that he possessed. The act of disposal creates another offence by means of another intent other than possession, thus, constituting multiple offences.

A more recent decision in 2010, case no. 6634-6635/2553, in a sting operation, police made a deal to buy 20,000 doses of methamphetamine for 500,000 Baht (approximately 15,800 US\$) from the defendants. Afterward, the defendants were arrested with the handed over drugs of 19,800 doses, 200 short of the amount dealt. Later, the remaining 200 doses were found in the defendants' car. The court of first instance rendered the judgement that the act constituted two offences of possession for disposal and sale of methamphetamine resulting in 50 years of imprisonment (33 years and 4 months for the offence of possession for disposal and another 33 years and 4 months for the offence of sale¹² but the final imprisonment was capped at 50 years in accordance with the Criminal Code Section 91), and life imprisonment for the second defendant (life imprisonment for both offences). The Court of Appeal Region 5 affirmed. The Supreme Court states in its decision that the defendants intended to sell 20,000 doses but merely mistakenly handed over only 19,800 doses, so, it is deemed that the defendants had sold all of the 20,000 doses, which was the same amount they had in possession for disposal. Consequently, their acts constitute only one offence. The first defendant got 33 years and 4 months of imprisonment, and the second defendant still got life imprisonment.

IV. POSSIBLE SOLUTIONS

A. Reconsideration of the Policy, Taking into Account Other Circumstances, and Shifting the Burden of Proof

In my opinion, this issue has to be dealt with through the policy of the government against illicit drugs. Thailand is a civil law country that mainly uses adversarial trial procedures, which means that, especially in criminal cases, the prosecution has the burden to prove beyond reasonable doubt that the defendant is guilty. But section 15, paragraph 3 of the Narcotics Act B.E. 2522 disrupts this principle by shifting the burden of proof to the defendant in light of fighting against illicit drugs. So, the government should carefully consider its view of narcotics offenders, whether to continue to strongly punish the offenders, or to shift the focus to more preventive measures and treat some offenders more like patients who need rehabilitation rather than sending them to jail, and to help them to get back on the right track. Particularly in Thailand, sending someone to jail has proven, in many situations, not to be the best choice. Some people even say, if you send someone to jail, it is like sending that person to a school that teaches you how to commit more serious crimes. If the government really wants to soften the punishment of drug dealers and give them more leeway with respect to the committed crimes, then the law should give more flexibility to the defendants to deny the charge of possession for disposal and to prove that the possession was not for disposal. Maybe shifting the burden of proof of the possession for disposal charge to the public prosecutor would be one idea; or maybe requiring the public prosecutor to prove some preliminary facts to demonstrate that the possession of the drugs was for the purpose of disposal but allowing the defendant to offer evidence against it. This will place less burden on the offenders and may help the amended section 15 be more effective.

B. Reconsideration of the Supreme Court Decision

The fastest way of dealing with this issue is to have more debate about the Supreme Court decision and reconsider the precedent set by the decision. One might say that the two situations are different because the defendant who only sells a portion of the possessed drugs has a chance to sell the remaining drugs to another person; hence, creating a large network for the illicit drug business if the defendant has not been arrested. But, in my opinion, there is not much difference between the two situations in which the offender can sell all

¹² He pleaded guilty in the investigating phase so he got 1/3 deduction of life imprisonment which equals to 33 years and 4 months.

of the methamphetamine in his or her possession or only a portion of it. The harm that these two cases will do to the society is the same. The selling of the remaining portion and expanding the illicit drug network is more like a prediction of the future. So, it is not proportionate to punish these two offenders differently. The underlying thought of this issue should be based on the intent of the defendant. In my view, the intent of possession for disposal and the intent of disposal are different and separable. So, the act of possession for disposal and the act of disposal should always constitute two offences.

V. CONCLUSION

While it may seem like these issues are not directly related to fighting illicit drug trafficking, and the two issues that I address sound like they contradict each other, but I think in order to make the effort of solving the illicit drug problem run smoothly, the whole system should be in harmony, reasonable, and effective. However, in the meantime, there is no concrete or clear-cut conclusion for the issues in this paper. But I hope to share my views and opinions with the other participants, and I would love to get suggestions and to learn about practices from other jurisdictions in other countries either with similar or dissimilar legal systems.