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Political Reform and the Constitutional Court of Thailand

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I. Introduction

Since the late 1980s, we have seen many pro-democratic movements in East Asian countries such as the Philippines (1986), Republic of Korea (1987), Thailand (1992) and Indonesia (1998). These successful pro-democratic movements usually led to constitutional law reform directed toward establishing a new framework for democratic governance. Many Asian countries, in the process of gaining their independence or modernization, followed the Western model of parliamentary system and constitutional law. However, under the authoritarian polity or developmental dictatorship that many Asian countries have experienced, constitutional law has been mobilized as the means to authorize and ensure the legitimacy of authoritarian polity. Constitutional reform after the pro-democratic movement is aimed primarily at eliminating the legacy of authoritarian governance through the removal of undemocratic elements in the constitutional law and reorganization of the legal framework for democratic governance. Especially important is the building of mechanisms for monitoring and controlling the exercise of state power and for enhancing of human rights protection.

The creation and enhancement of constitutional review is one of the common approaches in institutional reform after pro-democratic movements. Generally constitutional review systems are divided into two types: (1) continental European type constitutional courts that are independent from ordinary courts,[1] and (2) American type constitutional review systems in which the Supreme Court of Justice (and lower courts) reviews the constitutionality of laws or governmental acts. The Constitutional Court of Thailand can be categorized as a European type of constitutional court.

This paper examines the role of the Constitutional Court of Thailand that was established by the 1997 Constitution, which was itself the result of the political reform movement in 1990s in Thailand, as a case study of legal and institutional reform following the pro-democratic movement in East Asian countries.

Thailand experienced the so-called "Bloody May" incident in 1992, in which many people were killed and wounded when the Military fired into the mass demonstration. The people were protesting against the Army Commander, one of the Coup leaders of 1991, who took the position of Prime Minister in spite of his pledge not to do so. After this incident, "the development of democracy" or "political reform" was strongly propounded for advancing democratization, and it resulted in a series of amendments to the 1991 Constitution (in 1992, 1995 and 1996).[2] The debate on constitutional reform started in the National Assembly in 1992 with the establishment of the special committee on constitutional amendments. This committee raised 25 proposals, and some of them were embodied in the 1995 amendment of 1991 Constitution. Although the 1995 constitutional amendment introduced many reforms, a more comprehensive revision of the constitution was proposed. Hence, under the 1996 Amendment, the Constitutional Drafting Assembly (CDA), a separate body from the National Assembly, was established to draft the new Constitution.[3] After eight months of debate and public hearings nationwide, the CDC adopted a draft in August 1997, that was subsequently sent to the National Assembly and approved in September. After approval by the King, the Constitution of the Kingdom of Thailand 1997 was promulgated on October 11, 1997. The content of the 1997 Constitution, which was the direct result of political reforms in the 1990s, is progressive and differs from the former Constitutions of Thailand in many respects.

Political reform in Thailand in the 1990s started from the movement to protest military rule, so one of the tasks of constitutional reform is to eliminate or exclude the mechanisms built into the former constitutions to legitimatize the rule of the military groups (1992 constitutional amendment). However, the scope of the 1997 Constitution is not limited to this aspect. Rather, the political reform was motivated by the unsatisfactory situation of Thai parliamentary democracy: inefficiency of policy-making mainly caused by inter-party maneuvering; vote buying; corruption and so on.

The reforms introduced by the 1997 Constitution emphasized the building of mechanisms for monitoring and controlling the exercise of state power to secure democratic governance. The 1997 Constitution established the Constitutional Court as the core mechanism for monitoring and

controlling the political and administrative process to secure transparency and effectiveness, along with other newly established constitutional organizations such as the Administrative Court, the Election Commission, the National Counter Corruption Commission, the National Human Rights Commission and the Ombudsperson of the National Assembly (hereinafter referred as Ombudsperson), etc.

The concept of constitutional review is not new to Thailand. Since the 1946 Constitution, Thailand adapted the Constitutional Tribunal system,[4] although there was occasional discontinuation because of the frequent changing of political power through military coups. The so-called interim constitutions that were enacted shortly after a coup for setting up a tentative framework of governance did not adopt Constitutional Tribunals. The Constitutional Tribunal was in active in almost all of the periods of its existence, and was sometimes even detrimental to the democratization process.

Section II of this paper will examine the Constitutional Tribunals in the past constitutions. It will show how the problem of discontinuity and insufficient independence caused the low performance of the Constitutional Tribunal, which led to the establishment of the Constitutional Court under the 1997 Constitution.

Section III will provide an overview of the organization and functions of the Constitutional Court established by the 1997 Constitution. A preliminary analysis will be made of the performance of the Constitutional Court in the early years of its activity starting from 1998. Some cases regarding the measures for economic crisis under IMF conditionality will be briefly reviewed to show the political changes after the 1997 Constitution and the establishment of the Constitutional Court , and its impact on parliamentary politics. Some suggestions will be drawn from the experience of Thailand for the study of constitutional courts in other Asian countries.

II. Constitutional Tribunal under Past Constitutions

A. The Creation and Development of Constitutional Tribunal

The development of constitutional review in Thailand is divided into four periods: (1) The first period, when only the National Assembly had the right of constitutional interpretation (1932 Constitution); (2) The second period, when both the National Assembly and the Constitutional Tribunal had the

right of constitutional interpretation (from the 1946 Constitution to the 1978 Constitution); (3) The third period, when only the Constitutional Tribunal had the right of constitutional interpretation (1991 Constitution); (4) The fourth (current) period, when the Constitutional Court has the right of constitutional interpretation under the present Constitution.[5]

Constitutionalism in Thailand was influenced by the notion of Parliamentary Sovereignty in European countries, which turned away from the U.S. type of constitutional review before World War II. The 1932 Charter of the Kingdom of Siam, an interim constitution adopted at the time of the "Constitutional Revolution" by which Thailand shifted from "Absolute Monarchy" to "Constitutional Monarchy," provided that any law or acts that are not allowed by the Charter would be invalid. The supremacy of the Constitution was declared by this provision; however, it had no provision on constitutional review or constitutional interpretation. The 1932 Constitution of the Kingdom of Siam, the first permanent constitution adopted six months later after the Revolution, had a provision stating that the National Assembly has the *absolute right* to interpret the Constitution.[6]

It was the Supreme Court Decision of 1946 that triggered establishment of the Constitutional Tribunal in Thailand.[7] In this case, the Supreme Court declared that the War Criminals Act of 1946 was unconstitutional as an *ex post facto* law as far as it applied to acts committed before the date of its coming into force. The decision, rather influenced by the famous U.S. case, triggered a strong backlash from the National Assembly, which regarded it as interference in or encroachment on the National Assembly's absolute right of constitutional interpretation. A special committee was formed in the National Assembly to investigate and examine this matter. The committee, including the former President of the Supreme Court of Justice, confirmed the absolute right of the National Assembly to interpret the Constitution and declared that there was no room to consider whether other organs, including the court, had any right regarding constitutional interpretation.[8] The 1946 Constitution, which was adopted just a few months after that controversial Supreme Court decision, adopted the Constitutional Tribunal as the organs for constitutional review (concrete review), while the National Assembly continued to hold the absolute right of constitutional interpretation. The Constitutional Tribunal under the 1946 Constitution consisted of qualified members appointed by the National Assembly. The terms of the members of the Tribunal was linked to those of members of the House of Representatives; that is, the terms in office of the members of the Tribunal ended upon a general election or the dissolution of the House of Representatives.

