



**INTERNATIONAL STANDARDS OF FAIRNESS IN THAI
LEGISLATION ON CRIMINAL PROCEDURE IN JUVENILE
CASES
STATUTE ON ESTABLISHING JUVENILE AND FAMILY
COURT AND THE PROCESS OF CONSIDERING
JUVENILE AND FAMILY CASES, 2010, 2016**

*Alexandre Chitov

ABSTRACT

International human rights law pays significant attention to the procedural rights of young offenders. Legal procedure is conceived as an important element securing the fairness of criminal justice in general and in juvenile cases in particular. One of the requirements of international law is that juvenile offenders have a right to be treated differently. Each juvenile case requires an individualized approach to meet the goals of education. The principle of individualization in juvenile criminal cases comes into tension with the principle of the prohibition of discrimination and the principle of equal application of law (treating like cases alike). This comment illustrates this tension through the examination of procedural fairness in Thai juvenile courts in the light of international law.

Keywords: *criminal procedure, international law, juvenile cases, Thailand.*

THAI LEGISLATION ON JUVENILE CRIMINAL PROCEDURES: GENERAL CHARACTERISTICS

There are two important pieces of Thai legislation which define the juvenile delinquency justice process. These are the Criminal Procedure Code, B.E. 2477 (1934)¹ and the Statute on Establishing Juvenile and Family Court and the Process of Considering Juvenile and Family Cases B.E. 2553 (2010).² There are also important provisions on juvenile cases in the Thai Penal Code that was promulgated in 1956.

The Statute on Establishing Juvenile and Family Court and the Process of Considering Juvenile and Family Cases (further referred as the Statute on the Establishment of Juvenile Court) is the most important legislative act specifying the details of legal procedure in juvenile cases. The Thai law, reflecting international procedural standards, was adopted in 1991 but was significantly rewritten in 2010.³ The 2010 legislation is very dynamic. It is subject to constant revisions. At the time of writing, it has been already revised four times.⁴ The key element of the Thai legislation is a separate juvenile court. The 1991 legislation was not the first law in Thailand establishing a special court for juvenile cases because this can be traced back to 1951.⁵ The importance of the current legislation consists in the procedural rules which complete and amend the rules of the Thai Criminal Procedure Code in relation to juvenile cases. The new statute took into account the changes brought about the UN Convention on the Rights of the Child (1989). This legislation, however, leaves many questions unanswered and the authority is given to a number of ministries to issue clarifying regulations.⁶ The Thai system of juvenile delinquency justice depends to a large degree on the measures and policies adopted by the Ministry of Interior and the Ministry of Justice. Much of the internal regime in the juvenile correction institutions is determined by a Royal Decree issued by the Government.

The study of Thai procedural law in juvenile cases cannot be separated from the international movement towards securing the rights of the child. Those rights are mainly

¹ English translation is available at:

<http://www.ilo.org/dyn/natlex/docs/MONOGRAPH/93536/109383/F203580879/THA93536%20EngTha.pdf>

² Further referred as the Statute on the Establishment of Juvenile Court 2010. Thai text is available at:

<http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/89334/120556/F-978086130/THA89334%20Tha.pdf>

³ Thai text of the 2010 Act can be found at: <http://www.tak-ju.ago.go.th/images/download/law2.pdf>

⁴ *Statute on Establishing Juvenile and Family Court and the Process of Considering Juvenile and Family Cases* (N. 2)

B.E. 2558 (2015) พระราชบัญญัติศาลเยาวชนและครอบครัวและวิธีพิจารณาคดีเยาวชนและครอบครัว (ฉบับที่ ๒) พ.ศ. ๒๕๕๘; *Statute on Establishing Juvenile and Family Court and the Process of Considering Juvenile and Family Cases* (N. 3) B.E. 2558 (2015) พระราชบัญญัติศาลเยาวชนและครอบครัวและวิธีพิจารณาคดีเยาวชนและครอบครัว (ฉบับที่ ๓) พ.ศ. ๒๕๕๘; *Statute on Establishing Juvenile and Family Court and the Process of Considering Juvenile and Family Cases* (N. 4) B.E. 2558 (2016) พระราชบัญญัติ ศาลเยาวชนและครอบครัว และวิธีพิจารณาคดีเยาวชนและครอบครัว (ฉบับที่ ๔) พ.ศ. ๒๕๕๘; *Statute on Establishing Juvenile and Family Court and the Process of Considering Juvenile and Family Cases* (N. 5) B.E. 2558 (2016) พระราชบัญญัติศาลเยาวชนและครอบครัวและวิธีพิจารณาคดีเยาวชนและครอบครัว (ฉบับที่ ๕) พ.ศ. ๒๕๕๘. Thai text and updates are available at: <http://www.krisdika.go.th/wps/portal/general>

