A SHORT HISTORY OF THAI CRIMINAL LAW SINCE THE NINETEENTH CENTURY

Like many other Southeast Asian nations, Thailand was exposed to western legal influence as a result of western colonialism in the nineteenth century. This led to the seven-century old indigenous legal system being displaced by a westernized legal system.

This article surveys the historical development of Thai criminal law since the nineteenth century, especially the importation of western concepts of criminal law at the turn of the century. A comparative survey of the ways in which western criminal law was received by several eastern countries during the colonial era provides a backdrop for a critique of the Thai experience. The article then proceeds to survey the subsequent developments in Thai criminal law, and concludes by advocating the indigenization of modern Thai criminal law.

I. INTRODUCTION

THAILAND (formerly Siam) is one of the Southeast Asian nations in which both eastern and western concepts of law are intermingled. Such a condition is evidently more prevalent in this region than anywhere else in the east because, here, ancient Indian and Chinese cultures were intermingled with local cultures,[1] long before the introduction of western civilization in the eighteenth century.

In the late nineteenth century, King Chulalongkorn of Thailand led the country to adopt the western course of development and a western legal system whilst neighbouring countries fell prey to colonialism.[2] Although no conclusive evidence is available to explain why Thailand, under such a remarkable ruler, embraced westernization, two major reasons emerge as the apparent basic causes for such a change. First, voluntary adoption of western laws preserved national autonomy and evaded the colonial powers' claim of extraterritorial jurisdiction. Second, it was felt that westernization would help Thailand to reach developmental goals such as industrialization, national unification and social welfare.[3]

[1] Some anthropologists assert that Southeast Asia has its own distinctive culture. See *Southeast Asia in the Modern World* (Grossman, ed. 1972), p. 9. Charles Fisher also points out: "Southeast Asia must be accounted as a distinctive region within the larger unity of the Monsoon Lands as a whole, and worthy to be ranked as an intelligible field of study (on) its own account."

[2] In this regard, Kenneth Landon wrote: "King Chulalongkorn ruled from 1868 to 1910 under the title Phra Chula-Chom Klao. He is recognized by the Siamese as one of their greatest historical figures. Under his rule progressive steps were taken to adjust Siam to a new way of life. The old feudal system was gradually abandoned and a civil service was organized for the administration of the nation. Slavery was abolished, the judicial system was revised,____" Landon, *Siam in Transition,* (1968), pp. 6-7.

[3] Thailand was able to eliminate extraterritoriality upon the completion of her law reforms in accordance with western jurisprudence. See, for example, *Thailand Official Yearbook of 1968,* pp. 267-68, which contains a brief account of this event.

As a result of westernization, the indigenous concept of the law as a secret science known only to judges was discarded as the country prepared for new law codes. Government officials, as well as students, were sent abroad to Europe to familiarize themselves with western legal systems.[4] Consequently, the first law code was promulgated in 1908. This was the first Penal Code of Siam.[5] Later, the Criminal Procedure Code and the Civil and Commercial Code were introduced along with other laws necessary to establish a western system of justice.[6] Penal institutions, similar to those in western countries, were adopted as necessary parts of the system. The police system was also geared toward centralization and westernization to the greatest extent possible.[7]

Although Thailand underwent westernization in the nineteenth century, she is also a country with a long history of an established indigenous legal system. There is evidence which indicates that the indigenous system had been utilized since the thirteenth century.[8] The following century, this developed legal system was revised. Since then, all the laws had been codified. The final indigenous law reform was the codification of all the laws of the land hi the early nineteenth century which resulted in the Law Code of 1805.[9] The indigenous legal system was not entirely replaced until the early twentieth century.[10]

The essence of the early Thai law is *dharmasastra* or *thammasat,* which is sometimes equated with the Code of Manu, and is of Hindu origin. The Thai *thammasat,* however, is not identical to the Hindu original. It developed in response to the needs and beliefs of the Thai people.[11] Moreover, during the thirteenth century, Chinese culture from the north was also introduced as a result of trade between the two countries.[12] The Thai *thammasat,* or the Thai version of *dharmasastra* is, in effect, a blend of Hinduism, Buddhism, ethnic beliefs and attitudes. Even though this early legal system is somewhat

4 Landon, *supra,* note 2 at p. 7.

5 A Royal Commission on Codification had been set up in 1897. The Commission, the first of its kind in Thailand involving the new legal thinking, had been presided over by the then Minister of Justice, Prince Rabi of Rajburi. It has been pointed out that ". .. under the direction of this keen young lawyer-prince, systematic preparations for the proposed codification were vigorously and successfully carried out.": *Thailand Official Yearbook of 1968,* at p. 255.

6 See *ibid.*, at pp. 259-95, for the history of these codes.

7 See *ibid.*, at pp. 298-310 and 338-59.

8 The discovery of a stone inscription from the Sukothai period (1275-1350) bearing part of an enactment of unmistakenly Hindu origin reveals that Hindu jurisprudence must have formed the basis of the ancient Thai legal system during or even before 1257: see *ibid,* at p. 253.

9 Commonly known as the Law of Three Great Seals, this Code contained the principles of *thammasat* as well as royal decrees and edicts. The Code of 1805 remained applicable throughout the Kingdom for 103 years, see *ibid.*

10 It may be stated here that the promulgation of the Penal Code of 1908 marked the end of the indigenous legal system.

11 See *ibid.*, at pp. 251-52.

12 Some historians point out that the Siamese are a branch of the Thai people, who formerly lived north of the Yangtze River in the comparatively small area which today constitutes Szechwan Province in western China: see Landon, *supra,* note 4, at p. 1. Recently, this theory has been challenged. But the Chinese influence in the northern part of Thailand is prevalent.

mysterious in the eyes of western scholars,[13] it has been refined and tested for more than seven hundred years.

