The Formation, Action and Function of The Constitutional Courts: The Case Study of Thailand and South Korea

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จุฬาลงกรณ์มหาวิทยาลัย

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จุดมุ่งหมายของวิทยานิพนธ์ฉบับนี้คือ เพื่อศึกษาการกำเนิดขึ้น อำนาจหน้าที่ และการพิจารณาคดีของศาลรัฐธรรมนูญในประเทศไทย (ภายใต้รัฐธรรมนูญ๒๕๔๐) และศาลรัฐธรรมนูญประเทศเกาหลีใต้ (ภายใต้รัฐธรรมนูญปัจจุบัน) โดยเน้นหนักในประเด็นที่ฝ่ายการเมืองมีความเกี่ยวข้องกับการคัดเลือกตุลาการรัฐธรรมนูญและตุลาการศาลรัฐธรรมนูญในอดีตและในช่วงเวลาที่เป็นขอบเขตของการศึกษา รูปแบบการปกครองของทั้งสองประเทศมีอิทธิพลในการคัดเลือกตุลาการซึ่งทำให้ฝ่ายการเมืองเข้ามาเกี่ยวข้องกับศาล นอกจากนั้นขอบเขตอำนาจของศาลรัฐธรรมนูญยังเขียนขึ้นมาในลักษณะที่ทำให้ศาลต้องมีหน้าที่จัดการข้อพิพาทและปัญหาอันเกี่ยวเนื่องกับรัฐธรรมนูญซึ่งฝ่ายการเมืองมีส่วนในปัญหาเหล่านั้นด้วย และคดีต่างๆที่ผ่านเข้าสู่ระบบของศาลรัฐธรรมนูญอันเป็นการทำงานของศาลก็เปิดโอกาสให้ฝ่ายการเมืองเข้ามาเกี่ยวข้องกับศาล อย่างไรก็ตามระดับความเกี่ยวข้องดังกล่าวในศาลรัฐธรรมนูญของทั้งสองประเทศมีความแตกต่างกัน

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สาขาวิชา..เกาหลีศึกษา.... ลายมือชื่อนิสิต .....วิโรจน์ พลายแก้ว.....

ปีการศึกษา 2552 ลายมือชื่อ อ.ที่ปรึกษาวิทยานิพนธ์หลัก.....

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Wirot Plaikaew :The Formation, Action and Function of The Constitutional Courts: The Case Study of Thailand and South Korea. Thesis Advisor : Professor Chaiwat Kumchu,Ph.D.,176 pp.

The purpose of the research is to study the formation, function and action of the Constitutional Court of Thailand (under the abrogated 1997 Constitution) and South Korea (under the present Constitution). The focus is on how constitutional history influences the creation of the Constitutional Court in Thailand and South Korea. The study also explains how the formation or the selection of the justices of the Constitutional Court, because it is influenced by the system of government in each country, exposes the Court to political interests. The research further gives insight into how functions of the Constitutional Courts determine the Courts' closeness to political interests. To complete the study, a set of relationship has come into play and that is the more diverse the cases the Constitutional Courts in Thailand and South Korea handle, the less susceptible the Courts are to political interests. The study has shown that interactions exist between the Constitutional Court and the political interests at the early stage of the Court's formation. The functions, which are tantamount to the 'brain' of the Constitutional Courts, are also designed so that the Courts must scrutinize the political post holders, among other jurisdictions. The actions, or the cases heard by the Constitutional Courts of the two countries, put the Courts in contact with the political interests as well.

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Field of Study : Korean Studies Student's Signature วิโรจน์ พลายแก้ว

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Chapter I

Introduction

For a long time, the concept of courts had revolved around criminal and civil adjudications. The cases which went through the courts sought the settlement of illegal and wrongful deeds committed against individuals. The courts, therefore, previously assumed a rather individualistic and detached position in society. Their role was invariably legal and the institution of the courts may have been looked at as narrowly-scoped to address the increasingly diverse and complex problems which stem from the enforcement and interpretation of the laws. The changing social settings necessitate multi-faceted interpretations of the law, a demand which conventional courts may not have been able to adequately accommodate.

In new democracies, the people grow increasingly aware of their performance of their governments. When the government mishandles national affairs, mass movements take to the streets to pressure for unprecedented change and in the cases of Thailand and South Korea, such phenomenal change in recent decades has pointed to new direction for the evolving political, social and economic landscapes. The change has also ushered in an era of new and added responsibilities and duties for agencies and institutions including the courts. The compelling need to monitor the performance of the government and strengthen the system of checks and balances in a quest for greater administrative transparency has galvanized the society into looking to a respected and credible institution for help. The courts are traditionally viewed as impartial and independent, least prone among the fundamental branches of power to undue influences.

Both Thailand and South Korea had gone through periods of autocratic rules intertwined with corruption at various levels of government. The autocracy and corruption seen by many as culturally ingrained had pushed the tolerance of many sections of society to the limit. They grew conscious to the imperative, which is that the country had to embark on a more politically sure-footed, cleaner path to the future. The hope lies with a stronger accountability, which to a large extent requires preparing the ground for sweeping political and administrative reforms of the country.

Although far apart in terms of geography, the form of government and the size of economy, Thailand and South Korea have experienced turbulent times in their political history. Observations have been made that the two countries could have progressed economically, socially and politically at a faster rate if corruption and emasculated accountability had not held them back. The popular forces had

consolidated, united by a common mantra, to press for a meaningful, practical and sincere change to the status quo. The inevitable was apparent; a large portion of the populace mandated that the rule of the game long under the dominance of the politicians in power must be rewritten and hence the amendment of South Korea's constitution in 1987 and redrafting of the constitution in Thailand 10 years later.

The inception of Thailand's 1997 constitution and South Korea's redrafted charter gave reasons for hope and expectation; hope because both countries needed to break free from the pattern of public participation-exclusive governments which was unresponsive to good governance; and expectation because the constitutions are counted on to offer concrete forms of accountability-forging mechanisms. In words and intention, the constitutions enshrine a principle of unprecedentedly effective regulation against administrative malpractices and power abuse by the holders of public and political offices. That principle has been institutionalized with the establishment of anti-graft agencies such as the Korea Independent Commission Against Corruption (KICAC) and Thailand's National Anti-Corruption Commission. In fact, it has been analyzed that a principal, functional feature in both constitutions is the improved teeth in the anti-corruption laws they have afforded.

The constitutions of the two countries have marked the birth of the Constitutional Courts which did not exist before. The constitutions were conceived with the people's expectations that they resolve past flaws, shortcomings, limitations and void in the previous charters. That said, it is only fair to assume, as it is evident, that the two constitutions represent breakthroughs in many respects. The contents of the charters take a multi-dimensional transformation and, complimented by the generally greater political awareness of the people since the conception of the constitutions, have heightened the need to interpret the constitutionality queries which follow. In other words, the constitutions cover a diverse content, introducing new areas where there may not have been constitutionality problems in the past. The wider the constitutional contents become, the more opportunities there are of having the specific aspects of the charter interpreted. The interpretation is the task which must be entrusted to a specialized and respectably neutral institution and the Constitutional Court has been established to fulfill such responsibility.

However, interpreting the constitution is not the sole function of the Constitutional Courts of Thailand and South Korea. The Courts are empowered, among a host of other functions, to proceed with cases of impeachment against the political post holders.

One of the central questions has to do with why the institution of the court is called upon to rule on the constitutionality and constitutionality-based conflicts. The answer may rest with the public trust in the court's impartiality and its prerogative in issuing the rulings with the resoluteness and finality.

The adjudication of the cases associated with the functions of the Constitutional Court is seen an extension of the judicial power in that the Constitutional Courts also deal with legal cases that are intrinsically political in nature. There have been some perceptible concerns that the deliberation of political cases could expose the Constitutional Courts to the political interests creating the kind of interaction that could compromise or even endanger the integrity and independence of the Courts or of the institution of the courts as a whole.

For a long time, the court of justice, constitutionalism and the concept of accountability were totally separate spheres. To have a constitution - which gives the court a special authority to ascertain the compliance to the constitution and maintain a sound balance in the administrative government by means of impeaching political post holders whose act or conduct is deemed a violation of the constitution – comes across as an unfamiliar 'mixture'. A reasonable fear has been harbored as to whether the Constitutional Court, which is a specialized court but nonetheless a court, may be susceptible to politicization.

In order to explain the assumption that the Constitutional Courts of Thailand and South Korea may be prone, one at a higher degree than the other, to political influence, a hard look is warranted at the formation or origin, functions as well as the actions of the Courts.

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1.1 Objectives of the research

1. To study the significance of Thailand's 1997 Constitution and South Korea's 1987 Constitution with the emphasis on the institutionalization of the Constitutional Court organic to improvement of accountability of government;

2. To define the specialization of the Constitutional Courts;

3. To explain the formation and actions of the Constitutional Courts of both countries;

4. To understand the rationale behind, and in some instances limitations in, the formation of the two Courts, which bring the Courts close to political interests;

5. To understand the actions of the Courts in term of their acceptance and adjudication of cases; and; and

6. To analyze the diversity of cases deliberated by the Courts and how such diversity signifies the susceptibility of the Courts to political interests.

1.2 Hypothesis

South Korea's Constitutional Court is less exposed to political interests than Thailand's Constitutional Court due to their formations, functions and actions.

1.3 Scope of the research

1. The relevant Constitutions of Thailand and South Korea with a focus drawn on their contents specific to the Constitutional Courts;

2. The process of obtaining the Constitutional Court justices, which starts with the nomination of candidates, and where applicable, the individual or party who is the authority in appointing the judges;

3. The form of government – Thailand's constitutional monarchy and South Korea's presidential system – which has an indirect bearing on the composition of the justices;

4. The explanation of the functions of the Constitutional Courts in both countries;

5. The specific cases the Courts handled which constitute their actions and are chosen to represent the diversity of those cases and; and

6. The research is limited to the aforementioned aspects of the Constitutional Courts under the abrogated 1997 Constitution for Thailand (from 1997-2006) and under the present Constitution for South Korea (since 1987 to the present).

1.4 Value of the thesis

1. Understanding of the importance of the Constitutional Courts of Thailand and South Korea as the vehicle for keeping checks and balances;

2. Gaining the analytical insight into the formation of the Constitutional Courts as dictated by the form of government, their functions and actions which could subject the Courts to risks from being close to the political interests; and

1.5 Research methodology

The research is structured through the employment of the analytical description using information from a variety of sources;

1. Documentary research;

1.1 Secondary sources including academic papers, thesis, journals and newspaper articles;

1.2. Primary sources including release of the court verdicts and minutes of the meetings;

2. Direct observations in seminars and forums; and

3. Direct interviews with individuals who command the knowledge in the process of constitution drafting as well as legal experts whose comments on the roles and performance of the Constitutional Courts prove useful for putting the research in perspectives.

The resources for researching Thailand's Constitutional Court are mainly library textbooks, website data and where necessary, interviews with experts. Websites were explored which provided both primary as well as analyzed information useful for constructing the research. Also, translations make up an extensive proportion of the thesis content because many available reading materials are written in Thai. However, the resources for South Korea's Constitutional Court are not as varied. Because of the distance and the difficulty in accessing the on-site materials, much of the information has been obtained via the websites. Best precautions are made to avoid potentially unreliable online sources: origins of the websites are checked and double-checked for the identity of the writers.

1.6 General Concept of the Constitutional Courts

Noppadol Hengcharoen, the former secretary-general of the Office of the Constitutional Court, has expanded on the significance of the general concept of the Constitutional Court applied in countries which have adopted the written form of constitution.[1]

In countries where the constitution is declared as the supreme law, there is the utmost necessity to institutionalize a mechanism to preserve the legal sanctity of the constitution. The constitution stipulates that no law must not contravene with it while constitutional provisions are stated so that the amendment of the constitution is more difficult to pursue than the alteration of ordinary laws. Importantly, the constitution mandates the institutionalization of an agency entrusted with the duty of ruling on the constitutionality of the law or whether the law in question contradicts the constitution.

Historically, during the early stages of political evolution of modern states in Europe, the highest power of government was vested with an individual, being the monarch. After the introduction of democracy, that power of government was passed on to the people as it came to belong to the nation. The parliament is the representative of the people and in its hands rests the highest power of government.

The people gradually lose their confidence in the parliamentary system with the disenchantment they experience observing the performance of members of parliament they elected and the political parties to which those members were affiliated. The populace was embracing a shift of political paradigm where state and the parties who exercise the state power such as parliament are made to be subject to laws and most especially the constitution. This partly explains the necessity to establish the Constitutional Court which could counter-balance the power of political parties who command the parliamentary majority.[2] The idea of creating the Constitutional Court to check on the constitutionality of the laws was the concept laid down by Austrian law scholar Hans Kelsen. His argument behind his concept was built on the flaws he noticed of the French model of keeping laws from being inconsistent with the constitution. He felt the French model was too inclined to serve a political purpose.[3] In the United States, allowing the courts of justice to perform the constitutionality

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[1] Noppadol Hengcharoen, Constitution Court of Thailand: Past, Present and Future (Bangkok: Nana Publishing Co. Ltd, 2000). pp. 23-163.

[2] Amorn Chantharasomboon, ‘‘Constitutional Court,’’ A Report by the Parliament Extraordinary Committee on the Guideline of the 1997 Constitution amendment, 2nd edition (June 1993): pp. 299.

[3] Visanu Kruangam, Constitutional Law (Bangkok : Sawaengsuthi Printing House, 1987): pp. 669.

check with the justices by profession as the checkers has it downside. The principal problem has to do with the tendency for the justices to be engrossed in a narrow mindset, being unable to keep abreast with the changing social need. In addition, placing the justices to scrutinize the issue related to constitutionality is contrary to the principle governing the separation of powers.[4]

Considerations had been put forth to the effect that the authority to decide what laws contradict the constitution may be construed as an undue performance of the legislative branch. Such decision, which could result in a law being repealed, could imperil the duty of the legislature whose function is to enact laws. That said, Kelsen had proposed there should be a body empowered to rule on constitutionality of laws but that the legislature should have a say in the selection of the members of the body in question.[5] However, ideally the selection role of the legislature could endanger the independence of the body and to prevent the political pressure or interference, the body must assume the status of a court. Further, for the sake of prudence in their functions, the membership of this body must embody a mix of experts from the relevant fields, being the law, politics and economics. The body must be structured to perform as a single entity and the rulings demand legal bind.[6]

Kelsen's concept became widely accepted in Austria. Under Austria's constitution in 1920, the Constitutional Court first came into inception to vet the constitutionality of the laws. It was to be the model of constitutional courts which subsequently came into existence in other countries such as Germany, Italy, Portugal, Belgium, South Africa and South Korea.

1.7 Definition of Important Research Keywords

This research is framed around several key words which constitute the elementary substance of the study. Those words which appear in the research are context-specific and they hold unconventional, and sometimes modified, meanings which will be explained as follows;

I. Formation – The term describes the inception of the Constitutional Courts in South Korea and Thailand with a special designation to the selection and the

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[4] Visanu Kruangam, Constitutional Law, pp. 669.

[5] Bowornsak Uwanno, "The Constitutional Court under the 1997 Constitution," Ratthapirak Journal 41st Year, 2nd Quarter (April-June 1999): pp. 24.

[6] Visanu Kruangam, Constitutional Law, pp. 675.

procedures in selecting the individuals and the panel of Constitutional Court justices. The formation does not, in this manner, prescribe any meaning connected to the establishment of the offices of the Constitutional Courts in the two countries.

II. Function – It connotes the authority, responsibilities and duties of the Constitutional Courts which are entrusted to them by law and related regulations.

III. Action – The actions by the Constitutional Courts pertain to the cases they accepted for hearing, deliberated and judged which could dictate the ability of the Court justices to conduct themselves and work with the unquestionable, institutional as well as the justices' own independence.

IV. Political interests – The term looks at the functioning branch of politics in general, political post holders or political actors who play a role in the administration of the country in the local and national levels.

V. Judicial independence – It is contextually applicable to the institutional independence of the Constitutional Court as well as the independence of the Constitutional Court justices.

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Chapter II

Literature Review

The issue of how the Constitutional Courts in Thailand and South Korea are formed and act is the backbone concept of this research. A wealth of collection of reading materials has been made available addressing this issue although some are more insightful and relevant to the topic than others. The formation and action of the Constitutional Courts in the two countries are written about by experts who have made claims to the law and political science as their forte. The Constitutional Courts in Thailand and South Korea have a special place in the judicial realm and it may be a matter of etiquette if not the attempt to avoid a possible impartiality risk that the offices of the courts themselves do not produce their comment on or assessment of their own performances in deliberating or judging the cases that passed through them. Having said that, the information able to be obtained from the offices of the courts are primarily straightforward facts and statistical data related to such areas as history, composition, inception and proceedings of the courts. It was expected, however, that the Constitutional Courts, as would any other courts, disseminate non-analytical report of their work, which in this case is displayed through their respective, official websites, in keeping with the preservation of the courts' neutral stand. Maintaining such stand is what lends the Constitutional Courts their institutional integrity and authority.

Large volumes of the analytical viewpoints and outputs concerning the Constitutional Courts of the two countries have been located in rather specialized libraries which are parts of governmental organizations. Much of the information on the Constitutional Court of Thailand has been taken from the King Prajadhipok's Institute where the literature references contain compilations of academic papers and articles written or co-written by respected specialists who have previously held important offices or assumed ex-officio duties. Some of the writers themselves had been appointed with the responsibilities of drafting the 1997 Constitution under which the Constitutional Court first came into existence in Thailand. As for South Korea, a similar list of research papers and articles has been sourced, albeit with some initial hindrances. As the process of researching is chiefly based in Thailand, the South Korea's portion of the study, especially during the early stages of information gathering to consider the feasibility of the research subject, has been conducted with the reliance on the on-line reading textbooks. Best caution has been exercised in the verification and cross-verification of the sources of the websites. Only the reputable, official web-pages attached with academic credentials and identities of the writers were selected for consideration and for the subsequent citation.

The research pertains to two basic elements; one involving the establishment of the courts with the specific focal point being the selection of the justices, the authority and their implementation of the authority; and another being applicable to the extension of the first element. That extension looks at the breadth of closeness between the Constitutional Courts of the two countries and the political interests which come into contact with them. More reference materials were able to be found for the first element which matched the need for academic citations. The materials for the second element are comparatively fewer as the content is largely constructed by indirect means of analysis achieved through methods of induction, inference and interpretation.

The overall structure of the research requires the support of the researcher's analytical viewpoints balanced by established, verifiable facts. In general, the facts from different text materials were consolidated and collated after weighing their relevance and depths. Some sources provide greater academic insights than others, prompting the researcher to be selective with creaming off the information to be compiled in the study. The difficulty that was apparent was the fitting of the selected pieces of information in the study in such a manner which values the coherence and the logical flow throughout the research body. The difficulty was overcome by drawing on the statements of facts and cited analysis that are not lop-sided and are buoyed by properly-executed and sequential arguments which also guide and compliment the core ideas of the research.

The very foundation of the thesis is embodied by the formation, the function and the actions of the Constitutional Courts of Thailand and South Korea. Those critical components of the Constitutional Court have been made comprehensible by reviewing a research paper by Sabrina L. Pinnell, of the Department of Political Science,University of California at Santa Barbara.[1] Indeed, the Pinnell's work has delved into the subject closely identifiable with this research and it has come across as a helpful pointer to powers vested in the Constitutional Courts, the Courts' enforcements of their decisions and how they protect the principles of the political and legal systems.

A noted significance in Pinnell's research is described in the mention of constitutions as providing the foundation that creates new state structures and lays down the basic norms for the new regime in new democracies. The paper refers to the writers' assertion that the constitutions in their documentary form are not strong institutions. She states that in countries with a weak tradition of the rule of law and where political

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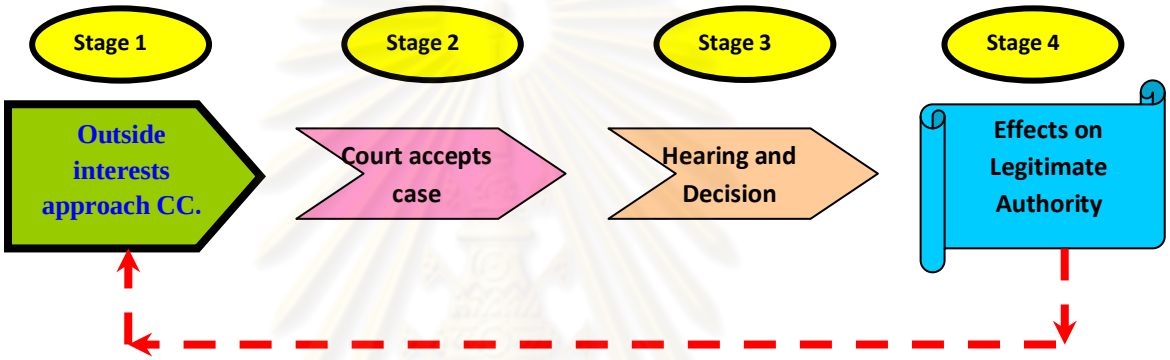
[1] Sabrina Pinnell, **Formation vs Action: What Empowers Constitutional Courts?** [online], March 2007. Available from : http://research.allacademic.com/meta/lsa07_p_index.html?filter=F

actors may choose to ignore the bounds set by constitutions, the document may have no real force after it is ratified.

Chart 1: by Sabrina L. Pinnell of the Constitutional Courts' interaction with political interests and how they evolve their behavior over time in response to cases they deliberated.



Since this thesis narrows its scope of study on the formative years of the Constitutional Courts of Thailand and South Korea, the illustration above is a fitting tool for rationalizing the court-political interest influence. However, whether the model mirrors the reality of the Courts' behavior in the two countries is debatable and this will be discussed later in the sub-sections of Chapters 3 and 4 on actions of the Constitutional Courts.

The model - furnished from the crystallization of Pinnell's comparative study of the Constitutional Courts in Russia, South Africa and Hungary - segments the Courts' interaction with the political interest into cyclical phases. The Stage 1 is when outside interests seek the Court's judicial review. But as more cases are heard, the interests may change their decision to approach the Courts based on how they think the Courts will be sympathetic to their side. Stage 2 proposes that the degree of controversy of cases admitted correlates to the legitimate authority of the Courts. Political environment surrounding the cases are considered. If early in the tenure o the Courts, some cases are taken up for deliberation because they are more controversial than others, it could mean the Courts are not afraid their verdicts will be disrespected. Stage 3 supposes that if there are credible indications during the hearings that a Court shows an inclination toward politically powerful individuals, it could signal the Court's lack of legitimate authority. Stage 4 affirms the verdicts of particular cases

will naturally determine if the Court will lose or gain its legitimate authority. The outcome of cases will spell out a decrease or an increase of the Court's authority in the long run, which could gradually alter its behavior. It may exude more confidence in hearing and conducting cases.

The Constitutional Courts are perceived by many quarters to be the mediator of constitutionality conflicts stemming from political issues or acts by politicians. In that sense, the Courts are expected to sit on one side of the fence and the political interests on the other. Pinnell, however, argues that the Constitutional Courts are both political and legal entities. It is their mediation of conflicts between the actors in the political system using the norms of the constitution which leads to Pinnell's assumption that the Courts also hold political role. This research favours the opinionn that the Constitutional Courts possess such 'dual roles' which explains the close space between the political interests and the Courts.

Many researchers [2] have examined the formation of the Constitutional Courts and elaborated on the essential observation that the interests involved in the creation of a new Constitutional Court play a vital part in deciding how well the court will function in the new political and legal systems, in terms of being the institution these interests will approach later to resolve the conflicts and having its decisions enforced by these interests. John Schiemann [3] has emphasized the point where bargaining may be struck between the political interests in the process of Constitutional Court formation. The interests harbor a vision that a Court they 'help' to establish will support them later in the conflict resolution. The anticipated reciprocity, as Schiemann indicates, is one of the reasons the interests want the Court to come into inception. The writer also expands on the essence of the Court's formation which corresponds to one of the underlying constituents of this research – the selection of the justices. He observes that the selection of the justices and who is eligible will have a bearing on the composition of the Court and notably how it decides issues.

There is a direct connection Pinnell has drawn between the principle roles of the Constitutional Courts and the realm of politics. Indeed, it invariably typifies the

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[2] John W. Schiemann, "Explaining Hungary's Powerful Constitutional Court: A Bargaining Approach," European Journal of Sociology 42, No. 2(2001): 357/ Erik S. Herron, and Kirk A. Randazzo, "The Relationship Between Independence and Judicial Review in Post-Communist Courts," The Journal of Politics 65, No. 2 (May 2003): 423-438/ Carla Thorson, "Constitutional Courts as Political Actors: Russia in Comparative Perspective," (Ph.D dissertation, University of California, Los Angeles, 2003).

[3] Schiemann, Ibid.

functions assigned to the Constitutional Courts of Thailand and South Korea. Pinnell has elaborated on how the Courts can review the administrative actions of the state organs for the constitutionality compliance. With the review, Constitutional Courts actually carry out both the legislative and mediative roles in the political system. Pinnell, however, furnishes the explanations of the roles based on a rather generalized concept although she illustrates a point that Constitutional Courts in some countries command the power to implement new legislations while those in other countries reserve the right to only point out the need for the laws. The Courts, Pinnell added, are designed to invoke the mediative authority through the dissemination of the constitutional interpretation of the boundaries within which political interests can bargain with each other and how the bargaining process should be conducted. The Courts hand down the final word in tackling conflicts which concern the constitutionality of a law or a state organ's behavior.[4]

The Constitutional Court justices and their closeness to political interests may be an intertwined and sometimes a contest concept. Roger E. Hartley insists 'it is very difficult to separate the meaning of judicial independence from the politics that surround it''. There is a link between one's level of political support for what courts in fact do and the degree to which one embraces a robust notion of judicial independence.[5] Sanford Levinson also allows a further light by stating that there are conceptions of judicial independence in clear tension with other important values, the most important one being accountability to the general public. He mentions a set of variables which underscores the description of judicial independence. Some of the variables stress the pressures, both formal and informal, that can be brought to bear on judges during their terms of office with regard to shaping their specific decisions.[6] The Constitutional Court's functions are also put into context by Chavana Traimas[7] with the emphasis on the Thailand's Constitutional Court. He refers to the Courts'

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[4] Sabrina Pinnell, Formation vs Action: What Empowers Constitutional Courts?

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[5] Roger Hartley**, Law & Politics, Book Review** [online], 2002. Available from : http//www.bsos.umd.edu/gvpt/lpbr/subpp.s/reviews/Burbank-stephen.htm.

[6] S. Levinson, **Identifying Independence** [online], April 22, 2006. Available from :

http://bu.edu/law/central/jd/organizations/Journals/bulr/volume8605/documents/LEVINSONv.2.pLevi.

[7] Traimas Chavana, "Thailand's Constitutional Court in the Midst of Political Reform," in Thailand's Constitutional Court in the Midst of Political Reform 2, Office of the Constitutional Court, (Bangkok: P. Press, March 2003), pp. 197-258.

regulatory authority over the laws, organizations and people, which are the three segments sustaining national administration. The Court is duty-bound to undertake a posterior review of laws by ensuring the constitutionality validity of the *Praratcha Banyat* or Acts. Those subject to the review are the Acts in general including the Act governing the annual national expenditure as well as parliamentary regulations. As for the human factor, the Court admits cases involving any individual charged with subversion of the constitutional monarchy. Political parties which commit the same offence can also be ordered dissolved by the Constitutional Court. Apart from the political parties, the Court has jurisdiction in issuing constitutionality ruling over 11 agencies and entities (the Cabinet, the House of Representatives, the Senate, the Administrative Court, the Courts of Justice, the Military Court, the Election Commission, the Ombudsman, the National Human Rights Commission, the National Anti-Corruption Commission, and the Office of the Auditor General).

Chavana has given a solid analysis of 'independence' which is one of the ultimate principles to be upheld by the Constitutional Court. He insists the Court's ability to remain impartial and above influences is rooted in its internal and external workings. Internally, each justice produces his or her verdict in a case and the justices cannot meddle with the individual rulings of their colleagues. Externally, the Court obeys the organizational structure which insulates it from any intrusion of the regulatory power of other organizations. Further, it is neither attached to any ministry, which is politically supervised, nor comes under the management of any civil service unit which is governmentally controlled.

Chavana, however, has hammered home a point which must not be dismissed. He suggests it is opened to question whether, if not to what extent, the Constitutional Court carries the risk of being intervened or interfered by the political powers. He finds it is in the interest of transparency that the information concerning the selection of the justices is made accessible to the general public. [8] He encourages academic research on the matter as the Court's capacity to fend off political interference in the choice of the people who mete out constitutionality-related justice is tied to the legitimacy of the Court.

The Court's independence also forms the nucleus of Wirat Wiratnipawan's study of five high-profile verdicts issued on political entities, independent agencies and political office holders. The study has concluded that the public confidence in the Court has been eroded somewhat by some of the Court's decisions which ran counter

[8] Traimas Chavana, Thailand's Constitutional Court in the Midst of Political Reform, pp. 197-258.

to the benefits of the people at large. The decisions have been critically scrutinized in the wider public domain and the criticism has weighed down on the people's faith in the Court as it casts doubts on the popular belief that the Court will always manage a 'safe' distance from political interests. [9]

With the South Korea's Constitutional Court, Tom Ginsburg sees it as a highly-respected, relatively quiescent institution which is called upon to resolve major political conflicts and issues of social. He writes that the Court justices were perceived to have been able to rule on major cases with demonstrable neutrality and legitimacy. Ginsburg has suggested a compelling tendency where the South Korean Constitutional Court is not only un-submissive to the political interests but is, in actuality, rising above them and, in some instances, exerting so much judicial intervention that it is 'judicializing' the outlets of government. Decision-making prudence displayed by the justices is the Constitutional Court's major drive toward neutrality and legitimacy. There is the perceptible, gradual judicialization of Korean politics in which important social and political questions are increasingly determined in the courtroom rather than the more conventional political institutions. [10]

ศูนย์วิทยทรัพยากร
จุฬาลงกรณ์มหาวิทยาลัย

[9] Wirat Wiratnipawan, A Research Project on the Rulings of the Constitutional Court and the Constitutional Court Justices (Febuary 2001), pp. 24.

[10] Tom Ginsburg, **The Constitutional Court and the Judicialization of Korean Politics; New Courts in Asia** [online], 2010. Available from : http://works.bepress.com/tom_ginsburg/30.

Chapter III

Constitutional Court of Thailand (under the 1997 constitution)

3.1 History of the 1997 Constitution

When debating political closeness of the Constitutional Court of Thailand, an examination of the rationale behind the Constitution which gave birth to the Court is in order as it strived to advance accountability which helps augment the judicial independence. The constitutions promulgated prior to 1997 were thought to have perpetuated rather than eliminate deep-seated corruption or streamline the ineffectual administration of the country. The political state had been weak with episodes of military revolts overthrowing civilian governments and successive administrations being dominated by the same crop of politicians blamed for trapping Thailand in the cyclical stagnation.

The civilian rules had been leveled with a long list of graft allegations which invited the dreaded prospects of the military coup to undo the political impasse. A sweeping political reform was sought-after by the people. There were those who wished to democratize the system of government and redress the acute lack of transparent administration and who offered credible methods of doing so.[1]

The political critical mass which was to culminate in the drafting of the 1997 Constitution had gathered pace after the Chatichai Choonhavan government was ousted by the coup d'etat engineered by the National Peace Keeping Council in 1991. The military staked a claim that it toppled the Chatichai government because it was corrupt and there was no public uproar that the government had been removed. Its coup-installed successor led by Anand Panyarachun had the task of seeing to a smooth transition to a new constitution and the ensuing general elections. After the elections in March 1992, the coup makers were bent on retaining its power and

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[1] James Klein, "The Constitution of The Kingdom of Thailand, 1997: A Blueprint for Participatory Democracy," The Asian Foundation Working Paper Series (March 1998): pp. 38.

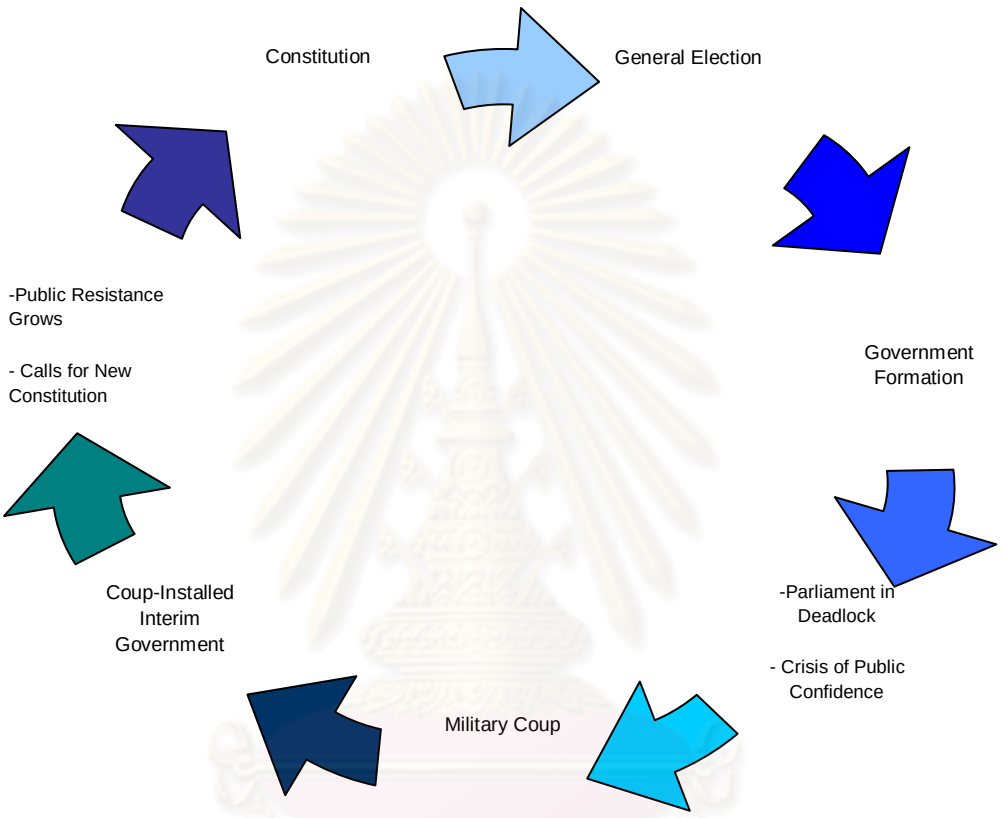
worked to put one of its strongmen Gen Suchinda Kraprayoon in the prime minister's seat. A popular movement turned out on the streets to protest Gen Suchinda's imminent rise to the premiership leading to the Black May uprising. The crisis was defused with the intervention of His Majesty the King and Anand was called once again to take the helm of the interim government organized in September, 1992. The Democrat Party emerged victorious in the polls although by a small margin of votes and formed the coalition government.

The Black May bloodshed had spurred the Democrat-led government to honor its promise to execute serious political reform policies. At the same time, a public debate was in full swing trying to figure out how to break the 'vicious cycle' where corruption cripples national progress and subdues accountability providing a fertile ground for a military revolt to be followed by another corrupt and stricken government (refer to Chart 2). Parliament President Marut Bunnag set up the Committee for Democratic Development on June 9, 1994 which was chaired by highly-respected Dr Prawase Wasi. The committee explored ways to realize political reforms, which included amending the charter, amid the urging of many people that rectifying the constitution should not be left in the hands of the politicians but through a participatory approach. Article 211 of the 1992 constitution was altered to allow for the establishment of the Constitutional Drafting Assembly. The new charter would institute the mechanisms needed to put the political reform into practice.[2]

ศูนย์วิทยทรัพยากร
จุฬาลงกรณ์มหาวิทยาลัย

[2] James Klein, The Constitution of The Kingdom of Thailand, 1997: A Blueprint for Participatory Democracy, pp. 40.

Chart 2: The Vicious Cycle of Politics in Thailand



Source: Evolution of Thai Constitution

After the Democrat-led government resigned in May, 1995, after a cabinet minister was targeted for a non-confidence debate over his alleged abuse of authority in connection with the land reform program. The coalition parties disintegrated and the government was replaced by the new administration headed by Banharn Silpa-archa, leader of the Chart Thai Party. He was behind the establishment of the Political Reform Committee whose main charge is to create a master plan on political overhaul. The committee was following up on the suggestions of the Committee for Democratic Development. Two options had been floated by the Political Reform Committee; rewrite the 1992 constitution or write a whole new charter.

A constitutional amendment to Section 211 was finalized in Parliament on Sept 14, 1996 that cleared the legislative path for a new charter to be drafted. Corruption allegations subsequently forced the collapse of the Banharn government which was taken over by the administration under Chavalit Yongchaiyudh, the former army chief and leader of the New Aspiration Party. It is noted that the despite the administrative interruption from frequent changes of the guard at the time did not derail the process to establish the Constitution Drafting Assembly (CDA).

The CDA with 99 members – 76 standing for each province and 23 recognized experts from the fields of law, political science and administration - was represented by people from various sections of society.

It was mandated to adopt public participation in developing the charter and reorganize political structures to factor in checks and balances. The Assembly had 240 days in which to produce a charter. Thitinan Pongsudhirak [3] commented that the Assembly took further concrete steps to codify concepts, ideas, people's grievances, demands, and expectations into a charter. He explains the new charter was to integrate a broad-based consensus to craft rules to get rid of money politics and the vicious cycle of constitution, electoral contest, corruption, and coup.[4]

Money politics had emasculated political progress as it perpetuated such vicious cycle which had no chance of being severed unless the Constitution was modified to rein in on unethical and corrupt politicians who consolidate power through electioneering. John Laird said Thailand's political development had hit crisis point and the creation of the CDA was trusted by the growing population, most notably the educated middle class, to be a new dawn which could turn what many reckon is the hapless state of politics around. The CDA is a break with tradition, considering that parliamentarians have been left out of the actual drafting of the new charter. The institution of politics and government are failing the need of development and the CDA lights up hope that major changes can be made to these institutions so mechanisms could be laid down that will cut the lines of influence of money politics and set the foundation for clean and stable government.[5] The CDA officially started its first day on January 7, 1997. The assembly elected Uthai Pimchaichon, the former parliament president as its chairman and three months later, the first draft of the constitution was completed. The

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[3] Thitinan Pongsudhirak, "Lessons from the Tragedy of 1997 Charter," Bangkok Post (September 16, 2009): 9.

[4] Ibid.

[5] John Laird, Money Politics, Globalisation and Crisis: the Case of Thailand, (1997), pp. 19.

draft attracted input through public hearings organized in the provinces nationwide. The preliminary draft had been put up for vetting at the provincial level with participation by the civic networks.

