

THE THAI CRIMINAL JUSTICE SYSTEM AND PROTECTION FOR VICTIMS OF CRIME AND USE OF RESTORATIVE JUSTICE PROGRAMMES

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I. THE HISTORY OF THE THAI CRIMINAL JUSTICE SYSTEM

A. The *Sukhothai*, the *Ayutthaya* and the *Thon Buri* Periods

The Thai legal system and the judiciary's history started between AD 1238 to 1350 (the *Sukhothai* period) when the King, himself, adjudicated all disputes between his citizens. Later in the *Ayutthaya* period (AD 1350 to 1767), the Thai legal system was developed by introducing the *Dhammasattham* — the ancient Hindu jurisprudence—as the law code of the realm. The *Dhammasattham* was a fundamental law dealing with both civil and criminal matters. Unfortunately, during the reign of King Taksin the Great (AD 1767 to 1782), the country was faced with a series of battles; therefore, the law and judiciary system had little improvement.

B. In the Early *Rattanakosin* Period (Absolute Monarchy)

Later, at the beginning of the Chakri Dynasty in 1782, the Law of Three Seals was written, as the code law, by revising the laws derived from the *Ayutthaya* period. In the reign of King Rama V, there was important development of the legal and judiciary system when the country was required to standardize the law and legal system equally to foreign nations. The first criminal law code was enacted in 1908, and drafting of the Civil and Commercial Code was started but was not completed until the reign of King Rama VII.

C. In the Present *Rattanakosin* Period (Democracy)

The Revolution of 1932 changed the form of government from an absolute monarchy to a democracy and had an important effect on the Thai legal and judiciary system. The Constitution B.E. 2475 (AD 1932) established the powers, functions and duties as well as the structure of the Executive, the Legislative and the Judiciary. The Constitution of the Kingdom of Thailand, B.E. 2540 (1997) has had a significant impact on the reorganization of the political system as well as the judicial system of Thailand.

D. The Courts of Justice

Before 1997, there were two types of Courts in Thailand; however in 1997, a significant change in the Judiciary power had been made. Under the 1997 Constitution (and the 2007 Constitution), there were (and now are) four types of courts: the Constitutional Court, the Courts of Justice, the Administrative Courts and the Military Court. The Courts of Justice are classified into three levels comprising the Courts of First Instance, Courts of Appeal and the Supreme Court. Courts of First Instance are categorized as general courts, juvenile and family courts and specialized courts, called the Central Intellectual Property and International Trade Court, the Central Bankruptcy Court, the Central Tax Court and the Labour Court. The general courts are ordinary courts which have authority to try and adjudicate criminal and civil cases.

E. Judges of the Court of Justice

There are four types of judges in the current Thai judicial system, namely, career judges, senior judges, lay judges, and *Kadi* (*Datoh Yutithum*). Firstly, career judges are recruited by the Judicial Commission and are appointed by His Majesty the King. In order to be an eligible candidate for career judge one has to be of Thai nationality, at least 25 years of age and must have earned a Bachelor's

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degree in law, passing the examination of the Thai Bar Association, and having not less than two-years' working experience in the legal profession. A candidate must pass a highly competitive examination given by the Judicial Commission. Once the candidates are recruited, they have to be trained as judge-trainees for at least one year. Those candidates who complete the training with satisfactory results will be approved by the Judicial Commission and tendered to His Majesty the King for royal appointment to be a junior judge. A solemn declaration before His Majesty the King is also required before taking office as a judge. Secondly, senior judges must be at least sixty years of age and have performed judicial services for at least twenty years and also pass the assessment of health performance, according to the Act on Rules for Appointing and Holding Senior Judge Position, B.E. 2542 (AD 1999). Judges who are qualified and wish to be senior judges must express their intention in writing to the President of the Supreme Court. Senior judges are able to remain in office until they reach seventy years of age. A senior judge cannot be appointed to hold the office of court executive, such as a Chief Justice, or even to perform duties in place of such person. Thirdly, Lay Judges who are laymen recruited separately to perform duties in the Juvenile and Family Courts, the Labour Courts or the Central Intellectual Property and International Trade Court. The reason for having lay judges is to have an experienced person or an expert in a relevant field who can work closely with a career judge in adjudicating cases. Unlike a career judge, becoming a lay judge is not a permanent position. Each lay judge holds his or her office for a term of years depending on which specialized court he or she is working for. Forty *Kadi* (*Datoh Yutithum*), according to the Act on the Application of Islamic Law in the Territorial Jurisdictions of Pattani, Narathiwat, Yala, and Satun Provinces, B.E. 2489 (1946), the Islamic Law on Family and Succession except the provisions on prescription in respect of succession shall apply instead of the Civil and Commercial Code in adjudicating civil cases concerning family and succession of Muslims. In such cases, career judges and a *Kadi*, who is an expert on Islam, will sit on the bench together to adjudicate the case to comply with the principles of Islam. A *Kadi* must not be less than thirty years of age, know the Thai language at the prescribed level, and have knowledge of Islam to enable him to apply the Islamic laws relating to family and succession.

