

EFFECTIVE LEGAL AND PRACTICAL MEASURES FOR COMBATING CORRUPTION

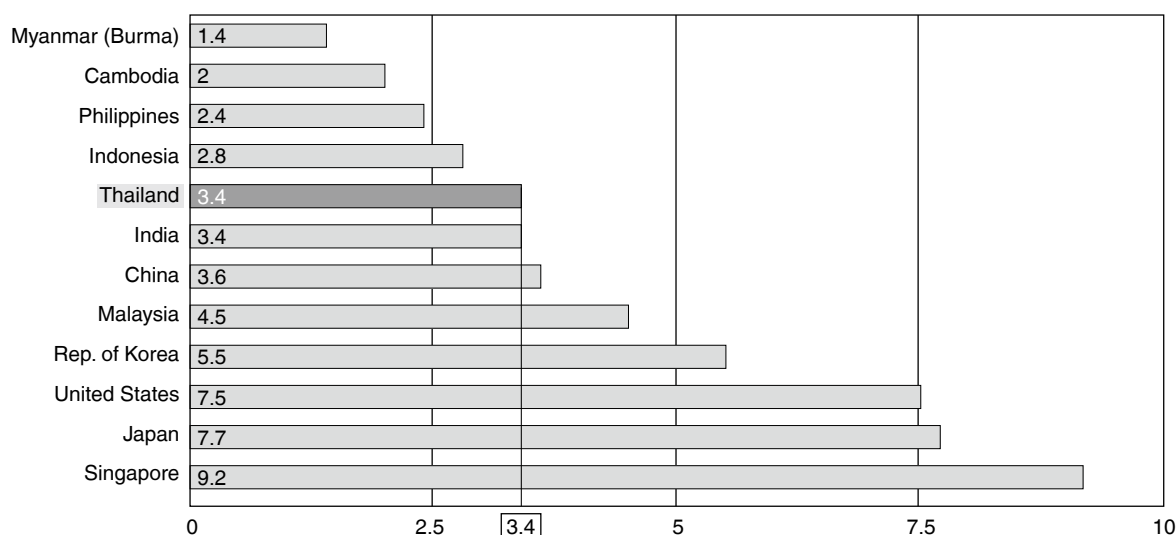
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I. INTRODUCTION

Corruption, a parasite on society, has existed in Thailand for a long time. Corruption is not restricted to a particular country or a region, but it appears to be a global problem, and causes particularly huge damage to developing countries, such as Thailand, especially in terms of bribery and fraud in public procurement. All over the world, countries try to find effective measures to deal with corruption, including legislative and social measures.

Corruption occurs in both the public and private sectors. This paper will nevertheless focus on corruption in the public sector. Although corruption does not have a specific definition, it can be generally defined as 'abuse of public authority or power for a private gain'. This reflects a conception that corruption occurs when an official exercises the power or authority of his or her office or position for personal interest. 'Corruption' is not limited only to monetary gain; it may rather take other forms of benefit, such as discounts when buying goods or services, or receiving stocks or shares in a company without the name of the holder being specified, etc.

The Corruption Perceptions Index (CPI) measures the perceived level of public sector corruption in 180 countries around the world. A higher CPI means a lower level of corruption or a cleaner public administration; for example, a country with CPI of nine is cleaner than the one with a rating of five. The higher CPI of the developed countries indicates a situation of more transparency than countries with lower ratings.¹ If we focus on Asian countries, the index shows that the CPI of developed countries, like Japan and Singapore, are higher than those of developing countries or under-developed countries. In the selected CPI scores below, Thailand and India were at same rating of 3.4; Indonesia was rated 2.8; Cambodia 2; and Myanmar 1.4. This means that in Thailand corruption seems to be less of a problem in comparison to Indonesia, Cambodia and Myanmar.