The two groups of charter drafters are indirectly elected. The 76 members represent each province and the 23 members are experts in the fields of political science, administration and law. In the provinces, qualified individuals can register their candidacy as the provincial representatives. If more than 10 candidates applied in any province, they were to vote among themselves to prepare the list of the top 10 candidates which were submitted to the Parliament which then voted behind closed door to pick one individual from each provincial list. The second group of the CDA members was chosen from the 30 candidates nominated by government and private universities. Each institution short-listed the names of five political scientists, five public law experts, and five public administration specialists. The Parliament President compiled the candidates into three lists. The Parliament then selected eight individuals from the public law list, eight from the political science list, and seven from the administration list. The CDA line-up is said to be represented by some of Thailand's most eminent and respected individuals. The Information is sourced from Klein's working paper titled 'The Constitution of The Kingdom of Thailand, 1997: A Blueprint for Participatory Democracy,' The Asian Foundation Working Paper Series, March 1998.

The draft had been debated, revised and approved by the CDA on August 15, 1997.[6] The CDA members had voted 92 to 4 to pass the draft which was submitted to the National Assembly for further scrutiny. The draft sailed through the National Assembly on September 27, 1997 after 578 parliamentarians voted in its favor with 16 against and 17 abstentions (Klein, 1998). The charter which would become known as the 1997 Constitution was promulgated on Oct 11, 1997.

Pornpimol Kanchanalak[7] writes that the 1997 Constitution was hailed as the "People's constitution" because it was the first to be drafted by a popularly elected Drafting Assembly. It stipulated for the first time that both the House of Representatives and Senate were to be directly elected. It legally encouraged independent NGOs and human rights groups to provide a check-and-balance mechanism. It put in numerous measures that were to increase the stability of elected governments.

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[6] James Klein, The Constitution of The Kingdom of Thailand, 1997: A Blueprint for Participatory Democracy, pp. 40.

[7] Pornpimol Kanchanalak, "Tell It As It Is, A Rude Re-awakening to the Same Old Political Nightmare," The Nation (December 10, 2009):13.

In order to stymie election fraud and vote buying, the 1997 Constitution laid down the one-man-one-vote system that was supposed to make the cost of money politics so exorbitant that it would gradually disappear. It was intended to strengthen the country's party system so that it could improve Thailand's political stability (Kanchanalak, 2009).

In Peter Janssen's view [8] the decade-old charter strengthened the role of the prime minister, and favored the establishment of large political parties as well as the independent bodies that were supposed to guarantee clean and fair elections and to make accountable elected politicians.

Thitinan noted that while the CDA's final draft was being modified, it faced fierce opposition from Parliament. Ratification necessitated major public campaigns to bring pressure to bear on parliamentarians before promulgation in October 1997. There was no referendum but the public participation in the drafting process lent it unrivalled legitimacy. [9] Thitinan emphasized the general principles of the new constitution were bottom up as it sought to promote stability and effectiveness of government and transparency and accountability of the political system. To combat corruption, it set up the National Anti-Corruption Commission and the Anti-Money Laundering Office. Provisions Thitinan describes as quirky, such as requiring all candidates to have a university bachelor's degree, were premised on preventing the unscrupulous from entering Parliament.

The executive branch had been strong and sometimes too strong allowing its execution of duty to go unchecked. Several other independent institutions were also established to protect the public from an overly powerful executive. An Administrative Court was established to address conflicts between citizens and officials. A National Human Rights Commission and Ombudsman were created to afford people access to government, to the constitution, to the machinery of government.[10]

The 1997 Constitution created the controversial Constitutional Court as an independent entity with jurisdiction over the constitutionality of parliamentary acts, to draft legislation, and appoint and remove public officials and political parties. The

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[8] Peter Janssen, "Thailand's 18th Constitution is a must-read," Bangkok Post, (July 27, 2007): 11.

[9] Thitinan Pongsudhirak, Lessons from the Tragedy of 1997 Charter, pp. 9.

[10] Ibid.

court was established as another corrective measure to prevent groups in power from exploiting the charter for their own gain.[11]

But there were sections in the 1997 Constitution which were conducive to a strong executive. For example, a no-confidence motion, which is instrumental in keeping the prime minister answerable to his duties and responsibilities, was not always easy to mount. At least 200 MPs were needed to file the motion. The Constitution may have set stage for the separation of powers by requiring the prime minister be elected as an MP but the MPs could not concurrently assume the cabinet portfolios. The purpose is for the prime minister to fully focus on the affairs of the state without solidifying his influence with the voters which could possibly see the central budget diverted to the support base of the prime minister when the head of the government should not be bent on partisan benefits.

In essence, the independent agencies were put to work and most apparently, the [1] Thitinan Pongsudhirak, "Lessons from the Tragedy of 1997 Charter," Bangkok Post (September 16, 2009): 9.

Constitutional Court, fared rather disappointingly in the eyes of some observers with regards to its deliberation of the assets concealment trial against the then prime minister Thaksin Shinawatra in 2001. The Thaksin trial will be given a detailed analysis in the review of major cases under 3.4) Action of the Constitutional Court. Thitinan believes that hindsight indicates that Thaksin's narrow acquittal in the case was the straw that tragically broke the inner-workings of the 1997 charter.

After his acquittal, Thaksin inexorably abused, usurped and dominated the constitutional principles, contours and configurations.[12] Thitinan reckons the 2007 Constitution was anti-politician while letting the voices of the electorate fall by the wayside. It is also flawed as it is implicitly distrustful of the predominantly rural voters. The 2007 Constitution appeared to have missed the most critical point which was to focus on the electorate at the bottom of the corruption food chain. As Thitinan puts it, the 2007 charter revolves around the relationship between a select few and elected politicians at the expense of the ties between voters and their representatives.

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[11] Pornpimol Kanchanalak, Tell It As It Is, A Rude Re-awakening to the Same Old Political Nightmare, pp. 13.

[12] Thitinan Pongsudhirak, Lessons from the Tragedy of 1997 Charter, pp. 9.

3.2 Background of Thailand's Constitutional Court

In Thailand, the establishment of the first agency in charge of providing constitutionality safeguard was in 1944. It was when the Courts of Justice issued the verdict No 1/2487 entitling themselves to the full power of ruling on the constitutional validity of the laws. Three months later in the same year, a 'constitutional tribunal' was appointed to be the constitutionality checkers, superseding such authority of the Courts of Justice. There had been written stipulations in many subsequent constitutions which confirmed the tribunal's legitimacy.(See relevant Sections of Thailand's Constitutions 2492BE, 2495BE, 2511BE, 2519BE, 2521BE and 2534BE.)

After the tribunal had been put to work for sometime, however, it transpired that the performance of the tribunal members had been problematic. The tribunal had been positioned as an 'a political organization' by virtue of the requirement that a partial number of the sitting tribunal members were to include figures who concurrently hold political posts, namely the parliament president and senate president. Other tribunal members occupy top-ranking permanent positions in the bureaucracy such as the Supreme Court president and the attorney-general. Called into question was the working efficiency of the members because they must divide their time between the full-time obligation to their main job and the tribunal responsibilities and they may not be able to fulfill both charges equally efficiently. Another potential flaw of the tribunal was the possible conflict of dual duties arising from the assumption of concurrent posts.[13] Moreover, regulations were opened for members of the tribunal appointed in their capacity as experts to renew their term. It was undeniable such leeway may have subject the tribunal members to the political pressure from the parliament which is a political institution under the indirect representative system of government. For this reason, the tribunal members' freedom stands to be compromised.[14]

The shortcomings and inadequacies in the structure of the tribunal membership were evident and they were brought forth in the conception stage of the 1997 constitution. The Constitution Drafting Assembly had set the course of direction for the charter redraft and it was decided that a reform was needed to the structure, composition, functions and adjudication method of the body which is trusted to 'guarantee' the constitutional compliance and validity of the laws. The reform had resulted in the re-

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[13] Bowornsak Uwanno, "Thailand's Cons Bowornsak Uwanno. The Constitutional Court under the 1997 Constitution. Ratthapirak Journal 41st Year, 2nd Quarter (April-June 1999): 17-24.

[14] Kamolchai Rattanasakawongse, "Constitutional Court and Constitutional Proceedings," Academic Report presented to Democracy Development Committee, (1995): 15.

modeling of the tribunal and marked the birth of the Constitutional Court. The intention is for the Constitutional Court to operate as a court in deliberating cases in line with the process of justice and public law. Fundamentally, the Constitutional Court must be devoid of the organizational characters identifiable with a political entity which would allow politics in any shape or form to influence its verdict in some instances.[15] Thailand's first Constitutional Court was established under the 1997 constitution to replace the constitutional tribunal.

Needless to say, according to Noppadol, the verdicts of the Constitutional Court generate impact far and wide in the country's legal system because it is binding not only on the three foundation powers; the parliament, the Cabinet and the courts, but also the state agencies as a whole.

The Constitutional Court shares a number of similarities with the other courts in that, for example; their adjudication of cases must proceed in the name of His Majesty the King; they have the freedom to adjudicate the cases; they must swear the oath of allegiance to the King, a formal procedure consummating their duty as the Constitutional Court justices; and they rightfully enjoy the power to tailor their own unique approach of deliberating case. The Constitutional Court and other courts also cannot take up cases for deliberation unless there is a damaged party filing a complaint.[16]

Although the Constitutional Court is essentially classified as a court, it holds certain distinctive functions which set it apart from the courts of justice. Noppadol has outlined four definitive characteristics of the Constitutional Court.

First, the Constitutional Court differs from the courts of justice in that it does not answer to the usual three-court principle. Its verdicts are final because there is no Appeal Court or the Supreme Court which may contest the verdicts of the courts of the first instance. The Constitutional Court is also unique in comparison to the Administrative Court whose decisions may be taken higher to the Supreme Administrative Court. The only means of appealing against the verdicts passed by the Constitutional Court is through constitutional amendment.

Second, the Constitutional Court is vested with the right to tailor its own method of

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[15] Bowornsak Uwanno, The Constitutional Court under the 1997 Constitution, pp. 23.

[16] Noppadol Hengcharoen, Constitution Court of Thailand: Past, Present and Future, pp. 29.

proceedings. For the courts of justice, the Administrative Court and the Military Court, the laws governing their proceedings are enacted by parliament.[17]

Third, the composition of the Constitutional Court justices varies, including non-judges. The justices are appointed from the judges of the Supreme Court, the Administrative Court and also selected from experts in law and political science.

Fourth, the term of the Constitutional Court justices is nine years and not renewable. By contrast, the judges in the courts of justice and the Administrative Court, after receiving the royal command endorsing their appointments, stay on as judges until their retirement, unless they die, resign or are dismissed from duty for any reason.

Fifth, the verdicts of the Constitutional Court are binding on the parliament, the cabinet, other courts and the state agencies. In this respect, it strays from the norm associated with the verdicts of the courts of justice which are binding only on the individual parties involved in the dispute. This is also true of the Administrative Court (unless where its verdicts lead to the abrogation or revocation of the royal decree, the ministerial regulations or the ministerial announcements, in which case the verdicts are binding beyond the disputed parties.)

It is worthy of note that should the Constitutional Court rule that a law contravenes the constitution, such act is tantamount to an exercise of a legislative power 'in negation,' which is an exception in other courts. In other words, the Constitutional Court reserves the right to 'dismantle' an enacted law.

It is observed that while the courts of justice cannot deliberate cases in excess of the scope of the complaints lodged the Constitutional Court is not bound by that restriction. Some cases admitted by the Constitutional Court seek resolution based on open-ended queries.

The Constitutional Court in Thailand was re-modeled from the Constitution Tribunal and the drafters of the 1997 constitution had looked to established models in the United States, France and Germany before laying down the concept of the Constitutional Court.

In America, the Supreme Court is empowered to decide on legal cases presented to it as well as determine the constitutionality of the laws. In other words, the US Supreme Court doubles as the Constitutional Court.

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[17] Noppadol Hengcharoen, Constitution Court of Thailand: Past, Present and Future, pp. 23.

In France, the 'Conseil Constitutional' or the Constitutional Advisory Council (a loose translation by researcher) undertakes to sift through important draft bills for any constitutionality fault prior to the passage of those bills into law. It also forwards recommendations on resolving constitutionality problems to the president and supervises elections and referendums.

In Germany, a Constitutional Court for the federation considers constitutionality disputes.

Thailand's Constitutional Court is a combination of the German and French models in that its main adjudicatory function is to arbitrate the disputes related to the constitutionality of laws in advance of legislation (ante factum). This is not the usual duty of the Courts of Justice which receive complaints and deliberate them after they were submitted and the Courts do not provide any advance legal counsel. Also, the verdicts of the Courts of Justice are not binding on other cases based on similar disputes because no two cases are exactly the same in details. The Courts take into consideration the prevailing societal norms.[18]

In Thailand, prior to 1945, there was no known agency empowered to rule whether any particular law conforms to or infringes on the spirit of the constitution.[19] The year had been historic as it marked the end of the Second World War which entailed the passage of the 'War Criminals Act'. The law prescribed punishments against wrongdoers whose conduct and acts were judged to be that of a war criminal.

The law contained a clause which stipulated that the punishable acts of war criminal may have preceded the enforcement of the Act. Cases had been filed with the courts of justice amid growing doubts as to the legitimacy of the Act in having a retro-effect on the wrongdoers. The unusual defiance of the legal norm had many wondering if the Act was constitutionally compliant. The Supreme Court had stepped in with the claim to inherent authority to decide on the constitutionality of a law. The Court reasoned that it is an institution that is in the business of exercising the law and so it is naturally the best party to recognize a constitutionality fault when it comes across one.

The Supreme Court declared the War Criminals Act enacted with the retro-active legal coverage was devoid of the constitutional validity. The law, therefore, was not enforceable and had to be repealed in pursuant to the Supreme Court's ruling on a war

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[18] Noppadol Hengcharoen, Constitution Court of Thailand: Past, Present and Future, pp. 24.

[19] The Constitutional Court Volume 1: Constitutional Court of Thailand (Bangkok: Nana Publishing Co. Ltd., 2001). pp. 25.

crime case.[20] The ruling had spurred the interest on the issue of which agency should be given the charge of interpreting and deciding the constitutionality of a law. It came to be recorded in history as the rallying point in the efforts to push for the materialization of the 'Constitutional Tribunal' with the naming of the batch of founding appointees. The Tribunal was entrusted with task of making itself approachable for constitutionality ruling of any law as requested by relevant party. The decision on whether a law conforms to the spirit and letters of the Constitution is also interpreted as the Tribunal's attempt to mitigate in and resolve a legal discord involving the executive and the judicial branches.

The Tribunal made its debut under the 1944 Constitution and has since evolved in form, structure and power. It was with the promulgation of the 1997 Constitution that the Tribunal had gone through the most radical change; its status was elevated to that of the Constitutional Court. The watershed transformation is intended to inject momentum into the political reform championed by the 1997 Constitution.

In serving with the political reform objective of the Constitution, the Constitutional Court must be a complete changeover of the Tribunal. As a departure from the Tribunal, the Court is composed of justices, replacing the political post holders who previously sat in the Tribunal. Bowornsak Uwanno writes that the exclusion of the political post holders was to rid the Court of any trace of political susceptibility. In particular, the House Speaker and the Senate Speaker, the political appointees who occupied seats in the Tribunal were excluded from the Court structure. He said the independence of the Constitutional Court was being ascertained by the requirement that the Court justices, many of whom are not judges by profession, were accorded the treatment, privilege and recognition as justices.

A more crucial point to note is the cross-over from the Tribunal to the Constitutional Court goes beyond the name and structural changes. Indeed, the common misconception had circulated over what legal issues the Tribunal and the Constitutional Court will admit for hearing. It was unequivocal that when the Tribunal morphed into the Court, it would not make itself available and accessible for consultation on the legality petitions arising from scenarios. In other words, the petitions which enter the Constitutional Court cannot be surreal or anticipated legality disputes. Those disputes must have taken place in order for them to be admissible in Court. Bowornsak has maintained Thailand's Constitutional Court does not duplicate the work of the Council of State. (The Council of State or *Krissadeeka* is the government's legal arm.)

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[20] The Constitutional Court Volume 1: Constitutional Court of Thailand, pp. 16.

It does not answer questions or convey advice that is aimed at clearing away doubts surrounding the legality issues presented it. He recalled that a request had been lodged with the Constitutional Court with the request to rule on whether the Election Commission is authorized to initiate a draft bill under Section 68 of the Election Commission Act. (Section 68 governs the temporary nullification of some personal rights resulting from the person's failure to vote in elections.)

Bowornsak says such is deemed a request for legal consultation, which the Constitutional Court does not hold the jurisdiction to provide.[21]

Table 1: shows the numbers, compositions, qualifications, prohibitions and lengths of the terms of the Tribunal members and of the Constitutional Court justices under different constitutions:

Constitution	**Number/ Composition**	**Qualifications/Prohibitions**	**Length of Term**
1944 Constitution	- 15 members - Parliament appoints Tribunal members from 'specialists' and names one of the specialists to be the Tribunal chairman.	- No qualifications of the specialists were specified.	- Term is equivalent to those of parliamentarians.
1949 Constitution	- 9 members - Five Tribunal members concurrently hold the Tribunal seats by virtue of their positions as Senate Speaker (who is also Tribunal chairman), House of Representative Speaker, Supreme Court President, Appeals Court director-general, and Attorney-	- The four appointees must be specialists in law	- Term commences from appointment date (within 30 days of the reconvening of the Parliament session). The term expires when the parliament reconvenes for

[21] Borwornsak Uwanno and Wayne Burns, The Thai Constitution of 1997 Sources and Process: "Civil Society and the Constitution of 1997" (1999), pp. 23.

Constitution	Number/ Composition	Qualifications/Prohibitions	Length of Term
	General Office director-general. Four Tribunal members are specialists appointed by Parliament.		the first time following a general election.
1952 Constitution	- 6 members - Three Tribunal members are selected who are concurrently Supreme Court President (who is the Tribunal chairman), Appeals Court director-general, and Attorney-General Office director-general. Three other Tribunal members are specialists appointed by Parliament.	- No qualifications of specialists are stated.	- Term takes effect on the date of appointment by Parliament (within 30 days of the re-opening of the Parliament session). Appointees vacate office when the parliament reconvenes for the first time following a general election. Former appointees may be re-appointed.
1968 Constitution	- 9 members - Five Tribunal members concurrently hold the Tribunal seats by virtue of their positions as Senate Speaker (who is also Tribunal chairman), House of Representative Speaker, Supreme Court President, Appeals Court director-general, and Attorney-General Office director-general. Four other Tribunal members are specialists appointed by	- The four appointees must be specialists in law.	- Term takes effect on the date of appointment by Parliament (within 30 days of the re-opening of the Parliament session). Appointees vacate office when the Parliament session reconvenes for the first time following a

Constitution	Number/ Composition	Qualifications/Prohibitions	Length of Term
	Parliament.		general election. Former appointees may be re-appointed.
1974 Constitution	• 9 members • The Parliament, the Cabinet and the Judiciary each appoint three specialists to be Tribunal members. The Prime Minister forwards the names of the appointees for royal endorsement. The Tribunal members choose one person among themselves to be the chairman.	• No specialist qualifications are stated although they cannot concurrently serve as senators, members of parliament, civil servants with a permanent position or fixed salary, state enterprise employees, or local administration officials.	• Appointment of the Tribunal members must be completed within 60 days of the general election. The Tribunal members' term expires or they leave office when the Parliament session reconvenes for the first time following a new round of general election. No Tribunal member may be re-appointed after having served two consecutive terms.
1978 Constitution	• 7 members • Three Tribunal members are the incumbent Parliament	• No specialist qualifications are stated although they cannot concurrently serve as senators, members of parliament, civil servants with a permanent position or fixed salary, state	• With each general election, the Parliament is to appoint replacements

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Constitution	Number/ Composition	Qualifications/Prohibitions	Length of Term
	President (who is also the Tribunal chairman), the Supreme Court President, and Attorney-General Office director-general. Four other Tribunal members are Parliament-appointed specialists	enterprise employees, or local administration officials	of the specialist Tribunal members within 30 days of the Parliament session reconvening. The Tribunal members' term expires or they leave office when the Parliament session reconvenes for the first time following a new round of general election. Former Tribunal members may be re-appointed.
1991 Constitution	- 10 members - Four Tribunal members are the incumbent Parliament President (who is also the Tribunal chairman), Speaker of the House of Representatives, the Supreme Court President, and the Attorney-General. The remaining six Tribunal members are specialists in the field of	- The specialist Tribunal members cannot concurrently serve as senators, members of parliament, civil servants with a permanent position or fixed salary, state enterprise employees, or local administration officials.	- Each Tribunal member has a four-year tenure and they may be re-appointed.

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Constitution	Number/ Composition	Qualifications/Prohibitions	Length of Term
	law or political science. The House of Representatives and the Senate each appoint three of them.		
1997 Constitution	- 15 members - The Court comprises of five Supreme Court judges elected in a secret vote by the Supreme Court assembly; two Supreme Administrative Court judges elected in a secret vote by the Supreme Administrative Court assembly; five specialists in law nominated by a selection committee and chosen by the Senate; and three political science specialists nominated by a selection committee and chosen by the Senate. The Constitutional Court justices choose one persona among themselves to be the Court President.	- The specialist Court justices must be a Thai national by birth and be 45 years or older. They must have served as a Cabinet minister, an election commissioner, an ombudsman, and executive of the National Human Rights Commission, an executive of the National Anti-Corruption Commission, or an executive of the State Audit Commission or have assumed position in the civil service with the seniority equivalent to at least a deputy Attorney-General, a departmental director-general, or a university professor. The justices must not possess the qualifications prohibited under Section, 106 and/or Section 109(1), (2), (4), (5), (6), (7), (13) or (14) (footnote: details of the Sections) in the Constitution. They must not concurrently be a Senator, a Member of Parliament, a political post holder, or a member or executive of a local administration organization. The justices must not be or have been member or holder of any position in a political	- The Constitutional Court justices' term span nine years from the day their appointments receive a royal approval. They may only serve a single, non-renewable term. They must leave the position at 70 years old.

Constitution	Number/ Composition	Qualifications/Prohibitions	Length of Term
		party in at least three years before becoming Constitutional Court justices. They must not concurrently be an election commissioner, an ombudsman, an executive of the National Human Rights Commission, an Administrative Court judge, an executive of the National Anti-Corruption Commission, or an executive of the State Audit Commission.	

Source: Evolution of Thai Politics

3.3 Formation of the Constitutional Court

The formation of the Constitutional Court under the 1997 Constitution is a starter point in the study into the contacts between the Court and the political interest. The essence of the formation is in what the Constitutional Court justices are composed of, what they represent and how they are selected which explain the basics for analyzing the political interaction that arises.

3.3.1 Composition and representation of the judges

As stipulated by Section 255 in the 1997 Constitution, the Constitutional Court functions through a panel of 15 justices, one the Court President and 14 other justices. His Majesty the King endorses the appointments of the justices on the recommendation of the Senate.

The Constitutional Court justices are grouped into:

I. Five judges in the Supreme Court elected in a secret vote by the Supreme Court assembly;

II. Two judges in the Supreme Administrative Court elected in a secret vote by the Supreme Administrative Court assembly;

III. Five specialists in the field of law nominated by a selection committee and appointed by the Senate; and

IV. Three specialists in the field of political science nominated by a selection committee and appointed by the Senate.

A closer look at the early stage of designing the composition of the justices reveals the intensity of the debate within the CDA as to how many and who should be offered the bench in the Constitutional Court. It was natural that the CDA would have to iron out differences among themselves because of the tremendous public expectations for the panel of the Court justices to have a proven track record of integrity and neutrality. The CDA was to formulate the right mix of justices that would not only stave off political intrusion in the Constitution Court's work but also keep the justices in check.

The CDA wanted the judicial branch to have a stronger influence over the composition of the Constitutional Court. In the beginning of the CDA discussion, the Court was to have nine justices; six legal experts and three political scientists. A 17-person panel would propose 18 names from among which the Parliament would elect nine justices. Although an ex-officio member of the panel would have been the Supreme Court President, the panel would also have included four representatives of the political parties in Parliament. A proposal was pressed forth in the CDA calling for an inclusion on the bench of ex-officio members from the Supreme Court and the Administrative Court, as well as the other judicial officials on the Court. However, the concept was inconsistent with the principle that he Court would be an independent agency and a full-time job for its justices.[22]

In the end, the CDA resolved to scrap the idea of having nine justices and increased the number to fifteen with seven justices being the nominees of the judiciary, a reference to the Supreme Court and the Supreme Administrative Court (refer to Table 2). In the selection of the specialist justices, the CDA cut

[22] The Constitutional Court of Thailand; The Provisions and The Working of the Court, Amara Raksasataya and James R. Klein (eds.), pp. 34.

back on the number of law experts to five and political scientists to three. The CDA also granted the Senate sole authority in electing the specialist justices although the Assembly earlier pondered the suggestion of the election being the final decision of a joint sitting of the House of Representatives and the Senate.[23]

While the Senate is empowered to appoint the specialist justices, the appointments of the justices in the quotas of the Supreme Court and the Supreme Administrative Court are off-limits to it. The Senate neither endorses nor approves the selection of justices appointed by the Supreme Court or the Supreme Administrative Court (as stated in the ruling No. 1/2541 issued by the Constitutional Tribunal acting as an interim Constitutional Court). What the Senate Speaker does, however, is countersign the royal command appointing the president and 14 justices of the Constitutional Court.

The justice selection, however, had had a backfiring effect on the 1997 Constitution. No sooner than the charter was promulgated had the demand for its amendment been echoed as potential constitutional contradictions were spelled out. The contention had resulted from the fact that the Senate lacked the power to review the background and to accept or reject the Constitutional Court candidates to be appointed by the Supreme Court and the Supreme Administrative Court. Despite the Senate having the role of balancing out the House of Representatives' legislative decisions through its vetting and vetoing of the draft laws, it remained firmly in many people's mind a political unit. This is mainly due to the 'democratization' of the Senate by the 1997 Constitution which pronounced that the senators would now be elected rather than appointed as in the past. The election of senators, although being made more restrictive than the election of MPs, had aggravated public concerns that the Upper House could end up as the 'spouse chamber' where an MP husband may secretly support his wife, relatives or close aides in the contest for a Senate seat. Such apprehension took its toll on public confidence in the Senate's ability to disassociate themselves with the political post holders. The elected Senate was the topic of accusations that it was turning into another political apparatus.

With the concern over the Senate's credentials and performance mounting, an expansion of power that would enable it to go so far as to accept or reject the

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[23] The Constitutional Court of Thailand; The Provisions and The Working of the Court, Amara Raksasataya and James R. Klein (eds.), pp. 34.

judicially-appointed Constitutional candidates could possibly be interpreted as failure to limit the political influence from the Senate within its appointment of the specialist justices in the selection procedures. But according to Klein, a potential technical shortcoming in the Constitution may in fact invite the Senate to have a sweeping authority over the choice of the justices. Section 255 of the Constitution demands that the Constitutional Court consist of justices ultimately appointed by the King 'upon the advice of the Senate.' In practice, the Senate Speaker countersigns the royal command appointing the Constitutional Court Presidents and the justices. Since the Senate must be accountable to the King, it is logical that it must have the authority to review the backgrounds of the judicial nominees so they can decide whether or not the names of the candidates should be submitted to the King. That is, although the Constitution does not grant the Senate the power to 'elect' the judicial candidates, Section 255 does grant the Senate full authority to accept or to reject the judicial candidates.[24]

It can be viewed that the 1997 Constitution itself has, advertently or not, left room for interpretation. The recruitment of the Senate does not, beyond all reasonable doubts, make it certain that the Upper House will be politics-free in picking the specialist justices who are the majority members of the Constitutional Court. On the one hand, the Senate is without a say in reviewing the backgrounds the judicial candidates of the Constitutional Court, which appeared to prevent the Senate from asserting resolute authority in the selection matter. But on the other hand, the Constitution is written to afford the Senate the final decision whether to accept or reject the judicial candidates. This had rendered futile any attempt at forging accountability in the selection process.

3.3.2 Court judges selection committee

In order for the majority of the Constitutional Court justices who are the law and political science specialists under the 1997 Constitution to be nominated, the selection is left in the hands of a special selection panel.

As stated in Section 257 of the 1997 Constitution, the selection committee has 13 members; a Supreme Court President, four Law Faculty deans or those in equivalent positions (picked from among all deans of the Law Faculties of

[24] The Constitutional Court of Thailand; The Provisions and The Working of the Court, Amara Raksasataya and James R. Klein (eds.), pp. 35.

state-run tertiary institutes), four Political Science Faculty deans or those in equivalent positions (chosen from among all deans of the Political Science Faculties of state-run tertiary institutes), and four political representatives (chosen by political parties represented in the House of Representatives). The committee draws up lists of candidates vying for the seats of the Constitutional Court specialist justices. The committee proposes ten law specialist candidates and six political science specialist candidates (accounting for twice the number of specialist justices). With the consent of the candidates, the lists are submitted to the Senate within 30 days as from the date when a ground for the selection of the persons to be in such office arises. The resolution on such nomination must be passed with a vote of no less than three-fourths of the total number o the existing members of the selection committee.

Section 257 further prescribes the Senate Speaker is to convoke the Senate for a sitting for the purpose of passing a resolution on the nomination by means of a secret ballot. The Senate will select from the lists of nominees presented by the selection committee. The first five persons on the name list of law specialist candidates and the first three persons on the list of political science specialist candidates who receive the highest votes (which amount to more than one-half of the total number of the existing senators will be elected the Constitutional Court justices. But if the number of the persons elected from the name lists is less than five in the case of law expert candidates and less than three in the case of the political science candidates, the names of candidates in either list who were not elected on the first occasion will be submitted to the Senate for voting on another occasion consecutively. In such case, the persons receiving the highest number of votes in respective order in the specified number will be elected Constitutional Court justices. If the candidates obtain equal votes in any order which result in having more than five or three persons, as the case may be, the Senate Speaker is to draw lots to determine who are the elected persons.(Section 257 of the 1997 Constitution translated by the Office of the Council of State.)

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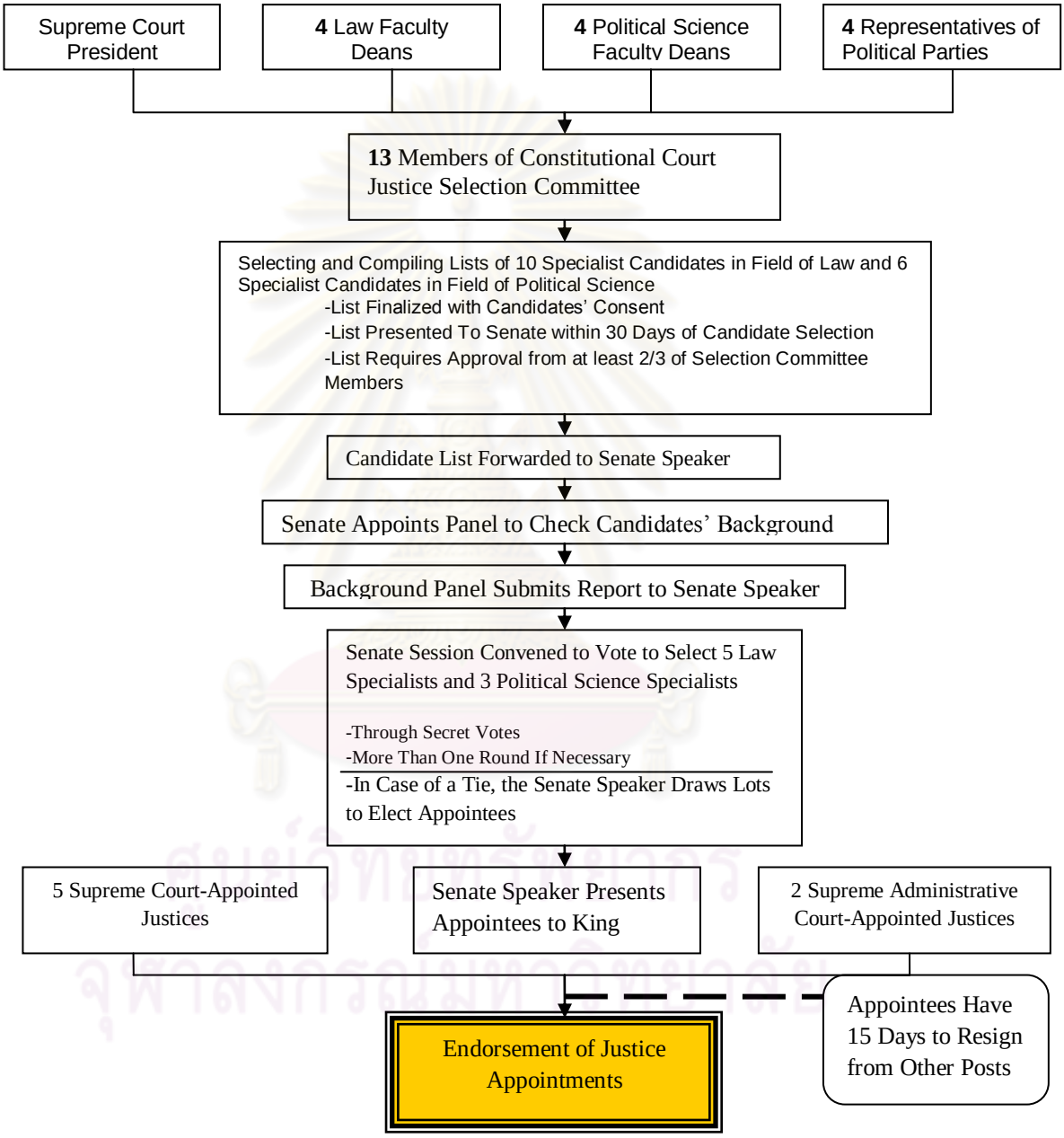
Chart 3: The Selection of the Constitutional Court Justices



3.3.3 Analysis of the composition of the Constitutional Court justices (under Thailand's 1997 Constitution) relative to the interaction with the political interests

There is the inevitable connection between judicial independence and the selection of the justices. How and who were chosen as the justices speaks great depths about how they carry out their duty in the Constitutional Court. Public confidence in the Court's performance in trial inflates or deflates depending on the names of the justices set against the backdrop of their personal background, which bears heavily on the people's perception of their integrity and independence.

To fully comprehend the justice composition-political interaction equation, two crucial elements - the history of the Constitutional Tribunal and the form of government - must be discussed and analyzed.

The history of the Constitutional Tribunal dates back to 1944 and until the end of its life in 1997, the Tribunal had varied in the numbers of the members, their compositions, qualifications and lengths of tenure through the rise and fall of many governments amid the precarious political state. The Tribunal applicable to this research is one which was put to work under the 1974 Constitution. Up until that point in time, the Tribunal members had been ex-officio and/or political appointees such as the Parliament President, House Speaker or individuals fielded by the Parliament. Although the compositions also contained the Supreme Court and the prosecution, the line-up suggested a conspicuous presence of political influence. Relatively speaking, the Tribunal did not command as much authority or enjoy as many functions as the Constitutional Court. Nonetheless, it was a component that decided on constitutional compatibility of a law, the exercise of which was bound to affect politicians in power one way or the other. It can be assumed that the Tribunal was an agency to watch and its functions were managed by the Tribunal members whose duty could either smoothen or hinder the direction of political policies.

The inclusion of political post holders, such as the Senate and House of Representatives Speakers or individuals they nominated, in the ranks of the Tribunal members was indicative of a feared infiltration of politics in the agency's constitutionality interpretation. But the composition of the 1974 Tribunal was unconventional as it stood out among those of the Tribunals that came before and after it. It carried the unprecedented compositional structure which, at least on the face of it, took a greater leaning toward the checks and balances than in previous or subsequent Tribunals. Installed in the Tribunal were nine specialists with the Parliament, the Cabinet and the Judiciary each appointing three of them. The Parliament, the Cabinet and the Judiciary are the pillars of the legislative, executive and the judicial branches respectively. The composition arouses curiosity as to what

motivated the sudden shift of the line-up of the Tribunal membership with the abandonment of the old formula of reserving vacancies for politicians or their nominated persons. The explanation traces back to one of most tumultuous periods in Thailand's political history. The promulgation of the tenth Constitution in 1974 followed the popular uprising on October 14 in the previous year when the mounting tension between students and the military government came to a head. The mass demonstration forced the military government to flee into exile paving the way for the creation of the 1947 Constitution which was hailed as a most-democratic and gender-respecting charter. But the Constitution touted as one of the most progressive ever written[25] suffered a premature death after two years of use; it was repealed after the crackdown on students on October 6, 1976.

Back in 1974 after the Oct 14, 1973 uprising in which the regime of Field Marshal Thanom Kittikachorn was overthrown, there was a constitution drafting committee and a committee propagating democracy. Tens of thousands of students went to the provinces to propagate democratic values among the people. Television, radio, printed media helped the democratic values dissemination programme. The TV programme started with the cry of a baby just born. Then, there was a voice that said when we were born we were all free _ we have the right to enjoy good air, the blowing wind, the sky and what not.[26]

The aftermath of the October 14, 1973 had let off steam many people's bottled-up displeasure against what they saw as autocratic and un-transparent governance. In the lead-up to the uprising, many students and the educated sector of society had been impatient over the Thanom Kittikachorn administration's slow pace of drafting a new constitution and had launched a street campaign for an expeditious completion of the constitution. The government retaliated by pressing charges of committing communist acts against 13 leaders of the pro-charter movement and placed them under indefinite detention. The Students Federation of Thailand demanded the detainees' immediate and unconditional release and the promulgation of the new charter within a year. The government rejected the demands prompting hundreds of thousands of students and pro-democracy to converge at Thammasat University on October 14, 1974. On the next day, a pocket of protesters clashed with security authorities, degenerating into bloody riots. Many buildings and the physical symbols of military dictatorship were torched and vandalized. Field Marshal Thanom, along with a number of top-brass in his regime, fled the country and he was replaced as prime minister by Sanya

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[25] **Evolution of Thai Politics, "Background of Thai Politics** [online], March 11, 2010. Available from: http://e-learning.mfu.ac.th/mflu/1604101/chapter3/Lesson10.html.

[26] Likhit Dhiravegin, "Another Drama with a Hidden Agenda," Bangkok Post (March 18, 2009): 11.

Dhammasakdi who was royally appointed. The Sanya government promised to have the charter ready for use in six months although it managed to do so in three months. The drafting responsibility was delegated to the 18-man assembly. The charter, 238 Sections long, was promulgated on October 7, 1974. Two years later, after having been amended once, the 1974 Constitution was cancelled in a military revolt headed by Admiral Sangad Chaloryoo, the Supreme Commander at the time, on October 6, 1976.

