

Summary of Constitutional Court Ruling No. 12/2555 (2012)

Dated 28th March B.E. 2555 (2012)*

Re: Whether or not section 54 of the Direct Sales and Direct Marketing Act B.E. 2545 (2002) was contrary to or inconsistent with section 39 paragraph two and section 40(5) in conjunction with section 30 of the Constitution.

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1. Summary of background and facts

The state attorney for Buriram Province prosecuted Asian Gems Company Limited, first defendant, and Mr. Pithan Cheawhatapong, second defendant, in the Buriram Provincial Court on charges of offences under the Direct Sales and Direct Marketing Act B.E. 2545 (2002). The second defendant, a direct sales business operator, had acted in a way which induced other persons to subscribe to a network of independent distributors and to purchase the first defendant's products in consideration of a monetary return if such members were able to find additional independent distributor members to purchase products. The sum would incrementally increase to higher levels when the independent distributor was able to find additional members. The agreement provided a return for obtaining new subscribers to the network, calculated from the number of additional subscribers to the network, which was a violation of the law. The state attorney sought a sentence for both defendants under section 3, section 19, section 46 and section 54 of the Direct Sales and Direct Marketing Act B.E. 2545 (2002).

The Buriram Provincial Court gave judgment that both defendants had committed offences under section 19, section 46 and section 54 of the Direct Sales and Direct Marketing Act B.E. 2545 (2002). The first defendant was sentenced to a fine of 500,000 baht. The second defendant was given a five-year term imprisonment sentence. Both defendants appealed. The Court of Appeals for the 3rd Region affirmed the judgment. Both defendants appealed to the Supreme Court, challenging the judgment of the Court of Appeals for the 3rd Region. The case was pending in the Supreme Court.

The second defendant subsequently submitted a motion to the Supreme Court, stating an objection that section 54 of the Direct Sales and Direct Marketing Act B.E. 2545 (2002), which provided that in the case where an offender liable to a penalty under this Act was a juristic person, the managing director, manager or person responsible for the juristic person's

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operations would also be liable for the penalties provided for such an offence, except where it can be proven that the person had no involvement in the commission of the offence of such juristic person, was contrary to or inconsistent with section 39 paragraph two and section 40(5) in conjunction with section 30 of the Constitution. In other words, in the case where the plaintiff was able to adduce evidence to show that the juristic person, first defendant, had committed an offence under such law and that the court had already given a sentence to such juristic person, the managing director, manager or person responsible for the juristic person's operations would also be liable to the penalties prescribed by law for such an offence. The plaintiff was not required to prove that the second defendant, the managing director, had conspired in the commission of the offence. The law provided that the managing director or manager was immediately liable and the burden of proof was shifted to the second defendant to prove that he had no involvement in the commission of offence by the juristic person. This constituted a denial or exclusion of judicial powers to hear evidence adduced by the plaintiff in favour of the managing director and manager. Moreover, the juristic person enjoyed a right to presumption of innocence under such provision, but the managing director or manager, the second defendant, did not receive such right. On the contrary, the law imposed a liability concurrently with the juristic person, unless there was proof of non-involvement with the commission of the offence. The provision failed to protect the second defendant, the managing director, under the principle of "presumption of innocence of a defendant in criminal proceedings."

The Supreme Court ordered the referral of the opinion and objection of the second defendant through official channels to the Constitutional Court for ruling.

2. Preliminary issue

The preliminary issue was whether or not the Constitutional Court had the competence to accept this application for ruling under section 211 paragraph one of the Constitution.

After consideration, the Constitutional Court found as follows. The issue under the application was an objection concerning whether or not section 54 of the Direct Sales and Direct Marketing Act B.E. 2545 (2002) was contrary to or inconsistent with section 39 paragraph two and section 40(5) in conjunction with section 30 of the Constitution. The Supreme Court was going to apply such a provision of law to a case and there had not yet been a ruling of the Constitutional Court in relation to such provision. The case was thus in accordance with section 211 paragraph one of the Constitution in conjunction with clause 17(13) of the Rules of the Constitutional Court on Procedures and Rulings B.E. 2550 (2007). The Constitutional Court therefore ordered the acceptance of this application for ruling.

3. The issues considered by the Constitutional Court

The issue considered by the Constitutional Court was whether or not section 54 of the Direct Sales and Direct Marketing Act B.E. 2545 (2002) was contrary to or inconsistent

with section 39 paragraph two and section 40(5) in conjunction with section 30 of the Constitution.

After consideration, the Constitutional Court found as follows. Section 39 paragraph two and section 40(5) of the Constitution were provisions in Chapter 3 on Rights and Liberties of the Thai People, Part 4 Rights in the Judicial Process. Section 39 paragraph two provided that, in a criminal case, there should be a presumption that a suspect or defendant was innocent. This provision was intended to protect the rights of a suspect or defendant in a criminal case by presuming that the suspect or defendant was innocent until a final conviction. This presumption of innocence of a suspect or defendant in a criminal case as provided under section 39 paragraph two was derived from human rights, as found in the Universal Declaration of Human Rights, Article 11, which provided that “everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.” This fundamental principle, according to which all persons were not regarded as criminal offenders, formed the core of the international criminal justice system, as a safeguard for the rights and liberties of a person in relation to criminal liability. The state protected all persons from criminal penalty until proven by evidence that a person was an offender. This principle also constituted a Rule of Law recognised by civilised nations and internationally, i.e. the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, under which Thailand was a member and bound under the obligations stated therein.

