

EFFECTIVE MEASURES FOR COMBATING CORRUPTION

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I. INTRODUCTION

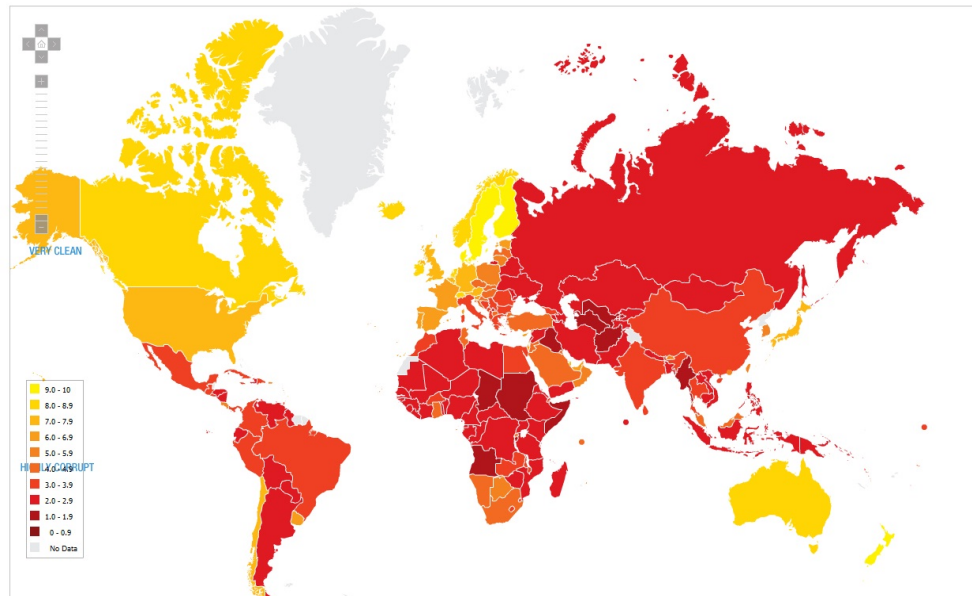
Corruption has been considered a major and widespread problem in many nations. Particularly, corruption causes huge damage to developing countries, such as Thailand, especially bribery and fraud in public procurement. All countries try to find effective measures to deal with corruption cases, including legislative and social measures.

The Corruption Perceptions Index (CPI) measures the perceived level of public sector corruption in 178 countries around the world. It is a tool that ranks each country in comparison to others. A higher CPI means lower corruption or cleaner public administration (a country with CPI of 8 is cleaner than one with a CPI of 4). Thailand's CPI in 2009 was 3.4 and in 2010 was 3.5. Thailand has improved its CPI score over the past years, though at 3.5 it remains troublingly low and indicative of a serious corruption problem in the public sector. Nevertheless, Thailand's corruption situation seems to be slightly above average in comparison with those of other ASEAN countries – e.g. Myanmar, Cambodia, Lao PDR, Philippines, and Indonesia – with their CPI 2010 scores ranging from 1.4 – 2.8.¹ Even though Thailand has fought corruption for many decades, in which various legislative and social strategies and measures, either preventive or suppressive, have been imposed to solve this problem, corruption in Thailand still persists and has become more sophisticated and difficult to address.

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¹ http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results

CORRUPTION PERCEPTIONS INDEX 2010 RESULTS



II. LEGAL ASPECT

Thai legislators have enacted various laws and regulations to prevent and combat corruption. They are divided into two categories in connection with their nature – substantive law and procedural law.

A. Substantive Law

Regarding substantive law, there are two major types of laws in Thailand punishing acts of corruption: the Thai Penal Code and the Organic Act on Counter Corruption B.E. 2542 (1999).

The provisions of the Penal Code incriminating acts of corruption are contained in articles 147 to 157 and those that aggravate the punishment for specific conduct of officers are stipulated in articles 200 to 202. Article 147 punishes officers who commit embezzlement in their duties with imprisonment of 5 to 20 years or imprisonment for life and a fine of 2,000 to 40,000 Baht.² Also, articles 148 to article 150 punish officers conducting various types of bribery with imprisonment from 5 to 20 years or imprisonment of life or the death penalty.

² As of the end of October 2011, the exchange rate is about 31 Baht for 1 US Dollar.

