

GROUP 3

COMMUNITY-BASED DISPUTE RESOLUTION

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I. INTRODUCTION

There would be no opposition to the thought that one of the major objectives of our criminal justice system is to prevent crime in accordance with rule of law (Sustainable Development Goal 16.3). Our formal criminal justice system would be listed at the top of the options because those specialized organizations, such as the police, prosecutors' offices, courts, correctional facilities and probation offices, operate under statutory laws by duly appointed public servants. These organizations are supposed to be competent in crime prevention. Under such systems, a typical example of public participation is the jury system. Among participating countries, Japan has adopted a lay-judge system, through which the sound common sense of ordinary citizens is introduced into the legal system to curb the adverse effects of excessive expertise and abuse of power; also, citizens who have served as lay judges bring their experiences back to the community and enhance the public's understanding of the legal culture.

However, proper management of such entities is nothing more than a means and not the purpose. In addition, the formal judicial system in general is expensive, time-consuming and not necessarily familiar with the actual situations in which crimes are committed. These issues are even more important for countries which are challenged by underdeveloped economies, geographical remoteness and diversified cultures.

Considering these factors, the group has chosen "Community-Based Dispute Resolution" (hereinafter referred to as "CBDR")—through which members of the community participate in the criminal justice system in a broad sense—as the main topic, believing in its significance and importance; to effectively prevent crime by an approach incorporating the community; to improve access to justice and to enhance rule of law by providing fair, prompt and inexpensive means of dispute resolution; and to maintain peace and harmony in the community based on its diversified culture, etc.

It also should be mentioned that the group found it challenging to establish a detailed and specific definition of CBDR, mainly because of the difference and diversity in the legal systems and practices among the participants' jurisdictions. However, bearing in mind the above-mentioned significance and importance of CBDR, the group tried to identify the practices of each participant's jurisdiction and found common issues: how to enhance CBDR; how to guarantee fairness through CBDR; and how to ensure the performance of obligations agreed to through CBDR. This report summarizes the practices of CBDR and the discussions based on the above-mentioned issues.

II. OVERVIEW OF CBDR IN THE PARTICIPANTS' COUNTRIES

As mentioned above, the group accumulated its examples of CBDR in each participant's country as the basic materials for its further discussions.

A. Bhutan

Community-based dispute resolution has existed in Bhutan for a long time and is still in practice. In the Bhutanese context it is known as *nangdrik*, which means settling disputes and cases in the community by elders without going to court. However, there were some instances where certain heinous cases also were settled mutually by community elders. Later with codifying the law, such process was to be stopped, but due to mountainous terrain it was difficult for the people to go to court to settle the case, which proved expensive. To ease these burdens, the judiciary allowed the practice of community-based dispute resolution to continue, but there is a restriction that the serious cases cannot be settled at the community level. People are all aware about the system and are happy. They report the case to police and the police screen the case and allow them to settle the minor cases amicably at the community level.

The challenges faced in Bhutan are the lack of sufficient numbers of judges and prosecutors; hence all people who want to avail themselves of the service are deprived. Moreover, there are not many students interested in law since they are not taught in the elementary school. Only a few understand that the law is important and those ex-judges' children opt for law. Therefore, it is very difficult to have many judges. Some judges retire early and establish their own law firms which are lucrative at this juncture. Therefore, settling cases in the court takes a long time, which people do not like. Most people prefer resolving the case amicably without going to court. Moreover, there is no law college in the country for students who want to pursue law at their own expense, and they cannot go outside the country to study due to financial constraints. A law college has to be established in the country to solve the above-mentioned challenges. If a law college is established in the country, the current situation can be partly solved, and the rule of law can be enhanced. More legal awareness has to be promoted in the schools, which will create enthusiasm in the minds of students.

B. Indonesia

In Indonesia, especially in criminal cases, CBDR is not available in criminal cases. Only in civil cases is there an opportunity to settle the dispute using CBDR or mediation as we know it. Because in Indonesia there is the principle of legality (*nullum delictum nulla poena sine praevia lege poenali*) through the criminal code and the principle of codification, any criminal act must be processed based on Indonesia's written law by criminal procedural law. This challenge hinders the promotion of CBDR as an alternative option to avoid formal proceedings or trial by court, and the only remedy is the amendment of the criminal code and the criminal procedural law.

