

Criminal Justice Reform Committee

Office of the National Economic and Social Development Board
926 Krung Kasem Road
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24 July 2018

Dear Members of the Criminal Justice Reform Committee,

Recommendations concerning the Draft Amending Criminal Procedure Code Act and the Draft Act on Judicial Process Timeframe

We write to your office concerning the Draft Amending Criminal Procedure Code Act ('Draft CPC Amendment Act') and the Draft Act On Judicial Process Timeframe ('Draft Judicial Process Act'), scheduled for public consultation on 24 July 2018.

We welcome the Criminal Justice Reform Committee's efforts to enhance the effectiveness and fairness of the criminal justice system in Thailand, through proposed amendments to Thailand's Criminal Procedure Code B.E. 2551 (2008) and the Judicial Process Timeframe Act.

Draft CPC Amendment Act

We commend the Committee's inclusion within the Draft CPC Amendment Act of the following provisions and wish to make the following recommendations as to how they could be further strengthened:

a. Section 13/1. Video and audio recordings of arrests and/or searches

This provision to conduct recordings of arrests and/or searches is an important safeguard against potential violations of the rights of suspects and/or arrested persons, including in particular, torture or other ill-treatment, coercion or other unlawful or improper conduct or use of force by authorities conducting the arrest and/or search. This safeguard can also assist law enforcement officers who may be confronted with allegations of abuse.

Recommendation: Extend this provision to include video and audio recordings of all places of deprivation of liberty, including during the transport of suspects and/or arrested persons, for example, in police vehicles. This is important as alleged acts of torture, ill-treatment, coercion and other unlawful or improper conduct or use of force by police or other law enforcement officials are also likely to occur during the transportation of detainees from one place to another, including to and from detention facilities.¹

¹ See Association for the Prevention of Torture, 'Factsheet: Video recording in police custody - Addressing risk factors to prevent torture and ill-treatment', 2nd edition, 2015, https://www.ap.t.ch/content/files_res/factsheet-2_using-cctv-en.pdf; See also, Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT), 'Report on the visit of the SPT to Mexico', CAT/OP/ MEX/1, 31 May 2010, para 141,

Notably, amendment of this provision does not override the necessity of undertaking other preventive measures, including the provision of adequate training for law enforcement officials on the legitimate and lawful use of force and prevention of torture and ill-treatment.² This should be made explicit in the legislation.

Recommended new wording: *"During an arrest or a search, **and in all places of deprivation of liberty, including during the transport of suspects and/or arrested persons in law enforcement vehicles**, an authority who conducts an arrest, transportation or search shall take steps to record visual images and sound that can be replayed continuously unless, **and only exceptionally, where there is an immediate technical impossibility to ensure a recording and the arrest is strictly necessary to prevent a serious crime.**"*

This provision does not override the necessity of undertaking other measures to prevent torture, ill-treatment, coercion or other unlawful or improper conduct or use of force by authorities, including but not limited to those in the Criminal Procedure Code."

b. Section 13/2. Prohibitions against violation of the presumption of innocence

This provision to prohibit the disclosure of any visual images or audio recordings of a suspect and/or arrested person and to ban the involvement of a suspect and/or arrested person in the media or press interviews, will help to protect the right of a suspect and/or arrested person to the presumption of innocence until proven guilty in a court of law.

The right to the presumption of innocence is protected under article 14(2) of the International Covenant on Civil and Political Rights (ICCPR), to which Thailand is a State party. In its General Comment on State obligations under article 14 and the right to fair trial, the Human Rights Committee asserted that all public authorities have a duty to refrain from prejudging the outcome of a trial, through refraining from making public statements about the guilt of a suspect, and that the media should refrain from any news coverage that would undermine the right to presumption of innocence.³

Recommendation: In the interests of protecting the presumption of innocence and to ensure accordance with Thailand's obligations under the ICCPR, extend this provision to all public authorities and for the period of time until the suspect and/or arrested person is proven guilty in a court of law, not just limited to the "authority who has made an arrest or to whom an arrested person is delivered, or an inquiry official" and "during the stage of an arrest or an inquiry". We would also like to highlight that the amendment in section 13/2 to prevent "(commission of) other actions in (any) manner which may shame an arrested person or a suspect" should expressly include abstaining from making public statements prejudging the guilt of a suspect, in line with international legal standards.

Recommended new wording: ***"All public authorities shall be prohibited from involving an arrested person or a suspect in the press reportage or in giving interview to the press, until such arrested person or suspect has been proven guilty in a court of law."***

https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2FOP%2FME X%2F1&Lang=en.

