Clash of Reason: Methodological Conflicts between Law and Economics in Anti-Corruption Perceptions and Practices in Thailand*

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I am delighted to have a chance to deliver the keynote address this morning. As a commissioner who played a part in initiating this conference some time ago, I am very happy to see the realization of that initiative today.

The subject of my address this morning is the methodological conflicts between law and economics in anti-corruption perceptions and practices in Thailand. I hope to share with you some of my thoughts and experiences in my work as an anti-corruption commissioner in the past two and a half years.

As the only academic economist in the National Anti-Corruption Commission (NACC), I knew from the very first day of taking this office that I would face some methodological problems while working with my colleagues at the NACC, many of whom are established legal experts. It is a well-known fact that law and economics are the two most prominent and strongest social science disciplines, and legal and economics scholars often hold their views as sacrosanct when two such professionals come into contact with one another. However, since it is important that the subjects of law and economics form the foundation of any social policy, representatives of these two professions need to understand the basic methods of both subjects.[1]

More than 25 years ago, when I was still at the Faculty of Economics at Thammasat University, I helped set up a special course in the Faculty of Law of the same university; it was called "Economics for Lawyers," which, I think, is still being offered there today. That was my one-way contribution to law students at that time. I did not realize that, 25 years later, I would be forced to learn the basic methods of law in order to do my job properly today.

Of course, I have learned and greatly appreciate the power of law and legal methods in my work at the NACC, and have used my newly acquired legal skills in many corruption cases. However, there are still many methodological conflicts in the work of the NACC that I want to bring out and share with you, so that we can find ways and means to resolve these conflicts and bring about smoother, more effective, and more efficient outcomes of our activities.

At this stage, I can think of five areas of such conflict, which I can briefly explain within the time allotted to me.

1. Corruption vs. Misconduct in Office

The first methodological conflict has to do with the scope of authority of the NACC. As the name implies, we are expected to deal exclusively with all aspects of corruption, that is, its suppression, its prevention, and the promotion of social integrity so that corruption will not take place. However, the laws that currently empower the NACC specify that the Commission take care of both corruption and the misconduct in office of state officials.

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[1] One light-hearted way of telling the difference between lawyers and economists is that lawyers accept what is given and go from there while economists will not go anywhere until they know what is given.

In economics, corruption in the public sector can be defined as the misdeed of any public officials who use their official positions to generate and transfer public benefits for their own private gain. It is true that misconduct in office may or may not involve a corrupt misdeed. If it involves corruption, then the misconduct is within the purview of the authority of the NACC.[2] If not, then this case should be relegated to the State Service Commission or the Administrative Court, freeing the NACC to deal with corruption cases only. The benefit of this approach is that, not only is this a proper division of labor, but it also avoids conflict between the NACC and the State Service Commission and the Administrative Court.[3]

2. Code of Conduct of State Officials vs. Offences of Dereliction of Duty

The second form of conflict concerns the proper status and role of state officials, and how to subject them to various laws when they have committed legal offences. Normally, in the context of public sector economics, state officials would be regarded as those who represent or work on behalf of the state. Their prescribed behavior, rights and duties must distinguish them from ordinary citizens. Their behavior can be quite extensive and wide-ranging depending on how the state (which is their employer) would like these state officials to behave in their jobs. A code of conduct can be established based upon mutual agreement between the state and the state officials, and once this code of conduct is violated, those state officials found guilty must be punished or dealt with as having committed a legal offence while in office.[4]

However, the ways in which a state official can be found by the NACC to have committed misconduct in office currently are quite limited indeed. First, the state official must have been given a specific duty to perform; he or she can be assumed to have committed the offence of malfeasance or misconduct in office only when that official failed to perform his or her duty properly. Take for example the case of a secretary of a director-general of a department: she takes a bribe from someone on the promise that she would ask her boss (the director-general) to give that person a job in the department. When the unlucky person who had paid his money to the secretary, without getting the promised job, lodges a complaint with the NACC against this secretary, NACC legal experts would not accept his complaint on the legal ground that the secretary had no direct duty of appointing anyone to a job in the department, so she could not be found guilty of the offence of malfeasance or misconduct in office. However, she could be sued as a private individual for fraud and might be dealt with by a disciplinary committee, but she could not be charged with a criminal offense while in office.

