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**SEPARATION OF POWERS AND INDEPENDENCE OF
THE CONSTITUTIONAL COURT OF THAILAND**

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INTRODUCTION

The principle of separation of powers among the legislature, the executive and the judiciary is of fundamental importance to modern democracy. The separation of powers among the three authorities means mutual checks and balances among them which guarantee the limitation of any excess of power by other powers. One of the importance hallmarks of a state that respects this principle is the independence of the judiciary. In fact, the independence of the judiciary is a logical corollary of the principle of separation of powers in the sense that the vesting of judicial functions in a body separate from the legislature and the executive can only be meaningful if that body is truly independent.

Every constitution that had been promulgated in Thailand since the change from absolute monarchy to constitutional monarchy in 1932 embraced the principle of separation of powers. The current one - the Constitution of the Kingdom of Thailand, B.E. 2550 (2007) (hereinafter referred to as “the Constitution”) stipulates that Thailand adopts a democratic regime of government with the King as Head of State.¹ Sovereign powers belong to the Thai people. The King as Head of State shall exercise such powers through the National Assembly, the Council of Ministers and the Courts in accordance with the provisions of this Constitution. The performance of duties of the National Assembly, the Council of Ministers, the Courts, Constitutional organs and States agencies shall be in accordance with the rule of law.²

The Constitution contains one chapter - Chapter X the Courts - dealing with the judicial powers. Chapter X is divided into 5 parts. Part 1 is the General Provisions which states the general principles regarding the judicial powers, while Parts 2, 3, 4, 5 contain provisions concerning the Constitutional Court, the Courts of Justice, the Administrative Courts and the Military Courts respectively. The division of the Chapter in this fashion

¹ *The Constitution of the Kingdom of Thailand, B.E. 2550 (2007)*, section 2.

² *Ibid.*, section 3.

signifies that the Judiciary or the Court system in Thailand is a parallel system of judicial jurisdiction with 4 types of courts.

Judicial powers, as one aspect of sovereign powers, are vested in the Courts. This is affirmed in the Constitution which provides that the trial and adjudication of cases are the powers of the Courts, which must be carried out with due regard to justice in accordance with the Constitution, laws and in the name of the King. Judges are independent in the proper, swift and fair trial and adjudication of cases in accordance with the Constitution and laws.³

This means that only the Courts can exercise judicial powers to ensure justice. The Constitutional Court, just like other Courts in the system, is independent and has to decide constitutional cases in accordance with the Constitution and laws.

Various guarantees of independence of the Constitutional Court are specified in the Constitution and related laws. These guarantees will now be examined.

I. The independence of the Constitutional Court as an institution

In constitutional democracy, the constitution is regarded as supreme. This principle of the supremacy of the constitution is reflected in the Constitution that the Constitution is supreme law of the State. The provisions of any law, rule and regulation, which are contrary to or inconsistent with the Constitution will be unenforceable.⁴

The Constitutional Court performs the important function of safeguarding this supremacy of the Constitution. It also serves as a judicial body which recognizes and protects the rights and liberties of the people and translate into reality the protection of rights and liberties by the exercise of adjudicative power.

The constitutional status of the Constitutional Court

The Constitutional Court was established by virtue of the Constitution. It consists of the President and eight judges to be appointed by the King upon advice of the Senate.⁵ Judges of the Constitutional Court are styled “Justices of the Constitutional Court”.

The Constitution provides for the Constitutional Court to have powers and duties in adjudicating and ruling constitutional cases. These powers and duties may be divided into the following nine categories:

(1) constitutional review of bills and draft rules of procedure of the legislative branch prior to their promulgation to ensure that they are not inconsistent with or contrary to the Constitution;⁶

³ *Ibid.*, section 197 paras. 1 and 2.

⁴ *Ibid.*, section 6.

⁵ *Ibid.*, section 204 para. 1.

⁶ *Ibid.*, sections 141, 149, 154, 155.

