



IN THE NAME OF THE KING
The Constitutional Court

Ruling No. 1/2541*

Dated 23rd May B.E. 2541 (1998)

Re : The President of the House of Representatives requested for a Constitutional Court ruling that the enactment of Emergency Decrees were inconsistent with section 218 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

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The President of the House of Representatives referred to the Constitutional Court the opinion of 90 members of the House of Representatives, whose names were listed in the annex to this ruling, filed with the President of the House of the Representatives. According to such an opinion, dated 21st May B.E. 2541 (1998), 4 Emergency Decrees, namely, the Emergency Decree Conferring Powers on the Ministry of Finance to Incur Foreign Debts in Order to Revive the Economy, B.E. 2541 (1998), the Emergency Decree Conferring Powers on the Ministry of Finance to Borrow and Manage Borrowings in order to Assist the Fund for Rehabilitation and Development of Financial Institutions, B.E. 2541 (1998), the Emergency Decree Amending the Emergency Decree Amending the Bank of Thailand Act, B.E. 2485 (1942) (No. 2), B.E. 2540 (1997), B.E. 2541 (1998) and the Emergency Decree on Financial Institution Asset Management Corporation (No. 2), B.E. 2541 (1998), were not urgent laws. The opinion was referred to the Constitutional Court for a ruling under section 219 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

The Constitutional Court considered the matter and held that such a submission of opinion to the Constitutional Court, although lacking in clarity of the issue submitted to the Constitutional Court for ruling, was a reliance of the powers under section 219 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). The Constitutional Court therefore held that such an opinion should be accepted for consideration.

* Published in the Government Gazette, Vol. 115, Part 33a, dated 2nd June B.E. 2541 (1998)

As regards the opinion of the submitters that the four Emergency Decrees were laws enacted in a case of urgency, the Constitutional Court held that by the words “case of urgency” the submitter referred to the “case of emergency and necessary urgency which is unavoidable” under section 218 paragraph two of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). Under section 219 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), members of the House of Representatives had the right to submit an opinion to the President of the House of Representatives that an Emergency Decree was not in accordance with section 218 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). A preliminary issue which had to be considered was therefore whether or not the submitter was entitled to submit an opinion to the Constitutional Court for a ruling on the constitutionality of the above Emergency Decrees under section 218 paragraph two of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

On this problem, section 219 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) provided that “Before the House of Representatives or the Senate approves on Emergency Decree under section 218 paragraph three, members of the House of Representatives or senators of not less than one-fifth of the total number of the existing members of each House have the right to submit an opinion to the President of the House of which they are members that the Emergency Decree is not in accordance with section 218 paragraph one, and the President of the House who receives such opinion shall then refer it to the Constitutional Court for decision. After the Constitutional court has given a decision thereon, it shall notify its decision to the President of the House referring such opinion.

When the President of the House of Representatives or the President of the Senate has received the opinion from members of the House of Representatives or senators under paragraph one, the consideration of such Emergency Decree shall be deferred until the decision of the Constitutional Court under paragraph one has been notified.

In the case where the Constitutional Court decides that any Emergency Decree is not in accordance with section 218 paragraph one, such Emergency Decree shall not have the force of law ab initio.

The decision of the Constitutional Court that an Emergency Decree is not in accordance with section 218 paragraph one must be given by the votes of not less than two-thirds of the total number of members of the Constitutional Court.”

Under section 219 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), a case where members of the House of Representatives or senators could submit an opinion that an Emergency Decree was not in accordance with the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) must be a case where the Emergency Decree did not satisfy the criteria in section 218 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), i.e. that the Emergency Decree was not enacted for the purpose

of maintaining national or public safety or national economic security, or averting public calamity. In such a case, the members of the House of Representatives or senators had the right to submit an opinion to the President of the House of which they were members, and the President of the House who received such opinion should then refer it to the Constitutional Court for a ruling.

