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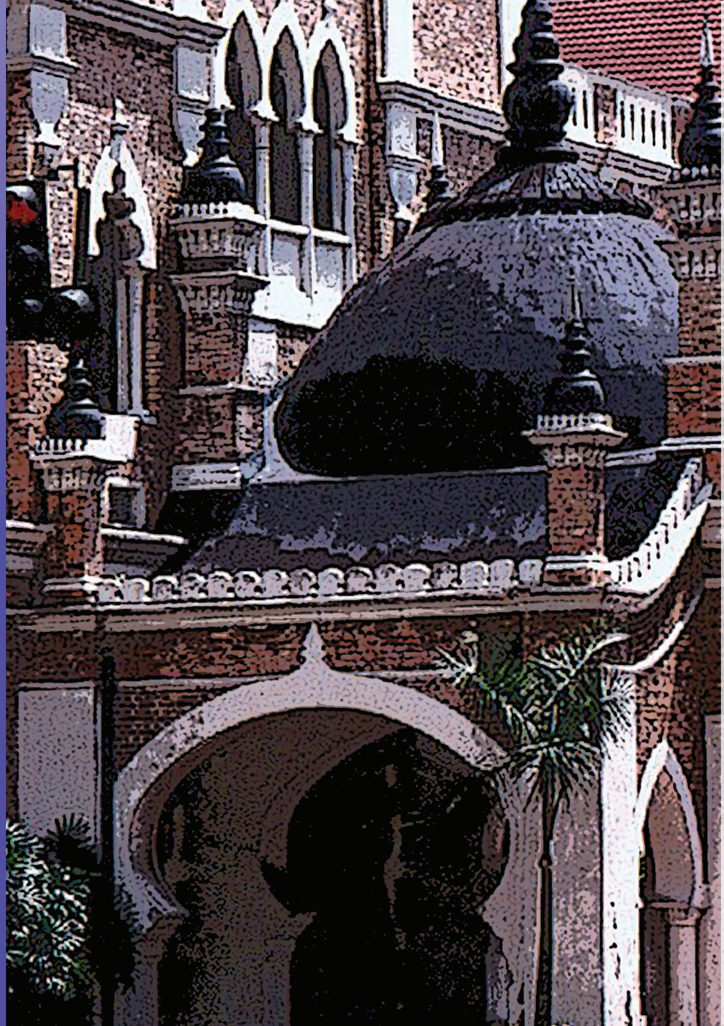
CONSTITUTIONALISM IN SOUTHEAST ASIA



Volume 3 Cross-Cutting Issues

Konrad
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Stiftung

CONSTITUTIONALISM IN SOUTHEAST ASIA

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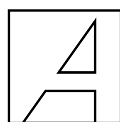

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PREFACE

"Every country has its own constitution (...) ours is absolutism moderated by assassination", a Russian is reported to have said in the 19th century. Nowadays, in most countries, constitutions are considered the basic and supreme laws. They typically are supposed to guarantee rules for the political process and rule of law, and often guarantee individual rights and fundamental policies. Constitutions provide legitimacy to states and to governments and should not just be "nice words on paper", but real supreme law. A constitutional state is not a state that has a constitution but a state that functions according to a constitution. This might be called constitutionalism and although there may be different versions and significant setbacks, the concept of constitutionalism is on the rise.

Southeast Asia is no exception. Nearly all Southeast Asian countries have constitutions and in all of them constitution making or constitutional reform has occurred, or been on the agenda in recent decades. Some Southeast Asian countries have established special Constitutional Courts and Councils. The process of constitutionalization is even visible at a regional level. Southeast Asian states have agreed on a Charter for the Association of Southeast Asian Nations (ASEAN). They have not only started a process which may lead to what is called regional constitutionalization, but have also stipulated "adherence to the rule of law, good governance, the principles of democracy and constitutional government" as principles to be followed by all member states (Article 2 [2g] ASEAN Charter). Constitutionalism clearly is a Southeast Asian agenda item.
This three volume publication includes the constitutional documents of all countries in Southeast Asia as of December 2009, as well as the ASEAN Charter (Vol. I), reports on the national constitutions (Vol. II), and a collection of papers on cross-cutting issues (Vol. III) which were mostly presented at a conference in 2008. Some of the constitutions have until now not been publicly available in an up to date English language version, but apart from this we believe that it is useful to have them all together in a printed edition. The country reports provide readers with up to date overviews on the different constitutional systems. In these reports, a common structure is used to make comparisons easy. References and recommendations for further reading will facilitate additional research. Some of these reports are the first ever systematic analysis of those respective constitutions, while others draw on substantial literature on those constitutions. The contributions on selected issues highlight specific topics and cross-cutting issues in more depth. Although the whole range of possible topics cannot be addressed in such a volume, they indicate the range of questions facing the emerging constitutionalism within this fascinating region.

This publication, which is the first of its kind in the region, is published and funded by Konrad-Adenauer-Stiftung (KAS). In 2005, this German political foundation established a regional programme for Southeast Asia to address various aspects of the rule of law. The programme aims at strengthening the dialogue within the region as well as between the region and Europe. Constitutionalism naturally plays an important part in this programme. The project would not have been possible without the help of numerous constitutional scholars and experts from around the region. The editors are grateful to all the authors, who dedicated their valuable time to this

project and made it possible to finalize the publication within a comparatively tight time frame. Thanks also go to the involved staff at KAS office in Singapore and the Senate in Phnom Penh, and to Chris and Gerald Leather for their extensive proof reading and translation assistance. Considerable effort has been made to ensure the accuracy of the documented texts. In the case of the Cambodian constitution, an updated and improved translation was prepared especially for this publication. However, the editors can not guarantee the correctness of the published constitutions or accept responsibility for any inaccuracies. We recommend that where high levels of accuracy are required, official versions of the constitutions should be obtained from the respective official sources. It goes without saying that in countries where English is not the official legal language, the English version is not an official version anyway. Although evident, we emphasize that all opinions expressed in Vol. II and III are those of the authors and do not reflect the opinions of the editors or the publisher.

Finally, we want to express our hope that this publication will contribute to the understanding of developments in Southeast Asian constitutional law and that readers find it useful and interesting.

Singapore, June 2010

Clauspeter Hill   Jörg Menzel

Chapter One: Constitutionalism in Southeast Asia

CONSTITUTIONALISM IN SOUTHEAST ASIA: SOME COMPARATIVE PERSPECTIVES

Jörg Menzel

I. Introduction

Fourteen years after Bruce Ackermann's famous article[1], constitutionalism still seems to be on the rise. More than ninety new constitutions have been adopted in the last twenty years[2]. To have a constitution, typically embodied in a single written document, seems to have become a necessary element of statehood. But, does every state with a constitution embrace constitutionalism, and does the converse apply, do states without a constitution not embrace constitutionalism? Very few states do not now have written constitutions as a matter of principle, but two of those states, Great Britain and New Zealand, are widely considered constitutionalist despite that lack of a single document[3], as they embrace certain principles now considered constitutional essentials, namely democracy, protection of basic rights and the rule of law. Other states that have a single written document called a constitution may not be considered constitutionalist because of their failure to embrace these principles. There may be differences of opinion about the level of constitutionalism, not only because of a possibly diverging evaluation of factual situations (does a government commit election fraud, human rights violations etc.), but also because of different definitions of constitutionalism itself. Can a country be constitutionalist despite not being democratic (or having a non-Western definition of what democratic means)[4]? How should basic rights be protected?[5] Should there be some kind of judicial review? What about the relationship between (constitutional) law in the books and life on the street? Some constitutions seem symbolic or they simply lack the authority to steer political and legal developments. Even if a constitution is taken seriously and respected in practice, there are still questions about its overall scope. Some constitutions are just organizational statutes just regulating the most important aspects of the

1 The Rise of World Constitutionalism, 83 Virginia Law Review 771 (1996).

2 *Cheryl Saunders,* Towards a Global Constitutional Gene Pool, 4 National Taiwan University Law Review 2 (2009), at 17.

3 For a recent discussion see *T.R.S. Allen*, In Defence of the Common Law Constitution. Unwritten Rights as Fundamental Law, LSE Working Papers 5/2009 (London School of Economics).

4 It is interesting that in German, the literal version of the term constitutionalism, which is "Konstitutionalismus", is not used with respect to modern democratic constitutions, but with respect to pre-democratic German monarchic constitutions of the 19th century. "Verfassungsstaat", literally meaning constitutional state, is the term used for a state based on a modern democratic constitution.

5 A significant number of (mostly older) constitutions do not include a catalogue of rights (including the original version of the Constitution of the United States).

political process, whereas others are comprehensive orders of values[6], providing for substantial fundamental rights and major policy decisions from education to the environment. The discourse on constitutionalism with all its unanswered questions is thus comparable to the discourse on the rule of law, with thick and thin concepts competing (and no clear definition what is thin or thick)[7]. It is also similar to the well-known distinction between "rule by law" and "rule of law". Do constitutions legitimize government, or do they limit it? The best answer to this will be that it should do both[8] (just as rule by law is not the opposite, but an aspect of rule of law), but philosophies and practices are obviously quite diverse around the globe.

Karl Loewenstein, in one of the more influential attempts to categorize constitutions, distinguished normative, nominalistic and semantic constitutions.[9] Normative constitutions are respected in practice, nominalistic constitutions are not fully respected but depend on the good will of the political leaders, and semantic constitutions are only words on paper without relevance in practice. Many other categorisations have been proffered. Distinctions between ambitious and descriptive constitutions, value-oriented and technical constitutions or transformative and preservative constitutions[10] are helpful, as are distinctions between professional, political and traditional constitutions[11]. In essence, it is often about how relevant a constitution is and how much it is expected to achieve. In this respect, Kenneth C. Wheare was of the opinion that "practically without exception, they [modern constitutions] were drawn up and adopted because people wished to make a fresh start, so far as their system of government was concerned"[12]. Although that statement is true with respect to many famous and even less well known constitutions around the world, we have to acknowledge the exceptions. Some constitutions are *not* expressions of the will of the respective peoples, but simply drafted to cement a status quo, the power of incumbent leaders / elites and to *prevent* any kind of fresh start. Some are only window dressing intended to imbue a government with legitimacy in the international arena.

To have a constitution has, as mentioned, become somewhat of a *conditio sine qua non* of the modern state. Whereas earlier in the 20th century the Nazi regime in Germany did not waste time adopting a new constitution (although it initially planned to do so), today even the most autocratic dictatorial regimes usually produce a written document called a constitution[13]. Regarding their

6 See also *Thilo Rensmann*, The Constitution as a Normative "Order of Values. The Influence of Human Rights Law on the Development of Modern Constitutionalism, in: Festschrift für Christian Tomuschat, Kehl 2006 (Engel Verlag), p. 259.

7 See also *Wil Waluchow*, "Constitutionalism", in: Stanford Encylopedia of Philosophy (2007) <http://plato.stanford.edu/entries/constitutionalism>.

8 The function of limitation is often predominant, however, see e.g. *András Sajó*, Limiting Government. An Introduction to Constitutionalism, Budapest 1999 (Central European University Press).

9 *Karl Loewenstein*, Verfassungslehre, 2nd edition, Tübingen 1969 (Mohr), p. 151.

10 For the latter see *Cass Sunstein*, Designing Democracy. What Constitutions do, Oxford 2002 (Oxford University Press), pp.67-69.

11 For an application of this approach, developed by *Ugo Mattei* (Three Patterns of Law, Taxonomy and Change in the World's legal systems, 45 American Journal of Comparative Law 5 [1997]), in the field of comparative constitutional law, see also *Saunders*, note 3, at 25-26.

12 *Kenneth C. Wheare*, Modern Constitutions, London 1951 (Oxford University Press), p. 8.

13 See for example the Constitution of Democratic Kampuchea (1976).

substance it seems that constitutions now in their overwhelming majority claim to be democratic (with varying definitions thereof). They are also usually longer and address more topics compared to the constitutions of the late 18th and early 19th century[14]. The number of "constitutional goods" has significantly increased[15]. Constitutions often stipulate social and economic rights (and not only liberal rights as the United States Constitution), and they provide guidelines for policies in fields such as economy, education, health, environment etc. Modern constitutions also typically contain clear statements on the supremacy of the constitution (which was not common in earlier times) and increasingly provide for constitutional watchdogs, most notably judicial review by a Supreme Court or a specialized Constitutional Court.

Constitutionalism may be on the rise worldwide but it develops differently from state to state. There may be a tendency to more similarity in constitutions around the world, but, as Cheryl Saunders has rightly pointed out, this tendency should not be overestimated[16]. There is no universal "model constitution"[17] and it would not be a good idea to develop one. Comparative constitutional law[18], which is as much on the rise as constitutionalism, examines the similarities and differences. For the time being, comparative law in general (comparing legal systems, traditions etc.) and comparative constitutional law are not yet well-integrated disciplines. Only recently has comparative constitutional law been included in some general comparative law handbooks[19]. As the field is relatively new (or re-awakened after a long sleep[20]), inevitably there is debate about benefits, risks and methodology[21]. One of the traditional shortcomings in comparative constitutional law has been its euro-centrism, but there is increasing awareness of interesting and important constitutional developments in all corners of the world and the internet has revolutionized access to information about developments even in formerly remote jurisdictions.

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14 See also the comparison of the three generations of constitution (USA, Germany, South Africa) at *Peter E. Quint*, What is a twentieth-century constitution?, 67 Maryland Law Review 237 (2007).

15 *Alan Brudner*, Constitutional Goods, Oxford 2004 (Oxford University Press).

16 *Saunders*, note 3, at 28.

17 In the United States of America the National Municipal League has proposed a "Model State Constitution" (first in 1921), see *Alan G. Tarr*, Understanding State Constitutions, Princeton 1998 (Princeton University Press), p. 152.

18 See *Mark Tushnet*, Comparative Constitutional Law, in: Mathias Reimann / Reinhard Zimmermann (eds.), The Oxford Handbook of Comparative Law, Oxford 2006 (Oxford University Press), pp. 1225-1257; *Vicky Jackson* & *Mark Tushnet*, Comparative Constitutional Law, 2nd edition 2005; *Norman Dorsen / Michael Rosenfeld / Andràs Sàjo / Suzanne Baer*, Comparative Constitutionalism: Cases and Materials (2003). The evolution of this field is also evidenced by the increased number of conferences as well as specialized law journals such as the "International Journal of Constitutional Law"; *Brian Landsberg / Leslie Jacobs*, Global Issues in Constitutional Law, St. Paul 2007 (Thomson/West); *Vikram David Amar / Mark V. Tushnet* (eds.), Global Perspectives on Constitutional Law, Oxford 2009 (Oxford University Press).

19 See e.g. *Andrew Harding and Peter Leyland*, Comparative Law in Constitutional Contexts, in: Esin Örücü and David Nelken (eds.), Comparative Law. A Handbook, Oxford and Portland 2007 (Hart Publishing), pp. 313-338; *Tushnet*, note 18.

20 There was a considerable body of comparative constitutional law literature published in Germany and elsewhere in the 19th century.

21 See *Saunders*, note 3, at 5 to 16; Gunter Frankenberg, Comparing Constitutions: Ideas, Ideals and Ideology – Toward a Layered Narrative, 4 Int'l J. Const.L. 439 (2006); *Ran Hirschl*, On the blurred methodological matrix of comparative constitutional law, in: Sujit Choudry (ed.), The Migration of Constitutional Ideas, Cambridge 2006 (Cambridge University Press), p. 39; *Tushnet*, note 18, p. 1225.

The (again Western rooted) main distinction in general comparative law, the one between common law and civil law systems, is not as significant in constitutional comparative law as in other fields. There is no distinct type of constitutions in common law countries as opposed to those in "civil law countries". Great Britain, the motherland of all common law, is an exception within the common law world in still having no written constitution and stands e.g. in massive contrast to the United States regarding its constitutional structure. The constitutional law of Germany, which is one of the motherlands of the civil law tradition, on the other hand has significant similarities to the constitutional law of the United States, India and South Africa. Many of the relevant choices in constitutional design (unitary vs. federal, monarchic vs. republican, parliamentarian vs. presidential, providing basic rights or not, judicial review or not) have nothing to do with whether the state has a common law and civil law system, is. At least there is one distinction civil law systems usually (although not always[22]) establish separate constitutional courts, whereas common law countries tend to put judicial review in the hands of the ordinary courts (with final responsibility lying with the highest court in that country)[23].

Comparative constitutional law is not just an interesting hobby for academics. It has practical applications[24]. Constitution makers around the world try to learn from experiences in other countries. Constitution making in the 19th century was largely influenced by ideas from the United States of America and its states, as well as the constitutional aftermath of the French Revolution. Ever since constitutional design is inspired by models and experiences elsewhere, the constitution of the United States, various French constitutions, Germany's post World War II constitution and South Africa's post apartheid constitution being among the particularly influential models[25]. And comparison doesn't end with the adoption of a constitution, as nowadays courts as well increasingly take the decisions of courts in other countries into account when interpreting their constitution[26], particularly, but not exclusively, in the field of basic rights. Common standards also make their way into global and regional international law[27], which provides standards for

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22 See for example Japan and Latvia, where, within civil law settings, supreme courts are in charge of final constitutional interpretation.

23 South Africa is frequently mentioned as a common law state that has a Constitutional Court, but it should be noted that South Africa is generally classified as a mixed system; see e.g. *Jacques E. du Plessis*, South Africa, in: *Jan M. Smith*, Elgar Encyclopedia of Comparative Law, Cheltenham 2006 (Elgar Publishing), pp. 667-671.

24 See also *Andrew Harding*, Global Doctrine and Local Knowledge: Law in Southeast Asia, ICLQ 51 ICLQ 31 (2002), at 44: "Comparative Law has become an industry".

25 On the "competition", which the US constitution received as a model, see also *Heinz Klug*, Model and Anti-Model: The United States Constitution and the "Rise of World Constitutionalism", 3 Wisconsin Law Review 297 (2000).

26 The literature written on this topic in recent years fills libraries. In the USA it is mainly inspired by the controversy within the Supreme Court on the issue. See most comprehensively *Vicky C. Jackson*, Constitutional Engagement in a Transnational Era, Oxford 2010 (Oxford University Press). Comparative Information on a number of jurisdictions (USA, Canada, Australia, Germany, India, South Africa) can be found in *Jeffrey Goldworthy* (ed.), Interpreting Constitutions. A Comparative Study, Oxford 2006 (Oxford University Press). The topic is discussed in Southeast Asia as well, particularly in Singapore: see e.g. *Arun K. Thiruvengadam*, Comparative law and constitutional interpretation in Singapore: Insights from constitutional theory, in: Li-ann Thio / Kevin YL Tan (eds.), Evolution of a Revolution. Forty years of the Singapore Constitution, London / New York 2009 (Routledge), p. 114; *Victor Ramraj*, Comparative Constitutional Law in Singapore, 6 SingJICL302 (2002); *Li-Ann Thio*, Beyond the 'Four Walls' in an Age of Transnational Judicial Conversations: Civil Liberties, Rights Theories, and Constitutional Adjucation in Malaysia and Singapore, 19 Columbia Journal of Asian Law 428 (2006).

27 *Thilo Rensmann*, Modern Constitutionalism between Regional and Universal Values, in this Volume.

constitution making, not only in the field of human rights, but also other aspects of rule of law, democracy[28] and good governance[29]. The fact that constitution making and the promotion of constitutionalism have become cornerstones of state and nation-building as well as development cooperation, has contributed to the increased attention given to "extraordinary places"[30]. The making of the South African constitution has produced an unprecedented interest in the constitutional development of an African country and more recently places like Afghanistan, Iraq and Nepal, to mention only a few, have received a lot of attention. In all these places, experiences in other countries have played a significant role in the discussion process. Constitutional ideas migrate, and with ("constitution-building") experts able to travel to nearly every capital in the world within 48 hours to do their business and endless amounts of documents being available at the click of a mouse, they "migrate" faster than ever before.

Regional organizations increasingly stipulate standards of constitutional homogeneity in a way previously only known in federal structures. This is true for established organizations such as the European Union[31] and the Organization of American States (OAS)[32], but now also in ASEAN as well[33]. This regional stipulation of constitutional standards is one of the reasons why a regional approach to comparative constitutional law is of special value. Following such a path, it quickly emerges that the levels of similarity differ significantly. Latin America for example has remarkably common patterns[34]. It is not only fairly homogenous in terms of language and religion (Spanish/ Portuguese, Roman-Catholic), but most of its states have also much in common constitutionally, with formal concepts of republicanism, presidentialism, judicial review and separation of power revealing the strong influence of the United States. Africa is much more diverse in every respect, but there are interesting attempts to explore patterns of constitutionalism on this continent[35].

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28 See e.g. the seminal article by *Thomas M. Franck*, The Emerging Right to Democratic Governance, 86 AJIL46 (1992) and Gregory H. Fox & Brad R. Roth (eds.), Democratic Governance and International Law, Cambridge 2000 (Cambridge University Press); Richard Burchill (ed.), Democracy and International Law, Aldershot 2006 (Ashgate).

29 *Beate Rudolf*, Is 'Good Governance' A Norm of International Law?, in: Festschrift für Christian Tomuschat, Kehl u.a. 2006 (N.P. Engel Verlag), p. 1007, who concludes that good governance is indeed emerging "as a legal principle of customary international law" (at p. 1028).

30 For this term see *Esin Örücü*, Comparatists and extraordinary places, in: Pierre Legrand & Roderick Munday (eds.), Comparative Legal Studies: Traditions and Transitions, Cambridge 2003 (Cambridge University Press), p. 467.

31 *Richard Burchill*, The Promotion and Protection of Democracy by Regional Organizations in Europe: The Case of Austria, 7 European Public Law 79 (2001).

32 *Stephen J. Schnably*, Constitutionalism and democratic government in the inter-American system, in: Fox/Roth, Democratic Governance in International Law, note 28, p. 155.

33 *Richard Burchill*, Regional Integration and the Promotion and Protection of Democracy in Asia: Lessons from ASEAN, 13 Asian Yearbook of International Law (2008). See also supra IX.

34 For some recent analysis of aspects of Latin American Constitutionalism see *Miguel Schor*, Constititutionalism Through the Looking Glass of Latin America, 41 Texas International Law Journal 1 (2006): *Paolo G. Carozza*, From Conquest to Constitutions: Retrieving a Latin American Tradition of Human Rights, 25 Human Rights Quarterly 281 (2003).

35 *H. Kwasi Prempeh*, Africa' "constitutional revival": False start or new dawn?, I.Con 2007, pp. 1-38; H. Kwasi Prempeh, Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa, 80 Tulane Law Review 1 (2006; *John Hatchard, Muna Ndulo and Peter Slinn*, Comparative Constitutionalism and Good Governance in the Commonwealth. An Eastern and South African Perspective, Cambridge 2004 (Cambridge University Press).

Constitutionalism in Europe is homogenous in respect of some core values and principles, at least as far as the member states of the European Union are concerned. But the constitutional traditions in Europe are nonetheless very diverse with written and unwritten constitutions, monarchies and republics, unicameral and bicameral parliaments, etc. However, constitutional diversity is much greater – and much more substantial - in Asia[36], particularly in Southeast Asia, which is the focus of this publication.

The term Southeast Asia emerged as late as the Second World War and although it defines a region of old and grand civilizations it has, sandwiched between Indian and Chinese spheres of influence, for a long time not been regarded as a region with a distinct identity[37]. This changed in the second half of the 20th century with ASEAN gradually developing as the best-known regional organization in the whole of Asia. However, despite the existence of ASEAN as a well-developed regional organization[38], the area is politically and legally as diverse as it is culturally. All Southeast Asian States have constitutions (Myanmar's Constitution will come into force during 2010), but they are as diverse as one can imagine. This leads to interesting questions, including the relevance of the "Asian Values" concept invented in Southeast Asia[39], for Southeast Asian constitutionalism. Another fascinating question is about the relevance of the new ASEAN Charter for the development of national constitutionalism in the region, as this charter contains some interesting commitments to the standard values of modern constitutionalism. I will return to these questions later in this overview.

II. Constitutional Histories

Southeast Asia is a region that has seen many magnificent cultures and formidable states over thousands of years. The prevailing form of government was monarchic and written constitutions were not adopted in the region before it was colonized. Modern Southeast Asian constitutional history[40] therefore seems to have arisen as colonialism ebbed. An early development was the

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36 *Lawrence Ward Beer* (ed.), Constitutional Systems in Late Twentieth Century Asia, Seattle & London 1992 (Washington University Press); *Graham Hassall & Cheryl Saunders*, Asia-Pacific Constitutional Systems, Cambridge 2002 (Cambridge University Press); see also *Cheryl Saunders / Graham Hassall* (eds.), Asia Pacific Constitutional Yearbook, Volume 1-5 (1993-1997), Centre for Comparative Constitutional Studies, Melbourne (1995-1999); see most recently also *Jiunn-Rong Yeh*, The Emergence of Asian Constitutionalism. Features in Comparison, 4 National Taiwan University Law Review 38 (2009), mostly focussing on East Asia.

37 For some standard treatises on Southeast Asian history see *D.G.E. Hall*, A History of Southeast Asia, 4th edition, New York 1981 (Palgrave); *Nicholas Tarling* (ed.), The Cambridge History of Southeast Asia, Two Volumes (in four paperbacks), Cambridge 1999 (Cambridge University Press); *Norman G. Owen* (ed.), The Emergence of Modern Southeast Asia, Singapore 2005 (Singapore University Press).

38 East Timor, the youngest state in the region, is the only non-member of ASEAN in Southeast Asia, but its application for membership is pending.

39 On the Asian Values debate see e.g. *Leena Avonius & Damien Kingsbury* (eds.), Human Rights in Asia. A Reassessment of the Asian Values Debate, New York 2008 (Palgrave); *Anthony J. Langlois*, The Politics of Justice and Human Rights, Southeast Asia and Universalist Theory, Cambridge 2001; *Amartya Sen*, Human Rights and Asian Values, New York 1997; *Karen Engle*, Culture and Human Rights: The Asian Values Debate in Context, 32 International Law and Politics 291 (2000); *Simon S.C. Tay,* Human Rights, Culture, and the Singapore Example, 41 McGill Law Journal 743 (1996).

40 For an insightful overview see also Kevin YL Tan, Comparative Constitutionalism: The Making and Remaking of Constitutional Orders in Southeast Asia, 6 Singapore Journal of International and Comparative Law 1 (2002).

attempt of Philippine Freedom Fighters to establish an independent state at the end of the 19th century[41]. Although their 1899 "Malolos Constitution" was short lived, it is significant for regional constitutional history. It is not only the first independent constitution in the region, but also a model for modern constitutionalism, entailing a concept of government based on democracy, separation of power and the endorsement of basic rights. But it was not until 1935 that another constitution was adopted in the Philippines and 1946 before this became the constitution of an independent state. When the Philippines became independent in 1946, the Kingdom of Thailand, the only state in the region that was never colonized, was already under its third constitution, with the first having been adopted in 1932. Many more would follow in Thailand where the adoption of new constitutions would become an all too regular event. The first big wave of constitution making occurred around the end of Second World War with constitutions adopted in Indonesia (1945/1949/1950), North Vietnam (1946), Burma, Cambodia and Laos (1947). The next state to get a constitution was Malaya (later Malaysia) in 1957. Singapore and Brunei transformed pre-independence autonomy constitutions into sovereign state constitutions in 1965 and 1984 respectively.

Although the early constitutions in Southeast Asia were often conceptually democratic, the ideas of democracy and constitutionalism had, as in other parts of the decolonizing world[42], a difficult time in the beginning. Kevin YL Tan has identified the legacy of colonialism, communism, as well as revolution (and evolution) as the three major themes of the region's constitutional development[43]. As a result, authoritarian systems of different types and based on different ideologies emerged in the early post-colonial phase, sometimes transforming, abusing or simply ignoring promising constitutions in order to guarantee political power. Communist dictatorships emerged in Vietnam (1946/1975), Laos (1975) and Cambodia (1975); anti-communist autocrats ruled in South Vietnam (pre 1975), the Philippines and Indonesia (from Suharto's takeover); and the military, dominated in Cambodia (under Lon Nol), still dominates in Burma, and has stepped in and out of power on a regular basis in Thailand. The stable forms of government in Malaysia and Singapore are labeled "soft authoritarianism". Overall, it can be said that from the 1950s to the mid 1980s democracy had hardly any stronghold on the region.

Things started to change again, however, as in other parts of the world, in the second half of the 1980s. The first big step was the re-democratization of the Philippines with removal from power of President Marcos and the adoption of a constitution "with a strong democratic ethos"[44] in 1987. Cambodia adopted a democratic constitution in 1993 (the country's fifth constitution since 1947), Thailand gave itself new democratic constitutions in 1997 and, after yet another military coup in 2006, again in 2007. Indonesia started its democratization process with comprehensive

41 See *Harry Roque*, Philippines, Volume II, p. 213 (214).

42 See also *Brun-Otto Bryde*, Constitutional Law in "old" and "new" law and development, in: 41 Verfassung und Recht in Übersee 10 (2008), at 11: "The first transfer to constitutionalism was not very successful. Ten years after independence most newly independent states in Africa were either military regimes or one-party-systems (...)" Southeast Asia has had a similar experience.

43 *Tan*, note 40, at pp. 2-3.

44 *Tan*, note 40, at p. 34.

45 See comprehensively *Denny Indrayana*, Indonesian Constitutional Reform 1999 to 2002: An Evaluation of Constitution Making in Transition, Jakarta 2009; see also *Indrayana*, Indonesia, in Volume II.

constitutional reforms following the end of the Suharto regime (1999 to 2002)[45], and newly independent East Timor got its democratic constitution in 2002. Vietnam and Laos have not democratized, but in 2002 and 2003 respectively they significantly reformed their constitutions in processes that aimed to liberalize their economic systems as well as improve the legal system and rule of law[46]. Constitution making and reform was on the agenda even in the most blatantly undemocratic states of the region, with a new constitution (formalizing military dominance on all levels) being adopted in Myanmar in 2008 and constitutional reforms (basically entrenching the absolute monarchy[47]) being adopted in Brunei in 2004.

Overall, Southeast Asian constitutional development has been quite dynamic in recent decades. All Southeast Asian countries have either had more than one constitution or significant amendments since independence. Only in Myanmar[48] and Laos (1975 to 1991) were there significant periods where there were no formal constitutions in place. The record-holder for the number of constitutions is Thailand, which is currently under its 18th constitution since 1932, whereas the most stable constitution in recent times has been that of the Philippines, which has not been amended since its adoption in 1987[49].

III. Constitution Making and Amendment Procedure

Constitution making in Southeast Asia has been as diverse as elsewhere in the world. The first constitutions were often drafted before independence, with significant influence of the still incumbent colonial powers (Cambodia, Laos, Myanmar, Malaya, Singapore and Brunei). In other cases, the first constitutions were hastily drafted post-independence constitutions (Indonesia, Vietnam). Later, some constitutions were drafted in carefully organized and transparent processes (Philippines 1987, Thailand 1997), but in other cases, even recent constitutional drafting has been secretive (Laos 1991, Cambodia 1993, Myanmar 2008) or non-inclusive (East Timor 2002). Although sometimes the people themselves have been involved in approving the new constitution through a referendum, some referendums have not met democratic standards. On the contrary, some constitutional referendums have been used to give questionable legitimacy to authoritarian rule or otherwise questionable practices[50].

Southeast Asians constitutions all have special provisions for amendment and most of the amendment procedures are not too technically difficult. A controversial exception is the new constitution of Myanmar, under which future amendments might be difficult for even clear

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46 See *Mark Sidel*, The Constitution of Vietnam, Oxford 2009 (Hart Publishing), pp. 83-109: The Charter of Renovation (Doi Moi); see also *Clauspeter Hill,* in Volume II; for Laos see *Gerald Leather*, in Volume II.

47 See *Tsun Hang Tey*, Brunei's Revamped Constitution: The Sultan as the Grundnorm?, 9 Asian Law 265 (2007); *Tsun Han Tey*, Brunei, in Volume II.

48 See *Myint Zan*, Myanmar, in Volume II.

49 For a general analysis on the basis of global comparison see *Zachary Elkins, Tom Ginsburg & James Melton*, The Endurance of National Constitutions, Cambridge 2009 (Cambridge University Press).

50 For a critical assessment of the recent constitution making process in Myanmar see Human Rights Watch, Vote to Nowhere. The May 2008 Constitutional Referendum in Burma, May 2008 <www.hrw.org>. The making of the current Constitution of Thailand is another example, see *Traimas / Hoerth*, Thailand, Volume II, pp. 314-315.

majorities to achieve[51]. At the other end of the spectrum, constitutional amendments have been unspectacular and routine in Malaysia and Singapore[52]. Most countries have amended their constitutions less often. Some amendments are fundamental and bring the distinction between constitution making and constitutional amendment into question (Indonesia 1999 to 2002). Amendment procedures are sometimes more and sometimes less "public". In Laos, the substantial 2003 amendments were not even published within Laos for more than six months after adoption. One of the problematic "amendments" in recent times occurred in Cambodia in 2004, where, in order to overcome an election deadlock, an "additional law to the constitution" was adopted in a process that did not comply with the constitutional requirements for amendment[53].

IV. General Aspects

Southeast Asian constitutional history and its present constitutional landscape provide examples of most categorial distinctions available in comparative constitutional theory. Ugo Mattei's assumption that all Southeast Asian legal systems would be based on the "rule of tradition although they may tend to the rule of politics"[54] is problematic in general[55] and it is no less problematic with respect to constitutional systems. In terms of Cass Sunstein's categories there are transformative constitutions (Philippines, Cambodia) and preservative constitutions (Brunei, Myanmar). The regions' constitutions vary in degrees of normativity. Today all Southeast Asian constitutions may claim to be the supreme laws of the respective states, but in reality they differ in the degree to which they are normative. There is significant judicial review in the Philippines and Indonesia, which indicates at least some level of normativity. Singapore and Malaysia may be criticized for amending their constitutions frequently, but these frequent amendments at least indicate that the constitution is not simply ignored in its role as supreme law. At the other end of the spectrum the constitution of Laos still seems to be in the tradition of socialist "symbolic" or "semantic" constitutions. Unfulfilled constitutional provisions can also be found elsewhere, for example in the constitutions of Cambodia, Thailand and the Philippines, which have constitutions filled with promises.

Is there anything specifically "Asian" or even "Southeast Asian" in the constitutions? Is Southeast Asian constitutionalism based on some specific "Asian values"? No constitution expressively commits itself to Asian values. The question is therefore whether there are certain provisions within Southeast Asian constitutions that are expressions of such values. Asian values were a prominent issue in the early 1990s, when, after the end of the Cold War, the global quest for democracy and human rights was at its peak and at the same time, authoritarian "Asian Tigers"

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51 According to chapter XII of the Constitution of 2008 any amendment needs a majority of more than 75 % in parliament and with respect to some specified provisions an additional absolute majority in a referendum.

52 Critics have argued that because of the frequent amendments to its constitution Singapore does not have a real constitution at all, see the reference at *Jaclyn Ling-Chien Neo and Yvonne CL Lee*, Constitutional Supremacy. Still a little dicey?, in: Thio/Tan (eds.), Evolution of a Revolution, note 26, at 155.

53 See *Menzel*, Cambodia, in Volume II.

54 *Mattei,* note 11, at 36 (Fn. 136).

55 *Andrew Harding*, Comparative Public Law. Some Lessons from Southeast Asia, in: Andrew Harding / Esin Örücü (eds.), Comparative Law in the 21st century, London 2002 (Kluwer), p. 249 (at 264-265).

were becoming more self confident due to their economic successes. Within Southeast Asia, the governments of Singapore, Malaysia and Indonesia were the main proponents of Asian values, but Indonesia and to a certain extent Malaysia have experienced significant change since the heyday of this idea in the period before the Asian Crisis in 1997. In Singapore with its unique "communitarian" parliamentary system it seems that Asian values have mutated into "Singapore exceptionalism"[56]. Some other extraordinary concepts include the Malaysian constitution with its unique federal system, Brunei with its constitutionally enshrined absolute monarchy and Myanmar, which has constitutionally cemented the dominance of the military. However, none of these constitutions seems to be particularly "Asian" in concept; they are all concrete answers to specific national situations.

Victor V. Ramraj has observed that constitutional developments in Southeast Asia have taken place largely independently of Western discourse on constitutionalism[57]. Although it is indeed true that Southeast Asian constitutions are sometimes quite different in structure and style from modern Western models, global developments and influences are apparent in most constitutions. Most of them establish versions of presidential or parliamentary democracy or the Soviet Union version of communist constitutions. Constitutional reforms in Vietnam and Laos were undertaken specifically in response to international expectations with respect to economic investment regulation. Recent global developments are absorbed as well. For example, Thailand's constitution follows the recent international trend to focus on environmental questions[58]. Meanwhile, one of the landmark court decisions in environmental constitutional law worldwide was delivered in the Philippines, where the Supreme Court confirmed the right of small children (represented by their parent) to challenge environmental degradation on behalf of future generations[59].

V. Systems of Government

The variety of political systems in Southeast Asia is breathtaking. Currently, Southeast Asia has one absolute monarchy (Brunei), one military dictatorship (Myanmar), two socialist one party systems (Vietnam, Laos) and seven constitutional systems allowing at least theoretically for competitive elections (Philippines, Thailand, Indonesia, Cambodia, Malaysia, Singapore, East Timor), each of which has peculiarities when viewed from the perspective of "Western" thinking about liberal democracy.

Heads of States

With the re-establishment of a monarchy in Cambodia in 1993, there are currently four monarchies in Southeast Asia[60]. The most unique is probably the Malaysian monarchy where the king is

56 *Laurence Wai-Teng Leong*, From "Asian Values" to Singapore Exceptionalism, in: Avonius/Kingsbury (note 39), pp. 121-240; see also Kevin YL Tan, in: Thio/Tan (eds.), Evolution of a Revolution, note 40, pp. 50-78.

57 Constitutional Tipping Points: Sustainable Constitutionalism in Theory and Practice. Paper presented at the Third Asian Forum on Constitutional Law 2009 (Asian Constitutionalism at Crossroads: New Challenges and Opportunities, Taipeh; see Conference Documentation. Volume I.

58 On the environment in Southeast Asian constitutions see generally *Jolene Lin*, in this Volume.

59 *Oposa v. Factoran*, 224 SCRA 792 (1993).

60 For a comprehensive analysis see *Roger Kershaw*, Monarchy in South-East Asia. The faces of tradition in transition, London & New York 2001 (Routledge).

elected every five years from a pool of hereditary regional rulers. The only "real" monarchy with a monarch politically ruling the country is in Brunei. The other kings do not govern, as is explicitly laid down in the Cambodian Constitution[61]. In Thailand the highly revered king has been, however, of utmost importance in the recent history of the country[62].

Presidential systems with directly elected presidents exist in the Philippines and in Indonesia. Whereas the presidential system of government in the Philippines has a long tradition in part due to the constitutional influence of the United States, direct elections of a president were first conducted in Indonesia in 2004. Whereas the Philippine president may only have one term of office, the Indonesian president can be re-elected once. In the Philippines, the office of president has been contentious in recent decades with two presidents being removed by "peoples' power" and others threatened by impeachment, military conspiracies and other challenges. Four presidents in the region are more "ceremonial" in concept. In Vietnam and Laos they are elected by parliament, whereas in Singapore (since a constitutional amendment of 1991) and East Timor they are directly elected. Under its new constitution of 2008, the president of Myanmar will be elected by an electoral college, for a five year term and be able to stand for re-election once.

Parliaments

Parliamentarism is the cradle of democratic nationhood. There may be states and nations without parliaments, but by now there are (as far as I can see) no democracies without parliaments, although in many "new" democracies the parliaments struggle to live up to their official role under the constitution[63]. Even the smallest countries, such as Tuvalu with a population of around 11,000, where "direct democracy" would be a realistic option, elect their parliaments. In Asia and more specifically in Southeast Asia elected parliaments are the standard as well, although their roles and performances are far from uniform[64]. Even the democratic rule that parliamentarians are to be elected is not without some significant exceptions. A minor modification exists in Singapore, where up to nine "nominated members", who have limited rights, are appointed in addition to the elected members[65]. A much more significant exception is to be found in Myanmar, where under the 2008 constitution, a quarter of the seats in both chambers will be reserved for members of the military, who are to be appointed and not elected[66]. A proportion of members in the Brunei parliament[67] shall also be appointed rather than elected. Competitive elections are

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61 Cambodian Constitution, Article 7 (1): "The King of Cambodia reigns but does not govern".

62 See also *Kobkua Suwannathat-Pian*, Kings, Country and Constitutions. Thailand's political development 1932-2000, London & New York 2003 (Routledge).

63 On the role of the Cambodian parliament see e.g. *Hor Peng,* in this Volume.

64 See *Jürgen Ruland, Clemens Jürgenmeyer, Michael H. Nelson & Patrick Ziegenhain*, Parliaments and Political Change in Asia, Singapore 2005 (ISEAS Publications); for an analysis of the role of the Indonesian Parliament see *Patrick Ziegenhain*, The Indonesian Parliament and Democratization, Singapore 2008 (ISEAS Publishing).

65 On this category of "apolitical parliamentarians" see *Li-Ann Thio*, Volume II, pp. 273-274; see also *Kevin Y.L. Tan*, in: Thio/Tan, Evolution of a Revolution, note 40, pp. 74-76; *Tsun Hang Tey*, Singapore's Electoral System, in this Volume.

66 Constitution of Myanmar, Sections 109, 141.

67 For details on the "Legislative Council" see *Tey*, Brunei, Volume II, pp. 23-26.

not held in Vietnam and Laos, which have one party systems[68]. Singapore and Malaysia have anti-competitive electoral systems[69], although in the case of Malaysia recent developments show a new dynamic towards real competition in elections.

There are bicameral parliaments in Thailand, the Philippines, Cambodia, Malaysia, Indonesia and Myanmar. In the Philippines, the members of the Senate are all directly elected, whereas in Malaysia and in Thailand, under the latest constitution, some senators are appointed[70]. In Cambodia, senators are elected by Commune Council Members and National Assembly Members, with two senators being appointed by the King. There has been public criticism of the weakness of this Senate in political as well as constitutional terms. The directly elected second chamber in Indonesia is the "Council of Representatives of the Regions" and its duties are restricted to matters in the field of regional government. Here too, there has been public debate as to whether this second chamber is too weak to justify its cost, but attempts to strengthen it have not yet produced results.

Government

Asian states have a historic reputation for being authoritarian. The Western perception (or propaganda myth) of "oriental despotism" can be traced back to antique Greek political thinkers as Herodot and Aristotle and be found in the writings of Machiavelli, Montesquieu, Hegel, Wittfogel and others. Today some Asian writers themselves claim that the East has a more positive attitude towards state authority than the West (with the result of the rejection of "Western" concepts of pluralist democracy and liberalism). In reality, Southeast Asia's recent experience is not so much different from other parts of the world, where authoritarian forms of government appear and disappear as well. As elsewhere de-colonializatid countries often slipped into authoritarianism. Leaders like Sihanouk and Hun Sen (Cambodia), Sokarno and Suharto (Indonesia), Marcos (Philippines), Lee (Singapore) and Mahathir (Malaysia), have all exercised strong executive power and control in their respective countries. Today there are however significant differences. Whereas the governments in Myanmar and Brunei have unlimited power, the situation in Vietnam and Laos is more complex because of the relationship between government and the party. The executive in Singapore and Malaysia has traditionally been powerful, but there are indications of a tendency towards a more pluralistic political landscape in Malaysia. In Cambodia, the pluralist constitution with its checks and balances contrasts with a political reality where a strongman prime minister is at the center of power.

Federalism and Decentralization

The only federal state in Southeast Asia is Malaysia, where the idea of a federation was basically a condition of building the state[71]. The constitutional arrangement of Malaysian Federalism is

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68 On the role of communist party in these states see Constitution of Laos, Art. 3, and Constitution of Vietnam, Art. 4.

69 See *Tey*, Malaysia's Electoral System, in this Volume, and *Tey,* Singapore's Electoral System, in this Volume.

70 See most recently *Paul Chambers*, Superfluous, Mischievous or Emancipating? Thailand's Evolving Senate today, in: 28 Journal of Southeast Asian Affairs 3 (2010).

71 See *Sabaruddin*, in this Volume.

as sophisticated as it is unique, with most states headed by hereditary rulers and some being republics. Indonesia's decentralization process, which was designed as shock therapy after the fall of Suharto in the late 1990s, has often been regarded as a desperate attempt to rescue this multi-ethnic archipelago from disintegration. In view of the extensive powers of the provinces and the establishment of a national second chamber with responsibility for regional matters, one might suggest that Indonesia has essentially become a federal system. However, as the constitution clearly stipulates Indonesia is a unitary state the "F-word" is officially avoided[72]. Decentralization is a priority in other states such as Thailand, Laos, Vietnam and Cambodia, and it is much promoted by bilateral and international development partners[73]. One remarkable aspect of the current regulations is the widespread existence of asymmetric federalism / decentralization. In Malaysia, the Borneo states of Sarawak and Sabah have greater autonomy than other Malaysian states; in Indonesia special regimes apply for Aceh and Papua, and in the Philippines it is Mindanao that has greater autonomy.

Political Parties, People Power and "Post-political" Constitutionalism

In Western political thinking, political parties are often regarded as the cornerstones of pluralistic democracy. Political parties are supposed to have a particular political ideology such as "conservative", "socialist", "communist" or "liberal". In Southeast Asia we find a wide spectrum of systems, traditions and developments. Brunei has no political parties at all and in Myanmar, political parties can not currently operate. As mentioned earlier, Singapore has been close to a one party system for a long time, whereas Malaysia has moved towards multi - party democracy in recent times. Vietnam and Laos still apply one party rule and in both countries the leading role of the communist party is stipulated in the constitution[74]. Multi-party systems have emerged in the Philippines, Thailand and Indonesia[75]. Multi-party-systems are also in place in East Timor and in Cambodia, but in the latter, the former communist party has been able to solidify its hold on power. Party structures are quite different from country to country. Constitutionally, the multi-party system is particularly embraced in the Constitution of Cambodia, (Arts. 1, 51), East Timor (Arts. 7, 46) and Thailand (Art. 65).

The term people power originates in the Philippines, where it was coined when protesters overthrew the dictatorial regime of Ferdinand Marcos and installed a new democratic constitution in 1987. Demonstrations and public protests were successful again in 1999, when President Estrada was forced out of office. However, the constitution explicitly embraces people power only to a certain extent. It acknowledges the role of "people's organizations"[76], allows lawmaking by referendum, empowers the people to propose a referendum and allows the recall of local

72 See e.g. *Jacques Bertrand*, Indonesia's quasi federalist approach: Accommodation amid strong integrationist tendencies, in: Sujit Choudhry, Constitutional Design for Divided Societes, Oxford 2008 (Oxford University Press), pp. 205-232; on decentralization in Indonesia see also *Arianto*, in this Volume.

73 See e.g. *Kim Sedara and Joakim Öjendal*, Decentralization as a Strategy for State Reconstruction in Cambodia, in: Joakim Öjendal an Mona Lilja (eds.), Beyond Democracy in Cambodia, Copenhagen 2009 (Nias Press), p. 101.

74 Constitution of Vietnam, Article 4; Constitution of Laos, Article 3.

75 For a comparison see *Andreas Ufen*, Political Party and Party System Institutionalization in Southeast Asia: A Comparison of Indonesia, the Philippines and Thailand, GIGA Working Papers No. 44, Hamburg 2007.

76 Philippines Constitution, Article XIII Sec. 15.

government officials. Within Southeast Asia, this approach is unique, although the political culture of "democracy on the streets" has spread at least to Indonesia and Thailand.

Can a constitution be "post-political"? This suggestion is made by Tom Ginsburg in his analysis of the 1997 Constitution of Thailand[77]. Ginsburg points to the inclusion of a number of "neutral" watchdog institutions in that constitution (basically unchanged in the new 2007 Constitution) which were designed to control, and to a certain extent limit, the political process. Similar provisions have been in the Constitution of the Philippines since 1987 and have been in the Indonesian Constitution since the reforms between 1999 and 2002. Politics are, however, very much alive in all these countries. It seems that the new institutions are more like additional players within the political system, thus creating more complexity but not eliminating politics. The most "post-political" constitution is probably found in Singapore, where the whole state is more or less organized like a (family run) economic enterprise with a CEO being paid accordingly[78] and where there is even a category of apolitical members of parliament.

Emergencies

The use of emergency powers is a traditional part of Southeast Asian constitutionalism, or – more precisely – anti-constitutionalism[79]. The states that have emerged from British colonialism have made excessive use of emergency powers. Brunei has been governed under formal "emergency rule" for virtually all of its existence as a state, although it is politically one of the most stable states in the region. Vestiges of emergency powers exist in Singapore and Malaysia, again without any real emergencies being apparent most of the time. Emergency rule has also been used in the Philippines and naturally, military governments in Myanmar and in Thailand have invoked emergency powers. Indonesia has had its regional emergencies and still has special regulations in place, in particular with respect to Papua. To make things worse, post-9/11 political developments have triggered emergency style security regulations around the world and in Southeast Asia. Such regulations, usually not even labeled as emergency laws, often amount simply to a strengthening of police powers.

From the perspective of the rule of law and constitutionalism post-9/11 developments have not all been bad news[80]. In the United States, even a fairly conservative Supreme Court has put limits on government policies with respect to the treatment of so-called "enemy combatants" and in

77 *Tom Ginsburg*, Constitutional Afterlife: The continuing impact of Thailand's postpolitical constitution, 7 I.Con 83 (2009).

78 Singapore's Prime Minister is the officially best paid head of government in the world, with a salary of more than two million U.S. Dollar. His father, the previous prime minister, reportedly justified the high government salaries by saying that if one pays peanuts, one gets monkeys.

79 See *Ramraj*, in this volume; more comprehensively now *Victor V. Ramraj & Arun K. Thiruvengadam* (eds.), Emergency Powers in Asia, Cambridge 2009 (Cambridge University Press) and, from a general perspective, *Victor V. Ramraj* (ed.), Emergencies and the Limits of Legality, Oxford 2008 (Oxford University Press).

80 See also the positive outlook at *Arun K. Thiruvengadam*, Asian judiciaries and emergency powers: reasons for optimism?, in: Ramraj/Thiruvengadam (eds.), Emergency Powers in Asia, note 79, p. 466.

Germany the Constitutional Court has torpedoed some significant anti-terrorism legislation[81]. In Southeast Asia, the Indonesian Constitutional Court has declared some anti-terrorism legislation[82] unconstitutional and in the Philippines, a declaration of emergency has been declared illegal by the Supreme Court[83].

VI. Fundamental Rights

The 1898 Philippine Malolo Constitution, the first Southeast Asian constitution adopted, contained a full catalogue of fundamental rights, as most Southeast Asian constitutions do today. Asia, and particularly Southeast Asia, however, has some reputation for human rights exceptionalism[84]. This might be due to Asia in general and Southeast Asia in particular being the only major region of the world with no regional human rights framework. An Asian Human Rights Charter has been under discussion for some time, but there is no definite timetable for the drafting or adoption of a regional charter. The new ASEAN Charter makes some references to international human rights[85], but does not provide a catalogue of rights. It also promises a human rights body for ASEAN, but again does not provide any details[86].

Considering the intensive debate about human rights and Asian values it might come as surprise that civil and political rights are formally granted in nearly all Southeast Asian constitutions. Only Brunei's constitution fails to stipulate any rights (with the exception, of course, of the numerous rights of its Sultan). In some constitutions the catalogue of rights is rather short (Laos, Indonesia), but in others (e.g. Thailand) it is comprehensive. Some include mostly classical liberal rights (e.g. Malaysia), while others guarantee social and economic rights as well (e.g. East-Timor). A fairly sophisticated model can be found in the Philippines, where a liberal "bill of rights" is complemented by a large number of policies (not providing individually enforceable rights) in the field of social justice and human rights (Article 13), education, science and technology, arts, culture, and sports (Article 14) as well as the family (Article 15)[87]. Among the rights guaranteed by all constitutions, although not with equal effectiveness, is the equality of men and women[88].

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81 See especially the decision of 15 February 2006 – Aviation Security Act (in English translation available at <www.bundesverfassungsgericht.de>); on this case see also *Oliver Lepsius*, Human Dignity and Drowning of Aircraft, 7 German Law Journal 761 (2006) <www.germanlawjournal.com>.

82 See *Nadira Hosen*, Emergency powers and the rule of law in Indonesia, in: Ramraj/Thiruvengadam (eds.), Emergency Powers in Asia, note 79, p. 267, at 288.

83 See *Raul, C. Pangalangan*, Political emergencies in the Philippines: changing labels and the unchanging need for legitimacy, in: Ramraj/Thiruvengadam (eds.), Emergency Powers in Asia, note 79, p. 412, at 426/7.

84 See e.g. *Randall Peerenboom*, *Carole J. Petersen & Albert H.Y. Chen* (eds.), Human Rights in Asia, London 2006 (Routledge), with many of the contribution focusing on national fundamental rights guarantees; *Avonius / Kingsbury*, note 39.

85 ASEAN Charter, Article 1 (7), 2 (2)(i).

86 ASEAN Charter, Article 14.

87 On the reason for this article, being a compromise between advocates for an inclusion of these rights as basic rights and advocates for a narrow bill of rights with civil and political rights only, see *Raul C. Pangalangan*, The persistence of rights discourse vis-à-vis substantive social claims, in: Peerenboom/Petersen/Chen, Human Rights in Asia, note 84, p. 346, at 355-360.

88 See *Katrin Merhof*, in this Volume.

The legal relevance of the guaranteed rights obviously differs from state to state, as does their interpretation. In the Philippines, the Supreme Court has full authority to take them as the basis for judicial review. On the other side of the spectrum, in Vietnam and Laos basic rights are not (yet) enforced by courts[89]. In Cambodia they should be from a constitutional perspective, but practically there is for example no way to challenge the action of authorities in courts[90]. In Singapore and Malaysia rights adjudication is seen as being biased towards limiting individual rights in favor of the interests of "community"[91].

The ever present question in respect of fundamental rights is the extent of their procedural protection. In addition to courts and constitutional courts, there are other institutions which protect rights. This is particularly important in cultural and political contexts, where courts are not very effective. Ombudsmen and human rights commissions (more or less independent) have been established in a number of Southeast Asian countries to protect basic rights or to recommend government action in that regard.

VII. Constitutional Jurisprudence

Increasingly courts around the world have authority to review the constitutionality of state action, including the constitutionality of parliamentary legislation. Two main models exist: Whereas in common law jurisdictions such authority will be vested in the highest court, in civil law countries the Austrian-German model of a specialized Constitutional Court is increasingly being followed. Although it should be noted that judicial review, particularly when it comes to pieces of legislation, is still not practiced in a number of traditional democracies[92] and is heavily criticized in others[93], the trend towards such mechanisms is clear in recent constitutional history internationally. Asia is no exception. In East Asia, Japan has a strong Supreme Court and powerful constitutional courts have been established in South Korea, Taiwan and Mongolia[94]. In South Asia, where common law systems prevail, there is a particularly strong Supreme Court in India[95].

Southeast Asia has not, however, been a leader when it comes to judicial review. Only the Philippines have a strong tradition in this field, with a Supreme Court which resembles its big brother in the

89 For an intensive discussions about a constitutional right to possess more than one motorbike, which occurred in 2005, see *Sidel*, Constitution of Vietnam, note 46, p. 197.

90 See *Menzel*, Cambodia, in Volume II.

91 *Li-Ann Thio*, Taking rights seriously? Human rights in Singapore, in: Peerenboóm/Petersen/Chen, Human Rights in Asia, note 84, p. 158; *Li-Ann Thio*, Protecting Rights, in: Thio/Tan, Evolution of a Revolution, note 26, p. 193.

92 See e.g. the Netherlands, where Article 120 of the Constitution provides that "The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts".

93 For the United States see e.g. *Mark Tushnet*, Taking away the Constitution from the Courts, Princeton 1999 (Princeton University Press); *Larry D. Kramer*, The People themselves: Popular Constitutionalism and Judicial Review, 2004.

94 See *Tom Ginsburg*, Judicial Review in New Democracies, Constitutional Courts in Asian Cases, Cambridge 2003 (Cambridge University Press), mainly relying on Taiwan, Mongolia and South Korea.

95 On the role of the Indian Supreme Court see e.g. *S. P. Sathe*, India: From Positivism to Structuralism, in: Goldworthy, Interpreting Constitutions, note 26, p. 215.

United States, but is even more clearly rooted in the nation's constitution. The Supreme Courts in Singapore and Malaysia do have a legal competence to review laws and government action on the basis of the constitution, but it is generally agreed that in practice they have been quite subservient to the government, at least when it comes to "political" matters. The Cambodian Constitutional Council, modeled on a mixture of the French and German equivalents, has been fairly invisible in its first decade, although it might develop as a more powerful institution at some point in the future. Predictions on the "Constitutional Tribunal", which is to be established under the new constitution of Myanmar[96] when it comes into force in 2010, would be premature, but the overall political situation in Myanmar justifies some skepticism. In Vietnam, the question of constitutional review is under discussion[97]. The author is unaware of any discussion in Laos, and Brunei has made a strong statement against any judicial review, banning it by constitutional amendment in 2004[98].

The most remarkable developments in this field in Southeast Asia are the establishment of constitutional courts in Thailand and Indonesia. They are both new institutions within their jurisdictions, and both are well equipped with concrete constitutional powers. The Thai Constitutional Court, first established under the 1997 Constitution and re-established with increased powers under the 2007 Constitution, has earned itself a mixed reputation so far[99], whereas the Indonesian Constitutional Court seems to be one of the main constitutional success stories of that country's recent history[100]. The Indonesian Constitutional Court has decided a number of important and controversial cases and has already established itself as a constitutional force. Similar to the Thai Constitutional Court it got immediately involved in political conflicts, but has been somewhat more successful in gaining a reputation as an independent force.

Overall, judicial review is on the rise in Southeast Asia, as it is in other parts of the world[101]. It is now firmly established in the three biggest countries and in others, judicial review is on the rise. As elsewhere the process is difficult. Accusations of Supreme Courts or Constitutional Courts interfering illegitimately in the democratic or political process are unavoidable in established systems such as the USA or Germany, and not unsurprisingly similar accusations arise wherever judicial review is established. Recently established courts been under much more pressure, as they need to find a balance of power with other constitutional organs (Parliament and the Executive Government) and meet immense public expectations. In Thailand and Indonesia the constitutional courts simply did not have the time the Supreme Court in the USA or the German Constitutional Court had, to carefully but forcefully locate themselves in the system.

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96 Myanmmar Constitution, Articles 320 to 336.

97 See *Sidel*, The Constitution of Vietnam, note 46, pp. 183 to 210.

98 See *Tey*, Brunei, in: Volume II, p. 9 (31).

99 See *Andrew Harding*, A Turbulent Innovation: The Constitutional Court of Thailand, 1998-2006, Working paper (unpublished), Melbourne 2007.

100 On positive rankings of the Constitutional Court in polls (which contrasts with the generally low reputation of the judiciary) see *Petra Stockmann*, The New Indonesian Constitutional Court, Jakarta 2007, p. 99.

101 For Africa see *Prempeh*, note 35, for Asia in general *Tom Ginsburg*, note 94, for Eastern Europe *Herman Schwartz*, The Struggle for Constitutional Justice in Post-Communist Europe, Chicago 2000 (The University of Chicago

VIII. Legal Systems and Rule of Law

Constitutions are not only frameworks for the political process. They usually contain provisions on the organization of the judiciary and substantial provisions on all sorts of topics which all laws have to comply with. As elsewhere in the world there is little definition of the legal system in most constitutions in Southeast.

Most legal systems are formally either based on the common law tradition or a variation of the civil law tradition. In Southeast Asia, Singapore, Malaysia and Brunei are generally regarded as common law countries. The Philippines is also largely a common law country, but because of the long period of Spanish colonial rule there are elements of the civil law tradition. Myanmar should, on the basis of its colonial tradition, be a common law system but a socialist and authoritarian tradition may not have left much of that tradition intact. Vietnam, Laos and Cambodia have a French civil law legacy, but again in all these countries socialist legal thinking has played a significant role and shaped legal culture. Thailand, the only state in the region that has not been under colonial rule, has adopted parts of the civil law systems from France, Germany and elsewhere, to modernize its legal system. Indonesia's mix of influences is particularly interesting, with the Dutch colonial legacy strongly influenced by local Adat law and Muslim law[102]. Muslim law also plays a significant role in Brunei, Malaysia and elsewhere in Southeast Asia[103]. Under Malaysia's constitution, the normal courts have no jurisdiction over cases which fall into the Shariah court system, a provision which has caused plenty of legal controversy in recent times[104]. Southeast Asia is clearly a legal melting pot and place of mixed legal traditions[105].

Constitutionalism is directly linked to the rule of law, but whereas liberal constitutionalism with its typical elements of democracy and human rights is still considered to be "Western" by some, the "rule of law" is embraced nearly everywhere in Southeast Asia, although (or because) definitions differ significantly[106]. A modern constitution typically demands the rule of law as well as a functioning legal system and is reliant on these elements for its effectiveness. Legal reform is therefore in many cases a constitutional process, be it reforms relating to the economic system in Vietnam[107] or the reform of the judiciary in Laos[108]. Routinely constitutions will contain provisions guaranteeing the independence of the judiciary, but it seems that this is a topic where

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102 For a comprehensive analysis see *Peter Burns*, The Leiden Legacy. Concepts of Law in Indonesia, Leiden 2004 (KITLV Press); the role of religion in the recent constitutional reform process is discussed by *Nadirsyah Hosen*, Shari'a & Constitutional Reform in Indonesia, Singapore 2007 (ISEAS Publications).

103 *M.B. Hooker*, Islamic Law in Southeast Asia, 4 Australian Journal of Asian Law (2002), p. 213.

104 For a detailed analysis see *Malik Imtiaz Sarwar*, Resolving Conflicts: Approaching Article 121 (1A), in this Volume; for a more general perspective see *Andrew Harding*, The Keris, the Crescent and the Blind Goddess: The State, Islam and the Constitution in Malaysia, 6 Sing.J.Int'l & Comp. L. 154 (2002).

105 See *Andrew Harding*, Global Doctrine and Local Knowledge, note 24; *M.B. Hooker*, A Concise Legal History of South-East Asia, Oxford 1978 (Clarendon Press), p. 1.

106 For an Asian perspective see the collection in *Daniel Peerenboom* (ed.), Asian Discourses of Rule of Law, London 2004 (Routledge); for a good overview on rule of law definitions see also *Michaeal J. Trebilcock and Ronald J. Daniels*, Rule of Law Reform and Development, Chaltenham 2008 (Edward Elgar), pp. 12-37.

107 See *Tran Thanh Huong & Duong Anh Son*, Economic Development and Constitutional Reforms in Vietnam, in this Volume.

108 See *Somphanh Chanhthalyvong*, the Lao PDR Constitution and Reform of the Judiciary, in this Volume.

realities and constitutional stipulations are all too often very different things[109]. It is notable, however, that the increased relevance of constitutions in Southeast Asia seems to go hand in hand with a tendency for judicialization in administrative law[110]. At the same time, it seems there can be an uneven relationship between a "strong" legal tradition and strong "constitutionalism". For example, Singapore ranks high on at least some aspects of the "rule of law" (at least it usually gets favorable ratings for the efficiency and freedom from corruption of its judiciary), but it lacks other typical features of modern constitutionalism[111]. In the Philippines the situation is reversed with at least some strong constitutionalist elements (particularly strong judicial review by the Supreme Court), but weak general rule of law[112].

IX. International Aspects

Modern constitutionalism is increasingly defined by rules on international cooperation and international law[113]. However, this development is not very visible in Southeast Asian constitutions. Comparatively modern provisions regarding international law and integration can be found in the constitutions of East Timor (where they are taken from the Portuguese constitution)[114] and Thailand[115], but otherwise constitutions in the region are mostly rudimentary. There is plenty of uncertainty, when it comes to the status of international law, be it treaties or customary law[116].

Despite the uncertainties created by lack of reference to it in the region's constitutions, international law is as important in Southeast Asia as in other parts of the world. Two of the current constitutional systems in Southeast Asia are in fact concrete results of international

109 For the (post-) socialist limitations to judicial independence see for example *Jörg Menzel* (Cambodia), *Gerald Leather* (Laos), *Clauspeter Hill* (Vietnam) and on limits to the independence of the judiciary in Malaysia see *C.L. Lim*, all in Volume II; on Cambodia see also *Kheang Un*, The Judicial System and Democratization in Post-Conflict Cambodia, in: Öjendal/Lilja (eds.), Beyond Democracy in Cambodia, note 73, p. 70.

110 See *Tom Ginsburg and Albert H.Y. Chen* (ed.), Administrative and Governance in Asia, New York 2009 (Routledge). The tendency toward juridification and judicialization ("with Malaysia and Singapore being possible exceptions") is referred to in the concluding remarks by *Chen*, see p. 372-373.

111 See also *Kevin YL Tan*, An Introduction to Singapore's Constitution, Singapore 2005, p. 30-31; on Singapore's rule of law concept see also *Gordon Silverstein*, Singapore: The Exception That Proves Rules Matter, in: Tom Ginsburg / Tamir Moustafa (eds.), Rule of Law. The Politics of Courts in Authoritarian Regimes, Cambridge 2008 (Cambridge University Press), p. 73; *Li-Ann Thio*, Rule of law within a non-liberal 'communitarian' democracy: the Singapore experience, in: Randall Peerenboom (ed.), Asian Discourses of Rule of Law, note 106, p. 183; *Li-Ann Thio*, Lex Rex or Rex Lex? Competing Conceptions of the Rule of Law in Singapore, 20 Pacific Basin Law Journal 1 (2002).

112 See *Roque*, Philippines, Volume II, at 223-224.

113 For a German perspective see *Daniel Lovric*, A Constitution Friendly to International Law: Germany and its Völkerrechtsfreundlichkeit, 25 Australian Yearbook of International Law 75 (2006).

114 Section 9 of the Constitution of East-Timor (copy of the Portuguese Constitution's Article 8).

115 See particularly Constitution of Thailand, Section 190, which requires for parliament involvement and in formation of the public with respect to negotiations on certain international treaties.

116 See e.g. *Simon S.C. Tay*, The Singapore Legal System and International Law: Influence or Interference? In: Kevin YL Tan (ed.), The Singapore Legal System, 2nd edition, Singapore 1998, pp. 467; *Abdul Ghafur Hamid / Khin Maung Sein*, Judicial Application of International Law in Malaysia: An Analysis, 1 Asia Pacific Yearbook of International Humanitarian Law 117 (2006); *Alloysius P. Llamzon,* The Generally Accepted Principles of International Law as Philippine Law, 47 Ateneo Law Journal 243 (2002); for an in depth analysis of international human rights and humanitarian law in the Philippines, see *Harry Roque*, in this Volume.

involvement. Cambodia and East-Timor were reorganized as constitutional states with massive help from the United Nations[117]. In the case of Cambodia the core elements of its constitution were stipulated in an international treaty (the "Paris Agreements"), which led to the UNTAC-mandate and the first elections. Southeast Asian states are also parties to many other international treaties in fields such as human rights[118], environment[119] or trade. Southeast Asian states make use of the dispute settlement mechanisms of the WTO[120], as well as the International Court of Justice[121].

In contrast to most European Constitutions, no special provisions are found in the Southeast Asian national constitutions regarding regional integration. ASEAN still has little impact (compared to the European Union) on national constitutional sovereignty. Although the new ASEAN Charter is very strong (even in comparison to the newest version of the European Union Treaty) in constitutionalist rhetoric[122], ASEAN remains a traditional international organization. For example, Southeast Asian states do not face the situation (yet) where national constitutional provisions are overridden by "community law", as is the case in Europe. There are, however, now some provisions in the new ASEAN Charter[123] stipulating standards for national constitutional law:

> Article 1: "The Purposes of ASEAN are: (...) 7. To strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms, with due regard to rights and responsibilities of the Member States of ASEAN; (...)"
>
> Article 2 (2): "ASEAN and its Member States shall act in accordance with the following principles: (...) h) adherence to the rule of law, good governance, the principles of democracy and democratic government; i) respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice; j) upholding the United Nations Charter and international law, including international humanitarian law, subscribed to by ASEAN Member States; (...)"

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117 On Cambodia see *Lucy Keller*, UNTAC in Cambodia – from Occupation, Civil War and Genocide to Peace, 9 Max Planck UNYB 127 (2005); on East-Timor *Markus Benzing*, Midwifing a New State: The United Nations in East Timor, 9 Max Planck UNYB 295 (2005); for a critical assessment of the democratization process of both UN mandates see *Aurel Croisssant*, The Perils and Promises of Democratization through United Nations Transitional Authority. Lessons from Cambodia and East Timor, Democratization 14 (2007), S. 649 ff.

118 For somewhat skeptical analysis *See Li-ann Thio*, Implementing Human Rights in ASEAN Countries: "Promises to keep and miles to go before I sleep, 2 Yale Human Rights and Development Law Journal 1 (1999); *Suzannah Linton*, ASEAN States, Their Reservations to Human Rights Treaties and the Proposed ASEAN Commission on Women and Children, 30 Human Rights Quarterly 436 (2008).

119 See *Jörg Menzel*, Internationales Umweltrecht in Südostasien, Vom ASEAN-Way zur aktiven Gestaltung regionalen und globalen Umweltvölkerrechts, 45 Archiv des Völkerrechts 566 (2007).

120 See, most famously, the *Shrimp Turtle Case* (Report of the Appellate Body, October 12, 1998; ILM 38 (1998)), with Thailand and Malaysia as plaintiffs.

121 See the *Case concerning the Temple of Preah Vihear* (Cambodia v. Thailand), ICJ Reports 1962, 9; and more recently the decision of May 23, 2008, regarding the *Sovereignty over Pedra Branca/ Pulau Batu Puteh, Middle Rocks* (Malaysia v. Singapore).

122 For a comparison in detail see *Thilo Rensmann*, in this Volume.

123 See generally *Simon Tay*, in this Volume.

With these provisions, ASEAN has set significant goals and established principles relevant to the constitutional systems of its member states, although for the time being there is no concrete mechanism to enforce these goals and principles and they seem to be designed as soft law at best. They may put at least some political pressure on member states[124]. There have also been signs that ASEAN is getting a little tougher towards its most difficult member, Myanmar[125], although the ongoing problems with Myanmar indicate that ASEAN still has not made the substantial changes required to transform the new charter and its rhetoric into reality.

X. Developing Constitutionalism in a Developing Region: Concluding Remarks

Constitutionalism was not invented in Southeast Asia but now it would be wrong to say that it is an alien concept in the region. All Southeast Asian states have constitutions[126] and there is a tendency to take them more seriously than in earlier phases of state development in the region.

Constitutionalism in Southeast Asia has mainly advanced in an environment of development[127]. If development is defined by an increase of freedom, as Amartya Sen has famously pointed out[128], a lack of the guaranteed freedoms and protections usually found in a modern constitution, defines Southeast Asian states as developing states. In Southeast Asia it seems that constitutionalism and development are closely connected. There is an ongoing debate about what kind of constitutional system encourages economic development. The "development first" argument, self-confidently presented by Singapore over many years, was based on the assumption that "Western" constitutional values, such as individual freedoms and a pluralistic political system, would hinder economic development. Although it has achieved an impressively high level of economic development and a strong state, Singapore has not yet started to liberalize its political system and human rights. In this respect, Singapore has not followed the same path as South Korea and Taiwan. Singapore has instead changed its argument and started justifying its "soft authoritarianism" using an Asian values argument, which is not dependent on the state of a country's development and can be sustained notwithstanding Singapore's advanced state of development.

Theories about "constitution building" in the context of a developing country are still in their infancy[129]. Constitution making in post-conflict settings (Afghanistan, Iraq, Nepal, etc.), after

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124 It should be remembered in this context that the homogeneity standards in European Union Law (Article 2 and 7 of the Union Treaty in the post Lisbon Treaty version) or the Organization of American States did not develop overnight, but are the result of an evolutionary process.

125 *C.L. Lim*, From Constructive Engagement to Collective Revulsion. The Myanmar Precedent of 2007, 26 Singapore Law Review 204 (2008).

126 The Myanmar Constitution adopted but not in force at time of writing.

127 Even in the two states, which economically can't be labeled as "developing" any more, Singapore and Brunei, constitutionalism itself still can be seen as in need of development. See also *Kevin YL Tan*, who concludes that after forty years of constitutional development in Singapore the process of building a powerful state has been successfully completed, but it still needs to impose controls on the state itself (which is also part of constitutionalism); in: Thio/Tan (eds.), Evolution of a Revolution, note 26, p. 78.

128 Development as Freedom, New York 1999 (Penguin).

129 See e.g. *Kristi Samuels*, Postwar Constitution Building. Opportunities and Challenges, in: Roland Paris & Timothy D. Sisk (eds.), The Dilemmas of Statebuilding, London 2009 (Routledge), p. 173.

fundamental regime changes (South Africa) or in settings of ethnic diversity (Kenya, Fiji)[130] have received most attention, but in recent years different constitution making processes in many parts of the world have been systematically analyzed. International organizations and institutions like the International Institute for Democracy and Electoral Assistance[131] as well as intergovernmental institutions like the Venice Commission[132], have engaged in research and advice on constitution making as well as constitutionalization processes. Recent constitution making processes in Southeast Asia have, however, overall been remarkably domestic. Although it is undisputed that the constitutional development of many states in the region started under much influence of colonial power there is a certain autonomy (not necessarily autochthony) in Southeast Asian Constitutionalism today[133]. Even in Cambodia and East Timor, where constitutions were drafted within the context of massive United Nations involvement, the current constitutions were drafted by local political elites with limited advisory influence from foreign advisors (although in the case of East Timor the constitution was largely copied from Portugal and Mozambique)[134].

From a development perspective, it seems that constitution making is only the first, and often probably the easiest step. Constitutions need to be made operational, by bringing the legal system of the country into accordance with provisions of the constitution and by aligning all legal processes and state administration with the reformed laws as well as the constitution. A country can be called constitutionalist only if the constitution is in practice respected as the supreme law and binding regulation for state action. Although constitutions are, to borrow Edgar Bodenheimer's definition of law in general, often "bridges between is and ought", they need to be taken as "real" law, not as intellectual or poetic exercises. Achieving constitutionalism is obviously more difficult in the context of a developing country without much of a tradition of a professional judiciary and bureaucracy[135]. Legal, judicial and administrative reform, which are usually high on the agenda in the developing countries of Southeast Asia (as elsewhere), are therefore also often part of the constitutionalization processes in these countries. So is increased activity in the field of academic research and exchange on constitutional issues in the region, to which this publication on "Constitutionalism in Southeast Asia" aims to make a small contribution.

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130 See generally *Sujit Choudhry* (ed.), Constitutional Design for Divided Societies. Integration or Accomodation?, Oxford 2008 (Oxford University Press).

131 The "International Institute for Democracy and Electoral Assistance" lists "constitution building processes" as one of its core fields of expertise and has published numerous reports on the subject. See <www.int.idea.int>.

132 The "Venice Commission" is an advisory body to the Council of Europe and operates as a think tank on constitutional law for the member-states of the European Council as well as other states who wish to participate (currently the additional full members are Kyrgyzstan, Chile, South Korea, Morocco,, Algeria, Israel, Tunisia, Peru, Brazil and Mexico – but no Southeast Asian state). See <www.venice.coe.int>.

133 See, however, *James Tully*, The Imperialism of Modern Constitutional Democracy, in: Martin Loughlin & Neil Walker (eds.), The Paradox of Constitutionalism, Oxford 2007 (Oxford University Press), p. 315.

134 See *Jörg Menzel*, Cambodia, in Volume II, and Christian Roschmann, East-Timor, in Volume II.

135 This is only one of the reasons why the assumption that democratic constitutionalism can be quickly and easily developed in countries like Iraq or Afghanistan because it was in post World War II Germany and Japan, is too simplistic.

Although there are setbacks and progress is sometimes slow, it seems undeniable that constitutionalism is developing in Southeast Asia. Not only is the ASEAN Charter's embracing of the principles of democracy, human rights, rule of law, good governance and constitutionalism an indicator for this change, but there is also some actual progress. In his seminal article on the Rise of World Constitutionalism, Bruce Ackermann suggested looking back sixty years to fully realize the amount of progress that has been made[136]. In Southeast Asia today, one only needs to look back twenty five years to see the difference. In 1985, the dictators Marcos (Philippines) and Suharto (Indonesia) were still in power and Thailand was at least partly under military rule. All these states still have their problems and crisis[137], but in all of them democratic and liberal constitutions and mechanisms of judicial review are in place. Twenty five years ago Cambodia was still under a communist regime, whereas it is now under a democratic constitution as well. Again, the system is still far away from perfect[138], but it is impossible to ignore the progress made since 1985. In that year, Laos and Vietnam had yet to embark on the constitutional reform process that started to liberalize their economies and advance the rule of law by modernizing legislation, public administration and the courts. Taking a broad perspective based on the ideals of modern constitutionalism, it seems clear that despite some setbacks, progress has been made since 1985[139]. However, an "end of history" is not yet in sight in Southeast Asia – but that again doesn't distinguish it from the rest of the world.

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136 *Ackermann*, note 1, p. 771.

137 For Indonesia, where recently progress has been most impressive, see e.g. *Bob S. Hadiwanata / Christoph Schuck (eds.), Democracy in Indonesia. The Challenge of Consolidation, Baden-Baden 2007 (Nomos); Ross H. McLeod / Andrew MacIntyre (eds.)*, Indonesia. Democracy and the Promise of Good Governance, Singapore 2007 (ISEAS Publishing).

138 See e.g. *Öjendal / Lilja*, Beyond Democracy in Cambodia, note 73.

139 For an overall positive assessment on successes in East and Southeast Asia see also *Tom Ginsburg*, Lessons for Democratic Transition: Case Studies from Asia, Illinois Public Law and Legal Theory Research Papers, No. 07-08 (2007).

THE ASEAN CHARTER BETWEEN NATIONAL SOVEREIGNTY AND REGIONAL CONSTITUTIONALISM

Simon S. C. Tay

I. Introduction: The Charter Celebrated and Questioned

The Association of Southeast Asian Nations (ASEAN) celebrated its 40th anniversary and unveiled their ASEAN Charter at its 13th Summit of leaders, held in Singapore on 21 Nov 2007. Leaders of all ten member states[1] signed the Charter and, just one year and on schedule, all ten countries have ratified the document, each state according to its own legal requirements.[2]

Hailed by some as constitution for the grouping of ten member countries, the Charter has been expected by some to move ASEAN to a higher stage and be something of a "constitutional moment", after which previous norms and practices will change. The ASEAN leaders at the signing stated that they, "[C]elebrated the signing of the ASEAN Charter as a historic milestone for ASEAN, representing our common vision and commitment to the development of an ASEAN Community as a region of lasting peace, stability, sustained economic growth, shared prosperity and social progress."[3]

Others, both inside and outside the region, have criticized the Charter as being mediocre, toothless and even without any meaning.[4] Some criticisms relate specifically to difficulties in Myanmar over human rights that, while long standing, boiled over in the weeks prior to the 2007 Summit. Another strand of criticism emerges from hopes that the Charter might overhaul the norms and workings of ASEAN more thoroughly so as to ensure a more effective, people-oriented and forward looking organization. These hopes had been fed by some experts, non governmental organizations and also some statements from the ASEAN eminent persons report on the Charter in 2006 that preceded the drafting by the high level panel.

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1 The ten member states are: Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam.

2 As at March 2008, four ASEAN member states have ratified the Charter: Singapore, Laos, Brunei and Cambodia. However, doubts have been expressed in some other member states and President Arroyo of the Philippines has declared that ratification may not be assured unless there is progress on political problems in Myanmar.

3 On the drafting of the Charter, as recounted by the High Level Panel and other officials, see "The Making of the ASEAN Charter", edited by Tommy Koh, Rosario G Manalo and Walter Woon, World Scientific Press, 2009.

4 *Jusuf Wanandi*, Jakarta Post Daily, "ASEAN's Charter: Does a mediocre document really matter?", Nov. 26, 2007. See Bangkok Post, 19 November 2007, "Toothless charter will hurt Asean credibility". For views from outside the region, see, *Amy Kazmin*, Financial Times, November 21 2007, "Asean charter falls foul of Burma divisions"; and The Economist, 22 Nov 2007, "Fifth from the Right is the Party Popper".

A cause for celebration or another reason to criticize ASEAN: Which of these interpretations is more accurate and what accounts for such divergent views of a single document? What are the implications of the ASEAN Charter, both now and for the longer term, especially for the national sovereignty of the ASEAN member states? Is there an emerging legal and constitutional order for the member states and indeed the peoples of the region?

These questions have not been resolved at ASEAN Summit of Leaders held in Thailand in March 2009 even if this was the first such Summit after the Charter had been ratified. The ASEAN leaders realistically acknowledged, "[T]hat implementation will be the key to the realisation of the vision outlined in the ASEAN Charter."

Beyond this, there was a variety of different initiatives and emphases at the Summit. On one hand, the ASEAN Summit issued a declaration against protectionism and leaders pledged to move more quickly with their own, intra-ASEAN economic integration.[5] They also noted the adoption of a free trade agreement between ASEAN and Australia-New Zealand, and the enlargement of currency swop fund organized by ASEAN and the Northeast Asian of China, Japan and South Korea. On the other hand, in the area of democracy and human rights, ASEAN leaders held an informal dialogue with civil society representatives and discussed the terms of reference for a human rights body promised by the Charter. The Summit in this sense did not give clear indications of the main direction or purpose that the Charter holds out for the grouping. It was moreover, not clear how much the Charter would help the grouping be more decisive and rules based in coming to their decisions.

Two incidents at the Summit perhaps symbolize this continuing uncertainty about ASEAN and its Charter. First at the Summit's dialogue with civil society representatives, both the governments of Myanmar and Cambodia rejected their respective representatives and declined to enter dialogue with them.[6] Second, and perhaps even more symptomatic of ASEAN, the entire Summit had been postponed from end 2008 because of political divisions and protests in the host country Thailand. Both incidents, in their different ways, suggest that ASEAN has a long way to go before the group can adhere and move forward without interruption from domestic issues, and that the Charter is in itself no panacea.

This article will consider these and other questions by looking at ASEAN's Charter and suggesting how it has affected and interacted with the norms within the grouping and with processes of developing ASEAN's institutions and decision making processes.

First, the article shall try to consider the factors that led the ASEAN member countries to move ahead with the Charter and then (within the limits of length) to provide a closer reading of the Articles of the Charter. This will not proceed article by article. I aim instead to set these purposes in a broader schematic that looks on one hand at the aims of economic integration and, on the other hand, hopes that ASEAN can move on democracy, human rights and good governance.

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5 See Financial Times, 1 Mar 2009 "Asean summit backs plan to tackle downturn", accessed at <http://www.ft.com/cms/s/0/38ced08c-066f-11de-ab0f-000077b07658.html>.

6 See above and also The Nation, 1 Mar 2009. PM: meeting with civil-society groups major achievement of summit. Accessed at <http://www.nationmultimedia.com/2009/03/02/politics/politics_30096928.php>.

Secondly, the article will also consider the institutional arrangements envisaged in the ASEAN Charter. While falling short of creating regional institutions that trump their counterparts at the national level, a number of changes have been proposed will potentially be able to monitor and supervise national implementation, policies and laws to a greater degree than before. Thus, in the view of this article, ASEAN after the Charter should be more efficient and effective than it has been in the past, even if this prospect may not be overtly stated.

Thirdly, after the discussion of purposes, principles and institutions, I shall seek to evaluate the Charter as a supranational document, and whether it constitutes a what maybe called a "Constitutional moment" for the region. In so doing, I consider if the ASEAN member states are moving beyond the norm of non intervention that privileges national sovereignty first and foremost. Such analysis is needed, I believe: to go beyond what the Charter sets out as purposes and consider the means and processes it sets out to achieve those stated purposes. For, in building architectures for regional as well as international regimes, we do not lack knowledge how best to make those regimes stronger. When there are weak regimes, it is more often the case that states lack the political will to do so.

Last and in closing, I shall consider how ASEAN has evolved and even been reinvented when compared to what we have seen in its first 40 years or even as recently as 1997, when it was expanded and simultaneously entered in the Asian financial crisis.

II. Analyzing the Articles: Motivating Factors, Purposes and Principles

What are the motivating factors for the ten member states of ASEAN to go forward with an ASEAN Charter? What is the extent of political will that drives the Charter, in different areas and from the different member states?

Certainly the idea of the Charter was not explicit in the origins of ASEAN.[7] To ask why 10 member states agreed to the Charter is therefore to look more at recent trends and concerns. This is not a monolithic response. The ten member states of ASEAN are at different levels of development, economically and politically, and have different histories and socio-cultural backgrounds. Their sources of security or insecurity also differ. A grand narrative of ASEAN and the impulse for the Charter that accurately reflects all the views of all member states is therefore difficult. Nevertheless, although we must recognize national differences, there is a larger, overarching context for the ASEAN Charter in which three factors can be identified.

We should also recognize that the Charter, coming after 40 years of the grouping's existence, captures historical aims and achievements as well as emerging purposes. This historical perspective explains the first few purposes stated in the Charter, which are long standing aspirations for the group. These are the aim to maintain and enhance peace, security and stability and further strengthen peace-oriented values in the region (Article 1); to enhance regional resilience (Article

7 Some better known works on ASEAN's origins are: *Jurgen Haacke*, ASEAN's Diplomatic and Security Culture, Routledge 2003; *Amitav Acharya*, The quest for identity: international relations of Southeast Asia, Oxford University Press, 2000; and *Sharon Siddique* and *Sree Kumar*, The 2nd ASEAN reader, Institute of Southeast Asian Studies, 2003.

2); preserve Southeast Asia as a Nuclear Weapon-Free Zone that is free of all other weapons of mass destruction (Article 3) and to ensure that the peoples and Member States of ASEAN live in peace with the world at large (Article 4) are along standing aims of the group.

Newer aims and purposes are also to be seen in the Charter. These have developed both from the indigenous development of ASEAN in these past years, as well as in response to external factors and events.

The first of these was the experience of the group from the financial crisis of 1997-98 and its expansion to include all 10 member countries of the sub-region. This has led ASEAN to recognize both its weaknesses and its potential strength if its member countries can cooperate much more closely than they have in the early years of the group. This recognition led to an ambition to "reinvent ASEAN".[8] This fuelled ASEAN's shared ambition to create a community. As announced by ASEAN leaders at their 2003 Summit, the ASEAN Community is to have three pillars: economic, political-security and socio-cultural. This may be seen as an outgrowth of ASEAN as a regional organization that seeks to enhance regional resilience. The Charter while not initially planned for as part of the drive towards this ASEAN Community has taken on an important role in building a legal basis for the ASEAN Community and an opportunity to review and improve norms and rules for ASEAN to move ahead with the community building project.

A second factor is for ASEAN to be more competitive as a economic unit. Since the 1997 Asian crisis, the ASEAN member states have witnessed the economic rise of China and, more recently, that of India. Whereas pre-1997 figures of foreign direct investment and other economic indicia favoured ASEAN, the statistics a decade on clearly suggest that China and India are growing more rapidly than the smaller and medium sized countries of ASEAN. Against this background, ASEAN leaders have often cited competitiveness as a primary driving factor for them to move ahead with both ASEAN Community and Charter. The concern with competitiveness has particularly driven the building of the economic pillar of ASEAN Community, with the prospect of creating a single market of over 500 million people which would. While admittedly this would still be smaller than either China or India, such an ASEAN market would be more sizeable than any one of the ASEAN member states on its own.

A third factor behind the ASEAN Community and Charter is to maintain and indeed gain political influence in the wider region. ASEAN. Commentators have described ASEAN has been one of the more successful regional or sub-regional associations of states. Historically, this has been traced to the unity of purpose among ASEAN member states to respond to the Vietnamese occupation of Cambodia in the context of the Cold War. This allowed ASEAN to play a role in the Paris peace process in Cambodia and then to bring Vietnam into the grouping, followed by Laos, Myanmar and Cambodia. From this, we can see that ASEAN has often acted in unison to respond to issues in the region that have arisen from external factors and forces. This action moreover is as much in the political-security realm, as in the economic.

8 For a review by scholars and experts on ideas on ASEAN reinvention after the crisis and as the group approached a new millennium, see *Simon Tay, Jesus P. Estanislao, Hadi Soesastro*, Reinventing ASEAN, Institute of Southeast Asian Studies, 2001.

The historical moment prevailing during the negotiation, signing and ratification of the Charter again saw the grouping seeking to respond to external changes in the political security realm. This change was the rise of major powers – China, India and Japan – to seek greater weight and influence in political and security issues as Asia experienced a nascent regionalism in the years since the 1997 crisis. Given the historical tensions between these Asian powers and the additional and still dominant influence of the USA as a non regional actor on the region, ASEAN has sought something of a role, despite its own limitations. This was not only directly in security issues but in the free trade agreements within the region that were often not only economic in nature but also political signals.

We may thus observe that ASEAN is the host of a number of regional fora which are larger than itself, and the hub of many FTAs. For example, ASEAN chairs the ASEAN Regional Forum which covers a wider Asian footprint beyond its own membership. ASEAN also has FTAs with China, India, South Korea and Japan (the last concluded initially with a number of individual ASEAN member states).

These three factors intertwine in the slogan adopted by ASEAN in this period: "One ASEAN at the heart of Asia". This envisages ASEAN unity through the Community building project and ASEAN acting both economically and in politics-security as a hub in the wider region. The will behind the ASEAN Charter is allied to these ambitions.

The text of the Charter can be read in this context. Purposes set out in Article 1 (1) to (4) affirm the historical achievements and ambitions of the Association. Then, in 1(5) a newer ambition is given priority: This is, "To create a single market and production base which is stable, prosperous, highly competitive and economically integrated with effective facilitation for trade and investment in which there is free flow of goods, services and investment; facilitated movement of business persons, professionals, talents and labour; and freer flow of capital."

Supporting this purpose, comes Article 2.2. (n). This sets out that ASEAN member countries should work in "adherence to multilateral trade rules and ASEAN's rules-based regimes for effective implementation of economic commitments and progressive reduction towards elimination of all barriers to regional economic integration, in a market-driven economy."

These articles may not seem radical in comparison to the development of the European Union in creating a single common market. For ASEAN however it must be born in mind that the grouping mainly comprises developing countries and has included the countries of Cambodia, Laos, Myanmar and Vietnam only for ten years or less. The diversity of economic development levels amongst ASEAN member countries differs greatly. So too do their knowledge and experience in dealing with free markets and liberalized trade regimes. It is telling that many of these countries are only recent members of the World Trade Organization, whose rules in the GATT and other agreements do not reach so far as the economic integration which ASEAN aims for.

The ASEAN ambition for economic integration requires a concerted liberalization of existing rules for trade, investment and other behind the border laws and policies among all of its ten member countries and this is a considerable undertaking. As such, the Charter lifts this to a purpose of the grouping.

The Charter also recognizes the prospects of achieving economic integration is wedded to the less developed member countries, and not just the most developed. Allied to this comes Article 1(6) of the Charter that sets out the ambition, "To alleviate poverty and narrow the development gap within ASEAN through mutual assistance and cooperation". This "development gap" has been increasingly recognized in the last decade after the entry of the newer members.

On the other hand, there were no provisions for large intra-ASEAN transfers of funds or assistance to build capacity. Indeed these may have been hard to imagine as the expansion coincided with the 1997 crisis that left many of the original members economically battered. The recognition of the "development gap" has been elevated to a purpose of ASEAN but it may be said one that is allied to the larger project of building a single market and Community. The means to close that gap moreover remain to be developed.

Another newer cluster of purposes of ASEAN relate not to economic issues but to politics and security. The ASEAN Charter has included a number of references to democracy, human rights and good governance.

As noted above, Article 1.4 sets out the long standing purpose to "to ensure that the peoples and Member States of ASEAN live in peace with the world at large". But in the Charter, it adds to this that this ambition to live in peace would be "in a just, democratic and harmonious environment".

More direct is Article 1.7 of the Charter. This sets out the purpose "to strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of the Member States of ASEAN."

In conformity with these purposes and principles of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms, the ASEAN Charter sets out an institutional expression of this ambition in Article 14. This promises that ASEAN shall establish, "an ASEAN human rights body".

A lot has been said and written about these provisions of the Charter. They were hoped for by many advocates on these issues, including non governmental organizations in the region like the Working Group for an ASEAN human rights mechanisms.[9] Yet their inclusion in the Charter, decided by ASEAN foreign Ministers in their 2007 meeting in Cebu, the Philippines, was unexpected. After all, ASEAN in the early 1990s had been part of the "Asian values" discourse that doubted that human rights were universal values. Moreover, an ASEAN member country – Myanmar – has been the subject of international approbation for human rights violations, and these mounted in the run up to the signing of the Charter in 2007 when the Myanmar regime put down protests by monks and civilians with lethal force.

There are some further articles in the Charter that bear consideration.[10] But these two clusters – relating to economic integration on one hand, and and, on the other, to democracy, human

9 The author was a member of the Working Group, representing Singapore, from its early years to 2003.

10 For instance, ASEAN promises to promote Sustainable Development and protect the environment in Articles 1.8 and 1.9.

rights and good governance – deserve focus. Both are relatively new purposes for the group, and come with their controversies. Both moreover potentially intrude on what has traditionally been considered domestic jurisdiction and on the interests of domestic constituencies.

III. Institutions: Stronger, More Efficient and Effective?

As I have set out in the introduction, I believe that it is important to look beyond the stated purposes of ASEAN as set out in the Charter and consider the means and institutions that are put in place to try to achieve those purposes. International institutions (and regional) have many examples where lofty aims is let down by wholly inadequate institutions and mechanisms. In a number of cases, we might suspect that the weakeness result not from ignorance or mistake but are deliberate. If so, we would be right to question the genuine conviction behind the noble aims that have been stated.

On the other hand, we have to be careful to guard against the common mistake of expecting the strongest possible mechanisms and institutions. Few international institutions are armed with hard measures like sanctions, and easy decision making processes. There are questions of sovereignty that apply to every institution that is built on the foundations of modern public international law. ASEAN is not an exception to this.

Indeed since its creation it has been noted for respecting sovereignty of its member countries even as cooperation was fostered and enhanced. The so called ASEAN way has taken the norm of non intervention in the domestic affairs of member states as one of its cardinal precepts. It cannot be expected that after 39 years of this practice, and a fair amount of success in moving regional cooperation forward, ASEAN would in its fortieth year turn over such norms overnight.

The Charter does not create the power of sanction by the majority over the minority. Nor does it create a single decision making body that can do away with consensus and decide for all, based on some super majority system.

What the ASEAN Charter sets out is not a regime that trumps the national sovereignty of the member countries to create a regional Constitution and transnational institutions. But nor is what the Charter envisages a simple continuation of past ASEAN practices. In my view, a number of changes in the Charter can help make ASEAN more effective and rules based than ever before. The Charter is not determinative but it does open the door for ASEAN to act decisively even when there is a lack of full consensus.

Much will depend on what ASEAN governments and especially their leaders decide in the future. But new possibilities exist because of the Charter. This view of the Charter's potential is based on three separate but reinforcing clusters articles that relate to dispute settlement mechanisms, the ASEAN secretary general and the ASEAN Summit of Leaders.

Article 22 deals with disputes among ASEAN member states. Article 22 (1) sets out that ASEAN Member States shall endeavour to resolve peacefully all disputes in a timely manner through dialogue, consultation and negotiation. This is uncontroversial insofar ASEAN practice to date have been within this range of softer approaches to settling disputes.

Article 22 (2) however goes further. This is that, "ASEAN shall maintain and establish dispute settlement mechanisms in all fields of ASEAN cooperation." Currently, there are dispute settlement mechanisms in use mainly in the economic areas of cooperation, like the ASEAN Investment Area. Beyond this, there are quite a few areas in which ASEAN has maintained silence on resolving disputes.

In this context, we can see that while the above article 22 does not determine what kind of dispute mechanisms should be used, it does bring the issue to bear. We may expect that while in some areas softer approaches will still be used, there will be others in which more efficient and determinative methods will be introduced. Article 22 (2) is in this sense something of a directional arrow: the Charter points in the direction of ASEAN increasingly becoming more rules based, and seeking formal mechanisms to resolve disputes.

In Article 27, the Secretary-General of ASEAN is given the responsibility to monitor the compliance with the findings, recommendations or decisions resulting from an ASEAN dispute settlement mechanism, and submit a report to the ASEAN Summit. This may seem an obvious power to those who have faith in supranational institutions and regard them as sine non qua for regionalization.

In Article 11, the powers of the Secretary-General are clearly spelt out. This includes the power of the office to "facilitate and monitor progress in the implementation of ASEAN agreements and decisions, and submit an annual report on the work

of ASEAN to the ASEAN Summit." Additionally, there is Article 27. This gives the Secretary-General he power to monitor compliance and to advise when a state has or has not met whatever commitments it has undertaken.

From these powers, we may surmise that the intention is for the Secretary-General to play a significant and even key role in promoting greater transparency and accountability concerning the implementation of agreements by ASEAN member countries. For while there are no powers of sanction or compulsion, the Charter creates a system that is considerably stronger than merely depending on a state to report on itself, as has often been the case to date. Such a system of monitoring and reporting and the transparency and accountability that is created can greatly foster implementation, as a number of international studies on compliance with treaties have shown.[11]

The powers to monitor and report have not always been there for the ASEAN Secretary General, either explicitly or implicitly. The history of the ASEAN Secretary General has notably been that the office was created only some time after the grouping. For a long time, moreover, the office was a "post office" and "more secretary than general". Notwithstanding that post was officially recognized as being of ministerial rank, in everyday practice, the ASEAN Secretary General has reported to the Senior Officials.

From this position, the Charter takes a considerable step forward. In Article 11, The Secretary-General is to "carry out the duties and responsibilities of this high office (emphasis added). Moreover, he is to "participate in meetings of the ASEAN Summit, the ASEAN Community Councils, the ASEAN Coordinating Council, and ASEAN Sectoral

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11 See for example, *Abram Chayes* and *Antonia Handler Chayes*, On Compliance, © 1993 The MIT Press.

Ministerial Bodies and other relevant ASEAN meetings". All the meetings that are named are of ministerial rank or higher. The Charter, in this respect, can be read as clearly placing the Secretary-General above the control and domain of the ASEAN senior officials.

Internally too, the Secretary-General is strengthened with changes relating to the new structure of ASEAN Secretariat under the Charter.

First, Article 11 makes it much clearer that the Secretary General has the power and responsibility to run the Secretariat, as its chief administrative officer (Article 11 [3]). The Secretariat is bolstered by the addition of two more Deputy Secretary Generals, bringing the total to four. This is more than a numbers game.

The two new posts are to be recruited on an open basis on merit (Article 11 [6b]). Additionally, the two existing posts of deputy secretary-generals are made clearly accountable to the Secretary-General and the latter can even recommend their removal from office. This is a change from the present practice in which these positions are filled by ASEAN member countries on rotation and tend to report more to their own home governments than directly to the Secretary-General.

This clearly shows the recognition that the Secretariat will have more work, and more need for capable staff at the higher levels.

Secondly, under Article 12 of the Charter, ASEAN member countries are to send permanent representatives to ASEAN, to be based at the Secretariat in Jakarta. These representatives are to have the rank of ambassador and serve as a key committee at the working level to link between the ASEAN secretariat and the various ministerial bodies (see below), and in external relations.

This step is akin to the practice in bodies such as the United Nations, and the North Atlantic Treaty Organization (NATO). The thinking behind this is to provide for greater efficiency and speed in dialog and cooperation. Having the relevant officers in one place together, and interacting on a daily basis, is expected to be more effective, as compared to being based in their respective capitals.

This is backed up by Article 13, whereby each member country is to establish National Secretariats which are to be focal points in that country to, inter alia, coordinate the implementation of ASEAN decisions at the national level.

In summary therefore, the Charter arguably establishes significantly improved and centralized mechanisms in the Secretariat to work out the implementation of decisions.

There are also improvements made to the process of ASEAN reaching those decisions. The political dimension of ASEAN has emerged in response to historical needs and exigencies. The foreign ministers of the ASEAN member countries were the first to convene and remain, until today, central to the grouping with the ASEAN Ministerial meeting.

However, in these last four decades, ASEAN cooperation has been facilitated in many other areas – ranging from those that clearly cross border cooperation like trade and finance, to those which remain domestic, national issues at their core, like education and social services. The result has been that ASEAN meetings for ministers in different sectors have proliferated without clear coordination.

The Charter does not do away with these ministerial meetings. Article 10 instead recognizes the need for these functional ministerial meetings to continue. However, the Charter does take a significant step forward to establish an order to these ministerial meetings. This effort is made by clustering them around the three communities that ASEAN has undertaken to create – economic, political-security and socio-cultural.

Article 9 of the Charter establishes "Community Councils" for each of these communities. The community councils then undertake to coordinate the work of the different sectoral ministerial bodies under their respective purview.

The three community councils are themselves to be coordinated for coherence and efficiency. On top of these community councils, Article 8 of the Charter creates the ASEAN Coordinating Council, comprising the ASEAN Foreign Ministers. The coordinating council is to meet at least twice a year and one of its duties is to coordinate with the ASEAN Community Councils to enhance policy coherence, efficiency and cooperation among them. The Coordinating Council is then to prepare for the ASEAN Summit.

It is not proven that these changes will be effective. They may indeed be open to criticism as simply ossifying the current jumbled schedules of ministerial bodies and meetings. Critics can also claim that the Charter would do better trim these ministerial entities away and instead give power to a centralized, supranational regional institution, ala the European Commission.

However, it is not clear to others whether this is either possible or desirable. National sovereignty and the imperative of ministries at the capital cannot be dissolved overnight. Nor indeed might this be desirable if a deeper and more effective cooperation is the goal. There can also be counter arguments that centralizing authority leads to a bloated and distant bureaucracy.

In this, the Charter seems again to have taken a middle path. The clustering of ministerial bodies can lead to a more efficient regime for making the negotiations and political compromises for deeper cooperation among the ASEAN member countries. The strengthened ASEAN secretariat and the ambassadorial representatives to ASEAN can then serve as more focused and effective mechanisms to implement those agreements.

This need to balance sovereignty with regional cooperation is again the motif to understand what the Charter does for the ASEAN Summit of its leaders.

The ASEAN Summit has been elevated to the pinnacle of decision-making in ASEAN. This is a considerable step forward when we recount that the Summit did not initially exist in the grouping, and was initially held only once in two years, often focusing on ceremonies and grand statements. The Charter instead gives the Summit a new and pivotal role.

As recounted, the ASEAN Coordinating Council is to take all the work of the Community councils and sectoral ministerial bodies and prepare them for the Summit. The ASEAN secretary-general too is to shepherd the work of the Secretariat and Ambassadors to the Summit.

If all is agreed, the Summit can then provide the formal ratification of these agreements already reached. In such a scenario, the ASEAN Summit can continue to serve as a ceremonial gathering of sorts to table and give the highest possible political imprint to decisions.

But what if there are issues that cannot be resolved, whether in reaching compromises for deeper cooperation, or gaps in implementation? This is where the potential difference in the Charter becomes clearer. The Charter envisages that the Summit also serve as the meeting to resolve outstanding problems and, if need be, find new ways to resolve impasse.

Article 7 of the Charter sets out the roles of the Summit as being "the supreme policy-making body", and to "deliberate, provide policy guidance and take decisions on key issues pertaining to the realization of the objectives of ASEAN". The Summit is also tasked to "address emergency situations affecting ASEAN by taking appropriate actions".

To enable the Summit to take on these tasks, the Charter provides that the leaders of ASEAN are to meet not once, but now twice a year. They are also to convene, whenever necessary, as special or ad hoc meetings.

The Summit's role in decision making is also much strengthened and the leaders are explicitly given room to innovate on how decisions are reached. Article 20 of the Charter begins by reaffirming the long-standing basic principle that decision-making in ASEAN shall be based on consultation and consensus. However, the Charter explicitly provides that, "Where consensus cannot be achieved, the ASEAN Summit may decide how a specific decision can be made."

Similarly, Article 26 of the Charter provides that, when a dispute remains unresolved, after the application of the preceding provisions of this Chapter, this dispute shall be referred to the ASEAN Summit, for its decision.

It is not predetermined in the Charter how the Summit is to use these prerogatives. That will undoubtedly be resolved by the combined political judgments of the leaders, in response to the circumstances that arise. The Charter cannot in this sense predict what circumstances may arise. But it is notable for the Charter to create the constitutional space and legitimacy for such decisions and improvising.

IV. Conclusion: ASEAN Reinvented?

Is the Charter a "Constitutional moment" for the region? Does it reinvent ASEAN to ensure effective, efficient and deeper cooperation in the region?

In asking these questions, the doubts expressed by critics of the Charter must again be considered. These, as briefly related, stem from two main roots. First, particular hard cases, like the human rights violations in Myanmar. Secondly, from a comparison with the institutionalization and deep integration seen in the example of the European Union. From this, some of the main criticisms of the Charter have been the lack of sanctions and non-consensus decision making; the retention of the principle of non intervention; the lack of supranational institutions such as a much stronger secretariat and a regional parliament or other mechanisms to allow consultation participation by the peoples of ASEAN directly, rather than only through their national governments.

The critics are of course right in the sense that the Charter has not delivered such mechanisms. They are also right in that some of these suggestions are to be found in the eminent persons report that preceded the drafting of the Charter.

But the criticism may be misguided if it fails to appreciate the changes made and to recognize that these may indeed make ASEAN more efficient and effective and help create deeper cooperation and integration among member countries.

The measures taken by the Charter may not go as far as some critics would like. But on the whole, the Charter helps ASEAN move from an almost purely political relationship and towards relationships in which there are legitimate expectations that arise from repeated interactions, shared principles and purposes, and norms, as well as stronger regional processes and institutions that will foster compliance by the member countries to their promises and obligations.

It is not a new Constitution for the region that displaces all that has gone before and dissolves national sovereignty for the ten diverse member countries of the group. But the Charter does have provisions that significantly change the structure and workings of the group. These hold out the potential that ASEAN will now move ahead in ways that are different from before, even if those differences are intertwined with elements of continuity. The answer to whether the Charter represents a "Constitutional moment" may therefore have to be that it remains to be seen, as the Charter is put into effect and member countries interact in the new ways created and made possible by the Charter.

In this, ASEAN and its Charter are responding to both internal and external factors to change itself and its norms. In so doing, we are witnessing the creation of new norms and institutions that will hasten processes to create 'legalization' and rules-based interaction within ASEAN. This will not solve all things for ASEAN or its member countries. Nor does it signal the end of national sovereignty for the ASEAN member states.

But the norms and institutions in the Charter and legalization processes that are being set in motion do indicate a time of change for ASEAN, moving from the crisis of 1997 into a new period for the regional group. If we take this medium term perspective, or indeed if we look at the changes over the 40+ years since it was started, ASEAN has indeed been reinvented.[12]

In time, moreover, these can potentially affect the reservations of national sovereignty and the scope of the domestic jurisdiction that the member states can legitimately claim. The ASEAN Charter is not be an overtly radical document that is a clear and agreed road map for bringing the regional together in a regional constitution. But it is far from simply reflecting the status quo in ASEAN, ante-Charter.

There are instead bases for saying that the Charter constitutes some real and potentially far reaching steps forward for the grouping, and some optimism that post Charter ASEAN will be able to move further down the road towards a regional order based on shared norms, agreed rules, and sufficient institutionalization that can constitute a new regional order and "constitutionalism".

12 See for instance, *Simon Tay, Jesus P. Estanislao, Hadi Soesastro*, Reinventing ASEAN, Institute of Southeast Asian Studies, 2001.

MODERN CONSTITUTIONALISM BETWEEN REGIONAL AND UNIVERSAL VALUES

Thilo Rensmann

I. A Constitutional Moment in Europe and Southeast Asia

The year 2007 marked a truly "constitutional moment"[1] for regionalism in Southeast Asia and Europe. By signing the ASEAN Charter[2] in Singapore in November 2007 the ASEAN Member States laid the legal and institutional foundations for closer regional integration with the ambitious goal of creating an Economic Community by 2015.[3] Only a few weeks later the Heads of State and Government of the Member States of the European Union signed the Treaty of Lisbon.[4] This Treaty (also known as the Reform Treaty) gives the institutional structure of the European Union – which was originally designed in the 1950s for a Community of six – the overhaul desperately needed in today's Union of 27 Member States.