The two years under the 1974 Constitution had provided a rare window of opportunity for eliminating the vagueness in the laws which enabled politicians to 'muddle through' in exercising their administrative authority. The 1974 Constitution had imposed some groundbreaking restrictions, for example, that the prime minister must not be a member of parliament, the national political post holders cannot concurrently hold the posts of local leaders, or that the parliamentarians and the cabinet ministers must declare their assets and liabilities. The Constitution also sought to short-circuit the vicious political cycle by enforcing a ban on an amnesty to be granted to individuals who destroy the constitution.[27]

The public sentiment had surged in favor of loosening the political holders' grip on the state machinery including the Constitutional Tribunal. There was the sudden hunger for democracy which drove the composition of the Tribunal members to be modeled to truly represent the separation of powers. It can be said that the prevailing public sentiment to reform politics had led to the ideally desirable model of a Tribunal composition to be realized. That ideal was alive and tangible in that the Tribunal seats had been configured to distribute the decision making roles equally among the members nominated by the Parliament, the Cabinet and the Judiciary. The model was an emulation of the power separation principle and the designers of the 1974 Constitution was apparently perceptive of the people's wishes for the Tribunal to have an effective and accountable internal organization.

A similar '3:3:3' model, which is thought to be less prone to political interference, is adopted by South Korea's Constitutional Court.

It makes sense, therefore, to recognize the 3:3:3 configuration as a practical, well-suited formula that could ascertain accountable functionalities of the Constitutional Tribunal. After the 1974 charter was abrogated in 1976 with the military take-over of the national administration, the justice line-up was reverted to the previously politically-inclined structure. A pattern has emerged of politicians gaining access to

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[27] Evolution of Thai Politics, "Background of Thai Politics.

the Tribunal with the usurping of government. When a popular struggle for democracy wins the day, the Tribunal took on a new chapter dedicated to a composition of justices who are governed by a workable system of keeping tab on one another and preventing a particular cluster of justices from dominating the bench which would have increased the Tribunal's chances of being penetrated by the external politics. South Korea's Constitutional Court operates on the 3:3:3 configuration and has been held in high esteem in the wider sectors of the general public (an elaboration can be found in 4.3.1).

A fascinating query has been pressed forward: Would the 3:3:3 configuration have succeeded in deflecting political influence had it been allowed more time to function? The Sangad-led military revolt may have been the hand that ripped apart the 1974 Constitution and brought back the old politically-exposed line-up of the Tribunal justices. But the 3:3:3 configuration would most likely have failed eventually on the account of the form of government.

Thailand's Constitutional Monarchy rule may not necessarily be the best example of effective separation of powers. The prime minister is head of the Cabinet, the Parliament President who is the House Speaker leads the legislature and the Supreme Court President is the highest position of the judiciary. The principle of parliamentary majoritarianism reigns supreme as the biggest political party or the bloc of coalition parties which muster the majority votes in the House of Representatives also nominates the party members to be the Cabinet ministers. The inseparability of the two branches has somewhat crippled the structure of the three powers. The majority votes in parliament may be a boon to continuity and consistency in the implementation of government policies but it could also stifle the attempts through parliamentary means such as the filing of the no-confidence motion to scrutinize the executive branch's performance. The 1974 Constitutional Tribunal had borrowed the concept of the 'Triangle of Powers' and so it is only fair to predict that the Parliament and the Cabinet, which are sympathetic to each other, would have chosen the people both these branches could rely on in delivering their jobs in the Tribunal. Together the portions of the Tribunal memberships on the sides of the Parliament and the Cabinet could easily control six votes between them, against three votes from the judicial-appointed specialists. If this supposed bloc-voting was the case, the ideal model of the Tribunal would have been incapable of developing immunity to the political influence.

The potential weakness inherent in the 3:3:3 configuration looked to have been left out rather than rectified in the 1997 Constitution. Although the 1997 Constitution did not follow the pattern of the post-coup liberation as did the 1974 charter, it was a glaring retaliation of many people against the seemingly perennial corruption and administrative malpractices by the political post holders. Various blueprints of the

country's first Constitutional Court passed through the charter designers. The 3:3:3 configuration was not adopted and instead the charter drafters opted for a complex method of recruiting the justices.

Insofar as the 1997 Constitution Court has been entrusted with the core mission as an independent agency to rule on constitutionality of the laws, which puts it in close proximity with the political interests, the justices had to demonstrate they had unblemished personal and career backgrounds of being impartial. The complex recruitment of the justices was invented to permit specialist justices to be shortlisted by the Selection Committee. However, track record did not seem to be as much of a priority in choosing the specialist candidates as did the individual candidates' specializations. In fact, the faculty deans enjoyed a free hand to nominate their peers to stand in the respective category of specialist candidates without any background restrictions issued that could screen out those with who might retain fondness for or any outstanding affiliation with the political interests. No assurance was provided that the selectors of specialist justices will not be politically influenced in the use of their discretion to sift through the choices of finalists. The specialist selection was bent on a search for law and political science expertise.

The Selection Committee fulfilled its working obligations on the premise that the deans of respective faculties in the state-run tertiary were exceptionally dependable authorities in the sectors of law and political science. But the political influence was likely to have started at the point of narrowing the candidacy among the deans. A cajoling by political interests could have shaped the choice of specialist justice nominees and the selection may well have been sealed based on the amount of candidates' political inclination. The procedure for nominating the justices of the Constitutional Court should be transparent and opened to the public scrutiny.[28] The institute advises that the final selecting body should not escape monitoring which can be done through a disclosure of the vote of each selection panelist.

The candidates' possible political inclination can be rationalized by the patronage system. Political post holders have been known to extend adviser positions attached to their offices to university academics and the deans are no exception. The advisers are often the drive behind the formulation of state policies which could be beneficial to the office holders themselves. John Laird notes that decisions which feed on what could amount to a patronage tend 'to overlook better, more rational courses of action, and could result in more harm than good to the country and the people'.

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[28] **Research Paper Abstract** [online], 2010. Available from: http://www.tdri.or.th/abstract/s48_abs.pdf

The mathematics of the composition of the Selection Committee for 1997 Constitutional Court justices are suggestive of the risk of pattern voting and with the presence of four political party representatives in the Committee, the independence of justice finalists could be in doubt. The political party representatives make up four seats on the Selection Committee. Had there been any 'established relationship' between the representatives and the dean segments of selectors, all the representatives needed was three more seats from the dean selector portions to realize the simple majority votes over the justice finalist compilation. Within the ranks of the political representatives in the Selection Committee, majoritarianistic practice was at play. Politicians refused to be cast aside in deciding the justice appointments although calls were echoed for them to stay out of the selection of the members of the agency that would keep them in check. Since the political representation in the Selection Commission came from the political parties elected to the House of Representatives, it would not be surprising that politically-nominated selectors were members of the ruling coalition parties which garnered the parliamentary majority. The political representation in the Selection Committee gave no fixed quota of seats for the opposition party bloc and was therefore devoid of the internal counter-balance. This permitted one group of collectively powerful politicians to lead the opinions of the selector, according to Supawadee Inthawong.[29] Criticism has arisen because there had been no opposition party representatives in the selection panel since the promulgation of the 1997 Constitution. Supawadee said it would be naïve to suppose that that personal prestige and expertise of the selectors would enable them to deflect political interference.

Since the persons nominated for the Constitutional Court justices must receive the votes of three-fourths of the 13-member Selection Committee, the four political representatives on the Committee had an effective veto over all applicants, which enables them to reduce the pool o candidates proposed to the Senate to those individuals whom the government approves.[30]

As Banjerd Singkaneti put it, selecting the Constitutional Court justices was the most controversial process of any in the constitutional agencies. Political elements had interfered before, during and after the justices had assumed their posts. The

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[29] Interviewing Supawadee Inthawong, a senior reporter of the Bangkok Post, March 2, 2010. (Supawadee formerly worked as a Government House reporter who covered the constitutional reform beat and wrote many news pieces on the subject.)

[30] The Constitutional Court of Thailand; The Provisions and The Working of the Court, Amara Raksasataya and James R. Klein (eds.), pp. 35.

interference was paramount and rife from the very point of recruiting the Selection Committee members down to the stage where the Senate chooses the justices from the finalists. 'The Constitutional Court is made to cross paths with the politicians because their roles could make or break them. But when the Constitutional Court is without that protective wall around it, it is opened to interference,' Banjerd said.[31]

3.4 Actions of the Constitutional Court

The actions of the Constitutional Court are practically the cornerstone of the Court's institutional efficiency and prestige. They attest to the Court's performance after it has proceeded with the admission, deliberation and adjudication of the cases. This particularly critical phase of the study is dedicated to the explanations of the functions of the Constitutional Court, which put a scope on the Court's authority, and segmentation of cases handled by the Court as well as the review of major cases. The analysis is premised on the argument that the more diverse the cases tried by the Constitutional, the lower the focus on political interests.

3.4.1) Functions of the Constitutional Court

The functions of the Constitutional Court affirmed by the 1997 Constitution derive from four areas of its jurisdictions.[32]

1. Jurisdiction in Determining the Constitutionality of the Statutes and the Organic Law Bills

This is one of the chief jurisdictions of the Constitutional Court. The purposes of the determination of the constitutionality of the statute and the organic law bills are for; public interest without infringing on the basic rights and liberties o the people as provided in the Constitution; democratic regime of government in balancing the

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[31] Banjerd Singkaneti, **Relations; Capital and Politics, A Big Deal in Political Reform** [online], January 26, 2010. Available from : http://politic.isranews.org/index.php?option=com_content&task=view&id=225&Itemid=0.

[32] The Constitutional Court of Thailand; The Provisions and The Working of the Court, Amara Raksasataya and James R. Klein, pp. 44**.**

powers and duties among the constitutional organizations; and the sake of preserving the Constitution, which is recognized as the supreme law of the State. The constitutionality scrutiny of a relevant law bill can proceed before or after the enactment of the law.

1.1 Determination of Constitutionality before Enactment of the Statute

The step can be timed during the deliberation of legislation or during the drafting of an Emergency Decree before enactment. It is done by scrutinizing a draft bill or verifying the legality of the enacting process under the Constitution. The Constitutional Court will determine the constitutionality of the following items prior to the enactment;

a) an organic bill;

b) the issuance of the Emergency Decree by the Cabinet Ministers;

c) the statute or the organic law bill reintroduced by the Cabinet Ministers or members of the House of Representatives provided the law bill in question has the same or similar principle as that of the statute or the organic law bill being withheld.

A) Determining the Constitutionality of an Organic Law Bill

The Constitutional Court considers and decides as to the constitutionality of any bill or organic law bill that has been already approved by the Parliament or has been reaffirmed by the Parliament but which the prime minister has not presented to the King for signature. In the consideration of the Constitutional Court, such statute or organic law bill must not be contrary to or inconsistent with the Constitution or be enacted contrary to the provisions of the 1997 Constitution in accordance with Section 262 of the Constitution.

Section 262: After any bill or organic law bill has been approved or reaffirmed by the Parliament, before the Prime Minister presents it to the King for signature:

(1) If members of the House of Representatives, Senators or members of both Houses of no less than one-tenth of the total number of the existing members of both Houses are of the opinion that provisions of the said bill are contrary to or inconsistent with the Constitution or such bill is enacted contrary to the provisions of the Constitution, they shall submit their opinion to the President of the House of

Representatives, the President of the Senate or the Parliament President, as the case may be, and the President of the House receiving such opinion shall then refer it to the Constitutional Court for decision and, without delay, inform the Prime Minister thereof;

(2) If no less than twenty members of the House of Representatives, Senators or members of Both Houses are of the opinion that the provisions of the said organic law bill are contrary to or inconsistent with the Constitution or such organic law bill it enacted contrary to the Constitution, they shall submit their opinion to the President of the House of Representatives, the President of the Senate or the Parliament President, as the case may be, and the President of the House receiving such opinion shall then refer it to the Constitutional Court for decision and, without delay, inform the Prime Minister thereof;

(3) If the Prime Minister is of the opinion that the provisions of the said bill or organic law bill are contrary to or inconsistent with the Constitution or it is enacted contrary to the provisions of the Constitution, the Prime Minister shall refer such opinion to the Constitutional Court for decision and, without delay, inform the President of the House of Representatives and the President of the Senate thereof. During the consideration of the Constitutional Court, the Prime Minister shall suspend the proceedings in respect of the promulgation of the bill or organic law bill until the Constitutional Court gives a decision thereon. If the Constitutional Court decides that the provisions of such bill or organic law bill are contrary to or inconsistent with the Constitution or it is enacted contrary to the provisions of the Constitution and that such provisions of the bill or organic law bill form the essential element thereof, such bill or organic law bill shall lapse. If the Constitutional Court decides that the provisions of such bill or organic law bill are contrary to or inconsistent with the Constitution otherwise than in the case specified in paragraph 3 such conflicting or inconsistent provisions shall lapse and the Prime Minister shall proceed further.

B) Determining the Constitutionality of the Issuance of the Emergency Decree by the Cabinet Ministers

The Constitutional Court considers and decides if the issuance of the Emergency Decree is necessary in maintaining national or public safety or national economic

security, or avert public calamity. The submission of such case to the Constitutional Court for consideration is provided in Section 219 of the Constitution.

> *Section 219: Before the House of Representatives or the Senate approves an Emergency decree, members of the House of Representatives or Senators of no less than one-fifth of the total number of the existing members of each House have the right to submit an opinion to the President of the House of which they are members that the Emergency Decree is not in accordance with the relevant Section, and the President of the House who receives such opinion shall then refer it to the Constitutional Court for decision. After the Constitutional Court has given a decision thereon, it shall notify its decision to the President of the House referring such opinion. When the President of the House of Representatives or the President of the Senate has received the opinion from members of the House of Representatives or Senators, the consideration of such Emergency Decree shall be deferred until the decision of the Constitutional Court has been notified. In the case where the Constitutional Court decides that any Emergency Decree is not in accordance with the appropriate Section of the Constitution, such Emergency Decree shall not have the force of law ab initio. The decision of the Constitutional Court that an Emergency Decree is not in accordance with the appropriate Section must be given by votes of no less than two-thirds of the total number of members of the Constitutional Court.*

According to Section 219, the Constitutional Court particularly and practically controls the issuance of the Emergency Decree whether the Emergency Decree adhere to the purpose for maintaining national or public safety or national economic security, or averting public calamity or not. In this regard, if the Emergency Decree is not in accordance with the Section 219, such Emergency Decree shall not have the force of the law. Unlike the control of the constitutionality of the bill and the organic law bill, the Constitutional Court does not control the Emergency Decree from being contrary to or inconsistent with the Constitution.

C) Determining the Constitutionality of the Statute or the Organic Law Bill Reintroduced by the Cabinet Ministers or Members of the House of

Representatives Having the Same or Similar Principle as that of the Statute or the Organic Law Bill Being Withheld in accordance with Section 177.

> *Section 177: While a bill or an organic law bill is being withheld, the Cabinet Ministers or members of the House of Representatives may not introduce a bill or an organic law bill having the same or similar principle as that of the bill of the organic law bill so withheld. In the case where the House of Representatives or the Senate is of the opinion that the bill or the organic law bill so introduced or referred to for consideration has the same or similar principle as that of the bill or the organic law bill being withheld, the President of the House of Representatives or the President of the Senate shall refer the said bill or organic law bill to the Constitutional Court for decision. If the Constitutional Court decides that it is a bill or an organic law bill having the same or similar principle as that of the bill or the organic law bill so withheld, such bill or organic law bill shall lapse.*

1.2 Determining the Constitutionality after the Enactment of a Bill

In the event of a bill having been approved by the legislature and come into force upon its publication in the Royal Gazette, the Constitutional Court determines its constitutionality after the bill's enactment through the two methods; the determination by the Court proceedings and by the Ombudsmen. If such bill is contrary to or inconsistent with the Constitution, the Constitutional Court will be able to so determine after its enactment as provided in Section 264 and Section 198.

> *Section 264: In the application of the provisions of any law to any case, if the Court by itself is of the opinion that, or a party to the case raises an objection that, the provisions of such law fall within the provisions of the appropriate Section and there has not yet been a decision of the Constitutional Court on such provisions, the Court shall stay its trial and adjudication of the case and submit, in the course of official service, its opinion to the Constitutional Court for consideration and decision. In the case where the Constitutional Court is of the opinion that the objection of a party is not essential for decision, the Constitutional Court may refuse to accept the case for consideration. The decision of the Constitutional Court shall apply to all cases but shall not affect the final judgments of the Courts.*

A) Determination by the Court Proceedings in accordance with Section 264

In reference to Section 264, in order to submit any case to the Constitutional Court for decision, the case is to be tried in Courts, for example the Courts of Justice (the Court of First Instance, the Appeals Court and the Supreme Court which includes the Civil Court, the Criminal Court and the Courts of Special Jurisdiction such as the Family and Juvenile Court and the Central Intellectual Property and international Trade Court), the Administrative Courts or the Military Courts. The Court or a party to the case raises and objection that the provisions of any law applying to the case are contrary to or inconsistent with the Constitution and that there has not yet been a decision of the Constitutional Court on such provisions. The Constitutional Court is to submit, in the course of official service, such as to the Constitutional Court for consideration and decision. Subsequently, the Court stays its trial and adjudication of the case until the Constitutional Court passes a decision.

In the case where a dispute arises as to the performance of government officials, such matter is not to be submitted to the Constitutional Court for consideration in accordance with Section 264. The Constitutional Court is not vested with the authority to consider a dispute in regard to other Court procedures.

B)Determination by the Ombudsmen

The Ombudsmen directly receives a motion from the complainant in regard to the omission to perform or performance beyond powers and duties of an official of a state agency, a state enterprise or a government organization, which unjustly cause injuries to the complainant or the public as to whether such act is lawful or not as provided in Section 198.

> *Section* 198: *In the case where the Ombudsman is of the opinion that the provisions of the law, rules, regulations or any act o any person under the appropriate Section raises the question of constitutionality, the Ombudsmen shall submit the case and opinion to the Constitutional Court or Administrative Court for decision in accordance with the procedure of the Constitutional Court or the law on the procedure of the Administrative Court, as the case may be. The Constitutional Court or Administrative Court, as the case may be, shall decide the case submitted by the Ombudsmen without delay.*

Under Section 198, the Ombudsmen are able to submit the case and the opinion on a dispute of the provisions of law, rules, regulations or any act o any person incompatible with the constitutionality to the Constitutional Court or Administrative Court for consideration and decision, as the case may be.

2. Jurisdiction in Considering and Deciding Qualifications of a Member of the House of Representatives, a Member of the Senate, a Cabinet Minister, the Election Commissioners and any Person Holding a Political Position Who Shall Submit an Account Showing Particulars of His/Her Assets and Liabilities

The jurisdiction of the Constitutional Court to this effect involves the consideration whether or not a member of the House of Representatives, member of the Senate, a Cabinet Minister, the Election Commissioners are constitutionally qualified or are not under prohibitions as provided in the Constitution. By virtue o the Constitution, the Constitutional Court is to look into and rule on issues of qualification or status in regard to the mentioned positions.

Further, the Constitutional Court is to consider and adjudicate on any person holding a political position who declares an account showing particulars of his/her assets and liabilities together with the supporting documents that are evidence of the actual existence of such assets and liabilities. Whoever fails to present an account showing the particulars and the supporting evidence or intentionally so presents them with false statements or conceals the facts which must be revealed, is subject prohibited from holding a political position.

2.1 Consideration on Termination o Membership in the House of Representatives or the Senate

Members of the House of Representatives or senators of no less than one-tenth of the total number of the existing members of each House reserve the right to lodge with the President of the House of which they are members a complaint asserting that the membership of any member of each House has terminated. Then, the President of the House with whom the complaint is lodged, is to refer it to the Constitutional Court for decision in accordance with Section 96.

> *Section 96: Members of the House of Representatives or Senators of no less than one-tenth of the total number of the existing members of each House have the right lodge with the President of the house of which they are members a complaint asserting that the membership*

of any members of such House has terminated and the President of the House with whom the complaint is lodged shall refer it to the Constitutional Court for decision as to whether the membership of such person has terminated. When the Constitutional Court has made a decision, it shall notify the President of the House with which the complaint is lodged of such decision.

The membership of the House of Representatives ceases upon:

- Resignation;
- Being disqualified as candidate such as not being a Thai national by birth, being less than twenty-five years of age on the election day or having graduated with less than a Bachelor's degree or its equivalent except for the case of having been a member of the House of Representatives or a Senator before such prohibition took effect;
- Being under any prohibition to be a candidate in an election such as being addicted to drugs, being an undischarged bankrupt or b being disfranchised;
- Acting in contravention of any prohibition such as holding any position or having any duty in any state agency or state enterprise receiving any concession from the state, the state agency or state enterprise, accepting any special money or benefit from any state agency or state enterprise, interfering or intervening in the recruitment, appointment, reshuffle, transfer, promotion and elevation of the salary scale of a government official holding a permanent position or receiving salary;
- Being appointed Prime Minister or Minister;
- Resignation from membership in this or her political party or his or her political party passing a resolution terminating his or her membership in the political party;
- Loss of membership in the political party in the case where the political party of which he or she is a member is dissolved by an order of the Constitutional Court and he or she is unable to become a member of another political party within sixty days as from the date on which the Constitutional Court issues its order;
- Having been absent for more than one-fourth of the number of days in a session, the length of which is no less than ninety days without permission of the President of the House of Representatives;

- Having been imprisoned by a final judgment to a term of imprisonment except for an offence committed through negligence or a petty offence.

For the Senators, their membership comes to an end upon:

- Resignation;

- Being disqualified as candidate in an election of senators such as not being a Thai national by birth, being less than forty years o age on election day, having graduated with less than a Bachelor's degree or it equivalent or having any of the disqualifications as a candidate in an election on a constituency basis;

- Being under any of the prohibitions to be a candidate in an election of senators such as being an member of or holder of other positions in a political party, being a member o the House of Representatives or having been a member of the House of Representatives and his or her membership has terminated for not yet more than one year up to the date of applying for the candidacy, being or having been a senator in accordance with the provisions of the Constitution during the term of the Senate preceding the application for the candidacy or being disfranchised;

- Being under any of the prohibitions because of being a Minister or other political official position;

- Acting in contravention of any prohibition such as holding any position or having any duty in any state agency or state enterprise, receiving any concession from the state, state agency or state enterprise, accepting any special money or benefit from any state agency or state enterprise, interfering in the recruitment, appointment, reshuffle, transfer, promotion an elevation of the salary scale o a government official holding a permanent position or receiving salary;

- Having been absent for more than one-fourth of the number o days in a session, the length of which is no less than one hundred and twenty days without permission of the President of the Senate;

- Having been sentenced by a final judgment to a term o imprisonment except for an offence committed through negligence or a petty offence.

2.2 Consideration on Termination of being a Minister

The Constitutional Court is to consider the termination of a ministership under Section 216. The proceeding in submitting a case to the Constitutional Court for consideration is provided for in Section 96, that is the members of each House or both Houses lodge a complaint asserting the membership in the House of Representatives or the Senate is subject to disqualification.

The ministership ceases upon:

- Resignation;
- Being disqualified or being under any of the prohibitions such as not being a Thai citizen by birth, being less than thirty-five years of age or having graduated with less than a Bachelor's degree or its equivalent being under any of the prohibitions to be a candidate in an election of members of the House of Representatives, having been charged in Court for a period of less than five years before the appointment after being sentenced by a judgment to imprisonment for a term of two years or more, except for an offence committed through negligence or bring a senator or having been a senator whose membership has terminated for no more than one year up to the date of the appointment as Minister;
- Having done a prohibited act; for example, that a Minister may not hold a position or perform any act except the position required to be held by the operation of law, and may not hold any other position in a partnership, company or any organization which engages in business with a view to sharing profits or income or be an employee of any person or a Minister may not be a partner or shareholder of a partnership or a company or remain being a partner or shareholder of a partnership or a company up to the legal limit;

2.3 Consideration of the Qualifications of an Election Commissioner as Being under any legal prohibition

The Constitutional Court is to consider and decide that an Election Commissioner has the necessary qualifications and must not be subject to prohibitions under relevant laws. According to Section 142, the members of the House of Representatives, Senators, or members of both Houses of no less than one-tenth of the total number of the existing members of the two Houses may lodge with the Parliament President a complaint that any Election Commissioner is disqualified or is under any of the prohibitions by law. Then the Parliament President is to

refer the complaint to the Constitutional Court for decision as to whether that Election Commissioner has vacated his or her office.

> *Section 142: Members of the House of Representatives, Senators, or members of both Houses o no less than one-tenth of the total number of the existing members of the two Houses have the right to lodge with the President of the Parliament a complaint that any Election Commissioner is disqualified or is under any o the prohibitions under an appropriate Section of the Constitution or has acted in contravention of any of the prohibitions stated in an applicable Section and the President shall refer that complaint to the Constitutional Court for its decision as to whether that Election Commissioner has vacated his or her office. When the Constitutional Court has passed a decision, it shall notify the Parliament President and the Chairman of the Election Commission of such decision.*

The Election Commissioners must possess the necessary qualifications and must not be subject to any prohibitions as follows:

- Being a Thai national;
- Being of no less than forty years of age on the nomination day;
- Having graduated with at least a Bachelor's degree or equivalent;
- Not being a member of the House of Representatives or the Senate, a political official, a member of a local assembly or a local administrator;
- Not being or having been a member or a holder of other positions in a political party throughout a period of five years preceding the holding of office;
- Not being an Ombudsman, a member of the National Human Rights Commission, a judge of the Constitutional Court, a judge of the Administrative Court, a member of the National Anti-Corruption Commission or a member of the State Audit Commission.

The Election Commissioner also may not be a government official holding a permanent position or receiving a salary; be an official or employee o a state agency, state enterprise or local government organization; hold any position in a partnership, a company or an organization carrying out businesses for sharing profits or income, or be an employee of any person; and engage in any other independent profession.

2.4 Consideration of any Person Holding a Political Position who Intentionally Fails to Submit an Account Showing Assets and Liabilities and Supporting Documents as provided in the Constitution or Intentionally Submits the Same with False Statements or Conceals Facts which Should be Divulged

The determination is whether such acts warrant a vacation from office or not. Persons holding the following political positions – Prime Minister, Ministers, Members o the House of Representatives, Senators, other political officials, local administrators and members of a local assembly – must submit an account showing particulars of their assets and liabilities. Under Section 295, the Constitution provides for a penalty for an omission or an intentional failing to submit the account showing assets and liabilities and supporting documents or an intentional submission of the same with false statements or a concealment of the facts which should be revealed. Any person holding a political position who neglects to submit the supporting documents to confirm the actual existence of such assets and liabilities is subject to the ban from holding any political position for five years.

> *Section 295: Any person holding a political position who intentionally fails to submit the account showing assets and liabilities and the supporting documents as provided in the Constitution or intentionally submits the same with false statements or conceals the facts which should be revealed shall vacate office as from the date of the expiration of the time limit for the submission or as front the date such act is discovered, as the case may be, and such person shall be prohibited from holding any political position for five years as from the date of the vacation of office. When such case occurs, the National Anti-Corruption Commission shall refer the matter to the Constitutional Court for further decision, and when the decision of the Constitutional Court is given, the provisions of an appropriate law shall apply mutatis mutandis.*

3. Jurisdiction in Considering and Deciding a Dispute Regarding the Powers and Duties of Organizations under the Constitution

Constitutional organizations are to perform their duties in accordance with the Constitution without interfering or affecting the powers and duties of other organizations. As stipulated in Section 266, the Constitutional Court is to consider and decide a dispute on the powers and duties of the constitutional organizations.

> *Section 266: In the case where a dispute arises as to the powers and duties of organs under the Constitution, such organs or the Parliament President shall submit the matter together with the opinion to the Constitutional Court for decision.*

Importantly, a dispute on the powers and duties of organizations under the Constitution must be a 'dispute' in regard to a performance of such powers and duties. As a result, the Constitutional Court cannot consider a petition without a common ground of dispute. For instance, an interpretation of the powers and duties of organizations or a discussion regarding the powers and duties of organizations under the Constitution where a dispute has not occurred is not to be taken under the Constitutional Court's consideration and decision.

A definition has been given of the constitutional organizations. They are organizations established by the Constitution and which have the powers and duties as stipulated in the Constitution. Therefore, organizations under the administrative branch such as a Ministry or government department do not come under the meaning of constitutional organizations.

4. Other Jurisdictions as Stipulated by the Constitution and the Organic Law

The Constitution and the organic law provide the following jurisdictions for the Constitutional Court;

A) Other Jurisdictions as Stipulated by the Constitution

4.1 The Constitutional Court is to consider as to whether a person or a political party has exercised the rights and liberties prescribed in the Constitution with the purpose to overthrow the democratic regime of government with the His Majesty the King as Head of State or to acquire the power to rule the country by any means which is not in accordance with the procedures provided in Section 63.

> *Section 63: No person shall exercise the rights and liberties prescribed in the Constitution to overthrow the democratic regime of government with the King as Head of State under the Constitution or to acquire the power to rule the country by any means which is not in accordance with the procedures provided in the Constitution. In the case where a person or a political party has committed such act, the person knowing*

of such act shall have the right to request the Prosecutor General to investigate its facts and submit a motion to the Constitutional Court for ordering cessation of such act without, however, prejudice to the institution of a criminal action against such person. In the case where the Constitution Court makes a decision compelling the political party to cease to commit such act, the Constitutional Court may order the dissolution of such political party.

4.2 The Constitutional Court is to consider a political party's resolution and regulation on a matter which is contrary to the status and performance of duties of the Member of the House of Representatives or is contrary to or inconsistent with fundamental principles of the democratic regime of government with His Majesty the King as Head of State under Section 47.

Section 47: A person shall enjoy the liberty to unite and form a political party for the purpose of representing the political will of the people and carrying out political activities in fulfillment of such will through the democratic regime of government with the King as Head of State as provided in the Constitution.

The internal organization, management and regulations of a political party shall be consistent with the fundamental principles of the democratic regime of government with the King as Head of State.

Members of the House of Representatives who are members o a political party, members of the Executive Committee of a political party, or members of a political party, of no less than the number prescribed by the organic law on political parties shall, if of the opinion that the their political party's resolution or regulation on any matter is contrary to the status and performance of duties of a member of the House of Representatives under the Constitution or contrary to or inconsistent with fundamental principles of the democratic regime of government with the King as Head of State, have the right to refer it to the Constitutional Court for decision thereon.

In the case where the Constitutional Court decides that such resolution or regulation is contrary to or inconsistent with fundamental principles of the democratic regime of government with the King as Head of State, such resolution or regulation shall lapse.

4.3 Members of the House of Representatives can appeal to the Constitutional Court raising an objection to the termination of their memberships in the political party under Section 118.

> *Section 118: Membership of the House of Representatives terminates upon:…*
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> *(8) Resignation from the membership in his or her political party or his or her political party passing a resolution, with the votes of no less than three-fourths of the joint meeting of the Executive Committee of that political party and members of the House of Representatives belonging to that political party, terminating his or her membership of the political party. In such cases, his or her membership shall be deemed to have terminated as from the date of the resignation or the resolution of the political party except where such member of the House of Representatives appeals to the Constitutional Court within thirty days as from the date of the resolution of the political party in raising objection that such resolution is of such nature as specified in the appropriate Section. If the Constitutional Court decides that the said resolution is not of the specified nature, his or her membership shall be deemed to have terminated as from the date of the decision of the Constitutional Court. If the Constitutional Court decides that the said resolution is of specified nature, that member of the House of Representatives may become a member of another political party within thirty days as from the date of the decision of the Constitutional Court;…*

4.4 The Constitutional Court is to consider the annual appropriations bill, the supplementary appropriations bill and the transfer of appropriations bill of the House of Representatives or a committee. Subject to the Constitution, any proposal, submission of a motion or commission of act , which results in direct and indirect involvement by Members of the House of Representatives, Senators or members of a committee in the use of the appropriations, is not permitted under Section 180.

> *Section 180: In consideration by the House of Representatives or a committee, any proposal, submission of a motion or commission of an act, which results in direct or indirect involvement by members of the House of Representatives, Senators or members of a committee in the use of the appropriations, shall not be permitted.*

> *In the case where members of the House of Representatives or Senators of no less than one-tenth of the total number of the existing members of each House are of the opinion that the violation of the relevant provisions has occurred, they shall refer it to the Constitutional Court for decision and the Constitutional Court shall make a decision within seven days as from the date of its receipt. In the case where the Constitutional Court decides that the violation of the relevant provisions has occurred, such proposal, submission of the motion, or commission of the act shall be inoperative.*

4.5 According to the transitory provisions of the Constitution, in the initial period of the National Anti-Corruption Commission, the Constitutional Court is to consider the constitutionality of necessary regulations for the performance its duties under Section 321.

> *Section 321: For the purpose of implementing the Constitution, the National Anti-Corruption Commission shall prescribe necessary regulations for the performance of its duties under the Constitution. Such regulations shall be submitted to the Constitutional Court for consideration of their constitutionality before their publication in the Royal Gazette and shall be in force until the organic law on counter corruption comes into force…*

B) Jurisdiction as Stipulated by the Organic Law on Political Parties B.E. 2541 (1998)

The organic law on political parties provides for the jurisdiction of the Constitutional Court as follows:

4.6 Consideration and decision on an order of the Registrar of the political party, which does not accept the formation of a political party;

4.7 Consideration and decision on the removal of a leader of a political party and an Executive Committee of a political party from office;

4.8 Consideration and ordering cessation or revision of any act of a political party in regard to a policy or a regulation of a political party, which is contrary to the security of the state, public order, good morals or the democratic regime of government with His Majesty the King as Head of State;

4.9 Consideration and ordering the dissolution of a political party.

3.4.2 Segmentation of cases handled by the Court and review of major cases

A necessary prelude to the segmentation of cases is the eligibility of parties empowered by the 1997 Constitution to raise a direct petition with the Constitutional Court. Interestingly, an ordinary citizen is not one of the 15 parties slated by the Constitution as petitioners although they can channel their queries through one of the select parties among the petitioners.[33] The irony has been that while the 1997 Constitution promoted participatory politics, access to the Constitutional Court, which was an active organ which was supposed to invigorate accountability, to mostly individuals in political capacities.

The 15 petitioners or group of petitioners lodge their petitions on the following grounds (Also see Appendix):

I. The Courts of Justice, the Administrative Court and the Military Court – They request the Constitutional Court ruling when they feel the laws they are to enforce as a result of a trial may be unconstitutional. The laws sought for interpretation must be an Act, an executive decree or an organic law and there have been no prior constitutionality ruling on such law;

II. Speaker of House of Representatives – The House Speaker may approach the Constitutional Court and ask for its ruling on the constitutionality of a bill or an organic law bill approved by the Parliament but which the Prime Minister has not yet presented for the King's signature. The bill may have been enacted in violation of the constitutional requirement. A similar request may also be submitted to the Constitutional Court over a draft parliamentary meeting regulation which is passed by the House of Representatives but which has not yet been published in the Royal Gazette. A constitutionality clarification may be needed if there is skepticism that a bill or an organic law bill proposed by a Cabinet Minister or a Member of the House of Representatives duplicates with the legal principle of a bill being withheld because of veto. In addition, the House Speaker could obtain the ruling in case he or she feels a Cabinet Minister or an MP should cease his or her ministership or the MP status. Also, it is within the House Speaker's authority to seek to terminate an executive decree if it is deemed counter-beneficial to the maintaining of national security, public safety, or economic security or to the prevention of calamities.

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[33] Basic Knowledge of the Constitutional Court (Bangkok: P. Press Co., 2007). pp. 61.

III. Senate Speaker – The Senate Speaker may go to the Constitutional Court and ask for its ruling on the constitutionality of a bill or an organic law bill approved by the Parliament but which the Prime Minister has not yet presented for the King's signature. The bill may have been enacted in violation of the constitutional requirement. A constitutionality query may also arise from Senate meeting regulations already passed but which have not yet been published in the Royal Gazette. A constitutionality clarification may be needed if there is skepticism that a bill or an organic law bill proposed by a Cabinet Minister or a Member of the House of Representatives duplicates with the legal principle of a bill being withheld because of veto. Also, the Senate Speaker could obtain the ruling in case he or she feels a Cabinet Minister or a Senator should cease his or her senatorial or MP status. The Senate Speaker is authorized to request the termination of an executive decree if it is deemed counter-beneficial to the maintaining of national security, public safety, or economic security or to the prevention of calamities.

IV. Parliament President – The Parliament President may refer to the Constitutional Court for ruling on whether a bill or an organic law bill approved by the Parliament but which the Prime Minister has not yet presented for the King's signature is constitutional or not. The bill may have been enacted in violation of the constitutional requirement. A constitutionality question may also emanate from Senate meeting regulations already passed but which have not yet been published in the Royal Gazette. The Constitutional Court may also receive the Parliament President's petition on whether an Election Commissioner should be disqualified. Further, the petition could extend to potential problems pertaining to the powers and duties of the constitutional organizations.

V. Prime Minister – The Prime Minister is vested with the authority to ask the Constitutional Court to determine whether a bill or an organic law bill approved by the Parliament but which the Prime Minister has not yet presented for the King's signature is constitutional or not. Such bill may have been enacted in violation of the constitutional requirement.

VI. Constitutional Organizations – They must be constitutional organizations set up with the duties and powers afforded by the Constitution. The queries posed to the Constitutional Court must stem from conflicts from the exercising of duties and powers. They must be conflicts which have taken place and the Constitutional Organizations may not seek the Constitutional Court's advice or consultation for problems which have not occurred.

VII. Member of Parliament, Executive of Political Party or Member of Political Party – Petitioners may appeal for the Constitutional Court's ruling if they feel the resolution or regulation of the political party they are members of pose an obstacle to the performance of their duties, threaten their status or contravene the fundamental principles of the rule under the constitutional monarchy.

VIII. Member of Parliament or Senator – The Constitutional Court petition may be filed concerning the Parliament deliberation of the draft bills on national expenditures, the additional expenditures and transfers of the House of Representatives' spending. The petition could also be about the action by the bill scrutiny committee which has direct or indirect role in the utilization of the national budget expenditures.

IX. Member of the House of Representatives – The MP can petition the Constitutional Court if three-fourth the joint meeting of members and executives of his or her political party vote to expel that MP from the party. The MP must petition the Constitutional Court within 30 days of the expulsion resolution being passed. The MP may submit the petition on the ground that the resolution poses an obstacle to the performance of his or her duties, threaten his or her status or contravene the fundamental principles of the rule under constitutional monarchy.

X. Attorney-General – The Attorney-General may ask the Constitutional Court to order an individual or a political party, whose act is regarded as sabotaging the rule of constitutional monarchy or working to attain the power of national administration through unconstitutional means, to cease such action.

XI. National Anti-Corruption Commission – The Constitutional Court petition may be submitted against the political post holders who intentionally fail to declare, conceal or submit false statements of their assets and liabilities as required by law.

XII. Ombudsmen – The Ombudsmen refer to the Constitutional Court issues related to the constitutionality of an Act or equivalent laws.

