

# PROSECUTION AND ADJUDICATION OF HIGH-PROFILE CORRUPTION IN THAILAND: NEW AMENDMENT ON TRIAL *IN ABSENTIA*

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Corruption in Thailand, to some extent, was rooted in the general belief that offering bribes to officials or politicians would ease all government processes, expedite permits or licenses, provide a better opportunity in getting business going, or ease the progress of securing government contracts. The most significant stride towards the awareness of the corruption problem was embarked in 1997 where the Constitution of the Kingdom of Thailand B.E.2540 (1997) established the Criminal Division for Persons Holding Political Positions in the Supreme Court, and the Organic Act on Counter Corruption, B.E.2542 (1999) and the Organic Act on Criminal Procedure for Persons Holding Political Positions, B.E. 2542 (1999) were enacted, providing many dimensions of anti-corruption measures. In addition, with the concern that corruption is not just a domestic problem, Thailand became a signatory to the United Nations Convention against Corruption (UNCAC) on 9 December 2003 and ratified it on 1 March 2011. After it became a signatory to UNCAC, Thailand enacted many laws providing legal measures complying with UNCAC to fight against corruption. However, as per the Corruption Perception Index, Thailand had scored 35-38 during the years 2012-2017 where 0 is highly corrupt and 100 is very clean.<sup>1</sup> In 2018, Thailand was still ranked 99th out of 180 countries with the score of 36.<sup>2</sup> This indicates that corruption is still the prevailing problem causing serious effect on the stability and security of the country, and it undermines the rule of law. With the strong intention to curtail or possibly to eradicate corruption, Thailand had amended and enacted anti-corruption legislation to intensify the investigation, prosecution and adjudication measures during the past 3 years. Though there are many laws enacted and amended to combat corruption, the scope of this paper will be limited mainly to some significant laws which are the Penal Code, the Criminal Procedure Code, the Organic Act on Counter Corruption, B.E.2561 (2018), the Organic Act on Criminal Procedure for Persons Holding Political Positions, B.E. 2560 (2017), the Act on Establishment of Criminal Court for Corruption and Misconduct Cases, B.E. 2559 (2016) and the Procedure for Corruption and Misconduct Cases Act, B.E. 2559 (2016). Although the amendment provides new various anti-corruption measures, this paper will principally focus on trial *in absentia*, which is the measure related to the role of the judicial system. The trial *in absentia* under the Criminal Procedure Code, the Organic Act on Criminal Procedure for Persons Holding Political Positions, B.E. 2560 (2017), and the Procedure for Corruption and Misconduct Cases Act, B.E. 2559 (2016) will be discussed and compared. The high-profile corruption case study regarding the trial *in absentia* will also be examined. The paper will be divided into two parts. The first part will deal with the significant laws defining corruption offences and the structure of corruption cases under jurisdiction of the courts in Thailand. The second part will focus on provisions on trial *in absentia* in the past and present, a high-profile corruption case study and the comparison of trial *in absentia* for corruption cases under each jurisdiction of the court.

## I. CORRUPTION OFFENCES UNDER THAI LAWS AND JURISDICTION OF THE COURTS

### A. Corruption Offences under Thai Laws

Corruption has long been criminalized under the Penal Code. The criminal penalties are imposed on (i) whoever gives, offers or agrees to give a property or any other benefit to any official, (ii) whoever demands, accepts, or agrees to accept a property or other benefit, and (iii) intermediaries seeking, accepting or agreeing to accept a benefit as a return for inducing or having induced any official by dishonesty or unlawful means, which are divided into the Offences against Officials<sup>3</sup> and Offences against Judicial Officials.<sup>4</sup> In addition,

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<sup>1</sup> <https://www.transparency.org/research/cpi/overview>

<sup>2</sup> <https://www.transparency.org/cpi2018>

<sup>3</sup> The Penal Code, Section 143 and Section 144.

