

# Summary of the Constitutional Court Ruling No. 24/2543

Dated 15<sup>th</sup> June B.E. 2543 (2000)\*

**Re : The Regulation of the Election Commission Ordering a New Election before Announcing the Result of the Election of Senators (No. 2), B.E. 2543 (2000) is 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

Mrs. Porntip Tanasriwanichchai, a candidate in the election of Udon Thani senators, submitted a letter of claim to the Ombudsman stating that the Election Commission issued the Regulation of the Election Commission Ordering a New Election before Announcing the Result of the Election of Senators (No. 2), B.E. 2543 dated 1<sup>st</sup> May B.E. 2543 (2000). Under article 3 of such Regulation, article 6 bis was added to the Regulation of the Election Commission Ordering a New Election before Announcing the Result of the Election of Senators, B.E. 2543 (2000) dated 20<sup>th</sup> March B.E. 2543 (2000) which provided that “In the case where the Election Commission has not announced the result of an election of any candidate in such election more than one time, the Election Commission may make the decision by consensus that such the candidate shall be deemed as not being a candidate in a new election.” The reason of the Election Commission for issuing this Regulation was that in each election, if any candidate in such election who acted in any manner the Election Commission could exercise its power not to announce his name was allowed to be a candidate in the next election, the election may be held endlessly. Hence, the procedure set forth in that article of the Regulation could help the Election Commission in holding an election to be proceeded successfully and in an honest and fair manner.

The Election Commission by virtue of the said Regulation ordered that Mrs. Porntip Tanasriwanichchai was not a candidate in the new election of senators held on 4<sup>th</sup> June B.E. 2543 (2000). Mrs. Porntip was of the opinion that the Regulation was obviously contrary to or inconsistent with the Constitution. Mrs. Porntip accordingly requested the Ombudsman to submit the case and the opinion to the Constitutional Court for ruling by virtue of section 198 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

The Ombudsman considered the letter of claim and was of the opinion that the Regulation was questioned on being unconstitutional in relation to qualifications and

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prohibitions to which a person having the right to be a candidate in an election of senators had to be subjected under section 124, which provides that the provisions of section 105 and section 106 shall apply *mutatis mutandis*, section 125 and section 126 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) in conjunction with section 87 of the Organic Act on Election of Members of the House of Representatives and Senators, B.E. 2541 (1998) which provides that “A person having the right to be a candidate in an election of senators shall have qualifications and shall not have prohibitions to be such a candidate under the provisions of the Constitution.” Therefore, those provisions should be taken into consideration. In addition, the provision in the Organic Act on Election of Members of the House of Representatives and Senators, B.E. 2541 (1998) provided the Court of Justice with a power to revoke the right to be a candidate in an election. Whereas there was no provision in the Constitution or any other laws provided the Election Commission with the power to revoke the right to be a candidate in the election of senators, the Regulation of the Election Commission Ordering a New Election before Announcing the Result of the Election of Senators (No. 2), B.E. 2543 (2000) may therefore be unconstitutional.

## **2. Preliminary issue**

Section 198 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) provided that “In the case where the Ombudsman is of the opinion that the provisions of the law, rules, regulations or any act of any person under section 197 subparagraph (1) begs the question of the constitutionality, the Ombudsman shall submit the case and the opinion to the Constitutional Court or Administrative Court for decision in accordance with the procedure of the Constitutional Court or the law on the procedure of the Administrative Court, as the case may be.” According to the terms stated in the end of such provision, the procedure of the Constitutional Court meant the Rules of the Constitutional Court Procedure, B.E. 2541 (1998) which were applied to all cases submitted to the Constitutional Court for consideration and the law on the procedure of the Administrative Court meant the Act on Establishment of Administrative Courts and Administrative Court Procedure, B.E. 2542 (1999) of which section 43 provided that “In the case where an Ombudsman is of the opinion that any by-law or act of an administrative agency or State official is unconstitutional, the Ombudsman shall have the right to refer the case, together with the opinions thereon, to an Administrative Court. In presenting such opinions, the Ombudsman shall have such rights and duties as if the Ombudsman was the person entitled to file a case under section 42.”

Section 198 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) did not clarify which organ, the Constitutional Court or the Administrative Court, had the power to review the constitutionality of rules or regulations submitted to it by the Ombudsman. However, section 276 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), which was the general provision on powers and duties of the Administrative Court, provided the Administrative Court with the power to consider

“the legality” of the act of a State agency, State enterprise, local government organization, or State official under the superintendence or supervision of the Government. The power and duty of the Administrative Court in deciding the case under section 198 paragraph one of the Constitution was therefore limited only to the act of such entities. The Election Commission was an organ established under part 4 of Chapter VI of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). It was not State agency or State official under the superintendence or supervision of the Government as stated above. Hence, the Regulation in question was outside the powers of the Administrative Court to consider. The Ombudsman referred the case to the Constitutional Court by virtue of section 198 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). The case was therefore under the power of adjudication of the Constitutional Court.

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

Was the Regulation of the Election Commission Ordering a New Election before Announcing the Result of the Election of Senators (No. 2), B.E. 2543 (2000) which provided that “In the case where the Election Commission has not announced the result of an election of any candidate in such election more than one time, the Election Commission may make the decision by consensus that such the candidate shall be deemed as not being a candidate in a new election” constitutional or not?

The Constitutional Court held the following opinion:

Article 6 bis of the Regulation of the Election Commission Ordering a New Election before Announcing the Result of the Election of Senators (No. 2), B.E. 2543 (2000) was issued by virtue of section 10 of the Organic Act on the Election Commission B.E. 2541 (1998) which provided the Election Commission with the following powers: “... (7) to order a new election or a new voting at a referendum to be held in any or all polling stations or to order a re-count of the votes when it can reasonably believe on the evidence that the election or the voting at a referendum in that or those polling stations has not been conducted in an honest and fair manner pursuant to rules and procedure prescribed by the Election Commission.” Considering its substance, this Regulation was issued ultra vires the powers conferred by section 10 subparagraph (7) of the said Act. In addition, the substance of such Regulation was to restrict the right of a person to be a candidate in the election of senators, meaning as adding another prohibition of a person to be a candidate in the election of senators under section 126 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). This Regulation was therefore deemed as the provision amending section 126 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), which this was prohibited. Since the right to be a candidate in an election of a person when he had all qualifications under section 125 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) was recognized by the Constitution, the restriction of such right was prohibited pursuant to section 29 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

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

The Constitutional Court held that the Regulation of the Election Commission Ordering a New Election before Announcing the Result of the Election of Senators (No. 2), B.E. 2543 (2000) was unconstitutional, because it was contrary to or inconsistent with section 29 paragraph one and section 126 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) and the case was under section 6 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

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