XIII. Political Party Registrar (who is also the Election Commission chairman) – The registrar may take the case to the Constitutional Court when political party leader, the panel of party executives or individual party executives infringe on the political party regulations. The infringement is classified as acts which endanger national security, public peace, moral decency or the rule of constitutional monarchy. The registrar may petition the Constitutional Court after he or she has issued formal notification of such

acts, to which no response was forthcoming. The registrar also can solicit the Constitutional Court's order to dissolve a political party if the prosecution did not request such dissolution.

XIV. Party Seeking to Register a Political Party – The seeker can contest in the Constitutional Court a refusal by the Political Party Registrar to register his or her political party. The contest, however, must be submitted to the Constitutional Court within 30 days of his or her being officially informed of the refusal.

XV. Members of the House of Representatives Who are also Members of a Political Party, A Panel of Party Executives or Members of a Political Party as a Collective Group – The petitioners can lodge their case in the event that their political parties conduct their political activities in contradiction to the spirit of the rule of the constitutional monarchy.

The eligibility of petitioners has added to the issue of the perceived aloofness of the Constitutional Court as many petitioners are political office occupants and politically-elected individuals. In fact, they – the House Speaker, Senate Speaker, Parliament President, Prime Minister, Member of Parliament (either MP or Senator), Executive of Political Party or Member of Political Party - account for eight of the fifteen individual and group petitioners. Although at face value, the petitioning process has no connection to the level of Constitutional Court justices' independence, it implies that political interests have established an explicit and formal contact with the Constitutional Court. The proceedings engage the Constitutional Court with the political actors through the deliberation of the issues which are central to the trial.

Although no channel is opened to ordinary citizens in directly approaching the Constitutional Court, the 1997 Constitution granted them the right to forward a petition through the Court of Justice, the Ombudsmen, or the Speaker of either House or the Parliament President. The people can initiate the petition if; they find their basic rights and liberty have been violated by the Constitution; that they are treated unfairly by the law; or that they have reasons to believe a draft bill pending passage in parliament is unconstitutional.[34] Since the Constitutional Court is a single body, it cannot handle all petitions directly from the people. However, they can submit their

[34] Basic Knowledge of the Constitutional Court, pp. 61.

cases through other bodies such as the regular Courts, the Ombudsmen or the Parliament President.[35]

I. Court of Justice – The people can table the petition to the Constitutional Court via the Court of Justice on the condition that the petitioner is involved in a trial and that he or she feels the Court of Justice may apply a law which is against the Constitution in the trial. In this manner, the law to be interpreted by the Constitutional Court must be an Act or its equivalent. There must not be a prior constitutionality ruling by the Constitutional Court on such Act.

II. Ombudsmen – The Ombudsmen pass the people's petition conveying the constitutionality query of a law to the Constitutional Court along with their legal opinion of the petition.

III. Speaker of either House or Parliament President – People's rights to political participation may be exercised by handing their petitions to the Constitutional Court through either the House of Representative or the Senate. The Members of Parliament and the Senators receive the petitions in their capacity as the 'elected protectors of public interest' (Basic Knowledge about the Constitutional Court 2003). But the petition filed through this channel is limited to query on the constitutionality of a bill or an organic law bill approved by the Parliament but which the Prime Minister has not yet presented for the King's signature. The bill may have been enacted in violation of the constitutional requirement. The petitions then go through the Speaker of the respective House which receives the petitions before they are sent to the Constitutional Court.

As are mandatory of the general procedures, after the petition reaches the Constitutional Court, the panel of justices would schedule several sessions to debate whether to accept the case for consideration. If the justices agree that the case holds merit, it will be heard. On the contrary, if the case is deemed to have no reasonable ground to be pursued, it will be dismissed.

Following the admission of the case, there would be detailed discussions by the justices. When a case is adequately covered in the debates, sometimes after an open trial or by summoning experts for opinions, the Constitutional Court will set the date

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[35] The Constitutional Court of Thailand; The Provisions and The Working of the Court, Amara Raksasataya and James R. Klein, pp. 44.

for each justice to present his or her individual view. Then the Constitutional Court will take its vote. After that, the majority of the justices will prepare the decision on half of the entire Court. However, the draft will be tabled for amendment by the full Court. After all justices agree, they will sign the decision and send it for publication in the Royal Gazette. Each justice must prepare his or her own decision on each case to be read out before the full panel before voting. After voting, he or she must furnish a full account of his or her decision to be sent for publication in the Royal Gazette along with the Court's common decision.[36]

The statistics of the cases which passed through the Constitutional Court during its almost nine years of promulgation (from Oct 11, 1997-Sept 19, 2006) under the 1997 Constitution had been the gauge that measured the extent of how close or distant the Court is to the political interests. An assortment of cases had been admitted for hearing and the numbers are meaningful in the comprehension of political exposure of the Constitutional Court. The functions of the Constitutional Court provide the platform for formulating the categories of the cases that had entered trial. In the first three years of the establishment of the Constitutional Court, cases referred to the Court were divided into the following categories;[37]

a) Constitutionality of a law, a bill, and an emergency royal decree (footnote: as in Sections 177, 198, 219, 262, and 264);

b) Qualifications of MPs, Senators, Cabinet Ministers, high-ranking officials (footnote: as in Sections 142, 180, 216, and 96, 295);

c) Qualifications and legality of political parties and their members (footnote: as in Sections 47, 63, 96, and 118);

d) Functions and authorities of constitutional bodies (footnote: as in Section 266);

e) Unconstitutionality of the Rules and Procedures of the Parliament, National Anti-Corruption Commission, and Election Commission (footnote: as in Sections 263, 321, and 324);

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[36] The Constitutional Court of Thailand; The Provisions and The Working of the Court, Amara Raksasataya and James R. Klein, pp. 64.

[37] Ibid.

f) Cases submitted to the Constitutional Court under the jurisdiction of other laws, as in accordance with the provisions of the Political Party Act and the Election Commission Act.

It was noted the first three years of the Constitutional Court's inception, cases in segments a, c, and d were most common.[38] As the Court enriched its adjudicatory experience, such trend was reinforced by the record of cases petitioned from 1998 to 2002. During that period, a total of 246 cases were declared admissible by the Constitutional Court. Of these, the largest percentage of the petitions was centered on the provisions of the law which were thought to be contrary to the Constitution (125 petitions) followed by the requests for the dissolution of the political parties (47 petitions), problems relating to the authorities of the constitutional bodies (32 petitions), political office holders failing to declare their property holdings as well as assets and liabilities (19 petitions), drafts of Acts contrary to the Constitution (13 petitions), Ombudsmen's petition on constitutionality (4 petitions), the political parties' resolution believed to have been issued against the status and authority of Members of the House of Representatives (2 petitions), the proposed termination of ministership (2 petitions), the requested termination of membership of the House of Representatives (1 petition), and an emergency royal decree which carried the risk of being declared unconstitutional (1 petition).

What was explicably clear was that the Constitutional Court had gone after some of the high-powered politicians, some of whom with a promising career in politics, to the likes of former deputy agriculture minister Newin Chidchob and perhaps most controversially former prime minister Thaksin Shinawatra. It had taken up cases in a rather expeditious fashion, much to the delight of the large sections of society counting on the fruitfulness of political reform which was gathering pace. Newin and Thaksin held senior, if not the top-echelon, 'fine-grade' posts in the Cabinet at the time of their indictment in the Constitutional Court.

The Constitutional Court also considered a case which had left the national administration tethering on the verge of a power vacuum. It was the eleventh-hour incident which became known as the Prachakorn Thai Cobra Faction Rebellion episode in politics.

The researcher has found the Cobra, Newin and Thaksin cases are the most vivid examples of political interests who could best exhibit the contact on the formal,

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[38] The Constitutional Court of Thailand; The Provisions and The Working of the Court, Amara Raksasataya and James R. Klein, pp. 43.

judicial level with the Constitutional Court. They may have fallen into different categories of cases but they, nonetheless, characterize the disposition of political post holders in terms of their moral and ethical conscience and responsibility as well as the brittle state of Thai politics.

The former deputy agriculture minister and the former premier were occupants of prominent political portfolios at the apex of the executive authority able to dictate key government policies although the cases against them began to be heard and adjudicated in the Constitutional Court at different points in time; Newin on June 15, 1999 and Thaksin on August 3, 2001. The charges leveled against them were a vacation of office for Newin and wealth concealment for Thaksin. The Cobra case was registered with the Constitutional Court on May 28, 1998. The charge was the proposed expulsion of 12 members belonging to the political faction in the small, Bangkok-based Prachakorn Thai Party.

The Constitutional Court had made a reputation as an institution which had an expanding public support behind it. However, it was worthy of attention that the petitioners who brought the cases against high-profile political post holders namely Thaksin were either the National Anti-Corruption Commission (NACC) or the ordinary people who had had to 'detour' via the Court of Justice, the Ombudsmen, or the Speaker of either House or the Parliament President in order to have those politicians in power tried. The NACC examines the statements only to determine if they demonstrate any unusual increase in assets, an indicator of corruption.[39] The examination is performed as invoked by Section 295. (The NACC is to forward the cases where the political post holders fail to submit asset and liability statements, or who submit false or incomplete statements, to the Constitutional Court, which has the power to expel the individuals from office and prohibit them from taking any political position for a period of five consecutive years.)

While the Thaksin case was filed by the NACC, other petitions forwarded on a similar offence, the petitioners who had filed the Constitutional Court action against them were not the eligible political post holders or agencies that were among the constitutionally authorized petitioners. The irony is highly suggestive of the occurrence where the political post holders would tend to avoid scrutinizing the professional conduct of their own kind even if they are better facilitated by the letters of the law and thus more advantageous than ordinary people to do so.

In the Thaksin case, the charge had sprung from the alleged cover-ups of personal wealth. Political office holders are legally bound by law to truthfully divulge their

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[39] James Klein, The Constitution of The Kingdom of Thailand, 1997: A Blueprint for Participatory Democracy, pp. 38.

records of assets and liabilities when they enter the posts and again after they leave them. The intention of the declaration was to prevent the post holders from preparing leeway to acquire undue gains through abuse of power. The examination of wealth record was a terse response to the principal political reform objective which was the elimination of ingrained corruption in public office. The assumption of the mandatory declaration appeared to be to stop the politicians from dishonestly enriching themselves so as to disable them financially from further engaging in malpractices while in office. However, in some landmark cases such as that of Thaksin, the course of the defendants' defence in the Constitutional Court had alerted some political watchers to the perceptible skepticisms of the justices' judicial independence.

The popular supposition exists which supports the theory that creating a specialized judicial institution tasked with meting out punishment against the politicians for illegally amassing wealth is the answer to the long-untackled infestation of incessant graft. The punishment is the deprivation of electoral rights and the prohibition of the guilty individuals from participation in political activities for five years. However, there has been no credible proof the five-year electoral and political bans marking the political hibernation contribute conclusively to any reduction of what could be termed as the politicians' undue wealth. The ban is the severest penalty the Constitutional Court could impose on the guilty political post holders and any monetary seizure of the politicians' assets comes under the sole jurisdiction of the Supreme Court's Division for the Holders of Political Positions.

With the heavily-publicized Newin case, the justices had encountered a debatable test of their judicial profession at the Constitutional Court relatively early in the Court's establishment. The Constitutional Court was called to interpret the legality and enforceability of a Court of Justice's verdict against the former deputy minister. The outcome of the interpretation had baffled some of the people who had been following the query.

The following are the backgrounds of the three major cases deliberated in the Constitutional Court which have a significant implication for the Court's interaction with the political interests. The cases are arranged in chronological order:

A. Prachakorn Thai Cobra Faction Rebellion Case (No. 01/2542: May 23, 1998). (excerpt from Klein)

In November 1997, the Democrat Party had formed a government with the help of 12 Prachakorn Thai Party members in what would become known as the Cobra Faction headed by veteran politician Vatana Asavahame. The Prachakorn Thai with the late Samak Sundaravej as the leader was an opposition party. Samak was moving to have the Cobra dissents removed from the party which would have caused the Democrat to survive with a very slim margin in the House of Representatives. Samak began the process of expelling the Cobra members at the general assembly of his party. The meeting voted to increase the number o party executive committee members to 65, which would make it possible for Samak to tip the balance of a second crucial committee vote required to expel the Cobra members from the executive committee and subsequently from the party under a third vote. Samak requested the Election Commission to formalize the committee changes while Vatana asked the EC to hold the registration until the either the EC or the courts had determined if the party resolution had been legal. The EC later decided the resolution had been legal and proceeded to register the Executive Committee changes.

By March 2, 1998, Samak saw the opportunity to expel the 12 members in a no-confidence debate against the government. He thought if the dissidents sided with the government, he would have legal grounds to expel them for breaking rank and violating the party resolution which was to censure the government.

The dissidents filed a new suit in the Civil Court against the EC alleging that the poll regulator's decision to register the executive committee had been unconstitutional. They argued that only a court of law had the authority to determine if the committee changes had been legal. The court accepted the lawsuit and the 10 months that were needed to look into the case gave the Cobra Faction a temporary legal protection from party expulsion.

It was the first case of this nature which the Constitutional Court considered concerning the termination of membership in the House of Representatives. The key issue is the power of a political party, specifically the executive committee, to purge a member and thereby remove the member from his or her seat in the House of Representatives. In a vote of 9 to 6, the Constitutional Court ruled against the Cobra dissident MPs being expelled from the Prachakorn Thai. The minority justices insisted the MPs have varied duties to the public which are legislative in nature. But it is not one of their duties to form a government. The formation of a government is the duty of parties under the direction of their executive committees. Whether or not an MP's party is part of a government or not has no impact on whether or not he or she can fulfill their legislative duties as an MP. In the case of the government formation or a no-confidence debate, if an MP votes contrary to the party's resolution, the party has

the right to expel the MP from the party and such member stands to lose his or her seat in parliament as well.

The majority justices, however, thought that MPs are representatives of the people and they must carry out their duties honestly for the good of all people. The party's resolution to remove its MPs and thereby from the seat in the House of Representatives is not in the best interest of their pursuing those duties. Therefore, they had the right to seek membership of another party and retain their parliamentary seats.

It can be inferred from the verdict that the Constitutional Court justices can make or break a government and alter the administrative structure of the country. Had the verdict turned out in the opposite direction, the Cobra dissidents would have been expelled from Prachakorn Thai and the implications would have been far-reaching with the likelihood of the government facing difficulty in keeping his nose above water, if not being defeated in the no-confidence debate. In the latter event, political machinations both in and outside of the parliament would expect to have been orchestrated in an attempt by the opposition coalition parties to push for a switch of government. The vulnerably slim majority had been the weakest point of the Democrat-led administration and if the Cobra members had been politically sidelined as a result of an expulsion verdict, the ball game would have completely changed. The opposition would have capitalized on the volatility in the government as far as the narrow band of support for the Democrat-led coalition bloc was concerned. The verdict was a rallying point for some of the political analysts and commentators whose tone of frustration had been vocal. Legitimizing the split of the Prachakorn Thai so the Cobra could prop up the government was bound to compel the ruling Democrat to feel the debt of gratitude towards the Cobra faction. It is a political reality people must live with but there is a limit.[40] Vatana was the cobra that bit the hand that fed it. Yet, the Democrat welcomed him and his group into the coalition's fold. Vatana's son, Chonsawat, presided over fraud-ridden municipal election and it was embarrassing for the Democrat members who must put on a show of trying to bring someone influential in the faction to account.[41]

B. Newin Chichob Case (No. 36/2542) (excerpt from Klein)

Deputy Agriculture Minister Newin Chidchob had been sued for defamation by

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[40] Pichai Chueksusawasdi, "Forget the Debt, Mind the Nation," Bangkok Post (July 26, 1999): 11.

[41] Wasant Techawongtham, "Patronage Is With Us for a While Yet," Bangkok Post (August 6, 1999): 11.

former Democrat Party MP Karun Sai-ngam. The Buri Ram provincial court had judged Newin guilty on June 19, 1998 and sentenced him to a six-month jail term, suspended for three years. He was also fined 50,000 baht. On the legal technicality point of view, a minister must vacate his cabinet post upon being sentenced by a judgment to imprisonment, according to Section 216 in the Constitution. (Details of Section 216 can be found in the Constitutional Court of Thailand website.)

The civic advocacy group, the Constitution for the People Society, wrote on April 21, 1999 to Prime Minister Chuan Leekpai requesting Newin to be dismissed from the Cabinet. Chuan preferred the Constitutional Court determine if Newin should lose his post as this would set forth a precedent for future cases. On May 6 of that year, a group of MPs submitted their petition to the Senate Speaker Meechai Ruchupan. The petition had been carefully worded as the MPs asked the Constitutional Court to consider two crucial arguments at the heart of the Newin case: a suspended sentence, though exempting the person convicted from serving an actual jail term, is able to be imposed on Newin so that he must leave the ministerial post accordingly; and since the sentence can be appealed to a higher court, Newin does not need to vacate office until the final verdict by the Supreme Court. On June 15, 1999, the Constitutional Court handed down a 7 to 6 ruling that Newin was eligible to retain his Cabinet post.

The researcher has discovered that the outcome of the case had unleashed reactions which echoed dismay among those who had been keeping up with the developments in the case. The ruling had led to the impression that the justices had overlooked the intent of the Constitution and instead premised their decisions purely on the visible prints in the law.

In all fairness, however, the Constitutional Court's interpretation of the suspended jail term was not without its merit. Since the ruling of the Constitutional Court can be put up as reference in the consideration of trials by other Courts, where there is query in the jargon of the law, a clear definition and explanation must be provided by the Constitutional Court. There can be no legal contradiction between what is written in the Constitution and the subordinate laws. As such, a common definition of a term or a word has to be laid out so that there is not the slightest ambiguity in the understanding of it. The 'suspended jail term,' if taken to equate to an imprisonment and used interchangeably, could wreck legal havoc for the judiciary and the justice system because the ordinary courts would not see the point of using 'suspended jail term' in judging the cases in the future, according to Justice Preecha Chalermvanich.[42]

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[42] James Klein, The Constitution of The Kingdom of Thailand, 1997: A Blueprint for Participatory Democracy, pp. 38.

The suspension of jail term and the imprisonment entail two vastly different consequences.

Despite justification of the Newin ruling, the credibility of the Constitutional Court had been bruised. In the 'Fine Line between Politics and the Law, Opas Boonlom voiced his view that the Constitutional Court's past verdicts, with the inclusion of the Newin ruling, have been influenced by political principles, inviting criticism from the public that the Court was swayed by politics even though it was established to decide on political disputes.[43] In the Newin ruling, the majority Constitutional Court justices were believed to have disregarded the underlying purpose of the charter under which the Constitutional Court came into existence. The writers of the 1007 Constitution advocated that the ministers were supposed to be held to a higher level of accountability and moral standards than those required of the Members of Parliament. The evidence of this is in the distinctions the drafters had drawn between the cause removing a minister and another cause for removing an MP or a Senator. The charter drafters were in agreement that from any legal angle, a suspended sentence remains a sentence and the appeals process, from the point a verdict is delivered to the final appeal decision by the Supreme Court, would not change the fact that a suspended jail term is still a sentence.[44]

The Newin case had shaken the Constitutional Court's reputation due to what critics of the former deputy agriculture minister suggested was his alleged unsavory career track record. After the ruling, the Court's image was looked at as being gradually moving in the direction of sympathizing with the politician who may have possessed a low 'social capital'. Former British prime minister Tony Blair identifies social capital as the trust and confidence people have for each other.[45] By that definition, public faith in Newin may not have ranked so favorably since the start of the politician's foray into politics. Newin's background left some people unsure about his honesty. In 1995, the Central Investigation Bureau stumbled on 11 million baht in cash stapled together with the election campaign slip featuring the names of Chart Thai Party candidates led by Newin. The discovery was made during a police raid on a shophouse in Newin's native northeastern province of Buri Ram. Police suspected the money was being prepared for buying votes in the province's constituency 1. In the end, Newin was spared the prosecution after the couple who owned the shophouse

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[43] Opas Boonlom, "A Fine Line between Politics and the Law," The Nation (April 11, 2001): 10.

[44] James Klein, The Constitution of The Kingdom of Thailand, 1997: A Blueprint for Participatory Democracy, pp. 39.

[45] "Tony Blair's Global Viewpoint, Values Key to Making Globalization Work," Bangkok Post (December 20, 2008): 10.

confessed the money was being spent to buy land. The owner was convicted of violating election law and received a minor jail sentence. Also in 1995, Newin was embroiled in another scandal when he was accused of involvement in the heavy-handed tactic which was alleged to have enabled his father-in-law's construction firm, Chiang Mai Construction, to clinch the contract to build the Siyad dam in the eastern province of Chachoengsao. Earlier, a group of men had prevented one of the bidders from handing an envelope to compete in the price contest. Like the stapled cash case, Newin was implicated in the alleged crime but the evidence against him was found to be too flimsy.

C.Thaksin Shinawatra Case (No. 20/2544)

Source: Research on Analysis of the Decisions of the Court and Justices of the Constitutional Court, Wirat Wiratnipawan and team, Volume 2, Part 2, Nititham Publishing House, Bangkok, 2003, pp.1-156)

Former prime minister Thaksin Shinawatra, who founded and headed the now-dissolved Thai Rak Thai Party, which is the only party in recent memory to have captured the parliamentary majority votes of 376 which allowed it to form the government unaided by other political parties, was tried in the Constitutional Court for intentionally submitting false records of personal assets and liabilities to the National Anti-Corruption Commission with the intent to conceal his wealth. The NACC had indicted him and presented the case against Thaksin to the Constitutional Court on January 16, 2001.

In reference to the NACC's statement to the Constitutional Court, Thaksin, the respondent, had assumed the post of deputy prime minister in the Chavalit Yongchaiyudh administration and presented the wealth records three times; when he entered office, after he left office and one year after he left office.

The Commission determined that Thaksin had failed to declare certain items of his assets and liabilities held in his name, his spouse's name, and other people's names. The undeclared items owned by Thaksin were company shares worth 6,750 baht and the undeclared items owned by his spouse, Khunying Potjaman (who is now divorced and has since gone back to using her former surname of Na Pombejara) were shares in three companies and a promissory note valued altogether at 6.4 million baht. The NACC resolved that the value of the assets and liabilities was not so significant that it would motivate Thaksin and Khunying Potjaman to cover up the wealth record in preparation for power abuse to obtain ill-gotten gains later. Thaksin was alleged to have transferred 646 million baht worth of commercial shares in companies to proxies who included his housekeeper and driver in an effort to hide his fortune which may be used to finance causes that could not be accounted for. Thaksin explained the shares

in the companies were acquired for multiple but honest reasons such as assisting previous shareholders in financial dire strait, taking over struggling companies or simply increasing his shareholdings so he could achieve a controlling stake in a company. The former deputy prime minister maintained he and his secretary who filed the wealth declaration statements did not understand the NACC regulations governing the asset declaration and how to fill out the declaration forms. Thaksin and Khunying Potjaman also indicated they were too busy managing their business interests that they had no time to study the specifics of the relevant regulations and laws specific to the mandatory asset and liability declaration.

The Constitutional Court was convinced the shares held by proxies had been missing from the declaration form because the secretary was oblivious of the legal requirement to furnish the proxy shares in the declaration to the NACC as well. In the Court's verdict, the secretary had brought the filled-out declaration form to Thaksin who signed every pp. of the statement. As the statement was very long, Thaksin did not inquire about the proxy shares which had not been mentioned in the record. During the cross examination, the Constitutional Court heard from Khunying Potjaman that neither she was told by her secretary about the compulsory need to state the proxy shares in the declaration record. Thaksin had argued that since it was his wife who was the bona fide owner of the shares and that she did not know about the proxy share declaration requirement, it was inconceivable for him, who was far less involved in the business affairs, to have had the knowledge about it and been able to remind Khunying Potjaman of the necessity to formally produce and divulge the information.

The Constitutional Court agreed Thaksin's defense had grounds and found the documentary evidence and accounts of witnesses underpinning the NACC's charges against the former deputy prime minister did not carry sufficient weight. The Court decided in a vote of 8 to 7 to dismiss the case against Thaksin.

Immediately after the trial, a chorus of disenchantments greeted the verdict. By any measure, the event fit the description of the trial of the century since it was the first time a prime minister in Thai political history who was put on trial in the Court which was launched for the first time after the Constitutional rule of the game had been re-drafted. It had been four years from the point where Thaksin was alleged to have committed the wrongdoing when he was prime minister until the wealth concealment proceedings had got under way when he was prime minister. The flurry of public interest and even intrigue, at least within the media circles, in the case had been driven by the observations that Thaksin was immensely wealthy and popular with the rural voters and his Thai Rak Thai Party had emerged as a formidable competitor against the much older Democrat Party. The expectations of many supporters were for the Thai Rak Thai to be the main pillar in the political bloc to counter the Democrat-

led dominance in the opposition chamber of the House of Representatives. The Thai Rak Thai had all the formula that could transform it into a permanent rival of the Democrat. It has the three M's - Men, Might and Means – for guaranteeing the party's political sustainability and future growth. The party has shown to be on a strong financial footing with Thaksin's massive means to buoy the Thai Rak Thai political activities and assist the electoral campaigning. The means have made possible a consolidation of electoral power through the smaller parties' merger with the Thai Rak Thai as well as the defections of MP hopefuls, many of whom have many years of firmly-anchored electioneering experience to their names. The means became the requisite of a rapid pace of a party's expansion and this was indisputably true of the Thai Rak Thai. The party expanded not only in size but influence thanks to its steadfast populist policy platform which was tremendously well-received by followers notably in the Northeast and the Northeast, the two constituency-rich regions. The party had invested heavily in ensuring its budget-intensive populist policies were maintained in the midst of hounding criticism that it was ethnically wrong to spoil the people by giving them practically cash hand-out projects at the expense of the state resources to win them political loyalty.

What the 1997 charter failed to foresee was the rise of Thaksin, the telecommunications tycoon whose US$2 billion family fortune equated to 1% of Thailand's gross domestic product. In the country's entrenched system of money politics Mr Thaksin's money, combined with a certain charisma and successful populist policies, allowed him and his Thai Rak Thai party to monopolise power between 2001 to 2006 and to undermine the 1997 charter's checks and balances. ``Thaksin was a superman who flew through all the loopholes of the1997 Constitution and manipulated everything," said Kiatchai Pongpanich, a drafter of the new charter. ``What we thought was a way out became a dead end".[46]

It can be summed up that the Thai Rak Thai had the Means to pull in the Men who earned them Might. Since Thaksin, a former telecom tycoon, was founder of the party, he is synonymous with the party and they are one and the same. With the party fast deepening its grip on many constituencies and Thaksin winning the hearts and minds of large sections of the upcountry voters, the outcome of the asset declaration trial in the Constitutional Court was much eagerly-awaited. At stake was the political future of Thaksin, since if convicted, he would have been stripped of his electoral and political rights for five years. The pressure that had been brought to bear on the Constitutional Court justices who deliberated the case was stiff. The Court itself was

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[46] Peter Janssen, Thailand's 18th Constitution is a must-read, pp. 11.

seen to have treated the trial with a full concentration and the utmost importance, which was demonstrated by the full sitting of the bench. All 15 justices had attended and deliberated the trial.

(The 15 justices are Prasert Nasakul, Kramol Thongthammachart, Jumpol Na Songkhla, Lt Gen Jul Atirek, Preecha Chalermwanich, Pan Chantharapan, Mongkol Sarapan, Sak Techachan, Sujit Boonbongkarn, Sujinda Yongsunthorn, Suvit Theerapong, Anand Ketwong, Amara Raksasataya Issara Nitithanprapas, and Ura Wang-omklang.)

The wealth declaration trial had damaged the Constitutional Court's standing irrevocably. This spectacular setback to the public confidence in the Court had resulted from the reading from the verdict which struck some as being lenient to Thaksin. But it was the voting method which added insult to the Court's credibility injury. The system of voting undertaken in the Thaksin case was dismissed as a defiance of logic as it had a knock-on effect on the Constitutional Court's impartiality. It has been pointed out that the 8 to 7 outcome was reached after two votes: the first rejected by a wide Thaksin's argument that he was not required making an asset declaration; the second rejected by a smaller margin Thaksin's assertion that the concealment of assets had been an honest mistake. Overall, according to the conventions of the Court's unusual voting system, the two votes of 4 were added together to make 8 which is set against the 7 justices who had voted him guilty on the second ballot. The political scientist justices were in the spotlight as their votes were crucial in tipping the verdict in Thaksin's favor. The eight justices who voted to clear Thaksin were Justices Kramol, Jumpol, Jul, Preecha, Pan, Sak, Sujinda, and Anand. The justices who voted against Thaksin were Prasert, Mongkol, Sujit, Suvit, Amara, Issara, and Ura.

Each judge prepared his own verdict prior to the reading of the unified verdict. As in other trials of the Constitutional Court, the justices wrote their individual verdicts beforehand. They were later compiled and integrated into the unified verdict which conveys the full literary expression of content and tone of the majority justices. The bases of the unified verdict were two-fold; one on whether Thaksin was duty-bound as a political office occupant to submit the asset and liability statements to the NACC and another, more crucial motion was whether Thaksin had been advertent in his submission of false information of his wealth and debts or had intended to omit relevant facts in a manner that befits a concealment. Plainly put, the two issues had prompted Thaksin's indictment from the outset and they dealt with the duty and intention in his having to honestly fulfill compulsory steps in the assumption of ministerial office. The issues were considered in tandem by the Constitutional Court and the considerations of the two matters were intertwined with the 1997 Constitution prescribing that public office holders must be accountable for their duty, which must

conform to the words of the law, and intention, which is non-concrete and must be interpreted by the Courts, in the assumption and execution of office.

In the Thaksin trial, the justices cast their individual votes separately on the two issues. Twelve justices held that Thaksin, as deputy prime minister, had the duty to declare the assets and liabilities to the proper authority while two justices decided he did not have to do so. Only one justice refrained from passing judgment on this issue. On the point of intention in the wealth declaration, the justices voted 8 to 7 that Thaksin did not intend to hide his wealth. However, intention appeared to override duty as it was cited by the Constitutional Court as the basis of the unified verdict. (The same justices voted in the same pattern in the intention motion and the unified verdict.)

The verdict had caused some people to be perplexed and even disconcerted. The displeasure was 'quantified' and conveyed in a survey of 20 outstanding cases handled by the Constitutional Court. The cases were selected on the basis of their appeal to public interest and their representation of the cases categorized according to the Constitutional Court functions. The findings of the survey revealed that the Thaksin asset cover-up case was the only one where the majority of respondents (48.9%) disagreed with the verdict (details in Chart 4).

The survey was conducted from November, 2002 to February 2003 on 45 respondents. Because the subject matter of the survey was intellectually demanding, it required a specialized group of respondents to answer the questionnaire. They were law specialists, experts in political science or in public administration, and persons well-versed in issues of politics and national administration. The law specialists were university academics being at least an associate professor and law professionals and practitioners such as the Supreme Court judges and Administrative Court justices. The political science and public administration respondents were university academics who were at least associate professors, as well as the state-sector administrators. The respondents steeped in the knowledge of political and national administration affairs were those who had followed political issues closely and consistently over an extensive period of time without necessarily having to be politicians by profession. The respondents in this group included executive or secretary-general of independent agencies such as the National Anti-Corruption Commission and the National Human Rights Commission, as well as the MPs, Senators and former Constitution Drafting Assembly members.

Table 2: Result of the Opinion Survey of 20 Major Verdicts Issued by the Constitutional Court

No.	The cases in the Constitutional Court	Agree (%)	Disagree (%)	Undecided (%)	No answer (%)
1	No. 19/2544 (August 3, 2001) NACC VS Prayuth Makakitsiri	82.2	4.4	-	13.3
2	No. 20/2544 (August 3, 2001) NACC VS Thaksin Shinawatra	37.8	48.9	11.1	2.2
3	No. 28/2544 (September 6, 2001) Political Party Registrar VS Seritham Party	75.5	6.7	2.2	15.5
4	No. 51/2544 (December 27, 2001) Political Party Registrar VS Pattana Sangkhom Party	75.6	15.5	4.4	4.4
5	No. 3/2544 (January 18, 2001) Hayachi VS Chon Buri Central Prison	60	24.4	13.3	2.2
6	No. 11/2544 (March 20, 2001) Nakhon Duangkaew and Suban Sarapan VS Narcotics Control Act	77.8	8.9	6.7	6.7
7	No. 14/2544 (April 26, 2001) Nakhon Ratchasima Tummai Co Ltd. VS Bankruptcy Act	95.5	2.2	-	2.2
8	No. 50/2544 (November 27, 2001) Thai Wiwat Keha Co Ltd. VS Excise Department	93.3	2.2	2.2	2.2
9	No. 57/2543 (November 28, 2000) Newin Chidchob VS Solidarity Party	73.3	13.3	11.1	2.2
10	No. 4/2544 (February 6, 2001) Wichit Poonlap and others VS 10 Cabinet Ministers	60	26.7	6.7	6.7
11	No. 32/2543 (September 7, 2000) Adisorn Piangket and others VS	77.8	6.7	13.3	2.2

No.	The cases in the Constitutional Court	Agree (%)	Disagree (%)	Undecided (%)	No answer (%)
	Extraordinary House Committee				
12	No. 63/2543 (December 15, 2000) National Anti-Corruption Commission VS Adjudicatory Authority in Interpreting an Act	77.8	13.3	6.7	2.2
13	No. 13/2544 (March 29, 2001) Election Commission VS Senatorial Status	93.3	-	-	6.7
14	No. 13/2544 (March 29, 2001) Election Commission VS By-Election Order	91.1	2.2	-	6.7
15	No. 54-55/2543 (October 31, 2000) Panas Thassaneeyanont and others, Kamnuan Chalopatham and others VS Election Act	77.8	11.1	6.7	4.4
16	No. 56/2543 (October 31, 2000) Marut Bunnag and others VS Draft Bill on Election	82.2	2.2	11.1	4.4
17	No. 12/2544 (March 29, 2001) Sanit Worapanya and others VS Election Act	77.8	15.5	2.2	4.4
18	No. 33/2544 (October 11, 2001) Sak Korsaengrueng and others VS Boriharn Sinsap Thai Corporation	75.6	15.5	4.4	4.4
19	No. 58/2543 (November 30, 2000) Tambon Administration Organization, Provincial Administration Organization and Municipality VS Constitutional Organizations	73.3	20	4.4	2.2
20	No. 40/2544 (November 27, 2001) 10 Mutual Funds VS Executive Decree on Financial Institution System	84.4	6.7	2.2	6.7

Source: Wirat Wiratnipawan and others, Research on Analysis of the Decisions of the Court and Justices of the Constitutional CourtVolume 2 Part 2 (Bangkok: Nititham Publishing House, 2003). pp.156.

The 20 cases highlighted are spread out to capture the diverse segments of cases handled by the Constitutional Court. Also released were the findings of a parallel poll of the same group of respondents which corresponded with the conclusion of the verdict survey, most glaringly about the Thaksin trial. The respondents had replied to a question which rated their satisfaction of the Constitutional Court justices' performances in deliberating the 20 cases. The result of the justice satisfaction poll had been congruous with, and therefore lent credence to, the verdict findings. The poll found the three justices whose performances the majority of respondents were most satisfied with in the 20 cases were Amara Raktasataya (45.2%), followed by Prasert Nasakul (37.8%) and Sujit Boonbongkarn (24.4%). Amara and Sujit were appointed to the Constitutional Court under the political scientist quota while Prasert is the law specialist justice. However, the commonality between them is that the three justices were the minority justices who judged Thaksin guilty in the wealth concealment case. This signifies a negative correlation was at play: where the respondents were not satisfied with the verdict, they throw their support behind the justices who voted the other way in the case.

The opinion survey also disclosed the result of how the three justices voted according to the philosophical divide. The 15 justices were distinctly grouped into the subscribers of the conservative, liberal and populist ideals expressed in their judgments. Amara, Prasert and Sujit were confirmed by the survey to be the liberalists who emphasize the intent of the public law. They displayed the tendency to second the proposals to repeal rules and decrees that contradict the intent of the law while broadly interpreting the law and ignoring narrow interpretations of precedents and adjusting the law in accordance with prevailing social developments. They are also promoters of the rule of law, as opposed to the rule by law which is the case with the conservationists or the populists' aptness to 'go with the flow' of public sentiment. The liberalists also are the supporters of the sovereign authority of the people, the Constitution, and the democratic system with the vision to expand the rights of the citizens, advocate decentralization, public participation, community rights, and the environment.[47]

D. Thai Rak Thai Party Dissolution case

Another highly-publicized case which was arguably a political game changer was the dissolution of the Thai Rak Thai, the former governing party in 2007 following the military coup d'etat engineered by the Council for National Security on September

[47] The Constitutional Court of Thailand; The Provisions and The Working of the Court, Amara Raksasataya and James R. Klein, pp. 44.

19, 2006 which overthrew the government of Thaksin Shinawatra who founded the Thai Rak Thai. The verdict was handed down by the Constitutional Tribunal which temporarily filled in the place of the Constitutional Court that had been dissolved as a result of the abrogation of the 1997 Constitution. Members of the Tribunal were picked from the Supreme Court and the Supreme Administrative Court.[48]

The researcher has chosen the case for reference because, even though the case was finalized after the cancellation of the 1997 Constitution, the wrongdoing had been committed while the 1997 Constitution was still in effect. The Constitutional Tribunal, despite its judge-based compositional line-up, is recognized in its jurisdictional authority since it retains the adjudicatory power, making it an equivalent of the Constitutional Court. The Tribunal's exposure to the political interest is thus within the scope of the research.

However, Duncan McCargo looks at the Tribunal in a more critical light. He said that in practice, the substance of the "judiciary" was wide-ranging: it included professional judges, judges appointed by the Senate to bodies such as the Constitutional Court, or judges appointed by the Council for National Security (CNS) to the *ad hoc* Constitutional Tribunal. The picture here is confusing: the military appointed Constitutional Tribunal comprised six Supreme Court justices and three Supreme Administrative Court judges, including the presidents of both courts. CNS could claim that all the members of the Tribunal were "judges" in their own right, but the creation of the Tribunal itself was somewhat arbitrary.[49]

The following is the unofficial translation of the summary of the Thai Rak Thai Party dissolution case posted by the Foreign Affairs Ministry. (See www.mfa.go.th/internet/document/3408.doc.)

On 30 May 2007, the Constitutional Tribunal reached its decision in the case between the Attorney –General, the Claimant, Thai Rak Thai Party, Respondent No. 1, Pattana Chart Thai Party, Respondent No. 2, Pandin Thai Party, Respondent No. 3, on the subject that the Attorney-General has filed a petition to dissolve the Party of all three respondents.

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[48] **Burning Issue of Party Dissolution Case: A Big Test for the CNS** [online], November 29, 2006. Available from : http://www.nationmultimedia.com/2006/11/29/politics/politics_30020242.php.

[49] Duncan Mc.Cargo, **Thailand: State of Anxiety,' Southeast Asian Affairs** [online], 2008. Available from : http://muse.jhu.edu/journals/southeast_asian_affairs/v2008/2008.mccargo.pdf.

