

# **Summary of Constitutional Court Ruling\***

## **No. 1/2557 (2014)**

**Dated 8<sup>th</sup> January B.E. 2557 (2014)\***

**Re: Application for Constitutional Court ruling under section 68 of the Constitution**

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### **1. Summary of background and facts**

Mr. Wirat Kalyasiri submitted an application to the Constitutional Court for a ruling under section 68 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) on whether or not the President of the National Assembly, first respondent, Vice-President of the National Assembly, second respondent, Members of the House of Representatives and Senators, third to three hundred and eighty-first respondents, committed acts to acquire national governing powers by means which were inconsistent with the provisions of this Constitution.

The facts in the application could be summarised as follows. The third to three hundred and eighty-first respondents jointly submitted a motion to amend section 190 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) to the first respondent. Thereafter, all the respondents deliberated and passed a resolution of approval in the third reading. The said process for amending the Constitution and the substance of the Draft Constitution constituted an act to acquire national governing powers by means which were inconsistent with the provisions of section 68 of the Constitution. The applicant was of the opinion that the first respondent's order to end the discussion in the joint sitting of the National Assembly during the first reading of the Draft Amended Constitution and immediately proceed to voting prior to the completion of the period agreed upon by the Committee on the Coordination for Coalition Government Parties, the Committee on the Coordination for Coalition Opposition Parties and the Committee on Coordination for the Senate, amounted to an impartial performance of duties inconsistent with section 137 paragraph two in conjunction with section 125 of the Constitution and article 47 and article 59 paragraph two of the Rules of the National Assembly Sitting B.E. 2553 (2010). Subsequent to the appointment of a committee to consider such drafted amended constitution, the first respondent in his capacity as President of the National Assembly sitting, intentionally exercised his powers inconsistently with the provisions of the Constitution by setting the default 15-day period for submitting amendment motions to the Draft Amended Constitution pursuant to article 96 of the Rules of the National Assembly

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Sitting B.E. 2553 (2010) despite the lack of power to do so. Thus, the National Assembly had to reconvene to vote on the period for submitting an amendment motion. The sitting of the National Assembly, by a majority, eventually voted to approve the 15-day amendment motions period. The first respondent, however, ruled that such period commenced from the date of committee appointment, and therefore the remaining period for submitting an amendment motion was less than 15 days when counted from the date of the latter resolution. This exercise of power was inconsistent with section 137 paragraph two in conjunction with section 125 and section 126 of the Constitution and article 16, article 17, article 52 and article 96 of the Rules of the National Assembly Sitting B.E. 2553 (2010). In addition, in term of consideration and vote for drafted amended constitution (section 3) in the second reading, which was on the amendment to section 190 of the Constitution, it appeared that the President of the National Assembly Sitting directed members to vote on each paragraph, as opposed to voting section-by-section, which was inconsistent with section 125 of the Constitution and article 99 and article 101 of the Rules of the National Assembly Sitting B.E. 2553 (2010).

The substance in the Draft Amended Constitution aimed at limiting the powers of the National Assembly and increasing the powers of the executive branch to enter into a treaty with provisions changing the territorial boundaries or areas in external territories under Thailand's sovereignty, or jurisdiction under an agreement or international law without having to obtain the consent of the National Assembly. The amendment also increased the powers of the executive branch to enter into a treaty having a wide scale impact on the country's economic and social security, or having significant international obligations on trade, investment or the national budget amongst nations or with international organisations without having to obtain the consent of the National Assembly. Only in regard to an agreement providing for liberalisation of trade and investment, the executive branch required to obtain the prior consent of the National Assembly. The applicant was of the opinion that the constitutional amendment under the Draft Amended Constitution (No. ..) B.E. .... (amendment to section 190) constituted an act to acquire national governing powers by means which were not provided under the Constitution, prohibited under section 68 of the Constitution. It was therefore requested that the Constitutional Court gave a ruling and order 1) provisional emergency measures to restrain the presentation of the Draft Amended Constitution (No. ..) B.E. .... (amendment to section 190) to the King for Royal Assent; 2) that all respondents ceased to amend the Constitution of the Kingdom of Thailand B.E. 2550 (2007) (amendment to section 190); 3) to revoke all proceedings in the deliberation of the Draft Amended Constitution (No. ..) B.E. .... (amendment to section 190) from the first reading of the National Assembly onwards.

