

‘Thai Drug Laws and Practices: Disproportionate Punishment Against Women Minor Drug Offenders’

กฎหมายเกี่ยวกับยาเสพติดของไทยและการบังคับใช้:
การลงโทษผู้กระทำความผิดหญิงอย่างไม่ได้สัดส่วน

Natthanuch Mekara¹

Abstract

Disproportionate punishment under Thai drug laws which has been imposed on women minor drug offenders contributes to Thai women’s prison overcrowding. In Thailand, most women minor drug offenders receive harsh sentence regardless of their role in drug crime. With respect to women’s pathway into crime, this article found that women have been committed and involved with criminal offence because of their male figure in life. This article argues most women in drug crime play a lesser role and that minor culpability should not merit a custodial sentence. This article discusses the provisions of Thai drug laws in order to suggest the issues of the laws which needs to be amended. It found that the too low threshold quantity of drugs can lead women minor drug offenders to the harsher sentence. This is unlikely to be proportionate to their culpability. The examples of the Thai Supreme Court’s decision which are considered disproportionately sentencing women minor drug offenders are discussed. In comparing with the cases decided in other jurisdictions, it found that Thailand’s drug laws and policy fail to suppress drug crime. Despite aiming to eliminate drugs and drug crime organisation, it continues to sentence women minor drug offenders unceasingly. This article recommends women’s background and mitigating factors should be taken into account at trial and depenalisation model should be further suggested.

Keywords : disproportionate punishment, women minor drug offenders, Thai drug laws

¹ผู้ช่วยศาสตราจารย์ สาขาวิชานิติศาสตร์ คณะมนุษยศาสตร์และสังคมศาสตร์ มหาวิทยาลัยราชภัฏอุดรธานี

บทคัดย่อ

บทลงโทษที่ไม่ได้สัดส่วนภายใต้กฎหมายยาเสพติดของประเทศไทยที่ลงโทษผู้ต้องขังหญิงในคดียาเสพติดนั้น ถือเป็นสาเหตุสำคัญในการก่อให้เกิดปัญหาผู้ต้องขังล้นเรือนจำ โดยผู้ต้องขังหญิงส่วนใหญ่ในประเทศไทยเป็นผู้ต้องขังในคดียาเสพติด และบทลงโทษที่ผู้ต้องขังหญิงได้รับนั้นถือเป็นบทลงโทษที่รุนแรงเกินไปและไม่ได้สัดส่วนเมื่อเปรียบเทียบกับความร้ายแรงแห่งการกระทำความผิดที่ได้กระทำลงบทความนี้กล่าวถึงบทบัญญัติแห่งกฎหมายยาเสพติดของประเทศไทยที่ยังเป็นปัญหาและสมควรที่จะได้รับการแก้ไขเพิ่มเติม ผลจากการศึกษาพบว่าปริมาณยาเสพติดขั้นต่ำที่กำหนดไว้เป็นความผิดที่ต่ำเกินไปอาจทำให้ผู้ต้องขังหญิงต้องได้รับโทษที่รุนแรงอีกทั้งในการบังคับใช้กฎหมายยาเสพติดที่เคร่งครัดนั้นก็อาจทำให้เกิดการลงโทษที่ไม่ได้สัดส่วนกับการกระทำความผิดได้เมื่อเปรียบเทียบกับคำพิพากษาศาลฎีกาการตีความและแนวปฏิบัติในการลงโทษผู้ต้องขังในคดียาเสพติดของประเทศไทยและของประเทศอื่น ๆ พบว่าประเทศไทยล้มเหลวในการแก้ไขปัญหายาเสพติดเพราะในขณะที่เป้าหมายในการแก้ปัญหาอยู่ที่การกำจัดยาเสพติดและผู้กระทำความผิดรายใหญ่ แต่ประเทศไทยกลับลงโทษผู้ต้องขังที่มีบทบาทในอาชญากรรมเพียงเล็กน้อยอย่างต่อเนื่องจนเกิดปัญหาผู้ต้องขังล้นเรือนจำจนถึงทุกวันนี้

คำสำคัญ: การลงโทษที่ไม่ได้สัดส่วน, ผู้ต้องขังหญิงในคดีที่เป็นความผิดเล็กน้อย, กฎหมายยาเสพติดไทย

Introduction

This article discusses the impact of disproportionate punishment under Thai drug laws which has been imposed on women minor drug offenders. In Thailand where considers a drug crime as the most serious crime, women drug offenders have been likely to receive harsh and high sentences: long imprisonment or even death penalty, notwithstanding their low-level and limited role in drug crime. This consequently contributes to mass incarceration of minor drug offenders in Thai women's prisons. This article begins with male partners as a pathway of women to crime in order to show women's minor role in drug crime. Then, it will demonstrate the punishment of the drug-related offences under the Thai Narcotics Act B.E. 2522 (1979) (amended in 2017) hereinafter referred to 'THA NA'. This article will discuss how punishment under THA NA and its implementation can contribute to disproportionate punishment against women minor drug offenders and that contribute to the overcrowding in Thai women's prisons. By comparing with the sentencing guideline in the other jurisdictions, it argues the Thai punitive legislations and practices which are basically a 'one size fits all' framework (Corina, 2017) can impose disproportionate punishment on women minor drug offenders. The punitive legislations often apply harsh punishment to these women solely depending on amount of drug seizure regardless of their role. Since women in the lesser role more tend to plead not guilty, this article argues the conviction seems to result from women's failure to prove their innocence.

However, this article does not challenge the Thai drug policy but rather the concerns of some women who should be considered as victims in drug crime to be treated fairer or more proportionate and consistent sentence by the Thai criminal justice system. In order to justify the claim for reform of sentencing practice for minor drug-related offence in the Thai criminal justice, although an exact comparison of the drug cases is limited, this article compares the drug cases decided in countries which apply non-prosecution or non-punishment norms in attempting to either decriminalise or depenalise minor drug offences and ensure fairer punishment of vulnerable women minor drug offenders.

