

A BRIEF OUTLINE OF THE CURRENT SITUATION ON THE PROTECTION OF VICTIMS OF CRIME IN THAILAND

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I. INTRODUCTION

Early in history, criminal law was essentially law for victims. Victims of crime were the center of the administration of criminal justice. Most criminal sanctions aimed at providing redress to the victims, typically in the forms of compensation and restitution. The concept of crime as a “private wrong” has been replaced by the emergence of the notion that crime is an act against the well being of the state and thus needs “public prosecution”. The importance of the role of the victim of crime was limited to that of a “witness”. Over the past few centuries, the defendant and the State evolved as the two parties with legal standing in criminal proceedings. The victims were virtually forgotten and became, in the words of Bard, “the party without institutionalized voice in the legal process”¹.

The changing paradigm during that period was based on the following premises²:

1. A crime is primarily an offense against the government rather than a private wrong.
2. The government, because it acts for the good of the citizenry, cannot be held accountable for its mistakes or negligence in the administration of criminal justice.
3. Specially trained professional officers are better at controlling crime and seeing that justice is accomplished than the private citizens or victims of the offenses.
4. Victims are useful to the system as information sources and witnesses; their interests are not important to the system and could interfere with the efficient administration of justice.
5. Because of the great power of the state and the potential for abuse, persons accused or suspected of committing a crime need to be protected with an array of procedural rights and privileges.

This “new paradigm” which has remained the mainstream thinking of the criminal justice systems around the world for a long time until the older ideas have been rekindled only recently by the movement for the protection of crime victims.

II. CURRENT SITUATION REGARDING THE RIGHTS OF VICTIMS OF CRIME IN THAILAND

As in many countries, the rights of crime victims have received due attention in Thailand only recently. There are several factors leading to the awareness of the plight of victims of crimes in Thailand. To begin with, in my opinion, the movement for the protection of rights of women and children has contributed a great deal to the awareness and concerns of the plight of victims of domestic violence and child abuse. Dissatisfied by the poor response of the criminal justice system, which does not adequately protect women in case of sexual assault and domestic violence, leaders of the movement have effectively highlighted the weakness of the criminal justice systems and created civil society networks to substitute such shortcomings. They have brought to light the plight of crime victims and the necessity for them to be better assisted, supported, informed and, sometimes, participated in their own criminal trial. In addition, the increasing awareness of the rights of victims in Thai criminal justice was a result of a long campaign for criminal justice reform in the country. Such movement, which happened during the drafting of the Constitution of 1997, allowed the opportunity to put several provisions regarding the rights of victims in the Constitution. For instance, Section 53 provided that:

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¹ M. Bard, “Unblaming the Victim” in *Social Policy* (Winter 1985) at 43-46.

² P.S. Hudson, “The crime victim and the criminal justice system: A time for change” *Pepperdine Law Review* 11(1984), at 24.

“Children, youth and family members shall have the right to be protected by the State against violence and unfair treatment.

Children and youth with no guardian shall have the right to receive care and education from the State as provided by law.”

Although the protection rendered by this Section does not address crime victims in general, it however deals with such issues as domestic violence, which is one of the major areas where victims need special protection and treatment.

In addition, Section 245 of the Constitution stipulates that:

“In a criminal case, a witness has the right to protection, proper treatment and necessary and appropriate remuneration from the State as provided by law.

In the case where any person suffers an injury to the life, body or mind on account of the commission of a criminal offence by other person without the injured person participating in such commission and the injury cannot be remedied by other means, such person or his or her heir has the right to receive aid from the State, upon the conditions and in the manner provided by law.”

This provision is a mandate for the setting up of the scheme for compensation and assistance of victims and witnesses in the Thai criminal justice system.

