

Summary of Constitutional Court Ruling No. 5/2557 (2014)

Dated 21st March B.E. 2557 (2014)*

Re: The Ombudsman submitted a matter to the Constitutional Court for a ruling under section 245(1) of the Constitution on whether or not the general election of Members of the House of Representatives on 2nd February B.E. 2557 (2014) pursuant to the Royal Decree Dissolving the House of Representatives B.E. 2556 (2013) was constitutional.

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1. Summary of background and facts

The Ombudsman, applicant, submitted a matter to the Constitutional Court for a ruling under section 245 (1) of the Constitution. The facts in the application and supporting documents could be summarised as follows.

The applicant received a complaint letter from Mr. Kittipong Kamolthamwong stating that the operations of the Election Commission pertaining to the administration of the general election of Members of the House of Representatives on 2nd February B.E. 2557 (2014) was unconstitutional for the following reasons:

(1) The election was not held on the same day throughout the entire Kingdom pursuant to section 108 paragraph two of the Constitution.

(2) Applications for candidacy were not fair and inconsistent with the principle of equality under section 235 paragraph one and section 30 of the Constitution.

(3) Votes were counted openly while elections had not yet been completed throughout the Kingdom, which was inconsistent with section 236 paragraph one (1) of the Constitution, and not by secret, which was inconsistent with section 93 paragraph two of the Constitution.

(4) The counting of votes on 2nd February B.E. 2557 (2014) invalidated the ballot papers on 20th April B.E. 2557 (2014) and 27th April B.E. 2557 (2014) since the ballot papers on such dates would become spoilt ballots under section 102 paragraph two of the Organic Act on the Election of Members of the House of Representatives and Obtaining of Senators B.E. 2550 (2007).

(5) The Election Commission neglected to perform its duties in prohibiting the exercise of state powers to give an advantage to candidates from political parties in the

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government and having members holding offices in the Council of Ministers.

The applicant was of the opinion that the question raised by the complainant was a matter within the applicant's competence to conduct a factual inquiry pursuant to section 244 paragraph one (1) (c) of the Constitution. The Royal Decree Dissolving the House of Representatives B.E. 2556 (2013) was a provision of law enacted directly pursuant to section 108 of the Constitution. The Constitutional Court therefore had the competence to rule on the constitutionality of the Royal Decree Dissolving the House of Representatives B.E. 2556 (2013). As the administration of the general election of Members of the House of Representatives on 2nd February B.E. 2557 (2014) under the time condition prescribed by the Royal Decree Dissolving the House of Representatives B.E. 2556 (2013) under the circumstances of anti-government protests which persisted to the time of trial could not be carried out in a fair and just manner under the Constitution and democratic regime, there was thus a question of constitutionality under section 108 paragraph two, section 93 paragraph two and section 30 paragraph one in conjunction with section 235 and section 236 paragraph one (1) and (2) of the Constitution. The applicant therefore submitted the matter to the Constitutional Court for a ruling under section 245(1) of the Constitution that the general election of Members of the House of Representatives on 2nd February B.E. 2557 (2014) pursuant to the Royal Decree Dissolving the House of Representatives B.E. 2556 (2013) was unconstitutional.

2. The preliminary issue considered by the Constitutional Court

The preliminary issue was whether or not the Constitutional Court had the competence to admit this application for a ruling under section 245 (1) of the Constitution.

The Constitutional Court found as follows. Although the application was a case where the applicant submitted a matter together with an opinion to the Constitutional Court for a ruling on the constitutionality of the administration of general election of Members of the House of Representatives pursuant to the Royal Decree Dissolving the House of Representatives B.E. 2556 (2013) with respect to section 108 paragraph two, section 93 paragraph two and section 30 paragraph one in conjunction with section 235 and section 236 paragraph one (1) and (2) of the Constitution, upon an examination of the substance of the application in its entirety, it was found that the applicant intended to request a Constitutional Court ruling on the constitutionality of the Royal Decree Dissolving the House of Representatives B.E. 2556 (2013) only with respect to the provision on the general election of Members of the House of Representatives on 2nd February B.E. 2557 (2014). It was claimed that the administration of general election of Members of the House of Representatives on 2nd February B.E. 2557 (2014), the question raised in the application, was a consequence of the setting of a date for the general election of Members of the House of Representatives in the Royal Decree Dissolving the House of Representatives B.E. 2556 (2013), and that this Royal Decree was not one enacted by virtue of an act or equivalent law to an act that would be within the review jurisdiction of the Administrative Courts. The

