ISBN: 978-1-948012-02-7

Contents List available at VOLKSON PRESS

Economics & Management Innovations(EMI)

DOI : http://doi.org/10.26480/icemi.01.2017.299.301

Should the Non-Adversary System be Adopted for Criminal Courts in Thailand?

Kanpirom Komalarajun[1]

Faculty of Law, Pridi Banomyong Dhurakij Pundit University kanpirom.kon@dpu.ac.th

ARTICLE DETAILS

Article History:

Received 02 october 2017
Accepted 06 october 2017
Available online 11 october 2017

Keywords:
adversary, non-adversary, inquisitorial system. Principle of Examination, substantive truth.

ABSTRACT

This paper discusses criminal trials in Thai courts. The author is attempting to state that the adversary causes defects in the Thai criminal justice. Hence, the non-adversary system is welcome.

1. Introduction

Non-adversary system appears more often in Thai law. Organic Act on Criminal Procedure for Persons Holding Political Positions B.E. 2543 (2000 A.D.), Art.8 Procedure of Anti Human Trafficking Cases Act B.E. 2559 (2016 A.D.) and Art.6 Procedure of Anti-Corruption Cases Act B.E. 2559 (2016 A.D.), but serious legal issues arise. What is a non-adversary system and do we need it? The current system in Code of Criminal Procedure has deep-seated flaws and might not suit Thai laws? If this is arguably true, what alternative system should be adopted?

The purpose of this paper is to tackle the above issues. The argument is that there is much to be learned to appreciate and comprehend the non-adversary system. This paper describes typical criminal trials in Thai courts and also intellectual criticism on this issue (Part I). The paper defines the concept of non-adversary system (Part II). Finally, the paper suggests how to understand the new coming system in Thai laws (Part III).

2. Criminal Trials in Thai Courts before B.E.2559

From time immemorial, the criminal process in Thai courts was unfortunately shaped from the civil process. Code of Criminal Procedure and academics spoke and discussed about right to inflict punishment2 or legal relationship3, which are unfamiliar for the Continental Europe.

Prosecution and defendant were opponents on the same footing before the court. Their contradictory interests encountered each other and their rights to criminal justice are opposed to each other. Criminal Trials were formed strongly adversary.4

However, the justice reform was carried out during the colonialism period. To replace Three Seals Law, fundamental codes of law were drafted. Doctrine of state-run criminal justice, which considers establishing of peace under the law as one of state duties, was introduced. Provisions of criminal and civil process were strictly separated into two different codes of law. The difference between characters of criminal and civil process was gradually recognized by the scholars,5 but unfortunately not by the courts. The fact that the Code of Civil Procedure was held as the model of the Code of Criminal Procedure was scandalous. Art.15 Code of Criminal Procedure is an obvious sign showing that concepts of civil procedures still play a part in criminal trials. This norm, whose objective is to avoid unnecessary repeating of provisions6, permits integration of civil procedural norms into criminal process, in order to fill potential gaps. Yet, it causes foreign body in criminal process; "party-dominated process" still rules.7 The prosecution and defendant can present their cases and evidence on their own. They have such full authority of the process in their hands that the court has to consider only the evidence they present without examining the truth.8 Moreover, according to Art. 192 Code of Criminal Procedure, the court is not allowed to make a sentence exceeding the charge. Hence,

acquittal due to technical reasons can always be found. When the defendant is accused of handling stolen goods but the court finds them guilty of theft, the defendant must be granted a discharge. Or if the defendant is accused of theft but the court finds him guilty on theft at night, it cannot punish him on theft at night because it exceeds the charge. These lead to one critical problem: the substantial truth is not revealed. As a result, material justice does not take place because the punishment does not meet the culpability of the offender proportionally. All of these show defects in the Thai criminal justice system.