The Constitutional Tribunal has thoroughly considered the petition, rebuttal statement from the three respondents and all of the evidence of the Parties concerned, and found, on the factual and legal basis, with the following details in summary:

1. The Constitutional Tribunal has jurisdiction over the case in accordance with section 35 of the Constitution of the Kingdom of Thailand (Interim) B.E. 2549.

2. The filing of the petition to dissolve the Party is the authorized power given to the Registrar of the political parties. If the matter appears before the Registrar, notwithstanding wherever the source is, the Registrar has the authority to inform the Attorney-General to file a petition to the Constitutional Court to dissolve the Party.

3. The investigation of factual issue and determination of issues or arguments are within the powers of the Registrar of the political parties in accordance with the Organic Act on Political Parties of B.E. 2541, and is not subject to the Organic Act on the Election Commission of B.E. 2541, Section 19 paragraph 2 and 3. Moreover, it is the action under the order of the Registrar of the political parties, not of the Election Commission, so it is not bound by Section 40 of the Election Commission's regulation.

4. The Organic Act of the Constitution of the Kingdom of Thailand of B.E. 2540 has an equal legal standing with other general legislations. Therefore, the revocation or termination of the Organic Act of the Constitution of the Kingdom of Thailand B.E. 2540 requires a revoking legislation or a new legislation issued in place of it. Hence, the cause of party dissolution that occurred before is still valid and the action that breaches the Organic Act still continues to be a breach. The statement of the Secretariat of the Council for Administrative Reform is merely an opinion and thus, does not have a legal binding effect to terminate the two mentioned Organic Acts.

5. Section 328 of the Constitution of the Kingdom of Thailand

B.E. 2540 empowers the legislative branch to issue the law that has an effect to revoke or dissolve political parties. This does not mean that it could prevent legislative branch to issue the law that punishes political party under the Organic Act on Political Parties of B.E. 2541 Sections 66(2), (3) and (4). Hence, this is not a provision in excess of necessity, nor does it have an impact on the substantive freedom of individual rights for collective establishment of a political party.

A rebuttal argument was raised that the legal provision was not issued legitimately under the Constitution of the Kingdom of Thailand B.E. 2540. Section 262 of the Constitution gives the right to rebut only for members of the House of Representatives, the Senate and the Prime Minister. It does not give rise to rebuttal on such matter by the Thai Rak Thai Party.

6. As the Constitutional Court orders the political party to cease action that undermines the Constitutional Monarchy with the King as Head of State or the acquisition of administrative power over the country through means not in accordance with this Constitution under the Constitution of the Kingdom of Thailand B.E. 2540, the Constitutional Court also has the power to exercise immediate discretion to dissolve political parties under Section 63 paragraph 3 without having to first issue an order to the political party to cease actions under paragraph 2.

7. The election on 2 April B.E. 2549, which has been annulled by the said ruling of the Administrative Court, does not have the effect as to nullify the previous conduct of wrongdoing as it is separate from each other.

8. It is found on factual basis that the Thai Rak Thai Party had hired the Pattana Chart Thai Party and Pandin Thai Party, and that the Pattana Chart Thai Party and Pandin Thai Party agreed to be hired by the Thai Rak Thai Party to seek for election candidates to assist the Thai Rak Thai Party. The Pattana Chart Thai Party together with the Election Commission's officers amended information about Pattana Chart Thai party members to the meet 90 days requirement with the support of the Thai Rak Thai Party. Moreover, the Pattana Chart Thai Party and Pandin Thai Party issued a fraudulent letter to certify their members to use as a document for the registration of the election candidates.

9. General Thammarak Issarangkura na Ayudhya and Pongsak Raktapongpaisarn were the key executive members of the Thai Rak Thai Party who had been placed with great trust by the executive members committee and the Party leader to manage the Thai Rak Thai Party in such a way that the Party could promptly return to power. They played an important role for the Thai Rak Thai Party. The Thai Rak Thai Party had never held a meeting of executive members committee to make clarification on the accusation either before or after the date of election although such accusation was a significant matter which had an impact on the Thai Rak Thai Party's image. It is deemed that the action of General Thammarak and Pongsak was the action binding the Thai Rak Thai party.

Boontaweesak Amorasil, Pattana Chart Thai party leader had been involved with the amendment of information on the Pattana Chart Thai Party and received money from General Thammarak as a representative of the Pattana Chart Thai Party. It is deemed that Boontaweesak's action was the action binding the Pattana Chart Thai Party.

Bunyabaramipon Chinarat, Pandin Thai Party leader acknowledged and consented for Thattima Pawali to receive money from General Thammarak, as well as to issue a fraudulent letter of certification for Party members. It can be presumed that the action of Bunyabaramipon was the action binding the Pandin Thai Party.

10. The action of the Thai Rak Thai Party can be deemed as an acquisition of administrative power over the country through means not in accordance with the Constitution under section 66(1) of the Organic Act on Political Parties of B.E. 2541. It is an act that constitutes a threat to national security or good public order and moral under Section 66(3).

The action of the Pattana Chart Thai Party and that of the Pandin Thai Party can be deemed as an action that opposes the Constitutional Monarchy with the King as Head of State in accordance with the Constitution under the Organic Act on Political Parties of B.E. 2541, Section 66(2), as well as constitutes a threat to national security or good public order and moral under Section 66(3).

11. The action of the Thai Rak Thai Party is the action which sought to acquire administrative power over the country through means not in accordance with the Constitution as well as constituting threats to national security or good public order and moral under Section 66(3). It did not uphold the key principle of democratic form of government and did not respect the law of the country. It could not maintain the form of political party that created or sustained political legitimacy to the democratic form of government of the country as a whole. Therefore, there is a reasonable cause for the dissolution of the Thai Rak Thai Party.

The Pattana Chart Thai Party and the Pandin Thai Party were established for the benefit of the founder or the executive members committee of their respective Parties. They did not have any status as political parties. Therefore, there is a reasonable cause for the dissolution of the Pattana Chart Thai Party and the Pandin Thai Party.

12. The Announcement of the Council for Democratic Reform (later renamed Council for National Security) No. 27 is applicable to the cause of party dissolution under the Organic Act on Political Parties of B.E. 2541, Sections 1, 2 and 3 because the content of these sections clearly read as a prohibitive provision. As and when a political party acts in a certain way that is prohibited by the said sections, such political party may be dissolved. Hence, the effect is equivalent to the prohibition of a political party not to act in a certain way.

13. The Announcement of the Council for Democratic Reform No. 27 dated 30 September B.E. 2549 provides that the revocation of election rights is not criminal penalty. It is merely a legal measure derived from the effect of law which entitles the dissolution of political party which engages in prohibited acts under the Organic Act on Political Parties of B.E. 2541. It is meant to prevent the political party's executive members, who caused harm to the society and the democratic form of government, to repeat their wrongdoings in a certain period of time. Although the electoral rights are fundamental rights ensured for people in the democratic society, the law which sets criteria for persons who should be entitled for the electoral rights so as to suit the

social conditions or to sustain the democratic form of that society, could still be valid. Hence the Announcement of the Council for Democratic Reform No. 27, Section 3 has a retroactive binding effect to the act that is the cause of party dissolution in this case.

14. The fact that the political party's executive members, who held their positions during the time the concerned act occurred, withdrew their positions before the date of the Constitutional Tribunal's ruling, does not annul the effect of the actions committed by the political party during such time that the executive members were holding their positions. If otherwise, it could cause an illegitimate result and invalidate the enforcement of law to meet the legal intention. Hence, the Constitutional Tribunal cannot but withdraw the election rights of the political party's executive members.

The Constitution Tribunal hereby issues an order to dissolve the Thai Rak Thai Party, the Pattana Chart Thai Party and the Pandin Thai Party as well as to suspend the electoral rights of 111 executive members of the Thai Rak Thai Party, 19 executive members of the Pattana Chart Thai Party, 3 executive members of Pandin Thai Party, for a period of five years, effective on the date of the order of party dissolution.

The importance of the dissolution case is in the interpretation that the Constitutional Court has been requested to disband a major political party with a vast support base in many constituencies. The public expectation of the outcome on the case had been immense because it could aggravate political instability. The intensity of the pressure on the Court was detected as the dissolution trial could set a new course of national politics. The Court was dealing with the exposure to the political interests who were executives of the Thai Rak Thai. The party executives stood to lose their political rights for five years as a result of the party dissolution on grounds that they had conspired with the party to carry out electoral fraud. They are banned from engaging in political activities including appointment as Cabinet ministers during the ban period. The party ceasing to exist did not have so much significance as its executives being subject to the political ban since the administration of the party could continue to proceed with a simple renaming of the party. With the Thai Rak Thai, after the dissolution verdict, the party had been re-labeled as the People Power Party which had later disintegrated on the Constitutional Court's dissolution order on the same electoral fraud charge.

During the first seven years of the 1997 Constitution's inception, the Constitutional Court had ordered the dissolution of 55 political parties; one in 1998, four in 1999, four in 2000, 18 in 2001, 19 in 2002 and nine in 2003. The offences which constitute the grounds for dissolving political parties, in addition to electoral fraud, include the

under-subscription of members of political party, an endangerment to national security and an undertaking which seeks to destroy the constitutional monarchy.[50]

Overall, how the Thaksin's acquittal verdict, the Cobra faction, the Newin and the Thai Rak Thai dissolution cases have impacted the Constitutional Court's perceived legitimacy and adjudicatory authority can be explained using the Pinnell model (see Chart 1). The model embodies a four-stage analysis of the political interaction with the Court.

The Stage 1 is when outside interests seek the Court's judicial review. But as more cases are heard, the interests may change their decision to approach the Constitutional Courts based on how they think the Courts will be sympathetic to their side.

This stage is, on some levels, relevant to the Cobra faction and the Newin rulings as well as the Thaksin case. The Cobra trial constitutes a judicial review because the Election Commission had sought clarification of the law on whether the 12 faction stalwarts should be expelled from the Prachakorn Thai Party. The Newin ruling was in response to demands that he relinquish his ministerial seat because of the suspended jail sentence handed him. For Thaksin, if there was to be any relevance, it would be to the interpretation whether he had the duty to report his assets and liabilities to the NACC. But the core issue of the Thaksin trial concerned the accusation he covered up his wealth record, which does not fall into definition of judicial review set by the Pinnell model. That said, the Cobra faction, Newin or the Thai Rak Thai Party approached the Constitutional Court at their discretion; the petitions that would decide their political status or future were lodged by other constitutional parties. Therefore, they were in no position to go to the Constitutional Court based on how they envision the cases will be advantageous to them.

Stage 2 proposes that the degree of controversy of cases admitted correlates to the legitimate authority of the Constitutional Courts. Political environment surrounding the cases are considered. If early in the tenure of the Courts, some cases are taken up for deliberation because they are more controversial than others, it could mean the Courts are not afraid their verdicts will be disrespected.

This stage is partly true of the four major cases in discussion. The Cobra faction and Newin cases had been accepted by the Constitutional Court rather early in the Court's establishment. Only the dissolution case had been taken up almost at the end of the 1997 Constitution's lie. The Cobra faction case was admitted for hearing on May 23, 1998, barely eight months after the Court officially opened its door on October 11,

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[50] Panya Udchachon and Vudhilert Devakul, The Constitutional Court Power to Dissolve Political Party (Bangkok: 2004). pp. 58-60.

1997. The admission of the Newin case came in 1999 and the Thaksin trial commenced in 2001. Given the lifespan of the 1997 Constitutional Court, which extended almost nine years before the September 19, 2006 forced the abrogation of the 1997 Constitution, the three cases could be classified as having been deliberated early in the Constitutional Court's tenure. So, except for the dissolution case which came much later, these were the early, heavily-publicized cases which could be classified as controversial because they involved the political movers and shakers at the time. But it could not be determined with resoluteness that the Constitutional Court took up those cases on the consideration of the degree of the controversy they spun. There may or may not have been instances where the schedules of the deliberation had been moved up by the Court owing to how controversial the cases were. The consideration as to when the Court should pick a certain case for hearing at any particular point in time is an internal matter subject to a decision made at the discretion of the Court although as has been observed, the Constitutional Court procedurally allows sometime to lapse between the indictment and the first hearing. In other words, the trial does not commence immediately after the case was admitted. To be precise, the procedural steps have it difficult to establish with any certainty that the question of controversy has a conclusive effect which could bend the Constitutional Court's decision on when to take up a case.

Stage 3 supposes that if there are credible indications during the hearings that a Court shows an inclination toward politically powerful individuals, it could signal the Court's lack of legitimate authority. Stage 4 affirms the verdicts of particular cases will naturally determine if the Court will lose or gain its legitimate authority. The outcome of cases will spell out a decrease or an increase of the Court's authority in the long run, which could gradually alter its behavior. It may exude more confidence in hearing and conducting cases.

The researcher has found that Stages 3 and 4 apply more to the Newin and Thaksin cases than that of the Cobra faction. The reason for this is that the circumstances of the suspended jail term and the wealth concealment trial were individual-specific whereas the Cobra faction case was referred to the Constitutional Court to ascertain the applicability of the relevant law on whether a member could be expelled from the party if he or she act against the resolution of the party. The public dissatisfaction with the Thaksin's acquittal of the wealth cover-up trial reflected adversely on the Constitutional Court's standing. Klein observed the general public and the media were likely to have perceived the Court to have laid down the verdict without undue influence or pressure except with several major cases including the Newin's suspended jail term and Thaksin's wealth concealment. The cases were noticeably political in nature. Most especially, three of the four new justices were elected by the Senate in February 2003 amid public skepticisms that they may have strong ties to

Thaksin. Police Major General Suwan Suwanwecho led a signature campaign to solicit police and public support or Thaksin during the Court's inquiry into the former prime minister's alleged concealment of assets; retired deputy secretary-general of Prime Minister's Office, Sutee Suthisomboon, as head of the Mass Communications Organization of Thailand, had approved a concession which had been deemed less than transparent, to a firm owned by the Shinawatra family; and former director-general of the Customs Department, Manit Witthayatem, had been criticized for assisting another Shinawtra family firm to avoid paying taxes on imported communications equipment. The fourth new justice was Thammasat University law lecturer Dr Saowanee Asawaroj, who is not generally seen as connected to the former prime minister. She is the Constitutional Court's first female justice.[51] As for the dissolution case, the Constitutional Tribunal's verdict was met with both praise and condemnation as the dispute was restrictively political and bitterly divisive. For that reason, the query of whether the Tribunal's legitimacy had increased or decreased from the dissolution trial was debatable.

Most notably, the Thaksin trial had left virtually indelible stains on the 1997 Constitutional Court's credibility and its legitimate authority had caught the critics' attention as being eroded. The later reshuffle of some of the justices was not helpful in restoring public trust in the performance of the Constitutional Court which had suffered an image deficit, a setback which was believed to have gone un-reversed until its tenure was cut short by the September 19, 2006 military coup which toppled Thaksin from power.

In conclusion, only select stages of the Pinnell model are adaptable to the Thai context surrounding the three frequently-reviewed political cases in the 1997 Constitutional Court. Stages 3 and 4 describe the most critical developments in the proceedings of the Constitutional Court and are fairly typical of the Thai Constitutional Court under the 1997 Constitution with regard to its decisions on heavily publicized cases, particularly the Thaksin wealth cover-up fiasco.

3.4.3 Analysis of the level of diversity of cases relative to the Constitutional Court's interaction with the political interests

It has been said that the magnitude of cases deliberated by the Constitutional Court alone is meaningless to the calculation of the amount of exposure of the Court to the political interests. The overview of the issue is that the diversity or less of it in the

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[51] The Constitutional Court of Thailand; The Provisions and The Working of the Court, Amara Raksasataya and James R. Klein, pp. 40-44.

cases handled by the Constitutional Court is dictated by the functions of the Court. If many of the functions are geared toward settling disputes with or stemming from the political interests, it can serve an indication that a great deal of Constitutional Court's time and resources will be expended looking at political cases. A collection of statistical data has confirmed this supposition.

From 1998, the first year the petitions were compiled and collated, until 2005, the year preceding the September 19, 2006 military coup engineered by the Council for National Security which ended the life of the 1997 Constitution, the Constitutional Court registered a total of 594 petitions, 28 of which were pending verdicts as of the end of 2005. That left 566 petitions which were resolved, thrown out or declared inadmissible (see breakdown of the case in Table 3).

Table 3: The Number of Petitions Deliberated and Ruled, Declared Inadmissible, or Dismissed by the Constitutional Court

Year	Ruled	Dismissed or Inadmissible	Total
1998	17	16	33
1999	54	25	79
2000	64	33	97
2001	51	5	56
2002	64	32	96
2003	52	6	58
2004	88	27	115
2005*	32	-	32
Total	**422**	**144**	**566**

*The information is rounded off as on March 3, 2005.

Source: Summary of major Constitutional Court verdicts from 1998 to 2005, published by the Constitutional Court.

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The researcher has found that almost half the number of categories of verdicts and rulings reached by the Constitutional Court from 1998 to 2005 was the settlement of issues involving political post holders and political parties (see Table 4 below).

Table 4: Verdicts and Rulings of the Constitutional Court from 1998 to 2005 (under relevant sections of the Constitution and an organic law)

1. Section 47 (resolutions of political parties issued in conflict with the status and performance of the Members of the House of Representatives)	3 petitions
2. Section 96 (termination of the MP status)	1 petition
3. Section 180 (draft bill on the national budget expenditures)	1 petition
4. Section 198 (petitions filed through the Ombudsmen)	10 petitions
5. Section 216 (termination of ministership)	2 petitions
6. Section 219 (constitutional incompatibility of an executive decree)	4 petitions
7. Section 262 (unconstitutionality of a draft bill)	14 petitions
8. Section 264 (a law in conflict with the Constitution)	236 petitions
9. Section 266 (constitutionality of power and duty of constitutional agencies)	47 petitions
10. Section 295 (political post holders' failure to declare assets and liabilities)	29 petitions
11. Section 321 (ruling on regulations governing the NACC)	1 petition

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12. Section 65 (dissolution of political parties), Section 33 (decision on orders issued by political party registrar) and Section 17 (rejection of request to set up a political party) of the 1997 Political Party Act 74 petitions

Total **422 petitions**

Source: "The Constitutional Court of Thailand; The Provisions and The Working of the Court," Amara Raksasataya and James R. Klein (eds.). (2003), pp. 33-44**.**

From Chart 5, the political petitions fall into items 1, 2, 5, 10, and 12 pertaining to resolutions of political parties issued in conflict with the status and performance of the Members of the House of Representatives, termination of the MP status, termination of ministership, political post holders' failure to declare assets and liabilities and Sections 65, 33, and 17 of the Political Party Act respectively. There are 109 petitions between them and these account for 25.8% of the overall number of petitions or one in four petitions which passed through the Constitutional Court. However, it is also noted that on top of the 25.8% direct political cases, some of the cases filed under Section 264 (law in conflict with the Constitution) can also be described as political cases. This is because the laws at the heart of the constitutionality filing were initiated by the parliamentarians themselves. An example of such filing relates to the Constitutional Court ruling dated on September 22, 2003. The House of Representatives referred the opinion to the Constitutional Court for a ruling on whether or not the violation of Section 180 had occurred in the consideration of Section 17 of the Annual Appropriations Bill. The bill governed only the appropriations of the Department of Local Administration Promotion in the part of specific subsidy for the development of local administrative organizations under the country development strategy and specific subsidy for the development of tourism of local administrative organizations under the Thailand tourism development strategy.[52]

The bill in question was put forward to the Parliament by the parliamentarians and the constitutionality interpretation was certain to have implications for the financial management of the local administration agencies, which are known to retain links with the political interests who include MPs representing the constituencies. Therefore, the bill and its constitutionality scrutiny provide a clear illustration of the

[52] "The Constitutional Court Rulings 2003," in The Constitutional Court of the Kingdom of Thailand, Noppadol Hengcharoen, ed. (Bangkok: P.Press Co, 2003), pp. 99.

relationship between the political interests who are the sponsors of the pieces of legislations and what the purpose the bill is intended to serve.

The submission of many political petitions strongly suggests a close contact between the Court and the political interests. More importantly, the variety of cases was limited (five in 12 cases relating to political post holders) which further reinforces the Constitutional Court's concentration on the adjudication of political interest cases.

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Chapter IV

Constitutional Court of South Korea (under the present Constitution)

4.1 History of the Constitution and its 1987 origin

The Constitution is a written form of a country's supreme legal norm and often it is the product of social and political crisis. It is the rule of the game by which the national administration is kept in check.

Like the Thailand's Constitution, the Constitution of South Korea is the best written illustration of the intense political turbulence the country had experienced. The two countries have lived through periods of dictatorship before the first block of democracy brick could be laid. It had been a while before the two countries began building a sophisticated system of safeguarding the sanctity of the Constitution and that was how the era of the Constitutional Court had been heralded. However, an extraordinary pattern has emerged from both countries; the institutionalization of the Constitutional Courts materialized long after the first Constitution was promulgated and not unless the force of the people pressed for genuine commitment of the power-that-be to democratization, which entails a concept of accountability necessitating the establishment of independent agencies and the Constitutional Court is one of them.

A South Korea's constitutional past must be revisited in order to see how the public despair and desperation for democracy had turned into a massive drive to straighten out the dictators' exploitation of the Constitution for partisan gains.

Park Won-Soon has painted quite a dramatic picture of South Korea's constitutional history. He likened the early years of the Constitution as being under dictator's grip and that the charter was nothing but an ornamental decoration under the dictatorship. The power holders and the ruling power frequently ignore or violate the Constitution and revised it for their convenience and when the rectification served them. Park insists the revision also is meant to prolong the rulers' hold on power. The Constitution should set the standard for resolving legality queries.

The history of South Korea's Constitution goes hand in hand with the struggle for democracy. Dictators of the past had amended the Constitution many times to extend their reign, depriving people of their basic rights including the election rights. Public resistance had stiffened against the regime and even more so against the undemocratic Constitution which they insisted was the tool for furthering the cause for dictatorship.

‘As a foreign journalist, who witnessed the dictatorship and the powerlessness and ignorance of people in Korea, mentioned that democracy in Korea was a rose blooming in a garbage can.[1]

During the Park Chung –Hee presidency, the people were without the rights to directly elect the president, which was the responsibility of the National Conference for Unification. People’s demand for democratic Constitution had echoed louder and the government opponents were suppressed. Amid the hostile political environment, the people’s wish for better present and future through the repeal of the Constitution for Revitalizing Reform under the Park administration was crushed as the government jailed a lot of the dissidents. Even after Park’s death, the Constitution for Revitalizing Reform had carried on under his successor Chun Doo-Hwan.

As the Constitution remained unchanged, the people’s disapproval of the government surged. Being able to elect their own president was still a pipe dream for the people with their basic rights not being recognized. The simmering public intolerance of the despotic oppression came to a boil. Popular forces had solidified with people across the social spectrum, from academics to artists, consolidated and organized a mass protest for a democratic Constitution. The protesters converged in their thousands despite a large number of them being incarcerated and harshly punished. But the dictatorial regime could not continue governing the country for long and it eventually caved in to the pressure and allowed for a revamp of the Constitution.

Because the Constitution had been undemocratic from the start, its coarse form had been chiseled and polished through a series of revisions until it won more and more acceptance from the people. The Constitutional Court had been launched during the later amendment of Constitution in recognition of the need to find a ‘rule keeper’ who is able to preserve the norm of the Constitution from being abused or misinterpreted for partisan interests.

South Korea’s independence was not achieved until 1948, after having been under the Japanese rule and the US administration. Fresh from a long stint of dependence, the country was desperate for the highest law to be enacted and the enactment was the charge of the Constitutional Assembly. The first Constitution had enshrined some checks and balances although to some, the written democracy struck them as being abstract. It was not until the first revision of the Constitution in 1952 that the tangibility of the definitive democracy came to life; the introduction of the direct

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[1] Park Won Soon, **National Security and Constitutional Rights in Korea-National Security Law, Past and Present** [online], 2004. Available from : http://dspace.anu.edu.au/bitstream/1885/42061/1/Won_Soon.pdf

election of the President and the bicameral parliament. There would be altogether nine revisions of the Constitution over the course of 34 years.

Park Won Soon has offered a grim viewpoint of the state of despair the South Korean people had endured early in their struggle for democracy when people's rights were trampled upon and the people themselves were persecuted in the name o national security. He also writes that the law in a general term has been revised by the ruling power driven by political motives. The revision took place not because of the deterioration of or danger to the national security, which is sometimes used as a pretext to oppress the people who rebelled against the ruling power. The revisions equipped the powers-that-be who usurped administrative authority with the legal apparatus to crackdown on those who challenged the legitimacy of their rule.[2] Altogether, the Constitution of South Korea was amended in 1952, 1954, 1960 (twice), 1962, 1969, 1972, 1980, and on 29 Oct 1987.

The second revision in November 1954 followed a tussle in National Legislative Assembly. The legislators had first rejected the revision bill due to a lack of quorum in NLA but the rejection was later reversed after the minimum number for passing the bill had been fixed. The bill was passed and the contents included the retraction of limits on the second running by the first President in the presidential elections and the abolition of the Prime Minister system.

The Constitution was changed for the third time in the wake of mass, student-led civil unrest that forced the Rhee Syng Man government out of power.

Under Rhee Syng Man, the country had an extreme anti-communist system resulting from the pos-liberation and the subsequent Korean War. The anti-communist state wielded massive coercive power while civil society was controlled by the state. The anti-communism created a pseudo-consensus in all fields of society. While the country was equipped with the liberal democratic institutions, they functioned mainly with the limits of the anti-communist system. Rhee Syng Man's dictatorship in the 1950s was based on the extreme anti-communist system and the anti-communist regimented society. In this respect, it can be defined as an anti-communist dictatorship. Details can be found at:

http://iisdb.stanford.edu/pubs/22591/Development_of_Democratization_Movement_in_South_Korea-1.pdf

[2] Park Won Soon, National Security and Constitutional Rights in Korea-National Security Law, Past and Present.

The people had resisted against the presidential election on March 15, 1960 which was fraught with poll rigging. Taking over from the Lee administration was an interim government which initiated the charter revision which introduced press freedom and basic rights were promoted. In November, 1960, the charter was amended again, this time to prepare the legal grounds for punishing the vote riggers in the March 15 polls and those who suppressed the protesters. The laws were enacted to tackle vote fraud and punish the anti-democratic characters. Separate laws were also put into effect laying down penalty against the vote fraudsters and protest suppressers. The Constitution was fine-tuned for the fifth time in 1962 after a military coup. The Military Revolution Committee had imposed a nationwide martial law and put into place an emergency law which had the same power as the Constitution. The charter was revised so that presidential system was up and running and the constitutionality conflicts could be ruled by the court. The parliament took on the form of a unicameral legislature. The president was permitted to seek re-election three times. Seven years later in 1969, a charter revision bill was adopted in a referendum.

South Korea's quest for democracy was disrupted with the seventh constitutional revision. The term Constitution for Revitalizing Reform was used to label the revision in November, 1972, during which time President Park Jung-Hee had been responsible for going against the tide of democratic development.

The regime installed through a coup promoted aggressive economic development and Park Chung Hee had intended for the economic policy to excuse the government's lack of legitimacy over his government's rise to power by the coup. The export-oriented industrialization was successful and in the first Five-Year Economic Development Plan from 1962-1966, the Gross National Product grew at a robust 8.3%. The GNP expanded even more during the second five-year plan, out-stripping national average. Public opposition to his administration had been dormant for a while until the government tried to normalize relations with Japan. President Park's attempt to prolong his rule in the late 1960s also caused public uproar. A massive coordinated poll fraud was under way in the 7th general election in June 1967 which would clear the way for a charter amendment to allow Park to seek a third term in office. Huge student demonstrators poured onto the street to denounce the vote rigging. The students had in full-scale campaign protested against the electoral fraud and Park's efforts to keep himself in power under the façade of his economic achievements. However, the parliamentarians in the ruling party approved the charter revision in secret.

President Park Jung-Hee had declared martial law, disbanded the parliament, and banned political activities and political parties. The government had set up an emergency Cabinet meeting and that functioned in place of the parliament. The Constitution for Revitalizing Reform had spelled a tumultuous period ahead for South

Korea's half-baked democracy as the President was employing expedients to prolong his reign. Sections of the Constitution guaranteeing people's basic rights were annulled and the power to elect the President and appoint one-third of the lawmakers had rested in the hands of the National Conference for Unification which also endorsed the charter revision. The revised charter had given President Park the sweeping authority to undermine the judiciary as he could appoint or sack judges and the President of the Supreme Court at will. The whole judicial system was under threat and the government had gone unchecked.

The country thought it had seen some reprieve from an uninterrupted stint of dictatorial rule when President Park passed away in 1979 and was succeeded by General Chun Doo-Hwan who became president through a coup. He too imposed a martial law across the country in 1980 and set up the National Emergency Counter-measure Committee. The charter was changed again for the eighth time in 1980 and the amendment was purported to promote the basic rights and freedom when in reality it was had permitted the President to centralize enormous powers such as that to dissolve the parliament. The people's rights to elect a government were also taken away.

The mass civil protest had gathered steam against Gen Chun's administration. The people had been vehemently insistent in their demand for a direct election of the President and a concrete transition to a real democracy with a respect for the basic rights. An uprising of pro-democracy movement converged on the streets and Ro Taewoo, representative of the ruling party at the time, agreed to modify the Constitution. The ninth revision was made on Oct 29, 1987.

The history of South Korea's Constitution is not complete without a thorough discussion of the Yushin Constitution which many political scientists agreed had catapulted the mass movements into mandating a constitutional reform.

The Yushin is promulgated in place of the Constitution he suspended in October 1972. He maintained the Yushin Constitution would facilitate the reunification with North Korea. The Yushin system centralized the highest administrative power with the President and provided systemized measures required for stretching Park's time in power. In fact, the Yushin was primarily designed to pander to Park's desire to prolong his one-man rule for life. To do this, he amended the Constitution to run for a third term as President and then to contrive to extend his rule by an emergency measure. The Yushin promoted an indirect election of the President by nominal institution called the National Congress for Reunification while granting the President the right to appoint one-third of the National Assembly members and to invoke the ultra-constitutional emergency provisions.

What could be analyzed from the uprisings during the various regimes is that in the beginning, public resistance against the administration which had been drummed up was in large part a reaction to self-serving constitutional changes. The people were not happy with the leadership and vented their anger at an individual person. But with the Yushin, the resistance was very much directed at the entire system of government constructed on President Park's avarice to stay in power for as long as possible. The unfairness and disenfranchisement felt by the people were attributable to the surge in the anti-establishment sentiment, which harmonized the resistance groups. For example, the Catholic and Protestant groups had been the active campaigners in the early 1970s of the anti-Park movement. They were also linked to the workers who had been discriminated against due to the industrialization policies of President Park.

By the 1980s the democratization movement had expanded with the alliance forged between the student, dissident, social and labor movements. After the watershed chapter of history in the Kwangju Popular Uprising, the neo-military forces elected their coup leader, Gen Chun Doo Hwan, President under the Yushin Constitution. Politicians who were opponents of the military were removed as part of the 'purge' and 'purification' of dissenting officials, journalists and workers. The military amended the Constitution which stipulated that the President was to be elected by an electoral college of delegates, similar to the indirect election featured in the Yushin Constitution. Under the revised Constitution, Chun Doo Hwan was re-elected President and at the same time, the military re-organized the political party system so they could form and dominate both the government and opposition parties. Towards the end of 1983, however, the Chun regime reputed as coercive and oppressive, was seen to have made an about-turn when it launched the 'Appeasement Policy' aimed at toning down the oppression. The students expelled for their connection to the anti-government groups were permitted to go back to class and the professors were teaching again. The Appeasement Policy had given a new lease on life for the democratization movements in all sectors of society. The student and labor sectors were spearheading the anti-government forces which grew explosively leading to historically defining events for South Korea; the newly-established New Korean Democratic Party defeated the military-controlled Democratic Korea Party in a general election and emerged as the first bona fide opposition party; student activists staging a sit-in protest against the US's tacit support for the military forces dispersing the Gwangju Popular Uprising; union workers going on a work stoppp. en masse. The popular consolidation went down in record as the combination of the democratization movement and the social movement making the conjugation, in the words of Choi Jang Jip, the 'largest democratic coalition.[3]

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[3] Choi Jang Jip, Structure and Change of Contemporary South Korean Politics (Seoul: Ggachi, 1989): pp. 34-39.

The June Democratic Uprising of 1987 was proof of that coalition and it was hailed as the thrust of South Korea's democratic transition. It had forced the Chun regime to give in to popular demands for democratization, one of which is an amendment which would make the Constitution truly democratic. After the Chun regime was replaced by successor Roh Tae Woo, South Korea witnessed the constitutional system operating normally under the amended 1987 Constitution. The arbitrary exercise of the state's power had dropped markedly as the political and social sectors long under the authoritarian rulers' repression were also normalized through the fledgling democracy. A normal political party system based on popular support was being built from the ground up. At the same time, civil society also regained autonomy and developed rapidly afterwards.[4]

The researcher has observed distinguishable differences between the South Korea's and Thailand's Constitutions. From the evolution of South Korea's Constitution elaborated above, the charter changed over time by means of a revision rather than an entire rewrite as has been the case with Thailand's Constitution. There were nine revisions of the South Korea's Constitution as opposed to 18 Constitutions Thailand has had since the overthrow of absolute monarchy in 1932. But whether it was revision or a rewrite, the fact remained that the two countries' Constitutions were altered by those in top seat of power so they could harness that alteration to gain more power at the expense of democratic advancement.

For South Korea, the people's struggle to usher in democratization may have been successful but it was far from clear how the Constitutional Court, which provides a safeguard of the Constitution's sanctity, could sustain its institutional existence while keeping the judicial independence from being compromised by any influence from political interests which must be kept at bay.

4.2 Background of South Korea's Constitutional Court

In tandem with the promulgation of the Constitution of the First Republic on July 17, 1948, the country's first constitutionality interpreter had been set up. The Constitutional Committee was up and running with the judicial review authority at its disposal. (In case that the constitutionality of the act is of preliminary issue to settle the trial, the Court shall seek the decision of the Constitutional Committee on the

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[4] Jung Hae Gu and Kim Ho Ki, **Development of Democratization Movement in South Korea** [online], 2010. Available from : http://iis-db.stanford.edu/pubs/22591/Development_of_ Democratization_ Movement_in_South_Korea-1.pdf.

constitutionality of the act and adjudicate based on the decision. The Constitution of the First Republic, Section 81.)

The committee consisted of five Supreme Court justices and five representatives; the vice-president held the position of chief of the Committee.

According to Kiyoung Kim, [5] the composition was marriage of the French and German systems; it drew on the merits of the political traits of the French system and the eligibility requirement (a member should be judges) of the German system. The committee did not have very much to do as it deliberated only seven cases, only two of which were ruled unconstitutional.

During the Second Republic, the constitutionality ruling authority had some semblance of a constitutional court system. (The Constitution hereby empowers the Constitutional Court to review the constitutionality of legislation. The Constitution of the Second Republic, Section 83.)

Nine justices were named by the President, the Supreme Court justices, and the Senate. The justices appointed were cautioned that they 'should not' be members of political parties and 'should not' be engaged in politics.[6] The composition of the justices was legally recognized in a law enacted in April 1961. But less than a month later, a military revolt had dashed the people's hope to see a functional court exclusively handling constitutionality matters measure up to its tasks.

Later in the year, a judicial review system modeled on that of the US was incorporated into the Constitution of the Third Republic. Under the system, the Supreme Court was the final authority in interpreting constitutionality. (In case that the constitutionality of the act is at preliminary issue to settle the trial, the Supreme Court has the final authority to review the issue. The Constitution of the Third Republic, Section 102.)

The Supreme Court was staffed with 15 justices, and the power of judicial review was assigned to all justices. Some supporters reckoned the constitutionality-ruling Supreme Court had helped eliminate the need to designate a special constitutional institution.

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[5] Kiyoung Kim, "Laws Concerning Constitutional Rights in Korea: The New Constitution Court, Its Problems and Accomplishments, Possible Role of Germany, Japan and the US in the Future," (doctor of juridical science dissertation, University of Wisconsin, 1995).

[6] Ibid, pp. 2-9.

During the Third Republic a movement began to change the judicial system. Extensive proposals were introduced to reform the entire judicial structure. It was hoped that the reforms, including the restoration of judicial review, would result in a "consolidation of constitutionalism." As the drafting of the constitutional amendment began, proposals influenced by the U.S. system were introduced to restore the power of judicial review to the Korean Supreme Court. The resulting judicial structure, however, seemed to be more like the Japanese system. The sitting Korean Supreme Court of the Third Republic was called on to review the constitutionality of the amendment. Faced with the possibility of resolving highly controversial constitutional issues, the majority of the Korean Supreme Court Justices did not support the proposed expansion of their duties to include judicial review. The Court was reluctant to acquiesce to the proposal that they should make constitutional determinations because most of the justices were opposed to judicial activism. The justices strongly objected to this active role of the judiciary found in common law systems.[7]

The system of the constitution committee was revived and formulated again during the Fourth and Fifth Republics when it was tasked with the judicial review of the legislation. (In case that the constitutionality of the act is at the issue to settle the trial, the court shall seek the decision of the constitution committee on the constitutionality of the act and adjudicate based on that decision, pursuant to the Constitution of the Fourth Republic and the Fifth Republic, Section 105. The committees of both Republics shared common provisions for the composition, the tenure of their members and procedures of the committee trial although unlike in the Fourth Republic, the courts in the Fifth Republic were authorized to exercise their power of a prior examination on the constitutionality of the act.)

The Fourth and Fifth Republics were governed by the military regime and the constitutional rights of the people were harshly infringed upon. The return of the Constitutional Committee, in existence during the Fourth Republic from 1972-1980 and the Fifth Republic from 1980-1987, was not a popular option because it did not make a single constitutionality decision during its term.[8] The committee was made up of nine members; three elected by parliament, three nominated by the chief justice and the other three appointed by the President. The Committee did not render even a single judgment concerning the constitutionality of a piece of legislation. This is

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[7] Jibong Lim, **Korean Constitutional Court Standing at the Crossroads: Focusing on Real Cases and Variational Types of Decisions** [online], 2001. Available from : https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite&docid=24+Loy.+L.A.+Int'l+%26+Comp.+L.+Rev.+327&srctype=smi&srcid=3B15&key=1e8fcd05de63bec8fd9e9a2de05880e3

[8] Ibid

because the Supreme Court and the lower courts, which worked as the preliminary examiner of the constitutionality of the acts, did not pass recommendations for the committee to review any law.

The year 1988 heralded in the most radical reformation of the Constitutional Court system in the history of South Korea in the Sixth Republic. (In case that the constitutionality of the act is the preliminary issue to be settled in the trial, the court shall seek the decision of the Constitutional Court and follow its decision. Constitution of the Sixth Republic, Section 107.)

