

## Chapter 8: Judicial Review Under the New Constitution

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## CHAPTER 8

### JUDICIAL REVIEW UNDER THE NEW CONSTITUTION

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#### **I: Introduction**

According to the constitutionalism notion, the constitution, to be consistent with the rule of law principle, has to embody the separation of state powers as a measure for safeguarding the rights and liberties of the people and it must be recognised as the supreme law of the country. In line with that conception, legislative actions must be constitutional whilst all actions of the executive and the judiciary have to be lawful as well. Moreover, in order to prevent the state from abusing its powers in a manner jeopardising rights and liberties of the people, actions by state agencies will have to be subject to judicial review.

Following such idea of constitutionalism, the Constitution of the Kingdom of Thailand lays down measures safeguarding the rights and liberties of the people. As a preventive measure, the Legislature is prohibited from enacting laws restricting such rights and liberties of the people as recognised by the Constitution, except by virtue of provisions of the law specifically enacted for the purpose and only to the extent of necessity and provided that they shall not affect the essential substances of such rights and liberties. Such provisions of the law must, in addition, be of general application and may not be intended to apply to any particular case or person. No matter so well this preventive measure has been inserted into the Constitution, in practice, the exercise of state powers, whether the legislative power, the executive power or the judicial power, which is done through a person, will unavoidably encroach upon rights and liberties of private individuals. For this reason, the Constitution also enshrines a corrective measure, that is, making a violating action by state official subject to a review by a judicial or non-judicial body. Our examination in this Chapter will be limited to judicial review.

As already explained in other Chapters, the Constitution has established 4 categories of Courts with different jurisdictions. Certainly, such division

occasionally gives rise to the jurisdictional problem. In this Chapter, discussions will be focused on the following: (1) the judicial system under the Constitution (2) the relationship among courts and (3) problems relevant to the relationship among courts.

## **II. The Judicial System under the Current Constitution**

Provisions of Chapter VIII on Courts establish the quartet judicial system. There are four main courts, namely, the Constitutional Court, Courts of Justice, Administrative Court and Military Court. The court of each category has independent and different functions.

### **1. The Constitutional Court**

Although the Constitutional Court is not at the top of the hierarchy in the quartet judicial system, it is regarded as the most important court in view of its jurisdiction over the determination of constitutionality-related issues. The inspection system over the constitutionality-related issues in Thailand changed over time. Early constitutions regarded the House of Representatives as having supreme competence to interpret the constitution, as can be seen in the Constitutions of 1932. At the second stage, the constitution conferred such competence upon the National Assembly and the Constitutional Tribunal (as envisioned in the Constitution of 1946, the Constitution of 1947, the Constitution of 1949, the Constitution of 1952, the Constitution of 1974 and the Constitution of 1978). At a later time, only the Constitutional Tribunal was recognised by the constitution as competent to interpret the constitution<sup>1</sup>. In the drafting process of the current Constitution, some studies suggested that the Constitutional Tribunal was fraught with much difficulty, it encountered the lack of autonomy and inability to perform functions on a continuous fashion. The defects were occasioned by its inappropriate composition that was largely made up of politicians and, in addition, by the fact that the term of

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<sup>1</sup> Amorn Chandara-Somboon, “*The Constitutional Court*”, *Administrative Law Journal*. Vol. 12, December, 1993, pp. 519-609.

office of its member was dependent on the term of the House of Representative.<sup>2</sup> Therefore, there was made a proposal for the establishment of a Constitutional Court to bridle those shortcomings. This proposal was adopted and has given rise to several provisions in the present Constitution dealing with the 'Constitutional Court'. We will now discuss two major functions of the Constitutional Court: firstly, the determination of constitutionality issues and, secondly, the determination of powers and duties of organs established by the Constitution.

### 1.1 The Constitutionality Determination Role

The power to determine the constitutionality of legislation is of significant importance. The Constitutional Court considers whether any provision of any law is contrary to or inconsistent with the Constitution. A legal provision that is found unconstitutional will be nullified or void. The Constitutional Court can make the determination about the constitutionality both before promulgation of the legislation in question (that is, at the stage of a Bill) or after the law has already been promulgated.

