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Commentary

The Jurisprudence of the Supreme Administrative Court 2021

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I. INTRODUCTION

This Commentary on the jurisprudence of the Thai Supreme Administrative Court (the "Court") in the year 2021 is based on an analysis of 120 Judgments and Orders on appeal.[1] The decisions reflect a broad spectrum of substantive and procedural issues. Several themes were selected due to their doctrinal or practical importance. The Commentary focuses on decisions related to the invalidity of administrative acts (II.), the definition and scope of administrative contracts (III.), the admissibility requirement of individual concern (IV.), issues related to the calculation of deadlines (V.), and the application of constitutional law by the Court (VI.). In addition, we address several noteworthy decisions that dealt with specific legal issues or that were noteworthy for other reasons (VII.).

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[1] The decisions are Judgments [คำพิพากษา], i.e., Red Number Cases [คดีหมายเลขแดง], and Orders [คำสั่ง] from 2564 (2021). The Court's online database displays 677 decisions in total for the year 2021, <https://www.admincourt.go.th/admincourt/site/05SearchSuit.html>. 107 decisions were marked as "Interesting Cases" [คดีที่น่าสนใจ]. 13 additional decisions were selected for this Commentary in an effort to include cases from categories where the database otherwise displayed no "Interesting Case." Consequently, the authors reviewed 57 General Administrative Cases [งานคดีปกครอง], 13 Environmental Cases [แผนกคดีสิ่งแวดล้อม], 21 Personnel Management Cases [แผนกคดีบริหารงานบุคคล], one Fiscal Discipline and Budgeting Case [แผนกคดีวินัยการคลังและการงบประมาณ], one Contempt of Court Case [คดีละเมิดอำนาจศาล], one Arbitral Clauses Case [คดีเกี่ยวกับสัญญาอนุญาโตตุลาการ], no Retrial and Reconsideration Case [คดีที่มีคำขอให้ศาลปกครองพิจารณาพิพากษาคดีหรือมีคำสั่งชี้ขาดคดีนั้นใหม่], nine Tort and Other Liability Cases [แผนกคดีละเมิดและความรับผิดอย่างอื่น], and 17 Administration Cases [แผนกคดีบริหารราชการแผ่นดิน].

Of course, the Court routinely rules on a much wider variety of legal issues, such as on questions related to the definition of administrative acts,[2] legitimate expectation and good faith reliance regarding the revocation of administrative acts,[3] the procedural right to be informed and authorities' duties to give reasons,[4] the required content of instructions of legal remedies,[5] or the scope of administrative court judges' inquisitorial powers.[6] However, to be concise, the Commentary aims to focus on the issues laid out above.

II. INVALIDITY OF ADMINISTRATIVE ACTS

The validity of administrative acts can be a practically relevant issue in administrative practice and judicial adjudication. At the same time, it is a doctrinal question that illustrates the twofold foreign influence from France and Germany on Thai administrative law.

The Thai administrative court system is generally described as being heavily influenced by the French *droit administratif*.[7] On the other hand, the Administrative Procedure Act B.E. 2539 (1996), which provides the main legal framework for the actions of administrative authorities, is largely "borrowed" from the respective German federal and state Acts (the *Verwaltungsverfahrensgesetze* of 1976).[8] Consequently, Thai law adopted the German concept of the administrative act (*Verwaltungsakt*) as the main mode of administrative action. The definition of the administrative act (คำสั่งทางปกครอง; *kham sang tang pok khrong*) in Section 5 of the Administrative Procedure Act B.E. 2539 (1996) has been drafted in close similarity with Section 35 of the German Acts. The wider understanding of the French *acte administratif* has been less influential.[9]

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[2] Judgments No. Aor. 817/2564, 819/2564; Orders No. KorSor. 12/2564, KorSor. 13/2564, KorSor. 250/2564; 415/2564.

[3] Judgments No. AorBor. 141/2564, AorRor. 156/2564, Aor. 644/2564, Aor. 860/2564.

[4] Judgments No. AorBor. 373/2564, Aor. 701/2564, Aor. 954/2564.

[5] Orders No. KorBor. 225/2564, AorRor. 292/2564.

[6] Judgment No. Aor. 940/2564; Orders No. 154/2564, 209/2564, 418/2564.

[7] Peter Leyland, "*Droit Administratif* Thai Style: A Comparative Analysis of the Administrative Courts in Thailand" (2006) 8(2) Australian Journal of Asian Law 121.

[8] วรเจตน์ ภาคีรัตน์, กฎหมายปกครอง ภาคทั่วไป (นิติราษฎร์ 2554) [Worajet Pakeerut, *Administrative Law. General Part* (Nitirat 2011)] (Thai) 106ff; Peter Leyland, "The Origins of Thailand's Bureaucratic State and the Consolidation of Administrative Justice" in Andrew Harding and Munin Pongsapan (eds) *Thai Legal History* (Cambridge University Press 2021) 192. On the drafting process, see กองกฎหมายปกครอง สำนักงานคณะกรรมการกฤษฎีกา, รายงานผลการปฏิบัติงานของคณะกรรมการวิธีปฏิบัติราชการทางปกครอง ประจำปี พ.ศ. ๒๕๖๒ (2563) [Administrative Law Department, Office of the Council of State, Annual Work Report of the Administrative Procedure Commission 2019 (2020)] (Thai) 15–17. See also สมยศ เชื้อไทย, "ปัญหาทางทฤษฎีในการจัดทำประมวลกฎหมายวิธีปฏิบัติราชการ" (2528) 15(4) วารสารนิติศาสตร์ 141 [Somyot Chuathai, "Theoretical Problems with the Making of an Administrative Procedure Code" (1985) 15(4) Thammasat Law Journal 141] (Thai).

[9] Worajet (n 8) 120ff.

However, while German law contains an explicit provision dealing with the invalidity of administrative acts,[10] the Thai Act did not include it. This was apparently a deliberate decision to allow future doctrinal developments.[11] The concept of invalidity (ความเป็นโมฆะ; *khwam pen mokha*) is nonetheless a part of Thai administrative law too. It is distinguished from the mere unlawfulness of an administrative act and applies in cases of severe and obvious violations of the law.[12] Unlawful administrative acts are valid until revoked, while invalidity, once found, causes administrative acts not to have any legal effects from the beginning.

Interestingly, despite the fact that Thai administrative procedure law is largely borrowed from German law, the Supreme Administrative Court apparently adopted the French doctrine of *inexistence* regarding the invalidity of administrative acts.[13] This doctrine holds that seriously defective administrative acts are considered non-existent. In contrast, the German approach to invalidity considers that the administrative act may have existed, but without producing any legal effects from the beginning.[14]

Practically more important, Thai administrative law does not contain any standards to determine whether an error in the making of an administrative act must be considered "normal," resulting in unlawfulness, or serious, resulting in invalidity. The Supreme Administrative Court's jurisprudence is therefore of utmost importance to provide further clarity.

