The Formation, Action and Function of the Constitutional Court :The Case Study of Thailand and South Korea.*

การกำเนิดขึ้น อำนาจหน้าที่ การพิจารณาคดีของศาลรัฐธรรมนูญ กรณีศึกษา "ไทยและเกาหลีใต้"

วิโรจน์ พลายแก้ว**

บทคัดย่อ

จุดมุ่งหมายของวิทยานิพนธ์ฉบับนี้คือเพื่อศึกษาการกำเนิดขึ้น อำนาจหน้าที่ และการพิจารณาคดีของศาลรัฐธรรมนูญในประเทศไทย (ภายใต้รัฐธรรมนูญ๒๕๔๐) และศาลรัฐธรรมนูญประเทศเกาหลีใต้ (ภายใต้รัฐธรรมนูญปัจจุบัน) โดยเน้นหนักในประเด็นที่ฝ่ายการเมืองมีความเกี่ยวข้องกับการคัดเลือกตุลาการรัฐธรรมนูญและตุลาการศาลรัฐธรรมนูญในอดีตและในช่วงเวลาที่เป็นขอบเขตของการศึกษา รูปแบบการปกครองของทั้งสองประเทศมีอิทธิพลในการคัดเลือกตุลาการซึ่งทำให้ฝ่ายการเมืองเข้ามาเกี่ยวข้องกับศาล นอกจากนั้นขอบเขตอำนาจของศาลรัฐธรรมนูญยังเขียนขึ้นมาในลักษณะที่ทำให้ศาลต้องมีหน้าที่จัดการข้อพิพาทและปัญหาอันเกี่ยวเนื่องกับรัฐธรรมนูญซึ่งฝ่ายการเมืองมีส่วนในปัญหาเหล่านั้นด้วย และคดีต่างๆที่ผ่านเข้าสู่ระบบของศาลรัฐธรรมนูญอันเป็นการทำงานของศาลก็เปิดโอกาสให้ฝ่ายการเมืองเข้ามาเกี่ยวข้องกับศาล อย่างไรก็ตามระดับความเกี่ยวข้องดังกล่าวในศาลรัฐธรรมนูญของทั้งสองประเทศนั้นมีความแตกต่างกัน

Abstract

The purpose of the research is to study the formation, function and action of the Constitutional Court of Thailand (under the abrogated 1997 Constitution) and South Korea (under the present Constitution). The focus is on how constitutional history influences the creation of the Constitutional Court in Thailand and South Korea. The study also explains how the formation or the selection of the justices of the Constitutional Court, because it is influenced by the system of government in each country, exposes the Court to political interests. The research further gives insight into how functions of the Constitutional Courts determine the Courts' closeness to political interests. To complete the study, a set of relationship has come into play and

---

* บทความนี้เป็นส่วนหนึ่งของวิทยานิพนธ์ระดับปริญญาศิลปศาสตรมหาบัณฑิต สาขาวิชาเกาหลีศึกษา (สหสาขาวิชา) บัณฑิตวิทยาลัย จุฬาลงกรณ์มหาวิทยาลัย เรื่อง การกำเนิดขึ้น อำนาจหน้าที่ การพิจารณาคดีของศาลรัฐธรรมนูญ กรณีศึกษา "ไทยและเกาหลีใต้" โดยมี ศาสตราจารย์ ดร.ไชยวัฒน์ ค้ำชู เป็นที่ปรึกษาวิทยานิพนธ์หลัก

** นักศึกษาหลักสูตรปริญญาศิลปศาสตรมหาบัณฑิต สาขาวิชาเกาหลีศึกษา จุฬาลงกรณ์มหาวิทยาลัย E-mail Address : kenji200519@hotmail.com

that is the more diverse the cases the Constitutional Courts in Thailand and South Korea handle, the less susceptible the Courts are to political interests. The study has shown that interactions exist between the Constitutional Court and the political interests at the early stage of the Court's formation. The functions, which are tantamount to the 'brain' of the Constitutional Courts, are also designed so that the Courts must scrutinize the political post holders, among other jurisdictions. The action, or the cases heard by the Constitutional Courts of the two countries, put the Courts in contact with the political interests as well.

