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นายรักขิต รัตจุมพฏ

สถาบันวิทยบริการ
จุฬาลงกรณ์มหาวิทยาลัย

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ENFORCEMENT OF COMMUNITY-BASED RESOLUTION IN CRIMINAL CASES

Mr. Rakkit Rattachumpoth

สถาบันวิทยบริการ
จุฬาลงกรณ์มหาวิทยาลัย

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วิทยานิพนธ์ฉบับนี้มุ่งศึกษาความเป็นไปได้ที่จะบังคับตามคำชี้ขาดในคดีอาญาของผู้ตัดสินซึ่งเป็นตัวแทนของชุมชน เหตุผลสำคัญสองประการที่ต้องศึกษาคือ 1. กระบวนการยุติธรรมที่เป็นทางการกำลังประสบปัญหาอย่างหนักเพราะมีคดีเข้าสู่กระบวนการในปริมาณมากจนเกินกำลังและคำตัดสินของศาลไม่สามารถอำนวยความยุติธรรมได้เสมอไป 2. กระบวนการยุติธรรมที่ไม่เป็นทางการกำลังทวีความสำคัญขึ้นอย่างต่อเนื่อง

ผลการวิจัยพบว่าข้อพิพาททางอาญาระหว่างสมาชิกในชุมชนสามารถระงับได้ด้วยวิธีการที่ไม่เป็นทางการหลายอย่าง แต่ปัญหาสำคัญคือ คำชี้ขาดอาจจะไม่มีผลบังคับถ้าฝ่ายใดฝ่ายหนึ่งไม่ยอมปฏิบัติตาม ผลลัพธ์คือข้อพิพาททางอาญาจะต้องย้อนกลับไปสู่กระบวนการยุติธรรมที่เป็นทางการและส่งผลให้เสียเวลาและค่าใช้จ่ายในการดำเนินคดีเพิ่มขึ้นโดยไม่จำเป็น ทางออกสำหรับปัญหานี้คือต้องอาศัยอำนาจของหน่วยงานในกระบวนการยุติธรรมในการบังคับตามคำชี้ขาด กล่าวคือถ้ากระบวนการทั้งหมดตลอดจนคำชี้ขาดได้รับการเห็นชอบจากศาลที่มีอำนาจและหากศาลดังกล่าวมีคำสั่งว่าอย่างไรก็สมควรให้บังคับได้ในฐานะที่เป็นคำสั่งชนิดหนึ่งของศาล หากฝ่ายใดฝ่ายหนึ่งไม่ยอมปฏิบัติตามคำชี้ขาดนั้นก็จะต้องมีความผิดฐานละเมิดอำนาจศาล นอกจากนี้ผู้วิจัยยังเสนอว่าควรอนุญาตให้มีการตั้งบุคคลที่สามขึ้นมาเพื่อตัดสินข้อพิพาททางอาญาในกรณีที่เหมาะสมกับสภาพสังคมไทย เช่น กรณีความผิดอันยอมความได้และผู้กระทำความผิดกับผู้เสียหายมีสัมพันธภาพพิเศษต่อกัน ทั้งนี้คู่กรณีจะต้องให้ความยินยอมและมีโอกาสเลือกบุคคลที่จะมาทำหน้าที่ตัดสินดังกล่าว อนึ่งคำชี้ขาดของผู้ตัดสินจะบังคับใช้ได้ก็ต่อเมื่อกระบวนการทั้งหมดผ่านการรับรองของศาลด้วยวิธีการที่เหมาะสมแล้ว

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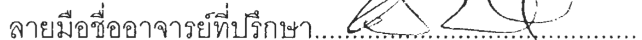
สาขาวิชา..........นิติศาสตร์......... ลายมือชื่อนิสิต..



การศึกษา..........2547................ ลายมือชื่ออาจารย์ที่ปรึกษา..

AN ABSTRACT

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KEY WORDS: COMMUNITY DISPUTE RESOLUTION / MEDIATION / ARBITRATION / INFORMAL JUSTICE / CRIMINAL JUSTICE

RAKKIT RATTACHUMPOTH : ENFORCEMENT OF COMMUNITY-BASED RESOLUTION IN CRIMINAL CASES. THESIS ADVISOR : ASSOC PROF APIRAT PETCHSIRI, Ph. D., 80 pp. ISBN 974-17-6403-9

This thesis examines the enforceability of community-based resolution in criminal cases. The study is necessary for two main reasons. First, formal criminal justice system is in a critical situation owing to the persistent overload of cases and growing inefficiency of court-based adjudication. Second, informal justice is gaining importance progressively.

The research finds that there are a multitude of informal methods to settle criminal conflicts between community members. But there is one problem: the community-based resolution may not be valid if any of the two parties refuse to abide by. As a result, the case may return to the formal justice system, hence duplicating the time and cost. To solve this problem, it is necessary to seek the authority of the criminal justice agency. To be precise, if the competent court has approved the process and finds that the decision is in accordance with some specified criteria, the community-based resolution should be binding and enforceable. The resolution can be deemed as a court's order. If any party fails to comply with it, they may be charged with contempt of court. The research also suggests the legalization of submitting certain types of criminal cases (e.g. compoundable nature and special relationship between the offender and the injured person) to a third neutral party selected or approved by the two disputing parties. The decision can be formally enforced when the process has been approved by the competent court.

Field of study: ……………..Laws………… Student's signature……………………………….………

Academic Year…………….2004………… Advisor's signature…………………………………..

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CHAPTER I

INTRODUCTION

As a kind of "social animal", human being can't live alone. Men must associate with other counterparts in order to survive. Coming along with human interaction is a conflict that leads to a dispute. Human society has put a lot of efforts to come up with an efficient method to resolve human conflicts. The best recognized method is the formal criminal justice. Its role is so active that it is considered the mainstream process. However, its efficiency is still questionable. Consequently, there are a large number of non-judicial modes of settlements to resolve criminal conflicts. It is still necessary to find out how to ensure the efficient use of these informal mechanisms.

1.1 Background and Importance of the Problem[*]

Two trends make it necessary to look for an alternative to formal criminal justice system. The first trend is an ever-increasing caseload of all criminal justice agencies, from the police, through the courts, and up to prisons. Much of this increase consists of minor conflicts for which the legal processing might be unnecessarily costly and time consuming.

All criminal justice agencies are flooded with an overload of criminal cases. Like other countries, Thailand is faced with a critical problem resulting from an overload of criminal cases. The difficult situation is best summarized in Mahidol University's report:[1]

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[*] Most of the materials about Thailand cited in this thesis are in Thai. Unless stated otherwise, translations were done by the author. The materials referred in the footnotes are in English unless they are indicated otherwise.

[1] Mahidol University. **Master Plan of National Criminal Justice (Draft).** p.8 (in Thai)

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> "In the upcoming 5 – 10 years, Thailand's criminal justice will face with an increasing number of crimes that will be more brutal and more complicated in terms of techniques and methods. Likewise, criminal behavior will be even more complicated. Also likely to be on the rise are offences against life, body, property and crimes relating to sexuality and drugs."

This threatening trend will certainly force the government to allocate a larger proportion of budget to keep the criminal justice functioning. That enormous sum could and should be, otherwise, spent on many other development projects and would hence benefit a large number of people.

Moreover, the increasing workload of all criminal justice agencies will deteriorate the already critical problem: time consumption in formal justice. The prosecution in Thailand, like many other countries, is extremely long and troublesome, especially in the court proceedings. The delay stems from a case suspension that is becoming more and more common. The examination in court might, therefore, take several months before a court-annexed decision could be made. Even worse, the case can be prolonged for many years if any involved parties decide to make an appeal.[2]

The second trend is the growing realization that the court-based adjudication is not necessarily an ideal form of justice in all circumstances. Moreover, in some cases, the legal processing is not entirely successful in terms of rehabilitating the offender, helping the victim, or preventing further troubles.

One of the most important goals of criminal justice is to rehabilitate the offender. Unfortunately, the offender rehabilitation seems to be overshadowed by the importance of bringing offenders into the formal justice system. As a result, many defendants are prosecuted for committing minor offenses. The court procedure is not only time-consuming but also causes a long-lasting stigmatization. Moreover, to render

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[2] Kittipong Kitayarak. **Strategies in Reforming Thailand's Criminal Justice.** 1st Edition (Bangkok: Duean Tula Printing House, 2001). p. 37 (in Thai)

a decision, the court's main concern is to punish the defendants but likely to overlook the importance of the relationship between the offender and injured. The convicts are then pushed forward the prisons, hence increasing the workload of the correction agencies. As a result, it is difficult to rehabilitate the offenders. Recidivism is, therefore, very common.[3]

The crisis of formal criminal justice is clearly concluded in the following statements:[4]

1. Formal criminal justice is administered and controlled by the state to the extreme extent that public participation is impossible.
2. Statutes and formal criminal justice aim to punish offender rather than rehabilitate them or prevent further problems.
3. Formal criminal justice overlooks the importance of the injured person or the crime victim.
4. Formal criminal justice aims to bring as many cases and conflicts as possible into the court procedure, understating the importance of community and discouraging its role in solving the problems.
5. Some agencies in criminal justice adhere with too strict rules and lack of flexibility. As a result, in the public eyes, people in troubles are maltreated.

These trends converge into new ideas put forward for processing criminal conflicts and settling disputes without the use of formal adjudication so as to provide all parties involved with advantages in terms of speed, cost, and improved results. This idea has been internationally recognized when the United Nations (UN) took an initiative in promoting informal justice by adopting Resolution 40/34 entitled Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. Article 7 of the resolution states:

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[3] *Ibid.* pp. 38 – 39

[4] *Ibid.* pp. 4 - 5

"Informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, should be utilized where appropriate to facilitate conciliation and redress for victims."

When a minor crime is committed among family members or within community members, the basic way to resolve the criminal matter is to hold a talk. The negotiation might result from the initiative of the offender and the injured person themselves. Sometimes, the talk happens because of a persuasion of a third person who can command the respect of the two parties. The criminal conflict can be solved if the offender and the injured person reach an agreement of settlement and fully comply with the terms and conditions included in the agreement. However, problems arise when any of the two parties fail to abide by the agreement. As a result, the criminal case is highly to be returned to the formal justice system, resulting in the duplication of cost and time waste. It is, therefore, necessary to conduct this research in order to find out the possibility to fully enforce the community-based resolution in criminal cases without having to recommence the court proceedings.

1.2 Objectives of the Research

1. To explore the similarities and differences of different modes of non-judicial settlement of criminal cases.
2. To acquire the concept and process of out-of-court settlement by an assistance of a third person in criminal cases.
3. To explore the possibility to assign a third person to settle a criminal case out of court.
4. To explore the role of criminal agencies in scrutinizing the referral of criminal case to be settled out of court of court by an assistance of a third person.
5. To explore the role of the court in enforcing the community-based resolution of criminal cases

1.3 Hypothesis of the Research

The efficiency of non-judicial modes of settlement in criminal cases can be improved if the formal mechanism recognizes the existence of the informal process. Recognition and legalization of the informal process are necessary for enforcing community-based resolution in criminal cases. Subject to certain legal criteria, dispute resolution in criminal cases rendered by a third person should be enforceable under Thai law provided that the process has been approved by the competent tribunal.

1.4 Scope of the Research

This thesis focuses on the recognition and legalization of the informal process that is used to settle criminal cases between community members. A number of community dispute resolution programs in the United States of America will be set up as an example to indicate that the trends for the effective use of informal mechanism are prevalence. The trends indicate the growing popularity of informal methods and offer the proof that informal mechanism benefits the society as a whole. In the end, it will explore various possibilities of enforcing dispute resolution in criminal cases with Thai criminal laws as a case study. Occasional references to criminal laws in certain foreign countries are made for comparison purposes.

Various modes of diversion will be included so as to indicate the importance of diverting some criminal cases from the formal justice system. But its efficiency is not the focus of this thesis. Therefore, the study will not go into details about its effective use.

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1.5 Expected Benefits

1. Understanding of the similarities and differences between various modes of non-judicial settlement of criminal cases.
2. Understanding of the concepts and process of out-of-court settlement with an assistance of a third person in criminal cases.
3. Understanding of the role of criminal agencies in scrutinizing the referral of criminal case to be settled out of court.
4. Understanding of the role of the court in enforcing the community-based resolution of criminal cases.
5. Knowledge about the possibility to assign a third person to decide on a criminal.

1.6 Methodology

To achieve the goal of this study, I will examine a myriad of related materials, mainly, textbooks, magazines, reports and articles. Documentary research is chosen because this research contains mainly dogmatic arguments rather than explores the general opinions of the criminal justice personnel.

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CHAPTER II

IMPORTANT CONCEPTS RELATED TO COMMUNITY-BASED RESOLUTION IN CRIMINAL CASES

A certain number of crimes do not only break the law, but also damage the relationship between the offender and the injured person. Moreover, it threatens the peacefulness of the community of which the two parties are members. After the confrontation in the court, the offender and the injured person might have to go on living together or associating with each other. One of the most important problems is that the court-based adjudication might not be able to help them mend their relationship. Therefore, it would be better to get the community involved with resolving their criminal conflict and help them restore their relationship before it becomes beyond remedy.

