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ARTICLE

Driving Irritation: Thailand's Supreme Court and the English Roots of Corporate Criminal Liability

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Abstract

In Thailand, the concept of corporate criminal liability is commonly identified with significant theoretical and practical uncertainties. Only limited attention, however, has been devoted to the notion's historical roots in English legal transfers. This article examines the relevant legislation, court cases, academic literature, and other records. It carves out the continuous English influence on Thai corporate crime doctrine and highlights the legal irritation that occurred along the way. It argues that irritation was not automatic but driven by the Supreme Court, whose choices were shaped by decades of English impact on Thai legal education and practice. The article thereby highlights the dynamics between legal transfers and local drivers of legal development. It expands the growing research on the continued relevance of English law in Thailand and concludes with an outlook on the future of Thai corporate crime doctrine.

Keywords: Corporate criminal liability; Thailand; English law; legal irritation; path dependence

Introduction

The idea that a legal person cannot commit a crime is outdated. *Societas delinquere non potest*?[1] Of course, it can! Common law jurisdictions took important steps in the 19th century before large parts of continental Europe followed suit, step by step, in the ensuing one hundred years.[2] A global wave of corporate crime adoption swept the 1990s and 2000s, fuelled in part by international conventions that demanded corporate sanctions in cases of terrorist financing, organised crime, or corruption.[3] The purposes and effects of corporate criminal liability, however, remain disputed.[4]

Distinct approaches emerged as to how the criminal liability of legal persons can be triggered. Depending on both theoretical and practical considerations, jurisdictions chose primarily between vicarious liability solutions, identification and attribution approaches, and aggregated fault or corporate culture doctrines.[5] Key differences arise mainly from the scope of human beings who can

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[1]'A company cannot commit offences' (author's translation).

[2]See Mark Pieth & Radha Ivory, 'Emergence and Convergence: Corporate Criminal Liability Principles in Overview', in Mark Pieth & Radha Ivory (eds), *Corporate Criminal Liability: Emergence, Convergence, and Risk* (Springer 2011) 3.

[3]Marc Engelhart, 'Corporate Criminal Liability from a Comparative Perspective', in Dominik Brodowski et al (eds), *Regulating Corporate Criminal Liability* (Springer 2014) 53, 55–56.

[4]See the general discussion by Mark Fenwick, 'The Multiple Uncertainties of the Corporate Criminal Law', in Mark Fenwick & Stefan Wrbka (eds), *Legal Certainty in a Contemporary Context: Private and Criminal Law Perspectives* (Springer 2016) 147.

[5]See the overview in James Gobert, 'The Evolving Legal Test of Corporate Criminal Liability', in John Minkes & Leonard Minkes (eds), *Corporate and White-collar Crime* (Sage 2008) 61.

‡The original version of this article was published with incorrect funding information and an error regarding an Act. A notice detailing these has been published and the errors rectified in the online and print PDF and HTML copies.

trigger the legal person's liability.[6] Nowadays, only few countries continue to uphold their resistance against the notion of corporate crime altogether.[7]

In Thailand, lawmakers recently took the first steps to include corporate criminal liability explicitly in the *Criminal Code*.[8] This development follows decades of doctrinal and practical uncertainty that triggered regular scholarly criticism.[9] Only limited attention, however, has been paid to the historical evolution of corporate crime since the late 19th century. This article therefore examines how the possibility to hold legal persons criminally liable grew out of an English legal import, was advanced decisively by the Supreme Court, and continued its life as a legal irritant in the civil law environment of post-codification Siam/Thailand.[10] It carves out the path from early legal transfers to strict, vicarious, and fault-based corporate criminal liability.

The article connects to an emerging body of literature on the British legacy in presumed civil law Thailand.[11] This scholarship reexamines and partly challenges the traditional narrative of Siam's sudden flip from initial English law imports to continental-style codification.[12] The field of criminal law, however, has so far been neglected.[13] By selecting corporate criminal liability, the article addresses a non-traditional concept that entered Siam from abroad.

The evolution begins in the late 19th century, at a time when English law is becoming a secondary legal layer to meet some of the challenges arising from Siam's rapidly developing trade relations. British-type strict liability penalties are included in royal company charters, while Siamese law just commences to adopt the concept of the legal person. Following King Chulalongkorn's[14] instruction to adopt continental-style codification in criminal and private law, the country's first *Penal Code* of 1908 stipulates criminal liability for natural persons only. A subsequent 1911 *Act on Partnerships and Companies* contains the penalties derived from the company charters. They are subsequently moved into the Penal Code, while strict vicarious liability is preserved. The Supreme Court then expands the concept to fault-based crimes in 1930, imitating earlier steps

[6]Pieth & Ivory (n 2) 21–36.

[7]On Germany, see Thomas Weigend, '*Societas Delinquere non Potest*? A German Perspective' (2008) 6(5) Journal of International Criminal Justice 927.

[8]Surasak Likasitwatanakul (สุรศักดิ์ ลิขสิทธิ์วัฒนกุล), 'Update Legal Issue ความรับผิดทางอาญาของนิติบุคคล และผู้แทน [Update Legal Issue, Criminal Liability of Legal Persons and Representatives]' (Thammasat Law Alumni Community, 7 Sep 2022) <https://alumni.law.tu.ac.th/news/692d228d-d0eb-48f1-9182-329462ffccf7/detail> accessed 5 Apr 2023.

[9]For instance, in Suraphong Assawaraphanich (สุรพงศ์ อัศวรำพำนิช), 'ความรับผิดทำงอำญำของนิติบุคคล [The Criminal Liability of Juristic Persons]' (Master Thesis, Chulalongkorn University 1983); Surasak Likasitwatanakul (สุรศักดิ์ ลิขสิทธิ์วัฒนกุล), 'ข้อสังเกตบำงประกำรเกียวกับคำพิพำกษำ ๓๔๔๖/๒๕๓๗ เรืองความผิดทำงอำญำของนิติบุคคล [Some Observations on the Supreme Court Decision No 3446/2537 Related to Corporate Criminal Liability]' (1995) 25 Thammasat Law Journal 260; Suchart Thammapitakkul (สุชำติ ธรรมำพิทักษ์กุล), ทฤษฎีสถำนภำพของนิติบุคคลกับควำมรับผิดทำงอำญำ [*Theory of the Character of Juristic Persons and Criminal Liability*] (Justice College, Ministry of Justice 1998); Lasse Schuldt & Pimtawan Nidhi-u-tai, 'The Supreme Court Jurisprudence on Corporate Criminal Liability 2010–2020' (2021) 1 Thai Legal Studies 173.

[10]In 1939, the government of Siam changed the country's official name to Thailand. This article adopts the respective usage.

[11]Adam Reekie & Surutchada Reekie, 'The Long Reach of English Law: A Case of Incidental Transplantation of the English Law Concept of Vicarious Liability into Thailand's Civil and Commercial Code' (2018) 6(2) Comparative Legal History 207; Surutchada Reekie & Adam Reekie, 'British Judges in the Supreme Court of Siam', in Andrew Harding & Munin Pongsapan (eds), *Thai Legal History. From Traditional to Modern Law* (Cambridge University Press 2021) 103; Surutchada Reekie & Adam Reekie, 'A Comparative Analysis of the Protection of Trade Names Under the English Tort of Passing Off and Section 18 of Thailand's Civil and Commercial Code' (2016) 11 Asian Journal of Comparative Law 1; Surutchada Reekie & Narun Popattanachai, 'Thai Trust Law: A Legal Import Rooted in Pragmatism', in Andrew Harding & Munin Pongsapan (eds), *Thai Legal History. From Traditional to Modern Law* (Cambridge University Press 2021) 153.

[12]See also Munin Pongsapan, 'The Fundamental Misconception in the Drafting of the Thai Civil and Commercial Code of 1925', in Andrew Harding & Munin Pongsapan (eds), *Thai Legal History. From Traditional to Modern Law* (Cambridge University Press 2021) 122.

[13]Almost 40 years ago, Apirat Petchsiri argued that the 'mixed [ie, Siamese-English] system was in operation for such a short period of time that not many of its effects were known in the later period.' See Apirat Petchsiri, 'A Short History of Thai Criminal Law since the Nineteenth Century' (1986) 28 Malaya Law Review 134, 145.

[14]Also referred to as Rama V. His reign lasted from 1868 until his death in 1910.

