

# **Summary of the Constitutional Court Ruling No. 4/2548**

**Dated 18<sup>th</sup> January B.E. 2548 (2005)**

**Re: The Administrative Court referred the objection of a plaintiff to the Constitutional Court for a ruling under section 264 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), in the case of whether or not section 51 paragraph two and section 53 of the Provincial Administrative Organization Act, B.E. 2540 (1997), and clause 3 of Ministerial Regulation No. 4 (B.E. 2541 (1998)) were contrary to or inconsistent with section 1 to section 3, section 6, section 28, section 29 and section 50 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).**

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## **1. Background and summarized facts**

The Administrative Court referred the objection of a plaintiff to the Constitutional Court for a ruling under section 264 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). The facts in the application and supporting documents may be summarized as follows.

Senior Colonel Mana Kesornsiri and others, a total of 11 persons, filed a plaint against the Chairman of the Rayong Provincial Administrative Organization (first defendant) and the Governor of Rayong Province (second defendant) in the Administrative Court of First Instance (Central Administrative Court) in pending case no. 1367/2545 and case no. 1729/2546. The plaint stated that the plaintiffs were hotel operators in Rayong Province who received a letter from Rayong Provincial Administrative Organization no. RY 51001/1076, dated 3<sup>rd</sup> May B.E. 2545 (2002), Re: Collection of Provincial Administrative Organization Rates. The letter stated that Rayong Provincial Administrative Organization issued a Bylaw on the Collection of Maintenance Fees for the Provincial Administrative Organization from Hotel Guests, B.E. 2545 (2002), given on 15<sup>th</sup> May B.E. 2545 (2002), which was publicized by open notice at the Office of the Provincial Administrative Organization for 15 days before coming into force as of 1<sup>st</sup> July B.E. 2545 (2002). The plaintiff considered the bylaw to be unlawful for being an exercise of powers to issue bylaws beyond the scope provided by law, an act which exceeded the scope of authority and an act which was done without due authority. In this case, the bylaw stipulated 3 types of penalties for infringers, namely imprisonment, a fine or both, whereas section 51 paragraph two of the Provincial

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Administrative Organization Act, B.E. 2540 (1997), provided for only two types of penalties, i.e. either imprisonment or a fine. The bylaw also empowered a competent official to settle a case by imposing a fine as well as the power to summon the controllers and managers of a hotel, hotel guests and related persons to make an oral statement or submit evidence despite the absence of any empowering provision. Moreover, the powers of the first defendant provided under the Provincial Administrative Organization Act, B.E. 2540 (1997), were contrary to or inconsistent with the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). That is, section 51 paragraph two and section 53 of the Provincial Administrative Organization Act, B.E. 2540 (1997), delegated legislative powers to the first defendant in issuing regulations that came into force upon publication by notice for a period of 15 days without having to make a publication in the Government Gazette. This amounted to a delegation of powers to provincial administrative organizations in every province to freely issue bylaws. The existence of mandatory provisions and penalties in such bylaws were therefore inconsistent with section 2 of the Penal Code and inconsistent with section 1 to section 3, section 6, section 29 and section 50 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). It also followed that Ministerial Regulation No. 4 (B.E. 2541 (1998)), issued under the Provincial Administrative Organization Act, B.E. 2540 (1997), which provided for the controllers and managers of hotels to collect fees on behalf of the provincial administrative organization, was enacted without an empowering legal provision.

The Administrative Court of First Instance expressed the opinion that the Constitutional Court had already determined in Ruling No. 1/2546, dated 4<sup>th</sup> February B.E. 2546 (2003), that section 65 of the Provincial Administrative Organization, B.E. 2540 (1997), was neither contrary to nor inconsistent with the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), and that such ruling of the Constitutional Court was final and binding on both defendants who possessed the power to issue bylaws under such Act that was neither contrary to nor inconsistent with the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). The Administrative Court of First Instance therefore held that this case lacked the prerequisite cause for making a reference to the Constitutional Court for further ruling. Moreover, since the Governor for Rayong Province, the second defendant, had already approved the bylaw and publicized the bylaw by making an open notice at the Office of Rayong Provincial Administrative Organization for a total of fifteen days by virtue of section 53 paragraph two of the Act, the bylaw was lawful and entered into force. By way of conclusion, once it was settled that the first defendant had the power to issue the Bylaw of the Rayong Provincial Administrative Organization on Collection of Maintenance Fees for the Provincial Administrative Organization from Hotel Guests, B.E. 2545 (2002), without being contrary to or inconsistent with the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), and that such bylaw was neither contrary to nor inconsistent with the Provincial Administrative Organization Act, B.E. 2540 (1997), the Bylaw of the Rayong Provincial Administrative Organization on Collection of Maintenance Fees for the Provincial Administrative Organization from Hotel Guests, B.E. 2545 (2002), dated 15<sup>th</sup> May B.E. 2545 (2002) was therefore lawful. Judgment was accordingly made to dismiss the plaint.

