

Summary of the Constitutional Court Ruling* No. 34/2554 (2011)

Dated 23rd November B.E. 2554 (2011)

Re: The National Human Rights Commission submitted a matter to the Constitutional Court for a ruling under section 257 paragraph one (2) of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) on whether or not section 86 of the Private Schools Act B.E. 2550 (2007) as amended by the Private Schools Act (No. 2) B.E. 2554 (2010) was consistent with section 27, section 29, section 30, section 44, section 64, section 81(2) and section 84(7) of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

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1. Summary of background and facts

The National Human Rights Commission, applicant, submitted an application dated 29th September B.E. 2551 (2008) along with supporting documents to the Constitutional Court for a ruling under section 257 paragraph one (2) of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). The facts could be summarised as follows.

The applicant received a complaint from Mrs. Heidi Park Charoenporn, Chairperson of the Thai-Chinese Schools National Union, calling for the repeal of section 86 of the Private Schools Act B.E. 2550 (2007). The Private School Teachers Association of Thailand, representative of private school employees, complained against state policies violating social security rights of private school employees. The Labour Committee and International Schools Trade Union complained of grievances as a result of the promulgation of the Private Schools Act B.E. 2550 (2007).

The applicant examined all three complaints and found that section 86 of the Private Schools Act B.E. 2550 (2007) was inconsistent with section 27, section 29, section 30, section 44, section 64, section 81(2) and section 84(7) of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). The applicant therefore passed a resolution to submit the matter along with an opinion to the Constitutional Court for a ruling under section 257 paragraph one (2) of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). The following reasons were stated:

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(1) Section 86 of the Private Schools Act B.E. 2550 (2007) stated that “the operations of in-system schools were not subject to the law on labour protection, law on labour relations, law on social security and law on workmen’s compensation...” As a consequence, employees and workers in private schools who were insured under section 33 of the Social Security Act B.E. 2533 (1990) and used to pay contributions to the social security fund entitling them to benefits in 7 cases, namely 1) danger or illness, 2) disability, 3) death, 4) giving birth, 5) child aid, 6) old-age and 7) unemployment, had their insured statuses terminated as an implication of the Private Schools Act B.E. 2550 (2007). These people no longer had any right to receive benefits or compensation. When the law came into force, all agencies failed to cope with the impact on the rights of such employees, despite the advice of the Social Security Office, Ministry of Labour, and the Private Education Promotion Commission, Ministry of Education, that employees of private schools who used to be insured under section 33 of the Social Security Act B.E. 2533 (1990) and whose insured statuses were terminated under section 86 of the Private Schools Act B.E. 2550 (2007) should apply for insurance under section 39 within six months as from the effective date of the law on private schools. Under the Social Security Act B.E. 2533 (1990), insured persons were divided into 3 categories, namely:

(1.1) An insured person under section 33, i.e. an employee in a business required by law to remit a contribution to the social security fund. In this case, the employer and government had to remit a contribution at the rate prescribed by law and the employee would receive compensation in 7 cases. At the time of the case, the contribution rate for the employee, employer and government was five percent of the wage base, from 1,650 baht but not exceeding 15,000 baht per month.

(1.2) An insured person under section 39, i.e. an insured person under section 33 who had remitted contributions for not less than twelve months and whose insured person status terminated under section 38(2). In this case, if such person wished to continue as an insured person, notice of intent should be filed at the Social Security Office within six months as from the cessation of insured person status and contribution should be paid at twice the amount applicable for an insured person under section 33 from a wage base of 4,800 baht. Compensation would be paid in 6 cases, namely: 1) danger or illness, 2) disability, 3) death, 4) giving birth, 5) childcare and 6) old age, except for unemployment for which a flat-rate monthly contribution of 432 baht had to be paid by each person without regard to the income base of the insured person. However, as a consequence of the Private Schools Act B.E. 2550 (2007), numerous employees of private schools (more than 10,000 persons) were disentitled from receiving compensation benefits under section 33 of the Social Security Act B.E. 2533 (1990). At the time of this case, there were 2 categories of affected persons, namely the category of persons wishing to remain in the social security system who were compelled to become insured persons under section 39, having to pay a greater contribution whilst receiving less benefits, and the category of persons who did not wish to become an insured person under section 39, thence losing their statuses as insured persons and becoming deprived of protection under all labour laws.

