

Summary of Constitutional Court Ruling No. 9/2549

Dated 8th May B.E. 2549 (2006)*

Re: The Ombudsman requested for a Constitutional Court ruling under section 198 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997) on constitutionality problems in the Election Commission's proceedings with respect to the general elections of members of the House of Representatives from 2nd April B.E. 2549 (2006) till present.

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1. Summary of Background and Facts

The Ombudsman (applicant) submitted an application together with an opinion to the Constitutional Court for a ruling under section 198 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997) on constitutionality problems concerning the Election Commission's proceedings with respect to the general election of members of the House of Representatives from 2nd April B.E. 2549 (2006) till present. There were 4 proceedings stated as causes for the application, as follows.

1. The Election Commission gave an opinion on the period of preparation for organization of elections of members of the House of Representatives, eventually resulting in the announcement of an unsuitable and unfair election date in the Royal Decree Dissolving the House of Representatives, which was inconsistent with the political impartiality required of the Election Commission under section 136 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997), and inconsistent with the principle which required that the controls and organization of an election had to be carried out in a fair and just manner under section 144 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997).

2. The arrangement of polling stations in such a way that the eligible voter faced the polling station while turning their backs on the election unit committee members and members of the public who had arrived to exercise their voting rights, as well as third party observing the election at the unit, was a violation of the principles of voting which had to be carried out by means of direct and secret votes under section 104 paragraph three of the Constitution of the Kingdom of Thailand B.E. 2540 (1997).

3. A major political party which had fielded candidates in every constituency throughout the country had hired candidates from several smaller political parties to field candidates in

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elections as determined by the major political party, thus violating a constitutional principle which provided that a political party could field only one candidate in one constituency election under section 108 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997), as well as an offence under the Organic Act on Elections of Members of the House of Representatives and Senators B.E. 2541 (1998).

4. The Election Commission had passed resolutions, directed, made announcements and issued orders on various matters pertaining to the elections, carried out investigations and inquiries to rule on objections relating to the elections, including the announcement and endorsement of election results without a consultation or without consultation amongst all existing Election Commissioners, and the announcement of endorsement of election results was not carried out by the unanimous resolution of all Election Commissioners under section 10 of the Organic Act on Election Commission B.E. 2541 (1998) in conjunction with section 145(6) of the Constitution of the Kingdom of Thailand B.E. 2540 (1997), and inconsistent with the discharge of duties by collective agencies under section 136 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997).

2. Preliminary Issue

The preliminary issue was whether or not the Constitutional Court had the power to admit the Ombudsman's application for ruling under section 198 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997).

The Constitutional Court held as follows. The first cause of application requesting for a ruling on the Election Commission's involvement with the government in determining the election date of members of the House of Representatives was a request for a ruling on the constitutionality of a Royal Decree, which was a 'regulation' under section 198 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997). This cause of application was therefore admitted for ruling.

On the second cause of application, the Constitutional Court found that the arrangement of polling stations was a result of the consensual approval of the Election Commissioners, which was made in the form of a "resolution" and had a general application. The resolution had the characteristics of a regulation without being intended to apply to any particular case or person, which was within the meaning of the word "regulation" under section 198 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997). The application was therefore a request for ruling on the constitutionality of a "regulation" under section 198 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997). This cause of application was therefore admitted for ruling.

On the third cause of application, the Constitutional Court found that the application was not related to the constitutionality of any provision of law, regulation or rules. This cause of application was therefore not admitted for ruling.

The fourth cause of application was a request for ruling in relation to the resolutions, directions, notifications and orders of the Election Commission, in which case a resolution, direction, notification or order that was generally applicable and not intended to apply to any particular case or person would be within the meaning of the word ‘regulation’ under section 198 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997). The application was therefore a request for ruling on the constitutionality of a regulation under section 198 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997). This cause of application was therefore admitted for ruling.

