

Commentary

The Supreme Court Jurisprudence on Corporate Criminal Liability 2010–2020

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Despite over a century of development, the Thai law on corporate criminal liability remains doctrinally unfinished. This Commentary looks at the past decade of relevant Supreme Court jurisprudence. It traces lasting trends and highlights questions that still require resolution.

I. DEVELOPMENT OF CORPORATE CRIMINAL LIABILITY IN THAI LAW¹

The beginnings of corporate criminal liability in Thai law date back to the year 1911 when the Act on Partnerships and Companies² was enacted. Violations of its rules could result in criminal liability also of the partnerships and companies, i.e., the legal persons, themselves. Thailand's first Penal Code of 1908,³ however, did not contain any rules on corporate crime. This changed when the aforementioned provisions from the Act on Partnerships and Companies were added to the Code (Sections 341-70) in

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¹ For a concise overview of the development both in legal scholarship and in Supreme Court jurisprudence, see ศูนย์วิจัยและให้คำปรึกษา คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์, การศึกษาเปรียบเทียบความรับผิดชอบทางอาญาของนิติบุคคลและผู้แทนนิติบุคคลของประเทศไทยกับประเทศต่างๆ ในประชาคมอาเซียน (สำนักงานอัยการพิเศษฝ่ายสถาบันกฎหมายอาญา สำนักงานวิชาการ สำนักงานอัยการสูงสุด 2558) [Centre for Research and Consultancy, Faculty of Law, Thammasat University, *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)] (Thai) 139–67.

² พระราชบัญญัติลักษณะเข้าหุ้นส่วนและบริษัท ร.ศ. 130 (= พ.ศ. 2448).

³ กฎหมายลักษณะอาญา ร.ศ. 127 (= พ.ศ. 2451).

1925. The current Criminal Code of 1956⁴ does not explicitly include corporate criminal liability. Rather, relevant special offences are dispersed across specific Acts. In 1963, however, the Thai Supreme Court extended the applicability of intentional crimes within the Criminal Code to legal persons in its seminal and much criticised Decision No. 787–788/2506. Three decades later, the Court declared the Criminal Code applicable to legal persons also regarding negligent crimes in Decision No. 3446/2537 (1994). Ever since, the Court’s jurisprudence has apparently consolidated. Scholarly discussions have continued, of course, and most recent Supreme Court cases from the years 2010 (B.E. 2553) to 2020 (B.E. 2563) reveal serious doctrinal uncertainties.

II. ATTRIBUTION OF CRIMINAL LIABILITY AND THE ROLE OF REPRESENTATIVES

As legal persons can only act through natural persons, the model of criminal attribution is of utmost legal interest: Whose action or omission triggers the legal person’s liability, and whose intention or negligence is relevant? To date, it has remained unclear which criminalisation model⁵ Thai criminal law pursues. With a few notable exceptions,⁶ the statutory law is silent on this issue.

The landmark Supreme Court Decision No. 787–788/2506 (1963) tried to provide some clarity at least for corporate criminal liability under general “Whoever” (ผู้ใด; *phudai*) provisions criminalising intentional wrongful behaviour, such as Section 274 of the Criminal Code in the case at hand. The Supreme Court held that Section 70(2) of the Civil and Commercial Code (CCC),⁷ according to which the purpose of a juristic person is expressed by its representatives (ผู้แทนนิติบุคคล; *phuthaen nitibukkhon*), was to be used to attribute the representatives’ criminal intention to the legal person, a limited company in the case. Scholarly commentary suggests that the Court’s approach reflects the identification or “Alter Ego” doctrine,⁸

⁴ ประมวลกฎหมายอาญา พ.ศ. 2499.

⁵ See generally, Mark Pieth and Radha Ivory, “Emergence and Convergence: Corporate Criminal Liability Principles in Overview” in Mark Pieth and Radha Ivory (eds), *Corporate Criminal Liability. Emergence, Convergence, and Risk* (Springer 2011) 3–60; James Gobert, “The Evolving Legal Test of Corporate Criminal Liability” in John Minkes and Leonard Minkes (eds), *Corporate and White-Collar Crime* (Sage 2008) 61–80.

