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**Rediscovering Mediation  
in the 21st century**

**VICTIM-OFFENDER MEDIATION:  
A PLACE IN THE CRIMINAL JUSTICE  
SYSTEM?**

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# Victim-Offender Mediation: a Place in the Criminal Justice System

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## Overview

During past two decades the criminal justice system had been discussed by the academics and society that it could not serve the needs of all stakeholders in the system. Most societies may be familiar with the principle concept of the criminal justice that the state is responsible to handle the crimes and consequently there is a quote in the court decision that the crime is an act against the state. In this point of view, the state has a duty to bring the criminals into the criminal justice system and if convicted then execute a punishment according to the court decision. This criminal justice system, we call “the retributive system” had been used in not only one particular country but the countries all over the world. However, the retributive system has been criticized that it focuses only on the punishment and does not satisfy all stakeholder in the criminal justice system. Then, there is an attempt to promote the offender’s rights or inmates at the downstream in the criminal justice system. Many rehabilitation programs have been created to help the inmates to return to the society without or less problems after the punishment. The center of the criminal justice system is moved in certain senses from the state-oriented to the offender-oriented system or “rehabilitation justice system”. The retributive system, when focusing on the punishment, deems to place the state as a center of the criminal justice system and vests the duties to the victim i.e., being questioned during the investigation process and testifying in the court to accomplish its duty but disregards or overlooks the individual rights of the victim. Due to the lack of balance of the stakeholder in the criminal justice, the community has consequently claimed some changes to the criminal justice system with more participation by the victim and community.

The restorative justice has become a response to the ineffectiveness of the retributive practice in the criminal justice for twenty years. It fulfils the gap of the retributive system by giving the victim and community the opportunity to participate in the criminal proceeding. The restorative justice emphasizes the needs of the victim that has been previously disregarded in the criminal justice system. Moreover, the restorative justice also concerns the community as one of the stakeholder in the crime besides the victim and the criminal. The core concept of the restorative justice is the crime affects the individual and the community as well. In this sense, the restorative justice has shifted the center or principal of the criminal justice from the state to the victim and the community. There are several types of the restorative justice such as the family group conference, victim-offender mediation, circle sentencing and community reparative board. However, the most frequently used and favorable method of the restorative justice is the victim-offender mediation.

The modern society was firstly recognized the victim-offender mediation when the probation officer in Kitchener, Ontario, Canada asked the permission from the court

to allow the offenders meeting with the victims. The case was involved the two drunken boys destroying the property of the victims. After reviewing the background of these two boys, the probation officer found no criminal records. The probation officer then recommended the boys face the victims in lieu of the punishment and the judge agreed. The juvenile offenders went to the houses of the victims, confessed to their crime and making the restitution agreements with each victim. Three months later, the juvenile offenders completed their commitments of the agreements and paid back all losses. With this proceeding, the offenders were allowed to express their accountability to their victims and the victims to tell the offenders the affect of the crime to their living whereas the ordinary criminal justice system that focusing on punishment could not provide.

## **Victim-Offender Mediation**

The victim-offender mediation is usually applied to the non-serious offenses, property offenses as well as crimes committed by juvenile. However, in certain jurisdictions where the victim-offender mediation is successful, the victim-offender mediation may be expanded to more serious cases. The victim-offender mediation can be used in any part of judicial process but should not interrupt the criminal proceeding. As the victim is a center of the victim-offender mediation, the victim is free to participate in the victim-offender or traditionally pursues his rights by claiming the civil damages against the offender. Generally, the victim-offender mediation is a process which we bring together the victim and offender and make them a part of the criminal justice system. In the safe and structured setting, the victim and the offender can have dialogue in order to learn the impact of the crime and taking the accountability of the offender.

The process of the victim-offender typically starts with preliminary meetings. The mediator meets the victim and then meets the offender in order to prepare the stakeholder and make an assessment of the case whether it is possible to have a safe and successful mediation. At this step, the mediator would set the rule or criteria for both victim and offender. Then, the mediation process begins with dialogue between the victim and offender with the assistance of the trained mediator. At this stage, the victim will have opportunity to explain the impact of the crime and ask questions of the offender. The offender acknowledges and describes how he participated in the offense and usually expressed his remorse and agreed to take responsibility of the crime he committed. Perhaps the forgiveness by the victim was expressed after the dialogue with the offender. Finally, the restitution agreement if any would be drafted and signed and the probation program may be set up and approved by the court.

The victim-offender mediation is implemented an alternative to the retributive justice system where the punishment in some particular cases is not suitable to prevent the future crimes. Not every criminal case is appropriate for the victim-offender mediation thus the retributive system still exists and is applied to many other cases to assure the public security. The victim-offender mediation program has been served our society for more than twenty five years. There are now 300 program of the victim-offender mediation in the United States and Canada and more than 700 programs in Europe such as Germany, Scandinavia, Eastern Europe, Australia and New Zealand.

