

Summary of Constitutional Court Ruling No. 17/2551

Dated 6th November B.E. 2551 (2008)*

Re: The President of the National Legislative Assembly referred the opinion of members of the National Legislative Assembly requesting for a Constitutional Court ruling on whether or not the Bill on Offences Relating to Conflicts of Personal and Common Interests B.E. was duly enacted in accordance with the provisions of the Constitution and whether or not it contained provisions contrary to or inconsistent with the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

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1. Summary of background and facts

The President of the National Legislative Assembly referred the opinion of Mr. Warach Chawapong, member of the National Legislative Assembly, and others forming a total of 51 persons, the applicants. The facts could be summarized as follows.

1. The Bill on Offences Relating to Conflicts of Personal and Common Interests B.E. contained provisions in certain sections which restricted a person's family rights under section 35 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). The preamble to the bill, however, did not specify the provisions of the Constitution which authorized the restriction of such rights and liberties. The enactment of such bill was therefore unconstitutional under section 29 paragraph two of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

2. The Bill on Offences Relating to Conflicts of Personal and Common Interests B.E. contained provisions which were contrary to or inconsistent with the Constitution of the Kingdom of Thailand B.E. 2550 (2007) and such provisions constituted the essential substance of the bill. In other words, the restriction of liberties of a "state official", "spouse" and "relative" under this bill exceeded the extent of necessity and affected the essential substance of the rights and liberties of life and body under section 32 of the Constitution, as well as affected the essential substance of a person's family rights under section 35 of the Constitution. The provisions were also inconsistent with the presumption of innocence of a person in a criminal case under section 39 paragraph two of the Constitution and affected the essential substance of a person's property rights under section 41 of the

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Constitution, as well as affected the liberty to engage in an enterprise or occupation under section 43 of the Constitution.

(1) The word “state official” was not confined to personnel of the state, i.e. political position holders, government officials, state enterprise employees, state agencies or local administrative agencies, but also included persons outside the public sector who were private persons appointed to become members of committees or subcommittees of government agencies, state enterprises or state agencies, despite the fact state agencies had to rely on such persons to assist in official functions. Those measures which restricted the rights and liberties of persons who accepted the committee or subcommittee positions constituted restrictions of rights and liberties beyond necessity.

(2) The word “spouse” and “relative” under this bill also included persons living in matrimony without registration of marriage, and regardless of whether or not there was a relationship in law or in fact. This amounted to an interference and violation of an important principle.

(3) The word “relative”, persons whose rights and liberties were restricted under this bill, was widely defined to include 8 categories, and could account for up to 84 persons.

(4) The restriction of liberties under section 5 paragraph five could be perceived as a case where a state official had not personally committed an act, but the act was committed by his/her spouse or child in law or in fact, in which case the law would deem the state official as the committer unless it could be proved that he/she did not connive or consented to the act. Such a provision was a presumption of guilt, imposing the burden of rebuttal on the state official. Hence, the presumption on the state official’s liberty exceeded the extent of necessity and was inconsistent with section 29 paragraph one and section 39 paragraph two of the Constitution.

(5) The application of this bill encompassed persons who were not state officials, their spouses or relatives, as was apparent in section 6 which provided for the presumption that a person benefitting from an act of a state official, spouse or relative of a state official would be deemed as having instantly committed an offence since the bill deemed that such person participated in the commission of the act unless it could be proved that he/she did not connive or consented. This imposed the burden of proving innocence on a person outside the public sector or a private person, but who had acquired benefits even though such person might not have requested the state official to commit those acts.

(6) The prohibition against accepting gifts, souvenirs, monies, properties or other benefits which had money value under section 8 was imposed not only on a state official but also extended to the spouse and relatives, which could be up to 84 persons. This restriction of rights and liberties exceeded necessity and reasonableness.

The Constitutional Court had already examined the application and directed the relevant persons, namely the President of the National Legislative Assembly, the Prime

Minister, the Chairman of the National Counter Corruption Commission, the Secretary-General of the Council of State and a representative of the Secretary-General of the Senate to sent documents and give opinions.