<sup>4</sup> *Supra* note, Section 167 and Section 201-202.

there are provisions regarding Malfeasance in Office aimed at punishing state officials who are abusing their duties for the benefit offered in various specific actions performed under different functions.<sup>5</sup> The fundamental concept of what constitutes a corruption act under the Penal Code is wide-ranging. The term “benefit” under these provisions is broadly defined to cover both tangible and intangible assets and does not have to be calculable in monetary terms. If the assets are sold or offered for sale at a price that differs from the price in market value, the benefit should be conferred. Moreover, if a person offers to pay bribes to public officials, or if the public official requires or solicits bribes to discharge his/her duties, he or she may be found guilty even though a bribe is not paid.

The Organic Act on Counter Corruption B.E. 2542 (1999) was firstly enacted and later amended, the latest in 2016, to provide effective measures for preventing and combating corruption in implementation of UNCAC. The Organic Act on Counter Corruption, B.E.2561 (2018) enacted by provision of the Constitution of the Kingdom of Thailand B.E.2560 (2017) retains the existing anti-corruption mechanisms by prohibiting (i) any party from offering bribes to state officials and foreign and public international officials, (ii) intermediaries to solicit to use of personal power to unlawfully perform their duties, and (iii) state officials, foreign and public international officials from accepting property or benefit.<sup>6</sup> The scope of offences expanded to include foreign government officials and international organizations and broaden the scope of liability to include juristic persons like corporate entities and senior management for bribery offences committed by employees, agents or others acting on behalf of the company if the company does not have in place appropriate internal control measures. The Act also requires state officials and persons holding political positions to declare their assets to the Office of the National Anti-Corruption Commission (NACC), and the concept of unusual wealth is used providing that officials and politicians must be able to declare their properties if they legally earned. The investigation power on this matter is authorized to the NACC.

## **B. Jurisdiction of the Courts**

The corruption offences under the Panel Code are originally under the jurisdiction of general criminal courts where an offence has been committed, alleged or believed to have been committed. The proceedings are under the Criminal Procedure Law where accusatorial system is used in the courts, leaving the parties to the case to present their arguments, gather and submit evidence, call and question witnesses and generally control the information presented, while the judges as a quorum are to be impartial observers during the trial.

In 1999 the Criminal Division for Persons Holding Political Positions in the Supreme Court has been established which it remains at present under the provisions of the Constitution of the Kingdom of Thailand B.E. 2560 (2017) and the Organic Act on Criminal Procedure for Persons Holding Political Positions B.E. 2560 (2017) for the purpose of expeditious and fair trial of corruption offences committed by politicians. Thus, the jurisdiction on corruption offences is not limited only to the general criminal courts. The Criminal Division for Persons Holding Political Positions in the Supreme Court has the power and duty to try and adjudicate cases against (i) persons holding political positions, Justices of the Constitution Court, persons holding positions in independent organization and the Auditor General, and (ii) a member of the NACC as considered by an independent inquiry, having been accused of becoming unusually wealthy, committing corruption in office, or intentionally performing the duty or exercising the power contrary to the provisions of the Constitution or law. A principal, instigator or aider and abettor of the commission of a criminal offence or a person who has given, offered to give or agreed to give property or any other benefit to mentioned persons for inducing an action, an inaction or a delay in an action which is unjustifiable in the performance of the duty are also under the jurisdiction of this special division to try and adjudicate the case.<sup>7</sup>

The criminal proceedings in this special division of the Supreme Court are specifically spelled out in the Organic Act on Criminal Procedure for Persons Holding Political Positions B.E. 2560 (2017), which are different from regular criminal proceedings under the Criminal Procedure Code in some aspects. The most important front is that the trial shall be conducted on the basis of the inquisitorial system, rather than an accusatorial system, whereby the Court shall find facts whether they are favourable or prejudicial to any party. The inquiries conducted by the NACC or by an independent inquiry panel shall principally be relied

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<sup>5</sup> Supra note, Section 147-156.

<sup>6</sup> The Organic Act on Counter Corruption, B.E.2561 (2018) Section 173-176.

