

THE PROCESS OF ESTABLISHING RESTORATIVE JUSTICE IN THE SOCIETY BY POLICE OFFICIALS

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Abstract:

Since the problem of crimes in Thailand has become more diverse and ever-changing in its forms than in the past, it is necessary for the government to swiftly enact legislation in order to respond to the increasing nature of the diversity and complexity of offences. As a result, the quantity of crimes has continued to rise; particularly, the statistic shows that the number of cases under the Court of First Instance has increased from 1,414,742 cases in B.E. 2557 (2014) to 1,501,042 cases in B.E. 2558 (2015). However, due to the limitation on financial and human resources, Thailand's judiciary system encounters a number of problems. In particular, the quantity of cases in the judiciary system does not correspond with the number of personnel including police officials, public prosecutors, judges, and correctional officers. As a consequence, the problem of caseload has emerged, and the quantity of prisoners exceeds the number of prisons. It is therefore necessary to study the rationale, the principle, as well as different forms of restorative justice at the stage of police from overseas, in order to find the course of dealing with misdemeanors in the way suitable to Thailand.

It is found from the research that the government should come up with other restorative measures empowering officers in the preliminary stage of the judicial process, especially police officers who are the closest to the community and the society, to be able to exercise their own discretion to manage and settle misdemeanor cases by lawful means with the use of the process of restorative justice under consent of all relevant parties i.e. culprits, injured persons and the community. However, whenever the police officials exercise their discretion to settle cases, such external agencies as the public prosecutors must be brought examine the exercise of such discretion. This is in order to guarantee the transparency and accountability of the police officials' discretion, so that it is in accordance with criminal procedural principles both at investigation and prosecution stages. Additionally, whenever the restorative justice is applied to settle the cases, monitoring measures should be continually conducted for a further period of time; e.g. conditional probation, public service requirement, or the use of electronic monitoring devices. These measures, principally, are required as the means to prevent culprits from repeat the commission of crimes.

Keywords: Case overload, Restorative Justice, Monitoring Measures

1. Introduction: the significance of the problem

According to the report of the National Reform-steering Committee on the Law and the Justice system, the indicators measuring the efficiency of the justice system is analyzed, with the use of some interesting indicators from overseas. For example, in the US, apart from the proportion of the numbers of cases of which judgment have been made, one of the important indicators is the ability to use placement in treatment or alternative program, and the ability of making prosecution orders appropriate to the nature of crimes and offenders (Wathanasawat, 1986), as well as the timely and efficient demonstration of justice. Whereas, in Sweden, the indicator includes the proportion of solved cases. In Australia, the cooperation between police authorities and governmental agencies is emphasized to maximize the efficiency. (The National Reform-Steering Committee on the Laws and the Justice System, 2016)

In Particular, the problem of crimes in Thailand has increased in terms of its variety, forms and complexity than in the past. (Sompong, 2008) This is due to economic, social and cultural problems pushing citizens in the society to struggle to make their livings. Because of the lack of resources, there is a high risk that the alleged offenders – either juvenile or adults – commit more crimes, hence the overload of cases in the court (Wongseyuen, 2005). While there is no filtering of cases in the criminal justice system before the cases is submitted to the court. The agency responsible at the beginning of the criminal justice system i.e. the police authorities, which is considered to be the closest to the community, have encountered numerous problems in the criminal justice system. These problems go even beyond the police authorities, especially the budget spent on recruiting law enforcement officers including police officers, public prosecutors, judges, probation officers, correctional officers, and other related resources, as well as the provision of facilities to control and detain these alleged offenders. However, the Thai Government is not reluctant to these problems, and has made efforts to solve them by significantly increasing budget into the justice system. The trend of caseload, however, has not decreased at all. To the contrary, the number of cases keep increasing – particularly those at the stage of the

Court of First Instance. The number of 1,414,742 cases in 2014 increased to 1,501,042 cases in 2015. Such budget should not be spent on fixing the problems of caseload. Alternatively, the government may choose to spend this amount of budget on providing welfare to tax-paying citizens, and on the development of the country.

