

Summary of Constitutional Court Ruling No. 3-4/2557 (2014)

Dated 12th March B.E. 2557 (2014)*

Re: The President of the National Assembly referred the opinions of Members of the National Assembly and the President of the House of Representatives referred the opinions of Members of the House of Representatives to the Constitutional Court for a ruling under section 154 paragraph one (1) of the Constitution on whether or not the Bill to Authorise the Ministry of Finance to Obtain Loans for the Development of National Transport Infrastructure B.E. contained provisions which were contrary to or inconsistent with the provisions of the Constitution.

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1. Summary of background and facts

The President of the National Assembly referred the opinions of 66 Members of the National Assembly and the President of the House of Representatives referred the opinions of 146 Members of the House of Representatives to the Constitutional Court for a ruling under section 154 paragraph one (1) of the Constitution. The facts under both applications and supporting documents could be summarised as follows.

On the first issue, the second applicant was of the opinion that the Bill to Authorise the Ministry of Finance to Obtain Loans for the Development of National Transport Infrastructure B.E. Ç. had not been properly enacted under the provisions of the Constitution. The reason was that in the second reading on Friday, 20th September B.E. 2556 (2013), it appeared that Mr. Narisorn Thongthiras, Member of the House of Representatives for Sakon Nakhon Province, used the identification cards of approximately four to five other Members of the House of Representatives to cast votes to approve the Bill on behalf of those Members. As it was evident that in the enactment process for this Bill in the second reading, a Member of the House of Representatives casted more than one vote and exercised the vote in violation of the privileges of other Members of the House of Representatives, the resulting vote should be rendered void, being an act expressly prohibited by law and contrary to public order or good morals. Moreover, the Bill was not enacted in accordance with the national budgetary procedure under the Constitution, and therefore not enacted in accordance with the provisions of the Constitution.

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On the second issue, the applicants were of the opinion that section 5 and section 6 of the Bill to Authorise the Ministry of Finance to Obtain Loans for the Development of National Transport Infrastructure B.E. contained provisions which were contrary to or inconsistent with section 169 of the Constitution. Section 169 of the Constitution provided that a disbursement of public funds could only be effected as provided in the law on expenditure budget, law on budgetary procedure, law on budget transfer and law on treasury. This Constitution was intended to control public expenditures under a strict fiscal disciplinary framework. The provisions were also inconsistent with section 170 of the Constitution since a law on public finance had not yet been enacted to lay down a fiscal disciplinary framework pursuant to section 167 paragraph three. Revenues obtained from a loan under this Bill therefore had the status of revenues of a state agency which had to be remitted as public revenues under section 170 of the Constitution, thus becoming a form of public funds. Hence, the provisions of the Bill on expenditure of such loans were contrary to or inconsistent with section 169 paragraph one and section 170 of the Constitution.

2. The preliminary issue considered by the Constitutional Court

The preliminary issue was whether or not the Constitutional Court had the competence to admit both applications for a ruling under section 154 paragraph one (1) of the Constitution.

The Constitutional Court found as follows. The President of the National Assembly referred the opinions of the 66 Members of both Houses, and the President of the House of Representatives referred the opinions of the 146 Members of the House of Representatives, which was not less than one-tenth of the total number of existing Members of both Houses, to the Constitutional Court for a ruling on whether or not the Bill to Authorise the Ministry of Finance to Obtain Loans for the Development of National Transport Infrastructure B.E. contained provisions which were contrary to or inconsistent with the Constitution, or whether or not it was enacted in accordance with the provisions of the Constitution. The case was therefore in accordance with section 154 paragraph one (1) of the Constitution in conjunction with article 17(7) of the Rules of the Constitutional Court on Procedures and Rulings B.E. 2550 (2007). The Constitutional Court thus admitted both applications for consideration.

3. The issues considered by the Constitutional Court

The Constitutional Court found that there were two issues to be considered, as follows.

The first issue was whether or not the Bill to Authorise the Ministry of Finance to Obtain Loans for the Development of National Transport Infrastructure B.E. was enacted in accordance with the provisions of the Constitution.