Article 151 criminalizes a wrongful exercise of an officer's function which is damaging the State, and makes it punishable with a maximum term of imprisonment of life; meanwhile article 152 punishes officers who have a conflict of interest in their duties with maximum imprisonment of 10 years. In addition, articles 153 to 156 impose criminal sanctions, up to imprisonment for life, on corrupted officers whose duties concern accountancy functions. The general offence is prescribed in article 157 as misconduct in office punishable with a maximum term of imprisonment of 10 years. Moreover, aggravating circumstances are contained in articles 200 to 202 which aim to increase punishment for corruption committed by officers whose duties are concerned with criminal justice, such as the police, public prosecutors or judges.

In addition to imprisonment and fine, when officers obtain money from corruption, these benefits shall be considered as properties which shall be forfeited by the Court's judgment according to article 34 (1) of Thai Penal Code. The forfeiture of properties deters others from committing corruption.

The Organic Act on Counter Corruption BE. 2542 (1999) establishes an independent organization called the National Anti-Corruption Commission (NACC) to deal with corruption. The function of NACC will be explained in the topic of competent authorities, below. Apart from the Thai Penal Code, the Organic Act on Counter Corruption incriminates certain acts of corruption. For example, the conflict of interest prescribed in article 100 shall be punished with imprisonment not exceeding three years and fines not exceeding 60,000 Baht, or both. Bribery, criminalized in article 103, shall be punished in the same manner as conflicts of interest.

B. Procedural Law

In the sphere of procedural law, Thailand has five major laws dealing with procedure of corruption cases: the Thai Criminal Procedure Code, the Organic Act on Counter Corruption

B.E. 2542 (1999), the Anti-Money Laundering Act B.E. 2542 (1999), the Act of Mutual Legal Assistance in Criminal Matters B.E. 2535 (1992) and the Extradition Act B.E. 2551 (2008).

The Criminal Procedure Code is the principle Code which is applied to every criminal case, including corruption. Whenever specific Acts do not mention certain proceedings, these acts normally refer to the Criminal Procedure Code in order to apply general principles to such proceedings.

The Organic Act on Counter Corruption B.E. 2542 (1999), not only establishes the National Anti-Corruption Commission (NACC) in order to deal with corruption but it also gives it powers of initial investigation of corruption in Thailand.

In connection with the Anti-Money Laundering Act B.E. 2542 (1999), it is an additional measure combating corruption. Corruption is one of the predicate offences for the purpose of forfeiture of assets obtained from corruption. This act establishes the Anti-money Laundering Office (AMLO) having authority to temporarily restrain, seize or freeze the assets involved in corruption. This measure is categorized as a civil forfeiture system without requiring a conviction.

The Act of Mutual Legal Assistance in Criminal Matters B.E. 2535 (1992), being in line with the UN Model Law on Mutual Legal Assistance in Criminal Matters and international standards, provides a basic principle of international cooperation with other countries to proceed with criminal litigation from the beginning of investigation to the end of the court trial. Many types of assistance can be provided, such as locating persons, searching and seizing objects or documents as evidence, taking statements of witness and confiscating assets.

Under the Extradition Act B.E. 2551 (2008), Thailand is able to extradite a person to a requesting country, and also make a request to foreign countries to extradite a fugitive to

Thailand. At present, we now have bilateral treaties with 13 countries regarding mutual legal assistance and 14 countries in relation to extradition. However, the rule of reciprocity is applied in cases of nonexistence of a treaty between the requesting and the requested country for the purpose of providing the broadest possible cooperation. In addition, Thailand signed a Mutual Legal Assistance Treaty with ASEAN countries in 2006. The process is now pending review and adoption by the domestic legislation.

III. COMPETENT AUTHORITIES CONCERNED

Many government authorities have been set up for monitoring, preventing and efficiently suppressing corruption, including the National Anti-Corruption Commission (NACC), Office of Public Sector Anti-Corruption Commission (PACC), Office of the Attorney General (OAG), Ombudsman, Office of the Auditor General, Royal Thai Police, Anti-Money Laundering Office (AMLO), Department of Special Investigation (DSI) and Supreme Court's Criminal Division for Persons Holding Political Positions. These organizations have the mutual objectives of ensuring transparency, fairness, accountability and guaranteeing civil rights. This paper will, however, only focus on the roles and functions of some of these agencies, as follows.