For the benefit of the proceedings, the Constitutional Court requested the Election Commission, represented by Police General Wasana Permlarp, Chairman of the Election Commission, and Mr. Parinya Nakchatri, Election Commissioner, to make oral statements together with the submission of a written statement on 3rd May B.E. 2549 (2006) to the Constitutional Court.

3. Ruling of the Constitutional Court

The issue in the application which had to be considered by the Constitutional Court was whether or not the proceedings of the Election Commission with respect to the general election of members of the House of Representatives on 2nd April B.E. 2549 (2006) till present contained a constitutional problem.

In this application, there had been proceedings relating to a Royal Decree and resolutions of the Election Commission which had the characteristics of regulations according to the decision on the preliminary issues above, thus constituting causes of application for the Constitutional Court to consider, as follows.

In the first cause of application, the Election Commission had given its opinion on the determination of the preparation period for the elections which resulted in the announcement of an unsuitable and unfair election date in the Royal Decree Dissolving the House of Representatives, inconsistent with the principle of political impartiality of the Election Commission under section 136 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997), and inconsistent with the principles on controls and organizations of elections which had to be carried out in a fair and just manner under section 144 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997).

After consideration, the Constitutional Court held as follows. The Royal Decree Dissolving the House of Representatives B.E. 2549 (2006) was comprised of provisions divided into two parts. The first part, section 3, provided for the dissolution of the House of Representatives in order to hold new elections of members of the House of Representatives. The second part, section 4, provided for new general elections of members of the House of Representatives on 2nd April B.E. 2549 (2006). On the provisions of the first part which provided for the dissolution of the House of Representatives, such dissolution of the House of Representatives was an act of the government. The Prime Minister, as government leader,

would present his advice to the King on the dissolution of the House of Representatives as an exercise of the executive's exclusive powers provided in the parliamentary system so as to allow checks and balances between the executive and legislative branches. This was a matter on the relationship between the National Assembly, as legislature, and the government, as the government. Dissolution of the House of Representatives was therefore the exclusive power of the executive which was not subject to the scrutinizing powers of the Court, being a judicial organ.

As for the second part of the provisions on the determination of the election date, even though the determination was made by the government as the countersigning party of the Royal Proclamation promulgating such Royal Decree, such determination of election date was related to the administration of the election which was the powers and duties of the election Commission as provided by the Constitution along with prescribed periods within which the Election Commission had to carry out several proceedings in the administration of the elections. The government's determination of election date in the Royal Decree must therefore be done after coordinating with the Election Commission. Once the election date was set, proceedings relating to the control and administration or holding of an election would be the powers and duties of the Election Commission as provided by the Constitution. If a problem arose on proceedings relating to the election, the Election Commission, as the exerciser of powers to control and administer or hold an election had the power to consider and rule on such a problem, and if a problem arose on the Election Commission's exercise of powers pertaining to the election, such problem was subject to the scrutinizing powers of the judicial organ.

Section 4 of the Royal Decree Dissolving the House of Representatives B.E. 2549 (2006), which scheduled the general election of members of the House of Representatives on 2nd April B.E. 2549 (2006), a period of 37 days subsequent to the coming into force of the Royal Decree Dissolving the House of Representatives B.E. 2549 (2006), was a scheduling of election date that was consistent with section 116 paragraph two of the Constitution, which required that an election had to be held within 60 days. Therefore, the government and the Election Commission had already proceeded according to section 116 paragraph two of the Constitution with respect to section 4 of the Royal Decree Dissolving the House of Representatives B.E. 2549 (2006).

