The Constitutional Courts

of the Liberal Democratic States in the 21st Century

25th Anniversary of the Constitutional Court
of the Kingdom of Thailand
11th April 2023

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Foreword

The study on "The Constitutional Courts of the Liberal Democratic States in the 21st Century" was conducted by a research team that consists of the President of the Constitutional Court, Justice of the Constitutional Court, supporting staff of the Constitutional Court's justices, that is, experts to the Justices, academics from the Graduate School of Law, National Institute of Development Administration, and Faculty of Law, Thammasat University, which are educational institutions that have signed a Memorandum of Understanding on academic cooperation with the Office of the Constitutional Court, and civil servants from the Office of the Constitutional Court, led by Professor Dr. Banjerd Singkaneti, an Expert to the Justice of the Constitutional Court.

The study's objectives are to study the development of foreign constitutional courts and the reasons for and necessity of the provision of a Constitutional Court to safeguard the Constitution and maintain the balance of constitutional organizations. In addition, it also aims to study the role, status, acquisition of justices, powers, and procedures of the Constitutional Court to compare the development of the Court in the modern era and the relationship between the Constitutional Court and other constitutional organizations, especially the parliament, the government, and other courts, as well as important constitutional court rulings. In this regard, the research team has chosen to study and compare the Constitutional Court of Thailand with the Constitutional Courts of seven countries representing each region of the world where the Constitutional Court is tasked to conduct constitutional review, namely, Germany, Hungary, Russia, South Africa, Chile, South Korea, and Indonesia. This reflects how popular the Constitutional Court, which is tasked with constitutional review, is.

Some contents of the full paper on "The Constitutional Courts of the Liberal Democratic States in the 21st Century" were translated into English by the Office of the Constitutional Court and published to disseminate knowledge about the Constitutional Court to a wider extent, which will provide basic information that is academically useful to those interested in further study and research in the future.

Office of the Constitutional Court
April 2023

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One-Hundred-Year Development of Austrian-model Constitutional Court

*Banjerd Singkaneti**

Introduction

The Austrian/German-model of Constitutional Court has gone through ideological and theoretical debates at least in 2 periods. The first period was before 1920, when there was the first important debate regarding the establishment of the Constitutional Court in Austria, while the second one was after World War II with less controversial debates because authoritarianism was proven to be an unbalanced regime among various groups in society. The Constitutional Court that emerged after World War II became an important organization in the transition from authoritarianism to liberal democratic states. The process has been successful in Europe. Afterward, the concept of Constitutional Court spread to other regions: Eastern Europe, Asia, Africa, and South America. The Constitutional Court in the new democratic countries in these regions is an important mechanism to protect the supremacy of constitution, especially given its important role in balancing the powers in society. Whether the constitutional courts in different regions will be as successful as those in Europe remains a matter for further study.

In the second century, an important issue for the Constitutional Court is its role and authority in the constitutions of those emerging countries. Many parties are concerned about the Constitutional Court's expansion of power into political matters, which could result in the

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justice of the Constitutional Court becoming "juristocracy", or the clash between the organization that can amend constitution and the Constitutional Court. And, the latter would ultimately have supreme power. In such a case, would it mean that constitutional regimes would become regimes under the Constitutional Court? All these concerns are issues that the academic community must address because, ultimately, there should be no organization with absolute power over others. The Constitutional Court in the second century has to avoid such unpleasant situations.

This article is divided into two main topics: 1.1 Development of the Constitutional Court 1.2 Roles and authorities of the Constitutional Court in each era. The details are as follows:

1.1 Development of the Constitutional Court

The development of the Constitutional Court[1] is divided into three eras: the first era started in Austria (1920-1945), the second era: the political reform after World War II (1946-1990) and the third era: after the collapse of Soviet Union (1991 - present).

1.1.1 The First Era started in Austria (1920 - 1945)

The concept of the Austrian School of Legal Theory (die österreichische Schule der Rechtstheorie) was regarded as an important basis for the establishment of the Constitutional Court. The school played an important role in developing the concept of Austrian supreme

[1] The Constitutional Court in this article refers to the Constitutional Court which is a judicial body specifically established to have the power to decide whether a law is contrary to the Constitution. The Constitutional Court in this sense is that of European model. This does not include the United States Supreme Court that has the power to decide whether a law is contrary to the Constitution.

law which is the Austrian School of Legal Theory (die österreichische Schule der Rechtstheorie), in particular, Adolf Merkl and Hans Kelsen, who worked hard to compile the problems concerning the supremacy of Constitution. They provided theoretical legal rationale for the bond of legislative bodies to higher-level laws. According to Adolf Markl, laws are a hierarchical system whereby authoritative laws originate laws of authorization, so called "the theory of legal hierarchy" (Theorie des rechtlichen Stufenbaus). Different laws in different hierarchies have interrelationship in the legislative process, such as the relationship between laws and administrative acts (Verwaltungsakt) or the relationship between constitution and laws.[2]

Hans Kelsen later wrote an important article titled "Who Should Be the Guardian of the Constitution?" based on the concept of the "Theory of Legal Hierarchy" (Theorie des rechtlichen Stufenbaus) that influenced his ideas. The article addressed the demand of legal policy to guarantee the constitution consistent with the rule of law, particularly the legitimacy of state missions in cases where the constitution may not be effective in reality. Therefore, in this sense, protection of the constitution is meaningless. Furthermore, there were legal technical problems concerning measures to create guarantee for the constitution's protection; specifically, whether they were to be preventive or remedial measures, there should be measures to eradicate actions contradict with the constitution, or it should be personal liability of the organization doing so. All these important issues will be discussed in this article. The necessary point that needs

[2] Karl Korinek, Die Verfassungsgerichtsbarkeit in Österreich, in: Verfassungsgerichtsbarkeit in Westeuropa, C. Starck/A. Weber (Hrsg.), Teilband I: Berichte, Baden-Baden 1986, p.153

to be emphasized is to guarantee the constitutional protection over the past decades which provides experience that the organization being created must be able to control the constitutionality of state actions which directly affect the constitution, especially that of the parliament and government. Such control may not be delegated to any single organization, and the actions of the auditing organization must be auditable. The political mission of constitution is to limit the exercise of power within the scope of the law. The guarantee for the constitutional protection means ensuring that no actions exceed the scope of the law.[3] The article concluded that extending the power of the president to serve as the Constitutional Court could not achieve the said objective because the president is considered to be part of a political party, which may be intended for political purposes.[4] For that reason, Hans Kelsen pushed for establishing the first "Constitutional Court" in Austria to control the constitutionality of the law.

There were Hans Kelsen's article entitled "System and Development of the Constitutional Court" (Wesen und Entwicklung der Staatsgerichtsbarkeit) and "The Imperial Court as the Guardian of Constitution" (Das Reichsgericht als Hüter der Verfassung)[5] written by Carl Schmitt. Their concepts played significant role in the ideological debates of the time. There are three important issues[6] that

[3] Hans Kelsen, Wer soll der Hueter der Verfassung sein ?, Die Justiz, Band VI(1930/31), p. 577

[4] *Ibid,* p. 627

[5] Carl Schmitt, Das Reichgericht als Hüter der Verfassung, in: Verfassungsgerichtsbarkeit, Hrsg. von P. Häberle, 1976, p.112

[6] Robert Chr. van Ooyen, Die Function der Verfassungsgerichtsbarkeit in der pluralistischen Demokratie und die Kontroverse um den Hueter der Verfassung'" in: Hans Kelsen, Wer soll der Hueter der Verfassung sein ?, Herausgegeben von Robert Chr. van Ooyen, Mohr Sieben, Tuebingen 2008, p.VIII

Carl Schmitt argued with Hans Kelsen: A. the inconsistency between the Constitutional Court and democratic principles; B. the inconsistency between the Constitutional Court and separation of powers; and C. the inconsistency between the judicial power and politics (including the Constitutional Court), with the following points for consideration:

A. The inconsistency between the Constitutional Court and Democratic Principles

The scholarly arguments surrounding the establishment of the Constitutional Court in Austria have raised several important controversies, especially the issue of the limitation of judicial power to be under the control of the parliament regarded as representative of the people that partly resulted from the creation of constitution after the French Revolution of 1789 by replacing the monarchy power with the supreme power of the parliament representing the people and controlling the exercise of executive power to be under the laws enacted by parliament. When laws were originated from the power of the parliament representing the people, the judges are bound by laws passed by parliament. Regarding democratic principles (Demokratieprinzip) and the Constitutional Court, the parties opposing the establishment of the Constitutional Court to control the constitutionality of laws viewed that having the courts perform such functions was against the principle of parliamentary sovereignty (die Souveränität des Parlaments) or even the principle of the people's sovereignty (die Volkssouveränität). As a result, this concept rejected judicial power in determining the constitutionality of laws passed by parliament. This is because if it is acceptable for the court to declare any law unconstitutional, it means the court is empowered to act against the will of the people. This concept limited judicial power in Europe in the early 19th century, which generally served to protect

the monarchy. Therefore, after the French Revolution, there was a concept to limit the judiciary's power to be strictly bound by the law. Like government officials, judges must serve the will of the legislature by treating the law as the command of the sovereign.[7]

Gusy, on the other hand, believed that the majority's will was not necessarily the will of the whole. The will of the majority is, therefore, the will of only a group of people. The principle of controlling the constitutionality of laws by the judiciary is consistent with the provision of guarantee to the minority by law, in particular the protection of fundamental rights. Therefore, such protection does not conflict with the sovereignty of the people, as it is only contrary to the opinion of the majority, not the opinion of the people (das Volk)[8].

Regarding sovereignty, Hans Kelsen opined that no single government body can say that it is a sovereign body.[9] He further elaborated that focusing on the claim that the Constitutional Court is inconsistent with parliamentary sovereignty indicates a tendency for political authorization to be confined to the legislative body, which cannot be limited by provisions of the Constitution. E. Friesenhahn viewed that, according to democratic principles with the separation of powers, no single organization could be considered the supreme body. As a result, the decisions of such organization are binding on all other organizations. An organization representing the people may act contrary to the constitution if the acts are beyond the scope in the constitution. For this reason, the people's coexistence should not

7 Bruno Aguilera, "Law as a limit to power – The origins of the rule of law in the European legal tradition." p. 30-31

8 C. Gusy, Parlamentarischer Gesetzgeber und Bundesverfassungsgericht, p. 27

9 H. Kelsen, Wesen und Entwicklung der Staatsgerichtsbarkeit, in: WDStRL 5, 1929, p. 53

depend on the will of the parliamentary majority in each regime but on the provisions of the constitution.[10] Therefore, it can be concluded that, in Hans Kelsen's concept, not only does the Constitutional Court not conflict with democratic principles, but it also serves to strengthen democratic principles by binding with the principle of pluralist democracy expressed through its authority in regulating the constitutionality of law.[11] The Constitutional Court is the instrument guaranteeing the constitutional supremacy, which means the mission of the Constitutional Court is to ensure the structure of a pluralist democratic society. The important task of the Constitutional Court in this regard is to protect the minority, which is considered a fundamental condition of pluralist democracy.[12]

B. The inconsistency between the Constitutional Court and the separation of powers

Hans Kelsen believed that the Constitutional Court is not an organization conflicting with the separation of powers in any way. On the contrary, the Constitutional Court is a negative legislative body with characteristics different from a constitutional body that is a political organization such as a parliament or government. Therefore, the Constitutional Court is a part of the political process that influences the in-depth dimension of the separation of powers. One of the main objectives of the separation of powers is to deter the abuse of power

[10] E. Friesenhahn, Wesen und Grenzen der Verfassungsgerichtsbarkeit, Zeitschrift für schweizerisches Recht 1954, p.155

[11] Robert Chr. van Ooyen, Die Function der Verfassungsgerichtsbarkeit in der pluralistischen Demokratie und die Kontroverse um den,Hueter der Verfassung'" in : Hans Kelsen, Wer soll der Hueter der Verfassung sein ?, Herausgegeben von Robert Chr. van Ooyen, Mohr Sieben, Tuebingen 2008, p.X

[12] *Ibid*, p. XI

and ensure the liberty of individuals. Therefore, the achievement of such aims may not be a complete separation of powers but may imply control through the separation of powers in the sense of "limitation of power exercise", which is a system of check and balance. So, in this respect, the Constitutional Court does not conflict with the separation of powers principle but rather confirms such a principle.[13] If the Constitutional Court is a negative legislative body, which must share the legislative power with the parliament or with the people in the case of referendum, according to the general mission of the separation of powers, this is consistent with the modern concept of a mixed constitution to balance the powers. Consequently, Kelsen saw the demand for a separation of powers into legislative, executive, and judicial branches for the organization's independence as consistent with Montesquieu's idea of check and balance. Additionally, according to Kelsen, the status of constitutional court in the political process of diverse social structure needs sovereignty to at least protect the constitution. According to Schmitt, the president is the guardian of the constitution, which is viewed as a political unit combining with the power of people to become "sovereign". Kelsen's view is different. He saw that only the Constitutional Court could protect the Constitution through division of power and do so with other political power.[14]

C. The inconsistency between the judicial power and politics (including the Constitutional Court)

According to Carl Schmitt, there will be confusion between the constitution (Verfassung) and constitutional law (das einzelne Verfassungsgesetz), and assuming that the constitution is not different

[13] H. Kelsen, Wesen und Entwicklung der Staatsgerichtsbarkeit, in: WDStRL 5, 1929, p. 25

[14] Robert Chr. van Ooyen, ibid, p. XV

from constitutional law and treating them the same way will cause problems. The reason is that the constitution (Verfassung) cannot be the object of the case because it is the foundation for the case judgment. When people file lawsuits against the state's actions, that is considered an administrative case. Carl Schmitt saw that disputes over the content of legislative decisions are not subject to judicial control because such issues must be judged politically by the legislative organization[15], while G. Radbruch,[16] viewed that the organization's judgment that can confront the majority will of people's representatives may not be regarded as the decision of a judicial body. It must be regarded as a political reaction that contradicts with political actions, and as such, it is a disguise of the minority's will in the form of law.

Hans Kelsen wrote an article titled "Who Should Be the Guardian of the Constitution?" (Wer soll Hüter der Verfassung sein ?)[17] presenting his view on Carl Schmitt's saying that, if the judiciary were allowed to decide on political matters, it would eventually be a burden and harmful to itself. Kelsen gave the reason that the parliament enacts laws based on the will of the majority (positive), while the Constitutional Court acts to end the enforcement of the law (negative) by ruling that a particular law is unconstitutional. Although considered a joint exercise of power in passing the law by the judiciary, it was an exercise of power limited under the constitution. The role of the Constitutional Court is, therefore, comparable to that of a member of parliament who rules on the end of law enforcement under the Constitution. In this respect, it shows that the power to review the constitutionality of law is given to a constitutional body with specific power and

[15] C. Schmitt, ibid., p. 113

[16] G. Radbruch, Richterliches Prüfungsrecht?, in: Deutsche Justiz 1925/26, p.12

[17] H. Kelsen, Wer soll Hüter der Verfassung sein ?, Die Justiz, Band 6 (1930/31), p. 11

independence to review the acts of the legislature and the government. As such, should that body be regarded as a judicial body with pure judicial tasks or only a political body? In Hans Kelsen's view, this is not an important issue.[18] However, the rationale behind the control of the constitutionality of law in a broad meaning is considered the "heart" of the Constitutional Court. As such, the Constitutional Court is able to protect pluralist democracy.[19] Regarding the issue of the court and politics, Hans Kelsen saw that the nature of the judiciary is an adjudicating process for disputes involving various conflicts of interest. Thus, the law is the will of society that shows the conflict of political power and reflects diverse interests. In this manner, laws and politics cannot be absolutely separated, so it can be assumed that the provisions of all laws, including the Constitution, depend on the conditions of political power. In this regard, Hans Kelsen concluded that conflicts of laws are actually conflicts of interest or conflicts of power. Therefore, legal disputes are regarded as political disputes, and all disputes of interest or political conflicts can be judged as legal disputes.[20] Consequently, there is no fundamental difference between the judgment of a judicial body on political matters based on constitutional provisions by the Constitutional Court and disputes between peasants in inheritance cases based on civil law by the Court of Justice. In Kelsen's view, every judgment is a political matter, and therefore, a judgment by the Constitutional Court under constitutional

[18] H. Kelsen, Wer soll Hüter der Verfassung sein ?, Die Justiz, Band 6 (1930/31), p. 65

[19] Robert Chr. van Ooyen, Die Function der Verfassungsgerichtsbarkeit in der pliralistischen Demokratie und die Kontroverse um den Hueter der Verfassung'" in: Hans Kelsen, Wer soll der Hueter der Verfassung sein?, Herausgegeben von Robert Chr. van Ooyen, Mohr Sieben, Tuebingen 2008, p.XII

[20] H. Kelsen, Wer soll Hüter der Verfassung sein ?, Die Justiz, Band 6 (1930/31), p. 67

provisions is no longer considered conflict with political matters. In conclusion, the Constitutional Court, in Carl Schmitt's sense, became a political judiciary. Kelsen saw no harm at all and, on the contrary, it is demanded to monitor powers. If political power cannot avoid the court's rulings and the separation of powers is means of controlling power, Kelsen saw that the Constitutional Court must be regarded as a political branch like the "Parliament" and the "Government".[21]

The Austrian Constitutional Court was stipulated in the 1920 constitution. However, not long afterward, it ruled on a landmark case concerning the payment of divorce compensation. The administrative authority accepted the legal consequences of the right to divorce and remarriage, while the Court of Justice did not accept the right to compensation from the divorce proceedings. The dispute led to a ruling by the Constitutional Court that the Court of Justice's ruling has no legal effect and the compensation and marriage in any case of the same nature is legitimate.[22] There was a mass mobilization by the Catholic Church to oppose the ruling and to demand Kelsen resign from the Constitutional Court because, even though "the Constitutional Court" was the target, Kelsen was responsible for the judgment. The event was the beginning of a counterattack against Austria's democratic constitution with the call for constitutional amendment to limit the autonomy of the Constitutional Court and make it accountable to the parliamentary majority.[23] Opponents of the Constitutional

[21] Robert Chr. van Ooyen, Die Function der Verfassungsgerichtsbarkeit in der pluralistischen Demokratie und die Kontroverse um den Hueter der Verfassung'" in: Hans Kelsen, Wer soll der Hueter der Verfassung sein ?, Herausgegeben von Robert Chr. van Ooyen, Mohr Sieben, Tuebingen 2008, p.XX

[22] Leo Gross' "Hans Kelsen : October 11' 1889 – April 15' 1973," p. 493

[23] Nadia Urbinati and Carlo Invernizzi Accetti, "Editors' Introduction," p. 21

Court have the support of Fascists and Christian Socialists in pushing for amendment of the Austrian Constitution to abolish the lifetime position of the Constitutional Court judge and make it a one-term position. Ultimately, amendment to the Austrian Constitution came into force on January 1, 1930. As a result, the former Constitutional Court was abolished, and a new set of Constitutional Court judges, almost all of whom supported the political parties of the executive branch, was appointed.[24] This act was considered the beginning of political development that led to the emergence of Fascism, and, later, a crisis in the European political system. In the democratic context in Europe at that time, a crisis of parliamentary democracy started and intensified. Conflicts between different political polarities within the parliamentary system became ideological conflicts, whether between communist or socialist parties and parties of liberal democracy or between Fascist authoritarianism and communism. The authoritarian regimes that existed in Europe were a key factor in driving the constitutional reform, in particular the development of "Constitutional Court," which later became a constitutional institution that defends the constitution.

1.1.2 The second era, the political reform after World War II (1946 - 1990) This section will study 1.1.2.1, rethinking of the German Constitutional Court, and 1.1.2.2, the expansion of new concept of the Constitutional Court in Europe. The details are as follows:

1.1.2.1 Rethinking of the German Constitutional Court. This section will study (1) the fundamental conceptual problem of establishing the Constitutional Court according to German Constitution,

[24] H. Kelsen, "Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution", *The Journal of Politics*, Vol. 4, No. 2 (May, 19420, p. 188

(2) the concept of Militant Democracy (das Konzept der "streitbaren Demokratie"), and (3) the judicialization of politics. The details are as follows:

(1) Fundamental conceptual problems of establishing the Constitutional Court according to German Constitution. There are two fundamental concepts.[25] The first concept regards the disputes arising from the use or interpretation of the Constitution as political matter and thus falling under the jurisdiction of a political body, not a judicial body. Bismarck is one supporter of the concept. The second concept views constitutional issues as legal issues that can be adjudicated by a judicial body like Court of Justice or Constitutional Court. Hughes, a former U.S. presidential candidate, stated to support this concept: "We are under a Constitution, but the Constitution is what the judges say it is". In Germany, the protection of basic constitutional principles has a long history, especially during the ruling of absolute monarchy. There were State courts (Staatsgerichtshof) in Wuerttemberg in 1819, Sachsen in 1831, and Bayern in 1850. The 1848 Constitution and the 1919 one also included provisions requiring State courts (Staatsgerichtshof) to have jurisdiction over certain constitutional issues. After losing the war in 1945 and the creation of a new state in Bayern, the 1949 Constitution, which is currently in use, established the Constitutional Court as the Supreme Court for ruling state issues. Later, the courts were also established in Hessen and Baden. In 1948, the drafter of a new constitution kept the concept of having the state constitution and the State courts continued to function. Therefore, the Constitutional Court of Bayern and the Civil Court of Hessen

[25] Albrecht Wagner, "Enstehung, Organisation und Kompetenzen des Bundesverfassungsgerichts, DRiZ, 1961, p. 280

remained functional. For the Constitutional Court at the federal level, there was a proposal to follow the guidelines of Supreme Court of the United States, The Federal Court of Switzerland, Austria's Constitutional Court established in 1920, and International Court in the Hague are the model for establishing the Federal Constitutional Court[26].