⁵ Duangporn Ukris, 'Juvenile Justice System in Thailand', *UN Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders*, 118th International Training Course, Resource Material Series, (2008) No. 59., p. 234. http://www.unafei.or.jp/english/pdf/RS_No59/No59_22PA_Ukris.pdf

⁶ See Section 7 of the Statute on the Establishment of Juvenile Court 2010.

procedural, although there is an affirmation of the substantive right of the juveniles to education. Juvenile cases aim at education not punishment. The Thai Statute on Establishment of Juvenile Court distinguishes between punishment and what it calls a measure for juveniles.⁷ In this distinction, the Statute follows the Thai Penal Code.⁸ Research shows that even though Thai law allows infliction of punishment on young offenders, in practice, judges in juvenile courts consider punishment as ill-suited for their task preferring instead various correctional measures.⁹

Thanks to the International Convention on the Rights of the Child (1989), the child rights centered approach to the juvenile criminal justice has become universally acceptable. The International Convention on the Rights of the Child reflects the earlier provisions of the International Covenant on Civil and Political Rights (1966) which was the first international instrument which contained special rights for the young offenders. Article 10 (2)(b) of the Covenant stated that “accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.” This comment covered the pretrial and trial process of detaining juvenile offenders. Article 10 (3) applied the same rule to post-trial detention: “Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.” It also affirmed that “The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.” Article 14 of the Covenant maintained that juvenile cases can be withheld from publicity in the interests of the offenders. Article 14 (4) required that: “In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.”

Thus, both the provisions of the Covenant and the Child Convention emphasize procedural rights. In other words, legal procedure is conceived as an important element securing the fairness of criminal justice in general and in juvenile cases in particular. One of the implications of this development is that a general right of juvenile offenders to be treated differently according to their needs is internationally affirmed. Thailand is one of the East Asian countries which has rigorously adopted the international standards of procedural fairness.¹⁰

It is not often easy to separate procedural fairness from substantive fairness in juvenile cases. Substantive fairness is different from its procedural counterpart, although they are intricately connected and depend on each other. Procedural fairness in criminal law is about the process of investigation, pleading and trial of the suspect. Substantive fairness

⁷ Thai Statute on Establishment of Juvenile Court 2010. Section 44(2).

⁸ See sections 74 and 75 of Thai Penal Code.

⁹ See: A. Shytov, & B. Pomphet, *Thai Juvenile Delinquency Justice and Its Perception by Minor Offenders* (Chiang Mai University, 2007)

¹⁰ J. Smith & M. Gompers, ‘Realizing Justice: The Development of Fair Trial in China,’ 2 *Chinese L. & Pol’y Rev.* 108, 140 (2007) 112. S. Persson, ‘Chinese Juvenile Justice Reform,’ 3 *J. Glob. Just. & Pub. Pol’y* 223 (2017). Thi Thang Nga Pham, ‘Developments in the Right to Defence for Juvenile Offenders since Vietnam’s Ratification of the Convention on the Rights of the Child’, 9 *E. Asia L. Rev.* 42, 88 (2014)

relates to the content of the judgement itself. It is asserted that substantive fairness cannot be achieved without procedural fairness.¹¹ That also applies to juvenile cases.

It is certainly fair to take into account the age of juvenile offenders. Thai law provides different treatment for children depending on their age. According to Article 4 of the Statute on Establishment of Juvenile Court 2010, juveniles are technically distinguished from children. They are defined as persons of the age of 15 to 18. Children in the meaning of this statute, are defined as persons of the age of 7 to 14. This distinction between juveniles and children is based on the Thai criminal law provisions concerning criminal liability. According to the Thai Penal Code, criminal liability begins with the age of 7.¹² From the age of 7 to 14, the punishment is not inflicted. A different treatment of children and juveniles can be already seen at the earlier procedures of criminal justice.

