

## REDEFINING DRUG OFFENCES IN SOUTHEAST ASIA

In the global debate around drug policy and its interface with criminal justice, there is a wide spectrum of viewpoints. At the one end, there is the idea that the drug market can be minimised, even eradicated, by deterring people from taking part in it. At the opposite end of the spectrum it is argued that high deterrence policies (sometimes associated with “the war on drugs”) have been an epic failure, and that the best way to manage drug markets is to legalise and regulate them with a view to mitigating the harm caused.

This article puts forward an alternative, which would satisfy constituencies demanding the retention of high deterrence policies, yet avoid many of their costly side effects. This could be achieved by defining drug offences with reference to the role of a person in the drug industry, as opposed to defining drug offences mainly or exclusively with reference to the quantity of drugs that a person is in possession of. This option would allow criminal justice resources to be concentrated on offenders with a leading role in the drug industry while freeing up the vast resources that are currently being spent pursuing offenders who have relatively minor roles.

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### **I. Introduction – Quantity as proxy for culpability**

1 Jurisdictions in South East Asia generally distinguish between two broad categories of offences pertaining to illicit drugs: (a) trafficking, sale and supply of drugs; and (b) possession and use of drugs.<sup>1</sup> What in practice distinguishes the two categories of offences from each other is typically the drug quantities involved. The Singapore

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\* In compliance with ethical standards, this work has not been funded in any way, does not contain any studies with human participants or animals performed by any of the authors, and no informed consent is applicable.

1 A third category of drug offences, with which this article is not directly concerned, are offences related to the cultivation, processing and manufacturing of illicit drugs.

Misuse of Drugs Act<sup>2</sup> (“MDA”) is an illustrative example. Section 17 states:

[Any] person who is proved to have had in his possession more than —

- (a) 100 grammes of opium;
- (b) 3 grammes of morphine;
- (c) 2 grammes of diamorphine;
- (d) 15 grammes of cannabis [and the list goes on]

... shall be presumed to have had that drug in possession for the purpose of trafficking unless it is proved that his possession of that drug was not for that purpose.

A person who is proven to have been in possession of lesser quantities than the thresholds listed above would be guilty of the simple possession offence.<sup>3</sup> Drug quantity thus serves as a proxy and typically the main evidence as to the accused person’s intentions,<sup>4</sup> or the *mens rea* of the offence. In both categories, the act, or the *actus reus* of the offence is to be in physical possession of a controlled substance.<sup>5</sup>

2 In many jurisdictions, both in Asia and beyond, the law looks very much like the example cited above, with a fixed threshold quantity demarcating the boundary between the offence of possession for presumed personal use and possession for presumed trafficking.<sup>6</sup> The trafficking offence is then in turn subdivided, with threshold quantities as benchmarks for levels of culpability and severity of accompanying sentences. In this article, the present author refers to this as the quantity

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2 Cap 185, 2008 Rev Ed.

3 See s 8 of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed).

4 Threshold quantities can be devised in different ways, which can significantly affect what impact they have. Of note, some countries, such as Singapore, use thresholds that are tied to deeming provisions (deemed supply laws). Under such laws, possession can be sufficient evidence to charge and sentence someone for drug trafficking. However, many countries that employ drug threshold laws use quantity as one marker of the offence (trafficking *versus* possession for personal use) along with other evidence before deciding whether to charge someone with drug trafficking or possession for personal use. Intent or evidence of intent is thus a crucial part of most threshold systems. There can still be further variation that affects impact such as what quantities are chosen. This variation is important as it means that not all threshold systems are the same.

5 The Misuse of Drugs Act (Cap 185, 2008 Rev Ed), again just used as an example, states in s 5(2), “a person commits the offence of trafficking in a controlled drug if he has in his possession that drug for the purpose of trafficking”.

6 In jurisdictions in which possession for personal use is either *de facto* or *de jure* decriminalised, as it is in, eg, Laos, it is still the quantity of the drugs that determines culpability, and that is used to distinguish between a user with no criminal liability and a presumed criminally liable supplier.

proxy approach, as it relies primarily, sometimes exclusively, on the drug quantities involved in the offence to determine the intentions and culpability of the accused.

3 There are historical and socio-economic explanations for why drug offences are constructed in this way.<sup>7</sup> Moreover, from a law enforcement point of view, using drug quantities as a proxy for the intentions of the accused is expedient. It is easy to prove possession; hence, this approach requires relatively little investigative effort and a high probability of conviction. This is a particularly attractive proposition in jurisdictions where police and prosecution officials are under pressure to fill quotas and reach numerical targets for convictions.<sup>8</sup> However, over the last decade or so, the problems with this approach have also become ever more apparent. These problems, it is argued, stem partly from a series of false assumptions around the links between drug quantities possessed and the culpability on the part of people found to be in possession of drugs.

## **II. Problems with quantity proxy approach**

### ***A. Users and dealers – Elusive threshold quantities***

4 The quantity proxy approach typically adopts thresholds to determine who is a user and who is a dealer. This has given rise to an endless debate around where the metaphorical line in the sand ought to be drawn, and different jurisdictions have arrived at radically different conclusions as to how much of any given drug can reasonably be deemed to be for personal use. It has proven impossible to agree on standard threshold quantities, even among jurisdictions that have a close co-operation around drug law enforcement, such as within the European Union.<sup>9</sup> Even within a federal country like Australia, state jurisdictions have set very different thresholds to differentiate between

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7 Jennifer Fleetwood, “Five Kilos: Penalties and Practice in the International Cocaine Trade” (2011) 51 *The British Journal of Criminology* 375 at 376.

8 A prosecutor in Cambodia explained how he could secure at least 20 convictions for drug offences in the time it took to secure one conviction for domestic violence or rape, two examples of cases in which it was far more difficult and time-consuming to secure convictions. This was according to an interview with the Prosecutor of Siem Reap on 5 May 2014. Similar explanations have been put forward in informal conversations with prosecutors and police in Malaysia and Laos.