Introduction

The motivation to study the subject stems chiefly from a personal fascination in the functions of the Constitutional Court which was a new idea to Thai society when it was unveiled for the first time under the 1997 Constitution. The Court has been positioned as a special court vested with the extraordinary authority to bring politically abusive individuals in power to account. However, it has transpired over the years since the Court was established in Thailand that the Court's exposure to the political interests through the deliberation of some landmark cases against high-powered politicians in office has lifted public skepticism about the Court's independence. Perhaps a most prominent of the cases which reinforced that skepticism was the wealth concealment trial against Thaksin Shinawatra, now a fugitive former prime minister. The substance of the alleged constitutionality contravention came as a challenge to the survival of Thaksin as prime minister and for that matter the government's stability as well. The Court was apparently under tremendous pressure as the verdict would not only threaten to unleash far-reaching political ramifications, but also be a barometer of the Court's performance. Thaksin was eventually acquitted of the charges by a slim majority in what had been widely described as an unorthodox voting method. The outcome of the trial left some unanswered questions in the Court's ability to maintain a distance with politics.

The Thaksin issue provides an extension to my curiosity in comparing the Constitutional Court under Thailand's 1997 Constitution with South Korea's Constitutional Court. A thorough pre-research documentary review has found some similarities and disparities in the functions of the two Courts although in practice South Korea's Constitutional Court has admitted more wide-ranging cases than Thailand's Constitutional Court under the 1997 Constitution.

As the two countries have recorded different paces of democratic developments, the Constitutional Court is the fundamental institutional factor which helps to enhance the maturity of democracy. The elements that sprang to mind which would make for the basis of the research were the origin of the Courts, their functions and their adjudication of cases. These elements place the Courts close to political interests although the central focus pertains to difference in the level of closeness to the political interests to be gauged between the two Courts.

What has also stirred the motivation to put together the research is a personal observation of the unstable politics in Thailand as opposed to a comparatively more steady politics of South Korea. In Thailand, one of the causes of such instability traces to the independence of the so-called 'independent agencies,' including the Constitutional Court. Such independence is possibly undermined, at least in part, by the agencies being close to political actors and powers generally termed in the research as 'political interests'. The personal observation of such interaction has made the researcher wonder if a similar interaction exists in South Korea's Constitutional Court and if so, to what extent.

Objectives of the research

1. To study the significance of Thailand's 1997 Constitution and South Korea's 1987 Constitution with the emphasis on the institutionalization of the Constitutional Court organic to improvement of accountability of government;
2. To define the specialization of the Constitutional Courts;
3. To explain the formation and actions of the Constitutional Courts of both countries;
4. To understand the rationale behind, and in some instances limitations in, the formation of the two Courts, which bring the Courts close to political interests;
5. To understand the actions of the Courts in term of their acceptance and adjudication of cases; and; and
6. To analyze the diversity of cases deliberated by the Courts and how such diversity signifies the susceptibility of the Courts to political interests.

Research methodology

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

1. Documentary research;

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

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

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

The resources for researching Thailand's Constitutional Court are mainly library textbooks, website data and where necessary, interviews with experts. Websites were explored which provided both primary as well as analyzed information useful for constructing the research. Also, translations make up an extensive

proportion of the thesis content because many available reading materials are written in Thai. However, the resources for South Korea's Constitutional Court are not as varied. Because of the distance and the difficulty in accessing the on-site materials, much of the information has been obtained via the websites. Best precautions are made to avoid potentially unreliable online sources: origins of the websites are checked and double-checked for the identity of the writers.

Hypothesis

1. History of the Constitution influences the creation of the Constitutional Court in Thailand and South Korea;
2. The formation of the Constitutional Court, because it is influenced by the system of government in each country, exposes the Court to political interests;
3. In both countries, the functions of the Constitutional Courts determine the Courts' closeness to political interests; and
4. The more diverse the cases the Constitutional Courts in Thailand and South Korea handle, the less susceptible the Courts are to political interests.