CRIMINAL PROCEDURAL LAW IN JUVENILE CASES IN THAILAND: PRETRIAL

The whole criminal procedure can be divided into several steps. The first step is investigation. The second is prosecution. The third is hearing the case. The fourth is making the judgement. In this respect, Thai juvenile procedure reflects criminal procedure in adult cases. The most noteworthy features of this procedure can be described as follows.

Criminal procedure in relation to the arrest of suspects differs for children before and after 14 years old. There are limitations for the reasons and powers of an arrest concerning children under 14 years old.¹³ An arrest can take place when a child under 14 years old is caught at the moment of committing offence, or there is an arrest warrant. At the same time, the law does not provide any special regulation for the arrest of the children over 14 years old (designated in Thai legal text as juveniles) stating that the general provisions of the Criminal Procedure Code should be applied.¹⁴ According to Section 78 of that Code, a person can be arrested without an arrest warrant on the following additional grounds: the person is preparing to commit offence, or there is a reason to believe that he is about to commit offence, such as when he has tools or instruments suitable for committing an offence, or when there is a reason to believe that he has already committed an offence and is trying to escape, or there is a requesting person who testifies that the minor has committed an offence. In other words, the police and other law officers retain very broad discretionary powers to arrest juveniles unlike children 14 years old and younger.

During the arrest, the suspects (both juveniles and children) must be informed about its reason and their rights.¹⁵ The arresting officer does not have authority to interrogate the

¹¹ T. Main, 'The Procedural Foundation of Substantive Law.' *Wash. UL Rev.* 87 (2009): 801.

¹² Thai Penal Code. Section 72.

¹³ See Section 66 of the Statute on the Establishment of Juvenile Court 2010.

¹⁴ *Ibid.*

¹⁵ Statute on the Establishment of Juvenile Court 2010. Section 69.

suspect, and any statements made by the latter cannot be used as evidence in court unless it is for the benefit of the accused.¹⁶ After the arrest, the accused must be brought to an officer who conducts a preliminary interrogation. The preliminary interrogation is limited to a proper identification of the accused. It does not include an inquiry into the offence. The accused is allowed to consult his parents or representatives. After the preliminary interrogation, the arrested person is sent to court for a judicial review of arrest and detention. That must be done within 24 hours of the time when the suspect was brought to the place of preliminary interrogation. The court reviews the legality of the arrest and will decide whether the suspect should be detained or released during the process of investigation. At the time of the judicial review, the court is obliged to appoint a legal counsel if the suspect does not have one.

If the decision is made to detain the suspect, then he is sent to a specialized institution: a Juvenile Observation and Protection Centre.¹⁷ The detention of a young suspect is said to be the last remedy. Its necessity must be carefully examined, and the suspect himself as well as his representatives have the right to raise an objection to the detention order before the court.¹⁸ The accused person has legal counsel present at all time during all subsequent interrogations.¹⁹

The procedure of arrest and detention in juvenile cases is significantly different from that in adult criminal cases. According to Thai Criminal Procedure Code, an adult can be arrested and kept in a police station without a court order for not more than 48 hours. If there is a need to extend the time of custody before bringing a formal charge, then the prosecutor can apply for a court's detention order, with a possibility of extending the time in custody in the most serious cases of up to 84 days, and in other cases 48 days. But that can be done by the order of the court only.²⁰

In juvenile cases, the prosecutor must bring the case to the court within 30 days from the time of the arrest.²¹ The prosecutor can apply to the court for an extension for the time of investigation. In less serious cases (inflicting five years of imprisonment and less), the extension can be granted twice for 15 days each time the request is made. In more serious cases, another two extensions of 15 days each can be granted by the court. The suspect has the right to challenge such extension. Section 80 of the Statute on the Establishment of Juvenile Court allows the prosecutor to file the case even when failing to meet all those deadlines if the chief-prosecutor allows such a move.

Comparing these provisions with those applied to adults, one can see a significant difference. The time limit for bringing a charge against adults in court is set at 48 hours with a possibility of extending this time for many days. In juvenile cases, a suspect must be brought to court within 24 hours, and the court has the power to release the suspect from detention before the case is brought to court by the prosecution officer.

¹⁶ Ibid. Section 69.