Source: Corruption Perceptions Index (CPI) 2009

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¹ http://www.transparency.org/policy_research/surveys_indices/cpi/2009

The current situation of corruption in Thailand is divided into two scales: grand corruption and petty corruption. Grand corruption is generally committed by high level public officers who gain more benefits from abuse of their authorities. For example, a minister or a chief of a public organization can abuse his or her authority for private gain by committing corruption in public procurement. This is categorized as grand corruption because he or she gains a lot of money from doing so and it causes huge damage to society. On the other hand, petty corruption normally consists of routine practices committed by lower ranking public officers who gain not much benefit. When a traffic police officer abuses his or her authority by demanding money from a car driver who violated a traffic regulation in return for not issuing a traffic ticket, it is classified as petty corruption. Although just one instance of petty corruption does not cause gross social harm, all such petty acts together destroy the government's credit vis-à-vis the citizenry and eventually result in huge damage to society as well.

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 officers are stipulated in Articles 200 to 202. Article 147 punishes officers who commit embezzlement in their duties with imprisonment from five to 20 years or imprisonment for life and fine of 2,000 to 40,000 Baht.² Besides, Articles 148 to 150 punish officers conducting various types of bribery with imprisonment from five to 20 years or imprisonment for life or the death penalty. Article 151 incriminates wrongful exercise of an officer's function damaging the State with a maximum imprisonment for life; meanwhile, Article 152 punishes officers who have a conflict of interest in their duties with a 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. A general offence is prescribed in Article 157 as misconduct in office punished with a maximum 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 properties which shall be forfeited at the Court's judgment, according to Article 34 (1) of the Thai Penal Code. The forfeiture of properties has a deterring effect from committing corruption.

The Organic Act on Counter Corruption B.E. 2542 (1999) establishes an independent organization called the National Anti-Corruption Commission (NACC). The function of NACC will be explained in the section on 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 fine not exceeding 60,000 Baht or both. Bribery incriminated in Article 103 shall have the same punishment as conflict of interest.

B. Procedural Law

In the sphere of procedural law, Thailand has five major laws dealing with the 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 principal Code applied to every criminal case, including cases of 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.

² As of the end of July 2010, the exchange rate is about 32 baht for 1 US dollar.

The Organic Act on Counter Corruption B.E. 2542 (1999) not only establishes the National Anti-Corruption Commission (NACC) but it also imposes 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 obtaining from corruption. This act establishes the Anti-money Laundering Office (AMLO), with the authority to temporarily restrain, seize or freeze assets involved in corruption. This measure is categorized as a civil forfeiture system; it does not require a conviction from a criminal court.

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 framework for international co-operation in the process of criminal litigation from the beginning of investigation to the end of trial. Many types of assistance can be provided, such as locating persons, searching and seizing objects or documents as evidence, taking statements of witnesses and confiscating of assets.

Under the Extradition Act B.E. 2551 (2008), Thailand can 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 where there is no treaty between the requesting and the requested country for the widest possible co-operation. In addition, Thailand also signed a Mutual Legal Assistance Treaty with ASEAN countries in 2006. The process is now pending upon the reviewing and amending of the domestic legislation.

Finally, Thailand has many other legal methods of dealing with corruption. Corresponding to international standards, in December 2003, Thailand signed the United Nations Convention against Corruption (UNCAC), but we have not yet ratified it. The completion of domestic legislative modifications would enable Thailand to ratify this convention in the near future. Currently, there are still four main points of incompatibility with the UNCAC: asset recovery (implementation of a value-based confiscation); mutual legal assistance in criminal matters; definition of 'foreign officer' (current Thai law incriminates only corruption by or to Thai officers); and the statute of limitations.

III. COMPETENT AUTHORITIES CONCERNED

Many government authorities are set up for monitoring, preventing and efficiently suppressing corruption cases, including the National Anti-Corruption Commission (NACC); the Office of Public Sector Anti-Corruption Commission (PACC); the Office of the Attorney General (OAG); the Ombudsman; the Office of the Auditor General; the Royal Thai Police; the Anti-Money Laundering Office (AMLO); the Department of Special Investigation (DSI); and the 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 focus on some of these agencies' roles and functions.

