

## **Role of Thai Public Prosecutors in Criminal Justice Administration**

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### **I. The Criminal Justice Process**

In Thailand, the major source of criminal law is the Penal code of 1956. The Code includes most of the main crimes, ranging from murder, rape, and robbery, to petty crimes. There are also many other statutes which provide criminal sanctions for specific crimes such as drug offenses, offenses relating to the securities market, and so on. In Thailand, unlike some countries with common law, crimes are not divided into felonies or misdemeanors. Moreover, unlike most countries where prosecuting crimes is the sole responsibility of the state, in Thailand the injured party may also institute criminal prosecution directly in the Court. According to the Criminal Procedure Code, in the event that a private person has instituted a criminal case, the court must order a preliminary examination to see whether there is a prima facie case that warrants prosecution.<sup>1</sup> In fact, the court may skip this process when the prosecutor has instituted the charge. However, in practice courts have almost never used this screening measure for cases instituted by the public prosecutor.

Crimes are divided into “private offenses” (or “compoundable offenses”) and “offenses against the state” (or “non-compoundable offenses”). The former is less serious, for society at large is considered unaffected by the illegal conduct, whereas the latter is more serious since the state has a legitimate interest in intervening with the criminal process. Libel and defamation, or ordinary trespassing, are examples of so-called “private offenses.” In this type of offense, the state will not by itself initiate criminal proceedings unless the injured party files a complaint with an official.<sup>2</sup> The Penal Code and other criminal statutes clearly specify which offenses are “private” and which are “compoundable offenses.”

The major source of criminal procedure law comes from the Criminal Procedure Code of 1935 and its subsequent amendments. There are also other procedural laws applicable to special types of offenses or particular kinds of offenders, such as special procedures for handling minor offenses in Summary Courts, for juvenile offenders in Juvenile and Family Courts, or for offenses under the jurisdiction of Military Courts. However, when not specifically identifying, we will mean the criminal process in conventional criminal courts where the majority of cases are prosecuted.

### **II. Criminal Justice Agencies**

The main criminal justice agencies are the police, the ministry of justice, public prosecutors, defense counsel, and courts, the work of which are all intertwined one way or another. All Thai criminal justice components are governmental organs, except for defense counsel. The Royal Thai Police are usually the first institution to deal with the criminal justice process when wrongful conduct occurs. The Department of Corrections under the Ministry of Justice is involved at the end of the criminal justice process after the courts have given judgment over the alleged wrongful act. Although public prosecutors are perceived as primarily being employed after police involvement and before the courts give judgement, in

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<sup>1</sup> Thai Criminal Procedure Code Section, section 162,

<sup>2</sup>Id, section 121.

reality, they often function as intermediaries between all agencies. This function includes work from the investigation and inquiry stages with the police and other agencies under the Ministry of Justice, i.e. the Department of Special Investigation and the Money Laundering Office – to the guilt-proving process in a criminal trial in court. Although, the work of the Office of the Attorney General seems to be involved in every part of the criminal justice process, it can easily be separated into three parts: Investigation, Prosecution and Trial, and Authority in Special Law related to Criminal Offences and International Cooperation in Criminal Matters.

### **III. The Role in Investigation**

#### **a) General Criminal Offenses**

Basically, the power to investigate and inquire after the offences under the Criminal Code and Criminal laws are vested only in the police or any other stipulated-by-law agency, while the public prosecutors have the authority to review the inquiry file submitted by the police.<sup>3</sup> Where the public prosecutors consider that further investigation is necessary for a decision to be made as to whether or not to issue a prosecution order or to drop the case, the public prosecutors have the power to direct the inquiry official to carry out further investigation or to send any witness for examination by the public prosecutors as it is deemed expedient for the purpose of making further order.<sup>4</sup> In the real work, if the public prosecutor deems that the criminal case file is incomplete i.e. there is a need to interrogate more witness or more documents are necessary, the public prosecutor may even return the file back to the inquiry officer in order for it to be completed.

