

Summary of Constitutional Court Ruling No. 13/2549

Dated 6th July B.E. 2549 (2006)*

Re: Whether or not section 49 paragraph one and section 45 of the Organization of Military Courts Act B.E. 2498 (1955) in conjunction with section 162 paragraph one subparagraph (1) of the Criminal Procedure Code were contrary to or inconsistent with section 301 paragraph one subparagraph (3) and section 30 paragraph one of the Constitution of the Kingdom of Thailand B.E. 2540 (1997)?

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1. Summary of Background and Facts

The Bangkok Military Court referred the application of an applicant, a defendant in Pending Case No. 32/2547, requesting for a Constitutional Court ruling under section 264 of the Constitution on whether or not section 49 paragraph one and section 45 of the Organization of Military Courts Act B.E. 2498 (1955) in conjunction with section 162 paragraph one subparagraph (1) of the Criminal Procedure Code were contrary to or inconsistent with section 301 paragraph one subparagraph (3) and section 30 paragraph one of the Constitution of the Kingdom of Thailand B.E. 2540 (1997). The objection could be summarized as follows. The Bangkok Military Court order which admitted the case for trial was inconsistent with the spirits of the Constitution that intended for the National Counter Corruption Commission (NCCC), an independent constitutional organ, to be the investigator of state officials alleged to have committed a misfeasance of official functions, regardless of whether such person was subject to the jurisdiction of the courts of justice or the military courts so as to prevent the aid or persecution by others. The inquiry of the charges in the military courts, which applied section 162 paragraph one subparagraph (1) of the Criminal Procedure Code pursuant to section 45 of the Organization of the Military Courts Act B.E. 2498 (1955), resulted in the defendant not having the right to present evidence at the charge inquiry stage. Moreover, the military courts also had the power to carry out the inquiry of charges in the absence of the defendant under section 165 paragraph two and paragraph three of the Criminal Procedure Code, thus depriving the defendant of equal protection under the law as with other people under section 30 paragraph one of the Constitution. Such provisions were therefore provisions that were contrary to or inconsistent with section 301 paragraph one subparagraph (3) and section 30 paragraph one of the Constitution of the Kingdom of Thailand B.E. 2540

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(1997). As there had not yet been a ruling of the Constitutional Court with respect to such provisions, it was therefore requested that the Bangkok Military Court impose a temporary stay of proceedings and refer the defendant's objection to the Constitutional Court for a ruling under section 264 of the Constitution.

The Bangkok Military Court, after consideration, found that the defendant's application was in accordance with section 264 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997) and that there had not yet been a ruling of the Constitutional Court. The matter was therefore referred to the Constitutional Court for ruling.

2. Preliminary Issue

The Constitutional Court held that the Bangkok Military Court had referred the objection of an applicant, the defendant, through official channels to the Constitutional Court for ruling. The case was therefore in accordance with the provisions of section 264 paragraph one of the Constitution and the Constitutional Court had the power to admit this application for consideration.

3. Issues Considered by the Constitutional Court

The issues in the application considered by the Constitutional Court were whether or not section 49 paragraph one and section 45 of the Organization of Military Courts Act B.E. 2498 (1955) in conjunction with section 162 paragraph one subparagraph (1) of the Criminal Procedure Code were contrary to or inconsistent with section 301 paragraph one subparagraph (3) and section 30 paragraph one of the Constitution of the Kingdom of Thailand B.E. 2540 (1997).

The Constitutional Court held as follows. Section 30 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997) was a provision which recognized the equality of people as well as the equal protection of rights and liberties of the Thai people under the law. All people were equal before the law and any discrimination which would result in inequality, i.e. any unfair discrimination, was prohibited. This prohibition, however, was not absolute. If the discrimination was a measure to eliminate obstacles or to promote equality by enabling persons to exercise rights and liberties in the same manner as other people, then such discrimination was permitted and not deemed as an unfair discrimination under section 30 paragraph four of the Constitution of the Kingdom of Thailand B.E. 2540 (1997).

