Summary of Constitutional Court Ruling No. 29-30/2547

Dated 19th February B.E. 2547 (2004)*

Re: The President of the Senate and President of the House of Representatives referred the opinion of members of each house of the National Assembly to the Constitutional Court for a ruling in the case of whether or not the Emergency Decree Amending the Penal Code, B.E. 2546 (2003), and the Emergency Decree Amending the Money Laundering Control Act, B.E. 2542 (1999), B.E. 2546 (2003), was in accordance with section 218 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

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1. Background and summarized facts

The President of the Senate and the President of the House of Representatives referred the opinion of members of each house of the National Assembly in a total of two applications to the Constitutional Court for a ruling under section 219 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

In the first application, the President of the Senate referred the opinion of 50 senators. In the second application, the President of the House of Representatives referred the opinion of 107 members of the House of Representatives. The applications requested the Constitutional Court to rule that the Emergency Decree Amending the Penal Code, B.E. 2546 (2003), and the Emergency Decree Amending the Money Laundering Control Act, B.E. 2542 (1999), B.E. 2546 (2003), were not in accordance with the conditions set forth in the provisions of section 218 paragraph one of the Constitution. The opinions of the members of both houses could be summarized as follows.

The issuances of both Emergency Decrees were not made for the purpose of maintaining national and public safety under section 218 paragraph one of the Constitution for the following reasons:

- In the issuance of the Emergency Decree Amending the Penal Code, B.E. 2546 (2003), the principles and reasons proposed by the Council of Ministers were remoted from a situation where there would be a lack of national and public safety and a necessary urgency that was unavoidable. Terrorist acts had occurred over a long period of time from

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the past and had recurred on a continual basis. Moreover, in the resolution of problems related to terrorism, the government had many other laws as well as the Penal Code itself which prescribed offenses and penalties of sufficient severity that would render a similar result to that which was expected from the issuance of this Emergency Decree.

• The issuance of the Emergency Decree Amending the Money Laundering Control Act, B.E. 2542 (1999), B.E. 2546 (2003), which added the offence of terrorism under the Penal Code as the eighth predicate offence necessarily implied that such predicate offence included the offence of attempted commission of a terrorist act, preparation, collusion or concealment of an attempt to commit a terrorist act, aiding and abetting a terrorist act or being a member of a terrorist group, was too widely defined and was seriously lacking in clarity. If a law enforcement officer abused the application of such measures beyond the appropriate levels, the people's rights and liberties would be breached.

• The issuance of an Emergency Decree prescribing an offence which was criminally punishable by the death penalty and the restriction of rights and liberties relating to property and private lives of individuals to such extent as conferring full powers of intervention to the State, were significant restrictions of rights and liberties. Such measures should be imposed with due care and could only be enacted by and with the consent and approval of the people's representatives, viz. the House of Representatives and the Senate.

• The Constitution conferred powers on the Council of Ministers to issue an Emergency Decree as an exception. There had to be a crisis in the nation or an imminent threat to the nation that could not await the enactment of a law through the regular legislative process for the remedial of problems or averment of such threat.

• The prescription of a punishable offence for members of a group stipulated by a resolution or declaration of the United Nations Security Council was a clear denial of the powers of the people's representative organ, namely the legislative body. Such acts constituted a threat to the State's independence.

The Constitutional Court made the following preliminary rulings on the applications. The first application was a case where 50 senators, which was not less than one-fifth of the existing members of the Senate, entered their names to present an opinion to the President of the Senate. The second application was a case where 107 members of the House of Representatives, which was not less than one-fifth of the existing members of the House of Representatives, entered their names to present an opinion to the President of the House of Representatives. Members of both houses of the National Assembly had entered their names to present opinions to the Presidents of their respective house in the National Assembly that the Emergency Decrees were not consistent with section 218 paragraph one of the Constitution. The Presidents of both houses of the National Assembly referred such opinions to the Constitutional Court for a ruling. Thus, both applications were in accordance with section 219 of the Constitution. The Constitutional Court had the power to accept such applications for consideration. The two applications were consolidated into one trial since they requested a ruling on identical issues.

The Constitutional Court gave an opportunity to the senators and members of the House of Representatives who entered their names in presenting an opinion to the President of the house to testify their opinions as well as an opportunity for the Council of Ministers to submit documents relating to the background and reasons for introducing the Emergency Decree, including the assignment of representatives to testify before the Constitutional Court. In this regard, the Deputy Prime Minister, acting for the Prime Minister, submitted an explanatory statement as well as an opinion of the Council of Ministers. Certain members of the House of Representatives also submitted supplemental opinions to the Constitutional Court. Representatives of the Senate and representatives of the Council of Ministers, consisting of representatives from the Office of the Council of State, Ministry of Foreign Affairs, Interior Ministry, Royal Thai Police, Ministry of Defence, Office of the National Security Council, Ministry of Justice and Anti-Money Laundering Office, testified before the Constitutional Court.