<sup>7</sup> The Organic Act on Criminal Procedure for Persons Holding Political Positions B.E. 2560 (2017), Section 10.

on in the trial and the Court shall, in the interest of justice, have the competence to conduct inquiries for finding additional facts and evidence.<sup>8</sup> Judgment of the Court can be appealed to the general assembly of the Supreme Court within thirty days as from the date on which it is rendered by the Court.<sup>9</sup>

Although the Criminal Division for Persons Holding Political Positions in the Supreme Court has special jurisdiction over corruption cases, it is not a specialized court in principle. Moreover, this court deals exclusively with some specific offences against political officials and persons with high positions as mentioned above, leaving the corruption cases of other state officials to be adjudicated under ordinary criminal proceeding at the general criminal courts. With such concern and the reason to expedite court procedures and convictions for officials and persons accused of corruption, there was the establishment of 10 Criminal Courts for Corruption and Misconduct Cases nationwide as the specialized courts during 2016 and 2017. At present, the Offences against Officials, Offences against Judicial Officials and Malfeasance in Office under the Penal Code or any other laws, offences related to money-laundering and falsified asset declarations in which the court has the mandate to consider whether to confiscate assets, provided that it is not under the jurisdiction of the Supreme Court's Criminal Division for Persons Holding Political Positions, shall be rendered by the Criminal Courts for Corruption and Misconduct Cases.<sup>10</sup> However, the general criminal courts still have jurisdiction to try and adjudicate corruption cases submitted to them before the Criminal Courts for Corruption and Misconduct Cases established. These specialized courts, consists of judges who have been in position no later than 10 years with competent knowledge on corruption control measures.<sup>11</sup> Together with the establishment of the Courts, the Procedure for Corruption and Misconduct Cases Act, B.E.2559 (2016) was enacted which its criminal proceedings are different from ordinary criminal proceedings in some aspects. One aspect is that the procedure for corruption and misconduct cases shall be founded upon the inquisitorial system in which the court can be actively involved in investigating the facts of a case as same as the proceedings of the Supreme Court's Criminal Division for Persons Holding Political Positions.<sup>12</sup> There was also the establishment of the Criminal Division for Corruption and Misconduct Cases in the Court of Appeal having jurisdiction to try and adjudicate corruption and misconduct cases in respect of which appeals are made against judgments or orders of Courts of First Instance.<sup>13</sup> A judgment or order of this Appellate Court's Division shall be final unless leave to appeal is granted by the Supreme Court.<sup>14</sup> This proceeding to ask for permission to appeal from the Supreme Court is different from the ordinary criminal proceeding, which uses the right to appeal proceeding.

In this aspect, the corruption cases in Thailand could be under the jurisdiction of three different courts; general criminal courts, the Criminal Courts for Corruption and Misconduct Cases and the Criminal Division for Persons Holding Political Positions in the Supreme Court. However, the jurisdiction of general criminal courts over corruption cases currently remains merely over those submitted to the courts before the establishment of the Criminal Courts for Corruption and Misconduct Cases. Such different jurisdiction can be classified by the offenders and the charges of cases. To clarify the jurisdiction of each court involves an understanding of the criminal proceeding of cases under different jurisdictions, which will be the main point discussed subsequently.

## II. A NEW AMENDMENT ON TRIAL *IN ABSENTIA*

### A. Background

Despite various anti-corruption mechanisms brought up with an attempt to prevent and combat corruption, including introducing new offences expanded to foreign government officials and international organizations, broadening the scope of liability to include any juristic person, increasing the power of investigation officers, setting up a financial disclosure system, creating the concept of unusual wealth, establishing specialized courts, and revising the court proceeding system, the prosecution and adjudication on corruption cases were

<sup>8</sup> Supra note, Section 6.

<sup>9</sup> Supra note, Section 60.

<sup>10</sup> The Act on Establishment of the Criminal Court for Corruption and Misconduct Cases B.E.2559 (2016), Section 7 and Section 3

<sup>11</sup> Supra note, Section 16.

<sup>12</sup> The Procedure for Corruption and Misconduct Cases Act, B.E. 2559 (2016), Section 6

<sup>13</sup> Supra note, Section 38.

