

Summary of Constitutional Court Ruling No. 1/2560 (2017)

Dated 5th September B.E. 2560 (2017)*

Re: The President of the National Legislative Assembly referred the opinions of Members of the National Legislative Assembly to the Constitutional Court for a ruling under section 148 paragraph one (1) in conjunction with section 263 of the Constitution on whether or not section 56 of the Organic Bill on Ombudsman B.E. contained provisions which were contrary to or inconsistent with the Constitution.

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1. Summary of background and facts

The President of the National Legislative Assembly, applicant, referred the opinions of 36 Members of the National Legislative Assembly to the Constitutional Court for a ruling under section 148 paragraph one (1) in conjunction with section 263 of the Constitution. It was stated that section 273 paragraph one of the Constitution was a provision relating to the tenure of Constitutional Court Justices, holders of offices in independent organs and the Auditor-General, holding office on the day prior to the effective date of this Constitution. The period was divided into two intervals. That was, while an Organic Act pursuant to section 267 of the Constitution was not yet enacted, such persons remained in office to continue performance of duties. Vacation of office would be as provided by the Constitution of the Kingdom of Thailand B.E. 2550 (2007) and Organic Act or relevant law. In other words, vacation of office would be as provided under the Organic Act on Ombudsman B.E. 2552 (2009), being the law in force at the time of taking office. In the event that an Organic Act under section 267 had already been enacted, the extent of remaining term in office would be as provided in such Organic Act. The term “extent of remaining term” referred to two situations, namely, whether or not the office term should continue or the office term would continue for a certain period. The term “extent” likely referred to only the appropriate period of time stipulated by the transitory provisions of the Organic Act enacted under section 267, and did not mean that such person could remain in office for the remaining term. In addition, section 273 of the Constitution did not provide for an exemption of qualifications and disqualifications for office holders on the day prior to the effective date of this Constitution. Therefore, even if there was a provision allowing the Justices of Constitutional Court, office holders in independent organs and the Auditor-General to remain in office to continue performing duties under the relevant Organic Act, such persons must

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also have the qualifications and not have the disqualifications as provided under the Constitution. As a consequence, section 56 of the Organic Bill on Ombudsman B.E., which provided for an exemption of certain qualifications under the Constitution to allow continued tenure, was contrary to or inconsistent with the Constitution.

2. The preliminary issue considered by the Constitutional Court

The preliminary issue was whether or not the Constitutional Court had the competence to accept the application for a ruling under section 148 paragraph one (1) in conjunction with section 263 of the Constitution.

After deliberation, the Constitutional Court found as follows. It was found on the facts that not less than one-tenth of the total number of Members of the National Legislative Assembly were of the opinion that section 56 of the Organic Bill on Ombudsman B.E. contained provisions which were contrary to or inconsistent with the Constitution. An opinion was submitted to the applicant. The applicant referred the opinion to the Constitutional Court for a ruling under section 148 paragraph one (1) on whether or not section 56 of the Organic Bill on Ombudsman B.E. contained provisions which were contrary to or inconsistent with the Constitution. The case was therefore in accordance with section 148 paragraph one (1) in conjunction with section 267 paragraph five, section 81, section 145 and section 263 of the Constitution. Thus, the Constitutional Court ordered the acceptance of application for consideration.

3. The issue considered by the Constitutional Court

The issue considered by the Constitutional Court was whether or not section 56 of the Organic Bill on Ombudsman B.E. contained provisions which were contrary to or inconsistent with the Constitution.

After deliberation, the Constitutional Court found that the transitory provision in the Constitution was a provision exempting certain constitutional provisions, which was necessary to cure problems which would arise during the transitory period between the enforcement of the previous and current Constitutions. The provision ensure the smooth application of the Constitution in line with public situation in the initial period, as well as to enable such organs to continue performing constitutional duties. The provision filled in gaps which could interrupt the performance of duties until the mechanisms newly installed or enforced were ready or able to operate, as the case may be.