1. Constitutional Court of Thailand (under the 1997 constitution)

1.1 Formation of the Constitutional Court of Thailand (under the 1997 Constitution)

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

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

The history of the Constitutional Tribunal dates back to 1944 and until the end of its life in 1997, the Tribunal had varied in the numbers of the members, their compositions, qualifications and lengths of tenure through the rise and fall of many governments amid the precarious political state. The Tribunal applicable to this research is one which was put to work under the 1974 Constitution. Up until that point in time, the Tribunal members had been ex-officio and/or political appointees such as the Parliament President, House Speaker or individuals fielded by the Parliament. Although the compositions also contained the Supreme Court and the prosecution, the line-up suggested a conspicuous presence of political influence. Relatively speaking, the Tribunal did not command as much authority or enjoy as many functions as the

Constitutional Court. Nonetheless, it was a component that decided on constitutional compatibility of a law, the exercise of which was bound to affect politicians in power one way or the other. It can be assumed that the Tribunal was an agency to watch and its functions were managed by the Tribunal members whose duty could either smoothen or hinder the direction of political policies.

The inclusion of political post holders, such as the Senate and House of Representatives Speakers or individuals they nominated, in the ranks of the Tribunal members was indicative of a feared infiltration of politics in the agency's constitutionality interpretation. But the composition of the 1974 Tribunal was unconventional as it stood out among those of the Tribunals that came before and after it. It carried the unprecedented compositional structure which, at least on the face of it, took a greater leaning toward the checks and balances than in previous or subsequent Tribunals. Installed in the Tribunal were nine specialists with the Parliament, the Cabinet and the Judiciary each appointing three of them. The Parliament, the Cabinet and the Judiciary are the pillars of the legislative, executive and the judicial branches respectively. The composition arouses curiosity as to what motivated the sudden shift of the line-up of the Tribunal membership with the abandonment of the old formula of reserving vacancies for politicians or their nominated persons. The explanation traces back to one of most tumultuous periods in Thailand's political history. The promulgation of the tenth Constitution in 1974 followed the popular uprising on October 14 in the previous year when the mounting tension between students and the military government came to a head. The mass demonstration forced the military government to flee into exile paving the way for the creation of the 1947 Constitution which was hailed as a most-democratic and gender-respecting charter. But the Constitution touted as one of the most progressive ever written(Evolution of Thai Politics, "Background of Thai Politics" 2010) suffered a premature death after two years of use; it was repealed after the crackdown on students on October 6, 1976.

Back in 1974 after the Oct 14, 1973 uprising in which the regime of Field Marshal Thanom Kittikachorn was overthrown, there was a constitution drafting committee and a committee propagating democracy. Tens of thousands of students went to the provinces to propagate democratic values among the people. Television, radio, printed media helped the democratic values dissemination program. The TV program started with the cry of a baby just born. Then, there was a voice that said when we were born we were all free _ we have the right to enjoy good air, the blowing wind, the sky and what not(Likhit Dhiravegin 2009: 11).

The aftermath of the October 14, 1973 had let off steam many people's bottled-up displeasure against what they saw as autocratic and un-transparent governance. In the lead-up to the uprising, many students and the educated sector of society had been impatient over the Thanom Kittikachorn administration's slow pace of drafting a new constitution and had launched a street campaign for an expeditious

completion of the constitution. The government retaliated by pressing charges of committing communist acts against 13 leaders of the pro-charter movement and placed them under indefinite detention. The Students Federation of Thailand demanded the detainees' immediate and unconditional release and the promulgation of the new charter within a year. The government rejected the demands prompting hundreds of thousands of students and pro-democracy to converge at Thammasat University on October 14, 1974. On the next day, a pocket of protesters clashed with security authorities, degenerating into bloody riots. Many buildings and the physical symbols of military dictatorship were torched and vandalized. Field Marshal Thanom, along with a number of top-brass in his regime, fled the country and he was replaced as prime minister by Sanya Dhammasakdi who was royally appointed. The Sanya government promised to have the charter ready for use in six months although it managed to do so in three months. The drafting responsibility was delegated to the 18-man assembly. The charter, 238 Sections long, was promulgated on October 7, 1974. Two years later, after having been amended once, the 1974 Constitution was cancelled in a military revolt headed by Admiral Sangad Chaloryoo, the Supreme Commander at the time, on October 6, 1976.

The two years under the 1974 Constitution had provided a rare window of opportunity for eliminating the vagueness in the laws which enabled politicians to 'muddle through' in exercising their administrative authority. The 1974 Constitution had imposed some groundbreaking restrictions, for example, that the prime minister must not be a member of parliament, the national political post holders cannot concurrently hold the posts of local leaders, or that the parliamentarians and the cabinet ministers must declare their assets and liabilities. The Constitution also sought to short-circuit the vicious political cycle by enforcing a ban on an amnesty to be granted to individuals who destroy the constitution (Evolution of Thai Politics, "Background of Thai Politics" 2010).