<sup>14</sup> Supra note, Section 42 Section 44 and Section 46.

not entirely effective. One important aspect lies under the criminal defendant's right to be present at the trial. The Criminal Procedure Code specifies its principal that the trial shall be conducted in the presence of the accused.<sup>15</sup> Trial *in absentia* under the earlier criminal procedure law was restricted to a case of voluntary of the accused, or a case of several accused when the Court deems expedient that the trial shall be proceeded without delay.<sup>16</sup> Although the right to be present at the trial is a fundamental right of criminal defendant, the accused having influential power or being in high position, especially in high-profile case, takes advantage of this loophole to evade the trial. The court proceeding cannot be commenced if an accused person is not physically present at the court. The case shall be disposed if an accused flees during the trial. The infliction of punishment is not possible if an accused escapes after conviction by a final judgment. The maximum prescription period for prosecution or punishment under the Penal Code is 20 years from the date of the commission of the offence, the day of the final judgment or the day on which the offender has made the escape.<sup>17</sup> The high-profile accused habitually escape the trial by fleeing until the expiration of statutory limitation. The case of high-profile corruption regularly involves politically exposed persons or high-ranking public officials; thus, the prosecution and adjudication of such a case is very difficult if not unfeasible. The Supreme Court, although, enacted the Rules on Criminal Procedure of Persons Holding Political Positions B.E. 2543 (2000), stating that the court shall conduct trial in the absence of the accused,<sup>18</sup> which is broader than the ordinary criminal procedure law. This was interpreted to apply when the accused appeared at the first trial but fled during the trial as the Organic Act on Criminal Procedure for Persons Holding Political Positions B.E. 2542 (1999) required the accused to appear before the court on the day of the first trial.<sup>19</sup> If the accused was not presented at the first trial, the case will be deferred. The trials on many high-profile corruption cases under the jurisdiction of the Supreme Court's Criminal Division for Persons Holding Political Positions were deferred because the accused were in absence at the first trial. The notorious fire truck case will be discussed as a case study on this matter.

## **B. Corruption Case Study**

In 2011, the National Anti-Corruption Commission (NACC) filed a lawsuit against five former top officials which were former Interior Minister, former Deputy Interior Minister, former Deputy Commerce Minister, the former head of the Bangkok Fire and Rescue Department, and former Bangkok Governor and an Austrian supplier company, Steyr-Daimler-Puch Spezialfahrzeug AG for their roles in a fire-vehicle purchase agreement with the accusation of abuse of authority, price collusion and corruption. This case dated back to 2004 when the Agreement of Understanding was signed in the form of a government-to-government contract in which the Bangkok Metropolitan Administration (BMA) agreed to purchase fire trucks and boats from the Austrian company Steyr-Daimler-Puch Spezialfahrzeug AG (hereinafter Steyr) with a deal to countertrade agriculture products from Thailand, which ended up at the usual export quota of boiled chickens. Additionally, it was revealed that the fire-vehicles were grossly overpriced. The price for the 315 fire trucks and 30 fire boats that BMA bought was an inflated price of 6.68 billion baht while the vehicles worth 3.5 billion baht at most, leaving the profit to Steyr at 48.77 percent. However, while the Supreme Court's Criminal Division for Persons Holding Political Positions sentenced two officials *in absentia* and acquitted three other defendants, the trial against Steyr, who was in charge of an abettor on Malfeasance in Office and corruption under the Penal Code and the Act on the Offences Relating to the Submission of Bids to Government Agencies, B.E.2542 (1999), was temporarily deferred by the court, as the representative of Steyr had never appeared in the court since the first trial.<sup>20</sup> The public can be under the impression that the accused who has absconded from trial was being rewarded for escaping. This case study obviously demonstrated how an accused took advantage of the fundamental right to appear at the trial.

## **C. New Amendment on Trial *in Absentia***

Whereas the right to be present at the trial is a fundamental right, it should not be an obstacle to the prosecution and adjudication. The concern on the rationale of not permitting the accused to avoid or delay justice had raised concern, leading to the revision of the provisions on trial *in absentia* under the criminal procedure laws during the past few years. The procedural laws relating to corruption cases, as discussed in

<sup>15</sup> The Criminal Procedure Code, Section 172.

<sup>16</sup> Supra note, Section 172 bis.

<sup>17</sup> The Penal Code, Section 95 and Section 98.

<sup>18</sup> Rules on Criminal Procedure of Persons Holding Political Positions B.E. 2543 (2000), Rule 10.

<sup>19</sup> The Organic Act on Criminal Procedure for Persons Holding Political Positions B.E. 2542 (1999), Section 27.