1. Women's role in drug crime

"Not all the women on the inside were bad though. Many had ended up there simply because of bad choices, often to do with men, which had made them spiral out of control. Women who'd helped a boyfriend cover up a crime, aided a man who dealt drugs, been abused as children and become involved in prostitutions or drugs..."(Angela Cannings and Megan Lloyd Davies, 2006 (Angela & Megan, 2006), quoted in Baroness Jean Corston, 2007 (Baroness, 2007))

Women's involvement in drug crime mostly is indicative of a lesser role. The secondary function which women carry out is often connected to their male partner, friends, or family. Women may be induced, forced, or deceived to involve in drug crime. This theory on male partners as a pathway of women to crime has long been discussed. (Charlotte, 2016) It has been said that coercion and control by men or a close relationship to men is a significant factor in driving women's offending. (Barlow, 2016)

Poverty and trauma of sexual violence as the pathways into crime are not a new theory to feminist criminologists who had been researching how social conditions constructed women's choices to commit a crime since 1980. (Gillian & Elizabeth, 2014) It was found that a relationship between women and drug crime has occurred as a result of male influence. (Stephen, 2008) Women in a coercive relationship with their male co-defendant might commit drug offence as a result of a direct threat or use of physical violence. In some cases women even agree to take the blame for their man. (S. Jones, 2008) Some women voluntarily offered to take part in smuggle drugs for men they fell in love with, whilst some women had no idea that their boyfriend was planning to commit a crime until they arrived at the crime scene where was difficult to back out. (S. Jones, 2008)

Moreover, sociologists' studies found that most people became involved in drug-related offences through personal connections. (Scott & Margaret, 2008) This was because family bond between family members could be trusted the most. (Marieka, Paul & Nan, 2008) In respect of women, it was found that apart from family connections women could also get involved in drug-related offences through incidental social relationships, including boyfriends and friends. (Jennifer, 2014)

Although some women were equal partners in a crime with their male co-defendant, some were in a coercive relationship committing a crime as a result of physical violence from their male co-defendant, and some involved in a crime because of love. (S. Jones, 2008) There is a study in the United Kingdom finding more than half of the women claimed to have played a primary role in their most recent offence. (S. Jones, 2008) However, of the women whose latest offence involved an accomplice almost half claimed that crime was initiated by a male who have never been prosecuted. (S. Jones, 2008) In Thailand, on the other hand, more than half of women in Thai women's prisons had a co-defendant. (Napaporn, 2012)

The recent studies of women in prisons in many countries including Thailand find that there are many women minor drug offenders who do not deserve to be there. Many women have been imprisoned for relatively low-level crimes which create little harm to others and society. (Loraine & Allison, 2002) In some cases, apart from economics hardship, some women rather than making a rational choice to smuggle drugs, are simply tricked or mislead to smuggle drugs. (Julia, 2005) Whilst some women know and make their own choice to carry drugs for others, many women are tricked to carry a bag for someone and have any idea what inside the bag is. (Melvina, 2017)

It was often found that women became involved in drugs smuggling because of their desire to please or help a male figure in their lives. (Sumter, Berger-Hill, Whitaker, & Wood, 2017) In this case, women are likely to be only supporting players and it is men who play the main part. (S. Jones, 2008) Even so, women are characterised as being an equal accomplice to their male co-offender despite unequal involvement. (Phil & Claire, 2008) Within male and female offending partnerships, in most cases each of the women are framed to be more harshly, or at least equally treated in terms of blame, charge, prosecution, and sentence in comparison to their male co-offender, irrespective of their level of criminal involvement. (Yvonne, 2015) Although the arrest data indicates drugs seizures and gives an overview of women's involvement on drug offences, it represents only women's presence, not participation - it does not indicate what women were doing when they were arrested. (Jennifer & Nayeli, 2011) Sometimes women merely are present during a drug seizure but nonetheless are prosecuted and convicted.

Although some men had narratives about women involved at high level of drug trade; as bosses' wife or daughter who inherited family drug business for instances, (Fleetwood, 2014) the previous research confirms that women are most frequently to be found at the lowest level of the drug trade often referred to as a drug mule. (Nayeli, 2017)

The term 'mule' is used to describe a form of drug courier which is widespread in the academic literature. (Eric & Jonathan, 2004) Drug mule is someone who carries drug for someone else. (Jennifer, 2017) Notwithstanding a confusion whether drug mule refers to carrying of drug across an international border or includes domestic drug market, drug mule herein represents a person who is subject to intensive control and exploitation carries drug for someone else (drug traffickers).

Unfortunately, the Thai drug law does not distinguish drug mule from drug trafficker, nor recognise drug mule as a distinct category of low-level offender. When police finds woman carrying drugs exceeding the threshold quantities, woman will be charged of possession of drugs with intent to traffic despite she is not a drug trafficker nor gain no benefits which will be derived from selling of drugs. When a sting operation is made, drug mule will be charged of drug trafficking which contains much harsher punishment despite wages for carrying drugs only are what drug mule receive. Many women drug mules have been disproportionately criminalised by the laws serving too severe punishment than they actually deserve. Thus, it is significant to distinguish between drug courier and drug mule in order to justify the need for more proportionality in sentencing practices for women drug mules as their culpability should be diminished - similarly to the sentencing practices in the United States, or England and Wales, for instances. (Fleetwood, 2014)

A distinction between mules and couriers in the United States was made due to the concern of the expanding female prison population. Disproportionate sentences had been imposed on offenders who had a limited role in drug trafficking. (Nayeli, 2017) A mule is described as drug transporter on or inside herself (such as swallow or suitcase). (Timothy, 1997) On contrary, a courier carries drugs in a vehicle or other equipment. (Timothy, 1997) The similar distinctions are also seen in the European context, subdividing drug couriers into two subtypes for sentencing purposes. A drug courier is used to describe a professional courier who organises drug importation themselves, whilst drug mule means a person who import drugs for others. (European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), 2012) Although some practitioners in England and Wales disagree with the use of the term 'drug mule' arguing that the criminalisation of women drug mules is part of punitive drug control, (Sudbury, 2005) it is still necessary to ensure consistency and fairer sentence in the punishment of women drug mules (Sentencing Council, 2016) who are considered victims of drug organisations playing a minor role in drug trade.

Among drug couriers, unlike men, women have always been seen as victim. (John cited by Tracy, 1995) This can be because drug laws in most countries, except Singapore, England, and Wales, rarely distinguish drug mules as a distinct category of low-level offender. (Jennifer, 2017) Thus, all drug offenders – either users, mules and couriers, dealers, and traffickers are sentenced under the same law. In some cases, drug users can be sentenced under the same provision as drug traffickers due to threshold drug quantities. In Thailand for instance, a mandatory sentence of four to fifteen years for drug trafficking can be imposed on drug users if the drugs seizure found are over the threshold quantities. (Thai Narcotics Act B.E.2522, 1979) This is on a par with those for serious offences such as murderer. (Thai Criminal Code, 1956)

Under the Thai drug laws, no distinction at all was made between drug mule and other types of drug traffickers or even among types of drug traffickers themselves. The role and, activity of the person involved, along with the level of drug organisation and level of profit are not taken into judiciary's consideration. Despite the level of involvement in drug crime apparently being an important part in sentencing decision, it seems like any decisions are made in an ad hoc manner. The main consequence of such a distinction can be that the shorter sentence should rather be imposed on drug mule, for instance. With respect to level of involvement in drug crime, vulnerability is undoubtedly found when disproportionate harsh punishment is imposed on the one deserving a lesser punishment.

