

An Economic Analysis of the Thai Criminal Justice System*

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1. INTRODUCTION

The Thai criminal justice system is fraught with problems of inefficiency in many parts of its process. Each year Thai courts receive many more cases than they can decide, leaving a growing backlog of undecided cases (Figure 1). The number of imprisoned convicts is roughly 170 percent more than the carrying capacity of prisons. However, these overloads are not the result of a lack of resources. By international standards, the Thai criminal justice system consumes relatively more resources in terms of budget and personnel than that of many other countries (Figures 2 and 3).

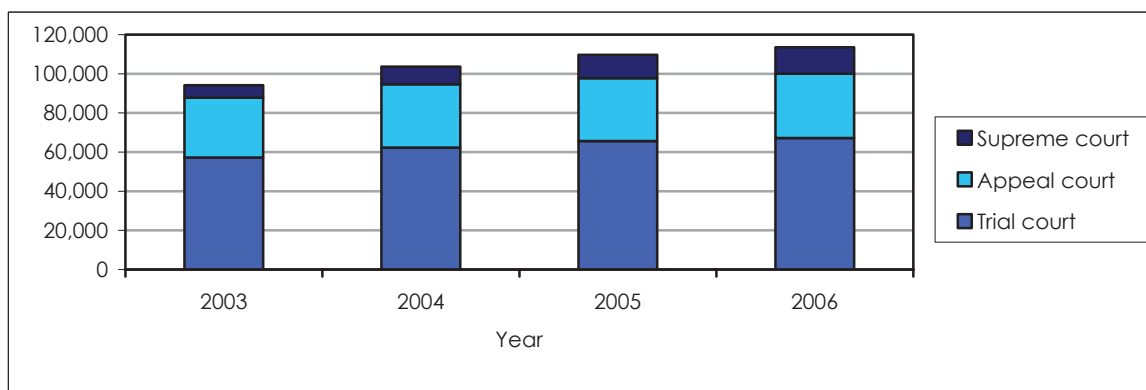
There are many ongoing initiatives to streamline the criminal procedures. For example, the court has introduced a system of continuous case hearings.

The Ministry of Justice has promoted the use of alternative dispute resolution, “community justice” and “restorative justice.” Useful as they are, these initiatives have so far been unable to significantly reduce the inefficiencies in the criminal justice system.

While most legal scholars and practitioners engaged in system reform put a lot of weight on the issues of accessibility to and fairness of the criminal justice system, few pay much attention to the efficiency of the system. We argue that, unless the system is reformed for greater efficient, accessibility and fairness would be of limited value. As the saying goes: “justice delayed is justice denied.”

In this article, we argue that an economic analysis of the criminal justice system can provide fresh insights into the problem and offer new perspectives for possible solutions.

Figure 1 Number of Cases Pending Decision in the Courts

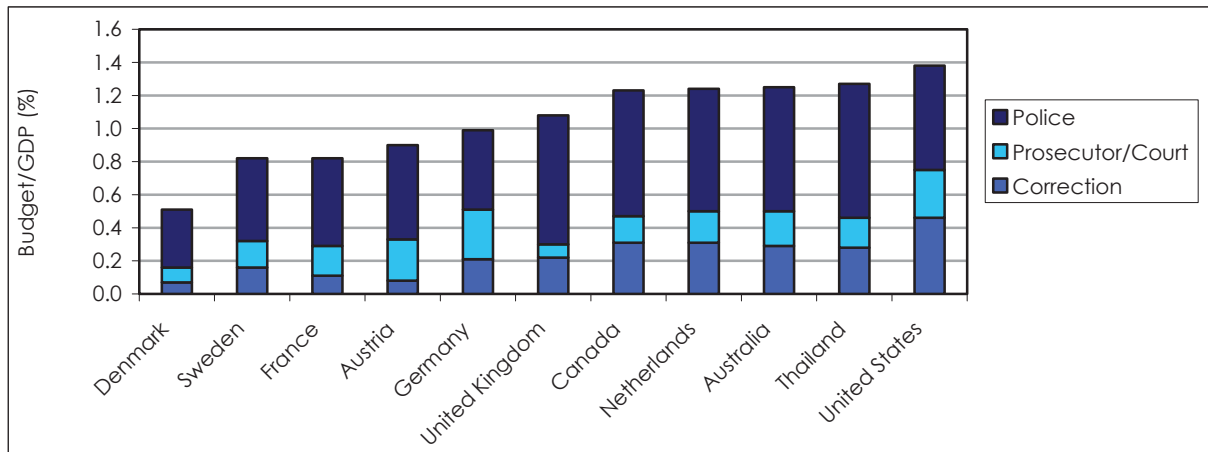


Source: Office of the Court of Justice.