#### (1) Determining the Constitutionality of A Bill

Any bill approved by the National Assembly can be examined by the Constitutional Court as to whether it is contrary to or inconsistent with the Constitution. In this connection, a request may be directed to the Constitutional Court for considering a Bill before the Prime Minister presents it to the King for the King's signature. If the Constitutional Court decides that a statement contained in the bill is contrary to or inconsistent with the Constitution and that statement constitutes the essential component of the Bill, then the bill will lapse in its entirety. If the problematic statement does not form the essential element of the Bill, it will follow that only such statement will have to be scrapped.

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<sup>2</sup> Rachata Promwan, Directions for Developing the Autonomy of the Members of the Constitutional Tribunal in Thailand, Thesis, Faculty of Law, Thammasat University, p. 106,

## (2) Determining the Constitutionality of an Act

Even though the Constitution attempts to forestall unconstitutionality at the outset through the mechanism by which a Bill can be challenged as unconstitutional, certain bills may probably elude the unconstitutionality censorship and may eventually be promulgated. It is for this reason that the Constitution also provides for a measure for deciding on the constitutionality of a promulgated Act. In a case brought before the Court of Justice, if the Court is of opinion that, or if a party to the litigation raises an objection that, the provisions of the Act at issue are contrary to or inconsistent with the Constitution and there has not been a decision of the Constitutional Court with regard to such provisions, the Court of Justice is obligated to stay the trial and adjudication of the case and refer the constitutionality issue to the Constitutional Court for its consideration and determination.

### 1.2 Determining Powers and Duties of Constitutional Organs

Now that the Constitution establishes several supervisory organs in charge of inspecting the exercise of state powers, conflicts may possibly arise as to powers and duties of those organs. This will, no doubt, have impacts on the exercise of state powers along the line of the spirits of the Constitution. The Constitution, therefore, confers upon the Constitutional Court the power to make the determination of the emerging conflicts.<sup>3</sup>

The justifications for empowering the Constitutional Court to settle this kind of conflict are twofold. First, given that the conflict arises as regards the powers and duties of organs established by the Constitution, the Constitutional Court should be in a better position than any other body to determine the conflict. Secondly, it must be recalled that the Constitutional Court has the power to interpret provisions of the Constitution. A conflict regarding powers and duties of organs under the Constitution is, in reality, the conflict needing interpretation of the provisions of the

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cited in Banjerd Singkaneti, *General Concepts Underlying the Constitutional Court*, Bangkok: Winyoochon, 2001, p. 129.

<sup>3</sup> However, in case of a conflict over jurisdictions of courts, such conflict, according to the Constitution, is to be resolved by a separate specially established commission rather than by the Constitutional Court. (Before the current Constitution, a jurisdictional conflict between courts was to be referred to the Constitutional Tribunal.)

Constitution concerned, with a result that it falls within the competence of the Constitutional Court accordingly.

## **2. The Court of Justice**

According to Chapter VIII, Part 3 of the Constitution, the Court of Justice has competence to try and adjudicate all cases except those specified to be within the jurisdiction of other special courts. There are three levels of Courts of Justice, namely, the Court of First Instance, the Court of Appeal and the Supreme Court of Justice.

In the Supreme Court of Justice, the Constitution also establishes a special division – the Criminal Division for Persons Holding Political Positions – dedicated to trying accusations made against those holding political positions, as initially discussed in the previous chapter. According to the Organic Act on Criminal Procedure for Persons Holding Political Positions B.E. 2542 (1999), the trial and inquiry conducted by the Supreme Court of Justice's Criminal Division for Persons Holding Political Positions shall be based on the case-file prepared and referred to it by the National Counter Corruption Commission, but the Supreme Court of Justice's Criminal Division for Persons Holding Political Positions may conduct additional hearings for fact finding as it thinks fit. A decision will be by a majority of votes and each member of the quorum is required to prepare a written opinion and to give a verbal statement at a meeting of the quorum before a final resolution is passed by the quorum. An order and judgement of the Supreme Court of Justice's Criminal Division for Persons Holding Political Position is to be taken as final and is also required to be published.