<sup>20</sup> Judgment of the Supreme Court's Criminal Division for Persons Holding Political Positions, Case No.7/2556.

the first part, which are the Criminal Procedure Code, the Organic Act on Criminal Procedure for Persons Holding Political Positions, B.E. 2560 (2017), and the Procedure for Corruption and Misconduct Cases Act, B.E. 2559 (2016), were amended and enacted with the new criteria on trial *in absentia*.

In 2016, the Procedure for Corruption and Misconduct Cases Act, B.E. 2559 (2016) enacted along with the establishment of the Criminal Courts for Corruption and Misconduct Cases allows trial *in absentia* for cases under the jurisdiction of these courts to include cases in which (i) the accused is a juristic person and the Court has issued a warrant of arrest against a manager or a representative of such juristic person but such person has not yet been successfully arrested and (ii) the accused, who is under the jurisdiction of the Court, has escaped and the Court has issued a warrant of arrest but the accused has not yet been successfully arrested.<sup>21</sup> This criteria, while broader than those in the earlier criminal procedure law, is quite similar to the Rules on Criminal Procedure of Persons Holding Political Positions B.E. 2543 (2000) in that the court has the competence to try the accused *in absentia* merely when the accused appeared at the first trial but fled during the trial.

In 2017, the Organic Act on Criminal Procedure for Persons Holding Political Positions, B.E. 2560 (2017) applied in the proceeding of the Supreme Court's Criminal Division for Persons Holding Political Positions was enacted with the provisions providing similar criteria on trial *in absentia* as those in the Procedure for Corruption and Misconduct Cases Act, B.E. 2559 (2016).<sup>22</sup> In addition, as the offenders under the jurisdiction of this court are high-profile persons who are capable of fleeing, strong measures are imposed to obstruct the evading accused. Under the new Act, the Supreme Court's Criminal Division for Persons Holding Political Positions may accept the case for trial although the accused fails to appear before the Court on the date of submission of the case, provided that the Attorney-General or the NACC (the plaintiff) has evidence satisfying the Court that a warrant has been issued to arrest the accused but such person has not been obtained, the non-appearance of the accused is prompted by dilatory attempts or the non-appearance on the appointed date is without any reasonable excuse.<sup>23</sup> Where the Court has accepted such case, the Court shall have the competence to conduct trial of the case in the absence of the accused, provided that (i) the accused was aware of the proceeding; by affirming that the court duly served on the accused a summons and a copy of the statement of allegation but the accused fails to appear before the Court and the Court issued a warrant of arrest against the accused person but the accused has not been successfully arrested within three months as from the issuance of the warrant of arrest (ii) the accused's right to appoint a lawyer to represent the accused is not precluded.<sup>24</sup> In the case that trial was conducted *in absentia*, the accused has a right to appear before the Court to defended in the case at any time prior to the Court's delivery of judgment, provided that such appearance has no effect of invalidating the inquiries and proceedings previously conducted.<sup>25</sup> After the Court has conducted the trial *in absentia* and has rendered judgment that the defendant has committed an offence, if the defendant thereafter has fresh evidence which may result in a substantial change of facts, the defendant may appear before the Court and submit a motion to the Court for retrial of the case, provided that submission thereof must be made within one year as from the date of the judgment of the Court, and the Court shall have the power to order retrial of the case as it may deem appropriate. Retrial of the case has no effect of invalidating the inquiries and proceedings previously conducted.<sup>26</sup> As a result, this amendment initiates the new rule for trial *in absentia* against an accused who has absconded since the first trial, provided that the accused must have notice of the proceeding and must be legally represented in the proceeding. The deferred case of Steyr-Daimler-Puch Spezialfahrzeug AG, who has been alleged as an abettor on Malfeasance in Office and corruption in the notorious fire truck case, falls under these new provisions. After the law came into force, the plaintiff of such case filed a motion with the Supreme Court's Criminal Division for Persons Holding Political Positions, requesting the Court to conduct the trial in the absence of Steyr under the new provisions. The case is currently in the process of serving on Steyr a summons and a copy of the statement of allegations by the Court. Other notorious high-profile corruption cases deferred by the special division of the Supreme Court follow one after another to hold the trial *in absentia* against the escaping accused.