9 Genevieve Harris, “Conviction by Numbers – Threshold Quantities for Drug Policy” *Transnational Institute* (May 2011) at p 3; see also European Monitoring Centre for Drugs and Drug Addiction, “Illicit Drug Use in the EU: Legislative Approaches” (November 2005), available at <http://www.emcdda.europa.eu/html.cfm/index34041EN.html> (accessed 11 May 2018).

users and the various levels of dealers and traffickers.<sup>10</sup> While legal scholars and politicians have wrangled over what the limits should be, medical practitioners have pointed to the futility of trying to come up with universal measures for how much of any drug can be deemed to be for personal use. Doses vary considerably depending on individual circumstances such as usage patterns and history, but also on drug purity and accessibility. Furthermore, the assumption that a person is a dealer or a trafficker just because he is in possession of drugs amounting to more than what can be consumed in a day or two has also proven to be misleading.<sup>11</sup> Methamphetamine users in Vientiane pointed out that because they can get a discount for purchases of ten tablets or more, many users sought to buy their methamphetamine in quantities that exceed the 0.3g threshold in the Penal Law of the Lao People's Democratic Republic,<sup>12</sup> thereby falling into the category of presumed traffickers.<sup>13</sup> This pattern of users buying drugs in larger quantities as a cost-saving measure has been documented in many other countries too.<sup>14</sup>

### ***B. Inadequate correlation between culpability and drug quantities possessed***

5 The quantity proxy approach assumes that there is a direct correlation between how much drugs a person is in possession of and the culpable intent of that person. Experience and research suggest that in respect of many categories of drug offenders, this is often a false assumption. This article examines three examples of drug offenders who, between them, are likely to make up the bulk of drug offenders in most countries in the world.

#### ***(1) Couriers***

6 Couriers carry drugs paid for and owned by someone else.<sup>15</sup> Because of this, the quantity of drugs carried is always decided by the

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10 See Caitlin Hughes, Alison Ritter, Nicholas Cowdery & Benjamin Phillips, "Australian Threshold Quantities for 'Drug Trafficking': Are They Placing Drug Users at Risk of Unjustified Sanction?" *Trends & Issues in Crime and Criminal Justice* (March 2014).

11 See Genevieve Harris, "Conviction by Numbers – Threshold Quantities for Drug Policy" *Transnational Institute* (May 2011) at p 4.

12 Penal Law (No 12/NA, 9 November 2005).

13 This was mentioned in a focus group discussion with patients at the community-based treatment centre in Sisattanak District Hospital in Vientiane on 15 July 2015.

14 Genevieve Harris, "Conviction by Numbers – Threshold Quantities for Drug Policy" *Transnational Institute* (May 2011) at p 4.

15 This article follows Jennifer Fleetwood's practice of distinguishing between two distinct groups of people who transport drugs: couriers (who carry drugs paid for and owned by others, and entrepreneur-traffickers, who carry drugs they paid for  
(cont'd on the next page)

person who pays for the drugs – the investor in the project. In order to make a profit, a critical quantity must be carried. Just what that critical quantity is depends on drug prices, operating costs and available funds for investment. In her research in Latin America, Jennifer Fleetwood also found that “investors preferred to limit the risks and expenses ... by sending quite significant amounts with one mule”.<sup>16</sup> It is clear that the quantity of drugs carried is seldom something the courier has any influence over, and it certainly bears no correlation to any intent or culpability on the part of the courier, since the quantities are determined by the investor, not by the courier.<sup>17</sup>

7 Research on those who act as drug couriers consistently concludes that they (a) are often unaware of exactly what they are carrying, (b) typically come from vulnerable and marginalised segments of society, (c) are frequently driven by poverty and economic hardship, and (d) may have little or no awareness of the severe penalties they face if caught.<sup>18</sup> Ko-Lin Chin has found that in Myanmar and China pregnant women or women with babies are often recruited to carry drugs as they are less likely to be searched by law enforcement officials.<sup>19</sup>

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themselves. The term “mule” should be taken to be synonymous with the term “courier” but is only used in this article in direct quotes. The term “courier” is preferred, as it best captures the work of a third party delivering goods in which the deliverer has no investment.

- 16 Jennifer Fleetwood, “Five Kilos: Penalties and Practice in the International Cocaine Trade” (2011) 51 *The British Journal of Criminology* 375 at 383.
- 17 Ko-Lin Chin & Sheldon X Zhang, *The Chinese Heroin Trade* (New York University Press, 2015) at p 119; Jennifer Fleetwood, “Five Kilos: Penalties and Practice in the International Cocaine Trade” (2011) 51 *The British Journal of Criminology* 375 at 380. This also means that it is probably ineffective to sentence couriers to death or long prison terms since they are very easily replaced. It has been argued that such sentences can deter people from taking on assignments as couriers but, regrettably, the truth is that the drug cartels have had no difficulties recruiting couriers, even in the jurisdictions with the most unforgiving drug laws: see Ko-Lin Chin, *The Golden Triangle: Inside South East Asia’s Drug Trade* (Cornell University Press, 2009) at p 117, 146 and Ko-Lin Chin & Sheldon X Zhang, *The Chinese Heroin Trade* (New York University Press, 2015) at p 100.
- 18 Ko-Lin Chin, *The Golden Triangle: Inside South East Asia’s Drug Trade* (Cornell University Press, 2009) at p 115; Ko-Lin Chin & Sheldon X Zhang, *The Chinese Heroin Trade* (New York University Press, 2015) at p 104; Penny Green, *Drugs, Trafficking and Criminal Policy: The Scapegoat Strategy* (Waterside Press, 1991), cited in Jennifer Fleetwood, “Five Kilos: Penalties and Practice in the International Cocaine Trade” (2011) 51 *The British Journal of Criminology* 375 at 380–381; Julia Sudbury, “‘Mules’, ‘Yardies’ and Other Fold Devils: Mapping Cross-Border Imprisonment in Britain” in *Global Lockdown: Race, Gender and the Prison-Industrial Complex* (Julia Sudbury ed) (Routledge, 2005) at pp 167–182; Jennifer Fleetwood, “Five Myths about Drug Mules and the Death Penalty” *The Conversation* (2 September 2013) <[https:// theconversation.com/five-myths-about-drug-mules-and-the-death-penalty-17706](https://theconversation.com/five-myths-about-drug-mules-and-the-death-penalty-17706)> (accessed 10 May 2018).
- 19 Ko-Lin Chin, *The Golden Triangle: Inside South East Asia’s Drug Trade* (Cornell University Press, 2009) at p 103.