This chapter will begin with details of Community Justice, a fundamental concept of promoting the roles of community in resolving criminal disputes between community members. Later, it will explore a brief history of development of criminal law and distinction between civil and criminal liability. Finally examined will be some important concepts that support the informal justice.

2.1 Community Justice

Community justice originated from a seminar organized by Bureau of Justice Assistance, U.S. Department of Justice in cooperation with Center of Effective Public Policy and Center for Court Innovation in September 2000. The American Probation and Parole Association (APPA) later adopted the following definition:[1]

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[1] Somchai Iam-anuphong. Concept paper in a seminar entitled **'Toward a New Paradigm of Justice: Community Justice'** organized by Probation Department and Justice Affairs Office, Justice Ministry on May 16, 2003. (in Thai)

"Community justice is a strategic method to reduce and prevent crime by creating and promoting partnership within community".

Community justice is a new concept to deal with crime problems with community involvement in solving the problems and provide victims with remedies. Its fundamental idea is that the state realizes the potential of the community in dealing with problems within the community. Moreover the state is aware of its limitation in solving all social problems. The restriction covers not only budget and manpower, but also adequate understanding of distinctive lifestyle in the community. Furthermore, the community justice is a new concept that complies with concept of criminal justice administration in capitalist economic system that emphasizes on high participation and low investment and accentuates rehabilitation of offender so that he or she becomes a productive citizen.[2]

Fundamental principles of the criminal justice are as follows:[3]

- Crime is a wrongful act against human relationship, not against the state.
- More important than retribution is restoration of the damage caused by crime.
- Damaged person, offender and community must cooperate to restore the damages caused by crime.
- Offender must admit his wrongdoing and feel guilty.
- Community has a collective will in possessing the power to administer justice and/or to administrate criminal justice.
- Punishment by incarceration does not always bring about a better society or help offender change into a good and productive citizen.

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[2] Angkana Boonsith. Concept paper in a seminar entitled **'Toward a New Paradigm of Justice: Community Justice'** organized by Probation Department and Justice Affairs Office, Justice Ministry on May 16, 2003. p.71 (in Thai)

[3] *Ibid*. p.72

Community Justice is a result of a major change in social science from "modernity" to "post-modernity". It brings about a drastic change in the fundamental concept of criminal justice: the shift of authority. "Authority" here means the power to define the justice, criminal justice agents, and process or modes to acquire justice, and finally, the measures to deal with the offender. According to the formal criminal justice, this power belongs to the state absolutely. But according to the Community Justice, community should be encouraged to be a part of formal criminal justice. Community has an authority to administrate criminal justice via meeting/agreement of community members in correcting offender. The ultimate purpose is to rehabilitate him or her so that he or she can become a good and productive citizen.[4]

New as it may seem, the community justice can be said to be long existent in Thailand and still influential in Thai society. In the past, Thai village was a self-governing unit that had its own method to settle criminal conflict. This non-judicial settlement is still practiced even though formal criminal justice system has been established for quite many years.[5] For example, when a case of assault occurs, villagers in the Northeastern Thailand usually refrain from bringing the case to formal justice system. The two parties choose, instead, to appoint 4 – 5 highly respected senior persons to mediate. They are willing to be bound by decision given by the senior representatives who may order the offender to pay a certain amount of money for restitution and demand that he or she promise not to commit a wrong behavior again. The criminal case is hence terminated while relationship between the two parties does not further deteriorate and peacefulness in the community is rapidly restored.

Community justice is practical and will be especially useful, provided that the state is willing to reduce its power and recognize the potential of the community, hence distributing adequate resources to promote it.[6]

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[4] *Ibid*. p.73

[5] Chatthip Natsupha and Pornpilai Lertvicha. **Culture in Thai Villages.** 2nd Edition. Bangkok: Duen Tula Publishing House. August 1998. pp. 64 – 65 (in Thai)

[6] Angkana Boonsith. *Ibid*. p.78 (footnote 2)

2.2 Historical Development of Criminal Offences

Legal historians believe that criminal law has originated from tort.[7] To be precise, tort is a stage of criminal law. The evolution started in an unknown time when an injured person has a right to take a revenge for any wrong committed against him. This assertion is best illustrated in the *lex talionis* that could be translated into the prevalent citation “An eye for an eye, a tooth for a tooth”. However, instead of taking revenge, the injured person could request for a compensation that hence terminated the conflict.

In any primitive society, a line between *Crimes* and *Wrongs* (*crimina* and *delicta)* is very blurred, if there is any. The penal law of ancient communities was not the law of Crimes; it was the law of Wrongs, or, to use the English technical word, of Torts. The person injured proceeds against the offender by an ordinary civil action, recovers compensation in the shape of money – damages – if he succeeds.[8]

This assertion is best exemplified by Roman history of law that distinguished illicit actions (*delicta or maleficia)* into two categories: *delicta privata* (private wrongs) and *delicta publica* (public wrongs). Only the latter were considered a threat to public interest. Through a criminal procedure in a representative tribunal, violators of public wrongs would be sentenced to corporal or pecuniary punishment. On the contrary, the private wrongs remain in the sphere of private law and go through civil tribunals because the Roman considered that only the private interest was threatened by the private wrongs. In most cases, offenders were made to pay a certain sum of money – called *‘poena’* or a fine (*une amende)* – exclusively to the victims.[9]

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[7] Lingat, Robert. **History of Thai Law.** First Edition. Bangkok: Thai Wattana Panich. 1983. p. 72 (in Thai)

[8] Henry Summer Maine, Sir. **Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas.** London: John Murray Albemarle Street. 1912. p. 379

[9] Andre Laingui. **Histoire du Droit Penal.** ***Que sais-je?*** 1er edition. Paris: Presses Universitaires de France. November 1985. pp.24 – 25 (in French)

The private wrongs included not only an attack against the property such as the theft *(furtum)* or a robbery by force of a movable property *(rapina),* the damaging of other's property *(damnum)* but also an attack against a person or his honour. The public wrongs were voluntary homicide, starting form parricide to murder of a slave, violence, violation against morals, falsification, political crime, lese the majority of the Roman people, then the emperor, peculation or concussion, and electoral corruption.[10]

The criminal law later underwent a long evolution. With the state growing more powerful, a newly-formed state started to forbid revenge between persons or families so as to maintain the social peacefulness. The state fixed a certain amount of compensation for each wrong. With the right to revenge removed by the state, the injured person was forced to accept the specified compensation whether he was willing or not.

Once well established, the state prohibited some private wrongs and prescribed certain penalty for their violation. As a result, such former private wrongs as theft and battery became public wrongs. It should be further noted that the more complicated the society becomes, the more numerous the criminal offences there are.[11]

Nowadays all civilized legal systems in the modern society agree in drawing a distinction between civil and criminal disputes so as to differentiate their procedures. Civil dispute means conflicts in the right and duty of individuals recognized by law either by the operation of the law or juristic act, or by custom constituting a claim to demand an action or its omission. If damage is caused, the injured party is entitled to claim for compensation. All civil disputes can be resolved by a compromise between the two disputants without punishment being enforced. Meanwhile, criminal dispute means

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[10] *Ibid.* p.24 - 25

[11] Dusadee Haleelamien. **Ignorance of Law and Criminal Liability Under Section 64 of the Penal Code.** LL.M. thesis submitted to the Faculty of Law, Chulalongkorn University. 1988. pp. 56 – 60

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conflict arising from criminal offence that is prescribed by current law. The offender shall be penalized in accordance with the law.[12]

There is still a group of offences that cause the offender to be liable both in civil and criminal claim if such offices inflicted damage to the injured party. Such a case is called a civil dispute in connection with a criminal dispute.[13] An offence normally causes damage to others as prescribed in Section 420 of the Civil and Commercial Code stating that "A person who, willfully or negligently, unlawfully injures the life, body, health, liberty, property or any right of another person, is said to commit a wrongful act and is bound to make compensation therefore." Any compromise settlement must be made for both criminal and civil claims. If the criminal offence is non-compoundable, only the compromise settlement for the civil claim is valid while the criminal liability is not yet terminated.

It should be noted that a case of a civil dispute in connection with a criminal dispute shows the possibility that a criminal case can be settled by the consent of the offender and the injured person. When the offender agrees to pay damages as requested by the injured person, the latter decides to drop the case.

In conclusion, although the modern concept of law tries to draw a line between criminal law and civil law, there is still a gray area between the two branches of laws. The non-finite distinction is important to the community-based resolution of criminal cases because it supports the termination of criminal case by non-judicial modes of settlement.

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[12] Sunee Mallikamarl et all. **Village Arbitration (Research Report).** Chulalongkorn University. Bangkok: November 1985. p.12

[13] *Ibid.* p.12

2.3 Classification of Crimes

Classification of crimes can be countless, depending on the purpose of the researcher.[14] When classifying crimes, it is important to consider: (1) what is the distinction between one class of crime and the other? (2) What difference does it make whether a crime is classified one way or the other?

Major classifications are *mala in se*/*mala prohibita*; felonies/misdemeanors; major/petty crimes[15] and compoundable offences. It is essential to understand these four classifications because they are involved with different procedures to be imposed on different groups of crimes.[16]

2.3.1 *Male in Se / Mala Prohibita*

For a question of how many kinds of crimes there are, the majority of jurists are likely to think of this classification. This is natural because this classification is probably as old as the history of criminal law. *Mala in se* mean wrong in themselves or inherently evil whereas *mala prohibita* are not inherently evil or wrong only because they are prohibited by the legislation. In other words, *mala in se* are socially condemned while *mala prohibita* are not. Examples of *mala in se* are murder, assault, theft and

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[14] Kanit Na Nakhon. **General Part of Criminal Law.** Bangkok: Winyuchon. December 2000. p. 96 (in Thai)

[15] LaFave, Wayne R. and Scott Jr., Austin W. **Handbook on Criminal Law.** St. Paul.Minnesota: West Publishing. 1972 pp. 26 – 33

[16] There are still ofther classifications of crimes; for example, *delits permanents* (permanent crimes) and *delits successifs* (successive crimes); *delits instantanes* (instant delicts) and *delits continues* (continual crimes); *delits simples* (simple crimes) and *delits complexes* (complicated crimes).

For details see Jean Laguier. **Le Droit Penal.** ***Que sais-je?*** Paris: Presses Universitaires de France. 1990. pp. 52 – 56

battery, to name just a few. Among *mala prohibita* is a violation of an embargo law, for instance.

Originated in the area of ecclesiastical law, this classification is important for determining what kind of criminal procedure should be applied for a crime in question. Offender of *mala prohibita* might claim ignorance of law as a ground for his defense.[17] On the contrary, the offender of *mala in se* might not able to claim ignorance of law as a ground for his defense.

However, this distinction seems to be obsolete because there are nowadays many criminal offences that are not directly involved with moral standard.[18] In other words, moral standard should not be the sole criterion in distinguishing one crime from another. Furthermore, a large number of offences are difficult to put into the group of *mala in se* or *mala prohibita*: for instance, fraud, document forgery and money counterfeit.[19]

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[17] Section 64 of Thai Penal Code states

"Ignorance of law shall not excuse a person from criminal liability. But, if the Court is of opinion that, according to the nature and circumstances, the offender may not have known that the law has provided such act to be an offence, the Court may allow such person to produce evidence before it, and if the Court believes that he does not know that the law has so provided, the Court may inflict less punishment to any extent than that provided by the law for such offence."

[18] Kanit Na Nakhon. *Ibid.* (footnote 14)

[19] Dusadee Haleelamien. *Ibid*. p.106 (footnote 11)

2.3.2 Felonies / Misdemeanors[20]

This is the most important classification of crime in general use in the United States. In this country the distinction is usually spelled out by a statute or (far less frequently) by the constitution. The usual provision is that a crime punishable by death or imprisonment in the state prison (or penitentiary) is a felony; any other crime (i.e., any crime punishable by fine or imprisonment in a local jail or both) is a misdemeanor. A less common provision distinguishes between felony and misdemeanor, not on the basis of the *place* of imprisonment, but rather on the basis of the *length* of imprisonment. Thus it may be provided that any crime punishable by death or imprisonment for more than one year is a felony and that any other crime is a misdemeanor. The typical provision, in whichever of these two forms it may be found, uses the word “punishable” or the phrase “which may be punished”. To sum up, determining which offence is a felony or a misdemeanor is the maximum penalty but not the actual punishment.

What difference does it make whether a particular crime is labeled a felony or misdemeanor? It may be important to make the distinction for purposes either (1) of the substantive criminal law, or (2) of criminal procedure, or (3) of legal matters entirely outside the field of criminal law.

So far as the substantive criminal law is concerned, there are a number of crimes whose elements are defined, or whose punishment is stated, with reference to felonies as distinguished from demeanors. For instance, burglary is defined at common law as breaking and entering another’s dwelling a felony (a misdemeanor will not do) therein. Another example is an accidental death in the commission or attempted commission of a felony may constitute murder under appropriate circumstances, but an accidental death resulting from the commission of or attempt to commit it misdemeanor generally can constitute no more than manslaughter.