As for the issue of whether or not the result of proceedings undertaken by the Election Commission to hold elections pursuant to the Constitution and such Royal Decree was honest and fair, after considering the data on exercise of voting rights, it was found that approximately half of all the valid ballot papers showed abstention votes, and if the number of abstention votes were aggregated with the invalid ballot papers they would exceed half the number of valid ballot papers of the votes exercised. Additional information on the election proceedings on 2nd April B.E. 2549 (2006) also clearly showed that many election constituencies were contested by only one candidate from the only political party that had fielded candidates in all constituencies, that was the Thai Rak Thai Party, and that such election candidates failed to obtain the number of votes as required under section 74 of

the Organic Act on Election of Members of the House of Representatives and Senators B.E. 2541 (1998). Such irregularities in the election results meant that the democratic system of government where the people elected representatives to govern the country failed to satisfy the spirits of the Constitution which sought to promote and protect the rights and liberties of the people in their involvement in government and greater scrutiny of the exercise of state powers, as well as the improvement of the political structure for greater stability and efficiency, paying essential regard to the opinions of the people. Thus, the general election of members of the House of Representatives that was held under the Royal Decree Dissolving the House of Representatives B.E. 2549 (2006), only with respect to section 4 which prescribed the general election date, was an election that was not fair and not truly democratic since the candidates did not truly receive the votes of the people under the democratic system.

Therefore, even though the Royal Decree Dissolving the House of Representatives B.E. 2549 (2006) was enacted pursuant to the provisions of the Constitution and the Election Commission, an organ provided by the Constitution with the powers and duties of administering elections, had conducted the elections in accordance with the Constitution and relevant laws, the facts that had occurred in the elections pursuant to the said Royal Decree had caused the election results to be unfair. Representatives of the people were not truly obtained under the democratic system. As a result, the elections were unconstitutional under the spirits of section 2, section 3 and section 144 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997).

In the second cause of application, it was stated that the arrangement of polling stations which positioned the eligible voters by making them face the polling station and turning their backs against the polling unit election committee as well as the public who had arrived to exercise their voting rights and other persons who were observing the elections in front of the unit, was a violation of election voting principles which had to be conducted by means of direct and secret votes under section 104 paragraph three of the Constitution of the Kingdom of Thailand B.E. 2540 (1997).

The Constitutional Court held as follows. Upon consideration of section 14 paragraph one of the Organic Act on Election of Members of the House of Representatives and Senators B.E. 2541 (1998), in conjunction with clause 4 of the Rules of the Election Commission on Appointment and Operational Procedures of the Polling Unit Election Committees in Elections of Members of the House of Representatives and the statement of the Election Commission explaining that the new arrangement of polling station would enable the polling unit election committee to observe the behavior of voters while casting their votes, the Constitutional Court found that the format of arrangements in the polling stations in the election of members of the House of Representatives on 2nd April B.E. 2549 (2006) caused the casting of votes by eligible voters to be made within distance of the constituency election committee, which was also represented by political parties fielding candidates in such constituency or in the party-list who had interests in the elections, to visibly observe the casting of votes by eligible voters. Such new arrangement of the polling station therefore

rendered the votes in the election of members of the House of Representatives to be made not by means of secret votes as required under section 104 paragraph three of the Constitution of the Kingdom of Thailand B.E. 2540 (1997).

After considering the reasons for the conduct of the Election Commission in relation to section 4 of the Royal Decree Dissolving the House of Representatives B.E. 2549 (2006) pursuant to the first cause of action together with the reasons for the conduct of the Election Committee in relation to resolution on the arrangement of polling stations pursuant to the second cause of action, the Constitutional Court found that the general election of members of the House of Representatives held on 2nd April B.E. 2549 (2006) under section 4 of the Royal Decree Dissolving the House of Representatives B.E. 2549 (2006) together with the arrangement of polling stations pursuant to the resolution of the Election Commission, were elections which produced unfair election results that were not truly democratic and therefore the elections were unconstitutional.

In the third cause of application, it was stated the actions of a major political party that had fielded candidates throughout the country in hiring candidates from several small political parties to contest in elections as determined by the major political party was a violation of the constitutional principles which stated that a political party could field only one constituency election candidate in each constituency under section 108 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997), and a wrongdoing under the Organic Act on Election of Members of the House of Representatives and Senators B.E. 2541 (1998).