¹⁷ See Section 72 and Section 73 of the Statute on the Establishment of Juvenile Court 2010.

¹⁸ Ibid. Section 74.

¹⁹ Ibid. Section 75.

²⁰ See Section 87 of the Criminal Procedure Code.

²¹ See Section 78 of the Statute on the Establishment of Juvenile Court 2010.

THE PROCEDURAL ROLE OF JUVENILE OBSERVATION AND PROTECTION CENTRE

Under the Thai law, the educational element of correction must be the most important in dealing with juvenile offenders, and a particular concept of education bears a decisive influence on procedural fairness in juvenile cases. Before juvenile suspects face court proceedings, they are sent to so-called “Juvenile Observation and Protection Centres”.²² The Juvenile Observation and Protection Centre has been the central element of the Thai juvenile delinquency system for a long time. It is placed under the authority of the Ministry of Justice. Each province has its own Centre.²³ The internal regime within these Centres is very mild and humane when comparing to the detention institutions for adults. During detention, a suspected juvenile offender is kept separately from already convicted offenders.

The most important role of the Centre, apart from pre-trial detention, is providing courts with detailed information about juvenile defendants, as well as recommendations on the best measures to be applied. The report is submitted to the court, which normally follows the advice of the Centre. The information, which the Juvenile Observation and Protection Centre gathers, covers the age, history, behaviour, intelligence, education, training, health, state of mind, habit, labour skills, and lives of both the suspected child and the parents, along with information on the suspected causes of the delinquent behaviour.²⁴ All this information is presented to the court which acts mostly on these findings and the recommendations of the institution. In other words, unlike adult cases, a juvenile offender is interrogated not only by an investigation officer, but also by more than one official from a Juvenile Observation and Protection Centre.

Further, the Centres have the additional task of educating the juveniles put under their care which can, according to law,²⁵ stretch beyond the pre-trial and trial periods. A Juvenile Observation and Protection Centre is not simply an important procedural instrument to prepare information about the accused juveniles for court proceedings. They are also assigned the task of combining pre-trial and post-trial education, including corrective measures. In practice, there has been very little involvement in post-trial work. After the court proceedings, the juveniles are either released from the Centre or are sent to a juvenile correction institution (sometimes called juvenile training centres).²⁶

In the past, the director of regional Centres had an extensive procedural role. According to Section 63 of the 1991 statute, in less serious cases the director could decide not to bring a case to court and impose a term of staying in the correctional institution for up

²² Statute on the Establishment of Juvenile Court 2010, Part 3

²³ See Section 35 of the Statute on the Establishment of Juvenile Court 2010.

²⁴ See Section 36 (1) of the Statute on the Establishment of Juvenile Court 2010.

²⁵ *Ibid.* Section 40

²⁶ *Ibid.* Section 54. In the past, these correction institutions were more closely associated with Juvenile Observation and Protection Centres than nowadays. Thailand does not have juvenile prisons as such, therefore sending an offender to a juvenile correction institution is the severest form of sanction carried out by a juvenile court. This institution performs the functions of correcting and educating young offenders who are kept in their custody.

to two years. His decision, however, had to be agreed to by the prosecutor, be accepted by the juvenile offender himself, and applied to cases where the director thought that “the offender can reform himself to be a good person.”²⁷ These procedural powers have been changed to some extent in the 2010 legislation. Now, Section 86 of the 2010 legislation allows the director in some less serious cases to offer a rehabilitation plan with the agreement of the victim, the offender, and the prosecutor. The plan is also reviewed by the juvenile court on the legality of its measures. If this plan is approved, the offender avoids a court’s judgement. In this case, the Centre may continue to play an important role after the decision not to prosecute the offender. Section 90 of the same law foresees the situations when such a plan is possible after prosecution is launched and it can be applied to more serious cases.

Further, according to Thai law, not only the prosecutor, but also the victim can initiate criminal proceedings before a criminal court. The director of the Centre has the power to prevent the victim from initiating such proceedings in the juvenile court after examining the claim of the victim. The remedy of judicial review is available for the victim if the director refuses to permit the victim’s application to bring court proceedings. The director cannot do the same when a prosecutor files the case.²⁸

CRIMINAL PROCEDURAL LAW IN JUVENILE CASES IN THAILAND: PROSECUTION AND TRIAL

The court begins to play a more active role after the prosecutor submits the case for trial and judgement. According to Section 23 of the Statute on the Establishment of Juvenile Court 2010, the decision is reached by voting. In all serious criminal cases, there are two professional judges and two lay judges. It is general practice that judges reach a unanimous decision.²⁹ It does not mean that judges do not have disagreements, but that they discuss them and settle them.