In the European countries, the development of a constitutional court especially after World War II was mostly motivated by the necessity to control state rights including the National Assembly, and enhancing human rights protection, but with Thailand, the creation of the Constitutional Tribunal was intended to explicitly exclude judicial review by the Court of Justice.

B. Overview of the Constitutional Tribunals: Composition, Powers and Outcomes

1. Powers of the Constitutional Tribunals[9]

Thailand has had fifteen constitutions since its first 1932 Charter to the present 1997 Constitution.[10] The Constitutional Tribunal was adopted by the constitutions of 1946, 1949, 1952, 1968, 1974, 1978 and 1991. Table 1 shows the composition and competences of the Constitutional Tribunals in past Constitutions.

The Constitutional Tribunal was initially given the authority to review the cases referred by the ordinary court that of opinion that, or on the complaints of any party to a case that the provision of any Act to be applied to the case was unconstitutional (concrete review). The powers of the Tribunal were increased in the later constitutions. The abstract review of bills was added to the powers of the Tribunal in 1974, as well as other powers to examine matters other than the constitutional review of legislation, especially in the 1991 Constitution.

The power to interpret the Constitution was vested in the National Assembly in the 1946 Constitution, but the scope of this power was reduced to matters related to the acts of National Assembly in the later Constitutions. The 1991 Constitution finally curtailed the National Assembly's power to interpret the Constitution, and instead vested this power in the Tribunal.[11]

As the provisions of the Constitutions regarding the powers of the Constitutional Tribunal are similar to the provisions of the 1997 Constitution regarding the function of the Constitutional Court, details of each procedure are examined later in the next section.

2. Composition of the Constitutional Tribunals

The 1946 and 1974 Constitutions of the democratic periods provided that the Tribunal was to consist of only members appointed from qualified persons. The 1974 Constitution, which was promulgated after the first democratic movement in 1973, provided that the qualified members of the Tribunal were to be selected by the National Assembly, the Cabinet, and the Judiciary

Table 1

The Composition and Powers of the Constitutional Tribunals in Thailand

Constitution	Number	Composition	Duration	Powers							
				a	b	c	d	e	f	g	h
1946	15	Qualified persons appointed by NA	HR	X							
1949	9	SN*, HR, SC, CA, AJ Qualified persons in law adopted by NA (4)	HR	X		X					
1952	6	SC*, CA, AJ Qualified persons appointed by NA (3)	HR	X							
1968	9	SN*, HR, SC, CA, AJ Qualified persons in law appointed by NA (4)	HR	X		X					
1974	9	Qualified persons appointed by the King, (Cabinet NA, and JC nominate 3 persons respectively.)	HR	X	X	X	X		X		
1978	7	NA*, SC, AJ Qualified persons appointed by NA (4)	HR	X	X	X	X		X		
1991	10	HR*, SN, SC, AJ Qualified in law or political science (6) appointed by the Senate and HR: 3 persons respectively	4	X	X	X	X	X	X	X	X

Source: Author.

Notes:

1. NA: (President of) the National Assembly; SN: (President of) the Senate; HR: (President of) the House of Representatives; SC: President of the Supreme Court; CA: Chief Justice of the Court of Appeal; AJ: The Director-General of the Department of Public Prosecutor, Ministry of Interior or Attorney-general (after 1991); JC: Judiciary Commission;*: President of the Constitutional Tribunal.
2. Duration: "HR" shows the duration of members of the Constitutional Tribunal ends with a general election or the dissolution of the House of Representatives.
3. Powers: (a) Concrete review (cases referred by ordinary courts); (b) Abstract review (on bill passed the National Assembly, yet to be approved by the King); (c) Termination of the status of Ministers or members of the National Assembly; (d) Examination whether any bill contains the similar principles with a withheld bill; (e) The constitutionality of Emergency Decree; (f) Problem of jurisdiction among ordinary courts; (g) The constitutionality of the Rules of each House or Joint Conference; (h) Interpretation of the Constitution.

Commission[12] (three persons for each), and appointed by the King. This arrangement seems to follow the appointment procedures for the members of Constitutional Council of France. In the other Constitutions, the Tribunal consisted of qualified members selected from qualified persons as well as *ex officio* members such as the President of the House of Representatives or the Senate, the President of the Supreme Court or the Attorney-general.[13]

Other than 1974 Constitution, the authority to appoint qualified persons was held by the National Assembly. Furthermore, the term in office of the qualified persons was linked to the House of Representatives; that is, the terms of the qualified members of the Constitutional Tribunal was to be terminated with the general election or the dissolution of the House of Representatives.

In the 1991 Constitution, the Constitutional Tribunal was vested the power to interpret the constitution. The Constitutional Tribunal consists of four *ex officio* members and six other members qualified in law or in political science selected by the Senate and House of Representative (three persons, respectively). The term of the qualified members is prescribed as four years, and not linked to the House of Representatives.

The composition of the Constitutional Tribunals was a crucial issue in the drafting of the constitution. The drafting process of the 1978 Constitution is a good example to show the intent of the drafters. The discussion in the constitutional drafting committee revolved around whether they should follow the 1968 Constitution approach (including *ex officio* members) or the 1974 Constitution approach (only qualified members). The majority opinion of the committee was that the 1974 Constitution approach was favorable from a theoretical standpoint, but in practice, it would cause the problem of partisanship. It was argued that under the 1974 Constitution approach, the selected member might include persons lacking the qualification necessary to become a member of the Constitutional Tribunal. The scope of *ex officio* members was another issue in the drafting.[14] There were differences as to the nature of the Constitutional Tribunal. One member proposed the exclusion of the presidents of the Senate and the House of Representatives as *ex officio* members because they were interested parties as drafters of the bills that the Tribunal would decide. It was also argued that the appointment of the qualified members by the National Assembly would sometimes be influenced by party politics, and they might be lacking qualifications required to serve as constitutional judges, while *ex officio* members were assumed usually to possess such qualifications. The other argument in the commission was that the authority of the Tribunal was not limited to the review of the bills; it dealt

also with political matters, such as examining the termination of membership of member of the National Assembly or ministers, so a knowledge of political science was also required. It was likewise argued that having the President of the Supreme Court or Court of Appeals as a member of the Tribunal would allow the Judiciary to intervene in matters of the National Assembly.

As these debates suggest, there are three features in deciding the composition of the Tribunal: (1) the appointment of qualified person by the National Assembly is, though desirable from democratic perspective, considered as influenced by party politics, and no safeguard exists for excluding the selection of unqualified persons; (2) Having the President of the Supreme Court or the Attorney-general as *ex officio* members is preferred as it is assumed they already possess the necessary qualification; and (3) the balance of powers, especially between the Legislature and the Judiciary, is the important factor in deciding the scope of the *ex officio* members.

3. Outcome of the Constitutional Tribunals

In 1946–1992, thirteen quorum of the Constitutional Tribunal were formed. Table 2 shows the cases of the Constitutional Tribunal from 1946 to 1997. The total number of decisions was 13 cases, and in only 5 cases was unconstitutionality of the law declared.[15]

Table 2

The Cases of the Constitutional Tribunal (1946–1997)

Types of Procedure	Decision	Date	Result	Constitution
Concrete Review	T1/2494	January 4, 1951	Unconstitutional	1949 Constitution
	T2/2494	January 4, 1951	Unconstitutional	
	T3/2494	January 29, 1951	Unconstitutional	
	2501	February 18, 1958	Unconstitutional	1952 Constitution
	T1/2513	January 5, 1970	Unconstitutional	1968 Constitution
Termination of the status of MP	1/2494	January 7, 1951	Not terminated	1949 Constitution
	1/2523	July 16, 1980	Terminated	1978 Constitution
	1/2526	November 29, 1983	Rejected	
	1/2529	October 10, 1986	Terminated	
Termination of the status of a Minister	1/2524	January 8, 1981	Not terminated	1978 Constitution
Emergency Decree	1/2535	June 3, 1992	Constitutional	1991 Constitution
	2/2535	July 22, 1992	Constitutional	
Interpretation	3/2535	November 9, 1992		1991 Constitution

Source: Author.