Other couriers have been forced into transporting drugs for someone else and have faced threats of violence against their loved ones if they try to resist.<sup>20</sup> A methamphetamine trader from Mae Sai put it bluntly: “once you are in, there’s no way out in this business. Many people here are killed when they try to get out.”<sup>21</sup> Once couriers have assumed their role, they are typically powerless. Recruiters of couriers have stated that they often mislead those recruited when it comes to both how much they are going to be transporting and the drug in question.<sup>22</sup> In sum, we know that those recruited to carry drugs for others “are being held responsible for decisions, circumstances and issues outside their knowledge, experience and control.”<sup>23</sup>

(2) *Social suppliers*

8 A concept of “social supply” has emerged that describes drug transactions that are almost exclusively to friends and acquaintances. Research has shown that social supply constitutes a significant portion of the lower levels of the retail drug market.<sup>24</sup> The Global Commission on Drug Policy offers a practical example:<sup>25</sup>

In this situation, there could be a designated buyer among a social group who will purchase drugs and share them among the group for minimal, if any, financial gain. Even in the absence of a structured designation of a buyer, sharing of drugs among friends is commonplace, the exchanges being carried out with a view more to accruing social rather than financial capital.

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- 20 Julia Sudbury, “Mules’, ‘Yardies’ and Other Fold Devils: Mapping Cross-Border Imprisonment in Britain” in *Global Lockdown: Race, Gender and the Prison-Industrial Complex* (Julia Sudbury ed) (Routledge, 2005) at p 169; Fleetwood 2010. Jennifer Fleetwood, “Drug Mules in the International Cocaine Trade: Diversity and Relative Deprivation” (2010) 192 *Prison Service Journal* 3.
- 21 Ko-Lin Chin, *The Golden Triangle: Inside South East Asia’s Drug Trade* (Cornell University Press, 2009) at p 151.
- 22 Justice Committee, “Draft Sentencing Guidelines: Drugs and Burglary – Justice Committee Contents: Written Evidence from Dr Jennifer Fleetwood, Professor Alex Stevens, Dr Alex Klein and Dr Caroline Chatwin, University of Kent (DB 02)” (May 2011) <<http://www.publications.parliament.uk/pa/cm201012/cmselect/cmjust/1211/1211we05.htm>> (accessed 30 December 2016); see also Jennifer Fleetwood, *Women in the International Cocaine Trade: Gender, Choice and Agency in Context* (2009) (PhD thesis, University of Edinburgh, archived at the Edinburgh Research Archive, University of Edinburgh) at p 234.
- 23 *Drug Couriers: A New Perspective* (Penny Green ed) (Quartet Books, 1996) at p 9.
- 24 Leah Moyle, Ross Coomber & Jason Lowther, “Crushing a Walnut with a Sledge Hammer? Analysing the Penal Response to Social Supply of Illicit Drugs” (2013) 22(4) *Social & Legal Studies* 553 at 556.
- 25 Global Commission on Drug Policy, *Advancing Policy Reform: A New Approach to Decriminalization* (2016) at p 24.

9 Social suppliers are increasingly understood not to be drug dealers “proper” and many argue that the criminal justice system should consider and process them differently to commercially motivated suppliers. Recent research in England suggests that “social supply acts (sometimes even involving large amounts of drugs/money) have become accepted as something closer to gift-giving or friendship exchange dynamics within social networks rather than dealing proper”.<sup>26</sup> Under current drug laws in most Asian countries, a social supplier who is in possession of a quantity of drugs that exceeds the applicable thresholds is treated no differently from an offender who is engaged in the trade for commercial gain. Furthermore, as with the couriers, there is no clear correlation between the quantities possessed by a social supplier and the degree of culpability. In the UK, a Police Foundation report found that under the UK Misuse of Drugs Act 1971<sup>27</sup> (under which drug quantities are considered evidence of intent), “too many of those prosecuted for supply were not the type of supplier that the Act was designed to capture and prosecute i.e. ‘dealers proper’, whose supply activity was essentially commercial in nature and whose culpability was significant”.<sup>28</sup>

(3) *User-dealers*

10 So-called “user-dealers” are dependent users who have chosen to sell drugs to other users to enable themselves to guarantee their supply. Research has found that “addicted user-dealers’ motivations are commonly different from those of commercially motivated suppliers, while their activities are perceived as a less harmful and more convenient way of funding their drug dependency than acquisitive crimes”.<sup>29</sup> This echoes the reasoning of the English Court of Appeal in the case of *R v Afonso*<sup>30</sup> (“*Afonso*”), which found that sentences, based on drug quantities possessed, were excessive and disproportionate in relation to this category of offender. Lord Justice Rose identified the category as “out of work drug addicts, whose motive is solely to finance the feeding of their addiction” and who, as a consequence of addiction, are subject to a unique set of choices: “[an] unemployed addict has, in practical terms, three means of financing his or her addiction –

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26 Ross Coomber, Leah Moyle & Nigel South, “The Normalisation of Drug Supply: The Social Supply of Drugs as the ‘Other Side’ of the History of Normalisation” (2016) 23(3) *Drugs Educ Prev Pol* 255 at 256.

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28 Leah Moyle, Ross Coomber & Jason Lowther, “Crushing a Walnut with a Sledge Hammer? Analysing the Penal Response to Social Supply of Illicit Drugs” (2013) 22(4) *Social & Legal Studies* 553 at 569.

29 Leah Moyle, “Earning a Score: An Exploration of the Nature and Roles of Heroin and Crack Cocaine User-Dealers” (2015) 55(3) *The British Journal of Criminology* 534 at 535.

30 [2005] *Crim LR* 72.

prostitution, theft or supplying others and sentencers should recognize that, in consequence, his or her culpability is likely to be less of than that of many other suppliers". The many cases that have cited *Afonso* as a defence or on appeal suggest a need for formal recognition of this type of offender.<sup>31</sup>

11 The dilemma of the user-dealers also arose in the context of crafting a new policy on illicit drugs in Laos. The Law on Drugs (2007)<sup>32</sup> in Laos incorporates the important principle that a drug user is not a criminal but a person who may be in need of help and care.<sup>33</sup> It was noted that a common *modus operandi* among dealers in Laos is to demand that drug users take part in drug distribution as a way of financing their drug use.<sup>34</sup> In such cases, the possession is effectively a culmination of drug use. Nonetheless, because the law defines the offence with reference to the quantity of drugs, a person is in possession of, drug using distributors end up being prosecuted on the same terms as dealers with far more sinister motives. No research has been done on what proportion of low-level dealers in Laos are "user-dealers", but law enforcement officials believe the majority of them are.<sup>35</sup> The situation is likely to be similar in other countries. Chin noted that "during our many months of fieldwork [in China], we have talked to enough [drug] vendors to realize that the retail business is dominated by addicts".<sup>36</sup> Unlike in English, there is even a term in Mandarin for retailing drugs to support an addiction – "以贩养吸" – roughly transliterated, "*yi fan yang xi*". The Mandarin language has found a reason to distinguish between different roles among drug dealers. Though, so far, the law has not.