While the ASEAN Charter entered into force on 15 December 2008 after having been ratified by all ten Member States, the fate of the Treaty of Lisbon is somewhat uncertain due to its rejection by the Irish electorate in a referendum in June 2008. However, the ratification process continues. As of the end of 2008 all Member States apart from Ireland and the Czech Republic have ratified the Treaty.[5] The Czech Republic might soon follow suit after the Czech Constitutional Court declared the Treaty of Lisbon compatible with the Czech Constitution.[6] It is to be expected that a solution will eventually be found to accommodate the concerns of the Irish people and thus remove the last obstacle to the Treaty of Lisbon entering into force.[7]

1 Cf. B. *Ackerman*, We the People – Foundations (1991).

2 Charter of the Association of Southeast Asian Nations, 20 November 2007, reprinted in: Clauspeter Hill/Jörg Menzel (eds.), Constitutionalism in Southeast Asia, Vol. I (2008), 385.

3 Declaration on the ASEAN Economic Community Blueprint, 20 November 2007, available at: <http://www.aseansec.org/21082.htm>.

4 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 29 December 2007, Official Journal C 306 of 17 December 2007.

5 Note, however, that despite Parliament having given the constitutionally required assent both in Germany and in Poland the instruments of ratification have not been signed by the President. In Germany the Federal President will only sign the instrument of ratification after the Federal Constitutional Court rules on the compatibility of the Treaty with the German Constitution. In Poland President Lech Kaczynski refuses to sign the instrument of ratification for political reasons pledging, however, that he would not withhold his signature once all the other Member States have ratified the treaty.

6 Constitutional Court of the Czech Republic, Case Pl. ÚS 19/08, judgment of 26 November 2008, English summary available at: <http://angl.concourt.cz/angl_verze/doc/pl-19-08.php>.

7 As to the various possible legal strategies see *St. Peers*, Can the Treaty of Lisbon be ratified or implemented? - A legal analysis, 19 June 2008, available at: <http://www.statewatch.org/news/2008/jun/analysis-lisbon-june-sp-2008.pdf>.

Although the ASEAN Charter and the Lisbon Treaty mark completely different stages in the process of regional integration they share some striking similarities. Both treaties are couched in constitutional language and in this sense differ fundamentally from ordinary constituent instruments of international organizations. Paradoxically the ASEAN Charter is in some respects even more unabashedly "constitutional" than the Lisbon Treaty. The first words of the ASEAN Charter "We, the peoples" clearly invoke constitutional pathos and in its Chapter XI the Charter endows ASEAN with motto, flag, emblem, commemorative day and anthem[8] – insignia commonly associated with independent statehood. The Treaty of Lisbon, in contrast, takes pains to avoid all constitutional symbolism.

The reason for this – for the outside observer – seemingly surprising restraint is the bitter experience of the semantics of constitutionalism having led the European Union into a deep crisis: the ambitious project of basing the European Union on what was at the time called a "European Constitution"[9] was rejected in national referenda in France and the Netherlands in mid 2005. The constitutional semantics and symbolism[10] had conjured up the fear of the European Union becoming a "super-State" threatening the sovereignty and the national identity of its Member States. At this juncture it becomes obvious how far regional integration has advanced in the European Union and how far ASEAN would still have to go for the mere semantics of constitutionalism to be perceived as a real threat to the sovereignty of the Member States.

II. European Union: Constitutional Values Between Universal Ethos and Regional Pathos

The Lisbon Treaty is a thinly veiled attempt to save the substance of the failed "European Constitution" while concealing its true constitutional nature. The old draft Constitution was simply re-labelled and given the technocratic designation "Reform Treaty". The provisions of the old draft Constitution which – like Chapter XI of the ASEAN-Charter – related to motto, flag and anthem of the European Union[11] were deleted.

What remains unchanged in the Treaty of Lisbon, however, are the provisions of the old draft Constitution which portray the European Union as "a community of values".[12] Values figure prominently in the Treaty of Lisbon. The new rhetoric of values is aimed at visualizing the transition from what many perceive as a soulless, utilitarian Economic Community to a more idealistic, value-based Union. More than half a century after its inception the European Union is apparently still in search of its soul. Values are aimed at giving expression to the deeper purpose and to the foundations which underpin the legitimacy of the project of European integration.

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8 Arts. 36-40.

9 Treaty establishing a Constitution for Europe, 29 October 2004, Official Journal C 310 of 16 September 2004.

10 See, e.g., Art I-8 of the Treaty establishing a Constitution for Europe ("The symbols of the Union").

11 See supra, note 10.

12 European Council, Athens Declaration, 16 April 2003, available at: <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/75509.pdf>: "Our Union represents a collective project: A project to share our future as a community of values".

The rhetoric of values is an attempt to capture the ideas which unite the Member States and their peoples despite their cultural and political diversity.

Article 2 of the Treaty of European Union as amended by the Lisbon Treaty will be the *Magna Carta* of the Union's values:

> "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States (...)" [13]

From a legal point of view the proclamation of these common values has a double function.[14] On the one hand it identifies the non-derogable constitutional essence or – as it is put in the Asian context – the "basic structure"[15] of the European Union, the building blocks on which the entire edifice of the European Union is based. On the other hand the new Article 2 sets forth the principle of constitutional homogeneity between the Union and the Member States. In proclaiming these values to be "common to the Member States" the Treaty not only points to the origin of these values in the constitutional traditions of the Member States.[16] It is also meant in a prescriptive sense as defining the basic constitutional principles by which the Member States of the Union need to abide. If the constitutional order of a Member State is found to be in serious breach of these values the Member State concerned will be subjected to sanctions by the European Union.[17] European States aspiring to membership in the Union may only be admitted if they have shown both the willingness and the capacity to live up to the common constitutional principles of the European Union.[18]

The values proclaimed in the Treaty of Lisbon are hence not merely lofty philosophical ideas but rather "hard", enforceable constitutional principles which embody a minimum-standard of constitutionalism for the Member States.

At the same time, however, the Treaty of Lisbon in portraying the European Union as a "community of values" also aims to create a sense of common purpose and identity[19] and as such speaks to the hearts of the Union citizens rather than the minds of constitutional lawyers.

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13 See also Preamble of the Charter of Fundamental Rights of the European Union Official Journal C 303 of 14 December 2007, 1.

14 As to a more detailed analysis see *A. v. Bogdandy*, Constitutional Principles, in: A. v. Bogdandy/J. Bast (ed.), Principles of of European Constitutional Law (2006), 3-12; *Th. Rensmann*, Grundwerte im Prozess der europäischen Konstitutionalisierung, in D. Blumenwitz et al., Die Europäische Union als Wertegemeinschaft (2005), 49-72.

15 On the „basic structure"-doctrine see the seminal case of the Indian Supreme Court *Kesavananda Bharati v. The State of Kerala*, AIR 1973 SC 1461.

16 As to the origin of the fundamental rights of the European Union in the constitutional traditions of the Member States see Art. 6 para. 3 of the Treaty of European Union (TEU) as amended by the Treaty of Lisbon.

17 Art. 7 TEU.

18 Art. 49 TEU.

19 On the role of constitutional values in creating a European identity see Armin von Bogdandy, The European constitution and European identity: Text and subtext of the Treaty establishing a Constitution for Europe, International Journal of Constitutional Law 3 (2005), 295-315; *M. Kumm*, Why Europeans will not embrace constitutional patriotism, International Journal of Constitutional Law 6 (2008), 117-136.

This double aspect of the value clause creates a fundamental tension which the Treaty of Lisbon has not entirely resolved.

Insofar as the European Union is the guardian of common constitutional values in relation to the Member States these values must be narrowly tailored lest they encroach upon the constitutional identity of the Member States which is now explicitly protected by the Treaty of Lisbon.[20]

This provides one explanation for the apparent paradox that the European Union attempts to forge a regional identity through values which are – as the Treaty proclaims in its preamble[21] – considered universal. Given that the foundational values of the Union constitute at the same time legal principles enforceable in relation to the Member States they can only be reconciled with the principle of respect for the constitutional identity of the Member States if the contents of these values is reduced to the thin "overlapping consensus"[22] on which their claim to universality is based.

It stands to reason that such a bloodless appeal to universal values can hardly contribute to creating a European identity and sense of belonging amongst the European peoples. This gap between the aspiration for regional pathos and the constitutional appeal to universal ethos is bridged in a new preambular paragraph introduced by the Treaty of Lisbon. In its amended version the European Union Treaty solemnly declares that "the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law" have developed from "the cultural, religious and humanist inheritance of Europe."[23] The "universal" and the "regional" merge into one: European values become universal and universal values European. The Treaty of Lisbon, it seems, has brought universal values home.

This Eurocentric narrative of the genesis of universal constitutional values is grist to the mills of those who have long challenged the universality of human rights, democracy and the rule of law on the basis of their cultural relativity. Proponents of "Asian values"[24] will gratefully point to the "European values" clause in the Treaty of Lisbon.

This is, of course, a somewhat exaggerated reading of the new preambular paragraph but it appears unfortunate that the Treaty of Lisbon nourishes the widely-held belief that the core values of modern constitutionalism are in essence a gift of European culture to mankind.

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20 Art. 4(2) of the TEU as amended by the Lisbon Treaty reads: "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State." – See also third recital of the Charter of Fundamental Rights of the European Union, Official Journal C 303 of 14 December 2007, 1: "The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organization of their public authorities at national, regional and local levels (...)".

21 Second recital of the TEU as amended by the Treaty of Lisbon: "(...) drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law (...)".

22 *J. Rawls*, A Theory of Justice (1971), 133.

23 See supra, note 21.

24 On the "Asian Values"-debate see, e.g., *A. J. Langlois*, The Politics of Justice and Human Rights – Southeast Asia and Universalist Theory (1997); *A. Sen*, Human Rights and Asian Values (1997).

III. ASEAN: From Asian to Universal Values

The ASEAN Charter is first and foremost remarkable for the fact that it contains a commitment "to the principles of democracy, the rule of law and (...) respect for and protection of human rights (...)".[25] The manner in which the exercise of governmental power is organized in the Member States is hence recognized to be of legitimate concern to ASEAN; the constitutional structure of the Member States has ceased to be an exclusively domestic affair. This commitment to the universal constitutional values of human rights, democracy and the rule of law may in this sense indeed be considered a breakthrough in the history of ASEAN.

A few caveats must be made, however. The principles or values of human rights, democracy and the rule of law are not explicitly referred to as universal values.[26] They could accordingly still be understood as "Asian values"[27].

The commitment to universal treaties recognizing these values is restricted to the United Nations Charter – which does not say a great deal about human rights and constitutional values – and international law "subscribed to by ASEAN Member States".[28] This selective reference to international law would in particular exclude the two International Covenants on Human Rights[29] – the most important international human rights treaties – as they have not been ratified by all ASEAN Member States.[30]

In the "architecture" of the ASEAN Charter the principles of sovereignty and non-interference feature more prominently than the commitment to human rights, democracy and the rule law. "[R]espect for independence, sovereignty (...) and national identity" are the first of the fundamental principles set forth in Art. 2 ASEAN-Charter, "adherence to the rule of law, (...) democracy" and "human rights" are relegated to the eighth and ninth principles.[31] This must not necessarily be understood as establishing a hierarchy amongst these principles; it does, however, fail to reflect the increased importance of human rights as basic values in today's international legal order.

The admission of new Members is contingent on the ability and willingness to carry out the obligations of Membership which include adherence to the rule of law, democracy and human rights.[32] In contrast to the European Union, ASEAN does not, however, have the power to impose sanctions on Member States in the case of a serious breach of the basic constitutional principles laid down in the Charter.[33] In such a case any measures will have to be decided on in "the ASEAN way", namely by consultation and consensus, which would require the assent of

25 Preamble, eighth recital; Art. 1(7); Art. 2(h) and (i) ASEAN Charter.

26 See note 25.

27 On the "Asian values"-debate see references supra, note 24.

28 Art. 2 (j) ASEAN Charter.

29 International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights, 19 December 1966, 992 UNTS 3.

30 While Art. 2 (j) ASEAN Charter makes a specific reference to international humanitarian law, international human rights law is not expressly mentioned.

31 See Art. 2 ASEAN Charter. See also Preamble, eighth and ninth recital.

32 Art. 6 ASEAN Charter.

33 Art. 5 in conjunction with Art. 20 ASEAN Charter.

the delinquent Member State. It is hardly to be expected that the "Human Rights Body", to the establishment of which the Member States committed themselves in Art. 14 of the ASEAN Charter, will lead to the establishment of an efficient enforcement mechanism in cases of serious breaches of human rights.

From a European point of view ASEAN's commitment to the creation of an Economic Community by 2015 may be of more importance to the promotion of human rights and constitutional values in the region than the somewhat tentative human rights clauses in the Charter. It should not be forgotten that the original treaties establishing the European Communities in the 1950s did not contain any human rights clauses. The protection of human rights and constitutional values within the European Communities and Union were rather a spin-off of the gradual process of economic integration. It is really only now, fifty years later, with the Treaty of Lisbon that this incremental process can be considered as fully consolidated.

IV. The Universal Declaration of Human Rights as a Blueprint for Modern Constitutionalism

These brief remarks on the role of constitutional values in the European Union and ASEAN may suffice to demonstrate that the relativist threat to human rights, democracy and the rule of law is still looming, surprisingly not only from the "Asian values"-school[34] but also from those Europeans who foster the myth of international human rights, democracy and the rule of law as being a European gift to humanity. One could also add certain developments in US constitutionalism and government practice which argue that "American values" and interests provide the justification for flouting international human rights standards.[35]

A good case can be made, however, for considering these values to be the "common heritage of mankind", values which underpin the emergence of a universal approach to modern constitutionalism. The key to this contention is the Universal Declaration of Human Rights[36] which to my mind has not yet been fully explored in its inter-cultural and constitutional dimension. The 60th anniversary of the proclamation of the Universal Declaration appears to be a particularly fitting occasion on which to shed some more light on these two dimensions.

The Universal Declaration was the product of a truly intercultural discourse and is hence – as the Declaration puts it– a faithful reflection of a "common understanding"[37] of constitutional rights and values. This truly universal nature of the Declaration is indeed hardly ever seriously challenged by any State. Singapore's Permanent Representative to the United Nations noted, however, on the occasion of the 50th anniversary, that

34 See supra, note 24.

35 See, e.g., Justice *Antonin Scalia's* criticism of the Supreme Court's recourse to international human rights law in interpreting the US Bill of Rights: "this Court (...) should not impose foreign moods, fads, or fashions on Americans", Lawrance v. Texas, 539 U.S. 558, 598 (2003).

36 Universal Declaration of Human Rights (UDHR), 10 December 1948, GA Res. 217 A (III), GAOR III, Resolutions, 71.

37 UDHR, seventh recital of the Preamble.

> "it is shocking to realize today that much of the Declaration was drafted then by major colonial powers who saw no contradiction between colonial rule and human rights. Double standards were present in 1948. They continue to remain in 1998."[38]

The underlying contention that the Declaration was a dictate by Western colonial powers is simply not supported by historical facts. On the contrary – and this is unfortunately not widely known – the Universal Declaration was the product of an unprecedented inter-cultural discourse bridging virtually all regions and religions of the world. It was a process which started in the mid 1940ies amongst NGOs[39] and which continued in a special committee under the auspices of UNESCO[40], the United Nations Human Rights Commission and the General Assembly.[41]

Representatives from Asia, in particular from China, India and the Philippines, played a key role in this process. The provisions on the equality of men and women, for example, were substantially influenced by Hansa Mehta, the Indian representative to the Human Rights Commission who was a close ally of Mahatma Gandhi.[42] Another example is provided by the communitarian dimension of Art. 1 of the Universal Declaration of Human Rights according to which "all human beings (…) should act towards one another in a spirit of brotherhood" which can be traced back to the Confucian philosophy of the Chinese delegate Peng Chung Chang.[43]

The Universal Declaration marked a paradigm shift in the evolution of both human rights and modern constitutionalism. The Universal Declaration is built on a "value system" in which human dignity as the highest value serves as the foundation for the trinity of freedom, equality and brotherhood.[44] Although the notion of human dignity[45] conjures up links with the moral philosophy of the enlightenment, in the Universal Declaration of Human Rights it signals rather the intention to break the mould of the philosophical tradition of the late 18th century.

All references to "Nature" or the "Creator" which the drafters of the Universal Declaration encountered in the classical human rights instruments were eliminated and substituted by the notion of human dignity.[46] Human dignity was, however, not meant to constitute a complete

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38 Ambassador *Kishore Mahbubani*, Statement on the Universal Declaration on 10 December 1998, quoted in: Li-ann Thio, Implementing Human Rights in ASEAN Countries: "Promises to keep and miles to go before I sleep", Yale H.R. Dev. L.J. 2 (1999), 1, 3.

39 See *Th. Rensmann*, The Constitution as a Normative Order of Values – The Influence of International Human Rights Law on the Evolution of Modern Constitutionalism, in: P.-M. Dupuy et al. (eds.) Essays in Honour of Christian Tomuschat (2006), 259, 262-265.

40 UNESCO, Human Rights – Comments and Interpretation (1949).

41 See the detailed account of the drafting history *M. A. Glendon*, A World Made New, Eleanor Roosevelt and the Universal Declaration of Human Rights (2001); *J. Morsink*, The Universal Declaration of Human Rights: Origins, Drafting, and Intent (2000).

42 See *Glendon* (note 41), at 38, 90.

43 See *T. Lindholm*, Article 1, in: G. Alfredsson/A. Eide (eds.), The Universal Declaration of Human Rights – A Common Achievement (1999), 41, 43.

44 See Art. 1 UDHR. On the „value system" of the Universal Declaration of Human Rights see *Rensmann* (note 39), 267-269.

45 As to the notion of human dignity in the Universal Declaration of Human Rights see *Rensmann* (note 39), 267-268.

46 On the *travaux préparatoires* of the dignity clauses in the Universal Declaration of Human Rights see *Morsink* (note 41), 281 et seq.

surrogate for the philosophical and theological answers to the question of the ultimate foundation of human rights. The value of human dignity rather marks the outer limits of the thin "overlapping consensus"[47] on which the universality of human rights is built.

In the Universal Declaration the concept of human dignity also heralds a substantive departure from the essentially "negative" or "defensive" thrust of classical liberal human rights. The ultimate goal of human rights is no longer limited to ensuring "liberty" in the sense of the individual's right to be "left alone" by the State. The image of the individual which the Universal Declaration portrays is rather the communitarian vision of an individual whose personality – as the Declaration puts it – can only develop freely and fully in community with others.[48] Whereas the values of liberty and equality[49] largely remain within the liberal paradigm, the value of brotherhood[50] aims at this new communitarian dimension of human rights. The value of brotherhood also underpins the new "economic, social and cultural rights" the realization of which the Universal Declaration of Human Rights deems "indispensable" for the free development of the human personality.[51] All human rights – liberal and social rights – are considered equally fundamental, they are "indivisible, (...) interdependent and interrelated".[52]

By tearing down the wall of separation which the liberal human rights conception establishes between the governmental and the societal sphere, the Universal Declaration endows human rights with an additional dimension. Human rights are not only understood as individual rights but also as normative "values" or "principles" which structure the social order at the national and international level.[53] This new dimension of human rights finds its clearest expression in Art. 28 of the Declaration which reads:

> "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized."

Art. 21 of the Universal Declaration of Human Rights emphasizes that the "full realization" of human dignity and human rights requires a democratic order. Since traditionally individual rights and the frame of government were strictly separated, this provision constitutes a complete novelty in the evolution of human rights.[54] In the Universal Declaration of Human Rights we find a fairly detailed description of what this new "right to democracy" requires.

According to Art. 21:

> "[e]veryone has the right to take part in the government of his country, directly or through freely chosen representatives. (…) The will of the people shall be the basis of the authority

47 See supra note 22.

48 See Art. 29 para. 1 UDHR.

49 See Art. 1 clause 1 UDHR.

50 See Art. 1 clause 2 UDHR.

51 See Art. 22 UDHR.

52 Vienna Declaration and Programme of Action, June 25, 1993, UN Doc. A/CONF.157/23, para. 5.

53 On the notion of „values" and „principles" in this context see *R. Alexy*, Theory of Constitutional Rights (2002), 86-93.

54 See *Th. Franck*, The Emerging Right to Democratic Governance, AJIL 86 (1992), 46.

of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."

The Universal Declaration of Human Rights sets, however, two decisive limitations on the maxim that "We the people" shall be the basis of all governmental authority. First, if popular sovereignty were exclusively understood in a procedural sense then "We the people" could by a democratic ballot abolish democracy. This is what in effect happened in Germany when Adolf Hitler rose to power in 1933. Against the backdrop of this historic lesson the Universal Declaration of Human Rights embraces the so-called concept of "militant democracy"[55]: "Nothing in this Declaration may be interpreted as implying for any (…) group (…) any right (…) to perform any act aimed at the destruction of any of the rights (…) set forth herein."[56]

Second, the Declaration is built on a substantive notion of democracy according to which a "democratic society" is not only characterized by adherence to democratic procedures but also by certain standards of justice and fairness. This substantive understanding of democracy forms the basis of the limitation clause in Art. 29 of the Declaration:

> "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and meeting the just requirements of morality, public order and the general welfare in a democratic society."

The promotion of the general welfare "in a democratic society" is hence primarily entrusted to the legislator. In pursuing this mandate the legislator is, however, subject to the legal strictures of the limitation clause which require a necessity and proportionality test to be met.[57]

The Universal Declaration of Human Rights also lays the foundations for a "common understanding" of the rule of law.[58] In its preamble the Declaration requires the protection of human rights by the "rule of law". In the light of the limitation clause this protection must also extend to threats posed to human rights by the legislator. The rule of law as understood by the Declaration therefore goes beyond the British understanding of the rule of law, since the Declaration considers Parliament to be bound by human rights and hence no longer "sovereign". Parliamentary supremacy has hence given way to constitutional supremacy.[59]

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55 On the notion of „militant democracy" see the seminal study by *K. Loewenstein*, Militant Democracy and Fundamental Rights, American Political Science Review 31 (1937), 417, 638.

56 Art. 30 UDHR.

57 On the role of the proportionality test in this context see *Th. Rensmann*, Wertordnung und Verfassung (2007), 275-278 with further references.

58 The possibility of defining such a "common understanding" is explored in detail by *S. Chesterman*, An International Rule of Law?, American Journal of Comparative Law 56 (2008), 331-361.

59 As to this notion see Canadian Supreme Court, *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217, § 72: "The constitutionalism principle bears considerable similarity to the rule of law, although they are not identical. The essence of constitutionalism in Canada is embodied in s. 52(1) of the Constitution Act, 1982, which provides that '[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.' Simply put, the constitutionalism principle requires that all government action must comply with the law, including the Constitution. This Court has noted on several occasions that with the adoption of the Charter, the Canadian system of government was transformed to a significant extent from a system or Parliamentary supremacy to one of constitutional supremacy.".

The principle of constitutional supremacy is closely linked to judicial review of legislative acts. Art. 8 of the Universal Declaration could legitimately be interpreted as implying such judicial review. This provision – which was modelled after the Latin American *amparo*-procedure[60] – guarantees every person the right to an effective judicial remedy against any act violating his fundamental rights which would also include legislative acts. Indeed, the fusion of the "value system" of the Universal Declaration of Human Rights with the principle of constitutional supremacy and judicial review has given rise to a new "ideal type" of constitutionalism which is increasingly taking hold in all regions of the world.

V. *Marbury v. Madison* and the Universal Declaration: The Emergence of a New Idealtype of Constitutionalism

On the chequered world map of modern constitutionalism two contending conceptions of the nature and role of a constitution may be discerned behind the bewildering variety of national idiosyncrasies.[61] The first, the "classical" liberal model of constitutionalism considers the exclusive object and purpose of a constitution to be the limitation and procedural regulation of governmental power. In keeping with this limited telos, constitutionally entrenched human rights are regarded as mere negative rights with exclusively offer protection against the intrusion of governmental power into the individual sphere of liberty. This "liberal" notion of constitutionalism finds its most prominent expression in the constitution of the United States and the jurisprudence of the United States Supreme Court.[62]

Since the Second World War this liberal paradigm has been increasingly challenged by a competing conception of modern constitutionalism which attributes additional normative dimensions to the constitution. The constitution is not only perceived as establishing a procedural frame of government and substantive limitations on the exercise of governmental power, but also as a set of constitutional "values" or "principles" which provide (positive) "guidelines and impulses" for all three branches of government. These values are in particular gleaned from constitutionally entrenched human rights ("fundamental" or "basic rights") which are in turn modelled after the "common understanding" of the Universal Declaration of Human Rights.

This novel approach to constitutionalism probably found its first expression in the early jurisprudence of the German Federal Constitutional Court. In its ground-breaking Lüth decision, the Court held with regard to the 1949 constitution of the Federal Republic of Germany ("Basic Law"):

> "Without doubt, the primary purpose of basic rights is to safeguard the individual sphere of liberty against interference by public authority (...) It is equally true, however, that the Basic Law, which does not purport to establish a value-neutral order, (...) has, in its section on basic rights, also set up an objective order of values and that this, in particular, gives expression to a fundamental reinforcement of the normative power of those basic rights (...) This value system, which centers around human dignity and the human personality freely developing with the social community, must be regarded as a fundamental decision

60 *Glendon* (note 41), 38.

61 See *Rensmann* (note 39), 259-262.

62 See *Rensmann* (note 57), 242-266.

> for all areas of law; it provides guidelines and impulses to the legislature, the executive and the judiciary.”[63]

This dictum is today echoed by many constitutions and constitutional courts around the globe. A pertinent example is provided by the South African Constitutional Court which stated that the new South African constitution of 1996 “is not merely a formal document regulating public power” but that it “also embodies like the German constitution, an objective, normative value system”.

At the core of this new type of human rights-based constitutionalism[65] is the premise that the legitimacy of governmental power is not exclusively based on the will of “we the people” but also on the universal values of human dignity and human rights.[66] The limitation of the democratic principle by the commitment to the value of human dignity is effectuated through the supremacy of the constitution and judicial review. The judicial branch is empowered to ensure that the democratic process pays due respect to the foundational values of human dignity and human rights. Judicial review does thus not pose a “counter-majoritarian difficulty”[67] but is the natural consequence of reigning in the democratic process by constitutionally entrenched substantive values.[68]

Human dignity is in turn understood as a universal value which finds its specific and authoritative expression in the Universal Declaration of Human Rights, the two International Human Rights Covenants and other international human rights instruments.[69] Fundamental rights entrenched in national constitutions must hence be interpreted in the light of international human rights standards.[70] As the new generation of human-rights based constitutions share the commitment to the universal values of human dignity and human rights, the interpretation of national fundamental rights becomes part of a common endeavor to shed light on the exact meaning of the lodestar of the Universal Declaration of Human Rights. The comparative analysis of other human rights-based constitutions hence becomes an integral part of the hermeneutic process of interpreting the constitution.[71]

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63 German Federal Constitutional Court, judgment of 15 January 1958, BVerfGE 7, 198, 205. The English translation is based on *D. P. Kommers*, The Constitutional Jurisprudence of the Federal Republic of Germany 361, 363 (2nd ed. 1997).

64 *Carmichele v. Minister of Safety and Security*, CCT 48/00, 2001 (4) SA 938 (CC), para. 54.

65 On this new idealtype of modern constitutionalism see *A. Barak*, A Judge on Judging – The Role of a Supreme Court in a Democracy, Harvard Law Review 116 (2002), 19, 38 et seq. (“substantive democracy”); *L.E. Weinrib*, Constitutional Conceptions and Constitutional Comparativism, in: V.C. Tushnet, Defining the Field of Comparative Constitutional Law (2002), 3, 15 et seq. (“post war conception” of modern constitutionalism).

66 See *Barak* (note 65), 39; *Rensmann* (note 57), 269-270.

67 *A. Bickel*, The Least Dangerous Branch (1962), 18.

68 *Weinrib* (note 65), 16-17, 22-23.

69 See *Ch. McCrudden*, Human Dignity and the Interpretation of Human Rights, EJIL 19 (2008), 655-724.

70 See, *e.g.*,. Section 39 (1) (b) of the South African Constitution of 1996: “When interpreting the Bill of Rights, a court, tribunal or forum … must consider international law.” Cf. also Canadian Supreme Court, *R v. Keegstra*, 3 S.C.R 697, § 70: “Generally speaking, the international human rights obligations taken on by Canada reflect the values and principles of a free and democratic society, and thus those values and principles that underlie the [Canadian] Charter [of Rights and Freedoms] itself”.

71 *Barak* (note 65), 112-3; Weinrib (note 65), 4. See also Section 39 (1) (b) of the South African Constitution of 1996: “When interpreting the Bill of Rights, a court, tribunal or forum (...) may consider foreign law”.

Today many constitutions around the globe, in particular those, which like the German and the South African constitution were created in a process of transition to democracy and the rule of law, attempt to give support and orientation to government and society by constitutionally entrenching the "value system" of the Universal Declaration of Human Rights and making it enforceable through judicial review. An early instance is provided by the Indian constitution of 1949.[72] Pertinent examples of more recent times are provided by the Spanish[73] and Portuguese[74] constitutions of the late 1970s which in turn strongly influenced many modern constitutions in Latin America.[75] After the collapse of the Soviet Empire practically all States in Middle and Eastern Europe adopted this new type of constitutionalism.[76]

Gradually this new human rights-based idealtype of constitutionalism also appears to be gaining a foothold in Southeast Asia.[77] Examples in point are the Philippines following the overthrow of Marcos in 1987 and Indonesia after the downfall of Suharto in 1998 which in their constitutions and constitutional jurisprudence combined the power of judicial review with a commitment to the universal values of human dignity and human rights.[78] Recent developments in the Philippines provide an interesting illustration of how the evolution of domestic constitutional structures is influenced by international human rights mechanisms. Apparently in response to a report by the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions[79] the Philippine Supreme Court adopted on October 24, 2007 rules on the Writ of Amparo with regard to the right to life, liberty and security[80] in cases of extralegal killings, enforced disappearances or threats thereof.[81] In its first decision on the basis of this new remedy

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72 The fundamental rights and directive principles in the Constitution of India were intensely influenced by the Universal Declaration of Human Rights, see *T. Jain*, Influence of Universal Declaration on the Judicial Interpretation of Fundamental Rights and Directive Principles in the Constitution of India, (December 1, 2004), available at: <http://ssrn.com/abstract=1087594>. On the judicial review under the Indian Constitution see *B. Neuborne*, The Supreme Court of India, Journal of International Comparative Law 1 (2003), 476-510.

73 *Cf. F.J. Díaz Revorio*, Valores superiores e interpretación constitucional (1997).

74 See *A. Thomashausen*, Der Einfluss des Grundgesetzes auf ausländisches Verfassungsrecht – Portugal, in: K. Stern (ed), 40 Jahre Grundgesestz (1999), 243.

75 See *L. Cea Egana*, Estado constitucional de Derecho - nuevo paradigma juridico, Anuario de Derecho Constitucional Latinoamericano Vol. I (2005), 43.

76 See *W. Sadurski*, Rights Before Courts – A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe (2005); *H. Schwartz*, the Struggle for Constitutional Justice in Post-Communist Europe (2000).

77 On the evolution of constitutionalism in Southeast Asia see *J. Menzel*, Domestizierung des Leviathan? – Südostasiens Verfassungen und ASEAN's neues Homogenitätskriterium demokratischer Verfassungsstaatlichkeit, Verfassung und Recht in Übersee (forthcoming 2009).

78 See *D. Indrayana, Indonesia* – In Search for A Democratic Constitution (1945-2008, in: Clauspeter Hill/Jörg Menzel (eds.), Constitutionalism in Southeast Asia, Vol. II (2008), 95-121; *H. Roque*, The Philippines, Quezon's Wish Granted, in: Hill/Menzel, Vol. II (2008), 213-247.

79 Preliminary Note on the Visit of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, Mission to the Philippines (12-21-February 2007), UN Doc. A/HRC/4/20/Add.3 (22 March 2007); Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Philip Alston*, Mission to the Philippines, 27 November 2007, available at: <http://www.extrajudicialexecutions.org/reports/A_HRC_8_Philippines_Advance_Edited.pdf>.

80 Art. III, Sec. 2 of the Philippine Constitution.

81 See *Adolfo S. Azcuna*, The Philippine Writ of Amparo: A New Remedy for Human Rights, available at: <http://www.venice.coe.int/WCCJ/Papers/PHI_Azcuna_E.pdf; *Roque* (note 78), 235, 238>.

the Supreme Court in interpreting the Philippine Constitution heavily relied on the Universal Declaration, the International Covenant on Civil and Political Rights and the jurisprudence of the European Court of Human Rights.[82]

Increasingly, States with a long democratic tradition are also entrenching the "value system" of the Universal Declaration of Human Rights in their constitutions and providing it with the teeth of *Marbury v. Madison*[83]. This applies, for example, to Canada which by adopting the Charter of Rights and Freedoms in 1982 parted with the Westminster Model of parliamentary sovereignty.[84] Gradually even the old democracies in the United Kingdom and France are moving towards the new human-rights-based idealtype of constitutionalism. The adoption of the Human Rights Act 1998[85] which incorporates the European Convention of Human Rights into British domestic law marked a clear departure from Dicey's tradition of parliamentary sovereignty although the power of judicial review remains confined to mere "declarations of incompatibility". The establishment of a new Supreme Court to replace the judicial committee of the House of Lords in 2009[86] is a further indication of the strengthened role of the judiciary *vis-à-vis* Parliament. Similarly the French constitution – to which in Rousseau's tradition the concept of the judiciary being granted the power to set aside acts of Parliament had been anathema – in an amendment passed in 2008 now allows for a *posteriori* judicial review[87] against the yardstick of human rights[88].

VI. Conclusion

This article does not, of course, argue that a model constitution exists in the realm of international law which every State is under a duty to adopt. Sixty years after its inception the Universal Declaration of Human Rights has, however, proved to be a common point of reference which enables us - across all cultural divides - to enter into a meaningful discourse on the substance of the universal values of democracy, the rule of law and the protection and promotion of human rights. Constitutions need to be tailor-made to suit the specific needs of every State and every region. But Constitutions also need to rest on the firm foundations of universal values. Only then will we come closer to the bold ideal of the Universal Declaration of Human Rights according to which

> "[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized."[89]

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82 *Secretary of National Defense, et al. v. Raymund Manalo and Renaldo Manalo,* G.R. No. 2180906, October 7, 2008.

83 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

84 See *L.E. Weinrib*, The Supreme Court of Canada in the Age of Rights, Canadian Bar Review 80 (2001), 699.

85 Human Rights Act 1998 (c. 42).

86 See part 3 of the 2005 Constitutional Reform Act (c. 4).

87 *F. Fabbrini*, *Kelsen* in Paris: France's Constitutional Reform and the Introduction of a Posteriori Constitutional Review of Legislation German Law Journal 10 (2008), 1297-1312.

88 As to human rights belonging to the "bloc de constitutionalité" see Conseil Constitutionnel, Decision No. 71-44 DC of 16 July 1971, available at: <http://www.conseil-constitutionnel.fr>.

88 Art. 28 UDHR.

CONSTITUTIONALISM AND EMERGENCY POWERS

Victor V. Ramraj

Of the eleven countries in Southeast Asia considered in this volume, all except two have in the past decade experienced or are currently in the midst of a *de jure* or *de facto* emergency.[1] But while the presence of these emergencies is occasionally acknowledged in treatments of constitutional law in Southeast Asia – particularly in Singapore and Malaysia[2] – the implications of emergencies and emergency powers for the project of constitutionalism and legality have not been sufficiently examined. In contrast, the constitutional implications of emergency powers have long been a feature of constitutional theory in the Western liberal-democratic literature, interest in which has been rekindled following the September 11, 2001 attacks on the United States. Much of this literature concerns the extent to which law is able to constrain the state's response to emergencies. One prominent approach to this problem subordinates the state's emergency response to the rule of law while attempting to ensure, through the careful and sophisticated redesigning of institutions, that the legal regime does not become contaminated by exceptional

1 Brunei has been under a *de jure* state of emergency since 1962 (see *Tey Tsun Hang*, 'Brunei: Entrneching an Absolute Monarchy', Constitutionalism in Southeast Asia, Volume 2, 7-36 at 33); East Timor declared a formal state of emergency in Feburary 2008, following an attack on its leaders; parts of Indonesia, such as Aceh, have until recently been under a de facto state of emergency; in Laos, a *de facto* state of emergency remains in effect, with Hmong insurgents, who once fought for the Americans, still operating in the jungles and engaging with the Laotian army (see *Thomas Fuller*, 'Old U.S. Allies, Still Hiding in Laos' (17th December 2007) New York Times <http://www.nytimes.com/2007/12/17/world/asia/17laos.html?ex=1355634000&en=6d9a062ce449 6474&ei=5124&partner=permalink&exprod=permalink>); Malaysia, which was conceived in an emergency, remains under a formal state of emergency today (see *C.L. Lim*, 'The Constitution of Malaysia (1957-2007): Fifty Years, Fifty Amendments and Four Principle Developments' in Constitutionalism in Southeast Asia, Volume 2, 155-80, esp. at 171-75); Myanmar, currently under a military rule, remains in a *de facto* state of emergency; the Philippine government most recently proclaimed a state of emergency on 24 February 2006, which for under two weeks (see Proclamation Nos. 1017 and 1021); Singapore remains technically under a *de jure* state of emergency, having never rescinded the state of emergency it inherited when it broke away from Malaysia in 1965 (see: *M. Hor*, 'Law and Terror: Singapore Stories and Malaysian Dilemmas' in V.V. Ramraj, *M. Hor*, and *K. Roach*, eds., Global Anti-Terrorism Law and Policy (Cambridge: CUP, 2005), 273-94 at 290); the insurgency in Thailand's southern provinces prompted an emergency decree in 2005, which was extended by the interim military government in 2007, following a coup. The Khmer Rouge abandoned its insurgency in 1998, although Cambodia is still emerging from years of conflict; and Vietnam appears not, in recent times, to be under either a *de jure* or *de facto* state of emergency. On the distinction between de jure and de facto emergencies, see *Joan Fitzpatrick*, Human Rights in Crisis: The International System for Protecting Rights During States of Emergency (Philadelphia: University of Pennsylvania Press, 1994), at 3-21.

2 See, for example, *Kevin Y.L. Tan* and *Thio Li-ann*, Constitutional Law in Malaysia and Singapore, second edition (Singapore: Butterworths Asia, 1997), esp. Chapter 14 ('Special Powers Against Subversion and Emergency Powers'), esp. 581-704; *Andrew Harding*, Law, Government and the Constitution in Malaysia (Kuala Lumpur: Malayan Law Journal, 1996), esp. Chapter 9 ('Emergency Powers'), 153-66.

legal norms;[3] another approach seeks to preserve the purity of the law by subjecting extra-legal powers primarily to political checks, so as to ensure that the inevitable exercise of such powers is not legally affirmed and normalized.[4] These models stand in tension with one another; the contemporary theoretical debate is largely a debate as to whether a legal or political approach would preserve the rule of law in times of emergency.[5]

This first aim of this chapter is to question (in Parts I and II) the relevance of this literature for the complex and varied constitutional regimes in Southeast Asia. Ostensibly, any discussion of emergency powers and its implications for the rule of law ought to be relevant; the invocation of emergency powers ostensibly in response to violent political emergencies[6] is, regrettably, a common feature of the political landscape of this region. Yet the contemporary debate over emergency powers seems distant from the experiences of many states in Southeast Asia confronted with the realities of emergency government; this chapter will therefore consider the reasons for the gap between the liberal-democratic discourse on emergency power and the legal and political realities of Southeast Asia. Second, the chapter will (in Part III) set out a research trajectory for examining the problem of emergency powers in more depth. It will advance a tentative thesis that theorizing emergencies and the rule of law beyond the liberal democracies of the West requires that close attention be paid to the social and historical context of the legal and constitutional order, and the role that law plays in the society in question. This is not to deny the importance of theory, but to emphasize its contextual dimensions. The final part of the chapter will thus consider strategies for engaging with emergencies and emergency powers in a way that is relevant to Southeast Asia and furthers our understanding of legality and constitutionalism in the region.

I. Emergency Powers in Contemporary Liberal-Democratic Theory

One central concern of the theoretical debate over emergency powers in the contemporary academic literature is to understand the relationship between the post-9/11 emergency powers and rule of law norms. Several sophisticated theoretical positions have emerged but among the most prominent and theoretically sophisticated of these are Oren Gross's extra-legal measures model and David Dyzenhaus's legality model.[7] In a provocative article in the Yale Law Journal,[8]

3 *David Dyzenhaus*, 'The State of Emergency in Legal Theory' ' in Victor V. Ramraj, Michael Hor, and Kent Roach, eds., Global Anti-Terrorism Law and Policy (Cambridge: CUP, 2005), 65-89. See also The Constitution of Law: Legality in a Time of Emergency (Cambridge: CUP, 2006).

4 'Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?' (2003) 112 *Yale Law Journal* 1011; 'Stability and Flexibility: A Dicey Business' in Ramraj, *Hor*, and *Roach*, eds., Global Anti-Terrorism Law and Policy, supra note 3, 90-106. See also *Oren Gross* and *Fionnuala* Ní Aoláin, Law in Times of Crisis: Emergency Powers in Theory and Practice.

5 See *Victor V. Ramraj*, 'Between Idealism and Pragmatism: Legal and Political Constraints on State Power in Times of Crisis' in Benjamin Goold and Liora Lazarus, eds., Security and Human Rights (Oxford: Hart Publishing, forthcoming 2007).

6 Emergency powers may, of course, be enacted in response to other kinds of emergency, including natural disasters. The focus of this discussion, however, is on state responses to political violence which, because of their overtly political nature, hold a significant potential for abuse.

7 Other notable theories include: *Bruce Ackerman*, 'The Emergency Constitution' (2004), 113 Yale Law Journal 1029-91, *John Ferejohn* and *Pasquale Pasquino*, 'The Law of the Exception: A Typology of Emergency Powers' (2004) 2 International Journal of Constitutional Law 210; *David Cole*, 'The Priority of Morality: The Emergency

Gross argues that disobedience by public officials, when faced with the possibility of catastrophic violence, should be permitted, provided that such conduct is publicly disclosed and open to the possibility of public ratification after the fact. Rather than creating new legal rules to validate such conduct, this approach would better preserve the rule of the law by isolating such conduct and subjecting it to political and public rather than judicial controls. This model deters public officials from acting outside the law by making the prospect of public ratification of their illegal conduct uncertain. Dyzenhaus challenges this 'extra-legal measures model' arguing that it would permit egregious departures from norms of legality.[9] Dyzenhaus argues, instead, that through 'experiments in institutional design' we can deal with emergencies in a way that acknowledges and respects the legitimate security interests of the state while remaining consistent with a rule-of-law project that regards the rule of law as 'a rule of fundamental constitutional principle which protects individuals from arbitrary action by the state.'[10]

Gross, for his part, argues that the rule of law (in the substantive sense that Dyzenhaus describes) comes under threat in times of crisis precisely when the law is used to constrain state power. The problem, for Gross, is a practical one, in that the history of emergency powers shows that rather than constraining state power, law succumbs to and is distorted by it. The courts and the ordinary legal system, by attempting to accommodate the emergency, become tainted by it, and extraordinary measures meant to address the crisis seep into the ordinary legal system. The solution to the problem of seepage, Gross argues, is to subject emergency powers to political, rather than legal checks – creating incentives for public officials to come clean with their extra-legal conduct in a public forum in which the people, as the ultimate sovereign, will decide their fate either by ratifying their actions or by allowing the legal system to take its course. By channeling the ultimate decision about the propriety of extra-legal conduct into the political realm, Gross believes that the legal system can remain true to its fundamental principles even in times of crisis.

For Dyzenhaus, in contrast, the state should respond through law even in an emergency and its response should be consistent with the rule of law understood substantively. The demands of secrecy in such a context might, however, justify experimenting with innovative institutions that are sensitive to the unique security intelligence challenges faced by the state in time of crisis, but such institutional experimentation is not unique; modern administrative law has already found

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Constitution's Blind Spot' (2004) 113 Yale Law Journal 1753. See also: *Victor V. Ramraj*, ed., Emergencies and the Limits of Legality (Cambridge; CUP, forthcoming 2008) for a collection of 17 essays on the theoretical dimensions of emergency powers, focused largely on Western liberal democracies. For classical approaches to emergency powers in the Western constitutional tradition, see: *Clinton Rossiter*, Constitutional Dictatorship – Crisis Government in Modern Democracies (New Brunswick: Transaction Publishers, 2002); *John Locke*, 'Of Prerogative' (Chapter XIV) in Two Treatises of Government, Peter Laslett, ed. (Cambridge: CUP, 1988); *A.V. Dicey*, Introduction to the Study of the Law of the Constitution, 8th ed. (London: Macmillan, 1920), esp. Chapters 4 and 8.

8 Ibid.

9 Supra, note 3.

10 *Dyzenhaus*, The Constitution of Legality, supra note 3 at 2. Dyzenhaus's conception of the rule of law is a thoroughly substantive one. He does, of course, acknowledge formal conceptions of the rule of law as well. But he argues that rule of law in the substantive sense he describes follows normatively from a commitment to govern according to the rule of law in a liberal democracy.

ways of acknowledging, on the one hand, the need for specialized administrative tribunals, while at the same time, developing principles that allow the courts to supervise such tribunals from a distance, ensuring that their decision-making procedures are fair and rational, while deferring to their expertise on the substantive issues at hand. There is no reason, Dyzenhaus argues, why decisions on matters of national security could not follow a similar pattern, with judges acknowledging the limits of generalist courts in such matters while allowing specialized tribunals to play an important role in upholding rule-of-law values.[11]

This debate is a critical one, because it confronts one of the pressing practical and normative questions that has arisen since 9/11 – whether the state's response to an emergency can and ought to be constrained by law. This is a critical question because the answer to it affects that stance that the courts take in security matters, where the demands of legality and fundamental values appear to conflict with the often legitimate concerns of the government. If legal constraints are impractical or normatively undesirable in times of crisis, the courts and the administrative tribunals under their supervision, should largely defer to the executive, allowing abuses of state power to be dealt with politically, through the sort of robust democratic accountability that Gross imagines. If, on the other hand, legal constraints are effective or normatively desirable, then courts and tribunals should ensure that the state's response to the crisis remains within the bounds of legality; they should not hesitate to subject the state's response to the crisis to careful scrutiny to ensure consistency with substantive rule of law values.

There is, of course, much more to be said about this debate and the range of intermediate positions that could be articulated and defended between the poles of legal and political accountability that Dyzenhaus and Gross propose. What I want to highlight in this chapter are the assumptions that Dyzenhaus and Gross both make about the institutions that their theories presupposes and the generality of their theories and then examine the relevance of these theories for an understanding of emergencies and the rule of law in Southeast Asia.

II. Assumptions and Problems

There are three important assumptions in the contemporary debate over emergency powers that are present in the Gross-Dyzenhaus debate, but are also echoed more generally in the post-9/11 literature on emergencies and the rule of law. The first is a tendency to regard these theories as broadly applicable, often beyond a liberal-democratic context. The second assumption is that the institutions that provide the foundation on which the theories – say, that judiciary and political system – embody and ought to embody a particular institutional structure and ethos that allows them to play the role they need to within the particular theory. A third assumption is that although legal and social circumstances might change in times of crisis, the legal and constitutional order is more or less stable. These assumptions are problematic, because they sit uneasily with the experience of emergencies and the rule of law in Southeast Asia.

11 The Constitution of Law, supra note 3, especially Chapter 3.

Theoretical Scope

At its most general, the theoretical debate as to whether and to what extent law can constrain the exercise of state power in times of crisis is an abstract debate about the relationship between power and authority, a debate that transcends particular legal systems. If the claim is that states should be no less constrained by law in times of crisis than in ordinary times, then this claim can be unhinged from the particular circumstances; it is a normative claim about the nature of law and government. Oren Gross and David Dyzenhaus both consider their theories to be broadly applicable, though not necessarily universal. Gross insists, for instance, that his is 'not an "American" study, nor is it a post-September 11th one' and should be 'treated as generally applicable to constitutional democratic regimes faced with the need to respond to extreme violent crises.'[12] Dyzenhaus, for his part, criticizes Gross's theory as too narrow, having little to say about 'well-ordered' societies that are 'neither liberal nor democratic.'[13] This he sees as a 'severe problem for his model since such well-ordered societies are plausibly at the front line of the fight against terrorism.'[14] In contrast, Dyzenhaus regards his own theory as more broadly applicable 'in an era when the rule of law has a currency such that at least lip service to its ideals is required'[15] and sees his theory, in part, as spelling out what a commitment to the rule of law implies.[16]

One important question that arises, then, is to what extent a theoretical debate about the limits of state power in times of emergency makes sense in a legal system that does not share a liberal-democratic conception of constitutionalism, with the commitment to limited government that that system embraces. More specifically, do the terms of the debate as set by such theorists as Gross and Dyzenhaus have any relevance in the diverse societies and legal orders of Southeast Asia? These questions concern, in part, the underlying substantive conception of the rule of law and its implications for emergencies in Southeast Asia. But the scope and limits of the theories can be seen more starkly when we examine the explicit and implicit assumptions they make about the nature of institutions and their relative stability.

Institutions

A second assumption that underlies both Dyzenhaus's and Gross's theories, then, is that the actual institutions on which their theories rely – the legal and administrative state, for Dyzenhaus and the democratic process for Gross – function, or have the practical capacity to function, in the very manner required by their theories. Dyzenhaus attempts to derive from a commitment to the rule of law, an elaborate structure of the administrative state through which institutions can be designed, consistent with common law principles, to ensure that security intelligence requirements are respected while preserving the rule of law. This is done by ensuring that the administrative

12 *Gross*, 'Chaos and Rules,' supra note 4 at 1027.

13 *Dyzenhaus*, 'The State of Emergency,' supra note 3 at 72.

14 Ibid.

15 Ibid at 86.

16 For instance, in respect of the United Kingdom, Dyzenhaus argues that at this point in its constitutional development, the 'judicial understanding of its content has been irrevocably changed by the international human rights regimes and other constitutional experiments of the last fifty years or so' (The Constitution of Law, supra note, supra note 3).

institutions in question are themselves committed to the rule-of-law project and take seriously their role in protecting fundamental constitutional values.[17] Arguably, however, what does the work in Dyzenhaus's account is not the rule of law *per se*, but what he elsewhere describes as a 'culture of justification' which comes about 'when a political order accepts that all official acts, all exercises of state power, are legal only on condition that they are justified by law, where law is understood in an expansive sense, that is, as including fundamental commitments such as those entailed by the principle of legality and respect for human rights.'[18] It is not sufficient, then, that the courts see their role as keeping the executive and legislative in check; the rule-of-law project, for Dyzenhaus, requires a ubiquitous public commitment to justifying all state action in terms of the 'fundamental commitments' of the political order.

Some might be tempted at this point to dismiss Dyzenhaus's theory as all-too-romantic. Yet in his romanticism about the rule of law lies an important observation – that a commitment to the rule of law is not simply about the text of the constitution, the principles of administrative law, or the role of the courts, but rather about the deep institutional ethos of government. This is an important observation, because it suggests that Dyzenhaus's theory might find its limits not in its theoretical aspirations, but in less malleable social practices and structures. Whatever its ostensible commitment to the rule of law, a state whose institutions do not share an ethos – or culture – of justification would simply fall outside the scope of Dyzenhaus's theory. It would be unable to make sense, for instance, of the recent military coup in Thailand, a country which, at one stage, appeared to be on a path toward a deeper entrenchment of constitutionalism and constitutional government. From the perspective of an outsider, what is striking about Thailand's interim constitution, which was proclaimed in October 2006, weeks after the coup, is its appeal to the institution and support of the monarchy as the ultimate source of the interim military government's legitimacy. Not only is the interim constitution itself proclaimed by the King, but the first two sections of the Constitution pay homage to the King.[19] The first acknowledges that the King is both the head of state and the head of the armed forces – and that 'he shall be enthroned in a position of revered worship and shall not be violated, accused or sued in any manner whatsoever.' The second vests 'sovereign power' in the people – to be exercised by the King (...) through the National Legislative Assembly, the Council of Ministers, and the Courts through the provisions of this Constitution.' Dyzenhaus's theory would be hard-pressed to make sense of the role that the military or the monarchy plays in Thailand's legal and constitutional order, whether in time of normalcy or times of crisis, or on the cycle of civilian and military governments that Thailand has experienced in its modern constitutional history.[20]

Gross, too, makes assumptions about institutions – particularly the political institutions of liberal democracies – that don't sit comfortably in a Southeast Asian context. For instance, the process

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17 The Constitution of Law, supra note 3, Chapter 3.

18 See *David Dyzenhaus*, 'Deference, Security, and Human Rights' in Ben Goold and Liora Lazarus, eds., Security and Human Rights (Oxford and Portland, Oregon: Hart Publishing, 2007), 125-56.

19 Constitution of the Kingdom of Thailand (Interim), B.E. 2549 (2006).

20 For a very helpful overview, see *Chaowana Traimas* & *Jochen Hoerth*, 'Thailand: Another New Constitution as a Way Out of the Vicious Cycle' in Clauspeter Hill & Jörg Menzel, eds., Constitutionalism in Southeast Asia, vol. 2 (Singapore: Konrad Adenauer Stiftung, 2008), 287-310.

of ratification that he envisions (which admittedly may take different forms), requires that the extra-legal measures taken by the government be 'openly, candidly, and fully disclosed to the public'[21] which then decides 'either directly or through its elected representatives, to ratify, ex post, those actions that have been taken on its behalf and in its name, or to denounce them.'[22] But crucially, his model 'calls for public deliberation and, eventually, for the taking of responsibility by each and every member of the community.'[23] The requirement of public ratification 'forces the community as a whole to come to grips with the reality of the emergency and with the hard choices that the community's leaders had to make.'[24]

Yet here again, Gross's approach assumes robust liberal democratic policy with a vibrant culture of debate and dialogue – political culture that may well be alien to some, though not all, parts of the Southeast Asian landscape. So whatever the other problems might be with an extra-legal measures model in terms of its potential for abuse, we might well question whether the political culture and the institutions needed to support it are sufficiently entrenched in Southeast Asia for his approach to resonate at all.

Stability

Another important assumption – one less explicit, but nevertheless present in the theories under consideration – concerns the relative stability of the legal-constitutional order and the institutions that comprise it. Dyzenhaus's theory, for instance, which draws heavily from the jurisprudence of Australia, Canada, and the United Kingdom, assumes the existence of an entrenched, albeit evolving, constitution, stable legal and political institutions, and, crucially, a rule-of-law tradition or common law constitution with deep roots in a particular legal tradition. The existence of relatively stable norms and institutions facilitates Dyzenhaus's project, which seeks to bring to light the deep normative structure of the law – in this case, the common law constitution and public law generally. Similarly, Gross's theory, despite his claims about its wide application, is primarily concerned with the institutions, practices, and values of established liberal democracies. That this is Gross's primary concern becomes clear in his response to Dyzenhaus's critique, in which Gross concedes that a substantive precondition of his theory, which allows him to distance his theory from that of fascist theorist Carl Schmitt, is that it 'is applied and used in a community that is "worth saving"[25] – a condition that he says 'ought to underlie any meaningful discussion of emergency powers.' It is telling, however, that this concession on Gross's part leads him to frame the tension between national security and civil rights in terms of a challenge to liberal democracies: 'The tension between self-preservation and defending the "inner most self" of the democratic regime (...) which is at the heart of all discussions of emergency powers, can only be captured by those who share the belief in the viability and desirability of a constitutional, liberal, democratic regime, while taking cognizance of the fact that emergencies require special

21 *Gross*, 'Chaos and Rules,' supra note 4 at 1111.

22 Ibid at 1111-12.

23 Ibid at 1126.

24 Ibid.

25 *Gross*, 'Stability and Flexibility,' supra note 4 at 106.

treatment that may deviate from the ordinary norms.'[26] So, like Dyzenhaus, Gross too seems to be concerned with the threat emergencies pose to entrenched liberal democracies, presupposing once again the long-standing institutions, practices, and values that these liberal democracies share.

My concern here is not simply to highlight the liberal-democratic focus of their theories; rather it is to emphasize that a focus on liberal democracies is able to draw on the stable core of institutions, practices, and values that constitute an important part of them. The concern of both Dyzenhaus and Gross is the preservation of a legal-political order in the face of an emergency, a concern that – perhaps ironically – draws on the values implicit in a long and relatively stable constitutional tradition. So both theorists appeal to the political philosophy of John Locke, the constitutional theories of A.V. Dicey, and the legal controversy around the measures taken by US President Abraham Lincoln during the Civil War in support of their theoretical claims.[27] In contrast, legal and constitutional orders in Southeast Asia do not, by and large, have the institutional stability and tradition to draw on. Timor-Leste is perhaps an extreme case, a nascent state undergoing a process of reconstruction where flux, not stability, has been the norm and justice, must be understood in deeply contextual and transitional way. But even leaving aside this extreme case, other Southeast Asia states confronted with serious political violence – Indonesia, the Philippines, and Thailand, come to mind – also have constitutional orders that are nascent or rapidly evolving, where flux, not stability, have been the norm.[28] It is important, however, to acknowledge the diversity of legal and constitutional orders in Southeast Asia; Singapore and Malaysia, inherited a the common law tradition which arguably includes at least some of the common law constitutional values that Dyzenhaus refers to; and yet they too differ in important institutional respects from the liberal democracies that Dyzenhaus draws upon in support of his thesis and that Gross appears to have in mind.[29]

To be fair, Dyzenhaus acknowledges an important difference between transitional societies 'which are trying to develop the rule of law as part of a more general task of escaping from an authoritarian past' and 'societies that are already governed by the rule of law' where 'the choice against the rule of law is (…) quite difficult and will in fact be made up of many particular choices that incrementally amount to a drift in the direction of authoritarianism.'[30] In the latter kind of society, respect for the rule of law is rationally required by 'principles and institutions (…) developed over centuries.'[31] Dyzenhaus's account of the rule of law in times of emergency thus attempts to spell out the implications of these principles and institutions, and his theory, as I have been suggesting in this chapter, should be understood in this narrower context. What is

26 Ibid.

27 Supra note 7.

28 Thailand's proposed new constitution, if approved in a national referendum anticipated in September, will be its 18th: 'Thai premier will have less power under draft charter' (19 April 2007), The Straits Times (Singapore), p. 13.

29 For a discussion of the dominant but contested conception of the rule of law in Singapore. See *Thio Li-ann*, 'Rule of Law within a Non-Liberal 'Communitarian' Democracy' – The Singapore Experience' in Randall Peerenboom, ed., Asian Discourses of the Rule of Law (London and New York: Routledge, 2004), 183-224.

30 *Dyzenhaus*, The Constitution of Law, supra note 3 at 14.

31 Ibid.

missing from this account, however, is an examination of how the rule of law is to be understood – and its implications for emergency powers – in societies that have a short and sometimes intermittent commitment to constitutionalism, or where the institutions and practices necessary to support a commitment to constitutionalism are not deeply entrenched. The next part of the chapter provides a sketch of what such an account might look like and the factors it would have to consider.

III. Theorizing Emergency Powers in Southeast Asia

Before we consider what a theory of emergencies and the rule of law in Southeast Asia might look like, a preliminary question arises as to whether we should simply abandon the project of theorizing altogether on the basis that it represents a 'Western' and alien way of thinking about the rule of law in Southeast Asian states. I appreciate the force of this objection. A study of the immanent rationality of the law might not make sense in a society where law does not play the same role as it does in Western liberal democracies and where alternative community-based means of resolving disputes and governing social interactions are available, effective, and enjoy widespread public acceptance. But recognizing the role of non-legal means for addressing these concerns, need not take away from the project of theorizing law. Indeed, acknowledging the practical and contextual limitations of law may well enhance theoretical understanding. So it may well be fruitful to entertain the possibility that in theorizing about emergencies and the rule of law in Asia, we can provided a more comprehensive picture and in doing so, shed light on the relationship between law, politics, and society not only in Southeast Asia, but equally in the liberal-democratic West.

What, then, might the key features of such a theory of emergencies and the rule of law look like? I suggest three. First, the theory would acknowledge that the role of law in a particular society may well be a function of the extent to which law and constitutionalism are accepted as playing a key role in addressing social concerns and facilitating transactions among individuals, organizations, and the state. A theory focused on the consistency and coherence of the rule of law in liberal democracies and the normative implications of a commitment to the rule of law in an established legal-constitutional order may be appropriate in that context; but law may function very differently where legal and constitutional norms are not entrenched and non-legal institutions and mechanisms have a more important social, political, and economic role. A theory of the sort we are seeking would examine the contested conception of the rule of law in a Southeast Asian context in light of these contextual considerations.[32]

Second, and following closely from the first point, it would recognize that while non-legal institutions and mechanisms might in some contexts be sufficient (practically and normatively) to address social concerns and facilitate a range of transactions, in an increasingly interconnected

32 Randall Peerenboom's collection on the rule of law (supra note 29) may be a useful starting point. It is important to note, however, that a social and contextual critique of the rule of law is well established in Western legal theory, and may well provide a useful perspective for understanding the invocation of emergency powers in liberal democracies as well: see *Mark Tushet*, 'The Constitutional Politics of Emergency Powers: Some Conceptual Issues' and Nomi Claire Lazar, 'A Topography of Emergency Power' both forthcoming in Victor V. Ramraj, ed., Emergencies and the Limits of Legality, above, note 7.

world in which governments are empowered by law, domestic and international, law itself will also become an essential tool for restraining state power, particularly in times of crisis. The post-9/11 international response by the United Nations Security Council is a good example;[33] its attempt to mandate and monitor a global 'executive-led anti-terrorism regime'[34] suggests that the few societies will be able to resist the increasing importance of law. But increasing the power of governments to act through law in countering terrorist threats – with the backing of the international legal system – carries with it the risk of abuse of that power. This suggests, in turn, that law must also be deployed to counter that risk of abuse of power – and so the need for rule of law norms as a constraint on state power, and supported by entrenched institutions and values, emerges once again – perhaps out of necessity – as an important aspiration, even beyond Western liberal democracies.

Finally, the theory would articulate the differing roles that law might play in societies that are more or less law-oriented. In short, it would be sensitive to the distinction, mentioned earlier, that Dyzenhaus draws between societies already governed by the rule of law and those that are trying to develop the rule of law. In the former, the challenge posed by emergencies is that of preserving the rule of law and constraining political power – a challenge that is the main concern of both Gross and Dyzenhaus. In contrast, in societies that are trying to develop the rule of law, the challenge is more complex. We might think of it as presenting what I term the emergency powers paradox: In states that are struggling to establish legality in the face of destabilizing political violence, emergency powers may be seen as necessary to establish basic conditions of relative stability in which a legal infrastructure and culture of accountability can take hold.[35] Specifically, the challenge consists of strengthening public institutions, restoring confidence in government and its ability to deliver or facilitate the delivery of essential services and to prevent political violence; empowering the government to take difficult and controversial steps to ensure that such institutions are in place; and ensuring in the interim that state power needed to contain political violence is not abused.

I am conscious that the tentative thesis advanced in this short chapter calls for elaboration and substantiation. It requires a closer examination of the scope and limits of law in constraining state power in the diverse societies of Southeast Asia, particularly in times of emergency, and, crucially, of informal constraints on state power that operate in these societies. It also requires an appreciation of how the institutional culture underlying key legal institutions could be strengthened to ensure that they are capable of supporting substantive constitutional values, including the rule of law, to the extent that these values are embraced. What is clear, however, is that we need not simply abandon the prospect of theorizing about emergencies and the rule of law in Southeast Asia provided that our theories are sufficiently attuned to the institutional and social context of the legal and constitutional orders in question.

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33 See, for instance, UN Security Council Resolution 1373 of 2001 and the numerous resolutions on international terrorism that followed in its wake.

34 *Cathy Powell*, 'Terrorism and Governance in South Africa and Eastern Africa' in Victor V. Ramraj, Michael Hor, and Kent Roach, eds., Global Anti-Terrorism Law and Policy (Cambridge: CUP, 2005), 555-80 at 580.

35 I am developing this thesis in a separate piece, 'The Emergency Powers Paradox' slated for publication in *Victor V. Ramraj* and *Arun K. Thiruvengadam*, eds., Emergency Powers in Asia (forthcoming).

Chapter Two: State Organization

MALAYSIA'S ELECTORAL SYSTEM

Tsun Hang Tey

I. Malaysia's Political Set-up & the Inherited Election Laws

More a result of political developments brought about by its ruling elite, rather than a residue of history and inertia, Malaysia's election laws have many of the forms and features of electoral democracy[1] with the authoritarian structures and powers of a strong state.

Whilst the actual conduct of elections and the wider social conditions surrounding the conduct of elections - such as the situation of civil liberties, curbs and impediments imposed on the opposition[2] and the degree of free and fair access to the mass media[3] - are of critical importance to the existence of a democratic electoral process, this article is limited to Malaysia's election laws. This article seeks to examine the constitutional and legal aspects of Malaysia's election laws (within its first-past-the-post electoral system) seen within the broader socio-political context of Malaysia's plural society and ethnic-based political representation, to evaluate if they conform to democratic principles and equitable standards. In particular, this article seeks to: (i) explore how the growth of the dominant political elite has had direct implications for the development of Malaysia's electoral regime and arrangements for the holding of democratic elections; (ii) survey the implementation and enforcement of the election laws, including the Elections Act, Election Offences Act, Election Commission Act, Election Petition Rules and Elections (Conduct of

1 The 1991 Report of the Secertary-General of the United Nations, A/46/609 and Corr. I, para 76.

2 For example, the barring of three opposition party leaders from participating in the 2004 general elections on grounds of criminal convictions related to their political activities: "Three opposition leaders barred from running in Malaysia elections" AFX Asia (4 March 2004). However, one of the accused was later not convicted: "Malaysian court quashes opposition leader's prison sentence on state secrets charge" Associated Press Newswires (15 April 2004). Also, in view of the Prime Minister's prerogative to advise the constitutional monarch to dissolve parliament and to call for a general election, the ruling coalition can restrict the political campaigning by opposition parties by limiting the campaigning period to polling day to as short as 8 days in the 2004 general elections: "Malaysian Election Commission: Polls to be held Mar 21" Dow Jones International News (5 March 2004); *William Case*, "Malaysia's general elections in 1999: a consolidated and high-quality semi-democracy" (2001) Vol. 25(1) Asian Studies Review 35 at 38. The Internal Security Act has also been used by the government to detain opposition party members, presumably to deny them the right to contest in the general elections: *Francis Loh*, "Understanding the 2004 Election Results: Looking Beyond the Pak Lah Factor" (2004) Vol. 24(3) Aliran Monthly 8 at 10.

3 All of Malaysia's mainstream newspapers and the broadcasting media are controlled by the government and it has been widely accepted that these mainstream mass media has been biased in their reports favouring the ruling coalition and portraying a poor and distorted image of the opposition parties: see *Abdul Rashid Moten*, "August 2004 By-election in Terengganu, Malaysia: The Ascendance of Islam Hadhari" (2006) Vol. 34(1) Asian Profile 43 at 50; *Mustafa K. Anuar*, "The Role of Malaysia's Mainstream Press in the 1999 General Election" in Francis KW Loh & Johan Saravanamuttu ed., New Politics in Malaysia (Singapore : Institute of Southeast Asian Studies, 2003) 53-65; *Tun Mohd. Suffian Hashim et al,* The Election Watch Report: the 1990 General Elections (Kuala Lumpur: Election Watch, 1990) at 12-14; *Mustafa K Anuar*, "The Media Circus Comes to Town" (2004) Vol. 24(2) Aliran Monthly 19.

Elections) Regulations; (iii) examine the need of immunity for the Election Commission; (iv) examine the role of the judiciary; and (v) highlight the areas for urgent electoral reforms to restore public confidence in the electoral system and ensure the legitimacy of the political system.

Malaysia, a federation comprising 13 states,[4] although politically dominated by the ethnic Malays, is heterogeneous, with substantial Indian, indigenous and Chinese minorities. Its population today is estimated at some 27 million.[5] What was formerly known as the Malayan Federation after its independence in 1957 from the British colonial rule, it was later renamed the Federation of Malaysia in 1963 following the merger with Singapore and the Borneo territories of Sabah and Sarawak.[6]

The form of government in Malaysia is constitutional, monarchical and parliamentary at both the state and federal levels with every state having its own constitution.[7] Common to every state is a Federal Constitution which guarantees, and provides for, a separation of important powers at the federal level. While the federal government is bicameral[8] in nature, the individual states in the federation consist of unicameral State Legislative Assemblies (Dewan Undangan Negeri).

Malaysia's political mobilization as a whole follows clear ethnic divisions, and its politics is communally-orientated.[9] The three major component parties of its ruling coalition[10] - which has remained in uninterrupted power since 1957 (despite the recent setback in the 2008 elections where the ruling coalition lost power in five states in the Peninsular Malaysia) - restrict their memberships to those of one ethnic group respectively. The struggle for power is still generally among political parties representing, or are dominated by, particular ethnic groups. Ethnic-based political representation appears to be the predominant consideration any Malaysian political party must entertain to measure up against their rivals on the political playing field.

More specifically, political contestation in Malaysia today engenders a clash between an assortment (but sometimes allied[11]) of opposition members on the one hand, and the dominant, ethnically well-spread Barisan National (BN) comprising the UMNO, MCA and MIC on the other side. It will also be demonstrated in the course of this article how electoral democracy in Malaysia has for decades been persistently ethnicised by political forces, and how the ruling coalition has increasingly adopted a measured calculus to defeat its political rivals in the elections depending on their ethnic-polarity.

Demographically, the Malays make up approximately 62% of the federal population, with the

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4 11 states in Peninsular Malaysia and the East Malaysian states of Sabah and Sarawak.

5 See online at <http://en.wikipedia.org/wiki/Malaysia>.

6 Singapore later separated with the Federation in 1965.

7 *Lim Hong* Hai, "Electoral Politics in Malaysia: 'Managing' Elections in a Plural Society" in A Croissant et al (eds) Electoral Politics in Southeast and East Asia 101 at 101 (Singapore: Friedrich Ebert Stiftung : 2002).

8 The Senate (Dewan Negara) and the House of Representatives (Dewan Rakyat).

9 See *Mavis Puthucheary*, "Contextualising Malaysian Elections" in M Puthucheary & N Othman (eds) Elections and Democracy in Malaysia 1 at 2-8 (Penerbit Universiti Kebangsaan Malaysia, 2005).

10 The Barisan National (BN) comprising mainly the United Malays National Organisation (UMNO), Malayan Chinese Association (MCA) and the Malayan Indian Congress (MIC).

11 Such as the Barisan Alternatif (BA).

Chinese forming the second major race at around 24%, and the Indians, 8%.[12] An estimated 7% of the population is made up of non-Malay indigenous bumiputras of Sabah and Sarawak.[13] It will be seen in due course that even such native groups of the Borneo states play a significant role in shaping and developing a pervasively 'ethnicised', communalized or plural' nature of the Malaysian society,[14] pushing electoral politics in the direction that entails ethnically-polarised political representation and participation in Malaysia.[15]

Since 1954, Malaysia has adopted the election laws generally practised earlier in the United Kingdom.[16] The main election laws are found in the Elections Act 1958, Elections Offences Act 1954,[17] Election Commission Act 1957, Elections (Registration of Electors) Regulations 2002, and Elections (Conduct of Elections) Regulations 1981. The electoral system essentially subscribes to a first-past-the-post or plurality method which, although favours big parties at the expense of the smaller ones, promises a stronger government than proportional representation.[18]

Throughout Malaysia's political history, parliamentary elections have been held every four years or so, the latest, on 8 March 2008. The BN (or its predecessor, the Alliance) has emerged as the main victor in every election despite its low vote percentage. For instance, the BN won 90.4% of the parliamentary seats with a significantly lower vote percentage of 63.9%.[19] A more egregious example would be the 1969 election results whereby the BN secured a 64% of the parliamentary seats in spite of winning an all-time low of 49.3% votes cast.

It would be seen that this was, and is going to continue to be, made possible through a rural weightage principle that favours the rural (and mainly Malay) votes, thereby giving rise to a lopsided statistical finding in the parliamentary elections.[20]

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12 See *Lim Hong Hai*, "Electoral Politics in Malaysia: 'Managing' Elections in a Plural Society" in A Croissant et al (eds) Electoral Politics in Southeast and East Asia 101 at 102 (Singapore: Friedrich Ebert Stiftung : 2002).

13 Ibid.

14 See *Mavis Puthucheary*, "Contextualising Malaysian Elections" in M Puthucheary & N Othman (eds) Elections and Democracy in Malaysia 1 at 3 (Penerbit Universiti Kebangsaan Malaysia, 2005).

15 *Lim Hong Hai*, "Electoral Politics in Malaysia: 'Managing' Elections in a Plural Society" in A Croissant et al (eds) Electoral Politics in Southeast and East Asia 101 at 102 (Singapore: Friedrich Ebert Stiftung : 2002).

16 The basic electoral rules were formulated prior to independence, 1957, for the first federal election in the Federation of Malaya in 1955. These basic electoral rules, together with important additions and changes, were then incorporated into the Federal Constitution adopted at the independence. Important amendments were also made to the election laws both before and after the 1963 formation of the expanded Federation of Malaysia.

17 For a brief exposition of the various election offences, see "Elections Offences" (2004) Vol. 24(2) Aliran Monthly 29.

18 *Lim Hong Hai*, "Electoral Politics in Malaysia: 'Managing' Elections in a Plural Society" in A Croissant et al (eds) Electoral Politics in Southeast and East Asia 101 at 103 (Singapore: Friedrich Ebert Stiftung : 2002).

19 See *Tunku Sofiah Jewa*, Malaysian Election Laws (Vol 1-3) pp 15, 71, 353, 490, 573, 877, 1090, 1267,1509, 1871 (Kuala Lumpur : Pacifica Publications, 2003).

20 See Ibid. See also *Khoo Boo Teik*, "Limits to Democracy: Political economy, ideology and ruling coalition" in M Puthucheary & N Othman (eds) Elections and Democracy in Malaysia 19 at 42 (Penerbit Universiti Kebangsaan Malaysia, 2005) which usefully details the relevant figures pertaining to BN's electoral victory reproduced here in the following manner [year] (percentage of seats won: percentage of votes collected): 1959 (71%: 51.7%), 1964 (86%: 58.5%), 1969 (64%: 49.3%), 1974 (88%: 60.7%), 1978 (84%: 57.2%), 1982 (86%: 60.5%), 1986 (84%: 55.8%), 1990 (71%: 53.4%), 1995 (84%: 65.2%), 1999 (77%: 56.5%).

The Election Commission was constitutionally established in 1957 under Article 114 of the Federal Constitution.[21] The intended objective was to allow for transparent administration and conduct of the electoral process that must be seen as fair to all competing political parties.[22] However, this does not mean that the credibility of the electoral system is entirely dependent on the performance of the Election Commission, for the electoral process could be controlled and manipulated by the legislature and certain government practices.

It is important to appreciate that the overwhelming parliamentary control by the BN has direct implications on the way Malaysia's electoral system is modified and adapted over the decades, to preserve the status quo of retaining BN's political leadership in Malaysia. This, as will be seen later, came in the form of constitutional amendments.

Legislative interference, however, is not the only factor behind the BN's control of the electoral process. The BN has at its disposal a whole array of state resources, including the command of administrative apparatuses, the control over economic resources, and the ownership and regulation of the mass media.[23]

This article analyses how the BN, ultimately, enlists a multi-pronged approach to stack the decks in its favour: legislative sculpting, behavioural conditioning of the Election Commission and exploitative utility of the state machinery to aid in its campaigning efforts.

Finally, it would be seen that Malaysia has departed sharply from the orthodoxy of electoral democracy following the abolition of local government elections in the 1960s.[24] This was to curb the growing influence of the Socialist Front which was at that time fast gaining popularity amongst the electorate.[25] What was previously known as a democratic local government was substituted with a nominative local government.[26] Not only did this raise concerns in the public over the accountability and transparency of the nominated local councilors, it also became unacceptable[27] as the people no longer have a say in choosing their grassroot representatives in the government.

II. The Election Commission – Manipulated, Constrained and Inept

Electoral administration in Malaysia is carried out by the Election Commission. The three main functions of the Election Commission are the delimitation of constituencies, the preparation and revision of electoral rolls and the conduct of elections for the House of Representatives (Dewan Rakyat) and the Legislative Assemblies of the states.[28]

21 See online at <http://www.spr.gov.my/index/history.htm>.

22 *Lim Hong Hai*, "Making the system work" in M Puthucheary & N Othman (eds) Elections and Democracy in Malaysia 249 at 249 (Penerbit Universiti Kebangsaan Malaysia, 2005).

23 *Khoo Boo Teik*, "Limits to Democracy: Political economy, ideology and ruling coalition" in M Puthucheary & N Othman (eds) Elections and Democracy in Malaysia 19 at 40 (Penerbit Universiti Kebangsaan Malaysia, 2005).

24 See generally *Goh Ban Lee*, "The Demise of Local Government Elections and Urban Politics" in M Puthucheary & N Othman (eds) Elections and Democracy in Malaysia 49 (Penerbit Universiti Kebangsaan Malaysia, 2005).

25 Ibid at 56.

26 Ibid at 62.

27 Ibid.

28 The general powers and duties of the Election Commission are spelled out under Section 5 of Elections Act 1958.

The Election Commission comprised three members[29] when it was first set up in 1957 under Article 114 of the Federal Constitution.[30] Membership grew to four in 1963 following the formation of Malaysia and the inclusion of Sabah and Sarawak. It was only in 1981 that the office of Deputy Chairman was created via a constitutional amendment, increasing its membership to five.[31] The Election Commission may also appoint officers to assist in the administration and running of elections.[32]

Today, the Election Commission comprises a total of seven members,[33] and assisted by an office of the Secretariat.[34] Office-bearers in the Election Commission enjoy security of tenure,[35] similar to that of the judiciary,[36] as well as some measure of remunerative security.[37] This seeks to ensure that the Election Commission can discharge its functions independently without any undue political influence.[38] This objective has not been achieved.

Inducing a compliant Election Commission

The independence of the Election Commission is not constitutionally guaranteed. All that is provided by the Constitution is that the appointment of members "shall have regard to the importance of securing an Election Commission which enjoys public confidence".[39] The wider expression of "public confidence" does not necessarily equate with independence. It thus appears that Article 114(2) is a practically defective and unsatisfactory constitutional safeguard against potential partiality of the Election Commission in the discharge of its functions.

A good example is the ostensible pattern of appointing political party members[40] and retired civil servants to office positions within the Election Commission.[41] While such appointments do not *ipso facto* lead to a loss of "public confidence" in the Election Commission, the guarantee of an independent Election Commission is severely weakened. The fear of partiality and party bias

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29 Comprising a chairman and two other members.

30 Article 114(1) today states: "The Election Commission shall be appointed by the Yang di- Pertuan Agong after consultation with the Conference of Rulers, and shall consist of a chairman, a deputy chairman and three other members".

31 Ibid.

32 Article 115(2) of the Federal Constitution; Section 3 of Elections Act 1958.

33 Comprising a chairman, deputy chairman, and five other members.

34 See online at <http://www.spr.gov.my/index/organization.htm>.

35 Article 114(3) of the Federal Constitution.

36 Article 125 of the Federal Constitution.

37 Article 114(5) of the Federal Constitution.

38 However, the independence and impartiality of the Election Commission has been severely doubted in view of its implementation and operation. For example, the 2004 general elections saw a mere 8 days of campaigning despite constitutional provisions stipulating that elections may be held within 60 days after the dissolution of Parliament: see "The Election Commission is Not Free and Fair" (2004) Vol. 24(2) Aliran Monthly 30.

39 Article 114(2) of the Federal Constitution.

40 For instance, members of the Malaysian Chinese Association (MCA) and the Malaysian Indian Congress (MIC), both of which belong to the Alliance led by the dominant ruling party UMNO.

41 See *Lim Hong Hai*, "Electoral Politics in Malaysia: 'Managing' Elections in a Plural Society" in A Croissant et al (eds) Electoral Politics in Southeast and East Asia 101 at 114 (Singapore: Friedrich Ebert Stiftung : 2002).

could have been significantly allayed had Article 114(2) expressly provided for the independence of the Election Commission.[42]

It is necessary to go deeper in order to explain the position adopted by the governing political leadership. The ruling Alliance became aware that an independent Election Commission could harm its political control and dominance of the government, and thus saw the need to counterbalance any potential disadvantage such an Election Commission could bring to the Alliance, by making partisan appointments to the Election Commission.

The first chairman of the Election Commission, Dr. Mustafa Albakri went through a strained relationship with the government in the 1960s due to his independent stance in attempting to re-delineate the electoral constituencies after the 1959 election. The changes brought about by the amendment to Article 114(4) in 1960[43] were widely perceived as an attempt aimed at removing the then chairman from the Election Commission.

Article 114(4) was amended to provide for the removal of the chairman if he "engages in any paid office or employment outside the duties of his office". Dr. Mustafa Albakri was able to defend his office by relying on Article 114(6) which ensures that no terms of office of a member of the Election Commission shall be altered to his disadvantage after his appointment.[44]

However, the effect of this provision was later circumvented by the government via a constitutional amendment in 1962 which, inter alia, empowered parliament to "provide for the terms of office of members of the Election Commission other than their remuneration".[45] This gave the government the power to intervene on the terms of office for appointment holders even before they officially hold office in the Election Commission, thereby preventing the government from falling foul of Article 114(6) in achieving its political agenda.

This brought about the possibility that subsequent appointed members might become beholden to the very governmental organ the Election Commission was originally designed to enjoy independence from. This indirect 'conditioning' of subsequent appointment holders in the Election Commission was accompanied by engineered co-optation of the Election Commission through partisan[46] appointments within its office, thereby granting the Alliance considerable assurance of its continued dominance within the government.

Recent developments in the Malaysian electoral system also indicate clearly manipulative behaviour of the ruling coalition. In late 2007, parliament moved to pass a bill the effect of which is the extension of the retirement age of the Election Commission chairman from 65 to 66.[47] The Constitution (Amendment) Bill 2007 was tabled for the first reading in parliament less

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42 Ibid.

44 Article 114(6) of the Federal Constitution.

45 Constitution (Amendment) Act of 1962 (No 14 of 1962), clause 21, inserting Article 114(5A).

46 It was observed, however, that subsequent replacements of members were not found to be "flagrantly partisan": *Lim Hong Hai*, "Electoral Politics in Malaysia: 'Managing' Elections in a Plural Society" in A Croissant et al (eds) Electoral Politics in Southeast and East Asia 101 at 114 (Singapore: Friedrich Ebert Stiftung : 2002). It could be surmised that the government is well aware of the controversy that it would attract had it done otherwise, and therefore retreated into a more subtle co-optation exercise in recent decades.

47 Article 114(3) of the Federal Constitution.

than two months before expiry of the term of office of the incumbent Election Commission chairman.[48] In a matter of weeks, the bill was approved by parliament, retaining the incumbent chairman in office for an additional year in spite of heavy resistance from both the public and opposition members in the legislature.[49] This was made possible only because the ruling coalition commanded an overwhelming majority in the legislature, holding more than four-fifths of the seats in the Lower House.[50]

The ruling coalition found it imperative to retain and employ the service of an Election Commission chairman who was widely criticized for being deferential to the BN in the discharge of his duties. Or at least his presumed ineptitude in managing the administration of past elections has proved to have been serendipitously favourable to the continuous electoral success of the BN. The ruling coalition would stop at nothing to turn a deaf ear to public outcry in the pursuit of its own political agenda, no matter how blatantly indiscreet its measures in doing so appear to be.[51]

In all eventualities, the deck is stacked in its own favour. The perceived inefficiency of the Election Commission in administering the election – whether through impartiality or sheer ineptitude – could potentially lead to an election whose results can hardly reflect the true will of the people.

Delimiting the powers of the delimiter

Constitutional reforms over the decades have effectively reduced the Election Commission to a mere administrative body with virtually meaningless administrative powers. In order to appreciate the full effect of these constitutional reforms, it is important to revisit the initial position laid down from the time the Malayan Federation gained independence in 1957.

The Alliance had by then acquired an overwhelming majority of 51 out of 52 seats in the first federal election in 1955.[52] Back then, the Alliance seemed content with the electoral system already in place as evidenced by its support to the formulation of the recommendations of the Reid Constitutional Commission. In the years to come, the Federation was to witness a gradual departure from the recommendations of the Reid Commission, brought about by the ruling Alliance.

Before 1962, the Election Commission enjoyed full and final authority in the review and the delimitation of constituencies.[53] The Election Commission did not have to seek the approval of the legislature in carrying out the delimitation of constituencies at the state and federal levels.

48 *Tan Sri Abdul Rashid Abdul Rahman*; see "Move to let polls panel members stay till 66" New Straits Times (Malaysia) (21 November 2007).

49 See *Carolyn Hong*, "KL approves Bill extending term of election chief" The Straits Times (Singapore) (12 December 2007); *Carolyn Hong*, "Protest march to Parliament foiled; 29 activists detained" The Straits Times (Singapore) (12 December 2007).

50 Such dominance far exceeds the requirement of a two-thirds majority for constitutional amendment.

51 *Carolyn Hong*, "Abdullah warns: Public safety before freedom" The Straits Times (Singapore) (11 December 2007). See also *Carolyn Hong*, "Protest march to Parliament foiled; 29 activists detained" The Straits Times (Singapore) (12 December 2007).

52 *Tunku Sofiah Jewa*, Malaysian Election Laws (Vol 1) p 5 (Kuala Lumpur : Pacifica Publications, 2003).

Once constituencies have been duly delimited by the Election Commission, there could be no amendment made by the ruling party in the parliament. This prerogative of the Election Commission was removed with the passing of the Constitution (Amendment) Act 1962,[54] which introduced a new Thirteenth Schedule to the Federal Constitution.[55]

Part II of the Thirteenth Schedule laid down the rules and procedure to be followed by the Election Commission in the delimitation of constituencies. What is notable is the sharp departure from the pre-amendment position — the Election Commission no longer had the final authority to review and delimit constituencies. It has to submit a report to the Prime Minister who would then present it to the House of Representatives for approval (with necessary amendments, if any, by the Prime Minister) by a simple majority vote.[56]

In 1973, the Constitution (Amendment) (No 2) Act 1973[57] amended Article 46 of the Constitution to allow the number of parliamentary constituencies, and apportioned seats among the states, to be established in accordance with what is specified in the new Article 46. This meant that the delimitation exercise by the Election Commission is severely restricted since the legislature now has the final say on the number of parliamentary constituencies and their apportioned seats.[58]

Although it has been observed elsewhere[59] that notwithstanding the 1973 restrictions imposed on the Election Commission the constituency reviews by the Election Commission can still extend to the total number of parliamentary constituencies, the combined effect of the 1973 amendments and the imposed mandatory parliamentary scrutiny of any recommended review by the Election Commission[60] has formalistically shrunk the scope of the Election Commission's powers and its jurisdiction over constituencies. Today, the Election Commission only retains its jurisdiction to conduct the delimitation of constituencies and apportionment within every state subject to parliamentary approval.[61]

In 1984, the Constitution (Amendment) (No 2) Act 1984[62] removed the upper limit of the mandatory periodic review of constituencies, leaving only the lower limit of "an interval of not less than eight years [after the date of completion of the last review]".[63] The significance of this amendment is that there is no longer a requirement to compel a periodic review of

53 *Lim Hong Hai*, "Making the system work" in M Puthucheary & N Othman (eds) Elections and Democracy in Malaysia 249 at 252 (Penerbit Universiti Kebangsaan Malaysia, 2005).

54 No 14 of 1962.

55 See Constitution (Amendment) Act 1962 (No 14 of 1962), clause 31.

56 See also Thirteenth Schedule clauses 9-11 of the Federal Constitution today.

57 Act A206.

58 An example would be the Constitution (Amendment) (No 2) Act 1984 (Act A585), clause 14 which amended the number of members for the Federal Territories of Kuala Lumpur and Labuan under Article 46 of the Constitution.

59 *Lim Hong Hai*, "Making the system work" in M Puthucheary & N Othman (eds) Elections and Democracy in Malaysia 249 at 253 (Penerbit Universiti Kebangsaan Malaysia, 2005).

60 Thirteenth Schedule of the Federal Constitution.

61 Thirteenth Schedule of the Federal Constitution.

62 Act A585.

63 See Article 113(2)(i).

constituencies if the Election Commission were not so minded. Periodic review, save for any eventualities specified in Article 113(3A),[64] is no longer automatically triggered.

Additionally, the new Article 113(3A) now enables review of constituencies to be triggered at the whim of the ruling party since legislative alteration of Article 46 could be carried out easily. This marked shift from a permissive to a prescriptive tone of the relevant constitutional provisions has effectively led to the usurpation by the legislature of the Election Commission's prerogative - of its own judgment and volition – to initiate a review of constituencies at anytime.

The Election Commission is relegated to a mere executor administrator of the electoral system, always having to take its cue from the ruling government. This situation is made even less optimistic in light of Article 113(3A)(i) which encourages (by way of permission) selective review of "the area which is affected by the [Article 46] alteration".[65] The room for abuse is alarmingly wide.

Failure to measure up

No electoral administrator, however independent and politically-insulated, can bring about free and fair elections without exhibiting a high standard of competence and efficiency in the discharge of its responsibilities. Malaysia's Election Commission has been drawing flak from persistent criticisms regarding its revision of electoral rolls and the actual conduct of election.[66] The real devil, so to speak, lies in identifying the real cause – whether ineptitude or lack of integrity – of the widely held dissatisfaction over these two key concerns. Although there is no immediate way of discovering the truth behind these matters, it would only take either monumental optimism or blithe naivety to believe that the attendant problems in the electoral rolls and conduct of election are solely caused by the ineptitude of the Election Commission.

III. The Apportionment and Delimitation of Constituencies – Gerrymandering as Norm

The Federal Constitution places the responsibility of delimiting constituencies[67] on the Election Commission.[68] In general, the delimitation of constituencies refers to the reviewing and redrawing

64 Article 113(3A)(i) reads: "Where the number of elected members of the House of Representatives is altered in consequence of any amendment to Article 46, or the number of elected members of the Legislative Assembly of a State is altered in consequence of a law enacted by the Legislature of a State, the Election Commission shall undertake a review of the division into federal or State constituencies, as the case may be, of the area which is affected by the alteration, and such review shall be completed within a period of not more than two years from the date of the coming into force of the law making the alteration.".

65 See Article 113(3A)(i).

66 See for example: Election Watch, Report on the eighth Malaysian general elections held on 20th and 21st October 1990 p 10 (Kuala Lumpur: Election Watch, 1990).

67 The suggestion of a radical system change to some form of proportional representation is politically not feasible, although it is the only effective way of solving the problem of unfairness in constituency delineation. A complete switch to proportional representation, judging by the past election results, would certainly deprive the ruling coalition of its two-thirds majority. See *Lim Hong Hai*, "Electoral Politics in Malaysia: 'Managing' Elections in a Plural Society" in Aurel Croissant et al ed., Electoral Politics in Southeast and East Asia (Singapore: Friedrich Ebert Stiftung, 2002) 101 at 103.

68 Article 113(2) of the Federal Constitution.

of the geographical boundaries into respective constituencies for the purposes of apportioning the number of seats in the House of the Representatives to the different states.[69]

The importance of subjecting the exercise of delimitation to a set of clear guiding principles carried out by a neutral body such as the Election Commission can be discerned from the recognition that elections can, through infinite possibilities of redrawing constituency boundaries, produce a variety of election results even if the pattern of votes remains constant. This is especially so since there are two potential causes of an unfair electoral process: mal-apportionment (where constituencies are not delineated proportionally according to the electorate population) and gerrymandering (where constituency boundaries are delineated unfairly in favour of a particular political party).[70]

Unfortunately, the Federal Constitution at present does not adequately spell out the guiding principles under which the Election Commission should carry out its duty in the delimitation exercises.[71] Vague and general guidelines give rise to inherent ambiguities that could work unfairly against contesting candidates. The vague usage of expression such as "regard ought to be had", "inconveniences attendant on alterations of constituencies", and "maintenance of local ties"[72] without further elaboration leaves much to be desired in assuring consistent and fair delimitation practices.

It would hence not come as a surprise that the electoral process is susceptible to abuse through arbitrary and capricious definitions adhered to by the Election Commission of the day. For instance, nothing in the guidelines as spelled out in the Federal Constitution today provides and obliges the Election Commission to strictly adhere to the equal-sized constituency doctrine in the delineation process. This gives rise to mal-apportionment where the constituencies can be delineated to constitute unequal electorate populations to favour a particular political party, and to dilute the electoral support for the rival political parties.

The Malaysian electoral system fails to adhere to the one-vote-one-value principle in its elections. A rural weightage principle is constitutionally provided for in the Thirteenth Schedule of the Federal Constitition.[73] This essentially seeks to protect the rural electors (where problems of accessibility and communication are more prevalent) by way of augmenting the value of their votes so as to dilute the corresponding advantage their urban counterparts carry over them.[74]

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69 The allocation formula has been interpreted by the Election Commission to mean a 2:1 weightage on electorate numbers to the total population numbers.

70 See *Lim Hong Hai*, "Making the System Work: The Election Commission" in Mavis Puthucheary & Norani Othman ed., Elections and Democracy in Malaysia (Malaysia: First Printing, 2005) 249 at 265.

71 It should, however, be noted that apportionment of parliamentary constituencies between the various states are no longer part of the Election Commission's role following the 1973 amendments: Article 113(2) of the Federal Constitution.

72 Clause 2 of the Thirteenth Schedule to the Federal Constitution.

73 Thirteenth Schedule of the Federal Constitition, clause 2.

74 Technically, such a principle serves to assign more weight to the rural votes due to difficulties such as accessibility and outreach of the government to electors in the rural areas. However, because most Malay electors are concentrated in the rural areas, the rural weightage principle has been more conveniently exploited to favour Malay-majority parties in the elections. The resulting effect of such ethnic politics is the inclusion of more non-Malay-majority parties (such as the Chinese-based MCA and the Indian-based MIC) into the Alliance (or now the National Front) who otherwise would be unable to secure parliamentary and state assembly seats in the government. Today, the ruling coalition has grown from a coalition of 3 parties to a coalition of 14.

However, the Federal Constitution does not define "rural" and "urban" for the purposes of constituency delineation.[75] Not once has the Election Commission attempted to define what "rural" and "urban" areas actually mean in the course of the delineation exercises. These are inherent shortcomings that render the principle of delimitation unsatisfactory. For example, depending on what the Election Commission chooses to characterize a "rural" or "urban" district, geographical boundaries can be arbitrarily drawn to manipulate the chances of electoral success for a particular political party.

The problem regarding the inherent ambiguity found in the Thirteenth Schedule is made worse by the removal of the limitation on the maximum allowable difference in the number of electorates between the rural and the urban constituencies.[76]

The historical development in this area can be traced to the 1950s. Prior to 1957, the maximum allowable difference between the number of electorates in a rural and an urban district was 33%.[77] Following the Reid Commission's recommendations in 1957, the limitation was reduced to 15%. This produced a closer adherence to an equal-sized constituency doctrine. However, this limitation was relaxed to 50% in 1962[78] and eventually entirely removed in 1973.[79] Thus, it results in the Malay-based UMNO being given the electoral advantage granted thereof.[80] This not only gave Malay-based political parties considerable advantage over non-Malay based political parties, but also paved the way for potential partisan-driven tendencies in mal-apportionment.

Some empirical analysis on electoral trends between 1960 and 1999 is sufficient to illustrate the prevalence of an induced and sustained Malay electoral advantage. The Malay population in Peninsular Malaysia was relatively stable, measuring to an average of around 55% of the entire Peninsular Malaysian population.[81] This closely coincided with the Malay electorate during that period of time. Ordinarily, one would expect that this would be proportionally mirrored in the corresponding percentage of Malay-majority constituencies. However, it was observed that notwithstanding the relatively constant percentage of Malay population (and electorate), the percentage of Malay-majority constituencies has seen a consistent increase over the years from the 1959 election to the 1999 election.[82] This trend holds true at the Federal level as well,[83] giving considerable advantage to the Malay-based UMNO[84] in every election.

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75 Clause 2(a) of the Thirteenth Schedule.

76 Clause 2(c) of the Thirteenth Schedule as amended by Constitution (Amendment) Act (No. 2) 1973; it now simply states inter alia: 'a measure of weightage'.

77 The maximum weightage on votes allowed was 2:1 for the rural constituencies from 1955 to 1957.

78 Constitution (Amendment) Act 1962.

79 Constitution (Amendment) Act (No. 2) 1973.

80 The result is that a smaller population of the rural voters would lead to a higher weightage assigned to their votes.

81 *Lim Hong Hai*, "Electoral Politics in Malaysia: 'Managing' Elections in a Plural Society" in A Croissant et al (eds) Electoral Politics in Southeast and East Asia 101 at 129 (Singapore: Friedrich Ebert Stiftung : 2002).

82 Ibid.

83 *Lim Hong Hai*, "Making the system work" in M Puthucheary & N Othman (eds) Elections and Democracy in Malaysia 249 at 268 (Penerbit Universiti Kebangsaan Malaysia, 2005).

84 The leading party in the Alliance.

One possible explanation for such electoral pattern is the increasingly liberal franchise rules flowing from the Federation's gradual move towards liberalization of citizenship requirements over the decades.[85] This invariably resulted in decreasing enfranchisement advantage the Malays had over other minority ethnic groups.

The ruling coalition saw the need to counterbalance this effect by adjusting the scale to maintain its electoral advantage over other opposition parties representing the minority non-Malay electorate. This could only be brought about through carefully engineered constituency re-delineations in a way that would enhance the political control of Malay-based political parties over the contesting constituencies.[86]

With respect to Sabah and Sarawak, political competition is heavily skewed in favour of the Muslim bumiputras (including the Malays) vis-à-vis non-Muslim bumiputras and other ethnic groups. This has been made possible through a grossly disproportionate advantage given to the former, to devalue the latter's votes, more drastically than the rural weightage imposed in Peninsular Malaysia. In both states, no electorally advantaged community constituted the majority in their state constituencies.[87] Thus Malay-based political parties had the best to gain from this arrangement since they clearly benefited the Malay-Muslim electors in these two states. Again, the success of Malay-based political parties in Sabah and Sarawak[88] would not have been possible without biased re-delineation practices.

The rural weightage principle would have become the UMNO-led coalition's absolute trump card were it not for the opposition PAS (Parti Islam SeMalaysia). PAS is a predominantly pro-Islam Malay political party which primarily aims to attract Malay-Muslim votes. As such, the rural weightage principle becomes a double-edged sword in PAS-contested constituencies. UMNO runs a considerable risk of losing out to the PAS, as evidenced by PAS's historical success in diluting UMNO dominance in the 1999 and 2008 elections. In the 1999 election, PAS secured a total of 98 out of 394 seats in both the Federal and State legislatures in Peninsular Malaysia, posing a real threat to the BN.[89]

In 2004, UMNO's stratagem against the PAS allegedly came in the form of mal-apportionment and gerrymandering in the 2003 constituency re-delineation.[90] The opposition charged, inter alia, that the effect of the constituency review was to diversify the ethnic composition in PAS-

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85 *Lim Hong Hai*, "Electoral Politics in Malaysia: 'Managing' Elections in a Plural Society" in A Croissant et al (eds) Electoral Politics in Southeast and East Asia 101 at 129 (Singapore: Friedrich Ebert Stiftung : 2002).

86 For a detailed study on the percentage of Malay-majority constituencies broken down to the various Penisular Malaysian states, see Lim Hong Hai, "Electoral Politics in Malaysia: 'Managing' Elections in a Plural Society" in A Croissant et al (eds) Electoral Politics in Southeast and East Asia 101 at 131 (Singapore: Friedrich Ebert Stiftung : 2002).

87 *Lim Hong Hai*, "Making the system work" in M Puthucheary & N Othman (eds) Elections and Democracy in Malaysia 249 at 270 (Penerbit Universiti Kebangsaan Malaysia, 2005).

88 More particularly Sabah: See *Lim Hong Hai*, "Making the system work" in M Puthucheary & N Othman (eds) Elections and Democracy in Malaysia 249 at 271 (Penerbit Universiti Kebangsaan Malaysia, 2005).

89 *Tunku Sofiah Jewa*, Malaysian Election Laws (Vol 3) p 1871 (Kuala Lumpur : Pacifica Publications, 2003).

90 See *Lim Hong Hai*, "Making the system work" in M Puthucheary & N Othman (eds) Elections and Democracy in Malaysia 249 at 271 (Penerbit Universiti Kebangsaan Malaysia, 2005). For detailed breakdown of the delimitation exercise, see online at <http://www.aliran.com/oldsite/monthly/2002/8f.html>. It must be noted that the re-delimitation exercise began in early 2002, and was finally approved by parliament with minor changes in April 2003.

held constituencies so as to reduce PAS's chances in securing victory in the 2004 election.[91] True enough, it turned out that PAS suffered a huge setback, losing control over the state of Trengganu and securing only a marginal victory in Kelantan with a narrow majority of 24 out of 45 seats.[92]

With respect to one of the most contentious states,[93] Kedah,[94] it was shown that "[t[he 2002 delimitation process involved moving 'safe areas' in traditional UMNO strongholds and non-Malays seats into constituencies that were vulnerable to the opposition and changing boundaries beyond the usual administrative areas in order to create constituencies that would strengthen the BN's electoral position."[95]

Again, the 2002 re-delimitation exercise demonstrated how UMNO became the beneficiary of a tactical dilution-through-diversification approach against PAS-held state constituencies in Kedah. Non-Malay wards deemed to be the BN's "safe state seats" were fused with PAS-held constituencies in the redrawing of boundaries.[96] For instance, the cross-administrative district transplantation of the Gurun state seat to the parliamentary state seat of Yan (renamed Jerai) was cited as a particularly egregious case of gerrymandering, the intention of which was to defeat PAS which previously won the seat in Yan by a slim majority of 0.7% of the votes cast.[97] The political impact of importing the "safe votes" from Gurun to Yan essentially boosted the BN's electoral strength by an estimated 5,233[98] votes.[99]

A similar pattern was observed in the parliamentary seats of Pokok Sena, Kuala Kedah and Baling.[100] The parliamentary seat of Alor Setar (which previously gave the BN an overwhelming victory of 14,384 votes) was employed as a buffer to absorb the state seat of Telok Kechai, neutralizing the electoral disadvantage it provided the BN (in the parliamentary seat of Kuala Kedah) in the 1999 election.[101] The result of the 2004 election, as one might have expected, was a crushing defeat for PAS.[102]

A revival of the limitation on the variation in the numbers of electorate between rural and urban constituencies has to be the primary focus of reform. It is not logical to assume that rural areas

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91 Ibid. See also "Motion on EC proposal passed" New Straits Times (Malaysia) (9 April 2003).

92 *Farish A Noor*, *Islam Embedded*: The Historical Development of the Pan-Malaysian Islamic Party PAS (1951-2003) (Vol 1) p 72 (Kuala Lumpur : Malaysian Sociological Research Institute, 2004). See also online at <http://en.wikipedia.org/wiki/Parti_Islam_Semalaysia>.

93 *Ong Kian Ming* & *Bridget Welsh*, "Electoral Delimitation: A case study of Kedah" in M Puthucheary & N Othman (eds) Elections and Democracy in Malaysia 316 at 316 (Penerbit Universiti Kebangsaan Malaysia, 2005).

94 Comprising a "predominantly rural Malay majority with pockets of non-Malay urban areas": Ibid.

95 Ibid at 317.

96 Ibid at 321.

97 See online at <http://www.aliran.com/oldsite/monthly/2002/8f.html>.

98 A figure based on the 1999 election results.

99 *Ong Kian Ming* & *Bridget Welsh*, "Electoral Delimitation: A case study of Kedah" in M Puthucheary & N Othman (eds) Elections and Democracy in Malaysia 316 at 339 (Penerbit Universiti Kebangsaan Malaysia, 2005).

100 Ibid.

101 Ibid.

102 Compare ibid at 322 with 343.

invariably remain rural in light of the relentless pace of urbanization in Malaysia. This is sufficient to justify imposing limitation – with a prospect of increasing equalization – on the variation in electorate size between rural and urban areas. Clear definitions of "rural" and "urban" areas have to be established.

Constitutional amendments over the years have gradually eroded the Election Commission's status as the bastion of independent administrator of the electoral process. For instance, the dissatisfaction by the Alliance over the Election Commission's Report of 1960 to re-delineate constituencies and reduce the number of seats in the House of Representatives from 104 to 100 was reversed by a constitutional amendment passed in parliament.[103] This showed how easily the Election Commission's actions in delimitation can be reversed by dissatisfied political parties in power. This 'thwarting mechanism' makes a convenient tool for the ruling party to fine-tune any changes brought by the Election Commission to its own political advantage.

The Election Commission's powers to delimit constituencies were also seriously constrained with the addition of the Thirteenth Schedule to the Federal Constitution, which effectively confined the Election Commission to review only the division of the Federation and states into constituencies and recommending necessary changes.[104]

Also, the Election Commission's recommendations are now required to be submitted to the Prime Minister who reserves the right to alter the recommendations even before submission of it is made to the House of Representatives.[105] If the House of Representatives does not accept the recommendations, the Prime Minister may amend it "after such consultation with the Election Commission as he may consider necessary".[106] The recommendations for delimitation need only be objected to by one-half of the members in the House of Representatives, and neither the Senate or the Upper House (Dewan Negara) needed to be consulted.[107]

Even though the public may under appropriate conditions submit its objection to any recommendations proposed and thereby obliging the Election Commission to conduct a local enquiry in respect of the relevant constituencies,[108] the Election Commission may not conduct more than two such local enquiries.[109]

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103 Constitution (Amendment) Act 1962.

104 Article 113(2) of the Federal Constitution.

105 Clause 9 of the Thirteenth Schedule states: 'As soon as may be after the Election Commission have submitted their report to the Prime Minister under section 8, he shall lay the report before the House of Representatives, together (except in a case where the report states that no alteration is required to be made) with the draft of an Order to be made under section 12 for giving effect, with or without modifications, to the recommendations contained in the report.'

106 Clause 11 of the Thirteenth Schedule.

107 Clause 11 of the Thirteenth Schedule; this is despite having a bicameral system of government.

108 Clause 5 of the Thirteenth Schedule states: 'Where, on the publication of the notice under section 4 of a proposed recommendation of the Election Commission for the alteration of any constituencies, the Commission receive any presentation objecting to the proposed recommendations from (a) the State Government or any local authority whose area is wholly or partly comprised in the constituencies affected by the recommendation; or (b) a body of one hundred or more persons whose names are shown on the current electoral rolls of the constituencies in question, the Commission shall cause a local enquiry to be held in respect of those constituencies.'

109 Clause 7 of the Thirteenth Schedule.

Among other later changes[110] include a prescriptive approach undertaken by parliament as a prerogative to apportion the seats amongst the states of Peninsular Malaysia,[111] as well as the removal of the limitation in the variation in electorate numbers between the rural and urban constituencies.[112] The exercise of the Election Commission's powers has since been relegated to the residual task of delineating constituencies within every state. The more important macro prerogative of apportioning seats in the House of Representatives is acquired by parliament.

More recent changes[113] have further relaxed the rules regarding periodical review of constituencies by allowing a special review of constituencies to be undertaken for any state, or part of a state, whenever the House of Representatives or any state assembly varies the number of its seats.[114] Additionally, the upper limit for mandatory periodic review of constituencies has been removed, giving rise to the possibility that constituencies may turn static should the Election Commission decline to initiate a review. The consequence of these changes is to enable the ruling party to effect any change to the constituencies at practically any time.

This substantial whittling down of the constitutional role of the Election Commission and the considerable transfer of constitutional power to parliament runs counter to the notion of an independent and effective Election Commission, capable of discharging independent and neutral administration of elections.[115]

IV. Manipulating the Electoral Rolls – of 'Missing' and 'Phantom' Voters

One essential area of the administrative role[116] of the Election Commission that has been subject to heavy criticisms is its preparation and revision of the electoral rolls prior to the elections. The registration of electors is generally governed by the Elections (Registration of Electors) Regulations 2002.

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110 Constitution (Amendment) (No. 2) Act 1973.

