

CRIMINAL JUSTICE RESPONSE TO CORRUPTION IN THAILAND

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I. INTRODUCTION

Corruption causes serious damage to the country in all aspects. Forms and methods of corruption are quite complicated and have both domestic and foreign connections as a result of advances in technology. Every country has struggled with the problem of corruption. Therefore, the cooperation of international organizations has formed for the purpose of taking serious action against corruption. The United Nations Convention Against Corruption 2003 (UNCAC) was born from the efforts of the international community that recognize the seriousness of the problem of corruption. The United Nations General Assembly is aware of the severity and danger of corruption, which has a huge impact on society and which is extremely dangerous for the stability and development of the country. UNCAC was adopted for that reason. The measures prescribed in UNCAC are expected to solve the problem of corruption effectively, in order to be an important mechanism in preventing and combating corruption and to set minimum standards as guidelines for countries to use as a framework for policy formulation, enactment, and to assist both the domestic and international levels.

II. THE UNITED NATIONS CONVENTION AGAINST CORRUPTION AND DOMESTIC ANTI-CORRUPTION LAW

Thailand is a state party of the United Nations Convention Against Corruption 2003 (UNCAC) and ratified the Convention on March 1, 2011, becoming effective on March 31, 2011. Currently, Thailand has amended the Organic Act on Counter Corruption B.E. 2558 (2015) in accordance with UNCAC on important issues, which is an international standard. In addition, the amendment is to provide effective mechanisms for preventing and combating corruption in both the public and private sector. Important amendments of the Organic Act on Counter Corruption are as follows:

A. The Periods of Prescription

The periods of prescription shall not run if the accused fled during the prosecution or court hearings, including when the defendant fled after the conviction of final judgement.¹ This amendment is not an extension of limitation periods in corruption cases, but it is the exception in case the offender escapes. The previous law had already provided this; however, the new law was amended to cover all stages in criminal proceedings such as procedures of fact finding, prosecution, court trial and after conviction.

B. Defining Offences for Legal Entities Associated with the Corrupt Officer

The new law provides for offences in such cases since entities are often beneficiaries of the bribes. The amended provision states that entities are guilty if their employees or agents bribe, whether Thai or foreign officials, and such kickbacks are made for the advantage of the company. In addition, entities without sufficient internal control measures to prevent bribery are punishable by appropriate monetary fines because a legal entity cannot be imprisoned.² Such penalty is a financial sanction through which the state is compensated for the damage by the return of the company's unlawful advantages to the state.

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¹Organic Act on Counter Corruption B.E. 2542 (1999), Section 74/1, as amended by the Organic Act on Counter Corruption B.E. 2558 (2015).

²Organic Act on Counter Corruption B.E. 2542 (1999), Section 123/5 paragraph 2, as amended by the Organic Act on Counter Corruption B.E. 2558 (2015).

C. Penalties for Bribery Offences

The new law defines imprisonment from five years to twenty years or life imprisonment, or capital punishment and fine of one hundred thousand to four hundred thousand baht in cases of Thai government officials, foreign government officials or officials of international organizations demanding, accepting or agreeing to accept any benefit.³ Nevertheless, the death penalty has already been imposed for such bribery offences under the Penal Code, Section 149.⁴ The current provision establishes additional offences, foreign government officials or officials of international organizations, and increasing fines.

D. Bribery Offences of Foreign Government Officials and International Organization Officials⁵

According to the amended law, foreign public officials or officials of international organizations are guilty if the official demands, accepts or agrees to accept for himself or another person property or any other benefit to perform or not to perform his mission, whether such exercise or non-exercise of his functions is wrongful or not, under the provisions of Section 123/2. The crime shall be punished as mentioned in the previous section. Another offence is Section 123/3: whoever, being a foreign public official or official of an international organization, exercises or does not exercise any of his functions in consideration of property or any other benefit which has been demanded, accepted or agreed to be accepted before being appointed as an official in such post. The crime shall be punished with imprisonment of five to twenty years or life imprisonment and a fine of one hundred thousand to four hundred thousand baht. These offences are established in accordance with UNCAC as well as to promote international cooperation in the prosecution of corruption under the Dual Criminality principle.

E. Value-Based Confiscation

Legislation has made forfeiture in corruption cases more efficient by covering the replacement property that has been acquired due to a distribution, supply, transfer, or conversion of property, including untraceable assets. The court can determine the value of the property and order the payment or forfeiture of other property equal in value.⁶

Thailand ratified UNCAC on March 1, 2011 and entered into force on March 31, 2011. Due to internal political problems, there were delays in the implementation of domestic law to comply with the obligations of the Convention. However, the government of Thailand made a serious attempt to resolve the problem in order to amend the legislation consistently with UNCAC.