² Ibid

³ UN Human Rights Committee, 'General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial', 23 August 2007, CCPR/C/GC/32, para 30. ('HRC GC No. 32') <http://www.refworld.org/docid/478b2b2f2.html>

All authorities mentioned in the first paragraph shall neither disclose the visual images or sound of an arrested person or a suspect to the public, nor consent to any person who is not an authority to record visual images or sound of an arrested person or a suspect, or commit other actions in the manner which may shame an arrested person or a suspect, including abstaining from making public statements prejudging the guilt of a suspect; however, this shall not apply to any necessary and appropriate action taken for the benefit of an inquiry or taken to pursue and arrest an offender.”

- c. Sections 121/2, 123 and 124/2. Lodging of criminal complaint with the public prosecutor, at any location and through email or other online medium

Sections 121/2 allows for the lodging of a criminal complaint with the public prosecutor where an inquiry official declines to accept the complaint; section 123 allows for the lodging of such complaint at any location, and section 124/2 allows for the lodging of such complaint through email or other online medium. We welcome these provisions as they will assist to ensure that no individual is deprived, in procedural terms, of his or her right to claim justice.⁴

In particular, allowing the filing of a criminal complaint via email or other online medium, will assist in increasing access to justice in cases involving threats to bodily integrity or physical harm, including torture, ill-treatment, sexual violence, rape and sexual or other assault, where victims do not feel safe lodging a complaint in person.

Recommended new wording: None.

- d. Section 136. Video and audio recordings of inquiry or interrogation

This provision requiring the inquiry official to “take steps” to conduct video and audio recordings during a plea inquiry or interrogation of a suspect is welcome as it includes an important safeguard against potential violations of the rights of suspects and/or arrested persons, as noted above.

Recommendation: Video and audio recordings should be conducted during all interrogations,⁵ regardless of the severity of the penalty imposed for the charges involved in a criminal matter, since the severity of a penalty is not linked to the risk of abuse. To ensure that an investigation is conducted in a transparent and legitimate manner, we recommend that not only all interrogations, but also any interviews conducted by law enforcement officials of not only suspects and/or arrested persons, but also witnesses and complainants should also be video and audio-recorded.

It is crucial also to prohibit the use of information gained from interrogations or interviews which are not recorded as evidence in court proceedings, to guard against bringing into

⁴ HRC GC No. 32, para 9.

⁵ Committee Against Torture, ‘General comment no. 2, Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment’, 24 January 2008, CAT/C/GC/2, para 14, <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhskvE%2BTuw1mw%2FKU18dCyrYrZhDDP8yaSRi%2Fv43pYTgmQ5n7dAGFdDalfzYTJnWNYOXxeLRAIVgbwcmSm2ZXH%2BcD%2B%2F6IT0pc7BkqqlATOUZPVhi>; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, ‘Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment’, 10 August 2010, UN Doc. A/65/273, para 75, <http://www2.ohchr.org/english/issues/torture/rapporteur/docs/A.65.273.pdf>; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, ‘Report of the Special Rapporteur on the question of torture submitted in accordance with Commission resolution 2002/38’, 17 December 2002, E/CN.4/2003/68, para 26(g), <https://undocs.org/E/CN.4/2003/68>

court proceedings evidence obtained by torture or ill-treatment.⁶ The latter is prohibited under Thailand's international legal obligations, namely article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to which Thailand is a State party.

As noted above, amendment of this provision does not override the necessity of undertaking other preventive measures, including the provision of adequate training for law enforcement officials on the legitimate and lawful use of force and prevention of torture and ill-treatment, which should be made explicit in the legislation.

In addition, as also noted above, the recording of interrogations and interviews will assist law enforcement officials in instances where they are confronted with allegations of abuse or other unlawful conduct or if suspects, arrested persons, witnesses or complainants later claim to deny admissions they made during the process of interrogation or interview.⁷

Recommended new wording: "During a plea inquiry, **interview** or interrogation of **any suspect, arrested person, witness or complainant**, ~~in a case containing an offence on which the law imposes minimum sentence of imprisonment for a term of five or more years or other severer types of sentences~~, an inquiry official shall take steps to record visual images and sound that can be replayed continuously unless, **and only exceptionally, where there is an immediate technical impossibility to ensure a recording and the arrest is strictly necessary to prevent a serious crime.**

Any information gained from inquiries, interrogations or interviews which are not video or audio- recorded shall be prohibited from being used as evidence in court proceedings.