111 Article 46(2) as amended by Constitution (Amendment) (No. 2) Act 1973, s.12.

112 Clause 2(c) of the Thirteenth Schedule now states: "the number of electors within each constituency in a State ought to be approximately equal except that, having regard to the greater difficulty of reaching electors in the country districts and the other disadvantages facing rural constituencies, a measure of weightage for area ought to be given to such constituencies".

113 Constitution (Amendment) (No. 2) Act 1984.

114 Article 113(3A) of the Federal Constitution.

115 Another such anti-democratic example was the abolition of local government elections within every state since the 1960s, and the subsequent replacement of the nominative local government system which eroded grassroot democracy and undermined the transparency of the nomination process which has considerable impact on the interests of the local population and citizens: see *Goh Ban Lee*, "The Demise of Local Government Elections and Urban Politics" in Mavis Puthucheary & Norani Othman ed., Elections and Democracy in Malaysia (Malaysia: First Printing 2005) 49; *Heikal Abdul Mutadir*, "Rapping Local Councils" (Sep 16, 2006) Malaysian Business 52. This 'demise' has effectively blocked out and excluded intervention by the Election Commission to administer the local government elections, thereby leaving the filling of local government official seats to the state assemblies who would most probably be politically biased since their members are essentially members from the various contesting political parties in the federal elections. A revival of local democracy is unlikely in spite of recent calls for a re-introduction of elections at the local government levels: "A Thinking Voter's Checklist" (2004) Vol. 24(2) Aliran Monthly 22 at 23.

116 Section 5(1)(a) of Elections Act 1958.

Of the most serious concern is the evidence that the Election Commission is responsible for manipulation of the electoral roll. For instance, it was estimated that the total number of the electorate in Peninsular Malaysia, after seeing a steady increase in the past years, suddenly suffered a sharp drop of approximately 8% after the 1973-1974 registration exercise.[117] Numerically, this translated into approximately 330,000 names being dropped out of the electoral roll.[118] Out of these 330,000 names removed, a majority consisted of non-Malays. This effectively resulted in a wider gap between the Malay-majority voters and the minority non-Malay voters.

In 1990, it was similarly observed that irregularities in the electoral roll affected about 300,000 voters.[119] In 1999, approximately 680,000 registrants were reportedly deprived of their votes owing to late certification and endorsement by the Election Commission.[120] These potential voters were widely seen as opposition supporters. These incidents fuelled unhappiness among the opposition candidates contesting in the elections, citing dishonesty as the key factor for their electoral failure.

Criticisms pertain also to the accuracy of the electoral rolls for the purposes of election. Frequent observations have been made about the electoral rolls containing "missing voters"[121] and "phantom voters".[122] Many a time has it been discovered that the electoral rolls contained voters who were deceased or whose addresses were traceable to one single - sometimes non-existent - address.[123] Additionally, there have been several occurrences showing different voters registered under the same identity number. More serious still, there was clear indication that ineligible voters were found to have been registered under forged identity cards. The Election Commission admitted to a systemic defect when it revealed that there was in fact more than one set of electoral roll used for the same general election.[124]

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117 *Lim Hong Hai*, "Electoral Politics in Malaysia: 'Managing' Elections in a Plural Society" in A Croissant et al (eds) Electoral Politics in Southeast and East Asia 101 at 116 (Singapore: Friedrich Ebert Stiftung : 2002).

118 See for example *Ong Kian Ming*, "Examining the Electoral Roll" in M Puthucheary & N Othman (eds) Elections and Democracy in Malaysia 292 at 294, estimating a figure of around "230,000 fewer voters in the 1974 electoral rolls compared to the 1972 electoral rolls".

119 *Lim Hong Hai*, "Making the system work" in M Puthucheary & N Othman (eds) Elections and Democracy in Malaysia 249 at 272 (Penerbit Universiti Kebangsaan Malaysia, 2005).

120 Ibid.

121 "Missing voters" has been defined as "qualified and registered persons whose names are improperly missing from the electoral rolls": *Lim Hong Hai*, "Electoral Politics in Malaysia: 'Managing' Elections in a Plural Society" in A Croissant et al (eds) Electoral Politics in Southeast and East Asi*a* 101 at 115 (Singapore: Friedrich Ebert Stiftung : 2002).

122 "Phantom voters" has been defined as "non-qualified persons who have nonetheless successfully registered and placed themselves on the electoral rolls": *Lim Hong Hai*, "Electoral Politics in Malaysia: 'Managing' Elections in a Plural Society" in A Croissant *et* al (eds) Electoral Politics in Southeast and East Asia 101 at 115 (Singapore: Friedrich Ebert Stiftung : 2002). See also *Ong Kian Ming*, "Examining the Electoral Roll" in M Puthucheary & N Othman (eds) Elections and Democracy in Malaysia 292 at 304. Sabah has probably the worst such occurrences of 'phantom voters' historically with several suspicious surges in registered voters prior to each election: see *Francis KW Loh*, "Electoral Politics in Sabah, 1999: Gerrymandering, 'Phantoms', and the 3Ms" in Francis KW Loh & Johan Saravanamuttu ed., New Politics in Malaysia (Singapore : Institute of Southeast Asian Studies, 2003) 228 at 240-242.

123 See for example *Ong Kian Ming*, "Examining the Electoral Roll" in M Puthucheary & N Othman (eds) Elections and Democracy in Malaysia 292 at 298, observing further that these residential addresses often indicated multiple registered voters belonging to various racial groups.

124 See *Jeff Ooi*, "e-Election? Not so Fast" (1 April, 2004) Malaysian Business 9.

In spite of having technological support in updating the electoral rolls months before the actual polling, the Election Commission often fails in keeping the electoral rolls up-to-date on polling day. For instance, notwithstanding the efforts by the Election Commission to boost its accessibility to the public via the internet and the Short Messaging Service (SMS) to allow voters to check their voting statuses, there are still several inherent shortcomings in the system that make it difficult for such a function to be consistently carried out.[125]

These shortcomings include the Election Commission website failing to provide critical information of voters' assigned polling centres, the inaccessibility of the website days before the election campaigning is to end, and the failure of the system to reply to SMS enquiries on polling day itself.[126]

More relevant to the actual conduct of election, there have been reports of voters being misled by false information prior to the election, only to realise on the day of polling that their names were registered under a different constituency in which they did not reside.[127] Such situations only served to confuse the voters, causing inconvenience to them through last-minute shuffling between polling stations just to get their ballots cast. In the course of such confusion, it could be expected that many ballots would have gone uncast on the actual day of election.

These incidents manifest a critical weakness in the electoral process – the votes could not accurately reflect the ballots cast. Disorganisation, unreliability and lack of transparency seem to be the order of the day for every past election.

This has a direct impact on the integrity and competence of the Election Commission. The reputation and image of the Election Commission has been seriously tarnished and marred for years. Doubt soon evolved into distrust and more recently it has escalated into utter distaste.[128] This has caused serious concerns on whether the outcome of elections depends not on the voters, but the Election Commission.[129]

The Election Commission, in its defence, claimed that practical difficulties are to blame for its perceived poor performance.[130] It claimed that "phantom voters" arise because voters fail to

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125 Ibid.

126 Ibid.

127 Such a problem has been occurring in every elections. Even in the 2004 elections, there have been reports of inconsistencies in the electoral rolls such as missing voters' names and wrong particulars of voters, thereby hindering the voting procedures and denying voters of their right to vote on polling day: see *Jeff Ooi*, "e-Election? Not so Fast" (1 April, 2004) Malaysian Business 9, A *Kadir Jasin*, "Improving on the Record" (1 April, 2004) Malaysian Business 7. See also "Voters 'not being planted' in opposition seats" New Straits Times (Malaysia) (30 November 2007).

128 See for example *Philip Khoo*, "A Brave New World? Worrying Implications for Democracy" (2004) Vol. 24(3) Aliran Monthly 2 at 4; "Polls chief: I'll quit if there is proof of vote-rigging" New Straits Times (Malaysia) (20 November 2007); *Chow Kum Hor*, "Anti-govt groups planning three more protests next month" The Straits Times (Singapore) (30 November 2007); "Look at yourself, polls chief tells losers" New Straits Times (Malaysia) (3 December 2007).

129 See "Let's talk, Election Commission tells parties" New Straits Times (Malaysia) (23 April 2007).

130 See a detailed defence in "Issues in Malaysian Election with Special Reference to Pertinent Aspects of the Electoral Roll System" by *Ab. Rashid bin Ab. Rahman*, 2006, Chairman, Election Commission, Malaysia, Ecm8/9/06.

update the National Registration Department (NRD) about changes in residential addresses, and the failure by relatives of deceased voters to report the deaths of their family members to the NRD.[131]

As regards voters bearing the same residential addresses, the Commission explained that this arises because many rural residents register their addresses collectively under some prominent nearby location out of convenience.

Since the preparation of electoral rolls is very much reliant on the statistics and information fed by the NRD, the Election Commission claimed that there is little it can do to prevent such discrepancies.[132]

The Election Commission also blamed the absence of a provision in the law to vary or remove any registered voter from an electoral roll other than deceased voters,[133] unless with the consent or at the request of the voter, even where it is aware that maintaining the voter in the roll would result in inaccuracy.

The Election Commission also blamed the citizens for their poor attitude in the presentation of proper facts such as their residential addresses.

Indeed, it would be unconstitutional for the Election Commission to vary the electoral rolls of living eligible voters, as it would be tantamount to interfering with the voters' rights and privileges as guaranteed by the Constitution where they had already met the requirement of the "qualifying date".[134]

However, such practical difficulties are no valid excuses for the Election Commission to condone the continuity of irregularities in the electoral roll. These are practical difficulties that can be substantially eradicated.

The law may be reformed to provide for stronger enforcement towards compulsory registration and obliging eligible voters to take their own initiative in updating any changes in their personal particulars such as their residential addresses. Voting procedures may also be improved. For instance, the plan for the introduction of indelible ink and transparent ballot boxes in the election in 2008 could pre-empt electoral abuses;[135] this plan was, however, cancelled days before the election. Much has to be done to restore public confidence in the Election Commission.[136]

V. The Election Petitions – Quagmire for the Losers

Elections may be challenged on two bases. The first is a challenge by the public against the accuracy of the electoral roll by way of a public inquiry; the second being an election petition by

131 "Commission cannot remove names of 'dead' voters" New Straits Times (Malaysia) (5 December).

132 Ibid.

133 This must nonetheless be substantiated with proof of death of the voter: See ibid.

134 Article 119(4) of the Constitution states that: "qualifying date means the date by reference to which the electoral rolls are prepared or revised".

135 "Don't Go for Outdated Voting Procedures, says Chia" Bernama Daily Malaysian News (4 June 2007); "Transparency begins with see-through ballor boxes" New Straits Times (Malaysia) (2 June 2007).

136 See for eg "Use of indelible ink a 'backward' step" New Straits Times (Malaysia) (6 June 2007).

way of a judicial review. The option of the preferred recourse primarily depends on two factors: the nature of the alleged wrongdoing or error in the election process, and the time at which the aggrieved party seeks to act.

A supplementary electoral roll may be challenged by way of a public inquiry under section 17 of the Election (Registration of Electors) Regulations 2002. The Registrar shall, as soon as practicable after receiving a claim for, or an objection to, the inclusion of any name in the electoral roll, hold a public inquiry into the claim or objection which has been duly made, giving not less than seven days' notice in a prescribed form to the claimant or the objector or the person in regard to whom the objection has been raised, and any person who appears to the Registrar to be interested in or affected by the inquiry may appear in person at the inquiry.[137]

However, following an amendment to the Elections Act 1958 in June 2002, the electoral rolls is now deemed to be final and binding after it has been certified or re-certified, and is not reviewable by any court.[138] Although this has yet to be tested in a proper case, existing case authorities seem to support the proposition that the appropriate mechanism for challenge would be to raise objections before the certification since the roll would already be open for inspection before the actual certification.[139]

In any event, a penalty may be imposed under section 18 of the Elections (Registration of Electors) Regulations 2002 for objections made without reasonable cause. The question of whether a public inquiry may be a good alternative to judicial review of the electoral rolls does not attract a comforting answer because the regulations[140] provide that the inquiry is to be conducted by the registrar who is after all an officer appointed by the Election Commission.[141] There is thus a danger of the inquiry being subject to cover-up practices by officers within the Election Commission.

Thus, a plausible mechanism through which the independence and efficiency of the Election Commission can be put under thorough scrutiny is through an Independent Commission of Enquiry that is external to the Election Commission.[142] This will provide an alternative means of ensuring that the Election Commission is effective and impartial in its operation and review of grievances from the public.

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137 Section 17(1) of Elections (Registration of Electors) Regulations 2002.

138 Section 9 and 9A of Elections Act 1958. Section 9A states: 'After an electoral roll has been certified or re-certified, as the case may be, and notice of the certification or re-certification has been published in the Gazette as prescribed by regulations made under this Act, the electoral roll shall be deemed to be final and binding and shall not be questioned or appealed against in, or reviewed, quashed or set aside by, any court.'.

139 See *Tg Nawawi bin Tengku Ab Kadir v. T Putra lwn Lokman bin Muda & 2 Lagi* [1996] 1 CLJ 551 (Unknown Court, Malaysia), per Abdul Hamid Mohamed H; *Salbin bin Muksin v. The Sabah State Election Officer & 2 Ors (*and Anor Election Petition*)* [1999] 4 AMR 4951 (High Court, Sabah and Sarawak (Kota Kinabalu)), per Hasan b Lah J.

140 Section 17 of Elections (Registration of Electors) Regulations 2002.

141 See definition of "Registrar" under Section 2 of Elections (Registration of Electors) Regulations 2002 which alludes to Section 8 of Elections Act 1958, which is on 'Appointment of officers'.

142 This has been supported by the Bar Council as well: "Bar Supports An Independent Commission Of Enquiry" (2004) Vol. 24(3) Aliran Monthly 33. Even the Election Commission chairman has once suggested the need for an independent commission to investigate certain electoral 'fiascos' that happened during the 2004 elections. However, such a suggestion was rescinded shortly after: "Current Concerns" (2004) Vol. 24(3) Aliran Monthly 35.

The other related issue that follows is, notwithstanding section 9A of the Elections Act 1958, whether a certified electoral roll can be challenged, if upon objection before certification, the Election Commission nevertheless proceeds with certification. The difficulty with this issue is that the relevant judicial pronouncements on this point were decided before 2002, and did not have the benefit of considering section 9A. While it was previously held in the *Wong Phin Chun* case (unreported, 1994) that it would not be appropriate to raise such disputes to an Election Court, the better view is that the electoral roll can be challenged because the very failure to hold a public inquiry after objections were raised is a contravention of the law.[143]

Apart from challenges to the electoral roll, an election of a successful candidate to the House of Representatives or to the legislative assembly of a state can be called in question by an election petition.[144] Election petitions are presented to the High Court having jurisdiction over the electoral constituency affected by the petition (also known as the Election Court). Every petition is tried by the chief justice or by a judge of any High Court[145] nominated by the Chief Justice for the purpose.[146] An election petition must be presented to the High Court within 21 days after the election results are gazetted.

At the conclusion of the trial, the election judge shall determine whether the candidate whose return or election is complained of, or any other person, was duly returned or elected.[147] The election judge is also empowered to declare an election null and void, in which event a fresh election must be held by the Election Commission.[148]

Except for the period after the first parliamentary election in 1955 when not a single election petition was filed, election petitions "seem to be the order of the day after every parliamentary election".[149] The conduct of election petitions is especially problematic because of the ambiguity of the language of the various statutory provisions,[150] coupled with conflicting judicial interpretations on the technical complexities entailed in such provisions.[151]

Election petition rules have been construed so strictly that they have become unfavourably burdensome and onerous to the petitioner to see his petition successfully admitted to the Election Court for hearing, instead of being struck off based on some procedural technicalities that are not clearly spelled out.

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143 *Harris Mohd Salleh v. Ismail bin Majin Returning Officer & Ors* [2001] 3 MLJ 433 (High Court, Kota Kinabalu), per Muhammad Kamil J.

144 Article 118 of the Federal Constitution provides: 'No election to the House of Representatives or to the Legislative Assembly of a State shall be called into question except by an election petition presented to the High Court having jurisdiction where the election was held.' See also Section 34 of Election Offences Act 1954.

145 Section 34 of the Election Offences Act, 1954.

146 Section 33(1) of Election Offences Act, 1954.

147 *Tunku Sofiah Jewa*, Malaysian Election Laws (Vol 1) p xxii (Kuala Lumpur : Pacifica Publications, 2003).

148 Section 36 of Election Offences Act, 1954; See also ibid.

149 *Tunku Sofiah Jewa*, Malaysian Election Laws (Vol 1) p xxiii (Kuala Lumpur : Pacifica Publications, 2003).

150 Part VII to Election Offences Act 1954; Second Schedule to Election Offences Act 1954, see Election Petition Rules 1954.

151 See also *Ali Amberan v. Tunku Abdullah* [1970] 2 MLJ 15 (Unknown Court, Malaysia), per Raja Azlan Shah J; Section 28 of Election Offences Act 1954.

For example, one of the disputes raised in *Devan Nair v. Yong Kuan Teik*[152] was whether a failure to comply with the time limits for the service of the petition by the aggrieved party under Rule 15 of the Election Petition Rules 1954[153] would result in the petition being struck off and rendered invalid. The Privy Council upheld the trial judge's decision that strict compliance with Rule 15 is mandatory rather than directory, and consequently a failure to comply with Rule 15 must render the petition a nullity. The decision of the Privy Council is salutary because of the need to ensure a speedy resolution to any disputes, as well as fairness in terms of allowing the other party to know the case against him timeously, and to prepare his evidence as soon as possible for the purpose of responding to the petition.

The issue of whether Rule 15 permits personal service on the returned candidate where an advocate has not been nominated by him under Rule 10, however, still remains uncertain. While there has been several post-*Devan Nair* cases[154] holding that personal service of a petition under Rule 15 is permitted, the position has taken a complete turn in Dr. Lee Chong Meng v. Abdul Rahman (No. 2),[155] where the court held that personal service was not a recognized mode of service under Rule 15 in the absence of an advocate nominated by the returning candidate under Rule 10. However, the case of *Dr. Lee Chong Meng* did not fit well with the line of past decisions.[156]

Yet another aspect of controversy that remains unresolved is the conflicting judicial decisions in *Rhina Bhar v. Karpal Singh*[157] and *Salbin bin Muksin v. Sabah State Election Officer*[158] on the issue of whether a failure to state clearly that a copy of the petition may be obtained from the registrar of the court was fatal to the party presenting the petition. However, the decision in *Ramely bin Mansur v. Suruhanjaya Pilihan Raya*[159] seemed to adhere to a stricter view as seen in Rhina Bhar which casts an extremely heavy burden on the party presenting the petition to attend to technical issues of specific distribution of copies of the petition, and to ensure that the relevant copies must reach the respondent even after sufficient copies have been passed over to the registrar.

The Election Petition Rules 1954 must be reviewed and worded with more clarity so as to remove any ambiguity, rather than to leave such ambiguity to the inadequacy and futility of judicial interpretation.

Election petitions may also deal with the non-compliance of the respondent with the election

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152 [1967] 2 AC 31 (Privy Council).

153 Second Schedule to Election Offences Act 1954; Rule 50 is on 'Notice of petition and copy of petition to be served on respondent'.

154 *Chong Thain Vun v. Watson & Anor* [1968] 1 MLJ 65; *Muib bin Tabib v. Dato James Wong* [1971] MLJ 246 (Unknown Court, Malaysia), per Lee Hun Hoe J; *Sabdin Ghani v. Mohamed Saidi Lampoh* [1983] 2 MLJ 61 (Unknown Court, Malaysia), per Seah J; *Rhina Bhar v. Karpal Singh* [1995] 4 CLJ 642 (High Court Malaya, Penang), per Tan Sri Dato' Anuar bin Dato' Zainal Abidin CJ (Malaya).

155 [2000] 3 MLJ 218 (High Court, Kuala Lumpur), per Augustine Paul J.

156 Arguably, it also cannot be a binding authority on later decisions simply because there is no express right of appeal within the existing Malaysian election laws.

157 [1995] 4 CLJ 642 (High Court Malaya, Penang), per Tan Sri Dato' Anuar bin Dato' Zainal Abidin CJ (Malaya).

158 [1999] AMR 4951 (High Court, Sabah and Sarawak (Kota Kinabalu)), per Hasan b Lah J.

159 [2000] 2 MLJ 550 (High Court, Kuala Lumpur), per Augustine Paul J.

laws. Some examples of non-compliance include a wrongful rejection of a nomination or failure to reject a nomination paper by returning officers,[160] non-observance of regulations pertaining to the conduct of elections at the polling centre,[161] as well as errors in the counting of votes and the failure to grant a request of recount.[162]

One question here is whether the duty incumbent on the petitioner to satisfy the election judge that the election was not conducted in accordance with the principles laid down in such written law and that such non-compliance affected the result of the election, must be construed conjunctively or disjunctively.[163]

There are conflicting views. In *Mohamed Jaafar v. Sulaiman & Anor*,[164] the election judge adopted the conjunctive view. This may seem to be logical since the provision under section 32(b) of the Election Offences Act 1954 expressly uses the word 'and' which suggests a conjunctive approach. In *Ishak Hamid v. Mustapha*,[165] the court held that a transgression of the law in the defective administration of a nomination paper of a successful candidate did not render the election results null and void. The reason as set out by the judge was that while there was indeed a procedural breach of the law by the returning officer in the admission of the nomination papers, the elections had been substantially conducted in accordance with the general principles of the law. The judge also observed that as the non-compliance of the law by the returning officer had not affected the result of the election, the respondent must be held to have been duly elected.[166]

However, it is submitted that the better view should be the disjunctive view adopted in a later case of *Re Tanjong Puteri Johore State Election Petition*.[167] The law should regard both procedural fairness and substantive fairness equally. The importance of procedural fairness in the conduct of elections would be undermined if the results of the elections (substantive fairness) are made the controlling factor to trigger the operation of section 32(b) in every case. Moreover, it is at

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160 *Muip bin Tabib v. Dato James Wong; Wan Hamid bin Tuanku Surur v. Francis Loke* [1971] 1 MLJ 246 (Unknown Court, Malaysia), per BTH Lee J; *Yusoff bin Abdul Latib v. Haji Adnan bin Haji Ramli & Anor* [1992] 1 MLJ 297 (High Court, Penang), per Mohamed Dzaiddin J.

161 Re Tanjong Puteri Johore State Election Petition*; Abdul Razak bin Ahmad v. Datuk Md Yunos bin Sulaiman & Anor* [1988] 2 MLJ 111 (Unknown Court, Malaysia), per Wan Yahya J.

162 *Mohamed Jaafar v. Sulaiman & Anor* [1970] 1 MLJ 18.1 (Unknown Court, Malaysia), per Chang Min Tat J; *Wan Daud bin Wan Jusoh v. Mohamed bin Haji Ali & Anor and Daud bin Jusoh v. Annuar bin Haji Musa & Anor and Mohd Nor bin Ismail* [1988] 2 MLJ 384 (Unknown Court, Malaysia), per Wan Yahya J; Y*eoh Khoon Chooi v Patto A/L Perumal & 2 Ors* [1995] 4 CLJ 811 (High Court Malaya, Penang), per Tan Sri Dato' Anuar bin Dato' Zainal Abidin CJ (Malaya)

163 Section 32(b) of Election Offences Act 1954 provides: 'The election of a candidate at any election shall be declared to be void on an election petition on any of the following grounds only which may be proved to the satisfaction of the Election Judge (...) (b) non-compliance with the provisions of any written law relating to the conduct of any election if it appears that the election was not conducted in accordance with the principles laid down in such law and that such non-compliance affected the result of the election;'.

164 [1970] 1 MLJ 18.1 (Unknown Court, Malaysia), per Chang Min Tat J.

165 [1965] 2 MLJ 18 (Unknown Court, Malaysia), per Ismail Khan J.

166 In any event, the root of the problem lies in statutory ambiguity, and that uncomfortable decisions like Ishak could have otherwise been avoided and be more convincing if the relevant election laws were clear enough in its wordings.

167 [1988] 2 MLJ 111 (Unknown Court, Malaysia), per Wan Yahya J.

best speculative to attempt to determine if a non-compliance of any written rules did in fact affect the result of the election. There simply is no litmus test that can be applied consistently in every case.

Ensuring free and fair elections necessarily requires that both procedural fairness and substantive fairness be satisfied, and it is through a disjunctive and not a conjunctive reading of section 32(b) that could bring about such an effect in the law. This does not, however, necessarily mean that every claim has to be given the full measure of judicial inquiry the moment a suit has been filed.

As much as justice must be seen to be done, the courts must be clairvoyant to dismiss unmeritorious cases. Before a full-blown inquiry is to be attracted, claimants must first prove to the satisfaction of the courts a prima facie case of non-compliance of election rules or a real possibility of an affected election result therefrom as a matter of preliminary inquiry. This will help the courts weed out frivolous and vexatious claims from losers of elections.

VI. Judicial Immunity – Time for a Serious Rethink

The judiciary has been commended elsewhere for some of its decisions such as *Stephen Kalong Ningkan v. Tun Abang Haji Openg and Tawi Sli*[168] and *Koh Yin Chye v. Leong Kee Nyean*[169] where the Election Court rightly found the governing party to have been wrong. However, these achievements should not be overstated in view of other legal disputes that had produced unsatisfactory results.[170]

The question of whether the Election Commission or the returning officer of any constituency should enjoy immunity against judicial scrutiny - in the face of the increasing allegations made against the Election Commission for being defective in the discharge of its duties - is critical here.

The traditional justification for immunity is to avoid defensive practices by the Election Commission that might lead to disruption in its ordinary functioning. Unfortunately, with the neutrality and competence of the Election Commission being subject to severe criticisms, it is time to rethink whether the Election Commission ought to enjoy continued judicial immunity.

The relevant cases do not provide clear authority on whether the Election Commission or any returning officer can be brought to court. In *Re Pengkalan Kota by-election*,[171] it was suggested that a returning officer may be joined as a respondent in an election petition only if it would be necessary to do so.

In *Dewan Undangan Negeri Kelantan v Nordin Bin Salleh*,[172] it was held that the Election Commission

168 [1966] 2 MLJ 187 (Unknown Court, Malaysia), per Harley CJ.

169 [1961] MLJ 67 (Unknown Court, Malaysia), per Smith J.

170 The independence of the judiciary in Malaysia has also been criticized since the sacking of the former Lord President Tun Salleh Abbas in 1988.

171 [1981] 1 MLJ 265 (Unknown Court, Malaysia), per Abdoolcader J.

172 [1992] 1 MLJ 697 (Supreme Court, Kuala Lumpur), per Abdul Hamid Omar LP, Gunn Chit Tuan SCJ and Edgar Joseph Jr SCJ.

can be made a respondent to an election petition, but on the circumstances of the case it was held that the failure to join the Election Commission as a party in the case was not fatal to the case. However, the more recent case of *Dr. Lee Chong Meng v. Abdul Rahman bin Haji Abdullah* (No. 1)[173] held that neither the Election Commission nor a returning officer could be made a respondent to an election petition.

The better view to adopt is that the proposition found in *Dr. Lee Chong Meng v. Abdul Rahman bin Haji Abdullah* (No. 1) does not confer judicial immunity and, accordingly, does not mean that the Election Commission cannot be held accountable for their acts. After all, the underlying purpose of an election petition is to submit an electoral dispute to the court to assess the validity of an election result, not to seek punitive remedies against the administrator of election. The Election Commission could still be held accountable in law for any corrupt or illegal practice in the course of their administration under the criminal law. Allegations of wrongful conduct on the part of the Election Commission merely serve a tactical litigation function in election petitions to secure annulment of the election outcome. It remains open for appropriate prosecution against any corrupt practice to be carried out in a separate criminal trial.

While making the Election Commission liable as a respondent to an election petition may undermine its administration of elections (since it would encourage defensive practices in the discharge of its duties), what should be borne in mind is that since the Election Commission is charged with the responsibility of ensuring free and fair elections, it should be held accountable in law for its acts in the course of its administration.

Rather, subjecting the Election Commission to judicial scrutiny carries a strong signal that reinforces the raison d'etre of the Election Commission – to administer and conduct elections in such a manner as to ensure free and fair elections.

No free and fair elections can be assured if the Election Commission could act, whether properly or improperly, under the absolute guarantee of impunity. From a constitutional perspective, it makes perfect sense to enforce judicial scrutiny over the Election Commission under the separation of powers model which aims to impose meaningful checks and balances over governmental behaviour. After all, what has been noted earlier is a strong indication of legislative and executive intervention with, and manipulation of, the independence of the Election Commission.[174]

As for alleged practice falling short of criminal behaviour (ie. negligence), the Election Commission

173 Unknown citation: (Election Petition No PP-1-2000), per Augustine Paul J. See also *Ramely bin Mansur v. Suruhanjaya Pilihan Raya*, [2000] 2 MLJ 550 (High Court, Kuala Lumpur) where Augustine Paul J referred to his own judgment in Lee Chong Meng (No. 1) saying that the Election Commission is not an appropriate party to be made a respondent in an election petition.

174 See "Let's talk, Election Commission tells parties" New Straits Times (Malaysia) (23 April 2007).

175 Section 37(1)(b) of Election Offences Act 1954.

172 [1992] 1 MLJ 697 (Supreme Court, Kuala Lumpur), per Abdul Hamid Omar LP, Gunn Chit Tuan SCJ and Edgar Joseph Jr SCJ.

173 Unknown citation: (Election Petition No PP-1-2000), per Augustine Paul J. See also *Ramely bin Mansur v. Suruhanjaya Pilihan Raya*, [2000] 2 MLJ 550 (High Court, Kuala Lumpur) where Augustine Paul J referred to his own judgment in Lee Chong Meng (No. 1) saying that the Election Commission is not an appropriate party to be made a respondent in an election petition.

174 See "Let's talk, Election Commission tells parties" New Straits Times (Malaysia) (23 April 2007).

may still be invited to testify as a witness to assist the election judge in coming to a decision on whether to quash a particular election result. *Dr. Lee Chong Meng v. Abdul Rahman bin Haji Abdullah* (No. 1) does not seem to pose any difficulty on this point, for it merely held that the Election Commission could not be made a respondent to an election petition.

Next, the proposition that (under an appropriate finding of corrupt practice before the Election Commission is to be reported by the court to the state authority)[175] the Election Commission may be compelled to testify and provide evidence under section 37(2) of the Election Offences Act 1954 does not seem to fit well with the Election Commission Act 1957. Under the Election Commission Act 1957, although penalties are imposed on persons attempting to influence the Election Commission,[176] and also on any unauthorized disclosure of information by members of the Election Commission,[177] no person shall in any legal proceeding be compelled to disclose any information on any form of communication which has taken place between any member of the Election Commission and any official in the government.[178] The latter is inconsistent with section 37(2) of the Election Offences Act 1954.

The blame for such confusion in the law should be placed on the poor drafting of statutes with little or no cross references between related Acts to ensure consistency in the law. Section 37(2) of the Election Offences Act 1954 should prevail as the Election Commission is after all the custodian of free and fair elections, and it ought to be held accountable to the public for its acts. This is also consistent with the preferred view towards stripping the Election Commission of all immunity against judicial scrutiny, so as to allay the growing and increasing sentiments of skepticism towards its neutrality, integrity, competence and independence.

VII. Other Aspects of the Election Laws – of Serious Concerns and Confusion

Some residual aspects of the election laws that remain in confusion, or are in need of further reform, include the standard of proof in election dispute cases, the right to appeal from an Election Court's decision, and certain aspects of election offences.

The prevailing view towards the standard of proof in disputes regarding the elections can be found in *Wong Sing Nang v. Tiong Thai King*,[179] where it was held that since allegations are generally in substance criminal in nature (such as allegations of bribery and misrepresentation by successful candidates), the appropriate standard of proof should be that under a criminal case i.e. proof beyond reasonable doubt. However, the contrary view, as enunciated in *Hamad bin Mat Noor v. Tengku Sri Paduka Raja*[180] is that since the Election Court is essentially a civil court, and that Section 32 of the Election Offences Act 1954 expressly states that the petitioner need only to prove 'to the satisfaction of the Election Judge' the commission of election offences, the

175 Section 37(1)(b) of Election Offences Act 1954.

176 Section 10 of Election Commission Act 1957.

177 Section 9 of Election Commission Act 1957.

178 Section 5 of Election Commission Act 1957.

179 [1996] 4 MLJ 261 (High Court, Sibu), per Charles Ho J.

180 [1993] 3 MLJ 533 (High Court, Kuala Terengganu), per Lamin J.

standard of proof should be that of a civil case i.e. on a balance of probabilities.

While there have been suggestions urging that the Election Offences Act 1954 be amended to state specifically what the standard of proof is to be expected from the petitioner, the requisite standard of proof should be made to be dependent on the nature of the allegations. If the allegation is one of criminal nature such as a bribery case, the standard to be followed must be that of beyond a reasonable doubt. On the other hand, if the allegation is directed at a criminally non-culpable practice, the recommended standard of proof may well be based on a balance of probabilities. In any case, the Election Offences Act 1954 should be reformed to categorically accommodate these two possibilities that may arise in a dispute.

Another area of confusion is the right to appeal against the decision of an election judge. Generally there is no automatic right of appeal in every Election Court decision due to the need of achieving a speedy resolution to disputes and the regard to be had for the public interest in ensuring that there is no indefinite delay in waiting for the outcome of the final decision as to whether a re-election is to be conducted. Although an intermediate stand seems to be adopted by the Privy Council in the *Devan Nair*[181] case where it held that there can be a right to appeal provided that the election judge expressly allows for such a right in his judgment and that the case was of exceptional public importance, more stronger views have been expressed for an automatic right to appeal. Thus in *Zulkaraini v. Syed Oma*[182] the election judge said:

> "I do not think election judges do not make mistakes whereas other judges do. We are all not infallible. What then happens if an election judge commits an error? (...) It appears to me the aggrieved party has no remedies under the law. Perhaps this matter can be also considered so as to safeguard against errors made. Perhaps a quick reference after judgment to the Federal Court within a short period of time to be provided in the law is the answer."

This view is preferable. It gives effect to the recognition of the reality that election judges do make errors in their judgment at times, and that consequently a right to appeal – albeit expeditiously – can provide legal recourse to correct such errors.

In addition, the controversies surrounding various ambiguities of Rule 10 and Rule 15 of the Election Petition Rules 1954 (as discussed earlier) would not have been so problematic had the Malaysian law allowed for appeals to be made against judgments of the Election Court. The right to appeal to an appellate court would demand that rules of stare decisis be observed, and this will serve to aid the public in identifying with relative confidence the authoritative propositions of the law for various electoral legal issues.

Lastly, having an automatic right to appeal does not necessarily lead to undue delays and confusion

181 [1967] 2 AC 31 (Privy Council). Lord Upjohn however underlined the point that the Privy Council would be reluctant as a general rule to entertain interlocutory appeals, especially in election petitions unless the case raised was of exceptional public and general importance.

182 [1979] 2 MLJ 143 at 146 (Unknown Court, Malaysia), per Mohamed Zahir J.

183 See generally *Cyrus Das*, "Elections laws and the compelling areas for reform in Elections and Democracy in Malaysia" in Mavis Puthucheary & Norani Othman ed., Elections and Democracy in Malaysia (Malaysia: First Printing, 2005) 372 at 380.

to the public, for there can be laid down strict limitation periods for the various types of disputes that may arise from elections.

Another area for possible reform is to improve the Election Offences Act 1954 to include special provisions pertaining to divisive practices by election candidates that may create disharmony and hatred among the various ethnic communities in Malaysia.[183] For example, there are merits in the suggestion of an equivalent of the Indian Act (the Representation of People Act, 1951) for incorporation into the Election Offences Act 1954 to prohibit divisive practices by candidates to swing the votes in their favour based on religious threats or remarks.[184]

An enactment of such provisions would also reflect the respect that candidates must show to the electors' ethnic and religious diversities, which in turn warrants that the voters are free from any undue influence to exercise their right to vote.[185]

Some provisions in the Election Offences Act 1954 may also be abused by the governing party in securing the conviction of opposition party members. For instance, section 4A of the Election Offences Act 1954, whilst dealing with offences of promoting feelings of ill-will or hostility, is widely worded, and can potentially apply to any conduct made in the course of a political campaign launched by the opposition.[186] It has been correctly pointed out that such a loosely worded provision in the Election Offences Act 1954 is not desirable.[187]

VIII. Conduct of Elections – an Unfair Game

The focus of this section is on how a lack of level playing field has resulted from the consistent exploitative utilisation by the ruling coalition of the state machinery during the elections to garner votes for itself.[188]

For example, it has been noted that the 1990 nationwide rallies undertaken by the then Prime Minister were arranged months before the election, abusing state resources such as government jets, facilities and funds.[189] Mass media access to the contesting parties in the pre-election period

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184 Ibid.

185 *Abdul Rashid Moten* & *Tunku Mohar Mokhtar*, "The 2004 General Elections in Malaysia: A Mandate to Rule" (2006) Vol. 46(2) Asian Survey 319 at 328.

186 Section 4A reads: 'Any person who (...) does any act or makes any statement with a view or with a tendency to promote feelings of ill-will, discontent or hostility between persons of the same race or different races or of the same class or different classes of the population of Malaysia (...) shall be liable, on conviction, to imprisonment for a term not exceeding five years or to a fine not exceeding ten thousand ringgit or to both such imprisonment and fine'.

187 See "Vote for Democracy" (2004) Vol. 24(2) Aliran Monthly 40 at 34; *Lim Hong Hai*, "New Rules and Constituencies for New Challenges?" (2003) Vol. 23(6) Aliran Monthly 7.

188 *Khoo Boo Teik*, "Limits to Democracy: Political economy, ideology and ruling coalition" in M Puthucheary & N Othman (eds) Elections and Democracy in Malaysia 19 at 40 (Penerbit Universiti Kebangsaan Malaysia, 2005).

189 Election Watch, Report on the eighth Malaysian general elections held on 20th and 21st October 1990 p 10 (Kuala Lumpur: Election Watch, 1990).

190 Ibid at 12. See also *Lim Hong Hai*, "Making the system work" in M Puthucheary & N Othman (eds) Elections and Democracy in Malaysia 249 at 275 (Penerbit Universiti Kebangsaan Malaysia, 2005).

was also inequitably shared among all parties, with the BN standing to gain the most coverage and airtime.[190] The government's press regulatory regime also indicates strong government control as exemplified by the hostile treatment of Election Watch.[191]

The Election Commission has been lacklustre in enforcing spending limits on campaign expenditure.[192] Also, the ruling coalition appears to have conflated itself with the state in tapping state resources to advance its own political campaigning during the pre-election periods. In doing so it has ignored the fundamental notion that the government becomes a caretaker government during the election period, whose function is to administer the daily affairs of the country until the swearing-in of the newly elected government.

As regards the actual conduct of election, there are three key concerns.[193] The first is the dissatisfaction over insufficient supervision of absentee or postal votes involving mainly the civil service sector, the police and the military personnel. Secondly, there is no secrecy of ballots,the justification for which is to enable the tracing of voters in election petition hearings. Thirdly, the 1990 reduction of the catering size of every polling station to no more than 700 voters has inevitably raised eyebrows for fear of "government reprisal" for voting against the BN. Arguably, this development also encourages gerrymandering by allowing the government to better derive more precise electoral result estimates in the elections by referring to past voting results in these bite-sized polling localities.

Finally, the progressive shortening of the campaign period from slightly over a month (prior to 1970) to less than two weeks (in 1986 and thenceforth) has also been derided as giving the ruling party undue advantage, since it could catch the opposition parties unaware in embarking on a full scale campaign without prior notice for preparation.[194] This, coupled with the inequitable access to the media and public facilities given to the contesting parties, greatly reduces the ability of the opposition to mount a more meaningful challenge against the incumbent in the elections.

IX. A Skewed Electoral Regime – the Continuous Legitimization of a Plebiscitary Pseudo-Democracy

This brief analysis of the nature, implementation and enforcement of the election laws of Malaysia, including the Election Commission Act 1957, Elections Act 1958, Election Offences Act 1954 and Election Petition Rules 1954, seeks to highlight the areas for urgent electoral reforms. In view of the severe, and persistent, criticisms[195] levelled against the Election Commission on its

191 An informal group comprising a few members who aim to restore free and fair elections through communication and collaboration with the Election Commission: Election Watch, Report on the eighth Malaysian general elections held on 20th and 21st October 1990 p i (Kuala Lumpur: Election Watch, 1990).

192 *Lim Hong Hai*, "Making the system work" in M Puthucheary & N Othman (eds) Elections and Democracy in Malaysia 249 at 275 (Penerbit Universiti Kebangsaan Malaysia, 2005).

193 Ibid.

194 Ibid at 274.

195 See for example, 'PAS plans march to force reform of ballot system; Opposition party fears losing Kelantan due to 'unfair practices'' (Straits Times) 7 June 2007.

competence, neutrality, impartiality and integrity in the discharge of its duties, serious doubts must be cast on the appropriateness of retaining judicial immunity for the Election Commission.

A regime obsessed with colossal victories by its very nature breeds a strong resistance towards changes that may reduce its political advantage acquired and accumulated over many years. To fuel such a political culture within the Malaysian society, the governing coalition resorted to continuous, conscious and calculated legitimization of its actions to secure electoral victory. Such an end can only be met through serious top-down distortion of electoral democracy.[196]

Barring an independent Election Commission and appropriate judicial remedies, electoral democracy risks being irretrievably jettisoned in Malaysia.[197] Instead of the continuous legitimization of an uninterrupted plebiscitary pseudo-democracy, urgent electoral reforms - in many areas - are needed in Malaysia to restore public confidence in its electoral system, as well as to ensure the legitimacy of its political system.

196 *Lim Hong Hai*, "Electoral Politics in Malaysia: 'Managing' Elections in a Plural Society" in A Croissant *et* al (eds) Electoral Politics in Southeast and East Asia 101 at 136 (Singapore: Friedrich Ebert Stiftung : 2002).

197 Ibid at 104.

SINGAPORE'S ELECTORAL SYSTEM

*Tsun Hang Tey**

I. Political Dominance and Calibrated Innovations

Singapore's[1] Westminster parliamentary system of governance[2] was adopted as a historical result of it being a British colony. In its post-Independence constitutional development, the dominant People's Action Party (PAP) political leadership had made a series of constitutional amendments to Singapore's original electoral system, introducing innovative schemes such as the Group Representation Constituencies (GRCs), the Non-Constituency Members of Parliament (NCMPs), the Nominated Members of Parliament (NMPs), and the Elected President. These have resulted in an electoral system that is so different and divergent from the Westminster model[3] that it should now be regarded a unique regime of its own.

In official presentation,[4] the political leadership has justified modifying the Westminster model electoral system by reference to what it perceived to be the unique local needs. Such changes, it has been argued, help to accommodate the imperatives of Singapore's multi-racial, multi-lingual

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1 Singapore became a separate colony by virtue of the Straits Settlements (Repeal) Act, 1946 and was given a Constitution by the Singapore Order-in-Council 1946: Order-in-Council, 27 March 1946, Statutory Rules and Orders, No. 462, 1946. In 1953, a Constitutional Commission headed by Sir George Rendel was set up and charged with reviewing the constitution. The British passed the State of Singapore Act on 1 August 1958: 6 & 7 Eliz. II, Ch. 59. The elections of 1959 saw the emergence of the People's Action Party (PAP) who won 43 out of 51 seats. The new Constitution came into force on 3 June 1959. In 1963, a merger was realized and Singapore became a member of the Federation of Malaysia on 6 September 1963. A new State Constitution was granted to Singapore: The Sabah, Sarawak and Singapore (State Constitutions) Order-in-Council 1963 (Statutory Instruments 1963 No. 1491), as published in the State of Singapore Government Gazette Sp. No. S 1 of 1963. However, the merger was transient. Separation was effected by the Independence of Singapore Agreement signed on 7 August 1965. Singapore ceased to be a state of Malaysia since 9 August 1965, and became a sovereign and independent state.

2 For Singapore's legal history, see generally: *Andrew Phang*, "The Singapore Legal System—History, Theory and Practice", [2001] 21 SingLRev 23; *Kevin Y.L. Tan*, "A Short Legal and Constitutional History of Singapore" in Kevin Y.K. Tan, ed., Essays in Singapore Legal History (Singapore: Singapore Academy of Law; Marshall Cavendish Academic, 2005); *C.M. Turnbull*, A History of Singapore 1819-1975 (Singapore: Oxford University Press, 1977).

3 On the Westminster model, see generally: *William Dale*, "The Making and Remaking of Commonwealth Constitutions". (1993) 42 ICLQ 67.

4 "From my experience, Constitutions have to be custom-made, tailored to suit the peculiarities of the person wearing the suit. Perhaps, like shoes, the older they are, the better they fit. Stretch them, soften them, re-sole them, repair them. They are always better than a brand new pair of shoes": Sing. Parliamentary Debates, vol. 44, col. 1736 (24 July 1984), Mr Lee Kuan Yew (Prime Minister).

and multi-religious society. The social and political circumstances, it is said, necessitated the evolution of its parliamentary system.[5]

Under Article 5, a two-thirds majority in parliament is generally required to amend the constitution[6]. However, given the unchallenged political dominance of the ruling party, coupled with the discipline of the Whip that forces even the protesting to vote in line with the party stance, the political leadership has managed to push through a series of constitutional amendments over the years without any hindrance. Although Singapore has a parliamentary system based on the Westminster model, the executive in Singapore has had a continuous dominance over the legislative branch, and has hardly seen any real need to limit its power substantially between parliamentary general elections. The overwhelming political dominance[7] thus allows the political leadership to translate its entire agenda into legislative reality.

The result is an electoral system that accurately reflects the political leadership's determination to remain politically indomitable, and that serves to 'accommodate what has been called the 'legislative gaps' that have emerged with the rise of a single party dominant system of government'.[8]

This article seeks to examine the rationales of the constitutional amendments that provided for the institutions of the GRCs, the NMPs, the NCMPs, and the Elected President. It seeks to show that the constitutional evolution of its electoral system is reflective of a political vision structured along elitist tendencies that makes paternalistic assumptions about what is beneficial for its citizens. It is an electoral system reflective of a de facto single party dominance.

It examines the subsequent implementation of the schemes, with particular regard to the election process. It also seeks to examine the substance of the allegations that the amendments have

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5 See e.g. "[W]e inherited the British Westminster system of government and made it work (...) Singapore has succeeded so far because we are willing to adapt and evolve the system that we have inherited according to the changing social and political circumstances and according to the imperatives of our multi-racial, multi-lingual and multi-religious society": Sing. Parliamentary Debates, vol. 69, col. 131 (1 June 1998), Mr. Wong Kan Seng (Minister for Home Affairs).

6 Constitution of the Republic of Singapore (1999 Rev. Ed.), art. 5(2). Despite promises of a new constitution following the separation from Malaysia, no new constitution ever materialized. Instead, the temporary constitution that was adopted on 22 December 1965 remains the only operational constitution Singapore has had since Independence. The document was a conglomeration of three separate documents: the Constitution of the State of Singapore 1963, the Republic of Singapore Independence Act 1965, and portions of the Malaysia Federal constitution imported through the Republic of Singapore Independence Act. A cohesive reprint of the Constitution, following this model and incorporating all subsequent amendments, was published on 31 March 1980. The disinclination to write a new constitution was explained by the then Prime Minister Lee Kuan Yew after his asked the British High Commissioner, Sir Arthur de La Mare to polish up the Constitution in 1970: "I decided that the experts just had no idea why we made certain basic alterations… I may not be here, but Singapore and Singaporeans may have to pay for it if I allow a constitutional perfectionist to alter what he thought was a little unusual mote in the Singapore Constitution. I decided to leave the Constitution as it is, just incorporate all the amendments, publish a clean copy. Never regretted it": Sing. Parliamentary Debates, vol. 44, col. 1817-9 (25 July 1984), Mr Lee Kuan Yew (Prime Minister).

7 At the May 2006 parliamentary general elections, the PAP won a 12th consecutive term in office – winning 66.6% of the overall votes, which coupled with walkovers, translated to 82 out of a total of 84 parliamentary seats – showing neither sign nor hint of any weakening of its total grip and entrenched hold on political power in Singapore.

8 *Kevin Y.L. Tan*, An Introduction to Singapore's Constitution (Singapore: Talisman Publishing, 2005) at 30. For the purposes of this paper, the legislative gaps refer to the lack of substantive alternative voices, such as a healthy opposition that numbers more than a bare handful, within the parliamentary system.

served to secure and entrench the near political hegemony of the PAP political leadership in local politics. This article advances the view that the constitutional amendments have systematically and successfully limited political participation on the part of the citizens in general,[9] obstructed political opposition, and sustained and enhanced a parliament that has moved away from the model that equates political representation solely with the right to vote and the equality of the votes. There has been significant departure from what was originally conceived to be democratic politics.

II. Non-Constituency Members of Parliament – For the Best Losers?

One of the first significant post-Independence divergences from the Westminster model was the introduction of the Non-Constituency Members of Parliament (NCMPs). Article 39(1)(b) of the Constitution provides for NCMPs to ensure the representation in parliament of a minimum number of members from political parties not forming the government. The Constitution now provides for up to six NCMPs at any one time.[10]

There are two significant characteristics that mark the NCMP. First, the NCMP's privileges are severely curtailed when compared to those provided to elected Members of Parliament, which limits the NCMP's effectiveness as an alternative voice in Parliament. Under Article 39(2), a NCMP cannot vote in Parliament on any motion pertaining to a Bill to amend the Constitution, a Supply Bill, Supplementary Supply Bill or Final Supply Bill, a Money Bill, a vote of no confidence in the Government or removing the president from office.[11]

Second, for a candidate to qualify as an NCMP, the candidate must have polled a minimum of 15% of the total number of votes,[12] which distinguishes the NCMP from the NMP who does not take part in the election campaigning process at all. The NCMP seats are offered according to a hierarchy determined in descending order by the highest percentage of votes fielded.[13] The facile legitimization of the NCMP is that he is a representative of the dissenting minority of the electorate.

However, even if the NCMP system is meant to ameliorate the effects of the first past the post system (where a substantial number of dissenting voters that consistently vote for opposition did not get heard), the sources of the NCMP's legitimacy nevertheless remains confused, being

9 The PAP MPs have many times retorted that the proof of the pudding is in the eating, and the success of their policies can be seen in their continued re-election to Parliament. As one PAP MP put it, "people elected us into Parliament because they liked the PAP. In other words, they supported PAP. If they had wanted PAP MPs to oppose PAP Government politics, then I believe, they would have elected Opposition MPs rather than PAP MPs into Parliament": Sing. Parliamentary Debates, vol. 54, col. 754 (29 November 1989), Mr Peh Chin Hua (Jalan Besar GRC).

10 Note however that s 52(1) of the Parliament Elections Act restricts the number of NCMPs at the moment to "3 (...) less the total number of Opposition Members elected to Parliament". Therefore, in 1991 when four opposition candidates were legitimately elected into parliament, the NCMP shceme was rendered unusable.

11 Constitution of the Republic of Singapore (1999 Rev. Ed.), art. 39(2).

12 Parliamentary Elections Act, s52(3)(a).

13 Parliamentary Elections Act, s52(2).

neither fully based on a clear electoral mandate like the elected MP, nor based on expertise or specialization like the NMP. It is not entirely clear that his legitimacy derives from his position as the representative of a minority of the electorate.[14]

The reasons offered for the necessity of the NCMPs remain on shifting ground.

During the Second Reading of the Bill, the then Prime Minister Lee cited three reasons for ensuring that Parliament should have a few opposition members. First, the benefit to the younger ministers and members of parliament was that they were to "sharpen their debating skills". However, this alone cannot be a sufficient reason. To enact a Constitutional Amendment that artificially introduces an element of opposition just for the sake of setting up a sparring partner to practise debating skills is unlikely to be the primary motivation, considering the weight that should be accorded the Constitution as the supreme source of law in the land.

Second, the reason for adopting the NCMP scheme was so that "the people will learn the limits of what a constitutional opposition can do". PAP ministers have often spoken of their preference for a consensus-building system, as opposed to an adversary-for-adversary's-sake opposition politics.[15] At the same time they have circumscribed the role of the opposition, in terms of the cliché, that an opposition is obliged to oppose or so lose its validity.[16] While the NCMP amendment was introduced in response to a perceived need for alternative voices in Parliament beyond that of the PAP hegemonic block and its backbenchers, it appears that the dominant party itself had reservations as to how the NCMP scheme would serve to raise the level of debate within the House.[17] From that viewpoint, the NCMP scheme would seem to be an exercise in futility.

The third justification offered was that "some non-PAP MPs will ensure that every suspicion, every rumour of misconduct, will be reported to the non-PAP MPs, at least anonymously… This approach of Opposition members will dispel suspicions of cover-ups of alleged wrongdoings".[18] It is submitted that this reason stands up best to logical scrutiny, going back as it does to the institutional system of checks and balances built into the Westminster parliamentary system of adversarial politics.

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14 See e.g. "The NCMP has got the mandate because he has gone through the electoral process": Sing. Parliamentary Debates, vol. 54, col. 810 (30 November 1989), Dr Arthur Beng Kian Lam (Fengshan); *contra* "He says that the NCMP has a measure of support. What is a measure of support? Is one vote a measure of support? Is the second highest poll a measure of support? It does not really matter. What matters is an opportunity is given for another viewpoint to be expressed and we should ask ourselves: is that opportunity good for Singapore? Is it good for our legislative process?": Sing. Parliamentary Debates, vol. 54, col. 788 (30 November 1989), Mr. Davinder Singh (Toa Payoh GRC).

15 See e.g. "I believe in consensus democracy. I do not think adversarial politics is good for Singapore": Sing. Parliamentary Debates, vol. 54, col. 851 (30 November 1989).

16 "What is the role of the opposition here? The role of the opposition in Parliament will be to pole holes, maybe even worse, to criticize and tear down all these policies that we want to implement, or even to question the very need for these policies. That is their role. They will attack us. If they do not do their job, and if they support us, reach consensus with us, then they are not the opposition": Sing. Parliamentary Debates, vol. 69, col. 140 (1 June 1998), Mr Wong Kan Seng (Minister for Home Affairs).

17 See e.g. "The objective of the Opposition is to damage the reputation of the Government amongst the voters. How could this sort of relationship bring about consensus in the Government?": Sing. Parliamentary Debates, vol. 54, col. 815 (20 November 1989), Mr Loh Meng Seng (Kampong Glam).

18 Sing. Parliamentary Debates, vol. 44, col. 1726 (24 July 1984), Mr. Lee Kuan Yew (Prime Minister).

Even taking the then Prime Minister's reasons at its highest bar, the NCMP scheme would seem to be designed specifically to institutionalize political pluralism and introduce checks and balances within the system.[19] However, the check and balance that has been introduced by the presence of the NCMP is artificially induced, highlighting how the unusual longevity of the PAP political dominance has brought about a need for periodic and incremental shifts of the Singapore system away from the original Westminster model.[20]

What has the PAP political leadership in fact tried to achieve by the introduction of the NCMP scheme? According to a speech by the then Prime Minister Goh, "[the] aim is to enable opposition parties to have at least three seats in Parliament".[21] Though he did not go on to explain why, the sub-heading of that section, "Widening Political Participation", might prove instructive.[22]

The then Prime Minister Lee Kuan Yew stated in parliament in 1984:

Its main purpose is to encourage the serious contenders who are now on the sidelines and are thinking of waiting for the old guards to pass on before they contest. I am saying to them, "Come out. Take advantage of the next four to five years of exposure. Build up." And if we find that they accept our parameters, we may well develop a two-party system.[23]

Presumably then, the NCMP scheme was designed, at first blush, to promote greater political participation by affording a training ground for potential opposition hopefuls, though that participation was contingent on an acceptance of the "parameters" set by the PAP.[24]

The Bill however, needs to be set against the historical backdrop of the PAP's unbroken and total political hegemony in parliament from 1968 until 1981 when Mr. J. B. Jeyeratnam won a seat in the Anson by-election.[25] Even thereafter, the PAP never lost more than a maximum of 4 seats despite the introduction of the NCMP scheme.[26] Perhaps the effect (no matter what its

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19 See also *Lua Ee Laine*, *Sim Jek Sok*, *Disa*, *Koh Theng Jer*, *Christopher*, "Principles and Practices of Voting: The Singapore Electoral System", (1996) 17 Sing L R 244 at 257.

20 See also Thio Li-Ann, Legal systems in Asian—Singapore Chapter 3—Government and the State, at 1, accessed from <http://www.aseanlawassociation.org/papers/sing_chp3.pdf>.

21 Speech by Prime Minister Goh Chok Tong at the Official Opening of the Commonwealth Parliamentary Association (CPA) 1999 Mid-Year Ex-Co Meeting, 4 May 1999, accessed from <http://app.mfa.gov.sg/2006/press/view_press.asp?post_id=1090>.

22 See *Ho Khai Leong*, Shared Responsibilities, Unshared Power: The Politics of Policy Making in Singapore (Singapore: Eastern Universities Press, 2003) at 189: "to a certain extent, the NCMP scheme was a reflection of the Goh administration's desire to be more open and consultative in its approach for accountability and answerability, providing a basis for an alternative voice in parliament".

23 Sing. Parliamentary Debates, col. 1819 (25 July 1984), Mr. Lee Kuan Yew (Prime Minister).

24 Those basic parameters include for example, "the independence and sovereignty of Singapore, its multi-racial, multi-religious, multi-lingual, multi-cultural character". The then Prime Minister put it strongly when he said, "[t]hey are not for argument. We start arguing about that, we are tearing out our entrails. Any argument as to party differences must accept that these basic parameters cannot be changed": Sing. Parliamentary Debates, vol. 44, col. 1811-2 (25 July 1984).

25 See also "Lee warns voters against swing to the opposition", Financial Times (24 December 1984), p1.

26 In the 2006 and 2001 elections, there were two elected opposition members – Low Thia Khiang and Chiam See Tong. In the 2006 elections, 37 seats were uncontested, all being from GRC wards. In 2001, 55 seats were uncontested. The maximum number of seats the opposition has occupied at any one time since Independence is four. See <http://www.elections.gov.sg/past_parliamentary.htm>.

motivations) of the NCMP scheme on the Westminster system has not been to encourage the growth of a robust opposition, but merely to ensure the continuity of an opposition voice within parliament. There is an inhibition of the natural growth of the check and balance via periodic political turnovers as voter motivation to bring opposition voices to parliament can be diluted by considerations that a default mechanism exists for the "best losers".

The NCMP scheme was not introduced until 1984, three years after J.B. Jeyeratnam's historic victory in Anson, and in the same year that the General Elections were to be called.[27]

In parliament, opposition member of parliament, Mr. J. B. Jeyeratnam questioned the motives for the introduction of the Bill. He raised as a point of objection, the haste with which the Bill had been introduced[28], and declared, "this Bill is a fraud on the electorate. If the Prime Minister is genuine in his desire to see Opposition Members in Parliament and therefore bring about parliamentary democracy in Singapore, then may I tell him that there are other ways of doing this, far better ways than this sham Bill".[29]

The alternative argument that one academic put forth is that the Bill was "to quell demands for more opposition members in parliament".[30]

What has been the history of the NCMP scheme in parliament? During the first elections after the constitutional amendment was passed, the number of those voting for the PAP dropped by 13.4%.[31] One NCMP seat was offered, but there were no takers.[32] In the 1988 elections, Chiam See Tong of the Singapore Democratic Party was the only elected opposition member. Dr. Lee Siew Choh became the first NCMP in Singapore's electoral history. The 1991 elections saw the election of four opposition members and consequently no NCMP seats were offered. In the 1997 election, two opposition members were elected and Mr. J. B. Jeyeratnam occupied

27 According to the then Prime Minister, "In brief, within eight months after the Member for Anson entered this Chamber, my senior colleagues and I came to the conclusion that the new situation, contrary to our expectations, was better for Singapore, better both for the Government and for the people. It is no longer in the interest of Singapore for the 1980s that the old guards should exert their dominance to exclude the Opposition in a general election so that distraction from our vital goals is minimized. We did this for the 1960s and 70s in order that the people could concentrate on the urgent tasks of survival. The position has changed, not just the challenges confronting us but also the nature of the electorate. Over 60% of today's voters are aged 40 and below. They were teenagers or toddlers when the struggles were enacted in the 1950s and 60s. They have no idea how destructive opposition can be. They feel that they are missing something. They want to experience some of the excitement of political combat (...) A person learns most vividly and remembers longest when his lessons are accompanied by sharp pain or great joy": Sing. Parliamentary Debates, vol. 44, col. 1726-8 (24 July 1984), Mr. Lee Kuan Yew.

28 Sing. Parliamentary debates, vol. 44, col. 1758 (24 July 1984), Mr. J. B. Jeyaretnam.

29 Sing. Parliamentary debates, vol. 44, col. 1754 (24 July 1984), Mr. J. B. Jeyaretnam.

30 *Kevin Y.L. Tan*, "A Short Legal and Constitutional History of Singapore" in Kevin Y.L. Tan, ed., Essays in Singapore Legal History (Singapore: Singapore Academy of Law; Marshall Cavendish Academic, 2005) 27 at 58.

31 See *Ho Khai Leong*, Shared Responsibilities, Unshared Power: The Politics of Policy Making in Singapore (Singapore: Eastern Universities Press, 2003) at 188. See also "The Financial Times considers the current state of Those basic parameters include for example, "the independence and sovereignty of Singapore, its multi-racial, multi-religious, multi-lingual, multi-cultural character". The then Prime Minister put it strongly when he said, "[t]hey are not for argument. We start arguing about that, we are tearing out our entrails. Any argument as to party differences must accept that these basic parameters cannot be changed": Sing. Parliamentary Debates, vol. 44, col. 1811-2 (25 July 1984).

the NCMP seat in an about-face.[33] Steve Chia of the National Solidarity Party became the next NCMP in the 2001 elections, followed by Ms. Sylvia Lim in 2006.[34]

The two-party system has not, to date, materialized in Singapore, though the minimal representation of opposition members in parliament seems to have become an institutionalized practice by now.

The effectiveness of the NCMP scheme is limited by the perception that the NCMP is obliged to be adversarial by virtue of being party to the opposition.[35] So far, NCMPs have precious little

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31 See also "Lee warns voters against swing to the opposition", Financial Times (24 December 1984), p1.

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31 According to the then Prime Minister, "In brief, within eight months after the Member for Anson entered this Chamber, my senior colleagues and I came to the conclusion that the new situation, contrary to our expectations, was better for Singapore, better both for the Government and for the people. It is no longer in the interest of Singapore for the 1980s that the old guards should exert their dominance to exclude the Opposition in a general election so that distraction from our vital goals is minimized. We did this for the 1960s and 70s in order that the people could concentrate on the urgent tasks of survival. The position has changed, not just the challenges confronting us but also the nature of the electorate. Over 60% of today's voters are aged 40 and below. They were teenagers or toddlers when the struggles were enacted in the 1950s and 60s. They have no idea how destructive opposition can be. They feel that they are missing something. They want to experience some of the excitement of political combat […[A person learns most vividly and remembers longest when his lessons are accompanied by sharp pain or great joy": Sing. Parliamentary Debates, vol. 44, col. 1726-8 (24 July 1984), Mr. Lee Kuan Yew.

31 Sing. Parliamentary debates, vol. 44, col. 1758 (24 July 1984), Mr. J. B. Jeyaretnam.

31 Sing. Parliamentary debates, vol. 44, col. 1754 (24 July 1984), Mr. J. B. Jeyaretnam.

31 *Kevin Y.L. Tan*, "A Short Legal and Constitutional History of Singapore" in Kevin Y.L. Tan, ed., Essays in Singapore Legal History (Singapore: Singapore Academy of Law; Marshall Cavendish Academic, 2005) 27 at 58.

31 See *Ho Khai Leong*, Shared Responsibilities, Unshared Power: The Politics of Policy Making in Singapore (Singapore: Eastern Universities Press, 2003) at 188. See also "The Financial Times considers the current state Singapore politics with opposition to the ruling People's Action Party significantly increased in recent months", Financial Times (8 January 1985), p3.

32 According to *Hussin Mutalib*, "The Returning Officer then declared that the next highest losing Opposition candidate, M.P.D. Nair from the Workers' party, who scored 48.8 per cent, qualifies as an NCMP. The Workers' Party, given its earlier avowed objection to the scheme, quickly rejected the offer. The next in line was the chairman of the Singapore United Front, Tan Chee Kien, who polled about 48 per cent in his Kaki Bukit constituency. Tan also turned down the offer after consultations with his other party leaders": "Shifting Rules of the Game" in Parties and Politics: A Study of Opposition Parties and the PAP in Singapore (Singapore: Marshall Cavendish Academic, 2004) at 326-7.

33 See "The leader of one of Singapore's opposition parties has rejected a Government offer to give one of its defeated candidates a parliamentary seat following last month's general election", Textline Multiple Source Collection, 5 January 1985 (Factiva); contra "Jeyeratnam to take up offer of non-constituency MP seat", Business Times Singapore (11 January 1997).

34 See "Singapore's Workers' Party names chairman Sylvia Lim as next NCMP", Channel News Asia (9 May 2006), <http://www.channelnewsasia.com/stories/singaporelocalnews/view/207449/1/.html; "General Elections Special Issue", <http://www.mfa.gov.sg/washington/April_May06.pdf>.

35 "An Opposition would exploit the unpopularity of a policy, even if it privately recognizes the merit of that policy and knows that it is good for the country. It has happened and it will happen again. I have had opportunities to exchange views with Parliamentarians from other countries and they acknowledge that this is indeed the case": Sing. Parliamentary Debates, vol. 54, col. 729 (29 November 1989), Mr. Lim Boon Heng (Kebun Baru).

to show since the inception of the scheme in 1984. No Bills have been successfully introduced by them.[36] Rather, several references have been made to the 1984 scheme, emphasizing that the NCMPs owe their places in parliament to the benevolence of the PAP.[37] Since the NCMP is neither a formally elected representative of the populace nor a technocrat of especial expertise, reservations as to the legitimacy and weight of the NCMP's representations can easily be made,[38] leading one to question exactly what has been gained by the compromise of the Westminster model in the form of the NCMPs thus far.[39]

Against allegations that the NCMP scheme was introduced to manage the increasing demand for a viable opposition, however, it should be noted that it was openly acknowledged that the PAP was under no obligation to ease the situation of the opposition parties,[40] though the mettle of the opposition NCMPs would speak for themselves so that an ineffective opposition would trip itself up in parliament.[41] It seems that the NCMP scheme is designed to make the public content with the status quo more than anything else,[42] since the government's professed intent to grow a viable opposition in Singapore is contradicted by its general attitude towards the opposition.

Unfortunately, the constitutional amendment has weakened the one man one vote representative nature of the electoral system without necessarily raising the quality of debate in the process.

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36 To my knowledge, no Bills have been introduced by the NCMPs thus far.

37 See e.g. "I feel strange that Dr Lee also objected to this measure, forgetting that he himself is a NCMP. He said there is no democracy in Parliament. If there is no democracy in Parliament, he would not have this chance to speak against the policy in the Parliament as a NCMP or does he think that he is being forced to support our stand?": Sing. Parliamentary Debates, vol. 54, col. 756 (29 November 1989), Mr Peh Chin Hua (Jalan Besar GRC); "In much the same way as the principle has been deviated - if that is the correct use of the word - by the presence in this House of the NCMP. It is hardly true, is it, that he is the representative of the people in his constituency? That constituency has elected another Member of this House". Sing. Parliamentary Debates, vol. 54, col. 788 (30 November 1989), Mr Davinder Singh (Toa Payoh GRC); "It is most ironical that the party which opposed this suggestion most was the Workers Party. Yet, now it is the same party that is the first to accept and be benefitted by the NCMP system. I wonder what Dr Lee Siew-Choh thinks of this". Sing. Parliamentary Debates, vol. 54, col. 831 (30 November 1989), Dr Koh Lip Lin (Nee Soon South).

38 See *Thio Li-Ann*, "The Elected President and the Legal Control of Government" in Kevin Y.L. Tan and Lam Peng Er, eds., Managing Political Change in Singapore (New York: Routledge, 1997) at 106.

39 Although, it should be noted that NCMPs could potentially contribute by responding constructively to parliamentary debate. Particularly, NCMPs Steve Chia and Sylvia Lim have utilized their privileges to pose oral and written questions to the ministers on diverse subjects ranging from revenue collected through the Electronic Road Pricing scheme to the number of mentally ill in Singapore and whether a "white horse" classification exists within the National Service.

40 See e.g. "[D]o we have to lose in order to show that we win? Where in democracy does it say that the government should not win all the seats?" Sing. Parliamentary Debates, vol. 44, col. 1769 (24 July 1984), Maj Fong Sip Chee (Minister of State for Culture).

41 See e.g. "Opposition Members have a penchant for beating their breast outside Parliament claiming their worthiness; so if they avail themselves of this opportunity and can really prove their worth in Parliament, they will emerge as a respectable opposition. However, in spite of this amendment, if they still fail, I think they should seriously believe that all the big talk about their reputation which they have built up is mere fantasy and a figment of their imagination". Sing. Parliamentary Debates, vol. 44, col. 1743 (24 July 1984), Encik Wan Hussin Zoohri (Parliamentary Secretary to the Minister for Health and the Minister for Culture); "Opposition will expose their own flaws – PM", Straits Times 29 December 2003.

42 See e.g. "We are evolving a unique parliamentary democratic system whereby in Parliament henceforth, the people can be assured of both ruling party and Opposition party members, thereby catering for both the majority and minority viewpoints. The Parliament is assured of at least three Opposition Members after the next general elections". Sing. Parliamentary Debates, vol. 44, col. 1739 (24 July 1984), Dr Lau Teik Soon (Serangoon Gardens).

Opposition members are often ridiculed for their theatrics,[43] indiscretions[44] or the insufficiencies of their argument[45] by the local media[46] and in parliament.

While the presence of an opposition is desirable in order to maintain the system of political checks and balances which is at the heart of the Westminster model, it is questionable if the forcible introduction of an alternative voice to the dominant party does not in fact dilute the representative nature of parliament despite claiming to enhance its representative nature on a pragmatic basis. It causes a dilution by entrenching the presence of a nominal opposition, potentially reducing voter motivation to elect an opposition, impeding any genuine, substantive change to the political make-up. The NCMP scheme in fact shores up the machinery of a political system dominated by a single party. Therefore, the results thus far from the presence of non-elected members in parliament, are suspect, for the serious impact it makes on the Westminster system of parliamentary democracy.[47]

The proponents of parliamentary democracy would argue that if the citizens wanted an opposition in parliament, they would have elected them through the electoral process.[48] For this reason, the presence of the NCMPs, whatever its merits or lack thereof, is more a manifestation of the paternalistic mindset of the PAP political leadership. The political leadership does not trust the electorate to return suitable members to parliament,[49] thus the necessary quota, in the form of the opposition element, is institutionalized in the name of pragmatism.

Furthermore, the political leadership has often spoken of the "constructive opposition" instead of adversarial politics for its own sake.[50] Yet, inconsistently, it constantly asserts that the

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43 See e.g. "…the NCMP is very fond of making wild suggestions without any basis of facts… I still maintain that Dr Lee Siew-Choh has an unnecessarily suspicious mind and worse, I think he is following the footsteps of his predecessor from the same party over here, going on fishing expeditions, making wild allegations, smearing here and there. And if he is not careful, I think he would go the same way as his predecessor". Sing. Parliamentary Debates, vol. 55, col. 1047-9 (29 March 1990, Mr Goh Chok Tong (Prime Minister).

44 See e.g. "Who says I'm a 'No Clothes' MP?", Straits Times, 28 March 2004; Nude photos of Steve Chia and maid found in his home", Straits Times 20 December 2003.

45 Recently, NCMP Sylvia Lim was ticked off for asking questions on composition of Legal Service Commission: see "Sylvia Lim ticked off for questioning courts' integrity", Straits Times 17 July 2007, and " 'Conspiracy theory' revived and rebutted", Channel NewsAsia 17 July 2007, 6:49 AM, (Factiva).

46 Which hardly enjoys any real freedom of the press.

47 See also *Thio Li Ann*, "Lex Rex or Rex Lex? Competing Conceptions of the Rule of Law in Singapore", 20 UCLA Pac. Basin L.J. 1 at 16.

48 On this point reference has been made in Parliament to the question of the " "disenfranchisement" of about 25% of the electorate, ie the voters who voted for Opposition parties in successive general elections". Sing. Parliamentary Debates, vol. 44, col. 1798 (25 July 1984), Mr S. Chandra Das (Chong Boon). The 25% that have consistently voted against the Government are underrepresented in the overwhelmingly PAP dominated Parliament: figure taken from Sing. Parliamentary Debates, vol. 44, col. 1732 (24 July 1984), Prime Minister Lee Kuan Yew. The acknowledgement of the problems of a first-past-the-post system, coupled with the rejection of calls for proportionate representation in favour of the institutionalized opposition guaranteed by the NCMP system effectively proportions less choice to the electorate, and more to the discretion of the government in its allowances for the silent minority.

49 See also *Thio Li-Ann*, "Recent Constitutional Developments: of Shadows and Whips, Race, Rifts and Rights, Terror and Tudungs, Women and Wrongs", 2002 Sing. J. Legal Stud. 328 at 331.

50 See e.g. "if a non-representative member of Parliament just indiscriminately opposes everything for the sake of opposition, it will be against the original intended principle of having him in the Parliament, as it will be more destructive than constructive". Sing. Parliamentary Debates, vol. 44, col. 1794-5 (25 July 1984), Dr Ow

opposition is by nature adversarial, and indeed obliged to be so even if privately the member can apprehend the benefits of the proposed policies. The inconsistency brings us back to the issue of the exact function that the NCMP scheme is supposed to serve. Is the NCMP the voice of the silenced minority in the first-past-the-post system? Or is the NCMP to meet the felt need for an alternative voice, without being too finicky about exactly whose voice it represents? The theoretical basis of the NCMP is unclear but if the purpose was to demonstrate the limits of what a weak constitutional opposition can do, then it seems to have succeeded admirably.[51]

III. Group Representation Constituencies – Ensuring or Undermining the Credibility of Minority Representation?

The next significant divergence from the Westminster model took the form of the Group Representation Constituencies introduced in 1988. In addition to the Presidential Council for Minority Rights provided for in the Constitution, the Group Representation Constituencies were introduced by constitutional amendment in 1988, in official presentation, to ensure the representation in parliament of members from the Malay, Indian and other minority communities in Singapore.[52]

The Westminster model of democracy, which predicates itself upon majority rule, is perceived as "being unsuitable for plural societies divided by ethnic differences"[53] and "the GRC concept seeks to ensure multiracial representation, affording a counter-majoritarian check via minority representation".[54] Or as the then Prime Minister Goh put it, the GRC was an innovation "to preserve multi-racialism in Parliament".[55]

Chin Hock (Leng Kee). Also, "An Opposition in Parliament does not simply mean taking pot-shots at the PAP, for this is just fumbling and cheating the people who sent them here. Neither is it a place for adversarial politics. Alternative and constructive ways of doing things must be the answer not just opposition and spurious accusations". Sing. Parliamentary Debates, vol. 44, col. 1785 (24 July 1984), Mr Eugene Yap Giau Cheng (Parliamentary Secretary to the Minister for Labour); "Of course, Sir, constructive Opposition can enhance the value of the system. Sadly, very sadly, it is in this area of constructiveness that the Opposition has been found to be very sorely wanting". Sing. Parliamentary Debates, vol. 44, col. 1767 (24 July 1984), Maj Fong Sip Chee (Minister of State for Culture).

51 See also *Thio Li-Ann*, "The Post-Colonial Constitutional Evolution of the Singapore Legislature: A Case Study", [1993] SJLS 80 at 98.

52 Constitution of the Republic of Singapore (1999 Rev. Ed.), art. 39A(1).

53 *Goh Chok Tong*, "A Minority Right—Ensuring Multi-racial Representation in the Singapore Parliament" (1989) LXX The Parliamentarian 6, cited in Wan Wai Yee, "Recent Changes to the Westminster System of Government and Government Accountability", (1994) 15 Sing LR 297 at 307. See also "At independence, we adopted the basic Westminster parliamentary model that has, in large part, stood us in good stead. But we were conscious that with a history of communist insurgency, coupled with racial riots, there was a need to incorporate certain safeguards into our parliamentary system. As we are a multi-racial country, religious and racial harmony is something which we work assiduously to preserve": Speech by Prime Minister Goh Chok Tong at the Official Opening of the Commonwealth Parliamentary Association (CPA) 1999 Mid-Year Ex-Co Meeting, 4 May 1999, accessed at <http://app.mfa.gov.sg/2006/press/view_press.asp?post_id=1090>.

54 See also *Tan Seow Hon*, "The Constitution as "Comforter"? –An assessment of the Safeguards in Singapore's Constitutional System", 16 Sing LR 104 at 145.

55 Speech by Prime Minister Goh Chok Tong at the Official Opening of the Commonwealth Parliamentary Association (CPA) 1999 Mid-Year Ex-Co Meeting, 4 May 1999, accessed at <http://app.mfa.gov.sg/2006/press/view_press.asp?post_id=1090>.

Under Article 39A of the Constitution, the president may declare any constituency a group representation constituency to enable any election in that constituency to be held on a basis of a group of not less than three but not more than six candidates. Two types of group representation constituencies are possible. Either the constituency is one where "at least one of the candidates in every group shall be a person belonging to the Malay community",[56] or one where "at least one of the candidates in every group shall be a person belonging to the Indian or other minority communities".[57]

Thus, at least in appearance, the multi-racial element in politics is entrenched, so that the minority communities have a constitutional right to participate in the legislative process.[58]

Yet, there was more to the political background than first meets the eye. In 1984, the then Prime Minister Lee acknowledged in parliament that the PAP had clearly lost the Malay ground in the 1968 elections, the first after Singapore's separation from Malaysia in 1965.[59] Consistent with these assertions, PAP candidates performed poorly in seats where Malays were relatively well represented in the 1988 elections.[60] Weak Malay electoral support for the PAP has been counteracted by a specific and targeted policy - the 1989 ethnic residential quotas in public housing estates.[61] These quotas have ensured that the Malays in Singapore do not constitute more than roughly 20% of the total population in any constituency.[62] The Chinese quota of about 80% assures that they shall remain the numerically and electorally dominant community in all constituencies throughout Singapore.

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56 Constitution of the Republic of Singapore (1999 Rev. Ed.), art. 39A(2)(a)(i).

57 Constitution of the Republic of Singapore (1999 Rev. Ed.), art. 39A(2)(a)(ii).

58 See also *Wan Wai Yee*, "Recent Changes to the Westminster System of Government and Government Accountability", (1994) 15 Sing LR 297 at 308.

59 *Mafoot Simon*, 'Malay Support a Yo-Yo No More', Straits Times Interactive, 18 May 2006; "But I knew that we lost the Malay ground. The shock of Separation and the problems of adjustment and resettlement from Malay kampongs to HDB estates were a strain. We regained that Malay ground in 1976, eight years later. By 1980, we had at least half the Malay ground and we had expanded our support amongst the English-educated and the Chinese-educated Chinese and isolated the pro-Communist and the chauvinist Chinese. The Indians we know are equally divided between those who support the Government because they benefit from it and those who want an Opposition because it is part of Indian culture": Sing. Parliamentary Debates, vol. 44, col. 1825 (25 July 1984), Prime Minister Lee Kuan Yew.

60 See eg. in Bedok, where prior to the Ethnic Integration Policy in 1988 the Malays accounted for 59.0% of the ward, the Worker's Party took 45.08% of the total cast, with a difference of just 5,063 votes. Figures taken from <http://www.elections.gov.sg/past_parliamentary1988.htm> supra 7 and "Integrating Differentials: A Study on the HDB Ethnic Integration Policy", CRESTimes, A research Bulletine of the Centre for Real Estate Studies, Vol 3 No. 1, at 5.

61 For a table of ethic quotas, refer to "Integrating Differentials: A Study on the HDB Ethnic Integration Policy", CRESTimes, A research Bulletine of the Centre for Real Estate Studies, Vol 3 No. 1, at 5.

62 The HBD "not only distributed different apartment types spatially but maintained an average 20 per cent quota on the proportion of Malays: this was made public by the Prime Minister in 1987. The policy was formalized in 1989 to include all housing blocks because the level of resales of apartments had resulted in racial enclaves being reformed": "Singapore's success in creating racial and religious harmony", an article by Ambassador Mark Hong. Accessible at: <http://sam11.moe.gov.sg/racialharmony/download%5CRacial_Religious_Harmony_final.pdf>.

By 1991, the then PM Goh could comment, "I think the Malay group was relatively sweeter than in 1988", when asked if the PAP's attack on communal politics by the opposition had caused a ground swing against the party: "Malay ground relatively sweeter than '88 – PM", Straits Times, 2 September 1991.

The quota prevents ethnically concentrated ghetto areas from forming where elections may swing on racial feeling. The practical effect is a guarantee of moderate politics, PAP style – the Malay candidate cannot become too extreme because that will lose Chinese votes, nor can the Chinese candidate become too chauvinistic – that will lose Malay votes which might be crucial in a close contest.

However, this also means that the Malay community cannot determine the electoral outcome in any constituency in any influential manner except as a corollary effect, whereas the Chinese, as the overwhelming majority, has arguably more clout.

Despite the avowed claims that the GRC scheme was introduced to entrench the multi-racial nature of Singapore, criticisms have been levelled against the GRC scheme for weighting the electoral regime in the substantial favour of the PAP. The "racial precondition greatly exacerbates the unevenness of the electoral playing field from the opposition's point of view. It is hard enough for the opposition to attract candidates of any degree of caliber into its fold, let alone compile the right racial mix with its limited manpower resources".[63]

The effect of the amendment and the GRCs is that political parties in Singapore are now obliged to field a multi-racial slate of candidates[64] - a disadvantage to the opposition. In addition, the candidates have to run as a team under the large GRC concept where the maximum number of seats within a GRC has been increased over time from four to six. As such, the opposition has cited the GRC scheme as another electoral obstacle that the PAP has come up with, in order to retain its dominance in parliament.[65]

The result of the introduction of the GRC scheme in 1988 is clear. It caused serious impediment to the opposition parties in seriously challenging the PAP's electoral and political hegemony. The reality is that to date, no opposition party has successfully contested a GRC in Singapore.[66] It is a fact that since the introduction of the GRC scheme, walkovers have become a much more predominant feature in the political landscape of Singapore than it was before.[67]

63 See *Thio Li-Ann*, "Chosing Representatives: Singapore Does it Her Way", a paper delivered at the second LAWASIA Comparative Constitutional Law Conference on Representation held in Kathmandu, Nepal in December 1994, at p 15, section V(D)(1).

64 See Sing. Parliamentary Debates (12 January 1988) vol.50, col. 337, Mr. Goh Chok Tong (First Deputy Prime Minister): "Yes, we recognize that this Bill will disadvantage the Opposition. It will, because the Opposition in the present state would not be able to field a multi-racial or a credible multi-racial team in more than one or two Group Representation Constituencies. They are going to be disadvantaged. But is it our fault that they are so weak, that they cannot get together? It is not our job to nurture an Opposition. It is their job to build themselves up and the way for them to build themselves up is to merge if each party is weak.".

65 In the 1991 elections, the SDP and WP swapped candidates in order to contest the GRC wards: "SDP and WP to team up", Straits Times (18 August 1991). See also "GRC scheme a ploy to keep Opposition out—Worker's Party", Business Times Singapore (27 August 1991), and the protest in 1996 when the maximum number of MPs in a GRC was increased from four to six: "Opposition MPs lash out against amendments", Straits Times (29 October 1996); Sing. Parliamentary Debates (11 January 1988) Vol.50, coln. 205-6, Mr. Chiam See Tong (Potong Pasir).

66 The closest contest so far has been in Cheng San. In the 1997 General Elections, the Workers Party garnered 44,132 votes, representing 45.18%, losing to the PAP by 9,412 out of 97,685 votes cast,
See <http://www.elections.gov.sg/past_parliamentary1997.htm>,
See also <http://www.wp.org.sg/party/history/1991_2000.htm>.

67 See e.g. <http://www.wp.org.sg/party/history/1991_2000.htm>,
<http://www.elections.gov.sg/past_parliamentary.htm>.

While it is not the PAP's job to nurture an opposition, it is doubtful that the GRC scheme, and its expansion since, has done more to entrench multi-racialism than it has, in substance, to propagate and enhance the political hegemony of the PAP regime.

The PAP's agenda of electoral dominance was perhaps again served by the expansion of the GRC team from four to six in 1996 as well as the incongruously divergent reasons given for the growing number of GRCs. For instance, in 1996, the GRC expansion was justified on the grounds that it would allow GRCs to better tie in with Community Development Councils.[68] Yet not long after the 2006 elections, Senior Minister Goh acknowledged that the GRC allowed for easier recruitment into the PAP political leadership and helped ensure the relatively smooth passage for the highly-qualified and highly-successful new PAP candidates.[69] Where the multi-racial rationale can be served by a GRC of two, a GRC of six clearly serves other purposes in addition.

Another charge that has been levelled is that "the GRC scheme coupled with the relative ease of redrawing electoral boundaries allows new candidates to be elected when teamed up with strategic vote-pullers.[70] The political manoeuvring and the placement of new candidates in strong incumbent wards weakens the identification the voter has with his member, as the candidate may be shifted out in the next elections if the party strategy so calls for it.[71]

In addition, as most of the constituency seats are considered safe, it is the party that determines the composition of MPs and ultimately the ministerial posts".[72] The clear illustration was shown in the 1991 elections, where new PAP candidates were teamed up with incumbents and cabinet ministers, helping to ensure that the new candidates would not lose to the opposition candidates.[73] The result is that the electorate is held hostage to electing candidates they might not have entire confidence in, if they want the incumbents to continue in office.

Furthermore, in 1988, Anson was incorporated as a GRC, effectively obliterating an opposition stronghold.[74] The tactic of political manoeuvring dilutes the representative link between the representor and the represented since MPs are shuffled between constituencies from one election to the next to maximize the chances of winning.[75]

For these reasons, it seems that the GRC scheme has not succeeded in representing the population even if the basis of its inception had been the representation of minorities in the elections.

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68 Peh Shing Huei, 'Time To Go Back to Three-Member GRCs?', *Straits Times*, 7 July 2006.

69 Cited in *Peh Shing Huei*, 'Time To Go Back to Three-Member GRCs?', Straits Times, 7 July 2006.

70 See Sing. Parliamentary Debates (28 October 1996) vol.66, col. 815, Prime Minister Goh Chok Tong.

71 See *Tan YL Kevin*, "Constitutional Implications of the 1991 General Elections" (1992) 13 Sing LR 26 at 48.

72 See also *Wan Wai Yee*, "Recent Changes to the Westminster System of Government and Government Accountability", (1994) 15 Sing LR 297 at 320. Under s 8(1) of the Parliamentary Elections Act, Cap. 218 (2007 Rev. Ed. Sing.), "the Minister may, from time to time, by notification in the Gazette, specify the names and boundaries of the electoral divisions of Singapore for purposes of elections under this Act".

73 See e.g: <http://www.elections.gov.sg/past_parliamentary1991.htm>; contra "Chiam 'already entrenched in ward' ", Straits Times (31 August 1991).

74 See "Changing electoral boundaries", Straits Times, 2 August 1991.

75 See also *Tan Seow Hon*, " "The Constitution as "Comforter"? –An assessment of the Safeguards in Singapore's Constitutional System", 16 Sing LR 104 at 146.

The GRC scheme shows that it leads to a pernicious situation where it becomes harder for the opposition to win four seats instead of a single one,[76] although it is also true that the GRC scheme may not always work to the advantage of the dominant party. In the 1988 and 1991 elections for example, the PAP almost lost the Eunos GRC.[77] Several other GRCs were also closely contested.[78] Despite that, whatever the actual motivations and good intentions[79] that lie behind the GRC scheme, the effect and appearance of its implementation is undesirable.

More seriously, the GRC scheme negatively impacts the principle of political equality by altering the vote weighting so that the value of the vote belonging to one residing within the GRC is simply one-third or one-fourth… of that of his SMC brethren.[80] Potential clashes with Article 12 of the Constitution were averted by the enactment of Article 39A(3) which states "No provision of any law made pursuant to this Article shall be invalid on the ground of inconsistency with Article 12 or be considered to be a differentiating measure under Article 78".

In similar vein, because of the increased prevalence of walkovers, the results show that it is possible to secure 74% of the seats in parliament with less than 37% of the votes cast under the GRC scheme, so that in the 1991 General Elections, the PAP secured 95% of the seats in parliament based on a mere 59.3% of the votes cast.[81] Holding the GRC to the smallest necessary size would go far towards alleviating the situation. This raises issues of whether it would be preferable to have an independent elections commission, instead of one appointed by the government.

Clearly, as far as the PAP political leadership was concerned, the supposed entrenchment of racial minorities in local politics far outweighed the constitutional provision of the right to equality. The GRC scheme only helps to achieve the appearance of a united, multi-racial parliament where each minority candidate is in fact not allowed or required to vote specifically with his race's interests in mind, but has to vote according to the party line.[82]

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76 See *Tan Seow Hon*, " "The Constitution as "Comforter"? –An assessment of the Safeguards in Singapore's Constitutional System", 16 Sing LR 104 at 145.

77 In 1988, a Workers' Party team polled 49.1 per cent of the valid votes. In 1991, it polled 47.6 per cent: "GRC changes risk being seen as tied to coming polls", Straits Times (2 October 1996).

78 *Chia Shi Teck*, "Notes From the Margin: Reflections on the First Presidential Election, by a Former Nominated Member of Parliament" in Kevin Y.L. Tan and Lam Peng Er, eds., Managing Political Change in Singapore (New York: Routledge, 1997) at 196-7. During the 1988 General Elections, the SDP took 43.67% of the votes in Aljunied. The Workers Party took 45.08% of the votes at Bedok, and 42.16% at Tiong Bahru: <http://www.elections.gov.sg/past_parliamentary1988.htm>. In 1991, the NSP gained 40.52% of the votes at Tampines: <http://www.elections.gov.sg/past_parliamentary1991.htm>.

79 "It costs us nothing to take precautions. It will cost us dearly if we do not, and end up with the problem of Parliament being under-represented by the Malay MPs". Sing. Parliamentary Debates (12 January 1988) Vol.50, coln. 346 (First Deputy Prime Minister Goh Chok Tong).

80 See *Lua Ee Laine, Sim Jek Sok, Disa, Koh Theng Jer, Chistopher*, "Principles and Practices of Voting: The Singapore Electoral System", (1996) 17 Sing LR 244 at 300. See also Tan YL Kevin, "Constitutional Implications of the 1991 General Elections" (1992) 13 Sing LR 26 at 44, where it is suggested that the GRC scheme dilutes the ability of an MP to represent the interests of what used to be his single constituency.

81 See *Tan YL Kevin*, "Constitutional Implications of the 1991 General Elections" (1992) 13 Sing LR 26 at 46.

82 See *Lua Ee Laine, Sim Jek Sok, Disa, Koh Theng Jer, Chistopher*, "Principles and Practices of Voting: The Singapore Electoral System", (1996) 17 Sing LR 244 at 302.

The move was criticized by some members of the ethnic minorities themselves, despite the expressed official rhetoric and the advantages of ensuring their political representation.[83] Concerns have been expressed that the GRC scheme would diminish the status of Malay members of parliament due to the inevitable perception that they are unable to be elected on their own. This might have affected the Malay members of parliament's standing in their community. This, at times, has invited challenge of political leadership from within their community.[84] It has also attracted allegations that PAP Malay members of parliament have not been able to be effective and forceful in representing their community's material and religious concerns.[85]

Such challenges from within the community were taken seriously, and at times attracted the government leadership to weigh in with clear warning of adverse consequences[86] for such challenges to the political leadership of the PAP Malay members of parliament in their community.[87]

If the government's intention, in diverging from the Westminster model was to institutionalize multi-racialism as a part of the local political scene, the PAP political leadership's achievements may well be only exterior. The racial minority candidates that are fielded are representative of minority interests only insofar as they happen to be of an ethnic minority; they do not compete on a racial platform, nor are they charged specifically with any duties that would have arisen from competing on a racial platform.

Rather, criticisms abound of the potential of the GRC scheme for abuse by the dominant party given the frequent redrawing of electoral boundaries especially close to election dates.[88]

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83 It has been questioned that the GRC's rationale of ensuring minority parliamentary representation stands in marked contrast with the allegation of Malay under-representation at the cabinet ministerial level. Since independence, there has never been more than one Malay cabinet minister at any given time in Singapore's cabinet. See <http://www.cabinet.gov.sg/CabinetAppointments/index.htm>; "BG Lee to be Finance Minister in Singapore's new Cabinet", Channel News Asia, 19 November 2001; "Only the best will be appointed", Straits Times (22 July 1991).

84 See e.g. *Lily Zubaidah Rahim*, The Singapore Dilemma: The Political and Educational Marginalization of the Malay World (Kuala Lumpur: Oxford University Press, 2001), p105; "Jufrie used Islamic terms to gain political support: PM", Straits Times, 14 September 1991; "Kan Seng misinterpreted Jufrie's use of Islamic terms, says Muis chief", Straits Times, 8 September 1991; "Kan Seng: Jufrie used Islamic phrases to stir Muslim sentiments", Straits Times, 6 September 1991.

85 See e.g. *Suzaina Kadir*, 'Islam, State and Society in Singapore', Inter-Asia Cultural Studies, Vol. 5, No. 3, 2004a, p. 368-369; W K Che Man, The Administration of Islamic Institutions in Non-Muslim States, Report No. 19 (Singapore: ISEAS, 1991), p. 4; *Steve Gan, James Gomez* and *Uwe Johannen*, Asian Cyveractivism: Freedom of Expression and Media Censorship (Singapore: Friedrich Naumann Foundation, 2004), p.333; "Can they agree to disagree?", Straits Times, 21 October 2000; "11 Malay MPs reject plan for new leadership", Straits Times, 4 November 2000; and "Malay MPs to reach out more to community", 10 November 2000.

86 See e.g. *Siti Andrianie*, "Be Mindful of all Races, Malays Told", Sunday Times, 21 January 2001; "AMP's proposal dangerous for Singapore – DPM Lee", Channel NewsAsia, 1 December 2000.

87 See e.g. *Ahmad Osman*, 'PM Gives Assurance on Madrasahs Relevance', Straits Times, 24 May 2000; 'Taman Bacaan Sooths Fears About Madrasah', Straits Times, 14 April 2000; Press Statement, 'PERGAS Stand on the Proposed SE (Compulsory Education) and the Madrasah', 31 March 2000, cited in PERGAS, Moderation in Islam in the Context of the Muslim Community in Singapore, Working Papers Presented at the PERGAS Ulama Convention, 13-14 September 2003, (Singapore: PERGAS, 2004), p. 351; "Schooling for all 'threatens madrasahs'", Straits Times, 1 April 2000; "Mardrasahs – Making them relevant", Straits Times, 10 April 2000; "Govt believes in madrasahs' importance", Straits Times, 22 April 2000; "Issue is future of Muslim children – PM", Straits Times, 2 May 2000; "Madrasah dialogue – PSLE idea accepted", Straits Times, 20 May 2000.

Contrary to expectations that the GRC scheme would strengthen the representative nature of parliamentary democracy in Singapore, it ironically dilutes that very representation by artificially imposing a racial quota where a natural development could have been encouraged instead. Similar to the NCMP scheme, the artificial imposition may have served instead to stunt the development of the very voice that the scheme sought to encourage.

In this respect, the shortcoming of the GRC scheme is similar to that of the NCMP. They both introduce the semblance of an alternative, minority or dissenting opinion, without opening up any real possibility of contest.

In essence, the GRC scheme reflects the PAP political leadership's distrust of the electorate and the opposition. It also reflects its paternalistic instinct to restructure voting behaviour and party politics to its vision.[89] In Singapore's de-facto one-party state, the GRC scheme has become increasingly entrenched despite widespread concern of its negative impact on the democratic fabric of society, from the very beginning.[90]

IV. Nominated Members of Parliament – Let Them Talk?

In addition to the NCMP scheme, the Westminster model was departed from by constitutional amendment, yet again, in 1990, to provide for Nominated Members of Parliament (NMPs). Again, the official presentation was that of another attempt to introduce alternative voices.[91]

This idea was first introduced in the President's speech at the opening of the parliament in 1989.[92] The difference between the NCMP and the NMP is that the NMPs are supposed to be

88 See e.g. "Change to Electoral Boundaries 'expected'" Straits Times (22 November 1996) 55; "Ministers Defend New Boundaries", Business Times Singapore, 25 November 1996.

89 See *Lua Ee Laine*, *Sim Jek Sok*, *Disa, Koh Theng Jer*, *Chistopher*, "Principles and Practices of Voting: The Singapore Electoral System", (1996) 17 Sing LR 244 at 299-300.

90 Shortly after the 2006 elections, a local journalist was prompted to express that "GRCs are state institutions which should not be confused with, and used for, party political needs" : Peh Shing Huei, 'Time To Go Back to Three-Member GRCs?', Straits Times, 7 July 2006.

91 See "The aim of this Bill is to further strengthen our political system by offering Singaporeans more opportunities for political participation and to evolve a more consensual style of government where alternative views are heard and constructive dissent accommodated. It is part of a broader vision which we in the PAP Government painted in 1984, and which led to the introduction of Non-Constituency MPs, and the establishment of GRCs and Town Councils. It should therefore be seen in this wider context": Sing. Parliamentary Debates, vol. 54, col. 695 (29 November 1989), Mr. Goh Chok Tong (Prime Minister); "The PAP has set out to try and gather the best and the most representative of each generation into the Party to stand for elections so that they can be in Parliament to lead Singapore. But speaking from experience, I know that despite all our efforts, there are still some Singaporeans who can contribute but who are not in Parliament. So I try and gather these Singaporeans into the political process.". Sing. Parliamentary Debates, vol. 54, col. 851 (30 November 1989), Mr. Goh Chok Tong (Prime Minister).

92 The sections headed "Building Consensus", "Encouraging Participation" and "Accommodating Dissent" signalled a clear shift towards the accommodation of alternative voices. According to the president, "The Government will continue to work towards a broad consensus. It will strive to bring together as many like-minded people as possible to work cohesively together for the country, whether or not their views coincide with the Government's on every issue. It will encourage those who support this consensus to identify themselves openly with the Government. Unless such persons speak up in support of policies which benefit all Singaporeans, the Government will find it difficult to carry these policies with the public […]The Government will systematically create more opportunities for Singaporeans to participate actively in shaping their own

independent and non-partisan persons who have rendered distinguished public service or who have distinguished themselves in various fields.[93] They are not appointed based on any reference to the electoral process whatsoever. "They were supposed to be known public figures who are expected to bring their expertise and fresh ideas into parliament to enrich the debates".[94] Unlike the NCMPs, they were to be neutral voices untainted by the demands of politics.[95]

The NMP scheme was passed despite the protest of several PAP members of parliament, through the use of the party whip.[96] The NMP scheme met with criticism in the press as well.[97]

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future. It will appoint more Advisory Councils on specific subjects, so that knowledgeable citizens can produce new ideas to improve our lives (...) Singaporeans have shown that while they value good government, they also increasingly want alternative views to be expressed and dissenting voices to be heard. The Government will listen to alternative views and dissenting voices, and accommodate them where they are constructive. But national security and social cohesiveness must never be undermined (...) The first step towards this accommodation was the Non-Constituency Member of Parliament scheme. With NCMPs, there will always be several opposition MPs in Parliament, whatever the outcome of the general elections. Such non-government MPs can question Government policies and argue for alternative courses of action. Provided they do so constructively, they can help the Government to reshape national policies, and help the public to understand issues more clearly. The Government will review the NCMP scheme and increase the number of non-government MPs to achieve this". Sing. Parliamentary Debates, vol. 54, col. 14-15 (9 January 1989), Mr. Wee Kim Wee (President).

93 Fourth Schedule, 3(2): the Constitution.

94 *Hussin Mutalib*, Parties and Politics: A Study of Opposition Parties and the PAP in Singapore, 2nd ed. (Singapore: Marshall Cavendish Academic, 2004) at 330.

95 "If we have nominated MPs over here, they will not be playing politics. They will be examining each Bill, each policy, for its intrinsic worth: does it or does it not benefit the people, and not does it or does it not benefit me as a Member of Parliament or as a party". Sing. Parliamentary Debates, vol. 54, col. 850 (30 November 1989), Mr. Goh Chok Tong (Prime Minister).

96 See e.g. "Having spoken strongly against the Bill, I am now required to vote for it because the Party Whip is not lifted. Sir, if for only this reason, Singaporeans have to accept NMPs, then it is a sad day for parliamentary democracy. They do not really understand what they have to give up": Sing. Parliamentary Debates, vol. 54, col. 727 (29 November 1989), Mr. Tan Cheng Bock (Ayer Rajah); "Sir, I cannot support this Bill. However, as a PAP Backbencher, I say this again, like my colleagues, well realising that I will be subjected to the Party Whip. This is the constraint upon us, and I guess we will have to continue to live a "schizophrenic" political life - speaking against, yet voting for a Bill". Sing. Parliamentary Debates, vol. 54, col. 765 (29 November 1989), Dr. Arthur Beng Kian Lam (Fengshan); "Mr Speaker, Sir, let me state at the outset that I do not like the Bill, but I can live with it. The imposition of the Party Whip is not something that Backbenchers like but I believe it is a small price to pay for political stability". Sing. Parliamentary Debates, vol. 54, col. 816 (30 November 1989), Dr. Augustine H.H. Tan (Whampoa); "some of my colleagues feel that it is against their conscience to speak against the Bill, then vote for the Bill, because the Whip is not lifted". Sing. Parliamentary Debates, vol. 54, col. 764 (29 November 1989), Dr. Arthur Beng Kian Lam (Fengshan).

97 See e.g. "A Nominated MP, on the other hand, is more likely to express views culled from his personal experiences and, unless he has the Prime Minister's gift of being able to correctly feel the pulse of the nation and his ability to visualize political and social scenarios. His views are unlikely to reflect political and social realities": "No good reason to have nominated MPs", Straits Times, Forum, 17 October 1989.

Some condemned it entirely. See e.g. "The First Deputy Prime Minister, Mr Goh Chok Tong, should not refer the proposed Nominated Members of Parliament Bill to a select committee. Instead, he should withdraw it altogether": "Good People can serve outside Parliament too", Straits Times 9 December 1989; "It is idealistic to think that the NMPs can represent the views of those people who are not happy with certain government policies but still want a PAP government. Because they do not have grassroots support, NMPs represent, to a large extent, only themselves and people in their professions. On the other hand, those who are qualified to be NMPs are likely to be outstanding people in the academic and professional fields. Even if they become NMPs, would they be able to speak freely without worrying about what it will do to their careers? Once they have such misgivings, the scheme will not work": "The problems which may arise from the NMP Scheme", Shin Min Daily News, Straits Times, 12 December 1989.

Other responses included calls for an Upper House as an alternative voice instead of the NMP scheme: "Upper House would provide alternative voice", Straits Times 9 December 1989.

Most of the objections stemmed from the perceived retrogressive nature of the scheme,[98] and the dilution of the democratic nature of parliament that the introduction of nominated, rather than elected, members would entail.[99]

In 1988, a suggestion to nominate Malays or Indians in the event of their under-representation in parliament was rejected on the basis that it was "not democratic because they are not elected by the people", and was therefore "against the principle of democracy".[100] Yet, the NMP proposal was accepted despite its undemocratic nature, and for arguably reasons less important than that which drove the debate on the GRC scheme.

While each successive parliament decides for itself if there should be NMPs during its term of office,[101] there is no formal constitutional provision that restricts the NMPs from taking on a ministerial position.[102] In parliament, it was disclosed that it is "not the intention of Government that NMPs should be eligible to become Ministers or other office holders. The principle that office holders must come from the ranks of elected MPs will remain. If the provisions are not specific on this point, suitable amendments can be made".[103] Unfortunately, following the Select Committee recommendations to the contrary,[104] no such provisions ever came into existence.[105] The citizens

98 "I can think of no important sector of our social and economic fabric which is not represented by at least one elected MP here. I ascribe this to the thoroughness of the PAP's selection process. Sir, we have filled that gap which the government of that period was concerned about. We have economists, bankers, businessmen, employers, unionists, Ph.D's and non-graduates, every race, religion, language. In fact, we have already a microcosm of Singapore society. Sir, it will be a retrograde step if we introduce Nominated Members into this House": Sing. Parliamentary Debates, vol. 54, col. 722 (29 November 1989), Mr. Tan Cheng Bock (Ayer Rajah); "The proposed amendment is a retrogressive step. It will whittle down our democratic parliamentary system": Sing. Parliamentary Debates, vol. 54, col. 735 (29 November 1989), Mr. Chiam See Tong; "The Government would be taking us back 50 years to the colonial era, to the late 40's and the 50's. It is a retrograde step, as some speakers have already said". Sing. Parliamentary Debates, vol. 54, col. 756 (29 November 1989), Dr. Lee Siew Choh.

99 "Though they will not vote on constitutional and money Bills, to me, Nominated MPs means a dilution of the democratic process, a dilution of the one-man-one-vote parliamentary system": Sing. Parliamentary Debates, vol. 54, col. 727 (29 November 1989), Mr. Tan Cheng Bock (Ayer Rajah). Note however, that then Prime Minister mounted an extended defence of the democratic nature of the amendment in Sing. Parliamentary Debates, vol. 54, col. 842-8 (30 November 1989). His main argument was that the presence of appointed, non-elected representatives in parliament was not without precedent in systems that are commonly acknowledged to be democratic.

100 Sing. Parliamentary Debates, vol. 50, col. 332 (12 January 1988), Mr. Goh Chok Tong (First Deputy Prime Minister).

101 The Fourth Schedule, 1(1) and 1(2), of the Constitution.

102 Constitution of the Republic of Singapore (1999 Rev. Ed.), art. 25(1) and art. 25(2).

103 Sing. Parliamentary Debate, (29 November 1989) vol 54. Col.698.

104 Select Committee Report at par.29. In essence, the committee's reasons were that many democratic countries regularly appointed cabinet ministers and other government office holders from the non-elected members of the legislature (at par.30), that persons best suited for specialized ministerial portfolios may have neither the temperament nor the inclination to go through the electoral process despite being able to serve the nation in the posts with distinction (at par.31), that there is no need to deny a future government the option of making such an appointment (at par.32), and that since the Constitution does not bar an NCMP from being appointed office holder an NMP should also not be precluded (at par.33).

105 In fact, in 1998, Mr. Lee Hsien Loong refused to consider "amending the Constitution to provide for the appointment of a Minister who is not a Member of Parliament with the provision that the appointment will be made as the need arises and that the Minister must become a Member of the House within a stipulated period": Sing. Parliamentary Debates, vol. 68, col. 471 (27 February 1998), BG Lee Hsien Loong (Deputy Prime Minister) for the Prime Minister.

are dependent on the honour of the government to ensure that ministers continue to be appointed from those who are elected (or who have won through walkovers).

Furthermore, the scheme, which originally provided for up to six NMPs, has since been extended to up to nine NMPS following the 1997 elections,[106] and the original two year term has since been extended to two and a half years.[107]

Each parliament has to decide for itself within six months after it first meets if there are to be NMPs in the House.[108] Unlike the debate over the introduction of the Amendment Bill, the Whip is lifted during these motions. The president makes NMP appointments on the advice of a special select committee[109] appointed by the PAP-dominated parliament.

In official presentation, the initial emphasis was on the way in which such a system could draw on talented individuals and people with specialist expertise. It should be noted however that the special expertise drawn on in practice has tended to focus on the representation of discrete interests. From the very beginning, the appointments were weighted towards functional representation of discrete interests,[110] including domestic business,[111] labour,[112] women's[113] and ethnic organisations.[114]

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106 Fourth Schedule, 3(1), of the Constitution. The Bill to increase the number of NMPs was debated in Parliament on 31 July 1997.

107 See Sing. Parliamentary Debates, vol. 75, col. 796 (27 August 2002), Mr. Lee Hsien Loong (Deputy Prime Minister and Minister for Finance).

108 Fourth Schedule, 1(1), of the Constitution.

109 According to the Fourth Schedule:

(2) Subject to the provisions of this Constitution, the President shall, within 6 months after Parliament has so resolved under subsection (1), appoint as nominated Members of Parliament the persons nominated by a Special Select Committee of Parliament.

