

Summary of Constitutional Court Ruling No. 12/2552

Dated 19th August B.E. 2552 (2009)*

Re: Saraburi Provincial Court referred the objection of a defendant (Mr. Tanarat Kaewwaree) 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 clause 3 of the Announcement of the National Executive Council No. 45, dated 17th January B.E. 2515 (1972), as amended by clause 1 of the Announcement of the National Executive Council No. 252, dated 16th November B.E. 2515 (1972), was contrary to or inconsistent with section 26, section 27, section 28, section 29, section 30, section 36 and section 50 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997).

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1. Summary of background and facts

Saraburi Provincial Court referred the objection (application) of a defendant (Mr. Tanarat Kaewwaree) in Criminal Case No. 4062/2548 (2005) 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 could be summarized as follows.

1. On 19th November B.E. 2548 (2005) at 01.30 hours, the applicant (Mr. Tanarat Kaewwaree) was arrested by administrative officials and police officials and charged with offences under the Announcement of the National Executive Council No. 45, dated 17th January B.E. 2515 (1972), and the Announcement of the National Executive Council No. 252, dated 16th November B.E. 2515 (1972). The arrest booking recorded that the applicant operated the business, Ran Khao Tom Ai-Hea, which sold food and beverages during prohibited hours without a license, and the applicant was handed over to investigation officials of Saraburi Muang Regional Police Station.

Thereafter, on 16th December B.E. 2548 (2005), the state attorney of Saraburi Province filed an action against the applicant as a defendant in Saraburi Provincial Court on charges of the offence of selling food and beverages during prohibited hours without a license. The state attorney motioned for the court to sentence the defendant (applicant) pursuant to clause 1 and clause 2 of the Announcement of the National Executive Council No. 252, dated 16th November B.E. 2515 (1972).

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2. The applicant submitted an application, dated 30th January B.E. 2549 (2006), objecting that the applicant had made a commercial registration under the Commercial Registration Act B.E. 2499 (1956) in order to operate the commercial business “Ran Khao Tom Ai-Hea” to sell food and beverages, but not the sale of liquor. Prior to the arrest, administrative officials and police officials had sent a letter to notify the applicant to file for a license under the Announcement of the National Executive Council No. 45, dated 17th January B.E. 2515 (1972), and the Announcement of the National Executive Council No. 252, dated 16th November B.E. 2515 (1972). The applicant, however, presented documents in his commercial register showing that on 8th July B.E. 2547 (2004), the applicant received a commercial registration certificate from the Department of Business Development under the Commercial Registration Act B.E. 2499 (1956). As regards the police official’s notice of charge that the applicant sold food and beverages during prohibited hours without a license, being an offence under clause 1 of the Announcement of the National Executive Council No. 45, dated 17th January B.E. 2515 (1972), as amended by clause 3 of the National Executive Council No. 252, dated 16th November B.E. 2515 (1972), such Announcements of the National Executive Council had been in force for more than 30 years with the intent of preventing delinquents from getting together and mixing with a view to committing a crime, particularly by restricting only certain places, such as bowling alleys, skating rinks, hotels, airports, railway stations, bus terminals or other similar places. The applicant’s restaurant, however, had obtained an operation license under the Commercial Registration Act B.E. 2499 (1956), and the premises did not have the said characteristics. The premises also did not constitute a place for the mixing of criminals, did not involve the commission of an act inconsistent with public morals, or caused detriment to the nation. Moreover, there were currently many shops selling food and beverages open 24 hours a day, such as convenience stores in petrol service stations, since the public now travel during both day and night times as opposed to the past. Such Announcement of the National Executive Council was therefore inapplicable to current times. Also, the prohibition imposed on a person from consuming food or beverages in a place selling food or beverages pursuant to such Announcement of the National Executive Council was obviously inconsistent with the daily livelihood of the people. Therefore, whereas the Constitution of the Kingdom of Thailand B.E. 2540 (1997) provided for the people’s liberty to travel and the liberty to engage in a business or occupation on an equal basis under the law as well as to receive equal protection under the law, it was implied that clause 3 of the Announcement of the National Executive Council No. 45, dated 17th January B.E. 2515 (1972), as amended by clause 1 of the Announcement of the National Executive Council No. 252, dated 16th November B.E. 2515 (1972), was contrary to or inconsistent with section 26, section 27, section 28, section 29, section 30, section 36 and section 50 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997).