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by English courts. Legislators push back and exclude corporate crimes from the 1956 *Criminal Code*. The Supreme Court, however, continues the expansion and introduces the English-origin identification doctrine into Thai law. Legal scholarship responds with sharp rebukes, pointing to *nullum crimen sine lege*. But the Court holds course and establishes a line of precedents in a legal system that is conventionally qualified as civil law.

These are the sketches of a process in which codified and statutory law met with judge-made corporate crime doctrine, leading to legal irritation, a notion proposed by Teubner.[15] This article, however, highlights the argument that irritation does not occur by itself but requires institutional drivers. In the case of corporate criminal liability in Thailand, it was the Supreme Court that was determined to preserve and expand the English law legacy. The Court's choice, in turn, was shaped by decades of English influence on Thai legal education and practice.

The article starts with an overview of the multiple uncertainties of Thai corporate criminal law. It recapitulates the notion of legal irritants and emphasises their drivers. The main part then sets out in eight steps the origins, evolution, and drivers of corporate criminal liability in Thailand. Finally, the conclusion interprets the findings and provides an outlook on the possible future of Thai corporate crime doctrine.

The multiple uncertainties of corporate criminal liability in Thailand

Despite the global expansion of corporate criminal liability, doctrinal models tend to differ from country to country.[16] Thai scholarship has generally settled on the distinction between three types of corporate offences:[17]

1. Offences specifically addressed at legal persons;
2. Offences addressed at persons with specific characteristics if legal persons have such characteristics;[18] and
3. General criminal offences addressed at 'whoever' (ผู้ใด *phu dai*), which the courts also apply to legal persons.

The first type relies on specific legislation, the second on statutory interpretation, and the third type was added by the Supreme Court. Under the latter, legal persons can be punished by attributing to them the conduct and fault of their representatives, usually directors, but possibly also other personnel.[19] The Supreme Court's conceptual explanation distinguishes between intentional and negligent crimes.[20] Under the first two types of offences, the circle of relevant natural persons is not precisely circumscribed either. It extends beyond the representatives,[21] but how far exactly

[15]Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61(1) The Modern Law Review 11.

[16]Pieth & Ivory (n 2).

[17]Centre for Research and Consultancy, Faculty of Law, Thammasat University (ศูนย์วิจัยและให้คำปรึกษา คณะนิติศาสตร์มหาวิทยาลัยธรรมศาสตร์), การศึกษาเปรียบเทียบความรับผิดทางอาญาของนิติบุคคลและผู้แทนนิติบุคคลของประเทศไทยกับประเทศต่างๆ ในประชาคมอาเซียน [*Comparative Study of Corporate and Representative's Criminal Liability in Thailand and ASEAN Countries*] (Office of the Special Prosecutor, Criminal Law Institute, Academic Office, Office of the Attorney General 2015) 150–156.

[18]Characteristics such as being a 'business operator', 'permit-holder', or 'fuel trader'.

[19]See, for instance, Supreme Court judgments No 185/2489 (1946): managers; No 1620/2508 (1965): managerial board.

[20]To attribute intentional conduct, the Supreme Court routinely refers to s 70(2) Civil and Commercial Code, according to which the purpose of a legal person is determined by its representatives; see the seminal Supreme Court (General Meeting) judgment No 787–788/2506 (1963) on trademark imitation, which is further discussed below. Decisions that deal with negligence offences, however, attribute conduct without a reference to private law; see the landmark cases on negligent killing, Supreme Court judgments No 3446/2537 (1994) and No 8565–8566/2558 (2015).

[21]The narrow focus on representatives for general criminal offences is seen as a limitation on the otherwise expansive jurisprudence. See Surasak Likasitwatanakul (สุรศักดิ์ ลิขสิทธิ์วัฒนกุล), 'ความรับผิดทางอาญาของนิติบุคคล : การศึกษาทางกฎหมาย

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remains subject to case-by-case assessments.[22] The corporate crime models thus differ depending on the criminal provision in question. It is largely assumed that vicarious liability applies to the first two types, while the identification doctrine covers the third.[23]

It is this latter type that caused most controversies. First and foremost, scholarly commentary argued that the Supreme Court violated the legality principle, *nullum crimen sine lege*, according to which, in many legal systems, every crime must be stipulated by written law before the criminal conduct occurred.[24] It is a fundamental principle of Thai criminal law[25] and part of the *Thai Constitution*.[26] The critics' key argument is that the Criminal Code's drafters did not intend the Code to be applied to legal persons.[27] According to this view, the Court's jurisprudence on the third type of corporate offences expanded criminal liability without a valid legal basis. Consequently, every punishment based on this type violates the *nullum crimen* principle.

But the problems did not end there. In some cases, the Supreme Court neglected its principles of attribution. For instance, it held a company liable under a general ('whoever') offence, even though it could not be proved that any of its representatives had committed the electricity theft in question.[28] The Court also used a kind of 'reverse attribution' when it derived a director's criminal liability from the company's crime, defying hitherto accepted categories.[29] Further scholarly criticism was provoked by considering legal persons and their representatives as joint principals, which appears problematic as a director can hardly conspire or make a common plan with the company they represent.[30]

Legal transplants and drivers of irritation

The article situates itself within the multifaceted debate on legal transfers. Scholarly work on borrowing, imports, or transplants of legal rules covers an increasingly differentiated spectrum of theoretical considerations, historical accounts, and practical assessments.[31] The debate is still frequently connected to the coordinates set by Alan Watson and Pierre Legrand and their opposing views on

เปรียบเทียบโดยเฉพาะทีเกียวกับประเทศไทย [Corporate Criminal Liability: A Comparative Legal Study with Particular Focus on Thailand]' (Master Thesis, Thammasat University 1984) 120.

[22]See Assawaraphanich (n 9) 63, who excludes agents, employees and contractors because their tasks are based on contracts rather than on the law.

[23]The latter is assumed by ibid 70; Thammapitakkul (n 9) 49 et seq; Surasak Likasitwatanakul (สุรศักดิ์ ลิขสิทธิ์วัฒนกุล), 'ความรับผิดทางอาญาของนิติบุคคล : การศึกษาเปรียบเทียบทางนิติวิธีในประเทศคอมมอนลอว์ และซีวิลลอว์' [Corporate Criminal Liability: A Comparative Study of Legal Methods in Common Law and Civil Law Countries]' (1995) 25(4) Thammasat Law Journal 684, 707; and Nalinorn Tibodi, 'นลินอร ธิบดี ความรับผิดทางอาญาของนิติบุคคล : ศึกษากรณีกระทำาผิดโดยประมาท [Corporate Criminal Liability: Case Study of Criminal Negligence]' (Master Thesis, Chulalongkorn University 2008) 101, 106.

[24]Claus Kreß, '*Nulla Poena Nullum Crimen Sine Lege*', in Anne Peters & Rüdiger Wolfrum (eds), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2008–) marginal nos 1, 21 <www.mpepil.com> accessed 5 Apr 2023.

[25]Kanit Na Nakorn (คณิต ณ นคร), กฎหมายอาญาภาคทัวไป [*Criminal Law: General Part*] (7th edn, Winyuchon 2020) 89; Kanaphon Chanhom (คณพล จันทน์หอม), หลักพืนฐานกฎหมายอาญา เล่ม 1 [*Fundamental Principles of Criminal Law – Book 1*] (Winyuchon 2020) chs 3, 4; Achariya Chutinun (อัจฉรียา ชูตินันทน์), 'หลักการกำหนดความผิดอาญาและหลักการกำหนดโทษอาญาในการตรากฎหมาย [The Principles of Defining Criminal Offences and the Principles of Defining Criminal Penalty in Legislation]' (2021) 35(3) Suthiparithat 21.

[26]See Constitution of the Kingdom of Thailand BE 2560 (2017), s 29(1).

[27]Likasitwatanakul, 'Corporate Criminal Liability' (n 21) 121 et seq; Likasitwatanakul, 'Some Observations' (n 9) 270–271; Thammapitakkul (n 9) 47 et seq.

[28]Supreme Court judgment No 12328/2558 (2015).

[29]Schuldt & Nidhi-u-tai (n 9) 176.

[30]ibid 177 et seq.

[31]For good overviews of the debate, see Toby Goldbach, 'Why Legal Transplants' (2019) 15 Annual Review of Law and Social Science 583; William Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplants' (1995) 43(4) American Journal of Comparative Law 489.

