Natural Law, Criminalization and Extraterritorial Jurisdiction in Thailand and China: A Comparative Law Perspective

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Abstract

This paper examines the expending extraterritorial jurisdiction in Thailand and China in relation to criminal offences. It is argued that the expanding ambit of extraterritorial jurisdiction logically requires the presence of some limitations. There are certain limits that are imposed by international law on the sovereign states in relation to criminalization policies. They consists not only of ever-changing international agreements, but also of the universal principles of natural law. International law affirms such natural law principles as the prohibitions of double jeopardy and retroactivity of criminal laws. From a natural law perspective, the legislation and practice of both countries insufficiently reflect those prohibitions. Criminal laws in Thailand and China, being influenced by legal positivism, ignore a natural law approach in limiting extraterritorial effects of their criminal law policies. Ignoring fundamental natural law principles can lead to the situations of the conflict of jurisdictions, and more importantly to an unjustifiable criminalization of people beyond national borders.

Keywords: Natural law / Criminalization / International law / Extraterritorial jurisdiction / Double jeopardy / Non-retroactivity of law

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บทคัดย่อ

บทความนี้ศึกษาการขยายอำนาจของศาลนอกอาณาเขตของประเทศไทยและจีนเกี่ยวกับความผิดทางอาญา การขยายนี้จะต้องมีข้อจำกัดอย่างมีเหตุมีผล กฎหมายระหว่างประเทศกำหนดข้อจำกัดบางประการเกี่ยวกับเสรีภาพของรัฐในนโยบายเรื่องการกำหนดความผิดทางอาญา ข้อจำกัดนี้ประกอบด้วยไม่เพียงแต่ข้อตกลงระหว่างประเทศที่สามารถเปลี่ยนแปลงได้ตลอดเวลา แต่ยังรวมถึงหลักการสากลของกฎหมายธรรมชาติอีกด้วย กฎหมายระหว่างประเทศได้รับรองหลักการกฎหมายธรรมชาติดังกล่าวว่า การห้ามฟ้องซ้ำคดีอาญาและมิให้มีกฎหมายอาญาที่มีผลย้อนหลัง จากมุมมองกฎหมายธรรมชาติ การออกกฎหมายและการปฏิบัติของทั้งสองประเทศสะท้อนถึงข้อห้ามเหล่านั้นอย่างไม่เพียงพอ เพราะว่ากฎหมายอาญาในประเทศไทยและจีนได้รับผลกระทบจาก legal positivism ซึ่งเป็นทฤษฎีที่ไม่คำนึงถึงแนวทางกฎหมายธรรมชาติที่จำกัดนโยบายกฎหมายอาญาภายในประเทศ การละเลยหลักการพื้นฐานของกฎหมายธรรมชาติ อาจนำไปสู่สถานการณ์ของความขัดแย้งระหว่างประเทศทางเขตอำนาจศาล และนำไปสู่การกำหนดความผิดทางอาญาที่ไม่เป็นธรรมสำหรับคนที่อยู่นอกอาณาเขตของประเทศ

คำสำคัญ: กฎหมายธรรมชาติ / กำหนดความผิดทางอาญา / กฎหมายระหว่างประเทศ / อำนาจของศาลนอกอาณาเขตของประเทศ / การห้ามฟ้องซ้ำคดีอาญา / ไม่ใช่การย้อนหลังของกฎหมาย

Introduction

The purpose of this paper is much less ambitious than the title may suggest. It will not attempt to present any justification of natural law in relation to criminalization policies in general and to criminalization policies in particular in the Far East. Rather, it attempts to draw attention to the apparent logical necessity to apply certain principles of natural law in order to deal with the

expanding extraterritorial criminal law jurisdiction of the courts of China and Thailand. There are several reasons for examining the issue of extraterritoriality in these two countries. The laws of these two countries are quite different, and therefore, finding some common trends between them will help to understand the global developments better. Another reason is that both countries are becoming increasingly open for the international exchange with other countries and between themselves.