#### **b) Criminal Offense related to juvenile**

Under certain juvenile-related criminal cases; however, the Criminal Procedure Code requires the public prosecutor, together with a psychologist or social worker, any person (parents or teacher) requested by the young offender, injured person or witness to be present with the inquiry official as a quorum for investigation. The investigation of such offences carried out without the participation of these persons is considered invalid and consequently, the public prosecutor cannot take the case to the court.

#### **c) Investigation of Special Cases**

Due to the complexity of crimes and the inconvenience of the investigation, the Act on Special Investigation B.E.2547 (2004) stipulates that some wrongful conduct related to organized crime, financial crimes, large-scale fraud and money laundering have to be vested in the principal investigation of the inquiry officials of the Department of Special Investigation. In certain cases, like organized crimes or crimes related to influential persons specified in section 21 paragraph 1 (1)(c) and (d) of the Special Case Investigation Act B.E. 2547 (2004), however, section 32 requires the inquiry officials have to investigate jointly with the public prosecutor. Furthermore, under aforementioned section 32, the Board of Special Case (BSC) may approve a public prosecutor or military prosecutor to inquire or participate in any other types of special cases in order to give advice and examine evidence from the start of the investigation process. This is due to the belief that cooperation between the public

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<sup>3</sup> Id, sections 140-144.

<sup>4</sup> Office of the Attorney General Regulation B.E. 2547, section 70.

prosecutor and the inquiry officer at the beginning would ensure a complete case with few drawbacks, leading to the efficient proof of guilt of the accused. This cooperation between the public prosecutor and the inquiry officer is used in the legal system of the United States.

#### **d) Investigation of conduct committed outside Thailand**

Section 20 of Criminal Procedure Code requires the Attorney General, the person in charge of his functions, or any inquiry official delegated by him, to be the responsible inquiry official for the offence punishable under Thai law which has been committed outside of Thailand. These offences compose of offences stipulated in the three sections of the Criminal Code: offences relating to the security of the Kingdom, counterfeiting and alteration, and robbery on the high seas in the Penal Code, section 7; Offences stipulated in the Penal Code, section 8, where the offender be a Thai person and there be a request by the government of the country where the offence has occurred or by the injured person – or the offender be an alien, and there be a request for punishment by the injured person who is the Thai Government or the Thai person; and offences related to malfeasance in office and judicial office under section 9 of the Penal Code. In practice, the Attorney General will appoint the inquiry officials from the Royal Thai Police or the Department of Special Investigation, depending on the type of offence, to investigate jointly with public prosecutors from the International Affairs Department and the Department of Criminal Litigation.

### **IV. The Role in Prosecution and Trial**

#### **a) Prosecution Power**

The OAG has the main authority to conduct prosecution and trial. Upon receipt of the inquiry file from the inquiry officials giving their conclusions as to the case, the public prosecutors will examine the file and then decide whether to issue a prosecution or non-prosecution order. If such an investigation is deemed to be incomplete, they will direct the inquiry official to make additional investigation before issuing an order. If they believe there is insufficient evidence to incriminate the alleged offender, they may drop the case. They may also use their discretion not to prosecute if, in their opinion, prosecuting the case will not serve the public interest.<sup>5</sup> If the public prosecutor-in-chief decides to drop the case for the reason of insufficient of evidence, the file of inquiry must be submitted to the Police Director-General for cases in Bangkok and to the Police Commander-in-chief of the region for cases in the province, for further review.<sup>6</sup> If the Police Director-General or the Police Commander-in-chief of the region agrees with the decision, the non-prosecution order is considered final.<sup>7</sup> If there is a disagreement, the file of inquiry will be submitted to the Attorney General for final decision.<sup>8</sup> However, in the case of a non-prosecution order by the public prosecutor-in-chief on the reason of not serving the public interest, the public prosecutor-in-chief must direct the case to the Attorney General to approve or disapprove.<sup>9</sup>

#### **b) Criminal Trial Process**

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<sup>5</sup> Public Prosecutor Organization and Public Prosecutors Act B.E. 2553 (2010), section 21.