(1.3) An insured person under section 40, i.e. a person who was not an employee under the Social Security Act B.E. 2533 (1990) and voluntarily became an insured person, having to pay annual contributions in the amount of 3,360 baht per year and receiving compensation benefits in only 3 cases, namely 1) giving birth, 2) disability and 3) death. In addition, the Private Schools Act B.E. 2550 (2007) affected the rights of private school employees to form a labour committee and trade union, as stated in the application of the International Schools Trade Union, which had played an important role in safeguarding the rights and benefits of employees for more than 25 years. Such labour committees and trade unions would be deprived of rights and roles, which was unconstitutional.

(2) The Private Schools Act B.E. 2550 (2007) also contained provisions which were not consistent with relevant international laws and covenants to which Thailand had become a party, namely:

(2.1) The International Covenant on Economic, Social and Cultural Rights (ICESCR), in particular article 8 on the right of a person to form and join a trade union and article 9 on the right of a person to social security and social insurance. Thailand became a party by accession on 6th September B.E. 2542 (1999) and the covenant entered into force for Thailand on 5th December B.E. 2542 (1999).

(2.2) The International Covenant on Civil and Political Rights (ICCPR), in particular article 26 on the right of a person to receive equal protection under the law. Thailand became a party by accession on 27th October B.E. 2539 (1996) and the covenant entered into force for Thailand on 30th January B.E. 2540 (1997).

(2.3) The ILO Declaration on Fundamental Principles and Rights at Work, as regards the elimination of discrimination in employment and professions and the freedom of association and collective bargaining.

(3) The Ministry of Education and the Government hastily introduced the Private Schools Act B.E. 2550 (2007) without circulating the Bill to the relevant Ministries, Sub-Ministries and Departments for opinion contrary to the longstanding practice of the Government in introducing and enacting legislation. The Government, in particular the Ministry of Education, was also unable to prescribe any executive measure to restore the people's rights.

2. Preliminary issue

The preliminary issue was whether the Constitutional Court had the competence to admit this application for a ruling under section 257 paragraph one (2) of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

After examination of the application, the Constitutional Court found that this application was a case where the National Human Rights Commission submitted a matter together with an opinion to the Constitutional Court in concurrence with a complaint that

section 86 of the Private Schools Act B.E. 2550 (2007) was contrary to or inconsistent with section 27, section 29, section 30, section 44, section 64, section 81(2) and section 84(7) of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). The application was therefore in accordance with section 257 paragraph one (2) of the Constitution in conjunction with article 17(19) of the Rules of the Constitutional Court on Procedures and Rulings B.E. 2550 (2007). The Constitutional Court therefore ordered the admittance of this application for ruling.

3. The issues considered by the Constitutional Court

During proceedings in the Constitutional Court, the Private Schools Act (No. 2) B.E. 2554 (2011) was enacted to amend section 86 of the Private Schools Act B.E. 2550 (2007) from:

“Section 86. The activities of an in-system school are not subject to the application of the law on labour protection, law on labour relations, law on social security and law on workmen’s compensation. A school worker, however, shall receive remuneration in an amount not less than as provided under the law on labour protection.

The protection of working conditions and the formation of a committee for the protection of working conditions and minimum remuneration for in-system school workers shall be as prescribed by regulation of the Board.”

The aforesaid provisions were repealed and replaced by the following:

“Section 86. The activities of an in-system school only in regard to the director, teachers and educational personnel are not subject to the law on labour protection, law on labour relations, law on social security and law on workmen’s compensation. The director, teachers and educational personnel, however, shall receive remuneration in an amount not less than as provided under the law on labour protection.

The protection of working conditions and the formation of a committee for the protection of working conditions and minimum remunerations committee for the director, teachers and educational personnel of an in-system school shall be as prescribed by regulation of the Board.”

