

ผนวก ก

REPORT ON THE PROPOSED CODE OF PENAL PROCEDURE
FOR
THE KINGDOM OF SIAM
SUBMITTED TO THE MINISTER OF JUSTICE
BY
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Chapter V

The preliminary enquiry by Court
and the advisability of having Investigating Magistrates or
Juges d' Instruction

In Continental Procedure , the preliminary investigation up to commitment for trial is almost exclusively into the hands of the Public Prosecutor. The Public Prosecutor enquires about the offence , orders the arrest of the accused , examines the accused and the witnesses for both parties . If there are no sufficient presumptions of guilt , he discharges the accused . If there are sufficient presumptions of guilt , he commits the accused for trial .

In English Procedure , the Public Prosecutor is obliged to resort to a Court for having the accused arrested , searches made , etc . In every case of some importance , the accused is discharged or committed for trial by a Court of Preliminary Enquiry . Bail is granted by Court . Remands are granted by Court also .

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In Siam , a somewhat mixed system is prevailing . The Public Prosecution has full power of investigation . But if the offence is of some importance , the accused cannot be committed for trial by the Public Prosecutor . He is brought before a Court of Preliminary Investigation which hears the evidence and commits the accused for trial or refuses commitment .

In the provinces , cases under the jurisdiction of Monthon Court are investigated by the Muang Court in the preliminary enquiry . In Bangkok , the Borispah Courts are Courts of Preliminary Enquiry for the Criminal Court . But there is no precise rule showing which cases must be submitted to Preliminary Investigation in Court , which shall not .

According to the Transitory Criminal Procedure Code it seems that every case ought to be submitted to preliminary investigation by Court .

Section 3 provides that every arrested person shall be taken before a Judge for examination .

Section 14 of the law of Organization of the Courts of Justice of the year 127 reads :

“ The Borispah Courts shall have jurisdiction to hold a preliminary enquiry into all criminal cases which all Courts under this decree have jurisdiction to try ”

In fact all small cases , all petty offences , and most of the cases where the accused has been caught in the very offence are tried direct without preliminary enquiry in Court . Preliminary enquiry in court is held only in important cases .

As a Judge in Siamese Courts I have seen a considerable number of cases where preliminary investigations by Court were held and I must confess that . I am under the impression that most of the work done at these preliminary enquiries is useless .

In the English system , the making up in Court of a prima facie case against an accused is necessary to have the accused arrested , warrant issued , remands granted , witnesses subpoenaed , etc . I can quite understand why an English Public Prosecutor is obliged to refer to Court from the very beginning of a case . But a Siamese Public Prosecutor has full power to arrest an accused , to keep him into custody and to

make a complete investigation about the case . For the sake of the procedure , there is no necessity of having a preliminary investigation held in Court . Neither can it be said to be of any use to the accused . Under the present lines , the preliminary investigation is held only for the prosecution , The accused can reserve his defence for trial , and in fact he always reserves it . The Court of Preliminary Enquiry simply hears the evidence supporting the charge and , without knowing anything about the defence , decides whether there is a *prima facie* case against the accused or not . If the Court of Preliminary Enquiry finds that there is a *prima facie* case , the accused is committed for trial , In such case , the preliminary enquiry is simply a waste of time for Public Prosecutor , the accused , the witnesses and the Court.

If the Court of Preliminary Enquiry does not commit the accused for trial , the Public Prosecutor almost invariably appeals . If the Higher Courts confirm the decision of the Court of Preliminary Enquiry , the accused is definitively discharged , but he had to undergo the several successive stages of jurisdiction in most cases , it would be better for him to be acquitted direct by a Court of trial than on appeal against an order of a Court of Enquiry . If the Appeal Court or Dika Court reverses the order of the Court of Preliminary Enquiry and orders the accused to be committed for trial , the whole preliminary enquiry results in time wasted by the parties and by the Court .