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the feasibility of legal transplants and the proper methods of comparative law.[32] They are not reiterated here. Recent research and scholarly commentary aim to shift the attention to the study of distinct types of transplanting activities and their practical implementation rather than to focus the inquiry on the question of 'success' and its vague parameters.[33]

For the purposes of this article, Teubner's concept of the legal irritant is the most fruitful. It refers to a rule or principle that is transferred from one legal system to another and, in the receiving system, produces quite unintended outcomes.[34] It irritates in the sense that it 'triggers a whole series of new and unexpected events.'[35] The irritation might affect the 'law's binding arrangements', possibly even leading to 'wild perturbations'.[36] As a consequence, both the existing system as well as the 'alien element' need to be adapted through 'an evolutionary dynamic in which the external rule's meaning will be reconstructed and the internal context will undergo fundamental change.'[37]

Teubner's seminal article examined the import of good faith into British contract law through EU-driven legal harmonisation in the 1990s. Here, however, we are dealing with a different jurisdiction, a different area of law, and a distinct historical setting and motivation for legal transfer. The concept is nonetheless highly relevant to conceptualise the evolution of corporate criminal liability in Thailand. This is because traditional Siamese law neither recognised legal persons nor could it, consequently, prescribe corporate liability for offences committed by their personnel. The introduction of English-style penalties for companies in the latter half of the 19th century thus triggered a series of events that transformed parts of Siamese corporate law along a criminal law trajectory. Subsequent continental-style codification, however, matched uneasily with the English concepts. What followed was legal irritation.

While Teubner argued that 'good faith is irritating British law',[38] this article aims to highlight the driving forces of irritation. It emphasises that legal irritation does not occur by itself and illustrates Thailand's Supreme Court as an agent of irritation. Consequently, the article argues that irritation is a choice; that there can be alternatives, less irritating routes. This differs from malicious legal transplants that require the intention to do harm.[39] The case of corporate criminal liability in Thailand rather demonstrates how historical and institutional legacies explain the choices made. Irritation neither happens automatically nor because of bad faith, but because of preferences that are shaped by earlier developments. For corporate crime in Thailand, the choices resulted in significant setbacks for legal certainty, compromising the legal transfer's long-term success.

Origins, evolution, and drivers of corporate criminal liability in Thailand

Setting the scene: Traditional Siamese law meets growing trade

Corporate offences were not part of Siamese law until the era of legal and administrative modernisation. Most of what we know today about the traditional law of prior Siamese Kingdoms stems from the *Three Seals Code* 1804, a collection and preservation of Ayutthayan law compiled during the first

[32]Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edn, University of Georgia Press 1993) ch 2; Pierre Legrand, 'The Impossibility of "Legal Transplants"' (1997) 4(2) Maastricht Journal of European and Comparative Law 111; more recently, Pierre Legrand, 'The Guile and The Guise: Apropos of Comparative Law as We Know It' (2021) 16 Asian Journal of Comparative Law 155.

[33]See Andrew Harding, 'The Legal Transplants Debate: Getting Beyond the Impasse?', in Vito Breda (ed), *Legal Transplants in East Asia and Oceania* (Cambridge University Press 2019) 13.

[34]Teubner (n 15).

[35]Jaako Husa, 'Developing Legal System, Legal Transplants, and Path Dependence: Reflections on the Rule of Law' (2018) 6 The Chinese Journal of Comparative Law 129, 136.

[36]Teubner (n 15) 12.

[37]ibid.

[38]ibid 11.

[39]Mathias Siems, 'Malicious Legal Transplants' (2018) 38(1) Legal Studies 103.

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reign of the Rattanakosin (Bangkok) Kingdom.[40] The Three Seals Code, including its criminal law elements, remained by and large applicable until the entry into force of modern codified law.[41]

The law of Ayutthaya was strongly influenced by ancient Indian law, particularly by the *Code of Manu*, which, in fact, recognised corporate bodies such as associations of castes, religious believers, or professions, and guaranteed their right to govern their own internal affairs. Under the relevant provisions, however, if heads of associations acted in bad faith, the King could only intervene and punish the head but not the corporate body itself.[42]

Similar autonomous domains were recognised in traditional Siamese law. Family units, communities, tribal, and religious groups were the most prevalent segments of society.[43] The Three Seals Code also contained provisions on joint investments into commercial activities and the distribution of profits.[44] Nonetheless, 'in Siam there [were] no laws on companies and their existence, and their statutes must be proven by witnesses and by assumptions.'[45] Consequently, laws to punish enterprises were absent, too.

With Siam's rapidly expanding trade relations, however, partnerships and companies entered the Kingdom's economic and legal system.[46] The late 19th century saw foreign businessmen, often of European origin, establish companies in Siam to conduct trade in rice and manufactured goods, railway construction, and other business. By virtue of a system of treaties that Siam had been pressed to conclude with several foreign powers, however, the non-Siamese owners were not subject to the local laws but to their respective home jurisdictions.[47] Companies could be established and operated by foreigners[48] based on foreign laws. Legal disputes involving foreigners were mainly resolved in consular courts.[49]

[40]Thai legal history is frequently told with reference to the country's key historical eras. Following the settlement of Tai groups throughout the first millennium, these main periods are the Sukhothai Kingdom (from 1238), the Ayutthaya Kingdom (from 1351) and the present Rattanakosin (Bangkok) Kingdom (from 1782). See, for instance, Sawaeng Bunchalermwiphat (แสวง บุญเฉลิมวิภาส) & Utirud Tanbuncharoen (อติรุจ ตันบุญเจริญ), ประวัติศาสตร์กฎหมายไทย [*The Thai Legal History*] (19th edn, Winyuchon 2020).

[41]Regarding criminal law, see Kanaphon Chanhom, *Codification in Thailand During the 19th and 20th Centuries: A Study of the Causes, Process and Consequences of Drafting the Penal Code of 1908* (PhD Thesis, University of Washington 2010) 65.

[42]M Rama Jois, *Legal and Constitutional History of India. Ancient Legal, Judicial and Constitutional System* (Universal Law Publishing 1984) 177 et seq.

[43]See, for instance, David M Engel & Jaruwan S Engel, *Tort, Custom, and Karma: Globalization and Legal Consciousness in Thailand* (Stanford University Press 2010) ch 3; Daniel Francis Robinson, *Biodiversity-Related Traditional Knowledge in Thailand* (PhD Thesis, University of Sydney 2007) 190–191.

[44]Phra Ayakarn Bet Set (พระไอยการเบ็ดเสร็จ) [Law on Miscellaneous Issues], ss 101, 102, as published in กฎหมายตราสามดวง เล่น 3 [*Three Seals Code, Book 3*] (Khurusapha Trade Organization 1963) 149–150. In the absence of the Western legal personality concept, it has been suggested that these provisions could be conceived of as an early legal recognition of partnerships. See Thira Singhphan (ธีระ สิงห์พันธุ์), คำอธิบายเรียงมาตราประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยหุ้นส่วนและบริษัท [*Civil and Commercial Code: Partnerships and Companies*] (5th edn, Ramkhanghaeng University Publishing 2000) 1.

[45]Emile Jottrand, *In Siam. The Diary of a Legal Adviser of King Chulalongkorn's Government* (1905) as quoted in Walter EJ Tips, *Crime and Punishment in King Chulalongkorn's Kingdom* (White Lotus Press 1998) 12. Emile Jottrand was a Belgian assistant legal adviser in the Siamese Ministry of Justice from 1898 to 1902.

[46]See the preamble to the *Act Amending the Principles of Debt R.E. 110* (1891), Government Gazette, Book 8 (13 Mar 1891) 445, referring to the increased trade, particularly with foreign countries, and the 'several ways to form a partnership' (author's translation).

[47]Beginning with the so-called *Bowring Treaty* of 1855, these treaties granted respective citizens 'extraterritoriality' in Siam, ie, the right to be subject to the laws of their home jurisdiction. See Eldon R James, 'Jurisdiction over Foreigners in Siam' 16(4) American Journal of International Law (1922) 585.

[48]For instance, the Bangkok Dock Company Ltd was established in 1865 by the English Captain John Bush. See Bangkok Dock Company, 'Company History' <http://www.bangkokdock.co.th:8080/2563/index.php/th/2020-04-05-09-22-27/2019-09-20-16-03-29> accessed 5 Apr 2023.

[49]In some years, British subjects formed the majority of plaintiffs in the consular courts. See Judicial Adviser [Stewart Black], 'Chapter XIII: Justice', in A Cecil Carter (ed), *The Kingdom of Siam* (Knickerbocker Press 1904) 197.

