

Summary of Constitutional Court Ruling* No. 4/2556 (2013)

Dated 13th March B.E. 2556 (2013)

Re: Whether or not section 36, section 37, section 38, section 39 and section 41 of the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) were contrary to or inconsistent with section 3 paragraph two, section 29 and section 40(2), (3), (4) and (7).

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1. Summary of background and facts

A public prosecutor, plaintiff, had prosecuted against Police Lieutenant General Somkid Boonthanom and others, a total of 5 defendants, to the Criminal Court in Black Case No. *OR* 119/2553 on charges of conspiracy to detain another person causing such person's death, and conspiracy to kill another person with intent and premeditation in order to conceal wrongdoings and to evade criminal liability for other wrongdoings committed. Thereafter, the prosecutor filed a motion to examine the plaintiff witness, namely Police Lieutenant Colonel Suvichai Kaewpaluk, in a Cambodian court and a Saudi Arabian court pursuant to the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992). The Criminal Court found that this prosecution witness was a key oral evidence. In pursuance of section 228 of the Criminal Procedure Code, the issues were referred to the Cambodian court and Saudi Arabian court for witness examination.

All of the five defendants filed a motion requesting a referral of an objection by the Criminal Court to the Constitutional Court for a ruling that section 12(2), section 37 and section 41 of the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) were a provision of law contrary to or inconsistent with section 26, section 27, section 29 and section 40 of the Constitution. The objections could be summarised as follows.

1. Section 12(2) of the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) provided that the central coordinator should send a request to examine a witness, documentary evidence or material evidence under the court proceedings, and a request for proceedings to confiscate or seize assets, to the special prosecutor for further action. Section 37 provided that a request for cooperation from a foreign country and all documents that were going to be sent shall be complied with the form, rules, procedures and conditions prescribed by the central coordinator. It was argued that such provisions did not provide for a process and procedure for witness examination, and thus the five defendants were unable to track the issues, where the witnesses were examined in the court of both foreign countries.

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It was further argued that the Thai language was not used during witness examination; that there was no translation measure to enable such defendants and their lawyers to acquire a proper understanding; and that the defendants were not granted the right to attend the hearing, witness examination, witness statement challenge and recusal of the judge. The defendants were unable to cross-examine the witness in person, but could only submit cross-examination questions in advance without knowing whether they were consistent with the testimony given by the plaintiff's witness. Furthermore, the cross-examination questions would be known by the plaintiff's witness in advance. These arguments were inconsistent with the witness examination principle, where such examination shall be conducted in the presence of defendant and in open court. This provision of law was therefore contrary to or inconsistent with section 26, section 27, section 29 and section 40 of the Constitution.

2. Section 41 of the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) provided that all evidence obtained under this Act shall be deemed as evidence admissible by law. This provision was considered unfair and contrary to the rights and liberties of the defendants. The court and the defendants were forced to accept such evidence which had been unconstitutionally obtained. The provision was therefore contrary to or inconsistent with section 29 and section 40(2), (3), (4) and (7) of the Constitution.

The plaintiff filed a motion to object the five defendants' arguments which could be summarised as follows.

1. A witness examination conducted in a foreign court shall comply with the rules and procedures of the court receiving the request in such country. This adhered to the principle where a witness examination conducted by courts of justice of other countries shall be presumed as a just process.

2. The defendants and their lawyers shall have the right to attend the witness examination, cross-examine the witness in the foreign courts, file objections and refer to documents adduced in the witness's testimony, as proceedings in open court. This included the right to motion for the recusal of a judge pursuant to the universal principles of justice. Besides, even though the witness examination conducted in the foreign courts applied such countries' languages, such testimony shall be translated back into Thai.

3. The plaintiff requested for a referral of issues for examination of this witness in foreign courts because the witness was unable to enter the Kingdom of Thailand. Therefore, the denial of a percipient witness from giving testimony in the case would be regarded as a distortion and concealment of facts, which could lead to a judgment based on lack of significant facts and a prejudice to justice. The Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) was therefore neither contrary to nor inconsistent with the Constitution.

