

THE PHILOSOPHY OF CRIMINOLOGY WHEN SENTENCING IN THAI COURTS: A CASE STUDY OF INTENTIONAL, NEGLIGENT AND PROVOKED CRIMINALS

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ABSTRACT

Research was undertaken to study the concept of applying the philosophy of criminology to the sentencing procedures in Thai courts and to analyze the judges' doctrines on the primary research findings. The study was conducted by a documentary based and in-depth interview approach, focusing on cases of criminals by nature and criminals by mistake. One thousand two hundred and forty nine judges, who were in their judicial positions for over 10 years, were chosen for the study. The research findings revealed that sentencing should be pertinent for both the offence and the offender. The two elements of sentencing were *the facts of the case* and *the theoretical principles*. The facts of the case are overviews of the circumstances of the case and the offender's history. The major theoretical principles are the theoretical principals of retribution, prevention, rehabilitation, and social protection. The present study recommends the exercise of integrated measures for the sentencing regimen. To be appropriate for both the offence and each specific offender, judges shall rationalize the facts of the case and the punishment theories in their exercise of discretion on sentencing so that the sentencing is competent and may result in more effective prevention of crimes. Theoretical principles suggested for the different cases are the retributive theory for cases involving serious offences, the rehabilitative theory for less serious cases and the preventive theory for recidivists.

Keywords: Thai courts, judges, philosophy of criminology, sentencing procedures.

INTRODUCTION

Sentencing in a criminology regime means the formal judgment of the court, given to the accused who pleads guilty or who, following his judgment, becomes the offender. The sentencing decisions include conditional or unconditional probation, a fine, the death penalty, and penalties as provided by special laws, social work as determined, reparation, corporal punishment, imprisonment, or other punishments (Reid, 1984).

The philosophy of criminology is a concept related to the commission of an offence and the search for the cause of such offences, including the concept of prevention, crime control, and the treatment of offenders, by the sanction of penalties and the rehabilitation of offenders (Siegel, 1999). Reliance is placed on causes and effects, including the use of scientific explanations to certain phenomena and a systematic approach to the problems encountered, such as the presence of various theories to explain phenomena and a systematic approach to finding solutions to the various problems, as well as testing and experimentation to verify the results. As for the treatment of offenders, a branch of criminology called penology, a subject related to the punishment of offenders, has expressed a number of theories for punishment: *the retributive theory, the preventive theory, the rehabilitative theory, and the social protection theory* (Karl, 1968). The retributive theory states that the punishment must be appropriate for the offence committed, or in other words, in proportion to the offence committed. The preventive, rehabilitative and social protection theories, on the other hand, state that punishment must be appropriate for the offender.

Although a number of punishment theories have been provided as a guideline for the judge to exercise appropriate sentencing for an individual offender, there are yet several factors in the justice process resulting the inappropriate discretion of the judges on the determination of punishment. Three main etiologies are causing problems in the sentencing discretion of Thai courts.

1. *Inadequacy of facts in the grounds for sentencing*

The small number of judges and probation officers result in an inability to seek the facts in regards to all offenders. In addition, the pursuit of such facts is limited by the law, which provides that the court only has such power in cases where

the court can punish with imprisonment not exceeding two years. The court, thus, does not have power to seek the relevant facts in the case of severe offences.

2. *Non-uniformity in applying the philosophies of criminology to sentencing*

Each of the philosophy of criminology has different views, and conflicts in application may occur. Philosophies of criminology on punishment cannot, therefore, be applied to the mutual benefit of all cases. Applying only one of them without taking others into account cannot completely achieve the objectives of criminal punishment and furthermore cannot bring about the ultimate benefits.

3. *The variety of judges' characteristics*

Each individual judge has his own history, personality, habits, knowledge or education, experience, and beliefs. This reflects the diversity of judges' thinking, attitude, viewpoint, and rationale. Some of them are strict, while some are kind. Some believe in the retributive theory, while some believe in the rehabilitative one. All of these differences are reflected in the problem of sentencing disparity.

