

Summary of Constitutional Court Ruling* No. 44-45/2554 (2011)

Dated 14th December B.E. 2554 (2011)

Re: Whether or not section 116, section 215 and section 216 of the Penal Code were contrary to or inconsistent with section 26, section 27, section 28, section 29, section 39, section 45 and section 63 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007)?

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1. Summary of background and facts

Pattaya Provincial Court referred the objections of defendants in 2 applications to the Constitutional Court for a ruling under section 211 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). The facts under the applications and supporting documents could be summarised as follows.

First Application (Case No. 31/2552 (2009)). The public prosecutor, Office of Pattaya Provincial Prosecutor, prosecuted Mr. Arisman Pongruengrong, Mr. Nopporn Namchiangtai, Police Lieutenant Colonel Wairoj Apornrat and Mr. Somyos Prompa as defendants in Pattaya Provincial Court in Criminal Case No. 3537/2552 (2009) on charges of conspiracy to violate an official order to terminate an unlawful assembly, rally and other acts in obstruction of traffic, conspiracy to convey to the public verbally or otherwise in a manner not within the intent of the Constitution and not being an expression of opinion or criticism in good faith to cause discontent or disobedience among the public to the extent of causing disorder in the Kingdom and provoking the public to violate the laws of the nation, unlawful assembly of ten or more people to cause disorder in society whilst acting as its head and directing the commission of offences and conspiracy to trespass and destroy property. The public prosecutor requested for a conviction of the defendants pursuant to section 83, section 91, section 116, section 215, section 216, section 358, section 362, section 364 and section 365 of the Penal Code, section 4 of the Act Amending the Penal Code (No. 6) B.E. 2526 (1983), section 108, section 114 and section 148 of the Land Traffic Act B.E. 2522 (1979) and section 8 of the Land Traffic Act (No. 7) B.E. 2550 (2007).

The defendants pleaded not guilty and the third defendant submitted a motion to Pattaya Provincial Court raising the objection that the causes for prosecution of the third defendant in this case were consequences of the assembly of “red shirts” in Pattaya City, Chonburi Province, between 10th - 11th April B.E. 2552 (2009). The third defendant’s action

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constituted an exercise of liberty as provided under the Constitution, being an expression of the public under the democratic form of government and an exercise of the constitutional liberty to assemble peacefully and free of arms as provided under section 63 of the Constitution. State officials had prosecuted the third defendant and the public charging them of unlawful assembly, an offence under section 216 of the Penal Code. The expression of opinion in an assembly was the liberty of a person to express opinions as provided under section 45 of the Constitution. Therefore, the application of section 116 of the Penal Code to the third defendant was not allowed because of its being contrary to or inconsistent with section 45 and section 63 of the Constitution. The third defendant thus motioned for the referral of his objection to the Constitutional Court for a ruling that section 215 and section 216 of the Penal Code were contrary to or inconsistent with section 63 of the Constitution, and that section 116 of the Penal Code was contrary to or inconsistent with section 45 and section 63 of the Constitution.

Second Application (Case No. 39/2552 (2009)). The public prosecutor, Office of Pattaya Provincial Prosecutor, prosecuted Miss Jidapa Tanahataruchai, Miss Samruay Saengprapa and Miss Saowalak Sanuwit as defendants in Pattaya Provincial Court in Criminal Case No. 3232/2552 (2009) on charges of participating in an unlawful assembly of 10 people or more and the use of force, threat of force, instigation of disorder in society while acting as the head of an unlawful assembly and leader with the authority to instruct and provoke such wrongdoings. The acts of all three defendants therefore constituted offences under section 83 and section 215 of the Penal Code. The prosecution requested for the conviction of the defendants pursuant to the law.

All three defendants pleaded not guilty and raised an objection that they were exercising rights under section 63 of the Constitution, which provided for the right to assemble, and that the assembly was peaceful and free of arms as provided under section 69 of the Constitution, under which a person had the right to protest peacefully against the acquisition of national governing powers by means other than those stated under this Constitution. Section 215 of the Penal Code was therefore a case under section 6 of the Constitution and was unenforceable due to being contrary to or inconsistent with section 26, section 27, section 28, section 29, section 39 and section 63 of the Constitution. It was thus requested that the objections of all three defendants be referred to the Constitutional Court for a ruling.

