

# Summary of Constitutional Court Ruling No. 18-22/2555 (2012)

Dated 13<sup>th</sup> July B.E. 2555 (2012)\*

**Re: Request for a Constitutional Court Ruling under Section 68 of the  
Constitution.**

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## 1. Summary of background and facts

General Somjet Boonthanom and others, Mr. Wanthongchai Chamnankij, Mr. Wirat Kalayasiri, Mr. Warin Thiamcharas and Mr. Boworn Yasinthorn and others submitted a total of five applications to the Constitutional Court for a ruling under section 68 of the Constitution.

The Constitutional Court found that the five applications raised identical questions. Therefore, in the interest of procedural efficiency, the cases were consolidated into one trial. The named applicants were General Somjet Boonthanom and others, first applicant, Mr. Wanthongchai Chamnankij, second applicant, Mr. Wirat Kalayasiri, third applicant, Mr. Warin Thiamcharas, fourth applicant, and Mr. Boworn Yasinthorn and others, fifth applicant. The named respondents were the President of the National Assembly on behalf of the National Assembly, first respondent, the Council of Ministers, second respondent, Pheu Thai Party, third respondent, Chart Thai Pattana Party, fourth respondent, Mr. Sunai Julphongsathorn, fifth respondent, and Mr. Paradorn Prisananthakul and others, sixth respondent. The facts in the application could be summarised as follows. The second to sixth respondents submitted a motion to amend section 291 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) to the first respondent. The applicants were of the opinion that section 291 of the Constitution was a provision on rules and procedures which applied only to constitutional amendments. The respondent's motion to amend the Constitution in order to rewrite a new constitution, however, would result in a repeal of the Constitution of the Kingdom of Thailand B.E. 2550 (2007), i.e. an abolishment of the democratic form of government with the King as head of state under this Constitution, or an attempt to acquire national governing powers by means which were not provided in this Constitution. The actions were inconsistent with section 68 paragraph one of the Constitution. The applicants therefore sought a Constitutional Court ruling and order (1) the respondents to cease any acts relating to the amendment of the Constitution of the Kingdom of Thailand B.E. 2550 (2007), (2) to dissolve the third respondent party and fourth respondent party who were the proposers of the motion to amend the Constitution of

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the Kingdom of Thailand B.E. 2550 (2007), and (3) to revoke the election rights of the party leader and executives of the third respondent party and fourth respondent party for a period of five years as from the day of the Constitutional Court order.

## **2. Preliminary issue**

The preliminary issue was whether or not the Constitutional Court had the competence to admit this application for consideration under section 68 of the Constitution.

After deliberation, the Constitutional Court found as follows. Section 68 paragraph two was a provision which granted a right to a person who was aware of an act committed by a person or political party under section 68 paragraph one to submit an application for review of such act. Two channels were provided. Firstly, the matter could be submitted to the Attorney-General to conduct a factual inquiry. And secondly, the matter could be submitted to the Constitutional Court for an order to cease the act. The powers and duties of reviewing and ruling in the event that an applicant exercised the right to protect the Constitution pursuant to section 68 paragraph two were the powers and duties of the Constitutional Court. The Attorney-General merely had the duty of conducting a preliminary factual inquiry and submitting an application to the Constitutional Court, without prejudice to the applicant's right to submit a direct application to the Constitutional Court. Since the applicants had already submitted the matter to the Attorney-General for review but had not yet received a satisfactory outcome, they could therefore opt for the second right of submitting an application to the Constitutional Court. The Constitutional Court thus ordered the admittance of all five applications for consideration under section 68 of the Constitution and clause 17(2) of the Rules of the Constitutional Court on Procedures and Rulings B.E. 2550 (2007). Proceedings were continued.