The Criminal Court found that it was reasonable cause and therefore referred the arguments of all of the five defendants and the plaintiff's objections to the Constitutional Court for a ruling under section 211 of the Constitution.

2. Preliminary issue

The preliminary issue was whether or not the Constitutional Court had the competence to admit this application for a ruling under section 211 paragraph one of the Constitution. The Constitutional Court found that the application raised an objection on whether or not section 12(2), section 37 and section 41 of the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) were contrary to or inconsistent with section 26, section 27, section 29 and section 40 of the Constitution. The Criminal Court would apply those provisions of law to the case and there had not been yet a prior ruling of the Constitutional Court pertaining to such provisions. The case was in accordance with section 211 paragraph one of the Constitution. The Constitutional Court therefore ordered the admittance of this application for consideration.

3. The issues considered by the Constitutional Court

The Constitutional Court found that all of the five defendants objected that provisions of the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) were contrary to or inconsistent with the Constitution on 4 issues as follows:

1. Whether or not section 12(2) of the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) was contrary to or inconsistent with section 26, section 27, section 29 and section 40 of the Constitution.

2. Whether or not section 36, section 37, section 38 and section 39 of the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) were contrary to or inconsistent with section 39 of the Constitution.

3. Whether or not section 41 of the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) was contrary to or inconsistent with section 26, section 27 and section 39 of the Constitution.

4. Whether or not section 36, section 37, section 38, section 39 and section 41 of the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) were contrary to or inconsistent with section 3 paragraph two, section 29 and section 40(2), (3), (4) and (7) of the Constitution.

The Constitutional Court considered whether or not the provisions of law stated in the five defendants' arguments were significantly proper for a Constitutional Court ruling under section 211 paragraph two of the Constitution.

On the first issue concerning whether or not section 12(2) of the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) was contrary to or inconsistent with section 26, section 27, section 29 and section 40 of the Constitution, the Constitutional Court found as follows. Section 12(2) of the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) provided for the central coordinator to send a request for foreign

assistance to a competent authority. This provision did not pertain to the exercise of powers by a state organ and was neither a restriction of rights and liberties of a person nor a restriction of rights in the judicial process as provided under section 26, section 27, section 29 and section 40 of the Constitution. The objection on this issue was therefore without merit for a Constitutional Court ruling under section 211 paragraph two of the Constitution.

On the second issue concerning whether or not section 36, section 37, section 38 and section 39 of the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) were contrary to or inconsistent with section 39 of the Constitution, the Constitutional Court found as follows. Section 36, section 37, section 38 and section 39 of the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) were provisions on rules and procedures for requesting foreign assistance for the purpose of preventing and suppressing crime with special characteristics. This provision did not pertain to the criminal liability of a person or the presumption of innocence of a suspect or defendant under section 39 of the Constitution. The objection on this issue was therefore without merit for a Constitutional Court ruling under section 211 paragraph two of the Constitution.

On the third issue concerning whether or not section 41 of the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) was contrary to or inconsistent with section 26, section 27 and section 39 of the Constitution, the Constitutional Court found as follows. Section 41 of the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) was a provision relating to the admissibility of evidence obtained under this Act as deemed such evidence as legally admissible. The provision neither governed the exercise of powers by a state organ nor the criminal liability of a person, nor did the provisions stipulated a presumption of guilt of a suspect or defendant, as prescribed under section 26, section 27 and section 39 of the Constitution. The objection on this issue was therefore without merit for a Constitutional Court ruling under section 211 paragraph two of the Constitution.

The only issue which remained to be considered by the Constitutional Court was the fourth one on whether or not section 36, section 37, section 38, section 39 and section 41 of the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) were contrary to or inconsistent with section 3 paragraph two, section 29 and section 40(2), (3), (4) and (7) of the Constitution.