In some cases, it can be of particular interest whether administrative acts resulting from corruption are unlawful or invalid. So far, there have apparently been no decisions dealing with the question of invalidity where the rules governing the exclusion of administrative officers from deciding in their own affairs were allegedly

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[10] German Federal and State Administrative Procedure Acts (1976) s 44 para 2.

[11] เอกพงษ์ ตั้งวิชาชาญ, ความเป็นโมฆะของคำสั่งทางปกครอง : ศึกษาเปรียบเทียบกฎหมายเยอรมัน ฝรั่งเศส อังกฤษ และไทย (วิทยานิพนธ์นิติศาสตรมหาบัณฑิต คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 2548) [Ekkapong Tangwichachan, *Void Administrative Act: A Comparative Study of German, French, English and Thai Law* (Master Thesis, Thammasat University 2005)] (Thai) 57, referring to ชัยวัฒน์ วงศ์วัฒนศานต์, กฎหมายวิธีปฏิบัติราชการทางปกครอง (จิรรัชการพิมพ์ 2540) [Chaiwat Wongwattanasan, *Administrative Procedure Law* (Chirarat Printing 1997)] (Thai) 282.

[12] Worajet (n 8) 204ff, according to whom an administrative act shall be invalid if 1. it is issued in written form but fails to show the issuing authority, 2. by law it can be issued only in a prescribed form, and this form is not followed, 3. it is impossible to be implemented, 4. it requires an action in contravention of the law incurring criminal punishment, 5. it offends against morality. These grounds of invalidity are similar to those found in the German Federal and state Administrative Procedure Acts (1976) s 44 para 2.

[13] Ekkapong (n 11) 93 with reference to Judgment No. Aor. 47/2546. On this case, see also อัญชริกา มูลมา, "ปัญหาทางกฎหมายเกี่ยวกับคำสั่งทางปกครองที่ไม่ชอบด้วยกฎหมายที่มีลักษณะผิดพลาดอย่างชัดแจ้งและร้ายแรง" (2558) 8(1) วารสารนิติศาสตร์ มหาวิทยาลัยนเรศวร 114 [Uncharika Moonma, "Legal Problems Involving the Illegality of Administrative Order That is Explicit and Serious Error" (2015) 8(1) Naresuan University Law Journal 114] (Thai).

[14] Worajet (n 8) 205.

violated.[15] Two new judgments now provide insights into the Court's standards for serious errors in corruption cases.

According to the facts of Judgment No. AorBor. 250/2564, the plaintiff was appointed to work at a municipality after he had passed the selection exam which was administered by a Rajabhat university. However, an investigation revealed that the university was, in fact, not authorized to administer such exams. Consequently, the municipality staff committee, one of the defendants, revoked the appointment. The plaintiff's request for reinstatement was rejected by the First Instance Court and, on appeal, by the Supreme Administrative Court as well.

The Court mainly reasoned that the selection process was flawed because university personnel had wrongfully pretended to be authorized to organize the selection process. Indeed, further investigations revealed corruption, leading also to criminal charges. In the words of the Court, the selection process was "corrupted and severely unlawful." Consequently, the administrative act appointing the plaintiff was severely and clearly defective and had therefore to be deemed as if it had never been issued. The defendants would, in fact, not have needed to revoke this non-existent administrative act. The Court thus considered the level of corruption so high as to render the appointment invalid. In addition, the decision confirmed the adoption of the French *inexistence* approach.

Judgment No. AorBor. 317/2564 dealt with a case of strikingly similar facts. However, the Court came to a partly different conclusion. Just like in the previous case, the plaintiffs were municipality employees who had been appointed after passing the respective selection exam. As it later appeared that corruption had occurred in the selection process, central authorities launched an investigation. Again, it turned out that the Rajabhat university in question was not an authorized institute to administer the exam, leading to the revocation of the appointment. Both the Court of First Instance as well as the Supreme Administrative Court rejected the plaintiffs' request to reverse the authorities' decision.

The Court's reasoning, however, differed in an important respect from its previous decision. Despite holding that the corrupted selection process caused severe harm to the personnel management of the local authorities, the Court merely affirmed that the Subdistrict (Tambon) Administrative Organization's order to revoke the appointment was lawful under Section 49 of the Administrative Procedure Act B.E. 2539 (1996). In particular, the Court argued that the plaintiffs' individual reliance interest was outweighed by the public interest in restoring the integrity of the selection process. In a remarkable difference to Judgment No. AorBor. 250/2564, the Court did not consider whether the administrative act (the appointment) was perhaps invalid

[15] Administrative Procedure Act B.E. 2539 (1996) ss 13–18. วรนารี สิงห์โต, ข้อสังเกตเกี่ยวกับหลักความเป็นกลางของเจ้าหน้าที่ฝ่ายปกครอง: วิเคราะห์เปรียบเทียบกฎหมายไทยและกฎหมายเยอรมัน (กฤษฎีกา 2560) [Woranaree Singhto, "Observations about the Principle of Impartiality of Administrative Officers: A Comparative Analysis of Thai and German Law" (Council of State 2017)] (Thai) 9 <https://www.krisdika.go.th/data/activity/act282.pdf> notes that the Council of State considers that such violations cause administrative acts merely to be unlawful but not invalid.

from the beginning and would therefore not even have needed to be revoked. To be sure, the Court did highlight the severity of the case when distinguishing the facts from those underlying an Opinion of the Administrative Procedure Commission[16] according to which mere defects would not justify a revocation. Thus, the Court emphasized the severe misconduct but refrained from finding the administrative act non-existent.

The two Judgments illustrate discrepancies among Supreme Administrative Court judges in the evaluation of severe administrative errors, in particular with regard to cases of corruption. They also reflect the continued doctrinal discussion about the proper handling of invalid administrative acts.[17] Legal certainty may indeed demand more explicit standards for the assessment of invalidity.

III. DEFINITION AND SCOPE OF ADMINISTRATIVE CONTRACTS

Besides administrative acts, administrative contracts are another important mode of administrative action. Disputes related to respective contractual obligations, however, often require an initial decision about the legal characterization of the contract. Administrative courts only have the power to adjudicate disputes relating to administrative contracts. This is one of the grounds of jurisdiction under Section 9 para. 1(4) of the Act on the Establishment of Administrative Courts and Administrative Court Procedure B.E. 2542 (1999). Conversely, disputes related to private law contracts are adjudicated by the Courts of Justice. The latter conduct adversarial trials, while administrative court proceedings follow the inquisitorial system. The characterization of a given contract may therefore play a significant role for the admissibility of a case and the parties' roles in the trial.

The definition of an administrative contract in Section 3 of the aforementioned Act:

> includes a contract at least one of the parties of which is an administrative agency or a person acting on behalf of the State, and which exhibits the characteristic of a concession contract, a contract providing public services or a contract for the provision of public utilities or for the exploitation of natural resources.