II. THAI CRIMINAL JUSTICE SYSTEM

Concentrating criminal cases in Thailand, the prosecution process is the responsibility of several government organizations: the Royal Thai Police, the Office of the Attorney General, the Courts of Justice, and the Ministry of Justice. Almost all criminal cases are filed by the State, the public prosecutor, against a person or organization who violates a penal law. Which acts or omissions are considered as crimes or offences must be identified by the Penal Code. Special penal laws, for example, the Narcotics Control Act B.E. 2522 (AD 1979), the Land Traffic Act B.E. 2522 (AD 1979), and the National Forest Act B.E. 2507 (AD 1964), however, can identify and impose punishment on one who does or omits something that is considered as a criminal act. Even though an act is socially or morally wrong, no criminal liability is incurred until that act is classified as a crime under the law. The reason why the public prosecutor—not the private injured person or the victim—sues the offender, is because crimes are considered offensive to peace and order in society. The victim is considered only as a witness for the State to prove the criminal's guilt. This long process starts with the victim having to go to the Police to report of a criminal incident. The Police then proceed to investigate the alleged crime and report their findings to the Office of the Prosecutor. Later, the Office of the Prosecutor files the appropriate criminal case with the Court. Courts have jurisdiction in the district where an offence has been committed, alleged or believed to have been committed, or where an accused resides or is arrested, or where an inquiry official conducts an inquiry. After the court hears the witnesses of the prosecution and the defence, it then renders its judgment. Due to the fact that the victim of the crime is also affected by the offender and the overwhelming number of criminal reports, the Criminal Procedure Code empowers the victim of the offence, a private citizen, to hire lawyers to directly file the criminal case in court, instead of reporting it to the police. In the Thai justice system, only judges decide criminal cases; the jury system does not apply in this country.

A. The Crime Victim's Right To Be Compensated

Early in history, criminal law was essentially law for victims who were the center of the administration of criminal justice. For example, compensation and restitution were criminal sanctions aimed at providing redress to the victims. However, the criminal justice system had changed to a system of retributive justice and became offender centered—a system that only put emphasis upon guilt and

punishment. Crime victims are recognized as the rights of the accused and, at best, valuable witnesses for the prosecution of the state's case; on the other hand, at worst, they are sometimes viewed as impediments to the prosecutorial process. The concept of crime as a victim redressing has been replaced by the notion that crime is an act against the well-being of the state. Therefore, society, including crime victims, seeks the most severe possible punishment for offenders. Victims believe that the longer offenders are in jail, the happier the victims will be in the future, but such severe punishment often leaves victims feeling empty and unsatisfied because a retributive criminal system cannot compensate their losses, ease their fears and insecurities, restore their confidence or heal their physical and emotional wounds. On the other hand, after serving their time in the prison, offenders often return to the community even more antisocial than before and tend to recidivate.

The Thai criminal justice system recognizes the crime victim's right to be compensated by the offender. According to Section 43 of the Criminal Procedure Code, public prosecutors—only in cases of theft, snatching, robbery, piracy, extortion, cheating and fraud, criminal misappropriation and receiving stolen property—may seek restitution on behalf of the victims. Later in 2005, the Criminal Procedure Code was amended; Section 44/1 grants authority to the public prosecutor to have the right to claim compensation for loss of life, bodily or mental harm, injury to person, impairment of reputation or proprietary damage from the crime offenders on behalf of the crime victims or injured people. Before this amendment, crime victims had to file complaints with the civil court for such compensation at their own expense; therefore, many of them tended not to pursue their rights. (Crime victims also can apply for compensation awards to the Victim Compensation and Restitution Board (VCR), Ministry of Justice, according to the Victim Compensation and Restitution for the Accused Person Act and the Witness Protection Act B.E.2544 (AD 2001)).