C. Japan

There is no CBDR system in the criminal procedure in Japan; however, it is possible for the parties to make civil reconciliation. Because civil negotiation is not decided statutorily, civil reconciliation can be held at any time and there is no limitation on those involved. Although the parties can also use the court's civil mediation system, the process is relatively time consuming. The mediator is selected from the private sector. Criminal liability is separated from civil liability. So even if civil reconciliation is concluded, the criminal procedure does not end immediately. It can be a factor that reduces criminal responsibility. Although the police will send cases to the prosecutor once the investigation is started, the prosecutor will not prosecute those cases if mediation is concluded in minor cases.

D. Maldives

In Maldives, CBDR has not been effectively in place due to the country's ongoing legal reforms. Presently, a threshold issue in the Maldives is legal aid and numerous problems faced by citizens in obtaining competent and affordable legal representation due to high demand. However, many efforts have been taken to improve the criminal justice system. Disputes are handled predominantly on an intra-family basis or with the intervention of the Island Council or senior members of the community. In both rural and urban areas, police play a vital role in dispute resolution and guiding the public. In minor cases, the police try to solve the disputes by negotiation. If the matter is not resolved, investigation continues; if there is reasonable evidence, the case is sent to the Prosecutor General's Office for prosecution. In children- and family-related cases, after analysis, depending on the magnitude of the case, the case is sent back to the police for mediation. For juvenile cases, the court uses guidelines for mediation, in which case conferences are held for both pretrial cases and convicted cases. The agencies included are the police, prosecutors, correctional, juvenile justice unit case workers, family and gender case workers, and the Ministry of Education.

E. Papua New Guinea

Village Court Mediation in the PNG context is a customary way of resolving disputes and maintains peace and harmony in communities. Community leaders have a responsibility to maintain peace and harmony in communities. They use CBDR to mediate civil cases and in criminal cases. PNG law does not allow mediation of criminal cases, but local communities resort to mediation, especially in sensational cases, for the sole purpose of maintaining peace and harmony in communities. This does not, however, necessarily exempt the accused party from criminal liability; hence payment of compensation is taken into account as a mitigating factor in criminal proceedings. Cultural diversity and geography are major challenges. Clans or tribes compose their so-called community and each community has its own culture; therefore, it is almost impossible to come up with just one procedure to be adopted by all without encountering much resistance from the locals themselves. People from remote areas cannot easily access the regular courts, so they resort to the mediation process in the village courts. Good practices in PNG in regard to CBDR are as follows: social pressure from the community on the defendant to meet the agreed terms of settlement, so assistance is sought from tribes, clans in settling terms agreed upon during mediation. Community, clan or tribal contribution in settling disputes enables stronger communities in deterring crimes.

F. Philippines

In the Philippines, the *Barangay* Justice System is mandated by Republic Act No. 7160 or the Local Government Code of 1991 as a community-based mechanism for dispute resolution. The system has an established procedure that covers all issues that may arise in the administration of CBDR and all necessary forms were provided for proper recording of complaints, serving summons, observance of the period of settlement of disputes and other related procedures. There are some indigenous tribes mostly in the northern and southern part of the country who have their own customary traditions regarding conflict resolution in their respective communities; however, the law on the *Barangay* Justice System (BJS) provides that in communities that have distinct traditional practices in settling disputes, the customs and traditions of the indigenous cultural communities shall be applied. Thus, settling disputes through their Councils of Elders are recognized and followed with the same force and effect as the procedure in the BJS. It is also noteworthy to mention that there is an annual search for outstanding *Lupon Tagapayapa* or *Lupon* (Barangay Peace Council). Aside from the distinct honour, the chosen outstanding *Lupon* will be given the Presidential Commendation and a cash prize. This awards system is a strong motivation to all *Barangay Lupon* to perform their best.

G. Sri Lanka

In Sri Lanka mediation is governed by procedural law and is available for both criminal and civil matters but with limitations. Minor criminal cases such as injury and mischief where the sentence is less than one year necessarily should go to mediation. Minor civil claims of less than 25,000 rupees, too, should undergo the same process. The original court has jurisdiction to try these cases only if the mediation process fails. Legal representation is not permitted. The mediation is attempted by three mediators. Two of them are selected by both parties, and the leader is selected by those two. Mediation is not available in matters where the state is a party or in proceedings instituted by the Attorney General.

