

Summary of Constitutional Court Ruling No. 3/2552

Dated 18th March B.E. 2552 (2009)*

Re: The Supreme Administrative Court referred the objection of plaintiffs (Mr. Paiboon Kongkerd and others totaling 211 persons) to the Constitutional Court for a ruling on whether or not section 46 paragraph one of the Promotion and Preservation of National Environmental Quality Act B.E. 2535 (1992) was contrary to or inconsistent with section 56 paragraph two and section 59 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997).

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1. Summary of background and facts

1.1 The plaintiffs filed complaints against the Kam Muang Tambon Administrative Organization, the first defendant, Nam Pong Tambon Administrative Organization, the second defendant and Suan Kwang Tambon Administrative Organization, the third defendant, in the Khon Kaen Administrative Court. The complaint stated that all three defendants jointly committed unlawful acts in the Solid Waste Disposal System Construction Project due to their failure to arrange for a public hearing of the people residing in the area of the construction project. All proceedings carried out by the three defendants were improper exercises of powers since the relevant agencies did not possess sufficient information on the pollution problems which affected the natural water sources and the people's way of living. It was requested that the Court give a judgment and order the first defendant to annul the meeting resolution for the construction of the waste disposal facility and order the termination of constructions in the original solid waste disposal sites of the second and third defendants.

1.2 The defendants replied that this construction project was deemed as a cooperation between local administrative organizations to jointly establish a solid waste disposal center, and prior to the commencement of the project, the second defendant had requested the assistance of the Faculty of Public Health, Khon Kaen University, to conduct a study and assessment, as well as to find measures for the prevention and mitigation of the impact from the project's operations, including to conduct a survey of the people's opinion of the third defendant's development of the solid waste disposal site. The survey showed that the majority of the people agreed with the development.

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1.3 The plaintiffs objected to the reply, stating that even though all three defendants had the powers and duties to administer the locality as provided by law, their performances had to be in accordance with section 56 and section 59 of the Constitution in conjunction with the Rules of the Office of the Prime Minister on Public Consultation by Means of Public Hearing B.E. 2539 (1996). Failure to organize a public hearing was deemed as a violation of the plaintiffs' rights as recognized under the Constitution. Therefore, the plaintiffs were of the opinion that the construction of a solid waste disposal pit definitely affected the environmental quality. All three defendants had to comply with the constitutional provisions.

1.4 The Khon Kaen Administrative Court found that section 56 paragraph two of the Constitution of the Kingdom of Thailand B.E. 2540 (1997) provided that the operation of a project or activity which could result in a serious impact on environmental quality could not be carried out except where a study and survey of the environmental impact had been conducted. At the time, there was only one law governing the preparation of a study and environmental impact assessment, namely the Promotion and Preservation of National Environmental Quality Act B.E. 2535 (1992). Section 46 paragraph one of the Act provided that the Minister, upon approval of the National Environmental Commission, had the power to issue a notification prescribing the types and sizes of projects or activities of government agencies, state enterprises, or private entities which affected the environment and required the preparation of an environmental impact analysis report that had to be submitted for approval. Upon considering the joint solid waste disposal system project undertaken by the three defendants, it was found that the project was not subject to the requirement of an environmental impact analysis report. Section 59 of the Constitution provided that a person had the right to receive information, statements and reasons from a government agency, state agency, state enterprise or local government before licensing or undertaking a project or activity which could affect the environment, health and sanitation, quality of life or other essential interests pertaining to persons or the local community, as well as the right to express one's opinion on such matter. At the time, the Rules of the Office of the Prime Minister on Public Consultation by Means of Public Hearing B.E. 2539 (1996) was in force. Such rules did not require state projects to arrange for public consultation by means of public hearings. However, it was left to Minister's discretion for projects of the central government, or the discretion of the provincial governor for projects carried out by the provincial or local governments. The Court was not able to intervene in the exercise of discretion to review suitability on behalf of a state official in the Executive Branch, who was directly responsible for the administration of state affairs. Khon Kaen Administrative Court therefore gave judgment to dismiss the plaintiff.

1.5 The plaintiff appealed to the Supreme Administrative Court that the solid waste disposal system project undertaken by the three defendants was a project which had a serious impact on environmental quality. The project was subject to section 56 paragraph two of the Constitution of the Kingdom of Thailand B.E. 2540 (1997), which was an absolute prohibition, unless the prescribed conditions had been fulfilled. Furthermore,

section 59 of the Constitution was a principle which granted a right to a person to receive information, statements and reasons prior to the licensing or undertaking of a project or activity which could have an impact on environmental quality, health and sanitation, quality of life or other essential matters pertaining to persons or the local community, and a right to express one's opinion on such matter. If the operation of any project or activity was within the conditions prescribed by the Constitution, which was an absolute prohibition, there was no discretion whatsoever to determine the suitability of organizing a public hearing. In addition, the plaintiffs were of the opinion that provisions of laws, rules and regulations applied by the Khon Kaen Administrative Court to the case were clearly contrary to or inconsistent with section of 56 paragraph two and section 59 of the Constitution and there had not yet been a ruling of the Constitutional Court with respect to these two provisions. The plaintiffs therefore motioned to the Supreme Administrative Court to impose a temporary stay of proceedings and refer the plaintiffs' opinion to the Constitutional Court for a ruling.