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[16] Administrative Procedure Commission [คณะกรรมการวิธีปฏิบัติราชการทางปกครอง], Opinion No. 576/2561 (2018).

[17] Regarding the related question whether general administrative procedural law is suitable to be used for revoking the appointment of civil servants, see นิติกร ชัยวิเศษ, "ความไม่เหมาะสมในการนำพระราชบัญญัติวิธีปฏิบัติราชการทางปกครอง พ.ศ. 2539 มาใช้กับการเพิกถอนคำสั่งแต่งตั้งข้าราชการ" (2562) 48(2) วารสารนิติศาสตร์ 248 [Nitikorn Chaiwiset, "The Inappropriate Application of the Administrative Procedure Act B.E. 2539 to the Withdrawal of the Appointment of Civil Servants" (2019) 48(2) Thammasat Law Journal 248] (Thai).

Whether a contract qualifies as an administrative contract is an objective question; the parties' intention is irrelevant in this regard.[18]

The definition in Section 3 is non-conclusive and leaves room for doctrinal developments.[19] Indeed, the Supreme Administrative Court developed at least two more categories besides the four categories expressly enumerated.[20] At the same time, however, previous decisions have also caused considerable uncertainty regarding the distinction between private and administrative law contracts.[21] It has been noted, in particular, that the Court had qualified a large number of contracts as administrative merely due to the fact that the respective goods or services were supposed to be used for public purposes.[22]

Among the decisions reviewed for this Commentary, Order No. 395/2564 is particularly noteworthy. According to the facts, the plaintiff was a private company contracted by a Rajabhat university, the defendant, to install a self-service kiosk system for the university's library. As the library's existing computer programs were not compatible with the new software, the plaintiff was unable to install the program. This led the university to terminate the contract and demand a stipulated penalty for non-performance. The plaintiff requested compensation. The legal issue addressed by the Court's Order at this stage of the proceedings was largely limited to the question of jurisdiction.

With reference to the Rajabhat University Act B.E. 2547 (2004) and the university's mandate to provide education for the people, the Court found that using new technologies was a valid method for administrative authorities to fulfil their mandates. The contract for the installation of the library self-service program was therefore an administrative contract, regardless of its monetary value, thus triggering the jurisdiction of the administrative courts. The Court's reasoning here is comparable to that of the Committee on Jurisdiction of Courts in a case ten years ago. Back then,

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[18] Worajet (n 8) 288.

[19] ชูชาติ อัศวโรจน์, คำอธิบายกฎหมายสำคัญที่เจ้าหน้าที่ใช้ในการปฏิบัติงานและที่ศาลปกครองใช้ในการพิจารณาคดี (โรงพิมพ์เดือนตุลา 2562) [Chuchart Asawaroj, *Explanation of Important Laws For Administrative Practice and Administrative Court Proceedings* (Duan Tula Printing House 2019)] (Thai) 265.

[20] These additional categories are contracts granting certain privileges to administrative authorities, and contracts by which private persons are directly engaged to provide a public service. See Worajet (n 8) 302f; Chuchart (n 19) 269 ff. adds, as another separate category, contracts about the purchase or rent of instruments that are important for the provision of public services. See also เดชา สินธุเพ็ชร์, "เกณฑ์การวินิจฉัยความเป็นสัญญาทางปกครอง : ศึกษาเฉพาะกรณีสัญญาเข้าร่วมจัดทำบริการสาธารณะและสัญญาให้เอกสิทธิ์แก่ฝ่ายปกครอง" (2563–2564) 9(11) วารสารวิชาการนิติศาสตร์ มหาวิทยาลัยทักษิณ 121 [Decha Sintupatch, "The Criteria of Administrative Contract: A Study of Participation in Public Service Contract and Contract with Highly Unusual Provisions" (2020–2021) 9(11) Thaksin University Law Journal 121] (Thai); นิสา สุริยะคาวงศ์ และรุ่ง ศรีสมวงษ์, "หลักความได้สัดส่วนกับการกำหนดเอกสิทธิ์ของคู่สัญญาฝ่ายปกครองในสัญญาทางปกครอง" (2562) 12(1) วารสารสังคมศาสตร์วิชาการ 89 [Nisa Suriyakhamwong and Rung Srisomwong, "The Principle of Proportionality and the Privilege of Administrative Parties in the Administrative Contracts" (2019) 12(1) Journal of Social Academic 89] (Thai).

[21] นิรัชรา พงศ์อาจารย์, "ทิศทางของสัญญาทางปกครองในระบบกฎหมายไทย" (2562) 12(2) วารสารผู้ตรวจการแผ่นดิน 113 [Niratchara Pong-ajarn, "The Direction Towards Administrative Contracts in According with Thai Legal System" (2019) 12(2) Journal of Thai Ombudsman 113] (Thai).

[22] Worajet (n 8) 303ff.

the Committee had qualified a contract between a vocational school and a private company about the rent of computers and the installation of a network system as an administrative contract as well. Like the Court, it mainly referred to the educational purpose to which the IT equipment contributed.[23]

Another case, Judgment No. Aor. 1051/2564, concerned the question of whether contracts between the Department of Labor Protection and Welfare and the Ministry of Labor, the defendants, and the plaintiffs were to be considered temporary employment contracts that would entitle the plaintiffs to certain benefits, such as salary for sick days, maternity leave compensation, or social security payments. The plaintiffs had been hired as janitors, accountants, and drivers. While the Court of First Instance had partially granted the requests, the Supreme Administrative Court rejected the remaining demands on appeal. However, the Court also scrutinized whether the outsourcing agreement constituted an administrative contract as this issue had been raised by some of the defendants. Though the defendants constituted administrative bodies, the Court found that the terms of the outsourcing contract neither allowed them to unilaterally terminate it nor did it grant them any particular privileges. As the plaintiffs were hired as janitors, accountants, and drivers, their services were also unrelated to the purpose of the authorities' mandates. Consequently, the contracts were governed by private rather than administrative law. The decision thus confirms earlier jurisprudence according to which the provision of services under a given contract needs a rather close relation to the public purpose to render the respective contract an administrative contract.[24]

While the correct characterization of contracts continues to be a doctrinal challenge, Judgment No. Aor. 1055/2564 addressed an issue of particular practical relevance: The calculation of stipulated penalties in administrative contracts. According to the facts, the Department of Water Resources, one of the defendants, had hired the plaintiff to build a water supply system. Due to several delays, despite extended deadlines, the Department demanded daily penalty payments by the plaintiff who, in turn, requested the administrative court to revoke the penalty and to order the defendant to return fines already paid. The First Instance Court granted a partial return, which the Supreme Administrative Court further increased.

The Court found that the authority's penalty calculation was partly flawed as it failed to take into account a temporary exemption granted by a Cabinet Resolution which had been enacted in response to a flood. Regarding delays that were not covered by this exemption, the Court applied Section 138 of the Rules of the Office of the Prime Minister on Procurement B.E. 2535 (1992), which provided that if a stipulated penalty incurred by a delay exceeded 10% of the procurement contract's whole value, the administrative authority had to terminate the contract unless the contracting party agreed to pay the additional stipulated penalty. In this case, the plaintiff had agreed to pay such extra penalty.

