

# Summary of Constitutional Court Ruling No. 3/2561 (2018)

**Dated 30<sup>th</sup> May B.E. 2561 (2018)\***

**Re: The President of the National Legislative Assembly referred the opinion 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 35(4) and (5) of the Organic Bill on Election of Members of the House of Representatives B.E. .... were contrary to or inconsistent with section 95 paragraph three of the Constitution and whether or not section 92 paragraph one of the Organic Bill on Election of Members of the House of Representatives B.E. .... was contrary to or inconsistent with section 85 of the Constitution.**

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## **1. Summary of background and facts**

The President of the National Legislative Assembly, applicant, referred the opinion of Mr. Preecha Vajrabhaya, Member of the National Legislative Assembly, and others, a total of 27 persons, to the Constitutional Court for a ruling under section 148 paragraph one (1) in conjunction with section 263 of the Constitution. The facts in the letter and supporting documents could be summarised as follows.

Members of the National Legislative Assembly approved the Organic Bill on Election of Members of the House of Representatives and referred to the Election Commission and Constitutional Drafting Committee for review of the Organic Bill's consistency with the spirits of the Constitution. Subsequently, the Chairman of the Election Commission and Chairman of the Constitutional Drafting Committee notified the applicant that such Organic Bill contained certain provisions which were not in accordance with the spirits of the Constitution. The National Legislative Assembly adopted a resolution to appoint an ad hoc committee to consider the Organic Bill on Election of Members of the House of Representatives B.E. .... pursuant to section 267 paragraph five of the Constitution. Thereafter, the ad hoc committee reported the outcome of deliberations on the Organic Bill to the National Legislative Assembly. The National Legislative Assembly considered the Organic Bill on Election of Members of the House of Representatives B.E. .... and adopted a resolution to approve and submit the Organic Bill to the Prime Minister for consideration before

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presentation to the King for Royal Assent and promulgation as law.

Mr. Preecha Vajrabhaya, Member of the National Legislative Assembly, and others, were of the opinion that section 35(4) and (5) of the Organic Bill on Election of Members of the House of Representatives B.E. .... were contrary to or inconsistent with section 95 paragraph three of the Constitution, and that section 92 paragraph one of the Organic Bill on Election of Members of the House of Representatives B.E. .... was contrary to or inconsistent with section 85 of the Constitution for the following reasons.

1. Draft section 35(4) provided a measure whereby an eligible voter who did not exercise voting right and did not give notice of inability to exercise voting right would be prohibited from holding a political office under the law on administration of political officials and parliamentary political office under the law on administration of parliamentary officials. Subsection (5) was a provision with regard to the offices of a deputy local administrator, a secretary to a local administrator, an assistant secretary to a local administrator, a chief advisor to a local administrator, an advisor to a local administrator or a member of a committee of advisor to a local administrator under the law on the establishment of local government organisations. It was argued that those provisions were contrary to or inconsistent with section 95 paragraph three of the Constitution, which clearly provided that “an eligible voter who does not exercise voting right without giving notice of reasonable cause under the Organic Act on Election of Members of the House of Representatives may have certain rights restricted pursuant to provisions of law.” Therefore, a restriction under draft section 35 was limited only to the “right”. However, subsections (4) and (5) were the competence of other persons who had the power to effect appointments by law to consider persons with qualifications and without disqualifications under the law to hold such offices. This was not the right of an eligible voter to demand or elect to appoint solely by oneself. Furthermore, the holding of office was not a right, but a liberty to engage in an occupation under section 40 of the Constitution.

2. Draft section 92 paragraph one provided that “in order to facilitate voting by a disabled or handicap person or senior person, the Commission or person designated by the Commission shall specifically provide facilities to for voting by such persons, or provide assistance in vote casting within the supervision of the committee of polling station. Such assistance shall be rendered in a manner allowing such persons to cast votes personally in a accordance with their determination, except where physical nature hinders the ability of disabled or handicapped person or senior person to mark a symbol on the ballot card, in which case another person or member of the committee of polling station shall be carry it out on their upon their consent and in accordance with their determination. In such a case, voting shall be deemed to have been conducted in a direct and secret manner.” It was asserted that this provision could be inconsistent with section 85 of the Constitution because the exercise of vote for a voter by another person did not constitute a direct and secret vote. This was discernible from the wording in draft section 92 which inferred a direct and secret vote. Hence, the Organic Act, being at a lower level in the legal hierarchy from the Constitution, could not state provisions to the contrary.

Upon Mr. Preecha Vajrabhaya, Member of the National Legislative Assembly, and others, submitted a written opinion to the applicant for a referral to the Constitution for a ruling under section 148 paragraph one (1) in conjunction with section 263 of the Constitution, the applicant sent a letter to the Prime Minister for further action under section 148 paragraph one (1) or (2), as the case may be. The Prime Minister gave written notice to the applicant to consider taking action under the Constitution. The applicant therefore submitted the opinion of such Members of the National Legislative Assembly to the Constitutional Court for a ruling under section 148 paragraph one (1).

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

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

After deliberations, the Constitutional Court held as follows. In this case, the National Legislative Assembly had considered and approved the Organic Bill on Election of Members of the House of Representatives B.E. .... pursuant to section 267 paragraph five of the Constitution. However, Mr. Preecha Vajrabhaya, Member of the National Legislative Assembly, and others were of the opinion that section 35(4) and (5) of the Organic Bill on Election of Members of the House of Representatives B.E. .... Approved by the National Legislative Assembly were contrary to or inconsistent with section 95 paragraph three of the Constitution, and that draft section 92 paragraph one was contrary to or inconsistent with section 85 of the Constitution. Such opinion was therefore submitted to the applicant for referral to the Constitutional Court for ruling. Hence, the case was in accordance with section 148 paragraph one (1) in conjunction with section 263 of the Constitution and section 50 of the Organic Act on Constitutional Court Procedures B.E. 2561 (2018). The Constitutional Court had the competence to accept the application for consideration and an order to accept the application for ruling was issued accordingly. The relevant persons were directed to provide an opinion and relevant information in writing to the Constitutional Court.