The Constitution provides for a safeguard of judicial independence of judges of Courts of Justice. The promotion of judges is not dependent on ministerial or administrative officials but is within attentive oversight by the 'Judicial Commission of the Courts of Justice' which is set up by the Constitution and composed of judges from all levels of the Courts of Justice. Under the new Constitution, the Court of Justice also has an independent administrative office in charge of studying and evaluating performances and gathering judicial precedents.

### **3. The Administrative Court**

The present Constitution adopts the dual judicial system whereby the Administrative Court is separated from the Court of Justice. Under section 276 of the Constitution, the Administrative Court have the powers to try and adjudicate (a) cases of dispute between a State agency, State enterprise, local government organisation, or State official under the superintendence or supervision of the Government on one part and a private individual on the other part, or (b) cases of dispute amongst State agencies, State enterprises, local government organisations, or State officials under the superintendence or supervision of the Government. The dispute must be as a consequence of the act or omission of the act that the law requires to be performed by such State agency, State enterprise, local government organisation, or State official, or as a consequence of the act or omission of the act under the responsibility of such State agency, State enterprise, local government organisation or State official in the performance of duties under the law.

The Organic Act on the Establishment of Administrative Courts and Administrative Court Procedures, B.E. 2542 (1999), which has been enacted in the implementation of the Constitution, specifies the following cases as falling within the jurisdiction of the Administrative Court:

(1) the case involving a dispute in relation to an unlawful act committed by an administrative agency or the State official, be it in connection with the issuance of a by-law or an order or in connection with any other act, by reason of acting without or beyond the scope of the powers and duties or inconsistently with the law or the form, process or procedure which is the material requirement for such act or in bad faith or in a manner indicating unfair discrimination or causing unnecessary process or excessive burden to the public or amounting to undue exercise of discretion;

(2) the case involving a dispute in relation to an administrative agency or State official neglecting official duties required by the law to be performed or performing such duties with unreasonable delay;

(3) the case involving dispute in relation to a wrongful act or other liability of an administrative agency or State official arising from the exercise of power under the law or from a by-law, administrative order or other order, or from the neglect of official duties required by law to be performed or the performance of such duties with unreasonable delay; and

(4) the case involving a dispute in relation to an administrative contract.

In sum, the Administrative Courts, as established for the first time by the Constitution and the Act on the Establishment of Administrative Courts and Administrative Court Procedure, B.E. 2542 (1999), will play a vital role in inspecting lawfulness or legality of administrative acts. Such scrutiny will, in turn, result in a better safeguard of rights and liberties of individuals as well as more transparent and accountable administrative performance.

#### **4. The Military Court**

The Military Court has competence to try and adjudicate military criminal cases. There are three levels of the Military Court: (1) the Military Court of First Instance, (2) the Central Military Court and (3) the Supreme Military Court. The Military Court will try and adjudicate only criminal cases in which criminal offences are committed by military officers; the Military Court has no competence over civil disputes. The prime justification for establishing the Military Court as a separate judicial body from ordinary Courts of Justice lies in an attempt to impose a more stringent control on military members. This will help prevent military officers from committing unpeaceful acts rather than performing peace-keeping duties.

### **III. Relationship among Judicial Bodies**

As spelled out above, four types of Courts have been established by the Constitution, namely, the Constitutional Court, the Court of Justice, the Administrative Court and the Military Court. In effect, some relationships can be found in the classification. We will here look at, first, the relationship between the Constitutional Court and other Courts and, secondly, the relationships among the Court of Justice, the Administrative Court and the Military Court.



## 1. Relationships between the Constitutional Court and other Courts

The relationships between the Constitutional Court and other Courts can be explored in two dimensions: the relationship in connection with the jurisdiction and the relationship in the aspect of the binding force of decisions of the Constitutional Court on other Courts.