For sentencing aims, the importance of public protection has consequently legitimised the implementation of sentences and the reduction in proportionality for women despite the low level of offence severity. (Barbara, 2011) The mandatory sentence for drug offences has played a major role in ways that distinctly disadvantage women. It discourages judges from considering gender-based factors and women's role in crime that results in women's sentence becoming harsher than that of her male counterpart (Meda & Marc, 2011) due to trying to plead not guilty. The use of sentences by judiciary has become more disproportionate and severe which directly affects the increasing number of women in prisons. (Marisa & Chris, 2008) However, this is not to recommend a separate sentencing framework for women but rather women's early experience along with actual involvement in crime should be included in consideration that might well suggest a level of culpability and mitigate women's sentences. For most women other than those committing serious or violent crimes, it is more appropriate to address the issues connected with their offending before imprisonment. (Jill, Jo & John, 2015)

The punitive way in which women drug offenders are being treated seems to be disproportionate and inappropriate, as prison should only be used when necessary to deal with serious and dangerous offenders. (Baroness, 2007) This leads to the criticism in this article over why so many women being incarcerated in the Thai women's prisons for relatively small drug crimes.

2. Impact of Thailand's drug war on women: harsh and high sentences notwithstanding women's low-level in drug crime

[T]he death penalty should be eliminated for crimes such as economic crimes and drug-related offences. In this regard, the Special Rapporteur wishes to express his concern that certain countries, namely China, the Islamic Republic of Iran, Malaysia, Singapore, Thailand, and the United States of America, maintain in their national legislation the option to impose the death penalty for economic and/or drug-related offences. (UN Commission on Human Rights, 1996)

The discourse about drug war plays an essential role in justifying and legitimating those who can be punished and the extent of their punishment. (Jennifer & Lizzie, 2017) In fact, most of those punished by drug war policies are not heads of drug organisation, but drug users and low-level drug traffickers who are often motivated by poverty.

In Thailand, as similar as many countries, the increase in the women's prison population is more the result of punitive sentencing practices rather than the increase in serious crime by women. (Michele, Margaret & Gill, 2015) In other words, the increase in the women's prison population can more likely to be attributed to the increasing use of custodial sentences by judiciary. (Gill & Michele, 2011) Since the criminal justice system clearly distinguishes a wholly innocent victim from a completely guilty offender, the degree of crime involvement which should be considered prior to sentence being imposed is likely to be ignored. Because in Thailand where the war on drugs is being taken very seriously, the mitigating factors before passing sentence in the drug-related offences are rarely taken into account by judge.

According to the Thai Criminal Code Section 52, (Thai Criminal Code, 1956) the mitigation shall be provided to an offender only in some particular cases – in a case that offender admits guilt and/or has no previous criminal record, for instance. In deciding whether to provide the offender the mitigation and to what extent the offender should be mitigated shall depend on the court's consideration and

the seriousness of the offence and its circumstance shall be taken into consideration.²Further, because Thailand is a Civil Law country, no precedent case shall be relied on for deciding the mitigation in later cases. Since most women drug offenders plead not guilty, including the Thai judiciary's perspective toward drug-related offences as the most serious crime, the mitigation is rarely provided for these women drug offenders. This can be evidenced by the recent decision of the Thai Supreme Court case no. 2385/2560 (2017). In this case, the defendant was a truck driver using methamphetamine during driving. The court denied to provide any mitigation to the defendant reasoning that using methamphetamine during driving could make the defendant be unconscious and that could harm and injure others' property, and/or body, and/or life at any time. The court stated that the defendant's behaviour was considered the most serious harm and that although the defendant had no previous criminal background, the defendant's sentence could not be mitigated.

Although the drug-related offences are regarded the most serious crime, this article argues the Thai judiciary should consider the cases of a lesser role player differently. Full sentence should not be imposed on women who offended with men but occupied a secondary role. In Thailand, women in drug crime are often prosecuted and convicted for being an equal accomplice to their male co-offender despite their unequal involvement. Worse, women are often disproportionately and more harshly punished than their male co-offender due to pleading not guilty.

Recently, there has been a trend called a 'Tough on crime' strategy in the various countries. This strategy has increased crime-control legislation including mandatory minimum sentences for non-violent offences such as drug-related offences. The over-punishment and over-criminalisation have produced too much punishment which is argued unjust as some conduct should not have been criminalised at all. (Douglas, 2008) The Thai government's deterrence measure accompanied by harsh punishment and zero tolerance for any drug-related activities has lead Thailand to the world's sixth largest prison population as well as having the world's highest incarceration rate for women – the majority of whom are imprisoned for low-level drug offences (mostly for methamphetamine). Despite harsh punishment in deterring people from engaging in drug trade, the supply of drugs especially methamphetamine has only increased. The overcrowded prisons, and the negative social, health and human rights consequences are all caused by imposing disproportionately severe punishment for all drug activities.

²The Thai Supreme Court decision case no. 12477/2547 (2004).

³The Thai Supreme Court decision case no. 292/2550 (2007). In this case, the court stated that '...whether to provide the offender the mitigation which lies under the Thai Criminal Code Section 52 shall be an absolute authority of the court. To what extent the mitigation shall be provided, the court shall consider on the case-by-case basis. The offender cannot claim the mitigation in the precedent cases for his/her particular case...'.
⁴ibid.

2.1 Punishment of drug-related offences under THA NA

Thailand amended the punishment of drug-related offences in 2017 aiming to decrease severity of the punishment. However, to what extent an offender shall be sentenced depends on the quantity and category of drugs, not an offender’s level of involvement in drug offence. Since methamphetamine is still in the same category (category I) which is still considered the most serious harm (equal to heroin) and the mandatory minimum sentence of the drug-related offences is imprisonment, the severity of the punishment including the number of drug offenders in the Thai prisons are unlikely to be much decreased.