A. National Anti-Corruption Commission (NACC)

To strengthen efforts in combating corruption, the 1997 Constitution and the Organic Act on Counter Corruption B.E. 2542 (1993) added checks and balances on the State by establishing the National Counter Corruption Commission (NCCC) as an independent agency. The NCCC has a number of duties and responsibilities both in prevention and suppression areas. This commission is responsible for inquiring into all kinds of corruption offences committed by all levels of government officials. As a consequence, the NCCC has encountered a caseload problem. The best way to solve this problem is to limit the NCCC's

exercise of its power only to corruption cases conducted by politicians and high ranking government officials. So, the 2007 Constitution changed the official title of the NCCC to the National Anti-Corruption Commission (NACC) and it has been invested with only three functions: (1) declaration and inspection of assets and liabilities, (2) prevention of corruption and (3) suppression of corruption.

The NACC is responsible for corruption cases against persons holding political positions, i.e. the Prime Minister, Ministers, Members of the Senate, Members of the House of Representatives, and high ranking government officers who are accused of being unusually wealthy, committing an offence of abuse of power and authority according to the Penal Code, or committing an offence of dishonesty in office or corruption according to other laws. The role of the NACC is to perform the initial investigation of corruption cases. After completion of an inquiry file, the NACC will forward the investigation file with adequate legal background to the government agency for which the accused works to start the disciplinary action if the disciplinary offence is well-founded. Otherwise, if the NACC found grounds for a criminal offence, it would refer the inquiry file to the Office of the Attorney General for further criminal prosecution.

B. Office of Public Sector Anti-Corruption Commission (PACC)

Due to the caseload of the NCCC, the 2007 Constitution established the NACC and Office of Public Sector Anti-Corruption Commission (PACC) to deal with corruption cases. The PACC is the newest investigation authority under the Ministry of Justice.³ This office is responsible for the corruption cases conducted by lower-ranking government officials. After completion of inquiry files, the case shall be referred to the agency concerned in the same process as the NACC as mentioned above. However, the PACC has not yet begun executing

³ http://www.pacc.go.th/index.php?mod=about_profile

its full functions, pending the drafting of regulations; meanwhile the NACC temporarily handles its cases.

C. Office of the Attorney General (OAG)

According to the current Constitution, the Office of the Attorney General (OAG) is an independent organization. The OAG is authorized to suppress corruption in both private and public sectors. Therefore, the Office of Attorney General plays an important role in deciding whether to prosecute all of the corruption cases in Thailand.

After conclusion of an inquiry file by the NACC, if a corruption offence is found, the case shall be submitted to the Attorney General for further criminal prosecution. Then, if there is sufficient evidence for the prosecution's charge of corruption, the Attorney General shall prosecute the accused before the Supreme Court's Criminal Division for Persons Holding Political Positions in a case where the accused is a politician or to another competent court in a case where the accused is a State official. On the other hand, in case of insufficient evidence, the OAG and the NACC shall set up a joint working committee to collect further evidence necessary for the Attorney General. After receiving such further evidence, the Attorney General will make a prosecution order. However, if the joint working committee fails to reach the point, the NACC by itself has the power to file the case with the competent court or ask a private lawyer to do so.⁴

In addition, the Attorney General acts as the central authority of international cooperation in criminal matters in the areas of mutual legal assistance and extradition, as mentioned above in part II above.

D. Supreme Court's Criminal Division for Persons Holding Political Positions

There are five specialized courts in Thailand: the Labor Court, the Tax Court, the Central Intellectual Property and International Trade Court, the Bankruptcy Court and the

⁴ The Organic Act on Counter Corruption 1999, Section 97.

Juvenile and Family Court. At present, there is no permanent specialized court for corruption cases. However, the Supreme Court's Criminal Division for Persons Holding Political Positions has been established since 1999 by the 1997 Constitution and Article 8 of the Organic Act on Criminal Procedure for Persons Holding Political Positions B.E. 2542 (1999) for the mission of fair and speedy trial of corruption offences committed by politicians.⁵

This specialized division of the Supreme Court has power and duties to try and adjudicate cases against persons holding political positions who have been accused of becoming unusually wealthy, committing an offence of malfeasance in office according to the Penal Code, committing an offence of dishonesty in office or corruption according to other laws. This court consists of nine Judges of the Supreme Court who are selected by a plenary session of the Supreme Court on a case-by-case basis. The trial in this specialized division Court is founded upon an inquisitorial system.⁶ The orders and decisions will be final and disclosed. Nonetheless, the decision can be appealed to a plenary session of the Supreme Court, but only if there is fresh evidence in the case.⁷

Statistics indicated that few cases were submitted and disposed by this specialized division of the Supreme Court: one case in 2001, two cases in 2002, one case in 2003, one case in 2004, two cases in 2007, 20 cases in 2008, nine cases in 2009⁸ and 10 cases in 2010.⁹

IV. PERSPECTIVE ON COMBATING CORRUPTION

As I have already mentioned in part II, the magnitude of punishment of corruption offences, according to the Thai Penal Code and others, is currently at the highest level, i.e. the death penalty and life imprisonment, yet it nevertheless seems that the number of corruption cases in Thailand has not declined.