(3) The Special Select Committee of Parliament shall consist of the Speaker as Chairman and 7 Members of Parliament to be nominated by the Committee of Selection of Parliament.

Standing Orders

100 – (1) (b) The Committee of Selection shall consist of the Speaker as Chairman, and seven Members of Parliament to be appointed by Parliament, in such manner as shall ensure that, so far as is possible, the balance between the Government benches and the Opposition benches in Parliament is reflected in the Committee. The Committee shall inform Parliament by the means of a report when any Member has been nominated to any Committee. The Committee shall not have power to send for persons, papers and records unless Parliament so resolves.

110 See e.g. "in 1997, apart from inviting the general public to submit the names of suitable persons, the Special Select Committee on NMPs wrote to organisations representing three major functional groups: (a) business and industry; (b) labour; and (c) the professions - to propose candidates for this Special Select Committee's consideration (...) for this Tenth Parliament, the Government would like the Special Select Committee to also invite an additional three functional groups: (a) social and community service organisations; (b) tertiary educational institutions; and (c) media, the arts and the sports organisations - to submit nominations (...) the Government hopes that the outcome of doubling to six the number of functional groups involved in the selection process will be an even wider cross section of NMPs entering Parliament": Sing. Parliamentary Debates, vol. 74, col. 571-2 (05 April 2002), Mr. Wong Kan Seng (Leader of the House).

111 See e.g. Mr Leong Chee Whye, managing director of United Industrial Corporation and chairman of the Singapore Tourist Promotion Board (1990), Mr Robert Chua, Executive chairman of A. C. E Daikin (1992), Mr Chia Shi Teck, Managing director of Heshe group (1992), Ms Claire Chiang, executive director, Banyan Tree Gallery (1997), Mr Tay Beng Chuan, managing director of Uni-Ocean Maritime Pte Ltd (1997), Mr Zulkifli Baharudin, executive director and general manager of CE Logistics (Asia) Pte Ltd (1997), Mr Chuang Shaw Peng, managing director of Chuang Uming Pte Ltd. (1997), Dr Gan See Khem, nominated by business

The NMP scheme in effect introduces a greater element of elitism to parliament through the appointment of technocrats. The NMP scheme reinforces the PAP's technocratic and elitist view of politics ahead of politics of representation by shifting politics from the grass roots level towards that of the specialist;[115] the educational elitism could potentially cause political representatives to lose touch with the man on the street.

Throughout the 1990s, the concept of functional representation was explicitly acknowledged and increasingly broadened to include a range of professional organisations.[116] The electorate is "deprived of its right to personally evaluate the candidate's credentials and exercise "quality-control" over who is in government",[117] at least insofar as the NMP minority is concerned.

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group leaders Steven Lee and Kwek Leng Joo (2002), Ms Olivia Lum Ooi Lin, entrepreneur (2002), Dr Lawrence Leow, executive chairman of Crescenda Group (2004), Dr Loo Choon Yong, executive chairman of Raffles Medical Group (2004), Mr Alexander Chan, executive director of MMI Holdings (2004), Prof. Ivan Png Paak Liang, co-founder of Thothe Technologies (2004), Dr Tan Sze Wee, managing director of Rockeby Biomed (2004), Mr Gautam Banerjee, executive chairman of PricewaterhouseCoopers (2007), Mr Edwin Khew Teck Fook, CEO and managing director of IUT Global and president of Singapore Manufacturers' Federation (2007).

112 See e.g. Mr Tong Kok Yeo, general secretary of Union of Telecoms Employees (1992),Mr. John De Payva, Unionist (1994), Mr Stephen Lee Ching Yen, Singapore National Employers' Federation president (1994), Mr Cyrille Tan, trade unionist (1997), Mr Thomas Thomas, general secretary of the Shell Employees' Union (1999), Mr A Nithiah Nandan (2002), Mr Teo Yock Ngee, general secretary of Amalgamated Union of Public Employees (2004), Ms Cham Hui Fong, Director of National Trades Union Congress' (NTUC) industrial relations department (2007).

113 See e.g. Dr Kanwaljit Soin, orthopaedic and hand surgeon and President of Association of Women for Action and Research (1992), Dr Jennifer Lee, CEO of KK Women's and Children's Hospital (1999), Braema Mathiaparanam, former newspaper journalist proposed by the women's action group AWARE (2001), Eunice Elizabeth Olsen, former Ms Singapore Universe (2004).

114 See e.g. Mr Imram bin Mohamed, Malay community leader (1994).

115 See e.g. "[The NMP scheme] reinforces the PAP's technocratic and elitist view of politics ahead of a politics of representation. According to this view, decision making should be left to the most rational and capable individuals, freed from the pressures and constraints of interest groups and partisan considerations. In Singapore, 'capability' is widely and closely associated with professional qualifications, an association the current stock of NMPs may have helped to consolidate": Garry Rodan, "State-Society Relations and Political Opposition in Singapore" in Garry Rodan ed, Political Oppositions in Industrializing Asia (London: Routledge, 1996) at 104. See also Select Committee Report at par.31: "Even if such persons stand for election, it cannot be assumed that they will be elected. If they are by chance not returned, the new government would then be hard put to find substitutes for them".

116 The major functional groups specified have been business and industry, labour, the professions, social and community service organizations, tertiary educational institutions, and media, the arts and the sports organizations: see Sing. Parliamentary Debates, vol. 74, col. 571-2 (05 April 2002), Mr. Wong Kan Seng (Leader of the House). The sports organizations have been represented by Singapore Sports Council chairman Mr Ng Ser Miang (2002), and Mrs Jessie Phua, executive director of Victor's Superbowl and President of Singapore Bowling Federation (2007). Amongst the professions, the doctors have been represented by cardiologist Associate Prof Maurice Choo Hock Heng (1990) and private practicioner Dr Toh Keng Kiat (1992). Lawyers such as Mr Shriniwas Rai (1997), Mr Chandra Mohan K Nair, also president of the civic group, Roundtable (2001), and Mr Siew Kum Hong (2007) have also served, in addition to accountants Mr Gerard Ee Hock Kim (1997) and Mrs Fang Ai Lian (2002), Mr Goh Chong Chia, principal partner at TSP Architects and Planners (1999), and Mr Noris Ong Chin Guan, a tax partner at Price Waterhouse Coopers (1999). Dr Geh Min was the president of Nature Society of Singapore (2005). In addition, several tiertiery lecturers served, many from the law faculty of NUS including, Assoc. Prof. Walter Woon Cheong Ming (1992), Mr Simon Tay Seong Chee (1997) and Prof. Thio Li-ann (2007). Other lecturers included Assoc. Prof. Ong Soh Khim (2005), Prof. Kalyani K Mehta (Social work, NUS) (2007), Assoc. Prof. Ngiam Tee Liang (social work and psychology lecturer) (2002), and Dr Lee Tsao Yuan (economist and deputy director of the Institute of Policy Studies) (1994).

As was raised in parliament, the very fact that the candidate has neither the temperament nor the inclination to go through the electoral process makes the depth of commitment of the NMP and the degree of sacrifice he is willing to make for the people's sake suspect. Furthermore, the effectiveness of the NMP scheme depends largely on the ability and determination of each individual NMP appointed. Thus, it is argued that unpopular technocrats who might never make it through an election could be co-opted to strengthen the ruling party.[118]

The NMP scheme thus implicitly recognises the inadequacy of the present system and the existing structures of political representation. Again, the constitutional amendment introducing the NMP scheme, coming as it did in 1990, just before the 1991 elections, has given rise to allegations that the NMP scheme is yet another way in which the PAP has sought to undercut support for the opposition.[119]

It has been argued that the NMP's non-partisan nature might make it more politically palatable for the PAP political leadership to accept their views than that of the NCMP's criticisms.[120] Since an NMP would have no need to play up to the gallery, unlike an opposition MP, he was unlikely to introduce a more aggressive adversarial element into parliament.[121]

If the government has been so concerned about "freak" election results, it is ironic that the introduction of NMPs could make the situation worse by allowing the "freak" government to appoint its supporters as NMPs.[122] It is now even more imperative that the government must continue to remain in the hands of nothing less than honourable and above-board politicians.

V. The Elected President – Screening and Selection?

The most recent modification of the Westminster model came in the form of constitutional amendment to provide for an Elected President who was to act as a formal check on the executive and legislative powers, as a "second-key"[123] to a "two-key safeguard mechanism".[124]

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117 *Lua Ee Laine*, *Sim Jek So*k, *Disa, Koh Theng Jer, Chistopher*, "Principles and Practices of Voting: The Singapore Electoral System", (1996) 17 Sing LR 244 at 267.

118 *Tan Seow Hon*, "The Constitution as "Comforter"? –An assessment of the Safeguards in Singapore's Constitutional System", 16 Sing LR 104 at 144.

119 "[H]istory has also shown that the ruling Party has attempted to use the NMP scheme to convince the voters that there is no need to vote for Opposition MPs. For example, in the 2001 election, literature circulated by a PAP candidate urged voters not to vote for the Workers' Party candidate as the NMPs were there to check on the Government": Sing. Parliamentary Debates, vol. 82, col. 877 (14 November 2006), Ms Sylvia Lim (NCMP); "The public too gave it a mixed reaction. And the usual argument against the proposal would have it that it is a ploy by the ruling party to augment its voice or reinforce its power, as if there is some ulterior motive behind this": Sing. Parliamentary Debates, vol. 55, col. 1039 (29 March 1990), Encik Abdul Nasser bin Kamaruddin (Hong Kah GRC).

120 See *Ho Khai Leong*, Shared Responsibilities, Unshared Power: The Politics of Policy Making in Singapore (Singapore : Eastern Universities Press, 2003) at 191.

121 *Thio Li-Ann*, "The Elected President and the Legal Control of Government" in Kevin Y.L. Tan and Lam Peng Er, eds., Managing Political Change in Singapore (New York: Routledge, 1997) at 106-7. Otherwise, the best example of how an NMP might contribute is the Maintenance of Parents Act that was initiated by NMP Walter Woon. That was the only legislation successfully pushed through by an NMP.

122 Although it should be noted at this juncture that the NMPs face the same restrictions on voting that the NCMPs do: see Constitution of the Republic of Singapore (1999 Rev. Ed.), art. 39(2).

123 Sing. Parliamentary Debates (3 January 1994) Vol.56, coln. 519 (Prime Minister Goh Chok Tong); "An Elected President with reserve powers will add a further important check and balance to our political system. The

The provisions for an Elected President came into force in 1991, though the idea of an elected president had been mooted by the then Prime Minister Lee as early as 1984.[125]

The Elected President is not an executive power in the sense that the President of the United States is, but serves a watchdog function.[126] Amongst various functions and duties, the Elected President is empowered to withhold his assent to certain Bills,[127] disapprove budgets that eat into reserves not accumulated during the current term of office,[128] refuse restraining orders under the Maintenance of Religious Harmony Act subject to preconditions,[129] grant pardons,[130] give consent to Corrupt Practices Investigation Bureau investigations where the Prime Minister has refused,[131] and veto certain appointments including directors of government companies,[132] members of statutory boards[133] and other public offices.[134]

These powers, however, are not in themselves unconditional.[135] For example, the Elected President can only refuse restraining orders under the Maintenance of Religious Harmony Act if the advice of the cabinet and the presidential council differs.[136] Similarly, on the issue of the budget, the Elected President's actions can be overridden if his assent to Supply Bills is withheld contrary to the recommendations of the Council of Presidential Advisers.[137] In the matter of

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Government has accumulated large reserves and savings, which it holds in trust for the people of Singapore. If these assets are not protected, an unscrupulous government may use them up quietly before anyone knows what has happened": Sing. Parliamentary Debates (9 January 1989) vol.52, coln. 15-6, President Wee Kim Wee; "My Cabinet colleagues and I believe that a good system of government must have checks and balances. There are inadequate checks in our present parliamentary system of government. Of course, where the Government acts unlawfully, ultra vires the Constitution or the laws, one can have recourse to the courts. But our Constitution does not provide any checks on lawful Government decisions or conduct which are excesses against the best interest of our nation. There is no Upper House, no Council of Rulers, or the equivalent of the United States Federal Reserve Board, to debate and consider, and if necessary, to restrain or even veto the activities of a government which are clearly detrimental to national interest": Sing. Parliamentary Debates (4 October 1990) vol.56, coln. 461, Mr Goh Chok Tong (First Deputy Prime Minister and Minister for Defence).

124 Sing., " Safeguarding Financial Assets And The Integrity Of The Public Services: The Constitution Of The Republic Of Singapore (Amendment No 3) Bill", Cmd. 11 of 1990, para 7.

125 Prime Minister's National Day Rally Speech, The Straits Times (10 August 1988), p1.

126 The Bill takes the approach that the presidency is a post of the highest honour and responsibility. It is a custodial post of the highest importance. The president is expected to protect the country's financial reserves and safeguard the integrity of the public service: Select Committee Report at para. 6.

127 Articles 22E, 22H and 148A of the Constitution.

128 Article 22B and 22D of the Constitution.

129 Article 22I of the Constitution and section 12 of the Maintenance of Religious Harmony Act.

130 Article 22P of the Constitution.

131 Article 22G of the Constitution.

132 Article 22 C of the Constitution.

133 Article 22A of the Constitution.

134 Article 22 of the Constitution; See also *Tan Seow Hon*, " "The Constitution as "Comforter"? –An assessment of the Safeguards in Singapore's Constitutional System", 16 Sing LR 104 at 139.

135 Such measures have led critics such as NMP Walter Woon to express the view that there is no point in having two keys to a door if you leave the door unlocked: Sing. Parliamentary Debates (25 August 1994) vol. 56, col. 437.

136 Section 12(3) of the Maintenance of Religious Harmony Act.

137 Article 148D of the Constitution.

appointments, the veto of the Elected President may be overridden by a parliamentary resolution passed by not less than two-thirds of the total number of the elected members of parliament.[138] However, the mechanism of the Elected President may potentially have the effect of drawing attention to the subject of his veto by virtue of the extra measures necessary to override his decisions.

The long gestation period leading up to the actual constitutional amendments points rather clearly to the deliberate intent behind the provisions for an Elected President.[139] Furthermore, as an academic puts it, "the office of the President is now more tightly entrenched than most other provisions under the Constitution, including our parliamentary system of government, judiciary and fundamental liberties. Article 5(2A)[140] now requires that any Bill to amend Articles 17 to 22, and 22 A to 22O of the Constitution, pertaining to the post of the President, cannot be passed by Parliament unless it has been supported at national referendum by not less than two-thirds of the total numbers of votes cast".[141] Clearly, the intention of the PAP-dominated parliament was to doubly-entrench the post of the Elected President in Singapore's constitutional structure.

In the first of two White Papers, the rationale for the creation of an elected presidency was mainly that the Elected President was a safeguard against irresponsible government, where the national reserves could be squandered on vote-buying and popularity stunts,[142] and where key appointments to public service and statutory boards may be made otherwise than by merit.[143]

The departure from the Westminster model was again justified by a distrust of the electorate's discernment in always returning a good slate of candidates.[144] It acts as a provision for a worst-case scenario, that of a government which holds differing views from what the current ruling party believes to be the cornerstones of national stability in Singapore.[145]

138 See Articles 22(1)(A), 22A(1)(A), and 22C(1)(A) of the Constitution.

139 "We have taken a long time to finalize this Bill. That is as it should be since we are making a fundamental modification to our parliamentary system of government. We want to be sure that our proposal for a safeguard mechanism for financial prudence and public sector integrity is workable and the best": Sing. Parliamentary Debates (4 October 1990) vol.56, coln. 460, Mr Goh Chok Tong (First Deputy Prime Minister and Minister for Defence).

140 Article 5(2A) of the Constitution.

141 *Kevin Y.L. Tan*, An Introduction to Singapore's Constitution" (Singapore: Talisman Publishing, 2005) at 89.

142 Sing., "Constitutional Amendment To Safeguard Financial Assets And The Integrity Of The Public Services", Cmd. 10 of 1988, para 6.

143 Sing., "Constitutional Amendment To Safeguard Financial Assets And The Integrity Of The Public Services", Cmd. 10 of 1988, para 11; see also Sing., " Safeguarding Financial Assets And The Integrity Of The Public Services: The Constitution Of The Republic Of Singapore (Amendment No 3) Bill", Cmd. 11 of 1990, para 7; Sing. Parliamentary Debates (4 October 1990) vol.56, coln. 459-61, Mr Goh Chok Tong (First Deputy Prime Minister and Minister for Defence).

144 Sing. Parliamentary Debates (4 October 1990) vol.56, coln. 462, Mr Goh Chok Tong (First Deputy Prime Minister and Minister for Defence).

145 Sing. Parliamentary Debates (4 October 1990) vol.56, coln. 466-7, Mr Goh Chok Tong (First Deputy Prime Minister and Minister for Defence).

146 At the end of his term in office, during an interview given on 16 July 1999, amongst a "long list of problems", President Ong Teng Cheong expressed disappointment about not being able to use the "second key" to unlock reserves as the government's method of calculating current reserves had taken away the need for it: "Outstanding issue – 'And this was one of them' – NII", Straits Times (17 July 1999). See also "I had a long

Yet, in safeguarding the population from 'bad government' through the means of the Elected President, parliament was not content to repose complete trust in the integrity of the Elected President either, as seen from the many restrictions on the Elected President's powers.[146]

A ruling of the constitutional tribunal that the president could not veto a bill to amend Article 22H of the constitution leaves one wondering exactly what clear powers the Elected President possesses and how far effectively those powers can be exercised.

In 1994, when the government wanted to tweak Article 22 H of the Constitution (which provided that if a president used his veto when parliament attempted to amend parts of the Constitution, his veto would be the decisive one should the courts rule that the proposed amendment would curtail his powers), a constitutional reference was decided such that Article 22 H itself could be amended without the president's consent.[147]

The president clearly has not been handed an office of absolute trust. Such adjustments to the role of the president were done despite the government's own expression, that it was clipping its own wings through the introduction of the Elected President.[148]

The main criticism to be levelled against the Elected President is doubts as to its independence as a watchdog. Arguably the stringent pre-selection criteria rule out all but pro-establishment candidates and "involves the absolute discretion of three unaccountable "wise men" of the Presidential Elections Committee".[149] According to Article 18(2), the Presidential Elections Committee shall consist of (a) the Chairman of the Public Service Commission, (b) the Chairman of the Accounting and Corporate Regulatory Authority established under the Accounting and Corporate Regulatory Authority Act 2004,[150] and (c) a member of the Presidential Council for Minority Rights nominated by the chairman of the council.

It follows in Article 18(3) that the Chairman of the Public Service Commission shall be the chairman of the Presidential Elections Committee, and if he is absent from Singapore or is for

list of problems (...)", Straits Times (17 July 1999). In fact, he said, "I suspect that they consider the Elected President a nuisance - checking on them or looking over their shoulder": "Public officers 'need change of mindset'", Straits Times (17 July 1999).

Note however that the government mounted a defence in parliament of its actions in relation to President Ong's remarks, under the title of "Issues raised by President Ong Teng Cheong at his press conference on 16th July 1999 (Statements by the Prime Minister and Minister for Finance)", Sing. Parliamentary Debates (17 August 1999) vol. 70, col. 2018-2068. Consequently a third white paper on the issue of the Elected President to layout the principles of facilitating a harmonious working relationship was released: "The Principles for Determining and Safeguarding the Accumulated Reserves of the Government and the Fifth Schedule Statutory Boards and Government Companies", Cmd. 5 of 1999.

The Government has declined to bring Article 5(2A) into operation as "[they] are still refining the Presidential safeguards, especially in regard to the country's reserves", and "[intend] to amend the definition of how much Net Investment Income (NII) from our past reserves can be spent by the current Government": Sing. Parliamentary Debates (12 February 2007) Vol.82, Oral Answers to Questions no. 10, Prof. S Jayakumar (Deputy Prime Minister and Minister for Law).

147 Constitutional Reference No 1 of 1995, [1995] 2 SLR 201; [1995] SGCT 1.

148 Sing. Parliamentary Debates (4 October 1994) Vol.56, coln. 462-3 (Prime Minister Goh Chok Tong).

149 See also *Tan Seow Hon*, "The Constitution as "Comforter"? –An assessment of the Safeguards in Singapore's Constitutional System", 16 Sing LR 104 at 141.

150 Act 3 of 2004.

any other reason unable to discharge his functions, he shall nominate a Deputy Chairman of the Public Service Commission to act on his behalf. The Committee has considerable latitude given that the Presidential Elections Committee may regulate its own procedure and fix the quorum for its meetings,[151] and may act notwithstanding any vacancy in its membership.[152]

A set of stringent criteria listed under Article 19(2) has to be met if one wishes to run for president. Amongst other requirements, the candidate is to be a citizen of Singapore, not be less than 45 years of age, satisfy the Presidential Elections Committee that he is a "person of integrity, good character and reputation", not be a member of any political party on the date of his nomination for election, and held office for not less than three years in stipulated positions such as minister or chief justice, chairman or chief executive officer of a statutory board, or any similar or comparable position of seniority and responsibility that has in the opinion of the Presidential Elections Committee given him such experience and ability in administering and managing financial affairs as to enable him to carry out effectively the functions and duties of the office of president.[153] The string of requirements emphasize the vision of the Elected President as a mature person of integrity and moral standing, who has also the ability to monitor the financial affairs of the state and the management of the public service sector.

However, the stringent criteria also means that the position of the Elected President is intrinsically an elitist and pro-establishment one; one likely to be filled by a candidate with substantial experience in the public service, and who by virtue of having spent so much time in the establishment, is likely to identify himself with it.[154] In a press report, it was estimated that "only just over 400 people have the necessary financial or administrative experience to qualify as spelt out in the Constitution".[155]

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151 Article 18(6) of the Constitution.

152 Article 18(7) of the Constitution.

153 President Nathan was elected to office in his first term, unopposed, when the two others who submitted papers to run for president did not manage to obtain certificates of eligibility. During the 2005 elections, nominations opened on the 31 May. 17 forms were issued during the first month though none were returned during the same time: "17 application forms issued for certificate of eligibility for presidential poll", Channel NewsAsia (39 June 2005). The incumbent president announced his intention to run for reappointment in mid July despite early hints at retirement: "I decided to stand because people wanted me to". Straits Times (13 July 2005). By 6 August, 22 nomination forms had been issued but only four received, including the incumbent president, former JTC Corporation group CFO, Andrew Kuan, real estate executive Ooi Boon Ewe and an unknown fourth hopeful: "22 nomination forms given out so far, four applications received", Straits Times (6 August 2005). Mr Andrew Kuan was advised by PM Lee Hsien Loong to tell Singaporeans about the jobs he took for JTC, and why in some cases he changed them very quickly: "presidential hopefuls should bear no secrets from public: PM Lee", Today (Singapore) (10 August 2005). Mr Kuan suffered some embarrassment when JTC and Hyflux Ltd expressed disappointment over hiring Kuan: "JTC, Hyflux disappointed over hiring Kuan": Business Times Singapore (12 August 2005). Finally, only Mr S R Nathan was awarded the certificate of eligibility. Mr Kuan was rejected as "it was the Committee's assessment that the seniority and responsibility of that position was not comparable to those needed for the office" : "No contest for Presidential Election, only SR Nathan gets eligibility certificate", Channel NewsAsia (13 August 2005). The saga of the 2005 elections raises the point that the Presidential Elections Committee could effectively determine who fills the post by restricting the number of people who are deemed eligible.

154 Although, according to the Select Committee, "The issue is not the right of every citizen to stand for election as President (...) It is to ensure that voters are given qualified and suitable candidates to choose from. Only then will there be some guarantee that the right person is chosen to fulfill a most important role (...) One becomes a Prime Minister only after passing many stringent tests of leadership. These tests do not exist in the case of the Presidency (...) Safeguards are therefore necessary to guarantee that voters are given suitable candidates to choose from": at para 9-13.

155 "Why so few takers for this job?" Straits Times (4 June 2005).

The allegation of elitism is worsened by the fact that the Presidential Elections Committee's certificate of qualification is final and cannot be subject to appeal or review in any court.[156] This places too much discretionary power in the hands of a small group of persons, with no guarantee that they are qualified to judge others as being of integrity and good character or are unbiased, as there is no provision for any independent election commission.[157]

More than that, the manner in which the Presidential Election is structured demonstrates a marked distrust of the electorate.[158] It is an attempt at making the system as "idiot proof" as possible.[159] In substance, in instituting the pre-qualifying round of the Presidential Elections Committee, the post of the Elected President has moved yet one more step away from popular choice – towards an institutionalized selection process that potentially undercuts the legitimacy of the electoral process. Whereas most electoral systems have a qualifying round, the degree of candidate-filtering is much greater for the Elected Presidents under this scheme.

Furthermore, the stringent criteria coupled with the need to be vetted by the Presidential Elections Committee has led to results similar to the walkovers in the GRCs, where in the absence of an alternative candidate, a presidential candidate has been automatically appointed to office without the benefit of an election.[160] The first presidential election was held on 28 August 1993, when

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156 Article 18(9) of the Constitution.

157 See *Valentine S. Winslow*, "The Election of a President in a Parliamentary System: Choosing a Pedigree or a Hybrid?" in Kevin Y.L. Tan and Lam Peng Er, eds., Managing Political Change in Singapore (New York: Routledge, 1997) at 96.

158 Amongst the more polemical writings, the New York Times alleged that, "As another gesture of mistrust in the successor generation, Mr. Lee has designed a new job, an elected presidency, with extraordinary powers to intervene in the life of the nation and its Government. The new President would not only monitor the country's finances and approve all key public appointments -- to the police and judiciary as well as to state-owned companies -- but would be able to veto budgets and approve security detentions and bannings": "Singapore Journal; As Sons Take Power, Patriach Looks On Sternly", The New York Times, Late Edition, (6 November 1990).

159 See *Lua Ee Laine*, *Sim Jek Sok*, *Disa, Koh Theng Jer*, *Chistopher*, "Principles and Practices of Voting: The Singapore Electoral System", (1996) 17 Sing LR 244 at 258.

160 Presidential Elections Act, Cap 240A (2007, Rev. Ed), Sections 15(1), 15(2).

To date, the first elected president was deemed to be the then incumbent President Wee Kim Wee: "Singapore Parliament Approves New Presidential Post", Reuters News (3 January 1991); "Singapore Passes Bill To Give President Greater Powers", Japan Economic Newswire (3 January 1991).

During the 1993 Elections, several names were bandied around: "EP candidates: Several names and lots of talk", Straits Times (31 July 1993), though there was difficulty finding candidates both qualified and willing to contest the post. Even when then NMP Chia Shi Teck expressed an intention to contest if no one else would, it was tinged with reluctance: "NMP Chia to stand against Teng Cheong if no one else will", Straits Times (3 August 1993). The popular sentiment was Mr Ong was overwhelmingly likely to win: "Teng Cheong 'sure to win in an election'", Straits Times (4 August 1993). Ironically, while Mr Chua Kim Yeow, a former civil servant, eventually ran for office, he admitted that his initial reaction was to refuse as he considered Mr Ong a far superior candidate: "Singapore Candidate Heaps Praise on His Rival": The Asian Wall Street Journal (9 August 1993). Mr Chua allegedly had to be persuaded to run by former deputy premier Goh Keng Swee and then Finance Minister Richard Hu: "Singapore", Agence France-Press (18 August 1993). Mr Ong's assenters were formidable. He was proposed by NTUC President Oscar Oliverio, seconded by Dr Ee Peng Liang, former president of the Community Chest, and assented by Singapore's ambassador at large Prodessor Tommy Koh, Mr Robert Chua, president of the Singapore Manugacturers' Association, Mr Chua Gim Siong, honorary secretary-general of the Singapore Federation of Chinese Clan Associations, lawyer Sat Pal Khattar, Mr Ridzwan Dzafir, a director-general in the Trade Development Board and a roving ambassador, and Madam Halimah Yacob, Deputy Director of the NTUC's Legal Department: "Lawyer of labourer, all pro-Teng

Mr Ong Teng Cheong was elected. Mr S R Nathan[161] became the next Elected President on 1 September 1999. He was sworn-in for his second term of office on 1 September 2005 – Mr S R Nathan was elected to the post unopposed during both his terms of office.[162]

"The elected president is [one of] the latest in a line of constitutional changes designed to strengthen the structure of government by providing a 'countervailing' check in certain areas".[163] However, as a watchdog institution, the Elected President is not a satisfactory deviation from the Westminster model in several respects.

The effect is, it has further diluted the voting system through the intermediary step of the Presidential Elections Committee, bred elitism through the pre-qualifying criteria, and in general assumed that the electorate is unsophisticated enough to firstly return good candidates to parliament, and secondly, independently choose a suitable candidate for the post of the Elected President.[164] "Parliament has attempted to write the Constitution like an insurance policy"[165] – reflecting the heavily paternalistic political instinct of the political leadership in Singapore.[166] Unsurprisingly, it has generated political apathy.[167]

VI. Systemic Fragility – Government by the People or Sophisticated Perpetuation of Political Dominance?

Seldom in the history of countries with constitutions modelled on the Westminster electoral democracy has so much deliberate and persistent effort been devoted to calibrating an electoral regime in such an elaborate and painstaking manner, over decades of fine-tuning and

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Cheong", Straits Times (19 August 1993). Mr Ong received 58.7 percent of valid ballots cast: "Former Deputy Premier wins Singapore presidency", Agence France-Presse (28 August 1993); "Docile Candidate Fail To Fire Singapore's Voters", Financial Times (28 August 1993).

161 See <http://www.istana.gov.sg/PresidentSRNathan/index.htm>.

162 "Outgoing Singapore President says "teething problems" will pass", Associated Press Newswires (30 August 1999) and "Ex-civil servant S.R. Nathan wins Singapore's presidency", Asian Political News (23 August 1999).

163 See *Thio Li-Ann*, "The Elected President and the Legal Control of Government" in Kevin Y.L. Tan and Lam Peng Er, eds., Managing Political Change in Singapore (New York: Routledge, 1997) at 134.

164 "Singapore has perhaps tried to ensure a safe result": *Valentine S. Winslow*, "The Election of a President in a Parliamentary System: Choosing a Pedigree or a Hybrid?" in Kevin Y.L. Tan and Lam Peng Er, eds., Managing Political Change in Singapore (New York: Routledge, 1997) at 96. See also the criticism that despite all the qualifications of the Elected President, it is unable to ensure the requirement that the Elected President would have been the people's choice expressed in a popular poll: "A contest will be good for the Elected President", Straits Times (31 July 1993).

165 *Valentine S. Winslow*, "The Election of a President in a Parliamentary System: Choosing a Pedigree or a Hybrid?" in Kevin Y.L. Tan and Lam Peng Er, eds., Managing Political Change in Singapore (New York: Routledge, 1997) at 96.

166 "Singapore Parliament Approves New Presidential Post", Reuters News (3 January 1991); "Singapore Passes Bill To Give President Greater Powers", Japan Economic Newswire (3 January 1991); "Tailor-made for Mr Lee", South China Morning Post (5 January 1991).

167 In a straw poll conducted by the Straits Times, more than half of the 100 people interviewed had little or no interest in the presidential election: "Presidency: Only one issue – who's the best man?" Straits Times (8 August 1993). A survey published by the Institute of Policy Studies in 1990 found that while 68 per cent of those polled were aware of proposals to introduce an Elected President, only 3.2 per cent said they were interested in it: "From A to Z on the EP", Straits Times (14 August 1993).

critical changes to its essential features.[168] Singapore's PAP political leadership has utilized its overwhelming dominance in parliament to pass a series of constitutional amendments, in official presentation, aimed at institutionalizing the principles that it deems foundational to the security and stability of the nation, and institutionalizing a system of checks and balances to provide against possible future 'bad government'.

Yet, none of these critical constitutional amendments have given rise to any semblance of a satisfactory workable system of checks and balances. The checks and balances were designed to hamstring a potential future government with radically different ideas from the present one – not to supervise and check on the existing government. In a system where walkovers predominate, where PAP members are continually returned to office unopposed in several GRCs,[169] and where two out of three times a presidential candidate has been returned unopposed,[170] the system of checks and balances that the political leadership had sought to introduce through the constitutional amendments might be even more fragile than first presumed.

Rather, each of the schemes introduced has successively moved the Constitution further and further away from its original Westminster model. The ultimate check and balance that is election by the votes of its citizens has slowly been diluted by an increasingly paternalistic system of tight screening and deliberate selection. It is now an electoral regime that is tilted heavily towards the PAP political leadership's vision - of what its citizens need, rather than an affirmation of what its citizens want[171] - one that fails to serve its representative function in any meaningful way.

The result is an electoral regime that is unique, and, so far, effective and calibrated for the needs of its political leadership. It is a regime that has proved durable in systematically obstructing political opposition, and has been hugely successful in preventing political pluralism[172] or any form of substantive organized political competition to the current political leadership. The ideological rationale of the political leadership is writ large in these changes and the innovative schemes introduced.

And yet, it is, in essence, an electoral regime that contains systemic fragility. Its so-called in-built defence mechanisms all seem to point to one dependency. It is a system that is almost entirely dependent on the integrity and honour of its core political leadership who could choose to, or not to, abuse its political hegemony and executive dominance.

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168 See *Thio Li-Ann*, "The Elected President and the Legal Control of Government" in Kevin Y.L. Tan and Lam Peng Er, eds., Managing Political Change in Singapore (New York: Routledge, 1997) at 134.

169 See e.g. <http://www.elections.gov.sg/past_parliamentary.htm>.

170 See e.g. <http://www.elections.gov.sg/past_parliamentary.htm>.

171 See e.g. "[I]t is not the Constitution or any law that determines the success of our parliamentary democracy. Indeed, it is not any law or constitution that determines the success of any institution. It is not just Parliament. We need people who are honest, people with integrity, people with the nation's interest at heart, in order to make sure that we have a good and clean system. So no number of independent commissions of inquiry or independent council or Ombudsman will make sure that we will have a good, clean and corrupt-free system": Sing. Parliamentary Debates, vol. 69, col. 134 (1 June 1998), Mr Wong Kan Seng (Minister for Home Affairs).

172 Despite increasing social pluralism and economic prosperity in Singapore.

THE ROLE OF CAMBODIA'S PARLIAMENT IN CURRENT DEVELOPMENT

Hor Peng

I. Introduction

Cambodia is, according to its constitutional framework, a democratic country.[1] The current Constitution, which was adopted and came into effect in 1993, establishes a Kingdom with a King who rules according to the Constitution and the principles of liberal democracy and pluralism (Art.1 (1)). Popular sovereignty is established (Art.51 (2)) with the King reigning but not governing (Art. 7 (1)). The fundamental right of Khmer citizens to freedom is recognized, respected and strongly protected by the judiciary (Art. 31 to 45 & 128). The Constitution also promotes the rule of law (Art. 49 & 150) and the concept of "government of the people, by the people, and for the people" effected through a system of parliamentary government (Art. 76, 90, 119). This paper looks at the role of Cambodia's parliament in the country's democracy from 1993 onwards. Throughout this era, Cambodia has been viewed as being a nation with a representative parliament that plays a key role in its democracy.

The parliament of Cambodia currently consists of the National Assembly and the Senate. In 1993, the Constitution established a unicameral parliamentary system with the National Assembly being the sole representative of the people, but in 1999, after a constitutional crisis in 1998, the Constitution was amended to establish a bicameral system by adding a Senate. The reason for the establishment of the Senate was to solve a constitutional crisis in the democratic process of forming the executive government which in Cambodia is the Council of Ministers. Both the National Assembly and the Senate[2] are representative bodies. However, the National Assembly is more powerful than the Senate because the current Constitution empowers the National Assembly to fulfil a variety of democratic roles. The National Assembly has four major parliamentary roles: the forming of the Council of Ministers; designation of the Prime Minister and confirmation by a vote of confidence for a Council of Ministers (Art.119 & 90); lawmaking and approval of the national budget and international treaties (Art.90); scrutinising the actions of the government (Art. 96-98); and representing the people - the nation as a whole. These are the *de jure* powers of the National Assembly. The Senate has three major roles: reviewing legislation, coordinating work

1 Cambodia has struggled to achieve modern democratic constitutionalism since it became independent in 1947. Over this 60 year period, Cambodia has experienced many constitutional changes: constitutional monarchy, republic, communism, socialism, and a democratic government within a constitutional monarchy. In this paper I will examine the current constitutional regime that started in 1993 after the reunification of the country through a democratic election arranged by UNTAC.

2 Although some would argue that the Senate is not truly representative because it is not directly elected by the people and some members are appointed.

between the National Assembly and the Council of Ministers, and a representative role. In this paper, I will concentrate on the roles of the National Assembly.

II. The Roles of the National Assembly in Parliamentary Democracy

The Assembly's Role in Forming the Council of Ministers is to Ensure a Reflection of the Popular Will

The Constitution gives the National Assembly the sole power to form a Council of Ministers.[3] According to constitutional procedure, the President of the National Assembly, with the agreement of both Vice-Presidents, recommends a prime ministerial candidate to the King. The King designates the candidate to form a Council of Ministers. The Council of Ministers seek a vote of confidence by an absolute majority of the members of the National Assembly before it is appointed by the King.[4] Under the Constitution the prime ministerial candidate must be a member of the National Assembly from the political party that won the most seats in the election, and his/her Council of Ministers' members are also required to be members of political parties which hold seats in the National Assembly. In practice, the party which wins the most seats in parliament forms the Council of Ministers. In a sense the formation of the Council of Ministers has been transferred from the National Assembly, to the people and the political parties because it depends upon the outcome of the election. This is because firstly, only the party which wins the most seats in the election has the legal right to propose a prime ministerial candidate. Secondly, although there is no legal requirement to do so, in each electoral campaign the major political parties in Cambodia present their prime ministerial candidate and their party's program to the electorate directly. This has become a reality of Cambodian politics.[5] This development combines the prime ministerial candidate with a party political program. Effectively this means that the prime ministerial candidate is directly elected by the people through the general election of members of the National Assembly, and thus Cambodia is moving towards a presidential form of democracy. This development can be seen as a positive one in the form of the democratization of the head of the executive branch and because it promotes popular participation in politics.

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3 See Article 119 and Article 90 of the current Constitution. These Articles deal with the formation of the Council of Ministers. In 2004 during a constitutional crisis over the formation of the Council of Ministers, the National Assembly adopted an additional constitutional law introducing a new constitutional procedure, the so-called ' package vote law'. The package vote law requires that the vote of confidence in the Council of Ministers and the vote for the National Assembly's leadership positions be held at the same time. It is up to the National Assembly to decide which procedure is suitable on each occasion. Thus, there are two constitutional procedures for forming the Council of Ministers. In addition in 2006, the Constitutional requirement for a 2/3rd majority vote of confidence to form a Council of Ministers was replaced by an absolute majority (50%+1). In 2008, the process of forming the Council of Ministers was completed quickly and smoothly.

4 See Article 90 and 119 of the 1993 Constitution.

5 In the 1998 election for the National Assembly (the second parliament), the Cambodian People's Party (CPP) was the first party to nominate the party's candidate for Prime Minister before the election. The CPP Party Congress endorsed Samdec Hun Sen as the party's prime ministerial candidate. His name was presented directly to the people during the general election campaign for the members of the National Assembly. This was designed to avoid any internal challenge from within the CPP and to block any challenges from outside the party. In the third parliamentary election in 2003, not only CPP, but both the Funcinpec and Sam Rainsy parties named their respective prime ministerial candidates in the parliamentary election campaign. So now, in Cambodia the election of the members of the national assembly effectively means the election of the prime ministerial candidate as a head of executive. Whether the development of this informal model could lead to a formal change of the parliamentary system remains an unresolved question.

Table 1. Parliamentary Parties and Formation of Government

Election	Parties in National Assembly	Parties in Coalition Govt	Opposition Parties
First Election 1993	4 (total = 120 seats)	4 (total 120/120 seats)	0 (total = 0%)
Second Election 1998	3 (total = 121 seats)	2 (total = 105/121)	1 (total = 15/121 seats)
Third Election 2003	3 (total = 123 seats)	2 (total = 99/123)	1 (total = 24/123)
Fourth Election 2008	5 (total = 123 seats)	2 (total =92/123)	3 (total = 31/123)

Lawmaking: The Council of Ministers Initiates Most Draft Laws

The Constitution authorizes parliament to make the law because in a democracy the parliament is a representative body of the people and the law must is an expression of the national will (Art.90 & 99). However, in Cambodia this primary function seems to have been effectively transferred to the Council of Ministers, the executive branch. For example, in the lawmaking process, the parliament plays a role in only deliberation and legitimization. Nearly all of the law submitted to the parliament has been initiated by the Council of Ministers and nearly all is passed by the parliament without any amendment. In this sense the Council of Ministers is a key body in the current lawmaking process. Parliament proposes very few laws due to the majority of members of parliament being members of the parties which make up the coalition government. They can get their policies put into law through the members of their parties who are members of the Council of Ministers. On the other hand, the opposition parties are very weak politically and in terms of legal professionalism.

In the Cambodian parliamentary democracy, the Council of Ministers is the primary drafter of the law and has direct responsibility for implementing law and public policy. The current dominance of legislation drafted by the Council of Ministers is a natural consequence of the Cambodian view of politics, in which the primary function of parliament is to stabilize the process of government and to legitimize the Council of Ministers' draft legislation, which has been approved by the parties which govern in coalition. This practical view of the lawmaking process turns parliament into a rubber stamp for legislation drafted by the Council of Ministers. However, it is not bad for parliamentary democracy if the Council of Ministers' draft laws reflect the will of the people.

Table 2. Laws passed by Parliament

Parliament	Gov't's Draft Laws		PMs' Proposed		Total Passed Laws
National Assembly	Submitted	& Passed	Submitted	& Passed	
First Term (1993-1998)	111	89	4	1	90
Second Term (1998-2003)	95	83	4	1	84
Third Term (2003-2008)	130	130	4	4	134

Notes: The Council of Ministers draft laws (e.g. 22 and 20 draft laws in the first and second term of the parliament respectively), were not rejected by parliament. They lapsed at the end of the parliamentary term. These draft laws were sent back to the initiators thereby allowing the new Council of Ministers to decide whether they should be submitted again in accordance with the constitutional requirements of the principle of discontinuity.

Under the Constitution a draft law may be submitted to the National Assembly by the Prime Minister (proposed in the name of the Council of Ministers), members of the National Assembly, and members of the Senate (Article 91). There is no law that stipulates the basic procedure of lawmaking except for some provisions of the current Constitution. According to the Constitution the National Assembly is the key constitutional organ with legislative power (Article 90), and any law approved by the National Assembly is required to be reviewed by the Senate and then signed by the King before being promulgated (Article 93). There are four formal stages in the present process of lawmaking: (1) the drafting of the law by the responsible ministries, (2) the National Assembly deliberation on the law, (3) the Senate's review of the law, and (4) promulgation of the law and reviewing its constitutionality.

Stage 1. Drafting by the Responsible Ministry

The starting point of a draft law is in the relevant ministry or in the Council of Jurists (COJ). The ministry with responsibility for the subject matter of the law prepares the draft law. Other ministries and interest groups whose work and interests on the subject matter of the draft law may be formally consulted about the draft law. The draft law must be formally written, divided into articles and accompanied by a statement of cause explaining why the proposed legislation is needed.[6] The formal draft law drafted by the responsible ministry is submitted to the Council of Ministers and is then reviewed by the Council of Jurists (COJ). The COJ, which is staffed by legal specialists, most of whom are senior attorneys, is under the direct control of the Council of Ministers.[7] Any review of the draft law by the COJ begins with a consideration of whether the draft law is really necessary and how the proposal will fit into the existing legal order and national policy. At this stage, the COJ checks the constitutionality of the draft law, the arrangement of its specific provisions and the structure of the draft law as a whole.

After the Council of Jurists' review is completed, and before it is submitted to the National Assembly, the draft law has to be approved by the Council of Ministers. At a Council of Ministers meeting presided over by the Prime Minister, the Minister responsible for the draft law and the Chief of the COJ, present and explain the draft law. The Council of Ministers can amend a draft law before it is sent to the National Assembly for approval.

Stage 2. The Process of Deliberation in the National Assembly

Once the draft law is approved by the Council of Ministers, it is submitted to the National Assembly through the Standing Committee.[8] The Standing Committee submits the draft law

6 See Article 22 of the 1993 Constitution.

7 See Sub-Decree on Establishment of the Council of Jurists.

8 See, the Internal Rules of the National Assembly, Article 22.

to a technical commission for a further review. The commission analyzes the draft law and may consider advice and information from the National Assembly's legal experts, the draft law's initiators (the head of the Council of Jurists or the responsible Ministers) and interest groups or civil society. However, in practice, due to time limitations when reviewing draft laws, commissions usually only invite the initiating Minister(s) to discuss the draft law and rarely organize a public hearing or public consultation to collect other information for scrutinizing the draft law. The deliberations of the technical commission are not open to the public. When it completes its deliberations, the commission provides comments and recommendations on the draft law, to a plenary session of the National Assembly.

In Cambodia, deliberation on a draft law in a plenary session of the National Assembly is very important because it is open to the public and there is active debate. The debate usually begins with an explanation by the responsible Minister on the need for the draft law and overview of the draft law. The chairman of the technical commission which reviewed the draft law then conveys the views of the commission and asks the members of the National Assembly to decide whether the draft law should be considered or not, and whether it should be deliberated upon urgently.

The discussion of the draft law starts by focusing on the draft law as whole and is then considered article by article, unless the draft law involves the national budget.[9] Each deputy has a limited time to speak (maximum 20 minutes) on the draft law although this does not apply to the Minister who initiated the draft law.[10] The Minister has no time limits on his/her speech.

Stage 3. The Senate's Review

Once the National Assembly adopts the draft law, it must be sent to the Senate, where it undergoes the same process of deliberation, firstly in a technical commission and then in the plenary session. Unless there is an objection from the Senate within one month of the law being submitted, the law is automatically promulgated[11]. However, if the Senate calls for amendments to the draft law within the one-month period, the National Assembly must examine the revised provision requested by the Senate. In these circumstances, the process of sending the draft law back and forth between the Senate and the National Assembly must be completed within one month. If the Senate rejects a draft law which was initially passed by the National Assembly, the National Assembly may decide in a second open vote, by an absolute majority (50 plus one), to send that draft law directly to the King for promulgation. However, this procedure has not yet been used because the Senate always approves the laws adopted by the National Assembly and rarely requests that the National Assembly amend a draft law.

Stage 4. The Process of Promulgation and the Review of Constitutionality of Law

When a draft law is adopted by the National Assembly and completely reviewed by the Senate, it must be sent to the King for promulgation before becoming law. However, if the draft law is an organic law (a law relating to an institution) it must be submitted to the Constitutional Council for

9 Ibid. Article 29.

10 Ibid. Article 59 and 60.

11 Article 113.

confirmation of its constitutionality before it is sent to the King for promulgation. In addition, the Constitution provides that if there is any doubt about a draft law's constitutionality, the King, the Prime Minister, the President of the National Assembly, one-tenth of the members of the National Assembly, the President of the Senate, or a quarter of the members of the Senate may send the draft law to the Constitutional Council for confirmation of its constitutionality before it is promulgated. In Cambodia, in the process of promulgation, the King has no constitutional power to reject a law (no legal power of veto). After promulgation, the new law must be made published in an official journal (Rackach).

After the law has been promulgated, a court or any of the parties named above may ask the Constitutional Council to review the constitutionality of a law. By comparison with the French model, reviewing the constitutionality of a law in Cambodia is very flexible because it may occur before and after the promulgation of the law.

III. Scrutinizing the Actions of the Council of Ministers: Internal

The Constitution gives the National Assembly the crucial role of scrutinizing the policies and work of the Council of Ministers. The Senate has no such constitutional role. Firstly, the National Assembly deputies have a constitutional right to put questions to the Council of Ministers through the President of the National Assembly.[12] Secondly, the technical commissions of the National Assembly also have a constitutional right to invite any Minister to clarify important issues under their responsibility.[13] Thirdly, the Constitution requires the National Assembly to set aside one day a week when deputies can question Ministers about their portfolios.[14] Fourthly, a minimum of 30 deputies have a constitutional right to submit to the National Assembly a motion of censure against the Council of Ministers or an individual Minister.[15]

However, to date the National Assembly has only used these powers in a very limited manner. For example, the deputies ask only 20-50 written parliamentary questions per year to the Council of Ministers. This is in large due to the process of government being run through a consensus

12 The 1993 Constitution Article 96 says: "The deputies have the right to put questions to the royal government. The questions shall be submitted in writing through the President of the National Assembly. The replies shall be given by one or several ministers depending on the matters related to the accountability of one or several ministers. If the case concerns the overall policy of the royal government, the prime minister shall reply in person. The explanations by the ministers or by the prime minister shall be given verbally or in writing. The explanations shall be provided within seven days after the day when the question is received. In case of a verbal reply, the President of the National Assembly shall decide whether to hold an open debate or not. If there is no debate, the answers of the minister or the prime minister shall be considered final. If there is a debate, the questioner, other speakers, the ministers or the prime ministers may exchange views within a timeframe not exceeding one session. The National Assembly shall establish one day each week for questions and answers. There shall be no vote during any session reserved for this purpose.".

13 Ibid. Article 97 says, "The National Assembly Commissions may invite any ministers to clarify certain issues under their field of responsibility.".

14 Ibid. Article 96.

15 Ibid. Article 98 says "The National Assembly shall dismiss a member or members of the royal government or the whole Council of Ministers by the adoption of a motion of censure passed by a 2/3rd majority of the entire National Assembly. The motion of censure shall be proposed to the National Assembly by at least 30 members in order for the National Assembly to decide.".

system of party politics (party coalition), not an adversarial system that produces coalition governments. Thus, all legislation is adopted by agreement between parties in the coalition government. The deputies from the parties, which are in the coalition government, do not fulfill their scrutinizing role in public because of strict party discipline. Privately they have created a system of scrutinizing the Council's activities within the party e.g. the ruling party's forum to examine all important draft laws before they are submitted to parliament. The deputies from the ruling party seem to be required to support the Council of Ministers' policies rather than criticize them publicly, but informally they can give their point of view about the draft law through the internal party system. Parliamentary democracy in Cambodia is conducted within party caucuses. The role of scrutinizing Council of Ministers' policies seems to have been transferred to the opposition party. The opposition parties (minority) in parliament play a more important role than the ruling majority party in making the parliamentary process more transparent.

IV. Representation: the Party, the Constituency and the Nation

The National Assembly is an elected representative organ of the people. The work of parliament is collective and accountability is assessed party-by-party and member-by-member. According to constitutional principles, the deputies and senator are deemed to represent their constituency and political party, and the whole nation (Art. 77). In this respect, the deputies and senators should hear and obey the people's will and they should not represent a section of the people, but all of the people. In practice however, the deputies tend to represent the political party rather than the local constituency or the nation. This is because the election system endows the political parties with great power to control the deputies and the senators, producing the party's sovereignty in parliament. This is not so bad for parliamentary democracy if the party policies represent the popular will. Currently in parliamentary debates and in elections, most major political parties act to represent the people's interest in order to seek political support from the public. If this continues, the sovereignty of the people is recognized and respected in Cambodian politics.

V. Recent Developments

A recent development in parliamentary democracy in Cambodia has been the constitutional reform in 2006, which removed the pro-consensus approach of party politics (2/3rd majority required in the vote of confidence to establish a new government) and replaced it with a majority approach (requiring 50%+1 majority in a vote of confidence). This has helped to make Cambodia a stable parliamentary democracy. The roles of parliament are gradually changing so that it is becoming an active working parliament. To date, there have been three important major constitutional reforms. The first was in 1999 when the constitution was amended to create the Senate as a second chamber of parliament. The official reasons for the creation of the Senate was firstly political, to stabilize national politics for party reconciliation; secondly, democratic, to provide for further consideration in the legislative process (Chambre de Réflexion)[16]; and thirdly,

16 See official parliamentary record of the debate on the constitutional amendment to create the Senate in 1999 (published by the Secretariat of the National Assembly) pp. 1-23.

historical, to restore the bicameral system which Cambodia had had in the past. The Senate is a forum for a second consideration of legislation.

The second constitutional change was in 2004. It created an additional constitutional law, the so-called 'package vote law'. It was introduced to solve a constitutional crisis caused by difficulties in forming a new Council of Ministers and to ensure the stability of Cambodia's parliamentary democracy. The third constitutional change was introduced in 2006. It amended the Constitution to change the process of forming the Council of Ministers as well as the parliamentary meeting quorum. Before this amendment, a pro-consensual system of party politics applied, i.e. the formation of the Council of Ministers requiring a two-third majority, and the quorum of a parliamentary meeting requiring a seven-tenth majority.[17] The original reason for this constitutional principle was to maintain the stability of politics to encourage national reconciliation and national unity after a long civil war.[18]

This *de jure* constitutional requirement was very necessary to ensure democracy and democratic representation in the transitional period because, on the one hand Cambodia was deeply divided in terms of political perspectives, and on the other hand, as a matter of political reality, the idea of opposition parties was not yet part of the domestic political culture. The role of an *'opposition party'* was not well understood in the context of Cambodia's political culture.[19] If there was no consensual approach to government, Cambodia would possibly have returned to civil war. If only a simple majority had been required to form a government, that may have produced authoritarianism and would possibly have led to the oppression of the opposition parties.

Theoretically as well as practically, the consensual approach requires that political power be shared and limited, to encourage inclusiveness, bargaining and compromise.[20] It seeks to prevent exclusion, not to institutionalize it, and so all political parties, which are likely to be affected by a problem are entitled to participate in its resolution. It required power-sharing arrangements through a coalition of parties in order to form a government. It also required a good process of political communication and compromise between the parties in the coalition partnership, in order to ensure an effective and stable government. However, this consensus approach to a government was not healthy for parliamentary democracy because in practice it produced not only a political standoff and an ineffective government, but also a passive parliament.

Effective parliamentary democracy needs strong support from a democratic political culture and political parties, and when this is lacking, the de jure enforcement is necessary. The official reason for changing the Constitution is to resolve old problems and to secure and extend parliamentary democracy. A new democratic culture has emerged in Cambodian politics because some democratic elements have developed dramatically. For example, the national elections for members of the National Assembly have been held regularly; the multi-party system or political pluralism, and in particular the existence of opposition parties inside and outside the parliamentary process,

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17 See supra at Chapter 1, Section 3.1.1. of the Constitution.

18 See the official parliamentary record of the constitutional debate in 1993 (1993, published by the Secretariat of the National Assembly, pp. 832-854.

19 See *David W. Roberts*, Political Transition in Cambodia 1991-99, Power, Elitism and Democracy 2001, pp. 31-49.

20 See *Malcolm Shaw*, The British Parliament, Journal of Parliamentary Affairs, Vol 57. NO. 4, 2004, pp. 877-889.

has been steadily emerging. A civil society (interest groups and NGOs) and the media, have emerged and are well developed. These fundamental elements are bound by constitutional orders and substantive laws and have been safeguarded by the Constitutional Council and independent courts. A core requirement of a constitution is that it provides legal protection for the minority opposition. If the constitutional provisions requiring a highly consensual approach had not been removed political liberalism would have been limited.

VI. Conclusion

The current state of parliamentary democracy in Cambodia has moved from a two-third majority approach to a (50%+1) majority approach. However, a number of key questions remain. Is the judicial system strong enough, in terms of independence and professional competence, to enforce the law fairly? Do elections reflect the people's will and serve as a referendum on the government's policies? Is the party system stable and democratically organized? Are the people sufficiently educated and have sufficient information to understand political questions?

If, and when, these questions can be answered in the affirmative, democracy will be working well.

A BACKGROUND OF FEDERALISM IN MALAYSIA

Johan S. Sabaruddin

This chapter will provide a background of the Federal Government of Malaysia. This will include a brief history of the State Constitutions and their Governments and how they evolved and merged with the Federal system and the Federal Constitution. Important salient features of the relationship between the Governments will be identified to assist in the understanding of the Constitutional principles that regulate the State and Federal Governments. One fundamental feature to be addressed is the role of the Rulers of the States, a feature which has governed the relationship and status of the State governments. This, plus several peculiar factors that imposes a strong influence on the way the Federal and State Governments in Malaysia function will be looked at such as communal politics and Islam, without which a study of constitutionalism in Malaysia would be misunderstood.

I. History of the State Constitutions

The beginnings of the State Constitutions were founded on the needs of the Malay Rulers and on their relationship with their subjects. Gullick describes the situation as follows:

> "They [the heterogeneous villages of Malay states] were conscious of themselves as people of a state whose welfare depended on the good or bad genius of their Sultans. They shared a common relation of subjection to their chief. They were bound to him by ties of loyalty and yet were sagely cynical about the risks and misfortunes which came to them at his hands. In the worship of their God and in the magical procedures for obtaining supernatural help and blessing they were aware of what they shared. On this foundation of partial cohesion the political system was built".[1]

As an example the first formal written constitution, the Johore State Constitution of 1895, was very much concerned with the Ruler's own interest. It was drafted by Sultan Abu Bakar's British legal advisers and promulgated by him shortly before his death in 1895 with several objects in view[2]: i.e. to strengthen the position of his son and heir by presenting him as a constitutional monarch; to limit the giving away of the state independence without consulting the State Council; to establish the succession for the benefit of his own family; to clarify the position of the Council

1 *Gullick, M*, [1956] Indigenous Political Systems of Western Malaya (London), 143.

2 *Allen, J de V, et al* (eds), [1981] A Collection of Treaties and Other Documents Affecting the States of Malaysia 1761-1963, vol I (New York), 75-76.This early Constitution although preserved in the present Constitution did not influence the relevant portions pertaining to present day government.

of Ministers and their rights vis-à-vis the Ruler especially in determining the size of the Ruler's allowance; to settle an order to rank and precedence according to merit in the view of the Ruler; and to legitimize other appurtenances of sovereignty.

The 1895 Constitution began having some semblance of a modern constitutional structure when it began looking at the welfare of its people after it was amended in 1908 and 1912. In 1908 a remarkable amendment inserted into the Constitution a partial bill of rights. It provided that "(...) no person could be deprived of his liberty except indue course of law, that the right of habeas corpus should be recognised, that no political pressure should be brought on judges and magistrates, and that the Sultan should act honourably and impartially to all governing according to law and maintaining the existing religion and the rights and liberties of the people".[3]

The other amendment in 1912 constituted the Executive Council whose functions included the consideration of applications for agricultural and mining lands and tenders for public works, the initiation of legislation and other matters of importance. The fact that the Ruler appointed its members who sat at his pleasure, and could ignore their advice as long as he stated his reasons for so doing, could not denigrate the significance, in terms of constitutional government, this amendment had brought.

The second written constitution was the Terengganu State Constitution of 1911 which was written much in the mould of the Johore Constitution to protect the interests of Sultan Zainal Abidin III who almost certainly wrote it.[4] Unlike its more illustrious and respected model,[5] the Terengganu Constitution failed to meet the needs of its society and there was even talk of annulling it in 1914 because it was not being obeyed.[6] However it did lay down for the future, a system of society which was more concerned with merit than with status at birth.[7] Nevertheless the institutions it prescribed were operative with some modifications, until up to 1945.

The British ignored these two early Constitutions, making no effort to recognise or ratify them as their position was hardly affected by it. The 1914 Johore Agreement and the 1919 Terengganu Treaty which provided for a British general Adviser to be appointed with greater functions and powers were adequate for controlling the Sultan and governing the State. At this stage, this had little to do with Constitutionalism. This was more to facilitate the colonist disposition of the British Advisers.

Thus, the actual constitutional system that was in operation in all of the Malay States in the early twentieth century was the British Resident and Adviser system.[8] Each Malay State had a

3 Quoted in *Emerson*, *R*, (ed), [1964] Malaysia – A Study in Direct and Indirect Rule (Kuala Lumpur), 205-206. This provision has now been deleted from the Johore State Constitution.

4 *Allen*, [1981] 469.

5 In the Johore Constitution, a case in point is shown by a move to depose Sultan Ibrahim under article XV of the Johore Constitution for signing away the State's sovereignty under the MacMichael agreement prior to the formation of the Malayan Union in 1945.

6 *Allen*, [1981] 469.

7 See for example Chapter Five, Laws of the Constitution of Terengganu (No 1 of 1911).

8 The Federated Malay States consisting of Perak, Selangor, Negeri Sembilan and Pahang were under the Resident system while the Unfederated Malay States consisting of Perlis, Kedah, Kelantan, Terengganu and Johore were under the Adviser system. Though named differently and based on different treaties i.e. The Pangkor Treaty of 1874 for the Resident system and the Anglo-Siam Treaty of 1909 and the Johore Treaty of 1914 for the Adviser system, both permit the British Officer to administer the State through advice that must be followed except in matters of Malay custom and religion.

Council of State modelled on the Perak Council of State which was formed in 1877. It was of an advisory nature and continued in the Malay States to exercise both legislative and executive functions until 1948.[9] There was no separation of powers as we understand it today between the legislative, executive and judicial functions and often the Council acted as the final court of appeal. Although it consisted of both traditional chiefs and nominated officials which included Chiefs of the Chinese community in certain states, the Council of State was ineffective as it only considered trivial matters and there was no room for the expression of opposition.[10] The Residents and Advisers were the dominant players and as the system settled in, the Council of State lost its importance.[11]

After the failure of the MacMichael treaties and the Malayan Union proposal of 1946,[12] the Federation of Malaya Agreement of 1948 was entered into by the Malay States. The nine almost identical State Agreements were signed on the twenty first of January 1948 – the day when the Federation of Malaya Agreements was also concluded. Under these State Agreements there was still no change concerning the receiving of advice from British advisers on all matters connected with the government of the State other than matters relating to the Muslim religion and the custom of the Malays. The outstanding feature of this Agreement, however, was the beginning for all the States to have a written constitution which hitherto only Johore and Terengganu were in possession of. Clause 9 of the Agreement states that the rulers undertake to govern their States in accordance with the provisions of a written constitution which shall be in conformity with the provisions of the State and Federation Agreement.[13]

The 1948 Agreement was a formal constitution,[14] something the States never had. It provided the States with a formal machinery of government dividing powers and functions between the State and Federal authorities. Power was already at this stage weighted heavily in favour of the Federal Government.[15] This relieved both the British and Malay establishment of the constitutional, political and administrative tangles which had knotted round the decentralisation issue before the war.[16]

Each State then proceeded to promulgate, in most cases with the advice of the traditional chiefs and elders of the State, "Laws of the Constitution" of the State, setting out the provisions of

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9 *Sheridan, LA*, (ed), [1961] Malaya and Singapore: The Borneo Territories; The Development of their Laws and Constitutions (London), 69.

10 Gullick, JM, [1988] Malaysia: Its Political and Economic Development (Kuala Lumpur), 50.

11 *Harding, AJ*, [1996] Law, Government and the Constitution in Malaysia (London), 18.

12 For a full account of the events see *Lau, A*, [1991] The Malayan Union Controversy 1942-1948 (Singapore).

13 The clause goes on to provide "(...) and which shall be granted and promulgated by His Highness as soon as conveniently may be either in whole or, if His Highness thinks expedient, in parts from time to time.", in all the State Agreements except for Johore and Terengganu, because both these States already have a written constitution.

14 *Allen, J de V, et al* (eds), [1981] A Collection of Treaties and Other Documents Affecting the States of Malaysia 1761-1963, Vol II (New York), 98.

15 Ibid.

16 Id, 99. For an account of the decentralisation issue see Simandjuntak, B, [1969] Malayan Federalism 1945-63 (Kuala Lumpur), Chapter 3.

what has come to be known as "the machinery of government" part of the State Constitutions.[17] The Legislature of each State also passed enactments ratifying the provisions of the State and Federation of Malaya Agreement 1948 and declaring that they should have the force of law throughout the State.

Then with independence looming in 1957, the States were faced with another constitutional change. They were to become component States of an independent federated nation. The Reid Constitutional Commission which was set up to draft a Federal Constitution for the new Federation, suggested that the scheme of government in each of the States of the Federation should be "a simplified version" of that of the Federal government.[18] The State Constitutions have to accommodate the new structure of government so that it runs in tandem with the Federal Constitution. With this new set-up the States of Penang and Malacca which were until then Straits Settlements and therefore under the direct administration of the Colonial Office, were given their own respective State Constitutions that were identical to each other.

The legal instrument utilised to create this new set-up was the new Federation of Malaya Agreement 1957 which revoked the previous agreement of 1948.[19] This new agreement brought with it in the form of schedules, the agreed upon Federal Constitution of Malaya and also the State Constitutions of Penang and Malacca. In the Federation, the Federal Legislative Council then enacted the Federal Constitution Ordinance 1957 and this was followed by State Enactments in each of the Malay States approving and giving the force of law to the Federal Constitution.[20]

The State Constitutions of the Malay States before independence were substantially alike as they were created or adjusted to conform with the 1948 Agreement. The Federal Constitution of Malaya further compelled them to uniformity by setting out in the Eighth Schedule thereto, what is called the "essential provisions". Article 71 of the Federal Constitution set out this task by requiring that the States ensure by not later than June 30, 1959 that they conformed. If the States did not modify their Constitutions with provisions similar or substantially the same effect or if it had any provisions which were inconsistent with the "essential provisions", the Federal Parliament would make provisions giving effect, in the States which failed to comply, to the essential provisions or for removing the inconsistent provisions.[21] The provisions of the State Constitutions in the Malay States and the Straits Settlements had been assigned to them. Their constitutional history has been devoid of a constitutional will. Sabah and Sarawak however, are slightly different even though they were given prepared written constitutions which were annexed to the Malaysia Agreement of 1963. They showed a strong independence and conviction in

17 Sheridan, [1961] 70. The relevant provisions incorporated into the State Constitutions can be found under Articles 86-109 of the Agreement i.e., Articles 89-96 for the State Executive Council and Articles 97-109 for the Council of State. Johore added these requirements as supplements to its original Constitution because of the almost divine sanctity ascribed to their Constitution.

18 Federation of Malaya Constitutional Commission, 1956-7 Report (Kuala Lumpur, Government Printer, 1957), (Reid Report) paragraph 179.

19 In the United Kingdom, the Federation of Malaya Independence Act 1957 was passed and an order in council, Statutory Instrument 1957 No 1533, was made under the act giving the force of law to the Constitutions contained in the Schedules and revoked the Federation of Malaya order in council of 1948.

20 See for example State of Johore Enactment No 2 of 1957.

21 Article 71(4) of the Federal Constitution.

having guarantees in both the Federal and State Constitutions in order to preserve their interests. Due to their unique status, their position will be explained under a specific heading for the autonomy of the States.

II. Legitimacy of the State Constitutions

Friedrich described "legitimacy" as the proper term for designating the political constellation in which a Ruler is believed by those he rules to have a right to do so.[22] Indeed, legitimacy has normally been viewed from the position of the Rulers, but in newly formed political systems where the constitution is supreme and it is the constitution which create the Rulers and the machinery of government, the legitimacy of that constitution is what should come under scrutiny.

Nwabueze explains that the legitimacy of a constitution is concerned with how to make it command the loyalty, obedience and confidence of the people, and contends that a major cause of the collapse of constitutional government in many new States is because of the general lack of respect for the constitution among the populace and the politicians.[23] He argues that many constitutions of the new States are no less law because they are colonial creations and lack autochthony. However their moral authority is affected by this mere fact, and this in its ultimate sense is where the legitimacy lies.[24]

The present State Constitutions of the Federation of Malaysia were created to conform with agreements with the colonial government.[25] The earlier Constitutions of Johore and Terengganu were on the other hand created from a reaction to colonial powers because one of the reasons underlying their creation was to restrict the surrendering of State sovereignty to foreign powers.[26] However, as apparent from the main provisions of the early Johore Constitution, this was not as important a purpose as the protection of the position of the Sultan and his descendants.

The 1948 Federation Agreement provided for the formulation of the State Constitutions modelled in a way to fit into and follow the working of the Federal Constitution. Each of the agreements signed by the Rulers of each State, in Clause 9, provided that:

> "His Highness undertakes to govern the State in accordance with the provision of a written Constitution which shall be in conformity with the provisions of the respective State Treaties of 1948 and of the Federation Agreement".

With the exception of Johore and Terengganu which already had a written Constitution, the Treaty for the other States went on to stipulate the granting and promulgation of this Constitution as soon as it was convenient. Each of the States then, through their Legal Advisers under the direction from the Attorney General in Kuala Lumpur to ensure consistency, drafted the State Constitutions. According to Allen, there was consultation with the Sultan, State Elders and

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22 *Friedrich, CJ*, [1968] Constitutional Government and Democracy (4th edn, Massachusetts), 583.

23 *Nwabueze, BO*, [1973] Constitutionalism and the Emergent States (London), 24.

24 Ibid.

25 The 1948 and 1957 Agreement.

26 *Allen*, [1981] 75.

Chiefs during the drafting process.[27] However, he does not state who these elders were and to what extent the consultation was made. Besides this there is no other documentation or evidence of any consultation with the people. This lack of consultation with the people the Constitution seeks to control, may provide the basis for arguing that the Constitution lacks legitimacy. As Nwabueze convincingly maintains:

> "[T]he alien character of the system of government instituted by the Constitution of the new states and of the ideas underlying it made it necessary that something should have been done to legitimize them in the eyes of the people. What this means is that a Constitution should be generally understood by the people and be acceptable to them. A Constitution cannot hope to command the loyalty, respect and confidence of the people otherwise. And to achieve this understanding and acceptance, a Constitution needs to be put through a process of popularization, with a view to generating public interest in it and an attitude that everybody has a stake in it, that it is the common property of all. The people must be made to identify themselves with the Constitution. Without this sense of identification of attachment and involvement, a Constitution would always remain a remote artificial object, with no more real existence than the paper on which it is written".[28]

This observation from Nwabueze is important to understand the apparent lack of authority the constitutions seem to sway with political leaders.

Hickling, while admitting the unsatisfying position that there was no consultation with the people during the formation of the State Constitutions, disagrees that the Constitutions lack legitimacy merely because of this fact, because he argues that people go through political evolution and change, and what may be legitimate to one group of people during a particular period may not be so to another during a later period.[29] He contends that the State Constitutions achieved legitimacy in the eyes of the people through acceptance.[30]

The States did not have much of a choice. The Federal Constitution through Schedule Eight, dictated the contents of the State Constitutions.[31] These are the essential provisions which by treaty enjoined the States to include provisions which were in line with them, by not later than June 30, 1959.[32] In the case of Perak, Kelantan and Terengganu, their Constitutions were suitably modified to meet these requirements but for the States of Selangor, Negeri Sembilan, Pahang, Kedah, Perlis, Sabah and Sarawak, new Constitutions were promulgated.[33] The Johore

27 *Sheridan*, [1961] 70.

28 *Nwabueze*, [1973] 24.

29 Interview with Professor RH Hickling, Legal Historian [August 20, 1997].

30 Ibid.

31 Article 71(3) states that: "If it appears to Parliament that in any State any provision of this Constitution or of the Constitution of that State is being habitually disregarded Parliament may, notwithstanding anything in this Constitution, by law make provisions for securing compliance with those provisions".

32 Article 71(4) of the Federal Constitution goes further by providing that: "If at anytime the Constitution of any State does not contain the provisions set out in Part 1 of the Eighth Schedule, (...) or provisions substantially to the same effect, or contains provisions inconsistent with the essential provisions, Parliament may, notwithstanding anything in this Constitution, by law make provision for giving effect in that State to the essential provisions or for removing the inconsistent provisions".

33 Sheridan, [1961] 70-71.

Constitution was again the exception because it had given itself divine sanctity by reason of which it could not be altered or amended.[34] Thus, provisions to comply with the Federal Constitution were added by means of supplements.

If Nwabueze was correct in predicting the downfall of Constitutions which lacked the moral legitimacy he was talking about, this would mean Constitutions in the States of Malaysia would be facing an insidious decline. The State Constitutions possess all the legal authority to give it the legitimacy that it requires by law to exist. But whether this legitimacy is carried into the hearts and minds of the people who are subject to it will be a question that only time can answer.

III. The Federation under the Federal Constitution

Relation between the Federation and the States

In the Federal Constitution this area is governed mainly by PartVI,[35] and together with the Eighth and Ninth Schedules, this remains the only main legal guidance as to how the Federation is structured and run. Granted the understanding of such relations goes beyond looking at the issues purely from a constitutional law perspective. This is because it also involves examining the interaction between the federal design and the political process.[36] However, the extent to which governments can use the political process to detract from the Constitution will depend on how strong the written words found therein will be able to restrict such activities. A definition of federalism is in order before we look at the way the powers are distributed. A peculiarly apt definition for Malaysia is offered by Rudolph:

> "An institutional arrangement reflecting a particular social pattern present in a society or group of societies, initially formulated in a bargaining process involving two different levels of government seeking agreement on common aims and interests, and constantly being reformulated in practice in response to changes in the social pattern (…) and in response to shifts in loyalties from one level of government to another".[37]

True to this description, Hickling describes the Federal Constitution as:

> "Evolutionary in its character, it grew out of the mishaps of the past: out of the confused constitutional structure of the old Straits Settlement and the Malay States, the strengths and weaknesses of the advisory treaties, the disasters of the Japanese occupation, the preemptory nature of the Malayan Union and the various compromises of the Federation of Malaya Agreement. At each step the emphasis was more on the authoritarian and the utilitarian, than upon the democratic and the cosmetic".[38]

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34 The preamble declares that the State Constitution: "(...) which, enduring and continuing from generation to generation, shall become and form the Law of our State, Country and people, and be an inheritance which cannot be altered, varied, changed, annulled, infringed, or in any way or by any act whatsoever repealed or destroyed".

35 Articles 73-95E.

36 *Shafruddin*, *BH*, "Thirty Years on the Road Between Centre and States in Malaysia", in Aliran, [1987] Reflections on the Malaysian Constitution (Penang), 169-185 at 169.

37 *Rudolph*, *R*, [1971] Federalism and Nation Building: India, Pakistan, Malaysia and Nigeria, (High Wycombe, England), 11.

38 *Hickling*, *RH*, [1991] Essays in Malaysian Law (Kuala Lumpur), 151.

The Federation which Malaysia evolved into is a union of several States and their Governments under the purview of a Central Government with both the States and Central Government maintaining their autonomy over several determined matters. This Federal arrangement is best explained by Basu:[39]

After the Federation is formed, both the Federal and the State Governments owe their existence and authority from the Federal Constitution which distributes governmental powers between the Federal and the State Government, which are exercised by them according to the constitutional distribution, independently of each other. A Federation is thus distinguished from a unitary state in that the regional government in a Federal State are not mere sub-divisions, agents or delegates of the central government, but possess independent constitutional powers.

The Malaysian Federal Constitution distributes the governmental powers between the Federal and State Governments and specifically through its Ninth Schedule. This distribution of powers is binding on the Federal and State Governments and the Courts will enforce them. The legal test for federalism is whether the constitutional division of powers is justiciable,[40] which means whether a case can be taken to Court, if the division of powers is transgressed either by the State Government or by the Federal Government. In Malaysia, this point is well settled in the case of *Mamat Bin Daud & Ors v Government of Malaysia*.[41] In this case the Supreme Court had to decide whether a section in an amendment to a Criminal Law Code was properly enacted by the Federal Parliament when the subject matter of the amendment was concerning "religion" which according to the Ninth Schedule belonged to the jurisdiction of the State Legislature. The Supreme Court held that the Federal Parliament could not transgress into the powers of the State Legislature because this would go against the division of powers between the Federal and State Government, determined by the Federal Constitution. Here the Federal Parliament was held to be powerless to enact the said amendment. However, the division of powers in the Federal Constitution are generally in favour of the Federal Government and this is how the centre can control the States in many regards.

The changes experienced by the Federal Constitution with regards to Federalism show the continuing centripetal forces working upon it. At the same time they underline the extremely slender protection accorded to the States, for according to Hickling the only strict constitutional safeguard of the States lies in Article 159.[42]

The distribution of legislative powers which has been an important area in Federal-State relationship is found in Articles 73-79. The subject matters in this distribution of spheres of power is listed in the Ninth Schedule and divided into three legislative lists namely: the Federal List, the State List and the Concurrent List.[43] Although the list is a legislative one, the executive

39 *Basu*, *DB* [1987] Comparative Federalism (New Delhi) 7. For further reading on Federalism see *Fenna*, *A* [2006] Comparative Federalism: A Systematic Inquiry (New York).

40 *Basu* [1987] 12.

41 [1988] 1 MLJ 119.

42 Ibid, 122. Article 159 of the Federal Constitution is the amendment provision which is subject to some procedural safeguards.

43 Article 77 of the Federal Constitution states that any matter not on one or other of the legislative lists is within the competence of the States.

powers are divided in the same way.[44] In the event of an inconsistency between a Federal statute and a State enactment, the Federal law prevails.[45] Parliament is given certain powers of legislating on matters in the State List.[46]

Under Article 81 of the Federal Constitution, the States are obliged to exercise their executive authority so as to secure compliance with Federal law and so as not to impede or prejudice the exercise of the Federal executive authority. On the question of land, one of the few important matters found in the State List, provisions are made for some limited interaction,[47] but none as important as the setting up of the National Land Council.[48] Articles 92 to 95 relate how the Federal Government may extend its powers into the activities of the States through development plans or federal inquiries, surveys and publication of statistics. A National Council for Local Government is set up under Article 95A to formulate a national policy for the control of local governments. For the Borneo States of Sabah and Sarawak there are some modifications for the distribution of powers and this is provided for under Articles 95B to 95E.[49]

One of the most vital aspects of the relationship between the Federal and State Government ensuring the smooth running of government are the essential provisions. All the State Constitutions follow a common pattern in relation to the provisions dealing with "the machinery of government", and the reason for this uniformity lies in Article 71 of, and the Eighth Schedule to the Federal Constitution. The intention was that the scheme of government in each of the States should be a "simplified version" of that of the Federation itself.[50] In order to standardise activities between the Federal and State Government, the essential provision required uniformity in important areas such as the Ruler to act on advice, the Executive Council and its functions, the State Legislative Assembly and rules pertaining to it, Financial Provisions and Amendment to the Constitution.[51]

The Autonomy of the States

Whereas states that in the federal principle both the general and regional governments should be limited to their own sphere and within that sphere, should be independent of the other.[52] A major characteristic of the federal set-up in Malaysia is its highly centralised form and the weakness

44 See Article 80 of the Federal Constitution and the exceptions found therein.

45 Article 75 of the Federal Constitution.

46 Article 76 of the Federal Constitution. But only: (a) for the purpose of implementing any treaty, agreement or convention between the Federation and any other country, or any decision of an international organization of which the Federation is a member; or (b) for the purpose of promoting uniformity of the laws of two or more states; or (c) if so requested by the Legislative Assembly of any State.

47 See Articles 83-91 of the Federal Constitution. Article 83 for example provides for acquisition of land for federal purposes.

48 Article 91(5) of the Federal Constitution provides that it be the duty of this Council to formulate national policies for the promotion and control of the utilization of land and for the administration of any laws relating thereto of which must be followed by the Federal and State Governments.

49 The special position of Sabah and Sarawak is discussed briefly below under Subheading 1.3.2.

50 See paragraph 179, Report of the Federation of Malaya Constitutional Commission.

51 Eighth Schedule of the Federal Constitution.

52 Wheare, KC, [1947] Federal Government, 15.

of the thirteen constituent States.[53] Therefore to understand the working of the Federation it is best to look at what autonomy the regional governments have and to what extent they are independent of the general government.

Besides the Ninth Schedule, which remains the main bastion for State powers, there are other provisions which offer some semblance of autonomy. Article 45(1)(a) was promulgated for the purpose of representing State interests in the Federal Parliament so that the Senate can act as a buffer against the onslaught of the centrally strong and politically motivated lower house.[54] Clause (4) of the same Article even provides for the increase of the number of these State elected representatives, a provision which has never been utilised.[55]

Article 71 is entitled "Federal Guarantee of State Constitutions" and does rightly guarantee the rights and privileges of the Rulers in their States according to their respective Constitutions.[56] Clause (3) provides the State Constitutions with Federal backing, by supplying Parliament the power by law to make provisions for securing compliance to the State Constitutions. The guarantee under clauses (1) and (2) may be carried out through legal proceedings by the Federation or by use of the police or armed forces and through legislation under clause (3).[57]

The State Legislative Assemblies are protected by Article 72, which precludes any question as to the validity of proceedings and any activities from the jurisdiction of the courts. The non-justiciability of the validity of the proceedings in the State Legislative Assemblies have been defended by the courts in several decisions.[58]

As finance is a Federal matter, the States are very much dependent on the Federal Government for funds.[59] This shows a federal system which is much dominated and controlled from the centre. However Article 109 guarantees grants to States every financial year, and these are the capitation grants calculated in accordance with the population of the State and the State road grants calculated in accordance with the number of roads in the State.[60]

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53 For some general reading on the Malaysian Federal Government see, *Watts*, *RL*, [1968] New Federations – Experiments in the Commonwealth (London), *Mohd Salleh Abas*, "Federalism in Malaysia – Changes in the First Twenty Years" in Suffian, Lee & Trindade [1978] The Constitution of Malaysia (Kuala Lumpur), 163-191, *Ahmad Ibrahim* & *Ahilemah Joned*, [1995] The Malaysian Legal System (Kuala Lumpur) especially Chapters 7 and 8.

54 The provision provides that two members from each State shall be elected into the Senate via the procedure found in the Seventh Schedule.

55 The Senate was originally composed of 22 senators elected by the States and 16 appointed by the Yang Dipertuan Agong while the present position is 26 elected (due to the addition of Sarawak and Sabah) and 44 appointed.

56 Also in Part 1 of the Eighth Schedule, are the discretionary functions of the Rulers and the Yang Dipertua Negeri.

57 Article 71(3) states that "If it appears to Parliament that in any State any provision of this Constitution or of the Constitution of that State is being habitually disregarded Parliament may, notwithstanding anything in this Constitution, by law make provision for securing compliance with those provisions." See note on this Article in Sheridan & Groves [2004], 5th edn, The Constitution of Malaysia, (Kuala Lumpur), 311-313.

58 See for example *Lim Cho Hock v The Speaker, Perak State Legislative Assembly* [1979] 2 MLJ 85 and *Tun Datu Mustapha bin Datu Harun v Legislative Assembly of State of Sabah* [1986] 2 MLJ 388.

59 The States obtain limited income from sources of revenue assigned to States which are listed in Part III of the Tenth Schedule of the Federal Constitution.

60 These grants which are charged on the Consolidated Fund are calculated according to the Tenth Schedule of the Federal Constitution.

Besides these guaranteed grants, the States are allowed proceeds from the taxes, fees and other sources of revenue specified in Part III of the Tenth Schedule,[61] so far as collected, levied or raised within the State and ten percent of the export duty of tin produced by the State.[62] The States may borrow money but this is restricted to borrowing from the Federation as borrowing from other financial sources is subject to Federal Government conditions and approval.[63]

The States of Sarawak and Sabah are given slightly modified and additional autonomous powers. Salleh Abas opined that the far greater autonomy given to Sarawak and Sabah were meant to provide an interim measure before a suitable degree of assimilation was achieved.[64] These special areas include additional grants,[65] language,[66] natives,[67] safeguarding of constitutional position,[68] a supplementary State List,[69] and additional sources of revenue.[70] There are also other areas such as immigration,[71] which place Sarawak and Sabah in a more autonomous position than the other States in Malaya.[72]

No discussion of the Federal system in Malaysia is complete without explaining the background of the unique features of these two States in relation to the other States.[73] Gullick explains that politically in Sarawak and Sabah, there have been numerous changes of party alliances as individual groups move into or out of a coalition. The aim of the Federal Government is to construct in each State an administration run by a coalition around a Malay or at least a Muslim party group which supports the National Front alliance and which is amenable to Federal influence, if not control.[74]

However politicians from West Malaysia where the Federal seat of Government is located, found it difficult to understand and appreciate the divergence and differences of the many indigenous groups of people in Sarawak and Sabah and hence there was a tendency to oversimplify the racial situation in the two States.[75] It was therefore quite surprising that Sarawak and Sabah agreed

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61 Amongst others these include revenue from lands, mines and forests, water rates, entertainment duties, Islamic *zakat* and revenue of local authorities.

62 Article 110(3) of the Federal Constitution.

63 Article 111(2) of the Federal Constitution. For an interesting tussle between the State and Centre on this matter see *Govt of Malaysia v Govt of Kelantan* [1968] 1MLJ 129.

64 Mohd Salleh Abas, [1978] 180.

65 Article 112C and Part IV of the Tenth Schedule of the Federal Constitution.

66 Article 161 of the Federal Constitution.

67 Article 161A of the Federal Constitution.

68 Article 161E of the Federal Constitution which requires in addition to the normal two-thirds majority, the concurrence of the Yang Dipertua Negeri of the State concerned.

69 List IIA of the Ninth Schedule of the Federal Constitution.

70 Part V of the Tenth Schedule of the Federal Constitution which includes import and excise duty of petroleum products and export duty of timber and other forest produce.

71 See Immigration Act 1959/1963.

72 See Malaysia, Report of the Inter-Governmental Committee 1962, Government Press, Kuala Lumpur (1963).

73 For the constitutional position of these two States see Trindade & Lee, [1986] chapter 6 for Sabah and chapter 7 for Sarawak.

74 Gullick, [1981] 133.See also *Tan*, *PL* "From Malaya to Malaysia" in Harding, A & Lee, HP [2007] Constitutional Landmarks in Malaysia – The First 50 Years 1957-2007 (Petaling Jaya).

75 *Milne*, *RS & Ratnam*, KJ [1974] Malaysia – New States in a New Nation: Political Development of Sarawak and Sabah in Malaysia, 6.

to join the Federation.[76] One reason put forward by Milne and Ratnam was the absence of a feasible alternative.

However the initial reluctance of these States to join Malaysia resulted in concessions being made to protect the weakness and the effects of underdevelopment as compared with the rest of the country. These concessions form the basis of the unique relationship within the Federation, although the relationship between the States of Malaya and the Federal Government were initially strained owing to the lack of consultation regarding the new Federation and its setup. Indeed the new Federation is often referred to until today as a Federation of three entities i.e. the States of Malaya, Sarawak and Sabah.

This came about after the recommendation of the Inter-Governmental Committee (IGC) in 1962 which was set up to work out the details of the constitutional arrangements and the form of the necessary safeguards required by the Borneon leaders to protect their interests when they join the Federation. The IGC report was published in February 1963 and its contents had incorporated most of the safeguards demanded by the Sarawak and Sabah leaders. These safeguards subsequently found their way into the Federal Constitution as explained earlier.

Shafruddin admits that the Federal design has a crucial limitation in that it could not encapsulate all political processes. If federalism is to succeed, he says, the political process will have to be substantially accommodated, perhaps necessitating going beyond the federal design into the realm of cooperative or even coercive federalism.[77] It is interesting to note at this juncture what the Reid Commission had to say in 1956 with regards to this matter, in order to gauge better the strength of the centripetal forces that exists today:

We were informed, however that in practice the Federal Government has never introduced either a major change of policy or a legislative measure without first obtaining the agreement of all the State Governments concerned. Thus, while the Federal authorities have the powers to carry almost any policy they wish, the convention has developed that they do not exercise these powers. Instead there is consultation between the Federation and State and Settlement Governments through the medium of correspondence and later if necessary, at meetings of the Conference of Federation Executives.[78]

The present Federal Constitution does provide the leeway for the sort of cooperative or coercive federalism mentioned by Shafruddin, and the Central Government is in the position to use these provisions to control the State Governments.

With regard to the fundamental question of membership of the Federation, the Federal Court

76 For an East Malaysian perception of the entrance of Sarawak and Sabah into Malaysia see *Kitingan*, *JG*, "Thorny Issues in Federal-State Relations: The Case for Sabah and Sarawak" in Aliran, [1987] Reflections on the Malaysian Constitution (Penang), 149-168. See also *James Chin*, "Unequal Contest: Federal-State Relations Under Mahathir" Chapter 2 in Ho Khai Leong & James Chin (eds) [2003], Mahathir's Administration (Singapore). For a constitutional law discussion on the position of these two States see Mohd Jemuri bin Serjan, "The Constitutional Position of Sarawak" and Fung, Nicholas, "The Constitutional Position of Sabah", both in Trindade & Lee (1986).

77 *Shafruddin*, *BH*, [1988] "Malaysian Centre-State Relations by Design and Process", in Shafruddin BH & Fadzli MZ (eds), Between Centre and State Federalism in Perspective (Kuala Lumpur), 25.

78 Reid Report, paragraph 33.

has ruled that the States do not have a right of say in the Federal Government's decision to include new members in the Federation.[79] Here lies a very significant indicator as to the strength of the bias of the Federal Government.

Besides during the state of emergency whereby the Federal Government or just the Federal Executive may take over the functions of the State Governments,[80] the Federal Constitution also allows during normal times for a host of situations whereby the Federal Government takes a strong commanding position over the States. Firstly, Article 4(1) declares the supremacy of the Federal Constitution and Article 75 follows up by settling any inconsistency between State and Federal laws by declaring the State law or any inconsistent part of it as void.

The Federal Constitution dictates what essential provisions should be found in the State Constitutions. Further, Article 71(4) allows Parliament to make laws that will secure compliance of the States to include those essential provisions or provisions consistent with them.[81]

The powers of Parliament to legislate for the States in certain cases such as promoting uniformity of laws between States is found in Article 76. Clause (4) goes further by giving this power to cover land which is an important State matter, and excluding any such action from the requirement of being adopted by the State Legislature first.

Generally, executive authority coincides with legislative powers.[82] However clause (4) of Article 80 extends Federal powers to the imposition of duties on any State Authority to administer any specific provisions of Federal law. This provision is a further limitation on State sovereignty.[83] Article 81 adds quite superfluously that the executive authority of every State shall be so exercised as to ensure compliance with any Federal law and to not impede or prejudice the exercise of the executive authority of the Federation.

Although land is a State mater, the Federal Government may acquire land for federal purposes by virtue of Article 83(1). The National Land Council formed under Article 91 formulates land policy through the Federation and although the States have a say in this body the control lies with the Federal Government as any legislation enacted contrary to the directions of this Council might be held to be unconstitutional.[84] It is different in Article 95E which specifically relieves the States of Sarawak and Sabah of the necessity of following the policies of the National Land Council unless they choose to be so bound.

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79 In the case of *The Government of the State of Kelantan v The Government of Malaya and Tunku Abdul Rahman Putra Al-Haj* [1963] MLJ 355, whereby Thomson CJ said thatby bringing about the changes (i.e. the inclusion of Singapore, Sarawak and Sabah), Parliament has done no more than exercise the powers given to it in 1957 by the constituent States including the State of Kelantan.

80 See Article 150 of the Federal Constitution.

81 The Eighth Schedule lists the provisions which are essential for the normal and smooth running of government within the Federation and also to fill any gaps which were quite apparent in most of the State Constitutions in order for them to be consistent with the Federal Constitution.

82 Article 80(1) of the Federal Constitution.

83 *Sheridan* & *Groves*, [2004] 347.

84 Ibid, 220-221. Article 91(5) of the Federal Constitution states that "(...) the Federal and State Governments shall follow the policy so formulated".

With regard to the provisions on national development in Chapter 5 of the Federal Constitution,[85] Sheridan and Groves find that the Articles impose a duty upon State officers and authorities to accomplish the federal objectives.[86] There is also a frequently recurring element in this chapter which is the statement of the obligation of State officers to follow Federal directions in reference to subject matters on the State List.[87] Sarawak and Sabah have certain exceptions from the provisions of this chapter.

IV. The Role of the Rulers

Harding sums up the delicate position of Their Highnesses the Rulers vis-à-vis the Federation quite adequately when he wrote that:

> "(...) the constitutional powers of the Rulers were identified in the public mind with the right of the Malays, the survival of the Malay States, and indeed Malay culture in general; the substitution of the Federation of Malaya for the Malayan Union in 1948 marked a signal triumph for the Malays and for the Rulers. The survival of the monarchy appears to depend partly on the maintenance of a federal system in Malaysia. Indeed the survival of the federal system also depends partly on the maintenance of the monarchy. The two are inextricably intertwined and it would require a very great political convulsion to remove them both".[88]

The monarchy in Malaysia despite its turbulent history has persistently remained in quite a safe and secure position no matter what political observers and the fate of monarchies elsewhere seem to indicate.[89] Indeed as a result of the latest constitutional crisis affecting the Rulers in 1993 the case for the abolition of the monarchy has become increasingly difficult.[90]

The Rulers are the main players in the constitutional history of the States. The earliest State Constitutions of Johore and Terengganu were in fact formulated for the purpose of entrenching the position and status of the Sultan, his successor and his family. The subsequent handing over of the reins of administration to British advisers was facilitated by the Rulers who were the spokespersons and negotiators on behalf of the Malay people and the Malay States. Their role as a focus of unity and allegiance of early Malay society right up to 1946,[91] was undeniably strong even though real political power were in the hands of others.[92] The Rulers were also responsible

85 Articles 92-95.

86 Sheridan & Groves, [2004] 372.

87 Ibid, 225.

88 *Harding, AJ*, [1993] Constitutional Evolution of the Malaysian Monarchy (SOAS LawDepartment Working Papers No 4), 2.

89 For a general discussion of the Malaysian monarchies see the chapter on Malaysia written by *Hickling* in Butler, D & Low, DA (eds), [1991] Sovereigns and Surrogates: Constitutional Heads of State in the Commonwealth (London), 203 and Tan, CK, [1984] The Monarchy in Malaysia (Kuala Lumpur).

90 *Harding*, [1993] 2.

91 This was the year where the Rulers' prestige was at the lowest ebb owing to the signing over of sovereignty of the States to accommodate the formation of the Malayan Union.

92 For an understanding of the position of Malay Rulers in the 19th and early 20th century see *Gullick*, [1988] and *Khoo, KK*, [1991] Malay Society: Transformation and democratization (Kuala Lumpur).

for skillfully creating the political necessity for the States to have, and to be seen to have, a neutral and constitutional character.[93]

The decline of the status of the Rulers during the Malayan Union formation days was precipitated by the rise of nationalism.[94] Fortunately for them they were able to identify themselves with the nationalist leaders who were themselves of royal or aristocratic origin. The survival of the Rulers allowed the independence of the States to be maintained against the strong push towards a central unitary government. It was the survival instinct of the Rulers together with the traditional and often religious bond that existed between them and the Malay masses which resulted in the institution of constitutional rulers being a fundamental inclusion in the terms of reference given to the Reid Constitutional Commission.[95] Thus the concept of constitutional rulers in a federal set-up was born in the Federal Constitution of 1957, which outlined limitations on the prerogatives of the Rulers in somewhat unclear terms which later turned out to be a source of some difficulty and considerable chaos for the nation. These Rulers were apparently not used to being limited by a democratic form of government.[96]

Under Article 71(4) and Schedule 8 of the Federal Constitution, the State Constitutions must include the provisions referred to as the essential provisions set out in the said Schedule or provisions substantially to the same effect. In effect it requires the States to conform to Westminster-style constitutional conventions.[97] These provisions include the working of the Constitutional Monarchy which in essence provides that a Ruler must act on the advice of the Executive Council or a member thereof acting under its general authority.[98] The areas where he may act in his discretion are[99]: the appointment of the Menteri Besar (Chief Minister), the withholding of consent to a dissolution of the Legislative Assembly, the summoning of a meeting of the Conference of Rulers concerned solely with the privileges of the Rulers or with religious matters, the performance of his functions as the Head of Islam, the award of honours and matters pertaining solely to the royalty of his State.[100]

The Rulers exercise ceremonial functions apart from a few important discretionary functions which are in the end controlled by constitutional conventions. In terms of state rights vis-à-vis Federal control, the Rulers have on their side a significant body created by the Federal Constitution

93 *Lowe*, [1982] "Symbolic Communication in Malaysian Politics: A Case Study of the Sultanate" 10 SEAJSS 71, which has created until today the political interlock described by Harding in the opening quotation.

94 On the Rulers and the nationalist movement see Cheah, B.K., [1988] "The Erosionof Ideological Hegemony and Royal Power and the Rise of Malay Nationalism, 1945-6" JSEAS 1, Khong, K.H., [1984] Merdeka! British Rule and the Struggle for Independence in Malaya 1945-57 (Kuala Lumpur) and Chandra Muzaffar, (1979) Protector? An analysis of the Concept and Practice of Loyalty in Leader-Led Relationships Within Malay Society (Penang).

95 Report of the Federation of Malaya Constitutional Commission (1957) HMSO (London), paragraph 3.

96 For a discussion on this relation see *Azmi, K*, "Role of the Monarch: Influences Upon the Development of Parliamentary Government" in Aliran, [1987] Reflections on the Malaysian Constitution (Penang), 44-53.

97 See *Marshall, G.* [1994] Constitutional Convention – The Rules and Forms of Political Accountability, (Oxford) and Jennings, I. [1959] The Law and the Constitution, (London).

98 Schedule 8 paragraph 1(1) of the Federal Constitution. Paragraph 1(1A) has been inserted in 1994 to make the requirement to act on advice absolutely clear. This came about after the convention to act on advice was not followed by the Rulers resulting in the Constitutional Crises of 1983 and 1993.

99 Schedule 8 paragraph 1(2) of the Federal Constitution.

100 See *Harding*, [1986] "Monarchy and the Prerogative in Malaysia" 28 Mal LR 345.

called the Conference of Rulers.[101] It is derived from the meetings of the Rulers or Durbars first held in 1897 and in its present from was instituted in 1948 with the Federation of Malaya Agreement. One of the two functions which the Conference performs is of a policy nature.[102] It is here that the Conference is a useful forum to discuss Federal-State matters outside the glare of publicity, and without confrontation, as it has no power to coerce the Executive.[103] The Conference in its policy discussion mode was considered an ideal session to discuss and settle matters pertaining to State rights in a more friendly atmosphere to nip any potential problems in the bud and precluding any need for confrontation between the States or between the States and the Federation.

The Conference has also what is known as a legislative role which is seen as more of a protective role rather than a legislative one. A number of laws require the consent of the Conference and these are laws altering State boundaries,[104] and laws directly affecting the privileges, position, honours and dignities of the Rulers.[105] After the racial riots of 1969 the Federal Constitution was amended so as to impose the requirement of consent of the Conference to the passing of a number of important kinds of legislation including some constitutional amendments.[106] These protected areas of law are popularly known as the "sensitive issues" which are, special position of the Malays and natives of Sabah and Sarawak, the National language, citizenship and the position of the Rulers. Even the questioning of these matters except in relation to the implementation thereof is prohibited even in Parliament and the State Legislative Assembly.[107] The Conference of Rulers which consist of a group of people who are above politics and the focus of unity, is the ideal institution to be the guardians of these important traditional elements of the Constitution.[108] However, none of these traditional elements included the federal nature of the nation and the independence of States and protection of their rights.

The Rulers apparently were not above the politics when they found themselves in the constitutional crisis of 1983. The Government decided that delays by the Rulers for personal gain in giving the royal assent to Bills at the State Legislative Assembly were causing administrative chaos. The Government decided to amend the provision for royal assent which had hitherto been dictated by constitutional convention, to allow for Bills to automatically become law irrespective of whether assent has been given or not. A five month constitutional impasse which followed after the Yang

101 Article 38 of the Federal Constitution.

102 Article 38(2) and 38(3) of the Federal Constitution The other function is of a religious or ceremonial nature, and functions relating to the monarchy itself which the Conference exercises in its discretion.

103 *Harding*, [1993] 13.

104 Article 2 of the Federal Constitution.

105 Article 38(4) and 38(5) of the Federal Constitution.

106 Constitution (Amendment) Act 1971, Act A30.

107 Articles 63(4) and 72(4) of the Federal Constitution. After the 1993 Constitutional crisis, members of both Federal and State Legislative Assemblies may now question the position of the Rulers except if they advocate the abolition of their constitutional positions. See Articles 63(5) and 72(5) added by Amendment Act A848 effective March 30, 1993.

108 For further reading on these traditional elements of the Constitution see *Mohd Salleh Abas*, [1986] "Traditional Elements of the Malaysian Constitution" in Trindade, FA and Lee, HP, (eds), [1986] The Constitution of Malaysia Further Perspectives and Developments (Singapore), 1-17.

Di Pertuan Agong (King) refused to give his assent to this amendment, ultimately resulted in a compromise.[109] However in 1994 following the diminished dignity suffered by the Rulers the previous year, the Government took the opportunity to amend this provision and reverted to the original proposed amendment which provided for the automatic assent thus nullifying the compromise they had worked out with the Rulers in the 1983 crisis.[110]

Again in 1993 the Rulers were to be blamed when the crisis of that year resulted in their immunity from legal action being removed.[111] A number of alleged activities of the Rulers precipitated the dramatic outcome. The most recent included several Rulers being involved in business while taking unreasonable advantage of their position, the Sultan of Kelantan campaigning for the opposition party in elections, the numerous instances of assault and battery committed by the Sultan of Johore *inter alia*. The Government decided to amend the provisions of the Federal and State Constitutions to remove the immunity which the Government rightly thought had been abused. The Conference of Rulers in a remarkable exercise of their discretionary powers to meet decided to exercise a prerogative which they had and that was to refuse consent to the amendment which would remove a privilege of the Rulers.[112] The Government realizing the constitutional barrier that lay before them, decided to 'steamroll' the amendment through even though it was clearly unconstitutional. With the help of the mass media they launched a campaign to highlight improper behaviour of the Rulers notwithstanding that it was clearly in breach of the Sedition Act 1948.[113] This accelerated the accommodation on the part of the Rulers and they agreed to give their consent to a revised amendment which would see the setting up of a special court for them to be tried in.[114]

Harding views the attacking of the Rulers by the Government as an indirect attack to the owners of the States and this implicitly reduces their perceived importance.[115] This has always been the trend of the centrally-strong Federal Government but an interesting outcome of this episode is that the Rulers though a bit bruised by these events, now find their position becoming stronger because abuse of their position has become difficult and without these abuses the Malaysian people will be quite reluctant to move for an abolition of the monarchy.

Another indication from these events is that the Rulers' role in protecting State rights other than those relating to the monarchy is infinitesimal. Their only main contribution is the strong interlocking relationship their position has with the federal nature of the nation, resulting in the latter's position becoming fortified.

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109 For a full account of these events see: *Lee*, *HP*, "The Malaysian Constitutional Crisis: King, Rulers and Royal Assent" in Trindade and Lee, [1986] 237-254, "The Malaysian Constitutional Crisis of 1983" 35 ICLQ (1986), 237 and Harding, [1986].

110 Article 66(4A) and Schedule 8 paragraph 11(2B) of the Federal Constitution as amended by Constitution (Amendment) Act 1994 (Act A 885).

111 For a brief account of these events see: Harding, [1993] 17-21.

112 Article 38(4) of the Federal Constitution.

113 Section 3(1)(d).

114 Article 182 of the Federal Constitution.

115 *Harding*, [1993] 20.

V. Peculiar Factors Influencing the Government

Communal Politics

Malaysia's nation-building process is not only burdened with bringing together Governments into a Federal cohesion but also a nation with a plural society. Ratnam expounds that unification in Malaysia is obstructed by not only racial differences but also by a complete lack of cultural homogeneity with each community having its own religion, language, customs and habits.[116] To try and explain these differences in this brief introductory note would be extremely insufficient, thus at this juncture only a very brief explanation of communal factors in Malaysia which have a bearing on Federal Government would be attempted.[117]

According to the 2000 Census Report, Malaysia has a population of 23,270,000 of which 66.1% are Malays and Natives of Sarawak and Sabah (collectively called 'Bumiputera' or sons of the soil), 25.3% are Chinese and 7.4% are Indians and 1.2% constitute other races. The main political parties in the political system are racially based. They have their origins in and draw their vitality from inter-communal conflict.[118] The failure of integrationist politics during the time of Dato' Onn Jaafar paved the way for communal politics to flourish.[119] Means describe the system as a political system that operated with mechanisms of ethnic accommodation which depended primarily on the capacity of key political elites from each community to reach accommodative solutions to critical public issues.[120] In the political struggles over independence, the nationalist movement had brought together an alignment of the three major communal parties into an overarching coalition called the Alliance.[121]

A system founded on communal lines will require its leadership to bargain authoritatively through elite negotiation to further a particular community's interest without the need to publicly wrestle ethnically sensitive issues.[122] However benevolent a system like this may be, a distressing symptom in terms of democracy, is that representative institutions will have to accept their diminished role of merely "ratifying" the product of elite bargaining as appropriate for resolution of these issues.[123] Further, communal-based opposition parties which have never commanded sufficient support to unseat the Alliance managed to heighten inter-ethnic tensions thus making the bargaining process more difficult for the ruling coalition.[124]

The coalition started off with the UMNO-MCA alliance in 1952,[125] and it developed into a

116 *Ratnam*, *KJ*, [1965] Communalism and the Political Process in Malaya (Kuala Lumpur), 1.

117 For some readings on Malaysian Communal politics see *Ratnam*, [1965] *Vasil*, *RK*, [1980] Ethnic Politics in Malaysia (New Delhi), *Khong*, [1984] *Gullick*, [1988] *Means*, *GP*, [1991] Malaysian Politics: The Second Generation (Singapore), *Heng*, *PK*, [1988] Chinese Politics in Malaysia (Singapore), *Ampalavanar*, *R*, [1981] The Indian Minority and Political Change in Malaya 1945-1957 (Petaling Jaya).

118 *Gullick*, *J*, [1981] Malaysia: Economic Expansion and National Unity, 125.

119 See *Heng*, [1988] and *Von Vorys*, [1975].

120 *Means*, [1991] Malaysian Politics: The Second Generation (Singapore) 1.

121 Renamed the Barisan Nasional or National Front in 1974.

122 *Means*, [1991] 2.

123 Ibid.

124 Ibid.

125 UMNO is short for United Malays National Organization and MCA is short for Malayan (later Malaysian)

successful and viable arrangement for inter-ethnic political co-existence acceptable to both Malay and Chinese electorate plus it also satisfied the British desire to see multi-racial power sharing in the soon-to-be independent Malaya nation-state.[126] The fundamental agreement that was to be the bedrock of inter-communal relations in the policies of the Federal Government was the attainment of the special position of the Malays, their language and their Rulers in return for citizenship based on jus soli for the non-Malays.[127] Ratnam views the political process in communal politics in the Federation as largely preoccupied with attempts to maintain a viable equilibrium between the different communities.[128]

The presence and importance of ethnic politics largely accounts for the absence of any class divisions strong enough to produce substantial social or political effects.[129] The act of looking for ethnic reasons and blaming the other race when economic or social injustice befalls a person indicates the extent and power of communal politicking in Malaysia.[130] Malaysian society is dictated by a "patron-client" relationship which means that the patron supplies help, financially or by intervening to protect clients from the rigidity of bureaucratic rule and the client provides respect, services at feasts and of course, electoral support.[131]

The communal structure in Malaysia is important in the study of the Federal system by way of the extent of support of these communities towards State independence and autonomy. Vasil in observing the trend during British rule views this simply by dividing the people into two camps consisting of the Malays who insisted on decentralisation and then non-Malays who favoured centralisation.[132] According to Vasil the Malays considered any increasing shift towards centralising as not only a threat to the position and powers of the Malay Rulers, but to their own special position. To the Malays the nine Malay States and their rulers were the symbols of their separate identity, thus any obliteration of the identity of the Malay States was viewed with alarm. The non-Malays however, had no sentimental ties to the various States and had no special reason to have a sense of respect and loyalty for the Malay Rulers. Centralisation certainly did them no harm especially when it promised greater efficiency and better opportunities for trade and commerce.

Ratnam agrees that the non-Malays have no regional loyalties but with regards to the Malays, he states that there is a conflict between Malay regionalism and the necessity to have a strong central government as communal problems have to be solved at the centre.[133] It is because of this factor and the realisation that it is more important to protect the interests of the Malays at a more

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Chinese Association, both political parties formed on the basis of race to protect their respective interests. MIC, short for Malayan (later Malaysian) Indian Congress joined later in 1954.

126 *Heng*, [1988] 159.

127 This agreement has notably been referred to as a social contract. See *Von Vorys*, *K*, [1975], Democracy Without Concensus (New Jersey), 73.

128 *Ratnam*, [1965] 3.

129 *Milne*, *RS* & *Mauzy*, *DK*, [1986] Malaysia – Tradition, Modernity and Islam (Boulder, USA), 76.