It is argued that the reason for the low performance of the Constitutional Tribunals was the discontinuity of its activity and the lack of independence. Under the Constitutions before 1991, the membership of the appointed members was terminated incidental to the expiration or the dissolution of the House of Representatives. *Ex officio* members are representatives of the organizations to which they belong, and cannot be independent. The appointed members were usually under the influence of the appointing organization (usually the National Assembly). Additionally the Constitutions did not provide procedures for the appointment of qualified persons: sometimes, therefore, the appointed members lacked the knowledge or experience necessary for work as a member of Constitutional Tribunals.[16]

C. Case on the Emergency Decree Regarding Amnesty

It is worth taking a brief look at the series of decisions that the Constitutional Tribunal delivered in 1992 for amnesty given in regard to "the May 1992 incident," as it would underscore the problems of the Constitutional Tribunal system. It can be said that the backlash against the decisions led to the establishment of the Constitutional Court under the 1997 Constitution.

The clash between the military-led government and pro-democratic groups in the May 1992 incident was ended by the mediation of the King, and the Suchinda Kraprayoon administration resigned for a new general election. Before resigning, the government issued the Emergency Decree to give amnesty to all criminals and other conduct relating to the May 1992 incident. Under the 1991 Constitution, the government was able to issue the Emergency Decree having the force of an Act, for the purpose of maintaining national or public safety or national economic security, or averting public calamity (1991 Constitution, Article 172, paragraph 1). If the Emergency Decree were not approved by the National Assembly, it would lapse. Article 173 provides that "before the House of Representatives or the Senate approves an Emergency Decree under Section 172, paragraph 3, members of the House of Representatives or senators no less than one-fifth of the total number of 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 Section 172, paragraph 1, and the President of the House who receives such opinion shall then refer it to the Constitutional Tribunal for decision."

The Emergency Decree issued on May 23, 1992, just a few days after the mediation of the King, provided for the exemption of all people involved in the incidents that occurred on May 17–21, 1992 from any criminal

responsibility and punishments arrizing out of the acts conducted in relation to the incident. Many irregularities were pointed out on this Decree. It is true that many pro-democratic activists and demonstrators were arrested at the time of the Bloody May incident, and this amnesty exempted them from any criminal responsibility. However, the amnesty also covered governmental officials, the army, and ministers that hampered the inquiry to discover the truth behind and assign blame for the many deaths and disappearances. Furthermore, there were irregularities in connection with the legislative procedure used to enact the Decree. At first, the granting of the amnesty in the form of an Act was postponed because of the discordance among the ministers. Then, when the proposal to issue amnesty in the form of the Emergency Decree was raised later, a circular letter was used to obtain the necessary support from the ministers for this proposal, instead of holding a cabinet meeting.

Based on the submission by a group of members of the House of Representatives, the matter of the constitutionality of the Emergency Decree was referred to the Constitutional Tribunal. The Tribunal rejected the case because the claim was based on Section 172, paragraph 2, which the Tribunal had no power to decide.[17]

The case was filed again with the Constitutional Tribunal on the grounds of the violation of Section 172, paragraph 1. The Tribunal held that the Emergency Decree was valid because the Tribunal thought the situation at the time of the Bloody May incident met the requirement of the Constitution. As to the matter of the irregularity in the legislative process of the Emergency Decree, the Tribunal held that it was an issue of Section 172, paragraph 2, that the Tribunal had no authority to examine it, and thus, it was rejected.[18]

Much criticism was expressed over this decision, which foreclosed any opportunity to prosecute the officials responsible. Some criticized that the Tribunal did not consider whether the situation requiring the Emergency Decree still remained at the moment the Emergency Decree was issued. When the Decree was issued, the curfew had already been lifted. Dr. Amon Cantrasomboon, one of the leading public law scholars in Thailand, expressed a criticism concerning the procedural aspects or the qualifications that the constitutional review organs should possess.[19] According to Dr. Amon, the Decision did not explain or show the logic, reasoning or grounds for the decision. Fact-finding was also unclear in many aspects. The Tribunal did not make apparent the basis on which it derived its findings and some facts are not invoked by the parties concerned.[20]

Later, the Emergency Decree was disapproved by the National Assembly,

and lost its legal effect as an Act. Because Section 172 of the 1991 Constitution provided that should the Emergency Decree be disapproved, "it shall not affect any act done during the enforcement of such Emergency Decree." Hence, the scope of the effect of this clause, or the effect of the amnesty was in question. The Chuan government asked the Constitutional Tribunal to interpret the extent of this clause relating to the amnesty given by the Emergency Decree that had been repealed. The Tribunal held that the exemption of criminal responsibility by the amnesty consisted of "any act done during the enforcement of such Emergency Decree" under the 172.[21] This decision was criticized as keeping the Emergency Decree that had been repealed by the National Assembly substantially still in force. It was argued that the exemption of criminal responsibility was the object of the Emergency Decree, and should not be construed as "the act done . . . ." Such interpretation renders the provision of the Constitution meaningless.[22]

The series of decisions regarding the amnesty case by the Constitutional Tribunals brought the public law scholars and pro-democratic activists to realize the imperfection of the Constitutional Tribunal system, and led to the establishment of the Constitutional Court as "a court" not a "political organ."

III. Constitutional Court under the 1997 Constitution

A. Establishment of the Constitutional Court

Before the Constitutional Drafting Assembly (CDA) started work on the draft in 1997, some committees were formed to discuss the constitutional amendment for political reform in the 1990s. The most influential forum was the Committee for the Development of Democratization, which was established by the President of the House of Representatives in 1994 to settle the turmoil in the constitutional amendment consideration.[23] The Committee consisting of scholars, pro-democratic activists and representatives from the political parties (58 members in total), adopted the report entitled, "Proposal on Framework of Thinking for Thai Political Reform,"[24] which contained comprehensive proposals for institutional reform. The proposals of the report on the matter of constitutional review are summarized as below:

> The Constitutional Judge (*tulakaan ratthathammanuun*) is one of the important organs of the constitutional system, because this person is the examiner of whether the exercise of power by the National Assembly in enacting legislation or conducting other practices is in accordance with the

> Constitution. Therefore, the Constitutional Judge should have the nature of a Constitutional Court, rather than that of the political organs that exist now. For this, the constitutional judge organization should be adjusted to consist of persons possessing adequate qualifications, the number of which shall not be large; and *ex officio* members should be excluded. There must be a provision that links the recruitment of the Constitutional Judge to the National Assembly. However, there must be protective clauses that will prevent the involvement of the National Assembly in the approval of the Constitutional Judges from becoming political affairs among political parties. Other than this, there must be a provision to actually make the Constitutional Judges independent. For example, the term of office of the Constitutional Judge should be sufficiently long, such as 9 years. Reappointment is prohibited. The Constitutional Judge must have the nature of a "Court," increasing the independence. The procedures must be adequate for the cases they deal with, and must follow certain standard. That is, they must allow the public to examine them. In making decisions on such matters, each constitutional judge must give his/her own opinion because the constitutional judge has the nature of a "Court" not a committee, and such opinions have to be published in the government gazettes. ... The powers and mandates of the Council of Constitutional Judges will be increased. In particular, there is to be referred by the people to the Constitutional Judge to decide the constitutionality of legislation, which is presently limited to the Court of Justice. ... In order to keep the number of cases below the level that exceeds the ability of the Court to deal with the cases, the grounds whereby the people have to refer through the court will remain. ...The new constitutional judge that will be established will possess the power of the present constitutional judge. Adding the power to review certain types of cases is necessary. ... The secretariat of the constitutional judge also must be prescribed as an independent organization, so as to prevent other sectors from seizing the secretariat.[25]