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[23] Committee on Jurisdiction of Courts [คณะกรรมการวินิจฉัยชี้ขาดอำนาจหน้าที่ระหว่างศาล], Decision No. 28/2554 (2011).

[24] See, for instance, Order No. 274/2548 (2005) (temporary hiring of health worker).

The accumulated penalty, however, amounted to 50.3% of the total value of the contract. The Court deemed this amount excessive. According to the Judgment, although administrative contracts are governed by the *pacta sunt servanda* principle, an administrative authority must not purposefully aim to cause severe financial damage to a private contracting party. Thus, a stipulated penalty amounting to this ratio was unjust, especially when, such as in this case, a company's construction work contributed to the authority's discharge of public duties. Consequently, the Court reduced the penalty to 20% of the contract's value.

IV. INDIVIDUAL CONCERN

Some of the issues discussed in the previous part involved the grounds of jurisdiction. In addition to the requirement of a case falling into one of the grounds stipulated by law, the plaintiff must have the required standing for a case to be filed to the administrative court. More precisely, the plaintiff must potentially have suffered from an administrative action (or the lack thereof), and the requested remedies must be available under the law. This is prescribed in Section 42 of the Act on the Establishment of Administrative Courts and Administrative Court Procedure B.E. 2542 (1999).

Persons who can file a case include both natural and legal persons,[25] government officials,[26] and governmental organizations.[27] According to the Court's past jurisprudence, plaintiffs in any of these categories must provide evidence that they suffered a direct injury.[28] Several prior cases are instructive in this regard. For example, in Order No. 118/2550 (2007), the Court rejected the plaintiff's claim to revoke a rule relating to the sales of assets of financial institutions on the grounds that the plaintiffs were merely citizens who used a public service but were not licensees. According to the Court, an *actio popularis* (a claim brought by a member of the public for the public interest) was inadmissible.[29] The Court has also repeatedly refused accepting cases involving claims against administrative acts where plaintiffs had mistaken injury to the public as injury to themselves.[30] For instance, in Order No. 93/2544 (2001), the Court dismissed the plaintiff's request to revoke a power purchase agreement between the Electricity Generating Authority of Thailand and a private powerplant on the ground that the plaintiff was not a contracting party.[31] In essence, plaintiffs need to be legally entitled to the alleged rights or interests that have allegedly been injured through an administrative action.[32]

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[25] Order No. 402/2550 (2007); Order No. 165/2551 (2008).
[26] Order No. 372/2552 (2009); Order No. For. 2/2552 (2009).
[27] Judgment No. Aor. 334/2550 (2007).
[28] Chuchart (n 19) 365ff.
[29] Judgment No. For. 31/2551 (2008).
[30] Order No. 628/2546 (2003); 700/ 2547 (2004); 864/2547 (2004).
[31] Order No. 93/2544 (2001).
[32] Order No. 90/2551 (2008); Order No. 134/2551 (2008); Order No. 193/2558 (2015).

Due to the high number of cases in which the plaintiff's standing must be considered, the law on this issue has been thoroughly developed by the administrative courts. The cases reviewed for this Commentary provide strong evidence of the Court maintaining its previous lines of reasoning. For example, in Judgment No. Aor. 884/2564, a case concerning a local community's resistance against the construction of the Map Ta Phut industrial estate, the Court found that the plaintiffs constituted a community and had been injured as their residences were in the pollution area. The Court thus confirmed its broad interpretation of the term "person" so that community rights could be protected.

Conversely, the Court has also remained consistent about the nature of claims that it excludes. In Order No. 150/2564, the plaintiff alleged that the land measurement conducted by the defendant land department was inaccurate and negatively affected the plaintiff's claim in a land dispute. The plaintiff thus requested the Court to order a new measurement. However, the Court refused, arguing that the measurement was merely a preparatory process for the making of an administrative act. Since the land department had not used the result of the measurement to in fact make the administrative act of amending the title deed, the plaintiff could not be deemed as an injured person.

Order No. 415/2564 was based on similar reasoning. In this decision, the defendant, the Royal Forest Department, had frozen a property transfer as the plaintiffs' land entitlement documents were allegedly related to land in a national forest area. The plaintiffs requested to revoke the findings of an investigation committee, albeit unsuccessfully as the Court deemed the findings only as a preparatory process, not causing any injury. Regarding the additional request to revoke the Royal Forest Department's notification to freeze the transfer of the land, the Court pointed out that the notification, mandatory by law, did not affect the plaintiffs' right to make changes to their land entitlement documents. Thus, the Court found that the plaintiffs were not injured in this case.[33]

The Court's firm stance was particularly evident in Order No. 387/2564. The case concerned an attempt to interplead in a dispute concerning the municipality's revocation of the plaintiff's building permit. The prospective interpleaders were neighboring tenants, and they provided a wide range of reasons to join the case. However, the Court rejected all their arguments: Although the rules governing interpleading in the Civil Procedure Code applied to administrative cases,[34] the interpleaders tried to invoke rights under criminal procedure instead. In addition, the Court found that the interpleaders had already had the chance to exercise their property rights when they requested the municipality to revoke the plaintiff's permit.

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[33] For another noteworthy case from 2021 in which this issue was adjudged in a similar manner, see Order No. KorBor.290/2564.

[34] Section 44 of the Act on the Establishment of Administrative Courts and Administrative Court Procedure B.E. 2542 (1999) provides that the rules governing interpleading are determined by the Rule of the General Assembly of Judges of the Supreme Administrative Court on Administrative Court Procedure, B.E. 2543 (2000). The Rule provides in Section 78 that Sections 57 and 58 of the Civil Procedure Code on interpleading apply to administrative court procedures *mutatis mutandis*.

Finally, the Court found that the revocation of the permit would not directly affect the interpleaders in their rights. They could therefore not join the proceedings.

The previous case is to be contrasted with Judgment No. AorRor. 96/2564, in which the Court accepted the interpleading request by a client who accused his lawyer, the plaintiff in this case, of professional misconduct. The Court found that the decision of the defendant, the Thai Lawyers Council, to revoke the plaintiff's license would affect the interest of the client as well.

Another interesting case, Order No. KorSor. 22/2564, concerns a dispute between the plaintiffs, several Buddhist temples, and the defendant, the Department of National Parks, Wildlife and Plant Conservation, over the Department's collection of fees from pilgrims who attended a Buddhist event hosted by the plaintiffs in a national park. The Court found that the plaintiffs could not use the injury to their pilgrims as a ground to file this case, especially since the Sangha Act B.E. 2505 (1962), which governed the plaintiffs in their capacity as juristic persons, did not give the plaintiffs the right to bring a claim on behalf of others. The plaintiffs' additional argument that their rights to protect Thai culture under Section 43 of the Constitution B.E. 2560 (2017) had been violated was dismissed, and the Court found that the collection of entrance fees was not injurious to the organization of Buddhist events.

