

The Constitutional Court
The Kingdom of Thailand

Constitutional Court Ruling

No. 4/2564 (2021)

Dated 11th March B.E. 2564 (2021)

Between	{	President of the National Assembly	Applicant
		-	Respondent

Re: The President of the National Assembly requested for a Constitutional Court ruling under section 210 paragraph one (2) on a question relating to the duties and powers of the National Assembly in the submission of a Draft Constitutional Amendment by Members of the National Assembly under section 256(1) of the Constitution.

The President of the National Assembly (applicant) submitted an application to the Constitutional Court for a ruling under section 210 paragraph one (2) of the Constitution on a question relating to the duties and powers of the National Assembly in the submission of a Draft Constitutional Amendment by Members of the National Assembly under section 256(1) of the Constitution. The facts under the application and supporting documents could be summarised as follows.

During the 3rd joint sitting of the National Assembly (second annual ordinary session) on 9th February B.E. 2564 (2021), the sitting deliberated on an urgent motion, re: submission of motion under article 31 of the Rules of Procedure of the National Assembly, B.E. 2563 (2020), for the National Assembly to adopt a resolution to apply for a Constitutional Court ruling on a question relating to the duties and powers of the National Assembly under section 210 paragraph one (2). Mr. Paiboon Nititawan, Member of the House of Representatives, in his capacity as Member of the National Assembly, and Mr. Somchai Swangkarn, Senator, in his capacity as Member of the National Assembly, submitted the motion claiming that as regards the submission of 2 motions by Members of the National Assembly on Draft Constitutional Amendments, namely (1) Draft Constitution of the Kingdom of Thailand Amendment (No. ..), B.E., dated 17th August B.E. 2563 (2020) together with a memorandum of principles and reasons, by Mr. Sompong Amornwiwat and others, and (2) Draft Constitution of the Kingdom of Thailand Amendment (No. ..), B.E., dated 1st

September B.E. 2563 (2020), together with a memorandum of principles and reasons, by Mr. Wirat Rattanaset and others, and a motion on Draft Constitution of the Kingdom of Thailand Amendment (No. ..), B.E. submitted by the people, it appeared that all three Draft Constitutional Amendments (amending section 256 and adding Chapter 15/1) contained principles and reasons for the drafting of a new Constitution and contained provisions in the Draft Constitutional Amendment which added Chapter 15/1 Drafting a New Constitution, and section 256/1 to establish a Constitutional Drafting Committee entrusted with the duty of drafting a new Constitution. It was asserted that no provision of the Constitution empowered the National Assembly to draft a new Constitution. Furthermore, under the public law principle “no authority without law”, there was an implication that without a provision granting authority, such act could not be done. The National Assembly thus had no power to draft a new Constitution. The National Assembly merely had the powers provided under section 256 of the Constitution, i.e. only the power to amend the Constitution. Therefore, any actions aimed to accomplish the drafting of a new Constitution was contrary to or inconsistent with the Constitution and rendered unenforceable under section 5 of the Constitution. The submitters of the motion gave the following supporting reasons. As there was no clear provision in the Constitution granting a power to draft a new Constitution, as was the case of section 32 of the Constitution of the Kingdom of Thailand (Interim), B.E. 2557 (2014), which provided that “there shall be a Constitutional Drafting Committee to prepare a Draft Constitution...”, as amended, section 46 paragraph one which provided that “in the case of necessity and expediency, the Council of Ministers and National Council for Peace and Order may jointly adopt a resolution to amend this Constitution by submitting a Draft Constitutional Amendment to the National Legislative Assembly for approval”, which meant that in the case of a permanent Constitution, the National Assembly could not rely on the provisions of the Constitution on constitutional amendments to prepare a new Constitution in its entirety. However, the National Assembly had the power to amend sections of the Constitution, as was the case of section 255 and section 256 of the Constitution of the Kingdom of Thailand, B.E. 2560 (2017), in accordance with Chapter 8, Introduction and Deliberation of Constitutional Amendment, article 114 paragraph three of the Rules of Procedure of the National Assembly, B.E. 2563 (2020), which provided that “an amendment or repeal of any section of the Constitution shall specify the section to be amended or repealed in the principle or may also be stated in the reasons.” All 3 motions with respect to the drafting of a new Constitution did not specify the sections to be repealed and did not stipulate new provisions to replace such provisions. Hence, the motions were not amendments to the Constitution that were