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Over time, Siamese citizens established companies, too,[50] but non-Siamese nationals often held major stakes in the entities founded in this era.[51]

Planting the seeds: Company charters and strict corporate liability English-style

The voids of Siamese corporate law needed to be filled. Like in other legal branches,[52] English law was the first choice. Companies under the Kingdom's laws were established by way of royal charters.[53] This mode of establishment was used until the entry into force of the Siamese‡ *Act on Partnerships and Companies* 1911,[54] which introduced simple registration. The concept of chartered companies had developed in England, where its practical importance spanned from the 14th century to the enactment of the English *Registration Act* (or *Joint Stock Companies Act*) 1844, which provided for incorporation by registration.[55] English legislators had thus abandoned the charter model for most practical commercial purposes by the mid-19th century. In Siam, however, its comparatively belated adoption allowed King Chulalongkorn's administration initial control over the creation of companies. It also advanced the introduction of legal personality in a piecemeal way: Each charter included a section which stipulated that legal personality was bestowed upon the company.[56] These provisions had constitutive character and could be found either as a concluding paragraph at the end of the charter,[57] or in a section toward the beginning.[58]

Siamese company charters largely resembled one another in terms of structure, content, and wording. They covered the requirements and procedures related to the establishment, operation, modification, and dissolution of companies, as well as the respective duties of the company itself, its directors, and its shareholders. Several transliterated English terms illustrate an English influence, such as เมโมแรนดำออฟแอสโซซิเอชัน (memorandum of association), อาติเกิลออฟแอสโซซิเอชัน (articles of association), ไดเรกเตอร์ (director), แชร์ (share), เอเยนต์ (agent), and โว้ต (vote).

Regarding provisions on sanctions, the charters prescribed the liability of directors, members, agents, employees, other personnel, and, importantly, of the company itself for the violation of stipulated duties. A comparison between the charter provisions and similar sections of the English

[50]For instance, the majority of shares of the Siam Electricity Company Ltd, which was established in 1889 based on a royal concession, was held by the Crown. See Silpa Wattanatham, 'แรกมี 'ไฟฟ้า' ในสยาม สิ่งฟุ่มเฟือยของชนชั้นนำ สู่กิจการโรงไฟฟ้าไทยทำเจ๊ง ฝรั่งทำรุ่ง [The First Time that there was Electricity in Siam, A Luxury for the Elite. The Powerplant Business was Ruined by Thai, Made Prosperous by Foreigners]' (Silpa Wattanatham, 17 Sep 2022) <https://www.silpa-mag.com/history/article_47129> accessed 5 Apr 2023.

[51]For instance, the Bangkok Times of 7 February 1891 reported that the shares in the Bangkok Tramways Company were distributed as follows: '976 owned by Englishmen, 11 by Siamese, 639 by Danes, 510 by Swiss, 56 by Americans, 59 by Italians, 20 by Germans, and 15 by Frenchmen.' Reprinted in Steve van Beek, *News From the 90's. Bangkok 1890–1899* (Nonart Bangkok 2018) 26.

[52]Chanhom, *Codification* (n 41) 109.

[53]They were published in the Government Gazette as ประกาศ พระราชทาน อำนาจ พิเศษ (*prakat phraratchathan amnat phiset*), which can be literally translated as 'announcements royally conferring special authority'.

[54]Government Gazette, Book 28 (17 Sep 1911) 206.

[55]Henry N Butler, 'General Incorporation in Nineteenth Century England: Interaction of Common Law and Legislative Processes' (1986) 6 International Review of Law and Economics 169.

[56]The Section would also clarify that the company could have claims and obligations in its own name and be claimant (โจทย์ *chot*) or respondent (จำเลย *chamloei*) in litigation.

[57]See the charters establishing the Phra Phutthabat Tram Company Ltd (1901), Thai Tram Company Ltd (1904), Bank Siam Company Ltd (1906), Bang Nara Company Ltd (1909), Pak Nam Railway Company Ltd (1910), Handicraft Company Ltd (1911), Siam Steamboat Company Ltd (1911), Sam Sen Garage Company Ltd (1911), and the Monton Bank Company Ltd (1913). The charters listed here and in the following footnote were published in the Government Gazette in the respective years.

[58]See, if not otherwise indicated, ss 3 of the charters establishing the Engineering Society of Siam Company (1906, s 5), Mae Nam Motorboat Company Ltd (1907), Transport Company Moto Ltd (1908), Thai Fire Boats Company Ltd (1908), Sri Racha Company Ltd (1908), Chinese-Siamese Bus Boats Company Ltd (1908), Siam Stoneworks Company Ltd (1908), and the Bangkok City Bank Company Ltd (1909).

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Companies Act 1862, in force in England throughout this era,[59] reveals remarkable parallels. The English Act established penalties for eight types of corporate offences,[60] several of which were also part of Siamese company charters.[61] The similarities between the English and Siamese provisions are tangible.[62] They reveal that the concept of strict corporate liability[63] for violations of statutory duties had travelled to Siam. Ordinary intentional crimes could, in turn, only be committed by natural persons, such as directors and agents, who could act with intention and thus be 'guilty'.[64]

English law: More than a gap filler

Beyond its relevance in the business sector, English law also dominated Siamese legal education. The curriculum of the country's first law school, established in 1897 and attached to the Ministry of Justice, was primarily based on English law and, to a lesser extent, the law of the Three Seals Code.[65] The school was run by Raphi Phatthanasak (1874–1920), Prince of Ratchaburi, a son of King Chulalongkorn and a graduate of the University of Oxford. He also authored key textbooks that combined Siamese and English law.

English concepts became part of Siamese legal education, such as the notions of consideration and trust in private law, and the concept of *mens rea* in criminal law.[66] The focus of legal education on English law prevailed for almost four decades, until 1934, when the law school was integrated into the newly founded Thammasat University, where continental European concepts were taught to increasing extents.[67] In judicial practice, eminent criminal court judges, who had graduated from

[59]The English Companies Act 1862 replaced the English *Joint Stock Companies Act* 1856 and was itself replaced by the English *Companies (Consolidation) Act* 1908. It was the relevant law in force in England at the time when the Siamese company charters were created.

[60]These were the failure to forward the memorandum and articles of association to company members (s 19), to keep and notify the register of members (ss 25, 27), to allow inspections of the register of members (s 32), to notify an increase of capital or members (s 34), to have a registered office (s 39), to have and use a correct company name and sign (s 42), to keep and notify the register of directors and managers (s 46), and the failure to notify or forward to members any special resolutions (ss 53, 54).

[61]The offences comprised failures to keep and notify the register of members, to allow inspections of the register of members, to have a registered office, to have and use a correct company name and sign, and to notify or forward to members any special resolutions.

[62]For example, Section 13 of the 1901 Charter of the Phra Phutthabat Tram Company Ltd read:

> The Company must have one regular office. The Company must register with the Ministry of Agriculture where it is located, the district and the city, to facilitate sending letters and government notifications to the hands of the Company. If there is no such office, or if it has not been registered, the company is liable to a daily penalty not exceeding 100 Baht for each day until it is correctly done [author's translation].

Section 39 of the English Companies Act 1862 stipulated on the same matter:

> Every company under this Act shall have a registered office to which all communications and notices may be addressed. If any company under this Act carries on business without having such an office, it shall incur a penalty not exceeding five pounds for every day during which such business is so carried on.

[63]Corporate liability for violations of company law was strict liability. See generally on the historical development of corporate criminal liability in England Celia Wells, *Corporations and Criminal Responsibility* (2nd edn, Oxford University Press 2005) 86–87.

[64]See ss 165–168 of the English Companies Act 1862 for crimes committed in the process of winding up.

[65]Judicial Adviser, 'Justice' (n 49) 191: 'The [examination] papers, in fact, bear a marked resemblance to ordinary bar examination papers in England, turned into Siamese with, it must be said, additional puzzles peculiar to Siamese law.'

[66]Bunchalermwiphat & Tanbuncharoen (n 40) 230–235.

[67]Munin Pongsapan, 'Legal Education at Thammasat University: A Microcosm of the Development of Thai Legal Education', in Andrew Harding, Jiaxiang Hu & Maartje de Visser (eds), *Legal Education in Asia: From Imitation to*

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English universities, conducted trials following English trial procedures.[68] Important legislation dating back to the modernisation era, such as the *Evidence Act* 1894, the *Temporary Criminal Procedural Act* 1896, and the *Civil Procedure Act* 1896, incorporated principles from English law.[69] The appointment of Stewart Black as Siam's first British Judicial Adviser in 1902 marked the beginning of a long line of British lawyers who served the government in various positions, including as Supreme Court judges,[70] along advisers from other countries. The significance of English law in legal education and practice throughout this era can therefore not be overstated.