The elements resulting in the inappropriate sentencing discretion of Thai courts are summarized in Figure 1. In 1997, the number of offenders under probation was 9,688, and out of which 2,827 were re-arrested and put on retrial (Department of Probation, 2000). This indicates that the sentencing and punishment may not be effective enough to control the crime, and thus offenders are not terrified by punishment and commit more crimes. In order to provide a sound recommendation for the sentencing discretion of Thai courts, the present study is aimed to observe the current concept of how the philosophy of criminology is applied when sentencing in Thai courts and to analyze the judges' doctrines based on the interviews and corresponding questionnaires.

RESEARCH METHODOLOGY

The present study conformed to a research conceptual framework of related theories, verdicts from previous studies and a literature review. The concepts arrived at were then analyzed and synthesized by the researcher so as to be a guide

for determination of the conceptual framework of this research. Several issues were included in the conceptual framework; the application of the philosophies of criminology to sentencing, problems and solutions of such applications, and are illustrated in Figure 2.

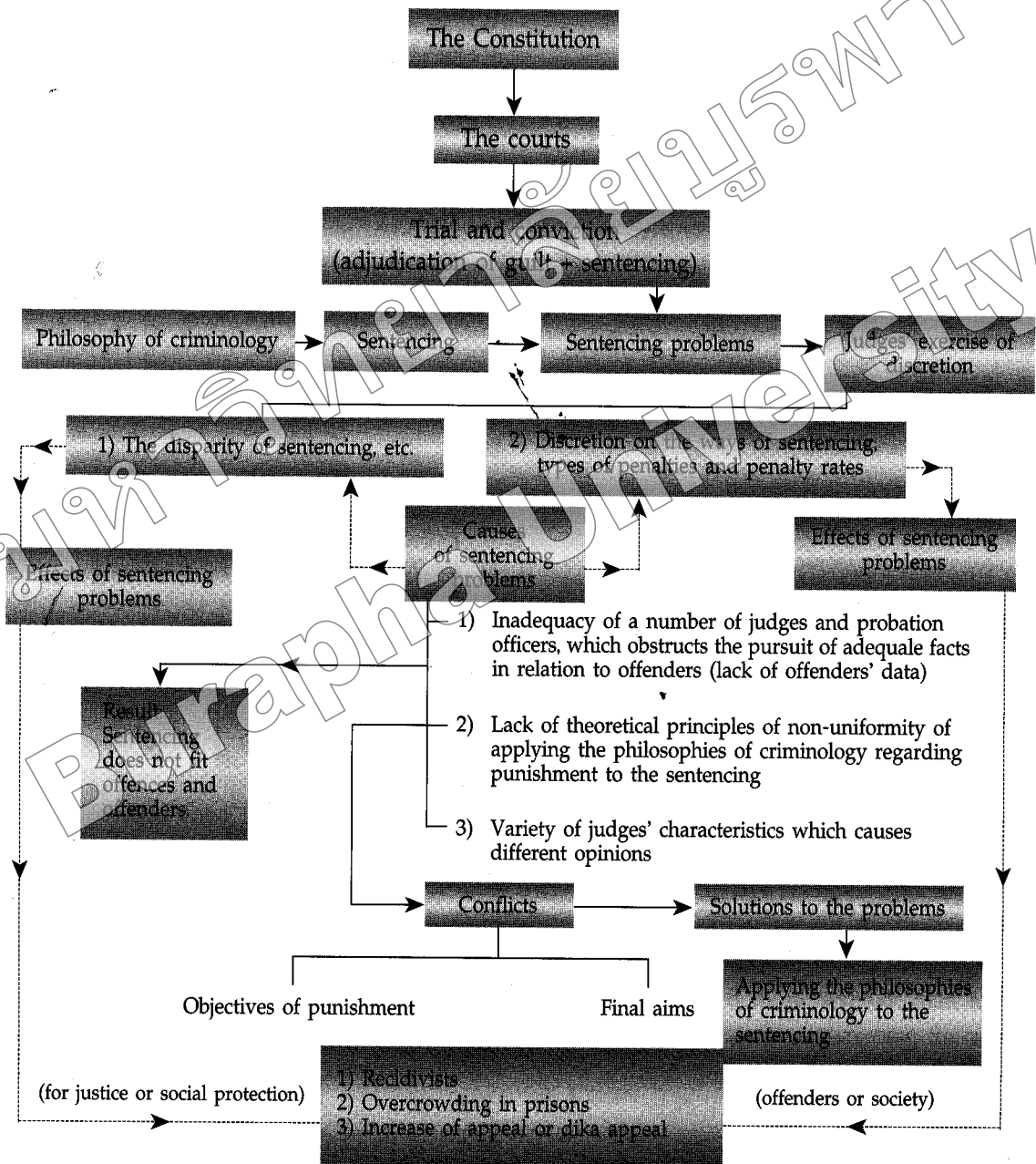


Figure 1. The elements related to sentencing.