In the area of criminal procedure, many of the procedural rules depend on whether the crime in question is a felony or a misdemeanor. A court’s jurisdiction over

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[20] LaFave, Wayne R. and Scott Jr., Austin W. *Ibid.* pp.26 – 29 (footnote 15)

a crime often depends upon whether the crime is classified as a felony or a misdemeanor. There are courts of limited criminal jurisdiction, which may try only misdemeanors, or some specific misdemeanors, or crimes with penalties not exceeding a certain maximum. In some jurisdictions, felonies must be prosecuted upon a grand jury indictment, whereas information will do for a misdemeanor. An accused felon must generally be present at his trail, though a misdemeanant may agree to be tried in his absence.

Even outside the area of substantive or procedural criminal law the distinction between felony and misdemeanor is frequently important. One convicted of a felony is in some jurisdictions disqualified for holding public office. He may lose his right to vote or serve on a jury; he may be prohibited from practicing as an attorney. Conviction of felony is often made a ground for divorce. These by-products of conviction of a felony do not generally apply to conviction of a misdemeanor.

2.3.3 Major Crimes / Petty Crimes

For some purposes crimes are divided into major crimes and petty crimes. Generally, petty offences are a sub-group of misdemeanors; that is, a felony is necessarily a major crime, but a misdemeanor may be either a major crime or a petty offence depending on the possible punishment. In the United States of America, it is commonly a rule of criminal jurisdiction that petty offences may be tried by a magistrate summarily. Summary procedure means a trial without some of the usual paraphernalia required for criminal trails for the greater crimes – i.e., without preliminary examination, without an indictment (or probably even on information; the defendant may generally be tried on the complaint) and usually without a jury.

This classification can be found in Thai criminal law.[21] Like the American legal provision, Thai criminal law states that strict liability is applied in case of petty offence. In other words, offender of petty offence may be punished although he has committed it without intent.[22] However those who attempt to commit or support any other to commit a petty offence may not be punished.[23]

An interesting problem exists as to whether a minor offence which requires for its commission no bad intent and which involves only a slight punishment should be classified as a 'crime" at all, or whether instead it should be called a 'public tort' or a 'civil offence' or by some other more pleasant name not involving the stigma inherent in the word 'crime'.

2.3.4 Compoundable Offences

Penal law is a branch of public law because it involves with offence and penalties. Moreover, it is concerned with relationship between private and state. Although some actions may cause damage to an individual person, those actions are considered offences against public as a whole. It is necessary for the state to get involved with the conflict so as to suppress and prevent further crimes.[24]

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[21] Petty offences are provided in Section 367 – 398 of Thai Penal Code.

[22] Section 104 of Thai Penal Code provides

"Petty offences under this Code are punishable offences, even though they are committed unintentionally, unless otherwise provided in such offences."

[23] Section 105 of Thai Penal Code provides

"Whoever attempts to commit a petty offence shall not be punished."

Section 106 of Thai Penal Code provides

"A supporter to commit a petty offence shall not be punished."

[24] Jitti Tingsabhat, **Explanation of Penal Code Part I Section I.** 7th Edition (Bangkok: Krung Siam Publishing House, 2525), p. 2

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Basically, when a criminal offence is committed, the offender must be punished. However, in some cases, punishment might not be an ultimate tool to provide the parties involved with an adequate satisfaction because it promotes the rigidity of the law. As a result, some offences which cause damage against an individual more than the state categorized as a separate set. These offences require a different procedure when compared with other offences. They are called "compoundable offences".[25]

Nevertheless, there is not any definition in either Thai Penal Code or Thai Criminal Procedure Code. Many experts try to give them definition. For example, Professor Sunee Mallikamarl wrote in her research report on Village Arbitration: [26]

> "Compoundable offence means an offence of which a compromise settlement between the parties is enforceable as it is committed by the offender against an individual and not the against the people. The settlement will extinguish the right to bring an action against the offender. If the injured party wish to take the offender to court, he has to file a complaint with an investigative officer within three months from the date the offence is known and the offender identified, otherwise it will be time-barred.
>
> A compromise which settles compoundable offence can be effected as follows:
>
> a. Lodge no complaint to investigative officer in the event no complaint has been lodged earlier.
> b. Withdraw the complaint filed with the investigative officer while it is under the investigation of the investigative officer.
> c. Withdraw the case under the trial of the court.

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[25] Nopparat Augsorn. **Compoundable Offences in the Criminal Justice Process.** Thesis in LL.M programme submitted to Graduate School of Chulalongkorn University. B.E. 2532. p. 6 (in Thai)

[26] Sunee Mallikarmarl et all. *Ibid. pp.12 – 13* (footnote 12)

The compoundable offence must be prescribed by the Penal Code."

To sum up, compoundable offence is an offence whereby the prosecution depends on the will of the injured person. The prosecution will begin after the injured person files a complaint with an investigative officer. Moreover, the offender and the injured person can make an agreement that stifles the prosecution and thus dismiss the criminal case. To stifle the prosecution means that the plaintiff/injured person agrees to resolve the dispute or willingly waive his right to prosecute the defendant. As a result, the criminal liability of the defendant is terminated and the case dismissed. [27]

Concept of compoundable offences is important to community-based resolution of criminal cases because it shows that a criminal case can be terminated by the consent of the injured person and the offender. In an exchange for damages paid by the offender, the injured person may refrain from filing a complaint; as a result, the case will be terminated after the lapse of prescription. Moreover, the injured person may revoke the complaint or drop the case, hence terminating the case.

Whether an offence is compoundable or not depends on the statuary provision. If the law does not state that an offence is compoundable, the offender and the injured person are not allowed to make an agreement of settlement. If they do, only the civil liability is terminated while the criminal liability is still active. Nopparat Augsorn's study shows that there are three factors determining whether an offence is compoundable or not.[28] First, it depends on the nature of the offences. In other words, compoundable offences comprise the non-appropriate behaviors that do not harm the social interests or public orders. Second, certain compoundable offences are determined by the customs. In the past, the injured person of certain offences was free to withdraw the cases. Additionally, those offences caused certain impacts on the injured person rather than affected the society as a whole. They are compoundable

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[27] Chaiyasith Trachutham. **Stifling the Prosecution.** Chulalongkorn Legal Magazine 5 (Issue 2, 2523), pp. 103-104. (in Thai)

[28] Nopparat Augsorn. *Ibid.* pp. 10 – 26 (footnote 25)

offences. Finally, relationship among family members plays an important role in determining that certain offences (especially those against property) are compoundable. In other words, some offences are generally non-compoundable but they are compoundable when committed by a family member to another member. Family is the most important foundation of the society. Conflicts might arise from their closely-knitted relationship. If the law provides that all misbehaviors among family member must be strictly prosecuted, their relationship might be affected to a certain extent, sometimes beyond remedy. Therefore, it is necessary to allow an agreement of settlement in such a case between family members.

Compoundable offences are included in the Penal Code of Thailand as demonstrated in the following table:

Table 1: Compoundable Offences in the Penal Code of Thailand

Categories	Section	Offences
Offences relating to trade	272	To use a name, figure, artificial make or any wording of others
Offences relating to sexuality	276 Paragraph I	To rape in normal circumstances
	278	To commit an indecent act in normal circumstances
	284	To take away another person for indecent act
Offences against liberty	309 Paragraph I	To compel another person to do or not to do any act
	310 Paragraph I	To details or confine another person
	311 Paragraph I	To cause another person to be detained by negligence
Offences against reputation	322	To break open or make away with a closed letter

	323	To disclose a private secret of another person by reason or his functions as a competent official or his profession
	324	To disclose a secret concerning industry, discovery or scientific invention
	326	To impute an alive person
	327	To impute a dead person
	328	To commit a defamation by means of publication
Offences against property	341	To commit a fraud with normal methods
	342	To commit a fraud with special methods
	344	To deceive ten person upwards to work
	345	To order or consume food or drink, or stay in a hotel in spite of having no money to pay the bill
	346	To convince a mentally-retarded person to sell things at a disadvantageous price
	347	To commit a fraud in an insurance
	349	To commit a fraud against a creditor who receives his gage
	350	To commit a fraud against a normal creditor
	352	To embezzle in normal circumstances

	353	To embezzle as a manager of a property belonging to another person
	354	To embezzle as an executor or an administrator of the property of another person under the order of the court or under a will
	355	To embezzle a valuable movable property hidden or buried under the circumstances in which no person may claim to be owner
	358	To cause damage to a property of another person
	359	To cause damage to a special kind of property
	362	To trespass in normal circumstances
	363	To trespass by removing a mark of an immovable property
	364	To hide in another person's building without his consent

Besides, some offences may be compoundable when they committed against relatives. Details are in the following table:

Offences against property	334	To commit a theft in normal circumstances
	355	To commit a theft in special circumstances
	336 Paragraph I	To commit a theft by snatching in presence of the owner

	343	To commit a fraud against the public
	357	To receive stolen goods
	360	To cause damages to a property used or possess for public benefit

In addition to the Penal Code of Thailand, a certain number of compoundable offences can be found in other statutes. Act of Offences Related to Check Use B.E. 2534 (Section 5) and Act of Copyright B.E. 2521 (Section 48), for instance.

This classification of crime demonstrates one important concept: consent of the injured party is a requirement for commencing the criminal procedure. To be precise, consent of the injured party is a pre-requisite for prosecution. In other words, the prosecution may not be performed without consent of the injured party. The case of compoundable offence can be wrapped up and criminal liability terminated when the injured person and the offender reach a mutual agreement.

However, some problems arise from legal provision that the injured person may withdraw the case or come to settlement out-of-court with the offender at any time before the case is finalized.[29] This means that the case can be withdrawn even though it is in the consideration of an appeal court. As a matter of fact, to allow a withdrawal of the case of compoundable offences after a court of first instance renders its decision is to allow its nullification. It is a stark contradiction to autonomy of court's decision.[30] Generally, courts cannot amend their own verdict once it has been read and

[29] Section 35 of Thai Criminal Procedure Code provides

"A case of compoundable offences may be withdrawn or settled out of court before the court reaches an absolute decision. But upon the objection of the defendant, the court may reject the application to withdraw the case."

[30] Section 190, 215 and 225 of Criminal Procedure of Thailand.

higher courts do not have the right to amend decision of lower courts except in case of appeals.

Another problem is that compoundable offence is based an assumption that the injured and the offender possess equal bargaining power, which is not always the case. Abuse of compoundable offences to threat for money or forced agreement is often heard. In stead of allowing the offender and injured person to negotiate on their own, it would be better to assign a third person to scrutinize the out-of-court settlement so as to ensure that the case will be terminated more swiftly and forced agreement be prevented.

In conclusion, the classification of crimes as compoundable offences state that not all criminal cases are pushed into the formal criminal justice system. Subject to certain legal criteria, the offender and the injured person are allowed to make an agreement to settle their criminal conflicts without recourse to the court.

2.4 Administration of the Criminal Justice System

The administration of the criminal law process is monopolized by the state.[31] Apprehension, adjudication, and punishment are tasks for which the state is exclusively responsible. Government has established a certain number agencies to carry out the operation of the system: for example, the police, the court and the correction department.

Unfortunately, the administration of the system has been called unsatisfactory, creaking, expensive, inefficient, etc.[32] Realizing of this problem, the agencies involved have has tried several alternative methods to criminal justice system and developed a certain number of alternative mechanisms. Nowadays a wide range of choices enable us to avoid stigmatization and time-and-money-consuming procedure in formal criminal justice system. The informal mechanisms support one important notion:

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[31] Apirat Petchsiri. **Eastern Importation of Western Criminal Law: Thailand as a Case Study.** Colorado: Fred B. Rothman. 1987. p. 198

[32] *Ibid.* p. 198.

not all criminal cases end up in the court. There are many other ways to stop criminal process.

2.4.1. Diversion from Formal Justice

Agencies of the formal criminal justice system apply a multitude of non-judicial procedures to terminate criminal cases instead of forwarding them through the court proceedings.

2.4.1.1. Decriminalization

A simple and obvious method of reducing court caseloads is to remove some minor misbehavior from the penal code. This has most often been advocated for so-called victimless offences; for example, suicide, homosexuality in private between consenting adults, kissing in public places, etc. Basically, little can be gained from treating these disapproved behaviors as crimes. The offenders are not *de facto* criminals. "Crimes" should involve some moral turpitude. But many of the new offences in the modern society are purely regulatory that should not be regarded in the same way as murder, robbery, rape, arson, etc.

Prosecution of regulatory or victimless offences can bring the law into disrespect, causing hostility on the part of the general public:

> "The truth is that, in our modern, complex world, Parliament has found it necessary to regulate so many every activities that it has become well-nigh impossible for even the honest and law abiding citizen to get through the average year without infringing some regulation or other. Since the breach of any of these regulations is a criminal offences under some statutes, the law can easily make criminal of us all".[33]

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[33] Marshall, T.F. **Alternatives to Criminal Courts: the Potential for Non-Judicial Dispute Settlement.** Grower Publishing House. Hamshire: 1985. p. 126

In many countries, crimes and contraventions form distinct categories in their legal systems. The penalties for infringement of these categories are imposed by different entities – the ordinary criminal courts in the case of crimes, and some other public authority (often the administration) in the case contraventions – and have different consequences for the citizen. European countries that distinguish crimes from regulatory offences include Austria (*verwaltungsubertretungen:* ‘administrative transgressions’), Germany (ordnungswidrigkeiten: ‘infringements of order’) Greece, Liechtenstein, Spain, Turkey, and, to a lesser extent, Italy (which deals with some regulatory offences through the ‘administrative breaches’, dealt with usually by an administrative agency under special statutes, usually by a fine or withdrawal of license).