The Constitutional Court found as follows. On the first issue the Constitutional Court found according to the second applicant's claim that Mr. Narisorn Thongthiras, Member of the House of Representatives, when using his electronic card to identify himself and cast a vote, also used the electronic cards to identify and cast votes on behalf of other Members of the House of Representatives. Such an act violated the fundamental principles of the office of Member of the House of Representatives as the representative of the Thai people, who was under an obligation to perform duties free from any mandate or influence, and to perform duties honestly for common benefits of the Thai people free from any conflicts of interest pursuant to section 122 of the Constitution. The act was also inconsistent with the principle of integrity stated in the oath given by the Member of the House of Representatives pursuant to section 123 of the Constitution and inconsistent with the voting principle under section 126 paragraph three of the Constitution. Once the voting process in the deliberations of the Bill was unconstitutional, it was deemed that the House of Representatives resolution in the enactment process of such Bill was also unconstitutional. Hence, the Bill to Authorise the Ministry of Finance to Obtain Loans for the Development of National Transport Infrastructure B.E. was not properly enacted under the provisions of this Constitution.

The second issue was whether or not the Bill to Authorise the Ministry of Finance to Obtain Loans for the Development of National Transport Infrastructure B.E. contained provisions which were contrary to or inconsistent with Chapter 8 on Monetary, Public Finance and Budget of the Constitution.

On the preliminary, the Constitutional Court had to decide whether the loan under the Bill to Authorise the Ministry of Finance to Obtain Loans for the Development of National Transport Infrastructure B.E. Ç. constituted public funds. The Constitutional Court found that Chapter 8 of the Constitution provided the rules for disbursement of public funds in section 169 and the rules relating to fiscal discipline in section 170 paragraph two and section 167 paragraph three. The term "public funds" was defined in neither the Constitution nor any law. Nevertheless, upon an examination of section 4 of the Organic Act on State Audit B.E. 2542 (1999), it was found that public funds referred to funds belonging to the nation's people as a whole. This term included all monies, properties, rights and interests owned by the state or in the state's possession, regardless of whether they were budgetary funds, non-budgetary funds, loans, subsidies, donations or other assistance from sources within or outside of the country incidental to the performance of functions stated by law or in accordance with the objectives of the relevant state agencies. In particular, a loan under this Bill gave rise to an obligation of repayment with respect to both the principal and interests, both of which would be appropriated in the annual expenditure budget. Therefore, a loan under the Bill to Authorise the Ministry of Finance to Obtain Loans for the Development of National Transport Infrastructure B.E. constituted public funds.

The subsequent issue to be decided was whether or not the Bill to Authorise the Ministry of Finance to Obtain Loans for the Development of National Transport Infrastructure B.E. was contrary to or inconsistent with section 169 of the Constitution.

The Constitutional Court found as follows. Section 6 paragraph one of the Bill to Authorise the Ministry of Finance to Obtain Loans for the Development of National Transport Infrastructure B.E. provided that “monies obtained from a loan under section 5 shall be disbursed in accordance with the objectives of the loan and do not have to be remitted to the Treasury under the law on budgetary procedure and law on treasury.” Disbursement of loan funds under this Bill was not affected under the authority of the law on annual budget, law on budgetary procedure, law relating to budgetary transfer or law on treasury. On the other hand, the Bill provided for the agency responsible for the project to submit details of the project to the Council of Ministers for approval of the project and approval of the disbursement of loan funds for such project. As a consequence, the disbursement of funds for projects in each budget year would not be examined by the National Assembly, which also lacked clear control and scrutiny over such spending. The Bill providing for disbursement of public funds was therefore not in accordance with section 169 paragraph one of the Constitution.

