

Summary of Constitutional Court Ruling No. 15/2552

Dated 4th November B.E. 2552 (2009)*

Re: The President of the National Legislative Assembly referred the opinion of members of the National Legislative Assembly to the Constitutional Court for a ruling under section 154 paragraph one (1) of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) on whether or not section 25 and section 35 of the Community Forest Bill B.E. were contrary to or inconsistent with section 66 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

.....

1. Summary of background and facts

The President of the National Legislative Assembly referred the opinion of General Surin Pikultong, member of the National Legislative Assembly, and others, comprising 29 persons, as the applicants, to the Constitutional Court. The facts could be summarized as follows.

The applicants submitted an opinion to the President of the National Legislative Assembly that section 25 and section 35 of the Community Forest Bill B.E. (appeared as section 34 in the Bill considered by the committee, and as section 35 in the Bill approved for promulgation into law by the National Legislative Assembly) contained provisions contrary to or inconsistent with section 66 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). Thus, it was requested that a referral be made to the Constitutional Court for a ruling under section 154 paragraph one subparagraph (1) of the Constitution. The following opinion was given.

1. Section 25 of the Community Forest Bill B.E. was contrary to or inconsistent with section 66 of the Constitution since section 66 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) provided for the recognition of the community's rights to preserve or revive traditions, local wisdom, good arts and tradition of a community and the nation, as well as to participate in the management, maintenance and utilization of natural resources, the environment, including biological diversity in a balanced and sustainable manner. The intent of section 66, provided as "recognition of rights", was the recognition of pre-existing matters, which could be in the form of ways of lives and traditions continuously followed by the community. In this case, the way of life relevant to the conservation and

* Published in the Government Gazette Vol. 127, Part 13a, dated 23rd February B.E. 2553 (2010)

utilization of forests, which had developed and transformed into the traditional system of one community over long and varying periods of time, was a concrete right of the community recognized by the academic society. However, it appeared that section 25 and section 35 of the Community Forest Bill B.E. possessed the characteristics of restricting rights or revoking the rights of a community that had existed previously. In other words, several communities had already undertaken the proper conservation, maintenance and utilization of community forests to the extent that several were renowned as exemplary in the management of community forests. Such management of community forests was carried out both in forest conservation zones and outside forest conservation zones without any problem on whether or not the community was situated in the conservation zone. Yet, the Community Forest Bill B.E. prescribed conditions which amounted to the elimination of a pre-existing community right in the management of a community forest, by laying down a time condition of ten years, and a categorization condition of conservation zoning. In this regard, the condition imposed by the Bill applied rules of conservation zones, or other zones to be determined by the state, was inconsistent with the actual descriptions of pre-existing community forests. As a result, communities situated on the border of conservation zones, despite having managed community forests in the conservation zone for not less than ten years prior to the promulgation of the Community Forest Act, and in spite of having other qualities as provided in section 25, would have no right to submit an application to establish a community forest.

2. Section 35 of the Community Forest Bill B.E., a provision on the management of community forests, provided that “the making of lumber in a community forest situated in a conservation zone is prohibited.” In this regard, section 3 of such Bill provided that the term “making lumber” meant cutting, chopping, pruning, falling, trimming, sawing, dissecting, grazing, uprooting, digging or dragging wood in a forest, or removing wood existing in a forest from the forest by any means. Therefore, even though a community might have all the qualifications and conditions under section 25, and had satisfied all the inspection processes and been awarded with a license to establish a community forest in a conservation zone, such community still did not have any right to utilize the wood. Hence, the prohibition against the utilization of wood from a community forest situated in a conservation zone, whether a community forest in an area for utilization or an area for conservation, was contrary to or inconsistent with the actual conditions of the community’s way of life, and further amounted to the delimitation and restriction of the rights of a community in the conservation and revival of good local tradition and wisdom, as well as the community’s right to utilize natural resources in a balanced and sustainable manner as recognized and protected under section 66 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

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 proceedings in the Constitutional Court under 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 become the Constitutional Court, and paragraph four provided that upon the appointment of Constitutional Court Judges under this Constitution, all such cases or matters pending proceedings would be transferred to the powers and duties of the newly appointed Constitutional Court.

Section 154 paragraph one of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) provided that “after any Bill has been approved by the National Assembly under section 150 or has been reaffirmed by the National Assembly under section 151, before the Prime Minister presents it to the King for signature, (1) if members of the House of Representatives, senators or members of both Houses of the National Assembly comprising not fewer than one-tenth of the existing members of both Houses finds that the provisions of the said Bill are contrary to or inconsistent with this Constitution, or has not been duly enacted in accordance with the provisions of this Constitution, an opinion shall be submitted to the President of the House of Representatives, President of the Senate or President of the National Assembly, as the case may be, and the President of the House receiving such opinion shall refer the opinion to the Constitutional Court for a ruling and notify the Prime Minister without delay.” Section 293 paragraph one provided that “the National Legislative Assembly under the Constitution of the Kingdom of Thailand (Interim) B.E. 2549 (2006) shall 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 under section 127.”