Thailand today is a developing country with many problems which are the result of the attempt to modernize with western technology. Modernization has brought burdens as well as blessings. Crime rates have been escalating during the past decade. Many social and environmental problems have been created as a result of the attempt to import modern technology. Clearly, the indigenous legal system of Thailand as described above would not be suitable for the present day situation. However, disregarding all ancient details, its general principles and concepts might not be totally worthless or irrelevant. Seven hundred years of history and efficacy might prove that the indigenous system reflects the convictions of the Thai people, and is thus invaluable to the development of Thailand. If indigenous Thai concepts also coincide with those of other countries, then they should be seriously considered and not be denied.

This article surveys the historical development of Thai criminal law, particularly, Thailand's importation of "modern" or "western" concepts of criminal law at the turn of the twentieth century. The article begins with a comparative survey of the ways in which western criminal law was received by several eastern countries during the colonial era. This sets the background for an examination and critique of the Thai experience. To complete the picture, the article moves on to survey the subsequent developments of Thai criminal law and ends by urging Thai law-makers to indigenize modern Thai criminal law.

II. THE RECEPTION OF WESTERN CRIMINAL LAW IN THE COLONIAL ERA

From the Thai (i.e.. the non-western) viewpoint, the reception of western criminal law in the colonial era may be said to fall into two categories: direct reception in the case of territorial annexation, and indirect reception in the case of extraterritoriality and capitulation.[14]

(1) *Direct Reception*

In this instance, the criminal law of the colonies was determined by the laws of the ruling power, which had "superior political authority".[15] Imperial law was introduced either *en bloc* or with some modifications for the purpose of administrative convenience. The Philippines, for example, were colonized by Spain in 1521. Spanish law (which included medieval Spanish law, Roman and Teutonic laws) was then imposed. When the movement for the scientific codification of the laws of Spain was completed, most of the codes and special laws promulgated in Spain during the period from 1810 to 1820 were extended to the Philippines. The Spanish Penal Code of 1780 in fact came into force in the Philippines on July 14, 1887.[16]

13 See, for example, V. Thompson, *Thailand, The New Siam* (1941), p. 267.
14 This categorization is tentative rather than conclusive.
15 See in general, M.B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-colonial Laws* (1975).
16 See, M.J. Gamboa, *An Introduction to Philippines Law* (6th ed. 1955), pp. 80-82, 86.

In India, the attempt to change the indigenous Muhammedan criminal law operating there during the eighteenth century occurred gradually. It began in 1722 when Warren Hastings, the British administrator, decided to interfere with the indigenous criminal law.[17] From that period to the mid-nineteenth century, the criminal law of India under British rule was subjected to many changes and reforms. Many British legal concepts were introduced *e.g.,* intent, preventive detention, and bail. In the area of definition of crimes, many new crimes were also created *e.g.,* infanticide, hostility to the British government, etc.[18]

The reception of western criminal law as a result of colonialism was designed primarily to enforce the new priorities.[19] Since the colonies had to adapt to the new type of social system, the indigenous law had to be changed, either in whole or in part, so that the life-style of the people would be compatible with western values and concepts of society, property and the modern capitalist economy. Western concepts of crime, such as crimes against property and crimes against trade and business regulations, were imported so that the new concepts of a modern economy would be enhanced.[20] To illustrate this point, we see, in the case of India, evidence of colonial criminal law created to deal with the new crimes which originated from the introduction of a modern economy. These crimes incurred severe penalties. The Thagi Act, for example, provided for life imprisonment with hard labour.[21] In the area of dacoity, more stringent penalties were imposed on the perpetrators, as well as forfeiture of estates or farms of the person harbouring or assisting any proclaimed dacoit.[22] Laotian penal law is another example of the enforcement of modern economic priorities. M. B. Hooker points out that such economic necessity resulted in peculiar and revealing penal provisions:

> In Laos the Penal Code of 1908 contained strange provisions; for example, it punishes theft by forced labour for a period of 15-20 years, while imposing a fine of only 50 piastres for assault on a wife or 14 piastres for rape.[23]

17 See T.K. Bannergee, *Background to Indian Criminal Law* (1967) p. 68.

18 See *ibid*., at pp. 71-129.

19 Most eastern criminal laws do not have provisions to deal with modern capitalist economies. For example, the Thai Three Great Seals Code of 1804 had some provisions touching on commercial matters such as tax evasion and other trade matters, but the new Penal Code of 1908 devoted an entire chapter (Chapter Five) to offences concerning false money *(i.e.,* coins, currency notes, banknotes, bonds, or certificates of debt, coupons or certificates of interest). The old Ottoman criminal law also dealt to a certain extent with trade regulations. For instance, it covered "market delict", the most important form of which was selling at a price higher than the official maximum market price. However, this rule was clearly incompatible with free market ideas. See Heyd, *Studies in Old Ottoman Criminal Law* (V.L. Menage ed. 1973), pp. 230-31.

20 There was much evidence of attempts to use criminal law for administrative convenience and to suppress the local people. Accounts of various incidents involving the struggles for independence among those colonies are abundant. See for example, Easton, *The Rise and Fall of Western Colonialism: A Historical Survey from the Early Nineteenth Century to the Present* (1964); Emerson, "Colonialism: Political Aspects", 3 International Encyclopedia of Social Sc. 1.

21 Bannergee, *supra,* note 17, at p. 112.

22 *Ibid*., at p. 88.