II. INTELLIGENCE AND INVESTIGATION IN CORRUPTION CASES

A. Intelligence

Intelligence is very important in order to gain information related to corruption allegations and other serious crimes. Several kinds of covert investigation have been constituted to deal with severe crimes, for example, the Narcotic Control Act B.E. 2519 (1976) as amended B.E.2545 (2002). A special provision under Section 14 of the said Act authorizes competent officials to access information such as wiretapping. However, it must follow reason and necessity:

- (1) There is a reasonable ground to believe that a narcotics offence has been or will be committed;
- (2) There is a reasonable ground to believe that information will be received relating to the commission of a narcotics offence from the accessing of such information;

³Organic Act on Counter Corruption B.E. 2542 (1999), Section 123/2, as amended by the Organic Act on Counter Corruption B.E. 2558 (2015).

⁴Penal Code, B.E 2499 (1956), Section 149.

Whoever, being an official, member of the State Legislative Assembly, member of the Changed Assembly or member of the Municipal Assembly, wrongfully demands, accepts or agrees to accept for himself or the other person a property or any other benefit for exercising or not exercising any of his functions, whether such exercise or non-exercise of his functions is wrongful or not, shall be punished with imprisonment of five to twenty years or imprisonment for life, and fine of two thousand to forty thousand bath, or death.

⁵Organic Act on Counter Corruption B.E. 2542 (1999), Section 123/2 - 123/3, as amended by the Organic Act on Counter Corruption B.E. 2558 (2015).

⁶Organic Act on Counter Corruption B.E. 2542 (1999), Section 123/6 - 123/8, as amended by the Organic Act on Counter Corruption B.E. 2558 (2015).

- (3) May not be used when another procedure is more suitable or effective.

Although the Organic Act on Counter Corruption does not authorize such extraordinary powers, those who wish to provide information on corruption can notify directly the Office of the National Anti-Corruption Commission (NACC). Thailand has no whistle-blower protection law, but the informant is protected by the Organic Act on Counter Corruption. Taking a person as a witness, as defined in the said, Act is an effective instrument to encourage and strengthen anti-corruption. An alleged culprit or a person alleged to have committed an offence with state officials, may be taken for the purpose of being a witness. A person who was taken as a witness has to testify and to provide information or material of facts on the corruption offence. The witness statement will be used as evidence, whereby the adjudication will take place on the basis of such statement. If the NACC deems it advisable to take anyone as a witness, such person may not be prosecuted for the offence in accordance with rules, procedures and conditions considered by the NACC.⁷

One of the important measures under the Organic Act on Counter Corruption to strengthen corruption prevention and suppression is to protect an accuser, injured person, a witness, or a whistle-blower that provides any information on corruption offences or unusual wealth. In such cases, the NACC may provide measures to protect those persons. The NACC shall inform concerned agencies to provide measures to protect those individuals who are witnesses, and they shall be provided protection under the law of witness protection in criminal cases. Moreover, the alleged culprit or person alleged to have committed an offence with a state official as a witness may be taken for the purpose of being a witness. This is an effective instrument in suppression of corruption cases under this Act.⁸

The witness protection procedures are under the Witness Protection Act B.E. 2546 (2003). There are two types of witness protection: general measures⁹ and special measures.¹⁰ Both of these measures provide protection in cases where there is reason to suspect that the witness would be in danger, and potential harm exists from giving information to the authorities to prosecute offenders.

General measures are protection measures which may include arrangements for a safe place for a witness; change of name/family name, domicile, identification, and information that would reveal the identity of the witness as appropriate; and the personal status of the witness and nature of the criminal case. Special measures are as follows:

- (1) A new place of accommodation;
- (2) Daily living expenses for the witness or his/her dependents not exceeding 1 year, with extensions as necessary for 3 months each time, not exceeding 2 years;
- (3) Coordination with the relevant agencies in order to change the first name, family name and information that may contribute to knowledge of the personal identity of the witness, including arrangements for a return to original status;
- (4) Action to help the witness have his/her own career, and training, education and other means of proper living for his/her life;
- (5) Assistance or action on behalf of a witness for his/her lawful rights;
- (6) Arrangements for a bodyguard service for a necessary period of time;
- (7) Other actions to assist and support a witness with security as appropriate.