Methamphetamine is what most women drug offenders have been convicted of. Thus, this article will focus only on the punishment of drug category I in which methamphetamine is. The following table demonstrates the punishment of drug category I-related offences under the current THA NA; Table 1: The punishment of drug category I-related offences under THA NA

Offence	Punishment
Production, import, or export of drugs category I	From 10 years to life imprisonment together with from 1,000,000 baht to 5,000,000 baht fine (Section 65 paragraph 1).
Production, import, or export of drugs category I for the purpose of disposal or traffic	Life imprisonment together with from 1,000,000 bahtto 5,000,000 baht fine), or death sentence (Section 65 paragraph 2). The purpose of disposal or traffic of drug category I (in case of methamphetamine) shall be presumed by followings;‘... Amphetamine or substituted amphetamine in the quantities computed to be pure substances of at least 375 milligrams or narcotics having such substance in the quantities of at least 15units of use, or having total weight of at least 1.5 grams ...’ (Section 15 paragraph 3(2)).
Production of drugs category I in the term of re-packing ⁵	From 4 years to 15 years imprisonment or from 80,000 baht to 300,000 baht fine or both imprisonment and fine (Section 65 paragraph3).

Production of drugs category I in the term of re-packing for the purpose of disposal or traffic	From 4 years to life imprisonment together with from 400,000 to 5,000,000 baht fine (Section 65 paragraph 4).
Drugs trafficking or possession of drugs category I for the purpose of trafficking	1. In the case of the quantities computed to be pure substances or total weight of drugs are less than the quantities stipulated in Section 15 paragraph 3 shall be imprisoned from 4 years to 15 years or 80,000 baht to 300,000 baht fine or both imprisonment and fine (Section 66 paragraph 1). 2. In the case of the quantities computed to be pure substances or total weight of drugs are according to Section 15 paragraph 3 but less than 20 grams shall be imprisoned from 4 years to life together with from 400,000 to 5,000,000 baht fine (Section 66 paragraph 2). 3. In the case of the quantities computed to be pure substances or total weight of drugs are more than 20 grams shall be subjected to life sentence together with from 1,000,000 baht to 5,000,000 baht fine or death sentence (Section 66 paragraph 3).
Possession of drugs category I	From 1 year to 10 years imprisonment or from 20,000 baht to 200,000 baht fine or both imprisonment and fine. (Section 67)
Use of drugs category I	From 6 months to 3 years imprisonment or from 10,000 baht to 60,000 baht fine or both imprisonment and fine (Section 91).

The severity of the punishment under THA NA can also be found in Section 100/1 paragraph 1. Although under Section 65-67 and 91 of THA NA the court can consider to

⁵The offence of production of drugs in term of re-packaging aimed to enable the court to consider a low-level of drug production offender distinctly from large-scale drug manufacturer.

impose either imprisonment or fine or both on the drug offender, Section 100/1 paragraph 1 of THA NA requires the court to always impose both imprisonment and fine on the drug offender. It states that:

‘If the drug offences under this Act contain both imprisonment and fine, the court must impose imprisonment together with fine on drug offender. This is to suppress the drug-related crimes....’ (Thai Narcotics Act B.E.2522, 1979)

However, the Thai drug laws seem to have the mitigation for low-level drug offender under Section 100/1 paragraph 2 but such mitigation is available only for fine, not for imprisonment. It states that:

‘... If the level of harm, offender’s financial status, and other related circumstances are found to be low-level, on the case by case basis, the court may order the drug offender to pay less than the minimum fine stipulated under the law.’ (Thai Narcotics Act B.E.2522, 1979)

Since Section 100/1 paragraph 2 aims to mitigate fine only, the mass incarceration of low-level drug offenders does not seem to be reduced. Because although drug offender’s fine is reduced, he/she will still have to be imprisoned as mandatory minimum sentence.

The current drug policy of Thailand fails to eliminate drugs and suppress large-scale drug traffickers. A large number of drugs have been seized for a decade and increasingly every years, people have been more arrested, but the availability of drugs, the use of drugs, the crime committed because of and through people who use drugs and, the violence associated with drugs, are all on the increase. Moreover, in regard of sentencing practices, the courts’ apparent impatience with those women pleading not guilty is apparent. The punishment imposed on women drug offenders are likely not to be culpable to the level of involvement in drug activities. Whilst the law authorises judiciary to ask for more relevant evidence prior to convicting a defendant, in most women’s drug cases, the judiciary rarely do so. Women’s background reports, as to whether she has connected to drug trade which is significant in considering women’s guilt is rarely presented at trial.

In Thailand, a gender and human rights perspective including proportionality principle seem to be overlooked when it comes to drug laws. The Supatra Case (Pitchayawat, Wichianwan, & Boonperm, 2012) demonstrates an injustice of disproportionate sentencing practices and how women are particularly affected by the harsh punitive measures. Supatra was sentenced for importation of one and a half methamphetamine tablet instead of consumption (possession for personal use).

⁶The Thai Supreme Court decision case no. 9206/2555 (2012).

The fact were that in 2007, Supatra, – a Thai native woman who often travelled across the border between Thailand and Laos, was arrested with one and a half methamphetamine tablet in her possession on the way back from Laos to Thailand. Supatra was charged with the importation of illegal drugs under THA NA. The Primary Court convicted Supatra for possession of illegal drugs and sentenced her to one year and a 20,000 Thai baht fine. However, as Supatra plead guilty, her sentence was reduced by half to 6 months and a 10,000 Thai baht fine. The Primary Court reasoned that Supatra had no previous criminal record and was a primary caretaker of her dependants, Supatra deserved a mitigation. Supatra’s sentence was suspended for two years. During the suspension, Supatra was ordered to serve a community service. The Primary Court dismissed the importation of illegal drugs charge on the reason that the amount of methamphetamine was of too small a quantity.

The prosecution appealed Supatra’s case to the Appeal Court asking the court to convict Supatra for importation of illegal drugs offence. The Appeal Court convicted Supatra for the importation of illegal drugs and imposed life imprisonment on her without suspension and a 1,000,000 Thai Baht fine. However, as Supatra plead guilty, her punishment was reduced to 25 years imprisonment and 500,000 Thai baht fine.

Supatra appealed her case to the Supreme Court asking the court to reconsider whether it is the case of importation of illegal drugs. The Supreme Court agreed with the Appeal Court’s decision stating that with respect to the objective of THA NA, methamphetamine was harmful to health, life, and society. The court further stated that travelling to Lao and back to Thailand with methamphetamine was considered the importation of illegal drugs under THA NA Section 4 regardless of quantity and intention. Either small or large amount of drugs, either for selling or for personal use, bringing illegal drugs into Thailand shall be considered importation under THA NA. Therefore, the Supreme Court affirmed and upheld the Appeal Court’s decision.