<sup>6</sup> Criminal Procedure Code, section 145.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Public Prosecutor Organization and Public Prosecutors Act B.E. 2553 (2010), section 21.

If a prosecution order is made, the public prosecutors will refer a charge against the alleged offender and take witnesses before the court to prove the guilt of the accused. The law adopts the principle of presumption of innocence, whereby the defendant should not be treated as a criminal until found guilty by the Court. The prosecutor must shoulder the burden of proof and prove “beyond a reasonable doubt” that the defendant really committed the crime before the Court can penalize them. For offenses having imprisonment terms of less than 5 years, if the defendant pleads guilty, the court may hand down a sentence right away. And for offenses having imprisonment terms of 5 years or more, even if the accused pleads guilty, the Criminal Procedure Code still requires that there be proof beyond a reasonable doubt that they are the one who actually committed the offense.<sup>10</sup> Should any witness need protection under the witness protection law, it is the discretion of the public prosecutors to ask the Ministry of Justice to issue an order of protection.<sup>11</sup> Also, as the public prosecutors role is considered to be the check and balance mechanism to counter the exercise of judicial power, they can appeal to a higher court if they believe that the judgment of the lower court is incorrect or inappropriate.

### **c) Authority to Claim for the Forfeiture and Restitution of Property**

Under the Criminal Procedure Code, the terms of the indictment can include a claim for the forfeiture of property used or possessed for use in the commission of an offence and the forfeiture of property acquired by a person through the commission of the offence as well as an application for restitution of property or its value on behalf of the injured person. Furthermore, under the Narcotics Act, the prosecutor is also vested with the power to request to the court an order of forfeiture of assets derived from the crime.

### **d) Juvenile Prosecution**

For juvenile prosecution, there is a unique feature differing from the adult criminal procedure. If the Director of the Observation and Protection Center considers that the juvenile can be reformed or rehabilitated and provided that the juvenile consents to be kept in custody to the Center, the public prosecutors can decide to drop the charge upon the suggestion of the Director of the Center. The public prosecutors can then give an order of non-prosecution and in such cases, the juvenile will be kept in custody for no more than 2 years. If the public prosecutors decide to prosecute, they have to prosecute the juvenile at the Juvenile and Family Court within 30 days from the date of the juvenile’s arrest.

## **V. The Role in Special Law related to Criminal Offences**

### **a) The Role in Anti-Money Laundering Act, B.E. 2542 (1999)**

Under section 49, when there is evidence to believe that an asset is related to the commission of an offense, the Secretary-general has to forward the case to the prosecutor for consideration to file a petition to the court to order the forfeiture of such asset. However, if the public prosecutor deems that the evidence is inadequate to file a petition, in whole or in part, the prosecutor can inform the Secretary-General of such so that he may proceed to obtain additional information. After receiving the additional evidence, should the prosecutor still deem that the evidence is inadequate, the prosecutor has to inform the Secretary-General in order to forward the matter to the Anti-Money Laundering Committee for consideration. The decision of the Anti-Money Laundering Committee is deemed to be final. However, if the Anti-Money Laundering Committee fails to issue a decision within thirty days as from the

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<sup>10</sup> Criminal Procedure Code, sections 176, 227.

<sup>11</sup> Witness Protection Act Section B.E.2546, section 6.

date of receipt from the Secretary-General, the prosecutor's decision will be final. According to section 56, after the public prosecutor has filed a petition to the Court under section 49, if there is probable cause to believe that the transfer, distribution, or placement of an asset related to the offences may happen, the Secretary-General may submit this fact to the public prosecutor to file a petition to the court to order a provisional seizure and restraint of the asset.