(2) constitutional review of a promulgated law to ensure that it is not inconsistent with or contrary to the Constitution;⁷

(3) constitutional review of the prerequisites for the enactment of an Emergency Decree to ensure that it is not inconsistent with or contrary to the Constitution;⁸

(4) ruling on whether or not members of the House of Representatives, senators or members of the committee are involved directly or indirectly in the use of the appropriations;⁹

(5) ruling on disputes regarding the powers and duties among the National Assembly, the Council of Ministers or the Constitutional organs other than the Courts which arise between two or more of such organs;¹⁰

(6) review resolutions or regulations of political parties, consideration of appeals of members of the House of Representatives and ruling on cases concerning the constitutional exercise of political rights and liberties by a person or a political party;¹¹

(7) ruling on the membership or qualification of a member of the National Assembly, Ministers and Election Commissioners;¹²

(8) ruling on whether or not a treaty requires prior approval of the National Assembly;¹³

(9) powers and duties prescribed under the Organic Act on Political Parties, B.E. 2550 (2007).¹⁴

Regulatory autonomy and administrative autonomy

The Constitutional Court has the autonomy to organize itself with regard to case management as well as the general administration of the Court. The Court has an independent secretariat, with the Secretary-General of the Office of the Constitutional Court as the superior official directly responsible to the President of the Constitutional Court. A person to be appointed as the Secretary-General of the Office of the Constitutional Court must be nominated by the President of the Constitutional Court with the approval of Justices of the Constitutional Court collectively. The Office of the Constitutional Court has independence in personnel administration, budget and other activities as provided by law.¹⁵

⁷ *Ibid.*, sections 211, 245, 257, 212.

⁸ *Ibid.*, section 184.

⁹ *Ibid.*, section 168.

¹⁰ *Ibid.*, section 214.

¹¹ *Ibid.*, section 65, 106 (7), 237.

¹² *Ibid.*, sections 91, 182, 233.

¹³ *Ibid.*, section 190.

¹⁴ *The Organic Act on Political Parties, B.E. 2550 (2007)*, section 13, 14, 41, 33, 20 (4), 31, 91, 93, 94, 98. See also, *Office of the Constitutional Court, A Basic Understanding of the Constitutional Court of the Kingdom of Thailand, 2008* pp. 4 – 32.

¹⁵ *Supra*, note 1, section 217.

In this connection, the Office of the Constitutional Court Act, B.E. 2542 (1999) was enacted to give effect to the above-mentioned provision of the Constitution. According to this Act, the Justices of the Constitutional Court collectively have the power to issue regulations or notifications with respect to general administration, personnel administration, budget, finance and property and other businesses of the Office of the Constitutional Court. Such regulations or notifications will be signed by the President of the Constitutional Court and come into force upon their publication in the Government Gazette.¹⁶

Justices of the Constitutional Court collectively, in practice, play 3 important and distinctive roles. For the adjudicative function, the Justices collectively are the Constitutional Court. The Justices collectively play a role of the Board of Directors in performing administrative affairs of the Office of the Constitutional Court. And, lastly, the Justices collectively become the Central Personnel Administration Body for officials of the Office of the Constitutional Court. All these show the independence of the Constitutional Court in the administration of its own affairs.

As for the procedures of the Court, the Constitution provides in Section 216 paragraph six that the procedures of the Constitutional Court shall be in accordance with the Organic Act on Procedures of the Constitutional Court. The Organic Bill on Procedures of the Constitutional Court has been submitted for consideration of the House of Representatives since 2008. Nevertheless, this Bill is still pending consideration in the House of Representatives.

The Constitution provides in Section 300 paragraph five, as part of its transitional provisions, that while the Organic Act on Procedures of the Constitutional Court has not yet been enacted, the Constitutional Court has the powers to prescribe rules on procedures and rendering of decisions. So the Constitutional Court has issued the “Rules of the Constitutional Court on Procedures and Ruling B.E. 2550 (2007)”. The Rules have been applied to every case that comes to the Constitutional Court at the present time. Constitutional Court procedures under the Rules provide for an inquisitorial system. Any procedure which is not specifically provided for under these Rules will be governed by provisions of the Civil Procedure Code to the extent that such provisions are applicable and not inconsistent with these Rules.

Budgetary independence

The Constitutional Court administers its own budget which is part of the State budget. The Constitution provides that the State will allocate adequate budgets for the autonomous administration of the Constitutional Court and in consideration of expenditure estimates for the Constitutional Court if the Court is of the opinion that the allocated budget is insufficient, it will submit a motion to the committee (National Assembly’s Budgetary Committee) directly.¹⁷

¹⁶ *Office of the Constitutional Court Act, B.E. 2542 (1999)*, section 6.