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

**The first issue was whether or not the Constitutional Court had the competence to admit the application for a ruling under section 68 of the Constitution.**

After deliberations, the Constitutional Court found as follows. Section 68 paragraph two was a provision which granted a right to a person who was aware of an act in violation of section 68 paragraph one to call for a review of such an act. Two channels were provided for the exercise of that right. Firstly, the matter could be submitted to the Attorney-General to conduct a factual inquiry and submit an application to the Constitutional Court. And secondly, an application could be submitted to the Constitutional Court for a ruling and order to cease such act. The powers and duties to review and give a ruling in the event of an applicant's exercise of right to protect the Constitution pursuant to section 68 paragraph two were powers and duties of the Constitutional Court. The Attorney-General merely had the duty of conducting a preliminary factual inquiry and submitting an application to the

Constitutional Court, without prejudice to the applicants' right to submit a direct application to the Constitutional Court. Even though the applicants had already submitted the matter to the Attorney-General for review, their second right to submit an application to the Constitutional Court was not prejudiced. Such an interpretation was consistent with the intent of section 68 as provided in the Constitution and gave effect to the protection of the Constitution as provided under section 69, i.e. "a person has the right to peacefully resist any act committed to acquire national governing powers by means which are not provided under this Constitution." The Constitutional Court could issue an order to cease an act which could constitute an exercise of rights and liberties under the Constitution to overthrow the democratic form of government with the King as head of state under the Constitution, or to acquire national government powers by means which were not provided by the Constitution, only when the act was still in progress and had not yet taken effect in order that the cessation order against the act to be meaningful. Otherwise, a Constitutional Court ruling under section 68 paragraph two would be an impossibility and unenforceable. Moreover, the right to protect the Constitution under section 68 contained the essential principle which encouraged the participation of all Thais to participate in the protection and safeguarding of the democratic form of government with the King as head of state and that access to national government powers should be in accordance with Constitutional means. Due to its nature, this right was therefore a preventive measure which gave an opportunity for review and ruling of cessation of an act before any detriment was caused to the form of government and before the Constitution could be overthrown. If the act perilous to the Constitution and the form of government under the Constitution was allowed to take effect, remedies and restoration would be an impossibility. Therefore, a citizen who became aware of a cause under section 68 paragraph two should have the ability to submit a direct application to the Constitutional Court. Hence, the Constitutional Court had the competence to admit the application for consideration and ruling under section 68 paragraph two of the Constitution.

**The second issue was whether or not the amendment to section 291 of the Constitution could repeal the whole Constitution.**

The Constitutional Court found as follows. The power to constitute the highest political body or the power to establish a Constitution was the power of the people which formed the direct source of the Constitution's origin. The people's powers were above the Constitution which established the legal system as well as all bodies exercising political and administrative powers. Since the established bodies possessed only the authority granted by the Constitution and were subject to the Constitution, it was not possible for those bodies to exercise the authority delegated by the Constitution to amend the Constitution in the same manner as a regular legislative amendment. Thailand was ruled under the democratic form of government with the King as head of state. Thailand adopted the code law system which adhered to the supremacy of the Constitution. Hence, the Constitution had to provide for a special procedure or process for amendment that was different from general legislation.

The promulgation of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) underwent a process which acquired an approval vote in a direct referendum of the people who were the holders of sovereign powers. The Constitution was therefore founded by the people. Even though the amendment to section 291 of the Constitution was within the power of the National Assembly, a constitutional amendment by way of rewriting the entire Constitution was inconsistent with the intent behind section 291 of the Constitution. As the current Constitution was obtained from a referendum of the people, it should therefore be conferred to the people, as holders of the power to establish a Constitution, to vote in a referendum on whether or not it was expedient to promulgate a new Constitution. Otherwise, the National Assembly could exercise powers to amend certain sections of the Constitution as deemed appropriate, within the National Assembly's authority, which was consistent with the intent behind section 291 of the Constitution.