The interrelation between Thai and Chinese criminal laws comes not only from the fact of existence of an extradition agreement between two countries (Treaty, 1993). There is a common bond between Thailand and China which is governed by international law. It has been long recognized that international law and domestic justice in criminal cases are fundamentally connected (Tesón, 1998, p. 1). The nature of this connection is a matter of an academic dispute which has significant practical implications. Are there some offences which must be criminalized or decriminalized according to international law? How far can the power to prosecute offenders stretch beyond national borders? All these questions eventually focus on a key concept of international law: the sovereignty of the states. The amount of literature dealing with the concept is enormous. This paper attempts to argue that without acknowledging certain moral limits over criminalization, the idea of sovereignty reflects nothing more than an arbitrary and willful penalization and marginalization of people. This thesis is illustrated in Thai and Chinese criminal law contexts.

Sovereignty and Criminal Law

The idea of sovereignty is very complex. Endicott (2010, p. 245) singled out three basic meanings of the idea: absolute power within a community, absolute independence externally, and full power as a legal person in international law. He argued that sovereignty in the first two meanings would imply that the states have complete freedom to introduce any criminal laws they want within their own territories. Most scholars would agree with Endicott that the states sovereignty is limited by international law. However, the extent and the nature of this limitation will depend very much on the basic understanding of international law. There are a number of conflicting theories of international law whose even a brief description will lead us far away from the subject of this paper. It is, however, necessary to note that the major divide lies between conventionalist theories of international law on the one hand and the natural law tradition on the other. Many positivist theories of international law are conventionalist in nature. (Marmor, 2001, 2005). Law is based on arbitrary rules (Marmor, 2001, p. 10). It is perceived as morally neutral being based on conventions as social facts (Ramet, 2007, p. 3). Conventions are understood as any explicit or implicit agreements among the subjects of law, including, in the words of Hart (1994), “mere usages, understandings, or customs” (Hart, 1994, p. 111). This group of theories tends to ignore the universal non-arbitrary moral principles that constitute the core of natural law. According to the conventionalist view, Chinese and Thai governments can pass any criminal laws unless their freedom is limited by any international agreement, custom, or any other convention.

Natural law theories maintain that there are some fundamental moral principles which cannot be derived from conventions and are binding on the states independently whether they want to accept them or not. Those moral principles constitute the foundation of international law. Even though their content may vary among different theories of natural law, there are some principles which have received a universal recognition. International lawyers agree that there are certain rules which the states cannot change by their agreement (*jus cogens*). Only few of them do recognize that the source of these rules lies in natural law (Czaplinski, 2006, p. 83).

The concept of sovereignty was developed originally within the tradition of natural law. Hinsley (1986, p. 27). Bodin (1576, p. I, 8) held that "sovereignty is that absolute and perpetual power vested in a commonwealth which in Latin is termed *majestas*." To that he adds: "If we insist however that absolute power means exemption from all law whatsoever, there is no prince in the world who can be regarded as sovereign, since all the princess of the earth are subject to the laws of God and of nature, and even to certain human laws common to all nations." Natural law rarely forms the centre of comprehensive works on criminal law nowadays. It is mainly treated as a historical reference (Bassiouni, 2008, p. 164; Nemeth, 2011, p. 13). Natural law theory, however, provides a useful tool for examining both substantive and procedural aspects of criminal law of any jurisdiction including Thailand and China. It maintains that Thai and Chinese criminal laws must adhere to certain fundamental moral rules binding

on every sovereign. The significance of this approach becomes particularly evident at the point where various national jurisdictions of criminal law collide.

Extraterritorial Jurisdiction and Sovereignty

Lindsay Farmer argued that “the nature of jurisdiction and its relation to criminal law is either poorly understood or neglected altogether. Jurisdiction is often viewed as either a purely technical matter – a procedural hurdle to be crossed before a court can hear a particular case, - or as something lined pragmatically to the limits of enforcement of the law” (Farmer, 2013, p. 229). There is an inseparable connection between the processes of criminalization on the one hand and the ambit of jurisdiction on the other.

According to the principle of sovereignty, each state has jurisdiction over crimes committed within its territory. In international criminal law, it is called ‘the principle of territorial jurisdiction’ (Lee, 2010, p. 17). According to this principle, it does not matter what nationality the victim and the offender have. Chinese Criminal Law, Article 6 states: “This Law shall be applicable to anyone who commits a crime within the territory and territorial waters and space of the People's Republic of China, except as otherwise specifically provided by law.” Thai Penal Code (Section 4) contains the same provision: “Whoever, committing an offence within the Kingdom, shall be punished according to law.” Thus, if crime is committed in Thailand or in China, the Thai and Chinese laws apply retrospectively.