For the reasons stated above, the Constitutional Court therefore held the opinion that section 219 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) entitled the members of the House of Representatives and senators to only submit an opinion to the President of the House of which they were members that an Emergency Decree was not in accordance with section 218 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

Nevertheless, although the opinion of the members of the House of Representatives who submitted the opinion that the 4 Emergency Decrees were not in accordance with the provisions of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), which the President of the House of Representatives considered as being a case under section 219 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) and referred the opinion to the Constitutional Court for a ruling, did not state the paragraph of section 218 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) applicable to the case, the Constitutional Court possessed the power under section 219 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) to consider the constitutionality of the enactment of Emergency Decrees under section 218 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). The Constitutional Court therefore deemed it appropriate to consider this matter on this occasion.

In the enactment of the 4 Emergency Decrees submitted by the Council of Ministers to the National Assembly for approval, the following reasons were stated in the appendix to each Emergency Decree published in the Government Gazette, vol. 115, part 23a, dated 7th May B.E. 2541 (1998):

(1) The Emergency Decree Conferring Powers on the Ministry of Finance to Incur Foreign Debts in Order to Revive the Economy, B.E. 2541 (1998) contained the following reasons for enactment:

“Whereas Thailand has suffered severe economic problems caused by the persistent financial crisis, which necessitated the State’s implementation of numerous measures for the remedy of such a crisis, such as the acceptance of obligations under the Plan for Request of Financial and Technical Assistance from the International Monetary Fund, financial assistance to enhance the liquidity of financial institutions through the Fund for Rehabilitation and Reform of the Financial Institution System, the suspension of some financial institutions and the enactment of laws on reform of the financial institution system and laws on financial institution asset management corporation, such past measures have not

been sufficient for the revival of the national economy and the enhancement of liquidity in the economy. There was thus a necessity to urgently remedy such problems by prescribing measures for obtaining monies from various financial sources into the economy as well as for the restructuring of the fiscal system in order to expediently normalise the situation. This should drive the circulation of funds in the economy and thereby generate confidence in the national economic system. As a result, stability of the Baht value will be maintained and the interest rates on domestic loans will be lowered to an appropriate level. The overall economy of the country will be revived and the reformed domestic fiscal and financial institution systems will exhibit strength and bear internationally accepted standards. Therefore, in order to achieve such standards, it is necessary to confer powers on the Ministry of Finance to incur foreign debts to directly apply funds for the revival of the national economy by the injection of funds to expediently engender financial liquidity during this period as part of the measures for remedying the economic crisis.”

(2) Emergency Decree Conferring Powers on the Ministry of Finance to Borrow and Manage Borrowings in order to Assist the Fund for Rehabilitation and Development of Financial Institutions, B.E. 2541 (1998) contained the following reasons for enactment:

“Whereas Thailand has suffered an economic crisis during the preceding period which sent an impact on the confidence in the financial institutions and monetary system of the country, making it necessary for the Fund for Rehabilitation and Development of Financial Institutions to obtain large sums to assist various financial institutions, but as most of the capital sources of the Fund are short term capital at high interest rates and limited in volume, the result was a problem in the funding of the Fund as well as the interest rates in the financial markets generally. Therefore, in order to create a systematic management of the financial obligations of the Government in giving financial assistance to the Fund, it was deemed appropriate to restructure the financial sources of the Fund for suitability. Powers should be conferred on the Ministry of Finance to borrow money in order to assist the Fund and clearly prescribe management procedures for the repayment of the loans for transparency and the greatest benefit as a whole. As a result, the State’s financial assistance obligations would be reduced and deviations in the country’s financial markets would be remedied and the interest rates would subsequently be reduced, which was one way of generating confidence in foreign investors. Such measures formed part of the measures for remedying the economic crisis.”