¹⁷ *Supra*, note 1, section 168 paras. 8 and 9.

As regards the submission of budget estimates, the Office of the Constitutional Court Act, B.E. 2542 (1999) stipulates that the Office will submit to the Council of Ministers its estimates of the budget in accordance with the resolution of the Justices of the Constitutional Court collectively for the purpose of incorporating it in the annual appropriations bill or the supplementary appropriations bill, as the case may be, in order to set it aside as subsidies of the Justices of the Constitutional Court collectively and the Office of the Constitutional Court. In this instance, the Council of Ministers may also prepare the opinion with regard to the allocation of budget of the Justices of the Constitutional Court collectively and the Office of the Constitutional Court to be included in the memorandum accompanying the introduction of the annual appropriations bill or the supplementary appropriations bill. In the consideration of the annual appropriations bill or the supplementary appropriations bill, the House of Representatives or the Senate may allow the Secretary-General of the Office of the Constitutional Court to give explanations.¹⁸

As it happens every year, the National Assembly Budgetary Committee or the National Assembly rarely changes the budget estimates of the Office of the Constitutional Court.

One outstanding feature of the budgetary management of the Office of the Constitutional Court is that the unspent money left over from the previous fiscal years can be carried forward to the current fiscal year for spending. However, a report regarding this amount has to be submitted to the Council of Ministers at the end of every fiscal year.

All in all, it could be said that the Constitutional Court has necessary autonomy regarding its budget which could contribute to its institutional independence.

Disciplinary independence

Justices of the Constitutional Court are required to follow the Constitutional Court's Guideline for judicial conduct. Serious violation of proper judicial conduct could result in criticism by fellow Justices. It is up to the person's conscience to do what is necessary to rectify the wrong. In practice, however, rarely did improper conducts occur.

Compliance with decisions of the Constitutional Court

The Constitution stipulates that the decision of the Constitutional Court will be deemed final and binding on the National Assembly, the Council of Ministers, the Courts and other State organs.¹⁹ It is final in the sense that the parties may not file an appeal to any court or body. It is binding in the sense that the decisions of the Constitutional Court will be binding not only to the parties but also to third parties. Thus, once the Constitutional Court passes a ruling, that ruling will be directly binding on the National Assembly, the Council of Ministers, the Courts as well as constitutional organs and state agencies in the enactment, application and interpretation of laws.

¹⁸ *Supra*, note 16, section 13.

¹⁹ *Supra*, note 1, section 216 para. 5.

In practice, so far, there has never been a case of non-compliance with the decision of the Constitutional Court.

Relationship with the media

The Constitutional Court attaches great importance to public understanding of the works of the Court. In this connection, the Court has undertaken a wide variety of projects, some already executed and some to be executed in the future, in order to promote public understanding of the role of the Constitutional Court as well as its decisions. For example, there are projects of the Court meeting the people in the provinces, quiz competition projects, drawing contest projects, etc. Apart from these, books, pamphlets, journals, bulletins, and newsletters are regularly prepared and distributed to bring information to the knowledge of the public.

Still, the help of the media is needed because the media can make the Court's proceedings and its ruling comprehensible to the general public. The media, as a matter of fact, acts like the public's eyes and ears. Correct and responsible reporting by the media is therefore very important. The good mutual understanding between the Court and the media is therefore necessary and desirable.

The Constitutional Court initiated a dialogue between the Court and the media in the form of seminars organized from time to time. At such seminars, the atmosphere was always good. Views were usually exchanged frankly and freely. Such seminars will surely be organized regularly in the future.

The Constitutional Court assigns the Office of the Constitutional Court the task of communicating with the media. A spokesmen team has been appointed to do this job, comprising the Secretary-General and one of the Deputy Secretaries-General of the Office of the Constitutional Court. The team usually holds press conference, especially on the day that the Constitutional Court renders a decision. Press release briefing the substance of the Court's decision are distributed at this occasion.

It can be said that, in general, the relationship between the Constitutional Court and the media is pretty good. There are, however, two kinds of problems occasionally coming up in this relationship.