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

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

It makes sense, therefore, to recognize the 3:3:3 configuration as a practical, well-suited formula that could ascertain accountable functionalities of the Constitutional Tribunal. After the 1974 charter was abrogated in 1976 with the military take-over of the national administration, the justice line-up was reverted to the previously politically-inclined structure. A pattern has emerged of politicians gaining access to the Tribunal with the usurping of government. When a popular struggle for democracy wins the day, the Tribunal took on a new chapter dedicated to a composition of justices who are governed by a workable system of keeping tab on one another and preventing a particular cluster of justices from dominating the bench which would have increased the Tribunal's chances of being penetrated by the external politics. South Korea's Constitutional Court operates on the 3:3:3 configuration and has been held in high esteem in the wider sectors of the general public (an elaboration can be found in 4.3.1).

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

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

The potential weakness inherent in the 3:3:3 configuration looked to have been left out rather than rectified in the 1997 Constitution. Although the 1997 Constitution did not follow the pattern of the post-coup liberation as did the 1974 charter, it was a glaring retaliation of many people against the seemingly perennial corruption and administrative malpractices by the political post holders. Various blueprints of the country's first Constitutional Court passed through the charter designers. The 3:3:3 configuration was not adopted and instead the charter drafters opted for a complex method of recruiting the justices.

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

The Selection Committee fulfilled its working obligations on the premise that the deans of respective faculties in the state-run tertiary were exceptionally dependable authorities in the sectors of law and political science. But the political influence was likely to have started at the point of narrowing the candidacy among the deans. A cajoling by political interests could have shaped the choice of specialist justice nominees and the selection may well have been sealed based on the amount of candidates' political inclination. The procedure for nominating the justices of the Constitutional Court should be transparent and opened to the public scrutiny(Thailand Development Research Institute 2010). The institute advises that the final selecting body should not escape monitoring which can be done through a disclosure of the vote of each selection panelist.

The candidates' possible political inclination can be rationalized by the patronage system. Political post holders have been known to extend adviser positions attached to their offices to university academics and the deans are no exception. The advisers are often the drive behind the formulation of state policies which could be beneficial to the office holders themselves. John Laird(1997) notes that decisions which feed on what could amount to a patronage tend 'to overlook better, more rational courses of action, and could result in more harm than good to the country and the people'.

The mathematics of the composition of the Selection Committee for 1997 Constitutional Court justices are suggestive of the risk of pattern voting and with the presence of four political party representatives in the Committee, the independence of justice finalists could be in doubt. The political party representatives make up four seats on the Selection Committee. Had there been any 'established relationship' between the representatives and the dean segments of selectors, all the representatives needed was three more seats from the dean selector portions to realize the simple majority votes over the justice finalist compilation. Within the ranks of the political representatives in the Selection Committee, majoritarianistic practice was at play. Politicians refused to be cast aside in deciding the justice appointments although calls were echoed for them to stay out of the selection of the members of the agency that would keep them in check. Since the political representation in the Selection Commission came from the political parties elected to the House of Representatives, it would not be surprising that politically-nominated selectors were members of the ruling coalition parties which garnered the parliamentary majority. The political representation in the Selection Committee gave no fixed quota of seats for the opposition party bloc and was therefore devoid of the internal counter-balance. This permitted one group of collectively powerful politicians to lead the opinions of the selectors (Supawadee Inthawong 2010: Interview). Criticism has arisen because there had been no opposition party representatives in the selection panel since the promulgation of the 1997 Constitution. Supawadee said it would be naïve to suppose that that personal prestige and expertise of the selectors would enable them to deflect political interference.

Since the persons nominated for the Constitutional Court justices must receive the votes of three-fourths of the 13-member Selection Committee, the four political representatives on the Committee had an effective veto over all applicants, which enables them to reduce the pool o candidates proposed to the Senate to those individuals whom the government approves (Amara Raksasataya and James R. Klein, eds. 2003).