With the mandate by the Constitution and the increasing interest of the general public in the necessity of reform of the criminal justice system, the past five years saw a dramatic increase in the protection and assistance of crime victims in both laws and practices. The Criminal Procedure Code was amended to adopt a new procedure for interrogation of children who were victims of violence, particularly of domestic violence. They were allowed to have a prosecutor, psychologist and social worker present during the interrogation. Teleconferencing was also provided during court hearings so as to reduce the pressure of confrontation with the defendants. Moreover, recently Parliament has passed the law on compensation for crime victims and the wrongfully accused. Currently, a new agency called Department of Rights and Liberties Protection, which includes a division on victims’ assistance, was recently established. The Department is now in the process of preparing ministerial regulations setting up the scheme for compensation.

III. VICTIMS’ RIGHTS TO INFORMATION AND PARTICIPATION IN THE CRIMINAL JUSTICE PROCEEDINGS

The right of crime victims to be informed is perhaps the most fundamental right without which the other rights and services available to them may be meaningless. There has been an increasing consensus among many countries that it is necessary to change current practices, which do not provide basic information to crime victims about the status of their cases. To some critics, the underlying thinking for these changes, however, may not result directly from the recognition of the significance of the right of the victims of crime as much as of the fact that the criminal justice system would benefit by “being nicer to victims”. Several research studies have pointed out that the reason that victims of crime did not report crime incidents to the police was because they were apprehensive about how they would be treated and whether they would be believed. Moreover, the major reason why victims and witnesses did not cooperate with the authorities were not because they were uncooperative but because they were intimidated by the criminal justice system and uninformed as to what they were expected to do. As a result, there have been notable improvements in the criminal justice systems of many countries in regard to new developments designed to address victim’s needs for better treatment and more information, as well as to the need of the State to have cooperative witnesses.

Although such developments are very much welcome, it should be noted that crime victims do not just want to be treated nicer but to be able to participate in the criminal justice system. In this aspect, there has been heated debate on whether or not and to what extent it should be allowed. Advocates of victims’ rights to participate in the criminal justice process present a host of arguments in its favor, ranging from the moral to penological. Some argue that sentencing will be more accurate if victims convey their feelings and that the criminal justice process will be more democratic and better reflect the community’s response to crime. Victim participation will also remind the judges and prosecutors that behind the state remains a real person with an interest in how the case is resolved. It may also lead to increased victim satisfaction and cooperation with the criminal justice system, thereby enhancing the system’s efficiency. Moreover, when the court hears from offenders’ family and friends, fairness dictates that the people who were actually injured should be

allowed to speak. Some researchers also suggested that victim's participation also promotes psychological healing of victims as well as the rehabilitation of offenders as they confront the reality of the harm that they caused to victims.

On the other hand, opponents of the movement also pointed out many reasons for disagreement. For instance, some suggested that it might disrupt court proceedings or expose the court to public pressure from which it should be insulated. Moreover, critics are afraid the court may be prejudiced by the presence of victims, which may diminish the quality of justice. Prosecutors and judges may be cautious of this since it means that their control over cases will be eroded.

A. Right to Information

In general, the right of victims to be informed has not yet been legally guaranteed in Thailand. In practice, however, victims were given some types of information according to the internal policy or directives of each criminal justice agency. Although in my opinion, there would be no strong objection to the enhancement of the right of crime victims to be informed of the status of their cases, there has been inadequate attention to its improvement by the relevant authorities. This may be because of the lack of appropriate perspectives on crime victims on the part of the Thai criminal justice officials.

As far as the notification of termination of investigation proceedings and decisions of the prosecution are concerned, crime victims are not automatically entitled to the notification of termination of proceedings from the police nor do they automatically receive any notification from the prosecution on whether or not the case is prosecuted. Practices vary from office to office on this.

Regarding the inspection of files and information, the victims of crime in Thailand do not have any right to inspect the files of inquiry. During the drafting of the Constitution, a question was raised as to whether and to what extent the victims of crime should have the right to access the police and prosecutor's files. However, after a debate, it was decided that they are not allowed to see the files except their own statement, since there was a fear that important evidence might be jeopardized. In practice, however, the police and prosecutor, upon their discretion, will allow some access by the injured party, particularly to the injured party's lawyer.

