

Summary of the Constitutional Court Ruling No. 56/2548

Dated 20th September B.E. 2548 (2005) *

Re: Whether or not the Radio and Television Broadcasting Act B.E. 2498 (1955) with respect to section 5 (as amended by section 5 of the Radio and Television Broadcasting Act (No. 4) B.E. 2530 (1987)), section 16 and section 17 (as amended by section 6 of the Radio and Television Broadcasting Act (No. 4) B.E. 2530 (1987)) and Ministerial Regulation No. 11 (B.E. 2536 (1993)) were contrary to or inconsistent with section 6, section 40 and section 335(2) of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

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1. Background and summarized facts

The State Attorney, as plaintiff, prosecuted Sakorn Cable TV Network Company Limited, the first defendant, and Mr. Wachira Jaroensakorn, the second defendant, at the Criminal Court in criminal case no. 22/2547 on charges of jointly providing television broadcasting services to the people or a community without a license, which was an offence under section 5, section 16 and section 17 of the Radio and Television Broadcasting Act B.E. 2498 (1955), section 5 and section 6 of the Radio and Television Broadcasting Act (No. 4) B.E. 2530 (1987), section 83 of the Penal Code and Ministerial Regulation No. 11 (B.E. 2536 (1993)).

Both defendants (the applicants) filed motions of objections at the Criminal Court stating that the applicants had already filed applications for radio and television broadcasting licenses pursuant to Form WT. 15 with the Department of Public Relations and the Department of Public Relations had already received the applications on 15th December B.E. 2542 (1999). In addition, the applicants' filings were considered in a meeting on 10th March B.E. 2543 (2000), the outcome of which was not sent to the defendants for acknowledgement. As a result, the applicants were of the conception that the Commission had resolved to issue a license to the applicants as to the other service providers. Thereafter, subsequent to the promulgation of the Organization for Frequency Distribution and Supervision of Radio and Television Broadcasting and Telecommunication Businesses Act B.E. 2543 (2000), the Department of Public Relations sought to rely on the transitory provision in section 80 as grounds for not issuing licenses to the applicants. On this matter, the applicants were of the opinion that section 40 paragraph two of the Constitution of the

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Kingdom of Thailand, B.E. 2540 (1997), which provided that “there shall be an independent regulatory body having the duty to distribute frequencies under paragraph one and supervise radio or television broadcasting and telecommunication businesses as provided by law”, stipulated that the duties of distributing frequencies used in radio and television broadcasting and telecommunication services were powers of independent organizations, i.e. the National Radio and Television Broadcasting Commission (NRTC) and the National Telecommunications Commission (NTC), whereby both organizations had to be established within 3 years under the transitory provision in section 335(2) of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). However, at the time, such independent organizations under the Constitution had not yet been established after the expiration of 3 years pursuant to the transitory provisions in section 335(2) of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). Therefore, it was argued that since the Radio and Television Broadcasting and Telecommunications Commissions were not established within the time prescribed by the Constitution, such establishments of the Commissions were void. As a result, the frequencies used for radio and television broadcasting and telecommunications remained resources of the nation for the benefit of the public under section 40 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). Since the frequencies were still public, the applicants were entitled to use the frequencies for providing television broadcasting services to the public or a community without requiring a license or having to file a license application with anyone. Thus, the prosecution filed by the plaintiff against the applicants and others as defendants charged with jointly providing television broadcasting services to the public or a community without a license under section 5, section 16 and section 17 of the Radio and Television Broadcasting Act B.E. 2498 (1955), section 5 and section 6 of the Radio and Television Broadcasting Act (No. 4) B.E. 2530 (1987), section 83 of the Penal Code and Ministerial Regulation No. 11 (B.E. 2536 (1993)), relied on the provisions of any law which were contrary to or inconsistent with section 6, section 40 and section 335(2) of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). As there had not yet been a ruling of the Constitutional Court on such sections, the applicants motioned for a temporary stay and a transmission of the opinion through official channels to the Constitutional Court for a ruling under section 264 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

The Criminal Court held that a cause for the Constitutional Court to rule on the application existed on the questions of whether the provisions relied by the plaintiff were contrary to or inconsistent with the Constitution. A temporary stay of proceedings was therefore ordered and a reference of the applicants’ opinion made to the Constitutional Court for further ruling.