A. National Anti-Corruption Commission (NACC)

To strengthen anti-corruption efforts, the 1997 Constitution and the Organic Act on Counter Corruption B.E. 2542 (1999) added to the checks and balances of State by establishing the National Counter Corruption Commission (NCCC) as an independent agent. The NCCC has a number of duties and responsibilities both in prevention and suppression. 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 politician and high-ranking government officials. So, the 2007 Constitution changed the official title of NCCC to the National Anti-Corruption Commission (NACC) and it has been vested 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 complete an initial investigation of corruption cases. After completion of inquiry files, the NACC will forward the investigation file with adequate legal background to the government agency for which the accused works to start disciplinary action, if there is a well founded basis. Otherwise, if the NACC finds grounds to believe that a criminal offence has been committed, it would refer the inquiry file to Office of the Attorney General for further criminal prosecution.

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

Due to the overloaded casework 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 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 way as the proceedings for the NACC, as mentioned above. However, the PACC has not yet exercised 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 the 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 inquiry files by the NACC, if a corruption offence is found, the case shall be submitted to the Attorney General for criminal prosecution. Then, if there is sufficient evidence for a prosecution's charge of corruption, the Attorney General shall prosecute the accused in the Supreme Court's Criminal Division for Persons Holding Political Positions (in cases where the accused is politician) or in other competent courts (in cases 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 that point, the NACC by itself has the power to proceed the case to the competent court or ask a private lawyer to do so.⁴

In addition, the Attorney General is acting as the central authority in international co-operation in criminal matters: mutual legal assistance and extradition, as mentioned in section 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 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 was established in 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 fair and speedy trial of corruption offences committed by politicians.⁵

This specialized division of the Supreme Court has the power and duty 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 Penal Code, committing an offence of dishonesty in office or corruption according to other laws. The quorum of 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 the inquisitorial system.⁶ The orders and decisions will be final and disclosed. Nonetheless, decisions can be appealed to a plenary session of the Supreme Court only if there is fresh evidence in the case.⁷

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

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

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.

Statistics indicate that few cases have been submitted to 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 and nine cases in 2009.⁸

IV. PERSPECTIVE IN COMBATING CORRUPTION

As I have already mentioned in Section II above, 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. Nevertheless, it seems that the number of corruption cases in Thailand has not declined.

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?

Regarding Becker's Economic model of crime,⁹ he offers that we should raise the offender's costs and limit the offender's benefits in order to reduce the offender's incentive for engaging a criminal act. Becker's model is relevant to a cost-benefit analysis which is generally accepted by current leading economists. He further suggests that the 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 periods of imprisonment, the 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 the Becker recommendation, increasing the magnitude of punishment would have less effect on government budgets. On the other hand, the government needs to spend more to invest in the law enforcement sector to increase the probability of punishment, including investigators, public prosecutors and criminal courts. Therefore, Becker prefers increasing the magnitude of punishment because it is more economical, compared to the other solution.

In my opinion, to combat corruption in Thailand, I believe that increasing the probability of punishment is more suitable in Thailand 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) for those who are found guilty of bribery (although the amount of fine is still out of date and of a low rate). However, it is obvious that such measures did not effectively eradicate corruption in Thailand. Therefore, prosecution of corruptors should be augmented to reduce corruption.

Secondly, corruption is categorized as a 'victimless crime' from which only the State suffers. Consequently, nobody files a complaint to the police when it is committed. Offenders are not intimidated by the threat of capital punishment because they are certain that their wrongs have not been noticed by others. However, Thai law has already introduced some measures to facilitate reporting of corruption by citizens by issuing complaints to the NACC or PACC to begin the investigation process, as I mentioned above.

Finally, in the aspect of evidence, corruption leaves few traces for detectives to investigate. This has a dilutive effect on investigation and punishment. Therefore, the severity of capital punishment would be diluted in the eyes of corruptors because of a lack of evidence.

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 large budget in every law enforcement unit; enlarging or adding to the organization, using modern investigating methods as well as effective international co-operation, 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.

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

⁹ 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

V. CONCLUSION

Corruption is considered a widespread problem in many nations. It is a serious transnational phenomenon which significantly hinders economic and social development. In addition to the various sanctions of law enforcement agencies to combat corruption, social networks or solidarity of the people can effectively strengthen anti-corruption measures by giving the information to the justice authorities. Finally, education can be a sustainable anti-corruption measure in which the government should invest. An academic curriculum should inculcate the moral values of the citizenry as well as anti-corruption measures for children who will become the government officers of the future.