The plaintiff appealed the Administrative Court of First Instance's judgment claiming that the case issue was erroneous. It was requested that the Supreme Administrative Court impose a temporary stay on the proceedings and refer the plaintiff's objection that section 51 paragraph two and section 53 of the Provincial Administrative Organization, B.E. 2540 (1997), as well as clause 3 of the Ministerial Regulation (No. 4) issued under the Provincial Administrative Organization Act, B.E. 2540 (1997), were contrary to or inconsistent with the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), to the Constitutional Court for a ruling under section 264 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

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

The issues considered by the Constitutional Court were whether or not section 51 paragraph two and section 53 of the Provincial Administrative Organization Act, B.E. 2540 (1997), were contrary to or inconsistent with section 1 to section 3, section 6, section 28, section 29 and section 50 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

The Constitutional Court held as follows. Section 1 to section 3 and section 6 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), were general provisions which prescribed the general characteristics of the State. Section 6, in particular, provided a guarantee for the Constitution as the supreme law of the State, where provisions of laws, rules or regulations which were contrary to or inconsistent with the Constitution would be unenforceable. Therefore, these four sections of the Constitution were not provisions which the provisions of section 51 paragraph two and section 53 of the Provincial Administrative Organization Act, B.E. 2540 (1997), could be contrary to or inconsistent with.

As for the case of whether or not section 51 paragraph two and section 53 of the Provincial Administrative Organization Act, B.E. 2540 (1997), were contrary to or inconsistent with section 28, section 29 and section 50 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), the Constitutional Court held as follows.

Section 28 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), provided for the protection of human dignity, i.e. the human value that was inherent in every person. To put it differently, the State could not treat people as if the latter were animals or things. Section 29 provided that rights and liberties may be restricted but such restriction must comply with certain conditions, namely, a restriction could be imposed only by virtue of provisions of law specifically enacted for purposes determined by the Constitution, such laws could only be enacted to the extent of necessity without affecting the essential substances of the rights and liberties recognized by the Constitution, and the law should be of general application and should not be intended to apply to any particular case or person. Section 50 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), provided for the liberty of a person in choosing to engage in an occupation without any impediment, except where the liberties of others were affected or where there was a specific law which authorized the restriction of liberties for the benefit of maintaining national or economic security. In this regard, the Provincial Administrative Organization Act, B.E. 2540 (1997),

was a case where the central government delegated powers to localities to exercise independent powers in self-administering local affairs in line with the needs of the people in such localities. This was achieved by means of enabling the Provincial Administrative Organization to issue bylaws, which were applicable to all operators in the same business in such localities. As a result, the bylaws did not specifically discriminate against any person in a manner that would amount to conferring business advantages to operators of the same business. On the contrary, every person still maintained the ability to engage in his or her desired occupation. Operators of the same business were equally treated by the provincial administrative organization. Thus, there was still fair competition among competitors of the same business. Also, once the Provincial Administrative Organization Act, B.E. 2540 (1997), had delegated law-making powers to the local administrative organizations, the bylaws issued by the local administrative organization had the characteristics of a law where enforcement could be achieved by means of criminal sanctions, of which section 7 and section 8 of the Official Information Act, B.E. 2540 (1997), mandated publication in the government gazette. In conclusion, section 51 paragraph two and section 53 of the Provincial Administrative Organization Act, B.E. 2540 (1997), were therefore neither contrary to nor inconsistent section 1 to section 3, section 6, section 28, section 29 and section 50 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). The objection with respect to clause 3 of the Ministerial Regulation No. 4 (B.E. 2541 (1998)) did not have to be ruled upon since it was not a provision of law within the definition of section 264 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), as was ruled by the Constitutional Court in Constitutional Court Ruling No. 27/2544.

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

By virtue of the above reasons, the Constitutional Court, by unanimous resolution, held that section 51 paragraph two and section 53 of the Provincial Administrative Organization Act, B.E. 2540 (1997), were neither contrary to nor inconsistent with section 1 to section 3, section 6, section 28, section 29 and section 50 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

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