23 M.B. Hooker, *A Concise Legal History of Southeast Asia* (1978), p. 163.

The attempt to diffuse western criminal law into colonial territories produced different types of legal systems, sprinkled with bits and pieces of indigenous as well as western legal concepts. There is no uniformity among these hybrids regarding the extent to which western concepts prevail. What they do share in common, however, is the fact that these new hybrids of law were often confusing to the local people. More often than not, they failed to persuade the local people to adopt the new political, economic and social priorities which these laws fostered. In some instances, the colonial criminal laws were thought of as a valuable heritage of colonialism. More often, however, they were regarded as evil consequences of colonialism. Such an attitude is rooted in the fact that the ancient civilizations, history, and legal cultures of the eastern world differ fundamentally from those of the western world. As David and Brierley rightly observe:

> [T]he Romano-Germanic, the Socialist and the Common law... are closely linked to the development of European civilization. They reflect a way of thinking and living which is European; they express ideas and embody institutions which have been formed in the European cultural and historical context. Their adoption in America offered almost no difficulties because no indigenous civilization could rival them. The only problem was to adapt them to a different geographical milieu.
>
> It has been altogether different in Asia and Africa, as well as Indonesia. Here European penetration did not take place in uninhabited areas as in America, or where there the existing population was ready to accept the European way of life as superior. In Asia, particularly, there was a vast population already established with forms of civilization which could not be considered inferior to that of the West. In a large part of Africa and Asia the indigenous civilizations also had religious beliefs which could to a certain extent block the reception of western laws and legal concepts. How have traditional conceptions of law in these countries and European conceptions been harmonized, and with what success?
>
> ... The time has passed when it can be thought that the only valid way of thinking is that known to the West.[24]

(2) *Indirect Reception*

Western law also diffused into the eastern world as a result of the exercise of "capitulatory" and extraterritorial rights by the western colonial powers.

Since the beginning of the sixteenth century, the world has witnessed the evolution of the regime created by the western world to facilitate mercantilism and later to subjugate the non-western world politically and economically. In the Far East, this regime was called "extraterritoriality", and in the Near East, it was called "capitula-

[24] R. David and J. Brierley, *Major Legal Systems of the World Today* (2nd ed. 1978), pp. 419-20.

tion".[25] Although the regime originated among European nations in ancient times, it has evolved into different forms over the passage of time.[26] Extraterritoriality, the older form of the regime, was utilized to honour foreign diplomats and facilitate international trade. However, through capitulation, the newer form of the regime,[27] the western countries practised imperialism, using the ancient justification of opening the independent eastern countries to free trade to force them to accept imported goods, to regulate their tariffs, and to prevent those countries from interfering with colonial economic and political interests. By exempting the subjects of the colonial powers from local legal control, their political, economical and social privileges were guaranteed.

Extraterritorial and capitulatory regimes were the instruments which enabled western laws to operate in foreign territories.[28] Indigenous legal systems received western law through the exercise of such rights. To be more precise, such rights permitted the extraterritorial operation of laws *i.e.,* "their operation upon persons, rights, or jural relations, existing beyond the limits of the enacting state or nation, but still amenable to its laws".[29] Exemptions granted to foreign diplomatic agents, warships and similar entities, from the obligations of the laws of a state were also among those rights.

[25] Keeton explains that the basic rationale for the ancient form of extraterritoriality was mainly because of religious differences: see Keeton, "Extraterritoriality in International and Comparative Law", Academe de Droit International, Recueil Des Cours. (I) Tome 72 (1948), p. 290. In ancient Greece, for example, aliens' legal affairs were committed to the care of *proxinoi* whose functions were similar to those of consuls in the early 20th century. During that time, the rules applied were commercial customs: see *ibid*., at pp. 287-89. It is agreed that the ancient extraterritorial system was characterized as having been more or less recipiocal or mutual in character, as having depended upon custom and usage for its execution, and as having owed its existence to the early political concepts and structure of society: see Sousa, *The Capitulatory Regime of Turkey: Its History, Origin, and Nature* (1933), p. 156.

[26] Extraterritoriality between European states existed until 1713: see Keeton, *supra,* note 25 at p. 294. It was given up for many reasons: (a) "Western nations began to feel jealous of their territorial integrity and sovereign system": Sousa, *supra,* note 25 at p. 158; see also, Keeton, *supra,* note 25 at pp. 293-94; (b) mercantile law as incorporated into the national law of the European states; and (c) such exceptions to the national law created difficulties for the host state: see *ibid.*

[27] The modern system of capitulation was a result of the agreement to promote trade, particularly that between western and eastern countries: see *ibid*., at p. 298.

[28] A Turkish scholar points out that the capitulatory regime in Turkey is not different from that of extraterritoriality in China. Both terms presuppose the same meaning: Sousa, *supra,* note 25 at pp. 172-73.

[29] H.C. Black, *Black's Law Dictionary* (5th ed. 1979), p. 528. Jones also states: "Extraterritoriality, then, since it implies jurisdiction as well as immunity, should be clearly distinguished from exterritoriality, or the exemption from all jurisdiction of heads of governments travelling abroad, ambassadors, ministers plenipotentiary, and other persons enjoying special privileges. It also differs from diplomatic protection, or the attempt of a state to safeguard the rights of its citizens abroad through the intervention of its accredited ministers, since such action never takes the form of a claim to jurisdiction.... Hence, only under an extraterritorial *regime* can a state exercise both sovereignty and jurisdiction outside its own territories. This is the distinctive and peculiar feature of extraterritoriality.": Jones, *Extraterritoriality in Japan and the Diplomatic Relations Resulting in Its Abolition 1853-1899* (1970), p. 1.