### 1.1 Jurisdictional Relationship

The Constitutional Court has specific competence in interpreting provisions of the Constitution. This competence does not vest in other Courts. No other Court can, therefore, decide constitutionality of given legislation or disputes involving powers and duties of the organs established by the Constitution. Other Courts may have a part in the constitutionality-determination process only by way of referring the issue to the Constitutional Court where such issue is perceived by the Court itself or is raised by the litigant party, in litigation *ex casu* before the Court.

### 1.2 Binding Effect of the Constitutional Court's Decisions

Under section 27<sup>4</sup> of the Constitution, a decision of the Constitutional Court is binding on other Courts in the enforcement and interpretation of laws. Further, section 268<sup>5</sup> provides that a decision of the Constitutional Court shall be deemed final and binding on other Courts, provided, however, that it will not prejudice final judgments of other Courts.<sup>6</sup>

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<sup>4</sup> **Section 27:** Rights and liberties recognised by this Constitution expressly, by implication or by decision of the Constitutional Court shall be protected and directly binding on the National Assembly, the Council of Ministers, Courts and other State organs in enacting, applying and interpreting laws.

<sup>5</sup> **Section 268:** The decision of the Constitutional Court shall be deemed final and binding on the National Assembly, Council of Ministers, Courts and other State organs.

<sup>6</sup> This qualification is expressly stipulated in section 264 paragraph three of the Constitution.

**Section 264:** In the application of the provisions of any law to any case, if the Court by itself is of the opinion that, or a party to the case raises an objection that, the provisions of such law fall within the provisions of section 6 and there has not yet been a decision of the Constitutional Court on such provisions, the Court shall stay its trial and adjudication of the case and submit, in the course of official service, its opinion to the Constitutional Court for consideration and decision.

## **2. The Relationships among the Court of Justice, the Administrative Court and the Military Court**

As mentioned above, the Court of Justice is the court with general competence to try and adjudicate all cases not falling under the jurisdiction of other special Courts. However, there may occur a dispute between different courts over their jurisdiction to try a case in question. Such jurisdictional dispute is considered and determined by a jurisdictional committee specifically set up for this purpose. The committee is chaired by the President of the Supreme Court and consists of the President of the Supreme Administrative Court, Head of the Office of Military Judges, the President of other Courts (in case other special Courts are established), and other qualified persons (not exceeding four in number).

The Committee takes charge of considering and making the determination of a jurisdictional issue as referred to it by a Court or a party to a case. More precisely, three scenarios of conflicts can be referred to the Committee for deliberation; first, the conflict as to the jurisdiction of different courts, second, the conflict emerging from different final judgments or different orders of Courts and, finally, the conflict between Courts in connection with provisional measures before judgment, the filing of a motion with the Court before litigation as provided by law, the taking of evidence before litigation, the execution of judgment or order and the performance of other duties of the Courts.

### **IV: Problems Involving Relationships among the Judiciary**

We have now experienced a critical problem in connection with the relationship among judicial bodies. The problem, indeed, takes root from a decision of the Constitutional Court No. 24/2543 which was concerned with the Regulation of the Election Commission on Calling for a New Election Before the Announcement of the Result of the Election of Senators (No. 2), B.E. 2543 (2000).

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In the case where the Constitutional Court is of the opinion that the objection of a party under paragraph one is not essential for decision, the Constitutional Court may refuse to accept the case for consideration.

The decision of the Constitutional Court shall apply to all cases but shall not affect final judgments of the Courts.

This Regulation intended to bar a person from being a candidate in an election of a senator if that person was a candidate in a previous election of a senator and, at that prior election, was refused an announcement of the election result on more than one occasion. The facts of this saga and the much criticised decision of the Constitutional Court can succinctly be explained below.

