

Chapter 8: Conclusion

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Chapter 8

Conclusion

At the turn of the century when western colonial powers were at its peak in this part of the world, two major legal systems were here competing for its supremacy on the nations of the East. Of course, there were the English Common Law and the Continental Civil Law. Japan and Thailand chose the Civil Law system in line with the German *BGB* and the French Code *Napoléon* for their law reform. However, in order to appreciate fully the Thai legal system, one must realize that Thailand belongs to the civil law system merely by the fact of its codification. The contents of the Thai Civil and Commercial Code are as varied as the major legal systems in the world themselves. English law played an important part on the Commercial Part of the Code whereas one could find traces of the ancient Thai law, a form of Hindu's *Dharmasastra*, in the Parts on Family and Succession of the Code. On the other hand, as far as the procedural aspect is concerned, Thai procedural law could be classified as adversary instead of inquisitorial like most of the Continental systems.

However, the modern view is also expressed that Thai procedural system combined the adversarial and the inquisitorial system. Whereas the fact-finding relies heavily on party-prosecution; each party controls and develops the preparation and presentation of his own cause, it also assigns to the court the basic responsibility for gathering the materials for decision.⁶³ It is widely recognized that the position of the judge is one of the most important factors in the proceeding. However, Thai judge does not act absolutely as a “case manager”⁶⁴ like it was deemed in civil law system, and not a “blind umpire”⁶⁵ in common law system. The concept of a judge as an independent

⁶³ The Civil Procedure Code Article 119, 187 and the Criminal Procedure Code Article 228.

⁶⁴ This concept is developed by **Peckham**, *The Federal Judge as a case manager: The New Role in Guiding a Case from Filing to Disposition*, 69 Calif. L. Rev. 770 (1981); **Resnik**, *Managerial Judges*, 96 Harv. L. Rev. 376 (1982).

⁶⁵ **Flanders**, *Blind Umpire – A Response to Professor Resnik*, 35 Hasting L. J. 505 (1984).

umpire between litigating parties is one basic to the common law adversary proceeding especially Anglo-American adversarial tradition considers the judge's independence is endangered if he claims too great a role in the proceedings. The combined role of judge-conciliator seems to be generally unknown in American litigation.⁶⁶ Thai judge could possibly suggest settlement discussions, help the parties to find a basis for compromise.⁶⁷ Nevertheless, subject to the Conciliator Rules provided by each Court according to the Civil Procedure Code Article 20, judges could even propose a possible formula for settlement and may be able to convert a legal dispute into a business problem which is the goal of informal conflict settling mechanisms but they have to be a panel other than a panel of judges of whom that case is in charged.

Generally, proceedings in civil & commercial cases and criminal cases are governed by the Civil Procedure Code 1935 and the Criminal Procedure 1935. As to the Civil Procedure Code, the rules of which are practical, giving the Court wide discretion in directing the proceedings in the cases. The trials must be held openly in court before all parties; except in case of default of appearance or in case of necessity to maintain order in court, the Court may proceed with the hearing in the absence of the party in default or the party expelled on the ground of improper behavior; and except where the subject matter should not be disclosed to the general public, the Court may sit *in camera*, i.e. the public and the press are excluded, and no report of them may be published without the Court's leave. Other essential principles of civil procedure include, *inter alia*, the followings: Both sides are given an equal opportunity to be heard, and are entitled to legal representation. Witnesses are subjected to examination-in-chief, cross-examination and re-examination. Little weight is given to any evidence where there has been no opportunity of cross examination. The judgement must state the grounds on which it is based. The losing party may make an appeal against the judgement to the Court of Appeal or the Regional Court of Appeal except where the appeal is prohibited by the Code or other law. With further restrictions, appeal may lie against the judgement of the Court of Appeal to the Supreme Court whose judgement is taken to be final. Although the judgement may be appealed to the Court of Appeal and further appealed to the Supreme Court, the lodging of an appeal or further appeal does not entail a stay of execution of the judgement or order to the Court of First Instance. The party lodging the

⁶⁶ Vincent Fisher-Zernin and Abbo Junker, *Arbitration and Mediation: Synthesis or Antithesis*, 5(1) Journal of Int'l Arbitration 21 (1988).

⁶⁷ The Civil Procedure Code Art. 20

appeal may, however, apply to the Court of Appeal or the Supreme Court for such stay of execution. During the proceedings, parties in all tiers of the Court could apply for the interlocutory injunction in order to protect their interests.