The first kind involves inaccurate or misleading reporting of the essence or reasons of the Court's decisions which results from erroneous interpretation of the decisions on the part of the media for whatever the reason. This kind of problems could, however, be rectified in the future by facilitating or helping the media in the writing of news reports on the Court's decisions. One way is by the Office of the Constitutional Court preparing a decision summary couched in laymen's terms as possible to be distributed to the media. The other way is that the Office of the Constitutional Court organizes from time to time a short training course about the working and functioning of the Constitutional Court and meaning of legal terms usually used in the decisions.

Another kind of problems is more serious. It is noted that every time cases which could have political implications are under consideration of the Constitutional Court, for example, a case involving whether a big political party would be dissolved or not, some newspapers then act as a “mouthpiece” of some political groups who have interests in the case by reporting only one-side understanding of the story, even rumours, sometimes to the point of bringing the Court into disrepute and diminishing or damaging the credibility and impartiality of the Court. Such being a case, the Office of the Constitutional Court has no choice but to issue explanations concerning the true story in order to dispel misunderstanding and correct false impression.

If the acts on the part of the newspaper amount to defamation or other violations of laws, the Office of the Constitutional Court, at the instance of the Justices of the Court collectively, will make a complaint to the police to start the criminal proceedings, in accordance with due process of law, in the Courts of Justice.

II. The constitutional independence of individual judges

While it is admitted that in one sense the individual independence of the judge depends on “the state of mind” of that particular judge in the discharge of judicial office, it is still important that there should be guarantees of independence of individual judges stipulated in either the Constitution or law. In the case of the Constitutional Court of Thailand, a certain number of guarantees that support the independence of individual judges are provided in the Constitution.

Selection process

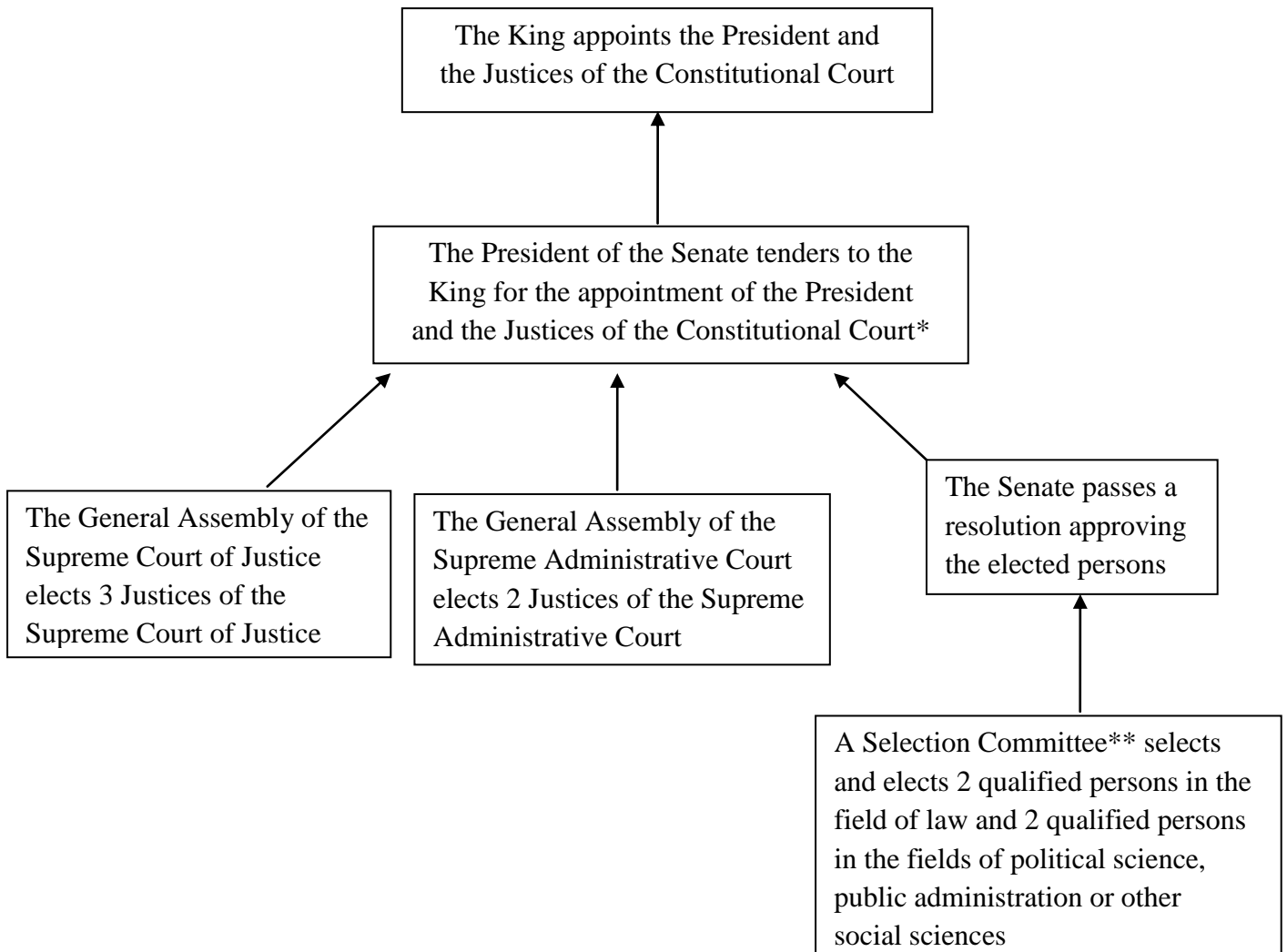
Since the Constitutional Court is a special judicial organ, the selection for the 9 Justices of the Constitutional Court is different from judges of other courts. Justices of the Constitutional Court are from three sources:

(a) *Justices of the Supreme Court of Justice*, 3 of whom are elected at a General Assembly of the Supreme Court of Justice by secret ballot.

(b) *Justices of the Supreme Administrative Court*, 2 of whom are elected at a General Assembly of the Supreme Administrative Court by secret ballot.

(c) *Qualified persons*, 2 qualified persons in the field of law who genuinely possess knowledge and expertise in law and 2 qualified persons in the fields of political science, public administration or other social sciences who genuinely possess knowledge and expertise in the administration of State affairs.

The selection process of the Justices of the Constitutional Court is as set out in a diagram below:



*- 9 elected persons shall hold a meeting and elect one among themselves to be the President of the Constitutional Court and notify the result to the President of the Senate accordingly.

-The President of the Senate shall countersign the Royal Command appointing the President and Justices of the Constitutional Court.

** The Selection Committee comprises the following:

1. President of the Supreme Court of Justice;
2. President of the Supreme Administrative Court;
3. Speaker of the House of Representatives;
4. Leader of the Opposition in the House of Representatives;
5. One person selected by and amongst Presidents of independent constitutional organs.

It can be seen that, among the 9 Justices, 5 Justices are elected by the Judiciary while the other 4 are elected by the Legislature. The Executive has minimal, if any, part in the election of the Justices of the Constitutional Court. Indeed, it could be said that the government has only one small voice through the Speaker of the House of Representatives in the Selection Committee of qualified persons since usually the Speaker is from the ruling political party or one of the ruling political parties. The Justices of the Constitutional Court therefore owe no duty of “gratitude” to those who elected them, thus enhancing their individual independence.

Professional qualifications

The Justices of the Constitutional Court have high professional qualifications. Five among the nine Justices are from the highest courts of the Judiciary, namely the Supreme Court of Justice and the Supreme Administrative Court. The other four, those who have been elected as qualified persons in the field of law or the fields of political science, public administration or other social sciences, also have high qualifications in that they must have been a Minister, a judge of the Supreme Military Court, an Election Commissioner, an Ombudsman, a National Counter Corruption Commissioner, a State Audit Commissioner or a National Human Rights Commissioner, or having served in a position of not lower than Deputy Attorney-General, Director-General or a person holding an administrative position in a government agency having administrative powers equivalent to a Director-General, or holding a position of not lower than Professor or having been a lawyer practicing legal profession regularly and continuously for not less than thirty years up to the date of nomination.

The Justices of the Constitutional Court are equal. The President is the “first among equals (*primus inter pares*)”. However, the election for the position of the President has to be done among themselves at the beginning of the term of office before the Royal Appointment or whenever the position is vacant thereafter. Therefore, there is no question of the promotional “temptations” as such.

Age and term of office

The minimum age for qualified persons in the field of law and the fields of political sciences, public administration or other social sciences to be elected to become Justices of the Constitutional Court is 45 years. There is no minimum age as far as Justices of the Constitutional Court who come from the Supreme Court of Justice and the Supreme Administrative Court are concerned. Of course, in practice, any person who could reach the positions of Justices of the Supreme Court of Justice and the Supreme Administrative Court usually are older than 45 years.