Territorial jurisdiction, similarly to other national laws (Dubber & Hörnle, 2014, p. 144), is acknowledged also in the cases when a consequence of the offence is felt within the country (Thai Penal Code, Sec. 5; Criminal Law of the

PRC, Art. 6). At this point, there can be an overlapping of different territorial jurisdictions. This provision receives a greater importance at the age of increased transboundary crime. The environmental crimes and computer crimes are of a particular significance.

Recently, a famous case of Kenyan fraud involved a number of citizens from Taiwan, China, and even one from Thailand (Hsu, 2016). A total of 77 suspects were involved in the case: 48 Chinese, 28 Taiwanese and one Thai. They were detained by Kenyan police in November 2014 and were charged with engaging in unlicensed as well as criminal telecommunications activities, using radio equipment without a license. In 2016, a Kenyan court found the evidence against the suspects insufficient. China insisted on deporting the Taiwanese suspects to China for further investigation on the grounds that most of those targeted were Chinese. There were hundreds of victims in China. The Kenyan government deported to Beijing the Taiwanese suspects. It is not clear what happened to the Thai suspect.

The Bangkok Post (2016) further reported that in around 6 months period, nearly 200 Taiwanese fraud suspects were deported to China from countries including Armenia, Cambodia and Kenya, according to Taiwanese authorities, in more than 10,600 phone fraud cases. Fraudsters were hacking into popular messaging app Line posing as the user's friends to access phone account details, or asking them to buy gift cards. By making phone calls to victims and posing as police officers, they obtained credit card information which were then used to make purchases, and also gained access to accounts implicated in

money-laundering. Some victims were deceived to transfer their entire accounts being assured that it was necessary to protect them. Chinese authorities claimed more than $1.5 billion in losses annually on the mainland.

In the case of the telecommunication fraud, the victims mostly resided in China. Therefore, the principle of territorial jurisdiction in the meaning of Article 6 is applicable. This case is complicated by the fact that China considers Taiwan a part of its territory. Chinese law affirms its jurisdiction in criminal cases based on the nationality of the suspect ('active national jurisdiction') in Article 7 of Chinese Criminal Law: "This Law shall be applicable to any citizen of the People's Republic of China who commits a crime prescribed in this Law outside the territory and territorial waters and space of the People's Republic of China." The same principle is affirmed in Section 8 (a) of the Penal Code of Thailand which claims jurisdiction over any Thai person who commits an offence outside Thailand.

Further, Thailand and China uphold their jurisdiction based on the nationality of the victim ('passive national jurisdiction'). The latter unavoidably becomes extraterritorial. Article 8 of the Criminal Law of the PRC states: "This Law may be applicable to any foreigner who commits a crime outside the territory and territorial waters and space of the People's Republic of China against the State of the People's Republic of China or against any of its citizens, if for that crime this Law prescribes a minimum punishment of fixed-term imprisonment of not less than three years; however, this does not apply to a crime that is not punishable according to the laws of the place where it is committed." In other words, a foreigner who commits a serious crime against a

Chinese outside the territory of China, can be subject to the Chinese jurisdiction. Thai Penal Code, Section 8 (b) contains the same rule.

Thus, the jurisdictional scope is defined similarly in Chinese and Thai criminal laws. The implication of both laws is that any Chinese who commits crime in Thailand and a Thai who commits crime in China are subject to the jurisdiction of both countries when the same act is penalized in the both countries. Moreover, Thai and Chinese courts are given extensive powers to penalize any person in the world whose acts (and omissions) bear consequences within the territories of Thailand and China. In other words, both systems of criminal law have a significant extraterritorial reach. That affects not only the citizens of the states involved, it also affects nationals of any country whose act or omission can violate the protected interests of the states and their citizens in any mode described above.

The expansion of extraterritorial jurisdiction is comparatively a recent phenomenon (Farmer, 2013, p. 234). It is apparent that the old positivist doctrine of criminal law faces serious difficulties as the conflicting jurisdictions break apart the neat seamless constructions of positive law. This doctrine by giving a formal definition of crime has failed to define its substantial features which would contribute to the unification of various national systems of criminal law on the one hand and would put some limits on the expanding use of criminal law sanctions beyond national borders on the other. With their theoretical paradigm, it is hardly possible for legal positivists to agree on such limits, since there is no common substantive ideological ground in countries like

Thailand and China that would unite them. The only solution to the over-expanding criminalization for a legal positivist would be a very complex process of negotiations (Franck, 1998, p. 14) which will unavoidably end up in the compromises and vague formulations which satisfy everyone and at the same time mean different things for each participant of the negotiations.