## **2. The preliminary issue considered by the Constitutional Court**

**First issue: whether or not the Constitutional Court had the competence to admit this application for a ruling under section 68 of the Constitution.**

The Constitutional Court found as follows. The power and duty to examine and give a ruling in the case where an applicant exercised the right to protect the Constitution under section 68 paragraph two of the Constitution was the Constitutional Court's. The Attorney-General had the duty to conduct a preliminary examination of facts and submit an application to the Constitutional Court. This provision did not abrogate the right of the applicant to submit a direct application to the Constitutional Court. In addition, the Constitutional Court found that there was cause in the application which could constitute an act to acquire national governing powers by means which were not provided under the Constitution as provided under section 68 paragraph one of the Constitution. Thus, the Constitutional Court ordered the admittance of this application for consideration under section 68 paragraph two and article 17(2) of the Rules of the Constitutional Court on Procedures and Rulings B.E. 2550 (2007) and proceeded with the trial.

**Second issue: whether or not the Constitutional Court had the competence to give a ruling in a case relating to a constitutional amendment to acquire national governing powers by means which were not provided under the Constitution.**

Constitutional Court Ruling No. 15-18/2556 ruled that, in the case where an applicant exercised the right to protect the Constitution pursuant to section 68 paragraph two of the Constitution by submitting an application to the Constitutional Court claiming that all respondents had wrongfully sought to amend the Constitution in order to acquire national governing powers by means which were not provided under this Constitution, the Constitutional Court had the competence to admit the case for consideration. Therefore, according to such case, the Constitutional Court found that, as the applicant submitted an application to the Constitutional Court for a ruling under section 68 paragraph two of the Constitution in the case of a constitutional amendment claiming that all respondents sought to commit an act to acquire national governing powers by means which were not provided under the Constitution, the Constitutional Court had the competence to give a ruling.

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

**First issue: whether or not the process for deliberating the Draft Constitutional Amendment (No. ..) B.E. .... (amendment to section 190) was constitutional.**

**(1) Whether or not the discontinuance of debate on the Draft Constitutional Amendment (No. ..) B.E. .... (amendment to section 190) in the first reading on approval of principle was constitutional.**

The Constitutional Court found as follows. Even though the closing of debate session fell within the discretion of the President of the National Assembly and also even though the majority had the right to vote on the closing of debate, such exercise of discretion and right of majority should neither abrogate the right to perform duties as a Member of the National Assembly nor neglect the minority opinion, especially when the debating period had not yet

lapsed. Therefore, the sudden closing of such debate and sitting to pave the way for voting was a wrongful exercise of powers and duties which unfairly benefitted the majority. The act was inconsistent with the rule of law. Thus, the closing of the debate on the Draft Constitutional Amendment in the first reading on principle was inconsistent with section 3 paragraph two and section 125 paragraph one of the Constitution.

**(2) Whether or not the determination of amendment motions submission period for the Draft Constitutional Amendment (No. ..) B.E. .... (amendment to section 190) was constitutional.**

The Constitutional Court found as follows. By nature, sufficient amount of time shall be provided for the amendment motions period in order to inform a Member desiring to submit an amendment motion with certainty. This is a privilege pertinent to the functions of a Member of the National Assembly. Such an amendment motions period could not commence retrospectively, but shall commence from the date of resolution onwards. The retrospective initiation of the period resulting in only one day remaining for amendment motions was an act which was contrary to the nature of performance of duties and privileges of a Member of the National Assembly. The act was also contrary to and inconsistent with the Rules of Procedure of the National Assembly, and reflected partiality. Thus, it was inconsistent with section 125 paragraph one and paragraph two, and also inconsistent with the rule of law under section 3 paragraph two of the Constitution.

**(3) Whether or not the deliberation and voting on section 3 of the Draft Constitutional Amendment (No. ..) B.E. .... (amendment to section 190) in the second reading on a paragraph-by-paragraph basis was constitutional.**

The Constitutional Court found as follows. The joint sitting of the National Assembly deliberated and voted paragraph-by-paragraph in a section which contained several paragraphs. Neither the Constitution nor the Rules of Procedure of the National Assembly provided for both the procedure and prohibition. Nonetheless, there was a benefit for the deliberation of such section to ensure consistency and no contradictions, especially for the deliberation of a section with several paragraphs such as section 190 of the Constitution. Hence, the voting of section 3 of the Draft Constitutional Amendment on a paragraph-by-paragraph basis was not in contravention of article 99 and article 101 of the Rules of Procedure of the National Assembly B.E. 2553 (2010) and not inconsistent with section 125 of the Constitution. The respondents' reply on this issue was sound.

