

## Chapter 2: Court system under the constitution

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## **Chapter 2**

### **Court system under the constitution**

#### **1. Introduction**

The constitution is the supreme law of the country that establishes the powers, functions and duties as well as the structure of the cabinet, the parliament and the courts. Since the first constitution has been granted in B.E.2475 (1932), Thailand has amended its constitutions from time to time in order to meet the rapid change of social and political. The present constitution, the Constitution of the Kingdom of Thailand B.E. 2540 (1997)(the “1997 Constitution”), has been drafted by the Constitution Drafting Assembly, a special body established under the Constitution of the Kingdom of Thailand B.E.2534 (1991) (the“1991 Constitution”). The purpose of drafting a new constitution was to reform the political system to a better and transparency system. Since the Constitution Drafting Assembly was represented by members, selected from each province throughout the country as well as the experts in public law, politics, and public administration for a total number of 99 members, it was the first time the people of Thailand having the opportunity of drafting a whole new constitution by their own. Consequently, the 1997 Constitution has substantial impact on the reorganization of political system as well as the judicial system in Thailand.

The 1997 Constitution gives the power to try and adjudicate of cases to the Courts. The Courts recognized by the 1997 Constitution are as follows:

1. The Constitutional Court
2. The Court of Justice
3. The Administrative Court
4. The Military Court

If there is a need for establishing the new court, it may be established only by an act. However, a new court specifically established for the trial and adjudication of any particular case or for a case of any particular charge in place of an ordinary court existing under the law which is having jurisdiction over such case shall not be established. It is also a prohibition for enacting a law having an effect of changing or amending the law on the organization of the Courts or on judicial procedure for the purpose of its application to a particular case.

The proceeding of the Courts must be in accordance with the Constitution and the law. Since the King exercises the judicial power through the Court, the proceeding of the Courts, however, must be in the name of the King.

## **2. Constitutional Court**

Since the constitution is the supreme law of the country, therefore, no any provision of law shall be in contradiction with the constitution. Otherwise, it shall be void and unenforceable. However, the issue of whether or not a bill or the existing law is inconsistency with the constitution might not be an easy task to solve. Therefore, it is the duty of the Constitutional Court to render judgment or decision on whether or not the laws as well as rules and regulations are unconstitutional. The Constitutional Court is a new institution established under the 1997 Constitution. It comes to substitute the Constitution Tribunal formed under the 1991 Constitution.

The Constitutional Court consists of one president and fourteen judges appointed by the King upon the advice of the Senate. The Senate shall approve the list of the nominees selected from the following persons:

- (1) 5 Supreme Court judges elected at the general meeting of the Supreme Court
- (2) 2 Supreme Administrative Court judges elected at the general meeting of the Supreme Administrative Court
- (3) 5 qualified persons in law, and
- (4) 3 qualified persons in political science

They shall elect one judge, among themselves, to be the President of the Constitutional Court. The president and judges of the Constitutional Court shall be in the office for only one term of 9 years.

The decision of the Constitutional Court shall have the binding effect upon the cabinet, court, parliament and other organizations. Cases in which the Constitutional Court has jurisdictions are as follows:

- (1) in the case when a bill or an organic law has been approved by the National Assembly but before the Prime Minister presents it to the King for signature,
- (2) in the case when there is a dispute arises as to the powers and duties of the organizations under the constitution, such organizations or the President of the National Assembly shall submit such matter along with the opinion to the Constitutional Court for decision.

(a) if members of the House of Representatives, senators or members of both Houses of not less than one-tenth of the total number of the existing members of both Houses challenge that such bill has the provision in contrary to or inconsistent with the constitution, or has been enacted in contrary to the constitution, they shall submit their opinion to the President of the House of Representatives, the President of the Senate or the President of the National Assembly, as the case may be, who shall in turn refer such opinion to the Constitutional Court for decision.