Extraterritoriality, therefore, is based on the principle that the defendant is sued in the court of his own state according to the law of his own state.[30] It was here that the local people came into contact with the western adjudication system. According to most treaty provisions, a local person could become a party to any civil or criminal case brought before the consular courts.[31] The indigenous system of justice was also disrupted by the fact that its jurisdiction over its own citizens was limited.[32] Eastern communities were thus subjected to a dual system of indigenous law and consular justice.[33]

Siam, Japan, China and Turkey were some of the countries which suffered under western expansionist policies. Colonial powers demanded that these nations grant them extraterritorial and capitulatory rights in order to exploit and dominate them without the need for colonization. Extraterritorial and capitulatory regimes during this period were imposed mostly by force and threats. These regimes were used as tools to exploit the weaker nations politically, economically and socially.[34]

However, the eastern countries soon realized that extraterritoriality and capitulation obstructed their national development.[35] Politically and economically, such regimes impeded the attainment of independence.[36] When neighbouring nations fell prey to colonialism, countries such as Japan, China, Turkey and Thailand, which had their own experiences of extraterritoriality and capitulation, were convinced that their sovereignty was at stake. Although they desired to abrogate

30 See Keeton, *supra,* note 25, at p. 307.

31 Keeton points out an example: "Thus if Great Britain enjoys extra-territorial rights in China, then if a British subject is accused of crime, whether by a foreigner enjoying extraterritorial rights,... or by a Chinese, in each case the British accused will be tried in a British consular court by British criminal law. The same position also exists in a civil case.": *ibid*., p. 312.

32 See The Ministry of Foreign Affairs of Siam, *Siam Case for Revision of Obsolete Treaty,* a paper presented to the Allies after the First World War, advocating the revision of the treaties with western powers, April 7, 1919, p. 8.

33 Even though merits had been claimed for the extraterritorial regime, its abusive and exploitative nature was prevalent during the industrial expansionism of the western powers in the mid-nineteenth century. During this period, colonial practice changed according to the political and economical situation of the western world. At first, there seemed to be a tendency towards free trade when the British, who possessed the only large empire, gradually adopted free-trade practices at home and extended it to their colonies. However, the free-trade era was short-lived because the industrial revolution and imperial expansion during the late nineteenth century led to the revival of protectionism concerning the new tropical empires. This period marked the eastern nations as markets for colonial products as well as the sources of raw materials. Eastern countries were also battlegrounds for the imperial powers.

34 Jones also points out that even though extraterritoriality existed in the West during the past, the modern regime is different from the older regime in many regards. Among other differences is the fact that the older regime originated from mutual consent of the parties involved, whereas the later originated from treaties concluded by the threat of force: see Jones, *supra,* note 29, at pp. 1-4.

35 See, for example, *ibid*., at p. 68.

36 For a detailed account of extraterritoriality, capitulation and national development, see Sousa, *supra,* note 25, at p. 104. In the case of Turkey, economic independence was thought the most important issue. On one occasion it was pointed out that judicial freedom could be delayed over the liberation of the country's economy: see *ibid*., at p. 77.

the treaties with the western powers and thereby eliminate extra-territoriality and capitulation, they were militarily impotent during that period, and could not denounce those treaties at will. Their strategy, therefore, was to abrogate the treaties by convincing the western powers that extraterritoriality and capitulation were not necessary, and that as host states they could provide the same kind of protection for the powers' interests. In order to do so, they had, among other measures, to reform their judicial systems and conform them to those of the western world. In this way, therefore, some eastern countries "voluntarily" adopted western legal systems.

Thus, we see that the second pattern of importation of western criminal law by eastern countries, *viz.* voluntary reception, was caused by the threat of colonization and the desire to compete with the industrialized world.[37] Between the late nineteenth and early twentieth centuries, the threats posed by the western colonial powers, especially France, Great Britain and the Netherlands, were prevalent everywhere in the East. Independent eastern countries such as China, Japan, Thailand and Turkey realized that there was a two-fold benefit from the voluntary acceptance of western law. First, the threat of colonization was avoided by eliminating any excuse for the western powers to gain *de facto* sovereignty over these countries.[38] Second, westernization would lead them to progress in the western sense, thus enabling these countries to compete with the industrialized world. In 1858, Turkey became the first country to enact a westernized Penal Code which was strongly influenced by French law.[39] Japan invited French scholars to draft its Penal Code of 1882,[40] and Thailand imported Belgian and Japanese jurists to draft its Penal Code of 1908.[41]

(3) *The Thai Experience*

There is evidence that western law was used as a means to political ends in the case of Thailand. Francis B. Sayre, the American Advisor of Foreign Affairs to Thailand elucidates the country's early twentieth century predicament:

> Long before the death of King Chulalongkorn in 1910, Siam had sought in every possible way to free herself from the shackles of the treaty restrictions, but in vain. As a small nation she lay at the mercy of the more powerful European states; and

[37] The classification of this type of reception as "voluntary" may not represent the true picture of the process of adoption. Eastern countries adopted western criminal law in the hope of avoiding further western erosion of their national sovereignty. Such adoption was thus dictated by necessity or duress, and was therefore not purely voluntary.

[38] The typical case of such *de facto* sovereignty was British rule in India, which originated from the expansion of the East India Company: see generally, Patra, *The Administration of Justice under the East-India Company in Bengal, Bihar and Orissa* (1963).

[39] See Lipstein, "Conclusion to the Reception of Foreign Law in Turkey," UNESCO, International Social Science Bulletin, Vol. IX, No. 1, Paris (1957), p. 72.

[40] See Noda, *Introduction to Japanese Law* (A.H. Angelo, trans. ed. 1976), p. 45.

[41] See in general, *Thailand Official Yearbook of 1968, supra,* note 3. After a long drafting period, China also finished its draft Penal Code in 1911, but it was never promulgated. See Meijer, *The Introduction of Modern Criminal Law in China* (2nd ed. 1967), p. 124.