Section 301 paragraph one of the Constitution was a provision on the powers and duties of the National Counter Corruption Commission (NCCC), a constitutional organ performing the duties of investigating the exercise of state powers. On the other hand, section 49 paragraph one and section 45 of the Organization of Military Courts Act B.E. 2498 (1955) in conjunction with section 162 paragraph one subparagraph (1) of the Criminal Procedure Code were provisions on criminal procedures within the jurisdiction of the

military courts with respect to the procedures for conducting an inquiry of charges in the event that a victim who was subject to the jurisdiction of the military courts wished to carry out the prosecution against the defendant on his/her own behalf. The trial process in the military courts provided in section 49 paragraph one of the Organization of Military Courts Act B.E. 2498 (1955) stated that the military prosecutor or the victim who was subject to the jurisdiction of the military courts, as the case may be, had the power to carry out prosecution in criminal proceedings in the military court during regular times, but if the victim was not subject to the jurisdiction of the military courts then the military prosecutor should be the prosecutor. As regards the criminal procedures of the military courts, section 45 of the Organization of Military Courts Act B.E. 2498 (1955) stated that the laws, regulations and rules enacted under the military laws should apply, and in the absence of such enactments, the Criminal Procedure Code would apply *mutatis mutandis*. In the case of this application the Bangkok Military Court applied section 162 paragraph one subparagraph (1) of the Criminal Procedure Code.

On the applicant's objection that the provisions mentioned above were contrary to or inconsistent with section 301 paragraph one subparagraph (3) of the Constitution of the Kingdom of Thailand B.E. 2540 (1997), the Constitutional Court held as follows.

Section 301 paragraph one subparagraph (3) of the Constitution provided that proceedings against a state official who had committed a misfeasance of official functions were within the powers and duties of the NCCC to conduct an inquiry and issue a decision in order to undertake further proceedings under the rules and procedures provided by the organic law on counter corruption. In this regard, Chapter 8 of the Organic Act on Counter Corruption B.E. 2542 (1999) on investigations of state officials who were not holders of political positions under section 308 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997) provided that the NCCC had the power to carry out a factual inquiry in relation to the allegations against the state official who was not a holder of political position under section 66. Such provisions were therefore specific provisions of law that applied to the case of an allegation against a state official filed with the NCCC and the case of a complaint or charges against state officials filed with investigation officers that had to undergo a prior factual inquiry and ruling of the NCCC. However, such provisions did not include the case where a victim wished to carry out proceedings in court by exercising rights as a victim prosecuting on his/her behalf. Therefore, the victim, regardless of whether he/she was a private individual or state official, upon finding that the rights and liberties of such person had been violated, would be able to take legal proceedings by prosecuting in a competent court for a judgment. As it appeared from the facts under the application that the victim and the applicant were both commissioned military officers, the court having competent jurisdiction was the Bangkok Military Court. The powers and duties and trial procedures of the military court were separate and not in any manner related to the powers and duties of the NCCC. Such provisions were therefore neither contrary to nor inconsistent with section 301 paragraph one subparagraph (3) of the Constitution of the Kingdom of Thailand B.E. 2540 (1997).

As for the applicant's objection that such provisions were contrary to or inconsistent with section 30 paragraph one of the Constitution, the Constitutional Court found as follows. The inquiry of charges already provided for guarantees of fairness for the defendant who was the applicant. Such proceedings were undertaken by the court, which was a constitutional organ exercising judicial powers impartially and independently. The court would conduct a preliminary examination of the plaintiff's evidence to determine whether the case contained sufficient materials to continue with the proceedings, in order to provide a vetting process prior to trial, where the rights and liberties of a person were already protected. The applicant, in his capacity as a defendant, therefore enjoyed a greater degree of rights protection under such provisions than the encroachment of rights or unequal treatment under the law as alleged by the applicant. Since the powers and duties of the NCCC under the Constitution did not include the case where a victim wished to individually undertake proceedings in court against a state official, the provisions of law on inquiry of charges in the military court were therefore not a case which caused any inequality, or unequal protection under the law between a state official subject to proceedings in court and a state official subject to a factual inquiry by the NCCC. Moreover, the provisions of law objected by the applicant only applied to persons subject to the jurisdiction of the military courts, in which case there was only one group of persons having the same status under the jurisdiction of the military courts all of whom were treated indiscriminately and equally in the application of laws. As a result, such provisions were therefore neither contrary to nor inconsistent with section 30 paragraph one of the Constitution of the Kingdom of Thailand B.E. 2540 (1997).

4. Ruling of the Constitutional Court

The Constitutional Court held that section 49 paragraph one and section 45 of the Organization of Military Courts Act 2498 (1955) in conjunction with section 162 paragraph one subparagraph (1) of the Criminal Procedure Code were neither contrary to nor inconsistent with section 301 paragraph one subparagraph (3) and section 30 paragraph one of the Constitution of the Kingdom of Thailand B.E. 2540 (1997).