(b) if members of the House of Representatives, senators or members of both Houses of not less than 20 members challenge that such organic law has the provision in contrary to or inconsistent with the constitution, or has been enacted in contrary to the constitution, they shall submit their opinion to the President of the House of Representatives, the President of the Senate or the President of the National Assembly, as the case may be, who shall in turn refer such opinion to the Constitutional Court for decision.

(c) if the Prime Minister is of the opinion that such bill or organic law has the provision in contrary to or inconsistent with the constitution, or has been enacted in contrary to the constitution, he shall refer such opinion to the Constitutional Court for decision.

If the Constitutional Court decides that such bill or organic law has the provision in contrary to or inconsistent with the constitution and such provision forms the essential element of the said bill or organic law, therefore, the said bill or organic law shall be terminated. However, if

such provision is not forms the essential element of the said bill or organic law, only that contrary or inconsistent provision shall be terminated. During the consideration of the Constitutional Court, the Prime Minister shall suspend the proceedings in respect of the promulgation of the said bill or organic law until the Constitutional Court has reached the decision.

- (3) in the case when the court, in applying the provisions of any law to any case, is of the opinion, or the parties to the case raise the objection that the provisions of the said law are in contrary to or inconsistent with the constitution and there has yet been any decision of the Constitutional Court on such provisions, the Court shall stay the proceeding of such case and refer such opinion to the Constitutional Court for decision. However, if the Constitutional Court is of the opinion that such objection of the parties is not essential for decision, the Constitutional Court may refuse to accept the case. The decision of the Constitutional Court shall apply to all cases but shall not have any affect to the judgment of the court which has already been final.

The quorum of judges of the Constitutional Court for hearing and making the decision shall consist of Constitutional Court judges for not less than 9 judges. The decision shall be made by majority vote. To facilitate the proceeding, the Constitutional Court shall have the power to demand documents or relevant evidences from any person or summon any person to give statements as well as request the court, inquiry official, state agency, state enterprise or local government organization to carry out an act for the purpose of its consideration.

For the purpose of managing and organizing the Constitutional Court, the Secretary-General of the Office of the Constitutional Court shall be responsible for the management of the Constitutional Court's personnel and budget. The appointment of the Secretary-General must be approved by judges of the Constitutional Court, and the Secretary-General shall be responsible directly to the President of the Constitutional Court.

### **3. Court of Justice**

The Court of Justice has a long history which can be dated back to the time of the establishment of the Ministry of Justice, in B.E. 2434 (1891). At that time, there

were several courts under the administration of various ministries. The Ministry of Justice was established with the purpose to unify all of the different courts of the different ministries to be under the administration of the Ministry of Justice. All of the courts, at the time, became the Court of Justice and came under the auspices of the Ministry of Justice. The Court of Justice since then has both civil and criminal jurisdictions over all of the cases. The Ministry of Justice was only responsible for the administrative works of the Court of Justice while the Court of Justice can concentrate independently on the trial and adjudication of cases. But when the 1997 Constitution came into force, it brought the new change to the Court of Justice that the Court of Justice shall be independent institution and separating from the Ministry of Justice.

Under the 1997 Constitution, judges are independent in the trial and adjudication of cases and shall not be subjected to hierarchical supervision. Regarding the distribution of case files to judges, it shall be in accordance with the rules prescribed by law. The recall or transfer of case files shall not be permitted except in the case where there shall be affected to the justice in trial and adjudication of the case. Moreover, the transfer of a judge without prior consent of the said judge shall not be permitted except in the case of transfer at the end of term as provided by law, promotion to the higher position, being under the disciplinary action or the said judge is becoming a defendant in a criminal case.

The separation of the Court of Justice from the Ministry of Justice took place on 20 August B.E. 2543(2000). The works under the responsibility of the Office of the Permanent Secretary to the Ministry of Justice, the Minister, and the Permanent Secretary shall be transferred to the Office of the Court of Justice, the President of the Supreme Court, and the Secretary-General of the Office of the Court of Justice, respectively. The Office of the Court of Justice shall be headed by the Secretary-General of the Office of the Court of Justice and shall have powers and duties concerning the administrative works of the Court of Justice, judicial affairs and legal affairs. The tasks of the Office of the Court of Justice shall be aimed to provide facilitation to the Court of Justice as well as improving the efficiency, speedy and convenience of trial and adjudication of the Court of Justice.