within the powers of the National Assembly under Chapter 15 on Constitutional Amendments, which only allowed amendments of certain sections where the sections to be repealed and the new provisions had to be specified. If the Constitution granted a power to draft a new Constitution in its entirety, such powers should be stated in the Constitution and not limited to only an amendment of the Constitution as was the case for the enactment of new Organic Acts and new Acts under section 131 and section 133 of the Constitution. On the contrary, section 256 of the Constitution provided only that the National Assembly specifically had the power to introduce a Draft Constitutional Amendment. As a result, the National Assembly did not have the power to submit a motion on Draft Constitutional Amendment which provided for the drafting of a new Constitution in its entirety. Furthermore, the drafting of a new Constitution was an act that was contrary to or inconsistent with the Constitution. Hence, a referendum under section 166 of the Constitution was not permissible. A ruling and decision that the National Assembly did not have the duty and power to prepare a new Constitution was within the competent jurisdiction of the Constitutional Court under section 210 paragraph one (2) of the Constitution in conjunction with section 7(2), section 41(4) and section 44 of the Organic Act on Procedures of the Constitutional Court, B.E. 2561 (2018). A motion in the National Assembly to adopt a resolution to refer to the Constitutional Court for a decision on a question that had already arisen relating to the duties and powers of the National Assembly pursuant to section 210 paragraph one (2) of the Constitution. In this regard, actions had to be taken under section 156(15) in conjunction with article 31 of the Rules of Procedure of the National Assembly, B.E. 2563 (2020). It was therefore expedient for the National Assembly to refer the matter to the Constitutional Court for a ruling on such question in parallel to the deliberations of the Draft Constitutional Amendment in the first and second readings. If the Constitutional Court found that a new Constitution could be drafted, deliberations could proceed to the third reading. However, if the Constitutional Court decided that the National Assembly did not have the power to prepare a new Constitution but only had the power to amend the Constitution, actions could be taken under section 129 of the Constitution by the appointment of a Constitutional Amendment Drafting Committee of the National Assembly to proceed with the drafting of a Draft Constitutional Amendment for submission to the National Assembly.

In the 3rd joint sitting of the National Assembly (Second Annual Ordinary Session) on 9th February B.E. 2564 (2021), upon the conclusion of debates on this motion, the joint sitting of the National Assembly adopted a majority resolution to refer the matter to the Constitutional Court for a ruling on the question relating to

the duties and powers of the National Assembly pursuant to section 210 paragraph one (2) of the Constitution.

The applicant sent a letter requesting for a Constitutional Court ruling under section 210 paragraph one (2) of the Constitution in the case of a question relating to the duties and powers of the National Assembly in the submission of a Draft Constitutional Amendment by Members of the National Assembly under section 256(1) of the Constitution.

The preliminary issue considered by the Constitutional Court was whether or not the Constitutional Court had the competence to accept the applicant's letter for a ruling under section 210 paragraph one (2) of the Constitution. The Constitutional Court found as follows. Section 210 paragraph one (2) of the Constitution provided that the Constitutional Court had the duties and powers to consider and decide on a question relating to the duties and powers of the House of Representatives, Senate, National Assembly, Council of Ministers and independent organs. The submission of an application had to be in accordance with the rules under section 210 paragraph one (2) of the Constitution and section 44 in conjunction with section 7(2) of the Organic Act on Procedures of the Constitutional Court, B.E. 2561 (2018). In other words, the question had to be actually raised relating to the duties and powers and the agency concerned with such question had the right to submit a letter to the Constitutional Court. Upon a finding of facts under the application that during the joint sitting of the National Assembly on Tuesday, 9th February B.E. 2564 (2021), the joint sitting of the National Assembly found that there was a question relating to the duties and powers of the National Assembly and adopted a majority resolution to refer such question relating to the duties and powers of the National Assembly in the submission of Draft Constitutional Amendment by Members of the National Assembly to the Constitutional Court for a ruling under section 210 paragraph one (2) of the Constitution, the case was therefore in accordance with section 210 paragraph one (2) of the Constitution in conjunction with section 44 and section 7(2) of the Organic Act on Procedures of the Constitutional Court, B.E. 2561 (2018). Hence, the Constitutional Court had the duty and power to accept this application for a ruling. In the interest of proceedings, expert witnesses, namely Mr. Meechai Ruchuphan, Mr. Borwornsak Uwanno, Mr. Somkit Lertpaithoon and Mr. Udom Rathamarit were called upon to submit written opinions to the Constitutional Court. All four experts submitted written opinions to the Constitutional Court.