**Second issue: whether or not the substance in the Draft Constitutional Amendment (No. ..) B.E. .... (amendment to section 190) was constitutional, and whether or not the amendment constituted an act to acquire national governing powers by means which were not provided by the Constitution.**

The Constitutional Court found as follows. Section 190 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) was a provision on the royal prerogative to enter into a peace treaty, ceasefire treaty and other treaties with a foreign nation or international

organisation, as provided under section 3 paragraph one of the Constitution. The constitutional intent was to provide political bodies, in particular the legislature and the executive, with checks and balances and efficiency under parliamentary democracy with the King as Head of State, as well as to prescribe rules for entering into an agreement with foreign nations. The principle was maintained that the power to enter into a treaty or other agreement between Thailand and a foreign nation or international organisation was a royal prerogative exercised in the King's capacity as the Head of State. It was further provided that a treaty or agreement of importance had to be dealt with in accordance with rules provided by the Constitution. The Council of Ministers had to propose a negotiation framework to the National Assembly for prior approval. After completion of negotiations or signing of the treaty, further approval of the National Assembly had to be obtained. In addition, information had to be disseminated and a public hearing had to be held prior to further action. The public should be given access to details of the treaty before the expression of an intent to bind the country.

The respondents' joint action to amend the substance of the Constitution by adding the term "apparent" as a descriptive for the treaties under section 190 paragraph two granted the Council of Ministers a discretionary power to give a narrow or wide interpretation to ensure that only a limited number of treaties required approval of the National Assembly as well as public awareness and participation. This limitation on the National Assembly's legislative power of check and balance and increase to the powers of the Minister or Council of Ministers affected the principle of separation of powers and the preservation of the balance between the National Assembly and the Council of Ministers. This change could also result in the grant of absolute powers to the Council of Ministers to enter into a treaty with a foreign nation or international organisation, and a lack of control and scrutiny as intended by the Constitution, which was designed to control the conclusion of a treaty of importance prior to committing the country to be bound in a way that could lead to irreversible problems.

The amendment to the substance of the Constitution by deleting the text "any treaty... which has a wide scale impact on national economic security, or society, or creates a significant binding obligation on national trade, investment or budget must be approved by the National Assembly..." would result in a restriction on the powers of the National Assembly, a legislative body, only to treaties providing for trade and investment liberalisation, whilst increasing the powers of the Council of Ministers in entering into treaties with foreign nations or international organisations that create a wide scale impact on the national economic security, or society or creating a significant binding obligation on national trade, investment or budget. Such an amendment would undermine the checks and balances under the doctrine of the separation of powers. Such acts committed by the respondent was therefore inconsistent with section 3 paragraph one and paragraph two of the Constitution. The amendment to section 190 paragraph three by removing the provision which required the Council of Ministers to declare to the National Assembly in relation to a treaty by proposing a negotiation framework for approval, amounted to a

diminishing of the check and balance powers of the legislature. The acts of the respondents were inconsistent with section 3 of the Constitution and therefore constituted an act to acquire national governing powers by means which were not provided by the Constitution.

In addition, the amendment to the substance of section 190 of the Constitution was intended to increase the executive's power to enter into a treaty with a foreign nation or international organisation, whereas the majority of the executive consists of members of a political party who would also enjoy an increase in power without scrutiny. This was not regarded as a performance of duty for the common benefit, but merely for the convenience of such persons. The acts of the respondents were therefore inconsistent with section 122 of the Constitution. The constitutional amendment which deleted the provision granting the public the right to receive information, exercise scrutiny and express opinions in the making of a treaty by the executive, as well as the abrogation of the public's right of access to details on the treaty prior to the Council of Minister's expression of intent for the nation to be bound, amounted to a restriction of the people's constitutional right and an undermining of equality of protection under this Constitution. The acts were thus inconsistent with section 4, section 5 and section 87 of the Constitution, being acts to acquire national governing powers by means which were not provided under the Constitution.

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

By virtue of the foregoing reasons, the Constitutional Court held by a majority that the deliberations and voting on the constitutional amendment by all respondents in this case constituted acts which were not in accordance with the processes under section 3 paragraph two and section 125 paragraph one and paragraph two of the Constitution, and the respondents' joint actions in amending the substance of section 190 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) constituted an act to enable a person or group to acquire national governing powers by means which were not provided under the Constitution B.E. 2550 (2007), which was a violation of section 68 paragraph one of the Constitution.

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