In adopting any substantive or procedural measure, the court takes into account the body, behaviour, intelligence, habit, profession, education, and the state of mind of the accused. That makes the whole procedure less certain and is subject to variation according to the discretion of the court. The court can even abstain from making judgement by giving an order to release the defendant, or to send him temporarily for detention to the juvenile correction institution, or to apply any measure specifically devised for children and juveniles.³⁰ The court has also the power to change its decision or order on its own initiative or on the submission of anyone who is responsible for the supervision of the defendant, if any of the facts or circumstances related to the body, behaviour, intelligence, habit, profession, education, and the state of mind have changed

²⁷ Thai term is กลั่นตนเป็นคนดี

²⁸ Statute on the Establishment of Juvenile Court 2010, Section 99.

²⁹ See: A. Shytov, B. Pomphet (note 10 above), p. 51.

³⁰ See among other provisions, Section 86 of the Statute on the Establishment of Juvenile Court 2010.

from those known to the court when making its decision.³¹ In other words, the course of criminal procedure can be reversed if the court deems it appropriate. If the modified punishment or the measure is heavier than according to the previous decision, then the defendant can appeal. The law does not say whether the prosecutor can appeal if the punishment or the measure is made lighter.

This broad judicial discretion is characteristic for all steps of the courts' procedure. For example, judges have to decide whether it is appropriate to keep the juvenile in custody or not during judicial proceedings.³² The concept of appropriateness is one of the most common words in Thai legislation giving judges a broad leeway for discretion on a number of occasions. This discretion is limited not only by the general duty to consider "the body, intelligence, health, state of mind and habits" of the accused,³³ as well as by the ultimate goal of the criminal process: the wellbeing and the future of children.³⁴ Considerations of the body, intelligence, health, state of mind and habits may lead to the decision to transfer the case to the ordinary courts, if the development of the child is mature enough. At the same time, in the cases of young people of not more than 20 years of age, the ordinary court must look at the same qualities with the possibility of transferring the case to a juvenile court.³⁵ Even though this rule is hardly applied in practice, it underlines a certain idea of juvenile justice in Thai law: procedural requirements must reflect the physical, intellectual, and moral maturity of the juvenile defendants.

The exercise of discretion is also limited by certain other procedural requirements. Only persons who are directly involved in the case or related to a juvenile suspect, such as victims, parents, and witnesses, can attend the proceedings.³⁶ It is interesting that teachers of the suspect do not have the right to attend unless allowed by the court. No decisions are published, and the names of the offenders or any particularities concerning their identity are not reported to the public.

The court procedures in juvenile cases remain less formal than in adult cases, since the law requires that judges not follow the Code on Criminal Procedure strictly.³⁷ There are requirements to use simple language, to conduct proceedings not in an ordinary courtroom, and the powers to call witnesses at any time make the process of juvenile cases very different from adult cases. In the latter, it is the parties who call witnesses according to the list submitted to the court in advance. In contrast, judges in juvenile cases themselves can call any witnesses at any time.³⁸ The accused can be questioned by judges privately, or the witnesses can be heard without the accused being present if that is necessary for the benefit of the accused.³⁹

³¹ See Section 62, Section 119, and Section 137 of the Statute on the Establishment of Juvenile Court 2010.

³² Appropriate in Thai: สมควร - Section 102 of the Statute on the Establishment of Juvenile Court 2010.

³³ See Section 97 and Section 115 of the Statute on the Establishment of Juvenile Court 2010.

³⁴ *Ibid.* Section 100.

³⁵ *Ibid.* Section 97.

³⁶ *Ibid.* Section 108.

³⁷ Statute on the Establishment of Juvenile Court 2010. Section 114.

³⁸ See Section 111 of the Statute on the Establishment of Juvenile Court 2010.

³⁹ See Section 106 and Section 109 of the Statute on the Establishment of Juvenile Court 2010.