Mr. Prasert Jantararungtong and others submitted an application to file an affidavit of facts or opinions which was admitted by the Constitutional Court for consideration.

The Constitutional Court considered the application, written opinions of expert witnesses and all relevant parties, as well as supporting documents, and found that this case raised a question of law and there was sufficient evidence for consideration and ruling. Inquiry proceedings were therefore concluded pursuant to section 58 paragraph one of the Organic Act on Procedures of the Constitutional Court, B.E. 2561 (2018).

The Constitutional Court determined that the question to be decided was whether or not the National Assembly had the duties and powers to draft a new Constitution.

After deliberations, the Constitutional Court found as follows. The Constitution was the supreme law which prescribed the form of a country, branches for national governance and the relationship between different branches. Importantly, it served as a social contract which allowed the state to have a role in restricting the rights and liberties of the people to a certain extent and under certain conditions. However, the Constitution was also a law which prescribed political structure and mechanisms deemed as social rules or norms for coexistence of the people in a particular country's society, and considered a sufficiently flexible law to enable the newer generation in society to manage the constantly evolving political, economic and social changes or diversity. Hence, the founding authority of the Constitution foresaw the dynamics of the Constitution by stipulating provisions on constitutional amendments in the Constitution itself. The organ empowered to make the amendment as well as the relevant processes were provided, so long as the constitutional amendments did not have the characters prohibited under the Constitution, or be in accordance with the rules and procedures provided by the Constitution.

The Constitution of the Kingdom of Thailand, B.E. 2560 (2017) stated essential substances, drafting process and promulgation in the following preamble, "... The governance of Thailand has always pursued the spirit and commitment under the democratic form of government with the King as Head of State. Despite several annulments, amendments and promulgations of Constitutions to reorganise governance on several occasions, governance still lacked stability or orderliness due to various problems and conflicts... One cause was national governing rules which were still unsuitable to national circumstances and times, giving more importance to forms and procedures rather than the fundamental principles of democratic rule, or the inability to effectively apply existing rules to the behaviour of persons or situations during times of unprecedented crises... Mechanisms have been provided to organise and strengthen the nation by providing a structure of duties and powers of various organs under the Constitution along with an appropriate relationship

between the legislature and the executive, providing the judicial institution and other independent organs having duties to scrutinize the exercise of state powers with the ability to perform duties efficiently, honestly, fairly and to have a role in the prevention and resolving of national crises where necessary and appropriate, as well as to recognise, defend and protect the rights and liberties of the Thai people with greater clarity and comprehensiveness... The Constitutional Drafting Committee periodically generated awareness and understanding to the people on the various principles and provisions, and allowed public participation in the development of substances of the Draft Constitution... Upon the completion of the Draft Constitution, the Draft Constitution was publicised... and a referendum was held to approve the entire Draft Constitution. On this occasion, the National Legislative Assembly adopted a resolution to propose an additional issue... The referendum result showed that the majority of the electorate who exercised votes in the referendum approved the Draft Constitution and additional issue. The Constitutional Drafting Committee therefore proceeded to amend the relevant provisions of the Draft Constitution in line with the referendum outcome on the additional issue and made a submission to the Constitutional Court for review... The Constitutional Drafting Committee has already made revisions in accordance with the Constitutional Court ruling. The Prime Minister therefore presented the Draft Constitution to the King. Subsequently, the Prime Minister humbly requested for the grant of a return of the Draft Constitution for certain changes to be made... Upon completion, the Prime Minister presented the Draft Constitution to the King for Royal Assent of promulgation as the Constitution of the Kingdom of Thailand. His Majesty granted approval and therefore proclaimed the enactment of the Constitution of the Kingdom of Thailand... as from the date of proclamation. It is requested that the Thai people have harmony in complying with and defending the Constitution of the Kingdom of Thailand to uphold the democratic regime of government and sovereign powers of the Thai people...”