The Secretary-General of the Office of the Court of Justice shall play a significant role in administration the works of the Court of Justice. The Secretary-General has the duties to govern and monitor the administrative work of the Court of Justice and assure that they has been carried out completely and in compliance with the

laws concerned, and shall directly respond to the President of the Supreme Court. Since the duties of the Secretary-General shall normally involved with the interconnection between the judges and court officials, therefore, the Secretary-General shall be nominated from judge or former judge to make sure of a better understanding and handling of the tasks.

In governing the policy of the Court of Justice, there shall be the responsibility of the “Court of Justice Executives Board”. The Board consists of judges and qualified persons as follows:

- (1) The President of the Supreme Court as the chairman,
- (2) 4 members elected from judges in the Supreme Court,
- (3) 4 members elected from judges in the Court of Appeals and the Court of Appeal Region 1 to Region 9,
- (4) 4 members elected from all of the Court of First Instance,
- (5) 2 to 4 qualified members elected from the qualified person in the field of budget management, organization development, or management and administration.

The Secretary-General of the Office of Court of Justice shall be the secretary of the Board in order to assure the successful implementation of the policy set out by the Board.

The duties of the Court of Justice Executives Board shall be as follows:

- (1) to issue regulations, notifications or resolutions for the purpose of administration the Court of Justice in compliance with the policy set forth by the President of the Supreme Court;
- (2) to give approval of submission of the bill concerning the administration and providing justice of the Court of Justice to the Cabinet;
- (3) to give approval of the estimated budget of the Court of Justice;
- (4) to give approval of the budget management of the Court of Justice and the Office of the Court of Justice;
- (5) to set the workdays, public holidays, and leave for the judges and personnel of the Court of Justice;
- (6) to consider the sign and symbol to be used for the Court of Justice and set the rules and conditions of using such sign and symbol.

The term of the Board is 2 years but members of the Board shall not hold the office for more than 2 consecutive terms.

In taking care of the judges, there shall be the responsibility of the Court of Justice Judicial Commission. The Commission shall be charged with the duties of promoting, transferring as well as punishing of the judges.

In taking care of the administrative officers of the Court of Justice, there is the duty of the Board of the Court of Justice Administrative Officers. The Board of the Court of Justice Administrative Officers consists of members as follows:

- (1) The most senior Vice President of the Supreme Court as chairman
- (2) The President of the Court of Appeal
- (3) The Secretary-General of the Civil Service Commission
- (4) The Secretary-General of the Court of Justice
- (5) 5 members elected from the Court of Justice administrative officers at level 8
- (6) 3 qualified members elected from the qualified persons in the field of organization development, personnel management, or management and administration

The Board shall have the powers to issue the regulations or notification concerning the personnel administration and other activities of the Office of the Court of Justice as follows:

- (1) matter concerning the qualification, selection, positioning, probation, developing, reshuffle, promotion, vacating, salary promotion, termination, suspension, discipline, investigation, penalty, grievance and appeal for the Court of Justice officers
- (2) matter concerning the substitution of the Court of Justice officers
- (3) to set the uniform and dressing of the Court of Justice officers
- (4) to hire the experts or specialists who shall be benefit to the work of the Court of Justice as well as setting the remuneration for such experts or specialists
- (5) to establish the welfare system for the Court of Justice officers

The Court of Justice shall have 3 levels as follows:

- (1) the Supreme Court

- (2) the Court of Appeals, which divided into
  - (i) the Court of Appeals,
  - (ii) the Court of Appeals Region 1 to Region 9
- (3) the Court of First Instance,
  - (i) the Civil Court
  - (ii) the Civil Court of Southern Bangkok
  - (iii) the Thonburi Civil Court
  - (iv) the Criminal Court
  - (v) the Criminal Court of Southern Bangkok
  - (vi) the Thonburi Criminal Court
  - (vii) the Central Juvenile and Family Court
  - (viii) the Central Labour Court
  - (ix) the Central Tax Court
  - (x) the Central Intellectual Property and International Trade Court
  - (xi) the Central Bankruptcy Court
  - (xii) the Provincial Court
  - (xiii) the Kwaeng Court

All cases shall commence at the Court of First Instance. The appeal of the judgment of the Court of First Instance shall be filed to the Court of Appeals with some restrictions. The Supreme Court is the highest court which has jurisdiction over the cases appealed from the Court of Appeals subject to the restriction provided by the Civil and the Criminal Procedure Codes.

There is a requirement under the constitution that the hearing of a case shall have a full quorum of judges. Any judge who is not sitting at the hearing of a case shall not give judgment or decision of such case, except for the case of force majeure or any other unavoidable necessity.

Basically, a judge in the Court of Justice shall be retired from the service at the age of 60. To reach at such age, one normally has already been in the service for approximately of 30 years in which making him to be a highly experience judge. Therefore, the 1997 Constitution, with the view to keep such valuable asset to the Court of Justice, provides the scheme of transferring the retired judge to be a senior judge sitting in the court of first instance. The main task of the senior judge is to try and adjudicate especially the complex cases. A senior judge shall be in the service until the

age of 70, however, at the age of 65, there shall be a performance evaluation process of such senior judge. Only one that passes the performance evaluation process shall be in the service until the age of 70. A senior judge can be sitting in the court of first instance only and shall not be promoted to be chief justice of any court of first instance, or be elected as the member of the Court of Justice Judicial Commission.

#### **4. The Administrative Court**

Although the Administrative Court has been mentioned in the previous Constitutions but in reality it has never been established. Until the 1997 Constitution came into force, the time frame has been set that the Administrative Court shall be established within 2 years from the promulgation of the 1997 Constitution. Obviously, as its name suggested, the Administrative Court has exclusive jurisdiction over the administrative disputes between the private sector and the State organs concerning the issue of the abuse of power by such State organ. Accordingly, the Act for the Establishment of and Procedure for Administrative Court B.E.2542 (1999) gives the Administrative Court the jurisdiction over the cases as follows:

- (1) case of dispute between a private sector or individual and the State agency, State enterprise, local government organization, or State official under the superintendence or supervision of the Government, or
- (2) case of dispute between the State agency, State enterprise, local government organization, or State official under the superintendence or supervision of the Government,

Both cases mentioned above shall concern with the issue of dispute as a consequence of the act or omission of the act that must be performed by such State agency, State enterprise, local government organization, or State official. Or the dispute as a consequence of the act or omission of the act of such State agency, State enterprise, local government organization, or State official which under the responsibility of the said State agency, State enterprise, local government organization, or State official in performing the duties under the law.

According to the Act for the Establishment of and the Procedure for Administrative Court B.E.2542 (1999), the Administrative Court shall have 2 levels as follows:

- (1) the Supreme Administrative Court

- (2) the Administrative Court of First Instance, which divided into
  - (i) the Central Administrative Court
  - (ii) the Regional Administrative Court

The Judicial Commission of the Administrative Court shall select the qualified persons to be judges of the Supreme Administrative Court and the Administrative Court of First Instance. Upon selection, the Judicial Commission of the Administrative Court shall submit the list of the nominees to the Prime Minister who shall then submit the list to the Senate for consideration.

## **5. Military Court**

The 1997 Constitution gives the powers to try and adjudicate military criminal cases to the Military Court. According to the Law for the Organization of the Military Court B.E. 2498 (1955), the Military Court shall have the jurisdiction over the cases as follows:

- (1) Cases which a person under the jurisdiction of the Military Court i.e. the military officer, has committed a crime against the military law or other criminal laws.
- (2) Cases which a person has committed a contempt of Court as provided by the Civil Procedure Code

However, the following cases shall not be under the jurisdiction of the Military Court

- (1) Cases in which a person under the jurisdiction of the Military Court and a person outside the jurisdiction of the Military Court have jointly committed crime
- (2) Cases connected with the case under the jurisdiction of the civilian court
- (3) Cases which must be tried at the Juvenile and Family court
- (4) Cases which the Military Court is of the opinion that such cases are not fallen within its jurisdiction

All of the cases which are not under the jurisdiction of the Military Court shall be tried and adjudicated in civilian court.