Royal Decree was enacted directly by virtue of the Constitution and was a special law issued by virtue of section 108 paragraph two of the Constitution. The Royal Decree could therefore be regarded as a provision of law under section 245(1) of the Constitution which the applicant could submit to the Constitutional Court for constitutionality review. In addition, the administration of the general election of Members of the House of Representatives on 2nd February B.E. 2557 (2014) could not be completed in the same day, also giving rise to several other constitutionality issues, and the Royal Decree was not under the review jurisdiction of any organ other than the Constitutional Court. The case was in accordance with section 245(1) of the Constitution in conjunction with article 17 (18) of the Rules of the Constitutional Court on Procedures and Rulings B.E. 2550 (2007). The Constitutional Court therefore admitted the application for consideration.

3. The issues considered by the Constitutional Court

The issue considered by the Constitutional Court was whether or not the Royal Decree Dissolving the House of Representatives B.E. 2556 (2013) with respect to the setting of a date for the general election of Members of the House of Representatives on 2nd February B.E. 2557 (2014) was constitutional.

When considering the issue in this application, the Constitutional Court had to make a preliminary determination on the cause of action as to whether the general election of Members of the House of Representatives on 2nd February B.E. 2557 (2014) was held on the same day throughout the Kingdom pursuant to section 10 paragraph two of the Constitution. The Constitutional Court found that the Royal Decree Dissolving the House of Representatives B.E. 2556 (2013) set a date for the general election of Members of the House of Representatives on 2nd February B.E. 2557 (2014). The Election Commission had administered the election by setting the dates for submission of the political party's list of candidates for election of party-list Members of the House of Representatives between 23rd December B.E. 2556 (2013) and 27th December B.E. 2556 (2013), and setting the date for receiving applications for candidacy in the election of constituency Members of the House of Representatives between 28th December B.E. 2556 (2013) and 1st January B.E. 2557 (2014). However, due to the political protests and obstructions to candidacy applications, there were 28 constituencies which had no election candidate.

Section 108 paragraph two of the Constitution expressly provided that "...such election date must be the same throughout the Kingdom." The provision in section 108 paragraph two which provided that an election date had to be the same day throughout the Kingdom was intended to ensure that the election complied with a key fundamental principle of elections, i.e. free elections. In other words, all eligible voters should exercise rights free from coercion or psychological pressure or any influence on their decision, regardless of the source of such influence. In addition, during the election and subsequent to the election, there should be no control over the voting tendency, committed in whatever form. A voter should reach a decision independently under an open process of political expression. This

principle of free elections also governed the preparation of an election and, in particular, candidacy applications and election campaigning. It could therefore be inferred that the setting of more than one date for the general election of Members of the House of Representatives would result in candidacy applications, election campaigns, voting behavior or other events on one election date having an influence on the election on the subsequent date.

The date for general election of Members of the House of Representatives set by the Royal Decree Dissolving the House of Representatives enacted by virtue of section 108 paragraph two of the Constitution, once set, placed the relevant persons under a duty to take various actions to ensure that an election was held on such date set by the Royal Decree, namely applications for election candidacy, announcement of election candidates and prescription of election-related rules. The polling date was set by virtue of the Organic Act on the Election of Members of the House of Representatives and Obtaining of Senators B.E. 2550 (2007), which was the law applicable to the administration of the general election as set by the Royal Decree. The prescription of a polling date was intended to facilitate eligible voters in the exercise of the right to vote. The polling date could be set over several days, e.g. voting outside of a constituency under section 94 and advance polling prior to the election date under section 95. However, a voting right could only be exercised when there was an election candidate on the polling date who could be voted by the eligible voter. In any event, there could only be one date for the general election of Members of the House of Representatives under section 108 paragraph two of the Constitution.

On the issue of absence of election candidate in 28 constituencies, upon an examination of the Organic Act on the Election of Members of the House of Representatives and Obtaining of Senators B.E. 2550 (2007) with respect to the powers and duties of the Election Commission in the administration of new elections, the Constitutional Court found that section 78 was a provision which empowered the Election Commission to set “a new polling date” in the event that polling in any polling station could not be undertaken due to a riot, flood, fire, force majeure event or other necessity occurring prior to the election date. Section 108 was a provision which empowered the Election Commission to set “a new polling date” in the event that prior to the election date, there was reasonable evidence to believe that polling in any polling station or constituency would not proceed in a fair and just manner due to an action of an election officer or other state official.