H. Thailand

Thailand attaches great importance to public participation in the settlement of disputes in the society. One form of CBDR in Thailand is the mediation process. The implementation of the mediation system aims to create fairness in the society. Mediation is an alternative dispute resolution process in which the mediator acts as a facilitator for helping and negotiating to settle the dispute between the parties. It is often used to settle disputes in civil cases and criminal cases which are compoundable offences such as fraud, embezzlement, libel etc. In Thailand the mediation can be done by the sheriff who is the head of the community by the request of the offender and with the consent of the victim. Even when the criminal case is ongoing, the justice process, not only in the investigation but also in the public prosecution proceeding, the police officer or the public prosecutor can also mediate a compoundable offence case. If the parties agree, the police officer or the public prosecutor will notify the victim to withdraw the petition and the victim's right to bring a criminal case against the suspect will be terminated. In the court proceedings, the mediation can continue as long as the case is not final. Initially, the case will be sent to the Mediation Center which will be conducted by the mediators who were selected from among people who are not judges. That is to say the mediation system in Thailand also gives the opportunity to the public to participate in the judicial process by being a mediator in court. Thailand has been promoting dispute resolution by mediation because when the

parties agree to resolve their dispute they also have a good relationship. The mediation process can reduce the number of cases that go to the court and also reduces the time and expense of litigation. Sometimes, the victim may receive compensation quickly and certainly because it can be determined as a condition that the victim will withdraw the petition when the suspect or offender has paid compensation to the victim. It also is good when the defendant has no prior history of offending.

III. CHALLENGES

The challenges faced in CBDR proceedings vary by jurisdiction depending on the unique and peculiar situations as well as the objectives in each country. Most countries use CBDR in civil or minor cases as a customary process of restorative justice in the community. Bhutan, Philippines, Maldives, Thailand and Sri Lanka mediate both civil and criminal offences but only in minor cases for criminal offences.

A. How to Enhance Mediation

The group generally agreed that enhancement of mediation is necessary in order to empower the public or community to actively and effectively participate in criminal justice. There are, however, challenges limiting this goal.

In Indonesia, they have rigid statutory law and do not recognize mediation in criminal cases because of the principles of legality and codification so that any criminal act must be processed based on Indonesia's written law. There are de facto mediations in Indonesian society, but it is quite rare for the parties involved to conduct them because even if they reach an agreement, it has no influence on the disposition of the criminal case.

In Maldives, CBDR is very challenging due to lack of cooperation between stakeholders, social, cultural and religious beliefs; lack of awareness of legal rights and options especially among vulnerable groups; close-minded people mostly in the islands, and geographical diversity. Furthermore, misuse of power by the negotiators especially at the local council level, since the councils have insufficient knowledge in this area, could diminish public trust in the criminal justice system.

In PNG, the individual perpetrator hides in the shadows of tribes or clans, and liabilities are shared by clans/tribes.

Public awareness, in the sense that the community must be educated on the process flow of the mediation, is lacking in almost all jurisdictions as mentioned by the participants during discussions. Promoting public awareness will enhance the effectiveness of the system. The public will be guided on what to do, where to go and whom to approach directly when an incident happens in their community, especially for the people living in remote areas.

B. How to Achieve Fairness in Mediation

There were different views shared by the group on principles of fairness in CBDR. A majority of the participants agreed based on experience and practice that wherever there is consensus reached by both parties, fairness is reached; however, if no amicable consensus is reached, the matter can be appealed to the next level of the formal justice system. In the case of Japan and PNG, social pressure from communities, whether positive or negative, can have a bearing on the outcome of the cases.

In Japan, the public legal support for victims had been weaker than that of the defendants or suspects. In some cases, the victim claimed that the mediation was not based on his/her consent, especially when only the offender is represented by his/her attorney. In other countries, it is also common that there are tendencies of unfairness in mediation due to the various reasons stated below:

1. Power Balance

In CBDR, there is always the challenge of striking the balance of power between the protection of rights of defendants versus the protection of victims' rights. This is the case in the Japanese system. Generally across the different countries, a lawyer is not needed in the mediation process as it is a customary process based on general consensus of resolving issues. Some issues are unresolved during mediation, partially because such cases can be referred to the formal justice system where legal assistance can be utilized.

2. Influence of Social Pressure

The influence of social pressure can have a positive and negative effect on mediation. The negative effect can be on the issue of collectivism versus individualism, where community expectations are placed on the offender or the victim which are contrary to the victim's will to resolve the issue. The social pressure can also influence the outcome of the mediation process at the community level based on general community expectation. On the other hand, the positive effect of social pressure helps in repairing the damage done by the offender.

In PNG where there is the issue of collectivism versus individualism, social pressure from communities can have a negative effect on the mediation process. Collectivism means the liabilities of the case are shared by clans or tribes who pay compensation upon agreement of mediation as seen as the customary way of settling disputes through mediation. Individualism is more of a formal process where individual perpetrators face the formal justice system on their own as individuals responsible for crimes committed. Perpetrators or complainants are also subject to social pressure by communities based on consensus.