After consideration, it was found that the National Legislative Assembly under the Constitution of the Kingdom of Thailand (Interim) B.E. 2549 (2006) had considered the Community Forest Bill B.E. and had given approval of such Bill in a special sitting of the National Legislative Assembly No. 65/2550 (2007) on Wednesday, 21st November B.E. 2550 (2007). Thus, it was deemed that the National Legislative Assembly performed the functions of the National Assembly as provided under section 293 paragraph one of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). The applicants consisted of 29 members of the National Legislative Assembly, which was a number not fewer than one-tenth of the existing members of the National Legislative Assembly (the National Legislative Assembly consisted of 242 members at that time), entering their names in the submission of an opinion that the provisions of section 25 and section 35 of the Community Forest Bill B.E. were contrary to or inconsistent with section 66 of 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 the referral of the application by the President of the National Legislative Assembly to the Constitutional Court for ruling, the Constitutional Court therefore had the power to admit this application for a ruling under section 154 paragraph one subparagraph (1), and that related persons, namely the President of the National Legislative

Assembly, the Prime Minister and the Minister of Natural Resources and the Environment should submit an opinion statement, and the Secretary-General of the Senate should submit documents and information pertaining to the consideration of the Community Forest Bill B.E. to the Constitutional Court for examination. In this connection, the related persons submitted statements and documents to the Constitutional Court.

3. Issues considered by the Constitutional Court

The Constitutional Court examined the application, statements, documents and evidence supporting the applicants and the related persons and found that there was already sufficient evidence in this case to make a ruling. The issues to be ruled upon were thus determined as follows: (1) whether or not the Community Forest Bill B.E. had been duly enacted in accordance with the provisions of the Constitution of the Kingdom of Thailand B.E. 2550 (2007); (2) whether or not the provisions of section 25 and section 35 of the Community Forest Bill B.E. were contrary to or inconsistent with section 66 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

The first issue was whether or not the Community Forest Bill B.E. had been duly enacted in accordance with the provisions of the Constitution.

After consideration, it was found that the Constitution of the Kingdom of Thailand B.E. 2550 (2007) provided for the Constitutional Court to have the roles and powers of safeguarding the rights and liberties of the people through the constitutional review of laws pursuant to the principle of pre-promulgation of laws under section 141 and section 154. This was a review of whether or not an Organic Bill or other Bills approved by the National Assembly had been duly enacted in accordance with the provisions of the Constitution and whether or not there were provisions contrary to or inconsistent with the Constitution. The Constitutional Court could also undertake a post-promulgation review of laws pursuant to section 211, section 212, section 245 and section 257, which provided for the Court to try and adjudicate cases where a person's rights and liberties were violated, and where the Ombudsman and National Human Rights Commission submitted a matter for a ruling on whether or not a promulgated law contained provisions that were contrary to or inconsistent with the Constitution, in which case the issues of unconstitutionality in the enactment process of such law could not be raised for a ruling of the Constitutional Court.

A request for constitutional review of other Bills which were not Organic Bills prior to promulgation as law was provided under section 154 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). In other words, prior to the presentation of a Bill to the King for Royal Assent, if members of the House of Representatives or senators, or members of both Houses constituting the number prescribed by the Constitution, or the Prime Minister, found that a Bill contained provisions contrary to or inconsistent with the Constitution, or had not been enacted in accordance with the provisions of the Constitution, the President of the House receiving such opinion, or the Prime Minister should send the opinion to the Constitutional Court for a ruling.

Such provisions of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) provided for the Constitutional Court to undertake a constitutional review of a Bill on, firstly, the issue of whether or not the Bill had been duly enacted in accordance with the provisions of the Constitution, and secondly, whether or not such Bill contained provisions that were contrary to or inconsistent with this Constitution. If the Constitutional Court found that such Bill contained provisions contrary to or inconsistent with this Constitution, and that such provisions constituted the essence of the Bill, or that the Bill had not been duly enacted in accordance with the provisions of this Constitution, such Bill would lapse under section 154 paragraph three.

Therefore, even if the applicant did not request the Constitutional Court to undertake a review of the enactment process with regard to the Bill, i.e. whether or not the Bill had been duly enacted in accordance with the provisions of the Constitution, the Constitutional Court still had the power to rule on the issue of the constitutionality of the enactment process of the Bill.

On the issue of whether or not the Community Forest Bill B.E. had been duly enacted in accordance with the provisions of the Constitution, a prior issue had to be decided as to whether or not the votes of 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).

Constitution of the Kingdom of Thailand (Interim) B.E. 2549 (2006):

Section 5 paragraph one. There shall be members of the National Legislative Assembly consisting of not more than two hundred and fifty persons appointed by the King from persons holding Thai nationality by birth and having not less than thirty-five years of age.