These proposals seem to be reflected in the deliberations in the Constitution Drafting Assembly (CDA) in 1997. The 1997 Constitution drafted by CDA established the Constitutional Court, as a "Court" in the place of the Constitutional Tribunals that was regarded as "a political" organ. The provisions of the Constitutional Court are provided in Chapter 8 entitled "The Court" of the 1997 Constitution, while the past Constitutions had a separate chapter for Constitutional Tribunals. The principles and rules regarding the Court are also applied to the Constitutional Court including:

> Section 3 The sovereign power belongs to the Thai people. The King as Head of the State shall exercise such power through the National Assembly, the Cabinet and the Courts in accordance with the provisions of this Constitution.
>
> Section 233 The trial and adjudication of cases are the powers of the Courts,

which must proceed in accordance with the Constitution and the law and in the name of the King.

Compared with the Constitutional Tribunals, there are two differences in the nature of the Constitutional Court: (1) the judges of the Constitutional Court are appointed by the King, like other judges of ordinary courts; and (2) the trial and adjudication of the Constitutional Court is done in the name of the King.

B. Overview of the Constitutional Court

1. The Composition of the Constitutional Court

Section 255 of the 1997 Constitution provides that the Constitutional Court consists of the President and fourteen judges appointed by the King upon the advice of the Senate[26] from the following categories:[27]

(1) five judges of the Supreme Court of Justice, elected at a general meeting of the Supreme Court by secret ballot;
(2) two judges of the Supreme Administrative Court, elected at the general meeting of the Supreme Administrative Court by secret ballot;
(3) five qualified persons in law selected under Section 257; and
(4) three qualified persons in political sciences under Section 257.

The judges under (3) and (4) are elected by the Senate from persons nominated by the Selective Committee for Judges of the Constitutional Court (Section 257).[28]

The qualifications and prohibitions regarding qualified persons under (3) and (4) are provided by Section 256. The qualified persons are required to be of Thai nationality by birth, not less than forty five years old, and also should have been, in the past, a Minister, Election Commissioner, Ombudsperson, a member of the National Human Rights Commission, a member of the National Counter Corruption Commission or a member of the State Audit Commission, or have served, in the past, in a position of not lower than Deputy Prosecutor General, Director-General or its equivalent, or held a position of not lower than Professor. Some of the qualifications and prohibitions regarding candidates of a member of the HR are also applied.

The President and judges of the Constitutional Court shall hold office for nine years as from the date of their appointment by the King and shall hold office for only one term (Section 259). The long term of office and the

prohibition of reappointment are considered necessary to secure the independence of the judge.

Recruiting judges of the Constitutional Court from judges of ordinary courts is similar to the Constitutional Court of Germany.[29] An early draft in the Constitutional Drafting Assembly (CDA) provided that the Constitutional Court should consist of the judges elected by the National Assembly, excluding the *ex officio* members. However, in the course of deliberating the draft in CDA, there were proposals to add the *ex officio* members mainly because there must be much influence from the political parties. I was agreed that some judges of the Constitutional Court should come from the professional judges of the Court of Justice and Administrative Court on the condition that they would be full time judges of the Constitutional Court.[30]

2. Powers

The Constitutional Court is empowered to exercise abstract review and concrete review of legislation or other governmental acts, as well as other powers under the Organic Act on Political Parties 1998. There are fifteen provisions on the powers of the Constitutional Court in the 1997 Constitution, while there were eight provisions regarding the powers of the Constitutional Tribunal in the previous 1991 Constitution.

The details of the powers and procedures are examined in the next section.

3. Procedures and decisions

The quorum of judges of the Constitutional Court for hearing and giving a decision shall consist of not less than nine judges. The decision of the Constitutional Court shall be made by a majority of votes, unless otherwise provided in this Constitution.

Every judge of the Constitutional Court who constitutes a quorum shall give a decision on his or her own part and make an oral statement to the meeting before a resolution is passed. The decisions of the Constitutional Court and all judges thereof shall be published in the Government Gazette. The decision of the Constitutional Court must at least consist of the background or allegation, summary of facts obtained from hearings, reasons for the decision on questions of fact and questions of law, the provisions of the Constitution and the law invoked and resorted to.

The decision of the Constitutional Court shall be deemed final and binding on the National Assembly, the Cabinet, Courts and other State organs (Section 268).

The procedure of the Constitutional Court shall be prescribed by the

Constitutional Court, which must be conducted by a unanimous resolution of its judges, and shall be published in the Government Gazette. The procedures of the Constitutional Court must also be founded at least upon fundamental guarantees with regard to the openness of hearing, the opportunity to the parties to express their opinions before the decision of the case, the right of the parties to inspect documents relating to them, the opportunity to challenge the judge of the Constitutional Court and the reasoning of the decision or order of the Constitutional Court (Section 269).

The Office of the Constitutional Court is an independent secretariat. The Office of the Constitutional Court shall have autonomy in personnel administration, budget and other activities as provided by law (Section 270).[31]

4. Outcomes

The first President of Constitutional Court and other Justices were appointed by the King on April 11, 1998, and the Constitutional Court was inaugurated on May 6, 1998. The Constitutional Court started with thirteen members until two judges joined from the Supreme Administrative Court that was established in 2000.

The Constitutional Court has delivered 167 decisions[32] since its inauguration[33] in 1998 to the end of 2002. Table 3 shows the types of procedures and the number of cases of the Constitutional Court from 1998 to 2002. As the number of decisions shows, the Constitutional Court has worked as the core mechanism to implement and realize the constitutional system envisaged in the 1997 Constitution. The total number of decisions declaring the unconstitutionality of legislation or other governmental acts remains 5 cases, and the subjects of these cases relate to the election system and legislative procedures. These cases emerged in the course of implementation of the new 1997 Constitution.

C. Functions of the Constitutional Court

According to Dr. Banjerd, the powers of the Constitutional Court can be divided into the following 6 groups:[34] (1) control of the constitutionality of legislation or bills, (2) affairs relating to the National Assembly, (3) review of membership or qualifications of Members of the National Assembly and others, (4) matters relating to political parties; (5) problems of the powers and duties of the constitutional organs; and (6) infringement of Section 295. The salient features of the powers or procedures of the Constitutional Court are briefly outlined below.

Table 3

The Number of Decision of the Constitutional Court of Thailand (1998–2002)

	1998	1999	2000	2001	2002	Total
Ombudsman (S. 198)			1	2	1	4
Concrete review (S. 264)						0
Court of Justice						0
First Instance	5	9	9	10	17	50
Court of Appeal				1		1
Supreme Court	1			1	1	3
Administrative Court					1	1
Emergency Decree (S. 219)	1					1
Abstract Review (S. 262)						0
Senators		2	3	0	1	6
MPs		2	1			3
Joint	1					1
Ministership (S. 216)		1				1
Membership of MP (S. 96)		1		1		2
Asset Disclosure (S. 295)			7	3	9	19
Resolutions of Political Parties (S. 47)		1	1			2
Problems on Powers and Duties between Constitutional Organs (S. 266)	6	7	9	2	3	27
Cases under the Organic Act on Political Party	1	4	5	17	19	46
Total	15	27	36	37	52	167

Source: Author.