After deliberations, the Constitutional Court found as follows. Section 86 of the Private Schools Act B.E. 2550 (2007), as amended by the Private Schools Act (No. 2) B.E. 2554 (2011) divided school workers of in-system private schools into two categories. The first category consisted of the director, teachers and educational personnel, i.e. persons involved in teaching, who were not governed by the law on labour protection, law on labour relations, law on social security and law on workmen’s compensation. The second category consisted of other workers who were not directly involved in teaching, e.g. dispatch carrier, laborer, driver and cleaner, who were still governed by such laws. Such categorization was made for the purpose of the application of laws. The principles under the previous law,

however, had been retained. The Constitutional Court therefore had the competence to continue with these proceedings insofar as they related only to the persons still governed by section 86, namely the director, teachers and educational personnel. The issues which had to be decided by the Constitutional Court were whether or not section 86 of the Private Schools Act B.E. 2550 (2007) was contrary to or inconsistent with section 27, section 29, section 30, section 44, section 64, section 81(2) and section 84(7) of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

The Constitutional Court reached the following findings. The Private Schools Act B.E. 2550 (2007) as amended by the Private Schools Act (No. 2) B.E. 2554 (2011) was intended to ensure that the provision of educational services by a private school having juristic person status and an executive committee responsible for the management and administration of the private school enjoyed independence under the supervision, monitoring and assessment of educational quality and standards in the same manner as a public educational establishment, as well as to allow private participation in the provision of educational services. The state was ready to provide sponsorship in the form of finance, benefits and technical assistance to private educational establishments. Section 86 provided for the activities of an in-system school, with respect to the director, teachers and educational personnel, i.e. persons involved in teaching, to be excluded from the application of the law on labour protection, law on labour relations, law on social security and law on workmen's compensation, and that there should be a committee for the protection of working conditions and minimum remunerations responsible for the protection of working conditions and benefits of such persons. In any event, the benefits under this Act should not be less than as provided under the law on labour protection. Such a provision protected the working conditions of the director, teachers and educational personnel of in-system schools to ensure equality in the essence. The provision was not directed at any particular person. On the contrary, the law was generally applicable to personnel involved in education, a distinctive profession which affected the national education and could be regarded as an important collective benefit to the people. There were legitimate reasons to enact such a provision. The provision did not unfairly discriminate against any person. It could also be regarded as the provision of security for work safety and welfare, as well as security for livelihood during working life and after working life, at a level not less than as provided by the relevant laws. The provision granted protection of benefits for such persons to ensure that they did not fall below other professions. In addition, section 86 also did not prohibit the director, teachers and educational personnel from exercising their freedom to form an association or private entity, except for the restriction on strikes to bargain with the employer under the law on labour relations. This restriction was reasonable as the director, teachers and educational personnel were key persons in a profession of great significance to the administration of the national educational system. The exercise of certain rights and liberties might affect the collective interest, public order and good morals of the people. The restriction of such rights and liberties were imposed to the extent of necessity and proportionately. Moreover, since section 86 was an instance where the state granted protection to the working conditions of the director, teachers and educational personnel, the matter therefore did not concern the state's

failure to implement the directive principles of fundamental state policies in regard to law and justice in safeguarding the rights and liberties of a person from violation by both a state official and by other persons as well as the equal facilitation of justice to the people. The provision was also not inconsistent with the directive principles of fundamental state policies on economics, which intended to ensure that persons performing the same value of work were provided with compensation, benefits and welfare on a fair basis and without discrimination. Such a case was within the scope of necessity and did not prejudice the essential substances of constitutional rights and liberties of such persons. The provision was therefore neither contrary to nor inconsistent with section 29, section 30, section 44, section 64, section 81(2) and section 84(7) of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

4. Ruling of the Constitutional Court

The Constitutional Court therefore held that section 86 of the Private Schools Act B.E. 2550 (2007) as amended by the Private Schools Act (No. 2) B.E. 2554 (2011) was neither contrary to nor inconsistent with section 27, section 29, section 30, section 44, section 64, section 81(2) and section 84 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007), and there was no problem of unconstitutionality.