As Banjerd Singkaneti put it, selecting the Constitutional Court justices was the most controversial process of any in the constitutional agencies. Political elements had interfered before, during and after the justices had assumed their posts. The interference was paramount and rife from the very point of recruiting the Selection Committee members down to the stage where the Senate chooses the justices from the finalists. 'The Constitutional Court is made to cross paths with the politicians because their roles could make or break them. But when the Constitutional Court is without that protective wall around it, it is opened to interference,' Banjerd said (Banjerd Singkanet 2010).

1.2 Functions of the Constitutional Court of Thailand (under the 1997 Constitution)

The functions of the Constitutional Court affirmed by the 1997 Constitution derive from four areas of its jurisdictions(Amara Raksasataya and James R. Klein, eds. 2003):

1. Jurisdiction in Determining the Constitutionality of the Statutes and the Organic Law Bills;
2. Jurisdiction in Considering and Deciding Qualifications of a Member of the House of Representatives, a Member of the Senate, a Cabinet Minister, the Election Commissioners and any Person Holding a Political Position Who Shall Submit an Account Showing Particulars of His/Her Assets and Liabilities;
3. Jurisdiction in Considering and Deciding a Dispute Regarding the Powers and Duties of Organizations under the Constitution; and
4. Other Jurisdictions as Stipulated by the Constitution and the Organic Law.

1.3 Action of the Constitutional Court of Thailand (under the 1997 Constitution)

It has been said that the magnitude of cases deliberated by the Constitutional Court alone is meaningless to the calculation of the amount of exposure of the Court to the political interests. The overview of the issue is that the diversity or less of it in the cases handled by the Constitutional Court is dictated by the functions of the Court. If many of the functions are geared toward settling disputes with or stemming from the political interests, it can serve an indication that a great deal of Constitutional Court's time and resources will be expended looking at political cases. A collection of statistical data has confirmed this supposition.

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

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

1.	Section 47 (resolutions of political parties issued in conflict with the status and performance of the Members of the House of Representatives)	3 petitions
2.	Section 96 (termination of the MP status)	1 petition
3.	Section 180 (draft bill on the national budget expenditures)	1 petition
4.	Section 198 (petitions filed through the Ombudsmen)	10 petitions
5.	Section 216 (termination of ministership)	2 petitions
6.	Section 219 (constitutional incompatibility of an executive decree)	4 petitions
7.	Section 262 (unconstitutionality of a draft bill)	14 petitions
8.	Section 264 (a law in conflict with the Constitution)	236 petitions
9.	Section 266 (constitutionality of power and duty of constitutional agencies)	47 petitions
10.	Section 295 (political post holders' failure to declare assets and liabilities)	29 petitions
11.	Section 321 (ruling on regulations governing the NACC)	1 petition
12.	Section 65 (dissolution of political parties), Section 33 (decision on orders issued by political party registrar) and Section 17 (rejection of request to set up a political party) of the 1997 Political Party Act	74 petitions
	Total	**422 petitions**

Source : 'The Constitutional Court of Thailand; The Provisions and The Working of the Court' edited by Amara Raksasataya and James R. Klein(2003).

From the Table, the political petitions fall into items 1, 2, 5, 10, and 12 pertaining to resolutions of political parties issued in conflict with the status and performance of the Members of the House of Representatives, termination of the MP status, termination of ministership, political post holders' failure to declare assets and liabilities and Sections 65, 33, and 17 of the Political Party Act respectively. There are 109 petitions between them and these account for 25.8% of the overall number of petitions or one in four petitions which passed through the Constitutional Court. The submission of many political petitions strongly suggests a close contact between the Court and the political interests. More importantly, the variety of cases was limited (five in 12 cases relating to political post holders) which further reinforces the Constitutional Court's concentration on the adjudication of political interest cases.

2. Constitutional Court of South Korea

2.1 Formation of South Korea's Constitutional Court

The line-up and compositional structure of the South Korea's Constitutional Court justices can be highly corresponding to the form of government. In a way, the Court justices are factionalized into the three foundation powers of South Korea's semi-presidential system where the '3:3:3 configuration' is readily inherent and operational. This chapter examines the composition of the justices and the government system as well as the linkage between them which could assume, at least in theory, to keep the Constitutional Court's political exposure in check.