The Ombudsman received a complaint from a candidate in an election of a senator for Udonthani Province. It was alleged that the Regulation issued by the Election Commission was unconstitutional by reason of its repugnance to section 126<sup>7</sup> of the Constitution, and based upon such allegedly unconstitutionality, it was requested that the Ombudman refer the matter to the Constitutional Court for its decision, in accordance with section 198<sup>8</sup> paragraph one of the Constitution.

Although the Constitutional Court is a competent organ to make the determination as to constitutionality of legislation, the Constitutional Court, in the instant case, went on to consider whether this matter would fall within the jurisdiction of the Administrative Court in accordance with section 276 of the Constitution. In this instance, the Constitutional Court's interpretation of section 276 of the Constitution has sparked a serious problem surrounding the jurisdiction of the Administrative Court.

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<sup>7</sup> **Section 126:** A person under any of the following qualifications shall have no right to be a candidate in an election of senators:

- (1) being a member of or holder of other position of a political party;
- (2) being a member of the House of Representatives or having been a member of the House of Representatives and his or her membership has terminated for not yet more than one year up to the date of applying for the candidacy;
- (3) being or having been a senator in accordance with the provisions of this Constitution during the term of the Senate preceding the application for the candidacy;
- (4) being disfranchised under section 109 (1), (2), (3), (4), (5), (6), (7), (8), (9), (11), (12), (13) or (14).

<sup>8</sup> **Section 198:** In the case where the Ombudsman is of opinion that the provisions of the law, rules, regulations or any act of any person under section 197 (1) begs the question of the constitutionality, the Ombudsman shall submit the case and the opinion to the Constitutional Court or Administrative Court for decision in accordance with the procedure of the Constitutional Court or the law on the procedure of the Administrative Court, as the case may be.

The provision in question – section 276 paragraph one of the Constitution – which is the general provision spelling out the competence of the Administrative Court states “The Administrative Courts have the powers to try and adjudicate cases of dispute between a State agency, State enterprise, local government organisation, or State official *under the superintendence or supervision of the Government* on one part and a private individual on the other part, or between a State agency, State enterprise, local government organisation, or State official *under the superintendence or supervision of the Government* on one part and another such agency, enterprise, organisation or official on the other part as provided by law” (emphasis added). The Constitutional Court has decided that the Administrative Court in this case had no power to decide the legal status of the Regulation issued by the Election Commission, the reason being that the Election Commission, as an independent organ under the Constitution itself, is not “a State agency, State enterprise, local government organisation, or State official *under the superintendence or supervision of the Government*”. This being so, the constitutionality of the Regulation of the Election Commission in the case under discussion would straightforwardly fall under the jurisdiction of the Constitutional Court, and, with regard to the constitutionality, the Constitutional Court was of the opinion that the said Regulation ran counter to the Constitution – it was inconsistent

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The Constitutional Court or Administrative Court, as the case may be, shall decide the case submitted by the Ombudsman under paragraph one without delay.

with section 29 paragraph one<sup>9</sup> and section 126<sup>10</sup> of the Constitution – and, thus became unenforceable, in accordance with section 6.<sup>11</sup>

The decision of the Constitutional Court No. 24/2543 has, inadvertently or not, produced at least two major consequences. Independent organs established by the Constitution are, firstly, not under the jurisdiction of the Administrative Court, with the immediate result that there will be a dual system of judicial review.

### **1. Jurisdiction of the Administrative Court over Independent Constitutional Organs**

As a result of the decision of the Constitutional Court above, an independent organ set up by the Constitution will not be under the jurisdiction of the Administrative Court, simply because it is not a State agency under the superintendence or supervision of the Government. Independent constitutional organs can be classified into four categories: (1) offices of the Courts and offices of the independent agencies, (2) agencies or bodies supervising the exercise of state powers, (3) the organ overseeing elections and (4) other organs under the Constitution.

#### **1.1 The Offices of the Courts and Offices of the Independent Agencies**

The Constitution establishes several offices of courts and offices of independent bodies that enjoy autonomy in personnel administration, budget and other activities. The list of these offices appears as follows: (1) Office of the

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<sup>9</sup> **Section 29:** The restriction of such rights and liberties as recognised by the Constitution shall not be imposed on a person except by virtue of provisions of the law specifically enacted for the purpose determined by this Constitution and only to the extent of necessity and provided that it shall not affect the essential substances of such rights and liberties.