130 Ibid, 77.

131 Ibid, 78.

132 Vasil, [1980] 14-15.

133 Ratnam, [1965] 3.

central level so that the Federation as a whole will be able to maintain and display the trappings of a Malay state, that we find Malay politics though still holding strong to regionalism, shifting gear towards centralisation.

Islam

For a matter which has been decided by the courts to be concerned with mere ritual and ceremony,[134] Islam is an area which is well guarded by the States.[135] In the Federal Constitution, Islam's status under Article 3(1) as the religion of the Federation is quite firmly entrenched though its significance to the implementation of an Islamic State may be questioned.[136]

At the State level it is considered as one of the last few bastions of State rights which is emotionally protected, for being a Malay and being a Muslim are inextricably intertwined as one.[137] Hussin Mutalib explains this phenomenon existing in Malay society as being rather schizoid in nature.[138] 140 At times, he says the Malay may lean closer towards Islam, while at other times the ethnic pull becomes too strong for him to contain. Similarly at times, the two forces act as integrative mechanisms for Malay unity, while at other times they divide the community. On balance, however, he finds that the evidence is that the ethnic force is the more powerful.[139]

From the interpretation of Article 3(1) of the Federal Constitution it is clear that Islam was intended by the founding fathers in UMNO to be the religion of the Federation within a secular state. The politics of accommodation and communal bargaining together with preoccupation with other political and economic activities left Islam out of the mainstream life of the nation. By and large UMNO adopted Islamic policies that were largely symbolic and nominal in nature, mainly to placate the pro-Islamic elements in the political arena, and in particular to dampen the Islamic appeal or advantage that PAS might have had over it.[140]

However in recent times Hussin Mutalib has found that the UMNO-led government has no alternative but to support Islam. This, he says has to do not only with the backdrop of the current global Islamic reaffirmation which the Government cannot prevent from affecting Malaysian Muslims, but also with the legitimacy of UMNO as the dominant Malay party in a country where Malays to a large extent dictate the contents and direction of politics. He adds that both the closeness of Malays despite their varying degrees of commitment, to the faith, as well as the perennial UMNO-PAS conflict, explains if not necessitates the pro-Islam slant of the ruling regime.[141]

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134 In *Che Omar Che Soh v PP* [1988] 2 MLJ 55.

135 See for example *Mamat bin Daud & Ors v Govt of Malaysia* [1988] 1 MLJ 119.

136 Especially to advocates of Islamic law being implemented in full in Malaysia. See *Hussin Mutalib*, [1993] Islam in Malaysia: From Revivalism to Islamic State (Singapore).

137 See Interpretation of "Malay" under Article 160 of the Federal Constitution.

138 See *Hussin Mutalib*, [1990] Islam and Ethnicity in Malay Politics (Singapore). Also see Milne & Mauzy, [1986].

139 *Hussin Mutalib*, [1990] 31.

140 Ibid, 35. PAS is the Opposition Pan-Malaysia Islamic Party.

141 Ibid, 156. This pro-Islam bias is seen to be concerned mainly with the protection of Malay rights and privileges vis-à-vis other ethnic communities. For readings on this see *Kamarulnizam Abdullah*, [2003] The Politics of Islam in Contemporary Malaysia (Bangi).

This brings us back to the basic principle in the Federal Constitution which is Islamic law is a state matter.[142] In this lies a conflict already, as Islam is regarded as a way of life but it is the Federal Government which is in control of nearly all important aspects of the day to day life of the Federation. The Rulers of the States with the exception of Penang, Malacca, Sarawak and Sabah are Heads of the Religion of Islam in their respective states.[143] There have been numerous instances of these Head of Religion stamping their authority and independence when it comes to the question of administration of Islam in their States.[144] This is a natural reaction to the dominance of the Central Government and its tendencies and ability to control and interfere in the affairs of the States.

The States have generally expressed their independence in Islamic matters through the administration of Islamic law within their own jurisdiction and State structures.[145] However more strikingly this independence can be seen in the States of Kelantan and Terengganu. In these two States one can see the UMNO-PAS struggle for influence over the Malay-Muslim minds, manifest itself in the usage of the Islamic subject matter given to the States by the Federal Constitution. Besides the matters enshrined in the State List, the two State government have gone beyond what is ostensibly provided for by the Ninth Schedule to introduce *Hudud* and *Qisas* laws.[146] The Kelantan government which is ruled by the opposition party PAS has passed the Kelantan Syariah Criminal Code (II) of 1993 and Terengganu which during the time was also ruled by PAS has passed the Terengganu Syariah Criminal Enactment (Hudud and Qisas) 2003. These laws attempt to expand considerably the jurisdiction of the State governments to impose a wider range of punishments than is permitted by the Ninth Schedule. Both the laws have been gazetted,[147] but remain inoperative.[148] The Federal government has been cautious in its response to this exercise of the State powers.[149]

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142 See Schedule 9 List II paragraph 1 of the Federal Constitution for the areas under Islamic law under State jurisdiction.

143 Article 3(2) of the Federal Constitution. The four States have instead the Yang DiPertuan Agong as their Religious Head.

144 See *Raja Azlan Shah*, [1986] for some examples. Rulers have been known to declare the beginning of Ramadan and of the Eid on different days from the rest of the Federation and some Rulers refuse to allow participation of their State in the National Council of Religious Affairs.

145 For an excellent study on the administration of Islamic law in Malaysia see *Horowitz, DL*, "The Qur'an and the Common Law: Islamic Law Reform and the Theory of Legal Change", in Vol XL11 1994, The American Journal of Comparative Law 233.

146 *Hudud* covers offences defined as (a) theft; (b) robbery; (c) unlawful sex; (d) false or unprovable accusations of unlawful sex; (e) consuming alcohol; and (f) apostasy. The penalties include flogging, amputation, stoning, death and imprisonment. *Qisas* encompasses various form of killing and wounding where the penalties are given in the form of compensation.

147 The Terengganu Enactment was gazetted on October 27, 2003.

148 The offences and punishments prescribed can only be imposed by Federal law, and would require amendments to the Federal Constitution. Hooker says "the Code is inoperative but it remains in the public domain and is a potent focus in the debate about the nature and place of Syariah in contemporary Malaysia". See *Hooker, MB* "Submission to Allah, The Kelantan Syariah Criminal Code (11), 1993" in Hooker V & Norani Othman (eds), [2003] Malaysia – Islam, Society and Politics, (Singapore), 80.

149 Prime Minister Dr Mahathir Mohamad had responded to the gazetting of the Terengganu Enactment by merely saying that the Federal Government will only take action if the State Hudud laws violated Federal laws. See New Straits Times October 28, 2003.

Because of the rivalry prevalent between the UMNO and PAS forces, Islam remains an area where the State Governments have managed to exercise a certain degree of independence.[150]

VI. Conclusion

Knowing the background of the Federal and State Governments is fundamental to the understanding of the workings of the Federal Constitution, the State Constitutions and the principles operating within these constitutional systems. The Constitutions do not operate in a vacuum, thus a description of the interplay between all of the factors discussed in this Chapter is vital to an understanding of how Constitutionalism operates in the system of the State Governments and Federalism.

History has a very close relationship with the questions of legitimacy of the Constitutions. Through the historical developments of the State Constitutions, it can be seen that the State Constitutions lacked moral legitimacy. Although the State Constitutions had legal legitimacy and possibly achieved legitimacy in the eyes of the people through acceptance, the importance of a strong autochthonous Constitution in the promoting and preservation of Constitutional principles cannot be understated.

The brief description of the structure of the Federation under the Federal Constitution is vital towards the understanding of how free the States are in preserving their own methods of control over their government, independent of the Federal Government. Although the State Governments are a microcosm of the Federal Government, the operational aspects of the State Governments are still left to the devise of the institutions within the State Government.

The Rulers cannot be separated from the Federation. Their inextricable role in the evolution of the State and Federal Governments demand that they have and will continue to have a role in the way the Constitution and Constitutional principles develop. Although their role in directly promoting Constitutionalism and State rights have been seen to be infinitesimal, they continue to play an indirect and extra-constitutional function in preserving State Constitutionalism.

The significant peculiar factors to Malaysia which impacts on the way the Federal and State Governments work, are discussed briefly to give an insight into the extra-legal dimension in which the Constitutions operate. Communal politics have always determined how rights-issues are addressed. Constitutional rights hence take a back-seat to communal-based rights. Communal politics also supports a strong centralisation of power which weakens the State Governments' potential to exercise independence in matters of Constitutionalism.

Islam on the other hand gives to the State Governments a domain to exercise their freedom and this can be utilised to institute methods of control independent of the Federal Government.

Understanding democracy, in the Malaysian mould is also vital towards entering into a discourse on Constitutionalism. The semi-authoritarian style of democracy shapes the operation of constitutional principles. Although this has resulted in a very limited scope for development of those principles, the emerging democratic trends will have a very positive impact on the future of Constitutionalism and Federalism in particular in the Federation.

150 For contemporary readings on the politics of Islam in Malaysia and the rivalry between UMNO and PAS, see *Kamarulnizam Abdullah*, [2003] The Politics of Islam in Contemporary Malaysia (Bangi). *Amrita Malhi*, "The PAS-BN conflict in the 1990's: Islamism and Modernity" in Hooker V & Norani Othman (eds), [2003] Malaysia – Islam, Society and Politics (Singapore).

DECENTRALIZATION AND THE CONSTITUTIONAL SYSTEM OF GOVERNMENT IN INDONESIA

Satya Arinanto

The reformation era, which has been ensuing for more than ten years in Indonesia, started with the resignation of president Soeharto on May 21 1998 and the appointment as president of the former vice-president B.J. Habibie. During the first two years of Habibie's administration, profound changes in various products of legislation were introduced especially in the form of laws among which there are new rules regarding regional administration, commonly known as regional autonomy laws. Many of the changes were made possible after revoking Law No. 5/1974 concerning principles of regional administration[1] and Law No. 5/1979 about village administration[2] and replacing them with a new regional administration law: Law No. 22/1999.[3]

Based on The Constitution of the Republic of Indonesia of 1945 (hereinafter "the 1945 Constitution"), which had not been changed when the regional administration was legalized in 1999, the division of regions on the basis of big and small, with their types and structures, did not have constitutional hierarchy.[4] In the descriptions of the 1945 Constitution regarding the subject matter, it is stated that:[5]

> "Because Indonesia is an *eenheidsstaat*, it will not have a region in its area that is also a staat. Indonesian regions will be divided into provinces and each province will also be divided into smaller districts. Within autonomous regions (*streek* and *locale rechtsgemeenschappen*) or merely administrative regions, there will be regulations confirmed by laws. In autonomous regions there will be regional representatives; hence, in regions, the government will also be within the frame of deliberation".

1 Indonesia, Law regarding Aspects of Regional Government, Law No. 5/1974, State Sheet No. 38/1974, State Sheet Addendum No. 3037.

2 Indonesia, Law regarding Village Administration, Law No. 5/1979, State Sheet No. 5/1979, State Sheet No. 56/1979, State Sheet Addendum No. 3153.

3 Indonesia, Law regarding Regional Government, Law No. 22/1999, State Sheet No. 60/1999, State Sheet Addendum No. 3839.

4 See Article 18 of the 1945 Constitution before being amended in the People's Consultative Assembly Republic of Indonesia, The First Amendment of the 1945 Constitution of the Republic of Indonesia (Jakarta: Secretariat General of the People's Consultative Assembly Republic of Indonesia, 1999), p. 6. 6.; See also in People's Consultative Assembly Republic of Indonesia, The 1945 Constitution of the Republic of Indonesia (Jakarta: Secretariat General of the People's Consultative Assembly Republic of Indonesia, 2000), p. 6.

5 Ibid., p. 17.

It is clear how the 1945 Constitution provides a strong foundation for regional autonomy by giving an authority that is extensive, real, and accountable to the regions. Further steps have been taken in order to develop this constitutional principle, as it is made evident by reading the Decision of the Republic of Indonesia's People's Consultative Assembly No. XV/MPR/1998 (hereinafter "decision XV/MPR/1998"). This decision is concerned with the implementation of regional autonomy; co-ordination, distribution, and utilization of national resources that are equitable and; balance of the central and regional finances within the frame of the unitary state of the Republic of Indonesia.[6]

In accordance with the decision XV/MPR/1998, regional autonomy is implemented by proportionally giving an authority that is, again, extensive, real, and accountable to regions. The authority is shaped into co-ordination, distribution, and utilization of national resources that are equitable, balanced with regards of the central and regional finances, and implemented on the basis of democratic, community-participatory, fair and justice principles, taking into account regional potentials and diversities.[7]

The principles of establishing regional autonomy referred to in Law No. 22/1999 follows several conditions: first, the implementation of regional autonomy is carried out by taking into account the aspects of democracy, justice, fairness, and regional potentials and diversities; second, it is based on an extensive, real and accountable autonomy; third, in regencies and municipalities the autonomy is extensive and intact, whereas the autonomy of provinces is limited; fourth, it should raise the self-sufficiency of autonomous regions and, therefore, in regencies and municipalities there should no longer be administrative districts; fifth, it should increase the role and functions of the Local House of Representatives, including the legislative function and the monitory function, as well as budgeting and regional administrative functions; sixth, the implementation of the de-concentration principle is placed on provincial areas in their position as administrative areas to execute certain governmental authorities delegated to governors as the government's representatives and; finally, the law acknowledges that the implementation of delegation principle is possible, not only from the central government to the regional administration, but also from the central and regional administrations to village administration, along with budget, facilities and infrastructures, and human resources responsible for reporting the implementation and accountability to the delegating party.

Law No. 22/1999 regarding regional administration was followed by the promulgation of Law No. 25/1999 regarding financial balance between the central and regional administrations.[8] The latter developed several main objectives to deepen preceding principles, among which we find:[9] empowering and increasing the financial ability of the regions; the creation of a regional financing system that is fair, proportional, rational, transparent, participatory, accountable and firm; the

6 People's Consultative Assembly Republic of Indonesia, Decisions of the People's Consultative Assembly Republic of Indonesia, Results of Extraordinary Summit Year 1998 (Jakarta: Secretariat General of the People's Consultative Assembly Republic of Indonesia, 1998).

7 See Explanation of Law No. 22/1999 regarding Regional Government.

8 Indonesia, Law regarding Financial Balance Between Central and Regional Governments, Law No. 25/1999, State Sheet No. 72/1999, State Sheet Addendum No. 3848.

9 See Explanation of Law No. 25/1999.

realization of a financial balancing system between the central and regional administrations reflecting clear distribution of authority and responsibility, supporting the implementation of regional autonomy through transparent operation of regional administration, taking into account the participation of and responsibility to the community, decreasing the gap among the regions in their capability of financing the autonomy, and ensuring the source of regional finances coming from their own regions; the confirmation of the financial accountability system by regional administration and becoming a reference in the allocation of state income for regions and for regional finances.

Various basic rules and other legislative regulations have followed in the form inter alia of the second amendment of the 1945 Constitution, decisions of the People's Consultative Assembly, laws, government regulations, presidential decisions, ministerial decisions, and circulation letters. Some of these rules will be described in the subsequent sections of this paper.

I. The Constitutional Foundation

The Indonesian People's Consultative Assembly in its first Annual Summit held in August 2000 produced several basic regulations related to regional autonomy, especially the second amendment of the 1945 Constitution. In the amendment, the old Article 18 was changed and the core principles informing the decentralization in Indonesia are embedded in its text:[10]

Article 18

(1) The Unitary State of the Republic of Indonesia shall be divided into provinces and those provinces shall be divided into regencies (kabupaten) and municipalities (kota), each of which shall have regional authorities regulated by law.
(2) The regional authorities of provinces, regencies and municipalities shall administer and manage their own affairs according to the principles of regional autonomy and the duty of assistance (tugas pembantuan).
(3) The authorities of the provinces, regencies and municipalities shall include for each a Regional People's House of Representatives (DPRD) whose members shall be elected through general elections.
(4) Governors, Regents (bupati) and Mayors (walikota), respectively as head of regional governments of the provinces, regencies and municipalities, shall be elected democratically.
(5) The regional authorities shall exercise wide-ranging autonomy, except in matters specified by law to be the affairs of the central government.
(6) The regional authorities shall have the authority to adopt regional regulations and other regulations to implement autonomy and the duty of assistance.
(7) The structure and administrative mechanisms of regional authorities shall be regulated by law.

10 For the full and updated text of the 1945 Constitution of the Republic of Indonesia see its unofficial translation in Constitutionalism in Asia, Volume 1. Konrad-Adenauer-Stiftung, Singapore (2008) pp. 81-93.

Article 18A

(1) The authority relations between the central government and the regional authorities of the provinces, regencies and municipalities, or between a province and its regencies and municipalities, shall be regulated by law having regard to the particularities and diversity of each region.
(2) The relations between the central government and the regional authorities in finances, public services, and the use of natural and other resources shall be regulated and administered with justice and equity according to law.

Article 18B

(1) The State recognises and respects units of regional authorities that are special and distinct, which shall be regulated by law.
(2) The State recognises and respects traditional communities along with their traditional customary rights as long as these remain in existence and are in accordance with societal development and the principles of the Unitary State of the Republic of Indonesia, and shall be regulated by law.

Later decisions of the Indonesia's People's Consultative Assembly have shaped this constitutional basis. Decision No. III/MPR/2000 is one of them, regulating the sources of law and the structure of legislative regulations. This decision sets a clear hierarchy of the sources of law: first, the 1945 Constitution; second, decisions of the Indonesia's People's Consultative Assembly, third, laws; fourth, government regulations substituting laws; fifth, ordinary government regulations; sixth, presidential decisions and; seventh, regional regulations.[11]

This decision also clarified that a lower law, regulation or decision cannot contradict a higher one.[12] Regulations or decisions of the Supreme Court, the Supreme Audit Board, ministers, the Bank of Indonesia, agencies, institutions or commissions at the same level established by the government, cannot contradict the regulations stated in the hierarchy set in the decision.[13]

The Indonesia's People's Consultative Assembly devoted its following decision -No. IV/MPR/2000- to issue policy recommendations for the implementation of regional autonomy. The decision started by describing several fundamental problems encountered in the implementation of regional autonomy:[14] first, there is not a constitutional mandate towards the central government to implement regional autonomy, and that hampers the smooth evolution of the process of decentralization. Secondly, the strong centralization process has made regional authorities highly dependent on the central government, almost destroying the creativity of communities and their regional administrative apparatus. Third, there has been a wide gap between the central government and the regional authorities, as well as among regional authorities, in the ownership

11 See Article 2 Decision of the People Consultative Assembly Republic of Indonesia No. III/MPR/2000, p. 41.

12 See Article 4 Sub-section (1) Decision of the People's Consultative Assembly Republic of Indonesia No. III/MPR/2000, p. 43.

13 See Article 4 Sub-section (2) Decision of the People's Consultative Assembly Republic of Indonesia No. III/MPR/2000.

14 See Chapter II Decision of the People's Consultative Assembly Republic of Indonesia No. IV/MPR/2000, pp. 50-51.

of natural resources, cultural resources, economic infrastructure and quality level of human resources. Finally, there have also been entrenched interests from various political parties that inhibit the implementation of regional autonomy.

Only then does decision No. IV/MPR/2000 address several recommendations to the central government and the House of Representatives.[15] It suggests that by May 1 2001, the laws regarding special autonomy for the special territories of Aceh and Irian Jaya should be issued, taking into account the will of the communities in those regions; the implementation of regional autonomy in the other regions, in accordance with Law No. 22/1999 and Law No. 25/1999, should encompass all the proper regulations by December 2000 and; the regions that are capable of executing a full autonomy could start its implementation effectively on January 1st 2001. On the other hand, those regions that are not ready to implement full autonomy could do so gradually, proportional to their particular capabilities. If the central government failed to issue all regulations by December 2000, regions capable of implementing full autonomy would be given the opportunity to replace them with regional regulations, which should be adjusted to those emanating from the central government once issued.

With regards to recommendations directed to regional authorities, it was advised that each region made a master plan of the decentralization in its own region, by considering implementation stages, institutional limitations, capacity and infrastructure, budget management system and public management.

For regions with limited natural resources, the decision went on to recommend, financial balance should be made by taking into account the possibility of gaining a share from the benefits of State-Owned Enterprises in their regions and a share from the income tax of the operating regions; whereas for regions with abundant natural resources, financial balance between the central and regional administrations was to consider fairness and appropriateness. Special attention should be granted to regions where the education of human resources is limited.

A co-coordinating team was advised to be established in each region to handle problems among institutions and to help both government and non-government institutions function to ensure the unhampered development of the implementation with a clear program.

Finally, and along with the spirit of decentralisation, democracy and equal relationship between the central government and the regional authorities, an initial pioneering effort was recommended to make a fundamental revision on Law No. 22/1999 and Law No. 25/1999. The revision should be aimed at giving a gradual autonomy to provinces, regencies, municipalities and villages.

II. Some Related Laws and Regulations: an Overview of the First Two and a Half Years Period (1999 – 2001)

As discussed above, the legalization of Law No. 22/1999 and Law No. 25/1999 has been followed by the implementation of various basic regulations and other legislative products. Let us focus in the most essential decentralization regulations, especially during the period between 1999 and 2001, the first two and a half year of the decentralization policy implementation, that

15 See Chapter III Decision of the People's Consultative Assembly Republic of Indonesia No. IV/MPR/2000, pp. 51-52.

have proven to be crucial. Within this period the government issued hundreds of implementing laws and regulations on decentralization.

Among basic and legislative regulations we consider: laws, government regulations, presidential decisions, ministerial decisions and circulation letters. This list is based on two criteria: first, hierarchy, based on the position of basic regulations and legislative regulations in the Indonesian legal system, and second, chronology, based on the time order of the establishment or legalization of basic and legislative regulations.

Law

There is a long list of laws, especially enacted within the 1999 – 2001 period, that are related to decentralization. Aside from the two laws that have been discussed above, namely, Law No. 22/1999 and Law No. 25/1999, there are four other laws promulgated during the 1990 -2001 period that will be discussed herein, that is, Law No. 28/1999, Law No. 34/1999, Law No. 41/1999 and Law No. 43/1999.[16]

Law No. 28/1999.

Issued on May 19 1999, its name is "State Operations that are Clean and Free of Corruption, Collusion, and Nepotism Law."[17] Although this law does not directly regulate regional autonomy, some of its parts are related to the regions. For instance, the meaning of "State Operation" in Chapter II includes governors. Besides, in the "membership of the four sub-commissions", one of them is the Sub-Commission on Regional Government-Owned Enterprises. Essentially, the law is aimed at covering the whole state operation, both in the central and regional administrations.

Law No. 34/1999

This law regulates the Provincial Government of Jakarta Indonesian Capital City Administration, established on 31 August 1999.[18] The background of the establishment of the Law is that Jakarta as the capital city of Indonesia is a Province that has unique characteristics, different from other provinces regarding task loads, responsibilities, and more complex challenges. The complexity is also related to its existence as the centre of the state government, limited territory factor, high population and all the impacts on settlement aspects, territorial management, transportation, communication, and other factors. To address such multifaceted challenges it is deemed crucial to provide autonomy to the province to enable the area to develop Jakarta in a unitary plan, implementation, and control. As a consequence, Jakarta is expected to be able

16 For other laws within the 1999 – 2001 period related to decentralization see: Law No. 7/2000, Law No. 8/2000, Law No. 9/2000, Law No. 10/2000, Law No. 11/2000, Law No. 12/2000, Law No. 13/2000, Law No. 14/2000, aw No. 15/2000, Law No. 23/2000, Law No. 27/2000, Law No. 34/2000, Law No. 38/2000, Law No. 5/2001, Law No. 6/2001, Law No. 18/2001 and Law No.21/2001.

17 See Law regarding State Operations that are Clean and Free of Corruption, Collusion, and Nepotism, Law No. 28/1999, State Sheet No. 75/1999, State Sheet Addendum No. 3851.

18 See Law regarding Jakarta Capital City Special Province Administration the Republic of Indonesia Jakarta, Law No. 34/1999, State Sheet No. 146/1999, State Sheet Addendum No. 3878, section on General Explanation.

to provide quick, accurate, and integrated services to the community. Thus, the area of Jakarta Capital City Administration is divided into municipality and administrative regency territories. Each territory is divided into districts, each of which is then divided into sub-districts. The authority of the Provincial Government of Jakarta Capital City Administration includes the authority in all governmental aspects, except the authority of foreign affairs, defense and security, justice, monetary and fiscal, religion, and other divisions, as regulated in legislative regulations. The provincial government of Jakarta delegates an extensive authority to the administrative municipalities and regencies to improve its services to the community.

Law No. 41/1999

This law regulates forestry and was established on September 30 1999.[19] In line with the running legislative regulations regarding regional administration, the implementation of some operational forest administration is delegated to regional administration at province, regency and municipality levels, while national or macro forest administration remains under the authority of central government. Forest utilization products are part of the state income from natural resources, forestry sector, by considering the balance of their utilization for the interest of both central and regional administrations. Furthermore, due to license holders' responsibility to pay contributions, commissions, and reforestation funds, license holders should also put aside some of their investment budget for the development of human resources, including for research and development, education and training, extension, and forest conservation investment budget. Although central and regional administrations are responsible for monitoring forests, the community also plays a role in the monitoring of forest development implementation, in order to make sure they know the plan for forest establishment, the utilization of forestry products, and the information of forestry.

Law No. 43/1999

This law, established on September 30 1999, regards personnel affairs.[20] In the context of regional autonomy, this law can be related to the implementation of governmental authority decentralization towards regions. Civil servants' responsibility for maintaining the unity and integrity of the nation is highlighted, and this should be achieved by carrying out their duties professionally and responsibly in implementing governmental and developmental functions, and by being clean and free from corruption, collusion and nepotism. The management of civil servants should be regulated holistically by applying uniform norms, standards, and procedures in determining staff formation, recruitment, development, salary and welfare program, and staff dismissal that become the elements of the management of civil servants. This includes both central and regional civil servants. Aside from making the management of civil servants easier, the uniform management can also create uniform behavior and legal protection for all civil

19 Law regarding Forestry, Law No. 41/ 1999, State Sheet No. 167/1999, State Sheet Addendum No. 3888, section on General Explanation.

20 See Law regarding Amendment of Law No. 8/1974 regarding Personnel Affairs, Law No. 43/1999, State Sheet No. 169/1999, State Sheet Addendum No. 3890, section on General Explanation.

servants. After Law No. 22/1999 decentralization of personnel affairs should be pushed to regions.

Government Regulations

Government regulations have been one of the main engines of decentralization in Indonesia. Particularly directed at developing the principles set in the laws, the structure and financial attributes of the regional authorities, inter alia, have been formulated through this type of regulation. Let us emphasize in some government regulations enacted during the 1999 – 2001 period, categorizing it according to the topics they regulate, namely, structure of regional administrations, regional finances, transfer of capital cities and civil servants.[21]

Structure of Regional Administrations

The shape of the decentralized provinces has been substantially designed through government regulations, largely –although not exclusively- due to the responsibility posed on the Indonesian government's shoulders through Law No. 22/1999.[22] This way, Government Regulation No. 84/2000, issued on 25 September 2000, regulates the guidelines of the regional apparatus organization. This regulation is concerned with six main issues: first, the establishment of a regional apparatus organization; second, the position, duties, and functions of the provincial apparatus; thirdly, with the position, duties, and functions of the regency and the municipality apparatus; fourth, with the position, duties, and functions of the Secretariat of the Regional Consultative Council; fifth, with organizational structures; and lastly with the rank, recruitment, and dismissal rules. The Regional Apparatus Organization is later approved by a regional regulation. The descriptions of the main duties and functions of the regional apparatus are legalized by a decision of the head of the region.

Regional establishment requirements, expansion criteria, elimination, and merger were determined in Government Regulation No. 129/2000, issued on December 13 2000. In line with Law No. 22/1999, the establishment of a new autonomous region is feasible by splitting a region as long as it meets the socio-cultural, socio-political, and demographic requirements, along with the economic capability, regional potentials, scope of the region, and other considerations. Therefore, it is clear that a proposal for the establishment of a new region cannot be processed if it only meets some of the requirements, like the majority of the proposals presented for the establishment of new regions, which are only based on political or historical factors. Establishment of a new region should be advantageous for the national development in general and regional development in particular, aiming at improving public welfare, which in turn can indirectly

21 As a more complete list of government regulations enacted during the 1999 – 2001 period that are related to decentralization see also the following Government Regulations: No. 15/2000; No. 25/2000; No. 47/2000; No. 62/2000; No. 84/2000; No. 96/2000; No. 97/2000; No. 98/2000; No. 99/2000; No. 100/2000; No. 101/2000; No. 104/2000; No. 105/2000; No. 106/2000; No. 107/2000; No. 108/2000; No. 109/2000; No. 129/2000; No. 141/2000; No. 142/2000; No. 151/2000; No. 11/2001; No. 20/2001; No. 39/2001; No. 52/2001; No. 56/2001; No. 65/2001; No. 69/2001 and No. 70/200.

22 See for example Article 12 of the Law No. 22/1999, which states that "further arrangements concerning government and provincial authority shall be regulated by government regulations".

increase regional income. The establishment of a new autonomous region should not make the parent region incapable of implementing regional autonomy. Likewise, provinces, regencies, and municipalities can be eliminated if the regions, based on research, determine that these are no longer capable of implementing their autonomy. Eliminated regions will be merged into one or several neighbouring regions.

The government has also enabled the provincial authorities to supervise regencies and municipalities in different aspects. Government Regulation No. 25/2000 determined that provincial authorities shall police cross regency/municipality services, especially when inter-regional agreements have not been reached; and conflicts of interests among regencies and municipalities will also be settled by provincial authorities.

However, significant political control over the regions is still held by the central government. The implementation of consultation on governor and vice-governor candidates, and legalization and appointment of heads and vice-heads of regions, has also been designed through government regulations, namely Government Regulation No. 47/2000. It decided that the names of governor and vice-governor candidates selected by the head of the Local House of Representatives are to be consulted with the President. The implementation of the consultation is to be delegated to the Minister of Home Affairs on behalf of the President. The approved pair of governor and vice-governor candidates, having gone through a selection process conducted by the House of Representatives, is then approved through a presidential decision.

Seemingly, Government Regulation No. 20/2001 regulates encouragement and supervision of regional governmental authorities. The operation of the governmental administration basically employs the principles of modern management, where managerial functions run simultaneously and proportionally, aiming to achieve the objectives of the organization. To create firmness and consistency in the implementation of a state administration that is efficient and effective for the sake of national development and public welfare, the regional authorities should be guided and supervised, and also to prevent them from becoming sovereign. Regional authorities are, basically, a subsystem of national government. The encouragement and supervision of Regional Government are implicitly an integral part of the system.

Finally, a regional government implementation report has been created and structured through Government Regulation No. 56/2001, issued on July 13 2001. Reports on the implementation of regional autonomy are an important facility that bonds the hierarchical relationship between central and regional governments, protecting the system of the Unitary State. The Heads of Regions are the persons responsible for conducting these reports.

Regional Finances

Although the main principles of the financial engineering of the provinces are found in the Law No. 25/1999, many details of its implementation have been devised through government regulations. The core principle of proportional budget, for instance, was developed in Government Regulation No. 104/2000, "in order to create a system of financial balance that is proportional, democratic, fair, and transparent, based on the distribution of authority between the central and

regional governments."[23] The regulation defines proportional budget as a source of regional income coming from the state and expenditure budget to support the implementation of regional authority within the process of giving autonomy to the region, especially oriented to improve the services and welfare of the community. The concept of proportional budget is comprised of three pillars: first, the regional share from land and building tax income, land and building rights acquisition fee, and income from natural resources; second, the general allocation budget, which is aimed at even distribution by taking into account regional potency, area, geographical condition, population, and the income level of the community, so that the gap between developed Regions and developing Regions can be minimized; and thirdly, the special allocation budget, a flexible pillar designed to help regions with their special needs.

Management and accountability of regional finances is also found in this category, through Government Regulation No. 105/2000. It establishes that the financial management system is basically a subsystem of the governmental system, following the constitutional patterns set in articles 23 and 78 to 86 of the 1945 Constitution. However, particular details of the financial management system and procedures are determined by each region. Diversity of systems is possible as long as it is still in line with this government regulation. It represents an attempt to encourage regions to be able to take creative initiatives in improving and updating their systems and procedures, and to review their systems continuously, aiming at increasing the efficiency and effectiveness on the basis of local condition, needs, and capability.

Regional debts are controlled by Government Regulation No. 107/2000. It develops the principle set in Law No. 25/1999 that considers regional debts as one of the regional income sources for decentralization. Loan budget is an addition to the available regional income sources and aimed at funding the provision of regional infrastructure or other fixed properties that are related to activities that can increase the income, enabling the region to pay its debts and give advantages to public services.

The rules regarding the financial position of the head of region and vice-head of region are found in Government Regulation No. 109/2000. These figures need to be given financial rights for them to execute their duties and functions as state functionaries, which will be provided by the state income and expenditure budget. In implementing their positions as the head of region and vice-head of region, the financial aid they receive is aimed to coordinate social unrest prevention, public protection, and other activities in relations to National Unity and integrity building.

Finally, regional financial information and regional tax have been devised in Government Regulation No. 11/2001 and Government Regulation No. 65/2001, respectively. The financial information of the regions is needed by the central government, especially the Minister of Finance. Regional tax principles are designed so that regional self-sufficiency and development can be achieved.

Transfer of Capital Cities

The rapid growth shown by different regencies have pushed the government to take action in order to canalize it, promoting what they call "even and balanced development among

23 Law No. 25/1999.

regencies."[24] Transferring the capital city of regencies can help alleviate some of the tensions caused by development, especially those related with territorial space management. This practice can help diminish the concentration in the capital city and create new centers of development that will contribute with "various aspects of governmental administration, development, and community affairs."[25] Jayapura Regency and Lombok Barat Regency have both had their capitals transferred to a less developed but more spacious area. The Sentani Area is the new capital in Jayapura Regency, replacing Jayapura City; whereas the Gerung Area serves now as the capital of the Lombok Barat Regency, in place of Mataram City.

Civil Servants

On 10 November 2000 a series of government regulations were issued in order to modernize the way in which civil servants are considered. Government Regulation No. 96/2000 focused on the authority of recruitment, transfer and dismissal of civil servants. In accordance with Law No. 8/1974 regarding Personnel Affairs, as replaced by Law No. 43/1999, civil servants can be moved from one department, institution, province, regency or municipality to another. This means that all civil servants are a unity, but work in different places.

Government Regulation No. 97/2000 versed on the formation of civil servants. Determinations on the formation of civil servants aim at enabling the State Organisational Units (SOU) to have a sufficient number of qualified staff in accordance with its workload and responsibility.

Government Regulation No. 98/2000 was meant to control the recruitment of civil servants, considered as a process to fill vacant formations. Formation vacancy in a SOU is commonly available due to diverse factors. Recruitment should be based on the needs, either in the number and quality of staff needed, or functionary competence required. In relations to that, every citizen of Indonesia that meets the requirements stated in this government regulation has the same opportunity to apply to be recruited as a civil servant.

Government Regulation No. 99/2000 regulates promotion of civil servant. Promotion is hitherto defined as an appreciation given to civil servants for their work performance and dedication for the country and it is aimed at encouraging them to improve. Every superior is responsible for considering the promotion for his/her staff to be given at the right time. All institutions are required to apply the same norms, standards and procedures for the promotion of civil servants.

Government Regulation No. 100/2000 controls the recruitment of civil servants in structural functions, and was intended to increase the professionalism and quality of civil servants, focusing on competitive superiority and bureaucracy ethics. It also contemplated civil servants' functions as unifiers and binders of the Unitary State, taking into account the development and intensity of demands on openness, democratisation, protection to human rights, and the environment.

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24 Government Regulation No. 62/2000; issued on August 7 2000, which regulates the transfer of capital city of Lombok Barat Regency from Mataram City to Gerung Area.

25 Government Regulation No. 15/2000; issued on March 10 2000, regulating the transfer of capital city of Jayapura Regency from Jayapura City to Sentani Area.

Finally, Government Regulation No. 101/2000 established the education and in-service training procedures for civil servants. Improvements were required in the areas of attitudes and spirits of dedication, oriented on the interest of the community, nation, country, and fatherland; technical, managerial, and leadership competence; and efficiency, effectiveness and quality of job implementation.

Presidential Decisions or Presidential Decrees

The Presidential Decision or Presidential Decree is a kind of regulation under the government regulation level. Constitutional law experts in Indonesia have often attributed the basis of this kind of regulation to the disposition in Article 4 paragraph (1) of the 1945 Constitution, which states: "The President of the Republic of Indonesia shall hold the power of government in accordance with the Constitution".[26]

There are several presidential decrees or presidential decisions relating with decentralization issued in this 1999 – 2001 period, and they are herein divided according to the main subjects they raise, namely, ministries, budget, the Regional Autonomy Advisory Council, the coordinating team for the follow up of the implementation of Laws Nos. 22/1999 and 25/1999, the Regional Employment Board and the implementation of the regional administration monitoring procedures.[27]

Ministries

It is by presidential decisions that the position, duties, functions, organisational structure and management of state ministries is regulated. On 10 November 1999 Presidential Decision No. 134/1999 was issued. What is most important in relation to regional autonomy in this decree is the appointment of State Minister of Regional Autonomy, which at that time was occupied by Prof. Dr. Ryaas Rasyid, M.A. The duty of the State Minister of Regional Autonomy is to help the President in implementing administration affairs in the area of regional autonomy. In the frame of executing that duty, State Minister of Regional Autonomy should perform at least five main functions: first, government policy formulation in the aspect of regional autonomy and supervision of its implementation; second, coordination and extension of plan arrangement integration and regional administration improvement programs; third, acceleration of transfer of authority by departments and non-department governmental institutions to provincial, regency and municipality administrations in the frame of optimizing regional autonomy; fourth, evaluation of the implementation of decentralization and regional autonomy; and finally, presentation of reports of evaluation, recommendation, and consideration in each field of duty and function to the President.

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26 See Article 4 paragraph (1) of the 1945 Constitution.

27 As a more complete list of Presidential Decisions enacted during the 1999 – 2001 period that are related to decentralization see also: No. 134/1999; No. 136/1999; No. 17/2000; No. 18/2000; No. 49/2000; No. 52/2000; No. 84/2000; No. 151/2000; No. 157/2000; No. 159/2000; No. 178/2000; No. 181/2000; No. 10/2001; No. 14/2001; No. 17/2001; No. 40/2001; No. 62/2001; No. 74/2001; No. 131/2001; No. 1/2002; No. 2/2002; No. 4/2002; No. 5/2002.

Presidential Decision No. 136/1999 established some of the functions of the Department of Home Affairs, stressing that it is as a body dedicated to help the president in implementing some governmental and developmental general duties in the aspect of domestic administration. In the frame of executing that duty, the Minister of Home Affairs should establish implementation policies, technical policies, state property management, and formulation and preparation of policy on general administration, national integrity, preserving the Unitary State, and community protection on the basis of the existing laws. The implementation of some duties of community empowerment in region and village development is also among its duties.

Budget

In relation to budgetary planning, presidential decrees are quite instrumental. Presidential Decision No. 17/2000, issued on 21 February 2000, focused on the implementation of state income and expenditure budget, confirming that its implementation must be executed in line with the existing laws, especially Law No. 22/1999 regarding regional administration and Law No. 25/1999 regarding financial balance between central and regional governments. Further presidential decrees versed on the provincial, regency and municipal General Allocation Fund. In the budget of the year 2000 Presidential Decision No. 181/2000 determined the General Allocation Fund establishment and estimation. The amount of the General Allocation Fund for budgeting year 2001 was set at twenty five per cent of the domestic income after a subtraction of the portion to be distributed to the regions. The amount of the General Allocation Fund for provincial areas was set at ten per cent, whereas for regency and municipality areas it was set at ninety per cent. The need of General Allocation Fund for a particular Region is estimated by taking into account the 'balancing factor' to anticipate decrease of regional capability in funding expenditures that become the region's responsibility. That balancing factor is set up by taking into account the expenditure burden of each region predicted on the basis of the amount of the Regional Routine Fund and the Regional Development Fund of an ongoing year, adding the prediction of the personal expenditure burden transferred from the vertical authority to regional staff. Presidential Decision No. 131/2001, issued on 31 December 2001, ratified the same formula and allocation percentage for the budgeting year of 2002.

The Regional Autonomy Advisory Council

The Regional Autonomy Advisory Council is a consultation forum at the Central level that is responsible to the President. It has a duty to give considerations to the President regarding the establishment, elimination, merger and expansion of regions; central and regional financial balance; and the capability of regencies and municipalities to implement certain authorities.[28] Through Presidential Decision No. 49/2000, issued on 7 April 2000, the functions of this body were clearly determined. It was given a mandate to conduct research on the recommendation of establishment, elimination, merger and expansion of provinces, regencies and municipalities; provide considerations on the making of regional autonomy policy and financial balance between central and regional governments; and monitor and evaluate the implementation of regional

28 See Article 11 Law No. 22/1999.

autonomy policy. The Council was formed by the Minister of Home Affairs as the head, the Minister of Finance and the State Minister of Regional Autonomy as the vice-heads, the Minister of Defence, the Minister of State Apparatus Empowerment, Secretary of State, Representatives of the Regional Government Association, and Regional Representatives. An amendment was presented through Presidential Decision No. 84/2000, issued on 7 June 2000, mainly adding the Head of the National Development Planning Board as a member of the Council; besides some changes in the organizational structure of the Secretariat of the Council. More fundamental changes were presented in Presidential Decision No. 151/2000, issued on 26 October 2000. With the incorporation of the State Minister of Regional Autonomy in the Department of Home Affairs, his role as vice-head is removed. Another novelty is the inclusion of regional government association representatives, including the Governor of West Java Province as Provincial Government Association Representative; the Head of Kutai Regency as Regency Government Association Representative; and the Mayor of Surabaya City as City Government Association Representative. Seemingly, regional representatives are included, namely, Prof. Dr. Tabrani Rab, from Riau Province, as Provincial Representative; Drs. H.M. Parawansa, from South Sulawesi Province, as Provincial Representative; H. Karimuddin Hasybullah, S.E., from North Aceh Regency, as Regency Representative; Ir. H.M Said, from South Hulu Sungai, as Regency Representative; Drs. Eliazer Mayor, from Sorong City, as City Representative; and H. Bachtiar Djafar, from Medan City, as City Representative.

The Coordinating Team for the Follow up of the Implementation of Laws Nos. 22/1999 and 25/1999

Presidential Decision No. 52/2000, issued on 7 April 2000, later amended by Presidential Decision No. 157/2000, issued on 10 November 2000, sets the framework of the Central Working Team for the implementation of Law No. 22/1999 regarding regional administration and Law No. 25/1999 regarding financial balance between central and regional governments. Its main duties consist of formulating and arranging strategy, policy and concept of the implementation of the laws; establish phases and priority arrangement for the follow up implementation of the laws; supervise and facilitate the regulation arrangement of the implementation of the laws by the authorities concerned; socialize the laws and their implementation regulations; formulate and establish steps needed to be taken by the government to accelerate and smoothen the implementation and realisation of regional autonomy; and report the result of duty implementation to the President periodically and anytime required.

Regional Employment Board

The Regional Employment Board has a principle duty help Regional Employment Officials implement the management of Regional Civil Servants. It was organizes by Presidential Decision No. 159/2000, issued on 10 November 2000. In implementing its principle duty as meant in Article 3, the Regional Employment Board has shall prepare the arrangement of regional regulation in the aspect of employment in accordance with norms, standards and procedures regulated by the government; plan and develop regional employment; prepare technical policy for regional employment development; prepare and executing the appointment, promotion,

transfer and dismissal of regional civil servants in accordance with norms, standards, and procedures regulated by the Law; prepare and establish Regional Civil Servant retirement; prepare the establishment of salary, extra allowance, and welfare of regional civil servants; implement regional civil servant administration; manage the regional employment information system; and report regional employment information to the State Employment Board.

Implementation of the Regional Administration Monitoring Procedures

The regional administration monitoring procedures are implemented in accordance to Presidential Decision No. 74/2001, issued on 18 June 2001. It consists of functional, legislative, and community monitoring. It includes all regional authorities on the basis of decentralisation, de-concentration and task assistance principles. Based on the result of monitoring, heads of working units of provincial, regency and municipal governments can take diverse follow-up actions, such as administrative action in accordance with existing regulations; compensation claims; civil prosecution; criminal offence report; and improvement of institutional, personnel and management affairs. It is stressed in the decree that those who execute the supervision on the implementation of the follow-up actions are the ministers head of non-department governmental institutions, the governors, the head of regencies and the mayors.

Ministerial Decisions

In the implementation of regional autonomy policy, from the legal point of view there is a fundamental problem regarding the position of ministerial decisions in the regulation order of the Republic of Indonesia. As commented above, one of the products of the annual session of the Republic of Indonesia's People's Consultative Assembly in August 2000 was the Decision of Republic of Indonesia's People's Consultative Assembly No. III/MPR/2000, regarding legal sources and regulation order.[29] Underlying the composition of that decision was a judgement claiming that the legal sources described on the Decision of the Temporary People's Consultative Assembly No. XX/MPRS/1966 had caused misunderstanding; hence it could not be used as a basis of regulation composition anymore.[30] This judgement evidences how Decision No. III/ MPR/2000 was long overdue.

However, Decision No. III/MPR/2000 turned out to contain problems as well, just like the decision it replaced. One of the issues it raised was related to the position of ministerial decisions, the implementation of which had caused heated debates. Many people, especially at the regional administration level, questioned whether such decisions are a legitimate legal source.

The question from those within the regional administration takes more relevance when contrasted with the above discussed Decision of the Republic of Indonesia's People's Consultative Assembly No. IV/MPR/2000, which was a policy recommendation in the implementation of regional autonomy. According to it, "[i]f all government regulations have not been issued yet by the end

29 People's Consultative Assembly Republic of Indonesia, Annual Summit MPR RI 7-18 August 2000, op.cit., pp. 37-44.

30 Ibid., section on Consideration, Item e.

of December 2000, regions which already have full capability to implement regional autonomy are given the opportunity to issue regional regulations that stipulates its implementation. If government regulations have been issued, regional regulations that are concerned have to be adjusted to the related government regulation."[31]

Several regional authorities considered that this recommendation is a clear evidence that the implementation of regional autonomy only 'obeys' laws and government regulations, hence it disregards presidential and ministerial decisions.

In a meeting held by "Across Indonesia Regency Administration Association" with some ministers of the National Unity Cabinet in the administration of President Abdurrahman Wahid whose duties are related to regional autonomy, some heads of regencies brought forward a claim towards the existence of some ministerial decisions the content of which were claimed to contradict Law No. 22/1999 and Law No. 35/1999.

Dissatisfied, the heads of regencies questioned the legitimacy of ministerial decisions as legal sources. By referring to Article 2 of the Decision of the Republic of Indonesia's People's Consultative Assembly No. II/MPR/2000, some of them argued that a form of regulation called 'Ministerial Decision' did not exist anymore. Therefore, according to them, all ministerial decisions issued since 18 August 2001 were invalid and did not have any binding power.[32]

The central government did not remain silent before the question. On 23 February 2001 the Minister of Justice and Human Rights issued a Letter No. M.UM.01.06-27 regarding the position of ministerial decisions, signed by the late Baharuddin Lopa. The essence of the letter stated that the stipulation in Article 4 (2) of the Decision of the Republic of Indonesia's People's Consultative Assembly No. III/MPR/2000 indicates that Ministerial Decision is part and parcel of regulations able to be issued by every minister as the president's assistants. The material content of all ministerial decision is a substance delegated to the minister by law, government regulation and presidential decision. The substance can directly be delegated by ministerial decision if the content is technical, in accordance with the authority of the concerned minister. In relation to Law No. 22/1999, it is confirmed that ministerial decisions as a type of regulation issued by the central government and valid in all areas throughout the Republic of Indonesia are higher in the hierarchy than regional regulations. Thus, if a regional regulation which has a regulative characteristic contradicts a ministerial decision, the former can be declared invalid by the central government on the basis of the stipulation of Articles 113 and 114 of Law No. 22/1999. Regulative authority that has been substantially transferred to regions in accordance with Government Regulation No. 25/2000 also has to take due regard to ministerial decisions the subject of which is delegated from a higher regulation.

31 See the Decision of the Republic of Indonesia's People's Consultative Assembly No. IV/MPR/2000.

32 For further information on the legitimacy of ministerial decisions as legal souces in Indonesia see Satya Arinanto, "Jurisdictional Position of Ministerial Decision in Decision of the Republic of Indonesia's People's Consultative Assembly No. III/MPR/2000: Jurisdictional Problems Encountered by Central Government and Regional Government" (This Paper was presented in the Co-ordinating Meeting of Initiative Recommendation Composition held by the Directorate General of Regulation of the Department of Justice and Human Rights in Jakarta, 6 December 2001), p. 4.

This letter has given a particular strategic direction regarding the existence of ministerial decision in the regulation order of the Republic of Indonesia. However, the fact that the letter was written by a minister undermines its weight, according to the view of many regional authorities. They questioned whether a minister has a right to give an explanation towards material content of a decision of the People's Consultative Assembly, and therefore did not consider the letter to have any legal force.

Consequently, the Republic of Indonesia's People's Consultative Assembly should pay attention to this matter. In its upcoming sessions –be it general, extraordinary or annual– improvement towards the Decision No. III/MPR/2000 is expected. The decision contains some other problems besides the one related to the legitimacy of ministerial decisions. One of them is related to the position of a government regulation that replaces a law. According to the 1945 Constitution, government regulations and laws are equal in the hierarchy.

The People's Consultative Assembly had not issued any regulation in this matter by November 2001. However, it issued a decision to establish a Constitution Judicature[33] as an institution intended to, inter alia, settle disputes between central and regional governments, including those related to the contradiction of the material content of a lower regulation and a higher one.

Despite the controversy, several ministerial decisions have been issued to regulate regional autonomy. Some of the most relevant ones are discussed below, divided according to the minister who dictated them.[34]

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33 See the Third Amendment of the 1945 Constitution.

34 An extensive list of all the ministerial decisions enacted during the 1999 – 2001 period is provided herein: Decision of the Minister of Home Affairs No. 61/1999; Decision of Minister of Home Affairs No. 63/1999; Decision of Minister of Home Affairs No. 64/1999; Decision of the Minister of Home Affairs No. 65/1999; Decision of the Minister of Finance No. 82/KMK.04/2000; Decision of the Minister of Finance No. 83/KMK.04/2000; Decision of the Minister of Finance No. 84/KMK.04/2000; Decision of the Minister of Finance No. 112/KMK.04/2000; Decision of the Minister of Home Affairs No. 16 Year 2000; Decision of the Minister of Home Affairs No. 118-281/2000; Decision of the Minister of Home Affairs No. 19/2000; Decision of the Minister of Home Affair No. 118.05-336/2000; Decision of the Minister of Home Affairs and Regional Autonomy No. 188-2-198; Decision of the Minister of Energy and Mineral Resources No. 1451/K/10/ MEM/2000; Decision of the Minister of Energy and Mineral Resources No. 1452K/10/ MEM/2000; Decision of the Minister of Energy and Mineral Resources No. 1453 K/29/MEM/2000; Decision of the Minister of Energy and Mineral Resources No. 1454 K/30/MEM/2000; Decision of the Minister of Energy and Mineral Resources No. 1455 K/40/MEM/2000; Decision of the Minister of Forestry No. 05. 1/Kpts-II/2000; Decision of the Minister of Forestry No. 06. 1/Kpts-II/2000; Decision of the Minister of Forestry No. 07. 1/Kpts-II/2000; Decision of the Minister of Forestry No. 08. 1/Kpts-II/2000; Decision of the Minister of Forestry No. 09. 1/Kpts-II/2000; Decision of the Minister of Forestry No. 10. 1/ Kpts-II/2000; Decision of the Minister of Forestry No. 11. 1/Kpts-II/2000; Decision of Minister of Forestry No. 12. 1/Kpts-II/2000; Decision of the Minister of Forestry No. 13. 1/Kpts-II/2000 ; Decision of the Minister of Forestry No. 14. 1/Kpts-II/2000; Decision of the Minister of Finance No. 514/KMK.04/2000; Decision of the Minister of Finance No. 515/KMK.04/2000; Decision of the Minister of Finance No. 516/KMK.04/2000; Decision of the Minister of Finance No. 517/KMK.04/2000; Decision of the Minister of Finance No. 518/KMK.04/2000; Decision of Minister of Finance No. 519/KMK.04/2000; Decision of the Minister of Health and Social Welfare No. 1747/MenkesKesos/SK/XII/2000; Decision of the Minister of Finance No. 523/KMK.03/2000; Decision of the Minister of Finance No. 556/KMK.03/2000; Decision of the Minister of Finance No. 6/KMK.04/2001; Decision of the Minister of Forestry No. 20/Kpts-II/2001; Decision of the Minister of Forestry No. 21/Kpts-II/2001; Decision of the Minister of Home Affairs and Regional Autonomy No. 13/2001; Decision of the Minister of Finance No. 344/KMK.06/2001; Decision of the Minister of Home Affairs and Regional Autonomy No. 22/2001; Decision of the Minister of Home Affairs and Regional Autonomy No. 23/2001 and; Decision of the Minister of Home Affairs No. 41/2001.

Minister of Home Affairs

Technical decisions related to decentralization are regularly taken by the Minister of Home Affairs. The guides and term adjustment in the implementation of village and district administrations is an example issued on 6 September 1999 under the Ministerial Decision No. 63/1999.[35] This decision enables socio-cultural conditions and customs of the local community to be taken into account when deciding village terms adjustment. It also designates the head of regency to conduct the adjustments, after getting considerations from the Head of Local House of Representatives.

The general guidelines regarding the establishment of villages[36] and districts[37] were issued on 6 September 1999 under Ministerial Decisions No. 64/1999 and 65/1999, respectively. They covered, inter alia, the establishment, elimination, and merger of villages and districts; the form and structure of village administration; village financial affairs; inter-village collaboration; and the procedure for the transformation of village into district. The Local House of Representatives is given a substantive role since most of the procedures covered by these decisions require its approval.

The guidelines for the establishment of regional government association and the appointment of its representatives as members of the Regional Autonomy Advisory Council are defined in the Ministerial Decision 16/2000, issued on 24 May 2000. The Regional Government Association is regarded as an independent organisation established by the regional governments with the objective of increasing inter-region collaboration. It is composed of the Provincial Government Association, the Regency Government Association, and the Municipality Government Association.

The Secretariat of the Regional Autonomy Advisory Council was established due to the Ministerial Decision No.118-281/2000, issued on 16 June 2000. This Secretariat is divided in two: the first half focuses on regional autonomy aspects, which shall research policy making of establishment, elimination, merger and expansion of regions, besides the capacity of regencies and municipalities to exert autonomy. The second part of the Secretariat verses on central and regional finance balance aspects, therefore it prepares material on financial balance and the amount of the General Allocation Fund. The guidelines for the appointment of the regional representatives before the Regional Autonomy Advisory Council were issued the same day under Ministerial Decision No. 19/2000.[38] The Council has a total of six regional representatives coming from provinces, regencies and municipalities, two of each. The procedure to select the

35 The Department of Home Affair, Decision of the Minister of Home Affairs Regarding the Implementation Guides and Terms Adjustment in the Implementation of Village and District Administrations, Ministerial Decision No. 63/1999, Article 2.

36 The Department of Home Affair, Decision of the Minister of Home Affair Regarding General Regulating Guidelines for District, Ministerial Decision No. 64/1999.

37 The Department of Home Affair, Decision of the Minister of Home Affair Regarding General Arrangement Guidelines for the Establishment of District, Ministerial Decision No. 65/1999.

38 The Department of Home Affairs, Decision of the Minister of Home Affairs Regarding Guidelines of the Appointment of Regional Representatives as Members of the Regional Autonomy Advisory Council, Ministerial Decision No. 19/2000.

additional members of the Council was not issued until 24 July 2000, under Ministerial Decision 118.05-336/2000, but it was given retroactive force.[39]

Ministerial Decision No. 118.05-336/2000 regulates that Additional Members of the Regional Autonomy Advisory Council in the field of Regional Autonomy and Central and Regional Financial Balance are Expert Staff of the Department of National Education as a Member of the Regional Autonomy Secretariat and the Directorate General of the Department of Finance as a Member of the Central and Regional Financial Secretariat.[40] The rules make sure that the additional representatives and their successors come from different regions of Indonesia, and two years is set as their office period.

Finally, the Minister of Home Affairs is responsible as well for regulating the regional law products and their arrangement procedures. Ministerial Decisions No. 22/2001 and 23/2001 establish how it is the Heads of Working Units of the Regional Secretary the ones entitled to initiate regional law products, and the methodology is clearly set. The law product plan proposals must determine the aims and objectives of the arrangement, the legal basis, the subjects to be arranged and the connection with other regulations.

Minister of Finance

Ministerial Decision No. 82/KMK.04/2000, issued on 21 March 2000, regulates the Distribution of Income from Land and Building Taxes between Central and Regional Governments. In this Ministerial Decision some matters are regulated as follows:[41] Income from Land and Building is State Income and fully deposited into State account. Ten per cent of that income is the Central Government's share, whereas ninety per cent of it is the Regional Government's share, which is later divided in sixteen point two per cent for Provincial Area, sixty four point eight per cent for regency and municipality areas, and nine per cent is for Collecting Fee, which is distributed to the Directorate General of Tax and Region.

Ministerial Decision No. 83/KMK.04/2000, issued on 21 March 2000, regulates the Distribution and Utilisation of Collecting Fee of Land and Building Taxes. Which is a fund spent for funding the operational activities of the collecting of Land and Building Taxes.[42]

Ministerial Decision No. 516/KMK.04/2000, issued on 14 December 2000, states that the amount of the value acquisition of tax objects free from tax is decided by every region and municipality,[43] setting maximum amounts of three hundred million rupiahs for those in kinship

39 The Department of Home Affairs, Decision of the Minister of Home Affairs Regarding Additional Member of the Regional Autonomy Advisory Council Secretariat, Ministerial Decision No. 118.05-336/2000, Article 3.

40 Ibid., Item 1.

41 The Department of Finance, Decision of the Minister of Finance Regarding Division of Income between Central and Regional Governments, Decision of the Minister of Finance No. 82/KMK.04/2000, Article 1 Sub-sections (1), (2), and (3).

42 The Department of Finance, Decision of the Minister of Finance Regarding Distribution and Utilisation of Collecting Fee of Land and Building Taxes. Ministerial Decision No.83/KMK.04/2000, Article 1.

43 The Department of Finance, Decision of the Minister of Finance Regarding theAmount of Value of the Acquisition Formulation Procedure of Tax Objects Free of Tax and the Acquisition Tax Fee upon Land and Buildings, Ministerial Decision No. 516/KMK.04/2000, Article 1.

relation of direct blood line in one degree of the person who leaves the legacy grant, and only sixty million rupiahs for all others.

Ministerial Decision 519/KMK.04/2000, issued on 14 December 2000, states that the revenue from the right acquisition fee upon land and buildings is shared by central and regional governments with twenty percent for the central government and eighty percent for the regional government.[44] Furthermore, the eighty percent of the local share is divided in sixteen percent for provincial area, sixty four percent for the manufacturing regency and municipality area.

Ministerial Decision No. 6/KMK.04/2001, issued on 9 January 2001, regulates the Implementation of Domestic Individual Income Tax Revenue Sharing Profit and Income Tax Between Central and Regional Governments Article 21, as mentioned in Article 2 Government Regulation No. 115/2000 is shared between central and regional governments with eighty percent for the central government and twenty percent for the provincial government. Meanwhile, the share for the Regional Government is divided in forty percent for provincial area and sixty percent for regency and municipality area. Furthermore, it is also decided that allocation of the regional government share to each regency and municipality is regulated on the basis of the governor's recommendation, taking into consideration factors such as total population, area space, and other relevant factors in the frame of even distribution.

Minister of Forestry

Ministerial Decisions Nos. 06, 07, 08, 09 and 10 1/Kpts-II/2000 were issued on 6 November 2000, and regulate the criteria and standard in natural production forests for the license of forest products utilization and forest harvesting products; the area, environmental service and forest products utilization and regulates the sustainable production forest management. Several guidelines are set for governors, heads of regencies and mayors. A Reforestation Fund Tariff is created in Ministerial Decision No. 11. 1/Kpts-II/2000, reaffirming that reforestation fund is non-tax state income. Forest products circulation and marketing rules are covered in Ministerial Decision No. 13. 1/Kpts-II/2000.

Ministerial Decision No. 20/Kpts-II/2001, issued on 31 January 2001, regulates the general and standard patterns and criteria of area and forest rehabilitation, which are guidelines in the frame of area and forest rehabilitation for central and regional governments, as well as for the people.[45] The objective of area and forest rehabilitation is to recover damaged areas and forest resources so that they can function optimally and can give benefits to all stakeholders, guarantee environmental balance and water system of river flow area, supporting the sustainability of forestry development.

44 The Department of Finance, Decision of the Minister of Finance Regarding the Profit Revenue Sharing Arrangement of the Right Acquisition Fee upon Land and Buildings Between Central and Regional Governments, Ministerial Decision No. 519/KMK.04/2000, Article 2 Sub-section (1).

45 The Department of Forestry, Decision of the Minister of Forestry Regarding General and Standard Patterns and Criteria of Area and Forest Rehabilitation, Ministerial Decision No. 20/Kpts-II/2001, Article 2.

III. Current Development: Some Frame of Thinking

As stated in the Elucidation of Law No. 32/2004 on regional administration[46] with regards to what is mandated in the 1945 Constitution, the regional administration shall be authorized to regulate and take care of its own government affairs according to the principles of autonomy and assuming assistance. The granting of such broad autonomy to the regions is directed to accelerate the public welfare efforts through the improvement of the service, empowerment and the role of the public. In addition, through such broad autonomy, the regions are expected to enable themselves to increase their competitiveness in view of the principles of democracy, equal distribution of wealth, justice, special characteristics, uniqueness, potentials and diversities of the regions under the unitary state of the Republic of Indonesia.

The aspects corresponding to finance, public service, utilization of natural resources and other sources must be carried out fairly and harmoniously. Apart from that, it is essential to view the opportunities and challenges in the global competition by making use of the developments of science and technology. In order to make sure that such role is exercised, the regions shall be given broad opportunities along with the rights and obligations in implementing the regional autonomy within the integrated system of running the state administration.

Any amendment of laws must view the existing laws related to political affairs, among others Law Number 12 of 2003 regarding the general elections for members of the House of Representatives, Regional Representative Council, and the Regional House of Representatives; Law Number 22 of 2003 regarding the Structure and Position of the People's Consultative Assembly the House of Representatives, Regional Representative Council, and the Regional House of Representatives; Law Number 23 of 2003 regarding the Election of the President and Vice President. Aside from that, it imperative to observe the other laws related to state finance affairs, namely Law Number 17 of 2003 regarding the State Finance, Law Number 1 of 2004 regarding State Treasury, and Law Number 15 of 2004 regarding the Audit of State Finance Management and Accountability.

The regional economic principles apply the broad economic principles in the context that regions shall be given the opportunity to manage and take care of all government affairs themselves apart from the ones handled by the central government as stipulated in the law. The regions shall have the power to draft their regional laws to provide services, step up the public participation, initiatives and empowerment aimed to improve the public welfare.

In line with such principles, the real and accountable autonomy principle is also applied. The real autonomy principle implies that management of government affairs shall be implemented in accordance to the actual and existing duties, authorities and obligations that have the potential to grow, live and develop according to the regional particularities. Thus, the content and type of autonomy across regions may not be homogeneous.

On the other hand, the autonomy granting aims to empower the regions, including improving the public welfare as the main goal of the national development. The development of regional

46 See section on General Elucidation of Indonesia, Law regarding Regional Administration, Law No. 32/2004, State Sheet No. 125/2004, State Sheet Addendum No. 4437.

Chapter Three: Constitutional Protection of Human Rights

WOMEN'S RIGHTS IN SOUTHEAST ASIA'S CONSTITUTIONS AND THEIR IMPLEMENTATION: THE START OF A LONG PROCESS[1]

Katrin Merhof

I. Introduction - rights and roles

> "No matter what the husband says,
> If he is angry and cursing, and never stops using harsh language
> If he is complaining and cursing because he is not pleased
> You should be patient with him and calm your own anger
> Don't be angry or react improperly to your husband
> (…)
> Don't speak to him as if you consider yourself his equal
> No matter what happens, we must be patient and listen to the harsh words
> (…)
> Even if your husband speaks inappropriately, you shouldn't let the mother know
> Or else your husband will get angry if the mother scolds him
> If you do not keep your silence, but keep talking, the problem will last
> If you keep confronting him, there will be no happiness
> If you complain and nag until everyone in the district knows the problem, there will be no happiness"[2]

This is part of the Cambodian "Chbab Srey", a code of conduct for girls and women that is taught at school and has been handed down from generation to generation for centuries. It clearly illustrates the dominant attitude in Cambodian society, where behaviour according to the "Chbab Srey" is expected.

In other Southeast Asian countries, a similar picture of women is also deeply embedded in the society: Women are strongly associated with the home and family spheres, and their valuation as family members has reinforced women's identities as being critically intertwined with their status as wife, mother, and daughter(-in-law).[3] This social role influences the perception of women as

1 The article is based on information up to and including September 2008.

2 This is an unofficial translation, oriented on the translation of PADV Cambodia (Partnership Against Domestic Violence) focusing on meaning and not exact wording.

3 *International Women's Rights Actions Watch*: Country Report Vietnam, <http://iwraw.igc.org/publications/countries/vietnam.htm>.

having rights significantly: For example, in a survey concerning domestic violence, the number of respondents approving the use of force rose dramatically when a wife appeared to violate the roles of 'good mother' and 'loyal wife'.[4] It includes advice to victims of domestic violence to be more patient, not to provoke their husbands and to persist with the marriage.[5] In addition, it leads to judgments like the following in which a Malaysian court decided that an aircraft was not a "conducive place" for a pregnant woman and that it was therefore understandable that the airline dismissed a pregnant stewardess.[6] It explains the decision of a municipal court in which Muslim women were asked not to use heavy lipstick or wear high-heels as they could lead to immoral activities.[7]

Of course the social role of women is not supposed to be the content of this essay. However, as will be seen, it is so closely linked with the legal position of women that it is impossible to consider one without the other. An explanation of why women are still discriminated against, even in these countries where equality is guaranteed by the laws, is helpful.

In fact, most of the constitutions of the Southeast Asian countries have a clause, which guarantees equality for all. Therefore, it can be seen that – regardless of women's social position – their legal situation has improved in almost all countries. This can be traced back to various factors, but the "Association of Southeast Asian Nations" (ASEAN) certainly has played a major role, as its 2007 charter included a commitment to human rights, and therefore also women's rights. In addition, in 2004 the ASEAN states issued the "Declaration on the Elimination of Violence against Women in the ASEAN Region" and the association has addressed women's issues for over 30 years. In 2002, the ASEAN Committee on Women (ACW) was established and has held annual meetings since then. Ratified by all of the Southeast Asian countries, the "Convention on the Elimination of All Forms of Discrimination against Women" (CEDAW) has had the greatest influence on women's rights. While CEDAW itself is not self-executing, that is, individuals cannot derive direct rights from it, the commitments outlined in CEDAW have led the signatory countries to extensively revise their constitution and basic laws. In addition, CEDAW is closely associated with the assertion of constitutional rights as will be shown with an example from the Philippines.

But how do the constitutional changes help the women in Southeast Asia? Are they aware of the rights that are established there? Do they know about them at all? And does the sub-constitutional law conform to the demands of CEDAW and the constitution? It is not easy to find an answer to these questions. Case-law archives, as are familiar in Europe, the USA and some other countries, are essentially non-existent in Southeast Asia. In addition, many changes to the laws are so new that their implementation and societal influence are still to be seen. Due to the diversity of the numerous signatory countries, every situation in which women experience discrimination

4 *International Women's Rights Actions Watch*: Country Report Singapore, <http://iwraw.igc.org/publications/countries/singapore.htm#_edn88>.

5 *Women's Aid Organisation*: Domestic violence, <www.wao.org.my/research/domesticviolence.htm>.

6 To that case, see below.

7 *Sisters in Islam* (25/06/08): The Star - Council gets a lot of 'lip' stick, <www.sistersinislam.org.my/index.php?option=com_content&task=view&id=733&Itemid=1> Katrin Merhof Page 2 of 29.

could not be individually addressed in this paper. Therefore, the focus was set on the existing constitutional rights and the accordance of the sub-constitutional laws, in particular in the areas of family, domestic violence and employment.

II. Constitutional rights and their implementation

BRUNEI DARUSSALAM

Constitution

In the Constitution of Brunei, individual rights are not guaranteed and there is no clause regulating the application of international treaties.

However, Brunei ratified CEDAW in 2006 and therefore has assumed the obligation of aligning its legislation and policies with these international human rights standards. In respect to CEDAW, Brunei has made two stipulations: the first applies to all provisions "that may be contrary to the Constitution of Brunei Darussalam and to the beliefs and principles of Islam"; secondly, Brunei made a reservation to the clause that state parties shall grant women equal rights with men with respect to the nationality of their children.[8]

The first reservation, in particular, opens a wide leeway for the government to restrict the principle of equality and thereby puts the impact CEDAW has on the legislation process in Brunei into harsh perspective.

Reality

Brunei is in many respects proof that even within Islamic tradition, equality can be promoted between men and women. This may be surprising due to the absence of a constitutional provision and the late ratification of CEDAW, but women in Brunei are offered a progressive life in many ways. On the other hand, the principles of equality are often not outlined in the laws.

Brunei has endorsed the equality of women in the economic, educational and vocational spheres. Women are educated on an equal level with men, have a high standard of health, and are entering the workforce in increasing numbers. They comprise 40 percent of the workforce; yet they receive only half the income of men, which is due to the fact that they are under-represented in higher positions and not equally paid.[9] At Brunei University, there are an increasing number of female graduates, and nearly two-thirds of the entering class is female.[10]

The legal situation of women has also improved in some aspects. For example, according to the Islamic Family Law Order (1999), either husband or wife can file for talaq divorce in Court (Section 42), which is a radical change to the traditional Islamic family law in Brunei. Besides,

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8 The reservation also applies to Article 29 of the Convention, which stipulates the settlement of disputes about the obligations of CEDAW by the International Court of Justice.

9 *Black*, Ann: The Re-Positioning of Women in Brunei, p. 216, in: Whiting, Amanda and Evans, Carolyn (Ed.): Mixed blessings: Laws, religions, and Women's Rights in the Asia-Pacific region (Volume 1). Leiden/Boston 2006.

10 *Online Women*: Country features – Brunei Darussalam; <www.onlinewomeninpolitics.org/brunei/bruneimain.htm>.

under the Islamic Family Law Order, Muslim women have similar rights to Muslim men in regard to areas such as divorce and custody of children.[11]

Still, discrimination against women exists in many fields. When revising the Family Law in 1999, for example, the question of polygamy[12] was not reconsidered. According to Section 23, par. 2 of the Islamic Family Order, an additional marriage can be celebrated with the written permission of a Sharia judge. When giving the permission, the judge has to review (among other things) the "consent and view of the existing wife".[13] This is, of course, not enough to protect women from polygamy and the mere existence of such a unilateral right leads to inequality in marriage.

Domestic violence, a form of discrimination, is a problem in Brunei even if the absolute numbers do not seem to be high. Cases of domestic violence in the country have risen in recent years by 264 percent, from 81 cases in 2000 to 214 in 2007, according to statistics from the Community Development Department.[14]

Although the government is aware of these facts,[15] no specific law to protect women and children from domestic violence has been passed. Currently there are two acts that protect abuse victims, the Women and Young Girls Protection Act 1972 and the Children and Young Persons Order 2006.[16]

Furthermore, Brunei law does not criminalize spousal rape; it explicitly states that sexual intercourse by a man with his wife, as long as she is not under 13 years of age, is not rape.[17] That restriction of the definition can be found in many Southeast Asian laws and signifies a major gap in the rights of women.

Inequality can also be found in other fields: e.g. men are eligible for permanent positions in government service irrespective of whether they have a university degree, while married women without university degrees are only eligible to hold government positions on a month-to-month basis.

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11 Country Reports of the *US Department of State* on the Human Rights Practices in East Asia 2007 (here: Brunei): <www.state.gov/g/drl/rls/hrrpt/2007/100514.htm>.

12 *Black* (The Re-Positioning of Women in Brunei, p. 223; footnote 2, in: Whiting, Amanda and Evans, Carolyn (Ed.): Mixed blessings: Laws, religions, and Women's Rights in the Asia-Pacific region (Volume 1). Leiden/Boston 2006) points out that actually, polygamy is not the correct expression. What is meant would be polygyny, which allows a husband to have more than one wife (whereas in contrast to that, polyandry allows a wife to have more than one husband). Here, the expression "polygamy" will be used as it is more familiar and in this context, the meaning is clear.

13 *Black, Ann*: The Re-Positioning of Women in Brunei, p. 223, in: Whiting, Amanda and Evans, Carolyn (Ed.): Mixed blessings: Laws, religions, and Women's Rights in the Asia-Pacific region (Volume 1). Leiden/Boston 2006.

14 Out of the 214 cases reported, 147 were of abuse towards wives and 27 were of abuse towards children; The Brunei Times (05/07/07): "Domestic violence case on the rise in Brunei: sermon", <www.bt.com.bn/en/home_news/2008/07/05/domestic_violence_cases_on_the_rise_in_brunei_sermon>.

15 The Brunei Times (06/07/08): "Call for Domestic Violence Act to be enforced in Brunei"; <www.bt.com.bn/en/node/45415/print>.

16 The Brunei Times (10/07/07): "People urged to report cases of domestic violence", <www.bt.com.bn/en/home_news/2008/07/10/people_urged_to_report_cases_of_domestic_violence>.

17 Country Reports of the *US Department of State* on the Human Rights Practices in East Asia 2007 (here:Brunei): <www.state.gov/g/drl/rls/hrrpt/2007/100514.htm>.

To summarize, it can be said that women in Brunei are still far from enjoying equal rights, but some progress can be seen. However, women do not have a decision-making role and therefore, have been largely excluded from the debate over the modernization of Islamic traditions.[18]

CAMBODIA

Constitution

Cambodia has a progressive Constitution that includes human rights and explicitly defines women's rights. Still, it does not fully comply with Cambodia's international human rights commitments, as the relevant articles contain restrictions of these rights and allow legislators to limit them.

In the preamble of the Constitution, the guarantee of human rights is already emphasized. In addition, Article 31, 1 of the Constitution stresses the country's commitment to the implementation of international human rights, and in this context mentions the conventions related to women's rights in particular. However, the role that international treaties play within the national legal framework is not clearly defined. A statement by the Constitutional Council suggests that international human rights treaties might have the rank of constitutional law.[19] Therein, it is stated that national courts have to consider international human rights treaties when interpreting and applying national law. The same conclusion can be drawn based on the first decision taken by the ECCC in which it applied provisions of the ICCPR.[20]

The Cambodian Constitution emphasizes women's rights in a way that no other Southeast Asian constitution does. Article 45, 1 prohibits "all forms of discrimination against women". This article is not explicitly formulated as a right, but its classification – it is listed under Chapter III "the rights and obligations of Khmer citizens" – clearly suggests that individual entitlement is intended.

Articles 45 and 46 list those areas in which women are especially vulnerable: It is explicitly stated that the exploitation of women in a professional sphere shall be prohibited (Article 45, 2), that a woman's employment contract must not be terminated because of her pregnancy (Article 46, 2), that women shall have the right to take maternity leave with full pay (Article 46, 2), that men and women are equal in marriage and family matters (Article 45, 3) and that marriage is to be based on the principle of mutual consent between husband and wife (Article 45, 4).

In addition, it is stated that the state and society shall provide opportunities for women, especially rural women (Article 46 par. 3).

Article 31, 2 prohibits discrimination between Khmer citiens on the basis of (amongst other things) gender, but does not sanction the discrimination of women of other nationalities. Therefore, in this aspect it is not in accordance with Cambodia's international commitments

18 *Black, Ann*: The Re-Positioning of Women in Brunei, p. 238, in: Whiting, Amanda and Evans, Carolyn (Ed.): Mixed blessings: Laws, religions, and Women's Rights in the Asia-Pacific region (Volume 1). Leiden/Boston 2006.

19 *Menzel, Jörg*: Cambodia – from Civil War to a Constitution or Constitutionalism? P. 66, in: Hill, Clauspeter/Menzel, Jörg (Eds.): Constitutionalism in Southeast Asia, Vol. 2. Singapore 2008.

20 Decision of December 3, 2007, Criminal Case File No 001/18-07-ECCC-OCIJ (PTC01), paragraph 24.

from CEDAW.[21] However, Article 45 includes a prohibition of discrimination against women regardless of nationality and thereby fulfils the requirements of CEDAW.

Furthermore, Article 31, 2 states that "the exercis[ing] of such rights (…) shall be in accordance with the law" which provides far reaching possibilities for the limitation of fundamental rights without regard to international human rights treaties that only allow specified restrictions.

Besides, the Constitution does not include a definition for discrimination against women. This is problematic in regards to jurisprudence as it is not guaranteed that the courts will subsume indirect discrimination under Article 31 or 45.

A further provision specifically guarantees gender equality: Article 147, 2 states that Khmer citizens of both sexes shall have the right to participate in the National Congress. In Chapter VI, the Constitution places a particular focus on social affairs, and the need to support children and mothers is stressed (Article 72). However, no individual entitlements can be invoked as the articles mentioned in Chapter VI only determine state obligations.

Reality

Cambodia is perhaps one of the Southeast Asian countries with the biggest discrepancy between the legal and the actual situation of women. Theoretically, women have equal property rights, the same rights in marriage, an equal legal status for starting divorce proceedings, and the same access to education and jobs.[22] The Land Law states that women and men have the same rights for co-signing land titles (Chapter 2); the Law on Commune Election has a general provision for the rights of women and men to stand for election, but no specific provisions enabling a higher level of women's participation. The Labour Code recognizes gender-specific concerns and affords liberal rights to women in the professional sphere. It promulgates a policy of non-discrimination on grounds of gender in employment practices (Article 12), prohibits indecent behaviour and sexual harassment (Article 172), and offers special protection to pregnant women at work (Article 182). However, in practice, women face discrimination in almost all fields.

One of the biggest problems women face in Cambodia is (domestic) violence, which is common across the country. Three decades of war have led to the acceptance of violence as a method for ending conflicts.[23] Rape, including spousal rape, is a crime according to the UNTAC law (Article 33) and to the Law on Aggravating Circumstances (Article 5) – both laws are still in force, but it is to be expected that they will be replaced by a penal code which contains a provision penalizing rape. However, a rape victim is faced with social stigmas and shame in Cambodia, which combine to make it a very difficult atmosphere for women to seek help in.[24] Besides, even criminal justice

21 In Article 2 of CEDAW, it is stated that the principle of equality between men and women shall be embodied in the national Constitutions – it is not mentioned that this principle can be limited to citizens of the concerning state.

22 Country Reports of the *US Department of State* on the Human Rights Practices in East Asia 2007 (here: Cambodia): <www.state.gov/g/drl/rls/hrrpt/2007/100516.htm>.

23 *Ministry of Women's Affairs*: Violence against women. Cambodia 2005, p. 8.

24 Ibid p. 9 p.

officials do not seem to comprehend the difference between consensual sex and non-consensual sex and often they find it difficult to provide enough evidence for conviction.[25]

Between 20 and 25% of Cambodian women are affected by domestic violence.[26] In 2005, the Law on the Prevention of Domestic Violence was passed, but its implementation is hindered by many obstacles. First, in many cases women do not invoke their rights before the courts since the courts are often geographically or financially inaccessible. This reluctance to pursue formal complaints can also be traced back to the lack of trust in the judicial system, which is caused by the prevalence of impunity among perpetrators of crimes and the arbitrary interpretation of the criminal law by judges in favour of perpetrators.[27] Besides, authorities frequently avoid involvement in domestic disputes; both authorities and victims consider domestic violence to be a private matter. Another reason is that the judiciary, law enforcement officials and legal professionals are not sufficiently trained. In addition, legal aid is often unavailable to women,[28] and sometimes dependent on the coverage of a region by an NGO offering legal support. A further obstacle is the requirement of a medical certificate in the case of physical injuries, which is expensive and therefore cannot be provided by many.[29]

A general obstacle to the promotion of women and the implementation of all genderrelated laws in Cambodian society is the prevalent gender-role stereotyping, reflected in the traditional code of conduct "chbab srey" which was mentioned in the introduction. It requires women to serve and respect their husbands, honour their parents, care for theirchildren, and be modest in appearance and speech at all times.[30] It legitimizes discrimination against women and impedes women's full empowerment to claim their human rights and achieve a level of equality between men and women in Cambodian society.[31]

Tradition also prevents women from exercising their rights within the family, especially the right to enter into marriage with free and full consent:[32] Many marriages are arranged, particularly in the countryside.

Still, the government is quite aware of the problems and is willing to act: A National Strategic Development Plan for the years 2006-2010 identifies "gender concerns in all activities" as the first of nine overarching aspects which should govern all other actions to be pursued during the mentioned period.[33] It remains to be seen how much and especially how quickly these actions

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25 *Nakagawa, Kasumi*: More than With Cloth? Women's Rights in Cambodia. Phnom Penh 2006, p. 66.

26 *Ministry of Women's Affairs*: A fair share for women. Phnom Penh 2008, p. xvii.

27 Concluding comments of the *Committee on the Elimination of All Forms of Discrimination against Women*: Cambodia, <http://daccessdds.un.org/doc/UNDOC/GEN/N06/238/50/PDF/N0623850.pdf?OpenElement>.

28 Ibid.

29 Ibid.

30 *Ministry of Women's Affairs*: Violence against women, Cambodia 2005; p. 5.

31 Concluding comments of the *Committee on the Elimination of All Forms of Discrimination against Women*: Cambodia, <http://daccessdds.un.org/doc/UNDOC/GEN/N06/238/50/PDF/N0623850.pdf?OpenElement>.

32 Ibid.

33 *Ministry of Women's Affairs*: A fair share for women, Phnom Penh 2008, p. 174.

– provided they are undertaken - will affect women's lives, particularly in rural areas. After all, raising awareness and overcoming stereotypes is a big challenge in Cambodia.

INDONESIA

Constitution

The Constitution of Indonesia contains two provisions outlining the principles of equality[34]: First, according to Article 27 (1) "all citizens shall be equal before the law and the government (…), with no exceptions". This excludes all non-citizens, particularly migrant workers, which is problematic in respect to CEDAW. Second, Article 28 D (1) states that every person shall have the right to equal treatment before the law and that every citizen shall have the right to obtain equal opportunities in government (3). Women's rights are not explicitly mentioned, but in contrast to Article 27, non-citizens are also included here.

Still, Article 28 I (2) specifies that every person shall have the right to be free from discriminatory treatment based on any grounds whatsoever and shall have the right to protection from such discriminatory treatment. Therefore, the Constitution clearly – though not explicitly - forbids discrimination based on sex. As in other constitutions, no definition of discrimination is provided, which is problematic due to the inclusion of indirect discrimination in the application area of Article 28 I (2).

Restrictions to these rights are possible on the basis of Article 28 J (2) according to which, every person must accept the restrictions established by laws guaranteeing the rights and freedoms of others and to satisfy "just demands based upon considerations of morality, religious values, security and public order in a democratic society".

Of course there might be good reasons to treat persons differently, e.g. in the professional sphere, it is necessary to grant pregnant women more protection than men. However, the Constitution also allows restrictions to the principles of equality – as already mentioned above due to "morality, religious values, security and public order" (Article 28 J (2)). These expressions can be interpreted very broadly and therefore offer the legislator a wide degree of discretion.

This is not only problematic with regard to arbitrariness, but also with regard to the fulfilment of international treaties. CEDAW only allows unequal treatment in a very limited number of cases, e.g. in the case of temporary measures by a state aiming to accelerate the de facto equality between men and women (Article 4 (1) CEDAW).

Indonesia has ratified CEDAW and is bound to it even without any transformation of it into national law: In the Indonesian Law on Treaties, it is stated that Indonesia is bound to a treaty through signature, ratification, exchange of documents constituting a treaty/diplomatic notes and any other means as agreed upon by the parties to the treaty (Article 3).

The Indonesian Constitution also includes a commitment to international law and human rights. According to Article 28 I (5), the implementation of human rights shall be guaranteed, regulated and set forth in the laws and regulations for the purpose of holding and protecting human rights in accordance with the principles of a democratic and lawbased state.

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34 Probably a lapse of the legislator.

Reality

Despite the equality they are guaranteed by the Constitution, women in Indonesia are discriminated against not only due to tradition but also by sub-constitutional laws, especially in the field of marriage.

The Marriage Act of 1974 allows women to already marry at the age of 16, whereas men have to be 19. In reality, girls frequently even marry before reaching the age of 16, particularly in rural areas.[35]

The domestic roles of husband and wife are stipulated clearly in the Marriage Act: Men are the heads of the family and women are in charge of the household. The law also states that women's attention to self-development must not conflict with their role in improving family welfare and educating the younger generation.[36] The practice of polygamy is basically prohibited, but is possible in cases where both women give their written permission and when a court has allowed the second marriage to take place.[37]

Under Islamic law, a male guardian may give a (grand-)daughter under 16 for marriage if she is a virgin and he considers that the marriage will be in her best interests.[38]

In terms of divorce and remarriage, there is no guarantee of equality either. According to Islamic law, a man can repudiate his wife merely by uttering the word talaq and obtain a divorce.[39] To remarry, a divorced woman must first wait a certain period of time whereas a man can remarry immediately.[40]

Furthermore, discrimination can be found in regards to inheritance. According to Indonesian Islamic law, a daughter receives a smaller share of the inheritance than sons do, and a widower gets a larger share than a widow.[41] In contrast, the Civil Code, which is applicable to non-Muslims, states that inheritance shares are equal.

Still, some progress was made with the Law on Citizenship. In 2006, an amendment addressed the status of children from mixed marriages, where one parent was Indonesian and the other

35 Country Reports of the US Department of State on the Human Rights Practices in East Asia 2007 (here: Indonesia): <www.state.gov/g/drl/rls/hrrpt/2007/100521.htm>.

36 Ibid.

37 *Asian Development Bank*: The sociolegal status of women in Indonesia, Malaysia, Philippines, and Thailand; Poverty and Social Development Paper No. 1; Manila 2002; p. 45; Robinson, Kathryn: Muslim women's political struggle for marriage law reform in contemporary Indonesia, p. 196 p. in: Whiting, Amanda and Evans, Carolyn (Ed.): Mixed blessings: Laws, religions, and Women's Rights in the Asia-Pacific region (Volume 1). Leiden/Boston 2006.

38 *Asian Development Bank*: The sociolegal status of women in Indonesia, Malaysia, Philippines, and Thailand; Poverty and Social Development Paper No. 1; Manila 2002; p. 45.

39 Ibid p. 48.

40 Country Reports of the *US Department of State* on the Human Rights Practices in East Asia 2007 (here:Indonesia): <www.state.gov/g/drl/rls/hrrpt/2007/100521.htm>.

41 *Asian Development Bank*: The sociolegal status of women in Indonesia, Malaysia, Philippines, and Thailand; Poverty and Social Development Paper No. 1; Manila 2002; p. 53; *Robinson, Kathryn*: Muslim women's political struggle for marriage law reform in contemporary Indonesia, p. 196 p. in: Whiting, Amanda and Evans, Carolyn (Ed.): Mixed blessings: Laws, religions, and Women's Rights in the Asia-Pacific region (Volume 1). Leiden/Boston 2006.

foreign. Such children will now automatically receive Indonesian citizenship (Art. 4 c, d of the Law concerning Citizenship of the Republic of Indonesia), whereas in the past this was only possible in cases where the father was Indonesian.

An amendment to the Law on Political Party will help to ease the way for women into politics. It requires a 30% quota of women in party membership, party decision making bodies and political posts. Furthermore, the Law on General Elections now requires every third candidate on a party list be a woman.[42] These two amendments will hopefully be milestones for the representation of women in politics and considerably influence gender politics after the next elections in 2009.

A law on domestic violence was also enacted in 2004, which can be seen as an important basic step in the implementation of CEDAW and the requirements of the Constitution. It prohibits domestic abuse and other forms of violence against women, but there are practical problems in the implementation of the law and NGOs believe that even today the tendency of many victims is to keep silent.[43]

Another deficit of the law is that the definition of rape is narrow and excludes spousal rape.[44] The same applies to the Criminal Code. Article 285 only stipulates a punishment for rape outside of marriage. This is a restriction of women's rights, which unfortunately can be found in many other Southeast Asian countries and which is a clear breach of Article 28 I (2) of the Indonesian Constitution.

Another example of violence against women, female genital mutilation, exists in Indonesia[45] and is not forbidden by a law. The Ministry of Health has issued a decree prohibiting medical personnel from practicing, but the decree, which has yet to be backed by legislation, does not affect traditional circumcisers and birth attendants, who are thought to perform most female circumcisions.[46] This lack of protection for women is also discriminatory and therefore not in accordance with the Indonesian Constitution, regardless of the obligations imposed by CEDAW.

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42 *Satriyo, Hana*: 10 Years of Reformasi: Towards Women's Equal Status in Indonesia. <http://asiafoundation.org/in-asia/2008/05/28/10-years-of-reformasi-towards-women%e2%80%99s-equalstatus-in-indonesia>.

43 *Asian Development Bank*: The sociolegal status of women in Indonesia, Malaysia, Philippines, and Thailand; Poverty and Social Development Paper No. 1; Manila 2002; p. 53; *Robinson, Kathryn*: Muslim women's political struggle for marriage law reform in contemporary Indonesia, p. 196 p. in: Whiting, Amanda and Evans, Carolyn (Ed.): Mixed blessings: Laws, religions, and Women's Rights in the Asia-Pacific region (Volume 1).Leiden/ Boston 2006.

44 Country Reports of *the US Department of State* on the Human Rights Practices in East Asia 2007 (here:Indonesia): <www.state.gov/g/drl/rls/hrrpt/2007/100521.htm>.

45 According to a 2003 study by the Population Council, an international research group, 96 percent of families surveyed reported that their daughters had undergone some form of circumcision by the time they reached 14. However, in some parts of Indonesia, female circumcision is more symbolic and ritualistic without physical damage occurring. (New York Times Magazine (20/01/08): A cutting tradition. <www.nytimes.com/2008/01/20/magazine/20circumcision-t.html?_r=1&ref=magazine&oref=slogin.; Country Reports of the *US Department of State* on the Human Rights Practices in East Asia 2007 (here: Indonesia):<www.state.gov/g/drl/rls/hrrpt/2007/100521.htm>).

46 New York Times Magazine (20/01/08): A cutting tradition. <www.nytimes.com/2008/01/20/magazine/20circumcision-t.html?_r=1&ref=magazine&oref=slogin>.

As can be surmised, gender equality is still far from reach in Indonesia. However, since 1999 there is a Ministry of Women's Empowerment[47] and in addition there are a large number of organisations active in the promotion of women's rights.

LAOS

Constitution

The rights of Lao citizens are outlined in Chapter IV and include many fundamental human rights, while some like the right to life or the prohibition of arbitrary arrest, for example, are not listed. The guarantee of equality is contained in Article 37: "Citizens of both sexes enjoy equal rights in the political, economic, cultural and social fields and family affairs." It is not very clear if the term "citizen" excludes foreigners, which would be inconsistent with CEDAW. Although it seems to be distinct at first glance, doubts may arise, because in other provisions, the term "Lao citizens" is used (e.g. in Articles 35, 36 or 38 pp.). According to Article 34, Lao citizens are "the persons who hold Lao nationality as prescribed in the law". Therefore, it can be concluded that by using the word "citizens" all people residing in Laos are included.

There are no individual entitlements in Articles 22 and 29, but there are state commitments: According to Article 22, the state should focus its attention on creating broad opportunities and establishing conditions especially for women so they can receive education. In Article 29, state, society and family are called to aid the development and promotion of the women advancement policy and to protect the rights and interests of mothers and children.

The Lao Constitution does not contain a statement about the implementation of international treaties. Therefore, international treaties have to be transformed into national law by domestic legislation or the relevant provisions of the respective treaty must be expressly adopted.

Reality

Laos is a progressive country in terms of the promotion of women's rights. Although there is no officially recognized Ministry responsible for women's rights, in 2004, a "National Commission on the Advancement of Women" was established that drafted the National Strategy for the Advancement of Women for the years 2005-2010.[48] Important work on improving the situation of women in Laos has been made by the Lao Women's Union (LWU), a state agency which was already founded in 1955 as the Lao Women's Association, and which is recognized under the Constitution as the mechanism for promoting equal rights (Article 7). In collaboration with the Ministries for Health, Education, Agriculture, Labour and Social Welfare, LWU has responsibility for monitoring the implementation of all measures concerning women's development. Besides the LWU there is the Gender Resource and Information Development Center (GRID), a nongovernmental agency set up to improve gender information in Laos.[49]

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47 Before 1999, the ministry had a different portfolio and was called Ministry for the Role of Women; <www.menegpp.go.id/Eng/menegpp.php?cat=fix&id=visi>.

48 *United Nations Economic and Social Commission for Asia and the Pacific*, Gender and Development Section <http://ttd_webserver.unescap.org/esid/GAD/Resources/FocalDirectory/laoPDR-LaoNCAW.asp>.

49 *Friedrich-Ebert-Foundation* (FES): Gender issues – Laos; <www.fes.org.ph/rgp_more.htm>.

To implement the obligations of CEDAW, the "Law on the Development and protection of Women" was passed in 2004. It has the stated goal of eliminating discrimination against women, combating violence against women and stopping the trafficking of women and children. The law defines trafficking and violence against women and children as criminal actions and provides for the protection of victims.

Although domestic violence does not seem to be widespread, there is – in cases where it appears - a lack of awareness or recognition of it, including spousal rape, as a form of discrimination against women and as a violation of their human rights.[50] But this is not the only obstacle to effective protection of women. The Criminal Law grants exemption from penal liabilities in cases of physical violence without serious injury or physical damage.[51] However, in cases of rape that were tried in court, defendants generally were convicted with penalties ranging from 3 years' imprisonment to execution.[52]

Also, in the field of marriage and inheritance, women and men mostly are entitled to the same rights; the Family Code prohibits legal discrimination.

Many Laotian women occupy positions of responsibility in the civil service and private business, and in urban areas their incomes are often even higher than those of men.[53] Yet traditional attitudes on gender-role stereotyping keep women and girls in subordinate positions and are obstacles to the provisions of equal education and life opportunities, especially in rural areas.[54]

Despite the good legal situation of women in Laos, there is a lack of implementation, which cannot solely be due to traditional stereotypes and beliefs about women, but also to fact that women are not aware of the equal rights guaranteed them by the Constitution, or are not confident enough to assert them.[55]

MALAYSIA

Constitution

The fundamental rights are established in Article 5 pp. of the Malaysian Constitution and are ensured for both men and women. The principle of equality is guaranteed in Article 8 according to which all persons are equal before the law and entitled to equal protection from the law. In Article 8 par. 2 it is specified that there shall be no discrimination against citizens on the grounds of religion, race, descent or place of birth and since 2001 discrimination on the grounds of

50 Concluding comments of the *Committee on the Elimination of Discrimination against Women*: Lao People's Democratic Republic, www2.ohchr.org/english/bodies/cedaw/docs/CEDAW-CC-LAO-0523885E.pdf.

51 Ibid.

52 Country Reports of the *US Department of State* on the Human Rights Practices in East Asia 2007 (here: Laos): <www.state.gov/g/drl/rls/hrrpt/2007/100526.htm>.

53 Country Reports of the *US Department of State* on the Human Rights Practices in East Asia 2007 (here: Laos): <www.state.gov/g/drl/rls/hrrpt/2007/100526.htm>.

54 Concluding comments of the *Committee on the Elimination of Discrimination against Women*: Lao People's Democratic Republic, <www2.ohchr.org/english/bodies/cedaw/docs/CEDAW-CC-LAO-0523885E.pdf>.

55 *Friedrich Ebert Foundation (FES)*: Gender issues – Laos; <www.fes.org.ph/rgp_more.htm>.

gender is expressly prohibited.[56] In addition, par. 3 and 4 contain a prohibition on discrimination for any reason. The principle of equality is not guaranteed without reservation. First, there shall be no discrimination "except as expressly authorised" which means that a restriction may be allowed under the provisions of the Constitution. In the case of a conflict with other rights guaranteed in the Constitution, it is therefore not excluded that Article 8 will stand.[57]

Further reaching restrictions are possible on the basis of Article 8 par. 5 according to which, for example, provisions regulating personal law or employment at a religious institution or protection of aboriginal peoples of the Malay Peninsula are valid without prejudice to Article 8 par. 1 and 2.

Another provision concerning equality is contained in Article 12 which emphasizes that there shall be no discrimination on the previously mentioned grounds in the administration of any educational institution or in providing financial aid for education. In contrast to Article 8, discrimination on the grounds of gender is not included – unfortunately, this aspect was not considered when amending the Constitution meaning that discrimination in the fields mentioned in Article 12 is still possible. Article 8 should not be an obstacle as Article 12 is more specific and therefore already applicable to questions concerning educational institutions.

In addition, it is problematic that neither in the Constitution nor in any other law is there a definition of discrimination. This has enabled a narrow interpretation of this article by Malaysian courts.[58]

With regards to CEDAW, the Malaysian Constitution does not regulate the relation between national and international law. Only in Article 76 (1) (a) (Part IV) is it stated that the Parliament makes laws "for the purpose of implementing any treaty, agreement or convention between the Federation and any other country, or any decision of an International Organisation of which the Federation is a member". This confirms the need for the incorporation of international law into domestic law. As long as this has not happened, the standards provided in CEDAW do not necessarily need to be adopted by the courts.[59]

Malaysia has made significant reservations to CEDAW that put Malaysia's commitment to CEDAW in perspective. With regard to the provisions of the Islamic Sharia law and the Federal Constitution, the Government of Malaysia does not consider itself to be bound to the obligation of taking measures to modify the social and cultural patterns of conduct of men and women (Article 5 (a) of CEDAW), particularly in respect to prejudices and customary practices; to the

56 The current version of the chapter "Fundamental Liberties" can be found on the website of the Human Rights Commission of Malaysia: <www.suhakam.org.my/en/act_federal.asp>.

57 Furthermore, the following are not prohibited by Article 8 Par. 1: any provision regulating personal law (a); any provision prescribing residence in a State or part of a State as a qualification for election or appointment to any authority having jurisdiction only in that State or part, or for voting in such an election (d); any provision of a Constitution of a State, being or corresponding to a provision in force immediately before Merdeka Day (e); any provision restricting enlistment in the Malay Regiment to Malays (f).

58 Concluding comments of the *Committee on the Elimination of Discrimination against Women*: Malaysia, <http://daccessdds.un.org/doc/UNDOC/GEN/N06/384/40/PDF/N0638440.pdf?OpenElement; in detail see the following section>.

59 *International Women's Rights Action Watch Asia Pacific*: NGO Statement to the Committee for the Elimination of All Forms of Discrimination Against Women on the Initial and Second Periodic Report from the Government of Malaysia 22 May 2006, <www.iwraw-ap.org/resources/malaysia.htm>.

obligation to ensure the right of women to participate in the formulation of government policy and to perform all public functions at all levels of the government (Article 7 (b)); to the assurance of equality in passing nationality to children (Article 9 (2)) and in some aspects of marriage (Article 16 (a), (c), (f), (g)).[60]

Reality

As previously mentioned, there are two main problems despite the prohibition of discrimination in the Constitution: first, the lack of a definition and second, the lack of a law implementing CEDAW. For these reasons, it is not surprising that even the highest court in Malaysia has found its own way to interpret discrimination according to Article 8 of the Constitution without regard to CEDAW. In the relevant case, a female employee filed suit against her employer, the national airline carrier Malaysia Airlines, because the collective agreement she was bound to contained a provision that required stewardesses to resign upon becoming pregnant or else the company had a right to fire them.[61]

The Malaysian Court of Appeal dismissed the application. In the Court's opinion, the constitutional provisions on equality prohibited discrimination by state and public authorities only and not by non-state (private) actors, and guaranteed equality only to those falling within the same class (group) of persons.[62] Malaysia Airlines was not considered a "public authority" in terms of Article 8 par. 2 and a collective agreement could not be subsumed under the term "law". Therefore, according to the Court, Article 8 was not applicable.

The Federal Court upheld the decision of the Court of Appeal. In the court's opinion, "there was no definite special clause in the collective agreement that discriminates against the applicant for any reason which will justify judicial intervention".[63] The court based its position on the view that the equal protection of Article 6 "extends only to persons in the same class. It recognizes that all persons by nature, attainment, circumstances and the varying needs of different classes of persons often require separate treatment."[64] This interpretation of Article 8 of the Constitution is clearly inconsistent with Article 11 par. 2 (a) of CEDAW. The Court only measured the applicant's right to equality against the rights of the other flight stewardesses in the same employment category and therefore misconceived that an additional comparison with the whole male and female cabin crew would have been necessary.[65] In view of the fact that it was a decision as to whether the

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60 Reservations and Declarations to CEDAW, www2.ohchr.org/english/bodies/ratification/8.htm#declarations. The Malaysian delegation to the Committee on Elimination of Discrimination against Women expressed that there were plans to withdraw reservations to articles 5 (a) and 7 (b), <www.un.org/News/Press/docs/2006/wom1562.doc.htm>.

61 *Beatrice Fernandez vs. Sistem Penerbangan Malaysia & Anor* (2004) 4 CLJ 403; <www.commonlii.org//cgibin/disp.pl/my/cases/MYFC/2005/12.html?query=beatrice%20fernandez>.

62 *Women's Centre for Change Penang (WCC)*: Malaysian NGO Shadow Report 2005; <www.wccpenagn.org/wcc/images/legealdocs/articles_1_4.pdf>.

63 *Beatrice Fernandez vs. Sistem Penerbangan Malaysia & Anor* (2004) 4 CLJ 403; <www.commonlii.org//cgibin/disp.pl/my/cases/MYFC/2005/12.html?query=beatrice%20fernandez>.

64 Ibid.

65 *Kaur Batt, Jashpal* (17/11/2005): How far does article 8 of the Federal Constitution guarantee gender equality?

airline's regulation was discriminatory or not, the court added some irrelevant remarks like it was "impracticable" for an employer to give a pregnant flight stewardess up to a year off from her usual duties and that working on a plane was "certainly not a conducive place for pregnant women to be".[66]

The Court does not mention CEDAW in the judgment at all, although it can be assumed that it was aware of the existence of CEDAW since the applicant raised this issue.

But at such a point, the dimension of the lack of awareness about the role of CEDAW in interpreting national laws can be seen. If even the highest court ignores it, then it is not surprising that the lower-level courts know nothing whatsoever about it.[67] There is almost no history in the Malaysian courts of utilising international treaties or even international norms effectively.[68]

This highlights the need for the implementation of CEDAW in national laws to protect Malaysian women against discrimination, irrespective of whether they are by public, private, federal or state authorities and to define the meaning of discrimination.[69]

The arbitrary definition of equality by courts, however, is not the only obstacle to eliminating discrimination. Discriminatory rules are still contained in sub-constitutional laws and particularly the dual legal system of civil law and Sharia law entails unequal treatment especially in the fields of marriage and family.

First of all, spousal rape is not subsumed as rape in terms of Section 375 of the Penal Code, but in 2006 the Penal Code was amended and since then includes a new regulation criminalizing forced sex during marriage (Section 375 A of the Penal Code). Accordingly, a man who causes hurt or fear of death to his wife or any other person in order to have sexual intercourse with his wife shall be punished with up to five years imprisonment.

Even if this is a step in the right direction, there is no justification for the continued unequal treatment in both cases: a crime in terms of Section 375 A can only be punished with up to five years whereas the punishment for rape out of marriage can be extended to twenty years.

In the area of marriage, further discriminatory regulations still exist. The minimum age for a man to marry is 18 years whereas a woman only has to be 16. She can even marry at a younger age when a judge grants such a request.[70] Though it is forbidden for non- Muslims to have more

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<www.malaysianbar.org.my/gender_issues/gender_discrimination_in_employment__how_far_does_article_8_of_the_federal_constitution_guarantee_gender_equality_by_jashpal_kaur_bhatt.html>.

66 *Beatrice Fernandez vs. Sistem Penerbangan Malaysia & Anor* (2004) 4 CLJ 403; <www.commonlii.org//cgibin/disp.pl/my/cases/MYFC/2005/12.html?query=beatrice%20fernandez>.

67 Concluding comments of the *Committee on the Elimination of Discrimination against Women*: Malaysia, <http://daccessdds.un.org/doc/UNDOC/GEN/N06/384/40/PDF/N0638440.pdf?OpenElement>.

68 In one case the Federal Court stated in respect to the appliance of the Convention of the Rights of the Child that this was a serious question to be tried, but did not specify this issue. *Women's Centre for Change Penang (WCC)*: Malaysian NGO Shadow Report 2005; <www.wccpenang.org/wcc/images/legaldocs/articles_1_4.pdf>.

69 International Women's Rights Action Watch Asia Pacific: NGO Statement to the Committee for the Elimination of All Forms of Discrimination Against Women on the Initial and Second Periodic Report from the Government of Malaysia 22 May 2006, <www.iwraw-ap.org/resources/malaysia.htm>.

70 *Noor Aziah Haji Mohd Awal*: Women and Law, p. 104; in: Omar, Roziah/Hamzah, Azizah (Ed.): Women in Malaysia Breaking Boundaries. Kuala Lumpur 2003.

than one wife, the law allows polygamy for Muslims and it is practiced, though only in limited numbers. Furthermore, women are discriminated against in terms of inheritance as Islamic law generally favours male offspring and relatives.[71]

It happens that women face discriminatory treatment in Sharia courts due to prejudicial interpretations of Islamic family law. In a recent case, for example, a Malaysian court evoked Sharia law to allow a man to divorce his wife by the text massage "Am dvrcng u".[72] According to Sharia law, a man can divorce a woman simply by announcing his intentions, while a woman must go before a court to seek divorce and must prove an inadequacy of her husband before the court.[73]

Furthermore, despite having a Domestic Violence Act since 1994, which is part of the Penal Code, violence against women remains a problem. Some 4,000 cases of domestic violence were reported in 2007 compared to 3,200 in 2006 and the estimated number of unreported cases is high.[74] The Malaysian government has made some encouraging steps, for example, the Violence and Injury Prevention Unit within the Disease Control Division of the Malaysian Department of Public Health was established[75] and a hotline was launched to provide assistance to victims of domestic violence, child abuse and natural disaster, amongst other things.[76]

However, various factors still inhibit the effectiveness of the Domestic Violence Act: differences in the interpretation of the law, the lack of gender sensitivity of implementing authorities, and the influence of culture. Women are still recognized only in terms of their relationships with others, as mothers, or wives and not as individuals capable of making decisions appropriate to their own lives.[77] Besides, in the view of women's rights' groups, the act fails to protect women in immediate danger by requiring separate reports of abuse to be filed with both the Social Welfare Department and the police, causing delays in the issuance of restraining order against the perpetrator.[78]

In summary, Malaysia still must undertake significant efforts to eliminate discrimination against women. But as already seen in other countries with more gender-neutral legislation, the amendment of laws alone is not enough. The implementation of the laws is the relevant issue, and in that concern Malaysia faces the same obstacles as almost all other Southeast Asian

71 Country Reports of the US Department of State on the Human Rights Practices in East Asia 2007 (here: Malaysia): <www.state.gov/g/drl/rls/hrrpt/2007/100527.htm>.

72 *Sisters in Islam* (15/08/08): Divorce by text message; <www.sistersinislam.org.my/index.php?option=com_content&task=view&id=763&Itemid=1>.

73 Ibid.

74 <http://malaysia.news.yahoo.com/bnm/20080820/tts-women-violence-993ba14.html>; *Women's Aid Organisation*: Research and Advocacy – Domestic Violence, <www.wao.org.my/research/domesticviolence.htm>.

75 *World Health Organisation*: Third Milestones of a Global Campaign for Violence Prevention Report 2007, <http://whqlibdoc.who.int/publications/2007/9789241595476_eng.pdf>; see also the website of the unit: <www.dph.gov.my/vip/>.

76 <http://malaysia.news.yahoo.com/bnm/20080820/tts-women-violence-993ba14.html>.

