

# Summary of Constitutional Court Ruling No. 1/2561 (2018)

**Dated 9<sup>th</sup> March B.E. 2561 (2018)\***

**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 185 of the Organic Bill on Prevention and Suppression of Corruption B.E. .... was 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 32 Members of the National Legislative Assembly to the Constitutional Court for a ruling under section 148 paragraph one (1) in conjunction with section 267 paragraph five, section 81, section 145 and section 263 of the Constitution. The opinions stated that section 185 of the Organic Bill on Prevention and Suppression of Corruption B.E. ...., which provided that the President of the National Anti-Corruption Commission and National Anti-Corruption Commissioners holding offices on the day prior to the effective date of this Organic Act would remain in office until the expiration of term as provided under the Organic Act on Counter Corruption B.E. 2542 (1999), as amended, or would vacate office pursuant to section 19, except for the case under section 19(3) in relation to a lack of qualification under section 9 and disqualification under section 11(1) and (18) that would not apply, was a provision contrary to or inconsistent with section 216(3) in conjunction with section 202(1) and (4) and section 273 of the Constitution. The stated reason was because there was an exemption of disqualifications under section 11(1) and (18) for incumbent National Anti-Corruption Commissioners whereas section 273 paragraph one of the Constitution did not provide an exemption of disqualification pertaining to an office holder in an independent organ for incumbent office holders on the day prior to the effective date of the Constitution. Furthermore, the term “extent” probably referred only to the competence of the National Legislative Assembly to prescribe a “period of time” for the incumbent office holder in an independent organ to remain in office to continue performing functions, but did not include an exemption of constitutional disqualification for such group of persons. Even though the Constitutional Court had already given Ruling No. 1/2560, there was no ruling on the question of whether or not the enactment of an Organic Act pursuant to section

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273 paragraph one of the Constitution could exempt provisions on the disqualification of office holders in independent organs under section 216(3) in conjunction with section 202 of the Constitution for incumbent office holders in independent organs.

## **2. The preliminary issue considered by the Constitutional Court**

The preliminary issue was whether or not the Constitutional Court had the competence to accept this application for a ruling under section 148 paragraph one (1) in conjunction with section 267 paragraph five, section 81, section 145 and section 263 of the Constitution.

After deliberation, the Constitutional Court found as follows. According to the application, the National Legislative Assembly had already considered and approved the Organic Bill on Prevention and Suppression of Corruption B.E. ...., and submitted the Organic Bill to the National Anti-Corruption Commission and the Constitutional Drafting Committee pursuant to section 267 paragraph five of the Constitution. The National Legislative Assembly therefore proceeded under section 81 in conjunction with section 145 of the Constitution. It was found on the facts that Members of the National Legislative Assembly constituting not less than one-tenth of the total number of existing Members of the National Legislative Assembly were of the opinion that section 185 of the Organic Bill on Prevention and Suppression of Corruption B.E. .... contained provisions which were contrary to or inconsistent with the Constitution. An opinion was thus submitted to the applicant and the applicant referred the opinion to the Constitutional Court for a ruling under section 148 paragraph one (1) of the Constitution on whether or not section 185 of the Organic Bill on Prevention and Suppression of Corruption B.E. .... contained provisions which were contrary to or inconsistent with the Constitution. Hence, the case was 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. The Constitutional Court could accept this application for consideration.

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

The issue considered by the Constitutional Court was whether or not section 185 of the Organic Bill on Prevention and Suppression of Corruption B.E. ...., with respect to the exemption of disqualifications under section 11(1) and (18), was contrary to or inconsistent with the Constitution.

After deliberations, the Constitutional Court found as follows. The transitory provision in the Constitution was a provision which exempted certain constitutional provisions. These exemptions were necessary to cure any problems which could arise in the transitory period between the enforcement of the prior Constitution and the current Constitution, to ensure the smooth application of the Constitution in line with societal conditions in the initial period. The provisions also enabled various organs to perform constitutional functions seamlessly, avoiding any gap which could disrupt the performance of duties, until the new or applicable mechanisms were ready or functional, as the case might be.

This principle was provided under section 273 paragraph one of the Constitution with the intent of recognizing the status of incumbent office holders on the day prior to the effective date of the Constitution, to enable the continued performance of functions in the transition period between the enforcement of the previous Constitution and the current Constitution. The extent of continued performance of functions would be as provided by the relevant Organic Act for such organ enacted pursuant to section 267. The transitory provisions of the Constitution did not specifically provide for the period of continued performance of functions or vacation of office, nor did it provide for any cause for exemption of qualifications and disqualifications. As the Constitution effected changes to every independent organ, with regards to the structure, qualifications, disqualifications and tenure of office holders compared to the Constitution of the Kingdom of Thailand B.E. 2550 (2007), the form of enactment by the National Legislative Assembly should take regard of the reasons, necessities and expediency in terms of composition and functions of each organ and the spirits of the Constitution.