> they saw no reason for relinquishing the privileges and advantages which they had secured. By the beginning of the twentieth century apart from special arrangements for some of the northern states, the most Siam has been able to attain were agreements with certain of the treaty Powers to prevent the wholesale creation of *proteges* and to fix definite limits to the groups entitled to foreign protection and exemptions.[42]

The Thai government realized that extraterritoriality could lead to undesirable results; politically, it could lead to colonization, and economically, it could lead to bankruptcy. The political threat was obvious when the country was carved into pieces and put under British and French rule.[43] The country's fiscal independence was hampered by the economic privileges of the western powers and their subjects.[44] To avoid these problems, extraterritoriality had to be abolished.

The westernization of the legal system in Thailand during that time was one of many plans devised for the avoidance of colonization. Thailand intended to prove to the colonial powers that it was capable of conducting its internal affairs in a "civilized" manner; that the Thai government was a government of law according to western standards.[45] The country, therefore, embarked on a path of westernization of its laws and administration. Francis B. Sayre, an American adviser to Siam provides an eyewitness account:

[42] Sayre, "The Passing of Extraterritoriality in Siam", 22 Am. J. of Int'l Law 74.

[43] There is much evidence of the strong French and British threat during that time. See Statson, *Siam's Diplomacy of Independence, 1855-1909, In the Context of Anglo-French Interests,* unpublished doctoral dissertation, Graduate School of Arts and Science, New York University, (1969), pp. 74-75. For a detailed treatment of the conflict between Siam and the Powers regarding extraterritorial jurisdiction, see Owart Suthiwart-Narueput, *The Evolution of Thailand's Foreign Relations since 1855: From Extraterritoriality to Equality,* unpublished Ph. D. thesis, Fletcher School of Law and Diplomacy, (1956).

[44] "By the terms of [the treaty between Siam and Great Britain... not only was opium, the former positive contraband, put on the free list, together with bullion and personal effects, but a limitation of three percent *ad valorem* was imposed upon the duties chargeable upon all other importations, and even in case of dispute as to the value of these goods, Siamese customs officials were deprived of the final voice, and required to call in the British Consul to aid them in reaching a decision. All exports were to be subject to but one duty, whether excise, inland transit, or export duty, and the rate for each article was definitely fixed (according to the then prevailing rates between Siam and China) by schedule attached to the treaty. Nor was this all. The tax upon land held by British citizens was limited to a certain schedule rate, and it was specifically stated that no additional charge or tax of any kind may be imposed upon a British subject, unless it obtain the sanction both of the supreme Siamese authorities and the British Consul. In line with this provision, Siam was forbidden to impose charges for passports or even to collect any of the fines, penalties, etc., levied upon British subjects for infractions of the laws, with the sole exception of those levied for infringement of the liquor and opium regulations.

Similar treaties with only slight modifications were entered into with France, the United States, Italy, Japan, Belgium, Portugal, Russia, The Netherlands, Spain, Sweden, Norway, Denmark, Germany and Austria-Hungary." See Ministry of Foreign Affairs of Siam, *supra,* note 32, pp. 13-14.

[45] Frank C. Darling also notes that the country "faced the paradox that, to free themselves from treaty restrictions imposed by the West, they had to adopt Western legal concepts and institutions.": Darling, "The Evolution of Law in Thailand" (1970) 32 Review of Politics 202 at 204. See also Hall, *A History of Southeast Asia* (1955) pp. 673-674.

> In 1868, with the accession of King Chulalongkorn to the throne of Siam, a new era began. Under the leadership of that remarkable king, telegraphic and mail communication was opened up with foreign countries, slavery abolished, railroads constructed, irrigation projects carried out, water supply systems built, modern hospitals erected, and the whole kingdom transformed and quickened with new life and development. The government of the kingdom was radically and completely reorganized, modern ministries were established, and an efficient system of law courts was set up to administer justice along Western lines.[46]

Thailand also took notice of the fact that Japan had succeeded in persuading the colonial powers to relinquish the extraterritorial system upon the promulgation of the Japanese law codes.[47] Thailand therefore entered into a similar type of treaty with Japan by which Japan was granted extraterritorial jurisdiction provided that such a right was to be terminated when the judicial reform of Siam was completed, that is, when a criminal code, a code of criminal procedure, a civil code (with the exception of a law of marriage and succession), a code of civil procedure and a law of constitution of the courts of justice had come into force.[48] Such a concession to Japan was done merely to provide the framework for the beginning of the abrogation of the extraterritorial regime.[49]

Taking Japan and Turkey as examples, Thailand appointed foreign legal advisers of different nationalities — French, British, Belgian, Japanese and American — to administer the nation's judicial system and to sit in its national courts. The purposes of such appointments were two-fold: firstly, to westernize the system, and secondly, to satisfy the individual powers that their own nationals were dispensing justice in the country.[50]

Foreign legal advisers were first employed in 1895. One of them, Professor Eldon James of Harvard Law School, described his colleagues as follows:

[46] Sayre, *supra,* note 42, at pp. 72-73.

[47] See E.R. James, "Jurisdiction Over Foreigners in Siam", (1922) 16 Am. J. Int'l Law 585 at 594.

[48] Treaty between Siam and Japan dated February 25, 1899: *British and Foreign State Papers,* Vol. 90, p. 66.

[49] Eldon James also points out: "The treaty between Japan and Siam makes the end of consular jurisdiction dependent upon the completion of certain designated reforms of the Siamese legal system upon the accomplishment of which Japanese subjects are to be submitted to the Siamese courts without any guarantees whatever": James, *supra,* note 47, at p. 594. Ironically, Japan herself had suffered under this type of treaty before and there seemed to be no good reason for Japan to be eager to see the westernization of Siamese law. The fact that Japan was the first country to concede its extraterritorial jurisdiction suggests the repugnancy of the regime.

