

# Summary of Constitutional Court Ruling No. 1/2555 (2012)

**Dated 8<sup>th</sup> February B.E. 2555 (2012)\***

**Re: Whether or not section 6 of the National Economic and Social Advisory Council Act B.E. 2543 (2000) was contrary to or inconsistent with section 258 of the Constitution.**

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## 1. Summary of background and facts

The Central Administrative Court referred the objections of plaintiffs (Mr. Kasem Chantnoi, first plaintiff, and Mr. Kriang Wisitorsora-at, second plaintiff) in case no. 809/2552 to the Constitutional Court for a ruling under section 211 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). The facts in the application and supporting documents may be summarised as follows.

Both plaintiffs filed complaints against the Prime Minister, first defendant, Office of the National Economic and Social Advisory Council, second defendant, Committee for Selection of Members of the National Economic and Social Advisory Council, third defendant, and Sub-Committee for Selection of Members of the National Economic and Social Advisory Council, fourth defendant, at the Central Administrative Court. The complaint stated that both plaintiffs suffered grievances and losses as a consequence of the unlawful selection of the 3<sup>rd</sup> National Economic and Social Advisory Council. As a result, both plaintiffs were not selected as Members of the National Economic and Social Advisory Council. It was thereby requested that the Central Administrative Court give a judgment or order to revoke various notifications relating to the selection and to restrain the first defendant from ratifying the nominations made by the second and third defendants pertaining to the 3<sup>rd</sup> National Economic and Social Advisory Council for publication in the Government Gazette. The Central Administrative Court admitted the complaint for trial. Thereafter, both plaintiffs motioned for the Central Administrative Court to refer an objection to the Constitutional Court for a ruling on whether or not section 6, section 27/1 and section 27/2 of the National Economic and Social Advisory Council Act B.E. 2543 (2000) were contrary to or inconsistent with section 6, section 258 and section 299 paragraph four of the Constitution.

The Central Administrative Court found that both plaintiffs claimed that section 6 of the National Economic and Social Advisory Council Act B.E. 2543 (2000), which provided

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that the office of Chairman of the Committee for Selection of Members of the National Economic and Social Advisory Council was to be held by the Chairman of the National Economic and Social Development Board, and that Members of the Committee for Selection of Members of the National Economic and Social Advisory Council consisted of four persons elected from and among the Permanent Secretaries of all Ministries, constituted a cause for selection which was not independent from the executive branch. This was inconsistent with section 258 of the Constitution which aimed to confer independence to the National Economic and Social Advisory Council and the Office of the National Economic and Social Advisory Council, in the same way as independent organs under the Constitution. Moreover, the provisions in section 27/1 paragraph three and section 27/2 of the National Economic and Social Advisory Council Act B.E. 2543 (2000) provided for the supervisory powers of the Prime Minister over the Office of the National Economic and Social Advisory Council, which was inconsistent with section 258 paragraph four and section 299 paragraph four of the Constitution. Upon both plaintiffs' claim that such provisions of law were contrary to or inconsistent with the Constitution and inapplicable under section 6 of the Constitution, being provisions which the Central Administrative Court had to apply to this case, and as there had not yet been a ruling of the Constitutional Court relating to such provisions, the Central Administrative Court therefore referred both plaintiffs' objection to the Constitutional Court for a ruling under section 211 of the Constitution.

## **2. Preliminary issue**

The preliminary issue which had to be considered by the Constitutional Court was whether or not the Constitutional Court had the competence to accept this application for a ruling under section 211 paragraph one of the Constitution.

The Constitutional Court considered the application and found that this application contained an objection that section 6, section 27/1 and section 27/2 of the National Economic and Social Advisory Council Act B.E. 2543 (2000) were contrary to or inconsistent with section 6, section 258 and section 299 paragraph four of the Constitution. The Central Administrative Court had to apply those provisions to a case and there had not yet been Constitutional Court ruling relating to these provisions. This case was in accordance with section 211 paragraph one of the Constitution in conjunction with clause 17(13) of the Rules of the Constitutional Court on Procedures and Rulings B.E. 2550 (2007). The Constitutional Court therefore ordered the acceptance of this application for trial and adjudication.

## **3. The issues considered by the Constitutional Court**

During trial in the Constitutional Court, both plaintiffs submitted a motion to the Constitutional Court for an injunction and provisional emergency measures to restrain the first defendant from making a presentation to the King for Royal Assent to the appointment

of the Secretary-General of the Office of the National Economic and Social Advisory Council pending a ruling of the Constitutional Court, or any other measures as deemed fit by the Constitutional Court. The Constitutional Court, after consideration, found that the parties to this case did not have standing to submit such a motion to the Constitutional Court for consideration and that it was the competence of the Central Administrative Court making this referral to the Constitutional Court for a ruling under section 211 of the Constitution to issue interlocutory measures. The Constitutional Court therefore dismissed the motion.

The next issue considered was the request for a Constitutional Court review of whether or not section 27/1 and section 27/2 of the National Economic and Social Advisory Council Act B.E. 2543 (2000) were contrary to or inconsistent with section 6, section 258 and section 299 paragraph four of the Constitution. The Constitutional Court found as follows. Section 27/1 and section 27/2 of the National Economic and Social Advisory Council Act B.E. 2543 (2000) were provisions relating to the establishment of the Office of the National Economic and Social Advisory Council as a departmental agency under the command of the Prime Minister. The provisions also provided the Council Chairman with the power to prescribe policies, goals and directives for the operations of the Office of the National Economic and Social Advisory Council in relation to tasks supporting the National Economic and Social Advisory Council as provided in this Act. If the Office of the National Economic and Social Advisory Council failed to comply with a lawful order of the Council Chairman given under such law, or in any other case causing an obstacle to administrative works concerning the National Economic and Social Advisory Council, the Council Chairman could notify the Prime Minister to consider remedial actions pursuant to his powers and duties. Such provision merely stated the legal status of the Office of the National Economic and Advisory Council and the powers and duties of the National Economic and Social Advisory Council, unrelated to the selection of Members of the National Economic and Social Advisory Council which formed the grounds of this objection. A ruling on this issue was thus not required.