⁷Organic Act on Counter Corruption B.E. 2542 (1999) (As amended), Section 103/6.

⁸Organic Act on Counter Corruption B.E. 2542 (1999), Chapter 9/1, as amended by the Organic Act on Counter Corruption B.E. 2558 (2015).

⁹Witness Protection Act B.E. 2546 (2003), Section 6, Paragraph 3.

¹⁰ Witness Protection Act B.E. 2546 (2003), Section 10.

B. Investigation

Besides wiretapping, another effective measure is an undercover operation to obtain information about the offence. NACC can arrest persons who committed offences relating to the submission of bids for government agencies. If hearing this evidence is helpful to do justice in a situation that might cause harm to the rights of the people, the court is able to hear such evidence according to the Criminal Procedure Code (this issue will be discussed in the prosecution section).

Basically, the period to investigate corruption cases depends on the complexity of the case. The problems in fact-finding procedure are a long period of time in each step of fact inquiry. Every procedure in NACC fact inquiry regards the rights of the alleged person, which is the essence of the Constitution of the Kingdom of Thailand. Therefore, fact inquiry would be conducted strictly according to the procedure.

III. LITIGATION PROCESS OF CORRUPTION CASES

A. Prosecution

Thailand's major agencies for preventing and combating corruption are the National Anti-Corruption Commission (NACC) and the Public Sector Anti-Corruption Commission (PACC). This paper will mention corruption cases investigated by NACC. When receiving reports from the NACC, the prosecutor will consider whether or not the accused has committed an offence as defined in the Organic Act on Counter Corruption. However, NACC has power to initiate the prosecution on its own motion. It can be said that both the Prosecutor-General and the NACC Commission has power to prosecute corruption cases.

Thai Criminal Procedure does not define the type of acceptable evidence or evidence that is prohibited to bring to the trial. As for the principle of legal evidence, all kinds of evidence, whether physical evidence, documentary evidence, witnesses, or expert witnesses, which can affirm that the defendant is guilty or innocent, can be cited as evidence unless prohibited by law.¹¹ One important provision is the Exclusionary Rule: any evidence that occurs correctly but is obtained wrongfully, or provided by the information made or received illegally, shall be excluded from the trial, unless the acceptance of evidence is beneficial to justice rather than a disadvantage affecting the criminal justice system or fundamental human rights.¹² This article is on the basis of two important public interests: the protection of rights and freedoms of citizens (Due Process). The purpose is to maintain peace and order in society (Crime Control), so these are exceptions to hearing evidence obtained illegally.

Standards of prosecution for public prosecutors are in Section 143 of Criminal Procedure Code.¹³ The prosecutor's decision to prosecute or not does not prove the guilt of the accused. This is the stage of investigation and there is sufficient evidence to prove guilt in court. The accused is guilty as charged or not guilty as determined by the court. The law does not require a prosecutor to file a case when considering that the accused is guilty or not guilty.

About the prosecution rate for corruption cases, with regard to statistics for suppression of corruption of NACC in the years 2007 - 2014, the total number of cases that have been conducted is 34,528 cases, and the number of cases completed is 25,012 cases. These cases include allegations which do not establish *prima facie* cases and cases that are filed with the public prosecutor. Additionally, cases at the Supreme Court's Criminal Division for Holders of Political Positions decided during the years 2007 - 2014, that were announced in the Royal Gazette are as follows:

- (1) offences of corruption, malfeasance in office or malfeasance in judicial office; 7 cases

¹¹ Criminal Procedure Code B.E. 2477 (1934) (As Amended), Section 226.

¹² Criminal Procedure Code B.E. 2477 (1934) (As Amended), Section 226/1 Paragraph 1.

¹³ Criminal Procedure Code B.E. 2477 (1934) (As Amended), Section 143.

(1) In the case where the non-prosecution opinion has been rendered and the public prosecutor agrees with such opinion, he shall issue the non-prosecution order, but in the case where the public prosecutor disagrees with such opinion, he shall issue the prosecution order and inform the inquiry official to take the alleged offender to be prosecuted.

(2) In the case where the prosecution opinion has been rendered and the public prosecutor agrees with such opinion, he shall issue the prosecution order and bring the case against the alleged offender to the court, but in the case where the public prosecutor disagrees with such opinion, he shall issue the non-prosecution order.

- (2) offences relating to submission of an account showing particulars of assets and liabilities; 54 cases
- (3) request for the property to devolve on the State; 2 cases

Although Thailand has no provision about plea bargaining, Thai courts have used plea bargaining for a long period of time, for example, a plea-bargained confession about the penalty, as stated in Section 78¹⁴ of the Penal Code and Section 176¹⁵ of the Criminal Procedure Code.

