

Summary of Constitutional Court Ruling No. 8/2561 (2018)

Dated 26th December B.E. 2561 (2018)*

Re: Whether or not section 51 paragraph three of the Anti-Money Laundering Act B.E. 2542 (1999) was contrary to or inconsistent with section 26 of the Constitution.

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1. Summary of background and facts

The Court of Appeals referred the objection of the second objector (Mr. Chinpong Chatruratcheewin) to the Constitutional Court for a ruling under section 212 of the Constitution. The facts in the written objection of the second objector and supporting documents could be summarised as follows.

The state attorney, Office of the Attorney-General, applicant, filed a motion in the Civil Court in case number For. 130/2558 stating that the Anti-Money Laundering Office (AMLO) had inspected reports and information relating to transactions. The evidence collection reached a finding that Mr. Padungsak Boonpinij and others showed circumstances of involvement with human trafficking offences and there were reasons to believe that 23 items of assets had been obtained, being assets related to the commission of human trafficking offences, thus constituting a predicate offence under section 3(2) of the Anti-Money Laundering Act B.E. 2542 (1999). It was therefore requested that the Civil Court order the confiscation of all 23 items of assets to vest in the state pursuant to section 51. As for the second objector, the Civil Court found that the second objector was a member of a network having circumstances of human trafficking and obtaining assets relating to the commission of human trafficking offences. It was therefore ordered that the assets of the second objector also vested in the state pursuant to section 51 paragraph one. The second objector appealed. Pending consideration of appeal in the Court of Appeals, the second objector submitted an objection for the Court of Appeals to refer the matter to the Constitutional Court for a ruling under section 212 of the Constitution that section 51 paragraph three of the Anti-Money Laundering Act B.E. 2542 (1999) was contrary to or inconsistent with section 26 of the Constitution. The stated reason was that section 51 paragraph three provided that “for the purpose of this section, if a person claiming to be the owner or transferee of assets under section 50 paragraph one is the person who is or had, in the past, been associated with an offender of predicate offence or an offence of money laundering offence, it shall be presumed that all such assets are the asset connected with the commission of offence or transferred in bad faith, as the case may be.” It was

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claimed that such provision of law restricted the right of the people and was contrary to or inconsistent with the rule of law and disproportionately increased the burden of the people in proving innocence. As a consequence, the second objector borne the burden of proving innocence to the court, as opposed to the competent official proving wrongdoing in the examination of transaction between the second objector and group of human trafficking offenders. On the contrary, the competent official only had to collect assets without proving wrongdoing, thus causing the Civil Court to believe that the second objector's assets were assets obtained from the commission of a human trafficking offence, and ordered the vesting of the second objector's deposit account in the state due to the presumption under such provision of law.

The Court of Appeals found that the second objector's objection was in accordance with section 212 paragraph one of the Constitution and therefore referred such objection to the Constitutional Court for a ruling under section 212 of the Constitution.

2. The preliminary issue considered by the Constitutional Court

The preliminary issue considered by the Constitutional Court was whether or not the Constitutional Court could accept this objection for a ruling under section 212 of the Constitution.

After deliberations, the Constitutional Court found that this was a case where the Court of Appeals referred the objection of the second objector to the Constitutional Court for a ruling under section 212 of the Constitution on whether or not section 51 paragraph three of the Anti-Money Laundering Act B.E. 2542 (1999) was contrary to or inconsistent with section 26 of the Constitution. This provision of law was going to be applied to a case. Even though the Constitutional Court had previously given a ruling in relation to such provision of law in Constitutional Court Ruling No. 40-41/2546 that such provision of law was neither contrary to nor inconsistent with section 29 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997), the provisions of section 26 of the Constitution contained a different substance from section 29 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997). That is, in the case where the Constitution did not provide a prerequisite, such law should not be contrary to the rule of law, not disproportionately increase a burden or restrict the rights or liberties of a person, and could not affect the human dignity of a person, and should specify the reasons of necessity for restricting the right and liberty. This case was therefore in accordance with the rules under section 212 paragraph one in conjunction with section 41 paragraph three and section 50 of the Organic Act on Procedures of the Constitutional Court B.E. 2561 (2018). The Constitutional Court therefore ordered the acceptance of application for ruling. For the benefit of trial, the Constitutional Court also ordered the Chairman of the Constitutional Drafting Committee and Secretary-General of the Anti-Money Laundering Board (AMLB Secretary-General) to submit a written opinion and relevant information, and directed the Office of the Judiciary to submit a copy of the court of first instance judgment, appeal of the second objector and documents relevant to the case to the Constitutional Court.