Nevertheless, while there are certainly possibilities for removal of some offences from court jurisdiction and using other procedures for their settlement, the problem is it is hard to determine the criterion for cases suitable for this kind of diversion.

2.4.1.2. Diversion from Criminal Justice Agencies

A. Public Prosecutors

In America and Scotland, the decision whether to prosecute is not in the hands of the police, as it is for most offences in England and Wales, but the responsibility of a separate department. This can help relieve loads on the court if the public prosecutor decides to take no formal action on a number of the cases referred to him/her by the police. Having invested considerable resources in the investigation of a case, the police are likely to be reluctant to withdraw a prosecution, but the office of public prosecutor is able to take a more parsimonious stance. Issues of cost and court over-crowding may then be taken into account in assessing whether prosecution is really in the public interest.

In America at least, the public prosecutor may attempt pre-court conciliation and thus divert many cases by mutual agreement of all parties concerned,

an achievement the police themselves are not well situated to replicate. The powers of the prosecutor vary from country to country. In Sweden, Denmark and Belgium the prosecutor can set a fine according to a fixed schedule for minor offences (for which the maximum penalty, in Sweden, six months' imprisonment), if the accused admits guilt and is willing to accept the fine in lieu of trial. In Sweden, almost every eligible case is treated in this way, for traffic offences, drunkenness, smuggling, petty theft, disorderly conduct etc.

In Norway the prosecutor can even convict without a trial where there is a good case, detailed confession, and no penalty is feasible, for example, mercy killing, petty persistent offenders, or crimes by foreigners. In practice, however, suspended sentences are now used for must such offenders, and the prosecutor rarely makes use of this power.

Another method, in use especially in Germany, is the penal order, which is a written statement by the prosecutor of the crime, the defendant's behavior, the evidence, and the recommended punishment, agreed on a voluntary basis with the defendant. This may be considered by the court in lieu of a trial if the order is found acceptable. It applies to misdemeanors only,[34] for which imprisonment is not permissible

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[34] The English common law divided crimes into two general categories: felonies and misdemeanours. A felony comprised very species of crime that occasioned at common law the forfeiture of lands and goods. All common law felonies were punished by death. The list of felonies was short: felonious homicide (later divided into statute into murder and manslaughter), arson, mayhem, rape, robbery, larceny, burglary, prison escape, and (perhaps) sodomy. All other criminal offences were misdemeanours.

In modern penal codes, the line between felonies and misdemeanours is drawn differently than in the past. Generally speaking, an offence punishable by imprisonment in a state prison or death is a felony; an offence for which the maximum punishment is a monetary fine, incarceration in local jail, or both, is a misdemeanour. For sentencing purposes, the Model Penal Code, and the statutory schemes of various jurisdictions, also divide felonies into many degrees. Some states have added ad additional classification of crime, e.g. 'violation' or 'infraction'. These offences convey very minor misconduct and cannot result in incarceration.

penalty. It bears similarities with the negotiated plea or plea-bargaining in the United States of America.[35]

In other European countries prosecutors may place defendants on probation (as in America) and can dismiss cases in suitable circumstances. For instance, in Poland, when a first offence is concerned, good post-offence behavior on the part of the accused may lead to a dismissal, dependent upon an apology to the victim and appropriate compensation. Such dismissal can be used in such minor offences as traffic, petty theft and failure to support one's family. In Austral it is used in certain drug cases only.

B. Police Cautioning

Insofar as the police retain a diversionary role this is in itself tending to become formalized. One of the ways in which this has happened is represented by the official caution, for which there are administrative guidelines and the necessity of keeping formal records. It is used only where evidence to support prosecution exists, with the consent of the offender (or his/her parents in case of a juvenile) and upon admission of guilt, but may be used in conjunction with some form of conciliatory settlement and the wishes of the aggrieved party may be taken into account. There is no indication that cautioning is less of a deterrent than prosecution, so that there would seem to be potential for extending its use. Until recently cautioning was rarely used with adults for indictable offences and there is thus scope for policed force to use this resource more fully. Some forces employed such powers much more readily than did others. Those offences for which it is used consists of an miscellany of traffic offences,

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Joshua Dressler. **Understanding Criminal Law.** 2nd Edition. Time Mirror Higher Education Group Company. 1996. pp. 2 - 3

[35] For further detailed discussion of plea-bargaining, see Nijjarin Ongphisut. **Plea-Bargaining.** Thesis in LL.M programme submitted to the Faculty of Law, Chulalongkorn University. 1983. (in Thai)

sex offences, shoplifting, breaches of regulations in relation to firearms and dogs, absconding, prostitution offences, cruelty to children and selling tobacco to children.

C. On-the-Spot Fines & Fixed Penalties

There are a number of offences for which court processing is largely an automatic routine procedure, applying mechanical tariffs. The diversion of such offences, especially in the realm of motoring regulations, into administrative channels has already been enforced. Not only is there the possibility of savings in court time, but also the employment of traffic wardens releases the more costly resource of police constable for other duties. There seem to be few drawbacks with this method of processing such offenders, and the possibility of further extensions to regulatory offences other than motoring might be considered. It is most appropriate for victimless crimes (where there is no issue of reparation) for which the penalty in court is almost always a fine, especially where level of seriousness, if applicable, are easily defined.

Thai Criminal Procedure Code also allows many chances to settle criminal cases without recourse to the court.[36] For example, in some cases whereby the penalty is a fine only, criminal liability is automatically terminated when the accused person pays the maximum fine stated in the law.

Systems of fixed penalties in existence at present vary in terms of their procedure in two important ways. In the first stance, there is the issue of whether or not the police constable personally collects money or whether this is collected in some other way, and in the second case, there is the issue of how those who fail to pay are dealt with.

With respect to the first problem, the procedure in the United Kingdom at present is like that in the bulk of Western nations, e.g. Canada, generally in the United States of America, Belgium, Denmark and Sweden: the police officer or traffic warden issues a 'ticket' which constitutes a summons or order to appear in court but offers an out-of-court settlement of a specified fine, payable within particular time limits to the

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[36] Section 37 of Criminal Procedure Code

court or some special administrative body. Payment in the time allowed leads to the withdrawal of prosecution. The fact an accused person may select the option of prosecution ensures that notices will not be issued without good grounds for a judicial conviction. This system also avoids the direct handling of cash by the police. There is the danger, however, that the rate of payment will be low, involving enormous clerical costs to keep account of non-payment and the necessity for many prosecutions on top of this. In fact, many people naturally try to escape their obligations if they can do so,

One way of overcoming such problems, at least in those offences where there is direct a confrontation between the police and the offender, is to use on-the-spot fines collected immediately by the constable. Countries where this is possible – although always combined with the option of paying later by post – include the Netherlands, France, Switzerland and France, to name just a few. In exchange for payment of the fine the police constable issue a numbered receipt, the counterfoil of which is used to keep account of such dealings. It is obviously in many ways simpler and quicker than administrative processing, but problem could arise when police officers themselves have to handle money and carry it around with them, including possibilities for corruption and unfair discretion.

With respect to dealing with non-payers there are two basic systems, distinguished by the Committee on Alternatives to Prosecution (United Kingdom) as 'opting-out' and 'opting-in'. In the first case, failure to pay does not lead to prosecution unless the accused person actively opts for a trial – in other words, his/her acceptance of guilt is assumed. Instead, fine enforcement procedure is initiated immediately. In the second case, all those failing to pay must be brought to trial, i.e. innocence is presumed until proven guilty at a legal hearing. This is the option preferred by the Committee on justice grounds, but they concede that the first is simpler and cheaper to operate. Most others countries have also opted for the prosecution option. Problems with chasing up large number of non-payers, however, have led some of these countries to change to the 'opting-out' system, notably France in 1972 (where the Ministry of Finance now resort so civil proceedings) and Canada in 1980 (also operated by an administrative body, and accompanied by the withdrawal of the offender's driving license).

Worth considering is another option which avoids the direct handling of money by the police but ensure payment. Used in some parts of the United States of America, the system operates this way: the offender seals his/her payment, with the notice, in an official envelope addressed to the administrative body and supplied by the police officer. Its delivery to the nearest post-box is supervised by the officer.

All of these mechanisms provided the involved criminal justice agents with vast discretionary power that may lead arbitrary performance and abuse of power. In some cases (like on-the-spot fining), there is not any check-and-balance method. However, they are testimonials of an important trend. To be precise, a criminal case of minor matters should be diverted from formal criminal justice and criminal liability in it can be terminated out of court so as to relieve the workload of criminal justice agents, especially the court itself.

2.4.2. Non-Judicial Modes of Settlement

Many people could not help shivering with an idea of going to court, let alone to fight a case in it. As a result, many of us opt to other methods that replace the time-and-money and agonizing procedure of formal criminal justice. These substitutive methods include, primarily, conciliation, mediation and arbitration.

2.4.2.1. Conciliation[37]

When a crime is committed, the most fundamental method to settle the criminal conflict is conciliation in which a neutral or third person plays a significant role in convincing the offender and the victim to hold a talk. The neutral or third person – called “conciliator” - may suggest a solution that is acceptable for both parties.

Conciliator may be an individual or an organization, depending on the consent of the parties and legal system of each country. For example, in India, in case

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[37] Supatra Korn-urai. **Mediation in Criminal Conflicts.** Thesis in LL.M programme submitted to the Faculty of Law, Thammasat University: 2000. p. 2. (in Thai)

of conflict between family members or relatives, a senior member of the family will act as conciliator. This practice can also be found in many other countries where seniority is still an important social value.

The most important point is that conciliator will never decide on the conflict although he may participate in a talk to seek a solution. Besides, he may suggest an appropriate way-out and allow the parties make a decision on their own. To sum up, both offender and victim are not bound by a suggestion of conciliator. Conciliation can be totally informal proceedings without any intervention of criminal justice agents. This unthreatening method does not contain any binding power. All the decisions depend on the injured person and the offender.

2.4.2.2. Mediation

Mediation is like conciliation in many ways. First, mediation is a proceeding whereby a neutral person or a third person convinces the injured person and the offender to hold a talk after a criminal conflict arises among them. This person may suggest a solution that is acceptable for both parties. The so-called “mediator” can be an elderly person who can command respect from both parties. It also can be any agency, depending the consent of the parties. The mediation can be done since the commission of the crime until the court reaches the ultimate verdict.

One of the most important differences is that mediation is involved with more formal proceedings. A committee might be established. Or the mediation might be recognized in some regulations or even laws. For instance, in Poland, a mediator is an important social mechanism that is transcribed into a committee called “Social Court”. It is a separate organization from court of justice. In the Philippines, there is a mediating agency called *Lupong Tagapayaps* comprising of a special committee whose duty is to mediate conflicts. In Thailand, the Office of Right Protection and Legal Aid for People, Office of Attorney General established Project of Village Mediation of which the main

objective is to designate a village committee to mediate conflicts arising in the community.[38]

Furthermore, both conciliation and mediation are now encouraged in Thai courts of first instance nationwide. Susceptible cases are those are involved with compoundable offences. Conciliator/mediator is none other than the sitting judge of the case. But without the consent of both parties, the judge cannot proceed the conciliating or mediating process.

Apparently, Thai legal system should promote mediation to settle certain criminal cases more actively and more systematically[39]. The mediation adopted in Thailand is half-formal and half-informal. But there is not any mediation center that could serve as a national mechanism. As a matter of fact, mediation is practiced in small society. In order to promote mediation as a national mechanism, a central organization should be established to carry on mediation in the country as well as create orders or rules to support and regulate its operation. Moreover, mediating system should be changed and integrated into a part of criminal justice system. When compoundable offences are committed, the offender and the injured person should be required to go through mediation. If the mediation fails, they can push forward the case into the formal criminal justice system. In other words, mediation should be a pre-requisite for filing a lawsuit in certain criminal cases of compoundable offences.[40]

In civil case, if the disputing parties agree to settle the case out of court, a compromise agreement will be constituted to bind the parties. The Civil and Commercial Code of Thailand provides in Sections 850 through 852[41] that in order to be

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[38] *Ibid.* p. 3

[39] *Ibid.* pp. 87 – 111

[40] *Ibid.* pp. 10 – 11

[41] Section 850 of Thai Civil and Commercial Code provides:

"A compromise is a contract whereby the parties settle a dispute, whether actual or contemplated by mutual concessions."

Section 851 of Thai Civil and Commercial Code provides:

enforceable, a compromise agreement shall be made in writing and signed the party liable or his agent. In effect, the dispute is extinguished by the compromise agreement that binds the parties according to the terms and conditions agreed upon.

