

Summary of Constitutional Court Ruling No. 6-7/2561 (2018)

Dated 28th November B.E. 2561 (2018)*

Re: Whether or not section 8 of the Narcotics Act (No. 6) B.E. 2560 (2017) was contrary to or inconsistent with section 4, section 5, section 25, section 26, section 27, section 29 and section 279 paragraph two of the Constitution.

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1. Summary of background and facts

Nakhon Sawan Provincial Court and Phetchabun Provincial Court referred the objections of defendants in 2 criminal cases to the Constitutional Court for a ruling under section 212 of Constitution. Both defendants objected that the Narcotics Act (No. 6) B.E. 2560 (2017), which amended section 15 paragraph three, section 17 paragraph two and section 26 paragraph two, had changed the absolute presumption into a presumption which allowed the court to exercise a discretion after taking into account the circumstances or true intent of the offender. Section 8 paragraph one of the Narcotics Act (No. 6) B.E. 2560 (2017), however, provided that “section 15 paragraph three, section 17 paragraph two and section 26 paragraph two of the Narcotics Act B.E. 2522 (1979), as amended by this Act shall not apply to cases already adjudged by the court of first instance on the day prior to the effective date of this Act, and the provisions of law in force on the day prior to the effective date of this Act shall apply to such cases until the cases become final.” Both defendants filed an objection for a ruling on whether or not section 8 of the Narcotics Act (No. 6) B.E. 2560 (2017) was contrary to or inconsistent with section 4 of the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014) and section 4, section 5, section 25, section 26, section 27, section 29 and section 279 paragraph two of the Constitution of the Kingdom of Thailand B.E. 2560 (2017), as well as the International Covenant on Civil and Political Rights 1966. Nakhon Sawan Provincial Court and Phetchabun Provincial Court ordered the referral of both defendants’ objections to the Constitutional Court for a ruling under section 212 of the Constitution.

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2. The preliminary issue considered by the Constitutional Court

The preliminary issue was whether or not the Constitutional Court could accept the objections of both defendants for a ruling under section 212 of the Constitution.

The Constitutional Court found as follows. According to the written objections of both defendants, the issues raised as an objection were whether or not section 8 of the Narcotics Act (No. 6) B.E. 2560 (2017) was contrary to or inconsistent with section 4 of the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014), section 4, section 5, section 25, section 26, section 27, section 29 and section 279 paragraph two of the Constitution of the Kingdom of Thailand B.E. 2560 (2017), and Article 4 paragraph 2, Article 5 paragraph 2, Article 17 paragraph 1, Article 16 and Article 26 of the International Covenant on Civil and Political Rights 1966. Nakhon Sawan Provincial Court and Phetchabun Provincial Court were going to apply section 8 of the Narcotics Act (No. 6) B.E. 2560 (2017) to rule on a motion. The provision of law was therefore a provision of law which Nakhon Sawan Provincial Court and Phetchabun Provincial Court were going to apply to cases and there had not yet been a prior ruling of the Constitutional Court on the relevant provisions. This case was in accordance with the rule under section 212 of the Constitution in conjunction with section 50 of the Organic Act on Procedures of the Constitutional Court B.E. 2561 (2018). The Constitutional Court therefore ordered the acceptance of the matter for ruling and directed the President of the National Legislative Assembly to submit documents or evidence relating to the spirit of the Narcotics Act (No. 6) B.E. 2560 (2017) along with record of proceedings of the National Legislative Assembly, record of proceedings of the Ad Hoc Committee for Consideration of the Narcotics Bill (No. ..) B.E., and minutes of the Ad Hoc Committee for Consideration of the Narcotics Bill (No. ..) Bill B.E. to the Constitutional Court.

3. The issues considered by the Constitutional Court

The issues considered by the Constitutional Court were whether or not and to what extent section 8 of the Narcotics Act (No. 6) B.E. 2560 (2017) was contrary to or inconsistent with section 4, section 5, section 25, section 26, section 27, section 29 and section 279 paragraph two of the Constitution.