On such issue concerning whether or not section 36, section 37, section 38, section 39 and section 41 of the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) were contrary to or inconsistent with section 3 paragraph two, section 29 and section 40(2), (3), (4) and (7) of the Constitution, the Constitutional Court found as follows.

Section 36, section 37, section 38 and section 39 of the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) were provisions on rules and procedures for requesting foreign assistance in matters pertaining to investigations, inquiries, prosecution, confiscation and other proceedings relating to criminal cases. A state agency wishing to request foreign assistance may submit the matter to a central coordinator, i.e. the Attorney-General or his or

her assigned person. A request shall be filed in accordance with the form, rules, procedures and conditions prescribed by the central coordinator, and the central coordinator shall consider whether foreign assistance should be sought. The central coordinator's decision was final unless otherwise ordered by the Prime Minister. The requesting agency was bound to comply with Thailand's obligations to the country receiving the request in regard to the use of information or evidence in accordance with the purposes stated in the request. Moreover, the requesting agency had to keep confidential all requested information and evidence, except where such information or evidence was necessary for open trial as a result of an investigation, inquiry, prosecution or other proceedings relating to criminal cases as stated in the request. Hence, the provision of law merely provided for rules and procedures for submitting a request for foreign assistance in criminal matters, where a process was undertaken by the Executive. The provision of law was neither contrary to nor inconsistent with the rule of law since it did not restrict rights and liberties of the people, or rights in the judicial process, as provided under section 3 paragraph two, section 29 and section 40(2), (3), (4) and (7) of the Constitution.

On the issue of whether or not section 41 of the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) was contrary to or inconsistent with section 3 paragraph two, section 29 and section 40(2), (3), (4) and (7) of the Constitution, the Constitutional Court found as follows.

Section 41 of the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) did not provide details, procedures and processes for evidence seeking. The provision compelled the defendant to be bound by evidence obtained from the plaintiff's examination in a foreign court. The defendant did not have the opportunity to inspect or acknowledge, or sufficiently prepare a defence against such evidence. Even though the admissibility of evidence by a court was subject to section 227 and section 227/1 of the Criminal Procedure Code, allowing the court to exercise caution when determining the admissibility of evidence which the defendant had not cross-examined, and that such evidence should not be solely relied upon to convict the defendant, but such a rule was not an absolute prohibition. The court was still able to rely upon such evidence in conjunction with other evidence. The provision was thus unfair to the defendant. Section 40(2), (3), (4) and (7) of the Constitution recognised and protected rights in the justice process, which included the rights to an open trial, to be informed of facts and have sufficient opportunity to examine documents, to present one's facts, defence and evidence, to have a proper, expeditious and fair trial, to be appropriately treated in the justice process, to have sufficient opportunity to contest a case, and to receive legal assistance from a lawyer. Such provision of law was also inconsistent with Article 14.3 of the International Covenant on Civil and Political Rights (ICCPR), pertaining to the right to be tried in the defendant's presence, the right to defend oneself in person or through legal assistance, the right to examine witnesses against oneself, and the right to obtain the attendance and examination of witnesses on one's behalf under the same conditions as witnesses against oneself. Section 41 of the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) was therefore a provision of law restricting

rights and liberties and affecting the essential substances of rights in the judicial process pursuant to section 29 and section 40(2), (3), (4) and (7) of the Constitution. The provision was also inconsistent with the rule of law principle under section 3 paragraph two of the Constitution.

4. Ruling of the Constitutional Court

The Constitutional Court held that section 36, section 37, section 38 and section 39 of the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) were neither contrary to nor inconsistent with section 3 paragraph two, section 29 and section 40(2), (3), (4) and (7) of the Constitution, and that section 41 of the the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) was contrary to or inconsistent with section 3 paragraph two, section 29 and section 40(2), (3), (4) and (7).