Kim noted the system differed from that of the Second Republic in that the latter retained several powers such as the abstract control of norms and the election litigation for the Presidency. As well, the new Constitutional Court required the eligibility of a judge for the post of the Constitutional Court justice. The streamlining of the Constitutional Court system was carried out to fulfill the popular mission for democratic development in light of the political upheaval in the latter years of the Fifth Republic. The continuous dominance of military dictatorship during the Third and Fourth Republics had meant that the constitutional powers were the exclusive property of the President while protection of people's constitutional rights was trivialized. Having the Supreme Court undertake a constitutionality ruling charge had left some disenchanted that the people's rights to constitutional protection had fallen by the wayside.

Upon returning to Korea after studying in Europe, a number of influential Korean constitutional law scholars proposed a system of judicial review based on German models, which were examined as alternatives to the US system. These models were called the "constitutional court system." In response to calls for increased democratic order and reform of judicial review procedures, the modern Constitutional Court system was adopted during the Sixth Republic in the 1988 Constitutional amendments. The Constitutional Court replaced the Constitutional Committee, which had been established during the Fourth Republic.[9]

The new system was not flawless but it had rid many of the unjustness in the constitutional adjudication of the past, impressing the legal professions and the people who experienced nominal adjudication less protective of the constitutional rights.[10] Jibong Lim also got across a point to elucidate his argument about the invigoration of the Constitutional Court's merit by providing a chart confirming a jump in the number

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[9] Jibong Lim, Korean Constitutional Court Standing at the Crossroads: Focusing on Real Cases and Variational Types of Decisions.

[10] Y. Heo, "Let the Constitution Court Be As It Is," Chosun Monthly, (May, 1991): 132.

of constitutional petitions alleging constitutional injustice filed with the Constitutional Court.(The chart for the exhibition of cases of the Constitutional Court as of June, 1991. The jump in the number of Court-accepted constitutional petitions in question signified the 724 cases of constitutional conflict.)

Jibong Lim has explained the South Korean Constitutional Court has been the target of antagonism from competing branches within the Korean government because of its "judicial activism." It has clashed not only with the Korean Legislative and Executive branches, but also with the Supreme Court over jurisdictional issues. In an extraordinary observation, Tim Ginsburg has looked at the tendency for the South Korean Constitutional Court to wield excessive judicial intervention that it is 'judicializing' the outlets of government.

According to Gavin Healy, the Constitutional Court of Korea has shown itself to be an independent and active body. Its mandate, as construed from the Constitutional Court Act and Articles 111-113 of the Constitution, (Details of the articles may be found on the Constitutional Court of South Korea website.) gives it expansive powers to provide a check on over-reaching governmental authority and to be a force for judicial activism. However, he writes that the Court faced a great degree of skepticism as it began its existence. Much of this skepticism was justified, given the role of previous constitutional courts/committees as mere rubber stamps for governmental action. The judiciary in Korea has not traditionally taken on an activist role.[11]

Some unresolved cases involving the oppression of the underprivileged were presented to the Constitutional Court. The historical failure of the previous constitution court system as a result of the military revolt in the Second Republic and the people's disappointment and traumatic experience of the nine constitutional revisions by political powers had augmented people's desire for a more responsive and evolved constitutional justice.[12] Kim also expands on the institutionalization of a constitutional adjudication system as being a prevailing trend within the world community in the 1990's and this trend led to a new transition in within the political systems.

In sum, the First Republic had a Constitutional Committee, which was composed of the vice president (who served as its head), five Supreme Court justices and five parliamentarians.

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[11] Gavin Healy, "Judicial Activism in the New Constitutional Court of Korea," Columbia Journal of Asian Law, Columbia Journal of Asian Law, (Spring 2000): 20.

[12] (Kim 1995).

Members of the judiciary, however, were opposed to the creation of the Constitutional Committee and argued in favor of the de-centralized system of judicial review. Following the country's liberation from the Japanese colonial rule, a court system including a Supreme Court had already been established in Korea pursuant to a decree issued by the U.S. Military Government in Korea, which had taken temporary control of the country until the establishment the new government. In a written statement submitted in relation to the draft constitution, the Chief Justice of the Supreme Court argued that the power to review the constitutionality of statutes belongs as a matter of course to the judicial power under the principle of separation of powers. Although this view was at one point incorporated into the draft constitution, by the time of the final vote by the plenary session of the National Assembly the argument for creating a Constitutional Committee had regained the upper hand. The Founding Constitution thus came to adopt the centralized model of constitutional adjudication by establishing the Constitutional Committee. Source: Twenty Years of the Constitutional Court of Korea: pp. 62-63.

The Constitutional Committee was a blend of a constitutional court and political organization styles.The Second Republic established a Constitutional Court that mainly imitated the German Constitutional Court system. It consisted of nine judges, of which three were selected each by the President, the Supreme Court and the Senate. The court itself, however, was short-lived due to a military overthrow in 1961. The Third Republic had the so-called Impeachment Committee, which was composed of the chief justice of the Supreme Court (who served as head), three Supreme Court justices and five parliamentarians. The Fourth and Fifth Republics also had a Constitutional Committee, but the selection of justices was different from the procedures of the First Republic and rather similar to those of the Constitutional Court of the Second Republic. The Sixth Republic established the Constitutional Court, which is nearly same with that of Second Republic in its composition except that the Senate has been changed to the National Assembly.[13]

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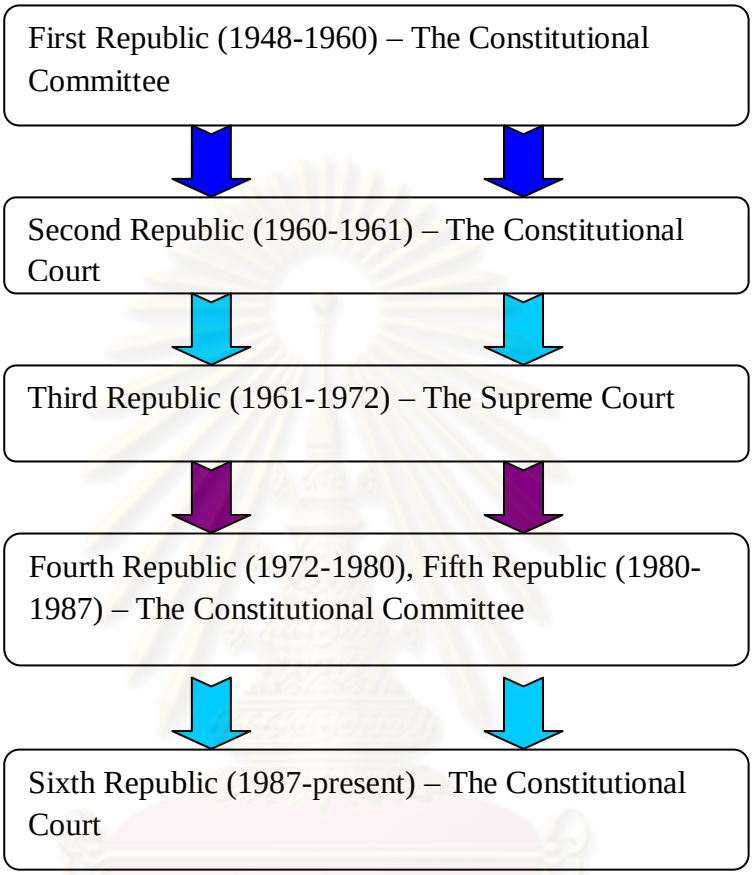
[13] Young-Sung Kwon, Hunbubhak Wonlon [Constitutional Law: A Textbook] (1994), pp. 1144-46.

The evolution of South Korea's constitutionality reviewers during the six Republics is shown in the **Chart 4** below:



It can reasonably be said that the current Constitution of the Sixth Republic has empowered the Constitutional Court by building up the '3:3:3' tripartite system where the highest national branches of powers - the executive, the legislative and the judiciary – are proportionately represented in the Court. The tripartite system is to be discussed in the next chapter.

The researcher has rendered a focal observation of the development of the Constitutional Court system in that in the early stages, the constitutionality adjudication had been cast aside in its importance as the country had been under the dictatorial rule. As far as relations with the political interest were concerned, the constitutionality interpreters wearing the hats of the Constitutional Committee members during the First Republic were exceptionally close to the core of national administration. The naming of five representatives in the committee with the vice-president assuming the position of chief of the Committee exemplifies the fragile political and judicial states at the time when the nationhood was in its infancy. The country was trying to find its feet and keeping the administrative house in order and it

could be excused for experimenting with an ideal model of constitutionality ruling authority. Apparently, assigning an authoritative role in the Committee to the vice president has spoken depths about the political exposure in the constitutionality interpretation, which could well imply that judicial independence was being treated as a secondary issue. Very few cases had been scrutinized by the Committee: seven cases, only two of which were ruled unconstitutional. The small number of deliberated cases was a confirmation of the Committee's unpopularity.

The independence of the judicial reviewing justices had grown into an issue of significance during the Second Republic as evident in the veil caution that the justices 'should not' be members of political parties and 'should not' be engaged in politics. The subtlety of the words was voiced as a sign of perceptible apprehension that political influence was not welcomed in the Constitutional Court's inner working. The Third Republic saw the judicial review power swinging away from any political centre to the conservative Supreme Court, which was lukewarm to the idea of its undertaking judicial activism. There was not much interaction between the political interests and the Supreme Court as the constitutionality interpreter in terms of the deliberation of cases. In Fourth and Fifth Republics, the constitutionality review ground to a halt because the revived Constitutional Committee did not deliver even a single judgment on the constitutionality of any legislation. An issue to note is that the Committee had the '3:3:3' composition of justices – three elected by parliament, three nominated by the chief justice and the other three appointed by the President - which could have ascertained its reliability and independence and yet the zero judgments passed must have raised eyebrows. But was the justices' presumed reliability certain, had they actually handled any case at all? The Fourth and Fifth Republics were ruled with an iron fist by the military regime which had centralized powers of administration over the executive and the legislative branches. This could be compared to what the parliamentary majoritarianism would have done to a similar structure of the 1974 Constitutional Tribunal of Thailand. So, if two of the top branches were not really independent of one another or were under the dictate of autocratic ruler or were made disabled by the parliamentary majority, the reliability of constitutionality review could lay in tatters.

The Committee's inability to render even a single judgment concerning the constitutionality of a piece of legislation was put to the failure of the Supreme Court and the lower courts, as the preliminary examiner of the constitutionality of the acts, to pass recommendations for the committee to review any law.

In the Sixth Republic, the creation of the Constitutional Court was achievable through a political compromise between the ruling party, which expected to play an insignificant role like the previous Constitutional Committees, and the opposition

party, which also had only vague hopes for its role.[14] However, people reflecting on the past when constitutional adjudication under the Supreme Court did not bring about any notable result had high hopes for the new Court as an institution specialized in defending the Constitution.[15]

President of the Constitutional Court Justice Yong-Joon Kim has observed that from a political standpoint, it can be said that the Constitutional Court has accelerated the process of democratization in Korea by doing away with the authoritarian system of past regimes**.** The legal system, which had been outside the control of the constitution, is now being reformed one step at a time. In particular, the unconstitutionality of many laws passed by the legislating bodies under past regimes has been confirmed.[16]

Ginsburg insisted the Constitutional Court of the Sixth Republic is held in high esteem as one of the most effective institutions in South Korea. It scored the highest as a government body in terms of public influence and trust.[17]

The justices were credited for being prudent in their decisions and were seen able to preserve neutrality and legitimacy in conducting trials. Ginsburg added some structural factors had led to an occasional open conflict between the Constitutional Court and other more partisan government institutions. He also asserted the Court can hold the act constitutional or unconstitutional in whole or part, but also can find challenged acts to be limitedly conforming (constitutional if interpreted in a particular way), constitutional but applied in an unconstitutional fashion, or nonconforming‘, in which case the National Assembly may be required to amend the act in the near future. These various gradations of declarations of constitutionality and unconstitutionality place the Court in dialogue with the political actors in the legislative branches and executive agencies, and give it some flexibility in terms of how to handle politically sensitive issues.[18]

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[14] **The Constitutional Court of Korea, The First Ten Years of the Korean Constitutional Court** [online], 2001. Available from : http://english.ccourt.go.kr/

[15] Jong Guen Lee, “Standards of Review Under the Equal Protection Clause in the US and Korean Constitution,” (a dissertation, University of Wisconsin Law School, 2004).

[16] “Constitutional Adjudication and the Korean Experience,” Harvard Asia Quarterly Volume IV, No. 1. (Winter 2000): 43.

[17] Shin Chang-un and JoongAng Ilbo, “Poll: Giant Firms Most Influential,” JoongAng Daily (July 3, 2007). Also Available from : http://joongangdaily.joins.com/article/view.asp?aid=2877553.

[18] Tom Ginsburg, **The Constitutional Court and the Judicialization of Korean Politics; New Courts in Asia** [online], 2010. Available from : http://works.bepress.com/tom_ginsburg/30.

The history of the development of South Korea's Constitutional Court, however, is not complete without the mention of the US's influence in the building of the country's legal system.

The US, apart from being the provider of tremendous economic and security assistance, has influenced South Korea's law and the system of educating its legal personnel. On October 4, 2004, the Korean Judicial Reform Committee ("KJRC") promulgated a plan to revise Korea's national bar examination system and implement an "American-style" graduate level professional law school system.[19] Also, Korea's first proposal advocating the adoption of an "American-style", three-year graduate law school system emerged in 1995 as part of the Report of the Presidential Commission on the Promotion of Globalization.[20]

U.S. law and legal practice have not only influenced Korean law, but they have also left their mark on international transactions related to Korean businesses. The methodologies and ideals of U.S. legal education are transferable while South Korea is thought to benefit from a larger pool of independent thinking attorneys with diverse backgrounds who are able to tackle issues and problems in an increasingly globalized and sophisticated world.[21]

As for the Constitutional Court, although the current system of the south Korean Constitutional Court does not reflect the American influence, the history of the Court has spelled out what amounted to an American borrowed concept of having the Supreme Court rule on constitutionality of the laws. The case in point is the Supreme Court of the Third Republic (1961-1972) being given the expanded jurisdiction to include judicial review. As the drafting of the constitutional amendment got underway at the time, proposals influenced by the U.S. system were introduced to restore the power of judicial review to the Korean Supreme Court.

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[19] Hoyoon Nam, "U.S.-Style Law School System in Korea: Mistake or Accomplishment," 28 Fordham Int'l L. J. 879 (2005): 883-84.

[20] Tom Ginsburg, "Transforming Legal Education in Japan and Korea," 22 Penn. St. Int'l L. Rev. (2004): 433, 434.

[21] Matthew J. Wilson, **U.S. Legal Education Methods and Ideals: Application to the Japanese and Korean Systems** [online], 2010. Available from: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1492166.

4.3 Formation of the Constitutional Court

Formation of South Korea's Constitutional Court pertains only to the aspect of the appointment of the justices and the justices' composition. The portion of this research does not extend beyond that limit.

The formation is the metaphorically the first line of political exposure of the Constitutional Court. It is tightly intertwined with the concept of judicial independence which, according to the article published by the United States Institute of Peace, is a central goal of most legal systems, and systems of appointment are seen as a crucial mechanism to achieve this goal.[22] While there is near-universal consensus on the importance of judicial independence as a matter of theory, legal systems utilize a wide range of selection mechanisms in practice, often reflecting slightly different conceptions of independence. The diversity of systems of judicial selection suggests that there is no consensus on the best manner to guarantee independence.

One reason for the diversity is that judicial appointment systems also implicate other values that may be in some tension with the ideal of judicial independence. For example, appointments must also ensure judicial accountability, the idea that the judiciary maintains some level of responsiveness to society. A related concern is the representativeness of the judiciary. In recent years, there has been concern in several societies about the composition of the judiciary on ethnic and gender lines. The underlying concern is that the judiciary should loosely mirror, to a certain degree, the diversity of the society in which it operates. Otherwise justice will be viewed as perpetuating dominance of one group over another. Several countries have revised their systems of appointing judges in recent years in order to ensure more diversity on the bench. It is helpful to begin by considering the concept of judicial independence. Independence can be defined in a number of different ways, each with its own implications for systems of judicial appointment.[23]

The judicial appointment systems include:

1. independence of judges from the other branches of government or politicians;

2. independence from political ideology or public pressure more broadly defined (including ethnic or sectarian loyalties); and

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[22] United States Institute of Peace. Available from: http://www.usip.org/files/Judicial-Appointments-EN.pdf, 2009.

[23] Ibid

3. independence of the individual judge from superiors in the judicial hierarchy, so that a judge can decide each case on his or her own best view of what the law requires.

The researcher has found most relevant to the subject of the study the USIP's outline of the four basic systems of judicial appointments in most countries including South Korea. The description of such systems, most notably one specific to the South Korean context, expanded below bolsters the argument of the researcher concerning the '3:3:3 configuration' which is previously elaborated in sub-section 3.3.3 (Analysis of the composition of the Thailand's Constitutional Court justices relative to the interaction with the political interests).

Systems of judicial appointments come in four basic configurations:

1. appointment by political institutions;
2. appointment by the judiciary itself;*
3. appointment by a judicial council (which may include non-judge members);*
4. selection through an electoral system.*[24]

Different countries use different systems which best suit them. A common configuration for countries in the civil law tradition, which utilizes a bureaucratic model of the judiciary, is some version of appointment by a judicial council for lower level judges, with a more political process being used for the Supreme or Constitutional Court. The US system uses election for some state judges but not at the Federal level. Internal variation is therefore possible.

The USIP article explores the body with the actual power or discretion to select judges. It explains the reality in many countries where the head of state appoints judges in highly procedural and nominal process. However, the actual selection is carried out by another institution, such as the legislature, executive or the judiciary itself. Thailand stands out as an example of the system in which a judge is appointed by the King, but only after the candidate has passed a judicial exam run by the courts, and served a one year term of apprenticeship. This type of system can be considered

[24] United States Institute of Peace. Available from: http://www.usip.org/files/Judicial-Appointments-EN.pdf.

one in which the judiciary plays the primary role, notwithstanding *formal* appointment by the King.[25]

For the sake of relevance and space, the researcher has focused on the appointment by political institutions, which befits the case of the South Korean Constitutional Court. The following is the USIP's analytical insight into the system of appointment by political institutions.

With the appointment by political institutions, there is a wide range of different models for political appointment mechanisms. Appointments to constitutional or supreme courts typically involve either a "representative" mechanism or a "cooperative" model. Other systems allow a single institution, either parliament or executive, to make appointments.

A representative system is one in which each of several political institutions will select a certain percentage of the court. For example, in many Eastern European countries, Italy and in South Korea, the Constitutional Court is formed by 1/3 of the members being appointed by the president, 1/3 by the legislature, and 1/3 by the Supreme Court. (One variant has 1/3 appointed by each of two houses of the legislature and 1/3 by the chief executive.) Representative systems are designed to ensure a mix of different types of professional and political backgrounds on the court, and to prevent any one institution from dominating. Since only one-third of the membership is appointed by any one body, each can be assured that it will be *unable* to dictate outcomes if each judge acts as a pure agent. However, it is also possible that judges will be seen as the agents of those who appointed them. For example, justices appointed by the parliament might favor the parliament in disputes with the executive. This system focuses on the collective nature of the court to ensure independence and accountability.

In a cooperative system, two or more institutions must cooperate to appoint members of the court. Supreme or Constitutional Court Justices in the US, Brazil and Russia, for example, must be nominated by the president and approved by a house of the legislature by a majority vote. Multiple institutions function somewhat like a supermajority, and help to ensure that judges must have broad support (institutional or political) before appointment. This system probably leads to more moderate judges, less likely to act as agents of those who appoint them, because they must have a supermajority of support. The cooperative system, however, risks deadlock, since appointment requires the agreement of different institutions to go forward. It is

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[25] Ibid.

possible that in circumstances of political conflict, appointments would not be made at all, and vacancies would persist.

In some systems, a single political institution dominates. The German Constitutional Court is effectively appointed by the parliament, with each house of the legislature appointing an equal number of members to the Constitutional Court. The German system uses supermajority requirements, so that a 2/3 vote is required. This has led to a norm of reciprocity that has established *de facto* permanent seats on the Constitutional Court held by the major parties. Each of the two largest parties has an equal number of seats. The norm produces a stable court that reflects broad political preferences without over- representing either of the two main factions. This version of the legislative-centered system is stable because the party system is stable: if the parties were less stable or if there were numerous small parties rather than a few large ones, the supermajority requirement might make appointments more difficult or even impossible.

Finally, in some cases (formerly the United Kingdom and several other common law jurisdictions) judges are appointed by a government minister (typically the Minister of Justice or Attorney General). Even though by convention the judges appointed under this system were not seen as explicitly political, there was a good deal of criticism in the United Kingdom that the judiciary did not adequately reflect the diversity of the society, with women and minorities highly under-represented. This system was recently replaced with a variant on a judicial council.

In short, political appointment systems lean toward accountability rather than independence. They have the virtue of ensuring political support for the judges, but risk politicization. Finally, the degree of representativeness of the judiciary in these models seems to increase with the number of political actors involved in the appointment process. Where one institution has the exclusive role (as the executive formally had in the United Kingdom) diversity suffers. Supermajority requirements and cooperative systems involving multiple institutions, on the other hand, tend to lead toward moderation and more diversity, but can take longer to make appointments or result in gridlock.

4.3.1 Composition and representation of the justices

The line-up and compositional structure of the South Korea's Constitutional Court justices can be highly corresponding to the form of government. In a way, the Court justices are factionalized into the three foundation powers of South Korea's semi-presidential system where the '3:3:3 configuration' is readily inherent and operational.

This chapter examines the composition of the justices and the government system as well as the linkage between them which could assume, at least in theory, to keep the Constitutional Court's political exposure in check.

The Constitutional Court of South Korea is composed of nine justices qualified to be court judges and appointed by the President. Three justices are appointed from persons selected by the National Assembly, and three appointed from persons nominated by the Chief Justice of the Supreme Court. The justices exercise jurisdiction in judgments as a member of either the full bench or panel. As members of Council of Justices, they exercise voting rights on important matters concerning the administration of the Constitutional Court.

The Council of Justices is the final decision making body regarding the administration of the constitutional court. The Council of Justices is composed of the nine justices, with the President as the chairman. The Council requires attendance of at least seven justices, and the majority of vote to decide. The President may put a matter to a vote. The matters decided by the Council of Justices include the establishment and revision of the Constitutional Court Act, filing a recommendation for legislations concerning the Constitutional Court to the National Assembly, budget request, expenditure of reserve funds and settlement of accounts, appointment and dismissal of the Secretary General, Deputy Secretary General, research officers, and public officials of Grade III and higher. The Council also decides on other matters brought up by the President of the Constitutional Court.

In the event that a justice's term expires or there is a seat vacant during the term of office, a replacement is to be appointed within 30 days of the expiry of the term or of the occurrence of the vacancy. If the term of a justice elected by the National Assembly expires or the vacancy occurs during adjournment or recess of the National Assembly, the National Assembly is to elect a replacement within 30 days of the commencement of the next session.

The justices serve a renewable six-year term. The justices retire at the age of 65 and the President of the Constitutional Court at 70. The justices may not be removed from office unless they are impeached or sentenced to imprisonment.

One of the merits of South Korean Constitutional Court's compositional 3:3:3 configuration is in the absence of a politically-susceptible, multi-tiered process of selecting the justices, which formed the central part of the selection of Thailand's Constitutional Court justices. By comparison, candidates of the South Korea's Constitutional Court justices are drawn from within their own blocs. If there is to be any 'political' meddling, it is restricted to the selection within the bloc and does not spill over across the blocs. This is because, as the USIP article mentioned, the configuration is designed so that no one institution or agent can dominate the other

two branches represented in the Constitutional Court. It also achieves a panel of justices with a variety of professional and political backgrounds. The one-third proportion offers on mathematical terms an assurance that one bloc will be unable to dictate the adjudicatory outcomes of the entire Constitutional Court justice panel. However, a possibility cannot be discounted of the justices working under the shadow of their 'agents' who appointed them. Justices appointed by the National Assembly could tilt their consideration and opinions of a case toward the lawmakers in a petition. The USIP article has made a realistic conclusion that the system focuses on the collective nature of the South Korea's Constitutional Court to ensure independence and accountability.

While in Thailand's Constitutional Court's selection of justice and the justice composition under the 1997 Constitution had been blamed in part for inhibiting the Court's performance to maintain a proper balance of political exposure, the South Korea's Constitutional Court may not all be completely insulated from political influence. Such influence could come from within and the 3:3:3 configuration may not be fail-safe against it considering the simple and visible fact that both the President and the National Assembly are political agents who, if colluded, would clinch a combined six out of nine votes in the Constitutional Court. It has been established by this research earlier on that the 3:3:3 configuration is unworkable in Thailand's Constitutional Court because the legislative and the executive powers are one and the same pool of politicians and that the one-third composition, if adopted, could see justices appointed by the legislature and the executive banding together on one side, leaving the judiciary-appointed justices in isolation. That would certain to create a formula for jeopardy for the Court's independence and respectability. So, is there any potentially damning risk of such lop-sidedness taking hold of the South Korea's Constitutional Court? It becomes imperative that before an answer could be found, the type of government and the political organization of South Korea must be studied.

South Korea is a democratic republic with a political system which is a blended presidential system encompassing some of the characteristics of a parliamentary system, setting it apart from a pure presidential system. For example, the system has a Prime Minister whose appointment is approved by the National Assembly. Also, the executive branch, including the President, often introduces bills and forwards them to the National Assembly.

The President, who is leader of the Government's executive branch and head of State, is selected through secret ballots in direct national elections. The President serves a single five-year term which is non-renewable. The single-term restriction prevents any individual from holding the reins of government power for a protracted period of time. In the event of presidential disability, the Presidency devolves to the Prime

Minister, followed by members of the State Council in a succession order predetermined by law. In the event of a vacancy in the office of the Presidency, a successor must be elected within 60 days. The President's duties include safeguarding the independence of the Republic of Korea and defending the Constitution, pursuing peaceful reunification of the homeland, and executing the laws of the Republic as ratified by the National Assembly.

The President's powers include exercising a veto over National Assembly bills (which can be overridden by a two-thirds majority of the National Assembly), attending and addressing National Assembly meetings, submitting a referendum directly to the public, declaring war and concluding peace, serving as commander-in-chief of the armed forces, declaring martial law, promulgating law, submitting government budgets to the National Assembly, and granting amnesties, commutations, and awards. Many of the Presidential powers are held in check by the National Assembly.

The President may not be charged with criminal offences during his term of office except for insurrection or treason. The President appoints and dismisses public officials, including the Prime Minister and members of the State Council, who hold office and his directive and may be removed by his order.

Under the Republic of Korea's Presidential system, the President performs his executive functions through the State Council, which is made up of 15 to 30 members and presided over by the President. The State Council is a constitutionally established deliberative body, composed of the leaders of various government departments as determined by the President, through which the President delegates his authority.

The Prime Minister is appointed by the President and approved by a majority of the National Assembly. As the principal executive assistant to the President, and a member of the State Council, the Prime Minister supervises the administrative ministries and manages the Office for Government Policy Coordination under the direction of the President. The Prime Minister also has the power to deliberate major national policies within the State Council, and to attend meetings of the National Assembly.

Members of the State Council are appointed by the President upon the recommendation of the Prime Minister and are subject to a hearing at the National Assembly in review of their qualifications. They lead and supervise their administrative ministries, deliberate major state affairs, and act on behalf of the President. Members of the State Council attend any meetings of the National Assembly, report on the State administration or deliver opinions and answer questions. Members of the State Council are collectively and individually responsible to the President only.

In addition to the State Council, the President has several agencies under his direct control to formulate and carry out national policies: the Board of Audit and Inspection, the National Intelligence Service, and the Korea Communications Commission. The heads of these organizations are appointed by the President, but the presidential appointment of the Chairman of the Board of Audit and Inspection is subject to the approval of the National Assembly. The Board of Audit and Inspection is independent from the President in carrying out its duties.

Legislative power is vested in the National Assembly that is a unicameral legislature, currently composed of 299 members (constitutional provision sets a minimum of 200 members) who serve four-year terms. Only nationals of the Republic of Korea who are eligible to vote and are 25 years of age or older may be elected to the National Assembly.

Out of the 299 members, 245 are elected by popular vote from local constituencies, while the remaining 54 members obtain their seats through a proportional representation system in which seats are allocated to each political party that has gained more than 3 per cent of all valid votes or more than five seats in the local constituency election. The system is aimed at reflecting the voices of people from different walks of life while enhancing the expertise of the Assembly.

The National Assembly is vested with a number of functions under the Constitution, foremost of which is making laws. Other functions of the Assembly include approval of the national budget, matters related to foreign policy, declaration of war, the stationing of Korean troops abroad or of foreign forces within the country, inspection or investigation of specific matters regarding state affairs and impeachment.

A member of the National Assembly is not held responsible outside the Assembly for any opinions expressed or votes cast in the legislative chamber. During a session of the Assembly, no Assembly member may be arrested or detained without consent of the Assembly except in the case of a flagrant criminal act.

There are two types of legislative sessions: regular and special sessions. The regular session is convened once a year from September through December, and special sessions may be convened upon the request of the President or by one-fourth or more of the members of the Assembly. The period of a regular session is limited to 100 days and that of a special session to 30 days.

The judiciary of the Republic of Korea consists of the Supreme Court, High Courts, District Courts, Patent Court, Family Courts, Administrative and Local Courts, and the Military Court.

The Supreme Court is the highest judicial tribunal. It hears appeals on cases rendered by lower courts. The Chief Justice of the Supreme Court is appointed by the President

with the consent of the National Assembly. Other Justices are appointed by the President upon the recommendation of the Chief Justice. The term of office for the Chief Justice is six years and is not renewable. The Chief Justice must retire from office at the age of 70. The term for other Justices is six years. Though they may be re-appointed in accordance with legal provisions, they must retire from office when they reach the age of 65.

The Military Court has jurisdiction over criminal cases only. It tries all crimes which are recognized in the civilian society, as well as crimes under the Military Criminal Law and Military Secret Protection Law.

4.3.2 Analysis of the composition of the justices relative to the interaction with the political interests.

The above summary of the functions of the President and the National Assembly shows a designation of the separation of the three branches of powers. Since no central selection committee was formed to nominate the nine justices, there is no insidious interference or contact between the Court and a common set of political interests across the board as can be inferred from the Thailand's 1997 Constitutional Court. The nomination criteria were unique to each bloc of justices. That said, any intra-political influence in the composition of the justices is concentrated in the two bloc; those of the President and the National Assembly. It is because these two blocs are the political vehicles of the national administration. The judiciary is inarguably a non-political outlet of the Constitutional Court justices, which is, therefore, outside the boundary of this research.

It may be superficial and dangerously simplistic to harbor a conclusion that the President and the National Assembly are independent of one another. Can we be so assured of such independence that one can feel the unquestionable ease in believing that their appointees in the two blocs function in parallel? After all, the two blocs are politically natured, the President belonging to a political party with seats in the National Assembly. What assurance is there that the appointees from the two powers, between the President and the National Assembly, will not collude and then distort the virtue of the 3:3:3 configuration as feared of the Thailand's Constitutional Court's justice composition? More precisely, is there any kind of attestable indication the two branches practically do not retain any attachment that could dispel the doubt of a collusion that subdues the 3:3:3 composition?

A working paper by Hae-Won Jun and Simon Hix has shed tremendous light on the conflict in South Korea's National Assembly which in its conclusion has captured the essence of the relationship between the parties in the Assembly and their leaders. While the research's epic-central content is not the examination of the link between

the President and the National Assembly, its finding has suggested a separation between them.

The paper investigates the nature of policy conflict in the Korean National Assembly via a spatial analysis of its members' voting. It discovers the main dimensions of conflict and look at the impact of institutions and members' preferences on their reveal spatial locations. The paper also asserts that Korean politics is both similar and unique compared to most developed democracies. Like other democracies, voting in the National Assembly is policy based, yet constrained by strong parties and the strategic context of a presidential system. In democracies, the political battles inside parliaments should reflect the major conflicts in society. A conflict between elites is essential for providing voters with a choice in elections. Alternatively, in the proportional vision of democracy, the parliament is a microcosm of society, where the interests of all the main social groups are articulated inside the parliament. While in a majoritarian vision, the battle between the winning majority and the losing minority reflects the two sides of the main societal cleavage.[26] Policy conflict in parliaments also has positive value. Battles over the policy agenda provide voters with information about policy options. Conflicts signal the policies that opposition elites are likely to pursue if they are given the chance to govern, and provide information about whether party leaders are likely to deliver on their manifesto promises. Policy conflicts also promote policy innovation, as they force party leaders to develop new ideas to gain advantage over their political rivals. As a result of all these factors, conflicts between elites enable citizens to form their opinions on often highly-complex policy issues and which parties are closest to their policy preferences. Hence, representative government in a country is not working as well as it could or should if *either* there is absolute consensus inside the parliament on all key issues, *or* if the conflicts inside the chamber are not driven by policy concerns but by institutional interests or personality politics.[27]

Jun and Hix went further to get across their point that in many parliamentary systems, extremist members of the governing party often vote with opposition against the government. As a result, the first dimension in many parliamentary systems represents a government-opposition split rather than a continuous left-right ideological dimension. Also, a wide range of institutions 'constrain' the ability of parliamentarians to vote sincerely. Such institutions include, *inter alia* whether the legislative agenda is set by the parliament or the government, whether the parliament

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[26]Arend Lijphart, Democracies (New Haven: Yale University Press, 1984); and G. Bingham Powell, Elections as Instruments of Democracy (New Haven: Yale University Press, 2000).

[27] Hae-Won Jun and Simon Hix, "The Meaning of Conflict in the Korean National Assembly," (a working paper, Department of Government, London School of Economics and Political Science, 2006).

operates an open or closed amendment rule, whether the electoral system is party-centered or candidate-centered, whether candidates are selected centrally or locally, and whether political parties can enforce party discipline. Where parties are concerned, their ability to enforce 'cohesion' is in part endogenous to the institutions of government. In parliamentary systems, parties in government can use vote-of-confidence motions to force their supports to 'back them or sack them.[28] In presidential systems, even if the party controlling the executive has a majority in the legislature, the survival of the executive is not threatened by a lack of party discipline in the legislature.[29] Nevertheless, even in the South Korean presidential system, there are internal incentives for parliamentary parties to form and discipline their members.[30] Parliamentarians could cooperate spontaneously, but this would mean that coalitions would have to be negotiated vote by vote.

The South Korean National Assembly is an interesting chamber for looking at the effects of institutions on parliamentary voting. First, as in most other democratic parliaments, parties in the National Assembly try to discipline their members. Second, the National Assembly has a mixed-member electoral system, where some members are elected in single-member districts and others are elected by party-list proportional representation in one single national constituency. These rules provide different incentives for candidates in the electoral and parliamentary arenas, in that the candidates who are elected in the single-member districts have a greater incentive to appeal directly to voters than the candidates who are elected on the 'closed' party lists. Third, both the president and the legislature can initiate legislation, and the budget is proposed by the president. Whereas during the 16th National Assembly, the president and the National Assembly were controlled by opposing parties, in the 17th National Assembly, the president's party had a majority in the National Assembly. As a result, agenda-setting and veto-powers were split between two opposing parties in the 16th National Assembly, but these powers were united in a single party in the 17th National Assembly.

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[28] John Huber, "The Vote of Confidence in Parliamentary Democracies," American Political Science Review 90 (1996): 269-82./and Daniel Diermeier and Timothy J. Feddersen, "Cohesion in Legislatures and the Vote of Confidence Procedure," American Political Science Review 92 (1998): 611-21.

[29] Matthew S. Shugart and John M. Carey, Presidents and Assemblies: Constitutional Design and Electoral Systems (Cambridge: Cambridge University Press, 1992). Pp.s 29-30.

[30] David W. Rohde, Parties and Leaders in the Postreform House (Chicago: University of Chicago Press, 1991). /and Gary W. Cox and Mathew D. McCubbins, Legislative Leviathan (Berkeley: University of California Press, 1993).

In the working paper, Jun and Hix discuss the party-political make-up of the 16th and 17th National Assemblies which are the foundation issues of their research. The 16th National Assembly was dominated by the conservatives, with the Grand National Party (GNP), the largest party, and the conservative parties controlling a majority of seats. However, the conservatives could not dominate the National Assembly in this period because the progressives controlled the presidency. Until 2003, the presidency was held by Kim Dae-Jung from the Millennium Democratic Party (MNDP). Then, in the December 2002 presidential election, the MNDP candidate, Roh Moo-Hyun, narrowly defeated the GNP candidate, Lee Hoi-Chang. There were also some dramatic party splits and re-alignments in the 16th National Assembly. Most notably, frustrated with the MNDP and eager to create a legacy independently of Kim Dae-Jung, President Roh established the Uri Party (UP), with initially 47 of the then 115 MNDP members. A few of the remaining MNDP members joined the GNP and almost half of the members of the other main conservative party, the LDU, joined the GNP. The GNP then held 53 percent of the seats in the KNA, with most of the remaining members divided between the two progressive parties, the old MNDP and the new UP. The 16th National Assembly was also marred by bitter battles between the GNP in the National Assembly and President Roh. The GNP was vehemently opposed to Roh's policies towards North Korea and his ambitious public spending plans. They also accused his administration of incompetence and illegally interfering in the election campaign for the April 2004 National Assembly elections (the Korean constitution forbids the president from campaigning in National Assembly elections). On 12 March 2004, the National Assembly voted by 193 to 2 to impeach President Roh, and he stepped aside. Roh's UP members had blocked the speaker's podium for several days to prevent a vote. However, the UP members eventually decided to abstain in the vote, as they realized that the impeachment crisis was beginning to play into their hands, as public support for Roh rose sharply during the showdown. The UP then swept the 17th National Assembly elections in April 2004, winning 152 (51 percent) of the 299 seats, and the Constitutional Court overturned the impeachment decision in May 2004. Roh returned power, and this time he controlled a majority in the 17th National Assembly.