The Narcotics Act B.E. 2522 (1979) was a law enacted with the intent of effectively combatting and controlling narcotic drugs. It was provided that a person who had committed an offence relating to category I, category II, category IV and category V narcotic drugs, if in possession of narcotic drugs in excess of the prescribed amount, would subject to an absolute presumption that such person had acted for distribution without any opportunity to consider the circumstances or take into account the true intent of the offender, and the suspect or defendant did not have the right to present proof in the case. Thereafter, an amendment was implemented pursuant to the Narcotics Act (No. 6) B.E. 2560 (2017) by amending section 15 paragraph three, section 17 paragraph two and section 26 paragraph two, prescribing a mere presumption and offering the suspect or defendant an opportunity to adduce evidence to

prove facts in court that one's action was not an action for distribution. However, section 8 paragraph one of the Narcotics Act (No. 6) B.E. 2560 (2017) provided that section 15 paragraph three, section 17 paragraph two and section 26 paragraph two of the Narcotics Act B.E. 2522 (1979), as amended, did not apply to a case adjudged by a court of first instance prior to the effective date of this Act, and that the law in force prior to the effective date of this Act would apply to such case until the case became final. In other words, upon a court of first instance giving judgment prior to the effective date of this Act, even though the case was not yet final, possibly pending consideration of the Court of Appeals or the Supreme Court, a defendant could not adduce evidence to prove one's intent relating to a narcotic drug that there was no intent for distribution. This was inconsistent or contrary to a defendant's right to defend a trial under section 29 paragraph two of the Constitution, under which a defendant had to be presumed innocent and prior to a final judgment convicting such person for an offence, such person could not be treated as an offender. Section 8 paragraph one of the Narcotics Act (No. 6) B.E. 2560 (2017) provided that provisions of law beneficial to a defendant would not apply to a case pending consideration of the Court of Appeals or Supreme Court, despite the fundamental principle of good and fair criminal justice administration in Thailand dictated that a beneficial law should apply to a criminal case defendant so long as there was no final judgment. Hence, the provisions of section 8 in this regard was a provision of law contrary to or inconsistent with the rule of law pursuant to section 3 paragraph two of the Constitution and a disproportionate restriction of rights and liberties of a person under section 26 paragraph one. Moreover, this treatment of a person as an offender even when the court had not yet given a final judgment was contrary to or inconsistent with section 29 paragraph two of the Constitution.

As for a case that was final, section 8 paragraph one of the Narcotics Act (No. 6) provided that section 15 paragraph three, section 17 paragraph two and section 26 paragraph two of the Narcotics Act B.E. 2522 (1979), as amended by the Narcotics Act (No. 6) B.E. 2560 (2017), did not apply to a case which the court had given a final judgment prior to the effective date of the Narcotics Act (No. 6) B.E. 2560 (2017). This provision protected the integrity of lawful proceedings and final judgments. It was not contrary to or inconsistent with the fundamental principle of criminal justice administration or the presumption of innocence of a suspect or defendant, being a universal principle as stated under section 29 paragraph two of the Constitution. Furthermore, the provision did not cause an unfair discrimination against a person without reason or legitimacy pursuant to section 27 paragraph three of the Constitution. The measure was appropriate after having regard to proportionality. The impact on rights and liberties of a person subject to a final conviction under the narcotic drugs was detrimental only to the extent of necessity in order to preserve public benefits and social order, i.e. the protection of national benefits and mutual peace and order of the people. Thus, the provision was neither contrary to nor inconsistent with section 3 paragraph two of the Constitution and did not prejudice human dignity pursuant to section 26 of the Constitution.

4. Ruling of the Constitutional Court

The Constitutional Court held that section 8 paragraph one of the Narcotics Act (No. 6) B.E. 2560 (2017), only in relation to the non-application of section 15 paragraph three, section 17 paragraph two and section 26 paragraph two of the Narcotic Drugs Act B.E. 2522 (1979), as amended by the Narcotics Act (No. 6) B.E. 2560 (2017), to a non-final case, was a contrary to or inconsistent with section 26 and section 29 paragraph two of the Constitution, and therefore unenforceable pursuant to section 5 of the Constitution.