⁶ For instance, Section 176 of the Organic Act on the Prevention and Suppression of Corruption 2018 [พระราชบัญญัติประกอบรัฐธรรมนูญว่าด้วยการป้องกันและปราบปรามการทุจริต พ.ศ. ๒๕๖๑] stipulates legal persons’ vicarious criminal liability for actions of natural persons involved with the legal person. Such involved persons include employees, representatives, affiliated companies or any other person acting for or on behalf of the legal person.

⁷ Section 75 at the time of the decision.

⁸ สุรศักดิ์ ลิขสิทธิ์วัฒนกุล, ความรับผิดทางอาญาของนิติบุคคล: การศึกษาทางกฎหมายเปรียบเทียบโดยเฉพาะที่เกี่ยวกับประเทศไทย (วิทยานิพนธ์ นิติศาสตรมหาบัณฑิต คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 2527) [Surasak Likasitwatanakul, *Corporate Criminal Liability: A Comparative Legal Study with Particular Focus on Thailand* (Master Thesis, Thammasat University 1984)] (Thai) 126; สุรพงษ์ อัสวราพานิช, ความรับผิดทาง

originally developed by the English courts. At the same time, the Supreme Court was viewed to have exceeded its powers by this drastic extension of the Criminal Code's applicability and the apparent mixing of civil and criminal law.⁹

The Court confirmed its extensive interpretation of "Whoever" provisions in subsequent decisions.¹⁰ Within the last ten years, this jurisprudence was continued on the levels of First Instance Courts, Appeals Courts and by the Supreme Court, applying "Whoever" provisions of the Criminal Code¹¹ and specific statutory legislation¹² to legal persons such as limited partnerships or limited companies, often as joint principals together with their representatives (see below III. on this particular issue). However, only one decision (No. 10194/2555 (2012)) was found in which the Supreme Court expressly used Section 70(2) CCC as an attribution mechanism.

In addition, the provision was referred to with respect to the question when a legal person as a *victim* has received knowledge of the facts constituting the crime. Supreme Court Decisions Nos. 693/2556 (2013) and 4603/2560 (2017) cite Section 70(2) CCC and state that the representative's knowledge is decisive in this regard. This may be important for the question of when the prosecution of a compoundable offence is barred by prescription under Section 96 of the Criminal Code.

The role of representatives in criminal proceedings has also been highlighted in Decision No. 10569/2558 (2015),¹³ in which the Supreme Court quashed prior convictions by the First Instance Court and the Appeals Court for the reason that the indicted limited company had not been properly represented at the preliminary hearings according to Section 165(1) of the Criminal Procedure Code (CPC). The Court held that, if a legal person was not represented by its legal representatives at this stage,

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⁹ Surasak, *Corporate Criminal Liability* (n 8) 121ff.

¹⁰ See, for instance, Supreme Court Decisions No. 1669/2506, 54/2507, 584/2508, 981/2508, 448/2513, 63/2517, 378-379/2517, 97/2518, 1586/2519.

¹¹ Sections 173, 175 (false incrimination) in Supreme Court Decisions Nos. 14508/2557, 2255/2560; Section 180 (providing false evidence) in 7250/2554, 10452/2557; Sections 264, 268 (forgery of documents) in 13740/2553, 7455/2554, 19144/2555, 833/2561; Sections 271, 272, 274 (unlawful use of names or trademarks) in 5340/2553, 8151/2553, 2451/2555, 3129/2555, 12268/2558, 13583-4/2558, 8995/2560; Sections 326, 328 (defamation) in 8511/2554, 9435/2554, 14169/2557, 3493/2562; Section 335 (theft) in 8403/2554, 12328/2558; Section 341 (fraud) in 11089/2557, 11732/2557, 7677/2561; Section 350 (defrauding creditors) in 4196/2558, 10570/2558; Section 362 (trespass) in 6006/2561.