An alternative to the endless and often fruitless discourses of the positivists on the limits of criminalization can be found in the theory of natural law. The issue of extraterritorial jurisdiction in criminal cases serves as a good example of the advantages of the idea of natural law which is not based on conventions swayed by public opinions and the diverse interests of various participants in the negotiations. Natural law principles have been articulated clearly in a number of influential writings[2] and, indeed, are self-evident to every reasonable being. They provide a clear guidance in defining limits for extraterritorial jurisdiction.

At this point, we may conclude that the foregoing analysis of the provisions of Thai and Chinese criminal laws indicates that both laws stretch far beyond offences committed on their territories, and that there are no clearly defined limits in positive laws when the extraterritorial jurisdiction ends. One way to solve this problem is to limit extraterritorial jurisdiction only to certain offences which are defined as crimes according to natural law (Goyette et al., 2004, p. 250).

[2] The amount of literature on natural law is enormous. For the contemporary treatment of natural law see: Finnis (2011).

Defining Crimes According to Natural Law

Applying natural law to criminal laws of Thailand and China is not an instance of cultural imperialism. Natural law is not simply a product of the Western philosophical tradition. Even though the Western philosophy is perhaps the most advanced in reflecting the principles of natural law, the same idea has found its expression also in Chinese and Thai legal philosophy. A thorough examination of Chinese and Thai beliefs on natural law is far beyond the scope of this paper. There have been a number of studies which have been accomplished already in this field.[3] Thus, Greer and Lim (1998, p. 88) maintained that despite some significant differences, the Western ideas of natural law and Confucianism share the idea of a natural moral order, that contains a standard for judging (and if necessary disobeying) positive law. "Both share the idea that social regulation through law is essentially a moral, rather than merely an instrumental, enterprise" (ibid). The fundamental concept of Confucian thought: Tian Li (天理) is often translated as "natural law" (Yao, 2000, p. 104).

Much less work has been done on studying natural law ideas in Thai legal thought. The Thai term *thammasat* is often rendered as "natural law' (Von Mehren & Sawers 1992; Sucharitkul, 1998; O'Connor, 1981). This Thai term comes from Sanskrit: *Dharmasastra* and constituted, according to Petchsiri (1987), the Thais' fundamental view of criminal law before codification.

[3] One of the best accounts of the tradition of natural law was presented in the article of Shih (1953).

Davis (2006), nevertheless, persuasively argued that identifying *Dharmasastra* with natural law would be incorrect even though he acknowledged that "the basic Aquinean view of natural law is broadly applicable to the Hindu case in the sense that natural law, the given, eternal, structuring order of the universe presented in and created by the Vedas, provides a framework for empirically, situationally, and historically determined positive law" (ibid, 291).[4] The presence of the idea of natural law in the Thai Buddhist political philosophy is well attested elsewhere (King, 2002).

In other words, despite many cultural and political differences, one can find in both Thai and Chinese legal and ethical traditions the common fundamental moral concepts which must define and limit the extraterritorial ambit of criminal law codes. A solution to the problem of conflicting extraterritorial jurisdictions with mutually contradicting normative contents would be a move towards a unification of substantive criminal law on the basis of the idea of natural law. The natural content of criminal law can be deduced both from a fact and from the common moral principles shared by the humankind.

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[4] Rendering *thammasat* as natural law will also be inaccurate from the linguistic point of view: Dharmasastra is a compound word of *dharma* and *sastra*. *Dharma* धर्म can be translated as that which is established or firm, steadfast decree, statute, ordinance, law, usage, practice, customary observance or prescribed conduct, duty, right, justice (often as a synonym of punishment), virtue, morality, religion, religious merit, good works. In the Buddhist literature, it can also mean nature, character, essential quality, peculiarity. *Sastra*, शास्त्र can be translated as an order, command, precept, rule, teaching, instruction, direction, advice, good counsel, any instrument of teaching, any manual or compendium of rules, any bock or treatise. See: Monier-Williams (1899). *Sanskrit-English Dictionary*.