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

The Constitutional Court determined that the following issues had to be ruled upon.

The first issue was whether or not section 35(4) and (5) of the Organic Bill on Election of Members of the House of Representatives B.E. .... were contrary to or inconsistent with section 95 paragraph three of the Constitution.

After deliberations, the Constitutional Court found as follows. Draft section 35(4) and (5) provided for a restriction of right to hold the offices of a political official, parliamentary political official and local administrator. This restriction of specific interests of a person prohibits the person from holding such offices. The provision stated a legal outcome of an

action constituting a cause following an eligible voter's failure to exercise voting right without notice of reason, or giving notice of inability to exercise voting right but the reason provided was not reasonable, pursuant to section 95 paragraph three of the Constitution which provided that the restriction of certain rights would be as provided by law. However, the object of restriction was limited only to rights. Thus, there was a question as to whether draft section 35(4) and (5), which provided for a restriction of right to hold office, was within the bounds of a right that could be restricted under section 95 paragraph three of the Constitution. On this question, the Constitutional Court found as follows. Draft section 35(4) and (5) was a consequence of actions that triggered a legal consequence which restricted such person's right to hold the stated offices. The stipulation of conditions on restriction of rights of a person wishing to hold such political offices was merely a stipulation of inadequate qualities for holding office, similar to political offices under draft section 35(2) and (3). In addition, the prohibition period was only an estimate, two years at a time, under draft section 35 paragraph two, from the election day when the election right was not exercised. If such person exercised voting right in the subsequent election, the restriction of right would be lifted. Therefore, it was discernible that even though the effect of draft section 35(4) and (5) was comparable to conditions relating to qualifications and disqualifications of a person assuming the offices of political official, parliamentary political official and local administrator, the restriction of right applied to an eligible voter who did not exercise voting right without giving notice of inability to exercise voting right or giving notice of reason of inability to exercise voting right but the reason stated was unreasonable, resulting in a restriction to hold such offices. Thus, it could be deemed that the holding of offices under draft section 35(4) and (5) was a constitutional right which could be restricted by law pursuant to section 95 paragraph three of the Constitution. Hence, section 35(4) and (5) of the Organic Bill on Election of Members of the House of Representatives B.E. .... were neither contrary to nor inconsistent with section 95 paragraph three of the Constitution.

The second issue was whether or not section 92 paragraph one of the Organic Bill on Election of Members of the House of Representatives B.E. .... was contrary to or inconsistent with section 85 of the Constitution.

After deliberations, the Constitutional Court found as follows. Section 85 paragraph one of the Constitution provided that the election of Members of the House of Representatives in constituency elections should adopt a direct and secret voting procedure. However, there was no provision on the direct and secret voting procedures. Only the essential principle was provided that an eligible voter had the right to cast one vote each. Such voter could cast a vote for a candidate or choose to not vote for any candidate. Direct voting was one of the key elements which a citizen, as the holders of sovereign powers, could express a political decision by oneself. Secret ballot was a voting procedure whereby each eligible voter marked a symbol on a ballot paper in a booth and dropped the ballot card into a ballot box. The eligible voter was prohibited from disclosing to the public his/her vote for a particular candidate at the time of voting. Draft section 92 paragraph one therefore provided a voting procedure for a disabled or handicapped person or senior person in the event of an inability to mark a symbol on the

ballot card, whereby another person or the committee of polling station member could act on such person's behalf with such person's consent and in accordance with the intent of the disabled or handicapped person or senior person. In such a case, it would be deemed that voting was done directly and secretly. Such procedure was aimed at facilitating and assisting a disabled or handicapped person or senior person, by giving such person an opportunity to exercise voting rights, being an important political right, on an equal basis with other persons. A guarantee was provided for a disabled eligible voter to have an opportunity to exercise rights on an equal basis as other persons, or to not be deprived of an opportunity to exercise voting rights due to handicap or physical defect which hindered access to a polling place and entry to exercise a vote independently. Upon examination of the measure under draft section 92 paragraph one, which allowed another person or polling station committee member to assist in the voting with the consent and in accordance with the intent of the disabled or handicap person or senior person, the measure merely enabled a disabled or handicap person or senior person who was unable to mark a symbol on a ballot card to have the opportunity to exercise voting right on an equal basis with other persons generally. As long as there was no disclosure of the vote of the disabled or handicapped person or senior person to the public, it could be deemed that the voting was done directly and secretly. The state had to prescribe measures under draft section 92 paragraph one clearly, and prescribe stringent measures in the case of the other person or member of the polling station committee facilitating or assisting the casting of vote inconsistently with the intent of the disabled or handicap person or senior person, or causing the vote to not be done directly and secretly. Therefore, section 92 paragraph one of the Organic Bill on Election of Members of the House of Representatives B.E. .... was neither contrary to nor inconsistent with section 85 paragraph one of the Constitution.

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

The Constitutional Court held that section 35(4) and (5) of the Organic Bill on Election of Members of the House of Representatives B.E. .... were neither contrary to nor inconsistent with section 95 paragraph three of the Constitution, and section 92 paragraph one of the Organic Bill on Election of Members of the House of Representatives B.E. .... was neither contrary to nor inconsistent with section 85 of the Constitution.

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