The Constitution provided that the extent of continuing office would be as provided by Organic Act, being a law connected to the Constitution which were merely necessitated for the provision of details not provided in the Constitution. It could be seen that during the transitory period or period stated in the Constitution's transitory provision, there was a preliminary exemption of newly prescribed qualifications and disqualifications for incumbent office holders who had to continue performing those functions. It also had to be accepted that there were differences in the duties and powers of each independent organ. A transitory provision of an Organic Act could therefore provide for an incumbent office holder in an independent organ to continue in office for the remainder of the original term, with certain exemptions for rules pertaining to new qualifications and disqualifications, or provide for only fully qualified incumbent office holders to remain in office, or provide for the vacation en masse of incumbent office holders in the independent organ, depending on the reasons, necessities and expediency of each organ in the light of promoting efficiency in the performance of functions by each agency and the greatest benefit for the nation. The Constitutional Court decided in Ruling No. 1/2560 that section 56 of the Organic Bill on Ombudsmen B.E. ...., which provided an exemption of certain constitutional qualifications to the incumbent Ombudsmen on the day prior to the effective date of the Organic Act was neither contrary to nor inconsistent with the Constitution. Such ruling, however, did not include disqualifications. Upon an examination of the meaning of the terms qualifications and disqualifications and their applications, it was found that the term application referred to a characteristic which a person had to possess personally prior to the attainment of a right or office. Whereas, the term "disqualification" referred to a characteristic which, if possessed by a person, would prohibit a person from holding a right or office or continuing in an office throughout the period of having such characteristic. These characteristics were enacted with the intent of preventing persons having certain characteristics as provided, or showing inappropriate behavior from enjoying such right or office. It was discernible that even though the terms qualification and disqualification had different meanings, both qualifications and disqualifications were tools or measures for screening or controlling the behavior of a candidate to an

office in a constitutional independent organ and served the same purpose. It could thus be deemed that both qualifications and disqualifications were closely interrelated.

The Organic Bill on Prevention and Suppression of Corruption 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. Section 185 of the Organic Bill on Prevention and Suppression of Corruption B.E. .... was a draft transitory provision on the continuity of office term in the transitory period between the lapse of previous law and application of new law. Draft section 185 provided for the exemption of disqualifications under section 11(1), i.e. not being or having been a Constitutional Court Justice or office holder in any independent organ, and (18), not being or having been a Member of the House of Representatives, Senator, political office holder or member of a local assembly or local administrator in the ten-year period prior to selection or recruitment. This provision was an exemption of certain disqualifications under the Constitution. Section 173 paragraph one in conjunction with section 267 of the Constitution provided that an incumbent office holder on the day prior to the effective date of this Constitution should remain in office for continued performance of functions and there was no provision which prohibited such holding of office. Furthermore, the Constitutional Court decided in Ruling No. 1/2560 that section 273 paragraph one of the Constitution provided that the National Legislative Assembly was to prescribe the extent of term of office holders under the Constitution. It could be deemed that the Constitution had delegated powers to the National Legislative Assembly to consider the tenure of such office holder. In this instance, the Constitution did not provide the period of continued performance of functions or vacation of office, nor did it specifically provide for the exemption of qualifications for such persons. Hence, the National Legislative Assembly, being the organ exercising legislative powers under section 263 of the Constitution, would be the organ entrusted with the consideration and approval of section 185 of the Organic Bill on Prevention and Suppression of Corruption B.E. .... The provision stipulated the continuity of tenure of office holder during the transitory period to enable the continuous performance of functions of such office holder pursuant to the transitory provisions of the Constitution. Therefore, this case was considered in accordance with the rule of law and regard was given to reasons, necessities and expedencies with respect to the composition, duties and powers of the National Anti-Corruption Commission, consistent with the rule of law and spirits of the Constitution, which was neither contrary to nor inconsistent with the Constitution.

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

The Constitutional Court held that section 185 of the Organic Bill on Prevention and Suppression of Corruption B.E. ...., with respect to the exemption of disqualifications under section 11(1) and (18), was neither contrary to nor inconsistent with the Constitution.

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