Despite making the statements during the 2016 UNGASS reaffirming its objective of a drug-free country and defending disproportionate measures in dealing with drug-related crimes, a 25 years sentence for women involved in very low-level drug offences are regrettably common in a country that continues to uphold the goal of achieving a drug-free society.(Nischa, 2017) This practice of the higher court will also contribute to a failure of a sustained reduction in the number of people in Thai prisons as it over criminalises drug users and low-level drug offenders. Moreover, despite the pressure put on the countries that maintain capital punishment for drug offences during the 2016 UNGASS, (Vanda & Harold, 2016) the evidence that women are framed by drug traffickers to smuggle drugs across borders without knowledge of drugs’ quantities and consequences of drugs smuggling, women are still kept on death row.

In England and Wales on the other hand, in respect of culpability in drug crime, the distinction between vulnerable drug mules and couriers was mentioned in England's drug cases. Whether or not the sentence of drug mules should be mitigated, the categories of 'subordinate' and 'significant' roles of drug offenders shall be taken into consideration. The vulnerability of drug mules in assessing their sentencing was originally mentioned in *R v Aramah* [1983] 76 Cr. App. R. 190. In this case, unfortunately, vulnerability was not enough to afford drug couriers any mitigation because their role in drug trade was considered significant, and reduction of sentences would not deter drug traffickers from taking advantage of these drug couriers. This case established the first guideline judgment on vulnerable drug importation offenders. It mentioned the effect of sentencing vulnerabilities and disproportionate sentences of people having limited role in drug offence. (Nayeli, 2017)

After applying 'Aramah guidelines'⁷ for almost forty years, in 2012 a new sentencing guidelines which aims to increase consistency and proportionality in sentencing drug mules came into effect. In England and Wales, there is the definitive guideline available for the court to use in imposing punishment on drug offenders with respect to their culpability in drug crime. (Sentencing Council, 2012) In accordance with Section 120 of the Coroners and Justice Act 2009, the Sentencing Council issues the drug offences' definitive guideline requiring that the court should determine the offender's culpability (role) and the harm caused (quantity) at the beginning stage. In the case of fraudulent evasion of a prohibition by bringing into or taking out of England and Wales a controlled drug, in determining the offence category, it states that:

'In assessing culpability, the sentence should weigh up all the factors of the case to determine role. Where there are characteristics present which fall under different role categories, the court should balance these characteristics to reach a fair assessment of the offender's culpability.'

In assessing harm, quantity is determined by the weight of the product. Purity is not taken into account at the step 1 but is dealt with at step 2.'

The lower sentences for drug mules are most evident in *Lewis and Ors*⁸ following *R. v Boakye and Ors*⁹ in which the court emphasised that the sentencing practice should remain consistent with current levels, except in the case of vulnerable drug mules.

⁷See (*R v Aramah*, 1983).

⁸See (*Lewis & Ors v R. Re Attorney General's Reference No.15, 16 & 17 of 2012*, 2012).

⁹See (*R. v Boakye and Ors*, 2012)

Vulnerability generally is understood as relating to women who are poor, uneducated, having mental illness, or violent background. However, in drug-related offences despite women being educated or employed, they can be considered vulnerable. In *R v Attuh Benson (Irene Cynthia)*, at first the court did not consider the claim that the defendant was vulnerable because she was not a poor, unemployed, and uneducated but lastly she received the sentence reduction. The court reasoned that she was depressed from being away from her children. Although she was not driven to commit the offence by the hardship, as a suffering mother she thus deserved the reduction.¹⁰

When making a comparison between Thailand and England and Wales on the issues of sentencing practices of drug-related offences, in England and Wales, at the first step, culpability is demonstrated by offender's role – leading role, significant role, and lesser role. In Thailand on the other hand, culpability is rather demonstrated by the type of drugs. Further, whilst in Thailand distinguish harm caused by the type of drugs along with the amount and purity of them, in England and Wales, harm caused is determined by the quantity (weight) of drugs at the first step rather than their type. Therefore, since Thailand categorises methamphetamine the most harm drug (category I), even a small amount of it can be regarded as the most serious crime regardless of offender's role. Role and Culpability of drug offender including mitigation factors are significant factors in making proportionate sentence. Where the offence is street dealing or possession of drugs for personal use, the quantity of drugs is less indicative of the harm caused and therefore the starting point should not be based on type and quantity.

Further, Thailand's sentencing trends which are based on the amount of drugs seizure rather than a defendant's role in crime make women drug mules who carry larger quantities than the threshold are likely to receive high sentences and can be considered a professional drug courier. In the drug market, women drug mules are more likely to carry more drugs than professional drug couriers as they often have no control over what and how much is put in the bag. (Jennifer, 2011) Yet, the judiciary rarely accepts the argument that women drug mules have had a subordinate role. Without clear evidence, the judiciary often concludes that women are in drug crime for money, rather than being involved through naïvete and exploitation.¹¹

In Thailand, the vulnerability of women drug offenders who carry drugs for others has not been addressed yet. Neither the drug mule nor people's roles in drug trade are distinguished. Section 15 of THA NA which is a main provision of drug law stipulates types of action that are subjected to drug (category I) offences, stating that:

¹⁰See (*R v Attuh-Benson (Irene Cynthia)*, 2004).

¹¹See (*R v. Henry (Nadine Chrystel)*, 2014)

“No person shall produce, import, export, dispose of, or possess narcotics of Category I,¹² unless the possession thereof is necessary for use in government service as permitted in writing by the Minister.

The application and permission shall be according to the rules, procedure, and conditions stipulated in the Ministerial Regulations.

The production, import, export, or possession of narcotics of category I in the quantities computed to be pure substances of the followings shall be presumed as production, import, export, or possession for the purpose of disposal.

(1) Lysergic acid diethylamide or LSD in the quantities computed to be pure substances of at least 0.75 milligrams, or narcotics having such substance in the quantities of at least 15 units of use, or having total weight of at least 300 milligrams.

(2) Amphetamine or substituted amphetamine in the quantities computed to be pure substances of at least 375 milligrams or narcotics having such substance in the quantities of at least 15 units of use, or having total weight of at least 1.5 grams.

(3) Narcotics in Category I apart from (1) and (2) in the quantities computed to be pure substances of at least 3 grams.”¹³ (Thai Narcotics Act B.E.2522, 1979)

Apparently, Section 15 only specifies the actions which are subjected to drug offences, including the threshold quantities of each type of drugs as a reverse presumption presuming that a drug defendant who possesses the threshold has the intent to traffic. It does not define the offence range which reflects varying degrees of seriousness.