[46] The appointment of foreign judges to the local judicial system was one of the successful steps towards the abolition of the extraterritorial system since it gave rise to the Siamese International Courts which had jurisdiction over the colonial powers' subjects and *proteges.* All judgments of these courts were subject to the right to appeal to the Court of Appeal and the judgments of the Court of Appeal in such cases had to bear the signatures of two European judges: see *ibid.*, at p. 597. This arrangement, however, was an obvious encroachment upon Thai judicial autonomy.

> Mr. R. J. Kirkpatrick, *docteur en droit,* appears in the Bangkok directory for 1895 as Legal Adviser to the Ministry of Justice, which had been reorganized in 1892. In the Directory for 1898, Mr. Kirkpatrick is listed as a judge of the Court of Appeal. The Directory for 1899 gives the names of five Europeans as Assistant Legal Advisers and Mr. Kirkpatrick is stated to be a member of the Supreme Court, In 1900 there were nine foreigners employed as Legal Advisers or Assistant Legal Advisers by the Ministry of Justice. It must not be forgotten that in 1892 and for ten years thereafter the Siamese Government had the services of M. Rolin Jaequemyns, a distinguished Belgian jurist, as General Adviser. He was succeeded in 1902 by Professor Edward H. Strobel, then Bemis Professor of International Law in the Harvard Law School, who died in Siam in 1908. Professor Strobel's successor was Professor Jens I. Westengard, also of the Harvard Law School. Professor Westengard served as General Adviser until his retirement in 1915. Mr. Wolcott H. Pitkin was then appointed Adviser in Foreign Affairs and served for two years. Mr. Pitkin was a graduate of the Harvard Law School and had been Attorney General of Porto Rico.[51]

It is clear that these foreign legal advisers played a significant role in the later abrogation of the extraterritorial regime in Thailand and thereby saved the country's independence. Statson, for example, points out that without the assistance of the neutral foreign advisers, Thailand would have been unevenly matched against the experienced lawyers of the western powers in negotiating the revision of the unequal treaties. One example drawn from the negotiations with Great Britain proved his point:

> The British were represented in Siam by diplomats Stringer, Beckett, Archer and Paget and in London by Lansdowne and Gray, while Siam was represented by Prince Damrong, coached by the astute advice of Chulalongkorn's American advisor, Edward H. Strobel, who had been Dean of the Harvard Law School before coming to Siam.[52]

The earlier reform of the Thai legal system during the nineteenth century resulted in the mixture of English common law with the indigenous law. There were two reasons for this. First, Siam, unlike Japan and Turkey which had close relationships with France and the continental system, actually favoured the Common Law of England. This was because the Kings themselves, Chulalongkorn and his father, Mongkut, were familiar with the British system of justice.[53] Second, early western-trained local jurists were mostly the product of the English legal educational system.[54] The reformed system seemed to operate smoothly during that time because the common law principles were flexible enough for the local judges to administer the indigenous law side by side with English legal principles. However, this mixed

[51] *Supra,* note 47 at p. 597, footnote 36.

[52] Statson, *supra,* note 43, at p. 181.

[53] Statson, for example, indicates that the royal family was labelled "anglophile": *ibid*., at p. 144.

[54] See Darling, *supra,* note 45. The early legal education system in Thailand was modelled after the British system as well. See Statson, *supra,* note 43, at p. 147.

system was in operation for such a short period of time that not many of its effects were known in the later period.

Despite the country's familiarity and close relationship with the English legal system, it embarked on a new course — the continental legal tradition — for fear that judicial independence would not otherwise be preserved. Since the imposition of the extraterritorial regime was purely political in nature, the attempt to abrogate it did not seem to be much different. Even though the continental system was alien to the eyes of the local practitioners, it was adopted to satisfy the demands of the western powers that the judicial reform of Siam and other eastern countries be done according to the continental legal tradition.[55]

Extraterritoriality was used by the western powers not so much as an instrument to coerce the eastern countries to adopt judicial reforms along western lines but as an instrument for extortion, *i.e.,* to extort undeserved political and economical benefits from these defenceless nations. Thailand paid a heavy price for her judicial independence. Parts of her territory as well as other rights and privileges in kind were surrendered to the western powers. The American adviser to the Siamese government once wrote to his superior in the United States expressing the then current practice of the western powers:

> It is only repeating... to say that a Western State which possesses consular jurisdiction should not give it up until the State is satisfied that its subjects will be justly treated; but when that time comes, the jurisdiction should be surrendered, and without price. A government which surrenders its jurisdiction before that time, cannot justify its action, no matter what price may be paid it.
>
> As far as Siam is concerned,... the first question always asked is: "What do you propose to pay for it?"[56]

In summary, it may be said that indigenous laws were eliminated instead of reformed during the nineteenth century because the national priority then was to eliminate extraterritoriality and regain judicial autonomy. As a result, there was no real "law reform" but merely the adoption of a new law that would be recognized by the western powers. The western criminal law adopted in this manner was essentially an international political instrument. It originated from exogenous exigencies and therefore had no relationship with local needs.

[55] M. Padoux, legislative adviser and French Consul, clarified this point well when he said: "Besides, the question of codification has in Siam its peculiar importance with regard to foreign relations. It seems doubtful whether foreign Powers will ever consent to the abolition of the extraterritorial rights as long as Siam cannot bring forward a better legal system." [J. Padoux] The Legislative Advisor, *Report on the Proposed Penal Code for the Kingdom of Siam,* Submitted to His Royal Highness Prince Rajburi Direckrit, Minister of Justice, Bangkok, 6th August R.S. 125 (1906), p. 4.

[56] Letter from Westengard to Elliot (March 19, 1912), Harvard Law School Library, Manuscript Division.