The term of office for the President and Justices of the Constitutional Court is 9 years. They will hold office for only one term.

In addition to the vacation of office upon the expiration of term, the President and Justices of the Constitutional Court vacate office upon:

- (1) death;
- (2) being of seventy years of age;
- (3) resignation;
- (4) being disqualified or being under any of the prohibitions;
- (5) having done an act in violation of incompatibilities;
- (6) the Senate passing the resolution for the removal from office;
- (7) being sentenced by a judgment to imprisonment notwithstanding the case not being final or the suspension of sentence, except the case of an offence committed through negligence, a petty offence or a defamation offence.²⁰

The removal from office by the Senate will be elaborated below.

The fixed term of office and non-renewability certainly serve as a guarantee for individual independence of the President and Justices of the Constitutional Court.

Material benefits

The Constitution stipulates that salaries, emoluments and other benefits of judges shall be as prescribed by law; provided that the system of salary-scale or emoluments applicable to civil servants shall not be applied. The said provisions also apply to Election Commissioners, Ombudsmen, National Counter Corruption Commissioners and State Audit Commissioners *mutatis mutandis*.²¹ In this connection, there is a separate Act on salaries, emoluments and other benefits of the President and Justices of the Constitutional Court. The level of salaries, emoluments and other benefits of the President and Justices of the Constitutional Court is, in principle, on par with those of the Presidents and Justices of the Supreme Court of Justice and the Supreme Administrative Court at a reasonable level commensurate with the positions concerned. It is believed that the level of salaries, emoluments and other benefits would promote the independence of those Justices.

Incompatibilities

According to the Constitution²², the President and Justices of the Constitutional Court must not be a government official holding a permanent position or receiving a salary. Nor can they be an official or employee of a State agency, State enterprise or local government organization or a director or adviser of a State enterprise or State agency. The other prohibitions are: they must not hold any position in a partnership, a company or an organization carrying out business with a view to sharing benefits or incomes, or be an employee of any person and they must not engage in any other independent profession. These incompatibilities start to be applied when the person concerned assumes his duty: he must have resigned from those positions mentioned above or must produced credible evidence that his engagement in such independent profession has ceased to exist. However, at the time of

²⁰ *Ibid.*, section 209.

²¹ *Ibid.*, section 202.

²² *Ibid.*, section 207.

being elected to the position of the President or a Justice of the Constitutional Court he must not be under any of the prohibitions:

(a) he must not be a member of the House of Representatives, senator, political official, member of a local assembly or local administrator;

(b) he must not be or have been a member or holder of other position of a political party over the period of three years preceding the taking of office;

(c) he must not be an Election Commissioner, an Ombudsman, a National Counter Corruption Commissioner, a State Audit Commissioner or a National Human Rights Commissioner.

The purpose of having these constitutional limitations is to prevent the Justice from being in a situation of conflict of interests or a situation that could compromise his independence.

Removal from office or impeachment process

The President and Justices of the Constitutional Court who are under exhibited circumstances of unusual wealthiness 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 or serious violation or failure to comply with ethical standards, may be removed from office by the Senate.²³

The process may be initiated by the lodging of complaint to the President of the Senate requesting the Senate to pass a resolution removing the person from office by either of the following:

(a) members of the House of Representatives of not less than one-fourth of the total number of the existing members of the House; or

(b) senators of not less than one-fourth of the total number of the existing members of the Senate; or

(c) voters of not less than twenty thousand in number.

The complaint must clearly itemize the circumstances in which such a person has allegedly committed the act.²⁴

The President of the Senate then refers the matter to the National Counter Corruption Commission for inquisition without delay. When the inquisition is completed, the National Counter Corruption Commission will prepare a report for submission to the Senate. Such a report will clearly state whether, and to what extent, the accusation stated in the complaint

²³ *Ibid.*, section 270.