This provision does not override the necessity of undertaking other measures to prevent torture, ill-treatment, coercion or other unlawful or improper conduct or use of force by authorities, including but not limited to those in the Criminal Procedure Code."

- e. Section 161/1. Right of the court to dismiss a case where it is filed in bad faith or with misrepresentation of facts in order to harass or take advantage of a defendant

We welcome this provision to prevent the filing of frivolous and vexatious litigation against a defendant, which will assist in preventing abuse of the legal system to harass defendants.

Recommendation: We note that an intention behind inclusion of this provision is to prevent the abusive undertaking of strategic litigation against public participation (i.e. SLAPP),⁸ including the use of criminal defamation and other laws, including, inter alia, Head of the National Council for Peace and Order (NCPO) Order No. 3, the Public Assembly Act and sedition-like offences, to harass individuals exercising their fundamental freedoms.

⁶ Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 'Report of the Special Rapporteur on the question of torture submitted in accordance with Commission resolution 2002/38', 17 December 2002, E/CN.4/2003/68, para 26(g), <https://undocs.org/E/CN.4/2003/68>

⁷ European Committee for the Prevention of Torture (CPT), 'CPT Standards', 2011, CPT/Inf/E (2002) 1 – Rev. 2011, at 9, para 36, <http://www.psychargos.gov.gr/Documents2/NEA/eng-standards.pdf>

⁸ For example, Thailand, 'Right to Reply', Item:4 General Debate (Cont'd) - 35th Meeting, 37th Regular Session Human Rights Council, Human Rights Council, 14 March 2018, at 2:51:00, <http://webtv.un.org/meetings-events/treaty-bodies/watch/item4-general-debate-contd-35th-meeting-37th-regular-session-human-rights-council/5751616281001/?term=&lan=original>; See also, Court of Justice, 'Principles and Rationales in cooperating the Draft Amendment to Criminal Procedure Act, B.E...', 2018 [THAI], http://www.jla.coj.go.th/doc/data/jla/jla_1521605382.pdf. The draft proposed a provision with a similar language to Section 161/1.

While we commend the Committee's intention and effort to attempt to prevent SLAPP, we remain concerned that there is no clear definition provided for "bad faith" or "misrepresentation of facts" in the legislation. If the intention of including this provision was to protect against the legal harassment of individuals, definitions must have necessarily included a clear pronouncement that protection of fundamental freedoms is the core reason to dismiss a SLAPP lawsuit, and not merely because the lawsuit was brought in "bad faith" or "misrepresented facts".

Further, we are concerned that this provision, aimed at combating the misuse of laws to harass and intimidate individuals, is situated in the Criminal Procedure Code. This provision cannot and should not be used as a protective measure against SLAPP lawsuits, particularly as it is a criminal law provision. We do not believe cases should be brought in criminal law to intimidate and harass individuals who merely exercise their fundamental freedoms in the first place, and that therefore 'preventive' provisions should not be required in criminal law against such lawsuits.

Instead, we strongly recommend that other domestic laws, including the laws noted above, be repealed or amended to ensure that fundamental freedoms are not effectively criminalized in Thailand. Provisions to prevent the filing of frivolous and vexatious litigation against a defendant should also be enacted within civil law provisions to guard against potential civil SLAPP lawsuits.

Recommended new wording: None, noting that we do not recommend this provision be used as a measure to prevent SLAPP lawsuits, in the absence of repealing or amending existing legislation that have been effectively misused to curtail fundamental freedoms.

f. Section 165/1. Allowing the defendant to submit a defence plea and produce supporting evidence in court

This provision allowing a defendant to submit a plea, furnish supporting evidence and call witnesses in defence of his/her case is an important and necessary development to ensure the fair trial right to defence, as protected under article 14(3) of the ICCPR.

We further note that even as Thailand's legal system generally follows the civil law model, the adversarial common law system has much influence in the development of the Thai legal system and that it is this manner of adjudication that is commonly used in trials and particularly in the fields of procedural law and the law of evidence. Amendment of this section will constitute an adoption of some of the best practices of other adversarial legal models into Thailand's system.

Recommended new wording: None.

g. Section 179/1. Trial *in absentia*

This provision allows for the court to hold a trial in the absence of a defendant where the defendant is unable to appear because of illness, where the defendant, or a representative of the defendant, has yet to be taken into custody, where the defendant has escaped from detention and where the defendant leaves the court either because he or she was ordered to do so, or on his or her own accord.