¹² These included relevant "Whoever" provisions from the Act on Offences Related to the Issuance of Cheques in Supreme Court Decisions 4207/2554, 10194/2555, 7453/2562; the Trademark Act in 5340/2553, 8151/2553, 15705-6/2557, 5446/2558, 13583-4/2558, 8995/2560, 7007/2562; the Customs Act in 2757/2561; the Revenue Code in 1040/2559, 8967/2561; the Copyright Act in 18122/2557, 1322/2558, 9960/2559; the Computer Crime Act in 319/2560; the Bankruptcy Act in 5252/2559; the Fertilizer Act in 12268/2558, 4214/2559; the Minerals Act and the Forest Act in 8403/2554; the Immigration Act in 2823/2553.

¹³ A similar constellation was found in Decision No. 7455/2554 (2011).

all subsequent steps of the proceedings were invalid. The decision is also in line with Section 7(1) CPC which demands subpoenas to be issued to managers or representatives if a legal person is the alleged or indicted offender.

Supreme Court Decision No. 12328/2558 (2015), however, raised more serious questions with regard to the attribution of criminal liability to legal persons. In this case, a limited company was defendant No. 1 while its two managing directors were defendants Nos. 2 and 3. The Appeals Court found all three defendants jointly criminally liable for theft under Section 335(1), (7) of the Criminal Code. The Supreme Court affirmed the Appeals Court's guilty verdict. According to the facts of the case, the limited company had entered into an electricity supply agreement with the Provincial Electricity Authority (PEA). A PEA official later found that an electricity meter cable had been cut. The company agreed to pay for the unrecorded electricity consumption while dismissing any criminal wrongdoing.

The Supreme Court acknowledged that it had not been proved who had cut the cable and when this had occurred. However, as the meter and the cable were located on the company's premises, the Court ruled that the company must be criminally liable. This is remarkable because the Court did not require proof that any of the legal person's representatives, i.e., the managing directors, had committed the act with the relevant intention. It could indeed have been anyone in the company. The question thus arises whether the Supreme Court silently dismissed its approach laid down decades ago. Is this a departure from the identification/*Alter Ego* doctrine? Can the action of any company member trigger the company's criminal liability? These questions remain unanswered.

The decision is interesting for another reason as the Supreme Court then apparently attributed the company's criminal liability to the managing directors: "as the facts indicate that defendant No. 1 [the limited company] committed the criminal act, it is considered that it is the criminal act of defendants Nos. 2 and 3, too."¹⁴ One may ask if this amounts to a "reverse attribution," from the legal person to the registered representative;¹⁵ but on which doctrinal basis? Are representatives such as managing directors automatically criminally liable once the legal person has been convicted? Such an approach would certainly be in tension with the existence of provisions found in dozens of statutory Acts according to which a representative's criminal liability can only be based on the proof of his or her own contribution to the crime.¹⁶ Further clarification is therefore urgently required.

¹⁴ See the Thai original in Supreme Court Decision No. 12328/2558: "เมื่อข้อเท็จจริงฟังได้ว่า จำเลยที่ 1 กระทำผิด ถือว่าเป็นการกระทำของจำเลยที่ 2 และที่ 3 ด้วย."

¹⁵ In the case, the Managing Directors had entrusted the actual company management to a third person but remained the registered representatives.

¹⁶ Such as Section 54, Direct Sale and Direct Marketing Act B.E. 2545 (2002): "Where the offender is a juristic person, if the offence derives from an order or action of a director or the manager or any person responsible for its operations, or where such person has the duty to issue an order or to take action but failed to do so thereby causing the juristic person to have committed the offence, such person shall be liable to the punishment provided for such offence as well." This wording was introduced in 76 Acts by the Act on the Amendment of Legal Provisions Related to Criminal Liability of Representatives

All but one decision reviewed for this Commentary involved intentional criminal acts. The one exception was the Supreme Court's Decision No. 8565–8566/2558 (2015), which dealt with the criminal consequences of the deadly fire in the Santika nightclub in Bangkok on 1 January 2009 that killed 66 people and injured more than two hundred more. The First Instance and Appeals Court had held that the company that had installed stage fireworks was criminally liable for negligent causation of fire (Section 225 of the Criminal Code), negligent killing (Section 291) and negligent grievous bodily harm (Section 300). Several natural persons including representatives of legal persons were found liable, too. The Supreme Court affirmed the company's conviction. It held that the negligent acts of a director with the capacity to represent the company must be attributed to the company. Therefore, the company was criminally liable, too.