Section 9 paragraph one. A sitting of the National Legislative Assembly must be attended by not less than one-half of the total number of members in order to constitute a quorum.

Constitution of the Kingdom of Thailand B.E. 2550 (2007):

Section 126 paragraph one. A sitting of the House of Representatives and sitting of the Senate must be attended by not less than one-half of the existing members of each House in order to constitute a quorum, except in the case of a deliberation on an agenda on questions under section 156 and section 157, the House of Representatives and Senate may provide otherwise for a meeting quorum in its Rules.

After consideration, the Constitutional Court found that 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) had

identical essential substances, i.e. a sufficient number of members had been prescribed in order to enable the collective expression of opinions and expression of intent in the form of a meeting resolution in the consideration of a Bill and the performance of other functions under the provisions of the Constitution, which was a parliamentary session principle used in various civilized countries. Constitutions of the Kingdom of Thailand that had been in force in the past all contained provisions on meeting quorums so as to ensure that House deliberations on various matters were carried out meticulously and that debates and exchanges of opinions were made widely. In particular, with regard to the performance of functions of the House of Representatives and the Senate on the enactment of laws, upon Royal Assent and publication in the Government Gazette, such laws would be applicable on all the people throughout the country. It was therefore crucial that careful consideration be undertaken in all readings. And as the Constitution prescribed a quorum constituting not less than one-half of the existing members of each House, it necessary followed that a sitting of the House of Representatives and sitting of the Senate attended by members deficient of the quorum could not be held as the exercise of legislative powers by the House of Representatives and Senate. Furthermore, if votes were made in a sitting of the House of Representatives and sitting of the Senate which were not properly constituted as a quorum, they could not be deemed as votes made in the House of Representatives and Senate duly made under the provisions of the Constitution.

As for the enactment of the Community Forest Bill B.E., section 293 paragraph one of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) provided that the National Legislative Assembly under the Constitution of the Kingdom of Thailand (Interim) B.E. 2549 (2006) should perform the functions 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. Votes in the sittings of the National Legislative Assembly must therefore also be made in a quorum in order to be held as votes properly made under the provisions of the Constitution.

After consideration, the Constitutional Court found that, as the facts appeared from the copies of the minutes and copies of voting records of members of the National Legislative Assembly in sitting no. 20/2550 (2007), on Thursday, 19th April B.E. 2550 (2007), which was the day of votes in the National Legislative Assembly in the first reading to approve the principle of the Community Forest Bill B.E., that there were 114 members from the actual number of members of the National Legislative Assembly of 240, the requirement of one-half the total number of members of the National Legislative Assembly at the time was therefore not met, i.e. 120 members. A quorum was therefore not constituted and the votes made in such deficient quorum could not be held as resolution duly passed by the National Legislative Assembly under section 9 paragraph one of the Constitution of the Kingdom of Thailand (Interim) B.E. 2549 (2006), which was 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 deliberated on the Community Forest Bill B.E. in the second and third readings in special sitting of the National Legislative Assembly No. 65/2550 (2007), on Wednesday, 21st November B.E. 2550 (2007). It appeared that in the second reading, the members present in the consideration of draft section 25, in regard to which a committee member reserved a motion to entirely delete the provisions in Chapter V Establishment of a Community Forest in the Preservation Zone, there were only 89 members present; in relation to draft section 25, which a committee member reserved a motion to amend section 25, there were only 94 members present; and in relation to draft section 35, there were only 61 members present. As for the third reading, there were only 60 members present, a number which was deficient of one-half the existing members of the National Legislative Assembly at the time, being 121 members. A quorum was thus not constituted and the votes of such deficient quorum could not be held as a resolution duly passed by the National Legislative Assembly under section 126 paragraph one of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

Hence, as the sittings of the National Legislative Assembly were deficient of a quorum and the votes in the deficient quorum could not be held as a resolution duly passed by the National Legislative Assembly under the Constitution, the enactment of the Community Forest Bill B.E. was therefore not duly made under the provisions of the Constitution of the Kingdom of Thailand B.E. 2550 (2007), resulting in the lapse of this Bill as provided under section 154 paragraph three of the Constitution, which provided that if the Constitutional Court ruled that a Bill was not duly enacted in accordance with the provisions of this Constitution, such Bill should lapse. Furthermore, upon the lapse of the Community Forest Bill B.E. pursuant to section 154 paragraph three of the Constitution, this case did not require a ruling on whether or not section 25 and section 35 of the Community Forest Bill B.E. contained provisions contrary to or inconsistent with section 66 of the Constitution since a decision on such issue would not alter the outcome of this ruling.

4. Ruling of the Constitutional Court

The Constitutional Court held that the Community Forest Bill B.E. had not been duly enacted in accordance with the provisions of the Constitution and lapsed under section 154 paragraph three of the Constitution.