2. Preliminary issue

The preliminary issue considered by the Constitutional Court was whether or not the Constitutional Court had the power to admit this application for a ruling under section 154 paragraph one subparagraph (1) of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

This case was pending trial in the Constitutional Court pursuant to section 300 paragraph one of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) which provided that the Constitutional Tribunal under the Constitution of the Kingdom of Thailand (Interim) B.E. 2549 (2006) would be the Constitutional Court, and paragraph four provided that upon the appointment of Constitutional Court judges under this Constitution, all cases or matters pending proceedings would be transferred to the powers and duties of the newly appointed Constitutional Court.

After consideration, it was found that the applicants consisted of 51 members of the National Legislative Assembly, which constituted not fewer than one-tenth of total number of existing members of the National Legislative Assembly (there were 250 members of the National Legislative Assembly at the time) who had entered their names in an opinion that the Bill on Offences Relating to Conflicts of Personal and Common Interests B.E. had not been duly enacted in accordance with the provisions of the Constitution and contained provisions which were contrary to or inconsistent with the Constitution of the Kingdom of Thailand B.E. 2550 (2007). The case was therefore in accordance with section 154 paragraph one subparagraph (1) of the Constitution. Upon referral of this application by the President of the National Legislative Assembly to the Constitutional Court for a ruling, the Constitutional Court therefore had the power to admit this application for a ruling under section 154 paragraph one subparagraph (1) of the Constitution.

3. Issues considered by the Constitutional Court

The Constitutional Court determined that the issues to be ruled upon were whether or not the Bill on Offences Relating to Conflicts of Personal and Common Interests B.E. had been duly enacted in accordance with the provisions of the Constitution and whether or not the Bill on Offences Relating to Conflicts of Personal and Common Interests B.E. contained provisions which were contrary to or inconsistent with the Constitution of the Kingdom of Thailand B.E. 2550 (2007) and thus lapsed under section 154 paragraph three of the Constitution.

On the first issue of whether or not the Bill on Offences Relating to Conflicts of Personal and Common Interests B.E. had been duly enacted in accordance with the

provisions of the Constitution, a preliminary issue had to be decided as to whether or not votes in the National Legislative Assembly and the quorum of the National Legislative Assembly was in accordance with section 9 paragraph one of the Constitution of the Kingdom of Thailand (Interim) B.E. 2549 (2006) and section 126 paragraph one in conjunction with section 293 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

After consideration, the Constitutional Court made the following findings. Section 9 paragraph one of the Constitution of the Kingdom of Thailand (Interim) B.E. 2549 (2006) and section 126 paragraph one of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) essentially provided for the determination of the number of members of parliament that would be sufficient for the collective expression of opinions and intents in the form of a meeting resolution in the consideration of bills and the performance of other duties under the provisions of the Constitution. Such parliamentary procedural principles were applied universally. The Constitutions of the Kingdom of Thailand that had been in force all contained provisions on the quorum of sittings of the House of Representatives and the Senate according to the number determined by the Constitution in order to constitute a quorum. The reason why all Constitutions provided for the number of members of the House of Representatives and senators to constitute a quorum was in order enable the sittings to consider various matters of parliament in a prudent manner and to enable wide debates and exchanges of opinions between members. This was especially the case in the performance of legislative functions by members of the House of Representatives and senators. Laws approved by the National Assembly, upon Royal Assent by the King and publication in the Government Gazette, would be applicable to all the people in the country. It was therefore crucial that detailed consideration be given in all readings. Since the Constitution had provided for a quorum consisting of not fewer than one-half of the existing members of each House, the implication was that a sitting of the House of Representatives and Senate attended by members deficient of the quorum could not be deemed as the exercise of legislative powers by the House of Representatives and Senate. Furthermore, if votes were cast in a sitting of the House of Representatives and Senate which were deficient of a quorum, the votes of members of the House of Representatives and senators would not be deemed as duly made under the provisions of the Constitution.