To a social scientist who is not trained in law, this would seem very strange, if not rediculous. How can we promote good governance in the public sector when the existing laws narrowly differentiate between the overall

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[2] Most of the time this type of corrupt misdeed or misconduct is also construed as a criminal offence.

[3] Some NACC Commissioners have argued that a total separation of authority is not possible because misconduct in office, although it involves administrative procedures, cannot be construed as a corrupt practices as defined earlier. Such misconduct may have "damaged" (or injured) someone, which could be regarded as a criminal offence which must be handled by such authority as the NACC, not the State Service Commission or the Administrative Court. On this issue, I have often felt increasingly uncomfortable that we have to build prima facie cases against many state officials both on criminal as well as disciplinary charges despite the fact that the alleged wrongdoings are clearly not corruption cases, but simply administrative cases. I wish that the law would be changed so that the NACC would only take care of corruption cases.

[4] Legal terminology for this offence is malfeasance, which refers to an individual intentionally performing an act that is illegal, whereas misfeasance is the unlawful performance of a lawful act, and non-feasance is an intentional failure to act.

status or position of a state official and what specific duty he or she is carrying out at a particular time, and when a criminal malfeasance charge would be filed against such an official: only when he or she wrongly carries out this exact duty, or fails to carry it out? The perplexing rule is that, if the wrongdoing is outside the realm of the person's duty, then no criminal malfeasance charge can be applied. [5]

3. Legal Absolutism vs. Economic Optimality

The third form of conflict is derived from a classic case of negative externalities in the textbook of public economics. Take the case of a polluting factory which emptied its wastewater into a river, resulting in the death of fish in the river, and adversely affecting the livelihood of fishermen downriver. A simple legal solution to this problem would be to close the factory as a punishment for polluting the river and hurting the fishermen economically. However, in economics it can be shown that such a legal action can be worse than allowing that factory to continue operating (and continuing to pollute the river). This is possible if the closure of the factory would result in greater loss to society (if people could not obtain the products that would have been produced by the factory) than loss to the fishermen owing to the death of the fish in the river. An economic solution to this problem may call for not total closure of the factory, but a reduction in its level of production which would lead to a lowering of the extent of pollution and an optimal outcome for both sides.

[5] In Thailand, we have a court verdict which illustrates this point: a policeman was absolved from an offence of misconduct in office when he was caught playing an illegal poker game while on duty. The Court said that, although he has a duty to arrest illegal gamblers, when he became an illegal gambler himself he was not causing injury to anyone or to the Police Department. So he was not charged with the criminal offence of dereliction of duty. Or take the case of a policeman who had the duty to guard against the escape of a female prisoner. He was not found to have committed the offence of malfeasance in office, although he had raped her while she was in his custody, because the prisoner did not escape.

But how can "legal absolutism" and "economic optimality" be reconciled? Legal authorities may insist that, if a law is broken the culprit or perpetrator must be punished, whereas economists may say: No, we should not close the factory, but indeed should help or subsidize the factory with physical equipment or technical know-how in order to reduce the pollution as long as the costs of doing so are still less than the overall benefits provided by the continued outputs of that factory and the continued catch of the fish by the fishermen downriver.

In real life, we may have seen many cases of conflict between legal absolutism and economic optimality. A state official may be found guilty of a certain form of misconduct, which is neither criminal nor a corrupt practice, but simply a disciplinary infraction. The existing law can be so rigid that there can only be one disciplinary punishment for such an infraction: expulsion from state service. The economic loss from such punishment can be enormous if that able official is deprived of the opportunity to continue to work for the good of the state and society.