2. Preliminary issue

The preliminary issue considered by the Constitutional Court was whether or not the Constitutional Court had the power to accept the application for consideration under section 264 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

The Constitutional Court held as follows. The Criminal Court had referred the opinions of parties to the Constitutional Court for a ruling under section 264 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), that section 5, section 16 and section 17 of the Radio and Television Broadcasting Act B.E. 2498 (1955) and section 5 and section 6 of the Radio and Television Broadcasting Act (No. 4) B.E. 2530 (1987) were contrary to or inconsistent with section 6, section 40 and section 335(2) of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). In this regard, it was further noted that Constitutional Court had not yet made a ruling in relation to such sections. The Constitutional Court therefore accepted the application for consideration under section 264 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

3. The issues considered by the Constitutional Court

The first issue was whether or not Ministerial Regulation No. 11 (B.E. 2536 (1993)) issued by virtue of the Radio and Television Broadcasting Act B.E. 2498 (1955) was contrary to or inconsistent with section 6, section 40 and section 335(2) of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). On this issue, the Constitutional Court had already determined in Ruling No. 27/2544, dated 4th September B.E. 2544 (2001), that provisions of any law which were subject to a Constitutional Court ruling under section 264 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), had to be provisions of any law enacted by an organ exercising legislative powers. The Ministerial Regulation issued by the executive pursuant to such Act was not a provision of any law within the meaning of section 264 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). The application on this issue was therefore dismissed.

The second issue was whether or not section 83 of the Penal Code was contrary to or inconsistent with section 6, section 40 and section 335(2) of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). The Constitutional Court held that section 83 of the Penal Code provided on the stipulation of a principal offender under the Penal Code. In the case of an offence committed by two or more persons, the persons participating in the commission of an offence were deemed as principals and liable to penalties prescribed for such offences. The provision was not directly related to the offence, but the State Attorney had to clearly elaborate details in the prosecution in the case of joint offenders in order to stipulate the defendants as principals liable to penalties under section 5, section 16 and section 17 of the Radio and Television Broadcasting Act B.E. 2498 (1955) and section 83 of the Penal Code. There was no relevance to section 40 and section 335(2) of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). Thus, there was no instance which was contrary to or inconsistent with the sections of the Constitution referred to.

The third issue was whether or not the Radio and Television Broadcasting Act B.E. 2498 (1955) with respect to section 5 (as amended by section 5 of the Radio and Television Broadcasting Act (No. 4) B.E. 2530 (1987)), section 16 and section 17 (as amended by section 6 of the Radio and Television Broadcasting Act (No. 4) B.E. 2530 (1987)) were

contrary to or inconsistent with section 6, section 40 and section 335(2) of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

The Constitutional Court considered section 6 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), to be a provision in Chapter I General Provisions that provided on the supremacy of the Constitution in the country thereby prohibiting laws, rules or regulations in force or which would subsequently come into force from containing substance which were contrary to or inconsistent with the Constitution. Hence, there was no instance which section 5, section 16 and section 17 of the Radio and Television Broadcasting Act B.E. 2498 (1955) could be contrary to or inconsistent with section 6 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

Section 40 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) was a provision in Chapter III Rights and Liberties of the Thai People that provided frequencies used in radio and television broadcasting and telecommunications to be national communication resources for the public benefit and that there would be an establishment of an independent State organization to perform the duties of distributing frequencies and supervising radio and television broadcasting and telecommunication businesses. In this regard, consideration had to be taken of the greatest benefits to be conferred upon the people at the national and local levels in terms of education, culture, State security and other public benefits, as well as fair competition. In any case, however, the application of section 40 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), was conditioned by the transitory provision in section 335 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), that “in the initial period, the following provisions shall not apply in the following cases... (2) section 40 shall not come into force until the enactment of a law implementing such provision which shall not be later than three years as from the date of the promulgation of this Constitution; provided that such law shall not affect any license, concession, or contract valid on the date such law comes into force until the expiration of such license, concession or contract”. In due course, the Organization for Distribution of Frequencies and Supervision of Radio and Television Broadcasting and Telecommunication Businesses Act B.E. 2543 (2000) was enacted to implement section 40 in conjunction with section 335(2) of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), coming into force as from 8th March B.E. 2543 (2000), which was not later than three years as from the date of promulgation of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

In this case, section 5 of the Radio and Television Broadcasting Act B.E. 2498 (1955), as amended by section 5 of the Radio and Television Broadcasting Act (No. 4) B.E. 2530 (1987), prohibited any person from providing radio or television broadcasting services to the public or a community without a license from a competent official. A violation was subject to penalties under section 17 of the Radio and Television Broadcasting Act B.E. 2498 (1955), as amended by section 6 of the Radio and Television Broadcasting Act (No. 4) B.E. 2530 (1987). In the case where a court gave judgment that a person had committed an offence under this Act, the court could also order the confiscation of the objects used in the commission of the offence for use in the official functions of the Department of Public

Relations under section 16 of the Radio and Television Broadcasting Act B.E. 2498 (1955).