As can be seen, the injury of the plaintiff is a vital component of an eligible claim. However, mere injury is not sufficient in circumstances where the law provides for a redress through the administrative appeal process. Under Section 42 para. 2 of the Act on the Establishment of Administrative Courts and Administrative Court Procedure B.E. 2542 (1999), the plaintiff must have tried to go through the administrative appeal process before filing a claim with the Court. An interesting case in this regard is Order No. KorSor. 14/2564, in which the plaintiffs claimed that the defendant, the Energy Regulatory Commission of Thailand, had allowed a wind farm to be built without proper environmental impact assessment and public hearing. The plaintiffs did not go through the appeal process. The Court, however, considered that, with respect to the administrative procedure concerning the wind farm license, the plaintiffs were not participants in terms of the Administrative Procedure Act B.E. 2539 (1996). Therefore, they did not have to appeal to the administrative authorities before filing their claim with the Court.

V. DEADLINES AND EXEMPTIONS

Even if plaintiffs have standing, they must of course meet the deadlines for the filing of a case. The law and decisions regarding these deadlines are of utmost practical importance.

Section 49 provides the general time limits for the filing of a case: 90 days from the date the cause of action is known or should have been known, or 90 days from when the plaintiff has made a written request to the administrative authority if the plaintiff has not received a response or considers the response unreasonable. Section

49 thus applies to cases concerning unlawful acts by authorities and to cases concerning an administrative authority's neglect or unreasonable delay in performing its duty. Cases concerning wrongful acts or other cases of state liability must be filed within one year, and cases concerning administrative contracts within five years of the date the cause of action is known or should have been known (Section 51). Both of the latter types of cases must be filed within ten years after such cause of action has arisen.

However, according to Section 52 para. 2, the Court has discretion to accept cases after the deadline if it deems the case of public benefit or necessary to be accepted for another cause. The text of the law does not define such terms, but the Court's jurisprudence has consistently provided guidance for their interpretation.[35]

Order No. 162/2564 elaborated upon the relationship between the appeal at the authority and the time limit for the filing to the court. It concerned the question of whether the objection against an order to demolish the plaintiff's building was filed within the 90 days' time limit according to Section 49. As the defendant authority in this case had not responded to the appeal, the Court held that the 90 days started from the date the authority was expected by law to render its decision, which was 60 days after the plaintiffs filed the appeal according to the Building Control Act B.E. 2522 (1979).

It may sometimes be doubtful when a deadline starts, particularly if the law does not provide for an appeal process, such as in the case of Judgment No. Aor. 779/2564. In this case, the plaintiff requested the revocation of the registration of the transfer of ownership in a condominium. The Condominium Act B.E. 2551 (2008) did not provide for appeals. Rather, the authority had the discretion to revoke or amend the registration. Thus, the Court decided that the plaintiffs' revocation requests were not appeals. The 90 days' time limit under Section 49 therefore started on the date the cause of action was known or should have been known, which was the date the transfer of ownership was registered.

Another relevant case concerning the start of the deadline is Judgment No. AorPhor. 230/2564. The plaintiff filed a case against the defendant, the Royal Irrigation Department, for damage caused to the plaintiff's land by the Department's implementation of the 'Bang Rakam' water management model. The available evidence was inconclusive as to when the plaintiff first knew of the model's implementation. The Court therefore determined the date by inference from the facts. In this regard, the judges considered that the date on which the plaintiff had requested the subdistrict administration organization to coordinate with the Department for compensation was not the date when the cause of action arose. Rather, it was when the Department refused to pay compensation at a subsequent meeting between the plaintiff and the Department. As the latter date was within the one-year time limit for cases concerning state liability under Section 51 of the Act on the Establishment of

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[35] บรรลือ สามารถกุล, คดีปกครองที่ยื่นฟ้องเมื่อพ้นกำหนดเวลาการฟ้องคดีโดยมีเหตุจำเป็นอื่น (วิทยานิพนธ์ นิติศาสตรมหาบัณฑิต คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 2559) [Banlue Samartkul, *Administrative Cases Filed After Expiration of Legal Time Limit With Other Necessary Causes* (Master Thesis, Thammasat University 2016)] (Thai) 109, 113.

Administrative Courts and Administrative Court Procedure B.E. 2542 (1999), the Court accepted the case into consideration.

In addition to issues related to the calculation of deadlines, cases from 2021 provide particularly interesting insights into the public benefit exception under Section 52 para. 2. Order No. 449/2564 concerned a dispute that arose out of a conflict between a resident in a private housing estate and the estate's juristic person over the demolition of a wall. The resident, who became the plaintiff, called on the defendant authority to order the juristic person to comply with the law. However, the claim was submitted after expiration of the deadline. The Court considered the public benefit exception but dismissed it since, according to the Court, the residents of one private housing estate did not constitute the general public.

Another relevant decision was made in the aforementioned wind farm case, Order No. KorSor. 14/2564. The 90 days' time limit had expired, and although the Court found that the protection of the plaintiffs' constitutional rights related to environmental impact assessments under Section 58 of the 2017 Constitution could not be considered a public interest, the construction of the wind farm nonetheless affected the general public. Thus, the exception under Section 52 para. 2 applied.

Order No. KorBor. 244/2564 provides a good example for what constitutes a "necessary cause" as an exception under Section 52 para. 2. According to the facts, the plaintiff had been dismissed from his duty at the municipality but failed to bring the case within the 90 days' time limit. In fact, the plaintiff had already brought the case to the administrative court earlier, but it was not admitted because the municipality was still considering the appeal. As the municipality did not deal with the appeal within the prescribed time, the plaintiff filed the case to the administrative court again. However, the prior case was still pending so that, according to Section 36 of the Rules of the General Assembly of Judges of the Supreme Administrative Court on Administrative Court Procedure B.E.2543 which prohibits parallel proceedings, the case could not be admitted a second time. In the meantime, the 90 days' deadline passed. Thus, the Court held that it was a case of a necessary cause in terms of Section 52 para. 2 and accepted the case into consideration.

Though the rules governing the deadline for filing a claim with the Court are provided in the Act on the Establishment of Administrative Courts and Administrative Court Procedure B.E. 2542 (1999), more specific rules would take precedence over these general provisions (*lex specialis derogat legi generali*). Interestingly, however, the Court may have deviated from this principle in Order No. KorPhor. 128/2564. The facts of this case revolved around the insufficient payment of compensation for the expropriation of the plaintiff's land by the defendant, the Department of Highways. Section 26 of the Immovable Property Expropriation Act B.E. 2530 (1987) provides that a case must be filed within one year after a decision on appeal has been received. The time limit for such a case under Section 51 of the Act on the Establishment of Administrative Courts and Administrative Court Procedure B.E. 2542 (1999), however, would be one year from having gained the actual or constructive knowledge of the cause of action and ten years from the rise of the cause of action. In this case,

the Court chose to apply the latter, general rule under Section 51. The judges justified their decision with reference to justice and the protection of citizens' rights.