77 *Women's Aid Organisation*: Research and Advocacy – Domestic Violence, <www.wao.org.my/research/domesticviolence.htm>.

78 Country Reports of the *US Department of State* on the Human Rights Practices in East Asia 2007 (here:Malaysia): <www.state.gov/g/drl/rls/hrrpt/2007/100527.htm>.

countries as illustrated by the following example.[79] In 1999, the Guardianship of Infants Act was amended to give Malaysian women equal guardianship rights. However, the application forms for a passport or a travel document have not been changed and continued to read "father/legal guardian". They were not changed until complaints came up in the media.

Besides, the common Asian values of placing society above the self and upholding the family as the building block of society, resolving issues through consensus instead of contention and placing duty as a counterpoint to rights still inhibit the perception and exercising of available rights.[80]

MYANMAR

Constitution

For almost 20 years, starting in September 1988, Myanmar did not have a Constitution, that is until the military government developed a new Constitution in 2008. On May 10th, a national constitutional referendum took place that was pushed through despite the national catastrophe caused by Cyclone Nargis, which devastated Myanmar's central coast a couple of days before the referendum. In deference to the people affected by the cyclone, the vote was postponed in the worst hit townships.[81] The results for over 90 percent of the votes cast was published before the referendum for the Constitution was held in the cyclone-affected areas[82] and the referendum was accompanied by a considerable number of human rights violations.[83]

Formally, the Burmese Constitution contains a range of human rights such as freedom of religion (Chapter VIII, 16), freedom of speech (10 a)) and freedom of assembly (10 b)). However, in most cases a provision is foreseen that the State is allowed to restrict the right "for the purpose of social welfare and reform" (18) or "subject to the laws enacted for State security, prevalence of law and order, community peace and tranquillity or public order and morality" (10) for example. The most important rules concerning women's rights can be found in Chapter VIII of the Burmese Constitution. According to this chapter, the State shall enable any citizen to enjoy equal rights before the law and shall provide all people equal legal protection (3). It is expressly stated that the State shall not discriminate against or in favour of any citizen on the basis of (amongst other things) sex (4) and that women shall be entitled to the same rights and salaries as those received by men performing similar work (6).

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79 Taken from *Women's Centre for Change Penang (WCC)*: Malaysian NGO Shadow Report 2005; <www.wccpenang.org/wcc/images/legaldocs/articles_1_4.pdf>.

80 *Byung-Sun Oh*: Harmonizing international human rights norms and East Asian cultural values, in: Human Rights Education in Asian Schools, Vol. 2, Osaka 1999; <www.hrea.org/erc/Library/curriculum_methodology/HRE-inAsia2/chapter5.html>.

81 *BBC* (26/05/08): "UN officials see Burma progress"; <http://news.bbc.co.uk/2/hi/asia-pacific/7419809.stm (30/07/08)>.

82 *BBC* (15/05/08): "Un chief send envoy to Myanmar"; <http://news.bbc.co.uk/2/hi/asia-pacific/7402018.stm>.

83 *Amnesty USA* (30/07/08): "Human Rights in Myanmar (Burma)"; <www.amnestyusa.org/allcountries/myanmar-burma/page.do?id=1011205&n1=3&n2=30&n3=955>.

Besides, citizens shall enjoy equal rights in the areas of civil service, occupation, trade, business, technical know-how and the profession and exploration of arts, science and technology (5). Mothers, children and expectant women shall enjoy rights as prescribed by law (7).

Reality

Despite the formal legal equality, human rights organizations report a wide range of violations against women, including political imprisonment, torture, forced labour, forcible relocation by the military authorities and restrictions on the internet, telecommunications, and freedom of expression.[84]

Women in Burma are often victims of rape, especially by the garrisoned military forces in conflict areas. In most (reported) cases authorities did not take any action, and occasionally they even arrested women who made a report about being raped by a soldier or a policeman.[85] In a resolution, adopted by consensus, on the human rights situation in Myanmar, the United Nations General Assembly expressed "grave concern at (…) rapes and other forms of sexual violence carried out by members of the armed forces" and emphasized "the disproportionate suffering of (…) women and children from such violations".[86]

Another problem for women is domestic violence. There are no specific laws against domestic violence or spousal abuse, although there are laws related to committing bodily harm against another person. Spousal rape is not a crime unless the wife is under 14.[87]

Discrimination is also apparent in other areas, for example women under the age of 25 are not allowed to travel to the border areas without a guardian; recently they even had to get a travel permit in the form of a recommendation letter which cost 150 USD.[88]

Burma's State Peace and Development Council has stressed that under Burmese Law women have equal rights with men to vote and run for election, which is paradoxical insofar as there are no democratic elections in which to participate.[89] Currently, there are no women in cabinet or in ambassadorial positions and only a few women occupy higher positions in government ministries. In 1996, the Myanmar National Committee on Women's Affairs was founded, but the Chairperson and the Vice-Chair of this committee are men.[90] That shows the priority given to

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84 *Human Rights Watch*: Burma, Events of 2007, <http://hrw.org/englishwr2k8/docs/2008/01/31/burma17601.htm>; *Amnesty International*: UN Human Rights Council, Eighth Session, 2-18 June 2008 - Compilation of statements, <www.amnesty.org/en/library/asset/IOR41/034/2008/en/8afe964b-57cf-11dd-be62-3f7ba2157024/ior410342008eng.pdf>.

85 Country Reports of the *US Department of State* on the Human Rights Practices in East Asia 2007 (here: Burma): <www.state.gov/g/drl/rls/hrrpt/2007/100515.htm>.

86 *UN General Assembly*, 57th session: Situation of Human Rights in Myanmar (Resolution A/RES/57/231), <http://daccessdds.un.org/doc/UNDOC/GEN/N02/554/43/PDF/N0255443.pdf?OpenElement>.

87 Country Reports of the *US Department of State* on the Human Rights Practices in East Asia 2007 (here: Burma): <www.state.gov/g/drl/rls/hrrpt/2007/100515.htm>.

88 *Women's League of Burma (WLB)*: NGO list of critical issues and questions for Burma, <www2.ohchr.org/English/bodies/cedaw/docs/ngos/WLB_Myanmar.pdf>.

89 *Friedrich Ebert Foundation (FES)*: Gender issues – Burma; <www.fes.org.ph/rgp_more.htm>.

90 Ibid.

the promotion of women's rights by the military regime, which holds to the enforcement of the traditional notion that a woman's primary place is at home and not in public life.[91]

In summary, one can say that the absence of women's rights in Myanmar is only a small part of the human rights violations that happen in Myanmar everyday. The situation has even worsened since 2007[92] and at the moment, there is no sign that anything will change in the following years – especially when considering the lack of political will on the side of the UN Security Council and Myanmar's Asian neighbours.

PHILIPPINES

Constitution

In the Philippine Constitution, the principle of equality plays an important role. In the preamble it is already emphasized that the Government shall secure the "blessings of independence and democracy under (…) a regime of (…) equality (…)." In article 2, Section 1 it is pronounced that the Philippines adopt the general principles of international law and adhere to a policy of (amongst others) equality. It explicitly commits itself to ensuring equality of men and women before the law as one of its fundamental principles (Article 2, Section 14).

A further commitment to equality is laid down in Article 13 ("social justice") Section 1 where the Congress is called to "give highest priority to the enactment of measures to (…) reduce political inequalities and remove cultural inequities by equitably diffusing wealth and political power for the common good". Section 14 focuses especially on women at work and states a clear request to the government to take measures for their protection: the state shall protect working women by providing safe and healthful conditions, especially in view of their maternal functions. Therefore, the state must establish facilities and opportunities for enhancing women's welfare and "enable them to realize their full potential in the service of the nation" (Article 13 Section 14).

While these declarations do not constitute individual rights, Article 3 contains a bill of rights, although it is limited to civil and political rights. According to Section 1, no person shall be denied the equal protection of the laws. However, the Constitution does not have a special reference to equality of women and men in the bill of rights.

In concern to the adherence to human rights, the Philippine state commits itself to their full respect in Section 11 (Article 2). Article 13 contains a special sub-clause about human rights and outlines the creation of a Commission on Human Rights (Section 17). The task of this commission is to investigate human rights violations and to take measures for the protection of human rights (Section 18). In addition, it has to monitor the Philippine government's compliance with international treaty obligations on human rights. Among those is CEDAW, since the Philippine government is a party to CEDAW without reservation.

International treaties do not have to be transformed for their applicability to the Philippines. According to the (previously mentioned) incorporation clause in Article 2 (Section 2), the principles

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91 Ibid.

92 *Human Rights Watch*: Burma, Events of 2007, <http://hrw.org/englishwr2k8/docs/2008/01/31/burma17601.htm>.

of international law form part of the national law. A treaty or an international agreement is only valid when passed by at least two-thirds of the members of the Senate (Article 7 (Section 21)).

Concerning CEDAW, the Supreme Court has stated that "in ratifying the instrument, the Philippines bound itself to implement its liberating spirit and letter" and it cited CEDAW to justify the establishment of a woman's right to choose her domicile and its concurrent implication on her right to stand for elections in that particular district.[93]

The Philippines have not only ratified CEDAW, but also the Optional Protocol. A Philippine woman was the first Asian to submit a complaint to the CEDAW committee under the communications procedure of the Optional Protocol.[94] Besides, in accordance with Section 17 of the Constitution, a human rights commission was established which has the task of protecting and promoting human rights, advocating and monitoring the government's compliance with its international treaty obligations on human rights and energizing and engaging civil society participation.[95]

The adoption of the Magna Charta of Women, which defines discrimination and translates CEDAW into a national law would mean a further strengthening of women's rights in the Philippines and a landmark legislation for Southeast Asia. It includes provisions on protection from violence, increased participation and representation of women, equal treatment before the law, comprehensive health services, comprehensive health information and education, and equal rights in all matters relating to marriage and family relations. Besides, the bill provides for the non-discriminatory and non-derogatory portrayal of women in media and film, equal access to and elimination of discrimination in education, scholarships and training.[96] The Magna Charta is, however, still pending in the Senate and it is to hope that it will be adopted soon.[97]

Reality

The Philippines play a leading role in the promotion of women's rights not only in regard to constitutional rights, but also the position of women in politics, administration and economy. In the last Gender Gap Report of the World Economic Forum, the Philippines had the outstanding rank of 6th place out of 128 countries – and is thereby also exceptional in being the only Asian nation among the top 10.[98] Furthermore, it is the only country in Asia to have closed the gender gap in both education and health and is one of only six in the world that have achieved this. An improvement in political empowerment was observed, and its scores for some economic

93 *Marcos vs. Commission on Elections* (GR No. 119976, Sept. 18, 1995), <http://119.111.101.4/judjuris/juri1995/sep1995/gr_119976_1995.html>.

94 New hope for victims of rape – the Karen Vertido case, <www.radiofeminista.net/ene08/notas/rape.htm>; *Tripon, Olivia*: Women's rights in the Philippines Today, <www.rightsreporting.net/index2.php?option_content&task=view&id=45&itemid=43>.

95 *Commission on Human Rights of the Philippines*: Vision and Mission, <www.chr.gov.ph/MAIN%20PAGES/about%20us/02vision_mission.htm>.

96 *Isis International Manila* (02/09/08): Women advocate and rethink Magna Charta of Women in the Philippines, <www.isiswomen.org/index.php?option=com_content&task=view&id=1097&Itemid=204>.

97 Ibid.

98 *World Economic Forum*: Gender Gap Report 2007 - Rankings; <www.weforum.org/pdf/gendergap/rankings2007.pdf>.

indicators such as estimated income, labour force participation and income equality for similar work were higher than in the previous years.[99] Thanks to an Election Law Quota, women are (comparatively) well represented in politics - in the Lower House 20.4% of the representatives are women and in the Upper House, 16.7%. This is without taking into account the fact that a woman has been head of the state since 2001.[100] A National Commission on the Role of Philippine women has the task of pressing for effective implementation of programs benefiting women and the long-term “Philippines Plan for Gender-Responsive Development (1995-2025)” is supposed to promote women’s advancement and gender equality.[101]

By law, women have most of the rights and protections accorded to men.[102]

Discriminatory provisions still exist in the Family Code, according to which the husband has the final decision in cases of disagreement over community and conjugal property (Articles 96, 124) and parental authority and legal guardianship over the person and property of a common child (Articles 211, 225). A bill to revise the Family Code has been scheduled for a long time but is not yet passed.[103]

Furthermore, violence against women is still a problem, even though protection by the law is provided. The Anti-Rape Law of 1997 (RA 8353) penalises all kinds of rape inclusive spousal rape. However, the penalty disappears in two cases: In the case of the subsequent valid marriage between the offender and the offended and in the case that the legal husband is the offender and the wife forgives him (Article 266-c). These clauses nullify the criminal dimension of spousal rape and its penalties and help to perpetuate the cycle of violence.[104]

Victims of domestic violence are protected by the Anti-Violence against Women and their Children Act 2004 (RA 9262). The reported number of cases rose from 1100 in 1996 to over 6500 in 2005 and dropped to 5758 in 2006.[105] The increase is not necessarily due to a further

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99 *World Economic Forum*: Gender Gap Report 2007: <www.weforum.org/pdf/gendergap/report2007.pdf; p. 18>.

100 *Global Database of Quotas for Women* (02/05/08): <www.quotaproject.org/displayCountry.cfm?CountryCode=PH>.

101 Country Reports of the *US Department of State* on the Human Rights Practices in East Asia 2007 (here:Philippines): <www.state.gov/g/drl/rls/hrrpt/2007/100535.htm>; *International Labour Organization*: National Guidelines in Philippines - Project Development, <www.ilo.org/public/english/employment/gems/eeo//guide/philip/aware.htm>.

102 Country Reports of the *US Department of State* on the Human Rights Practices in East Asia 2007 (here: Philippines): <www.state.gov/g/drl/rls/hrrpt/2007/100535.htm>.

103 Concluding comments of the *Committee on the Elimination of Discrimination against Women*: Philippines, <http://daccessdds.un.org/doc/UNDOC/GEN/N06/480/52/PDF/N0648052.pdf?OpenElement>.

104 *Tripon, Olivia*: Women’s rights in the Philippines Today, <www.rightsreporting.net/index2.php?option_content&task=view&id=45&itemid=43>.

105 *Delfin, Claire*: Victims of Domestic Violence: Attacked by Husbands, Trapped by Society, <www.rightsreporting.net/index2.php?option=com_content&task=view&id=748&iitemid=130>; Tripon, Olivia:Women’s rights in the Philippines Today, <www.rightsreporting.net/index2.php?option_content&task=view&id=45&itemid=43>.

106 *Online Women*: Women’s rights situation in the Philippines, <www.onlinewomeninpolitics.org/womensit/phil.pdf>; *Delfin, Claire*: Victims of Domestic Violence: Attacked by Husbands, Trapped by Society, <www.rightsreporting.net/index2.php?option=com_content&task=view&id=748&iitemid=130>; Tripon, Olivia:Women’s rights in the Philippines Today, <www.rightsreporting.net/index2.php?option_content&task=view&id=45&itemid=43>.

spread of domestic violence but to a higher report of cases. However, women, influenced by a traditional societal reluctance to discuss private family affairs are still hesitant to report their situation due to shame and fear and for the sake of family cohesion.[106] That is why Women and Children's Protection Units were set up in police stations and in government hospitals to facilitate women in these situations.[107]

Still, the good scores of the Philippines in the Gender Gap Report should not lead to the assumption that discrimination has been eliminated there. According to the German Friedrich Ebert Foundation, the Philippines "have one of the sharpest contradictions in gender equality today" and even though the legal framework for women seems impressive, the challenges of implementation and a cultural shift remain.[108]

The rules for Muslim women in the "Code of Muslim Personal Laws of the Philippines", in particular, result in discrimination against women. For instance, the Code still permits polygamy (Article 27). In addition, girls may marry before the age of 15 with a court's approval; the minimum marriage age for boys is 15 (Article 16). Men and women have different obligations and rights in marriage: the husband shall fix the residence of the family (Article 35) whereas the wife is supposed to "dutifully manage the affairs of the household" (Article 36 par. 1). The wife also needs the husband's consent for acquiring "gratuitous tide" and the exercise of any profession or occupation (Article 36 par. 2 and 3). These provisions are neither compatible with CEDAW nor with Article 2 Section 14 of the Constitution.

The good performance in the Gender Gap Report may therefore be surprising but the small number of Philippine Muslims, only 5 % of the population, may explain this.[109]

In regards to divorce, the law does not provide for the procedure, but the government recognizes religious annulment. The process can be costly, though, which is the reason why many lower-income couples simply separate informally.[110] However, the absence of legal divorce and limited job opportunities combine to limit the ability of both poor and wealthy women to escape destructive relationships.[111]

The Philippines face the same problems as most of the other Southeast Asian countries: even if women's rights are protected and in place on paper, implementation is lacking. Knowledge of the law among those who are supposed to enforce them – such as police and judges – is minimal and much lower among those who need them for their own personal protection.[112] Patriarchal attitudes and deep-rooted stereotypes regarding the roles and responsibilities of women and men in family and society persist and are an obstacle to the implementation of women's rights.[113]

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107 *Tripon, Olivia*: Women's rights in the Philippines Today, <www.rightsreporting.net/index2.php?option_content&task=view&id=45&itemid=43>.

108 *Friedrich Ebert Foundation (FES)*: Gender Issues – Philippines (2004); <www.fes.org.ph/rgp_ph.htm>.

109 <www.auswaertiges-amt.de/diplo/de/Laenderinformationen/01-Laender/Philippinen.html>.

110 Country Reports of the US Department of State on the Human Rights Practices in East Asia 2007 (here:Philippines): <www.state.gov/g/drl/rls/hrrpt/2007/100535.htm>.

111 *OnlineWomen*: Women's rights situation in the Philippines; <www.onlinewomeninpolitics.org/womensit/phil.pdf>.

112 *Tripon, Olivia*: Women's rights in the Philippines Today, <www.rightsreporting.net/index2.php?option_content&task=view&id=45&itemid=43>.

113 Concluding comments of the *Committee on the Elimination of Discrimination against Women*: Philippines, <http://daccessdds.un.org/doc/UNDOC/GEN/N06/480/52/PDF/N0648052.pdf?OpenElement>.

Still, in jurisprudence some promising judgments have been rendered. For instance, the Supreme Court strengthened women's rights in one case that dealt with the discriminatory policy of a company that would hire only unmarried women. The court considered this policy as unlawful and based its decision, among other things, on Section 14 (Article 2), Section 3 (Article 8) and Section 14 (Article 8) of the Constitution.[114]

Such cases are not the norm even in the Philippines, though, and do not seem to have changed the culture of the courts. There is still a gender bias in the court that has its roots in the patriarchal social milieu, is promoted by the antiquated curriculum of law schools and further institutionalized and perpetuated by court decisions, even those of the Supreme Court.[115]

SINGAPORE

Constitution

In Singapore's Constitution, equality is guaranteed in Article 12. Par. 2 specifies that there shall be no discrimination on the grounds of religion, race, descent or place of birth.

There is, however, no mention of gender and furthermore, no definition of discrimination against women. Even more problematic is the regulation in Article 12 Par. 3 according to which provisions regulating personal law and provisions or practices restricting office or employment connected with the affairs of any religion are not prohibited by Article 12 Par. 1 and 2. The first restriction, in particular, aims at maintaining the exclusion of women from combat duties in the armed forces and the exclusion of foreign domestic workers from rights ensured under the Employment Act. The second restriction serves the purpose of granting validity to Islamic law and thereby contributes to further legal discrimination against women in Singapore.[116]

The Constitution does not protect women explicitly in any other provision, although the "fundamental liberties" in Part IV of the Constitution - including civil liberties, employment, commercial activity and education - are entitled to both men and women. Formerly, even the Constitution contained a discriminative provision in regards to the acquirement of citizenship when only one of the parents is Singaporean. A Singaporean woman giving birth to her child overseas could not pass her nationality on to her child whereas this was possible when the father had Singaporean nationality. However, in April 2004, the Constitution was amended and now, children born overseas acquire Singaporean citizenship by descent from their Singaporean mothers.[117] Hence, Article 122 of the Constitution is gender neutral in that if a child was born on or after 15 May 2004, he/she shall be a citizen of Singapore by descent if at the time of his/her

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114 *Philippine telegraph and Telephone Company vs. National Labor relations Commission* (GR No. 118978, May 23, 1997), <www.lawphil.net/judjuris/juri1997/may1997/gr_118978_1997.html>.

115 *UNIFEM*: CEDAW advocacy in the Philippines, <www.unifemeseasia.org/projects/cedaw/docs/fullstories/Philippines%20May-05.pdf>; *Daririam, Shanthi*: The Statues of CEDAW Implementation in the ASEAN Countries and Selected Muslim Countries, <www.iwrawap.org/aboutus/paper11.rtf>.

116 *UN Press release* (01/08/07): "Women's Anti-Discrimination Committee commends Singapore on progress, but presses it to withdraw reservations to convention, strengthening the domestic legal framework", <www.un.org/News/Press/docs/2007/wom1647.doc.htm..

117 Consideration of reports submitted by state parties under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Third periodic report of States parties, Singapore; <http://daccessdds.un.org/doc/UNDOC/GEN/N04/624/53/PDF/N0462453.pdf?OpenElement>.

birth, either his/her father or mother is a citizen of Singapore, by birth, registration or descent. Singapore has signed CEDAW. Still, the Constitution does not deal with the application or the hierarchy of international law at all. The practice shows though that an act of transformation is needed before an international treaty has a domestic impact.[118] This transformation is not always solved by using an implementing law but often by developing guidelines. In particular, there has been no specific legislation enacted to implement CEDAW.

Singapore has made significant reservations to CEDAW. It does not consider itself bound to Article 2 (measures against discrimination in all its forms) and Article 16 (measures to eliminate discrimination in family and marriage matters) in cases "where compliance with these provisions would be contrary to their religious or personal laws".[119] A further reservation was made in regard to Article 11 Par. 1 (measures to eliminate discrimination in the field of employment) and a general reservation in regard to the application of laws regulating the entry into, residence in, employment in and departure from its territory by "those who do not have the right under the laws of Singapore to enter and remain indefinitely in Singapore and to the conferment, acquisitions and loss of citizenship of women who have acquired such citizenship by marriage and of children born outside Singapore".[120]

Reality

Singapore has neither enacted a specific sex discrimination law nor, as previously mentioned, specific laws to implement the obligations of CEDAW. Furthermore, Singapore has not established a Ministry responsible for women's affairs, only a "Women's Desk" within the Family Development group of the Ministry of Community Development, Youth and Sports. Still, Singapore has undertaken a few changes in its sub-constitutional laws to bring them in accordance with the Constitution and CEDAW. Still, there is much to be done to eliminate discrimination against women both in Singapore's laws and in society.

The most important law concerning the rights of women is the Women's Charter. It not only regulates marriage matters but also the protection of women from domestic violence.

Initially, the prohibition of polygamy is stipulated in Article 4 Par. 3. According to Article 46 Par. 4, husband and wife have equal rights and duties in the management of the home and children. Both have the right to file for divorce (articles 101 pp.); still, in practice women face significant difficulties that often prevent them from pursuing divorce proceedings.[121]

In addition, the Women's Charter enables a battered spouse to gain protection from the perpetrator by a protection order, Article 65, and provides for the punishment of offences against women and

118 *Thio, Li-ann*: Constitution of the Republic of Singapore, p. 292, in: Hill, Clauspeter/Menzel, Jörg (Eds.): Constitutionalism in Southeast Asia, Vol. 2. Singapore 2008.

119 Declarations, Reservations and Objections to CEDAW, <www.un.org/womenwatch/daw/cedaw/reservationscountry.htm#N57>.

120 Ibid.

121 Country Reports of the *US Department of State* on the Human Rights Practices in East Asia 2007 (here:Singapore): <www.state.gov/g/drl/rls/hrrpt/2007/100537.htm>.

girls (articles 140 pp.). In 2006, there were more than 2,600 applications for Personal Protection Orders, 70 percent of which were filed by wives for protection against their husbands.[122]

It can be concluded that the Women's Charter, at least formally, provides equal rights to both men and women in many ways. A general protection for women from discrimination is not included, however. There are regulations in other laws to avoid discrimination against women, but not all kinds of discrimination are covered, for example, the Employment Act provides regulations to protect women, but they are not valid for foreign domestic workers (who are mostly women).[123]

Regulations not in accordance with the constitutional principle of equality can also be found in the Penal Code, according to which, rape can be committed only by a man, and spousal rape is not a crime (Article 375 Par. 4 Penal Code), but husbands who force their wives to have intercourse can be prosecuted for other offences, such as sexual assault (Article 376 Penal Code).[124] While this issue was raised at a session of the Women's Anti Discrimination Committee, the Singapore delegation expressed the opinion that in the case of non-consensual intercourse, it was up to the couple to resolve the issue privately within the context of the marriage. They also added, though, that absolute marital immunity was not ideal and that Singapore was moving to abolish that practice in a calculated manner.[125] However, this shows an unfortunately widespread opinion in Southeast Asian society that all kinds of domestic violence, and even spousal rape, are private matters.

Further discrimination of women in Singapore can be traced back to the dual law system in family and inheritance issues. Islamic family law is still applied in addition to the civil family law in Singapore and the Muslim Law Act empowers the Shari'a court to oversee marriage and inheritance matters. The Islamic family law includes various rules that discriminate against women, for instance, it allows Muslim men to practice polygamy, although requests to take additional spouses may be refused by the Registry of Muslim Marriages, which solicits the views of an existing wife or wives and reviews the financial capability of the husband. During the year 2007 there were 54 applications for polygamous marriages, and only 18 applications were approved, which constitutes just 0.44 percent of Muslim marriages.[126]

Although the Singapore government holds that there was no discrimination because families could choose to apply civil law instead of Islamic law, this dualism leads to the factual application of discriminatory rules – and even the theoretic possibility of having another wife strengthens the husband's position in a marriage anyway.

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122 Ibid.

123 *UN press release* (01/08/07): "Women's Anti-Discrimination Committee commends Singapore on progress, but presses it to withdraw reservations to convention, strengthening the domestic legal framework", <www.un.org/News/Press/docs/2007/wom1647.doc.htm>.

124 Country Reports of the *US Department of State* on the Human Rights Practices in East Asia 2007 (here:Singapore): <www.state.gov/g/drl/rls/hrrpt/2007/100537.htm>.

125 *UN press release* (01/08/07): "Women's Anti-Discrimination Committee commends Singapore on progress, but presses it to withdraw reservations to convention, strengthening the domestic legal framework", <www.un.org/News/Press/docs/2007/wom1647.doc.htm>.

126 Country Reports of the *US Department of State* on the Human Rights Practices in East Asia 2007 (here:Singapore): <www.state.gov/g/drl/rls/hrrpt/2007/100537.htm>.

In order to maintain two systems of family law, Singapore has made the previously mentioned reservations to CEDAW. Singapore's government considers these reservations necessary to guarantee their commitment to religious freedom for Muslims and the indigenous rights of Malay citizens.[127] However, Singapore's law is still inconsistent with Article 12 Par. 1 of the Constitution. Nevertheless, it is valid since Article 4 of the Constitution states that only those laws that are enacted after the Constitution become invalid in case of conflict.

In summary, one can say that women formally have legal opportunities to gain equal treatment. Still, the achievement of equality continues to be far away due to discriminatory laws. Another reason is the lack of rights consciousness, which could be due to the fact that Asian values, such as societal harmony, community interest and respect for authority and the resolving of issues through consensus instead of contention, still dominate Singapore's society.[128] The same is valid for the government, whose position is that possible claims and concerns over rights could be addressed through soft regulatory codes and mediation rather than through binding legal regulations.[129]

So far there has not been a single case before court dealing with gender discrimination on the basis of Article 12 of the Constitution.[130] Therefore, various explanations can be found but one of them – referring back to the lack of awareness - certainly is the lack of specific regulations for discrimination on the grounds of gender. Besides, the government has won all notable constitutional cases and therefore, the path through the court does not seem to be an attractive option.[131]

THAILAND

Constitution

Equal protection for all Thai people has already been guaranteed in previous versions of the Constitution and can be found in the current Constitution in Chapter I "General Provisions" in Sections 4 and 5. According to Section 4, equality of the people shall be protected and in Section 5, it is emphasized that equality under this Constitution must be assured regardless of origin, gender or religion.

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127 *UN press release* (01/08/07): "Women's Anti-Discrimination Committee commends Singapore on progress, but presses it to withdraw reservations to convention, strengthening the domestic legal framework", <www.un.org/News/Press/docs/2007/wom1647.doc.htm>.

128 *Byung-Sun Oh*: Harmonizing international human rights norms and East Asian cultural values, *in*: Human Rights Education in Asian Schools, Vol. 2, Osaka 1999; <www.hrea.org/erc/Library/curriculum_methodology/HRE-inAsia2/chapter5.html>; Thio, Li-Ann, 'She's a women but she acts very fast': women, religion and law in Singapore, p. 257 in: Whiting, Amanda and Evans, Carolyn (Ed.): Mixed blessings: Laws, religions, and Women's Rights in the Asia-Pacific region (Volume 1). Leiden/Boston 2006.

129 *Thio, Li-Ann*: 'She's a women but she acts very fast': women, religion and law in Singapore, p. 258, in: Whiting, Amanda and Evans, Carolyn (Ed.): Mixed blessings: Laws, religions, and Women's Rights in the Asia-Pacific region (Volume 1). Leiden/Boston 2006.

130 Ibid p. 257.

131 *Thio, Li-Ann*: 'She's a women but she acts very fast': women, religion and law in Singapore, p. 257 in: Whiting, Amanda and Evans, Carolyn (Ed.): Mixed blessings: Laws, religions, and Women's Rights in the Asia-Pacific region (Volume 1). Leiden/Boston 2006.

A further provision stipulating equality is in Chapter III Section 30, according to which all persons are equal before the law and shall enjoy equal protection under the law. Equality of men and women is explicitly mentioned in Par. 2 and, according to Par. 3, discrimination on the grounds of (among other things) gender "shall not be permitted".

However, a restriction is possible based on Par. 4. It is not considered discrimination if the state takes measures in order to eliminate obstacles or to promote people's abilities to exercise their rights and liberties. This regulation enables, among other things "positive discrimination", i.e. the preference of women (and other disadvantaged groups).

On the other hand, it also holds a certain danger of being abused.

Further individual entitlements for women can be found in Parts III and IV of Chapter III. Section 40 regulates the rights in judicial processes and stipulates that every woman shall have the right to appropriate protection in judicial processes and to appropriate treatment in cases related to sexual offences. Section 52 deals with the right to public health services and according to this section, women shall have the right to be protected by the state against violence and unfair treatment and have the right to medical treatment or rehabilitation upon the occurrence thereof.

Thus, if one only looks at the wording in Sections 30, 40 and 52, each person, man or woman, is included. However, these provisions are located in Chapter III with the title "Rights and Liberties of Thai People" which implies that all provisions of this chapter are only applicable to Thai citizens, while non-citizens (such as many ethnic minority peoples in the northern highlands)[132] are excluded. This implies that discrimination against foreign women living in Thailand is not prohibited by the Constitution and therefore, the Constitution is not consistent with CEDAW.

Thailand is bound to CEDAW according to Section 82, which contains the directive principle of fundamental state policies – as the title of Chapter V pronounces – that Thailand shall comply with international obligations concluded with other countries and international organisations. In addition, the state shall adopt the principle of non-discrimination and comply with human rights conventions. But as Chapter V only contains principles, women cannot derive any rights from Section 82.

Although Thailand has ratified CEDAW, it has made one significant reservation, namely that the Thai government does not consider itself bound by Article 16, which obliges the parties to take measures to eliminate discrimination against women in all matters relating to marriage and family relations.[133] Nevertheless, there are improvements in Thai family law as can be seen in the following section.

132 *Traims, Chaowana; Hoerth, Jochen*: Another New Constitution as a Way Out of the vicious Cycle? P. 320, in:Hill, Clauspeter/Menzel, Jörg (Eds.): Constitutionalism in Southeast Asia, Vol. 2. Singapore 2008.

133 Declarations, Reservations and Objections to CEDAW: <www.un.org/womenwatch/daw/cedaw/reservationscountry>.

Reality

As outlined above, the Constitution provides for the equality of all citizens. The Thai government has made some progress in also guaranteeing this equality in subconstitutional laws, but some inequalities remain.

Progress was made, for example, in family law. Until 2008, a man could sue for divorce on the grounds that his wife had committed adultery, but a woman faced the additional legal burden of proving that her husband had publicly acknowledged another woman as his wife.[134] Now, according to Section 1516 Par. 1 of the Civil and Commercial Code, both husband and wife can divorce if the spouse "provides maintenance or honors another person as a spouse in an adulterous relationship, or has committed fornication with the person as a practice".[135] It remains to be seen if women will use this improvement to their rights and therefore if this regulation practically influences the situation of women.

A further advancement in 2007 was certainly the recognition and prosecution of spousal rape as a crime.[136] The amended criminal law also redefines rape as an act that can be experienced and perpetrated by a man or a woman.[137] However, the common problem of the practical implementation of the law exists, and Thai NGOs perceive law enforcement agencies as being incapable of bringing perpetrators to justice.[138]

Besides, domestic violence against women remains a serious problem. In a recent study, 65% of 721 students responding said they had had an experience of domestic violence in their family.[139] According to the health ministry, more than 8000 women and almost 10000 girls suffered abuse in 2007.[140]

In 2006, a law was adopted to prevent domestic violence and imposed a fine of up to $180 or as much as six months imprisonment for violators. It entitles authorities, with court approval, the power of prohibiting offenders from remaining in their homes or contacting family members during trial. Additionally, the reporting of domestic violence complaints is supposed to be improved by the law and it includes measures for the reconciliation between the victim and the perpetrator.[141]

But in this case, the implementation of the law is also a problem. As in other countries, domestic violence is viewed as a private issue and police and members of public organisations do not

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134 Country Reports of the *US Department of State* on the Human Rights Practices in East Asia 2007 (here:Thailand): <www.state.gov/g/drl/rls/hrrpt/2007/100539.htm>.

135 <www.thailawforum.com/news/2008/news-april-08.html>.

136 The China Post (22/07/08): Thailand outlaws marital rape. <www.chinapost.com.tw/asia/2007/06/22/113083/Thailand-outlaws.htm>.

137 Before, Thai law narrowly defined rape as an act committed by a man against a woman who was not his wife.

138 Country Reports of the *US Department of State* on the Human Rights Practices in East Asia 2007 (here:Thailand): <http://www.state.gov/g/drl/rls/hrrpt/2007/100539.htm>.

139 *Asia News Network* (15/08/08): Violence against women remains a threat in Thai society. <www.asianewsnet.net/news.php?sec+1&id=862>.

140 Ibid.

141 Country Reports of the *US Department of State* on the Human Rights Practices in East Asia 2007 (here:Thailand): <www.state.gov/g/drl/rls/hrrpt/2007/100539.htm>.

recognize violence against women as a crime despite legislation to the contrary.[142]

The same difficulty can be found in the area of labour law. In this area, government regulations "allow for" equal pay for work of equal value by men and women.[143]

Nonetheless, discrimination in hiring is widespread, and women are more concentrated in lower-paying jobs. In practice, women receive lower pay for equal work in virtually all sectors of the economy.[144]

Unequal treatment under the laws still exists. According to the Ministry of Social Development and Human Security, a foreign wife of a Thai man is eligible to apply for citizenship, while a foreign husband of a Thai woman is not eligible.[145]

In summary, it can be said that in the last years, Thailand has made improvements in the legal protection for women and in the adapting of its laws to guaranteeing equality in the Constitution and thereby under CEDAW. However, in daily life, women are still disadvantaged and discriminated against.

This continuing discrimination could be based on the fact that, as in other countries, even if women have the appropriate rights, they often do not take legal action. One reason may be the lack of a developed individual rights tradition in Thai law. Thai society is shaped by the pursuit of harmony, the avoidance of confrontation, and the resolution of disputes trough mutual understanding.[146] On the other hand, the legal system is based on Western European models, and therefore does not fully correspond to Thai values. An appeal to a court, hence, is often avoided and instead, a resolution of the dispute through informal means such as community or moral pressure is preferred.[147] Furthermore, many times women in particular still do not consider themselves as individual right-bearers but remain socially embedded and defined by their parents and male relatives, including their husbands.[148]

TIMOR-LESTE

Constitution

Already in the preamble of the Timorese Constitution, there is a commitment to respecting and guaranteeing human rights and the fundamental rights of citizens. In Section 9, it is stated that

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142 *Sricamsut, Amornrat:* Domestic violence against pregnant women: A Thai perspective. Griffith 2006; p. 10. <www4.gu.edu.au:8080/adt-root/uploads/approved/adt-QGU20070116.154749/public/02Whole.pdf>.

143 *Peach, Lucinda*: Sex or Sangha? Non-normative gender roles, p. 38, footnote 64; in: Whiting, Amanda and Evans, Carolyn (Ed.): Mixed blessings: Laws, religions, and Women's Rights in the Asia-Pacific region (Volume 1). Leiden/Boston 2006.

144 Country Reports of the *US Department of State* on the Human Rights Practices in East Asia 2007 (here:Thailand): <www.state.gov/g/drl/rls/hrrpt/2007/100539.htm>.

145 Country Reports of the *US Department of State* on the Human Rights Practices in East Asia 2007 (here:Thailand): <www.state.gov/g/drl/rls/hrrpt/2007/100539.htm>.

146 *Peach, Lucinda*: Sex or Sangha? Non-normative gender roles, p. 37; in: Whiting, Amanda and Evans, Carolyn (Ed.): Mixed blessings: Laws, religions, and Women's Rights in the Asia-Pacific region (Volume 1). Leiden/Boston 2006.

147 Ibid.

148 Ibid.

the legal system of Timor-Leste shall adopt the general or customary principles of international law (Par. 1) and that international treaties ratified by Timor-Leste are immediately applicable upon their approval, ratification or accession by the competent organs and after publication in the official gazette (Par. 2). For this reason, CEDAW is part of the domestic legal system of Timor-Leste. In addition, all rules that are contrary to the standards of CEDW and other human rights treaties are invalid (Section 9 Par. 3: "All rules that are contrary to the provisions of international conventions, treaties and agreements applied in the legal system of East Timor shall be invalid").

The Constitution contains a detailed catalogue of fundamental rights in Part II, civil and political rights (Title II), and also economic, social and cultural rights (Title III). According to Title II, "women and men shall have the same rights and duties in all areas of family, political, economic, social and cultural life" (Article 17). Thus, the Constitution explicitly confirms the main principle of CEDAW (Article 1 of CEDAW).

Restrictions to women's (and other people's) rights "can only be imposed by law in order to safeguard other constitutionally protected rights or interests and in cases clearly provided for by the Constitution" (Article 24) or if a state of emergency has been declared in accordance with constitutional procedures (Article 25).

Women during pregnancy and after delivery are especially protected by the Constitution (Part II, Title I Section 39). Besides, it is stressed that direct and active participation by men and women in political life is a requirement of the democratic system (Part III, Section 63 par. 1).

Reality

Even if equality is constitutionally guaranteed, according to the laws and their implementation, women remain discriminated against, especially in regard to their protection in cases of gender-based violence, which is one of the major human rights concern in the country.

There has not yet been a specific law passed protecting women against domestic violence in Timor-Leste.[149] Applicable laws are the Indonesian Criminal Code (KUHP) and the criminal procedure provisions contained in UNTAET[150] regulations. Spousal rape, for example, is not a crime and the definition of rape is limited to forced penetration of the vagina by the penis (see Article 285 KUHP). Besides this, there is no law prohibiting sexual harassment, and sexual harassment is reportedly common, especially within some government ministries and the police.[151] This legislation or lack thereof leads to clear discrimination against women, without even mentioning the breach of obligations imposed by international treaties.

UNMIT[152] reported that women increasingly reported abuses to the police.[153] However, not all

149 A draft domestic violence law is yet to be finalized and debated in Parliament, <www.unmit.org> (→ Rule of Law → Human Rights).

150 United Nations Transitional Administration in East Timor (till 2002).

151 Country Reports of the *US Department of State* on the Human Rights Practices in East Asia 2007 (here: Timor-Leste): <www.state.gov/g/drl/rls/hrrpt/2007/100519.htm>.

152 United Nations Integrated Mission (from 2002 on).

153 Country Reports of the *US Department of State* on the Human Rights Practices in East Asia 2007 (here: Timor-Leste): <www.state.gov/g/drl/rls/hrrpt/2007/100519.htm>.

of the cases are processed by the prosecutor's office. In many cases, the police officers refer cases to adap (the traditional justice process), or send the cases back to be settled by the family, or by the village or sub-village chief.[154] The victims also often withdraw their cases due to economic dependency on their husbands, not wanting to leave their children without a father, or threats of further violence or divorce or simply fear of embarrassment.[155]

In 2003/2004, cases of sexual violence against women made up between 13 and 28% of the cases in court.[156] However, there is a lack of prosecutorial capacity and many cases do not come to a final decision. This can be traced back to the court's inadequate dealing with offenders[157], for example having long delays and many postponements of cases,[158] which impacts negatively on the right of victims to a legal remedy. The NGO Judicial System Monitoring Programme pointed out that a number of complaints of domestic violence were lodged during the period of observation, but not a single domestic violence case was scheduled for hearing.[159] In one case recently decided, it took almost four years between the occurrence of domestic violence and the decision being delivered by the court.[160]

Furthermore, "inadequate community education, together with a lack of support and counselling services for victims of domestic violence continue to mean that such [gender based] offences often go unreported and/or inadequately managed".[161]

In cases with a final decision, the sentences predominately do not reflect the severity of the crimes committed.[162]

However, the number of domestic violence cases being processed by the courts is increasing[163] and it is hoped that the use of suspended sentences may encourage more women to use the formal justice system. Even if the criminal code discriminates against women, as seen above, the East-Timorese legal system offers remedies of protection.

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154 *Judicial Systems Monitoring Programme*: <www.jsmp.minihub.org/Reports/jsmpreports/Women%27s_Statistics/Statistics_Women_(english).pdf>.

155 Ibid.

156 Dili District Court 23%, Oecusse District Court 13%, Suai District Court 13 %, Baucau District Court 28%; *Judicial Systems Monitoring Programme* <www.jsmp.minihub.org/Reports/jsmpreports/Women%27s_Statistics/Statistics_Women_(english).pdf>.

157 *Judicial Systems Monitoring Programme*: Justice Update March 2006 <www.jsmp.minihub.org/Justice%20update/2006/WJU/0603%20Justice%20Update%20sentenceWJU%20(e).pdf>.

158 *Judicial Systems Monitoring Programme* <www.jsmp.minihub.org/Reports/jsmpreports/Women%27s_Statistics/Statistics_Women_(english).pdf>.

159 *Bere, Maria Agnes*: Women and Justice in Timor-Leste, <http://devnet.anu.edu.au/GenderPacific/pdfs/08_gen_legal_bere.pdf>.

160 East Timor Law Journal: Court Report 2008, <www.eastimorlawjournal.org/LawReports/2008/Dili-District_Court_Suspended_Sentence_Domestic_Violence_Case.html>.

161 *Judicial Systems Monitoring Programme*: Background Paper on the State of the East Timor Justice Sector <www.jsmp.minihub.org/Reports/jsmpreports/JSMP%27s%20Bacground%20paper.htm>.

162 *Judicial Systems Monitoring Programme:* Justice Update March 2006 <www.jsmp.minihub.org/Justice%20update/2006/WJU/0603%20Justice%20Update%20sentenceWJU%20(e).pdf>.

163 East Timor Law Journal: Court Report 2008, <www.eastimorlawjournal.org/LawReports/2008/Domestic_Violence_Cases_January_2008_jsmp_east_timor.html>.

In areas other than gender-based violence, some customary practices discriminate against women, for example, in some regions or villages where traditional practices hold sway, women may not inherit or own property.[164]

VIETNAM

Constitution

The Vietnamese Constitution contains a clear and progressive commitment to the principles of equality. According to Article 52, all citizens are equal before the law. Article 63 stresses the equality of male and female citizens in all fields – "political, economic, cultural, social, and the family life" (Par. (1)). Furthermore, all acts of discrimination against women and all acts damaging women's dignity are strictly banned (Par. (2)), especially at the working place, where men and women shall be equally paid (Par. (3)).

In addition, women shall enjoy "a regime to maternity" and female state employees receive pre- and post-natal protection (Par. (3)). Par. (4) contains an appeal to the state and the society to create all necessary conditions for women "to raise their qualifications in all fields and bring into full play their roles in society" by establishing social-welfare units to ensure the compatibility of family and career for women.

Equality is also mentioned in connection with family. According to Article 64, marriage shall conform to the principles of free consent, progressive union, monogamy and equality between husband and wife.

The fact should be noted, however, that the general principle of equality is only limited to citizens. That excludes all foreign women in Vietnam, an exclusion that is problematic in terms of consistency with CEDAW.

The Vietnamese government is bound to CEDAW. According to Article 84 No 13 of the Constitution, the parliament has the power to ratify and denounce international treaties. Therefore, the Constitution allows for the application of international agreements in the moment of ratification by the National Assembly and the promulgation by the State President.[165]

Reality

Not only the Constitution, but also the sub-constitutional laws are very progressive in Vietnam. There is – with one exception - no legal discrimination.[166] Only the Law on Marriage and Family still contains a discriminating provision. According to Article 9 (1) of this law, the minimum legal marrying age for men is 20 years, whereas women must be a minimum of 18 years old.

The implementation of the principles of equality in the rest of the sub-constitutional laws could – at least partly - be due to the fact that women in Vietnam are very well organized. The Vietnam

164 Country Reports of the *US Department of State* on the Human Rights Practices in East Asia 2007 (here: Timor-Leste): <www.state.gov/g/drl/rls/hrrpt/2007/100519.htm>.

165 *Hill, Clauspeter*: Constitutional development in a re-united country, p. 353, in: Hill, Clauspeter/Menzel, Jörg (Eds.): Constitutionalism in Southeast Asia, Vol. 2. Singapore 2008.

166 Country Reports of the US Department of State on the Human Rights Practices in East Asia 2007 (here: Vietnam): <www.state.gov/g/drl/rls/hrrpt/2007/100543.htm>.

Women's Union (VWU), a mass organization that is already in existence since 1930, has millions of members. The VWU counts about 40 per cent of Vietnamese women among its membership and has branches in all communes and districts.[167] Aside from the VWU, the National Committee for the Advancement of Women has also aimed to assist working women in Vietnam since 1993 and has recently been charged with implementing the government's national strategy on the advancement of women by the end of 2010.[168]

In July 2007, the Law on Gender Equality entered into force, which is a crucial step towards the elimination of discrimination. In the law, "gender discrimination" is defined as an "act of restricting, excluding, not recognizing or not appreciating the role and position of man and woman leading to inequality between man and woman in all fields of social and family life" (Article 5 (5)). Articles 11-18 specify that men and women are equal in the areas of politics, economy, labour, education and training, science and technology, culture, information, physical exercise and sports, public health and family. The policy makers are obliged to take measures to ensure gender equality in all laws and to make the necessary financial resources available (Articles 19-24). However, it is not only state institutions that are pushed to act but agencies, organizations, families and individuals are also declared responsible for the elimination of discrimination (Articles 25– 34). According to Article 9, a government assigned ministry or a ministerial-level agency is supposed to be the main monitoring institution for the implementation of the law ("state management agency on gender"). Agencies, organizations and individuals have the possibility to complain to this institution about decisions or acts by any of the mentioned actors when they violate the law on gender equality (Article 37).

Other laws had already been amended even before the Law on Gender Equality was passed. A revision of the Land Law, for example, entailed that women and men now have the same rights to land titles.[169]

Furthermore, the Law on the Election of National Assembly Deputies amended in 2002 and the Law on the Election of Members of the People's Council established a quota system for female deputies. Since then, Vietnam has become the leading ASEAN country in terms of the percentage of women's participation in the Lower House (26 percent).[170]

Further progress has been made in the field of domestic violence. In 2006, the Law on Domestic Violence Prevention and Control was passed. The law stipulates measures for prevention and control of domestic violence, defines responsibilities for control and handling of violations, and defines the victims' rights.[171] The actual implementation of the law is the same problem in Vietnam as in the other Southeast Asian countries. According to a survey, domestic violence

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167 *Friedrich Ebert Foundation (FES)*: Gender issues – Vietnam; <www.fes.org.ph/rgp_more.htm>; UNAIDS: Role of the Viet Nam Women's Union, <www.unaids.org.vn/local/partnerwu.htm>.

168 Country Reports of the *US Department of State* on the Human Rights Practices in East Asia 2007 (here:Vietnam): <www.state.gov/g/drl/rls/hrrpt/2007/100543.htm>.

169 UN Press release (17/01/07): New law on gender equality will greatly improve Viet Nam's legal regime for women's advancement, anti-discrimination committee told", <www.un.org/News/Press/docs//2007/wom1593.doc.htm>.

170 *Friedrich Ebert Foundation (FES)*: Gender issues – Vietnam; <www.fes.org.ph/rgp_more.htm>.

171 *Embassy of Denmark*, Hanoi (08/04/08): "National Assembly Approves Law On Domestic Violence" <www.ambhanoi.um.dk/en/menu/AboutUs/News/NationalAssemblyApprovesLawOnDomesticViolence.htm>.

occurs in about 20 percent of marriages,[172] but it still remains behind closed doors, without adequate intervention by the police or social services. The reasons therefore are comparable to those in the other countries, namely that couples fear 'losing face' or do not want to 'wash their dirty linen in public'.[173] Officers, though, increasingly acknowledge the existence of domestic violence as a significant social problem.[174]

Considering the efforts made in the last years, however, Vietnam has taken a leading and exemplary role in promoting women's rights in Southeast Asia, though this does not mean that there is no discrimination in everyday life. Women still continue to face societal discrimination. The persistence of patriarchal attitudes and deeply rooted stereotypes are a significant obstacle to the implementation of gender equality.[175] The preference of male offspring, in particular, has led to the subjection of women to many harsh practices. The failure to produce a male child is directly attributed to the wife and, in this case, bad treatment by the husband and family is considered acceptable.[176]

Besides, women are overburdened by the double load of work within and outside the home, the lack of or poor quality of medical access services, the risk of trafficking, and other harsh conditions resulting from sex discrimination.[177] Society still expects women to display the traditional ideals of diligence, beauty, grace and virtue, while men continue to wield power and accumulate wealth.[178]

It remains to be seen if the Vietnamese society can change as much and as quickly as the Vietnamese laws in the coming years.

III. Concluding remarks

The welcome conclusion of the comparison of the different constitutions is that, with the exception of Brunei, all Southeast Asian countries ensure equality in their constitutions. In seven countries, there is an explicit legal basis for equal treatment and protection from discrimination based on gender.

Another clear result, however, is that the constitutional rights alone cannot make much of a difference. In almost all countries, the sub-constitutional laws do not satisfy the guarantees of

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172 *United Nations Vietnam*: "Family undergoing major shifts in Viet Nam, shows first-ever nationwide survey on the family" (26/07/08) <www.un.org.vn/index.php?option=com_content&task=view&id=548&Itemid=1>.

173 Ibid.

174 Country Reports of the US Department of State on the Human Rights Practices in East Asia 2007 (here:Vietnam): <www.state.gov/g/drl/rls/hrrpt/2007/100543.htm>.

175 Concluding comments of the *Committee on the Elimination of Discrimination against Women*: Viet Nam; <http://daccessdds.un.or.g/doc/UNDOC/GEN/N07/244/04/PDF/N0724404.pdf?OpenElement>.

176 *International Women's Rights Action Watch*: Country report Vietnam, <http://iwraw.igc.org/publications/countries/vietnam.htm>.

177 *International Women's Rights Action Watch*: Country report Vietnam, <http://iwraw.igc.org/publications/countries/vietnam.htm>.

178 *Friedrich Ebert Foundation (FES)*: Gender issues – Vietnam; <www.fes.org.ph/rgp_more.htm>.

equality, which in some cases leads to inconsistencies with the constitution. In other cases, the constitution allows the authorities to limit the guarantees of equality – in countries characterized by Muslim populations, this is usually justified through the argument of enabling religious freedoms.

Another conclusion of the report is that even in the case that there is a legal basis for the equality of women, as is the case of Vietnam, this alone is not sufficient to guarantee a better position for women in society, as it is one thing to have a constitutional right and another to make it into a social reality.

In all Southeast Asian countries, this lack of implementation of legal guidelines is due to similar root causes. On the one hand, women lack knowledge and awareness about their protected rights as well as the financial resources and access to appropriate legal advice. They also fear the legal process, which is generally protracted and often not crowned with success. On the other hand, traditional perceptions of daily life have a major effect on women and they influence the interpretation and use of laws in legal processes and administration practices. A woman is not seen as a sovereign legal entity, but rather in her role as a mother and wife, who owes her husband respect. This is particularly noticeable in the area of domestic violence, where it impedes the effective implementation of protective laws in almost all Southeast Asian countries, if such laws are even present. In addition, police and authorities are often unfamiliar with the present legal situation and are poorly trained.

Despite these factors, there is no reason for pessimism. The legal basis for women has improved in all countries and surveys show that the perception of women in Southeast Asian society is slowly changing.[179]

Still, the equality of women is not only a question of justice. Studies have shown that improving women's situation in society also leads to significant progress in addressing poverty and improving democratization in a country.[180]

One can hope that the stereotypes that are anchored in society will be eliminated as quickly as possible, although it is likely to last as long as the process of formerly setting equality in laws, although even this is not yet complete.

179 See for instance surveys in Cambodia, published in "A fair share for women" by the *Ministry of Women's Affairs*, Phnom Penh 2008, p. 11.

180 *Bundesministerium für wirtschaftliche Zusammenarbeit und Entwicklung*: Gleichberechtigung – Schlüssel zur Umsetzung der Milleniumserklärung der Vereinten Nationen, <www.bmz.de/de/service/infothek/buerger/themen/Faltblatt_Gleichberechtigung.pdf>.

RESOLVING CONFLICTS: APPROACHING ARTICLE 121 (1A)

Malik Imtiaz Sarwar

Over the past decade, one of the most difficult and painful areas of law that the Malaysian courts have had to deal with is that area relating to the intersection of Islamic personal law and the public law of the country. Since this observation is the premise of this paper, I will take some time to explain what I mean.

Let me start with what I mean by intersection of Islamic personal law and public law. No serious difficulties have arisen as to how it is Islamic personal law in the strict sense is to be administered or enforced. As the Supreme Court observed in the case of *Che Omar Che Soh*[1], Islamic law was intended by the framers of the Constitution to be applied as purely personal law. For this purpose, the Constitution allows for the establishment of syariah courts and the empowering of these courts by legislation enacted for that purpose[2]. Such legislation is however kept within a narrow compass by the Constitution by the establishment of a neutral, non-religious based public law framework[3]. This neutral framework has sometimes been described as a secular framework, as was the case in Che *Omar Che Soh*, secular being used in the sense I have described as opposed to that which advocates the eradication of religion. The syariah courts are inferior tribunals in the administrative law sense and are limited in their jurisdictional reach to enacted matters of Islamic personal law in respect of persons professing the religion of Islam[4]. As I have said, in this area, no serious difficulties have arisen. Issues arising from marriages and divorces, deaths and so on are routinely dealt with.

Depending on how one looks at things, situations may arise where there is an intersection of a matter of personal law and a public law right. The starkest example of this is the issue of choice of religion where Muslims are concerned. When a Muslim chooses to renounce his or her faith, it could be said that this is a matter of personal law as religious doctrine is arguably involved. On the other hand, it could also be said that the freedom of religion[5] is involved and, where such freedom is impeded by the state, is a matter of public law. This type of scenario is exemplified by the *Lina Joy* case[6].

1 *Che Omar Che Soh v. PP* [1988] 2 MLJ 55.

2 Article 74 (power to legislate) read with Item 1, List II, 9th Schedule (fields of legislation).

3 See the fields of legislation in the Federal List i.e. List I, 9th Schedule.

4 *Latifah bte Mat Zin v Rosmawati Binti Sharibun & Anor* [2007] 5 MLJ 101.

5 Guaranteed by the Federal Constitution in Article 11(1) which reads: "Every person has the right to profess and practice his religion and, subject to Clause (4), to propagate it".

6 *Lina Joy v Agama Islam Wilayah Persekutuan & 2 Ors* [2005] CA.

In the same way, where a non-Muslim couple marries under the civil law framework and one of them embraces Islam, it could be said that the Muslim party is entitled as a matter of personal law to have his rights and obligations defined by Islamic personal law and, as such, adjudicated by the syariah courts. On the other hand, the non-Muslim party could argue that as the marriage was contracted as a civil marriage, a civil court should determine questions of divorce and ancillary relief. Where the Islamic authorities and the syariah courts assist in the cause of the Muslim party, then the rights of the non-Muslim are undermined and in some cases rendered illusory. This is particularly evident where the Islamic authorities and the syariah courts facilitate or uphold conversions of children of the marriage to Islam by the Muslim party without the consent of the non-Muslim party. Where these types of situation arise, there is a dimension of public law involved in view of the guarantee of equality under the Constitution along with a number of other fundamental liberties. This type of scenario is exemplified by the *Subashini*[7] and *Shyamala*[8] cases.

It is in these types of cases that the controversy has arisen. Though this has been in part due to the attitudes of the Islamic authorities and the relevant Government agencies, the approach adopted by the superior, or civil, Courts has been as instrumental. In these cases, it is more usually the person who finds himself pitted against the system that is aggrieved. That would more usually be the non-Muslim who is compelled by circumstance to resort to the courts for relief. In the case of *Kaliammah*[9], a widower who believed that her husband (Moorthy) had died a Hindhu sought a declaration to that effect from the High Court. In *Subashini*[10], a wife sought an injunction from the High Court to restrain her husband, who had converted to Islam, from converting her second child to Islam without her consent as he had with their first. She also sought to restrain him from setting up in the syariah court proceedings in competition to those in the civil court on the ground of abuse of process. In *Lina Joy*[11], a Malay woman who had converted to Christianity from Islam sought judicial review against her the National Registration Department for refusing to register the fact of her conversion on official documentation. Without this, she could not practice her chosen religion nor could she marry a non-Muslim[12]. In all these cases, and others like them, the superior court declined to grant relief for their not having the jurisdiction to do so.

I say painful for the obvious trauma that had been caused to these litigants, to others in their situation and the wider community that had identified with their cause by the refusal to grant relief even though there were clear violations or denials of guaranteed rights; painful for the way the superior courts have chosen to shield themselves from their responsibilities behind a contrived jurisdictional construct premised on a provision of the Constitution, Article 121(1A), that does no more than to clearly establish the jurisdiction of the syariah courts as inferior tribunals.

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7 *Subashini Rajasingham v Saravanan Thangathoray* [2007] CA.

8 *Shamala Sathiyaseelan v Dr. Jeyaganesh C. Mogarajah & Anor* [2004] HCKL.

9 *Kaliammal Sinnasamy v Majlis Agama Islam Wilayah Persekutuan & 2 Ors* [2005] HCKL, pending appeal before the Court of Appeal.

10 See supra note 7.

11 See supra note 6.

12 Marriages between muslims and non-muslims in Malaysia are not recognized in law.

That this was made clear by several decisions of the apex court soon after the introduction of the provision in 1988 does not appear to have been of great significance to the courts in the period since the beginning of the decade. Decisions of great significance have been handed down, relief denied, in clear breach of the principles of stare decisis in a process that seems to have been more concerned with the end rather than the means to that end[13]. So much so that the Federal Court in 2007 felt it necessary to caution against judicial legislating in these sorts of cases in its decision in *Latifah Mat Zin*[14].

Allow me to expand on this.

- Article 121(1A) merely provides for the following: the High Courts have no jurisdiction in respect of any matter within the jurisdiction of the syariah courts. The clear implication of this provision is that if the syariah courts are not seized with jurisdiction, then the High Court is if jurisdiction and power have been conferred by law[15].
- It is beyond dispute that the High Courts are seized with jurisdiction by virtue of the wide ranging jurisdiction conferred by the Courts of Judicature Act 1964[16]. In particular, this Act empowers the High Court to grant any orders to give effect to the fundamental rights guaranteed by the Constitution[17]. It follows therefore that in the types of cases that are under discussion, the High Court has the necessary jurisdiction and power.
- In considering matters of jurisdiction, the High Court must first determine whether the syariah courts have jurisdiction. It is self-evident that jurisdiction is conferred by enacted law meaning that if there is no enacted law, there is no jurisdiction and, in these cases, the High Court would have jurisdiction. There is no plausible basis for an implying of jurisdiction from a legislative field provided for under the Constitution. Were it to be the case, there would be no need for the legislature.
- The legislature cannot vest a syariah court with the jurisdiction to adjudicate over matters involving non-Muslims, even if there were Muslims involved. This stems from the Constitution only allowing for the establishment of syariah courts having jurisdiction over persons professing the religion of Islam[18]. A person who has renounced Islam cannot be a person professing the religion of Islam and as such, cannot be within the jurisdiction of the syariah courts. Similarly, any measure aimed at regulating the renouncing of the Islamic faith would contravene the clear language

13 See how the majority in *Subashini cit.* dealt with the decision of the Federal Court in *Latifah Mat Zin cit.* and the earlier decision of the Federal Court in *Tang Sung Moi*. Contrast this with the treatment of the same decisions in the dissenting opinion. Consider also the majority decision in *Lina Joy cit.* and the dissenting opinion.

14 See supra note 4.

15 As required under Article 121(1), Federal Constitution.

16 Enacted in 1964 as Act No. 7 of 1964. Revised in 1972 and published as Laws of Malaysia Act 91.

17 Item 1, Schedule read with Section 25. Consider the wide ranging interpretation of the item by the Federal Court in *Petrojasa Sdn. Bhd. v. Minister of Finance, Sabah* [2006] 6 CLJ.

18 Item 1, List I, 9th Schedule.

of the guarantee of freedom of religion[19]. It is these self-evident truths that led to the majority in Lina Joy implying into the provision a requirement that Muslims renounce faith in accordance with Islamic law. The nature of these requirements is not apparent, more so for the fact that the prevalent view amongst Islamic administrators appears to be that apostates ought be executed.

- Similarly, in interpreting enacted law, the Courts cannot understand the legislature as having vested a jurisdiction to adjudicate over matters that do no fall within Islamic personal law as this has not been permitted by the Constitution. In determining the scope of Islamic personal law, one must have regard to the framework established by the Constitution. As such, though it can be said that Islam is an all encompassing way of life, the syariah court cannot be vested with jurisdiction over matters of banking law, admiralty law, commercial law and so on, not only because the legislature is not empowered to do so but also because this would run counter to the constitutional framework. It is manifest that in understanding a particular jurisdiction conferring law in this regard, the Courts cannot ignore the balance of powers that the Constitution provides for.

A consideration of the Constitution can only lend to the foregoing analysis, one that the Federal Court expounded in *Latifah Mat Zin*[20]. Notwithstanding, we have had courts declaring that matters are within the jurisdiction of the syariah courts on the basis of jurisdiction being implied from legislative field[21]. We have had High Courts saying that they do not have jurisdiction in matters of judicial review in matters pertaining to the administration of Islam notwithstanding the Islamic authorities being administrative bodies exercising pubic law functions[22] and the fact that syariah courts cannot entertain judicial review applications[23]. The list borders on the bizarre and one is compelled to ask why it is that the courts over the last decade failed to follow decisions of the apex courts handed down in the mid to late 1990s. These aspects of the application of Article 121(1A) were dealt with in a manner that allowed for just and equitable treatment of issues[24]. This question becomes that much more relevant when appreciates that severe injustices have been occasioned.

The situation is difficult, primarily due to decisions of the courts that have caused or added to the confusion by failing to address the issues as they need to be; holistically and by reference to constitutional guarantees and the principles of stare decisis. It is a sad truth that constitutionalism has suffered at the hand of the courts to the extent it could be said that the Constitution has been turned on itself. In many ways, majoritarianism has become the order of things, with the so-called Malay and Islamic interests being deferred to in a way that is not easily reconciled with the

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19 Article 11(1), supra note 5.

20 See supra note 4.

21 See *Lina Joy cit.*, *Shaik Zolkafli* and the majority view in *Subashini Rajasingham cit.*

22 *Lina Joy cit.*, Kamariah Ali & Anor lwn. Majlis Agama Islam Dan Adat Melayu Terengganu & Anor [2005] 1 MLJ 197; Kamariah Ali & Lain-lain lwn. Kerajaan Negeri Kelantan, Malaysia & Satu Lagi [2004] 3 CLJ.

23 The jurisdiction is vested in the High Court.

24 *Dalip Kaur v. Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1991] 3 CLJ, *Mohd Habibullah Mahmood v. Faridah Dato' Talib* [1993] 1 CLJ; *Sukma Darmawan Sasmitaat v PP* [2006] CA.

framework of equality established by the Constitution. This is hardly surprising in view of there being no real culture of non-discrimination in this country, a state of affairs that sadly seems to have infected the judicial process.

No matter how we dress things up, it is an obvious fact that the type of decisions that I speak of here have victimized minorities in one way or the other. For instance, in requiring persons born into the Islamic faith to exercise their freedom of religion through the syariah courts in a manner not provided for by the clear and unambiguous provision in the Constitution, a majority of the Federal Court bench in *Lina Joy* re-wrote the Constitution. Its apparent aim was to deny *Lina Joy* relief, something which the dissenting judge thought she should be given. This occasioned an injustice just as the refusal to entertain Kaliammal's application to determine the religious status of her deceased husband[25].

From my work in this area, I have come to understand that just as the Social Contract has been made the subject of debate to cater to political interests and Malay Supremacy (Ketuanan Melayu) made the basis of policy decisions since the late 80s, so too has the role of Islam in public life. Though this has in part been the result of a resurgence throughout the Islamic world and a heightening of religious identity post September 11, 2001, a politicizing of religion has also been a prime factor. In an environment where free speech has been unevenly stifled on the ambiguous ground of sensitivity, this has had very unfortunate consequences. A close relationship between the dominant Malay ethnic community and Islam has allowed for the prioritizing of Islam in a way that has transcended the limits allowed for under the Constitution.

Though one could say that this has no relevance to the judicial process for being matters extraneous to the process of law, an objective assessment of the situation would reveal that the judicial process has been made vulnerable to these external influences over the years through an undermining of the Rule of Law. Allow me to explain this. The Rule of Law was attacked in 1988 when the then Lord President (as the office of the Chief Justice was known then) was sacked along with two Supreme Court justices[26]. Along the way, five Supreme Court justices[27] were suspended for doing nothing more than adhering to their oath to defend the Constitution. The Judiciary was suborned to Parliament and, by extension, the Executive by a controversial amendment to the Constitution that for all purposes and intents put an end to the doctrine of separation of powers[28]. That this had the effect of subverting the judiciary is evident from the insistence by the Judiciary itself that that controversial amendment was constitutional notwithstanding it affecting the basic structure established under the Constitution[29]. With the

25 An application the High Court would have entertained in the mid-90s. See, for instance, *Dalip Kaur v. Bukit Mertajam District Police Officer* [1992] 1 MLJ 1.

26 Tun Salleh Abas (LP), George Seah, Wan Suleiman.

27 Tan Sri Azmi Kamaruddin, Tan Sri Eusoffe Abdoolcader, Tan Sri Wan Hamzah Mohamed Salleh, Tan Sri Wan Suleiman Pawanteh and Datuk George Seah.

28 The 1988 amendment to Article 121(1) which deleted the phrase "the judicial power of the Federation shall be vested in the two High Courts (…) and the High Courts (…) shall have such jurisdiction and powers as may be conferred by or under federal law" and inserted "may be conferred by or under federal law". See the majority view in *PP v Kok Wah Kuan* [2007] FCJ.

29 Ibid.

weakening of the Judiciary, prompted by a series of controversial judicial appointments and promotions, the wider democratic system was undermined[30]. For all purposes and intents, this country became one governed by decree or edict of the Prime Minister. Put another way, the Rule of Law transformed into a Rule by Law. It is in this climate that policy statements were made by the Government to the effect that this nation is an Islamic State. It would seem that the Judiciary was keen to promote a bigger and more prominent role for Islamic law in the public law system, perhaps in part to appease the Executive's interest in view of its declared policy position, or perhaps due to a misunderstood notion of the constitutionalism or both. It is significant that the current Chief Justice recently cautioned judges from toadying[31].

It cannot also be denied that a question arises as to the level of competence in the Judiciary. In a speech made earlier this year, the Prime Minister acknowledged that standards have declined and that we may not have the best persons for the job[32]. It is now beyond dispute that there is a serious need for a reform of the administration of justice in this country. That this involves improving the way in which we appoint judges is equally beyond debate with the announcement by the Government that an independent appointments commission will be established as one of the elements of a reform initiative. It is clear therefore that the state of the Judiciary has had a tremendous impact on developments in constitutional and public law as much as it has had in other areas of law.

I do not mean to be harsh or disrespectful. It is vital that we understand what it is that has brought us to the point that we are at. I do not believe that deficiencies in the Constitution led us here. I believe it is the way in which we have interpreted the Constitution and allowed it to be applied unevenly that did that. We must understand that no matter how well intentioned, the situation that the Judiciary has lent itself to is not one that will be remembered as having allowed for a welcomed renaissance of Islam and the birth of a fresh constitutional perspective. It will instead be remembered as the start of a process that divided this country through the creation of deep fissures that left us traumatized. In *Che Omar Che Soh*[33], the Federal Court observed that until the Constitution is amended to make Islam the supreme law, the Constitution itself is the supreme law. All laws, be they inspired by religion or otherwise, must be consistent with it. In Lina Joy, the Federal Court was urged to depart from Che Omar Che Soh and conclude that Islam is the governing paradigm of this nation. It refused to do so. We must remind ourselves of that.

Though at a personal level, there is no harm in aspiring to have a greater role for Islam, Judges take oaths to protect the Constitution. That is their paramount duty, above everything else, even where adherence to the Constitution does not allow for fulfillment of personal aspirations where

30 Consider the revelations during the enquiry conducted by the Royal Commission of Inquiry into the V.K. Lingam Video Clip and the report, conclusions and recommendation of the said Royal Commission.

31 See Tan Sri Zaki Azmi's speech after taking office as Malaysia's 12th chief justice, as reported by New Straits Times on October 30, 2008. Available online at : <http://www.malaysianbar.org.my/legal/general_news/zaki_shows_he_means_business.html. Last seen June 17, 2009>.

32 See the full text of the speech by Deputy Prime Minister at the Pahang Bar Annual Dinner held on 28 February 2009. Available online : <http://www.pmo.gov.my/?menu=speech&page=1677&news_id=6&speech_cat=11. Last seen June 17, 2009>.

33 See supra note 1.

Islam is concerned. It is not for the Courts to be concerned with aspirations, justice is blind and must be done as much as it must be seen to be done. The Courts must as such be vigilant and, when called upon to scrutinize attempts to make aspirations a reality, ensure that the Constitution is adhered to in the sense that it was intended to be and not as desired by any particular quarter. As Tun Abdul Hamid, our most recent Chief Justice remarked, the judiciary is “the last bastion of civil society”[34]. It is for this reason, that the Lina Joys, the Subashinis and a host of other aggrieved persons to them. If they cannot do that, who is it that they turn to? We cannot ignore the fact that there is a direct causal connection between the frustrations of people and taking to the streets when they feel that they have no other options. One of the matters focused on by HINDRAF was the way in which cases like *Kaliammal's* were being dealt with.

The way forward is clear. In *Latifah Mat Zin*, there is a precedent that allows for the Courts to reestablish the neutral framework that served us well for so long, even after the advent of Article 121(1A). That decision has in many ways corrected prior misimpressions of the law and allows for resolution of conflicts which when looked at objectively and unemotionally are not conflicts at all. It is regrettable that the conflicts of interest that some judges feel in deciding these types of cases have been created by decisions of the Courts themselves. Prior to the decision of the Federal Court in Soon Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah[35], there was no need for a Muslim wishing to renounce faith to first obtain a declaration of apostasy from the syariah court. The decision was premised on a misconception of the relevant law as no such requirement existed at the time nor, in my view, could it have. We are where we are because the apex court has consistently refused to see that that decision was fundamentally flawed.

In the same vein, the High Court had in prior times adjudicated the status deceased persons, dissolved marriages and granted ancillary relief where one spouse converted to Islam, declared the religious status of individual and provided for judicial review. There is no reason why it cannot once again do so, and in taking that course, allow for a healing of society. The law had not changed in between, our attitudes had.

We are at a crossroads. If we continue down the path that we are, we will be undermining efforts aimed at promoting the unity that we crave for. We however have the option of adopting an approach that is more just. This can be done without in any way sacrificing the status of Islam as the religion of the Federation. It does however call for us to appreciate that as underscored by the Federal Court in its recent decision in *Sulaiman Takrib*[36] in the current constitutional scheme, the role of Islamic law is limited to personal law. Until the Constitution is amended to provide otherwise, it must remain contained as such.

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34 See Chief Justice Tun Abdul Hamid Mohamed's farewell speech at a Hari Raya open house at the Palace of Justice on October 17, 2008, at The Star Online. Available online at <http://thestar.com.my/news/story.asp?file=/2008/10/18/nation/2313240&sec=nation. Last seen June 17, 2009>.

35 *Soon Singh v Pertubuhan Kebajikan Islam Malaysia* (PERKIM) Kedah [1999] 2 AMR 1211.

36 *Sulaiman Bin Takrib v Kerajaan Negeri Trengganu & Anor*, Federal Court Petition No.1 of 2006.

THE CAMBODIAN CRIMINAL PROCEDURE CODE AS A MANIFESTATION OF THE CONSTITUTIONAL PROMISES TO CAMBODIAN CITIZENS

Gerald Leather

I. Introduction

Cambodia's 1993 Constitution sets out the rights of Cambodian citizens who become involved in criminal proceedings. These rights have been further elaborated in the Code of Criminal Procedure ("the new Code" or "the Cambodian Code") which was adopted by the National Assembly on 7 June 2007. The adoption of the Code is an important step in translating the broad general rights set out in the Constitution into detailed rules governing the conduct of the police, prosecutors, judges and courts in applying the criminal law.

This paper considers what rights Cambodian citizens have in the pretrial phase of criminal proceedings and, in the Cambodian context, whether the new Code will improve the prospects of all Cambodian citizens being fairly and justly treated if they become involved in criminal proceedings. It begins with a description of the rights included in the Constitution and then describes the background to the introduction of the new Code and the context into which it was introduced. Finally, it examines whether the provisions of the new Code will lead to greater protection of the rights of suspects and accused persons in the course of the pretrial phase of criminal proceedings.

This paper reviews only the provisions relating to the pretrial phase because with the enactment of the new Code, Cambodia has recommitted itself to an inquisitorial criminal justice system in the French tradition. In an inquisitorial system the pretrial investigation phase is the most important phase of the criminal trial process. It is during this phase that evidence is gathered, recorded in writing and placed on a case file. The case file becomes the centerpiece of inquisitorial procedure. In an inquisitorial system the trial judge reads the evidence on the case file before the trial. It is not uncommon both in France and Cambodia for no, or very few, witnesses to be called to give evidence at the trial.[1] In an inquisitorial system the trial is less important than the pretrial phase and is sometimes characterized as an audit of the conduct of the pretrial procedures and the written evidence collected.

1 The Centre for Social Development (CSD) as part of their Court Watch Project observed 232 trials in the Phnom Penh and Kandal courts between April and June 2006 and found that in 95% of cases there were no witnesses (not including victims) and in 87% of the cases the victim was not present. CSD Court Watch Bulletin (CWB) Vol. 3 No.14 p.6.

II. The Constitution

The Cambodian Constitution was adopted in 1993. The Paris Agreements of 1991 between the Vietnamese backed government of the State of Cambodia government and delegates from the Khmer Rouge and other factions opposed to the government, provided guidance on the contents of the proposed constitution. The Agreements specifically provided that the constitution contain "a declaration of fundamental rights, including the rights to life, personal liberty, security, …. due process and equality before the law" and that it "be consistent with the provisions of the Universal Declaration of Human Rights and other relevant international instruments."[2]

The Constitution includes a number of articles which spell out the fundamental rights of Cambodian citizens. These include:

> Article 32:
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> Everybody shall have the right to life, freedom and personal security.
>
> Article 38:
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> The law prohibits all physical abuse of any individual. The law protects the life, honor and dignity of citizens.
>
> No person shall be accused, arrested, or detained except in accordance with the law.
>
> The coercion, physical ill-treatment or any other mistreatment which imposes additional punishment on a detainee or prisoner, is prohibited. Persons who commit, participate in or conspire in such acts shall be punished according to the law.
>
> Confessions obtained by physical or mental force shall not be admissible as evidence of guilt.
>
> The accused shall have the benefit of any reasonable doubt.
>
> Any accused shall be presumed to be innocent until they are finally convicted by the court.
>
> Everybody shall have the right to defend him/herself through the judicial system.
>
> Article 40:
>
> Any search of a house, personal property or a person shall be in accordance with the law.

In addition to these specific provisions the Constitution also "recognizes and respects human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights and the covenants and conventions related to human rights, women's rights and children's rights." and declares that "Khmer citizens shall be equal before the law, enjoying the same rights and freedom and obligations regardless of race, color, sex, language, religious belief, political tendency, national origin, social status, wealth or other status. (...) The exercise of such rights and freedom shall be in accordance with the law."[3] The Cambodian authorities have been inconsistent in interpreting this provision, sometimes insisting that these rights need to be incorporated into national law before they are enforceable and sometimes recommending their direct application

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2 *Jörg Menzel*, Cambodia, From Civil War to a Constitution to Constitutionalism, in Constitutionalism in Southeast Asia, Clauspeter Hill & Jörg Menzel (Eds), 2008, Volume 2, p.47.

3 Constitution, Article 32.

by the courts. The Constitutional Council has recently formally decided that provisions of international conventions are to be taken into account by Cambodian courts when they interpret national law.[4]

The provisions of the Constitution are, however, essentially normative because there is no practical mechanism within the Constitution for their direct enforcement by individual applications to the courts. The Constitutional Council is the only body able to interpret the Constitution and decide whether a law, or parts of it, is constitutional.[5] Requests for a review of the constitutionality of a law may only be made by the King, the President of the Senate, the President of the National Assembly, the Prime Minister, one quarter of the Senators, one tenth of the Members of the National Assembly, or the Courts. Ordinary citizens only have a right "to appeal against the constitutionality of any law through Members of the National Assembly, or the President of the National Assembly, or Senators, or the President of the Senate"[6] and notably <u>not</u> through the courts.

Even though it lacks enforceability its status as the supreme law gives the Constitution considerable persuasive power amongst Cambodians despite most having little knowledge of the law. Its provisions are frequently quoted by lawyers in the courts and referred to by citizens in disputes with the authorities. With very little human rights training, citizens with minimal education are able to assert their rights in terms which constitutional lawyers would recognise.

> "Land is very important for life and we have a right to life. If our land is stolen from us it means that our right to life is violated." (A Cambodian subsistence farmer)

One might even argue that the broad principles enunciated in the Constitution provide better arguments for ordinary citizens pursuing their rights than the detailed law which tends to give lawyers a monopoly on the protection of rights.

However, the Constitution's lofty promises are only translated into detailed enforceable rights and obligations for citizens and the authorities, by provisions in the ordinary law. The new Code is therefore an important step in applying and implementing the Constitutional promises of citizens' rights to life, liberty, physical security and fair trials. This paper considers the extent to which the new Code has given ordinary citizens the rights they were promised in the Constitution.

III. The Code of Criminal Procedure

Background

The new Code was drafted with the assistance of French experts and is based on the French Code of Criminal Procedure.

The new Code is, in a number of ways, an improvement on the laws it replaces. For the first time, at least since 1993, Cambodia has a single detailed Code of Criminal Procedure because

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4 *Jörg Menzel*, Cambodia, From Civil War to a Constitution to Constitutionalism, in Constitutionalism in Southeast Asia, Clauspeter Hill & Jörg Menzel (Eds), 2008, Volume 2, p.60.

5 Constitution Articles. 136,140 & 141.

6 Constitution Article 141.

the new Code abrogates all previous laws on criminal procedure. It replaces two temporary laws which had conflicting provisions, were brief and lacked coherent detailed procedural provisions. Detailed procedural provisions are necessary for providing guidance to participants in the justice system, most of whom have had little experience or knowledge of an inquisitorial criminal justice system. Only a handful of lawyers and judges who had worked in and understood the French style court system prior to the Khmer Rouge takeover, survived the Khmer Rouge.

In respect of due process, the new Code introduces improvements. It requires the Police to inform a person detained in police custody of the reasons for his/her detention and his/her right to legal assistance. It also requires an interpreter to be present "if necessary" and a written record made of the detention process and any interrogation.

The new Code was, however, an opportunity for significant reform of criminal justice in Cambodia. An examination of the detailed provisions of the new Code indicates that this opportunity to positively influence actual practices and procedure in Cambodia, has been lost. This is most unfortunate because getting a large, complex law like the new Code amended in the Cambodian context will be difficult and it may be some time before there is another opportunity for significant reform.

The Context

The reform of criminal procedure is a continuous process and the extent of any reform is limited by the capacity of a nation's institutions and citizens to cope with change. However, more could have been made of this opportunity to improve the practical implementation of citizens' constitutional rights. Virtually all commentators would accept that there are substantial and continuing problems in the criminal justice process, including corruption, impunity, inadequate resources and problematic "cultures" in the police, prosecution and judiciary. All of these inevitably affect basic fairness and due process. Reforming the law alone is never going to solve all the problems. Changing deep cultures in the police and the courts is hard. But even if law does not immediately change practices (even in something so 'rule-bound' as criminal procedure), it is important that at the very least the directions are clear, and that clear rules are established that might favour fairer process. Over time, these might be progressively enforced. However, the evidence of a lack of basic fairness and due process under previous law and practice has not been fully recognized or dealt with. Indeed, the new Code may in some key respects provide less protection for individual rights than the law it replaced.

Three factors appear to have prevented the new Code from being a more reforming law.

Firstly, having opted to reconstruct its criminal justice system along French style inquisitorial lines Cambodia has drawn heavily on the French Criminal Procedure Code ("the French Code"), but the selection and adaptation of provisions from the French Code has been conservative. A possible explanation for that conservativism may be that the drafting of the Cambodian Code started soon after the adoption of the Constitution in 1993 and has coincided with a period when the French Code has been in a state of flux. The French Code has been amended significantly on at least four occasions since 1993. The French Code, which is still less than exemplary in its protection of the rights of individuals, was prior to the first of those amendments in 1993

even less protective of the rights of suspects and accused persons. The changes to the French Code since 1993, however, have not all improved the protection of individual rights. Positive improvements made in the 1990s were partially reversed in the early 2000s. Given the size and complexity of the Cambodian Code it is understandable that the drafters, with the limited resources available to them, might have been reluctant to incorporate each of the French Code changes into the new Cambodian Code when there was uncertainty about the permanence of the French Code changes.

Unfortunately the Cambodian Code has tended to follow the French Code when it has given the police and prosecutors greater powers. But provisions now in the French Code which protect the rights of suspects and the accused have been left out, diluted or included in a form which is likely to make them ineffective in practice.

Secondly, the new Code includes repressive parts of the previous law or parts of the previous law which have been repressively applied. Thirdly, provisions which protected the rights of suspects and accused persons under previous temporary laws have not been carried forward into the new law or have been replaced by provisions which are less protective of suspects and accused persons.

This means that the new Code provides little improvement in the protection of rights of suspects and accused persons: rights which were not adequately protected under the old law and practice. The rest of this paper considers some of the changes introduced by the new Code and assesses their impact on the protection of the rights of suspects and accused persons during the pre-trial phase.

IV. Arrest and Police Detention

Provisions of the new Code relating to arrest and detention in police custody provide less protection for suspects than international standards require. The criteria for a valid arrest are not well specified. Suspects may be detained in police custody for up to three days with very limited access to legal advice. Suspects and their families are unable to request a medical examination of the suspect while he/she is in police custody.

The new Code should protect the rights relating to arrest and detention in police custody specified in the International Convention on Civil and Political Rights (ICCPR). These are the rights for a person not to be arrested except on grounds established in law, to be informed at the time of arrest of the reasons for their arrest, to be promptly informed of any charges against them, to be promptly brought before a judicial officer to be tried or released unless there are sound legal grounds for continued detention, and the right to have a court decide without delay whether they should be released.[7] The right to a fair trial in Article 14 of the ICCPR is also important in the pre-trial phase. The European Human Rights Court, interpreting almost identically worded fair trial rights found in the European Human Rights Convention, has declared that "the trial cannot be treated as a discrete phase in the criminal process, unaffected by the processes that precede it, and a denial of defence rights at the pre-trial stage is likely to prejudice the preparation of the

7 ICCPR article 9.

defence case and so the fairness of the trial."[8] The European Court has decided that fair trial rights apply to individuals from the point of arrest[9] and that once a person is under investigation they need to have the protection of fair trial rights "even if a formal charge or indictment is never brought."[10] "This protection includes access to custodial legal advice because it is 'fundamental to the preparation of [an accused person's] defence".[11]

Arrest

Cambodian suspects are often arrested on the basis of little or no evidence.[12] The wording of the Cambodian Code does little to reduce the risks of arbitrary arrest. Under the French Code police may only arrest and detain people if "there exists one or more plausible reasons to suspect that they have committed or attempted to commit an offence". The Cambodian Code only requires that a person be "suspected" of committing an offence. There is no attempt to objectify this criteria.

Police Custody

Provisions of the Cambodian Code regarding access to legal advice and police custody are also less protective of suspect's rights than the equivalent provisions of the French Code. In Cambodia, as in France, the police have the power to detain suspects while they conduct initial investigations. In France, suspects may be detained for an initial period of 24 hours, whereas in Cambodia they may be detained for twice as long - 48 hours. In Cambodia, as in France, detention in police custody may be extended for a further 24 hours for more serious offences.

The 48 hour period is the same as it was in the previous Cambodian law. There are good reasons for the initial period of police custody in Cambodia to be no longer than 24 hours. Firstly, under the new Code the period in police custody now starts from the time the suspect arrives at the police station, rather than at the time they are arrested.[13] This lengthens the time a suspect can be held because under the prior law traveling time is explicitly included within the 48 hour period. Defining the length of the custody period to exclude traveling time creates further risks for the suspect. The process of taking the suspect to the police station may be unnecessarily extended and during that process the suspect may be mistreated and subjected to other forms of pressure

8 *Hodgson*, *J*, 2004(a), The Detention and Interrogation of Suspects of Suspects Detained in Police Custody in France: A Comparative Account" vol. 1, no.2, European Journal of Criminology, pp163-99 p.174.

9 *Hodgson* (2004a) p.174.

10 *Hodgson* (2004a) p.174 referring to *Allenet de Ribemont v France* 1995 20 EHRR 557, where the court held that a person was 'charged' at the point of arrest.

11 *Hodgson* (2004a) p.174 referring to *Bonzi v Switzerland* (1978) 12 D.R. 185 at p. 190.

12 Suspects are often arrested on hearsay or suspicion. (Cambodian League for the Promotion of Human Rights, 2003, Torture in Police Custody in Cambodia: A LICADHO Report, Phnom Penh also available on <http://www.licadho.org/reports.php, p.14>.) My observations from reported public pronouncements of police officers indicate that investigations are often very much focused on a search for someone with a motive rather than an open minded search for evidence.

13 The new Code, Article 96.

14 An example of this is cited in "Torture in Police Custody in Cambodia" at p.18. A man was arrested (illegally at that time) by a number of people and taken to a police post. On the way there he was seriously beaten by his

and humiliation.[14] Article 87 of the new Code empowers anyone, including a police officer, to arrest a person suspected of committing a flagrant offence. It should include a requirement that an arrested suspect be taken to a police officer by the quickest means possible and that the police officer be required to transport the arrested person "by the most rapid means available"[15] directly to the police station where they are to be held. The person who arrests the suspect and the police officer to whom the arrested person is delivered should be required to take all reasonable steps to ensure the safety of the suspect.

Secondly, the police argue that the 48 hour period is required because under the previous law they could not continue to investigate the offence after the suspect was handed over to the prosecutor at the end of the police custody period. However, the new Code provides that the police may (as the police in France do) continue to investigate matters specified under rogatory commissions issued by investigating judges.

Thirdly, the reason most frequently given for the 48 hour period is that any lesser period does not allow the police enough time to establish a prima facie case against the suspect before they are required to hand the file and the suspect over to the prosecutor. The provisions of the new Code mean that this argument is no longer valid. Article 96 only authorizes the police "to detain a person who is suspected of having participated in the commission of an offense". This is the requirement regardless of whether the suspect has been arrested in flagrante delicto or is detained in the course of a preliminary enquiry.[16] The difference between a flagrante delicto arrest and detaining a suspect in the course of a preliminary enquiry, is that the police can control the timing of the latter but may have to arrest the suspect in the former to prevent their escape, stop the suspect from continuing to commit the crime and/or to protect the suspect from the anger of bystanders. In a flagrant case, by definition, someone has to have observed the suspect performing a criminal act, or doing something incriminating after the offence occurred. The observers of the activity and/or the victim are immediately available witnesses whose evidence should be taken relatively quickly and easily within 24 hours of the arrest. The police have the power to require victims and witnesses to remain at the scene of the offence, to question them and take their statements.[17] The police also have the power to conduct searches related to flagrant offences at any time of the day.[18] It should therefore be easy for a disciplined police enquiry to gather sufficient prima facie evidence to enable the prosecutor to charge the suspect within 24 hours. If the investigating judge requires further evidence he/she may issue a rogatory commission requesting the police to obtain it.

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captors. When the police arrived they joined in beating and kicking the suspect to try to extract a confession. This encouraged the crowd to join in beating the suspect.

15 Wording in the law which preceded the new Code. UNTAC Law Article 13(1).

16 Under the previous law the police had to have a warrant from a judge to arrest a person not caught flagrante delicto. Under the new Code the police have almost identical powers in flagrant cases and other cases. But while there is a power for anyone to arrest a suspect in flagrant cases (article 87), in other cases the police now have power to order a suspect to appear before them and be questioned and only if the suspect refuses to appear do the police have to ask prosecutor for a summons authorizing the police to use force to bring the suspect before them (article 114). After the questioning the police will presumably use their power to detain the suspect in police custody (article 116 which applies article 87 to non flagrant cases).

17 The new Code, Articles. 89 and 94.

18 The new Code, article 91.

In cases where the suspect is no longer present at the scene of the crime and the victim does not know who the offender is, the investigation may take longer. However, if the police carry out a thorough investigation before summoning or arresting the person who carefully collected evidence indicates is the perpetrator, 24 hours should be plenty of time to complete the interrogation of the suspect and to conduct any further enquiries arising from the interrogation.

In the early 1990s a 48 hour detention period may have been justified by the very poor state of transport infrastructure and security in Cambodia. Greatly improved security and improved transport infrastructure means that the initial detention period could and should have been reduced to 24 hours in the new Code.

Legal advice while in police custody

Until a very late stage in the legislative process, the Cambodian Code did not provide for the suspect to have any access to legal advice during the period the suspect is detained by the police. The new Code as finally enacted includes a right to one meeting with a lawyer after 24 hours in police detention.[19] This is an improvement but the suspect may after that one meeting with his/her lawyer, be detained for up to a further 48 hours with no right to a further meeting with his/her lawyer. This compares very unfavorably with the French Code which gives the suspect the right to meet with his/her lawyer at the beginning of the detention period, after 20 hours and again after 36 hours.

A very significant improvement in the new Code is that the 24 hour meeting may be with a lawyer or another person chosen by the suspect. The police are also required to advise the suspect of his/her right to this meeting. This alternative right to meet with another person is important because the shortage of lawyers in Cambodia and their tendency to be concentrated in Phnom Penh means that it is unlikely that a lawyer will be available to meet with suspects at many police stations outside of the capital and only in a limited number of provincial towns.

Being able to meet with a lawyer or another person during the police detention period has the potential to reduce the widely reported use of torture and other techniques to pressure suspects to make a confession. Despite the strong incentives for torture victims not to report torture, human rights and legal aid NGOs report that between eight and thirty percent of suspects allege they have been tortured in police custody in Cambodia.

Medical Examinations

Medical examinations are another means of deterring torture and other abuse of suspects. The French Code gives a suspect or his/her family the right to request a medical examination of the suspect at the beginning of the detention period and when detention is extended.[20] The Cambodian provisions have been diluted by allowing a medical examination but only at the request of the prosecutor or a police officer. Any protection this offers the suspect is further diluted because if the doctor finds the suspect unfit to be detained, the prosecutor must be

19 The new Code, Article 98.

20 The French Code. Article 63-2.

notified and may "verify the condition of the arrested person".[21] The suspect, in the meantime, will undoubtedly remain in police custody until the prosecutor arrives. That may take some time, particularly at more remote police stations.

Imediate Appearance

The new Code introduces a new procedure, immediate appearance, which has significant implications for the rights of accused persons. Under the previous law when a suspect was brought before him/her by the police, the prosecutor had a limited range of options. He/she could either release the suspect or, with minor exceptions, refer the case to an investigating judge.

The new immediate appearance procedure gives prosecutors the power to send as many as a quarter of all cases[22] directly to the court to be heard on the same day as the suspect is brought before the prosecutor. The immediate appearance procedure may be applied in flagrant cases[23] which carry a sentence of imprisonment of between one and five years.[24] These cases will not be subject to any judicial scrutiny by an investigating judge. This procedure looks very like the guilty plea in adversarial systems and is therefore a considerable departure from the philosophy of French style inquisitorial procedure which justifies the minimal involvement of defence counsel in pre-trial procedures on the grounds that the investigation is carried out by a neutral judicial officer, the investigating judge.

Under the immediate appearance procedure, an accused person who is likely to have been in police custody for 48 or 72 hours, will be taken before the prosecutor. The prosecutor is required to tell the accused person what they are charged with, take the accused's statement if they wish to give one and advise the accused of their right to a lawyer (without charge if they cannot afford to pay for one). The accused is then taken to the court where the trial judge will inform them that they are entitled to extra time to prepare a "defence".[25] If the accused requests an adjournment

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21 The new Code, Article. 99.

22 On the basis of the 2003 Court statistics presented in "Pathways to Justice" I estimate that approximately one quarter of the criminal cases would on the basis of the penalty limits qualify for the immediate appearance procedure. *Yrigoyen Farjardo, R, Kong, R & Phan, S*, 2005, Pathways To Justice: Access to Justice with a focus on Poor, Women and Indigenous People, United Nations Development Programme, Cambodia and the Cambodian Ministry of Justice, Phnom Penh p. 284.

23 The conflicting provisions of the previous laws were interpreted in a way which allowed most cases to be treated as flagrant cases. *Coghill, S*, 2000, Resource Guide to the Criminal Law of Cambodia, International Human Rights Law Group Cambodia Defender Project, Phnom Penh p.83-92. It is estimated that 95% of cases were treated as flagrant cases in which the judicial police may arrest a suspect without an arrest warrant. This situation seems unlikely to change under the CCCP because the definition of flagrant cases in article 86 is expanded by article 88 to include any enquiry requested by the owner or occupier of a place where an offence has occurred.

24 The new Code, Article 47.

25 In a number of articles in both the Code and the French Code there are references to the accused or their lawyer presenting a "defence" when what they are really doing is presenting their or their client's submissions or arguments on the issue being decided by the judge. The use of "defence" is at its most incongruous in article 48 because the immediate appearance procedure is effectively a guilty plea and what the accused or their lawyer are presenting are submissions on penalty. It is unfortunate that the drafting of the Code has been similarly distorted in a way which will hinder the understanding by Cambodian lawyers of their role in the immediate appearance procedure and any hearings on whether the accused is to be detained pretrial or not.

(to prepare their case) or the court cannot hear the case that day, it will be adjourned to a later date. The trial judge may order that the accused be temporarily detained for up to two weeks. If the accused's case has not been heard by the end of that period the accused will be released.[26] If the accused does not request an adjournment and the court has sufficient time to hear the case it will be heard that day.

The immediate appearance procedure is very similar to the procedure under the French Code, but the safeguards for the accused in the Cambodian Code are in a form which makes them less effective than the safeguards in the French Code. Under the French Code the accused having a lawyer and the case being adjourned, as the default options because the accused cannot waive their right to an adjournment unless they have a lawyer present.[27] This gives the French judge and prosecutor an incentive to ensure that the accused has a lawyer. (The effectiveness of these French safeguards is questioned because of the limited time the usually young and inexperienced legal aid lawyers have to review the file and interview the accused before presenting what amounts to a plea in mitigation to the judge, and because of the disapproving attitude taken by the French trial judges to any request for an adjournment.[28] However, it is better to have a protective procedure which is capable of being made to work, as is the case under the French Code, than to have procedures which are likely to result in the accused not being legally represented in very hasty proceedings, as is the case under the Cambodian Code.)

By contrast the Cambodian Code allows the accused to waive the right to an adjournment without being legally advised. The accused only has to be advised of their right to a lawyer after they have been told the charge they face and had their statement in response to the charge taken. A poorly educated accused person who has been held incommunicado in police custody for 48 hours and who has already "confessed" to the police and made a possibly incriminating statement to the prosecutor, is less likely to see any advantage in the assistance of a lawyer at this point.[29] There is, therefore, the potential for many people to be imprisoned for up to five years after very truncated proceedings and without ever receiving legal advice or being represented by a lawyer.

V. First Appearance before an Investigating Judge

In both the Cambodian and French systems, at the accused's initial appearance before an investigating judge, the judge identifies the accused, tells him/her what offence they have been charged with, takes any statement the accused wishes to make in response to the charge (which is written down and placed on the case file and so may be used against them), interrogates the accused and decides whether to release the accused to appear later or to place them in pretrial detention.

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26 The new Code article 48 & repeated at article 304.

27 The French Code article 397.

28 *Hodgson, J*, 2005, French Criminal Justice: A Comparative Account of the Investigation and Prosecution of Crime in France, Hart Publishing, Oxford and Portland, Oregon pp.62, 130-1, *Vogler, R*, 1996, "Criminal Procedure in France", in Hatchard, J, Huber, B, Vogler, R, (eds) Comparative Criminal Procedure, British Institute of International and Comparative Law p.41, *Field, S* & *West*, A, 2003,"Dialogue and the Inquisitorial Tradition: French Defence Lawyers in the Pre-Trial Criminal Process", Criminal Law Forum, vol 14, no.3, 261-316, p.298

29 90% of prison inmates confess during police interrogation. " Torture in Police Custody in Cambodia" p.5.

Legal Representation Again

One of the defining weaknesses of the Cambodian Code is an apparent unwillingness of its drafters to acknowledge the role lawyers should play in fair judicial processes to minimize the possibility of miscarriages of justice. In addition to having very limited opportunity for legal advice while in police custody, an accused is now less likely to be represented at his/her first appearance before the investigating judge than under the previous law. Under the previous law an investigating judge could only take an accused's statement if he/she had first informed the accused that they did not have to make a statement without the assistance of their lawyer and that the accused had the right to a lawyer whether or not they could afford one.[30] The appointment of a lawyer was automatic for any person charged with a felony who could not afford a lawyer, and for minors or disabled persons. If the accused was entitled to, or requested a lawyer, the investigating judge was required to suspend the interrogation of the accused until the lawyer was present.[31] In practice, however, experienced lawyers say that lawyers were only present at approximately 50% of interviews conducted by investigating judges and that investigating judges did their best to persuade the accused to waive their right to have a lawyer present.[32]

The previous law and practice further undermined the protection of the accused, by having a lawyer present during the investigating judge's interview, in two ways. Firstly, the accused person was able to waive their right to a lawyer.[33] To have asked for a lawyer, an unrepresented accused (often non-literate[34] or poorly educated and overawed by the court) had to assert rights which they probably did not know they had, to a socially superior judge who may have tried to dissuade them.

Secondly, any difficulty in asserting their right to a lawyer is compounded by the obstacles an accused has to overcome to arrange legal representation in time for the first appearance before the investigating judge. The accused is not permitted to contact a lawyer while in police custody, nor while detained in prison during the judicial investigation. An accused therefore relies on their family or one of the NGOs which visit some prisons to contact a lawyer for them. The accused or their family has to make a written request for a lawyer. That request is filed with an application for a "writ of appointment of attorney" at the court. It takes the court several days to issue the writ.[35] Only once the "writ" has been issued is the lawyer allowed by the prison authorities to meet with his/her client. (Coghill notes that "[t]here appears to be no legal authority whatever for imposing this procedure."[36]) Even if there was a law which empowered the court to control

30 SOC Law article 75.

31 SOC Law article 76 Paras. 1 & 2.

32 A CSD survey found that in 75 out of 120 cases "the defendants were not represented by defense counsel at any time during the investigation stage" and where they were represented, it was by a legal aid lawyer appointed only minutes before the interview with the IJ "[t]he presence of the lawyer was treated as a mere formality." CWB Vol. 3, Number 15, p.4.

33 SOC Law article 76 Para 3.

34 36 percent of women and 15 percent of men over the age of 15 are non-literate. "The World Factbook" at <https://www.cia.gov/cia/publications/factbook/geos/cb.html#People>.

35 *Koy*, *N*, 1998, Introduction to the Cambodian Judicial Process, The Asia Foundation, Phnom Penh p.108.

36 *Coghill p.* 134.

the appointment of lawyers it would have been abrogated by the passing of the new Code. This bureaucratic process for appointing a lawyer has meant that by the time the lawyer got to see the accused he/she may have been interrogated by the investigating judge, perhaps more than once. I am told that despite a lack of legal authority for this procedure it is continuing under the new Code.

The form of the provisions of the new Code governing the first appearance of an accused person appears to reduce the provisions effectiveness. An investigating judge is required to identify the accused, advise him/her of the charge, inform him/her they need not make a statement in response to the charge and finally, perhaps after the accused has made a statement, inform them of their right to have a lawyer present.[37] In contrast the French Code gives priority to the requirement that the investigating judge advise the accused of their right to a lawyer. If the accused requests a lawyer the French investigating judge must inform the lawyer or the bar association. The investigating judge is also required to inform the accused that they may remain silent, make a statement or be interrogated but that the accused may only consent to being interrogated in the presence of their lawyer.[38] The French Code also ensures that an accused facing the possibility of provisional detention has sufficient time to prepare their arguments opposing provisional detention, by giving the judge the power to delay the hearing and temporarily remand the accused in prison for a period of not more than four days.[39]

VI. Provisional Detention

Lawyers in Cambodia complain that accused persons are presumed guilty from the time they are arrested and that the investigation and judicial processes which follow are simply formalities.[40] This perception is reinforced by the very high percentage of accused persons provisionally detained in prison (the equivalent of a remand in custody) after their first appearance before an Investigating Judge. A study conducted by the Centre for Social Development ("CSD") in mid 2006 found that the Phnom Penh Municipal Court ordered the provisional detention of 97% of accused persons and the Kandal Provincial Court ordered that 87% be detained.[41]

37 The new Code, article 143 "When an accused person appears for the first time, the investigating judge shall check his/her identity, inform him/her of the imputed act, and receive his/her statement after informing him/her of the right to answer or not answer. The statement shall be written in the record for the first appearance. If the accused person wants to answer, the investigating judge shall take the statement immediately.
The investigating judge must inform the accused person of his/her rights to choose a lawyer or to have a lawyer appointed according to Article 30 of the Law on the Bar."

38 FCCP articles 114 &116.

39 FCCP article 145.

40 Lawyers say that once a person has been arrested and made a "confession" it is very unlikely that a prosecutor or judge will listen to and investigate allegations that the confession was made under duress. Instead they will assume that the accused is changing their story and try to verbally batter the accused into admitting the facts as set out in the case file. As at best only a summarized version of any such exchange (written by the Judge or the clerk) is placed on the case file there is often no evidence of the accused's complaint on the file at each stage that it is made. So when an investigating judge or a trial judge is faced with a complaint that a confession was made under duress they are likely to ask why, if this is true, the accused did not complain to the prosecutor or the investigating judge, and refuse to investigate.

41 CSD CWB Vol.3, No.15 p.8.

The introduction of judicial supervision, a new procedure for releasing the accused pending trial, in the new Code is an opportunity to reduce the excessive use of pretrial detention and consequent overcrowding of prisons. An accused person may be released under judicial supervision on condition that they comply with one or more of twelve specified conditions which the judge may impose. However, the order in which the articles relating to provisional detention and judicial supervision are laid out in the Code and the vagueness of definitions of the grounds upon which pretrial detention may be ordered, are likely to limit any reduction in provisional detention rates. The first article of Section Five (entitled "Provisional Detention") of Chapter Three, states a "general principle, [that] the freedom of an accused must be allowed"[42] although this article is entitled "Principle of Provisional Detention" and makes no mention of judicial supervision. Section Five includes 15 other articles relating to provisional detention. "Judicial Supervision" is not defined and described until Section Seven of Chapter Three. This muddled layout which gives precedence to provisional detention contradicts the general principle and is in sharp contrast to the French Code where a Section headed "Judicial Supervision and Pre-Trial Detention" includes firstly an article which makes it clear that pretrial detention should only be used in exceptional circumstances and only after judicial supervision has been considered and found to be inadequate.[43] The French provisions relating to Judicial Supervision are then set out in Subsection 1[44] of the Section and the Pretrial Detention provisions are set out in Subsection 2.[45] The ordering of the subsections helps to reinforce the general principle in the French Code that judicial supervision is the preferred option.

The wording of Article 205 of the new Code, which sets out the grounds on which provisional detention may be ordered, is unlikely to give judges any confidence that they should make greater use of judicial supervision. The sixth ground upon which provisional detention might be ordered seems to create a new catchall ground, which has been alternatively interpreted as "to prevent public order from being disturbed by the offense" or "to preserve public order from any trouble caused by the offense". This ground is very broad particularly when contrasted with the French equivalent, "to put an end to an exceptional and persistent disruption of public order caused by the seriousness of the offence, the circumstances in which it was committed, or the gravity of the harm that it has caused."[46] Under the French article, before the accused can be detained, the disruption must already be happening and the disruption of public order must be "exceptional" and "persistent" and must be caused by the seriousness and/or nature of the offence. This is a different and more limited ground than the sixth ground in the Cambodian Code which requires

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42 The new Code, article 203.

43 French Code Article 137 "The person under judicial examination, presumed innocent, remains at liberty. However, if the investigation so requires, or as a precautionary measure, he may be subjected to one or more obligations of judicial supervision. If this does not serve its purpose, he may, in exceptional cases, be remanded in custody".

44 French Code Article 138.

45 French Code Article 139.

46 French Code article 144. Public order is an ill defined term and tends to be used repressively as a catchall by officials in Cambodia. The Governor of Phnom Penh recently ordered the removal of advertising signs from the back of tuk-tuks, "To guarantee public order and beauty…" Cambodia Daily, 6 February 2007, p.15. No evidence was offered as to how these signs might affect public order. On this occasion the Governor's edict was revoked by the Prime Minister. Cambodia Daily 12 February 2007, p.15.

the judge to speculate on whether the release of the accused might cause public order to be disturbed in the future. The lack of any definition of what constitutes a disturbance of public order is likely to cause judges to err on the side of caution and detain accused persons rather than face disciplinary action if the release of a person under judicial supervision should cause an incident which the authorities deem to be a disturbance of public order.

The range of offences for which pretrial detention may be imposed under the Cambodian Code includes all felonies and misdemeanors for which the penalty is one year in prison or more.[47] As all felonies and virtually all misdemeanors carry a maximum penalty of one year or more this provision will do nothing to reduce the overuse of pretrial detention. The French Code limits the use of pre trial detention to offences carrying a maximum penalty of three years imprisonment or more.[48]

Provisional Detention Limits

Accused persons are not only needlessly 'provisionally detained', they have also in the past often been detained for periods exceeding the time limit prescribed under the law. Under the previous law an adult could be detained for a maximum of four months, which could be extended by the investigating judge to six months "if justified by the requirements of the investigation…" Minors under 13 could not be held in pre-trial detention and those aged between 13 and 18 years could only be held in custody for one month on a misdemeanor charge or two months on a felony charge.[49] A CSD study found that of the persons placed in pre-trial detention by the Phnom Penh court 18% had been detained for between four and six months[50] and 46% had been detained for more than six months. Of those appearing in the Kandal Court, 22% had been detained for between four and six months and 48% had been detained for more than six months.[51] Detention of accused persons in excess of legal limits is a breach of the right to be released if they have not been tried within a reasonable time. The excessive length of pretrial detention sometimes leads to a practice, reported by lawyers, of judges convicting detained persons and facilitating their almost immediate release by sentencing them to a prison term which they have already served as pretrial detention. This is perceived as the trial judge dealing with a case where they are either unconvinced of the guilt of the accused or unconvinced that the facts justify the severity of the charge brought against the accused person. The judge convicts and sentences them to the time already served, to avoid offending his/her fellow judges, the prosecutor and/or the police.[52]

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47 The new Code, Article 204.