With regard to the right to know reasons for non-prosecution, Section 241 of the Constitution provided that "In a criminal case for which the public prosecutor issues a final non-prosecution order, an injured person, the suspect or an interested person has the right to know a summary of evidence together with the opinion of the inquiry official and the public prosecutor with respect to the making of the order for the case, as provided by law". The aim of this provision is to make the prosecutor's decision not to prosecute more transparent as it may be checked by the injured party. Moreover, this may allow the injured party to decide whether or not he will start his own private prosecution.

Apart from the above mentioned right to information, I believe that it is also necessary to keep the victims of crime informed of the outcome of court proceedings and the release of the offenders from custody.

B. Right to Participation in Criminal Proceedings

Unlike in most countries where there has been heated debate regarding whether or not victims of crime should be allowed to participate in judicial proceedings, Thailand, under the still prevalent concept of private prosecution stipulated in its Criminal Procedure Code, allows victims of crime the full right to bring their cases to the court by themselves as joint prosecutors. Although the laws on criminal procedure in Thailand were modeled after the civil law system, many elements of common law were presented in the laws as well as in practices, including the concept of private prosecution.

According to the Thai criminal procedure, the victims of crime have the full right to bring the case to court by themselves without having to initiate a complaint to the police. Criminal offenses have been classified into two types: compoundable and non-compoundable offenses. Compoundable offenses are non-serious crimes; while non-compoundable offenses are more serious crimes which have a more adverse impact on society.

For compoundable offenses the decision on whether or not to initiate criminal proceedings remains fully within the hand of the injured party. The injured party may either request the police to proceed with criminal

investigation by submitting a complaint to the police or he or she may prosecute the case directly to the Criminal Court by himself. Without a complaint from the injured party, neither the police nor the prosecutor can start investigation or prosecution. In addition, if the injured party decides to withdraw the complaint during any stage of the criminal proceedings, the case will be dismissed.

In regard to non-compoundable offenses, however, the main responsibilities of criminal prosecution remain with the State throughout the prosecution. The injured party, however, can still play a role in the criminal proceedings. For instance, apart from being able to file a complaint to the police or file a separate suit directly to the Court, the injured party can also submit a request to the court for permission to join in the prosecution's case as a "joint prosecutor". The prosecutor, however, is in charge of the case and can request the court to withdraw the status of joint prosecutor from the injured party if he thinks he or she may jeopardize the case.

In reality, there are not many cases brought to the Court through this private prosecution channel. This is because of the high cost of litigation and the lack of investigation facilities and capabilities on the part of the injured party.

In my opinion, the model in Thailand is a result of the product of the westernization of law but not of genuine concern for the right of the accused. In fact, the choice of the victims of crimes should not be between joining the proceedings as a "joint prosecutor" or not joining at all. Instead of providing such avenue, which is in fact impractical, the criminal process must take into account the real needs of the victims of crime. Most victims, I believe, do not want to be involved to the extent of being a "joint prosecutor". In most instances, they want to have the right to observe and to have some "ownership" of the process. I am in support of the model of "private accessory prosecutor" as adopted in Germany which may provide a middle ground for victims' participation in criminal proceedings.

IV. CRIME VICTIM'S RIGHT TO RESTITUTION AND COMPENSATION

It is obvious that crime victims suffer damage from crime in terms of loss of property, bodily injury, death and mental suffering. Such suffering definitely causes some damage and costs to the victims. It is only fair to say that such damage and costs should not be left unaddressed, but, where appropriate, offenders should make fair restitution to victims, their families or dependents. Such restitution should include the return of property or payment of the harm or loss suffered, and reimbursement of expenses incurred as a result of the victimization. To obtain such restitution, many jurisdictions allow the consideration of civil claims in criminal proceedings or the issue of a restitution order directly by the court. Apart from claiming directly from the offenders, who oftentimes are unable to pay their dues, crime victims may generally be entitled to compensation from the State for monetary relief, separate from the apprehension and conviction of the offender.