Pattaya Provincial Court found that the objections of defendants in both applications were cases under section 211 of the Constitution. As there did not appear to be a ruling of the Constitutional Court on these issues, the matter was referred to the Constitutional Court for a ruling.

2. Preliminary issue

The preliminary issue considered by the Constitutional Court was whether or not the Constitutional Court had the competence to admit these two applications for a ruling under

section 211 paragraph one of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). The Constitutional Court held that both applications raised the objections that section 116, section 215 and section 216 of the Penal Code were contrary to or inconsistent with section 26, section 27, section 28, section 29, section 39, section 45 and section 63 of the Constitution and there had not yet been a prior ruling of the Constitutional Court in relation to such provisions. The case was therefore in accordance with section 211 paragraph one of the Constitution in conjunction with article 17(13) of the Rules of the Constitutional Court on Procedures and Rulings B.E. 2550 (2007). The Constitutional Court thus ordered the admittance of both applications for trial and adjudication and the consolidation of the applications into one ruling.

3. The issues considered by the Constitutional Court

The issues considered by the Constitutional Court were whether or not section 116, section 215 and section 216 of the Penal Code were contrary to or inconsistent with section 26, section 27, section 28, section 29, section 39, section 45 and section 63 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

After deliberations the Constitutional Court found as follows. The Penal Code provided for the characteristics of acts constituting offences and the penalties imposable as criminal sanctions. Section 116 was a provision in Title 1 on offences relating to national security. The provision stated that any person who represented to the public orally, in writing or by any other means which was not an act within the intent of the Constitution, or which was not committed for the purpose of expressing an opinion or criticism in good faith (1) to instigate a change in the laws of the nation or government by the use of force, coercion or violence, (2) to cause discontent or disobedience of the public to the extent of causing unrest in the Kingdom, or (3) to cause the public to violate the laws of the nation, would be regarded as having committed an offence and liable to penalties. Section 215 and section 216 were provisions on offences under Title 5 on offences relating to public peace and order. Section 215 provided that any person participating in an unlawful assembly of ten or more people, using force, threat of force or committing any act to cause disorder in society, would be regarded as having committed an offence and liable to penalties. If any offender possessed a weapon, all offenders were liable to a heavier penalty. If the offender was the leader or person directing the offence, a heavier penalty would be imposed. Section 216 provided that once an officer ordered the participants of an unlawful assembly under section 215 to dissipate, any person who refused to obey would be regarded as having committed an offence and liable to penalties. The provisions in these three sections were in force at the time of the commission of the predicate acts in this case. The provisions neither had any retroactive effect to impose a criminal offence or criminal sanction on a person, nor was there any presumption of guilt or treatment of a person as if he/she were an offender prior to a final judgment. The provisions were therefore neither contrary to nor inconsistent with section 39 of the Constitution. The restriction of rights and liberties was imposed by virtue of law as permitted under section 45 paragraph two of the Constitution, i.e. to preserve

national security and to preserve peace, order and good morals of the people. The restriction was also imposed to the extent of necessity without prejudicing the essential substances of the rights and liberties recognized under the Constitution. Section 116, section 215 and section 216 of the Penal Code were therefore provisions consistent with section 29 of the Constitution. In other words, the provisions restricted rights and liberties by virtue of laws enacted specifically for the purposes provided under the Constitution and only to the extent of necessity. The provisions also applied generally and were not directed at any particular case or person. The essential substances of rights and liberties recognized by the Constitution were not prejudiced. There was no restriction of liberty of persons to assemble peacefully and free of arms as provided under section 63 of the Constitution. The matter did not concern the exercise of powers by an organ without regard to human dignity, rights and liberties as provided under section 26 of the Constitution. The provisions did not prevent a person from invoking human dignity or from exercising one's rights and liberties, and did not prevent a person whose constitutional rights and liberties were violated from invoking the provisions to exercise rights in court as provided under section 28 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

4. Ruling of the Constitutional Court

The Constitutional Court held that section 116, section 215 and section 216 of the Penal Code were neither contrary to nor inconsistent with section 26, section 27, section 28, section 29, section 39, section 45 and section 63 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).