# **Victim-Offender Mediation in Thailand's Perspective**

## **1. Victim-Offender Mediation in community**

Like many other countries in Asia, the community in Thailand learned how to resolve the disputes within its community through mediation in ancient time when the community leader took his role not only to rule and govern the community but to resolve the disputes in community. Surprisingly, this phenomenon occurred not only in Asia but other parts of the world like the native or Indian in North America or Polynesian in Pacific Islands. At that time, there was not a clear distinction of what is civil or criminal action. The community leader with the status of high respected of the community exercise his authority to resolve disputes in some manners including adjudication and mediation. The mediation as one of alternative methods had played its role in resolving disputes within community until the modern administration has been developed in our society.

In the modern society, the community leader was reduced his leadership role and pass his administration and judiciary power to the central government or state. Under the constitution, the central government centralizes all power that was belonged to the community leader and constitutes what we call "nation" or "state" in today. In the modern society, the leader is appointed by the central administration to govern the community and vest the role of dispute resolution to the judiciary. Consequently, the community mediation became disappeared from the Thai society a little by little due to the lack of leadership status of the community leader. However, in 1914, the central government showed its attempt to reduce the gap of the dispute resolution regime which rarely found in the community by introducing the authority to mediation to the district chief officer appointed by the central government in the Local Administration Act 1914. However, the mediation under the district mediation regime was limited to the civil dispute up to 20,000 baht in volume only. The mediation performed by the district chief officer has performed within its district with a limited success due to a number of roles vested to the district chief officer and a lack of budget and support from the central administration.

In 2007, the government proposed and the legislative approved the amendment to the Administration Regulation Act to emphasis the civil mediation of the district mediation regime and the most important empower the district to the criminal disputes. However, the criminal mediation under the Administration Regulation Act is limited to only one category of the criminal case namely, the compounded case except the sexual related offense. The criminal mediation by the district is based on the voluntary of both the victim and the offender. In addition, the new mediation program empowers the district chief officer or permanent-secretary of district chief officer to mediate the victim and the offender. According to the law, if the victim-offender mediation success and the offender fulfills to perform his duty in the restitution agreement, the case will be disposed from the criminal justice system.

## **2. The Court of Justice and the Victim-Offender Mediation**

The mediation has been attached to the court proceeding from the ancient period. There is evidence in the ancient law of Ayutthaya reign that empowers the judiciary to mediate or conciliate the case before hearing. The court mediation especially the civil case is obviously endorsed in the modern society after the judicial reform in the Rama V reign. The current Civil Procedure Code, even many amendments, empowers the judge to mediate any civil case at early stage or at any stage before the judgment. With the provision of the Code empowering the mediation, the individual judge mediates the case assigned to him in the hearing room and if not success hears the evidence and makes a judgment. Even though the procedure law empowers the court to mediate only the civil cases, the judge in practice mediates the criminal cases which are the compound offenses such as the property offenses and unpaid check issuing offense and etc. In 1994, the court mediation was reformed dramatically and the court-annexed program was introduced to the Civil Court in Bangkok. The principle of the separation of mediation and the hearing was firstly implemented in the court of justice. The judge who mediates the case will not hear the evidence and make a judgment to guarantee the free flow of information in the mediation session. Then it would say that the court-annexed mediation is now boomed and easy to access when the court-annexed mediation program has been implemented in courts throughout the country since 2003. The number of cases that parties voluntary join the mediation has been increasing in satisfactory number every year as well as the success rate. Like the other countries, the courts mainly implement the court-annexed mediation program as one of the tools of the case management to expedite the court proceeding.

Whereas, the court is successful in promoting the civil mediation, there is a demand to improve the mediation in the criminal cases as well. Many courts implement the mediation program to the criminal cases not only the said compound cases but also the offenses against the public interest which are not compoundable. However, the criminal mediation was firstly limited to the cases which the individual not the public prosecutor file the criminal case to the court. The rational behind the limitation of cases in mediation is that such cases can be disposed from the docket automatically or with the withdrawal petition if the victim agrees and compromises with the offender. The court typically applies the mediation to the criminal cases by providing the meeting between victim and offender to discuss the wrongdoing and the compensation.