B. Trial Procedure

Criminal Prosecution in Thailand involves both an inquisitorial and adversary system. Inquiry officers¹⁶ and prosecutors¹⁷ seek evidence under the inquisitorial system, whereas Thai Court procedure is based on the adversary system. On the contrary, corruption trials in the Supreme Court's Criminal Division for Holders of Political Positions and the Criminal Court are based on the inquisitorial system, where the judge questions witnesses by themselves unlike at a general trial.

The estimated duration of adjudicating corruption cases in court does not take long due to the continuing trial. The delays in the proceedings of corruption cases is in the process of the initiating agencies. There are a very large number of cases, and the complexity of each case is different. The countermeasure addressing this problem are planning to investigate and collect the evidence effectively, and administrative systems must be concise in order to shorten the time.

The standard of proof for conviction is beyond a reasonable doubt, which assures justice for the defendant, according to the principles and provisions of the law as discussed above in.

IV. OTHER GOOD PRACTICES AND PROBLEMS

One of the significant cases concerning international cooperation in the prosecution of a major corruption case by the NACC is the former governor of the Tourism Authority of Thailand (TAT). The case began in the United States, involving investigation by the Federal Bureau of Investigation (FBI) and prosecution under the US Foreign Corrupt Practices Act against Mr. Gerald and Mrs. Patricia Green on charges of giving bribes to Mrs. Juthamas Siriwan, former governor of TAT, in order to obtain the right to organize the Bangkok Film Festival. Green was sentenced by the US Court for six months' imprisonment and house arrest for another six months and was required to pay restitution of US\$ 250,000. Mrs. Juthamas Siriwan and her daughter are currently being prosecuted by the courts of the two countries. The achievement of this case is collaboration between the USA and Thailand on the details and information of the case.

¹⁴ Penal Code, B.E. 2499 (1956), Section 78.

Whenever it appears that there exists an extenuating circumstance, whether or not there be an increase or reduction of the punishment according to the provisions of this Code or the other law, the Court may, if it is suitable, reduce the punishment to be inflicted on the offender by not more than one-half.

Extenuating circumstances may include lack of intelligence, serious distress, previous good conduct, the repentance and the efforts made by the offender to minimize the injurious consequence of the offence, voluntary surrender to an official, the information given or the Court for the benefit of the trial, or the other circumstance which the Court considers to be of similar nature.

¹⁵ Criminal Procedure Code B.E. 2477 (1934) (As Amended), Section 176.

In the trial of a case, if the accused pleads guilty to the charge, the Court may give judgment without taking any further evidence, provided that if the minimum punishment in the case where the accused pleads guilty to the charge is imprisonment from five years upwards or heavier, the Court must hear the witness for the prosecution until it is satisfied that the accused is guilty.

In the case of several accused, and only some accused have pleaded guilty to the charge, the Court may, if it thinks fit, dispose of the case for those who refuse guilt in order that the prosecutor may institute the prosecution against such accused as another case within the period fixed by the Court.

¹⁶ Criminal Procedure Code B.E. 2477 (1934) (As Amended), Section 131.

The inquiry official shall gather all types of evidence as possible in order to know the facts and other circumstances concerning the offence alleged, and to find out who the offender is and prove his guilt or innocence.

¹⁷ Criminal Procedure Code B.E. 2477 (1934) (As Amended), Section 143 (n. 4).

V. EVALUATION AND RECOMMENDATIONS

The justice system to prosecute corruption in Thailand within the existing domestic legislation and amended law according to UNCAC has strengthened measures to combat corruption that will have a positive impact on the prosecution of corruption cases, which are complex and pose difficulties for the acquisition of evidence. Witnesses and co-perpetrators can provide information on corruption with confidence that they will be protected. However, for the protection of the informant in good faith, criminal penalties should be imposed, as well as civil remedies, for those who retaliate against witnesses or informants.

VI. CONCLUSION

Preventing and combating corruption requires effective legal provisions. Special measures as well as the new provisions of the Organic Act on Counter Corruption comply with UNCAC. These measures and procedures not only enhance the work of investigation and inspection of corruption cases, but also are directly beneficial to those who took part in the anti-corruption efforts. Especially at present, corruption is taking place within the country, and it is a transnational crisis that has affected the world community. Therefore, the major key to achieving successful outcomes in the fight against corruption is effective legislation and cooperation at the country and international levels.