Deducing natural law crimes from a fact is done by means of identifying crimes which have been defined so in all major civilizations. Crimes of murder, robbery, theft, rape are penalized by every subject of international law including China and Thailand. However, this approach will not be sufficient to meet new challenges posed by the advances in science and technology. Environmental and computer offences, for example, can and must be defined on the basis of universal moral principles.[5]

A serious attempt to reexamine the normative content of penal codes from the perspective of natural law will be beneficial in several aspects. From a theoretical point of view, it will help to ground the concept of crime on a solid philosophical basis. From a practical point of view, it will help to define better the scope of criminal law by purging its content from a mass of trivial offences. In relation to the extraterritorial jurisdiction, it will have several important consequences. Firstly, it will promote the unified body of criminal law across borders. Successful criminal proceedings will be facilitated by the fact that trans-border crime is addressed in the same way in different states. Secondly, the situation when a person is guilty of crime in one country but innocent in another would be avoided. For example, a person, residing in one country, may be subject to the criminal laws of another country without knowing it, by uploading certain prohibited content on the Internet. This situation is particularly undesirable in the light of the principle that *ignorantia juris non excusat,* which

[5] For a criminal examination of Chinese environmental criminal law see: Shytov (2016).

is used in Thailand and China to penalize people who have never had real opportunity to know the content of the applicable criminal laws.

Natural law must be a basis to describe extraditable offences including those committed abroad. In this case, the principle of extraterritoriality within its active and passive national jurisdictions will effectually be limited only to the most serious offences. Such limitation will provide a clearer scope of extraditable offences than those described in the current extradition treaties: any offences which are punishable by a heavier penalty (more than one year of imprisonment according to Article 2 of the *Treaty between The Kingdom of Thailand and the People's Republic of China on Extradition*, 2009), and constitute crime according to the laws of all countries involved, except political crimes, purely military service offences, or the offences which violate the rights to racial or ethnic equality and the freedoms to hold dissenting religious and political beliefs (ibid., Article 3).

Natural law is important not only because it is able to provide a standard for judging the appropriateness of the substantive content of specific offences and to be an instrument of criminal law harmonization among the nations, it also maintains certain procedural requirements which are essential for the fairness of criminal laws (Fuller, 1969).

Double Jeopardy

It is a general principle of natural law that no one should be penalized twice for the same crime (double jeopardy) (McAleer, 2010, p. 74). In words of an American judge: "It is impossible to trace the doctrine to any distinct origin. It seems to have been always embedded in the common law of England, as well

as in the Roman law, and doubtless in every other system of jurisprudence, and, instead of having a specific origin, it simply always existed" (*Stout v. State*, 36 Okl. 744 at 756 (1913). Even academic writers who adhere to legal positivism, acknowledge this principle as "a self-evident protection that is inevitable in any legal system" (Thomas, 1998, p. 1; Sigler, 1963).

This principle has been well described by Blackstone, who was one of the most distinguished natural law theorists (1765, IV, 26, 4): "no man ought to be twice brought in danger of his life for one and the same crime." This principle is reaffirmed in the *International Covenant on Civil and Political Rights* (1966) Article 14(7): "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country." Unlike Thailand, China has not so far ratified this international agreement. Accordingly, Chinese criminal law does not acknowledge the prohibition of double jeopardy to the full extent. Article 10 of its Criminal Law states: "a person who has already received criminal punishment in a foreign country may be exempted from punishment or given a mitigated punishment." He may be exempted but he may also not. The Chinese law in such cases gives discretion to the courts to exempt the offender from punishment or inflict a mitigated punishment. In other words, this provision admits that an offender can be brought to trial again and punished even though he has already been tried and received penalty in a foreign country.

A possibility for a Chinese person to go through the trial again and to be punished a second time clearly contradicts the principles of natural law. Legal

positivism can hardly explain the existence of this prohibition. On the contrary, natural law theory justifies it on the basis of at least two moral principles. The first principle is the Golden Rule which is well articulated in the Confucian ethics: "What you do not want done to yourself, do not do to others" 己所不欲，勿施于人 (Analects, 15, 23). The second principle is the principle of equality: all people are equal before the law (*Universal Declaration of Human Rights*, 1948, Article 7). This principle is found in Article 4 of the Chinese Criminal Law which requires that the law should be applied equally to anyone who commits crime. The Confucian ethics also affirms the same principle yet with a significant degree of differentiation reflecting the values of relationalism, familialism, and communitarianism (Fan, 2011, p. 67). Confucianism is often criticized as lacking an egalitarian principle. This may be true in describing political and family relationships, but it is certainly incorrect when applied to the whole area of law and ethics. Confucian ethics is based on the belief of *equal opportunity* for moral perfection which serves as a justification for political inequalities (Kim, 2016, p. 209).