2. The issues considered by the Constitutional Court

Were the Emergency Decree Amending the Penal Code, B.E. 2546 (2003), and the Emergency Decree Amending the Money Laundering Control Act, B.E. 2542 (1999), B.E. 2546 (2003), in accordance with section 218 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997)?

The Constitutional Court held as follows. Section 3 of the Constitution provided that the King exercised sovereign powers through the National Assembly, the Council of Ministers and the Courts in accordance with the provisions of the Constitution. The Constitution provided for a separation of the exercise of sovereign powers of each organ in several ways. In other words, the National Assembly had the power and duty to enact Acts, Organic Acts and approve Emergency Decrees. The Council of Ministers was able to present advice to the King on the issuance of an Emergency Decree having the force of an Act subject to the conditions stipulated in the Constitution, which would thereafter be submitted to the National Assembly for approval pursuant to section 218 to section 220 of the Constitution. From those provisions, it could be seen that the issuance of an Emergency Decree was an exclusive power of the executive, i.e. the Council of Ministers. The Constitution did not intend to confer wide powers to review the issuance of an Emergency Decree in the same manner as the National Assembly. Thus, the Constitutional Court could not review the constitutionality of such Emergency Decrees under section 218 paragraph two of the Constitution which enabled such an issuance when the Council of Ministers deemed that there was a necessary urgency which was unavoidable. In this respect, section 219 paragraph one of the Constitution only conferred a right on the members of the House of Representatives or senators to enter their names in submitting an opinion to the President of their respective house that an Emergency Decree was not in accordance with section 218 paragraph one. Such a conclusion could be drawn from Constitutional Court Ruling No. 1/2541, dated 23rd May B.E. 2541 (1998) and Ruling No. 14/2546, dated 1st May B.E. 2546 (2003).

As for the consideration of whether or not the Emergency Decree Amending the Penal Code, B.E. 2546 (2003), and the Emergency Decree Amending the Money Laundering Control Act, B.E. 2542 (1999), B.E. 2546 (2003), were in accordance with section 218 paragraph one of the Constitution, the Constitutional Court had to determine on the issue of whether or not those two Emergency Decrees were issued for the purpose of maintaining national and public safety. The facts showed that terrorist acts had continually occurred in several regions and countries throughout the world over a period of decades. This had prompted the formulation of a total of 12 international conventions on international terrorism. Thailand had become a party to 4 of these conventions. In the period between the years B.E. 2542 (1999) and B.E. 2546 (2003), terrorist acts were committed in the form of complex organizations that were linked to several groups in more than one country and with intensifying violence that were aimed at creating serious injuries to persons as well as damages to properties in various countries without regard to the targets of such acts. The lives and properties of innocent citizens were not even spared. All this was done in order to compel governments or international organizations to concede to their demands or to create disturbances and terror in those countries. A terrorist act therefore constituted a serious threat which sent an impact to all countries. It would not be possible to predict as to when and in which country a terrorist act would occur. Terrorist acts in the past and present were violent and could happen in every part of the world. There was also a tendency and possibility that a terrorist act could happen in Thailand which would send a direct impact on the security of the country and public safety. After the terrorist attack on the United States of America on 11th September B.E. 2544 (2001) up till the war in Afghanistan and Iraq, the harms of terrorism intensified and expanded to various regions. Terrorism was linked in an increasingly complex network. A contingent of the terrorists sought refuge from suppression in Thailand, a center of communications in the region which upheld the policies of promoting tourism and a benevolent attitude towards all parties. The terrorists had hid, rested or used financial and banking channels in Thailand to send financial support to terrorism in other countries. This included terrorist attacks in neighbouring countries where members of terrorist organizations were arrested in several ASEAN countries. The events constituted such facts were exposed to the whole world. The Council of Ministers, therefore, proceeded to enact a law for the prevention and suppression of terrorism pursuant to a resolution of the United Nations Security Council No. 1373 (2001) since October B.E. 2544 (2001). Such efforts, however, had not been successful. Moreover, Thailand was host to the pending APEC Summit in October B.E. 2546 (2003), which would witness the arrival of leaders from 21 economic areas for the meetings as well as a significant number of foreign correspondents. That number included the visit of 5 heads of states and governments. Thus, a terrorist act in Thailand during that time was a possibility. Hence, the government was under a duty to impose measures for the effective and efficient prevention of terrorism in all dimensions, especially legal measures to engender faith and confidence amongst foreigners traveling to Thailand to attend the meetings that there would not be a terrorist incident in Thailand during such period. As a result, the Council of Ministers was under a duty to employ all means of preventing the commission of a terrorist act in Thailand to the extent that was necessary and appropriate for securing national and public safety.