III. THE SUBSEQUENT DEVELOPMENT OF THAI CRIMINAL LAW

From the foregoing, it can be seen that as a result of indirect legal diffusion, Thailand adopted a western style penal code in 1908.[57] Theoretically, this code in its original form was far from perfection. First of all, it was the product of colonial intervention. Second, it was the first time that western criminal law, especially continental criminal law, had been introduced into the country's legal system. The Code itself was a brief, simplified version of various western codes, supplemented with some local traditions in the special part.

Since its promulgation in 1908, the Thai Penal Code has undergone various changes most of which originated from the instrumentalist conception of criminal law as an instrument to prepare the people for the complexity of modern life. The original code was too rigid in nature. For instance, judicial discretion was limited to the minimum for fear that local judges might not be familiar with the new system of penal law. It was only in 1917 that the local judges were freed from the rigidity of the old Code and regained their judicial autonomy in the area of sentencing.[58]

The 1917 reforms also included the transfer of the criminal procedure provisions from the Penal Code to the Code of Criminal Procedure (which was drawn up ten years after the Penal Code).[59] Even though these and many of the other 1917 reforms were regarded as purely technical, they illustrate the fact that the 1908 code had been drawn up merely to provide the western powers with evidence of attempts on the part of the Thai government to revise their law according to western standards. To this effect, the Committee of Redaction of 1917[60] stated:

> [O]wing to the progress which has been made since ten years and to the present acquaintance of the courts with a modern system of criminal penalties, it could appear timely to extend further the power of appreciation of the judges.[61] [sic]

The Committee justified the extension of judicial discretion on the ground that it was consistent with the utilitarian aims of the Code.

> … [T]he punishments specified in a Penal Code are not revenge — what is unworthy of the society and contrary to the modern sense of justice — but a way to prevent criminal actions before

[57] Indirect legal diffusion has previously been explained.

[58] See *Report on the Revision of the Penal Code of 1908* (1917) dated July 28, 1917 by the Committee of Redaction (Siam). It should be mentioned here that the 1908 Code, drafted and influenced mostly by the French legislative adviser, M. Padoux, provided for the maximum and minimum penalty whenever the maximum punishment was over three years' imprisonment. This was because the French draftsman felt that "… it would be safer for the Siamese Judge and for the public…." (id. at 23) to have certain measures to restrain the judges' discretion. The new revision of 1917 provided for the minimum imprisonment term only where the maximum penalty was over seven years.

[59] See *ibid.*

[60] The Committee of Redaction was the first one to undertake the revision of the -Penal Code of 1908.

[61] *Report on the Revision of the Penal Code of 1908, supra,* note 58, at p. 8.

> their being committed, and, if they have been committed, a way to put a stop to the wrong doing by deterring the wrong doer from committing them again.[62] [sic]

The instrumentalist conception of criminal law as a tool for preparing the people for the complexity of life in a modern society is more evident in the political and economic spheres. In the economic sphere, many crimes were added to the special part of the Code in order to punish conduct which endangered a modern economy and a western form of government. For example, in 1925, offences concerning partnerships, companies, associations and foundations were added to the Penal Code. The amendments prohibited any acts which might obstruct the development of modern commercial institutions. Such acts included defrauding, destroying, altering or falsifying books or documents or other valuable securities relating to the organization, administration and regulation of such modern economic institutions.[63] In 1932, arson involving immovable property was dealt with separately from the arson of movable property because it was felt that the real estate institutions should be better protected.[64] Further, the offence of counterfeiting currency became subject to the maximum punishment of life imprisonment.[65] In 1935, more severe penalties were imposed on the crimes of malfeasance in public office and perjury.[66]

In the political realm, the penal law was revised when the country was in the full bloom of democracy to make the Code conform more to the democratic form of government. Thus, for example, an expression of opinion in good faith or a critical and unbiased comment on government or an administrative act within "the spirit of the constitution and for the public interest"[67] was a defence against the crime of causing public disturbances by acts of propaganda. Also, any acts which undermined the existence of a democratic form of government, *e.g.* secret organization activities to overthrow the government, were subjected to stiff penalties.[68]

The modernization of Thai penological theories is reflected in the Penal Code Amendment of 1946. In the Report on the Revised Penal Code, a modern version of the idea of rehabilitation was introduced. Prevention was distinguished from punishment to allow the application of preventive as well as rehabilitative measures to habitual or potential offenders. The Commission on the Revision of the Penal Code[69] straightforwardly stated:

62 *Ibid*., at p. *6.*
63 The Penal Code Amendment Act of B.E. 2468 (1925).
64 The Penal Code Amendment Act of B.E. 2475 (1932), ss. 3-5.
65 *Ibid*., ss. 7-9.
66 The Penal Code Amendment Act of B.E. 2477 (1935) No. 2.
67 Art. 104 (2) para. 3 as amended by The Penal Code Amendment Act of B.E. 2478 (1936).
68 Art. 104 (3), (4), (5) as amended by The Penal Code Amendment Act of B.E. 2478 (1936).
69 This Commission was appointed in the year 1936, and consisted of members of the Department of Legislation, as well as the Minister of Justice, R. H. Thaval Damrongnavasavasdi. The Commission made two successive studies of the Penal Code, incorporating the modifications introduced in the draft into the Revised Penal Code of 1946: see *Report on the Revised Penal Code B.E. 2489* (1946), *supra,* note 58.