⁵ <http://www.supremecourt.or.th/webportal/maincode/index.php?lang=en&base=24>

⁶ *Ibid.*

⁷ Constitution of the Kingdom of Thailand 2007, Article 278.

⁸ <http://www.supremecourt.or.th/webportal/maincode/index.php?lang=en&base=24>

⁹ <http://www.supremecourt.or.th/file/criminal/new%201.pdf>

In order to solve this problem, two alternative solutions are proposed for further consideration. Firstly, we increase the magnitude of punishment to deter the government officer from committing corruption. Secondly, we increase the probability of prosecution of corruptors for the same reason. Both of these solutions could discourage the corruptors but the further question is which one is suitable for Thailand?

Becker's Economic Model of Crime¹⁰ offers that we should raise an offender's costs and limit an offender's benefits in order to reduce an offender's incentive for engaging in a criminal act. Becker's model is relevant to Cost-Benefit analysis, which is generally accepted by current core Economists. He further suggests that an offender's costs consist of the combination of the Magnitude of Punishment and the Probability of Punishment. If we raise the Magnitude of Punishment, such as increasing of periods of imprisonment, an offender's cost would consequently be raised. It would be the same if we raise the Probability of Punishment by strengthening police units or using modern technology in criminal investigation. In accordance with Becker's recommendation, increasing the Magnitude of Punishment would less affect government budgets. On the other hand, the government wastes its budget by investing in law enforcement sectors (including investigators, public prosecutors and criminal courts) to increase the probability of punishment. Therefore, Becker prefers increasing the Magnitude of Punishment because it is more economical, compared to the other solution.

To combat corruption in Thailand, I believe that increasing the probability of punishment is more suitable for the following three reasons:

Firstly, according to Article 149 of Thailand's Penal Code, we have already increased, since 1959, the magnitude of punishment to the highest level (death penalty) which would be applied for those who were found guilty of bribery (although the amount of fine is still out of

¹⁰ Gary S. Becker, "Crime and Punishment: An Economic Approach", *in* Essays in the Economics of Crime and Punishment, 1974 at www.nber.org/chapters/c3625.pdf

date and too low). However, it is obvious that such measures could not effectively eradicate the extent of corruption in Thailand. Therefore, the probability of prosecution of corruptors should be increased to reduce corruption.

Secondly, on the aspect of evidence, corruption leaves few traces for detectives to investigate. This situation would have a dilutive effect: the severity of capital punishment would be diluted in the eyes of corruptors because of a lack of evidence.

Finally, corruption is categorized as a “victimless crime” from which only the State suffers. Consequently, nobody files complaints to the police when there is corruption. Offenders are not intimidated by capital punishment because they are certain that their wrongs have not been noticed by others. However, in order to facilitate reporting of corruption and broaden the perceptions of concerned authorities, Thai law has already introduced an effective process in which citizens can directly report corruption to NACC or PACC to start the process, as I mentioned above.

For these three reasons, I propose a reinforcement of all law enforcement units to be the best solution for combating corruption in Thailand. Although the government must invest a gross budget in every law enforcement unit, enlarging or adding organizations, using modern investigative methods as well as effective international cooperation, the outcome of such investment would be more profitable for the country. Since corruption poses a serious harm to society, a high investment in combating corruption would absolutely not be wasteful.

V. CONCLUSION

Corruption is not restricted to a particular country or a region, but it appears to be a global problem. It is a serious transnational phenomenon which significantly undermines economic and social development. In addition to law enforcement agencies combating corruption by using various sanctions, social networks or solidarity of the people could effectively strengthen anti-corruption measures by giving information to the justice agencies. Finally, the education of children could be a sustainable measure in which the government should invest. The academic curriculum should be integrated with moral values of citizens as well as anti-corruption measures for children who will become the government officers of the future.