1.6 The Supreme Administrative Court, after consideration, found that in the adjudication or issuance of an order in this case, it had to apply the provisions of section 46 paragraph one of the Promotion and Preservation of National Environmental Quality Act B.E. 2535 (1992). However, as the appellants objected that such a provision was contrary to or inconsistent with the Constitution of the Kingdom of Thailand B.E. 2540 (1997) and there had not yet been a ruling of the Constitutional Court with respect to such provisions. The appellants' objection was therefore referred to the Constitutional Court for ruling, and the trial proceedings or issuance of an order in this case was temporarily stayed.

2. Preliminary issue

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

After consideration, the Constitutional Court found as follows. This application was pending trial by the Constitutional Court under the Constitution of the Kingdom of Thailand B.E. 2540 (1997). Thereafter the Constitution of the Kingdom of Thailand (Interim) B.E. 2549 (2006) was promulgated on 1st October B.E. 2549 (2006), and later the Constitution of the Kingdom of Thailand B.E. 2550 (2007) was promulgated on 24th August B.E. 2550 (2007) wherein section 300 paragraph four provided that all cases or matters pending proceedings by the Constitutional Tribunal would be continued by the Constitutional Court, and 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. The Constitutional Court therefore had the power to admit this application for trial and adjudication.

3. Issues considered by the Constitutional Court

The Constitutional Court examined the application and documents in support of the application and decided to accept the application on the issue of objection that section 46 paragraph one of the Promotion and Preservation of National Environmental Quality Act B.E. 2535 (1992) was contrary to or inconsistent with section 56 paragraph two of the Constitution of the Kingdom of Thailand B.E. 2540 (1997) for ruling, and to decline to rule on the objection issue that the Rules of the Office of the Prime Minister on Public Consultation by Means of Public Hearing B.E. 2539 (2006) was contrary to or inconsistent with section 59 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997) since it was not within the powers and duties of the Constitutional Court to make a ruling.

After consideration, the Constitutional Court found as follows. While the Constitutional Court was preparing its ruling on this application, the Constitution of the Kingdom of Thailand B.E. 2550 (2007) had already been promulgated. The provision of section 56 paragraph two of the Constitution of the Kingdom of Thailand B.E. 2540 (1997) which the applicant objected that a provision of law was contrary to or inconsistent with embodied the same principle as the provision of section 67 paragraph two of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). This application was therefore ruled upon in accordance with section 67 paragraph two of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

The issue which had to be ruled upon by the Constitutional Court was therefore whether or not section 46 paragraph one of the Promotion and Preservation of National Environmental Quality Act B.E. 2535 (1992) was contrary to or inconsistent with section 67 paragraph two of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

The Constitutional Court found that the provision of section 46 paragraph one of the Promotion and Preservation of National Environmental Quality Act B.E. 2535 (1992) was one legal measure which applied to government agencies, state enterprises or private entities which undertook a project or activity that had an impact on the environment. If the Minister, upon the approval of the National Environmental Commission, issued a notification prescribing a project or activity as requiring the preparation of an environmental impact analysis report, the government agency, state enterprise or private entity undertaking such project or activity had to proceed in accordance with the notification so as to fulfill the law's intent, as well as to protect the interests of the state and the community in promoting and preserving environmental quality, being a provision that was already consistent with section 67 paragraph two of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). Section 46 paragraph one of the Promotion and Preservation of National Environmental Quality Act B.E. 2535 (1992) was therefore neither contrary to nor inconsistent with section 67 paragraph two of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). However, since the Constitution of the Kingdom of Thailand B.E. 2550 (2007) intended the rights and liberties as recognized under the Constitution to have immediate effect upon the promulgation of the Constitution without the need for a preceding implementing legislation;

therefore in the case of a project or activity which required the preparation of analysis report or a project or activity which did not require environmental impact analysis report under section 46 paragraph one of such Act, if it appeared that the project or activity could cause a serious impact on a community's environmental quality, natural resources and the health of persons or a community, the person or community would have the right to file a plaint in the Administrative Court under section 67 paragraph three of the Constitution in order to request the Court to give a judgment or order the government agency, state enterprise, or private entity carrying out such project or activity to conduct a study and assessment of environmental quality and the people's health, to arrange for a public consultation, or to seek the opinion of an independent organ in the environmental or health fields and a higher education institution administering education on the environment or natural resources or health, prior to the operation of the project or activity as provided under section 67 paragraph two of the Constitution.

4. Ruling of the Constitutional Court

By virtue of the foregoing reasons, the Constitutional Court held that section 46 paragraph one of the Promotion and Preservation of National Environmental Quality Act B.E. 2535 (1992) was neither contrary to nor inconsistent with section 67 paragraph two of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).