The law under paragraph one shall be of general application and shall not be intended to apply to any particular case or person; provided that the provision of the Constitution authorising its enactment shall also be mentioned therein.

The provisions of paragraph one and paragraph two shall apply *mutatis mutandis* to rules or regulations issued by virtue of the provisions of the law.

<sup>10</sup> See note 7, *supra*.

<sup>11</sup> **Section 6:** The Constitution is the supreme law of the State. The provisions of any law, rule or regulation, which are contrary to or inconsistent with this Constitution, shall be unenforceable.

Constitutional Court, (2) Office of the Court of Justice, (3) Office of Administrative Courts, (4) Office of the National Counter Corruption Commission (NCCC) and (5) Office of the State Audit.

(1) Office of the Constitutional Court

According to section 270 of the Constitution, the Constitutional Court has its independent secretariat, with the Secretary-General of the Office of the Constitutional Court as the superior responsible directly to the President of the Constitutional Court. It is additionally specified that this Office has autonomy in personnel administration, budget and other activities as provided by law.

(2) Office of the Courts of Justice

Section 275 of the Constitution also mandates that the Courts of Justice have an independent secretariat, with the Secretary-General of the Office of the Courts of Justice as the superior responsible directly to the President of the Supreme Court of Justice. Likewise, the Office of the Courts of Justice has autonomy in personnel administration, budget and other activities as provided by law.

(3) Office of the Administrative Court

The Constitution, as set forth in section 280, directs that the Administrative Courts have an independent secretariat, with the Secretary-General of the Office of the Administrative Courts as the superior responsible directly to the President of the Supreme Administrative Court. The Office of the Administrative Courts has autonomy in personnel administration, budget and other activities as provided by law.

(4) Office of the National Counter Corruption Commission

Under section 302 of the Constitution, the National Counter Corruption Commission has an independent secretariat, with the Secretary-General of the National Counter Corruption Commission as the superior responsible directly to the President of the National Counter Corruption Commission. The Office of the National Counter Corruption Commission has autonomy in personnel administration, budget and other activities as provided by law.

(5) Office of the State Audit

It is provided in section 312 of the Constitution that the State Audit Commission shall have an independent secretariat, with the Auditor-General as the superior responsible directly to the Chairman of the State Audit Commission.

#### 1.2 Agencies or Bodies Supervising the Exercise of State Powers

The agencies or bodies that are to supervise the exercise of state powers under the Constitution can be listed as (1) the National Counter Corruption Commission, (2) the State Audit Commission, and (3) the Ombudsman.

##### (1) The National Counter Corruption Commission

According to the Constitution, the National Counter Corruption Commission is the major organ in combat of corruption. The National Counter Corruption Commission has the power to conduct a preliminary investigation for the purpose of removing key persons from office (section 305<sup>12</sup>) and the power to refer the matter

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<sup>12</sup> **Section 305:** Upon receipt of the request under section 304, the President of the Senate shall refer the matter to the National Counter Corruption Commission for investigation without delay.

When the investigation is complete, the National Counter Corruption Commission shall prepare a report thereon for submission to the Senate. The said report shall clearly state whether, and to what extent, the accusation put in the request is *prima facie* case and shall state the reasons therefor.

In the case where the National Counter Corruption Commission is of the opinion that the accusation put in the request is an important matter, the National Counter Corruption Commission may make a separate report specifically on the said accusation and refer it to the Senate in advance.

If the National Counter Corruption Commission passes a resolution that the accusation has a *prima facie* case, the holder of the position against whom the accusation has been made shall not, as from the date of such resolution, perform his or her duties until the Senate has passed its resolution. The President of the National Counter Corruption Commission shall submit the report, existing documents and its opinion to the President of the Senate for proceeding in accordance with section 306 and to the Prosecutor General for instituting prosecution in the Supreme Court of Justice's Criminal Division for Persons Holding Political Positions. If the National Counter Corruption Commission is of the opinion that the accusation has no *prima facie case*, such accusation shall lapse.