What the study has presented is that political parties in the National Assembly are relatively highly disciplined, despite the fact that South Korea is a presidential system, where party leaders have few powers to enforce party discipline. This is also despite a high level of heterogeneity in the preferences of the members of the main political parties. Competition between the main political parties is a stronger determinant of voting behavior than either the personal preferences of the individual National Assembly members or whether National Assembly members are elected in single-member districts or on party lists. The shift from divided government in the 16th

National Assembly to unified government in the 17th National Assembly sharpened the partisan structure of voting in the National Assembly.[31]

The Jun and Hix research is built primarily upon the academic arguments surrounding the voting behavior of assemblymen. But its scientific method of proving its study objectives has also been able to conclusively establish that the parliamentary voting, which is one of the legislators' foremost responsibilities, can be typical of the South Korea's presidential system in which party leaders have little power to enforce party discipline. What can be inferred is that the President as a party member is not bound by any duty to his or her party in the National Assembly although he is empowered to influence the legislative process by the use of or the threat of using the power to veto the legislative bills.[32] In fact, the President is constitutionally barred from acting partially toward his own party, something the late President Roh Moo-hyn (in office from 2003–2008) was accused of having done which led to his impeachment. A President is both ethically and legally prohibited from engagements which favor the political parties in the National Assembly, providing the two branches with reasons to stay apart and keep themselves independent of one another. The system also allows the opposition to lead the National Assembly which could pit it against the president. So, it does not necessarily follow that the President and whose party may control a majority support in National Assembly could 'collaborate' and that such notion could imperil the intra-independence of the 3:3:3 configuration of the South Korea's Constitutional Court to the extent of distorting justice composition and turning it into a '3+3:3' relationship.

The President and the National Assembly maintain systemic checks of each other which are designed to prevent them from improper interaction. The President can veto a piece of legislation while the legislature reserves the authority to run checks over any possible abuse of presidential prerogatives including the passage of a motion for impeaching the President, approval of emergency orders, concurrence in the declaration of war, and consensus to a general amnesty.[33] A concrete example of the legislature-executive separation is in the divide of policy issues between the President and the National Assembly. In 2009, a constitutional revision was proposed by floor leader. (Floor leaders have the duty to whip up support among the rank and file in order to maintain party discipline. At every stage of decision making, members follow the instructions of their floor leaders. In South Korea's presidential system of

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[31] Jun and Hix, The Meaning of Conflict in the Korean National Assembly.

[32] "South Korea," in World Encyclopedia of Parliaments and Legislatures Volume 1, George Thomas Kurian (ed.) (London: Fitzroy Dearborn Publishers, 1998), pp. 96.

[33] World Encyclopedia of Parliaments and Legislatures, pp. 97.

government, an underlying principle is checks and balances between the executive and the legislative branches. Information obtained from World Encyclopedia of Parliaments and Legislatures, Research Committee of Legislative Specialists, International Political Science Association and Commonwealth Parliamentary Association.)

Ahn Sang-soo of the governing Grand National Party (GNP) wanted to do away with an 'imperial presidency' which, if persisted, would prevail at the risk of unproductive politics.[34]

According to Korea Times, Ahn proposed three options for the proposed amendment - the U.S.-style four-year, two-term presidency; the Japanese-style Cabinet form of government; or the "decentralized" presidential system whereby the prime minister takes charge of domestic state affairs. The first option to replace the current five-year single term presidency had been widely discussed among all political parties. Discussion has also been heated on whether or not the president should share power with the prime minister with the former taking care of diplomacy and international affairs. The GNP said change is necessary as the Constitution was last amended two decades ago and the current single-term presidency tends to make the President an early lame duck. Ahn suggested the creation of a parliamentary panel to change the basic law, and noted that the majority of people were in favor of a constitutional amendment. Under the current Constitution, the President and the National Assembly are prone to clash over every issue perpetuating a winner-takes-all situation.[35] Such tendency to 'clash' serves as a credible sign that the two branches do have the probability on occasions to stand on opposing sides and that they are not wrapped in a relationship which entices them to conspire for vested interests.

The troubled ties between the President and the Assembly had been exemplified by the impeachment on March 12, 2004 of the embattled President Roh Moo-hyun. He faced the unprecedented impeachment notion lodged by the opposition-dominated National Assembly. (The impeachment of President Roh will be detailed in the next sub-chapter). The presidential impeachment indicates more than a failure of political leadership; a reflection is telling of deeper structural problems in South Korea's democracy. It offers a dramatic demonstration of the problems of divided government. A government with both a popularly elected president and a popularly elected government require close cooperation between the two branches of power in order to prevent a stalemate in conducting the business of government. Roh's desire in

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[34] Lee Tae-hoon and Ahn Sang-soo were quoted in article "President Sets Deadline for Constitutional Revision," Korea Times (May 5, 2009).

[35] Ibid.

taking a 'principled stance' on the political reform agenda, reinforced by his high-risk style of confrontational politics instead of conflict resolution through give-and-take, has also contributed to the political impasse between the executive and the legislative branches.[36]

In sum, from the voting behavioral research, the checks and balances regulating the roles of the President and the National Assembly, the constitutional amendment issue, to the political implication of the Roh impeachment, an invisible line has emerged dividing the President from the National Assembly. This is an affirmation that the two powers are not induced to have common ground that would render them inclined to collude. Without the inclination to collude, it may not be far-fetched to conclude that the 3:3:3 configuration which typifies the structure of the South Korea's Constitutional Court justices is in itself a system of blocking any of the three representative elements from dominating one another. With the justice composition being conducive to internal independence, the political influence from outside is likely to be difficult to penetrate and corrupt the inner workings of the Constitutional Court.

4.4 Actions of the Constitutional Court of South Korea

The actions of the Constitutional Court of South Korea hinge on the functions or jurisdictions of the Court. The composition installs the people who proceed with the adjudication and it is the action which clarifies how the trial proceeds and what verdict is delivered. It is bold fact that the actions of the Constitutional Court are governed by the Court's functions which, as far as the South Korea's Constitutional Court is concerned, differ in some crucial points from those of Thailand's Constitutional Court. In this sense, since the functions determine the actions of the Court, the understanding is that there will be varying levels of political influence experienced by the two Courts. In this chapter, the Court's jurisdictions will be elaborated and select major cases which passed through the Constitutional Court will be cited in support of the assumption that the diversity of cases is the yardstick that measures the degree of political exposure of the Court.

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[36] Young Whan Kihl, "Advancing Democracy for South Korea: Beyond Electoral Politics and Presidential Impeachment," International Journal of Korean Studies Volume IX, No.1 (Fall/Winter 2005): 53.

4.4.1 Functions of the Constitutional Court of South Korea

The competence of South Korea's Constitutional Court is tied to its jurisdictions which are as follows.[37]

1. Constitutionality of statutes;

2. Impeachment;

3. Dissolution of political parties;

4. Competence disputes between state agencies and local governments; and

5. Constitutional complaint.

(1) Constitutionality of statutes

The Court will adjudicate the issue related to the constitutionality of statutes when an ordinary court requests to the Court to review the unconstitutionality of the statutes pending in a case. On the other hand, if an ordinary court rejects the motion from the party in the pending case for requesting the aforesaid review of statutes to the Constitutional Court, the party may file a constitutional complaint against the decision of the ordinary court rejecting the motion. In which case, the Constitutional Court is to review the unconstitutionality of the statutes in the same procedure mentioned above.

(2) Impeachment

The Constitutional Court has exclusive jurisdiction over the impeachments of high-ranking public officials including the President, the Prime Minister, Justices and judges. When a request of impeachment is upheld by the National Assembly, the Constitutional Court is to decide whether the accused person should be removed from his/her office or not.

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[37] Joung-Joon Mok, **The Effects of the Constitutional Adjudications on Politics in Korea** [online], 2010. Available from : http://www.mkab.hu/index.php?id=young-joon_mok__member_of_the_constitutional_court_of_south_korea. Joung-Joon Mok serves as member of the Constitutional Court of South Korea.

(3) Dissolution of political parties

The Constitutional Court is to adjudicate on dissolution of the political parties upon the Executive's request on the ground that the objectives and activities of the party are contrary to the basic order of democracy.

(4) Competence disputes

When any controversy on the existence or the scope of competence arises between state agencies, between a state agency and a local government, and between the local governments, the Constitutional Court is empowered to decide, on the request of any party, whether or not the other party infringes on its competence granted by the Constitution and the laws.

5) Constitutional complaint

Anyone whose fundamental right as guaranteed by the Constitution has been violated by an exercise or non-exercise of governmental power or directly by the legislative act, may file a constitutional complaint with the Constitutional Court. The judgments of ordinary courts, however, cannot be the subject of the complaint, unless they are contrary to the precedents of the Constitutional Court. The decision of the Constitutional Court to uphold the complaint binds all the state agencies, including the Legislative and the Executive, and the local governments.

Mok's concise but comprehensive expansion of the jurisdictions above is also discussed in a political perspective. He contends that during the 21 years of the Constitutional Court's inception the Court has dealt with a lot of cases which were deeply related to sensitive political issues such as the impeachment of the President. The adjudications of the Constitutional Court have had tremendous impact on the political front. It was noted that at times the political groups were not satisfied with the Court's decisions which interrupted or frustrated their political plans. But by performing their duties in respect of the Constitution, the justices who handle cases freely on their own conscience without regard to any political concern, the Court has earned more public trust from the people than any other state organ. The Court's rulings are binding on the state agencies and the executive, legislative, and judiciary branches, as well as the local governments of Korea and the agencies obey the guideline stipulated by the Court. In more ways than one, the Constitutional Court has

played a role in safeguarding the constitutional values, controlling political powers, protecting fundamental rights of people, as well as preserving political peace by absorbing political conflicts into the field of constitutional adjudication. Mok noted that the politicians' goals are not always in accordance with constitutional values and so it might be inevitable that there may be the conflicts between politics and legal justices. The Constitutional Court has the responsibility to lead politics and harmonize it with constitutional justices by applying judicial standard to political area.[38] It is not too far off the mark to try to rationalize the inevitable closeness between political interests and the Constitutional Court of South Korea since the Court is the final arbiter of majority political conflicts.[39] The Court has helped transform Korea's military-bureaucratic government of the past into a constitutional democracy mostly by striking down the individual statutes left over from the previous regime.[40]

Ginsburg also insists the political forces have the penchant to change the rules of the game to their advantage and the Constitutional Court balances out the political forces while becoming an instrument of transformation. The South Korea's Constitutional Court and the political process are inter-connected as the Court is frequently called on to adjudicate issues related to elections and political conflicts, many of which involve schemes designed to restrict involvement in the political process and, as Ginsburg observes, the Court has consistently sided with political minorities in this regard. An example cited was the minority party challenged the Local Election Law of 1990, which required large registration fees from candidates. This provision served as a strong disincentive for minority parties to field candidates. The Court found that the provision in question violated the constitutional guarantee of equality, as it prevented sincere but resource-poor candidates from participating, (One-Person One-Vote Case, 13-2 KCCR 77; 2000Hun-Ma91; 2000Hun-Ma112; 2000Hun-Ma134 (Consolidated) July 19, 2001.) preceded by the four-digit filing year (two-digit for requests filed until December 31, 1999) and followed by a serial number given in the order of filing in that year. (The case number consists of a case code ("Hun-Ka" for request for constitutionality review of statutes; "Hun-Na" for impeachment proceedings; "Hun-Da" for political party dissolution cases; "Hun-Ra" for competence disputes; "Hun-Ma" for Article 68 Section 1 constitutional complaints; "Hun-Ba" for Article 68 Section 2 constitutional complaints; "Hun-Sa" for various motions.)

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[38] Joung-Joon Mok, The Effects of the Constitutional Adjudications on Politics in Korea.

[39] Tom Ginsburg, The Constitutional Court and the Judicialization of Korean Politics.

[40] Tom Ginsburg, Judicial Review in New Democracies (New York: Cambridge University Press, 2003), Pp.s 226-246.

Until 1990, when an internal by law on case codes was adopted, Article 68 Section 2 constitutional complaints were also classified as Hun-Ma cases (there are sixteen such cases).[41]

Another example was the invalidation in 1989 of Article 33 of the National Assembly Members Election Act, which required a higher deposit from independent candidates than from those affiliated with a party. The Court had ruled that the right to vote and to run for office was one of the core democratic freedoms that could not be granted unequally. In 1992, the Court struck provisions, in the same law that provided party-based candidates advantages over independent candidates in campaign appearances and leaflets.[42] The Court found that these provisions limited the Constitution‘s guarantees of equality of opportunity and of the right to hold public office. Consequently, the Constitutional Court rejected a party-based view of democratic governance, facilitating independent participation.[43] In 1995, the Court found several provisions of the National Assembly Elections Law to be nonconforming to the Constitution because of excessively disproportional representation for rural districts compared with urban ones.

The researcher has taken stock of a very important jurisdictional feature of the South Korea’s Constitutional Court which makes it stand out from Thailand’s Constitutional Court of 1997. The two Courts appear to operate more or less with similar functions although the South Korea’s Constitutional Court has a wider reach of jurisdiction due to what is seen as its sweeping ‘open-ended’ power to receive the broadly-termed constitutional complaints. This channel is opened to ‘anyone’ who is a South Korean general public or an ordinary citizen to file such complaint directly with the Constitutional Court to challenge his or her claim of a violation of his or her basic constitutional rights by an exercise or non-exercise of governmental power or by the legislative act. The petition is registered by the affected party in seeking relief. By ‘constitutional complaints’ being defined as a privilege extended to all eligible citizens, the expectation is that a floodgate of complaints has been unleashed where the Constitutional Court must handle complaints of all sorts as long as they qualify as cases of breach of the fundamental, constitutional rights. In contrast, Thailand’s

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[41] **Twenty Years of the Constitutional Court of Korea** [online], February 11, 2010. Available from : http://www.ccourt.go.kr/home/english/organization/organization.jsp .

[42] National Assembly Members Act Case, 92 HonMa 37, 39, 4 KCCR 137 (Mar. 13, 1992).

[43] Tom Ginsburg, The Constitutional Court and the Judicialization of Korean Politics; New Courts in Asia.

Constitutional Court is less opened in terms of the type of complaints it takes up and who are permitted to lodge them. The broad functions mean more variety of cases going through South Korea's Constitutional Court. (The issue is analyzed in the final sub-chapter.)

The petitions from the public are governed by Article 68 of the Constitutional Court Act. Article 68(1) of the Constitutional Court Act allows petitions, after all available legal remedies have been exhausted, by citizens whose rights have been infringed by unconstitutional state action. Most of these cases have involved allegations of abuse of prosecutorial discretion when prosecutors do not indict.[44]

Article 68(1) cases are the mainstay of the docket, in part because decisions of ordinary courts (to whom plaintiffs must turn to exhaust legal remedies) are excluded from the jurisdiction of the Constitutional Court. Article 68(2) allows filings after a party has unsuccessfully sought referral by an ordinary court under Article 41 of the Constitutional Court Act, and leads to a stay in ongoing litigation pending the Constitutional Court judgment.[45]

4.4.2 Segmentation of cases handled by the Court and review of major cases

The Constitutional Court of South Korea has had to endure an immense workload with 18,643 cases filed and of these 17,996 cases were settled as of February 28, 2010.[46] Given the magnitude of the cases submitted for hearing, the Constitutional Court has invented a prior examination bench called the 'Small Bench' or the 'Designated Bench to tackle the huge caseload. Currently in Korea, as in most countries which have Constitutional Courts, the proportion of constitutional complaint cases in comparison to the total number of all cases has been the highest. The Small Bench determines whether a constitutional complaint will be heard by the Full Bench or not. A Small Bench is composed of three justices of the Court and the bench takes charge of prior examinations of a constitutional complaint. In order to determine to

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[44] K. W. Ahn, "The Influence of American Constitutionalism on South Korea," Southern Illinois Law Journal 27 (1997): 114./and J. West and D. K. Yoon, "The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of the Vortex," American Journal of Comparative Law 40 (1992): 101–2.

[45] Tom Ginsburg, The Constitutional Court and the Judicialization of Korean Politics; New Courts in Asia.

[46] Twenty Years of the Constitutional Court of Korea, official website of the Constitutional Court of South Korea. See Table 5.

dismiss it, the Small Bench needs a unanimous vote of all the participating justices. A decision accepting a constitutional complaint by the Full Bench of the Constitutional Court binds all organs of the state and local governments

The Constitutional Court's classification of the cases actually received over the span of more than 20 years is relative to the Court's functions laid out by the Constitution. The researcher has been able to locate such portion of the information dating back to the Court's establishment. The significance of the statistical data concerning the caseload of the Constitution Court needs to be deciphered in order to comprehend the political exposure of the Court. Table 5 shows the distribution of cases according to the five jurisdictions – the constitutionality of law, impeachment, a dissolution of a political party, competence dispute and constitutional complaint. The striking aspect about the caseload is that 96% of the cases filed fall into the constitutional complaint category. Within the constitutional complaint category, 15,512 of the 17,916 cases or 86% of them are pertaining to the alleged violation of Section 1 of Article 68 of the Constitutional Court Act and the remainder to the alleged infringement of Section 2 of the same Article.

(1) The written request for constitutional complaint pursuant to Article 68, Section 1 of the Act shall include the following:

1. Indication of the complainant and counsel.

2. Respondent (Provided, that this does not apply to constitutional complaint on statutes).

3. Infringed rights.

4. Exercise or non-exercise of state power by which the infringement of the rights was caused.

5. Grounds for the request.

6. The fact that other relief procedures provided by other laws have been exhausted.

7. The fact that the time limit for filing has been observed.

(2) The written request for constitutional complaint pursuant to Article 68, Section 2 of the Act shall include the following:

1. Indication of the complainant and counsel.

2. Indication of the underlying case and its parties.

3. The statute or statutory provisions that are interpreted as unconstitutional.

4. Reasons why it is interpreted as unconstitutional.

5. Reasons why the constitutionality of the statute or the statutory provisions is a condition

precedent for the adjudication of the underlying case.

4. The fact that the time limit for filing has been observed.

Table 5 : shows the distribution of cases to the five jurisdictions

Type		Total	Constitu-tionality of law*1)	Impeac-hment	Dissolution of a Political Party	Compe-tence Dispute	**Constitutional Complaint**		
							S u b total	**© 6 8 I**	**© 6 8 II**
Filed		18643	660	1		66	17916	15512	2404
Settled		17996	586	1		51	17358	15197	2161
Dismissed by Small Benches		7914					7914	7282	632
Decided by Full Bench	Unconstitutional*2	348	138				210	61	149
	Unconformable to Constitution*3	129	47				82	30	52
	Unconstitutional, in certain context4*4	52	15				37	11	26
	Unconstitutional, in certain context*5	28	7				21		21
	Constitutional	1296	243				1053	4	1049
	Annulled*6	331				11	320	320	
	Rejected	5889		1		12	5876	5876	

Type		Total	Constitu-tionality of law*1)	Impeac-hment	Dissolution of a Political Party	Compe-tence Dispute	Constitutional Complaint		
	Dismissed	1409	30			19	1360	1183	177
	Miscellaneous	5					5	4	1
Withdrawn		595	106			9	480	426	54
Pending		647	74			15	558	315	243

*1. This type of "Constitutionality of Law" case refers to the constitutionality of statutes cases brought by ordinary court, i.e., any court other than the constitutional court.

*2. "Unconstitutional" : Used in Constitutionality of Laws cases.

*3. "Unconformable to Constitution" This conclusion means the Court acknowledges a law's unconstitutionality but merely requests the National Assembly to revise it by a certain period while having the law remain effective until that time.

*4. "Unconstitutional, in certain context" In cases challenging the constitutionality of a law, the Court prohibits a particular way of interpretation of a law as unconstitutional, while having other interpretations remain constitutional.

*5. "Constitutional, in certain context" This means that a law is constitutional if it is interpreted according to the designated way. This is the converse of "Unconstitutional, in certain context". Both are regarded as decisions of "partially unconstitutional".

*6. "Annulled" This conclusion is used when the Court accepts a Constitutional Complaint which does not include a constitutionality of law issue.

The majority of cases are deemed non-political because of the phrase in Section 1 which states that the constitutional complaint is filed due to 'the exercise or non-exercise of state power by which the infringement of the rights was caused'. The inference drawn from such statement is the petitioners or complainants are the persons who are not political power holders but the damaged parties who suffer as a result of the exercise or the non-exercise of the state power, which is the action reserved for office holders. While it may be true that some of the petitioners themselves may be

political office holders who file the cases in this category because they feel their rights as ordinary citizens are infringed upon, these are not considered the Constitutional Court's direct interaction with political interests. This, therefore, suggests that most of the cases handled by the Constitutional Court have been non-political. However, it should be noted that there may be far fewer political cases by comparison but the ramifications on society and the administration of the country generated by those cases could be much more profound than the non-political ones.

The researcher's observation that the political cases make up a rather small slice of the entire caseload is supported by the Constitutional Court of South Korea's choice of 'major cases' posted on the Court's official website.
(See http://www.ccourt.go.kr/home/english/organization/organization.jsp.)

A collection of major cases is listed in jumbled order and they are given different designations under (1) political cases; (2) rights of freedom; (3) procedural rights; (4) property rights; (5) competence dispute: (6) social rights; and (7) legislative omission. In all, there are 135 cases on the list and of these 24 are political cases or 17% of the caseload. Procedural rights disputes account for the highest number of cases at 22%. The cases deliberated by the Constitutional Court are classified more generally by the Court into five groups:

1 Decisions on Freedom of Press and other Intellectual Freedoms

2 Decisions Concerning Politics and Elections

3 Cases Concerning Economic and Property Rights and Taxation

4 Cases Concerning Social Relations such as Family, Industrial Relations

5 Cases Concerning Procedural Rights and Criminal Justice

It is clear the Court has separated political cases from the others, further making the diversity of cases all the more distinguishable. To illustrate the point, the researcher has selected some landmark cases which are starkly outstanding with regard to the completely different basis of the disputes. The selected cases show that the Constitutional Court of South Korea has the final say on issues ranging from those that are highly social, revolving around moral rectitude, to the impeachment of a sitting president which could impede national leadership, causing a political stir. This offers credence to the argument that the Korean politics is being judicialized since

important social and political questions are increasingly determined in the courtroom rather than the more conventional political institutions.[47]

The researcher has selected three major cases to represent the diverse distribution of cases which spread across various adjudicatory categories. The cases – the impeachment of President Roh Moo-hyun in 2004, the adultery dispute, and the ban on clearing hangover advertisement – are wide-ranging, dealing with the politics of the highest office, the legal point of view surrounding the socially controversial issue of adultery and the interpretation of the entitlement to the basic rights to public health. Details of the cases are obtained in whole from the Constitutional Court's website.

I Presidential Impeachment

[16-1 KCCR 609, 2004 Hun-Na 1, May 14, 2004]

A. Background of the Case

On March. 12, 2004, the National Assembly of Korea passed a resolution to impeach President Roh Moo-hyun(of the 195 Assembly members who voted, 193 voted in favor and 2 against). The president's powers were suspended according to the Constitution as of the date that the resolution was delivered to the President's office. Korean politics and society became engulfed in a heated controversy as a result of the impeachment resolution, and its news made headlines all over the world. The Korean public was radically divided into supporters of the impeachment and its opponents. One side severely attacked it as a "coup d'etat" masquerading as an exercise of parliamentary powers. The other side defended it as a legitimate exercise of the powers of the parliament, and a much needed brake on the "imperial presidency." Innumerable perspectives, both for and against the impeachment, were expressed in the media in the form of editorials and columns, while heated debates were carried out in cyberspace among "netizens." Legal professionals and scholars continued to voice competing viewpoints on the legal issues surrounding the impeachment.

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[47] Tom Ginsburg, The Constitutional Court and the Judicialization of Korean Politics; New Courts in Asia.

The controversy became even more feverish as large-scale candlelight vigils were held for several days demanding the withdrawal of the impeachment resolution. As the Constitutional Court was still deliberating on the impeachment case, the general election for choosing the members of the Seventeenth-Term National Assembly was held on April 15, 2004. As a result of the election, the Uri Open Party, composed of supporters of President Roh, won a majority of the seats in the legislature, and the Grand National Party and the New Millennium Democratic Party, which had spearheaded the impeachment resolution, suffered a crushing defeat.

In order to start adjudicating the impeachment claim, the Constitutional Court had to first resolve one by one many procedural issues. Starting with the issue of whether the petitioner is the National Assembly or the Chair of the Standing Committee on Legislation and Judicial Affairs, such issues included whether the president as the "respondent" is obligated to be present during the oral pleadings; whether changes can be made to the grounds for indictment by adding new charges or withdrawing certain parts; if so what are the procedures and requirements for making changes; what is the procedure and method for inspecting the evidence whether the impeachment resolution can be withdrawn; how to deal with witnesses who fail to appear; whether minority opinions may be published.

Substantively, the most crucial issue was how the language in Article 65 Section 1 of the Constitution, "violated the Constitution and other statutes in the performance of official duties," should be interpreted. Other substantive issues included: when does the performance of official duties start and end; should a distinction be made between the president and other officials in analyzing the impeachment grounds; should a requirement of "grave" violation be read into the constitution; if not, what are the criteria for setting a reasonable limit to impeachment grounds; can unfaithful performance of official duties or violation of the duty to uphold the constitution be grounds for impeachment as claimed by the petitioners, etc. After a number of oral pleadings, the Constitutional Court on May 14, 2004 rendered its final decision of rejecting the petition for impeachment adjudication, which was televised live throughout the nation. From a global perspective, the case marked a truly significant development in that a judicial organ was called upon to make the final determination in an impeachment proceeding against the president.

B. Summary of the Decision

There were basically three grounds for the impeachment. The first was the charge of having disturbed and disparaged the authority of the nation's laws. This category included the acts of showing support for a particular political party on the eve of a general election and showing contempt for constitutional agencies. The second was the charge of corruption stemming from abuse of power, which included receipt of illegal political contributions and the president's implication in the misconducts of his close associates. The third was the charge of having caused a breakdown of the state administration due to unfaithful performance of presidential duties.

Regarding the respondent's arguments that the impeachment itself was unlawful because of procedural irregularities, the Constitutional Court declined to pass judgment on them as all the alleged irregularities lay within the scope of the National Assembly's power to regulate its own procedures which should respected by other constitutional agencies. These included the arguments that the investigation and evaluation at the National Assembly had been insufficient that the opening time for the plenary session had been changed arbitrarily that the opportunity for questioning and deliberating on the issue had been omitted; that each ground for impeachment had not been voted on separately; that due process had been violated because the respondent had not been given a chance to submit his own views. Rejecting all of these arguments, the Court recognized the impeachment resolution as lawfully passed and proceeded to judge the merits of the case. Next, of the numerous counts of impeachment, the Court acknowledged only three as involving violations of the Constitution or other statutes. First, the president's expression of support for a particular political party at a press conference prior to a general election was a violation of the public officials' duty to maintain neutrality in relation to elections as stipulated in Article 9 of Public Election Act.

Secondly, the president's statement, made after he had been warned by the National Election Commission of his violation of the Public Election At, which denigrated the current election law as "a relic of a by-gone era of government-manipulated elections" and which publicly questioned the legitimacy of statutes amounted to a violation of the constitutionally mandated presidential duty to uphold and protect the Constitution.

Thirdly, although he never went through with it, the president's mere proposal of a national vote of confidence, which is disallowed by the Constitution, is by itself in contravention of Article 72 of the Constitution, and therefore a violation of his duty to uphold and protect the Constitution.

The Constitutional Court, however, stated that the clause "when the petition for impeachment adjudication has merit" as specified in Article 53 Section 1 of the Constitutional Court Act should be interpreted to include not every single instance of violations of the Constitution or statutes, but rather only those "grave" violations which is sufficient to justify the dismissal of the public official from office. In the case of a president, a grave violation that can justify his dismissal from office must be limited to "cases where maintaining the office of the presidency can no longer be allowed from the perspective of protecting the Constitution or where the president has betrayed the trust of the people and therefore is no longer qualified to administer the affairs of the state."

The Court then concluded that the violations of the president found in this case do not amount to such grave violations. The petition for impeachment was thus rejected.

In rendering this decision, the Court went through a heated debate on whether minority opinions could be published, because at the time the Constitutional Court Act did not specifically mention impeachment proceedings as a category of cases for which publication of minority opinions was possible. In the end, the Court decided not to include minority opinions in its decision, but it did state that a different opinion had been voiced for announcing the individual opinions of the Justices.

C. Aftermath of the Case

In the constitutional history of Korea, resolutions for impeachment have been proposed nine times, four of which were voted on at the plenary session of the National Assembly, and five of which were discarded. Of these, this was the only case in which the impeachment resolution was actually passed by the National Assembly, and a final decision rendered by an adjudicatory agency.

After the Court decided this case, many probed into the socio-political causes and motives behind the impeachment crisis, as well as its historical and political significance in the overall context of democracy constitutional order. Legal academics offered various analyses and assessment of the decision.

As the Court relied on the Constitutional Court Act to reach its decision not to reveal the individual votes of the Justices, a debate ensued among politicians and scholars as to the wisdom of announcing minority opinions in impeachment decisions. On July 29, 2005, the National Assembly amended Article 36 Section 3 of the Constitutional

Court Act to provide “Any Justice who participates in adjudication shall express his or her opinion on the written decision.” As a result, for every decision rendered by the Court, including impeachment decisions, any Justice who holds a view different from the majority opinion is now obligated to state his or her opinion expressly.

II Adultery Case

[2 KCCR 306, 89 Hun-Ma 82, Sept. 10, 1990]

A. Background of the Case

In this case, the Constitutional Court upheld the Criminal Act provision on adultery, which has long been subject to a dispute on a contention that the state’s attempt to restrict individuals’ sexual life has been excessive and is against the principle of equality. The complainant was charged with adultery and sentenced to one year in prison at the first trial and to eight months by the appellate court. Upon appeal of the conviction to the Supreme Court, he requested constitutional review of Article 241 of the Criminal Act outlawing adultery. When the Supreme Court denied the motion, the complainant filed a constitutional complaint with the Constitutional Court.

B. Summary of the Decision

Explaining the relationship between the right to sexual self-determination and the crime of adultery, the Constitutional Court upheld Article 241 of the Criminal Act on adultery in the following majority opinion of six Justices:

On matters of sexual self-determination, Article 10 of the Constitution on the right of personality and the right to pursue happiness presumes the individual right to self-determination, which includes right to sexual self-determination, namely, right to decide whether and with whom to enter into sexual relationships. The legal prohibition of adultery by Article 241 of the Criminal Act does limit the right of individuals to sexual self-determination. However, protection for the right to sexual self-determination is not absolute. The right has an inherent limit where it concerns

the rights of others, public morality, social ethics and public welfare in the context of national and social community life.

Article 241 of the Criminal Act is aimed at maintaining sexual morality and the monogamous conjugal system, protecting sexual fidelity between husbands and wives, guaranteeing a family life, and deterring social evils arising from adultery. To that end, it bans adultery by a married person and subjects the transgressors to a punishment of up to two years of incarceration. They constitute a necessary minimum regulation on sexual self-determination and do not violate the rule against excessive restriction and the rule against violation of the essence of basic constitutional rights. The provision, when applied, produced different results depending on the degree of patience and retaliatory intent on the part of the victim and the economic ability of the wrongdoer. Its application is admittedly prone to be favorable to the economically more resourceful male than female. However, those phenomena result from the fact that, for the purpose of protecting reputation and privacy, adultery was made a crime prosecutable upon a complaint.

These phenomena are inevitably general to all crimes prosecutable upon complaints under the Criminal Act and are not unique to adultery. The provision does not violate the principle of equality. The adultery provision is not in violation of Article 36 Section 1 of the Constitution, which provides that "marriage and family life should be based on and maintained by individual dignity and gender equality, and the state shall guarantee this institution." Rather, the provision is consistent with the aforementioned constitutional duty of the state to guarantee marriage and family life on the basis of individual dignity and gender equality.

Two dissenting Justices, Han Byung-chae and Lee Shi-yoon expressed the opinion that criminal punishment for adultery itself was constitutional, but the adultery provision provides incarceration as the only form of punishment without allowing more moderate forms of penalty, and is therefore unconstitutional. Justice Kim Yang-kyun also dissented, stating that the adultery prohibition was unconstitutional as a violation of right to withhold private matter from disclosure or of the principle against excessive restriction. He further went on to say that even if the prohibition itself is constitutional the penalty provision allows only a sentence of imprisonment of up to two years, violating the rule against excessive restriction.

C. Aftermath of the Case

In the decision, the Constitutional Court, while holding that the right to pursue happiness guaranteed by Article 10 of the Constitution includes sexual self-determination, ruled that sexual self-determination could be limited for maintaining and securing marriage and family life. The decision ignited a series of debates on where to draw the line between ethics and law, and on the limit of state's intrusion upon personal lives. During a revision process of the Criminal Act after the decision was held, there was a discussion about modifying the adultery provision to include fine as punishment in addition to imprisonment but it was not reflected in the legislation. Later, the Constitutional Court had occasion to rule again on the constitutionality of the crime of adultery. On March 11, 1993, it ruled that the above decision shall be maintained (90 Hun-Ka 70). Then, on October 25, 2001, it stated through a majority opinion that punishment of adultery is constitutional.

However, the case is more social than it is political. The legislature has been urged to reconsider a related law in light of the following factors. First, the international trend is to abolish the crime as it is essentially a matter of morality between private individuals. Second, legal intervention in matters of individual privacy and sexuality is not necessarily proper. Third, this crime tends to be abused as a means for threatening others or for extracting more divorce settlement payment. Fourth, charges are often dropped during investigation or trial, which necessarily cause a weakening of the state's penal powers. Fifth, from a criminal policy perspective, maintaining it as a crime as has almost no preventive effect and contributes little to the re-socialization of criminals. Sixth, there is widespread skepticism regarding its role in the protection of the family or of women. The Court pointed out that an earnest discussion based on a thorough examination of the changes in the legal values of the people is urgently needed to gauge the desirability of its abolishment (2000 Hun-Ba 60).

A high-profile adultery case which shook South Korea reached the Constitutional Court in 2008. Ok So-ri, one of the best-known actresses, failed to secure the Constitutional Court's decision to overturn the law which criminalizes adultery. She was sentenced by the lower Court to eights months in jail, suspended for two years.

She had petitioned the Constitutional Court, saying the law was an infringement of human rights and amounted to revenge.[48]

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[48] BBC News, **Korean Adultery Actress Sentenced Published** [online], December 17, 2008. Available from : http://news.bbc.co.uk/1/hi/7786985.stm.

Ok was sued by her former husband, Park Chul. She admitted having an affair with a well-known pop singer, and blamed it on a loveless marriage to Mr Park. The 40-year-old actress sought to have the adultery ban ruled an unconstitutional invasion of privacy, and in a petition to the Constitutional Court, her lawyers claimed the law had "degenerated into a means of revenge by the spouse, rather than a means of saving a marriage".

But the adultery ban was upheld, and judges in Seoul have now given her an eight-month suspended sentence, and her lover a six-month suspended term. South Korea is one of the few remaining non-Muslim countries where adultery remains a criminal offence.[49]

Why the anti-adultery law was fiercely contentious could be justified by the fact that it was contested in the Constitutional Court four times in 1990, 1993, 2001, and again in 2008. The Constitutional Court upheld the law every time a petition against it was raised. In the BBC report, it was observed that the judges' support for the law has gradually declined. The report went on that the law's repeal would require the 'supermajority' backing of six of the nine justices. In the Ok case, five justices backed the law's repeal. Also, supporters of the law insisted adultery undermines the social order, and say the law protects women's rights in marriage. The opponents, however, argued the law is often abused as a means of revenge or securing greater financial divorce settlements; and say in reality those who suffer under the law are most often women.[50]

The Constitutional Court took the side of the supporters, reasoning the practice of adultery was a threat to social order and that the law should be allowed to remain enforced.

III Ban on Clearing Hangover Advertisement Case

(12-1 KCCR 404, 99Hun-Ma143, March 30, 2000)

In this case, the Constitutional Court invalidated the Food Labeling Standard that

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[49] Ibid.

[50] BBC News, Korean Adultery Actress Sentenced Published.

banned the use of such phrases as "before or after drinking" or "clearing hangover" on food items or the containers or packaging thereof.

A. Background of the Case

According to the Food Sanitation Act, the Minister of Health and Welfare is authorized to set and put on public notice a standard of marking food items for the purpose of sale if the Minister finds it necessary for public health. Food items subject to the noticed standard cannot be sold unless they comply with that labeling standard.

The public health authorities found that the recently popular hangover-fighting drinks are encouraging drinking, and thereby does harm to the public health. Therefore, they added to the labeling standard a provision that 'bans such content as before-or-after-drinking, hangover-clearing, or other phrases inducing drinking.'

The complainants obtained a patent titled hangover-clearing organic tea and its manufacturing method' but could not place on the tea manufactured through the patented process a patent mark 'hangover-clearing organic tea.' They filed this constitutional com- plaint, arguing that the promulgated standard violates their basic rights.

B. Summary of the Decision

The Constitutional Court decided on a unanimous vote that the instant public notice infringes on the complainants' basic rights as follows:

The legislative purpose of the instant statutory provision is to ban those markings that encourage drinking and protect public health from drinking-related threats.

However, whether and how much to drink is determined by one's liking of drinking, economic conditions, moods, and other circum- stances. People consume hangover-clearing food items when they obtain an opportunity to drink, out of expectation that the items will dilute or clear hangover. The markings such as the instant cannot be said to contribute to drinking. A ban on such markings, if applied against effective anti-hangover agents, blocks consumers' access to accurate information and genuine goods. This deprives them of an opportunity to be cleared of hangover. Whether a product can be marked as hangover-clearing directly and profoundly affects the sales of the affected food items. Entrepreneurs and inventors, if they cannot mark their products as such, will lose any incentive to invent or develop them.

Misplaced over-reliance on the hangover-clearing products may lead to such side-effects as over-drinking. Whether to rely on such products should be left to the sound judgment and responsibility of consumers, and not be intermeddled in by the State. The State may enact a policy measure requiring all hangover-clearing products to have a warning that exorbitant drinking in reliance on the products will hurt health, but a flat ban on all the markings referring to hangover-clearing definitely constitutes excessive restriction.

Therefore, this regulation does not constitute the minimum restriction, does not uphold the balance of interests, and therefore does not satisfy the elements of a legitimate legislation that restricts basic rights. It infringes the right to manufacture and sell hangover- clearing products and the right of expression through advertisement in violation of the rule against excessive restriction.

Furthermore, the constitutional mandate to protect inventors' rights through statutes and the legislative purpose of the Patent Act establish a patent holder's right to sell his or her products as the essential content of a patent right. If one cannot mark his or her product using the name or content of the patented invention, that product will not benefit from the explanatory power and the selling and attraction point of that patent. The patented product will not fully realize its role and effects. Then, a right to exercise a patent as an occupation will be made hollow. Since such restriction violates the constitutional principle of excessive restriction, it also violates the constitutional guarantee to the complainants of their property right: patent.

Now that the three example cases have been disclosed, the performance of the Constitutional Court of South Korea is put to the 4-stage Pinnell test which analyzes the Court’s action which correlates to its authority and legitimacy.

The Stage 1 is when outside interests seek the Court’s judicial review. But as more cases are heard, the interests may decide to approach the Constitutional Courts based on how they think the Courts will be sympathetic to their side.