The compromise agreement can be reached either in court or out of court. In court compromise agreement is made when the settlement is reached between the parties while the case is on trial or examined in lower or high courts prior to the judgment. The court may mediate the dispute and if the parties agree, the compromise agreement will be entered into thus resolving the dispute. Out of court compromise agreement may be made by the parties which are not acknowledged by the court. The compromise agreement shall bind the parties and if one party is in breach, the other party is entitled to sue the other party for the enforcement of the compromise agreement. In case of compoundable offences, if offender and injured person reach an agreement consensually, criminal liability is terminated.[42] Additionally, the court's authority to hear the case and render decision is terminated. [43]

In general, the injured person and the offender can reach a mutual agreement to settle the criminal case on their own. But they sometimes find it necessary to refer the case to conciliator or mediator who can either encourage them to hold and talk or accelerate the consensual settlement. Conciliation and mediation are usually

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"A contract of compromise is not enforceable by action unless there be some written evidence signed by the party liable or his agent."

Section 852 of Thai Civil and Commercial Code provides:

"The effect of the compromise is to extinguish the claims abandoned by each party the rights which are declared to belong to him."

[42] Section 39 (2) of Thai Criminal Procedure Code provides:

"In case of private wrongs, the right to file a criminal case will be extinguished when a complaint is withdrawn, charge withdrawn or legitimate consensual settlement reached."

[43] Kanit Na Nakhon. **Criminal Procedure Law.** Fifth Edition. Nitibhumi: Bangkok: Publishing House, December 1999. p. 69 (in Thai)

integrated in such a great extent that it is difficult to distinguish one from the other. Conciliation might be a consequence of the mediation. In some cases, the failure of the conciliation might lead to mediation. However, success of conciliation or mediation results in a halt of formal justice procedure at any stage. For example, an injured person might withdraw his complaint or abstain from filing it with an investigative officer.

There is one important similarity among conciliation and mediation. Both of them are based on consent of the offender and the injured person. But mediator or conciliator's suggestion does not contain a binding power. Mediator/conciliator's words are merely personal comments suggesting a possible way-out to be taken into consideration by the parties. But the offender and the injured person have the right to make a decision on their own will. In other words, neither of the two partiers can get the suggestion enforced by the court unless both of them reach an agreement that complies with the law of compromise. As a result, the case is highly to return to the formal procedure, hence doubling the time and cost of court proceedings. Another drawback of mediation and conciliation is that they are based on an assumption that both parties have equal bargaining power. But that is not always the case.

2.4.2.3. Arbitration

Although legal experts have yet to agree on the definition of arbitration,[44] it is safe to conclude that arbitration consists of following characteristics:[45]

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[44] Professor Rene David proposed a definition in his book "Arbitration in International Trade 1 (1985)" stating,

> "Arbitration is a method in which a person or many persons are trusted to solve a problem relating to the interests of two persons or more. The authority of the arbitrator(s) comes from the agreement by both sides, not from the state. The arbitrator(s) must precede the case in compliance with the agreement."

Black's Law Dictionary (Fifth Edition) states that arbitration is

A. Nature of Arbitration

a. Arbitration is a kind of dispute resolution. What kinds of disputes are susceptible of arbitration depends on the policy of each country on the basis that the issues affecting the public order and must be decided by the court only.

b. A person who is to settle the dispute or to serve as an arbitrator must be a third person, not the disputants. That person must be neutral as well. There can be a single arbitrator or a panel of arbitrators who is selected or appointed by the parties, or by a proceeding previously agreed upon by parties, or by a legal provision. The mandate is to settle any particular dispute.

c. The scope of authority of the arbitrator in hearing and settling the dispute is stated in the agreement of both disputing

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"The reference of a dispute to an impartial (third) person chosen by the parties of the dispute who agree in advance to abide by the arbitrator's award issued after a hearing at which both parties have an opportunity to be heard.

"An arrangement for taking and abiding by the judgment of selected persons in some disputed matter, instead of carrying it to established tribunals of justice, and is intended to avoid the formalities, the delay, the expense and vexation of ordinary litigation."

Corpus Juris Secundum (Volume 6) states that arbitration is

"The submission of controversies, by agreement of the parties thereto, to persons chosen by themselves, for determination, and the rights, powers, duties and proceedings of arbitrators so chosen and umpires."

[45] Anan Chantara-ophakorn. **Dispute Settlement by Arbitration Out of Court.** Nitidharma Publishing House. Bangkok: 1993. pp.10-12 (in Thai)

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parties. Therefore, the arbitrator is not allowed to perform beyond the authority stated in the contract agreed upon by both disputants. The freedom of the contracting parties depends on the provisions of arbitration law and juristic act law of each country.

d. The arbitrator must settle the dispute in a judicial way. The decision must not be arbitrary. But the arbitrator does not necessarily adhere to the provisions in the procedural statutes just as the court does because the ultimate goal of arbitration is to reduce the formality and the complexity of the court proceedings. However, the arbitral proceedings must be based on the rule of justice. For instance, both disputing parties must be granted equal chance to defend themselves. In addition, the decision must be based on evidence introduced by both parties.

e. Arbitration is a procedure to settle a dispute conducted by private agencies. Therefore, legal provisions in many countries tend to provide with maximum freedom in reaching an agreement concerning the arbitral proceeding, designating the arbitrator as well as the scope of authority. The state should play a supportive role in facilitating the arbitration and simultaneously avoid unnecessary intervention.

f. The arbitrator's decision is generally final. It means that both questions of fact and questions of law are definitely settled and that both disputants must be bound by the decision. If the party who has lost fails to abide by the decision, the other party may get the decision enforced by resorting to the authority of the state agencies especially the court of justice.

g. The hearing and the decision making of the arbitration is not the exercise of sovereign authority of the state court. The

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court would normally intervene only in the necessary cases: for instance, to force the disputing parties to abide by the contract of arbitration, to scrutinize the hearing proceedings and to enforce the award. However, the scope of intervention varies from country to country. As the award of arbitration is not the exercise of sovereign authority, the award can be accepted and enforced in foreign countries more easily than an actual verdict of the court.

B. Arbitration and Criminal Matters

There is a potential that criminal matters can be referred to arbitration. Anthony Walton, Q.C., a Bencher of the Middle Temple wrote: [46]

> "In considering whether a criminal matter or proceeding may be referred to arbitration, regard must be had to whether the matter or proceeding is one which the policy of law would or would not permit to be compromised. If not, then it would not be capable of removing from the ordinary tribunals of the land.
>
> It would seem that a reference is not barred, in cases where it would be otherwise permissible, by the fact of a conviction having been recorded.
>
> Where an indictment is pending it would seem that the consent of the court ought to be obtained if a reference is agreed upon, though the absence of such consent does not necessarily invalidate the award".

In Thailand, the idea of applying arbitration in criminal case was introduced by Sirisak Tiyaphan, a public prosecutor. In his paper presented in the

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[46] Anthony Walton. **Russell on the Law of Arbitration.** Nineteenth Edition. London: Stevens & Sons. 1979. pp. 30 - 31

Meeting of International Council of Criminal Law in Tokyo, Japan from 14 – 16 March 1983, he stated that arbitration can be applied in criminal cases.[47]

> "In criminal case, arbitration is a reference of a criminal case to an impartial person called an "arbitrator" to decide and settle the dispute between injured person and offender. Both parties are bound by the decision of the arbitrator.
>
> However, the decision of the arbitrator is generally considered to be an intervention with the court's authority. The applicability of arbitration and the legality of the decision, therefore, depend on two factors: consent of the two parties and criminal policy of each country.
>
> For Thailand, if arbitration is applied in criminal case, it would be possible in a case of compoundable offence. But there is not any law directly involved with this issue."

Conclusion

Community Justice is an important concept that promotes the participation of the community in resolving criminal cases whereby the offender and injured person are members of the community and hold a certain quality of relationship such as family members or neighbours.

There are many mechanisms to divert criminal cases from formal procedure; for example, decriminalization, small claims courts, prosecution suspension, police cautioning, on the spot fines & fixed penalties. Still, a certain number of criminal

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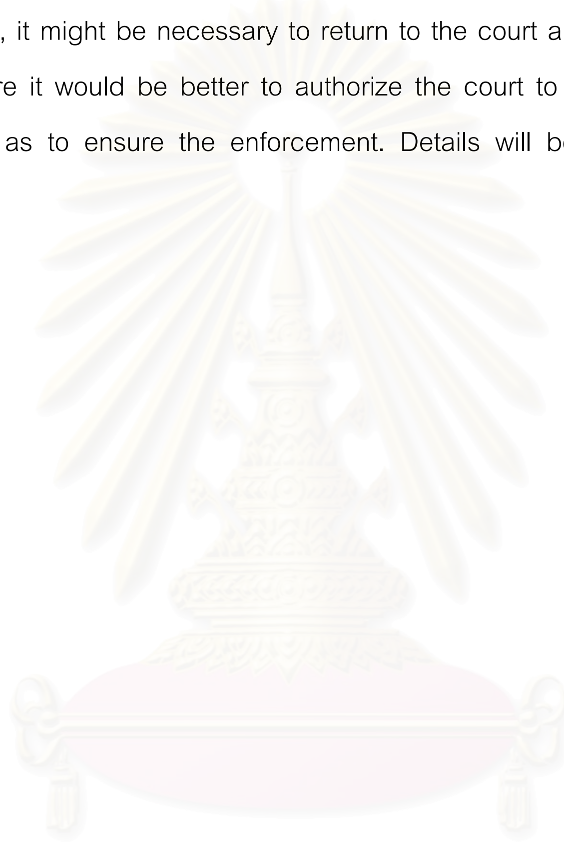
[47] Sirisak Tiyaphan. **Alternative Measures to Prosecution in Criminal Cases.** Warasarn Aiyakarn Year 14 Volume 162 (August 1991) p. 71 (in Thai).

This article was adapted from his paper entitled "Diversion and Mediation" presented in the International Council of Criminal Law in Tokyo, Japan from 14 – 16 March, 1983. A part of this article was published in Revue International de Droit Penal (Vol. 45) Number 54 Part 3 in 1983.

cases are resolved by a myriad of non-judicial settlement that lead to the termination of criminal liability. These non-judicial modes of criminal settlement are not to replace the formal criminal justice and not to rival with it either. On the contrary, they play a supportive role in saving cost and time.

However, difficulties of non-judicial modes lie in the enforcement of settlement resolutions in the criminal cases. For example, if any party fails to comply with the agreement, it might be necessary to return to the court and get it enforced by the court. Therefore it would be better to authorize the court to supervise the settlement procedure so as to ensure the enforcement. Details will be discussed in following chapters.



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CHAPTER III

COMMUNITY-BASED RESOLUTION OF CRIMINAL CASES

IN THE UNITED STATES OF AMERICA

The preceding chapter pointed out an important assertion: criminal conflicts in a community can be settled out of court by a multitude of methods: conciliation, mediation and arbitration. The present chapter will demonstrate the experience of the United States of America where mediation and arbitration have long been used to relieve workload of courts. The discussion will begin with different types of programs, the development of some examples together with important details about the proceedings to terminate the case. To be included finally will be results of the programs including their advantages and disadvantages.

American courts are typically overloaded with minor criminal cases for which complicated legal procedure involve disproportionate costs, human resources and time. Moreover the adversarial model of formal adjudication drives the injured person and the offender into a direct confrontation when it may be more productive to seek collaborative solutions rather than to underline problems causing the dispute. The formal criteria of relevance in presenting evidence are, moreover, insufficiently flexible to provide the basis for a problem-solving approach.[1]

In the United States, there have been a number of experiments aimed at removing a certain number of criminal cases from the courts by taking them to less formal, more flexible fora for handling the case, such as independent neighbourhood justice centers, using procedures such as mediation, conciliation and arbitration.[2] There

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[1] Marshall, T.F. **Alternatives to Criminal Courts: the Potential for Non-Judicial Dispute Settlement.** Hamshire: Grower Publishing House. 1985. p. 45.

[2] *Ibid*. pp. 65 - 66

has been debate about the efficacy and legitimacy of such schemes, but adequate empirical data have yet to be available.

One of the most outstanding efforts to offload the work of court is the Community Dispute Resolution. The basic concern underlining the development of community dispute mechanisms is very simple: there must be a better way than routine court proceedings for handling a certain number of disputes that might otherwise lead to more serious crimes. A minor assault between two neighbours today may escalate into a felonious assault or homicide next month or next year if the dispute is allowed to fester.

3.1 Types of Community Dispute Resolution Programs

Community dispute resolution programs have a wide variety of local titles. For example, 'citizen dispute settlement center,' 'community mediation center,' 'night prosecutor program,' 'community board program,' 'urban court project,' etc. Despite the variation due to locations and defy simple categorization, community dispute resolution programs can be divided three basic clusters in terms of structures and goals.[3] These are:

(1) Justice system-based programs
(2) Community-based programs
(3) Composite approaches

3.1.1 Justice System-Based Programs

These programs are sponsored by justice system agencies. The most typical sponsors include the courts and prosecutor's offices. The goals of dispute resolution can be grouped into three major categories: (1) *improve efficiency,* which would presumably include more effective screening, reduced court caseloads, delay reduction, reduced systems costs, and as a consequence, an improved justice system

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[3] McGillis, Daniel. **Community Dispute Resolution Programs and Public Policy.** U.S. Department of Justice: December 1986. pp. 19 – 29

image; (2) *increased access* to justice in terms of convenient locations, times, and procedures for hearing and the elimination of costs for hiring an attorney; and (3) an improved process for case processing, including more lasting and equitable resolutions for both parties.