B. Crime Victims' Rights in Domestic Violence Offences

The problem of domestic violence has been increasingly realized and acknowledged in Thai society. Domestic violence cases should not be conducted using the conventional criminal judicial process because it does not take an interest in the harm suffered by the victim and the community and cannot prevent offenders from recommitting their crimes. Therefore, Thailand enacted the Domestic Violence Victim Protection Act to handle domestic violence cases. The Domestic Violence Victim Protection Act, B.E.2550 (AD 2007), which deals with any act committed with an intention to cause bodily or mental harm, or an act committed intentionally in a manner that may cause bodily or mental harm, to a family member or any coercion or undue influence conducted with a view to make a family member do something, refrain from doing something or accept any act illegally, has some kind of protection which is different from the general criminal cases. For example, under section 6, the domestic violence victim has right to get treatment from a physician and to have a consultation with a psychiatrist, psychologist or social worker. If the domestic violence victim would like to file a complaint, he or she can file a complaint on his or her own or allow the competent official to file a complaint on his or her behalf. In order to respect the domestic violence victim's privacy rights, section 9 orders that in domestic violence cases, no person shall publish or make known to the public in any manner whatsoever any picture, story or any information which may cause damage to the person who commits an act of domestic violence or to the domestic violence victim. As mentioned above, domestic violence cases are different from general criminal cases because of the relationship between the offender and the victim. These kinds of cases need to have some special court orders. Therefore, section 10 orders that the domestic violence victim has the right to ask the competent official to impose provisional remedial measures or means in favour of the domestic violence victim, such as an order requiring the person who commits domestic violence to receive a diagnosis from a physician, to pay financial assistance in accordance with his station in life, not to enter into the residence of the family or to stay close to any person in the family, as well as an order concerning care of his or her child. *Thon Buri* Criminal Court established the Psychosocial Clinic. This Clinic employs psychosocial clinic consultants who have a duty to give a consultation for domestic violence offenders and victims. Psychosocial clinic consultants are lay persons with psychological or social-work experience, and they must attend the psychosocial clinic's training.

C. Child Offenders, Victims and Witnesses

The Thai criminal justice system is concerned about children who have been involved in criminal cases as offenders, victims or witnesses. Therefore, section 133 bis of the Criminal Procedure Code

orders that in cases of offences punishable with maximum imprisonment of three years and upward, or in the case of offences punishable with fewer than three years' imprisonment and the injured person or witness who is a child so requests, or in the case of causing bodily harm to a child not yet over eighteen years of age, the examination of a child victim or witness shall be made separately in a place suitable for him or her, and a psychologist or social worker, a person requested by the child and the public prosecutor shall participate in such examination. At trial, section 172 ter of the Criminal Procedure Code orders all courts to provide a suitable place for child witnesses and requests that a psychologist or social worker must attend to help the child witness during the examination-in-chief, cross-examination, and re-examination.

D. Mediation Center and Reconciliation Center

The Mediation Center has authority to mediate compoundable offences when the crime victim or injured person files the complaint by himself or herself, while the Reconciliation Center deals with non-compoundable cases in which the State, through a public prosecutor, brings a lawsuit before the court. The Mediation Center and Reconciliation Center allow offenders, victims, and their family members to participate in every session. During the mediation and reconciliation process, the offender and victim will participate in a face-to-face victim-offender meeting, including both joint and caucus sessions. The mediation and reconciliation system has a special concern for the needs of crime victims. The crime victim has a chance to express his or her emotion, agony and insecure feelings as well as to ask for compensation and restitution from the offender. At the same time, the offenders are able to show their responsibility, sympathy and regret. During the mediation process, a mediator will conduct and facilitate both parties to express their real interest and finally get to the agreement. On the other hand, during the reconciliation process, a judge has a duty to explain the charge, the accused's rights and liability and victim's rights. Unfortunately, the mediation and reconciliation process are alternative options.

E. Courtroom without Directly Confronting the Accused

In general, the trial and taking of evidence must be conducted in open court and in the presence of the accused. A witness has to give evidence in front of the accused. The judge, public prosecutor, defendant and defendant's attorney shall be present in the courtroom. A criminal trial shall be made with direct confrontation of the witness and the accused. However, in some cases, the original courtroom is not suitable for adult witnesses who feel fear or embarrassed by the accused. *Thon Buri* Criminal Court is concerned about the rights and safety of witnesses. Therefore, *Thon Buri* Criminal Court established the Courtroom without Direct Confrontation of the Accused. In this courtroom, a witness gives testimony in the courtroom where the judge, public prosecutor and defendant's attorney are together but a witness will not confront the accused. Moreover, there is the Witness Room where a witness can rest and relax before and after giving testimony. This type of courtroom is suitable for a witness who is a child under 18 years of age, women and the elderly who are afraid or ashamed of the accused. Up until now, there was only one courtroom without direct confrontation of the accused in the Kingdom of Thailand.

III. CHALLENGES FOR THE THAI CRIMINAL JUSTICE SYSTEM

From my experience as a *Thon Buri* Criminal Court judge, the challenge for the Thai criminal justice system, in terms of protecting victims' rights and applying Restorative Justice, firstly is the attitude of crime victims and judges. Secondly, as mentioned above, the victim and society desire the severest punishment possible for the offender, which is actually a burden to the court and the criminal justice system. Thirdly, the Mediation and Reconciliation process concentrates only on crime victims and offenders but leaves the whole community out of the process, and the victims usually refuse the court's efforts to have the victim meet with the offender, or they only reluctantly participate in the mediation and reconciliation process. Even if the concept of Restorative Justice has been introduced to the juvenile criminal justice system since 2010, the criminal justice system has not fully applied Restorative Justice in its system.

The Courtroom without Direct Confrontation of the Accused





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The Courtroom for Child Witnesses