4. Damage to Anyone vs. Benefits for All

The fourth type of conflict is derived from the implementation and enforcement of Section 157 of the Penal Code of Thailand. This is the famous provision in Thailand's Penal Code that has become the trade-mark penalty of our anti-corruption activities. Section 157 states that:

> *Any person who is a competent official who conducts or refrains from conducting his duty properly so as to cause damage to any person, or (who) conducts or refrains from conducting his duty corruptly, will be subject to imprisonment from one to ten years, or (a) fine from 2,000 to 20,000 baht, or both imprisonment and fine.*

Most corruption cases that the NACC Commissioners built have relied on this

Section for the requisite charge. Many economists would see that this famous legal provision has a lot of loopholes. First, it is not only corruption offences that are included under this Section, but also malfeasance or misconduct in office that causes someone damage. As mentioned previously, this has created ambivalence concerning the proper role of the NACC. Second, an act by an official that causes anyone damage would be sufficient to incur this penalty if it could be proven that such act was intentional. In economics, we know that the same coin always has two sides. An action relating to something can always be seen as a non-action with regard to something else. The trade-off or opportunity cost concept, which is the life-line of economics, is often missing in a legal provision such as this. For example, a decision to privatize a state-owned enterprise may hurt or damage the interests of a certain group of people, even though it benefits a larger number of the population in the long run. Legally speaking, such a privatization could be deemed as violating Section 157 of the Penal Code, and the state official who is responsible for this act may face criminal punishment according to Section 157. In actual fact however the damage caused by not privatizing the enterprise may be even higher. Can this concept of economic trade-off be used in the correct interpretation of Section 157?

To be fair, economic interpretation by economists on these issues may be unacceptable to some legal scholars. Take for example the case of a government decision to spend public money in any way the government likes, or to follow certain policies that it sees fit, on the presumption that it is the prerogative of the government, or within the democratic rights of the government (since it has the consent of the majority of the people), to do anything while it is in power. Imagine a government continuing to implement an economic policy that could be proven beyond reasonable doubt to be wasteful, corrupt, or inefficient (such as the current rice mortgage policy of the government or the student loan program of the government). In such a situation, should the legal authorities have the right to question the propriety or legality of such policies? Should the anti-corruption authority consider this type of activity as a corrupt practice, and try to haul the responsible minister or even the entire Cabinet into the court of law?

5.Disciplinary Action vs. Violation of Employment Contract and Human Rights

Finally, the fifth form of conflict can be seen in the type of legal punishment meted out by the government against state officials. Currently, only two categories of disciplinary infraction can be charged against public officials in this country: ordinary infraction and severe infraction. There is nothing in between. If a person is found to have committed a severe disciplinary infraction, he or she would have to be either expelled or removed from the civil service. There is no other way to punish him or her.

What is even more startling is that, if one is expelled from the civil service, he or she will lose all the pension that person was supposed to have received after having worked for a certain length of time with the government. It is this legal condition of forfeiting the right to receive a pension that an economist like myself cannot accept. To me, the right to receive a pension after long years of service with the government is based on an employment contract into which the state official had entered with the government from the beginning of his or her service. The application of any rule that would involve reneging on this contract with the employee is equivalent to breaking the law. Even if the government argues that it set this as an employment condition with the official in question from the beginning of his or her work, it could still be challenged that this rule violates basic human rights as stipulated in the Universal Declaration of Human Rights. Thus, it is illegal.

These are some of the methodological conflicts between law and economics that I have encountered in the last few years of my work. Owing to my limited knowledge of law, I cannot

claim that what I have said represents any definitive situation or understanding concerning anti-corruption perceptions and practices in Thailand. However, I hope to spend more time on this work so that I could suggest ways and means that legal experts and economists could utilize to work together more fruitfully and more harmoniously in order to bring about better results in our anti-corruption efforts in Thailand.

Thank you very much for your kind attention.