### C. *Establishing the weight of pure substance*

12 The law in many jurisdictions refers to the weight of the pure substance for purposes of determining quantity.<sup>37</sup> Due to the lack of forensic technology and capacities in many countries, law enforcement

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31 See, eg, *R v Nash* [2010] EWCA Crim 1007 and *R v Gray* [2011] EWCA Crim 3027.

32 Law on Drugs (National Assembly No 103/NA).

33 The principle is also incorporated in Art 147(7) of the Penal Law of the Lao People's Democratic Republic.

34 This was according to an interview with the law enforcement division of the Lao National Commission for Drug Control and Supervision on 23 July 2015. It is common that users are offered one *yabaa* tablet for every delivery they complete.

35 This was according to an interview with the law enforcement division of the Lao National Commission for Drug Control and Supervision on 23 July 2015.

36 Ko-Lin Chin & Sheldon X Zhang, *The Chinese Heroin Trade* (New York University Press, 2015) at p 42.

37 A package of heroin may weigh 100g, but if the purity of that heroin is only 40%, then the offence involves 40g of heroin, not 100g.



agencies have faced challenges in accurately determining purity and the weight of the pure substance. Even where the analysis equipment is available, the necessary chemicals have to be continuously imported, which can lead to frequent shortages. Drug purity “is not something that can be ascertained by poorly trained police officers in poorly resourced settings”.<sup>38</sup> In Laos, officials often proceed on the estimate that one *yabaa* tablet is equivalent to 0.1g of methamphetamine.<sup>39</sup> In other cases, only a small sample is tested. However, as the United Nations Office on Drugs and Crime (“UNODC”) noted:<sup>40</sup>

[The] purity of methamphetamine tablets vary considerably ... The actual weight may vary from tablet to tablet and batch to batch as they are produced under clandestine conditions. Considering tablet purity alone can be misleading as tablets of different weights contain different amounts of methamphetamine even if the purity is the same ...

Hence, these approximations are unsatisfactory so long as the severity of the offence is determined with reference to the weight of the pure substance involved in the offence. This is not a problem in jurisdictions with sufficient law enforcement resources (as in Singapore), but it is a serious problem in Laos, and possibly also in other jurisdictions with more limited law enforcement capacities and resources.<sup>41</sup> Moreover, few users and even dealers are aware of or have control over the purity of the drugs in their possession, thus making the weight of pure substance a bad proxy for evidence of intent and culpability.<sup>42</sup>

#### ***D. Ever-increasing pressure on criminal justice systems***

13 Due to the ever-greater numbers of people convicted of drug offences, the pressure on criminal justice systems around the world is increasing. Case backlogs are building up, remand rates are climbing, and prisons are becoming ever more over-crowded. UNODC reported

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38 Genevieve Harris, “Conviction by Numbers – Threshold Quantities for Drug Policy” *Transnational Institute* (May 2011) at p 3.

39 The Thai term, “*yabaa*”, literally “mad drug” (formerly known as “*ya ma*”; literally “horse drug”), are tablets typically containing a mixture of methamphetamine and caffeine.

40 United Nations Office on Drugs and Crime, *The Challenge of Synthetic Drugs in East and South-East Asia and Oceania – Trends and Patterns of Amphetamine-Type Stimulants and New Psychoactive Substances* (May 2015) at p 6.

41 In some very poorly resourced settings, total mass measurements can be equally impractical; in Pakistan, police and prosecutors complain they are not even equipped with scales: see Patrick Gallahue & Rick Lines, *The Death Penalty for Drug Offences: Global Overview 2010*, International Harm Reduction Association (2010) at p 34.

42 Genevieve Harris, “Conviction by Numbers – Threshold Quantities for Drug Policy” *Transnational Institute* (May 2011) at p 3.

that the global increase in drug-related crime is driven mainly by a rising number of offences related to drug possession. Moreover, the vast majority of drug offenders in prison are described as “low-level offenders”.<sup>43</sup>

14 It is not easy to obtain figures as to how big the financial burden of prosecuting and incarcerating low-level drug offenders is, especially not in countries in which such data is not published. It has been estimated that expenditure by European Union countries on drug offenders in prisons is within the range of €3.7bn–5.9bn annually.<sup>44</sup> In addition to that, there are of course all the costs associated with the administration of justice from arrest to appeal. In many Asian countries, low-level drug cases make up the majority of all criminal cases, thus consuming significant portions of the resources allocated for law enforcement and criminal justice. Thailand offers a good example; in 2013, 65% of all prisoners there were charged with or convicted of drug offences.<sup>45</sup> In 2016, that figure was up to 70%. This follows a trend that has seen the number of drug convictions double over the last decade according to figures from the Thai Department of Corrections.<sup>46</sup> Since the launch of its “war on drugs” in 2003, Thailand has become home to the world’s sixth largest prison population, as well as having the world’s highest incarceration rate for women; the majority of whom are imprisoned for low-level drug offences.

15 Commenting on this, the UNODC regional director for South East Asia noted that “the situation has approached a noticeable crisis point. The reality is that talk has not yet moved to action, and the prison population is still growing”.<sup>47</sup>

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43 United Nations Economic and Social Council, *World Crime Trends and Emerging Issues and Responses in the Field of Crime Prevention and Criminal Justice*, E/CN.15/2013/9 (30 January 2013).

44 (European Monitoring Centre for Drugs and Drug Addiction, *EMCDDA Papers – Estimating Public Expenditure on Drug-Law Offenders in Prison in Europe* (February 2014).

45 Among female prisoners only, the figure was 85%: see United Nations Office on Drugs and Crime, *World Drug Report 2014*, Annex 1, available at [https://www.unodc.org/documents/wdr2014/World\\_Drug\\_Report\\_2014\\_web.pdf](https://www.unodc.org/documents/wdr2014/World_Drug_Report_2014_web.pdf) (accessed 27 January 2015).