3. The issue considered by the Constitutional Court

The issue considered by the Constitutional Court was whether or not section 51 paragraph three of the Anti-Money Laundering Act B.E. 2542 (1999) was contrary to or inconsistent with section 26 of the Constitution.

After deliberations, the Constitutional Court found as follows. Section 26 of the Constitution was a provision in Chapter 3, Rights and Liberties of the Thai People. The second provided prerequisites for enacting laws having the effect of restricting a right or liberty of the people, which had to comply with the constitutional prerequisites. In the case where the Constitution did not provide a prerequisite, such law should not be contrary to the rule of law, not disproportionately increase the burden or restrict a right or liberty of the people, and could not affect the human dignity of a person. The reasons of necessity for restriction of right and liberty should also be specified. In addition, the law should apply generally and not be directed to any particular case or person. According to such provision, there was a recognition and safeguard of rights and liberties of a person, such that when enacting a law to restrict the rights and liberties of a person, the legislature or organ exercising state powers had to take into account a fundamental principle, namely the principle of proportionality, which was an important principle serving the purpose of controlling, inspecting or restricting the exercise of state power to prevent the unfettered enactment of laws enforced upon the people. The enactment of a law to restrict the right or liberty of the people under such principle had to be appropriate, necessary and proportionate or balanced with the public or mutual benefit when measured against the right or liberty of the people that would be lost as a consequence of such law.

The Anti-Money Laundering Act B.E. 2542 (1999) was intended to break the chain of crime and remove a key incentive in crimes of high return. Measures had been provided for effective proceedings against money laundering, consistent with Thailand's obligation to the global community to provide a separate civil measure from criminal proceedings. Criminal measures would be used against persons and civil measures would apply to proceedings against assets. As regards criminal sanctions, this Act provided for offences which were punishable by imprisonment, fines or both. Civil measures involved proceedings against assets by way of seizures or freezing and vesting of assets to the state. This was a separate proceedings from criminal proceedings against a person. This special measure was specifically provided by the state to enable civil proceedings against assets involved in the commission of predicate offences under section 3. The rationale behind his measure was the protection of social benefit and public benefit, prevention of transnational crime and tracing and retrieving assets obtained from the commission of an offence. The principles had been recognised by the Constitutional Court in Constitutional Court Ruling No. 40-41/2546.

Upon examination of the Anti-Money Laundering Act B.E. 2542 (1999) with respect to proceedings against assets relating to the commission of an offence, being civil measures under Chapter 6, section 48 to section 59, the Constitutional Court found as follows. Such provision of law provided measures which constituted continual proceedings against an asset