#### **b) The Role in Corruption Case**

According to the current Constitution and organic laws, the Office of the Attorney General (OAG) is empowered to suppress corruption in both the public and private sectors. In cases involving the public sector, the National Counter Corruption Commission (NCCC) should carry on an investigation and, if deemed appropriate and necessary, it would then submit the case with adequate legal background to the OAG. While the Supreme Court's Criminal Division for Persons Holding Political Positions was established to rule on criminal offenses committed by political position holders, i.e., the Prime Minister, Ministers, Members of the Senate, Members of the House of Representatives, or other political position holders, the OAG is constitutionally mandated to scrutinize cases filed by the NCCC and to be the sole agency in the country to decide whether a case has adequate grounds for prosecution on the charge of corruption in the public sector.

The OAG is also mandated to file a petition to the court seeking a court order to forfeit assets to the state domain in case the accused are political position holders or government officials accused of being unusually wealthy. This is part of a legal process to recover the assets from corrupt political position holders or government officials, which is the jurisdiction of the OAG in civil cases.

For corruption cases involving the private sector, i.e., offences committed by a partnership, company, legal entity, or commercial enterprise, offences involving banking or financial entities, offences involving stocks and shares, or trading in the Stock Exchange, if there is a damaged party, and an accusation has been properly filed with investigation officers, legal action shall be taken by the public prosecutor if deemed to be within his mandate and jurisdiction.

### **VI. The Role in International Cooperation in Criminal Matters**

The OAG plays a significant role in international cooperation in criminal matters; extradition and mutual legal assistance. Also, the Attorney General is one of the members in Transferring of Prisoners Committee under the Act on Transferring of Prisoners.

#### **a) Extradition**

For extradition, the Attorney General is the central authority to cooperate with all agencies, no matter in Thailand or abroad, in extradition matters. The public prosecutors are also responsible for seeking from a court an order for extraditing a person to the requesting state and for making a request to foreign countries to extradite a fugitive to Thailand. The sources of law under this authority are the Extradition Act B.E.2551 (2008) and related treaties. Thai prosecutors also occupy a key role in the national committee on extradition whose main function is to negotiate extradition treaties with potential parties. Currently, Thailand has extradition treaties with 10 countries, namely, the UK, Belgium, Indonesia, the Philippines, the USA, China, Cambodia, Bangladesh, Lao PDR, and the Republic of Korea.

#### **b) Mutual Legal Assistance in Criminal Matters**

The OAG takes the lead in the subject of mutual legal assistance in criminal matters. Specifically, under the Act on International Cooperation in Criminal Matters B.E.2559 (2016), the Attorney General is the Central Authority with a number of responsibilities, of which the most important is the making of decisions as to whether Thailand would request assistance from other countries or would provide assistance sought by other countries. There are many types of assistance Thailand can provide, such as locating persons, searching and seizing objects or documents as evidence, taking statements of witnesses, and the confiscation of assets. Currently, Thailand has mutual legal assistance treaties with 14 countries, namely, the UK, Canada, the USA, France, Norway, India, Poland, the Republic of Korea, China, Sri Lanka, Peru, Belgium, Australia and the Ukraine.

## **VII. Conclusion**

Concerning the duty of the public prosecutor, it could be concluded that the public prosecutor's role is intertwined into all aspects of the criminal justice system. About a decade ago, the work of public prosecutors was mostly to deal with the review of inquiry files of the police and prosecution. Today, in court, the public prosecutor's duty is to prove guilt by bringing witnesses into court. The public prosecutor plays a vital role in interviewing witnesses in court. As the public prosecutor's aim is to bring justice to and have influence over the court to penalize the culprit, the public prosecutor must have trust in the inquiry process; that it is true and complete according to the law. This is one of the reasons why the public prosecutor should also have a role in the inquiry, or investigation process in order to be certain that witnesses are trustworthy.

This idea has led to the introduction of new laws which have handed more power to public prosecutor in their role in the investigation or inquiry stage. This change in role may bring discomfort to some Thai public prosecutors who are unaccustomed to the role of investigation and inquiry – as perhaps some have never interrogated a witness before submitting their case to court. It is believed that it will take time for some public prosecutors to adapt and improve themselves to this more active role. In time, however, I feel sure that all public prosecutors can adequately prepare themselves for this important work.