46 Jon Fernquest, “Soaring Prison Population: Drug War Rethink” *Bangkok Post* (18 July 2016).

47 Jon Fernquest, “Soaring Prison Population: Drug War Rethink” *Bangkok Post* (18 July 2016).

16 The situations in Laos and Cambodia are similar.<sup>48</sup> The deputy director general for the Cambodian Ministry of Interior's General Department of Prisons recently said:<sup>49</sup>

The number [of inmates] goes up every day, not down. This is not just a local problem. Prisons in Siem Reap, Banteay Meanchey and Battambang, were each quite overcapacity in December, before the crackdown [on drug dealers and users] began. I don't know for how long we can cope with this method ...

In neighbouring Laos, the Lao National Commission for Drug Control and Supervision recently noted that “over the last five years, there has been a three-fold increase in the number of drug-related arrests in Laos, and law enforcement and criminal justice authorities in our country have been overwhelmed”.<sup>50</sup>

17 Thailand, Cambodia and Laos are examples of countries that have sought to retain high deterrence, using the quantity proxy approach. This has given rise to large numbers of criminal cases and many people having to serve relatively long prison terms. While conditions and resources differ from one country to another, similar problems have been encountered in many countries across Asia.<sup>51</sup>

### ***E. Catching the wrong people***

18 Another problem with the quantity proxy approach is that, in many jurisdictions, it has diverted law enforcement resources towards the bottom end of the drug industry, where the people who perform the risky tasks of transporting the drugs are found, away from the top end of the industry, where people seldom touch drugs and certainly do not carry around quantities that exceed trafficking thresholds. In China, Chin described how “the authorities were frustrated that they were only

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48 Mech Dara & Martin de Bourmont, “Arrests Soar under Drug War Compared to 2016” *The Phnom Penh Post* (21 February 2017); Yesenia Amaro, “Drug Crackdown Pushes Courts and Prisons to Breaking Point” *The Phnom Penh Post* (20 January 2017).

49 Mech Dara & Martin de Bourmont, “Arrests Soar under Drug War Compared to 2016” *The Phnom Penh Post* (21 February 2017); Yesenia Amaro, “Drug Crackdown Pushes Courts and Prisons to Breaking Point” *The Phnom Penh Post* (20 January 2017).

50 “Synthetic Drug Market in East and Southeast Asia Continues to Expand” *Vientiane Times* (1 September 2016).

51 For a recent account of the pressure of drug-related cases in Cambodia, see Yesenia Amaro, “Drug Crackdown Pushes Courts and Prisons to Breaking Point” *The Phnom Penh Post* (20 January 2017). In Myanmar, prosecutions of drug-related cases jumped from about 8,800 in 2015 to about 13,500 in 2016: see “Record Year for Myanmar Drug Seizures” *The Straits Times* (2 February 2017).

catching and punishing drug mules and not the big bosses”.<sup>52</sup> Reporting from a recent drug trafficking trial in Singapore, Arjun Malik wrote:<sup>53</sup>

The word ‘drug trafficker’ often evokes images of a wealthy drug kingpin profiting royally off the suffering of addicts. In reality, those executed [in Singapore] are very rarely the kingpins who command the drug trade. Instead, like the defendants in this case, they are mostly poor, low-level drug couriers who may have little knowledge of what they are getting themselves into.

19 In Laos, it was noted how “thousands of low-level dealers and consumers have been arrested, charged and convicted, and tonnes of drugs have been confiscated. This may have caused temporary disturbances in some distribution networks, but it is unlikely to have had any notable effect on the drug business as a whole”.<sup>54</sup> Just as in China, this has given rise to a degree of frustration among officials and citizens alike. In 2015, National Assembly President, Pany Yathotou noted that “only small-time dealers have been apprehended so far and it is disappointing that the ringleaders have escaped punishment”.<sup>55</sup> Similar sentiments have been echoed on repeated occasions in meetings and in the media.

20 In a discussion paper published as part of the consultations for legal reform, it was explained that one of the main reasons for why law enforcement has been so focused on what Yathotou referred to as “small time dealers” is because, as it stands:<sup>56</sup>

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52 Ko-Lin Chin, *The Golden Triangle: Inside South East Asia’s Drug Trade* (Cornell University Press, 2009) at p 207.

53 Arjun Malik, “Singapore’s Heartless Death Penalty for Drug Traffickers” (11 June 2016) <<http://www.theonlinecitizen.com/2016/06/11/singapores-heartless-death-penalty-drug-traffickers/>> (accessed 29 November 2016).

54 The Government of the Lao PDR, “National Master Plan for the Control of Illicit Drugs” *United Nations Office on Drugs and Crime* (2016).

55 “Bring Crime Ringleaders to Justice, Prosecutors Told” *Vientiane Times* (8 January 2015).

56 See Marcus Baltzer, “Discussion Paper: Drug Offences in the Draft Penal Code of the Lao PDR” (10 July 2015), presented in Vientiane. There is no detailed research in Southeast Asia on exactly what proportion of drug offenders can be labelled “low level”. In the US, however, it was found and only a relatively small percentage of inmates could be described as “unambiguously low-level”. Alternatively, not many were “kingpins”. Rather, most fell into a middle spectrum representing different degrees of seriousness that depend on what factors were emphasised. These findings dampened hopes of dramatically reducing prison populations by getting out of prison those who are unambiguously low-level drug offenders. They simply did not represent the majority of incarcerated drug offenders. The research nonetheless found that “‘drug courier exceptions’ to sentencing laws that apply to minor role offenders possessing large quantities could have a greater prison reduction impact”: see Eric L Sevigny & Jonathan P Caulkins, “Kingpins or Mules: An Analysis of Drug Offenders Incarcerated in Federal and State Prisons” (2004) 3 *Criminology and Public Policy* 401 at 404.

[The law] defines drug offences in terms of the how much drugs a person is in possession of. But the individuals who control the drug industry, who invest in it, who manage its operations, and who reap its vast profits – they will never be found in possession of as much as a trace of any illicit narcotic substance.

### **III. Attempts at solving problems**

21 Some jurisdictions have sought to address the problems identified above by changing the way in which sentences for drug offences are calculated and arrived at.

#### **A. England and Wales**

22 In February 2012, new sentencing guidelines for drug offences became effective in England and Wales. The guidelines change the way in which all drug offenders are sentenced; however, there has been no change in the substantive drug law.