<sup>21</sup> The Procedure for Corruption and Misconduct Cases Act, B.E. 2559 (2016), Section 28 paragraph 2 (2)(3).

<sup>22</sup> The Organic Act on Criminal Procedure for Persons Holding Political Positions, B.E. 2560 (2017), Section 31 paragraph 2 (2) (3).

<sup>23</sup> Supra note, Section 27.

<sup>24</sup> Supra note, Section 28.

<sup>25</sup> Supra note, Section 28, paragraph 3.

<sup>26</sup> Supra note, Section 29.

In February 2019, the Act Amending the Criminal Procedure Code (No.33), B.E.2562 (2019) added the provisions on trial *in absentia* to the Criminal Procedure Code to include cases in which the accused as a person or juristic person, appeared at the first trial but fled during the trial or failed to appear in the trial without any reasonable excuse, provided that (i) the Court issued a warrant of arrest against the accused person or manager or representative of the juristic person but such person has not been successfully arrested within three months from the issuance of the warrant of arrest (ii) the Court deems it expedient that the trial shall proceed without delay and the accused has a lawyer (iii) the case does not involve an offence punishable with death or an accused eighteen years of age or less on the day as he/she is instituted to the Court.<sup>27</sup>

At present, the criminal procedure laws for corruption cases under three different jurisdictions are amended and enacted in the same direction permitting trial *in absentia* in case the accused has escaped. However, the laws provide different criteria on what constitutes the absence of the accused under the jurisdiction of the court. The criminal proceeding for the Supreme Court's Criminal Division for Persons Holding Political Positions grants the widest criteria allowing the court to conduct trial *in absentia* in various situations as to the supremacy of offenders under the jurisdiction, while the criminal proceeding for the Criminal Courts for Corruption and Misconduct Cases is scoped down and those of the general criminal court are limited in extent. Additionally, the new provisions for the Supreme Court's Criminal Division for Persons Holding Political Positions and the Criminal Courts for Corruption and Misconduct Cases also provide for the suspension of the prescription period where the accused has escaped during legal proceedings, during trial by the court, or during the sentence by the final judgment.<sup>28</sup> The accused who decides to flee the trial after the laws came into force shall no longer enjoy the expiration of limitation.

The legal provisions have been enacted and amended to strengthen effective measures to prevent and combat corruption. The loopholes that existed in the former laws are being addressed with an aim to obtain positive impact on the prosecution and adjudication of corruption cases. The latest provisions on trial *in absentia* have been raised in the proceedings of high-profile corruption cases. However, this is merely the primary step. The new provisions on trial *in absentia* are ways challenging the international fair trial standard, especially when the proceeding in the Criminal Courts for Corruption and Misconduct Cases do not provide the right to legal representation and the right to retrial and when the right to retrial under the procedure law of the Supreme Court's Criminal Division for Persons Holding Political Positions is not invalidating the inquiries and proceedings previously conducted but just allows the defendant to present fresh evidence which may result in a substantial change of facts.

In conclusion, Thailand has underlined the formation of anti-corruption measures for many years. The flaw in the anti-corruption legislation has been contemplated to revise and enact the new legislation. The existing anti-corruption legislation has complied with UNCAC. However, fostering a culture to reject corruption is as significant as the formation of anti-corruption measures. As corruption in officials, to some extent, was rooted in people's perception that it would ease all government processes or magnify their opportunities in doing business without difficulty, the anti-corruption education revealing the negatives of corruption must not be ignored. Last but not least, corruption will exist as a dilemma in Thai society as long as the integrity of state officials is not upheld; thus, the mechanisms to ensure integrity of state officials such as the allocation of appropriate remuneration, or ethical indoctrination and verification must be deliberated in conjunction with anti-corruption measures.

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<sup>27</sup> The Criminal Procedure Code, Section 172 bis/1 and Section 172 bis/2.

<sup>28</sup> The Procedure for Corruption and Misconduct Cases Act, B.E. 2559 (2016), Section 13, The Organic Act on Criminal Procedure for Persons Holding Political Positions, B.E. 2560 (2017), Section 25.