relating to or obtained from the commission of a predicate offence under section 3. The offence were complicated and difficult to obtain evidence for proceedings against the behind-the-scene controller who obtained direct benefits from such commission of offence. The commission of crime generating assets from the commission of predicate offence in the law on anti-money laundering usually relied on a person who was involved in or used to have a relationship with the committer of a predicate offence or money laundering offence in order to conceal the unlawful acquisition of assets. The preliminary determination of assets or amount of assets relating to the commission of an offence was difficult in practice due to such facts being in the knowledge of the owner of the assets, transferee of assets or beneficiary of assets. The imposition of burden of proof on the state attorney, as applicant, in the Civil Court under the principle that “the burden of proof lies in the person asserting the claim” pursuant to section 84/1 of the Civil Procedure Code would make it very difficult to vest assets relating to the commission of a predicate offence under the law on money laundering in the state. In the consequence, the objectives and spirits of the law would not be realised. It was therefore expedient and necessary to provided that a person involved in or used to have a relationship with the committer of a predicate offence or prior money laundering offence should bear the burden pursuant to the principle that facts within the exclusive knowledge of a party should be such party’s burden of proving such facts. In any event, when motioning the Civil Court to order the vesting of assets to the state, a state attorney had to submit a motion with evidence to reasonably believe that an asset constituted an asset relating to the commission of an offence. This showed that evidence was required to provide preliminary proof of such facts pursuant to section 49. The Civil Court could order such assets relating to the commission of offence to vest in the state after conducting an inquiry proceedings on the motion of the state attorney. The state attorney had the burden of proving in the Civil Court that (1) a predicate offence had been committed; (2) the asset requested for vesting in the state was an asset relating to the commission of an offence; and (3) the person claiming to be the owner or transferee or beneficiary of such asset was a person involved in or used have a relationship with the committer of a prior predicate offence or money laundering offence under section 51 paragraph three or section 52 paragraph two, as the case may be. Upon such proof, the person claiming to be the owner or transferee or beneficiary of the asset under section 50 had the right to prove or had the burden of proving in the Civil Court that he/she was the true owner and such asset was not an asset connected with the commission of offence, or he/she was the honest transferee for consideration, or obtained the asset honestly and appropriately in line with good morals or charity, as the case may be. Proof also had to be presented to rebut the presumption under section 51 paragraph three to show the Civil Court that he/she was not involved in or never had a relationship with the committer of a prior predicate offence or money laundering offence. If the person claiming to be the owner or transferee or beneficiary of asset was unable to rebut such assumption, the Civil Court would order the vesting of such assets in the state pursuant to section 51 paragraph one. It was discernible that the presumption under section 51 paragraph three was a civil presumption connected to or had satisfied the proving process under section 50. Although the state attorney could prove facts which were prerequisites for relying on the presumption as stated under section 51 paragraph three, the Civil Court did not absolutely relied on the facts under the

presumption. The law gave an opportunity for a person claiming to be an owner or transferee or beneficiary of the asset to have the right to present evidence to object or rebut the legal presumption. Thus, section 51 paragraph three was merely a shifting of burden of proof which was relevant or reasonably related between fundamental facts pursuant to the prerequisite of presumption as provided under section 51 paragraph three and facts that had to be proven under section 50 prior to a Civil Court order to vest such assets relating to the commission of offence in the state pursuant to section 51 paragraph one. Moreover, this Act provided safeguard measures for a person who was an owner of such asset obtained honestly and for consideration, to be able to prove that the asset had been obtained rightfully in the Civil Court pursuant to section 50. Also, there were remedial measures whereby the Civil Court could order the protection of right of a beneficiary pursuant to section 52 paragraph one, or return of asset prior to a Civil Court order or subsequent to a Civil Court order of confiscation, as the case may be, pursuant to section 53. These provisions protected the property rights of a person who had lawfully obtained assets, and allowed the owner of asset or beneficiary to prove innocence with regard to the source of asset. This showed that the provisions of law were fair in the maintenance of balance between the combat of certain serious crimes to protect public interests and the protection of personal assets from the exercise of measures relating to the vesting of assets in the state. The provisions of section 51 paragraph three was therefore not contrary to the rule of law since any order relating to an asset had to be given by a judicial organ (Civil Court), which was an organ exercising judicial powers. There were checks and balances between the performance of duties of a competent official in proceedings against assets relating to an offence and parties having the full right to defend an action. Even though there was some restriction of right in property, the restriction of a person's right in property was proportionate and reasonable and balanced between public benefits or mutual benefits and the rights of a person whose right had been restricted. The reason of necessity had been specified. The measure did not impose a disproportionate burden or restriction of right of a person and there was no provision which showed that proceedings against an asset relating to the commission of an offence to vest assets in the state affected human dignity. Furthermore, such provision applied generally and was not directed to a particular case or person. The provision was therefore neither contrary to nor inconsistent with section 26 of the Constitution.

4. Ruling of the Constitutional Court

The Constitutional Court held that section 51 paragraph three of the Anti-Money Laundering Act B.E. 2542 (1999) was neither contrary to nor inconsistent with section 26 of the Constitution.