From the study of Haeberele's article titled "Basic Problems of Constitutional Court's Jurisdiction" (Grundproblem der Verfassungs-gerichtsbarkeit), the first section addresses the issue of "Laws and Politics" (Recht und Politik)[27], which is considered an issue about the scope of the Constitutional Court's jurisdiction that has been debated for a long time. The debate about the quality of constitutional laws, which are regarded as political laws, inevitably became an issue of controversy. Triepel saw that the Constitution was a law for politics and, therefore, political law. Kelsen's view differs from Triepel's on the issue of assessing the Constitutional Court's role. Triepel saw that the Constitutional Court's jurisdiction is always a political dispute, so, in fact, it is the problem of having the Constitutional Court, while Carl Schmitt saw that state power did not expand into judicial jurisdiction, but, on the contrary, judicial power has expanded into political matters. As such, that does not mean making politics a legal matter; rather, judicial power is a political matter, which, ultimately, will create conflict in the Constitutional Court. E. Kaufmann saw that the Constitutional Court's jurisdiction does not concern political matters, as political problems are disputes without a legal basis for ruling. According to Leibholz's view, there is a distinction between the nature of laws and

[26] *Ibid*, p. 281

[27] Peter Haeberele (herausgegeben), Grundproblem der Verfassungsgerichtsbarkeit, in: Verfasuungsgerichtsbarkeit, WISSENSCHAFTLICHE BUCHGESELLSCHAFT DARMSTADT, 1976, p. 2

of politics. Politics is dynamic and seeks to adapt to the ever-changing way of life, while the nature of laws is fundamentally a constant rationale that attempts to counterbalance such political power.[28]

The conflict about the opposite nature of "laws" and "politics" resulted in a proposal to use a principle known as political-question-doctrine, which is a principle developed by the United States Supreme Court for the Constitutional Court to exercise power within its jurisdiction by avoiding a judicial review of the matters of political nature of political organizations. Political-question-doctrine means that the Supreme Court does not wish to decide a dispute outside the scope of the laws or without legal guidelines. Such cases must fall under the judgment power of the political organization[29]. K. Vogel was of the opinion that the adoption of the political-question-doctrine principle could not be precisely defined. Secondly, as the constitutional systems of Germany and of the United States are different, the adoption of the principle in the German system has been heavily criticized[30]. In addition to the political-question-doctrine principle, which was accepted by the United States Supreme Court, there is also a reference to the "judicial self-restraint" principle in the United States. The "judicial self-restraint" principle is intended to maintain the freedom of political judgment of constitutional bodies entrusted by the Constitution, especially on foreign, economic, and social policy measures[31]. The Constitutional Court

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[28] Referenced in the footnote, Peter Haeberele (herausgegeben), Grundproblem der Verfassungsgerichtsbarkeit, in : Verfasuungsgerichtsbarkeit, WISSENSCHAFTLICHE BUCHGESELLSCHAFT DARMSTADT, 1976, p. 2

[29] Benda/Klein, Lehrbuch des Verfassungsprozeßrechts, 1991, S.10; K. Schlaich, Bundesverfassungsgericht, 2 Aufl., S.268

[30] Kurt Vogel, Bundesverfassungsgericht und die übrigen Verfassungsorgane, Europäische Hochschulschriften, Bd/Vol.736, S.27

[31] J. Jekewitz, Bundesverfassungsgericht und Gesetzgeber, Der Staat 19 (1980), p.543

held that the judicial self-restraint principle is the waiver of power to make political judgments[32].

The argument was debated even before the existence of the Constitutional Court and the establishment of the Constitutional Court in Germany, which expanded the Constitutional Court's jurisdiction to a broader extent. However, the debate about the Constitutional Court today is not about whether it should rule on political matters, but rather about what role it should play in political process.[33]

Winfried Steffani wrote an article titled "Constitutional Court and Democratic Decision Making" (Verfassungsgerichtsbarkeit und demokratischer Entscheidungsprozess), which concluded that the Constitutional Court is considered a victory of "modern democratic rule of law". Throughout the years, none has been more acclaimed than the Austrian legal philosopher René Marcic, who wrote the book "The Constitution and Constitutional Court." He saw that the Constitutional Court is the guardian of Constitution, the watcher of judicial process, and the protector of Constitutional Supremacy. Today, the Constitutional Court is the central body of the state because it enables the achievement of fundamental core values of society, namely, stability in human dignity, freedom, equality, public interests, the dominance of the constitution, and the peace of society. Heinz Laufer concluded about the Constitutional Court that "the Constitutional

[32] Benda/Klein, Lehrbuch des Verfassungsprozeßrechts, 1991, S.10; K. Schlaich, Bundesverfassungsgericht, 2 Aufl., p. 9

[33] Peter Haeberele (herausgegeben), Grundproblem der Verfassungsgerichtsbarkeit, in : Verfasuungsgerichtsbarkeit, WISSENSCHAFTLICHE BUCHGESELLSCHAFT DARMSTADT, 1976, p. 4

Court is the completion of constitutional democracy" (Verassungsgerichtsbarkeit sei die Vollendung der rechtsstaatlichen Demokratie).[34] Friedrich Giese concluded that the Constitutional Court today is regarded as the crown of the legal state.[35]

(2) The Concept of Militant Democracy (das Konzept der "streitbaren Demokratie") or the creation of "Militant Democracy" mechanism (wehrhafte Demokratie). The experience from the Weimar Constitution is that the Constitution did not contain any provisions that could be used to counteract actions which subvert the Constitution and be detrimental to democracy.[36] Consequently, when the new constitution of Germany was established, "Militant Democracy" was the reaction of Germany toward the failure of democracy and the Constitution of the Weimar Republic.[37] The measures or mechanisms to be discussed hereafter are the tools of the "Militant Democracy" principle in the German Constitution, namely:[38] (2.1) determination of basic constitutional principles that cannot be amended by constitutional amendments (Ewigkeitsklausel) in Section 79, paragraph 3 of the Constitution; (2.2) deprivation of fundamental

[34] Winfried Steffani, Verfassungsgerichtsbarkeit und demokratischer Entscheidungsprozess, in: Peter Haeberele (herausgegeben),Grundproblem der Verfassungsgerichtsbarkeit, in : Verfasuungsgerichtsbarkeit, WISSENSCHAFTLICHE BUCHGESELLSCHAFT DARMSTADT, 1976, p. 379

[35] Ibid, p. 379

[36] Papier, Hans-Jürgen, AöR 128 (2003), 340, 343.

[37] Lameyer, Johannes, Streitbare Demokratie contra Terrorismus?, ZRP 11 (1978), 49, 49.

[38] For details, please see Banjerd Singaneti et al., Research Project on "The Constitutional Court and the idea of militant democracy (Sustainable Democracy)", presented to the Office of the Constitutional Court, by National Institute of Development Administration, July 2020, pages 75 - 116.

rights (Grundrechtsverwirkung) in Section 18[39] of the Constitution, (2.3) dissolution of political parties (das Verbot politischer Parteien) in Section 21, paragraph 1 of the Constitution; (2.4) prohibition of anti-constitutional association (das Verbot verfassungs-feindlicher Vereinigungen) in Section 9, paragraph 2 of the Constitution; (2.5) the right of resistance to actions that are subversive or contrary to the Constitution (das Widerstandsrecht) in Section 20 (4) of the Constitution, (2.6) the determination of duty to be loyal to the Constitution (Verfassungstreuklauseln) to exercise basic rights in Section 5, paragraph 3 which prescribes "Fidelity Clause," (Treueklausel)[40], (2.7) restrictions on the secrecy of letters, post, and telecommunications (Beschränkungen des Brief-, Post-, and Fernmeldegeheimnisses) in Section 10, paragraph 2 of the Constitution, (2.8) restrictions on freedom of movement (Einschränkungen der Freizügigkeit) in Section 11, paragraph 2 of the Constitution, (2.9) the right to prevent harm to the federal and states in an emergency situation in Section 91 of the Constitution, (2.10) the

[39] Section 18 (deprivation of basic rights)

"Any person exercising their freedom of expression particularly the freedom of newspapers (Article 5, Paragraph 1). Freedom of teaching (Article 5, paragraph 3) Freedom of assembly (Article 8) Freedom of association (Article 9) confidentiality of letters post and telecommunications (Section 10), ownership (Section 14), or the right to asylum (Section 16a). by misuse of such freedom which is contrary to the fundamental principles of a liberal democratic state In the case of the deprivation of such basic rights of that person The deprivation of rights and the scope of such deprivation of fundamental rights shall be made by a decision of the Federal Constitutional Court."

[40] Kittiyanupong, Torpong, Das Weisungsrecht im Hochschulwesen in Deutschland und Thailand, Frankfurt am Main 2013, S. 133. Cited in Banjerd Singkaneti et al., Research project on The Constitutional Court and Militant Democracy (Sustainable Democracy)", presented to The Constitutional Court, by National Institute of Development Administration, July 2020, page 110

right to file petition to the Constitutional Court alleging that the justice acted in violation of the basic constitutional rules in Section 98(2) of the Constitution.

In conclusion, the creation of such measures and mechanisms resulted from the drawbacks of the Weimar Constitution that led to its downfall. This important lesson inspired various measures and mechanisms in the new German Constitution, with the Constitutional Court serving as an important organization and mechanism to protect the Constitution and its supremacy.

(3) Judicialization of Politics. The problem in this regard is the fundamental conceptual problem of establishing the Constitutional Court. According to the German Constitution, there are 2 basic approaches.[41] **The first approach** views that disputes arising from the use or interpretation of the Constitution are political and thus fall under the jurisdiction of political bodies, not judicial bodies. Bismarck is a supporter of this concept. The second approach sees that constitutional problems are considered legal problems, so they can, therefore, be judged by a judicial organization like the Court of Justice or the Constitutional Court. There is a quote by Hughes, a former U.S. presidential candidate: "We are under a Constitution, but the Constitution is what the judges say it is." In Germany, the protection of basic constitutional principles has a long history, especially during the rule of an absolute monarchy. There were State courts (Staatsgerichtshof) in Wuerttemberg in 1819, Sachsen in 1831, and Bayern in 1850. There were also provisions in the 1848 and 1919 constitutions mandating the State courts (Staatsgerichtshof) have jurisdiction over several constitutional issues. After losing the war

[41] Albrecht Wagner, "Enstehung, Organisation und Kompetenzen des Bundesverfassungsgerichts, DRiZ, 1961, p. 280

in 1945 and the creation of a new state level in Bayern, the 1949 Constitution, which is currently in use, established the Constitutional Court as the Supreme Court for ruling on state issues. Later, the courts were also established in Hessen and Baden. In 1948, the drafters of a new constitution maintained the concept of having the state's constitution and the State courts continued to function. Therefore, the Constitutional Court of Bayern and Hessen remained functional. For the Constitutional Court at the federal level, there was a proposal to follow the guidelines of the Supreme Court of the United States, The Federal Court of Switzerland, Austria's Constitutional Court established in 1920, and International Court in the Hague are the model for establishing the Federal Constitutional Court.[42]

One of the most significant decisions in Germany's new constitution was giving the Constitutional Court a lot of authority.[43] This decision distinguished Germany's Constitutional Court from other courts in the past.[44] Therefore, increasing the power of the Constitutional Court was contrary to the approach of the Weimar Constitution.[45] The important issue in considering the power of the Constitutional Court was that the Constituent Assembly had expanded the jurisdiction from the Drafting Committee to a wide range.[46] When compared to the constitutional courts of other nations, the German Constitutional Court's jurisdiction is the broadest it has ever been.

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[42] Ibid, p. 281

[43] Especially when compared to Austria's Constitutional Court, the world's first constitutional court, established in 1920 with sole authority to control the constitutionality of law.

[44] Benda/Klein, Lehrbuch des Verfassungsprozessrechts, Rdnr. 1, p. 1

[45] Rudolf Dolzer, Die staatstheoretische und staatsrechtliche Stellung des Bundesverfassungsgerichts, Berlin 1972, p. 32

[46] H. Laufer, Verfassungsgerichtsbarkeit und politischer Prozess, 1969, p. 36

1.1.2.2 The expansion of new concept of the Constitutional Court in Europe

The model of the Austrian Constitutional Court after 1945 was once again endorsed by the Austrian Constitution, as was the model of the German Constitutional Court established in 1951 by Sections 93 and 94 of the 1949 Constitution. Additionally, the Constitutional Court of Italy, which was provisioned in Sections 134–137 of the 1947 Constitution following the model of the Constitutional Courts of these countries, later, played an important role in modeling the Constitutional Court. The Austrian and German model of the Constitutional Court later had influence in other countries, such as Portugal after the end of Estado Novo von Antonio de Oliveira Salazar's rule or Spain after the end of Francisco Franco's rule in the 1980s.[47]

During the enactment of the Act on the Federal Constitutional Court (Gesetz über Bundesverfassungsgericht), which entered into force on April 17, 1951, the Federal Constitutional Court was established in Karlsruhe on September 8, 1951. Afterward, the concept of establishing constitutional court began to spread to countries in Europe. In 1961, the Max-Planck-Institut für auslaendisches oeffentli-ches Recht und Voelkerrecht published a book from an academic conference in Heidelberg on the issue of the Constitutional Court. The said book concluded that after World War II, the concept of establishing constitutional court spread rapidly, especially in countries in Europe after the authoritarian rule that distorted the constitution, which was based on democratic principles and the rule of law. These countries are divided into two groups.

[47] Thomas Kroell, "Amerikanisches" oder "oesterreiches Modell ?, in : in : Christoph Grabenwarter, u.a (Hrsg.), Verfassungsgerichtsbarkeit in der Zukunft – Zukunft der Verfassungs-gerichtsbarkeit, Verlag Oesterreich 2021, p. 191

The first group. Austria is a country that used to have a republic constitution and has established the Constitutional Court. Italy, a Roman Empire territory where fundamentally the laws cannot be controlled or reviewed, established the Constitutional Court as a specialized court with extensive power. Japan has adopted the power and authority of the Constitutional Court as the Supreme Court's power, while the German Constitution has provided stability by granting broad power to the Constitutional Court.

The second group. The countries that embraced the concept of having a constitutional court but adapted to be an independent institution in the form of a specialized court or a court-like institution. The mentioned organization protects the constitution from the exercise of state power by various parties. The organization and the authority differ depending on the concept of establishment and the organization's purposes. France is in this group according to the Fifth Republic Constitution of 1958, which primarily aimed to control the constitutional relations between constitutional bodies. In addition, Cyprus has established a Constitutional Court, as has Turkey, which went back to constitutional rule after the 1960 revolution with a specialized court to perform the functions.[48]

In the academic conference, there were 17 countries that submitted reports relating to the courts or organizations responsible for constitutional review, divided into 7 groups[49] as follows:

[48] Hermmann Mosler (hersausgegeben), Verfassungsgerichtsbarkeit in der Gegenwart, Laenderberichte und Rechtsvergleichung, Internationales Kolloquim veranstaltet vom Max-Planck-Institut fuer auslaendisches oeffentliches Recht und Voelkerrecht, Helidelberg 1961, CARL HEYMANNS VERLAG KG, Koeln-Berlin, 1962, p. IX

[49] Ibid, p. XIV

Group 1: Austria, Italy, Germany, France, Cyprus, and Turkey. These countries have specific institutions of the Constitutional Court; therefore, there are studying issues which cover all aspects.

Group 2: Switzerland, a country where the jurisdiction of Constitutional Court rests with the Federal Supreme Court.

Group 3: Denmark, Norway, Sweden, and Finland. Though these countries have not established constitutional courts with specific jurisdiction, constitutional rules can perform their functions perfectly.

Group 4: The United States, constitutional jurisdiction is the power of Supreme Court, in particular, concrete control of constitutionality (die Inzidentkontrolle der Gesetze), which plays an important role in the Supreme Court and became a model for Japan.

Group 5: Countries in the Commonwealth. These countries have close ties with England; the concept is, therefore, not yet evident.

Group 6: South Africa has a separate concept from the Commonwealth. The fundamental legal considerations are thus different from those of the Commonwealth.

Group 7: Latin American countries: Colombia, Mexico, and Argentina. Colombia has a Supreme Court that serves as the Constitutional Court. In Mexico, the focus was on Amparo, which may lead to constitutional complaints. Argentina was highlighted as a very interesting country.

It can be said that the reports from different countries have 4 main issues.[50] namely: (1) status of the Constitutional Court in the determination of state's organizational structure according to the Constitution, (2) abstract constitutional control (die Normenkontrolle),

[50] Ibid, p. XVI

(3) disputes between the highest state bodies (constitutional organizations), and (4) a person's constitutional complaints. These were important topics for debate and discussion at the academic conference.

In addition to the countries that attended the 1961 conference in Heidelberg, many European countries established constitutional courts or courts that have jurisdiction to rule on constitutional issues during that time. In Greece, the 1975 Constitution, Section 100, provided that there would be a specialized court having jurisdiction over constitutional issues. In Portugal, in the 1976 Constitution, Chapter 6, the "Constitutional Court" (Sections 223–226) the Constitutional Court has jurisdiction over constitutional matters following European guidelines. And, in Spain, under Chapter 9 of the 1978 Constitution (Sections 159–165), the "Constitutional Court" has the power to control the abstract constitutionality of law, including a person's right to complain to the Constitutional Court (Section 161).

In summary, after World War II, the concept of establishing Constitutional Court, or an institution with jurisdiction over constitutional issues, spread rapidly in many countries, especially in Europe. The countries' adoption of the concept of Constitutional Court or an institution with jurisdiction over constitutional issues could be attributed to the authoritarian regimes in each country. Therefore, after World War II, the constitutions of various countries in Europe put in place measures and mechanisms for examining the exercise of constitutional power to achieve a balance in the state's use of supreme power. The Constitutional Court, therefore, plays an important role in the transition from authoritarianism to liberal democracy.

1.1.3 The Third Era after the collapse of Soviet Union (1991 - present)

After the collapse of Soviet Union in 1991, the concept of establishing a constitutional court rapidly spread and can be divided into two groups: (1) countries of Soviet Union and Eastern European countries, and (2) countries in different regions, with details as follows:

(1) Countries in Soviet Union and Eastern European countries may be divided into two groups as follows: A. Countries in Soviet Union; 13 of the 15 emerging countries have established the Constitutional Court as the organization responsible for upholding the supreme law, namely: Georgia, Kyrgyzstan, Uzbekistan, Moldova, Kazakhstan, Armenia, Lithuania, Belarus, Ukraine, Russia, Tajikistan, Azerbaijan, and Latvia. Most of these countries have "parliamentary" form of government and the Constitutional Court is the body for regulating the constitutionality of law and adjudicating disputes between constitutional bodies. This approach was influenced by the Constitution of Germany, B. Other Eastern European countries: these countries were influenced by ideas from countries in Europe in the past. Therefore, after the collapse of Soviet Union, countries in Eastern Europe adopted the concept of establishing a constitutional court and provisioned it in their constitutions, such as the Czech Republic, Cyprus, Turkey, Hungary, etc.

(2) Countries in various regions where the Constitutional Court has been established as a constitutional check-and-balance body are: Latin America, such as Guatemala, Chile, Peru, and Colombia; Asia, such as South Korea, Thailand, and Indonesia; and Africa, such as South Africa and Benin.

In summary, the expansion of Constitutional Court in the 3rd Era stems from 2 different fundamentals. **Firstly**, due to the lack of democratic experience, the new democratic countries rely on the approaches of the countries that have adapted to modern

constitutional systems. The German Constitution was an important modern constitution that provided guidelines for various countries because it has been adapted to create a balance between organizations exercising state power. Secondly, a group of countries that needed more stable constitutional regimes established the Constitutional Court as an organization that would guarantee the supremacy of the Constitution and create balance between various constitutional organizations, including the guarantee of people's right and liberty.

1.2 Roles and Authorities of the Constitutional Court in Each Era

The study of the Constitutional Court's roles and authorities in each era will be divided into 3 eras as mentioned earlier: 1.2.1 The First Era (1920 -1945), 1.2.2 The Second Era (1946–1990), and 1.2.3 The Third Era (1991–present).