The rise of continental legal concepts and the challenge for corporate crime

With the recruitment of Gustave Rolin-Jaequemyns in 1892,[71] Siam had taken a decisive turn toward legal reform. In 1894, the Legislative Council was created to assist the King in considering new legislation. The Council's early laws were derived from English models.[72] In criminal law, a special commission drafted revisions of existing rules. However, they were withdrawn in 1897.[73] To nonetheless satisfy foreign demands for reform and thus overcome the treaty-based extraterritorial regime, a thorough legislative overhaul appeared to be a non-negotiable step.[74] The Penal Code 1908 became the first codified law of this era.[75]

The Code was drafted in English and translated into Thai. The two drafting phases illustrate the growing influence of continental European legal advisers. The first drafting commission (1898–1901) still largely adopted elements from the British-made Indian *Penal Code* 1860 and, to a lesser extent, from the Japanese and Italian codes. The second commission (1904–1908), however, switched to use mainly continental codes as sources,[76] which has been explained with reference to the drafters' personal backgrounds.[77] The process also reflected King Chulalongkorn's increasing preference for systematic civil law style codification, which he considered similar to the Three Seals Code.[78] For the local practitioners, who were used to English concepts and procedures, however, 'the continental system was alien.'[79]

Innovation (Brill Nijhoff 2018) 299, 301–302. Thammasat University's initial name was University of Moral and Political Sciences.

[68]Petchsiri (n 13) 144; Jottrand (n 45) 24 and 27.

[69]Chanhom, *Codification* (n 41) 116; Judicial Adviser, 'Justice' (n 49) 187–188.

[70]Reekie & Reekie, 'British Judges' (n 11) 107. Black, however, also highlighted the limits of foreign laws particularly in criminal law: 'In civil cases where the law is silent new paths can always be struck out, but in criminal cases this is not quite so feasible. The importation of brandnew [sic] codes would doubtless make the work of the judges easier, but the advantages of working on a system known to the people for centuries are obvious.' See Judicial Adviser, 'Justice' (n 49) 189.

[71]See Walter EJ Tips, *Gustave Rolin-Jaequemyns and the Making of Modern Siam: The Diaries and Letters of King Chulalongkorn's General Adviser* (White Lotus Press 1996) 1.

[72]The *Royal Decree on Rape* 1899, the *Royal Decree on Insult* 1899, and the *Cheating Act* 1900. See Chanhom, *Codification* (n 41) 122.

[73]ibid 117.

[74]See, for instance, the *Japanese-Siamese Protocol* of 25 Feb 1898, which stipulated the continuation of Japanese consular jurisdiction 'until a Criminal Code, a Code of Criminal Procedure, a Civil Code, a Code of Civil Procedure and a law of Constitution of the Courts of Justice come into force'; as cited in Chanhom, *Codification* (n 41) 120.

[75]Government Gazette, Book 25, Special Issue 206 (1 Jun 1908).

[76]According to Stewart Black, the Siamese government's Judicial Adviser, the Italian, French, Indian and Japanese Codes were particularly influential. See Siam Society, Ordinary General Meeting, 2 Jul 1908, 'Discussion on Dr. Masao's Paper' (1908) 5(2) Journal of the Siam Society 15, 16. See also Bunchalermwiphat & Tanbuncharoen (n 40) 249–250: French, German, Italian, Dutch Codes, as well as the criminal laws of Hungary, Egypt and Japan.

[77]The second drafting commission was chaired by Georges Padoux from France. The other members were WAG Tilleke, the acting Attorney General who had immigrated from Sri Lanka, Phra Athakarn Prasidhi, a judge in the International Court, and Luang Sakon Satayatorn, a judge in the Civil Court.

[78]Chanhom, *Codification* (n 41) 164 and 178. Interestingly, his son and Minister of Justice, Prince Raphi, opposed codification because of the time and money consumed by it. He was thus not involved in the second drafting period, see ibid 177–179 and 182.

[79]Petchsiri (n 13) 145.

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The drafts of both phases focused exclusively on the criminal liability of natural persons, although the Indian Penal Code 1860, influential mainly during the first drafting phase, applied to natural and legal persons alike.[80] The focus on human beings reflected both traditional Siamese law as well as the continental criminal law doctrine of the time.[81] Consequently, the legal situation began to change: Siam's codified law was on a continental-law trajectory that still generally rejected corporate crimes, while company law, including corporate sanctions, largely remained in English-law territory.

No irritation yet: The consolidation of strict vicarious liability

Although first drafts of a company law circulated since 1900,[82] the *Act on Partnerships and Companies* was promulgated only in 1911. The Act recognised the two types of legal persons and introduced incorporation by registration. The law on corporate sanctions, however, did not substantially change. The corporate penalties from the now-obsolete royal charters were incorporated into the Act.[83] Consistent with their prior quasi-criminal status, they prescribed strict vicarious liability.

After all, the 1911 Act was just an interlude before the promulgation of the *Civil and Commercial Code* (CCC) in 1925, which incorporated large parts of the Act. Only the penalty provisions had to go elsewhere. They were added to the Penal Code and, together with some additional offences, formed the second part's eleventh chapter.[84] The newly added Sections were, technically, covered by the Code's general part that demanded proof of intention (เจตนา *jetana*) for every crime unless stipulated otherwise.[85] It is doubtful, though, that the drafters intended this consequence. Switching strict liability offences into fault-based corporate crimes would have been a doctrinal leap. An influential contemporary textbook, in use in the Ministry of Justice law school, also rejected such possibility.[86] The inclusion of specific corporate offences in the amended Penal Code did therefore not result in a switch to fault-based liability. Rather, corporate liability remained limited to certain strict vicarious liability offences.

The situation resembled earlier steps in English law, where corporate crime had grown out of vicarious tort liability.[87] Siamese criminal and tort law thus converged with regard to their

[80]Indian Penal Code 1860, s 11: 'The word 'person' includes any Company or Association, or body of persons, whether incorporated or not.' See Walter Morgan & Arthur George MacPherson, *Indian Penal Code (Act XLV. Of 1860) With Notes* (GC Hay & Company 1863) 16.

[81]In accordance with the continental spirit, the drafters also aimed to limit judicial discretion as they felt that this 'would be safer for the Siamese Judge and for the public.' This was mainly achieved through the stipulation of minimum and maximum punishments, following the model of the French Penal Code. See Tokichi Masao, 'The New Penal Code of Siam' (1908–9) 18(2) Yale Law Journal 85, 93–94.

[82]Tips, *Gustave Rolin-Jaequemyns* (n 71) 278–279.

[83]In pt 6, โทษานุโทษ (*thosanuthot*), which can be translated as 'Major and Minor Offences'. Specifically, companies were liable for the failures to properly use the term 'Limited' (s 281), to keep a record of shareholders (s 282), to officially register certain changes within the prescribed deadlines (s 283), to submit certain documents, to officially register shareholders, and to stipulate the company's share assets (s 284), as well as to sell acquired shares by auction according to the applicable rules (s 285).

[84]Government Gazette, Book 42, 233 (21 Dec 1925); ss 281–285 of the 1911 Act became ss 347–351 of the Penal Code, with a few changes in the wording. The failure to register a company office, omitted in the 1911 Act, was added as a corporate crime in s 352 of the Code.

[85]1908 Penal Code, s 43(1). While the petty offences (ความผิดลหุโทษ *kwaamphit lohuthot*) of the tenth chapter were mostly strict liability offences, this concept was not extended to ch 11.

[86]Henri Laurent (เฮนรี โลรัง), คำแนะนำหัวข้อกฎหมายอาญา [*Advice on Criminal Law Issues*] (Sophonphiphatthanakorn Press 1924) 40, who considered that only strict liability offences, such as those in the 1911 Act or those among the Penal Code's petty offences, could be applied to legal persons.

[87]Wells (n 63) 93–99. See also *R v Great North of England Railway Co* [1846] 115 ER 1295, Ex 1846, in which a company was held strictly liable for public nuisance, and *Pearks, Dunston & Tee Ltd v Ward* [1902] 2 KB 1, in which a company was held strictly liable for a statutory offence.

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respective English roots. As Reekie and Reekie argued, the drafters of Siam's Civil and Commercial Code apparently rejected the fault-based conception of vicarious liability found in the civil codes of Japan and Germany – two jurisdictions which are conventionally considered most influential on the CCC. The drafters likely adopted a strict vicarious liability notion in line with English law.[88] By 1925, criminal and tort liability of legal persons were therefore aligned, limited to strict vicarious liability. This was nonetheless a fertile ground from which the Supreme Court pushed for more, again tracing developments in England.