1. Control of the constitutionality of legislation or bills

The control of the constitutionality of legislation or bills is the essential function of the constitutional review organs. This is further divided into the following four categories: (a) cases referred by the Ombudsperson of the National Assembly under Section198, (b) cases referred by ordinary courts under Section 264, (c) cases regarding the Emergency Decree under Section 219, and (d) abstract review of bills under Section 262.[35]

(a) Cases referred by the Ombudsperson

The Ombudsperson was one of the new institutions established by the 1997 Constitution.[36] The number of the Ombudsperson is not exceeding three persons. The Ombudsperson is empowered, as one of its functions, to refer the case to the Constitutional Court.

Section 198 provides that in the case where the Ombudsperson is of the opinion that the provisions of any laws, rules, regulations or any act of certain government officials prescribed in Section 197, paragraph 1, raises the question of the constitutionality, the Ombudsperson shall submit the case and the opinion to the Constitutional Court or Administrative Court for decision. There have been three such cases referred by the Ombudsperson.

Under the past Constitutions, only the parties of the concrete cases in the ordinary courts could refer to the Constitutional Tribunals though that court. As mentioned earlier, in the course of political reform debates, there had been some proposals to introduce a system that allows the individuals to refer the case to the Constitutional Court directly like the system of constitutional objections of the Federal Republic of Germany or the Republic of Korea,[37] but the 1997 Constitution does not adopt this system.[38] In this regard, this clause may be used to enable the people to refer to the Constitutional Court without having a suit in the ordinary courts.[39]

(b) Cases referred by the ordinary courts

Section 264 provides that in the application of the provisions of any law to any case, if any ordinary court by itself is of the opinion, or a party to the case raises an objection, that the provisions of such law fall within the provisions of Section 6, the court shall stay its trial and adjudication of the case and submit its opinion to the Constitutional Court for consideration and decision. Section 6 provides that "the Constitution is the supreme law of the State. The provisions of any law, rule or regulation, which are contrary to or inconsistent with this Constitution, shall be unenforceable."

Constituted Court review is conditioned on "there not yet having been a decision by the Constitutional Court on such provisions." If the Constitutional Court considers that the objection of a party is not essential, it may refuse to accept the case. The decision of the Constitutional Court shall apply to all cases but shall not affect the final judgments of the Courts.

The concrete review cases referred by ordinary courts under the Section 264 amounted to 51 cases (31% of the total number of cases), consisting of the principal part of the cases. It is interesting that many complaints have been filed in relation to civil cases, in most of which the closing or

nationalization of financial institutions at the time of 1997 Economic Crisis were contested as unconstitutional. However, there was no case that declared the unconstitutionality of legislation so far in the procedures under Section 264.

(c) Emergency Decrees

To review whether the Emergency Degree issued by the Council of Ministers is in accordance with Section 218, paragraph 1 (Section 219).[40] Before the House of Representatives (HR) or the Senate approves an Emergency Decree under Section 218, paragraph 3, members of the HR or senators numbering no less than one-fifth of the total number of 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 Section 218, paragraph 1, and the President of the House who receives such opinion shall then refer it to the Constitutional Court for decision. In cases where the Constitutional Court decides that any Emergency Decree is not in accordance with Section 218, paragraph 1, 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 Section 218, paragraph 1, must be rendered by votes of not less than two-thirds of the total number of members of the Constitutional Court.

(d) Abstract review

To review whether any bill has content contrary to or in contradiction to the Constitution, or is enacted not in accordance with the Constitution (Section 262). Under Section 262, after any bill or organic law bill has been approved the National Assembly under Section 93 or Section 94, before the Prime Minister presents it to the King for signature, the Constitutional Court is empowered to review whether provisions of the said bill are contrary to or inconsistent with this Constitution or whether such bill is enacted contrary to the provisions of this Constitution, upon the submission of the opinion by the: (1) Members of the House of Representatives, senators or members of both Houses (for an ordinary bill, not less than one-tenth of the total number of existing members of both Houses; and for the organic law bill, not less than twenty of such members) through the President of the respective House, or (2) by the Prime Minister. During consideration by 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 renders a decision thereon.

If the Constitutional Court decides that the provisions of such bill or

organic law bill are contrary to or inconsistent with this Constitution or it is enacted contrary to the provisions of this Constitution and that such provisions of the bill or organic law bill form the essential element thereof, such a bill or organic law bill shall lapse (or otherwise such conflicting or inconsistent provisions shall lapse).

This procedure was first introduced in 1974, but no case was brought the Constitutional Tribunals. The Constitutional Court has decided 10 abstract review cases by the end of 2002. In only one case did the Court declare the two bills in dispute unconstitutional and invalid as not being enacted in accordance with the provision of the Constitution,[41] while in other cases the claimants did not succeed.

It is generally observed that abstract review may function as adding a stage of legislative process in constitutional courts. It will be an efficacious instrument of parliamentary opposition, because if deemed unconstitutional by the constitutional court, the bill is immediately voided.[42] Furthermore, the opposition party, which usually loses in the parliament under majority decision rules, may be attracted to refer to the Court, as the procedure will place the majority and minority to participate as equal parties.[43] A similar advantage may be seen in other types of procedures, as well.

2. Affairs relating to the National Assembly

The second group reviews the proceedings in the ambit of the affairs of the National Assembly, which is divided into three types:

(a) To review whether any newly submitted bill has principles that are the same or similar to the bill being vetoed under Section 177;
(b) To review the draft Rules of Procedures of the House of Representatives, or of the Senate or of the Joint Meeting of the National Assembly under Section 263;[44] and
(c) To review and decide whether submission of a motion or commission of an act 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, which is prohibited by Section 180, paragraph 6[45]

3. Review of membership or qualifications of Members of the National Assembly and others

The third group is decisions regarding the membership or qualifications of: (a) a Member of the National Assembly (Section 96); (b) of a Minister (Section 216), or (c) an Election Commissioner (Section 137).

This type of procedure was first introduced with rspect to the membership of a senator or a member of the House of Representatives in the 1949 Constitution, and later extended to ministerships under the 1974 Constitution.[46]

4. Matters relating to political parties

The fourth group is the review and adjudication of political parties, which is divided into two types:[47]

(a) To review and decide whether the resolution or regulation of any political party is contrary to or inconsistent with fundamental principles of the democratic regime of government with the King as Head of State (Section 47, paragraph 3);
(b) To review and decide whether a person or a political party has committed any acts to overthrow the democratic regime of government with the King as Head of State under this Constitution or to acquire the power to rule the country by any means, which is not in accordance with the modes provided in this Constitution (Section 63).[48]

Other than these powers conferred by the Constitution, the Constitutional Court holds the powers and duties under the Organic Act on Political Parties.[49] They are related to the dissolution order of a political party on the ground that the newly established political party could not fulfill the requirements prescribed by law, or failed to submit a report on the usage of political funds (Organic Act on Political Parties, Section 26). It seems that many of them are cases without substantial disputes.[50] This category includeds 44 cases, 28% of the total number, as the end of 2002.

5. Problems of the powers and duties of the constitutional organs

Section 266 provides that "in the case where a dispute arises as to the powers and duties of organs under the Constitution, such organs or the President of the National Assembly shall submit the matter together with the opinion to the Constitutional Court for decision."