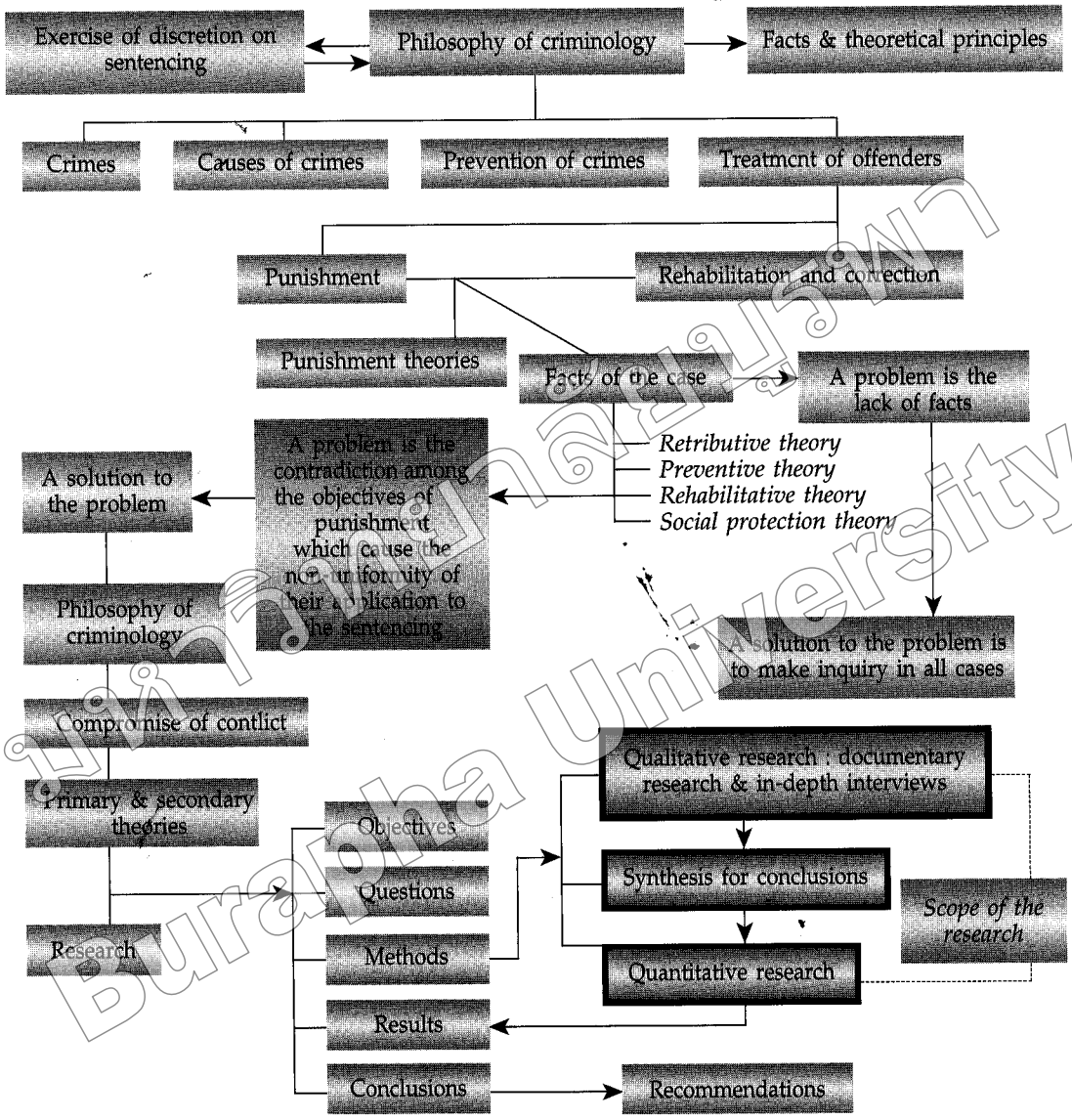


Figure 2. The conceptual framework of the research.