The Thai Penal Code (Section 10) contains a general prohibition against double jeopardy if there is a final judgment of a foreign court and the convicted offender has already undergone the punishment. However, Thai law does not explicitly prohibit double jeopardy for the offences related to the security of the Kingdom specified in Section 7(1) of Thai Penal Code. There can be political reasons to justify this exception from the general prohibition of double jeopardy. However, these reasons are unlikely be able to withstand the moral force of natural law.

The Principle of Non-retroactivity of Law

The prohibition of retroactive application of law is perceived as another procedural principle of natural law (Fuller, 1969, pp. 96-106). It is also prohibited according to international law (*International Covenant on Civil and Political Rights*, 1966, Article 15). Retroactive rule-making and application is allowed neither by Chinese Criminal law (Article 12) nor by Thai Penal Code (Section 2). The retroactive rule-making and application takes place when there is a legal problem, but there is not a legal rule to solve it, or the old rule is so obsolete that its application would be unreasonable. Application of new rules to the acts committed before their acceptance is generally unacceptable in the area of criminal law. Retroactive rule-making and application in criminal law is a more common phenomenon than many would think. Such rule-making or application does not often need a new statute or a regulation governing the relationship existing in the past, although the latter also may occur. Normally, retroactive rule-making and application take place when judges deciding on the legality of an act give an interpretation of a rule which differs significantly from its interpretation generally acceptable at the time of performing the act.

Even before the revision of Criminal Law of the People's Republic of China in 1997, when penalties for environmental crimes got their statutory expression, Chinese courts were prepared to impose very harsh penalties in crimes against biodiversity. In one reported case, Bu Luxiao was sentences to death for illegal hunting, repeated speculation, and smuggling of rare and endangered animals in Xishuangbanna Wildlife Natural Reserve in Yunnan Province (Sharma, 2005,

p. 241). He and other defendants were caught smuggling thirteen Asian elephant, wild buffalo, and two pairs of ivory tusks. They were prosecuted in 1995. Such heavy punishment was imposed on the grounds of the Decision of the Standing Committee of the National People's Congress Regarding the Severe Punishment of Criminals Who Seriously Sabotage the Economy, as well as other provisions. The death penalty was allowed according to Article 151 of Criminal Law of People's Republic of China dealing with the crime of smuggling.

As early as 1979, there was another highly publicized case of Zhang Changlin, a worker at the Suzhou People's Chemical Plant, whose negligence brought about a major pollution of a river with a disastrous effect on local fishery (Bellamy, 2003, p. 599). Together with Changlin, two factory leaders were also convicted. They were prosecuted under Article 115 of the Criminal Law which deals with the crimes endangering public security by means of fire, explosions, poisonings, etc.

These two examples may not be classified as a retroactive application of law. They, nevertheless, elucidate the problem of "stretching out" the old rules of criminal law to adjust them to the necessities of the present. The fact that penalties for environmental crimes were enshrined in 1997 proves that previous legislative and judicial remedies against environmental crimes were not sufficient, and as one writer described it, were a rare attempt of the political authorities to educate the "masses." (Bellamy, 2003, p. 599).

In Thailand, the issue of retroactivity in criminal law was brought before Thai Constitutional Court (2003) in the consolidated cases of Charles Mescal and Mrs. Tayoy (40-41/2546). The Court considered whether the retroactive

application of Thailand's *Anti-Money Laundering Act* B.E.2542 (1999) (AMLA) to proceeds acquired prior to its enactment violated Thailand's Constitution B.E.2540 (Section 32) that protected persons against retroactive application of criminal law. In Mescal, the defendant was convicted of drug trafficking and imprisoned in Italy. He transferred money to Thailand prior to the enactment of AMLA. In Tayoy, a Thai criminal court had acquitted the defendant in 2000, but her assets were seized in and handed over to the Anti-Money Laundering Office for forfeiture. (Greenberg, 2009, p. 45). The Constitutional Court held that there was no violation or conflict with the Constitution because the asset forfeiture was not a criminal law penalty in the meaning of Section 32 of the Constitution.