As for provisions relating to constitutional amendments, specific provisions were stated in Chapter 15, as follows. Section 255 provided that “an amendment of the Constitution which results in a change in the democratic regime of government with the King as Head of State or a change in the form of the State is prohibited.” Section 256 provided that “subject to section 255, the Constitution may be amended under the following rules and conditions: (1) a motion to amend must be submitted by the Council of Ministers or Members of the House of Representatives constituting not less than one-fifth of the existing Members of the House of Representatives, or Members of the House of Representatives and Senators constituting not less than one-fifth of the existing Members of both Houses, or by not

less than fifty thousand eligible voters under the law on petition for legislative proposals; (2) a motion to amend must be submitted as a Draft Constitutional Amendment to the National Assembly and the National Assembly shall deliberate in three readings; (3) voting in the first reading to give approval in principle shall be effected by roll call and open ballot, and the votes to approve the amendment must constitute not less than one-half of the existing Members of both Houses, consisting of not less than one-third of the existing Senators; (4) deliberations in the second reading shall proceed section-by-section and voting in the second reading shall be by simple majority, but in the case of a Draft Constitutional Amendment submitted by the people, representatives of the petitioners must be given an opportunity to give opinions; (5) upon completion of the second reading, proceedings shall adjourn for fifteen days; upon completion of this period, the National Assembly shall continue with the third reading; (6) voting in the third and final reading shall be by roll call and open ballot, and there must be votes in favour of the promulgation of the Constitution constituting more than one-half of the existing Members of both Houses, and in this number there must be Members of the House of Representatives from political parties which do not have Members holding ministerial offices, President of the House of the Representatives or Vice-President of the House of Representatives, altogether constituting not less than twenty percent of such political members, and approving Senators constituting not less than one-third of the existing Members of the Senate; (7) upon a resolution of approval under (6), proceedings shall be adjourned for fifteen days before presenting the Draft Constitutional Amendment to the King and the provisions of section 81 shall apply *mutatis mutandis*; (8) in the case where the Draft Constitutional Amendment amends Chapter 1 General Provisions, Chapter 2 The King or Chapter 15 Constitutional Amendments, or relates to the qualifications or prohibitions of various office holders under the Constitution, or relates to the duties or powers of the court or independent organs, or addresses a matter which prevents a court or independent organ from exercising duties and powers, prior to proceedings under (7), there shall be a referendum under the law on referendum; if the outcome of the referendum is in favour of the Draft Constitutional Amendment, then proceedings may continue under (7); (9) prior to the Prime Minister presenting the matter to the King for Royal Assent under (7), Members of the House of Representatives or Senators or Members of both Houses collectively constituting not less than one-tenth of the existing Members of each House or both Houses combined, as the case may be, have the right to petition an opinion to the President of the House of one's membership or President of the National Assembly, as the case may be, that a Draft Constitution under (7) is contrary to section 255 or had a characteristic under (8), and the

President of the House receiving such matter shall refer to the Constitutional Court. The Constitutional Court shall deliver a ruling within thirty days of receiving the matter. During consideration by the Constitutional Court, the Prime Minister may not present such Draft Constitutional Amendment to the King for Royal Assent.” The Constitution provided for the organ which considered constitutional amendments in Chapter 7 National Assembly, Part 5 Joint Sitting of the National Assembly, section 156, which provided that “in the following cases, the National Assembly shall convene in a joint sitting... (15) amendment of the Constitution pursuant to section 256...” It could be seen that the aforementioned provisions of the Constitution stipulated constitutional amendments at 2 levels, 3 types. Level 1 applied to a very important matter where amendments would be difficult and level 2 applied to matters which did not significantly affect the form of the State or political structure where amendments would be more difficult than usual after essentially taking into account the participation of all parties. As for the 3 types, type 1 prohibited any amendment to change the democratic regime of government with the King as Head of State or change in regime of the State. Type 2 related to amendments in the following matters: 1) Chapter 1 General Provisions, 2) Chapter 2 The King, 3) Chapter 15 Constitutional Amendment, 4) matters relating to the qualifications or prohibitions of various office holders under the Constitution, and 5) matters relating to the duties and powers of the courts or independent organs, or matters hindering a court or independent organ from exercising duties and powers. The National Assembly was entrusted to consider and approve a motion to amend the Constitution submitted by the Council of Ministers, Members of the National Assembly or not less than fifty thousand citizens and a referendum had to be held. Type 3 was an amendment of other provisions which had to be approved by the National Assembly by the votes of more than one-half of the number of Members in both Houses, consisting of the approval votes of Members of the House of Representatives from political parties that did not have Members holding ministerial offices, the President of the House of Representatives or Vice-President of the House of Representatives, constituting not less than twenty percent of such political parties combined, as well as the approval votes of Senators constituting not less than one-third of the existing Members of the Senate.