The Court's finding is similar to that in Decision No. 3446/2537 (1994) already referred to above. That case dealt with the disastrous liquid gas explosion in Bangkok on 24 September 1990 that killed 90 people and injured more than a hundred. It was the first time that the Supreme Court approved the conviction of a legal person for a negligent crime.¹⁷ However, the Court did not pronounce which attribution model it pursued. It also refrained from applying any civil law provisions, apparently because the case did not involve intention. The managing partner's negligence in the handling of the dangerous goods was considered the legal person's negligence. The decision was subject to strong criticism, suggesting a violation of the *nullum crimen sine lege* principle.¹⁸ Nonetheless, about two decades later, the Supreme Court reached a largely similar conclusion in the Santika case. The legal basis for the attribution of criminal liability to legal persons, however, remains opaque.

III. LEGAL PERSONS AND REPRESENTATIVES AS JOINT PRINCIPALS?

The practice of Thai criminal courts¹⁹ to find legal persons and their representatives jointly liable has already received some scholarly attention.²⁰ Recent Supreme Court

B.E. 2560 (2017) [พระราชบัญญัติแก้ไขเพิ่มเติมบทบัญญัติแห่งกฎหมายที่เกี่ยวกับความรับผิดชอบในทางอาญาของผู้แทนนิติบุคคล พ.ศ. ๒๕๖๐] after a series of Constitutional Court decisions had found the previous wording in violation of the constitutionally protected presumption of innocence. See Constitutional Court Decisions Nos. 12/2555, 5/2556, 10/2556, 11/2556, 19–20/2556.

¹⁷ Like in the Santika case, criminal liability was based on Sections 225, 291 and 300 of the Criminal Code.

¹⁸ สุรศักดิ์ ลิขสิทธิ์วัฒนกุล, “ข้อสังเกตบางประการเกี่ยวกับคำพิพากษา ๓๔๔๖/๒๕๓๗ เรื่องความผิดทางอาญาของนิติบุคคล” (2538) 25(2) วารสารนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 260 [Surasak Likasitwatanakul, “Some Observations on the Supreme Court Decision No. 3446/2537 Related to Corporate Criminal Liability” (1995) 25(2) Thammasat Law Journal 260] (Thai); see also Nalinorn, *Corporate Criminal Liability* (n 8) 107, who considers that the decision reflects the identification or “Alter Ego” doctrine.

¹⁹ See, for instance, Supreme Court Decisions Nos. 1328/2503; 59/2507; 584/2508; 63/2517; 84/2539.

²⁰ Suraphong, *Criminal Liability of Juristic Persons* (n 8) 75–83; นครเศรษฐ์ สว่างแจ้ง, ความรับผิดชอบทางอาญาของผู้บริหารนิติบุคคล: ศึกษาบทบัญญัติของกฎหมายไทย (วิทยานิพนธ์ นิติศาสตรมหาบัณฑิต คณะนิติศาสตร์

decisions provide an opportunity to revisit the issue and highlight persistent doctrinal vagueness.

In Decision No. 10194/2555 (2012), a limited partnership and its managing partner with the capacity to represent the partnership were found to have issued a dishonoured cheque as part of a real estate deal. Both the limited partnership and the managing partner, as defendants, argued that the cheque was issued in the managing partner's own name so that the legal person should not be implicated. The Supreme Court rejected this due to the factual circumstances, particularly because the managing partner had stamped the company seal next to his signature. Based on these facts, the Court held that it could “clearly be seen that it was a joint perpetration of a criminal act.”²¹ The Supreme Court thus affirmed the finding of the Appeals Court according to which the limited partnership and the managing partner had violated Section 4 of the Act on Offences Related to the Issuance of Cheques B.E. 2534 (1991) as joint principals under Section 83 of the Criminal Code.