VI. APPLICATION OF CONSTITUTIONAL LAW

While the Court mainly applies specific administrative provisions, our review of cases shows that the judges frequently refer to constitutional law too. Administrative and constitutional law are, of course, deeply related to each other. As administrative law often deals with everyday issues, Ginsburg aptly described it as the "poor relation of public law; the hard-working, unglamorous cousin laboring in the shadow of constitutional law."[36] Administrative law might nonetheless better reflect local values and provide more endurance for many polities than constitutional law can, leading Ginsburg to conclude that administrative law should be understood as even "more 'constitutional' than constitutional law," despite having only limited symbolic functions.[37]

Regarding Thai law, Worajet describes the relation between constitutional and administrative law as one between high-level but abstract constitutional provisions, and lower level but more concrete administrative rules. In accordance with this characterization, constitutional rights play a role when assessing the lawfulness of administrative action.[38] Chuchart refers to Articles 3(2), 4 and 5 and the chapter on rights and liberties of the Constitution B.E. 2560 (2017) and argues that the principles and rights laid down there, including human dignity, must be applied by the administrative courts, notwithstanding the fact that such rights are not explicitly mentioned in the Act on the Establishment of Administrative Courts and Administrative Court Procedure B.E. 2542 (1999). According to him, administrative law must always be applied and interpreted in the light of the Constitution.[39] Wissanu, with a slightly different emphasis, suggests that administrative law shall within itself lay down the principles for the protection of rights and liberties against arbitrary decision-making by administrative authorities.[40]

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[36] Tom Ginsburg, "Written Constitutions and the Administrative State: On the Constitutional Character of Administrative Law" in Susan Rose-Ackerman and Peter L Lindseth, *Comparative Administrative Law* (Edward Elgar 2010) 117.

[37] ibid 119, inverted commas in the original.

[38] Worajet (n 8) 25f.

[39] Chuchart (n 19) 7. See also ต่อพงศ์ กิตติยานุพงศ์, หฤษฎีสิทธิขั้นพื้นฐาน (โครงการตำราและเอกสารประกอบการสอน คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 2561) [Torpong Kittiyanupong, *Theory of Fundamental Rights* (Project for Promotion of Textbooks and Teaching Materials, Faculty of Law, Thammasat University 2018)] (Thai) 156.

[40] วิษณุ เครืองาม, เอกสารสอนชุดวิชากฎหมายมหาชน หน่วยที่ 3 : ความรู้ทั่วไปเกี่ยวกับกฎหมายรัฐธรรมนูญ (สาขาวิชานิติศาสตร์ มหาวิทยาลัยสุโขทัยธรรมาธิราช 2526) [Wissanu Krueangam, *Public Law Teaching Materials, Part 3: General Knowledge Of Constitutional Law* (Department of Law, Sukhothai Thammathirat University, 1983)] (Thai) 106f, as cited in ชาญชัย แสวงศักดิ์, คำอธิบายกฎหมายปกครอง (พิมพ์ครั้งที่ 30, วิญญูชน 2564) [Chanchai Sawaengsak, *Explanation of Administrative Law* (30th ed, Winyuchon 2021)] (Thai) 36.

During the year 2021, the Court referred to and applied constitutional provisions on several occasions. Besides some relevant examples mentioned above,[41] Judgment No. Aor. 884/2564 is the most instructive in this regard. Dozens of plaintiffs had filed the case to suspend industrial projects at the Map Ta Phut industrial estate in Rayong province until pollution problems were solved. The defendant governmental agencies had granted licenses to 76 projects, some of which had caused pollution.[42] Key questions were whether the agencies had failed to enact constitutionally required laws and regulations for environmental protection and whether they had omitted to compose committees and conduct public hearings as part of environmental impact assessments (EIAs).

The Court decided in favor of the state authorities and dismissed the plaintiffs' requests. Despite the absence of Cabinet and parliamentary legislation to ensure compliance with constitutional rights, the Court argued that relevant independent organs and regulations governing the criteria to approve the projects had been put in place. Thus, the demands for transitional legislation under Section 303(1) of the Constitution B.E. 2550 (2007), which was in force at the relevant time, were satisfied. In addition, the Court found no irregularities with the EIAs that had been conducted.

However, the Court ruled in favor of the plaintiffs regarding the question of whether they could file the case as a community. Here, the Court disagreed with the authorities who had argued that only registered communities had a right to sue. The judges considered that a community according to Section 67 of the 2007 Constitution simply refers to a group of people who share a geographical location, social or economic standing, or culture. Thus, the plaintiffs were a community in this sense. This part of the decision might be of high practical importance for future environmental litigation.

When assessing the constitutional framework of environmental protection, the Court argued for an elevated protection level. It came to this conclusion by way of a comparison between Section 67 of the 2007 Constitution and Section 56 of the Constitution B.E. 2540 (1997): According to the judges, the 2007 Constitution provided more safeguards for environmental protection than its 1997 counterpart. In particular, the Court referred to the explicit requirements for public hearings and health impact assessments contained in the 2007 Constitution. It also found that these mandatory requirements for environmental protection were applicable immediately after the Constitution had been enacted. Here, the Court referred to Constitutional Court Judgment No. 3/2552 (2009) as well as Sections 27 and 216(5) of the 2007 Constitution.

Finally, the Court also cited freedom of occupation (Section 43 of the 2007 Constitution) as a relevant consideration on the side of the businesses that had received the governmental approvals. Overall, the Map Ta Phut case illustrates how

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[41] Order No. KorSor. 22/2564 (Buddhist temple); Order No. KorSor. 14/2564 (wind farm case).

[42] In preliminary proceedings following a toxic leak, the Court upheld an injunction suspending 65 projects; see Order No. 592/2552 (2009). See also Andrew Harding and Peter Leyland, *The Constitutional System of Thailand. A Contextual Analysis* (Hart 2011) 208.

the Court applies relevant constitutional provisions, including fundamental rights, in environmental disputes.

In the cases reviewed for this Commentary, the Court also made occasional references to the principle of the rule of law as laid down in the Constitution. In Order No. 414/2564, the plaintiff, whose bid for an elevator maintenance contract at Suvarnabhumi airport had been rejected by the Airports of Thailand (AOT) Public Company Ltd., alleged that AOT had selected an unqualified competitor. Considering the admissibility of the case, the Court highlighted the power of administrative courts to review the legality of government procurement notwithstanding appeal procedures existing under the Government Procurement and Inventory Management Act B.E. 2560 (2017). In this respect, the Court cited the rule of law under Article 3(2) of the 2017 Constitution and referred to Article 197 which stipulates the mandate of administrative courts.