23 Under the guidelines, drug weight remains as an indicative proxy for “harm caused”. But in addition to that, the guidelines recognise the offenders’ role. The guidelines list three main roles. The more control, power, and influence an offender has over the operation as a whole, and the more money an offender anticipates to make from the offence, the longer the sentence will be. The table below lists the factors that characterise each of the three roles.

<b>Role descriptions – Sentencing guidelines for drug offences, England and Wales</b>		
Leading role	Significant role	Lesser role
Directing or organising buying and selling on a commercial scale;  Having substantial links to, and influence on, others in a chain  Having close links to original source  Having expectation of substantial financial gain	Having operational or management function within a chain  Involving others in the operation whether by pressure, influence, intimidation or reward  Being motivated by financial or other advantage, whether or not operating alone	Performing limited function under direction  Being engaged by pressure, coercion, intimidation  Having involvement through naivety or exploitation  Having no influence on those above in a chain

Using business as cover	Having some awareness and understanding of scale of operation	Having very little, if any, awareness or understanding of the scale of operation
Abusing position of trust or responsibility		If own operation, keeping drugs solely for own use

24 An analysis found that consideration of role in England and Wales has led to lower sentences for those in a “lesser” role. The number of short and non-custodial sentences has increased, reflecting the large portion of offenders in lesser roles, while a small number of serious offenders, with significant to leading roles, have received longer prison sentences.<sup>57</sup> Fleetwood, who has evaluated the impact of these changes, noted that “taking offenders’ role and motivation into account during sentencing is practically feasible and seems to lead to more fair and proportionate outcomes”.<sup>58</sup> She also noted that, as commentators predicted, “the continued use of drug weights appears to produce arbitrarily harsh sentences for some of those in a lesser role”.<sup>59</sup> Based on that, it is suggested:

[One’s] role ought to take primacy over drug weight at sentencing. Doing so would support the stated aim of proportionality in the sentencing of drug mules in comparison to those in leading roles. It would also reflect the fact that those in leading roles may be responsible for wider harms than simply [transporting] illegal drugs ...

**B. Singapore**

25 In 2012, Singapore’s MDA was amended in a bid to “draw a very careful, calibrated distinction between the different levels of accountability [and to] temper and mitigate the harsh drug laws with compassion”.<sup>60</sup> One of the recurring criticisms by opponents to the stringent drug laws in general, and the mandatory death penalty in

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57 Jennifer Fleetwood, Polly Radcliffe & Alex Stevens, “Shorter Sentences for Drug Mules: The Early Impact of the Sentencing Guidelines in England and Wales” (2015) 22(5) *Drugs Educ Prev Pol* 428 at 453.

58 Jennifer Fleetwood, Polly Radcliffe & Alex Stevens, “Shorter Sentences for Drug Mules: The Early Impact of the Sentencing Guidelines in England and Wales” (2015) 22(5) *Drugs Educ Prev Pol* 428 at 453.

59 Jennifer Fleetwood, Polly Radcliffe & Alex Stevens, “Shorter Sentences for Drug Mules: The Early Impact of the Sentencing Guidelines in England and Wales” (2015) 22(5) *Drugs Educ Prev Pol* 428 at 443.

60 *Singapore Parliamentary Debates, Official Report* (12 November 2012) vol 89 at 3.45pm (Mr Edwin Tong Chun Fai).

particular, is that more often than not, the people arrested are couriers who are usually in desperate need of money rather than the masterminds or kingpins of well-organised drug syndicates.<sup>61</sup>

26 The 2012 amendments give the courts sentencing discretion if the accused can prove, on a balance of probabilities, that he was merely acting as a courier.<sup>62</sup> These amendments have forced courts to consider the role of drug offenders convicted of having been in possession of quantities exceeding the thresholds that trigger the death penalty. One of the questions arising in the jurisprudence that has followed in the wake of the amendments is: who is a courier?<sup>63</sup> In the case of *Public Prosecutor v Abdul Haleem bin Abdul Karim*,<sup>64</sup> Tay Yong Kwang J (as his Honour then was) observed that the new exception to the mandatory death penalty was confined solely to those typically referred to as “drug mules” and whose involvement was “limited to delivering or conveying drugs from point A to point B”.<sup>65</sup> Tay J further observed that while the exception strictly applied only to an accused acting in the narrow role of a courier, it should not be construed pedantically such that an incidental act of storage or safekeeping by the accused in the course of transporting, sending or delivering the drugs would mean that he was also playing the role of storing or safekeeping drugs within a drug syndicate. In a later case, the Court of Appeal found that “a courier is someone who receives the drugs and transmits them in exactly the same form in which they were received without any alteration or adulteration”.<sup>66</sup> In the same case, the Court of Appeal went on to clarify that if “the person convicted has been found to have the intent to sell the controlled drugs, then he is evidently not merely a courier”.<sup>67</sup>

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61 See Chen Siyuan, “Discretionary Death Penalty for Convicted Drug Couriers in Singapore: Reflections on the High Court Jurisprudence Thus Far” (2015) 23 *IUMLJ* 31. The somewhat controversial Court of Appeal decisions in *Nguyen Tuong Van v Public Prosecutor* [2005] 1 SLR(R) 103 and *Yong Vui Kong v Public Prosecutor* [2010] 3 SLR 489 are often cited as examples by such detractors, though in the latter case, the death sentence was eventually commuted to imprisonment and caning pursuant to the amended Misuse of Drugs Act.

62 See s 33B(2)(a) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed). The accused must also show that he substantively assisted the authorities in disrupting drug-trafficking activities in Singapore.

63 Although the term “courier” is not used in the law, it was adopted by Parliament to describe a person “whose role[, in essence,] was confined to transporting, sending or delivering a controlled drug, and who did not play any other role within the drug syndicate”: see *Singapore Parliamentary Debates, Official Report* (12 November 2011) vol 89 at 3.22pm (Mr Teo Chee Hean, Deputy Prime Minister and Minister for Home Affairs).

64 [2013] 3 SLR 734.

65 [2013] 3 SLR 734 at [51].

66 *Public Prosecutor v Chum Tat Suan* [2015] 1 SLR 834 at [68].