Article 14(3)(d) of the ICCPR provides for the right to be present at one's trial, and this right is an essential and fundamental fair trial right. However, the Human Rights Committee, and other authorities have acknowledged that this right may be limited in very exceptional circumstances to allow for a trial in absentia. Therefore, a trial may legitimately proceed in the interest of proper administration of justice where an accused person,

although informed of proceedings sufficiently in advance, declines to exercise their right to be present.⁹

Recommendation: Add within this section a provision asserting that the court must have verified whether necessary steps had been taken to summon the accused in a timely manner and to inform them beforehand about the date and place of their trial and to request their attendance, and whether the accused person had declined to be present, before conducting a trial *in absentia*.¹⁰

In addition, the provision should note that individuals who have been convicted *in absentia* must be accorded the right to remedy, including a retrial with their presence, once he or she found out about the proceedings and is willing and able to take part in them.¹¹

Further, if an accused person convicted *in absentia* seeks to challenge his or her conviction on the grounds that the trial should not have occurred in that person's absence, he or she must not be left with the burden of proving that he or she was not seeking to evade justice or that his or her absence was due to *force majeure*.¹²

Recommended new wording: [Recommended to include as new section 179/2]

"In its determination of whether to hold a trial in absentia, the Court must ascertain that the following considerations have been sufficiently met:

(1) whether necessary steps had been taken to summon the accused in a timely manner and to inform them beforehand about the date and place of their trial and to request their attendance; and

(2) whether the accused person had declined to be present.

In the event a trial in absentia is held and an individual convicted in such trial, but the individual is only thereafter fully apprised of the trial, the individual retains the right to remedy, including a retrial with his or her presence, from the moment he or she finds out about the proceedings and is willing and able to take part in them.

Further, if an individual convicted in absentia seeks to challenge his or her conviction on the grounds that the trial should not have occurred in the individual's absence, the burden of proof does not lie on the individual to prove that he or she was not seeking to evade justice or that his or her absence was due to force majeure."

⁹ HRC GC No. 32, para 36.

¹⁰ Ibid; Human Rights Committee, 'Maleki v Italy', Communication No. 699/1996, UN Doc. CCPR/C/66/D/699/1996, 27 July 1999, para 9.4,

<http://hrlibrary.umn.edu/undocs/session66/view699.htm> ; Amnesty International, 'Fair Trial Manual', 2014, at 158, <https://www.amnesty.org/download/Documents/8000/pol300022014en.pdf>

¹¹ HRC GC No. 32, para 54; European Court of Human Rights, 'Colozza v Italy (9024/80)', 12 February 1985, para 29, https://www.juridice.ro/wp-content/uploads/2018/04/CASE_OF_COLOZZA_v._ITALY_08.pdf; Human Rights Committee, 'Maleki v Italy', Communication No. 699/1996, UN Doc. CCPR/C/66/D/699/1996, 27 July 1999, para 9.5, <http://hrlibrary.umn.edu/undocs/session66/view699.htm>.

¹² European Court of Human Rights, 'Colozza v Italy (9024/80)', Court (Chamber), 12 February 1985, para 30, <https://hudoc.echr.coe.int/eng#%7B%22dmdocnumber%22%3A%5B%22695339%22%2C%22itemid%22%3A%5B%22001-57462%22%5D%7D> ; European Court of Human Rights, 'Sejdovic v Italy (56581/00)', Grand Chamber, 1 March 2006, para. 87-88, <https://hudoc.echr.coe.int/eng#%7B%22dmdocnumber%22%3A%5B%22792978%22%2C%22itemid%22%3A%5B%22001-72629%22%5D%7D>

Draft Judicial Process Act

We welcome and commend the Committee's proposed provisions in the Draft Judicial Process Act to ensure prompt access to justice, as guaranteed under article 14(3) of the ICCPR. We further commend the Committee's proposed section 8 of the Draft Judicial Process Act which will provide in law responsibilities to a designated person to keep a victim, victim's relative, friend or lawyer apprised of developments and progress in a case.

In this respect, we would like to highlight that updates on the developments and progress in a case should be regular and consistent, and actively provided on the part of the designated liaison person, regardless of the actions of the victim, victim's relative, friend or lawyer, to seek such updates.¹³

The ICJ remains committed to supporting the efforts of the Thai government, and the Criminal Justice Reform Committee, to strengthen the criminal justice system in Thailand in a manner that protects the fundamental rights of persons in Thailand and ensures Thailand's compliance with international law.

Please do not hesitate to contact us if you have any questions or require further information or advice.

Yours faithfully,

[Signed]

Kingsley Abbott

Senior Legal Adviser

International Commission of Jurists

¹³ See for example, in the case of investigating potentially unlawful deaths, the Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016), para 35.