As for the issue of whether or not this Bill exhibited an urgent necessity under the exception for disbursement of public funds under section 169 paragraph one of the Constitution, the Constitutional Court found as follows. Development of the national transport infrastructure under the Bill to Authorise the Ministry of Finance to Obtain Loans for the Development of National Transport Infrastructure B.E. could be implemented by several means, e.g. normal budgetary procedure by obtaining a loan pursuant to section 9 bis of the Budgetary Procedure Act B.E. 2502 (1959) and section 21 of the Public Debt Management Act B.E. 2548 (2005), or by private participation under the rules and procedures of the Private Investments in State Undertakings Act B.E. 2556 (2013). These procedures had less impacts or risks of loss than the rules under the Bill to Authorise the Ministry of Finance to Obtain Loans for the Development of National Transport Infrastructure B.E. Under normal budgetary procedures, the National Assembly was able to exercise close scrutiny of project implementation by the executive. Otherwise, implementation by way of private investments could also prevent or minimise impacts on long-term national financial security, not posing a limitation to the extent of preventing the implementation of any project.

Therefore, the Bill to Authorise the Ministry of Finance to Obtain Loans for the Development of National Transport Infrastructure B.E., which authorised the disbursement of public funds without authorisation under the law on expenditure budget, law on budgetary procedures, law relating to budgetary transfers or law on treasury, not being an urgent necessity, was therefore contrary to or inconsistent with section 169 paragraph one of the Constitution.

The next issue which had to be considered was whether or not the Bill to Authorise the Ministry of Finance to Obtain Loans for the Development of National Transport Infrastructure B.E. was contrary to or inconsistent with section 170 of the Constitution.

The Constitutional Court found as follows. Even though the Constitution did not provide a clear definition of fiscal disciplinary framework and a law on fiscal discipline

had not yet been enacted to implement a fiscal disciplinary framework under section 167 paragraph three of the Constitution, the Budgetary Procedure Act B.E. 2502 (1959), Treasury Act B.E. 2491 (1948), and Public Debt Management Act B.E. 2548 (2005) currently in force contained provisions on budgeting, spending and budgetary control and public debt management, which governs disbursements of public funds. For this reason, the fiscal discipline under Chapter 8 referred to the rules governing financial planning, revenue collection, guidelines for preparing public expenditure budget, management of finance and properties, creating debts, public financial obligations and other relevant issues used for setting parameters of revenue collections, supervision of spending pursuant to the stability maintenance principles, sustainable economic development and social justice.

Section 6 of the Bill to Authorise the Ministry of Finance to Obtain Loans for the Development of National Transport Infrastructure B.E., which provided that monies obtained from loans under this Bill could be disbursed in accordance with objectives without have to be remitted to the treasury under the law on budgetary procedure and law on treasury, and section 18, which provided for the Council of Ministers to report loans obtained, operating results and performance assessments under the work plans in each strategy to the House of Representatives and Senate only for acknowledgement, were a departure from the Budgetary Procedure Act B.E. 2502 (1959), which was a law relating to the disbursement of public funds. As a consequence, control and scrutiny of disbursements of budgetary funds was not in accordance with the Constitution and relevant laws. Moreover, this Bill would authorise the Ministry of Finance to obtain loans to the value of two trillion baht, but there was no clarity on the details of work plan or project for disbursement of funds relating to financial planning, revenue generation for debt repayment or expenditure management. In addition, the Bill would create a financial obligation on the country in a tremendous amount and for a long term without sufficient security for financial and fiscal risks as well as the national economy. Hence, upon finding that the spending of loan funds under the Bill to Authorise the Ministry of Finance to Obtain Loans for the Development of National Transport Infrastructure B.E. was not compliant with the fiscal disciplinary framework under Chapter 8 of the Constitution, the Bill was therefore contrary to or inconsistent with section 170 paragraph two of the Constitution.

4. Ruling of the Constitutional Court

For the foregoing reasons, the Constitutional Court held that the Bill to Authorise the Ministry of Finance to Obtain Loans for the Development of National Transport Infrastructure B.E. was not properly enacted under the provisions of the Constitution and contained provisions which were contrary to or inconsistent with section 169 paragraph one and section 170 paragraph two of the Constitution. Since the provisions were constituted the essential substance, the Bill therefore lapsed under section 154 paragraph three of the Constitution.