RESULTS AND DISCUSSION

Guidance for the combined application of punishment theories may be divided into 3 sections: 1) serious offences, *the retributive theory* is primarily applied and is supplemented by other punishment theories; 2) minor or petty offences; *the rehabilitative theory* is primarily applied and is supplemented by other punishment theories; 3) recidivism, *the social protection theory* is primarily applied and is supplemented by other punishment theories (Karl, 1968; Immanuel, 1972).

The sentencing discretion of Thai courts regards the offenders into two different types: *criminals by nature and criminals by mistake*. The judges exercise punishments in accordance to characteristics of criminals, as follows:

Criminals by nature (intentional offenders) are categorized into 6 cases.

1. Criminals by nature (intentional offenders) who are first-time offenders (with a good chance of rehabilitation) and who have committed a serious offence should, in principle, be severely sentenced by imprisonment for rehabilitation.
2. Criminals by nature (intentional offenders) who are recidivists (not frequent and with some chance of rehabilitation) and who have committed a serious offence should, in principle, be sentenced more severely than is usual for such a case (increasing the penalty) where imprisonment is imposed for rehabilitation and in order to remove the offenders from society. Safety measures will be imposed as a supplement.
3. Criminals by nature (intentional offenders) who are frequent recidivists (habitual offenders or instinctive offenders with little chance of rehabilitation) and who have committed a serious offence should,

in principle, be sentenced more severely than is usual for such a case (increasing the penalty) and imprisonment is imposed for rehabilitation and in order to remove the offenders from the society. Safety measures will also be imposed as a supplement.

4. Criminals by nature (intentional offenders) who are first-time offenders (with a good chance of rehabilitation) and who have committed a minor offence should, in principle, be sentenced lightly, without imprisonment, as a means of rehabilitation. Behavioral control is more appropriate (rehabilitation outside prisons), except in some cases where imprisonment is necessary for rehabilitation.
5. Criminals by nature (intentional offenders) who are recidivists (not frequent and with some chance of rehabilitation) and who have committed a minor offence should, in principle, be sentenced more severely than is usual for such a case (increasing the penalty); they should not be imprisoned for rehabilitation (behavioral control should be applied instead), except in some cases where imprisonment is necessary for rehabilitation and removing the offenders from society as is required for safety measures.
6. Criminals by nature (intentional offenders) who are recidivists (habitual offenders or instinctive offenders with little chance of rehabilitation) and who have committed a minor offence should, in principle, be sentenced more severely than is usual for such a case (increasing the penalty) and imprisonment is imposed for rehabilitation and in order to remove the offenders from society. Safety measures will also be imposed as a supplement.

Criminals by mistake are described as negligent criminals and provoked criminals.

Negligent criminals

1. Negligent criminals/offenders who commit first-time serious offences (with a good chance of rehabilitation) should, in principle, be severely sentenced by imprisonment as a means of rehabilitation, except in cases where imprisonment is unnecessary, such as where reasonable compensation has been paid.

2. Negligent recidivists who commit serious offences (not frequent and with some chance of rehabilitation) should, in principle, be sentenced more severely than is usual for such a case with imprisonment as a means of rehabilitation. This should also be supplemented by safety measures, except in some cases where imprisonment is unnecessary for rehabilitation (in which case behavioral control will be imposed instead).

3. Negligent recidivists who are repetitious or habitual offenders (with little chance of rehabilitation) committing serious offences should, in principle, be sentenced at the highest level with imprisonment as a means of rehabilitation and as a supplement for safety measures.

4. Negligent first-time offenders (with a good chance of rehabilitation) committing minor offences should, in principle, be sentenced lightly without imprisonment as a means of rehabilitation (behavioral control is preferred).

5. Negligent recidivists committing minor offences (not frequent and with some chance of rehabilitation) should, in principle, be more severely sentenced than is usual for such a case and without imprisonment as a means of rehabilitation (behavioral control is preferred), except in some cases where imprisonment may be imposed for rehabilitation as supplemented by safety measures.

6. Negligent recidivists (with little chance of rehabilitation) committing minor offences should, in principle, be sentenced more severely than is usual

for such a case with imprisonment as a means of rehabilitation as supplemented by safety measures.

