

# Summary of the Constitutional Court Ruling No. 24/2546

Dated 26<sup>th</sup> June B.E. 2546 (2003)\*

**Re : The Ombudsman requested for a Constitutional Court ruling under section 198 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), in the case where section 19 paragraph three of the Organisation of the Military Courts Act, B.E. 2498 (1955), raised the question of constitutionality.**

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## 1. Background and summarized facts

1.1 The Ombudsman considered a complaint by Sergeant Anek Ut-thiya and Sergeant Phanom Thepkiri and held that the intentions behind section 236 of the Constitution of the Kingdom of Thailand was that the only role of the judge or judicial official presiding a case was the preparation of judgment. The reason for such a contention was because the judge or judicial official had heard the facts and evidence of the case directly in person. However, section 19 paragraph three of the Organisation of the Military Courts Act, B.E. 2498 (1955), stated that in some cases the Provincial Military Court had the power to try a case but not to pass a judgment. Such Provincial Military Court would refer the case to the Municipal Military Court or the Bangkok Military Court as the judgment maker. As a result thereof, the Provincial Military Court, which was the court that tried the case, was not the judgment maker. On the contrary, the Municipal Military Court or the Bangkok Military Court, which did not try the case, assumed the role of the judgment maker in lieu of the Provincial Military Court. Moreover, the application of section 19 was not limited only to cases of force majeure or other unavoidable necessities, and nor was the trial of a Military Court subject to the transitory provisions of section 335 subparagraph (5) of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), which was only applicable to the Courts of Justice. Therefore, it was argued that section 236 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), was applicable to the trial of Military Courts as from the date of promulgation of the Constitution. Section 19 paragraph three of the Organisation of the Military Courts Act, B.E. 2498 (1955), conferred powers on the judge or judicial official who had not presided over a case to pass a judgment, which was contrary to or inconsistent with section 236 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). An application was therefore submitted to the Constitutional Court for a ruling under section 198 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

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1.2 The Judge Advocate General's Department sent a letter and appointed a representative to give a statement to the Constitutional Court. The submissions could be summarized as follows. The trial jurisdiction of Provincial Military Courts and Municipal Military Courts were in accordance with section 19 paragraph three of the Organisation of the Military Courts Act, B.E. 2498 (1955). Cases which the Provincial Military Court had trial jurisdiction but no adjudicative jurisdiction were called extra-jurisdictional cases. In such cases, the judicial official presiding over the trial proceedings until its completion, who although did not have the power to make a judgment, had the power to make a ruling after deliberation. However, where the judicial official deemed it appropriate to impose an imprisonment sentence or a fine on the defendant at a scale which exceeded that which they were empowered to impose by law (under section 19 paragraph two), the case had to be referred to the judicial official of the Municipal Military Court. Those judicial officials were more senior than judicial official of the Provincial Military Court and performed the role of inspecting the ruling made by the latter. In making a judgment in these extra-jurisdictional cases, the judicial official of the Municipal Military Court could not transgress the facts learned, seen or acknowledged by the judicial official of the Provincial Military Court in the trial, unless it appeared from the case file that there were defects or errors in the fact-finding process which had to be rectified. Section 236 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), only referred to provisions of law on the trial process. It did not encompass every aspect of the legal proceedings. As for the submission that legal proceedings in Military Courts were not deemed as being subject to the transitory provisions in section 335 subparagraph (5) of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), which provided for the non-application of section 236 to legal proceedings in the Courts of Justice in the period not exceeding five years as from the date of promulgation of the Constitution, the implications arising thereof was that the relevant provisions did not yet apply to the Courts of Justice. However, there was no wording which indicated that section 236 was immediately applicable to Military Courts because a wider interpretation could not be made that those provisions were immediately applicable to the proceedings of other courts. There were no reasons to support the conclusion that the exception was provided exclusively for the Courts of Justice other than the possible explanation that such provisions were inapplicable to other courts which embodied specific court procedures and which were already recognised by the Constitution. Therefore, section 19 paragraph three of the Organisation of the Military Courts Act, B.E. 2498 (1955), was neither contrary to nor inconsistent with section 236 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

## **2. The issues considered by the Constitutional Court**

Was section 19 paragraph three of the Organisation of the Military Courts Act, B.E. 2498 (1955), a provision which raised the question of constitutionality under section 236 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) ?

The Constitutional Court held the following opinion. Section 236 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), provided security for the rights of the parties in court proceedings. The hearing of a case required a full quorum of judges. Any judge not sitting at the hearing of a case should not give judgment or a decision of such case, except for the case of force majeure or any other unavoidable necessity as provided by law. Under such exception, in order for a judge who did not preside over the trial to be able to give judgment or a decision of such case, the case must not only be a force majeure or an unavoidable necessity as provided by law, but the judge or judicial official must also belong to the court which had jurisdiction over the case.

The Provincial Military Court, Municipal Military Court, Bangkok Military Court and Military Courts attached to military units were all courts of first instance. However, once the Provincial Military Court had conducted criminal proceedings under the powers provided by law, if a heavier sentence than that provided by law was to be imposed, it turned out that the court did not have the power to give judgment. In such case, the Provincial Military Court had to prepare an opinion and refer the case to the same type of court of first instance, namely, the Municipal Military Court or the Bangkok Military Court, as the case may be, who would then be the court giving the judgment under section 19 paragraph three. However, the Municipal Military Court or the Bangkok Military Court had not in any manner tried the case from the beginning. In addition, there were no provisions of law which provided for the exception of the case of force majeure or unavoidable necessity. Hence, section 19 paragraph three was contrary to or inconsistent with section 236 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). The transitory provisions in section 335 subparagraph (5) of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), stated that section 236 would not apply to the proceedings of the Courts of Justice for a period not exceeding five years as from the date of promulgation of the Constitution without specifying the same for other courts. Therefore, the Military Court was unable to raise such transitory provisions of the Constitution. The proceedings of Military Courts were therefore subject to section 236 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), as from the date of promulgation of the Constitution.

### **3. Ruling of the Constitutional Court**

By virtue of the reasons stated above, the Constitutional Court held that section 19 paragraph three of the Organisation of the Military Courts Act, B.E. 2498 (1955), was unconstitutional for being contrary to or inconsistent with section 236 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). Such provision was unenforceable according to section 6 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

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