As for the setting of new elections, section 88 was a provision which empowered the Election Commission to declare a “new election” in a constituency where there was only one constituency election candidate and such candidate received the votes of less than twenty percent of the number of eligible voters in the constituency or not more than the number of ballot papers indicating an intention to abstain from voting. Section 103 paragraph six was a provision which empowered the Election Commission to order a “new election” in a constituency which the Election Commission ordered the revocation of election rights of an election candidate subsequent to the polling date but prior to the announcement of voting results. Section 109 was a provision which empowered the

Election Commission to hold a “new election” or a recount in any polling station or all polling stations in the event that after counting the votes there was reasonable evidence to believe that voting in such constituency had not been conducted in a fair and just manner or the vote count was not properly conducted. Finally, section 111 paragraph one was a provision which empowered the Supreme Court to order a “new election” in a case subsequent to the announcement of election results if there was reasonable evidence to believe that voting in a constituency had not been conducted in a fair and just manner, or a Member of the House of Representatives or election candidate had committed any dishonest act to be elected or the election was won dishonestly through the actions of a person or political party in violation of the Organic Act on the Election of Members of the House of Representatives and Obtaining of Senators B.E. 2550 (2007), rules or notifications of the Election Commission or the Organic Act on Political Parties.

The abovementioned provisions of law empowered the Election Commission to set a new polling date or hold a new election, or empowered the Supreme Court to order a new election specifically in the event that a candidate had already been elected and votes could not be cast, or there were facts indicating that an election had not been conducted in a fair and just manner. However, the 28 constituencies in question had no election candidate. Thus, the general election in such 28 constituencies had never taken place. It was therefore outside the powers of the Election Commission and the Supreme Court to order new elections. Moreover, section 93 paragraph one and paragraph six of the Constitution was intended to ensure that the House of Representatives had the complete number of 500 Members of the House of Representatives who were elected from a general election held on the same day throughout the Kingdom pursuant to section 108 paragraph two of the Constitution. Therefore, the election of Members of the House of Representatives in the 28 constituencies in question had to be held on 2nd February B.E. 2557 (2014). To arrange for elections in such 28 constituencies by setting a new date for general election of Members of the House of Representatives would be unconstitutional and foreseeably cause incessant legal objections, which would culminate into two dates for this general election of Members of the House of Representatives, i.e. 2nd February B.E. 2557 (2014) as stated in the Royal Decree Dissolving the House of Representatives B.E. 2556 (2013), and the new date for the general election in the 28 constituencies which never had any election candidates. Such an outcome would be contrary to or inconsistent with section 108 paragraph two of the Constitution. Once the general election of Members of the House of Representatives on 2nd February B.E. 2557 (2014) could not be held on the same day throughout the Kingdom pursuant to section 108 paragraph two of the Constitution due to the fact that the date set for the general election of Members of the House of Representatives under the Royal Decree Dissolving the House of Representatives B.E. 2556 (2013) was in a period of serious conflict and disharmony of people in the nation as well as obstructions to candidacy applications. Holding an election in such a situation would cause the administration of the election to run contrary to the constitutional intent. The Election Commission thus filed an application to the Constitutional Court and the Constitutional Court held in Ruling No. 2/2557 that if there was a necessity to set a new general election date

which differed from the original general election date in the Royal Decree Dissolving the House of Representatives, such a course of action was within the joint powers and duties and responsibility of the Prime Minister and the Chairman of the Election Commission. However, it appeared that the Prime Minister did not postpone the general election date and the general election proceeded on 2nd February B.E. 2557 (2014) while failing to hold elections in 28 constituencies where no candidacy applications had been accepted. Hence, on 2nd February B.E. 2557 (2014) could not be regarded as a date for the general election of Members of the House of Representatives throughout the Kingdom. The election was therefore unconstitutional. Hence, the Royal Decree Dissolving the House of Representatives B.E. 2556 (2013) with respect to the prescription of the date for the general election of Members of the House of Representatives on 2nd February B.E. 2557 (2014) raised a constitutional question under section 108 paragraph two of the Constitution. Upon a ruling of the Constitutional Court on such issue, a further ruling on other causes of action would not alter the outcome of this ruling. The other causes of action were therefore not considered.

4. Ruling of the Constitutional Court

The Constitutional Court held that the Royal Decree Dissolving the House of Representatives B.E. 2556 (2013) with respect to the prescription of the date for the general election of Members of the House of Representatives on 2nd February B.E. 2557 (2014), because the general election could not be administered throughout the Kingdom on the same day, was therefore inconsistent with section 108 paragraph two of the Constitution.