3. Concept of Non-adversary System

The term "non-adversary" system is often used interchangeably with the "inquisitorial" procedure and is juxtaposed to the "accusatorial" or "adversary" procedure. Accusare in Latin means to accuse or to prosecute, while inquirere means to examine.9 Accusatorial procedure would mean a contradictory or adversarial party-dominated procedure with an investigative and prosecuting institution (public prosecutor or investigating judge) and another sentencing institution (court), whereas the inquisitorial system means the system, in which the investigation and the sentencing rest in one hand, seeking ex officio the substantive truth.10 The accusatorial system in the sense of the introduction form of criminal trials was for a long time applied in central Europe. The state-run criminal justice, which began in the middle age by adopting the inquisitorial system, brought advantages to the Rechtsstaat as opposed to the private prosecution.

In ancient Greece (6th-4th Century B.C.), the process was purely accusatorial. Every citizen could bring in a charge, a so-called popular prosecution. The Principle of Disposition dominated the procedures because the court was bound by the accuser's charge.11 In the era of Roman Republic (509-27 B.C.), the private prosecution dominated in most cases. But in treason cases, the inquisitorial procedure conducted by judge existed, because the public interest appeared. These cases were in the responsibility of the state. However, the purpose was not to examine the substantive truth, rather to point out the guilt or the innocence of the defendant by means of irrational evidence.12 In the absence of the Principle of Examination, an inquisitorial procedure did not exist in the

beginning of Rome.13 But when Rome became larger, the necessity of institutionalization of the criminal justice was recognized and in the 3rd Century B.C. the tresviri capitales, a kind of prosecution department, was established. Approximately 100 years after that, courthouses were founded, in which the popular prosecution in the sense of the introduction form of criminal trials still played a major role. The Principle of Accusation still ruled.14 Rome in the imperial period (27 B.C.-6th Century A.D.) was governed by the Emperor with absolute sovereignty, and also in criminal law. The Principle of Accusation and of Public Prosecution started to exist side by side. But without examining the substantial truth, the term "inquisitorial" procedures in the strict sense could not be used.15 In Germanic law (5th-9th Century A.D.), the classic accusatorial principle was applied. "Wo kein Kläger, da kein Richter.",16 a German phrase for "Where no prosecutor, then no judge." The criminal justice depended upon the private or popular prosecution. Not only compensation and penalty, but also lawsuits in civil procedure and charges in criminal procedure were not strictly separated. Criminal process did not aim for substantial truth, rather for the defendant's guilt or innocence in a strict formal process. Formal evidence regulations were applied; without their presence, the guilt or the innocence of the defendants was directly decided.17 As a result, the Germanic criminal procedure was accusatorial in the sense of the introduction form of criminal trial, since privates could generally bring their own charges to the court.

At the time of Pope Innocent III (1161-1216), the inquisitorial process in the narrow sense had made a breakthrough in Church law. A charge from privates was not necessary anymore. Rather officials could step in. Then the examination of the substantive truth followed.18 The canonical inquisitorial process was served to discipline irresponsible and corrupt clerics more effectively. Afterwards, heretic inquisition was established to turn beliefs of clerics and heretics back to correct religious belief by torture. Inquisition and torture were indispensable in witch-hunts. Without constrained confession, the offence of witchcraft could not be proven.19 The unfolding of late medieval state created new lifestyles where individuality became a dominant strength. With changing in social situations, that is more and more replacement of the archaic, family bound-based society with centralized state structures for larger population and growing organized crime, a state-run criminal process began.20 The new process was formed to examine the substantial truth with the assistance of rational admissibility of evidence. Privates could still bring a charge to the court but it was on one side very costly; privates had to perform the investigation themselves. On the other hand, their right to inquisitorial process remained unaffected.21 At the end of 18th to the beginning of 19th Century, the abolition of torture led to deformalization of law of evidence with the recognition of free evaluation of evidence. The awareness to reform inquisitorial procedures was fundamentally established. Subject position of the defendant with the possibility to defend themselves in public hearing became recognized.
With the foundation of prosecution authority, prosecution function and sentencing function were separated. The irreversible transition from a private to official prosecution took place. The functions of boundary and of binding effect of the charge were realized.22 With all these characters, the modern inquisitorial process is labeled.