**The third issue was whether or not the respondents' actions constituted acts to overthrow the democratic form of government with the King as head of state under this Constitution or to acquire national governing powers by means that were not provided by this Constitution as provided under section 68 paragraph one of the Constitution.**

After deliberations, the Constitutional Court found as follows. The amendment to section 291 of the Constitution was intended to set up a process for a section-by-section amendment of the Constitution in order to implement political reform and a revision of the political structure to achieve greater stability and efficiency. Such powers were conferred by the Constitution of the Kingdom of Thailand B.E. 2550 (2007) as a means of resolving any problem which could arise from a defect in the Constitution itself, or a problem arising from a political event which required a systematic and comprehensive approach to resolution all at once. After an examination of Constitutional Amendment (No. ..) B.E. .... which would lead to an amendment of section 291 of the Constitution in order to establish a Constituent Assembly to prepare a new Draft Constitution, currently pending a vote in the third reading, it was deemed that the process still lacked sufficient facts to determine that the act constituted an attempt to overthrow the democratic form of government with the King as head of state as provided under the Constitution as alleged by the applicants. Moreover, the stages of establishing a Constituent Assembly had not yet materialised. The applicants' claims were based on a prediction of events that had not yet occurred. In addition, after a review of the provisions in section 291(1) paragraph two of the Constitution, which provided the constraints for amending the Constitution of the Kingdom of Thailand B.E. 2550 (2007), there was a clear provision for constitutional amendments that "a motion to amend the Constitution which results in a change of the democratic form of government with the King as head of state or a change in the form of the state is prohibited." Also, the Memorandum of Principles and Reasons for the Draft Constitution of the Kingdom of Thailand Amendment (No. ..) B.E. .... stated a reason "to maintain the democratic form of government with the King as head of state for an indeterminable period." The provisions of section 291/11 paragraph five of the Draft Constitution further provided a safeguard that the newly drafted

Constitution would not affect the essential substances of the state, i.e. “the Draft Constitution shall not result in a change of the democratic form of government with the King as head of state or a change in the form of the state, or a change of provisions in the Chapter on the King.” If the Draft Constitution contained a characteristic under paragraph five, “the Draft Constitution shall lapse” as provided under section 291/11 paragraph six.

In any event, if the Constituent Assembly prepared a Draft Constitution which had the characteristics of a change of the democratic form of government with the King as head of state, or a change in the form of the state, or a change in the provisions in the Chapter on the King, both the President of the National Assembly and the National Assembly would have the power to strike down the Draft Constitution. Also, in the event that any person became aware of an act to overthrow the democratic form of government with the King as head of state as provided under this Constitution, such person would have the right to submit the matter to the Attorney-General to conduct a factual inquiry and submit an application to the Constitutional Court for an order to cease the act at any point of the event known by the person so long as section 68 of the Constitution continued to remain in force. Significantly, upon an examination of the replies, affidavits and inquiry conducted by the Court as regards the respondents, namely, Mr. Somsak Kiatsuranont, President of the National Assembly, Mr. Achaporn Charuchinda, representative of the Council of Ministers, Mr. Yongyuth Wichaidith, representative of Pheu Thai Party, Mr. Chumpol Silpa-archa, representative of Chart Thai Pattana Party, and Mr. Paradorn Prisanantakul, it was heard from their testimonies that the intent of actions leading to the preparation of a new Draft Constitution was not intended to overthrow the democratic form of government with the King as head of state as provided by this Constitution. All respondents showed a fixed determination to maintain the democratic form of government with the King as head of state.

After deliberation, it was found that the facts did not lead to a conclusion that acts committed by the six respondents were acts to overthrow the democratic form of government with the King as head of state as provided under this Constitution, or to acquire national governing powers by means which were not provided under this Constitution. All allegations were therefore merely predictions or concerns for the Royal Institution and the democratic form of government with the King as head of state. The acts were too remote from the alleged outcome. Hence, the acts committed by the six respondents did not imply an intent to overthrow the democratic form of government with the King as head of state or to acquire national governing powers by means which were not provided by this Constitution as provided by section 68 paragraph one of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). The application on this issue was thus dismissed.

After giving such a ruling, it was therefore no longer necessary to decide on the issue of whether or not the actions were within the scope of section 68 paragraph one which would be deemed as a cause for dissolution of the political parties and revocation of the election rights of the party leader and political party executives.

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

By virtue of the foregoing reasons, all five applications were dismissed.

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