

Summary of Constitutional Court Ruling No. 10-11/2553 (2010)

Dated 6th September B.E. 2553 (2010)*

Re: Dusit District Court referred the objections of a defendant (Police Lieutenant Colonel Waipot Apornrat) in criminal case no. 1288/2552 (2009) to the Constitutional Court for a ruling under section 211 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) on whether or not section 9(2) and section 11(1) of the Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005) were contrary to or inconsistent with section 32, section 39 and section 63 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

Re: Dusit District Court referred the objections of a defendant (Mr. Suporn Attawong) in criminal case no. 1627/2552 (2009) to the Constitutional Court for a ruling under section 211 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) on whether or not section 4, section 5, section 9(2), section 11 and section 18 of the Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005) were contrary to or inconsistent with section 27, section 29, section 32, section 36, section 39, section 45, section 63 and section 87(3) of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

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1. Summary of background and facts

The facts in the applications and supporting documents of both applications could be summarised as follows.

First Application. On 24th April B.E. 2552 (2009), the state attorney instituted legal proceedings against the defendant (Police Lieutenant Colonel Waipot Apornrat), the essence of which could be summarised as follows. On 13th April B.E. 2552 (2009), the defendant along with Mr. Suporn Attawong and others, constituting more than five persons, assembled for unlawful purposes and incited unrest in violation of the Declaration of Serious Emergency Situation, dated 12th April B.E. 2552 (2009), and the Regulation issued under

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section 9 of the Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005), dated 12th April B.E. 2552 (2009). The defendant subsequently submitted a motion to the Dusit District Court requesting for a referral of an application to the Constitutional Court. It was stated in the objection that the Declaration of Serious Emergency Situation and regulation issued by the Prime Minister constituted a reliance of legal powers to disperse a peaceful and arms-free assembly of the people, a fundamental liberty recognized and protected by the Constitution of the Kingdom of Thailand B.E. 2550 (2007). In addition, powers were exercised under section 11 of the Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005) to give competent officials the power to arrest and hold custody of suspects even in the absence of any wrongdoing by the suspect and without having to give notice of any charge. The defendant was one of the persons subject to the abuse of powers by the Government. It was therefore contended that section 9(2) and section 11(1) of the Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005), the Declaration of Serious Emergency Situation, dated 12th April B.E. 2552 (2009) and the Regulation issued under Section 9 of the Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005) were either contrary to or inconsistent with section 32, section 39 and section 63 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

Second Application. On 27th May B.E. 2552 (2009), the state attorney instituted legal proceedings against the defendant (Mr. Suporn Attawong) based on the same facts as the first application. The defendant subsequently submitted a motion to the Dusit District Court requesting for a referral of an application to the Constitutional Court. It was stated in objection that the Policy Declaration of the Council of Ministers led by Mr. Abhisit Vejjajiva as Prime Minister on 30th December B.E. 2551 (2008) was not regarded as a policy declaration to the National Assembly as provided under section 176 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). As a result, the Prime Minister was not authorised to administer the nation and did not have the authority to enact laws, notifications or any order. The Prime Minister's declaration of a serious emergency situation was therefore unconstitutional. The assembly conducted by the defendant and "red-shirts" was an exercise of a right under section 70 of the Constitution and thus not deemed as an offence under the Penal Code. On the contrary, it amounted to an exercise of rights under section 63 of the Constitution. Hence, the Declaration of Serious Emergency Situation issued by the Prime Minister in reliance of the Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005) in order to disperse the assembly on 12th April B.E. 2552 (2009) was therefore contrary to or inconsistent with section 27, section 29, section 36, section 45, section 63 and section 87(3) of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

The Dusit District Court ordered the consolidation of the two cases into one trial. Upon examination of the motions filed by both defendants, it was found that they were cases under section 211 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) and there were no prior rulings of the Constitutional Court on those issues. The matter was therefore referred to the Constitutional Court for a ruling on whether or not section 9(2) and section

11(1) of the Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005), the Declaration of Serious Emergency Situation, date 12th April B.E. 2552 (2009) and the Regulation issued under section 9 of the Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005), dated 12th April B.E. 2552 (2009) were contrary to or inconsistent with section 32, section 39 and section 63 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

2. Preliminary issue

The preliminary issue considered was whether or not the Constitutional Court had the competence to admit these applications for trial and adjudication under section 211 paragraph one of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). The Constitutional Court found as follows. The applications were cases where the Dusit District Court referred the objections of both defendants to the Constitutional Court for a ruling under section 211 paragraph one of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) on whether or not section 9(2) and section 11(1) of the Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005) were contrary to or inconsistent with section 32, section 39 and section 63 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). There were no prior rulings of the Constitutional Court in relation to such provisions. As the case was in accordance with section 211 paragraph one of the Constitution, the Constitutional Court therefore ordered the admittance of both applications for trial and adjudication.