Another important problem is that, nowadays Thailand's criminal proceedings prevent the police, who are the closest to the communities and society, from exercising discretion to end petty crimes. That is why the numbers of cases in court keep soaring every year. Therefore, the theory of restorative justice must be put in practice in Thailand, by diverting cases out of the justice system by the police. From the study and analysis, the numbers and types of non-compoundable and compoundable offences in Thailand are categorized. Suggestions are made as to the numbers and types of these offences which are appropriate and acceptable in the community. Moreover, once the police officers can exercise their discretion in ending these crimes, it will be determined as to whether or not it is necessary, and to what extent, for external agencies such as public prosecutors and judges to make inspection of the discretion exercised by the police. This is in order to guarantee the transparency and accountability, in accordance with the principles of criminal proceedings at the stage of investigation and prosecution. Providing that criminal cases can be ended by the method of restorative justice i.e. conciliation in criminal cases, it is suggested that there should be a after-care system in place to monitor the alleged offenders for another period of time. Such system may include conditional probation, social/community service, or the use of electronic monitoring bracelets, as appropriate. This is in order to prevent offenders' recidivism. **Research**

2. The scope of research project

The scope of this research work is limited to utilizing restorative justice in the form of criminal conciliation in petty crimes and some other certain types of crimes by authorized investigators. These officers include authorized investigators under the Criminal Procedure Code, and the conciliation can take place for both compoundable and non-compoundable offences. The study will be on both legal and practical problems. This qualitative research will be done by in-depth interview and focus group with academia and relevant law enforcement officers for their opinions. These will then be analyzed, a draft legislation will be proposed to related agencies for more efficient law enforcement.

3. Methodology

Paper research includes documents both in Thai and foreign languages, textbooks, articles, research reports, book, journals, as well as other online resources. This is in order to learn the proceedings of restorative justice, as well as problems, obstacles, advantages and disadvantages of an adoption of restorative justice in the form of criminal conciliation. Data will also be collected in the field including in-depth interview and focus group of relevant officers in the criminal restorative justice system in Bangkok area e.g. police officers, public prosecutors, judges, academia, as well as the general public. This is in order to find appropriate legal solution of the problems aforementioned which has led to the adoption of restorative justice at the stage of police.

3.1 Tools for the research

Tools for the research include interview form consisting of the following questions:

1. Types and the principle of restorative justice at different stages in the criminal justice system including the stage of police
2. The transparency, the monitoring and inspection to examine the appropriate of discretion exercised by police officers
3. Types of cases or offences which may be enforced by the use of restorative justice at the stage of police.

3.2 Population and sample

Sample of population in the research includes: In cases of a focus group of those involved in justice system, particularly in the process of restorative justice in Bangkok and suburban area e.g. police officers, public prosecutors, judges, academia, and the general public in total of 20 people, with in-depth interviews of 5 people

3.3 Data analysis

Data obtained from the interview and focus group will be analyzed, summarized, categorized into main, and subsidiary issues, and examined by experts in the justice system. This will then be arranged for descriptive presentation.

4. Results of the research

4.1 Offences appropriate for the use of restorative justice at the stage of police

Even though the Criminal Procedure Laws allows some usage of restorative justice at the stage of police (Kittayarak, 2012) For instance, section 37 of the Criminal Procedure Code stipulates that

“Section 37, a criminal case may be finalized as follows:

- (1) In cases where fine is the only punishment, when an offender consent to paying the maximum fine of such offences to an officer before the trial;
- (2) In cases where an offence is a petty crime, or an offence incurs a penalty not more severe than that of petty crimes; or an offence with a penalty not more severe than that of a petty crime or other crimes with only a maximum fine not exceeding ten thousand baht, or an offences relating to tax law with a maximum fine not exceeding ten thousand baht, when the alleged offender pays a fine as suggested by an investigator.
- (3) In cases where an offence is a petty crime or an offence with a penalty not more severe than that of a petty crime, or a case with a maximum fine not exceeding ten thousand baht which take place in Bangkok, when an alleged offender pays a fine as suggested by a local police officer with a ranking of a police captain or higher or an authorized police officer with a ranking of lieutenant acting on behalf of those in such ranking.
- (4) In cases where a fine can be paid according to other laws, when an alleged offender pays a fine as suggested by an officer.”