The applicants had claimed that section 40 paragraph two of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), provided for the establishment of a National Radio and Television Broadcasting Commission (NRTC) and a National Telecommunications Commission (NTC) within 3 years pursuant to section 335(2) of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). The applicants further stated that such independent State organizations had not been established within the time prescribed by the Constitution. As a result, the subsequent establishments were void and the frequencies used for radio and television broadcasting and telecommunications remained natural resources for the public benefit under section 40 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). The applicants therefore assumed the right to use the frequencies to provide television broadcasting services to the public and communities without having to obtain a license or file a license application from any person. Upon a consideration of this issue, the Constitutional Court held that the provisions of section 40 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), which classified frequencies used for radio and television broadcasting and telecommunications as natural resources for the benefit of the public had the effect that no person or agency could exclusively take possession or use frequencies for radio and television broadcasting and telecommunications while denying the people of equal rights to use such frequencies. There had to be in compliance with the conditions set forth in section 40 paragraph two of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), which provided that there should be an establishment of an independent State organization to perform the duties of distributing frequencies and supervising radio and television broadcasting and telecommunication businesses as provided by law.

Should the selection and appointment of NRTC and NTC members not be completed within 3 years, the Organization for Distribution of Frequencies and Supervision of Radio and Television Broadcasting and Telecommunication Businesses Act B.E. 2543 (2000) was not rendered unenforceable, and nor was the applicants able to use frequencies freely without any control from the responsible agencies as claimed. This was because the use of frequencies for providing radio and television broadcasting services to the public or a community was a matter which affected the society, necessitating control and supervision to ensure public order. In this regard, section 80 of the Organization for Distribution of Frequencies and Supervision of Radio and Television Broadcasting and Telecommunication Businesses Act B.E. 2543 (2000) which was enacted pursuant to section 335(2) of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), provided that the relevant State official in the administration of frequencies, distribution of frequencies, licensing, supervision and control of radio and television broadcasting and telecommunication businesses still maintained powers and duties as provided by law until the expiration of thirty days as from the royal appointment of the chairman and members of the NRTC or NTC, as the case may be. However, in the interim, no distribution of frequencies, issue of operating licenses or supplemental licenses could be undertaken. Therefore, before the expiration of

the time prescribed by law, the provision of radio and television broadcasting services to the public still required a license from a competent official under the Radio and Television Broadcasting Act B.E. 2498 (1955), a law which was still in force. But during such time, section 80 of the Organization for Distribution of Frequencies and Supervision of Radio and Television Broadcasting and Telecommunication Businesses Act B.E. 2543 (2000) prohibited the issue of a new radio or television broadcasting license or supplemental license. Proceedings under section 5 of the Radio and Television Broadcasting Act B.E. 2498 (1955), as amended by section 5 of the Radio and Television Broadcasting Act (No. 4) B.E. 2530 (1987), were therefore neither contrary to nor inconsistent with section 40 in conjunction with section 335(2) of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). Thus, once it was decided that section 5 of the Radio and Television Broadcasting Act B.E. 2498 (1955), as amended by section 5 of the Radio and Television Broadcasting Act (No. 4) B.E. 2530 (1987), was neither contrary to nor inconsistent with section 40 in conjunction with section 335(2) of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), section 16 and section 17 of the Radio and Television Broadcasting Act B.E. 2498 (1955), as amended by section 6 of the Radio and Television Broadcasting Act (No. 4) B.E. 2530 (1987), which were provisions related to section 5, were therefore also neither contrary to nor inconsistent with section 40 in conjunction with section 335(2) of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

4. Ruling of the Constitutional Court

By virtue of the reasons above, the Constitutional Court held by unanimous resolution that the Radio and Television Broadcasting Act B.E. 2498 (1955), with respect to section 5 (as amended by section 5 of the Radio and Television Broadcasting Act (No. 4) B.E. 2530 (1987)), section 16 and section 17 (as amended by section 6 of the Radio and Television Broadcasting Act (No. 4) B.E. 2530 (1987)) were neither contrary to nor inconsistent with section 6, section 40 and section 335(2) of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).
