

Summary of the Constitutional Court Ruling No. 22/2543

Dated 23rd May B.E. 2543 (2000)*

Re : The President of the Senate referred the opinion of senators to the Constitutional Court for a ruling under section 262 paragraph one subparagraph (1) of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) on whether or not the Bill on Management of Partnerships and Shares of Ministers, B.E. contained any provision which was contrary to or inconsistent with the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

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1. Background and summarized facts

The Management of Partnerships and Shares of Ministers Bill, B.E. was a Bill approved by the National Assembly under section 175 (3) of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). Prior to the Prime Minister's action under section 93 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), certain senators submitted an opinion to the President of the Senate that section 5 of the Bill on Management of Partnerships and Shares of Ministers, B.E. contained provisions which were contrary to or inconsistent with section 209 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). Such section of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) laid down the principle that a Minister should not be a partner or shareholder of a partnership or a company or retain his or her partnership or shareholding interests in a partnership or a company unless such interests were within the limit prescribed by law. Under this Bill, section 4 prescribed the amount of shares that could be held or retained as being not more than five per cent of the capital or the total number of shares. In the case where any Minister intended to continue to benefit from such provisions of law, the last part of section 209 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) provided that the Minister should inform the President of the National Counter Corruption Commission and transfer such shares to a juristic person who would manage such shares. The words "transfer his or her shares" in section 209 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) referred to the shareholdings allowed under section 4, i.e. not more than five per cent. Nevertheless, section 5 of the Bill went on to state that "in the case where the Minister intends to receive benefits from the partnership or shareholding interests in a partnership or a company over the amount stated in section 4, the Minister shall carry out the following (1) inform the President of the National Counter Corruption

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Commission in writing... and (2) transfer the shares in the partnership or company to a juristic person within ninety days...”. The senators considered that such a provision in section 5 which provided for the amount of shares which exceeded the limit in section 4 and which provided for the transfer of shares over the five per cent threshold to a juristic person for management was a provision which was contrary to or inconsistent with section 209 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). The constitutional prohibition of a Minister from becoming a partner or a shareholder in a partnership or a company would be rendered meaningless because in the result, the Minister could become a partner or hold shares in any amount, provided that the amount which exceeded the five per cent threshold is transferred to a managing juristic person. As for the amount within the five per cent, the Minister could continue to become a partner or shareholder. As a consequence, section 216 (6) of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), which provided for the termination of the ministership of an individual Minister upon the commission of an act prohibited by section 209, would not have any force. That was the case because the prohibition had been exempted by section 5 of the Management of Partnerships and Shares of Ministers Bill, B.E. In this application, the President of the Senate referred such opinion to the Constitutional Court for a ruling under section 262 paragraph one subparagraph (1).

2. Preliminary issue

At the time when the President of the Senate referred such opinion of the senators to the Constitutional Court for a ruling, there were 382 members of the House of Representatives and 250 senators, or a total of 632 members of the National Assembly. Therefore, 65 senators constituted a number which was not less than one-tenth of the total number of existing members in both Houses of the National Assembly. The application was therefore in accordance with section 262 paragraph one subparagraph (1) of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) and the Constitutional Court had the power to accept this application for consideration.

3. The issue considered by the Constitutional Court

The issue considered was whether or not section 5 of the Management of Partnerships and Shares of Ministers Bill, B.E. contained provisions which were contrary to or inconsistent with section 209 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

The Constitutional Court held the following opinion:

Section 209 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) stated that “a Minister shall not be a partner or shareholder of a partnership or a company or retain his or her being a partner or shareholder of a partnership or a company

unless held up to the limit as provided by law...” The Constitutional Court was of the opinion that whereas section 209 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) contained provisions which prohibited a Minister from being a partner or shareholder in a partnership or company or retain a partnership or shareholding interests in the partnership or company, the words which followed such prohibitions were “up to the limit provided by law.” Such a provision was an exemption which allowed the Minister to continue being a partner or shareholder in the amount provided by the law. Section 4 of the Management of Partnerships and Shares of Ministers Bill, B.E. prescribed the amount of shares in a partnership or company which could be held by a Minister. As for the amount which exceeded such limits, if the Minister intended to receive benefits from the partnership or shareholding interests in the partnership or company or retain his or her being a partner or shareholder in the amount which exceeded the limit prescribed by law, section 5 of the Bill provided that the Minister should inform the President of the National Counter Corruption Commission in writing and transfer such partnership or shares in a partnership or company in the amount which exceeded the legal prescription to a juristic person which managed assets for the benefit of other persons. Whereas section 209 paragraph two of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) stated that “the Minister shall not do any act which, by nature, amounts to the administration or management of shares or affairs of such partnership or company,” the provision in section 5 of the Bill supported the principle in section 209 paragraph one that a Minister could be a partner or hold shares in a partnership or company or retain partnership or shareholding interests in a partnership or company in the amount provided by law. This was also consistent with section 48 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) which provided that the property right of a person was protected and the extent and the restriction of such right was in accordance with the provisions of the law. Moreover, this was also in accordance with the principle that a person should enjoy the liberties to engage in an enterprise or an occupation under section 50 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). Section 209 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) prohibited a Minister from holding a substantial partnership interest or shares in a partnership or company which by nature enabled him or her to manage such a partnership or company concurrently with his or her holding the position of a Minister. The principle was laid down in order to guarantee that the performance of ministerial functions would not result in a conflict of interests.

4. Ruling of the Constitutional Court

The Constitutional Court held that section 5 of the Bill on Management of Partnerships and Shares of Ministers, B.E. was neither contrary to nor inconsistent with section 209 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).