Case screening seems to be the primary goal of these programs. Staff members are former law enforcement personnel, and hearing often focus on legal issues and factual accounts of the complaint. Resolution of the dispute between the parties is considered to be a subsidiary goal, although settlements may often be achieved incidental to the effort to ascertain whether legal grounds exist for a charging decision.

3.1.2 Projects Having a Community Emphasis

In contrast to justice system-based projects, community-based projects are typically sponsored by private organizations and focus upon receiving referrals directly from citizens rather than from justice system agencies.

The community-based projects differ dramatically from the justice-based projects on virtually every dimension. Some of these programs serve entire cities or counties but others serve more circumscribed “neighborhoods” within a city (e.g. the community boards within San Francisco that each serves areas of approximately 20,000 people). Community-based projects very actively seek referrals outside of the justice system.

The community-based projects and tend to use very little pressure in seeking referrals and may visit disputants at their home to describe the benefits of the program. Hearings are often relatively long and held in informal settings such as daycare centers, church basements and similar surroundings. The caseloads and budgets of such programs and tend to be relatively low due, at least in part, to their lesser use of justice system referrals and their relatively low intake coercion.

These community-based projects share a number of goals with justice system oriented projects. Primary goal is *to increase access to justice*, attempting to provide hearings at convenient locales and times, with simple and accessible

procedures. Most importantly, it is unnecessary to hire an attorney. Community dispute resolution programs provide an *improved process* for dispute settlement in comparison to adjudication.

The advocates of community-based projects believe that dispute resolution centers can contribute to a reduction of the tensions and conflicts commonly associated with density of population, diversity of demographic characteristics, and related aspects of urban living.

3.1.3 Projects Taking a Composite Approach

Many projects combine characteristics of both the justice system and community-based approaches. These composite, or "mixed" projects are sponsored by a variety of organizations. Unlike the justice system-based projects cited earlier, composite projects tend to have offices outside the justice system building in houses, storefronts, office buildings, and other locations to provide an independent identity. Composite projects not only receive referrals the justice system, but also encourage referrals from the community by advertising their services in brochures, radio announcements and other techniques similar to the community-based programs.

Examples of composite projects include the Atlanta Neighborhood Justice Center, the Suffolk County (New York) Community Mediation Center, and the Chapel Hill, N.C. Dispute Settlement Center. These projects all have vigorous referral links with the local justice systems and vigorous outreach efforts to encourage community referrals.

Goals for composite projects typically include a mixture of the goals for system-oriented and community-oriented projects. The weight given specific goals may vary across projects and is dependent upon many factors, including the nature of the sponsoring agency, local needs, the philosophy of the specific project director and governing board, etc.

Conclusion

In short, a wide variety of types of community dispute resolution programs have evolved to offer an alternative to legal adjudication. Justice-system based programs are typically sponsored by the courts and prosecutors and tend to receive the overwhelming bulk of their cases from justice system agencies. They are often designed to meet justice system needs for faster and less expensive case processing. Justice system efficiency goals are not a central concern for community-based programs. These programs tend to emphasize the improved processing of cases through alternative dispute resolution techniques, increased access to justice by citizens, and benefits to the community arising from the dispute resolution process. Composite programs are typically sponsored by non-profit agencies but rely heavily upon the justice system for case referrals. Their goals are often a blend of those for justice system-based and community-based programs. The philosophies of program developers and local policy-makers tend to determine the specific goals and structures of individual programs.

Table 2 : Typical Features of the Major Types of Community Dispute Resolution Programs[4]

	Justice System-based	Community-based	Composite
Sponsorship	Justice System Agency	Non-profit Agency	Governmental or Nonprofit
Area Served	Entire City of Country	Either Entire or of a City or County	Mixed Approach
Major Referral Source	Justice System Agency	Sources Outside Justice System	Both Justice System and Other Sources

[4] McGillis, Daniel. *Ibid.* p. 21

3.2 Community Dispute Resolution in Criminal Cases

The basic concern underlying the development of community dispute resolution mechanisms is very simple: there should be a better way than routine court processing for handling minor criminal disputes between community members. This part seeks to explain how a minor criminal dispute between community members can be resolved in the United States of America, from the referral until a decision reached.

3.2.1. Intake Procedures[5]

Cases are referred to community dispute resolution from various sources; namely, walk-ins/self-referrals, police, prosecutor, court and community groups. Once a case is filed by a complainant, a letter is typically sent to the respondent in the case indicating the scheduling of case hearing. The wording of such letters varies great across the diverse dispute processing projects. The letters can be arrayed on the dimension of level of "coercion" of respondents, from very low coercion to compulsory participation in the dispute processing forum. The different levels of coercion indicate the major variations in pressure upon respondents to attend non-judicial hearings, though many additional gradations of encouragement are possible. The selection of a specific level of approach to respondent coercion depends upon a variety of factors, including:

- **The aims of the specific program.** Projects designed to attempt to relieve court caseloads pressures tend to adopt high levels of coercion. Meanwhile, community-based projects tend to avoid the impression of pressuring respondents to attend hearings.
- **Programme sponsorship and affiliations.** Clearly, the higher levels of coercion are only available to projects that are either sponsored by justice system agencies or tied sufficiently close to

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[5] McGillis, Daniel. *Ibid.* p.21

them to warrant their confidence in virtually compelling respondent attendance at mediation sessions.

- **Point of intervention in case procession.** Some projects seek to obtain cases prior to the filing of any charges on the theory the “voluntary” settlements among the disputants are more likely when no formal court actions have yet commenced. Such projects not the high levels of coercion are counterproductive, reducing the probability of durable settlements. Meanwhile, other projects assert that dispute settlement is most effectively achieved once a case has already entered the official court system. These projects seek then to divert cases to an alternative procedure.

In general, it appears that attendance at hearings does increase as coercion increases. However, a large number of cases are dropped before the hearings because the injured person and the offender can reach an agreement.

3.2.1. Hearing

Community Dispute Resolution Programs employ a variety of non-judicial modes, including conciliation, mediation and arbitration. Hearing is the most important technique.

In the context of community dispute resolution programs, the term ‘conciliation’ is considered to be any effort by a neutral third party to assist in the resolution of a dispute short of bringing the parties together with face-to-face for a discussion of the matter. Such efforts can include holding meetings with individual parties to discuss the controversy and potential solutions to it, contacting individual parties by telephone or mail, and performing “shuttle diplomacy” between the parties and serving as a conduit for information between them. Many community dispute resolution programs attempt to settle disputes through telephone or letter contact with the defendant prior to the scheduling of a formal hearing. Some programs limit

themselves to this approach and inform complainants that they may proceed to other forums if conciliation fails. Other programs view conciliation as only the first available project option, with mediation and/or arbitration as a sequel of conciliation fails.

In terms of mediation, Community dispute resolution programs define it as an effort by a neutral party to resolve a dispute through the conduct of a face-to-face meeting between the disputing parties. In such meetings the third party is not authorized to impose a settlement upon the parties, but rather seeks to assist the parties in fashioning a mutually satisfactory resolution to the conflict. Mediators vary greatly in how assertive they are in suggesting possible resolutions to a controversy, and the term 'mediation' encompasses a broad array of conflict resolution styles by third-party interveners. Face-to-face, mediation of conflicts between disputants is a common procedure. Techniques of mediation vary considerably, with some project using panels up to five mediators while other use a single mediator per hearing. Also various are lengths of mediation hearings: some tend to have relatively brief mediation (about 30 – 45 minutes), while others typically have lengthy hearings (as long as two hours). Many mediation projects employ written resolutions, and some project dispute resolution forms even state that the written mediation resolution agreement is enforceable in court while others do not use written agreements.

The last mode is arbitration which is a dispute resolution process whereby a neutral third person is empowered to impose a settlement upon disputing parties following a hearing between the parties. Arbitrator often seeks to mediate a settlement first and impose an arbitrator's award only as a last resort. Sometimes the mediator becomes the arbitrator automatically if the mediation hearings prove a failure, but sometimes another person is brought in to serve as an arbitrator.

The difference between mediation and arbitration becomes blurred in some prosecution-sponsored projects, and the threat of criminal charges for failure to maintain a mediated agreement can be very real.

3.3 Major Programs of Community Dispute Resolution

Historical development of community dispute resolution center may be traced back to late 1960s when The Philadelphia Municipal Court Arbitration Tribunal was established in 1969 through the joint efforts of the American Arbitration Association (AAA), the Philadelphia District Attorney, and the Municipal Court. This program made a significant step because it started to provide disputants with the option of binding arbitration for minor criminal matters and set up an example for many similar schemes nationwide. For better understanding of criminal arbitration in the real practice, it will be sufficient to described briefly three of them. The first is an example of a scheme set up directly under the aegis of a criminal justice agency in or to serve, at least primarily, the needs of the law enforcement system. This project uses professionals of some kinds as mediators. The next two represent what is probably the most prevalent type, run by a voluntary agency with Law Enforcement Assistance Administration (LEAA) funds, employing lay mediators, but geared quite strongly to the needs of the criminal justice system.

3.3.1 The Night Prosecutor's Program, Columbus, Ohio

Starting at about the same time as the Philadelphia Municipal Court Arbitration Tribunal, this program is now operated by the city Attorney's Office in conjunction with the Capital University Law School and serves the city of Columbus and the surrounding area. The program is situated in the prosecutor's office in the city center and accepts cases coming to the prosecutor from the police or directly citizen complaint, after screening for suitability by clerks at the prosecutor's office.

Using both mediation and arbitration, the program puts emphasis on cases of interpersonal conflict and minor crime, although in practice more cases of 'bad cheques', brought by merchants, are received than all other types combined. Other charges include assault, menaces, vandalism, telephone harassment, improper language and minor thefts.

One of the originators of the project, Professor John Palmer, gives some illustrative cases typical of the general run. These include wife-battering, a complaint about a neighbor's barking dogs, a gypsy 'brideprice' dispute, a street brawl, a feud

between two families that had led to numerous assault, and adultery. He also makes a number of observations, including:

- In interpersonal disputes the complainant who files the criminal affidavit is frequently the disputant who has won the race to the police station. In many instances, he is as guilty as the other party or is the only guilty party.
- An *ex parte* statement by either the complainant or the respondent is at best a half-truth. Only through confrontation does the whole truth begin to emerge.
- Many people come to a police station not to file criminal charges but because they have a serious social problem and do not know where else to go.
- Most criminal acts in interpersonal disputes are the result of communication failure in an urban setting.
- In a legal trial arising from an interpersonal dispute, the rules of evidence often prevent the truth from being discovered. The basic causes of the dispute would be ruled 'irrelevant' or 'immaterial' and inadmissible as evidence. The formal criminal process thus aggravates rather than reduces the tension and hostility between the parties.
- The most effective way to help antagonistic parties resolve their dispute is to arrange for interaction, face-to-face confrontation, soon after commission of the overt act that caused the criminal complaint.
- Frequently in an interpersonal dispute the line between a minor misdemeanor and a major felony is fortuitous. What started a menacing threat may become a murder.

3.3.2 Dorchester Urban Court in Boston

Both the Philadelphia and the Columbus programs stimulated the development of similar in other cities. Other major projects developed in early 1970s. This project is one of them. It is operated by a non-profit agency, Justice Resource Institute, which is in fact closely tied to the criminal justice system, in terms of its functions, funding, location close to the District Court, and sponsorship by the latter. Its cases are also predominantly referred from the criminal court or the prosecutor's office at the point of complaint, or even later in the process, although victims may bring their complaints directly to the project and other community agencies may also make referrals. Like the Night Prosecutor's Program, the focus of this project is upon interpersonal matters involving relatives, neighbors, friends or other ongoing relationships, such as between landlord and tenant or merchant and customers.

3.3.3 New York Dispute Resolution Center

It is run by IMCR (Institution for Mediation and Conflict Resolution) with funds initially from LEAA but latterly from the local authorities. This scheme is unique in its proceeding switching to arbitration automatically when mediation fails (although this occurs in less than 10 percent of cases).

Although the center accepts direct requests for mediation from members of the community or social service agencies, it is limited by contract to taking at least 95 percent of its referrals from the criminal justice system, reflecting the main emphasis on diversion from adjudication. Cases are screened from complaints received by summons part of the Criminal Court and from police referrals. Cases involving serious violence, drugs or repeat offenders are not accepted, but nearly a third of all charges is found suitable for attempted mediation. The complainant is then issued with a 'Request-to-Appear' summons that he/she must serve in person on the respondent (accompanied by a police officer). Failure to appear or to keep the agreement made will result in the re-activation of criminal charges. Typical charges coming to mediation are harassment, threats, assaults, petty theft and damage amounting to less than $1,000, noise, mischief and trespass. The disputants are usually involved in some kind of ongoing relationship.