²⁴ *Ibid.*, section 271.

contains a *prima facie* case, whether there are convincing evidences, and the resolution therefor.²⁵

Upon receipt of the report of the National Counter Corruption Commission, the President of the Senate will convoke a sitting of the Senate for considering the said matter without delay. A senator will have independence in casting a vote by secret ballot. A resolution for the removal of any person from office must be passed by the votes of not less than three-fifth of the total number of the existing members of the Senate.²⁶

The Oath of office

In Thailand, before taking office, every judge must have an audience with His Majesty the King to make a solemn declaration before the King in the following words:

“I (name of the declarer) do solemnly declare that I will be loyal to His Majesty the King and will faithfully perform my duties in the name of the King without any partiality in the interest of justice, of the people and of the public order of the Kingdom. I will also uphold and observe the democratic regime of government with the King as Head of the State, the Constitution of the Kingdom of Thailand and the law in every respect.”²⁷

Any solemn declaration before the King is considered the sacred act in Thailand. It is therefore widely believed that this declaration should at least serve as a constant reminder to each individual judge that he should abide by the declaration in the discharge of his judicial office, thereby promoting his independence.

III. Operating procedures of the Constitutional Court

Standing (*locus standi*) before the Constitutional Court

The Constitutional Court, as a court, cannot start the proceeding by itself at its own initiative. There must be some subjects who have legal standing (*locus standi*) according to the Constitution to file an application with the Constitutional Court to start the case. The Constitution provides that Courts of Justice, Administrative Courts, Military Courts, Constitutional organs, holders of certain important political positions, members of the House of Representatives, senators, Attorney-General and persons whose rights and liberties have been infringed have the right to file an application with the Constitutional Court for a ruling or order.

The filing of an application has to be in accordance with the procedures and conditions stipulated in the Constitution. Just to give examples. For a constitutional review of a bill, only the Speaker of the House of Representatives, President of the Senate, President of the National Assembly and the Prime Minister will have *locus standi* before the Constitutional Court. However, for the Speaker of the House of Representatives or the

²⁵ *Ibid.*, section 272.

²⁶ *Ibid.*, sections 273 and 274.

²⁷ *Ibid.*, section 201.

President of the Senate or the President of the National Assembly (the Speaker of the House of Representatives also holds this position) to do so, he must be requested by members of the House of Representatives, Senators or members of both Houses constituting no fewer than one-tenth of the existing members of the those Houses. Or in the case of a constitutional review of provisions of promulgated laws, only Courts of Justice, Administrative Courts and Military Courts can apply for ruling if the court finds on its own accord or a party to the case objects with reasons that a provision of law to be applied to the case is contrary to or inconsistent with the Constitution.²⁸

A priori and a posteriori constitutional reviews

Thailand's system provides for both *a priori* and *a posteriori* constitutional reviews.

Just two examples of *a priori* review cases.

1. *A priori* review of an Organic Bill before it is presented to the King for Royal Signature. This is compulsory. The Constitutional Court has to complete its determination of its constitutionality within thirty days.²⁹

2. *A priori* review of a Bill before it is presented to the King for Royal Signature. If either members of the House of Representatives, senators or members of the both Houses of the National Assembly constituting no fewer than one tenth of the existing members of both Houses or the Prime Minister finds that such a bill contains provisions which are contrary to or inconsistent with the Constitution or the enactment process as provided by the Constitution was not properly complied with.³⁰

In its *a priori* review, the Constitutional Court will look into the substance of the bill as well as the enactment process. The effect of the Constitutional Court's decision will be examined in the next item regarding the role of "negative legislator".

A posteriori review, on the other hand, is a review of promulgated law in a concrete case. Contentious constitutional issues are usually referred to the Constitutional Court by the Courts of Justice, the Administrative Courts or the Military Courts. But the system in the Constitution also allows the Ombudsmen³¹ and the National Human Rights Commission³² to file applications to the Constitutional Court. Moreover, a person whose rights and liberties recognized by the Constitution has been violated by a provision of law has the right to file an application with the Constitutional Court for a ruling. However, in a case of complaint such as this all legal remedies must have been exhausted.

²⁸ For detail, see *Office of the Constitutional Court, A basic Understanding of the Constitutional Court, supra.* note 14. pp. 34-49.

²⁹ *Ibid.*, section 141.

³⁰ *Ibid.*, section 154.

³¹ *Ibid.*, section 245.

³² *Ibid.*, section 245.