1.2.1 The Constitutional Court in the First Era (1920 - 1945)

In the beginning, the Constitutional Court in a centralized system emerged in continental Europe, with Austria being the first country to establish a Constitutional Court under the 1920 Constitution. The Constitutional Court in Austria has had a long history since 1868, when it was called the "Imperial Court" (Reichsgericht), with important authorities as follows: (1) ruling conflict cases about the court's authorities; (2) protecting political rights and liberties violated by the administrative or judicial bodies; and (3) deciding in the prosecution of violations of the Constitution's provisions by users of state power. Later, when the Federal Constitutional Court Act (Bundesverfassungs-gesetz von 1920—B-VG) was legislated, the mentioned authorities were the power of the Constitutional Court (Verfassungsgerichtshof - VfGH). Additionally, the Act also expanded the Constitutional Court's power,

especially the power to examine the constitutionality of laws (die Gesetzesprüfungskompetenz),[51] enacted by both legislative and executive bodies. Kelsen saw that reviewing the constitutionality of executive legislation was a key authority that distinguished the Austrian Constitutional Court from that of the United States Supreme Court. The Constitutional Court have 4 important authorities: (1) ruling conflict cases about the court's authorities; (2) protecting political rights and liberties violated by the administration or judiciary; (3) deciding in the prosecution of violation of the Constitution's provisions by users of state power; and (4) examining the constitutionality of law (die Gesetzesprüfungskom-petenz). The important authority of the Constitutional Court in the beginning was the authority to examine the constitutionality of laws (die Gesetzesprüfungskompetenz), which led to the theoretical arguments previously mentioned, became important, and evolved into a diverse system of constitutionality control later on.

1.2.2 The Constitutional Court in the Second Era (1946 - 1990)

In the second era, the authorities of the Constitutional Court, modeled after those of Germany, established measures and mechanisms for a wide range of important functions based on five key concepts: (1) being an organization that protects the fundamental rights of individuals (2) being an organization that plays an important role in creating balance of power (3) building political institutions to be "Modern Parliamentary System" (Rationalized parliamentary system) (4) creating mechanism of "Militant Democracy" (wehrhafte Demokratie), and (5) judicialization of politics. Based on such important principles,

[51] Ernst Hellbling, Die geschichtliche Entwicklung der Verfassungsgerichtsbarkeit in Österreich, JBl. 1951, S.197 ff.

the Constitutional Court's authorities have been widely prescribed. It can be said that the Federal Constitutional Court of Germany is one that has the widest power with authorities as follows:[52]

(1) Limitation of basic rights of individuals (Section 13, item 1 BVerfGG)

(2) Cases relating to political parties (Section 8 GG and Section 13, item 1 BVerfGG)

(3) Election inspection (Section 41, paragraph 2 GG and Section 13, item 3 BVerfGG)

(4) Impeachment of the Federal Presidents (Section 61, paragraph 2 GG and Section 13 item 4 BVerfGG)

(5) Disputes concerning rights or duties of constitutional organizations (Sections 93, item 1 GG and Section 13, item 5 BVerfGG)

(6) Abstract control of constitutionality (Section 93, paragraph 1, item 2 GG and Section 13, item 6 BVerfGG)

(7) Disputes about rights or duties between the State and the Federation (Section 93, paragraph 1, item 4 GG and Section 13, item 7 BVerfGG) and other public law dispute cases between the federation and the state, or state and state (Section 93, paragraph 1, item 4 GG and Section 13, item 8 BVerfGG)

(8) Constitutional complaints by the people (Section 93, paragraph 1, item 4a and 4b, and Section 13, item 8a BVerfGG)

(9) Cases against federal or state judges (Section 98, paragraph 2 and 5 GG and Section 13, item 9 BVerfGG)

(10) Concrete control of constitutionality (Section 100, paragraph 1, GG and Section 13, item 11 BVerfGG)

[52] For details, see Banjerd Singaneti, General Knowledge of the Constitutional Court, 3rd Edition, Winuchon Publishing House, Bangkok 2020, p. 109

(11) Examination of general rules of international law whether it is a domestic law (Section 100 paragraph 2 GG and Section 13 item 12 BVerfGG)

(12) Control to ensure unity in the interpretation of constitutional cases (Section 100, paragraph 3 GG and Section 13, item 13 BVerfGG)

(13) Decide whether the law which came into force before the current Constitution shall still be in force (Section 136 GG and Section 13, item 15 BVerfGG)

(14) Other cases as provided for in the Federal Law (Section 100 paragraph 3 GG and Section 13 item 13 BVerfGG)

Based on the aforementioned authorities of the German Constitutional Court, it can be concluded that 3 important roles and authorities of the German Constitutional Court are as follows:[53]

A. The Constitutional Court protects political rights, and in particular, individual human rights, to defend against unlawful interference by political organizations through majority vote.

B. The Constitutional Court protects the organization for the implementation of state missions consistent with the rule of law and the separation of powers. It can protect the principles of state organizations by opposing violations of their principles resulting from politics through majority rule.

C. The Constitutional Court stabilizes the transparency of the democratic will process by opposing the bias of the majority to dominate and monopolize political power, which will affect the principle of minority equality.

[53] Brüneck, Verfassungsgerichtsbarkeit in den westlichen Demokratien, 1992, p. 141

To summarize, the Constitutional Court's roles and authorities in this era have changed dramatically from the beginning era. The reason is rooted in the experience of authoritarian regime that resulted in global disaster during World War II. Therefore, after the political system reform in Europe, it is essential to devise measures to counterbalance political power by emphasizing the principle of the supremacy of the Constitution. Germany was one of the countries most traumatized by such consequences, and the apparent flaws of the German Weimar constitution were the driving force behind the creation of "Constitutional Court" to have the authorities and roles mentioned earlier.

1.2.3 The Constitutional Court in the Third Era (1990 - Present)

This section may be divided into (1) authorities of the Constitutional Court and (2) roles of the Constitutional Court, as follows:

(1) The authorities of most constitutional courts established after 1990 are as follows:

a) Constitutional Court of every country has the duty of controlling the constitutionality of laws, which is regarded as basic authority to protect the principle of the supremacy of the constitution.

b) Making judgments concerning the authority of constitutional organizations. In many countries, the constitutional court also has jurisdiction over matters not limited to constitutional bodies.

c) Most Constitutional Court during this time was authorized to play a role in the impeachment of the head of executive branch.

d) The constitutional power in the political party dissolution case was specific to only some countries, and

e) The constitutional power in constitutional complaint cases was specific to only some countries.

(2) The roles of newly established Constitutional Court may be divided into 3 groups as follows:

Group one: The Constitutional Court has a complete role in controlling the constitutionality of laws, protecting the rights and liberties of the people, protecting the basic constitutional principles, and issuing ruling on senior political officers, including minority protection. The Constitutional Courts of Hungary and South Korea are in this group.

Group two: The Constitutional Court is responsible for ensuring the constitutionality of laws, protecting people's rights and liberties, and upholding basic constitutional principles. The Constitutional Courts of Chile and Indonesia are in this group.

Group three: The Constitutional Court plays a role in controlling the constitutionality of laws and protecting the rights and liberties of the people. In this case, it is the Constitutional Court of Russia.

Conclusion

From the study of 1.1 the development of the Constitutional Court and 1.2 the roles and authorities of the Constitutional Court in each era, the essences are as follows:

(1) The origin of the Constitutional Court's establishment. The emergence of the Austrian-model Constitutional Court differs from that of the United States Supreme Court in making judgment whether the law is unconstitutional. The United States Supreme Court was created from the interpretation of Supreme Court in ruling the dispute and postulating such principle while the Austrian Constitutional Court was a result of scholarly debates between two parties of legal theorists who were active at that time. The cornerstone of the Constitutional Court's establishment is "The Hierarchy of Law Theory" and the most important and controversial concept is whether the Constitutional

Court is contrary to democratic legitimacy. Regarding the concept that opposes the establishment of the Constitutional Court, Hans Kelsen, the important legal theorist of the time, was able to explain and resolve the theoretical fundamental problems of the opposing parties, especially the issue of violation of democratic legitimacy, and pushed for the creation of the world's first Austrian-model Constitutional Court in 1920, which marked the success of the beginning of the Constitutional Court which would later expand with a role to play.

(2) The adjustment of the roles and authorities of the Constitutional Court after World War II. When the Constitutional Court started in Austria in 1920, authoritarianism soon took over continental Europe and led to World War II. After the end of World War II, there was a process of constitutional reform in countries in continental Europe, especially the development of "Militant Democracy", which prescribes that the organization that plays an important role in protecting democratic principles and the Constitutional supremacy is the "Constitutional Court". The main development began in Germany and Austria and later expanded into Western Europe. The Constitutional Court after World War II played 3 critical roles: A. It was an important mechanism for the transition from an authoritarian regime to a liberal democratic regime; B. It was an organization that balanced the powers of constitutional bodies to protect the fundamental principles of the Constitution; and C. It was an important mechanism for the protection of the people's rights and liberties. The success of such a process made the "Constitutional Court" widely accepted in Western Europe and it played an important role in creating political stability for countries in continental Europe.

(3) After World War II, the constitutional courts in Europe played a crucial role in the transition from authoritarianism to liberal

democracy. The Constitutional Court had a role in defending the principle of the Constitutional supremacy based on the concept of "Militant Democracy." Therefore, the roles and authorities of the Constitutional Court are, in a sense, to counterbalance the parliamentary majority, or, in other words, to protect the minority in the parliament. Such a role makes the Constitutional Court's judgments a judicialization of politics. The Constitutional Courts in Europe were able to maintain the balance of various parties' power within the scope of the Constitution and power equilibrium. The success of the Constitutional Court in continental Europe is an important factor that helped spread the idea of establishing a Constitutional Court to all regions of the world. (4) After the Constitutional Court was stable in continental Europe, the concept of establishing a constitutional court was expanded to other regions, especially after the collapse of the Soviet Union and the emergence of new democratic countries in different regions: Eastern Europe, Asia, Africa, and Latin America. As such, the Constitutional Court inevitably played a role in spreading the concept to the new democratic countries, similar to what it did in Europe after World War II through 3 important roles, namely: A. It was an important mechanism for the transition from an authoritarian regime to a liberal democratic regime. B. It was an organization that balanced the powers of constitutional bodies to protect the fundamental principles of the Constitution; and C. It was an important mechanism for the protection of the rights and liberties of the people. However, whether the Constitutional Court in these new democratic countries will be as successful as it has been in continental Europe is an issue to be studied and monitored.

(5) The Constitutional Court has played a role in stabilizing the constitutional regime for a century. Its role in the second century tends to have expanded its power into other areas. This is because the

conflicts in society tend to be more between various interest groups. Such conflicts require the jurisdiction of the judiciary. Consequently, there are concerns from academics, especially in countries that use the common law system, who see that the Constitutional Court increasingly decides on political issues. The expansion of the Constitutional Court's jurisdiction into the political sphere is a phenomenon in every region, raising concerns that it will eventually lead to "juristocracy." The views of the United States Supreme Court on this issue differ from those of the European Constitutional Court. The United States Supreme Court holds the "political question doctrine," which prescribes that the courts will not make judgments on political matters, while the European Constitutional Court views the judicialization of politics as an important role of the Constitutional Court. This fundamental difference has led to concerns about the aforementioned issue.

In short, the Constitutional Court in the second century continues to play an important role in society on the grounds that social conflicts are increasingly diverse and complex. The existence of the Constitutional Court as an equilibrium body that balances the power of various groups in society to have space and be able to play their roles needs society's trust and judicial independence, especially from politics, based on academic principles and protection of public interests. As such, the Constitutional Court will sustainably play a central role in liberal democratic politics in the second century.

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Chapter 2
"The Constitutional Court" in the 21st Century

*Punya Udchachon**

This chapter is presented in four eras: the first is the development of the world's constitutional review; the second is the constitutional review after World War II; the third is the organization responsible for constitutional review at present; and the fourth is the Constitutional Court in the 21st century, which comprises regional and global cooperation strategies and the political equilibrium of liberal democratic state under the decision of the Constitutional Court.

2.1. The First Era: the Development of the Global Constitutional Review

2.1.1 The early development of constitutional review concept in the world stems from two important factors. Firstly, the global trend of limiting the power of kings in absolute monarchy to constitutional monarchy, which resulted in the establishment of Constitution as the supreme law that takes precedence over all other laws. The Constitution was established based on the philosophy of natural law, which assumes that people's rights and liberties have been inherent since birth. Although there is no written law, each human being has fundamental rights that must be properly maintained under the principle of constitutionalism. Constitutionalism is a process that originated in the 18th century for states to have constitution as the supreme written law

* Justice of the Constitutional Court

preventing state power and state entities from eventually becoming arbitrary and tyrannical.[1] Secondly, popular sovereignty recognizes that the supreme governing power is vested in the people. Human rights and the people's rights and liberties shall be protected. Therefore, the Constitution must be established on such foundations to be considered justified by the rule of law, such as respect for human rights, separation of powers, review of state power's exercise, ethics, and public participation, etc. Constitutionality is the essence of governance structure in democratic regime because the Constitution is the fundamental law for the country's social order and the balance of powers among sovereign organizations, which include parliament, the government, and courts, as well as constitutional independent organizations. In a liberal democratic state, separation of powers is a dynamic mechanism for the exercise and balance of power that ensures the sustainability of governance structure. For this reason, the important fundamental principle of Constitution is its supremacy whereby legislation and action of state agencies must be authorized by provisions of law that are not contrary to the Constitution.

2.1.2 When the supremacy of constitution is accepted, no law can be contrary to or inconsistent with the Constitution. The constitutional review of laws is therefore important. The key point is which organization will have the duty and power to carry out the mission of constitutional review. When the constitution is the supreme law, the body responsible for constitutional review should be the supreme organization exercising sovereign power, i.e., the legislative or executive body, or such an organization deemed to have a duty in

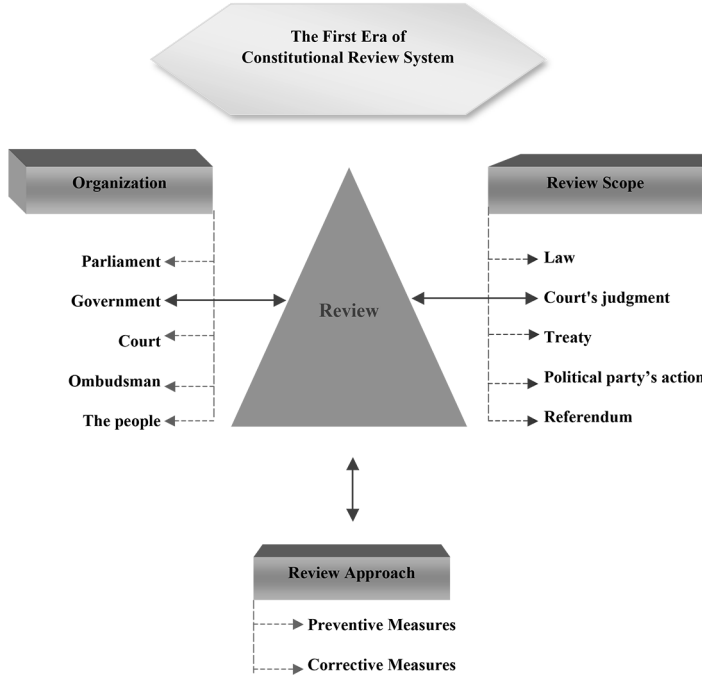
[1] Bowonsak Uwanno, Public Law Volume 1: The Philosophical Evolution and Characteristics of Public Law in Different Eras, Bangkok (Chulalongkorn University Press: 2009), p. 82.

proposing, enacting, and approving laws by judicial power. Therefore, the judicial body, that is the court, is appropriate because it is independent and has the power to counterbalance the legislative and executive powers. Furthermore, the court serves as a pillar in establishing legal guarantees for resolving political conflicts in society with the recognition and trust of people.

2.1.3 The form and scope of constitutional review has been continuously developed throughout history due to the influence of legal philosophy in each era. The constitutional review is dynamic, depending on the problems in each society at the time. Although the form and scope have changed, the important goals have not changed which are to create political balance, prevent parliamentary dictatorship, solve the country crisis, build social stability, protect civil rights and liberties, and ultimately safeguard the Constitution.

2.1.4 The constitutional review generally aims to prevent any law from being contrary to or inconsistent with the Constitution. But, indeed, there are also other significant aims, including preserving nationhood and civic spirit, and balancing political institutions and independent organizations to enable their effective existence. Therefore, the system of constitutional review is important for the protection of democratic principles, the building of knowledge and understanding about the Constitution for people, the creation of an independent audit system, and people access to the judicial process in a modern, convenient, fast and fair manner. Consequently, the constitutional review in the past has been continually developed involving with the organization, the scope, and the review approach as shown below.[2]

[2] Gagik Harutyunyan, The Constitutional Review and its Development in the Modern World, Republic of Armenia, (Yerevan: 1999) p. 5.



2.2 The Second Era: the Constitutional Review after World War II

2.2.1 After the end of World War II in 1944, the form of an organization that reviewed the constitutionality of laws as a special organization with the independence from the legislative and executive branches was more explicit and concrete. This arose from the concept of the Supremacy of the Constitution that has increasingly replaced the Supremacy of the Parliament, especially the form of the Constitutional Court[3], such as Austria in 1920, Germany in 1949, Italy in 1948, Syria in 1950, Portugal in 1976, Turkey in 1961, and Thailand in 1997. However,

[3] Donald P. Kommers and Russell A Miller, The Constitutional Jurisprudence of the Federal Republic of Germany, U.K. (London: 2012), p.1.

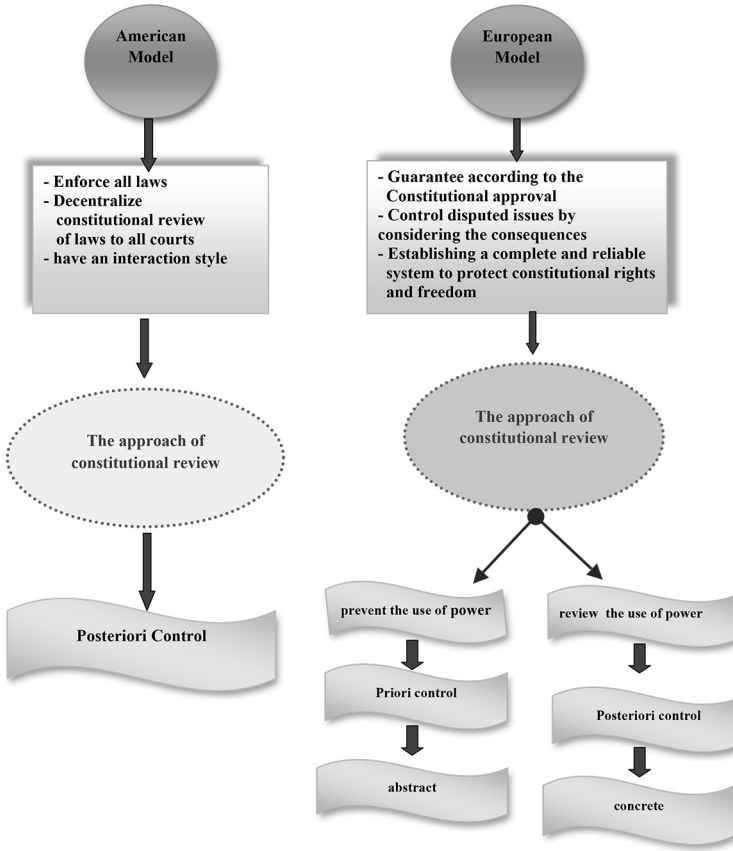
considering the form of organizations that review the constitutionality of laws which are courts, namely the Constitutional Court and the Ordinary Court, it can be divided into two models, namely the European model and the American model.

2.2.2 The European or Austrian Model originated from the concept of a legal philosopher, Professor Dr. Hans Kelsen, in 1920, where the constitutional review was performed by the Constitutional Court, a specialized court. The persons who will hold the Constitutional Court judge position must be specially qualified judges with the background as public law professors, Supreme Court judges, or those with experience in the country's administrative functions. There is a special trial process (Principaliter) that controls the law before enforcement called Priori control, or abstract, and post-enforcement called Posteriori control, or concrete. The results of the Constitutional Court's decision have a binding effect on all organizations (Erga omnes). Based on the mentioned characteristics, it is called the centralized system.

2.2.3 The American Model is based on the foundation laid down by the 1803 case of Marbury v. Madison, which established the U.S. Supreme Court's ruling that since the Court has jurisdiction to try and adjudicate cases, it has the power to interpret the law. The United States Supreme Court ruled in the aforementioned case that the nomination and appointment of the Justice of the Supreme Court are under the authority of the President and the endorsement by the Senate. Giving both organizations the power to monitor their actions would be inappropriate. The court, therefore, is the central organization that would review the process of such actions. The American model of constitutional review takes the form of an ordinary court using an ordinary trial process (incidenter) with post-enforcement control,

which is called posteriori control or "concrete," by appeals of the lower court or in the case of disputes between states or organizations. The results of the decision have a binding effect on the parties (except for the stare decisis principle, which has a binding effect on every organization). Based on the mentioned characteristics, it is called a decentralized system.