A reverse presumption is a clause contained in a provision within a legislation which shifts the burden of proof onto the defendant to disprove an element of offence or to prove his or her innocence on the balance of probabilities in order to avoid conviction. (Paul & Adrian, 2004) The defendant will be taken to have committed an offence unless the contrary is proved. (Andrew, 2010) Generally, a reverse presumption is not considered a breach of a defendant’s human rights or infringing the presumption of innocence.¹⁴ This is because defendant is provided an opportunity to present evidence in order to disprove the reverse presumption. (Stumer, 2010) However, in order to avoid erroneous conviction, a reverse burden of proof must balance defendant’s right and community’s need of law enforcement. (David, 2007)

¹²See the Ministerial Announcement of the Ministry of Public Health of Thailand No.135 (B.E.2535) (1992) regarding Names and Types of Narcotics according to the Narcotics Act B.E.2522 (1979).

¹³An unofficial translation made by the Office of the Council of State, Thailand.

¹⁴The right for accused and defendant of criminal offence to be presumed innocent. The burden of proof is on prosecution. At trial, prosecution is required to present relevant evidence in order to convince judiciary that defendant is guilty beyond reasonable doubt.

The reverse presumption is mostly applied by law whenever the offences are obviously harder for prosecution to prove. (Roberts & Zuckerman, 2004) Typically, in a criminal justice system, the reverse presumption is applied not only to drug offences, but also to possession of an offensive weapon, road traffic offences involving intoxication by drink or drugs, trademark offences, and health and safety violations exposing employees to dangerous condition of work. (Paul & Adrian, 2010)

Under Section 15 of THA NA prosecution has to prove a defendant was found in possession of drugs and amount of drugs seizure reaches the threshold in order to show the trafficking intention. Whether the defendant plays a primary role or secondary role is not required to be demonstrated. (Thai Narcotics Act B.E.2522, 1979) It is up to the defendant to show that while they were in possession of the drugs they did not have the intention to traffic; in other words, the defendant has to overcome a reverse presumption in order to establish his or her innocence.

Interestingly, the statutory presumption in circumstances in which an accused was found to be in possession of the offence of possession of drugs with intent to traffic can attribute vulnerable drug mules who might not know that he/she is carrying a threshold quantity the harsh sentences. Under Section 15 of THA NA, intention to traffic is found when the drugs in accused's possession reach the threshold quantity regardless of either intention to make financial gain or remuneration, or intention to immediate supply to other person. Therefore, a person possessing the threshold quantity even for personal use can also be charged with such offence. Depending on the quantity of the substance handled seems to play a major role in prosecution and sentencing for drug-related offences in Thailand. Specifying the threshold aims to distinguish the offence of possession of drug for personal use from other more serious offences like possession of drugs with intent to traffic or drug trafficking because the intention behind the possession is not easy to infer. (EMCDDA, 2003) Thus, the quantity of the substance is often used as an indicator. However, too low a threshold may result in sentencing of drug users as traffickers (which is harsher than they actually deserve), and too high a threshold may allow drug traffickers to traffic drugs with little interference.

Some European countries, Austria for instance, do not precisely define a threshold quantity in their drug legislation leaving this to the discretion of prosecutor and court to determine on a case-by-case basis. Section 35.1 of the Austrian Narcotic Substances Act states:(European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), 2012) *"Should a person be charged with purchase or possession in violation of existing regulations of a small amount of narcotic substance for his own use, the public prosecutor's office shall provisionally defer the charge for a probationary period of two years under the conditions set forth hereafter."* The similar trend can be found in the legislation of France,Greece,

Spain, and Ireland in which the concept of a small quantity is mentioned but not precisely specified. (European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), 2012) In Italy, the Italian drug law introduces the ‘average daily dose’ to distinguish possession for personal use from possession for trafficking – what constitutes a drug offence is left to the discretion of police and judicial authorities irrespective of the quantity or type of drugs possessed. (European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), 2012) Thus, in Italy, there can be the cases of possession of large quantities of drugs where the authorities are satisfied that defendant has no involvement in drug trafficking activities.

Nevertheless, a key to the spirit of the United Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (‘the 1988 UN Convention’) is the intention - the accused or defendant’s intention to traffic is most important to establish drug offences, not the quantity involved. (United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988) Most countries in the European Union do not set specific quantities in their legislation that will allow judge to take all circumstances into consideration when considering the intention of particular drug offence. (EMCDDA, 2003) Despite being a participant in the Convention, Thailand on the contrary precisely specifies the amount of drugs in its legislation in order to establish drug offences rather than focusing on either knowledge or intention to commit drug-related offences.

Section 15 of THA NA which was amended in 2017 was claimed the development of Thai drug laws as it clearly stated in the amended Act that the amendment was aimed to reduce the number of prison population in the Thai prisons. (Thai Narcotics Act (No.6) B.E.2560, 2017) This is because prior to the amendment, it was impossible for defendant in a drug case to rebut the presumption under Section 15 of THA NA. The previous law considered a person possessing the threshold quantity as possession of drugs with intent to traffic. Although in fact, even if a possessor had no knowledge about drugs in his/her possession, it was a conclusive presumption which could not be rebutted by evidence. Nevertheless, although Section 15 has recently been amended, it is still unclear how much opportunity drug defendant has in proving innocence. It is too early to analyse and summarise whether the amendment helps reducing harsh sentences on vulnerable drug mules and lesser role players in drug trade. Under the punitive approach considering drug-related offence as a serious crime, despite the defence is available, it is unclear whether drug mules or low-level drug traffickers will be considered vulnerable or still be regarded as the significant role player.

Without the distinction between roles in crime, the reverse presumption under Section 15 can attribute vulnerable women drug mules to be convicted of harsher offence than their actual involvement. Because it is likely to be difficult for judiciary to believe that women have no idea of what in the bag they are carrying is.

Therefore, solely relying on drug quantities which fails to distinguish women drug mules from either drug couriers or drug traffickers, can contribute to the vulnerability of women drug mules. When the reverse presumption under Section 15 fails to consider defendant's role and involvement in drug crime properly, with respect to the low-level involvement, women drug mules are likely to be convicted of more severe offence and harsher sentence than their culpability. It can be seen in the Thai Supreme Court Decisions that the judiciary tends to convict drug mules for possession of drugs with intent to traffic despite the lack of trafficking intention by solely relying on the threshold specified in Section 15.