Provoked criminals

1. First-time provoked criminals/offenders (with a good chance of rehabilitation) committing serious offences, should, in principle, be sentenced to a reasonably severe penalty with imprisonment as a means of rehabilitation, except for some cases where penalties may be reduced, without the need for imprisonment, when it appears that the offender was severely intimidated or the victim greatly contributed to the cause of the offence.

2. Provoked recidivists (not frequent and with some chance of rehabilitation) committing serious offences should, in principle, be sentenced to a harsher penalty than is usual (maybe with an increase in penalty), with imprisonment as a means of rehabilitation as a supplement to safety measures. In some cases, imprisonment may not be necessary (rehabilitation by behavioral control may be preferred).

3. Provoked repetitious or habitual recidivists (with little chance of rehabilitation) committing very serious offences should, in principle, be sentenced to a harsher penalty than is usual (with an increase in penalty) with imprisonment as a means of rehabilitation and removal of the offender from society as a supplement for safety measures.

4. First-time provoked offenders (with a good chance of rehabilitation) who commit a minor offence should, in principle, be sentenced lightly without imprisonment as a means of rehabilitation and where behavioral control is to be preferred.

5. Provoked recidivists (not frequent and with some chance of rehabilitation) committing minor offences should, in principle, be sentenced to a harsher penalty than is usual without imprisonment as a means of rehabilitation (behavioral control is preferred), except in some cases where imprisonment is necessary for rehabilitation as a supplement for safety measures.

6. Provoked habitual recidivists (with little chance of rehabilitation) committing minor offences should, in principle, be sentenced to a harsher penalty than is usual for such cases (increase of penalty) with imprisonment as a means of rehabilitation as a supplement for safety measures.

For those recidivists who commit different offences, both intentionally and negligently, judges usually consider that a harsher penalty should be given after the third offence is committed.

Recommendations

The findings from this research suggest the need for a more efficient sentencing system in Thai courts. Various aspects have been derived from this study:

Responsible agencies: Agencies responsible for the enforcement of judgments and court orders, in accordance with the provisions of law on criminal sentencing, must be efficient. Existing agencies related to the execution of judgments and court orders in the sentencing process, such as the Department of Probation and the Department of Corrections should have a clear plan for implementation and readiness in terms of personnel, premises, equipment, and budgets so that an efficient operation concerning judgment or court order, which is acceptable to society, can be made. A probation officer, for example, should carry out his duties diligently and faithfully and report his investigations and behavioral control results accurately. This would generate trust in the judge and the data obtained. The probation officer should also carry out the investigations speedily in order that sentencing may be made in as short time as possible.

Personnel resources: Research findings suggest that judges should be acquainted with criminology and penology and be soundly concerned with the significance of sentencing. Variations in sentencing and sentencing concepts are consequences of the differences in experience

and learning of each judge and an inadequate knowledge of the basic principles. Discretion in sentencing cannot be exercised consistently by different judges, which results in differences in sentencing both by the same court and between the First Instance and Appeal Courts. As a result, more sentencing appeals are sent to the Appeal Courts. The researcher considers that there should be a provision in the law that lays down general principles for the exercise of discretion in sentencing. This principle should state the factors that a court should consider in order to provide a framework for Thai courts to, accurately and consistently, exercise their discretion in sentencing.

Operation system for sentencing: The offender's background history should be of greater importance than the severity of the case in the consideration of sentencing. The facts about the offender's background history would suggest whether such offence was the offender's first offence or a repeated one as well as the root cause of the offence and the circumstances and environment of the offender so that an appropriate sentence would be given. Instinctive offenders with little chance of rehabilitation will accordingly be imprisoned for a long period of time to prevent them from causing trouble to society. The offender's background history is also important for punishment system within the prison, for a different treatment may be imposed on criminal offenders as compared to negligent offenders. An inquiry or an investigation of the facts by the court and the probation officer should be undertaken speedily so that the facts obtained may be immediately applied to sentencing, once the case is concluded and the court convicts the offender. This enables the speedy execution of punishments, which effectively acts as a deterrent and preventative effect, in line with law enforcement theory.