Basic Characteristics of Post-World War II Constitutional Review Models



2.3 The Third Era: the Organization Responsible for Constitutional Review at Present

The century development of the Constitutional Court has pointed out that the organization responsible for the constitutional review is a product of the liberal democratic system of a modern state based on the rule of law, the separation of powers doctrine, and the principle of protecting fundamental rights of the people. The aforementioned liberal democracy has two important missions: firstly, to safeguard the Constitution through the democratic process of legislative, administrative, and judicial actions by sovereign organizations; and secondly, to protect the people's fundamental rights from the use of state power by state agencies.[4] Therefore, the Constitutional Court plays an important role in safeguarding the principles of a liberal democratic state.[5] However, the form of an organization performing constitutional review inevitably depends on the legal system, historical background, and development of democracy in each country.

Since Constitution is the supreme law that regulates the form of the state, the political structure of the country, and sovereign organizations; the parliament is the body that exercises legislative power, the government uses executive power, and the court uses judicial power; they are, therefore, constitutional organizations under the Constitution's legislation and have duties and authorities under the provisions of the Constitution. The constitution originated from the people's constitutional power[6] and it is considered a hierarchy of law

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4 H. Hausmanninger, "Constitutional Review" The Austrian Legal System, University of Vienna, School of Law (Vienna: 2011), p.137.

5 Bunjerd Singkaneti, General Knowledge of the Constitutional Court, Bangkok (Winyuchon: 2017), p. 37.

6 The ruling of the Constitutional Court of the Kingdom of Thailand No. 18-22/2555 dated 13 July B.E. 2555.

including a distinctive constitutional amendment process that is more difficult than that of general laws. Therefore, the Constitution is the supreme law according to the constitutional supremacy principle that any law cannot be contrary to or inconsistent with the Constitution. The mentioned supremacy of the constitution principle covers both the form, that is, the Constitution is the law that establishes the sovereign organizations, and the content, that is, the Constitution is the law that guarantees all people are equal before the law, including creating a balance of organizations exercising sovereign power. Therefore, since the Constitution is the supreme law, it is necessary to create a mechanism to safeguard the Constitution to maintain the lasting value of its supremacy. The countries that hold to the principle of supremacy of the constitution are the United States, France, Austria, the Federal Republic of Germany, the Kingdom of Thailand, etc.[7] The organization that defends the Constitution of each country has different characteristics due to the differences in history, political conditions, governance, and political and social culture of each of those countries. However, in terms of organizational structure, the organization that protects the Constitution or reviews the constitutionality of law can be classified into four types:

2.3.1 The Constitutional Court. Considering the special structural characteristics and the jurisdiction involved in performing the mission independently, the Constitutional Court, therefore, refers to the Constitutional Court and the Constitutional Tribunal. The countries where the Constitutional Court is provisioned by the Constitution are Austria, Angola, Armenia, Belgium, Bosnia and Herzegovina, Bulgaria,

[7] Punya Udchachon, The Constitutional Court of the Kingdom of Thailand in the Modern World, Bangkok (Winyuchon: 2019), pp. 17-18.

the Central African Republic, Chile, Croatia, the Dominican Republic, Ecuador, Egypt, Georgia, Germany, Hungary, Indonesia, Italy, Jordan, South Korea, Latvia, Lithuania, Madagascar, Mongolia, Niger, Peru, Portugal, Romania, Russia, Serbia, South Africa, Syria, Thailand, Turkey, Tajikistan, Togo, Tunisia, Ukraine, Uzbekistan, etc. The form of Constitutional Court can mostly be found in countries that use civil law and a dual court system; for example, the Austrian Constitutional Court, established under the 1920 Austrian Constitution, was regarded as the world's first Constitutional Court and was situated in Vienna as a special court. At present, it consists of 20 Constitutional judges, namely President of the Constitutional Court, Vice President of the Constitutional Court, 12 members of the Constitutional Court, and 6 substitute members in case of the Constitutional Court members cannot perform the duties. Of all the members, 5 are selected and endorsed by the House of Representatives (Nationalrat), 4 by the Senate (Bundesrat), and 11 by the Federal Government. The President and Vice President of the court must be selected and endorsed by the Federal Government. All members of the Constitutional Court are appointed by the President. Therefore, it can be seen that the Austrian Constitutional Court originated from two bodies: the legislative branch and the executive branch.

2.3.2 The Court of Justice. This can mostly be found in countries that use common law and a single court system. The Constitution provides that the Supreme Court serves to protect the constitution through interpreting the constitution in addition to the duty and power to try and adjudicate civil and criminal cases. This can be seen from the case of the United States Supreme Court's interpretation of the constitution in the Marbury v. Madison case in 1803, The New Deal case in 1937, The Same Sex Marriage case in 2015, etc. The countries where

the Constitution has been established in the form of a Court of Justice are the U.S.A., Afghanistan, Argentina, Bahamas, Bangladesh, Bhutan, Brazil, Canada, Cuba, Denmark, El Salvador, Estonia, Ghana, Honduras, Iceland, India, Jamaica, Japan, Kenya, Malaysia, Monaco, Namibia, Nigeria, Pakistan, Paraguay, Philippines, Rwanda, Samoa, Singapore, Sweden, Trinidad and Tobago, Uganda, Uruguay, United Kingdom, Venezuela, and Zambia, etc. As an example, the U.S. Supreme Court was established under the United States Constitution of 1787 in Washington, D.C., as the Supreme Court and began hearing in 1789[8]. It consists of nine justices, proposed by the President with the endorsement and consent of the Senate. The U.S. Supreme Court is regarded as the only court in the world where the Supreme Court Justice positions have lifetime term of office, under the reasoning that it should be independent of judicial decisions. Consequently, the Supreme Court justices come from the executive branch with the endorsement of the Senate.

2.3.3 The Committee. It is a form of a committee called the Constitutional Council (Conseil Constitutionnel) that has important duties and authority in making decisions in the arguments and providing consultation to the head of state, as well as constitutional review as in the case of the French Constitutional Council's interpretation of the Constitutional value under the principle of equality before the law in 1973 and the case of the status of Corsican in 1991, etc. The countries where the Constitution has been established in the form of a Constitutional Council are France, Algeria, Burkina Faso, Cambodia, Chad, Cote d'Ivoire, Djibouti, Lebanon, Morocco, Mozambique, and Senegal, etc., As example, the French Constitutional

[8] Robert J. McKeever, The United States Supreme Court: A political and legal analysis, second edition, Manchester University Press, U.K. (Manchester: 2016), p.2.

Council (Conseil constitutionnel) in Paris was established by the Constitution of the Fifth Republic in 1958, as a committee with a direct connection with the public, and comprised at least 9 members who are appointed through 2 approaches; the first approach is a member as of right; the former Presidents of the Republic who came from the people's election have a lifetime appointment, and the second approach is by appointment; 3 members appointed by the President of the Republic, 3 members appointed by the President of the National Assembly, and 3 members appointed by the President of the Senate; totaling 9 members who serve a non-renewable term of 9 years. The President of the Constitutional Council is appointed by the President of the Republic. In the Constitutional Council meeting, the President of the Constitutional Court has the right to casting vote in case of a tie.[9] Therefore, the characteristics of the French Republic Constitutional Council are a committee where the chairman of the meeting can cast a decisive vote and it has a connection with the people because the former presidential position is elected by the people.

2.3.4 Other forms, that are, those with characteristics that differ from the three formats mentioned above, the following forms are interesting:

2.3.4.1. The Guardian Council of the Islamic Republic of Iran

The Guardian Council of the Islamic Republic of Iran was established under the 1979 Constitution of the Islamic Republic of Iran and it is situated in Tehran. It has duties and powers to protect Islamic statutes and the Constitution and comprises 6 Islamic jurists

[9] The Constitution of the French Republic 1958, Article 56

who are virtuous and knowledgeable in Islamic jurisprudence as well as well-versed in the needs of the times, appointed by the head of state, and 6 legal scholars with expertise in various fields among Muslim judges under the guidance of the High Court and Islamic Consultative Council (Majlis), also appointed by the head of state, totaling 12 people.[10] The term of office is 6 years whereby, after the first 3 years, half of the members of each group must be drawn by lot to allow new members to replace them.[11] The duties and powers of the Guardian Council, according to the provisions of the Constitution, are as follows:

2.3.4.1.1 Review of the bills. All bills passed by the Parliament, known as the Islamic Consultative Council (Majlis), must be reviewed by the Guardian Council whether they are contrary to or inconsistent with Islamic statutes and constitutional principles. The Guardian Council must complete its consideration within 10 days from the date of receipt of the bills. If any statement in the bill is contrary to or inconsistent with Islamic principles or constitutional principles, the bill will be returned to parliament; otherwise, it will be published in the Official Gazette for further enforcement.[12]

2.3.4.1.2 If the Guardian Council cannot complete its review within 10 days, it may request the 10-day extension from Parliament, along with justification.[13]

2.3.4.1.3 The meeting of the Guardian Council adopts a majority rule.[14]

[10] The Constitution of the Islamic Republic of Iran 1979, amended in 1989, Article 91

[11] Ibid., footnote 10, Article 92

[12] Ibid., footnote 10, Article 94

[13] Ibid., footnote 10, Article 95

[14] Ibid., footnote 10, Article 96

2.3.4.1.4 Interpretation of the Constitution. The Guardian Council is tasked with interpreting the Constitution. This case uses a resolution of three-fourths of all 12 members of the Guardian Council.[15]

2.3.4.1.5 Election administration. The Guardian Council has the authority to oversee the elections of the Assembly of Experts for Leadership, the President, the Islamic Consultative Council (Majlis), and the Referendum.[16]

The Guardian Council also has the duty and powers to attend sessions of the Islamic Consultative Council (Majlis) during the review of the bills proposed by the government or members of Parliament. However, if a bill under review by the Islamic Consultative Council (Majlis) is an emergency or urgent matter, members of the Guardian Council must attend and express their opinions at such a meeting.[17] Thus, it can be seen that the Guardian Council of the Islamic Republic of Iran is an important form that places great emphasis on the morality and ethics of lawyers who will serve as members of the Guardian Council as well as the duties and powers to attend the meeting to review the bills of the Islamic Consultative Council (Majlis), which acts as the Parliament.

2.3.4.2 The Standing Committee of the National People's Congress of The People's Republic of China

The Standing Committee is an important mechanism of the National People's Congress because it has a large number of members. The Standing Committee is a constituent part of the unicameral legislature, serving a five-year term, the same as that of the

[15] Ibid., footnote 10, Article 98
[16] Ibid., footnote 10, Article 99
[17] Ibid., footnote 10, Article 97

National People's Congress.[18] The Standing Committee of the National People's Congress is comprised of 9 committees, namely:

2.3.4.2.1 Constitution and Law Committee

2.3.4.2.2 Ethics Committee

2.3.4.2.3 Internal Affairs and Justice Committee

2.3.4.2.4 Finance and Economics Committee

2.3.4.2.5 Education, Science, Culture, and Public Health Committee

2.3.4.2.6 Foreign Affairs Committee

2.3.4.2.7 Overseas Chinese Affairs Committee

2.3.4.2.8 Environment and Resources Conservation Committee

2.3.4.2.9 Agriculture and Rural Affairs Committee

The Constitution and Law Committee consists of the chairman, 200 vice chairs, and the secretary of the committee. It has the duties and powers to interpret the Constitution and the law and repeal any regulations, executive resolutions, or orders that are contrary to the Constitution and the law. Therefore, the Constitution and Law Committee is a part of the National People's Congress, which is not a court but the people's representative that has the duties and powers to interpret the Constitution and the law, including constitutional review. As part of the National People's Congress, the Constitutional and Law Committee's performance is highly unified.[19] This is because the National People's Congress and the Standing Committee of the National People's Congress are political institutions that use legislative power to enact laws under the provisions of the Constitution.

[18] The Constitution of the People's Republic of China 1982, Article 66

[19] Qianfan Zhang, The Constitution of China: A Contextual Analysis, Hurt Publishing, U.S.A. (Oregon: 2012), p.131.

2.4 The Fourth Era: the Constitutional Court in the 21st Century

2.4.1 Regional and Global Cooperation Strategies

The Constitutional Courts and organizations that have duties and powers like the Constitutional Court, which are called "equivalent institutions," have established academic cooperation under the Charter, with which the Constitutional Courts or equivalent institutions of each country have membership status. Such academic cooperation is operated by an organization called the Association. Therefore, the consolidation of the Constitutional Courts or equivalent institutions is done based on the location of the country by continent or linguistic groups, such as the Association of Asian Constitutional Courts and Equivalent Institutions, the Union of Arab Constitutional Courts and Councils, the Cooperation of Constitutional Courts in Europe, the Ibero-American Conference of Constitutional Justice, the Conference of Constitutional Jurisdictions of Africa, and the World Conference on Constitutional Justice, etc.

2.4.1.1 The Constitutional Court of the Kingdom of Thailand and Regional Cooperation

The Association of Asian Constitutional Courts and Equivalent Institutions (AACC) was established under the Jakarta Declaration on July 12, 2010, in Indonesia. The founding countries consisted of 7 countries, namely: the Constitutional Court of Thailand, the Constitutional Court of Korea, the Constitutional Court of Indonesia, the Constitutional Court of Mongolia, the Constitutional Court of Uzbekistan, the Supreme Court of Malaysia, and the Supreme Court of the Philippines. Its objective is to promote academic development in the rule of law, democratic principles, and fundamental rights principles. The Jakarta Declaration stipulates that the Association's statute consists of 10 chapters and 32 articles and

requires a general meeting to be held every two years. The President of the Court of the hosting country shall be the President of the Association for a term of two years. The AACC's Joint Permanent Secretariat was established by the 3rd General Meeting in Nusa Dua, Bali, Indonesia, with three working areas: research and development with the office in Seoul, Republic of Korea; planning and coordination with the office in Jakarta, Republic of Indonesia; and training and human resource development with the office in Ankara, Republic of Turkey. The Asian Association of Constitutional Courts and Equivalent Institutions (AACC) currently has 19 member countries: Afghanistan, Azerbaijan, Indonesia, Kazakhstan, Korea, Kyrgyzstan, Malaysia, Mongolia, Myanmar, Pakistan, Russia, Tajikistan, Thailand, the Philippines, Turkey, Uzbekistan, India, the Maldives, and Bangladesh.

The Asian Association of Constitutional Courts and Equivalent Institutions (AACC) held 5 meetings during 2012–2022, as follows:

(1) The 1st Congress of the AACC or Inaugural Congress on "Present and Future of Constitutional Justice in Asia" hosted by the Constitutional Court of the Republic of Korea at Lotte Hotel Seoul, Republic of Korea, between May 20 - 24, 2012.

(2) The 2nd Congress of the AACC on "Protection of Human Rights by Constitutional Courts" hosted by the Constitutional Court of the Republic of Turkey at the Hilton Hotel Istanbul, Republic of Turkey, between April 27 - May 1, 2014.

(3) The 3rd Congress of the AACC on "The Promotion and Protection of the Constitutional Rights of Member State's Citizens" hosted by the Constitutional Court of the Republic of Indonesia at Nusa Dua, Bali Island, Republic of Indonesia between August 11 – 12, 2016.

(4) The 4th Congress of the AACC on "The XXI Century Constitution – the Rule of Law, the Value of Person and the Effectiveness of the State", hosted by the Constitutional Council of the Republic of Kazakhstan via online channels in Nur-Sultan, Republic of Kazakhstan between August 25 – 27, 2020.

(5) The 5th Congress of the AACC in 2022 on "Recent Developments of Constitutional Justice in Asia" hosted by the Constitutional Court of Mongolia.

(6) The 6th Congress of the AACC in the year 2024 - 2025, will be hosted by the Constitutional Court of the Kingdom of Thailand.

2.4.1.2 The Constitutional Court of the Kingdom of Thailand and Global Cooperation

The Venice Commission established cooperation with the Constitutional Courts of different regions or in linguistic groups in 1996, especially the Constitutional Court in continental Europe, the Association of French-speaking Constitutional Courts, the Constitutional Courts in South Africa, the Asian Association of Constitutional Courts and Equivalent Institutions, and various unions or multilateral partnerships, known as the World Conference on Constitutional Justice (WCCJ), intending to strengthen constitutional justice over the rule of law, democratic principles, and human rights principles in 115 countries, using the statutes of the WCCJ as guidelines for operations. The structure is divided into three main organizations: the General Assembly serves as the host for the general meeting, and the President of the hosting Constitutional Court will serve as the President of the General Assembly; the Bureau acts as the director of the General Assembly; and the Secretariat acts as the administrator and secretary. In general, the Venice Commission will serve as the secretariat. The assembly will be held every two years, rotating

among the representatives of each region. There are 7 languages used in each General Assembly, namely: English, French, German, Spanish, Portuguese, Russian, and Arabic.

The Constitutional Court of the Kingdom of Thailand with the approval of the Constitutional Court justices attended the WCCJ meeting on February 25, 2012. The Constitutional Court or the Constitutional Council, the Supreme Court, or other organizations that are members of the WCCJ are the following 115 countries in alphabetical order:

1. Albania, Constitutional Court
2. Algeria, Constitutional Council
3. Andorra, Constitutional Court
4. Angola, Constitutional Court
5. Armenia, Constitutional Court
6. Australia, High Court
7. Austria, Constitutional Court
8. Azerbaijan, Constitutional Court
9. Bahrain, Constitutional Court
10. Belarus, Constitutional Court
11. Belgium, Constitutional Court
12. Benin, Constitutional Court
13. Bosnia and Herzegovina, Constitutional Court
14. Brazil, Federal Supreme Court
15. Bulgaria, Constitutional Court
16. Burkina Faso, Constitutional Council
17. Burundi, Constitutional Court
18. Cambodia, Constitutional Council
19. Cameroon, Constitutional Council
20. Canada, Supreme Court
21. Cape Verde, Constitutional Court
22. Central African Republic, Constitutional Court
23. Chad, Supreme Court
24. Chile, Constitutional Court
25. Colombia, Constitutional Court
26. Comoros, Supreme Court
27. Congo (Brazzaville), Constitutional Court
28. Congo, Democratic Republic, Constitutional Court
29. Costa Rica, Constitutional Chamber of the Supreme Court
30. Côte d'Ivoire, Constitutional Council
31. Croatia, Constitutional Court
32. Cyprus, Supreme Court

33. Czech Republic, Constitutional Court
34. Denmark, Supreme Court
35. Djibouti, Constitutional Council
36. Dominican Republic, Constitutional Court
37. Ecuador, Constitutional Court
38. Egypt, Supreme Constitutional Court
39. Estonia, Supreme Court
40. ESwatini, Supreme Court
41. Ethiopia, Council of Constitutional Inquiry
42. Finland, Supreme Court
43. France, Constitutional Council
44. Gabon, Constitutional Court
45. Georgia, Constitutional Court
46. Germany, Federal Constitutional Court
47. Ghana, Supreme Court
48. Guinea, Constitutional Court
49. Guinea-Bissau, Supreme Court of Justice
50. Hungary, Constitutional Court
51. Indonesia, Constitutional Court
52. India, Supreme Court
53. Ireland, Supreme Court
54. Israel, Supreme Court
55. Italy, Constitutional Court
56. Jordan, Constitutional Court
57. Kazakhstan, Constitutional Council
58. Kenya, Supreme Court
59. Korea, Republic, Constitutional Court
60. Kosovo, Constitutional Court
61. Kuwait, Constitutional Court
62. Kyrgyzstan, Constitutional Chamber of the Supreme Court
63. Latvia, Constitutional Court
64. Lithuania, Constitutional Court
65. Lebanon, Constitutional Council
66. Luxembourg, Constitutional Court
67. Madagascar, High Constitutional Court
68. Malaysia, Federal Court
69. Mali, Constitutional Court
70. Mauritania, Constitutional Council
71. Mauritius, Supreme Court
72. Mexico, Supreme Court
73. Moldova, Constitutional Court
74. Monaco, Supreme Court
75. Mongolia, Constitutional Court
76. Montenegro, Constitutional Court
77. Morocco, Constitutional Court
78. Mozambique, Constitutional Council
79. Namibia, Supreme Court
80. Netherlands, Council of State
81. Netherlands, Supreme Court
82. Nicaragua, Constitutional Chamber of the Supreme Court

83. Niger, Constitutional Court
84. North Macedonia, Constitutional Court
85. Norway, Supreme Court
86. Pakistan, Supreme Court
87. Palestine, Supreme Constitutional Court
88. Panama, Supreme Court
89. Peru, Constitutional Court
90. Poland, Constitutional Tribunal
91. Portugal, Constitutional Court
92. Romania, Constitutional Court
93. Russia, Constitutional Court
94. Samoa, Supreme Court
95. São Tomé and Príncipe, Supreme Court / Constitutional Court
96. Senegal, Constitutional Council
97. Serbia, Constitutional Court
98. Seychelles, Supreme Court
99. Slovakia, Constitutional Court
100. Slovenia, Constitutional Court
101. Somalia, Supreme Court New
102. South Africa, Constitutional Court
103. Spain, Constitutional Court
104. Sweden, Supreme Administrative Court
105. Switzerland, Federal Court
106. Tajikistan, Constitutional Court
107. Tanzania, Court of Appeal
108. Thailand, Constitutional Court
109. Togo, Constitutional Court
110. Turkey, Constitutional Court
111. Uganda, Supreme Court
112. Ukraine, Constitutional Court
113. Uzbekistan, Constitutional Court
114. Zambia, Supreme Court
115. Zimbabwe, Constitutional Court

The Venice Commission is the organizing body of the conferences of World Conference on Constitutional Justice (WCCJ) from 2009 to 2022 totaling 5 times as follows:

(1) the 1st Congress of the World Conference on Constitutional Justice on the topic of "Influential Constitutional Justice: Its Influence on Society and on Developing a Global Jurisprudence on Human Rights" in Cape Town, Republic of South Africa, between January 22 - 24, 2009, attended by 93 countries with the support of the

Venice Commission and the Constitutional Court of the Republic of South Africa. This conference marked the beginning of the cooperation of the Constitutional Courts and equivalent bodies around the world, as it was resolved to hold a general meeting of member countries and observe it every three years.