As for the request for Constitutional Court ruling on whether or not the Declaration of Serious Emergency Situation, dated 12th April B.E. 2552 (2009) and Regulation issued under Section 9 of the Emergency Decree on Public Administration in Emergency Situation B.E. 2548 (2005), dated 12th April B.E. 2552 (2009), were contrary to or inconsistent with section 32, section 39 and section 63 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007), the Constitutional Court held that such Declaration and Regulation were not enacted by an organ exercising legislative powers. The enactments were therefore not provisions of law within the meaning of section 211 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). Hence, the Constitutional Court did not have to make a ruling.

3. The issues considered by the Constitutional Court

The issues considered by the Constitutional Court were whether or not section 9(2) and section 11(1) of the Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005) were contrary to or inconsistent with section 32, section 39 and section 63 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

Section 32 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) was a provision on the protection of rights and liberties in the lives and bodies of the people. Section 39 was a provision on safeguards of the people from criminal sanctions except

where a person committed an act which constituted a punishable offence by a law in force at the time of commission, and in a criminal proceeding the alleged person or defendant should be presumed innocent. Finally, section 63 was a provision which recognized the liberty to assemble.

The Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005) was a law intended to empower the executive to administer a situation having an impact on state security or potentially causing the country or any part thereof to fall into a precarious situation which could in turn impact the unity and integrity of its territory. The Emergency Decree also aimed to address problems arising from natural disasters and the restoration of the affected people's livelihoods. In this regard, section 9(2) provided the Prime Minister with the power to issue regulations as necessary so as to reach a speedy resolution of the emergency situation or in order to avoid the aggravation of the situation. There would be a prohibition on assembly or gathering at any place as well as on any act that would provoke unrest and disorder. Section 11(1) provided the Prime Minister, upon the approval of the Council of Ministers, with the power to declare that an emergency situation was a serious emergency situation if there appear to be terrorist acts, use of force against lives and bodies or properties, or reasonable cause to believe that a serious act had been committed thereby affecting the security of the state, safety of lives or properties of the state or the people, and that it was necessary to expedite the resolution of such problem efficiently and in a timely manner. An announcement could be made to grant competent officials with the powers of arrest and custody of persons suspected of being involved in causing the emergency situation, or being the agent provocateur, promoter, abettor, or for concealing information on the acts causing the emergency situation. The extent of such authority was defined by the necessity to prevent such person from committing or conspiring to commit any act that would cause a serious event or to enable cooperation in the resolution of such serious situation.

After deliberations, the Constitutional Court found as follows. The exercise of powers by the Prime Minister in issuing regulations under section 9(2) and section 11(1) were important measures or tools of the executive for preventing a serious event or to achieve a speedy resolution of an emergency situation. When implementing section 9(2), there was a condition that the regulation should specify the timeframe for implementation or conditions for the exercise of functions by competent officials, or to delegate to the competent official the task of prescribing the area and further details so as to ensure that those exercise of functions did not cause undue grievances on the people. Section 11(1) merely provided the procedures for arresting and holding custody of a person suspected of having an involvement in causing the emergency situation or of being an agent provocateur, campaigner, abettor or having concealed information relating to the acts causing the emergency situation. The provision aimed at preventing such person from acting or conspiring to commit any act which would cause a serious situation or at enabling collaboration in the resolution of the serious situation. The arrest and custody of suspected persons were not unfettered discretions of the competent officials. The competent officials, however, had to petition a court of

competent jurisdiction or the Criminal Court for authorization under section 12 paragraph one of the Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005), thus providing another layer of review by the Courts of Justice on the exercise of powers by competent officials. In no instance was the people treated as an offender. Moreover, section 9(2) and section 11(1), despite the restrictions on the people's rights and liberties, granted powers only to the extent of necessity for the speedy resolution of an emergency situation or the prevention of a serious event or the resolution of an emergency event. The provisions would protect the common interests of the nation and the people. The provisions were therefore within the scope permitted by the Constitution. The essential substances of rights and liberties were not affected. The provisions were also generally applicable and not aimed at any particular case or person.

4. Ruling of the Constitutional Court

By virtue of the aforesaid reasons, the Constitutional Court held that section 9(2) and section 11(1) of the Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005) were neither contrary to nor inconsistent with section 32, section 39 and section 63 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).