48 French Code Article143-1.

49 UNTAC Law, Article.14.

50 There is no indication as to whether the detention had been formally extended.

51 CWB Vol.3, No.15 p.8.

52 Six people including two under 18 were arrested for fighting. The prosecutor charged them with battery with injury and they were ordered to be detained by a judge. They were brought to trial nearly eight months later. The minors who had been illegally detained for seven months were sentenced to eight months in prison and the adults who had been illegally detained for nearly two months were sentenced to nine months i.e. essentially the period they had already been in prison. CSD CWB Vol. 3 No.15 p.9.

The new Code deals with this issue by legitimizing longer periods of provisional detention. It lengthens the period an accused charged with a felony may be held in custody, to six months extendable by a maximum of two additional periods of up to six months each (a total of 18 months maximum).[53] For a misdemeanor, the maximum period is four months extendable for one further period of up to two months but subject to a maximum of one half of the minimum sentence for the misdemeanor with which the accused has been charged.[54] The different formula for felonies and misdemeanors may create confusion because offences created in laws other than the UNTAC Law have generally not been categorized as felonies or misdemeanors.[55] This may lead to excessive periods of pre-trial detention being justified by confusion over the categorization of offences. To avoid this and prevent illegal over-detention there should be a default definition to apply where the law creating the offence does not specify whether it is a felony or misdemeanor.

VII. Evidence and Inquiries

The provisions of the new Code regarding the gathering of evidence do not provide protection as effective as that provided in the French Code and fall short of the ICCPR fair trial rights.

Power to detain witnesses

Particular areas of concern are the power of the police to detain witnesses, and the accused not having the right to be present or have their lawyer present when evidence is gathered,

The inclusion in the new Code of a police power to detain suspects, a power not permitted under the previous law, is an example of the Code legitimizing past police practices. Lawyers report that it has not been unusual for the police to invite a witness to the police station for questioning and then detain them. Under the new Code, a witness who has information but will not disclose it, can be detained in police custody on the same terms as a suspect. The only check on this extraordinary power is that the prosecutor has to approve the detention of the witness, in writing. There is no requirement for the police or the prosecutor to be satisfied on reasonable grounds that the person has the evidence sought. Neither is there a requirement, as there is if the police are acting under a rogatory commission issued by the investigating judge, for questioning to cease if the police realize that the person is about to incriminate themselves.[56] This provision has the potential to allow police to put pressure on possible witnesses to provide evidence. The result is likely to be unreliable evidence given by people threatened with detention or actually detained. A similar provision in the French Code was removed in 2000.[57]

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53 The New Code, Article 208.

54 The New Code, Article 209.

55 The 1969 Criminal Code defines a misdemeanor as carrying a penalty of between eight days and five years. Coghill p. 46. But that provision may well have been repealed by the Code (see the new Code Article 611).

56 The new Code, Article 179.

57 *Hodgson* (2005) p.43.

Evidence from the accused

The accused has the right to ask the investigating judge to interrogate him or her, to question a civil party or a witness, to arrange a confrontation or to visit the site of the offence.[58] A record of all interviews, interrogations, confrontations and site visits must be included in the case file. However, in contrast to the French Code which allows the defence lawyer to be present, the accused person does not have the right under the Cambodian Code to request that their lawyer be present when evidence gathering takes place.[59] In Cambodia only the prosecutor may be present when the judge and his/her clerk gather evidence. The evidence may also be gathered by the police under a rogatory commission: again with no right for the accused's lawyer to be present. Concerns about corruption and impunity will give an accused person little confidence that the evidence they wish to have included on the case file will be fairly gathered and accurately recorded if their lawyer is not present.

Not being able to have their lawyer present when evidence is gathered, places the accused at a distinct disadvantage because in an inquisitorial system it is critical to ensure that evidence which raises doubts about the guilt of the accused or indicates that they may be innocent, is on the case file where it is likely to have greater influence on the trial judge. In Cambodia most trials proceed without any witnesses appearing and the trial judge relies solely on the case file.[60] The alternative means of getting evidence before the court, by having a witness appear in court, is a high risk strategy because of the difficulty and expense of getting witnesses to come to court and the judges' powers to decide whether to allow witnesses to give evidence at a trial if they are not formally summonsed to give evidence.[61] The failure to allow the accused a right to have his/her lawyer present at the time evidence is gathered, amounts to a serious violation of the accused person's right to a fair trial and specifically the right to have his or her witnesses heard.

The Quality of Evidence on the Case File

Most of the evidence relied on by a trial judge will come from the case file. As few, if any, witnesses give evidence at a trial the accused has no opportunity to test the evidence by cross examination. This raises concerns about whether statements on the case file accurately reflect what was actually said and the context in which it was said. The practice of investigators, unconsciously or consciously, of constructing statements of evidence in a manner which is designed to improve

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58 The new Code, Article 133.

59 The new Code. Article 82-1 and 82-2.

60 CSD reports that of the cases they observed in 2005, there were no witness in 75% of felony trials and 89% of misdemeanor trials. CSD Court Watch Project Annual Report 2005. p.23. In his observation of five cases before the French Tribunal *Correctionel* McKillop noted that only one of 17 witnesses appeared to give evidence in court and that witness was also a civil party. McKillop, B. (1998) Readings and Hearings in French Criminal Justice: Five Cases in the *Tribunal Correctionnel,* The American Journal of Comparative Law, Vol. 46, p757 at p.773. To the extent that this practice is informed by legal reasoning may be based on a view that these adversarial type provisions in the UNTAC Law have been abrogated by the provisions of the later SOC Law which envisages the use by the judge of the dossier and making the calling of witnesses optional. More probably it is the continuation of practice under the courts of the socialist era and the residual influence of the French system pre 1975 on the Judges.

61 The New Code, Article 324.

the prospects of conviction, is an issue in all criminal justice systems.[62] In an inquisitorial system the results of interrogation of the accused by police and the investigating judge are placed, in the form of a brief continuous statement by the person giving the evidence, on the influential case file. This format has two implications. Firstly, it gives a misleading impression that the person being questioned gave their evidence as a continuous statement when it is usually a summary of answers to a series of questions. Even if the responses to the questions were faithfully recorded, the absence of the questions from the record removes clues vital to the interpretation of the evidence. Secondly, in the course of summarizing the evidence, meanings get subtly changed and reservations and nuances get lost, particularly as the record is being made by a police officer or investigating judge who knows the impact of using particular words and phrases and not using other words and phrases. The person being interviewed, unaware of the effect on later readers of the way in which the judge or police officer is constructing the statement, may be quite happy to accept the summary and may not appreciate the potential impact of particular words and phrases.

One provision of the new Code should reduce the tendency for investigating judges to "construct" statements because it includes a requirement that the record of every interrogation or confrontation "must accurately state the questions, answers and spontaneous statements."[63] This will give the court a better understanding of what the interviewee is trying to convey, rather than what the interviewer wishes to record and should reduce the risk of miscarriages of justice. Unfortunately this requirement for a verbatim record of the interview of a suspect is not required of the police when they interrogate a suspect or interview witnesses.

Another considerable improvement is Article 128 of the new Code which provides that the clerk "cannot perform the duties of the investigating judge." This seemingly innocent article should end a practice which threatens to undermine the philosophic foundations of inquisitorial procedure in Cambodia. Some investigating judges have allowed or required their clerks, who are not judicial officers, to carry out the judicial role of questioning witnesses and accused persons, albeit sometimes under supervision of the investigating judges.[64] This has occurred despite the lack of any legal authority for this practice under the previous law.

VIII. Concluding Remarks

Cambodia has made great progress in many fields since 1993. The new Code is part of that progress but is a work in progress. Cambodian politicians and officials often stress that progress

62 *Hodgson* (2005) p.192 "The result [of police interrogation] is a very clipped statement, presented as a narrative, with the occasional inclusion of a question and response recorded verbatim. Summarising the evidence in this fashion produces a record which is incomplete in important ways, making it difficult to assess credibility of the evidence presented. It reveals nothing of the tone of the interview; the extent to which the suspect's answers are spontaneous or the result of questions put to her; any pressure to make admissions…. The absence of any interrogation context within which to interpret or evaluate the evidence produced is a significant weakness, demonstrated by (...) the miscarriages of justice [in France and England and Wales].

63 The New Code, Article 242.

64 Lawyers complain about this practice and it has been observed by Court Watch Monitors. Court Watch Bulletin Vol. 2 No. 8 &9 p. 43.

can only be made step by step. It is to be hoped that in respect of the new Code big steps are taken and taken frequently, so that amendments are made to fully realize the fundamental rights promised to citizens by the Constitution and thereby reduce the risk of citizen's rights being violated and miscarriages of justice occurring. Having completed the enormous task of reconstructing a comprehensive criminal code, it is to be hoped that the government, its officials, its advisers and the civil society organizations will continue to work together to make amendments to those areas of the new Code which do not fully protect the rights of citizens. It is quite natural for amendments to be needed and made even for a relatively recent law. Most articles in the French Code have been amended between five and ten times over the last 50 years.

There is a need for an evaluation of the implementation of the new Code by the Courts, prosecutors and judges, on an ongoing basis, to assess how well the new Code is protecting citizens' rights and what amendments need to be made to improve the new Code. There may also be a need to assess how familiar judges, prosecutors and the police have become with the law and their view on how well it is working. Further refresher training may be necessary because this is a large and complicated law and I understand that the training provided at the time of the Code came into force, was limited.

Ordinary citizens may also be catalysts for change as they become aware of the mismatch between the promises of the Constitution and detailed provisions of the new Code as its implementing law. The extent of ordinary citizens' participation in the process will depend on Cambodians becoming more aware of their rights. They may also have to overcome their understandable fear, after nearly thirty years of civil conflict, of risking disharmony by demanding greater rights. However, ordinary Cambodians, having observed the international standard criminal procedure in cases before the Extraordinary Chambers of the Cambodian Courts, may now ask why the same standards should not be applied in their courts and to their cases.

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THE BINDING NATURE OF INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAWS IN THE PHILIPPINE CONSTITUTION

Harry L. Roque, Jr.

" Our duty to interpret, apply and make effective the Constitution must be performed without any fear nor favor. Must not be deterred by the mistaken idea that were exists any principle, rule or doctrine of international, law that can supersede, supplant, or overpower the fundamental law. No consideration, absolutely no consideration, should be allowed to deviate us from that duty."

Justice Gregorio Perfecto, Dissenting Opinion George L. Tubb vs Thomas L. Griess, 78 Phil. 249, 269 (1947)

This paper will delve into the manner in which the Philippine Supreme Court, as the final arbiter of cases, renders its decisions in light of existing international agreements on International Humanitarian Law and International Human Rights.

To do this, this paper will first discuss the status of Public International Law in the Philippines and will then present pertinent decisions rendered by the Supreme Court which touch upon international agreements related to International Humanitarian Law and International Human Rights.

I. Public International Law In The Philippines

Publicists in International Law characterize the binding nature of International Law in domestic legal systems either as 1) automatically forming part of domestic law under the monist system[1] or 2) subject to legislation under the dualist system where International law needs to be specifically enacted by the legislative before it becomes part of the laws of the land. Under the first, domestic constitutions typically provide that the country renounces war as an instrument of its foreign policy and that it adopts the generally accepted principles of international law automatically as part of the laws of the land without need of further legislative enactment. International law norms therefore, have the effect of statute.[2] This explains why in these jurisdictions, treaty making is a shared task between the Executive and the Legislative branches of government.

1 See *Hersch Lauterpacht*, international law and human rights (1950), *Lassa Oppenheim*, international law: a treatise (h. Lauterpacht ed., 8Th ed. Vol.1 1955), 38.

2 Ibid.

The 1987 Philippine Constitution falls under this category. Article II of that instrument states: "The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations."[3]

If a treaty or norm of international law is not a generally accepted principle of international law, Section 21 Article VII of the Philippine Constitution provides: "No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate."

In the Supreme Court case of *Bayan vs. Executive Secretary*[4], the Supreme Court discussed the powers and limitations of both the President and the Senate in treaty making. This decision is noteworthy in that it effectively legitimized, through the Visiting Forces Agreement, the use of US Military installations in Philippine territory in order to strengthen the Philippine-US defense and security relationship. This Court held that:

> "As regards the power to enter into treaties or international agreements, the Constitution vests the same in the President, subject only to the concurrence of at least two thirds vote of all the members of the Senate. In this light, the negotiation of the VFA and the subsequent ratification of the agreement are exclusive acts which pertain solely to the President, in the lawful exercise of his vast executive and diplomatic powers granted him no less than by the fundamental law itself.
>
> (...)
>
> As to the power to concur with treaties, the Constitution lodges the same with the Senate alone. Thus, once the Senate performs that power, or exercises its prerogative within the boundaries prescribed by the Constitution, the concurrence cannot, in like manner, be viewed to constitute an abuse of power, much less grave abuse thereof. Corollarily, the Senate, in the exercise of its discretion and acting within the limits of such power, may not be similarly faulted for having simply performed a task conferred and sanctioned by no less than the fundamental law". (citations omitted)

As to whether the Executive Branch of Government has a ministerial duty to transmit to the Senate a copy of a treaty signed by the representative of the President, the Supreme Court in the case of *Pimentel vs. Executive Secretary*[5] held:

> "In the realm of treaty-making, the President has the sole authority to negotiate with other states. Nonetheless, while the President has the sole authority to negotiate and enter into treaties, the Constitution provides a limitation to his power by requiring the concurrence of 2/3 of all the members of the Senate for the validity of the treaty entered into by him. Section 21, Article VII of the 1987 Constitution provides that "no treaty or international

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3 1987 Phil. Const. Art. Ii (2).

4 G.R. No. 138570, October 10, 2000.

5 G.R. No. 158088, July 6, 2005. For an analysis of the said case , see *Raymond Vincent G. Sandoval*, Case. Note: The Philippine Supreme Court, The Pimentel Case and the Ratification of the Rome Statute of the International Criminal Court, 2 APYIHL 273 (2006).

agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate.

(...)

Petitioners' submission that the Philippines is bound under treaty law and international law to ratify the treaty which it has signed is without basis. The signature does not signify the final consent of the state to the treaty. It is the ratification that binds the state to the provisions thereof. In fact, the Rome Statute itself requires that the signature of the representatives of the states be subject to ratification, acceptance or approval of the signatory states. Ratification is the act by which the provisions of a treaty are formally confirmed and approved by a State. By ratifying a treaty signed in its behalf, a state expresses its willingness to be bound by the provisions of such treaty. After the treaty is signed by the state's representative, the President, being accountable to the people, is burdened with the responsibility and the duty to carefully study the contents of the treaty and ensure that they are not inimical to the interest of the state and its people. Thus, the President has the discretion even after the signing of the treaty by the Philippine representative whether or not to ratify the same. The Vienna Convention on the Law of Treaties does not contemplate to defeat or even restrain this power of the head of states. If that were so, the requirement of ratification of treaties would be pointless and futile. It has been held that a state has no legal or even moral duty to ratify a treaty which has been signed by its plenipotentiaries. There is no legal obligation to ratify a treaty, but it goes without saying that the refusal must be based on substantial grounds and not on superficial or whimsical reasons. Otherwise, the other state would be justified in taking offense.

It should be emphasized that under our Constitution, the power to ratify is vested in the President, subject to the concurrence of the Senate. The role of the Senate, however, is limited only to giving or withholding its consent, or concurrence, to the ratification. Hence, it is within the authority of the President to refuse to submit a treaty to the Senate or, having secured its consent for its ratification, refuse to ratify it. Although the refusal of a state to ratify a treaty which has been signed in its behalf is a serious step that should not be taken lightly, such decision is within the competence of the President alone, which cannot be encroached by this Court via a writ of mandamus. This Court has no jurisdiction over actions seeking to enjoin the President in the performance of his official duties. The Court, therefore, cannot issue the writ of mandamus prayed for by the petitioners as it is beyond its jurisdiction to compel the executive branch of the government to transmit the signed text of Rome Statute to the Senate." (citations omitted)

Accordingly, the Philippine Supreme Court has ruled that pursuant to the maxim of *pacta sund servanda,* treaties entered into with the concurrence of the Philippine Senate have the force and effect of a local statute[6]. Hence, where a treaty conflicts with a local legislation, the conflict may be resolved by applying the domestic rules of statutory construction, to wit: the later enactment prevails as against an earlier one; and the specific law prevails as against the general law.[7]

6 See *Agustin v. Edu*, 88 SCRA 668 (1979), *Reyes v. Bagatsing*, 125 SCRA 553 (1983).

7 See *La Chemise Lacoste v. Fernandez*, 129 SCRA 373 (1984); *Tañada v. Angara*, 272 SCRA 18 (1997); *Marubeni v. Commissioner*, 177 SCRA 500 (1989); *Philip Morris v. Court of Appeals*, 224 SCRA 576 (1993); *Mighty Corporation*

Treaty-based international law is as unquestionably binding as local laws. However, this rule is not as clear where the international law norm concerned is either a customary norm, or a general principle of law. Here, Philippine jurisprudence adopts the technique of classifying a norm into two categories, as either forming part of generally accepted principles of international law by reason of the fact that all civilized countries adhere to that norm[8], or because it predated even the establishment of formal governments[9]. In *Oposa vs. Factoran*[10], a case which sought to implement principles of International Environmental Law, the court said that the binding nature of these norms was outside of the incorporation clause:

> "While the right to a balanced and healthful ecology is to be found under the Declaration of Principles and State Policies and not under the Bill of Rights, it does not follow that it is less important than any of the civil and political rights enumerated in the latter. Such a right belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation — aptly and fittingly stressed by the petitioners — the advancement of which may even be said to predate all governments and constitutions. As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind. If they are now explicitly mentioned in the fundamental charter, it is because of the well-founded fear of its framers that unless the rights to a balanced and healthful ecology and to health are mandated as state policies by the Constitution itself, thereby highlighting their continuing importance and imposing upon the state a solemn obligation to preserve the first and protect and advance the second, the day would not be too far when all else would be lost not only for the present generation, but also for those to come — generations which stand to inherit nothing but parched earth incapable of sustaining life."[11]

In every case, the fact that the Philippine Supreme Court has been predisposed to individually examining the content of a customary norm in order to determine whether these norms, particularly those subsumed in international humanitarian law and human rights law, have been accepted by the Philippine Supreme Court courts as valid and binding in the Philippines.

II. International Humanitarian Law

The Philippines has not been accorded due recognition for providing important judicial precedents on the binding nature of international humanitarian law. It was stated in the case of *Alcantara vs. Director of Prisons*[12] that:

> "Under the Constitution of the Commonwealth of the Philippines, International Law is a part of the fundamental law of the land, As International Law is an integral part of our

v. Gallo Winery, G.R. No. 154342, July 14, 2004; *Gonzalez v. Hechanova*, 9 SCRA 230 (1963); *Abbas v. Comelec*, 179 SCRA 287 (1989); and *Ichong v. Hernandez*, 10 Phil 1156 (1957).

8 See *Holy See v. Rosario G.R.* No. 101949, December 1, 1994; USA v. Guinto, 182 SCRA 644 (1990).

9 *Juan Antonio Oposa et.al., v. Secretary Fulgencio Factoran et. al.*, G.R. No. 101083, July 30, 1993.

10 Ibid.

11 Ibid.

12 *Aniceto Alcantara v. Director of Prisons*, G.R. No. L-6, November 29, 1945.

> law, it must be ascertained and administered by this Court, whenever questions of right depending upon it are presented for our determination.
>
> Since International Law is a body of rules accepted by nations as regulating their mutual relations, the proof of their existence is to be found in the consent of nations to abide by them; and this consent is evidenced chiefly by the usages and customs of nations, as found in the writings of publicists and in the decisions of the highest courts of the different countries of the world.
>
> But while usages and customs are the older and original source of International Law, great international treaties are a later source of increasing importance, such as The Hague Conventions of 1899 and 1907.
>
> The Hague Convention of 1899, respecting laws and customs of war on land, expressly declares that:
>
> "Article XLII. Territory is considered occupied when it is actually placed under the authority of the hostile army.
>
> The occupation applies only to the territory where such authority is established, and in a position to assert itself.
>
> Art. XLIII. The authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to reestablish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."
>
> The above provisions of the Hague Conventions have been adopted by the nations giving adherence to them, among which is the United States of America ." (citations omitted)

In fact, Justice Perfecto's concurring opinion in the Supreme Court case of *Yamashita vs. Styer*[13] should be recognized as the precedent for the norm that individuals who commit grave breaches of the Geneva Conventions should incur individual criminal liability. This decision pre-dated Nuremberg by at least two years. Here, the controversy was the defense of legality invoked by the highest Japanese ranking official in Southeast Asia when Japan lost the war. Upon being charged with the commission of 122 counts of Grave Breaches of the Geneva Conventions, he invoked the defenses of legality and the fact that he was not a principal, accessory nor an accomplice to the criminal acts.

While the ruling of the Court was that the Geneva Conventions was applicable because both Japan and the US were parties to the conflict, Justice Perfecto, in a separate concurring and dissenting opinion, explained the binding nature of International Humanitarian Law (IHL) even in the absence of a domestic implementing legislation or a ratification of the Convention. Said Perfecto:

> "Impelled by irrepressible endeavors aimed towards the ideal, by the unconquerable natural urge for improvement, by the unquenchable thirstiness of perfection in all orders

13 G.R. No. L-129, December 19, 1945.

of life, humanity has been struggling during the last two dozen centuries to develop an international law which could answer more and more faithfully the demands of right and justice as expressed in principles which, weakly enunciated at first in the rudimentary juristic sense of peoples of antiquity, by the inherent power of their universal appeal to human conscience, at last, were accepted, recognized, and consecrated by all the civilized nations of the world."[14]

On further appeal to the United States Supreme Court, the court further expounded on what would become the beginnings of "command responsibility", or the criminal responsibility of commanders for their failure to prevent grave breaches of the laws and customs of warfare:

> "But it is urged that the charge does not allege that petitioner has either committed or directed the commission of such acts, and consequently that no violation is charged as against him. But this overlooks the fact that the gist of the charge is an unlawful breach of duty by petitioner as an army commander to control the operations of the members of his command by "permitting them to commit" the extensive and widespread atrocities specified. The question, then, is whether the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and whether he may be charged with personal responsibility for his failure to take such measures when violations result. That this was the precise issue to be tried was made clear by the statement of the prosecution at the opening of the trial.
>
> It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could, with impunity, neglect to take reasonable measures for their protection. Hence, the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.
>
> (...)
>
> These provisions plainly imposed on petitioner, who at the time specified was military governor of the Philippines as well as commander of the Japanese forces, an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population. This duty of a commanding officer has heretofore been recognized, and its breach penalized by our own military tribunals."[15]

In another case[16] involving yet another high ranking Japanese officer, the Supreme Court, still ruling on the automatic application of IHL in the Philippines, opined that notwithstanding the

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14 Ibid.

15 327 U. S. 15-17, available online at <http://supreme.justia.com/us/327/1/case.html#F3%23F3>.

16 *General Shigenori Kuroda vs. Generla Jalandoni et. al.*, G.R. No. L-2662, March 26, 1949.

fact that the Philippines only became a party to the Geneva Conventions in 1951, the executive order that paved the way for the prosecution of General Shigenori Kuroda in 1949 was pursuant to a "generally accepted principle of international law":

> "Petitioner argues that respondent Military Commission has no Jurisdiction to try petitioner for acts committed in violation of the Hague Convention and the Geneva Convention because the Philippines is not a signatory to the first and signed the second only in 1947. It cannot be denied that the rules and regulation of the Hague and Geneva conventions form, part of and are wholly based on the generally accepted principals of international law. In facts these rules and principles were accepted by the two belligerent nation the United State and Japan who were signatories to the two Convention, Such rule and principles therefore form part of the law of our nation even if the Philippines was not a signatory to the conventions embodying them for our Constitution has been deliberately general and extensive in its scope and is not confined to the recognition of rule and principle of international law as continued in treaties to which our government may have been or shall be a signatory."

There is a subtle difference in the reasoning of the Court in both cases. In *Yamashita*, IHL was binding because "it bound all civilized nations", whereas in *Kuroda*, its binding nature was derived from "generally accepted principles of international law" which automatically forms part of the laws of the land. Such a distinction is important because in the first, the binding nature is a consequence of being "civilized", while the latter is based on an express mandate of the Constitution.

This would not be the last time that the Court ruled that a norm is binding even outside of the Art. 2, Sec. 2 of the Constitution.

III. International Human Rights

While the Philippine Supreme Court has ruled that International Humanitarian Law and environmental laws are automatically valid and binding in the Philippines, it has taken a slightly different view on the binding nature of human rights. Here, the court has made a distinction between civil and political rights and social, economic and cultural rights.

In the case of *Aberca vs. Ver*[17] it was stated in the concurring opinion of Chief Justice Teehankee that:

> "It need only be pointed out that one of the first acts of the present government under President Corazon C. Aquino after her assumption of office in February, 1986 was to file our government's ratification and access to all human rights instruments adopted under the auspices of the United Nations, declaring thereby the government's commitment to observe the precepts of the United Nations Charter and the Universal Declaration of Human Rights. More than this, pursuant to our Constitution which the people decisively ratified on February 2, 1987, the independent office of the Commission on Human Rights

17 G.R. No. 69866, April 15, 1988.

> has been created and organized with ample powers to investigate human rights violations and take remedial measures against all such violations by the military as well as by the civilian groups."

This decision is noteworthy as it was to define the binding nature of human rights norms as binding treaty norms voluntarily entered into by the Philippines.

The distinction though between the self-executory nature of civil and political rights and cultural, economic and cultural rights was based on an erroneous interpretation of the intent of the framers of the 1987 Constitution. Thus, in determining the extent of the investigative power of the constitutionally created Commission of Human Rights[18], the court in the case of *Simon vs. Commission on Human Rights*[19] noted:

> "But while the Constitution of 1935 and that of 1973 enshrined in their Bill of Rights most of the human rights expressed in the International Covenant, these rights became unavailable upon the proclamation of Martial Law on 21 September 1972. Arbitrary action then became the rule. Individuals by the thousands became subject to arrest upon suspicion, and were detained and held for indefinite periods, sometimes for years, without charges, until ordered released by the Commander-in-Chief or this representative. The right to petition for the redress of grievances became useless, since group actions were forbidden. So were strikes. Press and other mass media were subjected to censorship and short term licensing. Martial law brought with it the suspension of the writ of habeas corpus, and judges lost independence and security of tenure, except members of the Supreme Court. They were required to submit letters of resignation and were dismissed upon the acceptance thereof. Torture to extort confessions were practiced as declared by international bodies like Amnesty International and the International Commission of Jurists." The Constitutional Commission engaged in a long deliberation of these concepts.[20]

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18 1987 PHIL. CONST. Art. XIII § 17. 1.

19 *Brigdio R. Simon Jr. et. al., vs. Commission on Human Rights et. al.*, G.R. No. 100150, January 5, 1994.

20 "MR. GARCIA. Yes, because the other rights will encompass social and economic rights, and there are other violations of rights of citizens which can be addressed to the proper courts and authorities.

(...)

"MR. BENGZON. So, we will authorize the commission to define its functions, and, therefore, in doing that the commission will be authorized to take under its wings cases which perhaps heretofore or at this moment are under the jurisdiction of the ordinary investigative and prosecutorial agencies of the government. Am I correct?

"MR. GARCIA. No. We have already mentioned earlier that we would like to define the specific parameters which cover civil and political rights as covered by the international standards governing the behavior of governments regarding the particular political and civil rights of citizens, especially of political detainees or prisoners. This particular aspect we have experienced during martial law which we would now like to safeguard.

"MR. BENGZON. Then, I go back to that question that I had. Therefore, what we are really trying to say is, perhaps, at the proper time we could specify all those rights stated in the Universal Declaration of Human Rights and defined as human rights. Those are the rights that we envision here?

"MR. GARCIA. Yes. In fact, they are also enshrined in the Bill of Rights of our Constitution. They are integral parts of that.

"MR. BENGZON. Therefore, is the Gentleman saying that all rights under the Bill of Rights covered by human rights?

> The final outcome, now written as Section 18, Article XIII, of the 1987 Constitution, is a provision empowering the Commission on Human Rights to "investigate, on its own or on complaint by any party, all forms of human rights violations involving civil and political rights" (Sec. 1)."

Thus, while the Court has ruled that civil and political rights are binding either as generally accepted principles of international law or as a matter of treaty obligation, it has ruled that

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"MR. GARCIA. No, only those that pertain to civil and political rights.

"(...)

"MR. RAMA. In connection with the discussion on the scope of human rights, I would like to state that in the past regime, everytime we invoke the violation of human rights, the Marcos regime came out with the defense that, as a matter of fact, they had defended the rights of people to decent living, food, decent housing and a life consistent with human dignity.

"So, I think we should really limit the definition of human rights to political rights. Is that the sense of the committee, so as not to confuse the issue?

"MR. SARMIENTO. Yes, Madam President.

"MR. GARCIA. I would like to continue and respond also to repeated points raised by the previous speaker.

"There are actually six areas where this Commission on Human Rights could act effectively: 1) protection of rights of political detainees; 2) treatment of prisoners and the prevention of tortures; 3) fair and public trials; 4) cases of disappearances; 5) salvagings and hamletting; and 6) other crimes committed against the religious.

"(...)

"The PRESIDENT. Commissioner Guingona is recognized.

"MR. GUINGONA. Thank You Madam President.

"I would like to start by saying that I agree with Commissioner Garcia that we should, in order to make the proposed Commission more effective, delimit as much as possible, without prejudice to future expansion. The coverage of the concept and jurisdictional area of the term 'human rights' . I was actually disturbed this morning when the reference was made without qualification to the rights embodied in the universal Declaration of Human Rights, although later on, this was qualified to refer to civil and political rights contained therein.

"If I remember correctly, Madam President, Commissioner Garcia, after mentioning the Universal Declaration of Human Rights of 1948, mentioned or linked the concept of human right with other human rights specified in other convention which I do not remember. Am I correct?

"MR. GARCIA. Is Commissioner Guingona referring to the Declaration of Torture of 1985?

"MR. GUINGONA. I do not know, but the commissioner mentioned another.

"MR. GARCIA. Madam President, the other one is the International Convention on Civil and Political Rights of which we are signatory.

"MR. GUINGONA. I see. The only problem is that, although I have a copy of the Universal Declaration of Human Rights here, I do not have a copy of the other covenant mentioned. It is quite possible that there are rights specified in that other convention which may not be specified here. I was wondering whether it would be wise to link our concept of human rights to general terms like 'convention', rather than specify the rights contained in the convention.

"As far as the Universal Declaration of Human Rights is concerned, the Committee, before the period of amendments, could specify to us which of these articles in the Declaration would fall within the concept of civil and political rights, not for the purpose of including these in the proposed constitutional article, but to give the sense of the Commission as to what human rights would be included, without prejudice to expansion later on, if the need arises. For example, there was no definite reply to the question of Commissioner Regalado as to whether the right to marry would be considered a civil or a social right. It is not a civil right?

"MR. GARCIA. Madam President, I have to repeat the various specific civil and political rights that we felt must be envisioned initially by this provision — freedom from political detention and arrest prevention of torture, right to fair and public trials, as well as crimes involving disappearance, salvagings, hamlettings and

economic, social and cultural rights, such as the right to livelihood, require domestic implementing legislation:

> "Recalling the deliberations of the Constitutional Commission, aforequoted, it is readily apparent that the delegates envisioned a Commission on Human Rights that would focus its attention to the more severe cases of human rights violations. Delegate Garcia, for instance, mentioned such areas as the "(1) protection of rights of political detainees, (2) treatment of prisoners and the prevention of tortures, (3) fair and public trials, (4) cases of disappearances, (5) salvagings and hamletting, and (6) other crimes committed against the religious." While the enumeration has not likely been meant to have any preclusive effect, more than just expressing a statement of priority, it is, nonetheless, significant for the tone it has set. In any event, the delegates did not apparently take comfort in peremptorily making a conclusive delineation of the CHR's scope of investigatorial jurisdiction. They have thus seen it fit to resolve, instead, that "Congress may provide for other cases of violations of human rights that should fall within the authority of the Commission, taking into account its recommendation."[21] (citations omitted)

And in what is so far the clearest and most authoritative ruling of the Court on the binding nature of rights embodied in the ICCPR, the Court ruled in *Republic Of The Philippines vs. Sandiganbayan, Major General Josephus Q. Ramas and Elizabeth Dimaano*[22], that these rights are binding to the

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collective violations. So, it is limited to politically related crimes precisely to protect the civil and political rights of a specific group of individuals, and therefore, we are not opening it up to all of the definite areas.

"MR. GUINGONA. Correct. Therefore, just for the record, the Gentlemen is no longer linking his concept or the concept of the Committee on Human Rights with the so-called civil or political rights as contained in the Universal Declaration of Human Rights.

"MR. GARCIA. When I mentioned earlier the Universal Declaration of Human Rights, I was referring to an international instrument.

"MR. GUINGONA. I know.

"MR. GARCIA. But it does not mean that we will refer to each and every specific article therein, but only to those that pertain to the civil and politically related, as we understand it in this Commission on Human Rights.

"MR. GUINGONA. Madam President, I am not clear as to the distinction between social and civil rights.

"MR. GARCIA. There are two international covenants: the International Covenant and Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The second covenant contains all the different rights — the rights of labor to organize, the right to education, housing, shelter, et cetera.

"MR. GUINGONA. So we are just limiting at the moment the sense of the committee to those that the Gentlemen has specified.

"MR. GARCIA. Yes, to civil and political rights.

"MR. GUINGONA. Thank you.

"(...)

"SR. TAN. Madam President, from the standpoint of the victims of human rights, I cannot stress more on how much we need a Commission on Human Rights. (...)

"(...) human rights victims are usually penniless. They cannot pay and very few lawyers will accept clients who do not pay. And so, they are the ones more abused and oppressed. Another reason is, the cases involved are very delicate — torture, salvaging, picking up without any warrant of arrest, massacre — and the persons who are allegedly guilty are people in power like politicians, men in the military and big shots. Therefore, this Human Rights Commission must be independent.

21 Ibid.

22 G.R. No. 104768, July 21, 2003.

Philippines even in the absence of a constitutionally guaranteed Bill of Rights. The issue in this case is whether under a Revolutionary Government under then President Corazon C. Aquino, the accused public officers accused of amassing ill-gotten wealth could invoke the guarantees against unreasonable seizure and searches in the absence of a bill of rights contained in a Constitution that has since become inoperative as a consequence of the 1986 People Power Revolution. The case arose from the investigation of the AFP Anti-Graft Board against private respondents Ramas and Dimaano. Based on its mandate to investigate reports of unexplained wealth and corrupt practices by AFP personnel, the AFP Board investigated various reports of alleged unexplained wealth of respondent Major General Josephus Ramas, then Commanding General of the Philippine Army, and his alleged mistress Elizabeth Dimaano, a clerk typist at the office of Ramas. The Presidential Commission on Good Government filed a petition for forfeiture against Ramas, but the same was amended to implead Dimaano as co-defendant. After so many postponements due to inability of petitioner to show further evidence, private respondents filed their motion to dismiss. The Sandiganbayan dismissed the amended complaint and ordered, among others, the return of the items confiscated through an illegal search and seizure to respondent Dimaano. Hence, a petition for review was filed by the Republic of the Philippines to set aside the resolutions of the Sandiganbayan.

In a ruling reminiscent of its view on the binding nature of IHL, the Supreme Court, as to the legality of the search and seizure of the items, held:

> "Petitioner wants the Court to take judicial notice that the raiding team conducted the search and seizure on March 3, 1986 or five days after the successful EDSA revolution. Petitioner argues that a revolutionary government was operative at that time by virtue of Proclamation No. 1 announcing that President Aquino and Vice President Laurel were "taking power in the name and by the will of the Filipino people." Petitioner asserts that the revolutionary government effectively withheld the operation of the 1973 Constitution which guaranteed private respondents' exclusionary right.
>
> (...)
>
> The EDSA Revolution took place on 23-25 February 1986. As succinctly stated in President Aquino's Proclamation No. 3 dated 25 March 1986, the EDSA Revolution was "done in defiance of the provisions of the 1973 Constitution." The resulting government was indisputably a revolutionary government bound by no constitution or legal limitations except treaty obligations that the revolutionary government, as the de jure government in the Philippines, assumed under international law.
>
> The correct issues are: (1) whether the revolutionary government was bound by the Bill of Rights of the 1973 Constitution during the interregnum, that is, after the actual and effective take-over of power by the revolutionary government following the cessation of resistance by loyalist forces up to 24 March 1986 (immediately before the adoption of the Provisional Constitution); and (2) whether the protection accorded to individuals under the International Covenant on Civil and Political Rights ("Covenant") and the Universal Declaration of Human Rights ("Declaration") remained in effect during the interregnum.

We hold that the Bill of Rights under the 1973 Constitution was not operative during the interregnum. However, we rule that the protection accorded to individuals under the Covenant and the Declaration remained in effect during the interregnum.

During the interregnum, the directives and orders of the revolutionary government were the supreme law because no constitution limited the extent and scope of such directives and orders. With the abrogation of the 1973 Constitution by the successful revolution, there was no municipal law higher than the directives and orders of the revolutionary government. Thus, during the interregnum, a person could not invoke any exclusionary right under a Bill of Rights because there was neither a constitution nor a Bill of Rights during the interregnum.

(...)

During the interregnum, the government in power was concededly a revolutionary government bound by no constitution. No one could validly question the sequestration orders as violative of the Bill of Rights because there was no Bill of Rights during the interregnum. However, upon the adoption of the Freedom Constitution, the sequestered companies assailed the sequestration orders as contrary to the Bill of Rights of the Freedom Constitution.

(...)

Thus, to rule that the Bill of Rights of the 1973 Constitution remained in force during the interregnum, absent a constitutional provision excepting sequestration orders from such Bill of Rights, would clearly render all sequestration orders void during the interregnum. Nevertheless, even during the interregnum the Filipino people continued to enjoy, under the Covenant and the Declaration, almost the same rights found in the Bill of Rights of the 1973 Constitution.

The revolutionary government, after installing itself as the de jure government, assumed responsibility for the State's good faith compliance with the Covenant to which the Philippines is a signatory. Article 2(1) of the Covenant requires each signatory State "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant." Under Article 17(1) of the Covenant, the revolutionary government had the duty to insure that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence."

The Declaration, to which the Philippines is also a signatory, provides in its Article 17(2) that "no one shall be arbitrarily deprived of his property." Although the signatories to the Declaration did not intend it as a legally binding document, being only a declaration, the Court has interpreted the Declaration as part of the generally accepted principles of international law and binding on the State. Thus, the revolutionary government was also obligated under international law to observe the rights of individuals under the Declaration.

The revolutionary government did not repudiate the Covenant or the Declaration during the interregnum. Whether the revolutionary government could have repudiated all its

obligations under the Covenant or the Declaration is another matter and is not the issue here. Suffice it to say that the Court considers the Declaration as part of customary international law, and that Filipinos as human beings are proper subjects of the rules of international law laid down in the Covenant. The fact is the revolutionary government did not repudiate the Covenant or the Declaration in the same way it repudiated the 1973 Constitution. As the de jure government, the revolutionary government could not escape responsibility for the State's good faith compliance with its treaty obligations under international law.

It was only upon the adoption of the Provisional Constitution on 25 March 1986 that the directives and orders of the revolutionary government became subject to a higher municipal law that, if contravened, rendered such directives and orders void. The Provisional Constitution adopted verbatim the Bill of Rights of the 1973 Constitution. The Provisional Constitution served as a self-limitation by the revolutionary government to avoid abuses of the absolute powers entrusted to it by the people.

During the interregnum when no constitution or Bill of Rights existed, directives and orders issued by government officers were valid so long as these officers did not exceed the authority granted them by the revolutionary government. The directives and orders should not have also violated the Covenant or the Declaration. In this case, the revolutionary government presumptively sanctioned the warrant since the revolutionary government did not repudiate it. The warrant, issued by a judge upon proper application, specified the items to be searched and seized. The warrant is thus valid with respect to the items specifically described in the warrant". (citations omitted)

IV. Freedoms Protected By The UDHR, ICCPR And Other Human Rights Instruments

Right To Life And Against Cruel And Inhuman Punishment Or Treatment

Since the Supreme Court has already cited the UDHR as enforceable in the country, with more reason has the court ruled that rights under the legally binding ICCPR were also binding. For instance, in *Leo Echegaray vs. People*[23], while the Court recognized the right to life as enshrined in the ICCPR, it also held that it is not an absolute ban on the imposition of the death penalty :

"Article 6 of the International Covenant on Civil and Political Rights provides:

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final

23 *Leo Echegaray vs. Secretary of Justice* G.R. No. 132601, October 12, 1998.

judgment rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Indisputably, Article 6 of the Covenant enshrines the individual's right to life. Nevertheless, Article 6 (2) of the Covenant explicitly recognizes that capital punishment is an allowable limitation on the right to life, subject to the limitation that it be imposed for the "most serious crimes"."

As to cruel and inhuman treatment or punishment, the Court, in a line of jurisprudence[24], would determine whether a penalty is cruel not by its harshness or severity but by proportionality. Thus a penalty is cruel if it is flagrantly or wholly disproportionate to the nature of the offense as to shock the moral sense of the community.

Right Against Slavery/forced Labor

While Article 8 of the ICCPR prohibits slavery and forced labor, Philippine laws[25] also prohibit these acts unless it involves a return to work order issued by the Labor Secretary as provided by Article 263 (g) of the Labor Code for industries indispensable to the national interest. In *Aclaracion vs. Gatmaitan*[26], the Court compelled a former court stenographer to transcribe his stenographic notes, it being part of the inherent power of the court essential to the administration of justice and not involuntary servitude.

Right Against Liberty And Security

While Philippine laws[27] and jurisprudence[28] hews closely to Articles 9 and 10 of the ICCPR, there have been local and international reports of unlawful arrests and detentions perpetrated

24 See *People vs. Dapitan* 197 SCRA 378 (1991), *People vs. Alejandro* 225 SCRA 347 (1993), *Agbanlog vs. People* 222 SCRA 530 (1993) and *People vs. Tongko* 290 SCRA 595 (1998).

25 See Art III Sec 18 Pilippine Constitution: " No involuntary servitude in any form shall exist except as a punishment for a crime whereof the party shall have been convicted"; See also Article 272 Revised Penal Code: "The penalty of prision mayor and a fine of not exceeding P10,000 shall be imposed upon anyone who shall purchase, sell, kidnap, or detain a human being for the purpose of enslaving him".

26 Aclaracion vs. Gatmaitan 64 SCRA 131 (1979).

27 See 1987 PHIL. CONST. Art. III §2 and §3; See also Rule 126 of the Rules of Criminal Procedure; See also

by government and non-government agents against civilians[29], as well as reports of deplorable conditions of the Philippine penitentiary system[30].

Right Against Imprisonment For Non-payment Of Debt

In *Lozano vs. Martinez*[31] and *Vallarta vs. Court of Appeals*[32], the Court upheld the constitutionality of the Bouncing Checks Law and the Penal Code provision on estafa respectively, as these punish the issuance of a worthless check because of its negative effects on the usefulness of checks as a substitute for currency. In *Vergara vs. Gedorio*[33], the Court held that the imprisonment for nonpayment of rent is covered by the Constitutional prohibition as Article III Section 20 refers to a civil debt or a debt not arising from a criminal offense.

Right To Travel And Abode

While the Article 13 of the UDHR and Article 12 of the ICCPR both provide that every person has the freedom of movement and residence within the border of each State, the Philippines has carved out limitations on the right to travel such as interest of national security, public safety,

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Art. 2219 Civil Code on Moral Damages that may be claimed to illegal arrest and detention, Arts. 124 and 125 of the Revised Penal Code; See also Republic Act No. 7438 which defines the rights of those even under custodial investigation, which combined with the exclusionary rule that renders such evidence in admissible in any proceeding renders Philippine Laws more stringent than the Miranda Doctrine.

28 On arbitrary detention see the following cases: *United States vs. Hilario Braganza, et al.*, G.R. No. L-3971, February 3, 1908, 10 Phil. 79 *Ramon S. Milo vs. Angelito C. Salanga*, G.R. No. L-37007, July 20, 1987 and *Benito Astorga vs. People of the Phil.*, G.R. No. 154130, October 1, 2003; On searches and seizures see the following cases: As to who can invoke the right see *Bache and Co., vs. Ruiz*, 37 SCRA 323 (1971) *Stonehill v. Diokno*, 20 SCRA 383 (1967); As to the conditions of a valid warrant see *Burgos vs. Chief of Staff*, 133 SCRA 800 (1984), *People v. Chua Ho San*, 308 SCRA 432) (1999), *Microsoft Corp. v. Maxicorp.*, G.R. 140946, September 13, 2004, *Pita vs. CA*, 178 SCRA 362 (1987), *Alvarez vs. CFI*, 64 Phil. 33 (1937), *Mata vs. Bayona*, 128 SCRA 388 (1984), *Prudente vs. Judge Dayrit*, 180 SCRA 69 (1989) and *Yousef Al Ghoul vs. C.A, GR* No.126859, September 4, 2001; As to what can be seized see *Unilab v. Isip*, G.R. No. 163858, June 28, 2005; As to a valid waiver in warrantless searches see *Caballes v. Court of Appeals*, G.R. No. 136292, January 5, 2002 and *People vs. Tudtud, et. al.*, G.R. No. 144037, September 26, 2003; As to a warrantless search incidental to a lawful arrest see *People v. Malmstedt*, 198 SCRA 401 (1991), *People vs. Tangliben*, 184 SCRA 220 (1990) and *People vs. Libnao*, et al., G.R. No. 136860, January 20, 2003; As to other instances of valid warrantless searches see *People v. Musa*, 217 SCRA 597 (1993), *People vs. Suzuki*, G.R. No. 120670, October 23, 2003, *People v. Solayao*, 262 SCRA 255 (1996), *Salvador v. People*, G.R. No. 146706, July 15, 2005, *People vs. De Gracia* 233 SCRA 716 (1994), *Aniag vs. Comelec*, 237 SCRA 424 (1994) and *People v. Vinecario*, G.R. No. 141137, January 20, 2004; On warrantless arrests see the following cases: *Umil vs. Ramos*, G. R. 81567, July 9, 1990, *People v. Cubcubin*, G.R. No. 136267, July 10, 2001, *People v. Calimlim*, G.R. No. 123980, August 30. 2001, *People vs. Enrile*, 222 SCRA 586 (1993), *People vs. Aminnudin*, 163 SCRA 402 (1988), *People v. Plana* G.R. No. 128285, November 27, 2001 and *People v. Conde*, G.R. No. 113269, April 10, 2001..

29 See Melo Comission Report which details the acts of killings and enforced disappearances of activists and the press in the Philippines available online at <http://www.newsbreak.com.ph/index.php?option=com_remository&Itemid=88889068&func=fileinfo&id=12>; See also the preliminary note of UN Special Rapporteur Philip Alston available online at <http://www.taskforce211.com.ph/bk_sub/bk_sub/downloads/A_HRC_4_20_Add_3.pdf>.

30 See United States of America State Department Country Report on Philippine Human Rights Practices available online at <http://www.state.gov/g/drl/rls/hrrpt/2006/78788.htm>.

31 *Lozano vs. Martinez* 146 SCRA 323 (1986).

32 *Vallarta vs. Court of Appeals* 150 SCRA 336 (1987).

33 *Vergara vs. Gedorio* G.R. No. 154037, April 30, 2003.

public health or as may be provided by law. In the case of *Pase vs. Drilon*[34] the Court upheld the validity of an administrative order issued by the Secretary of Labor temporarily suspending the deployment of Filipina domestic helpers abroad in order to protect them from exploitation and abuse by foreign employers. In *Marcos vs. Manglapus*[35], the Court upheld the refusal of government to allow the return of the Marcos family to the Philippines on the ground of national security. In *Manotoc vs. Court of Appeals*[36], the Court upheld the trial court order refusing Manotoc permission to travel abroad even if Manotoc was out on bail.

Rights Of Aliens And Extraditees

In addition to Article 13 of the ICCPR, the Geneva Convention on Refugees of 1951 defines the rights of both asylum seekers and refugees. Among the rights of asylum seekers are the rights to non-refoulement and the right to non-prosecution for illegal entry. The Philippines is a party to this Convention as well as to the 1967 Protocol as early as 1981.[37] Even prior to its ratification of the said treaty, the Philippines had already recognized that individuals suffering from a well grounded fear of prosecution were entitled to remain in the country on humanitarian grounds. Thus, in the case of *Kookooritchkin vs. the Solicitor General*, the Court in vesting citizenship on a Russian refugee ruled:

> "We do not believe that the lower court erred in pronouncing appellee stateless. Appellee's testimony, besides being uncontradicted, is supported by the well-known fact that the ruthlessness of modern dictatorship has scattered throughout the world a large number of stateless refugees or displaced persons, without country and without flag. The tyrannical intolerance of said dictatorships toward all opposition induced them to resort to beastly oppression, concentration camps and blood purges, and it is only natural that the not-so-fortunate ones who were able to escape to foreign countries should feel the loss of all bonds of attachment to the hells which were formerly their fatherland's. Petitioner belongs to that group of stateless refugees.
>
> Knowing, as all cultured persons all over the world ought to know, the history, nature and character of the Soviet dictatorship, presently the greatest menace to humanity and civilization, it would be technically fastidious to require further evidence of petitioner's claim that he is stateless than his testimony that he owes no allegiance to the Russian Communist Government and, is because he has been at war with it, he fled from Russia to permanently reside in the Philippines. After finding in this country economic security in a remunerative job, establishing a family by marrying a Filipina with whom he has a son, and enjoying for 25 years the freedoms and blessings of our democratic way of life, and after showing his resolution to retain the happiness he found in our political system to the extent of refusing to claim Russian citizenship even to secure his release from the Japanese and of casting his lot with that of our people by joining the fortunes and misfortunes of

34 Philippine Association of Service Exporters Inc. vs. Drilon, G.R. No. 81958 June 30, 1988.

35 *Marcos vs. Manglapus* 178 SCRA 760 (1989).

36 *Manotoc vs. Court of Appeals* 142 SCRA 149 (1986).

37 See State Parties to the 1951 Covention relating to the status of refugees and the 1967 Protocol available at <http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf>.

> our guerrillas, it would be beyond comprehension to support that the petitioner could feel any bond of attachment to the Soviet dictatorship."[38]

The cases of *Borovsky, Mejoff and Chirskoff,* also Russian refugees, gave the Philippine Supreme Court the occasion to rule on the binding nature of rights even when they were merely provided in the non-binding Declaration of Human Rights. In these cases all involving Russian asylum seekers, whose petition for the issuance of the *writ of habeas corpus* were initially denied on ground that the writ is not the proper remedy for exclusion cases; the court later granted the writ after a lapse of two years with the Russian asylum seekers still in detention. In doing so, the court invoked the right to "liberty"as provided in the Universal Declaration of Human Rights.[39]

In extradition proceedings, the Court in the case of *Government vs. Puruganan*[40] held that a potential extraditee may apply for bail as a matter of right but that:

> "(...) the executive branch of government voluntarily entered into the Extradition Treaty, and our legislative branch ratified it. Hence, the Treaty carries the presumption that its implementation will serve the national interest.
>
> Fulfilling our obligations under the Extradition Treaty promotes comity with the requesting state. On the other hand, failure to fulfill our obligations thereunder paints a bad image of our country before the world community. Such failure would discourage other states from entering into treaties with us, particularly an extradition treaty that hinges on reciprocity.
>
> Verily, we are bound by pacta sunt servanda to comply in good faith with our obligations under the Treaty. This principle requires that we deliver the accused to the requesting country if the conditions precedent to extradition, as set forth in the Treaty, are satisfied. In other words, "[t]he demanding government, where it has done all that the treaty and the law require it to do, is entitled to the delivery of the accused on the issue of the proper warrant, and the other government is under obligation to make the surrender." Accordingly, the Philippines must be ready and in a position to deliver the accused, should it be found proper." (citations omitted)

However, in a later ruling of the Court in *Hongkong vs. Olalia*,[41] the Court declared that:

> "(...) this Court cannot ignore the following trends in international law: (1) the growing importance of the individual person in public international law who, in the 20th century, has gradually attained global recognition; (2) the higher value now being given to human rights in the international sphere; (3) the corresponding duty of countries to observe these universal human rights in fulfilling their treaty obligations; and (4) the duty of this Court to balance the rights of the individual under our fundamental law, on one hand, and the law on extradition, on the other.
>
> (...)

38 G.R. No. L-1812, August 27, 1948, 81 Phil. 435 (1948).

39 *Victor Borovsky vs. Commissioner of Immigration*, G.R. No. L-4352, September 28, 1951; *Boris Mejoff vs. Director of Prisons*, G.R. No. L-4254, September 26, 1951; *Vadim Chirskoff vs. Commissioner of Immigration*, G.R. No. L-3802, October 26, 1951.

40 *Government of the United States of America vs. Guillermo Puruganan et. al.*, G.R. No. 148571, September 24, 2002.

41 *Government of Hongkong Special Administrative Region vs. Hon. Felixberto Olalia*, G.R. No. 153675, April 19, 2007.

The Philippines, along with the other members of the family of nations, committed to uphold the fundamental human rights as well as value the worth and dignity of every person. This commitment is enshrined in Section II, Article II of our Constitution which provides: "The State values the dignity of every human person and guarantees full respect for human rights." The Philippines, therefore, has the responsibility of protecting and promoting the right of every person to liberty and due process, ensuring that those detained or arrested can participate in the proceedings before a court, to enable it to decide without delay on the legality of the detention and order their release if justified. In other words, the Philippine authorities are under obligation to make available to every person under detention such remedies which safeguard their fundamental right to liberty. These remedies include the right to be admitted to bail. While this Court in Purganan limited the exercise of the right to bail to criminal proceedings, however, in light of the various international treaties giving recognition and protection to human rights, particularly the right to life and liberty, a reexamination of this Court's ruling in Purganan is in order.

First, we note that the exercise of the State's power to deprive an individual of his liberty is not necessarily limited to criminal proceedings. Respondents in administrative proceedings, such as deportation and quarantine, have likewise been detained.

Second, to limit bail to criminal proceedings would be to close our eyes to our jurisprudential history. Philippine jurisprudence has not limited the exercise of the right to bail to criminal proceedings only. This Court has admitted to bail persons who are not involved in criminal proceedings. In fact, bail has been allowed in this jurisdiction to persons in detention during the pendency of administrative proceedings, taking into cognizance the obligation of the Philippines under international conventions to uphold human rights.

The time-honored principle of pacta sunt servanda demands that the Philippines honor its obligations under the Extradition Treaty it entered into with the Hong Kong Special Administrative Region. Failure to comply with these obligations is a setback in our foreign relations and defeats the purpose of extradition. However, it does not necessarily mean that in keeping with its treaty obligations, the Philippines should diminish a potential extraditee's rights to life, liberty, and due process. More so, where these rights are guaranteed, not only by our Constitution, but also by international conventions, to which the Philippines is a party. We should not, therefore, deprive an extraditee of his right to apply for bail, provided that a certain standard for the grant is satisfactorily met." (citations omitted)

Rights Of The Accused

Philippine laws[42] have tried to attain the requirements of Articles 14 and 15 of the ICCPR including juvenile delinquents[43].

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42 See 1987 PHIL. CONST. Art. III § 14 and Rule 115 Rules of Criminal Procedure.

43 See Republic Act No. 9344 or the Juvenile Justice and Welfare Act which saliently provides: 1) that a child from 9-15 years old is exempt from criminal liability and subjected to an intervention program 2) a child between 15-18 years old who acted without discernment shall be exempt from criminal liability and subjected to an intervention program and 3) decriminalization of status offenses as well as vagrancy, mendicancy, prostitution and sniffing of contact cement/rugby provided they undergo treatment and counseling.

As to the presumption of innocence, jurisprudence because of certain Philippine laws creating exceptions to this presumption. In *Vallarta*[44], wherein the petitioner argues that the presumption of deceit in the crime of estafa for failure to deposit within three days the necessary funds to make good the check issued violated this presumption, the Court held that the presumption of deceit is inconclusive and can be rebutted by proof of good faith. The Court further held that there is no constitutional objection to the passage of a law that when certain facts have been proved they shall be prima facie evidence of guilt if there is a rational connection between the facts proved and the presumed facts. In *Tio*[45], the Court upheld the constitutionality of the provision that created a presumption of failure to register when there is a failure to present proof of registration as there is a rational connection between them. The Court applied the same line of reasoning the cases *Pamintuan*[46], and *Hizon*[47].

As to the right to be informed of the offense charged, the Court has been vigilant in protecting this right. In cases of deaf mutes[48] and incompetents[49] who were deprived of this right, the Court has overturned their conviction. In other instances, the Court has overturned convictions when the element[50] of the crime or the qualifying circumstance[51] had been omitted in the information or the crime is not an included offense in the information[52]. In relation, the Court in protecting the right of the accused to be present[53], held that the presence of the accused during arraignment[54] and his identification by the witnesses[55] were indispensable and cannot be waived.

The same goes as to the right of the accused for a speedy trial. In *People vs. Court of First Instance of Rizal*[56], the Court denied the petition of the prosecution when it was the cause of the respondent's wait of two years and eight months for trial to begin. In *Rama*[57], the Court held that for this right to be violated, the delay should be considered in view of the whole proceedings. Thus, a delay of 20 hearing days[58], due to pendency of an omnibus motion[59] or to circumstances beyond the control of the parties and the court[60] were deemed reasonable delays. On the other hand,

44 *Vallarta vs. Court of Appeals* 150 SCRA 336 (1987).

45 *Tio vs. Videogram Regulatory Board* 151 SCRA 208 (1987).

46 *Pamintuan vs. People* 234 SCRA 63 (1993).

47 *Hizon vs. Court of Appeals* 265 SCRA 517 (1996).

48 *People vs. Crisologo* 150 SCRA 653 (1987); See also *People vs. Parazo* 310 SCRA 146 (1999).

49 *People vs. Alcalde* G.R. Nos. 139225-28, May 29, 2002.

50 *People vs. Regala* 113 SCRA 613 (1982).

51 *People vs. Evangelista* 256 SCRA 611 (1996), *People vs. Mahinay* 416 SCRA 402 (2003), *People vs. Payopay* G.R. No. 141140, December 10, 2003, and *People vs. Quitlong* 292 SCRA 360 (1998).

52 See *Embuscado vs. People* 179 SCRA 589 (1989), *People vs Legaspi* 246 SCRA 206 (1995), *People vs. Paramil* 329 SCRA 453 (2000) and *People vs. Alajay* 408 SCRA 629 (2003).

53 See note 47 supra.

54 *Borja vs. Mendoza* 77 SCRA 422 (1977); See also *Nolasco vs. Enrile*, G.R. No. L-68347 November 7, 1985.

55 *People vs. Presiding Judge* 125 SCRA 269 (1983); See also *People vs. Macaraeg* 141 SCRA 37 (1986).

56 *People vs. Court of First Instance of Rizal* 161 SCRA 249 (1988).

57 *People vs. Rama* 350 SCRA 266 (2001).

58 *People vs. Tee* 395 SCRA 419 (2002).

59 *Hipolito vs. Court of Appeals* 230 SCRA 191 (1994).

60 *Almario vs. Court of Appeals* 355 SCRA 1 (2001).

delays due to the waiver of the right by the accused[61] or pleadings filed by the accused[62] unless the prayer for postponement was to avail the right of the accused to compulsory process[63] were considered by the Court as violations of this right. In relation, the Court in cases were political motivations were involved in the prosecution[64] or failure to decide a case within the prescribed period[65] violated the right of the accused to speedy disposition of his case unless it was through the fault[66] or acquiescence[67] of the accused or due to the complexity of the issues[68].

As to the right to counsel, Philippine law has been jealous in protecting this right by providing standards perhaps more stringent than that of the ICCPR that it has very limited exceptions[69]. This right was violated when represented by a person posing as a lawyer without the knowledge of the accused[70] or a grossly negligent counsel[71]. In *Serzo*[72], the Court, in noticing that accused had been ample time to secure counsel of his choice but failed to do so, held that this is right is not absolute.

With regard to the right of the accused to confrontation and cross examination, the Court held the right was violated when the affidavit of a witness who was not produced in court was admitted in evidence[73], the trial court convicted the accused based on a decision in another case[74] or the accused properly waived his right to cross examination[75].

With regard to the right against self-incrimination, the Court has held that it covers natural persons[76] in all types of cases[77]. As to the scope of the right, the Court held that it extends to any evidence which is communicative in nature acquired under duress[78] such as a forced re-

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61 *Guerrero vs. Court of Appeals* 257 SCRA 703 (1996).

62 *Arambulo vs. Laqui* 342 SCRA 740 (2000).

63 *People vs. Yambot* 343 SCRA 20 (2000); To avail of the right of compulsory process, the Court in People vs. Chua 356 SCRA 225 (2001) held that the accused must show that (1) the materiality of the evidence, (2) did not neglect in previously obtaining the evidence, (3) the evidence will be available at the time desired and (4) no similar evidence can be obtained.

64 See *Tatad vs. Sandiganbayan* 159 SCRA 70 (1988), *Roque vs. Office of the Ombudsman* 307 SCRA 106 (1999), *Cervantes vs. Sandiganbayan* 307 SCRA 149 (1999) and *Lopez vs. Office of the Ombudsman* 364 SCRA 569 (2001).

65 *Magdamo vs. Pahimutlinn* 73 SCRA 110 (1976) and *Lambino vs. De Vera* 275 SCRA 60 (1997).

66 *Gonzales vs. Sandiganbayan* 199 SCRA 299 (1991).

67 *Alvizo vs. Sandiganbayan* 220 SCRA 655 (1993).

68 *Binay vs. Sandiganbayan* 316 SCRA 65 (1999); See also *Guiani vs. Sandiganbayan* G.R. Nos. 146897-917, August 6, 2002.

69 In *People vs. Tulin* 364 SCRA 10 (2001), the Court held that this right can be waived if it was intelligently made with the assistance of a lawyer.

70 *Delgado vs. Court of Appeals* 145 SCRA 357 (1986); *People vs. Santocildes* 321 SCRA 310 (1999).

71 *People vs. Delos Reyes* 215 SCRA 63 (1992), *People vs. Cuizon* 256 SCRA 325 (1996), *People vs. Bermas* 306 SCRA 135 (1999), *People vs. Nadera* 324 SCRA 490 (2000), *People vs. Mala* 411 SCRA 327 (2003) and *People vs. Hamton* 395 SCRA 156 (2003).

72 *People vs. Serzo* 274 SCRA 553 (1997); See also *People vs. Caralipio* 393 SCRA 59 (2002).

73 *People vs. Ramos* 122 SCRA 312 (1983); See also *People vs. Crispin* 327 SCRA 167 (2000) and *Cariaga vs. Court of Appeals* 358 SCRA 583 (2003).

74 *People vs. Miyake* 279 SCRA 180 (1997).

75 *People vs. Narca* 275 SCRA 696 (1997); *People vs. Baring* 374 SCRA 696 (2002).

76 *Bataan Shipyard and Engineering Co. Inc. vs. Presidential Commission on Good Government* 150 SCRA 181 (1987).

77 *Bagadiong vs. Gonzales* 94 SCRA 906 (1979).

enactment of a crime or involves testimonial compulsion[79]. It excludes those that involve the determination of physical attributes determinable by simple observation such as a police lineup[80], ultraviolet radiation examination of the presence of fluorescent powder[81], the presentation of public documents[82] or object evidence[83].

Right To Privacy

While Philippine laws have been created to protect the rights covered in the ICCPR, the Court in *Ayer*[84] held with regard to the right to privacy:

> "It is left to case law, however, to mark out the precise scope and content of this right in differing types of particular situations. The right of privacy or "the right to be let alone," like the right of free expression, is not an absolute right. A limited intrusion into a person's privacy has long been regarded as permissible where that person is a public figure and the information sought to be elicited from him or to be published about him constitute matters of a public character. Succinctly put, the right of privacy cannot be invoked to resist publication and dissemination of matters of public interest. The interest sought to be protected by the right of privacy is the right to be free from "unwarranted publicity, from the wrongful publicizing of the private affairs and activities of an individual which are outside the realm of legitimate public concern." (citations omitted)

Thus, while the right is not specifically provided by the Constitution the Court in *Ople*[85] held that this right "is recognized and enshrined in several provisions of the Constitution. Zones of privacy are likewise recognized and protected in our laws." Further, in *Epie*[86]:

> "In this jurisdiction, the fundamental law of the land recognizes and protects the right of a person to privacy against unreasonable intrusions by the agents of the State. This right to undisturbed privacy is guaranteed by Section 2, Article III of the Constitution which provides:
>
> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures of whatever nature and for any purpose shall be inviolable, and no search warrant or warrant of arrest shall issue except upon probable cause to be determined personally by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched and the persons or things to be seized.

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78 *People vs. Olvis* 154 SCRA 513 (1987).

79 *Alih vs. Castro* 151 SCRA 279 (1987); See also *People vs. Gamboa* 194 SCRA 372 (1991), *People vs. Salveron* 228 SCRA 92 (1993) and *People vs. Canceran* 229 SCRA 581 (1994).

80 *People vs. Codilla* 224 SCRA 104 (1993).

81 *People vs. Tranca* 235 SCRA 455 (1994).

82 *Almonte vs. Vasquez* 244 SCRA 286 (1995).

83 *People vs. Malimit* 264 SCRA 167 (1996).

84 *Ayer Productions PTY. LTD et.al., vs. Hon. Ignacio M. Capulong et. al.*, G.R. No. 82380. April 29, 1988.

85 *Blas Ople vs. Ruben Torres* G.R. No. 127685. July 23, 1998.

86 *Mabini Epie Jr. et.al., vs. Hon. Ulat-Marredo*, G.R. No. 148117. March 22, 2007.

Section 3(2), also of Article III, provides that any evidence obtained in violation of the above provision shall be inadmissible for any purpose in any proceeding.

Hence, as a general rule, a search and seizure must be carried through with judicial warrant, otherwise, such search and seizure constitutes derogation of a constitutional right.

The above rule, however, is not devoid of exceptions. In People v. Sarap, we listed the exceptions where search and seizure may be conducted without warrant, thus: (1) search incident to a lawful arrest; (2) search of a moving motor vehicle; (3) search in violation of customs laws; (4) seizure of the evidence in plain view; (5) search when the accused himself waives his right against unreasonable searches and seizures; (6) stop and frisk; and (7) exigent and emergency circumstances. The only requirement in these exceptions is the presence of probable cause. Probable cause is the existence of such facts and circumstances which would lead a reasonable, discreet, and prudent man to believe that an offense has been committed and that the objects sought in connection with the offense are in the place to be searched. In People v. Aruta, we ruled that in warrantless searches, probable cause must only be based on reasonable ground of suspicion or belief that a crime has been committed or is about to be committed. There is no hard and fast rule or fixed formula in determining probable cause for its determination varies according to the facts of each case." (citations omitted)

In *Valmonte*[87], the Court held that this right "belongs to the individual in his private capacity, and not to public and governmental agencies" because "the entire basis of the right to privacy is injury to the feelings and sensibilities of the party and a corporation would have no such ground for relief." Further, in *KMU*[88], the Court in upholding an executive order adopting a unified government identification system held that "the right to privacy does not bar the adoption of reasonable ID systems by government entities". Also in *Standard Chartered Bank*[89], not every invocation of the right to privacy should be allowed to thwart a legitimate congressional inquiry. It further stated:

"In *Sabio v. Gordon*, we have held that the right of the people to access information on matters of public concern generally prevails over the right to privacy of ordinary financial transactions. In that case, we declared that the right to privacy is not absolute where there is an overriding compelling state interest. Employing the rational basis relationship test, as laid down in Morfe v. Mutuc, there is no infringement of the individual's right to privacy as the requirement to disclosure information is for a valid purpose, in this case, to ensure that the government agencies involved in regulating banking transactions adequately protect the public who invest in foreign securities. Suffice it to state that this purpose constitutes a reason compelling enough to proceed with the assailed legislative investigation." (citations omitted)

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87 *Ricardo Valmonte et.al., vs. Feliciano Belmonte Jr. et. al.*, G.R. No. 74930. February 13, 1989.

88 *Kilusan Mayo Uno vs. et. al., vs. Director Genera et.al.*, G.R. No. 167798, April 19, 2006.

89 *Standard Chartered Bank et. al., vs. Senate Committee on Banks* G.R. No. 167173. December 27, 2007.

Right Of Peaceful Assembly And Suffrage, Freedom Of Expression, Thought And Religion

In the seminal case of *Reyes vs. Bagatsing* petitioners sought to exercise the right to peaceful assembly in front of the US embassy to rally against the continuing presence of the US bases in the country. Citing the Universal Declaration of Human Rights (UDHR), the court limited the right of local government mayors to prescribe the time, place and manner of the exercise of the right to peaceful assembly, and not the exercise of the right itself:

> "There was no justification to deny the exercise of the constitutional rights of free speech and peaceable assembly. These rights are assured by our Constitution and the Universal Declaration of Human Rights"[90]

The freedom of expression protected by the above mentioned *Reyes* case was reiterated in *Bayan vs. Eduardo Ermita*[91]:

> "It is very clear, therefore, that B.P. No. 880 is not an absolute ban of public assemblies but a restriction that simply regulates the time, place and manner of the assemblies. This was adverted to in *Osmeña v. Comelec*, where the Court referred to it as a "content-neutral" regulation of the time, place, and manner of holding public assemblies.
>
> A fair and impartial reading of B.P. No. 880 thus readily shows that it refers to all kinds of public assemblies 22 that would use public places. The reference to "lawful cause" does not make it content-based because assemblies really have to be for lawful causes, otherwise they would not be "peaceable" and entitled to protection. Neither are the words "opinion," "protesting" and "influencing" in the definition of public assembly content based, since they can refer to any subject. The words "petitioning the government for redress of grievances" come from the wording of the Constitution, so its use cannot be avoided. Finally, maximum tolerance is for the protection and benefit of all rallyists and is independent of the content of the expressions in the rally.
>
> Furthermore, the permit can only be denied on the ground of clear and present danger to public order, public safety, public convenience, public morals or public health. This is a recognized exception to the exercise of the right even under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, thus:
>
> Universal Declaration of Human Rights
>
> Article 20
>
> 1. Everyone has the right to freedom of peaceful assembly and association.
>
> (...)

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90 *Jose B.L. Reyes vs. Ramon Bagatsing*, G.R. No. L-65366, November 9, 1983. It is interesting to note that in footnote 34 of the said case it was stated: "The Philippines can rightfully take credit for the acceptance, as early as 1951, of the binding force of the Universal Declaration of Human Rights even if the rights and freedoms therein declared are considered by other jurisdictions as merely a statement of aspirations and not law until translated into the appropriate covenants. In the following cases decided in 1951, *Mejoff v. Director of Prisons*, 90 Phil. 70; *Borovsky v. Commissioner of Immigration*, 90 Phil. 107; *Chirskoff v. Commissioner of Immigration*, 90 Phil. 256; *Andreu v. Commissioner of Immigration*, 90 Phil. 347, the Supreme Court applied the Universal Declaration of Human Rights".

91 G.R. No. 169838, April 25, 2006.

Article 29

1. Everyone has duties to the community in which alone the free and full development of his personality is possible.

2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

The International Covenant on Civil and Political Rights

Article 19.

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
   (a) For respect of the rights or reputations of others;
   (b) For the protection of national security or of public order (ordre public), or of public health or morals."

Note, however a different situation exists if the permit to rally involves the premises of the judiciary[92] or speeches that attack the judiciary[93]. In the case of *In re: Valmonte*[94], petitioner, when denied by the City Mayor a permit to rally due to a Supreme Court Resolution, in front of the Hall of Justice to demand a speedy disposition of his clients' cases, argued that this Resolution denied his freedom of expression, among others. The Court, in denying his petition, held that judicial independence and the fair and orderly administration of justice constitute

92 In *Nestle Philippines vs. Sanchez* 154 SCRA 452 (1987), the Court required the Nestle workers, who were in a labor dispute with Nestle Philippines and mounted a 24 hour picket in front of the Supreme Court premises and harangued the Court pleading their case, to show cause why they should not be cited for contempt. The workers apologized and desisted, with a promise that it would not happen again.

93 While criticism by an individual of official conduct, is given the widest latitude as such criticism is a "scalpel that relieves the abscesses of officialdom" [*U.S. vs. Bustos* 37 Phil 731], note also the following cases: In re: Atty. Emiliano P. Juardo Jr. A.M. No. 5-2373, July 12, 1990 where Jurado wrote in his column proceedings of the court in a pending action, the Court held that a publication relating to a pending action that tends to impede, embarrass or obstruct the court constitutes a clear and present danger to the administration of justice; In re: Sotto 46 O.G. 2570, the Court punished Senator Sotto for contempt for attacking a Supreme Court decision, called the Court incompetent and narrow minded and announced his filing of a bill of its reorganization; and In re: Laureta G.R. No. 68635, March 12, 1987 where a lawyer was cited for contempt and suspended from practicing law when he written letters arrogantly questioning the Supreme Court Justices that were members of a division that decided against his client and also threatened to expose them if they did not decide in his favor.

94 In re: Valmonte 296 SCRA xi (1998).

paramount governmental interests that can justify the regulation of the public's right to free and peaceful assembly in the vicinity of the courthouses. *In the case of Zaldivar vs. Sandiganbayan*[95], then Tanodbayan (Office of the Special Prosecutor), now Justice Secretary Raul Gonzales made public statements that the Supreme Court ruled that the Tanodbayan cannot exercise the powers and functions of the Ombudsman because the Court was motivated to stop his investigation of its friends. The Court held that the invocation of the freedom of speech by Gonzales was improper, as this freedom has to accommodate the equally important public interest of maintaining the integrity and orderly function of the judiciary and thus Gonzales is being penalized with an indefinite suspension from law practice because of the nature of the criticism and the manner it was carried out.

In libel cases, fair comments on matters of public interest are privileged communication that also constitutes a valid defense against libel or slander. In the case of *Borjal vs. Court of Appeals*[96] the Court held that when a discreditable imputation is against a public person in order for it to be actionable such imputation is a false allegation or a comment based on false premises; And and award for damages in favor of the public person is only proper when it is proven that the imputation was made with the knowledge that it was false or with reckless disregard of whether it was false or not. In *Guingguing vs. Court of Appeals*[97], in noting the diminishing scope of criminal libel, the Court stated among others:

> "It may also be noted that this heightened degree of protection afforded to free expression to comment on public figures or matters against criminal prosecution for libel has also gained a foothold in Europe. Article 10 of the European Convention on Human Rights and Fundamental Freedoms provides that "[e]veryone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers." The European Court of Human Rights applied this provision in Lingens v. Austria, in ruling that the Republic of Austria was liable to pay monetary damages "as just satisfaction" to a journalist who was found guilty for defamation under the Austrian Criminal Code. The European Court noted:
>
> [Article 10] is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'. (...) These principles are of particular importance as far as the press is concerned. Whilst the press must not overstep the bounds set, inter alia, for the 'protection of the reputation of others', it is nevertheless incumbent on it to impart information and ideas on political issues just as on those in other areas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has the right to receive them. (...)
>
> The international trend in diminishing the scope, if not the viability, of criminal libel prosecutions is clear. Most pertinently, it is also evident in our own acceptance in this

95 *Zaldivar vs. Sandiganbayan* 166 SCRA 316 (1988).

96 *Borjal vs. Court of Appeals*, 301 SCRA 1 (1999).

97 *Ciriaco Guingguing v. Court of Appeals*, G.R. No. 128959, September 30, 2005.

jurisdiction of the principles applied by the U.S. Supreme Court in cases such as New York Times and Garrison." (citations omitted)

Also, freedom of expression during election period is generally uncurtailed. In the cases of *Sanidad vs. COMELEC*[98] and *Adiong vs. COMELEC*[99], the Court in both cases rendered invalid COMELEC resolutions prohibiting in *Sanidad* media personalities to use their media to campaign for or against the issues except through COMELEC space and time and in *Adiong* the posting of stickers and decals on areas not authorized by the COMELEC. In *Sanidad*, the Court held that COMELEC has no power to supervise and regulate the exercise of media personalities of their profession as it is constitutionally protected speech. In *Adiong*, the Court held that the posting of decals and stickers on cars and other moving or movable places has no clear and present danger that justifies the resolution and the expression curtailed here is an individual right to express his or her preferred candidate in the hope that this will convince other voters to agree. In the case of *ABS-CBN vs. COMELEC*[100], the Court held invalid the absolute ban on exit polls by the COMELEC, as the concern by the COMELEC, that exit polls would undermine the credibility and integrity of the electoral process when the exit polls does not tally with the official count, is not a substantial danger that the state has a right to prevent.

However, the Supreme Court in certain instances limited freedom of speech during the election period. In *Gonzales vs. COMELEC*[101], the Court upheld the validity of the law prohibiting except during the prescribed period the making of speeches or comments for or against a party or candidate for public office. In *NPC vs. COMELEC*[102] upholding the validity of Section 11 (b)[103] of Republic Act No. 6646[104]:

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98 *Sanidad vs. COMELEC* 181 SCRA 529 (1990).

99 *Adiong vs. COMELEC* 207 SCRA 712 (1992).

100 *ABS-CBN Broadcasting Corp. vs. COMELEC* 323 SCRA 811 (2000).

101 *Gonzales vs. COMELEC* 27 SCRA 835 (1969).

102 *National Press Club et.al., vs. Commission on Elections*, G.R. No. 102653. March 5, 1992.

103 SECTION 11. Prohibited Forms of Election Propaganda. — In addition to the forms of election propaganda prohibited under Section 85 of Batas Pambansa Blg. 881, it shall be unlawful:

(...)

b) for any newspapers, radio broadcasting or television station, other mass media, or any person making use of the mass media to sell or to give free of charge print space or air time for campaign or other political purposes except to the Commission as provided under Sections 90 and 92 of Batas Pambansa Blg. 881. Any mass media columnist, commentator, announcer or personality who is a candidate for any elective public office shall take a leave of absence from his work as such during the campaign period.

104 This law however has been superseded by Republic Act No. 9006:

SECTION 4. Requirements for Published or Printed and Broadcast Election Propaganda.

4.1. Any newspaper, newsletter, newsweekly, gazette or magazine advertising, posters, pamphlets, comic books, circulars, handbills, bumper stickers, streamers, sample list of candidates or any published or printed political matter and any broadcast of election propaganda by television or radio for or against a candidate or group of candidates to any public office shall bear and be identified by the reasonably legible or audible words "political advertisement paid for," followed by the true and correct name and address of the candidate or party for whose benefit the election propaganda was printed or aired.

4.2. If the broadcast is given free of charge by the radio or television station, it shall be identified by the words "airtime for this broadcast was provided free of charge by" followed by the true and correct name and address of the broadcast entity.

> "The objective which animates Section 11 (b) is the equalizing, as far as practicable, the situations of rich and poor candidates by preventing the former from enjoying the undue advantage offered by huge campaign "war chests." Section 11 (b) prohibits the sale or donation of print space and air time "for campaign or other political purposes" except to the Commission on Elections ("Comelec"). Upon the other hand, Sections 90 and 92 of the Omnibus Election Code require the Comelec to procure "Comelec space" in newspapers of general circulation in every province or city and "Comelec time" on radio and television stations. Further, the Comelec is statutorily commanded to allocate "Comelec space" and "Comelec time" on a free of charge, equal and impartial basis among all candidates within the area served by the newspaper or radio and television station involved.
>
> (...)
>
> The Comelec has thus been expressly authorized by the Constitution to supervise or regulate the enjoyment or utilization of the franchises or permits for the operation of media of communication and information. The fundamental purpose of such "supervision or regulation" has been spelled out in the Constitution as the ensuring of "equal opportunity, time, and space, and the right to reply," as well as uniform and reasonable rates of charges for the use of such media facilities, in connection with "public information campaigns and forums among candidates."It seems a modest proposition that the provision of the Bill of Rights which enshrines freedom of speech, freedom of expression and freedom of the press (Article III [4], Constitution) has to be taken in conjunction with the Article IX (C) (4) which may be seen to be a special provision applicable during a specific limited period — i.e., "during the election period." It is difficult to overemphasize the special importance of the rights of freedom of speech and freedom of the press in a democratic polity, in particular when they relate to the purity and integrity of the electoral process itself, the process by which the people identify those who shall have governance over them. Thus, it is frequently said that these rights are accorded a preferred status in our constitutional hierarchy. Withal, the rights of free speech and free press are not unlimited rights for they are not the only important and relevant values even in the most democratic of polities. In our own society, equality of opportunity to proffer oneself for public office, without regard to the level of financial resources that one may have at one's disposal, is clearly an important value. One of the basic state policies given constitutional rank by Article II, Section 26 of the Constitution is the egalitarian demand that "the State shall guarantee equal access to opportunities for public service and prohibit political dynasties as may be defined by law." (citations omitted)

Similarly, the case of *Telecommunications and Broadcast Attorneys of the Philippines (TBAP) vs COMELEC*[105] the Court upheld the validity of Section 92 of the Omnibus Election Code which provides for air time that may be procured by COMELEC free of charge as there are substantial

4.3. Print, broadcast or outdoor advertisements donated to the candidate or political party shall not be printed, published, broadcast or exhibited without the written acceptance by the said candidate or political party. Such written acceptance shall be attached to the advertising contract and shall be submitted to the COMELEC as provided in Subsection 6.3. hereof.

105 *Telecommunications and Broadcast Attorneys of the Philippines vs COMELEC*, G.R. No. 132922, April 21, 1998.

distinctions between print media to broadcast media such as the physical limitations of the broadcast spectrum and the unique pervasiveness of broadcast media in the Philippines, that justified the different treatment the different treatment for purposes of free speech.

In contrast to the NPC and TBAP cases above, in *SWS vs. COMELEC*[106], the Supreme Court held that Section 5.4 of Republic Act No. 9006 which provides a limited period of publication for election surveys invalid:

> "(...) 5.4 of R.A. No. 9006 (Fair Election Act), which provides:
>
> Surveys affecting national candidates shall not be published fifteen (15) days before an election and surveys affecting local candidates shall not be published seven (7) days before an election.
>
> (...)
>
> To be sure, §5.4 lays a prior restraint on freedom of speech, expression, and the press by prohibiting the publication of election survey results affecting candidates within the prescribed periods of fifteen (15) days immediately preceding a national election and seven (7) days before a local election. Because of the preferred status of the constitutional rights of speech, expression, and the press, such a measure is vitiated by a weighty presumption of invalidity. Indeed, "any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity. (...) The Government 'thus carries a heavy burden of showing justification for the enforcement of such restraint."' There is thus a reversal of the normal presumption of validity that inheres in every legislation.
>
> Nor may it be argued that because of Art. IX-C, §4 of the Constitution, which gives the COMELEC supervisory power to regulate the enjoyment or utilization of franchise for the operation of media of communication, no presumption of invalidity attaches to a measure like §5.4. For as we have pointed out in sustaining the ban on media political advertisements, the grant of power to the COMELEC under Art. IX-C, §4 is limited to ensuring "equal opportunity, time, space, and the right to reply" as well as uniform and reasonable rates of charges for the use of such media facilities for "public information campaigns and forums among candidates."
>
> (...)
>
> First. §5.4 fails to meet criterion [3] of the O'Brien test because the causal connection of expression to the asserted governmental interest makes such interest "not unrelated to the suppression of free expression." By prohibiting the publication of election survey results because of the possibility that such publication might undermine the integrity of the election, §5.4 actually suppresses a whole class of expression, while allowing the expression of opinion concerning the same subject matter by newspaper columnists, radio and TV commentators, armchair theorists, and other opinion makers. In effect, §5.4 shows a bias for a particular subject matter, if not viewpoint, by preferring personal opinion

106 *Social Weather Station vs. COMELEC* 357 SCRA 496 (2001).

> to statistical results. The constitutional guarantee of freedom of expression means that "the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." (...) Nor is there justification for the prior restraint which §5.4 lays on protected speech.
>
> Thus, contrary to the claim of the Solicitor General, the prohibition imposed by §5.4 cannot be justified on the ground that it is only for a limited period and is only incidental. The prohibition may be for a limited time, but the curtailment of the right of expression is direct, absolute, and substantial. It constitutes a total suppression of a category of speech and is not made less so because it is only for a period of fifteen (15) days immediately before a national election and seven (7) days immediately before a local election.
>
> This sufficiently distinguishes §5.4 from R.A. No. 6646, §11(b), which this Court found to be valid in *National Press Club v. COMELEC* and *Osmeña v. COMELEC.* For the ban imposed by R.A. No. 6646, §11(b) is not only authorized by a specific constitutional provision, but it also provided an alternative so that, as this Court pointed out in *Osmeña*, there was actually no ban but only a substitution of media advertisements by the COMELEC space and COMELEC hour.
>
> (...)
>
> Second. Even if the governmental interest sought to be promoted is unrelated to the suppression of speech and the resulting restriction of free expression is only incidental, §5.4 nonetheless fails to meet criterion [4] of the O'Brien test, namely, that the restriction be not greater than is necessary to further the governmental interest. As already stated, §5.4 aims at the prevention of last-minute pressure on voters, the creation of bandwagon effect, "junking" of weak or "losing" candidates, and resort to the form of election cheating called "dagdag-bawas." Praiseworthy as these aims of the regulation might be, they cannot be attained at the sacrifice of the fundamental right of expression, when such aim can be more narrowly pursued by punishing unlawful acts, rather than speech because of apprehension that such speech creates the danger of such evils." (citations omitted)

In the case of *Romulo Macalintal vs. Commission on Elections*[107], the Court upheld the right to suffrage of Overseas Filipinos by upholding the constitutionality of Section 5(d) of R.A. No. 9189 or the Overseas Absentee Voting Law. Justice Antonio Carpio, in concurring with the Court decision, elucidated:

> "The right of suffrage is the cornerstone of a representative government like that established in the 1987 Constitution. A representative government is legitimate when those represented elect their representatives in government. The consent of the governed is what stamps legitimacy on those who govern. This consent is expressed through the right of suffrage. It is a precious right for which many have fought and died so that others may freely exercise it. A government that denies such right on flimsy or meaningless grounds does so at its peril. The International Covenant on Civil and Political Rights, to which the Philippines is a signatory, requires the Philippines to respect the people's right of suffrage

107 G.R. No. 157013, July 10, 2003.

> "without unreasonable restrictions." The Philippines is duty bound under international law to comply in good faith with its treaty obligations under the Covenant. To require overseas Filipinos to return to the Philippines twice within 12 months so they may vote abroad as absentee voters is plainly an unreasonable restriction outlawed by the Covenant. When the framers of the Constitution introduced absentee voting in Section 2 of Article V, they were aware of the country's obligations under the Covenant. In their discussions on the death penalty, human rights and the Bill of Rights, the framers of the Constitution often referred to the country's obligations under the Covenant. It is inconceivable that the framers intended overseas Filipinos to comply with the double residency requirement, an unreasonable restriction that would patently violate Article 25 of the Covenant and practically negate the overseas Filipinos' right of suffrage." (citations omitted)

As to the applicability of the right to students, the Supreme Court held in the case of *Villar vs. Technological Institute of the Philippines*[108] that the respondent school was liable for violating petitioners' right to education for expelling a student who exercised his right to peaceful assembly. The Court ruled that the right to education is paramount:

> "What cannot be stressed too sufficiently is that among the most important social, economic, and cultural rights is the right to education not only in the elementary and high school grades but also on the college level. The constitutional provision as to the State maintaining "a system of free public elementary education and, in areas where finances permit, establish and maintain a system of free public education" up to the high school level does not per se exclude the exercise of that right in colleges and universities. It is only at the most a reflection of the lack of sufficient funds for such a duty to be obligatory in the case of students in the colleges and universities. As far as the right itself is concerned, not the effectiveness of the exercise of such right because of the lack of funds, Article 26 of the Universal Declaration of Human Rights provides: "Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit."
>
> It is quite clear that while the right to college education is included in the social, economic, and cultural rights, it is equally manifest that the obligation imposed on the State is not categorical, the phrase used being "generally available" and higher education, while being "equally accessible to all should be on the basis of merit." To that extent, therefore, there is justification for excluding three of the aforementioned petitioners because of their marked academic deficiency.
>
> The academic freedom enjoyed by "institutions of higher learning" includes the right to set academic standards to determine under what circumstances failing grades suffice for the expulsion of students. Once it has done so, however, that standard should be followed meticulously. It cannot be utilized to discriminate against those students who exercise their constitutional rights to peaceable assembly and free speech. If it does so, then there is a

108 *Venecio Villar et.al., vs. Technological Institute of the Philippines et. al.*, G.R. No. 69198, April 17, 1985.

> legitimate grievance by the students thus prejudiced, their right to the equal protection clause being disregarded.
>
> While the dispositive portion refers only to petitioners of record, the doctrine announced in this case should apply to all other students similarly situated. That way, there should not be any need for a party to apply to this Court for the necessary redress." (citations omitted)

The aforementioned case was clarified in the later case of *Arreza vs. GAUF*[109]:

> "In the even more recent case of *Villar v. Technological Institute of the Philippines*, reference was made to Article 26 of the Universal Declaration of Human Rights: "Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally accessible to all on the basis of merit." Then came this relevant paragraph: "It is quite clear that while the right to college education is included in the social, economic, and cultural rights, it is equally manifest that the obligation imposed on the State is not categorical, the phrase used being 'generally available' and higher education, while being 'equally accessible to all should be on the basis of merit.' To that extent, therefore, there is justification for excluding three of the aforementioned petitioners because of their marked academic deficiency." It is quite clear then that an educational institution may drop a student with failing grades, under standards set by it and made to apply to all similarly situated." (citations omitted)

Note however that in the case of *Miriam College vs. Court of Appeals*[110], the Court held that the right of students to free speech must be applied in light of the special characteristics of educational institutions. As such, the school cannot suspend or expel a student solely on the articles he or she has written, unless that article materially disrupts class work or involves substantial disorder or invades the rights of others.

In relation to the freedom of religion in the educational institution, the Court in *Ebralinag vs the Division Superintendent*[111] in granting an exemption in favor of the members of the religious sect, the Jehovah's Witnesses, the public schoolchildren, to refuse to salute the flag, sing the national anthem and recite the patriotic pledge as required by Republic Act No. 1265 held:

> "In the context of the instant case, the freedom of religion enshrined in the Constitution should be seen as the rule, not the exception. To view the constitutional guarantee in the manner suggested by the petitioners would be to denigrate the status of a preferred freedom and to relegate it to the level of an abstract principle devoid of any substance and meaning in the lives of those for whom the protection is addressed.
>
> (...)
>
> To the extent to which members of the Jehovah's Witnesses sect assiduously pursue their belief in the flag's religious symbolic meaning, the State cannot, without thereby

109 *Carmelo Arreza et. al., vs. Gregorio Araneta Univeristy Foundation et. al.*, G.R. No. L-62297, June 19, 1985.

110 *Miriam College Foundation vs. Court of Appeals* G.R. No. 127390, Dcember 15, 2000.

111 *Roel Ebralinag et.al., vs the Division Supreintendent of Schools of Cebu et.al.*, G.R. No. 95770. December 29, 1995.

> transgressing constitutionally protected boundaries, impose the contrary view on the pretext of sustaining a policy designed to foster the supposedly far-reaching goal of instilling patriotism among the youth. While conceding to the idea — adverted to by the Solicitor General — that certain methods of religious expression may be prohibited to serve legitimate societal purposes, refusal to participate in the flag ceremony hardly constitutes a form of religious expression so offensive and noxious as to prompt legitimate State intervention. It is worth repeating that the absence of a demonstrable danger of a kind which the State is empowered to protect militates against the extreme disciplinary methods undertaken by school authorities in trying to enforce regulations designed to compel attendance in flag ceremonies. Refusal of the children to participate in the flag salute ceremony would not interfere with or deny the rights of other school children to do so. It bears repeating that their absence from the ceremony hardly constitutes a danger so grave and imminent as to warrant the state's intervention.'" (citations omitted)

In relation to freedom of religion vis-à-vis State provisions penalizing bigamous or adulterous relationships, the Court in *Estrada vs. Escritor*[112] deemed sufficient the act of signing a Declaration Pledging Faithfulness, is sufficient to legitimize a union which would otherwise be classified as adulterous and bigamous. This case involved a court interpreter, Soledad S. Escritor, who admittedly, while still married to another, cohabited since 1980 to Luciano Quilapio, Jr., who was himself married to another. Escritor and Quilapio had a nineteen-year old son. The private complainant herein was not personally related to Escritor nor did he personally know her. However, he wanted the Court to declare as immoral the relationship of Escritor with Quilapio in consonance with the pertinent provision of the Administrative Code. Escritor alleged that in compliance with the foregoing rules, she and her partner signed the Declaration Pledging Faithfulness in 1991, and by virtue of such act, they are for all purposes, regarded as husband and wife by the religious denomination of which they are devout adherents. The Court stated in this manner:

> "It is a cardinal rule in constitutional construction that the constitution must be interpreted as a whole and apparently conflicting provisions should be reconciled and harmonized in a manner that will give to all of them full force and effect. From this construction, it will he ascertained that the intent of the framers was to adopt a benevolent neutrality approach in interpreting the religious clauses in the Philippine constitutions and the enforcement of this intent is the goal of construing the constitution.
>
> Benevolent neutrality recognizes the religious nature of the Filipino people and the elevating influence of religion in society; at the same time, it acknowledges that government must pursue its. secular goals. In pursuing these goals, however, government might adopt laws or actions of general applicability which inadvertently burden religious exercise. Benevolent neutrality gives room for accommodation of these religious exercises as required by the Free Exercise Clause. It allows these breaches in the wall of separation to uphold religious liberty, which after all is the integral purpose of the religion clauses. The case at bar involves this first type of accommodation where an exemption is sought from a law of general applicability that inadvertently burdens religious exercise. Although our constitutional

112 *Alejandro Estrada vs. Soledad Escritor*, A.M. No. P-02-1651 August 4, 2003.

history and interpretation mandate benevolent neutrality, benevolent neutrality does not mean that the Court ought to grant exemptions every time a free exercise claim comes before it. But it does mean that the Court will not look with hostility or act indifferently towards religious beliefs and practices and that it will strive to accommodate them when it can within flexible constitutional limits; it does mean that the Court will not simply dismiss a claim under the Free Exercise Clause because the conduct in question offends a law or the orthodox view for this precisely is the protection afforded by the religion clauses of the Constitution, i.e., that in the absence of legislation granting exemption from a law of general applicability, the Court can carve out an exception when the religion clauses justify it. While the Court cannot adopt a doctrinal formulation that can eliminate the difficult questions of judgment in determining the degree of burden on religious practice or importance of the state interest or the sufficiency of the. means adopted by the state to pursue its interest, the Court can set a doctrine on the ideal towards which religious clause jurisprudence should be directed. We here lay down the doctrine that in Philippine jurisdiction, we adopt the benevolent neutrality approach not only because of its merits as discussed above, but more importantly, because our constitutional history and interpretation indubitably show that benevolent neutrality is the launching pad from which the Court should take off in interpreting religion clause cases. The ideal towards which this approach is directed is the protection of religious liberty "not only for a minority, however small — not only for a majority, however large — but for each of us" to the greatest extent possible within flexible constitutional limits. Benevolent neutrality is manifest not only in the Constitution but has also been recognized in Philippine jurisprudence, albeit not expressly called "benevolent neutrality" or "accommodation". In *Aglipay*, the Court not only stressed the "elevating influence of religion in human society" but acknowledged the Constitutional provisions on exemption from tax of church property, salary of religious officers in government institutions, and optional religious instruction as well as the provisions of the Administrative Code making Thursday and Friday of the Holy Week, Christmas Day and Sundays legal holidays. In *Garces*, the Court not only recognized the Constitutional provisions indiscriminately granting concessions to religious sects and denominations, but also acknowledged that government participation in long-standing traditions which have acquired a social character — "the barrio fiesta is a socio-religious affair" — does not offend the Establishment Clause. In *Victoriano*, the Court upheld the exemption from closed shop provisions of members of religious sects who prohibited their members from joining unions upon the justification that the exemption was not a violation of the Establishment Clause but was only meant to relieve the burden on free exercise of religion. In *Ebralinag*, members of the Jehovah's Witnesses were exempt from saluting the flag as required by law, on the basis not of a statute granting exemption but of the Free Exercise Clause without offending the Establishment Clause. While the U.S. and Philippine religion clauses are similar in form and origin, Philippine constitutional law has departed from the U.S. jurisprudence of employing a separationist or strict neutrality approach. The Philippine religion clauses have taken a life of their own, breathing the air of benevolent neutrality and accommodation. Thus, the wall of separation in Philippine jurisdiction' is not as high and impregnable as the wall created by the U.S. Supreme

Court in Everson. While the religion clauses are a unique American experiment which understandably came about as a result of America's English background and colonization. the life that these clauses have taken in this jurisdiction is the Philippines' own experiment, reflective of the Filipinos' own national soul, history and tradition. After all, "the life of the law (...) has been experience."

The "compelling state interest" test is proper where conduct is involved for the whole gamut of human conduct has different. effects on the state's interests:, some effects may be immediate and short-term while others delayed and far-reaching. A test that would protect the interests of the state in preventing a substantive evil, whether immediate or delayed, is therefore necessary. However, not any interest of the state would suffice to prevail over the right to religious freedom as this is a fundamental right that enjoys a preferred position in the hierarchy of rights — "the most inalienable and sacred of all human rights," in the words of Jefferson. This right is sacred for an invocation of the Free Exercise Clause is an. appeal to a higher sovereignty. The entire constitutional order of limited government is premised upon an acknowledgment of such higher sovereignty, thus the Filipinos implore the "aid of Almighty God in order to build a just and humane society and establish a government." As held in Sherbert, only the gravest abuses, endangering paramount interests can limit this fundamental right. A mere balancing of interests which balances a right with just a colorable state interest is therefore not appropriate. Instead, only a compelling interest of the state can prevail over the fundamental right to .religious liberty. The test requires the state to carry a heavy burden, a compelling one, for to do otherwise would allow the state to batter religion, especially the less powerful ones until they are destroyed. In determining which shall prevail between the state's interest and religious liberty, reasonableness shall be the guide. The "compelling state interest" serves the purpose of revering religious liberty while at the same time affording protection to the paramount interests of the state. This was the test used in Sherbert which involved conduct, i.e., refusal to work on Saturdays. In the end, the "compelling state interest" test, by upholding the paramount interests of the state, seeks to protect the very state, without which, religious liberty will not be preserved." (citations omitted)

Rights Of Women And Children Under UDHR, ICCPR, CEDAW And CRC

The Court, in numerous instances, has also cited the Convention on the Elimination of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC) though it has not categorically ruled these instruments are self executory in the Philippines.

In the case *Imelda Marcos vs Commission on Elections*[113], the exiled former First Lady filed a certificate for candidacy for the position of District Representative in her hometown in Leyte. Her opponent filed a disqualification case against her on the ground that she was not a bona fide resident of the district that she was seeking to represent. Her opponent's argument was that under the Civil Code of the Philippines, a married woman follows the domicile of her husband. Ergo,

113 G.R. No. 119976, September 18, 1995.

petitioners claimed that since the former President was from the Province of Ilocos Norte, she too was domiciled in that province.

The Court, in a narrow vote, granted the petition. In a separate opinion by Justice Flerida Ruth Romero, a noted civil law expert, opined:

> "All these indignities and disabilities suffered by Filipino wives for hundreds of years evoked no protest from them until the concept of human rights and equality between and among nations and individuals found hospitable lodgment in the United Nations Charter of which the Philippines was one of the original signatories. By then, the Spanish "conquistadores" had been overthrown by the American forces at the turn of the century. The bedrock of the U.N. Charter was firmly anchored on this credo: "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women.
>
> It took over thirty years before these egalitarian doctrines bore fruit, owing largely to the burgeoning of the feminist movement. What may be regarded as the international bill of rights for women was implanted in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) adopted by the U.N. General Assembly which entered into force as an international treaty on September 3, 1981. In ratifying the instrument, the Philippines bound itself to implement its liberating spirit and letter, for its Constitution, no less, declared that The Philippines (...) adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations. One such principle embodied in the CEDAW is granting to men and women "the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.
>
> CEDAW's pro-women orientation which was not lost on Filipino women was reflected in the 1987 Constitution of the Philippines and later, in the Family Code, both of which were speedily approved by the first lady President of the country, Corazon C. Aquino. Notable for its emphasis on the human rights of all individuals and its bias for equality between the sexes are the following provisions: "The State values the dignity of every human person and guarantees full respect for human rights" and "The State recognizes the role of women in nation-building, and shall ensure the fundamental equality before the law of women and men." (citations omitted)

In deciding the citizenship of Presidential Candidate Fernando Poe Jr. (FPJ), the Court applied the right of a child to a nationality enshrined in the International Convention on the Rights of the Child. In the case of *Tecson v. COMELEC*[114], the court ruled:

> "The Philippines signed the Convention on the Rights of the Child on 26 January 1990 and ratified the same on 21 August 1990. The Convention defines a child to mean "every human being below the age of eighteen years unless, under the law applicable to the child,

114 *Maria Jeanette C. Tecson et. al., v. Commission on Elections* G.R. No. 161434, March 3, 2004.

majority is attained earlier." Obviously, FPJ cannot invoke the Convention since he is not a child as defined in the Convention, and he was born half a century before the Convention came into existence. FPJ's citizenship at birth in 1939 could not in any way be affected by the Convention which entered into force only on 2 September 1990.

The Convention has the status of a municipal law and its ratification by the Philippines could not have amended the express requirement in the Constitution that only natural-born citizens of Philippines are qualified to be President. While the Constitution apparently favors natural-born citizens over those who are not, that is the explicit requirement of the Constitution which neither the Executive Department nor the Legislature, in ratifying a treaty, could amend. In short, the Convention cannot amend the definition in the Constitution that natural-born citizens are "those who are citizens of the Philippines from birth without having to perform any act to acquire or perfect their Philippine citizenship."

In any event, the Convention guarantees a child "the right to acquire a nationality," and requires States Parties to "ensure the implementation" of this right, "in particular where the child would otherwise be stateless." Thus, as far as nationality or citizenship is concerned, the Convention guarantees the right of the child to acquire a nationality so that he may not be stateless. The Convention does not guarantee a child a citizenship at birth, but merely "the right to acquire a nationality" in accordance with municipal law. When FPJ was born in 1939, he was apparently under United States law an American citizen at birth. After his birth FPJ also had the right to acquire Philippine citizenship by proving his filiation to his alleged Filipino father in accordance with Philippine law. At no point in time was FPJ in danger of being stateless. Clearly, FPJ cannot invoke the Convention to claim he is a natural-born Philippine citizen." (citations omitted)

The Convention was also cited in the case of *Cang vs. Court of Appeals*[115] where the Court held that minor children cannot be legally adopted without the written consent of their natural parent even though such parent is alleged to have abandoned them, saying:

Inasmuch as the Philippines is a signatory to the United Nations Convention on the Rights of the Child, the government and its officials are duty bound to comply with its mandates. Of particular relevance to instant case are the following provisions:

"States Parties shall respect the responsibilities, rights and duties of parents (...) to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

(...)

States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

(...)

115 *Herbert Cang v. Court of Appeals et., al.*, G.R. No. 105308, September 25, 1998.

> A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents.
>
> (...)
>
> States Parties shall respect the rights and duties of the parents (...) to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.
>
> Underlying the policies and precepts in international conventions and the domestic statutes with respect to children is the overriding principle that all actuations should be in the best interests of the child. This is not, however, to be implemented in derogation of the primary right of the parent or parents to exercise parental authority over him. The rights of parents vis-a-vis that of their children are not antithetical to each other, as in fact, they must be respected and harmonized to the fullest extent possible." (citations omitted)

The Supreme Court has also recognized the value of protecting the best interests of a child of tender years when resolving the issue of custody. Thus, in the case of *Pablo-Gualberto v. Gualberto*[116] the Court held:

> "The principle of "best interest of the child" pervades Philippine cases involving adoption, guardianship, support, personal status, minors in conflict with the law, and child custody. In these cases, it has long been recognized that in choosing the parent to whom custody is given, the welfare of the minors should always be the paramount consideration. Courts are mandated to take into account all relevant circumstances that would have a bearing on the children's well-being and development. Aside from the material resources and the moral and social situations of each parent, other factors may also be considered to ascertain which one has the capability to attend to the physical, educational, social and moral welfare of the children. Among these factors are the previous care and devotion shown by each of the parents; their religious background, moral uprightness, home environment and time availability; as well as the children's emotional and educational needs." (citations omitted)

In another case concerning the provisions of the Revised Implementing Rules and Regulations of the Milk Code, the Supreme Court in the case of *Pharmaceutical and Health Care vs. Duque*[117] held:

> "The Court notes that the following international instruments invoked by respondents, namely: (1) The United Nations Convention on the Rights of the Child; (2) The International Covenant on Economic, Social and Cultural Rights; and (3) the Convention on the Elimination of All Forms of Discrimination Against Women, only provide in general terms that steps must be taken by State Parties to diminish infant and child mortality and inform society of the advantages of breastfeeding, ensure the health and well-being of families, and ensure that women are provided with services and nutrition in connection

116 *Joycelyn Pablo-Gualberto v. Crisanto Rafaelito Gualberto V*, G.R. No. 154994, June 28, 2005.

117 *Pharmaceutical and Healthcare Association of the Philippines v. Francisco T. Duque III et.al.*, G.R. No. 173034. August 15, 2006.

with pregnancy and lactation. Said instruments do not contain specific provisions regarding the use or marketing of breastmilk substitutes.

(...)

Under the 1987 Constitution, international law can become part of the sphere of domestic law either by transformation or incorporation. The transformation method requires that an international law be transformed into a domestic law through a constitutional mechanism such as local legislation. The incorporation method applies when, by mere constitutional declaration, international law is deemed to have the force of domestic law.

Treaties become part of the law of the land through transformation pursuant to Article VII, Section 21 of the Constitution which provides that "no treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the members of the Senate." Thus, treaties or conventional international law must go through a process prescribed by the Constitution for it to be transformed into municipal law that can be applied to domestic conflicts.

The ICMBS and WHA Resolutions are not treaties as they have not been concurred in by at least two-thirds of all members of the Senate as required under Section 21, Article VII of the 1987 Constitution.

However, the ICMBS which was adopted by the WHA in 1981 had been transformed into domestic law through local legislation, the Milk Code. Consequently, it is the Milk Code that has the force and effect of law in this jurisdiction and not the ICMBS per se.

The Milk Code is almost a verbatim reproduction of the ICMBS, but it is well to emphasize at this point that the Code did not adopt the provision in the ICMBS absolutely prohibiting advertising or other forms of promotion to the general public of products within the scope of the ICMBS. Instead, the Milk Code expressly provides that advertising, promotion, or other marketing materials may be allowed if such materials are duly authorized and approved by the Inter-Agency Committee (IAC).

On the other hand, Section 2, Article II of the 1987 Constitution, to wit:

SECTION 2. The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation and amity with all nations. (Emphasis supplied) embodies the incorporation method.

(...)

As previously discussed, for an international rule to be considered as customary law, it must be established that such rule is being followed by states because they consider it obligatory to comply with such rules (opinio juris). Respondents have not presented any evidence to prove that the WHA Resolutions, although signed by most of the member states, were in fact enforced or practiced by at least a majority of the member states; neither have respondents proven that any compliance by member states with said WHA Resolutions was obligatory in nature.

Respondents failed to establish that the provisions of pertinent WHA Resolutions are customary international law that may be deemed part of the law of the land.