The Constitutional Court of South Korea is composed of nine justices qualified to be court judges and appointed by the President. Three justices are appointed from persons selected by the National Assembly, and three appointed from persons nominated by the Chief Justice of the Supreme Court. The justices exercise jurisdiction in judgments as a member of either the full bench or panel. As members of Council of Justices(The Council of Justices is the final decision making body regarding the administration of the constitutional court. The Council of Justices is composed of the nine justices, with the President as the chairman. The Council requires attendance of at least seven justices, and the majority of vote to decide. The President may put a matter to a vote. The matters decided by the Council of Justices include the establishment and revision of the Constitutional Court Act, filing a recommendation for legislations concerning the Constitutional Court to the National Assembly, budget request, expenditure of reserve funds and settlement of accounts, appointment and dismissal of the Secretary General, Deputy Secretary General, research officers, and public officials of Grade III and higher. The Council also decides on other matters brought up by the President of the Constitutional Court), they exercise voting rights on important matters concerning the administration of the Constitutional Court (Twenty Years of the Constitutional Court of Korea 2010).

One of the merits of South Korean Constitutional Court's compositional 3:3:3 configuration is in the absence of a politically-susceptible, multi-tiered process of selecting the justices, which formed the central part of the selection of Thailand's Constitutional Court justices. By comparison, candidates of the South Korea's Constitutional Court justices are drawn from within their own blocs. If there is to be any 'political' meddling, it is restricted to the selection within the bloc and does not spill over across the blocs. This is because the configuration is designed so that no one institution or agent can dominate the other two branches represented in the Constitutional Court. It also achieves a panel of justices with a variety of professional and political backgrounds. The one-third proportion offers on mathematical terms an assurance that one bloc will be unable to dictate the adjudicatory outcomes of the entire Constitutional Court justice panel. However, a possibility cannot be discounted

of the justices working under the shadow of their 'agents' who appointed them. Justices appointed by the National Assembly could tilt their consideration and opinions of a case toward the lawmakers in a petition.

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

In fact, however, the President as a party member is not bound by any duty to his or her party in the National Assembly although he is empowered to influence the legislative process by the use of or the threat of using the power to veto the legislative bills(George Thomas Kurian, ed.1998: 396). In fact, the President is constitutionally barred from acting partially toward his own party, something the late President Roh Moo-hyn (in office from 2003–2008) was accused of having done which led to his impeachment. A President is both ethically and legally prohibited from engagements which favor the political parties in the National Assembly, providing the two branches with reasons to stay apart and keep themselves independent of one another. The system also allows the opposition to lead the National Assembly which could pit it against the president. So, it does not necessarily follow that the President and whose party may control a majority support in National Assembly could 'collaborate' and that such notion could imperil the intra-independence of the 3:3:3 configuration of the South Korea's Constitutional Court to the extent of distorting justice composition and turning it into a '3+3:3' relationship.

2.2 Functions of the South Korea's Constitutional Court

The competence of South Korea's Constitutional Court is tied to its jurisdictions which are as follows (Joung-Joon Mok 2010).

1. Constitutionality of statutes;
2. Impeachment;
3. Dissolution of political parties;

4. Competence disputes between state agencies and local governments; and
5. Constitutional complaint.

2.3 Action of the South Korea's Constitutional Court

The more diverse the cases and segmentation, the more likelihood there is for the Court to have the opportunity to interact with the non-political interests. This assumption responds to the demand of the jurisdictions of the Constitutional Court which do not demonstrate a concentration on any specific cluster of functions; constitutionality of statutes, impeachment, dissolution of political parties, competence disputes between the state agencies and the local governments, and constitutional complaints. The political functions, most notably the impeachment and the political party dissolution, are rarely, if at all, invoked. The Constitutional Court has devoted much of its time and resources hearing constitutional complaint cases which command the lion's share of the caseload. Looking closely at the caseload record, the constitutional complaints filed under Article 68 (1) paves the way for ordinary citizens to approach the Court to redress what they reckon is the infringement of rights from the exercise or non-exercise of state power. The cases able to be filed as well as the petitioners are both diverse. This, coupled with the petition process being opened to practically anyone, suggests that the Constitutional Court of South Korea has greater chance of interacting with the non-political interests judging from its extensive preoccupations with the constitutional complaints. There had been only one political case the Court handled which concerned the highest political post holder. The case in question is the impeachment of President Roh while there was zero number of cases of political party dissolution.