The provision requiring the court to conduct hearings in a less formal room than in adult cases⁴⁰ is supposed to facilitate confidence in the court among young defendants, to disperse their fear and release their stress. Research shows that many defendants continue to display mistrust and fear when being brought to court.⁴¹ Even though the fear of punishment is an essential element of criminal justice, the main purpose of criminal procedure in juvenile cases is not convicting the guilty and imposing punishment but the juvenile's reformation and rehabilitation. Therefore, trust is more important than the fear of punishment. As will be discussed below, Thai law would do much better by writing down and enforcing the general principle that judges are under the duty to adopt a procedure which facilitates trust among the juveniles to have their case heard with fairness and parental care, leaving to judicial discretion what specific procedural measures to adopt.

Writing down rules and principles is definitely not enough to create trust among defendants. The relevant rules and principles must be applied in an effective way. For example, the power of the presiding judge to interview the defendants in private without any one being present⁴² is normally used only in exceptional circumstances. The same applies to another rule which requires that juvenile judges should "employ a simple language which the defendant can easily understand; and an opportunity must be given to the defendant and to the parents, or guardian, or the person who accommodates him, or teacher, or the employer, or anyone concerned to make statements, to express feelings and opinions including correcting and asking witnesses at any time during the trial of the case."⁴³

Would this change if the court had more discretion? In the past (as in the present), these rules did not work, simply because the overwhelming majority of the cases that reach juvenile courts are those where the defendants plead guilty.⁴⁴ The whole proceedings in the court takes, according to the juvenile offenders, up to 15 minutes. Therefore, there is no opportunity for the defendants to express their feelings and opinions. Some juvenile offenders stated that no questions were asked and their guilty plea was given.⁴⁵ Other defendants stated that even though some questions had been asked by a single judge (out of four), no real opportunity to express themselves was given largely due to their mental and emotional state.⁴⁶

To attain the goals of juvenile criminal procedure, Thai judges must make an effort to make defendants express themselves. Writing down on paper, or creating a law, giving the minor the right to express himself is not sufficient taking into account Thai juvenile culture. They will not speak in the court room, unless asked. The rule that allows a private interview between the judge and the defendant must reflect a common practice

⁴⁰ See Section 107 of the Statute on the Establishment of Juvenile Court 2010.

⁴¹ See: A. Shytov, B. Pomphet (note 10 above), p. 49.

⁴² Statute on the Establishment of Juvenile Court 2010. Section 106.

⁴³ *Ibid.* Section 114.

⁴⁴ See: A. Shytov, B. Pomphet (note 10 above), p. 49.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

rather than an exception. Despite these problems that appear in real cases, Thai law on the whole reflects well the procedural standards encouraged in international law.

PROCEDURAL RIGHTS OF JUVENILE OFFENDERS IN THE CONTEXT OF INTERNATIONAL LAW

International law has had a great impact on both procedural and substantive rights of Thai juvenile offenders. For example, in 2003, the Thai Penal Code was amended in order to meet the international obligation not to impose a capital or life imprisonment sentence on minor offenders in accordance with the Convention on the Rights of the Child, Article 37.⁴⁷ In practice, after the enactment of the Statute on Establishment of Juvenile Court in 1991, it appeared that no capital or life imprisonment sentence against minors was actually executed, since there were provisions which allowed Thai judges to exercise discretion⁴⁸ and replace punishments of death and life imprisonment by longer term prison sentences.⁴⁹ Many procedural rights of juveniles are the same as for adults.⁵⁰ However, specific provisions of Thai law secure additional rights for juvenile suspects which basically follow the Convention on the Rights of the Child in providing special rights for minors involved in criminal law proceedings.

Article 37(a) of the Convention states: “No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.” Article 37(c) adds: “Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.” Further, in the Article 37(b) of the Convention it is written that “No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.” Article 37(d) of the Convention, affirms that “every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.”⁵¹

Thai law reflects well these provisions of international law. Section 66 of the Statute on the Establishment of Juvenile Court 2010 imposes significant limitations on the arrest of children below 15 years old. For juveniles, when issuing an arrest warrant, the court is

⁴⁷ See Section 18 of Thai Penal Code.

⁴⁸ See Section 76 of Thai Penal Code.

⁴⁹ Sections 52 and 53 of Thai penal Code.

⁵⁰ See Section 6 of the Statute on the Establishment of Juvenile Court 2010.