Consequently, legislation is necessary to transform the provisions of the WHA Resolutions into domestic law. The provisions of the WHA Resolutions cannot be considered as part of the law of the land that can be implemented by executive agencies without the need of a law enacted by the legislature." (citations omitted)

V. Freedoms Protected By The ICESCR

Even before the existence of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Philippines has already recognized a right enshrined therein. In the 1909 case of *Carino vs. Insular Government*[118], the Court recognized the right of indigenous communities to self determination. The Court said that the Indigenous people in the Philippines had native title, stating:

"It might, perhaps, be proper and sufficient to say that when, as far back as testimony or memory goes, the land has been held by individuals under a claim of private ownership, it will be presumed to have been held in the same way from before the Spanish conquest, and never to have been public land. Certainly, in a case like this, if there is doubt or ambiguity in the Spanish law, we ought to give the applicant the benefit of the doubt. Whether justice to the natives and the import of the organic act ought not to carry us beyond a subtle examination of ancient texts, or perhaps even beyond the attitude of Spanish law, humane though it was, it is unnecessary to decide. If, in a tacit way, it was assumed that the wild tribes of the Philippines were to be dealt with as the power and inclination of the conqueror might dictate, Congress has not yet sanctioned the same course as the proper one "for the benefit of the inhabitants thereof."

If the applicant's case is to be tried by the law of Spain, we do not discover such clear proof that it was bad by that law as to satisfy us that he does not own the land. To begin with, the older decrees and laws cited by the counsel for the plaintiff in error seem to indicate pretty clearly that the natives were recognized as owning some lands, irrespective of any royal grant. In other words, Spain did not assume to convert all the native inhabitants of the Philippines into trespassers, or even into tenants at will."

Rights Of Labor

Both the ICCPR[119] and ICESCR[120] have provisions on protecting labor that Philippine laws[121]

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118 41 Phil 935, 212 US 449; available online at <http://supreme.justia.com/us/212/449/case.html>. This case was decided by the United States of America Supreme Court as the Philippines at that time was a U.S. Colony.

119 See ICCPR Article 22 [1].

120 See ICESCR Articles 7-9.

121 See *International School Alliance of Educators (ISAE) vs. Hon. Leonardo A. Quisumbing and Central Bank (now Bangko Sentral ng Pilipinas) Employees Association, Inc., vs. Bangko Sentral ng Pilipinas infra* for a list of a few Philippine laws that protect the rights of labor. See also 1987 PHIL. CONST. Art. XIII §3, Presidential Decree No. 442 and Republic Act No. 8042.

strive to achieve. In *Gonzales*[122], the Court held that "Employment is not merely a contractual relationship; it has assumed the nature of property right. It may spell the difference whether or not a family will have food on their table, roof over their heads and education for their children. It is for this reason that the State has taken up measures to protect employees from unjustified dismissals. It is also because of this that the right to security of tenure is not only a statutory right but, more so, a constitutional right."

In *ISAE*[123], the Court ruled that the point-of-hire classification employed by respondent School to justify the distinction in the salary rates of foreign-hires and local-hires was an invalid classification. There is no reasonable distinction between the services rendered by foreign-hires and local-hires. It further stated:

> "The Constitution specifically provides that labor is entitled to "humane conditions of work." These conditions are not restricted to the physical workplace — the factory, the office or the field — but include as well the manner by which employers treat their employees.
>
> The Constitution also directs the State to promote "equality of employment opportunities for all." Similarly, the Labor Code provides that the State shall "ensure equal work opportunities regardless of sex, race or creed." It would be an affront to both the spirit and letter of these provisions if the State, in spite of its primordial obligation to promote and ensure equal employment opportunities, closes its eyes to unequal and discriminatory terms and conditions of employment.
>
> Discrimination, particularly in terms of wages, is frowned upon by the Labor Code. Article 135, for example, prohibits and penalizes the payment of lesser compensation to a female employee as against a male employee for work of equal value. Article 248 declares it an unfair labor practice for an employer to discriminate in regard to wages in order to encourage or discourage membership in any labor organization.
>
> Notably, the International Covenant on Economic, Social, and Cultural Rights, supra, in Article 7 thereof, provides:
>
> The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favorable conditions of work, which ensure, in particular:
>
> a. Remuneration which provides all workers, as a minimum, with:
>
> i. Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
>
> (...)
>
> The foregoing provisions impregnably institutionalize in this jurisdiction the long honored legal truism of "equal pay for equal work." Persons who work with substantially equal qualifications, skill, effort and responsibility, under similar conditions, should be paid similar

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122 *Lorlene A. Gonzales vs. National Labor Relations Commission et.al.*, G.R. No. 125735, August 26, 1999.

123 *International School Alliance of Educators (ISAE) vs. Hon. Leonardo A. Quisumbing et.al.*, G.R. No. 128845. June 1, 2000.

> salaries. This rule applies to the School, its "international character" notwithstanding." (citations omitted)

In the case involving employees of the Bangko Sentral ng Pilipinas (BSP), the Court, through now Chief Justice Reynato Puno, espoused the binding nature of international law norms against all forms of discrimination. In deciding whether or not Section 15(c) of R.A. No. 7653[124] violated the equal protection clause stated, the court ruled[125]:

> "The principle of equality has long been recognized under international law. Article 1 of the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights. Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitutes basic principles in the protection of human rights.
>
> Most, if not all, international human rights instruments include some prohibition on discrimination and/or provisions about equality. The general international provisions pertinent to discrimination and/or equality are the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the International Convention on the Elimination of all Forms of Racial Discrimination (CERD); the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW); and the Convention on the Rights of the Child (CRC).
>
> In the broader international context, equality is also enshrined in regional instruments such as the American Convention on Human Rights; the African Charter on Human and People's Rights; the European Convention on Human Rights; the European Social Charter of 1961 and revised Social Charter of 1996; and the European Union Charter of Rights (of particular importance to European states). Even the Council of the League of Arab States has adopted the Arab Charter on Human Rights in 1994, although it has yet to be ratified by the Member States of the League.
>
> The equality provisions in these instruments do not merely function as traditional "first generation" rights, commonly viewed as concerned only with constraining rather than requiring State action. Article 26 of the ICCPR requires "guarantee[s]" of "equal and effective protection against discrimination" while Articles 1 and 14 of the American and

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124 Section 15. Exercise of Authority. — In the exercise of its authority, the Monetary Board shall:

(...)

(c) establish a human resource management system which shall govern the selection, hiring, appointment, transfer, promotion, or dismissal of all personnel. Such system shall aim to establish professionalism and excellence at all levels of the Bangko Sentral in accordance with sound principles of management.

A compensation structure, based on job evaluation studies and wage surveys and subject to the Board's approval, shall be instituted as an integral component of the Bangko Sentral's human resource development program: Provided, That the Monetary Board shall make its own system conform as closely as possible with the principles provided for under Republic Act No. 6758 [Salary Standardization Act]. Provided, however, That compensation and wage structure of employees whose positions fall under salary grade 19 and below shall be in accordance with the rates prescribed under Republic Act No. 6758.

125 *Central Bank (now Bangko Sentral ng Pilipinas) Employees Association, Inc., vs. Bangko Sentral ng Pilipinas*, G.R. No. 148208. December 15, 2004.

European Conventions oblige States Parties "to ensure (...) the full and free exercise of [the rights guaranteed] (...) without any discrimination" and to "secure without discrimination" the enjoyment of the rights guaranteed. These provisions impose a measure of positive obligation on States Parties to take steps to eradicate discrimination.

In the employment field, basic detailed minimum standards ensuring equality and prevention of discrimination are laid down in the ICESCR and in a very large number of Conventions administered by the International Labour Organisation, a United Nations body. Additionally, many of the other international and regional human rights instruments have specific provisions relating to employment.

The United Nations Human Rights Committee has also gone beyond the earlier tendency to view the prohibition against discrimination (Article 26) as confined to the ICCPR rights.

(...)

In its view, Article 26 applied to rights beyond the Covenant including the rights in other international treaties such as the right to social security found in ICESCR.

Although Article 26 requires that legislation should prohibit discrimination, it does not of itself contain any obligation with respect to the matters that may be provided for by legislation. Thus it does not, for example, require any state to enact legislation to provide for social security. However, when such legislation is adopted in the exercise of a State's sovereign power, then such legislation must comply with Article 26 of the Covenant.

Breaches of the right to equal protection occur directly or indirectly. A classification may be struck down if it has the purpose or effect of violating the right to equal protection. International law recognizes that discrimination may occur indirectly, as the Human Rights Committee took into account the definitions of discrimination adopted by CERD and CEDAW in declaring that:

(...) "discrimination" as used in the [ICCPR] should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

Thus, the two-tier analysis made in the case at bar of the challenged provision, and its conclusion of unconstitutionality by subsequent operation, are in cadence and in consonance with the progressive trend of other jurisdictions and in international law. There should be no hesitation in using the equal protection clause as a major cutting edge to eliminate every conceivable irrational discrimination in our society. Indeed, the social justice imperatives in the Constitution, coupled with the special status and protection afforded to labor, compel this approach.

International law, which springs from general principles of law, likewise proscribes discrimination. General principles of law include principles of equity, i.e., the general principles of fairness and justice, based on the test of what is reasonable. The Universal

> Declaration of Human Rights, the International Covenant on Economic, Social, and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Discrimination in Education, the Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation — all embody the general principle against discrimination, the very antithesis of fairness and justice. The Philippines, through its Constitution, has incorporated this principle as part of its national laws.
>
> In the workplace, where the relations between capital and labor are often skewed in favor of capital, inequality and discrimination by the employer are all the more reprehensible.
>
> The Constitution specifically provides that labor is entitled to "humane conditions of work." These conditions are not restricted to the physical workplace — the factory, the office or the field — but include as well the manner by which employers treat their employees.
>
> The Constitution also directs the State to promote "equality of employment opportunities for all." Similarly, the Labor Code provides that the State shall "ensure equal work opportunities regardless of sex, race or creed." It would be an affront to both the spirit and letter of these provisions if the State, in spite of its primordial obligation to promote and ensure equal employment opportunities, closes its eyes to unequal and discriminatory terms and conditions of employment.
>
> (...)
>
> The foregoing provisions impregnably institutionalize in this jurisdiction the long honored legal truism of "equal pay for equal work." Persons who work with substantially equal qualifications, skill, effort and responsibility, under similar conditions, should be paid similar salaries." (citations omitted)

With regard to discrimination of women in the workplace, the Court held in the case of *PT&T vs NLRC*[126], that petitioner's policy of not accepting or considering as disqualified from work any woman worker who contracts marriage runs afoul of the right against discrimination, afforded all women workers by our labor laws. It reasoned out among others that:

> "Corrective labor and social laws on gender inequality have emerged with more frequency in the years since the Labor Code was enacted on May 1, 1974 as Presidential Decree No. 442, largely due to our country's commitment as a signatory to the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).
>
> Principal among these laws are Republic Act No. 6727 which explicitly prohibits discrimination against women with respect to terms and conditions of employment, promotion, and training opportunities, Republic Act No. 6955 which bans the "mail-order-bride" practice for a fee and the export of female labor to countries that cannot guarantee protection to the rights of women workers; Republic Act No. 7192, also known as the "Women in Development and Nation Building Act," which affords women equal

126 Philippine Telegraph and Telephone Co. v. National Labor Relations Commission et. al., G.R. No. 118978, May 23, 1997.

opportunities with men to act and to enter into contracts, and for appointment, admission, training, graduation, and commissioning in all military or similar schools of the Armed Forces of the Philippines and the Philippine National Police; Republic Act No. 7322 increasing the maternity benefits granted to women in the private sector; Republic Act No. 7877 which outlaws and punishes sexual harassment in the workplace and in the education and training environment; and Republic Act No. 8042, or the "Migrant Workers and Overseas Filipinos Act of 1995," which prescribes as a matter of policy, inter alia, the deployment of migrant workers, with emphasis on women, only in countries where their rights are secure. Likewise, it would not be amiss to point out that in the Family Code, women's rights in the field of civil law have been greatly enhanced and expanded.

In the Labor Code, provisions governing the rights of women workers are found in Articles 130 to 138 thereof. Article 130 involves the right against particular kinds of night work while Article 132 ensures the right of women to be provided with facilities and standards which the Secretary of Labor may establish to ensure their health and safety. For purposes of labor and social legislation, a woman working in a nightclub, cocktail lounge, massage clinic, bar or other similar establishments shall be considered as an employee under Article 138. Article 135, on the other hand, recognizes a woman's right against discrimination with respect to terms and conditions of employment on account simply of sex. Finally, and this brings us to the issue at hand, Article 136 explicitly prohibits discrimination merely by reason of the marriage of a female employee". (citations omitted)

However with regard to a contract stipulation that marriage between employees of competing corporations is prohibited, the Court in *Duncan vs. Glaxo*[127], upheld the validity of the said stipulation:

"Glaxo has a right to guard its trade secrets, manufacturing formulas, marketing strategies and other confidential programs and information from competitors, especially so that it and Astra are rival companies in the highly competitive pharmaceutical industry.

The prohibition against personal or marital relationships with employees of competitor companies upon Glaxo's employees is reasonable under the circumstances because relationships of that nature might compromise the interests of the company. In laying down the assailed company policy, Glaxo only aims to protect its interests against the possibility that a competitor company will gain access to its secrets and procedures.

That Glaxo possesses the right to protect its economic interests cannot be denied. No less than the Constitution recognizes the right of enterprises to adopt and enforce such a policy to protect its right to reasonable returns on investments and to expansion and growth. 20 Indeed, while our laws endeavor to give life to the constitutional policy on social justice and the protection of labor, it does not mean that every labor dispute will be decided in favor of the workers. The law also recognizes that management has rights which are also entitled to respect and enforcement in the interest of fair play.

127 Duncan Association of Detailman-PTGWO v. Glaxo Wellcome Philippines Inc., G.R. No. 162994, September 17, 2004.

> (...)
>
> The challenged company policy does not violate the equal protection clause of the Constitution as petitioners erroneously suggest. It is a settled principle that the commands of the equal protection clause are addressed only to the state or those acting under color of its authority. Corollarily, it has been held in a long array of U.S. Supreme Court decisions that the equal protection clause erects no shield against merely private conduct, however, discriminatory or wrongful. The only exception occurs when the state in any of its manifestations or actions has been found to have become entwined or involved in the wrongful private conduct. Obviously, however, the exception is not present in this case. Significantly, the company actually enforced the policy after repeated requests to the employee to comply with the policy. Indeed, the application of the policy was made in an impartial and even-handed manner, with due regard for the lot of the employee." (citations omitted)

With regard to the rights of labor to self organization, the Court held that Section 23[128] of Republic Act 875 that required labor organizations to register, did not violate the UDHR and the Internatonal Labor Organization (ILO) Conventions in the case of *PAFLU vs. Secretary of Labor*[129] because:

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128 SECTION 23. Registration of Labor Organizations.

(a) There shall be in the Department of Labor a Registrar of Labor Organizations (hereinafter referred to as the Registrar).

It shall be the duty of the Register to act as the representative of the Secretary of Labor in any proceeding under this Act upon any question of the association or representation of employees, to keep and maintain a registry of legitimate labor organizations and of their branches of locals, and to perform such other functions as the Secretary of Labor may prescribe.

(b) Any labor organization, association or union of workers duly organized for the material, intellectual and moral well-being of its members shall acquire legal personality and be entitled to all the rights and privileges granted by law to legitimate labor organizations within thirty days of filing with the office of the Secretary of Labor notice of its due organization and existence and the following documents, together with the amount of five pesos as registration fee, except as provided in paragraph "d" of this section:

(1) A copy of the constitution and by-laws of the organization together with a list of all officers of the association, their addresses and the address of the principal office of the organization;

(2) A sworn statement of all officers of the said organization, association or union to the effect that they are not members of the Communist Party and that they are not members of any organizations which teaches the overthrow of the Government by force or by any illegal or unconstitutional method; and

(3) If the applicant organization has been in existence for one or more years, a copy of its last annual financial report.

(c) If in the opinion of the Department of Labor the applicant organization does not appear to meet the requirements of this Act for registration, the Department shall, after ten days' notice to the applicant organization, association or union, and within thirty days of receipt of the above-mentioned documents, hold a public hearing in the province in which the principal office of the applicant is located at which the applicant organization shall have the right to be represented by attorney and to cross-examine witnesses; and such hearing shall be concluded and a decision announced by the Department within thirty days after the announcement of said hearing; and if after due hearing the Department rules against registration of the applicant, it shall be required that the Department of Labor state specifically what data the applicant has failed to submit as a prerequisite of registration. If the applicant is still denied, it thereafter shall have the right within sixty days of formal denial of registration to appeal to the Court of Appeals, which shall render a decision within thirty days, or to the Supreme Court.

(d) The registration and permit of a legitimate labor organization shall be cancelled by the Department

"(...) The registration prescribed in paragraph (b) of said Section 1 is not a limitation to the right of assembly or association, which may be exercised with or without said registration. The latter is merely a condition sine qua non for the acquisition of legal personality by labor organizations, associations or unions and the possession of the "rights and privileges granted by law to legitimate labor organizations. " The Constitution does not guarantee these rights and privileges, much less said personality, which are mere statutory creations, for the possession and exercise of which registration is required to protect both labor and the public against abuses, fraud, or impostors who pose as organizers, although not truly accredited agents of the union they purport to represent. Such requirement is a valid exercise of the police power, because the activities in which labor organizations, associations and union of workers are engaged affect public interest, which should be protected. Furthermore, the obligation to submit financial statements, as a condition for the non-cancellation of a certificate of registration, is a reasonable regulation for the benefit of the members of the organization, considering that the same generally solicits funds or membership, as well as oftentimes collects, on behalf of its members, huge amounts of money due to them or to the organization

For the same reasons, said Section 23 does not impinge upon the right of organization guaranteed in the Declaration of Human Rights, or run counter to Articles 2, 4, 7 and Section 2 of Article 8 of the ILO-Convention No. 87, which provide that "workers and employers,. shall have the right to establish and join organizations of their own choosing, without previous authorization"; that "workers and employers (...) organizations shall not be liable to be dissolved or suspended by administrative authority"; that "the acquisition of legal personality by workers' and employers' organizations, (...) shall not be made subject to conditions of such a character as to restrict the application of the provisions" above mentioned; and that "the guarantees provided for in" said Convention shall not be impaired by the law of the land. (citations omitted)

The right to self organization of labor as held in the case of *Victoriano vs. Elizalde*[150], includes the right not to join a labor union because:

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of Labor, if the Department has reason to believe that the labor organization no longer meets one or more of the requirements of paragraph (b) above; or fails to file with the Department of Labor either its financial report within sixty days of the end of its fiscal year or the names of its new officers along with their non-subversive affidavits as outlined in paragraph (b) above within sixty days of their election; however, the Department of Labor shall not order the cancellation of the registration and permit without due notice and hearing, as provided under paragraph (c) above, and the affected labor organization shall have the same right of appeal to the courts as previously provided.

The Department of Labor shall automatically cancel or refuse registration and permit to the labor organization or the unit of a labor organization finally declared under sections five and six of this Act to be a company union as defined by this Act. The restoration or granting of registration and permit shall take place only after the labor organization petitions the Court and the Court declares (1) that full remedial action has been taken and (2) sufficient time has elapsed to counteract the unfair labor practice which resulted in the company union status.

(e) Provisions of Commonwealth Act Numbered Two hundred and thirteen providing for registration, licensing, and cancellation of registration of organizations, associations or unions of labor, as qualified and expanded by the preceding paragraphs of this Act, are hereby amended.

129 Philippine Association of Free Labor Unions et. al., vs. Secretary of Labor et. al., G.R. No. L-22228, February 27, 1969.

> "(...) a right comprehends at least two broad notions, namely: first, liberty or freedom, i e., the absence of legal restraint, whereby an employee may act for himself without being prevented by law; and second, power, whereby an employee may, as he pleases, join or refrain from joining an association. It is, therefore, the employee who should decide for himself whether he should join or not an association; and should he choose to join, he himself makes up his mind as to which association he would join; and even after he has joined, he still retains the liberty and the power to leave and cancel his membership with said organization at any time. It is clear, therefore, that the right to join a union includes the right to abstain from joining any union. (...)
>
> The right to refrain from joining labor organizations recognized by Section 3 of the Industrial Peace Act is, however, limited. The legal protection granted to such right to refrain from joining is withdrawn by operation of law, where a labor union and an employer have agreed on a closed shop, by virtue of which the employer may employ only members of the collective bargaining union, and the employees must continue to be members of the union for the duration of the contract in order to keep their jobs. (...)
>
> To that all embracing coverage of the closed shop arrangement, (...) Republic Act No. 3350 merely excludes ipso jure from the application and coverage of the closed shop agreement the employees belonging to any religious sects which prohibit affiliation of their members with any labor organization. What the exception provides, therefore, is that members of said religious sects cannot be compelled or coerced to join labor unions even when said unions have closed shop agreements with the employers; that in spite of any closed shop agreement, members of said religious sects cannot be refused employment or dismissed from their jobs on the sole ground that they are not members of the collective bargaining union. It is clear, therefore, that the assailed Act, far from infringing the constitutional provision on freedom of association, upholds and reinforces it. It does not prohibit the members of said religious sects from affiliating with labor unions. It still leaves to said members the liberty and the power to affiliate, or not to affiliate, with labor unions. If, notwithstanding their religious beliefs, the members of said religious sects prefer to sign up with the labor union, they can do so. If in deference and fealty to their religious faith, they refuse to sign up, they can do so; the law does not coerce them to join; neither does the law prohibit them from joining; and neither may the employer or labor union compel them to join. Republic Act No. 3350, therefore, does not violate the constitutional provision on freedom of association." (citations omitted)

While private sector employees are allowed to organize and conduct concerted peaceful activities in accordance with the law, including the right to strike, the situation is different for employees of the civil service. In the case of *GSIS vs. Kapisanan*[131], citing a line of jurisprudence on the matter, stated that civil servants while they can form organizations the freedom of expression and peaceful assembly does not include the right to strike:

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130 *Victoriano vs. Elizalde Rope Workers Union* 59 SCRA 54 (1974).

131 *Government Service Insurance System (GSIS) et.al., vs. Kapisanan ng mga Mangagawa sa GSIS*, G.R. No. 170132. December 6, 2006.

"In *Alliance of Government Workers v. Minister of Labor and Employment*, a case decided under the aegis of the 1973 Constitution, an en banc Court declared that it would be unfair to allow employees of government corporations to resort to concerted activity with the ever present threat of a strike to wring benefits from Government. Then came the 1987 Constitution expressly guaranteeing, for the first time, the right of government personnel to self-organization to complement the provision according workers the right to engage in "peaceful concerted activities, including the right to strike in accordance with law."

It was against the backdrop of the aforesaid provisions of the 1987 Constitution that the Court resolved *Bangalisan v. Court of Appeals*. In it, we held, citing *MPSTA v. Laguio, Jr.*, that employees in the public service may not engage in strikes or in concerted and unauthorized stoppage of work; that the right of government employees to organize is limited to the formation of unions or associations, without including the right to strike.

Jacinto v. Court of Appeals came next and there we explained:

"Specifically, the right of civil servants to organize themselves was positively recognized in Association of Court of Appeals Employees vs. Ferrer-Caleja. But, as in the exercise of the rights of free expression and of assembly, there are standards for allowable limitations such as the legitimacy of the purpose of the association, [and] the overriding considerations of national security. (...)"

As regards the right to strike, the Constitution itself qualifies its exercise with the provision "in accordance with law." This is a clear manifestation that the state may, by law, regulate the use of this right, or even deny certain sectors such right. Executive Order 180 which provides guidelines for the exercise of the right of government workers to organize, for instance, implicitly endorsed an earlier CSC circular which "enjoins under pain of administrative sanctions, all government officers and employees from staging strikes, demonstrations, mass leaves, walkouts and other forms of mass action which will result in temporary stoppage or disruption of public service" by stating that the Civil Service law and rules governing concerted activities and strikes in government service shall be observed." (citations omitted)

And in the fairly recent case of *Gesite v. Court of Appeals*, the Court defined the limits of the right of government employees to organize in the following wise:

"It is relevant to state at this point that the settled rule in this jurisdiction is that employees in the public service may not engage in strikes, mass leaves, walkouts, and other forms of mass action that will lead in the temporary stoppage or disruption of public service. The right of government employees to organize is limited to the formation of unions or associations only, without including the right to strike, adding that public employees going on disruptive unauthorized absences to join concerted mass actions may be held liable for conduct prejudicial to the best interest of the service."

Significantly, 1986 Constitutional Commission member Eulogio Lerum, answering in the negative the poser of whether or not the right of government employees to self-organization also includes the right to strike, stated:

> "When we proposed this amendment providing for self organization of government employees, it does not mean that because they have the right to organize, they have also the right to strike. That is a different matter. (...)" (citations omitted)

As private sector employees have the right to strike in accordance with the law, a legitimate strike by private sector employees automatically stops when the Secretary of Labor assumes jurisdiction or sets it for compulsory arbitration. In the case of *Philtread vs. Confesor*[132] assailed the power of the Secretary of Labor to assume jurisdiction or to certify a dispute for compulsory arbitration to cases involving industries that are indispensable to national interest under Article 263 (g) of the Labor Code. Here, the Supreme Court held:

> "In the case at bar, no law has ever been passed by Congress expressly repealing Articles 263 and 264 of the Labor Code. Neither may the 1987 Constitution be considered to have impliedly repealed the said Articles considering that there is no showing that said articles are inconsistent with the said Constitution. Moreover, no court has ever declared that the said articles are inconsistent with the 1987 Constitution.
>
> On the contrary, the continued validity and operation of Articles 263 and 264 of the Labor Code has been recognized by no less than the Congress of the Philippines when the latter enacted into law R.A. 6715, otherwise known as Herrera law, Section 27 of which amended paragraphs (g) and (I) of Article 263 of the Labor Code.
>
> At any rate, it must be noted that Articles 263 (g) and 264 of the Labor Code have been enacted pursuant to the police power of the State, which has been defined as the power inherent in a government to enact laws, within constitutional limits, to promote the order, safety, health, morals and general welfare of society. The police power, together with the power of eminent domain and the power of taxation, is an inherent power of government and does not need to be expressly conferred by the Constitution. Thus, it is submitted that the argument of petitioners that Articles 263 (g) and 264 of the Labor Code do not have any constitutional foundation is legally inconsequential."
>
> Article 263 (g) of the Labor Code does not violate the workers' constitutional right to strike. The section provides in part, viz.:
>
> "When in his opinion, there exists a labor dispute causing or likely to cause a strike or lockout in an industry indispensable to the national interest, the Secretary of Labor and Employment may assume jurisdiction over the dispute and decide it or certify the same to the Commission for compulsory arbitration. (...)"
>
> The foregoing article clearly does not interfere with the workers' right to strike but merely regulates it, when in the exercise of such right, national interests will be affected. The rights granted by the Constitution are not absolute. They are still subject to control and limitation to ensure that they are not exercised arbitrarily. The interests of both the employers and employees are intended to be protected and not one of them is given undue preference." (citations omitted)

132 *Philtread Workers Union et. al., v. Nieves Confesor et. al.*, G.R. No. 117169, March 12, 1997.

Right To Education

Philippine Laws[133] have tried to flesh out and actualize the right to education under Article 13 of the ICESCR. With regard to Section 5(5), Article XIV of the 1987 Philippine Constitution[134], the Court in *Guingona*[135] held:

> "While it is true that under Section 5(5), Article XIV of the Constitution Congress is mandated to "assign the highest budgetary priority to education" in order to "insure that teaching will attract and retain its rightful share of the best available talents through adequate remuneration and other means of job satisfaction and fulfillment," it does not thereby follow that the hands of Congress are so hamstrung as to deprive it the power to respond to the imperatives of the national interest and for the attainment of other state policies or objectives."

In *Tablarin*[136], the Court, in assailing petitioners invocation that the holding of a National Medical Admission Test was unconstitutional held:

> "Article II of the 1987 Constitution sets forth in its second half certain "State policies" which the government is enjoined to pursue and promote. The petitioners here have not seriously undertaken to demonstrate to what extent or in what manner the statute and the administrative order they assail collide with the State policies embodied in Sections 11, 13 and 17. They have not, in other words, discharged the burden of proof which lies upon them. This burden is heavy enough where the constitutional provision invoked is relatively specific, rather than abstract, in character and cast in behavioral or operational terms. That burden of proof becomes of necessity heavier where the constitutional provision invoked is cast, as the second portion of Article II is cast, in language descriptive of basic policies, or more precisely, of basic objectives of State policy and therefore highly generalized in tenor. The petitioners have not made their case, even a prima facie case, and we are not compelled to speculate and to imagine how the legislation and regulation impugned as unconstitutional could possibly offend the constitutional provisions pointed to by the petitioners.
>
> Turning to Article XIV, Section 1, of the 1987 Constitution, we note that once more petitioners have failed to demonstrate that the statute and regulation they assail in fact clash with that provision. On the contrary we may note — in anticipation of discussion infra — that the statute and the regulation which petitioners attack are in fact designed to promote "quality education" at the level of professional schools. When one reads Section 1 in relation to Section 5 (3) of Article XIV as one must one cannot but note that the

133 See 1987 PHIL. CONST. Art. XIV, Republic Act Nos. 7332 (Educational Vouchers), 7722 (Higher Education Act of 1994) 7880 (Fair and Equitable Access to Education Act), 8292 (Higher Education Modernization Act of 1997), 8545 (Government Assistance to Students and Teachers in Private Education Act) and 9155 (Governance of Basic Education Act of 2001.

134 Art XIV (5) The State shall assign the highest budgetary priority to education and ensure that teaching will attract and retain its rightful share of the best available talents through adequate remuneration and other means of job satisfaction and fulfillment.

135 *Teofisto T. Guingona Jr. et. al., vs. Hon. Guillermo Carague et.al.*, G.R. No. 94571, April 22, 1991.

136 *Teresita Tablarin et.al., vs. Hon. Judge Angelina Gutierrez*, G.R. No. 78164, July 31, 1987.

> latter phrase of Section 1 is not to be read with absolute literalness. The State is not really enjoined to take appropriate steps to make quality education "accessible to all who might for any number of reasons wish to enroll in a professional school but rather merely to make such education accessible to all who qualify under "fair, reasonable and equitable admission and academic requirements."

In *U.P. vs. Hon. Ayson*[137], the Court in denying that U.P. had to provide secondary education in Baguio City held that:

> "A careful perusal of Rep. Act No. 6655 could not lend respondents a helping hand either. Said Act implements the policy of the State to provide free public secondary education (Sec. 4) and vests the formulation of a secondary public education curriculum (Sec. 5), the nationalization of public secondary schools (Sec. 7) and the implementation of the rules and regulations thereof (Sec. 9) upon the Secretary of the Department of Education, Culture and Sports (DECS). Rep. Act No. 6655 complements Sec. 2 (2), Article XIV of the Constitution which mandates that the State shall establish and maintain a system of free public secondary education. However, this mandate is not directed to institutions of higher learning like UP but to the government through the Department of Education, Culture and Sports (DECS). As an institution of higher learning enjoying academic freedom, the UP cannot be compelled to provide for secondary education. However, should UP operate a high school in the exercise of its academic freedom, Rep. Act No. 6655 requires that the students enrolled therein "shall be free from payment of tuition and other school fees." (citations omitted)

In *Ebralinag*[138], the court held that:

> "(...) the expulsion of members of Jehovah's Witnesses from the schools where they are enrolled will violate their right as Philippine citizens, under the 1987 Constitution, to receive free education, for it is the duty of the State to "protect and promote the right of all citizens to quality education (...) and to make such education accessible to all" (Sec. 1, Art. XIV)."

In *Regino*[139], the Court discussed the nature of the school-student contract:

> "In the present case, PCST imposed the assailed revenue-raising measure belatedly, in the middle of the semester. It exacted the dance party fee as a condition for the students' taking the final examinations, and ultimately for its recognition of their ability to finish a course. The fee, however, was not part of the school-student contract entered into at the start of the school year. Hence, it could not be unilaterally imposed to the prejudice of the enrollees.
>
> Such contract is by no means an ordinary one. In *Non*, we stressed that the school-student contract "is imbued with public interest, considering the high priority given by

137 *University of the Philippines vs. Hon. Judge Ruben Ayson*, G.R. No. 88386, August 17, 1989.

138 *Roel Ebralinag et.al., vs the Division Superintendent of Schools of Cebu et.al.*, G.R. No. 95770. December 29, 1995.

139 *Khristine Rea M. Regino vs. Pangasinan Colleges of Science and Technology et. al.*, G.R. No. 156109, November 18, 2004.

the Constitution to education and the grant to the State of supervisory and regulatory powers over all educational institutions." Sections 5 (1) and (3) of Article XIV of the 1987 Constitution provide:

"The State shall protect and promote the right of all citizens to quality education at all levels and shall take appropriate steps to make such declaration accessible to all.

(...)

Every student has a right to select a profession or course of study, subject to fair, reasonable and equitable admission and academic requirements."

The same state policy resonates in Section 9(2) of BP 232, otherwise known as the Education Act of 1982:

"Section 9. Rights of Students in School. — In addition to other rights, and subject to the limitations prescribed by law and regulations, students and pupils in all schools shall enjoy the following rights:

(...)

(2) The right to freely choose their field of study subject to existing curricula and to continue their course therein up to graduation, except in cases of academic deficiency, or violation of disciplinary regulations." (citations omitted)

With regard to Academic Freedom as a defense the Court in the same case held:

"We are not impressed. According to present jurisprudence, academic freedom encompasses the independence of an academic institution to determine for itself (1) who may teach, (2) what may be taught, (3) how it shall teach, and (4) who may be admitted to study. In *Garcia v. the Faculty Admission Committee, Loyola School of Theology*, the Court upheld the respondent therein when it denied a female student's admission to theological studies in a seminary for prospective priests. The Court defined the freedom of an academic institution thus: "to decide for itself aims and objectives and how best to attain them . . . free from outside coercion or interference save possibly when overriding public welfare calls for some restraint."

In *Tangonan P. Paño*, the Court upheld, in the name of academic freedom, the right of the school to refuse readmission of a nursing student who had been enrolled on probation, and who had failed her nursing subjects. These instances notwithstanding, the Court has emphasized that once a school has, in the name of academic freedom, set its standards, these should be meticulously observed and should not be used to discriminate against certain students. After accepting them upon enrollment, the school cannot renege on its contractual obligation on grounds other than those made known to, and accepted by, students at the start of the school year." (citations omitted)

However in *Polytechnic University of the Philippines (PUP)*[140], the Court in affirming the lower court's ruling that NDC could not excuse itself of its obligation to offer the property for sale first to

140 *Polytechnic University of the Philippines vs. Court of Appeals*, G.R. No. 143513, November 14, 2001.

Firestone before it could to PUP, as a party to a contract cannot unilaterally withdraw a right of first refusal that stands upon valuable consideration and further stated:

> "Paradoxically, our paramount interest in education does not license us, or any party for that matter, to destroy the sanctity of binding obligations. Education may be prioritized for legislative or budgetary purposes, but we doubt if such importance can be used to confiscate private property such as FIRESTONE's right of first refusal." (citations omitted)

VI. Conclusion

The Philippine Supreme Court has been consistent in ruling that International Humanitarian Law is self-executory and binding even in the absence of the incorporation clause in the Philippine Constitution. This too is the status of international norms intended to protect the environment as the duty to protect the same "predates" the establishment of governments.

With regard to International Human Rights, the Supreme Court has ruled in favor of the binding and self-executory nature of civil and political rights enshrined in international agreements on human rights, in particular, the UDHR and the ICCPR. Anent rights covered by the ICECSR, while it has ruled that rights such as the right to self-determination of cultural minorities and the right to education are self-executory, it has thus far refused to extend this interpretation to other ECOSOC rights such as the right to livelihood. The latter, the court has held, still requires domestic enabling legislation.

This is erroneous. Human rights, as enshrined in both the ICCPR and the ICECSR are universal, interrelated, interdependent and indivisible. Whether they are civil and political rights, such as the right to life; or social and cultural rights, such as the rights to development and self-determination, these right are intended to be self-executory although the basis may be different: the duty to promote and protect civil and political rights, on the one hand; and the duty to take progressive steps to realize ECOSOC rights. As clearly spelled out by the Human Rights Committee, the enforceability of ECOSOC rights is as follows:

> "States are under the immediate obligation to do what they can to provide for these rights. They are required to identify a programme for the progressive achievement of those rights, in some considerable detail."[141]

It is hoped thus that future Philippine jurisprudence could rectify this erroneous interpretation of the binding nature of economic, social and cultural rights.

141 See *P. Alston* and *G. Quinn*, "The Nature and Scope of States parties Obligations under the International Covenant on Economic, Social and cultural rights" (1987) 2 HRQ 157-93.

Chapter Four: Various Policies

THE LAO PDR CONSTITUTION AND JUDICIAL REFORM

Somphanh Chanhthalyvong

I. Development of the Legal System within a Constitutional Framework

The Lao legal system has been shaped by Lao tradition and custom and by the French colonial administration. Under Lao's first Constitution drafted under French supervision and promulgated on May 11, 1947, Lao became an independent state within the French Union.

The Constitution defined the structure of the state and its political and legal systems during the French colonial period. For the next 28 years, Lao was occupied by foreign countries.

After three decades of internal political instability and civil war, the Lao People's Democratic Republic was proclaimed in December 1975. The new government declared its commitment to establishing a new era of national consolidation and development under the Lao People's Revolutionary Party (LPR). When the government took power it inherited a war-torn country, a largely subsistence agricultural economy, very limited industrial capacity, weak infrastructure and undeveloped natural resources. On the positive side, the country had low population density, considerable agricultural potential, substantial teak forests, water and other natural resources.

Consistent with its socialist orientation, the government established a highly centralized, command-oriented approach to managing the economy and the government as a whole. Detailed targets for the achievement of specific production goals were spelled out in annual plans. In 1986, the Fourth Party Congress adopted the New Economic Mechanism (NEM) that was the beginning of a more market-oriented approach to the management of the economy. The government took this decision having recognized the lack of success in the first decade of implementation of its socialist economic system of production. It looked to the lessons and insights from this experience and from neighbouring countries and introduced new economic measures that would allow market forces to play an increasing role in the economy. The Lao PDR legal system has therefore been shaped by Lao tradition and custom, by the adoption of a Soviet-styled socialist ideology and law, and the colonial legal system. Officially though, the government still denies colonial influence on the legal system.

In 1975, the first Supreme Congress established the Supreme People's Assembly, executive organs of the state and judicial organs, and defined their powers. Initially the Lao PDR dismantled the western-style legal system but over the past ten years, the Lao Government has transformed the Lao legal system from one based on decrees and resolutions of the National Assembly into a system based on statutes. After establishing the Lao PDR in 1975, the government issued Regulation No.53/PM in 1976 which established the country's criminal procedures. On January

9 1990, the Law on the Courts and the Law of Civil Procedure were promulgated.

The Constitution of Lao PDR 1991 provided for a division of powers between the legislative, the executive and judiciary. Under the 1991 Constitution, the Lao court system was divided into three tiers: the first tier was comprised of district courts; the second tier was comprised of provincial courts and the one prefectural court; and the third tier was the People's Supreme Court. Under amendments to the Constitution passed in 2003, the court system was divided into four tiers: the first tier was comprised of district courts; the second tier was comprised of provincial courts and the one prefectural court; the third tier was comprised of appellate courts and the fourth was the People's Supreme Court.

Article 96 of the Constitution states that it is the fundamental law of the nation. The changes to the Constitution in 2003 provided the constitutional basis for the implementation of the reform of the Lao People's Revolutionary Party. It recognised the socialist-oriented market economy policy and the existence and need to develop private ownership to harness the creativity of the people. The formation of a Rule of Law state requires an effective mechanism to control the power of the state and its officials. Article 52 of the Lao Constitution provides that the ultimate supervision of the nation and the organs of state is the responsibility of the National Assembly. The scope and nature of that supervision are specified in the Constitution.

The government's administration of the state and society through the law is necessary for the peaceful and just pursuit of commerce by the people living within the society. The law, therefore, must guarantee equality and equity for all levels within society.

Procedures to remedy disputes that arise in society must be carried out in a transparent and just manner in accordance with the law. It is the duty of government authorities as representatives of the state and the Lao people to ensure that justice is administered in this way. If these procedures operate fairly and transparently, the Lao PDR will be able to achieve all of its future and long-term socio-economic plans for the country, to an acceptable international standard.

The development of the legal system in this age of globalization, where there is a high level of international competition, necessitates a modern approach to enable Lao P.D.R to compete and to protect its interests in regional cooperation and in the international community.

With respect to the development of laws and regulations, the Government of the Lao PDR confirms the importance of the protections extended by the Constitution and the laws of Lao PDR, which are supported by all authorities and sectors of society.

The obstacles to the development of the economy of Lao PDR may be attributed to an underdeveloped country with a population comprised of many ethnicities with different traditions, all living in a landlocked country. The development of systematic laws and regulations are thus necessary in order for it to compete with countries throughout the region and the world. In order to do this, the "Identified Needs" of Pillar One: Development of the Legal Framework should be addressed by proceeding with the Pillar One Action Plan.

Since the promulgation of the Constitution of the Lao PDR in 1991, many laws and much subsidiary legislation have been promulgated. These laws are evidence of the intent of the Lao PDR to become a state governed by a constitution and laws, instead of simply governed by

orders and decrees as happened in the past. There was a period where certain state organizations, organizations of the masses and of society, each issued their own rules and regulations in an uncoordinated manner without considering how they fitted into the legal system. This resulted in some of these rules and regulations being inconsistent with other rules and regulations and with the constitution and the laws already adopted by the National Assembly.

The protection of citizens, the state and society by the application of the constitution and laws is important work, which calls for careful planning and coordination if it is to progress in an orderly manner. A clear master plan, with objectives set periodically to achieve overall future success, is necessary to develop a legal system that protects citizens rights and develops the country, consistent with the principles of good governance.

The goal of the development of the Lao PDR, announced in a resolution of the Eighth Party Congress, is to develop, step by step, a rule of law state, in pursuit of the main objective of enhancing the institutionalization of freedom, and the democratic and human rights of its citizens. Mechanisms will be developed to protect the rights and interests of children and the rights of members of ethnic minorities, achieve equality between men and women, and ensure the implementation of obligations under the international treaties to which Lao is a party.

By 2020, Lao PDR's legal system will have been renovated and developed by a series of fundamental measures intended to implement the principles of the 2003 Constitution, including the basic principle of the "Supremacy of Law" in Article 10. Implementing these principles means that the constitution is the highest normative law of the country and that all state agencies and the party, society and all citizens must obey the law. To ensure the effective implementation of the constitution as the highest law of the land, it is necessary to develop state mechanisms to administer and promote social activities that further the Rule of Law.

The formation of the comprehensive institutions required for a socialist-oriented market economy, is also necessary and the policies on building a Rule of Law state of Lao PDR. need to be institutionalized. An important part of renovating and developing the legal system is enhancing the efficiency and effectiveness of the implementation and enforcement of the law so that basic rights of citizens are respected and the rights of all people are equally recognized and guaranteed. Mechanisms are required to ensure that the law is implemented according to the principle that individual citizens may do everything not expressly prohibited by law and that state agencies and officials must not do anything except that which is expressly permitted by law.

Since 2003, there have been further changes to the court system. District courts have been reorganised into dispute resolution bodies and the district court tiers have been eliminated completely from the court structure. The provincial courts have become the first tier and are now the courts of first instance.

In 2003, a new tier of courts, the appellate courts, were added to the court system. Regional appeal courts have been created to handle appeals from provincial courts. The Appellate Court for the Central Region was set up in Vientiane in 2004, followed by the Appellate Court for the Southern Region in Pakse in 2005. The Northern Appellate Court was set up in March 2008. The Supreme People's Court remains the top tier to which appeals can only be made if the

Supreme People's Court agrees to accept them. The Supreme People's Court hears appeals from the Appellate Courts on questions of law only.

The appointment, transfer and removal of judges will henceforth be on the recommendation of the President of the Supreme Court and not of the Government as was the practice earlier. The administration of courts has been removed from the Ministry of Justice (MoJ) and placed under the control of the Supreme Court. The Legal Sector Evaluation of 2003 (LSE) saw these developments as signifying a welcome and much needed shift towards accelerating the establishment of the Rule of Law but emphasised that the judiciary must be made independent in practice.

II. The Legal System and its Current Challenges

The judiciary is the most important part of the legal system and the judicial process. The legal system of a country can be judged by the independence that its judiciary has, the people's perception of the judiciary, availability of remedies and the quality of the judicial process.

Within the legal system there are three natural parties with three separate duties: the judge, the prosecutor and the defence lawyers. The combination of the duties of one of these parties with the duties of either of the other invariably results in a conflict of interest. The three powers must be properly separated and made independent of one another. Furthermore, in the interest of justice, the prosecutor and the defence must be on a level playing field. Otherwise, the outcome of cases may depend more upon the resources of the parties rather than the law.

Judges in Lao are effectively independent of the Bar, but not fully independent of the prosecutors. Public prosecutors have the authority to monitor and inspect the implementation of laws in the court, as well as to monitor whether courts are exercising their powers within the limits of their jurisdiction, a role normally carried out by the judges themselves within the appeal system. The Standing Committee of the National Assembly is charged with the appointment and removal of judges, while the entire National Assembly elects and removes the President of the Supreme People's Court. Many courts do not sit, because the Lao system generally requires a three judge bench for each case and there are simply not enough judges. Lao currently has 283 judges but estimates a need for 732 by the year 2020. Perhaps as a result of this shortage, the eligibility criteria for a judge are low and most new judges are straight out of law school. Formally, prospective judges must be at least 25 years of age, have strong political commitment, be of good character, be patriotic, safeguard the national interests, be ethical, be in good health, and have obtained either a law degree or legal professional skills before enrolling at the state-sponsored Judges Training Center.

In contrast, public prosecutors are both independent of the judges and the defence lawyers and also have monitoring and inspection powers over the judges and the lawyers. The Supreme People's Prosecutor, who is nominated by the President of the State, and confirmed and removed by the National Assembly, nominates Deputy Supreme Prosecutors to the President of the State for confirmation and removal, and independently appoints, transfers and removes local prosecutors. Each province and almost every district has its own prosecutor, totaling 524 prosecutors for 141 districts in 2003. Formally, prosecutors have the same eligibility criteria as judges.

Independence of the Judiciary

The judiciary has become more institutionally independent of the other two branches of government. Under the amended Constitution, the President of the Supreme Court is still appointed by the National Assembly. But all other judges are now appointed by the Standing Committee of the National Assembly on the recommendation of the President of the Supreme Court and not by the Government, as was the case earlier. The administration of courts has been transferred to the Supreme Court from the Ministry of Justice. The legal sector has welcomed these changes. The changes have instilled a sense of independence in judges although some judges are still less independent than they should be.

Concern has been expressed that judges have been instructed by the Supreme Court to consult legal coordination committees at provincial and district level in important, difficult and complicated cases and to obtain their views before hearing such cases. The explanation given by officials for this practice is that this is necessary because judges are not experienced and many were not qualified.

Adequacy of Remedies

The Legal Sector Evaluation laid much emphasis on the need to have public (constitutional and administrative) law remedies, describing them as being essential to the Rule of Law. The primary purpose of administrative law is to ensure that the government exercises its powers within legal bounds so as to protect citizens against abuses of powers. The Legal Sector Evaluation also noted that there was no mechanism for the enforcement of fundamental rights. The Standing Committee of the National Assembly interprets and explains the constitution and laws. The Legal Sector Evaluation emphasised that constitutional interpretation was a judicial function. It proposed that the Supreme Court be vested with jurisdiction to interpret the constitution and to declare void any legal provision inconsistent with the constitution. A fundamental rights jurisdiction for either the Supreme Court or the Appellate Courts was also proposed.

Many in the legal sector have stressed the need for administrative law remedies. It appears to the author that there is growing interest in administrative law after the Legal Sector Evaluation and questions have been raised at various forums.

The Draft Master Plan proposes the setting up of a Constitutional Court for the interpretation of laws “in cases of legal ambiguities”. It is not clear whether such a court would also have jurisdiction to interpret the constitution and to declare void any law or legal provision that is inconsistent with the constitution.

Given that public law is not yet established in Lao and the legal community has had little exposure to it, it may be difficult to find enough judges to sit on a separate Constitutional Court. Supreme Court judges welcomed the proposal but thought it too early to have a separate Constitutional Court.

The Legal Sector Evaluation, while stressing the need for constitutional and administrative law remedies, did not consider these remedies could be established very soon because the legal system is very undeveloped in Lao. It was thought prudent to initially develop a training programme for

policy makers, the legal community, administrators and law students. Such a programme would focus on the importance of public law for the Rule of Law and the necessity to have public law remedies to strengthen rights and develop remedies suitable for Lao PDR, taking experiences of other countries into consideration. The teaching of public law at the Faculty of Law and Political Science should be strengthened.

The low level of understanding on public law issues, even among senior legal sector officials, is shown by the following reference to administrative law in the Draft Master Plan:

"On Administrative Law, the improvement of the public law remedies of the people against officials must be systematic and clearly defined. (This means the implementation of the Law on Public Complaints (Grievance) promulgated by the National Assembly in 2005.)"

Administrative law remedies are thus equated with public complaints. This underscores the need to have a programme that enables the legal community to study the subject so that administrative law remedies suitable for Lao PDR can be developed.

Appeals outside the Judicial Process

Under Lao law, prosecutors may propose changes to judgments of courts or their cancellation and the suspension of their enforcement if such judgments are considered improper by the prosecutor. This applies not only to criminal or civil cases in which prosecutors appear on behalf of the state, but also to civil cases between citizens.

In practice, parties may also "appeal" to the National Assembly without any time limit. The National Assembly receives complaints from the public about executive and judicial decisions. Under item 13 of Article 24 of the Law on the National Assembly, the Standing Committee of the Assembly has the duty to "examine and solve people's complaints". Under Article 43, it is the duty of members of the National Assembly to "receive complaints or requests from the people in order to discuss them with the relevant bodies in order to arrive at a fair settlement". If such an "appeal" is made, enforcement of a judgment is then suspended. The "appeal" is considered by prosecutors who may submit a proposal for revision.

The Background Paper on Governance presented to the Governance Roundtable Process in April 2003, referred to the Government's commitment to making the Supreme Court the final arbiter. The paper stated that the National Assembly would only consider complaints of national or provincial interest.

Consequent upon amendments made to the Law on Civil Procedure in 2004, only the Supreme Court can re-open a case. Such a request, based on new information or evidence, may be made by the Office of the Supreme Public Prosecutor (OSPP) on its own motion or at the request of a party. Such a request must be made to the OSPP within one year of the judgment. There is no time limit for the OSPP to make a request on its own motion. OSPP officials say that these provisions have limited the number of "appeals" outside the judicial process. Judgment enforcement officials have confirmed that the average period of suspension of judgments has now come down to between three to five years.

At the installation of a Minister of Justice, the President of the National Assembly reportedly stated that the assembly would not, in future, entertain "appeals" against judgments. This

statement was well received in the legal community. One hopes that it will not be long before judgments of the Supreme Court become truly "final".

Role of Prosecutors and Lawyers

Prosecutors continue to be passive in court, as in 2003, leaving even the questioning of witnesses to judges. Senior prosecutors acknowledged this weakness although a few stated that there had been improvements.

Senior judges emphasised the need for active prosecutors. Most prosecutors are passive and do not question witnesses even when asked to. According to the judges this results in a public perception that judges prosecute. They, however, conceded that many judges do not insist on prosecutors playing their role.

The role of defence lawyers in court is not yet properly understood, especially by judges and prosecutors at lower levels. Defence lawyers are "officers of court" and need to be recognised as such. They are not busybodies who are out to make things difficult for judges and prosecutors. They play an important role in the judicial process, assisting courts to ascertain the truth and to act according to law.

The author found attitudes among senior judges and prosecutors encouraging. They acknowledged that the presence of lawyers improved the efficiency of judges and prosecutors. Cross-examination of witnesses helps to bring out the truth. Lawyers also research the law, which improves the quality of justice. It is also an access to justice issue. Supreme Court judges and officials acknowledged that lawyers may not be welcome in some lower courts but insisted that all judges were properly instructed to allow lawyers to perform their role.

However, many judges had critical comments to make. They said many lawyers lacked confidence and are not assertive. Submissions are of poor quality. Some are only interested in money. However, there are good, talented lawyers.

The Vice-President of the Luang Prabang Provincial Court, while agreeing that lawyers in court would be very helpful in dispensing justice, found very few lawyers to have been helpful. Some make written submissions and only appear in court on the day judgment is given. Lawyers do not question witnesses but request judges to do so. He did, however, concede that many judges did not have a clear idea about the role of lawyers and did not know whether the questioning of witnesses was the responsibility of prosecutors, lawyers or judges.

Lawyers in Luang Prabang contradicted the Vice-President. They stated that judges did not encourage lawyers and looked on them as "ordinary people" having no special status in the court. Direct cross-examination of witnesses was not allowed. Each question had to be approved by the judges.

The author observed two trials in the criminal chamber of the Vientiane Municipality Court in 2005. In both cases, the prosecutor played no role, other than making an opening statement. The evidence of witnesses was not formally led. Rather, judges randomly and informally asked questions of the police, witnesses and defendant in no particular order and in an unstructured way. Statements made by witnesses to the police and the alleged confession of the defendant were

liberally quoted by the judge. Such references to written statements and informal questioning were preferred to the formal oral testimony that is required by law.

A lawyer appeared for the victim's family in a case of running down a pedestrian causing death. The lawyer did not have a table to sit at in the body of the court and sat on a bench provided for the public. The judges did not give him the recognition that is usually given to a lawyer but did allow him to speak. The lawyer appeared intimidated by the environment and certainly lacked confidence.

Enforcement of Judgments

The enforcement of judgments has been slow for a long time. Parties ignoring judgments, appeals outside the judicial process, a lack of clear authority and the necessary resources for enforcement offices, absence of meaningful penalties and the inability to locate parties due to lack of information in case records, were some of the reasons given for the delay in enforcement of judgments in both the 1997 Assessment and the Legal Sector Evaluation.

There has been some improvement since 2003. Enforcement of judgments is now governed by a law passed in 2004. At the end of 2002, there were 5268 cases with judgments awaiting enforcement. Presently, the figure is around 4000.

The Director of Judgment Execution gave additional reasons for the failure to enforce. Fines are difficult to collect as many defendants are poor. In civil matters, many debtors have no money and they have no land or property which could be seized to satisfy the judgment. The new law does not include provisions for the sale of seized property.

Some Progress But More Needs to be Done

In summary there have been some improvements but much more needs to be done. Coordination between various public sector institutions is necessary. But coordination must not influence the judicial process in any manner whatsoever. Judges should never have to "explain" judicial conduct or even personal conduct to authorities outside the judiciary. Most executive authorities are not trained in the law and even if some are, any comments on pending cases would amount to undermining the independence of judges, which is guaranteed by Article 82 of the Constitution.

The perception among ordinary people that the rich always win in the courts should ring alarm bells at the highest levels. This, together with the fact that prosecutors also come under pressure, certainly raises questions regarding the country's commitment to the Rule of Law. The independence of the judiciary needs to be ensured in practice as well as in the law.

The appointment of experienced legal persons to the Appellate Courts is a step in the right direction. One hopes that experience will be the only criteria in future appointments to the Supreme Court as well. Observations that District Judges in the Vientiane Municipality are better judges than the lower ranks of the judiciary in the provinces indicate that provincial judicial positions are not as attractive to lawyers due to the difficult conditions provincial judges work under. Better salaries and facilities, better promotion prospects, greater recognition and true

judicial independence would attract quality lawyers to the provinces.

The criminal justice process lags far behind international minimum standards. With the ratification by Lao PDR. of the International Convention on Civil and Political Rights likely soon, action is needed in this area. However, emerging plans for the future do not indicate that the issue is being addressed seriously, despite activities of the international law project. Reports that some judges require lawyers to ask all questions through them show that Article 78 of the Law on Criminal Procedure, which states that questions should be put with the approval of the presiding judge, is being misinterpreted. Similar provisions are found in many jurisdictions. What it means is that judges can rule out irrelevant and unlawful questions. These practices underscore the need to have a law on evidence. The process needs streamlining to provide for clear roles for judges, prosecutors and lawyers.

No serious attempt has been made to introduce public law remedies. The author can only repeat that an in-depth study is needed because the legal community has had little exposure to this branch of the law, which is essential for the Rule of Law.

Limitations on appeals outside the judicial process by way of amendments to the Law on Civil Procedure, have shown results. The average "waiting period" for the hearing of appeals is lower and more judgments are being enforced. The next step is for "appeals" to the National Assembly to be abolished. Thereafter, any applications to "revise" final judgments should be permitted only in exceptional circumstances and only to remedy serious miscarriages of justice. All appeal procedures should be essentially judicial in character.

The author is sympathetic to the situation the lawyers are in, although in part their difficulties are of their own making. Senior defence lawyers must be seen in courts more often and set an example to junior lawyers. Recognition of lawyers as officers of court, is needed. Every court should provide a table for defence lawyers. Formal attire for lawyers would enhance their stature. More institutional interaction between the Lao Bar Association, the Courts, the OSPP and Police would help. Defence lawyers should also be invited to attend seminars and functions.

III. Alternate Dispute Resolution

The non-judicial mechanisms for dispute resolution and redress are village mediation and commercial arbitration.

Alternative Dispute Resolution (ADR) mechanisms are becoming popular for a variety of reasons. Many minor disputes can be settled by mediation and conciliation, and there is little reason for the parties to spend money and time on judicial proceedings. They also help to avoid acrimony between the parties. The business community prefers ADR as commercial litigation is usually drawn out. Trained mediators and arbitrators make the process more attractive.

Village Mediation

There has been a long and healthy Lao tradition of settlement of disputes at village level. Village Mediation Units (VMU) are an extension of that tradition and found in more than 83% of villages. (9103 out of 10944 villages). They are administered by Provincial and District Justice

offices. Overall responsibility for VMUs is with the Department of Judicial Administration of the Ministry of Justice.

VMUs were set up pursuant to the Decision of the Minister of Justice No. 304/MOJ, dated 07 August 1997. New guidelines were issued by Decision No. 08/MOJ, dated 22 February 2005. Minor civil and criminal disputes first go before a VMU. If not settled, mediation is again attempted by the District Justice Office, which refers disputes that are not resolved, to the appropriate court.

A VMU consists of five to nine members, with the head of the village (Nai Ban) presiding. Representatives of the Lao Women's Union and the Lao Front for Reconstruction are also members. Other members are appointed by the authorities in collaboration with the Nai Ban and the Women's Union and Lao Front representatives.

Prior to February 2005, the representatives of the Lao Women's Union and the Lao Front for Reconstruction were nominated by their respective organisations. Under new guidelines, they are elected by the people. The Director-General of the Department of Judicial Administration told the author that the change was effected because it was found that nominated representatives did not enjoy the trust of the people. He stated that the next change would be to remove the Nai Ban because he is an official. In remote areas, it has been difficult to recruit a Nai Ban and this has affected the establishment of VMUs in those areas.

In Oudomxay, the author met with the Nai Ban of Vanghai village, and provincial and district justice officials. Vanghai village is a village within the city of Oudomxay. The VMU has nine members. Two of them are women and five belong to ethnic groups.

In the Director-General's view, about 30% of the VMUs function effectively, mainly in urban areas. The position is improving in the provinces. VMUs operate with limited capacity. Training is provided but has not been adequate. A trial exercise in training is being conducted in the Vientiane province and a manual is being developed. The Nai Ban of Vanghai had no formal education. He received short-term training on legal decision making and office administration at the District Justice Office.

According to the Director-General, about 90% of cases coming before VMUs are settled. In rural areas, people were more willing to compromise. Urban people are more concerned about their prestige and less willing to compromise. In Vanghai, 80% of the matters coming before the VMU were civil matters, mainly violations of contracts, land ownership and family disputes. In 2006, 26 civil matters came before the unit and 22 were settled. No criminal cases came before the unit during this period.

Parties are jointly required to pay a fee of 25,000 kip (approximately US$3) per case. According to the Director-General, in practice they have to pay more. In cities he estimated the amount charged was more than 200,000 kip. There is less over-charging in rural areas, mainly because the people are poor.

Complaints against members of VMUs are investigated. Where excess fees have been collected, they are returned. Guilty members are disciplined and even removed.

Comments made by the Nai Ban of Vanghai seemed to confirm the Director-General's comments

on VMUs. He said some people wanted to by-pass the VMU and go direct to the court. He attributed this to the VMU's processes being weak and "lacking legitimacy".

Unhealthy trends appear to be emerging in the village mediation process. If 90% of the cases are settled, but authorities consider the system to be only 30% efficient, the inference drawn is that the quality of justice is far from adequate. Parties may be settling cases only to avoid expensive and time-consuming litigation. If some VMUs have been charging fees that are not permitted by law, the possibility of low level corruption cannot be ruled out. The country's traditional method of settling disputes should not be permitted to become weak and lose credibility. Every possible step should be taken to arrest these trends.

Commercial Arbitration

The Commercial Arbitration Organisation of Lao PDR was established in 1995, under a Prime Minister's Decree. It is now governed by the Law on Commercial Arbitration adopted in May 2005. OEDR is administered by the Department of Commercial Arbitration of the Ministry of Justice. Arbitration centers are situated in Vientiane, Luang Prabang, Savannakhet, Oudomxay and Pakse - the last two having been set up in 2003. Recourse to arbitration is not mandatory under the law.

Parties to commercial disputes may avail themselves of mediation or arbitration at the Commercial Arbitration Organisation, which is now governed by the Law on Commercial Arbitration.

There is a panel of 125 arbitrators. They come from different backgrounds including business and public administration. Training is provided. Parties each nominate an arbitrator who jointly nominates a president. Lawyers are allowed to appear in arbitrations and interested lawyers have been given training.

A dissatisfied party may appeal the decision of commercial arbitrators to the Provincial Court, which has limited jurisdiction. The court will consider whether the award is within the law or whether there has been a misinterpretation of the contract. Where it finds the arbitrators have erred, the matter is sent back for arbitration before another panel. Awards are enforced by the Department of Judgment Enforcement and the same problems are encountered in enforcing arbitration awards, as are experienced with the enforcement of court decisions. Unlike court decisions, no appeal may be made from arbitrators' awards to the National Assembly and prosecutors.

In each of 2004 and 2005, 80 cases were considered by arbitration. For the first six and a half months of 2006, there were 100 cases, indicating that commercial arbitration is becoming popular. Eighty percent of the cases were resolved through mediation. The head of the organization stated that even foreign investors were making use of the process but was concerned that poor enforcement may dissuade them from continuing to use commercial arbitration. The President of the Lao National Chamber of Commerce and Industry did not consider the forum to be efficient.

Lao PDR acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1998. A decree on the enforcement of foreign arbitral awards was drafted in 2003 but no further action has been taken.

Successful mediation and arbitration of commercial disputes is one sign of a good economy and will also help to attract foreign investors. Investors like to avoid protracted litigation but the alternate dispute resolution mechanism available should be efficient and predictable. The system in Lao PDR has the potential to make Lao attractive to foreign investors. This is all the more important as the judicial system is still weak. Enforcement of awards is problematic and may discourage investment by the business community.

IV. Other Dispute Resolution Mechanisms

As befits a country where large numbers of people are very poor there are other avenues for making complaints.

Law on Public Complaints

The Law on Public Complaints adopted in 2005 sets out the procedure to be followed. Complaints are received by the Department for Citizen Complaints and Nationalities. Citizens may complain about executive and judicial acts and also about personal matters. The complaints are referred, along with a report, to the Standing Committee of the National Assembly for action. The Standing Committee calls for comments from the institution concerned and attempts to redress the grievance. The process is, however, not very well- structured and needs improvement. At present, the National Assembly does not have the facilities, manpower or the expertise to exercise such a function.

In 1999, an experienced international consultant made recommendations on transforming the Department for Citizen Complaints and Nationalities into an Ombudsman. The UNDP project at the Assembly will soon hire an international consultant to review the existing procedure and make recommendations regarding the setting up of an "Ombudsman-like" institution within the National Assembly. An effective complaints mechanism is a necessary tool for providing redress.

In many countries, Parliamentary Commissioners or Ombudsmen have proved very effective. Recourse to such mechanisms cost the aggrieved party almost nothing and litigation is avoided. Disempowered sections of the community therefore benefit greatly. The mechanism is also a check on the abuse of power.

Access to Justice

The setting up of regional Appellate Courts constitutes an improvement of access to justice. As an appeal in the Lao system can virtually become a fresh trial with introduction of new evidence being permitted, parties will be better placed to provide such evidence if the hearing is in the region itself.

Being the dispute resolution body at the lowest level, VMUs deal with the bulk of disputes in the country. The disappearance of district courts therefore has serious implications for access to justice. Poor people will be pushed into settling disputes at the VMU under terms that are

unfavourable to them. In cases that do not come within the jurisdiction of mediation units, people who cannot afford to travel long distances may be unable to seek justice in provincial courts.

Ethnic minority groups, who mostly live in mountainous areas which lack roads and transport, often do not have VMUs in their own districts. Disempowered sections of society, such as women, children and the disabled, are also affected by a lack of easy access to courts.

Another important limitation on access to justice is the availability of legal advice. Although there have been some improvements since 2003, the lack of lawyers is a problem of great magnitude for Lao PDR. A Law on Lawyers is on the legislative agenda for 2006. The Lao Bar Association has been working hard on this law, with international assistance. The Law on Lawyers will put defence lawyers on a firmer footing. But a law on its own will only resolve part of the problem. The legal profession needs to be made more attractive to new entrants and also needs to be recognised by the authorities as being essential for the proper administration of justice. The lack of legal aid programmes makes access to justice an illusion. A specific recommendation made in the Legal Sector Evaluation, that a free legal aid programme be set up, has not been seriously considered by stakeholders.

During an earlier consultancy, the author proposed to the Lao Bar Association that they launch a free legal aid programme by simply announcing that lawyers would appear free for every woman and child who sues their husband or father for maintenance under the Family Law. Such a programme would need little or no administration. Much to the author's disappointment, the proposal was greeted with queries such as "who will pay for clerical expenses?" and "who will pay for our travel to court?" The clients can be asked to pay the clerical charges, which should not be great. How much would it cost for a lawyer to travel from his office in Vientiane to the Municipality Court? On the other hand, by how much would the profile of the legal profession be raised by such a programme?

The Head of the Oudomxay regional office has shown by example how the profile can be raised. The author has no doubt that other lawyers have been similarly exemplary. Exemplary conduct by individuals contribute but little. Collective conduct will raise the profile of the legal profession to much greater heights.

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ECONOMIC DEVELOPMENT AND CONSTITUTIONAL REFORMS IN VIETNAM

Tran Thanh Huong & Duong Anh Son

I. Introduction

Constitutional changes are primarily evaluated for their political and legal effect on society. However, the economic effects of constitutional change should not be overlooked. This is because the legal environment, and extent to which it conforms to the principles of the rule of law (such as having a transparent law-making process; simplified transparent administrative procedures for organizations and individuals, efficient functioning of legal enforcement organs and organizations), has a great impact on business activity, and consequently, influences the economic performance of each country.

The modern Vietnamese legal system has been developed under four constitutions. The 1946 Constitution was adopted after Vietnam was declared independent of France and the feudal regime in the country collapsed. The 1959 Constitution was ratified after the Dien Bien Phu victory and the Geneva Agreement divided the country into North and South Vietnam. The 1980 Constitution was the result of a desire to create a unified constitution for the whole country after the American-Vietnamese war ended in 1975. The current Constitution, passed in 1992 and amended in 2001, shows the results of the renovation (Doi Moi) period and its many strategic economic changes[1].

Since each of the four constitutions is declared "the fundamental law of the state", each has "supreme legal force" and includes "all other legal documents must be consistent with the Constitution". Article 146 of the 1992 Constitution serves as an example. Each constitution, while replacing its predecessor, was developed within certain ideological, political and social-economic principles and contexts. This article provides a general outline and broad introduction to the economic development and constitutional (legal) changes that have occurred in Vietnam over the last couple of decades. It focuses on the period when Vietnam transformed from a centrally planned economy, declared to have ended in 1986/7, to a market economy.

II. 1992 Constitution - the basic legal reform for economic development

After reunification in 1975, the Vietnamese economy should have developed rapidly but it faced many difficulties. The nation, economically depressed by war and following a centrally-planned

1 For the history of Doi Moi and a description of the changes which occurred during this period see Section 1.1 below and *Clauspeter Hill*, Vietnam Constitutional Development in a Re-united Country, in "Constitutionalism in Southeast Asia", Vol. 2, p.320, Konrad-Adenauer-Stiftung, Singapore 2008 at page 338.

economic policy, was in crisis. As a poor agricultural country, it had limited workforce skills or ability to manage economically. As a result, there was inadequate food, supplies, transport, health care, education and other social services. The country became dependent on foreign aid and built up significant debt. This situation was caused by the continuation of the socialist model of economic policy and was legally supported by the 1980 Constitution with a chapter entitled "Economic System" including an article that gave "heavy industry" economic priority and used terms such as "revolution of production relations" (Art. 16, 17, 18 of Constitution 1980). Industrialization and nationalization within a command economy was not successful. Many planned targets such as life expectancy, poverty rates etc., were not reached.

The Communist Party of Vietnam - the only political party in the country - realized that it had to do something to help the nation overcome a deepening economic crisis. The renovation (Doi Moi) period was launched officially with a resolution by the Communist Party of Vietnam at its Sixth Congress in 1986, and aimed at comprehensive renovation, especially of economic changes.

However, from a legal perspective, the rule of law and constitutionalism require that economic changes must be based on solid legal principles and norms. In other words, any economic relationships and economic-related transactions need to be legalized or legally recognized by the state. In the political and legal system of Vietnam, for both practical and theoretical reasons, the economic strategy and policy of the Communist Party has always been included in the constitution. All constitutions of Vietnam since 1959 have contained an independent chapter on the economic system. And thus, the constitutional reforms of the country were given formal expression by the provisions of the "Economic System" chapter in the Constitution - the fundamental law of the state[2].

The 8th National Assembly adopted a new Constitution on 15th April 1992. It replaced the 1980 Constitution which was inappropriate for the changed circumstances in which Vietnam found itself.

Chapter 2 of the 1992 Constitution entitled "Economic System" has been almost completely rewritten with many new provisions implementing changes in the economic policy of the Communist Party of Vietnam, including abolition of the centrally state-planned economic policy and the establishment of a comprehensive and effective market economy.

The state adopted consistent policies on the development of a market economy through a series of changes, including recognition of diversity of ownership of assets, encouragement and stimulation of all economic sectors, policies for the integration of Vietnam into the world and regional economies, creating a climate for accelerated foreign trade, foreign direct investment and administrative reform. All of these changes were crucial for the development of a market economy. In this paper, we analyze aspects of these changes that have opened Vietnam's economy:

2 The other translation is "Economic Regime". In fact, the open economic policy of Vietnam had been recognized and implemented even before the adoption of the 1992 Constitution. Examples include, limited foreign investment permitted by the Law on Foreign Investment 1987, many important measures on the market economy introduced in other regulations passed in the late 1980s, including the Foreign Investment Charter – issued by the Government in 1978. During this period the Government introduced a number of measures and incentives for specific sectors. Therefore, the 1992 Constitution was not the first legal document in which the market economy was recognized.

private ownership, land rights, the development of a socialist-oriented market economy and the state's role in economic management according to constitutional provisions.

Private ownership

The most significant step towards a market economy in Vietnam was the recognition in the 1992 Constitution, of private ownership of "the means of production". As a result, the state gave up its monopoly over the ownership of companies, buildings, machinery and other means of production. Article 15 of the Constitution sets out general economic policy and private ownership rights in Vietnam:

> "The multi-sector economic structure with diversified forms of production and business organization is based on the entire people's ownership, collective ownership and private ownership (...)"

Much attention has also been paid in the Constitution to the protection of private property. Article 23 of the Constitution stipulates that:

> "The lawful property of individuals or organizations shall not be nationalized.
>
> In cases made absolutely necessary by reason of national defense, security and the national interest, the State can make a forcible purchase of, or requisition, pieces of property of individuals or organizations [with] compensation, taking into account current market prices.
>
> The formalities of the forcible purchase or requisition shall be defined by law"

Article 58 spells out the general scope of citizens' ownership:

> "The citizen enjoys the right of ownership with regard to his lawful income, savings, housing, chattel[s], means of production, funds and other possessions in enterprises or in other economic organizations; with regard to land entrusted by the State for use, the matter is regulated by the provisions of Articles 17 and [18].
>
> The State protects the citizen's right of lawful ownership and of inheritance".

The protection of foreign investors' property provides a measure of foreign investment assurance, which is specifically confirmed in Article 25:

> "The State encourages foreign organizations and individuals to invest capital and technologies in Vietnam in conformity with Vietnamese law and international law and practice; it guarantees the right to legal ownership of capital, property and other interests of foreign organizations and individuals. Enterprises with foreign investments shall not be nationalized.
>
> The State encourages and creates favorable conditions for overseas Vietnamese to [invest in] the country"

As well as recognizing the private ownership of property, the Constitution also guarantees, in Article 57, the right of citizens' "freedom of enterprise as determined by law". This is a core requirement in the development of a market economy because it releases the constraints on labor and ensures the fundamental rights of citizens.

All of these provisions reassure business people that they will not be deprived of their property through nationalization, although there is still a concern that the importance of strong national ownership has been stressed in the Constitution by the declaration that "the entire people's ownership and collective ownership constitutes the foundation" of the property rights[3].

Land rights

The policy on land rights in Vietnam has changed over time since 1945. Private ownership of land was formally abolished in the 1980 Constitution. The 1992 Constitution maintains a model of land ownership which treats land as a special asset for the whole of society. All land is still under the ownership of the entire people, but this is expressed in the Constitution in a softer and more flexible way consistent with the property rights granted under the Constitution, which are necessary in any market economy.

Article 18 of the Constitution provides that:

> "The State manages all the land according to overall planning and in conformity with the law, and guarantees that its use shall conform to the set objectives and yield effective results.
>
> The State shall entrust land to organizations and individuals for stable [long-term] use.
>
> These organizations and individuals are responsible for the protection, enrichment, rational exploitation and economical use of the land; they may transfer the right to use the land entrusted to them by the State, as determined by law."

While the land remains in state ownership, the right of individuals and organizations to use land has become broader through the development of the land law. According to the land law, land use rights can be transferable, can be inherited and can be rented or mortgaged depending on the form of land allocation, the user's legal status, and the purpose for which the land is used etc. The land policy provides sufficient certainty for land users to invest in the land to improve its productivity. The land property right, although not de jure recognition of ownership of the land, is gradually becoming a de facto ownership right[4].

Socialist-oriented market economy

Vietnam's market economy is different from market economies in other countries in that it "implements the policy of developing a socialist-oriented market economy (...)"[5] Although private ownership of some assets is now permitted (and this may lead to a reduction of the state and collective ownership of property, the only form of property ownership allowed under the planned economy) and private ownership is guaranteed, Article 15 of the Constitution still defines the people's collective ownership of property as "the foundation"[6] of the economy.

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3 Article 15.

4 The law does not confer on individuals and organizations the right to sell or buy land. Instead it confers a right to use the land and states that a "land use right" may be legally transferred. There are, however, now calls for further changes to land law to prevent speculation, ensure equity and protect investors.

5 Article 15 (2).

6 Article 15 (2).

Article 19 of the Constitution intentionally favors the state economic sector by stating that it "shall be consolidated, strengthened and developed, particularly in key branches and domains, play the leading role in the national economy, and, together with the collective economic sector, become an ever firmer and firmer foundation of the national economy."

The concept of a "socialist-oriented market economy" is not defined in the Constitution itself, or in the laws or regulations. It is political ideology rather than a legal concept. Its core elements can be understood and characterized as having socialist principles for the distribution of goods, while maintaining the principles of a market economy that balances economic growth and social progress; ensuring harmony between society, the state and individuals; and guaranteeing the existence of a system of social welfare.

In practice, Vietnam has gained progressive social outcomes by sustaining high rates of economic growth. It has been able to use the benefits of such growth to support social values by investing in education, health care and infrastructure.

State economic management

The transformation to a market economy requires a clear definition of state economic principles of management. Article 26 stipulates that:

> "The State manages the national economy by means of laws, plans and policies; it makes divisions of responsibilities and devolves authority to various departments and levels of administration; the interests of individuals and collectives are brought into harmony with those of the State".

The Constitution allows the state to use three means of management for the national economy: (i) laws, (ii) plans and (iii) policies. The use of laws as economic management tools is a common characteristic of countries with market economies and states that respect the rule of law. However, sometimes state plans and policies dealing with social needs and requirements may create legal uncertainties and breach the principles of the rule of law. This criticism concerns the possible creation of state administrative discretions for economic management that may distort the market and economic development[7].

The justification for the use of plans and policies is that the legal uncertainty sometimes works well in a country like Vietnam, where its remarkable economic growth is evidence for the idea that sometimes governing the economy by administrative orders enables prompt government reaction to changes in the economy.

In developing countries, following slow and complicated law-making procedures does not allow state bodies to respond quickly enough to protect their economy in rapidly changing economic circumstances. Therefore, there is sometimes a contradiction between "the rule of law", "the transparency of state agency activity" and "economic development"[8].

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7 Ambiguity and uncertainty in laws have been analyzed by international observers including *Bergling Per* in his thesis on "Legal Reform and Private Enterprise: the Viet Nam Experience" at the Department of Law, Umea University, Sweden. He considers that Vietnam in 1999 had maintained a balance between market principles and a planned economy, and ambiguous private property protection.

8 The same ideology may be applied, to some extent, to the relationship between the "non-corrupt state" and "economic development".

III. Constitutional amendments and modifications - continuation of the renovation period

The constitutional reforms have positively influenced the economic development of the country. The results of renovation are seen in the economic growth; macro-economic stability; reduced inflation and sustained increases in exports over a long period[9].

However, from an economic development perspective, the 20th century did not end peacefully in Southeast Asia. Vietnam could not avoid the negative influences of the financial and monetary crisis in the region and the consequential slowdown in economic growth and foreign investment. In addition, further economic development and the application for membership of the World Trade Organisation gave the country no choice but to make further constitutional changes towards a fully market economy.

Constitutional amendments that enable new economic and political policies are part of the continuing stage of renovation. Free enterprise and experiments in a more democratic system have been gradually constitutionalized.

Article 15 (1) was amended to read as follows:

> "The State builds an independent and sovereign economy on the basis of bringing into full play the internal resources and actively integrating into the international economy: and carries out the national industrialization and modernization."

Article 15(2) emphasizes that the State "consistently implements the policy" of developing a socialist-oriented market economy.

Article 16 was amended to read:

> "The aims of the State's economic policy are to make the people prosperous and the country strong, to [better] satisfy the people's material and spiritual demands on the basis of releasing all production capacity, bringing into full play all the potentials of the economic sectors including the State's economic sector, the collective economic sector, the private and small-owner economic sector, the private capitalist sector, the State capitalist economic sector and the foreign investment economic sector in various forms, boosting the construction of the material-technical foundations, broadening economic, scientific and technical cooperation [and] exchanges with the [international] market.
>
> All economic sectors are important constituents of the socialist-oriented market economy. Organizations and individuals of all economic sectors are allowed to conduct business and/or production activities in[industries]and trades not banned by law and to be jointly engaged in long-term development and co-operation, and healthy competition according to law".

Once the market economy is recognized by the constitutional amendments, economic development very much depends on the next steps of the implementation of the policy by state organs within their operational frameworks of responsibility. They must take a series of actions to facilitate the

9 Vietnam is one of the biggest rice exporters in the world.

development of a market economy[10].

Examples of important constitutional reform achievements include:

- The area of business law, the protection of legal rights, the enhancement of a legal framework for contract enforcement and a system of dispute settlement.
- was amended. Although, after the introduction of the new law, the functioning of the competition A competition law introduced in 2001 - the same year the 1992 Constitution authority remained problematic, the wording of the law lacked precision, and certain anti-competitive actions by enterprises continued without sanction, the competition law can still be considered a good signal for the development of a free and fair market.
- The Law on Enterprise was passed in 1999 and then replaced by a new Law on Enterprise in 2005. Article 5 of the Law on Enterprise which confers the right of citizens to establish enterprises and conclude contracts freely, emphasizes the state guarantee of enterprise and their owners:
  1. The State recognizes the long lasting existence and development of all types of enterprises as governed in this law, ensures the equality of enterprises before law, regardless of ownership and economic sector and recognizes the lawful profitability of business activities.
  2. The State recognizes and protects ownership rights, invested capital, income, rights and other lawful rights and interests of the enterprises and their owners.
  3. The lawful property and invested capital of enterprises and their owners shall not be nationalized or confiscated by administrative methods.

In cases of absolute necessity due to the reason of national defense, security or national interest, a compulsory purchase or requisition of an enterprise's asset can be made by the State; that enterprise shall be paid or compensated in accordance with the market price of the asset at the time of such compulsory purchase or requisition. Such payment and compensation must ensure the interests of enterprises and non-discrimination among enterprises.

Legal principles and policies for a market economy are implemented in a variety of different laws. The important job of the lawmaker is to ensure that the provisions of each law conform and do not conflict with provisions of other laws. Recognizing that to work efficiently a market economy needs clear enforceable laws regarding private property and contractual rights and obligations, the laws of Vietnam focus on those matters. Article 389 of the Civil Code 2005 (formerly Article 395 in the Civil Code 1995) is about the right to contract freely. "The establishment of civil

10 Theoretically, Vietnam has a strict hierarchy of legislative documents: The Constitution, Laws, Ordinances, Resolutions, Decrees, Decisions and Directives etc. The Constitution itself in most cases is not directly applicable. To implement and apply constitutional provisions the next step after adopting the Constitution is to enact laws. Except for some legislation including the Law on Foreign Direct Investment in Vietnam (1987) passed before the Constitution was adopted, most important laws were passed by the National Assembly after the adoption of the Constitution including the Land Law (1992); the Law on Promotion of Domestic Investment (1994); the Insolvency Law (1994); the Civil Code (1995) and the Commercial Law (1997). Almost all of these laws contain international principles for protecting and governing ownership and economic transactions. By this means, the provisions of the Constitution on economic policy have practical legal effect.

contractual relationships shall conform with the following principles: (1) Freedom to enter into contracts, provided the contracts are not contrary to law and social ethics; (2) voluntariness [sic], equality, goodwill, cooperation, honesty and good faith".

The Commercial Law 2005 emphasizes the principle that a contract should be freely and voluntarily entered into. Article 11 stipulates:

1. Parties have the rights of freedom to reach agreements not in contravention of the provisions of law, fine traditions and customs and social ethics in order to establish their rights and obligations in commercial activities. The State respects and protects such rights.
2. In commercial activities, the parties shall act on their own freewill, and neither party is allowed to impose its own will on, force, intimidate or obstruct, the other party.

The new legal framework for the market economy has generally operated well in Vietnam and has undoubtedly contributed to its dramatic economic progress and improvements in living standards. As many international observers have consistently noted, Vietnam has made enviable progress in poverty reduction and its renovation was not "a Vietnamese versi*on of [Soviet Union's] perestroika and glasnost*"[11]. Its progress may serve as an economic model that can be considered by many other developing countries in the region of South-East Asia and around the world.

IV. Challenges

Despite economic prosperity, there are some issues that need to be examined and considered as challenges for the future. Some of the difficult questions about how far the DoiMoi economic policy could still positively influence the country, are discussed below:

- Economic growth is not a sufficient definition of economic development. Economic development should have a very broad meaning with a variety of indicators, such as the reduction or elimination of poverty, the reduction of unemployment, increased leisure time, improved environmental quality and improvements in infrastructure and services, and it should encompass other social values like freedom, equality and justice.
- The basic and unresolved economic problems of weak competitiveness due to the lack of experienced and skillful state managers (at both ministerial and local levels), corruption, labor shortages, the isolation of ethnic minority areas and low technology in the countryside, remain crucial and will take a long time to overcome. As a result, the economic growth of Vietnam during the last two decades under the renovation policies and led by the new constitutional provisions, does not guarantee that the economic development of the country will continue, especially in the global economic recession at the end of the first decade of this 21st century.

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11 *Clauspeter Hill*, Vietnam Constitutional Development in a Re-united Country, in "Constitutionalism in Southeast Asia", Vol. 2, p.320, Konrad-Adenauer-Stiftung, Singapore 2008.

- The full benefit of constitutional reforms can only be fully achieved if they are fully implemented, but this has been difficult because of the legal practices of the country. As stated above, most Vietnamese constitutional provisions cannot be directly enforced. In addition, the mechanisms for claiming constitutionally protected rights are weak. There is no constitutional court and no action for judicial review where unconstitutional acts of both central and local government authorities can be challenged. The Administrative Court is the only judicial body that can consider and decide on the grievances and complaints of individuals and businesses, against government bodies. It plays an important role in this field, but its jurisdiction is limited and the level of its independence is low.
- Economic demands, together with the pressure to have the legal system conform to requirements imposed by the World Trade Organisation and other international agreements, require the country to maintain and continuously change its economic policies towards the commonly accepted principles of a market economy. However, with only two decades of experience of a market economy Vietnam still struggles to deal with the many legal problems of contemporary society. Such questions include how to create tariffs to protect internal industries that do not conflict with existing trade commitments, or how to encourage competitive exports and follow WTO regulations on subsidies and countervailing measures at the same time etc.
- Constitutional and legal reforms are important but in addition to focusing on whether there are enough laws or how to make the laws less fragmented and inconsistent, it is also important to ensure that existing laws are properly enforced. Economic rights and the interests of individuals and organizations are not fully protected even under well-expressed laws, unless people want to, and are able to, assert those rights. Vietnam's legal system does not have a strong legal tradition and culture that meets the criteria of legal order in the contemporary world. The common Vietnamese expression, "The King's law stops at the village gate", explains why obedience of laws is still not a habit for most people. This and other negative aspects of law enforcement such as the dysfunctional court system, a lack of judicial independence and very limited enforcement of court judgments, create a feeling that the law exists, but its protection is still not as strong as it should be in civilized society governed by the rule of law. Furthermore, while many laws function well as instruments by which the state manages the relationship between the state and individuals or organizations they often do not function well as an instrument for individuals or commercial organizations to protect their interests when those interests are threatened by the actions of government officials or government bodies. The enforcement of existing law is generally problematic.

V. Conclusion

In recent times, in an environment of increasing global economic integration, Vietnam has achieved remarkable economic growth. Although constitutional reform has not been the only factor influencing economic growth in Vietnam, constitutional reforms and the constitution, as a regulatory tool for social relations have played an important role in the economic development of Vietnam.

Even after taking account of Vietnam's low starting point in terms of economic and constitutional development, it is still hard to see the clear relationship between the economic success of a country and respect for the rule of law. Economic changes in a stable political environment were successful in the transformational period from the planned economy to a market economy. However, the next step for the country will not be so simple because economic development touches on many other social problems such as political openness, democracy and justice.

Vietnam should expect a much lower rate of economic growth over the next decade compared to the last one. Further political and constitutional reforms will be required for continued economic progress.

CONSTITUTIONALISM AND ENVIRONMENTAL PROTECTION

Jolene Lin

Constitutionalism is such a well- expounded idea in political and legal philosophy that it would be unnecessary to spend much ink on defining or explaining the concept. However, I thought that it would not be too superfluous to begin by setting down some basic ideas of constitutionalism, an area of the law which has developed a significant relationship with environmental governance and management. Summarily, when we speak of constitutionalism, we mean that, within a state, there exists rules creating legislative, executive and judicial powers, and that these rules impose limits on these powers. These limitations often take the form of individual or group rights against governments, rights to free expression, association, equality and due process of law. These limits on the powers of government are referred to as constitutional limits because they are usually enshrined in a document that sets out the rights and obligations of the government and the governed, that is, the constitution. Constitutionalism therefore refers to the collective notions that government can and should be limited in its powers, that governmental authority depends on the observance of these limitations in order to gain legitimacy, and the primacy of the constitution as the fundamental law of the land.

Constitutional provisions offer a powerful tool for protecting the environment, but to date, this tool has been severely under-utilized in the countries of Southeast Asia, namely, Brunei, Cambodia, Thailand, Vietnam, Laos, Singapore, Indonesia, Malaysia, the Philippines, Myanmar and East Timor.[1] This article explores how constitutionalism can advance environmental protection in these countries. A broad survey of the constitutions of Southeast Asian countries shows that most constitutions do not grant citizens the right to a healthy environment. As such, the use of constitutional environmental rights to protect the environment faces limitations. An alternative avenue worth exploring is the right to life provision, which is found in all the constitutions. The right to life is traditionally viewed as a right not to be arbitrarily deprived of life. Imposing a death penalty without trial or other due process would certainly violate this right. Some courts in other jurisdictions have interpreted the right of life to include the right to a healthy environment in which to live that life. Thus, by connecting an environmental degradation to the violation of the fundamental right to life, environmental protection may be advanced through constitutional litigation even when the constitution in question does not provide for the right to a healthy environment.

1 All the above-mentioned countries, except East Timor, are members of the Association of Southeast Asian Nations (ASEAN). While East Timor may not be part of geopolitical Southeast Asia, I have included it on the basis of its geographical location in the Southeast Asian region. For our purposes, the inclusion of East Timor is instructive as it has a fairly new constitution which contains provisions on environmental rights.

Part I provides an overview of environmental rights, or more specifically, the constitutional right to a healthy environment. Part II surveys the constitutions of the Southeast Asian countries, concludes that the right to a healthy environment is found in few of these constitutions, and suggests that a possible way forward for advancing environmental protection through the constitution is by relying on the universal right to life. Part III concludes.

I. Overview of environmental rights

Apart from establishing the powers of the branches of government, a constitution also guarantees citizens basic fundamental human rights such as the right to life, the right to due process, and the right to religious freedom. With heightened environmental awareness in the past few decades, many constitutions have been amended to expressly provide for the right to a healthy environment and to guarantee the procedural rights necessary to implement and enforce this right.

Constitutional provisions may be used as both a shield and a sword. As a shield, constitutional provisions can be used to protect against actions that violate a citizen's constitutional rights (such as a government's unlawful interference with an association that seeks to educate the public about environmental protection). As a sword, constitutional provisions may be used to compel a government to ensure certain rights (such as shutting down polluting businesses that impair the rights to life (and a healthy environment)). In this way, constitutional rights can be a valuable tool for the advancement of environmental protection. Constitutional rights can also promote environmental protection by:

(1) providing a means for the resolution of environmental problems that existing legislative and regulatory frameworks do not address. Environmental legal and regulatory regimes may not adequately address all environmental concerns, a problem that is more pronounced in developing countries which usually have less comprehensive environmental laws or weaker law enforcement. The availability of constitutional provisions which citizens can resort to in order to force the executive or its regulatory agencies to address environmental problems allows citizens to play a direct law enforcement role and to force the executive to address lacunas in the existing environmental regulatory framework.

(2) providing a strategic angle in environmental litigation. Especially in developing countries, environmental protection often plays second fiddle to other priorities such as economic development. The inclusion of environmental protection in a country's constitution allows lawyers to elevate their advocacy in environmental cases to that involving constitutional concerns and fundamental human rights.[2] In this way, constitutional environmental rights provide a useful litigation strategy.

(3) providing a basis which is less susceptible to political vagaries.[3] The time-consuming and arduous process of amending a constitution (which usually requires a super-

2 *Carl Bruch et al*, "Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa" (2001) 26 Columbia Journal of Environmental Law 131 at 134.

3 Ibid.

majority approval by the legislature) has a deterrent effect, making it less likely that environmental rights, once enshrined in a constitution, will be deleted or watered down (though, of course, this does not prevent dilution through judicial interpretation).

The scope of the substantive "right to a healthy environment"

For the above reasons, it may be argued that the right to a healthy environment should be included in a constitution. Some have even argued that the right to a healthy environment is a fundamental human right.[4] What then is the scope of such a right? Developments at the international level, since the 1972 United Nations Conference on the Human Environment, are instructive. The first authoritative statement supporting the idea of environmental human rights appeared in the Declaration of the United Nations Conference on the Human Environment (1972 Stockholm Declaration). Principle 1 of the Stockholm Declaration states "Man has the fundamental right to freedom, equality, and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations". The Brundtland Report (1987) provided a further impetus to developing the link between human rights and environmental protection through its portrayal of the goals of environmentalism as an extension of existing human rights discourse and its proposed formulation of an environmental right: "All human beings have the fundamental right to an environment adequate for their health and well-being".[5]

The 1994 Final Report of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities on the relationship between human rights and the environment (also known as the 'Ksentini Report') provides us with a conceptual framework of the scope of a right to a healthy environment.[6] The Ksetini Report contained a draft "Declaration of Principles on Human Rights and the Environment" which encapsulated the idea of a universal right to a secure, healthy and ecologically sound environment. Amongst the rights proclaimed in the draft Declaration were rights of all persons to:

— freedom from pollution, environmental degradation and activities that adversely affect the environment, or threaten life, health, livelihood, well-being or sustainable development;

— protection and preservation of the air, soil, water, sea-ice, flora and fauna, and the essential processes and areas necessary to maintain biological diversity and ecosystems;

— the highest attainable standard of health free from environmental harm;

— safe and healthy food and water adequate to their well-being;

— a safe and healthy working environment;

4 See, for example, *Tim Hayward*, Constitutional Environmental Rights, Oxford University Press, 2004.

5 "Report of the World Commission of Environment and Development: Our Common Future", transmitted to the General Assembly as an Annex to document A/42/427 Development and International Cooperation: Environment.

6 *Ksentini, Fatma* (1994), Final Report of the UN Sub-Commission on Human Rights and the Environment, UN Doc.E/CN.4/Sub.2/1994/9.

— adequate housing, land tenure and living conditions in a secure, healthy and ecologically sound environment;

— not to be evicted from their homes or land for the purpose of, or as a consequence of, decisions or actions affecting the environment, except in emergencies or due to a compelling purpose benefiting society as a whole and not attainable by other means;

— timely assistance in the event of natural or technological or other human-caused catastrophes;

— benefit equitably from the conservation and sustainable use of nature and natural resources for cultural, ecological, educational, health, livelihood, recreational, spiritual or other purposes. This includes ecologically sound access to nature;

— preservation of unique sites, consistent with the fundamental rights of persons or groups living in the area.[7]

Procedural rights

In addition, the draft Declaration of Principles on Human Rights and the Environment set out the procedural rights which are necessary for realization of the substantive right to a healthy environment, including the right to information concerning the environment (Principle 15), the right to hold and express opinions and to disseminate ideas and information about the environment (Principle 16), the right to environmental and human rights education (Principle 17), the right to participate in planning and decision-making activities that may have an impact on the environment and development (Principle 18), the right to freedom of association (Principle 19), and the right to effective redress (Principle 20).[8]

II. The Constitution and the environment in Southeast Asia

A survey of the constitutions of Brunei, Cambodia, Thailand, Vietnam, Laos, Singapore, Indonesia, Malaysia, the Philippines, Myanmar and East Timor show that only three countries (Indonesia, East Timor, and the Philippines) grant their citizens the constitutional right to a healthy environment (Refer to Table 1).[9]

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7 Ibid, Articles 5-13.

8 It should be noted that while the international community has not adopted a legally binding instrument on environmental rights to date, the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention) is the only legally binding international agreement that links environmental rights and human rights by establishing procedural rights (to information, to participation in decision-making, and to access to justice in environmental matters) which it expressly affirms are aimed at securing the "right to live in an environment adequate to his or her health and well-being". More information about the Aarhus Convention is available on the United Nations Economic Commission for Europe (UNECE) website: <http://www.unece.org/Welcome.html>.

9 See *Juan Antonio Oposa v Factoran* [1993] G.R. No: 101083 Supreme Court, a landmark case on the right to a balanced and healthful ecology guaranteed in the constitution of the Philippines.

Table 1: Right to a Healthy Environment

	Right to a Healthy Environment
East Timor	Section 61: Environment (Part II: Fundamental Rights, Duties, Liberties and Guarantees, Title III: Economic, Social and Cultural Rights and Duties) “1. Everyone has the right to a humane, healthy and ecologically balanced environment and the duty to protect it and improve it for the benefit of the future generations. 2. The State shall recognise the need to preserve and rationalise natural resources. 3. The State should promote actions aimed at protecting the environment and safeguarding the sustainable development of the economy.”
Indonesia	Article 28H “Each person has a right to a life of well-being in body and mind, to a place to dwell, to enjoy a good and healthy environment, and to receive medical care.”
Philippines	Section 16 (Article II: Declaration of Principles and State Policies) “The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.”

Generally, environmental rights are less commonly found in older constitutions (which came into force at a time of less environmental awareness), and unless there is strong political pressure to amend the constitution to include environmental rights, most of these older constitutions will not contain explicit provisions on environmental rights.

However, given the history of colonialism and large-scale foreign appropriation of natural resources in this part of the world, it is not surprising that many of the constitutions contain detailed provisions on the ownership of natural resources which is usually vested in the State on trust for its citizens. The imposition of duties upon the State to protect the environment is important, and it may be argued that these constitutional provisions provide legal bases for citizens to sue the State for failure to perform its constitutional duties to protect the environment (Refer to Table 2).

Table 2: Duties of the State in relation to the Environment

	State Duties in relation to the Environment
Cambodia	Article 58 (Chapter V: Economy) "State property comprises land, underground mineral resources, mountains, sea, undersea, continental shelf, coastline, airspace, islands, rivers, canals, streams, lakes, forests, natural resources, economic and cultural centers, bases for national defense and other buildings determined as State property. The control, use and management of State property shall be determined by law." Article 59 (Chapter V: Economy) "The State shall protect the environment and the balance of natural resources and establish a precise plan for the management of land, water, air, wind, geology, ecological system, mines, oil and gas, rocks and sand, gems, forests and forestry products, wildlife, fish and aquatic resources."
Burma	Chapter I: State Fundamental Principles In connection with the natural environment, it is laid down that " (...) (31) the State shall protect the natural environment". Chapter VIII: Citizenship, Fundamental Rights and Duties of Citizens "(49). Every citizen is under a duty to contribute towards the following tasks being carried out by the State (...) [including] Environmental conservation (...)"
East Timor	Section 6: Objectives of the State "The fundamental objectives of the State shall be (...) (f) To protect the environment and to preserve natural resources (...)"
Laos	Article 19 (Chapter 2: The Socio-Economic Regime) "All organisations and citizens must protect the environment and natural resources: land surfaces, underground [resources,] forests, animals, water sources and the atmosphere."
Indonesia	Article 33 (Section XIV: National Economy and Social Welfare) "(3) The land and the waters as well as the natural riches therein are to be controlled by the state to be exploited to the greatest benefit of the people.

	(4) The organization of the national economy shall be based on economic democracy that upholds the principles of solidarity, efficiency along with fairness, sustainability, keeping the environment in perspective, self-sufficiency, and that is concerned as well with balanced progress and with the unity of the national economy. (5) Further provisions regarding the implementation of this article are to be regulated by law."
Thailand	Section 85 (Chapter V: Directive Principles of Fundamental State Policies; Part 8: Directive Principles of State Policies in relation to Land, Natural Resources and the Environment) "The State shall pursue directive principles of State policies in relation to land, natural resources and the environment, as follows: (1) to prescribe rules on land use which cover areas throughout the country, having regard to the consistency with natural surroundings, whether land areas, water surfaces, ways of life of local residents, and the efficient preservation of natural resources, and prescribe standards for sustainable land use, provided that residents in areas affected by such rules on land use shall also have due participation in the decision-making; (2) to distribute land holding in a fair manner, enable farmers to have ownership or rights in land for farming purposes thoroughly through land reform or otherwise, and provide water resources for sufficient use of water by farmers in a manner suitable for farming; (3) to provide town and country planning and carry out the development and action in the implementation of town and country plans in an efficient and effective manner in the interest of sustainable preservation of natural resources; (4) to provide a plan for managing water resources and other natural resources systematically and in a manner generating public interests, provided that the public shall have due participation in the preservation, maintenance and exploitation of natural resources and biological diversity in a balanced fashion; (5) promote, maintain and protect the quality of natural resources in accordance with the sustainable development principle, control and eradiate polluted conditions affecting health, sanitary conditions, welfare and the quality of life of the public, provided that members of the public, local residents and local government organisations shall have due participation in determining the direction of such work."

The Philippines	Section 2 (Article XII: National Economy and Patrimony) "All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated. The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. (...) The State shall protect the nation's marine wealth in its archipelagic waters, territorial sea, and exclusive economic zone, and reserve its use and enjoyment exclusively to Filipino citizens. The Congress may, by law, allow small-scale utilization of natural resources by Filipino citizens, as well as cooperative fish farming, with priority to subsistence fishermen and fishworkers in rivers, lakes, bays, and lagoons."
Vietnam	Article 17: Ownership of the Entire People (Chapter II: Economic System) "The land, forests, rivers and lakes, water supplies, wealth lying underground or coming from the sea, the continental shelf and the air, the funds and property invested by the State in enterprises and works in all branches and fields - the economy, culture, society, science, technology, external relations, national defence, security - and all other property determined by law as belonging to the State, come under ownership by the entire people." Article 29: Protection of the Environment (Chapter II: Economic System) "(1) State organs, units of the armed forces, economic and social bodies, and all individuals must abide by State regulations on the rational use of natural wealth and on environmental protection. (2) All acts likely to bring about exhaustion of natural wealth and to cause damage to the environment are strictly forbidden." Article 112: Duties and Powers (Chapter VIII: The Government) "The Government has the following duties and powers: (...) 5. To take measures to protect the rights and legitimate interests of the citizen, to create conditions for him to exercise his rights and fulfill his duties, to protect the property and interests of the State and society; to protect the environment…"

Table 3: "Right to Life" Provisions

	Right to Life
Cambodia	Article 32 (Chapter III: The Rights and Obligations of Khmer Citizens) "Everybody shall have the right to life, freedom and personal security."
East Timor	Section 29: Right to life (Part II: Fundamental Rights, Duties, Liberties and Guarantees; Title II: Personal Rights, Liberties and Guarantees) "(1) Human life is inviolable. (2) The State shall recognise and guarantee the right to life."
Indonesia	Article 28A (Section XA: Fundamental Human Rights) "Each person has the right to live and the right to defend his life and existence."
Laos	Article 6 (Chapter 1: The Political Regime) "The State protects the freedom and democratic rights of the people which cannot be violated by anyone. All state organisations and government officials must disseminate and create awareness of all policies, regulations and laws among the people and, together with the people, organise their implementation in order to guarantee the legitimate rights and interests of the people. All acts of bureaucratism and harassment that can be detrimental to the people's honour, physical well-being, lives, consciences and property are prohibited." Article 42 (Chapter 4: Fundamental Rights and Obligations of Citizens)

While most constitutions do not provide for the right to a healthy environment, and not all constitutions establish duties for the State in relation to managing natural resources and protecting the environment, Table 3 below illustrates that all the Southeast Asian constitutions protect the right to life.

Therefore, even though a constitution in question does not protect the right to a healthy environment, constitutional litigation to advance environmental protection is not doomed as an alternative is to rely on the right to life provision, essentially arguing that a citizen's right to life

	"The right of Lao citizens in their bodies, honour and houses are inviolable. Lao citizens cannot be arrested or searched without the order of the Public Prosecutor or the people's courts, except if otherwise provided by the laws."
Malaysia	Article 5 (Part II: Fundamental Liberties) "(1) No person shall be deprived of his life or personal liberty save in accordance with law."
Burma	Chapter VIII: Citizenship, Fundamental Rights and Duties of Citizens "9. Nothing shall, except in accord with existing laws, be detrimental to the lives and personal freedom of any citizen."
The Philippines	Article II(5): Declaration of Principles and State Policies "The maintenance of peace and order, the protection of life, liberty, and property, and promotion of the general welfare are essential for the enjoyment by all the people of the blessings of democracy."
Singapore	Article 9: Liberty of the person (Part IV: Fundamental Liberties) "(1) No person shall be deprived of his life or personal liberty save in accordance with law (...)"
Thailand	Section 32 (Chapter III: Rights and Liberties of Thai People; Part 3: Personal Rights and Liberties) "A person shall enjoy the right and liberty in his or her life and person (...)"
Vietnam	Article 71: Inviolability of the Person; Legal Guaranties to Protect Liberty; Ban on Torture (Chapter V Fundamental Rights and Duties of the Citizen) "(1) The citizen shall enjoy inviolability of the person and the protection of the law with regard to his life, health, honour and dignity."

is being violated by a particular environmental problem, such as high levels of air pollution or dumping of hazardous waste near residential areas. In this regard, India has generated the richest jurisprudence on the environmental aspects of the constitutional right to life (Article 21 of the Indian constitution).

The Indian Supreme Court has interpreted Article 21 to include the right to enjoy a healthy environment, specifically that "[t]he right to live is a fundamental right under Article 21 of the Constitution, and it includes the right of enjoyment of pollution-free water and air for full enjoyment of life'.[10] In *M.K. Sharma v. Bharat Electric Employees Union,* the Court directed the Bharat Electric Company to comply with safety rules strictly to prevent hardship to the employees ensuing from harmful X-ray radiation. The Court did so under the ambit of Article 21, justifying the specific order on the reason that the radiation affected the life and liberty of the employees.[11] In *Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh,* the Supreme Court based its five comprehensive interim orders on the judicial understanding that environmental rights were to be implied into the scope of Article 21.[12] In *Indian Council for Enviro-Legal Action v. Union of India,* the plaintiff brought this action to stop and remedy the pollution caused by several industrial plants in Bichhri village, Udaipur District, Rajasthan, which produced chemicals such as oleum (a concentrate form of sulphuric acid), single super phosphate and the highly toxic "H" acid (the manufacture of which is banned in western countries). The Supreme Court held that the national government's failure to control an industry's release of toxic chemicals violated the right to life, and relying on this constitutional right, the court ordered the authorities to regulate the industry and carry out remedial measures (the cost of which would be borne by the industrial plants).[13]

III. Concluding Remarks

Southeast Asia is one of the world's most biodiversity-rich regions and is also abundant in natural resources. Unfortunately, due to poor governance, economic pressures and environmental mismanagement, Southeast Asian countries are rapidly losing their forests, polluting their water, air and land. The long-term consequences of such extensive environmental degradation will be severe. One way of halting the rate of environmental destruction is through imposing duties upon the State to protect its citizens' right to a healthy environment or right to life. This paper has identified that few Southeast Asian constitutions protect the right to a healthy environment, which limits the extent to which constitutionalism may be relied upon to protect the environment. However, arguments based on the right to life may be just as effective, as seen in the jurisprudence of other countries such as India. As all Southeast Asian countries guarantee the right to life, the environment may find some protection under this constitutional right. Given the fragility of the environment in these countries, this linkage between constitutionalism and environmental protection should not be lightly dismissed as a possible way to engage the judicial branch of government in the quest to protect the environment.

10 *Subhash Kumar v. State of Bihar* AIR 1991 SC 420.

11 1987 (1) SCALE 1049.

12 AIR 1985 SC 652.

13 (1996) 3 SCC 212.

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autonomy must be constantly oriented to the improvement of public welfare by always considering the interests and aspirations from the communities. In addition, the running of the regional autonomy must ensure the harmonious relationship among the regions, promoting cooperation rather than producing disparities among the regions. It cannot be overstated how regional autonomy must also guarantee a harmonious relationship between the regions and the central government in the sense that both must ensure that the unitary state of the Republic of Indonesia shall remain intact.

Indonesia is leaving the reformation era behind and entering the post-reformation era. To implement the decentralization policy in this new era, the government has drafted some basic principles called "The Principal Idea of Grand Design on the Structuring of Regional Autonomy" which is prepared by the Department of Home Affairs. In order to make sure that the regional autonomy may be implemented in line with the goals expected to be achieved, the central government must provide the support and enhancement that comprise guidelines for research, development, planning and supervision. In addition, it must also provide the standards, directions, guidance, training, supervision, control, coordination, monitoring and evaluation. Simultaneously, the central government must help the regional governments by providing the necessary facilities, assistance, and encouragement so that the autonomy may be implemented efficiently and effectively according to the laws and regulations.

This three volume publication includes for the first time all current constitutions in Southeast Asia as well as the ASEAN Charter (Vol. I), reports on all the national constitutional systems (Vol. II), and a collection of papers on selected topics as well as cross-cutting issues. Some of the constitutions have not been publicly available in updated English versions so far and comparative research will be facilitated by having them collected in one printed volume. Some of the country reports are the first ever published analysis of the respective systems and the papers on selected topics may illustrate the variety of issues to be discussed in this fascinating region. All together the reader is provided with a comprehensive documentation and analysis of the emerging Constitutionalism in Southeast Asia.