Driving irritation: The Supreme Court takes the lead on fault-based corporate crimes

Following the 1925 amendment of the Penal Code, the Supreme Court's jurisprudence took important steps to extend the scope of corporate criminal liability. Most noteworthy is the 1930 Supreme Court decision No 265/2473. It dealt with one of several defamation cases against the English-language newspaper Siam Free Press. The defendant newspaper truthfully reported that the plaintiffs had confessed to the police the misappropriation of gold jewellery. The first instance court, the appeals court, and the Supreme Court considered this 'bad news' defamatory as no public interest exemption applied.[89] In addition, the Supreme Court affirmed the appeals court's finding according to which both the editor and the Siam Free Press Company Ltd should be held criminally liable.

In short, the Supreme Court, without acknowledging it, introduced two major innovations:

1. A legal person was held criminally liable for an intentional crime (defamation) rather than for a strict liability crime.
2. A general offence (defamation) of the Penal Code, which hitherto was understood to apply to natural persons only, was the basis to punish a legal person.

In an apparent attempt to justify this expansion, the Court cited Section 33 of the *Magazine, Document and Newspaper Act BE 2479* (1927), which had been enacted three years before. According to this provision, the chief editor and the owner of a newspaper were to be held jointly, ie, vicariously, liable for the publication of criminal content. In addition, the Court referred to Sections 347 to 353 of the Penal Code, which had been added in 1925. This latter set of sections, however, merely contained specific crimes related to certain aspects of managing companies, while saying nothing about defamation.

The Supreme Court seemingly advocated a view according to which the Penal Code amendment had injected a more general principle into Thai criminal law: that legal persons could be held criminally liable even absent any explicit provision to this effect. The 'reading together' of the different sources led the judges to the conviction that the right result could only be the newspaper's corporate liability for defamation. This finding, however, expanded the grounds of vicarious liability from mere strict liability to liability for fault, since punishment for defamation required the proof of intention.

In coming to this conclusion, the Supreme Court ignored Section 25 of the *Magazine, Document and Newspaper Act 2479* that, in fact, limited liability to natural persons only. This provision said that where the owner of a newspaper was a partnership or a limited company, only its manager or director could be held vicariously liable, but not the legal person. The Court thus reached its progressive result in disregard of explicit statutory limitations, but seemingly with a strong determination to drive the development of Thai criminal law. The judges confirmed their finding in a subsequent case.[90]

[88]Reekie & Reekie, 'The Long Reach of English Law' (n 11) 224–225.

[89]Criminal defamation in Thai law can be committed by both false and true reports, making malicious intent particularly relevant. See David Streckfuss, *Truth on Trial in Thailand: Defamation, Treason, and Lèse-Majesté* (Routledge 2011) 139–156.

[90]Supreme Court judgment No 952/2474 (1931), another defamation case against the Siam Free Press.

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Written law versus judge-made law: Parliament's rebuke and the Supreme Court's revenge

A survey of cases of the following years, however, indicates that prosecutorial and judicial practice went back to holding companies criminally liable under strict liability offences. These were cases dealing with violations of specific legislation, such as the *Mining Act BE 2461* (1918),[91] the *Act on the Control of Consumer Goods and Consumption and Other Items in Times of Crisis BE 2488* (1945),[92] and the *Exploration and Prohibition of Rice Detention Act BE 2489* (1946).[93]

In 1956, the new *Criminal Code BE 2499* was promulgated[94] to bring Thai criminal law into conformity with legal developments that had occurred in the half century since the first Penal Code's promulgation. However, as Chanhom noted, 'most provisions in the Penal Code were transferred to the Criminal Code with minimal revisions.'[95] Importantly, the drafters restored the Code's purity regarding its applicability to natural persons. All provisions on the criminal liability of companies and partnerships were taken out and moved into the new *Act Prescribing Offences Related to Registered Partnerships, Limited Partnerships, Limited Companies, Associations and Foundations BE 2499* (1956) (referred to hereinafter as the Corporate Offences Act).

Moreover, the legislators refused to pick up the preceding judicial steps that had extended corporate criminal liability to general crimes. Quite to the contrary, the Council of State rejected to include a draft provision in the Corporate Offences Act that would have declared all offences 'in this Act or other laws' applicable to legal persons.[96] The Council's Secretary-General, Yut Saeng-uthai,[97] argued that, if at all, this issue should be addressed in the draft Criminal Code. That, however, would not really be necessary because each specific offence in statutory legislation could be interpreted as to whether or not legal persons could be punished.[98] In explaining the Council's stance to members of parliament, Yut also referred to the Siam Free Press case:

> There has once been a Supreme Court judgment where a company that owned a newspaper was also held criminally liable for defamation. The committee believes that this should be a matter on which parliament should enact specific laws; or otherwise leave it to the courts to interpret in what cases registered partnerships, limited partnerships or limited companies should be liable under criminal law.[99]

Yut, who had received his doctoral degree in Germany,[100] highlighted the courts' general authority to interpret rather than make laws. His disagreement with the Supreme Court's progressive turn two decades earlier is tangible. In addition, he clearly favoured a statutory piecemeal approach rather than a grand solution in the Criminal Code. Parliament followed his advice, rejected draft Section 3 of the Corporate Offences Act, and purified the Criminal Code from all corporate crime elements.

The Supreme Court's chance for revenge came with a trademark imitation case in 1963.[101] The first instance and the appeals court had found the managing partner of an ordinary partnership

[91]Supreme Court judgment No 185/2489 (1946).

[92]Supreme Court judgment No 1144/2493 (1950).

[93]Supreme Court judgment No 219/2500 (1957).

[94]Government Gazette, Book 73, pt 95 (15 Nov 1956), Special Issue, 12.

[95]Chanhom, *Codification* (n 41) 253.

[96]See draft s 3 of the Corporate Offences Act as cited in Likasitwatanakul, *Corporate Criminal Liability* (n 21) 91.

[97]Yut Saeng-uthai is one of the most cited authorities in Thai law. He served as the Secretary-General of the Council of State, published almost three dozen textbooks, and taught as an adjunct professor at Thammasat University and Chulalongkorn University.

[98]Report of Meetings of the House of Representatives, Ordinary Session No. 17/2499 (1956), 36, as cited in Centre for Research and Consultancy, *Comparative Study* (n 17) 142–143.

[99]ibid (author's translation).

[100]He graduated with a Doctor of Law degree from Friedrich Wilhelm University Berlin in 1936. The university's name changed to Humboldt University Berlin in 1949.

[101]Supreme Court (General Meeting) judgment No 787-788/2506 (1963).

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criminally liable under the relevant sections of the 1956 Criminal Code.[102] The trial judges rejected punishment of the legal person as they considered legal persons unable to act intentionally. A general meeting of the Supreme Court, however, overruled the acquittal on revision.[103] The highest court argued that the physical and mental elements of a general crime could be attributed to a legal person by its representatives. Ironically, the judges supported their reasoning with reference to a provision of the Civil and Commercial Code, according to which, for matters of private law, the purpose of a juristic person is expressed by its representatives.[104]

The decision's implication was not only a late affirmation of the 1930 Siam Free Press ruling that general ('whoever') provisions could be applied to both natural and legal persons, but more importantly, the Court attempted a doctrinal explanation which, however, rejected the vicarious liability approach. Scholars commented that the Supreme Court had adopted something like the English identification (or 'alter ego') doctrine, according to which the will of a company was identical with the will of its directing mind, which is the mind of its directors.[105]

The ruling duped parliament: Beyond reaffirming the Court's earlier stance on the applicability of general criminal law to legal persons, the judges doubled down with an effort to entrench their solution in legal doctrine. The palpable aim was to rid themselves of the shackles that parliament had attached. The 1963 decision indeed laid the legal groundwork that would support decades of jurisprudence.[106] But of course, a law-making court sat uncomfortably with the country's shift to civil law methodology.

The Supreme Court's preferences exhibit astonishing parallels to prior developments in England. To recapitulate, the Thai Court's jurisprudence on corporate criminal liability took two defining steps:

- 1930: The Siam Free Press case, expanding vicarious liability from strict to fault-based crimes and from specific statutory offences to general crimes of the Penal Code;
- 1963: The trademark imitation case, introducing the attribution of fault from representatives to the company for general ('whoever') crimes.