Information on the offenders: Such information should be complete and be easily and accurately retrieved. A readily accessed network

should be established between judicial agencies and other related agencies, including within each court agency within each court in order that a more efficient judicial system may be established. The information, for example, can be used as evidence in the prosecution, a plea for increasing the penalty or for the court to impose a heavier penalty. A reform of the Thai sentencing system should, therefore, start as a reform of the information system on offenders. This is of the greatest priority, since it will have an effect on the differentiation between the treatment of criminal and negligent offenders. This has always been a problem for the Thai judicial process and has been neglected for a long time. It needs to be modified for greater efficiency.

The sentencing system: The following reforms should be imposed on the system of penalty reduction in prisons, pursuant to sentencing in the courts: (1) offenders who are not instinctive criminals or first-time serious offenders should be given an opportunity to earn remission by acquiring a reduced penalty, such as a suspension of punishment; (2) offenders who are instinctive criminals such as recidivists should not be entitled to a reduction in penalties so that the offender will bear the sentence imposed by the court; nevertheless, the system of penalty reduction should be retained as an incentive for the benefit of administering offenders in this category; (3) habitual recidivists or instinctive offenders or professional criminals should acquire a minimal reduction in penalty, compared to offenders in other categories. Offenders who are instinctively evil and are a threat to society should not be given a reduction in penalty for the sake of the society's safety. Prisons for these offenders should be heavily fortified with officers, in suitable numbers and with a stringent safety system, to prevent an escape of these offenders, who are pressurized by the loss of hope for freedom in the outside world.

Sentencing should not rely solely on sentencing guidelines (Yee-Tok). The current scale of penalties applies penalties that are appropriate only to the offence, since they only consider one aspect of the case, such as facts on the circumstances of the case, like the severity of the offence, the damage caused, elements of the offence, weapons used in the offence and damage to property. The other aspect, the appropriateness for the offender, is not provided for in the scale of penalties. Sentencing which does not combine the two aspects of appropriateness for the offence and the offender lacks completeness and is inconsistent with the philosophy of criminology or punishment theories.

Legal issues: Certain provisions of the Penal Code that are related to penalty rates should be modified for greater appropriateness to the nature of each offence. The gap in minimum and maximum penalties should be widened to allow a greater discretion in the sentencing of each offender. An example is the Penal Code (section 288) which provides that a person who kills another shall be liable to execution, life imprisonment or imprisonment of between fifteen and twenty years. It may be observed that there is a wide gap between life and fifteen to twenty year imprisonments and an insufficient gap between the maximum and minimum penalties of only five years. Hence, the court may be unable to sentence appropriately. Moreover, another problem encountered is the provision of only one penalty for an offence, such as the Penal Code (section 297) which provides the penalty of imprisonment from six months to ten years without a fine for the offence of causing grievous bodily harm, which if a discretion is conferred on by the courts, it is possible that no penalties will be imposed at all. This can be contrasted to section 295; the offence of battery, a lighter offence, where discretion exercised by the courts may impose a fine on the offender. The researcher considers this to be a problem in enacting

legislation and if the offence under section 297 is a result of the offence under 295, the penalty provided for the latter offence should be equally applicable to the former. The law should provide the court with the power to impose an indeterminate range of penalty rates, such as specifying maximum and minimum period of time for punishment, in order to aid the correction of offenders in terms that may be more flexible and may be changed according to behavior of each individual offender. In addition, the provisions of the Probation Procedure Act of the Penal Code, B.E. 2522 should be modified to confer on the courts the power to order an investigation in every case.

Forms of the punishment: Law should provide more forms of punishment than is available at present in order to allow the courts to exercise their discretion in sentencing more appropriately for the offence and offenders. An example is weekend imprisonment, victim compensation, and residential detention or boot camps.

If the sentencing process can be developed in accordance with these research findings, the courts' exercise of discretion will be more efficiently performed. This may result in a reduction of crime. Fewer cases of inappropriate sentencing would be appealed to the appellate courts. It is, therefore, held that more limitations are imposed on the ability to appeal sentencing problems to the Court of Appeal and the Supreme Court. Sentencing by the Courts of First Instance would be more satisfactory, reducing the causes, which result in cases reaching the Court of Appeal and the Supreme Court. If the law is not altered, the parties will continue to rely on their rights to appeal even in cases without reasonable grounds.

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