This principle was provided in section 273 paragraph one of the Constitution by recognising the status of the Justices Constitutional Court office holders in independent organs and the Auditor-General holding office on the day prior to the effective date of the Constitution to remain in office for performance of duties during the transitory period between the previous and current Constitutions to ensure continuity of functions of such

office holders. Such recognition of status were stipulated during two intervals. In the period when an Organic Act under section 267 had not yet been enacted, the vacation of office of such office holder would be as provided under the Constitution of the Kingdom of Thailand B.E. 2550 (2007) and Organic Act or relevant law. In the period when an Organic Act under section 267 had already come into force, the extent of remaining term would be as provided under the Organic Act enacted pursuant to section 267. The Constitution did not provide the period for continued performance of duties or vacation of office, including causes for exemption of disqualification. A prescription on extent of remaining term of such office holders could take many forms. For example, the office holder could remain in office until expiration of term pursuant to the Constitution of the Kingdom of Thailand B.E. 2550 (2007), or only an office holder having the qualifications and not having disqualifications under the Constitution could remain in office, or all office holders should vacate office. In any event, the prescription of any particular form should take into account the reasons, necessities and expediencies in terms of composition, functions and competence of each organ, as well as conformance with the spirits of the Constitution.

The Organic Bill on Ombudsman B.E. was an organic bill drafted by the Constitutional Drafting Committee and approved by the National Legislative Assembly pursuant to section 267 and section 273 paragraph one of the Constitution. Draft section 56 was a transitory provision on continuing tenure during the transition between the end of previous law and commencement of the new law, with respect to the extent of tenure of the Chief Ombudsman and Ombudsmen holding office on the day prior to the commencement date of the Organic Act as provided in the transitory provision under section 273 paragraph one of the Constitution. The majority of the National Legislative Assembly affirmed that the National Legislative Assembly had already taken into consideration the necessity of such law as well as the rule of law, fundamental principles of the Constitution. The Constitutional Drafting Committee and Ombudsmen were not of the opinion that such organic bill was inconsistent with the spirit of the Constitution. Such draft provision provided for the continued tenure in two intervals, namely:

(1) The continued tenure. This draft provision stated that the Chief Ombudsman and Ombudsmen holding office on the day prior to the commencement date of the Organic Act would remain in office until the expiration of term as provided by the Organic Act on Ombudsmen B.E. 2552 (2009).

(2) Qualifications under the Constitution. This draft provision exempted the application of certain qualifications required under the Constitution. The Chief Ombudsman and Ombudsmen holding office on the day prior to the effective date of this Organic Act would vacate office for a cause under section 18 but the cause under (3) with respect to lack of qualification under section 8 did not apply.

Draft section 56 was merely a provision which recognised the status of the Chief Ombudsman and Ombudsmen holding office on the day prior to the effective date of the Organic Act to remain in office to continue performing duties during the transitory period

between the application of previous law and current law to ensure the smooth enforcement of laws, as well as continuity in the performance of constitutional functions without any gap which could disrupt the functions. The form of transitory provision was therefore in accordance with the rule of law, having regard to reasons, necessity, expediency and the spirit of the Constitution. Such transitory provision for the Ombudsmen could differ from other independent organs.

As for the contention that draft section 56, which provided an exemption of section 8 on the qualifications of the Ombudsman pursuant to section 228 of the Constitution, and as a consequence such section was a provision contrary to or inconsistent with the Constitution, the Constitutional Court found as follows. Section 273 paragraph one of the Constitution provided that the National Legislative Assembly would consider the continued tenure of office holders but the Constitution did not provide the period for continued performance of duties or vacation of office or specific causes for exemption qualifications for such person. Therefore, the exemption of certain constitutional qualifications in draft section 56 was not a case where draft section 56 of this Organic Act was contrary to or inconsistent with the Constitution.

4. Ruling of the Constitutional Court

The Constitutional Court held that section 56 of the Organic Bill on Ombudsmen B.E. was neither contrary to nor inconsistent with the Constitution.