Table 3 : American Community Resolution Programs That Use Mediation and Arbitration to Settle Criminal Cases[6]

Location and title	Starting date	Agency	Mode of dispute resolution	State sanction	Type of Catchments Area	Sources of referral (possible)	(Actual)	Type of case (eligible)	(actual)
Anne Arundel, Maryland: Community Arbitration Project (similar elsewhere in Maryland)	1976	Probation	Arbitration (courtroom atmosphere)	Threat of prosecution	Suburban	Criminal justice system	Police	Misdemeanors by juveniles	
Rochester, New York: 4-A	September 1973	American Arbitration	Mediation &	Threat of prosecution	Mixed	General	82 % from criminal justice	Interpersonal crimes and	0%

[6] Marshall, T.F. *Ibid.* pp. 68 – 69 (footnote 1)

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Program (related projects in Ohio & California)		Association with LEAA funds	Arbitration				system	cheques: city regulations: complaints: housing disputes	harassment, 16% assault
New York; Institute for Mediation & Conflict Resolution Dispute Center	June 1975	Voluntary agency with LEAA funds	Mediation & Arbitration	Threat of prosecution	Started in black ghetto: all N.Y. since 1979	General	94 % criminal justice system	Interpersonal disputes	ostly crimes
Kansas City: Neighborhood Justice Center	March 1978	Local agency with LEAA funds	Mediation & Arbitration	Threat of prosecution (can award damages)	City Center 45% black	General	67% criminal justice system (of which 2/3 from courts)	Minor crimes and interpersonal disputes	1% pre-arrest harassment & assault commonest

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3.4 General observations on American Dispute Resolution Centers[7]

The range of schemes described above makes clear that these programs have two aims: to divert part of the caseload of the criminal justice system to simpler and less expensive methods, and to provide a service to ordinary citizens to help settle their everyday conflicts and problems. The two are not necessarily incompatible. The more successful early intervention in interpersonal disputes and other minor troubles can be, the fewer will be those that escalated into serious criminal acts which will have to be dealt with by the police and the court.

Most of the existing information is descriptive of the programmes themselves, and data on outcomes are slowly becoming available. Apparently, success in reaching agreements is likely to happen in cases of violence (usually minor) between parties in fairly close relationship. It is more difficult to persuade unrelated or casually related parties to a property dispute to be cooperative with the programmes or accept a compromise settlement. It the latter cases, however, agreements once reached are more likely to be carried out, as they usually involve some simple form of once-and-for-all restitution. Appeal rates are low, presumably indicating that most settlement proves satisfactory, but the rate of achieving a settlement is not always as high as it should be, only 40 – 65 percent. However, this rate is usually much higher for the more coercive schemes such as those receiving referrals from the criminal justice system.

Post-settlement surveys generally reveal high levels of satisfaction on the part of both complainants and defendants and, when comparisons have been made, higher levels of satisfaction than those expressed by parties experiencing formal adjudication. Disputants normally find mediation and arbitration procedures more understandable or fairer, and welcome the chance to fully participate fully.

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[7] Marshall, T.F. *Ibid*. p.76 - 79 (footnote 1)

Conclusion

This chapter shows that American community dispute resolution programs employ a wide range of non-judicial settlements to resolve community conflict in criminal case; namely, conciliation, mediation and arbitration. Evidence regarding the long-term impact of mediation tend to be very favorable. Disputants tend to improve their mutual understanding, experience reduced anger, and improved relationship following mediation. There is still an important problem: how can the community—based resolution in criminal case be enforced if any party of the case fails to maintain the agreement? The two parties may agree with the idea of referring the case to be settled by non-judicial modes. But they may fail to comply with the decision or the settlement agreement. The enforcement of community-based resolution hence seems to be impossible. The case is likely to go back to formal criminal justice, hence duplicating effort and time. To solve this problem, it is therefore necessary that the community-based resolution in criminal cases be legally recognized and fully enforced. Details about this issue will be discussed in the following chapters along with the court's role in scrutinizing and endorsing the community-based resolution in criminal cases.

CHAPTER IV

COMMUNITY-BASED RESOLUTION OF CRIMINAL CASES IN THAILAND

This chapter will feature an analysis of an attempt to deal with criminal conflicts within a community in Thailand. To provide with a background for better understanding of Thai society, the content will begin with a historical background of crime and tort in Thailand. Then, it will proceed to an overview of Village Arbitration in Kamphaengphet, a pilot project that was aimed at promoting the role of community in terminating criminal conflicts between community members. The final topic will be the enforcement of community-based resolution in criminal cases.

4.1 Historical Development of Crime and Tort in Thailand[1]

Like in many primitive societies, Thai criminal law originated from tort. But there was a mixture between criminal liability and civil liability. The mixture could be seen in two facts. First, liability of civil violator was like liability of criminal violator. In other words, a person was subject to civil liability when there was legal provision only. Second, violator was liable for a certain amount that was both a (criminal) fine and a (civil) compensation.[2] This confusion was gradually removed when Siam (former name of Thailand) started to import legal concepts from the West.[3]

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[1] Lingat, Robert. **History of Thai Law.** First Edition. Thai Wattana Panich. Bangkok: 1983. (in Thai)

[2] Lingat, Robert. *Ibid.* p.145

[3] For details about importation of Western criminal law in Thailand, see following documents:

- Apirat Petchsiri. **Eastern Importation of Western Criminal Law: Thailand as a Case Study.** Colorado: Fred B. Rothman & Co. 1987.

The assertion that criminal law originated from civil law is reflected in the fact that a large number of offences are compoundable. In other words, compoundable offences stem from damages caused to an individual. They are quasi-civil law and can be settled when the injured person and the wrongdoer reach an agreement. Before the promulgation of Criminal Law Ror Sor 127, almost all of these actions were considered a tort.[4]

The distinction between criminal liability and civil liability was later made clear by the Announce of Fraud on 25 September B.E. 2443 (1890) *(Prakat Laksana Chor)*. It provided that a person convicted of committing a fraud was subject to a jail sentence and a fine while an injured person had a right to receive an amount not exceeding the damage caused to him by the fraud. This provision meant that the injured person was not entitled to a share in the fine that totally went to the state. It was indeed an important concept of damage claim in a civil case prevalent up to the present.

The distinguishing of criminal and civil laws may be theoretically clear. But in reality, the confusion between civil and criminal liability is still prevalent. There is a gray area between the two branches of laws, as best summarized by Prince Rajaburi in his speech concerning the distinction between the two branches of law, stating:

> "Law may be categorized into two parts: civil and criminal. Which wrongs can be called civil and which can be called criminal cannot be explained for there is no authority on this. What was considered criminal *(archya* in Thai) in ancient times is almost nonexistent today because the institution of a fine (which was not considered *archya* in indigenous law) has been constituted. Crimes of the original law were wrongs against the kings and against the public administration in nature. This is very clear in

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- Phatcharin Piamsomboon. **Legal Reform in Thailand from 2411 B.E. to 2478 B.E.** M.A. thesis submitted to the Faculty of Arts, Chulalongkorn University. 1974. (in Thai)

[4] Sanya Dharmasakti. **Explanation of Criminal Procedure Law.** Fifth Edition. Krung Siam Publishing House. Bangkok: 1987. pp. 260 – 261. (in Thai)

the indigenous Thai law where it contains less criminal provisions than any other civilized country. What is called criminal in other countries we call civil.[5]

The non-finite distinction between civil and criminal laws is a main reason why Thai society favor the use of informal mechanisms in settling criminal conflicts between community members, as illustrated by the success of a pilot project to be discussed in the following part.

4.2 Village Arbitration in Kamphaengphet

Traditional Thai society had many methods to settle criminal disputes or wrongful acts.[6] Among them was to refer the case to be mediated or settled by a *phuyai* (a 'big person'). This person had to possess sufficient status and authority to command the respect of both parties. Traditional Thai society with its formal structure of patron-client relationship was ideally suited for the mediation and arbitration of private grievance, and this procedure was much preferred to formal procedure as somehow reflected in a popular Thai proverb saying: "It is better to eat dog's shit than to go to a court" *(Kin Kheema Deekwar Pen Kwam)*.

It should be noted that the settlement of criminal disputes by referring to a third person is still practiced in Thailand, but not yet recognized by the law. It is, in fact, a natural method for handing some criminal conflicts that are not otherwise resolved, abandoned, or ignored by the participants. This mode of procedure is natural in the Thai setting because of its subtlety, indirection, and its close relationship to the

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[5] Prince Rajaburi Direkrit, ***Wa Duay Paeng Lae Aya*** **(Essay on Civil and Criminal Law),** undated reproduced manuscript (in Thai)

Cited by Apirat Petchsiri. *Ibid.* (footnote 3) p. 161

[6] Engel, M. David. **Code and Custom in a Thai Provincial Court.** Arizona : The University of Arizona Press, 1978. pp.18 – 24.

system of hierarchical organization that typifies Thai society.[7] At present, villagers in northeastern Thailand still refer a criminal case to be settled by a group of respectable senior fellow villagers.[8] Offences that are arbitrated include physical assault, defamation and rape. Normally the so-called arbitrators decide that the offender pay a certain of amount called *"Kha Prapmai"* (a compensation) to the injured person.

While criminal justice agencies have yet to recognize the importance of "criminal arbitration", administrative agencies seem to be more aware and have already translated this concept into a pilot project called **Village Arbitration in Kamphaengphet.**[9]

Established in 1983 the project was to carry out the policy of the Ministry of Interior to promote people's participation combined with justice principle and legal effectiveness. Also taken into consideration was Thai rural custom and culture. The purpose of the project was to have all disputes in the villages amicably settled by the villagers themselves so as to save time and money as the judicial proceedings became unnecessary and the settlement reached satisfies all parties concerned.

There was no fixed location for arbitration. It was left open for convenience and suitability of each locality. Wherever it was, the people preferred to call it "village court" *(San Mooban)*. In order to avoid confusion with the court to law, the administration renamed it as "Dispute Mediating House" *(Sala Pranom Khor Phiphat)*. However, the people still called it "village court".

Village arbitrators were voted by residents of each village. The number of arbitrators was between 3 – 5 persons, decided by the villagers as well. Either male or female, a qualified candidate is an elderly villager aged between 41 – 60 years residing in the village for over 10 years, having good economic status, leading a decent life, and being capable to dedicate time to perform the duty. Each arbitrator shall be in office for

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[7] *Ibid.* p.78

[8] Chattip Nartsupha and Phornphilai Lertvicha. **Culture in Thai Villages.** *(Watthanatham Mooban Thai).* Second Edition. Bangkok: Samnakphim Sangsan, 1998. pp.64 – 65. (in Thai)

[9] Sunee Mallikamarl et all. **Village Arbitration (Research Report).** Bangkok: Chulalongkorn University, 1985.

a period of 1 year and may be re-elected. An arbitrator may be removed if the people have no confidence in him.

Village arbitrator played double roles as mediator and arbitrator. They were required to make decision upon request of disputing parties. As prescribed by the administration, village arbitrator was authorized to settle misdemeanor disputes including compoundable offence. The arbitration proceeding should be carried out in a friendly atmosphere by avoiding any disagreement, which may lead to further conflict. The proceeding was to be carried before two witnesses and a quorum of 1 – 3 arbitrators (depending on the complication of the case). After the dispute was settled, a record must be made in the dossier provided by the provincial administration signed by the arbitrator(s) and the parties in dispute. It should be noted that to write a record was quite burdensome for the arbitrators most of which (86%) finished only fourth grade. They would record the proceedings the resolution when asked by the administration and not immediately after the settlement was made. Teachers have been asked to do this job. Naturally, the information obtained was not highly accurate.

In terms of criminal offences, village arbitrator was authorized to settle only compoundable offences expressly prescribed in Penal Code of Thailand. However, arbitrator sometimes performed the duty beyond his scope of authority: rendering a decision on cases of non-compoundable. For example, there was a case of bicycle stealing. It was a non-compoundable offence because it was not committed by family members. But the arbitrators decided that the offender had to carry a bicycle on his shoulder and walk around a market while repeatedly shouting “I’ve stolen a bicycle”. The offender agreed to do so. As remarked by one villager, the bicycle stealing party was “penalized by the society”. [10] Although criminal liability in this case was not terminated by the decision rendered by arbitrators, all parties were satisfied with it.

Disputing parties were obviously satisfied with the operation of the village arbitration. They considered the outcome was just and fair for them because it was not imposed by arbitrator but they were willing to do it on their own decision.[11] Moreover,

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[10] *Ibid.* p. 65

[11] *Ibid.* p. 104

they thought that the village arbitration was a good organization that could reduce conflicts between villagers and help saving time and money. Moreover, despite the conflicts, the disputants could maintain their good relationship afterward.[12]

In conclusion, village arbitration is a combination of a political science theory on people's participation and the rural social values on having respect for the elderly of the village.

> 'Reasons why the disputing parties bring their disputes to the village arbitrators are respect and faith they have in them. They see the arbitrators as good, capable and honest people and they know them well. Most importantly, they believe the village arbitrators are able to give them justice.'[13]

This project is now defunct. This is quite natural in Thailand: a certain policy of an administrative agency, however useful or efficient it may be, is subject to be changed when decision makers of that agency no longer hold the position.

In conclusion, Village Arbitration in Kampangphet proved a success in terms of the satisfaction of the two disputing parties because it complied with social values and practices in Thai society. Unfortunately, there was an obvious drawback: the enforcement of the village's arbitrator's decision. The performance as requested in the agreement depends on the will of the parties involved. There was no measure to be applied when any party fails to comply with the decision.