The Emergency Decree Amending the Penal Code, B.E. 2546 (2003), contained provisions that laid down measures to prevent and suppress terrorist acts, an offence universally recognized by the international community as a crime and calling for mutual cooperation by a revision of each country's internal laws to state terrorism as a crime entailing severe punishments pursuant to Resolution No. 1373 (2001) of the United Nations Security Council. This was specifically addressed to terrorist acts which had the distinct characteristics of violence that caused harm to the lives, bodies and properties of the people with the special intention of compelling a government or creating fear of the people. In this respect, the current Penal Code in Thailand did not contain provisions that encompassed offences having the description of terrorist acts. In addition to the prescription of an offence for terrorism, measures to prevent terrorism were also installed. The acts of preparation, collusion, aiding and abetting and gaining membership of a group of persons that committed a terrorist act were deemed as an offence. Moreover, it was also provided that offenders of terrorist acts outside the Kingdom would be punishable within the Kingdom. Such measures were prescribed in order to enable the effective suppression of terrorism. The prevention of terrorism necessarily required actions to be taken at the stages of preparation, collusion, aiding and abetting and gaining membership of groups that intended to commit a terrorist act, in order to prevent cases where terrorists entered the country in disguise to stockpile weapons, troops and deal in financial matters. It was not desirable to wait for the offence to occur and the harm done. It was therefore necessary to employ pre-emptive legal measures to stop acts that had the tendency of leading to terrorism. If terrorist acts were allowed to occur, harm would be done to the lives, bodies and properties of the people, which would send a direct impact on national security and public safety and require a lengthy period for rehabilitation to normal state. In such a case, the country's economic stability would also be affected. Thus, it was necessary to use legal measures in an expedient manner to respond to the chance of such situations occurring. Otherwise, it might not be possible to maintain national security and public safety. Also, the fact that the Emergency Decree Amending the Penal Code, B.E. 2546 (2003), provided for the offence of terrorism in the Penal Code did not affect the rights and liberties of innocent people more than was reasonable under the circumstances because proof of the offence would be conducted under the judicial procedures in the Criminal Procedure Code that already provided for the protection of rights and liberties of an accused or defendant. The court in such a case would be the determiner of whether or not there had been a commission of an offence that was punishable under the law, constituting a guarantee of rights and liberties of the people. Furthermore, the conduct of officials in a search, arrest as well as investigation of the offence and arraignment of offenders and the conduct of court proceedings had to be in accordance with **the Penal Code** and **the Criminal Procedure Code**. Such laws had already provided for guarantees of rights and liberties of the people. The important principles therein were also embedded in the Constitution. Hence, it could be deemed that the issuance of the Emergency Decree Amending the Penal Code, B.E. 2546 (2003), was made for the benefit of maintaining national and public safety under the provisions of section 218 paragraph one of the Constitution.

As for the Emergency Decree Amending the Money Laundering Control Act, B.E. 2542 (1999), B.E. 2546 (2003), an amendment was made to the law by adding the offence of terrorism as another predicate offence. Thus monies or property of a sponsor or that was used in the commission of a terrorist act would be subject to seizure or attachment. This was a measure to prevent the commission of a terrorist act by removing the source of finance which formed an important element in supporting terrorism which was made an offence by an amendment to the Penal Code. In the absence of such a law, the prevention and suppression of terrorism in Thailand would fail to succeed and would be inconsistent with the resolution of the United Nations Security Council, under which Thailand had an obligation to comply. Therefore, the issuance of such Emergency Decree was also made in order to maintain national and public safety.

3. Ruling of the Constitutional Court

The Constitutional Court, by 14 Constitutional Court judges, voted on a decision under section 219 paragraph four of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), on whether or not the Emergency Decree Amending the Penal Code, B.E. 2546 (2003), and the Emergency Decree Amending the Money Laundering Control Act, B.E. 2542 (1999), B.E. 2546 (2003), were in accordance with section 218 paragraph one of the Constitution. The result was as follows. Four Constitutional Court judges ruled that both Emergency Decrees were not in accordance with section 218 paragraph one, which was less than two-thirds of the total number of Constitutional Court judges under the threshold in section 219 paragraph four. Therefore, it was deemed that the Emergency Decree Amending the Penal Code, B.E. 2546 (2003), and the Emergency Decree Amending the Money Laundering Control Act, B.E. 2542 (1999), B.E. 2546 (2003), remained in accordance with section 218 paragraph one of the Constitution.