4. Next Steps in Non-adversary System in Thailand

As mentioned at the end of Section 2, adversary system is believed to be a reason of defects in Thai criminal justice. To fix those defects, non-adversary system has been adopted in some cases, that is in anti-human trafficking23 and in anti-corruption cases.24 These cases are believed to be major problems in Thailand. Combatting human trafficking has been for several years national agenda in order to improve status in US human trafficking report. Corruption has been one large obstacle in economic and social development. When criminal procedures are no longer "party-dominated process" or put it another way, when Principle of Examination rules, the court can find himself evidence, which both parties do not bring in.25 It can examine the truth without binding to any requests or evidence from any party.26

Supreme Court's Criminal Division Decision 60/2559 shows that the court apprehends its role in the non-adversary system quite evidently.
"… In non-adversary system, the court has to seek for the truth. It is the court's duty to approve if the charge is correct before accepting it. Hence, the defendant cannot raise the issue that the charge does not contain all the criteria in order that the court decides to acquit him. …"

The decision is welcome. The court in the non-adversary system does not acquit the defendant only because the charge is not complete. The prosecutor is not an oracle. However, looking closely in these three Acts, there is one missing point: exclusionary rules. The main focus of exclusionary rules in adversary system is on deterrence. In the non-adversary system, like in Germany, the deterrence of officer's future violations is not cited as the primary justification for the rules. Evidence will not be excluded only when the police violate the rules in the Code of Criminal Procedure. The court will attempt to find a balance between the protection of the defendant's constitutional rights and the interests of effective law enforcement.27 As a result, there are a number of written exclusionary rules in the adversary system, but none or very few in the non-adversary system.Since exclusionary rules unfortunately appear in Thailand's Code of Criminal Procedure quite largely,28 and these three Acts do not mention them, it might cause misinterpretation. The court might consider Code of Criminal Procedure general matters (lex generalis) and apply the rules in anti-human trafficking and anti-corruption cases. That would be disastrous. In non-adversary system, because of the Principle of Examination, the court himself will balance the interests of defendant's rights and the interests of effective criminal justice.There are going to be more provisions stating the non- adversary system is to be applied. In order to apply the system correctly, there are only two things to remember. First, in the non-adversary system, the court must play an active roll without binding to any requests. He can find himself evidence that the parties do not bring in. Second, there are no written exclusionary rules to obstruct the court's examination of the truth.

References

[1] Lecturer at Faculty of Law, Pridi Banomyong, Dhurakij Pundit University. 2 Art. 34, 36, 39 Code of Criminal Procedure.

[2] Nanakorn, Thai Criminal Procedure Law: Difference of Legal Principles and Common Practice, in: Criticism on Criminal Procedure Law, (Bangkok: Winyuchon, 2009), p.9, 15.

[3] See also Komalarajun, Die prozessuale Tat nach deutschem Recht und der angeklagte Akt nach thailändischem Recht, (Frankfurt a.M.: Peter Lang, 2014), pp. 21.

[4] Likasitwatanakul, Thai Criminal Justice: Some Problems and Suggests, Dulpah 43, 4 (Oct.- December, 1996), pp.9; Nanakorn, Thai Criminal Procedure Law: Difference of Legal Principles and Common Practice, in: Criticism on Criminal Procedure Law, (Bangkok: Winyuchon, 2009), pp.9, 24.

[5] Nanakorn, Law of Criminal Procedure, 8th ed., (Bangkok: Winyuchon, 2012) p.48.

[6] Prokati, Thai Legal Reform under European Influence, 3rd ed., (Bangkok: Winyuchon, 2010), pp.31.

[7] Nanakorn, Thai Criminal Procedure Law: Difference of Legal Principles and Common Practice, in: Criticism on Criminal Procedure Law, (Bangkok: Winyuchon, 2009), p.9, 29.

[8] http://latin-dictionary.net; see also Ambos, Zum heutigen Verständnis von Akkusationsprinzip und -verfahren aus historischer Sicht, JURA 8/2008, p.586.

[9] Ambos, Zum heutigen Verständnis von Akkusationsprinzip und –verfahren aus historischer Sicht, JURA 8/2008, p.586.

[10] Breitbach, Der Prozess des Sokrates – Verteidigung der oder Anschlag auf die athenische Demokratie? Ein Beitrag aus rechtswissenschaftlicher Perspektive, in: Gymnasium 112 (2005), p. 321, 330.