The Court has reported an increasing workload (see Table 5) as a result of greater respectability it gained over the years from deliberating important cases. The Constitutional Court has secured a firm footing for being a judicial entity whose ability to preserve impartiality has been apparent, a credit mentioned by Ginsburg. If the Stage 1 assumption is anything to go by, it implies that the political interests calculate the amount of sympathy the justices will have for them and submit the petition when the opportunity is most advantageous to them. This does not appear to

be the case with the South Korea's Constitutional Court which retains, at least technically, an internally-independent panel of justices, as explained earlier. With the independence, the review of the cases is assured to be conformable to the framework of the law, leaving little room for arbitrary deliberation guided by sympathy.

Stage 2 proposes that the degree of controversy of cases admitted correlates to the legitimate authority of the Constitutional Courts. Political environment surrounding the cases are considered. If early in the tenure of the Courts, some cases are taken up for deliberation because they are more controversial than others, it could mean the Courts are not afraid their verdicts will be disrespected.

In the first year of operation in September 1988, the Court received in its docket 13 requests for constitutional review of statutes and 27 constitutional complaints. In 1989, the Court received 142 requests for constitutional review of statutes (many against the Social Protection Act and the Private School Act) and 283 constitutional complaints. In 1990, there were 71 requests for constitutional review of statutes, 59 Article 68 (2) challenges, and 230 constitutional complaints. By the end of August 1998, the Court totaled 351 in requests for constitutional review of statutes, 3,247 in constitutional complaints, 586 in Article 68 (2) challenges, and 9 competence disputes. The figures confirm the rise in the amount of cases including those that were controversial. However, the Constitutional Court of South Korea, as are Constitutional Courts in most other countries, either accepts or throws out the petition submitted to them on the account of admissibility, not controversy. It could be more logical that some cases are taken up because they are more urgent or have greater significance on national interest. Nonetheless, some of the cases the Constitutional Court of South Korea adjudicated over the years, such as the adultery cases and the circumvented petition to relocate the nation's capital, had whipped up controversy.

Stage 3 supposes that if there are credible indications during the hearings that a Court shows an inclination toward politically powerful individuals, it could signal the Court's lack of legitimate authority. Stage 4 affirms the verdicts of particular cases will naturally determine if the Court will lose or gain its legitimate authority. The outcome of cases will spell out a decrease or an increase of the Court's authority in the long run, which could gradually alter its behavior. It may exude more confidence in hearing and conducting cases.

In Stage 3, the Constitutional Court is seen to come often on the side of the minority although in the president impeachment case, it overturned the impeachment handed by the National Assembly. A president is a politically powerful individual but it cannot be said with any certainty that the Court's rejection of the impeachment was

testament to its lack of legitimate authority since the verdict passed was in line with the popular stand for President Roh who, during the weeks following the impeachment decision, witnessed a surge in his popularity rating which had translated into an overwhelming support he needed to win the subsequent National Assembly election.[51] The verdict was thought to have helped the Constitutional Court score on its legitimate authority in the eyes of many people, especially the Roh supporters. Therefore, if the outcome of the rejected impeachment case was any measure of the ebb and flow of the Constitutional Court's legitimacy, it would definitely bode favorably for the Court.

4.4.3 Analysis of the level of diversity of cases relative to the interaction with the political interests

The three cases deliver a glaring representation of the diversity of cases which cut across virtually all of the key sectors, be they economic, social and political. The cases are the manifestation of the jurisdictions which have been shown to have a broad focus, spelling out a distributive segmentation. Political interests are one of many groups of petitioners and so they do not possess the exclusive and total channel to contact the Constitutional Court. In fact, the statistics show the political cases are far outnumbered by the constitutional complaints, many of which involve disputes of social sensitivities. The Constitutional Court of South Korea is entrusted with a great deal of 'horizontal power,' that is the power to adjudicate cases of so many different natures that the Court's attention is not fixed on a particular area of jurisdiction but is divided among its functions.

The more diverse the cases and segmentation, the more likelihood there is for the Court to have the opportunity to interact with the non-political interests. This assumption responds to the demand of the jurisdictions of the Constitutional Court which do not demonstrate a concentration on any specific cluster of functions; constitutionality of statutes, impeachment, dissolution of political parties, competence disputes between the state agencies and the local governments, and constitutional complaints. The political functions, most notably the impeachment and the political party dissolution, are rarely, if at all, invoked. The Constitutional Court has devoted much of its time and resources hearing constitutional complaint cases which command the lion's share of the caseload. Looking closely at the caseload record, the constitutional complaints filed under Article 68 (1) paves the way for ordinary citizens to approach the Court to redress what they reckon is the infringement of

[51] Young-Sung Kwon, Hunbubhak Wonlon [Constitutional Law: A Textbook] (1994), pp. 1144-46.

rights from the exercise or non-exercise of state power. The cases able to be filed as well as the petitioners are both diverse. This, coupled with the petition process being opened to practically anyone, suggests that the Constitutional Court of South Korea has greater chance of interacting with the non-political interests judging from its extensive preoccupations with the constitutional complaints. There had been only one political case the Court handled which concerned the highest political post holder. The case in question is the impeachment of President Roh while there was zero number of cases of political party dissolution.

The complaints sorted out by the Constitutional Court were indeed a bursting variety; the political cases, the rights of freedom, the procedural rights, the property rights, the competence dispute, the social rights, and the legislative omission. It is observed that due to such diversity, the roles of the South Korea's Constitutional Court had geared it toward arbitrating the people on the ground and not just the powers-that-be or the policy makers. What matters is not so much how many political or non-political cases have gone through the Court as how segmented the cases are which the Court actually has deliberated. The segmentation permits various petitioners to seek recourse and so the cases are not concentrated on only the disputes involving the political interests. That balances out the interaction between the Court and the political interests through its admission of diverse cases.

On that note, it may be constructive to make a comparison of petition segmentation with Thailand's Constitutional Court. The finding of this research is that the cases registered with the Thailand's Constitutional Court are far less diverse than those which passed through South Korea's Constitutional Court. The Thailand's Constitutional Court cases are also far fewer but, as mentioned earlier, the numbers justify many assumptions but they alone do not explain the whole story. The Court's interaction with the political interest is relatively greater because the cases are less diverse. The petitions that had been tallied up and it was found that many of them had been classified under political cases; resolutions of political parties issued in conflict with the status and performance of the Members of the House of Representatives; termination of the MP status; termination of ministership; political post holders' failure to declare assets and liabilities; dissolution of political parties; decision on orders issued by political party registrar; and rejection of request to set up a political party of the 1997 Political Party Act. These cases could not be lumped together and easily categorized as political cases because they come under different sections of the laws. Different laws prescribe different punishments and offenders are thus treated in different adjudicatory categories. The petitioning process is also restrictive to ordinary people who must petition the Constitutional Court through Court of Justice, the Ombudsmen and the Speaker of either House or Parliament President. The citizens

are not among the 15 categories of ‘direct petitioners’ who are mostly political post holders. Fifteen groups of direct petitioners may come across as diverse but the fact that they left out the citizens made it an ‘exclusive club’ of the holders of power and opened the Constitutional Court to the full force of political exposure. In matters which decide the fate of institutional politics such as the dissolution of political parties including the major ones, Thailand’s Constitutional Court had deliberated numerous dissolution cases and issued verdicts. This further intensifies the court room contact between the Court and the political interests.

The diversity of the cases is the barometer of the political interaction between the Constitutional Court and the political interests and from the research finding it can be concluded that the Constitutional Court of South Korea is less exposed to political interests than Thailand’s Constitutional Court.

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Chapter V

Functions of the Constitutional Court of Thailand and South Korea as determined by the democratization and constitutionalism in the two countries

This chapter is aimed at expanding on the functions of the Constitutional Courts of Thailand and South Korea. The expansion is to supplement the understanding gained from the discussion in previous chapters of the Courts' formations and actions. The researcher has found that even the functions are not impervious to political influence.

If the formation of the Constitutional Court marked its birth and its action were the arms, the functions or the jurisdictions would be the brain that dictates the Court what to do. The concept of a reformist Constitutional Court is new to both countries. The Constitutional Court established under Thailand's 1997 Constitution and that which came into inception under the 1987 Constitution of South Korea have been the result of the people's quest for democratic progression. It can be said that the Constitutional Courts are the keepers of the supreme rule and their functions are shaped by the social movements which fought passionately against the politicians in power who are defiant in retaining the status quo and because of the democratic forces, the Constitutions were attainable.

It is undeniable that the Constitutional Courts were the product of a chain of events originating from the consolidated mass movements pushing for practical substance of constitutional democracy which is expected to liberate society from autocracy and corruption. The Constitutions then reset the rule of the game in a bid to achieve the democratizational ends. The demands for an all-out reform were incorporated into the constitutions and the evidence of that incorporation was in the creation or the re-modeling of independent agencies and institutions. The functions of those agencies are laid down to steer the agencies within the border of their jurisdictions.

The Constitutional Courts are the independent agencies and their functions have found conformity to the public demands that they help nurture democratic growth and improve accountability in the national administration. For a clearer picture of why the Courts' functions are not above political sphere, it is requisite to go back to the

designing stage of the charter when the functions of the constitutional courts were defined.

What fascinates the researcher is the irony that the people on the ground who moved in bloody uprisings to have the Constitution they expected would revolutionize the helpless state of politics had very little or no chance at all in drafting the document. Political elements were not prepared to sit back and let the people design the rules for them. Some political observers in Thailand have satirically remarked that the political elements would never allow the people on the streets to have a free hand in deciding the functions of the independent agencies, which would be akin to slipping on a bell-studded collar on the cat that would alert owner to what the pet is doing. No politician would want a stringent rule enacted to keep track and regulate them. It is precisely the reason that in Thailand the drafting of the 1997 Constitution was a grand affair which saw the coming together of 99 members – 76 standing for each province and 23 recognized experts from the fields of law, political science and administration – who were represented by people from various sections of society to stave off the drafting responsibility being centralized.

However, the opinions of drafters had been swayed and influenced when they brainstormed and debated the functions of the Constitutional Court. An analytical support on the subject has been sourced from the research by Yodchai Chutikamo. The constitution drafting process had been the stage where the charter writing opinions from many quarters were laid on the table and put up for discussion amid negotiations and compromises among the constitution drafters. The purpose of the negotiations was to maintain the interests of the political elites who influence the constitutional formation through interaction with the charter drafters. The political elites are Members of Parliaments, Senators and high-ranking civil servants. The opinions influencing the draft contents was made through the media channels as well as the provincial charter writers who are connected with the MPs and Senators via the patronage ties. The MPs and the Senators represent the provincial electorates and the charter drafters are local representatives, many of whom are known to have had contacts on political basis with the MPs and the Senators.

The Yochai research defines the political elites as a clique at the top of the social pyramid. They are educated and have the means, resources, status and prestige and they can use such prowess in dominating the decisions over public policies and lead the public opinions to benefit their vested interests. As for pressure group, the Yodchai research explains that it is a consolidation of individuals in society who collectively push for social and political changes. They are guided by public agenda

which does not necessarily include their own benefits. They are bent on influencing political decisions without the eventual aim to take over the seat of government. Among the pressure group are the private business organizations, the labor groups, pro-democracy networks and media outlets.

During the charter writing, the Constitutional Drafting Assembly had had to thrash out contentious issues that emerged from devising a suitable blueprint of the Constitutional Court. The judiciary, who is an technically grouped by the Yodchai research as a political elite with the conservative mindset, had opposed to the CDA-proposed idea of challenging the institutional authority of the judiciary by entrusting a new Constitutional Court with the powerful functions that would enable it to exercise immense judicial mandate while at the same time enjoying the executive power, for example, to check the constitutionality of the issuance of the emergency decree by the Cabinet ministers and to consider the annual appropriations bill, and the transfer of appropriations bill of the House of Representatives (details are provided in Chapter 3.4.1). The senior judiciary were also concerned that the constitutional demand that the Constitutional Court consist of justices ultimately appointed by the King 'upon the advice of the Senate' would subject the selection of the Constitutional Court justices to the interference of the Senate which is deemed a political branch.

However, despite a number of objections raised by the judiciary to the draft constitution's content related to the Constitutional Court, much of the relevant section of the original draft had remained intact. The CDA had agreed to fix the composition of the Constitutional Court justices by adding political science experts to the line-up. Originally, the CDA had resolved to make law experts the only group of specialist justice. Adding the political scientists would help the Constitutional Court acquire well-rounded knowledge of political science in deliberating cases such as the dissolution of political parties and the expulsion of political party members.[1] The inclusion of political scientists emphasized the CDA's recognition of the importance of the Constitutional Court's function involving the Court's ability to adjudicate political cases.

The researcher believes the functions or the jurisdictions designed by the CDA had been fine-tuned by their exposure to political elites outside the assembly. They wield

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[1] Yodchai Chutikamo, "The Process of Drafting the Thai Constitution in 1997: Power Interactions between Pressure Groups and Political Elites," (a thesis, Master's of Arts in Government, Department of Government, Political Science Faculty, Chulalongkorn University, 1998).

influence which obviously could modify directly or indirectly the powers of Thailand's Constitutional Court under the 1997 Constitution.

As for South Korea, the writing of the current Constitution was the business of the parliament between the government and the opposition parties. The functions of the Constitutional Court were part of the revolutionized political terrain from the democratic transition of 1987 which was ensued by the drafting of the charter. Woon-Tai Kim attributes the heralding of the transition to the rise of the *iikjipdan* or the interest or pressure group which is closely related to modernization, structural differentiation, and political development. Individuals form groups to advance their private or public interests in political processes.[2] Since the 1987 democratic opening, interest groups, both private and public, have phenomenally increased as the government legally assured the freedom of association.[3]

The middle class too have had their hands in pushing for democratic progress. According to Woon-Tai Kim, the middle class in South Korea is often characterized by an ambivalent political orientation. Having served as the mainstay of conservative forces, the middle class once favored the status quo. But since the democratic opening in 1987, the middle class can no longer be considered to be conservative. This is an illustration that a great majority of the middle-class supported and even participated in student protests against the ruling regime which led to the democratized 1987 Constitution. Woon-Tai Kim writes that white-collar elements were instrumental for shifting the middle class attitudes on politics and political demand for improved accountability. The middle class has now become more vigilant and taken a lead in shaping public opinion. The shift in attitude can be attributed in part to the consummate objection of authoritarian rule and in part to the overall culture shift in favor of democratic values while rejecting conservative and authoritarian ones. In the age of democratic opening and consolidation, the middle class is likely to play a more crucial role in crafting South Korea's political landscape.[4]

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[2] Zeigler Harmon, Interest Group in American Society (Englewood Cliffs: Prentice Hall, 1964). Pp.s 30-31.

[3] See Hyong-sop Yoon, "Han'guk Chongchi Kwajong (Political Process in South Korea)," in Han'guk Chongchiron (Korean Politics), Woon-Tai Kim et al., (Seoul: Pakyoungsa, 1989), 2nd ed., pp. 532; Young-rae Kim, Han'gukui Iik Chipdan (Interest Groups in Korea) (Seoul: Dae-wangsa, 1987).

[4] Woon-Tai Kim. Korean Politics: 'Setting and Political Culture,' in Understanding Korean Politics: An Introduction, edited by Soong Hom Kil and Chung-in Moon, State University of New York Press, Albany 2001: pp. 20-24.

Conclusion

The functionality of the Constitutional Court, or of any other Court for that matter, requires the basic compositions; the justices, the authority, and the legal proceedings. How the justices are recruited, what authority or jurisdictions they are vested with and how they deliberate cases form the central questions of the Constitutional Court's existence. The research has arrived at the analytical conclusion that both Thailand's and South Korea's Constitutional Courts are exposed to the inevitability – the political interests.

In more ways than one, the Constitutional Courts of both countries were the fruit of democratic struggles, often driven in blood, for political and social reforms. The hope had been to cleanse the country of the abusive practices of national administration at the hands of corrupt and autocratic governments. Independent agencies had been established to institutionalize reforms through the maintaining of accountability of government. Ideally, the establishment of the independent agencies should be left free of participation or influence from the political power holders to avoid conflict of interest. But this is far from being the case with either Thailand's or South Korea's Constitutional Court. The Constitutions in respective countries, which were the 'supreme rules,' were written in a process that integrates the roles of political players. The result was that the independent agencies that were constitutionally organic, including the Constitutional Court, could not escape political exposure in their formation. The formation is question cuts across the recruitment of justices of the Courts and in the two countries the justice line-ups are different in numbers and compositions and it was found that this is owing to the form of government. The South Korea's Constitutional Court justice composition may be more conducive to ensuring accountability but it looks to be unworkable in the Thai system due to its failure to retain intra-independence among the segments of justices. The Thai Constitutional Court justices under the 1997 Constitution were selected not so much with the panel's intra-independence in mind as the consideration of the justices' individual specializations in political science and law. The choice of the specialist justices, therefore, was made on practical basis; that is those justices are enrolled for their profound knowledge in law and political science which comes in handy in adjudicating legally and politically complex cases. It can be said that there is no perfect composition of Constitutional Court justices which can absolutely insulate the Court from political influence.

South Korean governments in the past have experimented with various models of Constitutional Tribunal before settling with the present compositional versions. The present Korean version, which centers on the‘3:3:3’ compositional configuration (where the legislative, executive and judicial branches each name three Constitutional Court justices) may make its Constitutional Court less prone to political influence compared to the Thai model but it remains a fact that the political interests exert their roles in the formation of the Constitutional Courts in the two countries. Their linkages in that respect cannot be dismissed.

It can be concluded from the research that the formation, functions and actions of the Constitutional Courts of the two countries share commonalities and strike some differences. With the formation, both Constitutional Courts were the creations of the constitution which had resulted from the people’s intense struggle for democratic reform in the countries. The Courts were set up to deal with constitutionality challenges which arise as the countries embraced new developments in a more complex context of constitutionalism. At the same time, the democratic reform demands greater accountability of the political posts holders and so the Constitutional Courts in the two countries are vested with the authority to keep the politicians in check by, for example, exercising the power to impeach the holders of public office.

The formation of the two Courts may be more or less rooted in a similar origin but composition-wise, they are quite far apart. The factor which makes them different has to do with the form of government. The Korean Constitutional Court adopts the 3:3:3 justice line-up; three justices are appointed each by the executive, legislative and judicial branches. There is a clear separation between the three powers under the presidential system of government which enables such justice composition to function with intra-independence needed to deflect any undue influence through interaction with the political interests. The Thai Constitutional Court, on the other hand, operates under the constitutional monarchy system in which the three branches of power may not be completely separate. The political parties holding the parliamentary majority come together and establish the government and so the executive and the legislative branches retain close ties, sometimes so close that they blur the line that separates them. By that logic, if Thailand were to adopt the 3:3:3 configuration, it may not be a functional, independence-conducive formula. That would only compromise, or even endanger, the country’s Constitutional Court’s independence in light of its exposure to political interests. For this reason, Thailand’s Constitutional Court has not adopted the 3:3:3 configuration and focus instead on designing the justice line-up so that there are 15 justices altogether. Of the 15 justices, seven are Supreme and Administrative Court judges and eight political scientist and law experts.

The difference in the formation between Thailand's and South Korea's Constitutional Courts is in the selection of the justices. The eight expert justices of the Thai Constitutional Court, who form the majority justices, were chosen through a more complex and politically-susceptible selection process than that of justices of the Korean Constitutional Court. The expert justices were nominated by a special selection committee made up in part by members of parliament. The selection committee's membership structure which also comprises deans of the universities suggests it may be opened to exertion of political influence and a possible lobbying by politicians. The nominees were short-listed and appointed, with the mandatory endorsement of the King, in the end by the Senate which is a political unit. The Korean Constitutional Court, meanwhile, comes into being without the involvement of any central selection panel. The 3:3:3 composition was the result of a direct selection within the individual branch of power. Each branch picks its own representatives.

Also, the Courts' functions which define its scope and variety of powers are also innovated to keep tab of the political post holders besides providing constitutionality ruling of the laws, among other jurisdictions. However, the research has determined that the South Korea's Constitutional Court has more wide-ranging functions than does Thailand's Constitutional Court by not placing concentration on politics-related jurisdictions. The Korean Constitutional Court's jurisdictions are comparatively more distributive and accessible by the common people who can file petitions directly with it, as opposed to a proxy submission requirement of the Thai Constitutional Court. On the account of easy access, the Korean Constitutional Court has received many cases for hearing over the years and its perceived judicial activism has been the source of credit affirmed by its pro-active stand in tackling some legal disputes, which is a break from tradition of the conservative judiciary.

As the functions are the determinants of the intensity of political exposure of the Constitutional Courts, the jurisdictions with a concentration on political disputes naturally put the Court in close contact with the political interests, as are the case with those of the Thai Constitutional Court. The functions that cater more toward settlement of political cases could also be strongly suggestive of the volatile state of politics of a country since the politics of high office does much to impact the formulation of top-level policies and set the course of national administration. The research has presented statistics of the caseload of both Thai and Korean Constitutional Courts which, by such assumption, confirms the varying amounts of political exposures of the two Courts and how Thailand fares more vulnerably with regard to its ability to sustain political solidity than South Korea.

As for the design of their functions, the Constitutional Courts of both countries are geared toward solving the constitutionality queries. But there is also a crucial duty on their shoulders which draws them close to the political interests. The duty in question pertains to the deliberation of cases stemming from the conduct or official performance of the occupants of public office. The Constitutional Courts of the two countries are similar in terms of having jurisdictions which serve the purposes, among others, of tackling constitutionality questions and deciding on the status of political post holders facing complaints from exercising their power. The Constitutions of the two countries recognize the necessity to keep the laws constitutionally consistent while also making the political post holders accountable for their execution of office.

The differences between the two Courts, as far as their functions or jurisdictions were concerned, were evident in the outline of the jurisdictional powers. The Korean Constitutional Court holds more distributive jurisdictions, meaning the Court is not focused so heavily on matters concerning the political post holders. It has segmented the jurisdictions to cover the political cases (dissolution of political parties and impeachment) in addition to 'constitutional complaints' category of petitions. It is found that the most petitions filed with the Constitutional Court fall into this category. It goes to show that the Court's attention is concentrated on the 'constitutional complaints' on account of the magnitude of cases received and not so much on the political cases, limiting the Court's exposure to political interests. The reason many cases reach the Court under such category is because it allows anyone, whose fundamental right as guaranteed by the Constitution has been violated by an exercise or non-exercise of governmental power or directly by the legislative act, to file a constitutional complaint with the Constitutional Court.

By contrast, Thailand's Constitutional Court's jurisdictions are more focused on political cases as almost half (5 out of 12) categories of cases are reserved for petitions involving political post holders. That gives the Thai Constitutional Court greater chances of being politically exposed compared to the Korean Constitutional Court. The Thai Constitutional Court is also perceived to be less approachable to the general public because no ordinary citizen may file the case directly with it. For that reason, no cases were submitted by ordinary citizens, which could help 'dilute' the intensity of the political exposure of the Court. While the Korean Constitutional Court permits anyone to be a Court petitioner, the Thai Constitutional Court under the 1997 Constitution restricted the petitioning access to 15 parties or groups of parties and only six out of the 15 parties or groups of parties that are petitioners are non-political post holders. The six non-political petitioners are; the Courts of Justice, the Administrative Court and the Military Court; the Constitutional Organizations; the Attorney-General; the National Anti-Corruption Commission; the Ombudsmen; and

the Political Party Registrar. The rest of petitioners are politicians including MPs, senators and executives of political parties and so the Thai Constitutional Court is exposed to political interests right from the process of petitioning which precedes the actual deliberation of the cases.

It is also found that while the Korean Constitutional Court has less politically-connected functions than those of the Thai Constitutional Court, it possesses swifter, more decisive power to 'make or break' the political post holders. Unlike the Thai Constitutional Court, the Korean Constitutional Court is equipped with the power to impeach political post holders although no such impeachment has been ordered so far. The Thai Constitutional Court, although having a broader focus on political post holders in its jurisdictions, is without the authority to impeach political post holders as the impeachment is a jurisdiction reserved by the Senate.

The functions of the Constitutional Courts, however, only work on paper if they are not executed. The execution represents another crucial portion of the research, which is the action of the Constitutional Courts in the two countries. The action of the Courts is the concrete proof of the political exposure of the Courts as it deals with the cases and trials which Constitutional Courts actually took up and deliberated. The functions dictate the actions and so if the functions allow the opportunity for the Courts to be exposed to political interests, the actions provide the evidence of such exposure. This element of the research revolves around the correlation that a greater variety of cases the Constitutional Courts hear, the more distance there is between them and the political interests. In other words, the Courts' attention is diverted to non-political cases which have been filed in significant numbers with the Korean Constitutional Court. The research cited some landmark example cases admitted by the Constitutional Courts of Thailand and South Korea which aptly gauge the degree of political susceptibility of the Courts. The cases – the 'Cobra faction' expulsion, the interpretation of Newin Chidchob's jail term sentencing, and the Thaksin Shinawatra's alleged wealth concealment - cited for the Thai Constitutional Court were dramatic, yet crucially important for the political office holders. These are the tip of the iceberg of many political cases of public office occupants. A sizeable number of political cases were submitted to the Thai Constitutional Court under the 1997 Constitution and so the Court's preoccupation had been with the conducting of the trials involving political interests. Indeed, there were non-political cases but they were few major trials of social significance and the variety of the cases in general was not as broad as that of the Korean Constitutional Court. In some cases, most notably that relating to the Thaksin's alleged concealment may have pushed the Constitutional Court's political exposure over the limit and compromised its independence. It may be argued that being exposed to politics does not equate to a presumptive loss of

independence. But as it occurred in the Thaksin trial, the political exposure of the Court had been so excessive that it raised public doubts, as confirmed by an independent opinion survey, about the Constitutional Court's ability to remain above undue political influence.

Chosen to represent the variety of cases which passed through the Korean Constitutional Court were those which spread across social, commercial and political strata. The adultery case, the President Roh Moo-hyun impeachment, and the ban sought against the clearing hangover advertisement speak of the diversity of cases registered with the Korean Constitutional Court. These cases, except for the impeachment petition, dealt with the matters of everyday life which are closely identifiable with the needs of the people on the street. The Constitutional Court itself has rated the cases as controversial, suggesting they generate perceptibly substantial impact on society. The people's eligibility to petition directly with the Constitutional Court has given the diversity of the cases a boost as the citizens are permitted the chance to approach the Court for legal interpretation or ruling which could resolve their plights. There are many cases which fall into the political segments but these account for a small percentage of the overall caseload. That means that in both diversity and numbers, the political issues do not make up the bulk of the Constitutional Court's admitted cases. It goes to show the focus of the Court is not dominated by the political cases, supporting the research hypothesis that diversity of cases going through the Constitutional Court translates into less exposure of the Court to the political interests and it holds true for the Korean Constitutional Court.

In sum, the actions of the Constitutional Courts of Thailand and South Korea display both similarities and differences. The two Courts' proceedings and authorities are governed by their respective functions. But it is the diversity of cases they handled which set them apart in terms of political exposure. The Korean Constitutional Court has dealt with more varied cases, ranging from those related to the constitutionality of adultery law to the clearing hangover advertisement, which impact everyday life of the common people. The Thai Constitutional Court, on the other hand, handled many high-profile cases which were mostly political in nature, such as the Thaksin Shinawatra wealth concealment and the Cobra faction cases which had unequivocal implications for the survival of the government. These represent a concentration of cases targeting high public offices and so an impression was created of the Thai Constitutional Court as being removed from the business of settling constitutionality-based disputes incurring from everyday general affairs as it is preoccupied with rather heavy focus on the deliberation of political issues. The Korean Constitutional Court,

in the meantime, has deliberated far fewer political ‘life-threatening’ cases, except for President Roh Moo-hyun impeachment bid which, in the end, was rejected by the Constitutional Court.

A recommendation for future research may be made with a reference to the subject that is an extension of this thesis. Warranting an academic investigation is how Thailand’s Constitutional Court’s political exposure could be reduced by perhaps allowing ordinary people to petition the Court directly and broadening its functions to cover constitutionality complaints. If such proposed exposure reduction or the function broadening is not possible in practical terms, a study should be pursued to shed light on the hindrances. As for the Korean Constitutional Court, an interesting point for further academic research may be the intensity of its judicialization of some political institutions and the significant implications for the function of the Court which could be viewed as actually interfering with other agencies.

Through summary and analysis of relevant facts and support of text materials, it has been established that from the origin of the Constitutional Courts of Thailand and South Korea to the cases which pass through the justices’ hands, the political interests have retained their presence, in one form or another, although such exposure varies between the Courts of the two countries. As the research has presented, South Korea’s Constitutional Court is less exposed to the political interests than Thailand’s Constitutional Court under the 1997 Constitution.

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Appendix

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Appendix

Cases within the Jurisdiction of the Thai Constitutional Court

By Sections, Subjects and Authorized Petitioners

No	Constitution Article	Subject of Petition	Authorized Petitioner	Conditions
1	47 Para 3	Whether a resolution or rules of a Pol.Party is contrary to the status and performance of duties of an MP. or contrary to fundamental principles of democratic government .	1. Members of house of Rep. 2. Pol.Party Exec. Com. 3. Members of Pol.Party	Minimum numbers of MPs, Ex. Com., and Party members are specified in the Pol.Party Law as follows: 1) One fourth of party members who are MPs, 2) One third of party Ex.Com., 3) 50 party members.
2	63	When the Attorney-General finds out that 1) A Person or Pol. Party has exercised the Constitutional rights and liberties to overthrow the democratic regime, or 2) To acquire power to rule the country by means	Attorney-General	Any person knowing that a person or a political party commits such act may request the Attorney-General to investigate and refer the case to the Court.

No	Constitution Article	Subject of Petition	Authorized Petitioner	Conditions
		inconsistent with the const. He will investigate the facts and submit a motion to the Const.Court to order cessation of such act. The Court may order the dissolution of such Pol.Party		
3	96	When a number of MPs. Or Senators believe that one of its member is disqualified under Art. 118 (3, 4, 5, 6, 7, 8, 9, 11, 12), or Art. 133 (3, 4, 5, 6, 7, 9, 10)	1. Speaker of the House of Rep., or 2. President of the Senate	Not less than a tenth of existing numbers of the HR. or the Senate may petition to their Speaker/President to forward the petition to the Const.Court.
4	118(8)	When a member of the HR appeals to the Const.Court against a resolution of the Party to dismiss him. If he is guilty of charges in accordance with Art. 47 Para 3, his dismissal becomes effective on the date of the Court's decision. If not, he	Member of the House of Rep. who are dismissed by a Party	He must appeal the Party decision within 30 days

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No	Constitution Article	Subject of Petition	Authorized Petitioner	Conditions
		is allowed to join a new party within 30 days from the date of the Court's decision.		
5	142	When a member of MPs. Or of both Houses believe that a member of the Election Commission is not qualified or prohibited to hold such office in accordance with Art. 137 (1-7) or takes undue action prohibited by Art. 139 (1-4).	President of the Parliament (Speaker of the House , ex officio)	A tenth of MPs or Senates, or of both Houses may petition to the President of Parliament to petition to the Const. for consideration and decision.
6	177	When a bill is being withheld because of veto, any other bill with a similar principle cannot be proposed. Members of Parliament may petition through their president to send such an alleged bill to the Const.Court	1. Speaker of the HR, or 2. President of Senate	A resolution of either House is needed to instruct their president to send the doubtful bill to the Const.Court.
7	180 Para 6	MPs, Senators or Budget Committee members are	One-tenth of the existing number of MPs or	The Const.Court must decide on such petition

No	Constitution Article	Subject of Petition	Authorized Petitioner	Conditions
	and 7	prohibited from intervening or influencing the allocation of a budgetary bill to related bills. If such action occurs the other members may petition to the Const.Court to make such intervention null.	Senators	within seven days. The nullification order does not carry other penalties on MPs or Senators who violate this article.
8	198	When the Ombudsman is of the opinion that the provisions of a laws, rule, regulation or any act of any official under Article 197 (1) begs the question of Constitutionality, the Ombudsman shall submit the case, after investigation, with opinion to the Constitutional Court or the Administrative Court for decision in accordance with the procedures of the Const.Court or the law on the procedures of the	Parliamentary Inspector-General (Ombudsman)	Any citizen may petition to the Ombudsman that a public official does not act according to law or act in ultra vires, or the act or failure to act by an official causes damages to the petitioner or the people unjustifiably regardless of whether such act is within his authority. The Ombudsman must investigate the facts of the case before making up his opinion and determining to send such case to the Constitutional Court or an

No	Constitution Article	Subject of Petition	Authorized Petitioner	Conditions
		administrative Court, as the case may be.		Administrative Court.
9	216 with 96 and 97	Members of the House or Senate may petition to their Presidents that a ministership is individually terminated due to resignation, lack of qualifications stipulated in Art. 206, being sentenced to imprisonment, or acts in violation of Art. 208 or 209	1. Speaker of the House, or, 2. President of the Senate	At least one-tenth of the existing MPs or Senators must petition to their Presidents. The President will forward the petition to the Const.Court to decide. The Const.Court must deliver its decision to the sending President.
10	219	Determining the legality of an Emergency Royal Decree (An executive action with the force of an Act) which must be issued only under strict conditions as stipulated in Art. 218.	1. Speaker of the House, or, 2. President of the senate	1. Before the House or the Senate approves an Emergency Royal Decree, which will make it a full fledged Act of Parliament, at least one-fifth of existing number of the MPs or Senators may send their opinion to their respective President that such decree is not within the purview of Art.218 Para1. 2. The President shall refer it

No	Constitution Article	Subject of Petition	Authorized Petitioner	Conditions
				to the Const.Court for decision. 3. After the Court makes the decision, it shall notify the sending President. 4. If the Court decides that the Decree is not in accordance with Art. 218 para 1.,the Decree shall not have the force of law ab initio.
11	262	To reexamine a bill before submitting it for royal approval but after passing both Houses, there are 3 possible circumstances : 1. When a bill's provisions are contrary to or inconsistent with the Const., or its enactment is contrary to the processes prescribed in the Court. 2. Similar observations 3. Similar observations	1.1 Speaker of the House, or 1.2 President of the Senate, or 1.3 President of the Parliament 2.1 Speaker of the House, or 2.2 President of the Senate, or 2.3 President of the Parliament 3.1 The Prime Minister	1. At leat one-tenth of the existing number (maximum total = 500+200) of MPs and or Senators may submit their opinion to the appropriate President who shall refer it to the Const.Court for a decision, and without delay, inform the Prime Minister who shall not present the bill for Royal Assent. 2. At least 20 MPs and or Senators may submit their opinion to the appropriate President… (same as

No	Constitution Article	Subject of Petition	Authorized Petitioner	Conditions
				above) 3. Prime Minister having such reservation sent to the Const.Court for decision and inform the Speaker of the House and the Senate President without delay.
				In all three circumstances, the following provisions rule : 1) The Prime Minister must wait for the Const.Court decision before moving the bill further. 2) If the Const.Court decides that the suspected provisions of the bill are substantially significant the entire bill shall lapse. 3) If the suspected provisions are not substantial, only such provisions shall lapse, but the rest of the bill can stand and the Prime Minister may proceed with the enactment

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No	Constitution Article	Subject of Petition	Authorized Petitioner	Conditions
				process : that is, to present to His Majesty the King for assent and publish it in the Royal Gazette to finally become a law.
12	263	Whether the Rules of Procedure of the House of the Representatives or the Senate, or the Parliament are contrary to or inconsistent with the Const., or its enactment is contrary to the processes prescribed in the Const.	1. Speaker of the House, or 2. President of the Senate, or 3. President of the Parliament	A least 20 members of the HR and or the Senate may submit their opinion to the appropriate President to refer to the Const.Court for decision.
13	264	Whether a provision of the law that a court will apply to a case is contrary to or inconsistent with the Constitution and such provision has not been decided by the Const.Court	1. Court of Justice, Administrative Courts and other Courts. 2. Parties to a court case.	The Court itself case may or a party to a court raise the issue. The Court will stay its trial and adjudication, and submit its opinion to the Const.Court for consideration and decision.
14	266	Whenever there is a dispute over the powers and duties of the	1. Constitutional bodies, or 2. President of the	The Const. Body, or the parliament President may submit the matter together

No	Constitution Article	Subject of Petition	Authorized Petitioner	Conditions
		constitutional bodies.	Parliament	with an opinion to the Const.Court for a decision.
15	295	Whether a person holding a political position should be prohibited from holding any political position for 5 years if he fails to submit the account showing assets and liabilities along with supporting documents, or intentionally submits them with false statement or concealing facts which should be revealed.	The National Counter-Corruption Commission	When such a case occurs the National Counter Corruption Commission must investigate. If it finds adequate evidence it shall refer the matter to the Const.Court for a decision.
16	321	Before establishment of the National Counter Corruption Commission under this Const., the existing Anti-Corruption Board shall prescribe necessary regulations for the performance of its duties in lieu of the new body. Such regulations	The Anti-Corruption Board	This is a transitional provision when the old body must take on new duties until a new law can be promulgated, which must be within a 2 year period. Now the new Commission has its own law, which could be contested in the Const.Court under other procedures

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No	Constitution Article	Subject of Petition	Authorized Petitioner	Conditions
		must be scrutinized by the Const.Court for possible conflict with the Const.		such as through Arts.198, 264, 266.
17	324 (2)	The Const.Court has to scrutinize the Election Commission's regulations prepared for up-coming election to ensure honest and fair elections, if the new election law is not ready.	The Election Commission*	This is a transitional provision to ensure that the national elections are conducted in consonant with the new Const. The new electoral law was promulgated in 1998.

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Biography

Wirot Plaikaew was born on January 25, 1978 in Bangkok. Early in his childhood, he began his primary education at the Prathuengthip Witthaya School where, as a fast learner, he exhibited an extraordinary interest in languages and scored well in them. However, by the time he enrolled in high school at the Ritthiyawanalai School in Don Muang district, Wirot discovered he had a keen grasp for science and registered for the science-based study program. After six years in high school, he sailed through to the Rajabhat Phra Nakhon University, which marked another turning point for his academic life. It is here that he was drawn to the allure of arts and sciences of broadcasting, one of the increasingly popular subjects for tertiary students. He chose communication arts as his core program and majored in broadcasting. Wirot and a few of his fellow students produced an exceptional research paper on slides as an important instrumentation for public relations. The paper was titled 'Loha Prasart (Metal Castle): A Buddhist Art in Thai Religious Architecture and Slide Production for Use in Public Relations.' The paper won praises from many who have read it.

After graduation, Wirot embarked on different career paths that set him on course to becoming anything from shop manager, part-time model to research coordinator for cross-border development projects. He has enriched his working experiences throughout the various stints of his professional endeavors, each time learning something new and cultivating knowledge. He has been keeping up with the current affairs and political developments, which spurred him to make a choice of the topic for his master's degree thesis in Korean Studies.

His personal interests have been and will most likely continue to be communications and this explains why his passions are never too far from languages. Mastering the Korean language has been his aspiration and it is what he is working toward achieving. Wirot is also skilled in acting, having appeared in supporting roles in a number of day- and night-time television dramas, commercials as well as movies.