(2) the 2nd Congress of the World Conference on Constitutional Justice on the topic of "Separation of Powers and Independence of Constitutional Courts and Equivalent Bodies" in Rio de Janeiro, Federal Republic of Brazil, between January 16 - 18, 2011, attended by 88 countries. At this meeting, the meeting agreed on a draft Statute for the establishment of a cooperation organization of constitutional courts around the world.

(3) The 3rd Congress of the World Conference on Constitutional Justice on the topic of "Constitutional Justice and Social Integration" in Seoul, Republic of Korea between 28 September - 1 October 2014, and was attended by 100 countries. The objective of this conference was to highlight the important role of the Constitutional Court in social integration and conflict resolution in society.

(4) The 4th Congress of the World Conference on Constitutional Justice on the topic of "The Rule of Law and Constitutional Justice in the Modern World" was held in Vilnius, Republic of Lithuania, between September 11 - 14, 2017, and attended by 110 countries. The conference's objective was to highlight that the Constitutional Court performs its duties actively and vigorously under pressure from the legislature, executive, and media. This is to build the faith and confidence of the people under the rule of law.

(5) The 5th Congress of the World Conference on Constitutional Justice on the topic of "Constitutional Justice and Peace" was held in Bali, Republic of Indonesia, between October 4 - 7, 2022.

This conference aimed to point out the roles, duties, and powers of the Constitutional Court in terms of constitutional justice and peace.

The 5th Congress on the topic of "Constitutional Justice and Peace" had 4 sub-topics as follows:

1. Sources and Jurisdiction

2. Limitation of the Role of Constitutional Courts in Maintaining Peace

3. Fundamental Principles: The Protection of Human Rights, Democracy, and the Rule of Law as a Precondition to Peace

4. Stocktaking on the Independence of the Member Courts

The results of this congress can be summarized as follows:

1. The integration of two regional associations: the Association of Asian Constitutional Courts and Equivalent Organizations (AACC) and the Conference of Constitutional Jurisdictions of Africa (CCJA). This was a new direction of regional integration. The first regional integration was the Association of Asian Constitutional Courts and organizations equivalent to the constitutional courts in Asia and Europe (Eurasia), totaling 9 countries.

2. Cooperation on four fronts: the rule of law, democracy, human rights, and peace. The meeting unanimously agreed that the Constitutional Court plays a very important role in protecting these four pillars.

3. The World Conference on Constitutional Justice (WCCJ) unanimously adopted the establishment of the Constitutional Supremacy Index (CSI), which is a set of indicators for performing the missions according to the conference statute and a benchmark for the performance of the constitutional courts around the world.

4. The key principles of the independence include important principles of transparency and public trust.

5. In this Congress, the President of Constitutional Court of the Kyrgyz Republic commended the Constitutional Court of the Kingdom of Thailand on its decision-making in an approach of "Decision in Positive for Promoting Resolution" and received applause in the meeting.

Remarks: In this Congress, the Lithuanian Constitutional Court proposed to expel the Russian Constitutional Court from its membership due to the war between Russia and Ukraine. The Constitutional Court of the Kingdom of Thailand argued that the meeting was an academic conference not related to politics. The proposal was contrary to the objectives of the establishment of the World Conference of the World Constitutional Court's Statute, which came into force on 24 September 2011, Article 1 and Article 2. Finally, all member countries that attended the congress agreed and did not consider the proposal of the Lithuanian Constitutional Court.

In short, this congress of the World Conference on Constitutional Justice was successful and accomplished all aspects with the direction of cooperation and observations presented above. Therefore, the Constitutional Court of the Kingdom of Thailand must develop and adapt to international standards of the rule of law indicator.

With the compilation of regional and global cooperation strategies, it is seen as a new dimension of the world Constitutional Courts or equivalent organizations that changed the direction of creating constitutional justice to be under the same international standards under three pillars: the rule of law, democracy, and human rights, which are stated in the statutes of both the Asian Association of Constitutional Courts and Equivalent Institutions (AACC) and the World Conference on Constitutional Justice (WCCJ

Article 11.2) to exchange views that will contribute to strengthening constitutional justice in each country concerning the principles of constitutional justice arising from the rulings of the Constitutional Court.

2.4.2 Maintaining the Political Equilibrium of a Liberal Democratic State under the Constitutional Court's Ruling

2.4.2.1 Maintaining the Political Equilibrium of Legislative Organizations

The National Assembly is a political institution that uses legislative power to enact the laws. However, there is a subject matter that the Constitutional Court must consider: whether the National Assembly has the duties and powers to prepare a new Constitution. For this issue, the Constitutional Court of the Kingdom of Thailand ruled that[20] the fact that members of the House of Representatives submitted a motion for amending the Constitution by proposing the draft Constitutional amendment of the Kingdom of Thailand Amendment (No...) B.E. .... to the joint sitting of the National Assembly under Section 256, which has principles and reasons for the preparation of a new Constitution, with the content of the Draft Constitutional Amendment to include Chapter 15/1, the preparation of a new Constitution, and Section 256/1, to establish a Constitution Drafting Committee to draft a new Constitution under this Chapter. It believes that Section 156 (15) of the Constitution provides that constitutional amendment is made by a joint sitting of the National Assembly to amend the Constitution as an exercise of the powers of the National Assembly. However, the Constitution stipulates that the process of exercising the legislative power of the National Assembly

[20] The ruling of the Constitutional Court of the Kingdom of Thailand No. 4/2564 dated 11 March 2021.

in such cases has rules and procedures that are different from the performance of duties in the general legislative process. Its main goal is to protect the Supremacy of the Constitution and maintain its continuity. In other words, although the National Assembly has the power to amend the Constitution, it is a delegated power that is limited in form, process, and content. It must, therefore, strictly carry out the delegated duty by not acting outside the scope of duties and powers prescribed by the Constitution. Constitutional amendment must therefore meet conditions that are binding on the original Constitution, adhere to basic principles, and be appropriate and consistent with public opinion. The Constitution of the Kingdom of Thailand, B.E. 2560, Chapter 15, provides for the constitutional amendment only, not for the preparation of a new Constitution.

The preparation of a new Constitution through a Draft Constitutional Amendment to include Chapter 15/1 would have the effect of repealing the Constitution of the Kingdom of Thailand, B.E. 2560, which is the amendment of the important principle that the original constitutional authority wanted to protect. If the National Assembly wants to prepare a new constitution, it must arrange for the people who have the authority to establish the constitution to vote in a referendum on whether a new constitution is appropriate. If the referendum results in an agreement, work on a new constitution will begin. When finished, a referendum must be held again for the people to consider the contents of the new Constitution and determine whether the new Draft Constitution is agreed upon before it is presented to the King for royal assent and promulgation as the Constitution of the Kingdom of Thailand, according to the preparation process of the constitution under the democratic regime with the King as Head of State.

Based on the above reasons, it was therefore ruled that the National Assembly has the duty and power to prepare a new constitution, provided that the people authorized to establish the Constitution have to vote in a referendum on whether they wish to have a new Constitution. When the new Draft Constitution is finished, another referendum must be held to allow the people to vote on whether they agree with the new Draft Constitution.

2.4.2.2 Maintaining the Political Equilibrium of Political Parties

Political parties are very important political institutions composed of individuals with the same political ideology who unite and register political parties to create civil political participation that will lead to the representation of the people in parliament. But there was an important issue on which the Constitutional Court had to decide whether the actions of the Federal Minister of Education and Research violated the rights of political parties. This issue was considered by the Federal Constitutional Court of Germany as follows:[21]

1. In a liberal democratic regime under the Federal Constitution, all state authorities derive such power from the people exercising their rights through election and voting as well as through legislative, executive, and judicial bodies. These are all created by the people who cast their votes through free decision-making and a wide-open opinion process from many parties. In this context, every political party plays an important role in ensuring its openness, which is important for every politician to have the opportunity to participate in political competition equally as long as it is not against the

[21] The ruling of The Constitutional Court of the Federal Republic of Germany 2 BVerfGE 148, 11, 2018.

Constitution. Section 21 (1) of the Federal Constitution were enacted to guarantee the rights of political parties, namely the right to form a political party, the opportunity to participate in building political will, the right to equal political opportunity, and the right to organize rallies by political parties for political competition. In addition, when considering political participation, the debate is an important way of discussing political matter, which will make it clearer if there is controversy or problems from participants who object to various issues.

2. Equal opportunities to participate in the formation of the political will of people are important that state organizations be neutral in political competition for all parties by providing equal assistance to all parties. Therefore, the interventions during the election campaign of any party or the politics of each political party are all the result of the protection guarantee according to Section 21 (1) of the Federal Constitution. However, respect for the principle of equality of political parties prevails even not during the election campaign. The development process of the political opinion framework is not confined to the election campaign period but can be done continuously provided that it is not contrary to Section 21 (1) of the Federal Constitution. If any state agency issues a notice or expresses it clearly in a manner that interferes with a gathering or political rally of a particular party, it violates the principle of impartiality that state organizations should adhere to and comply with. This includes the acts of state organizations intended to induce political rallies or any behavior that compels the public to join them. The negative state organization's assessment of a political situation that can result in obstruction including influencing the behavior of people participating in political rallies is comparable to intervening in the right to equality of political parties under Section 21 (1) of the

Federal Constitution, which states in essence that "political parties must participate in the formation of the political will of the people and be free to form..." In addition, if state organization uses political rallies as an opportunity to judge the merits of the political party organizing such rallies, it would also be considered an intervention.

3. Although the Federal Government exercises its powers to report and disseminate information to the public, it is not exempt from its duty to observe the principle of impartiality of state organizations as well as the use of power in accessing state resources, which is considered an important factor influencing the formation of the political will of the people as an important part of the political process in a liberal democracy as stipulated by the Constitution. Therefore, governments' actions have significant impacts on the electoral prospects of political parties. However, government actions must demonstrate that they do not interfere with the competition of any political party. Under the Constitution, the Federal Government may not have the same ideology as every political party, nor may it be able to create means and opportunities in political matters for any party.

4. According to the aforementioned facts, the Federal Government has the right to refute allegations relating to its policies; however, the presentation or action of the Government in doing so shall be fair and uphold the principle of impartiality of the state agencies. The mentioned principle requires the Government to refrain from making statements that favor any party or statements about the expenses of each political party. After explaining the policy details and refuting the opposing party's arguments, the Government should not use the opportunity to promote its political parties or attack rival political parties. The Government's vindication must explain and deal with all arguments with facts based on the principle of impartiality,

in the same manner as conducting public relations or disseminating information to the public. However, state organizations' right to refute allegations may be exercised in a manner that does not conflict with the principle of impartiality and does not defame the objector.

5. If any member of the Government wishes to participate in the objection of political allegations, he must act without taking advantage or using his authority to retaliate against his political opponents. This is because equality of political competitive opportunities will decrease when a member of the Government uses an opportunity or method that favors his partisans to act against the opposing political party while its political competitor is unable to do so. In this case, a member of the Government used his ministerial powers to retaliate against dissidents and political opponents.

6. Concerning the retaliatory actions, it can be seen that the statement of the respondent, who was the Minister, was an act that violated the petitioner's right to equal opportunity in political competition under Section 21(1) of the Federal Constitution relating to information dissemination. The respondent exercised his governmental authority by publicizing a statement on the ministry's website, which also included the ministry's seal. The use of the ministry's seal represents the minister's performance of duty. The dissemination of such information on the ministry's website manifests disrespect for the principle of impartiality of state organizations, which is an important prerequisite for political competition. The statement was a violation because it was done by a mechanism of using state resources under the control of the Minister as well as attempting to influence the behavior of those wishing to attend the rally to be held on November 7, 2015. The statement demonstrated discrimination by stating that the

political competitor was a party that supports "right-wing nationalism" and incited violence to change the foundations of society. Such a statement by the minister was similar to the one-sided use of power by the respondent, which had an impact on the political rival party. In addition, the statement was intended to influence the behavior of individuals wishing to attend the rally to be held on 7 November 2015. The respondent expressed his opinion that the rally would cause society to be divided and would support people of nationalist ideology. It was also indirectly persuading people who wish to join the rally to argue against the acceptance of refugee policies to stay away from such gatherings because it would imply that they are nationalists. As a result, the respondent's actions violated the principle of impartiality of state organizations in political competition. Consequently, the respondent's statement on November 4, 2015, constituted an interference with the rights of candidates from various political parties who deserve equal opportunities to freely express their political opinions. The respondent's statement was an irrational act by the Government in opposing the attack on refugee policy. Dissemination of the statement was beyond the scope of public relations, which must adhere to the principle of impartiality that the Government should always keep in mind. The state organization should indeed object to the topic of the rally on November 7, 2015, organized to protest against government policy. But the respondent's statement did not contain detailed information related to such an issue, and it urged people to stay away from the upcoming demonstrations. Additionally, there was no statement about political measures and government programs, nor was there a denial of the allegation of refugee policy. There were only statements that attacked the candidate, who was considered a political competitor of the respondent.

Therefore, it was deemed that the respondent had exercised his powers beyond the Government's scope that allows members of the Government to act in providing necessary information to the public. It is an act that is contrary to or inconsistent with the Federal Constitution, Section 21 (1) because it violates the rights to equal opportunities of political parties.

2.4.2.3 Maintaining the Political Equilibrium of the Head of State with Executive Power

In a country with a presidential system, the president acts as head of state and also heads the executive branch. There is a subject matter on which the Constitutional Court has to decide whether the president acts in violation of the provisions of the Constitution and the law and whether impeachment is justified by the Court. This subject matter had been considered by the Constitutional Court of the Republic of Korea by determining 12 subject matters for review as follows:[22]

1. Whether the Grounds for Impeachment Have Been Specified

Description of the grounds for impeachment is considered a complete indictment element sufficient for a clear determination of the scope of the dispute. It is a fact that the grounds for impeachment are not categorized under a clear category of unconstitutional acts. However, when considering the stated facts as the basis for impeachment in conjunction with the acts in violation of the law, the details are sufficient to distinguish them from other grounds for impeachment.

[22] The ruling of the Constitutional Court of the Republic of Korea (Impeachment of the President Park Geun-hye) 2016 Hun – Na 1, dated 10 March. 2017.

2. Whether the Voting Procedure of the National Assembly Was Legal

(a) The control of the exercise of state power in the parliamentary debate process must be based on the separation of powers theory, as long as there is no clear violation of the Constitution or the law. Furthermore, Chapter 1 Section 130 of the National Assembly Act prescribes that investigation of the grounds for impeachment is at the discretion of the National Assembly. As a result, the fact that the National Assembly did not conduct a separate investigation into the grounds for impeachment, or that it voted to proceed with the impeachment motion without waiting for the outcome of the executive or special prosecutor's investigation, does not mean that the vote violated the Constitution or the law.

(b) The National Assembly Act does not explicitly require a debate before a vote. Moreover, no member of the National Assembly wanted to debate the vote for impeachment, which resulted in the vote proceeding after clarifying the proposition for impeachment motion without any debate. The Speaker did not have any intention to hinder or prevent any member of the National Assembly from engaging in a debate against his or her will.

(c) Whether the hearings of each litigation should be presented separately, or be presented as a single motion at the discretion of the National Assembly members proposing the motion in case there are many violations of the Constitution and the law. In this hearing, it was deemed sufficient to justify the impeachment. Thus, various grounds for impeachment can be consolidated and proposed under a single motion for impeachment.

(d) The impeachment procedure concerns the relationship between the two constitutional bodies, i.e., the National Assembly and

the President, and the resolution of the National Assembly did not violate the basic rights of the President as a private individual. Thus, the due process principle, formed as a legal principle that should be observed in the exercise of governmental power by a state institution on its citizens, cannot be directly applied to the impeachment procedure designed to protect the Constitution against a state institution.

3. Whether or Not Adjudication on Impeachment Can Be Undertaken by Eight Justices

As a rule, constitutional trials can be held by a full bench consisting of nine justices. However, in reality, on certain occasions, justice will inevitably be unable to participate in trials. For this reason, the Constitution and the Constitutional Court Act clearly state that a case can be reviewed and decided on with seven justices or more, notwithstanding a vacancy or vacancies, to prevent the interruption of the role of the Constitutional Court in protecting the Constitution.

As a result, the trial by the full bench of eight justices due to the vacancy of one justice was not in violation of constitutional principles or judicial laws, nor was the adjudication of the impeachment.

4. Requirements for Impeachment

Section 65 of the Constitution stipulates that the grounds for impeachment should be "violation of the Constitution or other Acts in the performance of official duties."

"Official Duties," as defined herein, refer to the duties inherent in a particular government office as provided by law and other related duties as they are generally understood. Therefore, it is a concept that not only legal actions but also actions taken by the President in his or her office in connection with the conduct of state affairs are included.

"Constitution" includes the unwritten constitution established by the precedents of the Constitutional Court as well as the provisions of the constitution.

"Other laws" include not only statutes in a formal context but also other international treaties with the same enforcement as statutes and international laws generally accepted.

Chapter 1 Section 53 of the Constitutional Court Act provides that the Constitutional Court shall pronounce a decision that the respondent is removed from office.

"When there is a valid ground for the petition for impeachment adjudication". The case of the President's impeachment has the benefits of upholding the Constitution because the President's impeachment has the severity of the negative impact on or harm to the constitutional order caused by the President's violation of law, and it is considered grave damage to the nation. Consequently, "the existence of a valid ground for the petition for impeachment adjudication" means the existence of a grave violation of the Constitution or the law sufficient to justify the removal of the President from office.

5. Has There Been a Violation of Duty in Public Service or not?

In Chapter 1 Section 7 of the Constitution, according to the principles of the sovereignty of people and representative democracy, prescribes the obligations of state officials in serving the public interest as "facilitators for the entire people," and Section 69 emphasizes the duty of the President to serve the public interests. The President, who is the servant of "the entire people," is obliged to be independent of the special benefits of political parties, especially those of religious groups, the region or social organizations of which he or she is a

member, and the group of his or her acquaintance and to serve the entire people fairly with balanced impartiality. The duties of the President to serve the public interests are further addressed under Section 59 of the State Public Officials Act, Chapter 3 Section 2-2 of the Public Service Ethics Act, and Item 4(a) under Sections 2 and 7 of "the Act on the Prevention of Corruption and the Establishment and Management of the Anti-corruption and Civil Rights Commission." (hereinafter referred to as the "Anti-Corruption Act and the Civil Rights Commission"). The respondent appointed several individuals recommended by Choi O-Won to be public officials, and some public officials appointed in this manner helped Choi O-Won pursue personal interest. The respondent gave orders to establish Mir and K-Sports and solicited money for those foundations from many private companies. The respondent used her position and presidential powers to request donations from various companies. Afterward, the respondent appointed individuals recommended by Choi O-Won to senior management positions at Mir and K-Sports so that Choi O-Won could have de facto control over the two foundations. Choi O-Wan used such control as a tool for personal interest through Playground Communications Inc. and The Blue K Inc. (hereinafter referred to as "The Blue K"), both of which are actually under the management of the respondent. The respondent called on companies to hire certain individuals and make contracts with certain companies by using her position and presidential authority to interfere with the administration of private companies. Furthermore, the respondent ordered the establishment of policies relating to Choi O-Won's benefits, such as restructuring sports clubs and requiring Lotte Group to donate large sums of money to K-Sports to build sports facilities in five key areas for the sports talent fostering programs.

With such behaviors, the respondent improperly used her position and presidential authority for the benefit of Choi O-Won and others, which was not regarded as a fair performance of duty. The respondent violated Chapter 1 Section 7 of the Constitution, Section 59 of the State Public Officials Act, Chapter 3 Section 2-2 of the Public Service Ethics Act, and Item 4(a) of Sections 2 and 7 of the Anti-Corruption Act and the Civil Rights Commission.