A. Civil Action in Criminal Procedure

In Thailand, the injured party is not allowed to enter into the so-called *partie civile*, a procedure whereby the victim of crime can pursue a civil claim against the offender at the same time and in the same proceedings as the criminal trial. However, the Thai Criminal Procedure allows the prosecutor, in some types of offenses, such as in cases of theft, snatching, robbery, gang-robbery, piracy, extortion, cheating and fraud, criminal misappropriation and receiving stolen property, to apply for restitution of the property or the value thereof on behalf of the injured party. A civil case can also be instituted by the injured party in connection with the criminal case. However, in reality such an avenue is too difficult to attain restitution since the injured party would need to have assistance from a lawyer and the lengthy civil proceeding would deter such practice.

B. Restitution

A Restitution order issued directly by the criminal court that the offender should compensate the victim is another method that, if available would directly assist the victim of crime to attain restitution. However, in Thailand, there is no law allowing the court to issue such an order. In order to assist the victims of crime, the Court in some countries may on its own initiative and discretion issue such order. Restitution, in my opinion, if appropriately used, is an effective measure, which may serve rehabilitative and punitive purposes. It is a good way to alleviate harm done to the victim and may provide a constructive way for the offender to be held accountable for their action.

C. State Compensation Scheme

Although crime victims are entitled to the choice of *partie civile* or restitution order as mentioned earlier, in reality, it would be difficult for them to receive adequate compensation or any compensation at all. This is because in many criminal cases offenders cannot be identified and brought to justice. Moreover, offenders may lack enough money to make up for victims' damages. Victims themselves may not be able to collect enough evidence to sustain civil actions as well as to hire a lawyer. For these reasons, state compensation is a necessary means of providing financial relief for victims of crime.

As mentioned earlier, the Thai Constitution of 1997 stipulated that a state compensation scheme for victims of crime be established. Recently, the Victim Compensation Act of 2001 was promulgated and the Ministry of Justice is in the process of drafting ministerial regulations for the implementation of the scheme.

V. RESTORATIVE JUSTICE AND VICTIMS OF DOMESTIC VIOLENCE: A PILOT PROJECT

As in the case of Thailand it is very difficult to introduce restorative justice from a top down approach, we decided to start with the issue of domestic violence, particularly in cases of battered wives. This is because domestic violence particularly when female spouses are assaulted by their loved ones has recently received a great deal of attention in Thai society. Through long, continued and efficient campaigns by women's rights advocates, the public has started to realize the inadequacies of the conventional criminal law and criminal justice process in protecting the rights of the aggrieved wife. In such cases it is obvious that in most cases the victims do not want their husbands to be put into prison; they just want them to change their behavior and stop hurting them.

Unlike in other countries where the criminal justice system may already have more appropriate alternatives the criminal justice system in Thailand does not leave many choices for the aggrieved wives, since the police, for obvious reasons, do not want to receive these complaints as the incidents are viewed as a family matter. The battered wives will mostly be forced to reconcile with the aggressors, a venue which does not adequately protect them or guarantee that future similar incidents will not occur. On the other hand, if the police decide to proceed with the complaints, it is more likely than not that the wives will later request the police or prosecutors to withdraw the cases for fearing that the husbands will have to be imprisoned, a result which will directly affect the women and their children economically and socially. Such dilemma represents the weakness of the existing conventional criminal justice process to which restorative justice can appropriately fill the gap.

As a matter of fact, an attempt to introduce the restorative justice approach to the solution of domestic violence was made even before the formal introduction of the restorative justice concept in January 2002. A few years earlier, while serving as the Director of the Thailand Criminal Law Institute, I and a group of women's rights advocates attempted to introduce a programme for the treatment of the aggressor as part of an alternative to prosecution in domestic violence cases. At that time, although the idea was well received by academics and practitioners, it was very difficult to start the programme without a strong commitment from the police, the prosecutors and a coordinating agency, such as, for the case of Thailand, the probation services. After I had the opportunity to run the Department of Probation in August 2001, I then reintroduced this programme on the first appropriate occasion in November of 2002, since November is the month for campaigning against violence against women and children.