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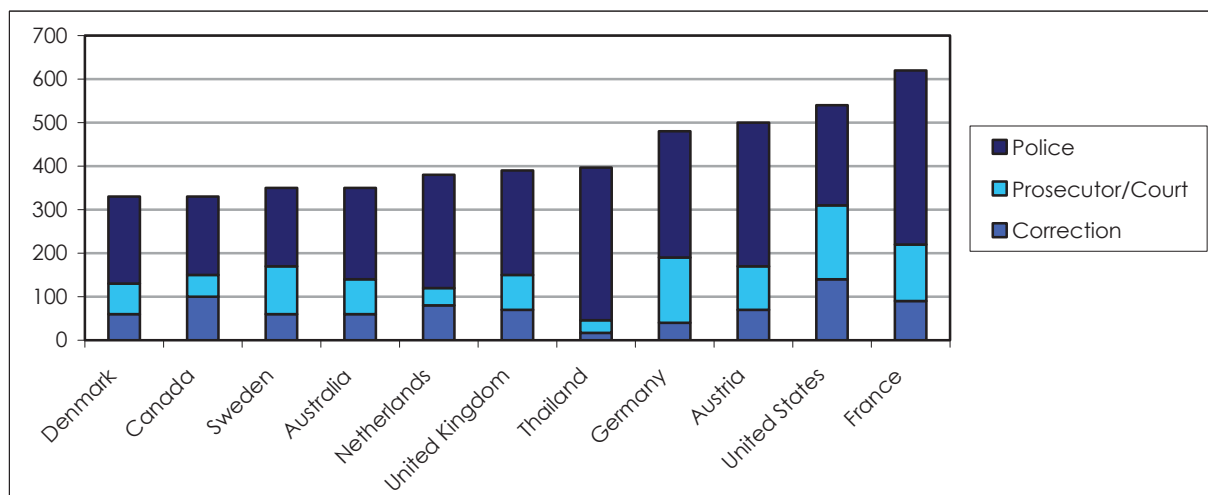
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Figure 2 Comparison of Budget of Criminal Justice Systems



Sources: Bureau of the Budget (for Thailand) and Social and Cultural Planning Office (2004) (for other countries).

Figure 3 Comparison of Number of Personnel in Criminal Justice Systems (per 100,000 population)



Sources: Bureau of the Budget (for Thailand) and Social and Cultural Planning Office (2004) (for other countries).

2. THE ECONOMIC APPROACH TO LAW ENFORCEMENT

The approach taken in this article is that of economic analysis of law, pioneered by Gary Becker and Richard Posner of the University of Chicago. This approach seeks to identify the effects of legal rules, both substantive and procedural, on the behaviors of relevant actors and determine whether these effects are socially desirable (Polinsky and Shavell 2008). In most analyses, it is generally assumed that individuals are forward looking and attempting to maximize their own interests. From this perspective, people commit offenses if they expect the benefits from them to exceed the benefits they could obtain by using their time and other resources to perform other activities. Some persons become “criminals” therefore not because their basic motivation differs from that of others, but because their perceived benefits and costs differ.

Enforcement of civil laws, such as contract or tort laws, is essentially private in nature, whereas criminal laws are publicly enforced. In other words, in cases of civil law, a private party brings a lawsuit to the court and bears the cost of his or her legal action. In cases of criminal law, however, the state, represented by state attorneys, becomes a party to the case and thus bears a significant part of the cost. From an economic perspective, if a dispute that is private in nature is allowed to be settled criminally, the plaintiffs would have an incentive to overuse the justice system by initiating more lawsuits than necessary since they would not have to bear the full cost of their actions.

Similar to the traditional legal approach, the economic approach assumes that crime prevention can be achieved through monetary and non-monetary sanctions that are strong enough to convince potential offenders that criminal activities are not attractive. However, the economic approach also provides fresh

insights into the nature of costs and benefits of monetary sanctions (e.g., fines) and non-monetary sanctions (e.g., imprisonment, banishment, restrictions on movement and occupation, and capital punishment).

From the economic perspective, criminal activities cause many losses for society. The losses include the damage to the victim, the costs of law enforcement, including the costs of apprehension and conviction of offenders, and the costs of carrying out the punishment imposed. According to Becker (1968), the optimal level of law enforcement and punishment is the one that minimizes the sum of these losses to society.

A key major insight of the economic approach is that monetary sanctions such as fines are superior to non-monetary ones in many ways. Aside from small collection costs, the social cost of fines is about zero, as they are just transfers from the convicted offenders to the public. Fines also have another advantage over imprisonment in that, while still furnishing deterrence effects, they do not deprive the convicted offenders of freedom and attach social stigma to them. As a result, they do not have the negative effects of excluding the offenders from current and future labor market and disrupting economic activities. On the other hand, the cost of imprisonment can be very high, as it comprises the sum of the earnings foregone, the value placed on the restrictions on consumption and freedom, and the social costs of stigmatization.