I can understand that , at least for the important cases , the Government might like the case for the prosecution to be tested by a judicial authority before it is sent to a Court for trial , But the disadvantages of the present system seem to considerably exceed the advantages . The principle drawback is to protect the preliminary enquiry . It is extremely difficult to procure the attendance of witnesses in the Siamese Court . Yet , when a case is subject to a preliminary investigation in Court the witnesses have to give evidence at least three times , viz . first at the enquiry at the Krom Ayakarn's , second at the preliminary enquiry , third at the trial . It is considerable hardship on them, and it is a considerable delay for the prosecution ; Besides , the preliminary enquiry in Court is not likely to help the trial . Most of the witnesses are not cross-examined the court itself , not knowing what the defence will be , is unable to put proper question or to

call for extra evidence . On the other hand , it is materially impossible that witnesses examined three times will give always exactly the same account of the facts which they witnessed . Their successive evidence is bound to show discrepancies . The only result obtained from the preliminary enquiry in Court is to throw more uncertainty on the evidence . Besides , the Muang Court or Borispah Court when making a preliminary investigation is sitting in the ordinary way ; several judges , a registrar and sometimes an advisor are kept busy for hours during which the Court cannot sit as a Court for Trial . To say nothing of the facilities afforded to the accused and their counsel for scrutinizing the evidence for the Prosecution at the preliminary enquiry and preparing for the trial tainted evidence in favor of the defence .

If the Government approves of the suggestions of the Commission as to the lines under which criminal proceedings should be conducted , the preliminary enquiry in Court ought to be held for the prosecutions and for the defence . That is to say the defence ought to be disclosed and tested together with the charge . But , If the charge and defence are tested publicly by a Court of preliminary enquiry , in the presence of the accused and with the assistance of counsel , there will be no difference between a preliminary enquiry in Court and a trial , except that the Judges in the Court of Preliminary Enquiry will be of lower rank than the judges in the Court of trial . The decision of the Court of Preliminary Enquiry would be equivalent to judgment in the first instance . Why then have a Court of Preliminary Enquiry distinct from the Court of trial ?

It is true that in several European Legislations the jurisdiction which has power to commit on accused for trial resembles very much a Court of First Instance . But it must be borne in mind that in most of these European countries , no appeal lies against decisions of the Higher Criminal Courts . In England a system of criminal appeals is just being organized . In France , Germany , Italy etc. judgments in cases of misdemeanors and petty offences may be appealed against . But judgments by the Courts of Assizes , acting with a jury , are only subject to an appeal on points of law ; no appeal on points of fact lies against their decisions . One can understand that before committing an accused for trial in a Court the decision of which is final on the point of

fact , the Government might like that a Court of Preliminary Enquiry should test the case. For practical purposes , the Court of Preliminary Enquiry is then acting as a Court of First Instance and the Court of trial as a Court of Appeal.

In Siam every criminal judgment is subject at least to two successive appeals on points of fact as well as on point of law . With the present system an accused may be brought three times in Court for preliminary enquiry (Borispah Court , Appeal Court , Dika Court) and afterwards three times in Courts for trial (Criminal Court , Appeal Court , Dika Court) . His guilt or innocence may be thus examined and tested six times before the case reaches its ultimate stage . There is little doubt that the system is redundant . One of the principle difficulties of the administration of Justice in Siam is to get able man to act as Judges . Yet , the Siamese Courts are organized in such a way that they require proportionately a much larger staff than any other Courts . It is probable that the number of stages through which a criminal case may go will be reduced in the near future . Several measures have already been taken to that effect by the Ministry of Justices . But Criminal cases will anyway be allowed at least one appeal on points of fact and points of law and a further appeal on point of law . With two successive appeals , it seems unnecessary to have still a Court of Preliminary Enquiry

Now , in several countries where preliminary enquiry up to commitment for trial is into the hands of Public Prosecutors , it has been deemed advisable to let the Courts cooperate with the Public Prosecution through “ Juges d’ Instruction ”

“ Juges d’ Instruction ” exist in Germany , France , Italy , Spain , Japan and Egypt

a Juges d’ Instruction is a judge in an ordinary Court , who gets a special commission from the executive authority to make preliminary investigation in criminal cases . Being a member of the Court , he presents the same guarantees of impartiality independence and legal training as any other judge sitting on the bench . His duties are generally :

1. to inquire into crimes , that is to may offences of the most serious character ; and

2. to enquire into other offences whenever he is requested to do so by the Public Prosecutor .