⁵¹ See also Article 40 (2)(b)(ii) of the same Convention.

required to take into the account the age, gender, and future of the juvenile “which ought to receive protection.”⁵² If the arrest would have a negative impact on the state of mind of children or juveniles, it is recommended to seek another methods of dealing with them.⁵³ The parents must also be promptly informed and they have the right to accompany their children to the place of interrogation.⁵⁴

Thai law on juvenile delinquency also contains many provisions requiring milder and more caring treatment of juvenile suspects. For example, when arresting a juvenile suspect, it is required that the officials act gently (ละมุนละม่อม).⁵⁵ The use of handcuffs is allowed only in situations of apparent necessity.⁵⁶ During preliminary interrogation, Thai law imposes on the interrogating official the same requirement of taking into account the age, gender, and condition of the suspect, to use language he can understand, and respect his human dignity.⁵⁷ The same applies to subsequent interrogations.⁵⁸ In deciding whether to issue a detention order or not, “the court must be guided by the considerations of the rights of the child as well as his ultimate benefits.”⁵⁹

As we saw, judicial review of arrest and the judicial decision on whether to detain a juvenile suspect during investigation and trial within 24 hours was introduced in the 2010 legislation. In the past, judicial review could only take place in limited cases. Nevertheless, the 1991 legislation also reflected international law provisions on the rights of the child. For example, arrested young person could not be placed in the room together with arrested adults or in a room arranged for keeping arrested adults.⁶⁰ It is true, however, that Thailand has many good laws that are not always implemented.⁶¹ The interviews conducted with juvenile offenders showed that some offenders were detained in the police station for much longer than the time allowed by law.⁶²

From the brief analysis of Thai legislation offered in the previous section, one can see that a suspect is given legal counsel from the time of the judicial review of arrest and detention that must be carried out within 24 hours from the time of preliminary interrogation or even earlier.⁶³ This is a significant improvement when compared to the 1991 legislation. The 2010 legislation made Thai law similar to the laws of developed countries which require compulsory representation for juveniles by an advocate.⁶⁴ In

⁵² Statute on the Establishment of Juvenile Court 2010. Section 67.

⁵³ Ibid. Section 67.

⁵⁴ Ibid. Section 69.

⁵⁵ See Section 69 of the Statute on the Establishment of Juvenile Court 2010.

⁵⁶ Ibid. Section 69.

⁵⁷ Ibid. Section 70.

⁵⁸ Ibid. Section 75.

⁵⁹ Ibid. Section 74.

⁶⁰ Statute on the Establishment of Juvenile Court 1991. Section 54.

⁶¹ On the relationship between culture and law in Thailand see: Klausner W. *Reflection on Thai Culture*. (Bangkok: The Siam Society, 1993)

⁶² See: A. Shytov, B. Pomphet (note 10 above), p. 45.

⁶³ Statute on the Establishment of Juvenile Court 2010. Section 73.

⁶⁴ For German law see: Para 68 of the Juvenile Court Statute (JGG). The text is available at: <http://www.datenschutz-berlin.de/recht/de/rv/szprecht/jgg/index.htm> For French law see: Article 4-1 of L'ordonnance du 2 février 1945. The text is available at: <http://www.legifrance.gouv.fr/WAspad/Ajour?nor=&num=45-174&ind=8&laPage=1&demande=ajour>

contrast, Section 83 of the older Statute on the Establishment of Juvenile Court 1991 stated: “In the court which has the power to decide juvenile and family cases, the defendant cannot have an advocate as a representative, but let the defendant have a legal counselor to perform the same duties as the advocate. In the situation where the defendant does not have a legal counselor, let the court appoint a legal counselor except when the defendant does not need one and the court thinks it is not necessary, then it is allowed not to appoint a legal counselor.” The problem with this old provision was that in many cases where a defendant confessed his offence, the court thought that having a legal counselor was not important.

The 2010 legislation, by imposing judicial review on the legality of arrest and the necessity to obtain a judicial decision on detention, as well as by the compulsory presence of a legal counsel and by allowing parents also to be present during investigation of the case, certainly makes it more difficult to force confessions and helps to meet the requirements of Article 40 that the accused should “not be compelled to give testimony or to confess guilt.” Section 75 allows the suspect to refuse giving testimony.

