

Summary of Constitutional Court Ruling No. 4/2559 (2016)

Dated 29th June B.E. 2559 (2016)*

Re: The Ombudsman referred a motion to the Constitutional Court for a ruling under section 45 of the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014) on whether or not section 61 paragraph two of the Act on Referendum on the Draft Constitution B.E. 2559 (2016) raised a question of constitutionality under section 4 of the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014).

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1. Summary of background and facts

The Ombudsman, applicant, received a complaint from Mr. Jon Ungpakorn and others stating that section 61 paragraph two of the Act on Referendum on the Draft Constitution B.E. 2559 (2016) provided for acts constituting offences through the use of wide and ambiguous terms such as “violence”, “offensive” and “incitement”, which was inconsistent with the principles of criminal law and an unreasonably excessive restriction of rights and liberties of the people. Also, the penalties provided in section 61 paragraph three and paragraph four were also disproportionate to the wrongdoing which was merely a peaceful and non-violent expression of opinion. Furthermore, the provision was also contrary to the referendum principles under section 165 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) and prejudiced the right and liberty to express opinions under section 29 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

The applicant was of the opinion that the right and liberty to express opinions was a right and liberty of all Thai people once recognised and protected under section 4 the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014). Even though such Act was intended to maintain peace and order in the referendum, with a recognition of the people’s freedom of expression in section 7, offences carrying criminal penalties were provided. The terms used in such provision were also abstract. As a consequence, the public would be apprehensive of expressing an opinion pertaining to the Draft Constitution. The provision could also cause law enforcement by state officials to excessively restrict the rights and liberties of the people. Hence, the applicant was of the opinion that section 61 paragraph two of the Act on Referendum on the Draft Constitution B.E. 2559 (2016) raised a question of constitutionality under section 4 of the Constitution of the Kingdom of Thailand

* Published in the Government Gazette Vol. 133, Part 93a, dated 27th October B.E. 2559 (2016).

(Interim) B.E. 2557 (2014). On the other hand, the applicant was of the opinion that section 61 paragraph three and four did not raised any constitutionality question.

2. The preliminary issue considered by the Constitutional Court

The preliminary issue was whether or not the Constitutional Court could admit the application for a ruling under section 45 in conjunction with section 4 of the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014).

The Constitutional Court found as follows. The applicant submitted a matter together with an opinion to the Constitutional Court for a ruling on whether or not section 61 paragraph two of the Act on Referendum on the Draft Constitution B.E. 2559 (2016) raised a constitutionality question under section 4 of the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014). Section 61 paragraph two was a provision on the channels for expressing opinions on the Draft Constitution, which constituted the people's freedom of expression, a liberty of the Thai people protected under previous Constitutions. The liberty was therefore regarded as part of Thailand's convention under the democratic form of government with the King as Head of State, and a fundamental right and liberty which was essential to the democratic form of government recognized by civilized nations, i.e. the International Covenant on Civil and Political Rights, under which Thailand was already bound by international obligations. The freedom of expression was therefore a liberty protected under section 4 of the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014). The case was in accordance with section 45 of the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014) in conjunction with section 14 (1) of the Organic Act on Ombudsmen B.E. 2552 (2009) and article 17(18) of the Rules of the Constitutional Court on Procedures and Rulings B.E. 2550 (2007). Hence, the Constitutional Court had the competence to admit this application for consideration.

3. The issue considered by the Constitutional Court

The issue considered by the Constitutional Court was whether or not section 61 paragraph two of the Act on Referendum on the Draft Constitution B.E. 2559 (2016) was contrary to or inconsistent with section 4 of the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014).