In the case where the Prosecutor General is of the opinion that the report, documents and opinion submitted by the National Counter Corruption Commission under paragraph four are not so complete as to institute prosecution, the Prosecutor General shall notify the National Counter Corruption Commission for further proceedings and, for this purpose, the incomplete items shall be specified on the same occasion. In such case, the National Counter Corruption Commission and the prosecutor General shall appoint a working committee, consisting of their representatives in an equal number, for collecting

and its opinion to the Supreme Court of Justice's Criminal Division for Person Holding Political Positions in order that such judicial body will consider criminal liability of the accused position holders (section 308<sup>13</sup>). Furthermore, the NCCC has the power to inquire and reach a decision as to whether a State official has become unusually wealthy or has committed an offence of corruption, malfeasance in office or malfeasance in judicial office, and to inspect the accuracy, actual existence as well as change of assets and liabilities of the persons holding political positions and State officials.

## (2) The State Audit Commission

According to Chapter 11 of the Constitution (as seen in section 312<sup>14</sup>) and the Organic Act on the State Audit, B.E. 2542 (1999), the State Audit Commission

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complete evidence and submit it to the Prosecutor General for further prosecution. In the case where the working committee is unable to reach a decision as to the prosecution, the National Counter Corruption Commission shall have the power to prosecute by itself or appoint a lawyer to prosecute on its behalf.

<sup>13</sup> **Section 308:** In the case where the Prime Minister, a minister, member of the House of Representatives, senator or other political official has been accused of becoming unusually wealthy, or of the commission of malfeasance in office according to the Penal Code or a dishonest act in the performance of duties or corruption according to other laws, the Supreme Court of Justice's Criminal Division for Persons Holding Political Positions shall have the competent jurisdiction to try and adjudicate the case.

The provisions of paragraph one shall also apply to the case where the said person or other person is a principal, an instigator or a supporter.

<sup>14</sup> **Section 312:** The State audit shall be carried out by the State Audit Commission and the Auditor-General who is independent and impartial.

The State Audit Commission consists of the Chairman and nine other members appointed by the King with the advice of the Senate, from persons with expertise and experience in state audit, accounting, internal audit, finance and other fields.

The State Audit Commission shall have an independent secretariat, with the Auditor-General as the superior responsible directly to the Chairman of the State Audit Commission, as provided by the organic law on state audit.

The King shall appoint the Auditor-General with the advice of the Senate from persons with expertise and experience in state audit, accounting, internal audit, finance or other fields.

The President of the Senate shall countersign the Royal Command appointing the Chairman and members of the State Audit Commission and the Auditor-General.

Members of the State Audit Commission shall hold office for a term of six years from the date of their appointment by the King and shall serve for only one term.



has powers and duties to set out state audit policies, formulate rules and procedures in connection with the budgetary and fiscal disciplines, give consultancy, give suggestions for improving the state audit, determine administrative penalties, and carry out the consideration and decision upon the disciplinary, budgetary and fiscal offences.

### (3) The Ombudsman

The Ombudsman is the constitutional organ which is conferred a crucial role of inspecting the exercise of state powers. In this regard, it is empowered to consider and inquire into the complaint for fact-findings in the following cases: (a) failure to perform in compliance with the law or performance beyond powers and duties as provided by the law of a Government official, an official or employee of a State agency, State enterprise or local government organisation and (b) performance of or omission to perform duties of a Government official, an official or employee of a State agency, State enterprise or local government organisation, which unjustly causes injuries to the complainant or the public, whether such act is lawful or not.