Thai procedural law in juvenile cases affirms the international standards in protecting the privacy of the juvenile offender.⁶⁵ All judicial proceedings must be conducted in secret.⁶⁶ Article 40 of the Convention on the Rights of the Child requires that accused and convicted minors must “be treated in a manner consistent with the promotion of the child’s dignity and worth.” This can be seen in the provision forbidding officials to chain juveniles during hearing procedures unless they are accused of a serious crime punishable with over 10 years of imprisonment.⁶⁷ In contrast, the Criminal Procedural Code says nothing about chaining or unchaining in adult cases.

The process of making judgements in juvenile court also reflects the international obligation of official domestic institutions to make the best interests of the child the primary consideration.⁶⁸ This obligation has found its formal recognition in Section 119 of Thai Statute on the Establishment of Juvenile Court 2010 which imposes on Thai juvenile court judges the duty to “take into account the wellbeing and the future of juveniles who should receive training, teaching and assistance to make them come back to be good citizens, more than to punish them” during court proceedings. The same section of Thai law continues: “and in making judgement, let the court take into account the personality, health and the state of mind of the children or juveniles for each person individually, and let punishment or its substitution, or a measure against children and juveniles be appropriate to the children or juveniles and the circumstances even though the children or juveniles have committed offences together.” According to Section 75 of the Penal Code, the court can inflict punishment on juveniles with reducing the scale of punishment from one third to one half if it seems appropriate to the court.⁶⁹ In practice,

⁶⁵ Convention on the Rights of the Child. Article 40 (2) (vii).

⁶⁶ Statute on the Establishment of Juvenile Court 2010. Section 108.

⁶⁷ Ibid. Section 103.

⁶⁸ Article 3 of the Convention on the Rights of the Child.

⁶⁹ Section 76 of Thai Penal Code.

the courts hardly ever punish minor offenders preferring to apply special correctional measures to juveniles.

In practice, Section 119 can lead to differentiating among offenders not only in substantive punitive or corrective measures towards them, but also in the procedural approach in each case. Differentiating is vital to achieve the educational purposes of the juvenile delinquency justice system. It is particularly obvious in substantive measures. One Thai judge explained,⁷⁰ that when choosing an appropriate measure for juveniles, the primary question is whether the family can control and educate the minor or not. If the answer is not, then the minor can be sent to a juvenile correction institution for a longer period of detention. This is a very sound approach considering the fact that there is not often an effective educational policy towards offenders except sending them to a correctional institution. However, many offenders⁷¹ viewed their detention in the correction institution not as a purely preventive or educative measure, but as a measure of punishment. Therefore, they complained that it was not just or fair that their friends who were not less guilty should receive much lighter or even no punishment at all. Since differentiation is also required in adopting a particular procedural measure, it is obvious that there is an inherent conflict between the prohibition of discrimination on the one hand, and the demand, on the other, to take into account particular needs of each individual offender.

CONCLUSION

Thai law generally follows international law in defining the procedural aspects of juvenile criminal justice. Minors are provided with different institutions which look after them, with different courts and different mechanisms employed by those courts. One of the important provisions of the Convention in relation to juvenile delinquency is the recommendation that all criminal cases must be heard and adjudicated by a specialized juvenile court or tribunal.⁷² Section 11 of the Thai 2010 Statute meets this requirement by defining the jurisdiction of the special court established by the same act. The distinctive characteristic of this jurisdiction is that the court decides not only all criminal cases involving juveniles, but also family law cases within the meaning of the Thai Civil and Commercial Code.

In hearing juvenile cases, Thai courts are empowered to apply an individualized approach to meet the goals of education and rehabilitation of young offenders. The principle of individualization in juvenile criminal cases comes into tension with the principle of the prohibition of discrimination and the principle of equal application of law (treating like cases alike). This tension may lead to a perception of unfairness in the cases where offenders receive different treatment even though having an equal measure of guilt. To solve this problem, judges in juvenile cases have to communicate the reasons

⁷⁰ See: A. Shytov, B. Pomphet (note 10 above), p. 50.

⁷¹ Ibid.

⁷² UN Convention on the Rights of the Child (1989), Article 40 (3).

for their decisions in such a way that the fairness of each case becomes apparent to the offenders themselves, as well as the victims and the public.