

Summary of the Constitutional Court Ruling No. 38/2545

Dated 4th July B.E. 2545 (2002)*

Re : The President of the National Assembly requests for a Constitutional Court ruling under section 266 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) on the powers and duties of the Selective Committee for the Election Commission.

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1. Background and summarized facts

The President of the National Assembly made a submission of a matter together with an opinion to the Constitutional Court pursuant to section 266 of the Constitution requesting that a ruling be made in the case of a dispute on the powers and duties of the Selective Committee for the Election Commission.

The facts as stated in the application and supporting documents can be summarized as follows. The Selective Committee for the Election Commission (the “Selective Committee”) under section 138 of the Constitution had considered the selection of five qualified persons under section 137 of the Constitution who were suitable to be Election Commissioners and nominated their names to the President of the Senate on 25th June B.E. 2544 (2001). The general meeting of the Supreme Court also considered and selected five persons who were suitable to be Election Commissioners and nominated their names to the President of the Senate on 21st June B.E. 2544 (2001).

The Senate appointed an “Ordinary Committee for Examining Past Records and Behaviours of the Persons Nominated for Holding the Position of Election Commissioners” (the “Ordinary Committee”) pursuant to section 135 of the Constitution to perform the duties of examining past records and behaviours of the persons nominated for holding the position of Election Commissioners as well as gathering necessary facts and evidence to be reported to the Senate for its further consideration.

The Ordinary Committee examined the selection process for Election Commissioners adopted by the Selective Committee and discovered that from the applications, fifty-five candidates were made available for selection, and the meeting of the Selective Committee completed its selection process after seven rounds of votes had been cast. After voting in round 1, round 2 and round 3, the Selective Committee obtained one person in each round

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who received not less than three-fourths the existing members of the Selective Committee, namely, Police Lieutenant General Wasana Peumlarb, Mr. Veerachai Naewbunnean and Mr. Jaral Booranaphansri respectively. In round 4 of the voting, three candidates received votes, namely, General Sirin Thoopklam, Mr. Phayont Phansri and Mr. Somchai Srisunthiyakorn, but none received the votes of not less than three-fourths. The Selective Committee cast another round of votes in round five which gave the same results as round 4. The Selective Committee therefore modified the rules in round 6 by carrying out voting only for the three candidates with the highest votes, viz General Sirin, Mr. Phayont and Mr. Somchai. Each Selective Committee member was allowed one vote. The candidate who received the lowest number of votes was eliminated. Thereafter, the remaining candidates were voted on one more time. The result was that Mr. Phayont received the lowest number of votes and was therefore eliminated from the list. In round 7 of the voting, each Selective Committee member was given two votes. In the result, General Sirin and Mr. Somchai each received the maximum 10 votes. The Selective Committee therefore nominated both persons and claimed that they had received the votes of not less than three-fourths the existing members of the Selective Committee. The Selective Committee sent a report of the result of its consideration to the President of the Senate.

The Senate, in its 21st meeting (ordinary session) on Thursday, 4th October B.E. 2544 (2001), considered the Selective Committee's report and reached a resolution to elect five Election Commissioners, namely, Police Lieutenant General Wasana Peumlarb, General Sirin Thoopklam, Mr. Veerachai Naewbunnean, Mr. Jaral Booranaphansri and Mr. Prinya Nakchatri. Such persons became Election Commissioners by royal appointment on 21st October B.E. 2544 (2001).

Subsequently, Police Colonel Pratin Santiprapob, a senator, and company, a total of forty-one people, sent a letter to the President of the Senate stating opinions on the disputed issue of the powers and duties of the Selective Committee.