Twenty-seven cases have been referred under Section 266. Most of them have been requested to clarify the meaning of provisions of the new 1997 Constitution. In 2 cases, the acts of the constitutional organs were declared unconstitutional and invalid. The first was on the Rules of the Election Commission regarding the qualifications of candidates for the election of senators. The Election Commission's resolution provided that the members

of the House of Representatives who remained in their seat due to the transitory provisions of the Constitution were allowed to run for election, but the Constitutional Court vacated this decision.[51] The other decision nullified the appointment of the Election Commissioners in 2002 because of the lack of qualifications.[52]

6. Asset disclosure system and the Constitutional Court

Review by the Constitutional Court regarding the infringement of asset disclosure is one of the most unique systems introduced by the 1997 Constitution. It places much emphasis on monitoring and controlling the exercise of state power.

Chapter 10 entitled "Examination of the Exercise of State Power," provides three mechanisms for monitoring and controlling the political or administrative process: (1) asset disclosure, (2) impeachment by resolution of the Senate, and (3) criminal prosecution of persons in political positions. The Constitution also established the National Counter Corruption Commission (NCCC) responsible for implementing these systems.

The Constitutional Court involves the asset disclosure system.

Section 291 provides that—

> "The persons holding the following political positions shall submit an account showing particulars of assets and liabilities of themselves, their spouses and children who have not yet become *sui juris* to the National Counter Corruption Commission on each occasion of taking or vacating office: (1) Prime Minister; (2) Ministers; (3) members of the House of Representatives; (4) senators; (5) other political officials;[53] (6) local administrators and members of a local assembly as provided by law."

The supporting documents evidencing the actual existence of such assets and liabilities as well as a copy of the personal income tax return for the previous fiscal year must be submitted together. The declarer has to certify the accuracy of the account and copies of the submitted documents by affixing his or her signature on every page thereof (Section 291(2)).

Section 295 provides that:

> "Any person holding a political position who intentionally fails to submit the account showing assets and liabilities and the supporting documents as provided in this 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 under

section 292[54] or as from 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 from the date of the vacation of office.

When the case under paragraph one occurs, the National Counter 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 section 97 shall apply *mutatis mutandis*.

(Underline added)

From 1999 to 2002, the Constitutional Court decided 19 cases referred by the NCCC. In all but one of these cases, the Court found the infringement of Section 291 or 292, and declared vacation of the position, as well as prohibition from holding public office within 5 years. Generally speaking, the Constitutional Court has contributed to realization of the asset disclosure system under Chapter 10 of the 1997 Constitution.

The most controversial case under Section 295 was the case involving Prime Minister Thaksin Sinawatra (PM: March 2001–the present) on the charge of infringement regarding the asset disclosure in August 2001. It was argued that stocks possessed by the wife of PM Thaksin were transferred to his driver and other employees, and such stocks were not declared in the account that PM Thaksin submitted to NCCC. The Constitutional Court found that the transfer of the stocks had not been reported to the NCCC, and PM Thaksin had therefore failed to fulfill the obligation under Section 292. The Court could not determine that such nonfulfillment was intentionally conducted. In the Decision in August 2002, the Constitutional Court held 8–7 that PM Thaksin did not infringe Section 292, and dismissed the case. If infringement of Section 295 had been found, Thaksin would have been dismissed, and prohibited from holding public office for five years.

The supporters of PM Thaksin welcomed this Decision. However, the Decision faced many criticisms, such as giving much priority to political considerations given the high approval rating for Thaksin at that time.[55] Another criticism concerned the method of voting in the Court's decision-making. According to the Decision, the preliminary point to be decided by the Constitutional Court was whether Section 292 should be applied to the Prime Minister's case. The Court decided for this point, 11 to 4 in the affirmative. The critics argued that the four judges against the application of Section 292 should have not joined the voting on the second question of whether there had been an infringement of Section 292. Only four of hte remaining judges believed that PM's conduct was not intentional. If the four judges against the application of Section 292 had been excluded from the

voting on the secondary question , the conclusion would have ruled against Thaksin, 7 to 4.[56]

D. Impact of the Constitutional Court on Politics

This section briefly reviews some cases brought before the Constitutional Court in the early years following its establishment to show the role of the Constitutional Court in the context of rebuilding parliamentary politics after democratization. The cases selected here are primarily controversial with respect to politics, though legally they may be of less importance. They are concerned with the economic reforms taken by the government during the Economic Crisis after July 1997, mostly under conditions specified by the International Monetary Fund (IMF) for its assistance. The focus is on the period of the Chuan Leekphai government (from November 1997 to March 2001), when confrontation between government and opposing parties or groups within the senate was important to implementation of the 1997 Constitution, as well as the economic measures carried out under IMF monitoring. Opposition parties and senators were against such bills and filed complaints with the Constitutional Court regarding various procedures. The promulgation of the 1997 Constitution in October 1997 was exactly when the value of the Thai baht was sharply declining under the Economic Crisis that started in July 1997. The Chavalit Yongchaiyudh administration at that time was deposed, mainly because of its mishandling of the economic crisis, and the Chuan administration started from November 1997. The Chuan administration faced the task of implementing the 1997 Constitution, as well as simultaneously carrying out economic measures for economic recovery. In this period, due to the transitory provisions, the members of the House of Representatives (MPs) and senators remained in office until the expiration of their terms. The ruling parties and opposition parties commanded similar numbers. The senators were appointed by the Banharn Silaparcha administration in 1996, and some of them took a conservative position on the measures, arguing that the bills were forced on them by the IMF. In particular, the so-called "11 Bills for Rehabilitation of the Economy," a package of bills including a controversial bankruptcy law amendment bill, was called "slave's bills." Amid much controversy, modifications of the bills[57] were made in the National Assembly. Additionally, referral to the Constitutional Court was also the strategy of the opposing parties and groups of senators.

The first case to reach the Constitutional Court was raised by 90 MPs regarding the 4 Emergency Decrees. The Emergency Decrees concerned were a part of the Emergency Decrees issued by the government for reform

of financial institutions and for economic recovery after the Crisis. In this Decision, the Constitutional Court, examining the explanatory notes attached to the Decrees, held that the Decrees were made in accordance with the requirements under the Constitution and dismissed the complaint.[58]

Some of the abstract cases on bills were related to IMF measures. In all these cases, the Constitutional Court held that the bill in dispute was constitutional and dismissed the complaints. In the case regarding the bill that amended the Bankruptcy Act, 112 MPs submitted complaints asking the court to decide the constitutionality of the bill. They claimed that the Bill was initiated as a condition demanded by foreign countries, and was not an ordinary bill submitted voluntarily. In its judgment, the Court found that the legislative procedure of that bill was in accordance with the provisions of the Constitution and dismissed the case, without going into the matter of the existence of foreign coercion. Also, the Court refused to allow the application of Section 224 on the approval of Treaties by the National Assembly to the case.

Similar arguments were seen in the case concerning "Letters of Intent" issued by the government with IMF. In this case, 126 MPs headed by former Prime Minister Chavalit, first submitted a request to the Senate asking it to issue a resolution removing Prime Minister Chuan and Finance Minister Tarrin Nimmanheaminda at that time, on charges that they exchanged Letters of Intent with IMF, without obtaining the approval from the National Assembly. This was, they argued, obligatory for concluding a treaty under Section 224.

Section 303 provides—

> "A person holding the position of Prime Minister, Minister, member of the House of Representatives, senator, President of the Supreme Court of Justice, President of the Constitutional Court, President of the Supreme Administrative Court or Prosecutor General, who is unusually wealthy, indicative of the commission of corruption, malfeasance in office, malfeasance in judicial office or an intentional exercise of power contrary to the provisions of the Constitution or law, may be removed from office by the Senate."

