

# Summary of Constitutional Court Ruling No. 28-29/2555 (2012)

Dated 10<sup>th</sup> October B.E. 2555 (2012)\*

**Re: Whether or not section 112 of the Penal Code was contrary to or inconsistent with section 3 paragraph two, section 29 and section 45 paragraph one and paragraph two of the Constitution.**

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## 1. Summary of background and facts

**First Application** (Case No. 16/2555). The State Attorney, as prosecutor, prosecuted Mr. Somyot Prueksakasemsuk as a defendant in the Criminal Court on charges of defamation, insult or showing hostility towards the King, Queen, Heir Apparent or Regent under section 58, section 91 and section 112 of the Penal Code. During trial, the defendant objected that section 112 of the Penal Code was a law which stipulated an offence similar to the offence of defamation against a regular person under section 326 of the Penal Code, whereas the latter allowed the accused to have an opportunity to prove an exception for the offence as provided under section 329 of the Penal Code. Section 112 of the Penal Code, however, provided no exception. By stipulating a minimum sentence of three years, the court was unable to exercise any discretion under section 112 of the Penal Code to sentence the offender to an imprisonment term of less than three years. The provision of law and sentencing under section 112 of the Penal Code was therefore a restriction of the people's rights that was inconsistent with the principle of proportionality, inconsistent with section 29 of the Constitution, and inconsistent with the rule of law under section 3 paragraph two of the Constitution.

**Second Application** (Case No. 44/2555). The State Attorney, as prosecutor, prosecuted Mr. Ekachai or Ek Hongkangwan, as a defendant in the Criminal Court on charges of defamation, insult or showing hostility towards the King, Queen, Heir Apparent, and engaging in a video recordings operation as a business or receiving benefits therefrom without a permit from the Registrar pursuant to section 112, section 91 and section 33 of the Penal Code, section 4, section 54 and section 82 of the Films and Video Recordings Act B.E. 2551 (2008), and clause 1 of Ministerial Regulation No. 8 (B.E. 2542 (1999)) issued under the Tapes and Video Materials Control Act B.E. 2530 (1987). During trial, the defendant objected that the offence under section 112 of the Penal Code, which provided a penalty of three years to fifteen years imprisonment for offenders, stipulated a penal

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sanction that was excessive and disproportionate. It was contended that the provision prejudiced the people's rights and was contrary to or inconsistent with section 29 of the Constitution. Moreover, it was argued that the level of punishment exceeded the intent of section 8 of the Constitution to accord special protection to the King only. Section 112 of the Penal Code was not a law that could limit liberties under section 45 of the Constitution as it was not a special law under section 45 paragraph two of the Constitution. Hence, the defendant stated that the provision was contrary to or inconsistent with section 45 of the Constitution.

The Criminal Court found that the objections of both defendants were cases under section 211 of the Constitution. The matter was therefore referred to the Constitutional Court for consideration.

## **2. Preliminary issue**

The Constitutional Court held that it had the competence to admit the application for a ruling under 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 cases were consolidated into one trial and ruling.

The applications stated an objection on whether or not section 112 of the Penal Code was contrary to or inconsistent with section 45 of the Constitution. The Constitutional Court found that these applications constituted **requests for ruling that section 112 of the Penal Code restricted the freedom of expression of a person** by challenging that section 112 of the Penal Code was either contrary to or inconsistent with section 45, only in relation to paragraph one and paragraph two, of the Constitution. As for the objection that section 112 of the Penal Code was contrary to or inconsistent with section 8 of the Constitution, the Constitutional Court found that section 8 of the Constitution was a provision which recognized the status of the King as a revered position. Due to the status of the King as the head of state and the principal organ of the nation, the state conferred protection by prohibiting any person from violating, alleging or taking any action against the King. Section 112 of the Penal Code was an implementation of section 8 of the Constitution. Hence, there was no cause for a claim that the provision was contrary to or inconsistent with section 8 of the Constitution.

## **3. The issues considered by the Constitutional Court**

The issue considered by the Constitutional Court was whether or not section 112 of the Penal Code was contrary to or inconsistent with section 3 paragraph two, section 29 and section 45 paragraph one and paragraph two of the Constitution.

On the issue of whether or not section 112 of the Penal Code was contrary to or inconsistent with section 3 paragraph two of the Constitution, the Constitutional Court

found as follows. Thailand was ruled under the democratic form of government with the King as head of state. The Constitution provided for the King to be an institution under the Constitution due to history, ancient royal customs, and legal tradition. Apart from being the country's principal institution, the King enjoyed a position of revered worship which no person could violate. No allegations or claims could be made against the King. The honour exhibited by the Royal Institution sustained the nation's honour and preserved the essential elements of the democratic form of government with the King as head of state. There was thus legitimacy in the enactment of laws to prevent violations of the King as the head of state and principal institution of the country, as recognised and protected by the Constitution. Section 112 of the Penal Code provided an offence and penalty for a person who defamed, insulted or showed hostility to the King, Queen, Heir Apparent or Regent. If any person committed an offence under this section, such person should be liable for the criminal penalties for such actions. The principle under section 112 of the Penal Code was therefore consistent with section 2 of the Constitution which recognised Thailand as having a democratic form of government with the King as head of state, and section 8 which recognised and protected the status of the King as the head of state and principal institution of the country. The prescription of penal sanctions for an offender was thus intended to preserve public order and good morals of the people under the rule of law. Section 112 of the Penal Code was therefore a provision consistent with the rule of law and was neither contrary to nor inconsistent with section 3 paragraph two of the Constitution.

As for the issue on whether or not section 112 of the Penal Code was contrary to or inconsistent with section 29 and section 45 paragraph one and paragraph two of the Constitution, the Constitutional Court found as follows. Section 112 of the Penal Code was a provision of law enacted to preserve state security, or to maintain public order or good morals of the people under section 45 paragraph two of the Constitution, being a condition for imposing a restriction on the freedom of expression as provided under the Constitution. Furthermore, the prescription of penalties under section 112 of the Penal Code was only made to the extent of necessity and suitability to the characteristics of the offence. The offence of defamation, insult or showing hostility to the King, Queen, Heir Apparent or Regent was more serious than defamation or insult to a regular person under section 326 of the Penal Code. Also, in order to guard and protect the King, Queen, Heir Apparent or Regent from being easily violated by way of defamation, insult or hostility, there was no exception for the offence or excuse from penalty as would be the case of section 329 and section 330 of the Penal Code. Moreover, section 112 of the Penal Code was applied generally without being specifically directed at any particular case or person, and did not affect the essential substance of the freedom of expression provided under section 45 paragraph one of the Constitution. A person still enjoyed freedom of expression within the parameters of the Constitution and the law. Section 112 of the Penal Code was therefore neither contrary to nor inconsistent with section 29 and section 45 paragraph one and paragraph two of the Constitution.

#### **4. Ruling of the Constitutional Court**

The Constitutional Court held that section 112 of the Penal Code was neither contrary to nor inconsistent with section 3 paragraph two, section 29 and section 45 paragraph one and paragraph two of the Constitution.

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