The position of a Juge d' Instruction is somewhat similar to the position of a magistrate holding a Court of Preliminary Enquiry in England ,

The advantage derived from the institution of these Magistrates is that the enquiry held by them looks more a judicial one than the enquiry held by a Public Prosecutor . So much the more when Public Prosecutors are officials of another Ministry than the Ministry of Justice . A Magistrates is presumed to be less inclined to take arbitrary steps than a Public Prosecutor . By a reason of his former experience as a Judge he will always feel disposed to proceed impartially with the enquiry , looking at the interest of the accused as well as at the interest of the community . When the case come for trial , the Court is perhaps more under the impression that the preliminary enquiry was unprejudiced . Witnesses who are giving evidence before a Judge and under oath are more careful about what they say . There is less probability of their making before a Magistrate statements which they shall withdraw when the case comes for trial . I have referred above to a number of confessions recorded in the Police of Amphur's or in the Krom Ayakarn's Offices , and which are afterward and disregarded in Court . This is lose likely to happen with confessions recorded by a magistrate .

Most of the preliminary enquiries in the Borispah or Muang Court are at present useless because they are made at an intermediary stage of the procedure . They do not record the original depositions or answers of the witnesses or accused . These original depositions are made and recorded at the offices of the executive authority (Police , Gondarmerie , Amphur , Krom Ayakarn or Attorney General) who is conducting the investigation . Now the best and most important evidence in a Criminal case is the evidence recorded just after the crime was committed , at the moment when the corpus delicti is still on the place , when the witnesses are still under the impression of what heard and saw , when the presence or absence of the accused may be easily ascertained , and before people have begun to talk over the crime , to listen to the unavoidable gossiping , to make up their mind as to what they will say to the Police , and

to consider how they could possibly take the opportunity for favoring their friends or harming their enemies . It is a great pity if the authorities who collect such evidence are not ... and if the evidence collected at that stage is not used in the subsequent proceedings.

If the Siamese Government think that even after the Public Prosecutors are reorganized and a better control of the Public Prosecution is instituted , the preliminary investigation of Krom Ayakarns may still be distrusted by the Courts , they might substitute to the present Courts of Preliminary Investigation “ Investigating Magistrates ” or Juges d’ Instruction or whatever name may be found appropriate . Let us call them simply “ Magistrates ” ...

The main difference between an enquiry held by a Magistrate as described above and a preliminary enquiry held by a Siamese Court is that the Magistrate conducts the enquiry himself , whilst the Court of Preliminary Enquiry only tests the enquiry made by the Public Prosecutor . The Investigating Magistrate controls the enquiry from the moment when the offence is discovered up to the time of trial . He takes successively every necessary step in order to ascertain the truth . On the contrary , a Court of Preliminary Enquiry does not conduct the enquiry . The Court simply sits and boards such part of the evidence collected by the Public Prosecutor as the Public Prosecutor thinks fit to produce in Court . The Court does not take cognizance of the whole of the preliminary enquiry . The Court does not enquire about defence . The Court only ascertain whether the evidence for the Prosecution is sufficient to commit the accused for trial . It seems that the advantages derived by defence from such formality do not compensate the waste of time and money resulting from the intercalation of an intermediary stage between the Preliminary Investigation and the trial . Even if no Juges d’ Instruction were to be instituted , I am of opinion that a better organization of Public Prosecution , as proposed above , would constitute a sufficient guarantee for the defence . The idea at present is to prevent Public Prosecutors to enter prosecutions which are not justified at all . If the right of Public Prosecution were limited to a smaller number of officials and subject to the authority and control of technical man , there is

very little probability that prosecutions would be entered although there is no prima facie case against the accused . Suppose even that a case be entered despite of insufficient evidence . The case shall simply be dismissed by a Court of trial instead of being dismissed by a court of Preliminary Investigation . The accused will be none the worse . And several weeks time shall be saved in the numerous cases at present subject to a preliminary test in a Court of first enquiry.