Joint perpetration of a legal person and its representative was also found in Decision No. 7677/2561 (2018). In this case, a travel agency (a limited company) had defrauded customers while also operating without the necessary business licence. The First Instance Court convicted the company and its director jointly of fraud under Section 341 of the Criminal Code as well as of operating a travel agency without the required licence under Sections 15(1), 80 of the Tourism Business and Guide Act B.E. 2551 (2008), in conjunction with Section 83 of the Criminal Code. While the Appeals Court rejected the conviction based on the Tourism Business and Guide Act, the Supreme Court restored the First Instance Court's findings, emphasising that the defendants “jointly sold tour programmes and arranged their service for [the victim] The actions of both defendants therefore constitute the joint offence of operating a travel business without a licence.”²²

Another example is Decision No. 8967/2561 (2018) which dealt with allegations of tax evasion under Section 37 of the Revenue Code. The First Instance Court found the defendants, a limited partnership and its managing partner, criminally liable as joint principals under Section 83 of the Criminal Code. The Appeals Court reversed the decision and acquitted the defendants, which was affirmed by the Supreme Court. While the decision was also interesting for its distinction between tax evasion and different shades of tax avoidance, it particularly emphasised what would have been necessary to convict the legal person and its representative. The defendants would have needed to act intentionally according to Section 59 of the Criminal Code so that “Defendant No. 1 and Defendant No. 2 must have joint intention to evade or to attempt to evade tax, and must commit the act jointly with false information, by fraudulent or

มหาวิทยาลัยธรรมศาสตร์ 2556) [Noraset Sawangchaeng, *Criminal Liability of Administrators of Legal Persons: A Study of Thai Laws* (Master Thesis, Thammasat University 2013)] (Thai) 66–68, 161–63.

²¹ See the Thai original in Supreme Court Decision No. 10194/2555: “จึงเห็นได้ชัดว่าเป็นการร่วมกันกระทำความผิด.”

²² See the Thai original in Supreme Court Decision No. 7677/2561: “ได้ร่วมกันขายโปรแกรมการท่องเที่ยวและจัดบริการให้แก่ [ผู้เสียหาย] . . . การกระทำของจำเลยทั้งสองจึงเป็นความผิดฐานร่วมกันประกอบธุรกิจนำเที่ยวโดยไม่ได้รับใบอนุญาต.”

deceitful acts or in another manner of a similar nature.”²³

The examples illustrate how legal persons and their representatives are frequently convicted as joint principals for the same action.²⁴ Criminal law doctrine, however, seems to be opposed.

Joint principals (ตัวการ; *tuakan*) under Section 83 of the Criminal Code are two or more persons who commit an offence together (ร่วม; *ruam*). The relevant crime must be an intentional offence, and the perpetrators must have joint intention (เจตนา ร่วม; *chettana ruam*, or การร่วมใจ; *kanruamchai*).²⁵ It is generally true that a legal person and a respective representative may both be criminally liable for one action, either under the same or under different provisions. But this can hardly be joint liability under Section 83 of the Criminal Code because joint intention presupposes two or more persons who are each capable individually to develop intention. Legal persons, however, cannot develop their own independent will, let alone the will to collaborate with their representatives. This is inherent in the nature of legal persons, and this is why the will of a natural person needs to be attributed to the legal person in order to establish corporate criminal liability. Representatives are also not “split personalities” who have “two wills,” their own and the legal person’s will.²⁶ Such would be a questionable fiction for which there is no discernible need as both persons can be criminally liable on separate accounts.