Even though one can agree with the Thai judges, the nature of seizing the assets and imposing the burden on their owner to prove that the assets did not originate in criminal activities do not seem to go along with the presumption of innocence. It is noteworthy that neither Thai Penal Code nor the Thai Code of Criminal Procedure explicitly affirm the presumption of innocence in the same way as the French Code of Criminal Procedure (2000) does (Article 1-P). However, Section 227 of the Thai Code of Criminal Procedure upholds the standard of beyond reasonable doubt which does not make sense without the presumption of innocence. The latter is affirmed in a number of Thai constitutions including the last one (Constitution of Thailand. B.E.2560 (2017), Section 29) along with the principle of non-retroactivity of criminal law.

The positivist approach to law is unable to provide a satisfactory guidance as to the exact scope of non-retroactivity of criminal law. Natural law theory binds the application of criminal law not so much to any formal promulgation of law in an official journal (which is not read by the public in China and Thailand anyway), as to a particular state of individual conscience that accepts a particular rule of behavior (including a sanction for violating it) as valid. What matters is that criminal law is applied to an individual who realizes the consequences of breaking a particular rule. From this point of view, many rules of criminal law in Thailand and in China are retroactive. Being enacted by poorly publicized legislation or being dependent on an indefinite number of ever changing administrative regulations, they penalize people who had no real opportunity to be properly informed of their content. A sporadic and uneven application of criminal provisions for copyright offences in Thailand against half-illiterate street vendors serve as a good illustration of such an application of law (Maneepong & Walsh, 2013).

Thai police and judges would, of course, argue that *ignorantia juris non excusat*. It is noteworthy that *ignorantia juris* in Latin can mean not only the *ignorance of law* but also an intentional *disregarding of law*. It is in the second meaning that this principle has been formulated originally (Thomas, 2006, vol. 28, pp. 16-17), and it was often restricted to this meaning in legal practice (Dubber, 2006, p. 198). This principle is directed against willful blindness, not against those who unlikely be able to have a prior knowledge of complex regulations and criminal sanctions for their violation. It is a fundamental principle of natural law that a person is guilty of offence only if he realizes the evil nature of his act or omission. As Rutherforth (1832, p. 221) in his *Institutes*

of Natural Law affirmed “entire and invincible ignorance of what ought not to be done, or an absolute impossibility of doing otherwise, would clear a man of all guilt.” Then, he adds “that if ignorance or restraint are admitted in alleviation of a man's guilt, as rendering his act in some sort the result of necessity, rather than of his own disposition to offend, this ignorance or restraint must be such as have not originally been owing to himself.”

Thus, any penalty which is enacted in such a way that it does not *effectively* impose the prescribed duty on the conscience of the individual is a violation of the principle of non-retroactivity of law if it is applied on an ignorant person. Many street vendors in Thailand and in China, for example, belong to this type of person when they sell products in the violation of copyright laws.

Conclusion

Sovereignty must not be understood as an absolute power of the states to penalize any behavior they perceive worthy of a criminal sanction. There are certain limits that are imposed by international law which consists not only of ever-changing international agreements, but also of the universal principles of natural law. Further, natural law imposes moral limits on the extent of extraterritorial jurisdictions including China and Thailand. Criminal laws in Thailand and China being influenced by legal positivism, do not apply a natural law standard in limiting extraterritorial effects of their criminal law policies. That leads to the situations of the conflict of jurisdictions, and more importantly to an unjustifiable criminalization of people beyond national borders.

International law affirms such natural law principles as the prohibitions of double jeopardy and retroactivity of criminal laws. However, Thai and Chinese criminal laws reflect those prohibitions in a defective way. Chinese law admits a possibility to try and punish again those who have been already tried by a foreign tribunal. Thai law admits such a possibility in relation to some political offences. Retroactivity of criminal laws, even though prohibited by the respective provisions of both laws, nevertheless takes place through a defective promulgation of criminal laws. According to natural law theory, a proper promulgation of laws requires an effective communication to the subjects of law. Printing laws containing penalties in a Chinese or a Thai journal unknown to the mass of ordinary people cannot be considered as an effective communication. It is evident that without interpreting double jeopardy and retroactivity of law within the natural law tradition, these prohibitions become obscure and ineffective.

The principles of the prohibition of double jeopardy and retroactivity of criminal laws are not the only principles of natural law which must limit the expanding jurisdiction of criminal law around the world. These two principles are taken as the most illustrative ones. Other principles of natural law still await its proper academic treatment and practical application in relation to the policies of criminalization.

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