The Military Court is under the administration of Ministry of Defense. The

Minister of Defense shall be responsible for the administrative matter of the Military Court. However, the Military Court has the sole discretion on trial and adjudication of the cases. The Military Court is divided into 3 levels as follows:

- (1) The Military Court of First Instance
- (2) The Central Military Court
- (3) The Supreme Military Court

## **6. How to solve conflict of jurisdiction among the Courts**

The overlapping of the jurisdiction among the Courts could possibly occur and would not be an easy task to find the proper solution. The 1997 Constitution has established one committee, namely the “Jurisdictional Conflicts Solving Committee”, specially designed to handle this issue. The Jurisdictional Conflicts Solving Committee has the responsibility to solve the issue of whether the concerned case shall fall under the jurisdiction of which courts, among the Court of Justice, the Administrative Court, the Military Court or others Court (if any). This Committee consists of members as follows:

- (1) the President of the Supreme Court as chairman
- (2) the President of the Supreme Administrative Court
- (3) Chief of the Military Judicial Office
- (4) President of the other Court (if any), and
- (5) qualified persons at the maximum number of 4 persons

When the parties raised the issue of jurisdictional conflict to the court in which the case has been filed, such court shall stay the proceeding and send the said motion along with the court’s opinion to the court in which the parties alleged to have jurisdiction. The procedure shall be as follows:

- (1) If the sending court is of the opinion that such case shall fall under its jurisdiction and the receiving court agrees with, the receiving court shall inform the sending court of such opinion in order for the sending court to continue the proceeding.
- (2) If the sending court is of the opinion that such case shall not fall under its jurisdiction and the receiving court agrees with, the receiving court shall inform the sending court of such opinion. The sending court may transfer the case to the receiving court or dismiss the case. The parties shall, then,

file the case to the court which has the jurisdiction over such case.

- (3) If the sending court and the receiving court have different opinion on such case, the sending shall submit the issue to the Jurisdictional Conflicts Solving Committee for consideration.

The decision of the court in the above mentioned (1) and (2) and the decision of the committee shall be final.

## **7. Special function of the Supreme Court under the 1997**

### **Constitution**

In order to counter corruption which is presently the growing concerned in Thailand, the 1997 Constitution has entrusted the Supreme Court as an appropriate institution in dealing with this issue by establishing the “Supreme Court’s Criminal Division for Persons Holding Political Positions” within the Supreme Court. In addition to the removal from office by the Senate, the persons such as the Prime Minister, a minister, members of the House of Representative, senator or other political official shall be faced with the criminal prosecution if such person has been accused of becoming unusual wealthy, or committing malfeasance in office, or committing dishonest act in the performance of duties or corruption. Once the National Counter Corruption Commission is of the opinion that the accusation is prima facie, the Chairman of the National Counter Corruption Commission shall send all the documents and evidences along with the opinion to the Attorney General for issuing of the prosecution order and filing the case to the Supreme Court’s Criminal Division for Persons Holding Political Positions. Then the President of the Supreme Court shall call for a general meeting of the Supreme Court judges for election of 9 Supreme Court judges to be a quorum of such case by secret vote. Among the 9 judges, they shall select one to be the judge in charge of the case. Then the case shall be trial continuously on workday until the close of the trial. The judgment shall be make by majority vote. During the trial, the Division shall have the power to issue search and seize warrant and shall consider the provisional release. The President of the Supreme Court, subject to the approval of the general meeting of the Supreme Court judges, shall empowered to issue Rules of the Court on the proceeding of the case.