After consideration, Saraburi Provincial Court found that the objection of the defendant (applicant) was a case under section 264 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997) and that there did not appear to be a ruling of the Constitutional Court on such issue. A temporary stay of proceedings was therefore imposed and the matter

referred to the Constitutional Court for a ruling on whether or not clause 3 of the Announcement of the National Executive Council No. 45, dated 17th January B.E. 2515 (1972), as amended by clause 1 of the Announcement of the National Executive Council No. 252, dated 16th November B.E. 2515 (1972), was contrary to or inconsistent with section 26, section 27, section 28, section 29, section 30, section 36 and section 50 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997).

2. Issues considered by the Constitutional Court

After consideration, the Constitutional Court ordered the acceptance of the application for proceedings under clause 12 of the Rules of the Constitutional Court on Constitutional Court Procedures B.E. 2546 (2003), and acceptance for trial and adjudication under section 264 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997) on 2nd May B.E. 2549 (2006).

This application was pending proceedings in the Constitutional Court when the Constitution of the Kingdom of Thailand B.E. 2540 (1997) was repealed by the Announcement of the Council for Democratic Reform No. 3, dated 19th September B.E. 2549 (2006). Thereafter, the Constitution of the Kingdom of Thailand (Interim) B.E. 2549 (2006) was promulgated wherein section 35 paragraph one provided that all matters provided by law to be the powers of the Constitutional Court or upon a problem arising on whether or not a law was inconsistent with the Constitution would become the power of the Constitutional Tribunal, and paragraph four provided that all cases or matters pending proceedings in the Constitutional Court prior to 19th September B.E. 2549 (2006) would be transferred to the powers and responsibilities of the Constitutional Tribunal. Later, 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), and came into force as of 24th August B.E. 2550 (2007), where section 300 paragraph one provided that the Constitutional Tribunal under the Constitution of the Kingdom of Thailand (Interim) B.E. 2549 (2006) became the Constitutional Court; paragraph three provided for the continued application of the provisions in section 35 paragraph two, paragraph three and paragraph four of the Constitution of the Kingdom of Thailand (Interim) B.E. 2549 (2006) until the enactment of the Organic Act on Constitutional Court Procedures; and paragraph four provided that all cases or matters pending proceedings in the Constitutional Tribunal under paragraph one would be continued by the Constitutional Court under this section. Also, 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. Hence, the Constitutional Court had the power to admit this application for trial and adjudication.

The Constitutional Court examined the application and found that at the time of trial of the application in the Constitutional Court, the Constitution of the Kingdom of Thailand B.E. 2550 (2007) had already been promulgated. The constitutional review of

any provision of law therefore had to take into consideration whether or not such provisions of law were contrary to or inconsistent with the Constitution in force at the time of ruling by the Constitutional Court. Since the provisions of section 26, section 27, section 28, section 29, section 30, section 36 and section 50 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997), which were raised in the applicant's objection that provisions of law were contrary to or inconsistent with, embodied identical principles to the provisions of section 26, section 27, section 28, section 29, section 30, section 34 and section 43 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007), the Constitutional Court therefore ruled this application in accordance with the provisions of section 26, section 27, section 28, section 29, section 30, section 34 and section 43 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

The issues considered by the Constitutional Court were therefore whether or not clause 3 of the Announcement of the National Executive Council No. 45, dated 17th January B.E. 2515 (1972), as amended by clause 1 of the Announcement of the National Executive Council No. 252, dated 16th November B.E. 2515 (1972), was contrary to or inconsistent with section 26, section 27, section 28, section 29, section 30, section 34 and section 43 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

The Constitution of the Kingdom of Thailand B.E. 2550 (2007), in section 43 paragraph one, recognized the liberty of a person to engage in an enterprise or occupation with the exception of the enactment of a law to restrict such liberty as provided under section 43 paragraph two. Such restriction of personal liberty as recognized by the Constitution also had to be consistent with the principle of the protection of rights and liberties as provided under section 29. When considering a law restricting rights and liberties as recognized by the Constitution, apart from taking into account the public conditions and way of living of the people at the time of enactment of the law, regard must also be given to the public conditions and way of living of the people at the time of the application of such law. It was understood that at the time of the law's promulgation, the National Executive Council had successfully seized governing powers on 17th November B.E. 2514 (1971) and repealed the Constitution of the Kingdom of Thailand B.E. 2511 (1968). The forms of authorized agencies were altered, whereby the Executive Branch, i.e. the government, exercised both executive and legislative powers concurrently in order to secure peace and order until the promulgation of a Constitution in accordance with the tradition of the democratic form of government with the King as head of state. Moreover, at the time of such seizure of powers, the National Executive Council, in exercising national administration powers, wished for the people to remain in peace, without any disorder that would affect national security, and therefore restricted rights and liberties of the people, especially in the case of the Announcement of the National Executive Council which was raised as an issue in this case. In this connection, the rights and liberties of a business operator or person carrying out the occupation pertaining to a food or beverages shop were restricted, along with the restriction of the rights and liberties of consumers who were members of the public. The National Executive Council did not want the people to leave