The Constitutional Court held as follows. Section 108 of the Constitution was a provision which prescribed the procedures for fielding candidates by each political party that had nominated candidates in the elections. As for the issue raised by the application that a major political party that had fielded candidates throughout the country had hired candidates from several small political parties to contest in elections as determined by the major political party, such issue was not a problem related to section 108 of the Constitution. Such problem was a case within the powers and duties of the Election Commission to consider proceedings under the relevant laws. At this moment, the matter was not yet a case of constitutionality that was within the jurisdictional powers of the Constitutional Court. The Constitutional Court therefore declined to admit this cause of application for decision, as already decided on the preliminary issue of the Constitutional Court's powers to accept applications.

In the fourth cause of application, it was stated that the Election Commission had made resolutions, directions, notifications and orders on various matters relating to the election, investigations and inquiries to rule on objections pertaining to the elections, including considerations pertaining to the announcement and endorsement of election results without holding a consultative meeting, or without consultation of all the existing Election Commissioners, and the considerations on endorsement of election results were not carried out by the unanimous resolution all the Election Commissioners under the rule in section 10

of the Organic Act on Election Commissioner B.E. 2541 (1998) in conjunction with section 145(6) of the Constitution of the Kingdom of Thailand B.E. 2540 (1997), and was contrary to the discharge of functions by a collective organ under section 136 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997).

The Constitutional Court held that such matters were proceedings of the Election Commission under the relevant laws. After ruling on the first and second causes of application, the consideration of this cause of application did not alter the rulings on the first and second causes of application. Therefore, the Constitutional Court did not have to make a ruling on this cause of application.

By virtue of the reasons stated above, the Constitutional Court held as follows:

1. The proceedings with respect to the general election of members of the House of Representatives on 2nd April B.E. 2549 (2006) till present contained problems of constitutionality that were related to the causes of application, i.e. in relation to the determination of the election date under section 4 of the Royal Decree Dissolving the House of Representatives B.E. 2549 (2006) under the first cause of application, which held a general election of members of the House of Representatives on 2nd April B.E. 2549 (2006), including election proceedings consequential to such elections, and the Election Commission's proceedings relating to the resolution on arrangement of polling stations under the second cause of application which resulted in non-secret votes. The said elections produced unfair results which did not constitute a truly democratic system of government. Thus, the elections were unconstitutional under section 2, section 3, section 104 paragraph three and section 144 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997), from the start of the election administration process, in other words, from the determination of the election date, the acceptance of candidacy applications, voting, vote counting and announcement of election results.

2. After ruling that proceedings relating to the general election of members of the House of Representatives on 2nd April B.E. 2549 (2006) till present was unconstitutional, it was consequential that the candidates whose election results were endorsed by the Election Commission pursuant to the Election Commission's announcement on the results of constituency and party-list elections of members of the House of Representatives also lapsed. The election of members of the House of Representatives pursuant to such announcement of election results by the Election Commission was thereby revoked. Moreover, since the sixty-day period under section 116 paragraph two of the Constitution for holding a general election of members of the House of Representatives in consequence of the dissolution of the House of Representatives under the Royal Decree Dissolving the House of Representatives B.E. 2549 (2006) had already expired, and in order to ensure that the subsequent election would be fair and in accordance with the spirits of the Constitution, it was decided therefore that the organ having the powers and duties pertaining to the scheduling of a date for the general election of members of the House of Representatives in consequence of the dissolution of the House of Representatives to undertake to enact a Royal Decree to amend the date

of general election of members of the House of Representatives by scheduling the date of general election of members of the House of Representatives within sixty days as from the date of coming into force of such Royal Decree so as to satisfy the requirements under section 116 paragraph two of the Constitution of the Kingdom of Thailand B.E. 2540 (1997).