6. Is There any Violation of the Rights, Liberties, and Properties of Private Companies?

The subject matter of the dispute over the actions taken personally or through the President's senior secretary in financial matters, that is, the respondent called on various corporate executives to make donations to Mir and K-Sports using the presidential powers and authority in finance and the economy. It, therefore, shows that the establishment of the foundations by the respondent and her partisans with the power to control and manage the said foundations is unusual since the respondent's intention in making such demands from the company's executives is regarded as formal orders to be complied with instead of recommendations or voluntary cooperation requests. The respondent forced companies to donate money to the foundations by using her presidential authority without prescribing rules and regulations that could prove the legal interference of government powers, which is considered a violation of property rights as well as the independence of those companies' management.

The respondent demanded the Lotte Group support the construction of a sports facility project in Hanam that involved beneficial projects and instructed Ahn O-Beom to check on the progress of such projects when necessary. The respondent demanded Hyundai Motor Company sign a contract with a company run by an acquaintance like

Choi O-Won and demanded KT Inc. hire and internally delegate work to a group of persons associated with Choi O-Won. The respondent also demanded companies form sports teams and sign contracts with The Blue K through high-ranking government officials Ahn O-Beom and Kim O. The aforementioned actions of the respondent were judged to be official orders rather than recommendations or suggestions seeking voluntary cooperation. It can be viewed that the respondent interfered with the independent personal sphere of authority of the companies by exercising presidential authority without any legal justification, thus violating the right to property and independence of those companies' management.

7. Whether There Has Been a Violation of the Duty of Confidentiality

Many documents were revealed to Choi-O-Won under the respondent's orders and tacit approval. These documents contained information on the President's schedule, diplomacy, foreign affairs, personnel affairs and policies. If information about the president's duties is disclosed to the public, it would be contrary to administrative purposes. Therefore, keeping the confidentiality of the information relating to the duty is an obligation borne by public officials. The respondent ordered or neglected the disclosure of the aforementioned documents to Choi O-Won, thereby violating the duty of confidentiality provided for in Section 60 of the State Public Officials Act.

8. Whether the Power to Appoint and Dismiss Public Officials Has Been Abused

There is no evidence to prove that the respondent ordered disciplinary personnel measures to Roh O-Kang and Jin O-Soo, who are public officials of the Ministry of Culture, Sports, and Travel for

interference with Choi O-Won's pursuit of personal benefits. The evidence submitted is insufficient to justify whether the respondent dismissed Yoo O-Ryong from office or ordered the President's Chief of Staff to collect resignation letters from six Grade 1 public officials. Therefore, this ground for impeachment cannot be accepted.

9. Whether the Freedom of the Press Has Been Infringed

Based on the respondent's statement condemning the leaking of Cheong Wa Dae documents, the South Korean Presidential Office, it can be regarded that the respondent only expressed criticism against the Segye Ilbo report on the Jeong O-Hoe document. However, this cannot be regarded as a violation of Segye Ilbo's freedom of the press, and there is no evidence to prove that the respondent was involved in the dismissal of Cho O-Kyu from Segye Ilbo.

10. Whether the Duty to Protect the Right to Life Has Been Violated

As Chief of the executive branch, the respondent must exercise authority and perform duties to enable the State to faithfully fulfill the duty of protecting the lives and physical safety of the people. However, it is difficult to say that the respondent is immediately responsible for the duty in emergency and duty to prevent harm to others, for example, participation in rescue operations when there is a threat to the lives of the people. The manner in which the respondent dealt with the Sewol ferry tragedy was inadequate and inappropriate, but it cannot be regarded as a violation of the duty to protect the right to life.

11. Whether the Unfaithfulness to Execute Duties is the Ground for Impeachment

Although the President's 'obligation to faithfully execute duties' is a constitutional obligation, unlike the 'obligation to safeguard

the Constitution,' by nature, its performance cannot be normatively enforced. Therefore, this obligation is, in principle, unreasonable, even if the respondent acted out of loyalty to her duties, the performance of duty in the Sewol ferry tragedy could not constitute a ground for impeachment. For the above reasons, it is not considered a subject matter for impeachment.

12. Whether to Remove the Respondent from Office

The respondent delivered to Choi O-Won documents on state affairs containing classified information relating to official duties, and the respondent also used the opinions of Choi O-Won, who was not a public official, in the administration of state affairs. Such action was unlawful, but the respondent continued. For over three years since the respondent took office as President, the respondent abused the powers entrusted by the people for personal purposes, along with supporting Choi O-Won in her pursuit of personal gain repeatedly. In this process, the respondent used her position as President, or mobilized state agencies and organizations in gross violations of the law. The President has a duty to disclose the performance of her duties transparently so that the public can assess them. However, the respondent allowed Choi O-Won to interfere in state affairs while keeping the matter a secret and denied all the raised suspicions were merely assertions. Thus, it is practically impossible for constitutional institutions such as the National Assembly to provide checks and balances under the principle of separation of powers, or for the private sector, including the media, to monitor such behavior. The respondent undermines the principles of representative democracy and the spirit of the rule of law and constitutes a grave violation of the President's obligation to serve the public interest.

Instead of trying to restore the public trust for violating the Constitution and the law, the respondent insincerely apologized to the public and could not keep her word that she would give the fullest cooperation in the investigation. As a result of the aforementioned words and actions of the respondent in the judicial process, we could not find any clear intent that the respondent wanted to protect the Constitution.

Consequently, the respondent's conduct violated the Constitution and the law, was regarded as a betrayal of public confidence, and constitutes grave violations of the law that are unpardonable from the perspective of protecting the Constitution. Due to the negative impact and influence on the constitutional order that the respondent's violations of the law have, we believe that the benefits of protecting the Constitution by removing the respondent from office outweigh the national losses incurred by not removing the President.

Thus, it can be said that the "Constitutional Court" in the 21st century has changed direction from that of the 20th century, both in the number of organizations in the form of the Constitutional Court, as a special court, that review the constitutionality of laws, that has increased, and in the extensive duties and powers in various fields such as constitutional review, both before enforcement (priori control) and after enforcement (posteriori control), the balance of power with the legislative branch to prevent parliamentary dictatorship, and checks and balances with the executive branch to prevent corruption through conflicts of interest. The changes in direction, both in the organizational form and various duties and powers, are constitutional court associations or equivalent organizations of various continents

such as Asia, Eurasia, Europe, Africa, and so on, as well as World Conference on Constitutional Justice (WCCJ) under the Venice Commission, which are important mechanisms for building multilateral cooperation of courts around the world with a common will for common standards based on the principles of the Rule of Law, Democracy, and Human Rights.

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Chapter 3
Summary Analysis of the Constitutional Court of the Liberal Democratic States

This section is a summary analysis of four topics, as follows: 3.1 A 100-Year Development of the Austrian-model Constitutional Court, 3.2 "Constitutional Court" in the 21st Century, 3.3 The Constitutional Court's Roles and Authorities in the 21st Century and 3.4 The Constitutional Court in the 21st Century and Regional and Global Cooperation. The essences are as follows:

3.1 A 100-Year Development of the Austrian-model Constitutional Court

The study of the development of the Constitutional Court and its roles and authorities in each era can be summarized as follows:

(1) Whether the emergence of the Austrian-model Constitutional Court differs from the United States Supreme Court in deciding if the law is unconstitutional: The latter originated after the interpretation of the Supreme Court in dispute resolution and postulated the principle of constitutional review, while the Austrian-model Constitutional Court emerged from the scholarly argument of two legal theorists who were active at the time. The important cornerstone of establishing the Constitutional Court is the "Hierarchy of Law Theory" and one concept that is the most controversial is whether such establishment is contrary to the principles of democratic legitimacy. Regarding the theoretical argument against the creation of the Constitutional Court, Hans Kelsen, a renowned legal theorist at the time, was able to clarify and address the basic theoretical issues, particularly whether the Constitutional

Court would conflict with democratic legitimacy, and he pushed for the establishment of the first Austrian Constitutional Court model in 1920, which was the successful start of the Constitutional Court that would expand and play a role later.

(2) Shortly after the Constitutional Court was initiated in Austria in 1920, authoritarian regimes invaded Europe and led to World War II. After the end of World War II, there was a process of constitutional reform in continental Europe countries, especially the development of "Militant Democracy" principle, according to which the organization that plays an important role in protecting democratic principles and the Constitutional Supremacy is the "Constitutional Court." The aforementioned principle began in Germany, Austria and later spread to Western Europe. After World War II, the Constitutional Court played three important roles: (a) an important mechanism for the transition from an authoritarian regime to a liberal democratic regime; (b) an organization that balances the constitutional organization's powers to protect the basic principles of the constitution; and (c) an important mechanism for protecting people's rights and liberties. The success of these processes has made the "Constitutional Court" widely accepted in Western Europe and played an important role in creating political stability for European countries.

(3) After the Constitutional Court was well established in Europe, the concept of establishing a Constitutional Court expanded to various regions, especially after the collapse of Soviet Union and the emergence of new democratic countries in different regions, for example, in Eastern Europe, Asia, Africa, or Latin America. In the expansion of concept of establishing a Constitutional Court in these new democratic countries, the Constitutional Court played three important roles

similar to what it did in Europe after World War II: (a) an important mechanism for the transition from an authoritarian regime to a liberal democratic regime; (b) an organization that balances the constitutional organization's powers to protect the basic principles of the constitution; and (c) an important mechanism for protecting people's rights and liberties. However, whether the function of the Constitutional Court in these new democratic countries will be as successful as it has been in Europe is a matter that will need to be studied and monitored in the future.

(4) The Constitutional Court has played a role in stabilizing the system of government under the Constitution for a century. The role of the Constitutional Court in the second century is likely to increasingly broaden its powers into various scopes because conflicts in society tend to be more between various interest groups. Such conflicts called for the judiciary to have decision-making duty. For this reason, there were academic concerns, especially among academics in countries that use the common law system, who saw that the Constitutional Court increasingly made decisions on political issues. The expanding of the Constitutional Court's jurisdiction into the political sphere was a phenomenon in every region and raised concern about whether the Constitutional Court justices would become "juristocracy." There were different concepts about this matter between the Supreme Court of the United States and the European Constitutional Court. The United States Supreme Court holds the "political question doctrine" that the courts will not make decisions on political matters, while the European Constitutional Courts consider that judicialization of politics is an important role of the Constitutional Court. The aforementioned fundamental differences have led to concern about the matter.

3.2 "The Constitutional Court" in the 21st Century

The 100-year development of the Constitutional Court has pointed out that the organization that is responsible for constitutional review is a product of the liberal democratic system of a modern state based on the rule of law, the separation of powers doctrine, and the principle of protecting people's fundamental rights. The aforementioned liberal democracy has two important missions: firstly, to protect the Constitution through the democratic process of legislative, administrative, and judicial actions by sovereign organizations; and secondly, to protect the fundamental rights of people from the use of state power by state agencies.

The forms of organization protecting the constitution or reviewing the constitutionality of laws can be divided into 4 characteristics as follows:

(1) The Constitutional Court: When we consider the nature of the organization with special structural characteristics and independence in carrying out duties and powers, the Constitutional Court refers to both the Constitutional Court and the Constitutional Tribunal. The countries with constitutional courts as provided by the Constitution are Austria, Angola, Armenia, Belgium, Bosnia and Herzegovina, Bulgaria, the Central African Republic, Chile, Croatia, the Dominican Republic, Ecuador, Egypt, Georgia, Germany, Hungary, Indonesia, Italy, Jordan, the Republic of Korea, Latvia, Lithuania, Madagascar, Mongolia, Niger, Peru, Portugal, Romania, Russia, Serbia, South Africa, Syria, Thailand, Turkey, Tajikistan, Togo, Tunisia, Ukraine, and Uzbekistan..

(2) Court of Justice: The Courts of Justice can be found mostly in countries with common law and single-court system. The Constitution provides that the Supreme Court, in addition to its duty and power to

try and adjudicate civil and criminal cases, also serves to protect the Constitution by interpreting the Constitution, for example, the Supreme Court of the United States of America interpreting the Constitution in the Marbury v. Madison case of 1803, the New Deal case of 1937, and the Same-Sex Marriage case of 2015, etc. The countries with the Courts of Justice provided by the Constitution are U.S.A., Afghanistan, Argentina, the Bahamas, Bangladesh, Bhutan, Brazil, Canada, Cuba, Denmark, El Salvador, Estonia, Ghana, Honduras, Iceland, India, Jamaica, Japan, Kenya, Malaysia, Monaco, Namibia, Nigeria, Pakistan, Paraguay, The Philippines, Rwanda, Samoa, Singapore, Sweden, Trinidad and Tobago, Uganda, Uruguay, United Kingdom, Venezuela, and Zambia.

(3) A committee, that is, a form of committee called the Constitutional Council (Conseil Constitutionnel), with important duties and powers in dispute resolution and providing consultation to the head of state, as well as constitutional review, as in the case of the French Constitutional Council interpreting the constitutional value of equality before the law in 1973 and the case of the status of Corsican people in 1991, etc. The countries where the constitution provides for the form of Constitutional Council are France, Algeria, Burkina Faso, Cambodia, Chad, Cote d'Ivoire, Djibouti, Lebanon, Morocco, Mozambique, and Senegal.

(4) Other forms with characteristics that differ from the three described above. There are two interesting forms, as follows:

A. The Guardian Council of the Islamic Republic of Iran, which was established under the 1979 Constitution of the Islamic Republic of Iran located in Tehran, has duties and authority to protect Islamic statutes and the Constitution.

B. The Constitution and Law Committee under the Standing Committee of the National People's Congress of the People's

Republic of China, which consists of the chairperson, 200 vice chairpersons, and the Secretary-General, has the duty and power to interpret the Constitution and the Law and repeal the regulations, resolutions, or orders of the executive branch that are contrary to the Constitution and laws. Therefore, the Constitution and Law Committee is a part of the National People's Congress, which is not only a court but is also a representative of people. It has the duty and power to interpret the Constitution and laws, including constitutional review, as part of the National People's Congress.

3.3 The Constitutional Court's Roles and Authorities in the 21st Century

The five subject matters of the analysis are as follows: (1) the Constitutional Court in the capacity of a constitutional institution and a transitional process from an authoritarian regime; (2) the judicialization of politics; (3) the balance of conflicts in society; (4) whether the Constitutional Court justices will become a "juristocracy"; and (5) a confrontation between the organization that is responsible for constitutional amendment and the Constitutional Court. The essences are as follows:

(1) The Constitutional Court in the capacity of a constitutional institution and a process of transition from authoritarianism at the early establishment of the first Constitutional Court in Austria led to many controversies: A. whether it contradicted the democratic principles; B. whether it was a constitutional organization; C. whether it was a judicial organization; and D. how it was related to other constitutional organizations; how the legislative branch is related to executive branch. These issues have been the subject of theoretical debates, particularly in the early period, and Hans Kelsen played a key role in providing the

theoretical arguments that led to the successful establishment of the first Constitutional Court in Austria. However, the role of the Austrian Constitutional Court, established in 1920, did not last long. Later, Fascist authoritarianism amended the Constitution and changed the acquisition of the Constitutional Court justices to be the same as that of the political section. Afterward, authoritarianism came to power in the governments of European countries and eventually led to World War II. After World War II, there was political system reform in Europe, particularly in Germany, where the constitutional structure, especially that of the organization that counterbalanced the parliamentary majority system, was reformed by setting up the Constitutional Court as an important organization to help create balance between various parties. The countries went through a transitional process from authoritarian states to liberal democratic states, with the Constitutional Court being one of the courts that played a role in the transitional process. It can be said that the Constitutional Court has specific authority in the transitional process from an authoritarian regime to a liberal democratic regime, which is a key factor in ensuring the stability of democracy and the rule of law in states in Europe.[1]

The important difference between the Austrian/German-model Constitutional Court and the United States Supreme Court is the subject matter of "politics." The courts in the United States, under the "political question doctrine", have limited the scope of their decision-making on a case involving state actions of political nature. The ruling of the United States Court has long been accepted as evidence that the court has jurisdiction to decide only legal issues,

[1] Thomas Kroell, Amerikanisches oder oesterreiches Modell ?, in : Christoph Grabenwarter, u.a (Hrsg.), Verfassungsgerichtsbarkeit in der Zukunft – Zukunft der Verfassungs-gerichtsbarkeit, Verlag Oesterreich 2021, p. 247.

not political issues. The court will make decisions only on the individual's rights or matters relating to a property, not on matters relating to sovereignty. Political problems will be determined by constitutional organizations, i.e., the President or parliament.[2] The political question doctrine has a long historical development that is closely related to the emergence of constitutional review of law, particularly concerning the Supreme Court's relationship with the states.

The above statement is a concept used by the Supreme Court of the United States. W. Scharpf has thoroughly studied the political question doctrine concept used by the United States Supreme Court and commented[3] that the acceptance of the political question doctrine by the U.S. Supreme Court can be found in the first decision of constitutional review of law in the Marbury vs. Madison case. After that, in the Marshall case, whereby the Supreme Court gave reasons that the review of constitutionality of law by the Supreme Court will be required in an unavoidable case. According to the U.S. Constitution, the President sets the policies and acts accordingly with his discretion. The President has responsibilities specific only to the country. The executive's discretion in the operation is inherent and there is no power to review that discretion.

On the other hand, the German-model Constitutional Court does not have limitations as practiced by the United States Supreme Court.

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2 Hans Schneider, Gerichtsfreie Hoheitsakte, Ein rechtsvergleichender Bericht ueber die Grenzen richterlicher Nachpruefbarkeit von Hoheitsakten, RECHT UND STAAT IN GESCHICHTE UND GEGENWART, VERLAG J.C.B. MOHR &PAUL SIEBECK), TUBINGEN 1951, p. 60.

3 Rudolf Dolzer, Die staatstheoretische unf staatsrechtliche Stellung des Bundesverfassungsgerichts, Schriften zum Oeffentlichen Recht, Band 181, Duncker und Humblot/ Berlin 1971, p. 100.

From the perspective that the "Constitutional Court" is considered as a constitutional institution or a "constitutional organization" like parliament, government, or an organization that exercises state sovereignty like legislative and executive powers. However, it is an organization that exercises judicial power that is not a judicial organization in general, i.e., it is not a general court like the Court of Justice or the Administrative Court. It is a court that has specific jurisdiction over constitutional disputes. Constitutional disputes inevitably include political disputes. Nevertheless, the Constitutional Court is not a political organization, despite the fact that it makes decisions on political disputes. Further details on this subject matter will be given in the Judicialization of Politics topic.

(2) Whether judicialization of politics will ultimately lead to a "Judicial Activism": In a comparative study of the constitutional justice system, Torbjörn Vallinder saw that the judicialization of politics by the judiciary was an important phenomenon in the political and administrative contexts of the late 20th and early 21st centuries. The important characteristic of such a phenomenon is the increasing expansion of court jurisdiction into political matters and public policy in the dimension of law and justice. As a result, the decision-making power in those matters, which used to be the power of the political section, was transferred to the judge as the final arbiter[4]. The two important essences discussed herein are: (1) the meaning of "Judicialization of Politics" and (2) the cause of Judicialization of Politics, as follows:

A) The meaning of "Judicialization of Politics.": In Hirschl's view, the meaning of "Judicialization of Politics" is as follows: **The first level** is judicialization of politics related to the legal system and justice. In this scope, it is the bringing of justice into the realm of politics and

[4] Torbjörn Vallinder, "When the Courts Go Marching In", p. 13.

public policy-making, such as the use of quasi-judicial system in the decision-making process on public issues. As a result, social relations are based on law and justice. **The second level** is judicialization of politics in the realm of legal proceedings and policy decisions related to justice matters such as immigration, taxation, public procurement, urban planning, and public health relating to industry and consumer protection. As a result, the formulation of public policy is subject to judicial decisions. **The third level** is judicialization of politics concerning with pure political conflicts, such as electoral audits and executive power audits in the sphere of economic planning and national security. The emergence of the judicialization of politics is evidenced by the extensive role of the Supreme Court in political matters beyond the scope of fundamental rights of the Constitution. This is what Hirschl called the process of transition to "juristocracy."[5]

The new spheres of judicialization of politics which have resulted in the Supreme Court playing more roles in political matters are a global phenomenon. Four spheres are as follows.[6]

A.1) The first sphere is where the High Court examines the power of legislative or executive branch in the scope of foreign affairs, such as when the Supreme Court of Canada rejected the "political question doctrine" in the Operation Dismantle case decision by endorsing the 1982 Charter of Rights and Freedoms to argue against the constitutionality of the United States' missile testing on Canadian soil. The Supreme Court of Canada unanimously ruled that the question of whether the legislative or executive branch can act in violation of the constitution must be considered by the Court without considering

[5] Ran Hirschl, The Judicialization of Politics, www.oxfordhandbooks.com, date: 23 December 2021, p. 5

[6] Ibid., p. 7

whether the controversial matter is political.[7] Another case is that of Chechnya, whereby Russia's Constitutional Court accepted a petition filed by an opposition member of the Duma arguing against the constitutionality of three presidential orders for Russian troops to invade Chechnya. The majority of the justices ruled that the presidential orders were meant to preserve Russia's territorial integrity and unity. Additionally, there is also the case of the Hungarian Constitutional Court and the Argentine Supreme Court, which made decisions in the political realm of foreign affairs.