Careless or improper implementation of law can contribute women to harsher offence and more severe punishment. Although a reverse presumption is acceptable, the general principle is that such an onus must be not too difficult for the defendant to disprove. It can be seen in many Thai Supreme Court decisions that Thai judiciary tends to believe that women who live or stay with drug offenders at the time of arrest have knowledge and involvement with drug offence. Women's denial of guilt is mostly ignored. In order to convict accomplices of drug offences, the intention to assist or facilitate in the commission of the offence should be a crucial element which the prosecution should prove beyond reasonable doubt. It should not be left to defendant to prove that he/she lacks knowledge of drug or has no intention to assist or facilitate someone committing a drug offence.

It can be clearly seen that the Thai judiciary rarely accepts the claim of woman in simply denying the knowledge of the drug. Even though Section 228 of the Thai Criminal Procedure Code allows judiciary to take more evidence whenever the existing evidence provided at trial seems to be insufficient, this provision is rarely used by the Thai judiciary. Section 228 which aims to create opportunity for defendant to access a fair trial, states that

“During the trial, with or without the request from a party to a case, the judiciary has the authority to take more evidence by himself or by another court where the required evidence is under its jurisdiction.” (Thai Criminal Procedure Code, 1934)

As mentioned, Section 228 of the Thai Criminal Procedure Code is rarely used by the Thai judiciary. Even if the evidence provided at the trial is considered insufficient, judiciary mostly decides the case upon the limited existing evidence provided at the trial. This is because of Section 9 of the Code of Thai Judicial Conduct, which discourages judiciary not to take more evidence into the case. Section 9 states that

“It should always be kept in the judiciary’s mind that taking more evidence and evidence examination are the duties of the parties to the case and their lawyers. The judiciary ought to take more evidence or examine the evidence by himself only when considered necessity and for the sake of justice or there is the particular provision requiring the judiciary to do so.” (The Code of Thai Judicial Conduct, 2009)

Obviously, most of Thai judges rely on Section 9 of the Code of Thai Judicial Conduct rather than Section 228 of the Thai Criminal Procedure Code. Thus, the implementation of Section 228 is rarely seen at trial, especially in drug-related cases where it could be argued that supporting evidence of women’s denial of knowledge of the drug’s presence should be sought more often. But the court does not think it needs more evidence.

For instance, in the Thai Supreme Court decision no. 258/2538 (1995)¹⁵, the defendant herself did not know how to convince the judiciary. She could only deny guilt claiming that she had no knowledge of heroin found in the house where she had just moved in only for two months. However, there was no other evidence to satisfy the judiciary. The additional evidence which could be required by the judiciary itself or requested from other courts, such as financial behaviour whether she became extravagant after moving in her boyfriend’s house, or her boyfriend’s pleas whether she had knowledge or involved with such heroin, or her previous recorded background to prove that she had never involved with the drugs and been of good character, which could be the significant evidence to the case. But the judiciary in this case chose not to exercise Section 228 of the Thai Criminal Procedure Code to get more information and convicted the woman.

¹⁵See the Thai Supreme Court decision no. 258/2538 (1995)

Further, although the gathering of evidence to disprove the onus generally is the duty of defendant and his lawyer, women defendants in drug cases mostly are poor, lack education, and do not have lawyers at both pre-trial and trial stage (Havanon, Jeradechakul, Wathanotai, Paungsawad, & Sintunava, 2012) Consequently, women defendants are faced with great difficulty in overcoming their drug-related offences in the Thai criminal justice system.

Also, although the rights to legal assistance are written in the law, women rarely receive such assistance in practice. The statistics were revealed in 2012 that 74.1% of women drug offenders in Thai women’s prisons did not have lawyers during the stage of police’s investigation (Havanon et al., 2012) as illustrated in Figure 1. At trial, 53.3% of women drug offenders did not have lawyers defending their drug-related cases because they intentionally admitted guilt (Havanon et al., 2012) as illustrated in Figure 2. Moreover, it was found some of them admit guilt in place of her boyfriend or husband. (Nutthanuch, 2014) Among 46.7% of women drug offenders who proceeded their drug-related cases, only 28.7% of women drug defendants could afford lawyer’s hiring, whilst another 18% who could not afford the expenses would have to rely on volunteer public defenders provided by the court.

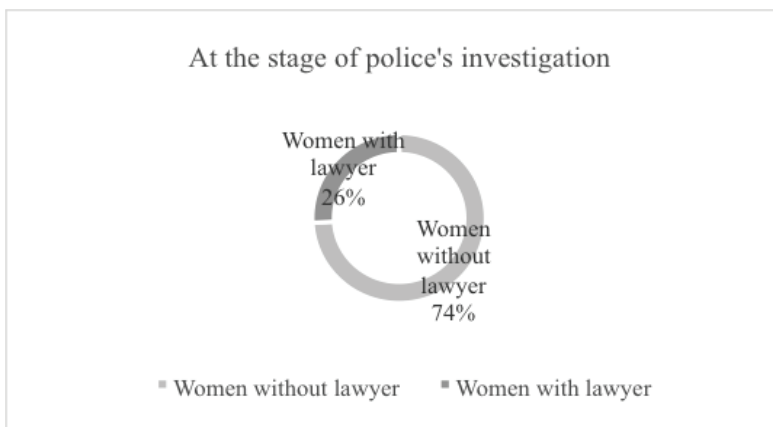


Figure 1 Percentage of women accused of drug-related offences with/without lawyer at the stage of police’s investigation in Thailand in 2012.

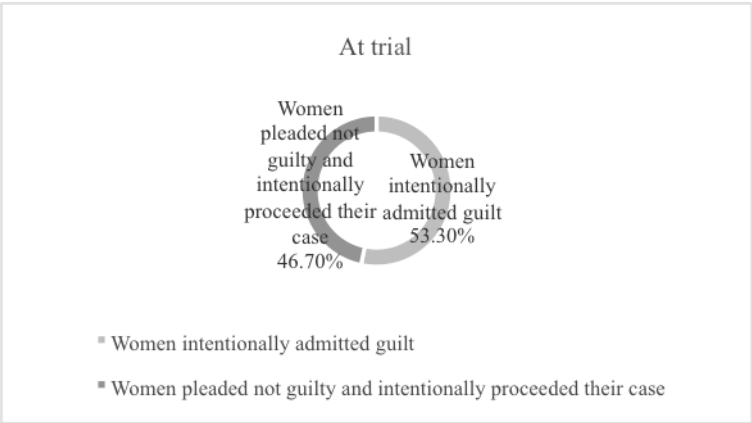


Figure 2 Percentage of women defendants in drug-related cases who intentionally admitted guilt and who were willing to proceed their case in Thailand in 2012.