The President of the Senate considered that the forty-one senators objected to the powers and duties of the Selective Committee by stating that the process for the selection of persons who were suitable to be Election Commissioners was unconstitutional. This was therefore a case on the performance of functions by the Selective Committee that had an impact on the performance of functions by the Senate and the Election Commission which were organizations under the Constitution. Section 266 of the Constitution provided the President of the National Assembly with the power to refer the matter with an opinion to the Constitutional Court for a ruling. By virtue of such provisions, the following matters were referred to the Constitutional Court for ruling: (1) whether or not the Selective Committee had the power to disqualify the other forty-nine candidates in round 6 of the votes who were not included in the selection voting and whether or not such proceedings were unconstitutional; (2) regarding the resolution in round 7, even though the nominations were made with the votes of not less than three-fourths the existing members of the Selective Committee,

whether or not such a resolution was constitutional, and if not, whether the Selective Committee should nominate two persons who were suitable to become Election Commissioners or whether the general assembly of the Supreme Court should consider and select persons who were suitable to become Election Commissioners in lieu of the Selective Committee; and (3) when the Constitutional Court ruled that the selection process adopted by the Selective Committee was inconsistent with the Constitution, whether or not there should be new selections of Election Commissioners.

2. Preliminary issue.

Whether or not the case was in accordance with section 266 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

The Constitutional Court held that the Selective Committee was an organization established by section 138(1) of the Constitution because it was an organization established by the Constitution and whose composition, powers and duties and practice procedures had been provided for in the same section. Moreover, this was a dispute on the powers and duties of the Selective Committee in the implementation of the selection process. This was a case where a problem had arisen on the powers and duties of an organization under the Constitution. The case was in accordance with section 266 of the Constitution and the Constitutional Court therefore accepted the application for consideration.

3. The issues considered by the Constitutional Court

One issue considered by the Constitutional Court was whether or not the selection of Election Commissioners by the Selective Committee in round 6 and round 7 was constitutional.

The Constitutional Court held as follows. Sections 138(1) and (3) of the Constitution prescribed a general procedure for the selection of Election Commissioners by the Selective Committee. There should be a selection of five persons possessing the qualifications under section 137 for making nominations to the President of the Senate upon the consent of the nominated persons within thirty days as from the date when the ground for the selection of such persons to be in such office occurred. In the case where the Selection Committee was unable to make nomination, or unable to make nomination in the complete number, within the prescribed time, the Supreme Court should, at its general meeting, make nominations to obtain the complete number within fifteen days as from the date of the expiration of the Selective Committee's nomination time. The resolution for nominations must be made by the votes of not less than three-fourths the existing members of the Selective Committee. No other details were provided for other procedures to be adopted by the Selective Committee in the making of nominations. When problems were encountered in round 4 and round 5 of the voting, whereby no candidate received the votes of not less than three-fourths, the Selective

Committee's modification of the procedure for voting in round 6 due to its inability to obtain a candidate with the votes of three-fourths was a change of the rules. Candidates were eliminated in order that there were two candidates to fill in the remaining two nominations. Those two candidates were thereafter voted on for approval by all members of the Selective Committee in round 7 with a view to acquiring the votes of not less than three-fourths as required by the Constitution. Such a procedure allowed votes to be cast only for the two persons while excluding the remaining candidates. As a result, such a selection was inconsistent with the interpretation of section 138(1) of the Constitution. The change of rules in round 6 of the voting was therefore unconstitutional. Hence, only the votes in round 6 and the resolution for selection in round 7 were unconstitutional. The votes of the Selective Committee in the selection of persons in round 1 to round 3 whose names had been nominated to the Senate were, however, constitutional.

The Constitutional Court, by a majority of votes, held that the selection of Election Commissioners by the Selective Committee in round 6 and round 7 were unconstitutional.

Another issue which the Constitutional Court had to consider was whether or not there should be another selection of Election Commissioners under the Constitution.

The Constitutional Court held that once the Constitutional Court had made a ruling that the Selective Committee's selection process in rounds 6 and 7 were unconstitutional, the persons selected in rounds 6 and 7 had to be deemed as not being persons selected and not persons nominated to the Senate for selection as Election Commissioners. Therefore, the Senate's selection of those selected in rounds 6 and 7 to be Election Commissioners was therefore flawed. New selections of Election Commissioners should therefore be made.

4. Ruling of the Constitutional Court

The Constitutional Court, by a majority of votes, held that the selection of Election Commissioners, only in round 6 and round 7, was inconsistent with section 138(1) of the Constitution and there should be new selections of Election Commissioners under section 138 of the Constitution.