A.2) The second sphere is where the court deals with political matters in the area of political controversy. In 2004, the Constitutional Court of South Korea ruled that President Roh Moo-hyun was removed from office by an impeachment proposal of the National Assembly that was submitted to the Constitutional Court for a decision (it was the first time in modern constitutional history that the National Assembly could impeach the President under the rule of the Constitutional Court) or in the case of Pakistan's Supreme Court's role in a political transition since 1990. Pakistan's Supreme Court has played a significant role in each of the five violent political transitions.

A.3) The third sphere is where the court reviews the democratic process, for example, in an electoral process examination. This sphere is prevalent in countries where elections and referendums are held. To this extent, the court makes decisions concerning the funding of political parties, the use of election funding, campaigning through the media of political parties, constituency determination, and the examination of qualifications and prohibited characteristics of political parties or candidates. Over the past decade alone, the constitutional courts in more than 25 countries have played a role in deciding the future of

[7] Ibid., p. 6

political leaders by impeachment or being judged as having prohibited characteristics, such as in the cases of President Alvaro Uribe of Colombia, President Yoweri Museveni of Uganda, President Boris Yeltsin of Russia, or former Prime Ministers Benazir Bhutto and Nawaz Sharif of Pakistan, and the case of President Joseph Estrada of the Philippines. In all these cases, the fate of political leaders was decided by the Supreme Court. Additionally, there were the cases of political leaders being prosecuted for corruption, such as Silvio Berlusconi of Italy, Alberto Fujimori of Peru, etc. Or, the cases where the Supreme Court becomes the final arbiter of the controversy over election results, e.g., Taiwan in 2004, Georgia in 2004, Puerto Rico in 2004, Ukraine in 2005, Congo in 2006, and Italy in 2006. The obvious case is the United States' Bush v. Gore case, which was ultimately decided by the Supreme Court.

A.4) The fourth sphere is transitional justice. In the past two decades, the judiciary has played a large role in transitional justice, as the Truth and Reconciliation Commission with quasi-judicial organization status or a special committee dealing with transitional justice issues, for example in El Salvador, Ghana, and South Africa, or during the transitional processes of countries in Latin America, or in the case of former communist countries that established the Constitution Court. The role of the courts in these countries is to adjudicate acts that violated human rights and liberties during the communist rule, for example, in the Czech Republic, or in other cases where the courts played a role in the struggle of "indigenous people", especially in Australia, Canada, and New Zealand.

In many countries, Supreme Court or Constitutional Court has gradually taken over as the primary decision-maker on societal crossroads issues. The transitional justice issues, legitimacy of governance, and common problems of society are determined to be

constitutional claims, which pave the way for matters to be brought to the courts.

B) In Hirschl's view, the three important causes of the judicialization of politics, or factors that cause the judiciary to play a role in the resolution of political issues, are as follows:[8]

B.1) The institutional characteristics of the judiciary: The reason for the judiciary's judging political issues is the fundamental claim that the judiciary is an independent and impartial body that is accepted by different parties and has judicial proceedings that are fair to all parties. In this regard, there is a connection between the Constitution's provision of fundamental rights protection and the stipulation of mechanism for judicial oversight that not only gives the court the authority to control and examine but also permits the court to extend its authority into disputes that are significant political issues.

B.2) The behavioral characteristics of the judiciary: The judiciary's behaviors in making judgments on political issues, especially the Constitutional Court, are based on national interests, responsiveness to public opinion, personal ideology, group deliberation, or legal or strategic considerations. These characteristics can be compared to the decisions of other national level organizations. The studies of the behavior of the judiciary, especially concerning making judgments on political problems, reveal that the judiciary behaves the same as any other organization, that is, the courts and judges are organizations that attempt to expand their power by finding ways to maintain their power or to enhance the institutional standing of the judiciary in comparison with other organizations in playing a role in judging national issues or expanding their political influence.

[8] Ibid., p. 11

B.3) Political factors, the constitutional framework, as well as the behaviors of the judiciary are important for the judiciary's role in politics. However, without political conditions, the judiciary's role may be limited. In the dimension of comparative studies, there are three main characteristics of the judiciary's power expansion as follows: A. arising from social policies, B. controversial issues related to constitutional rights, and C. problem avoidance of the political section. Only the third characteristic will be discussed in this section. It becomes a "hot potato" for the judiciary when a political party gains or loses benefits or political legitimacy. Or, the opposition might attempt to find a way to obstruct or oppose the powerful political section by taking the argument to the judiciary. The condition of conflicts in the political section was a major phenomenon in Europe before World War II, and it was an important reason for the design of the German-model Constitutional Court. This is owing to the crisis of parliamentary democracy, caused by serious conflicts between various political poles in the parliamentary system; left-wing political parties, right-wing political parties, and liberal political parties. These conflicts are all key factors in the emergence of constitutional courts in continental Europe countries. However, empirical studies confirm that the high courts of most democratic states are satisfied with their judiciary's legitimacy before the public and will support virtually any political institution to allow the constitutional mechanism to continue.

In summary, the phenomenon of the judiciary playing a role in political matters has been expanding over the past two decades. The court's entry into this role stems from many reasons. Constitutional Courts in various countries are regarded as the most active judiciary organizations in such a phenomenon. The important issue in the mentioned situation is the Constitutional Court's growing role in ruling

on political matters. However, if considering the emergence of the Constitutional Court in Europe, especially in Germany, it can be seen that the issue is not at all unusual from the perspective of the theoretical basis of German constitutional law, because the Constitutional Court of Germany was created to balance political power under the process provisioned in the Constitution. But countries under the common law system look at the issue from another angle. This is the gap between the legal concepts of the civil law system and the common law system.

(3) The balance of conflicts in society: The Constitutional Court balances conflicts in society in at least three areas as follows:

A) The balance between the majority and the opposition: In this area, Hans Kelsen believes that the Constitutional Court serves to strengthen democratic principles by tying the principle of pluralist democracy to the Constitutional Court through its authority over the constitutionality of law.[9] The Constitutional Court is the instrument guaranteeing the Supremacy of the Constitution; meaning, the mentioned task of the Constitutional Court is the guarantee for a pluralist democratic society's structure by protecting the minority as per the basic condition of a pluralist democracy.[10] Consequently, it can be seen that without such a guarantee, the democratic regime, which is a system of majority rule, will become "a tyranny of the majority." Thus, the functioning of the Constitutional Court in this sense renders guarantees for minorities and a pluralist democracy consisting of diverse parties. In other words, minority protection is linked to the principle

[9] Robert Chr. van Ooyen, Die Function der Verfassungsgerichtsbarkeit in der pliralistischen Demokratie und die Kontroverse um den Hueter der Verfassung'" in: Hans Kelsen, Wer soll der Hueter der Verfassung sein ?, Herausgegeben von Robert Chr. van Ooyen, Mohr Sieben, Tuebingen 2008, p.X

[10] Ibid, p. XI

of constitutional commitment, which confirms "the Supremacy of the Constitution".

B) The balance between the organizations with area supremacy: The point for consideration in this dimension may be divided into two cases: A. in the case of a federal state and B. in the case of a unitary state. The points of consideration are as follows:

B.1) A federal state: The Constitutional Court is an organization of great importance for a federal state (Bundesstaat). Friesenhahn saw that the important obligation of the German Constitutional Court stems from the fact that the German state's structure is a federal state. With careful consideration, we can see that the foundation of modern Constitutional Courts is largely based on the relationship between the states because of the federal state structure. Hence, the federation must control the states, and on the other hand, the states need to be protected from the actions of the federation. Therefore, the resolution of disputes between the states or between the states and the federation is an important task of the Constitutional Court in the federal state.[11] It can be said that the structure of a federal state calls for one supreme organization to resolve issues of jurisdiction relating to relationship between the federation and the states or state and state. As such, it justifies the Constitutional Court's having jurisdiction in this case.

B.2) A unitary state: Even in the case of a single state, the level of administrative power at the area level varies according to the history of each area. A province or an administrative region may not be a state, but it has more autonomy in governance than local government organizations. This could lead to conflicts over the formation of

[11] Scheuner, Probleme und Veranwortung der Verfassungsgerichtsbarkeit, DVBl. 1952, S. 295.

independent states. Therefore, it may be necessary to have an organization that controls balances so that the regions are not excessively pressured by the central government or, at the same time, prevents the partition of the country into new states, such as in the case of Catalonia in Spain. On October 27, 2017, the Parliament of Catalonia declared unilateral independence from Spain after a contested referendum. The Spanish Senate, therefore, approved the Spanish government to take measures to directly govern Catalonia. It dismissed the entire Catalan government and called for an impromptu regional election on 21 December 2017. And, on November 2, 2017, Spain's Supreme Court ordered seven ex-regional executives in custody on charges of rebellion and abuse of state funds, among others. For that reason, the countries' Constitutional Courts have the authority to review the constitutionality of law of the administrative districts, for example, the Constitutional Court of Spain has the authority over legitimacy control before enforcement[12] of the bills of independent governing bodies of the constitutional laws, disputes between the state and independent entities or between independent entities,[13] review the legitimacy of any law or resolution of an independent governing body.[14] Or, the Italian Constitutional Court has jurisdiction over a) the constitutionality of laws issued by state or the administrative region including other provisions that have a statutory value;[15] and b) disputes of authority between state agencies, between states and administrative regions or, between administrative regions.[16]

[12] The Law on The Constitutional Court (ley Organica 2/1979, de 3 de octubre del Tribunal Constitucional or LOTC) LOTC, Titel VI

[13] Article 161 (1) (c) the Spanish Constitution; and LOTC, Titel IV, Kapitel I, II

[14] Article 16 (2) The Spanish Constitution and LOTC, Titel V

[15] Article 134 of the Italian Constitution and Article 23 ff. of Legge II marzo 1953, n. 87.

[16] Article 134 of the Italian Constitution and Article 37 ff. of Legge II marzo 1953, n. 87.

From such consideration points, it can be seen that the structure of the organization of state, or the historical nature of any subdivisions or administrative region, are sensitive issues that will lead to conflicts that could lead to a civil war. Therefore, it is imperative to have an organization that is accepted by all parties to decide on these issues or be a guarantee of peaceful coexistence under any one state.

C) The balance between different interest groups in society: In modern society, changes are rapid, interest groups are different and diverse, and there are conflicts between interest groups in society. As a result, the political section plays an important role in the equitable coordination of such benefits. However, issues related to these fundamental rights are usually guaranteed and protected by the Constitution. Consequently, when an individual's or people's fundamental rights are violated, many countries' legal systems are often written to provide them the right to present their cases to the judiciary. In this area, the Constitutional Court plays a role in protecting the rights of individuals from the actions of the state in various dimensions, e.g., it could take the form of enacting laws that affect rights or taking executive actions that affect rights of individuals. Therefore, the balance in this dimension on the one hand is equivalent to counterbalance with political power, whether it is legislative or executive power. The scope of the Constitutional Court's protection in this dimension includes protection of the minority's rights, protection for disadvantaged people, protection of specific groups, such as gender groups, or protection of religious or cultural beliefs that are different from the majority of society. These groups of people would not have enough power to fight against the main forces of society. In this dimension, the Constitutional Court can, therefore, be regarded as an organization that plays a role in creating balance of various power groups in society in the name of basic constitutional right protection.

(4) Whether the Constitutional Court justices will become a "juristocracy": The aforementioned conditions, as well as the role of the judiciary in adjudicating political issues, raise concerns about whether the countries' constitutional democratic systems will eventually become the judicial rule, as Hirschl referred to as "a process of transition to juristocracy."[17] This is a serious concern, particularly for academics in common-law countries. Therefore, the important question for the development of the Constitutional Court over the past hundred years is different from that in the early days, when the first Constitutional Court was established in Austria in 1920. The question then was whether the Constitutional Court had the authority to determine whether a law passed by the National Assembly conflicted with the Constitution. After a hundred years of establishment, the new question is whether the Constitutional Court justices will become a "juristocracy."

According to Hirschl's study, with the expansion of the judiciary's jurisdiction in the late 20th and early 21st centuries, national Supreme Courts and the supra-national judiciary became the dominant political decision-making organizations under the Constitution's provision that the powers representing the people could be increasingly reviewed by the judiciary. This allows the judiciary to play a regulatory role in the political process through the mechanism of constitutional review under constitutional principles. This is to guarantee the supreme law of the Constitution, fundamental rights protection principles, as well as the protection of the democratic regime from the dictatorship of the majority. Hirschl noted that although the expansion of the judiciary's role to replace the

[17] Ran Hirschl, The Judicialization of Politics, www.oxfordhandbooks.com, date: 23 December 2021, p. 5

decision-making of the political section, which represents the majority, reflects characteristics that are inconsistent with democratic principles, the concept of making the political process subject to constitutional rights protection principles and constitutional review by the judiciary is, nevertheless, widely accepted. As a result, a democratic regime is not only majority rule, but majority rule under constitutional guarantees.[18]

In Hirschl's view, the power expansion of the judiciary through constitutionality control is a byproduct of the interplay between three key groups:[19] The first group is the political elites, who were challenged by the majority decision-making process and sought the ways to maintain their political standing. Therefore, the judiciary has a role to play in such a quest. The second group is the economic elites. These individuals are content with the political process being guaranteed and constitutional rights, particularly the right to property and the right to entrepreneurial freedom, being protected. The third group is the judicial elites, who seek to elevate their political influence as well as international recognition. When all three groups have mutual interests in the interplay, the political elites will play a key role in coordinating with the economic and judicial elites. These elite groups will have the status of "strategic legal innovators." Thus, modifying the constitution by expanding the judicial section's power equals the protection of the interests of the elites in the political system by transferring decision-making power from the majority to the Supreme Court. Therefore, the phenomenon of expanding judicial power is often caused by the main problem in politics.[20]

[18] Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism (Massachusetts: Harvard University Press, 2004), pp 2 – 3.

[19] Ibid., p. 11

[20] Ibid., p. 3

(5) A confrontation between the organization that is responsible for constitutional amendment and the Constitutional Court: Markus Vasek wrote an article on this issue, "Is the Constitutional Court the least dangerous organization?" (Verfassungsgerichtsbarkeit als "least dangerous branch"?) in a book titled " The Constitutional Court in the Future: The Future of the Constitutional Court" (Verfassungsgerichtsbarkeit in der Zukunft – Zukunft der Verfassungsgerichtsbarkeit) published on the occasion of the Constitutional Court of Austria's 100th anniversary. In Markus's view, the organization that is responsible for constitutional amendment is an organization that sets the rules for the Constitutional Court to use as review criterion, in particular the review of the provisions of law enacted by the parliament. According to basic principles, the parliament or constitutional amendment organization has the power to amend the Constitution, especially the section concerning the Constitutional Court. The constitutional amendment organization is inevitably under the Constitutional Court. Markus has two considerations regarding the constitutional amendment organization and the Constitutional Court, as follows:[21]

A) Amending the Constitution (Verfassungsaenderung): Basically, the constitutional provisions are subject to amendment to be in line with the changing conditions of society by an organization that has legitimacy for constitutional amendments. Such constitutional amendments may concern the improvement of the supervision of the Constitutional Court, which is normal. However, in states with democratic constitutions, constitutional amendment issue is significant,

[21] Markus Vasek, Verfassungsgerichtsbarkeit als "least dangerous branch"? in : Christoph Grabenwarter, u.a (Hrsg.), Verfassungsgerichtsbarkeit in der Zukunft – Zukunft der Verfassungs-gerichtsbarkeit, Verlag Oesterreich 2021, p. 247.

especially the legal issues in the context of relations between constitutional amendment organization and the Constitutional Court. On this point, Markus asked two basic questions: **Firstly**, can the understanding of the constitutional provisions of controversial issues that ultimately lead to legal instability be clarified by the constitutional amendment organization or, must it be resolved by the Constitutional Court? **Secondly**, if the aforementioned issue ultimately has to be decided by the Constitutional Court, will the constitutional amendment organization be able to amend the constitution in the direction it wants? If the answers to both questions are "cannot be done," it inevitably means the constitutional amendment organization has practically lost its power to control the Constitution's direction and, therefore, the relationship of the administration of the state's mission toward the state's organizations must be considered. In general, the legal systems, including that in Austria, allow the constitutional amendment organization the ability to control the constitution's direction, which includes amendment concerning the Constitutional Court.

Markus saw that there was only one difficulty: the two phenomena and the answers for political change always given by the constitutional amendment organization regarding the Constitutional Court's decisions resulted in the resolutions being interpreted as political reviews and eventually regarded as incorrect, making the resolutions unreliable, particularly in light of the relationship between the constitutional amendment organization and the Constitutional Court.

B) The internal hierarchy of the Constitution and the immortalization of the Constitution (Internal Hierarchization and Verewigung of the Constitution): Even if it can be assumed that the Constitution can be amended, its internal hierarchy must still be

considered. Some provisions of the Constitution cannot be amended by normal constitutional amendments, or some provisions cannot be amended, as, for example, in the case of Section 44, Paragraph 3, of the Austrian Constitution or Section 79, Paragraph 3, of the German Constitution, known in Germany as the "Eternity Clause" (Ewigkeitsklausel). The question of a constitutional amendment in the first aforementioned case is the possibility of amendment, which often extends to cover the provisions under the principle of the "Eternity Clause," implying that the relationship between the constitutional amendment organization and the Constitutional Court must be considered in other ways than it has been based on their former relationship. That is the temptation of Germany's Constitutional Court model, which tends to include the contents of the Constitution in the steel chamber of the "Eternity Clause." However, this issue may be misused because, firstly, the Constitution has stipulated the "Eternity Clause" principle, and secondly, the Constitutional Court may reject the constitutional amendment; ultimately, it must be proceeded by the Constitutional Court's decision. In such a case, the constitutional amendment organization may not inevitably become the Supreme organization over the Constitutional Court (Ueberverfassungsgericht). The Constitutional Court has resolved disputes under these conditions. The Constitutional Court's interpretation of refusal will eventually be legally effective because, even if the interpretation is incorrect, it cannot generally be challenged by other courts.

Markus concluded from the preceding considerations that the subject of the relations of carrying out the state's mission, particularly between the constitutional amendment organization and the Constitutional Court, is a critical issue for the legislative and judicial branches. The establishment of the Constitution and especially

constitutional amendments are subject to judicial review. In recent years, violations of the principles of the constitutional amendment by the constitutional amendment organization were common, despite the effort to maintain the scope of constitutional provisions as being bound by democratic principles. A constitutional amendment that is difficult to do, legally or factually, or that cannot be amended will otherwise lead to the importance of carrying out the state's tasks being amendable. According to the possibility of amendment in any case, the "Eternity Clause" can be determined by the Constitutional Court because, ultimately, these are the essences of the Constitution that are untouchable by the legislative organization.

3.4 The Constitutional Court in the 21st Century and Regional and Global Cooperation

The Constitutional Court and organizations that have the same duty and authority, which may be called "equivalent institutions," have entered into academic cooperation under the Charter, with which the Constitutional Court or equivalent institution of each country has membership status. Such academic cooperation is operated by an organization called the Association. Therefore, the assembly of the Constitutional Courts or equivalent institutions is based on the countries' location by continent or linguistic group, which can be divided into two levels:

(1) Regional cooperation, which is the cooperation of countries in the same region or linguistic group, such as

A. The Association of Asian Constitutional Courts and Equivalent Institutions

B. The Union of Arab Constitutional Courts and Councils

C. The Cooperation of Constitutional Courts in Europe

D. The Ibero – American Conference of Constitutional Justice, and

E. The Conference of Constitutional Jurisdictions of Africa

Regular meetings are held in each region; for example, the Association of Asian Constitutional Courts and Equivalent Institutions (AACC), has held five congresses. The latest congress was the 5th Congress of the AACC which was held in 2022 and hosted by the Mongolian Constitutional Court. The Constitutional Court of the Kingdom of Thailand will host the 6th Congress of the AACC in 2024.

(2) The World Conference on Constitutional Justice (WCCJ) has 115 members from Constitutional Courts, Constitutional Tribunals, Supreme Courts, and other organizations. From 2009 to 2022, the Venice Commission organized five congresses of the World Conference on Constitutional Justice (WCCJ) as follows:

- The 1st Congress of the World Conference on Constitutional Justice on the topic of "Influential Constitutional Justice - its Influence on Society and on Developing a Global Jurisprudence on Human Rights" was held in Cape Town, Republic of South Africa, between 22-24 January 2009, attended by 93 countries.

- The 2nd Congress of the World Conference on Constitutional Justice on the topic of "Separation of Powers and Independence of Constitutional Courts and Equivalent Bodies" was held in Rio de Janeiro, Federal Republic of Brazil, between 16 – 18 January 2011, attended by 88 countries.

- The 3rd Congress of the World Conference on Constitutional Justice on the topic of "Constitutional Justice and Social Integration" was held in Seoul, Republic of Korea, between 28 September - 1 October 2014, attended by 100 countries.

- The 4th Congress of the World Conference on Constitutional Justice on the topic of "The Rule of Law and Constitutional Justice in the Modern World" was held in Vilnius, Republic of Lithuania, between 11 – 14 September 2017, attended by 110 countries.