67 *Public Prosecutor v Chum Tat Suan* [2015] 1 SLR 834 at [62]. This distinction is different from the one that many academics have made between couriers as people

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27 While the 2012 amendments may seem like mere tinkering with what remains some of the world's most severe drug laws, they nevertheless mark an unequivocal departure from the principle that a person should be judged solely by the weight of the drugs carried. The revised law recognises, albeit to a very limited extent, that the role of the accused *is* a relevant factor in determining culpability in drug offences.

### C. *Why sentencing reform is not enough*

28 In the two examples above, it is clear that policymakers, in two very different jurisdictions, have recognised that using quantity as a proxy for culpability can lead to unfair outcomes. Presumably, because bold reform of drug laws is politically complicated almost everywhere in the world, policymakers have sought to adjust sentencing procedures, which might be easier than amending the substantive law. While this may help mitigate some injustice, regrettably, it does not solve the fundamental problem. The intent behind the action is a defining element of the crime. Take the examples cited above; carrying drugs belonging to someone else, supplying friends at a party, or selling drugs in a desperate attempt to pay for an uncontrollable disorder are all quite obviously different from planning the procurement, transportation, marketing and sale of drugs as an entrepreneurial enterprise. The way drug offences are currently defined is like having one offence of homicide on the statute books, ignoring factors such as why the accused caused the death of the victim, what his intentions were, or the manner in which he acted. Such a law would, of course, be considered preposterous. Almost all jurisdictions acknowledge that the intent and motivation of a person committing homicide, the *mens rea*, changes the fundamental nature of the offence, even if the *actus reus* and the outcome is the same. Most jurisdictions recognise the fundamental difference between murder and manslaughter.<sup>68</sup>

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who transport drugs belonging to someone else, and “professional traffickers” who transport drugs they themselves have invested in. If a person sells drugs owned by someone else, is that an act that is more culpable than that of transporting drugs owned by someone else? Under the current law in Singapore, the answer is an unequivocal “yes”. People who are familiar with how the global drug trade works in practice may possibly argue that both functions are examples of what could be considered as a “minor” role, depending on the degree of control, influence and oversight that the accused has over the operation.

68 Ross Coomber and Leah Moyle used the same analogy (see Ross Coomber & Leah Moyle, “Beyond Drug Dealing: Developing and Extending the Concept of ‘Social Supply’ of Illicit Drugs to ‘Minimally Commercial Supply’” (2013) 21(2) *Drugs Educ Prev Pol* 157 at 163):

We believe that a separate gradated offence (as in the case of murder/manslaughter) of minimally commercial supply should be created and that this should be sensitive to real-world supply activities, foster proportional and consistent sentencing vis-à-vis motivation, harm and intent.

(*cont'd on the next page*)



29 Sentencing reform is also not enough because as long as the offence is defined primarily or exclusively with reference to quantities, the offence will encompass such a wide spectrum of potential offenders, with such differing motives and intentions that a sentencing range, if it were to reflect this diversity of offenders, would have to reach from probation all the way to life in prison. A user-dealer with a drug use disorder, for example, will require a very different response from that of an entrepreneur who trades in drugs with no other motivation than to make the maximum amount of financial profit.

30 This dilemma has arisen in the jurisdictions that have sought to address the problem with sentencing reform alone as people with minor roles in the drug industry continue to face disproportionately long prison sentences on account of the quantities of drugs they were caught with. In short, sentencing reform alone simply cannot accommodate the wide range of culpability that lies behind a certain quantity of any given drug.

#### **D. Thailand**

31 Thailand's Minister of Justice, General Paiboon Koomchaya, ignited a heated debate when he proposed taking methamphetamine off the schedule of narcotic drugs.<sup>69</sup> One of the Minister's objectives is to ensure that "people who use drugs ... do not end up in prison."<sup>70</sup> After about two years of debate on drug policy reform in Thailand, the first amendments to the drug law were adopted and took effect on 16 January 2017. The reform momentum was driven largely by the serious problems with prison overcrowding and a burgeoning prison population discussed earlier. The legislative amendments include changes to how culpability is determined, replacing mandatory sentences with a rebuttable presumption of the intention to sell controlled drugs. Under this new framework, the role of lawyers, and indeed the entire criminal process, could become more important, as

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Further research could effectively delineate the different aspects of minimally commercial supply behaviours and would thus be key to creating guidelines which could situate different roles in social supply behaviour (for example 'brokers'; 'non-profit motivated sellers'; 'nominated group buyers'; user-dealers) in terms of their relative seriousness.

69 Kin-Oua Laohong & Anuch Charoenpo, "Regime Favours Ending War on Methamphetamine" *Bangkok Post* (16 June 2016) <<https://www.bangkokpost.com/news/security/1011181/regime-favours-ending-war-on-methamphetamine>> (accessed 25 May 2018).

70 Kin-Oua Laohong & Anuch Charoenpo, "Regime favours ending war on methamphetamine" *Bangkok Post* (16 June 2016) <<https://www.bangkokpost.com/news/security/1011181/regime-favours-ending-war-on-methamphetamine>> (accessed 25 May 2018).

the accused is given an opportunity to put forward evidence and arguments to contest the presumed supply offence. Much like in Singapore, one commentator noted how these reforms “appear subtle at first” but that the “wording of the code means that drug users will no longer be automatically prosecuted as drug dealers”.<sup>71</sup> The new law also removes the mandatory death penalty for supply offences involving large quantities of drugs. The sentencing discretion now afforded to judges will allow them to take the offender’s role, along with other relevant factors, into account when sentencing. In other words, while the law demonstrates that Thailand is not planning to abandon its high deterrence policy in relation to drug offences, it also signals a recognition that culpability cannot be determined exclusively with reference to the quantity of drugs a person is in possession of. In response to the new law, Alex Wodak tweeted, “[movement] to drug law reform in Thailand. Important. Will affect other countries in the region”. This remains to be seen.

### ***E. Alternative to liberalisation agenda***

32 Many countries in Asia wish to maintain their high deterrence stance, and for cultural, social or political reasons, both policymakers and the general public remain deeply sceptical to what is commonly described as “liberalising” drug laws.<sup>72</sup> Gloria Lai explained that “both the use and supply of controlled drugs are regarded in Southeast Asia as a threat to state security that must be eradicated, justifying the implementation of severely punitive drug policies”.<sup>73</sup> There are currently no indications that this position might shift in any fundamental way. As the Minister of Home Affairs from Singapore said in his speech at the United Nations General Assembly Special Session on Drugs (or “UNGASS” in short): “[our] approach has been successful for us”.<sup>74</sup> This sentiment was echoed by the Malaysian government, which urged countries to “remain resolute against calls to legalise drugs”, while Thailand stated that “we do not agree with legalisation of illicit drugs

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71 See Mel Larcombe’s blog at <http://miaescobudkohphangantales.blogspot.co.uk/2017/02/thailand-reforms-death-penalty-for-drugs.html> (accessed 11 May 2018).