This impeachment procedure can be lodged by (1) the members of the House of Representatives (not less than one-fourth of the total number of existing members), (2) voters numbering not less than fifty-thousand. Senators have the right, if not less than one-fourth of the total number of the existing members of the Senate, to lodge with the President of the Senate a complaint requesting that the Senate pass a resolution under section 307

removing a senator from office. The NCCC will conduct an investigation and report to the Senate.

NCCC requested the Constitutional Court, under the authority of Section 226, to decide whether the Letters of Intent fell into the category of treaties under Section 224 as the preliminary question. The Constitutional Court held that the Letters of Intent did not fall into the category of treaty, the conclusion of which had to be approved by the National Assembly. It should be noted that, according to this Decision, the allegation that the Letters of Intent needs the approval of the National Assembly, was first raised by the opposition parties including the Democrat Party headed by Mr. Chuan, when the Chavalit government issued the first two Letters of Intent to IMF.[59]

In most cases the complaints raised against IMF-related measures were dismissed by the Constitutional Court. If we look into the details of the arguments raised by the opposing parties and groups of senators in these cases, some arguments seem unsupported by legally persuasive reasoning, although it is understandable that the argument of foreign pressure may strike the right chord with the citizenry in certain political situations. It would be reasonable to understand that opposing parties or groups of senators, when referring to the Constitutional Court, put much importance to improving their own political position by, for example, trying to reduce the people's confidence in the government. In these cases, the details of the decision might be of secondary importance to the complaint. Then, did the emerging of the Constitutional Court just increase the opportunity for inter-party struggles, like no-confidence motions, to be heavily used?

One approach may be to give attention to the function of the Constitutional Court as a mediator for streamlining the political process by making a decision on the issues in the early stage of political confrontation. Political confrontation may give rise to endless debates, and may cause the political stagnation that seems so common to parliamentary democracies, especially in the transitory process following democratic movements. If the Constitutional Court could decide this issue in a timely manner, then the issue would lose importance in the political process. Politics may shift focus to another issue. In a sense, the avoidance of political deadlock can be considered a function of the Constitutional Court.

IV. Conclusion

The establishment of the Constitutional Court of Thailand was motivated by political reform aimed at rebuilding the framework for a stable and efficient

parliamentary democracy. The philosophy of political reform was reflected in the composition and functions of the Constitutional Court, on the basis of critical consideration of the constitutional tribunal system under past Constitutions. The increase of the cases shows that the Constitutional Court has contributed to the realization of the new provisions and mechanisms introduced by the 1997 Constitution. The activation of constitutional litigation is expected to encourage the development of constitutional law in the field of human rights protection, and in economic or social policy making. Also as its powers increase, the Constitutional Court is becoming more heavily involved in the political process, not only as a watchdog of the constitution, but also as a kind of mediator of the political process. Further analysis is necessary on this aspect. In designing the constitutional review system after pro-democratic movements, much attention should be given to the broader scope of the function of the Constitutional Court.

Notes

1 This type of constitutional court has developed in the continental European countries, especially after World War II. The number of the countries to introduce this type has grown in Europe and other areas. See generally Louis Favoreu, *Les Cours Constitutionelles*. 3e édition, Paris: Presses Universitaires de France, Que sais-je?, n° 2293. (Japanese translation by Hajime Yamamoto, *Kenpo saibansho* [in Japanese] Keibundo, 1999). In East Asia, the Republic of Korea, Cambodia, Indonesia and Mongolia have established a Constitutional Court, though there are many variations in composition and functions.

2 For the political change in Thailand in the 1990s, see e.g. Kevin Hewison (ed.), *Political Change in Thailand*, Routledge, 1997; Pasuk Phongpaichit and Chris Baker, *Thailand: Economy and Politics*, Oxford University Press, 1995.

3 CDC had 99 members consisting of 76 members selected from each province, and 23 members from the academics in law and political science. See the 1991 Constitution (amended in 1996), Section 211f.

4 The original name in Thai language, *Khana tulaakaan ratthathammanuun* can be translated as "Council of Constitutional Judges." It is usually translated as Constitutional Tribunal in many English translations of past Constitutions, so this paper uses "Constitutional Tribunal." The word *tulaakaan* means a judge or judiciary. A judge of ordinary Courts of Justice is called *phuu piphaaksaa*, while a judge of the Constitutional Court, Constitutional Tribunals and Administrative Court is called "tulaakaan."

5 For the Constitutional Court in Thailand, Banjerd Sinkhanes, *Khwaamru thuapai kiawkap saan ratthathammanuun* [in Thai] (General Knowledge on Constitutional Court), Bangkok: Winyuchon, 2002; Somkit Lertpaithoon, *Tulaakaan*

ratthathammanuun [in Thai] (Constitutional Tribunal), Bangkok: Nithitham. 1993.

6 The 1946 Constitution, Section 86. The National Assembly consists of two Houses: the House of Representatives and the Senate. Senators were appointed by the King, before the first election was conducted in 2000 under the 1997 Constitution.

7 Supreme Court Decision 1/2489, dated March 23, 1946.

8 Somkit, *op. cit.*, pp. 11–12.

9 Somkit,*op.cit.*, pp. 51–61.

10 The reason Thailand has had so many Constitutions is the frequent changing of political power through military coups. When a coup succeeded, the new group brought down the National Assembly and repealed the existing Constitution. It was perceived as inevitable that each new coup group would enact its own new Constitution legitimizing their governance in place of the Constitution they repealed. Many of the coups resulted from power games among the ruling military groups, so there were few differences between the Constitutions.

11 Somkit, *op. cit.*, p. 61.

12 The appointment or removal of judges is made by the King with the approval of the Judicial Commission headed by the President of the Supreme Court.

13 Prior to 1991, public prosecutors belonged to the Ministry of Interior. The director-general of the Department of Public Prosecutors was assigned to be one of the *ex officio* members of the Constitutional Tribunal.

14 Office of the Secretariat of the National Assembly, *Ratthathammanuun aanaajakr thai phutsakraat 2521 phrom duai kaanphijaaranaa khong saphaa nitibanyat heang chaat* [in Thai] (Constitution of the Kingdom of Thailand 1978: with the Deliberation of the National Legislative Assembly), Bangkok, 1978, pp. 349–359.

15 Banjerd, *op. cit.*, pp. 134.; All the decisions are reproduced in Somkit, *op. cit.*, pp. 101f.

16 As Table 3, shows all five cases referred by the ordinary court in 1950s, unconstitutionality of the laws is declared. Prior to the 1991 Constitution, the condition for referral from the ordinary court is limited as the relevant provision required the ordinary court to be certain (*nae jai*) of the unconstitutionality of any Act to be applied to the case. The 1991 Constitution relaxed the requirement to that the ordinary court could find the justiciable reason (*hect an somkhuan*) to think the Act was unconstitutional. Somkhit, *op. cit.*, p. 59. The relaxation of the requirement for the referral from the ordinary court did not increase the number of cases.

17 Constitutional Tribunal Decision 1/2535, dated June 3, 1992. According to Dr. Amon, both requirements of paragraph 1 and 2 of Section 172 were provided in the same paragraph in the former Constitution, but the author of the 1991 Constitution intended to exclude this type of allegation. Amon Cantrasomboon, "Botwicaan khamvinichai khong khanatulaakaan ratthathammanuun: karani praraachakamnot niratootkam nai heatkaan duanwrusapaakhom (thamin) phor sor 2535," [in Thai] ("Article Examining the Decision of the Constitutional Tribunal: The Case on the Emergency Decree Giving Amnesty in the (Grief) May 1992 Incident"), *Rapisan*, special edition, 1994, pp. 42–43.