Therefore, the principles on constitutional amendments provided for absolute prohibitions against constitutional amendments in section 255. Rules and procedures for amending the Constitution had to be in accordance with section 256(1) to (9) and a constitutional amendment could be enacted by a joint sitting of the National Assembly pursuant to section 156(15). In other words, a joint sitting of the National Assembly to amend the Constitution under section 256 had to strictly

comply with the rules under the Constitution pertaining to the absolute prohibition stated by the Constitution against amendment, as provided under section 255, or cases where the Constitution allowed amendments provided that the conditions stipulated by the Constitution were complied with by holding a referendum under section 256(8).

In this case, Members of the House of Representatives submitted a motion to amend the Constitution by submitting two versions of Draft Constitution of the Kingdom of Thailand Amendment (No. ...), B.E. to the joint sitting of the National Assembly pursuant to section 256, stating principles and reasons for preparing a new Constitution, with provisions in the Draft Constitutional Amendment providing for Chapter 15/1 Drafting of a New Constitution, and section 256/1 on the establishment of a Constitutional Drafting Assembly to perform the duty of drafting a new Constitution under this Chapter. The Constitutional Court finds as follows. Section 156(15) of the Constitution provided that a constitutional amendment had to be done by a joint sitting of the National Assembly with the aim of entrusting the power to amend the Constitution exclusively to the National Assembly. Nevertheless, the Constitution provided a legislative process of the National Assembly in such instance differently from the rules and procedures generally applied to the legislative process with the objective of safeguarding the legal supremacy of the Constitution and preserving the continuity of the Constitution. In other words, even though the National Assembly had the power to amend the Constitution, such entrusted powers were subject to limitations in form, process and substance. The National Assembly was thus bound to exercise such entrusted functions within strict constraints and could not act outside the duties and powers provided by the Constitution. A constitutional amendment therefore had to comply with the conditions connected to the existing Constitution, and reflect the fundamental principles as well as expediency and suitability to the public consensus. Chapter 15 of the Constitution of the Kingdom of Thailand, B.E. 2560 (2017) provided that the Constitution could be amended but did not provide for the drafting of a whole new Constitution.

The drafting of a new Constitution by means of a Draft Constitutional Amendment providing for Chapter 15/1 would result in the annulment of the Constitution of the Kingdom of Thailand, B.E. 2560 (2017), being an amendment of an essential principle which the founders of the existing Constitution wished to safeguard. If the National Assembly wished to draft a new Constitution, a referendum should be held for the people who were holders of the powers to found the Constitution to vote on whether or not there should be a new Constitution. If the referendum delivered an outcome in favour then actions could be taken to draft a new Constitution. Upon completion of the draft, another

referendum should be held for a vote of approval or disapproval of the new Draft Constitution so as to allow the people to scrutinize the contents of the new Draft Constitution before presenting to the King for Royal Assent. Upon granting Royal Assent, the Constitution of the Kingdom of Thailand would be promulgated. This was the process for drafting a Constitution in accordance with conventions of the democratic regime of government with the King as Head of State.

For the foregoing reasons, the Constitutional Court held that the National Assembly had the duty and power to draft a new Constitution after holding a referendum of the people as holders of the power to found the Constitution on whether there was a wish to have a new Constitution, and upon the completion of a new Draft Constitution, the people should vote in another referendum on whether or not to approve the new Draft Constitution.