Nevertheless, it can be seen that section 37 of the Criminal Procedure Code allows restorative justice to be applied only in cases where an alleged offender gives his/her consent to pay a fine in a crime relating to tax, or a petty crime, or an offence with a penalty not more severe than that of a petty crime with a maximum fine not exceeding ten thousand baht. Moreover, there are provisions which are conditions for the termination of a criminal case. It is stipulated in section 39 that the right to file a criminal lawsuit shall terminate as follows; (2) In a compoundable offence, when a complaint is withdrawn, a lawsuit is withdrawn, or the case is legally reconciled. According to the laws, in many cases where the injured party withdraws the complaint or agrees to a reconciliation, the police officers and community leaders in the areas where the crimes are committed e.g. sub-district headman, village leader usually act as an intermediary, conduct negotiation so that an alleged offender agrees to pay damages. (Suteesorn, 1998) or grows a conscience in his/her actions of committing the crimes.

However, there are limitations to restorative justice at the stage of police according to section 37 and section 39 of the Criminal Procedure Code. The main issue is that restorative justice can be applied only in some offences. In other words, offences are compoundable only when they are explicitly specified in the Criminal Code. Without such clauses, the offences are deemed as non-compoundable offences e.g. defamation, embezzlement, fraud, cheating of debtors, trespassing, damaging of property etc.

On the one hand, the Draft Act on the Measures in Lieu of Criminal Prosecution B.E. is special in a way that it provides a dual-system restorative justice i.e. criminal reconciliation and the suspension of prosecution within the same piece of legislation. The criminal reconciliation can be applied not only for compoundable offences and petty crimes, but also any criminal offences with maximum imprisonment sentence not exceeding five years according to an annex of the act. On the other hand, even though it appears the power of restorative justice at the stage of police has been increased, it is found that, despite the lack of the Act on the Measures in Lieu of Criminal Prosecution, the termination of cases for those two types of offences mentioned earlier is possible under the Criminal Procedure Code. It is thus unnecessary to repeatedly specify those two offences. With regard to the third type of offences i.e. the offences with a maximum imprisonment sentence not exceeding five years as listed in an annex of the Act. Even though restorative justice applied to this type of cases may bring about peace and unity among all parties and allow the alleged offender to sustainably repatriate into the society, it is unlikely that the caseload will decrease at a significant amount. Because there are only a few types of offences listed in an annex of the Act that satisfy the conditions of this Act, it is proposed that such system of restorative justice shall be extended to negligent offences and drug-related offences. This is in accordance with academic experts in the field of restorative justice at international level e.g. Howard Zehr, Tony Marshall, who all believe that restorative justice can be applied with other types of cases for the purpose of efficient case management even though they are not just petty offences (Chatpaitoon, 2008). This shall not be limited to

compoundable or non-compoundable offences, but should be applied to all other types of crimes. Moreover, drug-related offences are specifically mentioned because it has the highest number of unresolved cases in the Court of First Instance, as shown in the table below:

Table 1: Statistics of numbers of criminal cases in the Court of First Instance in Thailand in 2015

Offences punishable by laws	Numbers of cases submitted to the court
1 Offences relating to administration	5,285
2 Offences relating to public order	153
3 Offences relating endangerment to the public	433
4 Offences relating to forgery and alterations	5,495
5 Offences relating sex	7,712
6 Offences relating to life and body	30,111
7 Offences relating to property	33,793
8 Offences of extortion, blackmail, theft with force, robbery	3,039
9 Offences according to the Narcotics Act B.E. 2522 (1979)	273,597
10 Offences according to the Customs Act B.E. 2522 (1979)	772
11 Offences according to the Immigration Act B.E. 2522 (1979)	29,941
12 Offences according to the Tourism Business and Guide Act B.E. 2551 (2008)	508

Source: the Office of the Judiciary

From the table, it can be seen that there are as much as 273,597 drug-related cases that are submitted to the Court of First Instance for consideration. While there are only 33,793 and 3,039 offences relating to property, which must be considered insignificant when compared with the number of drug-related cases. With regard to negligent offences resulting in death, the punishment inflicted on the defendant is usually suspended, and the defendant is usually on probation for a certain period of time e.g. in the Supreme Court Judgment no. 288/2549. Therefore, case management by the use of criminal reconciliation are truly necessary for these two types of offences. Because of the caseload, the government wastes significant amount of budget on case management, from expenses of conducting investigation by investigators, public prosecutors, detention of defendants during trials, numbers of judges as well as support staff.