Moreover, it was found 60.4% of women drug defendants who were represented by their hired lawyers received none or less legal counselling as illustrated in Figure 3. Some of women drug offenders in the Thai women’s prisons who were interviewed by the Ministry of Justice of Thailand said that their lawyers were not likely to help them. This was because their lawyers did not visit them at the remand prisons as often as they should, thus at the trial the lawyers knew very little about their cases. Some of them said their lawyers did not show up at the trial despite the hire had been paid. It was also revealed that 25% of total women drug offenders believed that they did not access justice at trial. Although an awareness of innocence’s conviction lies under Section 14 of THA AMSOON,¹⁶ 14.3% of total women drug offenders claimed they were innocent. (Havanon et al., 2012)

¹⁶Section 14 of the Thai Act on Measures for the Suppression of Offenders in an Offence relating to Narcotics B.E.2534 (A.D.1991) (herein referred to as ‘THA AMSOON’ states “The arrest or charge of accused according to Section 6 and Section 8 of the THA AMSOON is required to be firstly approved by the Secretary of the Board of Narcotics Prevention and Suppression...”

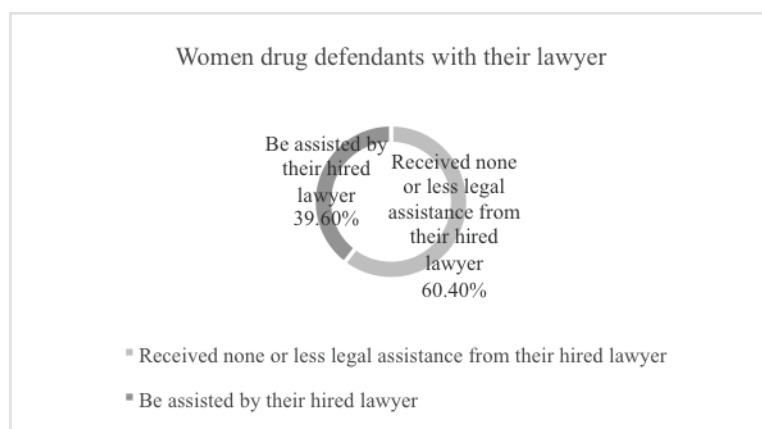


Figure 3 Percentage of women drug defendants who received legal assistance from their hired lawyer and who seldom received it.

The Thai legislation which was originally enacted to punish large-scale drug traffickers and drug manufacturers has become harmful to drug users, first time non-violent offenders, and small-scale drug traffickers. Being charged and prosecuted as an accomplice or co-conspirator in drug offence makes it is difficult for defendant, – especially woman defendant, to overcome the case because the Thai judiciary is likely to require defendant to prove her innocence by showing that she has no involvement in drug offence or no agreement with others to commit drug offence. Although the facts are within the knowledge of defendant, the difficulty of proving she is unaware of the presence of the drugs still exists. The difficulty in disproving the offence is found in cases where women need to convince judiciary that they have no knowledge or involvement in a drug offence committed by their co-defendant, who usually is a boyfriend, husband, friend, or relative. This includes cases where women need to convince the judiciary that they do not have an agreement with their co-defendant to commit drug offence. As a result, the more woman tries to defend her case, the longer imprisonment shall be imposed on her.

If women’s background, intention to commit drug-related offences, level of involvement in drug crime, offending patterns, previous experiences of victimisation, or levels of coercion, for instance, were recognised as a mitigating circumstance, it would reduce sentences and the prison population. The overcrowding in the Thai women’s prison could be addressed if the drug law was designed to take such circumstances into account in making decision whether or not and how much punishment an individual should receive.

3. Conclusion: a demand for reform of drug laws in Thailand

Whilst the intention of THA NA aims to suppress and eliminate drugs in Thailand, its sentencing practices seems to target more minor drug offenders (some cases even include the innocent women) than major and large-level drug traffickers. In some cases, it appears that women were imposed too harsh punishment and disproportionately for the activities which they committed. Despite women's lowly or none of status in drug trade, they suffer the harshest penalties inflicted by the criminal justice process and drug law. (Penny, 1996)

Since Thailand has become the world's sixth largest prison population, as well as having the world's highest incarceration rate for women, - the majority of whom are imprisoned for low-level drug offences, mostly for methamphetamine, it should reconsider its drug policy and drug law with respect to the effectiveness of harsh punishment against drug users and low-level drug traffickers, including people who are considered accomplices or conspirators in drug offence despite a lack knowledge of the drug-related activity. The disproportionate punishment can also unintentionally contribute to overcrowding in Thai women's prisons. If the discussed interpretation and implementation of drug laws are inappropriately further carried on, the drug problem in Thailand can never be resolved. On the contrary, the problem of prison overcrowding is going to be more serious. Punishments imposed on convicted women have been increasing in severity. The women prison population has grown dramatically, and the evidence suggests that this is more a consequence of changes in sentencing patterns than any overall increase in the seriousness of offending.

Perhaps a more feasible approach would be the introduction of changes to the law and practice of sentencing women offenders. This would suggest first, abolishing the minimum quantities of threshold for trafficking and giving judges discretion to consider on the case-by-case basis. Because the use of drug quantity may have the unintended effect of increasing punishment of those with lesser culpability such as drug mules carrying large quantities of drug or women offended with their partner. Second, the drug laws should clarify that the prosecution is required to prove intent and if there is no evidence of this, the result must be acquittal. The burden of proof should not be left with a defendant because proving that he/she had no guilty mind is too difficult to convince judiciary. Third, changing sentencing law and the introduction of alternatives to prison and encouraging the judges to use them. This can be done by either diverting minor drug cases, suspending the sentences, community service, or etc. If it is needed to sentence a defendant, the principle of proportionality and mitigating factors should be taken into account.

Arguing that the woman drug mule, accomplice, and conspirator's sentence should be reduced does not mean to dismiss the criminal punishment role but rather attempt to establish more proportionality in sentencing drug offenders according to their culpability or to introduce alternative measures to imprisonment.

Indeed, the overcrowding in prison is not merely a problem for the Department of Corrections of Thailand, but for the overall Thai criminal justice system. The prison overcrowding crisis cannot be solved by building new prisons as they will be filled up again endlessly. The implementation of law, especially drug laws, should be considered more by the involved authorities. The criminal justice agencies should aim to reduce unnecessary imprisonment and increase the use of alternative forms of sentencing towards non-violent offences, particularly drug-related offences. The appropriate solutions to the implementation of drug laws should be further suggested and discussed.

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