Joint or separate responsibility may not make a significant difference in sentencing. But the collateral damage for doctrinal clarity and the reliability of criminal law should not be underestimated if a legal fiction with limited roots in reality is continuously reaffirmed. It might therefore be preferable to reconsider the practice of finding legal persons and their representatives jointly responsible for the same action.²⁷

Joint perpetration faces even higher doctrinal hurdles if different provisions

²³ See the Thai original in Supreme Court Decision No. 8967/2561: “จำเลยที่ 1 และจำเลยที่ 2 ต้องมีเจตนา ร่วมกันหลีกเลียงหรือพยายามหลีกเลียงการเสียภาษีอากรนั้น และต้องร่วมกันกระทำโดยความเท็จ โดยฉ้อโกงหรืออุบาย หรือโดยวิธีการอื่นทำนองเดียวกัน.”

²⁴ Additional evidence can be found, for instance, in Supreme Court Decisions Nos. 5446/2558, 10570/2558, 12328/2558, 1040/2559 and 7007/2562.

²⁵ หยุต แสงอุทัย (ผู้แต่ง), ทวีเกียรติ มินะกนิษฐ (บรรณาธิการ), กฎหมายอาญา ภาค 1 (พิมพ์ครั้งที่ 21, สำนักพิมพ์ มหาวิทยาลัยธรรมศาสตร์ 2556) [Yut Saeng-uthai (Author), Twekiat Menakanist (Editor), *Criminal Law Part 1* (21st edn, Thammasat University Press 2013)] (Thai) 104ff; ทวีเกียรติ มินะกนิษฐ และ รณกรณ์ บุญมี, กฎหมายอาญา ภาคทั่วไป (พิมพ์ครั้งที่ 23, วิญญูชน 2564) [Twekiat Menakanist and Ronnakorn Bunmee, *Criminal Law, General Part* (23rd edn, Winyuchon 2021)] (Thai) 130–31; วิวรรณ ดำรงค์กุลนันท์, คำอธิบายกฎหมายอาญา ภาคทั่วไป (มาตรา 1-106) (พิมพ์ครั้งที่ 2, วิญญูชน 2563) [Wiwat Damrongkulnan, *Explanation of Criminal Law. General Part (Section 1-106)* (2nd edn, Winyuchon 2020)] (Thai) 169ff.

²⁶ For an overview of this opinion, see Noraset, *Criminal Liability of Administrators* (n 20) 66–68.

²⁷ *ibid* 163, who also considers that the principles of criminal law do not permit joint perpetration in these cases; Suraphong, *Criminal Liability of Juristic Persons* (n 8) 89, who rejects the possibility of a common plan made by a legal person and a representative, though specifically for conspiracy; สุชาติ ธรรมาพิทักษ์กุล, ทฤษฎีสถานภาพของนิติบุคคลกับความรับผิดชอบทางอาญา (งานวิจัย, วิทยาลัยการยุติธรรม กระทรวงยุติธรรม 2541) [Suchart Thammapitakkul, *Theory of the Status of Juristic Persons and Criminal Liability* (Research, Justice College, Ministry of Justice 1998)] (Thai) 49, especially with regard to cases involving cheques.

apply to the legal person than to the representative. Supreme Court Decision No. 3282/2558 (2015) is instructive in this regard. The case dealt with tax fraud. The First Instance Court found the limited company and its director jointly liable under Section 90/4(7) of the Revenue Code. The provision stipulates criminal punishment for “a business operator [ผู้ประกอบการ; *phu prakopkan*] who intentionally uses a false tax invoice or tax invoice which is unlawfully issued for the purpose of tax credit.” Thus, the First Instance Court considered both the legal person and its representative as business operators.²⁸ In the next instance, the Appeals Court decided that the director was liable additionally under Section 90/5, reflecting the prosecutor’s initial indictment. At that time, Section 90/5 read:

In the case where the offender liable to any penalty under this Chapter is a juristic person, the managing director, director or representative of such juristic person shall also be liable to the penalty provided for such offence unless such person can prove that he or she did not give consent to or was not involved in the commission of the offence of such juristic person.²⁹