The victim-offender mediation in the court was crucially developed again when the Criminal Procedure Code was amended in 2004 by affirming the rights of victim under the constitution to be compensated appropriately. Before amending the Code, the victim has to file the civil suit asking for the compensation from the offender separately except certain property cases that allowing the public prosecutor to claim back the property or claim damages on behalf of the victim against the offender. Moreover, according to the old law, the victim has to wait until the offender is finally convicted. The amendment of the Code added the provisions allowing the victim to file a petition in the criminal proceeding requesting the judge to order the offender to pay the compensation. The rights of the victim has been improved dramatically by give the

victim an prompt access to compensation without delay and eligible to be compensated without filing the civil suit against the offender separately.

Without a specific law mentioning the criminal mediation except the domestic violence offense, the court of justice applies the amended provisions to back up the criminal mediation program and generally organizes the mediation between the victim and offender. Most of the courts issue the court order to regulate the criminal mediation within their jurisdictions. They mainly grasp the concept of voluntary to the mediation of the both parties and bring them together in the meeting with an assistance of the trained mediator. Even though the main objective of the mediation is to negotiate and conciliate the victim and offender concerning the damages of the wrongdoing, there are a number of cases going beyond the damages conciliation. When the meeting between the victim and offender is organized in the safety circumstance like in the court, the victim and offender will have an occasion to talk to each other concerning the impact of the action and accountability including healing may be expressed especially in the negligence offenses.

One example of the victim-offender mediation is the case of negligence driving which broke the victim's leg. The victim talked to the offender the impact of the accident to his day-today life which he would not be able to drive his child to school. Besides the compensation, the offender expressed his remorse and offered the ride to school for the victim's children during the rehabilitation. In the follow up session, the probation officer reported to the court that the offender kept his promise and had taken the victim's child a ride to school for two months before the school break.

The another important development of the victim-offender mediation in Thailand is the promulgation of the Domestic Violence Protection Act 2007. The act implements the concept and practice of the restorative justice into the domestic violence offense proceeding. The domestic violence procedure shows the concern of the state to set up the appropriate criminal proceeding to this specific offense to introduce the sustainable problem resolution to the domestic violence problem in the society. Firstly, it applies the mediation of victim and offender to any appropriate case considered by the officer or court. Secondly, the act provides the mediation as a diversion from the ordinary criminal justice system. Thirdly, the proceeding emphasizes the rehabilitation of the offender and compensation to the victim rather than punishment. Fourthly, the act brings together the professionals such as psychologist, lawyers, social welfare officer and sociologist into the process. Last but not least, the outcome of the mediation which is a restitution agreement will be reviewed by the officer or the court to guaranty the legitimacy of the agreement.

Recently, the office of national police has proposed a bill to introduce the victim-offender mediation to the investigation process. According to the bill, the police officer will be appointed as a mediator panel to mediate the dispute between the victim and offender. The categories of case to be eligible to the mediation are as follows; compound case, property case and the case which the prison punishment is up to 5 years. When the mediation is successful, the criminal proceeding will finish.

## **Conclusion**

The victim-offender mediation in Thailand can be traced back to the ancient society when the village leader was assumed the authority to rule the village including role of dispute resolution of the village. In that circumstance the leader is respectful

among members of the village. After listening to the stakeholders in the mediation, the resolution of the dispute was not limited to the imprisonment but varied to compensation, apology or even expel from the village. When the society was developed to a modern state, the state has become an important body to manage the administration including the justice system within its jurisdiction. In the modern state, the power of the leader is now vested by the state not the member of society. The village leader was reduced his role in the village as well as a role of dispute resolution in the society and consequently the victim-offender mediation rarely found in the small unit like village. The state recently has an attempt to restore the mediation in community by introducing the victim-offender mediation in the district. Unlike the civil mediation which inviting local members to a mediation panel, the criminal mediation under this program is conducted by the district chief officer or permanent-secretary of district chief officer. Moreover, it is limited to the compound cases excluding sexual-related cases.

Even though, there is only one act namely, the Domestic Violence Protection Act 2007, explicitly authorizes the court to set up the victim-offender mediation, most of the court of justice have the mediation program which is not limited to the civil cases. Whereas some courts limit their victim-offender mediation to two types of cases; the compound case and the criminal case which individual files the criminal case, the others expand the mediation to other criminal cases if appropriate.

It would say that Thailand has have an attempt to apply the restorative justice into the criminal justice system due to the need of only the society but also the stakeholders in the justice system themselves. It is obviously the criminal justice system recognizes the rights of the victim in the criminal proceeding more than ever. However, there are some waiting steps to the further development in the criminal justice system; 1) an explicit legislative allowing the victim-offender mediation which including the category of case and mediation process 2) the training program for mediator to build up the knowledge and skills needed 3) the manual and training for the officer to handle the program 4) the awareness building to the public including the stakeholders in the mediation to make an correct understanding to the victim-offender mediation and 5) the follow up and evaluation program should be set up to assure the success of the program.