> In almost all countries, the Codes are revised from time to time, in order to follow the progresses of the science of law and the local modifications which may happen in the country. This is still more frequent in the case of penal laws, because they are so intimately mixed with the daily life of all citizens and because the criminology is the object of many modern studies which take into consideration other progresses similarly made in sociology, medical art, phynology [sic].[70]

The Commission went on to say:

> The modern criminology has more and more given up the old conception that penalties were a kind of revenge exercised by the Society against offenders. They have come to the more acceptable idea that a punishment was chiefly intended to make it impossible for the offender to cause further evils, or to induce him to desist from doing so. This is obtained not only by placing him for a certain period in conditions which will prevent the repetition of his evil-doings, but also by taking the opportunity of that severance from the community to give him good examples, to teach him to become a good citizen who abides by rules adopted by the community in which he has to live. So that even the evil-doer himself benefits by that far-seeing policy.[71] [sic]

It was bluntly stated by the Commission that a consequence of the modern criminal policy was that it would be better, for the protection of the community, to "prevent" the commission of offences than to "punish" the offender. This was merely the application of the old medical slogan that it was better to prevent diseases than to have to cure them:[72]

> Consequently, the policy of prevention of offenses has induced the Modern Code to introduce provision concerning "Measure of Safety." The measures of safety are not taken as punishment of offenses, they are applied because attention has been called upon the fact that a person is an habitual offender or has shown by undesirable action that he is likely to indulge in the commission of offenses. Then it is deemed necessary and profitable to take some precautions which may strike at the root of the evil and reduce as far as possible the chance that offenses will be committed or committed again by the said person.[73] [sic]

Also, in the area of juvenile delinquency, the Commission pointed out that it was desirable to create a special "Criminal Court for Minors".[74] The Commission made this recommendation on the basis of a comparative study of the treatment of problems of juvenile delinquency in foreign countries.[75] The Commission opined:

> The modern legislations contain provisions specially intended to deal with these minors, in order that, on account of faults com-

70 *Ibid.*, at p. 1.
71 *Ibid.*, at pp. 6-7.
72 *Ibid.*, at p. 8.
73 *Ibid.*
74 *Ibid.*, *at* p. 13.
75 *Ibid.*

> mitted during youth, they shall not be treated too harshly, mixed up with grown up people and habitual offenders, and that they may receive proper training in order not to relapse in their errors and to become good citizens.[76] [sic]

The same instrumentalist justification runs throughout the areas in which the parliamentary draftsman introduced changes and reforms. Alterations of theories of criminal liability (such as excuse and defence) were justified on the basis that they were consistent with the modern criminal law theory of that time.[77] The new Penal Code of 1956 was promulgated on the same basis. The Act Promulgating the Penal Code of B.E. 2499 (1956) states: "Whereas; [sic] the country's conditions have undergone considerable changes and reforms since the promulgation of the Penal Code of B.E. 2451 [1908]; it is deemed appropriate to reconsider the revision of the Penal Law".[78]

The Penal Code of 1956 originated from the political changes of the late 1940s which saw the military return to power in 1947.[79] The then Prime Minister, Field Marshal P. Pibulsongkram, had then commissioned the drafting of the new Penal Code to be promulgated in the Buddhist Era 2500 (1957). It was a tradition for the ruler of the country to leave behind a contribution to the science of law.[80] Local scholars, however, are of the opinion that the 1956 Penal Code, in fact, introduced no radical changes to the existing principles of Thai penal law. The Code was basically a consolidation of the Penal Code of 1908 and its subsequent revisions.[81]

The reason why the contents of the Penal Code of 1956 were little influenced by the existing authoritarian regime can be summarized as follows. First, military leaders of that time had "… received little or no exposure to western influences prior to coming to power, and they remained deeply attached to a strong authoritarian rule".[82] In simple words, they did not justify their regime through law and the judicial system. Rather, "[t]hey used the communist threat and the need for rapid economic and social development to justify the steady expansion of their power".[83] Criminal law therefore was of no utility since those in power were not bound by the law. The second reason why the contents of the Penal Code of 1956 were little affected by the prevailing authoritarian regime is because the parliamentary draftsman did not want any radical changes in Thai criminal law. The revision of the 1908 Code had just been accomplished in 1946, and it was felt that there was no need for more

[76] *Ibid*., at pp. 12-13.
[77] See *ibid.*
[78] Author's translation.
[79] See Darling, *supra,* note 45, at p. 212.
[80] For example, Rama I promulgated the indigenous law code in 1804 and proclaimed that such revision and codification of Siamese law was done as a contribution to the future kings to enable them to rule the kingdom with justice, etc. See, Krom Silpakorn, *Reung Kod Mai Tra Sam Duong* [The Law of the Three Great Seals] in Thai (1978), p. 2.
[81] See in general, *Thailand Official Yearbook of 1968, supra, note* 3; Darling, *supra,* note 45.
[82] Darling, *supra,* note 45, at p. 212.
[83] *Ibid*., at pp. 212-13.

modernization.[84] Today, the Penal Code of 1956 is still in force with only a few amendments.[85]

IV. CONCLUSION

In conclusion, it may be said that, to a large extent, modern Thai penal law is the product of western legal instrumentalist conceptions, first introduced by western legal advisers during the extraterritorial regime, and subsequently perpetuated by western-trained Thai scholars and law makers.

It is timely to reconsider the age-old assumption that western legal concepts can lead any country to development. The time is overdue for Thai scholars to stop importing western legal concepts and to create new ones more suitable to the country. The history of Thai criminal law may be brief, and makes no contributions to modern criminal law theories. However, it may well serve as a catalyst for the reform of criminal law along more indigenous lines in the world of ancient civilizations.

APIRAT PETCHSIRI*

[84] See *Thailand Official Yearbook of 1968, supra,* note 3.

[85] There have been three amendments since 1956: in 1959 by the Amendment Act of B.E. 2502; in 1969 by the Amendment Act of B.E. 2512 (No. 2) and in 1971 by the Decree (No. 11) of the National Executive Council B.E. 2514. Most of these amendments pertain to the increase of punishment for specific offences.

* J.S.D. (N.Y. Univ.), Associate Professor, Faculty of Law, Chulalongkorn University, Thailand.