3. KEY PROBLEMS OF THE THAI CRIMINAL JUSTICE SYSTEM

From an economic perspective, we believe that the inefficiencies of Thailand's current criminal justice system are a result of two major problems: (a) systematic biases toward criminal proceedings over civil ones, and (b) the underutilization of monetary sanctions.

A. Systematic Biases toward Criminal Proceedings

Based on our analysis, the Thai legal system leans too much toward criminal proceedings even in cases where civil proceedings would be applicable. This is due to four factors.

First, there are more than 350 statutes in the Thai legal system that contain provisions for criminal sanctions, the most important of which is the Penal Code. It provides criminal sanctions for a wide range of activities, such as offences against bodies, property and the state. These are considered standard criminal activities in most countries. Unlike in many countries, however, the Code in Thailand also includes defamation as a cause for a criminal action. In addition, there are a number of activities that are of a private nature but are defined by other statutes to be criminal. For example, issuing "bouncing" or "rubber" checks as instruments for payment constitutes a criminal action under the Wrongful Acts related to the Cheque Act.

Second, as in other countries, criminal activities that involve tortuous actions can expose the offenders to civil liability. When cases are pursued in both the civil and the criminal courts simultaneously, the Criminal Procedural Code requires that the civil courts consider their cases only after the facts related to the criminal cases have been settled. Thus, criminal cases are accorded higher priority than the related civil ones.

Third, most economic regulatory bodies, such as the Trade Competition Commission, the National Telecommunications Commission and the Stock Exchange Commission, are designed to enforce their laws mainly by using criminal sanctions. Even though administrative measures have gradually been introduced, criminal sanctions remain the predominant tools for law enforcement.

Finally, driven by outmoded theories of criminalology, convicted offenders in many cases, most importantly in cases involving illicit drugs, are treated by the law as "criminals," rather than as "victims." As in the United States, such drugs-related "criminals" constitute a large portion of the population in Thai prisons.

B. Underutilization of Monetary Sanctions

Another problem in the Thai criminal justice system lies in the way that monetary sanctions, i.e., fines, are imposed. Even though almost all statutes provide judges with a choice of imposing imprisonment or fines, or both, on convicted offenders, our study finds that imprisonment has been the predominant mode of sanction (see Table 1). Fines are used only in cases involving minor criminal offenses, such as gambling, or in combination with suspended imprisonment. The reason appears to be that maximal fines are fixed by laws in absolute terms and thus cannot be increased without first going through a time-consuming legislative process. Unsurprisingly, most fines were never adjusted after the laws had been enacted. For example, almost all maximal fines in the Penal Code were established in 1956 and remain at their original levels until now. As a result, after 54 years of implementation, the inflation-adjusted levels of fines in the Code have shrunk to one-eighth of their original levels. Thus, fines have become increasingly ineffective measures, making imprisonment the only means of applying credible sanctions.

4. CONCLUDING REMARKS

From an economic perspective, the inability of the Thai criminal justice system to respond to the increasing demands being placed on it is caused largely by the adverse incentives generated by the current substantive and procedural rules embedded in the law. Based on the above analysis, we propose the following policy recommendations to enhance the efficiency of the Thai criminal justice system:

Table 1 Percentage of Trial Court Decisions in Selected Criminal Cases (2003-2008)

	Using bouncing check	Defamation	Stealing	Gambling	Violating traffic laws	Possessing unauthorized guns	Using or dealing in illicit drugs	Causing bodily harms
(1) All cases	52	58	52	50	51	53	53	56
(2) Convict and punishment cases	15	1	45	50	51	52	33	52
(a) Capital punishment	0	0	0	0	0	0	1	0
(b) Imprisonment	15	0	33	0	0	19	9	27
(c) Imprisonment and fines	0	0	0	0	0	0	20	0
(d) Suspended imprisonment	0	0	0	0	0	0	0	19
(e) Suspended imprisonment and fines	0	1	12	12	51	25	3	5
(f) Fines	0	0	0	38	0	7	0	0
Percentage of cases with imprisonment and suspended imprisonment in total convicted cases	100.0	100.0	100.0	24.0	100.0	84.6	97.0	98.1

Source: Authors' calculation.

- (a) Attempts should be made to decriminalize offenses that are private in nature, e.g., defamation, the use of so-called bouncing checks, and minor infringements of intellectual property rights. Regulatory bodies are also encouraged to replace criminal sanctions with administrative measures, when appropriate;
- (b) To make fines a credible alternative to imprisonment, the levels of maximal fines set by the law should be adjusted upward to account for past inflation. In addition, they should be indexed to the inflation rate so that in the future they would keep pace with inflation without having to go through lengthy legislative processes;
- (c) Attempts should be made to divert cases to be settled out of court at various stages in criminal procedures, i.e., during the investigation stage by the police, the prosecution

phase by the state attorneys and before the preliminary examinations by the courts. The conditions for appealing to the court of appeal and the supreme court should also be made more stringent in order to reduce the number of frivolous appeals.

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