As for the issue requesting for a Constitutional Court review of whether or not section 6 of the National Economic and Social Advisory Council Act B.E. 2543 (2000) was contrary to or inconsistent with section 6 and section 299 paragraph four of the Constitution, the Constitutional Court found as follows. Section 6 of the Constitution was a provision in Chapter 1 on General Provisions, which provided that the Constitution was the supreme law of the nation, and that any provision of law, rule or regulation contrary to or inconsistent with this Constitution was unenforceable. The provision in this section of the Constitution did not provide for any power or duty or recognized any right or liberty, but only stated the legal supremacy of the Constitution, and that no provision of law could be contrary or inconsistent thereto. If an objection was to be made that a provision of law was contrary to or inconsistent with the Constitution, the objection had to make reference to other sections of the Constitution that would lead to the outcome under section 6 and a subsequent ruling of the Constitutional Court. Hence, this was not a case where section 6 of

the National Economic and Social Advisory Council Act B.E. 2543 (2000) could be contrary to or inconsistent with 6 of the Constitution. Section 299 paragraph four of the Constitution, on the other hand, was a transitory provision, which provided that a person under this section should continue to perform duties as provided by an Organic Act or a relevant law in force on the promulgation date of this Constitution until the promulgation of an organic law or law implementing this Constitution, except where a provision was contrary to or inconsistent with the provisions of the Constitution, in which case the constitutional provisions should apply instead. The term “person under this section” in this case referred to Members of the National Economic and Social Advisory Council holding office on the promulgation date of the Constitution. This transitory provision stated in the Constitution was in line with the general principles of legislation which necessarily required legal continuity in order to avoid a lacuna. This was therefore also not a case where section 6 of the National Economic and Social Advisory Council Act B.E. 2543 (2000) could be contrary to or inconsistent with section 299 paragraph four of the Constitution.

The Constitutional Court determined that the issue which required a ruling was whether or not section 6 of the National Economic and Social Advisory Council Act B.E. 2543 (2000) was contrary to or inconsistent with section 258 of the Constitution.

After consideration, the Constitutional Court found that section 258 was a provision in Chapter 11 on Constitutional Organs, Part 2 Other Constitutional Organs. Paragraph one stated that the National Economic and Social Advisory Council had the duty of giving advice and suggestions to the Council of Ministers on various economic and social problems, including relevant laws. Paragraph two provided that comments should be sought from the National Economic and Social Advisory Council before the promulgation of the National Economic and Social Development Plan and other plans as provided by law. Paragraph three provided that the composition, source, functions and operations of the National Economic and Social Advisory Council should be as provided by law. Paragraph four provided that there shall be an office of the National Economic and Social Advisory Council being an agency having independence in personnel administration, budget and other activities as provided by law. This constitutional provision was intended to establish the National Economic and Social Advisory Council as another Constitutional Organ with the duties of giving advice and suggestions to the Council of Ministers on economic and social problems, as well as relevant laws, and to establish the Office of the National Economic and Social Advisory Council as an independent agency for the administration of personnel, budget and other operations as provided by law.

The National Economic and Social Advisory Council Act B.E. 2543 (2000) was a law enacted under section 89 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997), and a law which provided for details relating to the National Economic and Social Advisory Council as well as the establishment of the Office of the National Economic and Social Advisory Council. Section 6 of the National Economic and Social Advisory Council Act B.E. 2543 (2000) was a provision in Chapter 1 on Members of the National Economic and Social Advisory Council which provided for the recruitment of Members of the National

Economic and Social Advisory Council, wherein it was stated that a Committee for Selection of Members of the National Economic and Social Advisory Council consisting of 21 members should be established to perform the duty of selecting Members, prescribing rules of selection and procedures for examining qualifications of nominated persons. The Selection Committee consisted of the Chairman of the National Economic and Social Development Board, four members selected by and among the Permanent Secretaries of all ministries, three members selected by and among the Rectors of all higher education institutions having juristic person statuses, one member selected by and among the Rectors of all Rajabhat Institutes and Rajamangala Institutes, four representatives of manufacturing sector institutes, one representative selected by and among labour unions, four representatives of non-profit private sector organisations and three representatives of the media, one each from the newspaper sector, radio broadcasting sector and television broadcasting sector. It was apparent that the composition of the Selection Committee was obtained from a system which screened persons independently from each other. The members were also derived from a variety of sectors in order to promote public participation in the determination of policies and plans for economic and social development so as to reflect the different dimensions of economic and social problems, thus leading to material solution, being the direct functions of the National Economic and Social Advisory Council as provided under section 258 of the Constitution. Even though certain members of the Selection Committee are under the command of the Prime Minister, they were overwhelmed by the proportion of Selection Committee members from other sectors. Hence, members of the Selection Committee under the command of the Prime Minister were unable to cast a decisive vote to direct the Selection Committee according to their wishes. The Selection Committee was therefore independent from the executive branch. Selected Members of the National Economic and Social Advisory Council thus acquired the status of other Constitutional Organs as provided under section 6, without prejudice to the independence of the National Economic and Social Advisory Council. The provision was therefore neither contrary to nor inconsistent with section 258 of the Constitution.

#### **4. Ruling of the Constitutional Court**

The Constitutional Court held that section 6 of the National Economic and Social Advisory Council Act B.E. 2543 (2000) was neither contrary to nor inconsistent with section 258 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

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