The Constitutional Court found as follows. The referendum under the Act on Referendum on the Draft Constitution B.E. 2559 (2016) was a referendum under the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014) as amended by Constitutional Amendment (No. 2) B.E. 2559 (2016) with the purpose of framing a new Constitution. Such a referendum would occur in a country that had experienced a domestic political crisis and remained under the official administration of an interim government. The process enables the promulgation of a new Constitution to replace the previous Constitution that had been annulled. State organs played a role in overseeing the administration of the referendum. The

Act intended to entrust the Election Commission with the administration of the referendum on the Draft Constitution pursuant to section 39/1 of the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014), as amended by Constitutional Amendment (No. 2) B.E. 2559 (2016). Section 7 recognised a person's liberty to express an opinion and publicize opinions relating to the referendum in good faith and without infringing the law in order to ensure that the referendum proceeded in a fair and just manner, and that the results obtained truly reflected the intent of the people free from any distortion, coercion, threat or inducement from various parties. Hence, an offence and criminal penalty was provided for a person who caused unrest such that the referendum did not proceed in an orderly manner, or acted in a certain way which would cause the referendum to be conducted not in a fair and just manner, in section 61. Paragraph one (1) provided for the criminal offence of a person who caused unrest which caused a referendum to not proceed in an orderly manner. Paragraph two provided a clarification to the nature of unrest that would cause a referendum to not proceed in an orderly manner that would constitute an offence under section 61 paragraph one (1). The provision further provided the scope of powers of a state official. In other words, an offence under section 61 paragraph two (1) in conjunction with paragraph two had to be constituted by the following offence elements: (1) an act, namely a dissemination of text, picture, sound by channel of a newspaper, radio, television broadcast, electronic means or other channels; (2) the dissemination of such text, picture or sound had to be contrary to facts or had the character of being violent, offensive, rude, inciting or threatening; (3) the committer of the act had a regular intent to commit the acts constituting the elements under (1) and (2) pursuant to section 59 of the Criminal Code; and (4) the committer of the act had a special intent to attain an outcome where eligible voters would not exercise their voting rights or to cast votes one way or another or to refrain from voting altogether. When determining whether an act constituted an offence and a penalty under paragraph three or paragraph four, the circumstances of such person's actions had to be considered along with the regular intent and special intent. As for the penalty provided under section 61 paragraph three, despite the maximum imprisonment penalty of ten years, there was no minimum penalty. The court therefore had the discretion to impose an appropriate sentence. The provision was therefore not a case where a provision of law on an offence and criminal liability was ambiguous or unclear.

As for the terms in section 61 paragraph two, "violent", "offensive", "rude", "inciting" or "threatening", such terms were clear but unspecific because the law was unable to predetermine all future events. It was therefore necessary to use unspecific terms. Only when an event had occurred that one would know and understand whether such event constituted a situation stipulated by law. Such use of terms was therefore necessary for the administration of justice and not inconsistent with the principle of "no offence and no penalty where there is no law." Furthermore, the dissemination of information by public media would sent a wide scale impact. The provision of accurate information, use of polite, nonviolent, inoffensive, not rude terms would lead to peace and order in society pursuant to the intent of such law which recognised the person's liberty to express opinions and disseminate opinions relating to the referendum in an honest and

lawful manner.

Hence, section 61 paragraph two of the Act on Referendum on the Draft Constitution B.E. 2559 (2016) did not prohibit the expression of opinions or dissemination of opinions relating to the referendum. Such expression, however, had to be made in good faith, within the legal framework, and not intended to induce the eligible voters to refrain from exercising a vote or vote one way or another or not vote. The expression also should not have the character of causing unrest or affecting the overall peace and order of society to ensure that the referendum on the Draft Constitution on this occasion proceeded in a peaceful and orderly manner, as well as to protect the rights and liberties of persons eligible to vote in the referendum to be able to exercise such rights and liberties freely. The provision was in accordance with section 4 of the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014) and referendum under the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014). A restriction on the freedom of expression was imposed only to the extent of necessity in the interest of national security, public order or good morals of the people and the protection of votes' rights and liberties in the referendum. The essential substances of a person's freedom of expression was not prejudiced. The law was generally applicable and was not specifically directed to any particular case or person.

4. Ruling of the Constitutional Court

The Constitutional Court held that section 61 paragraph two of the Act on Referendum on the Draft Constitution B.E. 2559 (2016) was neither contrary to nor inconsistent with section 4 of the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014). Thus, there was no question of constitutionality under the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014).