[11] Ambos, Zum heutigen Verständnis von Akkusationsprinzip und -verfahren aus historischer Sicht, JURA 8/2008, p.586, Mommsen, Römische Strafrecht, (Darmstadt: Wissenschaftliche Buchgesellschaft, 1961) pp.152-154.

[12] Trausen, Strafprozess und Rezeption, in: Trausen (ed.), Gelehrtes Recht im Mittelalter und in der frühen Neuzeit, 1997, p.145, 230. 14 Wesel, Geschichte des Rechts, (München: C.H.Beck, 2006), p.169.

[13] Biener, Beiträge zu der Geschichte des Inquisitions-Processes und der Geschworenen- Gerichte, 1827, p.11-15; Ambos, Zum heutigen Verständnis von Akkusationsprinzip und - verfahren aus historischer Sicht, JURA 8/2008, p.587.

[14] Sellert, Handwoerterbuch zur deutschen Rechtsgeschichte (HRG), Vol.II, 1978, 853.

[15] Eb. Schmidt, Inquisitionsprozess und Rezeption, in: Leipziger Juristenfakultät (Hrsg.), Festschrift der Leipziger Juristenfakultät, 1941, pp.99; Eb. Schmidt, Einführung in die Geschichte der deutschen Strafrechtspflege, 3rd ed., 1965, p.40, 81; Wesel, Geschichte des Rechts, (München: C.H.Beck, 2006), p.269, 287.

[16] Rüping/Jerouschek, Grundriss der Strafrechtsgeschichte, 6th ed., (München: C.H.Beck, 2011) marginal no.8; Oehler, Zur Entstehung des strafrechtlichen Inquisitionsprozesses, in H.- J. Hirsch (Hrsg.), Gedächtnisschrift für Hilde Kaufmann, (Berlin: De Gruyter, 1986), p.847, 849, 860; Vogler, A World View of Criminal Justice, (Oxford: Routledge, 2005), p.27.

[17] Rüping/Jerouschek, Grundriss der Strafrechtsgeschichte, 6th ed., (München: C.H.Beck, 2011), marginal no.139; Wesel, Geschichte des Rechts, (München: C.H.Beck, 2006), p.394.

[18] Sellert, Handwoerterbuch zur deutschen Rechtsgeschichte (HRG), Vol.II, 1978, 164, 166- 167; Eb. Schmidt, Einführung in die Geschichte der deutschen Strafrechtspflege, 3rd ed., 1965,84.

[19] Eb. Schmidt, Inquisitionsprozess und Rezeption, in: Leipziger Juristenfakultät (Hrsg.), Festschrift der Leipziger Juristenfakultät, 1941, p.100.

[20] Ambos, Zum heutigen Verständnis von Akkusationsprinzip und –verfahren aus historischer Sicht, JURA 8/2008, p.592; Rüping/ Jerouschek, Grundriss der Strafrechtsgeschichte, 6th ed., (München: C.H.Beck, 2011), marginal no.245.

[21] Art.8 Procedure of Anti-Human Trafficking Cases Act B.E. 2559

[22] Organic Act on Criminal Procedure for Holders of Political Positions B.E. 2543 and Art.6 Procedure of Anti-Corruption Cases Act B.E. 2559

[23] Art.23 Procedure of Anti-Corruption Cases Act B.E. 2559, Art.29 Procedure of Anti- Human Trafficking Cases Act B.E. 2559

[24] Art.25 Procedure of Anti-Human Trafficking Cases Act B.E. 2559 and Art.19 Procedure of Anti-Corruption Cases Act B.E. 2559

[25] Bradley, The Exclusionary Rules in Germany, Harvard Law Review 96 (1983), 1032, 1035, see also Rogall, Beweisverbote in System des deutschen und des amerikanischen Strafverfahrensrechts, in: Wolter (ed.), Zur Theorie und Systematik des Strafprozessrechts, München: Luchterhand Verlag, 1995, 113, 136, 149. 28 Art. 226, 226/1, 84.