Section 40(5) of the Constitution was a provision which recognised the rights of a victim, suspect, defendant and witness in a criminal case to enjoy protection as well as necessary and appropriate assistance from the state. The necessary stipend, compensation or expenses would be as provided by law.

Section 30 of the Constitution was a provision in Chapter 3 on Rights and Liberties of the Thai People, Part 2 Equality. The provision recognised that all persons were equal before the law and enjoyed equal protection under the law. Men and women enjoyed equal rights. Unjust discrimination against a person for the causes stated by the Constitution was prohibited.

The Direct Sales and Direct Marketing Act B.E. 2545 (2002) was a law enacted for the purpose of protecting consumers from the direct offer for sale of goods or services made by an independent distributor or direct sales agent to the consumer at a place of residence or office of the consumer or other person, or at other places which were not normal business premises. In such a situation, the consumer would be under circumstances which limit his/her ability to make an independent and prudent decision to purchase goods or services. In addition, there were goods or services distributors communicating offers for the sale of goods or services directly to consumers, but where the goods or services concerned were not consistent with the representations made by the advertisements. Also, current direct sales and direct marketing conducts employed persuasive methods and provided for the general

public to subscribe to the business network upon a promise of a monetary return upon acquiring new subscribers to the network, calculated from the number of additional subscribers to the network. This conduct amounted to a fraud to the public. The general public, as consumers, were at a disadvantage, causing injustice and public disorder. As a consequence, a penalty was provided in section 54, i.e. in the case where an offender liable to a penalty under this Act was a juristic person, the managing director, manager or person responsible for the operations of such juristic person should also be liable to the penalty prescribed by law for such offence except where it could be proven that he/she was not involved in the commission of the offence by the juristic person.

The Constitutional Court found that section 54 of the Direct Sales and Direct Marketing Act B.E. 2545 (2002) was a presumption by law which resulted in a presumption of the defendant's guilt. The plaintiff was not required to show any prior proof of any act or intention of the defendant. The wrongful act of another person was applied as a condition for presuming the defendant's guilt and criminal liability, following from the presumption that if an offender was a juristic person, the managing director, manager or person responsible for the juristic person's operations should also be jointly liable with the juristic person offender, except where it could be proven that he/she had no involvement in the juristic person's offence. The plaintiff was not required to prove any act or intent of the managing director, manager or person responsible for such juristic person's operations that showed conspiracy with the juristic person in the commission of the offence. The only proof needed was that the juristic person had committed an offence under this Act and that the defendant was a managing director, manager or person responsible for the operations of the juristic person. The case was therefore a presumption from the very beginning that the managing director, manager or person responsible for the juristic person's operation also committed the offence. The burden of proving innocence was shifted to the managing director, manager and all persons responsible for the operations of the juristic person. Such provision was a presumption of guilt of a suspect and defendant in a criminal case by relying on the status of a person as a condition, not a presumption of fact constituting certain elements of the offence after the plaintiff had proven a certain act concerning the defendant's alleged wrongdoing. This was also inconsistent with the rule of law that a plaintiff in a criminal case should bear the burden of proving a defendant's wrongdoing as satisfying all the elements of an offence. Moreover, such provision drew a person into the criminal process as a suspect and defendant, resulting in a restriction of such person's rights and liberties, such as by arrest or detention, without any preliminary evidence of such person's act or intent relating to the alleged offence. The provision which presumed criminal wrongdoing of the suspect and defendant without any fact or intent relating to the offence was therefore inconsistent with the rule of law and contrary to or inconsistent with section 39 paragraph two of the Constitution.

The Constitutional Court, by 5 Constitutional Court Justices, namely Mr. Wasan Soipisut, Mr. Charun Pukditanakul, Mr. Chalernpol Ake-uru, Mr. Chat Chonlavorn and Mr. Boonsong Kulbupar, found that section 54 of the Direct Sales and Direct Marketing Act B.E. 2545 (2002), only with respect to the presumption that the managing director, manager

or person responsible for the juristic person's operations should be jointly liable to the juristic person's criminal penalties, despite the absence of any involvement with the commission of the offence by the juristic person, was contrary to or inconsistent with section 39 paragraph two of the Constitution.

As for 4 Constitutional Court Justices, namely Mr. Jaroon Inthajarn, Mr. Nurak Mapraneet, Mr. Supoj Kaimook and Mr. Udomsak Nitimontree, found that section 54 of the Direct Sales and Direct Marketing Act B.E. 2545 (2002) was neither contrary to nor inconsistent with section 39 paragraph two, section 40(5) and section 30 of the Constitution.

4. Ruling of the Constitutional Court

By virtue of the foregoing reasons, the Constitutional Court held that section 54 of the Direct Sales and Direct Marketing Act B.E. 2545 (2002), only with respect to the presumption that the managing director, manager or person responsible for the juristic person's operations should be jointly liable to the juristic person's criminal penalties, despite the absence of any involvement with the commission of the offence by the juristic person, was contrary to or inconsistent with section 39 paragraph two of the Constitution. The provision was thus unenforceable pursuant to section 6 of the Constitution. It was not necessary to give a ruling on whether or not such provision was contrary to or inconsistent with the other sections of the Constitution.