The decisions mirrored earlier steps in England:

- 1917: In *Mousell Brothers Ltd v London and North Western Railway Co*, a warehouse worker deliberately omitted to provide full information on goods transported by railway, resulting in the violation of toll payment duties under the English *Railway Clauses Consolidation Act* 1845 (UK). In its decision, the English High Court moved beyond strict liability when holding that Mousell Brothers was vicariously liable for the intentional crime committed by its employee.[107]
- 1944: In a trio of fraud cases, the English High Court's King's Bench division and the English Court of Appeal held that companies could be criminally liable for intentional statutory and common law offences, arguing that a responsible person's knowledge and intention must be imputed to the company. The cases involved corporate liability for a transport manager's

[102]ss 274, 275.

[103]General Meetings (ประชุมใหญ่ *prachum yai*) of the Supreme Court can be called by the President of the Court if a case involves important legal questions or if it is a case prescribed by law. The author's survey of prior General Meeting decisions shows that it was not until the 1963 trademark case that this body addressed a doctrinal question related to corporate criminal liability. See Praphat Uaychai (ประภาศน์ อวยชัย), ข้อโต้แย้งจากที่ประชุมใหญ่ศาลฎีกา หรือฎีกา 100 ปี ตามกฎหมายอาญา เล่ม 1–4 [*Arguments from Supreme Court General Meetings, or 100 Years of the Supreme Court, in Criminal Law, Vol. 1–4*] (Council on Social Welfare of Thailand under Royal Patronage 1994–1998).

[104]Civil and Commercial Code, s 75 at the time of the decision, s 70(2) in the Code's current version.

[105]See ibid; n 9.

[106]See Assawaraphanich (n 9) 61–62.

[107]*Mousell Brothers Ltd v London and North Western Railway Co* [1917] 2 KB 836, 846 (Atkin J): 'No *mens rea* being necessary to make the principal liable, a corporation is in exactly the same position as a principal who is not a corporation.'

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submission of falsified records to fraudulently acquire petrol coupons,[108] a conviction for common law conspiracy to defraud by a managing director and a registered owner,[109] and a company's fraud liability due to false tax returns made by a branch and a sales manager with the intent to deceive.[110]

As early as in 1917, English courts were thus prepared to punish legal persons not only for strict liability crimes but also for intentional offences, based on the concept of vicarious liability, which had been carried over from tort law.[111] The Supreme Court of Siam adopted this view thirteen years later in the Siam Free Press case.

The English courts then took another step and adopted an attribution model for general offences that allowed the punishment of legal persons for the fault of their representatives. The three cases are conventionally regarded as the historical starting points of the identification doctrine in English criminal law.[112] Nineteen years later, the Thai Supreme Court followed suit in the trademark imitation case, adding a doctrinal reference to the Civil and Commercial Code.

Grooming the irritant, surpassing the motherland

The 1917 and 1944 English rulings were treated with caution in their home country. The House of Lords described the application of vicarious liability to *mens rea* crimes as a 'long-standing anomaly'.[113] This hesitation regarding liability for intentional offences also affected the identification doctrine's development, which 'has been allowed only an extremely restricted ambit'[114] in English judicial practice. Despite the House of Lords' 1971 decision in the false advertisement case *Tesco v Nattrass*, which vindicated the law's bifurcation into vicarious and identification liability,[115] English courts have been more inclined to interpret statutory law to impose strict or vicarious liability on corporations.[116]

In contrast, hesitation turned out to be only temporary in Thailand. As mentioned, the 1930 Siam Free Press ruling was an 'anomaly' that was not reflected in subsequent prosecutorial and judicial practice, and in 1956, the Council of State even rebuked the Supreme Court somewhat belatedly. It was not until 1963 that the Court struck back by importing the identification doctrine into the trademark imitation case. From there, however, a long list of cases[117] entrenched the doctrine, despite repeated scholarly criticism.[118] It became a firm, though unwritten, part of criminal law that resulted in the punishment of companies and partnerships for a large variety of Criminal Code offences. Over the course of the last decade (2010–2020) alone, these included cases involving false incrimination,[119] providing false evidence,[120] forgery of documents,[121] unlawful use of

[108] *Director of Public Prosecutions v Kent and Sussex Contractors Ltd* [1944] 1 All ER 119.

[109] *R v ICR Haulage Ltd* (1944) 30 C App Rep 31.

[110] *Moore v I Bresler Ltd* [1944] 2 All ER 515; the managers also intended to defraud the company itself.

[111] Wells (n 63) 90–91, 99.

[112] ibid 94–96; in tort law, the doctrine had already been established in *Lennards Carrying Co Ltd v Asiatic Petroleum Ltd* [1915] AC 705 HL. See also Simon Parsons, 'The Doctrine of Identification, Causation and Corporate Liability for Manslaughter' (2003) 67(1) Journal of Criminal Law 69.

[113] *Vane v Yiannopoulos* [1965] AC 486.

[114] Wells (n 63) 99.

[115] *Tesco Supermarkets Ltd v Nattrass* [1971] 2 WLR 1166, 1196, where the doctrine has, perhaps most famously, been set out by Lord Pearson: 'there are some officers of a company who may for some purposes be identified with it, as being or having its directing mind and will, its centre or ego, and its brains.'

[116] Parsons, 'Doctrine of Identification' (n 112) 73.

[117] See, for example, Supreme Court judgments Nos 1669/2506 (1963), 54/2507 (1964), 584/2508 (1965), 981/2508 (1965), 448/2513 (1970), 63/2517 (1974), 378-379/2517 (1974), 97/2518 (1975), 1586/2519 (1976).

[118] See ibid; n 9 and n 27.

[119] Supreme Court judgments Nos 14508/2557 (2014), 2255/2560 (2017).

[120] Supreme Court judgments Nos 7250/2554 (2011), 10452/2557 (2014).

[121] Supreme Court judgments Nos 13740/2553 (2010), 7455/2554 (2011), 19144/2555 (2012), 833/2561 (2018).

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names or trademarks,[122] defamation,[123] theft,[124] fraud,[125] defrauding creditors,[126] and trespass[127] – quite the opposite of the 'extremely restricted ambit' that English courts granted it. In addition, the Court extended its approach to negligent offences, holding companies liable for manslaughter where managing directors had violated their duties of care.[128]

As a result, the Supreme Court not only prolonged but intensified the English legacy as it continued to replicate developments in corporate crime doctrine. This amounted to judge-made law in a legal system that was supposedly being programmed on written laws. In this sense, and with reference to Teubner, the Court irritated one of Thai law's 'binding arrangements.' In the process, 'the external rule's meaning [was] reconstructed', offering much wider application to the identification doctrine than it received in England itself; and the 'internal context [underwent] fundamental change'[129] in the sense that Thai criminal law expanded beyond the written law, and this expansion became deeply entrenched over the course of the next 60 years.

Conclusion and outlook

Why did the Thai Supreme Court become a driver of legal irritation? The characteristically brief judgments allow us only to speculate about its motivation. References to public policy or the need to fill gaps in the law have remained conspicuously absent from its jurisprudence. But the judges apparently felt the need to punish companies and partnerships for intentional crimes committed by their personnel and looked for ways to do so.

Of course, legal transfers to enhance domestic law may occur for a variety of reasons. The will to improve the country's economic performance and attract foreign business and investment is often an important factor,[130] but less so if the transfer results in expanded corporate criminal liability. Sacco has argued for 'imposition and prestige' as the two fundamental causes of imitation.[131] With regard to legal transplants by the judiciary, Cuniberti argued that judges may also want to increase their own reputation in relevant circles.[132] Watson highlighted, in particular, the enormous influence of legal education on legal attitudes.[133]

In the case of Siam, the initial entry of English law was certainly catalysed by Siam's semi-colonial status and the Western pressure to 'modernise' during the 19th and early 20th centuries. By the 1930s, however, all major codes had entered into force, and no foreign government was forcing the continued adoption of English corporate crime doctrine. The Supreme Court's decision to

[122]Supreme Court judgments Nos 5340/2553 (2010), 8151/2553 (2010), 2451/2555 (2012), 3129/2555 (2012), 12268/2558 (2015), 13583–4/2558 (2015), 8995/2560 (2017).

[123]Supreme Court judgments Nos 8511/2554 (2011), 9435/2554 (2011), 14169/2557 (2014), 3493/2562 (2019).

[124]Supreme Court judgments Nos 8403/2554 (2011), 12328/2558 (2015).