18 Constitutional Tribunal Decision 2/2535, dated July 22, 1992.

19 Amon, *op. cit.*, pp. 59–68.

20 *Ibid.*

21 Constitutional Tribunal Decision 3/2535, dated November 9, 1992.

22 Amon, *op.cit.*, pp. 74–77.
23 The senators at that time were nominated by the coup group in 1991, and took a position opposing the plan of the government to reduce the power of the senate and to introduce the election of the senators, and they supported the opposing parties' bill. The bill of the government was rejected, and the 1995 amendment was based on the opposing parties' bill. The political maneuvering related to the constitutional amendment was strongly criticized by the pro-democratic groups.
24 Committee on Democracy Development, *Khoo saneu kroop khwaamkit nai kaan patiruup kaanmuang* [in Thai] (New Framework of Thinking for Political Development), Thai Research Fund, 1996.
25 *Ibid.*, pp. 38–39.
26 The 1997 Constitution provides that the senatorial candidates are not members of any political party, nor do they have certain relationships with any political party as prescribed in the Constitution. The term of office of a senator is 6 years, and any person who is a senator is restricted to one term only. These provisions are intended to prevent a senator from seeking special interests for his/her constituency, and instead, to concentrate on the more general interests of the Kingdom. Therefore, theoretically, senators are expected to be free from inter-party political maneuvering under this Article. And based on the "neutrality" or theoretical non-partisan character of the Senate, the Senate is given a significant role in the constitutional system, especially in the nomination or appointment of public positions under the Constitution.
27 The English text of the 1997 Constitution of the Kingdom of Thailand was taken from the Election Commission's website, with some modifications by the author. See http://www.ect.go.th/english/laws/constitutioneng.html (accessed on March 1, 2003).
28 The Selecting Committee comprises the President of the Supreme Court of Justice as chairperson, and representatives from the Deans of the Faculties of Law of National Universities (4 persons), and of the Faculties of Social Sciences (4 persons), as well as representatives from the political parties (4 persons). For the selection procedure of the Constitutional Court Judges, see Section 256.
29 The Constitutional Court of Germany consists of 16 judges, of which 6 judges are selected from among the judges of the Federal Court of Justice, Federal Administrative Court, Federal Labour Court, Federal Social Court or Federal Tax Court, and the other 10 judges are selected from among persons having qualifications for judicial officer; in practice most of them are university professors or politicians who have passed the bar exam. Favoru (translated by Yamashita), op. cit., pp. 55–56.
30 Montree Rupsuwan, Kanchanaratt Leevirojana, Ruthai Hongsiri and Manit Jumpa (eds.), *Ceetanaarom khong ratthathammanuun* [in Thai] (Sprit of the Constitution), Winyuchon, 1999, pp. 392–393.
31 For details, see Act on the Office of Constitutional Court 2000.
32 This figure is calculated by the author from the Decisions available from the website of the Constitutional Court at http://www.concourt.or.th/ (accessed on March 13, 2003) or the series of the compilation of the Decisions published by the Office of the Constitutional Court.
33 The Constitutional Court first consisted of 12 judges, until the establishment of the Supreme Administrative Court in 2000.

34 Banjerd, *op.cit.*, pp. 152–159.
35 *Ibid.*
36 The 1991 Constitution (amended in 1995) first introduced the Ombudsperson, however no appointment was made.
37 See e.g. Commission for Development of the Democracy, *op .cit.*, p. 39.
38 The number of the decisions of the Constitutional Court of Korea from its inauguration in 1987 to August 31, 2002 amount to 8,070 cases, and 7,617 cases are referred by individuals as "constitutional complaint" under Section 68 of the Constitution of the Republic of Korea. For details of the case of ROK, see http://www.ccourt.go.kr/ (accessed October 1, 2002).
39 Faculty of Law, Thammasat University, *New Legal Frameworks towards Political and Institutional Reform under the New Constitution of Thailand*, IDE Asian Law Series No. 14, Chiba, Japan: IDE-JETRO, 2002, p. 16.
40 Section 218 provides that the King may issue an Emergency Decree which shall have the force of an Act, "for the purpose of maintaining national or public safety or national economic security, or averting public calamity, The issuance of an Emergency Decree shall be made only when the Council of Ministers is of the opinion that the case is an emergency and of necessary urgency, which is unavoidable. (Sec. 218, paragraph 2). The Emergency Decree has to be considered by the National Assembly for approval. If disapproved, the Emergency Decree shall lapse; provided that it shall not affect any act done during the enforcement of such Emergency Decree.
41 Constitutional Court Decision 13–14/2541, dated November 12, 1998.
42 Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe*, Oxford University Press, 2000, p. 198.
43 *Ibid.*
44 This type of procedure was introduced by the 1991 Constitution. Section 263 provides that the provisions of Section 262 (2) shall apply *mutatis mutandis* to draft rules of the procedure of the House of Representatives, draft rules of the procedure of the Senate and draft rules of the procedure of the National Assembly, which have already been approved by the House of Representatives, the Senate or the National Assembly, as the case may be, but remain unpublished in the Government Gazette.
45 In the 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 (Section 180, paragraph 6).
46 Somkit, *op.cit.*, p. 54–56.
47 From 1998 to 2002, there were two cases regarding the resolution of a political party.
48 Section 63 provides that the person knowing of such an act shall have the right to request the Prosecutor General to investigate the facts and submit a motion to the Constitutional Court ordering cessation of such act without prejudice to the institution of a criminal action against such person. In the case where the Constitutional Court makes a decision compelling the political party to cease committing the act under paragraph 2, the Constitutional Court may order the dissolution of such political party.

49 *Ibid.*, pp. 159–162.
50 There were some separate opinions arguing that such procedures did not need to be the power of the Constitutional Court.
51 Decision 51–52/2542, dated November 23, 1999.
52 Decision 38/2545, dated July 4, 2002.
53 For the scope of the political officials, see the Act on the Regulation of Political Officials 1992.
54 Thirty days from the date of taking office or within thirty days from the date of vacation. The person holding a position of Prime Minister, Ministers, local administrator, member of a local assembly or the person holding a political position but having vacated office has to also re-submit an account showing particulars of assets and liabilities within thirty days from the date of the expiration of one year after the vacation of office (s. 292).
55 The Court publicized its decision on August 3, 2001, but it could not show the reasoning until August 21. Such irregularity encouraged the critics.
56 Nao Otomo, "Taini okeru oshoku to fusei: 1997 kenpo no torikumi [in Japanese] (Corruption in Thailand: Approaches of the 1997 Constitution," in Naoyuki Sakumoto & Shinya Imaizumi (eds.), *Ajia shokoku ni okeru minshuka katei to ho* (Democratization Process and Law in Asia: The Philippines, Thailand and Indonesia), Chiba: IDE-JETRO, 2003.
57 At that time, some MPs and senators were said to have had their own business damaged by the economic crisis, and were reluctant to pass the bills such as the bill on bankruptcy law amendments as they thought their business would be wiped out.
58 Constitutional Court Decision 1/2541, dated May 23, 1998.
59 Constitutional Court Decision 11/2542, dated May 25, 1999. For details of the relationship between IMF and Thailand, see e.g. the website of IMF at http://www.imf.org/external/country/tha/index.htm (accessed March 1, 2003).