(3) The Emergency Decree Amending the Emergency Decree Amending the Bank of Thailand Act, B.E. 2485 (1942) (No. 2), B.E. 2540 (1997), B.E. 2541 (1998) contained the following reasons for its enactment:

“Whereas Thailand has faced a severe economic slump, various measures have been implemented to remedy the numerous prevailing economic crises. One of such measures was the financial assistance and management of the Fund for Rehabilitation and Development of the Financial Institution System which was aimed at enhancing the financial

strength of the Fund and reducing the financial obligations of the State in assisting the Fund. At the same time, there was a need for transparency to encourage confidence in future domestic investments. However, during the preceding period, the Fund has assisted various financial institutions in the form of guarantees and granting of financial assistance in large volumes to remedy the financial crisis at the time. Therefore, to prevent the Fund from detriment as a result of granting such assistance, together with the fact that the Fund had to release the guarantees obtained from such financial institutions under the law in fairness of the other creditors, making the Fund unable to repay debts and thereby sending an impact on the rehabilitation of the Fund under the measures for remedying the economic crisis, it was necessary to protect and arrange for security that the Fund will be repaid the sums granted in assistance in the capacity of such financial institutions' creditor as from now."

(4) The Emergency Decree on Financial Institution Asset Management Corporation (No. 2), B.E. 2541 (1998) contained the following reasons for its enactment:

"Whereas at present there is a necessity to expediently remedy the national economic crisis in order to revive the economy of the country in both the financial and investment sectors, the State therefore prescribed measures to remedy such problem by enacting numerous laws to accumulate capital to engender circulation in the economy. In remedying the problem on financial liquidity, the Financial Institution Asset Management Corporation was established to purchase the low quality debts in the various financial institutions whose further operation faced problems. However, the implementation of such powers by the Corporation necessitated the utilisation of large sums of funds for the purchase of low quality debts, which under the current laws, a problem persists on the limitations of the Corporation in increasing its capital. Hence, there has been an insufficiency of funds for the purchase of low quality debts for conversion into good debts making it not possible to create the financial circulation necessary for enhancing confidence in investments. Therefore, it was necessary to stipulate that the Corporation shall have the ability to increase its capital by offering shares to the general public as well as prescribe incentives for investing in the Corporation. Powers should also be conferred on the Corporation to give assistance by offering loans to acquire low quality debts which were investment projects transferred to it for conversion into good debts. As a result, there would be financial circulation in the overall economy of the country as part of the enhancement of financial liquidity under the measures for remedy of the economic crisis."

The reasons for enacting the 4 such Emergency Decrees could be summarised as follows. Thailand had suffered a severe economic slump caused by persistent financial crises. The State found it necessary to implement numerous measures in order to remedy such an economic problem, such as by the acceptance of obligations prescribed by the International Monetary Fund, the suspension of two-thirds the licensed and operating financial institutions in the category of securities companies, the enactment of the law on reform of financial institutions to remedy the problem of financial institutions, the assistance of the Fund for Rehabilitation and Development of Financial Institutions which offered

financial assistance for enhancing the liquidity of financial institutions and the establishment of the Financial Institution Asset Management Corporation to manage the low quality debts of financial institutions facing problems in their management.

Such facts stated above were evident to the public. Moreover, the provisions in all 4 Emergency Decrees related to the remedy of the economic crisis. The first two Emergency Decrees conferred powers on the Ministry of Finance, with the approval of the Council of Ministers, to borrow for the Government of the Kingdom of Thailand from domestic and foreign sources to utilise in the rehabilitation of the national economy, enhance the liquidity of the problematic economy and restructure the sources of capital. As for the third Emergency Decree, protection and securities were given to the Fund for the Rehabilitation and Development of the Financial Institution System. The fourth Emergency Decree increased the capital and enabled the Fund to give financial assistance to suspended financial institutions. Implementations under all such measures above could be deemed as cases for the benefit of preserving the economic security of the country, being cases for the enactment of an Emergency Decree under section 218 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

For the reasons stated above, the Constitutional Court held by a unanimous resolution of Constitutional Court judges that all 4 Emergency Decrees submitted by the Council of Ministers to the National Assembly for approval were in accordance with section 218 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).