The Supreme Court rejected the conviction under Section 90/5, arguing that the prosecutor had failed to prove the director’s knowledge of the criminal act in question.³⁰ The conviction as joint principals under Section 90/4(7) remained. While this finding of joint liability is in itself problematic for the reasons set out above,³¹ it shall be highlighted here that the Appeals Court’s additional conviction based on Section 90/5, a provision that applies exclusively to managing directors, directors or representatives, does certainly not extend to the legal person. Joint perpetration under Section 83 of the Criminal Code presupposes that all principals possess all necessary characteristics to commit the offences in question.³²

A comparable constellation existed in Supreme Court Decision No. 6176/2559 (2016) which dealt with a case of tax evasion under Section 90/4(6) of the Revenue Code. Here, the Appeals Court apparently found the managing director jointly liable under Sections 90/4(6) and 90/5 of the Revenue Code, citing also Section 83 of the Criminal Code. The Supreme Court rejected the conviction based on Section 90/5 because the provision was not part of the prosecutor’s indictment. Had the Appeals

²⁸ “Business operator” is defined by Section 77/1(5) of the Revenue Code as “a person who sells goods or provides service in the course of a business or profession.” In this respect, it should be noted that Section 77/1(1) usefully defines for Chapter IV of the Code that “‘person’ means a natural person, a group of persons without juristic personality, or a juristic person.” The term “juristic person” is then further defined in Section 77/1(4) in conjunction with Section 39.

²⁹ The wording of this provision was changed in 2017 to bring it into conformity with the constitutional guarantee of the presumption of innocence, see n 16.

³⁰ The Supreme Court apparently interpreted Section 90/5 of the Revenue Code in light of the Constitutional Court’s decisions, see n 16.

³¹ An additional problem is whether legal person and representative can indeed both be considered as “business operators” under the Revenue Code, or whether only the legal person has this capacity in this case.

³² Yut and Twekiat, *Criminal Law* (n 25) 105; Suraphong, *Criminal Liability of Juristic Persons* (n 8) 79.

Court considered joint perpetration also under Section 90/5, the rules applying to joint principals would certainly have been another reason to dismiss the conviction.

Finally, the Supreme Court's Santika decision already mentioned above could be illustrative of another problem that is connected to the issue of joint perpetration. In this decision, the Court reversed the Appeals Court's acquittal of the club owner and found him guilty of negligent killing (Section 291 of the Criminal Code) and negligent grievous bodily harm (Section 300) mainly because the club's emergency exits were either blocked or otherwise insufficient. Despite these being negligent offences, one phrase of the judgment reads almost as if the Court considered that the owner "acted in joint negligence" besides the negligence of two other defendants.³³ Joint negligence is doctrinally impossible, of course.³⁴

IV. CONCLUSION

The last ten years of Supreme Court decisions on corporate criminal liability have shed new light on persistent doctrinal uncertainties. These are mainly related to how the objective and subjective elements of a crime are attributed to a legal person but also to the question of joint principals. As criminal prosecution of legal persons occurs quite frequently in Thailand, the doctrinal questions—many of which have existed for decades—have high practical relevance and should therefore finally be resolved. To this end, the constitutional principles of legality and legal certainty (*nullum crimen sine lege*) may require legislative interventions. Section 176 of the Organic Act on the Prevention and Suppression of Corruption B.E. 2561 (2018) appears to be a possible model in this regard. In the meantime, legal scholarship should continue to critically observe related developments in judicial practice.

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³³ See the Thai original in Supreme Court Decision No. 8565–8566/2558: “จำเลยที่ 1 จึงได้ชื่อว่ากระทำโดยประมาทร่วมด้วยนอกเหนือจากการกระทำโดยประมาทของจำเลยที่ 6 และที่ 7.”

³⁴ Twekiat and Ronnakorn, *Criminal Law* (n 25) 131–32; but see Suraphong, *Criminal Liability of Juristic Persons* (n 8) 71, who apparently affirms the possibility of negligent joint perpetration.