Another reference to the rule of law under Article 3(2) of the 2017 Constitution can be found in Judgment No. AorRor. 145/2564. The Court held that the principle would not be violated when deviating from a prior decision due to a change of facts. This change of facts had occurred when a claim for the return of sugar price stabilization fees had become time-barred in the meantime.

In Judgment No. Aor. 557/2564, the Court applied Section 36 of the 2007 Constitution (freedom of communication) when dismissing claims that an announcement of the National Broadcasting and Telecommunication Commission (NTBC) compelling telecommunication service providers to collect information on pre-paid SIM card users infringed constitutional rights. The Court found no violation, arguing that the interest to protect national security, in particular to prevent insurgencies in southern provinces, outweighed users' rights. In another telecommunications-related case, Judgment No. AorRor. 187/2564, the Court had to deal with a claim against the NBTC permitting the telecommunication provider DTAC to offer the use of its network infrastructure to other companies. The Court's full dismissal of the plaintiff's request was largely based on references to the 1997 and 2007 Constitutions both stipulating that transmission frequencies were national communication resources for public interest.[43] Another example is, finally, Judgment No. AorPhor. 344/2564, in which the Court applied constitutional provisions governing the expropriation of land, finding no violation of the plaintiff's rights.

Overall, the review of decisions shows that, despite recurrent removals and replacements of the written Constitution, the Supreme Administrative Court referred to constitutional law where necessary. On some occasions, the Court identified constitutional change and continuity with regard to the Constitutions of 1997, 2007 and 2017. While most cases were, of course, decided based on the specific provisions of administrative law, the Court was prepared to interpret these Acts and regulations in light of the respective Constitution, and even apply relevant provisions and principles directly. The Court's continuous jurisprudence in a changing constitutional

[43] Ss 40 and 47, respectively.

setting might remind us of Otto Mayer's famous saying that "constitutional law vanishes, administrative law persists."[44] Ironically, however, it also reflects Harding and Leyland's description of Thai constitutionalism as a "continuously emergent concept that does not necessarily hinge fundamentally on the constitution in force at any given time."[45] This view indeed corresponds to Ginsburg's emphasis of administrative law's constitutional character.

VII. OTHER NOTEWORTHY DECISIONS

Apart from the decisions related to the specific issues above, we added five more noteworthy cases from 2021. We selected these decisions for two main reasons: Firstly, some decisions had and may continue to have immense political and societal relevance. They reflect contentious public debates and may affect future state policies. Although there is no formal system of precedent in Thai law,[46] lower courts tend not to deviate from prior decisions of higher courts. In addition, Supreme Administrative Court decisions are likely to influence both governmental action and public opinion. Secondly, several decisions possibly reflect underlying values and may contain hints of the Court's perception of social order. Thus, such cases illustrate once more administrative law's constitutional character and its role in defining the state-citizen relationship.

A. Pak Bang Dam

Order No. KorSor. 1/2564 concerned the construction of the Pak Bang Dam in Laos. The case needs to be seen in contrast to Order No. KorSor. 8/2557 (2016), in which the Court partially accepted into consideration the request of Thai plaintiffs to order Thai authorities to disclose information and conduct a proper impact assessment in relation to the construction of the Xayaburi Dam (also in Laos).[47] The 2021 decision on the Pak Bang Dam, however, could indicate a new direction in the Court's jurisprudence and might have an impact on the merits of the still pending Xayaburi Dam case.[48]

According to the facts, the plaintiffs, residents of Chiang Rai living close to the Mekong, argued that the defendants, the Secretary of the Office of the National Water Resources, the Office of the National Water Resources, and The National Mekong Committee of Thailand, failed to conduct sufficient public hearings which led to the defendants' further failure to object to the construction of the Pak Bang Dam in the

[44] "Verfassungsrecht vergeht, Verwaltungsrecht besteht." Otto Mayer, *Deutsches Verwaltungsrecht* [*German Administrative Law*] (3rd ed Duncker & Humblot 1924) (German) Preface.

[45] Harding and Leyland, Constitutional System (n 41) xxxii.

[46] Worajet (n 8) 38ff.

[47] Order No. KorSor. 8/2557 (2014).

[48] Judgment, Black Case No. Sor. 493/2555 (2012); Black Case No. AorSor. 11/2559 (2016).

Lao Mekong Committee. The Court agreed that the plaintiffs had the right to a public hearing under Section 58 of the 2017 Constitution. However, it rejected the plaintiffs' claims to rectify the alleged failures on the basis that they were not injured under Section 42 of the Act on the Establishment of Administrative Courts and Administrative Court Procedure B.E. 2542 (1999) and therefore did not have standing.

In coming to this conclusion, the Court found that the defendant government authorities did not have the duty to conduct public hearings since they only had to follow the procedures under the 1995 Mekong Agreement, signed by Cambodia, Laos, Thailand and Vietnam. In an apparent reconsideration of its position in the Xayaburi case, the Court held that Section 58 of the 2017 Constitution and the relevant environmental regulations only applied to projects situated in Thailand. According to the Court, Thailand's competence to assess the impact of projects governed by international treaties was limited, and the construction of the Dam was subject to the Lao government's sovereign decision.

What is more, regarding the plaintiffs' request to order the defendants to object against the project, the Court found that the authorities were acting on behalf of Thailand and in compliance with the country's international obligations: falling into the realm of international relations, the defendants' conduct was not an exercise of administrative power and thus did not fall into the Court's jurisdiction.

B. 2011 Bangkok Flood

Case No. AorSor. 3/2564 arose from the plaintiffs' allegation that the defendants, who consisted of the Prime Minister and various ministries and agencies, had failed to control the flood of 2011, which caused damage to the plaintiffs who lived in areas surrounding Bangkok.[49] The flood had a deep social and economic impact, and the appropriateness of the government's measures was widely and controversially discussed.[50] In this particular case, the Court found that the release of water through the Bhumibol and Sirikit dams was lawful since the measures were in accordance with scientific knowledge, the relevant authorities had closely cooperated, and the water released from the reservoirs contributed only minimally to the flood. Coming to this conclusion, the Court affirmed the authorities' discretion to choose necessary and reasonable measures and the power to act without prior notifications or hearings in cases of public emergency.

Regarding the construction of dikes and the placement of mega-sized sandbags to protect inner Bangkok by diverting water to surrounding areas, the Court found that the defendants were not liable as they had acted reasonably and without gross negligence (Section 43 para. 1 of Disaster Prevention and Mitigation Act B.E. 2550

[49] See also the similar decision in Case No. AorSor. 6/2564, arising from similar facts.

[50] "แกลเลอรี: 10 ปี มหาอุทกภัยปี 2554 ประเทศไทยจมบาดาล" บีบีซีไทย (22 ตุลาคม 2562) ["Gallery: 10 Years of Great Flood of 2554, Thailand under Water" *BBC Thai* (22 October 2019)] (Thai) <https://www.bbc.com/thai/58992279>.

(2007)). The Court held that the flood was an unforeseeable event and that the authorities' measures were suitable, necessary, and proportionate due to Bangkok's central economic importance and the merely temporary nature of the flooding of other areas.