The project, which was named by the media as "husband rehabilitation clinic" or, literally in Thai, "husband repairing factory," aims at setting up a diversion programme at the prosecution level for treatment of abusive husbands. It is proposed that the police, after receiving complaints from the victims of aggression, proceed with the case rather than viewing it as a family matter and decline to accept the complaint. At the prosecution level, the prosecution will consider conditional dismissal of the charge if the following prerequisites are met: consent of the victims; the aggressors are repentant and willing to undergo a treatment programme if necessary; and the nature of the case is appropriate for pretrial dismissal (factors such as the gravity of the case, etc. will be looked at). If the prosecutor decides that conditional dismissal is more appropriate than prosecution, he will submit the case to the probation officer. The probation officer, after considering the facts and circumstances of the case, may organize a conference among the victim, the aggressor, their relatives or trusted persons (if necessary) and respected members of the community (if appropriate) to find appropriate measures for the treatment of the aggressor and the solution to the personal conflict and/or other problems. In this process, the probation officer will act as a facilitator trying to seek

reconciliatory measures for the belligerent couple. The aggressor may be subject to some or all of the following conditions: attending appropriate treatment programmes (such as programmes to control anger or to quit drinking, etc.); regularly report to a probation officer within a specified period of time; and providing restitution or rendering community service, as deemed necessary. If the aggressor is able to meet with the conditions set for him, the probation officer will report the positive result to the prosecution who will then drop the charge. On the contrary, if the agreed conditions are broken the prosecutor will continue with the suspended prosecution.

By having this alternative programme, it is hoped that not only both the victims and aggressors in domestic violence will be appropriately taken care of, but such measures will also allow the police to be more efficient in the preventive campaign against domestic violence.

As mentioned earlier, the project was proposed once again in November 2001 during the National Seminar for the Protection of the Rights of Women and Children, an event held every year during the month of November. This time it began to receive wider support from the public and has become front-page news. However, it was not until November 2002 at a Seminar on Restorative Justice and Domestic Violence, organized by the Department of Probation and the Thailand Research Fund (TRF), that it became the talk of the town and one of the biggest news items during the campaign month for ending domestic violence.

During the early debate on at what stage should the case be referred to this restorative process, there were suggestions that this should be done during the police level. However, there are several reasons which have made it less appealing to do as such. Firstly, it is not legally possible for the police once they have accepted the complaint by the battered wife to use its own discretion not to pursue the case. Secondly, there are some concerns in regard to the use of discretion at this level which has low visibility and thus is difficult to structure and control.

Although the proposed scheme has received high publicity and overwhelming support from the public, the Department of Probation is still unable to launch the project as early as expected due to reluctance on the part of the Office of the Attorney General to start the suspension of prosecution scheme without any corresponding legislation. The proponents of the scheme are of the opinion that no law is needed in this case since in limited circumstances, particularly in petty crimes, the prosecution has already adopted the opportunity principle in dropping the prosecution of several cases on the grounds that prosecution will serve no public interest. Such non-prosecution orders were issued even without any conditions. As a result, in domestic violence cases where the victims provide their consent, the nature of the case is not aggravated and the offenders are willing to undergo and complete a rehabilitative and restorative programme, there are even less grounds for prosecution. Although there is no real opposition to the idea, some believe that it may be better to wait for the law on suspension of prosecution before attempting an innovative idea such as this. Others, particularly more conservative criminal justice and judicial officials, may simply not understand the seriousness of the problem and may not see any urgent need for a special programme of this kind.

Despite the obstacles for the immediate implementation of the scheme, I am quite confident that the project will soon be implemented. On the latest movement, the Office of the Attorney General has shown an interest in the programme and a discussion with the Department of Probation as to how to implement such a programme will soon occur.