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

On that note, it may be constructive to make a comparison of petition segmentation with Thailand's Constitutional Court. The finding of this research is that the cases registered with the Thailand's Constitutional Court are far less diverse than those which passed through South Korea's Constitutional Court. The Thailand's Constitutional Court cases are also far fewer but, as mentioned earlier, the numbers

justify many assumptions but they alone do not explain the whole story. Thailand's Constitutional Court's interaction with the political interest is relatively greater because the cases are less diverse. The petitions that had been tallied up and it was found that many of them had been classified under political cases; resolutions of political parties issued in conflict with the status and performance of the Members of the House of Representatives; termination of the MP status; termination of ministership; political post holders' failure to declare assets and liabilities; dissolution of political parties; decision on orders issued by political party registrar; and rejection of request to set up a political party of the 1997 Political Party Act. These cases could not be lumped together and easily categorized as political cases because they come under different sections of the laws. Different laws prescribe different punishments and offenders are thus treated in different adjudicatory categories. The petitioning process is also restrictive to ordinary people who must petition the Constitutional Court through Court of Justice, the Ombudsmen and the Speaker of either House or Parliament President. The citizens are not among the 15 categories of 'direct petitioners' who are mostly political post holders. Fifteen groups of direct petitioners may come across as diverse but the fact that they left out the citizens made it an 'exclusive club' of the holders of power and opened the Constitutional Court to the full force of political exposure. In matters which decide the fate of institutional politics such as the dissolution of political parties including the major ones, Thailand's Constitutional Court had deliberated numerous dissolution cases and issued verdicts. This further intensifies the court room contact between the Court and the political interests.

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

Conclusion

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

A recommendation for future research may be made with a reference to the subject that is an extension of this thesis. Warranting an academic investigation is how Thailand's Constitutional Court's political exposure could be reduced by perhaps allowing ordinary people to petition the Court directly and broadening its functions to cover constitutionality complaints. If such proposed exposure reduction or the

function broadening is not possible in practical terms, a study should be pursued to shed light on the hindrances.

Through summary and analysis of relevant facts and support of text materials, the research has satisfied its goal of establishing that from the origin of the Constitutional Courts of Thailand and South Korea to the cases which pass through the justices' hands, the political interests have retained their presence, in one form or another, although such exposure varies between the Courts of the two countries.

Glossary of Important Research Keywords

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

I. Formation – The term describes the inception of the Constitutional Courts in South Korea and Thailand with a special designation to the selection and the procedures in selecting the individuals and the panel of Constitutional Court justices. The formation does not, in this manner, prescribe any meaning connected to the establishment of the offices of the Constitutional Courts in the two countries.

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

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

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

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

References

Banjerd Singkanet. Relations; Capital and Politics, A Big Deal in Political Reform [online]. 2010. Available from: http://politic.isranews.org/index.php?option=com_content&task=view&id=225&Itemid=0. [2010, February 18]

Joung-Joon Mok. The Effects of the Constitutional Adjudications on Politics in Korea [online]. 2010. Available from: http://www.mkab.hu/index.php?id=young-joon_mok__member_of_the_constitutional_court_of_south_korea. [2009, December 16]

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

Supawadee Inthawong. Senior Reporter, Bangkok Post. Interview, March 2, 2010.

_____. The Constitutional Court of Thailand; The Provisions and The Working of the Court. Amara Raksasataya and James R. Klein (eds.) 2003.

_____. Evolution of Thai Politics, "Background of Thai Politics" [online]. 2010. Available from: http://e-learning.mfu.ac.th/mflu/1604101/chapter3/Lesson10.html. [2010, April 1]

_____. Twenty Years of the Constitutional Court of Korea [online]. 2010. Available from: http://www.ccourt.go.kr/home/english/organization/organization.jsp [2010, March 22]

_____. Research Paper Abstract [online]. 2010. Available from: http://www.tdri.or.th/abstract/s48_abs.pdf. [2010, April 10]

_____. South Korea. In George Thomas Kurian (ed.), World Encyclopedia of Parliaments and Legislatures Volume 1, pp. 396. London: Fitzroy Dearborn Publishers, 1998.