4.2 Accountability of an exercise of discretion in restorative justice system at the stage of police

Thailand adopts both the legality and opportunity principle of criminal prosecution. (Nakorn, 2012). However, government officers lacks integration in terms of cases management within the justice system, resulting in case overload. (Jaihan, 2007). Therefore, restorative justice can be applied at all stages of the justice system. (Chatpaiboon, 2007). All relevant law enforcement agencies including administrative officers, the police, public prosecutors and judges, can adopt this principle in order to restore peace and order in a sustainable manner in the Thai society. As analyzed in 4.1 that the adoption of criminal reconciliation should be extended to include drug-related and negligent offences, there may be abuse of power by police officers without stringent inspection system. For example, in drug cases with an imprisonment sentence from one year to the capital punishment, the severity of punishment should depend upon not only the type of narcotics, but also the amount of pure substance. The abuse of power may arise when the police officers smuggle some drugs from the calculation of pure substance so that the imprisonment sentence is within the 10-year range. Alternatively, a police officer may intend to help an alleged offender by choosing to charging the defendant with an offence of acting negligently result in another person's death according to section 291 of the Criminal Code instead of intentional murder according to section 288 even though there is sufficient evidence of the latter. Even with the charge of acting negligently resulting in another person's death according to section 291, a police officer may exercise his/her discretion to benefit the wealthier party by other unlawful means.

Accordingly, if a police officer is vested with the power to exercise his/her discretion of criminal reconciliation, it is suggested that an monitoring system shall be put in place to inspect the exercise of such discretion in the restorative justice system at the stage of police in accordance with international standards (Chaidetchsuriya, 2006). Apart from internal monitoring system by the use of hierarchy system within the police organization (Meeboonsalang, 2001), there must be an external monitoring system by the Public Prosecution Organization. This is in order to establish a check and balance system, in line with the good governance principle of criminal

justice system which considers the process of investigation and prosecution the same process (Panuttikorn, 2012). Moreover, it is appropriate for public prosecutors to supervise the process of reconciliation by the police. Once an investigator exercises his/her discretion by proposing to his supervisor that some cases shall be in the process of reconciliation. At the stage of reconciliation, there shall be, apart from an injured party, an alleged offender, an investigator, community leader, a public prosecutor who plays a role in the negotiation, approves or supervision an investigator's exercise of discretion. Similar to a provision in section 86 of the Juvenile and Family Court and the Juvenile and Family Court Procedure Act B.E. 2553 (2010), a public prosecutor must approve the use of special measures in lieu of criminal prosecution against children and juvenile. Another vital reason is that a public prosecutor can hear an explanation of an investigator to ensure whether his/her actions and the process as a whole is legal, whether an investigator has legally notified the charges and a consent to a reconciliation has truly been given, and whether the process has been conducted by the use of force, threats, coercion, or any other unlawful promises made by a police officer, as well as an agreement to compensate the victims of the crimes. With an approval of a public prosecutor, an after-care monitoring system, a prosecutor can also exercise his/her discretion in determining a period and conditions of aftercare efficiently and appropriately to a commission of crime and circumstances of the case.