However, the Court partly sided with the plaintiffs when it affirmed the state's liability without fault due to the extraordinary burden suffered by the plaintiffs without incurring any benefit from the measures. The plaintiffs' claim for compensation was nonetheless rejected as they had been compensated under a government scheme to help flood victims.

C. BTS Sky Train Elevators

Case No. AorRor. 101/2564 concerned the Bangkok Metropolitan Administration's (BMA) liability for the Bangkok Mass Transit System's (BTS) failure to implement a prior Supreme Administrative Court judgment. In the prior Judgment, the Court had ordered the BMA to build elevators at BTS sky train stations within one year to ensure the rights of disabled persons.[51] The BMA failed to do so, and 430 plaintiffs claimed compensation for their increased travel costs caused by not being able to use the sky trains. The Court of First Instance had dismissed the plaintiffs' requests. The Supreme Administrative Court reversed the decision.

The Court applied the criteria of tort under Section 420 of the Civil and Commercial Code. It found the BMA's failure to be unlawful since an unreasonably long period of five years had passed since the prior judgment. Regarding the question of negligence, the Court held that the BMA could foresee disabled persons' suffering from the lack of elevators, which violated the plaintiffs' rights to equal treatment under Sections 4 and 25 of the 2017 Constitution. Although the constitutional rights were not analyzed in detail, the Court's application of these provisions reaffirms our findings above that the administrative courts are more than an alternative to the Constitutional Court in terms of the protection of citizens' rights.[52]

The amount of compensation awarded by the Court was rather minimal, though: The plaintiffs received 5,000 Baht with interest. In this respect, the Court took into consideration the BMA's genuine efforts to construct the elevators. Moreover, some claims were already time-barred. Punitive damages were not awarded as neither intention nor gross negligence was found (see Section 16 para. 2 of the Empowerment of Persons with Disabilities Act B.E. 2550 (2007)).

[51] Judgment No. Aor. 650/2557 (2016).

[52] Frank Munger, Peerawich Thoviriyavej, and Vorapitchaya Rabiablok, "An Alternative Path to Rule of Law? Thailand's Twenty-First Century Administrative Courts" (2019) 26(1) Indiana Journal of Global Legal Studies 133.

D. Award of a Government Contract to a Family Member

Case No. AorRor. 117/2564 concerned an alleged conflict of interest in an administrative authority. According to the facts, the plaintiff, a mayor of a subdistrict administrative organization, awarded a government construction contract to a company owned by his son. This caused the defendant, the district chief, to set up a committee and remove the plaintiff from his position. The plaintiff's appeal against his removal to the Court of First Instance was dismissed.

The Supreme Administrative Court, however, overturned the decision and granted the plaintiff's request, reinstating the plaintiff as the mayor. The case is noteworthy because of the Court's interpretation of Section 64/2 para. 1 of the Act on Subdistrict Council and Subdistrict Administrative Organization B.E. 2537 (1994), which prohibits the mayor of a subdistrict administrative organization from being a direct or indirect stakeholder in a government contract. The Court found several factors which made the award of the contract to the company of the plaintiff's son necessary. Such factors included budgetary constraints, the lack of contractors available at the time, and the urgency in which the construction had to be made.

Moreover, the Court held that the plaintiff's son benefitting from the contract did not cause the plaintiff himself to be a direct or indirect stakeholder. In this respect, the Court emphasized that the plaintiff no longer had the duty to take care of his adult son. Conversely, although the son owed maintenance to the plaintiff by law, the Court did not find any evidence that the plaintiff's son had used the benefit from the government contract to meet these obligations.

The Court's narrow interpretation of "stakeholders" might have significant repercussions on the practice of Thai authorities. The Court's apparent leniency may even reflect a certain acceptance of family members' involvement in administrative affairs despite Section 13 of the Administrative Procedure Act B.E. 2539 (1996), which explicitly prohibits administrative authorities from engaging descendants in administrative processes.[53]

E. True-NBTC Mobile Portability

Finally, Judgment No. Aor. 817/2564 concerned the legality of administrative fines imposed by the National Broadcasting and Telecommunications Commission (NBTC) on True Move, a telecommunication service provider. True Move was fined for its repeated failure to implement a mobile number portability service in accordance with NBTC announcements. This led to True Move seeking to revoke both the NBTC announcements and the orders imposing fines. The Supreme Administrative Court affirmed the first instance court's dismissal of the case, citing in particular the purpose of the relevant legislation to protect the interests of telecommunication users.

[53] On this provision, see Judgment No. Aor. 129/2547 (2004).

Among other legal issues, the Court had to determine whether the implementation of the service was technically feasible in terms of Section 12 of the Telecommunications Business Act B.E. 2544 (2001). The Court found that True Move could have prepared itself much earlier despite an unforeseeable shortage in specialist personnel. It based its dismissal also on the fact that True Move was aware of its obligations as the company had even participated in the drafting of the NBTC announcements. Regarding the amount of the administrative fine, the Court acknowledged the NBTC's discretion to calculate it based on True Move's estimated profit.

VIII. CONCLUSION

Our Commentary has not only revealed the spectrum of the legal issues addressed by the Supreme Administrative Court in one year; it has also tried to reflect the wide variety of factual circumstances giving rise to administrative litigation. Issues of national interest took turns with highly individual and local cases. When looking at the decisions from the perspective of legal certainty, however, the Court might have missed a few opportunities. That became clear regarding the invalidity of administrative acts in cases of corruption, the award of government contracts to family members, and in the Pak Bang Dam case where previously granted access to the Thai administrative courts in transnational circumstances was apparently rolled back. On the other hand, the Court consolidated its jurisprudence on administrative contracts, on the admissibility requirement of individual concern (in purely domestic cases), and on the calculation of and exemptions from deadlines. The importance of constitutional law for the decision of administrative cases was discernable as well. Of course, we had to leave several doctrinal and practical issues unaddressed, which would have merited discussion.

The purpose of this Commentary, however, has also been to make recent developments in Thai administrative law accessible to a wider non-Thai readership. Previous English-language publications on Thai administrative justice have mainly focused on its history and development, the constitutional and political context, its institutional features, and the courts' independence, as well as on case statistics and a few high-profile decisions.

But after more than twenty years since the inauguration of the first administrative courts in Thailand, international scholarship is ready to zoom in and engage in more rigorous analyses of the legal developments. We believe that by tracing the consolidation of doctrines and interpretations, and by critically observing the evolving relationship between constitutional and administrative law, a deeper understanding of the entrenchment of Thai constitutionalism, the limitation of governmental power, the protection of rights and equality, the state of democratization, and the process of social change is possible.

In this sense, we hope that administrative law will not only be the next frontier[54] but indeed the next success story for comparative law.

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[54] Janina Boughey, "Administrative Law: The Next Frontier for Comparative Law" (2013) 62(1) International and Comparative Law Quarterly 55.