4.3 Enforcement of Community-based Resolution in Criminal Cases

The experience both in the United States of America and in Thailand leads to conclude that non-judicial modes of settlement are preferred in resolving criminal cases within a community. But a problem still arises from the fact that the

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[12] *Ibid.* p. 104

[13] *Ibid.* p. 104

community-based resolution in criminal cases is sometimes not fully enforced when one of the parties refuses to comply with it, resulting the waste of time and energy of the parties involved.

In this part, I will try to come up with idea to ensure the effective use of non-judicial modes in resolving criminal disputes between community members.

4.3.1 Legalization of Informal Mechanisms.

Recognition and legalization of non-judicial modes of settlement are necessary for the enforcement of the community-based resolution. As demonstrated in Thailand experience in Kamphaengphet, the non-judicial modes are not recognized by laws. This pilot project was merely an attempt of an administrative agency to promote the people's participation in resolving criminal conflicts within their own community. When the offender and the injured person reached an agreement, the enforcement of the resolution depended on the will of the two parties. It did not have an actual binding power. In other words, the full enforcement of community-based resolution cannot be ensured without the legal recognition of the whole process.

The criminal agency that should play an active role in supervising the process of the non-judicial modes is the court. If the process has been approved by the competent tribunal, the resolution should be deemed a court's order and fully enforced. Any party failing to comply with it should be faced with a charge of contempt of court.

In short, the success of informal justice still need the threat of formal prosecution to back up their attempt to achieve settlements and consequent enforcement of the agreement. The role of court as the ultimate threat remains an essential part of any justice system.

4.3.2 Content of Community-Based Resolution

Community-based resolution should be a verdict without having to conclude that the offender is guilty or innocent. On the contrary, the content may force the offender to pay a certain amount of money and perform a certain kind of action

reflecting his paying back to the injured person and the society as a whole. An apology, for instance. Moreover, the community-based resolution might contain certain measures that are likely to prevent more serious crimes and correct the unwanted behavior of the offender: for instance, forbidding to enter a certain place or venue or forcing the offender to enter some rehabilitating programs. While the offender is undertaking such a program, the prosecution might be suspended. If his performance is satisfactory and meet all requirements stated in the decision, the case will be dropped. On the other hand, in case of not complying with the decision approved by the court, the offender should be faced with a charge of contempt of court and prosecution will resume.

The agreement should be recorded in writing and sent to the competent tribunal for a review and approval. The court should have the right to review it to make sure that the content is not against the legal provisions.

4.3.3 Enforcing Agencies

To ensure the enforcement of community-based resolution in criminal cases, some administrative agencies should be assigned to supervise the performance of the parties involved. In rural area, local administrative agents such as *Kamnan* (sub-district chief) or *Phuyai Baan* (village headman) should be responsible for this task because they are closely connected to the two parties. Meanwhile, in a city, probation officer should be involved in scrutinizing the compliance with the decision. The main responsibility of the enforcing agencies is to make sure that all the parties involved, especially the offender, comply with the resolution. They should be authorized to make a comment about the offender; for example, if he complies with the decision and his performance is satisfactory, the charge should be dropped.

4.3.4 Impeaching Decision or Appeals

Impeaching a community-based resolution should be permissible for a certain number of reasons where the decision is illegal, or where there has been fraud,

misconduct, or palpable or gross mistake or error. Both the offender and the injured person have the right to appeal.

Conclusion

Thai people tend to prefer non-judicial modes in settling their criminal conflicts because the non-finite distinction between criminal and civil liabilities is still prevalent. Moreover the pilot project of Village Arbitration in Kamphaengphet shows that non-judicial modes of settlement are favorable in Thai society because they are in compliance with social values and practices. Nevertheless, the informal mechanisms have an important drawback. To be precise, the resolution settled with an assistance of a third person may be impossible if any of the two parties fail to comply with the decision. As a result, the criminal case is highly to go back to the court, hence wasting time and cost. On the contrary, if the informal process is supervised and approved by the court, the resolution should be deemed a court's order and can be, therefore, fully enforced. Any person who fail to abide by should be charged with a contempt of court.

To sum up, it is evident that the coercion of formal justice agents is necessary for the effective use of the informal mechanisms.

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CHAPTER V

CONCLUSION AND RECOMMENDATIONS

Men have long been trying to invent an efficient mechanism to settle conflict among themselves as well as between them and state. Nowadays, non-formal and sometimes non-judicial modes of settlement gain more acceptance in modern society. But these informal mechanisms have drawbacks as well. Among them is the problem of enforcement of the resolutions of these types of settlement. This research comes to the conclusions which aim at the improvement of the efficiency of informal mechanisms.

5.1 Conclusion

There are a myriad of non-judicial modes to settle criminal conflicts in a community. But these informal methods are faced up with an important problem: The lack of measures to enforce the outcome of the process. Enforcement seems impossible when one of the two parties refuses or fails to comply with it. Consequently, cases are likely to be returned to the formal criminal justice system, hence duplicating cost and energy of all agencies involved. This study shows that the formal court's authority is still required to enforce the community-based resolution in criminal cases.

5.1.1 Critical problems in formal criminal justice make it necessary to apply non-judicial modes of criminal settlement

As mentioned earlier, critical problems in the formal criminal justice system makes it necessary to apply non-judicial modes of settlement, and encourages community to continue with the enforcement of community-based resolution in criminal cases. This thesis finds that there are two main reasons why it is necessary to look for an alternative to formal criminal justice system. First, all agencies in the criminal justice

from police to prison are faced with an overload of criminal cases many of which are minor problems that can and should be settled out of court. This threatening trend certainly consumes an enormous proportion of state budget that should be, otherwise, used to improve the standard of living of the people nationwide.

Second, there have been increasing concerns about the efficiency of court-based adjudication. In some cases, legal proceeding does not seem to be entirely successful in rehabilitating the offender, helping the victim, or preventing further troubles.

These trends converge into new ideas put forward for processing criminal events and settling criminal conflicts without the use of formal adjudication so as to provide all parties involved with advantages in terms of speed, cost, and improved results. This problem receives an international recognition when the United Nations (UN) adopted Resolution 40/34 entitled Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. It recommended that informal mechanisms should be applied to resolve the criminal conflicts.

5.1.2 Enforcement of Community-based Resolution in Criminal Cases

The effective use of non-judicial modes in resolving criminal disputes between community members requires legal recognition. Otherwise, it would be almost impossible to scrutinize the non-judicial methods of settlement. The criminal justice agency that should play the most active role in supervising the whole process of the informal modes is the court. If the whole process has been approved by the competent tribunal, the community-based resolution should be legally deemed a court's order and can be fully enforced. Those who do not comply with it should be charge with contempt of court.

To ensure the full enforcement of community-based resolution in criminal cases, an administrative agency should be assigned to carry on the task. In rural areas, local administrative agents *Kamnan* (sub-district chief) or *Phuyai Baan* (village

headman) should be responsible for this job. Meanwhile, in a city, probation officer should be involved in making sure the offender complies with the decision.

Any of the two parties who are not content with the community-based resolution should have the right to appeal.

5.2 Recommendations

In order to ensure the efficient use of non-judicial modes of settlement in criminal cases, I would like to make following recommendations. Yet, they are merely examples and guidelines for the future legal amendment, guidelines for administrative practices as well as the government's role in promoting the social awareness of informal injustice and encouraging community strength.

5.2.1 Legitimization of Informal Process to Settle Criminal Cases in a Community

There are a large number of non-judicial methods to settle criminal cases in a community. Unfortunately, these methods are not fully recognized by law. As a result, the enforcement of the community-based resolution cannot be assured. To solve this problem, there should be legal provisions that fully recognize as well as put a limit on these informal methods. Details will be discussed below.

5.2.1.1 Restriction of the Use of Informal Process

There should be some limitations in using the non-judicial methods to settle criminal cases between community members. Only a certain types of criminal cases can be referred to a third person. Based on the operation of the American experience and Village Arbitration in Kamphaengphet project, I would like to recommend that a case susceptible for community-based resolution must possess following components:

- Consent of the injured person and the offender
- Compoundable offences
- The injured person and the offender must hold a certain kind of relationship; for instance, interpersonal conflicts between relatives, neighbors, friends, and other ongoing relationship such as between landlord and tenant or employee and employer.

5.2.1.2 Due Process

Certain degrees of fairness should be guaranteed for both the offender and the injured person. In order to ensure that the resolution will be enforceable, the informal process must be approved and can be scrutinized by independent and impartial parties in every stage. The process of community-based resolution in criminal cases can be divided into two stages: pre-hearing and hearing.

I. Pre-hearing stage

A. Referral mechanism

The referral of criminal case to a third person should be made within the limited duration:.

1. After a complaint has been filed until the prosecution is made, the offender and the injured person can inform the investigator or the public prosecutor of their mutual agreement to opt for an informal method, depending on the fact that the case is in the consideration of the investigator or the public prosecutor. After being informed of their request, the investigator or the public prosecutor in charge of the case must submit a motion requesting an approval of the court.
2. After a prosecution has commenced until the court reaches a verdict, the two parties can submit an application informing the

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court of their intention to refer the case to be settled by a third person. The court may scrutinize the case before giving an approval.

It is important for the court to scrutinize the request of referral so as to ensure that the agreement does not result from a forced consent or a threat. Once a third person is assigned, the process has to carry on until a decision is reached. If the offender changes his mind or refuses to abide by the resolution, he might be charged with contempt of court because the referral to a third person now constitutes a court's order.

In my opinion, however, the referral of criminal cases to a third person should not be allowed after the court of first instance reaches a decision. Otherwise, it would be equivalent to allow the injured person and the offender to interfere with the court's descretion, which is not the purpose of the informal justice. It also ruins the integrity of the court.

B. Qualified Third Person

Chosen or approved by the offender and the injured person, a single third person or a panel should be a respectable person who can command the respects of both the offender and the injured person. Followings are guidelines for choosing qualified person:

(a) **When to appoint a third person.** A proper appointment of a third person and his acceptance to settle the case is necessary for validate the informal process. The appropriate time to appoint a third person is when the two parties agree that the case should be settled out of court. It means that the appointment must take place after the commission of crime and must be made in the submission itself so that the court can consider before giving an approval.

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However, if the offender and the injured person cannot agree upon the appointment when submitting the request of referring the case to a third person, the court might assign a third person after reviewing the request.

(b) **Qualification of a third person.** Potential person does not have to be a legal practitioner. But he or she must be a neutral and impartial person. More importantly, a third person must possess certain qualifications that can command the respect of both the offender and the injured person.

II. Hearing

Even though informal methods do not require the formality of judicial proceedings, and the technical rules applicable to court proceedings shall not be applied, some form of registration is needed. In other words, when a counsel's representation and rules of evidences might not be applied, the proceedings should be recorded in writing for future references, especially for the future court's review.

III. Enforcement of the Resolutions

The community-based resolutions can be enforced if the process has been approved and the resolutions endorsed by the court. The decision can be considered a court's order. If any party fails to comply with it, he or she might be faced with a charge of contempt of court.

A certain kinds of measures should be included in the resolution. The community service, the preventive measures, the probation, the compensation and the apology, for instance. However, the jail term and corporal punishment should not be possible.

Both the offender and the injured person should have the right to appeal on the ground that there are some irregularities in the process. For instance, the third person is biased.

5.2.2 I also would like to recommend an amendment of a clause concerning possible compensations for the injured person in the general part of the penal code. The punishment, which is a means of expressing social disapproval or reaction to the crime, focuses on the offender no matter what the purposes are (retribution, deterrence, incapacitation or rehabilitation). Meanwhile, the measures of safety are applied mainly to protect the society from possible harms of recidivism. Obviously absent is how to compensate the injured person and to help them to resume their normal life as soon as possible. Such legal provision will ensure the injured person of remedies that can be in various forms including damages payment and a ceremony of apology, for example.

5.2.3 The government should promote the strength of the community so as to encourage the people's participation in settling criminal conflicts within the community. Informal methods will be more efficient in an active and strong community.

5.2.4 More community dispute resolution centers should be established. If the pattern and operation of Kamphaengphet Village Arbitration are to be adopted in any other provinces, local customs and tradition should be taken into consideration.

Epilogue

A multitude of non-judicial modes are now encouraged to settle criminal conflicts between community members. The ultimate goal is to reduce the caseload of criminal justice agencies. The success of the community dispute resolution programmes in the United States of America indicates that these informal mechanisms are likely to provide benefits to the society as a whole. Moreover, the pilot project of Village

Arbitration in Kamphaengphet, Thailand indicates that in case of minor offences, Thai people prefer the informal mechanisms because they comply with the prevalent values and practices in Thai society.

Nevertheless, the non-judicial modes of settlement have a drawback. The resolution sometimes cannot be enforced if any of the two parties refuse to abide by. As a result, the case is likely to be pushed forward to the formal criminal justice system, hence duplicating the time and cost of the court proceedings. It is, therefore, necessary to find a measure to ensure the full enforcement of the resolution without having to recommence the formal court proceedings.

The study shows that the efficient application of the informal mechanisms requires the intervention of the criminal justice agencies, especially the court. In other words, the legal recognition can improve the efficiency of the non-judicial modes of settlement. The coercion of the formal criminal justice system will serve as an efficient persuasive force that convinces the two parties of criminal conflicts to comply with the community-based resolution more easily, resulting in the termination of the criminal conflicts.

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