The Criminal Procedure Code 1935 applies to trial of criminal cases in all Courts of Justice except in Kwaeng Courts, Juvenile and Family Courts, and Intellectual Property and International Trade Courts which have their own special criminal procedures. Usually, four types of personnel of the law are involved in criminal proceedings. They are police officers, public prosecutors, lawyers, and judges. Investigation and inquiry in order to find the offender and establish his guilt are the responsibility of the police officers. The file of inquiry will be submitted by the police officer to the public prosecutor for consideration and the offender will be prosecuted if the public prosecutor concludes that there is enough evidence to support the conviction. At the trial, it is the burden of the public prosecutor to prove to the satisfaction of the Court that the defendant is guilty as charged. The Court will conduct a trial by hearing evidence from both sides openly in court before the defendant. It should also be added that the accused is entitled to full legal representation. In certain cases it is obligatory on the part of the judges to call upon and appoint a lawyer in his defense. An injured person himself may prosecute the alleged offender. In such a case, a preliminary hearing will be held by the court to ascertain that there is a *prima facie* case to justify compelling the defendant to appear in court and proceedings with trial. This is a filtering process to safeguard an innocent person from being prosecuted unnecessarily. If the judge is of the opinion that there is a *prima facie* case, he will issue a summons or a warrant of arrest on the accused. In practice a warrant is not issued unless a prior summons for the accused's appearance proves ineffective. Attendance of the accused during trial is obligatory. But there are certain exceptions. The evidence of the prosecutor will be adduced first. Witnesses of the prosecutor are examined-in-chief by the prosecutor, cross-examination by the accused or his lawyer if he so wishes, and re-examined by the prosecutor. Subsequently, the accused is entitled to adduce his evidence. Judgement will be delivered within 3 days after the closing date. Appeal against judgement of the Courts of First Instance either on the question of fact or on the question of law may be made to the Court of Appeal or the Regional Court of Appeal. Appeal on the question of fact may be barred if the offences have the maximum punishment of not more than 3 years' imprisonment or fine not exceeding 60,000 Baht, and such offence are dismissed by the Court. Appeal against judgement of the Court of

Appeal will lie to the Supreme Court subject to certain restrictions such as the case when the Court of Appeal upholds the acquittal judgement, and so on.

However, for the last two decades, There has been an attempt to establish a new system of specialized court within the system of the Court of Justice, for example, The Central Labour Court, The Central Tax Court, The Central Intellectual Property and International Trade Court, and the most recently The Central Bankruptcy Court, all of which have their own special procedures in order to ensure convenience, expediency and fairness of the proceedings. The panel of judges always consists of professional judges who possesses competent knowledge of the matters involved, for example, Labour law, Intellectual Property, International Trade, Tax, etc. and also the expert, so called “Associate judges” to sit collaborately on the bench except for the panel of judges in the Tax Court and the Bankruptcy Court. Once there was an attempt to establish the Administrative Court with which an expert judge associated to be one of specialized court in the system of the court of justice but there was no support by the cabinet or the parliament. Finally the Administrative Court was established to be a new organization with judicial power other than the existing court of justice. However, no matter what kind of judges in the specialized court are, they could properly exercise their discretion, considers their own expertise sufficient to decide the case. They do not mind acting as self-appointed specialists deciding question of highly contested even among experts. We can say that Thai specialized court have both bench and bar because we have expert on the bench which is a double guarantee of specialization.

The role of a judge in Thailand as well as the role of a judge elsewhere in the world is changing rapidly. Like any other members of the society, judges need to make their contribution to the society. Their role on the bench is changing too. Judges in Thailand are playing a more constructive role of settlement of disputes. More and more conciliation techniques are attempted. In many cases the role of a judge is becoming more involved, more inquisitive and more active than the traditional passive role of a judge in the adversary system.

We are living in an increasingly changing society. We are certainly living in an interesting time. To the audience who are more acquainted with Thailand, the comparison of the judiciary to *"the last recourse for the people"* is all too familiar. Time and again, the judiciary acts as insulation against oppression and unfairness for the people, irrespective of their economic, religious, ethnic or social background.

It is hoped that the Thai judiciary today can maintain the reputation it once

enjoyed almost a hundred years ago when Walter Graham, in his book, *Siam*, (3rd edn, London: Alexandra Moring, 1924 Vol. I, pp 372-373) said:

...The Ministry has built up a service probably the cleanest and straightest Siam has ever seen, and containing in its ranks officers who could compare favourably with the members of the judiciary of many European countries. In fact, about the year 1909, the Ministry of Justice was the bright particular star in the administration of the country. ..