72 This typically refers to decriminalising drug use, and then eventually legalising and controlling drug markets in ways similar to how the tobacco and alcohol markets are regulated with a view to mitigating harm.

73 Gloria Lai, “Is Drug Decriminalisation on the Cards for Thailand?” *volteface* <<http://volteface.me/features/thailand-drug-decriminalisation/>> (accessed 11 December 2016).

74 K Shanmugam, Minister for Home Affairs and Minister for Law, “Singapore Statement at the UNGASS 2016 Plenary Session”, speech at the 2016 United Nations General Assembly Special Session on the World Drug Problem (19–21 April 2016).

and decriminalization for serious offences”.<sup>75</sup> At the Fifth ASEAN Ministerial Meeting on Drug Matters on the fitting theme of “Securing Drug-Free Communities for Our Future”, member states rejected calls for drug policy reform. An official statement deemed such “calling for legal regulation and decriminalisation as irresponsible people who care little about the consequences of their actions”. At the meeting, Singapore warned ASEAN<sup>76</sup> countries against allowing the medical use of certain drugs, and called on them to ensure the region maintains its zero-tolerance approach.<sup>77</sup> Reform that looks too “liberalising” will require the sacrifice of so much political capital that it is probably unrealistic at this point in time. *The Economist* recently observed that “drug wars are good politics [in Asia]”, eluding to the public demand for a continuation of current polices, and that “the sorts of alternatives now favoured in the West [therefore] are virtually non-existent”.<sup>78</sup>

33 *The Straits Times* correspondent, Tan Hui Yee, reported from Thailand that “[for] entire generations brought up on the ‘zero tolerance’ rhetoric on drugs, anything other than harsh penalties may appear alien”. Jaran Pukditanakul J, who sits on the Constitutional Court in Thailand recalls how “we told them that narcotic drugs are bad, get rid of them all [so] it’s not easy to educate society now, particularly when you have to go against the concept that has been planted in their heads ... It’s like telling people in Thailand not to eat rice”.<sup>79</sup>

34 At the same time, high deterrence policies, combined with the quantity proxy approach, have led to ever-increasing criminal caseloads and overcrowding in prisons and detention facilities. The increasing social and financial costs of enforcing existing drug laws is probably unsustainable in many countries, in particular, in the countries with more limited budgets for law enforcement, administration of criminal justice, and prison services. High deterrence policies have also proven to have significant public health repercussions.<sup>80</sup>

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75 Axel Kline, “UNGASS 2016 – The Consensus Holds, But Only under Protest” *DrugWise* (2016) <<http://www.drugwise.org.uk/ungass-2016-the-consensus-holds-but-only-under-protest/>> (accessed 3 January 2017).

76 “ASEAN” stands for “Association of Southeast Asian Nations”.

77 Ann Fordham, “Questioning the ‘Limits of Reality’ – ASEAN Reaffirms Commitment to Become ‘Drug-Free’” *International Drug Policy Consortium* (2016) <<http://idpc.net/blog/2016/10/questioning-the-limits-of-reality-asean-reaffirms-commitment-to-a-drug-free-asean>> (accessed 3 January 2017).

78 “Asia is Still Just Saying No to Drugs” *The Economist* (14 January 2007).

79 Tan Hui Yee, “A Failing Drug War Triggers New Approach in Thailand and Myanmar” *The Straits Times* (6 August 2016).

80 See, eg, Joanne Csete *et al*, “Public Health and International Drug Policy” (2016) 387 *The Lancet* 1427.

35 The alternative, for countries that can no longer afford to be on the current trajectory, is to consider the possibility of defining drug offences with reference to the role of the alleged offender. This would not amount to “liberalising” the law. It would simply be a matter of changing the law to better reflect the reality that people may be in possession of drugs for a whole host of reasons, and that the law will be more equitable and fair if it judges people on their roles and motivations for engaging in the drug industry, as opposed to the weight of whatever drug they happen to be carrying. The role-based approach thus presents an opportunity to maintain high deterrence policies in relation to the offence of taking on leading or significant roles in the drug industry. Courts could hand down the kind of sentences called for by high deterrence proponents against people who orchestrate, manage, and who reap tremendous profits from the drug industry (but who probably never touch drugs, let alone carry dozens of kilos around). There could then be separate offences of, for example, carrying or transporting drugs owned by someone else (acting as a courier) and trading drugs for purposes of financing a drug use disorder. As noted above, jurisprudence in Singapore has already begun to delineate the courier function. Similarly, *Afonso* and the jurisprudence that has followed it in England and Wales offer a basis upon which to define the offence of trading drugs for purposes of financing a drug use disorder. Another option would be for the drug law to operate in a manner similar to the law of homicide in Singapore. The offence of murder requires proof of the intent to kill or to cause lethal injury.<sup>81</sup> However, when there is evidence to show that the accused was provoked or acted in “excess of private defence” (to mention just two of several mitigating circumstances), then the accused is not guilty of murder but of culpable homicide not amounting to murder.<sup>82</sup> In the same way, the aggravated offence of drug trafficking might require proof of the accused having management and supervisory functions in a drug trading operation. But when there is evidence to show that (a) the accused was carrying or transporting drugs owned by someone else (acting as a courier), or (b) the accused was trading drugs for purposes of financing a drug use disorder, then that would amount to a lesser offence of supply of illicit drugs not amounting to trafficking.

36 There are no existing models for such a legislative approach, and much work remains to be done to establish, *inter alia*, what sort of evidence would be required to prove these different types of role-based drug offences. Investing in a new role-based approach would nevertheless be justified, not only by the need to ensure that the law is fair, but also by the need to reduce transaction costs in relation to those

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81 Penal Code (Cap 224, 2008 Rev Ed) s 300.

82 Penal Code (Cap 224, 2008 Rev Ed) s 300.

very large numbers of drug offenders who may have been in possession of drugs, but who serve only rather peripheral functions in the drug industry.

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