### 1.3 The Organ Supervising Elections

According to the Constitution, the Election Commission is established as the supervisory organ to supervise an election of members of the House of Representatives, an election of senators, as well as an election of members of a local assembly and local administrators. In addition, the Election Commission oversees the voting in a referendum for the purpose of rendering it to proceed in an honest and fair manner. Under section 144 paragraph two of the Constitution, the Election Commission has powers and duties to find facts and make a decision on any problem or any dispute arising under the organic law on the election of members

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Qualifications, prohibitions, selection, election, and vacation of office of members of the State Audit Commission and the Auditor-General as well as powers and duties of the State Audit Commission, the Auditor-General and the Office of the State Audit Commission shall be in accordance with the organic law on state audit.

The determination of qualifications and procedure for the election of persons to be appointed as members of the State Audit Commission and the Auditor-General shall be made in the manner which can secure persons of appropriate qualifications and integrity and which can provide for the guarantee of the independence in the performance of duties of such persons.

of the House of Representatives and senators, the organic law on political parties, the organic law on the voting in a referendum and the law on the election of members of local assemblies or local administrators.

#### 1.4 Other Constitutional Bodies.

There are two remaining constitutional organs. These are the National Human Rights Commission and the frequency distribution agency pursuant to section 40<sup>15</sup> of the Constitution.

##### (1) The National Human Rights Commission

According to the Constitution, the National Human Rights Commission has the powers and duties to (a) examine and report the commission or omission of acts which violate human rights, (b) propose appropriate remedial measures to the person or agency committing or omitting such acts for taking action, (c) propose to the National Assembly and the Council of Minister policies and recommendations with regard to the revision of laws, rules or regulations for the purpose of promoting and protecting human rights, and (d) prepare an annual report for the appraisal of situations in the sphere of human rights in the country and submit it to the National Assembly.

##### (2) The Frequency Distribution Agency

Section 40 of the Constitution sets up an independent regulatory body to be charged with the duties to distribute frequencies and supervise radio or television broadcasting and telecommunications businesses.

Having pointed out all the independent organs under the Constitution, it must be recalled that the decision of the Constitutional Court above establishes a

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<sup>15</sup> **Section 40:** Transmission of frequencies for radio or television broadcasting and radio telecommunication are national communication resources for public interest.

There shall be an independent regulatory body having the duty to distribute the frequencies under paragraph one and supervise radio or television broadcasting and telecommunication business as provided by law.

In carrying out the act under paragraph two, regard shall be had to utmost public benefit at national and local levels in education, culture, State security, and other public interest including fair and free competition.

precedent to the effect that all these agencies or bodies are placed outside the jurisdiction of the Administrative Court.

## **2. Administrative Disputes under Dual Jurisdiction: A Mistake?**

Now that we are now bound by the decision of the Constitution Court No. 24/2543 above that actions by independent agencies established by the Constitution do not fall within the jurisdiction of the Administrative Court, we will have yet to find it hard to explain why such agencies' actions elude the scrutiny net of the Administrative Court albeit those actions are administrative in nature and concern the exercise of administrative powers as well. Illustrations include orders given in connection with personnel appointment, removal or disciplinary punishment. If, for example, Head of an independent agency under the Constitution issues an order dismissing its official and it is challenged that the order is unlawfully made, then, the dispute in question, based on the decision of the Constitutional Court No. 24/2543, is outside the jurisdiction of the Administrative Court. In this connection, section 271 of the Constitution provides: "The Courts of Justice have the powers to try and adjudicate all cases except those specified by this Constitution or by the law to be within the jurisdiction of other courts." It follows, therefore, that the dispute in the hypothetical dismissal order case above is to be submitted to the Court of Justice.

It is questionable whether it is intended by the Constitution that administrative acts by independent bodies under the Constitution are to be within the jurisdiction of the Court of Justice rather than the Administrative Court or whether it is merely an unexpected consequence of the decision of the Constitutional Court. Indeed, according to section 9 paragraph two of the Organic Act on the Establishment of the Administrative Courts and Administrative Court Procedure, B.E. 2542 (1999), the Administrative Court has the power to try and adjudicate all general administrative disputes, except the disputes specified by law to be under the jurisdiction of other courts. It seems that we will have to bear the uneasy sentiment on this point.

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