In its *a posteriori* review, the Constitutional Court can only look into the substance of the promulgated law. If the provisions of law are found to be contrary to or inconsistent with the Constitution they will be unenforceable.³³

Role of “negative legislator”

In case of *a priori* review of an organic bill, if the Constitutional Court decides that the provisions of an organic bill are contrary to or inconsistent with the Constitution, such provisions shall lapse. But if the Constitutional Court decides that such provisions are the essential element thereof or the organic bill has not been duly enacted under the provisions of the Constitution, such organic bill shall lapse.³⁴

However, in the case where a decision of the Constitutional Court results in the lapse of provisions contrary to or inconsistent with the Constitution as stated above, such organic bill will be returned to the House of the Representatives and the Senate respectively for their reconsideration. The House of Representatives or the Senate will amend the organic bill by removing the provisions which are contrary to or inconsistent with the Constitution. The organic bill will then proceed towards promulgation.³⁵

In *a priori* review of an ordinary bill, the Constitution prescribes that if the Constitutional Court rules that such bill contains provisions which are contrary to or inconsistent with the Constitution, or has not been enacted in accordance with the provisions of this Constitution, and such provisions constitute an essential substance, the entire bill will lapse.³⁶ Such being a case, the enactment process for that bill will have to be restarted.

However, if the Constitutional Court rules that such bill contains provisions which are contrary to or inconsistent with the Constitution, but do not constitute an essential substance, only such contrary or inconsistent provision will lapse. The bill without the lapsed provisions, however, will be able to come into force upon promulgation.³⁷

These provisions of the Constitution show that in Thailand, a role of “negative legislator” played by the Constitutional Court is the acceptable norm for the Legislature.

Dissenting Opinions

The Constitution provides that the quorum of Justices of the Constitutional Court for hearing and rendering a decision will consist of not less than five Justices. The decision of the Constitutional Court will be made by a majority of votes, unless otherwise provided in the Constitution. Every Justice of the Constitutional Court who constitutes a quorum will give an opinion on his own part and make an oral statement to the meeting before passing a

³³ *Ibid.*, section 6.

³⁴ *Ibid.*, section 141 para 2.

³⁵ *Ibid.*, section 141 para 3.

³⁶ *Ibid.*, section 154 para 3.

³⁷ *Ibid.*, section 154 para 4.

resolution. The decisions of the Constitutional Court and the opinions of all Justices will be published in the Government Gazette.³⁸

From this provision, it can be seen that the Justices of the Constitutional Court of Thailand are free to have separate opinions or dissenting opinions. Transparency is served since the Court's decisions as well as each Justice's opinion will appear in the Government Gazette. The process will surely enhance the independence of individual Justices.

Process of deliberation of the Court

The Justices of the Constitutional Court collectively will consider a case after accepting it for consideration and ruling. However, when an application has been filed with the Constitutional Court, the President usually appoints no fewer than three Justices to have charge of the case. The duties of Justices in charge are: consideration whether to accept the application for consideration and ruling or not; have charge over the case file; and issue any order which does not constitute a ruling of the case. An order of Justices in charge of a case will be made by a majority vote.

At present, the President has appointed two groups of four Justices in charge and it works well.

The Court which means the Justices of the Court collectively considers the case *in camera*. Confidentiality has to be preserved strictly. In the deliberation, the Justices are free to state their opinions on the case. The decision of the Court will be taken by votes on each issue of the case as set by the Court. No abstention will be allowed.

The confidentiality of the deliberation of the Constitutional Court will serve as a guarantee for the Court's independence.

CONCLUSION

Independence is a very important tenet of the judiciary, including the Constitutional Courts. It is a means which enables judges to decide cases impartially, without fear or favour, affection or ill will. The guarantees of independence of the Constitutional Court of Thailand as an institution as well as the constitutional independence of individual justices as provided in the Constitution and related laws are certainly necessary. But are they sufficient? May be not.

At the present time, when diverse challenges – or even threats – to independence of the Constitutional Court happen to be on the rise, supports from the executive, the legislators, the administrators, the media, civil society organizations and the public in general are required. It is admitted that the diversity of challenges to independence of the Constitutional Court calls for diverse answers to how independence of the Constitutional Court could be defended and reinforced, both in the short term and long term.

³⁸ *Ibid.*, section 216.

In facing these challenges, the “state of mind” of the Justices of the Constitutional Court becomes all the more important. The Justices must stand firm, face the difficulties with great fortitude, and also maintain the high level of resilience in the discharge of their judicial duties with impartiality. Especially, they must abide by their oath of office solemnly declared before His Majesty the King at the time of their taking office.