[125]Supreme Court judgments Nos 11089/2557 (2014), 11732/2557 (2014), 7677/2561 (2018).

[126]Supreme Court judgments Nos 4196/2558 (2015), 10570/2558 (2015).

[127]Supreme Court judgment No 6006/2561 (2018).

[128]Supreme Court judgment No 3446/2537 (1994) dealt with the criminal consequences of a massive liquid gas explosion, and judgment No 8565–8566/2558 (2015) followed a deadly fire in a Bangkok night club. Again, parallels may be drawn to an earlier English case, *R v P & O European Ferries (Dover) Ltd* [1991] 93 Cr App R 72, that had dealt with the sinking of the MS *Herald of Free Enterprise*. The English court found corporate manslaughter generally conceivable but rejected the shipping company's criminal liability in the case at hand.

[129]Teubner (n 15) 12.

[130]See, for instance, Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, 'The Transplant Effect' (2003) 51(1) American Journal of Comparative Law 163, 164.

[131]Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)' (1991) 39(2) American Journal of Comparative Law 343, 398–400.

[132]Gilles Cuniberti, 'Enhancing Judicial Reputation through Legal Transplants: Estoppel Travels to France' (2012) 60(2) American Journal of Comparative Law 383, 397 et seq, with reference to Nuno Garoupa & Tom Ginsburg, 'Reputation, Information and the Organization of the Judiciary' (2009) 4(2) Journal of Comparative Law 228.

[133]Alan Watson, 'Aspects of Reception of Law' (1996) 44(2) American Journal of Comparative Law 335, 350.

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drive legal irritation was its own choice. The prestige of English law must have been a significant factor in this respect. It had grown over decades of legal teaching and practice, and it set the Court on a self-confident, rule-making path, which may also have raised its profile among fellow judges and other practitioners. Within Miller's typology of legal transplants,[134] the case of corporate criminal liability in Thailand may thus be very roughly categorised as a legitimacy-generating and cost-saving transplant, rather than an externally dictated or 'entrepreneurial' one. Thai academic circles nonetheless responded with repeated criticism and renewed rejection. In their eyes, the Court must have been out of step with the times. Many of them took the legal constraints of *nullum crimen sine lege* much more seriously, whereas the Court continued its journey beyond the written law.

The present study also raises questions about the role of precedents in Thai law. While Vietnamese lawmakers have recently opted to introduce the notion of binding precedents by way of a 'mixed legal transplant',[135] no similar developments have been taking place in Thailand, where court decisions are not a source of law. Looking back at Supreme Court cases from the 1920s and 30s, however, Reekie and Reekie identified several judgments in which the respective judges used the common law style of reasoning and compared the material facts of a case with those of cited precedents, even including scattered references to English cases.[136] Over time, the Court developed its characteristic style of briefly citing prior decisions as a point of reference without detailed discussion. Whether Thai judges treat prior cases as sources of law or merely as orientations for interpretation remains unclear. But the Supreme Court's jurisprudence on intentional corporate offences must be classified as rulemaking, going far beyond mere interpretation. Further study may be required to prove if this is illustrative of a general ambition or self-perception as a driver of legal development.

The Supreme Court's precise motivation for adopting and entrenching the identification model as a firm part of Thai corporate crime doctrine thus remains unknown. But the development can be explained with reference to historical path-dependence. The critical juncture[137] occurred in 19th-century Siam: the introduction of English legal concepts, including the possibility of judicial rulemaking, forged a path for these ideas to take root in Siam. This step could only be partially reversed by subsequent turns to continental ideas, and it rendered the judges, who had been extensively exposed to English law, the drivers of irritation in an unfamiliar civil law environment.

So, what is the future of Thai corporate criminal law? A recent anti-corruption act included comprehensive rules on how to assess the criminal liability of legal persons, including a compliance defence.[138]

[134]Jonathan M Miller, 'A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process' (2003) 51(4) American Journal of Comparative Law 839.

[135]Kien Tran, Nam Ho Pham & Quynh-Anh Lu Nguyen, 'Negotiating Legal Reform through Reception of Law: The Missing Role of Mixed Legal Transplants' (2019) 14 Asian Journal of Comparative Law 175.

[136]Reekie & Reekie, 'British Judges' (n 11) 116–118.

[137]On this notion, see Husa (n 35) 140–141, with reference to Mariana Prado & Michael Trebilcock, 'Path Dependence, Development, and the Dynamics of Institutional Reform' (2009) 59(3) University of Toronto Law Journal 341, 350 et seq.

[138]Act Supplementing the Constitution Regarding the Prevention and Suppression of Corruption B.E. 2561 (2018), s 176 (translation by the Council of State):

> (1) Any person who provides, requests or agrees to provide assets or any other benefit to a State official, a foreign State official or a staff of an international organization in order to persuade them to act, omit to act or delay in acting in his or her duties in an unlawful manner, shall be liable to imprisonment for a term of not exceeding five years or to a fine of not exceeding one hundred thousand baht or to both.
>
> (2) In the case where an offender pursuant to paragraph one is a person who is involved with any juristic person and acts for the benefit of that juristic person where such juristic person does not have appropriate internal control measures to prevent such commission of offence, that juristic person shall be guilty under this section and shall be liable to a fine from one time but not exceeding twice of the injury occurred or benefit received.
>
> (3) A juristic person in the meaning of paragraph 2 is every juristic person which has either been established under

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It was the first time that written criminal law explicitly spelled out the scope of people who trigger a legal person's criminal liability. Interestingly, the drafters opted for a wide vicarious liability model, rejecting identification.[139] Most recently, the government instructed the Council of State to start working on a general legal footing for corporate crimes in the Criminal Code. The responsible committee produced a draft that would effectively supersede the Supreme Court's jurisprudence.[140] The draft's key provision reads:

> A legal person is punishable if its representative or a person authorised to act on behalf of the legal person acts within the objective, according to the powers, and for the benefit of the legal person.[141]

If the draft became law, it would finally reassert parliament's exclusive authority to enact criminal law, while relegating the courts back to legal interpretation. Interestingly, the draft rejects vicarious liability and, rather, opts for an enhanced identification approach. Liability is triggered by a representative, but also by 'a person authorised to act on behalf of the legal person.' This is reminiscent of the model adopted in 1994 in France, which distinguishes between 'organs' and 'representatives'.[142] More importantly, such a provision, if inserted into the Criminal Code, would apply throughout the entire Thai criminal law, unless statutory legislation contains more specific rules. Subject to this caveat, the enhanced identification approach would be applied generally, so that it would also serve as the model for the first and second types of liability offences that have been mentioned earlier, and which have hitherto been treated as vicarious liability offences without an explicit legal basis.

The future of Thai corporate criminal liability may therefore consist of continuation, enhancement, and expansion: English-style identification would not only be continued, but enhanced with supposedly French elements and extended to almost all corporate crimes. Whether the draft will resolve existing irritation or cause new remains to be seen. Either way, the Supreme Court-driven English legacy will remain an important part of Thai corporate criminal law.

Thai law, or which has been established under foreign law and which conducts business in Thailand.

(4) A person involved with the juristic person pursuant to paragraph two shall mean an employee, a representative, an affiliated company or any person who acts for or on behalf of such juristic person, whether they have the power or duties in such matter or not.

[139]The United Nations Convention against Corruption (art 26) leaves the liability model to the legal principles of each state party. Thailand ratified the Convention in 2011.

[140]ร่างฯ ที่ผ่านการพิจารณาของคณะกรรมการพิจารณาปรับปรุงประมวลกฎหมายอาญา, บันทึกหลักการและเหตุผลประกอบร่างพระราชบัญญัติแก้ไขเพิ่มเติมประมวลกฎหมายอาญา [Draft bill that passed the consideration of the Committee to Consider Improving the Criminal Code, Record of principles and reasons for the draft bill amending the Criminal Code] (Office of the Council of State, 2 May 2023) <https://www.krisdika.go.th/th/detail-law-draft-under-consideration-by-the-office-of-the-council-of-state?billCode=414&lawdraftType=between> accessed 31 Aug 2023.

[141]ibid s 59/1(1) (author's translation).

[142]See Pieth & Ivory (n 2) 30: '"organs" being individuals and bodies who act as the corporation under its rules of association in law or in fact and "representatives" being those who have been delegated executive powers within a certain area of corporate operations.' See also Katrin Deckert, 'Corporate Criminal Liability in France', in Mark Pieth & Radha Ivory (eds), *Corporate Criminal Liability: Emergence, Convergence, and Risk* (Springer 2011) 158–161.

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