With regard to the enactment of the Bill on Offences Relating to Conflicts of Personal and Common Interests B.E., section 293 paragraph one of the Constitution provided for the National Legislative Assembly under the Constitution of the Kingdom of Thailand (Interim) B.E. 2549 (2006) to perform the duties of the National Assembly, House of Representatives and Senate under the provisions of this Constitution until the first sitting of the National Assembly. In the consideration of this bill, the National Legislative Assembly was therefore the organ exercising legislative powers on behalf of the House of Representatives and the Senate. Voting in the National Legislative Assembly therefore also had to be made in a sitting of a properly formed quorum in order to be upheld as votes duly made in accordance with the provisions of the Constitution.

As for clause 18 paragraph two of the Rules of Procedure of the National Legislative Assembly B.E. 2549 (2006) which provided that “upon the registration of attendance of not fewer than one-half of the total number of members, a quorum is constituted,” such provisions only related to the opening of a sitting. A sitting of the National Legislative Assembly could proceed upon the registration of not fewer than one-half of the total number of existing members of the National Legislative Assembly. However, after commencement, at the voting stage of any agenda which was a result of consultations in the sitting of the National Legislative Assembly, the quorum had to be in accordance with section 9 paragraph two or the Constitution of the Kingdom of Thailand (Interim) B.E. 2549 (2006) or section 126 paragraph one of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

After consideration, the Constitutional Court held as follows. The facts were finally determined according to the documented voting records of members of the National Legislative Assembly which were sent by the Secretary-General of the Senate together with a statement submitted to the Constitutional Court for consideration, that in National Legislative Assembly sitting number 31/2550 on Wednesday, 20th June B.E. 2550 (2007), which was the date of voting in the first reading to approve the principle of the Bill on Conflicts of Offences Relating to Personal and Common Interests B.E., there were only 78 members present at the sitting. A quorum was therefore not constituted and the votes made in a deficient quorum could not be deemed as a resolution of the National Legislative Assembly duly passed under section 9 paragraph one of the Constitution of the Kingdom of Thailand (Interim) B.E. 2549 (2006), being the Constitution in force at that time.

Thereafter, the Constitution of the Kingdom of Thailand B.E. 2550 (2007) was promulgated to replace the Constitution of the Kingdom of Thailand (Interim) B.E. 2549 (2006). The National Legislative Assembly held a sitting to consider the Bill on Offences Relating to Conflicts of Personal and Common Interests B.E. in its third reading in National Legislative Assembly sitting number 54/2550 on Wednesday, 27th September B.E. 2550 (2007). The sitting was attended by only 95 members, deficient of one-half of the total number of existing members of the National Legislative Assembly, i.e. short of 125 members. A quorum was therefore not constituted and the votes of such deficient quorum could not be deemed as duly made by the National Legislative Assembly under section 126 paragraph one of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

As the quorum of the National Legislative Assembly was not constituted and the votes of the deficient quorum could not be deemed as votes duly made by the National Legislative Assembly under the Constitution, the Bill on Offences Relating to Conflicts of Personal and Common Interests B.E. was therefore not duly enacted in accordance with the provisions of the Constitution. As a result, the entire bill lapsed under section 154 paragraph three, which provided that upon ruling by the Constitutional Court that a bill had not been duly enacted in accordance with the provisions of this Constitution, such bill would lapse. Furthermore, as the Bill on Offences Relating to Conflicts of Personal and Common Interests

B.E. lapsed under section 154 paragraph three, other issues in the application therefore did not have to be ruled upon since the outcome of the ruling would remain unchanged.

4. Ruling of the Constitutional Court

By virtue of the foregoing reasons, the Constitutional Court held that the Bill on Offences Relating to Conflicts of Personal and Common Interests B.E. was not duly enacted in accordance with the provisions of the Constitution and lapsed under section 154 paragraph three of the Constitution.