their homes at night, which would pose difficulties to controls and monitors, and could lead to secret gatherings and disorder that would affect national security and public order. Such restrictions were necessary when the public situation was administered by a coup d'état, as evidenced in the preamble to the Announcement of the National Executive Council. Nonetheless, at a time when the public situation returned to normalcy, the way of life of individuals naturally differed from such a situation. Also, at the present time of globalization, societies had changed significantly. The country's economy had advanced, national transportation became convenient, and the people were able to travel to various places at all times. As a result, the daily routine of the people had altered such that it was no longer determinable as to which times were working hours and which times were recreational hours. Due to such changes, the government was no longer able to control the people to remain in their homes at night as people found it necessary to travel for business or a variety of other purposes, including also business operators or persons engaged in occupations pertaining to food or beverage shops during nighttime.

Clause 3 of the Announcement of the National Executive Council No. 45, dated 17th January B.E. 2515 (1972), as amended by clause 1 of the Announcement of the National Executive Council No. 252, dated 16th November B.E. 2515 (1972), by prohibiting an owner or occupier of a premise which sold food or beverages from selling food or beverages between 01.00 hours till 05.00 hours, except with the prior permission of the Director-General of the Police Department for Bangkok-Thonburi City or the Provincial Governor for other provinces, certainly constituted a direct restriction of the people's liberty to engage in an enterprise or occupation as well as to engage in free and fair competition as provided under section 43 paragraph one of the Constitution. The only question remained as to whether or not such restriction of liberty fell within the exceptions permitting restrictions by virtue of provisions of law in paragraph two. In this regard, a provision of law authorizing the restriction of the people's liberty to engage in an enterprise or occupation had to be limited to "the benefit of maintaining national or economic security, the protection of the people with regard to public utilities, maintenance of public order or the good morals of the people, maintaining order in occupations, consumer protection, city planning, preservation of natural resources or the environment, the people's welfare or to prevent monopolies or eradicate unfair behavior in competition," as provided under section 43 paragraph two of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). Moreover, the restriction could only be imposed to the "extent of necessity and should not affect the essential substances of such rights and liberties" as provided under section 29 paragraph one of the Constitution.

The restriction of the liberty to sell food or beverages between 01.00 hours and 05.00 hours of each day, apart from constituting an unnecessary restriction of the opportunity to engage in an honest commercial occupation of a significant number of people, also imposed a burden on people engaged in other honest occupations who needed to consume food or beverages during such times of each day without any justifying reasons or necessities. Even though the restriction was mitigated by the provision of

licensing from the Director-General of the Police Department or the Provincial Governor, it still created unnecessary conditions and burdens on the exercise of such liberty. The requirement that people who engaged in the occupation of selling food or beverages in all areas throughout the country should apply for a license from a high-ranking state official was difficult to implement in practice, and also caused the people engaged in such occupations to be subject to the empowerment of officials without reasonable justification. It was apparent that the restriction of such liberty was not in any manner beneficial to the security of the state or the national economy, the protection of the people with regard to public utilities, the maintenance of public order or good morals of the people, or other benefits as specified under section 43 paragraph two of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). In addition, the needs pertaining to the maintenance of public order had changed, and the measures were no longer suitable to the current way of life of the people. The restriction of the people's liberty as recognized under the Constitution therefore exceeded the extent of necessity and affected the essential substance of such liberty, thus prohibited under section 29 paragraph one of the Constitution.

3. Ruling of the Constitutional Court

By virtue of the foregoing reasons, the Constitutional Court held that clause 3 of the Announcement of the National Executive Council No. 45, dated 17th January B.E. 2515 (1972), as amended by clause 1 of the Announcement of the National Executive Council No. 252, dated 16th November B.E. 2515 (1972), was unconstitutional for being contrary to or inconsistent with section 29 paragraph one and section 43 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007), and therefore rendered unenforceable under section 6 of the Constitution. It was thus unnecessary to make a further ruling on whether such provision of law was contrary to or inconsistent with other sections of the Constitution.