- The 5th Congress of the World Conference on Constitutional Justice on the topic of "Constitutional Justice and Peace" was held in Bali, Republic of Indonesia, between 4 – 7 October 2022. This meeting aimed to point out the role, duties, and powers of the Constitutional Court in the area of constitutional justice and peace.

Looking at the themes of the World Conference on Constitutional Justice, it can be seen that important topics are set each year to allow the Constitutional Court, the Constitutional Tribunal, the Supreme Court, or other organizations that are WCCJ members the opportunity to exchange and learn together. With about 100 countries participating each year, this reflects a new dimension of global judicial circles in which judicial forums are attended by many countries. The reasons for the large number of participants may be analyzed as follows:

A) The congress of the World Conference on Constitutional Justice is an open meeting that provides the opportunity for the Constitutional Court, the Constitutional Tribunal, the Supreme Court, or other organizations that are WCCJ members to meet and exchange ideas with one another. Therefore, the characteristics of the judicial organization, whether in the form of the Constitutional Court, the Constitutional Tribunal, the Supreme Court, or any other form of organization, are not an issue in any way. The common characteristic of these organizations is that they are the supreme bodies dealing with the resolution of constitutional issues. Initially, it can be said that the common fundamental characteristics are the existence of a written

constitution as the basis of the country's governance and that the constitution is considered the supreme law of the country.

B) In addition to the fact that constitutions form the basis of governance, the powers and duties of an organization with jurisdictional power are also similar, namely, ruling on the constitutionality of law, resolving conflicts of authority among various organizations, or protecting the people's rights and liberties. Because of the similar nature of authority, the participating organizations were able to share their experiences in carrying out the ruling functions. Holding a joint meeting is, therefore, an important occasion for the Constitutional Court, the Constitutional Tribunal, the Supreme Court, or other organizations that are members of the WCCJ to learn together.

C) Whereas the Constitutional Court, the Constitutional Tribunal, the Supreme Court, or other organizations that are members of the WCCJ are the supreme bodies in ruling on constitutional issues, the key role of these organizations is in creating balances between different parties in society during the transition of the country or during the important period when the harmony of different parties in society is needed. As a result, these characteristics play an important role and can be learned from each other. The congresses of the World Conference on Constitutional Justice are, therefore, very valuable for providing opportunities to exchange knowledge so that those courts can apply the experience of other countries to their own countries as applicable.

For the reasons listed above, the World Conference on Constitutional Justice is a significant phenomenon in global jurisprudence where the Constitutional Court, the Constitutional Tribunal, the Supreme Court, and other WCCJ member organizations can exchange knowledge and best practices to fulfill their roles in the pursuit of peace and justice in their respective nations.

The World Conference on Constitutional Justice's topic analysis for each congress is presented here to show what information the participating nations have gained and shared:

- The topic for the 1st Congress was "Influential Constitutional Justice - Its Influence on Society and on Developing a Global Jurisprudence on Human Rights." The subject matter of the topic is the roles and authority of the Constitutional Court, the Constitutional Tribunal, the Supreme Court, or other WCCJ member organizations in using and interpreting domestic laws in the direction of human rights protection.

- The topic for the 2nd Congress was "Separation of Powers and Independence of Constitutional Courts and Equivalent Bodies." This topic emphasizes the Constitutional Court's and equivalent organizations' independence. Given that the rulings of the Constitutional Court have an impact on many groups in society, the independence of the Constitutional Court is thus a crucial topic, particularly in the political section. This congress was an opportunity for important exchanges on maintaining the independence of the Constitutional Court and equivalent organizations.

- The topic for the 3rd Congress was "Constitutional Justice and Social Integration." The determination of this topic inevitably reflects that the Constitutional Court and equivalent organizations are indeed important organizations that play an important role in creating unity in society through the constitutional justice process. Many countries may have experience with this issue, and this congress was therefore a forum to gain valuable experience.

- The topic for the 4th Congress was "The Rule of Law and Constitutional Justice in the Modern World," which was determined for learning about the rule of law and the judicial process that the modern

world deems important and how the Constitutional Court can apply these principles in the constitutional justice process.

- The topic for the 5th Congress was "Constitutional Justice and Peace," which had the purpose of pointing out the role, powers, and authority of the Constitutional Court in the area of constitutional justice and peace in society. Whereas peace in society is the ultimate goal of the constitutional justice process, how can the Constitutional Court apply the constitutional justice process to create peace in society?

Considering the contents of five congresses of the World Conference on Constitutional Justice, it creates value for approximately 100 countries in learning from one another's experiences. The organization of such a congress illustrates the mechanisms of the constitutional justice process around the world through the Constitutional Court, the Constitutional Tribunal, the Supreme Court, or other organizations that are members of the WCCJ in helping create constitutional justice in each respective country according to the mandate and social conditions in each country.

After a brief analysis of the Constitutional Court in the 21st century and regional and global cooperation, it can be seen that regional and global cooperation will play an unprecedented role in constitutional justice in the judiciary and any other branch of justice. These two levels of cooperation will be an important mechanism for building multilateral cooperation of courts around the world with a common commitment to a common standard by adhering to the Rule of Law, Democracy, and Human Rights, and ultimately for peace in the world community and countries based on their respective roles, responsibilities, and social conditions.

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Chapter 4
Conclusion and Recommendations for the Constitutional Court of the Kingdom of Thailand

Based on the study of "The Constitutional Courts of the Liberal Democratic States in the 21st Century," the research team would like to present the subject matters from the comparative study as recommendations to the Constitutional Court of the Kingdom of Thailand related to: 4.1 the organization of the Constitutional Court, 4.2 the qualifications and acquisition of the Justices of the Constitutional Court, 4.3 powers and duties of the Constitutional Court, 4.4 the roles of the Constitutional Court of Thailand, and 4.5 the Organic Act on Procedures of the Constitutional Court. The following are the main points:

4.1 The Organization of the Constitutional Court

The Constitutional Court of every country is guaranteed protection in the constitution. The guaranteed protection is divided into two characteristics, namely: a. the Constitutional Court is provisioned under "the judiciary," or b. the provision is separated from that of the legislative, executive, and judicial organizations as a particular "Constitutional Court" section. However, regardless of how it is provided, overall, the Constitutional Court is a "constitutional organization" with the supreme status that exercises sovereignty as well as legislative and executive powers.

Regarding the provision of the Constitutional Court in the Constitution, there are two important considerations, namely: 4.1.1 the provision of the Constitutional Court in the Constitution and 4.1.2 the provision of the Constitutional Court's budget guarantee. The considerations are as follows:

4.1.1 The provision of the Constitutional Court in the Constitution: The Constitution of the Kingdom of Thailand B.E. 2560 (2017) has a provision for the Constitutional Court in Chapter 11 "Constitutional Court", separated from Chapter 10 "The Courts" and Chapter 12 "Independent Organs", which is in line with the foreign principles mentioned earlier. However, the Constitution B.E. 2540 (1997) and the Constitution B.E. 2550 (2007) previously defined the Constitutional Court under "The Courts," which consist of (1) the Constitutional Court, (2) the Court of Justice, (3) the Administrative Court, and (4) the Military Court. In terms of system consideration, the provision of the Constitutional Court under "The Courts" in the Constitutions B.E. 2540 (1997) and B.E. 2550 (2007) would be more systematic. This is because Chapter "The Courts", Part 1, "General Provisions", states basic principles relating to the judicial organization, such as the principle of legally binding effects of the judicial organization, the independence guarantee of the judicial organization, the principle of the establishment of the courts, the principle forbidding the establishment of special courts, the principle of ruling over a dispute on competent jurisdictions, etc. The essence of Part 1, "General Provisions," would also apply to the Constitutional Court because it is regarded as a judicial organization like other courts.

4.1.2 The provisions of the Constitutional Court's budget guarantee are as follows: The Constitution of the Kingdom of Thailand, B.E. 2560 (2017), Section 193, states that "Each court, except the Military Court, shall have a secretariat that is independent in personnel administration, budget and other activities, with the Head of the Office as the superior official directly responsible to the President of each court, as provided by law." From the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) to the present, the Constitutional Court has

been tasked with more duties and powers, such as the right to submit a petition directly to the Constitutional Court, as provisioned in the Constitution of the Kingdom of Thailand, B.E. 2560 (2017), Sections 51 and 213. Therefore, it is necessary to have a sufficient budget provided to disseminate knowledge and make the people understand their rights and liberties in submitting petitions to the Constitutional Court to facilitate swift justice at a reasonable expense, conduct research under academic cooperation both domestically and abroad, and provide training programs for youth and senior government officials. However, it is a fact that the Constitutional Court's budget has consistently been reduced without cause—for example, in the fiscal year 2007, the Constitutional Court proposed a budget of 186,729,000 Baht and received an allocation of 100,266,400 Baht, which was reduced by 86,462,600 Baht, representing 6.30%; or the budget for a training program on "The Rule of Law for Democracy" (NorTorPor) Batch 2 in the fiscal year 2014 was cut, which resulted in the court needing to request an amendment from the House of Representatives; or in the fiscal year 2023, the court proposed a budget of 436,298,600 Baht, was allocated 360,956,900 Baht, which was reduced by 75,341,700 Baht, representing 20.87%, etc. Practically, there are four procedures for the Constitutional Court's budget reduction, as follows:

(1) procedures of the Budget Bureau, Ministry of Finance

(2) procedures of the Cabinet

(3) procedures of the Sub-Committee for Annual Appropriation Bills

(4) procedures of the Committee for Annual Appropriation Bills

In Thailand, all ministries and agencies are obligated to follow the procedures governing the budget formulation process stated in the Budget Procedure Act, B.E. 2502 (1959), as amended by B.E. 2543

(2000), namely, budget request, budget approval, budget management, and budget evaluation. In comparison to other foreign constitutional courts, the Federal Constitutional Court of Germany and the Hungarian Constitutional Court have full budgetary independence with a specific law to guarantee the court's budget, which means that if the Constitutional Court's budget is reduced by the executive branch, the Courts can submit budget proposals together with the original requests directly to the Federal House of Representatives, which has both the government and the opposition to support it.

1. The 1969 Federal Budget Act, Sections 28–31, govern the budget formulation of the Federal Constitutional Court of Germany. The Federal Constitutional Court is regarded as one of the five-highest organizations of the Federation, consisting of the Federal House of Representatives, the Federal Senate, the Federal Government, the President of the Federation, and the Federal Constitutional Court.

2. The Act on Constitutional Court of Hungary of 2011, Section 4, states that "The budget of the Constitutional Court shall have a separate chapter within the structure of the central budget. The Constitutional Court shall prepare its own budgetary proposal and report on the implementation of its budget, and the Government shall submit them to Parliament without changes as part of the bill on the central budget and the bill on the implementation of the budget, respectively. The budget of the Constitutional Court shall not be less than the budget allocated to the Constitutional Court in the central budget of the previous year."

Therefore, under the academic cooperation mechanism of the MOU in 2017, the Constitutional Court of Thailand, the Supreme Court, and the Administrative Court should have specific laws in place to guarantee the courts' budgets. This will truly create an efficient process

of constitutional justice, civil and criminal justice, and administrative justice.

4.2 Qualifications and Acquisition of the Justices of Constitutional Court

On this issue, there are two consideration points for the Constitutional Court of Thailand: 4.2.1 qualifications of the Justices of the Constitutional Court; and 4.2.2 acquisition of the Justices of the Constitutional Court, as follows:

4.2.1 Qualifications of Justices of the Constitutional Court: The Constitution B.E. 2560 (2017), Article 200, stipulates that *"The Constitutional Court consists of nine Justices appointed by the King from the following persons:*

(1) three judges in the Supreme Court holding a position not lower than Presiding Justice of the Supreme Court for not less than three years elected by a plenary meeting of the Supreme Court;

(2) two judges of the Supreme Administrative Court holding a position not lower than a judge of the Supreme Administrative Court for not less than five years elected by a plenary meeting of the Supreme Administrative Court;

(3) one qualified person in law obtained by selection from persons holding or having held a position of Professor of a university in Thailand for not less than five years, and currently having renowned academic work;

(4) one qualified person in political science or public administration obtained by selection from persons holding or having held a position of Professor of a university in Thailand for not less than five years, and currently having renowned academic work;

(5) two qualified persons obtained by selection from persons holding or having held a position not lower than Director-General or a position equivalent to a head of government agency, or a position not lower than Deputy Attorney-General, for not less than five years."

Regarding the qualifications of the Justices of the Constitutional Court under Article 200, there are two recommendation points for the Thai Constitutional Court, namely (1) to reduce the number of judges in the Supreme Court and (2) to increase the number of the qualified person in law and adjust qualifications. The following are points for consideration:

(1) Reducing the number of judges in the Supreme Court; from the study of the Constitutional Courts in various countries, it was found that the courts call for professional judges to be included in the composition of the Constitutional Court to bring the experience of professional judges to the Constitutional Court's ruling in terms of legal reasons or the trial process. In the case of the Constitutional Court of Thailand, there are judges from 2 courts, namely, 3 judges of the Supreme Court and 2 judges of the Supreme Administrative Court, totaling 5 people. However, since the disputes considered by the Constitutional Court include political disputes, the ruling needs not only knowledge about the laws but also a theoretical basis or fundamental legal principles in various dimensions to aid the consideration. Public law is considered an important basis for the judgments of the Constitutional Court. Consequently, to ensure the Constitutional Court's rulings cover all dimensions, it is recommended to increase the number of justices from qualified person in law, specifically public law, in addition to the current number by reducing the number of judges in the Supreme Court

to two persons, equal to the number of judges in the Supreme Administrative Court.

(2) Increasing the number of the qualified person in law and adjusting qualifications; By reducing the number of judges in the Supreme Court to two persons and increasing the number of qualified persons in law to two persons, with adjustments to the qualifications as follows: the persons qualified in law must at least include one who is qualified in public law. In addition, for a more open scope of the qualifications of qualified persons in law, it is recommended to adjust the selection requirements to be persons holding or having held a position of Professor at a university in Thailand for not less than five years, or holding or having held a position of Associate Professor at a university in Thailand for not less than ten years, and currently having renowned academic work.

4.2.2 Acquisition of Justices of the Constitutional Court: According to the study of foreign countries, there are three forms of acquisition of the Constitutional Court's Justices, namely: (a) the Parliament plays a key role in the acquisition of the Court's justices; (b) all three powers participate in the appointment process; and (c) the Head of State proposes the candidates, which are subject to the approval of the House of Representatives and the Senate.

The form of the acquisition of justices of the Constitutional Court of Thailand cannot follow the model of that of the foreign constitutional courts because of the different sociological conditions. For this reason, the Justices of the Constitutional Court of Thailand are acquired through the "Selection Committee," which is an organization that considers and proposes candidates to the Senate for approval. However, the Selection Committee as provided in three Constitutions, Constitution B.E. 2540 (1997), Constitution B.E. 2550 (2007), and

Constitution B.E. 2560 (2017), gave weight to different groups of actors, namely the Selection Committee, provided in the Constitution B.E. 2540 (1997), gave weight to political parties, resulting in the justices being determined by the political section; the Selection Committee, provided in the Constitution B.E. 2550 (2007), gave weight to courts and constitutional independent organs, resulting in the justices being determined by the courts and constitutional independent organs. The Selection Committee, provided in the Constitution B.E. 2560 (2017), gave weight to "persons appointed by the independent organs." However, the problem with the Constitution B.E. 2560 (2017) is that "persons appointed by the independent organs" must have the same qualifications and no prohibitions as a Justice of the Constitutional Court, which means that no one is qualified to serve on the Selection Committee because the person would have to resign from all positions. This is a major problem with being members of the Selection Committee, as provided by the Constitution B.E. 2560 (2017). To address the issue, it is deemed appropriate to change the qualifications of committee members appointed by the independent organs to be professors of law, political science, or public administration, or individuals who previously held a position not lower than the Director-General, while the appointment is still tasked to the independent organs. This will solve the problem of having no qualified candidates, and these experts, who are professors or have held positions not lower than Director-General, will be able to consider the candidates suitable to serve as Justices of the Constitutional Court because they are in the same field of work.

4.3 Powers and Duties of the Constitutional Court

The basic powers and duties of the Constitutional Court of every country lie in three important areas: a) controlling the constitutionality

of law; b) making decisions concerning the powers and duties of constitutional organizations; and c) playing a decisive role in deciding the impeachment or removal person from the highest executive office. Other powers and duties, such as the dissolution of political parties and constitutional complaints, are limited to certain countries.

The recommendations for the Thai Constitutional Court on powers and duties are divided into two categories: (1) political party dissolution and (2) constitutional complaints. The following are the main points:

(1) The dissolution of political parties: The Constitution B.E. 2560 (2017) does not directly stipulate that the Constitutional Court has the power to dissolve political parties. Such power is stipulated in the Organic Act, and it can be used widely. It is recommended that A. the scope for a political party dissolution be provided only in the Constitution and on the basis that a political party has violated the fundamental principles of the Constitution; and B. for actions of political parties that do not affect the basic principles, measures other than a dissolution of the political party should be imposed, depending on the gravity of the charge against that action.

(2) Constitutional complaints: The Thai legal system has already provided the constitutional complaints in Section 213 of the Constitution, B.E. 2560 (2017), while the details are in the Organic Act on Procedure of the Constitutional Court, B.E. 2561 (2018). The provision that sets limitations on constitutional complaints is Section 47 of the Organic Act on Procedure of the Constitutional Court, B.E. 2561 (2018), concerning cases that cannot be taken to the court, item (4), a matter pending trial by another court, or a matter on which another court has rendered a final judgment. This limitation should be addressed by providing for exceptions with an addition to the principle that “unless it is evident

that important issues may affect the rights and liberties protected by the Constitution". The Constitutional Court can then consider only the important issues relating to the rights and liberties guaranteed by the Constitution.

4.4 The Roles of the Constitutional Court of Thailand

The roles of the Constitutional Court may be divided into three groups, namely: the first group is the Constitutional Court, which has complete roles; the second group is the Constitutional Court, which plays a role in controlling the constitutionality of law, protecting the rights and liberties of the people, and preserving fundamental constitutional principles; and the third group is the Constitutional Court, which plays a role in controlling the constitutionality of law and protecting the rights and liberties of the people.

The Constitutional Court of the kingdom of Thailand is in the group that has complete roles and responsibilities, that is, controlling the constitutionality of law, protecting the rights and liberties of people, preserving fundamental constitutional principles, and making rulings concerning high-ranking political officers as well as the protection of minorities. However, despite its full roles, the Thai Constitutional Court still lacks stability according to social belief. This is because if a case concerns the constitutionality of law or the protection of people's rights, society is quite convinced that the Constitutional Court will consider the issue according to legal and related principles. However, if a case involves a dispute between political organizations, it is believed that the Court may be biased towards the party with state power or the government. And, if a case involves a dispute about the defense of fundamental constitutional principles, society believes that the Constitution Court tends to rule based on traditional concepts.

The conflict between the state and the capitalist group against the public interest is the issue that causes society to lose faith in the Constitutional Court. In such a case, the Court tends to interpret the Constitution to benefit the state and the capital group rather than in the direction of protecting the public interest. This issue is, therefore, an issue of public trust before the Constitutional Court. In general, society believes that the Court's constitutional interpretation favors those with state power over those without, as well as state and capital groups, rather than protecting the public interest. The latter, especially, is an issue that affects the general public. Ultimately, if the Constitutional Court does not try to gain society's trust as a shield to protect itself, this issue may lead to a crisis of faith in the Court. In other words, it is a crisis of faith and trust in the Constitutional Court. On the occasion of the 25th anniversary of the Constitutional Court of the Kingdom of Thailand, the Court has not yet deeply rooted itself in the trust of Thai society. For this reason, the key to gaining society's trust is the ruling of the Constitutional Court to safeguard and protect public interests based on constitutional principles, which have yet to be proven.

4.5 The Organic Act on Procedures of the Constitutional Court

There is an important recommendation concerning the Organic Act on Procedures of the Constitutional Court, that is, the structural organization, which is divided into 4 chapters, namely, Chapter 1: the Court; Chapter 2: Composition of the Court; Chapter 3: Proceedings; and Chapter 4: Ruling and Order. The recommendation will be focused on the proceedings, which should be split into two chapters: Chapter 1: General Case and Chapter 2: Specific Case. In Chapter 2, it is recommended to categorize cases by type, which may follow

the categories stipulated in Section 7 of the Organic Act on Procedures of the Constitutional Court, B.E. 2561 (2018). The reason for proposing a specific case proceeding is because the present Organic Act stipulates proceedings in Chapter 3, which are considered proceedings on general cases, without the details required for specific cases. The structure of the Organic Act does not include a particular chapter on the proceedings of specific cases, resulting in the lack of a section stipulating details of each type of case. Therefore, to complete the details for each type of case, it is necessary to restructure the Organic Act on Procedures of the Constitutional Court B.E. 2561 (2018) to make it clear to the applicant or the respondent when taking the case to the Constitutional Court.

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