4.3 After-care monitoring system of an offender in restorative justice system at the stage of police

After a public prosecutors approve an adoption of restorative justice by the use of criminal reconciliation at the stage of police, if deciding not to prosecute, it is necessary for a public prosecutor to determine a condition in order to monitor the alleged offender's behavior and also as to whether such person fulfils a set of conditions specified in writing in a deal made in restorative justice system e.g. paying for damages in monthly installments when an alleged offender does not have a lump sum to pay for damages. A period of probation shall be determined on a case-by-case basis depending on circumstances and severity of the case. In cases of petty crimes or in cases where the amount of damages is not significant, the period shall not exceed one year. On the contrary, in cases affecting the society as a whole, or in cases where the victims' lives or property are severely injured, or there is an agreement for damages to be paid in monthly installments, a public prosecutor shall determine a probation period of not less than one year but not exceeding five years. Moreover, the conditions shall specify the amount of damages to be paid to the society or the community in the conditions of probation. This is because most crimes do not only directly cause damages to the injured party, but also indirectly endanger the society. It can be arranged that the alleged offender help doing public services in government buildings, temples, or the community. Also, conditions may be stipulated that an alleged offender shall not associate with other persons who are likely to commit crimes. In drug cases, conditions may be set that addicts shall participate in rehabilitation program or show remorse to the injured party and his/her relatives, or he/she can give a presentation sharing his/her knowledge and experience so that others will not follow his/her footsteps. Alternatively, electronic monitoring devices (EMD) (Suwanmongkol, 2013) can be used to as a condition of probation in certain types of crimes to prevent convicts from entering high-risk places. EMDs can also be used to confine convicts in limited space as agreed upon. This is to ensure safety in the community in which the alleged offender resides. Apart from that measures shall be initiated so that the family and relatives of alleged offenders see the importance of, and participate in the rehabilitation and repatriation of an alleged offender to the society in a sustainable manner. A public prosecutor can determine methods of convicts' supervision by using family psychology i.e. setting a condition of probation that will emotionally reconnect parents, guardians, or family members of alleged offenders. Providing that an alleged offender's conduct has not met the conditions or try to escape which would trouble the parents or guardians, a public prosecutor may set a condition that shall put down a set amount of deposit as a guarantee that the parents or guardians will try their best to ensure the alleged offender's behavior. If an alleged offender commits a crime again, such deposit shall immediately be confiscated.

5. Conclusion and Suggestion

The Thai society has nowadays become more complex, causing more crimes which result in caseload at trial stage. Consequently, the government has to invest a significant amount of budget in personnel in the justice system including police officers, public prosecutors, judges, and correctional officers. This leads to a significant increase in the cost of case management. The restorative justice system through criminal reconciliation at the stage of police can help decrease the number of cases which will go to the court, resulting in a decline of number of convicts in the correctional facilities. Therefore, it is suggested as follows;

1. The types of cases appropriate for restorative justice system at the stage of police: it is recommended that the appropriate offences are criminal offences with an imprisonment sentence not exceeding five years according to the Criminal Code, or negligent offences, or drug-related cases according to the Narcotics Act B.E. 2522 (1979) with an imprisonment sentence not exceeding ten years. This is to ensure an efficient decrease of caseload.

2. The monitoring system: it is recommended that a police officer shall be able to exercise his/her discretion to bring in restorative justice by means of criminal reconciliation. However, if such discretion is exercised independently at the stage of investigation with a mere supervision by hierarchy system of police, this will not be in line with the good governance system of criminal procedure. Thus, an external supervision i.e. by public prosecution organization is suggested to establish a proper check and balance system. A public prosecutor should play a role in supervising an alleged offender's behavior after the process resulting from reconciliation at the stage of police. The role they place may be in terms of substance of the case, elements of crimes, circumstances of the case, the alleged offender's consent to restorative justice system, and damages as well as the determination of other appropriate conditions so that the alleged offender can truly repatriate into the society.

3. The after-care monitoring system of an alleged offender in restorative justice system at the stage of police: a probation period between one year and not exceeding five years is recommended along with other conditions such as possible deposit of guarantee, control by EMDs, social service, and treatment, depending upon circumstances and severity of the case.

Biography

Dr. Nutdanai Supatrakul is a lecturer at law, Humanities and Social Science Faculty, Phranakhon Rajabhat University in Thailand. He is graduated with a LL.D. in Law from Dhurakij Pundit University with a barrister-at-law certificate from the Thai Bar Association under his Royal Patronage. He is specialized in the law for development, public law, criminal law, criminal procedure law, as well as tourism law. He is an honourable reviewer in a research journal of the Phranakhon Rajabhat University and an editor of an academic journal of the Phranakhon Rajabhat University in Thailand.

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