3. Quality of Mediator

It was generally discovered in the group discussion that the selection of mediators was based on some criteria depending on the different context of mediation in each country. The importance of selection of mediators has become greater because it is at the core of achieving fairness in CBDR. In our discussion, we talked about the issues related to their incentives. We unanimously agreed that the internal incentives, *i.e.*, satisfaction felt by contributing to society could be the most important, because those who want such feelings are expected to be fair and sincere mediators. Countries that have formal mediation systems have criteria outlining different levels of competencies, codes of conduct and qualifications. Some countries have formal guidelines on how to conduct mediation while others do not. It was also generally observed that there is a growing need for mediators to be trained to ensure that quality mediation outcomes are realized. The diversity of cultural practices and geography also pose challenges. General agreement from discussion on enhancing fairness indicates that there is growing need for guidelines on mediation, training and appropriate procedure of selection to be in place to guide a fair process for the culturally diverse and geographically challenged countries with more public awareness on the process and training of mediators.

4. How to Secure the Execution of Settlements Resulting from Mediation

As realized in the group discussions, securing mediation settlement is often through consensus by the parties involved. The process of ensuring compliance of terms agreed upon during mediation differs from country to country. In Japan, prosecutors and counsel put importance on approaches incorporating the relatives or the neighbours of the defendants to encourage the defendant to comply with the obligations agreed to with the victim. In PNG, village court officials or clan/tribal leaders are responsible for ensuring compliance with terms of settlement agreements. If there is a breach of the agreement, the matter is referred to police for prosecution or to the courts. In Thailand, there are two types of agreements: one is conditional and the other is without condition. If the agreement is breached, the matter is referred to court for prosecution either civil or criminal in nature. In Bhutan, if there is a breach in the settlement agreement, it will be referred to the police for filing of charges, or they can directly approach the court for settling the case.

IV. RECOMMENDATIONS

After all the sessions concluded, the group agreed to the following recommendations to address the issues and challenges identified:

A. **On Enhancement Issues**

1. In order for the community-based mediation system to be effective, countries need to recognize its significance or impact on criminal justice and pass a statute as a basis to that effect. In turn, policy guidelines will be laid out for its implementation so that they can reap the benefits that it offers;
2. Public awareness or education campaigns must be actively carried out by stakeholders to disseminate the said statute and policy guidelines through the utilization of call centres, such as Japan does, and also the mass media or various social media platforms;
3. Collaboration with bar associations for *pro bono* legal assistance to parties; and

4. Establishment of volunteer probation officer systems which would be greatly beneficial in involving the public in the criminal justice system.

B. On Fairness Issues

1. Appropriate selection and training of quality mediators are important to increase the success of mediation. In Thailand, they have established a mediation centre in every court of first instance where mediators with proper training mediate cases, resulting in a 90% success rate, which means that 90% of cases were successfully mediated and only 10% went to court. In Japan, selection may also be an issue because of its aging population with the obvious problem of getting mediators from the younger age groups; however, this situation can be advantageous in the sense that older people have a wealth of knowledge and experience in dealing with conflicts or problems as well as their feelings of self-fulfillment that they will leave behind a legacy of their own.
2. Policy guidelines are also important here to guide the mediators in upholding the rule of law at all times whenever they mediate cases;
3. Providing incentives to mediators whether in monetary or honorary form, or both, will serve as motivation factors for them to perform their role the best they can to reciprocate the incentives they receive; and
4. As a last resort, when concerned parties are not satisfied with the settlement, they can always appeal their case and go to the formal legal procedure.

C. Securing Compliance with Negotiated Settlements

1. Inclusive mediation where family members, colleagues in the workplace, friends and other community members will be proactively involved in ensuring compliance with the settlement.
2. Include in the policy guidelines procedures for securing execution of settlement agreements in case the respondent does not voluntarily comply with the settlement to ensure that the victim will receive the compensation agreed upon.

V. CONCLUSION

The group came to the conclusion that public participation in criminal justice is not an independent topic to be tackled exclusively, but it is intertwined with the topics of access to justice and law-related education. This is due to the fact that in order for the public to actively participate in the criminal justice system, law-related education is required to make them aware and empowered to get involved. It is in the same way that CBDR, which is the focal point of this humble undertaking, provides access to justice, especially to the poor and underprivileged, who compose the majority of the population around the world, in order to bring forth justice for all. It is therefore the group's aspiration that this report will contribute to the promotion of the rule of law and the culture of lawfulness (SDGs 16.3) through possible replication of the good practices shared.